

NEW JERSEY

Court of Errors and Appeals.

THOMAS J. BRESLIN,
Plaintiff,
(*Defendant in Error*),

vs.

FRIES-BRESLIN COMPANY,
Defendant,
(*Plaintiff in Error*).

On Error.

BRIEF FOR DEFENDANT IN ERROR.

This is an action brought by Thomas J. Breslin against the Fries-Breslin Company to recover the money due from the company to Breslin.

The declaration is upon the common counts in assump. it.

The pleas are non-assumpsit, and the statute of limitations.

At the trial the defendant craved leave to file a plea or notice of set off, which was accorded it; but no such plea or notice is filed.

The verdict of the jury was in favor of the plaintiff, and judgment was entered against the defendant for \$52,306.94.

This writ of error was then sued out by the defendant.

The assignments of error will be found on page 231 of the case.

Each assignment will hereafter be taken up and dealt with *seriatim*.

The items which went to make up the total of the plaintiff's claim were all proven out of the books of account of the defendant company.

The judgment represents the excess of credits over charges as they are admitted in the defendant's own books of account.

The Bill of Particulars, attached to the declaration, and printed in the case (pp. 4 to 18 inclusive), is shown to be a transcript of the defendant's books of account (pp. 96, 211 and 218), except as to one item of salary, \$5,000.

All of these items of credit in favor of the plaintiff are practically admitted, or at least are not seriously disputed by the defendant, except the items of dividends or profits.

The last item of dividend or profit is credited to the plaintiff under date of December 31st, 1898.

Up to that time the total credits of the plaintiff are \$78,804.98.

The total amount of the plaintiff's withdrawals is \$74,115.18.

Since the withdrawals are not appropriated to any particular credits it is the rule to apply them to the earliest, and by so doing it will be found that deducting the withdrawals from the credits there was upon December 31st, 1898, a credit balance due Breslin of \$4,689.80.

Everything claimed by the plaintiff since the 31st day of December, 1898, is practically undisputed by the defendant.

Since December 31st, 1898, there is no item of dividend or profit credited to the plaintiff.

As a result it will be seen that the matter which occupied the greatest part of the time in the trial Court and upon which the whole fight of the defendant was centered, really concerns only \$4,689.80, because the balance of the amount claimed by the plaintiff and recovered in the judgment is for items since December 31st, 1898, and does not include any items of dividends or profits.

To be able intelligently to determine the questions arising upon this writ of error it is necessary to be fully informed of the facts.

STATEMENT OF FACTS.

In 1890 Frederick A. Fries, Thomas J. Breslin and Alfred Richmond were carrying on the business of manufacturing and selling Smyrna rugs under the firm name of Fries & Breslin.

Their manufactory was at Malaga, New Jersey.

Fries was the practical rug maker, Breslin the salesman and Richmond put in some little capital.

They came into contact with John M. Carroll, and in 1891 they formed a corporation under the General Corporation Act of New Jersey, and called it the Fries-Breslin Company (pp. 22-23).

The original incorporators were Frederick A. Fries, Thomas J. Breslin, John M. Carroll, Edward McGill, P. J. Murphy and James G. Carroll.

The capital stock was \$50,000, and shortly after

the incorporation all of it was issued to the persons above named.

The six persons above named were all the stockholders and constituted the board of directors.

The business was moved to Camden.

P. J. Murphy was President, McGill was Secretary, and John M. Carroll Treasurer (p. 38).

Fries attended to the practical part of the business in the manufacturing of the rugs, John M. Carroll to the financial part and Breslin to the selling.

In 1893 the capital stock of the company was increased \$25,000, making \$75,000 in all, and the additional stock was issued to some of the six already existing stockholders.

In 1893 all of the persons interested, being the six men above named, who held all of the capital stock of the company, met and went through proceedings by which they intended to create preferred stock, that is to say, they intended to make certain of the then existing common stock, preferred stock.

At this meeting a resolution was offered and passed by which 350 shares of the then existing common stock was declared to be "preferred stock" upon which 15 per cent. per annum upon its par value was to be paid each year and was to cumulate if not paid; the holders of the preferred stock were not to have a vote and were not to be eligible for the board of directors.

It was intended that the stock held by John M. Carroll, P. J. Murphy, Edward McGill and James G. Carroll should be turned into preferred stock.

This resolution at this meeting was voted for by

John M. Carroll, Frederick A. Fries, Thomas J. Breslin and James G. Carroll.

It was voted against by P. J. Murphy and Edward McGill (pp. 63, 71, 72, 74, 82, 143, 149, 184).

The stock of Murphy was purchased by John M. Carroll and the stock of McGill was purchased by Fries and Breslin (pp. 141, 142, 147).

This left as stockholders John M. Carroll, James G. Carroll, Fries and Breslin.

James G. Carroll after the turning of his stock into preferred stock as above, retired from the board of directors and never attended any meetings or acted in any way as a director (pp. 24, 28, 29, 33, 34, 56, 63, 74, 82, 121, 181, 183, 205), until after Fries retired, when John M. Carroll transferred a share of his common stock to James G. Carroll to qualify him, and James G. Carroll again became a member of the board of directors (p. 183).

After the Murphy and McGill stock had been acquired as above mentioned this reduced the number of stockholders to four.

The board of directors consisted of John M. Carroll, Fries and Breslin, and the officers consisted of John M. Carroll, President and Treasurer, and Fries Secretary.

After the proceedings with respect to the preferred stock and the change in officers and directors of the company by which Murphy retired as President and John M. Carroll took his place, and McGill retired as Secretary and Fries took his place, and Murphy and McGill and James G. Carroll retired as directors and John M. Carroll, Fries and Breslin constituted the directors, the course of business was as follows:

Each six months, in June as of July first, and in December as of January first, the directors caused an inventory to be made of the company's assets; they charged off against their assets such things as they saw proper and found what the net profits, for that period had been (pp. 28, 29).

Out of the net profits thus ascertained they set apart for the preferred stock a dividend at the rate of 15 per cent. per annum, the balance of the net profit they set apart to the common stockholders (pp. 32, 70, 77, 89).

That part of the net profit which remained, (after deducting the percentage for the preferred stock) which was set apart for the common stockholders, was then divided into three equal portions and one of each of these portions was credited to John M. Carroll, Frederick Fries and Thomas J. Breslin (p. 78).

The amounts so set apart by the directors were, after the meeting at which they were acted upon, given to the bookkeeper of the company to enter them upon the defendant's books, giving appropriate credits to each of the stockholders in accordance with this action of the directors (p. 35).

This was the course of procedure from 1893 after the proceedings with respect to the preferred stock down to and through the year 1898, when Fries retired from the company.

During all of that period the only parties in interest were John M. Carroll, Frederick A. Fries, Thomas J. Breslin and James G. Carroll.

They held all of the stock of the company

It is evident that they thought (whatever the legal fact may be) that they had created preferred stock or had changed some common stock into preferred stock.

It is evident that they thought that Jas. G. Carroll, who voted in favor of the change, and who acted in accordance with it by accepting the stock and retiring from the board of directors, was no longer a director in the company.

It is evident that, by some arrangement which does not in the least concern us in this case, the other stockholders agreed to divide up the dividend after paying the preferred stock dividend, not in accordance with the number of shares that each was the record holder of, but in equal portions.

The books of the company show that after the proceedings of 1893 the understanding then entered into was carried out.

Each time that dividends were declared the 15 per cent. per annum was credited to James G. Carroll on his preferred stock and the balance of the profits, set apart as dividend, was then dealt with by those who were entitled to it (namely, the common stockholders) as they saw fit.

The books of the company show credits in accordance with this arrangement during all of this period.

After the retirement of Fries (whose stock was purchased by the others), the only stockholders left were the two Carrolls and Breslin.

John M. Carroll continued to act as President and Treasurer and Thomas J. Breslin was made Secretary.

James G. Carroll, as the others understood it and as he understood it, was not eligible to act as a director, because he held none of the common stock of the company, and John M. Carroll thereupon transferred one share of his common stock to James

G. Carroll to qualify the latter to act as a director and he became a director of the company.

After the retirement of Fries and beginning with the year 1899 no dividends were declared.

There was a resolution passed voting a salary of \$10,000, a year to John M. Carroll and a similar salary to Thomas J. Breslin.

The items of salary appearing in the account after 1898 were in accordance with this resolution and are admitted (p. 34).

The item of \$5,000, for salary, dated June 30, 1902, is not admitted, but must surely stand on the same basis as the other.

The statement of the Court (p. 218) embodies the facts with respect to this item.

There was no evidence that could in any way effect plaintiff's right to this as well as all the other items of salary.

ARGUMENT.

From the recital of the facts it is apparent that the plaintiff claims from the defendant the balance of money which the defendant's own books show and admit to be due from the defendant to the plaintiff.

Upon proof that the book of account, in which these items appear, was a book of the defendant company and that the entries made thereon by the defendant company showed an excess of credits over debits, the plaintiff has made out a prima facie case and is entitled to judgment for the credit balance shown.

The burden thereupon shifted to the defendant

to show that its own books were incorrect and that the credits were not due the plaintiff.

This is the burden cast upon the defendant in this case. The defense of the company is *not* that any false or fraudulent entries were made upon the said books; it is *not* that any entries were made thereon which were not fully authorized by the acting directors of the defendant company.

There is no serious dispute but that the book called "Private Ledger" was the company's book and all of the evidence shows that no serious contention in this respect finds any support in the testimony.

All of the testimony shows that it was not only one of the books of the defendant company, but the sole book of the defendant company, in which many of its essential accounts were entered.

This will be more fully dealt with in the assignment of error with respect to the admission of this book.

The defense does not pretend that the profits dealt with by the acting directors were not made. Nor does it pretend that any one's rights are involved in this controversy excepting those of the plaintiff and the defendant.

That is to say, there is no pretense that creditors or their interests are in any wise involved in any issue to be determined in this suit, nor is it pretended that the State or any question of public policy is concerned.

The defense does not dispute that those acting as directors met each six months, made inventories of the business, charged off what they saw fit, ascertained the net profits and set apart the agreed per-

centage to the preferred stockholders and the balance to the common stockholders.

The company does not pretend that any stockholder at any such time received any amount less than he had at that time agreed to receive.

The company does not dispute that at each time these dividends were declared the proper amount, as agreed upon, was set apart and credited upon the books of the company; nor does it dispute that the moneys sued for by the plaintiff were thus set apart for and are credited to him.

Each and all of these things are affirmatively admitted or are so fully proven as not to admit of serious dispute.

The defense appears to be that the plaintiff is not entitled to recover the amount of his credit balance as it appears upon the books of the company, because included among the credit items are the dividends or profits set apart by the directors which they contend were not legally declared and set apart.

They contend that the action of the directors lacked legality and validity for these reasons:

A.

Because, James G. Carroll did not participate, by his presence, in the declaration of the dividends.

B.

Because, the dividends were not credited according to the pro rata holdings of stock.

C.

Because the Statutes of New Jersey, as among stockholders, regulate the only way and fix the only time when dividends may be declared.

These contentions will be dealt with under the above headings.

A.

To determine the worth and substance of this defense, the proven facts and the verdict of the jury thereon must be duly weighed and considered.

It is demonstrated and not disputed that during the period between 1893 and 1899 when these dividends were earned and paid, the only stockholders of the company were John M. Carroll, Fries, Breslin and James G. Carroll.

It is admitted by every one that in 1893, the parties in interest attempted to convert some of the common stock into preferred stock.

It is proven conclusively that James G. Carroll, whose stock was to be converted into preferred stock, was in favor of the change and voted for it.

It is shown that after that time his certificate of stock was marked "preferred 15 per cent. cumulative."

It is testified on behalf of the plaintiff that it was part of the resolution and agreement at the time of the conversion of the common into preferred that holders of preferred stock no longer should vote, and therefore, should not be directors.

It is proven without dispute that after the proceedings in 1893 with respect to the preferred stock James G. Carroll never acted as a director and did not consider himself a director and that the others did not consider that he was a director. Fries so testifies (pp. 25, 82), as does John M. Carroll (p. 121) when, he plainly states that the directors were Fries, Breslin and himself.

It was shown that during all this period in question (1893-1898) the 15 per cent. agreed to be paid James G. Carroll was duly credited to him out of the dividends, and that he was cognizant of this.

It is really too plain to require argument to convince anyone who reads the testimony that in 1893 there was a perfect understanding and agreement among the four stockholders who held all the stock of the defendant company; and that the understanding and agreement was literally and in good faith lived up to by each and every of them.

It is plainly evident that for reasons which were entirely satisfactory to James G. Carroll he agreed at that time that if his stock should receive 15 per cent. per annum and cumulate in the event of non-payment that he would not be entitled to share to any greater extent in the net profits if it should happen that sufficient net profits were made and declared as dividends to entitle him to a greater share, and that he would retire from the directorate.

It plainly appears that this agreement was understood by and acted upon by all the parties interested.

Upon the retirement of James G. Carroll the board of directors consisted of John M. Carroll, Fries and Breslin—and every declaration of dividend between 1893 and 1898 was made by the board thus constituted. The defence does not dispute this.

Their sole contention under this head is that since James G. Carroll was elected a director in the beginning and did not send in a written resignation he is to be considered a director and the action of the board taken without his presence or without

formal notice to him of the meetings is invalid and illegal and dividends declared by the board so constituted and without his presence or notification to him need not be paid to the stockholders.

The evidence is clear and is uncontradicted that in 1893 it was understood by all four of these men, who held all of the stock of the company, that James G. Carroll retired from the board of directors.

Before that time he regularly attended the meetings, after that time he never did. He knew what was going on, his stock was marked "preferred 15 per cent. cumulative;" he received his 15 per cent. per annum all these years, and when, after Fries retired and John M. Carroll and Breslin were the only directors left, and they two, with James G. Carroll, were the only three stockholders, he received a share of common stock from John M. Carroll to qualify him to act as a director.

If he was to now attempt to set up any right in opposition to the situation created by his own conduct the estoppel worked against him by his conduct would be an impassable barrier.

Where then does the company get any greater or other right?

Every one else in interest was present and is bound and estopped. James G. Carroll is bound and estopped. All are thus bound and estopped. Cases which may be cited in which the situation was a different one do not in any way apply.

So soon as the interests of one not bound by his own conduct, or the interest of creditors, or some question of public policy is concerned, different rules of law apply.

But in the case at bar none such was present.

There was no reason in law why James G. Carroll could not retire from the board of directors. There is no reason why the transactions of a board from what he retired should not thereafter be given full legal effect. It is proven beyond all question that he did retire; that he ceased to be a director, and therefore the board which acted was the legal governing body of the corporation.

B.

The only way therefore to deny legal efficacy to what the directors did with respect to the declaration of dividends is to contend that no dividend was in fact ever declared.

The evidence as stated and reviewed so plainly shows that whatever was done in this respect was done by the directors and all the directors of the defendant company; that the last hypothesis stated is that which must be contended for by the defendant and dealt with in its order by the Court.

Concerning this there is no dispute that the profits were earned; there is no dispute that the profits were ascertained in a proper manner; but it is contended that since they were not declared upon the pro rata holdings of the common stock they were not legal and the plaintiff cannot recover them.

If, as we have argued and as we think is plainly shown, James G. Carroll is placed out of consideration, then the question is how to determine the effect of the action of the board of directors, composed of John M. Carroll, Fries and Breslin.

It will be recalled that after the directors ascertained the net profits they first set aside the 15 per cent. for the preferred stock and the balance to the common stock, and that that which went to the common stockholders was not divided pro rata

in accordance with their holdings, but was divided into three equal portions and credited to each of the three common stockholders.

If it be admitted to be the fact as it was found to be by the jury that James G. Carroll made the arrangement by which his stock received 15 per cent. per annum then since whatever was done with the balance was done by the unanimous concurrence of the others, the legal question to be determined may be stated in this way:

May a board of directors of a corporation declare a certain amount of net profits as a dividend to the stockholders and credit that amount in the way they are requested or directed by all those entitled to the dividend, or must the corporation or the directors credit it only pro rata?

It is respectfully submitted that this is a fair statement of the question involved, and that it is not difficult to answer.

There is no reason why all of the owners of a sum of money may not, as among themselves, divide that sum as they please.

We are not at all concerned in this case as to why the record holder of shares of stock should agree that the dividends accruing on that stock should not all go to him and that some part should go to some one else.

It does not appear, but that there has been an assignment from one to the other, either of the dividends or of stock; in the event of either it was the duty of the company to recognize it and credit the dividends accordingly.

When the fund to go to the common stockholders was once determined upon by the directors and was thus set apart from the company's funds, it is re-

spectfully submitted that the owners of this dividend fund could do with it precisely as they chose, and that the corporation is not in the least concerned with what disposition they made of it.

The only concern of the corporation is

First—That the directors should exercise the power of setting aside a certain part of the net profits to the stockholders; and

Second—That no more than the total amount so set aside should be credited against the company.

With the limitation as to the amount of credit not exceeding the total sum set aside it is contended that it is immaterial to the corporation who received the credit, so long as all the persons entitled are estopped as against the corporation to deny the efficiency of the credit given.

In the case in hand the directors did determine the amount of net profits to be set apart to the common stockholders.

All of the common stockholders did then join in a direction as to how this fund belonging to them should be credited to them.

It can scarcely be seriously argued that the board of directors could not declare a legal dividend by setting aside a certain sum of money to be distributed to the stockholders.

This is usually the way of declaring dividends.

The amount to be credited to each stockholder is usually ascertained by dividing the whole number of shares into the total amount declared as dividends and multiplying the result by the number of shares each stockholder holds.

Is any essential legal step omitted by the

board of directors declaring the total amount to be set apart for dividends and then receiving from all the stockholders a direction that all the dividends coming to all of them should be credited in a certain way?

If this question is answered that such a course would not in any way affect the validity (and this we contend is the correct answer) then that disposes of the defence.

Would this not clearly appear by this sort of an illustration.

A board of directors determines that out of the net profits \$10,000 should be declared as a dividend.

Thereupon all of the stockholders present an order signed by each one requesting the corporation to credit all of the dividends to one of their number, or, if you please, to a stranger.

The board of directors agrees to do this, and does it.

What legal principal is involved which renders this action invalid?

With respect to the corporation it has not suffered in the least nor have any of its rights been in any way interfered with, much less imposed upon.

It is fully protected from a suit of any stockholder for his pro rata part of the dividend by the estoppel created by the stockholder in requesting that the corporation credit the dividend in the way it did.

The person to whom the dividend is credited undoubtedly has the right to recover the money thus assigned to him.

As suggested before, that which induced or led the company to credit the dividend as it did, may have been an assignment from the record holders of stock of so much of their stock or of the dividends on their stock as would produce exactly the result reached by the credits appearing in the books. If there was such an assignment the company should recognize it. In this suit it is not incumbent on the plaintiff to show more than that, with the concurrence of all interested he received credit for certain moneys. What induced that concurrence is neither relevant or material.

The defendant is, therefore, in the case at bar reduced under this head to contend for the bald proposition that unless a dividend after being set apart is credited pro rata to the record stockholders, the corporation may repudiate this declaration and may defend upon that ground.

It must even go further and contend that after a dividend has been set apart and all of those entitled to it have joined in determining what should be done with it, the corporation having assented to such disposition of the stockholders' money may refuse to pay the same and is justified in such refusal.

We do not see how an argument of any weight can be based upon this slender contention.

Whatever may be said with respect to those things which a corporation must do in rigid observance of statutory procedure with respect to its own affairs, it is certainly true that after the dividend has been declared the same belongs to the stockholders and there is nothing in reason or precedent which disenables the stockholders to deal with it as they please.

In the case at bar, after the declaring of the dividend, after the directors had set apart from the

company's funds the amount of net profits belonging to the stockholders the only act that the corporation did was to credit on its books this money, belonging to the stockholders, in the way that the stockholders requested it to be credited.

There is surely nothing in all of the law respecting corporations which makes such a proceeding on the part of the corporation illegal or invalid and yet in the last analysis this is the only thing done in this case by this corporation which the corporation now claims it could not legally do and is not legally bound by after it has done it.

It is respectfully submitted that there is no such doctrine to be invoked defensively by corporations.

If the case is rid of all extraneous matter it reduces itself to this state of facts:

Four men held all the stock of the company. They agree that one of them shall out of the net profits declared as dividends receive 15 per cent. per annum on his stock; and he upon this consideration foregoes further participation, and the other three agree that the balance of the net profits declared as dividends shall be divided equally among themselves.

The consideration or inducement to each is not material, since no question is here raised either as to the fact of the agreement or as to its binding force.

For many years this procedure is followed. After the entire execution of the contract it is difficult to see how any one of the parties to it could legally have any standing to object.

But we do not even have that question to contend with.

This action has, and can be made to assume no such form.

The position of the corporation is that having credited the dividends in the manner stated, it may legally repudiate the credits, because the dividends should have been credited pro rata to the stock holdings.

It is respectfully submitted that such a contention has no legal basis to support it. Just so soon as the net profits were declared as dividends, the dividends became the property of the stockholders—the mere formality of dividing the sum declared to be dividends by the number of shares of stock does not add any legal feature to the declaration. As the word implies, so soon as the money to go to the stockholders is *divided* from the corporate assets, it becomes dividend.

As has been before stated all that directors usually do or are ever required by law to do to make a dividend is to divide off the amount of net profits that is to go to the stockholders.

Thereafter it is a matter of arithmetic to determine how much goes to each stockholder.

This being so, when the directors in the case at bar divided off the amount of net profits to go to the stockholders, and the stockholders caused it as among themselves to be credited as they desired it to be credited, the company's sole legal obligation is to pay the creditor.

C

The defense under this head is based upon the contention that under the statutes of New Jersey a dividend (prior to 1901, when the act was

changed) must have been declared in the month of August or otherwise be invalid and illegal.

The contention is that by the revision of the Corporation Act of 1875, Section 7, no corporation can make dividends except according to this Act, and that by P. L. 1891, page 176, it is provided that all manufacturing corporations should, on the first day of August, declare their dividends.

The provision in the Revision will be first found in the Acts of 1846, page 17, Section 7, and there reads as follows:

"And be it enacted, That it shall not be lawful for the directors of any bank, or moneyed or manufacturing corporation in this State, to make dividends, except from the surplus profits arising from the business of the corporation, nor to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the said corporation, nor to reduce the said capital stock without the consent of the Legislature."

Subsequent acts were passed (P. L. 1846, page 66; P. L. 1846, page 69; P. L. 1849, page 305), with respect to the method of reducing capital stock and withdrawing capital from the business, and in 1875, Section 7 was amended so as to read as in the revision of that year.

It is quite plain that the section contained two distinct matters.

The first is that dividends should not be declared except from the surplus or net profits; the other is that in no way should anything be withdrawn from the capital excepting in the original act, by consent of the Legislature, and in the subsequent act, according to the act itself.

It is not, however, of much importance how this

act is construed, because the only use that the defense makes of it is to argue that because it requires dividends to be declared in accordance with it, the Act of 1891, page 176, fixes the time when they must be declared.

The latter act is first found in our laws in 1866, P. L. 1034. It is subsequently re-enacted in the Revision of 1875, Section 52.

It is respectfully submitted that the purpose of this section is to cast a duty upon the directors to make and declare dividends at a fixed time, so that if they fail to do so the stockholders who are entitled to receive dividends may legally call upon the directors to fulfill this duty.

It cannot be seriously contended that if the directors with the acquiescence of the stockholders fulfill this duty upon some other day, that the corporation could plead in defense of its non-payment of the dividend thus declared that it was not declared on the day fixed by the statute.

The time when dividends should be declared so far as the business requirements of a corporation is concerned are as varied as can be imagined.

There is no reason in law why all of the corporations of a State should on any grounds of public policy declare their dividends on a certain day.

Nor is there any reason why a corporation may not fix any day for the carrying out of this duty to its stockholders.

The Legislature took this view of the matter and passed an act in 1876 (P. L. 1876, page 74), that when a company is limited by its charter to certain fixed times for declaring dividends, such company should have power at any time to change the time or times for declaring dividends upon the vote of two-

thirds in interest of its stockholders at any regular meeting of its said stockholders.

The sole purpose to be achieved in fixing a time is to enable the stockholders if that time be passed without the declaring of a dividend to call upon the directors to declare one.

It is respectfully submitted that it is inconceivable that a Court should permit a corporation to defend against the payment of a dividend that it has declared upon the ground that it was not declared upon a date fixed by statute when it is shown that by unanimous consent for a long period of years the dividends were regularly declared at fixed periods.

This whole defence seems so unsubstantial as not to require further attention.

PRECÉDENTS AND AUTHORITIES.

In approaching this case for the purpose of applying the correct legal principles to the facts proved, the initial thing to be kept in mind is, that while it is true that the defendant is a corporation, which is a separate entity from the individuals who compose it, it is equally true that we are dealing solely with the individual interests of the stockholders; and that is really the distinctive and decisive feature of the case.

Counsel is mindful of the principles of law which require corporations in the exercise of the powers granted, to strictly follow the provisions of law in the execution of such powers.

Whenever the interests of a non-assenting stockholder or a creditor are involved and the claim is that a corporation, by its action, has unfavorably affected such interests, it is held, that such action

of the corporation must have been in strict accordance with the law of its being and those general laws and by-laws governing and controlling the subject matter.

Whenever the interests of the public or the State are concerned, with respect to corporations, it is held that the corporation is strictly and rigidly governed by the laws just mentioned.

It is respectfully submitted, however, that none of the decisions with respect to the subject matters just dealt with are in any degree applicable to the case at bar.

It is the well recognized rule that where only the rights of stockholders are concerned and only their interests are being dealt with, where the matter is one which is termed of internal management the principles above alluded to do not apply at all and there is a clear and marked distinction.

The latter class of cases, those of internal management, are largely, if not wholly, matters of contract among the stockholders, and are governed by the same rules of law as are applied to other cases of contract.

A very clear statement of the matter will be found in the case of *Hazlehurst vs. Savannah, &c. Railway Company*, 43 Geo., 13.

On page 54 the Court after stating that there is a conflict of authorities on the question of acquiescence validating certain acts; and that by the misuse of the term *ultra vires* confusion seems to have arisen, says:

“Upon a close examination, however, of the authorities, it will be found that this conflict is, for the most part, only apparent.

“Every charter is a contract between the public

“and the corporators, and between the corporators
“themselves.

“An act of the officers (and a corporation can act
“in no other way) may violate the contract with
“the public; according to the authorities, such an act.”
“is an illegal contract, contrary to public policy, and
“void. But if the act only violates the contract be-
“tween the corporators, it may or may not be void,
“as the corporators may have directed, assented to,
“or acquiesced in it. The former class of acts in-
“cludes those which relate to the enterprises or
“franchises not granted.

“The latter class includes such acts as violate
“those provisions of the charter which regulate
“the rights of the corporators with each other. It
“is apparent that there is a wide difference in the
“nature of things between these two classes of acts
* * * “The provision of the charter fixing,
“the stock at \$100 per share, and implying equality
“between the shareholders, is clearly a matter in
“which the public, as such, has no interest. It is
“simply a regulation looking to the internal man-
“agement of the affairs of the company, to the
“rights of the shareholders among each other. So,
“too, as to the qualifications of directors. The com-
“pany may make any rule on that subject they see
“fit.

“These things are, even if they be provided for in
“the charter, mere contracts among the stockholders
“for the regulation of their rights as to each other.”

Since in the case at bar the only rights involved
are those of the four stockholders of this company,
and since the things that were done were wholly
those of internal management and were all done by
consent, acquiescence or were ratified, it is plainly

apparent that the principles of law, just quoted, apply.

It is the admitted fact in the case that the net profits which were divided were earned.

The contention of the plaintiff was that the directors of the company at stated periods met and ascertained the net profits, and by agreement with James G. Carroll set apart to him the fifteen per cent. upon the par value of his stock, and set apart the balance to the common stockholders.

Upon this branch of the case the only contention of the defendant is that James G. Carroll was not present at the meetings, that he had been a director and had not formally resigned as such and must still be considered to have been a director, and that as he did not receive notice of these meetings the action taken thereat was void.

The reply of the plaintiff to this was that the four stockholders agreed that the stock of James G. Carroll should be considered preferred stock upon which when dividends were declared there would be paid him fifteen per cent. per annum, and that such dividends should be cumulative; that as part of that agreement James G. Carroll should retire from the Board of Directors, and that he did so retire.

The issue raised with respect to this state of facts was squarely left to the jury; and their verdict settled the facts to be as contended for by the plaintiff.

We are therefore to apply legal principles to a settled state of facts, namely, that in 1893, the stockholders of this company made an agreement with James G. Carroll under which he agreed to accept as dividends on his stock fifteen per cent. per annum and to retire from the Board of Directors;

that his stock was sought to be made, by the proceedings then taken, preferred stock, that since that time all of the four stockholders acted upon the agreement thus made.

Whenever dividends were declared there was always allotted to James G. Carroll the agreed percentage.

He did retire from the Board of Directors and never attended any meetings, although he knew that they were declaring the dividends to him, and that it was not until the number of stockholders became reduced to two that he again became a director, receiving at that time a share of so-called common stock from John M. Carroll so as to qualify him.

The facts proven showed and the verdict of the jury settled that we are dealing with a situation in which all of the stockholders acquiesced in the action of the corporation.

Under these circumstances the corporation was estopped.

Thompson on Corporations, page 1678, Sec. 2254, says: "The doctrine of *estoppel in pais*, as is well known, rests upon the idea that a party, by adopting a course of action which influences the conduct of others may put himself in a position where he will not be allowed to disclose the real truth.

"Such being the basis of the doctrine, it cannot, except in cases rising to the grade of questions of public policy, make much difference what that truth is." And again on page 4029, Sec. 5314, he says, "The body of stockholders, in every business corporation, are the persons who are incorporated. They are, in a substantial sense the corporation * * * it follows that many acts which the directors may

“do outside the scope of their powers become ratified and validated by the acquiescence of the body of shareholders; and, in general, the body of shareholders can ratify and confirm any act, done by the directors or other officers of the corporation, without a precedent authorization, which the shareholders could have authorized originally.” And again on page 3983, Sec. 5270, he says, “Individual stockholders are estopped from impeaching corporate action which has been taken with their knowledge and consent; * * * ”

The Court, in the case of *Allen v. Wilson*, 28 Fed. Rep. 677, 680, expressed the principle in this language: “It does not lie in the mouth of a stockholder to object to what the company has done, if the action which he complains of was taken with his knowledge and consent. He cannot be heard to complain that he has been injured by the doing of something which he knew of at the time, and expressly consented to, or, by long silence acquiesced in.”

See also *Wood v. Boney* (Ct. Chancery N. J.), 21, Atl. 585.

Thompson, page 3332, sec. 4497, after stating the principle that acquiescence by all the shareholders estops the company, says “It must follow that where the corporation is thus estopped, the stockholders are estopped, and *vice versa*; and where an action was brought by the corporation and the stockholders, it was reasoned in substance that if the stockholders were destitute of equity no relief could be accorded to the corporation.”

In dealing with this principle in the case of *Burden vs. Burden*, 159 N. Y., 287, the Court of Appeals of New York said, “It is equally well settled

"that the act of a corporation that is *ultra vires* cannot be questioned by a stockholder who has assented to it. Kent vs. Quicksilver Mining Co., 78 N. Y., 159; Hotel Company vs. Wade, 97 U. S., 13.

"It is true that in these cases the rights of third parties were also considered, but the principle holds good between the stockholders. If in the case before us neither the sovereign nor the creditor appears upon the scene, surely the plaintiff has no occasion to complain of a situation that he has assisted in creating."

Crompton v. the Chelsea, 13 N. Y. Supp., 722.

Reed v. Hoyt, 109 N. Y., 659, affirming

19 J. & S., 121. Kansas City Hotel Co. v.

Harris, 51 Mo., 64, (1873) also 57 Mo., 126.

Thompson, page 3964, Sec. 5247, says, "Subject to differences growing out of the differences of their Constitution, the rule is that *estoppels is pais* operate against corporations, in like manner as against natural persons."

Reed v. Hoyt, 109 N. Y., 659, affirming 19

Jones v. Spencer 121, Railway Co. v.

Martin, 57 Ark., 355 (1893).

Taylor on Private Corporations Third Edition, page 179, sec. 211, says "if all the persons having a right to object to the act unanimously acquiesce in it, the act will be as binding on the corporation as if it had been originally authorized."

The assent and acquiescence of all the stockholders cures an irregularity in the adoption of a resolution to increase the stock of a corporation by the Board of Directors instead of by the stockholders themselves.

Bailey v. Chamberlain Co., 77 Wis., 453.
Sewell's case L. R. 3 Ch. (131).

In Bailey v. The Chamberlain Mining and
Prospecting Co., 77 Wis., 453 (Sup. Ct.,
1890).

"By mistake the articles of incorporation fixed the
"whole capital stock at \$20,000 instead of \$40,000.

"To correct this mistake, a resolution in-
"creasing the capital stock to \$40,000 was adopted
"with the assent of all the stockholders: Held that
"even if such resolution was adopted at a meeting
"of the directors instead of the stockholders, the
"consent and acquiescence of all of the stockhold-
"ers cured the irregularity."

From the brief of counsel, p. 455, it appears, "The
"directors composed all the stockholders except F.
"C. Bailey the father of the plaintiff, who acquiesced
"in what was done at the meeting."

A consenting party may not complain that he is
deprived of the benefit of a fellow stockholders judg-
ment. Chapman v. Bates, 16 Dick, 667 (Ct. Errors
1900).

Where every stockholder is present irregularities
will not be considered.

In re Griffing Iron Co., 34 Vroom, 171,
affirmed on opinion below same vol.
p. 357.

"It does not lie in the mouth of those who par-
ticipated in this act or received the stock voted at
this meeting" (held without notice) "to question
its validity."

Handley v. Stutz, 139 U. S., 417.

Beers v. Bridgeport Spring Co., 42 Conn., 17.

Railway Co. v. Martin, 57 Ark., 355.

Lockhart v. Van Alstyne, 31 Mich., 76.

And the whole matter is summed up by Thompson, 4 Vol. p. 3982, Sec. 5269, in the following language:

“We may also conclude, from the premise that “the body of stockholders are in substance the corporation, that estoppels are concurrent between “the stockholders and the corporation—in other “words, that whatever will estop the stockholders “will estop the corporation, and that whatever will “estop the corporation will estop the stockholders.”

Home Fire Ins. Co. v. Barber, 60 L. R. A., 927 (Neb., 1903), although in equity, is a well reasoned and valuable opinion on the question of the character and nature of a corporation, and the mutual rights of the entity and of those composing it.

Estoppel when it goes to the whole action is applied at law as well as in equity, and may be enforced in an action at law when it goes to the whole case.

Fowler v. Parsons, 143 Mass., p. 401; 3 N. E. Rep., p. 449.

Michigan &c. Mfg. Co. vs. Parsell, 38 Mich., p. 480.

Hall vs. Fisher, 9 Barb., p. 31.

Besson v. Eveland, 26 N. J. Eq., p. 472.

Martinez vs. Runkle, 28 Vroom, p. 111.

Drexel vs. Berney, 122 U. S., p. 24.

Bernadoes vs. Lem, 49 Mich., p. 444.

Dickerson vs. Board of Commissioners, 6

Ind., p. 128.

Gibbs vs. Craig, 29 Vr., 661.

It will first be necessary to consider the law with respect to the matter of the preferred stock.

The statutory provisions with respect to the issuing of preferred stock that obtained in 1893, at the time the proceedings were taken attempting to issue preferred stock in the case at bar, were contained in the Act of 1889 (P. L., 412).

By that act it was provided that any company should have power to create and issue general and preferred stock; that the preferred stock must not exceed two-thirds of the capital paid in and that the directors should not issue it except by authority of two-thirds of the stock.

This act provides that the dividends should not exceed eight per cent.

Excepting that the dividend here was 15 per cent. it is not apparent why the proceedings in this case to create preferred stock were not valid.

The amount of stock so created did not exceed two-thirds of the actual capital paid in and it was voted for by at least two-thirds of the stock.

It is not argued that with respect to those whose common stock was to be changed into preferred stock, without their consent, that the action is binding, because it is not necessary in this case to insist on any such contention.

But with respect to the others who voted for the change and who are all the parties concerned (because the dissenters were bought out) it is respectfully submitted that, as among themselves, the action taken was sufficiently in accordance with the statutes to be binding; and that the stock of James G. Carroll was preferred stock.

However this may be (upon the question of the

strict compliance with the statute making this stock, preferred stock) there is no question but that at law, as among themselves, the contract or agreement to consider the stock preferred was valid.

In a note to a case in the 27th L. R. A., at page 129, it is said :

“A preference of shareholders as among themselves being a matter of contract and one which would seem to involve no danger of injury to the people generally, there seems no reason for denying the operation of the principle of estoppel with respect to rights in preferred stock, *McGregor vs. Home Insurance Company*, 33 N. J. Eq., 181; *Hill vs. Cincinnati Hotel Company*, 25 Ohio Law Journal, 425; *Taylor vs. S. N. R. R. Co.*, 13 Fed. Rep., 152; *Banigan vs. Bard*, 134 U. S., 291 (33 L. Ed., 932); *Branch vs. Jessup*, 106 U. S., 468 (27 L. Ed., 279).”

It has accordingly been held that a corporation may classify its stock at its organization and provide a preference of one class over another in respect of both capital and dividends in the absence of charter regulation or prohibition by law. *Hamlin vs. T. St. L., Kan. R. R.*, 36 L. R. A., 826 (47 N. S., App. 422.)

And it has also been held that lack of any authority in the charter for the issue of preferred stock will not prevent stock otherwise properly issued from being valid as preferred stock, if it was issued by the original authority and consented to by all of the stockholders, or has received their subsequent ratification, by long acquiescence. *Higgins vs. Lansing*, 40 N. E. Rep., 362, 154 Ill. (See note, L. R. A., Book 27, 136.)

To the same effect, are

King vs. Quicksilver Mining Company, 78
New York, 159.

Havemeyer vs. Bordeaux Company (11 C. C.),
8th Nat. Corp. Rep., 127.

Hazelhurst vs. Savannah Railroad Company,
43 Geo., 13.

Westchester & P. R. Co. vs. Jackson, 77 Pa.,
321.

Elkins vs. Camden & Atlantic Railroad Com-
pany, 36 N. J. Eq., 233, 236, 237.

One who votes for and receives stock may not
question it because of irregularities.

Handley vs. Stutz, 139 U. S., 417.

Peck vs. Elliott, 38 L. R. A., 616 (79 Fed.
Rep. 10), at p. 623.

Lockhart vs. Van Alstyne, 31 Mich., 76.

The next question to be considered is with respect
to the retirement by James G. Carroll from the
Board of Directors.

He was elected at the first meeting, in 1891, for
one year, and was never re-elected. He held over
until 1893, at the time he got his preferred stock,
and then retired. He became a member again (by
consent, not by election) in 1899, after Fries retired,
and when there were but two other stockholders,
Breslin and John M. Carroll. The latter transferred
a share of his common stock to him to qualify him
to act as a director.

Even in municipal bodies the resignation of an
officer may be conclusive against himself. Reiter
vs. Ohio, 23 L. R. A., 681, and note.

There is no doubt whatever that a resignation of a director need not be in writing, need not be in any particular form, and to be effectual it need not appear to have been ever accepted by the other directors ; certainly not in a case in which all of the stockholders, as in the case at bar, acquiesced in his retirement.

21 American and English Encyclopedia of Law, page 848, see cases, under Note 7; see page 849, notes.

International Bank vs. Faber, 86 Fed. Rep., 445.

Fearing vs. Glen, 73 Fed. Rep., 119.

International Bank vs. Faber, 79 Fed. Rep., 920.

People vs. New York and M. B. R. Co., 84 New York, 566.

In re Leslie, 58 N. J. L., 619, it was held that the right, of one who was made a stockholder and director solely to make up the number required by statute, to hold office could not be disputed by one who consented and concurred in his admission and election.

In the case of Santa Eulalia Silver Mining Co., 4 N. Y. Supp., 174, it was held that the eligibility of a person as trustee of a corporation cannot be questioned by stockholders in a proceeding to dissolve so as to show that the requisite number of trustees have not united in a petition therefor, where the stockholders have permitted him to act as trustee without question.

It will, of course, be borne in mind that in applying the principles of law to this branch of the case the doctrines of acquiescence and estoppel are applicable.

In *Wallace vs. Walsh* 125, N. Y., 26, the original by laws required twelve directors. There was an attempt made to change them, but the change was not affected according to law.

After the attempted change they never elected more than nine directors.

The question was whether six directors were a majority of the Board. The Court said: "It cannot, we think, be doubted, but that the proceedings referred to, concurred in by every one having an interest in the corporation or its affairs, effected a practical reduction of the number of its trustees, and constituted the nine thereafter elected a *de jure*, as well as a *de facto* Board, entitled to act for the corporation in transacting its business until some party whose interests were affected, should raise the question in a direct proceeding to question the exercise of such authority. *People vs. New York & M. B. R. Co.*, 84 N. Y., 856. Neither the company nor its trustees or stockholders could have been heard to allege in a collateral proceeding, the invalidity of their action in reducing such board, or its want of authority to administer the general affairs of the corporation."

See also

Re Tavistock Ironworks Co., L. R., 4 Eq. Cases, 233.

The next question for consideration is the making of the dividends.

Judge Cooley in *Lockhart vs. Van Alstyne*, 31 Mich., 76 (Sup. Ct., 1875): says: "A dividend, in the common understanding of the term means a sum which the corporation sets apart from its profits to be divided among its members."

The acts of the directors in setting it apart are provable by parol.

In the case at bar the plaintiff called on the defendants for a minute book and it was proven to have been lost. This would admit the evidence in any event.

As Thompson says, page 3895, Sec. 5175: "The settled law is now believed to be that the acts of corporations are provable by parol in all cases where, under like circumstances, the acts of individuals would be so provable, unless a record of the particular transaction is required to be kept by the governing statute or By-laws."

Dividends must be declared by the directors, and a shareholder claiming dividends must show that the directors have declared such, but the doctrine of estoppel and acquiescence is applied to cases in which informal distributions of profits were held to be dividends by reason of consent and acquiescence.

Reading Trust Co. vs. Reading Iron Works,
137 Pa. St., 282 (Sup. Ct., 1890).

But in the case at bar the plaintiff does not have to rely upon the doctrine of estoppel, consent or acquiescence so far as the validity of the declaration of the dividend depends upon the validity of the action of the directors.

He has two equally strong grounds for asserting that the dividend was declared by the directors.

First—Because it was proven that the three directors were the only directors of the company at the time these dividends were declared, and, therefore, the declaration was in every way legal.

Second—He showed that the only other stock-

holder acquiesced in and consented to the constitution of the Board of Directors and to its actions and that by such acquiescence, consent and ratification, he was estopped; and by the principles which have already been fully cited the corporation was estopped.

Nor, is there any embarrassment arising out of the lack of proof as to the declaration of these dividends.

It was fully proven without contradiction that at each period the sums of money so declared as dividends were credited to the stockholders entitled to receive the same.

When dividends have been declared and become payable to the stockholder they become absolutely the property of the stockholder to do with as he pleases. Cook on Corporations, Fourth Edition, 1001, Sec. 541.

It has been held that contracts of assignment by a shareholder before the dividend is declared are valid.

Martin vs. Gibbon, 33 L. T., Rep. 561 (1875).
Cook on Stock & Stockh. (3rd Ed.); §4538,
p. 708.

Certainly after it has been declared it may be dealt with as any other personal property or chose in action.

“A dividend which has been declared may
“be made the subject of a contract, which
“may be entered into regarding it, in the same
“manner, and to the same extent, and as valid and
“binding, as one in reference to any other kind of
“personal property. Cook, Stock and Stkh., Sec-
“tions 540, 541; Morawetz Priv. Corp., Sec. 162.”

Cook vs. Monroe, 45 Neb., 349 (Sup. Court Neb., 1895).

In Williams vs. Western Union Telegraph Company, N. Y. (Super. Court, 1881), 9 Abb. N. C., 419, at page 428, the Court said: "should a dividend be declared, the manner in which it should be used and enjoyed is under the control of the stockholders individually."

In Currie vs. White, 31 Super. Ct. (N. Y.) 1 Sweeney, 166, the Court said: "Dividends do not arise from the stock, but are profits earned and distributed by the corporation to owners of stock who are recognized as such on the books of the company. They may be sold or assigned without parting with the stock."

In Gemmell vs. Davis. (Md. 1892), 23 Atl. Rep., 1032, it is held that the dividend is a simple debt owing from the corporation to the stockholder, and that where stock is assigned with notice to the company, the assignee is entitled to the dividend, even though the stock is not transferred.

This is the holding of many cases.

In King vs. Paterson & H. R. R. Co., 5 Dutch. 82 S. C. on Appeal, 504, at page 505, the Court said: "After a dividend is declared, all community of interest in relation to such dividends as between the stockholders themselves, and between the stockholders and the corporation is at an end. The right of a party to whom the dividend is payable is recognized as a separate and independent right which may be enforced as against the corporation."

At page 506 the Court said:

"The true principle is that a dividend, from the time that it is declared, become a debt due from the corporation to the individual stockholder."

In this case the Court holds that where the corporation carries a dividend to the general account of the stockholders it becomes a debt due from the corporation to the stockholders, and is subject to all the rules applicable to ordinary debts.

In *Beers vs. Bridgeport Spring Company*, 42 Conn., 17, the corporation credited the stockholders on its books with dividends.

After they had done this for many years they sought to charge the amounts thus credited to an account called surplus account.

It was held that this could not be done.

The Court said : "The company having declared "that it had received for and owed to each stockholder a certain sum of money, and having set the "same apart from its own funds for his sole and "separate use, cannot thereafter nullify its votes or "repudiate its obligations by declining to pay or "name a time when it would pay."

"The interest of stockholders in profits set apart "is adverse to other stockholders, and the corporation directors cease to represent him in relation "thereto, and cannot dispose of or deal with the "same in any manner without his authority or "consent."

In a prior part of the brief references were given to cases showing that the relationship between stockholders is a matter of contract.

In the case in hand the facts show and the verdict of the jury settles that all the stockholders here agreed to what was done.

Under such circumstances the doctrine of estoppel applies and the corporation is bound.

In *Elkins vs. Camden and Atlantic Railroad Com-*

pany 36 N. J. Equity 233, the Court held that the relationship between the stockholders is one of contract, and approves of authorities "which likens the case to a partnership agreement, where two or three co-partners agreed that the third should, out of the profits of their venture, have a certain fixed per centum per annum on his capital before any part of the profits are payable to them."

And in *Park vs. Grant Locomotive Works*, 40 N. J. Eq., 114, affirmed in 45 N. J. Eq., 244, it is held that where there was a contract regulating the disposition of the profits of a corporation the directors must in that case dispose of such profits as directed by the contract.

Our Court of Errors in the case of *Laurel Springs Land Company vs. Fougery*, 57 N. J. Eq., at page 758, speaking of the matter of dividends, says: "The shareholders in such concerns not unreasonably expect to enjoy the fruits of successful enterprises in stated distributions of the profits. When the by-laws are silent on the subject the directors are invested with a discretionary power with regard to the time and manner of making such distributions, and so long as they act in the exercise of an honest judgment their authority is absolute."

In the case at bar the directors, with the assent and acquiescence of every stockholder, did, at the times and in manner agreed upon, make and declare the dividends. It is respectfully submitted that the proofs were ample and the principles of law plain and the verdict was therefore well founded and legal.

ASSIGNMENTS OF ERROR AND COMMENTS THEREON.

The first four assignments do not specify the errors complained of, and are too general to require notice.

V.

Because the trial court improperly allowed a witness on behalf of the plaintiff at the trial to testify as follows:

Q. "What was the character of your stock, common or preferred?"

A. "Common stock."

Case, p. 25, 26.

There is no merit in the objection interposed to these questions, and it calls for no argument.

VI.

Because the trial court allowed a witness on behalf of the plaintiff at the trial to testify as follows:

Q. "What was done by the directors on these semi-annual occasions with respect to any profit that the business was shown to have made for the preceding six months."

A. "After paying the interest or the dividend on the preferred stock, the rest of the profits were set aside to Mr. J. M. Carroll and Mr. Breslin and myself, and entered upon the books."

Case, p. 32.

The assignment incorrectly quotes the testimony, which is correctly quoted above.

The witness had shown (p. 24-25) that during the period in question the acting directors of the Company were John M. Carroll, Frederick A. Fries and Thomas

J. Breslin; that twice a year in January and July the directors met and took an inventory of the business, and ascertained the amount of profit made (p. 29).

The above question was therefore clearly proper to elicit information as to what was done by them with respect to any profit shown to have been made. The defendant company was called on to produce any minutes it might have relating to the subject matter (p. 30) and it replied that it had none such. It is respectfully submitted that the question was a proper one, and no error was committed in its allowance. If the action had been originally recorded in the minutes and they had been lost or not produced, then the evidence was surely proper.

Bower v. Earl, 84 Ga., 219, (1890).

Thayer v. Middlesex, 27 Mass., 325, (1850).

Lohman v. N. Y. R. R. Co., 2 Sandf., 37, (1848).

Elems vs. Ogle, 15 Jur., 180 (1850).

Narragansett Bank vs. Atlantic Silk Co., 44 Mass., 282 (1841).

There is no difference between admitting secondary evidence of contents, etc., with respect to corporation books, than with respect to any other private writing.

Thompson on Corp., Sec. 7738, p. 6142.

If there was no minute in the company's books then the testimony was clearly legal.

Directors are not required by any law to record their actions in writing.

Merrill vs. C. T. Segar Mfg. Co., 32 Hun. (N. Y.), 543 (1884).

Nashua R. R. vs. Boston R. R., 27 Fed. Rep.,
821 (1886).

Moss vs. Averell, 10 N. Y., 449 (1853).

The acts of corporations are provable by parol in all cases unless a record is required to be kept.

Thompson on Corp., p. 3895, Sec. 5175.

“The entry of a resolution in a minute is not essential to the validity of the resolution which is proved aluinde.”

Re Great Northern vs. Works L. R., 44 Ch. D., 472 (1890).

Allen vs. Jones, 45 Fed. Rep., 148 (1891).

“Where a corporation consists of a small number
“of persons, like a partnership, they may transact all
“their business by conversation without formal votes;
“and it would be a violation of the plainest principle
“of justice to hold those who deal with them to prove
“all their acts by written votes, which they do not
“keep or do not produce.”

Melledge vs. Boston R. Co., 59 Mass., 158,
179 (1849).

Hall vs. Hester, 83 Hun. (N. Y.), 19 (1894).

Outterson vs. Fonda Lake Paper Co., 20 N. Y. Supp., 980 (1892).

Columbia, &c., Co. vs. Vancouver & Co., 52 Pac. Rep. 5138 (Oreg., 1898).

Preston vs. Missouri R. R. Co., 51 Mo., 43 (1872).

Edgerly vs. Emerson, 23 N. H., 555 (1851.)

Wood vs. Wiley, &c., Co., 56 Conn., 87 (1888).

U. S. Bank vs. Dandridge, 12 Wheat. (U. S.),
64, 95 (1827).

Taylor vs. Griswold, 2 J. S. Green, 240
(1834).

VII.

Because the trial court at the trial improperly allowed the plaintiff to testify as follows:

Q. "How long was it after the organization of the company before these gentlemen ceased to act as directors?"

A. "I should think about 1894."

Case, p. 33.

The matter inquired about was certainly pertinent. The witness has shown actual personal knowledge of the facts.

There are no grounds stated in the objection, or in the assignment.

Counsel (as the Court said in *Donnelly vs. State*, 2 Dutch., 511) is utterly at a loss to know the ground of the objection.

It is also held in that case that in the assignment the grounds of error should be specified.

VIII.

Because the trial court at the trial improperly admitted in evidence, on the part of the plaintiff, book L. M. G. I.

Case, p. 98.

This book, called the "Private Ledger," was the book in which, among other accounts, were the accounts with the stockholders.

In it were entered the salary items due each and the dividends (Fries, p. 35). It was produced from the custody of the defendant company under a subpoena duces tecum (J. M. Carroll, p. 84); it was

shown by the bookkeeper that in addition to the accounts of the stockholders the company kept in this book such accounts as merchandise, cash, bills payable, bills receivable, expense, etc. (Kelly, p. 90), and that these accounts were not kept in any other book of the company; and that this book was absolutely an essential part of the company's accounting system; that no trial balance could be made up without using this book (Kelly, p. 90).

Under these circumstances there can be no merit in an objection that this was not shown to be a book of the defendant company; and there was no error in admitting it in evidence.

IX.

Because the trial court at the conclusion of the plaintiff's case improperly refused to grant the defendant's motion to non-suit the plaintiff.

Case, p. 111.

To argue the righteousness of the refusal to non-suit would be, of course, to repeat the argument in the foregoing brief.

We respectfully submit that there is no aspect of this case in which the questions involved could be settled in a suit excepting by the verdict of a jury.

X.

Because the trial court at the trial improperly admitted in evidence, on the part of the plaintiff, two letters, Exhibits 4 and 5.

Case, p. 114.

These two letters are printed (pp. 239, 240).

They were introduced to show the demand made by the plaintiff for payment.

It was not necessary in this case for the plaintiff to make other demand than the suit, but the letters were relevant, and if not, were harmless.

Demand for payment of a dividend is only necessary when it has not been specifically set apart to the individual stockholder.

That is to say, it must be demanded when the dividend has been declared, but his proportional part has not been segregated.

When each stockholder's part has been so set apart and credited on the books of the company to him, no demand other than suit is necessary. Besides, this plaintiff was not suing for dividends, but for a sum of money made up of many items of credit, such as salary, loans to the corporation, etc.

The commencement of the suit is sufficient demand, even if dividends were the only subject matter sought to be recovered.

Cook on Stock and Stockholder (3d Ed.),
§ 543, p. 716.

In *King v. Paterson and H. R. R. Co.*, 5 Dutch., 82 S. C., on appeal, 504, it was held that a demand was necessary where the proportional part of each stockholder had not been credited, but that portion of the opinion (p. 505 *et seq.*) which deals with dividends which have been credited on the books to the individual stockholders shows undoubtedly that in such cases the amount becomes a debt immediately payable and no demand other than suit is necessary.

But there was a specific demand in this case contained in Mr. French's letter; and since the refusal to pay is not put upon the ground of a demand for an incorrect or uncertain amount, but upon the ground that no dividends at all were due, the demand was sufficient.

Robinson v. Nat. Bank, 95 N. Y., 637.

XI.

Because the trial court at the trial improperly refused to allow the defendant to prove by John M. Carroll his ownership of shares of stock of the company.

The rulings complained of were on p. 116, but on pp. 118, 119, 136, 137, 138, 139, 140, 141 and 142 Mr. Carroll was permitted by the Court to go into the whole question at great length.

XII.

Because the trial court at the trial improperly denied the offer of the defendant to introduce in evidence the minute book of the board of directors of the company.

Case, p. 131.

The matter arose in this way: John M. Carroll, President and Treasurer, and a director in the company, was being examined by the defendant.

He testified, on p. 124, that there was a meeting of the board of directors of the company on the eleventh day of June, 1902 (p. 124).

Minutes of that meeting were kept by Breslin, the Secretary, the plaintiff in the action (p. 124). Those minutes, both of the directors' meeting and the stockholders meeting of the same date, were admitted in evidence and marked, "Directors' minutes marked Ex. C of defendant; stockholders' minutes marked Ex. D of defendant" (p. 127).

They were afterwards by some one copied into a book and the offer of the book was rejected. This was proper and in every way harmless. The defendant had all the advantage of the evidence that it possibly could have—the mere copy in a book could not add to or help them in any way.

XIII.

Because the trial court at the trial improperly denied the offer of the defendant to introduce evidence touching the indebtedness of the Brimfield Manufacturing Company to the defendant company, and to show that the plaintiff and John M. Carroll each assumed one-half of the Brimfield Company's indebtedness to the defendant, in the amount of fifty thousand dollars, or thereabouts, whereby the obligation of the Brimfield Company to the defendant company was discharged, and Breslin and Carroll made debtors of the defendant company in the sum of twenty-five thousand dollars, or thereabouts, each.

P. 153, 154.

It was not an offer, but arose on an attempt to put in the books of defendant company as evidence for it.

On page 153 counsel for the defendant company showed to the witness an account contained in the "Private Ledger," showing its dealings with a corporation named the Brimfield Manufacturing Company.

It was sought to prove in this way that the Brimfield Manufacturing Company owed money to the Fries-Breslin Co.

Laying aside for the moment the question of relevancy, this was not the way that the Fries-Breslin Co. could legally show the fact.

Its own books were not evidential to prove the fact of indebtedness to it for moneys loaned and advanced (the items of that account were all of that nature).

Our cases are clear upon this.

Inslée v. Frall (Sup. Ct., 1852) 23 N. J. L., 457.

On error, 25 N. J. L., 665.

Oberg v. Oberg (Sup. Ct., 1887), 50 N. J. L., 145.

Hauser v. Leviness (Sup. Ct., 1898), 62 N. J. L., 518.

Myers v. Weger (Ct. Errors, 1898), 62 N. J. L., 440.

The question of relevancy is mingled with the next objection and will be dealt with thereunder. The defendant's counsel asserted its relevancy as follows, (p. 154) :

"Mr. Pancoast : It is on the matter of off-set. The claim is that the Brimfield Company owed to the Fries-Breslin Company a certain amount of money, and by agreement between Mr. Carroll and Mr. Breslin they each assumed the payment of one-half of that money upon the books of the company, and became debtors of the company to that amount."

The only instrument of proof offered to the Court to sustain the relevancy of the testimony, was the book of the Fries-Breslin Company, containing the account between the Fries-Breslin Company and the Brimfield Manufacturing Co.

The Court ruled that it was not relevant proof, p. 154, 155.

This was the only proper ruling that could be made. An analysis of the matter demonstrates the illegality of the evidence.

It is sought first to prove by the Fries-Breslin Co.'s own books of account that it lent money to the Brimfield Manufacturing Co.

That is not proper proof—(see cases last cited).

It is then proposed by the books of the Fries-Breslin Company to show that in this same account the Fries-Breslin Co. made entries which charged Carroll and Breslin with certain sums of money,

which were stated in the book or claimed by the Fries-Breslin Co. to be assumptions by Carroll and Breslin of the payment by them of the money lent to the Brimfield Manufacturing Co.

What becomes of the doctrine of consideration? None is shown for any such contract. What becomes of the Statute of Frauds? A party to be charged with the debt, default or miscarriage of another must sign the memorandum so charging him!

But it is not necessary to go any depth below the surface. It cannot seriously be argued that books of account of a corporation can ever be evidence of such a nature in favor of the company as here claimed by the defendant.

That such is the law is plainly settled in *Rudd v. Robinson*, 126 N. Y., 113, where all the authorities are reviewed.

Glenn v. Liggett, 47 Fed. Rep., 472.

Haynes v. Brown, 34 N. H., 545.

Hill vs. Manchester, 5 Brad., 866.

Powell vs. Conover, 75 Hun. (N. Y.), 11.

After this matter had been ruled upon, the defendants (on p. 156) made an offer which (on p. 159) was objected to, but when counsel for the plaintiff found that the defendant constantly shifted positions and sought to have the ruling cover undisclosed and unoffered matters he withdrew his objection to the offer, leaving the defendants to their right to ask such questions and offer such papers as they thought raised the issue (p. 159), and this was the course the matter took (p. 160). The only other step then taken by the defendant was to offer another page of the book of the Fries-Breslin Company containing the Brimfield account, and that was ruled out on the same ground as previously stated

(p. 161). It is submitted that the rulings were strictly correct.

XIV.

Because the trial court at the trial improperly denied the offer of the defendant to introduce evidence touching the minutes of the defendant company.

This assignment apparently relates to the questions asked the witness John M. Carroll (p. 161-172,) about the contents of a book marked E. A. A., pages 61 to 65 inclusive, (p. 161).

When this book was offered in evidence and objected to and overruled (p. 172) no exception was taken.

This witness testified (p. 161) that the Fries-Breslin Company had a meeting on July 14, 1902.

It was the minutes of this meeting that were being testified about.

The question of the relevancy will be elsewhere dealt with.

We will confine ourselves now to the propriety of the rulings on the questions asked.

This witness testified that the minutes were in typewriting—they were signed Joseph A. McKeown, Secretary (p. 168).

He was alive and was afterwards called to the stand (p. 188).

It is respectfully submitted that where the thing sought to be proved is the minute made of a meeting and it is signed by the Secretary, that minute must, if the Secretary be alive and where he can be produced, be proven by the oath of the Secretary, or by some one who can verify the making of the minute. It is not contended that the transactions at a meeting may only be shown by the Secretary or that it is not competent to show what

was done; but that is not now the subject of judicial inquiry; the thing sought to be introduced were minutes of a certain meeting—the minutes were signed by the Secretary. He was alive, and was actually in court and was afterwards called as a witness.

It is perfectly clear, we submit, that the questions asked Mr. Carroll (p. 161 to 172) to attempt to prove the verity of the minutes by him were illegal and that they were properly overruled.

Cook on Stock and Stockh. (3d ed.), Sec. 714.

The testimony of McKeown (p. 188-193) shows that he was Secretary and was elected on July 14, 1902 (p. 191), and that he signed the minutes they were endeavoring to introduce in evidence after Nov. 3, 1902. That is, the President on the 14th of July, 1902, handed him some papers and he put them in the minute book, and after November 3, 1902, he signed them as Secretary (p. 189).

He was only present part of the time of the meeting of July 14, 1902, and made no minutes (p. 191).

Not having made any minutes it was manifest that he could not so identify such and make them evidence.

It will be noticed that nowhere was either of these witnesses asked from his personal knowledge to state what was done at the meeting of July 14, 1902. The defendant sought solely to prove certain papers termed minutes. It utterly failed to offer the necessary proof to authorize the introduction into evidence of these papers as minutes. The rulings were therefore correct.

In *Highland v. McKean*, 10 Johns, 154, it was held: "Corporation books are evidence of the acts and proceedings of a corporation, but it must be made to appear that they are the books of the

“corporation, kept as such by the proper officer
 “or some other person, authorized to make en-
 “tries in his necessary absence.

“It is not enough to prove the books to be in the
 “handwriting of a person stated in the book itself
 “to be the Secretary, but not otherwise shown to be
 “the proper officer.”

In *Powell vs. Conover*, 75 Hun., 11 (1894), in order to make the corporate books admissible, proof must be given as to who kept them, and that the entries were made at the proper time or by the proper officers and that entries were properly made.

Whitman v. Granite Church, 24 Me., 236.

But if the measure of proof required to admit these minutes in evidence had been forthcoming they were inadmissible because they were irrelevant, incompetent and immaterial.

It is shown (on pp. 190-191) for what purpose defendant desired to introduce these minutes and why they claimed they were relevant.

“THE COURT (p. 190, line 21)—What specific thing do you wish to place in issue respecting this matter?”

“MR. GILLERAN—Respecting our counterclaim in this case; respecting the account known as the Brimfield account.

“THE COURT—What is there about that counterclaim which you say will appear from these minutes? What is the point made that there was some resolution passed?

“THE COURT—Just draw my attention to that.”

The Court was then shown the records talked about, which (p. 190 line 1-6) were those brought before the meeting of November 3rd, 1902.

The minutes of that meeting of November 3rd, 1902, show that the plaintiff was not present.

The Court (p. 191) ruled them out as irrelevant. This was clearly correct.

It does not seem necessary to cite numerous authorities upon the proposition that the defendant company could not deprive the plaintiff of what was his, namely, the debt due by the company to him, by passing resolutions.

In *Beers vs. Bridgeport Spring*, 42 Conn., 17, it was held that such an act was futile.

In 9 Am. and Eng. Enc. of Law, p. 893, it is said:

"But where the corporation deals with its members as with individuals in which they sustain the relation of strangers to it, the corporation books are not admissible against the members as evidence of such private contracts and dealings.

Green vs. Leggett, 47 Fed. Rep., 472.

Haynes vs. Brown, 36 N. H., 545.

Hill vs. Manchester, etc., 5 B. and Ad.

866; 27 E. C. L. 219, 2 N. and M., 573.

Rudd vs. Robinson, 126 N. Y., 113.

And in the application of this principle directors of the corporation and stockholders thereof stand upon the same footing.

Rudd vs. Robinson (supra.)

Powell vs. Conover, 75 Hun., N. Y., 11.

If what the defendant sought to do was to show a contract by Breslin to pay the debt due by the Brimfield Manufacturing Co. to The Fries-Breslin Co., the defendant should have proved such a contract, shown its consideration, and the parties to it; and if it was as they stated, a contract of assumption of a debt, the signature of the parties to be charged therewith.

This is not even attempted to be done.

There is nowhere shown the slightest consideration for any such undertaking on the part of Breslin, nor the proof or offer to prove any contract by him.

XV.

Because the trial court at the trial improperly denied the offer of the defendant to introduce in evidence the book of minutes of the company.

When offered (p. 172), and overruled, it was not excepted to.

When offered (p. 193), it was clearly shown that no verification had been made that the minutes were made by any one knowing them to be of the occurrences of the meeting.

The witness plainly showed and stated that he did not know. He was only present part of the time, and made no minutes.

If the things done at a meeting were relevant and Breslin was thereby affected the proper way to prove them against him was to prove what was done, not to attempt to bind him by what appeared in what are termed minutes—which are not proven to be such.

It is respectfully submitted that where the rights of an individual stockholder or director are sought to be affected by what was done at a meeting, the proof should be clear that the relevant thing was done. It will not do to simply prove that some writings in a book called minute book says it was done.

The rights of individuals may be affected by proof of what they did, but the self serving entries in a minute or elsewhere in a company's books are not proper instruments of proof in such instances, where the thing sought to be proven is some dealing with the member as an individual and not his rights and liabilities as a member.

This has been more fully dealt with and the authorities cited under a previous assignment.

XVI.

Because the trial court at the trial improperly allowed testimony on the part of the plaintiff to the effect that it was understood that whoever took preferred stock no longer had any vote in the corporation and that it was understood that the preferred stockholders who took preferred stock in the company, were to withdraw from the board of directors.

P. 74, p. 82.

In neither instance was there any exceptions taken.

No authorities are needed to sustain the principle so often stated by this Court, that it will not consider alleged errors which were not excepted to.

XVII.

Because the trial court at the trial improperly refused the request of the defendant to charge the jury "that any private arrangement or agreement between Fries, Breslin and Carroll, touching the division of the profits of the company, was not binding on the corporation in this suit;" and wrongfully charged the jury on this point, as follows: "I have charged you that if all of the stockholders agreed to a division and that division was reached in this suit that it does bind the corporation, and I repeat what I have said on that subject."

P. 219.

The charge is so full upon the question of the necessity of finding acquiescence, approval, authorization or ratification by all the stockholders, and with respect to the things necessary to be found by the jury to warrant a verdict for plaintiff, that this request could not properly be answered in any other way. No one pretended or alleged that Fries, Breslin

and Carroll could affect by their own conduct the rights of James G. Carroll. The Court properly referred the jury to his charge in which he had told them that they must find that all had authorized, acquiesced, approved or ratified. There was no error in not directly repeating this request in its words.

XVIII.

Because the trial court at the trial improperly denied the request of the defendant to charge the jury as follows: "That there is insufficient proof in this case to establish that the profits sought to be recovered in this suit were ordered by the board of directors to be divided as a dividend, according to law;" and wrongfully charged the jury on this point as follows: "I decline to charge that there is insufficient proof, but do charge that there is sufficient proof to go to the jury and have them determine what the fact is."

P. 219.

As has been argued throughout this brief, it was a question of fact for the jury. The Court left it to the jury. There was no error in refusing the request.

XIX.

Because the trial court at the trial improperly denied the request of the defendant to charge the jury as follows: "That the plaintiff is not entitled to recover the items of profit set forth and demanded in and by his bill of particulars, annexed to the declaration in the cause."

P. 219.

The Court's response to this request was—"Well, that is just what is submitted to you." In other words, he left the issue of fact to the jury.

XX.

Because the trial court at the trial improperly refused to comply with the defendant's request to charge the jury as follows: "That the plaintiff was not entitled to recover interest on the items of wages or salary claimed in this suit," and wrongfully charged the jury on this point as follows: "Now, in regard to that matter, the only thing for your guidance is the fact that these interest items are testified to have been entered by the bookkeeper of the company, in a book which was kept under the management of the directors, and inspected by them, and whether or not they approved of allowing interest upon the moneys which the corporation owed (if it did owe them), and whether there was any implied contract to that effect can only be gathered from the course of business. I cannot charge you as a matter of law whether you will consider there was presumption that they were to pay interest upon the sums they owed (if they did owe them), or whether there was a presumption that they should not pay interest, nothing appears."

P. 220.

The charge was strictly in accordance with the law.

In the language of Lord Langdale, "interest should be given, if you can collect from circumstances or from the usage between the parties, that there ought to be or was intended to be such a computation of interest."

Miller v. Craig, 6 Beavan, 433.

Morris v. Allen, 1 McCarter, 46 (1861).

Buckingham v. Ludlum, 2 Stewart, 350 (1878).

Winchester v. Glazier, 9 L. R. A., 424, (Mass., 1890).

See cases cited in Note to this case.

XXI.

Because the trial court at the trial improperly denied the request of the defendant to charge the jury as follows: "That the plaintiff is not entitled to recover interest upon the items of profits claimed in this suit, prior to September 9, 1902;" and on this point improperly charged the jury as follows: "I charge you as regards interest on profits that it follows the same rule as the interest on salary. It is for you to find whether there was an implied agreement on the part of the corporation, judging from its course of bookkeeping, to pay interest."

P. 220.

Same reply as to assignment No. 20.

XXII.

Because the trial court at the trial improperly denied the request of the defendant to charge the jury as follows: "That without a demand by the plaintiff, and a refusal of the defendant company, to pay the profits in question, before suit was commenced, the plaintiff cannot recover the profits which he seeks to recover in this action;" and improperly charged the jury on this point as follows: "I charge that is the law, and that in this case you are to consider the exhibits which have been offered, the letter and its response, and also the nature of the entry upon the books as to whether, in your judgment, that constituted a recognition by the defendant, and in view of the subsequent refusal to pay the balance, constitutes a refusal to a demand."

P. 220.

Same reply as to assignment No. 10.

XXIII.

Because the trial court at the trial improperly denied the request of the defendant to charge the jury as follows: "That there is no sufficient proof of demand for and refusal of the defendant company to pay the profits or dividends sued for in this action, and, therefore, they cannot be recovered in this action."

P. 221.

Same reply as to assignment No. 10.

XXIV.

Because the trial court at the trial improperly denied the request of the defendant to charge the jury as follows: "That the plaintiff cannot recover any claim or demand for money which became due more than six years prior to the date of the commencement of this suit;" and improperly charged the jury on this point as follows: "I charge you that in a running account, such as this, the strict rule of the statute of limitations is not applicable."

P. 221.

This is the law.

Belles v. Belles, 7 Hals., 339 (*389).

Guleen v. Turnpike, 2 J. S. Green, 545.

XXV.

Because the trial court at the trial improperly charged the jury as follows: "Now, the first peculiarity of the suit by which your attention will be arrested is this: Usually when a plaintiff sues upon an account he comes into court and says to the defendant, 'I have got an account which I have kept against you, and by my account as I

have kept it, you owe me a certain sum of money.' But, in this case, you will observe that this is reversed, and that the plaintiff says to the defendant, 'You have kept whatever the account between us was, and I ask you that whatever your account shows you shall pay me.' That is a peculiar circumstance, and one which is the foundation of the manner in which the suit has been presented to you, and which must necessarily form the starting point from which you should consider what your verdict ought to be."

P. 225.

If the objection to this is because it is a comment on the evidence, and that is the only conceivable ground of objection, the answer is :

First, that it was entirely proper to call the jury's attention to the admitted, undisputed situation; and, second, that comments on evidence are not assignable as error if the facts are left to the jury.

C. & A. R. R. Co. v. Williams, 61 N. J. L.,
646

XXVI.

Because the trial court at the trial improperly charged the jury as follows: "Now, the defendant company does not say, 'We did not keep this account.' It does not say, 'We did not direct it to be kept in this way.' Nor does it say that the time it was kept it was not honestly kept for the purpose of establishing an account, with respect to all of the items on that book of account with the plaintiff, excepting those which were entered as cash and which have now been shown to have been a division of profits. As I understand the case, there is no dispute made but what the account is a proper one to be considered and allowed in adjusting the debits and credits between the plaintiff and the defendant. But with

respect to those cash items, the exact amount of which I have not added up, the main stress, in fact the entire stress, of this case has been made and upon that it turns."

P. 226.

Same reply as to assignment No. 25.

XXVII.

Because the trial court at the trial improperly charged the jury as follows: "Then, in the next place, you will ask, 'Must there be any particular forms provided by law—any particular time, any particular place, any other particular formality?' To that the law answers 'No;' those things are very desirable, because they prevent just such mistakes as are constantly arising, just such misunderstandings as can be said to exist in a case like this. It is well for a corporation to organize properly; it is well for it to have minutes; to keep a record of all it does. It is well for it to do everything as orderly as it can. But while the doing of these things has been found to be very desirable to keep people out of trouble, yet if they do not do these things the law does not at all compel their doing them, provided they do the substance of what the law requires of them."

P. 227.

See cases cited under assignment No. 6.

In addition to which the fact that whatever was done in the case at bar was by acquiescence, and the estoppel thus worked does away with the necessity of proofs as to conformity with strict forms.

XXVIII.

Because the trial court at the trial improper-

ly charged the jury as follows: "Now, what is the substance, then, of what the law requires? It is that the trustees, who are directing lawfully the business of a corporation, chosen for that purpose by the stockholders, shall ascertain, in the first place, that there has been a profit. That, the directors alone can do. The stockholders cannot do that. But that is not enough. They must then determine whether they will keep all of that profit to run the corporation upon, or whether they desire and consider it proper and discreet to divide some of it among the stockholders. They must decide that. If they decide that they do not want to keep all of those earnings, that they do want to divide some of it with the stockholders, they must go further, and must decide just how much money they set aside from what was their property as a corporation to what is to become the property of the stockholders. And when they have done that then they have separated it, as I said to you, under a prior rule."

P. 227.

Same reply as to assignment No. 27.

XXIX.

Because the trial court at the trial improperly charged the jury as follows: "Now, that being, then, what must be done in substance, and the rule of law being that there need be no particular formalities, providing the substantial thing is done, you come to the question of fact. Did this corporation, acting through its directors, upon these semi-annual occasions, do the substance of what the law thus requires? In other words, did they separate from what belonged to the corporation a certain quantity of the earnings to become a dividend or division of profits which the stockholders were

to have? If you decide that they did not, of course upon that branch of the case, you decide against the plaintiff, because the plaintiff's contention is that they did, and he should satisfy you by a preponderance of proof that the thing was done in a manner which carried out the substance of the law."

P. 228.

Same reply as to assignment No. 27.

XXX.

Because the trial court at the trial improperly charged the jury as follows: "Then the next question in the case that arises is whether that is modified or can be modified in case the conduct of the directors in making a distribution upon some other ground was done with the approval or by the authorization of all of the stockholders entitled to the distribution. Now, in regard to that, I charge you as the law, that where a fund has been determined to be a fund to be divided amongst all of the stockholders of a corporation, if all of the stockholders who are entitled to this fund acquiesce in, approve of, authorize or ratify any distribution of that fund among themselves, differing from the ordinary *pro rata* division, the directors, when so authorized, may make such distribution different from what they could make if they lacked such authority from the owners of the total fund of stock."

P. 228.

The argument and authorities, heretofore, upon the question of estoppel, and the cases showing that the dividend when declared is the stockholder's, to do with as he pleases, are decisive upon this question.

They need not be here repeated.

Whether there was an assignment from one to the other or whatever was the inducing cause, the

fact is that with the concurrence of all concerned the dividends when declared were dealt with as directed by the persons interested in them, and such action was concurred in by the corporation. The law favors making a finality of whatever has been so treated by the parties in interest.

If that result is not legally reached in this case it is difficult to see of what use the theory or doctrine of estoppel is.

XXXI.

Because the trial court at the trial improperly charged the jury as follows: "Now, there were four holders of stock. As to the three of them who were there present, practically doing these things themselves, they being the three active directors, I do not see that there can be any possible question but what they did all of those things. With respect to what they themselves did, my mind will not enter into a mental state in which I can conceive of a man doing a thing with respect to his own property which he himself neither authorizes, acquiesces in, approves of or ratifies. So I think we must say that the persons who were there present, actually doing these things in the guise of directors, if you so find that they did, approved of them."

P. 229.

If a court be permitted to say to a jury that two and two make four, then this instruction is without error.

Nothing could be plainer than the truth of the statement made, and it is respectfully submitted that it was not only proper but obligatory on the Court to inform the jury that the law took that view of one's own actions.

XXXII.

Because the trial court at the trial improperly charged the jury as follows: "But it is said you must consider the rights upon the question of James G. Carroll, and you must do so. Now, with respect to him, he was not present upon these occasions. You will consider the testimony with respect to whether he was an acting director, or whether he, under the testimony in the case, may be presumed to have ceased to be such, as part of his acceptance of the fifteen per cent. Upon his stock or whatever is your deduction from the testimony in that case, that is, as to his being a director."

P. 229.

This leaving of the fact to be settled by the jury was proper.

The defendants surely will not argue that the Court should have settled it.

It was plain, but still a question to be settled by the jury.

XXXIII.

Because the trial court at the trial improperly charged the jury as follows: "That leaves, as the only debatable matter, this question of the division of profits, about which I have endeavored to give you the rules of law to indicate to you the two respects in which you are to weigh the conduct of these parties and ascertain in substance what they did."

P. 230.

The two respects are stated at length throughout the charge and are summed up at p. 217 as follows: These, then, are the two questions of fact to be determined:

“Did the directors do, substantially, their duty
“on behalf of the corporation?”

“Did the sums of money which were placed to
“the account of the plaintiff and the other ‘com-
“mon stockholders,’ as they have been called, meet
“with the acquiescence or approval of the four
“stockholders that were the only ones interested in
“the fund?”

As a summing up of the two main questions upon
which the charge had dwelt at length this was un-
exceptionable.

It is respectfully submitted that correct legal
principles were applied to the issues raised; that
the verdict of the jury settled the facts and no legal
error appears in the rulings or charge of the Court;
therefore, the judgment should be affirmed and the
writ of error dismissed.

THOMAS E. FRENCH,
LINDLEY M. GARRISON,

Counsel for Plaintiff below, the Defendant in Error.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THOMAS J. BRESLIN,	}	10
Plaintiff (Defendant in Error),		UPON CONTRACT.
vs.		DEFENDANT'S
FRIES-BRESLIN COMPANY,		POINTS.
Defendant (Plaintiff in Error).		

D. J. PANCOAST, Counsel. 20

In this case, the plaintiff, a stockholder and director of the defendant company, a New Jersey corporation, in an action upon contract, on a declaration containing only the common counts, with a bill of particulars annexed, wherein he claimed certain alleged yearly and half-yearly profits of the business of the defendant company, was allowed to recover a judgment for such profits, as dividends, to the amount of \$52,306.94, although no dividend of them had ever been formally or officially declared by the board of directors of the company, and no demand had ever been made for the same prior to the suit. 30

The items so recovered are stated in the bill of particulars. pages 4 and 5, and are as follows:

1893.	
April 25.	Cash, part of profits..... \$1,496 97
1894.	
May 13.	Cash, share of profits..... 5,286 92
Dec. 13.	Cash, 1-3 profits..... 5,486 67
1896.	
10 July 6.	Cash, 1-3 profits, 6 months..... 6,126 92
Dec. 31.	Cash, 1-3 profits, 6 months..... 6,141 02
1897.	
July 3.	Cash, 1-3 profits, 6 months..... 6,768 58
Dec. 30.	Cash, 1-3 profits, 6 months..... 6,542 48
1898.	
June 30.	Cash, 1-3 profits, 6 months..... 9,862 65
Dec. 31.	Cash, 1-3 profits, 6 months..... 10,129 94

20 No mention or reference is made to dividends, either in the declaration or in the bill of particulars.

From the plaintiff's own proofs it appears that all the other items in his bill of particulars were more than paid and satisfied by the credits allowed to the plaintiff; and when he rested his case the defendant made a motion to non-suit, upon two grounds, namely: First, that the items in question had never been duly and legally declared to be a dividend; and, second, that there was no allegation in the declaration, or proof in the testimony, that the profits
30 sued for (assuming them to have been declared dividends) had been duly demanded before suit; and after the argument of the motion to non-suit, the Court allowed the plaintiff to offer two letters, Exhibits 4 and 5, pages 239 and 240, as evidence of a demand and a refusal, which letters were the only evidence on the subject (pages 111, 112, 113).

When the case was submitted to the jury, the Trial Judge left it to them to find; first, whether or not the profits sued for had been duly declared to be dividends belonging to the plaintiff; and, second, whether or not the plaintiff duly demanded payment thereof, which was refused before suit (see charge of the Court, page 210, &c., and the exceptions thereto, page 225, &c.); and the Court expressly denied the application of the defendant to instruct the jury that the plaintiff could not, under the pleadings and proofs, recover the profits sued for. (See defendant's requests, which were denied, and the exceptions to such denial, pages 218, 230.) On these and other grounds, set forth in the bills of exceptions and assignments of error, the defendant challenges the legality of the judgment rendered in favor of the plaintiff. (See defendant's bills of exceptions, pages 26, 27, 28, 29, 30, 32, 33, 34, 43, 69, 73, 74, 77, 80, 81, 82, 84, 99, 107, 109 (as to motion to non-suit), 113, 114, 116, 117, 131, 153, 154, 155, 161, 162, 163, 164, 165, 166, 172, 177, 180, 183, 187, 188, 189, 191, 192, 193, 194, 195, 196, 197, 201, 202, 203 (as to the charge), 226, 227, 228, 229 (as to refusal to charge), 230; and its assignments of error, page 231, &c.

FIRST POINT—AS TO DIVIDENDS.

A corporation is an artificial person, created by statute, and bound by its provisions. These provisions, in part, are for the benefit of the stockholders, and in part for the benefit of the public, or third parties with whom it may have dealings; and these provisions, especially those which are intended to protect the public, or outside per-

sons, cannot be ignored or set aside at the will or caprice of parties interested in so doing.

A solvent corporation is allowed by law to dispose of its assets for the payment of its debts in any way it sees fit; but the manner of the distribution of its moneys to its stockholders is not left to the discretion of the shareholders or directors; being a thing that concerns the public, that important corporate function or power is allowed
10 to be performed only in a certain prescribed manner.

Section 30 of our Corporation Act, Laws of 1896, page 286, provides that "No corporation shall make dividends, except from the surplus or net profits arising from its business, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of its capital stock, or reduce its capital stock, except according to this act, and in case of any violation of the provisions of this section, the directors, under whose administration
20 the same may happen, shall be jointly and severally liable, at any time within six years after paying such dividend, to the corporation, and to its creditors, in the event of its dissolution or insolvency, to the full amount of the dividend made or capital stock so divided, withdrawn, paid out or reduced, with interest on the same from the time such liability accrued; provided, that any director who may have been absent when the same was done, or who may have dissented from the act or resolution by which
30 the same was done, may exonerate himself from such liability by causing his dissent to be entered at large on the minutes of the directors, at the time the same was done, or forthwith after he shall have notice of the same, and by causing a true copy of said dissent to be published, within two weeks after the same shall have been

so entered, in a newspaper published in the county where the corporation has its principal office."

Section 47 of the same act provides that "The directors of every corporation created under this act shall, in January in each year, unless some specific day or days for that purpose be fixed in its charter or by-laws, and in that case then on the days so fixed, after reserving over and above its capital stock paid in, as a working capital for said corporation, such sum, if any, 10 as shall have been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount so reserved, and pay the same to such stockholders on demand; provided, that the corporation may in its certificate of incorporation or in its by-laws give the directors power to fix the amount to be reserved as a working capital."

This section has been amended (Laws of 1901, p. 246) so as to read as follows: "Unless otherwise provided in the original or amended certificate of incorporation, or in a by-law adopted by a vote of at least a majority of the stockholders, the directors of every corporation created under this act shall, in January in each year, after reserving over and above its capital stock paid in, as a working capital for said corporation, such sum, if any, as shall have been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount 20 so reserved, and pay the same to such stockholders on demand."

In the recent case in this court of *Appleton vs. American Mailing Co.*, 54 *Atlantic Reporter*, p. 454, it was held that stockholders who, in the name and for the 30

use of the corporation, sue for the recovery of dividends improperly declared, are not barred from maintaining such action, because those from whom they purchase their stock participated in the dividends in question. Chief Justice Gummere, in expressing the opinion of the Court, said that "the apparent object of the provision (referring to section 30 of our Corporation Act hereinbefore quoted) is to afford protection
10 equally to the corporation and to its creditors against loss by reason of the illegal act (page 456).

The proofs in this case, here under discussion, show that the question of the declaration of a dividend of the profits in question was never discussed or considered by the Board of Directors, either in board meeting or out of it.

There were only four persons concerned in the corporation during the period covered by the profits in
20 question, namely, John M. Carroll, James G. Carroll, Thomas J. Breslin and Frederick A. Fries, who were, at the same time, stockholders and directors. The parties to the entries of the profits in question were Fries, Breslin and John M. Carroll. James G. Carroll, who was given fifteen per cent. on his stock, as a preferred stockholder, although his stock was not legally preferred, was never consulted as to the profits or dividends in question.

Fries, who is no longer interested in the company,
30 as a witness on the part of the plaintiff, and upon whose testimony the plaintiff chiefly relies, testified as follows (page 28, &c.):

Ques. Did the directors of the Fries-Breslin Company arrive, by any method, at an ascertainment of the results of the business?

Ans. Yes, sir.

Ques. How often, taking a year, for instance, how often during a year?

Ans. Twice a year.

Ques. At what periods of the year?

Ans. January and July.

Ques. Please state what was done in January and July with respect to ascertaining whether the business had made a profit or loss?

Ans. We would take an inventory of the business and ascertain the amount of profits or losses that had been made. 10

Ques. When you say "we," whom do you mean?

Ans. The directors—Mr. John M. Carroll, Mr. Breslin and myself.

Ques. If there was a profit shown, what did the directors do with respect to that profit?

Ans. I cannot say; I cannot answer that question.

Ques. Did you ever make any written minutes in any minute book of any action of the Board of Directors of the Fries-Breslin Company, with respect to the division of the profits of the company, or declaration of dividends? 20

Ans. I do not remember.

Ques. Were you present at these semi-annual occasions of which you have spoken?

Ans. Yes, sir.

Ques. And always took part?

Ans. Yes, sir.

Ques. Who else was present?

Ans. Mr. John M. Carroll and Mr. Breslin.

Ques. What was done by the directors on these semi-annual occasions, with respect to any profit that the business was shown to have made for the preceding six months? 30

Ans. After paying the interest, or the dividend on the preferred stock, the rest of the profits were set aside to Mr. J. M. Carroll and Mr. Breslin and myself and entered upon the books.

Ques. You say it was set aside. Where was any note made of its setting aside?

Ans. In the books of the company.

Ques. When did you cease to have active connection with the Fries-Breslin Company?

Ans. I think February, in 1899.

Ques. And were you acting as a director from its incorporation up to that time?

Ans. Yes, sir.

10 Ques. Who else, besides yourself, Mr. Carroll, John M. Carroll, and Mr. Breslin, acted as directors from the incorporation of the company up to 1889?

Ans. When the company was first organized, there were three more directors—Mr. P. J. Murphy, Mr. James G. Carroll and Mr. Edward McGill were directors when the company was first organized.

Ques. How long was it after the organization of the company before these gentlemen ceased to act as directors?

20 Ans. I should think about 1894.

Ques. About 1894?

Ans. Yes, sir.

Ques. Now, from 1894 down to 1899, who else acted as directors beside Mr. John M. Carroll, Mr. Thomas J. Breslin and yourself?

Ans. No one.

(Page 35.) Ques. What was the name of the book in which these various items of credit were placed to the credit of Mr. John M. Carroll, Mr. Thomas J. Breslin and yourself?

30 Ans. It was called the "Private Ledger."

Ques. And was that book kept where you could see it?

Ans. Yes, sir.

Ques. And where Mr. John M. Carroll could see it?

Ans. Yes, sir.

Ques. And where Mr. Thomas J. Breslin could see it?

Ans. Yes, sir.

Ques. Was it frequently inspected by you gentlemen up to 1899, when you left?

Ans. Yes, sir; very frequently.

On cross-examination he testified as follows (page 58):

10

Ques. Mr. Fries, were you present at these semi-annual meetings, of which you speak, of the Board of Directors of the Fries-Breslin Company, from the organization of the company down to the time of your withdrawal?

Ans. Yes, sir. (Page 58, &c.)

Ques. You say the profits of the company were ascertained at those meetings, or did you so state?

Ans. They were ascertained before the meetings and given to the meeting and they disposed of them.

20

Ques. In what way was the meeting, at which the ascertainment was submitted to it, convened—was a notice sent to the directors, or were they just present in the mill, or office, as usual, and you met, or what was the particular form which you adopted, and method?

Ans. Prior to 1893 or 1894, I suppose Mr. James G. Carroll was sent for; he resides in Brooklyn; but the rest of us were all there, practically, on the premises, at all times.

Ques. And subsequent to 1894, what was the manner or form or method?

30

Ans. That is the period I spoke about. That is what I answered to. Did you say prior to 1894?

Ques. No; subsequent to 1894, sir.

Ans. Why, Mr. Carroll, Mr. Breslin and myself were there practically at all times, and when the books would be closed, each six months, we would set aside the amount of money that was coming to each one of us.

Ques. What was the manner adopted to set aside moneys that were coming to each one of you?

Ans. How did we ascertain the amounts?

Ques. *What particular things did you do, after ascertaining the profits and submitting them to the three directors, whom you have named, respecting the further distribution of those profits? State specifically and further what you did, what was done by those three gentlemen?*

10 Ans. *The amounts to be credited to the different people interested were given to the bookkeeper to enter on the books.*

Ques. *By whom were such figures given to the bookkeeper?*

Ans. *Usually by myself.*

Ques. *What further was done respecting these so-called profits of the business?*

Ans. *That was the end of it.*

Ques. *Did you have charge of the bookkeeping of the business with assistants?*

20 Ans. *Did I have charge of the bookkeeping?*

Ques. *Yes.*

Ans. *Not any more than the rest of the gentlemen interested.*

Ques. *As secretary you handed these figures usually to the bookkeeper?*

Ans. *As the manager of the manufacturing part, I did; yes, sir.*

30 Ques. *Which figures, the ascertainment of the profits, or the figures after the three directors had seen the figures in these meetings of which you speak?*

Ans. *The ascertainment of the profits.*

Ques. *Was that all that was done about those profits? They were entered in the books, I assume, by the bookkeeper?*

Ans. *Yes, sir.*

Ques. *What further was done at that meeting, or at*

any meeting, at which these profits were submitted and after which they were handed to the bookkeeper, respecting them?

Ans. There was not anything further done in regard to the profits.

(P. 64, &c.) *Ques. Were these profits so ascertained and set aside to the account of each one of the three directors who attended the meetings—were they ascertained and set aside pro rata to holding of stock?*

10

Ans. No, sir.

Ques. How were they divided, Mr. Fries?

Ans. After paying the dividends on the preferred stock, what was left was divided into three parts.

Ques. Now, what dividend was declared on preferred stock, if any?

Ans. Fifteen per cent.

Ques. How was it arrived at and declared; what was said and done about it, Mr. Fries?

Ans. I do not hardly know how to answer that question, how it was arrived at.

20

John M. Carroll, pursuant to a subpoena *duces tecum*, served upon him by the plaintiff, produced a book known as the "Private Ledger," marked for the plaintiff "L. M. G., 1," for identification, page 84.

Christopher J. Kelly, a witness on the part of the plaintiff, testified as follows, page 88:

30

Ques. During the time that you were bookkeeper, how often, with respect to the ascertainment of profit or loss, did you balance your books?

Ans. Every six months.

Ques. And was any thing done by Mr. Breslin, Mr. John M. Carroll and Mr. Fries with respect to the results of this balancing of the books?

Ans. Well, after the inventory was taken and the various items charged off, which would be the expense of the company, the balance was handed to me to credit up to their accounts.

Ques. Now, did you ever see Mr. Fries, Mr. Breslin and Mr. John M. Carroll, at any period, going over these badances that you gave them off the books, this inventory of these balances that you speak of?

Ans. Yes, sir.

10

Ques. How often did they do that?

Ans. Oh, well, very frequently.

Ques. How often was this balance taken off by you?

Ans. Every six months.

Ques. How often did they go over the results of your balancing the books?

Ans. Well, about every six months they would go over the work when it was finished.

Ques. They would go over the work when it was finished?

Ans. Yes, sir.

20

Ques. At what periods was it finished?

Ans. January and July of each year.

Ques. Of each year?

Ans. Of each year; yes, sir.

Ques. And after they had gone over it, what was given to you, if anything?

Ans. I was given the amounts on a slip of paper, to be credited to the accounts.

Ques. The accounts of whom?

Ans. First, the preferred stock, 15 per cent.

30

Ques. Fifteen per cent. of its face?

Ans. Fifteen per cent. per annum.

Ques. Of its face?

Ans. Of its face.

Ques. And then what?

Ans. Then the balance in three equal divisions.

Ques. And to whom did these three equal divisions go?

Ans. John M. Carroll, T. J. Breslin, Frederick Fries.

Ques. And they were entered by you on what book?

Ans. In the "Private Ledger."

Ques. What is called the "Private Ledger"?

Ans. The "Private Ledger."

Ques. What else went to these accounts, to the accounts of these people in the "Private Ledger," just generally speaking?

Ans. Credit for salary and any amounts that they paid in to the company; and they were charged with the amounts that they drew out for their own accounts. 10

Ques. I show you a book which has been marked for identification "L. M. G., 1," and ask you whether that is the book you refer to as the "Private Ledger"?

Ans. Yes; that is the book.

Book L. M. G., 1, was subsequently offered in return evidence on the part of the plaintiff, page 98, as evidence of the division of profits, therein set forth.

Kelly testified, on cross examination, as follows, page 101, &c.: 20

Ques. And you found this "Private Ledger" where?

Ans. In the safe.

Ques. What was said to you by any one of the directors, or anyone in the office who employed you and who had charge of you, respecting that book?

Ans. Nothing.

Ques. Did they say anything to you at any time respecting the manner of entry in that book? 30

Ans. What I should enter?

Ques. Yes.

Ans. At the periods when they would take the balances I was given amounts to enter, yes; to the credit of various accounts.

Ques. You have a dividend account in that book, have you not?

Ans. Yes, sir.

Ques. Was anything said to you respecting that dividend account, at any time, by any of the directors?

Ans. Yes, sir.

Ques. When was anything said to you, and what was said to you and by whom?

Ans. Can I look at that book to verify my memory on that? I have the book here.

Ques. Yes.

- 10** *Ans. (Referring to the book.) In December, 1897, I made an entry in this dividend account, and Mr. Fries told me that it was not a dividend, it was a division of profits, and should not have been entered in the dividend account.*

Ques. And did he direct you as to which account it was to be entered in?

Ans. Simply to the credit of John M. Carroll, Frederick Fries and T. J. Breslin.

- 20** James G. Carroll, a stockholder and director, who did not participate in the division of the profits in question, testified that he never consented to such division, page 200; and that he never heard of it; and these statements were not contradicted by any witness.

Upon such testimony the Court allowed the jury to find that the profits sued for were recoverable as dividends duly declared by the corporation through its board of directors.

- 30** The initial point of the plaintiff's case involves his right to recover profits which had never been turned into a dividend by the action of the board of directors.

His case, stated in his declaration, is of that character, and the case presented by the proofs is of the same tenor. It rests wholly upon the entries contained in the private ledger, Exhibit L. M. G., made with the approval of

three out of four of the stockholders and directors of the company.

These entries do not purport to be dividends. They were unknown to James G. Carroll. They were not thought to be dividends by the three directors who were parties to them. They were nowhere entered in the books of the company as dividends, and were at no time declared to be dividends by the board of directors. How, then, was it proper for the Court to leave it to the jury to find that they were, in substance and legal effect, dividends? 10

The first step towards a legal dividend is the ascertainment by the Board of Directors of the profits; the second is the determination of the board as to the amount thereof to be reserved for working capital and the amount to be distributed as dividends; and the third and last step, is the declaration of the dividend, which alone enables the shareholder to demand the same and sue for it upon the company's refusal to pay. The corporation itself cannot be made to pay its money to its shareholders, unless the statutory requirements have been complied with. Breslin, the plaintiff, was a director as well as a stockholder, during the period covered by these entries of profits in question, and as to them, he testified in a former case that they were never turned into dividends (page 176). No one of the three directors, who were parties to the entries of profits in question, testified that the said profits, after they were ascertained, were ever turned into dividends by any action of the Board of Directors at the time of their entry, or afterwards. 20 30

In case a Board of Directors should fraudulently refuse to declare a dividend, the remedy on the part of the

shareholders would be to enforce the board to do so by legal proceedings. *Fougeray vs. The Laurel Springs Land Co.*, 5 Dick., 756. But the power of a Board of Directors over dividends is absolute. So long as they act in the exercise of an honest judgment they may reserve of them whatever their judgment approves as necessary or judicious for repairs and improvements, and to meet contingencies, both present and prospective. *Park vs. Grant Locomotive Works*, 13th St., 118. A stockholder takes his shares, presumably, with a knowledge of the law relating to dividends; and, of course, a director is even still more bound to a knowledge of the law.

10 Powers denied to the stockholders and officers of a corporation cannot be lawfully exercised by them. They cannot ignore the existence of the corporation and the limitations it imposes upon their rights and
20 powers.

Watson vs. Bonfils, 16th American & English Corporation cases, new series, 924.

“If a company is incorporated a member cannot maintain an action against it for his undivided portion of its assets, because he is not a tenant in common of such assets and they are not owned by him and his co-
30 shareholders, but by the corporation, which is a distinct person from any of the stockholders.”

4 *Thompson on Corporations*, Section 4445.

“A dividend becomes the property of the shareholder,

and the shareholder acquires his legal right thereto only when it is regularly declared."

Cook on Stockholders, 525.

Elkins vs. Camden & Atlantic Railroad, 36 N. J. Equity, 233.

Jackson, &c., vs. Newark P. R. Co., 2 V., 280.

Taylor on Private Corporations, 5th Ed., pp. 562 and 563—note.

Gibbons vs. Mahon, 136 U. S., 549.

10

One of the essentials of a legal dividend is equality among the shareholders, according to their respective holdings of stock.

Preferred stock can be legally issued only in accordance with the terms of the corporation act. (See section 8, Laws of 1896, page 280.)

A corporation holds its property as trustee in trust for its shareholders, subject to the superior rights of its creditors. *Rabe vs. Dunlap*, 6th Dick., 40, 46. And 20 it follows that it must exercise its powers and duties according to the terms of the trust prescribed by the act under which it was created.

A Board of Directors, by undertaking to divide the profits of a corporation, in a way not allowed by the statute, cannot estop the corporation itself, or a subsequent Board of Directors, from insisting upon following the requirements of the statute respecting a withdrawal of profits. The setting aside of profits to each shareholder on the books of the company gives no additional 30 right to such shareholder. Before such setting aside, the profits equitably belong to the shareholders, as all other property of the company does; but the control of the profits belongs to the company until they are turned into dividends.

In this case, the plaintiff, a shareholder and director, sued the corporation for profits which, as a director, he procured to be allotted to himself on the books of the company, in an irregular way, not contemplated or sanctioned by the statute. Such allotment was wholly inefficacious to vest in him a right at law to them.

10 SECOND POINT—AS TO A DEMAND AND REFUSAL.

But if the profits in question were duly declared dividends in favor of the plaintiff, he could not maintain this action for them without proof of a demand for their payment and a refusal to pay them. The statute so prescribes, and all the cases on the subject hold this, including the case in this court of *King vs. Paterson, 4th Dutcher, 505 and 506.*

- 20** The only proof offered by the plaintiff in this case on this point was after the defendant's motion to nonsuit on the ground of the want of such proof, (pages 113, 114); and it consisted wholly of two letters, Exhibits 4 and 5 of the plaintiff (pages 239 and 240), which letters are as follows:

"9th mo., 9th, 1902.

"Fries-Breslin Co.,

"Camden, N. J.

30

"Gentlemen:

"Mr. Thomas J. Breslin has authorized me to demand the amount due him from your company, and in case of your refusal to take proceedings to recover the same. The demand is hereby made, and unless I hear from you this week, I shall consider the demand refused.

"Truly yours,"

"D. J. Pancoast,

"Counsellor-at-Law.

Telephone 403.

"Camden, N. J., Sept. 13th, 1902.

"Thos. E. French, Esq.,

"Dear Sir:

"As counsel of Fries-Breslin Co., I would be pleased to know from you just what your client, Mr. Breslin, claims to be due from the Co. to him and what proposition, if any, you have to make by way of settlement.

"Very truly yours,

"D. J. PANCOAST."

10

In this correspondence there is no statement on the part of the plaintiff of a demand for dividends and, consequently, no denial of such right appears therein. It was an omnibus demand, the particulars of which the plaintiff refused to give at the defendant's request. They were made known to the defendant for the first time in and by the plaintiff's bill of particulars after suit was brought; and this bill of particulars does not embrace any demand for dividends (page 4, &c.); so that it appears, first; that the plaintiff did not suppose he was demanding dividends before suit, and second, he did not suppose he was bringing a suit for dividends, otherwise he would have alleged in his narr (1) the declaration of the dividends, (2) his demand for their payment, and (3) the company's refusal to pay them.

20

The Court denied the defendant's request to charge the jury that there was no sufficient proof of demand and refusal (page 221), and charged on this point as follows (page 220): "I charge that is the law, and that, in this case, you are to consider the exhibits which have been offered, the letter and its response, and also the

30

nature of the entry upon the books, as to whether in your judgment that constituted a recognition by the defendant, and, in view of the subsequent refusal to pay the balance, constitutes a refusal to a demand."

THIRD POINT—AS TO INTEREST.

10 But if the profits sued for were dividends, and if the letters constituted a demand and refusal sufficient to justify the suit, he was not entitled to interest on the profits or dividends before the date of the letter or demand, which was September 10th, 1902. There was no pretence or contention that any demand had preceded that date; yet the learned trial judge allowed the jury to find interest on the items of profit in question, back of the date of the alleged demand. He was requested by the defendant to charge as follows (page 220): "That
20 the plaintiff is not entitled to recover interest on the item of profit claimed in this suit, prior to September 9, 1902." In reply to which request he charged as follows (page 220): "I charge you, as regards interest on profits, that it follows the same rule as the interest on salary—it is for you to find whether there was an implied agreement on the part of the corporation, judging from its course of bookkeeping, to pay interest."

30 There being no duty to pay a dividend until it is called for or demanded, there is no default or obligation to pay interest on the part of the company until demand is made. In the case of the State vs. B. & O. R. R. Co., 6 Gill (Md.), the Court said, 290: "The establishment of the principle that suits could be instituted without demand for dividends declared by banking and other cor-

porations, would greatly impair the value of stock held therein by rendering it unnecessary to employ agents to hunt up the stockholders, in various parts of the State, or the Union, in order to prevent a multiplicity of suits, or on the failure to do this, suits in consequence, causes might to be multiplied to an alarming extent. Such a doctrine has, certainly, never been supposed to exist. Dividends are paid when called for, and we apprehend that limitations would not run until demand was made. 10 Moreover, interest would not be chargeable against a corporation, on dividends declared, until a demand was made, which could not be so if the company was liable without demand."

FOURTH POINT—AS TO THE STATUTE OF LIMITATIONS.

The defendant pleaded the statute of limitations and at the trial requested the Court to charge as follows, 20 page 221: "That the plaintiff cannot recover any claim or demand for money which became due more than six years prior to the date of the commencement of this suit." In reply to this request, the Court charged as follows: "I charge you that in a *running account* such as this, the strict rule of the statute of limitations is not applicable (page 221).

The items demanded and set forth in the plaintiff's bill of particulars (page 4, &c.), consisted of numerous items 30 of "wages," "mdse.," "cash," "interest," "expenses," and "salary," commencing May 31st, 1892, and ending October 7th, 1902.

The plaintiff's suit was commenced on the 22d of October, 1902, so that all of the many items antedating that

date were more than six years old. On the books of the company the plaintiff was given various credits covering the same period, and the Court held that this constituted a "running account," which prevented the operation of the statute of limitations. The question thus presented requires only a brief consideration of the force and effect of the statute.

- 10** Our statute of limitations, General Statutes, page 798, section 8, excepts "such actions as concern the trade or merchandise between merchant and merchant, their factors, agents and servants."

A "current account" between merchants is without the statute of limitations.

Franklin vs. Camp Cox, 227.

The equity of the statute has been held to include mutual dealings between others than merchants.

- 20** *Belles vs. Belles*, 2 Southard, 345.
Gulick & Sons ats. Turnpike Company, 2 Green, 547.

But accounts or charges all on one side are not mutual and are within the statute.

Ingram vs. Sherard, 17 S. & R., 347.

Taylor vs. Sonora, M. C., 217 Cal., 594.

Ross vs. Ross, 6 Hun., N. Y., 80.

30

In this case before the Court the charges or accounts were all on the part of the plaintiff, and, therefore, the Court erred in declaring that there was a "current account" between the parties which was a bar to the operation of the statute.

FIFTH POINT.

All the foregoing points were made before the Trial Judge, as the record shows; and after dealing with them in his charge he said, page 218: "That leaves, *as the only debatable matter*, this question of the division of profits, about which I have endeavored to give you the rules of law and to indicate to you the two respects in which you are to weigh the conduct of these parties and ascertain in substance what they did"; to which statement the defendant duly excepted, page 230. 10

This positive assertion could not have failed to greatly prejudice the jury on the several fact questions in the case. The effect of it upon the minds of the jury must have been to lead them to ignore all questions of fact except the single one relating to dividends. It cannot be excused on the ground that it was merely the opinion of the Judge as to facts which he left to the jury to pass upon. An opinion upon facts, dogmatically expressed to a jury by a Trial Judge, even in this State where the largest latitude in that direction is allowed, is legal error, as was held by this Court in *Lindley vs. O'Reilly*, 17 V., 352. 20

Respectfully submitted,

D. J. PANCOAST,

E. A. ARMSTRONG, 30

Counsel.

November Term.

of

to

to

STATE OF NEW JERSEY, SS.

The State of New Jersey to the Chief Jus-
[L. s.] tice and other Justices of the Supreme Court 10
of Judicature, Greeting: Forasmuch as in
the record and proceedings, and also in the giving of
judgment in a certain plaint which was in our Supreme
Court of Judicature, before you, between Thomas J.
Breslin, plaintiff, and Fries-Breslin Company, defendant,
in a certain action upon contract, manifest error hath
intervened, to the great damage of the said defendant,
as it is said; we being willing that the error, if any
there be, should in due form be corrected and full and
speedy justice done to the parties aforesaid in this be- 20
half, do command you that if judgment be thereupon
given and affirmed, then you distinctly and openly send,
under your seal, the record and proceedings aforesaid,
with all things touching the same, to our Judges of our
Court of Errors and Appeals in the last resort in all
causes, at Trenton, on the eighteenth day of May, 1903,
together with this writ, with the record and proceedings
aforesaid, which being inspected, we may cause to be fur-
ther done thereupon for correcting that error what of
right and according to law and custom of the State of
New Jersey ought to be done. 30

Witness, our Chancellor and Presiding Judge of our
said Court of Errors and Appeals, at Trenton, the thir-
tieth day of April, A. D. nineteen hundred and three.

S. D. DICKINSON,
Clerk.

DAVID J. PANCOAST,
Attorney.

RETURN.

The answer of William S. Gummere, Chief Justice, within named :

10 The record and proceedings of the plaint whereof mention is within named, with all things concerning the same, to the Court of Errors and Appeals in the last resort in all causes within specified, at a day and place within contained, I certify in a certain schedule to this writ annexed, as I am within commanded.

W. S. GUMMERE,
Chief Justice.

SCHEDULE.

NEW JERSEY SUPREME COURT.

20

THOMAS J. BRESLIN,

vs.

FRIES-BRESLIN COMPANY.

ON CONTRACT.

ON POSTEA.

THOMAS E. FRENCH,
Attorney.

30

As yet of the third day of November, A. D. nineteen hundred and two.

Witness, WILLIAM S. GUMMERE, Esquire,
Chief Justice.

WILLIAM RIKER, JR.,
Clerk.

CAMDEN COUNTY, SS.

Fries-Breslin Company, the defendant in this suit, was summoned to answer unto Thomas J. Breslin, the plaintiff therein, in an action upon contract; and thereupon the said plaintiff, by Thomas E. French, his attorney, complains for that, whereas, the said defendant heretofore, to wit, on the first day of October, in the year of our Lord one thousand nine hundred and two, in the county of Camden aforesaid, was indebted to the plaintiff in two hundred thousand dollars, for the price and value of goods sold and delivered by the plaintiff to the defendant at its request; and in the like sum of money for the price and value of goods bargained and sold by the plaintiff to the defendant at its request; and in the like sum of money for the price and value of work done, and materials for the same provided by the plaintiff for the defendant at its request; and in the like sum of money for money lent by the plaintiff to the defendant at its request; and in the like sum of money for money had and received by the defendant for the use of the plaintiff; and in the like sum of money for money paid by the plaintiff for the use of the defendant at its request; and in the like sum of money for interest due from the defendant to the plaintiff for the plaintiff having forborne moneys due from the defendant to the plaintiff at the defendant's request, for a long time then elapsed; and in the like sum of money for money found to be due from the defendant to the plaintiff on an account then and there stated between them; and the defendant afterwards, to wit, on the day and year last aforesaid, in the county aforesaid, in consideration of the premises, respectively promised to pay the said several last mentioned moneys respectively to the plaintiff on request, yet the defendant disregarded its promises and has not paid any of the said moneys, or any part thereof, to the plaintiff's damage two hundred thousand dollars, and thereupon he brings his suit, etc.

Notice to Defendant.—The following is a bill of the particulars of the demand, whereupon the amended declaration is founded:

Fries-Breslin Company

to

Thomas J. Breslin.

		Dr.
10	1892.	
	May 31. Wages	\$1,500 00
	Nov. 30. Wages, 6 months.....	750 00
	Nov. 30. Mdse.	34 69
	1893.	
	Mch. 16. Cash	3,500 00
	Mch. 21. Difference in interest.....	78 38
	April 25. Cash	31 00
	April 25. Wages, 6 months.....	750 00
	April 25. Interest	6 08
20	April 25. Cash, part of profits.....	1,496 97
	May 31. Cash	26 00
	June 30. Cash	12 00
	July 31. Cash	15 00
	Sept. 30. Cash	15 00
	Nov. 1. Cash	2,500 00
	Nov. 1. Cash	10 00
	Nov. 14. Wages, 6 months.....	750 00
	Dec. 1. Expenses	211 12
	1894.	
30	May 7. Cash	1 50
	May 7. Wages, 6 months.....	750 00
	May 7. Interest	61 12
	Nov. 24. Wages, 6 months.....	750 00
	1895.	
	May 13. Wages, 6 months.....	750 00
	May 13. Cash, share of profits.....	5,286 92
	Dec. 13. Wages	750 00
	Dec. 13. Cash, 1-3 profits.....	5,486 67

1896.

July 6.	Wages, 6 months.....	\$750 00
July 6.	Cash, 1-3 profits, 6 months....	6,126 92
July 6.	Interest	94 18
Nov. 30.	Cash	50 00
Dec. 31.	Wages, 6 months.....	750 00
Dec. 31.	Interest	246 76
Dec. 31.	Cash, 1-3 profits, 6 months....	6,141 02

1897.

Feb. 28.	Cash (charged F. B.).....	139 86	10
May 21.	Cash	26 40	
July 3.	Wages, 6 months.....	750 00	
July 3.	Interest	410 22	
July 3.	Cash, 1-3 profits, 6 months....	6,768 58	
Dec. 30.	Salary, 6 months.....	750 00	
Dec. 30.	Interest	572 24	
Dec. 30.	Cash, 1-3 profits, 6 months....	6,542 48	

 \$55,641 11

1898.

Jan. 20.	Cash	\$2 00	20
Jan. 28.	Cash	1 50	
Jan. 31.	Cash	1 50	
April 26.	Cash, Wilson	4 00	
April 30.	Cash, Fitzgerald	10 00	
June 30.	Salary, 6 months	750 00	
June 30.	Interest	747 31	
June 30.	Cash, 1-3 profits, 6 months....	9,862 65	
Dec. 31.	Salary, 6 months.....	750 00	
Dec. 31.	Interest	1,004 97	
Dec. 31.	Cash, 1-3 profits, 6 months....	10,029 94	30

1899.

Feb. 28.	.....	12 26	
Jan. 31.	.....	37 00	
Feb. 28.	.....	31 86	
June 30.	Salary, 6 months.....	750 00	
June 30.	Interest	1,281 66	

	July 22.....	\$1 90
	Aug. 31.....	100 00
	Sept. 30.....	10 00
	Dec. 30. Salary, 6 months.....	5,000 00
	Dec. 30. Interest	887 12
	1900.	
	Mch. 31.....	2,000 00
	April 30.....	1,000 00
	May 31.....	500 00
10	June 30.....	500 00
		\$90,916 78
	June 30. Salary, 6 months.....	5,000 00
	June 30. Interest	1,114 28
	Sept. 30. To cash	1,500 00
	Sept. 30. To cash	05
	Oct. 30. To cash	2,000 00
	Dec. 31. Salary, 6 months.....	5,000 00
	1901.	
20	Feb. 28. Cash	53 49
	June 30. Salary, 6 months.....	5,000 00
	Aug. 31. Cash	600 00
	Dec. 30. Salary, 6 months.....	5,000 00
	Dec. 30. Interest	2,327 25
	Dec. 30. Interest	1,394 91
	1902.	
	June 30. Salary, 6 months.....	5,000 00
	Oct. 7. Interest	40 35
30	Total	\$124,947 11

CREDIT.

	1891.	
	June 20. Cash.....	\$30 00
	July 3. Cash.....	30 00
	July 18. Cash.....	30 00

Aug. 1.	Cash.....	\$30 00	
Aug. 15.	Cash.....	30 00	
Aug. 15.	Cash.....	15 00	
Aug. 29.	Cash.....	30 00	
Sept. 12.	Cash.....	30 00	
Sept. 26.	Cash.....	30 00	
Oct. 9.	Cash.....	30 00	
Oct. 24.	Cash.....	30 00	
Nov. 7.	Cash.....	30 00	
Nov. 21.	Cash.....	30 00	
Nov. 21.	Cash.....	14 35	10
Dec. 5.	Cash.....	30 00	
Dec. 5.	Cash.....	30 00	
Dec. 19.	Cash.....	30 00	
1892.			
Jan. 2.	Cash.....	30 00	
Jan. 16.	Cash.....	30 00	
1891.			
Dec. 24.	Cash.....	10 00	
Dec. 29.	Cash.....	25 00	20
1892.			
Jan. 30.	Cash.....	30 00	
Feb. 13.	Cash.....	30 00	
Feb. 27.	Cash.....	30 00	
Mch. 5.	Cash.....	20 00	
Mch. 12.	Cash.....	30 00	
Mch. 19.	Cash.....	13 75	
Mch. 12.	Cash.....	15 00	
Mch. 26.	Cash.....	30 00	
April 9.	Cash.....	30 00	
April 23.	Cash.....	30 00	30
May 7.	Cash.....	30 00	
May 21.	Cash.....	30 00	
May 23.	Cash.....	703 53	
June 4.	Cash.....	30 00	
June 13.	Cash.....	3 95	
June 18.	Cash.....	30 00.	

	July 2.	Cash.....	\$30 00
	July 16.	Cash.....	30 00
	July 30.	Cash.....	30 00
	Aug. 13.	Cash.....	30 00
	Aug. 27.	Cash.....	30 00
	Sept. 10.	Cash.....	30 00
	Sept. 13.	Cash.....	75 87
	Sept. 14.	Cash.....	10 00
	Sept. 24.	Cash.....	30 00
10	Oct. 8.	Cash.....	30 00
	Oct. 22.	Cash.....	30 00
	Nov. 5.	Cash.....	30 00
	Nov. 10.	Cash.....	10 00
	Nov. 15.	Cash.....	10 00
	Nov. 19.	Cash.....	228 21
	Dec. 3.	Cash.....	30 00
	Dec. 17.	Cash.....	30 00
	Dec. 31.	Cash.....	30 00
	1893.		
	Jan. 10.	Cash.....	28 30
20	Jan. 14.	Cash.....	30 00
	Jan. 16.	Cash.....	30 00
	Jan. 28.	Cash.....	30 00
	Feb. 11.	Cash.....	30 00
	Feb. 16.	Cash.....	100 00
	Feb. 25.	Cash.....	30 00
	Feb. 25.	Cash.....	75 87
	Feb. 28.	Cash.....	20 00
	Mch. 21.	Mdse	3 13
	Mch. 11.	Cash.....	62 00
30	Mch. 14.	Cash.....	33 00
	Mch. 21.	Mdse. (rugs)	9 64
	Mch. 25.	Cash.....	30 00
	Mch. 25.	Cash.....	21 00
	Mch. 27.	Cash.....	20 00
	Mch. 31.	Cash.....	2,292 95
	Mch. 31.	Cash.....	22 70

April 11. Cash.....	\$21 33	
April 18. Cash.....	50 00	
April 22. Cash.....	30 00	
April 25. Cash.....	23 00	
April 8. Cash.....	30 00	
April 26. Cash.....	6 00	
May 6. Cash.....	30 00	
May 8. Cash.....	13 34	
May 13. Cash.....	35 00	
May 20. Cash.....	30 00	10
May 18. Cash.....	10 00	
May 25. Cash.....	178 00	
May 25. Cash.....	117 60	
May 31. Cash.....	17 00	
June 2. Cash.....	30 00	
June 19. Cash.....	30 00	
June 8. Cash.....	15 00	
June 13. Cash.....	10 00	
June 27. Cash.....	19 89	
July 1. Cash.....	30 00	20
July 15. Cash.....	30 00	
July 29. Cash.....	30 00	
July 3. Cash.....	10 00	

\$6,079 41

Aug. 7. Cash.....	\$22 00	
Aug. 26. Cash.....	30 00	
Aug. 25. Cash.....	68 32	
Aug. 25. Cash.....	40 87	
Aug. 31. Cash.....	31 55	30
Sept. 9. Cash.....	30 00	
Sept. 2. Cash.....	55 55	
Sept. 18. Cash.....	7 50	
Sept. 23. Cash.....	30 00	
Sept. 25. Cash.....	22 00	

1893.			
	Sept. 30.	Cash.....	\$5 00
	Sept. 30.	Cash.....	20 00
	Oct. 7.	Cash.....	30 00
	Oct. 2.	Cash.....	19 89
	Oct. 21.	Cash.....	30 00
	Oct. 19.	Cash.....	34 00
	Oct. 19.	Cash.....	200 00
	Oct. 20.	Cash.....	25 00
10	Oct. 27.	Cash.....	19 89
	Oct. 30.	Cash.....	15 00
	Nov. 3.	Cash.....	30 00
	Nov. 4.	Cash.....	7 50
	Nov. 9.	Cash.....	25 00
	Nov. 13.	Cash.....	50 00
	Nov. 18.	Cash.....	45 00
	Nov. 23.	Cash.....	30 71
	Nov. 25.	Cash.....	21 00
	Nov. 28.	Cash.....	5 00
20	Sept. 28.	Cash.....	5 00
	Dec. 2.	Cash.....	98 34
	Dec. 16.	Cash.....	73 69
	Dec. 19.	Cash.....	7 50
	Dec. 20.	Cash.....	100 00
	Dec. 23.	Cash.....	50 00
	Dec. 18.	Cash.....	4 00
	Dec. 29.	Cash.....	40 77
	Dec. 30.	Cash.....	34 00
	Dec. 30.	Cash.....	6 00
30	Dec. 29.	Cash.....	4 75
	Dec. 29.	Cash.....	7 50
	Dec. 23.	Cash.....	32 00
	Dec. 23.	Cash.....	43 00
1894.			
	Jan. 3.	Cash.....	3 00
	Jan. 10.	Cash.....	50 00
	Jan. 13.	Cash.....	30 00

Jan. 13.	Cash.....	\$63 94	
Jan. 13.	Cash.....	11 13	
		\$7,684 81	
Jan. 16.	Cash.....	\$6 53	
Jan. 17.	Cash.....	6 00	
Jan. 26.	Cash.....	19 89	
Jan. 27.	Cash.....	50 00	
Jan. 27.	Cash.....	30 00	10
Jan. 27.	Cash.....	36 25	
Jan. 27.	Cash.....	14 00	
Feb. 1.	Cash.....	63 00	
Feb. 1.	Cash.....	17 50	
Feb. 6.	Cash.....	68 32	
Feb. 8.	Cash.....	5 40	
Feb. 9.	Cash.....	30 00	
Feb. 17.	Cash.....	30 00	
Feb. 22.	Cash.....	19 89	
Feb. 24.	Cash.....	30 00	20
Feb. 27.	Cash.....	68 32	
Feb. 28.	Cash.....	35 00	
Feb. 28.	Cash.....	5 00	
Mch. 6.	Cash.....	4 09	
Mch. 6.	Cash.....	2 07	
Mch. 10.	Cash.....	32 50	
Mch. 19.	Cash.....	3 75	
Mch. 21.	Cash.....	4 62	
Mch. 21.	Cash.....	17 00	
Mch. 24.	Cash.....	30 00	30
Mch. 19.	Cash.....	15 00	
Mch. 13.	Cash.....	5 00	
Mch. 27.	Cash.....	24 00	
Mch. 30.	Cash.....	19 89	
Mch. 31.	Cash.....	5 00	
1893.			
Dec. 1.	Cash.....	2,500 00	

1894.		
	May 7. Cash	\$452 12
	May 7. Mdse.	32 50
	May 11. Cash	50 00
	May 7. Cash	1 50
	May 31. Cash	227 99
	June 30. Cash	226 15
	July 31. Cash	193 81
	Aug. 31. Cash	189 80
	Sept. 30. Cash	662 47
10	Oct. 31. Cash.	379 04
	Nov. 21. Mdse.	6 90
	Nov. 24. Cash	155 77
	Dec. 31. Cash	265 16
	Dec. 31. Mdse.	18 70
	Dec. 31. Mdse.	7 00
	Dec. 24. Mdse.	6 25
1895.		
	Jan. 31. Cash	157 90
	Feb. 28. Cash	112 62
20	Feb. 28. Cash	193 16
	Mch. 31. Cash	178 72
	May 13. Cash	327 68
	June 30. Cash	176 14
	July 16. Mdse.	3 94
	July 31. Cash	145 55
	Aug. 29. Mdse.	41 51
	Aug. 31. Cash	306 61
		\$15,401 82
30	Sept. 30. Cash	\$243 55
	Sept. 30. Cash	54 50
	Oct. 31. Cash	586 85
	Dec. 13. Cash	294 69
1896.		
	Jan. 31. Cash	448 12

Jan. 23.	Mdse.		\$7 25	
Feb. 29.	Cash		252 74	
Feb. 29.	Cash		60 00	
Mch. 31.	Cash		209 25	
April 30.	Cash		146 64	
May 31.	Cash		282 49	
July 6.	Cash		144 90	
Aug. 1.	Cash		2,505 01	
Aug. 1.	Cash		4 50	
July 31.	Cash		166 34	10
Aug. 31.	Cash		856 94	
Sept. 31.	Cash		146 66	
Oct. 31.	Cash		224 87	
Nov. 30.	Cash		275 32	
Dec. 31.	Cash		252 81	
Dec. 24.	Mdse.		2 98	
1897.				
Jan. 31.			218 66	
Feb. 28.			258 16	
Mch. 31.			169 32	20
April 30.			214 89	
June 5.	Mdse.		16 20	
May 1.			12 00	
May 30.			825 68	
July 3.			140 53	
July 31	Cash		20 00	
Aug. 31.			242 14	
Aug. 31.			5 00	
Aug. 31.			407 22	
Sept. 30.			46 50	
Sept. 30.	J. W.		34 10	30
Sept. 30.	H. A. C.		27 43	
Sept. 30.			40 00	
Sept. 30.	B. B.		30 00	
Sept. 30.	Ins.		2 00	
Sept. 30.			40 00	
Sept. 30.	A. R.		9 44	

	Sept. 30.	May	\$39 78
	Sept. 30.	De DeS.	25 00
	Sept. 30.	.....	33 75
	Oct. 2.	.....	40 00
	Oct. 12.	B. A. L.	107 10
	Oct. 12.	Braddock	36 20
	Oct. 16.	.....	40 00
	Oct. 16.	.....	26 25
	Nov. 10.	.....	5 00
10	Nov. 10.	.....	19 89
	Nov. 13.	.....	40 00
	Nov. 13.	.....	40 00
	Nov. 18.	J. W.	57 45
	Nov. 25.	Chadwick	40 00
	Nov. 27.	Drexel	25 00
	Nov. 27.	.....	40 00

\$25,942 92

20	Nov. 27.	.....	\$15 00
	Nov. 30.	.....	84 95
	Dec. 24.	Mdse.	6 63
	Dec. 30.	.....	271 73
	Dec. 30.	.....	612 50
	Dec. 30.	.....	18 00
	1898.		
	Jan. 31.	.....	144 00
	Feb. 28.	.....	396 49
	Mch. 15.	.....	164 86
	Mch. 31.	.....	338 27
30	April 30.	.....	626 83
	May 31.	.....	222 18
	June 30.	.....	155 45
	July 30.	.....	319 15
	Aug. 30.	.....	323 44
	Sept. 30.	.....	7 00
	Sept. 30.	.....	306 33

Oct. 22. Mdse.	\$7 50	
Oct. 30.	666 52	
Nov. 30.	244 61	
Dec. 30.	704 70	
Dec. 31.	192 00	
1899.		
Jan. 31.	210 49	
Feb. 2.	31 86	
Feb. 8.	10 00	
Feb. 28.	363 60	10
Mch. 28.	140 00	
Mch. 28.	451 98	
April 28.	701 85	
April 28.	54 93	
May 31.	342 61	
May 31.	51 08	
June 30.	284 52	
July 31.	1,650 06	
Aug. 30.	436 00	
Sept. 30.	408 95	20
Sept. 30.	7 00	
Oct. 30.	725 54	
Nov. 30.	1,365 65	
Dec. 30.	471 32	
June 30. Löss	14,480 66	
1900.		
Jan. 31.	265 00	
Jan. 31.	236 24	
Feb. 28.	260 26	
Mch. 31.	243 23	
Mch. 31.	75 00	30
April 30.	581 20	
May 31.	409 50	
	\$56,029 59	
June 30.	\$244 49	
July. 31. Cash	291 16	

	July 31. Cash	\$30 41
	Aug. 31. Cash	40 00
	Aug. 31. Cash	221 92
	Sept. 31. Cash	198 84
	Oct. 31. Cash	698 15
	Nov. 31. Cash	1,809 40
	Dec. 31. Cash	456 66
	Dec. 31. Cash, T. Ex.	60 00
	1901.	
10	Jan. 31. Cash	507 74
	Feb. 28. Cash	637 42
	Mch. 30. Cash	554 98
	April 30. Cash	552 63
	May 31. Cash, T. Ex.	37 00
	May 31. Cash	635 60
	June 29. Cash	233 90
	June 29. Cash, J. J. B.	218 00
	June 29. Cash, Ted. B.	192 00
	June 29. Cash	54 36
	July 31. Cash	1,005 65
20	Aug. 31. Cash	660 66
	Sept. 30. Cash	415 87
	Oct. 31. Cash	440 15
	Oct. 31. Mdse.	19 00
	Nov. 11. Cash	20 00
	Nov. 11. Cash	25 00
	Nov. 11. Cash	1,829 70
	Dec. 31. Cash	1,494 45
	1902.	
	Jan. 31. Cash	180 00
30	Jan. 31. Cash	356 94
	Feb. 28. Cash	120 00
	Feb. 28. Cash	450 98
	Mch. 31. Cash	30 00
	Mch. 15. Cash	60 00
	Mch. 17. Cash	40 00
	Mch. 13. Cash	5 31

Mch. 13.	Cash	\$120 12	
Mch. 21.	Cash	30 00	
Mch. 25.	Cash	20 00	
Mch. 29.	Cash	50 00	
Mch. 31.	Cash	24 48	
Mch. 28.	Cash	30 00	
Mch. 31.	Cash	32 00	
April 29.	Cash, Traveling Exps.....	17 00	
April 29.	Cash	336 21	
May 2.	.....	15 00	10

\$71,432 77

May 2.	Cash	\$10 00	
May 2.	.....	3 50	
May 12.	.....	10 00	
May 12.	.....	50 00	
May 2.	.....	30 00	
May 2.	.....	32 00	
May 9.	.....	30 00	20
May 12.	.....	59 37	
May 12.	.....	2 80	
May 16.	.....	30 00	
May 24.	Travelling expenses	27 00	
May 23.	Cash	30 00	
May 27.	.....	3 00	
May 26.	.....	50 00	
May 29.	.....	30 00	
May 31.	.....	100 00	
June 11.	.....	5 65	
June 16.	.....	25 00	30
June 9.	.....	30 39	
June 9.	.....	61	
June 9.	.....	2 80	
June 16.	.....	85 64	
June 6.	.....	30 00	
June 13.	.....	30 00	

	June 7.	Travelling expenses.....	\$16 00
	June 21.	Cash	25 25
	June 20.	.....	30 00
	June 27.	.....	30 00
	June 28.	.....	25 00
	July 1.	.....	273 25
	July 8.	.....	10 00
	July 7.	.....	31 01
	July 7.	.....	9 00
10	July 14.	.....	50 00
	July 16.	.....	1,000 00
	July 29.	.....	25 00
	July 3.	.....	30 00
	July 7.	.....	15 50
	July 7.	.....	2 80
	July 11.	.....	30 00
	July 18.	.....	30 00
	July 26.	.....	19 89
	Sept. 25.	.....	300 00
20	Oct. 25.	Mdse.	21 95
Total.....			\$74,115 18
Total amount due plaintiff.....			\$124,947 11
Less credits			74,115 18
Judgment will be demanded for.....			\$50,831 93
with interest.			

30 And the said defendants, by David J. Pancoast, their attorney, come and defend the wrong and injury, when, &c., and say that they did not undertake or promise in manner and form as the said plaintiff hath above there-of complained against them; and of this they put themselves upon the country, &c.

And for a further plea in this behalf, the said plaintiff, by leave of the Court here for this purpose first had and

obtained, according to the form of the statute in such case made and provided, say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that the said action was not commenced and sued within six years next after the cause of such action accrued, in manner and form as the said plaintiff hath above thereof complained against them; and this the said defendants are ready to verify; wherefore, they pray judgment if the plaintiff ought to have or maintain his aforesaid action thereof against them. 10

And the said plaintiff, as to the plea of the said defendant by it first above pleaded and whereof it hath put itself upon the country, doth the like.

And the said plaintiff, as to the said plea of the said defendant by it secondly above pleaded, saith that the said plaintiff, by reason or anything by the said defendant in that plea alleged, ought not to be barred from having or maintaining his aforesaid action thereof against the said defendant, because he saith that the said action was commenced and sued within six years next after the cause of such action accrued in manner and form as the said plaintiff hath above thereof complained against it, and of this the plaintiff puts himself upon the country and the defendant doth the like. 20

Therefore let a jury thereupon come before our Chief Justice, or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Camden, in and for the county of Camden, on the first Tuesday of April, in the year of our Lord one thousand nine hundred and three, by whom, etc., and the same day is given to the parties aforesaid there, etc. 30

Now, at this day, to wit, the twenty-seventh day of April, A. D. nineteen hundred and three, before our Supreme Court, at Trenton, comes the said plaintiff, by his attorney aforesaid, and the Justices before whom, etc., having sent hither his record had before him in these words, to wit:

Afterwards, to wit, on the twentieth day of April, in the year of our Lord one thousand nine hundred and three, at a Circuit Court holden at Camden, in and for the county of Camden, before the Honorable Charles G. Garrison, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, according to the form of the statute in such case made and provided, come as well the within named Thomas J. Breslin, as the within named Fries-Breslin Company, by their respective attorneys within mentioned, and the jurors of the jury whereof mention is within made, being summoned, also come, who, to speak the truth of the matters within contained, being chosen, tried and sworn, upon their oaths say that the said Fries-Breslin Company did undertake and promise in manner and form as the said Thomas J. Breslin hath within complained against it, and they assess the damages of the said Thomas J. Breslin, on occasion of the breach of the contract within mentioned, over and above his costs and charges by him about his suit in this behalf expended, to the sum of fifty-two thousand three hundred and six dollars and ninety-four cents.

Therefore, it considered that the said plaintiff do recover against the said defendant his said damages by the jury in form aforesaid found to the sum of fifty-two thousand three hundred and six dollars and ninety-four cents, and also for his costs and charges by the Court now here adjudged to the said plaintiff and with his assent, which said damages, costs and charges in the whole amount to

Judgment signed this twenty-seventh day of April,
A. D. nineteen hundred and three.

W. S. GUMMERE,
C. J.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY CIRCUIT.

April Term, 1903.

THOMAS J. BRESLIN,

vs.

FRIES-BRESLIN COMPANY.

ON CONTRACT.

10

PROCEEDINGS AT THE TRIAL, INCLUDING THE TESTI-
MONY, CHARGE OF THE COURT AND EXCEPTIONS.

For the Plaintiff, THOMAS E. FRENCH and LINDLEY M.
GARRISON, ESQS.

For the Defendant, D. J. PANCOAST, E. A. ARMSTRONG 20
and THOMAS GILLERAN, ESQS.

BEFORE GARRISON J., AND JURY.

Mr. Pancoast: Through an inadvertence I failed to
plead set-off, and applied to my friends on the other side
for permission to plead set-off.

Mr. Garrison: I want to be understood as having 30
permission to file whatever is the proper answer to this
plea.

The Court: Then the plea may be filed, with
the understanding that the defendant shall have per-
mission to produce whatever facts may be necessary
to meet this plea.

THE CASE FOR THE PLAINTIFF.

FREDERICK A. FRIES, sworn.

By Mr. Garrison :

Ques. Where do you reside, Mr. Fries?

Ans. Haddon Heights, New Jersey.

Ques. What business are you now engaged in?

Ans. Manufacturing rugs.

10 Ques. Where?

Ans. Gloucester, New Jersey.

Ques. You have no connection now with the defendant company, the Fries-Breslin Company?

Ans. No.

Ques. And you have no connection with the plaintiff, Mr. Breslin, in this suit, have you?

Ans. No, sir.

Ques. When did you become engaged in the business
20 of manufacturing rugs with Thomas J. Breslin?

Ans. In 1890.

Ques. And where did you carry on that business at that time?

Ans. At Malaga, New Jersey.

Ques. And what part of the business was especially within your province?

Ans. The managing of the mill, the manufacturing part.

Ques. And what part was especially the business of
30 Mr. Breslin?

Ans. Selling ; the selling part.

Ques. And what was the firm name under which you carried on that business?

Ans. Fries & Breslin.

Ques. Had anyone else any capital in that firm except Mr. Fries and Mr. Breslin?

Ans. Yes; a gentleman by the name of Richmond, Alfred Richmond.

Ques. Did the firm of Fries and Breslin come in contact with John M. Carroll?

Ans. Yes, sir.

Ques. What was, in general, proposed to be done after you met Mr. Carroll with respect to carrying on its business?

Ans. It was proposed to form a corporation.

Ques. And in that corporation what were to be the things that were generally to be done by you, Mr. Breslin and Mr. Carroll, just in a general way? 10

Mr. Pancoast: I object to that; this incorporation will speak for itself. There is no objection to his proving that in consequence of this talk there was a corporation formed; my point is that the terms of the incorporation speak for themselves.

Mr. Garrison: I do not care to press that. 20

Ques. In consequence of this understanding was there a corporation formed called the Fries-Breslin Company?

Ans. Yes, sir.

Mr. Garrison: I now offer in evidence certified copy of the certificate of incorporation of Fries-Breslin Company, which appears to have been filed in the Secretary of State's office on the 20th of May, 1891.

Mr. Pancoast: No objection. 30

(Said certified copy of certificate of incorporation is marked Exhibit 1 of Plaintiff.)

Ques. How soon after the incorporation of Fries-Breslin Company did you move the business from Malaga?

(Objected to as immaterial).

The Court: I do not see the materiality of the location of the works. Objection sustained.

(Exception noted for the plaintiff.)

Ques. After the incorporation of the Fries-Breslin Company, what business did it engage in?

10 Ans. Manufacturing Smyrna rugs.

Ques. And with respect to that business what were the particular duties attended to by you, Mr. Breslin and Mr. Carroll?

Ans. I manufactured; I looked after the mill, the inside work, the manufacturing; Mr. Breslin sold goods, and Mr. Carroll looked after the financial part of it.

Ques. Do you recall who were the officers of this company along in say 1894 and 1895?

20 Mr. Pancoast: I object to that. The record ought to show that. The record of this corporation will be the best evidence of who were the officers.

Mr. Garrison: I want his independent recollection as to who were the officers.

Mr. Pancoast: That might embody a conclusion of law.

30 The Court: I suppose, in strictness, that the records of a corporation are the highest proof as to the result of its corporate acts, in every respect. The objection will be sustained.

(Exception noted for the plaintiff.)

Ques. Along in the years 1894 and 1895, who were acting as directors of the Fries-Breslin Company?

Mr. Gilleran: I still object to the question.

The Court: I think that is a competent question, because the question of *de facto* directors may be one that would not appear on the record of the corporation. The question is not one who were the *de jure* directors, but who participated, who acted. The objection is not sustained.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly. 10

Ans. Mr. Carroll, Mr. Breslin and myself.

Ques. Which Mr. Carroll?

Ans. John M. Carroll.

Ques. Did you hold stock at that time?

Ans. Yes, sir.

Ques. Did Mr. Breslin hold stock at that time?

Ans. Yes, sir.

Ques. Did Mr. Carroll hold stock at that time?

Ans. Yes, sir. 20

Ques. What was the character of your stock, common or preferred?

Mr. Gilleran: We object. The records and books of the company are the best proof.

The Court: Why, yes, for voting; but I do not understand that they prove anything at all as to the ownership of stock. A man may own stock, and if he is willing to deprive himself of the advantages of having it registered he is none the less the owner. As the question stands it seems to me competent. 30

Mr. Gilleran: I think there must be some voucher or record showing what stock he held, and there must be some record showing what the other stockholders held.

The Court: There are conditions under which that may be necessary, but upon the mere matter of ascertaining ownership, I do not understand that you have to have records at all. The objection is not sustained.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

10

Ans. Common stock.

Ques. What office did you hold in the company besides that of director?

Ans. Secretary.

Ques. Who, besides the gentlemen that you have just mentioned, at that time, owned any common stock in the defendant company?

20 Mr. Gilleran: I object to that on the same ground. The records of the company will show that. This man, as he now has qualified, is not competent to show who were the other owners of the common stock of the Fries-Breslin Company.

The Court: I do not see how he can prove that. The objection is sustained.

(Exception noted for the plaintiff.)

30 Ques. Were there any other owners of common stock of the Fries-Breslin Company at this time, excepting Mr. John M. Carroll, yourself and Mr. Thomas J. Breslin?

Mr. Gilleran: I object, on the same ground.

(Question overruled. Exception noted for the plaintiff.)

Ques. Have you personal knowledge of what stock had been issued by the Fries-Breslin Company in the year 1895?

Mr. Gilleran: I object to the question if the answer will extend further than an answer of "yes" or "no."

Mr. Garrison: I will ask the witness to limit it, Mr. Gilleran, to "yes" or "no."

Ques. Please just answer "yes" or "no" to that, Mr. Fries. 10

Ans. Yes.

Ques. From your personal knowledge, who were the common stockholders of the Fries-Breslin Company at that time?

Mr. Gilleran: I renew my objection upon the same ground.

(Objection sustained. Exception noted for plaintiff.) 20

Ques. Who was acting as president of the Fries-Breslin Company at that time?

Mr. Gilleran: I object to that, if your Honor please. The records of the company, the minutes of any meeting at which the president participated or acted, will be the best evidence.

(Objection not sustained.) 30

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
Justice Supreme Court.

Ans. Mr. John M. Carroll.

Ques. And who was acting as treasurer?

(Same objection. Objection overruled.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
Justice Supreme Court.

10 Ans. Mr. John M. Carroll.

Ques. Did the directors of the Fries-Breslin Company arrive by any method at an ascertainment of the results of the business?

Mr. Gilleran: I object.

The Court: I suppose that can be answered yes or no, in order to not involve two questions in one ruling.

20

Ques. Just answer yes or no.

Ans. Yes, sir.

Ques. How often, taking a year, for instance, how often during a year?

30

Mr. Gilleran: The objection is that the manner of doing this must appear by the proper records of any meeting of the board of directors, acting for this corporation; and, furthermore, that any answer of this witness, as he is now qualified, must of necessity be a conclusion.

(Objection not sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
Justice Supreme Court.

Ans. Twice a year.

Ques. At what periods of the year?

(Same objection. Objection overruled.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

10

Ans. January and July.

Ques. Please state what was done in January and July with respect to ascertaining whether the business had made a profit or a loss?

(Same objection. Objection overruled.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON. [L. S.]
Justice Supreme Court.

20

Ans. We would take an inventory of the business and ascertain the amount of profits or losses that had been made.

Ques. And when you say "we" whom do you mean?

Ans. The directors, Mr. John M. Carroll, Mr. Breslin and myself.

Ques. If there was a profit shown, what did the directors do with respect to that profit?

30

Mr. Gilleran: I object, if your Honor please, on the ground that the only interference or acts concerning these profits must be done by the board of directors, and that the records of the board of directors must show what was done, and that this witness is not competent to state, as he is now qualified, what was done by the board of directors, as such.

Mr. Garrison: I will show that there were no written records made.

The Court: The objection is sustained, as the matter now stands.

10 Ques. During the time that you were secretary of the Fries-Breslin Company, were there any written records kept of the action of the board of directors with respect to the division of profits or the declaration of dividends?

Mr. Gilleran: I object to that. It is not shown yet that the board of directors did anything of that kind.

The Court: The objection is not sustained.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

20

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ans. I cannot say; I cannot answer that question.

Ques. Did you ever make any written minutes in any minute book of any action of the board of directors of the Fries-Breslin Company with respect to the division of the profits of the company, or declaration of dividends?

Ans. I do not remember.

30 Mr. Garrison: I now call on the defendant to produce any minutes of the company prior to the year 1899, showing any action with respect to the declaration of dividends or the division of profits.

Mr. Gilleran: We have none such.

Mr. Garrison: I now ask to have that question repeated on the record.

Question repeated as follows:

Ques. If there was a profit shown, what did the directors do with respect to that profit?

Mr. Gilleran: I renew my objection on the ground that the witness has not qualified to state respecting any action of the board of directors at this time; he has not shown that the board of directors met, convened in a legal way, convened at a stated meeting, convened under notice, nor under waiver of notice, or under by-laws, or any other proceeding of the company. 10

The Court: Well, does this witness know? Was he present at such meeting? They are preliminary questions, it seems to me.

Mr. Garrison: I will lead up to that, sir.

Ques. Were you present at these semi-annual occasions of which you have testified when the inventories were taken and gone over and it was ascertained whether a profit or loss had been made? 20

Mr. Gilleran: I object to that part of the question specifying what was done at these meetings or conventions or gatherings; I do not object to his asking whether he was present.

The Court: I think the question, as it merely refers to a period of time, should not embody any propositions of fact as to what was done at this time; they are the subject matter of inquiry. 30

Mr. Garrison: He has already testified to it.

The Court: I know, but that does not justify its being

inserted in a question. If the question is altered so as to say—at these semi-annual occasions of which you have spoken, were you present? it will be allowed.

Ques. Were you present at these semi-annual occasions of which you have spoken?

Ans. Yes, sir.

Ques. And always took part?

Ans. Yes, sir.

10 Ques. Who else was present?

Ans. Mr. John M. Carroll and Mr. Breslin.

Ques. What was done by the directors on these semi-annual occasions with respect to any profit that the business was shown to have made for the preceding six months?

20 Mr. Gilleran: I object on the ground that it has not been shown that the board of directors' meeting was properly convened according to law, or convened according to any by-laws of the company. It has not yet been shown what the board of directors was, of whom it was composed, and how they came to meet at these times, and the manner of meeting.

(Objection not sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

30

Ans. After paying the interest, or the dividend on the preferred stock, the rest of the profits were set aside to Mr. J. M. Carroll and Mr. Breslin and myself, and entered upon the books.

Mr. Armstrong: To this question there is an answer inadvertently made by the witness as to the payment of

preferred stock. Your Honor has already ruled out the question of preferred stock, as I understood it, and if that answer is intended to embody any part of that, as it seems to, that part should be stricken out.

The Court: The motion will not obtain.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.] 10
Justice Supreme Court.

Ques. You say it was set aside—where was any note made of its setting aside?

Ans. In the books of the company.

Ques. When did you cease to have active connection with the Fries-Breslin Company?

Ans. I think February, in 1899.

Ques. And were you acting as a director from its incorporation up to that time?

Ans. Yes, sir. 20

Ques. Who else, besides yourself, Mr. Carroll, John M. Carroll, and Mr. Breslin, acted as directors from the incorporation of the company up to 1899?

Ans. When the company was first organized, there was three more directors—Mr. P. J. Murphy, Mr. James G. Carroll and Mr. Edward McGill were directors when the company was first organized.

Ques. How long was it after the organization of the company before these gentlemen ceased to act as directors? 30

(Objected to. Objection not sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

5 C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ans. I should think about 1894.

Ques. About 1894?

Ans. Yes, sir.

Ques. Now, from 1894 down to 1899, who else acted as directors beside Mr. John M. Carroll, Mr. Thomas J. Breslin and yourself?

Ans. No one.

Ques. Did the Fries-Breslin Company pay salaries to its officers?

10

(Objected to. Objection not sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ans. Yes, sir.

20 Ques. Did each of the officers receive the same salary, or a different one?

Ans. Yes, sir.

Ques. The same salary?

Ans. Yes, sir.

Ques. How much was that?

Ans. \$1,500 a year.

Ques. Mr. John M. Carroll received that salary, did he?

Ans. Yes, sir. Was J. Breslin?

30

Ans. Yes, sir.

Ques. And yourself?

Ans. Yes, sir.

Mr. Gilleran: It is conceded that the items of salary stated in the account of the plaintiff, excepting the item of \$5,000 from January to June, 1902, are correct.

Ques. Were these items of salary always paid by way of check or cash, at once, when due?

Ans. No, sir; they were not; they were placed to the credit of the individuals.

Ques. In the same book?

Ans. Every six months, on the same book.

Ques. In the same book in which the other items of credit were placed?

Ans. Yes, sir.

Ques. What was the name of the book in which these various items of credit were placed to the credit of Mr. John M. Carroll, Mr. Thomas J. Breslin and yourself? 10

Ans. It was called the "Private Ledger."

Ques. And was that book kept where you could see it?

Ans. Yes, sir.

Ques. And where Mr. John M. Carroll could see it?

Ans. Yes, sir.

Ques. And where Mr. Thomas J. Breslin could see it?

Ans. Yes, sir.

Ques. Was it frequently inspected by you gentlemen up to 1899, when you left? 20

Ans. Yes, sir; very frequently.

Ques. When you left the management and parted from the Fries-Breslin Company, in 1899, did you claim that they owed you any money on behalf of these semi-annual divisions of profit?

Mr. Gilleran: I object, on the ground that it is immaterial, irrelevant and incompetent. 30

The Court: I do not see the relevancy of it.

Mr. Garrison: I propose asking this witness, and developing this state of facts: That when he left the company, in 1899, he claimed that he had not received his credits, as shown on the books of the company, of the

10 semi-annual declarations of dividends or divisions of profits, and that he brought an action against the Fries-Breslin Company, the gist of which action was the recovery by him of these sums of money, including these semi-annual declarations of dividends; that Mr. Breslin was a witness in that suit, and that a judgment, upon the verdict of a jury, was entered in that suit against the company and in favor of Fries; that the sole point, practically, that was left to the jury was to determine the question of whether or not these semi-annual meetings had resulted, so far as this corporation was concerned, in the declaration of dividends. I propose then to raise the legal question that the estoppel worked by the verdict of that jury against this defendant and in favor of Mr. Breslin is operative in this suit.

The Court: I am prepared, without any lengthy argument, to overrule that.

20 (Exception noted for the plaintiff.)

Ques. Did you bring a suit to recover the money you claimed to be due you from the defendant company, including the money credited to you for these semi-annual profits or dividends, and in that suit was the question that was left to the jury to determine whether this company had, upon these semi-annual occasions, declared dividends, and did the jury find that it had?

30 (Same objection.)

The Court: The objection of immateriality is sustained.

Mr. Garrison: The offer, generally, is to offer the judgment in the suit of Frederick A. Fries vs. Fries-Breslin Company, and such collateral proof as is necessary and

legitimate to explain it, for the purpose of raising the doctrine that Breslin, by participation as a witness in that suit, has created a *res judicata* which binds the defendant in this suit, it appearing in such earlier suit that Mr. Breslin was a director, secretary and a stockholder of the Fries-Breslin Company, and a witness in that suit on behalf of the company.

Mr. Pancoast: We object to it on the ground that it is irrelevant, immaterial and incompetent. 10

The objection on those grounds is sustained.

(Exception noted for the plaintiff.)

Cross-examination of FREDERICK A. FRIES.

By Mr. Gilleran: 20

Ques. Mr. Fries, you say you acted as secretary of Fries-Breslin Company from its organization down to your withdrawal, in 1889?

Mr. Garrison: He did not say that.

Mr. Gilleran: I want to be corrected if it is not so.

The Court: Let the witness correct it if it is incorrect. 30

Ans. Not from its organization; no, sir.

Ques. From what time, Mr. Fries?

Ans. From about 1894 until 1899; about 1894; I am not positive as to the date.

Ques. And you say at that time Mr. John M. Carroll

was the president of the company and also its treasurer?

Ans. Yes, sir.

Ques. You were a director and stockholder of the company prior to that time?

Ans. Yes, sir.

Ques. Who were the other directors and stockholders prior to that time, and at the time that you were elected secretary?

Ans. Mr. P. J. Murphy, Mr. James G. Carroll and
10 Mr. E. F. McGill—

Ques. And you and John M. Carroll and Breslin?

Ans. Yes, sir.

Ques. And who were the officers at the time of the organization of the company and down to 1894, when you became the secretary?

Ans. Mr. McGill was secretary until the time I was elected. Mr. John M. Carroll was treasurer from its incorporation, and Mr. Murphy was president for a time, I cannot just tell how long.

20 Ques. He was president until Mr. Carroll was elected, was he not?

Ans. Elected president; yes, sir.

Ques. Now, these six incorporators acted as directors, did they not, from 1891, the time of the incorporation of the company, down to when?

Ans. About 1894.

Ques. Did you know about the affairs of the company during those two years or three years, from 1891 to 1894?

Ans. Yes, sir.

30 Ques. You were the manager of the business during that time?

Ans. I was the manager of the manufacturing part; yes, sir.

Ques. Was stock issued to you in the company, and if so, to what amount and when?

Mr. Garrison: I object to this. The witness, on direct

examination, was asked with respect to this business of stock, and who held the stock, and your Honor ruled it out; and I do not see how it can be admissible on cross-examination if it was not admissible on direct examination.

The Court: The objection is not sustained.

(Exception noted for the plaintiff.)

Ans. Stock was issued to me at different times: I cannot say now just at what time; but the entire amount was \$12,500. 10

Ques. And you do not know when this stock was issued to you specifically?

Ans. No; I don't know the dates.

Ques. And you do not know of any record, do you, showing when this stock was issued to you—you do not know of any record, either as secretary at one time, or as director of the company, when this was issued to you, or as stockholder of the company? 20

Ans. There were records of some of that stock being issued to me.

Ques. What record is there of that, Mr. Fries?

Ans. I had one certificate of stock for \$7,500.

Ques. You had one certificate?

Ans. Yes, sir.

Ques. I show you a book, and will ask you if you know what it is?

Ans. The stock book of the Fries-Breslin Company. 30

(Said book is now marked for identification D. J. P1.)

Ques. You do not know, do you, Mr. Fries, the time of the issuance of the additional stock to you?

Ans. Which additional stock do you refer to?

Ques. You say that you had \$12,500 worth of stock, which I assume to be 125 shares?

Ans. Yes, sir.

Ques. You have said that 75 shares were issued to you?

Ans. Yes, sir. There is a record, if I remember, there is a record in the minute book of the \$5,000 additional being issued, but I never held the certificate.

Ques. You do not know of any such record, however? You now refer to the minute book?

Ans. Yes, sir.

10 Ques. You said, Mr. Fries, that there were no minutes of this company?

Mr. Garrison: He has not said that, if your Honor please.

Ans. I do not remember saying so.

The Court: The objection is that your proposition is an erroneous one in fact, the witness not having made that statement.

20

Ques. You said you did not remember that there were any written minutes of the Fries-Breslin Company?

Mr. Garrison: I object; he has not stated that.

The Court: That is not a correct statement of the testimony. If you are going to lay a foundation by reciting what the witness said, that is not what he said.

30

Ques. Well, did you say so?

Ans. What is that question, please?

Ques. Did you say that you do not remember that there were any written minutes of the Fries-Breslin Company?

Ans. No, sir; I did not.

Ques. You did not say so?

Ans. No, sir.

Ques. Will you now state what you know concerning any written minutes of the Fries-Breslin Company, if there were any at any time, to your knowledge?

Ans. I know there is some; yes, sir.

Ques. Where are those written minutes, if you know?

Ans. In the minute book.

Ques. And what are those minutes, and what time, what period in the affairs of the company did they cover, if you know? 10

Mr. Garrison: I object to that, to his asking this witness what are those minutes. There may be a great deal in those minutes that is utterly irrelevant and immaterial to any issue that we are trying in this suit.

The Court: The objection is sustained; exception noted for the defendant.

Ques. Did you have possession of that minute book as secretary, Mr. Fries? 20

Ans. It was in the safe of the company.

Ques. Did you have it in your possession as secretary at any time?

Ans. Yes; I have entered up some minutes in that book at times.

Ques. You yourself have entered minutes in that book?

Ans. Yes, sir.

Ques. Where is that book now; do you know? 30

Ans. I do not know, sir.

Ques. When did you last see that book?

Ans. In 1899.

Ques. In whose possession was it at that time?

Ans. It was in the safe of the company, in the office of the company.

Ques. In what month of 1899?

Ans. In the safe belonging to the company where the rest of the books are kept.

Ques. Yes; but in what month and year again, if you please?

Ans. Well, it was there at all times before I left there in 1899. I think it was February or March, 1899.

Ques. Have you seen that book since that time, Mr. Fries?

10 Ans. I have not, unless it was at the former trial that I had with this defendant company.

Ques. You might have seen it then?

Ans. I might have seen it then.

Ques. In whose possession was it then?

Ans. I do not remember that I did see it, but perhaps I did. There was quite a number of books there.

Ques. Do you remember when the 75 shares that you speak of were issued to you out of the company, and in what manner, if you remember?

20 Ans. I do not remember the date when it was issued; no, sir.

Ques. Was it immediately after the incorporation of the company?

Ans. No, sir; not all. I cannot tell just when that certificate was issued, but it was issued for stock that was given to me through the minutes; the minutes, I think, will show at the different times.

Ques. Did you, Mr. Fries, as secretary, see any by-laws of the Fries-Breslin Company at any time?

30 Mr. Garrison: I object to that. I opened nothing in direct examination about by-laws; this must be part of the defendant's case, and not cross-examination.

Mr. Gilleran: I submit that this witness has shown himself to have been the secretary of the company; that he testified on direct-examination respecting what was

done by the officers of the company, which does not appear on the minutes and ought to, and that the administration of the affairs of a corporation are usually controlled, and almost entirely controlled by by-laws, and the assumption would be that by-laws existed, and that these directors, the acts of whom this witness has testified to, would be controlled by such by-laws.

The Court: The objection is sustained, the ground being that this is not cross-examination of any testimony of this witness in chief. 10

C. G. GARRISON, [L. S.]

(Exception noted for the defendant.)

Ques. Mr. Fries, did you attend any meetings of the board of directors of the Fries-Breslin Company from its organization down to the time that you withdrew, as you say, in February, 1899?

Ans. Yes, sir.

Ques. When did you so attend meetings of the board of directors? 20

Ans. Very frequently.

Ques. Did you attend any meetings of the board of directors in 1891, after May, the date of the incorporation of the company?

Ans. Yes, sir.

Ques. Can you tell me the time at which you attended these meetings?

Ans. I could not tell you the exact time; no, sir.

Ques. Who else was present at such meetings? 30

Ans. Usually the full board.

Ques. And who composed the full board?

Ans. Prior to 1894, there was the gentlemen I named a little while ago, Mr. Murphy, James Carroll, John M. Carroll, Mr. McGill, Mr. Breslin and myself. We were usually all present.

Ques. Did you have a meeting of the board of directors in the year 1892, and if so, when, what month?

Ans. I think we had meetings in January of 1892.

Ques. You were not secretary at that time?

Ans. No, sir.

Ques. How were those meetings called, if you know?

Ans. I don't know; we were all present at the plant at the time, excepting Mr. James G. Carroll, and I suppose he was written to to attend the meetings.

10 Ques. Do you know anything further about the matter except the supposition that he might have been written to, or do you know by whom he might have been written to?

Ans. I don't know, except supposition.

Ques. How were you notified to attend?

Ans. How was I notified to attend?

Ques. Yes; if you were notified?

Ans. Well, I was there at all times.

Ques. Did you hold an annual meeting in 1892?

20 Mr. Garrison: I object; I did not go into any question of annual meetings.

The Court: I think the general subject of the method in which these meetings were held is fairly open.

Mr. Garrison: Yes; but there is no such thing as an annual meeting of directors. The annual meeting is a meeting of stockholders.

30 The Court: Yes; but the general subject is not one wherein the Court will discriminate. It is generally open to examination as to what this witness knows about the stockholders' meetings and directors' meetings.

Ques. Was the annual meeting of the directors held in 1892?

Ans. There were two meetings held in 1892 at least.

Ques. And when were those meetings of directors held in 1892?

Ans. In July and January, I think. Those were the usual times.

Ques. Was either one of those an annual meeting?

Ans. I do not think it was.

Ques. Did you elect officers at the annual meeting or at any meeting of directors in 1892?

Ans. Yes; I think we did in the July meeting; I think 10
so.

Ques. During the July meeting. Did you hold meetings of stockholders during the year 1892?

Mr. Garrison: I object to that; that is not a subject that I went into on direct examination at all, and is not cross-examination of anything opened in the direct examination.

Mr. Gilleran: It would appear, sir, that these six 20
directors were the sole stockholders. That is testified to by the witness, and if they held an annual meeting of directors and elected officers, I want to determine whether those same stockholders, who were the directors, held a preliminary stockholders' meeting to select their directors prior to the annual meeting. I think this witness, if he knows of it, is competent to state.

The Court: I think the question is a proper one.

(Exception noted for the plaintiff.) 30

Ans. I don't know. We held the directors' meetings and all the directors were stockholders.

Ques. Did you hold a stockholders' meeting in 1891, immediately after the incorporation?

(Objected to for the same reason. Objection overruled. Exception noted for the plaintiff.)

Ans. Yes, we must have done so.

Ques. And at that meeting, did you elect directors?

(Objected to for the same reason. Objection overruled. Exception noted for the plaintiff.)

10 Ans. Yes, sir.

Ques. Whom did you elect, in 1891, directors of the Fries-Breslin company?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. All the stockholders were elected directors.

Ques. Those stockholders being John M. Carroll, James G. Carroll, P. J. Murphy, Thomas J. Breslin, E. F. McGill and Frederick Fries?

20

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. Yes, sir.

Ques. Did you, prior to the directors' annual meeting, in 1892, hold any stockholders' meeting of the Fries-Breslin Company?

30

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. I do not know that these meetings should be called directors' meetings or stockholders' meetings; all the stockholders were present and all the directors.

Ques. All the six?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. Yes, sir.

Ques. Now, what did you do in 1891, after electing your Board of Directors; did you then elect your officers, or did you elect officers in 1891?

(Same objection; same ruling. Exception noted for the plaintiff.) 10

Ans. Yes; we elected officers.

Ques. State who the officers elected were?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. Mr. P. J. Murphy was elected president, John M. Carroll, treasurer, and E. F. McGill, secretary. 20

Ques. I think you stated you do not remember any additional stockholders' meeting until the following year, 1892?

Ans. No, I have not said I remembered any stockholders' meeting in 1892.

Ques. You did not?

Ans. No.

Ques. Did you, at any meeting of the stockholders, in 1892, elect directors of the Fries-Breslin Company? 30

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. I don't know that we had any stockholders' meeting at all in 1892.

Ques. You do not know that you elected directors?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. No. We elected officers.

Ques. You elected officers?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. Yes, sir.

- 10** Ques. From whom did you elect officers, from the old Board of Directors?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. Yes, sir.

Ques. Not from any new board that was elected at the stockholders meeting at that time?

- 20** (Same objection; same ruling. Exception noted for the plaintiff.)

Ans. I do not remember of having any stockholders meeting.

Ques. In 1892, who were the directors from whom you elected the officers of the company?

Ans. The same as in 1891.

Ques. And whom did you elect officers?

Ans. The same officers as in 1891.

- 30** Ques. Did you subsequent to May, 1892, and prior to May, 1893, hold a stockholders' meeting of the Fries-Breslin Company?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. I do not remember that.

Ques. Did you, during that time, hold directors' meetings of the Fries-Breslin Company?

Ans. Yes, I think so.

Ques. When do you think you held such directors' meetings of the Fries-Breslin Company?

Ans. What time do you ask in that question—prior to May, 1893?

(Question repeated.)

10

Ans. In July and January of each year we held a regular directors' meeting.

Ques. And who attended those directors' meetings?

Ans. As a rule, the full board was there.

Ques. Did you, in May, or at any time in the year 1893, hold a stockholders' meeting of the Fries-Breslin Company, at which you elected directors of the company?

(Same objection; same ruling. Exception noted for the plaintiff.) 20

Ans. I do not remember.

Ques. Did you, in the year 1893, elect officers of the Fries-Breslin Company from a board of directors?

Ans. I think so; yes, sir.

Ques. And who composed the board of directors from which you elected officers in 1893?

Ans. The same gentlemen as were named before.

Ques. And at what time of the year, if you remember, did you have such election? 30

Ans. Most likely in July.

Ques. Between July, 1893, and May or July, 1894, did you have a meeting of the stockholders of the Fries-Breslin Company?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. I do not remember a stockholders' meeting.

Ques. You became secretary of the Fries-Breslin Company, as I recollect, in about May, 1893, did you not?

Ans. I am not sure if it was 1893 or 1894; I cannot say.

Ques. Did you, in the year 1894, at any time, hold a stockholders' meeting?

10

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. I do not remember a stockholders' meeting.

Ques. Did you, in the year 1894, hold a directors' meeting?

Ans. Yes, sir.

Ques. And who attended the meeting of directors?

Ans. I think, in 1894, there was only three common stockholders present.

20

Ques. Did you, at any stockholders' meeting in the year 1894, elect directors of the Fries-Breslin Company?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. I remember of no stockholders' meeting in 1894; no, sir.

Ques. And do you remember that at a stockholders' meeting you elected directors of the Fries-Breslin Company?

30

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. No, sir.

Ques. Did you, in the year 1894, elect officers from the board of directors of the Fries-Breslin Company?

Ans. I think not.

Ques. The same officers continued?

Ans. Yes, sir.

Ques. And who were those officers, in 1894?

Ans. I think, in 1893, Mr. Carroll, John Carroll, in addition to being treasurer, was elected president.

Ques. And the secretary?

Ans. And I was elected secretary.

Ques. At the same time that he was elected president?

Ans. I think so.

Ques. Now, did this occur in 1894 or 1893?

10

Ans. I am not sure which year.

Ques. Well, in the year 1895, and subsequent to July or June of 1894, to July, 1895, did the stockholders of the Fries-Breslin Company meet; did you have a stockholders' meeting of the Fries-Breslin Company?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. No, sir; I think not.

20

Ques. Did you have any annual meeting, or any meeting of the stockholders of the Fries-Breslin Company at which directors were elected, between July, 1894, and July, 1895?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. Which stockholders do you refer to?

Ques. I mean a stockholders' meeting.

30

Ans. Common stockholders, do you mean?

Ques. No; I mean a stockholders' meeting.

Ans. No; there was no meeting of all the stockholders.

Ques. And did you, between July of 1894 and July of 1895, at a meeting of the stockholders, held at any time, elect directors of the Fries-Breslin Company?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. There was no stockholders meeting in 1894.

Ques. And there were no directors elected at any stockholders' meeting?

10 Mr. Garrison: I desire to interpose an objection to all questions in respect to these stockholders' meetings, and ask for an exception to each objection overruled.

The Court: Yes.

Ans. Yes.

Ques. Did you state that there were no directors elected at the stockholders' meeting between July, 1894, and July, 1895?

20 (Same objection; same ruling. Exception noted for the plaintiff.)

Ans. Yes, sir.

Ques. Did you elect officers from any board of directors of the Fries-Breslin Company between July, 1894, and July, 1895?

(Same objection; same ruling. Exception noted for the plaintiff.)

30 Ans. I think not; I think the same officers held over.

Ques. Between July, 1895, and July, 1896, did you have a meeting of the stockholders of the Fries-Breslin Company?

Ans. I think not.

Ques. Did you, between those times, elect, at a stockholders' meeting, directors of the Fries-Breslin Company?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. No, sir.

Ques. Did you, between said times, elect, from the Board of Directors, officers of the Fries-Breslin Company?

Ans. I think not.

Ques. Did you, between July, 1895, and July, 1896, hold a stockholders' meeting of the Fries-Breslin Company? 10

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. I think not.

Ques. Did you at that time, at a stockholders' meeting, elect directors of the Fries-Breslin Company?

(Same objection; same ruling. Exception noted for the plaintiff.) 20

Ans. I think not.

Ques. Did you, during said time, elect from the directors of the Fries-Breslin Company officers of the Fries-Breslin Company?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. I think not. 30

Ques. Between July, 1896, and July, 1897, did you have a meeting of the stockholders of the Fries-Breslin Company?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. I think not.

Ques. Did you, at any meeting of the stockholders of the Fries-Breslin Company, between said times, elect directors of the Fries-Breslin Company?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. I think not.

10 Ques. Did you, between said times, elect from the Board of Directors of the Fries-Breslin Company, officers of the Fries-Breslin Company?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. I think not.

20 Ques. Did you, between July, 1897, and July, 1898, hold a meeting of the stockholders of the Fries-Breslin Company?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. I think not.

Ques. Did you, between said times, at a meeting of the stockholders of Fries-Breslin Company, elect directors of the Fries-Breslin Company?

30 (Same objection; same ruling. Exception noted for the plaintiff.)

Ans. I think not.

Ques. Did you, between said times, from the directors of the Fries-Breslin Company, elect officers of the Fries-Breslin Company?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. I think not.

Ques. Did you, between July, 1898, and any time in 1899, with which you are familiar, either as stockholders or directors, hold a meeting of the stockholders of the Fries-Breslin Company?

(Same objection; same ruling. Exception noted for the plaintiff.) **10**

Ans. No, sir.

Ques. Did you, at a meeting of the stockholders of Fries-Breslin Company, elect directors of the Fries-Breslin Company between July, 1898, and July, 1899?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. I think not. **20**

Ques. Nor hold a stockholders' meeting between said times?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. No, sir.

Ques. Nor did you elect, from the directors of the Fries-Breslin Company, between said times, officers of the company? **30**

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. I think not.

Ques. Subsequent to 1893, Mr. Fries, or in 1893, I

think you stated—and I don't wish to misstate anything that you have said, but this is my recollection—that all the directors of the Fries-Breslin Company met at these semi-annual meetings of which you spoke?

Ans. Yes, sir.

Ques. And in 1894 did that occur?

Ans. I am not sure whether they were all there in the 1894 meeting or not.

Ques. And you are not sure of the time at which you became the secretary of the company?

10 Ans. No, sir; I am not.

Ques. At the meetings, if any, which were held between July, 1893, and July, 1894, who attended meetings of the Board of Directors of the Fries-Breslin Company, if any meetings were held?

Ans. I assume the entire board.

Ques. Between 1893 and 1894, I am now asking you, the entire board would have consisted, or did consist, of the six people whose names you have mentioned?

20 Ans. Well, I am not sure of 1893 and 1894; I am not sure whether the change was made in 1893 or 1894, where three of the directors retired from the directorate; I am not sure whether that was 1893 and 1894.

Ques. Between July, 1894, and July, 1895, who attended the directors' meetings of the Fries-Breslin Company?

Ans. Mr. John M. Carroll, Mr. T. J. Breslin and myself.

Ques. You were secretary at this time?

Ans. Yes, sir.

30 Ques. How were the meetings called? Were they stated meetings, monthly, quarterly or half-yearly?

Ans. We had the meetings practically every day; we were practically always there.

Ques. There were no stated meetings?

Ans. No; there was no—

Ques. (Interrupting.) There were no meetings stated, no by-laws or other notices of the company?

Ans. No, sir.

Ques. And no notices were sent out to the stockholders or directors during that year respecting any meetings of either the stockholders or directors?

(Same objection; same ruling. Exception noted for the plaintiff.)

Ans. No, sir.

Ques. Were any notices of any character sent out between July of 1895 and July of 1896? **10**

Mr. Garrison: I object to that. That must be immaterial and irrelevant, as to whether notices of any character were sent out.

Ques. Notices of any character respecting meetings of either stockholders or directors between 1895 and 1896?

(Objected to as irrelevant and not cross-examination. Objection overruled. Exception noted for the plaintiff.) **20**

Ans. No, sir.

Ques. Or between July of 1896 and July of 1897?

Mr. Garrison: Unless this is limited to directors' meetings, I desire to be understood as objecting to each of these questions, without repetition, and ask for an exception upon the overruling of each objection. **30**

The Court: It is overruled.

(Exception noted for the plaintiff.)

Ans. No, sir.

Ques. You were secretary at that time?

Ans. Yes, sir.

10 The Court: Allow me to ask, in the interest of saving time, if there is any virtue in dividing this period, in respect to which every bit of this testimony has been uniform, into calendar periods? He has not made any variation in some fifty or sixty answers as to what happened between 1894 and 1899. Now, it would save much time if you should put the question from 1894 to 1899, instead of separating it into calendar periods?

Mr. Gilleran: We accept your Honor's suggestion.

Ques. Were any notices sent out between 1895, in July, or 1894, in July, and July, 1899?

The Court: He probably did not go as far as that.

20 Ques. Or up to the time when you say you withdrew, which was in February or March, 1899, to your knowledge?

Mr. Garrison: I desire to have the same general objection noted to the question, unless it is limited to the directors' meeting.

(Objection overruled; exception noted for the plaintiff.)

30

Ans. I think not.

Ques. Mr. Fries, you were present at these semi-annual meetings, of which you speak, of the board of directors of the Fries-Breslin Company, from the organization of the company down to the time of your withdrawal?

Ans. Yes, sir.

Ques. You say the profits of the company were ascertained at those meetings, or did you so state?

Ans. They were ascertained before the meetings and given to the meeting and they disposed of them.

Ques. In what way was the meeting, at which the ascertainment was submitted to it, convened—was a notice sent to the directors, or were they just present in the mill or office, as usual, and you met, or what was the particular form which you adopted and method?

Ans. Prior to 1893 or 1894, I suppose Mr. James G. Carroll was sent for; he resides in Brooklyn; but the rest of us were all there, practically, on the premises, at all times. 10

Ques. And subsequent to 1894, what was the manner or form or method?

Ans. That is the period I spoke about. That is what I answered to. Did you say prior to 1894?

Ques. No; subsequent to 1894, sir.

Ans. Why, Mr. Carroll, Mr. Breslin and myself were there practically at all times, and when the books would be closed, each six months, we would set aside the amounts of money there was coming to each one of us. 20

Ques. What was the manner adopted to so set aside moneys that were coming to each one of you?

Ans. How did we ascertain the amounts?

Ques. No, not how you ascertained it; but how you set aside those amounts?

Ans. By having the bookkeeper enter it into the books.

Ques. By having the bookkeeper enter what?

Ans. The amounts on the books, to the credit of each one of the three stockholders, the three common stockholders. 30

Ques. What particular things did you do, after ascertaining the profits and submitting them to the three directors whom you have named, respecting the further disposition of those profits? State specifically and fur-

ther what you did, what was done by those three gentlemen?

Ans. I do not quite understand that question.

(Question repeated.)

Ans. The amounts to be credited to the different people interested were given to the bookkeeper to enter on the books.

10 Ques. By whom were such figures given to the bookkeeper?

Ans. Usually by myself.

Ques. What further was done respecting these so-called profits of the business?

Ans. That was the end of it.

Ques. Did you have charge of the bookkeeping of the business with assistants?

Ans. Did I have charge of the bookkeeping?

Ques. Yes.

20 Ans. Not any more than the rest of the gentlemen interested.

Ques. As secretary you handed these figures usually to the bookkeeper?

Ans. As the manager of the manufacturing part, I did; yes, sir.

Ques. Which figures, the ascertainment of the profits, or the figures after the three directors had seen the figures in these meetings of which you speak?

Ans. The ascertainment of the profits.

30 Ques. Was that all that was done about those profits? They were entered in the books, I assume, by the bookkeeper?

Ans. Yes, sir.

Ques. What further was done at that meeting, or at any meeting, at which these profits were submitted and after which they were handed to the bookkeeper, respecting them?

Ans. There was not anything further done in regard to the profits.

Ques. Were you familiar with the account or the accounts that were directed to be made on such ascertainment of profits—were you familiar with the entry on the books of the bookkeeper respecting those?

Ans. Yes, sir.

Ques. In what way, if you remember, were these entries made upon the books of the company?

Mr. Garrison: I object to that. If they want to obtain that, the production of the books is the best evidence of that. 10

The Court: Yes, I think it is entirely competent on the cross-examination of this witness. He has purported to have such knowledge as that he has been permitted to testify, that these entries were in point of fact made. That, of course, opens how far he had knowledge or observation as to his affirmative testimony in chief. 20

(Exception noted for the plaintiff.)

Ans. In what way?

Ques. Under what heading, in what way, in what columns, and the manner, particularly, as you remember it, if you remember anything about it?

Mr. Garrison: I object to that question as not cross-examination. 30

The Court: The objection is not sustained.

(Exception noted for the plaintiff.)

Ans. They were entered under the head of each individual that got a share of it.

Ques. Were they entered in any other account in the books of the company?

Mr. Garrison: I object to that.

The Court: The objection is not sustained.

(Exception noted for the plaintiff.)

10 Ans. I do not remember.

Ques. Were these profits so ascertained and set aside to the account of each one of the three directors who attended the meetings; were they ascertained and set aside pro rata to holdings of stock?

Mr. Garrison: I object to that as not cross-examination.

The Court: The question will be allowed.

20

(Exception noted for the plaintiff.)

(Question repeated.)

30

Mr. Garrison: I object to the question on another ground. The more I hear of it the worse it gets. It seems to have every vice that a question can have. This witness has not said that any profits were set aside to anybody as directors. This question assumes that this witness has testified that these profits were set aside to the three directors who attended.

The Court: Read the question.

(Question repeated.)

Mr. Garrison: The first part of that question absolutely misstates this witness' testimony.

Mr. Pancoast: If your Honor please, he is trying to sue here to recover profits as dividends.

The Court: Well, it is a mere question of words, as I understand it. Will counsel allow me to put a question to this witness to clarify the matter in my mind?

By the Court:

Ques. At the time when there were six directors, you testified there were six stockholders; is that correct? 10

Ans. Yes, sir.

Ques. And that those directors were the six stockholders?

Ans. Yes, sir.

Ques. You have, also, as I understood it, testified that when there were three directors there were but three stockholders?

Ans. The stock was divided—

Ques. Answer the question. When there were but three directors later on, were there then but three stockholders? 20

Ans. Three common stockholders.

Ques. Then, if I understand it, the number of common stockholders had, between 1893 and 1895, in some way become reduced to only three common stockholders?

Ans. Yes, sir.

Ques. And those three common stockholders were the three persons who participated in these directors' meetings? 30

Ans. Yes, sir.

Ques. And when you speak of the three directors setting aside something to themselves, you are speaking about the three directors who were the only three stockholders?

Ans. Yes, sir.

The Court: In view of that, I think the question is permissible, and the ruling will be the same as heretofore made.

(Exception noted for the plaintiff.)

Former question repeated as follows: Ques. Were these profits so ascertained and set aside to the account of each one of the three directors who attended the meetings—were they ascertained and set aside pro rata to holdings of stock?

Mr. Garrison: I have the right to raise another objection. I now ask to have the question ruled upon as immaterial and utterly irrelevant.

The Court: I understood that objection to be embodied in the ruling.

Ans. No, sir.

20 Ques. How were they divided, Mr. Fries?

Mr. Garrison: I object to that.

(Objection overruled. Exception noted for the plaintiff.)

Ans. After paying the dividends on the preferred stock, what was left was divided into three parts.

30 Ques. Now, what dividend was declared on preferred stock, if any.

Ans. Fifteen per cent.

Ques. How was it arrived at and declared; what was said and done about it, Mr. Fries?

Mr. Garrison: I object to that as immaterial and irrelevant. I have not gone into any question about dividends on preferred stock. It is not cross-examination.

(Objection overruled. Exception noted for the plaintiff.)

Ans. I do not hardly know how to answer that question, how it was arrived at.

(Question repeated.)

By the Court:

Ques. The question is, what was said and done in order that the outcome of the meeting might be the establishment of this dividend upon the preferred stock? How did anybody know that that was in the minds of these three men? What did they say about it? How did that get into the conduct of the meeting at all? That is the question.

10

Ans. Why, your Honor, it was understood at each of these meetings—

20

Mr. Pancoast: Not what was understood.

The Court: The question is, if you can remember, at any particular meeting that you are asked about, what was said or done in regard to this preferred stock and this dividend; give it to us, so we will know it.

Ans. It was given to the bookkeeper, the same as the profits on the common stock, to enter to the credit of the preferred stockholders.

30

Mr. Pancoast: That does not answer the question.

The Court: No; but it is responsive.

By Mr. Gilleran :

Ques. What was said, if anything, in the meeting between you three gentlemen respecting the setting aside of fifteen per cent. on any preferred stock of the company?

Ans. I do not remember.

Ques. Nothing said?

10 Mr. Garrison: He did not say that.

Ans. I do not remember.

The Court: Get this clear. (To the witness.) Which is your testimony, that nothing was said, or that you cannot remember now what was said?

Ans. I cannot remember. Something must have been said about it, but I cannot now remember what was said. The money was passed—

20

The Court: No; don't go beyond that. You were only asked that one question.

By Mr. Gilleran :

Ques. Do you remember how many preferred stockholders, as you assume, there were of the company at these meetings, that existed at the time of these meetings—not present at the meetings, but that were in existence?

30

The Court: Do you speak now of the preferred stockholders?

Mr. Gilleran: The preferred stockholders.

Ans. What meeting do you refer to and what period?

Ques. The meetings at which profits were ascertained and set aside and handed to the book-keeper in the manner you have stated.

Ans. At what period, what time?

Ques. At any time that you know of.

The Court: It seems to me this is irrelevant and not cross-examination. What difference can it make, in regard to the sum of money which was owing to this plaintiff by the company, as to the number of persons who participated in the dividend which he says was declared? It would take us into a field which does not seem to me to have any possible bearing. 10

Mr. Gilleran: We are seeking to refresh his recollection.

The Court: Well, there must be plenty of evidence of a relevant character upon which you may refresh his memory without going so far afield. If the number of stockholders has any bearing upon the legality of this claim, of course it can be pointed out. 20

Mr. Gilleran: We have had no proof yet of the existence of any preferred stock?

The Court: Well, he don't claim it. This plaintiff is not claiming to have any of this money set aside for him that was given to the preferred stockholders. What difference does it make if there was no preferred stockholder at all? I am quite clear that this matter of the preferred stockholders cannot, in its subdivisions, bear upon this matter. 30

Mr. Gilleran: Counsel want to show, if your Honor please—

Mr. Garrison: I object to any offer, if your Honor pleases; I do not think I should be subjected to any offer before the jury.

(The Court and counsel thereupon retire to the Judge's room.)

10 Mr. Armstrong: The purpose of this question is to test what this witness knows as to the stockholding of the company, in view of the fact that he has already testified that the profits ascertained at these meetings were divided into three equal parts and carried to the credit of three of the stockholders. He has stated that those were the only common stockholders of the company, but before, in his testimony, he has shown that there were six stockholders of the company; and we seek to ascertain which of those six had become other than common stockholders, as they originally were, by this question, and what the witness knows about it. It seems to us that it is proper on two
20 grounds: First, to show what value the witness's testimony has as to the stockholding, in the interests of the parties; and, second, to show whether or not there could have been a legal division of the profits in the shape of a dividend to the stockholders. There certainly could not have been, if some stockholders were left out.

30 The Court: My idea is that his examination-in-chief was confined to this common stock, either in its voting capacity or in its right to participate in a dividend; and the fact of a sum being set aside for the payment of preferred stock is legitimate both in direct and cross-examination; but how persons entitled to this preferred stock subdivided it amongst themselves, and where they were at the different times and who they were, and when they changed, I think is entirely irrelevant; so that the question which was put is overruled, because it does not concern either the common stock or the common stockholders.

(Exception noted for the defendant.)

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Mr. Pancoast: That does not forbid cross-examination of this witness, as I understand it, touching his knowledge of this preferred stock?

The Court: Well, that bridge will be crossed when we reach it. I do not know what will arise then. This question, it seems to me, is too far afield. 10

Recess until 1.30 o'clock P. M.

Trial of the cause resumed at 1.30 o'clock P. M.

FREDERICK FRIES, recalled.

By Mr. Gilleran: 20

Ques. Mr. Fries, you are familiar with the distribution, and knew of the distribution of the stock of the Fries-Breslin Company, all of the stock?

The Court: Are you speaking now of the common or preferred stock?

Mr. Gilleran: All of the stock. 30

Mr. Garrison: I object to that as not cross-examination of anything I brought out in the direct examination.

(Objection sustained; exception noted for the defendant.)

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. Mr. Fries, you say that the profits of the business were set aside in January and July, on the stock of the company; is that correct?

Mr. Garrison: He has not said that.

The Witness: I do not think I have.

The Court: Yes; I think substantially he has said that. He may correct his testimony.

10

Ans. I think I said it was set aside to those entitled to it.

Ques. Now, who were entitled to it, Mr. Fries?

Ans. The preferred stock were entitled to their share of it, and the common stockholders to the rest.

Ques. And you set it aside accordingly; you three men, meeting as you have stated, set it aside accordingly?

Ans. Yes, sir.

20

Ques. And you know the manner in which it was set aside?

Ans. Yes.

Ques. Now, will you state the manner in which it was set aside?

Ans. As I stated before, it was handed to the book-keeper to post in the books.

Ques. Now, what was handed to him?

Ans. A slip of paper with the amounts to be credited to each one.

30

Ques. Now, do you remember what the slip of paper contained at each meeting which was handed to the book-keeper, usually by you, respecting the setting aside of the profits?

Ans. I do not remember the amounts; no, sir.

Ques. Do you remember the persons to whom the profits were set aside?

Ans. Yes.

Ques. Kindly state to whom, and the manner, if you know, and the extent, if you know?

Ans. The preferred stock was set aside to the holders of the preferred stock.

Ques. Do you know who those holders were?

Ans. Well, at one time there were four of them.

Ques. At what time were there four, Mr. Fries?

Ans. Why, I cannot just remember, but one of the preferred stockholders sold his stock, I think two of them.

Ques. Who was the preferred stockholder that sold his stock? **10**

Ans. Mr. Murphy sold his stock to Mr. Carroll.

Ques. To John M. Carroll?

Ans. To John M. Carroll.

Ques. How much stock did he sell to John M. Carroll?

Ans. I think ten thousand dollars.

Ques. A hundred shares?

Ans. I believe so.

Ques. Was that preferred stock?

Ans. Yes, sir. **20**

Ques. Now, to whom else were the profits allotted, either as common or preferred stockholders, if you know?

Ans. The common stockholders were John M. Carroll, Thomas J. Breslin and Frederick Fries; and at one time the preferred stockholders were James G. Carroll, Mr. P. J. Murphy, Mr. McGill and John M. Carroll.

Ques. Now, at what time were there four preferred stockholders of the company?

Ans. I beg your pardon. **30**

(Question repeated.)

Ans. I am not sure whether it was 1893 or 1894 when the preferred stock was issued, and it was, I suppose, two years that there were four preferred stockholders.

Ques. For two years there were four preferred stockholders?

Ans. I think so; I am not positive.

Ques. What were those two years?

Ans. Which were they?

Ques. Yes.

Ans. I cannot say whether it was 1894 or 1895 it was issued, but it was two years after the time of issue.

Ques. They continued to be preferred stockholders for two years after the preferred stock was issued?

Ans. Before they sold their preferred stock holdings to other parties.

10 Ques. Did you participate in making preferred stock of the company—did you join with the Board of Directors, or any other officers of the company, in any procedure to create preferred stock of the company?

Ans. Yes, sir.

Ques. When was this?

Ans. I am not sure whether it was in 1893 or 1894.

Ques. Who were present with you at any such procedure?

Ans. Mr. Murphy, J. M. Carroll, James G. Carroll,
20 Mr. McGill, Mr. Breslin, and myself.

Ques. You were all present?

Ans. All present.

Ques. All the stockholders; when was this?

Ans. I am not sure whether it was 1893 or 1894.

Ques. What did you do respecting the matter?

Ans. Passed a resolution.

Ques. Do you remember the resolution, in form or substance?

Ans. I do not. It will appear on the minutes,
30 though. I remember there were minutes made of it.

Ques. Did you and the other directors, thus meeting, proceed pursuant to any provision of the charter of the company, either original or amended, if you know?

Mr. Garrison: I object to his asking this witness about legal questions. He can ask him what he did; but

whether it was in accordance with some charter, law or something else, I think is entirely a matter of law for the Court to settle and not for the witness to settle.

Mr. Pancoast: He may cross-examine him, if your Honor please, respecting his knowledge of the preferred stock. Now, he said they created this preferred stock; and this question asks him whether, in attempting to create this preferred stock, they acted under and by virtue of any provision in the charter, whether it originated in the charter or whether it originated in some resolution or action that they took. It seems to me that is proper. 10

The Court: The objection is sustained. I may say I consider all of this examination as to the details with respect to the preferred stock as irrelevant and not cross-examination, and I shall sustain any objections along that line.

(Exception noted for the defendant.) 20

C. G. GARRISON, [L. S.]
J. S. C.

Ques. At the time, Mr. Fries, that you set aside profits of the Fries-Breslin Company in the manner that you have stated, or at any time that you so did, who were, if you know, the stockholders of the Fries-Breslin Company?

Ans. At what time, at what period?

Ques. At any time during the life of the company at which you set aside these profits? 30

Ans. At one time there was the six which I have mentioned, and later on there was only the three.

By the Court:

Ques. Won't you at this point state (for I have been wanting to get this out, and it has not been put in) how did the six become narrowed to the three, by what steps?

Ans. By accepting preferred stock for their common stock, and as the preferred stock had no vote, it narrowed itself down to the three stockholders.

10 By Mr. Gilleran:

Ques. You have stated that the preferred stockholders were John M. Carroll, James G. Carroll, P. J. Murphy and E. F. McGill?

Ans. Yes, sir.

Ques. Do you know what amount of preferred stock they held?

20 Mr. Garrison: I object to that as immaterial, irrelevant and not cross-examination.

(Objection sustained. Exception noted for the defendant.)

C. G. GARRISON, [L. S.]
J. S. C.

Ques. At the time of that setting aside of the profits, as you have stated, were all these persons stockholders of the company, either preferred or common?

30 Mr. Garrison: I object to that, because it is entirely indefinite as to what he means, or as to what time. That is an unintelligible question.

The Court: Well, take some one period, of course, because they varied.

Ques. Well, at any time which the three gentlemen whom you have named as the meeting of the directors, set aside the profits of the company to the stockholders of the company, were those six individuals stockholders of the company at any of those times?

(Objected to.)

The Court: See if I understand the question. Is it this: Whether this method of setting aside profits to common stockholders was ever pursued during the period when there were six common stockholders; is that your question? 10

Mr. Gilleran: No, sir; my question is whether the profits were distributed through ascertainment, and then taking a slip of paper and handing it to the bookkeeper at any time when the six men met with the stockholders of the company.

The Court: What do you mean, common stockholders? 20

Mr. Gilleran: No, sir; stockholders; because he said these profits were set aside to the preferred and common stockholders.

The Court: As I understand the question, it is whether at any time when the profits were distributed to the common stockholders in the manner that he has described, these four preferred stockholders and three holders of common stock were the holders of such stock. 30

Mr. Gilleran: No, sir; that is not quite the question.

The Court: Well, I am confused.

Mr. Gilleran: My question is whether, on the setting

aside of these profits at a meeting at which they had been ascertained, and at which a slip of paper so setting them aside had been made and handed to the bookkeeper, usually by the secretary, and on which slip of paper a setting aside was made, not only to common but to preferred stockholders, these six men were stockholders of the company.

10 The Court: Some of them preferred and some common?

Mr. Gilleran: He says that profits were set aside to both.

The Court: Well, that question is clear enough.

Mr. Garrison: I object to it as irrelevant.

The Court: The question will be allowed.

20 (Exception noted for the plaintiff.)

The Court (To the Witness): Do you understand the question?

Ans. I understand the question; yes. There was times when they were and times when they were not.

Ques. Now, Mr. Fries, I would like you to state when they were, if you remember, and when they were not, if you remember?

30 (Same objection; same ruling. Exception noted for the plaintiff.)

Ans. I cannot tell when Mr. McGill and Mr. Murphy sold their stock. I do not know the time at all that they sold their stock. They were subject to the same as the rest of the preferred stockholders.

Ques. There were four preferred stockholders of the company, were there not, Mr. Fries?

(Objected to as irrelevant, immaterial and incompetent. Objection sustained. Exception noted for the defendant.)

C. G. GARRISON, [L. S.]
J. S. C.

Ques. Mr. Fries, when did Mr. Breslin and you and John M. Carroll adopt the procedure, and pursue it, of ascertaining the profits in the manner you have stated, and setting them aside in the manner you have stated? 10

Ans. I am not sure if it was in 1893 or 1894. It was after the preferred stock was issued.

Ques. You say John M. Carroll held preferred stock of the company?

Ans. Yes, sir.

Ques. And you say that he purchased from, or received from Mr. Murphy in some way his 100 shares of preferred stock? 20

Ans. Yes, sir; I think he did.

Ques. Now, in the distribution or setting aside of the profits at the meetings, and in the manner you have specified, did you set aside, before setting aside to so-called common stockholders, any of these profits to the preferred stockholders existing at that time?

Ans. We set aside the preferred stockholders first, and the common stockholders second.

Ques. Did you set aside any profits on the preferred stock to John M. Carroll? 30

Mr. Garrison: I object to that as incompetent, irrelevant, immaterial and not cross-examination.

(Objection sustained. Exception noted for the defendant.)

C. G. GARRISON, [L. S.]
J. S. C.

Ques. You have not in mind now, Mr. Fries, the names that were upon the various slips of paper which you usually handed to the bookkeeper after these meetings of Mr. Breslin, Mr. Carroll and yourself, or have you?

Ans. Well, I have at times. You see, they changed. When they sold their stock, of course, they were not on the list; but at certain periods I may be able to tell you, if you state a period, state a time.

10 Ques. Can you say in May, 1895?

Ans. May, 1895? I am not sure whether Mr. Murphy had sold his stock to Mr. Carroll at that time or not.

Ques. Well, take July, 1896, Mr. Fries?

Ans. I must give the same answer. I do not know the time Mr. Murphy transferred his stock.

Ques. Or in December, 1896?

Ans. I cannot tell you.

Ques. Or in July, 1897?

20 Ans. I think Mr. Murphy had at that time transferred his stock, and if that is the case, there would be James G. Carroll, John M. Carroll, Thomas J. Breslin, and myself.

Ques. Now, have you in mind the proceedings of the meeting of July, 1897, respecting the setting aside of the profits ascertained before a meeting held in that month?

Ans. The proceedings would most likely be the same as they were at other times—requesting the bookkeeper to enter the amounts on the book.

30 Ques. Well, do you remember how you set aside the profits at that time, and to whom?

Ans. In the usual manner.

Ques. And how was that, Mr. Fries?

Ans. By crediting the preferred stockholders with fifteen per cent. and dividing the rest of it in three parts and crediting it to John M. Carroll, Mr. Breslin and myself.

Ques. Now, have you in mind to whom you distributed or set aside the profits in that month, who held the preferred stock and who held the common stock to which you allotted these profits?

Mr. Garrison: I think that must be immaterial as to the preferred stock.

The Court: Yes; that is immaterial as to the preferred stock.

10

(Exception noted for the defendant.)

Ques. Do you know, Mr. Fries, what pro rata dividend, if any, was declared upon the stock of the company at any of those meetings at which you had ascertained the profits and had set aside the profits to the various stockholders?

Ans. No; I could not tell you. The common stock was not taken into consideration, the pro rata holdings, in dividing the profits.

20

Ques. How was it divided?

Ans. I have already stated; it was divided into three parts.

Ques. And you had, prior to that time, allotted fifteen per cent. to the preferred stock?

Ans. Yes, sir.

Mr. Garrison: Fifteen per cent. of what? Make that clear.

30

Ques. Fifteen per cent. per annum, was it not?

Ans. Yes, sir.

Ques. Not fifteen per cent. of the profits, fifteen per cent per annum.

Ans. Fifteen per cent. per annum.

Ques. Well, you did not allot any uniform pro rata

upon holdings of common stock, as you considered common stock, at that time?

Ans. No, sir.

Ques. Did you allot or declare or set aside a uniform pro rata upon the holdings of stock of all the stockholders of the company at that time?

Mr. Garrison: I object to that question as before.

10 (Objection sustained; exception noted for the defendant.)

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. Was there, at any time, Mr. Fries, to your knowledge, a uniform pro rata dividend declared upon the stock out of the profits of the company?

20 Mr. Garrison: I think it must be immaterial whether the dividend given to the preferred stockholders and the dividend given to the common stockholders happened to be uniform. He stated what they did, and if it was uniform, I do not suppose that it makes any difference at all.

The Court: Do you object to the question?

Mr. Garrison: I object to it and am arguing it.

The Court: The objection is sustained without argument.

30

(Exception noted for the defendant.)

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. Was there at any time, Mr. Fries, a uniform pro rata dividend declared upon the common stock of the

company, as you understood the common stock, at any time?

Ans. Yes.

Ques. When was that?

Ans. Prior to the issuance of the preferred stock.

Ques. And when was the preferred stock issued?

Ans. Either 1893 or 1894, I am not sure.

Ques. It was not issued at the time of the incorporation of the company?

Ans. No, sir.

Ques. And did not bear any special dividend or have any special right prior to 1894? 10

Ans. Not if it was not issued until then; no.

Ques. And the common stock, some of the common stock that existed at that time, was made into preferred stock?

Ans. Yes.

Ques. There was no new issue of preferred stock, was there?

Ans. No, sir.

Ques. Was there any new issue of any common stock? 20

Ans. There was at the time the capital was increased from \$50,000 to \$75,000. I do not remember what time that was.

Ques. It was increased from \$50,000 to \$75,000, and the preferred stock was stock of original issue, was it not, or rather, the stock stated in the original certificate of incorporation?

Ans. Yes; the \$25,000 additional stock was issued after the preferred stock was created.

Ques. Were you one of the officers that assisted in increasing the capitalization of the company? 30

(Objected to; objection sustained. Exception noted for the defendant..)

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. Do you know, Mr. Fries, of your own knowledge, that the capital was increased?

(Objected to as not cross-examination; objection sustained. Exception noted for the defendant.)

C. G. GARRISON, [L. S.]
Justice Supreme Court.

By Mr. Garrison:

10

Ques. In answer to a question on cross-examination, you stated in 1893 or 1894 there occurred a change, when three of the directors retired from the business; just explain what you meant by that answer.

Ans. Those three directors accepted preferred stock for their common stock.

Ques. And after that, how many common stockholders were there?

Ans. Three.

20

Ques. And who were they?

Ans. John M. Carroll, P. J. Breslin and Frederick Fries.

By Mr. Gilleran:

Ques. How much did they each hold?

30 Mr. Garrison: I object; this was brought out not by me on direct examination; it was brought out entirely upon cross-examination, and I have only asked him to explain an answer that he made on cross-examination.

The Court: The objection is not sustained. (To Mr. Gilleran.) You mean now, how much did they hold of common stock?

Mr. Gilleran: Yes, sir.

The Court: That may be answered.

(Exception noted for the plaintiff.)

Ques. How much did these three stockholders that you have just named each hold of the common stock after 1893 or 1894, whichever period it was—Carroll, Breslin and yourself?

Ans. I do not know the exact amounts.

Ques. And was all of John M. Carroll's stock common stock? **10**

Mr. Garrison: I object to that. That certainly is not cross-examination in respect to this question that was brought out.

(Objection overruled. Exception noted for the plaintiff.)

Ans. No.

Ques. Some of it was preferred stock? **20**

Ans. Yes, sir.

Ques. All of it was; is that true?

Ans. From the time that it was issued it was. He had some of his own and he bought Mr. Murphy's.

Ques. And did that stock continue preferred stock down to date, as far as you know?

Mr. Garrison: I object to that as not cross-examination. **30**

The Court: The question may be put.

(Exception noted for the plaintiff.)

Ans. It appears on the books as such.

Ques. Did it or didn't it, Mr. Fries? I want a direct answer.

Ans. It did.

Ques. Did you, at any time, or did the three men you have named as having met as a board of directors, after ascertainment of the profits of the business, and on the setting aside of those profits and the handing of a slip of paper to your bookkeeper, ever give to Mr. John M. Carroll any profits upon preferred stock?

Mr. Garrison: I object to that.

10 The Court: The objection is sustained.

(Exception noted for the defendant.)

C. G. GARRISON, [L. S.]
Justice Supreme Court.

JOHN M. CARROLL, sworn.

20 By Mr. Garrison:

Ques. Mr. Carroll, you were served with a subpoena *duces tecum* in this case, were you not?

Ans. Yes, sir.

Ques. Have you brought with you a book beginning about in 1895 or 1896 that is known as the Private Ledger?

Ans. I think so; yes, sir.

Ques. Please produce it.

30 (Book produced.)

Ques. This is the book, is it?

Ans. Yes, sir.

(Said book is marked for identification "L. M. G., 1.")

Ques. Did you bring with you the minute book that is known as "the old Minute Book" and that had minutes in it from the date of the incorporation down until 1899?

Ans. I don't think so.

Ques. Why did not you bring that book with you?

Ans. Because I didn't have it.

Ques. When did you last see that book?

Ans. In court here.

Ques. When?

Ans. At the time this cause was tried.

10

Ques. Which case?

Ans. This Fries case was tried here.

Ques. Not this case, you don't mean?

Ans. No, sir.

Ques. And who had that book at that time when you last saw it?

Ans. Who had it?

(Question repeated.)

Ans. It was on the table here, in Court.

20

Ques. Who had brought it to Court?

Ans. The Fries-Breslin Company.

Ques. The company of which you are president?

Ans. Yes, sir.

Ques. Did it ever come back into your office after the trial of the Fries suit?

Ans. No, sir.

Ques. Have you ever seen it since?

Ans. No, sir.

Ques. Did you, at that time, at the time of the trial of the Fries suit, give that old minute book to any of your counsel?

30

Ans. It was brought here to Court; I don't know where it got from the Court.

Ques. And you have not seen it since the trial of the Fries suit?

Ans. No, sir.

No cross-examination.

HOWARD CARROW, ESQ., SWORN.

By Mr. Garrison:

10

Ques. Judge, you were concerned in the trial of what has been called the Fries suit, were you not?

Ans. I was.

Ques. At that time, did you see the book that is called the "old Minute Book?"

Ans. Yes.

Ques. Where was it?

Ans. It was here; it was in the case with the other books.

20

Ques. And what was the last that you knew of that book—I mean as to its disposition?

Ans. I have no personal recollection; I only know what I have heard from others.

Ques. Do you know of your own knowledge?

Ans. Of my own knowledge, I don't know anything about it.

Ques. Of your own knowledge, when was the last time you saw it?

Ans. I don't recollect.

30

Ques. Was it after that case?

Ans. I don't recollect ever having seen any of the books after that case.

Ques. You haven't the book in your possession?

Ans. I haven't the book; I do not recall all the books; they came together; there was a large bundle of books, the same as you have here.

Ques. Well, we haven't those here.

Ans. Well, they were here, anyhow, and I think they were all together; how they got out of the Court House I don't know, but I never saw that book, as I now recall, after it was in Court at that time after the trial.

No cross-examination.

CHRISTOPHER J. KELLY, sworn.

10

By Mr. Garrison:

Ques. Mr. Kelly, do you remember the book of the Fries-Breslin Company that has been referred to as the "old Minute Book?"

Ans. Yes, sir.

Ques. When was the last time you saw that book?

Ans. To the best of my recollection I saw that book in the factory after the trial.

Ques. After the trial of the Fries case?

20

Ans. Yes, sir.

Ques. Mr. Kelly, were you ever connected in any capacity with the Fries-Breslin Company?

Ans. Yes, sir; I was bookkeeper for the Fries-Breslin Company.

Ques. When did you become bookkeeper?

Ans. In August, 1897.

Ques. And how long did you remain bookkeeper?

Ans. Until February, 1902.

Ques. And when was what has been called the Fries case, about when?

30

Ans. It was in 1901, the latter part of 1901.

Ques. Now, then, after the trial of that case, did you ever see this book that has been called the "old Minute Book?"

Ans. I am most positive I did.

Ques. And where?

Ans. At the factory.

Ques. And where is the factory?

Ans. Ferry road, below Atlantic avenue.

Ques. In Camden?

Ans. Yes, sir.

Ques. Whereabouts in the factory was this book?

Ans. In the safe.

Ques. And that is the last you saw of it?

Ans. Yes, sir.

10

Mr. Garrison: We now call on the defendant, under a notice, to produce this old Minute Book. The notice has been served.

Mr. Gilleran: We have no such book.

Ques. Did you ever see any of the minutes that were in it, in that old Minute Book.

Ans. Yes, sir.

20

Ques. Do you recollect seeing any minute with respect to a salary to be paid to Mr. Thomas J. Breslin and to Mr. John M. Carroll?

Ans. Yes, sir.

Ques. What was that resolution?

Ans. That they should be paid ten thousand dollars a year salary.

Ques. Did it state how they were to be paid, whether semi-annually or annually?

Ans. I don't remember that.

30

Ques. During the time that you were bookkeeper, how often, with respect to the ascertainment of profit or loss, did you balance your books?

Ans. Every six months.

Ques. And was anything done by Mr. Breslin, Mr. John M. Carroll and Mr. Fries with respect to the results of this balancing of the books?

Ans. Well, after the inventory was taken and the various items charged off, which would be the expense of the company, the balance was handed to me to credit up to their accounts.

Ques. Now, did you ever see Mr. Fries, Mr. Breslin and Mr. John M. Carroll, at any period, going over these balances that you gave them off the books, this inventory of these balances that you speak of?

Ans. Yes, sir.

Ques. How often did they do that?

10

Ans. Oh, well, very frequently.

Ques. How often was this balance taken off by you?

Ans. Every six months.

Ques. How often did they go over the results of your balancing the books?

Ans. Well, about every six months they would go over the work when it was finished.

Ques. They would go over the work when it was finished?

Ans. Yes, sir.

Ques. At what periods was it finished?

20

Ans. January and July of each year.

Ques. Of each year?

Ans. Of each year; yes, sir.

Ques. And after they had gone over it, what was given to you, if anything?

Ans. I was given the amounts on a slip of paper, to be credited to the accounts.

Ques. The accounts of whom?

Ans. First, the preferred stock, 15 per cent.

Ques. Fifteen per cent. of its face?

30

Ans. Fifteen per cent. per annum.

Ques. Of its face?

Ans. Of its face value.

Ques. And then what?

Ans. Then the balance in three equal divisions.

Ques. And to whom did these three equal divisions go?

Ans. John M. Carroll, T. J. Breslin, Frederick Fries.

Ques. And they were entered by you on what book?

Ans. In the private ledger.

Ques. What is called the "Private Ledger?"

Ans. The "Private Ledger."

Ques. What else went to these accounts, to the accounts of these people in the Private Ledger, just generally speaking?

10 Ans. Credit for salary and any amounts that they paid in to the company; and they were charged with the amounts that they drew out for their own accounts.

Ques. I show you a book which has been marked for identification "L. M. G. 1," and ask you whether that is the book you refer to as the "Private Ledger?"

Ans. Yes, that is the book.

Ques. Could you arrive at a trial balance or strike a balance of the financial condition of the Fries-Breslin Company without using that book, Exhibit L. M. G. 1?

20 Ans. Not without having the amounts from that book; no, sir.

Ques. Not without having the amounts from that book?

Ans. No, sir.

Ques. What accounts are there in there that are necessary to be used in arriving at a trial balance or a balancing of the books of the Fries-Breslin Company—the names of the accounts, I mean?

30 Ans. The accounts of John M. Carroll, Frederick Fries, T. J. Breslin, merchandise, cash, bills payable, bills receivable, expense.

Ques. Was this one of the books actually used in keeping the books of the company?

Ans. Yes, sir.

Ques. Was there any other book kept by you in which these same accounts, or any part of these same accounts, were also written—any other ledger?

Ans. No, sir.

Ques. Please turn in that book to the account of T. J. Breslin.

Mr. Gilleran: Do you offer it in evidence, Mr. Garrison?

Mr. Garrison: After I have verified it I will offer it in evidence.

10

Ques. On page 105, appears whose account?

Ans. T. J. Breslin's.

Ques. Under head of January 1, 1899, who entered the items, "Balance, \$47,003.92?"

Ans. I did.

Ques. Where did you get that item from, those figures?

Ans. From the balancing of the account of the previous year, the previous six months, on the page above there.

20

Ques. And where did you get the items which appear in the figures "July 1, 1898, \$38,020.26"?

Ans. From the previous page, page 52. (Indicating.)

Ques. On page 51, whose accounts appears?

Ans. T. J. Breslin's.

Ques. Was that the beginning of T. J. Breslin's account in that book?

Ans. In this book; yes, sir.

Ques. And when did you begin to keep that book?

Ans. In August, 1897.

Ques. Now, coming down to August, does that appear on that page?

30

Ans. August, 1897? Yes. (Referring to page 51.)

Ques. What is the first item of credit that appears as made by you on this book after August, 1897, or in August, 1897, after you began to keep the book?

Ans. On this account?

Ques. Yes; on the account of T. J. Breslin?

Ans. December 30th, 1897, "Salary, \$750."

Ques. What is the item immediately above that one that you have read?

Ans. "Amount brought forward, \$23,332.72."

Ques. Is that a credit?

Ans. That is a balance.

Ques. A balance of credit?

Ans. A balance of credit, yes.

Ques. And where did you get those figures from?

10 Ans. Those figures were on the book when I took charge. That was a credit.

Ques. The first item, then, that you entered, independent item, was December 30, 1897; what was that for?

Ans. An item of "Salary, \$750."

Ques. What is the next item?

Ans. "Interest, \$572.24."

Ques. That was interest on what amount, on what money?

Ans. Interest on the balance, and part of the amount
20 of stock held by Mr. Breslin.

Ques. And were similar items of interest credited on any other accounts?

Ans. Yes.

Ques. Whose?

Ans. On Frederick Fries' and John M. Carroll's.

Ques. The next item that appears in your handwriting is "Cash, \$6,542.48," is it not?

Ans. Yes, sir.

Ques. What is that item for?

30 Ans. That was the proportion of profits for that six months.

Ques. Shown by what?

Ans. Shown by the inventory.

Ques. Where did you get that item from; who gave you that item, the item I have just referred to?

Ans. Mr. Fries.

Ques. Now, what is the next item that you have entered on the credit side?

Ans. January 20, 1898, \$2.00.

Ques. What was that for?

Ans. I don't recall that.

Ques. Where would it appear?

Ans. In the cash book.

Mr. Garrison: I call now for the cash book.

10

(Book produced.)

Ques. There is the entry; tell us what it is (indicating entry in cash book).

Ans. "T. J. Breslin, credit, M. C. L's Sons, \$2.00."

Ques. Well, what does that mean?

Ans. I don't recall what that was; it was some money paid in on his account.

Ques. Take the next item on the private ledger made by you, and tell us what that is?

20

Ans. "T. J. Breslin, January 28, T. P. Curley, \$1.50."

Ques. What does that mean?

Ans. I think those items were for tickets.

Ques. How did he get credit for them?

Ans. Checks, I believe. Checks sent while he was out on the road, and credited to his account.

Ques. The company got the money and credited his account?

Ans. Yes.

Ques. Well, now, what is the next credit item on the Private Ledger? 30

Ans. "January 31."

Ques. How much?

Ans. \$1.50 from the Petty Cash Book.

Ques. What does that mean?

Ans. I imagine it was the same thing.

Ques. Money paid in to your company, belonging to T. J. Breslin?

Ans. It was money paid in to the company, belonging to T. J. Breslin.

Ques. And you credited him with the amount?

Ans. Yes, sir.

Ques. What is the next item appearing on the Private Ledger?

Ans. April 26.

Ques. How much?

Ans. \$4.00.

10 Ques. What was that for?

Ans. It is marked "Wilson, \$4.00," money paid in to the company for him.

Ques. And credited to Breslin's account?

Ans. Credited to Breslin's account.

Ques. What is the next item?

Ans. April 30, \$10.00; marked "T. J. Fitzgerald, \$10.00."

Ques. What does that mean?

Ans. Money that was paid in by Fitzgerald for Mr. Breslin's account.

20 Ques. Now, what is the next item?

Ans. June 30, "Salary, \$750."

Ques. And what is the next item?

Ans. "Interest, \$747.31."

Ques. Interest on what?

Ans. Interest on the balance as shown by this book and his surplus of stock.

Ques. Was similar interest credited to anybody else?

Ans. Yes, sir.

30 Ques. On similar accounts?

Ans. Yes, sir.

Ques. Whose?

Ans. John M. Carroll and T. J. Breslin.

Ques. Who else?

Ans. John M. Carroll, T. J. Breslin and Frederick Fries, three accounts.

Ques. What is the next credit item?

Ans. The next credit item is \$9,862.65.

Ques. What is that?

Ans. That is division of profits for that six months.

Ques. And the next item?

The Court: Is there any substantial dispute over any of these items as they appear on the books of the company?

Mr. Armstrong: There is no question as to whether they appear on the books of the company at all, but this is not the book of the company. 10

The Court: I understand, but is it worth while to go over and verify the fact that these appear on these books? Whatever questions arise cannot arise on that fact; they must arise on the legal status of the evidence. The question is whether there is any utility in going over and ascertaining whether each item on this bill of particulars is an item which this witness finds upon a book which you say you do not accept. It is rather imposing on the Court the mere manual work which a typewriter and stenographer would be amply competent to do. 20

Mr. Armstrong: As to that I do not think there is any dispute.

The Court: Is there any utility in keeping Court and counsel here merely to effect this comparison? It is not customary. I never saw it done in a case where there was really no meritorious question to be raised on that question of comparison. It leaves the rights of the parties altogether untouched. Can you not put the question now in some general way so as to get from the witness the testimony that you want without having to go over precisely the same formula as to each item? 30

Mr. Garrison: Why, yes; if they consent to it.

The Court: Put it in a general way, leaving all legal questions to be discussed afterwards. I notice in following you it has been identical with the bill of particulars so far.

Ques. Does the right hand side of that book, on the pages of which T. J. Breslin's account appears, contain a correct statement of the items of credit passed to the credit of T. J. Breslin upon that book?

10 Ans. Yes, sir.

Ques. What appears upon the left hand side? What are the items upon the left hand side—just in one word you can give them.

Ans. Charges, withdrawals.

Ques. Now, I desire to call your attention to the item under date of July 31, 1900, \$5,440.50, and an item under date of November 30, 1901, of \$5,440.50, and ask whether those two items are balancing items?

Ans. Yes, sir.

20 Ques. The item that appears under date of July 31, 1900, for \$5,440.50 was marked for what, on the book?

Ans. Brimfield Manufacturing Company."

Ques. And it is there charged against Mr. Breslin's account, is it not?

Ans. Yes, sir.

Ques. Subsequently does there appear any item which gives him credit for that same amount of money on that same account?

Ans. Yes, sir.

Ques. Under what date is that?

30 Ans. November 30, 1901.

Ques. And what is the amount there credited to him?

Ans. \$5,440.50.

Ques. Now, under date of July 31, 1901, on the left-hand column, what is the second item on the page?

Ans. Charge to "Surplus" of \$64,363.25.

Ques. That appears on the charge side of this account?

Ans. Yes, sir.

Ques. That appears against Mr. Breslin's account?

Ans. Yes, sir.

Ques. How did you come to enter that item? Tell us the facts with respect to your entry of that item?

Ans. How I arrived at that amount?

Ques. Yes; the facts—how you came to enter that item on the books?

Ans. Why, I went through the T. J. Breslin—in fact, all of the accounts, T. J. Breslin's, John M. Carroll's and Frederick Fries', and ascertained the amounts credited those accounts for division of surplus and interest from a certain period, I think it was 1892. 10

Ques. From 1892?

Ans. I think that was the date.

Ques. All right.

Ans. And charged that to Mr. Breslin, Mr. Carroll and Mr. Fries.

Ques. Charged the whole of it to each of them?

Ans. One-third of it, or the amount on each account; it is different on each account; each one had a different credit. 20

Ques. You have selected the credit of "Interest" and "Profits?"

Ans. Yes, sir.

Ques. That had theretofore been credited to each one of these gentlemen?

Ans. Yes, sir.

Ques. And then you charged it off to them under the head of "Surplus;" is that right?

Ans. Yes, sir; that is right. 30

Ques. Did that bookkeeping entry mean that that money was paid them, or had been paid them; that it had been withdrawn from the funds of the company?

Ans. This entry?

Ques. Yes.

Ans. No, sir.

Ques. Who told you to do that?

Ans. Mr. Carroll.

Ques. Which Mr. Carroll?

Ans. Mr. John M. Carroll.

Ques. Now, on the side giving Mr. Breslin credit in this book there appears an item under the same date, July 31, 1901, of \$14,480.66 (we do not claim credit for this in the bill of particulars); how did that item of credit come to be entered to his credit?

10 Ans. That was to adjust a charge of June 30, 1899.

Ques. A charge against him?

Ans. A charge against him, charged as loss on the six months from January to July, 1899, and when I charged up the items that he had credit for formerly, I credited him with this item.

Ques. Who told you to do that?

Ans. Mr. Carroll.

Ques. Mr. John M. Carroll?

Ans. Mr. John M. Carroll.

20 Ques. When you came to enter this item back here under head of June 30, 1899, of loss, was that \$14,480.66 the total loss of that six months?

Ans. No; that was one-third of the loss.

Ques. One-third of the loss was charged to each.

Ans. Yes.

30 Mr. Garrison: I now offer this book, heretofore marked for identification "L. M. G. 1," in evidence, so far as the items thereon appear of credit to T. J. Breslin, and withdrawals from that credit which are in favor of the company.

Mr. Armstrong: We object to the admission of this book in evidence as a company book. The only proof that there has been here that it is a company book is the fact that certain accounts needed to be referred to by this witness, as bookkeeper, to balance his book are con-

tained therein. The whole book, of course, cannot speak as a company book, if that be true. The very name of it is that it is a private ledger, and it contains private personal accounts as distinguished from the company's accounts, as this witness has already testified; and, therefore, as a book of the company, it is incompetent and is immaterial to this issue.

The Court: It may be admitted.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

10

Ques. Up to the time at which you left, which I understand you to say was the 20th of February, 1902, was Mr. Breslin still there?

Ans. Yes, sir.

Ques. Actively employed in the business of the company? 20

Ans. Yes, sir.

Ques. Which part of the business did Mr. Fries attend to during the time that you were there?

Ans. The manufacturing part.

Ques. And what part did Mr. Carroll have?

Ans. Financial.

Ques. And what part did Mr. Breslin have?

Ans. The selling of the goods and designs, and making of the designs. 30

Mr. Garrison: I now call on the defendant, under notice, to produce the account of the company which will show the items of credit to the credit of T. J. Breslin, and the items of withdrawal of T. J. Breslin against that credit, prior to the first date in Exhibit P2, which date is, on the credit side, December 13, 1895, and on the charge side, January 31, 1896.

(Defendant produces book, which is marked on the back, "Ledger 2.")

Mr. Garrison: I desire to offer page 318 of this book, wherein appears the credits to the account of T. J. Breslin, and withdrawals from the account of T. J. Breslin. I offer this book in evidence now.

(Said book is marked "Exhibit P3.")

10

Mr. Garrison: I now call upon the defendant company for Ledger No. 1.

(Book produced.)

20

Mr. Garrison: On Ledger No. 2, Exhibit P3, I desire to offer in evidence the account of T. J. Breslin, on pages 20 and 21, showing credits given to him and withdrawals charged against him. I also offer in evidence this book, which has been produced by the defendant, so far as T. J. Breslin's account is concerned, on page 433 thereof, this being Ledger No. 1, showing the items of credit in his favor and the items of withdrawals charged against him; also pages 207, 287 and 433 of this Ledger No. 1, showing the account of T. J. Breslin, the credits to him and the withdrawals against him.

(Ledger No. 1 is marked "Exhibit 4 of plaintiff.")

30

Cross-examination of CHRISTOPHER J. KELLY.

By Mr. Gilleran:

Ques. Mr. Kelly, you know nothing of those earlier books of the company, do you?

Ans. No, sir.

Ques. Except as you found them in the office when you became employed there?

Ans. No, sir.

Ques. I take it you commenced your work there about 1897?

Ans. Yes, sir; correct.

Ques. And you found this Private Ledger where?

Ans. In the safe.

Ques. What was said to you by any one of the directors, or anyone in the office who employed you and who had charge of you, respecting that book? 10

Ans. Nothing.

Ques. Did they say anything to you at any time respecting the manner of entry in that book?

Ans. What I should enter?

Ques. Yes.

Ans. At the periods when they would take the balances I was given amounts to enter, yes; to the credit of various accounts.

Ques. You have a dividend account in that book, have you not? 20

Ans. Yes, sir.

Ques. Was anything said to you respecting that dividend account, at any time, by any of the directors?

Ans. Yes, sir.

Ques. When was anything said to you, and what was said to you and by whom?

Ans. Can I look at that book to verify my memory on that? I have the book here.

Ques. Yes. 30

Ans. (Referring to the book)—

Mr. Garrison: It does not seem to me that this is cross-examination of anything that was brought out on direct examination, unless they desire to make the gentleman their own witness. The book has been offered in evi-

dence. This examination cannot be based upon anything with the idea that they propose to show anything as to the probative force of this book; and if they desire to show affirmatively anything in regard to the Dividend Account it seems to me that would be making him their own witness.

10 The Court: Well, there has been no question asked yet about the Dividend Account. There is nothing that would indicate what the purpose is. General cross-examination may go, of course, as to what relation this witness bore to these books, in so far as the corporate management was concerned. I would not interrupt the examination until it became more evident that it was irrelevant.

(Question repeated.)

20 Mr. Garrison: I say that is not cross-examination, and is irrelevant and immaterial.

(Objection overruled. Exception noted for the plaintiff.)

Ans. In December, 1897, I made an entry in this Dividend Account and Mr. Fries told me that it was not a Dividend, it was a Division of Profits, and should not have been entered in the Dividend Account.

30 Quns. And did he direct you as to which account it was to be entered in?

Mr. Garrison: I ask to have that last answer stricken out as surely not cross-examination.

Mr. Pancoast: He was asked, I think, in the examination-in-chief, what passed between him and different persons that led to these entries in the book; now, this cross-

examination requires him to tell what further instruction he received from these same people in relation to this book.

The Court: The motion will not prevail.

(Exception noted for the plaintiff.)

(Question repeated.)

Ans. Simply to the credit of John M. Carroll, Frederick Fries and T. J. Breslin. **10**

Ques. In what form, Mr. Kelly?

Ans. As a division of profits.

Ques. Turn to the records and see how those amounts were entered in December, 1897, or January, 1898?

Ans. On T. J. Breslin's account, it is entered, page 21, "Cash, \$6,542.48."

Ques. Nothing but cash? No other item on the book? No other designation of that item except cash?

Ans. No other designation.

Ques. Was that a cash item, Mr. Kelly? **20**

Ans. No, sir.

Ques. Why did you make it cash, Mr. Kelly?

Ans. Because it had been so entered before, and I was instructed to continue the same entries.

Ques. Look in the account of T. J. Breslin, and see where it has been entered as cash before, and under whose instructions, if you know?

Ans. July 3, 1897, it is entered. I do not know under whose instructions.

Ques. Did you enter it? **30**

Ans. No; I did not.

Ques. You were not employed by the company at that time?

Ans. No.

Ques. Well, you don't know what that item is of July 3, 1897, do you?

Ans. I can tell you what it is marked, but I do not know anything about it.

Ques. Yes; but you personally do not know anything about what it was?

Ans. No.

Ques. Nor do you know what a cash item on the 31st of January, 1896, is, nor what a cash item on the 6th of July, 1896, is?

Ans. Well, now, that question puzzles me a little bit. I have looked them up and know where they came from.
 10 They were a division of profits, but I did not enter them.

Ques. Were they actual cash taken from the business or presented to the business?

Ans. They were entered through the cash book, and this was designating the place where they were first entered.

Ques. Was that cash given to the company by Mr. Breslin?

Ans. No, sir.

Ques. Then it was not cash, as a matter of fact?

20 Ans. It was not cash.

Ques. And simply represented what was considered part of the profits, as you understand them?

Ans. Yes, sir.

Ques. Turn to the item of December 13, 1895. I ask you if you personally know what that cash item is?

Ans. No, sir.

Ques. Or of the 13th of May, 1895?

30 The Court: Let me ask you, is it cross-examination of this witness, who was not examined at all, except as to his actual work as bookkeeper, to go back several years anterior to his employment as bookkeeper?

Mr. Gilleran: He was the one who verified the book when it was offered in evidence.

The Court: He only verified it as to the part when

he was bookkeeper. Obviously you cannot cross-examine a man as to a period with respect to which he was not examined in chief, and with respect to which, in the nature of things, he cannot testify.

Ques. Turn to the account, Mr. Kelly, of June 30, 1898, and tell us how that is entered and the mode of it?

Mr. Garrison: An item of charge or credit?

Mr. Gilleran: An item of credit.

10

Ans. There are three items under that date.

Ques. Please state what they are?

Ans. Salary, \$750; interest, \$747.31; cash, \$9,862.65.

Ques. What was that cash, Mr. Kelly?

Ans. Division of profits.

Ques. It was not actual money put into the business by Mr. Breslin?

Ans. No, sir.

Ques. Turn to the items of December 31, 1898, and tell me what those are? 20

Ans. Salary, \$750; interest, \$1,004.97; cash, \$10,029.94.

Ques. Was that cash put into the business by Mr. Breslin?

Ans. No, sir.

Ques. It was represented in the same way as the others, or did represent the same thing as the others?

Ans. Yes, sir.

Ques. Now, the interest items that you have referred to, you have stated were interest on balances, and interest on the stock; what do you mean by interest, on the amount of stock carried by Mr. Breslin? 30

Ans. On the amount over; I think it was \$15,000.

Ques. That is, he was credited with interest on a balance upon the books of the company—

Ans. (Interrupting) The amount of stock held by him, added to his balance on the books of the company, over and above \$15,000.

Ques. These interest items are carried in that way right through the books of the company?

Ans. Yes, sir.

Ques. Who calculated that interest, Mr. Kelly?

Ans. I did.

10 Ques. Did you do that yourself, or were the figures given to you by Mr. Fries or any other director of the company?

Ans. No; I did that myself.

Ques. You think you did it yourself. Under what regulation or instruction?

Ans. Sometimes from Mr. Fries, sometimes from Mr. Carroll. They both had something to say about it.

Ques. And you did as you were told about it?

Ans. Yes, sir.

20 Ques. Now, you remember the slips that were handed to you by Mr. Fries, respecting these cash entries, while you were employed by the company?

Ans. Yes, sir.

Ques. And can you now state from your best recollection what those slips contained?

Mr. Garrison: At what time?

Ques. At any time that you were directed to make these entries in the books of the company?

30 Ans. They usually contained the full amount of the inventory, from which was deducted the charge items, the items of expense of the business. From the balance there was deducted the fifteen per cent., or seven and a half per cent. for the six months, to the preferred stock, and the balance divided up into three.

Ques. Before there was a division composing the fifteen per cent. of the preferred stock and an equal divi-

sion of the balance, you had already credited interest upon the balance due to Mr. Breslin, and also fifteen per cent. on the stock over the \$15,000, had you not?

Ans. Yes, sir.

Ques. Now, wasn't it a fact that this was an account book kept between these three men (referring to the private ledger, so-called), these three gentlemen whom you saw about the mill, as their own private account and regulation of their business affairs; wasn't that stated to you by them as being the fact?

10

Ans. When?

Ques. At some time during your employment in that business, more particularly when you went into the employment of the Fries-Breslin Company?

Ans. No, sir; not until very much later. It was stated very much later.

Ques. Well, that account book contained the private account of these three stockholders and directors, did it not?

20

Mr. Garrison: I object to that as immaterial.

(Objection sustained. Exception noted for the defendant.)

C. G. GARRISON, [L. S.]
J. S. C.

Ques. Was there any other item, any other account, or any other bookkeeping of Thomas J. Breslin in that so-called private ledger, excepting such as has been offered in evidence and which you have gone over?

30

Ans. With him as an individual?

Ques. Either as an individual or as a director, or in any way?

Ans. No. There are some items, I think, in here of travelling expenses.

Ques. Well, are those not included in the credits to him, or debits against him, rather?

Ans. It is a separate account. There is an account of "T. J. Breslin, Travelling Expenses."

Ques. Now, do you remember, at any time, in the trial of any case, being asked, under oath, the following question: "Was it a corporation book (referring to this private ledger)? Now, you are asked to say whether it was a book of the corporation, or whether it was a private book containing the private accounts of these gentlemen?" and answering as follows: "It contained the private account of the three stockholders, and was considered their private ledger?"

Mr. Garrison: I object. This can only be relevant upon one subject, and that is as to the admissibility of that book. We have reached and passed that point. It can have no other possible relevancy.

The Court: I am inclined to think he could not be contradicted upon an irrelevant matter. I think I will admit the question.

Mr. Garrison: Now, I desire to object, if your Honor pleases, as to the form of the question. He is now asked whether, at any time, on any trial. The time and the trial should be specified unquestionably, and the entire circumstances, certainly, as the only purpose of this must be to impeach the credibility of the witness by showing that he has testified in some other trial differently from what he does now.

Ques. Did you, Mr. Kelly, on the so-called Fries trial, to which reference has already been made, so testify?

Mr. Garrison: Now, I object to that. That is not a proper question to put to any witness, as to whether on the so-called Fries trial, to which reference has been made, he so testified. Let him ask whether, in the trial of a cer-

tain case between certain parties, he was asked a certain question and made a certain answer.

The Court: I think the question is sufficient.

(Exception noted for the plaintiff.)

Ans. I testified that the book was considered a private ledger.

Ques. Did you also state, on your oath, that it contained the private accounts of the three stockholders? 10

Mr. Garrison: I object to that as immaterial, whether it contained the private account of the three stockholders.

The Court: Examination will be permitted on this line.

(Exception noted for the plaintiff.)

Ans. Yes, sir. *

Ques. And will you now state by whom it was considered their private ledger? 20

Mr. Garrison: I object to that.

The Court: The objection is sustained to that.

By Mr. Garrison:

Ques. In the trial of the suit of Frederick A. Fries vs. the Fries-Breslin Company, by which side were you subpoenaed to testify? 30

(Objected to as immaterial, irrelevant and incompetent. Objection overruled. Exception noted for the defendant.)

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ans. By Frederick Fries.

Ques. And appeared for the plaintiff, did you, in that suit, on the side of Frederick Fries, or for the corporation?

Ans. Frederick Fries subpoenaed me.

Ques. And which side called you, the defendant or the plaintiff?

Ans. Who was the plaintiff?

Ques. Why, Mr. Fries was the plaintiff.

10 Ans. Why, Mr. Fries called me.

Ques. You said on your cross-examination that you were told long after you went there first, that this Exhibit P2 was a private ledger; just explain that, please.

Ans. I do not think there was anything said about what it was until the trial of Frederick A. Fries' suit.

Ques. Up to the time of the trial of the Fries suit, had anything been said to you about whether this was a private book or a book of the corporation?

Ans. No, sir.

20 Ques. And the Fries' suit was tried about when?

Ans. I think it was in the latter part of 1901.

Ques. And you went to this company in 1897?

Ans. Yes, sir.

Ques. From 1897 up to 1901, did you use this book as one of the books of the corporation?

Ans. Yes, sir.

30 Ques. In the examination in the suit of Fries vs. the Fries-Breslin Company, were you asked this question and did you make this answer: "Q. When you balanced your books, was it possible to balance them without the use of the private ledger?" to which you answered, "No, sir."?

Ans. Yes, sir.

Ques. And were you also asked in that suit this question: "Q. That was, then, one of the books of the corporation? A. Yes, sir"?

Ans. Yes, sir.

Plaintiff rests.

Defendant, by its counsel, moves the Court to non-suit the plaintiff on the ground that if the items of profit and cash claimed in plaintiff's declaration are, as a matter of law, disallowed, the plaintiff has no cause of action; and that, upon the plaintiff's proofs before the Court he has failed to establish, *prima facie*, the disputed items as either cash profits or dividends, and therefore should be non-suited.

10

The Court: I am prepared to dispose of this as a motion in the trial, and I suppose I had better state the ground as it occurs to me, although it does not control the parties necessarily; however, I think it would be more satisfactory, and I will do it briefly.

Whatever names may be applied to the aggregate items which are discussed on this motion to non-suit, I take it that the plaintiff's right to recover must include proof of three different things, all of which must be done by the directors:

20

In the first place, the directors must have ascertained and set aside, of the profits of the concern for a stated period, a fund as dividends on the common stock.

Next, the directors must say what individualized proportion of that belongs to each stockholder, or to the plaintiff, at least, which is the only thing concerned in this suit.

Third, the directors must have indicated at what period the property of the plaintiff in that individualized portion became fixed.

30

Now, the first of these, namely, the ascertainment of the existence of profits, and the amount of profits, and the setting aside of those profits as dividends can be done solely by directors. Nothing that the stockholders, even all of them, can do, can take that duty away. That is a statutory duty that the directors must perform.

There is proof in this case sufficient to go to the jury upon that question.

- Now, the next question is a difficult one, and that is about the separation of this fund so as to individualize the proportion that the plaintiff sues for. I agree with the defendant that the normal powers of a Board of Directors, under our statute and under the common law use of the term "dividend," carries with it an imperative meaning. Nothing more appearing, no other powers being given to the directors, a fund is only legally divided by the directors when they have divided it according to the face value of the stock. That brings in a peculiar feature of this case, and that is that every act and every step which was taken by this Board of Directors, if the jury find that they did act as a board, was taken in the presence of, to the knowledge of, and with the co-operation and acquiescence of every holder of every share of common stock. That, then, raises the question what may the stockholders do as to this second feature, namely, what may stockholders do with respect to the powers of directors in apportioning that which they have already declared to be a dividend fund? As I have said, the directors alone can do nothing except to divide it pro rata to the face of the stock. A stockholders' meeting could do nothing to aid any different division of the fund. But I do hold, upon this motion, that where a fund has been set aside so that its ultimate destination is to the holders of every share of stock in whatever proportion the law fixes, that if the holders of every such share authorize the Board of Directors to make a distribution different from that which would be the normal mode, that, as to the plaintiff, who receives the result of that action, it is a corporate act; it is an act of the directors approved and authorized by the holder of every share of the stock. In other words, all of those who had any interest in it appropriated it in this way. So that would become the act of the directors specifically authorized in this plenary manner.

Then the third step would be the setting of this aside in an individualized form, fixing the period of time at which it became the property of the plaintiff. There is proof to the effect that the directors, with the co-operation of the stockholders, after making this "irregular dividend," as I should call it, authorized it to be placed upon a book, where it was, according to the proof, open to the immediate withdrawal of the plaintiff. That would be proof, I think, to go to the jury as to the complete renunciation of any corporate control of the plaintiff's right to that fund. 10

Now, as I say, these views are sufficient to guide my conduct on this motion; I do not consider that they have any effect at all in guiding the views counsel on either side may take in their further disposition of the case.

Whereupon the defendant, by its counsel, prays a bill of exceptions to the refusal of the Court to grant the defendant's motion to non-suit the plaintiff, and a bill of exceptions is allowed and sealed accordingly.

C. G. GARRISON, [L. S.] 20
Justice Supreme Court.

Mr. Garrison: I want to say, if there is any question raised about this matter of demand upon the plaintiff, I desire to prove that such demand was made.

The Court: You may unquestionably open the case to do that.

Mr. Garrison (to Mr. Pancoast): Do you question 30 that, Judge?

The Court: If you can put it in now here in the judge's room, it would be just as well; if not, you can open the case outside and put it in.

(Two letters produced by Mr. Garrison and shown to Mr. Pancoast.)

Mr. Pancoast: Well, I admit that that is my letter, but it don't seem to me that that proves any demand for these profits.

10 The Court: That is as to the legal effect of it; but the question is, are you willing that these letters be put in as exhibits in the case, their legal effect to be discussed if it becomes important?

Mr. Pancoast: I admit that that is my letter; I do not admit its competency and relevancy to this suit.

20 Mr. Garrison: I offer these two letters, one dated 9-9, 1902, to the Fries-Breslin Company, signed "Thomas E. French," and the letter in reply is dated September 13, 1902, from D. J. Pancoast to Thomas E. French. I offer the letters just as though they were now before the jury.

Mr. Pancoast: We object to them on the ground of incompetency and irrelevancy.

The Court: I overrule the objection.

(The two letters are marked respectively Exhibits 4 and 5 for plaintiff.)

30 Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

THE CASE FOR THE DEFENDANT.

Mr. Gilleran opens the case for the defendant.

JOHN M. CARROLL, recalled.

By Mr. Gilleran :

Ques. Where do you live, Mr. Carroll?

10

Ans. Haddon Heights.

Ques. What is your business?

Ans. Manufacturer.

Ques. Of what?

Ans. Rugs.

Ques. And where?

Ans. Camden, New Jersey.

Ques. What is your particular office or condition as such manufacturer—are you president of any company, or officer of any company?

20

Ans. I am president of the Fries-Breslin Company.

Ques. The defendant in this case?

Ans. Yes, sir.

Ques. You are also a stockholder of that company?

Ans. Yes, sir.

Ques. How much stock do you own in that company?

Ans. Four hundred shares.

Ques. What sort of stock?

Ans. Common stock.

Ques. You are an officer and director of that company?

30

Ans. Yes, sir.

Ques. What office do you hold, or offices?

Ans. President and treasurer.

Ques. When did you become the treasurer of the corporation?

Ans. When the organization was first formed, in 1891, I think.

Ques. When did you become its president, Mr. Carroll?

Ans. 1893.

Ques. What stock did you hold in the company on its incorporation?

Mr. Garrison: I object to this. It seems to me it must be immaterial what stock this witness held on the incorporation of the company.

10

(Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. Mr. Carroll, when did you become the owner of the four hundred shares of stock to which you have just testified?

20

(Objected to as incompetent, immaterial and irrelevant. Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. Mr. Carroll, how many shares of stock did you hold in the Fries-Breslin Company on the 31st day of May, 1892?

30

(Objected to as incompetent, irrelevant and immaterial. Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. Also how many shares of stock did you hold on the 15th of November, 1892?

(Same objection. Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly. **10**

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. Or on the 25th day of April, 1893?

(Same objection.)

The Court: What is the significance of that last date? Does it have some relation to some event? **20**

Mr. Gilleran: Yes, sir; those are the dates on which the corporation assumed to declare dividends.

The Court: Well, what is the date of the last one there? What happened on that date?

Mr. Gilleran: The 25th of April, 1893.

The Court: Is that within this suit, within the time of this suit? **30**

Mr. Garrison: Yes. The account that was put in evidence from the books of the company I think runs back to 1891.

The Court: Well, my idea about the relationship of this witness' holding is this, that for the purpose of showing how the shares were divided upon any of the occasions covered by the bill of particulars in this case, that is, when it was claimed that there was a division of the profits, that it is entirely relevant to show how the stock was divided at that time for the purpose of showing that this dividend was not one which was pro rata to the stock. Now, if these dates which have any incidents connected with them have such relation, it should be stated by counsel. The naked date conveys nothing that is relevant to the case.

10

Ques. I call the attention of the Court and witness to the statement in the bill of particulars of the plaintiff in this case that on the 25th of April, 1893, a claim is made for cash or profits of the defendant, and I ask you what your holdings of stock in that company at that time were?

20 (Objected to as irrelevant and incompetent. Objection not sustained. Exception noted for plaintiff.)

Ans. At what date?

Ques. In April, 1893.

Ans. I think one hundred shares.

Ques. Now, Mr. Carroll, will you state, and I call your attention to a claim of the plaintiff in this case for a share of the profits on the 13th of May, 1895, and ask you what your holdings of stock in the defendant company were at that time?

30

(Objected to as irrelevant and incompetent. Objection not sustained. Exception noted for plaintiff.)

Ans. Three hundred shares, in 1895.

Ques. This is May 13th, 1895?

Ans. Yes.

Ques. Do you remember when the capital stock of the company was increased?

Ans. In 1893.

Mr. Gilleran: I now offer in evidence the certificate of increase of capital stock of the Fries-Breslin Company, and also a certified copy of an annual report of the Fries-Breslin Company, filed in the office of the Secretary of State on the 11th of September, 1902.

10

Mr. Garrison: I shall object to each of those as incompetent, immaterial and irrelevant to any issue we are trying here in this suit.

The Court: It may be admitted.

(Exception noted for plaintiff.)

Ques. Mr. Carroll, you say that you owned one hundred shares on the incorporation?

20

(Objected to as immaterial and irrelevant.)

(Question withdrawn.)

Ques. Now, Mr. Carroll, did you acquire any of the stock of any other incorporator or shareholder of the Fries-Breslin Company at any time?

(Objected to as incompetent, irrelevant and immaterial. Objection overruled. Exception for the plaintiff.)

30

Ans. One hundred shares from P. J. Murphy.

Ques. When, to the best of your recollection, did you receive or acquire those shares of P. J. Murphy?

(Same objection. Objection overruled. Exception for the plaintiff.)

Ans. In 1895, to the best of my recollection.

Ques. Now, at what time in 1895?

(Same objection. Objection overruled. Exception noted for plaintiff.)

10 Ans. I think in the fall; I do not remember the date.

Ques. When were you elected president of the Fries-Breslin Company?

Ans. 1893.

Ques. Who was president prior to your holding that office?

Ans. Mr. P. J. Murphy.

Ques. And who were the directors at the time that you were elected president of the company?

Ans. All six gentlemen that have been named.

20 Ques. Will you kindly name them again?

Ans. Mr. Murphy, Mr. E. F. McGill, T. J. Breslin, Frederick Fries, James G. Carroll, and myself.

Ques. Now, do you know as to the meeting at which you were elected president of the company—do you know all the incidents of that meeting, and what transpired there?

Ans. Well, I know some of it.

Ques. Was there an election of secretary at that meeting?

30 Ans. Yes, sir.

Ques. Who was elected secretary?

Ans. Frederick Fries.

Ques. You still continued to be the treasurer?

Ans. Yes, sir.

Ques. Now, at any subsequent meeting of the Board of Directors who attended, if there was any such meeting?

Ans. There were no meetings since that time on to, I think—I don't remember the date that Mr. Fries and I held a meeting for the purpose of creating a mortgage; I don't remember the date; it was some time in 1896—I think it was in 1896; I am not sure of the date.

Ques. Now, Mr. Fries and you held a meeting of the directors, as you say?

Ans. Yes, sir.

Ques. Now, was there at any time subsequent to your election as president of the company, to your knowledge, a meeting of the directors of the Fries-Breslin Company, down to the time you have named? 10

Ans. No, sir.

Ques. And this meeting you have named was composed of you and Mr. Fries?

Ans. Yes, sir.

Ques. Who were the directors of the company in 1896?

Ans. Frederick Fries, T. J. Breslin, and myself.

Ques. T. J. Breslin and James G. Carroll were not at the meeting? 20

Ans. No, sir.

Ques. Were they summoned there by any notice?

Ans. No, sir.

Ques. And did not appear and sign any waiver of notice of meeting?

Ans. No, sir.

Ques. Nor did James G. Carroll attend a meeting, if any was held, of directors, subsequent to 1893, until about what time? 30

Mr. Garrison: I object to that. This witness has testified that there were no meetings of directors since that time, namely, 1893, until Mr. Fries and he held a meeting to create a bond of which he is not sure of the date. It is surely improper to ask him whether Mr.

James G. Carroll attended what this gentleman says never existed, namely, a meeting.

The Court: (To Mr. Gilleran.) The point is that if there was no meeting it is then inconceivable that a gentleman should have attended that which did not occur; the witness is asked to answer an inconceivable state of facts.

10 Ques. Subsequent to 1896, Mr. Carroll, or at the time at which this meeting was held by you and Mr. Fries to create the mortgage, when was the next meeting of the board of directors of the Fries-Breslin Company?

Ans. There were no meetings until last April—no; I am wrong in the date—yes; April, I think, April 9th.

Ques. Last year, 1902?

Ans. Yes, sir.

Ques. And who attended that meeting?

20 (Objected to as immaterial and irrelevant.)

The Court: Was that before or after the beginning of this suit?

Mr. Gilleran: It was before the beginning of this suit.

The Court: It may be admitted.

30 (Exception noted for the plaintiff.)

Mr. Garrison: I would like to first ask whether there were any minutes of this meeting; if there are minutes in existence, I think we ought to have the minutes to determine their relevancy.

The Court: Well, thus far there is no question which involves the use of the minutes; the next question may.

(Last question repeated.)

Mr. Garrison: I say if there is a written minute of that meeting I think that that would be the proper way to prove it.

The Court: Well, you may cross-examine as to whether there was a minute or not.

By Mr. Garrison:

10

Ques. Mr. Carroll, this meeting which you say was held in April, 1902, were there any minutes of that meeting, written minutes?

Ans. Some short minutes written by Mr. T. J. Breslin.

By Mr. Gilleran:

Ques. Do you know where those minutes are?

Ans. I do not.

Ques. Have you looked about in the office of the Fries-
Breslin Company for such minutes? 20

Ans. Yes, sir.

Ques. Have you found any such minutes?

Ans. No, sir.

Ques. Who was the secretary of the meeting?

Ans. Mr. T. J. Breslin.

Ques. Who was present at that meeting?

Ans. Mr. James G. Carroll, Mr. T. J. Breslin and myself?

Ques. Did you do anything respecting the distribution
of profits or declaration of a dividend on that day? 30

Ans. No, sir.

Ques. When was the next meeting, if any, of the board of directors of the Fries-Breslin Company?

Ans. Some time in the latter part of May, I think; I think the 29th.

Ques. Were there minutes of that meeting?

Ans. No; no minutes of that meeting.

Ques. Who attended that meeting?

Ans. The same gentlemen, Mr. James G. Carroll, Mr. T. J. Breslin and myself.

Ques. Were there, to your knowledge, any by-laws of the Fries-Breslin Company at any of the times that you have stated?

Ans. No, sir; that was the day we decided to get by-laws.

10 Ques. When was the next meeting of any of the board of directors of the Fries-Breslin Company?

Ans. On the 11th of June.

Ques. What year, Mr. Carroll?

Ans. The same year.

Ques. 1902?

Ans. 1902.

Ques. Were there minutes of that meeting?

Ans. Yes, sir.

20 Ques. Who kept the minutes of that meeting?

Ans. Mr. T. J. Breslin.

Ques. The plaintiff in this case?

Ans. Yes, sir.

Ques. Was he then secretary?

Ans. Yes, sir.

Ques. Did you see the minutes which he kept on that day?

Ans. I saw them; yes, sir.

Ques. (Handing witness two papers.) I show you these papers and ask you if you have seen them before?

30 Ans. Yes, sir.

Ques. And I ask you what they are, if you know?

Ans. Minutes of the meeting of June 11, 1902, written by Thomas J. Breslin.

Ques. Minutes of the meeting of what?

Ans. The Board of Directors of the Fries-Breslin Company.

Ques. I show you another paper, and ask you if you have seen that before?

Ans. Yes, sir.

Ques. And what is that?

Ans. That is the call for the meeting, and a meeting of the stockholders, also.

Ques. A meeting of the stockholders of the company on that day?

Ans. Yes, sir.

10

Mr. Garrison: I desire to cross-examine this witness with respect to these papers before they are passed upon.

The Court: Do you offer them now?

Mr. Gilleran: Yes, sir; I want to identify the signature of the secretary before offering them.

Mr. Garrison: He said they were in the handwriting of Mr. Breslin, as I understood him, did he not?

20

Mr. Gilleran: Yes, sir; and the signature—

Mr. Garrison: Well, there is no signature on one of them.

Ques. (Showing witness one of the papers referred to, being the second sheet of the minutes of the Board of Directors' meeting.) Look at the signature on that paper.

Ans. That is Mr. T. J. Breslin's signature, as secretary.

30

The Court: Are these exhibits offered now?

Mr. Gilleran: Yes, sir.

The Court (to Mr. Garrison): You may cross-examine.

By Mr. Garrison:

10 Ques. Mr. Carroll, are these two papers the minutes of the corporation with respect—or, rather, take the one of June 11th, 1902, of a directors' meeting—are those the minutes that the corporation retains with respect to the transactions of that meeting, or have you those minutes recorded in the minute book?

Ans. Those are the original minutes, written by Mr. Breslin. I think they are copied in the minute book.

Mr. Garrison: I now call for the minute book to see whether the minute is put into the minute book.

(Minute book produced.)

20 Ques. (Showing witness entry in minute book.) This is the thing in the minute book itself?

Ans. Yes, sir.

Ques. Now, with respect to the stockholders' meeting of the same date, does that appear in some book that is called the minute book of the company, or is this the only record that you have of that—by "this" I mean this piece of paper that you have produced here?

Ans. Yes, sir.

30 Mr. Garrison: I shall object to the papers as incompetent and irrelevant.

The Court: Will you state why? Is there any date that concerns it? Is it after the date of the beginning of this suit?

Mr. Garrison: I think the suit was begun after this.

The Court: Well, then, I will admit them.

(Exception noted for the plaintiff.)

(Directors' minutes marked Exhibit C of defendant;
stockholders' minutes marked Exhibit D of defendant.)

By Mr. Gilleran:

Ques. (Showing witness minute book heretofore produced.) Is that the minute book of the Fries-Breslin Company, Mr. Carroll? **10**

Ans. Yes, sir.

Mr. Gilleran: In addition to the original minutes made by the plaintiff, the secretary in this case, I offer in evidence the minute book of the Fries-Breslin Company, embracing a copy of those original minutes.

Mr. Garrison: I shall object to the reception of the book, and desire to be heard on that. **20**

The Court: Only so much of the book as has been proved to be relevant is offered; the original draft has been admitted, and now the offer is of the copy called for on cross-examination, as I understand.

Mr. Garrison: I only called for it to see if there was such a thing in the book.

The Court: I think it is admissible. **30**

Mr. Garrison: This meeting was held in June of 1902, The plaintiff makes no claim here for any profit or dividends as having been declared subsequent to the 31st of July, 1899.

The Court: Well, that is what I have been trying to get at several times.

Mr. Garrison: You asked me about the beginning of the suit.

10 The Court: Well, I meant what was covered by the suit, by the bill of particulars. I have asked on each occasion whether the dates of the meetings were within or after the matters concerning which this suit is brought. (To Mr. Gilleran.) Now, what is the relevancy of a meeting of this corporation held subsequent to a time for which there is no issue in this suit—assuming that to be a fact?

Mr. Gilleran: There is an issue in this suit respecting claims made by this plaintiff down to and including the 7th day of October, 1902.

20 Mr. Garrison: I do not think Mr. Gilleran attempts to show that we claim any dividend or division of profits after the 31st of July, 1899.

The Court: What are the items that are later than 1899?

Mr. Garrison: Interest and salary and matters of that description.

30 The Court: Now, what other point, Mr. Garrison, do you make against the admission of the book?

Mr. Garrison: My point is, sir, that the plaintiff directed inquiry to those actions of the board which had to do with the declaration of dividends down to the 31st of July, 1899, since which he makes no claim whatever for any dividends; therefore, it is immaterial and irrelevant as to what some board of directors might have done after the 31st day of July, 1899.

The Court: Now, what do you say is the relevancy of this, Mr. Gilleran?

Mr. Gilleran: We have, I think, in our plea, as matter of defense, set up the declaration of a dividend subsequent to this time, and the receipt of it by the plaintiff, for which no credit is given in his statement of his case, and which we have set up as a matter of defense.

The Court: The question now is what is the materiality of these minutes to any matter that is in controversy? 10

Mr. Gilleran: Our theory of the case is that the company at all times controlled those funds remaining in its possession, and that any minutes respecting the disposition or control of any of the property of the company in its meetings of stockholders or its meetings of directors are relevant to the claims made by this plaintiff, he being a stockholder and director.

The Court: I think you can only offer evidence that is relevant to the claims made by the plaintiff. I supposed the items here covered those periods. That is the question I have been trying to get at and that I have asked about. I understand the condition of it is this, that the claims and cash are not dependent upon the question of the validity of the corporate acts, that the questions that are at issue on that ground are these declarations of dividends, and that the last one that is in the issue made by the plaintiff, which he wants to recover, was in 1899. 20

Mr. Gilleran: There is also a dispute respecting the items of interest which accumulated. 30

The Court: I do not understand there is anything in these minutes which bears upon that, any action.

Mr. Gilleran: Yes, sir; the minutes of the meeting of the board of directors to control this condition of affairs passed by-laws at the meeting at which these minutes were made.

The Court: Well, could it be retroactive so as to cover the claim now in issue prior to 1899?

10 Mr. Gilleran: As to cover the condition of the company at that time, as I understand it.

The Court: Well, just draw my attention to the language in the minute that is relevant to the issue; that will be the best way.

Mr. Gilleran: (Reading from minutes.) "Mr. Breslin moved that the directors be directed to pass upon by-laws, said by-laws being submitted by the president of the company. Motion seconded. Carried."

20 The Court: Just read to me what item there is that you consider bears upon the validity of the action of the Board in 1899, or whatever is the date of the last debatable dividend sued for?

Mr. Gilleran: (Reading.) "It was moved—

The Court: You need not read it out, just call my attention to it and I will read it.

30 (Minutes of the board of directors handed to the Court.)

The Court: That says "hereafter." How does that bear upon what was done theretofore?

Mr. Gilleran: Well, it would show that no record was kept prior to that time.

The Court: Oh, it would not be admissible on that ground; it must be on the ground that it evidences a corporate action in some way different from that which the suit claims.

(After further discussion of the question, at side bar, out of hearing of the stenographer, the Court overruled the offer of the Book of Minutes.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly. **10**

C. G. GARRISON. [L. S.]
Justice Supreme Court.

Mr. Garrison: To do away with the necessity of proof I will admit that Mr. Breslin received \$375 on account of dividends, August 1, 1902, as stated in the notice. I will admit that.

Mr. Pancoast: The statement is as follows: "Aug. **20**
1, 1902. Credit by dividend of 3 per cent. 125 shares of capital stock of defendant company, \$375." That is correct, as I understand it?

Mr. Garrison: Yes, sir; some time in 1902.

By Mr. Gilleran:

Ques. Mr. Carroll, did you, subsequent to June, 1902, have a meeting of the board of directors of the Fries-Breslin Company? **30**

(Objected to as incompetent, immaterial and irrelevant to any issue in this suit.)

The Court: What is the competency of a meeting at that date?

Mr. Gilleran: It will go to show that a dividend was declared by the Fries-Breslin Company, out of which this plaintiff received a proportion, which is in issue in this suit and which is admitted by the plaintiff as having been received.

Mr. Garrison: We admit that we received the dividend.

10 The Court: I think you may show that, then, if it be certainly relevant; I think you have a right to show it. Counsel is not obliged to accept the method of proof which counsel suggests.

Mr. Garrison: I will have to withdraw the admission, then.

(Exception noted for the plaintiff.)

20 Ques. Did you hold a meeting of the board of directors subsequent to June 11, 1902?

Ans. Yes, sir.

Ques. When?

Mr. Garrison: I desire to object to each of these questions and have exceptions allowed if your Honor admits them.

The Court: (To the witness.) Answer the question.

30 (Exception noted for the plaintiff.)

Ans. On July 14th.

Ques. Who attended that meeting?

Mr. Garrison: I object, and desire to cross-examine the witness and see if there were minutes.

The Court: Cross-examine.

By Mr. Garrison:

Ques. Were there any minutes kept of this meeting on the 14th of July, 1902?

Ans. Yes, sir.

By Mr. Gilleran:

Ques. I show you some papers and ask you what those are? 10

Ans. Those are a waiver of the meeting, signed by myself—

Mr. Garrison: No, no; don't tell us the contents.

Ques. What are all these papers, beginning on page 61 of this book which you have in your hand, and ending on page 65? 20

Ans. Those are minutes of the meeting of the 14th of July.

Ques. Of the board of directors of the Fries-Breslin Company?

Ans. Of the board of directors; yes, sir.

Ques. Did the board of directors at that meeting declare a dividend?

Mr. Garrison: I object to that.

The Court: I suppose the minutes are the best proof of that. 30

Mr. Gilleran: I offer the minutes in evidence.

By Mr. Garrison :

Ques. How do you know these are the minutes, Mr. Carroll?

Ans. I know that that is my signature.

Ques. Well, but how does your signature make that the minutes of the corporation?

Ans. Because I was there.

10 Ques. Well, how does your signature make that paper the minutes of the corporation?

Ans. Well, I suppose because I know it was the minutes; I was actually there and signed them.

Ques. When did you first see these minutes; when was the first time that you ever actually saw these typewritten papers?

Ans. I think on the 14th of July.

Ques. How long before the meeting?

Ans. I don't remember exactly.

Ques. Who did you get them from?

20 Ans. Counsel.

Ques. From Judge Pancoast?

Ans. Yes; some of them.

Ques. Well, didn't they all come from Judge Pancoast?

Ans. No, sir; not all of them.

Ques. Who prepared those which Judge Pancoast did not prepare?

Ans. Mr. Gilleran.

Ques. And they were then taken to the meeting and were afterwards signed, you say?

Ans. Yes, sir.

30 Ques. And that is the way you know they were the minutes?

Ans. Yes, sir.

Mr. Garrison: I object to these minutes because they are irrelevant, incompetent and immaterial to any issue that can be tried in this suit.

Mr. Gilleran: Well, I think the very best proof is offered. It is shown that this man was the president of the meeting—

The Court: I understand you must prove the minutes by the person who made the minutes, or by the regular custodian who at the time participated in their preparation; I do not understand that any person who was present at the meeting can sign a typewritten copy

10

Mr. Garrison: He did not sign them; they are signed, "J. A. McKeown, Secretary."

The Court: Well, I do not understand that a non-recorder can make a typewritten copy of minutes, minutes, simply by signing them. A minute implies something that was done at the time, and derives its whole validity from that. Sufficient does not appear now to admit these documents as documentary proof of anything.

20

Ques. In April, 1893, prior to your becoming president of the Fries-Breslin Company, and the date mentioned here on which cash, part of profits, was set aside to the plaintiff in this case, that is, April 25, 1893, two years after the incorporation of the company, how many shares of stock in the company did you own?

Mr. Garrison: I object to that as incompetent, irrelevant and immaterial. Objection not sustained. Exception noted for plaintiff.)

30

The Court: Has he not already testified that he owned one hundred shares on that occasion?

Mr. Gilleran: Perhaps he has, sir.

The Court: (To the witness.) Haven't you already testified to that?

The Witness: Yes, sir.

Ques. I bring your attention to the certificate increasing the capital stock of the Fries-Breslin Company by 250 shares, in May, 1893; did you acquire any of those shares in the Fries-Breslin Company?

10 (Objected to as incompetent and irrelevant. Objection overruled. Exception noted for plaintiff.)

Ans. Two hundred of them.

Ques. Did you acquire those immediately on the increase of the capital?

(Same objection. Objection overruled. Exception noted for plaintiff.)

20 Ans. Yes, sir.

Ques. So in May, 1893, you owned three hundred shares of stock in the Fries-Breslin Company?

(Same objection. Objection overruled. Exception noted for plaintiff.)

Ans. Yes, sir.

Ques. In May, 1893, on this increase of capital stock, you became the president of the Fries-Breslin Company,

30 as I understand it, or about that time?

Ans. Yes, sir.

Ques. And you succeeded, as I think you have stated, P. J. Murphy as president of the company?

Mr. Garrison: I object. If he has stated all of these things well and good.

The Court: The examination is irregular, and is not a proper examination of the witness at all.

Ques. Did you, prior to Mr. Murphy ceasing to be president of the company, or about that time, acquire any of his stock in the company?

(Objected to as irrelevant and immaterial. Objection overruled. Exception noted for plaintiff.)

Ans. Not before he retired.

10

Ques. Well, about the time he retired, did you?

(Same objection. Objection overruled. Exception noted for plaintiff.)

Ans. Yes, sir.

Ques. Now, when did Mr. Murphy sell you—or when did you acquire his stock and he retire from the Fries-Breslin Company?

20

(Objected to as irrelevant. Objection overruled. Exception noted for plaintiff.)

Ans. He retired after I bought his stock.

Ques. Did he retire from the company soon after his retirement as president?

Ans. Yes, sir.

Ques. Now, about how soon after?

Ans. About a year and a half.

30

The Court: I think the witness had better state a year and a half from what date.

Ques. A year and a half from what date?

Ans. From the incorporation of the company.

The Court: A year and a half from the incorporation of the company?

The Witness: No, not the incorporation; I mean from the increase of the capital.

Ques. About a year and a half after May, 1893, you say Mr. Murphy finally retired from the company?

Ans. Yes, sir.

10 Ques. Do you figure that correctly to be about the end of 1894?

Mr. Garrison: That must be a general calculation as to time; I don't see that it does any good. I object to the question.

(Objection overruled. Exception noted for plaintiff.)

20 Ans. I don't remember the date.

Ques. But about that time?

Ans. Yes, about that time.

Ques. Now, through the acquiring of Mr. Murphy's stock in the company, how many shares did you then own?

(Objected to as incompetent and irrelevant. Objection overruled. Exception noted for plaintiff.)

Ans. Four hundred.

30 Ques. On the 13th of May, 1895—and I draw your attention to an item in the plaintiff's bill of particulars that on that day he received share of profits, cash, of the Fries-Breslin Company—how many shares of stock did you own in the company?

(Objected to as incompetent, irrelevant and immate-

rial. Objection overruled. Exception noted for plaintiff.)

Ans. Four hundred.

Ques. How long did you continue to hold those four hundred shares?

(Same objection. Objection overruled. Exception noted for plaintiff.)

10

Ans. I still hold them.

Ques. Did you hold them all since that time?

(Same objection. Objection overruled. Exception noted for plaintiff.)

Ans. Yes, sir.

Ques. Now, do you know the holdings of stock of the various stockholders in the Fries-Breslin Company?

Ans. Yes, sir.

20

Ques. Did you know the holdings of stock on all the dates—and I show to you the dates on which the plaintiff claims there was a distribution or setting aside of cash, part of profits of the Fries-Breslin Company, to wit, from the 25th of April, 1893, down to and including the last day stated in the bill of particulars, that is, from the 25th of April, 1893, down to and including the 30th day of June, 1898—did you know the various holdings of stock in the Fries-Breslin Company between those dates?

30

(Objected to as irrelevant and incompetent.)

Ans. Yes, sir.

Ques. Now, will you state, to the best of your knowledge, what the holdings were?

(Objected to as irrelevant and incompetent.)

The Court: I suppose that is not the best way to prove it; but I do suggest, as there is no earthly question about these facts, that they get them in without a prolonged calling for stock books, etc.

Mr. Garrison: I have not made any such call.

The Court: Well, your exception would cover that, because this is not a relevant way to prove this matter.
 10 There is a relevant way to prove it.

Mr. Garrison: Did I say I objected because it was "incompetent?"

The Court: Yes.

Mr. Garrison: Well, I strike out the word "incompetent."

The Court: Then your objection is overruled, and
 20 the witness is permitted to testify.

Mr. Garrison: I object to the relevancy and materiality of this question.

(Objection overruled. Exception noted for plaintiff.)

Ans. On June, 1898, I held—

30 The Court: You had better begin at the other end; begin at the anterior date.

Ques. What was the first date?

Ans. April 25, 1893.

Ques. Begin at that date?

Ans. At that date I had one hundred shares; James

G. Carroll, one hundred; E. F. McGill, fifty shares; T. J. Breslin, seventy-five; Frederick Fries, seventy-five.

Ques. Now, state any change, if you know, in ownership of those shares, or of increased capital, subsequent to that time?

(Same objection. Objection overruled. Exception noted for plaintiff.)

The Court: As soon as there occurred any change **10**
state what the change was.

Ans. In 1893 we had an increase of \$25,000, two hundred and fifty shares; out of that I got two hundred.

By the Court:

Ques. Just state how many shares each had after that increase?

Mr. Garrison: It is understood my objection goes to **20**
each of these questions?

The Court: That is understood fully.

(Exception noted for plaintiff.)

Ans. After that I held three hundred; Frederick Fries had one hundred; T. J. Breslin had one hundred. It did not change the other holdings at all. **30**

By Mr. Gilleran:

Ques. Subsequent to that time was there any change of ownership in the shares of Mr. Murphy and Mr. McGill?

Ans. Yes.

Ques. State what that change was?

Ans. I got Mr. Murphy's; Frederick Fries got twenty-five of Mr. McGill's fifty, and T. J. Breslin got the other twenty-five.

Ques. Now, state about the time that that took place, to the best of your recollection.

Ans. To the best of my recollection it was in 1895. I don't know the date.

Ques. But you stated that it was prior to the 13th of May, 1895, when a setting aside of profits, an item of which appears in the plaintiff's claim, was made?

Ans. Yes.

Ques. Now, Mr. Carroll, do you recollect any meeting of the board of directors at which the question of preferred stock was raised or spoken about or acted upon?

Ans. Yes, sir.

Ques. About when was that?

Ans. In 1893.

20 Ques. Do you know whether any minute or any minutes of that meeting were taken, and if so, by whom?

Ans. If there were any taken, they were taken by Mr. McGill.

Ques. Do you know of any minutes of that meeting that are now in existence?

Ans. I do not.

Ques. Did you know at one time of the existence of a minute book of the Fries-Breslin Company?

Ans. I did.

30 Ques. Did you see that minute book?

Ans. Yes, sir.

Ques. When did you last see that minute book, and where?

Ans. In the other court room.

Ques. In the other court room?

Ans. Yes, sir.

Ques. On the other side of that door?

Ans. Yes, sir.

Ques. In this building?

Ans. In this building.

Ques. And when was that?

Ans. That was during the Fries trial, in October, I think October, 1892.

Ques. October when?

Ans. 1891.

Ques. 1901?

Ans. 1901; yes, sir.

Ques. You have looked for those minutes and that minute book? 10

Ans. Yes, sir.

Ques. And you have not been able to find it, or them?

Ans. No, sir.

Ques. Will you state what took place at that meeting, and when that meeting took place, respecting preferred stock of the Fries-Breslin Company?

Ans. Mr. Fries and Mr. Breslin wanted to have preferred stock made—

20

Mr. Garrison: I ask you to have that stricken out. I could not foresee that the witness was going to say that.

The Court: Yes; it is irresponsive to the question, entirely.

Ques. State what was done at the meeting, not what the desire of the people was—what was actually done.

Ans. Excuse me. Why, the meeting tried to make preferred stock and did not—

30

Mr. Garrison: I object, and ask that that be stricken out.

The Court: The answer may be stricken out as irrelevant. (To the witness.) The question is just what did they do; did they pass a resolution or do anything as a meeting?

The Witness: I don't know how to answer that question, Judge.

Ques. Was there a formal resolution offered by any director in the meeting?

Mr. Garrison: I object to that. He is asked what was done.

10 The Court: I think this witness can certainly state what was done; he was present, and if they read newspapers, they did that; if they took a vote on something, they did that, and if they decided they would not take a vote, they did that. (To the witness.) Just state what they did, what you saw.

Ans. They took a vote on preferred stock.

Ques. What sort of a vote did they take? How did they do it? What was the manner of doing it?

20 Ans. They offered a resolution to make the common stock preferred stock, and mark it "15 per cent. cumulative."

Ques. How much of the stock?

Ans. Three hundred and fifty shares.

Ques. That was three hundred and fifty shares of the common stock in the original capitalization?

Ans. Yes, sir.

Ques. When was that meeting held?

Ans. In 1893.

Ques. And who attended that meeting?

30 Ans. Mr. James G. Carroll, Mr. P. J. Murphy, Mr. E. F. McGill, T. J. Breslin, Frederick Fries and myself.

Ques. And what further was done respecting—

The Court: Won't you get from the witness what the vote was upon this, whether it was unanimous?

Ques. What was the vote upon that resolution?

Ans. Four of the directors voted for the preferred stock; two voted against it.

Ques. Do you remember who voted for and who against it?

Ans. Yes, sir; Mr. Fries and Mr. Breslin and myself and Mr. James Carroll. Mr. Murphy and Mr. McGill voted against it.

Ques. What further was done respecting the stock, the common stock, which by this resolution you sought to make preferred stock?

10

Mr. Garrison: In the first place, I do not understand the question, but I don't know that I have to; but unquestionably it is not a proper question to ask this witness.

The Court: I think the question is improper.

Ques. What did the board of directors do, further, if anything, respecting that preferred stock?

20

Mr. Garrison: Do you mean at that meeting?

Mr. Gilleran: At that meeting.

Ans. They had no preferred stock, and they simply said to write the word "Preferred"—

Mr. Garrison: I object to that, if that is not what they did.

30

Ques. No; what did they do—not your own opinion of it, but what was actually done, the physical, visual things done?

Ans. I don't remember what they did do.

Ques. Did you get a certificate for common stock of the Fries-Breslin Company?

Ans. Yes, sir.

Ques. Was anything done at that meeting respecting the certificate, or the stock of which you received a certificate?

Ans. The secretary wrote the word "Preferred" across the face of it.

Ques. (Showing witness paper.) Is this the certificate to which that was done?

Ans. Yes, sir; that was the certificate.

10

Mr. Gilleran: I offer that certificate in evidence.

(Objected to as incompetent, immaterial and irrelevant.)

The Court: It may be admitted.

(Exception noted for the plaintiff.)

20

Ques. On how many certificates representing shares of stock, if you know, did the secretary write that memorandum of "15 per cent. preferred, cumulative," or a similar designation?

Ans. On four of those.

Ques. Now, how many shares were represented by the certificates on which this was placed?

Ans. Three hundred and fifty shares.

Ques. State who were the holders of those certificates at that time, if you know, in addition to this one held by yourself?

30

Ans. P. J. Murphy, James G. Carroll and E. F. McGill.

By the Court:

Ques. Did that include all that those three gentlemen held of their stock?

Ans. Yes, sir; at that time.

By Mr. Gilleran:

Ques. These three hundred and fifty shares, so marked as stated by you "Preferred stock, 15 per cent. cumulative," have been outstanding ever since, have they?

Ans. Yes, sir.

Ques. To your knowledge?

Ans. Yes, sir.

Ques. And who owned or acquired those, if there was any change of ownership, prior to 1898?

Ans. I received Mr. Murphy's; Mr. Breslin received twenty-five of E. F. McGill's, and Mr. Fries received twenty-five of E. F. McGill's.

Ques. Were those the only preferred shares ever issued by the Fries-Breslin Company?

Ans. Those three hundred and fifty?

Ques. Yes.

Ans. That is all.

Ques. Did you hold any meeting of the Board of Directors of the Fries-Breslin Company at which anything was done respecting this preferred stock, excepting the meeting the proceedings of which you have testified to?

Ans. No, sir.

Ques. Subsequent to the marking of this preferred stock "15 per cent. cumulative," did the Board of Directors of the Fries-Breslin Company meet?

Ans. Yes, sir.

Ques. And who were present at that meeting?

Ans. All of the stockholders.

Ques. Kindly recite who all the stockholders then were?

Ans. Mr. Murphy, Mr. James G. Carroll, Mr. Frederick Fries, Mr. T. J. Breslin, Mr. E. F. McGill, and myself.

Ques. Was the memorandum endorsed upon the cer-

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30

tificate, or written upon the face of the certificate, the only restriction or regulation or privilege respecting that stock which was then declared and passed upon by the meeting?

10 Mr. Garrison: I object to that. Mr. Gilleran is undoubtedly not on the stand and cannot be cross-examined; he is testifying now, by merely making a statement to this witness, who nods his head. I submit that is an entirely improper method of examination.

(Objection overruled. Exception noted for plaintiff.)

Ans. Yes, sir.

Ques. Now, when, do you remember, or do you recollect, that there was a meeting of the Board of Directors in January of 1894?

Ans. There were no meetings in January, 1894.

20 Ques. There was no meeting in January, 1894, of the Board of Directors?

Ans. No, sir.

Ques. Was there any meeting in July, 1894, of the Board of Directors?

Ans. No, sir.

Ques. Or in January or July of 1895?

Ans. No, sir.

Ques. Or 1896?

Ans. No, sir.

Ques. Or 1897?

30 Ans. No, sir.

Ques. Or 1898?

Ans. That particular meeting—I do not remember the date—that Mr. Fries and I had was the only meeting, as I testified before.

Ques. But between 1894 and June 30th, or July 1st, 1898 (I draw your attention to the fact that on the 30th

of June, cash, one-third of profits, six months, is claimed as set aside to the plaintiff in this case), was there any meeting of the Board of Directors?

Ans. No, sir.

Ques. Was any minute kept of any meetings during that time?

Ans. No, sir.

Ques. Did you have a meeting of the stockholders of the Fries-Breslin Company during that time?

Ans. No, sir.

10

Ques. Did you have any by-laws during that time?

Ans. No, sir; we never had by-laws.

Ques. Do you know of any regulation respecting a stated meeting of the Fries-Breslin Company during that time?

Mr. Garrison: I object to that.

The Court: It is immaterial what he knew.

20

Ques. Was there any resolution?

Mr. Garrison: I object to that.

The Court: Objection not sustained.

(Exception noted for plaintiff.)

Ans. No, sir.

The Court: Let me ask another question here, to make this clear.

20

By the Court:

Ques. Am I correct in understanding that from the time of the meeting at which this word "Preferred

stock," and whatever it was, was written on these certificates until the meeting in which you and Mr. Fries alone participated, that your testimony is that there was no meeting of the directors?

Ans. No meeting.

Ques. No meeting from the time when the preferred stock was passed until the meeting when the mortgage was spoken of?

Ans. That was the first meeting.

10

By Mr. Gilleran:

Ques. Now, Mr. Carroll, respecting the testimony which you have submitted about any meeting of the directors, if any were held, subsequent to the marking of this "Preferred" upon the stock, I want you to state exactly whether, after this meeting at which a vote of 4 to 2 was taken on the preferred stock, those six men, or any of those six men, had a meeting, met as a Board of Directors?

20

Mr. Garrison: I object to that.

Ans. No, sir.

The Court: Well, he answers "No."

(Exception noted for plaintiff.)

30

Ques. Was there any meeting of the stockholders held after that time?

Ans. No, sir.

Ques. Was there any meeting of stockholders, at which directors were elected, held subsequent to that time?

Ans. No, sir.

Ques. And the old officers continued, did they?

(Objected to as incompetent, irrelevant and immaterial. Objection overruled. Exception noted for plaintiff.)

Ans. Yes, sir.

Ques. You continued as president of the company?

Ans. Yes, sir.

Ques. Mr. Fries continued as secretary of the company?

Ans. Yes, sir.

10

Ques. Down to when?

Ans. Until the time he withdrew; I think that was about the 1st of April, 1898.

Ques. You mean by withdrawing, he—

Mr. Garrison: Let the witness state what he means.

Ques. What do you mean by withdrawing?

Mr. Garrison: I object to that as immaterial.

20

The Court: Yes; I do not think that is material.

Mr. Gilleran: I want to show the constitution of the Board of Directors.

The Court: You may fix the date, but the interpretation of the witness in regard to an action of a party who has no interest in this suit is merely taking up time for nothing. Fix the time, if you choose.

30

Ques. Who were the directors in 1898?

Ans. Mr. Fries, Mr. Breslin, myself, James G. Carroll.

Ques. Now, did Mr. Fries resign as a director at that time?

Ans. No, he did not.

Ques. Did he, to your knowledge, sell his stock in the company at that time?

Ans. Not at that time; no, sir.

Ques. Subsequent to that time, did Mr. Fries, to your knowledge, sell his stock?

Mr. Garrison: That must be immaterial. This is after we make any claim.

10 (Objection overruled. Exception noted for plaintiff.)

Ans. Yes, sir.

Ques. And when was that?

Ans. In 1901.

Ques. And to whom did he sell his stock?

(Objected to.)

20 The Court: That is immaterial.

Ques. Now, did the directors of the Fries-Breslin Company, between January, 1894, and July, 1898, also December, 1898, declare a dividend?

Mr. Garrison: I object to that as irrelevant and incompetent. I think this witness is perfectly competent to testify as to what they did between those dates, but I do not think he has any right to interpret it by saying that they did or did not do something which has a legal meaning.

30

(Objection overruled. Exception noted for plaintiff.)

Ques. Did they, subsequent to that time, and before the commencement of this action, declare a dividend?

(Objected to as irrelevant, incompetent and immaterial. Objection overruled. Exception noted for plaintiff.)

Ans. No, sir.

Ques. Do you know when this action was commenced, Mr. Carroll?

(Objected to as incompetent, immaterial and irrelevant. Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly. 10

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. Mr. Carroll, are you familiar with the affairs of the Fries-Breslin Company in relation to its financial dealings?

Ans. Yes, sir.

Ques. You are the treasurer of the company, and have been its financial officer since its organization? 20

Ans. Yes, sir.

Ques. Mr. Carroll, I call your attention to Exhibit 2 of plaintiff, at pages 138 and 139, called the Brimfield Account, and ask you if that is a correct statement of the indebtedness of the Brimfield Manufacturing Company to Fries-Breslin Company; also pages 140, 141 and 142.

Mr. Garrison: I object to that as incompetent, irrelevant and immaterial to any issue in this suit, also upon the ground that this is not the way by which this corporation can make self-serving declarations to operate against the plaintiff, even if it were material or relevant. 30

(Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. Has the Fries-Breslin Company charged itself with that item—

The Court: I had better hear this matter now.

10

(The further discussion of this matter was had at side bar.)

The Court: Assuming that some competent method of proving this book is offered, what is the relevancy of it?

20

Mr. Pancoast: It is on the matter of off-set. The claim is that the Brimfield Company owed to the Fries-Breslin Company a certain amount of money, and by agreement between Mr. Carroll and Mr. Breslin they each assumed the payment of one-half of that money upon the books of the company, and became debtors of the company to that amount.

30

The Court: Well, now, I sustain the objection that is made, both as to the method of proof and as to the nature of the testimony, and as to its irrelevancy. I do not think the books of the company can be offered for the purpose of establishing a claim of that character at all. It is not a dealing between merchants.

Mr. Pancoast: We do not rely wholly upon the book.

The Court: Well, I am only ruling on what is before the Court now, you know. The motion was that the proof of the book by this witness should not be admitted,

and that is sustained. Now, of course, if there is some further line of proof to be offered that will come in in some other shape.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

By the Court:

Ques. What are the numbers of those pages?

10

Ans. 142 and 143.

Ques. And what is the name of the book?

Ans. The Private Ledger.

Mr. Gilleran: The pages are 137, 138, 139, 140, 141, 142 and 143.

The Court: That will identify the pages, the offer of which is objected to and the objection sustained.

20

Mr. Pancoast: With the permission of the Court and counsel on the other side, I will ask the witness some questions touching the Brimfield matter.

The Court: (To Mr. Garrison.) Any objection?

Mr. Garrison: No, sir.

By Mr. Pancoast:

30

Ques. State whether or not, to your knowledge, the Brimfield Manufacturing Company was indebted to the Fries-Breslin Company?

Mr. Garrison: I object to that as irrelevant, incompetent and immaterial to any issue in this suit.

Mr. Pancoast: This is one of the steps leading up to proving the notice in our off-set, which reads as follows: "January 1, 1902—

Mr. Garrison: Never mind reading the off-set.

The Court: Well, I shall have to hear this whole matter, because this now goes beyond the question of the book.

10

Mr. Pancoast: (At side bar.) What we propose to prove is that the Brimfield Manufacturing Company was indebted to the Fries-Breslin Company in the sum of about fifty thousand dollars, and that Mr. Carroll and Mr. Breslin agreed each to assume one-half of that indebtedness, and did so assume it.

The Court: What do you show as the consideration of the obligation on Breslin's part to assume it?

20

Mr. Pancoast: The discharge of the obligation assumed.

The Court: I know, but what consideration moved Breslin to assume \$25,000 of debts, as I understand you he did, didn't he?

Mr. Pancoast: Yes; he assumed \$25,000 of debt.

30

The Court: Now, what consideration made that a good contract on his part?

Mr. Gilleran: The issuance of stock of the Brimfield Manufacturing Company on that account, preferred stock of the Brimfield Manufacturing Company.

Mr. Garrison: Do you claim that he ever got that preferred stock?

Mr. Gilleran: I claim that was in the process of—

The Court: No; what did he get for it? What was the legal nature of it? You see, a mere promise of a stockholder that he will assume bad debts of his corporation, of course, would be *nudum pactum*. I am speaking of it now as an original promise to pay a certain sum of money.

Mr. Gilleran: These two men were directors of the 10
Brimfield Manufacturing Company and also directors and stockholders of both companies at the time. The Fries-Breslin Company was seeking to develop the Brimfield Manufacturing Company. In doing so they advanced this sum of money, about \$50,000; and the arrangement was made that these two men would take over the Brimfield Manufacturing Company with all its accounts.

The Court: How does that bargain between Mr. Car- 20
roll and Mr. Breslin inure to the benefit of the corporation who is the defendant here?

Mr. Gilleran: They took this account, which might have been good or bad, we don't know, and made these men carry it, personally—wiped it off the books.

The Court: I know, but how does this bargain with 30
these two men that they would pay this inure to the benefit of the corporation? How can the corporation, for instance, sue either one of them for a failure to keep this promise? Was the corporation a party to it?

Mr. Gilleran: That was a corporation method, and it was thus arranged on the books of the company.

The Court: How are you going to prove the cor-

porate act by which the corporation entered into this contract, if it was a party to the contract?

Mr. Gilleran: These two men were a majority of the Board of Directors.

10 The Court: That won't do, because they are already parties, you see; and if this is to be a third party arrangement, in which Carroll stands for one party, Breslin for another, and the corporation for the third, of course the corporation must have some evidence of its action independent of the other two parties to the same contract, or else they would all be one and the same thing. I do not see my way clear to admit any part of this testimony as being relevant. If I have got a sufficiently full expose of it from you to rely on your exception, I am prepared to support the motion to not let it in.

Mr. Pancoast: Well, I have said all I know about it.

20 The Court: Well, I have got your statement pretty clear, I think, and I am willing to say that on legal grounds it is not admissible in this suit.

30 Mr. Gilleran: There was another aspect of the matter: That the Fries-Breslin Company made a contract with the Brimfield Manufacturing Company that for the issue of preferred stock to the par value of the amount of the indebtedness, the indebtedness should be wiped off the books of the Fries-Breslin Company as against the Brimfield Manufacturing Co., and that that stock, when issued, shall be issued to John M. Carroll and Thomas J. Breslin, who arranged to bear that account.

The Court: Then how do you meet the question that, under our statute of frauds, no evidence can be given of that unless it is a written evidence?

Mr. Gilleran: There was some memorandum respecting that on the books of the company.

The Court: Well, I do not understand you to say that in point of fact they did receive the stock.

Mr. Gilleran: The stock has been issued but not delivered.

The Court: I think you will have to rest on your exception, because I cannot see my way clear to guide this trial into any such remote channel. (To Mr. Garrison.) I understood the objection was based upon the ground that nothing has been offered that is susceptible of legal proof in this case? **10**

Mr. Garrison: Yes, sir.

The Court: I cannot see my way clear to permit it.

Mr. Gilleran: Of course this offer includes any entry in the book as to the Brimfield account. **20**

The Court: Well, whatever those pages contain. If you find other exhibits that you want, you had better get them.

Mr. Gilleran: Yes, I have an additional exhibit.

The Court: Well, you had better bring that in now. **30**

Mr. Garrison: Well, I do not want to object to an offer which includes the contents of some written contract.

(Counsel for the plaintiff thereupon withdrew his ob-

jection to the general offer made by the counsel for the defendant.)

Recess until 1.30 P. M.

Trial of the cause resumed at 1.30 o'clock P. M.

10 Mr. Garrison: I will not make an objection to this general offer that is made here.

The Court: How else can they raise this issue then, than by putting the witness on the stand and asking him the questions?

Mr. Garrison: I do not know of any other way.

20 (Court and counsel thereupon returned to the hearing room.)

The Court: I understand, then, that counsel withdraws the objections that were made to the offer?

Mr. Garrison: The general offer. I objected to some testimony, and that was ruled on.

The Court: Well, I mean the offers that were made in the other room.

30 Mr. Garrison: Yes, sir.

JOHN M. CARROLL, recalled.

Mr. Gilleran: I also offer in evidence page 137 of the

plaintiff's Exhibit 2, which is a continuation of page 143.

Mr. Garrison: I shall object to this as irrelevant, immaterial, incompetent and as not being a proper way to prove the facts sought to be proved.

(Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly. 10

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. Mr. Carroll, did the Fries-Breslin Company, of which you are president, have a meeting on the 14th day of July, 1902,—

Mr. Garrison: I object to that as immaterial, irrelevant and incompetent to any issue raised here. 20

(Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. I show you some writings in a book, which I ask to be marked for identification "E. A. A.," pages 61 to 65 inclusive, and ask you if you know what those writings are? 30

Mr. Garrison: I object to that. It has not been shown that if he did know, they are material or relevant.

(Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. Have you seen those before?

- 10 Mr. Garrison: I object. It is not shown to be material, whether he has ever seen them before or not.

(Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

- 20 Ques. What are those writings which you now see on the pages indicated?

(Objected to as immaterial and irrelevant. Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

- 30 Ques. Is that book a book of the Fries-Breslin Company?

(Objected to as immaterial and irrelevant. Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. What is the name of that book about which I have asked you?

(Objected to as incompetent, irrelevant and immaterial.)

10

The Court: The objection is not sustained to that.

(Exception noted for plaintiff.)

Ans. The Minute Book.

Ques. Of what company?

(Same objection. Objection overruled. Exception for the plaintiff.)

20

Ans. Of the Fries-Breslin Company.

The Court: Is it your purpose to offer those documents (referring to the writings on pages 61 to 65 inclusive, of the Minute Book "E. A. A.?")

Mr. Gilleran: Yes, sir.

The Court: Well, I wish you would offer them, so their materiality can come under review.

30

Ques. Are these writings which you have looked at, and which I have pointed out to you as being on the pages indicated, minutes of the Fries-Breslin Company?

Mr. Garrison: I object to that. That is not the way to prove the minutes of the Fries-Breslin Company.

(Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. Were you present at a meeting of the 14th of July, when minutes of the meeting were made?

10 (Objected to as immaterial, irrelevant and incompetent.)

The Court: That is introductory, I understand, and will be admitted.

(Exception noted for plaintiff.)

Ans. Yes, sir.

20 Ques. Did you see those minutes at that meeting?

Mr. Garrison: I object. That is incompetent, irrelevant and immaterial.

The Court: Well, standing alone, the objection is sustained.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

30 C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. Are these papers which I show you minutes of the meeting held on that day?

(Objected to as irrelevant, incompetent and immaterial. Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. At that meeting, held on the 14th of July, was the plaintiff in this case present?

Mr. Garrison: I object to that as incompetent, irrelevant and immaterial.

10

The Court: It may be admitted.

(Exception noted for the plaintiff.)

Ans. Yes, sir.

Ques. Was he secretary of the company at that time?

(Same objection. Objection overruled. Exception noted for the plaintiff.)

20

Ques. Was he secretary of that meeting?

(Same objection. Objection overruled. Exception noted for the plaintiff.)

Ans. Yes, sir.

Ques. Did he have possession of these minutes?

(Objected to as incompetent and irrelevant.)

30

Mr. Garrison: There is no proof yet of the minutes.

Ques. Did he have possession of such minutes as were made at that meeting?

(Same objection. Objection overruled. Exception noted for the plaintiff.)

Ans. He did.

Ques. Did you also have possession of these minutes?

(Objected to as immaterial.)

The Court: It is immaterial whether this witness had possession of the secretary's minutes.

Whereupon the defendant, by its counsel, prays a bill
10 of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
Justice Supreme Court.

Ques. Did you have possession of those minutes at, during and subsequent to that meeting?

(Objected to as immaterial, irrelevant and incompetent. Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill
20 of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
Justice Supreme Court.

Ques. You saw these minutes, did you not, Mr. Carroll?

(Objected to as immaterial, irrelevant and incompetent. Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill
30 of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
Justice Supreme Court.

Ques. Do you know, Mr. Carroll, What became of the minutes kept at that meeting?

Mr. Garrison: Now, I object to that, because I think it is utterly immaterial, incompetent and irrelevant as to what became of the minutes of a meeting which was held in 1902.

The Court: Yes; I think that is so. I think, where the person who is the proper person to prove the minutes is in existence, no secondary proof can be offered.

Mr. Gilleran: Well, I want to show the custody of these minutes, if your Honor pleases. He was the president of the meeting. 10

(Question repeated at the request of the Court.)

The Court: I think that is competent.

(Exception noted for plaintiff.)

Ans. They are in that book. (Indicating Minute Book marked "E. A. A.") 20

Mr. Garrison: I ask to have that answer stricken out.

The Court: Yes; I do not think that is a competent answer.

Ques. What became of the minutes at the meeting, during the meeting, and subsequent to the meeting, if you know? 30

Mr. Garrison: I object to that on the same grounds that I objected to the question in which he first asked him what became of the minutes.

The Court: It seems to me you take a good deal of a roundabout way. Were these minutes taken down in typewriting?

Mr. Gilleran: No, sir.

The Court: You see the witness is talking about one thing and you are talking about another thing. You are asking a question about manuscript notes, and he is testifying to something that is typewritten.

Mr. Gilleran: Well, there were no other minutes.

10 The Court: By what agency did the manuscript notes become transferred into typewriting?

Mr. Garrison: There were no manuscript notes. These are the only minutes they have talked about.

The Court: Oh, I thought you said there were manuscript minutes.

20 Mr. Garrison: These minutes are signed by the secretary, Mr. McKeown. He is alive and in existence, and should be brought here.

The Court: There has been no identification of these as yet (referring to pages 61 and 65 in Minute Book "E. A. A."), and the minutes he has talked about were taken by the secretary, I understand. In view of that testimony that the secretary was present at the meeting and had possession of the minutes of the meeting, how can secondary proof of it be offered—if the secretary, as secretary, had possession of the minutes?

30

Mr. Gilleran: The president also had possession of them, and had possession of them after the adjournment of the meeting.

The Court: Well, were these ready made minutes? Were they all ready, prepared before the meeting?

Mr. Gilleran: Yes, sir.

The Court: Well, that is what is confusing me. Was the Minute Book prepared before the meeting?

Mr. Garrison: Yes, sir; the minutes were prepared by Judge Pancoast, he said, when you first ruled these things out.

The Court: Oh, I didn't know the ones they were talking about. 10

Mr. Garrison: Yes, sir; these are same ones.

The Court: Then what they want to show is that these books contain minutes that were prepared prior to the meeting, and which were afterwards, to the knowledge of this witness, put in this book. How is that not competent? Where the validity of minutes in a book depends upon the accuracy of the scribe, there he is the only and the best witness; but where he had nothing to do with their accuracy—where they were ready-made and taken there, and it now becomes a mere question of tracing the reportorial object, there is no validity to be added to them by the secretary or anybody else, because he does not vouch for having taken them; he says he did not take them, according to this testimony. 20

Mr. Garrison: There is sought to be put in evidence a written record of what took place at a certain meeting; that written evidence, now here produced before us, is signed by a man who says he was secretary. They are not willing, for some reason, to call the secretary and have him verify that this is what took place at the meeting. They are seeking to get in evidence through some one else of what took place at that meeting, which is in writing, verified by the secretary. It makes no differ- 30

ence whether the secretary had the notes written out before, or whether some one else had them written out before. Whether or not this took place at that meeting, so far as these writings are concerned, depends upon the secretary's so certifying in the minute book, in the first instance. Those may not be correct. It may be shown that the secretary was mistaken. But as to a minute that appears in a minute book, over the signature of the secretary, how can they get that in by some one else? If they can do it in this instance, they can do it in every instance.

10

The Court: I understand that is just the distinction—that the normal condition of things is that the secretary, who vouches for minutes, does so because he took them; but where it appears that they were prepared by legal counsel—

Mr. Garrison: How does it appear, until we get the secretary here, as to what of these things prepared by counsel were passed upon, and what were not?

20

The Court: Simply the testimony that these things were entirely prepared by counsel.

Mr. Garrison: Oh, we have not had any such testimony as that.

The Court: I thought you stated that there was such testimony as that. Let us have it perfectly clear. Ask this witness whether this matter was entirely prepared prior to the meeting, or whether any part of it was taken by the secretary.

30

Ques. Did the secretary at that meeting make any notes of his own?

The Court: That is not what I want to get at. I want to get at whether these things in this book were brought, in exactly the same condition in which they now appear, before the meeting, or whether they were afterwards modified by anybody at the meeting, secretary or otherwise.

Ques. Were these things in this book brought, in exactly the same condition in which they now appear, before the meeting, or were they afterwards modified by anybody at the meeting, secretary or otherwise? 10

Ans. They were brought to the meeting.

By the Court:

Ques. And were not modified by the secretary, in view of anything that occurred?

Ans. No, sir.

By Mr. Gilleran:

20

Ques. And is this a record of the exact procedure of that meeting?

The Court: That won't do at all. The question is simply as to the identity of this typewritten copy that you are talking about.

Ques. I show you those writings and ask you if that is the identical copy or paper brought to that meeting?

30

(Objected to as immaterial, irrelevant and incompetent.)

The Court: It is admitted.

(Exception noted for plaintiff.)

Ans. Yes, sir.

Mr. Gilleran: We offer that in evidence.

Mr. Garrison: I object to it. It has not been identified with it in any way as what took place at that meeting. The only person who can officially state what took place at that meeting is the secretary.

10 The Court: I do not see how it becomes probative of anything. The offer is at present refused.

Ques. I now turn to pages 4, 5, 6, 7 and 8 of Exhibit "E. A. A. for identification," and ask you, Mr. Carroll, if you ever saw those paper writings before?

(Objected to as irrelevant, immaterial and incompetent. Objection sustained.)

20 Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

The Court: Are those the same as the others?

Mr. Gilleran: No, sir. These are minutes of the stockholders' meeting. I will defer the examination on this subject to some later time.

30 Ques. Mr. Carroll, on the setting aside of the profits of the Fries-Breslin Company, at the times stated in the claim of the plaintiff, and which have been mentioned to you, was there anything set aside to you on preferred stock held by you?

(Objected to as immaterial and irrelevant. Objection overruled. Exception noted for plaintiff.)

Ans. No, sir.

Ques. Was there at any time, Mr. Carroll, any profit, any of the net profits of the company, set aside to you—any time subsequent to 1893 were any net profits of the Fries-Breslin Company set aside to you on your preferred stock?

(Objected to as irrelevant and immaterial. Objection overruled. Exception noted for plaintiff.)

10

Ans. No, sir.

Ques. Did the plaintiff in this case, Mr. Breslin, at any time say to you, or in your presence, whether there ever had been a meeting of the Board of Directors of the Fries-Breslin Company since 1893, or about that time?

Ans. No, sir.

Ques. Were you present, Mr. Carroll, at a trial in this court wherein one Fries was plaintiff and the Fries-Breslin Company defendant, in the fall of 1901?

20

Ans. Yes, sir.

Ques. Did you hear Mr. Breslin make statements at that trial?

(Objected to.)

Ques. Respecting a meeting of the Board of Directors, or the declaring of dividends of the Fries-Breslin Company?

30

Mr. Garrison: I object. My objection is, if the purpose is to contradict their own witness, the obvious ruling will be made. He has been asked whether he ever heard Mr. Breslin make any statements.

The Court: No; but supposing the object is to show a declaration of the plaintiff?

(Last answer and question read.)

Mr. Garrison: If their purpose is to prove that at some trial he made such declarations, they are seeking to contradict their own witness.

The Court: There is nothing to prevent counsel from contradicting his own witness. He cannot impeach him, but he can always contradict him.

10

Mr. Garrison: The second objection is, that if it is sought to prove what was stated by Mr. Breslin in testimony in that former trial, this is not the way to produce that proof. We are entitled to have the entire examination in which those statements were made laid before the jury in this case. We are entitled to have the entire qualifications that may have been made in that testimony. We are not required to meet a single isolated recollection of this witness with respect to a single isolated statement.

20

The Court: Subject to the right to cross-examine, it strikes me that a declaration of a party may be put in to any extent that the other party desires, leaving it to the party's counsel to expatiate or broaden that, if they think that it requires it.

Mr. Garrison: My objection goes to the extent that they may not put in a part of a declaration; they must put in the whole of the declaration.

30

The Court: It does not appear yet that they are putting in a part of a declaration.

Mr. Gilleran: I am willing to let the whole of the record go in.

The Court: Well, the ruling that the Court makes is that the objection is not sustained.

(Exception noted for plaintiff.)

(Question repeated.)

Ans. No, sir. Can I correct myself on that?

Ques. Yes.

Ans. Was that in reference to the trial here? 10

The Court: Just read the question.

(Question repeated as follows):

Ques. Did you hear Mr. Breslin make statements at that trial respecting a meeting of the Board of Directors, or the declaring of dividends of the Fries-Breslin Company?

Ans. I want to reverse that answer. 20

By the Court:

Ques. What is your answer now?

Ans. And say, yes, I did. I misunderstood the question.

By Mr. Gilleran:

Ques. What did Mr. Breslin say at that time respecting meetings of the Board of Directors of the Fries-Breslin Company, subsequent to about 1893? 30

Mr. Garrison: Now, the objection is renewed. I do not propose to expatiate, because I desire to renew the same objection I made before, adding to it this one, that the declarations now about to be testified to by this wit-

- ness were elicited at a former trial of some suit; they could only have been made out of Mr. Breslin's mouth as a witness; they therefore must have been by question and answer. It seems to me that it must be entirely irregular to permit this witness to testify to his recollection of the substance of what remains in his memory of the questions and answers which were put to a witness in some prior litigation. In fairness to that witness, when there is in existence a record which contains the exact question put and the exact answer made, that should be taken to be the declaration, and not what may remain in this witness' recollection with respect to it. I therefore object to this method of proving the testimony of a witness in a prior trial.
- 10

The Court: The objection is not sustained.

(Exception noted for plaintiff.)

- 20 Ans. He said there were no meetings.
Ques. What did he say respecting the declaring of dividends during a similar period?

Mr. Garrison: I desire to renew my objection to this question.

(Objection overruled. Exception noted for plaintiff.)

- 30 Ans. He said there were no dividends.
Ques. What did he say respecting declaring of dividends during the same period?

(Same objection. Objection overruled. Exception noted for plaintiff.)

Ans. No dividends.

Cross-examination.

By Mr. Garrison:

Ques. The fifteen per cent. on the preferred stock of James G. Carroll was paid to him from the time of the creation of that stock down to 1899, at least, was it not, or was credited to his account on the books of the company?

Mr. Gilleran: I object to that. The books of the company, already in evidence, are the best evidence of that. 10

The Court: The objection is not sustained. This is not independent proof; it is cross-examination.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.] 20
Justice Supreme Court.

Ans. It was credited to his account on the books, not paid.

Ques. And he drew against his account during all of that period, did he not?

Ans. No, sir.

Ques. I now call for the book called the Private Ledger. You were the treasurer of the company, were you not?

Ans. Yes, sir. 30

Ques. I call your attention in this book which has been marked Exhibit 2 of plaintiff, pages 57 and 56, for this account seems to go backward, and ask you whether there does not appear on the left hand side of that book withdrawals of money by James G. Carroll?

Mr. Pancoast: How is that cross-examination?

The Court: The prior question was certainly cross-examination, and this was in the same line.

Mr. Pancoast: The point is that it relates to withdrawals by James G. Carroll.

10 The Court: You see this witness has been examined in chief as treasurer of the company with respect to all of these transactions, without any limitation; he has fully testified as to the relations with his brother, Mr. James Carroll, and he is now being cross-examined upon identically the same line that he was examined on in brief.

Mr. Pancoast: That escaped my observation, if that is true.

20 The Court: Yes; he was examined as to how his brother got this stock, and as to whether anything had been paid upon it and the propriety of its payment, and he has testified that he was the treasurer, in whose knowledge all of this was or was not done. That was his examination in chief. Obviously anything that touches upon that precise situation is cross-examination.

(Question repeated.)

Ans. As a dividend.

30 (Question repeated.)

Ans. He drew money, but it was not—

The Court: Read the question. (Question repeated.)
The question is whether it so appears?

Ans. It appears on the book; yes, sir.

Ques. In the trial of the Fries vs. Fries-Breslin case you say you heard the testimony of Mr. Breslin?

Ans. Yes, sir.

Ques. Did he not say upon that occasion that he knew from these meetings that were held by you and Mr. Fries and Mr. Breslin that there was a division of the profits being made?

Ans. Who, Mr. Breslin?

10

(Question repeated.)

Ans. Charges on the book called a division of profits.

Mr. Garrison: I ask that that be stricken out as irresponsible.

The Court: Yes. Repeat the question.

(Question repeated.)

20

Ans. I don't remember.

Ques. Do you remember his being asked as follows: "Q. Yes; and you never made any objection to it?" to which he answered, "No. Q. You acquiesced in it? A. Yes. Q. Knew what was going on? A. Yes, sir. Q. Knew of it being a division of the profits? A. Yes, sir." Did you hear those questions put and answers made by Mr. Breslin?

Ans. Yes; to the best of my recollection.

30

Ques. After 1893, when was this meeting that you speak of at which you voted about the preferred stock?

Ans. I think the year is here. I don't remember the exact year.

Ques. What do you mean when you say "It is here"?

Ans. In this examination. I think Mr. Black has that, that year.

Ques. Well, from your recollection, did you testify to it? Did you testify as to when that meeting was when the preferred stock was created?

Ans. When the preferred stock was created?

Ques. When you voted about the preferred stock?

Ans. Yes.

Ques. Now, when was that?

Ans. To the best of my recollection it was in 1893.

Ques. Now, at that meeting, all of these six gentlemen who then were stockholders were present, were they not?

Ans. Yes, sir.

10 Ques. At that meeting it was understood that whoever took preferred stock no longer had any vote in the corporation, was it not?

Mr. Armstrong: I object to that. He may say what was said and done, but he is asking the witness what was understood.

The Court: The question will be admitted.

20 Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
Justice Supreme Court.

Ans. No, sir.

Ques. At that meeting it was understood that the preferred stockholders, whoever took this preferred stock, Mr. McGill, Mr. Murphy and Mr. James G. Carroll were to withdraw from the board of directors, was it not?

30 Mr. Armstrong: I object.

(Objection overruled.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
Justice Supreme Court.

Ans. No, sir.

Ques. After that meeting they did withdraw, did they not?

Ans. No; not right away.

Ques. They did afterwards withdraw, did they not?

Ans. Yes.

Ques. And those three gentlemen, after that time, never acted as directors down, at least, until after 1899, did they?

Ans. Not after 1893; no.

10

Ques. After 1893, the business of this company was carried on where, at what locality?

Ans. Ferry road, below Atlantic avenue.

Ques. In Camden?

Ans. In Camden.

Ques. And you were the president, were you not?

Ans. Yes, sir.

Ques. And Mr. Fries was in charge of the manufacturing department?

Ans. Yes, sir.

20

Ques. And Mr. Breslin was in charge of the selling of the manufactured product on the road?

Ans. Yes, sir.

Ques. And you three gentlemen were the ones who directed the policy of the company, were you not?

Ans. We were.

Ques. And each six months you three gentlemen got together and ascertained whether you had made a profit or a loss, did you not?

Ans. No, sir.

30

Ques. Did you ever ascertain whether you made a profit or a loss?

Ans. Oh, yes.

Ques. When did you do that?

Ans. Well, at different times.

Ques. And those times appear in the book, do they not?

Ans. The division of the profit appears in the book.

Ques. And the division of the profits was based upon the ascertainment of whether you had made or lost a profit, was it not?

Ans. Yes, sir.

Ques. So the book will tell us at what times that was done, will it not?

Ans. Yes, sir.

10 Ques. And when you were asked about this question of directors' meetings, what you meant to say was that there never were any formal directors' meetings, didn't you?

Ans. That is what I meant to say.

Ques. Who are, at present, acting as the directors of this company?

(Objected to as immaterial.)

(Question withdrawn.)

20

By Mr. Gilleran:

Ques. What do you mean to have conveyed when you say that these men did not act as directors?

Mr. Garrison: I object.

Ques. Do you mean there was no meeting of directors, or that there were not any directors?

30

Mr. Garrison: I object. This is not re-direct examination in any sense of the word.

(Objection overruled. Exception noted for plaintiff.)

Ans. I meant there were no meetings of directors.

Mr. Garrison: I would like to have that answer stricken out.

(Motion overruled. Exception noted for plaintiff.)

Ques. When you say these men withdrew, which men do you mean?

Mr. Garrison: I object to that as not re-direct examination. 10

(Objection overruled. Exception noted for plaintiff.)

Ans. I mean Mr. McGill and Mr. Murphy.

Ques. Did you mean to say that James G. Carroll withdrew?

(Objected to.)

The Court: That is objectionable, in form at least. 20

Ques. Did James G. Carroll withdraw?

Ans. No, sir.

By Mr. Garrison:

Ques. Mr. Carroll, did Mr. James G. Carroll ever take any part as a director, after 1893, until after 1899?

Ans. No, sir.

Ques. In 1899 you transferred one of your shares of stock to James G. Carroll so as to qualify him to act as director, did you not? 30

(Objected to. Objection not sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
Justice Supreme Court.

Ans. Believing that—

Ques. Just answer yes or no.

Ans. Yes.

THOMAS J. BRESLIN, sworn.

By Mr. Gilleran:

10 Ques. Mr. Breslin, you are the plaintiff in this case?
Ans. I am.

Ques. And you were the secretary of the Fries-Breslin Company for the period prior to July, 1902?

Ans. I was.

Ques. Did you attend a meeting of stockholders of the Fries-Breslin Company on the 14th of July, 1902?

(Objected to as irrelevant and incompetent. Objection overruled. Exception noted for plaintiff.)

20 Ques. Did you act as secretary of that meeting?

Mr. Garrison: I object to the materiality of what happened at the meeting.

(Objection overruled. Exception noted for plaintiff.)

Ans. Part of the meeting.

Ques. This is the stockholders' meeting to which I refer?

30 Ans. I do not think I did.

Ques. You were present, were you not?

Ans. I was.

Ques. Who else was present?

Mr. Garrison: I object to that method of proving who was present, if they have minutes; also the materiality of it.

The Court: I do not see the materiality of it.

Mr. Gilleran: I want to show the minutes and the proceedings of that meeting.

The Court: You may prove the minutes, but I do not see how it is important to state who was present; that does not tend to prove the minutes at all.

Ques. Well, were you present all the time during that meeting? 10

(Objected to as immaterial. Objection overruled. Exception noted for plaintiff.)

Ans. I was.

Ques. If you did not act as secretary all the time, who acted as secretary the balance of the time?

(Same objection. Objection overruled. Exception noted for plaintiff.) 20

Ans. There was no secretary required for that meeting.

Ques. You were the secretary for the company in attendance?

Ans. Supposed to be.

Ques. Well, were you not? You were the secretary of the company, and you were in attendance at the meeting?

Ans. I was. 30

Ques. Now, did you, as such secretary, keep minutes of the meeting?

(Objected to as immaterial. Objection overruled. Exception noted for plaintiff.)

Ans. No.

Ques. You did not?

(Same objection. Objection overruled. Exception noted for plaintiff.)

Ans. No.

Ques. Were there any proceedings at that meeting?

10 (Objected to as immaterial and not the way to prove it. Objection overruled. Exception noted for plaintiff.)

Ans. There was.

Ques. Did you make a record of any of the proceedings?

Ans. I did not.

Ques. Were motions made and resolutions offered at that meeting?

20 (Objected to as immaterial. Objection overruled. Exception noted for plaintiff.)

Ans. There was.

Ques. What record of such was made, if any, Mr. Breslin?

Mr. Garrison: I object. The witness has said he made none. I also object to the materiality of the matter.
30

The Court: It may be answered.

(Exception noted for plaintiff.)

Ans. I don't know.

Ques. Did you see in the meeting any offer of a writ-

ten resolution, or printed or typewritten resolution, or motion, at that meeting?

Mr. Garrison: I think that must be immaterial. I object to it on that ground.

(Objection overruled. Exception noted for plaintiff.)

Ans. I did.

Ques. I show you typewritten pages beginning with page 4 and continuing to page 8, and including page 8, of "E. A. A. for identification," and ask you if those are the written data respecting motions and resolutions at that meeting? 10

(Objected to.)

The Court: I do not see that this witness has anything at all to do with that.

Mr. Garrison: Does your Honor exclude the question? 20

The Court: Yes; the question is overruled.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. You kept no minutes as the secretary of that meeting? 30

Ans. No, I did not.

Ques. Mr. Breslin, do you know what resolutions and motions were made at that meeting?

Mr. Garrison: I object to that on the ground of incompetency, immateriality and irrelevance.

The Court: It will be admitted.

(Exception noted for plaintiff.)

Ans. No, I don't know what minutes were made.

Ques. You don't know what?

Ans. I don't know what minutes were made at that meeting.

10 Ques. I am now speaking of the motions and resolutions.

Ans. I don't know what motions were made.

Ques. Have you in mind any motion made respecting what was known as the Brimfield account with the Fries-Breslin Company, at that meeting?

20 Mr. Garrison: I object to that, on the ground of irrelevancy, incompetency and immateriality, and that it is not the way to prove what was done at the meeting at which they state they had minutes. They have minutes here which were made by a secretary, they say, and if he is alive he is the man to come here and say how they got into the minutes of the corporation.

(Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
Justice Supreme Court.

30

JOSEPH A. McKEOWN, sworn.

By Mr. Gilleran:

Ques. What is your business, Mr. McKeown?

Ans. A salesman for the Fries-Breslin Company.

Ques. Are you secretary of that company?

Ans. I am.

Ques. I show you book, "E. A. A. for identification," pages 4 to 8, and ask you if you know what the entries there are?

Mr. Garrison: I object to that.

(Objection sustained.)

10

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. What is that book which I have given to you?

Ans. The Minute Book.

Ques. Minute Book of what?

Ans. Of the Fries-Breslin Company.

Ques. Now, I ask you what those entries in the Minute Book are? 20

(Objected to).

The Court: The entries must certainly speak for themselves, as far as being testimony at all. They are documentary proof; they cannot gain any force by oral testimony.

Ques. Is that your signature on those?

30

Ans. Yes, sir.

Ques. When did you sign these records?

Ans. After November 3, 1902; after approval at the meeting held November 3, 1902.

Mr. Garrison: I ask to have the latter part of that stricken out. He was not asked as to what caused him to sign it, nothing except the date.

The Court: Yes; strike out the answer excepting the date.

Ques. Were you secretary of a meeting of the Fries-Breslin Company held on or about November 3, 1902?

Ans. I was.

Ques. Were these records brought before that meeting?

10 (Objected to as irrelevant, incompetent and immaterial.)

The Court: What is the relevancy of all this?

Mr. Gilleran: The relevancy of all this is to prove the procedure of the company respecting the financial affairs of the company.

20 The Court: That is too vague. There might be millions of financial affairs that would not be relevant here. What specific thing do you wish to place in issue respecting this matter?

Mr. Gilleran: Respecting our counter claim in this case, respecting the account known as the Brimfield account.

30 The Court: What is there about that counter claim which you say will appear from these minutes? What is the point made—that there was some resolution passed?

Mr. Gilleran: Yes, sir; there was a resolution passed.

The Court: Just draw my attention to that. Let me see what it is, what date?

(Book "E. A. A. for identification" handed to the Court.)

The Court: What is the attitude you take in regard to it, Mr. Garrison? I mean in regard to the record, not what your argument is.

(Mr. Garrison's objection to the question repeated to the Court.)

The Court: It appears to me neither of these points are relevant or competent methods of proof; in other words, a thing that happened in 1902 cannot relate to the question of whether this plaintiff was entitled to dividends in 1899; and that the corporation cannot, by saying that they transferred a certain claim owing to them, in any way influence or bind the attitude of the plaintiff in the suit. 10

Mr. Garrison: Well, my objection is broad enough to cover both.

The Court: The objection is sustained, for the reason that the Court has given, that it is irrelevant. 20

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. Were you, Mr. McKeown, secretary of the Fries-Breslin Company on the 14th of July, 1902?

Ans. I was at part of the meeting; I was elected on that date. 30

Ques. Did you attend a meeting of the board of directors on that date?

Ans. Yes, sir.

Ques. Did you keep minutes of that meeting of the board of directors?

Ans. Minutes were handed me by the president to be inserted in the Minute Book.

Ques. Well, how was the meeting conducted, in respect to the things done at the meeting?

Mr. Garrison: He says he was only there part of the time; he certainly cannot testify as to the whole meeting.

Ques. Well, how was the meeting conducted in respect to the things done at the meeting, while you were there?

10 (Objected to as incompetent, irrelevant and immaterial. Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. Did you make a minute of what was done at that meeting?

20 (Same objection.)

The Court: I do not understand that he has testified that he made any minute at all. I understood him to say that he did not make a minute, but that some papers were handed to him by the president. (To the witness.) Am I right about that?

30 The Witness: The minutes were handed to me by the president.

The Court: What is the relevancy of what you propose to prove by this?

Mr. Gilleran: Precisely the same thing as before.

Mr. Garrison: I make the same objection.

(Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Mr. Gilleran: I offer the minutes in evidence.

Mr. Garrison: I object to them. They have not been proved, are incompetent, immaterial and irrelevant. 10

(Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. I show you these records, pages 61 to 65 inclusive, and ask you if you have seen those before, and if those are a correct recital of what was done at that meeting while you were there? 20

Mr. Garrison: I object. In the first place, this is incompetent; in the second place, immaterial and irrelevant; and in the third place, it has already been passed upon.

(Objection sustained.)

30

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

No cross-examination.

CHARLES S. KING, ESQ., SWORN.

By Mr. Gilleran:

Ques. Mr. King, you are a lawyer?

Ans. Yes, sir.

Ques. Are you secretary of the Brimfield Manufacturing Company?

Ans. Yes, sir.

10 Ques. Is the plaintiff in this case, Mr. Breslin, a director of the company?

(Objected to as immaterial, incompetent and irrelevant. Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
Justice Supreme Court.

20 Ques. Did you, in the presence of Mr. Breslin, and at a directors' meeting of the Brimfield Manufacturing Company, at any time, arrange, through resolution or motion or procedure, as a corporation, respecting an account owing by the Brimfield Manufacturing Company to the Fries-Breslin Company?

(Objected to as irrelevant, incompetent and immaterial. Objection sustained.)

30 Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
Justice Supreme Court.

Ques. Did you at any time, in that manner, make an agreement respecting the adjustment of that account,

through the issue of preferred stock of the Brimfield Manufacturing Company, in settlement of that account?

(Same objection. Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
Justice Supreme Court.

Ques. Did you prepare a certificate, which was signed by the officers of the Brimfield Manufacturing Company, for an amount in value equal to the claim which the Brimfield Manufacturing Company owed to the Fries-Breslin Company? 19

Mr. Garrison: To whom was this certificate made out?

Mr. Gilleran: To the Fries-Breslin Company. 20

Mr. Garrison: I object to the form of the question.

The Court: It is objectionable as not specifying anybody who is relevant to this case.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
Justice Supreme Court. 30

Ques. Was that a certificate for preferred stock of the Brimfield Manufacturing Company?

(Objected to as incompetent, irrelevant and immaterial. Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
Justice Supreme Court.

10 Ques. Was Thomas J. Breslin, the plaintiff in this case, present at a meeting of the Brimfield Manufacturing Company at which any arrangement leading to the issue of such stock in settlement of the claim of the Fries-Breslin Company against the Brimfield Manufacturing Company was brought up?

Mr. Garrison: I object to the question as irrelevant, incompetent and immaterial, and I object to the form of the question.

(Objection sustained.)

20 Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
Justice Supreme Court.

Ques. Was anything done respecting the issue of such stock by direction of the plaintiff, Thomas J. Breslin?

(Objected to as incompetent, irrelevant and immaterial. Objection sustained.)

30 Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
Justice Supreme Court.

Ques. You kept minutes of the meeting at which something was done respecting such claim, Mr. King?

Mr. Garrison: I object to that. Let us have the minutes, whatever it is.

(Objection sustained.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

10

Ques. I ask you to refer to any minutes of the Brimfield Manufacturing Company, in your position as secretary, relating to the claim known as the Brimfield account and being an indebtedness owing by the Brimfield Manufacturing Company to the Fries-Breslin Company?

(Objected to as incompetent, irrelevant and immaterial. Objection sustained.)

20

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ques. And to such minutes, at any meeting of the Brimfield Manufacturing Company at which Mr. Breslin was present, in respect to such account?

(Same objection. Objection sustained.)

30

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

No cross-examination.

JAMES G. CARROLL, SWORN.

By Mr. Armstrong:

Ques. Where do you live, Mr. Carroll?

Ans. In Brooklyn, New York.

Ques. Are you the James G. Carroll named as one of the incorporators of the Fries-Breslin Company, as shown by Exhibit 1 of plaintiff in this case?

10 Ans. Yes, sir.

Ques. I show you what purports to be a certified copy of the certificate of incorporation of this company, marked Exhibit 1 of plaintiff, and ask you how many shares of stock you had at the time of the incorporation of that company.

20 Mr. Garrison: I object to that as irrelevant, incompetent and immaterial. We have been all over this question of the ownership of stock, and your Honor said that did not require the production of books, or one thing and another.

(Objection overruled. Exception noted for plaintiff.)

Ans. I was in the company since it started, in 1891.

Ques. "James G. Carroll, Brooklyn, New York, fifty shares," appears on this certificate at the start of the company.

30 Ans. Yes; that was my first issue of the stock, fifty shares.

Ques. That was the first issue of the stock?

Ans. Yes, sir.

Ques. Did you afterwards obtain more of the stock, and, if so, how much?

(Same objection. Objection overruled. Exception noted for plaintiff.)

Ans. Fifty more.

Ques. Are you, or are you not, the James G. Carroll designated as a director of this company in the certificate marked Exhibit B in this case, as residing in Brooklyn, New York?

Ans. Yes, sir.

Ques. Who were the other directors of the company at that time?

Ans. Mr. Murphy, Mr. McGill, Fries, Breslin, Mr. Carroll, and myself.

10

Ques. Six in all?

Ans. Six in all.

Ques. Did you ever part with your stock, or any of it, Mr. Carroll?

(Objected to as irrelevant, incompetent and immaterial. Objection overruled. Exception noted for plaintiff.)

Ans. No, sir.

Ques. I ask you whether or not you resigned as a director of the company.

20

(Same objection. Objection overruled. Exception noted for plaintiff.)

Ans. No, sir.

Ques. I show you Exhibit B, which purports to be an increase of the capital stock of this company, and purports to be dated May 18, 1893, and to be signed by James G. Carroll, and ask you whether or not you joined in making that certificate.

30

(Same objection. Objection overruled. Exception noted for plaintiff.)

Ans. Yes, sir; I joined.

Ques. Mr. Carroll, state whether or not you ever consented to a division of the profits of the business of the company of Fries-Breslin Company into three parts, and the crediting of one of each of those parts to John M. Carroll, Frederick Fries and Thomas J. Breslin?

Mr. Garrison: I object to that as immaterial, irrelevant and incompetent, and I object to the form of the question.

10 The Court: The objection is not sustained.

(Exception noted for plaintiff.)

Ans. No, sir; I never have.

Ques. Mr. Carroll, did or did not you attend meetings of the Board of Directors of that company as director?

20 Mr. Garrison: When? I want to know the time, if your Honor pleases.

The Court: You will have to elicit that by a cross-examination later. (To Mr. Armstrong.) You had better make it between certain dates, so as to make it within the time with which this suit is concerned. Within what periods do you put your question?

Mr. Armstrong: I am formally proving by this witness that he is a director and acted as a director.

30

The Court: I know; but suppose it was with reference to a point of time irrelevant to this case, then it would be an irrelevant inquiry. A meeting held yesterday would be entirely irrelevant. The question will be stricken out unless so amended as to bring it within the scope of the case. I do not say you must specify the

time, but you must specify limits of time so as to show that it may possibly be relevant.

(Question withdrawn.)

Cross-examination.

By Mr. Garrison:

Ques. Mr. Carroll, what business are you in? 10

Ans. Bulding business, sir; speculator and building business.

Ques. In Brooklyn?

Ans. Yes, sir.

Ques. And do you recall a meeting of the stockholders of the Fries-Breslin Company, held some time in 1893, at which Mr. McGill and Mr. Murphy, Mr. Fries, Mr. Breslin, your cousin, and yourself were present?

Mr. Armstrong: I suppose, as there is no question allowed as to meetings, there can be no cross-examination on it. 20

The Court: The objection is not sustained.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ans. I have attended all the stockholders' meetings from the commencement of the— 30

Mr. Garrison: I ask to have that stricken out as not responsive.

(Question repeated.)

Ans. Yes, sir.

Ques. You did? .

Ans. Yes, sir.

Ques. Do you recall that at that meeting action was taken with respect to the issuance of certain preferred stock?

10 Mr. Armstrong: I object to that. That is no part of the cross-examination, certainly, of this witness. Nothing has been said as to that at all.

The Court: I can see an aspect of the case in which it is cross-examination. I do not think I ought to necessarily state why, but I can see how it can be proper cross-examination.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]

Justice Supreme Court.

20

Ans. At that meeting? I cannot say whether it was that regular meeting that the action on the preferred stock was taken or not.

Ques. You were present at a meeting some time at which there was action taken with respect to the issuance of preferred stock?

Ans. Yes, sir.

Ques. And when does your memory fix that time, in what year?

30

Ans. About 1892 or 1893.

Ques. 1892 or 1893?

Ans. Yes, sir.

Ques. At that time the stock which you had in the company had marked on the face of it "Preferred stock, 15 per cent. cumulative"?

Mr. Armstrong: I object to that as not being cross-examination.

(Objection overruled.)

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
Justice Supreme Court.

Ans. No, sir; I had my stock before that. I got my stock in 1892. 10

(Question repeated.)

Ans. Yes, sir.

Ques. After that meeting your stock was marked as preferred stock?

Ans. That I couldn't say. No; I had my stock before that meeting. 20

Ques. No, no; I say after that meeting?

Ans. It couldn't be marked after.

Ques. Well, why not?

Ans. It was marked before the meeting.

Ques. But the stock that you had held before the meeting, after the meeting, after it was determined that there should be preferred stock issued, your stock was marked as preferred stock, was it not?

Ans. My stock was marked in December, 1892.

Ques. As preferred stock?

Ans. Yes, sir; I have got it here. 30

Ques. Do you mean it was marked in December, 1892, or was issued in December, 1892?

Ans. I think it was, if I am not mistaken. (Producing certificate of stock.)

Ques. This shows that it was issued on the 1st of December, 1892, does it not?

Ans. Yes, sir.

Ques. When that was issued to you that did not have marked on it "Preferred, 15 per cent. cumulative," did it?

Ans. That was marked when I got it. It was sent to me at Brooklyn; it was then that it was marked on it.

Ques. When it was sent to you?

Ans. Yes, sir.

Ques. As matter of fact, there was not any preferred stock, as far as you know, until after this meeting, which

10 you say was in 1892?

Ans. Not until 1892.

Ques. Well, there never was but one meeting at which any preferred stock was issued, that you know of?

Ans. That is all.

Ques. And it was after that meeting that your stock was turned into preferred stock?

Ans. That is right, sir.

Ques. Now, after that time, Mr. Carroll, you never acted as a director of this company until about 1901, did you?

20 Ans. Yes, sir.

Ques. After 1893?

Ans. I think I acted as a director and also stockholder at the time John M. Carroll was elected president.

Ques. I say that was in 1893, wasn't it?

Ans. Yes. Well, I couldn't say the year; it was 1893 or 1894.

Ques. Well, all right, sir. After the time John M. Carroll was elected president you never acted as a director down to 1901, did you?

30 Ans. I never was notified—

Ques. That is not what I asked you.

Ans. No, sir; I never acted as one unless I was notified by the secretary, and after that I was never notified by the secretary.

Mr. Garrison: I ask to have that stricken out.

(Motion refused. Exception noted for plaintiff.)

Ques. After the time John M. Carroll was elected president of the company you never acted as a director; you never attended a meeting until some time in December, 1901, did you?

Ans. No; I did not.

Ques. Now, during that time did you get any information from anybody as to what the company was doing?

Ans. Well, yes.

Ques. And during that time you knew that the company was making money, did you not?

Ans. Well, I heard so.

Ques. And you knew that they were crediting you with 15 per cent. every six months, did you not?

Ans. They said so; that is all the knowledge I have of it.

Ques. Yes, sir; certainly that is all the knowledge required; and you knew they were dividing up the balance of the profit among those who called themselves the "common stockholders"? 20

Ans. No, sir; I did not.

Ques. Never heard that from anybody?

Ans. No, sir.

Ques. Did you ever ask what became of the other profits?

Ans. No, sir.

Ques. Never made any inquiry?

Ans. No, sir.

Ques. Never came down to Camden and looked at the books? 30

Ans. Never looked at the books.

Ques. Never inquired of your cousin whether there was any money being earned that was being distributed?

Ans. I knew there was money earned but didn't know what was done with it.

Ques. Didn't know at all what was done with it?

Ans. No, sir; had no knowledge whatever of it.

Ques. Didn't know what he was getting on his stock?

Ans. I did not.

Ques. And never made any inquiry?

Ans. Yes; as regards the business, that's all; but not for the financial affairs, only when they wanted eight or ten thousand dollars off of me they always sent me a note; that is the only time.

10 Mr. Garrison: I ask that that be stricken out.

The Court: I am inclined to think the answer is responsive.

Mr. Garrison: The Court allows that in, does it?

The Court: I think in view of the various questions that answer is responsive.

20 Ques. Did you ever make any inquiries as to whether the company was making profits?

Ans. I have.

Ques. Did you ever make inquiry as to what was being done with those profits?

Ans. No, sir.

Ques. Did you ever ask to look at the books to find out what they were doing?

Ans. No, sir.

30 P. J. MURPHY, sworn.

By Mr. Armstrong:

Ques. Are you the P. J. Murphy who was one of the incorporators of the Fries-Breslin Company, named in Exhibit 1?

Ans. Yes, sir.

Ques. You were the first president of the company, were you not?

Ans. Yes, sir.

Ques. How long did you continue president of the company?

Mr. Garrison: I think that must be immaterial. We do not attack his identity; we will admit that.

The Court: Let me get at a date which is already established in the case. Does this suit concern any dividends or distributions during the time when Mr. Murphy was a common stockholder? 10

Mr. Garrison: None excepting those which he shared in.

The Court: At what date have we already found that he transferred his stock to the other stockholders? 20

Mr. Armstrong: We have not ever ascertained what the date was certainly; I am going to see if I can, by this witness. The other witnesses give it as all the way from 1893 to 1895.

Ques. Do you recall how long you were a stockholder of the company?

Ans. Yes. I was two years president, and a year after that I held my stock before I transferred it to Mr. Carroll. 30

Ques. How many shares of stock did you hold?

(Objected to as incompetent, irrelevant and immaterial. Objection overruled. Exception noted for plaintiff.)

Ans. I held one hundred shares.

Ques. Do you remember the fact of there being an increase of the stock of the company from fifty thousand dollars to seventy-five thousand dollars?

Ans. It must have been after I left.

Ques. You do not recall that?

Ans. No, sir.

Ques. Do you remember whether or not there was some action taken by resolution of the Board of Directors as to making preferred stock in this company, or not?

10

(Objected to as immaterial, irrelevant and incompetent. Objection overruled. Exception noted for plaintiff.)

Ans. There was some talk about it, but it never appeared on paper.

Ques. How long after that was talked about was it before you sold your stock?

20 Ans. I guess about a year or so. I sold it to Mr. Carroll.

Ques. Up to the time you sold your stock to Mr. Carroll, did or did not you continue a director of the company?

Ans. I did continue for about a year, one meeting, I think, after they left our office, they went down then to the Fries-Breslin office; I attended one meeting there, and that is all, and it was no meeting of any account; we went there and did not transact any business.

30 Ques. Was that before or after this discussion in the board meeting about the preferred stock?

Ans. The preferred stock was talked about in our office before that meeting, but it did not amount to anything.

Ques. That is, before they moved to what you call the Fries-Breslin Company's building?

Ans. Yes, sir.

Cross-examination.

By Mr. Garrison:

Ques. Mr. Murphy, you had not paid for the stock that you held in the Fries-Breslin Company in full, had you?

Mr. Armstrong: I object to that. No matter whether he had paid for it or whether he had not; it cannot at all signify. 10

Mr. Garrison: I desire to vindicate that question before your Honor rules.

The Court: On what ground?

Mr. Garrison: I propose to follow it up by showing that the amounts that were voted to him upon this stock were credited as payments on account of the stock; that the amount of dividends that were voted to him were credited on account of his stock instead of being given to him in cash. 20

Mr. Armstrong: So far as I recall I did not ask him anything about any dividends.

The Court: It does not seem to me to be cross-examination.

(Exception noted for plaintiff.) 30

Mr. Armstrong: I desire to offer, as the only papers of any kind filed in the office of the Secretary of State by the Fries-Breslin Company, Exhibit 1 of the plaintiff, and the certified papers called Exhibit B of defendant.

The Court: Those two, as I understand, are already in evidence?

Mr. Armstrong: Yes, sir. Also a certified copy of the report of an election of this company, dated the first day of August, 1902, as being all of the papers filed at any time by this company in the office of the Secretary of State.

10 Mr. Garrison: I object to the relevancy of this last paper.

The Court: Well, it may be marked. I do not see the relevancy of the last one myself, but you need not discuss it; it is in evidence already.

Defendant rests.

Both sides close.

20

CHARGE OF THE COURT.

GARRISON, J.:

30 The plaintiff sues the defendant, which is a manufacturing company, for the amount of money standing to his credit on the books kept under the direction of the managers of the company, and also for a single item of salary of \$5,000, which is not placed to his credit on those books.

Now, the first peculiarity of the suit by which your attention will be arrested is this: Usually when a plaintiff sues upon an account, he comes into Court and says to the defendant, "I have got an account which I have kept against you, and by my account, as I have kept it,

you owe me a certain sum of money." But in this case you will observe that this is reversed, and that the plaintiff says to the defendant, "You have kept whatever the account between us was, and I ask you that whatever your account shows you shall pay me." That is a peculiar circumstance, and one which is the foundation of the manner in which the suit has been presented to you, and which must necessarily form the starting point from which you should consider what your verdict ought to be.

10

Now, the nature of this action has been explained to you by counsel on both sides, and you will have the book. The bill of particulars, which is a statement which the plaintiff furnishes the defendant, is established in the case to be taken from that book, and may, for some convenience, be referred to in so far as you find that it is a copy of that book. The only point in which it differs is that the bill of particulars contains a claim for the five thousand dollars, half-yearly salary, with interest on it, which is not entered on the book.

20

Now, the defendant company does not say, "We did not keep this account." It does not say, "We did not direct it to be kept in this way." Nor does it say that at the time it was kept it was not honestly kept for the purpose of establishing an account. With respect to all of the items on that book of account with the plaintiff, excepting those which were entered as cash and which have now been shown to have been a division of profits, as I understand the case, there is no dispute made but what the account is a proper one to be considered and allowed in adjusting the debits and credits between the plaintiff and the defendant. But with respect to those cash items, the exact amount of which I have not added up, the main stress, in fact the entire stress of this case has been made and upon that it turns. Now, with respect to those items, the proof on behalf of the plaintiff is that they were placed there by the direction

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of the directors of the company for the purpose of indicating that they were his property, and that that was the sole object of placing them there, just as when they placed the salary there, or when they placed a sum of money there which was owing to him from any other source—that the directors of the corporation ordered it to be put to his credit on that book for the single purpose of indicating that it was his money to be credited to him whenever they came to balance the account.

- 10 The defendant, upon the other hand, the corporation, does not deny that it was placed there by the orders of the three persons who were acting as directors of the company, and that it was placed there by their book-keeper, and as a result of a purpose that it should be placed there. But they say that that was not a legal method in which to separate, from the property of which the corporation was the owner, property which a stockholder could claim thereafter as his own. Now, that contention is a matter of law; and while you must settle this case according to your finding of the facts, yet
- 20 it does turn upon one or two matters of law which, however, are very simple; and I will say that your duty as to the facts, notwithstanding the length of time the case has taken, really is comparatively simple. The rule of law is that when a corporation makes money over and above its expenses—earns money so that it has profits—those profits do not belong to the stockholders. You may start with that. Yet you all know that stockholders take part in corporations because they hope to share in the profits. And yet you are met by the rule of law
- 30 that when profits are made they do not belong to the stockholders. So at once you say, “Well, how does it happen, then, that the profits, when they are made, belong to the corporation, and not to the stockholders; and yet, after a while, they belong to the stockholders and not to the corporation?” Now, there is just where the rule of law comes in which governs this case; and

that rule is that just whenever the corporation, through its directors, says that those profits shall cease to be the profits of the corporation and shall become the profits of the stockholders, just at that moment, in law, they do become the profits of the stockholders, and the corporation thereafter does not own them.

There, you see, is the rule of law which is fundamental in this case. For the plaintiff says that thing occurred. He says, "This corporation, through its Board of Directors, did come to a time when they did decide that this profit belonged to the stockholders—to me, amongst the rest. If so, it is mine." 10

The defendant, on the other hand, says that was never done. Now, there is the law, and you see that it is a very simple law and within a very narrow scope. You have got to decide whether this was done, or whether it was not done. That is a question of fact. Because whether the officers of a corporation did this thing involves a great many elements of fact.

But there is one other rule of law which will guide you, and that is, how must the officers act, or how may they act, in order to separate this money so that what was the property of the corporation becomes that of the stockholders? Well, in the first place, who may do it? Why, those trustees who are called the directors of the corporation, acting as a body of directors, are the ones who may do it, and nobody else. The stockholders cannot do that at all. 20

Then, in the next place, you will ask, "Must there be any particular forms provided by law—any particular time—any particular place—any other particular formality?" To that the law answers, "No, those things are very desirable, because they prevent just such mistakes as are constantly arising—just such misunderstandings as can be said to exist in a case like this. It is well for a corporation to organize properly; it is well for it to have minutes; to keep a record of all it does; 30

it is well for it to do everything as orderly as it can. But while the doing of these things has been found to be very desirable to keep people out of trouble, yet if they do not do these things the law does not at all compel their doing them provided they do the substance of what the law requires of them.

- Now, what is the substance, then, of what the law requires? It is that the trustees, who are directing lawfully the business of a corporation, chosen for that purpose by the stockholders, shall ascertain, in the first place, that there has been a profit. That, the directors alone can do. The stockholders cannot do that. But that is not enough. They must then determine whether they will keep all of that profit to run the corporation upon, or whether they desire and consider it proper and discreet to divide some of it among the stockholders. They must decide that. If they decide that they do not want to keep all of those earnings, that they do want to divide some of it with the stockholders, they must go further, and must decide just how much money they set aside from what was their property as a corporation to what is to become the property of the stockholders. And when they have done that then they have separated it, as I said to you, under a prior rule of law.

Then after that they have but one remaining duty, and that is to pay it. And they are not compelled to pay it until there has been a requisition or demand upon them which will indicate it that the man who owns it desires to have his property paid over to him.

- Now, that being, then, what must be done in substance, and the rule of law being that there need be no particular formalities, providing the substantial thing is done, you come to the question of fact, did this corporation, acting through its directors, upon these semi-annual occasions, do the substance of what the law thus requires? In other words, did they separate from what belonged to the corporation a certain quantity of the earnings to

become a dividend or division of profits which the stockholders were to have? If you decide that they did not, of course, upon that branch of the case, you decide against the plaintiff, because the plaintiff's contention is that they did, and he should satisfy you by a preponderance of proof that the thing was done in a manner which carried out the substance of the law.

Now, another matter requires legal instruction to you, and that is this: It is clear in this case that these sums of money which appear on the books of the corporation to the credit of this plaintiff every six months are much larger sums of money than would have been the pro rata dividend which he, upon the face of his one hundred and twenty-five shares of stock, or whatever shares he had, would have gotten. And the question is presented and argued to you that that also is unlawful, and that the directors cannot apportion to stockholders anything more than a percentage of the face value of their stock as it bears a relation to the total amount of capital stock. Now, I think that is entirely true, as a matter of law, where the directors alone are concerned and are acting. In other words, if there are thirty shares of stock in a corporation and there are thirty dollars to be divided, and nothing more appears, and the directors say, "We divide among the thirty shares thirty dollars," the law right there takes hold of it and imputes one dollar to every share; and the directors could not, by any act of theirs, say "That means we will give two dollars to the first share, and half a dollar to the next one," or any other different distribution—in other words, that, nothing more appearing, the right of the directors is to make a perfectly uniform division amongst all of the stock. There must be some rule of that kind, or else the stockholders who were not present would not have their interests protected.

Then the next question in the case that arises is whether that is modified or can be modified in case the

conduct of the directors in making a distribution upon some other ground was done with the approval or by the authorization of all of the stockholders entitled to the distribution. Now, in regard to that, I charge you as the law, that where a fund has been determined to be a fund to be divided amongst all of the stockholders of a corporation, if all of the stockholders who are entitled to this fund acquiesce in, approve of, authorize or ratify any distribution of that fund among themselves, differing from the ordinary pro rata division, the directors, when so authorized, may make such distribution different from what they could make if they lacked such authority from the owners of the total fund of stock.

10 So that in this case, after you shall have passed upon the question whether the directors did the substantial part of their duty, then your next question is, did the division which was made and put upon the books of this company result from the acquiescence, authorization or ratification of the holders of all the stock.

20 Now, there were four holders of stock. As to the three of them who were present, practically doing these things themselves, they being the three active directors I do not see that there can be any possible question but what they did all of those things. With respect to what they themselves did, my mind will not enter into a mental state in which I can conceive of a man doing a thing with respect to his own property which he himself neither authorizes, acquiesces in, approves of or ratifies. So I think we must say that the persons who were there present, actually doing these things in the guise of directors

30 —if you so find that they did—approved of them.

But it is said that you must consider the question upon the rights of James G. Carroll, and you must do so.

Now, with respect to him, he was not present upon these occasions. You will consider the testimony with respect to whether he was an acting director, or whether he, under the testimony in the case, may be presumed

to have ceased to be such, as part of his acceptance of the fifteen per cent. upon his stock, or whatever is your deduction from the testimony in that case—that is, as to his being a director.

But in regard to his being a stockholder, you will observe that whether he is present or not, the same rule of law exactly applies to him—in other words, this action is or is not valid as to him in case you do or do not find from the testimony whether it was with his approval, acquiescence, authorization or ratification.

Now, you must determine whether, after having undoubtedly made some sort of an agreement that was satisfactory to him, he, during these years, continued to be satisfied to accept the fifteen per cent., and acquiesced in whatever was done, or whatever, by inquiry he having found out, might have refused to ratify or refused to accept. You are to deal with him exactly as with the others, excepting that they were present, and it cannot possibly be said that they did not know what was going on or did not acquiesce in it. He was not present, and you, therefore, have to judge as to whether he acquiesced in it or not by considering his conduct in reference to all of the testimony in the case. 10

There, then, are the two questions of fact to be determined: Did the directors do, substantially, their duty on behalf of the corporation? Did the sums of money which were placed to the account of the plaintiff and the other “common stockholders,” as they have been called, meet with the acquiescence or approval of the four stockholders that were the only ones interested in the fund? 20 30

If either of these questions are found adversely to the plaintiff upon this branch of the case, you would disallow this distribution of the property. It is only in case that you find that the directors did perform their substantial duty, and that in this method of division there was the concurrence of the owners of the stock,

that you would find that the plaintiff was correct in maintaining that the book which the company had kept as their account against him was the book which the corporation at this time should continue to be bound by in their dealings with him.

- 10 In regard to the item which is not in the books, which is the \$5,000 item, I see no way to discriminate it, under the testimony in the case, from the other items of salary which are admitted to have been correct in amount, admitted to have been correct in the interval of payment, and are supplemented by further proof that upon minutes which have not been preserved, old minutes, the salary was, by resolution, fixed at \$10,000 for this plaintiff, and upon the further proof that he was, on behalf of the defendant, acting, at least, for part of the meeting, as secretary, and hence, obviously, was still holding some official connection with the company during the period for which this half-yearly salary is claimed. I think this \$5,000 should be included in the same category, although it is not covered by the admission, but that it should stand upon the same basis of fact before the jury as the rest of the bill of particulars with respect to salary.
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That leaves, as the only debatable matter, this question of the division of profits, about which I have endeavored to give you the rules of law and to indicate to you the two respects in which you are to weigh the conduct of these parties and ascertain in substance what they did.

- 30 In accordance with the practice of the Court, counsel on either side hand to the Court written statements of the law which they consider applicable to the case, and which they desire the Court to charge the jury; and the Court may either consider that it has covered those points entirely by the charge delivered to the jury, or may read them to the jury and specify such of them as the Court does or does not consider to be the law of the

case; and I will take that latter course and will read each proposition to you and then state whether or not I consider it applicable to the case.

These are the requests which I am asked by the defendant to charge:

1. That as a stockholder of the defendant company, the plaintiff is not entitled to recover any of the profits of the company except such as the Board of Directors, before the commencement of this suit, ordered to be divided among the shareholders as a dividend. 10

That I have charged you. I have charged you that fully and do charge it.

2. That any private arrangement or agreement between Fries, Breslin and Carroll, touching the division of the profits of the company, was not binding on the corporation in this suit.

I have charged you that if all of the stockholders agreed to a division, and that division was reached in this suit, that it does bind the corporation; and I repeat what I have said upon that subject. 20

3. That there is insufficient proof in this case to establish that the profits sought to be recovered in this suit were ordered by the Board of Directors to be divided as a dividend according to law.

I decline to charge that there is insufficient proof, but do charge that there is sufficient proof to go to the jury and have them determine what the fact is. 30

4. That the plaintiff is not entitled to recover the items of profits set forth and demanded in and by his bill of particulars annexed to the declaration in this case.

Well, that is just what is submitted to you. I decline to charge on that.

5. That the plaintiff is not entitled to recover interest on the items of wages or salary claimed in this suit.

Now, in regard to that matter, the only thing for your guidance is the fact that these interest items are testified to have been entered by the bookkeeper of the company in a book which was kept under the management of the directors, inspected by them, and whether or not they approved of allowing interest upon moneys which the corporation owed (if it did owe them), and whether there was any implied contract to that effect, can only be gathered from the course of business. I cannot charge you as matter of law whether you will consider there was presumption that they were to pay interest upon the sums they owed (if they did owe them), or whether there was a presumption that they should not pay interest. Nothing appears.

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6. That the plaintiff is not entitled to recover interest on the items of profits claimed in this suit prior to September 9, 1902.

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I charge you, as regard interest on profits, that it follows the same rule as the interest on salary—it is for you to find whether there was an implied agreement on the part of the corporation, judging from its course of book-keeping, to pay interest.

7. That without a demand by the plaintiff and a refusal of the defendant company to pay the profits in question before suit was commenced, the plaintiff cannot recover the profits which he seeks to recover in this action.

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I charge that is the law, and that, in this case, you are to consider the exhibits which have been offered, the letter and its response, and also the nature of the entry upon the books, as to whether in your judgment that constituted a recognition by the defendant, and, in view of the subsequent refusal to pay the balance, constitutes a refusal to a demand.

8. That there is no sufficient proof of demand for and refusal of the defendant company to pay the profits or dividends sued for in this action, and therefore, they cannot be recovered in this action.

I charge the same as I did in regard to the seventh request.

9. That the plaintiff cannot recover any claim or demand for money which became due more than six years prior to the date of the commencement of this suit.

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I charge you that in a running account such as this the strict rule of the statute of limitations is not applicable.

These are the plaintiff's requests to charge:

1. That the questions involved here are solely between the plaintiff and the defendant corporation.

That I charge.

2. If, as among themselves, stockholders agree to certain dispositions of the dividends on their stock, the corporation is not concerned, so long as the amount to be paid by it does not exceed the total amount declared as dividends.

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Well, I prefer the way in which I stated it, and that is that the directors may be authorized by all of the stockholders to declare a dividend in whatever way all of the stockholders want it declared.

3. If you find from the evidence that the directors of the defendant company met at the times alleged by the plaintiff and ascertained that a certain amount of profits had been made on the business of the company, and that that profit should be distributed among the stockholders, then you must find for the plaintiff.

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I have covered that in my charge.

4. That there are no formalities required of directors in declaring a dividend, provided that there is a lawful meeting of the directors at which they ascertain the amount of profits and declare what shall be set aside for the stockholders.

That I have charged.

10 5. That after the declaration of a dividend the dividend becomes the individual property of the stockholders, and they may deal with it as any other of their own property.

That I have, in substance, charged.

6. That there is nothing before the jury to show how many directors this company was required to have, the statute requires there shall not be less than three. If you find that three directors did constitute the board of directors, and that such board declared dividends, the dividends so declared were legal.

20 I have charged, in respect to that, that you are to determine from the conduct of Mr. James G. Carroll whether or not he was continuing to be a director during the years when he was receiving his fifteen per cent., and are to judge of the action of the board in view of the testimony.

30 7. If you find from the evidence that it was the intention of James G. Carroll to retire from the board of directors at the time John M. Carroll was elected president, and that he did so retire, that it was the same as a resignation, because it is not necessary in law that a resignation should be in writing, or that there should be any particular formality.

I charge that, in connection with what I have said—that you are to ascertain as a fact—not by any technicalities, but ascertain as a fact—whether Mr. Carroll did continue to act as a director, or whether he had an under-

standing, part of which resulted in his unquestionable course of conduct of ceasing to act as a director as he had theretofore done. It is a pure question of finding out what were in the people's minds, and how their conduct is to be read.

8. (Not read by the Court.) That it is undisputed that after the purchase of the Murphy and McGill stock the only stockholders of the company were James G. Carroll, John M. Carroll, Thomas J. Breslin and Frederick Fries, and if you find from the evidence that it was the understanding and intention of all of the stockholders that John M. Carroll, Thomas J. Breslin and Frederick Fries should act as the directors, then their actions as directors bind all the stockholders and the company. 10

I will not read the eighth request, because that seems to be a question of fact. I decline to charge the 8th.

9. That if the jury find from the evidence that James G. Carroll assented that the directors should be John M. Carroll, Breslin and Fries, and that he should not be a director, and that he should have 15 per cent. upon his stock, he is bound by the legal action of the board of directors so constituted. 20

I have charged that, in substance, it is to be gathered from the evidence.

10. That if the jury find from the evidence that James G. Carroll agreed that out of the profits he should be paid 15 per cent. per annum on the amount of his stock, and that the balance should go to the other stockholders, and the directors, after ascertaining what the amount of the profits to be paid stockholders should be, deducted said 15 per cent. and credited James G. Carroll with it, the said James G. Carroll is bound by the action of the directors. 30

I would not use the word "bound;" I should simply

say that if that is the way the jury finds the facts, it is not a question of binding anybody; it is simply a question that the directors were authorized to do it; if all the stockholders acquiesced in their conduct, it would be an act of the corporation. They were not *bound* by the directors, it was simply a corporate act.

11. That if the jury find from the evidence that James G. Carroll assented that his stock should be treated as preferred stock, and that in the distribution of profits as dividends it was treated as agreed, then it is immaterial in this suit whether such stock was issued as preferred stock in accordance with the statutes.

10 I do charge you that it is entirely immaterial to this suit whether this preferred stock was issued according to statute, or whether it was preferred stock at all. The question is, what was in the mind of James G. Carroll when he got his 15 per cent., no matter what it is called by? It is just a plain, common-sense deduction from the testimony, and not a question of technical names at all.

12. If you find from the books of the defendant company in evidence that there are admissions of credits to the plaintiff in excess of the withdrawals of money made by the plaintiff, the plaintiff is entitled to a verdict for the amount of such excess of credits over withdrawals.

20 I decline to charge the 12th; it is a mere question of arithmetic.

30 13. (Not read by Court.) If the jury find from the proofs that the sums paid to the plaintiff for which the plaintiff has allowed the defendant credits, which credits appear on the books of the defendant, and that the defendant has not appropriated the payments to any particular items of the account, they are to be appropriated

to the first in point of time, and if by so appropriating it appears that all the disputed items have been paid, the plaintiff is entitled to a verdict for the balance.

I decline to charge the 13th, on the ground that it is not essential.

14. (Not read by Court.) It being undisputed that plaintiff was to receive a salary for \$10,000 per annum, and the same having been credited to him, he is entitled to recover for each of these credits and with respect to the claim made for the last six months up to July 1, 1902; he is entitled to that because it has not been shown that he was discharged before that time. 10

The 14th I have charged, with respect to the salary.

15. (Not read by Court.) A corporation in New Jersey is required to have three directors; the company may make by-laws providing for a greater number of directors, if it does not make by-laws and the stockholders assent to the business being managed by the acting directors, all of the stockholders so assenting are bound by the lawful action of such directors. 20

The 15th I have covered.

Now, gentlemen, I have disposed in this way of all of the specific requests which you will consider as being supplemental to the charge which the Court delivered to you before the requests were read. You may retire.

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The defendant excepts to that part of the charge of the Court which is in terms as follows:

"Now, the first peculiarity of the suit by which your attention will be arrested is this: Usually when a plaintiff sues upon an account, he comes into Court and says

to the defendant, 'I have got an account which I have kept against you, and by my account as I have kept it, you owe me a certain sum of money.' But in this case you will observe that this is reversed, and that the plaintiff says to the defendant, 'You have kept whatever the account between us was, and I ask you that whatever your account shows, you shall pay me.' That is a peculiar circumstance, and one which is the foundation of the manner in which the suit has been presented to you, and which must necessarily form the starting point from which you should consider what your verdict ought to be."

And the exception is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]

J. S. C.

The defendant excepts to that part of the charge of the Court, which is in terms as follows:

"Now, the defendant company does not say, 'We did not keep this account.' It does not say, 'We did not direct it to be kept in this way.' Nor does it say that at the time it was kept it was not honestly kept for the purpose of establishing an account. With respect to all of the items on that book of account with the plaintiff, excepting those which were entered as cash and which have now been shown to have been a division of profits, as I understand the case, there is no dispute made but what the account is a proper one to be considered and allowed in adjusting the debits and credits between the plaintiff and the defendant. But with respect to those cash items, the exact amount of which I have not added up, the main stress, in fact the entire stress of this case, has been made and upon that it turns."

And the exception is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]

J. S. C.

The defendant excepts to that part of the charge of the Court which is in terms as follows:

"Then, in the next place, you will ask 'Must there be any particular forms provided by law—any particular time—any particular place—any other particular formality?' To that the law answers, 'No; those things are very desirable, because they prevent just such mistakes as are constantly arising—just such misunderstandings as can be said to exist in a case like this. It is well for a corporation to organize properly; it is well for it to have minutes; to keep a record of all it does; it is well for it to do everything as orderly as it can. But while the doing of these things has been found to be very desirable to keep people out of trouble, yet if they do not do these things the law does not at all compel their doing them provided they do the substance of what the law requires of them.' "

And the exception is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]

J. S. C. 20

The defendant excepts to that part of the charge of the Court which is in terms as follows:

"Now, what is the substance, then, of what the law requires? It is that the trustees, who are directing lawfully the business of a corporation, chosen for that purpose by the stockholders, shall ascertain, in the first place, that there has been a profit. That, the directors alone can do. The stockholders cannot do that. But that is not enough. They must then determine whether they will keep all of that profit to run the corporation upon, or whether they desire and consider it proper and discreet to divide some of it among the stockholders. They must decide that. If they decide that they do not want to keep all of those earnings, that they do want to divide some of it with the stockholders, they must go further, and must decide just how much money they set aside

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from what was their property as a corporation to what is to become the property of the stockholders. And when they have done that then they have separated it, as I said to you, under a prior rule of law.

And the exception is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
J. S. C.

The defendant excepts to that part of the charge of the Court which is in terms as follows:

- 10 "Now, that being, then, what must be done in substance, and the rule of law being that there need be no particular formalities, providing the substantial thing is done, you come to the question of fact, did this corporation, acting through its directors, upon these semi-annual occasions, do the substance of what the law thus requires? In other words, did they separate from what belonged to the corporation a certain quantity of the earnings to become a dividend or division of profits which the stockholders were to have? If you decide that they
- 20 did not, of course, upon that branch of the case, you decide against the plaintiff, because the plaintiff's contention is that they did, and he should satisfy you by a preponderance of proof that the thing was done in a manner which carried out the substance of the law."

And the exception is allowed and sealed accordingly.

C. G. GARRISON, [L. S.]
J. S. C.

- 30 The defendant excepts to that part of the charge of the Court which is in terms as follows:

"Then the next question in the case that arises is whether that is modified or can be modified in case the conduct of the directors in making a distribution upon some other ground was done with the approval or by the authorization of all of the stockholders entitled to the distribution. Now, in regard to that, I charge you

as the law, that where a fund has been determined to be a fund to be divided amongst all of the stockholders of a corporation, if all of the stockholders who are entitled to this fund acquiesce in, approve of, authorize or ratify any distribution of that fund among themselves, differing from the ordinary pro rata division, the directors, when so authorized, may make such distribution different from what they could make if they lacked such authority from the owners of the total fund of stock."

And the exception is allowed and sealed accordingly. 10

C. G. GARRISON, [L. S.]
J. S. C.

The defendant excepts to that part of the charge of the Court which is in terms as follows:

"Now, there were four holders of stock. As to the three of them who were there present, practically doing these things themselves, they being the three active directors, I do not see that there can be any possible question but what they did all of those things. With respect to what they themselves did, my mind will not enter into a mental state in which I can conceive of a man doing a thing with respect to his own property which he himself neither authorizes, acquiesces in, approves of or ratifies. So I think we must say that the persons who were there present, actually doing these things in the guise of directors—if you so find that they did—approved of them." 20

And the exception is allowed and sealed accordingly.

C. G. GARRISON, [L. S.] 30
J. S. C.

The defendant excepts to that part of the charge of the Court which is in terms as follows:

"But it is said you must consider the rights upon the question of James G. Carroll—and you must do so. Now, with respect to him, he was not present upon these

occasions. You will consider the testimony with respect to whether he was an acting director, or whether he, under the testimony in the case, may be presumed to have ceased to be such, as part of his acceptance of the fifteen per cent. upon his stock, or whatever is your deduction from the testimony in that case—that is, as to his being a director.”

And the exception is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
J. S. C.

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The defendant excepts to that part of the charge of the Court which is in terms as follows:

“That leaves, as the only debatable matter, this question of the division of profits, about which I have endeavored to give you the rules of law and to indicate to you the two respects in which you are to weigh the conduct of these parties and ascertain in substance what they did.”

20 And the exception is allowed and sealed accordingly.

C. G. GARRISON, [L. s.]
J. S. C.

Also to the Court's refusal to charge the requests severally as presented by the defendant in writing, and to what was said by the Court in relation to those several requests; and a bill of exceptions is allowed and sealed as to each several request.

C. G. GARRISON, [L. s.]
J. S. C.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

THOMAS J. BRESLIN,	}	
Plaintiff,		
(Defendant in Error),		
vs.		UPON CONTRACT.
FRIES-BRESLIN COMPANY,		10
Defendant,	}	
(Plaintiff in Error).		

ASSIGNMENT OF ERRORS.

The defendant, the plaintiff in error, assigns the following causes of error in the above stated cause: 20

1. Because the Trial Court improperly admitted testimony on the part of the plaintiff contrary to law.

2. Because the Trial Court improperly refused to admit legal testimony on the part of the defendant.

3. Because the Trial Court improperly refused to charge the jury according to law, as requested by the defendant.

4. Because the Trial Court improperly charged the jury contrary to law. 30

5. Because the Trial Court improperly allowed a witness in behalf of the plaintiff at the trial to testify as follows: "Q. What was the character of your stock, common or preferred?" "A. Common stock."

6. Because the Trial Court allowed a witness on behalf of the plaintiff at the trial to testify as follows: "Q.

What was done by the directors on these semi-annual occasions with respect to any profit that the business was shown to have made for the next preceding six months?" "A. After paying the interest, or the dividend on the preferred stock, the receipt of the profits were set down to Mr. J. M. Carroll and Mr. Breslin, and myself, and entered upon the books."

10 7. Because the Trial Court at the trial improperly allowed the plaintiff to testify as follows: "Q. How long was it after the organization of the company before these gentlemen ceased to act as directors?" "A. I should think about 1894."

8. Because the Trial Court at the trial improperly admitted in evidence, on the part of the plaintiff, Book L. N. G. I.

9. Because the Trial Court, at the conclusion of the plaintiff's case, improperly refused to grant the defendant's motion to non-suit the plaintiff.

20 10. Because the Trial Court at the trial improperly admitted in evidence, on the part of the plaintiff, two letters, Exhibits 4 and 5.

11. Because the Trial Court at the trial improperly refused to allow the defendant to prove by John M. Carroll his ownership of shares of stock of the company.

12. Because the Trial Court at the trial improperly denied the offer of the defendant to introduce in evidence the minute book of the Board of Directors of the company.

30 13. Because the Trial Court at the trial improperly denied the offer of the defendant to introduce evidence touching the indebtedness of the Brimfield Manufacturing Company to the defendant company, and to show that the plaintiff and John M. Carroll each assumed one-half of the Brimfield Company's indebtedness to the defendant, in the amount of fifty thousand dollars, or thereabouts, whereby the obligation of the Brimfield Company to the defendant company was discharged,

and Breslin and Carroll made debtors of the defendant company in the sum of twenty-five thousand dollars, or thereabouts, each.

14. Because the Trial Court at the trial improperly denied the offer of the defendant to introduce evidence touching the minutes of the defendant company.

15. Because the Trial Court at the trial improperly denied the offer of the defendant to introduce in evidence the book of minutes of the company.

16. Because the Trial Court at the trial improperly allowed testimony on the part of the plaintiff to the effect that it was understood that whoever took preferred stock no longer had any vote in the corporation, and that it was understood that the preferred stockholders who took preferred stock in the company were to withdraw from the Board of Directors. 10

17. Because the Trial Court at the trial improperly refused the request of the defendant to charge the jury, "that any private arrangement or agreement between Fries, Breslin and Carroll, touching the division of the profits of the company, was not binding on the corporation in this suit;" and wrongfully charged the jury on this point, as follows: "I have charged you that if all of the stockholders agreed to a division and that division was reached in this suit, it does bind the corporation, and I repeat what I have said on that subject. 20

18. Because the Trial Court at the trial improperly denied the request of the defendant to charge the jury as follows: "That there is insufficient proof in this case to establish that the profits sought to be recovered in this suit were ordered by the Board of Directors to be divided as a dividend, according to law;" and wrongfully charged the jury on this point as follows: "I decline to charge that there is insufficient proof, but do charge that there is sufficient proof to go to the jury and have them determine what the fact is." 30

19. Because the Trial Court at the trial improperly denied the request of the defendant to charge the jury as follows: "That the plaintiff is not entitled to recover the items of profit set forth and demanded in and by his bill of particulars annexed to the declaration in the cause."

10 20. Because the Trial Court at the trial improperly refused to comply with the defendant's request to charge the jury as follows: "That the plaintiff was not entitled to recover interest on the items of wages or salary claimed in this suit;" and wrongfully charged the jury on this point as follows: "Now, in regard to that matter, the only thing for your guidance is the fact that these interest items are testified to have been entered by the bookkeeper of the company, in a book which was kept under the management of the directors, and inspected by them, and whether or not they approved of allowing interest upon the moneys which the corporation owed (if it did owe them), and whether there was
20 any implied contract to that effect can only be gathered from the course of business. I cannot charge you as a matter of law whether you will consider there was presumption that they were to pay interest upon the sums they owed (if they did owe them), or whether there was a presumption that they should not pay interest, nothing appears."

30 21. Because the Trial Court at the trial improperly denied the request of the defendant to charge the jury as follows: "That the plaintiff is not entitled to recover interest upon the items of profits claimed in this suit prior to September 9, 1902;" and on this point improperly charged the jury as follows: "I charge you as regards interest on profits that it follows the same rule as the interest on salary. It is for you to find whether there was an implied agreement on the part of the corporation, judging from its course of bookkeeping, to pay interest."

22. Because the Trial Court at the trial improperly denied the request of the defendant to charge the jury as follows: "That without a demand by the plaintiff, and a refusal of the defendant company, to pay the profits in question, before suit was commenced, the plaintiff cannot recover the profit which he seeks to recover in this action;" and improperly charged the jury on this point as follows: "I charge that is the law, and that in this case you are to consider the exhibits which have been offered, the letter and its response, and also the nature of the entry upon the books, as to whether, in your judgment, that constituted a recognition by the defendant, and in view of the subsequent refusal to pay the balance, constitutes a refusal to a demand." 10

23. Because the Court, at the trial, improperly denied the request of the defendant to charge the jury as follows: "That there is no sufficient proof of demand for and refusal of the defendant company to pay the profits or dividends sued for in this action, and therefore, they cannot be recovered in this action." 20

24. Because the Trial Court at the trial improperly denied the request of the defendant to charge the jury as follows: "That the plaintiff cannot recover any claim or demand for money which became due more than six years prior to the date of the commencement of this suit"; and improperly charged the jury on this point as follows: "I charge you that in a running account, such as this, the strict rule, of the statute of limitations is not applicable." 20

25. Because the Trial Court at the trial improperly charged the jury as follows: "Now, the first peculiarity of the suit by which your attention will be arrested is this: Usually when a plaintiff sues upon an account, he comes into court and says to the defendant, "I have got an account which I have kept against you, and by my account as I have kept it, you owe me a certain sum of money." But in this case, you will observe that this is 30

reversed, and that the plaintiff says to the defendant, "You have kept whatever the account between us was, and I ask you that whatever your account shows you shall pay me." That is a peculiar circumstance, and one which is the foundation of the manner in which the suit has been presented to you, and which must necessarily form the starting point from which you should consider what your verdict ought to be."

- 10 26. Because the Trial Court at the trial, improperly charged the jury as follows: "Now, the defendant company does not say, "We did not keep this account." It does not say, "We did not direct it to be kept in this way." Nor does it say that the time it was kept it was not honestly kept for the purpose of establishing an account. With respect to all of the items on that book of account with the plaintiff, excepting those which were entered as cash and which have now been shown to have been a division of profits, as I understand the case, there is no dispute made but what the account is a proper
- 20 one to be considered and allowed in adjusting the debits and credits between the plaintiff and the defendant. But with respect to those cash items, the exact amount of which I have not added up, the main stress, in fact the entire stress of this case has been made and upon that it turns."

27. Because the Trial Court at the trial improperly charged the jury as follows: "Then, in the next place, you will ask 'Must there be any particular forms provided by law—any particular time—any particular place
- 30 —any other particular formality?' To that the law answers: 'No; those things are very desirable, because they prevent just such mistakes as are constantly arising—just such misunderstandings as can be said to exist in a case like this. It is well for a corporation to organize properly; it is well for it to have minutes; to keep a record of all it does; it is well for it to do everything as orderly as it can. But while the doing of these things

has been found to be very desirable to keep people out of trouble, yet if they do not do these things the law does not at all compel their doing them provided they do the substance of what the law requires of them."

28. Because the Trial Court at the trial improperly charged the jury as follows: "Now, what is the substance, then, of what the law requires? It is that the trustees, who are directing lawfully the business of a corporation, chosen for that purpose by the stockholders, shall ascertain, in the first place, that there has been a profit. That, the directors alone can do. The stockholders cannot do that. But that is not enough. They must then determine whether they will keep all of that profit to run the corporation upon, or whether they desire and consider it proper and discreet to divide some of it among the stockholders. They must decide that. If they decide that they do not want to keep all of those earnings, they they do want to divide some of it with the stockholders, they must go further, and must decide just how much money they set aside from what was their property as a corporation to what is to become the property of the stockholders. And when they have done that then they have separated it, as I said, to you under a prior rule. 10

29. Because the Trial Court at the trial improperly charged the jury as follows: "Now, that being, then, what must be done in substance, and the rule of law being that there need be no particular formalities, providing the substantial thing is done, you come to the question of fact, did this corporation, acting through its directors, upon these semi-annual occasions, do the substance of what the law thus requires? In other words, did they separate from what belonged to the corporation a certain quantity of the earnings to become a dividend or division of profits which the stockholders were to have? If you decide that they did not, of course, upon that branch of the case, you decide against the 20 30

plaintiff, because the plaintiff's contention is that they did, and he should satisfy you by a preponderance of proof that the thing was done in a manner which carried out the substance of the law."

- 10 30. Because the Trial Court at the trial improperly charged the jury as follows: "Then the next question in the case that arises is whether that is modified or can be modified in case the conduct of the directors in making a distribution upon some other ground was done with the approval or by the authorization of all of the stockholders entitled to the distribution. Now, in regard to that, I charge you as the law, that where a fund has been determined to be a fund to be divided amongst all of the stockholders of a corporation, if all of the stockholders who are entitled to this fund acquiesce in, approve of, authorize or ratify any distribution of that fund among themselves, differing from the ordinary pro rata division, the directors, when so authorized, may make such distribution different from what they could make if they
- 20 lacked such authority from the owners of the total fund of stock."

31. Because the Trial Court at the trial improperly charged the jury as follows: "Now, there were four holders of stock. As to the three of them who were there present, practically doing these things themselves, they being the three active directors, I do not see that there can be any possible question but what they did all of those things. With respect to what they themselves did, my mind will not enter into a mental state in which
- 30 I can conceive of a man doing a thing with respect to his own property which he himself neither authorizes, acquiesces in, approves of or ratifies. So I think we must say that the persons who were there present, actually doing these things in the guise of directors—if you so find that they did—approved of them."

32. Because the Trial Court at the trial improperly charged the jury as follows: "But it is said you must

consider the rights upon the question of James S. Carroll, and you must do so. Now, with respect to him, he was not present upon these occasions. You will consider the testimony with respect to whether he was an acting director, or whether he, under the testimony in the case, may be presumed to have ceased to be such as part of his acceptance of the fifteen per cent. upon his stock, or whatever is your deduction from the testimony in that case—that is, as to his being a director.”

32. Because the Trial Court at the trial improperly charged the jury as follows: “That leaves, as the only debatable matter, this question of the division of profits, about which I have endeavored to give you the rules of law and to indicate to you the two respects in which you are to weigh the conduct of these parties and ascertain in substance what they did.” 10

DAVID J. PANCOAST,
Att’y of Def’t.

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EXHIBIT 4 OF PLAINTIFF.

9th mo. 9th, 1902.

Fries-Breslin Co.

Camden, N. J

Gentlemen:

Mr. Thomas J. Breslin has authorized me to demand the amount due him from your company, and in case of your refusal to take proceedings to recover the same. The demand is hereby made, and unless I hear from you this week, I shall consider the demand refused. 30

Truly yours,

EXHIBIT 5 OF PLAINTIFF.

D. J. Pancoast,
Counsellor-at-Law.

Telephone 403.

Camden, N. J., Sept. 13th, 1902.

Thos. E. French, Esq.

Dear Sir:

10 As the counsel of Fries-Breslin Co., I would be pleased to know from you just what your client, Mr. Breslin, claims to be due from the Co. to him and what proposition if any you have to make by way of settlement.

Very truly yours,

D. J. Pancoast.

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