New Jersey Court of Errors and Appeals.

Between

THOMAS C. LAZEAR AND ANOTHER, executors, etc.,
Complainants–Appellants,

and

AMERICAN STEEL FOUNDRIES,
Defendant–Respondent.

On Appeal

BRIEF FOR APPELLANTS.

STATEMENT.

This case is before the Court on appeal from a final decree of the Chancellor dismissing the bill of complaint.

The respondent is a corporation of New Jersey, organized under the General Corporation Act of 1896. In 1902 it issued to the appellants certificates for 102 shares of its six per cent. cumulative preferred stock. These certificates are in usual form, and are set forth in full (case page 128). The preference applies both to dividends and principal. On this stock it paid dividends until August, 1904, since when it has paid no dividends to appellants, although they still hold their stock and produced the certificates in Court at the final hearing (case page 88). The respondent has, however, since 1910, distributed $1,761,360 (case page 126), as dividends on its common stock, or, as counsel for the respondent call it, new stock. Appellants ask that the respondent be directed to pay them their accumulated dividends, and that respondent be

enjoined from paying dividends on its common stock while any dividends on the preferred stock may remain unpaid.

The respondent resists the appellants' demands by setting up certain proceedings of the respondent for a change in and reduction of its capital stock, and for the amendment of its certificate of incorporation, the effect of which, it alleges, was to cancel appellants' stock. These proceedings were briefly as follows: The directors, January 3, 1908 (case page 141), resolved that a reduction and change was advisable, appointed a voting committee to carry it into effect, and called a special meeting of the stockholders to be held February 8, 1908, to take action thereon. A notice of the meeting (case page 150) was mailed to the stockholders together with a circular (case page 142), setting forth the plan, namely, "To have surrendered, retired and cancelled the outstanding stock of the Company, and to pay and issue for each share of preferred stock surrendered, $3 in cash, $20 in debentures and $77 in new common stock, and for each share of common stock surrendered, $23 in new common stock."

The stockholders' meeting was adjourned from time to time, until June 12, 1908, when the plan was adopted (case page 183) by the voting committee acting as proxies for the stockholders. The certificate of change in and reduction of the capital stock, and amendment of the certificate of incorporation was filed in the office of the Secretary of State, June 29, 1908 (case page 186).

The appellants declined to accept the common stock debentures and cash offered in exchange for their preferred stock, and retained their stock.

The learned Vice Chancellor, without deciding whether the effect of the foregoing proceedings was to cancel appellants' stock, dismissed their bill on the ground that they were in laches (case page 29).

In 1910 and from time to time since then dividends were paid on the new common stock without regard to appellants' preferred stock.

The appellants after the first dividend on the new stock brought an action in assumpsit against the respondent in

the United States District Court for the Western District of Pennsylvania (case page 250). To their statement of claim, the respondent in this case demurred, and this demurrer, on appeal to the United States Court of Appeals, was sustained. The respondent further contends that the judgment of the United States Court estops the appellants from obtaining relief in the present suit.

Certain phases of the case are set forth more fully in the following argument:

The learned Vice Chancellor dismissed the bill of complaint on the ground that the appellants delayed too long before bringing this suit, so the subject of laches occupies a large part of this brief, but before laches can be considered, it is necessary to take up the effect of the respondent's proceedings reducing its stock inasmuch as the appellants' duty to bring suit or make objection to those proceedings depends on the purpose and effect of the proceedings themselves. We will accordingly argue that the effect of these proceedings was to cancel and retire all old stock of assenting stockholders, but not in anywise to affect non-assenting stock, and in this connection consider a contention of the respondent that the appellants consented to the conversion of their stock. We will next take up the question of laches and seek to show that at the time of the retirement, the appellants communicated their dissent to the Company although they did not bring suit; that they had at most a very doubtful cause of action until the payment of dividends on the common stock in 1910, and that thereupon they acted with great promptness and have ever since continued to urge their rights both in Court and out. The next point in our argument will be that the Company is estopped by its conduct from alleging laches on the part of the appellants; that it lulled the appellants into a sense of security and allowed them to think that their stock was unquestioned by the Company. We will then consider the claim of the Company that the appellants are estopped by their conduct and that the whole subject is res adjudicata and conclude with a brief consideration of the appellants' ground for relief and the extent of relief to which they are entitled.

ANALYSIS OF ARGUMENTS.

I.

RESPONDENT'S PROCEEDINGS TO REDUCE ITS STOCK AND AMEND ITS CERTIFICATE OF INCORPORATION DID NOT CANCEL APPELLANTS' STOCK.

II. LACHES.

III. APPELLANTS ARE NOT ESTOPPED.

IV. APPELLANTS SHOULD HAVE RELIEF.

I.

RESPONDENT'S PROCEEDINGS TO REDUCE ITS STOCK AND AMEND ITS CERTIFICATE OF INCORPORATION DID NOT CANCEL APPELLANTS' STOCK.

A.

Appellants' stock certificates, a contract changeable only by consent of both parties.

The bill of complaint alleges, and the answer admits that the respondent was incorporated in 1902, under the provisions of the *Act concerning corporations* (Revision of 1896). This act provided for preferred stock as follows:

Section 18. "Every corporation organized under this act shall have power to create two or more kinds of stock of such classes with such designations, preferences and

voting powers or restrictions or qualifications thereof as shall be stated and expressed in the certificate of incorporation or in any certificate of amendment thereof....Such preferred stocks may, if desired, be made subject to redemption at any time after three years from the issue thereof at a price not less than par, and the holders thereof shall be entitled to receive, and the corporation shall be bound to pay thereon dividends at such rates and on such conditions as shall be stated in the original or amended certificate of incorporation not exceeding eight per centum per annum, payable quarterly, half-yearly, or yearly; and such dividends may be made payable before any dividends shall be set apart or paid on the common stock and such dividends may be made cumulative."

The certificate of incorporation prior to the amendment of 1908 (case page 201) provided in suitable language for six per cent. cumulative stock which should be preferred both as to dividends and principal. The appellants' certificates (case page 128) set forth the preferences in words identical with those of the certificate of incorporation.

"By this method of providing for the issue of preferred stock, there is a contract not only between the stockholders themselves under the organization certificate, but a contract in addition between the stockholder and the company created by the certificate itself as to all those matters which the statute directs to be expressly determined by the certificate. When this contract is so issued under the statute, and contains the provisions as to rate of dividend which the statute expressly authorizes the holder to receive and obliges the company to pay, a direct obligation or contract between the stockholder and the company as to the rate of dividend is created which cannot be altered without his consent, unless the right to do so has been expressly reserved."

Pronick vs. Spirits Distributing Co., 58 N. J. Eq., 97,100.

The contract under consideration differs in form though not in character from the ordinary contract in that its terms are found not in one instrument, but in the certificate of stock, certificate of incorporation and the statute.

Meredith vs. N. J. Zinc Co., 55 N. J. Eq., 211, 218, 56 N. J. Eq., 454.

A contract can be changed only by the consent of both parties. This principle is elemental; it is the essence of a contract; it needs no authorities to support it.

B.

Appellants did not consent to change at time of reorganization or subsequently.

The stockholders, including appellants, were first informed of the reorganization plan by a notice of a special meeting February 8, 1908 (case page 150), and by a circular accompanying said notice (case page 142). The notice states that the meeting will be held for the purpose of acting upon the proposition to reduce and change the authorized capital stock of the company, and to issue and deliver new stock, debentures and cash to the holders of the old stock in consideration of the surrender, retirement and cancellation of their shares, and for the purpose of amending the certificate of incorporation and of making application of any surplus arising from the retirement and cancellation of stock, and for the purpose of authorizing and empowering the committee named in the accompanying circular to take such action as they may deem proper.

The circular states that the board of directors has approved the plan, sets forth its advantages and states, "To insure the prompt carrying out of the plan upon the approval by the stockholders, IT IS NECESSARY THAT ASSENTING STOCK BE PUT IN TRUST PENDING ACTION BY THE STOCKHOLDERS, and for this purpose arrangements have been made with the Guarantee Trust Company of New York to act as depository and exchange agent, and to issue receipts for all such stock properly endorsed in blank and duly witnessed, as may be delivered to it. Such receipts to carry all the rights and privileges of the stock they represent, except the voting power, which by the deposit of the stock will be vested in a voting committee consisting of Messrs. Elbert H. Gary, Charles Miller,

Alfred F. Goltra, George B. Leighton, Edward Shearson and Richard H. Swartwout or a majority of them, who shall have power in their discretion to determine the time, manner and method of carrying out the plan herein set forth, or abandoning the same if found impracticable by reason of the failure of the stockholders to approve or otherwise. The deposit of stock and the issuance of the depositary's receipt therefor shall be full and irrevocable power and authority to vote said stock. — — — — "

The stockholders' meeting was adjourned from time to time until June 12, 1908, when the plan was approved and declared effective by about ninety per cent. of the stockholders, acting through the voting committee.

It will be noticed that the stockholder in order to signify his approval of the plan irrevocably deposited his stock with the trust company. If he failed to do so, he was counted against the plan; he was not included in the two-thirds of the outstanding stock voting in favor of it, which the statute required (*Corporation Act, Sections 27 and 29*). Mere failure to act on a stockholder's part was positive dissent. THE APPELLANTS DID NOT DEPOSIT THEIR 102 SHARES OF STOCK, AND THEY DID NOT VOTE FOR THE REDUCTION OR AMENDMENT, OR SIGN THE ASSENT ATTACHED TO THE CERTIFICATE OF AMENDMENT, AND THEREFORE, THEY DID NOT CONSENT TO THE CHANGE IN THEIR CONTRACT.

The appellants, however, did not rest solely on this negative action. On their behalf, Mr. Thomas C. Lazear wrote the secretary of the respondent company, April 6, 1908, and while the approval of the plan by the stockholders was still pending (case page 175), that his co-executors "hesitate as to the 102 shares belonging to the estate of Alice C. Lazear, deceased. Viewing the matter as they do, they doubt their power and the advisability of making the exchange contemplated by the plan proposed, at least without the approval of the Orphans' Court." The secretary, Mr. Patterson, replied, April 23, 1908 (case page 179), "Regarding the 102 shares for which you are executor, I can appreciate your position in this, and while the committee having the plan in charge would be very glad

indeed to have the stock come in, they will understand if it does not the reason for it." Mr. Patterson again wrote Mr. Lazear, October 7, 1908 (case page 231), noting "that the 102 shares of old preferred stock belonging to the estate of which you are one of the executors is still outstanding."

It so happened, however, that Mr. Thomas C. Lazear, one of the appellants, was the individual owner of 71 shares of preferred stock, and that he deposited this stock under the reorganization plan. Respondent's counsel in the Court below urged that this deposit of Mr. Lazear's personal stock operated as an explicit consent to the conversion of the 102 shares in question. Respondent's counsel also put in evidence the will of Alice C. Lazear (case page 272), and sought to show by it that Mr. Thomas C. Lazear as the life beneficiary under the will had the absolute disposition of the estate, including the stock in question, and that the stock was owned by him individually and not by appellants as executors.

Respondent, however, made the contract in question with and issued the certificates to the appellants as executors, and not to appellants' testatrix, Mrs. Lazear. Their title is derived directly from the respondent and not from their testatrix. She did not own this stock at her death. It was acquired directly by appellants in exchange for stock of another company which was merged in the respondent company. Respondent has recognized the executors for years as the owners of this stock and has paid dividends to them thereon. We insist that it is TOO LATE FOR RESPONDENT TO ATTACK APPELLANTS' TITLE, and that respondent is clearly estopped by its solemn certificate and by its action in the past from claiming in this suit that Thomas C. Lazear individually is the owner of this stock, and that appellants as executors are not the owners.

On referring to the will of Mrs. Lazear, it will be observed that Thomas C. Lazear did not have the right of disposition of the estate. He is merely the life tenant. To the executors is given the power and duty of making and changing investments, and on the death of Mr. Lazear,

the entire estate is given to testatrix's daughter, Anna L. Orr, and to her son, the appellant, Jesse T. Lazear.

Further, we cannot concede that Mr. Lazear's consent clearly given in his individual capacity could bind him and his co-appellant as executors. The rule that an action in one capacity will not bind the actor in another capacity is recognized in this State in the case of *Sip vs. Lawback*, 17 N. J. L. 442, where it was held that a deed by a widow as administratrix of her husband's estate, did not bar her dower.

Testatrix was a resident of Pennsylvania, and her estate is administered in that jurisdiction, so that the powers of her executors are defined by the laws of Pennsylvania. It is there held when executors, after the payment of debts, continue to hold the assets of the estate and to pay the income thereof to the beneficiaries, that they become in fact trustees, and that they must all join in an instrument in order to bind the estate. The action of one alone is not sufficient.

De Haven vs. Williams, 80 Pa. 480.

In re Bohlen's Estate, 75 Pa. 304.

But even if Mr. Thomas C. Lazear's individual acts could bind appellants, still his deposit of 71 shares could not affect the stock in question. THE ISSUE IS NOT WHETHER APPELLANTS APPROVED OR DISAPPROVED IN GENERAL OF THE REORGANIZATION OF THE COMPANY AND THE REDUCTION OF ITS CAPITAL; IT IS WHETHER THEY CONSENTED TO THE CONVERSION OF THE 102 SHARES ON WHICH THEY ARE SUING AND TO THE ALTERATION OF THAT VERY CONTRACT EVIDENCED BY THEIR CERTIFICATES. Mr. Lazear's deposit of his own stock may possibly be construed as an approval in general of reducing the respondent's capital, but it cannot be construed as a consent to the conversion of the 102 shares.

The appellants having declined to deposit their stock under the reorganization scheme and having expressly notified the respondent's secretary that they doubted their power and the advisability of giving up their stock, no further action on their part was necessary or proper,

because they had no reason to suspect that the respondent did not consider their stock as valid and outstanding, until the payment of the dividend on the common stock, May 14, 1910 (case page 126). Mr. Thomas C. Lazear then wrote Mr. Patterson, secretary, June 4, 1910 (case page 233), asking for dividends on this stock. This was the beginning of a correspondence which lasted until November. In none of the letters written during this period by Mr. Patterson as secretary, or Mr. Pam as general counsel of the respondent, is there any suggestion that this stock is not outstanding or that the appellants are not entitled to their dividends.

This correspondence did not secure definite results, and therefore the appellants began an action at law in the United States District Court for the Western District of Pennsylvania, April 8, 1911, for their accumulated dividends (case page 250). That suit was discontinued April 19, 1913 (case page 269), and the present suit begun shortly thereafter.

No consent to the conversion of appellants' stocks, express or implied, can be found in this case.

C.

Conversion without consent not authorized by contract.

Respondent maintains that as the corporation act enters into the stockholder's contract, and as that act contains provision for amending the certificate of incorporation and reducing the capital, therefore, appellants by their very contract, assented from the beginning to the changes in it which respondent claims were made in 1908. Obviously, if respondent is correct in this contention, preferred stock is a very precarious investment. It is a pseudo contract, which binds one party and not the other. It is a solemn promise which may be used to obtain money from investors and which may then be broken by the company at will. The Vice Chancellor declined to approve this contention of the respondent, and held that it was unnecessary to decide whether the corporation act authorized

respondent to cancel appellants' stock in the manner attempted.

Respondent relies on Sections 27 and 29 of the corporation act.

Section 27. "Every corporation organized under this act may change the nature of its business, change its name, increase its capital stock, decrease its capital stock, change the par value of the shares of its capital stock, change the location of its principal office in this State, extend its corporate existence, change its common stock into one or more classes of preferred stock, create one or more classes of preferred stock, and make such other amendments, change or alteration as may be desired in manner following:"

The clause "change its common stock into one or more classes of preferred stock" was inserted by supplement P. L. 1908, 127. This supplement contained the provision that it should not be construed to alter Section 18, which is the section relating to the issuance of preferred stock. It will be noticed that while Section 27 as amended expressly provides for the conversion of common stock into preferred stock, it does not provide for the conversion of preferred stock into common stock as respondent maintains was done in the case at bar.

Section 29. "The decrease of capital stock may be effected by retiring or reducing any class of the stock or by drawing the necessary number of shares by lot for retirement or by the surrender by every shareholder of his shares and the issue to him in lieu thereof of a decreased number of shares or by the purchase at not above par, of certain shares for retirement or by retiring shares owned by the corporation or by reducing the par value of shares."

The foregoing section should be read in connection with Section 18, relating to the issuance of stock, and especially that clause that "such preferred stocks may, if desired, be made subject to redemption at any time after three years from the issue thereof at a price not less than par;" also in connection with supplement P. L. 1902, page 217, which provides that corporations under certain conditions "may with the consent of the holder of any such preferred stock redeem and retire the preferred stock of

such holder out of bonds or out of the proceeds of bonds of the corporation."

D.

Provision that one party may alter contract strictly construed.

The courts of this State have always construed most strictly clauses in a contract which are alleged to give one of the parties the power to alter the contract without the consent of the other.

Several cases of this kind have arisen from benefit certificates of fraternal associations. The prospective certificate holder makes formal application for membership in the association and for the benefit certificate and agrees to be bound by the by-laws then in force or thereafter adopted. Our courts have always held that "These benefit certificates like other contracts confer a vested interest upon the member which may not be impaired by a subsequent amendment even though the power to amend be reserved in general terms."

O'Neil vs. Legion of Honor, 70 N. J. L., 410, 421.

Sautter vs. Supreme Conclave, 76 N. J. L., 763.

Coghlan vs. Heptasophs, 86 N. J. L., 41.

This question must be decided by the law of New Jersey and cases in other jurisdictions are of little value. But it may be worth while to consider the New York leading case on the power of a corporation to alter a stockholder's contract under a reserved general power to amend:

Kent vs. Quicksilver Mining Company, 78 N. Y., 159.

The Mining Company had power under its charter to make and amend by-laws and to issue stock certificates in such form as the by-laws might prescribe. At first only common stock was issued. Later, preferred stock was created and afterwards the by-laws were amended so that common stock might be exchanged for preferred stock and thus put all stockholders again on a parity. Such exchange was forbidden by the court which took the view that the

reservation of the general right to amend the by-laws did not authorize such an amendment as would impair rights which had vested under the by-laws.

> Folger, J., at page 182: "There is a power in this charter to alter, amend, add to or repeal, at pleasure, by-laws before made. It is argued from this that it was in the power of the corporate body, in due form and manner, to alter the by-law which had fixed the amount of the capital stock and the number and relative value of the shares thereof. The power to make by-laws is to make such as are not inconsistent with the constitution and the law; and the power to alter has the same limit, so that no alteration could be made which would infringe a right already given and secured by the contract of the corporation. Nor was the power to alter, to the extent of affecting the contracted relative value of a share, reserved when the share was sold to the stockholder, so as to enter into and form a part of the contract. An alteration is a pro tanto repeal; but no private corporation can repeal a by-law so as to impair rights which have been given and become vested by virtue of the by-law afterwards repealed. All by-laws must be reasonable and consistent with the general principles of the laws of the land, which are to be determined by the courts, when a case is properly before them (*The Master, etc., vs. Green*, 1 Ld. Raym., 113). A by-law may regulate or modify the constitution of a corporation, but cannot alter it (*Rex vs. Cutbush*, 4 Burr., 2204; *R. W. Co. vs. Allerton*, 18 Wall., 233). The alteration of a by-law is but the making of another upon the same matter. If the first must be reasonable and in accord with principles of law, so must that which alters it. If then the power is reserved to alter, amend or repeal, and that reservation enters into a contract, the power reserved is to pass reasonable by-laws, agreeable to law. But a by-law that will disturb a vested right is not such; see *Gray vs. Portland Bank* (3 Mass., 363; *Grant on Corps.*, 91). And it differs not when the power to make and alter by-laws is expressly given to

a majority of the stockholders, and that the obnoxious ordinance is passed in due form."

Zabriskie vs. Hackensack, etc., Co., 18 N. J. Eq., 179, 193. Zabriskie, C., considered the power reserved to the legislature to amend the company's charter and thus to alter the contract between the State and the corporation. "Again, the power of the legislature has its limits. It can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one, and oblige the stockholders to accept it. It can alter or modify the old one; but power to alter or modify anything can never be held to imply a power to substitute a thing entirely different. It is not the meaning of the words in their usually received sense. Power to alter a mansion-house would never be construed to mean a power to tear down all but the back kitchen and front piazza, and build one three times as large in its place. In anything altered, something must be preserved to keep up its identity; and a matter of the same kind, wholly or chiefly new, substituted for another, is not an alteration; it is a change."

There are several New Jersey cases dealing with attempts by corporations to deprive preferred stockholders of their rights by consolidations and other means.

Pronick vs. Spirits Distributing Co., 58 N. J., Eq., 97. Preferred stock had been issued under P. L. 1889, page 412, which is similar to Section 18 of the Act of 1896. The company sought to reduce the rate of dividend by an amendment of its certificate of incorporation, and this court by injunction forbade such alteration in the contract.

Emery, V. C.: "These provisions as to amendments are, under our decisions, to be regarded as incorporated into the original certificates of corporations subsequently organized and are relied on by the company as authorizing the amendments now proposed, In my judgment these general powers of amendment of the certificate, which originally fixed the relation between the stockholders *inter sese*, do not confer the power of altering the previous contract of the company itself with the stockholders, as to the rate of dividend

> which was created by a stock certificate, or contract of the company which was required by the statute to express this rate of dividend, and which reserved no power in the company to change. Such alteration would impair the obligation of the contract created by the stock certificate issued under the company's charter."

Willcox vs. Trenton Potteries Co., 64 N. J. Eq., 173.

Here the amendment altering the company's preferred stock expressly excepted non-assenting stock, and the court so distinguished this case from the preceding one.

> Stevens, V. C.: "But that case differs from the present one in this vital particular. There it was sought by an amended certificate to reduce the dividend on all the preferred stock against the will of non-assenting stockholders. Here both the amendment and the agreement in explicit language provide that the proposed change shall operate only upon those who consent, consequently the contract of the complainant, Willcox, contained in his stock certificate remains unchanged."

Beling vs. American Tobacco Co., 72 N. J. Eq., 32.

Dana vs. American Tobacco Co., 72 N. J. Eq., 44; 73 N. J. Eq., 736.

These cases considered the merger of three tobacco companies. By the plan of merger preferred stockholders of one of the old companies were offered bonds of the new company which would yield the same income as the preferred stock, and which would have a greater par value. After the merger was completed, complainants who were such preferred stockholders brought suit to dissolve it. This relief was denied. Defendant offered to pay, however, the value of the preferred stock and all dividends thereafter to accrue.

> Pitney, V. C.: "The only other decree than that offered by the defendant which I have been able to conceive can be properly made in favor of the complainant in this cause is a decree for the payment quarterly

of the eight per cent. dividend on the amount of the stock from the date of the last payment up to the termination of the charter of the old company, and the payment of the par value of the stock at that time."

It appears from the foregoing cases that a stockholder's contract cannot be altered by an amendment of the certificate of incorporation or by-laws or by a merger with other companies. We submit that the provisions of the statute as to reducing capital should be interpreted in the same spirit for the protection of preferred stock.

E.

Corporation Act, Section 18, forbids compulsory retirement of preferred stock, except by express stipulation in the certificate, and then at not less than par.

Preferred stock as originally provided for in our law was regarded as a means of obtaining temporary capital, and was always subject to redemption at a time fixed when it was issued. *Corporation Act* (revision of 1875) *Section 25*, declared that preferred stock "shall be subject to redemption at par, at a fixed time to be expressed in the certificate therefor." This was amended P. L. 1889, page 412, to read "may be made subject to redemption" instead of "shall be subject." This optional feature was carried into the revision of 1896, which provided, Section 18, "and such preferred stocks may, if desired, be made subject to redemption at not less than par at a fixed time and price to be expressed in the certificate thereof." This phrase was amended P. L. 1901, page 245, to read "such preferred stocks may, if desired, be made subject to redemption at any time after three years from the issue thereof at a price not less than par;" and Section 8 of the revision of 1896 directed that the certificate of incorporation should set forth "a description of the different classes of stock, if there be more than one class created by the certificate, with the terms on which preferred stock shall be created."

It is the clear purpose of these provisions of the statute that a corporation, if it desires to retain the right

to redeem preferred stock, shall reserve that right in the certificate of incorporation, and that the right of redemption shall be further limited to a price not less than par. The application of the maxim *expressio unius est exclusio alterius* compels the construction that preferred stock cannot be retired against the will of the holder, unless such a right is reserved in the certificate of incorporation, and also the conclusion that such retirement cannot be at less than par. This interpretation is harmonious with Section 29, which provides in general terms for the retirement of stock. This section points the way under which stock may be retired if the right to retire is reserved as provided in Section 18, and it should be limited in its operation as to preferred stock to cases where the right to retire has been reserved.

Another cardinal rule of construction is that effect is to be given to every clause and sentence of a statute. *James vs. DuBois*, 16 N. J. L. 285.

Clearly if preferred stock can be redeemed or retired, as respondent contends, whether or not it was made subject to retirement when issued, then the provision in Section 18 above quoted is nugatory and without effect.

IN NEITHER THE RESPONDENT'S CERTIFICATE OF INCORPORATION NOR THE APPELLANTS' CERTIFICATES WAS THE RIGHT TO REDEEM THIS STOCK RESERVED. Furthermore, the attempted redemption was at less than par. Under the reorganization scheme, Twenty Dollars ($20.00) in debentures, Three Dollars ($3.00) in cash and Seventy-seven Dollars ($77.00) in common stock was offered for One Hundred Dollars ($100.00) of old preferred stock. On this stock there had then accumulated dividends of approximately twenty per cent. and the debentures were intended to equal and be in satisfaction of these accumulated dividends (case page 143), so that the preferred stockholder was only offered for One Hundred Dollars ($100.00) par value of preferred stock, Three Dollars ($3.00) in cash, and Seventy-seven Dollars ($77.00) in common stock. But even if the common stock had made up an even One Hundred Dollars ($100.00), we contend that that could not be considered redemption at par. Par is expressed in

terms of lawful money and can be satisfied only by money and not by personal property of doubtful value.

F.

Compulsory retirement of preferred stock under Section 29 must be for cash.

Section 29 provides for the decrease of capital "by retiring or reducing any class of the stock, or by drawing the necessary number of shares by lot for retirement, or by the surrender by every shareholder of his shares and the issue to him in lieu thereof of a decreased number of shares, or by the purchase at not above par of certain shares for retirement, or by retiring shares owned by the corporation, or by reducing the par value of shares."

The provision for reducing capital is thus stated in the most general terms and without restriction of any kind. It is obvious, however, that the actual application of this section is restricted by the general principles of right dealing and is affected by the circumstances in each case. Consider for example the reduction of the par value of shares. If a corporation has only one class of stock, and the par value is reduced, the relations of the shareholders *inter sese* and their interest in the company and its earnings remain unchanged, and no objection can be made to the proceeding. But if a company has both preferred and common stock, to reduce by half the par value of all shares would (if no surplus resulted from the operation) take from the preferred stockholders half of their profits and give them to the common stockholders. This cannot have been the intent of the legislature, and we may say without hesitation that such a reduction of stock is not authorized by this section.

The decrease of capital by the surrender of shares and the issue in lieu thereof of a decreased number of shares, is limited by considerations similar to those applying to a reduction of the par value of shares, for the effect of taking from a holder 100 shares of the par value of One Hundred Dollars each, and issuing to him 50 shares of the par value of One Hundred Dollars is the same as reducing the value

of 100 shares to Fifty Dollars each. This clause must be further limited by the implied intention of the legislature that the decreased number of shares must be of the same class as those surrendered. COMPULSORY SURRENDER OF 100 SHARES OF PREFERRED STOCK AND THE ISSUE IN LIEU THEREOF OF 50 SHARES OF COMMON STOCK IS NOT ONLY IN EFFECT A REDUCTION OF CAPITAL, BUT IS A CHANGE IN THE NATURE OF THE CAPITAL REMAINING OUTSTANDING FOR WHICH NO COLOR OF AUTHORITY CAN BE FOUND.

The above examples illustrate our contention that the reduction of stock is limited and governed by principles of law not expressed in Section 29. The respondent's reorganization does not show on its face under what clause of the section the reduction was attempted, but the respondent now contends, if we understand its contention correctly, that the reduction was under the first clause, namely, by retiring or reducing any class of the stock. Reduction of preferred stock under that clause we insist must be accompanied by the payment to the holders of the par value of their stock in lawful money. The statute does not set forth whether anything must be paid to the holders of the shares retired, but it would be an absurdity to contend that the legislature intended that the holders of preferred stock might be compelled to give up their shares and receive nothing at all in exchange. This absurdity is only slightly diminished if the holders must be satisfied with any trivial sum which the majority is willing to give them, and it matters not that the securities offered the preferred stockholders express on their face a large value if in fact that value is fictitious.

By the supplement of 1902, preferred stock can be retired for bonds only with the consent of each holder. *Alabama C. C. & I. Co. vs. Baltimore Trust Co.*, 197 Fed. 347. WE SUBMIT THAT IT WOULD BE A REMARKABLE CONSTRUCTION OF THE LAW OF THE STATE THAT PREFERRED STOCKHOLDERS CANNOT BE FORCED TO TAKE BONDS, THE HIGHEST TYPE OF CORPORATION SECURITIES, BUT CAN BE FORCED TO TAKE UNSECURED DEBENTURES AND COMMON STOCK IN EXCHANGE FOR THEIR PREFERRED STOCK.

The reduction of capital stock was considered in *Bergen vs. U. S. Steel Corporation*, 63 N. J. Eq., 809. There

the Steel Corporation planned to retire two million shares of its preferred stock and to issue bonds in the same amount. There was no attempt to compel any stockholder to give up his stock or to take bonds. The acceptance of the company's offer was optional to each stockholder. One of the preferred stockholders sought to enjoin this action on the ground that the creation of this large bonded debt which would be preferred to his stock, would decrease the value of his stock. The court took the view that this was a proper method of decreasing stock under that clause of Section 29, which authorizes "the purchase at not above par of certain shares for retirement."

Van Sickle, J., at page 820, considering the effect of this section, said:

> "The first two methods provided for retiring the stock are compulsory, and if the company had cash assets to retire in those methods, the further provision for retirement by purchase would be unnecessary if it could be by ~~sary~~. The inference is that the draftsman of the 29th section intended to bestow the power to purchase on credit, cash assets not being in hand."

of cash only

It is clear from the foregoing quotation, and also from the whole case that the Court of Errors and Appeals understood that preferred stock could be compulsorily retired only for cash.

If preferred stock is retired for cash, the relations between the holder and the company are terminated. But if preferred stock is retired for debentures and common stock, the relations between the parties continue in another form. The former preferred stockholder acquires new rights and obligations arising from the contracts represented by the debentures and the common stock.

Although stock may be held under our statute subject to retirement by the company, IT WOULD BE A STRAINED CONSTRUCTION OF THE LAW THAT THE COMPANY COULD NOT ONLY CANCEL THE EXISTING CONTRACT BUT COULD MAKE AN ENTIRELY NEW CONTRACT FOR THE STOCKHOLDER AND WITH HIM AND WITHOUT HIS CONSENT.

G.

Reorganization was a change in form of capital rather than a reduction.

The evident purpose of Section 29—and the only purpose—is to provide for the reduction of stock. Under respondent's reorganization plan, Seventy-seven Dollars ($77.00) in common stock was issuable for One Hundred Dollars ($100.00) old preferred stock. Hence there was proposed a reduction of twenty-three per cent.; AS TO SEVENTY-SEVEN PER CENT., THERE WAS NO REDUCTION OF CAPITAL, BUT A CONVERSION OF PREFERRED INTO COMMON STOCK, A CANCELLATION OF ALL PREFERENCES. No hint of power to make such a change appears in this section, or elsewhere in the act.

The compulsory change of preferred stock into common is not only repugnant to general principles of equity, but is impliedly forbidden by Section 27 of the Corporation Act, as amended by P. L. 1908, page 127. This section enumerates the changes which a corporation can make in its charter, and among others "change its common stock into one or more classes of preferred stock." The power to change preferred into common does not appear.

We submit, for the reasons above stated, that the respondent's proceedings to change and reduce its stock did not and could not cancel appellants' stock.

II. LACHES.

The learned Vice Chancellor dismissed the appellants' bill on the ground of laches. He held that to declare that the reorganization did not cancel complainant's stock "would be to declare it unwarranted in point of law, and so among other things, to throw doubt over the validity of the three millions of debentures issued on the face of it, to carry it into effect. The complainant had ample notice of the scheme and ample opportunity to be heard in opposition to it. Under these circumstances, it seems to me that the attack upon it, indirect though it be, comes too

late. It is not an attack upon the right to retire, but only upon the mode in which it has been exercised. To such an attack, delay is fatal."

We respectfully join issue on this reasoning and conclusion of the court below. We will seek to show that appellants' stock can be sustained and enforced without declaring the reorganization unwarranted in law; that the court can so frame its decree as not to cast doubt on the debentures; that the appellants have been diligent and not slothful and finally that the respondent is estopped from alleging laches in appellants.

The question of laches does not arise if the proceedings of 1908 effectually cancelled appellants' stock. WE, THEREFORE, NOW ASSUME THAT THE APPELLANTS' STOCK WAS NOT LAWFULLY RETIRED.

A.

The decrease of capital viewed as a purchase of shares for retirement was valid.

The reorganization papers do not refer to any part of the corporation act, or state under which clause of Section 29 the reduction of stock was made. WHETHER OR NOT THESE PAPERS ON THEIR FACE PURPORT TO RETIRE DISSENTING STOCK IS A QUESTION OF INTERPRETATION. If respondent by this plan sought compulsorily to retire dissenting stock, the attempt was without sanction of law and was invalid for the reasons stated in Part I. of this brief. But if the reorganization was a reduction of stock "by the purchase of certain shares for retirement," it was entirely legal and proper, and did not affect dissenting stock.

Any action should be interpreted in such a way that it is proper and legal if that construction can reasonably be given it, for illegal, improper actions are never presumed.

Pitney vs. Bolton, 45 N. J. Equity 639.

The respondent's certificate of reduction and amendment is Exhibit D 32 (case page 186), and the important

parts of it from which its purpose and effect must be drawn are the resolutions of the directors (case page 200), and of the stockholders (case page 204).

The directors resolved that it was "advisable to decrease the authorized capital stock of this corporation from Thirty-seven Million, Six Hundred and Fifty Thousand Dollars— — — ($37,650,000) to Seventeen Million, One Hundred Eighty-four Thousand Dollars ($17,184,000) divided into 171,840 shares of the par value of One Hundred Dollars each, all of one class and kind without distinction or preference between any of such shares; and to accomplish such reduction by calling in for cancellation and retirement, the present outstanding preferred stock, and issuing and delivering and paying to and for each share of such preferred stock so surrendered, cancelled and retired $77 new stock, $20 debentures and $3 cash, etc. And the directors further resolved that it was "advisable to decrease and change the authorized capital stock, — — — and for that purpose that Article IV. of the Certificate of Incorporation — — — be amended so as to read as follows:

IV. The total authorized capital stock of the corporation is $17,184,000, divided into 171,840 shares of the par value of $100 each."

The stockholders resolved that the authorized capital be reduced to Seventeen Million, One Hundred Eighty-four Thousand Dollars ($17,184,000); that the capital be changed from preferred and common stock to an issue of stock all of one class and kind; "that such reduction and change in the capital stock of this company be effected by the retirement, surrender and cancellation of the present outstanding preferred stock and the present outstanding common stock;" that Article IV. of the Certificate of Incorporation be amended as above mentioned. They lastly resolved "that there be issued and delivered to the holders of the present outstanding preferred stock — — — in consideration of and upon the surrender and retirement and cancellation of the shares of preferred stock, including all rights to the accumulated dividends thereon," Seventy-seven Dollars ($77.00) new stock, Twenty Dollars ($20.00) debentures, and Three Dollars ($3.00) cash for each share of preferred stock.

The desire and hope of the company to retire all its preferred stock is apparent. But it is not clear that the company considered that the mere adoption of the resolutions and filing of the certificate accomplished such retirement.

The directors proposed two means for retiring the stock: (1) by calling in the outstanding stock and issuing and paying new securities and cash for each share surrendered, (2) by amending the certificate of incorporation so as to eliminate the provision for preferred stock. The amendment of the certificate of incorporation could not of course of itself cancel preferred stock validly outstanding. This amendment should be given only a prospective operation under the well known rule of construction that statutes and by-laws should not be given a retrospective operation if it can be avoided.

Frelinghuysen vs. Morristown, 77 N. J. L. 493.

Roxbury Lodge vs. Hocking, 60 N. J. L. 439.

The amendment, therefore, should be construed to prohibit the issuance of preferred stock in the future.

THE ESSENTIAL AND OPERATIVE FEATURE OF THE DIRECTORS' PLAN TO REDUCE THE STOCK WAS THE SURRENDER BY THE SEVERAL STOCKHOLDERS OF THEIR SHARES. The directors contemplated that some of the old stock might not be surrendered and intended that the plan should be effective only as to stock surrendered. This is evident because they did not provide for the issuance of all the new stock but only enough to pay FOR EACH SHARE OF THE OLD STOCK SURRENDERED.

The directors seem to have had in mind the fifth headnote of *Bergen vs. U. S. Steel Corporation*. "The provision in the twenty-ninth section that 'certain shares' may be retired by purchase means that in proceeding under it the directors must declare how many shares they propose to retire and failure to acquire that full number by purchase will not render the scheme abortive. It will be available to the extent it can be carried out."

So, in the case at bar, the directors proposed to retire all the preferred stock and they gave power to the voting

committee to determine how many shares must actually be deposited for retirement before the plan should be carried out.

The resolutions of the stockholders follow in general the resolutions of the directors, and contain the significant provision that the new securities are to be issued "IN CONSIDERATION OF AND UPON THE SURRENDER AND RETIREMENT AND CANCELLATION OF THE SHARES OF PREFERRED STOCK."

The *Corporation Act* authorized the respondent to reduce its stock by purchasing certain shares for retirement. The resolutions do not specifically state that the reduction was to be accomplished under this power, but the language of the resolutions gives indication that such was the intention of the company. The word 'consideration' used in the resolutions usually means the inducement to enter into a contract. It suggests the voluntary making of a new agreement with the company in the place of the old agreement.

Such a construction is supported by the circumstances of the company at the time of the reduction of stock and by the method used to accomplish the reduction. The company then had a capital outstanding of $33,050,000, and dividends had accumulated on the preferred stock to the extent of over $3,400,000. It was necessary to reduce greatly this capital, but it was relatively unimportant whether the capital was reduced to $17,184,000, or $17,284,000. A SUBSTANTIAL REDUCTION WAS NECESSARY. SMALL AMOUNTS COULD BE OVERLOOKED. In order to secure this reduction, the directors appointed a voting committee with full power "to determine in their absolute discretion whether the plan — — — is practicable and can be made effective, and to do any and all things in their judgment necessary or advisable for the purpose of carrying out the said plan or abandoning the same if it cannot be made effective by reason of the failure of the stockholders to approve or otherwise" (case page 203). The law required the consent of two-thirds of the stockholders for a reduction of the capital. If that amount of stock did not approve the plan, it must be abandoned. It was not a

matter in which discretion could be given. The Board evidently had in mind that the reduction of stock was to be accomplished by the voluntary surrender by the several stockholders of their stock, and the issue to them in consideration thereof of the new securities. The discretion given to the voting committee was whether to adopt or abandon the plan when only eighty-five or ninety, or ninety-five per cent. of the old stock was surrendered. It was a discretion to determine how much old stock could be disregarded and left outstanding without seriously impairing the plan for practical purposes.

In pursuance of this discretion, the voting committee adjourned the stockholders' meeting on February 8, although a majority of the stock had then been deposited in support of the plan (case page 154), and again adjourned the meeting March 14, although more than seventy-five per cent. of the stock had been deposited by that time (case page 159). Likewise they adjourned the stockholders' meeting April 18 and May 7, although there had been deposited prior to those meetings respectively eighty-seven per cent. (case page 177), and more than ninety per cent. (case page 180). Practically all the stock had been deposited prior to the meeting of June 12, when the plan was finally adopted.

It is hardly necessary to mention that if the retirement of stock was compulsory and cancelled all outstanding stock with or without the consent of the holders, then the several adjournments taken after two-thirds of the stock had been deposited in favor of the reduction were entirely unnecessary.

If our interpretation of the proceedings of the respondent above indicated is correct, then clearly the appellants cannot be barred by laches. Under such an interpretation, there was no breach, nor even a threat of breach of their contract until the payment of the dividend on the common stock May 14, 1910 (case page 126).

If our interpretation of the respondent's plan to reduce its capital is correct—if it was a reduction by the purchase of shares for retirement—then of course the present suit is not an attack, direct or indirect, upon that plan. To

SUSTAIN APPELLANTS' BILL WOULD NOT BE TO DECLARE THE REDUCTION UNWARRANTED IN POINT OF LAW, BUT WOULD MERELY BE TO RESTRICT ITS OPERATION WITHIN ITS PROPER AND LAWFUL BOUNDS.

B.

Appellants do not attack new stock or debentures.

The Vice Chancellor's conclusions as to laches, based on the proposition that appellants are attacking the reorganization plan, necessarily fall.

But even though our interpretation is incorrect—if this court is of the opinion that the respondent company was attempting to reduce its stock by the compulsory retirement of all stock—still that attempt is not indivisible. The valid can be separated from the invalid; there is no reason why the lawful and the unlawful features should stand or fall together. The retirement of so much of the stock as was voluntarily surrendered was lawful and should be sustained; the attempted retirement of other stock without the consent of the holder was unlawful and should not be countenanced by this court. The stockholders who have surrendered their old shares and accepted the new securities and cash cannot complain. They are most clearly estopped from any objection. Nor can the dissenting stockholders now object to the past surrender by the assenting stockholders of their stock and the issuance and payment to them of the new stock and debentures and cash. They cannot object to the payment of interest and principal of the debentures and dividends on the stock according to the letter of those securities. The appellants make none of these objections. They do not seek to undo anything which has been done. APPELLANTS DO NOT ATTACK ANY RIGHTS, OR EVEN APPARENT RIGHTS, WHICH OTHERS HAVE ACQUIRED. They ask only that their own contract be enforced; that their dividends as earned be paid them.

Counsel for respondent may object that the payment of these dividends would be in violation of the colorable

rights of the holders of the new common stock inasmuch as the amended certificate of incorporation does not mention appellants' preferred stock. The common stock certificates are, presumably, in the form (case page 135) recommended by the Directors' Committee. This is the form usual whether or not there is preferred stock and certainly states no privileges which are impaired by appellants' claims. If the common stockholder makes further investigation of his position and rights, he finds the whole record in the Secretary of State's Office. This record shows that the respondent company was originally authorized to issue preferred stock; that a large amount of preferred stock was issued; then that a part—but not all—of the preferred stock was surrendered and that the certificate of incorporation was amended so as to omit all reference to the preferred stock. The stockholders are presumed to know the law; to know that only the surrendered stock was retired; and therefore to know that their stock was subject to the preferred stock of appellants and other non-assenting holders.

We reiterate that appellants are not attacking any rights of the new stockholders.

The Vice Chancellor suggested that a decree for appellants would cast doubt on the debentures. The validity of these debentures is not questioned by appellants and is not at issue in the pleadings. We do not see how they can be affected by the decree; but if caution suggests that the decree affirmatively proclaims their validity, appellants eagerly consent thereto.

C.

Proceedings of 1908 were at most a threat and not a breach of appellants' contract.

Giving to the proceedings of 1908 a construction most favorable to the respondent, namely, that the proceedings were intended to cancel all outstanding stock—it remains that such proceedings did not constitute an actual invasion of appellants' rights, but only a threat or notice that when occasion arose, appellants' rights would be disregarded.

A stockholder in a New Jersey corporation has two rights, first, to share in the government of the company by voting at the stockholders' meetings; second, a right to the proper application of the corporate assets. We include in the latter the right to dividends under the provisions of the stock certificate. In the case at bar, there was no refusal of the appellants' right to vote and there was no misapplication of funds until the payment on the new stock in 1910. At most, therefore, the proceedings in 1908 were a threat that the company would, when dividends were earned, ignore appellants.

It is very doubtful if appellants had a cause of action until the declaration of the dividend in 1910. The case is somewhat similar to *O'Neil vs. Supreme Council*, 70 N. J. L. 410; the Supreme Court (Pitney, J.) there held that where one party to a contract repudiates in advance his obligations under the contract, the other party may *at his option* treat the contract as terminated and maintain an action at once for damages without awaiting the time fixed by the contract for performance. The court clearly indicated that the aggrieved party need not regard such repudiation, but could if he preferred await an actual breach, and of course the latter course is most usual.

Another suggestive case is *Pronick vs. Spirits Distributing Co.*, 58 N. J. Eq. 97, 101. The bill was filed by a preferred stockholder to enjoin an amendment to the charter reducing the dividend on the preferred stock. Emery, V. C., doubted, except for special circumstances, whether the relief should be granted because it seemed that a suit at law WHEN A DIVIDEND WAS DECLARED BY THE COMPANY was the proper remedy. The suggestion that a suit at law is the appropriate remedy was negatived in the present case by the United States Circuit Court of Appeals (case page 250); but the doubt remains whether appellants had a cause of action before the dividend on the new stock was declared in 1910.

Laches imply an element of negligence—a failure to act when a careful and vigilant man would act. IT CANNOT BE SAID THAT THE APPELLANTS WERE SLOTHFUL OR CARELESS BECAUSE THEY WAITED TILL THEIR CAUSE OF

ACTION HAD FULLY MATURED AND DID NOT INSTITUTE LEGAL PROCEEDINGS BEFORE THEIR CONTRACT HAD ACTUALLY BEEN BROKEN AND WHILE THEIR SUIT DEPENDED ON A DOUBTFUL CONSTRUCTION OF THE PROCEEDINGS TO REDUCE THE RESPONDENT'S STOCK.

The record does not show whether appellants even considered bringing suit until the payment of the dividend in 1910. Probably they did not. Mr. Thomas C. Lazear (case page 77), and Jesse T. Lazear (case page 90) both testified that the respondent company never until that dividend, intimated to them that their preferred stock was questioned.

The circulars and notices issued by the company during the reduction proceedings did not state once that the adoption of the plan would cancel all stock, assenting and non-assenting. The appellants, therefore, had no reason to believe that any action on their part was necessary.

D.

Appellants acted promptly after the actual breach.

There was no delay by the appellants after the payment of the dividend May 15, 1910, on the common stock. Twenty days later, Mr. Thomas C. Lazear wrote Mr. Patterson, the respondent's secretary, for his dividends (case page 233). This correspondence continued until November (case pages 234 to 249). The following spring, April 8, 1911, appellants brought their suit in the United States District Court for dividends (case page 250). This suit was vigorously prosecuted for two years until it was discontinued April 19, 1913, after the filing of an opinion in the Court of Appeals directing that a demurrer to the complaint be sustained on the ground that the controversy was properly one for the courts of New Jersey. The present suit was begun March 27, 1914. While the appellants were mistaken in their remedy in bringing their suit in the United States Court, it is well established that

the diligent prosecution of such a suit relieves the plaintiffs from the charge of laches pending the suit.

Comins vs. Culver, 35 N. J. Equity 94.
18 *American and English Encyclopedia* 110.

E.

Appellants are trustees.

The appellants hold their stock as trustees under the will of Alice C. Lazear. It appears from this will (case page 272) that the appellant, Thomas C. Lazear, is the beneficiary of this trust during his life time, and that upon his death the estate will pass to one Anna L. Orr, and to the appellant, Jesse T. Lazear. It does not appear that Mrs. Orr had the slightest knowledge of the proceedings to reduce the stock. No laches are charged against her, yet she is one of the principal sufferers from the decree of the Court of Chancery dismissing the appellants' bill. We are aware that laches of the holders of the legal title are sometimes imputed to the equitable owners, but such a rule is manifestly hard and should only be applied in cases where the laches are very clear and amount almost to fraud.

F.

The respondent is estopped from alleging laches in appellants.

The conduct of the respondent from 1908 until the argument of the Pennsylvania case in the United States Circuit Court of Appeals was calculated to induce appellants to believe that their stock was valid and outstanding and that they were entitled to dividends thereon in accordance with the terms thereof, and to induce appellants to refrain from attacking the reorganization of 1908.

Respondent sent a notice to its stockholders February 15, 1908 (case page 154), four months before the retirement plan was adopted, saying, "A restraining order against the

consummation of the proposed change in securities had been obtained from a New Jersey Chancellor at the instance of Mr. David Strauss, a stockholder owning about one thousand shares of preferred stock. This order, however, was totally unnecessary for the reason that a large percentage of the stockholders (although a minority) had failed to deposit their stock with the Guarantee Trust Company of New York as requested. The plan contemplated a change in the capital stock only upon condition that the stockholders should voluntarily adopt it." THIS NOTICE WAS CLEARLY INTENDED TO DETER STOCKHOLDERS FROM TAKING LEGAL ACTION TO PREVENT THE DECREASE.

Notices were sent to the stockholders March 21, 1908 (case page 159), April 20, 1908 (case page 177), May 11, 1908 (case page 180), and June 6, 1908 (case page 182), advising of the adjournment of the special meeting of the stockholders. The first three notices stated respectively that seventy-five per cent., eighty-seven per cent., and more than ninety per cent. of the outstanding stock had been deposited in favor of the proposed plan. The statute allows the certificate of incorporation to be amended and stock to be reduced by a two-thirds vote, yet the stockholders' meeting was repeatedly adjourned after a two-thirds vote had been secured. The obvious reason for these repeated adjournments was that the committee in charge believed or pretended to believe that no stock would be affected by the reorganization which was not voluntarily surrendered by the holders, and that the adoption of the plan was not advisable until it was assured that all but a very small amount of the old stock would be surrendered and retired. This was the impression certainly which these notices would convey to the stockholders and the stockholders would thereby be induced to refrain from any action to protect their stock.

The original notice of the plan (case page 150) in referring to the new securities, repeatedly uses the words "consideration for the surrender" of the old stock. Surrender is not an apt word to describe a compulsory cancellation of stock. Consideration is the inducement to enter into a contract. The words suggest the voluntary making

of a new agreement with the company in the place of the old agreement.

In Mr. Patterson's letter of April 23, 1908 (case page 179), he writes Mr. Lazear: "While the committee having the plan in charge would be very glad indeed to have the stock (the 102 shares in question) come in, they will understand if it does not, the reason for it." Why would the committee be glad to have the stock come in if it would be automatically cancelled by the adoption of the reorganization plan whether it came in or not ? THIS LETTER WAS CERTAINLY NOT INTENDED TO NOTIFY THE APPELLANTS THAT THEIR STOCK WOULD BE RETIRED WITH OR WITHOUT THEIR CONSENT. It was intended to induce them to believe that they had an option in the matter.

Mr. Patterson's letter of October 7, 1908 (case page 231) is to the same effect.

The respondent did not in any way, until the payment of the dividend on the common stock, May 15, 1910, indicate that the appellants' stock was invalid or that they would not be entitled to the accumulated dividends thereon as soon as earned. (Case pages 77 and 90.) After the payment of this dividend, June 4, 1910, Mr. Thomas Lazear wrote to the company asking for their dividends (case page 233). Mr. Patterson replied (case page 234), referring Mr. Lazear to the respondent's general counsel, Mr. Pam. Mr. Pam wrote Mr. Lazear June 24, 1910 (case page 237): "The matter mentioned in your letter it seems to me cannot be satisfactorily discussed by correspondence, and I should be glad of an opportunity to talk the matter over with you." He further wrote June 30, 1910 (case page 242), that he would take a few days to look into the authorities. Although Mr. Lazear kept writing the company until November, 1910, he was unable to get any further word from Mr. Patterson or Mr. Pam, and in none of their letters had they suggested that the stock in question was not valid and outstanding.

It was not until the argument in the Court of Appeals in the Pennsylvania case that the respondent was willing to say that the appellants' stock was cancelled by the proceedings of 1908, even without their consent. We

respectfully submit that respondent should not now be allowed to claim a different effect of this proceeding than the one indicated by its past actions and correspondence, and certainly that it should not be allowed to assert that the appellants are in laches in bringing this suit or are estopped by their delay in beginning legal proceedings.

G.

Respondent's Authorities.

The cases cited in the opinion of the learned Vice Chancellor and by respondent's counsel in the court below, are all easily distinguished from the case before the court.

Kent vs. Quicksilver Mining Co., 78 N. Y., 159. Here the court refused to declare illegal preferred stock which had been paid for in good faith and issued four years before any protest was made. That case would be analogous to the one at bar if appellants were asking the court to declare illegal the debentures issued in 1908.

Rabe vs. Dunlap, 51 N. J. Eq., 40.

Beling vs. American Tobacco Co., 72 N. J. Eq., 32.

Dana vs. Tobacco Co., 72 N. J. Eq., 44; 73 N. J. Eq., 736.

These are all cases where there was a merger of several corporations and after the merger had been completed and the new company had established its business, entered into contracts with third parties, etc., the complainant asked the court to declare the merger illegal, void the new companies' contracts and re-establish the original companies. In each case the court refused to do so. In the Tobacco Co. cases, the defendant offered to pay complainants the value of their stock and all dividends which might thereafter accrue upon it, and in addition, in the Beling case, the court suggested a decree for the quarterly payment of dividends on complainant's stock and the par value of the stock on expiration of the old company's charter. THIS SUGGESTED RELIEF IS THE VERY RELIEF WHICH THE APPELLANTS ASK IN THE CASE NOW BEFORE THE COURT.

III. APPELLANTS ARE NOT ESTOPPED.

A.

Estoppel by Judgment.

The respondent by its answer in the Court of Chancery suggested that the question at issue in this suit was finally adjudicated by the United States District Court and that the appellants are concluded thereby. The pertinent parts of the record in that case appear in Exhibit D 53 (case pages 250 to 269). It appears that the appellants brought an action at law in assumpsit for the accumulated dividends on their preferred stock; that the respondent demurred (case page 256) on the ground that plaintiffs' statement of claim did not allege that the defendant company made any earnings applicable to these dividends or had declared any dividends on appellants' stock, and on the further ground that the statement was otherwise uncertain, informal and insufficient. On this demurrer, judgment was entered in favor of the defendant, and a stipulation was ordered filed by the court (case page 269) to the effect that "the payment of costs in the above entitled case is done without prejudice to any rights the plaintiffs may have in another action touching the matters here in controversy, and without presumption of a retraxit."

Such a stipulation is foreign to our practice. We must assume, however, that it had some meaning in the court which ordered it filed. The only meaning which can be given it is that the right of the appellants to litigate their controversy in another suit was preserved.

There is no estoppel by record where the judgment does not go to the merits of the case.

The issues decided by the judgment of the District Court were formed by the demurrer and clearly did not affect the merits of the controversy in this court. The omission in the statement of claim to allege earning of dividends cannot affect earnings subsequent to the beginning of that suit. The omission to allege declaration of dividends does not affect the suit at bar because the bill of

complaint affirmatively states that no dividends have been declared on appellants' stock.

Judgment in the District Court was entered on a mandate from the Circuit Court of Appeals after the filing of an opinion by Gray, C. J. It clearly appears from this opinion that the demurrer was not sustained on the merits of the case but because the appellants had mistaken their remedy (case page 267). "For neglect or refusal by the officers of the corporation to perform a corporate function as to the declaration of the dividends or as to the distribution of funds asserted to be legally or equitably applicable to dividends, relief must be sought by an appropriate suit in equity in which the Chancellor may, while avoiding interference in the exercise of a new discretion by corporate officers, yet enforce the performance of a legal corporate duty."

B.

Equitable Estoppel.

Respondent's counsel in the court below urged that appellants were estopped by their conduct from asking the relief prayed for in their bill of complaint.

This court stated the essential elements which must unite in order to create an equitable estoppel by conduct. In *Musconetcong Iron Works vs. D. L. & W. R. R. Co.*, 78 N. J. L. page 717:

First: The party against whom the estoppel is urged must have made a representation or concealment of material facts inconsistent with the facts forming the basis of his present claim.

Second: Knowing such facts to be otherwise than as represented, or except for gross negligence would have been known.

Third: That such representation must have been made with intent to influence the conduct of another or else under such circumstances that a reasonably prudent man would suppose it was intended to be acted upon.

Fourth: That the party to whom the representation was made was ignorant of the fact without convenient opportunity to ascertain them.

Fifth: That there was, in good faith, a reliance upon the representation whereby the person deceived was induced to adopt a course of conduct prejudicial to himself if the other party be permitted to repudiate the representation.

IN THE CASE AT BAR, ALL THESE ELEMENTS ARE LACKING. The appellants have not misrepresented or concealed any facts, nor can we find in the answer of respondent even a suggestion of misrepresentation or concealment of facts. At most, there is a suggestion that appellants concealed their opinion of the law as to the effect of the reorganization. If we understand the respondent's position correctly on the point of estoppel, it suggests that appellants knowing that the reorganization did not in law affect the 102 shares in question, concealed this knowledge and so induced third parties to purchase stock in the respondent company. It is well established, however, that concealment of an opinion as to the law will not work an estoppel.

16 *Cyc.* 756, and cases there cited.

The evidence does not show, however, that any one ever made any inquiry of the appellants as to their position or that there were any circumstances requiring the appellants to speak. The appellants, indeed, did more than the most delicate conscience could require when Mr. Thomas C. Lazear wrote to respondent's secretary that his co-executors doubted the advisability of giving up their stock.

It does not appear by the evidence that any party interested was ignorant of the truth or was induced by the appellants to change his position. The respondent itself, of course, had full knowledge of the facts, and especially of the fact that appellants did not deposit their stock. The other stockholders had equal knowledge with the appellants as to the facts and they had actual notice that ten per cent. had not assented to the reorganization (case page 184), nor could they have been misled for they deposited their stock irrevocably with a voting committee

and could not know in advance how the committee would vote or what action their fellow stockholders would take. The new stockholders—those who have acquired their stock since the reorganization—were not misled. Presumably the respondent company gave to them on inquiry, such information as they desired, including the information that appellants' stock had not been surrendered. If they were misled, it was by no act or concealment of appellants, but rather the act or concealment of the respondent itself. If appellants are estopped as against new stockholders, on the same principle so should the holder of a promissory note or any other contract right against the respondent dating from before the reorganization and of which the new stockholders may not have had actual notice when they purchased their stock.

IV. APPELLANTS SHOULD HAVE RELIEF.

A.

Their contract in enforceable in equity.

The relation between stockholder and corporation has been a frequent subject of litigation in the Court of Chancery of this State, and it has uniformly been held that that Court is the proper tribunal in which a stockholder can enforce his contractual rights with the corporation.

Blanchard vs. Ins. Co., 78 N. J. Equity, 471.

Bassett vs. Pipe Co., 74 N. J. Equity, 668; 75 N. J. Equity, 539.

Even if there were any doubt as to the general rule, the court in the case at bar should hold that the appellants have chosen the proper remedy, because the United States Court of Appeals has, between the parties now before the court and in the same controversy, held that a suit at law was not maintainable (case page 250), and the same ruling has been made by the Supreme Court of the State of Pennsylvania in a case between other parties, but involving identically the same questions.

Hogue vs. American Steel Foundries, 241 Pa. 12.

B.

Appellants' loss was real.

Appellants' stock was preferred both as to principal and dividends. At the time of the reduction of stock in 1908, the respondent company had outstanding in common and preferred stock $33,050,000, but SO MUCH OF THIS WAS WATER THAT ALL OF THE ASSETS IN EQUITY BELONGED TO THE PREFERRED STOCKHOLDERS. There had accumulated in 1908 dividends on the preferred stock of about twenty per cent., and at the beginning of this suit, of about fifty per cent. The gist of the reduction plan was to present twenty-three per cent. of the assets and of the earnings to the common stockholders and to abolish all preference thereafter. The plan was as follows:

Authorized preferred stock	$19,540,000
Unissued	2,300,000
Outstanding preferred stock	$17,240,000
Retired without participation	56,000
Participating preferred stock	$17,184,000

Deliverable thereon under the reduction plan:

Debentures (20% of stock)	$ 3,436,800.00
Cash (3% of stock)	515,520.00
New stock (77% of stock)	13,231,680.00
	$17,184,000.00

Authorized common stock	$18,110,000.00
Unissued	2,300,000.00
Outstanding common stock	$15,810,000.00
Retired without participation	720.00
Participating common stock	$15,809,280.00
New stock (25% of old stock)	$ 3,952,320.00

New stock issued to preferred stockholders, (77% of new stock issue)	$13,231,680.00
New stock issued to old common stockholders (23% of new stock issue)	3,952,320.00
Total new stock	$17,184,000.00

It will be observed from the above that twenty-three per cent. of the new stock was issued to the old common stockholders, although in equity they own not a penny of the assets of the company.

Assuming that the respondent's reports to its stockholders as set forth in the record are correct, this plan meant a loss to appellants of $2,663.00. The calculation which follows is as of December 31, 1912, the date of the last report appearing in the record:

Undivided profits	$ 553,237.00
Reduced capital stock	17,184,000.00
Debentures issued in 1908	3,436,800.00
Cash paid preferred stockholders in 1908	515,520.00
Interest paid on debentures to Dec. 31, 1912	652,992.00
Dividends paid on new stock to Dec. 31, 1912	1,245,800.00
Total amount applicable to preferred stock if reduction plan had not been adopted	$23,588,349.00

Book value of 171,840 shares of preferred stock and 42½% dividends accumulated thereon	$ 137.00
Appellants' 102 preferred shares at 137	13,974.00
Reduced capital stock	17,184,000.00
Undivided profits	553,237.00
Total assets applicable to new stock	$17,737,237.00
Book value of 171,840 shares of new stock	$103.00

Deliverable to appellant under reduction plan on 102 shares:

New stock 78.54 shares (77% of 102) at 103..	$ 8,090.00
Dividends on same (6¼%) to Dec. 31, 1912	487.00
Debentures (20% of 102)	2,040.00
Interest on same to December 31, 1912	388.00
Cash on reduction (3% of 102)	306.00
	$11,311.00
Appellants' loss under plan	2,663.00
	$13,974.00

While it appears from the foregoing calculation that appellants' loss, if compelled to accept the reduction plan, was only $2,663.00, their loss would be in fact much larger, for they would be compelled to take their chances with the common stockholders and would be deprived of their preference as to dividends and principal.

C.

No proof of declaration of dividends or of fraud is necessary.

Respondent's counsel in the court below urged that appellants were not entitled to relief because they had not alleged or proved that any dividends had been declared upon their stock or that there was any fraud in the failure to declare such dividends. We do not take this defense seriously, and will devote but little attention to it. Clearly if dividends had been declared on appellants' stock, their relief would be in a court of law and the usual grounds for replying to a court of equity in cases of this character is that dividends have not been declared although they have been earned.

Blanchard vs. Prudential Insurance Co.,

No fraud was proved because the suit is not based on deceit but on a right secured by contract. We know of no

case which holds that fraud is an essential element of an action to compel payment of dividends on preferred stock when the company has paid dividends on common stock in violation of its contract.

D.

Respondent's suggestion of partial relief is unsound.

Respondent, in its answer, urged that if the appellants are entitled to any distribution upon their shares it should be limited to the proportion of the dividends paid on the new stock that their 102 shares bears to the total amount of preferred stock outstanding in 1908. Obviously this suggestion is unsound.

In the first place, it ignores the fact that the other preferred stockholders received in 1908, $3.00 in cash and $20.00 in debentures for each share of stock. Presumably they have also received the interest mentioned in the debentures and they have had the use of the cash for eight years.

The objection just stated goes only to detail, but there is a fundamental objection to this partial relief suggested. Appellants are either preferred stockholders or not. If they are not preferred stockholders, they are entitled merely to the right of conversion offered under the reduction plan. IF APPELLANTS ARE PREFERRED STOCKHOLDERS, AS WE CONTEND, THEY ARE ENTITLED TO THE DIVIDENDS AND PREFERENCES STIPULATED IN THEIR CONTRACT. This contract calls for six per cent. cumulative dividends in preference to any dividends payable on the common stock. There is no doubt that the so-called new stock is common stock, whatever was the character of the stock in exchange for which it was issued, and, therefore, appellants are entitled to dividends in preference to any of the new stock. The other holders of preferred stock voluntarily surrendered their stock for what they must have deemed an adequate consideration. They received a considerable cash payment at that time while the appellants patiently awaited more

favorable business conditions. They received interest bearing debentures which are a debt of the company preferred to appellants' stock.

The preferred stock so surrendered was cancelled and retired. It can in no sense be considered now outstanding and we, therefore, fail to perceive any reason why appellants should share their dividends with this imaginary, non-existing stock, the mere ghost of stock retired eight years ago.

In *Burlington City Loan & Trust Co. vs. Princeton Lighting Co.*, 72 N. J. Eq., 891, the court held that under the circumstances of that case that certain dissenting bond holders were only entitled to such a proportion of interest as their bonds bore to the whole issue which was retired; but in that case, the retired bonds were not cancelled. They were merely assigned to a trustee for the benefit of those who should assent to the plan. All the bonds, both those of the assenting and non-assenting holders, therefore, remained valid and outstanding and on a parity. The contrary is true in the case at bar as the assenting stock was all cancelled and retired.

E.

Appellants are entitled to full accumulated dividends.

Appellants would probably not be entitled to the accumulated dividends until the company should have sufficient funds on hand safely to pay the same. In order to ascertain if such was the case, appellants introduced into their bill of complaint certain interrogatories bearing upon the respondent's ability to pay. The respondent in its answer admitted generally "that in recent years its business has been profitable and that it has accumulated a surplus over and above all reserves for sinking funds, working capital, depreciation and other purposes," and declined to answer the interrogatories. Appellants thereupon moved to adjudge the answer insufficient. The learned Vice Chancellor denied the application on the

ground that the respondent's answer admitted "that it has funds with which to pay dividends on complainants' preferred stock if such stock constitutes an outstanding obligation. The real question is whether it does constitute such obligation. The interrogatories proposed (for such they are in effect) are consequently immaterial," (case page 28). This ruling made in behalf of respondent makes unnecessary a reference to ascertain whether all the accumulated dividends can now be paid.

The amount of these dividends is a simple matter of calculation. The certificates of stock (case page 128) provided that yearly dividends at the rate of six per centum per annum shall be payable quarterly on dates to be fixed by the by-laws. The complaint and answer show that quarterly dividends of one and one-half per cent. were paid on this stock until August 15, 1904, when a one per cent. dividend was paid, and that since that day, no dividends have been paid on appellants' stock. In the absence of proof to the contrary, the dividend days remain August 15, November 15, February 15 and May 15. The amount of dividends accumulated is as follows:

August 15, 1904, one-half per cent	$ 51.00
November 15, 1904, to May 15, 1910, 5 years, 9 months at 6% per year	3,519.00
August 15, 1910, to February 15, 1916, 5 years, 9 months at 6% per year	3,519.00
Total dividends accumulated on appellants' stock	$7,089.00

F.

Appellants are entitled to interest on dividends.

This suit is based on contract, and the general rule therefor applies that the aggrieved party is entitled to interest at six per cent. per annum on the amount ascertained to be due him from the time it should have been paid according to the terms of the contract. In this case the breach occurred May 15, 1910, when the respondent ascertained that it had funds available for dividends and

distributed such funds among the common stockholders in violation of appellants' rights. Appellants, therefore, ask for interest from May 15, 1910, on all dividends accumulated before that date and ask for interest on dividends since accumulated from the several dates on which such dividends should have been paid appellants. The calculation follows;

$3,570 at 6% from May 15, 1910, to February 15, 1916	$1,231.65
$3,519 (dividends accumulated since May 15, 1910) at 6% from the several dividend days to February 15, 1916, average interest period, 2 years, 9 months	580.63
Total interest	$1,812.28
Accumulated dividends	7,089.00
Total due appellants February 15, 1916	$8,901.28

G.

Appellants are entitled to an injunction against future breaches.

The record shows that the respondent has persistently paid dividends on its common stock in violation of the rights of appellants and in disregard of their protests. Many of these dividends have been paid after the appellants began suit. The appellants, therefore, ask that the respondent be enjoined from hereafter declaring or paying any dividends upon its common stock while any dividends heretofore or hereafter accumulated or accrued upon their preferred stock shall remain unpaid. Such relief is the appropriate purpose of an injunction.

Society, etc., vs. Morris Canal Co., 1 N. J. Eq., 157, 191.

H.

This Court should render such judgment as the Court of Chancery should have given.

There are no material facts in dispute. All the evidence necessary for a decree on the merits of the case has been presented to the Court of Chancery and is now before this court.

The general rule is that the appellate court will render such judgment as the inferior court should have given.

Newark, etc., Co. vs. Newark, 23 N. J. Eq., 515, 521.

Decker vs. Ruckman, 28 N. J. Eq., 614.

This court should decide the controversy from the proofs already taken and not send the case back for a retrial.

THE DECREE OF THE COURT OF CHANCERY SHOULD BE REVERSED FOR THE REASONS ABOVE STATED, AND A DECREE MADE FOR THE APPELLANTS PURSUANT TO THEIR PRAYER FOR RELIEF.

Respectfully submitted,

JOHN O. BIGELOW,
HENRY V. BLAXTER,
Of Counsel with Appellants.

New Jersey Court of Errors and Appeals.

Between
THOMAS C. LAZEAR and another,
Executors, etc.,
Complainants-Appellants,

AND

AMERICAN STEEL FOUNDRIES,
Defendant-Respondent.

BRIEF FOR RESPONDENT.

In 1907 the business and financial condition of respondent were such it was deemed advisable and in the interest of its stockholders that a reduction and retirement of its outstanding stock be had. The subject of such retirement was discussed and a committee for the purpose of devising a plan for such reduction and retirement appointed. On December 6, 1907, a report of the committee was made, and on January 3, 1908, the board of directors adopted a resolution setting forth the proposed terms and conditions of such reduction and retirement and calling a meeting of the stockholders to consider and take action thereon (Case, p. 200, Ex. B).

A special meeting of the stockholders was called for February 8, 1908. Notice of such special meeting, with a statement containing the proposed plan of reduction and retirement was sent to the addresses of the stockholders of record, including the appellants (See Case, p. 142, Ex. D-5 and p. 150, Ex. D-6). On February 8, 1908, the special meeting of the stockholders was held and was adjourned to March 14, 1904, and notice of such adjournment, together with a copy of the statement, under date of February 15, 1908, was sent to each

of the stockholders, including appellants (Case, p. 154, Ex. D–9). On March 14, 1908, the special meeting of the stockholders was again adjourned to April 18, 1908, and notice of such adjournment under date of March 21, 1908, together with a printed copy of the remarks of E. H. Gary, chairman, was sent to each of the stockholders, including appellants (Case, pp. 159-60, Ex. D–12). On April 18, 1908, the special meeting was once more adjourned to May 7, 1908, and notice of the adjournment, under date of April 20, 1908, sent to each of the stockholders, including the appellants (Case, p. 177, Ex. D–18). On May 7, 1908, the special meeting was adjourned to June 4, 1908, and notice of that adjournment, under date of May 11, 1908, was sent to all the stockholders, including appellants (Case, p. 180, Ex. D-23). On June 4, 1908, another adjournment was taken to June 12, 1908, and notice of such adjournment was sent to each of the stockholders, including the appellants (Case, p. 182, Ex. D-26). At the adjourned meeting on June 12, 1908, the plan for the reduction and retirement of capital stock of respondent was submitted to the stockholders and was approved and declared effective by the affirmative vote of about ninety per cent. of all the outstanding stock, and notice of such action was sent to each of the stockholders, including the appellants, under date of June 12, 1908 (Case, p. 184, Ex. D-29).

Notice to the effect that The Guaranty Trust Company of New York was prepared to carry into effect the retirement so adopted and approved by the stockholders, under date of July 11, 1908, was sent to each of the stockholders, including appellants (Case, pp. 227–9, Ex. D-34).

At the trial the defendant admitted the receipt of all the above notices (Case, p. 83, lines 42–7).

After the lapse of 17 days following the action of the stockholders in approving the plan of reduction and retirement the respondent on June 29, 1908, filed with the Secretary of State of the State of New Jersey its certificate of change in and reduction of its capital stock and all the proceedings in relation thereto, as well as the amendment of the amended certificate of incorporation and all proceedings connected therewith, including the written assent of the holders of about ninety per cent. of all the outstanding stock.

It is admitted that the proceedings were duly published as by law required (Case, p. 54, line 30, p. 120).

Prior to the reduction and retirement of the capital stock of respondent the preferred stock and the common stock theretofore outstanding had been listed upon the New York Stock Exchange (Case, p. 108, lines 33–4). Subsequent to June 29, 1908, such was stricken from the list and the new stock issued by respondent under such plan of reduction and retirement was thereupon listed upon the New York Stock Exchange (Case, p. 108, lines 35-9, and p. 109, lines 35–47).

Between June 12, 1908, and April 1, 1915, there were 4,151,237 shares of the new stock of appellant transferred, of which 3,599,614 shares were the subject of retransfer between the transfer agent and the trustee. The balance, 551,623 shares, represents transfers of that number of shares by owners thereof for their own purposes (Case, p. 113, lines 35–41).

Since June 29, 1908, 171,271 shares of the old preferred stock, out of a total of 171,840 shares theretofore outstanding (**99 66/100**%), have been surrendered and exchanged for appellant's new stock, leaving outstanding, unsurrendered and unexchanged 569 shares, or less than one-third of one per cent. (Case, p. 107, lines 42–48, and p. 108, lines 12–19).

At the close of business December 12, 1914, appellant had between twelve and thirteen hundred shareholders. Of this number 698 held $5,901,600 of the shares of the new stock, which was not acquired through exchange under the plan of reduction and retirement of January 3, 1908 (Case, p. 127, lines 11-21).

Pursuant to and subsequent to the amendment filed June 29, 1908, the appellant issued and has since had outstanding all its new stock amounting to $17,184,000 (Case, p. 108, lines 20-25). Appellant also issued at the same time and in the same connection its four per cent. debentures to the amount of $3,436,800 (Case, p. 108, lines 26-8). The appellant further paid in cash pursuant to the plan of reduction and retirement $515,520 (Case, pp. 108–9, lines 31–2).

Appellant did not declare any dividends at any time subsequent to June 12, 1908, on the old preferred stock outstanding prior thereto (Case, p. 106, lines 18–23). Dividends upon the new stock issued under the plan of reduction and retirement were declared and paid by appellant since June

12, 1908 (Case, p. 105, lines 11–15, 47–8, and p. 106, lines 11–17).

The appellant Thomas C. Lazear at the time of the reduction and retirement owned in his own right 71 shares of the respondent's preferred stock theretofore outstanding, which he turned over to the American Steel Foundries under the above plan of retirement (Case, p. 46, lines 11–19, 28–38, and p. 51, lines 20–29). At the same time he owned 102 shares of similar stock as life tenant under the will of his deceased wife, Alice C. Lazear.

At the time of her death she owned 48 shares of the common capital stock of the American Steel Castings Company and 27 shares of the preferred stock of the American Steel Castings Company, which, after her death, were converted into the old preferred stock of respondent, receiving in exchange therefor certificates for the 102 shares of the respondent's old preferred stock which constitute the basis of this action. The executors of the will of Alice C. Lazear, deceased, are Thomas C. Lazear, Jesse T. Lazear (his son) and Charles P. Orr (his son-in-law) (Case, p. 272). Charles P. Orr is still one of the executors of the will, though not a party to this suit (Case, p. 44, lines 29–31).

Prior to the filing of the complaint herein no objection or protest was made by or in behalf of the appellants against the reduction and retirement of the stock of respondent as proposed and adopted by the stockholders.

In that regard Thomas C. Lazear, one of the appellants, testified as follows:

> "Q. Judge Orr is your son-in-law? A. Yes, sir.
>
> "Q. And Jesse T. Lazear is your son? A. Yes.
>
> "Q. Did you attend any of the meetings or the adjourned meetings of the American Steel Foundries during the period that this plan for readjustment and change of capitalization was under consideration? A. No, I don't think I attended one.
>
> "Q. Did you execute any proxy or ask anybody to attend for you? A. No, I didn't think it was necessary. I put my stock in, and they accepted it, and the executors wouldn't put in my wife's stock.
>
> "Q. Did you have anybody appear at any of the

meetings to object to the proceedings, on behalf of anybody? A. I did not.

"Q. Did you at any time prior to the filing of the bill in the present case make any objection to the plan for the conversion and change of capitalization of the American Steel Foundries, as was submitted in a circular letter of January 3, 1908? A. I never did.

"Q. Did any of the executors, so far as you know? A. So far as I know, I don't know that they ever appeared any place.

"Q. Did any of the executors ever make any objection to the plan submitted by the American Steel Foundries under its circular letter of January 3, 1908, for the conversion and change of its capitalization, prior to the filing of the bill in this case? A. They made no objection that I know of. That is, they didn't assert themselves in any legal proceedings or attend any of the meetings to object to it."

Case, pp. 74–5.

And appellants even now make no attack upon the regularity of the proceedings for the reduction and retirement of the capital stock of respondent. Appellants admit that the proceedings in that regard were in all respects binding upon the stockholders assenting thereto (Appellants' brief 28), but insist that such is not binding on them, claiming not to have assented thereto and assert that their stock is preferred stock and entitles them to dividends at the rate of six per cent. per annum since 1904 prior and in prefeernce to the rights of *all* holders of the new stock.

On April 8, 1911, appellants brought an action against respondent in the District Court of the United States for the Western District of Pennsylvania for the recovery of unpaid dividends upon the 102 shares of appellants' old preferred stock, which are the subject of the present suit. Appellants recovered judgment against respondent in that action in the District Court, from which judgment an appeal was prosecuted to the Circuit Court of Appeals for the Third Circuit, and on such appeal the judgment of the District Court was reversed. The opinion was rendered by Mr. Justice GRAY and reported in 200 Fed. Rep., 204, and under the remanding

order judgment of dismissal with costs was entered for the respondent against the appellants (Case, pages 250–69).

The present suit was commenced on October 20, 1914, and after full hearing in open court the bill was dismissed.

After referring to the case of Berger vs. United States Steel Corporation, *infra*, Vice-Chancellor STEVENS concluded his opinion as follows :

> " Justice VAN SICKLE, speaking of the method of retiring stock that was adopted in the present case, says that it is compulsory and must operate equally upon all holders. The amended certificate of incorporation so provides. It does not and could not save the right of those who do not come into the plan. It constitutes a single class of stock and that unpreferred. If the court should give judicial recognition to two classes of stock it would not only disregard the charter as amended, but it would assert in effect that the method adopted was not compulsory and was not to operate upon all alike. Hence, to declare that it did not bind complainants would be to declare it unwarranted in point of law, and so, among other things, to throw doubt over the validity of the three millions of debentures issued on the fact of it, to carry it into effect. The complainant had ample notice of the scheme and ample opportunity to be heard in opposition to it. Under the circumstances it seems to me that the attack upon it, indirect though it be, comes too late. It is not an attack upon the *right* to retire but only upon the mode in which it has been exercised. To such an attack delay is fatal. The principle of cases like
>
> Kent vs. Quicksilver Mining Co., 78 N. Y., 159;
> Rabe vs. Dunlap, 51 N. J. Eq., 40 ;
> Dana vs. American Tobacco Company, 72 N. J. Eq., 44; 73 N. J. Eq., 736,
>
> applies, and therefore the bill should be dismissed."

We respectfully submit that the decision of the Chancery Court should be affirmed on this appeal for the following reasons :

Appellants have no Standing.

Where, as in this case, the complaining party is the owner of an infinitesimal interest in amount, the standing of the complaining party becomes an essential element in the case.

The interest of the appellants was approximately **1/17 of 1** per cent. of respondent's old preferred stock, and if we include the old common stock then the appellants interest in the entire outstanding stock of respondent was less that **1/35 of 1** per cent. thereof. In view of the very small interest claimed by the appellants the motive underlying the action not only is involved but becomes important in a Court of Equity.

It is not difficult to find the motive in this case. It is stated by Thomas C. Lazear in his letter to the treasurer of the respondent under date of June 16, 1910, wherein he says (Case, 235, line 39) :

> " We had a similar experience some years ago with the Westinghouse Electric & Machine Company. That Company, after its reorganization, undertook to pay dividends to its assenting stockholders, and to ignore the original stockholders who did not assent, but they saw their mistake when we notified them of our purpose to file a bill for an accounting and for an injunction, and made reparation satisfactory to our client. In that case the Company bought his stock. We have no desire to part with our stock, considering it a good investment and well secured. But a proposition from the Company to buy it (while we wish to make none) might be taken into consideration in order to settle up Mrs. Lazear's estate."

His own interpretation of this suggestion is contained in his letter to General Counsel of respondent under date of June 28, 1910, in which he says (case, 240, line 35) : " I intimated in one of my letters to Mr. Patterson that in order to prevent litigation, we might entertain a proposition from the Company to buy our stock. This suggestion is now withdrawn. I am almost ashamed that I hinted such a thing. It looks too much like a ' hold up.' "

Mr. Lazear also gave his interpretation of the term "hold up" in his testimony in answer to an inquiry as to the meaning thereof, as follows: "A. It looks too much like a threat to extort money" (Case, 73, lines 36, 44).

In this connection we call attention to the case of Trimball vs. American Sugar Refining Company, 71 N. J. Eq., 340, in which a stockholder owning one-seventh of 1 per cent. of the stock was the complainant. The Court there held that a stockholder owning only a few shares is required to show by the bill of complaint a clear case by definite affirmative allegation; he must anticipate and exclude all reasonably probable conditions which may bar his relief. Certainly he is relieved of no portion of this burden on final hearing.

We also wish to note that the appellants have not in any respect qualified themselves to prosecute this suit. Admittedly they are executors under a foreign will, and by express provision of statute have no right to prosecute a suit in the courts of this State until an exemplified copy of their letters testamentary have been filed with the Clerk of the Prerogative Court. (Compiled Statutes, Volume II., p. 2265, Sec. 21.) This has never been done.

Former Adjudication and Want of Equity Bar to Appellants' Action.

From the complaint in the action in the Federal Court (Case, 250-6*a*) between the same parties as here it appears that recovery was sought by the appellants from the respondent of dividends upon the same 102 shares of preferred stock of the respondent as are the subject-matter of the complaint in the case at bar. Averment is made in that complaint as to the proceedings of the respondent for the reduction and retirement of its capital stock; that of the 171,840 shares of the preferred stock then outstanding more than ninety per cent was surrendered under said plan, and that there remained outstanding 17,184 shares of such preferred stock; that $859,200 in dividends had been set apart and declared by the respondent upon the *new stock*; that out of the dividend fund so set apart for the new stock, the appellants were entitled to receive the sum of $4,029, being in the proportion of 102 shares of preferred

stock held by the appellant to 17,184 held by all the holders of said stock and still outstanding; that the amounts thus coming to the appellants they were entitled to receive in preference to the said new stockholders, together with interest from the several dates when the same were payable. Appellants charged that the respondent had been requested and refused to pay the appellants the dividends claimed to be due and payable, and that the action of the respondent in applying the whole of the dividend funds to payment of dividends on the new stock, to the exclusion of dividends due on the preferred stock held by the appellants, and others, was a violation of contract and a breach of trust. A demurrer was filed to this complaint and overruled. An affidavit of defense was submitted, setting up the proceedings of the respondent and its stockholders for the reduction and retirement of its entire capital stock, and insisting that such proceedings had been duly conducted and consummated in accordance with the laws of the State of New Jersey; that the appellants had full knowledge thereof, assented thereto and acquiesced therein; that the rights and interests of third persons had attached and became affected since then in great measure; that no dividends had been earned or declared or paid upon the former preferred stock of the respondent; that the appellants were not entitled to rocover; that the respondent would secure for the appellants the opportunity to participate in the securities issued and cash paid under the proceedings for the reduction and retirement of its capital stock, notwithstanding their failure to take advantage thereof within the time permitted.

The court held the answer insufficient and rendered judgment for appellants, from which judgment appeal was perfected to the Circuit Court of Appeals, aud there the judgment was reversed, and the court in considering the complaint as well as the affidavit of defense held that the appellants had failed to state a cause of action and directed the District Court to sustain the demurrer of the respondent, and enter judgment thereon. In the opinion filed in that case, the court said:

> "For neglect or refusal by the officers of the corporation to perform a corporate function as to the declaration of the dividend or as to the distribution of funds asserted to be legally or equitably applica-

ble to dividends, relief must be sought by an appropriate suit in equity, in which the Chancellor may, while avoiding interference with the exercise of a due discretion by corporate officers, yet enforce the performance of a legal corporate duty."

The court further said :

"There is no averment in the plaintiffs' statement of claim that the defendant had either earnings or surplus applicable to the payment of dividends on plaintiffs' preferred stock, nor is there any averment in the statement of claim that any dividends upon the preferred stock held by the plaintiffs had been declared and paid by the defendant. It is merely averred that payment of dividends was resumed by defendant on May 15, 1910, but it is nowhere averred that payment of dividends upon the preferred stock of defendant was resumed at that or any other time. On the contrary, it appears by the statement of claim (this refers to the plaintiffs' statement of claim in that case) that a plan for the reduction of capital stock of defendant and for the conversion of its preferred stock into common or unpreferred stock was submitted to all the stockholders, including plaintiffs, and that such proposal was adopted by the holders of ninety per cent. of the preferred stock, and it was specifically averred in the statement of claim that the dividends were declared by the defendant on this common stock and were payable to the holders thereof."

In pursuance of the judgment of the Circuit Court of Appeals on April 19, 1913, the demurrer was sustained, judgment entered for the respondent and the appellants ordered to pay the costs. The appellants filed a written memorandum entirely *ex parte*, and unassented to by the respondent, to the effect that the payment of costs was without prejudice to the appellants' right and without presumption of a retraxit.

The opinion filed by the Circuit Court of Appeals in that case will be found reported in *American Steel Foundry vs. Thomas C. Lazear et al.*, 204 Fed. Rep., p. 204.

While it is true in the Pennsylvania case the respondent insisted that the appellants' complaint and suit required judicial action with reference to the internal management of the respondent, yet the proceeding and the purpose thereof were to recover the payment of dividends earned, set apart and theretofore declared and paid out by the respondent upon the new stock contrary to the alleged rights of the appellants to have such earnings paid upon the 102 shares of preferred stock on account of dividends accrued and accruing and prior and in preference to the new stock, and that such action by the corporation was a violation of contract and breach of trust. The Circuit Court of Appeals took notice of the proceedings for the reduction and retirement of the stock of the respondent and held that before the appellants were entitled to recover, a dividend must actually have been declared payable upon the preferred stock upon which the appellants made their claim.

The appellants in the case at bar seek substantially the same relief as was sought by them in their action in the Pennsylvania case. Their prayer, folio 6, is as follows :

> " That the amount of dividends accumulated on your orators and other preferred stock, and the interest thereon from the times said dividends should have been declared and paid, may be ascertained by decree of this Honorable Court, and that said company may be commanded by a decree forthwith to declare and pay dividends to your orators and other preferred stockholders *pro rata* their several holdings, and the amounts so ascertained or such part thereof as can be in the judgment of this Honorable Court at this time safely distributed to such preferred stockholders, and that said company may be commanded by decree of this Honorable Court hereafter throughout the existence of said company to declare and pay quarterly to your orators and other preferred stockholders dividends at the rate of six per centum per annum, whenever in the opinion of the company's board of directors for the time being such dividends can be safely paid."

The undisputed evidence here shows that no earnings of any kind have ever been set apart or dividends or distribution

thereof declared or paid on account of the old preferred stock of the respondent, but that earnings to the amount of $1,761,360 had been distributed by way of dividends declared and paid upon the *new stock* (Case, pages 106, lines 18-23 ; also Case, page 105, lines 11-15-47-8, and page 106, lines 11-17). The times of payment and the rates are set forth in the letter of Mr. F. E. Patterson, secretary of the defendant, addressed to general counsel of the defendant under date of April 15, 1915, pursuant to the direction of the court (Case, page 106). No action can be maintained for the recovery of dividends upon stock until it appears that such have been declared, payable on the specific stock on account of which such recovery is sought. The undisputed evidence here is that no dividends were declared upon the 102 shares of the old preferred stock of the respondent held by the appellant, or any other similar stock. To this extent both the Pennsylvania action and the action at bar are the same, and the judgment in the Pennsylvania action should be held conclusive and an adjudication of the appellants' rights in that regard. Appellants in their prayer here seek to have the amount of dividends and interest thereon ascertained and the respondent commanded by decree to declare and pay to the appellants and others similarly situated such dividends when so ascertained. To that extent it may be said that the relief sought in the case at bar differs from that sought in the Pennsylvania case. It is our understanding of the law, and we think it will not be questioned by appellants, that courts will not direct the payment of dividends or invade the province of the directors of a corporation by decree ordering the payment of dividends unless the directors *fraudulently* had failed and refused to declare and pay dividends upon stock entitled thereto. There is no allegation or charge in the complaint of fraud on the part of the directors in failing or refusing to declare and pay dividends upon the 102 shares of old preferred stock. There is no proof of any fraud or other improper conduct on the part of the directors in that regard.

At this point we find appellants' position rather singular. Not being able nor having the right to prevail against the respondent upon either of the grounds above stated,—after the coming in of the respondent's answer,—they seek escape by allegations in the amendment to the complaint filed on

September 26, 1914, in which they imperfectly and insufficiently allege that the respondent gives out and pretends that on the 29th of June, 1908, all of the respondent's preferred stock theretofore issued and outstanding, including the 102 shares held by the appellants was retired, cancelled and extinguished in pursuance of the laws of this State; and proceed to narrate the various steps and proceedings by which such reduction and retirement of the respondent's capital stock was accomplished; and then further charge that the contrary is the truth and that appellants' 102 shares of preferred stock are still outstanding and a valid obligation of the respondent; and that they do not admit that the actions and proceedings of the respondent and its directors, stockholders or committee were actually taken and held; and leave the respondent to make proof; and then further aver that even if such action and proceedings, or any of them, occurred as pretended, that the appellants never assented thereto nor accepted its offer to purchase and retire their preferred stock; and then further charge that said proceedings were not intended to and did not cancel or affect the preferred stock of the appellants and other holders who did not come in and take advantage thereof, and that the respondent never actually tendered to the appellants and that the appellants never actually received any money or securities in satisfaction of their stock.

In other words, not being entitled to recover for dividends never declared upon their stock, and not being entitled to a decree ordering the directors to declare and pay a dividend upon their stock for the lack of any fraud on the part of the directors in not doing so, they set up, not affirmatively, but argumentatively, the reason why the respondent has not and does not declare or pay a dividend upon the preferred stock held by the appellants. They do not attack the regularity or validity of the proceedings of the respondent for the reduction and retirement of its entire capital stock. They do not charge that the statutes of this State in such case made and provided were not in all respects strictly complied with. They simply allege that there was a pretense by the respondent that proceeding were had by which the entire capital stock of the respondent was cancelled and retired and without admitting

the proceedings were had as pretended; that such were not binding upon the appellants, because the appellants had not assented thereto and had not accepted the benefits thereof. They seek to cast the burden upon the respondent to show the reason for not declaring and paying dividends on their preferred stock, instead of their doing what the law imposes upon them, proving and showing that either the dividend had been declared so that they were entitled to payment thereof or that the directors had acted fraudulently in not declaring and paying the dividend justifying the court ordering them to do so.

The appellants having failed to make any proof in that regard, the burden was cast upon them to prove even if a proper allegation had been made in the complaint (which was not made), and even if a proper prayer to that effect was incorporated in the complaint (which was not), that the reduction and retirement of the preferred stock by the respondent was illegal, invalid and not conducted in accordance with the statute in such case provided. This case was tried in a manner by which all the proofs of both parties were received by the court without regard to where the burden rested for making material proof, and thus the proceedings by which the reduction and the retirement of the entire capital stock of the respondent were undertaken and accomplished are before the court; but this condition of the record, we insist, does not relieve the appellants of the burden to show affirmatively the right to the relief prayed for.

II.

The proceedings for the reduction and retirement of the respondent's capital stock were authorized by the statute.

The regularity of the proceedings for the reduction and retirement of appellants' old preferred stock and common stock is not assailed. Each step required by statute was taken and complied with.

We insist under Sections 27 and 29 of the Act of 1896, as construed by this Court in *Berger vs. United States Steel Corporation*, 63 N. J. Eq., 809, that on two-thirds vote in interest of each class of stockholders, any class of stock may be retired or reduced, and that "this is compulsory and must operate equally upon all holders," and further, as held in the same case, that: "The complainant (stockholder) therefore has no vested right to retain her shares in opposition to any lawful method provided for retiring them."

The reasonableness and the propriety of the terms under which the old preferred stock and common stock were retired and the reduction of the capital stock accomplished were not gone into on the trial. Indeed, when counsel for respondent started to do so he was halted by the court with the statement, that no attack having been made upon the reasonableness or the good faith or the propriety of the proceedings, no evidence on the part of the respondent in that regard was necessary, no issue thereon having been tendered (Case, page 123, lines 16-28).

Vice-Chancellor STEVENS saying:

> "I cannot judge of the reasonableness of it. I shall assume that the directors were guided by proper motives and not corrupt motives, until the contrary is shown. It is possible if an issue of fraud were raised that then this Court might investigate the question; if the charge were that they had fraudulently sought to injure the complainant and other stockholders, why that would raise, perhaps, the whole question, but no such issue being made, it seems to me that its reasonableness or unreasonableness is not a matter of inquiry at this time" (Case, page 123, lines 16–28).

Appellants submit that the reduction and retirement of the stock of the respondent, if viewed as a purchase of its shares for retirement, was a legal and proper proceeding. In other words, the respondent had the right to *purchase* any portion of its stock, but in order to retire *all* of its capital stock under the statute it was compelled to *purchase* the entire stock outstanding, and could not procure its surrender for cancellation in any other way.

The respondent, by the proceedings for the reduction and retirement of its capital stock, undertook to retire all its capital stock then outstanding, both preferred and common, under the following provision of Sec. 29 of the Statute, *i. e.*: "Decrease of capital stock may be effected by retiring or reducing any class of the stock," and issue in lieu thereof new stock without preference of any kind. See Amended Certificate of Incorporation (Case, p. 186).

The reduction and retirement having been carried out in strict accordance and compliance with the law, no fraud or impropriety being claimed or proved, no question of adequacy or inadequacy of consideration being in issue in the case, the proceedings by which the old preferred stock and the old common stock were retired must be held to be binding and obligatory upon the 102 shares held by the appellants.

III.

Appellants assented actually to the readjustment and reduction of respondent's capital stock.

It appears from the evidence that the 102 shares of stock resulted from a conversion or exchange of 48 shares of common stock of the American Steel Castings Company and 27 shares of preferred stock of the American Steel Castings Company when that company was absorbed by the defendant. The stock of the American Steel Castings Company, as shown by the inventory of the estate of Alice C. Lazear, was a part of her estate, and defendant has shown by testimony of Mr. Thomas C. Lazear that the conversion was made after her death. It appears also from the testimony that at the same time Mr. Thomas C. Lazear, one of the plaintiffs in this action, received 71 shares of the old preferred stock of the respondent in exchange for an equal amount of common stock of the American Steel Castings Company. The appellant, Thomas C. Lazear, in his testimony taken by deposition at Pittsburgh, admitted having received all the various notices and com-

munications issued by the respondent and by the committees in charge of the proceedings for the reduction and retirement of its capital stock, including notices of all the meetings and each adjournment thereof, and including the final notice of June 12, 1908 (Case, 184), reading as follows :

> " Referring to the plan for change in the character and amount of the company's capital stock, submitted to stockholders under date of January 3, 1908, the committee begs to advise, that at the Stockholders Adjourned Special Meeting held this day, the plan was approved and declared effective by about ninety per cent of all the outstanding stock ; 1250 shares only voting against the plan.
>
> " Further steps necessary to consummate the plan will be taken as promptly as possible, and notice when deposit certificates may be exchanged for the new securities and cash, will be given in due course."

The court will here note that this notice of June 12, 1908, was received by the appellants seventeen days before the date when the certificate of reduction and retirement of the capital stock of the respondent and of the amendment of its certificate of incorporation as proposed was filed with the Secretary of State ; this interim—seventeen days—being afforded any stockholder not attending the meetings and not theretofore having expressed any view upon the subject to take such action as might be seen fit, either in approval or disapproval of the proceedings, and if in disapproval to take the necessary legal action to prevent or interfere with the consummation of the proceedings, and that no objection was made by anybody and no proceedings taken by anybody in that regard. The appellant, Thomas C. Lazear, on April 6, 1908, wrote Mr. Patterson, secretary of the defendant, saying :

> " I hold seventy-one shares preferred stock of your company, and Jesse T. Lazear, Charles P. Orr and myself, as executors of the will of Alice C. Lazear, hold 102 shares of the same class. I will probably deposit my 71 shares with the Guaranty Trust Company before the 18th, but my co-executors hesitate as to the 102

shares belonging to the estate of Alice C. Lazear, deceased. Viewing the matter as they do, they doubt their power and the advisability of making the exchange contemplated by the plan proposed, at least without the approval of the Orphans' Court" (Case, p. 175).

In pursuance of that letter Lazear did deposit his 71 shares, and as testified by him:

"Q. It was, then, a deposit with the Guaranty Trust Company of seventy-one shares of American Steel Foundries preferred under the plan for readjustment, by the terms of which you were to receive 77% in new American Steel Foundries single stock, 20% of American Steel Foundries 4% debentures, and 3% cash—is that correct? A. I think that is correct as you have stated it" (Case, p. 50, line 40; p. 51, line 13).

And:

"Q. It was your purpose, of course, as expressed by your exchange, so far as the 71 shares were concerned, anyhow, to assent to the proposed change in capitalization of the American Steel Foundries, as submitted? A. That was my purpose—so far, only, as the 71 shares were concerned. It had nothing to do with the shares that belonged to the estate of Alice C. Lazear" (Case, p. 53, lines 41-5; p. 54, lines 13).

It will be noted that in the letter of April 6, 1908, above quoted, there is no statement of dissent by the co-executors of Thomas C. Lazear, no objection to the proposed reduction and retirement of stock, but a mere statement of hesitancy as to the power or advisability of depositing it without the approval of the Orphans' Court.

By the will of Alice C. Lazear, under the first paragraph thereof, all the estate, real, personal and mixed, is bequeathed to plaintiff, Thomas C. Lazear, during the term of his natural life, and under paragraph 2 power is given to make sales and changes in the investments for other property, and such other property or securities to be "for the use

of my said husband (Thomas C. Lazear) during his natural life." At the time of Alice C. Lazear's death, as above stated, she owned 48 shares of common and 27 shares of preferred stock of the American Steel Castings Company, which was converted and exchanged after her death into the 102 shares of preferred stock of the American Steel Foundries, and which 102 shares under said second paragraph of the will were for the use of said appellant, Thomas C. Lazear (her husband), during his natural life. We contend that under the provisions of the will, the appellant, Thomas C. Lazear, who was the owner of 71 shares of the preferred stock of the respondent, also as the life tenant of the 102 shares of preferred stock of Alice C. Lazear had during his lifetime the absolute use and disposition of that property as he saw fit. In support thereof see

Sutphen vs. Ellis, 35 Mich., 446.

where the court giving construction to a will held that the life tenant to whom is granted the right to the use of the property during his lifetime is vested with the absolute right to use and dispose of that property as he sees fit and to the same effect see

Gee vs. Hasbrouck, 128 Mich., 509, at 513.

Thomas C. Lazear having actively assented to the proceedings for the reduction and the retirement of the capital stock of the respondent, and having deposited 71 shares of the preferred stock held by him, cannot claim that such assent was limited to the 71 shares and did not operate upon the 102 shares of which he had the absolute and unqualified disposition during his life. An exchange of preferred shares for other shares and for debentures and cash is one form of disposing of property. In this connection it is well to call the court's attention to his testimony to the effect that he was placed in charge and management of the estate by the other executors and other persons beneficially interested therein and constituted their agent for all purposes (Case, page 45).

The position of the appellants in this particular reminds us of an interesting case in Illinois where the dual capacity of the litigant was involved. We refer to the case of

People ex rel. Samuel Appleton, 105 Ill., 474.

This was an action for the disbarment of Appleton. He was charged with collecting $5,000 upon a mortgage entrusted to him by a client and appropriating the funds to his own use. His defense was that he collected the money as trustee and not as attorney. Upon the first presentation of the case the Supreme Court of Illinois disbarred him, but on a rehearing by a divided court a majority accepted his defense and held that he was not subject to disbarment because as claimed by him the money was collected as trustee and not as attorney. Justice MULKEY, in a dissenting opinion in that case, at p. 486, makes this interesting observation:

> "To the case thus clearly made out against the respondent he interposes the technical defense that in appropriating the relator's property to his own use in the manner we have seen, he was acting merely *as Trustee*, and not as attorney, and upon this ground alone the majority of this court have mercifully permitted him to escape. This defense so forcibly reminds me of the old story of the profane bishop who had the good fortune to be a duke, also, I cannot refrain from it. An acquaintance who happened to overhear him using profane language asked him how it was that he, being a bishop, could be guilty of swearing. 'Ah, my friend,' replied his Reverence, 'I swear as a Duke and not as a bishop.' 'But,' retorts the other, 'if the devil comes to get the Duke, what will become of the bishop.' So in this case when his satanic majesty calls for Appleton, the Trustee, I should like to know what will become of Appleton, the lawyer."

And so in the case at bar, we have the appellant, Thomas C. Lazear, holding two blocks of preferred stock of the respondent, one in his individual capacity, and the other in his capacity as life tenant under the will of Alice C. Lazear, deceased. He assented to the plan, but says it was limited to the 71 shares and that it was not intended to apply to the 102 shares. In his dual capacity he was playing two strings to the bow—for the 71 shares he would take new stock, debenture bonds

and cash under the proceedings for the reduction and retirement of the respondent's stock, and upon the 102 shares he would sit by, say nothing, allow everybody else to act upon his assent together with the assent of others, and if later the value of the new securities did not materialize as well as he would like, he would seek some other form of benefit or profit, and as the testimony shows he did. Under his letter of June 4, 1910, he asked for dividends upon the 102 shares of preferred stock, though he had deposited his 71 shares of stock and received the resulting securities and cash thereon and knew and admitted having received the notice of June 12, 1908, notifying him that the reduction and retirement of the capital stock of the defendant had been approved and effected by a vote of 90 per cent. of the holders of each class of the stock. Finding on June 16, 1910, that his claim for dividends was denied and that it was insisted by the respondent that there were no dividends payable upon the old preferred stock (see affidavit of Thomas C. Lazear attached to complaint); he then asked the respondent to make him a proposition to purchase the 102 shares at the price of par which he testifies he had then in mind, and in the event of its failure to do so threatened, as he did in a similar situation with the Westinghouse Company, to enjoin the payment of any dividends upon the new stock. We insist the appellant may not blow hot and cold. There cannot be acceptance by Thomas C. Lazear individually for his 71 shares by actual assent thereto and at the same time a speculation and effort to realize $100 per share by coercion of the respondent as to the 102 shares of which he is the owner as life tenant, and of which he had conrol as managing executor.

If it should be contended that under the laws of this State the title and right of disposition did not lodge absolutely in Thomas C. Lazear as life tenant, but were vested in the executors, nevertheless, his assent was binding upon the 102 shares, if not as life tenant then as executor. Under the laws of this State we find that all personalty of an estate passes to an executor or administrator at common law and the administrator has the absolute power of disposal over the whole estate. Since joint executors and joint administrators are regarded in

law as constituting but one person, the title of which extends to the entire personal estate of the testator or intestate, Thomas C. Lazear had full power of disposal.

See *Hayes vs. Hayes*, 45 New Jersey Equity, 461.
Shreve vs. Joyce, 36 New Jersey Law, 44–48.

Under the decisions of the courts of this State, the assent of equitable owners is not necessary in any proceeding requiring the assent of stockholders. What is contemplated by statute, and all that is required by the laws of this State, is the assent of the holder of the legal title.

See *Murray vs. Beattie Mfg. Co.*, 79 N. J. Eq., 604, where the court says, at p. 1040 :

> " The unanimous assent of the stockholders to the By-laws of 1900 was an assent only of the persons owning the legal title to the stock. This is all that is necessary, for under the statute they will not have the right to vote, and Trustees are expressly authorized to represent the stock held in trust and to vote thereon as a stockholder."

Therefore, whether Thomas C. Lazear held the 102 shares of stock as life tenant, with the absolute right of disposition thereof, as held in the Michigan cases, or by consent of all the executors and beneficial owners had the control of the 102 shares as executor, his active assent to the reduction and retirement of respondent's stock even though he seeks to limit it to the 71 shares held by him individually, must in a court of equity and upon all equitable principles be regarded as an assent applicable to the 102 shares as well as the 71 shares.

IV.

Appellants Impliedly Assented.

Should the court hold that assent of the appellants to the reduction and retirement of the respondent's capital stock was necessary, we further insist that in contemplation of law such

assent is not required to be an active actual assent, but may be an implied assent; an assent implied from action or inaction, or flowing from conduct or acquiescence. The record abounds with evidence constituting implied assent by the appellants. We refer again to the letter of April 6, 1908, in which Thomas C. Lazear expresses his assent to the proposed reduction and retirement of stock, on account of the 71 shares of the preferred stock held by him and stating that as to the 102 shares his co-executors hesitate to deposit their stock; that viewing the matter as they do, they doubt their power and the advisability of making the exchange contemplated by the plan proposed, at least without the approval of the Orphans' Court (Case, page 175). Mr. Patterson, the secretary, in answer to that letter, stated to Mr. Lazear that he could understand his position, and as explained by Mr. Patterson on the witness stand this meant "that he assumed that the executors did not want to go to the Orphans' Court for permission to deposit the stock until the plan had been consummated, and therefore they would go to the court after consummation when it was a fact and not a mere proposal" (Case, p. 119, lines 27–35). Consequently Mr. Patterson wrote to Thomas C. Lazear on October 7, 1908, inquiring as to the deposit of the 102 shares of the preferred stock standing in the name of the executors, and neither Mr. Thomas C. Lazear, individually or as executor, nor the other executors answered this letter or paid any attention to it. Mr. Jesse T. Lazear testified on the trial that he had never had any communication with the defendant or any officer of the defendant. (Case, page 88, lines 42-7). Mr. Thomas C. Lazear testified in his deposition that he did not answer the letter and he did not again communicate in any way with the defendant until June 4, 1910. Mr. Thomas C. Lazear admits in his deposition (Case, page 63, lines 34–48) having received all of the notices and circulars issued by the company relating to the proposed reduction and retirement of the defendant's capital stock, including all notices of adjournments of the meetings from time to time. Thomas C. Lazear further testifies (Case, page 54, line 30) that he talked with Jesse T. Lazear and Judge Charles P. Orr with reference to the proposed change in capitalization of the stock of the defendant as submitted in January, 1908, and

that no doubt such discussion with them had been had when he wrote the letter to Mr. Patterson of April 6, 1908, and that he discussed with them the terms of the exchange. Thus the entire matter was discussed in the light of the knowledge that he then had, and that all three executors of the estate of Alice C. Lazear had actual knowledge as early as April 6, 1908, of the proposed reduction and retirement of the defendant's stock and the terms thereof. They also knew that Thomas C. Lazear had assented thereto on behalf of the 71 shares.

Thomas C. Lazear testifies (Case, pp. 74–75) :

> " Q. Judge Orr is your son-in-law? A. Yes, sir.
>
> " Q. And Jesse T. Lazear is your son? A. Yes.
>
> " Q. Did you attend any of the meetings or the adjourned meetings of the American Steel Foundries during the period that this plan for readjustment and change of capitalization was under consideration? A. No, I don't think I attended one.
>
> " Q. Did you execute any proxy or ask anybody to attend for you? A. No, I didn't think it was necessary. I put my stock in and they accepted it, and the executors wouldn't put in my wife's stock.
>
> " (Motion to strike out everything after 'I didn't think it was necessary.')
>
> " Q. Did you have anybody appear at any of the meetings to object to the proceedings, on behalf of anybody? A. I did not.
>
> " Q. Did you at any time prior to the filing of the bill in the present case make any objection to the plan for the conversion and change of capitalization of the American Steel Foundries, as was submitted in a circular letter of January 3, 1908? A. I never did.
>
> " Q. Did any of the executors, so far as you know? A. So far as I know, I don't know that they ever appeared any place.
>
> " Q. Did any of the executors ever make any objection to the plan submitted by the American Steel Foundries under its circular letter of January 3, 1908, for the conversion and change of its capitalization, prior to the filing of the bill in this case? A. They made no

objection that I know of. That is, they didn't assert themselves in any legal proceedings or attend any of the meetings to object to it."

Jesse T. Lazear on the witness stand was not asked as to whether he, as executor, or Judge Orr, as executor, made any objections or protest either at a meeting or otherwise, but he testified in answer to the court's question that he had no communication with the company at any time or in any way (Case, p. 89), and in view of the testimony of Thomas C. Lazear that he had notified both Jesse T. Lazear and Judge Orr that he had assented to the plan and deposited 71 shares of stock, the silence of Jesse T. Lazear and of Judge Orr must be construed to be an implied assent, especially since they had full knowledge of all the matters involved and had discussed the matter with Thomas C. Lazear. Had they dissented they would naturally have expressed or voiced such dissent either in communication by letter or by attendence at the meeting or by judicial proceedings, but nothing was done by any of them except Thomas C. Lazear, who during his lifetime held both the 71 shares and the 102 shares of preferred stock, and who actually assented to the plan and participated therein. The first meeting was held February 8, 1908, it was adjourned to March 14, 1908, and notice sent to and received by appellants, adjournment again to April 18, 1908, and again notice sent to and received by appellants ; adjournment again to May 7, 1908, notice also sent to and received by appellants; adjournment again to June 4, 1908, notice thereof mailed to and received by appellants, and adjournment to June 12, 1908, when by action of the stockholders the plan was adopted and approved, and notice that it had been declared effective mailed, received and produced by appellant on the taking of the deposition of Thomas C. Lazear (Case, page 184, Ex. D–29). The appellants had a vital interest in the subject-matter of these proceedings ; their property, namely, 102 shares of the preferred stock, was to be materially affected by the change ; indeed, the stock was to be retired and in lieu thereof there were to be issued other securities and cash aggregating 100 per cent., namely 77 per cent new stock, 20 per cent. four per cent. debentures, and 3 per cent. in cash.

Charles P. Orr was a Judge of the United States District Court for the Western District of Pennsylvania, Thomas C. Lazear, a practicing lawyer of long standing, and Jesse T. Lazear, also a lawyer of long standing. It must be assumed that these gentlemen, as lawyers, if they did not intend to assent to this plan and considered the proceedings for the reduction and retirement of the capital stock not binding upon the 102 shares without their actual assent, would have taken proper steps and proceedings either by attending one or more of the meetings and object to and protest against the plan, or would, after receiving the notice of June 12, 1908, that the reduction and retirement had been approved and declared effective, interpose some objection or protest before the statutory certificate thereof was filed with the Secretary of State, or after June 29, 1908, when the certificate of change had been filed with the Secretary of State, but before any of the new stock or new debentures were issued or cash paid out, and the change went into effect would by appropriate judicial proceedings seek to enjoin its consummation. As lawyers they must have known that unless some objection was made and unless some legal proceeding expressing and voicing their protest was taken (if they did object or protest) that their assent thereto must be implied, especially in view of the fact that, as early as April 6, 1908, they discussed with Thomas C. Lazaer the proceedings, and were fully advised as to the terms and character thereof.

On this question of assent we direct the court's attention to the case of *Rankin vs. Newark Library Association*, 64 New Jersey Law, 65, where the court says :

> " The Act of 1897, being a public statute, every stockholder is chargeable with notice of its provisions, and accordingly was bound to anticipate that at the election to be held next after its passage the stockholders would be required to determine whether they would accept it and comply with its mandate.
>
> " Hence it should be assumed that those stockholders who felt any concern in the question were represented at that election, and that the absentee assented to whatever might be lawfully done in that regard by those in attendance. It appears that in January, 1899, there had

been issued 1,138 shares of the capital stock of the association. Of these 1,109 shares were represented and voted upon at the election of January, 1898, being the first election held after the passage of the Act of 1897, and one of the stockholders owned and voted upon 443 shares at that election. If the votes then cast should be counted pursuant to the charter, one set of directors would be elected; if counted pursuant to the Act of 1897, another set. The question was thus directly presented, which statute should prevail? Without a dissenting voice, the votes were counted under the Act of 1897, and the directors so appearing to be chosen were declared to be elected, assumed their offices, and managed the concerns of the corporation during the succeeding year. This course of events indicates the acceptance of the Act of 1897 by every stockholder of the association. The assent of those present or represented at the election of 1898 is clear. The assent of the absent holders of the remaining 29 shares is shown by their implied assent to the lawful action of those who attended, and also by their acquiescence during the year of 1898 in the control of the corporation by the directors chosen pursuant to that act. Indeed none of those absentees yet appears to dissent. Thus, the statute, which on its enactment became perhaps only conditionally the law of this association,—the condition being the assent of all the stockholders,—became on fulfillment of that condition the absolute law of the corporation."

So in the case at bar, at a meeting of June 12, 1908, more than 90 per cent. of each class of stock present and represented at the meeting voted to adopt the reduction and the retirement of the capital stock as proposed, and that vote was the lawful, proper act, and those who did not appear may fairly be said to have been represented by those appearing and voting affirmatively. And, again, in the case at bar, since the meeting there has been full acquiescence in these proceedings. Indeed, even now the appellants do not question or attack the validity of the reduction and retirement of the respondents' capital stock, but are seek-

ing to avail themselves of the benefits thereof, and at the same time seeking to avoid their obligations thereunder. In the same connection, see *Kent vs. Quick-silver Mining Company*, 78 N. Y., 159. In that case, page 183, the court holds with reference to the creation of a preferred stock by amendment of the by-laws :

> " We are, therefore, of the opinion that there was no power in the corporate body, nor in a majority of the stockholders, to provide by by-law for the creation of a preferred stock, so as to bind a minority of the stockholders not assenting thereto."

But the court said on the subject of assent (p. 184), as follows :

> " But there remains a serious question : whether, though there was at the outstart a minority of the stockholders who gave no assent to the corporate act, there has not been such tacit acquiescence and delay in action by that minority as to amount to indefensible laches and estoppel upon those who constituted it and their assigns. In our judgment their has ; and we find here a safe place on which to rest our decisions of these cases. The findings show that the by-laws empowering the creation and issue of the preferred stock were authorized at a stockholders' meeting regularly called and held and conducted ; that the stock was at once offered for subscription to all of the stockholders ; that a circular informing thereof was issued by authority and distributed to the stockholders ; that though all of them did not avail themselves of the chance to take it, it was not because the chance was not known ; a large number of them did subscribe, and paid money for the privilege to the corporation, and that money went into the assets and business of the company ; certificates for the preferred stock were thereupon issued, and it, as well as the common stock, was dealt in by the public, sales were made of the two kinds openly at the Stock Exchange, at prices for the one larger than for the other, and quoted in the daily public prints ;

and from year to year for four years the annual reports of the directors to the stockholders spoke of the two kinds of stock. There was ample knowledge, or means of knowledge, on the part of all stockholders, of the action of the corporation in the creation of the two kinds of stock, of the issue of certificates for the preferred stock, of the entry of that stock into the channels of trade, of the public dealings in it at the especial marts for the sale of such property, and of the continued recognition of its existence and validity by the company and the public. It is not to be conceived that the owners of the common stock of this corporation did not have actual knowledge that there had been created a stock having ostensibly greater right and value than their own, and that it had gone into the market and was dealt in by the public interested in the validity of it. For the lapse of *four years*, however, there was no action of the company, or of an individual stockholder, to have a judicial declaration that the company had exceeded its powers in the creation of the stock, and that it was invalid. We think that these facts, most of which are set forth in the findings in two of the cases, warrant the conclusion of law therein, *that the stockholders, by acquiescing in the action of the corporation in making the preferred stock, have ratified and assented thereto, and that the same is binding on them by reason of such assent and ratification.*"

V.

Appellants Barred by Laches.

Should perchance the court hold from the evidence in this case that there was neither actual nor implied assent of the appellants to the reduction and retirement of respondents' old preferred and common stock, then we further insist that the appellants must be denied the

right of recovery and relief because of their acquiescence and that they are estopped from questioning the reduction and retirement of the capital stock of the respondent, including the 102 shares of appellants' preferred stock, and from endeavoring to enforce the payment of dividends thereon, and from questioning the validity of the respondent's present outstanding stock of 171,840 shares and that such constitute the only outstanding stock of the respondent.

The appellants not only had notice but actual knowledge of the proceedings of the respondent for the reduction and retirement of its entire capital stock, both preferred and common, then outstanding. They had the original notice of January 3, 1908, fully setting forth the proposed proceedings and the purpose thereof and the terms thereof. They had knowledge from the circular letter to the stockholders of January 3, 1908, in detail calling attention to all the elements entering into the proceeding. The first meeting was held February 8, 1908, and adjourned to March 14, 1908. At the March meeting 75% or more of the stock had assented, but the defendant desiring a larger percentage of assent, though not required to have it under the statute, adjourned the meeting, notified all stockholders of the adjournment and sent with the notice the remarks of Judge Gary who acted as the chairman of the meeting on that occasion. Judge Gary in that statement indicated the difficulties besetting the company and its directors requiring the proceedings undertaken. He carefully went into the proposition as submitted to the stockholders so that all were fully advised, not only in a formal way, but in a most informal and intimate way, of the proceedings. These remarks together with the notice of the adjournment of the meeting to April 18, 1908 (Exhibit D12, Case, p. 160), were received by plaintiffs. Notice of the adjournment of meetings thereafter to May 7th, to June 4th and to June 12th were also received by appellants. On April 6, 1908, Thomas C. Lazear advised the company that he assented to the proposed plan and would deposit 71 shares of stock held by him individually, but that as to 102 shares of stock standing in the name of the executors of the estate of Alice C. Lazear, there was hesitation because of some question of power and advisability to make deposit without the approval of the Orphans'

Court. Thomas C. Lazear deposited his 71 shares and executed his proxy, which is the basis of written assent filed with the Secretary of State attached to the certificate of amendment. (First name on the page.) As we have before pointed out, appellants received, and on the taking of the deposition of Thomas C. Lazear, the appellants produced the notice of June 12, 1908, notifying the stockholders that the plan for the reduction and retirement of the respondent's capital stock had been approved and declared effective at the adjourned meeting of the stockholders held on that day by a vote of more than 90 per cent. of the holders of each class of stock, and that further steps necessary to consummate the plan would be taken as promptly as possible and notice when deposit certificates might be exchanged for the new securities and cash given in due course. The certificate of change and amendment was withheld for seventeen days to enable any stockholder who had not appeared, to object. None appearing, the certificate was filed with the Secretary of State on June 29, 1908. As testified by Thomas C. Lazear, neither he nor any of the executors attended any of the meetings nor authorized anybody else to attend the meetings for them, neither he nor any of the executors made any objection to the proceeding at any meeting or otherwise, neither he nor any executor undertook to protest or object by judicial or legal proceedings at any time. In due course Thomas C. Lazear received 55 shares of the new unpreferred stock, $1,400, plus scrip, of the new 4 per cent. debentures and $213 in cash, in pursuance of the plan. The respondent issued after June 29, 1908, and before June 4, 1910, when for the first time after April 6, 1908 Thomas C. Lazear again communicated with the respondent, $17,184,000 par value of its new stock, that is, the entire amount thereof and $3,436,800 of negotiable 4 per cent. debentures and paid in cash the 3 per cent. provided for under the plan aggregating $515,520. The former preferred stock and common stock of the respondent were stricken from the list of the New York Stock Exchange and the 171,840 shares of the new stock of the respondent were then listed upon the New York Stock Exchange. Up to July 31, 1911, which was only shortly after the appellants instituted their first suit against the respondent in the United States District Court of Pennsylvania, 4,008,365 shares of

the new stock of the respondent company had been transferred, of which transfers for 3,584,374 shares were in the nature of transfers and retransfers pursuant to the proceedings for the reduction and retirement of respondent's old preferred stock and common stock, and 423,991 shares of the new stock were dealt in by various holders for their own purposes, aggregating trades and dealings even up to that time in $42,399,100 par value of the new stock. Yet during all that time the appellants, with full knowledge of all the facts, made no objection and made no protest to the proceedings and in no way questioned the validity thereof. Even in the letter of June 16, 1910 (Exhibit D40, Case, p. 234), the appellants in no way contested or questioned the validity of these proceedings or of the outstanding new stock, but having speculated for two years and a dividend having been declared upon the new stock, sought to utilize the occasion to coerce the respondent to do one of two things, either recognize as outstanding the 102 shares of preferred stock contrary to the proceedings for the reduction and retirement of the entire old preferred and common stock of the respondent, or failing in that, to force the respondent to buy their stock at par, and if neither is done then to institute litigation having for its purpose an effort to enjoin the respondent from paying dividends upon the new stock issued and dealt in for two years to the extent of millions of dollars, *and of which more than 400,000 shares had been traded in by innocent persons.* When the respondent company declined to be "held up," to use the language of Thomas C. Lazear himself in his letter of June 28, 1910 (Exh. D-43, Case, p. 238), or to submit to an "extortion of money" as recognized by Thomas C. Lazear in his testimony on deposition (Case, 73, lines 36-44), this suit was instituted against the respondent to enforce the payment of accrued dividends upon the 102 shares of old preferred stock in the District Court of the United States for the Western District of Pennsylvania. In this action there was still no direct attack upon the integrity or validity of the proceedings for reducing and retiring the respondent's capital stock. Judgment was rendered against the respondent by Judge YOUNG. On appeal the Circuit Court of Appeals for the Third

Circuit reversed and directed judgment to be entered for the respondent.

On September 26, 1914, in an amendment to the complaint in the present case (Case, p. 7, line 20) for the first time did the appellants question the proceedings under which the capital stock of the respondent was reduced and retired, and then only argumentatively, still not insisting that the proceedings were invalid, but claiming if properly and legally consummated, were not binding upon the 102 shares because such had not assented thereto. Up to the time of the filing of the complaint in this case, March 27, 1914, it appears by the testimony the total amount of old preferred stock surrendered and cancelled under the proceedings for the reduction and retirement thereof in 1908, aggregated 171,271 shares out of a total of 171,840 shares, leaving but 569 shares unsurrendered and uncanceled and constituting less than one-third of one per cent. of the total amount. Between June 12, 1908, and April 1, 1915, trades and transfers of the new stock of the respondent aggregated 551,623 shares. At March 27, 1914, the date when the complaint herein was filed, the total number of stockholders of the respondent aggregated between 1,200 and 1,300. On March 27, 1914, there were 647 new stockholders of the respondent holding 58,157 shares of the new stock and who did not acquire their holdings through exchange under the proceedings for the reduction and retirement of the respondent's stock, but who became stockholders since that date, so that 647 persons wholly unconnected with the respondent at the time of the reduction and retirement of the capital stock have become new investors in the new stock to the par value of nearly $6,000,000 *without knowledge or notice of any claim or pretense of the appellants that such proceedings were invalid or not binding on them or others similarly situated.*

We maintain that the doctrine of estoppel is a complete answer and a complete defense to the appellants' action.

Nearly eight years have elapsed since the reduction and retirement of the respondent's stock was adopted and consummated, and since the new stock has been issued and has been traded in by the public, and since the

debenture bonds have been issued and outstanding. Seven annual meetings of the stockholders of the respondent have been held since then. Directors were elected at each of these meetings. At not a single meeting did these respondents assert the right either to attend the meetings or to vote the 102 shares of old preferred stock for directors or for any other purpose. The only stock outstanding so far as the same is recognized by the respondent or even by the State for that matter, by reason of the filing of the certificate of change on June 29, 1908, are the 171,840 shares of the new stock, and yet, if we understand the appellants' contention, the 102 shares of old preferred stock and the other few shares of the same kind of stock not surrendered are valid, outstanding shares of preferred stock as against the holders of the new stock. If the appellants claim or contend that the old preferred and common stocks were not retired by the proceedings therefor, why did they not attend the meetings of the stockholders? Why did they not otherwise claim the right that stockholders have to vote? And if their contention should be sustained, would it be claimed now that the appellants could vote the 102 shares of old preferred stock and exercise voting power? If so, on what basis? Indeed, we find that Thomas C. Lazear, under date of November 15, 1910, executed his proxy to vote his new stock at the annual meeting of the stockholders held on December 1, 1910, thus further recognizing the validity of the proceedings for the reduction and the retirement of the respondent's stock (Case, p. 247).

The proceeding here is one in equity, addressed to the conscience of the Court. The appellants stand by with full knowledge of the proceedings; fully conscious of the happenings thereafter; neither object nor protest; speculating with the two blocks of old preferred stock, depositing the one for 71 shares, and withholding the one for 102 shares; enjoying the fruits of the new securities and cash received for the 71 shares; and then after three years further experiment with the 102 shares to see if the respondent will pay dividends or submit to the levy of tribute at the rate of $100 per share rather than have a lawsuit. In the meantime respondent has conducted its business upon the new basis of capitalization; arranged its finances and affairs accordingly;

millions upon millions of dollars of property and money became involved and innocent third persons purchased new stock to the extent of nearly $6,000,000, par value ; yet these appellants seriously ask a court of conscience, a court of equity to give them relief which will for all practical purposes set aside the reduction and retirement of the old stocks of the company participated in by the appellants, and give to the 102 shares and other few shares similarly situated rights superior to all the other holders of the old preferred and common stocks and to the new purchasers of nearly $6,000,000, par value, of the new stock. This we insist the appellants may not do. Equity will not countenance it and conscience will not tolerate it. It should be unnecessary to cite authorities upon a proposition so plain. Nevertheless we submit for the court's consideration cases which in no uncertain terms characterize the attempt which the appellants are here making.

See Morawetz on Private Corporations, Second Edition, Vol. 2, Section 630 :

> " If a principal neglects promptly to disavow an act performed on his behalf, without precedent authority, he may become estopped by his silent acquiescence or laches from repudiating the act, although it was not his intention to ratify the act, and he has not actively manifested his assent. The reason of this doctrine is, that a principal ought not to be allowed to speculate at the risk of others on the unauthorized acts of his agents, with the privilege of adopting their acts if the result prove favorable, and of repudiating responsibility in case of loss.
>
> " In some instances, a principal may be estopped from repudiating an unauthorized act of which he had no actual knowledge, as where the principal ought by reason of the relation of the parties, to have known of the act, and cannot in equity and good conscience set up his ignorance.
>
> " The doctrines may often be applied with very equitable results to unauthorized corporate acts which have been sanctioned by vote of the majority at a general meeting of the shareholders. A shareholders'

meeting is intended to bring together the whole corporation; every member is entitled to be present, and to make known his views. It is not just that shareholders, knowing an act of the majority to be unauthorized, should lie by, and reserve an option to repudiate the act in case of a loss, or to enjoy its benefits if there should be a profit. Fairness in such case demands that the dissenting shareholders should make known their dissent immediately, and take the proper steps to restrain the majority from exceeding the powers conferred upon them.

"Nor can the shareholders of a corporation avoid responsibility for the unauthorized acts of their agents, by abstaining from inquiry into the affairs of the company, or by absenting themselves from the company's meetings, and at the same time reap the benefit of their acts in case of success.

"If a shareholder fails to take the trouble of inquiring into the affairs of the corporation of which he is a member, or to attend its meetings, its seems no more than just that his supineness should be construed as an acquiescence in the proceedings of the majority." (Citing authorities sustaining the text.)

We refer again to *Kent vs. Quicksilver*, *supra*, and direct the court's attention to page 186 :

"It was not expressly prohibited by the charter, or by any statute, to this corporation to classify the shares of its capital stock, so that one class should have greater right and value than another. It was not *malum in se* so to do, unless it was that a vested right was thereby affected ; but that was not a public evil, it was a wrong that affected private persons only, and one which they might assent to. This case is thus without the principle of *Ashbury Railway Co. vs. Riche* (7 Eng. & I. App. (L. R.), 653), where the act was expressly prohibited. And where third parties have dealt with the company, relying in good faith upon the existence of corporate authority to do an act, there *it is not needed that there be an express assent*

thereto on the part of stockholders to work an equitable estoppel upon them. Their conduct may have been such, though negative in character, as to be taken for an acquiescence in the act; and when harm would come to such third parties if the act were held invalid, the stockholders are estopped from questioning it. We suppose acquiescence or tacit assent to mean the neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress, after knowledge of the committal of it, whereby innocent third parties have been led to put themselves in a position from which they cannot be taken without loss. It is the doctrine of equitable estoppel, which applies to members of corporate or associated bodies, as well as to persons acting in a natural capacity. (2 Story Eq. Jur., 1539.) It is said that there is no question here between the stockholders and third parties; that it is a question between a minority of the stockholders and a majority of them or the assignees of that majority, and so all stockholders. True, it is a question at this time between the holders of preferred stock and of common stock; but it is a question of what were the rights which those preferred stockholders took on when they were strangers to the corporation and third parties as between it and the common stockholders in it. They were not stockholders, nor the assignees of stockholders, until as third parties they bought in the market shares of the preferred stock and parted with their money therefor. It was as third parties that they in good faith relied in that action of the corporate body; and so the question is between them as such and the common stockholders, whether they shall have that right in the corporation which they thought they were to get when they went into the market and bought the right of being a stockholder."

So in the case at bar, irrespective of the surrender by all the stockholders of the respondent of their preferred shares under the proceedings for the reduction and retirement of the capital stock, and the injury which they would sustain if the

appellants were permitted to have the relief sought here, the interests of the 647 persons who are holders of nearly $6,000,000, par value of this new stock purchased since June 29, 1908, without notice and who are innocent holders and the interests of the holders of $3,436,800 of debentures, would be seriously affected by the unconscionable and inequitable conduct and attitude of the appellants were they permitted to prevail.

The case of *Kent vs. Quicksilver Mining Company, supra*, has been cited with approval a number of times by the courts of this State, and we refer to:

Camden & Atlantic Railroad Co., vs. Mays Landing, etc., R. R. Co., 48 N. J. Law, 530, at 564 and 577.

Breslin vs. Fries-Breslin Company, 70 N. J. Law, 274, at p. 283.

Rabe vs. Dunlap, 51 N. J. Eq., 40, at p. 48.

In *Camden vs. Atlantic Railroad Company, supra*, the court goes to great length in adopting and approving the doctrine of estoppel as held in *Kent vs. Quicksilver Mining Co., supra*, by an analysis thereof on page 563 thereof, as follows:

> "In the previous case of *Bissel vs. Michigan Southern R. Co.*, 22 N. Y., 258, the same learned Judge expressed the view that where a corporation has received the consideration of its unauthorized contract, and restitution will not do complete justice, the other party may sue directly on the contract. He said that the plea of *ultra vires*, according to its just meaning, imports, not that the corporation could not make the unauthorized contract, but that it ought not to have been made. Such a defense, therefore, rests upon the violation of trust or duty towards the shareholders, and is not entertained where its allowance will do a greater wrong to innocent third parties. The acquiescence of the shareholders in the abuse will prevent the interposition of such a plea.
>
> "This case was decided without an expression of opinion by a majority of the court on this point; but in the later case of *Kent v. Quicksilver Min. Co.*, 78 N. Y., 159, Judge FOLGER delivered the opinion, in which the entire court concurred, giving the fullest approval to the views of Chief Justice COMSTOCK in

the cases cited. The case was one in which the directors had done an act which the company had no power to do, and in which there was not full execution on both sides. It was not of that class of cases where an authorized act was executed in an unauthorized manner. The transaction was clearly *ultra vires*, and in that aspect it was dealt with by the court. The English and American cases were cited, and the cause was ably and elaborately argued. The propositions maintained by the court were that acts of a corporation which are *per se* illegal, or *malum prohibitum*, or contrary to public policy, but which are *ultra vires*, affecting only the interest of stockholders, may be made good by the assent of shareholders, so that strangers to them, dealing in good faith with the corporation, will be protected in reliance on those acts; that it needed not that there be an express assent upon the part of shareholders to work an equitable estoppel upon them —when they neglect to promptly and actively condemn the unauthorized act, and to seek judicial relief after knowledge of it, then acquiescence will be presumed."

This completely meets the situation in the case at bar. The court in this case proceeded to quote from many other cases upon this same subject, all in harmony with the doctrine above expressed.

In the same connection see 4th Thompson on Corporations, Sections 5314, as follows:

"The body of stockholders in every business corporation are the persons who are incorporated. They are in a substantial sense the corporation. They are the ultimate constituency and the directors who are elected by them from their own number are their officers. The ideal body is in theory of law the principal and the board of directors are the managing agents; but in theory of equity the body of stockholders are the beneficiaries in a trust and the directors are their trustees. It follows that many acts which the directors may do outside the scope of their powers become ratified and valid 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."

See, also, *Allen vs. Wilson*, 28 Fed. Rep., 677, in which it was held by Judge GRESHAM that a stockholder is estopped to object to corporate acts which were performed with his knowledge and assent, and that such assent might be implied from his long silence.

In *Rabe vs. Dunlap, supra*, the court said, at page 47, in referring to *Kent vs. Quicksilver Mining Company, supra*, with approval as follows :

"The cases in which this principal, as it is applied to stockholders, has been discussed, are numerous. The doctrine they establish is that where an act is done openly, and especially on notice, and without evil intent, though clearly in excess of the power of the corporation, a non-assenting stockholder will not be allowed to pause to speculate upon the chances—to wait until he can see whether such act is likely to result in profit or loss—but, to be entitled to the summary inference of the court, he must ask for it promptly, and before the act of which he complains has become the foundation of rights or equities which must be destroyed, or greatly impaired, if the act be nulified or undone. Or, stated with greater brevity, and in its simple essece, the rule is this : If he wants protection against the consequences of an *ultra vires* act, he must ask for it with sufficient promptness to enable the court to do justice to him without doing injustice to others." Citing : *Kent v. Mining Co.*, 78 N. Y., 159 ; *Sheldon Hat-Blocking Co. v. Eickemeyer Hat-Blocking Mach. Co.*, 90 N. Y., 607 ; *Watts' Appeal*, 78 Pa. St., 370 ; *Kitchen v. Railroad Co.*, 69 Mo., 254 ; *Taylor v. Railroad Co.*, 4 Woods, 575 ; 13 Fed., Rep., 152 ; *Graham v. Railroad Co.*, 2 Mach. & G., 146).

"The principal must control the decision of the present application. No argument is required to

show its pertinency. When the leading facts of the case are recalled' it applies itself. Whether the complainants remaind inactive, to speculate upon the chances, intending to abide by the consolidation if it resulted in benefit, and, if not, to try to undo it, it is manifest that they acted precisely as they would have done if such had been their intention. Although they were fully informed of each step in the consolidation scheme, from its inception to its completion, and also of the fact that the new corporation had been organized, and was actively engaged in the prosecution of the several enterprises which had previously been carried on by the four corporations separately, yet for over three years they remained passive and inactive, and did nothing, and it is not until the new corporation has become insolvent, and all of its property is about to be sold to pay mortgages which were made and accepted while they were apparently assenting to the amalgamation, and all its consequences, that they seek to have the consolidation broken up, and the property of the corporation in which they are interested restored to it. They laid by until the new venture proved disastrous, and then, for the first time, they ask the court to undo what for over three years they had, by their inaction and delay, been apparently assenting to. Acquiescence or tacit assent, in such cases, was defined by Judge FOLGER in *Kent v. Mining Co., supra*, to mean neglect to promptly and actively condemn the unauthorized act by suit."

See, also, tn the same connection :

Beling v. American Tobacco Co., 72 N. J., Eq., 32 (65 Atl. Rep., 735).

Dana v. American Tobacco Co., 72 N. J., Eq., 44 (65 Atl. Rep., 730).

Dana v. American Tobacco Co., 73 N. J. Eq., 736 (69 Atl. Rep., (223).

Tanner v. Lindell Ry. Co. (Mo.), 79 S. W., 155.

Johnson v. United Railways of St. Louis (Mo.), 127 S. W. Rep., 63.

Tacoma v. Electric Light Co. (Wash.), 101 Pac. Rep., 365.

Spencer v. Seaboard Air Line Railway, 137 N. C.. 1n7 ; 1 L. R. A. (N. S.), 605 ; 49 S. E. Rep.,103,

In *Dana v. American Tobacco Co.*, 73 N. J. Eq., 736; 69 Atl.. 223, the court in a *per curiam* opinion says :

> "Upon the sole ground of the laches of the complainant herein the decree under review should be affirmed."
>
> "The consolidation agreement which is under attack was made by the several companies in September, 1904. It was agreed to by a large majority of the stockholders of each of the companies, and was filed in the office of the Secretary of State on October 20th. Full notice of the merger and of its terms came to the complainant at least as early as November 15th. Conceding that he was entitled to a reasonable time to investigate the matter and to determine whether his interests required that he should dissent, he had done this and become fully resolved to dissent at least as early as January 7, 1905, when he addressed a written protest to the president and directors of the constituent company of which he was a stockholder. He was not justified in assuming that this protest would be efficacious to stay the consummation of the merger. Within two weeks (or, at the utmost, three weeks) he was sufficiently notified that his protest would be disregarded. His bill of complaint was not filed until March 20, 1905.
>
> "The fact that so much time elapsed since the making of the merger agreement before he made up his mind to dissent; the magnitude of the interests involved in the merger; the fact that the securities of the consolidated company were daily changing hands in the open market, and that the actual business of the company was being carried on in such manner as to render a separation of the consolidated company into its constituent elements increasingly difficult—these and other peculiar circumstances disclosed in the evidence, and to some extent adverted to in the opinion of the learned Vice-Chancellor in this case and in that of *Beling* v. *American Tobacco Co.* (N. J. Ch.), 65 Atl., 725, were such as to call for the utmost diligence on the part of the complainant in making application to the court of

equity, if he desired the very drastic relief for which he prays.

"We think his delay in bringing the action is, under all the circumstances, sufficient to debar him from relief other than such as was offered to him in the court below, and which he there declined."

In *Spencer vs. Seaboard Air Line Railway, supra*, there was a consolidation of one corporation with others and non-assenting stockholders had notice of the meeting authorizing the consolidation and appeared by attorney and objected, but failed for two years to bring suit, during which time new stocks and bonds were issued and many private interests involved and public duties assumed. The court says :

"It is an elementary principle of equity jurisprudence that relief is granted to the vigilant, and will be refused when there has been unreasonable delay, amounting to laches. This is especially true where valuable rights have been acquired by innocent persons. This familiar principle was announced and enforced by this court in *Pender v. Pittman*, 84 N. C., 372 ; SMITH, C. J., saying : 'But this equity ought to be promptly asserted, and not deferred until by a sale other interests may intervene rendering it inequitable, if practicable, to reverse what has been done, and restore matters to their former condition.' In that case it was held 'that an injunction against carrying out a contract of sale made under a power contained in a mortgage will not be granted when the relief to which the plaintiff considers himself entitled is not sought until the sale has been made and the rights of a purchaser have intervened.' Mr. Noyes says : 'Acquiescence for an extended period, during which time the interests of third parties have intervened, may itself constitute laches, and prevent a stockholder from attacking a consolidation even on the ground of fraud.' Intercorporate Rel., 49. The authorities upon this subject are uniform and abundant."

We confidently insist, under the facts and the authorities, that the doctrine of estoppel is a complete bar to the appellants' action.

Some intimation was made on the hearing that there may be a distinction between fundamental changes in the capitalization made by undertaking such internally, that is, within the corporation itself, as here, and by means of consolidation of several corporatians into one new corporation. In this connection, we draw the attention of the court to.

Kent vs. Quicksilver Min. Co., supra,

where the change was undertaken and made internally, as in the case at bar, without consolidation with any other corporation, and by creating a new preferred stock to take precedence over the existing single common stock.

VI.

Relief.

Should for any reason the court find that the appellants are entitled to some distribution upon the 102 shares of old preferred stock, then there is presented for decision at this time, we believe, the basis of such distribution. The position of appellants in this regard is indeed curious. For the purpose of maintaining the contention that the preferred stock held by them is entitled to dividends, they question the validity of the proceedings for the reduction and retirement of the respondent's capital stock and insist that it is not binding or obligatory upon their stock. Yet in order to establish an untenable basis of recovery they seek the benefit of these very proceedings. They ask that the court decree the payment to them of the full amount of accumulated but undeclared dividends on the 102 shares of the old preferred stock, besides all current accrued dividends thereon at the full rate of six per cent. per annum. They insist that all earnings shall be applied to the payment of the accumulated and current dividends upon their old preferred stock before any distribution be made upon

the new stock, claiming that the new stock is common stock and subordinate to their preferred stock, and that under the terms of the certificate of the preferred stock no dividends are payable upon the new stock until all the accumulated dividends and the current dividends at the full rate of 6% per annum shall have been paid upon their preferrod stock. We have here the interesting inconsistency of questioning the validity of the reduction and retirement of the respondent's capital stock for the purpose of establishing a right of action, and in the same breath, seeking to avail themselves of that very proceeding for the purpose of fixing the measure of recovery.

If the proceedings for the reduction and retirement of the respondent's stock are not binding upon the appellants then we insist all the appellants would be entitled to receive, is that proportion of the dividends distributed by the respondent which they would have received had such proceedings never taken place, namely, the proportion which 102 shares bear to the 172,400 shares then outstanding. Appellants cannot repudiate the transaction for one purpose and affirm it for another. It is valid or invalid, binding or not binding. It cannot be half of one and half of the other.

Should the court hold that the appellants, notwithstanding the active assent and implied assent and the complete estoppel by acquiescence, still may be permitted to circumvent the reduction and retirement of the appellant's capital stock, then their recovery must be limited to the amount which they would be entitled to receive had the transaction not taken place. We are supported by abundant authority upon this proposition, and we draw the court's attention to the case of *Burlington City Loan & Trust Company vs. Princeton Lighting Company*, 72 N. J. Eq., 891. Mr. Justice SWAYZE, speaking for the court, says, at page 896:

> "Three views suggest themselves to us as possible: (1) The deposited bonds may be held for the benefit of all the new Princeton bondholders pending the exchange of the whole issue; (2) They may be held as collateral security to the new bonds taken in exchange and for the benefit of the depositing bondholders only; or (3) They may be treated as satisfied for the benefit

of those who have refused their assent to the scheme. The last seems to us inequitable, for the reason that it allows non-assenting bondholders to profit by a transaction which they have in effect opposed. All that they are equitably entitled to is such a proportion of the mortgage security as their bonds bear to the whole issue. *Barry v. M. H. & T. Ry. Co.* (C. C.), 34 Fed., 829. This allows them all they would have but for the merger agreement, and merely denies them an increased security due to the efforts of others. Equity does not allow them to gather the fruit after others have shaken the tree. While it may fairly be argued, as some of the cases suggest, that the depositing bondholders, by the exchange of bonds, evince an intention to give up the lien of their old bonds, it by no means follows that they intend to give up that lien for the benefit of those who refuse to operate with them. It is far more reasonable to assume that, if they give it up at all, it is for the benefit of all the new bondholders, who, in return, allow them to share in the security of the new bonds."

See, also, *Woodruff vs. Columbus Investment Co.*, 68 S. E. Rep., 1103.

In this case, unfortunately, the court wrote no extended opinion, but, as is the practice occasionally in Georgia, contented itself with stating its conclusions by way of syllabus. We have, however, secured copies of the briefs filed in the case, and from these briefs it appears that the corporation in question had an authorized capital stock of $148,120, all of one class and kind, and at a meeting of the stockholders a resolution was passed for the reduction of the capital stock to not less than $90,000, and under the practice prevailing in Georgia application was made to the court for an amendment so reducing the capital stock, which was granted by the court (the act of the court under the Georgia statutes being merely a ministerial one). Thereafter a directors' meeting was held and the amendment was accepted by the directors, and a resolution was passed authorizing the reduction of the capital stock by one-third, and the issuance of new certificates accordingly, and the refunding to each stockholder of an amount equal to one-third of his outstanding stock.

The amount due to the complaining stockholder was tendered to him, and he refused to accept it. The complaining stockholder did not attend the stockholders' meeting at which the reduction was voted. This meeting was held on May 20, 1907. On May 15, 1908, a dividend of six per cent. was declared upon the capital stock as reduced, and the amount of the dividend belonging to the complaining stockholder on the basis of his reduced shares was tendered to him, which he refused to accept. The complaining stockholder based his action and claimed the right to have the dividend upon the number of shares held by him prior to the reduction upon the contention that the reduction could not legally be made without the consent of *all* the stockholders. The syllabus written by the court and dealing with this subject is as follows :

> " If an unauthorized and illegal amendment to its charter has been accepted by a corporation and is about to be acted upon, a stockholder who has not assented thereto or become estopped from complaining may bring an equitable proceeding to enjoin or set aside any action by the corporation under the amendment.
>
> " But where an amendment to a charter af a corporation was obtained and accepted, reducing the capital stock, and all of the stockholders (of whom there were apparently many) save two surrendered their shares upon the terms provided in the amendment and received amounts of money and the lesser amounts of stock in accordance therewith, and where the corporation proceeded to do business upon the new basis for about a year, with the knowledge of one of the non-assenting stockholders, and a dividend of a certain per cent. was then declared, he could not recognize such a declaration and sue and recover the dividend, basing the amount of his recovery upon the amount of his stock unreduced and the per cent. declared, while others were paid on the basis of the reduced stock ; no proceeding having been instituted to set aside the illegal action complained of by them."

The proceeding here is for a declaration and payment of dividends, and if the court should happen to find (which we

confidently believe is not possible) that the appellants are entitled to relief in this action and are entitled to receive dividends upon the 102 shares of old preferred stock, then we ask the court to determine at this time from the evidence in the case the extent of the recovery.

It is not necessary as was intimated upon the hearing to take an account. The evidence discloses the full dividends paid by the respondent since 1904. They are shown specifically in pursuance of the suggestion of the court in the letter of Mr. Patterson above referred to, and aggregate $1,761,360. Under the rule laid down in *Burlington City Loan and Trust Company vs. Princeton Lighting Company, supra,* and *Woodruff vs. Columbus Investment Company, supra,* the interest of the appellants in the dividends paid by the respondent is ascertainable from the record as it stands, and is purely a matter of arithmetic.

A decision either holding invalid or inapplicable and not binding upon the appellants, the reduction and retirement of the respondent's old capital stock, without at the same time finding and determining the measure and extent of the appellants' rights in such event, might seriously injure the respondent and its stockholders because of the disturbing influence such a decision might have and because of the disquietude such a ruling might create among the great many stockholders of the respondent. The purport of the court's decision in such event may be either misunderstood or misinterpreted. The extent of its influence and consequence may be exaggerated and innocent persons may suffer still further injury as a result of appellants' actions. We therefore submit if the court should find the appellants entitled to any distribution on account of the dividends paid by the respondent since 1904, that the court determine the amount at this time without referring the matter for purposes of accounting. There are no facts necessary to ascertain this amount that are not already in the record. As above stated, the entire amount of preferred stock outstanding at the time of the reduction and retirement thereof is shown to have been 172,400 shares. The interest of the appellants is known, namely 102 shares. The amount of dividends distributed has been proved, namely, $1,761,360. This amount of $1,761,360 distributed among the 172,400 shares of old preferred stock would show payment of $10.211 per share, and the appellants having

102 shares of this preferred stock would be entitled to 102 times $10.211 distribution, or $1,031.52. In no event, we maintain, upon any possible hypothesis, could the appellants be entitled to any different distribution. It would give them their proportionate share of every dollar distributed by the respondent since any distribution was made on the old preferred stock, namely, August, 1904, and that is the most that appellant would be entitled to have should the court in any possible way reach the conclusion that the appellants are entitled to prevail in this action.

In urging this treatment of the question relating to the measure of recovery here, as we did before the Vice-Chancellor, we in no way abate or detract from our confidence in the right of our position, but merely to guard against added injury to innocent third persons, should the Court unexpectedly reach a different conclusion. On the contrary for the reasons stated in this brief we submit that the appellants' bill should be dismissed with costs.

VII.

In conclusion, we draw attention of the court to the averment in the answer (Case, pp. 25-6) that though the appellants have not availed themselves of the proceedings for the reduction and retirement of the respondent's capital stock as to the 102 shares of old preferred stock and have not accepted the secutities and cash payable thereunder, the respondent is still prepared and willing to secure for the appellants the full benefit thereof, which in figures is substantially as follows :

77% in new stock, namely, 78 full shares and stock scrip for .

20% in 4% debentures, namely, $2,000 in coupon debentures and scrip for $40.

3% in cash on 102 shares of old preferred stock or	$306.00
10¼% dividends on 78 shares of new stock, or	799.50
28% interest on $2,000 debentures, or	560.00
Aggregating in cash	$1,665.50

We will not undertake to follow the appellants in their labyrinth of figures under the title in their brief, page 40, " appellants' loss was real ". There is no basis for the figures used or assumed ; there is no evidence in the record to support them. In undertaking to reach the fanciful valuation of the old preferred stock the appellants are wrong and inaccurate in their figures. For instance, they entirely fail to take into account the outstanding issue of first mortgage bonds aggregating more than $2,500,000. They deduct entirely the old common stock of $18,100,000 with the statement that it was water.

Appellants instead of being injured by the reduction and retirement in fact are benefitted ; because the new stock, and the debentures and the cash items payable, far exceed the value of the original American Steel Castings Company stock held by the executors and converted into old preferred stock of respondent. The inventory valuation as stated below was proved on the trial by the production of a certified copy of the inventory, which is not incorporated in the record because mislaid by appellants' counsel ; but the figures herein stated are admitted to be correct.

The value to appellants of the above cash and new securities deliverable for the 102 shares of old preferred stock would be at this writing approximately as follows, omitting the fractions of stock and debentures :

78 shares of new stock at $50 per share (last known New York Stock Exchange price)	3,900.00
$2,000 of debentures at 87 (last known sales price)	1,740.00
$3 per share on each share old preferred stock	306.00
Dividends on new stock	799.50
Matured debenture interest coupons	560.00
Total	$7,305.50

The new stock has sold at prices much higher than at present.

The inventory valuation of the American Steel Castings Company stock for which the 102 shares of respondent's preferred stock was exchanged shows $60 per share for the 48 shares of common stock or $2,820, and $100 per share for the 27 shares of preferred stock or $2,700,

aggregating $5,520, so that the result to appellants of the new stock and the debentures and cash under the plan for the reduction and retirement of the respondent's stock would yield to the appellants at the present low prices nearly $2,000 in excess of the inventory valuation of their old American Steel Castings Company stock.

For the reasons hereinbefore set forth we respectfully submit that the decree of the Chancery Court be affirmed with costs.

Respectfully submitted,

LINDABURY, DEPUE & FAULKS,

Solicitors and of Counsel for Respondent.

J. EDWARD ASHMEAD,

MAX PAM (of Illinois Bar),

Of Counsel.

Index.

TESTIMONY.

Witnesses for Complainants:

Witness for Defendant:

EXHIBITS.

New Jersey Court of Errors and Appeals

Between THOMAS C. LAZEAR, and another, executors, etc., Complainants-Appellants, and AMERICAN STEEL FOUNDRIES, Defendant-Respondent.	Appeal.

Petition of Appeal.

Filed October 20, 1915.

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

The Petition of Thomas C. Lazear and Jesse T. Lazear, executors of the will of Alice C. Lazear, deceased, the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the first day of October, Nineteen Hundred and Fifteen, wherein your petitioners were complainants, and the said American Steel Foundries was defendant in this respect, to wit, that the said decree orders and adjudges that the complainants' Bill of Complaint be, and the same thereby is dismissed with costs, and your petitioners humbly appeal from the said decree of the

Chancellor which decrees as aforesaid, upon the ground that the same is erroneous for that your petitioners should have been granted the relief prayed for in their said bill of complaint with costs of suit.

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

YOUNG & BIGELOW,
Solicitors for and of Counsel with Appellants.

Answer.

Filed October , 1915.

The answer of the above-named defendant-respondent to the petition of appeal of the above-named complainants-appellants.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless says and admits that a decree was on October 1, 1915, made and entered in the Court of Chancery in the said cause for that purpose mentioned in said petition, but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity and he prays that the same may be affirmed with costs to be adjudged to this respondent.

LINDABURY, DEPUE & FAULKS,
Solicitors for and of Counsel with
Defendant-Respondent.

Complaint.

IN CHANCERY OF NEW JERSEY.

Filed March 27, 1914.

Amended September 26th, 1914.

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

Humbly complaining show unto your Honor, your orators Thomas C. Lazear and Jesse T. Lazear of Pittsburg, County of Allegheny and State of Pennsylvania, executors of the will of Alice C. Lazear, deceased, late of Pittsburg, preferred stockholders of American Steel Foundries, on behalf of themselves and all other preferred stockholders of said company, who may come in and contribute to the expenses of this suit.

1. That American Steel Foundries is a corporation existing under the laws of the State of New Jersey, and was incorporated on or about the twenty-seventh day of June, nineteen hundred and two, under and pursuant to the provisions of an act of the legislature of said State, entitled "An Act Concerning Corporations (Revision of 1896)" and the acts amendatory thereof and supplemental thereto.

2. On or about the thirtieth day of July, nineteen hundred and two, your orators acquired one hundred and two shares of the preferred capital stock of said company, of the par value of one hundred dollars each, and said company issued to them two certain certificates certifying that your orators were the owners of said stock, and should be entitled to receive when and as declared, from the surplus or net profits of the company, yearly dividends at the rate of six per centum per annum and no more, payable quarterly on dates to be fixed by the by-laws; and that the dividends should be cumulative and should be pay-

able before any dividend on the common stock should be paid or set apart, so that, if in any year dividends amounting to six per cent should not have been paid thereon, the deficiency should be payable before any dividends should be paid upon, or set apart for the common stock. Copies of said certificates are hereto annexed and made part hereof, and marked A and B. Your orators are still the owners and holders of said stock.

3. Said company paid to your orators quarterly dividends of one and one-half per cent, one hundred fifty-three dollars, on your orators' said stock every quarter until the fifteenth day of August, nineteen hundred and four, when it paid one per cent, or one hundred and two dollars; since that day said company has paid, and its directors have declared no dividends to your orators on your orators' said preferred stock. Said company paid to the holders of the common stock of said company, on or about the fifteenth day of May, nineteen hundred and ten and from time to time, thereafter dividends on said common stock, aggregating about one million, two hundred forty-five thousand, eight hundred forty dollars. The following is a schedule setting forth to the best of your orators' information, the dividends paid on such common stock:

On the fifteenth day of May, nineteen hundred and ten, Two hundred fourteen thousand eight hundred dollars;

On the fifteenth day of August, nineteen hundred and ten, Two hundred fourteen thousand eight hundred dollars;

On the fifteenth day of November, nineteen hundred and ten, Two hundred fourteen thousand eight hundred dollars;

On the fifteenth day of February, nineteen hundred and eleven, Two hundred fourteen thousand eight hundred dollars;

On the fifteenth day of May, nineteen hundred and eleven, Two hundred fourteen thousand eight hundred dollars;

On the thirty-first day of March, nineteen hundred and thirteen, Eighty-five thousand nine hundred twenty dollars;

On the thirty-first day of December, nineteen hundred and thirteen, Eighty-five thousand nine hundred twenty dollars.

4. Shortly after your orators learned of the payment of the first dividend on the common stock abovementioned, and frequently thereafter, your orators demanded of the company, payment of the accumulated dividends on your orators' preferred stock, and the company refused to pay to your orators said dividends or any part thereof. Your orators, in the month of April, nineteen hundred and eleven, began an action at law against said company, in the District Court of the United States for the Western District of Pennsylvania, for the accumulated dividends on your orators' said stock; your orators diligently prosecuted said action until about the nineteenth day of April, 1913, when, on motion of your orators (who were thereto advised by counsel learned in the law) said action was discontinued without prejudice to your orators.

5. Your orators do not know the exact number of shares of preferred stock of said company outstanding, but your orators are informed and believe and here aver that the whole amount of such preferred stock outstanding, including your orator's stock, does not now exceed in par value, One hundred thousand dollars, and that the accumulated dividends thereon, with interest, do not exceed fifty thousand dollars.

6. The business of said company in recent years has been very profitable, so that the company has accumulated large sums, as surplus, over and above all reserves for sinking funds, working capital and depreciations and other purposes. The report of said company to its stockholders setting forth the condition of the company on the thirty-first day of December, nineteen hundred and twelve, shows total assets of Twenty-six million two hundred twenty-three thousand seven hundred seventy-three dollars, in which sum is included Two hundred twenty-nine thousand four hundred thirty-eight dollars in cash on hand, and Three million one hundred thousand seven hundred forty-three dollars in accounts and bills receivable. Said report shows the company's liabilities to be capital stock and funded debt Twenty-three million thirty-four thousand eight hundred dollars, accounts payable and accrued liabilities One million one hundred eighty-two thousand forty-seven dollars, reserved for sinking fund and depreciations One million four hundred fifty-three thousand six hundred eighty-nine dollars, and undivided profits of Five hundred fifty-three thousand two hundred thirty-seven dollars. Your orators are informed and believe and therefore aver that in the first nine months of the year nineteen hundred and thirteen, after paying or reserving One million four hundred sixty-six thousand eight hundred and eight dollars for interest and sinking fund and depreciation charges, and One hundred seventy-one thousand eight hundred forty dollars for dividends on the common stock, there remained as undivided profits from the business of said nine months, One million two hundred thirty-eight thousand four hundred ninety-nine dollars. Said company has on hand a sum of money available for dividends, sufficient to pay all the accumulated dividends on your orators' preferred stock and on all other outstanding preferred

stock, and said company improperly withholds from your orators the dividends to which your orators are rightly entitled. But your orators aver that if said company continues to pay large dividends on its common stock and none on its preferred stock, the fund available for dividends on preferred stock will be dissipated, and said company will be unable safely to declare and pay the accumulated and accruing dividends on the preferred stock.

(Here begins the amendment.)

Your orators hoped that the said American Steel Foundries would have paid to your orators the accumulated dividends upon your orators preferred stock, as in Justice and Equity it ought to have done.

But now so it is, may it please your Honor, that the said American Steel Foundries refuse so to do, and some times give out and pretend that on or about the 29th day of June, 1908, all of said company's preferred stock theretofore issued and outstanding, including your orators, 102 shares thereof, became and was retired, cancelled and extinguished in pursuance of the laws of the State of New Jersey, and of acts and proceedings of the directors and stockholders of said company for the readjustment and reduction of its capital stock as hereinafter set forth, and that subsequent to such alleged proceedings, none of its preferred stock and none of its common stock issued and outstanding prior to June 29, 1908, remained outstanding and in force; that on November 7, 1907, at a meeting of the directors of said company, the subject of such readjustment and reduction was taken up for discussion and disposition.

Committees of its stockholders were appointed for the purpose of devising a plan for such readjustment and reduction of its capital stock. As a result of such action and consideration thereof at meetings of the Board of Directors of the company held November 7, 1907, November 8, 1907, December 6, 1907, and Janu-

ary 3, 1908, the said Board of Directors at a meeting thereof duly held on the said last mentioned date, resolved and declared that it was advisable to change and decrease the company's authorized capital stock, which was then $37,650,000, divided into 376,500 shares of the par value of $100 each, and consisted of $19,540,000 par value of preferred stock and $18,110,000 par value of common stock, to $17,184,000, divided into 171,840 shares of the par value of $100 each, all of one class and kind, without distinction or preference between any of said shares, and for that purpose that the certificate of incorporation of the defendant company should be amended accordingly. Pursuant to such action, a special meeting of the company's stockholders was thereupon called to be held on the 8th day of February, 1908, and due and full notice thereof together with a statement and plan of the proposed readjustment and reduction of its capital stock, and the necessity therefor, was on or about January 4, 1908, mailed to each of its stockholders.

By said statement the complainants, as well as all other such stockholders, were notified that if said plan was approved by the company's stockholders, its then preferred stock and common stock would be called in for cancellation and retirement, and there would be issued and paid in payment therefor securities and cash as follows:

For each share of its said preferred stock (1) $77 par value of the company's said proposed new stock; (2) Debenture bonds of the company dated February 1, 1908, payable as to principal in 15 years from such date, and bearing interest at 4% per annum, payable semiannually to the amount of $20; (3) $3 in cash. For each share of its said common stock $25 par value of the company's said proposed new stock.

The said special meeting of stockholders called for February 8, 1908, was held and adjourned until March

14, 1908. On February 15, 1908, the committee of the company's stockholders having in charge such readjustment and reduction of its capital stock mailed to all of its stockholders a further statement of the action so proposed to be taken and of the necessity therefor. On March 14, 1908, the said special meeting was again adjourned to April 18, 1908, and under date of March 21, 1908, notice of such adjournment, together with a further statement of the reasons for the necessity of the action proposed to be taken, was mailed to all of the company's stockholders. On April 18, 1908, the said special meeting was again adjourned to May 7, 1908, and notice of such adjournment was on April 20, 1908, mailed to all of the stockholders of the company. On May 7, 1908, the said special meeting was again adjourned to June 4, 1908, and notice of such adjournment was mailed to all of the company's stockholders, under date of May 11, 1908. On June 4, 1908, the said special meeting was again adjourned to June 12, 1908, and notice of such adjournment was sent to all of the company's stockholders.

At the said adjourned meeting of the company's stockholders held on June 12, 1908, such plan for the readjustment and reduction of its capital stock was declared effective by the affirmative vote and written assent of 90 per centum of all of the outstanding capital stock of the defendant, and notice of such action was under date of June 12, 1908, mailed to all of the company's stockholders.

That on June 29th, 1908, the company filed its amended certificate of incorporation with the Secretary of State of the State of New Jersey, which certificate included all of the resolutions and proceedings of its stockholders, making such change and reduction of its capital stock. Pursuant to action of its Board of Directors at a meeting thereof held on June 30th, 1908, the defendant on July 11, 1908, mailed notices

to all of its stockholders that the Guarantee Trust Company of the City of New York was prepared then and thereafter to carry into effect the readjustment and reduction of the American Steel Foundries capital stock so as aforesaid adopted and approved by its stockholders. In pursuance of the said plan of readjustment and reduction of its capital stock, the holders of 168,303 shares of the company's preferred stock have surrendered their shares and accepted in lieu thereof the securities and moneys issued and paid by the company in satisfaction thereof. In the consummation of the said plan in accordance with its terms and provisions, the company since the filing of its said amended certificate of incorporation on June 29, 1908 (1) has issued its said 15-year debentures to the aggregate amount of $3,436,800, (2) has issued its present outstanding capital stock of one class and amount to the amount of $17,184,000, (3) has paid to or for the benefit of the said holders of its former preferred stock $515,520.00 in cash.

And said company pretends by the filing of its amended certificate of incorporation and as a result of the acts and proceedings aforesaid, the preferred stock as well as the common stock of the company theretofore issued including the 102 shares of its preferred stock represented by the two certificates so as aforesaid issued to your orators, thereupon became cancelled and extinguished, and at all times since June 29, 1908, the only capital stock of the company outstanding or in force has been the said new and single class of its capital stock of the par value of $17,184,000, authorized by its said amended certificate of incorporation.

But your orators charge that the contrary is the truth and that your orators' said 102 shares of preferred stock are still outstanding and are a valid obligation of the company. Your orators do not admit

that the above pretended actions and proceedings of the company, its directors, stockholders or committees were actually taken and held, and your orators leave the company to make such statement and proof relative thereto as it may be advised.

And your orators further charge that even if such actions and proceedings, or any of them, occurred, as above pretended, that your orators never assented thereto, or accepted the company's offer to purchase and retire your orators' preferred stock; that said proceedings were not intended to and did not cancel or affect the preferred stock of your orators and other holders who did not come in and take advantage thereof. And that your orators still hold, and never surrendered their said 102 shares of preferred stock or any part thereof, and that said company never actually tendered to your orators, and that your orators have never received any money or securities in satisfaction of your orators' said stock.

(End of Amendment.)

In consideration whereof, and for as much as your orators are without adequate remedy in the premises at and by the strict rules of the common law, and can only obtain relief in this honorable court where matters of this nature are properly cognizable and relievable—

To the end therefore that the said American Steel Foundries may, but without oath, answer on oath being hereby waived, to the best and utmost of its knowledge, information and belief, full, true and perfect answer make to all and singular the premises, and that as fully and particularly as if the same were here repeated, and the said company distinctly interrogated thereto, and more especially that it may in manner aforesaid, answer and set forth the amounts paid as dividends on its stock since the fifteenth day of August, nineteen hundred and four, and the days on which said dividends were paid; and the names of

all its preferred stockholders of record, and the number of shares held by each, and that it may fully set forth in detail, a statement of its assets and liabilities, and of the operations of said company since the fifteenth day of August, nineteen hundred and four, and that it may declare on what days the several obligations of the company will mature, and what sum, if any, it has reserved as working capital, and what sums, if any, it is obligated to reserve for sinking fund or other purpose, and that the amount of dividends accumulated on your orators' and other preferred stock, and the interest thereon from the times said dividends should have been declared and paid, may be ascertained by a decree of this honorable court, and that said company may be commanded by a decree forthwith to declare and pay dividends to your orators and other preferred stockholders pro rata their several holdings, to the amounts so ascertained, or such part thereof as can be, in the judgment of this Honorable Court, at this time safely distributed to such preferred stockholders, and that said company may be commanded by a decree of this honorable court hereafter, throughout the existence of said company, to declare and pay quarterly to your orators and other preferred stockholders dividends at the rate of six per centum per annum, whenever in the opinion of the company's Board of Directors for the time being, such dividends can be safely paid, and that said company, its officers and directors may be restrained and enjoined from hereafter declaring or paying any dividends upon its common stock, while any dividends heretofore or hereafter accumulated or accrued upon its preferred stock shall remain unpaid, and that your orators may have such other and further relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your orators not only the State's writ of injunction issuing out of and under the seal of this Honorable Court, commanding American Steel Foundries forthwith to declare and pay a dividend to your orators and other preferred stockholders *pro rata* to their several holdings, to an amount to be ascertained by this Honorable Court, and commanding that said company hereafter, throughout the existence of said company to declare and pay quarterly, to your orators and other preferred stockholders, dividends at the rate of six per centum per annum, whenever in the opinion of the company's Board of Directors for the time being, such dividends can be safely paid, and restraining and enjoining the said American Steel Foundries, its directors and officers, from hereafter declaring or paying any dividends upon its common stock while any dividends heretofore or hereafter accumulated or accrued upon its preferred stock shall remain unpaid. But also the State's writ of subpoena issuing out of and under the seal of this Honorable Court directed to the said American Steel Foundries, commanding it by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this Honorable Court, then and there to stand to, abide by, and perform such order and decree therein as to your Honor shall seem meet, and as shall be agreeable to equity and good conscience.

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

YOUNG & BIGELOW,
Solicitors for and of
Counsel with Complainants.

John O. Bigelow,
H. V. Blaxter,
of Counsel.

(Exhibits A and B annexed to bill are same as Exhibits C1 and C2, *infra*.)

Answer.

Filed June 20, 1914.

The answer of American Steel Foundries, the defendant in the above-entitled cause, to the bill of complaint of Thomas C. Lazear and Jesse T. Lazear, executors of the will of Alice C. Lazear, deceased, complainants.

This defendant, answering unto so much and such parts of the complainants' bill of complaint as it is advised it is material and necessary for it to make answer unto, says:

1. It admits the allegations contained in paragraph 1 of said bill of complaint.

2. It admits that under date of July 30, 1902, it issued to the complainants two certificates of stock representing 102 shares of the issue of preferred stock which it then had outstanding, and that the papers "A" and "B" annexed to the said bill of complaint, and purporting to be copies of the said certificates of stock are in fact true copies thereof. It has no knowledge as to whether the complainants are still the holders and owners of said certificates nor of the date on which the complainants acquired the said shares of stock, and leaves them to make such proof of said matters as they may be advised it is material or necessary for them to do.

3. It admits that quarterly dividends of one and one-half per centum were paid on the said 102 shares of preferred stock every quarter until February 1, 1904; that a dividend of one per centum was paid thereon on the first day of August, 1904, and that since August 1st, 1904, it has paid and its directors have declared no dividends upon the said shares. It denies that it has paid any dividends upon its common stock which had been issued or was outstanding

at the time that any of its preferred stock was issued and outstanding. It says that prior to the 15th day of May, 1910, namely, on or about the 29th day of June, 1908, all of its preferred stock theretofore issued and outstanding, including the 102 shares thereof represented by the above-mentioned certificates, became and was retired, cancelled and extinguished under and in pursuance of the laws of the State of New Jersey and of acts and proceedings of the directors and stockholders of the defendant for the readjustment and reduction of its capital stock as hereinafter set forth, and that subsequent to such proceedings none of the preferred stock and none of the common stock of the defendant issued and outstanding prior to June 29, 1908, remained outstanding and in force. From and after June 29, 1908, and as the result of the said acts and proceedings there was issued by it a new and single class of its capital stock in the aggregate par value of $17,184,000, consisting of 171,840 shares of the par value of $100 each, which said last mentioned shares were and are the only shares of its capital stock that have been in existence and outstanding since the said last mentioned date. The dividends mentioned in paragraph 3 of the said bill of complaint as paid to the holders of the defendant's common stock, and any other dividends declared and paid by the defendant since the year 1904 have been declared and paid upon such new and single class of capital stock issued by it as aforesaid on or since June 29, 1908, and none of said dividends and no other dividends have been declared or paid upon any of its common stock issued and outstanding when the 102 shares of its preferred stock represented by the two said certificates or any other of its preferred stock remained outstanding.

4. It has no knowledge of any demands made upon it by the complainants for the payment of accumu-

lated dividends on the said 102 shares of preferred stock, and leaves the complainants to make such proof thereof as they may be advised it is necessary and material for them to do. It admits that it has not since June 29, 1908, paid to the complainants or any other holder of its preferred stock any dividends thereon and avers that all of such preferred stock was on said date retired, cancelled and extinguished by the acts and proceedings aforesaid, and that no dividends were payable thereon subsequent thereto. The defendant admits that in the month of April, 1911, the complainants began an action at law against it in the Circuit Court of the United States for the Western District of Pennsylvania, claiming from it dividends upon the said 102 shares of preferred stock, and that such action was prosecuted by the said complainants. It says that upon final adjudication in the said suit judgment was rendered against the complainants and any right of recovery upon their part denied, and that the discontinuance of said suit was undertaken and effected upon the *ex parte* application of the complainants and without the knowledge or consent of the defendant and in no way relieves the complainants from the adjudication therein denying them the right of recovery from the defendant as claimed by them.

5. It says that it has no preferred stock outstanding of any character or in any amount, and that there are no accumulated dividends of any kind upon any preferred stock due, payable or recoverable, either with or without interest.

6. It admits that in recent years its business has been profitable and that it has accumulated a surplus over and above all reserves for sinking funds, working capital, depreciation and other purposes. It also admits the correctness of the report to its stockholders as set forth in paragraph 6 of said bill of complaint.

It also admits that it has surplus and undivided profits accruing from its business, but it avers that none thereof are available for or applicable to the payment of any dividends upon the shares of preferred stock represented by the two stock certificates so as aforesaid issued to the complainants or upon any other preferred stock as in the said bill of complaint is set forth. It denies that it is improperly withholding from the complainants dividends upon the said 102 shares of preferred stock as claimed by them, and avers and insists that said complainants are not entitled to receive from it any dividend distribution of any kind on account of the said 102 shares of preferred stock mentioned in the said bill of complaint.

7. Except as admitted herein the defendant denies each and every allegation of the said bill of complaint.

FURTHER ANSWERING DEFENDANT SAYS AS FOLLOWS:

8. In 1907 the business and financial condition of the defendant were such that it became imperative in the interest of the defendant and of all its stockholders that a readjustment and reduction of its outstanding capital stock be had. Accordingly on November 7, 1907, at a meeting of the directors of the defendant the subject of such readjustment and reduction was taken up for discussion and disposition. Committees of its stockholders were appointed for the purpose of devising a plan for such readjustment and reduction of its capital stock. As a result of such action and consideration thereof at meetings of the Board of Directors of the defendant, held November 7, 1907, November 8, 1907, December 6, 1907, and January 3, 1908, the said Board of Directors at a meeting thereof, duly held on the said last mentioned date resolved and declared that it was advisable to change and de-

crease the defendant's authorized capital stock, which was then $37,650,000, divided into 376,500 shares of the par value of $100 each, and consisted of $19,540,000 par value of preferred stock and $18,110,000 par value of common stock, to $17,184,000, divided into 171,840 shares of the par value of $100 each, all of one class and kind, without distinction or preference between any of said shares, and for that purpose that the certificate of incorporation of the defendant company should be amended accordingly. Pursuant to such action, a special meeting of the defendant's stockholders was thereupon called to be held on the 8th day of February, 1908, and due and full notice thereof, together with a statement and plan of the proposed readjustment and reduction of its capital stock, and the necessity therefor, was on or about January 4, 1908, sent to each of its stockholders, including the complainants.

By said statement the complainants, as well as all other such stockholders, were notified that if said plan was approved by the defendant's stockholders, its then preferred stock and common stock would be called in for cancellation and retirement, and there would be issued and paid in payment therefor securities and cash as follows:

For each share of its said preferred stock (1) $77.00 par value of defendant's said proposed new stock; (2) Debenture bonds of the defendant, dated February 1, 1908, payable as to principal in 15 years from such date, and bearing interest at 4% per annum, payable semiannually to the amount of $20; (3) $3 in cash. For each share of its said common stock $25 par value of defendant's said proposed new stock.

The said special meeting of stockholders called for February 8, 1908, was held and adjourned until March 14, 1908. On February 15, 1908, the committee of defendant's stockholders having in charge such re-

adjustment and reduction of its capital stock sent to all of its stockholders, including the complainants, a further statement of the action so proposed to be taken and of the necessity therefor. On March 14, 1908, the said special meeting was again adjourned to April 18, 1908, and under date of March 21, 1908, notice of such adjournment, together with a further statement of the reasons for the necessity of the action proposed to be taken, was sent to all of the defendant's stockholders, including the complainants. On April 18, 1908, the said special meeting was again adjourned to May 7, 1908, and notice of such adjournment was on April 20, 1908, sent to all of the stockholders of the defendant, including the complainants. On May 7, 1908, the said special meeting was again adjourned to June 4, 1908, and notice of such adjournment was sent to all of the defendant's stockholders, including the complaints, under date of May 11, 1908. On June 4, 1908, the said special meeting was again adjourned to June 12, 1908, and notice of such adjournment was sent to all of the defendant's stockholders, including the complainants.

Such notices and statements were sent to the defendant's stockholders and such adjournments of said special meeting were had in order that all of the said stockholders, including the complainants, might have the fullest information with reference to the proposed conversion, retirement and cancellation of the capital stocks of the defendant then outstanding, and the issuance and payment in place thereof of its new securities and cash as aforesaid, and in order that any stockholder who might not approve of the said plan or any of the actions proposed to be taken thereunder should have every reasonable opportunity to question or oppose the same.

At the said adjourned meeting of the defendant's stockholders held on June 12, 1908, such plan for the

readjustment and reduction of its capital stock was declared effective by the affirmative vote and written assent of 90 per centum of all of the outstanding capital stock of the defendant, and notice of such action was under date of June 12, 1908, sent to all of the defendant's stockholders including the complainants.

The defendant avers that each and every of the said notices and statements was promptly received by the complainants and it begs leave to refer thereto as to the contents thereof and also to the minutes of the said several meetings of its directors and stockholders for the proceedings taken thereat, all of which it is ready to produce when and as this Honorable Court may direct.

9. For the purpose of affording a further opportunity to any non-assenting or non-appearing stockholder to question or object to the consummation of the said plan, the defendant delayed the filing with the Secretary of State of the State of New Jersey, of its Amended Certificate of Incorporation, effecting such change in and reduction of its capital stock until June 29, 1908. No such question or objection having then been raised by either of the complainants or any of the other defendant's stockholders after the said meeting of June 12, 1908, the defendant on June 29, 1908, filed such certificate with the said Secretary of State, which certificate included all of the resolutions and proceedings of its stockholders making such change and reduction in its capital stock.

10. By the filing of its said Amended Certificate of Incorporation and as a result of the acts and proceedings aforesaid the preferred stock as well as the common stock of the defendant theretofore issued and outstanding, including the 102 shares of its preferred stock represented by the two certificates so as aforesaid issued to the complainants, thereupon became can-

celled and extinguished, and at all times since June 29, 1908, the only capital stock of the defendant outstanding or in force has been the said new and single class of its capital stock of the par value of $17,184,000 authorized by its said amended certificate of incorporation. For the contents of such amended certificate the defendant prays leave to refer to a duly certified copy thereof which it is ready to produce when and as this Honorable Court may direct.

11. Pursuant to action of its Board of Directors at a meeting thereof duly held on June 30, 1908, the defendant on July 11, 1908, sent notices to all of its stockholders, including the complainants, that the Guaranty Trust Company of the City of New York, was prepared then and thereafter to carry into effect the readjustment and reduction of the defendant's capital stock so as aforesaid adopted and approved by its stockholders. The defendant avers that such notice was promptly received by the complainants, and it begs leave to refer thereto and to the minutes of the said last mentioned meeting of its Board of Directors, both of which it is ready to produce, when and as this Honorable Court may direct.

12. Notwithstanding that the complainants promptly received each and all of the said notices and communications and were promptly and fully advised with reference to all of the proceedings relating to the proposed readjustment and reduction of its capital stock, and that the said plan therefor would in the absence of objection from the stockholders be carried out by the cancellation and retirement of its said preferred and common stock and the issuance in payment therefor of its new securities and cash as aforesaid, neither of the complainants at any time made any objection thereto either directly or indirectly. The defendant also avers that all of the said proceedings and the said

change in and reduction of its capital stock were assented to by the complainants, and were on or about June 29, 1908, assented to in writing by the complainant Thomas C. Lazear, who was then the owner of the said 102 shares of the defendant's preferred stock, and that they and each of them are bound thereby and are estopped and precluded from questioning the said proceedings or the change in and conversion and reduction of the capital stock of the defendant affected thereby, or the validity thereof.

13. In pursuance of the said plan, and in reliance upon the absence of any objection to the consummation thereof after the said meeting of its stockholders held on June 12, 1908, the holders of 168,303 shares of the defendant's former preferred stock, prior to the filing of the said bill of complaint surrendered their shares and accepted in lieu thereof the securities and moneys issued and paid by the defendant in satisfaction thereof. In the consummation of the said plan in accordance with its terms and provisions, and in reliance upon the absence of any such objection, the defendant since the filing of its said amended certificate of incorporation on June 29, 1908, and prior to the filing of the said bill of complaint (1), issued its said 15-year debentures to the aggregate amount of $3,436,800, (2), issued its present outstanding capital stock of one class and kind to the amount of $17,184,000, and, (3), paid to or for the benefit of the said holders of its former preferred stock, $515,520 in cash.

Prior to said readjustment and reduction of its capital stock, the then outstanding preferred and common stocks of the defendant were listed on the New York Stock Exchange. Subsequent thereto and in reliance upon the proceedings aforesaid and the absence of objection thereto, each of said classes of defendant's stock theretofore outstanding were stricken from the list of New York Stock Exchange and the

said new and single class of its capital stock was listed upon said exchange. Prior to July 31, 1911, there were transferred of record on the stock transfer books of the defendant, 4,008,365 shares of its said new issue of stock, and there had also been transfers and retransfers to the said Guaranty Trust Company of New York as the defendant's exchange agent and the Trust Company of America for fractional shares of 3,584,374 of such new shares. The difference between these two items of transfer, namely, 423,991 shares, represents the number of shares of the new stock of the defendant dealt in upon the New York Stock Exchange and by various owners thereof for their own purposes between June 29, 1908, and July 31, 1911. Since the said last-mentioned date there have been further transfers and dealings in such shares by various holders thereof for their own purposes, aggregating 111,182 shares.

The said new stock of the defendant had at the time of the filing of the said bill of complaint been widely dealt in on said exchange and elsewhere for nearly six years and was then and is now held and owned by a large number of investors who had no connection with or interest in the defendant as stockholders or otherwise at the time of the issuance of its said new stock or at any time prior thereto. The complainants and each of them had knowledge of such listing of and trading in said new stock during all of the said period, but at no time prior to the institution of this suit presented any protest or objection to this defendant or to the New York Stock Exchange against the listing of such stock, or instituted any suit or proceeding to prevent such listing thereof, or to question the validity of such new stock, or to question or set aside the proceedings so as aforesaid had for the readjustment and reduction of the capital stock of the defendant or the cancellation, retirement or extin-

guishment of its preferred stock and common stock outstanding prior to June 29, 1908.

The defendant further submits that by reason of the matters and things herein set forth:

(a) The 102 shares of the defendant's preferred stock represented by the two stock certificates so as aforesaid issued to the complainant were duly and legally cancelled and retired prior to the filing of the said bill of complaint.

(b) The complainants and each of them have been guilty of laches disentitling them to the relief prayed for in their bill of complaint, or any part thereof.

(c) The complainants and each of them have assented to the cancellation and retirement of the said 102 shares of the defendant's former preferred stock.

(d) The complainants and each of them have acquiesced in and are estopped from questioning the cancellation and retirement of the said 102 shares of the defendant's former preferred stock or from endeavoring to enforce the payment of a further dividend or dividends thereon or any dividend distribution thereon whatsoever, or from questioning the validity of the defendant's said present outstanding stock of 171,184 shares or that such shares constitute the only outstanding stock of the defendant.

(e) The complainants' knowledge of the proceedings so as aforesaid had in the year 1908 for the said change in and reduction of the capital stocks of the defendant theretofore outstanding, their failure to object to or oppose such proceedings prior to the filing of the said amended certificate of incorporation on June 29, 1908, and their failure to take any action whatsoever with reference to the said 102 shares of the defendant's preferred stock represented by the cer-

tificates so as aforesaid issued to them, at any time prior to the institution in April, 1911, of the said suit in the Circuit Court of the United States for the Western District of Pennsylvania, debars them, and each of them, from any of the relief prayed for in this suit.

(f) It would be inequitable and unfair to the defendant and its stockholders and debenture holders to grant the relief prayed for by the said bill of complaint, or any part thereof.

(g) If it should be decreed that the complainants are entitled to have any distribution upon the shares of preferred stock mentioned in their said bill of complaint, notwithstanding the matters and things in this answer set forth, then such distribution should be limited to the proportion of the aggregate of the dividends paid by the defendant on and since May 14, 1910, that the said 102 shares of preferred stock bears to the total amount of shares of preferred stock of this defendant outstanding at the time of the change and reduction and conversion of the capital stock of the defendant on June 29, 1908, which sum would not exceed $889.60.

The defendant further shows that if the complainants had exchanged the said 102 shares of preferred stock in accordance with the said plan for the readjustment and reduction and conversion of defendant's stock, they would have been entitled to receive $7,854, par value of its said new issue of stock, $2,040 par value of its said 15-year debentures, dated February 1, 1908, and $306 in cash. They would also have now received $489.60 as interest payments on such par value of debentures and $687.23 as dividends upon said $7,854 par value of such new stock. Notwithstanding it is under no obligations so to do, the defendant has offered, and is still willing and hereby agrees

to secure to the complainants participation in and the same full benefits of said plan of readjustment and reduction of its capital stock as if the complainants had heretofore availed themselves thereof, and it hereby offers so to do notwithstanding the complainants' failure to heretofore accept such benefits and notwithstanding the lapse of time which has occurred since the consummation of the said plan.

The defendant prays to be hence dismissed with its costs.

AMERICAN STEEL FOUNDRIES,
By R. P. LAMONT,
(Seal) President.

Attest:
F. E. Patterson,
Secretary.

LINDABURY, DEPUE & FAULKS,
Solicitors for and of counsel
with Defendant.

Pam & Hurd,
Of Counsel.

State of Illinois, }
County of Cook, } ss:

The answer of the defendant, American Steel Foundries, was taken this 17th day of June, in the year 1914, before me, under the common seal of said corporation as by its said seal hereto affixed appears.

(Seal) E. W. WELLNER,
Notary Public.

Replication.

Filed October , 1914.

The replication of the complainants to the answer of the defendant.

The complainants join issue on the answer of the defendant.

YOUNG & BIGELOW.
Solicitors for the Complainants.

Final Decree.

Filed October 4, 1915.

This cause coming on to be heard in the presence of Mr. John O. Bigelow of Young & Bigelow, and Mr. H. V. Blaxter, of the Pennsylvania Bar, of counsel with complainants, and J. Edward Ashmead of Lindabury, Dupue & Faulke, and Max Pam, of the New York Bar, of counsel with defendant, and the pleadings having been read and the proofs of the respective parties having been taken in open court, and the arguments of the respective counsel having been heard, and the court having considered the same and being of the opinion that the complainants are not entitled to the relief prayed for in complainants' bill of complaint, or any part thereof;

It is, on this first day of October, 1915, ordered, adjudged and decreed that the complainants' said bill of complaint be and the same hereby is dismissed with costs.

E. R. WALKER,
C.

Respectfully advised.
Frederic W. Stevens,
V. C.

Memorandum.

September 11, 1914.

On motion to adjudge answer of defendant insufficient.

Mr. Bigelow for complainants.

Mr. Ashmead for defendant.

Stevens, V. C. The rule is that complainant is entitled to discovery of facts known to defendant, material to the proof of his case. Here in the sixth paragraph of its answer defendant admits "that in recent years its business has been profitable and that it has accumulated a surplus over and above all reserves for sinking funds, working capital, depreciation and other purposes." It admits therefore that it has funds with which to pay dividends on complainants' preferred stock, if such stock constitutes an outstanding obligation. The real question is whether it does constitute such obligation. The interrogatories proposed (for such they are in effect) are, consequently, immaterial. Except the first and second, they bear upon the company's ability to pay. As to the first and second which relate to the amount paid by way of dividends on the common stock and the time of payment, the answer avers that it has paid none upon common stock issued and outstanding at the time any of the preferred stock was issued and outstanding.

It would seem that in order to raise the real issue between the parties, complainants should amend their bill and attack the readjustment proceeding.

The application should be denied.

Opinion.

Filed September 20, 1915.

Mr. Bigelow and Mr. Blaxter, of Pennsylvania, for complainants.

Mr. Ashmead and Mr. Pam of Illinois, for defendant.

Stevens, V. C.:

The bill of complaint alleges that on July 30, 1902, the complainants acquired 102 shares of the preferred stock of the defendant company; that it ceased to pay dividends on this stock after August 15, 1902, and that on May 15, 1910, it began to pay and has since continued to pay dividends on the common stock. The prayer was that it be commanded to declare and pay to complainants and other preferred stockholders dividends at the rate of six per cent per annum whenever the same could be safely paid and that it be enjoined from paying any dividend upon the common stock while dividends upon the preferred stock remained unpaid.

The answer avers that in 1907 the financial condition of the defendant was such that a readjustment and reduction of its capital stock was considered desirable; that a committee of stockholders was appointed and that on their recommendation it was on January 3, 1908, resolved by the Board of Directors "that it was advisable to change and decrease the defendant's authorized capital stock which was then $37,650,000 divided into 376,500 shares of the par value of $100 each and consisting of $19,540,000 par value of preferred stock and $18,110,000 par value of common stock, to $17,184,000 divided into 171,840 shares of the par value of $100 each, all of one class and kind without distinction or preference between any of the shares and that the certificate of incorporation should be amended accordingly; that after several adjourn-

ments of the stockholders' meetings called to act upon this resolution and after due notice to all the stockholders, including the complainants, the plan was on June 12, 1908, declared effective, by the affirmative vote and written assent of 90 per centum of all the outstanding capital stock, and that on June 29, 1908, a certificate of the amended certificate of incorporation was filed with the Secretary of State together with the resolutions and proceedings of the stockholders.

The answer further averred that no objection was made by complainants to the carrying out of the plan and that in reliance upon the absence of objection the holders of 168,303 shares of preferred stock (out of a total of 190,540) surrendered their shares and accepted in lieu thereof the securities and moneys issued and paid by defendants in satisfaction thereof; the securities being common stock to the amount of 77 per cent of the face value of the preferred shares, and debentures to the amount of 20 per cent thereof; together with three dollars in cash for each share.

After the filing of this answer, the complainants amended their bill by stating the above proceedings and charging that complainants never assented to them and that notwithstanding the action taken, their preferred shares are still outstanding and a valid obligation of the company.

There is no pretense that this action was not taken in good faith or that it was not, from a business standpoint, advantageous to the company and its stockholders. It was not opposed by anyone and has since been accepted with almost complete unanimity by both classes of stockholders. Even Thomas C. Lazear, one of the complainants, accepted it, as to 71 shares held in his own right.

The position of the complainants is this. We, as executors, made a contract with the company by which

we were to be paid cumulative dividends at the rate of six per cent. We have never agreed to any change in it; consequently, it, as to us, remains intact, we do not ask that the proceedings, so far as it respects the assenting stockholders, be adjudged *ultra vires*, or that it be set aside. We stand merely on our *own* right. If this position be sound, there are still two classes of stockholders: the preferred, insignificant in point of numbers, and the common, alone recognized in the amended certificate.

In support of their position the complainants cite Pronick v. Spirits Distributing Co., 58 N. J. Eq., 97, where it was decided by Emery, V. C., that the company had no power to alter the rate of dividend it had agreed originally to pay. The decision was put upon the ground that a general power to amend the certificate of incorporation did not authorize a disturbance of a vested right, that the attempted change impaired the obligation of the stockholders' contract.

The case was decided upon the provisions of the Corporation Act as they stood prior to 1896. By Section 27 of the Act passed in that year it was enacted that "every corporation may change the nature of its business, change its name, increase its capital stock, *decrease its capital stock*, change the par value of the shares of its capital stock—change its common stock into one or more classes of preferred stock, create one or more classes of preferred stock and make such other amendment, change or alteration as may be desired."

Section 29 provided that, "the decrease of capital stock may be effected by *retiring* or reducing any class of its stock."

These sections were considered in Berger v. U. S. Steel Corporation, 63 N. J. Eq., 809, Van Syckle, J., says, "the 27th and 29th sections of the Corporation Act of 1896 expressly provide for the retirement of

both classes of stock. The 5th section of the act provides 'that this Act and all its amendments shall be a part of the charter of every corporation heretofore or hereafter formed under it, except so far as the same are inapplicable and inappropriate to the objects of such corporation.' The complainant therefore has no vested right to retain her shares in opposition to any lawful method provided for retiring them."

From this quotation it is apparent that the case in hand differs from the case of Prosnick vs. Spirits Distributing Co. in the important particular that in that case the contract did not provide for a change and that in this, by statutory enactment, it does. There can be no question but that under the power conferred by Section 29, any class of the stock of companies organized under the Act of 1896, may be retired *in toto*.

The question then is narrowed down to this. If retired, must it be for a money equivalent only? There is nothing in the Act itself which, in terms, so provides. Reliance is, however, placed upon the following passage from Judge Van Syckle's opinion in the Berger case. "The first two methods provided for retiring the stock (*i. e.* the method of retiring and reducing the stock and the method of drawing the necessary number of shares by lot for retirement) are compulsory and if the company had *cash* assets to retire in those methods, the further provision for retirement by purchase would be unnecessary. The inference is that the draftsman of the 29th section intended to bestow the power to purchase on credit, cash assets not being in hand." It is clear from this, say complainants' counsel, that the Court of Errors understood that preferred stock could be compulsorily retired only for cash.

It is unnecessary for me to decide the question: for I think that complainants must fail on another ground. The power to retire is conceded. It is also

conceded that the formal proceeding, consummated in June, 1908, was on its face, regular. Its validity was not questioned or attacked at any time during its progress, nor was it questioned, directly or indirectly, until April 8, 1911, when complainants began suit in the United States District Court for the Western District of Pennsylvania. They did not then attack it directly, but insisted, as they do here, that it did not affect them. They allowed nearly three years to elapse after the filing of the amended certificate before they took even that action and they did not ultimately prevail in it.

Justice Van Syckle, speaking of the method of retiring stock that was adopted in the present case, says that it is compulsory and must operate equally upon all holders. The amended certificate of incorporation so provides. It does not and could not save the right of those who do not come into the plan. It constitutes a single class of stock and that unpreferred. If the Court should give judicial recognition to two classes of stock, it would not only disregard the charter as amended, but it would assert in effect that the method adopted was not compulsory and was not to operate upon all alike. Hence, to declare that it did not bind complainants would be to declare it unwarranted in point of law, and so, among other things, to throw doubt over the validity of the three millions of debentures issued on the face of it, to carry it into effect. The complainant had ample notice of the scheme and ample opportunity to be heard in opposition to it. Under these circumstances, it seems to me that the attack upon it, indirect though it be, comes too late. It is not an attack upon the *right* to retire, but only upon the mode in which it has been exercised. To such an attack delay is fatal. The principle of cases like Kent v. Quicksilver Mining Co., 78 N. Y., 159; Rabe v. Dunlap, 51 N. J. Eq., 40; and Dana v.

American Tobacco Company, 72 N. J. Eq., 44; 73 N. J. Eq., 736, applies, and therefore the bill should be dismissed.

Case.

Deposition of Thomas C. Lazear, taken before Lucy D. Iams, Special Commissioner, appointed by the Court to take said deposition, at the office of Lazear & Baxter in the St. Nicholas Building, Pittsburgh, Pa., on March 17, 1915, at eleven o'clock A. M.; there appearing at said time and place Messrs. John O. Bigelow and Henry V. Blaxter, counsel representing the complainants and Mr. Max Pam, of counsel, representing the defendant.

THOMAS C. LAZEAR, being duly sworn according to law, deposes and says:

Direct-examination by Mr. Bigelow:

Q. Mr. Lazear, where do you live? A. In the City of Pittsburgh.

Q. How old are you? A. I will be eighty-four on the 29th of next May.

Q. Are you one of the complainants in this case now pending in the Court of Chancery of New Jersey in which Thomas C. Lazear and another, executors, are plaintiffs and the American Steel Foundries is defendant? A. Yes.

Q. I show you what appear to be two preferred stock certificates of the American Steel Foundries, one numbered 1196 for one hundred shares, and one numbered B-477 for two shares. Are they the certificates on which this suit is brought? A. Yes, sir.

Counsel for plaintiff here produced the two exhibits, C1 and C2, and offered the same in evidence.

No objection by counsel for defense.

Q. Mr. Lazear, are you and Mr. Jesse T. Lazear, as executors of the will of Alice C. Lazear, still owners of these certificates?

Objected to by counsel for defense, as involving a conclusion both by law and of fact, and as incompetent.

A. We are. We own and hold them.

Q. Have you ever sold or transferred these certificates?

Counsel for defendant enters the same objection, and the further objection that the question involves conduct in a representative capacity which can be otherwise proven, and also as incompetent.

A. I have not; or I should say, we have not.

Q. Did you write a letter to the American Steel Foundries, or to Mr. Patterson, its secretary, on or about April 6, 1908? A. I did.

Letter produced and shown witness.

Q. I show you a letter, which Mr. Pam has just produced addressed to Mr. J. E. Patterson, secretary American Steel Foundries, dated April 6, 1908, and ask you if that is the letter you refer to? A. It is.

Letter marked as Exhibit C15 and offered in evidence.

No objection.

Q. Did you receive a reply to this letter? A. I did.

Letter produced and shown witness

Q. I show you a letter addressed to Mr. Thomas C. Lazear, 450 Fourth Avenue, Pittsburgh, Pa., and dated April 23, 1908, and ask you if that is the reply? A. This is the reply to that letter.

Letter marked as Exhibit C20, and offered in evidence.

No objection.

Q. Do you recall whether or not you answered this letter? A. I have an impression that I probably did not reply to that letter, knowing that I could not reply satisfactorily to Mr. Patterson—that is, that I couldn't give a favorable answer such as he wanted; and my impression is that I didn't reply at all.

Counsel for defendant moves to strike out all of the foregoing answer, except that part wherein the witness states that he did not answer the letter.

Counsel for complainants consent that the portion of the answer referred to shall be stricken from the record.

Q. Did you receive in the fall of 1908 another letter from Mr. Patterson on the same subject? A. In the fall of 1908?

Q. This last letter was dated April 23, 1908, and this question is, did you receive another letter from Mr. Patterson in the fall of the same year on the same subject? A. I think I did.

Letter produced and shown witness.

Q. I show you a letter addressed to you and dated October 7, 1908, and ask you if you received that? A. Yes, I received this. I recognize it. That is, on October 7, 1908.

Letter just identified is marked as Exhibit C36 and offered in evidence.

No objection.

Q. Do you recall any other correspondence on the subject of converting your stock, your preferred stock — A. My individual stock, do you mean?

Q. No; the stock that you and your co-executors of the estate of Alice C. Lazear held. Do you recall any further correspondence with the company about the conversion of that stock? A. I cannot at present.

Q. Did you have some correspondence with the American Steel Foundries a year and a half or so later on the subject of dividends on the preferred stock which the estate held?

Objected to by counsel for defendant, on the ground that it is leading; the correspondence being the best evidence on the subject of the correspondence.

Q. I will withdraw that question, and instead ask, did you have some correspondence with the company a year and a half or so later? A. I think I had.

Letter produced and shown witness.

Q. I show you a letter which Mr. Pam has produced, addressed to Mr. F. E. Patterson, treasurer American Steel Foundries, dated June 4, 1910, and ask you if you wrote that letter? A. I wrote this letter.

Letter marked as Exhibit C38 and offered in evidence.

No objection.

Q. Has the American Steel Foundries ever actually tendered to you any securities or cash, or both, in exchange for the estate's preferred stock (Exhibits C1 and C2?

Objected to by counsel for defendant, as incompetent and irrelevant.

A. No.

Q. Were you the only executor of the will of Alice C. Lazear in 1908? A. No; there were two others; Judge Charles P. Orr and Jesse T. Lazear, my son. There were three executors.

Q. Did Judge Orr and Mr. Jesse T. Lazear, as executors, consent to the conversion of this stock?

Objected to by counsel for defendant, as incompetent and immaterial, and calling for a conclusion of other people's acts.

A. They did not; but they emphatically objected.

Counsel for defense moves to strike out all of the answer, except "They did not."

CROSS-EXAMINATION by Mr. Pam:

Q. Mr. Lazear, have you got the original will made by Alice T. Lazear? A. No; the original will is in the possession of the Orphans' Court.

(Paper shown witness.)

Q. Look at the paper that I hand you, and state if that is a true copy of the will?

Mr. Bigelow: I do not think this is a proper way to prove a copy of the will, but, as a hasty perusal makes it appear to be a correct copy. I have no objection to Mr. Lazear answering the question.

A. Yes; it is my impression that that is a correct copy.

By Mr. Pam:

Q. Who drew the will? A. I wrote the original will.

Q. What was the relationship of Alice C. Lazear to you? A. She was my wife.

Counsel for defendant here states that if counsel for complainants intend to object to the paper produced and identified, on the ground that it is not officially certified, and insist upon a certified copy thereof being filed, he would like to know that at this time.

To which counsel for complainants reply that they will make no objection to this, on the ground of its not being a certified copy.

Copy of will thereupon identified as Exhibit D57 and offered in evidence.

Q. When did Mrs. Lazear die? A. She died on the 26th of March, 1902.

Q. Did you have anything to do with the probating of the will?

Objected to by counsel for plaintiffs as immaterial.

A. I think I was present when it was probated.

Q. Who looked after the administration of the estate? A. Principally myself; but the others were always consulted as to any important matters to be done in the management of the estate. But in the receipt of dividends and rents and so on, I attended to that principally myself; but made no change of investment without consulting my co-executors.

Q. The property of the estate, or the property of Mrs. Lazear at the time of her death, was bequeathed to you for life under the will, was it not?

Objected to by counsel for complainants, on the ground that the will speaks for itself.

A. It was bequeathed to me for life.

Q. And it was your property during your life?

Thomas C. Lazear, Cross

Objected to by counsel for complainants, on the ground that that calls for a conclusion of law.

A. It was not my property absolutely in fee. It was simply a life interest, as the will directs.

Q. But the right of enjoyment and disposition was in you absolutely under the will during your life, wasn't it?

Same objection by counsel for complainants.

A. I suppose that would be the interpretation of the will.

Q. Well, you gave that interpretation to it yourself in correspondence, didn't you? A. How is that?

Q. You gave that interpretation to it yourself in a letter which you wrote, didn't you?

Objected to by counsel for complainants, that the letter is the best evidence of what the witness wrote.

A. I think that would be the correct interpretation.

Paper produced and shown witness.

Q. Look at this paper and state if this is an inventory of the estate of Alice C. Lazear filed in the Orphans' Court.

Objected to by counsel for complainants, on the ground that the proper way of proving an inventory is to have it exemplified.

A. I think this is a copy of the inventory that was filed.

Q. Does it correctly state the property of the estate of Alice C. Lazear at the time of her death, the personal property? A. Yes; this is the personal property.

Paper just identified is marked as Exhibit D58 and offered in evidence.

Objected to by counsel for complainants, on the ground that it is not properly identified, and on the further ground that it is immaterial.

Mr. Pam: Will you require me, then, to produce at the hearing an exemplified copy?

Mr. Bigeolw: Mr. Jesse T. Lazear informs me that he thinks this is a correct copy, and I will therefore not require the production of an exemplified copy at the hearing?

Mr. Pam: —I

Q. I notice, Mr. Lazear, from an examination of this inventory, that Alice C. Lazear did not hold at the time of her death the certificates of stock which have been offered in evidence by your counsel marked as Complainants' Exhibits Nos. 1 and 2—is that correct?

Mr. Bigelow: I object to that, on the ground that it is immaterial. And I may say further, that I object to this whole line of cross-examination, because it is immaterial to the issues raised by the pleadings in this case.

A. That is true.

Q. How and when did the executors of the estate of Alice C. Lazear obtain the two certificates of the American Steel Foundries, which have been offered in evidence?

Objected to by counsel for complainants, on the ground that the question is immaterial. The defendant has certified that the complainants were the owners of 102 shares of the preferred stock of this company on the date of these certificates, and it is immaterial how they acquired the stock.

A. My recollection is by an exchange of stock held in the American Steel Castings Company. You are

going into a history of matters that I cannot recall; but my recollection is that stock that she held in the American Steel Castings Company was used in the purchase of this stock in the American Steel Foundries.

Q. That is, the stock of the American Steel Castings Company which was held by Alice C. Lazear at the time of her death, as shown in that inventory, was converted into and exchanged for the stock of the American Steel Foundries?

Objected to by counsel for complainants, as immaterial.

A. I think that was the fact.

Q. On what basis, do you remember? A. No, I can't recall the basis.

Q. Was it two shares of American Steel Foundries preferred for one share of the Castings Company preferred, and one share of the American Steel Foundries preferred for each share of the American Steel Castings common?

Objected to by counsel for complainants, on the ground that the question is immaterial, and on the further ground that it is not proper cross-examination, and is leading.

A. I do not recollect.

Q. You came into possession, after the death of Alice C. Lazear, of forty-eight shares of the capital stock of the American Steel Castings common, and twenty-seven shares of the American Steel Castings preferred, did you not? A. I can't answer that question.

Q. Well, look at the inventory. A. Well, we were in possession of that stock at the date of her death. That's all I can answer you.

Q. What has become of the certificates for these stocks? A. Sir?

Q. What has become of the shares of stock, the certificates for the Castings Company stocks?

Objected to by counsel for complainants, as immaterial.

A. I don't know where the certificates are. I haven't seen them for a long time.

Q. Well, they were turned over, weren't they, in exchange and conversion for the Foundries stock? A. I suppose they must have been surrendered under the arrangement under which these two companies were merged. Wasn't the American Steel Castings merged into the American Steel Foundries.

Q. The American Steel Foundries gave two shares of its preferred stock to the holders of the Castings stock for each share of the preferred Castings stock, and one share of the Foundries stock for each share of the common stock of the American Steel Castings Company. Now, in the light of that statement, and figuring one share of Foundries preferred for each of the forty-eight shares of Castings common and two shares of Foundries preferred for each of the twenty-seven shares of Castings preferred, which would make fifty-four altogether, that constitutes 102 shares of Foundries preferred, doesn't it?

Counsel for complainants object to any question based on the statement made by Mr. Pam as to the merger of these companies, on the ground that it is not in evidence, and also on the ground that it is immaterial.

A. I think so.

Q. Mr. Lazear, why does the name of Judge Orr, as one of the executors of Alice C. Lazear, not appear on one of these certificates?

Objected to by counsel for complainants, as immaterial.

A. I can't recall. I think probably when that transaction occurred, Mr. Orr was absent; I am not sure. But it should have been issued in the name of the three executors.

Q. Well, each of the legal proceedings heretofore instituted in connection with this stock has been instituted in the names of yourself and your son, as executors, isn't that correct? A. That is correct, because they are named in the certificates as the only parties holding it.

Mr. Bigelow: I move to strike out the answer, which I did not have opportunity to object to, on the ground that the question is immaterial, and also incompetent, as the record of the suit is the best evidence.

By Mr. Pam:

Q. Judge Orr is still one of the executors of the estate, is he? A. Yes.

Q. And always has been? A. Yes.

Q. When you converted the stock of the American Steel Castings Company into the stock of the American Steel Foundries, did you consult the Orphans' Court with reference to that transaction?

Objected to by counsel for complainants, on the ground that it is immaterial, and also on the ground that the question assumes that there was a conversion of the stock of the American Steel Castings for stock of the American Steel Foundries.

A. I did not. Because it was unnecessary. All parties had agreed that that was a proper transaction for the good of the estate.

Counsel for defense moves to strike out all the foregoing answer after "I did not."

Q. Did you regard it at that time, namely, the conversion of the Castings stock into the Foundries stock, as a proper or necessary proceeding for the executor to submit to the Orphans' Court in dealing with the property of the estate?

Objected to by counsel for complainants, for the reasons given in the previous objection.

A. I did not regard it necessary under the circumstances, for the reason I have just stated. The owner and the trustees, all parties interested, were fully satisfied that this should be done, and it didn't need any order of the Orphans' Court giving consent.

Q. The owner being yourself and the trustees being yourself, Judge Orr and your son?

Objected to by counsel for complainants, on the ground that it is immaterial, and also that the ownership appears from the will.

A. Yes.

Q. Mr. Lazear, who made the investment for Alice C. Lazear in the stock of the American Steel Castings Company, you or she?

Objected to by counsel for complainants, as immaterial.

A. I think I made it for her.

Q. At that time, did you make any investment in the stock of the American Steel Castings Company on your own account? A. I don't know at what time, but I held some stock in the American Steel Castings Company.

Q. How much stock did you hold individually in the American Steel Castings, before the death of Alice T. Lazear?

Objected to by counsel for complainants, as immaterial.

A. I have to tax my memory, but my impression is it was about seventy or seventy-one. But I may be widely off the amount.

Q. Of common stock or of preferred stock? A. I don't remember now. I had seventy-one shares that I turned over to the American Steel Foundries under this adjustment plan. That was my own individual property.

Counsel for complainants move to strike out the answer, on the ground that it was not responsive, and also that the question is immaterial.

Q. The seventy-one shares that you refer to are seventy-one shares of the American Steel Foundries stock? A. I don't remember. You will have to give me an opportunity to examine my papers.

Q. Well, Mr. Lazear, you turned over and surrendered, in pursuance of this re-adjustment of securities, seventy-one shares of American Steel Foundries preferred stock, did you not?

Question objetced to by counsel for complainants, as immaterial and as leading.

A. It is my recollection that it was seventy-one shares.

Q. How did you get that seventy-one shares?

Objected to by counsel for complainants, as immaterial.

A. I don't remember.

Q. Did you buy that stock or did you receive that in exchange for other stock?

Objected to by counsel for complainants, as immaterial, and the witness has already stated that he doesn't remember.

A. I can't recollect. My recollection is that when this transfer was made to the American Steel Foundries, I had the seventy-one shares.

Q. Of American Steel Castings? A. In the American Steel Castings Company. How I acquired those shares or when I acquired them I am unable to state.

Q. I am not asking you when you acquired the stock of the American Steel Castings. But if it is a fact I want to show it, that the seventy-one shares of the American Steel Foundries preferred which you surrendered and exchanged in 1908 was received by you in conversion and exchange for a similar amount of common stock of the American Steel Castings Company which you held?

Objected to by counsel for complainants, as immaterial, and that there is no proper foundation for the assumptions stated in the question.

A. I can't answer that question without reference to my papers.

Q. Have you any recollection of having bought seventy-one shares of American Steel Foundries in the market?

Objected to by counsel for complainants, as immaterial.

A. I have no recollection of it.

Q. Who fixed the value of the American Steel Castings stock shown in that inventory?

Objected to by counsel for complainants, on the ground that it appears from the inventory itself that the appraisers fixed the value.

A. That is the fact. They fixed the value.

Q. Did they consult you with reference to the value?

Objected to by counsel for complainants, as immaterial.

A. I am not sure. I don't know where they got their information.

Q. What is your recollection as to whether they consulted you with reference to the value?

Objected to by counsel for complainants, as immaterial.

A. I have no recollection on the subject.

Q. Who were the appraisers named? A. The appraisers were C. H. McKelvey and J. Bruce Orr.

Q. Who is J. Bruce Orr? A. J. Bruce Orr is a member of the Pittsburgh bar

Q. Is he related to Judge Orr? A. He is a nephew of Judge Orr.

Q. What is the relationship of Mr. McKelvey to you or to your son or to Judge Orr? A. He is related to my son by marriage. My son's wife was a McKelvey. I don't know which one of the McKelvey's this is. My son married a McKelvey; that's all I can tell you.

Mr. Pam: I ask counsel for complainants to produce the notice of the American Steel Foundries of a meeting of the stockholders to be held February 8, 1908, dated January 4, 1908; also a circular issued to the stockholders of the American Steel Foundries, dated January 3, 1908, by a committee composed of E. H. Gary, Charles Miller, Edward F. Goltra, George P. Leighton, Edward Shearson and Richard H. Swartwout; also notice under date of March 21, 1908, from the same committee to the stockholders, of the adjournment of the meeting to April 18, 1908; also a copy of the remarks of Judge E. H. Gary, Chairman of the Committee, submitted with the notice of March 21st; also notice of the same committee of the adjournment of the meeting from April

18th to May 7th, 1908; also notice of the same committee of the adjournment of the meeting from May 7, 1908, to June 4, 1908; also notice from the same committee of the adjournment of the meeting from June 4 to June 12, 1908; also notice from the same committee concerning the proceedings held at the meeting dated June 12, 1908, relating to the proceedings of that meeting.

Mr. Bigelow: This is rather short notice, and, as I understand, you want us to produce these notices at this time. We will be happy, however, to produce such of the notices as we can lay our hands on. The only notices called for that we can now find is the one dated April 20, 1908, referring to the adjournment to May 7, 1908, and the one dated June 12, 1908; which two notices we produce.

Mr. Pam: I ask counsel, then, to produce all other communications sent by the American Steel Foundries, or its secretary, a number of which I see in his hands.

Mr. Bigelow: I produce two circular letters signed by Mr. Patterson as secretary, and each dated March 25, 1908; and two circular letters signed by Mr. Patterson as secretary addressed to Mr. Thomas C. Lazear, each dated April 3, 1908; also a letter signed by Mr. Patterson and addressed to Mr. Thomas C. Lazear and dated November 25, 1908; another letter from Mr. Patterson dated June 11, 1910; another dated June 18, 1910; a letter written by you, Mr. Pam, dated June 24, 1910; another by Mr. Patterson dated June 28, 1910; another by Mr. Pam dated June 30, 1910. I also find here a letter written by you, Mr. Pam, and dated March 21, 1912, and two letters writ-

ten by your private secretary, Miss Morley, and dated September 14 and September 24, 1910, respectively.

Those are the only letters I find. I have here, however, what appear to be copies of letters written by Mr. Lazear, and of course I have also the letters which have been offered in evidence.

By Mr. Pam:

Q. Mr. Lazear, as stated in your letter of April 6th, which has been offered in evidence by your counsel, you were about to deposit seventy-one shares of the stock of the American Steel Foundries with the Guaranty Trust Company? A. Yes.

Q. What was that deposit for?

Objected to by counsel for complainants, as immaterial.

A. I didn't catch the question.

Q. What was the purpose of that deposit? A. I don't know. Whoever was entitled to the surrender of it got it.

Q. Well, a surrender for what purpose? A. Well, for the purpose of getting this stock that I received individually.

Q. What stock? A. The stock of the American Steel Foundries.

Q. It was, then, a deposit with the Guaranty Trust Company of seventy-one shares of American Steel Foundries, preferred, under the plan for readjustment, by the terms of which you were to receive seventy-seven per cent in new American Steel Foundries single stock, twenty per cent of American Steel Foundries four per cent debentures and three per cent cash —is that correct?

Objected to by counsel for complainants, as immaterial and as leading.

A. I think that is correct as you have stated it.

Q. How were you induced—by what statements or what circular or what communication, to make that exchange?

Objected to by counsel for complainants, as immaterial.

A. I did it of my own motion. It was my own stock and I had a right to dispose of it as I pleased.

Q. Well, what did you know about it? A. Well, I knew about it by these circulars that were sent.

Q. By whom? A. Sent by—

Q. The American Steel Foundries, or the committee, or who? A. Oh, I don't remember. The circulars came; whether they came from Mr. Patterson or other officer of the company, I don't know.

Q. Your counsel has been unable to produce a circular that I called for under date of January 3rd, that contains these various statements that I have made to you as a basis of exchange. Could you identify, by reading a copy, or what purports to be a copy of that circular, the contents of it? A. No. I suppose I could not.

Q. Has your address been the same for a number of years? A. Yes.

Q. How long have you been in the St. Nicholas Building in Pittsburgh? A. Well, it has been over fifteen years.

Q. I call your attention to a copy of the circular and notice contained in the record of the United States Circuit Court of Appeals, on the appeal of the American Steel Foundries against Thomas C. Lazear and Jesse T. Lazear, executors, in which it appears, among other things, that the stock was to be deposited in the

Guaranty Trust Company of New York. I wish you would look at this notice and this circular and state if you saw what purported to be the originals, the notice being dated January 4, 1908, and the circular dated January 3, 1908—and sent to you?

Objected to by counsel for complainants, on the ground that the circular and notice are the best evidence of their contents; and that the question is immaterial and incompetent.

A. I think I received circulars to the same purport as in here.

Q. Then see, also, if that is so with reference to the notice of date January 4th?

Same objection by counsel for complainants.

A. Those circulars were all addressed to me individually, I think.

Q. I am not asking you now whether you received them in any particular capacity. I simply want to get the fact of the receipt of these notices. Now look at the circular or notice dated February 15, 1908, and state if the same is true?

Same objection by counsel for complainants.

A. I think I received a similar notice.

Q. Then, did you receive the notice dated March 21, 1908, together with a copy of Judge Gary's remarks at the meeting, appearing on pages 116, 117 *et seq.* of this record?

Counsel for complainants enter the same objection.

A. I think I did.

Q. Then the notice of the same committee, appearing on page 128 of this same record, and marked Exhibit No. 6?

Same objection by counsel for complainants.

A. Yes, I probably received that.

Q. And the notice dated May 11, 1908, on page 130 of this record?

Same objection by counsel for complainants.

A. I think it is probable I received that.

Q. And June 6, 1908, on page 131?

Counsel for complainants enter same objection as to previous similar questions.

A. I think I probably did.

Q. And also June 12, 1908, page 132?

Same objection by counsel for complainants.

A. Well, I will make the same answer to that. I think it is probable that I received such notice.

Q. In writing this letter of April 6, 1908, you had before you, then, the propositions contained in the circular letter of Jan. 3, 1908, which you have testified was received by you?

Objected to by counsel for complainants, on the ground that it does not sufficiently appear that the witness received the circular referred to in the question.

A. I had knowledge of that proposition. And I exchanged my stock in pursuance of it. But no other stock; the stock I held individually.

Q. It was your purpose, of course, as expressed by your exchange, so far as the seventy-one shares were concerned, anyhow, to assent to the proposed change in capitalization of the American Steel Foundries as submitted?

Objected to by counsel for complainants, on the ground that the purpose of Mr. Lazear's

act must be gathered from the action itself; and that it is immaterial.

A. That was my purpose—so far, only, as the seventy-one shares were concerned. It had nothing to do with the shares that belonged to the estate of Alice C. Lazear.

Counsel for defense moves to strike out the last part of the answer.

A. And I will further add, in that connection, that these circulars were addressed to me as an indvidual, and not in the capacity of executor.

Q. Did Mr. Jesse T. Lazear know anything about this proposed change?

Objected to by counsel for complainants, that it doesn't appear that this witness knows what Mr. Jesse T. Lazear knew.

A. Of course I can't state what he knew.

Q. Did you talk to either Mr. Jesse T. Lazear or Judge Orr with reference to the proposed change in capitalization of the stock of the American Steel Foundries as submitted in 1908? A. I did talk to both. We had our consultation, and they decidedly objected to the transfer of Alice C. Lazear's stock under this new plan.

Q. Did you favor it? A. Did I favor it?

Q. Yes. A. I don't remember whether I recommended it to them or not.

Q. And when did you discuss that with them—before you wrote that letter of April 6, 1908? A. I don't know whether before or after. But the matter had been decided.

Q. Well, look at the letter and answer the question. A. (Witness read letter.) I no doubt discussed that matter with them when I wrote that letter.

Q. And did you discuss the terms of the exchange—so that the entire matter was discussed in the light of the knowledge that you then had? A. Yes.

Q. Did you discuss with them the question of submitting the matter for the approval of the Orphans' Court? A. I probably did, but I can't recollect the conversation; I am not sure. But I know they would have agreed with me as to the improbability of the Orphans' Court authorizing such exchange. But they had their own opinion about it. They had the certificate of stock of Alice C. Lazear, and concluded that that was the best contract that they could desire for her estate.

Q. But Alice C. Lazear didn't have any such certificates? A. Oh, no.

Q. Then when you spoke of them as the certificates of Alice C. Lazear, you were mistaken? A. Well, these two certificates here.

Q. Well, they were in the name of yourself and your son as executors? A. Well, the certificates containing the contract.

Q. Well, the certificates you have reference to are the two certificates that were offered in evidence this morning? A. Yes. Those certificates weren't issued until after my wife's death, you know.

Q. I understand that. That is the reason I thought you were mistaken in your answer. A. Well, I may have gotten mixed up a little in the two companies.

Q. But the certificates that you held and that you exchanged for the seventy-one shares were identically the same, were they not, as these certificates offered in evidence? A. I think they were identically the same; that the same contract was set forth in both.

Q. What was said between you and Mr. Jesse T. Lazear and Judge Orr as to what disposition could and might be made of those 102 shares of stock? A. I don't understand that question.

Q. Well, when the question of surrendering and exchanging the 102 shares of stock was being discussed and considered between you and Mr. Jesse T. Lazear and Judge Orr, what was discussed and stated with reference to what disposition to make of those 102 shares if they were not to be exchanged? A. Well, we were to hold on to them.

Q. Was there any suggestion with reference to how the matter might be disposed of, otherwise than in exchange? A. No.

Q. You are quite sure of that? A. As to what other disposition should be made of the 102 shares if they didn't go into this arrangement, do you mean?

Q. Yes. What was suggested as to how you might dispose of it or deal with it, otherwise than by exchange? A. There was no suggestion of dealing with it other than as we held it. The stock they regarded, and I, too, as very valuable.

Q. I call your attention to your letter to Mr. Patterson of June 16th, in that regard, and ask you if you will not change your mind and change your answer about that? (Witness reads letter.)

By Mr. Bigelow:

Q. Before you answer this question, Mr. Lazear, I call your attention to the fact that this letter—

Mr. Pam: I object to counsel either informing the witness, advising the witness or communicating with the witness upon my cross-examination. If he has any objection to make, let him make his objection and stop; the witness now being under cross-examination and not under direct-examination.

Mr. Bigelow: I withdraw my remark. And I object, on the ground that the question does not sufficiently call the attention of the witness to the fact that the letter is dated two years

after the conversion about which Mr. Lazear is being examined.

Mr. Pam: I object to counsel calling the attention of the witness, or indicating to him or posting him as to what his testimony should be, given in the form of an objection, which is infinitely more objectionable than his earlier attempt to advise the witness directly, and I protest against that kind of a proceeding.

A. I really do not understand your question. That letter that I have read contains my views on the subject.

Q. I call your attention to the following sentence in your letter of June 16, 1910: "We had a similar experience some years ago with the Westinghouse Electric & Machine Company. That company, after its reorganization, undertook to pay dividends to its assenting stockholders and to ignore the original stockholders who did not assent. But they saw their mistake when we notified them of our purpose to file a bill for an accounting and for an injunction and made reparation satisfactory to our client. In that case the company bought his stock. We have no desire to part with our stock, considering it a good investment and well secured. But a proposition from the company to buy it (while we wish to make none) might be taken into consideration, in order to settle up Mrs. Lazear's estate." Now, calling your attention to that paragraph in that letter, I ask you what was considered and discussed between you and Judge Orr and Jesse T. Lazear as to how this stock might be otherwise disposed of than by exchange under the plan submitted?

Mr. Bigelow: I object, unless it is proposed to offer this letter in evidence.

Mr. Pam: I intend to offer it in evidence. It may be regarded as in evidence now.

The letter referred to was here marked as Exhibit D40 and offered in evidence.

Q. Will you please answer that question, Mr. Lazear? A. I answer that I remember of no such discussion with either my son or Charles P. Orr as to how it should be disposed of in that contingency.

Q. What reference did you have in this sentence in your letter, "But a proposition from the company to buy it (while we wish to make none) might be taken into consideration, in order to settle up Mrs. Lazear's estate"?

Objected to by counsel for complainants as immaterial.

A. What reference?

Q. Yes. What does that sentence just read refer to? A. Why, it referred to that stock.

Q. What stock? A. The 102 shares.

Q. Didn't I understand you to say earlier that that stock was the stock of the executors—didn't you make that answer in answer to your counsel's question? A. I really don't understand you. You are confusing me.

Q. I don't mean to. A. I know you don't.

Q. In answer to your counsel's question, you stated, did you not, that these 102 shares were held by or belonged to the executors? A. Yes, sir.

Q. And this letter of June 16, 1910, had reference to those same 102 shares, hadn't it? A. Yes, sir.

Q. Didn't you consult your co-executors with reference to what to do concerning that stock? A. I did. But the conclusion was that we would hold on to that stock as a splendid investment.

Q. I am now asking about this reference in this letter, in which you ask for a proposition from the company to buy the stock—what had been said be-

tween you and your co-executors concerning the stock which you held, and which you said was discussed with them?

Objected to by counsel for complainants, as immaterial.

A. Well, if a proposition had been made that was satisfactory, we probably would have discussed it and accepted it; a proposition to buy, to give us the value that we put on the stock.

Q. What value did you put on it? A. Well, I considered it equal to par all the time.

Q. Well, but what value did you and your co-executors put on it? A. I think they considered it in the same light.

Q. Is that what you wanted to get for it from the company? A. That's what we might have accepted, I have no doubt.

Q. Well, was it that kind of a proposition that you wanted from the company and which was referred to in that sentence in your letter?

Objected to by counsel for complainants, as immaterial.

A. It was that stock that was referred to in that suggestion in the letter.

Q. Yes. And was it the conclusion of the executors that you would accept a proposition from the company to buy the stock at par? A. Well, that hadn't been determined.

Q. What had been said about it? A. Nothing that I know of.

Q. What did you mean when you said a little while ago that the executors also believed that a proposition of $100 a share would be satisfactory? A. I think that might have been true.

Q. Then it must have been discussed, wasn't it? A. Oh, I don't think we discussed that feature of it at all.

Q. Wouldn't you discuss a thing of that kind with your co-executors? A. If a proposition had been made by the company, then it would have been discussed.

Q. Well, this was asking a proposition from the company. Wasn't that discussed? A. A proposition to buy?

Q. Yes. You were asking the company to make a proposition to buy. Wasn't that discussed? A. I don't remember that that was discussed. My letter indicates that we would take it into consideration.

Q. Yes, but how did you come to write that particular sentence? When you say "we," that meant all of you, didn't it? A. Oh, yes; but I represented all of them in that correspondence.

Q. Then they didn't consult about that feature of the proposition?

Objected to by counsel for complainants, as immaterial.

A. I don't remember that they did. If it had been made, it would have been discussed, but it wasn't made.

Q. But you invited it? A. I didn't invite it other than by that letter.

Q. Well, that was an invitation, wasn't it? A. Oh, no. No doubt if they had made a proposition satisfactory for what we considered the full value of that stock, it would have been entertained, and we would like the company to buy it.

Q. When you refer to a similar experience with the Westingtonhouse Electric & Machine Company, what was that experience? A. Well, nothing more than what is set out in that letter.

Q. Well, tell us about it, outside of that letter? A. I don't know.

Q. Well, did you know at the time you wrote the letter? A. Oh, at the time I wrote the letter I knew what is contained in there.

Q. Well, it had reference, as you will notice, to a similar experience with the Westinghouse Electric Company? A. Yes, as the letter says itself. They paid dividends to some of the stockholders to the exclusion of others who were entitled to it.

Q. That is, they had undertaken to pay dividends to assenting stockholders to the exclusion of non-assenting stockholders, as stated in this letter? A. Well, whatever was stated in that letter was then my impression of it.

Q. And you represented a non-assenting stockholder in the Westinghouse situation, did you? A. What do you mean by that? Let me see that letter.

Q. Read it again. A. (Letter handed witness.) That's all right.

Q. (Question read as follows.) And you represented a non-assenting stockholder in the Westinghouse situation, did you? A. I suppose so, according to that letter.

Q. And you threatened in that capacity to enjoin, and in consequence, the company bought that stock? A. Yes, sir.

Q. Now, the 102 shares of Foundries stock you regarded also as non-assenting stock, didn't you? A. Certainly.

Q. And you wanted the same thing to happen in the Foundries as happened in the Westinghouse—isn't that correct? A. Yes, sir.

Q. And if it didn't happen, you would file a bill or take some legal proceeding? A. If they didn't do the right thing.

Q. Didn't do the right thing—buy your stock, you mean? A. Oh, I don't know what. We were determined, if it was in our power, to compel the American Steel Foundries to pay the dividends on that stock to which the estate of Alice C. Lazear was entitled.

Q. Or buy it from you? A. Well, if they would pay enough.

Q. Yes, but the purpose was to have that company buy that stock or litigate with them. A. Our purpose was to have a payment of those dividends.

Q. No; but I am talking about your letter, as expressed. A. Well, that letter just simply says that if they made a proposition, it would be considered. And how it would be considered and determined was a matter that was not stated.

Q. You had litigation in mind, hadn't you, before you wrote this letter—as shown in your letter of June 4, 1910? A. Certainly. We were determined to compel the company to perform its contract; if necessary, why, litigation would be resorted to.

Q. Now, taking the two letters together, the one of June 4th, in which you say, "For good reasons, it was not deemed advisable by them to accept the proposition," and the reference in your letter of June 16, 1910, to what had been done in the Westingtonhouse case, namely, the purchase by the company, and your invitation for a similar proposition by the Foundries Company—the good reason for not turning the stock in as you had your individual stock, was the desire to have the company buy it from you, and if they didn't buy it from you, you would litigate?

Objected to by counsel for complainants, as immaterial.

A. I had no specific purpose in view except to compel the company to pay its dividends.

Q. Or buy your stock, as shown in that invitation? Answer that question, sir. What is the answer? I am awaiting your answer, Mr. Lazear. A. Our purpose was, as I have stated, to compel the company to pay the dividends on these shares of stock owned by the estate of Alice C. Lazear. If they paid what we considered its value, we would be willing to consider a proposition to buy that stock.

Q. That was exactly the same thing in the Westinghouse stock, where they refused to pay dividends on non-assenting stock and you threatened litigation and sold the stock to them?

Objected to by counsel for complainants, as immaterial.

Q. Answer the question. A. Yes. We had no desire for litigation, as the evidence shows. We tried to avoid it. What we wanted was to get our dividends on these 102 shares of stock. If the company had made a proposition to buy it, it would have been considered and if they paid enough for it, no doubt it would have been accepted. That's all there was of it.

Q. Mr. Patterson wrote you a letter under date of October 7, 1908. Did you ever answer that letter? A. I think I did not; but I am not sure.

Q. Do you know of any communication that you made to Mr. Patterson between April 6, 1908, and June 4, 1910? A. Do I know of any what?

Q. Any letter or communication from you to the American Steel Foundries, or Mr. Patterson, its secretary, between April 6, 1908, and June 4, 1910? A. I can recall no communication. If I did, you must have it in your possession.

Q. Well, so far as you know, there was none. Isn't that a fact? A. I can recall none. My reason for not replying further to this letter of October 7, 1908,

as to that exchange of stock was that that had been determined and settled by the executors, that they wouldn't do it. And there was no necessity for any further correspondence on that point.

Q. You knew, didn't you, as shown by the letter of June 15, 1908, that the plan had been approved and had gone into effect, by a vote of ninety-five per cent of both classes of stock? A. I may have known it.

Q. Well, you received that letter, didn't you? A. Well, this is the letter—it is not addressed to me.

Q. It was produced by your counsel. A. Oh, yes, I see. Well, I knew what is contained in that letter.

Counsel for defendant offers in evidence the letter just referred to, dated June 15, 1908, and the same is marked as Exhibit D30.

Q. Notwithstanding you knew from this letter of June 15, 1908, that the conversion and change in the capitalization of the stock had been consummated and approved on June 12, 1908, so far as you know, you made no communication, protest or objection of any kind between June 15, 1908, and June 4, 1910? A. I can recollect of no communication, and I am satisfied that I considered it unnecessary.

Q. What prompted you to write the letter of June 4, 1910? A. The desire to get what was coming on that stock.

Q. Well, what was coming on that stock at that particular time, do you know? A. I say here, "I have been expecting the dividends due on these 102 shares of stock." That prompted me to write this; the letter explains itself. It was a desire to get the dividends that we claimed on that stock.

Q. Why didn't you do that during the two years before? A. Well, I was in hopes that there would be no trouble about that. And you and I had a great deal of correspondence on that subject.

Q. Prior to that time? A. I don't know.

Q. Don't you know that we had no correspondence with reference to that matter prior to that time? A. I don't know when we had our correspondence. But I was expecting all the time that those dividends would be paid.

Q. Don't you know that the first correspondence with me was June 30, 1910? A. That may be so.

Q. Then, if it was a question of getting your dividends, why didn't you take some action before June 1910? A. Because I was in hopes that I would receive the dividends without litigation.

Q. You didn't ask for them? A. Certainly I did.

Q. Prior to June 4, 1910? You said you didn't make any communication between June, 1908, and June, 1910? A. Well, perhaps I didn't ask for them.

Q. Well, don't you know that you didn't? A. Well, since you press the question, and when I reflect, I don't think that I did ask for the dividends, but I was expecting them.

Q. Don't you know that you said a few moments ago that you made no communication between April 6, 1908, and June 4, 1910? A. I said I remember of none.

Q. If you had, you would remember it, wouldn't you? A. Oh, I might and might not.

Q. You have no office copy and no record of any communication? A. No, sir. Unfortunately, a good deal of my correspondence I carried on by my own hand.

Q. Don't you know, as a matter of fact, that it was just prior to June 4, 1910, that the American Steel Foundries had declared a dividend and paid a dividend upon the new single stock which had been issued by the American Steel Foundries in consummation of its plan of readjustment of 1908? A. Did I know that they had declared a dividend?

Q. And paid it, yes? A. I was informed of that.

Q. And you got some yourself? A. I got some on my individual stock.

Q. You got some on fifty-eight shares of stock? A. Yes.

Q. So it was only after the American Steel Foundries started to pay dividends on the new stock, for the first time since the consummation of the transaction, that you communicated again with the American Steel Foundries with reference to the 102 shares of stock? A. It wasn't necessary to communicate with them before that.

(Question repeated at request of counsel for defense.)

A. It was after they had declared a dividend to the common stockholders that I communicated with them.

Q. When you say "common stockholders," you mean on the new stock that was issued in 1908, don't you? A. The new stock. It was when they commenced paying dividends on the new stock that I complained.

Q. You stated in answer to your counsel that no tender had ever been made of new stock or debentures or cash on account of this 102 shares of stock? A. The question was whether it was actually tendered?

Q. When you say "tendered," do you mean physically offered to you? A. That's what I mean—actually tendered.

Q. That is, physically offered to you? A. Oh, it wasn't offered to us physically any more than to the other stockholders.

Q. But it was offered, however, on account of this stock, the same as your seventy-one shares, wasn't it? A. I got my dividends on my seventy-one shares.

Q. And the company offered you the same conversion on the 102 shares that was offered to you on

the 71 shares? A. That was the offer made to all stockholders.

Q. Including the 102 shares? A. Yes, sir.

Q. Then when you answered Mr. Bigelow's question that no tender was made to the executors of the 102 shares, you meant nobody handed you the physical papers—is that what you meant? A. That's what I thought his question implied—was there an actual tender made. There never was.

Q. But there was an offer made? A. There was an offer made in a general way, the same as to all the other stockholders.

Q. And it was that offer that you had reference to in your letter of April 6, 1908, relating to this 102 shares, wasn't it? A. I don't understand you.

Q. You don't understand? A. There was no actual tender of these securities.

Q. What do you mean by a "tender"? A. Well, I mean—what would you mean by it?

Q. I haven't used the word. A. The actual presentation of what they proposed to give in exchange for that stock.

Q. But they did offer you, in exchange for that stock, in accordance with the plan submitted, seventy-seven per cent of new stock, twenty per cent of debentures and three per cent in cash, didn't they, on account of the 102 shares? A. That offer was made to all the stockholders through these circulars.

Q. Including the 102 shares? A. Well, there was none specifically offered to me.

Q. But it included the 102 shares? A. Well, all the stockholders.

Q. And you regarded that offer as including the 102 shares? A. Why, certainly, I regarded the offer as including all the stockholders, but we wouldn't accept it.

Counsel for defense moves to strike out the words "but we wouldn't accept it," as not responsive to the question.

An adjournment was here taken until 2:15 P. M. by consent.

Continuation of the taking of depositions in the above-entitled cause, before me, Lucy Dorsey Iams, Special Commissioner, this 17th day of March, 1915, at 2:15 o'clock in the afternoon, at the office of Lazear & Blaxter, in the City of Pittsburgh, Pennsylvania, in the presence of Henry V. Blaxter, Esq., and John O. Bigelow, Esq., of counsel for complainant, and Max Pam, Esq., of counsel for defendant.

THOMAS C. LAZEAR, resumed the stand.

Examination by Mr. Pam:

Q. You stated in your examination that your co-executors objected to making the exchange of stock. What objections were stated? A. They thought the stock they held was the best investment they could make for the estate, much better than the proposition. The stock was cumulative, and it was admirably secured.

Q. Admirably secured at the time the proposition was originally submitted? A. Amply secured by the terms of the contracts. It was a first lien upon the property, and in case of the dissolution of the company it was still to be ahead of all other stockholders.

Q. Did you consider and discuss the amount of the capitalization as it then existed? A. I don't think we did. I don't remember. We just looked at the contract itself.

Q. Did you consider that there hadn't been any dividends paid since August, 1904? A. We didn't discuss any particular features of the case.

Q. Did you consider that there could have been no dividend paid for many years thereafter, for several reasons, one because of the claim that the property was not equal to the entire capitalization, including both stocks, and therefore the directors could not pay a dividend without involving personal liability, there being not sufficient surplus or earnings from which to pay? Did you consider that? A. Oh, we didn't consider all those details. Those were matters of argument.

Q. Did you consider the fact that in the new proposition there was a payment of all the accumulated dividends by a twenty per cent debenture bond?

Mr. Bigelow: Objected to on the ground that it does not appear that anything was to be paid on account of the accumulated dividends.

A. As I said before, we didn't go into a detailed discussion of all these matters which you refer to.

By Mr. Pam:

Q. Did you consider that a three per cent cash payment was coming from the Foundries in the readjustment and change of capitalization, together with the debenture bond in cash, which largely exceeded the even then diminished value, the valuation of the American Steel Castings security, as shown by your inventory?

Objected to as immaterial.

A. I make the same answer.

Q. In making the objections, was it stated or considered that the dividend on the preferred stock could not be expected, in the light of the fact that there

had been already more than four years of accumulation unpaid?

Mr. Bigelow : Objected to on the ground that it does not appear what objections are referred to in the question.

Mr. Pam: I am now referring to the objections stated by Mr. Lazear to have been made by his co-executors, to the conversion of the 102 shares of preferred stock into the new stock.

Mr. Bigelow: Objected to as immaterial.

A. The same answer as before.

By Mr. Pam:

Q. Was anything said about submitting the matter to the judge of the Orphans' Court for consideration and direction?

Mr. Bigelow: Objected to as immaterial.

A. No. There was such opposition to it on the part of the executors and those interested in the estate, that we didn't think it necessary to go into the Orphans' Court, and the Orphans' Court was not competent to grant such permission.

Q. You didn't make objection to it, did you, in your capacity as executor? A. I concurred in whatever they wanted, and they didn't want this and preferred to hold onto their stock.

Mr. Pam: I move to strike that answer out.

Q. Please answer my question. (Question read.) A. I didn't object to it in my capacity as executor.

Q. You didn't make any objection to the conversion of the 102 shares of the preferred stock into new stock, in your capacity as executor? A. I made no formal objection.

Q. Did you tell them that you were putting your own stock in and consenting to the conversion with reference to your own 71 shares? Did you tell your co-executors that as to the 71 shares which you individually owned, independent of the 102 shares, that you were assenting to the conversion and readjustment and accepting the new securities and cash? A. I was assenting to it only as to my own stock.

Q. But did you tell your co-executors you were doing that? A. I don't understand that.

Q. Did you in your discussion with your co-executors, as to what was to be done with the 102 shares, did you tell them that so far as the 71 shares were concerned, that you had assented and were going to assent to the change? A. They knew that I had assented as to my own stock, but they wouldn't give their consent as to the other stock.

Mr. Pam: I move to strike out the last sentence of that answer.

Q. I call your attention to letter of June 28th, 1910, and ask you if you wrote that letter? A. That letter is addressed to you?

Q. Yes. A. Yes, sir.

Q. You remember that letter? A. I remember that.

Q. That is your signature? A. Yes.

Letter marked Exhibit D43, and offered in evidence by counsel for defendant.

Q. Did you or your co-executors, Mr. Lazear, ever discuss between you the question of submitting the matter to the Orphans' Court for consideration and direction? A. With reference to the 102 shares?

Q. Yes. A. No, we didn't. We made up our minds that it was useless to do so.

Q. As lawyers, did you three concur in the statement contained in your letter that the Court did not

have the power, the executors didn't have the power to make the exchange, without submitting the matter to the Orphans' Court, as stated in your letter of April 6th?

Mr. Bigelow: Objected to as incompetent and irrelevant.

A. What I wrote here speaks for itself—"knowing the matter as they do, they doubt their power and the advisability of making the exchange contemplated by the plan proposed, at least without the approval of the Orphans' Court."

By Mr. Pam:

Q. Having looked at this letter and the expression that you three doubted you had the power, or either of you doubted the power to make this exchange without the consent of the Orphans' Court, was that considered—the question of power?

Counsel for plaintiff makes the same objection.

A. The power and propriety?

Q. Was the question of power considered? A. What do you mean was considered?

Q. In the letter, Mr. Lazear, you stated that one of the reasons or the reason for not assenting to this plan with reference to the 102 shares, was the lack of power in the executors to do so without submitting the matter to the Orphans' Court. Now, was the question considered among you three as lawyers, as to whether the executors had any such power or didn't have such power?

Counsel for plaintiff objected same as before.

A. We didn't discuss that aspect of the case at all.

Q. Look at the letter again, of June 28th, in which

you also refer to the question of authority, and further state, "felt sure that the Court having jurisdiction of their estate would not permit it to be done," and state what was said between you three on that subject. A. Oh, I can't tell you what was said. I can't recall conversations occurring so long ago.

Q. Then, a little while ago you said that the question of submitting it to the Court was not discussed. That is the reason I want to know why you made this statement in the postscript, if it wasn't even discussed? A. I don't remember, because we had made up our minds that the Court had no such power, and it would be improper for us to ask for the exercise of it in this intsance.

Q. The Court hadn't the power, or the executors hadn't the power? A. Maybe I should have said the executors.

Q. That being so, why was it that you exchanged American Steel Castings Company stock for American Steel Foundry stock without asking the Court for advice and direction? A. We needed no advice and direction from the Orphans' Court in this matter, because all the parties were agreed and we didn't need any authority to do what we did.

Q. I call your attention to the expression in this letter foot of page 3, "I intimated in one of my letters to Mr. Patterson that in order to prevent litigation, we might entertain a proposal from the company to buy our stock; this suggestion is now withdrawn. I am almost ashamed that I hinted such a thing; it looks too much like a holdup." What did you mean by the last sentence? A. It looks too much like a threat to extort money.

Q. When did that occur to you, how long after you wrote your letter of June 16th, 1910, did that phase of it occur to you? A. I can't remember.

Q. You had no letter between those two letters from the American Steel Foundries, had you, between June 16th, 1910, and June 28th, 1910? A. I don't remember.

Q. Look at the letter I hand you, July 1st, 1910, and state if that is your letter. A. I would rather speak from the documents themselves. This is July 1st, 1910; it is addressed to you. I stick to that still.

Letter marked Exhibit D46, and offered in evidence by counsel for defendant.

Q. Judge Orr is your son-in-law? A. Yes, sir.

Q. And Jesse T. Lazear is your son? A. Yes.

Q. Did you attend any of the meetings or the adjourned meetings of the American Steel Foundries during the period that this plan for readjustment and change of capitalization was under consideration? A. No, I don't think I attended one.

Q. Did you execute any proxy or ask anybody to attend for you? A. No. I didn't think it was necessary. I put my stock in and they accepted it, and the executors wouldn't put in my wife's stock.

Mr. Pam: I move to strike out from the record, all but "I didn't think it was necessary."

Q. Did you have anybody appear at any of the meetings to object to the proceedings, on behalf of anybody? A. I did not.

Q. Did you at any time prior to the filing of the bill in the present case, make any objection to the plan for the conversion and change of capitalization of the American Steel Foundries, as was submitted in its circular letter of January 3, 1908? A. I never did.

Q. Did any of the executors, so far as you know? A. So far as I know, I don't know that they ever appeared any place.

Q. Did any of the executors ever make any objection to the plan submitted by the American Steel Foundries under its circular letter of January 3, 1908, for the conversion and change of its capitalization, prior to the filing of the bill in this case? A. They made no objection that I know of. That is, they didn't assert themselves in any legal proceedings or attend any of the meetings to object to it.

Q. Do you know what the American Steel Castings stock cost Alice C. Lazear?

Objected to by plaintiff's counsel as immaterial.

A. I do not. I might have known at one period.

Mr. Pam: I want to offer in evidence the following which the witness testified were received by him, and identified, and appearing in the printed record in the case of American Steel Foundries vs. Thomas C. Lazear, *et al.*, in the Circuit Court of Appeals, at the following pages:

Page 99, notice, marked Exhibit No. 2 (Exhibit D6).

Page 103, circular, marked Exhibit No. 3 (Exhibit D5).

Page 111, notice, marked Exhibit No. 4 (Exhibit D9).

Page 116, statement of committee, marked Exhibit No. 5, dated March 21, 1908 (Exhibit D12).

Page 117, remarks of Mr. E. H. Gray, marked Exhibit No. 5 1/2 (Exhibit D12 continued).

Page 128, notice, marked Exhibit No. 6 (Exhibit D18).

Page 130, notice, marked Exhibit No. 7 (Exhibit D23).

Page 131, notice, marked Exhibit No. 8 (Exhibit D26).

Page 132, notice marked, Exhibit No. 9 (Exhibit D~~30~~ 29).

Above circular letters of American Steel Foundries marked as above indicated and offered in evidence by counsel for defendant.

Mr. Bigelow: I object on the ground that the copies presented are not the best evidence.

Mr. Pam: I offer in evidence the documents produced by counsel for plaintiff, and ask that they be marked as Exhibits D13, D14, D~~19~~ 18, being circulars dated Mar. 25, April 3 and April 20, 1908.

Mr. Bigelow: I would ask that these papers which I have produced at the request of Mr. Pam, be marked for identification as follows. I do not offer them in evidence at this time.

Exhibit C41, letter, American Steel Foundries to Thos. C. Lazear, dated June 18, 1910.

Exhibit C42, letter from Max Pam to Thos. C. Lazear, dated June 4, 1910.

Exhibit C44, letter from American Steel Foundries to Thos. C. Lazear, dated June 28, 1910.

Exhibit C45, letter from Max Pam to Thos. C. Lazear, dated June 30, 1910.

Exhibit C37, letter from American Steel Foundries to Thos. C. Lazear, dated Nov. 25, 1908.

Exhibit C39, letter from American Steel Foundries to Thos. C. Lazear, dated June 11, 1910.

Exhibit C55, letter from Max Pam to Thos. C. Lazear, dated March 21, 1912.

Exhibit C50, letter from Miss Morley to Thos. C. Lazear, dated September 24, 1910.

Exhibit 49, letter from Miss Morley, secretary, to Thos. C. Lazear, dated September 14, 1910.

RE-DIRECT EXAMINATION by Mr. Bigelow:

Q. Mr. Pam has asked you whether you demanded dividends on the 102 shares of stock prior to the payment of the dividend on the new or common stock, in the spring of 1910. Had the company questioned the validity of the 102 shares of stock at any time prior to that?

Mr. Pam: I object to that as immaterial and incompetent, and not the best evidence of the fact, and also a conclusion.

A. No.

By Mr. Bigelow:

Q. Had the company communicated to you before that time any objection to the validity of this stock?

Same objection.

A. I am pretty sure it had not.

Q. These letters which counsel for the defendant has introduced, written by you to Mr. Patterson or Mr. Pam, and dated in June, 1910, were all written, were they not, after the default in dividends on the 102 shares of preferred stock and after the payment of dividends on the common stock?

Mr. Pam: What do you mean by "common stock"?

Mr. Bigelow: The new or common.

Mr. Pam: The new stock, do you mean? There was an old issue of common stock, designated as common stock, but the new issue is not called common stock.

Mr. Bigelow: I will let the question remain as it is.

Mr. Pam: Objected to as incompetent and immaterial.

A. They were.

By Mr. Bigelow:

Q. These 102 shares were a part of the estate of Alice Lazear, in your hands, were they not? A. Oh, yes, they were part of her estate.

Q. You were asked at some length about conversations with your co-executors, Mr. Jesse Lazear and Judge Orr. I think you stated that Mr. Jesse Lazear and Judge Orr, as executors, never consented to the conversion of the 102 shares. Is that correct? A. That is correct.

RE-CROSS EXAMINATION by Mr. Pam:

Q. You understood, didn't you, from the plan of the American Steel Foundries readjustment and change in the capitalization, that the company was to have, after that plan went into effect, only one stock, only one kind of stock? A. Yes, I understood that.

Q. I call your attention to the letter received by you under date of June 15, 1908, and produced by your counsel, and call your attention to the following: The committee begs to advise that at the stockholders' adjourned special meeting held this day, the plan was approved and declared effective by about 90 per cent of all the outstanding stock." You knew, didn't you, that that meant— A. I only knew from this information. I had no personal knowledge of the matter at all.

Q. But that advised you that the plan by which the only stock that was to remain outstanding or that the company was to have thereafter, was the one stock?

Objected to by plaintiff's counsel as incompetent.

A. There was to be but one stock.

Q. One class of stock? A. One class of stock.

Q. When you answered, therefore, in reply to Mr. Bigelow's question, that the company had never questioned the validity of the 102 shares of the preferred stock, had you taken into consideration the fact that the company had as a matter of fact, notified you by that letter of June 15th and by the proceedings themselves, that all the stock of the American Steel Foundries theretofore outstanding had been canceled and only one issue of stock outstanding thereafter? A. I don't understand your question.

Q. In answering Mr. Bigelow's question, you stated that the company had never questioned the validity of the 102 shares of stock, prior to June, 1910. A. That I said was my recollection.

Q. Now, having before you the letter of June 15, 1908, received by you, it appears, does it not, that the company stated that the plan by which all the two stocks, preferred and common, of which the 102 shares was a part of the preferred stock, no longer were regarded outstanding by the company, but it had only the one stock outstanding which it undertook to authorize by these proceedings? A. Well, this speaks for itself.

Q. And is to the effect that I have just stated? A. Indeed, I can't understand you.

Q. That letter, Mr. Lazear, advised you that the plan of the company for the retirement of the preferred stock, of which you held 102 shares, and the common stock, had been effected and a new issue of one class issued in lieu thereof, besides debentures in cash, did it not?

Mr. Bigelow: Objected to. The letter speaks for itself.

A. Yes; that is all I can base my answer on, this letter itself.

By Mr. Pam:

Q. That letter notified you that that plan had been carried out, didn't it? A. "The plan was approved and declared effective by about 90 per cent of all the outstanding stock." That speaks for itself.

Q. What I have reference to is this: you stated in your answer to Mr. Bigelow that the company in no way had questioned the validity of your preferred stock, of the 102 shares of preferred stock, prior to June, 1910? A. You think this letter implies differently?

Q. Quite so. A. Let that letter speak for itself.

Q. You did not consider that letter when you made the answer to Mr. Bigelow's question? A. I hadn't this letter in view.

Q. Now, with reference to the 102 shares you answered Mr. Bigelow, stating that it was a part of the estate of Alice C. Lazear. That is not exactly correct, is it? A. The 102 shares?

Q. Yes. A. Why, of course, it is a part of her estate. We held them as executors.

Q. Isn't it a fact that those 102 shares of stock were not in the estate of Alice C. Lazear and was not a part of the property of Alice C. Lazear at the time of her death? A. They were not in existence at the time of her death.

Q. And therefore, they only came into existence so far as you and your co-executors or anybody else is concerned, after Alice C. Lazear died? A. Yes, so far as these stocks are concerned.

Q. At the time of her death her estate consisted, not of any American Steel Foundries stock, but of American Steel Castings Company stock? A. Yes.

Q. Which were converted by you after her death into these 102 shares of Foundry stock? A. That is correct.

By Mr. Bigelow:

Q. When you said that you understood this plan of the company would result in their being only one kind of stock, did you mean by your answer that you understood that these proceedings would wipe out and cancel the 102 shares of stock without your consent? A. I certainly didn't understand any such thing. I considered those 102 shares still remained.

THOMAS C. LAZEAR.

Sworn and subscribed in my presence
this 1st day of April, 1915.
Lucy Dorsey Iams,
Notary Public.

Before His Honor Vice Chancellor Stevens.

Messrs. Young & Bigelow, and Mr. Blaxter (of the Pittsburgh bar), for the complainants.

Messrs. Lindabury, Depue & Faulks and Mr. Max Pam (of the New York bar) for the defendant.

Transcript of shorthand report of the evidence given upon the trial of the above-stated cause, on Thursday, April 15th, 1915, at Chancery Chambers, Newark, N. J.

Mr. Bigelow: Now, if your honor please, a deposition was taken in Pittsburgh.

The Court: Yes, I have glanced over the deposition, and I have read the correspondence, so I suppose it will not be necessary to do anything more than offer the deposition in evidence, unless there is some objection to it.

Mr. Pam: There are a number of formal objections that are not very important, and I am not going to take the Court's time in that connection. But the offer of the stock certificates by the complainant we ob-

ject to on the ground that they are not admissible as a basis of action until it is shown that they are properly outstanding, in the light of the pleadings in the case, and therefore, before they can be considered by the Court as a substantive basis or right of action here, the other proof must first be supplied.

The Court: It will go in subject to your objection.

Mr. Bigelow: There are several objections by me mentioned in the deposition. We felt that a large part of the inquiry of Mr. Pam was immaterial in this case. Now, I do not want to waive any objection to the materiality of that testimony which I objected to.

The Court: Your objection is noted on the record made at the time?

Mr. Bigelow: Yes.

The Court: Well, the deposition can go in in that way, that any objection by either side noted in the deposition can be regarded as being now made and will be considered when the case comes to be considered, and if the evidence is incompetent it will not be considered.

Mr. Ashmead: If the Court please, there were some objections made by Mr. Bigelow as to certain copies of notices that were shown to Mr. Lazear, and the copies used were copies that had already been introduced in evidence in the Pennsylvania case; the issue was the payment of these dividends in an action at law, and Mr. Bigelow objected upon the ground that that was not a proper form of proof, or that they were not sufficiently identified. Now, of course in that respect it seems to me that we should have your Honor's ruling, so that we might supplement that if those exhibits are not already in evidence.

The Court: Do you insist upon that objection.

Mr. Bigelow: We did not have any chance at that time to compare the copy, which was offered, with the original notices, in fact we could not find the original notices, if there were such notices ever sent to the complainants; but we are satisfied now that the copies

offered are copies of notices which were sent out by the defendant; I do not know whether all of them ever reached the complainants or not; and of course we also do not want to admit that these notices are evidence of any matter stated in them.

The Court: Oh, no; they are evidence of notice of those matters, but they are not evidence of the matters themselves.

Mr. Bigelow: We will admit them.

The Court: Are you satisfied with that admission?

Mr. Ashmead: Yes.

Mr. Pam: If the Court pleads, the testimony of the complainant, Thomas C. Lazear, in my judgment sufficiently proves the receipt of the notices by him, and unless counsel offers evidence to the contrary we will accept that, subject to any further proof we desire to make as to mailing. I want it understood though that we claim that proof has been made of the receipt of these various notices by sufficient identification on the part of the complainant, whose testimony was taken in the deposition.

The Court: Well, what do you say to that?

Mr. Bigelow: I suppose that is a matter for argument, whether they have proved their case or not; I do not recall the depositions.

The Court: The question is whether they shall put in further proof on that matter, whether you require further formal proof.

Mr. Bigelow: I should think it would be a very short matter to prove the mailing of these notices, perhaps take five minutes.

The Court: Well, what do you say about it?

Mr. Bigelow: We will admit that notices were mailed.

Mr. Pam: Then, of course, we stand on the proof of the complainant as to the receipt of them.

The Court: If the notices were mailed that is *prima facie* proof that they were received.

Mr. Pam: Yes. Now, your Honor the question is whether the Court wants to read at this time these various notices; they were offered at the time of the taking of the deposition, on cross-examination; your Honor has read the deposition but has not read the exhibits, I do not know as your Honor has read all the exhibits offered on cross-examination, a number of exhibits of the defendant.

The Court: I have read this bundle of papers, which contains the correspondence on both sides.

Mr. Bigelow: That does not contain the notices that are in the printed book.

Mr. Pam: Does it contain all the other correspondence?

Mr. Bigelow: I am not sure; it contains all I had, copies of all.

Mr. Ashmead: Perhaps we would save time if we handed your Honor this book and you could glance through it, or would you rather have them read?

The Court: Is it agreed that that book shall go in evidence?

Mr. Pam: They are the ones offered in evidence and identified by the witness at the time.

Mr. Bigelow: Not the whole book, your Honor.

Mr. Ashmead: No, just these.

The Court: Give a reference to the pages.

Mr. Bigelow: Those are the notices to which Mr. Pam referred a few minutes ago, and which we admit are correct copies.

The Court: Let the notes state the page to which you make special reference in that book.

Mr. Bigelow: Page 60 of the deposition refers to the pages in the printed book.

Mr. Pam: I begin at page 99 of the printed record in the case of The American Steel Foundries, plaintiff-in-error, vs. Thomas C. Lazear and Jesse T. Lazear, Executors of the will of Alice C. Lazear, deceased, Defendants-in-error, filed in the United States Circuit Court of Appeals for the Third Circuit, and

read first, beginning at page 99, Exhibit D6, March 17, 1915, marked by the Commissioner, which is a notice of the special meeting of February 8th, 1909, as authorized by the Board of Directors at a meeting on January 3rd, 1908.

The next is Exhibit D5, appearing on page 103 of that book, and marked by the commissioner under date of March 17, 1915, being the circular which is sent to the stockholders of the American Steel Foundries by a special committee composed of Elbert H. Gary, Charles Miller, Edward F. Goltra, George B. Leighton, Edward Shearson and Richard H. Swartout, dated January 3, 1908.

The next is Exhibit D9, appearing on page 111 of this book, and marked by the Commissioner under date of March 17, 1915, being another circular notice to the stockholders by the same committee, dated February 15, 1908.

Exhibit D12, appearing on page 116 of the same book, being notice to the stockholders, dated March 21, 1908, by the same committee, and marked by the Commissioner under date of March 17, 1915.

The next is Exhibit D12 continued, appearing on page 117 of the same book, remarks of Mr. E. H. Gary, chairman of the Special Committee, which were incorporated in the notice of March 21, 1908.

Exhibit D18, appearing on page 128 of the same record, being a notice to the stockholders by the same committee, and identified by the commissioner under date of March 17, 1915.

Exhibit D23 appearing on page 130, being a notice to the stockholders, under date of May 11, 1908, by the same committee, and also marked by the commissioner.

Exhibit D26, appearing on page 131 of the same book, by the same committee, being a notice dated June 6, 1908, to the stockholders of the company, marked by the commissioner under date of March 17, 1915.

Also notice appearing on page 132 of the same book, Exhibit D29, being notice dated June 12, 1908, by the same committee to the stockholders, identified and marked by the Commissioner under date of March 17, 1915.

Would your Honor like to have these read now in connection with the deposition the Court has already read.

The Court: I do not think it is worth while to read them, they can be referred to in the argument.

Mr. Pam: There was offered in the taking of depositions, on the cross-examination, a copy of the will of Alice C. Lazear, and I desire to call the attention of the Court in that connection to the two first paragraphs, which I think cover the point I make. "First. I give, devise and bequeath to my husband Thomas C. Lazaer"—he is one of the complainants, your Honor, in this case, and was the same person who deposited seventy-one shares of the same stock, as shown by the deposition. "I give, devise and bequeath to my husband, Thomas C. Lazear, all my estate, real, personal and mixed for and during the term of his natural life. Second. I authorize and empower my Executors hereinafter named to lease and sell any and all of my real estate at their discretion as to the time, manner and terms and to execute good and sufficient deeds of conveyance to the purchasers thereof. Also to make sale of and change my investments from time to time as they may deem proper. And in the event of a sale or sales of any of my real estate, securities or investments of whatever kind, I authorize them to use the proceeds thereof for the improvement of my other real estate or the purchase of other property or investment in good securities. Such other property or securities to be for the use of my said husband during his natural life."

Also the appraisement which was offered, showing these two items: Forty-eight shares of the capital stock of the American Steel Castings Company, Sixty

dollars per share, common stock, $2,880, and the twenty-seven shares of preferred stock, $100 per share, $2,700. The evidence shows that the one hundred and two shares were to be in exchange of these two issues of the American Steel Castings stock, the one hundred and two shares which the executors now claim under.

Mr. Bigelow: We objected at the time that inventory was offered on the ground that it was immaterial. I would like to know on what theory Mr. Pam brings in that evidence. It seems to me this is a contract, if made at all, made with these executors themselves, and what property Mrs. Lazear may have left would be entirely out of the case; I do not see what it has to do with it, any more than what property I may have personally.

The Court: The rule in this Court is that if the evidence is of a doubtful character—if there is a fair doubt as to its admissibility, to admit it in the first instance, and to consider it or not consider it afterwards as it may turn out to be legal or illegal. I think this can go in subject to your objection.

JESSE T. LAZEAR, sworn.

Direct-examination by Mr. Bigelow:

Q. Are you one of the complainants in this case? A. Yes.

Q. And are you one of the executors of the estate of Alice C. Lazear, deceased? A. Yes.

Q. You are the son, I believe, of Mr. Thomas C. Lazear, your co-complainant? A. Yes.

Q. Have you ever sold or transferred the one hundred and two shares of stock which are the subject of this suit? A. No.

Mr. Pam: Objected to as immaterial and incompetent.

The Court: Well, the presumption is that if the title stands in the name of the executors it remains there until something is shown to the contrary. It seems to me that the evidence is unnecessary; I do not think it can do any harm; it is merely stating an admitted fact.

Mr. Bigelow: Your Honor, in the defendant's answer they said they had no knowledge as to whether the complainants still held this stock, and left them to make such proof thereof as they deemed advisable.

The Court: Well, if you show title, to the stock it is for them to produce proof that the title has been transferred, but you may ask the question if you want to.

Q. (Question read.) A. I have not.

Q. I show you two certificates which have been marked Exhibits C1 and C2, respectively, March 17, 1915, initial "L. B. I.," and ask you if those are the certificates for that stock? A. They are.

The Court: They have already gone into evidence.

Mr. Bigelow: Yes.

Q. You and your co-executors are still the holders of the stock?

Mr. Pam: Same objection.

A. Yes.

Q. Did you in 1908 or thereabouts have any correspondence yourself with the company, the American Steel Foundries? A. I never did.

Q. Did you personally talk to any of the officers of the company about that time? A. Did not.

Q. Did you consent to the conversion of this stock into common stock and other securities?

Mr. Pam: That is objected to as being incompetent and as a conclusion, and one of the things the Court has to decide.

The Court: I think that evidence is competent, whether he consented or not.

Q. (Question read.) A. I did not, I declined to.

Mr. Pam: I move to strike out all after "I did not" as being irresponsive.

By the Court:

Q. The declination I presume was in writing? A. No, I never had any communication with them at all.

By the Court:

Q. Then you did not decline. You must have declined either in words or in writing. Now if you had no communication with them at all why you could not have declined.

Mr. Bigelow: Your Honor, Mr. Pam examined the other Mr. Lazear at length on conversations of the executors among themselves, and I suppose that is what the witness is referring to here.

The Court: Well, as far as this witness went, he says that he declined to agree to the conversion.

CROSS-EXAMINATION by Mr. Pam:

Q. Who are your co-executors, Mr. Lazear? A. Of Alice C. Lazear's will?

Q. Yes. A. Thomas C. Lazear, and I believe Charles P. Orr was one of the original executors of the will, and myself.

RE-DIRECT EXAMINATION by Mr. Bigelow:

Q. Just one other question. Did the company, before the spring of 1910, ever communicate to you any objection to the validity of this stock, or intimate that the stock had been cancelled, or was no longer outstanding?

Mr. Pam: I object to that.

The Court: Well, the witness has said that he had no personal communication with any of the officers of the company. Now he may say whether he received any communication from them of that character. If he says that he did, why then you will produce the letter; if he says he did not receive any communication of that character that ends it.

Q. (Question read.)

The Court: That calls for the contents of the paper; I understand that it is perhaps objectionable in that form, but you can ask the witness whether he ever received any communication from the company on this subject, and then the communication will speak for itself.

Q. Did you ever receive, prior to the spring of 1910, any communication from the company relative to the cancellation of this stock, or its validity or invalidity?

Mr. Pam: Objected to as immaterial and incompetent; it calls for the contents of a document.

The Court: I will allow that question; it calls for yes or no.

A. I did not.

Mr. Bigelow: We rest.

The Court: Well, you offer nothing contained in that printed book?

Mr. Bigelow: No.

Mr. Pam: I am not at all familiar with the practice in this Court, but there is one point that appears to me perhaps ought to be made at this time, and before the conclusion of the hearing, and that is that the action lacks one of the necessary parties to the action, and that is Charles P. Orr, who is an executor of the estate of Alice C. Lazear, and is not a complainant, and I understand that no action can be brought in equity unless all the parties in interest are parties to the action.

The Court: Do you make that objection in your answer?

Mr. Ashmead: No, we did not know it at that time.

The Court: Well, it is rather late to raise new issues.

Mr. Pam: Of course we might have amended between the taking of the depositions and now, but the fact was brought out on the taking of the depositions, and if an amendment is necessary for that purpose I ask leave to amend the answer in that particular.

The Court: The objection is technical.

Mr. Pam: I beg to differ with the Court.

The Court: Well, it is within the discretion of the Court whether to allow an amendment at this time. Now, as far as I can see the objection is purely technical, and it is not such an objection as ought to be allowed now; if you had taken it at the right time why it would have been different, but I think now it is rather too late.

Mr. Pam: The facts cannot be changed whether the pleadings are amended or not; the three men are executors.

The Court: I do not think that it is an objection that the Court ought to allow at this time. I will have to deny the application.

Mr. Pam: Then the earlier motion, your Honor, to dismiss for want of proper parties is also denied I take it.

The Court: Well, you have not taken the objection in your answer?

Mr. Pam: No.

The Court: Then it is not in issue here.

FLOYD E. PATTERSON, sworn.

Direct-examination by Mr. Pam:

Q. Where do you reside? A. Chicago, Illinois.

Q. What relation have you to the American Steel Foundries? A. I am the secretary and treasurer of the company.

Q. How long have you been having that relation to that company? A. Since 1902?

Q. Have you here with you the record of the proceedings of directors and stockholders of the American Steel Foundries in 1908? A. I have.

Q. Relating to the reduction of stock? A. I have.

Q. Will you please produce them?

The Court: Are they not all to be found in that printed book?

Mr. Pam: No, your Honor, not the original resolutions.

The Court: Well, copies of them?

Mr. Pam: Yes.

The Court: Then will you not agree that the copies shall be referred to?

Mr. Bigelow: I would like an opportunity to look them over for a couple of minutes.

Could you turn to some other subject while we look over the originals?

The Court: Well, you have read the printed book.

Mr. Bigelow: Yes, but I have not read the originals.

The Court: Do you want to see whether the printed book is a correct transcript?

Mr. Bigelow: Yes.

The Court: Well, you will have an opportunity now of looking at the original minutes and comparing them. Now you may refer, the same way as you did before, to the pages of that book.

Q. Have you there, Mr. Patterson, the record, original record of the proceedings of the directors' meetings of the American Steel Foundries relating to the subject-matter? A. I have.

Q. Under what date is the first record that you have before you? A. November 7th, 1907.

Q. The meeting of the Board of Directors.

The Court: And you find a copy of the original minutes on page what?

A. Page 47 of the printed book.

Q. Does that set forth the proceedings of that meeting, that record? A. It does.

Mr. Pam: We offer that in evidence, if the Court please.

Mr. Bigelow: No objection.

Marked Exhibit D1.

A. November 8, 1907, page 48 of the printed record.

By the Court:

Q. Is a copy of? A. Is a copy of the minutes of the Board of Directors' meeting of the American Steel Foundries, held November 8, 1907.

By the Court:

Q. Found on page what? A. Found on page 366 of the minute book.

Mr. Pam: I offer that in evidence.
Marked Exhibit D2.

A. The next is December 6th, found on page 370 of the minutes of the directors' meeting of the American Steel Foundries, and a copy of it found on page 48 of the printed book.

Mr. Pam: I offer that in evidence.
Marked Exhibit D2 1/2.

Q. The next? A. Minutes of the directors' meeting of American Steel Foundries, January 3, 1908, found on page 375 of the minute book, and copied on page 50 of the printed record.

Mr. Pam: I offer that in evidence.
Marked Exhibit D4.

Q. The next? A. Minutes of the directors' meeting February 8, 1908, found on page 384 of the minute book, copied on page 55 of the printed record.

Mr. Pam: I offer that in evidence.
Marked Exhibit D8.

Q. The next? A. Minutes of the directors' meeting on March 14, 1908, found on page 388 of the minutes book, copied on pages 55 and 56 of the printed record.

Mr. Pam: I offer that in evidence.
Marked Exhibit D11.

Q. And the next? A. Minutes of the directors' meeting of April 18, 1908, found on page 394 of the minute book, and copied on page 56 of the printed record.

Mr. Pam: I offer that in evidence.
Marked Exhibit D17.

Q. The next? A. Minutes of the directors' meeting of May 7, 1908, found on page 398 of the minute book. This says here: printed copy of resolutions annexed hereto.

By Mr. Bigelow:

Q. Where does it say that here, or are they attached really to this? A. Attached to that. Copied in part on page 56 of the printed record.

Mr. Pam: I offer that in evidence.
Marked Exhibit D22.

Q. The next? A. Minutes of the directors' meeting on June 4, 1908, found on page 406 of the book, and copied on page 56 of the printed record.

Mr. Pam: I offer that in evidence.
Marked Exhibit D25.

Q. And the next? A. On June 12th the minutes record an adjournment to June 24th. The adjourned meeting held on June 24th is found on page 409 of the minute book, and copied on page 56 of the record book.

Q. The printed record appears to be inaccurate in what respect? A. That the date is June 12th instead of June 24th.

Mr. Pam: I offer that in evidence.
Marked Exhibit D31.

Q. Now the next? A. Minutes of June 30, 1908, found on page 412 of the minute book, and copied on page 231 of the printed record.

Mr. Pam: I offer that in evidence.
Marked Exhibit D33.

Q. That concludes the minutes of the meetings of the directors? A. Yes.

Q. Have you a record of the stockholders' proceedings in the same connection? A. Yes, sir.

Q. Please produce them. A. Yes.

Q. Will you please look at page 87 of the printed book, and state if the notice there printed was the first notice sent to the stockholders of the special meeting to be held at the time therein stated, the 8th day of February, 1908? I simply want to make the connection, and then draw attention to the minute in the stockholders' record? A. It was.

Q. Now, have you the minutes of the stockholders' meetings, beginning with that date, on the subject? A. Yes, sir.

Q. Will you please produce them? A. Yes.

Mr. Pam: I want to offer—it has not been formally offered—that notice appearing on page 87 of the paper book.

Marked Exhibit D6.

Mr. Pam: Together with the circular letter to the stockholders dated January 3, 1908, and appearing on pages 90 to 98.

Marked Exhibit D5.

Q. Please proceed in the same manner with reference to the meetings of the stockholders, that you did with reference to the meetings of the directors?

Mr. Bigelow: I want to ask a question before that is offered. I suppose you are going to offer those minutes, are you not?

Mr. Pam: Yes.

By Mr. Bigelow:

Q. Does it appear whether any of the stockholders were present at that stockholders' meeting? A. It does not in terms.

By Mr. Bigelow:

Q. Does it appear whether any of the members of the voting committee were present?

Mr. Pam: I object to this inquiry as immaterial.

The Court: Let the question be asked.

A. Yes, sir, it does.

The Court: I presume the paper will speak for itself; he is merely asked as to what the contents of the paper is.

Mr. Bigelow: Your Honor, the difficulty about that is only part of the minutes of the meetings have been introduced so far, and the part in the printed book is just a short paragraph. I want it to appear that by the minutes as a whole there is nothing to show that any stockholders attended, or any of the members of this voting committee attended.

The Court: You are entitled to have the whole printed if you like.

Mr. Pam: I offer it all in evidence.

The Court: The whole minute is offered, not an extract of the minute but the whole minute, and as a matter of convenience and for the purpose of saving expense and labor only those parts of the minute are printed which seem to be relevant to the situation, but either side—the minute itself having been offered—is entitled to use such parts of that minute as he thinks fit.

Mr. Pam: That is satisfactory.

The Court: Now you may read into the record anything that you desire, or if you desire to show that no mention is made of a certain fact then you can read the whole minute into the

record for the purpose of showing that no mention is made of that fact.

Mr. Bigelow: Wouldn't it be agreeable to the Court, and perhaps to Mr. Pam, if I just made the short statement that it appears there is no mention in any of these minutes of any stockholders attending.

The Court: Well, that was not objected to, but your next question was.

Mr. Bigelow: It appears Mr. E. H. Gary was present.

The Court: You may read the whole of that clause into the record.

Mr. Bigelow: "On motion regularly made and seconded, Mr. E. H. Gary was elected chairman of the meeting, and being present thereupon assumed the duties and thereafter presided."

By Mr. Bigelow:

Q. Is that the only reference, Mr. Patterson, to the presence of a member of the voting committee?

Mr. Pam: I do not know what the particular purpose of the inquiry is.

The Court: Well, perhaps it would be better, as the minute is very short any way, to read it into the record; there can be no objection to that.

Mr. Pam: Then I will continue my examination, Mr. Bigelow, and when it comes to your time to cross-examine I have no objection to your doing so, with any objection I desire to make.

The Court: Counsel seem to be at variance with reference to the inference to be drawn from the printed minute. Now that being so,

the printed minute itself had better appear on the stenographer's notes. If you can agree upon the correct inference that is one thing; if you cannot then let the whole thing go upon the notes, and you can each argue accordingly.

Mr. Pam: I have no objection to having the whole minute go in.

The Court: Well, just read it.

A. "American Steel Foundries. Stockholders' special meeting February 8, 1908. A special meeting of the stockholders of the American Steel Foundries was held at No. 15 Exchange Place, Jersey City, New Jersey, on Saturday, February 8, 1908, at 12 o'clock noon, pursuant to notice given. In the absence of the chairman of the board and the president of the company, the meeting was called to order by Mr. Max Pam. On motion regularly made and seconded Mr. E. H. Gary was elected chairman of the meeting, and being present thereupon assumed the duties and thereafter presided. On motion regularly made and seconded F. E. Patterson was elected secretary of the meeting. The chairman thereupon made a statement regarding the purposes for which the meeting was called and matters pertaining thereto, after which, on motion regularly made and seconded, it was duly resolved that the meeting adjourn to meet again at the same place, on Saturday, March 14, 1908, at 12 o'clock noon. F. E. Patterson, secretary."

Q. You were asked by Mr. Bigelow whether the record discloses any stockholders being present at that meeting. Do you know or not whether, from the records of the company, the three persons named at that meeting were not stockholders of the company at that time, namely, Judge Gary, yourself and Mr. Pam? A. They were.

Q. Proceed with the next? A. Minutes of the stockholders' special meeting, March 14, 1908, referred to on page 57 of the printed record.

Offered in evidence and marked Exhibits D7 and D10

Mr. Pam: I offer the original minutes as well.

The Court: Well, it merely records an adjournment. You need not read it.

Mr. Pam: Yes, and the persons present.

Mr. Bigelow: As I understand it, your Honor, Mr. Pam makes a point of estoppel that these complainants did not appear at any of the meetings.

Mr. Pam: I make no point; you make the point and I am simply covering it, that is all.

Mr. Bigelow: Well, I understood your answer made the point, and I think for that reason it ought to appear in the record that there is nothing to show that any other stockholders appeared and that any action was taken at those meetings. I am sorry to delay the proceedings, but if Mr. Pam will not admit it on the record, that these minutes do not show that, why—

Mr. Pam: I am not going to interpolate or put inferences into the record.

The Court: If you are going to make any point of the fact that the executors were not present at the stockholders' meetings, then I think Mr. Bigelow is entitled to have the minutes read into the record.

Mr. Pam: It is proved by Mr. Lazear that he was not there. I am willing to admit that none of them were there at any of the meetings of the stockholders.

Mr. Bigelow: You are ready to admit that none of whom?

Mr. Pam: None of the three executors were at any of the meetings of the stockholders.

Mr. Bigelow: If you will go further and admit no stockholders were present.

Mr. Pam: No, I won't do anything of the kind.

The Court: Well, you do not seem to agree, so let the minutes be read and go into the record.

A. "American Steel Foundries. Stockholders' special meeting March 14, 1908. An adjourned special meeting of the stockholders of the American Steel Foundries was held at No. 15 Exchange Place, Jersey City, New Jersey, on Saturday, March 14, 1908, at 12 o'clock noon, pursuant to adjournment. The meeting came duly to order. The chairman of the meeting, Mr. E. H. Gary, presiding, and the secretary, F. E. Patterson, recording. On motion regularly made and seconded it was duly resolved that the meeting adjourn to meet again at the same place, on Saturday, April 18, 1908, at 12 o'clock noon. F. E. Patterson, Secretary."

Mr. Pam: I offer that in evidence.

Marked Exhibit D11.

The Court: A memorandum of that is found on page 57 of the printed record.

A. Then on the next page I find, under date of April 18, 1908, a minute of an adjournment, in substantially the same language as the minute that has just been read.

Q. Turn to the next? A. That is the same thing, that statement is true of the meeting of May 7, 1908, except that the chairman there stated is Mr. Pam instead of Mr. Gary.

Q. Now, go on. A. On the next page there is a notice of a similar adjournment, the only difference be-

ing that Mr. Harrison was elected chairman. On the next page I find a minute of the stockholders' meeting under date of June 12, 1908, which is copied on page 57 and subsequent, of the printed book.

Mr. Pam: I offer those in evidence.

Marked Exhibits D16, D21, D27 and D28.

A. I think, Mr. Pam, that the stockholders' meeting on June 12th is the last one mentioned in this book.

Q. Yes, I think it is. Now, look on page 133 of the paper book. A. Yes, sir.

Q. And state if that contains a copy of the certificate of change in and reduction of capital stock, and amendment to the amended certificate of American Steel Foundries on June 29, 1908. Have you got a certified copy of that certificate of change in and reduction of capital? A. Yes, sir.

The Court: Any objection to offering the printed record?

Mr. Bigelow: If the certified copy is here I prefer to have the certified copy offered in preference to the printed record. I suppose it is correct, but I do not know anything about it. Mr. Ashmead suggests the printed copy go in subject to correction by comparison. That is entirely agreeable to me.

Offered in evidence and marked Exhibit D32.

Q. The contents of that certified copy appear in the printed book on pages 133 to 227 inclusive? A. I believe it does, sir, to the best of my knowledge and belief it does.

Mr. Bigelow: We have no objection to that.

Q. I call your attention to the notice of the same committee appearing on page 228 of the book of stockholders, and ask you when that was sent, with reference to the filing of the certificate of change just offered? Shown there on July 11th, is it not? A. It is dated July 11th, yes, sir. I could not say positively the day that that was mailed to stockholders and holders of deposit certificates, but it was on or about that date.

Q. Well, it was within a day or two of that date? A. Yes, sir.

By the Court:

Q. You sent it? A. Yes, sir.

Mr. Pam: I will offer that and will have it marked from pages 228 to 230 inclusive.

Marked Exhibit D34.

Q. I call your attention to letters written by you under date of October 7, 1908, and November 25, 1908, to Thomas C. Lazear, and being Complainant's Exhibit C36, offered on the taking of the deposition, and Exhibit C37, also on the taking of the deposition. Did you receive an answer to either of those letters from Mr. Lazear? A. I think not, I have no memory of ever reeiving any reply.

Q. When for the first time after April 6, 1908, did you receive any further communication from Thomas C. Lazear or any of the complainants in the case, the executors? A. I cannot say. On June 27, 1910, I received a letter from Mr. Thomas C. Lazear, dated June 25, 1910.

Q. I show you letter June 16, 1910; see if that is the first letter you received from him since that earlier date? A. On June 17, 1910, I received a letter from Mr. Thomas C. Lazear, dated June 16, 1910.

Q. So far as you know is that the first time you heard from Mr. Lazear since April, 1908. Did you receive any communication from him with reference to the one hundred and two shares, or anything else? A. I have no memory of receiving anything earlier than those.

Mr. Pam: Letter of June 16th referred to by witness being Defendant's Exhibit D40, offered on the taking of the deposition of Thomas C. Lazear.

It appears that the letter of June 25th has not been offered, so I will read it at this time. On the letterhead of Lazear & Baxter:

"June 25, 1910.

Mr. F. E. Patterson,
Treas. American Steel Foundries,
Chicago, Ill.

Dear Sir:

You have not given me the information I requested you to give me in answer to questions contained in my letter of the 16th inst. 1st. What was the aggregate amount of the *outstanding preferred* stock in your company at the time the second dividend was declared on the unpreferred stock? 2nd. What was the total amount of the dividends recently declared on the unpreferred stock? That information I am entitled to and you are the proper officer to give it. You do injustice to yourself as well as me in withholding it.

Mr. Pam invites correspondence with him in this matter, but I must have the information I have requested of you and which he as counsel would probably be unable to give.

Yours truly,
THOMAS C. LAZEAR."

Q. Mr. Patterson, when for the first time after the proceedings you have just testified to was any dividend action taken by the American Steel Foundries? Have you got your record? A. Yes, I will have to look that up.

Mr. Pam: While Mr. Patterson is looking at that I would like to call your Honor's attention to an exhibit offered on the deposition, which is an answer to the last letter of Mr. Lazear, written by me as the general counsel for the company:

"Upon my return here this week I find two letters written by you to Mr. Patterson of the American Steel Foundries, one dated June 4, the other dated June 18th. Mr. Patterson also sends me copies of his replies thereto.

The matter, as mentioned in your letter, it seems to me cannot be satisfactorily discussed by correspondence, and I should be glad of an opportunity to talk the matter over with you. Are you likely to be here in the near future, and if so, cannot we arrange for an interview on the subject?"

And then Mr. Patterson answered to that letter saying that the matter had been referred to the general counsel, Mr. Max Pam. I do not want the Court to get the impression that the letters were not answered.

Mr. Bigelow: The letter that was first read is Exhibit C42 and dated June 24, 1910.

A. April 28, 1910, the Board of Directors declared a dividend of one and one-quarter per cent.

Q. Can you refer to how much that was, how much was that dividend? A. In dollars two hundred fourteen thousand eight hundred.

Q. And on what stock? A. On the capital stock of this company.

Q. Of what stock? A. $17,184,000.

Q. Of what kind of stock? A. Common stock.

Q. Was any dividend declared at that time on what was known as preferred stock outstanding prior to June 12, 1908? A. There was not.

Q. At that time or at any other time? A. There was not.

Q. Will you give the dividend declarations and payments since that time up to the present time? A. The dividend declared April 28, 1910, was payable May 14, 1910. On June 27, 1910, the Board of Directors declared a dividend of one and one-quarter per cent payable August 15, 1910.

Q. How much was that in amount? A. $214,800.

Q. Proceed. A. October 24, 1910, the Board of Directors declared a dividend of one and one-quarter per cent payable November 15, 1910.

Q. Amounting to how much? A. $214,800. January 11, 1911, the Board of Directors declared a dividend of one and one-quarter per cent payable February 15, 1911, amounting to $214,800. April 12, 1911, the Board of Directors declared a dividend of one and one-quarter per cent payable May 15, 1911, amounting to $214,800. That is as far as the records I have here go on the matter of dividends.

Q. Where are the balance of the records? A. In Chicago.

Q. Can you ascertain and let us have the dates and the amounts, subsequent to those you have already given us, up to the present time? A. I think I can get them by this afternoon.

Q. I wish you would do so, please. Subsequent to June 29, 1908, please state what was done with reference to the exchange of the outstanding, the old preferred and common stocks of the American Steel Foundries outstantding prior to June 12, 1908?

Mr. Bigelow: I object, unless the question means what the witness did, or what was done in his presence.

The Court: He may state any fact of which he is personally cognizant.

Q. (Question read.) A. Subsequent to June 12, 1908, and I believe under date of July 11th, which would bring it subsequent to the date you refer to, a circular was sent to holders of the old preferred and common stock.

Q. That is the one that has been offered in evidence? A. Yes, sir; telling them that the plan had been adopted, and that the old stocks could be exchanged for the cash and new securities to which it was entitled under that plan.

Q. Will you please answer the question I asked you, as to what was done with reference to the exchange of the old preferred and old common stocks? Were they surrendered for exchange? If so, through whom? A. I don't think I get that.

Q. Well, subsequent to June 29th were the old preferred and common stocks exchanged; if so, for what? A. Most of them were exchanged for the new stock of the company.

Q. Were the old stocks surrendered, cancelled and retired? A. Yes, sir; they were.

Q. How much, up to the present time, of the old preferred stock and the old common stock have thus been surrendered and cancelled? A. Of the old common stock 157,056 shares and 8/10ths have been surrendered and exchanged for the new stock.

By the Court:

Q. Out of a total of? A. Out of a total of 158,092.8. Of the preferred 171,271 shares have been surrendered and exchanged out of 171,840.

Q. Was that substantially the condition at the time the bill of complaint was filed in this case, March, 1914? A. There has been some exchange since that time, I cannot say how much.

Q. Did the company pursuant to and subsequent to the amendment filed June 29, 1908, issue its new single stock? A. It did.

Q. How much? A. $17,184,000.

Q. Out of a total of the same amount? A. The same amount.

Q. And what other securities were issued at the same time or in the same connection? A. Debentures, four per cent debentures to the amount of $3,436,800.

Q. And how much cash was paid by the company, pursuant to the plan, since June 29, 1908? A. About $515,000, I don't remember whether that was the exact figure.

Q. On June 29, 1908, were the old preferred stock and common stock of the American Steel Foundries listed on the New York Stock Exchange? A. I think they were, sir.

Q. Were they subsequently removed from the list of that Exchange? A. Yes, sir.

Mr. Bigelow: I object, your Honor, on the ground that it is immaterial. As I understand, the New York Stock Exchange is a voluntary membership organization, and whether they buy and sell this particular issue would seem to be immaterial, and also beyond the control of the complainant or defendant in this suit.

The Court: I do not know what the object is.

Mr. Pam: I want to show that the new stock is listed in the dealings of that Exchange; it is on the question of estoppel; proof that rights of third parties have intervened.

The Court: What do you want to prove?

Mr. Pam: I want to prove that the old stocks went off the list of the New York Stock Exchange and the new $17,184,000 of stock issued by the American Steel Foundries in pursuance of this plan was listed on the Stock Exchange, and show the dealings therein and transfers thereof.

The Court: I do not think it makes any difference, so far as the issue involved is concerned. In the second place, I do not suppose this witness is competent to speak about the dealings of the Stock Exchange.

Mr. Pam: He was the secretary who appeared before the Stock Exchange and made the application for listing them, so I think he is competent.

The Court: He can testify to that, if you think it is material, that he appeared before them and asked them to list this new stock.

Q. Will you please state, Mr. Patterson, whether application was made by the American Steel Foundries to list the 171,840 shares of new stock issued by that company, pursuant to the plan shown in this case? A. There was.

Q. Did you appear for the company on that application before the New York Stock Exchange? A. I think not, sir.

Q. Did you make application as treasurer or secretary of the company? A. I think I signed it.

Q. In pursuance of that application were they listed? A. They were.

Q. Have they been dealt in?

The Court: Oh, no. This witness cannot testify as to what has been doing in the Stock Exchange; he was not there, and how can he tell.

Q. Are you familiar, Mr. Patterson, with the records or proceedings of the New York Stock Exchange as they appear in the public press? A. Yes, to a certain extent.

Q. Since the listing of this new stock upon the New York Stock Exchange has that stock appeared among the transactions on the New York Stock Exchange in the public press?

Mr. Bigelow: I object.

The Court: The question is merely whether he has seen any Stock Exchange transactions in the newspapers. If you think it will amount to anything.

A. I have.

Mr. Pam: Is it necessary to prove what the New York Stock Exchange is, or will the Court take notice of the fact.

The Court: Well, I take it that you can show by the Transfer Agent that this stock has been extensively bought and sold; that would be the evidence which the company could give, but as for what this witness saw in the newspaper, it seems to me that that is not evidence; he is not a member of the Exchange and had no connection with the Exchange, and he is not even the Transfer Agent of the company.

Mr. Pam: Well, I would like to know whether the Court will take notice of the character and function of the New York Exchange or whether you require proof.

The Court: I do not suppose the Court can take judicial notice of that.

Q. Have you got the transfer records of the company here? A. They are here; yes, sir.

Q. Have you made an examination of the transfers of the stock issued by this company since June 29, 1912, under the plan in evidence since that date? A. Yes, sir.

Q. Can you state the number of shares transferred since that date? A. According to the Transfer Agent's report sent to us.

Mr. Pam: Mr. Bigelow, if you want to inquire what the witness has before him you may do so, but I object to your looking over his shoulder.

Mr. Bigelow: I object to the witness telling what the Transfer Agent has told him or reported to him.

The Court: Do you want to cross-examine on his knowledge? You have a right to do that. I will permit you to cross-examine, if you desire to do so, with reference to the knowledge which this witness has of these transfers. Do you want to cross-examine?

Mr. Bigelow: Now?

The Court: Yes, before the question is asked you have a right to know whether the witness is testifying from his own knowledge or whether he is testifying merely as to facts which have been communicated to him by others.

CROSS-EXAMINATION by Mr. Bigelow:

Q. Have you made the transfers of stock yourself? A. I have not.

Q. Have you examined the transfer books yourself? A. At times, yes.

Q. Have you counted the number of transfers since this reorganization? A. I have not personally, no; had it done.

Q. Have you any personal knowledge as to the number of transfers or amount of stock transfers? A. As having had them counted under my supervision, yes.

Q. What does that mean?

The Court: As I understand it, the transfer books are here.

A. Yes.

Mr. Pam: The transfer agent is here with the record.

The Court: If the transfer agent is here he is the witness to be called on that subject.

Mr. Ashmead: The registered agent is the Corporation Trust Company, and they have one representative here bringing the books.

The Court: Well, whoever the transfer agent may be.

Mr. Pam: He has not made an examination himself. I will follow your honor's suggestion and produce the books.

The Court: Of course it is purely a technical objection, and will merely put this company to the trouble of bringing the man who went over the books, and having him testify. Where did you get this information from?

A. From the reports furnished to us by our transfer agent.

Q. You are reasonably sure that they are accurate? A. Yes, sir.

FURTHER DIRECT EXAMINATION by Mr. Pam:

Q. They are acted upon in the usual course of business by you and the corporation of the American Steel Foundries, these transfer agent reports? A. Yes, sir.

Mr. Bigelow: I have no objection to your testifying as to the number of transfers.

Q. Now, please answer the question fully?

Mr. Bigelow: Subject to the objection as to the relevancy.

The Court: Yes, subject to the relevancy of the evidence, and with the right, if you desire, to verify the information by reference to the books.

A. The reports furnished us by our transfer agent show that up to April first there had been total transfers of four million.

Q. April first what year? A. April 1st, 1915.

Q. And since when? A. Since June 12, 1908.

Q. Go on? A. Total transfers 4,151,237 shares. The records show transfers and re-transfers to the Guaranty Trust Company as Exchange Agent, and the Equitable Trust Company or Trust Company of America as trustee, of 3,599,614 shares. The balance indicates sales or transfers by owners for their own purposes; that balance is 551,623 shares.

Q. Will you state what the condition was in that respect at the time or immediately before the filing of the bill of complaint in this case, March, 1914? You have just given us that, practically, haven't you, the first of April, 1914. Was there any material difference between that date and the filing of the bill in March, 1914—the bill was filed March 27, 1914—

was there any substantial difference between April 1st, 1914 and March 27, 1914? A. There have been transfers since that time, yes.

Q. Between March 27th, 1914? You gave it to us as of April 1st, 1914. A. No, 1915.

The Court: How many of those transfers were made between the time of the filing of the bill and the present time?

Q. Have you had any record made of that, between March 27th? A. I haven't it ready yet.

Q. It is being prepared? A. Yes, sir.

Q. Will you state, Mr. Patterson, what, if any, change there was in owenrship of stock of the American Steel Foundries between the adoption of this plan of readjustment, or its effectuation, and April 1st, 1915, as to the personnel or ownership, namely, as to whether there are different owners than there were owners at the time? A. The records show at the time of our last dividend, declared in December, 1914, we had stockholders of between twelve and thirteen hundred, and of those nearly seven hundred did not acquire their holdings through the exchange of old stock.

Q. And what is the holdings of those seven hundred or about seven hundred stockholders? A. Little over fifty-nine thousand shares.

Q. Which, of the par value, would be nearly six million dollars? A. Yes, sir.

Q. Can you give us the facts in that regard as apply to the time of the filing of the bill, March 27, 1914? A. I cannot now, I shall be able to later.

Q. Mr. Eppel gives me the holdings, March 27, 1914, six hundred and forty-seven new stockholders, and the holdings are 58,157 shares; do you want to verify this, Mr. Patterson?

Mr. Bigelow: New since when?

Mr. Pam: Since the retirement of the old stocks, since June 12, 1908, and up to the time of the filing of the bill.

A. I cannot verify that offhand.

Q. Well, are you willing to accept the figures by Mr. Eppel? A. I am entirely so.

Q. Mr. Eppel is your assistant? A. Yes.

Q. And has been doing this work under your supervision? A. He has.

CROSS-EXAMINATION by Mr. Bigelow:

Q. Mr. Patterson, you testified as to the dividends which have been paid of recent years. I notice you had a book before you at the time; were you obtaining your information from the book? A. Yes, sir.

Q. Will you turn to the dividend declared April 28, 1910, which I believe you said was the first dividend since 1904, and will you read the resolution relative to the payment of this dividend? A. I read from page 513 of the minute book of the directors of the American Steel Foundries, April 28, 1910. "Resolved that a dividend of one and one-quarter per cent upon the capital stock of this company for the quarter ending April 30, 1910, payable May 14, 1910, be declared and paid to the stockholders of record at the close of business on May 7, 1910."

Q. You testified, I believe, as to the amount of the dividend. Does that appear from the record before you? A. The amount, yes, sir.

Q. Will you read the resolution relating to the amount? A. "Resolved that to facilitate the payment of the dividend declared by the board of directors, payable May 14, 1910, the officers of the company be and they are hereby authorized and directed to issue a check voucher for the amount of said divi-

dend, viz: $214,800 in favor of the National City Bank of New York; such check voucher to be placed to the credit of the American Steel Foundries dividend account, subject to checks of this company for dividend purposes. (signed) F. E. Patterson, Treasurer."

By the Court:

Q. Is this a dividend upon the common or the preferred? A. Common.

Mr. Pam: There is no dividend, if the Court please, upon either common or preferred; the dividend was upon the new single stock, it was not on either common or preferred. There is only one class of stock that this dividend is declared on.

The Court: Then the preferred stock was done away with entirely.

Mr. Pam: Yes.

The Court: And the common stock issued in place of both the old preferred and the old common.

Mr. Pam: Yes, sir, and that is the dividend upon that stock, so testified to by the witness.

Q. Were all the other dividends which you mentioned treated in the record there in substantially the same way as the dividends of which you just read? A. They were.

Q. Perhaps I better withdraw the question and have you turn to the record. Will you turn to the record of the next dividend? A. Page 524 of the minutes of the directors of the American Steel Foundries, June 27, 1910.

Q. Is the resolution relative to the payment of stock in the same form as the last resolution relative to dividends which you read? A. It is.

Q. And the resolution relative to the drawing of the check; is that in the same form? A. It is.

Q. Are all the subsequent resolutions declaring dividends, and the subsequent resolutions relative to the issuing of dividend checks in the same form? A. They are, with the possible exception of change in the name of the bank.

Q. Now these circulars which were sent out in 1908 were signed by half a dozen gentlemen. What are their positions with the company? A. Mr. Elbert H. Gary was—

Q. They were a committee in charge of this matter, were they not? A. They were.

By the Court:

Q. Committee of directors? A. They were not all directors.

By Mr. Pam:

Q. Gary was a stockholder and director, was he not? A. Mr. Gary was a stockholder and I believe was a director at that time; Charles Miller was chairman of the board, a director and a stockholder; Edward F. Goltra was a stockholder and director; George B. Leighton was a stockholder and director; Richard H. Swartwout was a stockholder.

Q. This committee was given power, was it not, under the plan of reorganization, to either adopt the plan or to drop it?

Mr. Pam: Well, I object to that.

The Court: I do not understand how that can affect this matter one way or the other. The question is what they did, not what they might have done.

Q. Did this committee hold meetings? A. They did.

Q. Were you the secretary of the committee? A. I was not.

Q. Do you know what happened at their meetings? A. Some of them.

Q. Were notices of the meetings of the committee sent to the stockholders of the company?

Mr. Pam: Objected to as immaterial, incompetent and irrelevant.

Mr. Bigelow: I merely want to show, your Honor, that the complainants did not have an opportunity to appear before the committee to object to the plan, if they cared to object.

The Court: If this witness was present at the committee meetings I suppose he may say whether or not they sent out notices of their meetings, although I do not think that will affect the result one way or another, but I do not understand that this witness was present at the meetings, and therefore, he does not know anything about it. Were you present at the meetings in any capacity?

A. I was sometimes present as a visitor.

By the Court:

Q. As a visitor? A. Yes, and perhaps by request.

Q. In the letter which you wrote Mr. Lazear on April 23, 1908, which has been marked Complainants' Exhibit C20, of March 17, 1915, you state that the committee having charge of the matter will understand why the one hundred and two shares of stock of the executors do not come in. Were you speaking for the committee then? A. Not officially, no.

Q. But you knew that you were speaking correctly I assume? A. I thought I was, yes.

Q. And the reason which you mention is I suppose the reason stated in Mr. Lazear's letter?

Mr. Pam: I object to that. Let him state the reason of that suggestion in his letter. If you want to ask him what the reason was he can give the reason, I do not object to your asking that.

The Court: Well, what do you say to that? It is a matter of very small account, I take it.

A. I had nothing to base it on except his letter.

The Court: Well, as I understand, the executors were doubtful of their power to agree to this change, as executors; that was the reason suggested, and this witness said that he could appreciate that objection. I do not think it makes any difference one way or the other.

Mr. Pam: The reason, as I understand it, was, as I get it from the witness, that he assumed the executors did not want to go to the Court for permission to deposit the stock until the plan had been consummated, and therefore they would go to the Court after consummation, when it was a fact and not merely a proposal. Is that right, Mr. Patterson?

A. That is right.

The Court: Well, the letters speak for themselves, there was correspondence and the correspondence speaks for itself.

Q. I show you what appears to be the stock ledger of the American Steel Foundries, and call your attention to a page in the name of Thomas C. Lazear, Jesse T. Lazear, executors of will of Alice C. Lazear, deceased; does that show their account as stockholders in the defendants?

Mr. Pam: As of what date?

The Court: Well, as of the date mentioned there, November 25th, 1902.

A. I believe it does.

Q. This is a book produced by one of your assistants, I believe, today? A. No, sir.

Q. By the transfer agent today. Is it up to date, can you tell by glancing at it? A. I cannot tell anything about that.

Mr. Bigelow: Well, I offer this book in evidence for what it is worth.

Marked Exhibit C56.

Q. According to the answer of the defendant in this case, Mr. Patterson, at the beginning of the suit there were 3,537 shares of preferred stock outstanding, and at the present time, according to your testimony as I understood it, there are 569 outstanding; what became of the rest of those shares that were outstanding at the time this suit was brought?

Mr. Pam: I have no objection to the substance of the inquiry, but I object to the use of the expression "outstanding," "569 outstanding," merely so that it may not be assumed that I admit there was any stock outstanding.

Q. In exchange.

The Court: Well, can you answer that?

Mr. Ashmead: It is a mere matter of calculation, if your Honor please.

A. This refers to preferred only?

Q. Yes. A. Of the old preferred stock everything has been deposited except 569 shares.

Q. Well, some three thousand shares have come in since the suit was brought, is not that correct? A. I should think approximately so.

Q. Well, on what terms would that stock come in?

The Court: That does not make any difference certainly; what happened since the commencement of this suit cannot affect the right of either the complainant or the company.

RE-DIRECT EXAMINATION by Mr. Pam:

Q. Mr. Patterson, at the time of the readjustment, the change in the capital stock in June, 1908, what was the condition of the company's credit? A. Good.

Mr. Bigelow: I object on the ground that it is immaterial.

The Court: What difference does it make?

Mr. Pam: I want to show the situation which prompted the company, in a measure, in doing this. In the first place, this company had had a deferred dividend from 1904 to 1908; its securities were seriously affected in their market value by the fact of this deferred dividend; its business credit I think was affected by the fact of that condition, and therefore I want to show, in supplementation of what the committee have recited in their proceedings, that the interest of the company and the interest of the stockholders were in fact bettered by this change, because of that unfortunate condition, and the fact, your Honor, that thirty-six million dollars or more of stock was outstanding at the time that this occurred, and a question was raised, irrespective of the earnings that no dividends could be paid upon the stock without director's liability, in view of the condition. I want to show the facts as the basis

of the committee's deliberation and action, not only relying upon the representations made by the committee but the facts underlying the representations. I want to get those facts in the record.

The Court: Well, it seems to me that the evidence is immaterial. You are not relying upon this change as a matter resting within the discretion of the Court as to its reasonableness, are you?

Mr. Pam: No.

The Court: You say that you have been reducing this stock strictly in accordance with law; you stand upon your right to reduce it, under our statute. Now, the question of the reasonableness of the reduction, whether the directors acted for the best interests of the company or not does not come into controversy I take it.

Mr. Pam: Only in this way, your Honor, in the answer we offer to the complainant that nothwithstanding the lapse of time, and his not having come in within the time allowed, we are prepared to carry out the original change in capital so far as he is concerned, so that he may not lose, and in that connection, I desire to show what that offer means, so that in a Court of Equity the Court may see that he is not being injured by the transaction.

The Court: Well, it seems to me that the issue presented is one of the right of the company to make the change. I cannot possibly investigate the question of its expediency. There might be a great deal of evidence offered on one side which would require a great deal of evidence offered on the other, and if you can go into this matter with a view of showing the

expediency of the arrangement at the time, the other side can go into the matter and argue it was inexpedient. I do not think that is an issue in this case, and I think it is rather a dangerous issue to go into anyway from your standpoint. I cannot judge of the reasonableness of it. I shall assume that the directors were guided by proper motives and not corrupt motives, until the contrary is shown. It is possible if an issue of fraud were raised that then this Court might investigate the question; if the charge were that they had fraudulently sought to injure the complainant and other stockholders, why that would raise, perhaps, the whole question, but no such issue being made, it seems to me that its reasonableness or unreasonableness is not a matter of inquiry at this time.

Mr. Pam: With that statement of the Court then I am content, without asking any further questions on that subject.

Q. At the time of this change in capitalization, namely, June, 1908, there was outstanding how much preferred stock, how many shares? A. The preferred stock was $17,240,000.

Q. That would be 172,400 shares? A. Yes, sir.

Q. Do you know the total amount of dividends paid since this change in the capitalization to the present time?

Mr. Pam: I am going to do a little calculation for the Court, because it is one of the matters I think ought to be considered, if the Court reaches that point.

A. Yes, sir.

Q. How much? A. $1,761,360.

Q. Now, if this change had not been made, how much of the dividends paid by the company would have been payable, and if declared upon the preferred stock of the company, would have been payable or paid to the complainants?

Mr. Bigelow: I object to that, your Honor.

The Court: Well, I will overrule it on the same ground. I do not think the reasonableness or unreasonableness of this arrangement comes into controversy. The directors and stockholders are far better able to judge of the reasonableness or unreasonableness of a transaction of this sort than the Court can possibly be.

Mr. Pam: I do not think the purpose of my question has been made apparent to the Court. I contend if for any reason this Court should hold that this change in capitalization is binding upon this complainant, that then the maximum of his right against the company is to recover that amount of dividends which would have been payable to him if no change had been made. It is purely a matter of computation.

The Court: When we come to an account why perhaps this evidence will be competent, if we ever get to an account.

Q. Will you please state—I am now addressing my inquiries with reference to the offer made by the defendant in the answer—will you please state, under the change in capitalization in the proceedings of June, 1908, what was deliverable on account of the one hundred and two shares of stock, being the subject-matter of this litigation?

Mr. Bigelow: I do not understand the question.

The Court: How much new stock would he get for his old?

Q. Yes, what would he get? A. Three dollars per share in cash, seventy-seven per cent in new stock, twenty per cent in four per cent debentures.

Q. Has interest been paid on those debentures since they were issued? A. There has.

Q. Now, please state what would be deliverable to the complainants, or what would be receivable on account of the one hundred and two shares of stock, if such were accepted at this time, taking into consideration the proportionate dividends paid since then, and the interest payments on the debentures since then?

The Court: Is not that a matter of calculation? You have shown what dividends have been declared. I do not think it is worth while to go into this, it is a mere matter of calculation as to what he would get; he would get the same as the others, if this transaction is legal, and it is perfectly plain what he would get, he would get his dividend as the others got theirs, and he would get his interest on the debentures, and he would get his cash with possibly some interest; whether he would be entitled to interest on his three dollars I do not know.

It is agreed by counsel that as far as the printed book goes it is a correct transcript of the record of the proceeding in the Federal Court, and that it may be supplemented by the production of the judgment and of any other part of the record which that book does not contain. See D 53, p. 250.

TESTIMONY CLOSED.

AMERICAN STEEL FOUNDRIES.

Hudson Terminal,

30 Church St., New York, April 15, 1915.

Mr. Max Pam, General Counsel,
American Steel Foundries,
71 Broadway, New York City.

Dear Sir:

Referring to the hearing today in the case of Thomas C. Lazear, *et al.* vs. American Steel Foundries, before Vice Chancellor Stevens in Newark, N. J., and my promise to the Vice Chancellor that I would complete my testimony by a letter to you, I beg to say that dividends on our stock have been declared and paid as follows:

Date of Payment.	Rate.	Amount of Dividend.
May 14, 1910	1 1/4%	$214,800.00
Aug. 15, 1910	1 1/4%	214,800.00
Nov. 15, 1910	1 1/4%	214,800.00
Feb. 15, 1911	1 1/4%	214,800.00
May 15, 1911	1 1/4%	214,800.00
Mch. 31, 1913	1/2%	85,920.00
June 30, 1913	1/2%	85,920.00
Sept. 30, 1913	1/2%	85,920.00
Dec. 31, 1913	1/2%	85,920.00
Mch. 31, 1914	1/2%	85,920.00
June 30, 1914	1/2%	85,920.00
Sept. 30, 1914	1/2%	85,920.00
Dec. 31 1914	1/2%	85,920.00

I understand that the action above referred to was begun on March 27th, 1914; therefore beg to say that

the certified list of our stockholders as at the close of business December 12, 1914, as furnished us by our Transfer Agent, and which was the latest list available at the time we commenced our search for this purpose, showed total stockholders of between 1200 and 1300. Of the total the list showed 698 with holdings of 59,016 shares, who did not acquire their holdings through exchange under the plan of January 3, 1908, adopted June 12, 1908, by our stockholders for a change in the amount and character of our capital stock.

At the close of business March 27, 1914 there were 647 stockholders, holding 58,157 shares, who did not acquire their stock through exchange under the plan of January 3, 1908.

Of the above 698 stockholders, 87 holding 6,760 shares, acquired their shares, so far as our records show, subsequent to March 27, 1914.

The apparent discrepancy between the total of 698 stockholders and the two subdivisions, arises from the fact that a certain number of the March 27th holders disposed of their shares before the date of the list, viz: At the close of business December 12, 1914.

I submit the foregoing as being true in all respects to the best of my knowledge and belief, and enclose a carbon copy for your convenience in case you should need it.

Yours very truly,

F. E. PATTERSON,

Secretary & Treasurer.

FEP-M

Exhibit C1.

100
Shares.

Preferred Stock.

AMERICAN STEEL FOUNDRIES.

No. 1196. Incorporated under the laws of the State of New Jersey.

Authorized Preferred Stock $20,000,000.

Authorized Common Stock $20,000,000.

This is to certify that Thomas C. Lazear, Jesse T. Lazear, Executors of Will of Alice C. Lazear, deceased, is the owner of One Hundred fully paid and non-assessable shares of the par value of one hundred dollars each in the Preferred Capital Stock of American Steel Foundries, transferable only in person or by attorney, upon the books of said company, upon the surrender of this certificate. The holders of the preferred stock shall be entitled to receive when and as declared, from the surplus or net profit of the Company, yearly dividends at the rate of six per centum per annum, and no more, payable quarterly on dates to be fixed by the by-laws. The dividends on the preferred stock shall be cumulative and shall be payable before any dividend on the common stock shall be paid or set apart, so that, if in any year dividends amounting to six per cent shall not have been paid thereon, the deficiency shall be payable before any dividends shall be paid upon or set apart for the common stock. Whenever all cumulative dividends on the preferred stock for all previous years shall have been declared and shall have become payable, and the accrued quarterly installments for current year shall have been declared, and the Company shall have been paid such cumulative dividends for previous years and such accrued quarterly installments, or shall have set aside from its surplus, or net profits, a sum sufficient for the payment thereof, the Board of Direc-

Exhibit C1

tors may declare dividends on the common stock, payable then or thereafter, out of any remaining surplus, or net profits. In the event of any liquidation or dissolution or winding up (whether voluntary or involuntary) of the Company, the holders of the preferred stock shall be entitled to be paid in full both the paramount of their shares and the unpaid dividends accrued thereon, before any amount shall be paid to the holders of the common stock, and after the payment to the holders of the preferred stock of its par value, and the unpaid accrued dividends thereon, the remaining assets and funds shall be divided and paid to the holders of the common stock, *pro rata,* according to their respective shares. The preferred stock and the common stock may be increased, as provided in the Certificate of Incorporation. This certificate is not valid without the signature of the Transfer Agent and Registrar of Transfers.

Witness the signature of the President or of a Vice President and of the Treasurer or of an Assistant Treasurer, of said Company.

Countersigned July 30, 1902.

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

The Corporation Trust Company of New Jersey.
Transfer Agent.

JOHN J. BILLINGS,
Vice President.

TRACY S. BUCKINGHAM,
Asst. Treasurer.

By E. J. Dudley,
Auditor.

Exhibit C2

SHARES
$100
EACH.

Registered Jul 30 1902
Colonial Trust Company, Registrar,
By P. V. Babeon
Asst. Secretary.

(Back of Certificate.)

FOR VALUE Received hereby sell, assign and transfer unto

Shares

of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint

Attorney.

to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated 1

IN PRESENCE OF

Received and filed May 22, 1911.

Exhibit C2.

This exhibit is here omitted as it is the same as Exhibit C 1, except that it is a certificate for two shares, instead of 100 shares.

Exhibit D3.

AMERICAN STEEL FOUNDRIES.

Report of Committee appointed December 6th, 1907, relative to change in the character and the amount of the stock of the Company authorized and outstanding.

COMMITTEE.

E. H. GARY, Chairman,
WM. V. KELLEY. EDWARD SHEARSON.
MAX PAM. ARTHUR J. EDDY.

To the Board of Directors:

In accordance with the authority conferred by the Board, your Committee has formulated a plan to be submitted to the stockholders for approval and necessary action, which plan is set forth at length in the form of the circular to the stockholders, herewith submitted.

To carry out the purposes outlined in the circular, the Committee recommends:

(1) That a special stockholders' meeting be called for February 8th, 1908, that the transfer books of both the common and preferred stock to be closed for such meeting January 23rd, 1908, and to be re-opened February 10th, 1908;

(2) That arrangements be made with the Guaranty Trust Company of New York to receive deposits of stock and issue receipts, as stated in the circular;

(3) That notice of the stockholders' special meeting, together with the circular to the stockholders issued or authorized by the Board, explaining the proposition, be sent as early as possible to stockholders of record at the close of business on January 4, 1908;

(4) That a committee be appointed with full power to make such application to the Stock Exchange as to it may seem necessary or desirable.

Exhibit D3

(5) That a Committee consisting of Elbert H. Gary, Charles Miller, Edward F. Goltra, George B. Leighton, Edward Shearson and Richard W. Swartwout be appointed, with full power to take such action as may be determined by said Committee or a majority of them, to the end that the plan referred to in said circular may be carried out or abandoned if in the opinion of the Committee the same cannot be made effective by reason of the failure of the stockholders to approve, or otherwise.

Referring to the foregoing we beg to say:

1. Attached hereto (Exhibit A) is a form of resolution by the Board of Directors in favor of the proposition and directing that it be submitted to the stockholders for action at the Special Meeting of February 8th, including call of special meeting and provision of closing stock transfer books as recommended by the Committee.

The amount of the proposed stock has been determined at $17,184,000 to lessen the work and expense on account of fractions, which would arise by the use of any other amount more nearly approximating the exact amount of the present outstanding preferred stock, and which would still allow an even division between the common and preferred stock in the ratio heretofore agreed upon by the Board.

Attached (Exhibit B) is a form of the proposed reduced stock. For stock equities of less than one share, non-dividend bearing scrip is to be issued.

The retirement without participation of $56,000 par value of the present outstanding preferred stock and $720 par value of the present outstanding common stock is provided for, in order that 23% of the proposed new stock shall exactly equal an even number

of dollars per share of the present outstanding participating common stock instead of a fraction more, which would entail a large additional amount of work and expense.

The Committee by authority of the power vested in it by the Board of Directors has arranged for the control and purchase by the Company at satisfactory prices of $56,000 par value of the present outstanding preferred stock and $720 par value of the present outstanding common stock to effect the above retirement.

2. The total amount of Debentures to be issued is $3,436,800.

The attached (Exhibit C) is the form of the Debentures to be issued if and when the plan is approved and authorized by the Stockholders. This form follows in its essentials similar issues by other corporations.

The Debentures are to be well engraved or lithographed, and generally follow in size and design similar issues, and the Secretary of this Company shall, after the issue has been authorized and information relative to the quantity of each denomination is available, arrange for the engraving or printing of them, together with required Debenture Scrip as hereinafter referred to.

These Debentues will be a direct obligation of the Company, and contain stipulations that not less than 10% of the entire issue shall in each year, commencing February 1st, 1913, be paid and retired at not exceeding par and interest, until the entire issue has been so paid and retired, and that unless such Debentures for retirement are purchased in the open market for not exceeding par and interest, they shall be determined by lot by the method usually employed in such cases. Due notice of such retirement by lot, together with the numbers and denominations so retired, shall be given to the Guaranty Trust Company of New York as Trus-

tee, and shall become effective on and after the next interest coupon due date, and upon the deposit with said Guaranty Trust Company of New York by this Company of sufficient funds to pay the principal and interest on such Debentures to such date; they shall on that date cease to bear interest without further notice.

The Debentures are to be issued in denominations of $1,000.00, $500.00, and $100.00, distribution to be made in the largest denominations applicable.

Debenture equities of less than $100.00 are to be evidenced by Debenture Scrip per form attached (Exhibit D). This scrip it will be noted provides plainly that it does not bear interest but may be exchanged in amounts of $100.00 or multiples thereof for Debentures having attached thereto interest coupons for interest from the issue date of such Debentures.

The cash payments by participating stock entitled thereto when due are to be made by the Guaranty Trust Company of New York, Depository, from funds to be deposited with it at the proper time by this Company, such payments to be made by a check per form attached (Exhibit E).

3. Arrangements have been made with the Guaranty Trust Company of New York to act as Depository and Exchange Agent if desired. It will receive stock for deposit under the terms of the Circular to Stockholders hereinafter mentioned, and will issue therefor suitable certificates, in the form hereto attached (Exhibit F), and which will be accepted as good delivery by the New York Stock Exchange when listed.

It will be noted that provision is made whereby the deposit of stock as invited by the Circular to stockholders referred to, and the issuances therefor of receipts by the Depositary in the form prescribed practically constitutes a proxy in favor of a Voting Committee, or a majority thereof as therein named, to vote

the deposited stock in favor of the proposition at the Stockholders' Special Meeting. This form or provision for proxy is not unusual, and is conceded to be satisfactory from a practical standpoint, and causes far less trouble, and uncertainty than a separate proxy, hence its adoption.

4. The attached Notice of the Stockholders' Special Meeting, (Exhibit G) conforms to requirements, and is self explanatory, as is also the Circular of the stockholders (Exhibit H).

(Exhibit A.)

This exhibit is here omitted as it is the same as Exhibit B attached to the certificate of amendment, *infra.*

(Exhibit B.)

000 Shares — 000 Shares

CAPITAL STOCK $17,184,000

AMERICAN STEEL FOUNDRIES

INCORPORATED AND REGISTERED UNDER THE LAWS OF THE STATE OF NEW JERSEY

No. 000 — (Blank) Shares

This certifies that _____ is the registered holder of (number of shares) Shares of the Capital Stock of the American Steel Foundries of One hundred dollars each transferable only on

Exhibit D3

the books of the company by the holder hereof in person or by duly authorized attorney, upon surrender of this certificate. This certificate shall not become valid until countersigned by the transfer agent and also by the register of transfers.

In testimony whereof the said company has caused this certificate to be signed by its President or a Vice-President and its Treasurer or Assistant Treasurer this day of A. D. 190 .

President.

Countersigned
THE TRUST COMPANY OF AMERICA
Transfer Agent

Treasurer.

Registered
GUARANTY TRUST COMPANY OF NEW YORK
Registrar.

Full Paid and Non-Assessable
000 Shares $100. Each 000

(Exhibit C.)

This exhibit is here omitted as it is the same as the form of debenture attached to amended certificate of incorporation, *infra*.

Exhibit D3

(Exhibit D.)

This exhibit is here omitted as it is the same as the form of debenture script attached to amended certificate of incorporation, *infra*.

(Exhibit E.)

AMERICAN STEEL FOUNDRIES STOCK REDUCTION AND CHANGE

No. New York, 190

GUARANTY TRUST COMPANY OF NEW YORK

28 Nassau Street

Pay to the order of

Dollars,

which, with certain debentures and other considerations, hereby are accepted in full payment of all claims of any name or nature of the owner or holder of shares of preferred stock of American Steel Foundries.

$

Assistant Treasurer.

Exhibit D3

(Exhibit F.)

(Stock Deposit Receipt.)

CERTIFICATE OF DEPOSIT

OF

000 Shares	(Com or Pref.) Stock	000 Shares

OF

AMERICAN STEEL FOUNDRIES.

Deposited under the Circular of American Steel foundries, dated January 3rd, 1908, a copy of which has been lodged with the undersigned. The term "Agreement" as hereinafter used, means such Circular, and the term "Committee or Trustees therein named or a majority of them or their successors," as hereinafter used means a voting committee consisting of Elbert H. Gary, Charles Miller, Edward F. Goltra, George B. Leighton, Edward Shearson and Richard H. Swartwout, to which, or a majority of which, is given by the deposit of stock hereunder and the issuance of this receipt therefor, full and irrevocable power and authority to vote said stock at the Special Stockholders' Meeting called for February 8th, 1908, and at any and all adjournments thereof, in favor of all the resolutions adopted by the Board of Directors at their meeting held January 3d, 1908, and particularly in favor of the amendments, changes and alterations in the Certificate of Incorporation referred to in the Notice of said Meeting, and to give written assent thereto and in favor of a resolution vesting in the above-named Voting Committee the power to take all steps on behalf of the Depositor which they in their discretion may deem wise to carry out the said "Agreement" (plan) or to abandon the same.

Exhibit D3

No. 000 0000 Shares

GUARANTY TRUST COMPANY OF NEW YORK

28 Nassau Street, New York.

hereby certifies that it has received from

(No. of Shares) shares of Stock as above stated, subject to the terms and conditions of the above described agreement and to be used for the purpose therein stated of the Committee or Trustees therein named or a majority of them or their successors and the holder hereof assents to and is bound by the provisions of said agreement by receiving this Certificate. The holder hereof is entitled to receive all the securities, benefits and advantages coming to the depositors respectively of said stock under said agreement. The interest represented herein is assignable by transfer upon books kept by this Company for that purpose by the holder hereof in person or by proxy upon surrender of this Certificate, subject to the terms thereof.

New York 190 .

GUARANTY TRUST COMPANY OF NEW YORK

By

Vice President

Assistant Treasurer.

Registered

THE TRUST COMPANY OF AMERICA

Registrar

By

Assistant Secretary.

Exhibit D3

Know all men by these presents that

the undersigned, for value received, have bargained, sold, assigned, and transferred, and by these presents do bargain, sell, assign and transfer unto

all the property, right, title and interest represented by the within Certificate, subject, however, to all the terms and conditions of the agreement referred to therein, and do hereby constitute and appoint

true and lawful Attorney, irrevocable, for and in name and stead, but to use, to sell, assign, transfer and set over all said property, right, title and interest, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that said Attorney or substitute or substitutes, shall lawfully do by virtue hereof

In Witness Whereof have hereunto set hand and seal this day of one thousand nine hundred and

LL

Signed Sealed and Delivered in Presence of

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

Exhibit D4

(Exhibit G.)

This exhibit is here omitted as it is the same as Exhibit D6, *infra.*

(Exhibit H.)

This exhibit is here omitted as it is the same as Exhibit D5, *infra.*

Exhibit D4.

AMERICAN STEEL FOUNDRIES,

BOARD OF DIRECTORS.

REGULAR MEETING, JANUARY 3, 1908.

Mr. E. H. Gary, on behalf of the Committee, appointed December 6th, 1907, thereupon presented the Report of the Committee.

On motion regularly made and seconded, it was duly

RESOLVED, that the Report of the Committee of December 6th, 1907, relative to a change in the character and amount of the Company's stock be and the same hereby is approved and adopted; and be it further

RESOLVED, that the Circular to the Stockholders dated January 3rd, 1908, be signed by the Voting Committee provided for in the report, viz., Messrs.:

Elbert H. Gary,
Charles Miller,

Exhibit D5

Edward F. Goltra,
George B. Leighton,
Edward Shearson,
Richard H. Swartwout;

and be it further

RESOLVED, that a copy of the Report of said Committee be annexed to these minutes.

Thereupon the following resolution was presented and adopted:

(The resolution is here omitted as it is the same as Exhibit B attached to the certificate of amendment, *infra.*) at p. 200.

Exhibit D5.

OFFICE OF AMERICAN STEEL FOUNDRIES.

TO THE STOCKHOLDERS:

After a careful consideration of a number of plans suggested, the Board of Directors has determined upon the proposition here outlined, which is now submitted to the stockholders for approval.

This plan is based upon a reduction of the stock which, because of the various considerations involved, is believed to be justifiable and proper, and upon which, it is hoped, dividends can be continuously earned and distributed to the stockholders.

It is expected that intrinsically as well as for market purposes, the value of the proportions of the reduced stock it is proposed to issue to the holders of the present preferred and common stock of the Company will be greater than the present holding, and will have an

increased value as collateral security and therefore that the adoption of the proposed plan by the stockholders will be highly advantageous to both the preferred and the common stockholder.

In the opinion of many stockholders, the cumulative feature of the present stock of the Company is not only of no value to the holders, intrinsically, but rather, by reason of the failure of the Company to pay dividends for a term of years and a constantly increasing accumulation of such dividends, has been a detriment and an injury to the market value thereof. Up to August 1, 1907, there have been accumulated and unpaid, upon the outstanding preferred stock of the Company, dividends amounting to approximately, $3,440,000, equal to twenty per cent of the par value. Under the proposed plan here submitted these accumulations will be discharged, and any possible recurrence of such accumulations avoided.

To the preferred stockholders an opportunity is afforded to obtain now the debentures of the Company, which will have a market value and be available as collateral security, to an amount, at par, equal to the accumulated dividends as well as a probability of regular dividends in the future, besides receiving a cash consideration for the surrender of their present holdings.

The plan is regarded as advantageous to the holders of the common stock also. While the common stockholder will have a reduced aggregate par value of stock, it will be stock in a total capitalization of about one-half of the present issue; the entire issue of preferred stock, with the accumulated dividends, will be wiped out, and the common stockholders will be entitled to share in any future distribution of earnings in proportion to their holdings of stock in the reduced issue, and will also have a proportionate interest in the assets and property of the Company with

the preferred stockholders, instead of only an equity over and above the par value of the preferred stock, as heretofore.

The holders of the preferred stock, under the proposed plan, will have the additional advantage of having obtained the consent and acquiescence of the holders of the common stock to an issue of debenture aggregating, approximately, $3,440,000, which will be equal to the amount of dividends now accrued, which dividends otherwise could not be distributed at this time, and perhaps not for many years to come.

The Board of Directors have endeavored to formulate a plan which gives due consideration to the rights of the holders of both classes of stock, recognizes the relative points of strength or weakness in each, gives attention also to the relative market values of both classes of stock for a period of years, and seeks primarily, and above all else, a treatment of the holdings of each class of stock which shall be fair and just to both.

This plan, to become effective and acted upon, must receive the assent and approval of the stockholders of the Company. And if carried out, it shall be operative as of August 1st, 1907, in so far as it concerns the use and application of earnings since that date, to the payment of dividends, thereby giving to the holders of the reduced stock the benefit of any earnings since August 1st, 1907, for dividend purposes, if, or as declared by the Board of Directors. The plan now proposed is as follows:

It is proposed to have surrendered, retired and cancelled, all outstanding stock of the Company, both preferred and common, and to make an issue of stock in the total amount of $17,184,000 in shares of $100 each, to be of one kind and class, without distinction or preference between any of the holders thereof.

Exhibit D5

In consideration of the surrender, cancellation and retirement of the preferred stock by the holders there is to be issued to them in exchange and in lieu thereof, including all rights to the accumulated dividends upon the preferred stock:

(1) seventy-seven per cent of the proposed issue of stock which is equivalent to seventy-seven per cent of the present outstanding preferred stock, namely, $13,231,680, being at the rate of $77.00 par value of the proposed stock for each $100, par value, of the present preferred stock, except as to $56,000 par value thereof, which is controlled by the Company and which is to be retired without participation;

(2) debenture bonds to be dated February 1, 1908, to the amount of $20.00, par value, for each $100, par value, of such preferred stock, payable as to principal, fifteen years from such date, and bearing interest at four per centum per annum, payable semi-annually, and

(3) an amount in cash equal to $3.00 for each $100, par value, of such preferred stock.

To the holders of the common stock, in consideration of the surrender, retirement and cancellation of their shares, the Company proposes to issue and deliver, in lieu of and in exchange for said stock, twenty-three per cent of the proposed stock, which is equivalent to $3,952,320, par value, or at the rate of $25.00 par value, for each $100, par value, of the present common stock, except as to $720 par value thereof, which is controlled by the Company and which is to be retired without participation.

For equities in the reduced stock, if and when issued, of less than one share of the par value of one hundred dollars, there will be issued, stock scrip, which will not be entitled to share in any dividends

Exhibit D5

that may be declared, but may be exchanged for stock, in amounts of one hundred dollars, or multiples thereof, as provided in such scrip.

The proposed debentures will be a direct obligation of the Company, payable to bearer, and will contain a stipulation that not less than ten per cent of the entire issue shall be paid and cancelled each year, commencing February 1, 1913, at not exceeding par and interest. They will also provide that all or any part of the Company's accumulated earnings or surplus may be used at any time to retire any or all of them, at not exceeding par and interest. Bonds for retirement to be, if possible, purchased in the open market, otherwise they will be chosen by lot in the usual manner.

For debenture equities of less than one hundred dollars, there will be issued Debenture scrip, which will not bear interest, but may be exchanged in amounts of one hundred dollars or multiples thereof, as provided therein, for Debentures having attached thereto interest coupons, for interest from the issue date of such Debentures.

In order that the plan may be submitted to the stockholders the Board has, by resolution, caused a special stockholders' meeting to be called to meet at the Company's Office, No. 15 Exchange Place, Jersey City, New Jersey, on Saturday, February 8th, 1908, notice of which is herewith inclosed; and has ordered a copy of such notice, and a copy of this circular, to be mailed to all stockholders of record at the close of business on January 4, 1908, and for the purpose of holding such meeting, has ordered the Transfer Books for both the common and preferred stock, to be closed at the close of business on January 23rd, 1908, to reopen on February 10, 1908.

To insure the prompt carrying out of the plan upon approval by the stockholders, it is necessary that as-

senting stock be put in trust pending action by the stockholders and for this purpose arrangements have been made with the Guaranty Trust Company of New York, New York City, to act as Depositary and Exchange Agent and to issue receipts for all such stock, properly indorsed in blank, and duly witnessed, as may be delivered to it, such receipts to carry all the rights and privileges of the stock they represent, except the voting power, which, by the deposit of the stock will be vested in a Voting Committee, consisting of Messrs. Elbert H. Gary, Charles Miller, Edward F. Goltra, George B. Leighton, Edward Shearson and Richard H. Swartwout, or a majority of them, who shall have power in their discretion, to determine the time, manner and method of carrying out the plan herein set forth or abandoning the same, if found impracticable by reason of the failure of the stockholders to approve, or otherwise.

The deposit of stock and the issuance of the Depositary's Receipt therefor shall be full and irrevocable power and authority to vote said stock at the special stockholders' meeting called for February 8th, 1908, and at any and all adjournments thereof, in favor of all the resolutions adopted by the Board of Directors at their meeting held January 3, 1908, and particularly in favor of the amendments, changes and alterations in the Certificate of Incorporation referred to in the notice of said meeting, and to give written assent thereto; and in favor of a resolution vesting in the above named Voting Committee the power to take all steps on behalf of the depositors, which they in their discretion may deem wise, to carry out the plan, or to abandon the same, if found by them, or a majority of them, to be impracticable, by reason of the failure of the stockholders to approve, or otherwise.

As soon as in the opinion of the Committee herein referred to, or a majority thereof, a sufficient amount

of stock has been deposited, application will be made for listing the Depositary's receipts so that the same, when listed, will be accepted as good delivery by the New York Stock Exchange, and may be transferred the same as stock certificates, but they cannot be exchanged for stock deposited or the reduced stock and securities until after the plan has been acted upon by the stockholders, and then only as hereinafter provided.

If the plan should be adopted the Guaranty Trust Company of New York shall upon notice from the Committee or a majority thereof, that the plan has been adopted and is to be carried out, deliver to or upon the order of the Committee all stock certificates held by it hereunder upon receipt of the new securities and cash exchangeable therefor as above stated, and notice will be given of the time when the new securities will be ready for delivery.

If the plan is not adopted and carried out, the depositing stockholders will be entitled to the stock deposited without charge or expense, upon application to the Guaranty Trust Company of New York, after the said Voting Committee shall give notice of the abandonment or failure of said plan.

The Board of Directors has appointed a Committee consisting of the same persons above named as the Voting Committee, with power to determine whether the plan shall be carried out or shall be abandoned if found impracticable by reason of the failure of the stockholders to approve, or otherwise; to make applications for listing the Certificates of deposit, and generally to do all things which in the discretion of such Committee or a majority thereof, shall be necessary or advisable for carrying out said plan or abandoning it.

The Guaranty Trust Company of New York, which has agreed to act as Depositary and Exchange Agent

hereunder, it must be understood, assumes no obligation or responsibility with reference to any of the statements made in this circular, nor to the adoption of or carrying out of the plan, nor with reference to or on account of the securities and cash to be received and distributed, except as such Depositary and Exchange Agent to receive and distribute such securities and cash as shall be delivered to it by or on the order of the Committee for that purpose.

By order of the Board of Directors.

ELBERT H. GARY
CHARLES MILLER
EDWARD F. GOLTRA
GEORGE B. LEIGHTON
EDWARD SHEARSON
RICHARD H. SWARTWOUT
Committee.

Dated January 3rd, 1908.

**For the convenience of the stockholders, a stamped envelope duly addressed, and formal letter of transmission to the Depositary Guaranty Trust Company of New York is herewith enclosed.

All Certificates presented for deposit must be endorsed in blank, the assignment witnessed and dated, and the signature guaranteed by a member of the New York Stock Exchange, or by a Bank having a New York correspondent, or acknowledged before a Notary Public, under seal.

Stockholders transmitting Certificates by mail or express will please indicate whether they desire the Certificates of Deposit to be forwarded to them by registered mail or by express, and if the latter, at what valuation.

Exhibit D6.

AMERICAN STEEL FOUNDRIES.

Notice of Special Meeting of February 8th, 1908, as Authorized by the Board of Directors' Meeting of January 3rd, 1908.

Notice is hereby given that a special meeting of the Stockholders of the American Steel Foundries has been duly called and will be held at the principal office of the Company, 15 Exchange Place, Jersey City, New Jersey, on Saturday, the 8th day of February, 1908, at twelve o'clock, noon, for the purpose of acting upon the proposition to reduce and change the authorized capital stock of the Company from thirty-seven million six hundred and fifty thousand dollars ($37,650,000), divided in three hundred and seventy-six thousand five hundred (376,500) shares of the par value of one hundred dollars each, and consisting of nineteen million five hundred and forty thousand dollars ($19,540,000) par value of preferred stock, and eighteen million one hundred and ten thousand dollars ($18,110,000) par value of common stock, to seventeen million one hundred and eighty-four thousand dollars ($17,184,000), divided into one hundred seventy-one thousand eight hundred and forty (171,840) shares of the par value of one hundred dollars each, all of one class and kind, without distinction between any of such shares; and to accomplish such reduction and change by calling in for surrender, retirement and cancellation the present outstanding preferred stock, and the outstanding common stock.

And to issue and deliver to the holders of the preferred stock, in consideration of the surrender, retirement and cancellation of their shares of preferred stock, (1) seventy-seven dollars ($77.00), par value of the proposed issue of stock for each one hundred dollars ($100) par value of the present preferred

stock; (2) the debentures of the Company, to be dated February 1, 1908, payable as to principal, fifteen years from such date, bearing interest at four per cent per annum, payable semi-annually, subject to such terms and in such form as the Board of Directors shall determine, to the amount of twenty dollars ($20.00), par value, for each one hundred dollars ($100), par value, of the present preferred stock; and (3) an amount in cash equal to three dollars ($3.00) for each one hundred dollars ($100), par value, of the present preferred stock.

And to issue and deliver to the holders of the common stock, in consideration of the surrender, cancellation and retirement of their shares of stock, twenty-five dollars ($25.00), par value, of the proposed shares of stock, for each one hundred dollars ($100), par value, of the present common stock.

And for the purpose of acting upon the proposition to amend Article IV of the Certificate of Incorporation of this Company, so as to read as follows:

"IV. The total authorized capital stock of the corporation is seventeen million one hundred and eighty-four thousand dollars ($17,184,000), divided into one hundred and seventy-one thousand eight hundred and forty shares of the par value of one hundred dollars each."

"From time to time the stock of the Company may be increased or reduced according to law, and may be issued in such amounts and proportions as shall be determined by the Board of Directors and as may be permitted by law."

and making the certificate of incorporation as amended read accordingly.

And for the purpose of making application of any surplus arising from the retirement and cancellation of stock, and the accumulated surplus up to August

1st, 1907, to (A) the cash payment to the present preferred stockholders, as a part of the consideration for the surrender, cancellation and retirement of the preferred stock; (B), to provide for the Debentures to be issued, also as a part consideration for the surrender, cancellation and retirement of the preferred stock; and, (C), to the reduction of cost of property.

And for the purpose of authorizing and empowering the Committee named in the accompanying circular as the Voting Committee to take such action and such steps as they or a majority thereof, in their discretion may deem necessary or proper, towards the approval and effectuation of the plan proposed or the abandonment, if in their opinion the same cannot be made effective, the listing of Certificates of Deposit and otherwise, as set forth in the resolutions of the Board of Directors, adopted January 3rd, 1908.

F. E. PATTERSON,
Secretary.

Jersey City, N. J., January 4th, 1908.

As the stock of the corporation should be represented as fully as possible at the special meeting, stockholders who wish to vote as above indicated, are requested to deliver their present stock certificates to the Guaranty Trust Company of New York, 30 Nassau Street, New York, in accordance with the Circular to stockholders, dated January 3rd, enclosed herewith.

In view of the very considerable amount of detail necessary to prepare for this meeting, it is desired that stock be deposited as above at as early a date as possible.

The resolution above referred to is subject to inspection by any stockholder at the office of the Secretary at the offices of the Company in New York and Chicago.

Exhibit D7.

AMERICAN STEEL FOUNDRIES.

Special Stockholders' Meeting, Feb. 8, 1908.

The chairman made a statement regarding the purposes for which the meeting was called and matters pertaining thereto.

Meeting adjourned to March 14, 1908.

Exhibit D8.

AMERICAN STEEL FOUNDRIES.

BOARD OF DIRECTORS.

Adjourned regular meeting, Feb. 8, 1908.

On motion regularly made and seconded, it was duly

RESOLVED, that, on account of the adjournment of the Stockholders' Special Meeting to March 14th, the transfer books for both the common and preferred stock of this corporation be closed at the close of business on February 10th, 1908, to reopen on Monday, March 16th, 1908.

Exhibit D9.

OFFICE OF THE AMERICAN STEEL FOUNDRIES.

To the Stockholders of the American Steel Foundries:

The meeting of stockholders fixed for Saturday, February 8th instant, at 12 o'clock M., was adjourned to Saturday, March 14th, 1908, at the same hour and place. No other action was taken. A restraining order against the consummation of the proposed change in securities had been obtained from a New Jersey chancellor at the instance of Mr. David Straus, a stockholder owning about 1,000 shares of preferred stock. This order, however, was totally unnecessary, for the reason that a large percentage of the stockholders (although a minority) had failed to deposit their stock with the Guaranty Trust Company of New York as requested.

The plan contemplated a change in the capital stock only upon condition that the stockholders should voluntarily adopt it. If they deem it unwise or opposed to their interests the plan will, of course, be abandoned. The conduct of the affairs of the Company will depend upon the decision of the stockholders. No director has had any intention to the contrary. No provision has been, or will be, made to purchase the securities of any minority stockholder.

The directors, taken as a whole, are the holders of a large amount of stock divided about equally between the preferred and common shares; and the plan in question was adopted after much thought and discussion. Before abandoning the plan the committee has decided to make a further statement of the facts to be considered in connection with the circular letter heretofore mailed to the stockholders.

About three years since, for reasons not necessary to here enumerate, the business affairs of the company

were in an unsatisfactory condition. The company was losing money, and the losses were increasing. It was without funds to pay maturing debts, and its credit was greatly impaired. Under these circumstances the directors determined to take prompt and efficient measures to rescue the company from threatening dangers which would probably result in a total loss to the stockholders of their interests. A financial plan for the issue and sale of bonds with which the stockholders are familiar was adopted, and the directors personally contributed the larger portion of the money necessary to make the plan successful. Thereupon attention was given to the question of reorganizing the management of the company so as to secure, if possible, profitable results from the business; and finally an arrangement was made with President Kelley and several associates, of great experience and ability, which it was believed would prove to be satisfactory. The results have fully justified the making of this arrangement.

Notwithstanding the business of the company has been prosperous its stock has appeared to be of little value for purposes of sale or security. There has accumulated a large amount of dividends on the preferred cumulative stock which up to the present time it has been impracticable to pay. No dividends are being or can be declared under existing conditions; and without a substantial change in the securities there seems no likelihood of dividends being paid on either class of stock in the near future.

But of more importance in considering the plan now submitted is the fact that since the company was organized there have been changes growing out of competition and other business conditions which have forced the opinion that the actual value of the properties of the company is materially less than the amount of the original capitalization. When the com-

pany was formed its stock was issued in good faith and based on knowledge then received of its properties and the prospect of its business, and the belief that the company could earn and pay dividends on the basis of the capital then issued. Subsequent events have shown that the capital stock is too large. Public sentiment has changed or is rapidly changing concerning the issue or the selling value of securities which are not represented by properties of full and equal value. It is the opinion of the present management that all the properties of this company, including manufacturing plants and other physical properties, machinery, cash, inventories, credits, good will, patents, etc., are of a value not exceeding the amount of capital stock determined upon by the plan now under consideration and including the other securities issued or to be issued as proposed. In view of these facts the directors do not believe there can properly be distributed any dividends until the deficiency above referred to is made up by the accumulation of earnings, or the contribution of new money, or by the reduction of the capital stock as proposed. Suits are pending to make directors in other corporations personally liable for the distribution of dividends under circumstances like those above named. Whatever may be the final results of these suits, the present sentiment of the public would not justify the directors in making any distribution of earnings unless and until there has been made some adjustment whereby the value of the properties shall be equal to the total amount of the securities outstanding and a surplus above that amount realized and contained in the treasury available for dividends. The capital stock must be decreased or the assets must be increased.

To make it possible to distribute earnings to stockholders without waiting to make up by accumulation of earnings the difference between the value of the

properties and the capital stock, the directors decided upon the present plan for the issue of securities representing the fair value of the properties of the company.

In order to secure a reduction of the capital stock necessary by the facts above related it was essential to provide a plan which should be fair and satisfactory to all the stockholders, including the preferred and common each. No plan which was more favorable to one class or the other, or which would be unsatisfactory to either class, could be effective. The basis which was adopted is believed to meet these requirements, although several from each class have presented claims that the other class was being too favorably treated. If the plan shall be carefully studied by any holder of either class who will take into account all the reasons applicable and including sales of the different classes of stock, respectively, in the market for a period of years, it is believed the conclusion must be the one reached by the directors.

The result to the preferred stockholders if the plan is adopted and carried out will be to give them for each $100 par value of stock:

$77 par value in new stock,
$20 in 4 per cent debentures; and
$3 in cash;

and, also, 77 per cent of all the future earnings and dividends, if and when declared, instead of a limit to six per cent on their present holdings.

Common stockholders will receive new stock which it is believed will be of greater total value than their present holdings, and will entitle them to receive on the reduced amount of stock a proportion of all stock dividend distributions.

In fact, in the opinion of the directors who are holders of a large amount of both preferred and com-

mon stock the pending plan will be of material and equal pecuniary benefit to each class of stockholders, if promptly carried into effect. The interest and desire of the directors are to serve the stockholders and make their holdings more valuable for purposes of sale and security both.

In all these matters the directors have acted openly, impartially, and, as they believe, for the benefit of the stockholders. It remains for the latter to determine what shall be done. The responsibility now is entirely with them. The directors have done their whole duty in the premises as they see it.

The depositary receipts for stock already deposited have been listed on the New York Stock Exchange, and may therefore be bought, sold, transferred and used as collateral the same as the stock itself. Stockholders who have not already deposited their stock and are desirous of doing so should promptly send the same to the Guaranty Trust Company of New York, New York, as provided in the circular of January 3rd, 1908.

ELBERT H. GARY,
CHARLES MILLER,
EDWARD F. GOLTRA,
GEORGE B. LEIGHTON,
EDWARD SHEARSON,
RICHARD H. SWARTWOUT,
Committee.

Dated February 15th, 1908.

Exhibit D10.

AMERICAN STEEL FOUNDRIES.

Adjourned Special Stockholders' Meeting, March 14, 1908.

Meeting adjourned to April 18, 1908.

Exhibit D11.

AMERICAN STEEL FOUNDRIES.

BOARD OF DIRECTORS.

Adjourned Regular Meeting, March 14, 1908.

On motion regularly made and seconded, it was duly

RESOLVED, that, on account of the adjournment of the Stockholders' Special Meeting to April 18th, the transfer books for both the common and preferred stock of this corporation be closed at the close of business on Monday, March 16th, 1908, to reopen on Monday, April 20th, 1908.

Exhibit D12.

TO THE STOCKHOLDERS OF THE AMERICAN STEEL FOUNDRIES:

At the adjourned special meeting of the stockholders held on March 14th, 1908, more than three-quarters of all of the outstanding stock of the Company was represented in favor of the proposed plan for a reduction in the amount and change in the character of the Company's stock.

In view of this great majority deposit of stock in favor of the plan, and the obligation of the Committee to such majority, as well as its desire that all stockholders should have full opportunity to deposit their stock, the meeting was adjourned to be held again at the same place (No. 15 Exchange Place, Jersey City, New Jersey), on April 18th, 1908, at twelve o'clock noon.

Exhibit D12

By request of the stockholders present at the meeting, the remarks of the Chairman of this Committee, who also acted as Chairman of the meeting, are printed and herewith submitted to the stockholders.

Stockholders who have not already deposited their stock in favor of the plan should do so by endorsing it in blank, having it duly witnessed, and forward it to the Guaranty Trust Company, Number 28 Nassau Street, New York City, the Trust Company will issue in lieu thereof Deposit Receipts, which are listed on the New York Stock Exchange, and will be just as available for buying, selling or collateral as the stock itself.

We trust, if you have not already deposited your stock, you will do so promptly.

Respectfully,
ELBERT H. GARY,
CHARLES MILLER,
EDWARD F. GOLTRA,
GEORGE B. LEIGHTON,
EDWARD SHEARSON,
RICHARD H. SWARTWOUT,
Committee.

Dated, March 21, 1908.

REMARKS OF MR. E. H. GARY, CHAIRMAN OF THE SPECIAL COMMITTEE AND MEMBER OF THE BOARD OF DIRECTORS OF THE AMERICAN STEEL FOUNDRIES, MADE AT THE STOCKHOLDERS' MEETING HELD MARCH 14TH, 1908.

Over seventy-five per cent of the stockholders have signified their acceptance of the plan for reducing the capital stock and changing the form of securities, and have accordingly deposited their stock with the

Exhibit D12

Trust Company pursuant to the circular letters which have hereto been issued. In view of the expressed opinion of so large a majority the Directors would not be justified in abandoning the plan under consideration without making every fair reasonable effort to carry into effect. It was adopted after the most careful deliberation by the Board of Directors as the only one which after advice of counsel seemed to be practicable in order to secure to the stockholders the benefits they should receive by reason of their interests.

The value of the properties of the Company at the present time and in view of the information now at hand is no doubt much less than the total amount of the capital stock. When the Company was organized conditions were materially different, and the management, which was not the same as the present management, had reason to believe, and did believe, that the capital stock was not in excess of the value of the property; but subsequent events have demonstrated to the satisfaction of the present management that at this time the capitalization is so greatly in excess of the present value of the assets that the Board would not be justified in declaring dividends on any part of the capital stock, preferred or common, until either sufficient earnings are realized to make up the difference between the present actual value of the property and the total capitalization, including all the securities issued, or unless the capitalization shall be reduced to correspond with the present actual value of the property. If the first suggested course is pursued evidently it would require a delay of several years at least before the earnings would be sufficient to make up the excess of capitalization. It appeared to the Board of Directors that this would hardly be fair to the present holders of stock; and, moreover, that it would not be desired by them inasmuch as the com-

pany has been during the last year or two prosperous and seems to have prospects of securing a continuance of earnings in the future even though they may be somewhat interrupted. The Board of Directors believe the stockholders should have some immediate benefit by reason of their holdings when and as profits are realized if it is practicable and lawful.

We understand a company has no right to pay dividends unless there is in the treasury a clear surplus available for dividends. Therefore, if a company has a capital stock of thirty-two million dollars, for example, and a present net value of assets over and above its liabilities (not including capital stock), of, say, eighteen or twenty millions of dollars, the question is raised at once as to whether or not the capital is depleted and whether or not this must be made up by contributions of new capital, or by taking it from the net earnings of the Company as they accrue from year to year before there is any right to treat the current earnings as a surplus so that they are available for dividends. The Directors were confronted with this proposition. They did not think it proper to ask the stockholders to contribute money to make up the capitalization, nor did they think it fair or desirable from the standpoint of the stockholders to wait a number of years until the capital should be made up by the net earnings. Therefore, the only practicable plan, as it seemed to the Board of Directors which would be fair and reasonable to the stockholders, and which would be desired by them, was to reduce the capital stock so as to make it substantially on a parity with the present actual value of the property.

In considering the question as to the method of reducing the capital stock for the purposes named the Directors had to meet the fact that there were two classes of stock, and that the vote of one class was

Exhibit D12

as important to be considered as the vote of the other class; that no one class, and no minority of both classes, could reduce the capital stock; that it was necessary to secure the approval of both classes of stock. They had to consider the fact that the preferred stockholders on the one hand had certain fixed interests by reason of the cumulative features of the preferred stock which prevented any dividend on the common stock until the rights of the preferred stockholders were provided for; and, on the other hand, that the common stockholders by reason of their large holdings could arbitrarily say they would never consent to any readjustment of the securities which would be for the benefit of the preferred stockholders alone, and in which the common stockholders could not see some immediate return to themselves. The question which came up for consideration and decision by the Board of Directors was how to formulate a plan which would be perfectly fair to both classes and which would probably influence both classes to come in and deposit their securities and accept the arrangement. The solution of this difficult question is found in the plan stated in the circular letters which have been issued.

I have personally a large interest in both classes of securities. They are about equal, and I speak without any feeling of prejudice or personal interest. When it was first discussed I thought it was to a slight extent more in the interests of the preferred stockholder. But taking everything into account I believe it is about fair to both classes of stocks. When you consider, on the one hand, the fact that the preferred stockholder has a preferred interest in the assets to the amount of the par value of his stock and the cumulative dividends, and, on the other hand, that the common stockholder has an interest which, while subordinate to that of the preferred so far as the

distribution of the assets is concerned, is precisely the same as to voting power; and when you view the values of the respective stocks as they are determined by sales in the market from month to month and year to year, it would seem evident that the division is about right.

I am asked to state what in my opinion will be the result of this plan if adopted. The preferred stockholder will get 77 per cent of the new stock, and therefore 77 per cent of the control of the company. He will also get 20 per cent in debentures, which should be perfectly good if not salable, at par, and as I believe, much more valuable than many of our stockholders now estimate; and in addition he will get 3 per cent in cash. The preferred stockholder gets as a total one hundred per cent par value in cash and securities for his present stockholding interests, and 77 per cent of the control of the company. The common stockholder, while he yields a large proportion of his right to control the company, and is immediately reduced to a small minimum of the control, receives something that is practical and beneficial, that is, the prospect of dividends in the future which does not now exist.

Complaints have been made from preferred stockholders and common stockholders each that the other class was receiving more than a just proportion. These complaints are pretty nearly even in number; and by the deposit of the stock which has been made with the Trust Company it is shown the two classes, taken as a whole, view this proposition as favorable to each. The deposits are a little larger in favor of the preferred stockholder than they are of the common stockholder; but there is not much difference. If you have followed the sales of stock in the market since the plan was announced you will have noticed the ordinary dealer in the market believes the plan places

both classes on an equality. This is shown to a demonstration. At all events the Board of Directors uninfluenced by any consideration except a disposition to be just to all the stockholders have used their best judgment. No compensation has been paid to anyone interested in the plan. It was suggested that a syndicate be formed to guarantee a fulfillment of the plan and to pay that syndicate, as is usual in such cases, a percentage upon the amount involved for acting in that capacity; but the Board of Directors declined to entertain the proposition and decided that it would deal directly with the stockholders and in their sole interest. Some of the stockholders have given much time and attention to the affairs of this company during the last few years. Prior to the time the present management was installed the stock of the company was of little, if any, value. Circumstances existed at that time which were beyond the control of those in charge. There was nothing they could do to change conditions. They had been burdened with various troubles not necessary now to mention. It is sufficient to say the management which existed at that time found themselves helpless, and it seemed inevitable that the company was rapidly drifting into the hands of a receiver. Unless those who are now more or less responsible for the management of the company had taken charge and contributed their money, and devoted their time to the interests of the stockholders it is evident the company would have been in bankruptcy, and in that case the stock would have been practically wiped out. But this management came in disinterestedly except to take care of their interests as stockholders and those of other stockholders, and have since given their time and best thought to the affairs of the company.

We have done this without compensation, and the business has been made successful. The company

has a good standing, and its future prospects are bright. It has an opportunity of maintaining its position in the trade and of extending its lines of business and thereby increasing its profits. The Board of Directors are not only willing, but would be pleased to distribute the earnings without any readjustment of securities if it were possible to do so with entire safety to the Directors. There are members of the Board who have taken an active interest in the affairs of the company, who would be glad to be relieved of the responsibility and to allow others to take the risk and declare dividends, provided such is the desire of the stockholders; but so long as the present Directors are members of the Board and continue to have the responsibility to the stockholders, and a personal liability, they will not consent to the declaration of dividends on the present capitalization because of the question of liability which is involved.

It has been suggested that as there is a large majority in favor of the plan some action should be taken which would deprive the minority stockholder from interfering with the opportunity on the part of the majority to improve their position; that is, to resort to some plan which would secure substantially the results which we are now seeking notwithstanding there is opposition on the part of a minority. The Directors are not in favor of doing this under present conditions. Of course, if stock continues to come in and the results prove that substantially all the stockholders are in favor of the plan, and that only a few are standing out for improper reasons, it may be the Directors would consent to some action on the part of the company which would be approved by lawyers of ability and respectability and which would protect the rights, and promote the interests, of the large majority. But so long as there is a substantial minority out acting in good faith, and acting on their

judgment and their information, I am not in favor of any controversy. I do not believe in crowding out the minority stockholders. They should all be protected. That does not mean that I approve of the action of two or three stockholders who might be attempting from motives of cupidity something clearly wrong and unreasonable and against the interests of the great majority of those who are endeavoring to promote their interests; but it means simply that I believe in giving every stockholder a full opportunity of being heard and of protecting the interests of all.

The stock is coming in day by day. The amount is steadily increasing. Many stockholders are absent and scattered, and it has been difficult to reach them; but generally when these stockholders have ascertained the provisions of the plan they have deposited their stock. Only yesterday I received a letter from a large firm stating their client was absent from home and would not be here for about thirty days, but so soon as the client returned he would immediately communicate with the committee. Similar information is frequently received. Then, as stated, there have been complaints from a few preferred stockholders and a few common stockholders, respectively, that the other class was receiving too much; but after full explanation they have generally accepted the plan.

Gentlemen, we have acted in good faith and for your interests. If a large minority of stockholders prefer to wait for a term of years until we can make up the difference between the actual value of the property and the capitalization the Directors are willing to wait. They are urging the plan because they feel certain it is for the pecuniary interests of all the stockholders. If it becomes effective the stockholders will have something tangible and valuable—something you never had before. The stock has not

been popular. There has been some sale of it in the market, but no considerable amount could be sold at any time without reducing the price. No one could realize very much at a time unless he sold at a great sacrifice. The stock has not been good collateral security at the banks. It is not in favor, but is in disfavor. The banks do not want it, they have thrown it out, and they would not take it at the present time. The fact that the dividends have been accumulating on the preferred stock, instead of improving its condition and increasing its value, has made it less valuable as a practical result. The banks have less confidence in it by reason of accumulation. The time is passing when companies can expect to pay dividends on stocks in cases of great over-capitalization, or when new companies can be organized with great over-capitalization. Indeed the day has probably already passed. There is an improved condition of affairs in the country. Many have seen the light and have recognized the criticisms which have been made. A sensible man does not ignore criticism, no matter from what source it comes. It may come from a journal characterized as a yellow journal, or from a politician, or a demagogue, or from one without much intelligence; but in either case it should not be ignored by any one even if directed at himself. He should consider it and receive benefit from it, if possible, by improving his condition or the interests he represents. The criticisms which have been made concerning this Company have not been ignored by the present management. They have been given due consideration and weight, and this plan is one of the results. I wish there were present a larger number of stockholders who have not deposited their stock, for I would be pleased to urge them to come in and support the Directors in this movement. We feel certain the proposed change in securities, if adopted, will put the

stock where it will be recognized as something worthy of purchase or collateral at the banks, and which should make the stock in the future more valuable. It seems difficult for me to understand how any holder of preferred or common stock can hesitate to deposit his stock.

I have no feeling whatever in regard to the matter; but I speak earnestly because I want to do my whole duty to the stockholders. If a majority of the stockholders would express their disapproval of the plan I would be very glad to abandon it, and retire from the Company, if desired, and wash my hands of all responsibility.

Full opportunity should be given any of the stockholders present to express their opinion concerning the matter under consideration.

MR. BROOKMAN: I think the stockholders, preferred and common both, are perfectly satisfied with the adjustment made, except I think a mortgage should be taken back to secure the proposed debenture bonds. It would cost the company nothing, if they are going to pay the interest on the bonds, to give a mortgage and it would not cripple the resources. The interest would be the same; the eventual payment would be the same, and it would be an evidence of good faith to the preferred stockholders to which I think they would be justly entitled.

JUDGE GARY: That is a very important question, and one that has not been ignored. The management believe if a mortgage were given the value of the stock would be diminished. The plan contemplates the retirement of the debentures within the near future. The company proposes to commence retiring these debentures at the end of five years, and to pay all of them within ten years thereafter. Good financiers were consulted on the subject, and the consensus of

opinion has been in favor of the debentures. Many railroad companies and other corporations who had been issuing securities which they expected to retire within the near future have issued debentures instead of mortgages; and those debentures have sold substantially on a parity with the mortgage bonds.

MR. LARZELERE: I should like to make this suggestion. I am very sorry that every dilatory or non-assenting stockholder could not be present to hear your elaborate explanation; and it seems to me that the same should in some way be distributed. It would be a convincing argument. I suggest the remarks, which I notice have been taken down by a stenographer, be printed and mailed to each stockholder. Upon reading these remarks I do not see how any stockholder could say he was not informed about the integrity and fairness and impartiality of the whole scheme.

JUDGE GARY: I appreciate the kindness of your remarks. I do not make speeches, and therefore do not like to have casual remarks circulated; but if it will do any good I will not object.

MR. LEIGHTON: It would be a very good idea to have published the difficulty we have had in reaching some of the stockholders on account of stock not being registered in their names. The gentlemen sitting opposite to me is a stockholder but not of record, and he comes to this meeting knowing practically nothing of the plan.

MR. DIMICK: I should like to add that I represent a party who is interested in 200 shares which both of us control, and we have not deposited our stock as yet. One thing is we have not had the matter put before us in the way it has been put today; and I should like to second the suggestion that has been made by the gentleman that this most excellent statement be drafted in copy form and sent out to the stockholders.

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JUDGE GARY: I appreciate your compliment.

Is there anything else from anyone? If not, gentlemen, we will stand adjourned until April 18th, 1908, at 12 o'clock M. at the same place.

Exhibit D13.

AMERICAN STEEL FOUNDRIES,

42 Broadway, New York,

March 25th, 1908.

Dear Sir:

Referring to my letter of the 9th relative to depositing your stock in favor of the proposed plan for a readjustment of the stock of this Company, I beg to say that as you have already been advised by the Committee having the matter in charge, there was at the Adjourned Special Meeting of the Stockholders held March 14th more than three-quarters of all the outstanding stock represented in favor of the plan. Since that time, the additional stock deposited brings the total up to nearly 80%

Some of the stock still outstanding is in your name, and if you own any of it, your particular attention is called to the very comprehensive statement of matters pertaining to the plan, made by Judge E. H. Gary, Chairman, at the Stockholders Meeting referred to. At the request of the stockholders present at the meeting a printed copy of Mr. Gary's remark has been mailed you by the Committee. Should it not have reached you I will be glad to send you another on request. I am satisfied that a careful reading will remove any doubts you may have as to its being to

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your interest to deposit at once any stock you may own or control.

Special attention is called to the following abbreviated salient points in the remarks, viz:

Stockholders should have some immediate benefit * * * when and as profits are realized if it is practicable and lawful.

The capitalization is so greatly in excess of * * * the assets the Board would not be justified in declaring dividends.

The only practicable plan * * * was to reduce the capital stock.

It was necessary to secure the approval of both classes of stock.

The question * * * was how to formulate a plan which would be perfectly fair to both classes.

The solution * * * is found in the plan stated in the circular letters issued.

Preferred Stockholders will get 77% of the New Stock, 20% in Debentures, 3% in cash * * * Total 100% in cash and securities * * * and 77% of the control of the Company.

Common Stockholders while * * * reduced to a small minimum * * * receive something that is practicable and beneficial.

No compensation has been paid to anyone interested in the plan.

It was suggested that a Syndicate be formed to guarantee the plan, and to pay that Syndicate * * * as is usual a percentage * * * but the Board declined to entertain the proposition, and decided it would deal directly with the Stockholders and in their sole interest.

Referring again to my letter of the 9th, I regret to say that many copies have been returned by the post office as unknown or unclaimed. Should you know any holders who have not received circulars, I

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will be greatly obliged if you will call their attention to the matter and send me their names and address, as the Committee wishes all holders to have full information.

Stock for deposit should be endorsed in blank, properly witnessed and sent to the Guaranty Trust Co., 28 Nassau St., New York, N. Y. which will issue Deposit Receipts for it.

Deposit Receipts are listed on the New York Stock Exchange, and are therefore, just as available for security or sale as the stock itself.

Yours truly,

F. E. PATTERSON,

Secretary.

Exhibit D14.

AMERICAN STEEL FOUNDRIES,

42 Broadway, New York,

April 3rd, 1908.

Thos. C. Lazear,
Pittsburgh, Pa.

Dear Sir:

Referring to my letter of March 25th relative to depositing any stock of this Company you may own, with the Guaranty Trust Company, No. 28 Nassau St., New York, in favor of the proposed plan for a readjustment of our capital, I beg to say that I have learned that a large proportion of the undeposited stock is not held by the registered owners, and in many instances I have been unable to learn who does hold it, and so have not been able to communicate with them.

Exhibit D14

About 80% of all the stock has been deposited in favor of the plan, and we have received many letters from Stockholders who are away from home saying they are in favor of the plan, and will deposit their stock as soon as they return home and can get at it.

There are between 1700 and 1800 Stockholders in the Company and when so great a majority are in favor of the plan, it is safe to say it is a good one; the Committee, however, would like to have all holders formally consent to it by depositing their stock.

According to the records, the undeposited stock standing in your name is as noted below, and I will be greatly obliged if you will advise me in the enclosed stamped envelope whether you own any of it, and if so how much, also whether the Committee having in charge matters in connection with the proposed plan can depend on your depositing any stock you may own or control BEFORE APRIL 18th, 1908, which is the date of the adjourned Stockholders Special Meeting, at which the plan is to be considered.

In considering the subject, please bear in mind that the plan is solely for the benefit of the Stockholders, there is no Syndicate or Underwriting Arrangement, no arrangement has been made nor will any be made for the purchase of dissenting stock, and there is no profit to anyone except as they benefit from their stock holdings; you will, therefore, be simply serving your own interest by doing all you can to help put it through.

Circulars giving the plan in detail have been sent you from time to time. If they have not reached you, please advise, and other copies will be sent.

If there is any stock in your name which you do not own, I will be greatly obliged for the names and addresses of the present holders so far as you know them.

Exhibit C15

Hoping to hear promptly and favorably from you,
Yours truly,
F. E. PATTERSON,
Secretary.

The records show you as the holder of
71 Shares Preferred
— " Common.

Exhibit C15.

LAZEAR AND ORR
Attorneys at Law

450 Fourth Avenue
Pittsburgh, Pa.

Thos. C. Lazear Chas. P. Orr
Jesse T. Lazear

Pittsburgh, Pa., April 6th, 1908.

Mr. J. E. Patterson,
Sec'y American Steel Foundries,
42 Broadway, New York.

Dear Sir:

I hold 71 shares preferred stock of your company and Jesse T. Lazear, Charles P. Orr and myself as Executors of the will of Alice C. Lazear hold 102 shares of same class. I will probably deposit my 71 shares with the Guaranty Trust Co. before the 18th but my co-executors hesitate as to the 102 shares belonging to the Estate of Alice C. Lazear, dec'd. Viewing the matter as they do, they doubt their power and the advisability of making the exchange contemplated by the plan proposed—at least without the approval of the Orphans' Court.

Yours truly,
THOS. C. LAZEAR.

Exhibit D16.

AMERICAN STEEL FOUNDRIES,

ADJOURNED SPECIAL STOCKHOLDERS' MEETING,
APRIL 18, 1908:

Meeting adjourned to May 7, 1908.

Exhibit D17.

AMERICAN STEEL FOUNDRIES.

BOARD OF DIRECTORS.

ADJOURNED REGULAR MEETING APRIL 18, 1908.

On motion regularly made and seconded, it was duly

RESOLVED that on account of the adjournment of the Stockholders' Special Meeting to May 7th, the transfer books for both the common and preferred stock of this Corporation be closed at the close of business on Monday, April 20th, 1908, to reopen on Friday, May 8th.

Exhibit D18.

AMERICAN STEEL FOUNDRIES.

General Offices: Commerical National Bank Bldg., Chicago,

42 Broadway, New York, April 20, 1908.

To Stockholders and Holders of Deposit Certificates:

At the adjourned Stockholders Special Meeting of April 18th no action was taken further than to adjourn the meeting to 12 o'clock Thursday, May 7th, 1908.

At the time of the meeting on the 18th there had been deposited in favor of the proposed plan for a readjustment of our capital about eighty-seven per cent of all the outstanding stock, and pledges received from Stockholders who have not deposited their stock on account of absence from home or similar reasons, brings the total assenting stock to about ninety per cent.

It has been learned that a large part of the undeposited stock does not belong to those in whose name it is registered and it is, therefore, difficult to ascertain the actual owners. The Committee believe that all owners should be fully advised of the plan, and have an opportunity to deposit their stock. To insure this requires time, hence the adjournment.

The Committee believe it is so clearly for the interest of both classes of stock to accept the provisions of the plan, that as soon as all of the Stockholders learn of it, will quickly become an accomplished fact.

In considering the subject, stock owners who have not yet deposited their stock should bear in mind that the plan provides that the proposed Debenture Bonds shall be dated February 1st, 1908, and bear interest from that time, hence the proposed securities are steadily increasing in value, and should the plan be-

come effective and be consummated, as there is now every reason to hope it will, the first semi-annual debenture interest coupons will shortly afterward become due and payable.

The assistance of those who have deposited their stock is solicited to help locate and secure the deposit of any outstanding stock of which they may know.

Respectfully yours,

ELBERT H. GARY,
CHARLES MILLER,
EDWARD F. GOLTRA,
GEORGE B. LEIGHTON,
EDWARD SHEARSON,
RICHARD H. SWARTWOUT,
Committee.

Exhibit C20.

AMERICAN STEEL FOUNDRIES.

Hudson Terminal,

30 Church St., New York, Apr. 23, 1908.

Mr. Thos. A. Lazear,
450 Fourth Ave.,
Pittsburgh, Pa.

Dear Sir:

Referring to yours of the 6th inst. I note with pleasure the stock standing in your own name has been deposited in favor of the proposed plan for a readjustment of our capital.

Regarding the 102 shares for which you are executor, I can appreciate your position in this, and while the Committee having the plan in charge would be very glad indeed to have the stock come in, they will understand if it does not the reason for it.

I assume if the plan should be approved and consummated that the executors would then have no objection to presenting the matter to the court for authority to make the exchange. If this is so, I believe it will answer the purpose, and will be glad if you will advise me whether your co-executors are also in favor of the plan.

Yours very truly,
F. E. PATTERSON,
Secretary.

FEP/U

Exhibit D21.

AMERICAN STEEL FOUNDRIES.

ADJOURNED SPECIAL STOCKHOLDERS' MEETING, MAY 7, 1908:

Meeting adjourned to June 4, 1908.

Exhibit D22.

AMERICAN STEEL FOUNDRIES.

BORAD OF DIRECTORS.

Regular Meeting May 7, 1908. (See copy of resolutions relative to debentures annexed to amended certificate of incorporation, *infra.* at p. 207.

Exhibit D23.

AMERICAN STEEL FOUNDRIES

Hudson Terminal,

30 Church St., New York, May 11, 1908.

To Stockholders and Holders of Deposit Certificates:

At the adjourned Stockholders Special Meeting of May 7th more than 90% of the company's outstanding stock was represented in favor of the proposed plan submitted. Most of the balance belongs to those who are not the registered holders, and it is difficult to locate the same. For this reason the meeting was adjourned to 12 o'clock noon Thursday, June 4th, 1908,

without further action, to enable the Committee to reach as many as possible of these holders.

Attention is again directed to the fact that if the plan becomes effective the Debenture Bonds proposed to be issued thereunder will bear date February 1st, 1908, and bear interest from that date, payable semi-annually.

Respectfully,
ELBERT H. GARY,
CHARLES MILLER,
EDWARD F. GOLTRA,
GEORGE B. LEIGHTON,
EDWARD SHEARSON,
RICHARD H. SWARTWOUT,
Committee.

Exhibit D24.

AMERICAN STEEL FOUNDRIES.

ADJOURNED SPECIAL STOCKHOLDERS' MEETING,
JUNE 4, 1908:

Meeting adjourned to June 12, 1908.

Exhibit D25.

AMERICAN STEEL FOUNDRIES.

BORAD OF DIRECTORS.

REGULAR MEETING JUNE 4, 1908.

On motion regularly made and seconded, it was duly

RESOLVED that on account of the adjournment of the Stockholders' Special Meeting to June 12th, the transfer books for both the common and preferred stock of this corporation be closed at the close of business on Friday, June 5th, 1908, to reopen on Saturday, June 13th, 1908.

Exhibit D26.

AMERICAN STEEL FOUNDRIES.

Hudson Terminal,

30 Church St., New York, June 6th, 1908.

To Stockholders and Holders of Deposit Certificates:

The adjourned Stockholders' Special Meeting of June 4th was without other action adjourned to 12 o'clock noon, Friday June 12th, 1908, to enable the Committee to consider certain details relative to the proposed plan submitted and thereby avoid if possible further adjournments.

Information as to the result of the next meeting will be given as usual.

Respectfully,
ELBERT H. GARY,
CHARLES MILLER,
EDWARD F. GOLTRA,
GEORGE B. LEIGHTON,
EDWARD SHEARSON,
RICHARD H. SWARTWOUT,
Committee.

Exhibit D27.

AMERICAN STEEL FOUNDRIES,

STOCKHOLDERS ADJOURNED SPECIAL MEETING,
JUNE 12, 1908.

E. H. Gary presiding, F. E. Patterson recording.

More than a majority of each kind of the outstanding stock of the company represented at the meeting.

Copy of the notice of the meeting presented. (See printed copy annexed.)

Meeting adjourned to afternoon of same day.

Exhibit D28.

AMERICAN STEEL FOUNDRIES,

STOCKHOLDERS 2ND ADJOURNED SPECIAL MEETING,
JUNE 12, 1908.

E. H. Gary presiding, F. E. Patterson recording.

On motion regularly made and seconded the following resolution was thereupon presented and read. (See Exhibit C attached to Amended Certificate of Incorporation.)

The Chairman thereupon declared the polls open for voting on the resolution submitted.

The polls having remained open for more than one hour, and no one having requested further opportunity to vote, they were declared closed.

The Inspectors having counted the votes, presented their report in writing, per copy annexed hereto, and the Chairman thereupon declared the resolution adopted.

On motion regularly made and seconded, it was duly

Resolved that the stockholders hereby express their appreciation of the work of the committee heretofore

appointed to formulate a plan of reorganization, which has commended itself, and with the hearty support and adoption of such a large majority of the stockholders, and this appreciation is all the more emphasized by the fact that the laborious work of the committee has been done gratis.

Exhibit D29.

AMERICAN STEEL FOUNDRIES.

Hudson Terminal,

30 Church St., New York, June 12th, 1908.

To Stockholders and Holders of Deposit Certificates:

Referring to the plan for change in the character and amount of the Company's capital stock, submitted to stockholders under date of January 3rd, 1908, the Committee begs to advise, that at the stockholders' adjourned special meeting held this day, the plan was approved and declared effective by about 90% of all the outstanding stock; 1250 shares only voted against the plan.

Further steps necessary to consummate the plan will be taken as promptly as possible, and notice when Deposit Certificates may be exchanged for the new securities and cash, will be given in due course.

Respectfully,

ELBERT H. GARY,
CHARLES MILLER,
EDWARD F. GOLTRA,
GEORGE B. LEIGHTON,
EDWARD SHEARSON,
RICHARD H. SWARTWOUT,

COMMITTEE.

D30 same as D29

Exhibit D31.

AMERICAN STEEL FOUNDRIES,

BOARD OF DIRECTORS.

Adjourned regular meeting, June 24, 1908.

It was thereupon reported to the Board that the plan of January 3rd, 1908, for a change in the character and amount of this Company's capital stock had been approved and adopted by the Stockholders at a Special Meeting held June 12th, 1908, the General Counsel presented a form of Amended Certificate of Incorporation of this Company, as prepared by himself and Mr. Charles MacVeagh, in accordance with said plan, and asked that the Board designate a date on which such Amended Certificate of Incorporation should be filed with the New Jersey State authorities.

On motion regularly made and seconded, it was duly resolved that the officers of this Company be and they hereby are authorized and instructed to file with the New Jersey State authorities, the Amended Certificate of Incorporation of this Company, per copy annexed hereto, on or before June 30th, 1908. (The copy is here omitted.)

Exhibit D32.

AMERICAN STEEL FOUNDRIES.

Certificate of change in and reduction of Capital Stock, and amendment of Amended Certificate of Incorporation and Stockholders' assent thereto, June 29, 1908.

("*Exhibit A.*")

AMENDED CERTIFICATE OF INCORPORATION OF AMERICAN STEEL FOUNDRIES.

(As Amended June 29th, 1908.)

We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the Act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)," and the acts amendatory thereof and supplemental thereto, do hereby certify as follows:

I. The name of the corporation is American Steel Foundries.

II. The location of its principal office in the State of New Jersey is at No. 15 Exchange Place, in the City of Jersey City, County of Hudson. The name of the agent therein and in charge thereof, upon whom process against the corporation may be served, is The Corporation Trust Company. Said office is to be the registered office of said corporation.

III. The objects for which the corporation is formed are:

To manufacture iron, steel, manganese, coke, copper, lumber and other materials, and all or any articles consisting, or partly consisting, of iron, steel, copper, wood or other materials, and all or any products thereof.

Exhibit D32

To acquire, own, lease, occupy, use or develop any lands containing coal or iron, manganese, stone or other ores, or oil, and any woodlands, or other lands for any purpose of the Company.

To mine, or otherwise to extract or remove, coal, ores, stone and other minerals and timber from any lands owned, acquired, leased or occupied by the company, or from any other lands.

To buy and sell, or otherwise to deal or to traffic in, iron, steel, manganese, copper, stone, ores, coal, coke, wood, lumber and other materials and any of the products thereof, and any articles consisting, or partly consisting thereof.

To construct bridges, buildings, machinery, ships, boats, engines, cars and other equipment, railroads, docks, slips, elevators, waterworks, gas works, and electric works, viaducts, aqueducts, canals and other waterways, and any other means of transportation, and to sell the same, or otherwise to dispose thereof, or to maintain and operate the same, except that the company shall not maintain or operate any railroad or canal in the State of New Jersey.

To apply for, obtain, register, purchase, lease, or otherwise to acquire, and to hold, use, own, operate and introduce, and to sell, assign, or otherwise dispose of any trade-marks, trade names, patents, inventions, improvements and processes used in connection with, or secured under letters patents of the United States, or elsewhere, or otherwise; and to use, exercise, develop, grant licenses in respect of, or otherwise to turn to account any such trade-marks, patents, licenses, processes, and the like, or any such property or rights.

To engage in any other manufacturing, mining, construction or transportation business of any kind or character whatsoever, and to that end to acquire, hold, own and dispose of any and all property, assets, stocks, bonds and rights of any and every kind; but not to

engage in any business hereunder which shall require the exercise of the right of eminent domain within the State of New Jersey.

To acquire by purchase, subscription or otherwise, and to hold or dispose of, stocks, bonds or any other obligations of any corporations formed for, or then or theretofore engaged in or pursuing any one or more of the kinds of business, purposes, objects or operations above indicated or owning or holding any property of any kind herein mentioned; or of any corporation owning or holding the stocks or the obligations of any such corporation.

To hold for investment, or otherwise to use, sell or dispose of, any stock, bonds or other obligations of any such corporation; to aid in any manner any corporation whose stock, bonds or other obligations are held or are in any manner guaranteed by the company, and to do any other acts or things for the preservation, protection, improvement or enhancement of the value of any such stock, bonds or other obligations, or to do any acts or things designed for any such purpose; and, while owner of any such stock, bonds or other obligations, to exercise all the rights, powers and privileges of ownership thereof, and to exercise any and all voting powers thereon.

The business or purpose of the company is from time to time to do any one or more of the acts and things herein set forth; and it may conduct its business in other States and in the Territories and in foreign countries, and may have one office or more than one office, and keep the books of the company outside of the State of New Jersey, except as otherwise may be provided by law; and may hold, purchase, mortgage and convey real and personal property either in or out of the State of New Jersey.

Without in any particular limiting any of the objects and powers of the corporation, it is hereby ex-

pressly declared and provided that the corporation shall have power to issue bonds and other obligations in payment for property purchased or acquired by it, or for any other object in or about its business; to mortgage or pledge any stocks, bonds or other obligations, or any property which may be acquired by it, to secure any bonds or other obligations by it issued or incurred; to guarantee any dividends or bonds or contracts or other obligations; to make and perform contracts of any kind and description; and in carrying on its business, or for the purpose of attaining or furthering any of its objects, to do any and all other acts and things, and to exercise any and all other powers which a copartnership or natural person could do and exercise, and which now or hereafter may be authorized by law.

IV. The total authorized capital stock of the corporation is seventeen million, one hundred and eighty-four thousand dollars ($17,184,000), divided into one hundred and seventy-one thousand, eight hundred and forty shares of the par value of one hundred dollars each.

From time to time the stock of the company may be increased or reduced according to law, and may be issued in such amounts and proportions as shall be determined by the Board of Directors, and as may be permitted by law.

V. The names and post office addresses of the incorporators, and the number of shares of stock for which severally and respectively we do hereby subscribe (the aggregate of our said subscriptions, being three thousand dollars, is the amount of capital stock with which the corporation will commence business), are as follows:

Exhibit D32

Name.	Post-office Address.	Number of Shares. Preferred Stock.	Common Stock.
Howard K. Wood	15 Exchange Place, Jersey City, N. J.	5	5
Kenneth K. McLaren	15 Exchange Place, Jersey City, N. J.	5	5
Donald H. Mann	15 Exchange Place, Jersey City, N. J.	5	5

VI. The duration of the corporation shall be perpetual.

VII. The number of directors of the company shall be fixed from time to time by the by-laws; but the number, if fixed at more than three, shall be some multiple of three. The directors shall be classified with respect to the time for which they shall severally hold office by dividing them into three classes, each consisting of one-third of the whole number of the Board of Directors. The directors of the first class shall be elected for a term of one year; the directors of the second class shall be elected for a term of two years; and the directors of the third class for a term of three years; and at each annual election the successors to the class of directors, whose terms shall expire in that year, shall be elected to hold office for the term of three years, so that the term of one class of directors shall expire in each year.

The number of the directors may be increased as may be provided in the by-laws. In case of any increase of the number of the directors, the additional directors shall be elected as may be provided in the by-laws, by the directors or by the stockholders at an annual or special meeting; and one-third of their number shall be elected for the then unexpired portion of the term of the directors of the first class, one-third

of their number for the unexpired portion of the term of the directors of the second class, and one-third of their number for the unexpired portion of the term of the directors of the third class, so that each class of directors shall be increased equally.

In case of any vacancy in any class of directors through death, resignation, disqualification or other cause, the remaining directors, by affirmative vote of a majority of the Board of Directors may elect a successor to hold office for the unexpired portion of the term of the director whose place shall be vacant, and until the election of a successor.

The Board of Directors shall have power to hold their meetings outside of the State of New Jersey, at such places as from time to time may be designated by the by-laws or by resolution of the board. The by-laws may prescribe the number of directors necessary to constitute a quorum of the Board of Directors, which number may be less than a majority of the whole number of the directors.

Unless authorized by votes given in person or by proxy by stockholders holding at least two-thirds of the capital stock of the corporation, which is represented and voted upon in person or by proxy at a meeting specially called for that purpose or at an annual meeting, the Board of Directors shall not mortgage or pledge any of its real property or any shares of the capital stock of any other corporation; but this prohibition shall not be construed to apply to the execution of any purchase money mortgage or any other purchase money lien. As authorized by the Act of the Legislature of the State of New Jersey, passed March 22, 1901, amending the 17th section of the Act concerning Corporations (Revision of 1896), any action which theretofore required the consent of the holders of two-thirds of the stock at any meeting after notice to them given, or required their consent in writing to

be filed, may be taken upon the consent of, and the consent given and filed by, the holders of two-thirds of the stock of each class represented at such meeting in person or by proxy.

Any officer elected or appointed by the Board of Directors may be removed at any time by the affirmative vote of a majority of the whole Board of Directors. Any other officer or employee of the company may be removed at any time by vote of the Board of Directors, or by any committee or superior officer upon whom such power of removal may be conferred by the by-laws or by vote of the Board of Directors.

The Board of Directors, by the affirmative vote of a majority of the whole board, may appoint from the directors an executive committee, of which a majority shall constitute a quorum; and to such extent as shall be provided in the by-laws, such committee shall have and may exercise all or any of the powers of the Board of Directors, including power to cause the seal of the corporation to be affixed to all papers that may require it.

The Board of Directors, by the affirmative vote of a majority of the whole board, may appoint any other standing committees, and such standing committees shall have and may exercise such powers as shall be conferred or authorized by the by-laws.

The Board of Directors may appoint not only other officers of the company, but also one or more vice presidents, one or more assistant treasurers, and one or more assistant secretaries; and, to the extent provided in the by-laws, the persons so appointed respectively shall have and may exercise all the powers of the president, of the treasurer and of the secretary, respectively.

The Board of Directors shall have power from time to time to fix and to determine and to vary the amount of the working capital of the company, and to direct

and determine the use and disposition of any surplus or net profits over and above the capital stock paid in; and in its discretion the Board of Directors may use and apply any such surplus or accumulated profits in purchasing or acquiring its bonds or other obligations or shares of its own capital stock to such extent and in such manner and upon such terms as the Board of Directors shall deem expedient; but shares of such capital stock so purchased or acquired may be resold, unless such shares shall have been retired for the purpose of decreasing the company's capital stock as provided by law.

With the assent in writing or pursuant to the vote of two-thirds of the capital stock issued and outstanding, the directors shall have power and authority to sell, assign, transfer, convey or otherwise dispose of the property and assets of this corporation as an entirety on such terms and conditions as the directors shall deem just and expedient.

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

Subject always to by-laws made by the stockholders, the Board of Directors may make by-laws, and, from time to time, may alter, amend or repeal any by-laws; but any by-laws made by the Board of Directors may be altered or repealed by the stockholders at any annual meeting, or at any special meeting, provided notice of such proposed alteration or repeal be included in the notice of meeting.

Exhibit D32

In Witness Whereof, we have hereunto set our hands and seals the 26th day of June, 1902.

HOWARD K. WOOD. (Seal.)
KENNETH K. McLAREN. (Seal.)
DONALD H. MANN. (Seal.)

Signed, sealed and delivered
in the presence of
Geo. R. Beach.

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

Be it remembered that on this 26th day of June, 1902, before the undersigned, personally appeared Howard K. Wood, Kenneth K. McLaren and Donald H. Mann, who, as I am satisfied, are the persons named in, and who executed the foregoing certificate, and I having first made known to them, and to each of them, the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

GEO. R. BEACH,
Master in Chancery of New Jersey.

AMERICAN STEEL FOUNDRIES
CERTIFICATE OF AMENDMENT.

The American Steel Foundries, a corporation of the State of New Jersey, by its President and Secretary, does hereby certify:

1. That the principal office of the company is at No. 15 Exchange Place, Jersey City, New Jersey, and the agent therein and in charge thereof, and upon whom process against the company may be served, is The Corporation Trust Company.

Exhibit D32

2. That the total authorized capital stock of said corporation, as set forth in its amended certificate of incorporation, is $37,650,000.00 divided into 376,500 shares of the par value of $100.00 each and consisting of $19,540,000.00 par value of preferred stock and $18,110,000.00 par value of common stock. Of this authorized capital stock there are now issued and outstanding 330,500 shares of the par value of $100.00 each, of which 158,100 shares of the aggregate par value of $15,810,000 are common stock and 172,400 shares of the aggregate par value of $17,240,000 are preferred stock.

3. That the Board of Directors of said company, at a meeting duly convened and held on the 3rd day of January, 1908, passed a resolution declaring, among other things, that the changes and amendments in the Certificate of Incorporation and the change in the capital stock of this company, and the reduction of the capital stock, hereinafter set forth, are advisable, and calling a meeting of the stockholders to take action thereon.

4. That a copy of said resolutions of said Board of Directors is hereto appended, marked "Exhibit B," and made a part hereof.

5. That thereafter, on the 8th day of February, 1908, at the hour of twelve o'clock, noon, pursuant to such call of the Board of Directors, and upon due notice given to the stockholders, in accordance with the by-laws of the company, a special meeting of the stockholders was held, at which meeting there were present in person or represented by proxy the holders of more than two-thirds of each class of stock of said company having voting power, and said meeting was duly adjourned until March 14, 1908, at twelve o'clock, noon; that on said March 14, 1908, at twelve

o'clock, noon, the stockholders met pursuant to adjournment, and the meeting was duly adjourned until April 18, 1908, at twelve o'clock, noon; that on said April 18, 1908, at twelve o'clock, noon, the stockholders met pursuant to adjournment, and the meeting was duly adjourned until May 7, 1908, at twelve o'clock, noon; that on said May 7, 1908, at twelve o'clock, noon, the stockholders met pursuant to adjournment, and the meeting was duly adjourned until June 4, 1908, at twelve o'clock, noon; that on said June 4, 1908, at twelve o'clock, noon, the stockholders again met pursuant to adjournment, and the meeting was duly adjourned until June 12, 1908, at twelve o'clock, noon; that on said June 12, 1908, at twelve o'clock, noon, the stockholders met pursuant to adjournment, and the meeting was duly adjourned until June 12, 1908, at four o'clock, P. M.; that at the adjourned meeting of the stockholders held on June 12, 1908, at four o'clock, P. M., there being present in person or represented by proxy the holders of more than two-thirds of each class of stock of said company, having voting power, there were presented to said meeting the resolutions of the Board of Directors adopted at the meeting of said board held January 3, 1908, declaring it to be advisable to decrease the capital stock of the corporation; that the capital stock of the company be changed from preferred stock and common stock to an issue of stock all of one class and kind; that such reduction and change be effected by the retirement, surrender and cancellation of the present outstanding preferred and common stock, and otherwise as set forth in said resolutions annexed hereto and marked "Exhibit B"; and declaring it to be advisable that the company amend its certificate of incorporation to effect such reduction, change (and retirement) in the manner hereinafter in this paragraph set forth; and more than two-thirds in interest

Exhibit D32

of each class of the stockholders having voting powers voted in favor of such reduction and change, and in favor of said amendment to the certificate of incorporation, and in favor of each and every of the resolutions a copy of which are hereto annexed and marked "Exhibit C," and the same were accordingly adopted. Said amendment to the certificate of incorporation is as follows:

(a) That Article IV of the Certificate of Incorporation of the company be amended so as to read as follows:

"IV. The total authorized capital stock of the corporation is seventeen million, one hundred and eighty-four thousand dollars ($17,184,000), divided into one hundred and seventy-one thousand, eight hundred and forty shares of the par value of one hundred dollars each.

"From time to time the stock of the company may be increased or reduced, according to law, and may be issued in such amounts and proportions as shall be determined by the Board of Directors, and as may be permitted by law."

(b) That the certificate of incorporation of the company, as amended, shall read as set forth in "Exhibit A" prefixed to this certificate of amendment.

6. The written assent in person or by proxy of more than two-thirds of each class of stock of said company, having voting power, to the foregoing amendment, change and alteration of the certificate of incorporation of the company is hereto appended, and marked "Exhibit D."

7. That there are also hereto appended copies of the resolutions adopted at said meeting of the stockholders held on the 12th day of June, 1908, marked "Exhibit C," and made a part hereof.

Exhibit D32

In Witness Whereof, the said American Steel Foundries has caused this certificate to be signed by its president and secretary, and its corporate seal to be hereunto affixed this 29th day of June, A. D. 1908.

AMERICAN STEEL FOUNDRIES,
By William V. Kelley,
President.

Attest:
F. E. Patterson,
Secretary.
William V. Kelley,
President of American Steel Foundries.
F. E. Patterson,
Secretary of American Steel Foundries.

In presence of:

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

Be it remembered, that on this twenty-ninth day of June, 1908, before me, the subscriber, a Master in Chancery for the State of New Jersey, personally appeared William V. Kelley and F. E. Patterson, who, I am satisfied, are the persons named in and who executed the foregoing certificate; the said William V. Kelley being to me known and known to me to be the president, and the said F. E. Patterson being to me known and known to me to be the secretary of the American Steel Foundries, the corporation named in and which executed the foregoing certificate, and I having first made known to them and each of them the contents thereof, they did thereupon severally acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

And the said F. E. Patterson being by me duly sworn according to law, on his oath doth depose and

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say, that he is the secretary of the American Steel Foundries, the corporation named in and which executed the foregoing certificate; that the seal affixed to the foregoing certificate is the corporate seal of said corporation, the same being well known to him; that it was so affixed by order of said corporation; that William V. Kelley is the president of said corporation; that he saw the said William V. Kelley as such president, sign the said certificate and affix said seal thereto and deliver said certificate and hear him declare that he signed, sealed and delivered the same as the voluntary act and deed of said corporation by its order and by authority of its Board of Directors for the uses and purposes therein expressed, and that this deponent signed his name thereto at the same time as a subscribing witness.

And he further said that the written assent of stockholders hereto appended is signed either in person or by proxy, duly constituted, and thereunto duly authorized by more than two-thirds in interest of each class of stockholders having voting powers.

F. E. PATTERSON.

Subscribed and sworn to before me
the day and year aforesaid, at Jersey City, N. J.

Master in Chancery of New Jersey.

All of which I hereby certify.

Master in Chancery of New Jersey.

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(*Exhibit B.*)

RESOLUTIONS OF DIRECTORS,

JANUARY 3D, 1908.

WHEREAS, the Committee appointed December 6, 1907, has this day submitted its report with reference to a proposed change in the character and amount of the authorized and outstanding capital stock of this corporation; now on motion made and duly seconded,

Resolved, that said report be and the same is hereby adopted;

Resolved further, that the Board of Directors of this Corporation deem it advisable to decrease the authorized capital stock of this corporation from $37,650,000, divided into 376,500 shares of the par value of $100 each, and consisting of $19,540,000 par value of preferred stock and $18,110,000 par value of common stock, to $17,184,000 divided into 171,840 shares of the par value of $100 each, all of one class and kind, without distinction or preference between any of such shares; and to accomplish such reduction by calling in for cancellation and retirement the present outstanding preferred stock, and issuing and delivering and paying to and for each share of such preferred stock so surrendered, cancelled and retired, (1) $77.00 par value of said proposed stock for each $100 par value of the present preferred stock, (2) the debenture bonds of the Company to be dated February 1, 1908, payable as to principal fifteen years from such date, and bearing interest at four per cent per annum, payable semi-annually, subject to such terms and in such form as the Board of Directors shall determine, to the amount of $20.00 par value for each $100 par value of such preferred stock, and (3) an amount in cash equal to $3.00 for each $100 par value of such

preferred stock; and by calling in for cancellation and retirement the present outstanding common stock, and issuing and delivering and paying to and for each share of such common stock so surrendered, cancelled and retired $25.00 par value of said proposed stock for each $100 par value of the present common stock, and to appoint a Committee with full power to prepare and carry out the plan set forth in said resolutions; and

Resolved further, that the Board of Directors of this corporation hereby declare that they deem it advisable to decrease and change the authorized Capital Stock from $37,650,000, divided into 376,500 shares of the par value of $100 each, and consisting of $19,540,000 par value of preferred stock and $18,110,000 par value of common stock, to $17,184,000 divided into 171,840 shares of the par value of $100 each, all of one class and kind, without distinction or preference between any of such shares, and for that purpose, that Article IV of the Certificate of Incorporation of this Company, now reading as follows:

"IV. The total authorized capital stock of the corporation is thirty-seven million, six hundred and fifty thousand dollars ($37,650,000) divided into three hundred and seventy-six thousand five hundred shares of the par value of one hundred dollars each. Of such total authorized capital stock one hundred and ninety-five thousand, four hundred shares, amounting to nineteen million, five hundred and forty thousand dollars ($19,540,000) shall be preferred stock, and one hundred eighty-one thousand, one hundred shares, amounting to eighteen million one hundred and ten thousand dollars ($18,110,000) shall be common stock.

"From time to time the preferred stock and the common stock may be increased according to law, and may be issued in such amounts and proportions as shall

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be determined by the Board of Directors, and as may be permitted by law."

"The holders of the preferred stock shall be entitled to receive when and as declared, from the surplus or net profits of the corporation, yearly dividends at the rate of six per centum per annum, and no more, payable quarterly on dates to be fixed by the by-laws. The dividends on the preferred stock shall be cumulative and shall be payable before any dividend on the common stock shall be paid or set apart, so that, if in any year dividends amounting to six per cent shall not have been paid thereon, the deficiency shall be payable before any dividends shall be paid upon or set apart for the common stock."

"Whenever all cumulative dividends on the preferred stock for all previous years shall have been declared and shall have become payable, and the accrued quarterly installment for the current year shall have been declared, and the Company shall have paid such cumulative dividends, for previous years and such accrued quarterly installments, or shall set aside from its surplus or net profits a sum sufficient for the payment thereof, the Board of Directors may declare dividends on the common stock, payable then or thereafter, out of any remaining surplus or net profits."

"In the event of any liquidation or dissolution or winding up (whether voluntary or involuntary) of the corporation, the holders of the preferred stock shall be entitled to be paid in full both the par amount of their shares, and the unpaid dividends accrued thereon before any amount shall be paid to the holders of the common stock; and after the payment to the holders of the preferred stock of its par value, and the unpaid accrued dividends thereon, the remaining assets and funds shall be divided and paid to the holders of the common stock according to their respective shares."

be amended so as to read as follows:

"IV. The total authorized capital stock of the corporation is seventeen million, one hundred and eighty-four thousand dollars ($17,184,000), divided into one hundred and seventy-one thousand eight hundred and forty shares of the par value of one hundred dollars each."

"From time to time the stock of the Company may be increased or reduced, according to law, and may be issued in such amounts and proportions as shall be determined by the Board of Directors and as may be permitted by law."

and that the certificate of incorporation of the American Steel Foundries, as amended, shall read as set forth in the copy thereof submitted to the Board of Directors at this meeting and appended to these minutes marked Exhibit 1.

Resolved further, that Elbert H. Gary, Charles Miller, Edward F. Goltra, George B. Leighton, Edward Shearson and Richard H. Swartwout be and hereby they are appointed a Committee, with full power to such Committee or a majority thereof (1) to determine in their absolute discretion whether the plan proposed and set forth in the circular to the stockholders, and in the resolutions this day adopted by the Board of Directors, is practicable and can be made effective; (2) to make all necessary arrangements with the Guaranty Trust Company; (3) to make application for listing Certificates of Deposit; and (4) to do any and all things in their judgment necessary or advisable for the purpose of carrying out the said plan or abandoning the same if it cannot be made effective by reason of the failure of the stockholders to approve, or otherwise.

Resolved further, that a special meeting of the stockholders of this corporation shall be and the same

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is hereby called, for the purpose of taking action on the foregoing changes, amendment and reduction in the capital stock of the Company, to be held at the office of the Company in Jersey City, New Jersey, on the 8th day of February, A. D. 1908, at the hour of twelve o'clock, Noon, and that the Secretary give due notice thereof, in accordance with the By-Laws of the Company, and the statute in such case made and provided.

Resolved further, that for the purpose of holding such stockholders' special meeting, the Transfer Books of both the common and preferred stock of this corporation be closed at the close of business on Thursday, January 23rd, 1908, to reopen on Monday, the 10th day of February, 1908.

(*Exhibit C.*)

RESOLUTIONS OF STOCKHOLDERS, JUNE 12TH, 1908.

RESOLVED, that the authorized capital stock of this Company be reduced from thirty-seven million, six hundred and fifty thousand dollars ($37,650,000) and divided into three hundred seventy-six thousand, five hundred (376,500) shares of the par value of one hundred dollars ($100) each, and consisting of nineteen million, five hundred forty thousand dollars ($19,540,000) par value of preferred stock, and eighteen million one hundred ten thousand dollars ($18,110,000) par value of common stock, to seventeen million, one hundred eighty-four thousand dollars ($17,184,000), divided into one hundred seventy-one thousand, eight hundred forty (171,840) shares of the par value of one hundred dollars ($100) each.

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Resolved further, that the capital stock of this company be changed from preferred stock and common stock to an issue of stock all of one class and kind, without distinction between any of such shares.

Resolved further, that such reduction and change in the capital stock of this Company be effected by the retirement, surrender and cancellation of the present outstanding preferred stock and the present outstanding common stock.

Resolved further, the Article IV, of the Certificate of Incorporation be amended so as to read as follows:

"IV. The total authorized capital stock of the corporation is seventeen million, one hundred and eighty-four thousand dollars ($17,184,000), divided into one hundred and seventy-one thousand, eight hundred and forty shares, of the par value of one hundred dollars each."

"From time to time the stock of the Company may be increased or reduced according to law, and may be issued in such amounts and proportions as shall be determined by the Board of Directors and as may be permitted by law."

and that the Certificate of Incorporation, as amended, shall thereupon read as follows:

(See Exhibit "A" prefixed to this certificate.)

Resolved further, that there be issued and delivered to the holders of the present outstanding preferred stock of this Company, except as to $56,000 par value thereof, which is now controlled by the Company, and which is to be retired without participation in the new stock to be issued, in consideration of and upon the surrender and retirement and cancellation of the shares of preferred stock, including all rights to the accumulated dividends thereon:

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FIRST. $77.00 par value of the single issue of stock to be made, as hereinabove provided for, for each $100 par value of the present preferred stock.

SECOND. The Debentures of this Company to be dated February 1st, 1908, payable as to principal fifteen years from such date, bearing interest at the rate of four per cent per annum, payable semi-annually; subject to such terms and in such form as the Board of Directors shall determine, to the amount of $20 par value, for each $100 par value of the present preferred stock.

THIRD. The sum of $3.00 in cash for each $100 par value of preferred stock.

And that there be issued and delivered to the holders of the common stock of this Company, except as to $720 par value thereof, which is now controlled by the Company, and is to be retired without participation on the new stock to be issued, in consideration of and upon the surrender, retirement and cancellation of the shares of common stock, $25.00 par value of the single issue of stock hereinabove provided for, for each $100 par value of the present common stock.

Resolved further, that the Debentures to be issued to the holders of the preferred stock, as hereinabove provided for, and the resolution containing the terms and conditions upon which such Debentures are issued, are and shall be substantially in the following form: (See form of debenture incorporated in following resolutions of Board of Directors.)

Exhibit D32

RESOLUTIONS OF DIRECTORS,

MAY 7TH, 1908.

WHEREAS, there has heretofore been submitted to the stockholders of this Company, under date of January 3, 1908, a plan concerning a change in the character and amount of this Company's authorized and outstanding capital stock, reference to such plan now on file with the Guaranty Trust Company of New York being hereby made for the purpose hereof: and,

WHEREAS, said plan, subject to the approval thereof by the stockholders, provided among other things, for the issue of certain debentures not exceeding in the aggregate the sum of $3,436,800; and,

WHEREAS, the form of said debentures, adopted by this Board at its meeting held January 3, 1908, refers to certain resolutions by this Board specifying the conditions of such debentures:

NOW, THEREFORE, BE IT RESOLVED, that if and when the said plan concerning such change in the character and amount of this Company's authorized and outstanding capital stock shall be approved and adopted by the stockholders and so declared by this Board, the said debentures shall be in due course issued upon the terms and conditions stated therein, and the following:

(*a*) All debentures issued under the hereinbefore mentioned plan of January 3, 1908, and this resolution shall be a direct obligation to this Company, and shall be in the following form, to wit:

Exhibit D32

[DEBENTURE.]

$000. No. 000. $0000.

UNITED STATES OF AMERICA,

STATE OF NEW JERSEY.

AMERICAN STEEL FOUNDRIES.

FOUR PER CENT DEBENTURE.

For value received American Steel Foundries (hereinafter called the "Company"), hereby acknowledge itself to be indebted to the bearer hereof, in the sum of hundred dollars, which sum it hereby promises to pay to the bearer hereof at the office of the Company, or its agency, in the City of New York, on the first day of February, 1923, with interest thereon at the rate of four per cent per annum, payable semi-annually, at its office or agency, in the City of New York, on the first days of August and February in each year from the date hereof, until maturity, upon presentation and surrender of the annexed interest coupons as they severally become due and payable.

This Debenture is one of an issue dated February 1, 1908, of like tenor and date, the issue being Debentures of One Thousand Dollars each, numbered from 1 upward, and Debentures for Five Hundred Dollars each, numbered from A-1 upward, and Debentures for One Hundred Dollars each, numbered B-1 upward, the entire issue being limited to an aggregate principal amount of Three Million Four Hundred and Thirty-six Thousand Eight Hundred Dollars, all of which Debentures have been issued under and in pursuance of, and are subject to, the covenants of the Company expressed in certain resolutions adopted by the Board of Directors of the Company on the seventh day of May, A. D. 1908, a certified copy of which said Resolutions is on file with the Guaranty Trust Company of New

Not valid until countersigned by the Guaranty Trust Company of New York.

Exhibit D32

York, and hereby reference is made to said Resolutions as fully as though herein set forth at length.

Both the principal and interest of this Debenture shall be paid without deduction for any tax or taxes which the Company, its successors or assigns, may be required to pay thereon, or deduct or retain therefrom, by whatsoever authority the same may be levied, the Company hereby agreeing to pay all such taxes.

The Company hereby covenants, in each year, commencing with the year 1913, to retire not less than three hundred and forty-three thousand six hundred and eighty dollars ($343,680) par value of the Debentures then outstanding, under and pursuant to the terms and provisions of said Resolutions.

This Debenture is subject to call and retirement on any interest day at par and accrued interest in the manner and upon the conditions expressed in said Resolutions.

The Company may use and apply any of its accumulated earnings or surplus to retire or redeem, or to purchase in the open market, if possible, for retirement or redemption, said Debentures at a price not to exceed par and interest.

Neither this Debenture nor any of the Coupons for interest thereon, shall be obligatory until the Debentures shall have been authenticated by the certificate endorsed thereon, duly signed by the Guaranty Trust Company of New York, the Trustee named in said Resolutions.

No recourse shall be had for the payment of principal or interest of this Debenture against any stockholder, director or officer, past, present or future, of the American Steel Foundries, either directly or through said Company, whether by virtue of any suit or the enforcement of any assessment or penalty or otherwise howsoever, all liability of stockholders, directors and officers being hereby waived and released by each successive holder of this Debenture.

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IN WITNESS WHEREOF the said American Steel Foundries has caused this Debenture to be signed by its President, or a Vice-President, and its corporate seal to be hereto affixed, and attested by its Secretary, and the *fac simile* signature of its Treasurer to be affixed to the coupons hereto annexed, all as of this first day of February, 1908.

AMERICAN STEEL FOUNDRIES,
By

President.

Attest:

Secretary.

[BACK OF DEBENTURE AND TRUSTEE'S CERTIFICATE.]

No. 000.
AMERICAN STEEL FOUNDRIES.
(Denomination)
Four Per Cent.
Debenture
Principal Due
February 1st, 1923.

---

interest payable
February 1st & August 1st
Principal & Interest
payable in
City of New York
Trustee's Certificate.

This debenture is one of a series of like date and tenor aggregating not to exceed the sum of $3,436,800 described in the Resolutions within referred to.

GUARANTY TRUST COMPANY OF NEW YORK,
Trustee.

By

Vice-President.

Exhibit D32

[FORM OF COUPON]

American Steel Foundries $00. On the first day of (Mo. & Year) will pay to the bearer at its office or agency in the City of New York (number of) Dollars ($00), being six months' interest then due on $000 four per cent Debenture No. 0000.

Treasurer.

(*b*) The total amounts of debentures issued shall aggregate not exceeding three million four hundred thirty-six thousand eight hundred dollars ($3,436,800).

(*c*) Interest shall commence February 1, 1908, and debentures shall be delivered to those entitled to receive same with all interest coupons attached.

(*d*) The debentures shall be issued in denominations of $1,000 each, numbered from 1 upward; for $500 each numbered from A-1 upward; and for $100 each, numbered from B-1 upward, and distribution shall be made in the largest denominations applicable.

(*e*) Debenture equities of less than $100 are to be evidenced by debenture scrip, which provides plainly that it does not bear interest, but may be exchanged in amounts of $100, or multiples thereof, for debentures, having attached thereto interest coupons for interest from February 1, 1908.

(*f*) Debentures aggregating an amount equal to the amount of debenture scrip shall be issued and delivered to the Guaranty Trust Company of New York, as Trustee, or Exchange Agent, for exchange for scrip as herein provided.

(*g*) All debentures under the hereinbefore mentioned plan of January, 3, 1908, shall be subject to call and retirement on any interest day, at par and accrued interest, in the manner and upon the conditions expressed in this resolution.

(*h*) Until the payment of the principal of the debentures issued under the hereinbefore mentioned plan of January 3, 1908, this Company agrees, at all times,

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to maintain an office or agency in the City of New York, where debentures and interest coupons may be presented for payment, and where notices or demands in respect of such debentures or interest coupons may be served.

(*i*) The Guaranty Trust Co. of New York is hereby appointed Registrar for such debentures and debenture scrip, and Disbursing Agent for the payment of the principal and interest of said debentures when and as same become due and payable, such payments to be made from funds furnished to said Guaranty Trust Co. of New York by this Company, as herein provided.

(*j*) This company agrees and covenants that it will duly and punctually pay the principal and interest of every debenture issued under the hereinbefore mentioned plan of January 3, 1908, at the dates and the place and in the manner mentioned in such debentures, or in the interest coupons thereto belonging, and this resolution according to the true intent and meaning thereof, and without deduction from either principal or interest for any tax or taxes which this Company, its successors or assigns, or the Registrar or Disbursing Agent, may be required to pay, deduct or retain therefrom, under any present or future law of the United States, or of any state or county or municipality therein.

(*k*) The interest on said debentures shall be payable only upon presentation and surrender of the several coupons for such interest as they respectively mature, and when paid, such coupons shall forthwith be cancelled.

(*l*) This Company particularly reserves the right to use and apply at any time any of its accumulated earnings or surplus, to retire or redeem or purchase for retirement or redemption any or all of said debentures at the time outstanding at a price not exceeding par and accrued interest.

Exhibit D32

(*m*) This Company agrees and covenants that, commencing not later than the calendar year 1913, and during each calendar year thereafter, until all the debentures issued hereunder shall have been acquired, paid or satisfied, to retire, at not exceeding par and accrued interest, not less than three hundred forty-three thousand six hundred eighty dollars ($343,680) of the debentures then outstanding.

(*n*) Debentures for retirement shall be, if possible, purchased in the open market, providing such purchase price shall not exceed par and accrued interest. If they cannot be so purchased, this Company, in writing, shall request the Trustee or Disbursing Agent to draw by lot a specified aggregate amount of such debentures for such redemption or retirement, and the Trustee, by such fair and impartial method as it may for itself determine, shall draw and determine by lot the numbers of the then outstanding debentures to the aggregate amount so requested, and such drawing shall take place not less than thirty days nor more than sixty days prior to February 1st or August 1st, as may be determined by this Company in its request.

(*o*) As promptly as possible after such drawing the Trustee shall advertise at least once in each calendar week, for two successive weeks, in a newspaper published in the City of New York, a newspaper published in the City of St. Louis, Missouri, and a newspaper published in the City of Chicago, Illinois, a notice addressed to the holders of debentures issued hereunder, specifying the distinctive number of the debentures so drawn for redemption, and stating that such debentures have been drawn for redemption, and that on a date designated in such notice (which date shall be on the first day of February or the first day of August next after such notice shall have been advertised for the period aforesaid) such specified debentures will become and will be due and payable at par and the

Exhibit D32

accrued interest to the date of payment specified in such notice.

(*o-l*) Upon such advertisement of such notice, the debentures therein specified shall become and shall be due and payable on the date designated in such notice, at the office of the Trustee in the City of New York, at par, together with the interest to that date accrued from the then last matured interest instalment. From and after the date so designated, no interest shall be payable for or on account of any debentures so specified or any coupons thereof maturing after such date.

(*p*) On and after the date of payment designated in such notice, the Trustee shall take up, and shall pay, at the rate aforesaid, out of the moneys which shall have been deposited by the Company with the Trustee for that purpose, the debentures that shall have been drawn at the request of the Company as aforesaid, and such debentures, together with their attached interest coupons, shall forthwith be cancelled and delivered to this Company.

(*q*) Whenever this Company shall request the Trustee to draw by lot debentures for redemption or retirement, it shall accompany its request with sufficient funds for the payment of such debentures, and unpaid interest accruing to the date of retirement, or any undertaking, or security for the funds satisfactory to the Trustee.

Be It Further Resolved, that prior to any issue of the said debentures a certified copy of this resolution be deposited with the Guaranty Trust Co. of New York.

Resolved further, that for equities in the new issue of stock issuable for an amount less than one share of the par value of $100, there shall be issued Stock scrip, which scrip shall not be entitled to share in any dividends that may be declared, but may be exchanged for

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stock, in amounts of $100, or multiples thereof, as provided in such scrip.

That the form of Stock scrip to be issued for such equities, is and shall be substantially in the following form:

No. $

STOCK SCRIP

AMERICAN STEEL FOUNDRIES.

CERTIFICATE OF FRACTIONAL INTEREST IN ONE SHARE STOCK.

This is to Certify that is entitled to |100 Dollars of interest in one share of the capital Stock of the American Steel Foundries.

Stock covering all outstanding Certificates of Fractional Interest or Stock Scrip, are lodged with the undersigned as Trustee or Exchange Agent.

This Certificate is not transferable on the books of the American Steel Foundries or the undersigned, but may be assigned as provided on the reverse side hereof.

This Stock Scrip is not entitled to share in any dividend which may be declared on the stock it represents, but may together with other light certificates altogether aggregating not less than One Hundred Dollars or multiples thereof be evenly exchanged for an equal amount in shares of the stock of the American Steel Foundries, at the face value of One Hundred Dollars each, together with all unpaid dividends declared and due in respect of the shares represented by the Fractional Certificates so surrendered.

In exchanging Stock Scrip for stock, odd amounts in excess of $100 or multiples thereof, will be evidenced by new Stock Scrip similar in all respects to this except as to amount.

New York, ,190 .

THE TRUST COMPANY OF AMERICA,

Trustee,

Trust Officer.

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For value received hereby sell, assign and transfer unto
all right, title and interest in the within Certificate, and the Stock represented thereby.

Dated

In presence of

And for Debenture equities of less than $100 there shall be issued Debenture scrip, which will not bear interest, but may be exchanged in amounts of $100 or multiples thereof, for debentures having attached thereto interest coupons, for interest from the issue date of such Debentures, as therein provided.

That the form of Debenture scrip to be issued for such equities shall be substantially in the following form:

[DEBENTURE SCRIP FORM]

No. 000 $ 000

AMERICAN STEEL FOUNDRIES DEBENTURE SCRIP.

This is to certify is entitled to an equity of |100 Dollars in certain Fifteen Year Debentures at par, dated February 1st, 1908, and bearing interest at the rate of Four per cent per annum payable semi-annually on August 1st and February 1st from the date thereof. Debentures covering all outstanding Debenture Scrip are lodged with the undersigned as Trustee or Exchange Agent.

The total issue of Debentures, of which the foregoing are a part, aggregate not exceeding $3,436,800.

This Certificate is not transferable on the books of the Company or the undersigned, but may be assigned as provided on the reverse side hereof.

This Debenture Scrip does not bear interest, but may, together with other like certificates altogether aggregating not less than $100 or multiples thereof,

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be evenly exchanged for an equal amount of Debentures of $100.00 or multiples thereof, having attached thereto interest coupons for interest from the original date of issue, viz., February 1st, 1908.

In exchanging Debenture Scrip for Debentures odd amounts in excess of $100.00 or multiples thereof will be evidenced by new Debenture Scrip similar in all respects to this except as to amount.

New York, 190

GUARANTEE TRUST COMPANY OF NEW YORK.

Vice-President.

Resolved further, that the certificate of change, in the nature and character of the capital stock of this Company, and of the reduction thereof, as hereinabove provided for, shall be duly filed with the Secretary of State, of the State of New Jersey, in accordance with the statutes in such case made and provided, and that the time for filing such certificate be determined by the Board of Directors of this Company.

Resolved further, that any and all surplus arising from the reduction, retirement and cancellation of the present outstanding preferred stock, and the present outstanding common stock, of this Company, and the accumulated surplus existing on July 31st, 1907, be applied and devoted as follows:

A. To the cash payment, as above provided, to the holders of the present preferred stock, in part consideration of the surrender and cancellation of each $100 par value of the preferred stock.

B. On account of the Debentures to be issued in part consideration for the surrender and cancellation of the preferred stock; and

C. To the reduction of cost of property.

Resolved further, that any surplus earnings arising from the business and operations of this Company

since August 1st, 1907, be applicable to the payment of dividends upon the new single issue of stock to be made, as hereinabove provided for, if and as declared by the Board of Directors of this Company; or to such other purposes of the Company, as the Board of Directors may determine.

Resolved further, that the Board of Directors of this Company, and its officers, be and are hereby authorized and directed to do or cause to be done any and all things, and take all action, necessary and proper to completely and effectually carry out each and all of the foregoing actions, resolutions and proceedings.

(*Exhibit D.*)

ASSENT OF STOCKHOLDERS REFERRED TO IN THE FOREGOING CERTIFICATE.

The undersigned, being more than two-thirds in interest, of each class of stockholders of American Steel Foundries having voting powers, at a special meeting of the stockholders of said corporation regularly called for that purpose, voted in favor of the change in and reduction of the capital stock of said American Steel Foundries, and in favor of the amendments, changes and alterations to the certificate of incorporation in the foregoing amendment fully set forth; and we do now, pursuant to law, by our proxies duly constituted and thereunto duly authorized, give our written assent to said change in and reduction of the capital stock of American Steel Foundries, and to said amendments, changes and alterations to the certificate of incorporation of American Steel Foundries, and to each and every one of them, and to the amendment, change and alteration of the certificate of incorporation to read

as set forth in "Exhibit A" prefixed to the foregoing certificate of amendment.

Dated June 29th, 1908.

Name	Shares of Stock Preferred	Common
* * *	*	*
Total	153,312	140,934

All the above stockholders by

ELBERT H. GARY,
CHARLES MILLER,
EDWARD F. GOLTRA,
GEORGE B. LEIGHTON,
EDWARD SHEARSON,
RICHARD SWARTWOUT,

Proxies.

In the presence of
Thomas G. Boone.

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

Be it remembered, that on this 29th day of June, 1908, before me, the subscriber, a Master in Chancery of the State of New Jersey, personally appeared Thomas G. Boone, who being by me duly sworn according to law, on his oath, saith, that he knows Elbert H. Gary, Charles Miller, Edward F. Goltra, George B. Leighton, Edward Shearson and Richard H. Swartwout to be the duly authorized proxies for the several stockholders of American Steel Foundries, whose names are signed by proxy to the foregoing assent; that he saw the said Elbert H. Gary, Charles Miller, Edward F. Goltra, George B. Leighton, Edward Shearson and Richard H. Swartwout, as attorneys, agents and proxies for said stockholders sign and deliver the foregoing assent of stockholders as such attorneys, agents and proxies for said persons,

respectively, and as their several voluntary act and deed for the uses and purposes therein expressed; and that he, the said Thomas G. Boone, subscribed his name to the said assent at the same time as an attesting witness.

Subscribed and sworn to before me
the day and year aforesaid at
Jersey City, New Jersey.

.....

Master in Chancery of New Jeresy.

Note: Publication of foregoing certificate according to law was duly made and proof thereof filed in the office of the Secretary of State of New Jersy.

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AMERICAN STEEL FOUNDRIES,

BOARD OF DIRECTORS.

Adjourned Regular Meeting, June 30, 1908.

On motion regularly made and seconded, the following resolution was thereupon unanimously adopted:

WHEREAS, the Special Committee appointed by the Board of Directors of this Company on January 3rd, 1908, with reference to the promulgation and consummation of the plan of that date, for a change in and reduction of the capital stock of this Company, did, at the meeting of the Board of Directors held on Wednesday, the 24th day of June, 1908, through its Chairman, Judge E. H. Gary, report that the plan submitted to the stockholders under date of January 3rd, 1908, had, at the adjourned stockholders' meeting held on June 12th, 1908, been adopted and approved; and

WHEREAS, the Board of Directors, in consequence of the approval and adoption of said plan by the stock-

Exhibit D33

holders of the Company, directed the certificates of change in and reduction of the capital stock, and the amendment of the Amended Certificate of Incorporation, so adopted and approved by its stockholders, be filed with the Secretary of State of New Jersey, in accordance with the law, and such certificate has, to wit, on the 29th day of June, 1908, been duly filed with the Secretary of State, at Trenton, New Jersey;

WHEREAS, it is now desired to in all respects carry on and perfect said plan in all its details; now, therefore, be it

RESOLVED:

First: That this Board of Directors declare and hereby does declare that the plan submitted to the stockholders of the American Steel Foundries, under date of January 3rd, 1908, for a change in and reduction of the capital stock of the Company, and for the amendment of the Amended Certificate of Incorporation, was duly adopted and approved by the stockholders of this Company.

Second: That the necessary and requisite certificate of the Company for such change in and reduction of the capital stock of this Company, and the amendment of its Amended Certificate of Incorporation, was duly filed with the Secretary of State, for the State of New Jersey, as required by law, on June 29th, 1908.

Third: That publication of the certificate so filed with the Secretary of State, be properly made by the officers of the Company under the direction of the General Counsel of the Company, as required by law.

Fourth: That due notice be given to the Guaranty Trust Company of New York, Registrar, and The Trust Company of America, New York, Transfer Agent, of the adoption and approval of the said plan

of January 3rd, 1908, by the stockholders of the Company.

Fifth: That the treasurer of this Company forthwith surrender and cancel the certificates for fifty-six thousand dollars ($56,000.00) par value, of the preferred stock of this Company, and seven hundred and twenty dollars ($720.00) par value, of the common stock of this company.

Sixth: That for the purpose of in all respects consummating and carrying out the change in and reduction of the capital stock of this Company, as proposed to and approved by the stockholders of this Company, there be issued and delivered to the Guaranty Trust Company of New York, or its nominee:

A. Certificates for one hundred and seventy-one thousand eight hundred and forty (171,840) shares of the new capital stock of the Company, of the par value of one hundred dollars ($100.00) each, aggregating seventeen million, one hundred and eighty-four thousand dollars ($17,184,000.00), duly signed and registered.

B. Three million, four hundred and thirty-six thousand, eight hundred dollars ($3,436,800.00), par value, of the debentures of the Company proposed to be issued under said plan of January 3rd, 1908, dated February 1st, 1908, payable as to principal fifteen years from such date, and bearing interest at the rate of four per cent per annum, payable semi-annually, duly signed by the officers of the Company, and sealed with its corporate seal, and in such denominations as is practicable for the purposes required.

C. The sum of five hundred and fifteen thousand five hundred and twenty dollars ($515,520.00) in cash or check, for payment to the stockholders, in accordance with said plan of January 3rd, 1908.

Exhibit D33

Seventh: That the said stocks, bonds and cash, next hereinabove directed to be issued and delivered to the Guaranty Trust Company of New York, be delivered and disposed of by said Guaranty Trust Company of New York, in accordance with the terms and provisions of the said plan of January 3rd, 1908, as follows:

A. To the owners and holders of certificates for each one hundred dollars ($100.00), par value, of the preferred stock of this Company, outstanding on June 28th, 1908, or deposit certificate representing the same, in consideration and upon the surrender thereof, together with all rights to any accumulated dividends thereon, there be delivered seventy-seven dollars ($77.00) par value, of said new stock of this Company; twenty dollars ($20.00), par value, of the said debentures of this Company, and three dollars ($3.00) in cash, aggregating the issue and delivery to the holders of the said entire outstanding preferred stock of this Company of thirteen million, two hundred and thirty-one thousand, six hundred and eighty dollars ($13,231,680.00), par value, of this Company, and three million, four hundred and thirty-six thousand, eight hundred dollars ($3,436,800.00), debentures of this Company, and five hundred and fifteen thousand, five hundred and twenty dollars ($515,520.00) in cash.

B. To the owners and holders of certificates for each one hundred dollars ($100.00), par value, of the common stock of this Company, outstanding on June 28th, 1908, or deposit certificates representing the same, in consideration of and upon the surrender thereof, there be delivered, twenty-five dollars ($25.00) par value, of the said new stock of this Company, aggregating the issue and delivery to the holders of the said entire outstanding common stock

of this Company of three million, nine hundred and fifty-two thousand, three hundred and twenty dollars ($3,952,320.00) par value, of the said new stock of this company.

Eighth: For all equities in the new stock of less than one share of the par value of one hundred dollars, and for all equities in the debentures of less than one hundred dollars par value, there shall be issued and delivered to the persons entitled thereto, respectively, stock scrip and debenture scrip, in accordance with the said plan of January 3rd, 1908.

Said stock scrip shall not entitle the holder thereof to any dividends, but such scrip may be exchanged for stock in amounts of one hundred dollars ($100.00), or multiples thereof, as therein provided.

Said debenture scrip shall not entitle the holder thereof to interest thereon, but such debenture scrip may be exchanged in amounts of one hundred dollars ($100.00), or multiples thereof, for debentures having attached thereto interest coupons for interest from the issue date of such debentures.

Ninth: That there be paid to the Guaranty Trust Company of New York, in due course, but not later than July 31st, 1908, the further sum of sixty-eight thousand, seven hundred and thirty-six dollars ($68,736.00) to be used and applied by it towards the payment of the first semi-annual interest due and payable on account of the debentures; said Guaranty Trust Company of New York to detach and cancel, upon payment of said semi-annual interest, the interest coupon numbered one, due August 1st, 1908, and attached to said debenture.

Tenth: That the Guaranty Trust Company of New York be and it hereby is requested to make or cause to be made, delivery and payment of the new stock,

debentures and cash, as hereinabove directed to be delivered by it, in exchange for and upon the surrender of the certificates for preferred stock and common stock of this Company, outstanding on June 28th, 1908, or deposit certificates representing the same, as hereinabove set forth and as in said plan of January 3rd, 1908, is provided for; and that said Guaranty Trust Company of New York notify all the holders of certificates for such preferred stock and common stock of this company, outstanding on June 28th, 1908, or deposit certificates representing the same, of the time, place and manner of the exchange and surrender of their stock for the new stock, debentures and cash deliverable therefor.

That the officers of this Company also notify the holders of certificates for such preferred stock and common stock, outstanding on June 28th, 1908, of the time, place and manner of the exchange and surrender of their said stock, for the new stock, debentures and cash of this Company, as hereinabove provided for, and in accordance with the terms and provisions of said plan of January 3rd, 1908.

Eleventh: That E. H. Gary be and he is hereby empowered to arrange for the listing of the new stock, and also, if desired, of the debentures and outstanding bonds of this Company, with the New York Stock Exchange, and for the removal from the list of the New York Stock Exchange of the preferred and common stock of this Company, outstanding on June 28th, 1908, and the deposit certificates therefor; and for that purpose to make all necessary applications, and to submit all and any required opinions, balance sheets, statements and accounts and do anything necessary and proper in and about the listing of the securities of the Company, as herein authorized.

Exhibit D33

Twelfth: That the report of the Special Committee composed of Messrs. E. H. Gary, Charles Miller, Edward F. Goltra, George B. Leighton, Edward Shearson and Richard H. Swartwout, be adopted and the Committee be continued for any further action; and in adopting and continuing the Committee the Board of Directors of this Company hereby expresses its keen appreciation and gratitude for the patience and ability exercised in the successful accomplishment of the plan so submitted to and approved by the stockholders of this Company; and be it further

RESOLVED, that The Trust Company of America be and it hereby is nominated and appointed the transfer agent of the stock of the Company, and that the Guaranty Trust Company of New York be and it hereby is appointed registrar of the stock of the Company; and be it further

RESOLVED, that certified copies of this resolution be furnished to the Corporation Trust Company, The Trust Company of America, Guaranty Trust Company of New York, and the New York Stock Exchange.

On motion regularly made and seconded, it was duly

RESOLVED, that not later than July 15th, 1908, notice shall be given to all the holders of the preferred and common stock of the Company outstanding on June 28th, 1908, and deposit certificates issued by the Guaranty Trust Co. of New York, representing same, that on presentation of the said stock or deposit certificates at the office of said Trust Company, new securities and cash may be had in exchange as provided in the plan of January 3rd, 1908; and be it further

RESOLVED, that for the purpose of exchanging the preferred and common stock of this Company out-

standing June 28th, 1908, and the deposit certificates issued by the Guaranty Trust Co. of New York representing same, for the cash and securities as provided in the plan of January 3rd, 1908, approved June 12th, 1908, the transfer books for both the common and preferred stock outstanding on said June 28th, 1908, and the transfer books for said deposit certificates be closed at the close of business on July 15th, 1908.

Exhibit D34.

AMERICAN STEEL FOUNDRIES.

To Stockholders and Holders of Deposit Certificates:

Referring to the plan for a change in the character and amount of this Company's Capital Stock submitted under date of January 3, 1908, and adopted and approved by the Stockholders June 12, 1908, the Committee begs to say, the money and new securities provided for in said plan have been delivered to the Guaranty Trust Co. of New York as Exchange Agent, and the Company's Stock and the Deposit Certificates for same issued by the Guaranty Trust Co. may now be presented to that Company for exchange for the new securities and money to which they are entitled to under said plan.

The ratio of exchange is as follows:

Each $100 par of Preferred Stock is entitled to
$77 par New Stock,
$20 par 4 per cent Debentures,
$3 cash.

Each $100 par of Common Stock is entitled to
$25 par New Stock.

Exhibit D34

Fractional shares of Stock and Debentures of less than $100 par will be evidenced by Scrip, in accordance with the terms of the plan.

Transfer books for both Common and Preferred Stock, and transfer books for the Deposit Certificates issued by the Guaranty Trust Company, of New York, representing the same, will be closed at the close of business on July 15, 1908.

Stock and Deposit Certificates should be endorsed in blank in exactly the name issued, properly witnessed, and unless delivered personally, sent safely to the Guaranty Trust Co. of New York, No. 28 Nassau Street, New York, N. Y.

Names in which new stock and checks are to be issued should be carefully given together with permanent addresses, also names and addresses to which checks, stock and debentures are to be sent.

Debentures, unless otherwise ordered, will be sent by express at their approximate market value at the expense and risk of the owner.

Particular attention is called to the appended circular of the Guaranty Trust Company of New York.

Stockholders and Depositors are requested to forward their certificates promptly for exchange as above outlined.

Respectfully,
ELBERT H. GARY,
CHARLES MILLER,
EDWARD F. GOLTRA,
GEORGE B. LEIGHTON,
EDWARD SHEARSON,
RICHARD H. SWARTWOUT,
Committee.

Referring to the above, the Guaranty Trust Company of New York is now prepared to deliver the

Exhibit D34

cash and new securities, to be issued under circular of January 3rd, of the American Steel Foundries, upon surrender of its Certificates of Deposit for Preferred and Common Stock of the American Steel Foundries.

All Certificates of Deposit surrendered must be properly endorsed in blank, dated and signature of assignor witnessed.

Where new securities are desired in names other than that appearing upon Certificates of Deposit, the signature of the assignor must be guaranteed by a New York Stock Exchange house, a bank having a New York correspondent or notarially acknowledged, with County Clerk's Certificate attached thereto.

New securities, deliverable against surrender of Certificates of Deposit for *Preferred Stock* received by mail or express, will be forwarded by express at the approximate market value of the Debenture Bonds, at the expense and risk of the depositor in the absence of specific instructions as to the manner of shipment. New securities deliverable against surrender of Certificates of Deposit for *Common Stock* will be forwarded by express at a nominal valuation at the expense and risk of the depositor, unless otherwise instructed.

GUARANTY TRUST COMPANY OF NEW YORK,
28 Nassau Street,
New York, N. Y.

New York, July 11, 1908.

Exhibit D35.

AMERICAN STEEL FOUNDRIES,

BOARD OF DIRECTORS.

Regular Meeting, Sept. 3rd, 1908.

Thereupon a request was presented from the Guaranty Trust Company of New York, asking that its action in certifying and delivering the 4% Debentures of this Company dated February 1, 1908, be approved; after which,

On motion regularly made and seconded, it was duly resolved that the action of the Guaranty Trust Company of New York in certifying to Three Million, Four Hundred and Thirty-six Thousand, Eight Hundred Dollars ($3,436,800.00) of the 4% Debentures of this Company dated February 1, 1908, as requested in resolution passed by this Board at its meeting June 30, 1908, and the delivery of said debentures to the Reorganization Department of the said Guaranty Trust Company for distribution to the stockholders of this Company entitled to same in accordance with the plan of January 3, 1908, for a change in the character and amount of this Company's capital stock, be and the same hereby is in all respects ratified, approved and confirmed.

Exhibit C36.

AMERICAN STEEL FOUNDRIES.

Chicago, Oct. 7th/08.

Mr. Thomas C. Lazear,
450 Fourth Ave.,
Pittsburgh, Pa.

Dear Sir:

I note with pleasure that the 71 shares of our old preferred stock which you own personally has been exchanged for the new stock, debentures, and cash under the plan of January 3rd. I also note that the 102 shares of old preferred, belonging to the estate of which you are one of the executors, is still outstanding. About 95% of both kinds of stock has been exchanged, and we would like to have the rest of it come in as soon as possible.

I therefore beg to ask whether you and your co-executors cannot see your way clear to forward that belonging to the estate.

Trusting that you can do this, and hoping to hear from you to that effect, I am,

Yours truly,
F. E. PATTERSON,
Secretary.

FEP/W

Exhibit C37.

AMERICAN STEEL FOUNDRIES.

Chicago, Nov. 25th/08.

Thomas C. Lazear,
St. Nicholas Bldg.,
Pittsburg, Pa.

Dear Sir:

Enclosed herewith find an envelope which we addressed to you c/o The Trust Co. of America, N. Y. C., and which was returned to us as being refused by the Co.

The envelope is addressed as shown on a list of our stockholders furnished by our Transfer Agent. I note that your address is shown on previous lists was St. Nicholas Bldg., Pittsburg, Pa., and I am therefore sending this letter to that address.

Kindly advise me how your address should be shown so that I may advise our Transfer Agent and greatly oblige

Yours truly,
F. E. PATTERSON,
Sec'y and Treas.
WE

WE/D
encs

Exhibit C38.

June 4th, 1910.

Mr. F. E. Patterson,
Treas. American Steel Foundries,
Commercial Nat'l Bank Bldg.,
Chicago, Ill.

Dear Sir:

The executors of Alice C. Lazear, deceased, have been expecting the dividends due on her 102 shares of the preferred stock held by her in your Company, and on which no dividend has been paid for several years. The executors consist of myself, Jesse T. Lazear, and U. S. Judge Charles P. Orr (though the latter is not named in the certificate of stock). For good reasons it was not deemed advisable by them to accept the proposition which I, as to my individual stock and others, accepted providing for an exchange of the original stock for cash, debentures, and other stock in the re-organized Company. The preferred stock being cumulative, the dividends due on it must amount to a considerable sum.

We hope we will not be put to the annoyance and expense of litigation in this matter, but as executors we may be compelled to do so, depending on what your reply may be.

Awaiting an early answer.

Yours truly,

THOS. C. LAZEAR.

TCL.

Exhibit C39.

AMERICAN STEEL FOUNDRIES

General Offices,

Commercial National Bank Building, Chicago.

Chicago, June 11th, 1910.

Mr. Thos. C. Lazear,
St. Nicholas Bldg.,
Pittsburg, Pa.

Dear Sir:

Referring to yours of the 4th, I beg to say I have referred same to our General Counsel, Mr. Max Pam, 71 Broadway, New York, to whom kindly address any further correspondence relative to the matter.

Yours truly,
F. E. PATTERSON,
Sec'y. & Treas.

FEP/M

Exhibit D40.

June 16th, 1910.

Mr. F. E. Patterson,
Treasurer of American Steel Foundries,
Commercial Nat'l Bank Bldg.,
Chicago, Ill.

Dear Sir:

Relative to the 102 shares of preferred stock in your Company belonging to the estate of Alice C. Lazear, which has been the subject of recent correspondence between you and myself, I beg to say that I have not heard from Mr. Max Pam, to whom you

Exhibit D40

referred my letter of the 4th inst. That letter stated the case fully and Mr. Pam should reply to it either to you or to me. But as I have not heard from him, I presume he does not intend to correspond with me on the subject. Possibly he may not have had time to give it attention. In the meantime, however, I shall ask you for information which I may need in making settlement, or in preparing for legal proceedings, if such should become necessary, though I hope such will not be necessary. I wish to ask for information in answer to the following questions:

First: What was the aggregate amount of the outstanding *preferred* stock at the date of the dividend recently declared?

Second: What was the total amount of the dividends so declared, or the whole amount set apart for their payment?

We claim that not one cent of this money should have gone to the new or unpreferred stockholders until the preferred stockholders should have been first paid the amount due them. Our rights were utterly disregarded in this matter, and the Company is liable to us for breach of contract and violation of its duty in thus taking what belonged to us and giving it to others.

We had a similar experience some years ago with the Westinghouse Electric & Machine Company. That Company, after its reorganization, undertook to pay dividends to its assenting stockholders, and to ignore the original stockholders who did not assent, but they saw their mistake when we notified them of our purpose to file a bill for an accounting and for an injunction, and made reparation satisfactory to our client. In that case the Company bought his stock. We have no desire to part with our stock, considering

Exhibit C41

it a good investment and well secured. But a proposition from the Company to buy it (while we wish to make none) might be taken into consideration in order to settle up Mrs. Lazear's estate.

As stockholders we are entitled to receive the information above requested, and you are the proper officer to apply to for it. Trusting, therefore, that you will not consider us troublesome in asking for the information, I remain,

Yours truly,
THOS. C. LAZEAR.

P. S. I will also thank you to state when the last dividend was paid on this stock and the amount.

Yours, etc.,
THOS. C. LAZEAR.

Exhibit C41.

AMERICAN STEEL FOUNDRIES

General Offices,

Commercial National Bank Building, Chicago.

Chicago, June 18th, 1910.

Mr. Thos. C. Lazear,
St. Nicholas Bldg.,
Pittsburgh, Pa.

Dear Sir:

Replying to yours of the 16th, I beg to say that I learn our General Counsel has been away from New York during the past week. I also understand that he will return to his office early the coming week. I

Exhibit C42

am, therefore, referring your latest letter to him in the belief that you will hear from him in reply.

Yours truly,

F. E. PATTERSON,

Sec'y. & Treas.

FEP/M

Exhibit C42.

EMPIRE BUILDING,
71 Broadway,
New York.

June 24, 1910.

Dear Sir:

Upon my return here this week I find two letters written by you to Mr. Patterson of the American Steel Foundries, one dated June 4, the other dated June 18th. Mr. Patterson also sends me copies of his replies thereto.

The matter, mentioned in your letter, it seems to me cannot be satisfactorily discussed by correspondence, and I should be glad of an opportunity to talk the matter over with you. Are you likely to be here in the near future, and if so, cannot we arrange for an interview on the subject?

Yours truly,

MAX PAM.

Thos. C. Lazear, Esq.,
Pittsburgh, Pa.

Exhibit D43.

June 28th, 1910.

Mr. Max Pam,
General Counsel of American Steel Foundries,
#71 Broadway,
New York, N. Y.

Dear Sir:-

I am in receipt of your favor of the 24th inst. relating to claim of the Executors of Alice C. Lazear, deceased, for payment of dividends on 102 shares of preferred stock of the American Steel Foundries belonging to her estate. I had expected a very different reply from you to the letters I had written to Mr. Patterson on the subject, and which he said he had referred to you, for those letters sufficiently stated the nature of our claim. I had hoped to hear that you would advise its payment without further delay. It should have been paid in May last, when the dividends were paid on the unpreferred stock, and in fact should have been paid sooner. Why the Board of Directors directed the payment of the dividend fund to be made only to the holders of the unpreferred stock, to the exclusion of the holders of the preferred stock, it is impossible to conjecture on any other supposition than that they were of the impression that all the preferred stock had been surrendered. If such was their belief, then Mr. Patterson was in fault, for he knew that we still retained Mrs. Lazear's stock and had declined to convert it into the new stock. He and I had considerable correspondence in regard to it. I am confident the action of the Board in this matter was not advised by you, or if so, that the advice was given without knowledge of the fact that our preferred stock was still outstanding.

You suggest a visit to you for the purpose of talking over this matter with you. I would be glad to meet

Exhibit D43

you if only to make your acquaintance, but I cannot have that pleasure at the present time, and do not know when I shall be in your City. Certainly not this summer. But I think we can accomplish as much by correspondence as by a personal interview in arriving at a correct understanding in this matter, and without unnecessary delay. The difference between us, if there should be any difference, is only a question of law, for there can be no difference as to the facts of the case. I know what the facts are, and you can readily ascertain them to your satisfaction from data you have in your possession, or can obtain the facts from Mr. Patterson. The claim of the executors of Mrs. Lazear (consisting of Jesse T. Lazear, Charles P. Orr and myself) is for unpaid dividends on her 102 shares of the preferred stock now belonging to her estate, at the rate of six per cent per annum payable quarterly. These dividends we received regularly, $153 each quarter, until August, 1904, when the last payment was made to us amounting to only $120. We have received nothing since, and therefore the amount due us is not less than $3552, to which should be added interest from May 14, 1910, the date when other dividends were payable. The dividends due us were not only preferred in the distribution of the profits, but by the terms of the certificate this preference was to continue in the distribution of the assets in the event of a dissolution or winding up of the corporation.

Now I dislike to take any legal proceedings to enforce our claim, and I hope you will come to a decision such as will make this unnecessary, but I must beg of you to let me know your decision at an early date, and before I leave on my summer vacation, two weeks hence. If compelled to sue, I will bring the suit here in our County Courts, for as the Company owns a valuable plant in Pittsburgh and has been doing business in Pennsylvania for many years, it is subject

Exhibit D43

to the jurisdiction of our State Courts. I may seek to recover only these unpaid dividends in an ordinary common law action as for breach of contract, but I may file a bill in equity and ask for an injunction to enjoin the Company from declaring further dividends on the unpreferred stock until the dividends on the preferred stock are first paid. Holding fifty-four shares of the unpreferred stock myself, such a course might be hurtful to me as well as others and might possible affect the market value of the stock, but my first duty in this matter is to Mrs. Lazear's estate, which we must protect whatever may be the consequence to me personally, or to others.

I will not presume to suggest to you how the questions of law in this case should be decided, but we have no doubt our courts here will follow the decisions of our Supreme Court in the following cases:

W. C. & Phil'a E. R. Co. vs. Jenkinson, 77 Pa. St. Rep. 321 Fidelity Title & Trust Co. vs. Lehigh V. R. R. Co., 215 Pa. St. Rep. 610.

And I may add that these are consistent with decisions of the courts of New Jersey, where our Company was incorporated. See Elkins vs. Camden R. R. Co. 36 N. J. 233.

I intimated in one of my letters to Mr. Patterson that in order to prevent litigation, we might entertain a proposition from the Company to buy our stock. This suggestion is now withdrawn. I am almost ashamed that I hinted such a thing. It looks too much like a "hold-up." The parties interested in Mrs. Lazear's estate only ask for their dividends, and prefer to hold on to the stock, considering it not only a good investment, but amply secured.

I wish you would write to Mr. Patterson to give me the information I requested of him in my letter of the 16th, and which you have in your possession. He seems to be ignorant of the rights of stockholders to

Exhibit D43

be informed of the affairs of the corporation. He probably thinks that such inquiries should be referred to you before he answers them. Nevertheless I have not obtained the information I requested.

Hoping to hear from you soon, I remain,

Yours truly,

THOS. C. LAZEAR.

TCL.

P. S. I wish to add that I held 71 shares of the preferred stock of this Company in my own right. These I surrendered and accepted the 54 shares above-mentioned of the new stock, together with three per cent cash and 20 per cent debentures. We did not consider ourselves authorized to dispose of Mrs. Lazear's stock in the same manner, and felt sure that the court having jurisdiction of her estate would not permit it to be done.

Yours very truly,

THOS. C. LAZEAR.

Exhibit C44.

AMERICAN STEEL FOUNDRIES

General Offices,

Commerical National Bank Building, Chicago.

Chicago, June 28th, 1910.

Mr. Thomas C. Lazear,
St. Nicholas Bldg.,
Pittsburgh, Pa.

Dear Sir:

Replying to yours of the 25th, I beg to say that, as your previous letters have been referred to our General Counsel Mr. Max Pam, I am also referring this one.

Yours truly,
F. E. PATTERSON,
Sec'y & Treas.

FEP/M

Exhibit C45.

Empire Building,
71 Broadway,
New York.

June 30, 1910.

Dear Sir:

I have yours of the 28th, and duly note its contents. I am also in receipt of letter from Mr. Patterson inclosing your note of the 25th to him, in which you ask certain information.

I regret to find in your letter to me a disposition to litigate rather than to discuss and thereby perhaps reach a correct understanding of the matter.

Exhibit D46

In view of your position I will take a few days to look into the authorities cited in your letter; also to confer with Mr. R. V. Lindabury, of Newark, and Mr. Charles MacVeagh, of this City, who were associated with me in the American Steel Foundries matter, and then further reply to your letter.

That I may be fully advised, will you please, in the meantime, let me know whether or not the Estate of Alice C. Lazear has been settled? If not, in what court it is pending, and who are the executors of the Estate?

When disposing of the matter, I will at the same time advise Mr. Patterson concerning your request for information.

Yours truly,

MAX PAM.

Thomas C. Lazear, Esq.,
Pittsburg, Pa.

Exhibit D46.

July 1st, 1910.

Mr. Max Pam,
General Counsel of American Steel Foundries,
#71 Broadway,
New York, N. Y.

Dear Sir:

Replying to yours of the 30th asking for the names of the executors of the will of Alice C. Lazear, deceased, and whether her estate has been settled, etc., I beg to say that the executors are Thos. C. Lazear (myself) Jesse T. Lazear and Charles P. Orr. Mr. Orr who is now District Judge of the United States Court

Exhibit D46

for the Western District of Pennsylvania, still consults with us, but takes but little active part in the management of the estate. The Orphans' Court of Allegheny County, Pa, has jurisdiction of the estate.

You certainly misapprehended my letters in saying that they manifested a disposition to litigate rather than discuss this matter. If you read them carefully you will see that I expressed a dislike of litigation and a desire to avoid it if possible. It will only be in the event of a refusal to recognize our claim, that legal proceedings will be instituted, in which event we, of course, have no alternative in discharge of our duties as executors. I am only waiting your decision to determine what course of action we will pursue. And as to discussing the question, I have shown my willingness to discuss it by opening up the discussion in my last letter. I gave you my views and cited my authorities, and now it is but fair that I should have yours. Please let me have them and then we will have both sides of the discussion.

I may add that all three of the executors have looked carefully into this question, and all have come to the same opinion as to the merits of our claim. We consider it a plain case and cannot see how it can admit of a difference of opinion. We would be glad, however, to know what defense the Company proposes to make to the payment of the claim.

The estate of Alice C. Lazear is not finally settled, and cannot be till my death, her will having given me all her estate for life, with remainder to her children.

You know all the facts of this case. The question is purely one of law to be determined by reference to the contract set forth in the certificate of preferred stock. Read it carefully, for no doubt you have a copy, or can readily obtain it.

Yours very truly,

THOS. C. LAZEAR.

T. C. L.

Exhibit C47.

July 2nd, 1910.

Mr. F. E. Patterson,
Sec'y & Treas. of American Steel Foundries,
Commerical Nat'l Bank Bldg.,
Chicago, Ill.

Dear Sir:

Will you please send me the last report or statement of the condition of the American Steel Foundries. No doubt this was submitted and acted on at the meeting of the Board of Directors last spring. Such reports have always been sent to me from other corporations in which I have been interested as a stockholder, and I do not understand why the same custom has not been observed by this Company.

This request need not be referred to Mr. Pam, with whom I am now in correspondence.

Yours very truly,
THOS. C. LAZEAR.

TCL.

Exhibit C48.

September 6th, 1910.

Mr. Max Pam,
General Counsel of American Steel Foundries,
71 Broadway,
New York, N. Y.

Dear Sir:

Relative to the claim of Alice C. Lazear's Estate against the above-named Company, and which has been the subject of considerable correspondence between you and myself, I had expected, on my return

this week from my summer vacation, to find another letter awaiting me from you in regard to the matter, but the failure to receive it may be because you have been taking a vacation yourself. Your communication of June 30th gave the impression that I would hear from you in a few days after a conference you proposed to have with Mr. Lindeburg and Mr. McVeigh.

Hoping to hear from you on receipt of this, I remain,

Yours truly,

THOS. C. LAZEAR.

TCL.

Exhibit C49.

2001 EMPIRE BUILDING

New York.

September 14, 1910.

Dear Sir:

Your letter of the 6th inst., addressed to Mr. Max Pam, is received. Mr. Pam is away and will not return until after September 20th, at which time letter will receive attention.

Yours very truly,

E. I. MORLEY,
Private Secretary.

Thos. C. Lazear, Esq.,
Pittsburg, Pa.

Exhibit C50.

2001 EMPIRE BUILDING

NEW YORK.

September 24th, 1910.

Dear Sir:

Mr. Pam now advises me that he expects to return to New York sometime between the 28th of September and the 1st of October.

Yours very truly,

E. I. MORLEY,

Secretary to Mr. Max Pam.

Thos. C. Lazear, Esq.,
Pittsburg, Pa.

Exhibit D51.

AMERICAN STEEL FOUNDRIES.

Proxy for Eighth Annual Meeting of December 1, 1910.

KNOW ALL MEN BY THESE PRESENTS, That the undersigned stockholder in the American Steel Foundries does hereby constitute and appoint E. H. Gary, Wm. V. Kelley and Charles Miller and each of them, true and lawful attorneys, agents and proxies of the undersigned, with power of substitution, for and in the name, place and stead of the undersigned, to vote upon all shares of stock held or owned by the undersigned at the Eighth Annual Meeting of the Stockholders of the American Steel Foundries, to be held at the office of the Corporation, at No. 15 Exchange Place, Jersey City, New Jersey, on Thursday, the first

Exhibit D51

day of December, 1910, at twelve o'clock, noon, and at any and all adjournments thereof, for the consideration and vote upon the report of the President of the Corporation, and the transaction of any and all other business that may come before the meeting, including the consideration and vote upon the approval and ratification of all accounts, contracts, acts, proceedings, elections, and appointments by the Board of Directors since the last annual meeting of the stockholders of the Corporation, the election of directors to succeed those whose terms then expire, and upon any and all matters that may come before the meeting, according to the number of votes the undersigned would be entitled to vote if then personally present, hereby revoking any proxy or proxies heretofore given to vote upon such stock, and ratifying and confirming all that said attorneys, agents or proxies may do by virtue hereof.

A majority of all or any of said attorneys, agents and proxies who shall be present and act at the meeting (or if only one shall be present and act, then that one) shall have, and may exercise, all of the powers of all of said attorneys, agents and proxies hereunder, and they are instructed to vote in favor of the approval and ratification of each and every of said accounts, contracts, acts, proceedings, elections and appointments, and the approval of the report of the President of the Corporation.

Witness my hand and seal this 15th day of November, 1910.

THOS. C. LAZEAR,
Address: St. Nicholas Bldg.,
Pittsburg, Pa.
(Seal)

Witness:
S. L. Hoskinson.

No. shares—55.

Exhibit C52.

November 15th, 1910.

Mr. Max Pam,
General Counsel of American Steel Foundries,
#71 Broadway,
New York, N. Y.

Dear Sir:

I have received today a check for dividend declared 24th ult. on the stock owned by me individually in the above-named Corporation, but nothing on account of the preferred stock of Alice C. Lazear, deceased.

Your last communication to me in reference to that stock was dated June 30th last in reply to mine of the 28th of the same month, and in it you said:

"In view of your position I will take a few days to look into the authorities cited in your letter, also to confer with Mr. R. V. Lindabury, of New York and Mr. Charles MacVeagh, of this City, who were associated with me in the American Steel Foundries matter, and then further reply to your letter."

This reply you have never given me, though I had certainly expected it relying implicitly on this promise. I am at a loss to understand the meaning of your silence. I dislike exceedingly to institute legal proceedings, but unless I hear from you within a reasonable time, I will bring suit in our United States Court to recover the dividend due the estate of Alice C. Lazear, deceased, including what should have been paid out of the last dividend fund. The amount is large enough to bring it within the jurisdiction of that court, and the case can be decided sooner in that court than in our State Courts. In case suit should be necessary I would be glad to bring it in the form of an amicable action, in which the facts can be agreed

upon in the nature of a case stated. I know of no facts in dispute, and I think you will concur with me in this, and if so why should not the whole controversy be submitted to the Court to be passed upon as a question of law.

I presume the Corporation is represented in this City by local counsel. If so I would be glad to be referred to them in this matter before bringing suit.

Begging an early reply, I remain,

Yours truly,

THOS. C. LAZEAR.

Exhibit D53.

(Condensed.)

UNITED STATES DISTRICT COURT,

FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

THOMAS C. LAZEAR, *et al.*, Executors, etc.,
Plaintiffs,
vs.
AMERICAN STEEL FOUNDRIES.
Defendant.

In Assumpsit.

April 8, 1911, Plaintiff's Statement of Claim filed as follows:

Exhibit D53

Western District of Pennsylvania, ss:

The plaintiffs, Thomas C. Lazear and Jesse T. Lazear, Executors of the Last Will and Testament of Alice C. Lazear, late of Allegheny, Pennsylvania, deceased, and citizens of said State, claim of the defendant, The American Steel Foundries, a corporation, organized, chartered and existing under the laws of the State of New Jersey, and a citizen thereof, the sum of FOUR THOUSAND AND TWENTY-NINE DOLLARS ($4,029.00) with interest at the rate of six per cent per annum on $1,272.00 from May 15, 1910, and on $1,272.00 from August 15, 1910; and on $1,270.00 from November 15, 1910, and on $213.00, balance of the said sum of $4,029.00, from February 5, 1911, all of which is justly due and payable to the plaintiffs upon the cause of action whereof the following is a statement:

Plaintiffs are the holders of one hundred two (102) shares of the preferred stock of defendant Company, for which two certificates were issued to them by the company on the 30th day of July, 1902, one certificate for one hundred (100) shares of said stock, and the other for two (2) shares. Copies of said certificates are hereto annexed, marked respectively "Exhibit A" and "Exhibit B." The contract set forth in said certificates entitles the plaintiffs to receive quarterly dividends on said stock at the rate of six per cent per annum, or One Hundred Fifty-three Dollars ($153.00) each quarter on the whole one hundred two (102) shares, in preference to the holders of common or unpreferred stock, and said dividends, by the terms of said certificates are made cumulative.

After the issuing of said certificates to plaintiffs, plaintiffs received from the defendant quarterly dividends of $153.00 on their said 102 shares (or at the rate of $1.50 per share) regularly every quarter, until

August 15, 1904, when they received only One Hundred and Two Dollars ($102.00) on account of the dividend then due, and have received no other dividends, or other payments on account thereof since that date. Defendant suspended payment of all dividends from that date until the 15th of May, 1910, a period of nearly six years, when it resumed payment of dividends but since this resumption defendant has not paid, and has refused to pay plaintiffs anything on account of the dividends due them on their said preferred stock, and paid all dividends declared by it only to the common or unpreferred stockholders to the exclusion of all preferred stockholders.

In the year 1908, four years after the suspension of the dividends, as aforesaid, defendant, by circulars addressed to all its stockholders, both preferred and common stockholders, proposed a plan to them for the reduction of its capital stock and for the conversion of all its stock into common or unpreferred stock, said plan, as regards holders of preferred stock, required them, if they assented thereto, to surrender their preferred stock and accept in exchange therefor new stock to be issued, all of which was to be of the same class, without preference, in the proportion of $77 for each share of the preferred stock so surrendered (each of said shares of the preferred stock then having a par value of $100), and in addition thereto they were to receive as a further consideration for such surrender and exchange $20.00 in four per cent debentures and $3 in cash for each share of their preferred stock. And as part of said plan the dividends on said new stock were to be at the rate of five per cent per annum, instead of six per cent, the rate payable on the preferred stock.

The majority of the stockholders at one or more meetings called to consider this plan, agreed to adopt it, and the holders of ninety per cent of the preferred

stock accordingly thereupon surrendered their preferred stock to defendant, and accepted in exchange therefor the new or unpreferred stock. But plaintiffs and other holders of the preferred stock declined to assent to said plan, and plaintiffs still hold their said 102 shares of the preferred stock, and insist on the payment of the dividends due thereon in accordance with the terms of the contract contained in their said certificates.

At the time the said plan was proposed the number of shares of the preferred stock of the Company was 172,240. Ninety per cent (90%) of this number was surrendered by the holders thereof in exchange for said new stock, and there remained as still outstanding 17,224 shares. No larger number is now outstanding, nor has a larger number been outstanding at any time since the surrender and exchange aforesaid of ninety per cent of the stock. Nor at the time of the declaration of the dividends hereinafter mentioned.

In the month of April, 1910, defendant set apart a dividend fund derived from the net earnings of its business, amounting to $214,800, and declared a dividend of one and a quarter per cent on each share of said new or unpreferred stock above mentioned, payable to the holders thereof on the 15th day of May, 1910, and to whom it paid the same.

In the month of July, 1910, defendant set apart another dividend fund derived from the net earnings of its business amounting to the like sum of $214,800 and declared another dividend of one and a quarter per cent on each share of the said new or unpreferred stock, payable to the holders thereof on the 15th day of August, 1910, and to whom it paid the same.

In the month of October, 1910, the defendant set apart another dividend fund derived from the net earnings of its business amounting to the like sum of

$214,800 and again declared a dividend of one and a quarter per cent on each share of said new or unpreferred stock, payable to the holders thereof on the 15th day of November, 1910, and to whom it paid the same.

In the month of January, 1911, defendant set apart another dividend fund derived from the net earnings of its business amounting to the like sum of $214,800 and declared a dividend of one and a quarter per cent on each share of the said new or unpreferred stock, payable to the holders thereof on the 15th of February, 1911, and to whom it paid the same.

Of the above dividend funds so set apart as aforesaid, amounting in the aggregate to $859,200, plaintiffs and the other holders of the said preferred stock who had not surrendered the same in exchange for said new or unpreferred stock, but still retained the same, were then entitled to receive the full amount of unpaid dividends due thereon, including all the dividends which had accumulated during the said period of suspension, and the amount which plaintiffs were entitled to receive thereof was not less than $4,029.00, being in the proportion of 102 shares of preferred stock held by plaintiffs to 17,224 held by all the holders of said stock and still outstanding.

The several amounts thus coming to plaintiffs and which they were entitled to receive in preference to the said new or unpreferred stockholders was $1,272, payable on the 15th of May, 1910, and the like amount of $1,272 payable on the 15th of August, 1910, and the like amount of $1,272 payable on the 15th of November, 1910, and $213.00, payable on the 15th of February, 1911, said last sum being the balance of dividends due plaintiffs to that date.

Plaintiffs also claim and are entitled to receive interest on the above sums from the several dates when the same were payable, as above stated.

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Defendant, although often requested so to do, has not paid, but has refused to pay plaintiffs the dividends due and payable to them, as aforesaid, and plaintiffs say that the refusal of defendant so to do, and the action of defendant in applying the whole of said dividend funds to payment of dividends on the common or unpreferred stock to the exclusion of dividends due on the preferred stock held by plaintiffs and others, was a violation of contract and breach of trust. To the damage of the plaintiffs in the amount hereinbefore demanded, for the recovery of which this suit is brought.

THOMAS C. LAZEAR.

Allegheny County, ss:

Thomas C. Lazear, one of the plaintiffs in the foregoing statement named, being duly sworn, deposes and says that the facts set forth therein are true.

THOMAS C. LAZEAR.

Sworn to and subscribed before me
this 7th day of April, A. D., 1911.
Allen H. Kerr,
Notary Public.
(Seal)
My commission expires February 21, 1915.

Exhibits A and B mentioned in foregoing statement are here omitted as they are the same as Exhibits C1 and C2, *supra*.

April 12, 1911, process returned duly served on April 10th.

May 22, 1911, Demurrer filed as follows:

Exhibit D53

And now, to wit, May 22d, 1911, comes the defendant, The American Steel Foundries, by Pam, Hurd & Day and Reed, Smith, Shaw & Beal, their attorneys, and says that the statement filed in this case is not sufficient in law to maintain the plaintiffs' action, and it demurs thereto, and in support of said demurrer assigns the following reasons:

FIRST. The plaintiffs, in their statement of claim, do not allege that the defendant company made any earnings applicable to the payment of dividends upon the stock alleged to be held by plaintiffs.

SECOND. The plaintiffs do not allege in their statement of claim that the defendant company, by its Board of Directors, or other competent authority, have declared any dividends upon the stock alleged to be held by the plaintiffs.

THIRD. The said statement of claim is in other respects uncertain, informal and insufficient.

PAM, HURD & DAY,
REED, SMITH, SHAW & BEAL,
Attorneys for Defendant.

Certificate of Counsel.

We hereby certify that we believe the foregoing demurrer to be well founded in law and that the same is not interposed for delay.

PAM, HURD & DAY,
REED, SMITH, SHAW & BEAL,
Attorneys for Defendant.

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August 2, 1911, opinion entered, overruling the demurrer.

February 7, 1912, affidavit of defense (being a pleading in answer to plaintiffs' statement), presented in open court, and leave thereupon allowed to file the same for the information of the Court.

March 7, 1912, opinion filed and motion of defendant for leave to file the affidavit of defense refused.

March 7, 1912, judgment entered for plaintiffs for $4,398.61 and costs.

March 30, 1912, bill of exceptions sealed and filed.

July 3, 1912, writ of error allowed and issued to United States Circuit Court of Appeals.

Feb. 13, 1913, following opinion filed:

Opinion.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

THE AMERICAN STEEL FOUNDRIES,
Plaintiff-in-Error,

vs.

THOMAS C. LAZEAR and JESSE T. LAZEAR, Executors of the Will of Alice C. Lazear, deceased,
Defendants-in-Error.

In Error to the District Court of the United States, for the Western District of Pennsylvania.

Before Gray, Buffington and McPherson, Circuit Judges.

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GRAY, Circuit Judge:

The defendants-in-error, citizens of the State of Pennsylvania (hereinafter called the plaintiffs), brought an action of assumpsit in the Court below, against the plaintiff-in-error, a corporation of the State of New Jersey (hereinafter called the defendant), to recover the sum of $4,029, the aggregate of certain cumulative dividends which they claimed were due and payable to them as the holders of 102 shares of the preferred stock of the defendant corporation.

Defendant demurred to the plaintiffs' statement of claim on the general ground that the facts averred therein were not sufficient to support an action of assumpsit. On August 2, 1911, the Court overruled the demurrer of defendant, and directed that an order be presented for judgment for the plaintiffs for the amount of the claim with interest. On the same day, August 2, 1911, there is the following entry by the Clerk: "In pursuance of said opinion, judgment is hereby entered in favor of the plaintiffs, * * * and against the defendants, * * * in the sum of $4,029," with interest from various dates, making an aggregate of $4,398.61. Afterwards the record shows an entry of the following order made by the Court: "And now, September 27, 1911, the Clerk having inadvertently entered judgment without an order so to do, the same is hereby stricken off. Per Curiam." On February 9, 1912, it appears from the record that an affidavit of defense was presented in open Court, and leave therefor allowed to file the same "for the information of the Court." On March 7, 1912, the Court filed an opinion, stating: "This cause comes before us now upon the motion and presentation of an order for judgment, the Court having heretofore overruled the defendant's demurrer in an opinion filed in the cause August 2, 1911. Upon presentation of

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this motion for judgment, defendant has presented to the Court an affidavit of defense, and has asked the Court to permit it to be filed, claiming that it presents a defense to the plaintiffs' action upon the merits. We have carefully considered the affidavit of defense, in order to determine whether or not the defendant has presented a defense upon the merits." After discussing at length the various allegations of the affidavit the Court decided that there was no merit in the grounds of defense set forth, and that judgment will therefore be entered for plaintiffs for the whole amount of their claim against the defendant," and the Clerk was thereupon ordered and directed to enter judgment accordingly. Pursuant to said order, such judgment was entered, and upon the same day the following order was made by the Court: "And now, to wit: March 7, 1912, the motion of defendant for leave to file the affidavit presented as an affidavit of defense to the action, is refused."

On this peculiar state of the record, the writ of error is sued out to the judgment entered by the Court, after its refusal to grant the motion of defendant for leave to file the affidavit presented as a defense to the action. The affidavit was, however, as we have seen, filed for the information of the Court, and was by the Court discussed and considered as to its sufficiency, and because of its insufficiency the judgment of March 7, 1912, was entered. Counsel on both sides seem to have been in doubt as to whether this was a final judgment on the demurrer, or a judgment for want of a sufficient affidavit of defense, and accordingly have argued it in its dual aspect. At all events, it seems certain that the Court would have declined to enter judgment on the demurrer if the affidavit filed for its information had in its opinion presented a legal defense to the action. In the following brief statement of the case, we may refer,

therefore, as the Court below did, to the facts presented by the affidavit of defense supplementary to those alleged in the statement of claim.

In 1907, the business and financial condition of the defendant corporation was such as to make it expedient in the interest of its stockholders that a readjustment of its outstanding stock be had. On November 7, 1907, at a directors' meeting, committees were appointed for devising a plan for such readjustment. Subsequent meetings of the directors were held for consideration of this business, resulting in a call for a special meeting of the stockholders for February 8, 1908, to consider and take action on the subject. Notices of such special meeting, with a statement of the proposed plan of readjustment, were sent to the addresses of the stockholders of record, including the plaintiffs, who, it appears, received such notice and plan of readjustment. The special meeting of the stockholders called for February 8, 1908, was adjourned to March 14, 1908, and subsequent meetings and adjournments were had between that date and June 12, 1908. Some eight in number were held, as to all of which due notices were addressed to the stockholders, including the plaintiffs. At the meeting of stockholders of June 12, 1908, the plan for readjustment of the capital stock of defendant was approved and declared effective by the affirmative vote of about ninety per cent of all the outstanding stock and notice of such action was sent to each of the stockholders, including the plaintiffs, and was received by them. All these matters and proceedings are set forth in the minutes of the various meetings, and appear as exhibits attached to the affidavit of defense.

It is further averred in the affidavit that, notwithstanding plaintiffs had notice of the proceedings for the readjustment of the capital stock of the defendant corporation, and had copies of all the reports and

proceedings relating thereto, with notice of each successive adjournment, yet at no time and in no way did the plaintiffs oppose or dissent from the action of the directors and stockholders of the defendant. No objection was made or protest submitted by plaintiffs, either in writing to the officers or directors of the company, or at any of the meetings of the stockholders, but on the contrary, Thomas C. Lazear, one of the plaintiffs, who is the owner of 102 shares of the preferred stock in question, as life tenant under the terms of the will of Alice C. Lazear, actively participated in the readjustment of the capital stock of the defendant, and accepted the benefits thereof, as the owner of seventy-one other shares of the same preferred stock, of which he made deposit in accordance with the terms and provisions of the plan for readjustment, and received and accepted the new common stock and the new debentures of the plaintiff-in-error, as well as the cash dividend distributed thereon. The affidavit then states that, after the lapse of seventeen days following the action of the stockholders in approving the plan, and no objection having been made, the company, on June 29, 1908, complied with the law of New Jersey, by filing with the Secretary of State of that State its certificate of change in and reduction of its capital stock, and all its proceedings in relation thereto. A notice to the effect that the Guaranty Trust Company of New York was prepared to carry into effect the readjustment so adopted and approved by the stockholders, was, under date of July 11, 1908, sent to each of the stockholders, including the plaintiffs, and was received by them. Subsequently, the preferred and common stock of defendant, theretofore outstanding and listed upon the New York Stock Exchange, were stricken from the list and the new common stock issued by defendant under said plan was substituted therefor

upon the said Exchange. The affidavit then states that notwithstanding the premises, plaintiffs at no time presented any protest or objection to the New York Stock Exchange, or to the defendant, or to anybody else, or instituted any suit or proceeding to prevent the listing of the new stock by the defendant. It is further stated that out of the total of 172,400 shares of old preferred stock, all but 978 shares had assented to and been converted into the new stock. In other words, the holders of 99 66/100 per cent of the old preferred stock participated in and accepted the readjustment proposed and adopted.

Upon the facts set forth in the affidavit of defense, the defendant contends:

(1) That the readjustment and conversion of the capital stock of defendant was in all respects legal and binding upon the plaintiffs and all other of its stockholders, because it received the necessary and requisite assent of the stockholders of the company, as required by the laws of the State of New Jersey, which are controlling in the premises.

(2) That such readjustment and conversion are complete and binding upon plaintiffs, because of their actual and active assent thereto and participation therein, their conduct in the premises constituting in law an assent to the conversion of their preferred stock.

(3) That their conduct in the premises was such as to constitute in law an estoppel *in pais*.

Defendant therefore contends that it may avail itself of the equitable defense of estoppel allowable under the Pennsylvania practice, arising from a situation in which it appears that Thomas C. Lazear, who has a present vested life estate in the 102 shares of preferred stock, the subject of the present controversy, as the owners of seventy-one other shares of the

same preferred stock participated in all the meetings and proceedings of stockholders had for the purpose of bringing about and putting in operation the said readjustment and plan for reducing the stock of the defendant corporation, and especially assented thereto by the surrender of his seventy-one shares of preferred stock, and receiving with the other stockholders the debentures, stock and cash offered by the defendant in exchange for the same.

It is further contended that it is inequitable for the plaintiffs to claim payment of all the undeclared and cumulative dividends on his preferred stock, withheld by him from surrender, out of a fund that was only rendered adequate for such payment in full, by reason of the surrender of their stock by other preferred stockholders.

Though judgment was entered by the Court below, after discussing and passing upon all the defenses set forth in the affidavit of defense, we are constrained to regard that judgment as having been entered in the discretion of the Court below on the demurrer. We therefore turn to the essential averments of the statement of claim demurred to, to wit, that the plaintiffs are the holders of 102 shares of the preferred stock of defendant company, for which certificates were duly issued to them by the company; that the contract set forth in said certificates entitled the plaintiffs to receive quarterly dividends on said stock at the rate of six per cent per annum, and that in case such dividends should not be declared, the same were made cumulative. The plaintiffs received such dividends on their preferred stock until August 15, 1904, but since that date no other dividends or payments on account of said stock had been received, defendant having suspended payment on all dividends from that date for a period of more than five years.

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It is then averred that the defendant has resumed the payment of dividends, but since this resumption has not paid and has refused to pay the plaintiffs anything on account of the dividends due them on their said preferred stock and paid all dividends declared by it only to the common or unpreferred stockholders, to the exclusion of all preferred stockholders. The statement of claim then states that in the year 1908, four years after the suspension of the dividends as aforesaid, the plan of readjustment and reduction of stock was proposed and carried into effect by the assent of nearly all the stockholders, as set out in the affidavit of defense, as above referred to. That under this plan about ninety per cent of the preferred stockholders surrendered their stock and accepted certain debentures, cash and common stock in lieu thereof. That plaintiffs and other holders of the preferred stock declined to assent to said plan, and plaintiffs still hold their 102 shares of the preferred stock "and insist on the payment of the dividends due thereon, in accordance with the terms of the contract contained in their said certificates," which certificates are appended as an exhibit and made a part of the statement of claim.

That "in the month of April, 1910, defendant set apart a dividend fund derived from the net earnings of its business, amounting to $214,800 and declared a dividend of one and one-quarter per cent on each share of said new or unpreferred stock above mentioned, payable to the holders thereof on the fifteenth day of May, 1910, and to whom it paid the same" (italics our own). The same averment was made as to what was done by defendant in the month of July, 1910, in the month of October, 1910, and in the month of January, 1911.

The statement then avers as follows: "Of the above dividend funds so set apart as aforesaid, amounting

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in the aggregate to $859,200, plaintiffs and other holders of said preferred stock who had not surrendered the same in exchange for said new or unpreferred stock, but still retained the same, were then entitled to receive the full amount of unpaid dividends due thereon, including the dividends which had accumulated during the said period of suspension, and the amount which plaintiffs were entitled to receive thereof was not less than $4,029, being in the proportion of 102 shares of preferred stock held by plaintiff, to 17,244 held by all the holders of said stock and still outstanding."

Upon these averments of the statement of claim the plaintiffs' case must on the demurrer thereto stand or fall. Plaintiffs' contention is that, under the contract evidenced by the certificates of stock, the plaintiffs were entitled to receive from the defendant company accumulated dividends of six per cent when the company, through its Board of Directors, set apart funds constituting profits.

It is hardly correct to speak of the certificate of stock as the contract between the shareholder and the corporation, upon which this suit is brought. Such a certificate establishes the status of the shareholder as one of the owners and constituent members of the corporation on the basis of which a contractual relation between the shareholder and the corporation and the shareholders *inter sese* may in certain respects be created. Certain obligations on the part of the corporation to the whole class of stockholders represented by such certificates may be, and as in the case of preferred stockholders are, defined therein. In general, such obligations—as the obligations to pay preferred dividends, and to make the same cumulative—are obligations incurred to the whole class of preferred shareholders under the authority of its charter.

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Referring to the copy of the certificate held by the plaintiffs, annexed to the statement of claim, we find that after setting forth the fact that the plaintiffs are the owners of 100 non-assessable shares of the capital stock of the defendant company, the certificate makes the following statement as to the rights of such owners:

"The holders of preferred stock shall be entitled to receive, when and as declared, from the surplus or net profits of the company, yearly dividends at the rate of six per cent per annum, and no more, payable quarterly on dates to be fixed by the by-laws. The dividends on the preferred stock shall be cumulative, and shall be payable before any dividend on the common stock shall be paid or set apart."

This statement in no wise differs from that usually made in certificates of preferred stock, and it seems too clear for argument, that such statement creates no right in the plaintiffs to claim in this suit the payment of undeclared dividends.

The plaintiffs have brought an action of assumpsit, which must be maintained, if at all, on the ground that the sum claimed has been declared as a dividend on the preferred stock held by plaintiffs, and that therefore a promise by the defendant to pay the same is implied. Upon such implied promise the suit is alone maintainable. Such implication of a promise arises from the declaration by the defendant company of a dividend on the preferred stock, not upon any alleged duty of the corporation or its officers to declare such dividend. What it or its officers ought to do in this respect, pertains to the interior administration of the corporation functions, and belongs to the category of those corporate rights and duties which are justifiable only under the authority of the legislation of the state by which the corporation was created.

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For neglect or refusal by the officers of the corporation to perform a corporate function, as to the declaration of the dividend, or as to the distribution of funds asserted to be legally or equitably applicable to dividends, relief must be sought by an appropriate suit in equity, in which the chancellor may, while avoiding interference of the exercise of a due discretion by corporate officers, yet enforce the performance of a legal corporate duty. No individual debt, however, from the corporation to the stockholder is created until the dividend is declared. It is hardly necessary to cite authority for these propositions. Those cited by the plaintiff-in-error, however, are here referred to:

Cook on Corporations, Sec. 542.
1 *Morawets on Private Corporations,* Sec. 276.
Wheeler vs. Northwestern Sleigh Co., 39 Fed. Rep.
Knapp vs. S. Jarvis Adams Co., 135 Fed. Rep., 1009, 1011.

There is no averment in the plaintiffs' statement of claim that the defendant had either earnings or surplus applicable to the payment of dividends on plaintiff's preferred stock, nor is there any averment in the statement of claim that any dividends upon the preferred stock held by plaintiffs had been declared or paid by the defendant. It is merely averred that payment of dividends was resumed by defendant on May 15, 1910, but it is nowhere averred that payment of dividends upon the preferred stock of defendant was resumed at that or at any other time. On the contrary, it appears by the statement of claim that a plan for the reduction of capital stock of defendant and for the conversion of its preferred stock into common or unpreferred stock was submitted to all the stockholders, including the plaintiffs, and that such

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proposal was adopted by the holders of ninety per cent of the preferred stock, and it is specifically averred in the statement of claim that the dividends were declared by the defendant on this common stock, and were payable to the holders thereof.

A careful reading of plaintiffs' statement of claim compels us to the conclusion that the averments therein contained do not constitute a cause of action. The demurrer thereto should have been sustained, and the judgment of the Court below is therefore reversed, with instructions to the Court below to enter judgment upon the demurrer in favor of the defendant.

March 17, 1913, mandate from United States Circuit Court of Appeals, reversing the judgment of this court and directing judgment to be entered upon the demurrer in favor of the defendant, received and filed.

April 15, 1913, pursuant to mandate, etc., to order of this Court of April 15, 1913, judgment entered.

Copy of Order.

April 15, 1913, on motion of counsel for American Steel Foundries, pursuant to the mandate of the United States Circuit Court of Appeals, judgment is entered upon the demurrer in favor of the defendant, the American Steel Foundries, with costs in the sum of $105.20.

Per CURIAM.

And now, to wit, April 19, 1913, on motion of Lazear & Blaxter, attorneys for plaintiffs, the within stipulation in connection with the payment of costs

is ordered filed, together with notice of presenting same to counsel for the defendant.

Per CURIAM.

Stipulation in Connection with Payment of Costs.

And now, to wit, April 19, 1913, comes Thomas C. Lazear and Jesse T. Lazear, executors of the will of Alice C. Lazear, deceased, plaintiffs above, by their attorneys, Lazear and Blaxter, and stipulate that the payment of costs in the above-entitled case is done without prejudice to any rights the plaintiffs may have in another action touching the matters here in controversy, and without presumption of a retraxit.

LAZEAR & BLAXTER.,
Attys. for Pltffs.

Exhibit C54.

March 14th, 1912.

Mr. T. E. Patterson,
Treasurer American Steel Foundries,
Commercial Bank Bldg.,
Chicago, Ill.

Dear Sir:

I mailed to you last week a Pittsburgh newspaper containing a notice marked for your attention, to the effect that in the case of Thos. C. Lazear and Jesse T. Lazear, Executors of Alice C. Lazear, dec'd, against your Company, judgment had been entered in their favor on the 7th inst. for the full amount of their

Exhibit C54

claim with interest. The judgment was for $4,398.61, which included interest to that date. As you made the affidavit of defense in the case, you need no information from me as to the nature of the claim.

But as we are now entitled to receive another dividend on the same stock, which was declared since that suit was brought (though improperly paid to other stockholders) I must now make formal demand on you as Treasurer of the Company, for payment of the same amounting to $153, with interest from May 15, 1911. I should know soon whether this will be paid, for if refused, we will, of course, be compelled to bring another suit for its recovery. But as the question of the liability of the Company in regard to that stock was fully adjudicated in our favor in the case recently decided, we trust that further litigation will be deemed unnecessary.

In regard to the judgment referred to, I will wait a short time to hear from you or the Company's attorney, before issuing execution on it, though there should be no unreasonable delay in the matter.

Hoping to hear from you soon,

Yours very truly,

THOS. C. LAZEAR.

TCL.

Exhibit C55.

2001 EMPIRE BUILDING

NEW YORK

March 21, 1912.

Dear Sir:

Yours of the 14th to Mr. F. E. Patterson was referred to me for reply. We are preparing an appeal from judgment rendered in your favor against the Company in the Circuit Court of Appeals. We expect the appeal will be perfected probably next week by the filing of the necessary bond.

Our position with reference to the other claims that you assert in your letter of the 14th, or any further claim that you may make, remains unchanged.

Yours very truly,

MAX PAM

Thomas C. Lazear, Esq.,
c/o Messrs. Lazear & Blaxter,
Pittsburg, Pa.

Exhibit C56.

AMERICAN STEEL FOUNDRIES

Preferred Stock

Name

Thos. C. Lazear, Jesse T. Lazear
Excts. of will of
Alice C. Lazear, dec'd.

Address

St. Nicholas Bldg.,
N. Holmes & Son,
Pittsburgh, Pa.

Date	Folio	Certificates	Dr.	Cr.	Cr. Balance
1902					
Nov. 25				102	

Exhibit D57.

I, Alice C. Lazear of Pittsburg, Pa. do make this my last will and testament hereby revoking all former wills by me at any time heretofore made.

FIRST: I give, devise and bequeath to my husand Thomas C. Lazear all my estate real personal and mixed for and during the term of his natural life.

SECOND: I authorize and empower my executors hereinafter named to lease and sell any and all of my real estate at their discretion as to time, manner and terms and to execute good and sufficient deeds of conveyance to the purchasers thereof. Also to make sale of and change my investments from time to time as they may deem proper. And in the event of a sale or sales of any of my real estate, securities or in-

vestments of whatever kind, I authorize them to use the proceeds thereof for the improvement of my other real estate or the purchase of other property or investment in good securities. Such other property or securities to be for the use of my said husband during his natural life.

THIRD: At and upon the death of my said husband I give, devise and bequeath my entire said estate to my daughter Anna L. Orr and my son Jesse T. Lazear, share and share alike.

FOURTH: Whereas my brother Rev. John Lyon has recently made his will giving me his entire estate as his sole legatee and devisee, Now I desire that his estate upon his death shall be distributed in the same manner as if he died without a will, so that I or my children representing me, shall receive only one-fourth of said estate, and the children of his deceased sister Anna M. Lyon and of his deceased brothers Alexander P. Lyon and Rev. Wm. Lyon, shall receive the remaining three-fourths thereof in the proportions to which they would be entitled thereto if the said John Lyon had died intestate. And I so direct.

And lastly I nominate and appoint my husband, Thomas C. Lazear, my son-in-law, Charles P. Orr and my son Jesse T. Lazear, executors of this my last will and testament.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 28th day of February, A. D., 1898.

(Signed) ALICE C. LAZEAR.

(Seal)

Signed, sealed and declared by the said Alice C. Lazear to be her last will and testament, in our presence, who at her request here subscribe our names as witnesses thereto.

GEO. A. LYON
WM. G. COSTIN
J. BENJ. LYON.