ARGUMENTS

OF

Mr. JAMES E. GOWEN,
Mr. FRANKLIN B. GOWEN,
Hon. GEO. M. ROBESON, and
Hon. B. WILLIAMSON,

COUNSEL FOR DEFENDANTS ON THE MOTION FOR A PRELIMINARY INJUNCTION,

IN THE CASE OF

DINSMORE

VS.

THE RAILROAD CO. et al.

DELIVERED IN THE U. S. CIRCUIT COURT AT TRENTON, N. J.

NOVEMBER, 1883.

STENOGRAPHICALLY REPORTED BY H. W. KNIGHT.

PHILADELPHIA:
ALLEN, LANE & SCOTT'S PRINTING HOUSE,
229-231 South Fifth Street.
1884.

ARGUMENTS

OF

Mr. JAMES E. GOWEN,
Mr. FRANKLIN B. GOWEN,
Hon. GEO. M. ROBESON, and
Hon. B. WILLIAMSON,

COUNSEL FOR DEFENDANTS ON THE MOTION FOR A PRELIMINARY INJUNCTION,

IN THE CASE OF

DINSMORE

VS.

THE RAILROAD CO. et al.

DELIVERED IN THE U. S. CIRCUIT COURT AT TRENTON, N. J.

NOVEMBER, 1883.

STENOGRAPHICALLY REPORTED BY H. W. KNIGHT.

PHILADELPHIA:
ALLEN, LANE & SCOTT'S PRINTING HOUSE,
229-231 South Fifth Street.
1884.

INDEX.

United States Circuit Court, District of New Jersey.

William B Dinsmore vs. *Central Railroad Company of New Jersey* et al.	On bill and on affidavits for Injunction.

ARGUMENT OF

JAMES E. GOWEN, ESQ.,

ON BEHALF OF THE DEFENDANTS.

MAY IT PLEASE THE COURT :—

The point in this case to which I shall principally, if not entirely, direct my argument is the legal question involved, and that is whether this lease, apart from any special consideration affecting the status of the complainant or his personal right to the relief which he seeks, is a valid instrument, under the statute law of New Jersey.

In arguing this question I shall assume for the purpose of the argument that all the stockholders of the Central Company assented to the lease, except Mr. Dinsmore; but before entering upon the line of argument I propose to follow, I shall, for fear of forgetting it in the multiplicity of considerations which may occur, refer now to the case of Clearwater *vs.* Meredith, in 1 Wallace, a case which Mr. Gummere considered an authority for the position that a single stockholder could prevent his associates in a railroad company from consolidating with another railroad company. This is

a misapprehension of the case, and a similar misapprehension appears to have misled Circuit Courts of the United States on at least two occasions, and to have induced them to render judgments which were subsequently reversed by the Supreme Court of the United States.

Indeed I should be content, if I were acting on my own responsibility, to rest the decision in this case, so far as the validity of the lease is concerned, upon what was said in Clearwater *vs.* Meredith. What was said there by Mr. Justice Davis, who delivered the opinion of the Supreme Court, was indeed irrelevant to the controversy before him, but its weight, whatever it may be, is decidedly in favor of the contention of the defendants here.

The question was as to an alleged breach of contract by which the defendant there had guaranteed that within a limited time the stock of a company would reach a certain value. To an action brought against him on this contract he pleaded that the stock of the company had been consolidated with that of another company, and that this had been done with the assent of the plaintiff. The court held that by the consolidation a new stock had been created, to which the agreement was inapplicable, and that the plea was good. Incidentally Mr. Justice Davis remarked that as the case stood, the plaintiff could have prevented the consolidation if he had objected. But why? I give the answer in the words of the judge himself: "There was no reservation of power in the act under which the company was organized, which gave authority to make material changes in the purposes for which it was created, and without such a reservation in no event could a dissenting stockholder be bound." See page 39. Does it not follow that if the charter of the company had contained a reservation to the legislature of power to make material changes, a different conclusion would have been reached, and the dissenting stockholder would have been bound? It was here that the learned judge was misunderstood by Circuit judges in subsequent cases, and this led to the reversal of their decisions.

That the charter was unalterable was the reason why a stockholder could have objected to a change he had never agreed to assent to, but if a power to make the change had been reserved by the legislature, he would have been bound. Assuming that there was a contract between his associates and himself, it would have been part of that contract that the majority should have the right to avail themselves of any privileges subsequently conferred upon the company by the legislature. I should not therefore fear to let this case be decided in accordance with the opinion in Clearwater *vs.* Meredith.

The well-known case of Lauman *vs.* the Lebanon Valley Railroad Company, 6 Casey, 43, was also commented upon by Mr. Gummere, and I shall refer to it now.

There a stockholder in a railroad company possessing an *unalterable* charter filed a bill asking for an injunction against the proposed merger of this company into another railroad company; but the court refused to grant the injunction. They held that it was the right of the majority to discontinue their business and sell out their property; but that at the same time the complainant could not be compelled to become a member of the purchasing company by accepting the shares of that company apportionable to him under the proposed merger; and they therefore made the payment to him of the value of his stock, when ascertained, the condition upon which the injunction would be refused and the merger permitted. But what did the Supreme Court of the United States say on this point when the case was referred to, as it was in Railroad Company *vs.* Georgia, 92 U. S., p. 671?

"So there are cases," said Mr. Justice Strong, "where it has been held that a consolidation can not be consummated against the consent of a stockholder in one of the companies, unless his stock is purchased. This, however, may be doubted as applicable to all cases."

That was their comment upon it, which is not all in accord with the criticism of Mr. Gummere. The intimation of the Supreme Court was that the Pennsylvania court had gone too far in favor of the dissenting stockholder. It must be remembered, too, that in Lau-

man's case, no question was made as to the right of the legislature to amend the charter, for no such right existed. In subsequent cases in the Supreme Court of the United States, the consolidation of railroad companies has been sanctioned when there had been no provision made to compensate dissenting stockholders. That is all I have to say as to these two cases, and I have said it now for fear of overlooking them hereafter in the hurry of argument.

I have another preliminary remark to make, and it is this:—

I call the attention of your Honor and of the learned counsel on the other side to the peculiarity of the affidavits upon which this motion for a preliminary injunction was made. I am glad that my friend, Mr. Seward, corrected me with regard to the authority of a notary public to administer oaths. I took the pains to look through the Revised Statutes last night, and didn't happen to have convenient access to the subsequent statutes, and probably it didn't occur to me that any change had been made. So far, therefore, as my objection was founded on the want of authority of a notary public to take affidavits, it must be overruled so far as it applied to the affidavits which were made before a notary. Where the affidavit was made before a State Commissioner, of course, the objection holds good. But what is fatal to the affidavits is that they were not made in a pending judicial proceeding. No man can ask a court to act upon evidence supplied by his own oath, unless that oath is a judicial oath, and an oath for which he can be held responsible if it is false. It has been often lamented years ago, and in a state of society where stock-jobbing and stock-jobbing litigation were not so rife as they are in this country, that affidavits in chancery proceedings were so unreliable. But at the present time, when, especially in the city of New York, applications for injunctions against great corporations have become customary incidents of stock speculations, the danger of listening to affidavits, unless they are verified by every sanction which the law requires, is all the greater. When Mr. Seward told you and me that he would

furnish authorities that an oath taken for use in a judicial proceeding not then pending would, if false, be perjury, he undertook to do what I know he can not do; and exceptional as may be equity practice in New York, I venture to say there is no such authority to be found, even in New York. Your Honor will find, by looking at the page of Daniels' Chancery Practice to which I referred, references there to New York decisions which are quoted as sustaining the rule stated in the text. It would be idle to find an indictment for perjury against a man unless there were evidence that the alleged false oath had been taken in a judicial proceeding or case then pending; of course I do not refer to statutory provisions by which certain extra-judicial oaths are placed on the same footing as judicial oaths.

When so-called affidavits were made in this case, there was no case pending; and if an indictment for perjury were based on any of these affidavits, the defense would be that the oath had not been taken in a pending judicial proceeding. Indeed, with the exception of Mr. Dinsmore's, the other affidavits appear to have been concocted before the character of the suit in which they were to be used had been even determined upon.

Thus we have Mr Charles E. Smith, a former president of the Philadelphia and Reading Railroad Company, swearing that this lease is so unfavorable to the Philadelphia and Reading Railroad Company, that that company will lose a million of dollars a year by it; and this affidavit, having been prepared beforehand, is appended to a bill which complains that the lease is a ruinous bargain for the New Jersey Central Railroad Company.

I listened with unfeigned astonishment to Mr. Gummere talking about the injury which the stockholders of the Central Company had sustained through this lease, when the record shows that his witness (Mr. Smith) swore that the wrong was to the Philadelphia and Reading Railroad Company which was to lose $1,000,000 a year by it.

As to the affidavit of the complainant himself, I understood that according to the practice of this court,

the answer was taken to be true upon the hearing of a motion for a preliminary injunction.

Mr. Seward or some other gentleman corrected me by saying that it was only to the extent that the answer was responsive to the bill, but I don't know that the correction was material because an answer in equity is only evidence so far as it is responsive to the averments of the bill; but does not the practice of the court require evidence to support a motion for a preliminary injunction?

Whether Mr. Dinsmore objected to this lease, what means he took to enforce his objection, what the value of the property was, what his pecuniary loss as a stockholder will be, are all matters upon which the court must be judicially informed by evidence in the cause. But what is the evidence? After reading the elaborate statements contained in the bill filed on the twenty-ninth day of June 1883, we come to page 26 of the bill, and there we read that "William B. Dinsmore, the complainant mentioned in the above bill of complaint, being duly sworn according to law, on his oath saith the matters, facts and things set forth and contained in said bill of complaint so far as they relate to him are true; so far as they relate to others he upon information believes them to be true."

Apart from the fact that the affidavit was made before the case was pending, could any court grant an injunction upon such an affidavit?

It is well settled with us in Pennsylvania, and I presume that it is settled everywhere, that an injunction can not be granted except upon specific injunction affidavits, and this New York practice of verifying a bill of complaint by swearing that it is true as far as it relates to complainant, and as far as it relates to others it is believed to be true, has certainly not been adopted in the United States Courts, or in any other courts of equity that I know. There must be injunction affidavits and evidence from them of a character sufficient to satisfy the court. It will not do for a man who knows nothing about the matter to swear that such and such a thing is true as far as he knows, and as far as he has been informed he believes it to be true. He must state what his knowledge is, and what the grounds of his belief are.

But let us look at evidence furnished by the answer. Is not this bill founded upon theory that this lease was improvident—grossly improvident; so improvident as to be almost fraudulent? This theory assumes that this property of the New Jersey Central was worth far more than a rental of six per cent. on the capital stock.

Now, it is certainly responsive to state in the answer what the real condition of the company was, and to state that the lease was the means of rescuing it not only from insolvency, but from absolute ruin. Then, again, the bill alleges that the complainant was a dissenting stockholder. The answer says that he assented to the lease. Then how can he ask the court for a preliminary injunction without a tittle of evidence to show of his dissent, and in the face of the statement in the answer that he did assent, which is responsive to his allegation?

I never knew, and I regret to say that my experience at the bar has been a lengthened one, of a case in which an application for an injunction was presented under such adverse circumstances.

I come now to the part of the case which I have been instructed to consider as that to which my argument should especially apply.

The New Jersey Central Company was chartered in the year 1847, and the court will find at the end of the bill the acts of Assembly under which it was incorporated. Without specially referring to them now, I will say there was nothing peculiar in charter—at least no peculiarity to which I shall advert at present; but when the original act of incorporation was passed (26th of February, 1847), it was the law of New Jersey by the act February 4th, 1846, "that the charter of every corporation which shall hereafter be granted shall be subject to alteration, suspension or repeal in the discretion of the legislature," That this provision must be considered as if incorporated with every subsequent charter and forming part of it has been repeatedly decided by the courts of New Jersey. In *Greenwood* vs. *The Freight Co., 105 U. S., page 113*, the decision was to the same effect. In that case the State of Massachusetts had taken away the railroad of a street railroad company by

authorizing another company to take possession of it, and at the same time had repealed the charter of the former company. This was no doubt looked upon as an extreme exercise of legislative authority, and the case went, on the appeal of a stockholder, to the United States Supreme Court. But unfortunately for the company its charter, like that of the Central Railroad of New Jersey, was subject to a general law in force in Massachusetts at the time the company was incorporated, which rendered it subject to repeal, and the court was powerless to interfere. Mr. Justice Miller said it was part of the original charter; that the State might repeal it. *The Iron City Bank* vs. *the City of Pittsburg, 1 Wright, 340, &c.*, is a similar decision in Pennsylvania.

The New Jersey cases will be found in my printed brief.

The charter of the Eastern and Somerville Company being, then, a contract variable at the will of the State—or in fact no contract at all, between the State and the incorporators—we find that by an act of the Legislature of New Jersey, approved the eleventh day of March, 1880 (acts of the session of 1880, page 231), it was made lawful for any railroad company incorporated under any of the laws of the State of New Jersey, to lease its road or any part thereof to any other corporation of this or any other State, or to unite and consolidate, as well as merge its stock, property, or franchises and road with those of any other company or companies of this or any other State, or to do both; and it was made lawful for such other companies to accept such lease, or to unite, consolidate, &c.

It is plain that the authority thus conferred was meant to be exercisable at the pleasure of the corporation referred to, and that action thereon might be taken according to the ordinary rules of corporate action. In other words, the legislature did not *mean* to require that every corporator of both companies should consent to the lease or consolidation.

In this respect, therefore, the case is unlike that of Kean *vs.* Johnston, 1 Stockton, 401, which was referred to by my friend Mr. Gummere, and is often referred to in

New Jersey in discussions similar to that in which we are now engaged. That was a case heard before Mr. Cortland Parker as a Master of the Court of Chancery. His opinion was but an advisory opinion, but that does not detract from the weight due to the opinion of a lawyer of his reputation. The question was whether the Elizabethtown and Somerville Railroad Company could lawfully transfer its road to the Easton and Somerville Railroad Company, in a process of consolidation, which was to be effected by a sale of the railroad of the Elizabethtown and Somerville Company to the Easton and Somerville Railroad Company, in consideration of the issue of stock of the latter company for distribution among the stockholders of the Elizabethtown Company. The complainant, Mr. Kean, a well-known citizen of this State, filed a bill to prevent his company, the Elizabethtown Company, from making the transfer or sale, and the decision of the master was, that the act which authorized the sale meant to require, and therefore did require, that all the stockholders of the Elizabethtown Company should assent. In this view of the case it became unnecessary for him to consider whether the legislature would have had the power to authorize the majority of the stockholders to make the sale without the consent of all. He found as a matter of statutory construction that the legislature had intended that all should assent, before the corporation could act. Of course the legislature could have provided that this lease should not be effected without the consent of all the stockholders of the leasing company, or without the consent of two thirds; but where an act confers a power upon a corporation, unless there is evidence of the most conclusive character to the contrary, the court must assume that the power is exercisable by a majority of the corporators. Your Honor will see that the same objection could have been made to every act of Assembly relating to the Central Railroad Company, the Camden and Amboy, the Delaware and Raritan, and every other corporation. It might have been said that nothing could have been lawfully done by any of these corporations, in the exercise of powers or privileges granted by the legislature with-

out the consent of all the shareholders; but no one ever supposed that such was the rule. If the legislature had power to pass this leasing act, the privileges thereby conferred were to be exercised in the ordinary form of corporate action. You will find in the charter of this very company, that on various occasions special provision was made for obtaining the vote on a certain quorum before this, that, or the other thing could be done or omitted. The original charter gave the company "the liberty" to increase the capital stock from $1,200,000 to $2,000,000 without specifying to what extent the votes of the stockholders, either in number or interest, should be cast for the increase; but can any one doubt that a majority of the stockholders present or duly represented at the annual meeting could have voted for the increase, even if such majority had been a minority of the whole number? But under the supplement of March 17th, 1854, which allowed an additional increase of capital stock, "with the assent of a majority in interest of the stockholders," it is equally clear that no majority in interest present at an annual meeting could have increased the capital unless such majority had been also an absolute majority in interest of all the stockholders. So the power given to the same company by the third section of the same act "to purchase or lease or operate any railroad which may connect with or intersect their own, or to guarantee the bonds of such company, or to consolidate the stock of such company with their own, on terms to be mutually agreed on," would have been exercisable by a bare majority, at a regular corporate meeting, if the act had not gone on to provide that such purchase or consolidation should not be made "without the assent of three-quarters in interest of the stockholders."

Your Honor will find that wherever anything more than a corporate vote, taken in the ordinary way, is required, that such requirement is invariably expressed. Why, the courts here in New Jersey would have had but little trouble with cases upon which Mr. Gummere dwelt this morning, if the rule that action by a corporation required the assent of all the corporators could have been

applied. The case of Zabriskie *vs.* Hackensack Railroad is generally looked upon as rather an exceptional decision—I say so with all respect. But the difficulty which the chancellor had to encounter as to the power of a majority of the corporators to invest the corporate funds in the construction of a new railroad would have been avoided by his simply saying that the act which gave the company authority to construct the road meant, of course, that all the stockholders should assent. That would have been the end of it. The Gordian knot would at once have been cut, and there would have been no occasion to attempt to untie it.

The question in this case is, therefore, not one of legislative intention, but one of legislative power, and that I propose to consider. Your Honor will find in the bill in this case, and in the argument in the Black case, a celebrated case in New Jersey and elsewhere, a theory developed that, when the legislature creates a corporation, the charter is not only a contract between the State and the corporation, but a contract between the corporators and the corporation; that there are two contracts, first, between the corporators and the State, as one, and secondly, between the corporators as an aggregate and the corporators as individuals. This is purely fanciful; it is not supported by any principle or analogy in the law that I am aware of. The corporation consists of the corporators, and as it takes two parties to make a contract, how corporators, although acting as a collective body, can contract with themselves individually I do not know. In England they have many sole corporations. Blackstone tells us a bishop is a corporation, and our friends would have us believe, I suppose, that a bishop, as a corporation, enters into a contract with himself when he becomes a corporation, on which suit could be brought, and which might be enforced by the corporation turning the individual out of doors if occasion should require.

In the plaintiff's bill it is also claimed that the corporation is a trustee for the corporators; but this also is an obviously incorrect definition of the relation of the corporation to its constituent members.

The corporators are the corporation, and that is all that can be said about it.

"Though the proceedings by information," said Chief Justice Nelson in The People *vs.* The Turnpike Company, 23 Wend., 205, "be against the corporation it is the acts or omissions of the individual corporators that are the subject of the judgment of the court. The powers and privileges are conferred, and the conditions enjoined upon them; they obtain the grant and usage to perform the conditions."

It is not worth while, however, to speculate as to the relation between the individual corporators and the company, viewed as a distinct entity. We all know what the relations between stockholders are; they accept the privileges and franchises conferred on becoming a corporation, and they are bound to the State and to each other by the law of their charter, because conformity to that law is the condition upon which the charter was granted. You may say that there is a contract between the corporators; but the fact is, that they assent to and are bound by the charter, and the charter as a law governs their relations to each other as well as to the State.

Now, in granting this charter the State reserved to herself, not only the power to alter or suspend it, but to repeal it entirely in her absolute discretion.

It ought to be known, and I wish it were known throughout the length and breadth of this land, that when people invest their money under such a charter, they invest it in their reliance upon the honesty or benevolence of the legislature. They have no other security, and they ought to know it. Great hardship has resulted from its not being known. It is true that formerly much greater respect was felt for the sanctity of corporate rights and corporate property than now, and citizens invested their means in corporate enterprise, supposing that the charters which protected them were inviolable. That was in the days of the Dartmouth College case, and before legislatures invented or adopted the simple expedient of making charters subject to repeal, alteration, or amendment at their discretion.

But no man can complain if, with his eyes open, he becomes a member of a corporation which is thus in the power of the legislature. It is his contract that it shall be so, and it is idle for him to complain afterwards if the power is exercised.

Mr. Gummere has talked about the respect felt in New Jersey for the rights of property, but in Pennsylvania our constitutional provision is that the charters may be repealed or altered, provided no injustice is done to the corporators, and the question of injustice thus becomes a judicial question not to be determined by the legislature. But in New Jersey you have thought proper to leave all corporate rights conferred since the passage of the act of 1847 to the absolute mercy of the legislature; they can repeal the charter absolutely, and thus destroy every right dependent upon the franchises granted by it. Will my friends contend that the shareholders of the Central Company have such a property in the New Jersey Central Railroad that if the legislature were to repeal the charter they could retain possession of the railroad, a public highway, and use it? The right to maintain the road is a franchise, and would revert to the State. In the case of the Freight Company and Greenwood, to which I have just referred, the stockholders complained that another railroad company had taken possession of their railroad; but although the court said that their property could not be taken away, and that if the legislature had made no provision for compensation, the courts would have to protect the property, they could not restore the railroad, since the charter under which it had been held was repealed. But when Mr. Dinsmore and his counsel come here and complain that a great wrong is done to him because, under a charter subject to a legislative power of repeal or alteration, the legislature has chosen to permit the corporation, meaning thereby the majority of the stockholders, to make a bargain which is of the greatest advantage to them, the complaint is simply absurd. That a corporation charged with public duties and invested with sovereign franchises which maintains and operates a great highway, even if

the charter contains no reservation of a power to alter, amend or repeal, should at the will of a single shareholder be restricted in the exercise of its rights and duties to the mode in which they were exercised fifty years ago, that he should be able to prevent his associates from availing themselves of new methods suggested or required by the progress of events, the increase of population, wealth and commerce, would be monstrous, indeed.

Most of us here engaged can remember the days when the transportation between the different points of this country was divided up among a number of petty companies whose interests were conflicting, which did not and could not provide for the public necessities resulting from the increase of population, wealth, and commerce.

The Philadelphia, Wilmington and Baltimore Railroad Company was formed by the consolidation of no less than four distinct companies, each of them owning a section of the line of railroad intervening between Philadelphia and Baltimore, a distance of but about ninety miles.

These companies were consolidated years ago, for consolidation began at an early date, and now their roads form but a comparatively insignificant part of the great system of the Pennsylvania Railroad Company. How many companies were consolidated in forming the New York Central I do not pretend to know; and it would puzzle an industrious statistician to furnish a statement of the number of companies which have been absorbed into the great companies which now perform the railroad service of the country.

In Pennsylvania (I do not know how it was in New Jersey, but I presume it was the same here) the early companies were simply railroad companies, not transportation companies. The Philadelphia and Reading Company was incorporated in 1833, and its primary object was to furnish a toll road upon which toll should be collected as upon turnpike roads; and the company to this day has not been invested with the monopoly of transportation, and there is nothing to prevent any one from putting a locomotive on its road if he pays toll.

The companies created under the general law of 1849 have no monopoly of car service and any man can place cars on their roads. Would it be reasonable, in view of the public character of these companies, and the business they were formed to transact, to apply to any proposed enlargement of their duties or privileges the same rates that may be thought to govern the affairs of an ordinary partnership or of petty trading companies? Was there ever a time when anybody thought that a single stockholder could prevent a railroad corporation from accepting the privilege of increasing its capital stock, or from availing itself of legislative permission to lay an additional track? Was there ever a time when it was thought that a single stockholder, whose company had been incorporated simply as a railroad, and not as a transportation company, could object to the company becoming, with legislative permission, a transportation company? Even if this act of 1846 had never been passed, would your Honor have listened to an application of a single stockholder to enjoin this company from availing itself of a legislative grant of power to run its cars upon the road of another company, or from permitting another company to run its cars upon the Central Road? What would have become of the business of the country if a single stockholder, acting secretly perhaps as the agent of another company, could, through the ownership of one share of stock, have prevented the company in which he was nominally interested from co-operating with others in enlarging and improving the business of railroad transportation?

It was soon seen that the law which regulated trading partnerships could not be applied to railroad companies. It was seen in England at an early day. Conservative as they are supposed to be there of the rights of property, they found it impossible to assimilate the rights of a shareholder in a public company to the rights of a partner in an ordinary partnership.

As was said by Vice-Chancellor Stewart, in Ffooks *vs* The London and South Western Railway Company, "That no doubt it is true as a general principle, that the

majority can not bind the minority in a joint stock company as to an act not within the common contract, if it be an act to extend the liability of the whole body in a way not contemplated by the contract, as in borrowing money to extend the capital, where the amount of capital was limited by the contract. This was so held in the case of Burmeister *vs.* Norris, Ex-Ch., 796; S. C., 8 Eng. Rep., 487. But although this, generally speaking, is the law as to joint stock companies unincorporated, and unconnected with public duties or interests, it has not been applied to corporate companies for a public undertaking, involving public interests and public duties under the sanction of Parliament. In such cases the Court of Chancery has permitted the use of the corporate seal and the moneys of the company to obtain the sanction of Parliament to purpose materially altering the interests of the stockholders according to the contract *inter se.* This was done in the case of Stevens *vs.* The South Devon Railway Company, 13 Beav. Therefore, what has been laid down in several cases as the right of a single shareholder or a few, to make all the others, of whose acts the bill may complain, join with him in seeking relief against their own acts, provided those acts be inconsistent with the contract or law of a partnership *inter se*, must be taken to be subject to many qualifications and requiring much caution and consideration."

In the case referred to, Stevens *vs.* The South Devon Railway Company, 13 Beav., 48, a general meeting of the shareholders of a railway company had authorized the directors to apply to Parliament for an act which would very materially alter the existing rights and interests of two classes of shareholders *inter se*, and it was held that such an application was not a breach of trust or duty, and that, " to hold otherwise would be applying too strictly to a railway company the principles admitted to be applicable to private partnership, resting on private contracts, unconnected with public duties and interests, and capable of dissolution."

In the well-known case of Ware *vs.* The Grand Junction Water Works Company, 2 R. & M., Lord Brough-

am dissolved an injunction which had been obtained by a shareholder, against the company applying to Parliament for an act authorizing a material change in its charter, and it was there decided that "a court of equity will not, at the instance of a shareholder, restrain a joint stock company, incorporated by acts of Parliament which prescribe its constitution and objects, from applying in its corporate capacity to Parliament, and from using its corporate seal and resources to obtain the sanction of the legislature to the remodeling of its constitution, or to a material alteration and extension of its objects and powers.

"The right of making such an application is incident to a joint stock company of that description."

The chancellor, after pointing out that a man who enters into a partnership with a party of such a kind must know that he is liable to the contingency of the company applying for an enlargement or alteration of its powers, said, "There never was so wild a dream as to imagine that by refusing this motion I shall overturn a decision of Lord Eldon in Natusch *vs.* Irving. I am rather, in fact, affirming that decision, but if I upheld the whole of this injunction I should be going against the principle of the case of the Mayor of Lynn *vs.* Pemberton (1 Swan, 251). The language of Lord Eldon's judgment in the latter case plainly shows that he could not have done what he is represented as having done in Natusch *vs.* Irving, *Ibid.*, page 435."

The idea that the company might be left at liberty to apply for a legislative change of its charter, and yet be afterwards restrained from accepting the change, is of course utterly inconsequential as applicable to courts in which the jurisdiction to restrain improper applications to the legislature is recognized; as it is to the fullest extent in the English courts of chancery. (See the cases as to this jurisdiction in Chancellor Green's opinion in Story *vs.* The Jersey City and Bergen Point Plank Road Company, 1 C. E. Green, 13.)

This remark is made because in the fifth edition of Redfield on Railways, section 212, paragraph 2, the

author, after saying that "the early cases upon this subject by Lord Brougham, as chancellor, although in some respects more liberal in favor of allowing applications to Parliament, seem to be more in accordance with the spirit of enterprise in this country than some of the recent English cases," goes on to add that "the question of enlarging the powers of the company, or altering the fundamental law, is a matter resting altogether in the discretion of the legislature, and this, if accomplished, will not bind the existing holders who have not assented to the alteration, but must be carried into effect by a new subscription probably, and this will subject the corporation to the embarrassment of a double accountability of the apportionment of loss and profit upon the several portions of the enterprise."

Now, in the first place, it is at present the unquestioned and unquestionable law of England that a public, or *quasi* public company, may apply to Parliament for an alteration or extension of its charter on public grounds, whatever may have been the earlier data or decisions to the contrary of the inferior courts of chancery (See Lancaster and Carlisle Railway Company *vs.* N. W. R. Co., 2 Kay, J., 293); and, secondly, the theory that any such alteration or extension, when granted by Parliament, could require or authorize a division of the company into two sets of stockholders, the original stockholders carrying on the old business and the new stockholders carrying on the new business, is so anomalous as not to justify its being even suggested.

"There is not a company, I suppose," said Lord Westbury, in Taylor *vs.* The Directors of the C. & M. Ry. Co., Law Reports, 4 Eng. and Irish Appeals, 648, "that has not in the course of time added some new undertaking to the old undertaking, and then it may or may not have funds specially applicable to the new undertaking.

"But if it is authorized to add the new undertaking to the old undertaking, it is then authorized to apply to the new that which was previously applicable to the old undertaking, for if the new made part of the old, that

which might originally be applied to the old, may now be applied to the collective subjects constituted of two things, namely, the old undertaking and the additional one."

Indeed, in a subsequent section of Judge Redfield's work, he says: "*And there seems to be no question made in the English courts of the power of Parliament to extend the line of a railroad or to consolidate existing companies, and that the shareholders are bound by the acceptance of such legislative provisions by a majority of the company, or by contracts to procure such powers by act of Parliament.*"

The inference that the corporators of the Central Railroad of New Jersey impliedly arranged with each other, and agreed with the State, that, exercising a public franchise they should be subject, more than an ordinary trading company, to the interference of the legislature, is strengthened by the fact that this company was not incorporated until the year 1847, when the consolidation of railroads in this country had been carried on to a great extent, when the subject of leases, mergers, and powers of running upon other railroads had largely attracted the attention of the legislatures, and when, in the very charter of this company, at least in the supplementary act shortly afterwards passed, this company was authorized to consolidate with other companies or to lease their railroad. The subjects of consolidation and leasing were familiar matters and were especially brought to the attention of these corporators by the provisions of their charter. How then can any of them say they could not have anticipated that the legislature might think that the interests of the State of New Jersey required that this Somerville and Easton Company should do something more than operate a railroad from Somerville to Easton?

But the fact, and the essential fact of this case is, that the charter *did* reserve to the legislature the power to alter, suspend or repeal it at their discretion.

In the case already cited, Greenwood *vs.* The Freight Company, 105 U. S., page 13, Mr. Justice Miller said, when speaking of a similar statutory reservation in Massachusetts, "It would be difficult to supply language more comprehensive and expressive than this:—

"Such an act may be amended; that is, it may be changed by the addition to its terms, or by qualifications of the same. It may be altered by the same power, and it may be repealed. What may be repealed? It is the act of incorporation. It is the organic law on which the corporate existence of the company depends, which may be repealed, so that it shall cease to be a law, or the legislature may adopt the milder case of amending the law in matters which need amendment, or altering it when it needs substantial change."

Whoever supposed that *immaterial* changes required such a legislative reservation? The strongest cases that can be found, even the case of Zabriskie *vs.* The Hackensack Company, assumes that immaterial changes may be made by the legislature without any reserved power. How could a railroad be operated if it were not so? Could a stockholder say: "I entered into a contract with my associates to maintain a single line of railroad between Baltimore and Philadelphia, and the legislature reserved no right to amend or change the charter, and yet my associates want to lay an additional track and have obtained permission from the legislature to do so." Would any one suppose it required a reservation of legislative power to authorize or compel the company to lay another track? But to resume the extract which I was reading from Justice Miller's opinion: "All this may be done at the pleasure of the legislature. That body need give no reason for its action in the matter. The validity of such action does not depend upon the necessity for it, or on the soundness of the reasons which prompted it. This expression, 'the pleasure of the legislature,' is significant, and is not in many of the similar statutes of other States." See page 17.

In the same case, page 21, the learned judge remarked that the reservation of a power to alter, &c., had been suggested by Justice Story, in the Dartmouth College case, 4 Wheaton, 518, and that the history of the reservation clause in acts of incorporation supported the proposition "that whatever right, franchise or power in the corporation depends for its existence upon the granting

clauses of the charter, is lost by repeal," and in support of this proposition he referred to the following cases:—

Pennsylvania College cases, 13 Wallace, 190; Tomlison *vs.* Jessup, 15 Wallace, 545; Railroad Company *vs.* Maine, 96 U. S., 499; Sinking Fund cases, 99 *Id.*; Railroad Company *vs.* Georgia, 98 *Id.*, 359; McLaren *vs.* Pennington, 1 Paige (N. Y.), 102 (relating to a New Jersey charter); Erie and N. E. Railroad *vs.* Casey, 26 Penna. State Reports, 287; Miners' Bank *vs.* the U. S., 1 Green (Iowa), 553; 2 Kent Com., 306, 307.

What injustice is done by the exercise of a reserved power to amend or repeal a charter? If I accept the grant of a franchise from the State under the clearly expressed provision that the State may take it away, can I complain of a violation of contract if the State resumes the franchises?

In State *vs.* The Mayor, 2 Vroom, page 575, Chief Justice Beasley said: "I am not aware that any court has ever treated a charter of an incorporated company, which was alterable at the legislative will, as a contract on the part of the public."

In Story *vs.* The Jersey City and Bergen Point Plank Road Company, 1 C. E. Green, 13, the syllabus of the reporter contains the following:—

"Where, at the time of the grant of a charter to a corporation, there is a general law of the State that the charter of every corporation granted by the legislature shall be subject to alteration, suspension, or repeal in the discretion of the legislature, the legislature in granting such charter must be deemed to have reserved to themselves the right of altering, suspending or repealing the same whenever in their discretion the public good may require it, as fully as if the reservation were inserted in the charter. *And all contracts express or implied resulting from the act of incorporation, and its acceptance by the stockholders, must be deemed to have been entered into by both parties subject to that reservation.*

"*Whatever limitation may exist to the reserved right of the legislature to alter or repeal a contract, such reservation is of itself valid; and this court ought not, upon a motion for*

a preliminary injunction, to pronounce any alteration, suspension or repeal of the charter to be unconstitutional or illegal. Much less should this court make such a declaration in advance of any actual legislation."

The language of the reporter is almost literally identical with that of Chancellor Green in the opinion delivered in the case, and it was used in answer to what he called the theory of the complainant's bill, viz.: "That the charter of an incorporated company can not be altered in any essential particular, even with the consent of the corporators, without the consent, express or implied, of every stockholder, and that such alteration would be unconstitutional, as impairing the obligation of the contract entered into between the State and such stockholders." Page 21.

The anticipated legislation to which the chancellor referred was legislation to enable a plank road company to alter the route of its road and to construct a railway, or permit one to be constructed thereon, without the consent of all the stockholders; and while this case is being referred to, it may as well be remarked here that it was there expressed and deliberately decided *that the legislature having authorized a railroad company to purchase any plank road "the sale by the Plank Road Company (defendant in the case) of the whole or any part of their road to the railroad company without the personal consent of the complainant, is not such an infringement, if any, of the complainant's right as a stockholder, as this court (Court of Chancery) will interfere to restrain by injunction.*"

Here is an express decision of the highest court of New Jersey, with the exception of the Court of Errors and Appeals; a decision that so far as I know has never been questioned, although it must have been brought to the attention of the Chancellor and Court of Errors and Appeals in the Black case. It is that the Court of Chancery will not interfere by injunction to restrain a majority of stockholders in a public company from selling out their works if the legislature chooses to grant them permission to do so. If that is law of New Jersey we might safely rest our case here.

But I wish your Honor to consider the scope of the power to repeal only. Suppose the legislature had reserved the power simply to repeal this charter. All must admit that if this power were exercised the franchises would revert to the State, the corporation would cease to exist, and the railroad would be a public highway and at the absolute disposal of the State, to be sold or leased if thought advisable to the Philadelphia and Reading, the Pennsylvania, or to any other company.

Why, therefore, may not the State exercise the lesser power of ordering that the road shall be leased if the majority of the stockholders prefer? If the greater includes the less, a power to take a railroad absolutely includes a power to authorize its owners to dispose of it on such terms as a majority shall elect.

If it would not have been unlawful for the legislature of New Jersey to have repealed the charter and taken possession of the road, can it be unlawful for the same legislature to enact that, with the consent of the corporation, another railroad company may take possession on such terms as the corporation may choose to prescribe?

If the power of eminent domain permit land to be taken for public use without compensation, certainly the taking of land with compensation can not be complained of.

If I can dispossess my tenant absolutely, I do him no wrong by putting another into possession, on condition that the latter pays rent to the former.

Indeed, it seems too clear that a power to repeal a charter absolutely and unconditionally implies a power to repeal partially or conditionally, and that the reserved right of the State of New Jersey to revoke the collective franchises and privileges of the Central Company, includes the right to revoke the franchise of taking toll on the Central Railroad, and *a fortiori* the right to permit the corporation to sell or lease this franchise upon such terms as should be satisfactory to it.

If the legislature had appointed a board of commissioners to supersede the directors of the Central Com-

pany, and had enacted that this board should, within certain maximum rates, regulate the tolls, could it have been contended that, although the legislature might have repealed the charter absolutely, it had no power to modify the privileges granted by the charter to the company of selecting the agents who should fix the rate of tolls?

Such an argument would seem to be a *reductio ad absurdum.*

But if it would be lawful for the legislature to fix the rate of tolls without the consent of the corporation or any member of it, could it be unlawful for the legislature to provide that the tolls might be such as the majority of the corporators should think fit to establish?

A power that can be exercised compulsorily can be exercised permissively.

"If an alteration of the charter of a corporation is of such a character that the State would have constitutional authority to impose it compulsorily by virtue of its general power of legislation, there seems to be no reason why such alteration should not be sustained if enacted in the shape of a permission or offer to the majority of the corporators.

"An alteration thus enacted would in effect be compulsory, and would bind the corporation upon its being assented to by a certain portion of the shareholders; and it would not impair the company's charter, more nor less, than if it had been imposed without the consent of any member. So, also, where the State has the right to repeal or alter a charter by virtue of the terms of a charter itself, this right may be exercised in any manner the State may see fit. An alteration may be made by an act of the legislature unconditional in its operation, or it may be made to depend upon the will of the majority, or any other portion of the corporators, whether the alteration shall go into effect."—"Morawitz on Corporations," section 484.

But to return to the consideration of the reserved power in this charter, as it actually existed, viz., a power to alter as well as repeal, I shall, in referring to cases on

this subject, confine myself mainly to an examination of those in the Supreme Court of the United States; for I think I can satisfy the court, and even my friend Mr. Gummere, if he is not already satisfied, that if there should be a difference on the question involved here between the New Jersey decisions and those of the Supreme Court of the United States, this court would be bound by the latter.

In Shields *vs.* State of Ohio, 95 United States Reports, page 319, it was held that under a constitutional provision in Ohio, that "no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the General Assembly;" an enactment that no railroad company should charge more than three cents per mile for the transportation of passengers, was applicable to a corporation whose charter empowered it to charge such tolls for the conveyance of passengers as it might deem reasonable.

"*It is urged,*" said Swayne, J., "*that the franchise here in question was properly held by a vested right, and that its sanctity as such could not be thus evaded. The answer is consensus facit jus. It was according to the agreement of the parties. The company took the franchise, subject expressly to the power of alteration or repeal by the 'General Assembly.'*"

In Miller *vs.* State, 15 Wallace, 478, the Supreme Court held, affirming the judgment of the Court of Appeals of New York, that where the charter of a corporation was subject to alteration, suspension or repeal in the discretion of the legislature, *it was competent for the legislature to provide by law that a municipality should have the right to elect seven directors of a railroad company, in place of four, the number which it had been originally empowered to elect, though such change resulted in giving the majority of the board to the municipality.*

"Attempt is made in this case," said Clifford, J., "to show that the right to elect all of the directors, except four, had become vested in the stockholders owning a majority of the shares, and that the amendatory act giving to the city the power to elect seven impairs that

vested right; but the court is of an entirely different opinion, *as the legislature in conceding that right made the concessions, subject to the reserved power to alter or repeal the charter, as ordained in the Constitution of the State and the several statutes mentioned, which clearly gives to the legislature the power to augment or diminish the number, or to change the apportionment, as the ends of justice or the best interests of all concerned may require.*"

Here was a case in which the charter gave the stockholders the right to elect trustees and managers of their property, and where the legislature, under its reserved power, took away this right, and the court affirming the judgment of the Court of Errors and Appeals, held that the change was justified by the reservation. Why talk, then, about the changes justified by the reservation being only such as would affect the public relations of the company? The election of directors was a domestic matter, in which the public had no interest, but the court did not consider that the reservation was thus restricted. and sustained the intervention of the legislature in the internal organization of a private corporation.

Among the cases referred to by Judge Clifford was that of Sherman *vs.* Smith, 1 Black, 587, as to which he said, "Members of banking associations, it was enacted by the general banking law of New York, should not be individually liable for the debts of the association, unless it was provided in the articles of association, but this court held in the case of Sherman *vs.* Smith that *a subsequent statute imposing such liability upon the shareholders of the association, was a valid law, as the charter reserved to the legislature the power to alter or repeal the act of incorporation.* Such a conclusion was earnestly resisted at the bar, as the conditional exception from such liability was embodied in the articles of association, but the court overruled the defense upon the ground that *the reservation in the charter of the right to alter or repeal the act was paramount.*"—*Ibid.*, page 495.

It seems to me that nothing can be more futile than to argue that the reservation in question applies only to the public relations of the company or to the exercise of

its public franchises. Here was a banking company possessing no public franchise but carrying on a private business under a charter which relieved them from personal responsibility, and the court held that under the power reserved to the legislature the shareholders could be made personally liable for the contracts of the corporation.

In the "Sinking Fund Cases," 99 U. S. Report, page 700, it was held that, under a reserved power to alter, amend or repeal an act by which a railroad company was incorporated, Congress could lawfully enact that the corporation should set apart a portion of its earnings as a sinking fund for the payment of its debts to the United States.

The question arose on a bill filed by a single stockholder to prevent the corporation from paying dividends or doing anything else in contravention of this requirement.

The case presented the peculiarity of a single stockholder insisting that the corporation should be made subject to a material alteration in its charter.

The court held that, while the United States *could not deprive persons or corporations of their property without the due process of law, nor could they compel the corporation to discharge its obligations to them, otherwise than according to the original contract, and while they are as much bound by their contracts as individuals, yet that the provision made for the sinking fund was a legitimate exercise of the power reserved to alter, amend or repeal the charter of the company.*

After reviewing several cases in the Supreme Court, in which the extent of such a reserved power had been considered, the Chief Justice said: "*Giving full effect to the principles which have thus been authoritatively stated, we think it safe to say that whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment.*"—Page 721.

The rule thus deliberately and authoritatively established should be regarded as the final adjudication of the Supreme Court on the subject.

It was adopted, too, it must be remembered, not with regard to any obligation or duty incumbent upon the railroad company in the exercise of public franchises, but with regard to its internal administration; and it affected not only the implied contract between the stockholders, but the express contracts of the corporation with its creditors.

As a creditor the United States occupied no different position from that of any other creditor (this was expressly held) so that the decision must necessarily have been the same if the sinking fund had been for creditors generally.

MR. ROBESON:—All those points which were taken by Mr. Gummere are in the dissenting opinion of that case and overruled by the Supreme Court itself. It is now the settled law of the land.

MR. JAMES E. GOWEN:—Undoubtedly.

Now a statute relating to the lease of a railroad obviously affects the use of the road as a public highway. It regulates the exercise of a public franchise, as much as a statute fixing the rate of tolls or prescribing in any other respect the so-called public duties of the company, and when the lease and its terms are left discretionary with the corporation, the statute can not be said to interfere with the internal administration of corporate affairs; but if it does, so does every public regulation which enlarges or restricts corporate powers or duties, and besides, as has been conclusively established, the regulation of the purely domestic affairs of a corporation is a legitimate exercise of the power to amend or repeal its charter.

The idea which I wish to express is this: The interference in the sinking fund case was not appropriate merely because the company was a railroad company.

There was nothing in the act of Congress relating to the mode in which the road should be used, the toll which should be charged, or anything relating to the exercise of a public franchise. The sinking fund act would have been held constitutional if it had been enacted with regard to a manufacturing company, to a stage company, or to a banking company. It did not affect any public matter, and therefore the decision in the case is

a fortiori applicable to the regulation of a sovereign franchise with which a corporation has been invested for the public good.

"Nothing is more common now," said Judge Drummond, in Dimpfel *vs.* Ohio and Mississippi Ry. Co., 8 Reporter, 641, "than the union of different lines of railroad by means of leases of one to the other, the authority for which is given, not so much under particular as under general laws of the State. * * * It must be borne in mind that the courts in recent times have been extremely liberal in the construction of powers of railroad corporations to accomplish the general scope and objects of their creation, and that the question of *ultra vires* has not of late years been construed with the strictness that existed in former times."

Taking the rule as formulated by Chief Justice Waite in the Sinking Fund case, can any one dispute that it would have been legitimate for the Legislature of the State of New Jersey to have provided in the original charter of 1847 that the Central Company might lease its road to any other railroad company. According to this rule anything that could have been inserted in the original charter may be supplied by amendment and what possible objection could there have been to the original charter, providing that the Central Company might become a lessor as well as that it might become a lessee in a railroad lease.

It is worthy of remark, too, *that even where the validity of a statute passed in exercise of the power of amendment might be questionable, any doubt must be resolved in favor of the statute. "Every possible presumption is in favor of validity of the statute; and this continues until the contrary is shown beyond a rational doubt. One branch of the government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."* *Ibid.*, page 178.

That was said with regard to the statute of the United States, and talk as we may about State rights, Federal rights, or the nationalization of the country, no one dis-

putes that it is yet an elementary rule that the jurisdiction of Congress is a limited jurisdiction and can only be exercised when specially permitted by the constitution, and that there is not the same presumption in favor of the constitutionality of an act of Congress as there is in favor of the constitutionality of a State statute.

Following in the path marked out in the Sinking Fund cases the Supreme Court of the United States held, in the recent case of Close *vs.* The Glenwood Cemetery, 2 Supreme Court Reporter, 267, *that under the reserved power to alter and amend it was lawful for Congress to enact that the holders of lots in a cemetery, and not the stockholders of the company, should elect three out of the five directors, and that three-fourths of the gross receipts thereafter accruing from the sale of lots should be devoted to the improvement and maintenance of the cemetery.*

"After the cemetery," said Mr. Justice Gray, "had been laid out and improved and used for the burial of the dead for more than twenty years, and two thousand burial lots had been sold, it was a reasonable exercise of the reserved power of Congress to authorize the owners, in good faith, of lots upon which burials had been made, to elect a majority of the trustees in whom should be vested the control and management of the cemetery, with a due regard to the equitable rights of all persons having any vested interest therein, and to provide that a portion only of the receipts arising from the future sale of lots should be paid to the original proprietors and the rest be devoted to the improvement and maintenance of the cemetery. Every legislative act is to be presumed to be a constitutional exercise of legislative power until the contrary is clearly established; and there is nothing in the record before us to show that the proportion of one-fourth of the gross receipts from future sale of lots, which is fixed by the act of Congress, 1877, and by the decree of the court below, as a compensation for the title and interest of the original proprietors and associates, is not a reasonable one."

This was said in reference to a private corporation and to the internal administration of its affairs, a corporation

which held no franchise except that of being a corporation. If the cemetery had been owned by an individual, any attempt on the part of Congress to enact that he should spend three-quarters of the receipts from it, in a certain way, would have been looked upon as outrageous. But it was owned by a corporation and its charter was subject to alteration or repeal, and it was for this reason that the interference of Congress was justified.

In face of such a decision what possibility of success would there have been of contending that an act authorizing the cemetery company to sell or to lease its ground and distribute the proceeds among the stockholders, would have been unconstitutional as against a dissenting stockholder; if, indeed, it could have been supposed that such an act was necessary, or that express legislation was required to enable the corporation to exercise the ordinary power of selling or disposing of its property.

It is true that a railroad is not property of the same kind as a cemetery; but the distinction does not warrant a larger exercise of legislative power with regard to the latter than to the former, but just the contrary; and with the consent of the sovereign power a railroad is as much the subject of sale or transfer as a cemetery or a building lot.

According to this decision the Legislature of New Jersey might have provided that the larger part of the earnings of the Central Railroad of New Jersey should be devoted to the improvement of the road or to distribution among the public, and in view of such power it is idle to contend that the State could not authorize the stockholders to dispose of their property in such manner as might seem most advantageous to them.

In the case of the County of Scotland *vs.* Thomas, 94 U. S. Reports, page 682, it was expressly held that, *under a power to alter, amend or repeal charters, it was lawful for the State to permit a railroad company to consolidate with a railroad company of another State and thus form a new company.*

"*It would seem clear therefore,*" said Mr. Justice Bradley, speaking of the consolidation, "*that alterations of the*

charter were admissible and would not affect rights of the company (one of the original companies) untouched thereby; nor a power to subscribe to its stock previously existing." Page 690.

The point was, whether the power to receive county subscriptions, which had been possessed by one of the divisional companies, attached to the new company.

It is true that before the subscription had been made the consolidation had been effected, whether with or without the consent of all the stockholders, does not appear; but the underlying question was whether a subscribing county could plead its want of authority to subscribe, because the original enterprise had been changed by the consolidation?

The case would not have been the least stronger if it had been the case of an ordinary individual subscriber refusing to pay his subscription, because by consolidation, the alleged object for which he had subscribed, had been altered, and claiming that there had been a fundamental change releasing him from his contract.

The question was whether the county had certain power. It had no power excepting to subscribe to company "A," and even if it had subscribed to the stock of another company it could have repudiated the subscription. It was argued that the county's subscription to the consolidated company was unauthorized; but the court held that the latter company into which company "A" had been merged, was a company lawfully created under the reserved power in the charter of "A," and that the county could not allege that the purpose for which it had subscribed had been changed without its consent.

It must be observed, too, that except where the interests of others are involved, *the very existence of a question as to the power to alter a charter presupposes the exercise of the power in invitum.*

It had never been suggested that the legislature might not make any alteration with the consent of all the stockholders.

Nothing seems plainer than that the same result would have followed if the contract of the county had been

with the divisional company before the consolidation, and the case had been that of a subscriber to the stock, claiming to be released on account of the subsequent consolidation. In fact the bonds of the county, from which it sought to be released, had been issued in payment of a stock subscription.

It would seem too plain for argument that if the power to alter or amend *is large enough to permit a consolidation, it is large enough to permit a lease;* unless it can be said that a railroad company, by leasing its road changes its organization and purpose more than it would have done by merging its corporate existence into a new company; which would simply be absurd.

In Nugent *vs.* The Supervisors (and see a precisely similar case in Sullivan *vs.* Portland Railroad Company, 94 U. S., 806), 19 Wallace, 241, we have a case *in which a county subscription to the stock of a railroad company was attempted to be repudiated on account of the subsequent consolidation of the company with another new company.* The attempt was successful in the Circuit Court, but not in the Supreme Court of the United States, where the judgment of the lower court was reversed, and where it was held, to quote the syllabus, that "*although a subscriber for stock in a company is released from his subscription by a subsequent alteration of the organization or purposes of the company, it is only when such an alteration is a fundamental one, and when in addition it is not provided for or contemplated by either the charter itself or the general laws of the State.*"

There the company for whose stock the subscription was made had been organized under a special act which made it lawful for it to unite or consolidate its road with any other railroad or railroads, and at a time when a general law of the State permitted such consolidation; and the Supreme Court held that the subscribers to the stock must be presumed to have known that the power thus conferred might be exercised by the corporation.

In the case now before the court there was no express authority, either in the special charter of the company or in the general law of the State, to lease the road to

another company, but there was an explicit reservation in the charter of a legislative power to alter, suspend or repeal it, and it is submitted that it has been abundantly shown on the highest authority that such a reservation reserved far more extensive power than that required to authorize a lease. Indeed, in the very case of Nugent *vs.* The Supervisors, Mr. Justice Strong, while discussing the subject at large and referring to authorities (among others, Clearwater *vs.* Meredith, which had been misapprehended in the court below), says:

"*The Supreme Court of Connecticut recognize the rule in Bishop* vs. *Brainerd* (*28 Conn., 299*), *and a subscriber to one company, was held to be a debtor to the consolidated company in a case where there was no general authority to consolidate, but the charter of the company was subject to amendment by the legislature, and where the legislature, after the subscription, confirmed the consolidation.*"

Many other cases to the same effect, as Bishop *vs.* Brainerd, are cited at the foot of page 251, 19th Wallace; among them Schenectady and Saratoga Plank Road Company *vs.* Thatcher, 1 Kernan, 102, where the capital had been increased, and a branch railroad built under subsequent legislation, and where the distinction between cases cited by counsel in support of the inviolability of charters, and the case in hand where the charter was subject to alteration or repeal was pointed out, "Every one," said Mr. Justice Johnson, "who enters into such a company is aware of the reservation of the power and of the possibility of its exercise and trusts, as in many other matters he must trust, to the wisdom and justice of the legislature that the power will not be abused." Page 114. Buffalo and New York City Railroad Company *vs.* Dudley, 4 Kernan, page 336, where the change complained of was an increase of the capital and an extension of the company's road, and where the court pointed out that it was unimportant whether the legislation under the reserved power was beneficial or not, and disavowed any inference to the contrary that might have been drawn from some expressions in the opinion of Parker, J., in the preceding case, Agricultural Branch Railroad Com-

pany *vs.* Winchester, 13 Allen, 32, where the amendment extended the time for completing a railroad.

It would be easy to multiply citations on this point, but it can hardly be necessary.

The sum of the whole matter, to use the language of Judge Drummond, in Pick *vs.* The Chicago and North Western Railroad Company, 6 Bissell, 131, a case heard before Judges Davis, Drummond, and Hopkins, is that "*a reserved power to alter or repeal a charter becomes by operation of law a part of every contract or mortgage made by the company. The share and bondholders take their stock or their securities subject to this paramount condition of which in law they have notice.*"

Some of us live in a State in which there has been a great deal of railroad legislation, where railroads abound, but no one ever thought that a railroad company could not, with the consent of the legislature, lease the road of another company, even although a minority of stockholders objected.

It would be surprising if the statute book of a single State, including New Jersey, could be found which does not contain statutes, public or private, authorizing railroad companies to lease their roads, and without a suggestion in them that any appropriation or condemnation of private rights was involved.

Statutes authorizing consolidation may be found in which provision is made for compensation to dissenting stockholders, but as to companies holding charters subject to legislative control, this may well be considered as *ex gratia* rather than *ex debito.*

In what may be considered a leading case, Lauman *vs.* The Lebanon Valley Railroad Company, 30 Penna., 46, the special act authorizing the consolidation made no provision for paying dissenting stockholders, and at the suit of such a stockholder the court granted an injunction against the consolidation, but only until security was entered for paying the plaintiff the value of his stock; but the charter there was not subject to amendment at the will of the legislature. (P. L., 1836, page 385.)

"So there are cases," said Mr. Justice Strong, 92 U. S., page 671, "where it has been held that a consolidation can not be consummated against the consent of a stockholder in one of the companies, unless his stock is purchased. *This, however, may be doubted as applicable in all cases*," and since this was said the decisions of the Supreme Court (already quoted) have established beyond question that the power to amend or repeal the charter of a railroad company includes the power to authorize a consolidation with another company.

But what comparison can there be between the effect upon the organization of a railroad company produced by its surrendering its separate existence in the process of consolidation, and that produced by its leasing its railroad, or, in other words, farming out its right to take tolls?

In Branch *vs.* Jessup, 16 Otto, 479, Mr. Justice Bradley, when speaking of a power given to a railroad company to incorporate its capital stock with the stock of any other company, says:

"*It contemplates, not only the possible transfer of the railroad and its franchises to another company, but even the extinguishment of the corporation itself and its absorption into a different organization. The greater power of alienation or extinguishing its franchise, including its own being and existence, contains the lesser power of alienating its road and the franchises incident thereto and necessary to its operation.*"

Can it be said that the power *to let for a term of years is greater than the power to sell absolutely?*

In that very case the decision was that a company which had power to consolidate its stock with the stock of another company had power to sell absolutely and outright a portion of its road—the power to merge its entire corporate existence and property into another company necessarily involving the power to sell a part of its property.

The fact that a franchise is inalienable is the only reason why the corporation to which it has been granted may not exercise the same general *jus disponendi* over it that it may exercise over its other property.

The right to take toll is a franchise, but the right to run cars upon a railroad is not; a railroad company may not therefore sell the franchise, but where has it been said that it may not sell its locomotives and engines if the majority of the corporators find it their interest to do so, and yet the retention of the cars and engines may be as essential to its business as the retention of the franchise.

The doctrine of *ultra vires* is as inapplicable to the sale of the franchise, with the consent of the State, as it is to the sale of any other species of property.

It has never been thought that a majority of the corporators could not mortgage their railroad and its franchises with the consent of the State, and if they may mortgage why may they not sell or lease?

It can not be that a power to mortgage must be restricted to the payment of debts. We know that it is constantly exercised to procure means for enlarging the business of the company; and it is impossible to suggest any reason why a power of sale may not be exercised either for the payment of debts or because the majority of stockholders may think it advisable to sell out and quit the business.

It would be a novelty indeed for a court of equity, at the suit of a single shareholder, to enjoin all the other shareholders in a mining or manufacturing company from selling out their mines or manufactory. If they represented that it was to their interest to sell or lease, would the court refer the question to a master and order him to forecast the future for them?

I contend now that apart from the question of State interference under a reservation of power, the mere assent of the State to the transferability of the franchise empowers the majority in a railroad corporation to sell out or lease the property.

Nothing can be clearer on principle than that any private corporation may discontinue its business whenever it thinks it advisable, and a railroad company is, except as to its public duties, a purely private corporation, and as to these the State is the sole arbiter.

"Does it violate the private right of a dissenting stockholder," said Lowrie, J., in Lauman *vs.* The Lebanon Valley Railroad Company, 30 Pa. State Rep., page 47, "when the others by a corporate act unite in selling out all the property of the corporation? In relation to ordinary private corporations for mere private purposes, it will not be pretended that it does, even when such a sale is equivalent to a dissolution of the corporation, as when a manufacturing corporation sells out its establishment and refuses to resume operations. And railroad companies go this far frequently in the effectiveness of the act where, with the consent of the legislature, they mortgage all their property, for a mortgage involves a power of sale."

In the case of Gratz *vs.* the Pennsylvania Railroad Company and the Philadelphia and Erie Railroad Company, 41 Penna. State Reports, 447, in which a single stockholder in these companies defendant sought to enjoin the latter company from leasing its road and selling its personal property to the former, it was never even suggested in the opinion of Mr. Justice Strong that any contract between the stockholders required the assent of all to the proposed sale or lease, and yet the case was argued by distinguished counsel, and any topic that they might have omitted could not have escaped the attention of a judge of such pre-eminent ability and of such conservative tendencies.

But let us see whether there is anything in the decisions of the courts of New Jersey to justify in the present case a disregard of the principles which we have been considering, assuming for the present (and the assumption is utterly untenable) that this court would in such a matter be bound to follow these decisions, in preference to those of the Supreme Court of the United States.

There are four well-known cases that bear upon this subject:

The first in date is that of Kean *vs.* Johnson, in which the advisory opinion of Cortlandt Parker, Esq., master, is reported at page 405 of 1 Stockton.

The case was presented on a demurrer to a bill filed by a stockholder to prevent the consolidation of the Somerville and Easton Company with the Elizabethtown and Somerville Company through the form of a sale of the railroad of the latter to the former, in consideration of the issue of stock of the Somerville and Easton Company.

Now it is quite sufficient for our purpose to point out, as has already been done, that the learned master expressly declined to consider the question whether the act authorizing the sale and consolidation would have been constitutional or not, if it had not provided for the consent of all the stockholders (see pages 420 and 421) since he had decided that the act was meant to require, and did require the consent of all.

It may be added too, that the *question* in Kean *vs.* Johnson was one of *consolidation* not *sale or lease*, and might have involved the consideration of the power of the legislature to authorize a majority of shareholders to commit the minority *to a new enterprise*, a matter of no importance, according to the recent decisions of the Supreme Court of the United States, where the charter is subject to amendment or repeal, but yet in the abstract, a different and more difficult question than that of the right of the majority to sell out or to lease.

The incidental remarks of the learned master as to the right of a minority or of a single stockholder to insist upon the continuance of the business, public or private, in which the corporation had engaged, were but *obiter dicta*, and even as such should be considered as applying to the case before him, viz., an alleged attempt not only to discontinue one business but to engage in another.

Besides giving the fullest possible effect to the language used by the master, it must be taken with the qualification annexed to it.

"Sometimes," said he, "the duration of such employment (*i. e.* of corporate funds) *is limited in the charter* and then until that time it *must be continued to be so employed unless, perhaps, in case of clear loss.* Sometimes no time

is fixed by the charter at which the proposed use of the capital shall cease, and *then the contract between the parties is that so long as the affairs of the company are prosperous it shall go on, unless all consent to the contrary.*" Page 414.

With sincere respect for the opinion of the master, it is *simply impossible that there can be a doubt as to the right of a majority to discontinue a business which in their opinion threatens to be a losing one, even if the time during which it was to be carried on has not expired*, but *quâcunque viâ datâ* the business of the Central Railroad Company had resulted not only *in clear loss*, but *in absolute bankruptcy; and no time had been fixed by the charter during which the business was to be continued.*

Indeed, the result had been not merely bankruptcy, but a condition of affairs in which *the very existence of the corporation was dependent upon the discretion of the chancellor*, and it was from this predicament that by the almost unanimous vote of the stockholders the corporation was *rescued by the execution of the lease which the plaintiff here now seeks to annul.*

The next New Jersey case, in point of time, is that of Story *vs.* The Jersey City and Bergen Point Plank Road Company, 1 C. E. Green, page 13, decided in 1863 by Chancellor Green, and which has already been referred to as bearing upon the extent of a reserved power to alter or repeal a charter and the equitable jurisdiction to restrain applications for additional legislation.

There the plaintiff, a stockholder in the company defendant, filed his bill praying for an injunction to restrain the defendant from selling any part of their road to a railroad company, and the chancellor, after stating that this, among other points, was "free from serious doubt or difficulty," went on to say that he was of opinion "*that the sale by the Plank Road Company of the whole or a part of their road to the railroad company, without the personal consent of the complainant, is not such an infringement (if any) of the complainant's rights as a stockholder, as the court will interfere to restrain by injunction.*"

Here is an express decision by a judge of the very highest eminence; and if this decision be the law of New

Jersey courts, this court would have no difficulty in following it if on such a question it were required to conform to the State, and not to the Federal decisions.

Assume that the *ratio decidendi* was the existence of the reservation in the charter, the charter of the Central Company contains a similar reservation, and if it be said that the use of the words "if any" implied that the chancellor did not mean to decide absolutely that the sale would be no infringement of the complainant's right, yet he did emphatically decide that the proposed sale afforded no ground for the interference of the court, and this is all that is material at present.

MR. ROBESON:—That is the law of the State of New Jersey to-day, and it has never been questioned.

MR. JAMES E. GOWEN:—We come next to the case of Zabriskie *vs.* The Hackensack and New York Railroad Company, 3 C. E. Green, page 178.

This case was decided by Chancellor Zabriskie in 1867, a long time ago in view of the subsequent development of the law relating to charter contracts.

It was there held that a single stockholder in a railroad company had an *equitable right to restrain his associates from applying the capital of the company to the construction of an extension of their road, the circumstances being that the original road was to be but five miles in length, while the extension was to be twelve miles long, and in other respects an entirely different enterprise from that for which the company had been chartered.*

It is apparent that the decision might have been rested upon the ground that the holders of a majority of the stock entitled to vote had never assented, and were in fact opposed to the extension (see the opinion at page 182), but it can not be denied that the chancellor was not content to occupy this ground alone, and we may therefore consider him as deciding that, notwithstanding the reserved power in the charter, the legislature could not constitutionally authorize the corporation to extend the road without the consent of the plaintiff.

It can hardly be necessary to say that in this respect the case is exceptional. The ruling was admitted to be

exceptional then (for the chancellor said "the weight of the decisions in other States is against it," see page 187), and it is all the more exceptional now.

But wherein does it impair or qualify the decision of Chancellor Green in the Story case? And wherein does it decide that the legislative power to alter or repeal a railroad charter is not great enough to enable the corporation to effect a lease of its road against the will of a single shareholder?

Admit, for the sake of argument, that this power is not broad enough to enable a majority of the shareholders to force a reluctant associate into an entirely different enterprise, and yet no progress is made towards proving that it is too narrow to enable the legislature to permit the corporation to conduct the old enterprise in such new manner as they may select, or to abandon it partially or totally.

And the supposed admission is indeed insufficient to warrant the conclusion that the majority may not engage in the new enterprise under their old charter, but only that the dissentient shareholder may withdraw altogether and insist upon being paid the value of his individual investment.

Such was the course pursued in Lebanon *vs.* The Lebanon Valley Company, where, however, as has already been seen, there was no reservation of a legislative power to alter or repeal the charter.

It seems inevitable that such a reservation leaves the corporation as a corporation free to accept such privileges, and subjects it to such obligations as the legislature may think fit to grant or impose.

But for all the purposes of this case there is nothing whatever in the Zabriskie case inconsistent with the position of the defendants, and such was the opinion of the learned chancellor himself, when, in the subsequent case of Black *vs.* The Railroad Company, he sustained the lease from the United Companies to the Pennsylvania Railroad Company.

In fact, no broader view of the scope of a reservation to alter or amend a charter could be required for the

purposes of this argument than that expressed by him in this very Zabriskie case. "*The power is to alter or modify the act, and the construction of this I hold to be an alteration of something contained in or granted by the act. Any of the franchises granted may be altered; the right to take land by condemnation; the right to take tolls or fare; or the amount to be taken.*" Page 192.

"Again, the act of 1861 does not, in fact, alter or modify the act of 1856, or any one thing embraced in it. That act, and every power and franchise granted by it, and any duty it imposed, remain the same." Page 193.

Can it be said that the right to maintain the New Jersey Central Railroad and take tolls thereon was not a franchise, and the essential franchise granted by the charter? Or can it be said that this franchise or the mode of enjoying it is not altered by the act authorizing the corporation to delegate to a lessee the duty of maintaining the road and the privilege of taking tolls?

And in this respect the act last mentioned directly affects the original charter and is not liable to the criticism in the latter extract from the chancellor's opinion.

The last of the four New Jersey cases referred to is that of Black *vs.* The Delaware and Raritan Canal Company, reported when in the Court of Chancery in 7th C. E. Green, and when in the Court of Appeals, in 9th C. E. Green, 455.

I think it important to understand what question was presented in this case; for whether the decision of the Court of Appeals is or is not authoritatively binding on this court it is entitled to very great respect. The bill was filed by certain shareholders in the United Companies to enjoin the proposed execution of a lease of the works of these companies to the Pennsylvania Railroad Company, the complainants contending that the act of 1870 was not intended to authorize the lease, or, if it was, that it was unconstitutional in attempting to authorize the lease without the consent of all the shareholders.

In support, apparently, of this latter position, the plaintiffs averred in their bill:

*"That there are not in the charters of said United Companies, or in either of them, or in any of the said supplementary or other acts relating thereto, reservations of power to the legislature of this State to repeal, alter or suspend said charter or either of them, in the discretion of said legislature, or without the consent of said companies or their stockholders; that each of said charters was granted to the said companies, respectively, prior to the enactment of the general act of this State concerning corporations, approved the fourteenth day of February, 1846, enacting in substance that the charter of every corporation which should thereafter be granted by the legislature should be subject to alteration, suspension and repeal in the discretion of the legislature. And the complainants therefore respectfully submit that neither of the said charters can be repealed or materially altered by the legislature, without the consent of said companies and their stockholders * * * * that the granting of said charters constituted a contract between the State and these companies, respectively, to the effect that no such repeal or alteration should be made without such consent, and constituted also a contract between those companies and their respective stockholders to the effect that the management of the affairs of those companies, respectively, should continue in substance as provided for in their charters, &c."*

The complainants thus informed the court that the charter of their company reserved no power to the legislature to alter, amend or repeal it, and therefore that, except in immaterial respects, it was not subject to alteration, amendment or repeal. The very statement of such a proposition was an implied admission that, if the charter had been subject to the legislative power of alteration and amendment, material alterations might be made; and thus the case was utterly unlike the present and called for no decision which, by any possibility, could have any weight in determining the question now pending.

If anything can be plain, it is that the case thus presented afforded neither *occasion nor opportunity for deciding whether, under the reserved power contained in the act of February 14th, 1846, the legislature could authorize*

a railroad company to lease its road to another company without the consent of all its stockholders; indeed, the bill seems by way of implication or inference to admit that it could.

As was to be expected, therefore, there is not a syllable in the opinion of the chancellor as to what would have been the law of the case if the charter of the United Companies had been subject to repeal or alteration at the discretion of the legislature, but he confined himself to considering what was the law of the case under charters which were not subject to alteration or repeal; and without here attempting any detailed examination of his opinion, it would seem that he decided in favor of the lease, because he thought that the making of the lease was an exercise of the power of managing the business and concerns of the corporation contained in the charter, which could be made by consent of the legal majority of corporators, without that of all; it being assumed, of course, that the consent of the State to the lease had been given by the act of 1870.

At page 404 will be found some remarks as to what the chancellor called the dictum of Parker, Master, in Kean *vs.* Johnson, viz., that where a time is not specified for which the enterprise is to be continued, the majority of corporators may not abandon the enterprise and sell out the property of the company (it will be remembered that this was qualified by the condition that the affairs of the corporation should be "prosperous," 1 Stockton, 414), as to an observation of his own in Zabriskie *vs.* The Railroad Company, and as to certain well known cases, Natusch *vs.* Irving (among others), which are worthy of attention. The chancellor's conclusion on this point was that in the case of a corporation, where no specified time was provided for its continuance, "*the doctrine that all the stockholders but one may be compelled to continue a business which they find undesirable and unprofitable, and wish to abandon, is so unreasonable and unjust, that it will not be held to arise by implication, unless that implication is a necessary one.*"

I think there was a misapprehension as to what Mr. Parker had held, for as your Honor has already seen,

what Mr. Parker held was, that when no time had been fixed for the cessation of a corporate business, the implied contract of all the corporators was that it should continue, as long as it was *prosperous*. Now Chancellor Zabriskie seems to have supposed that this qualification had not been introduced, and understanding the master's dictum to have gone to the length to which he supposed it to have gone, he disapproved of it.

So much for the case in the Court of Chancery as reported in the seventh volume of C. E. Green's Reports. It is well known that some time afterwards an appeal was taken to the Court of Errors and the decree in Chancery was reversed. As to the reversal and the reasons which led to it, I have this to say. In the first place, the opinion in the Court of Chancery would have been affirmed if the court had agreed with the chancellor as to the construction of the act of 1870. If the act of 1870 had been held to apply to a lessee situated as the Pennsylvania Railroad Company, a corporation of another State, the decree of the chancellor would have been affirmed; and I contend, if your Honor please, as a proposition of law, that a case even where it is an authority, is authority for nothing except the point which was essential for its decision. In a court situated as the Court of Errors and Appeals of New Jersey is, consisting of a very large number of judges, some of whom are laymen, it would be improper to assume, as it would be improper to assume in any case, that the court concurred in everything said by the judge who delivered the opinion. What the court concur in is the judgment, and it is as to the questions necessarily involved therein that the case becomes a precedent for other cases. How the Supreme Court of the United States view this matter your Honor will see by turning to the last page of my paper-book where you will find the following extract from the opinion of Mr. Justice Curtis in the case of Carroll *vs.* Lessee of Carroll, 16 Howard, page 286:—

"If the Court of Appeals had found it necessary to construe a statute of that State in order to decide upon the right parties subject to its judicial control, such a de-

cision deliberately made might have been taken by this court as a basis on which to rest our judgment. But it must be remembered that we are bound to decide a question of local law upon which the rights of parties depend as well as every other question as we find it ought to be decided * * * If the construction put by the court of the State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of common law, an opinion on such a question is not a decision. To make it so there must have been an application of the judicial mind to the precise question necessary to be determined to fix the right of parties and decide to whom the property in contemplation belongs. And therefore this court and other courts organized under the common law have never held themselves bound to any part of an opinion in any case, which was not needful to the ascertainment of the right or title in question between the parties. In Cohens *vs.* The State of Virginia, 6 Wheat., 399, this court was much pressed with some portion of its opinion in the case of Marbury *vs.* Madison."

And Mr. Chief Justice Marshall said, "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which these expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated The case *Ex parte* Christy, 3 Howard, 299, and Jenness *et al. vs.* Peck, 7 Howard, 612, are illustrations of the rule that any opinion given here or elsewhere can not be relied on as a binding authority, unless the case called for its expression. Its weight of reason may depend upon what it contains."

The point at issue in the Black case was whether the act of 1870 authorized the lease to a foreign corporation like the Pennsylvania Railroad Company, and the Court of Errors and Appeals held that it did not, and the case is an authority as an adjudication on that point.

But taking the principal opinion in the case, that of Judge Van Syckel, as an authoritative exposition by the court of the law of each topic of which it treats, I contend with entire confidence that there is not a syllable in anything there said which tells against the case of the defendants here, or which, indeed, touches the subject of the reservation of a right to repeal or alter a charter.

The court could not have intended to adjudicate what the law would have been if the charter had been alterable, when the complainants themselves presented their case, as they did present it, because their charter was unalterable.

The first question considered was whether it was within the power of the defendants, without the sanction of express legislation, to make the lease. This question was answered in the negative, but whether on account of the presumed contract between the corporators, or on account of the untransferability of the franchises, it is not easy to tell with certainty; but Judge Van Syckel does seem to have relied upon the ground that the corporation defendant could not make the lease, because the *contract with the State*, by which the corporators were invested with the franchises of maintaining a railroad and taking toll, was a personal grant, and a grant which could not be assigned without the consent of the State.

But let us presume that, apart from the inalienable character of the franchises, and the prohibition against transferring them, the learned judge did consider that it was implied, from the very association between the corporators, that they should not part with that railroad without the consent of all, still, as I again assert, he was dealing with a charter in which there was no reservation of a power to alter or amend, and nothing that was said or intimated was applicable to a charter in which there is such a reservation.

Admit that by leasing its railroad a company materially changes the mode of conducting its business, still the question recurs *whether such a change may not be made under a contract by which the corporation and the corporators solemnly agreed that the conduct of its business might be changed, and that even the business itself might be suspended or prohibited.*

To repeat again what was already been quoted from the opinion in the Zabriskie case (which is one of the cases relied on by Judge Van Syckel), "the true construction of this (power to alter, &c.) I hold to be an alteration of something contained in or granted by the act; *any of the franchises may be altered,* the right to take land by condemnation, the right to take tolls or fares, or the amount to be taken."

As to the case of Clearwater *vs.* Meredith, 1 Wallace, 40, which also was referred to by Judge Van Syckel, I have said before that I would be willing to rest the decision of this case on the opinion delivered there, for it was there said that the reason why a stockholder would not have been bound by the articles of consolidation, if he had not chosen to be bound, was that no power of alteration or amendment had been reserved in the charter. In Nugent *vs.* The Supervisors, already referred to, the judgment of the Circuit Court which was reversed, appeared to have been founded on this case, but erroneously as pointed out by Justice Strong (19 Wallace, 241).

The question whether a majority of corporators may not, even under an unalterable charter, abandon their business, is hardly touched upon.

Judge Van Syckel says that the rule that a corporation can not lease or dispose of any franchise needful in the performance of its obligations to the State, without legislative consent, is not "avoided by the proposition that a corporate body, by and with the consent of the majority of the corporators, may abandon their business" (page 465), but where the assent of the State has been given, or is not required, the right of abandonment must depend on other considerations, considerations grounded in the general commercial law of partnerships and joint

stock associations; and as to these this court is no more bound by the decision of the Supreme Court of the State of New Jersey than by the decision of the Supreme Court of the State of Pennsylvania.

And if any argument against the right to lease a railroad can be drawn from the circumstances adverted to by Judge Van Syckel (page 465) that "upon a dissolution the franchises could not be transferred, but would revert to the sovereignty from which they were derived," and "that the shareholders would become partners or joint owners in the assets, and for their share in such assets they could not be compelled to accept an annual rent for 999 years," it seems sufficient to say that, if a stockholder of this company has a right to insist that the franchise of maintaining the Central Railroad, and all the value inherent therein, shall not be leased at a rate which will bring six per cent. on all the money that has been put into it, but that it shall be sacrificed for nothing, and given up to the State, the right is one which no court of equity would think of enforcing. The proposition, that although the corporation may abandon its business, and although one associate may not compel the others to continue year after year in a losing business, yet, that as the price of their retirement, he may insist that a franchise which could be leased at a capitalization value of millions shall be surrendered for nothing is certainly a proposition that can never be recognized in practice. It is proper to add here that the law of New Jersey does not permit a railroad company to sell their road, but does permit them to lease it.

The next question considered by Judge Van Syckel is whether the legislature could empower a corporation, by the consent of any number of shareholders less than the whole, to alter fundamentally the charter of the enterprise and compel dissentients to engage in it; and it is said that since the famous Dartmouth College case, this is hardly debatable ground. See page 466. I have endeavored to show that the rule in the Dartmouth College case has not, in recent times, been held applicable to its full extent to corporations invested with public franchises and sub-

ject to correlative duties. But what has the Dartmouth College case to do with a charter which was drawn for the very purpose of evading the decision in the Dartmouth College case, and which was so drawn in consequence of the suggestions made by one of the judges who concurred in the opinion in that case?

MR. ROBESON:—Chancellor Zabriskie says that a similar clause in the general law of New Jersey was inserted to avoid the opinion in the Dartmouth College case.

MR. JAMES E. GOWEN:—The case of Lauman *vs.* The Lebanon Valley Railroad Company, cited at page 467, is an express authority as to the right of a majority of stockholders to abandon their enterprise and sell out. The difficulty there was the feature of the agreement by which the dissenting stockholder was to be made a stockholder in a new company, without his consent. This difficulty was avoided by requiring his associates to pay him the value of his stock, but the Supreme Court of the United States, at least, declined to admit the existence of the difficulty itself in all cases of railroad consolidation.

Besides, the Lauman case was under an unalterable charter, and it would be a mere waste of time to show that the Dartmouth College case can have no application to charters which were made alterable for the very purpose of avoiding the effect of that decision.

The other propositions discussed in Judge Van Syckel's opinion have no special relevancy in the present case.

It seems too clear for discussion that there is nothing, even in the argumentation of the opinion, inconsistent with the right claimed by the defendants here.

It may be inferred that the learned judge was of opinion that under the unalterable charters of the United Companies a majority of the corporators respectively could not have leased their railroads and canals, even with the express assent of the legislature, although there might have been no difficulty in their voluntarily surrendering them to the State. See page 465.

Nothing appears to have been said as to the question whether the right of a majority of corporators to abandon

their business depended upon the indefiniteness of the term for which it was to have been carried on, or its financial condition, or both. There is, therefore, nothing in the case inconsistent with the theory that, at least, when the term of duration is indefinite and the affairs of the company are not prosperous, the majority may abandon the enterprise; a theory admitted to be correct even in Kean *vs.* Johnson, as well as in Zabriskie *vs.* The R. R. Co.

There was no pretense in the Black case that the United Companies were financially embarrassed, or that there was any doubt as to their reasonable prosperity in the future. The answer averred that the directors could not "*expect or reasonably hope thereafter to make dividends upon their capital stock exceeding ten per centum per annum, nor even so much.*" (Page 147, 7 C. E. Green.)

And I can not help saying here that it is somewhat amusing to read what was said in the elaborate argument on behalf of the dissenting stockholders there, as to the sacrifice and ruin to be brought upon the stockholders of the United Companies by a ten per cent. dividend lease, and then to read the reports of the Pennsylvania Railroad Company as to the results to them of the lease.

What was the legal and financial status of the Central Railroad Company of New Jersey before the execution of this lease?

What were the sacred rights acquired by Mr. Dinsmore by his purchase of stock in the year 1880, after this corporation had been declared insolvent, and had been put under the control of the Chancellor, and when its existence was hanging by a mere thread that was daily fraying away?

His chartered rights then were to have the separate property sold, and the proceeds distributed among the creditors, and to be himself excluded from any interference with the affairs of the corporation, except so far as his interference as a stockholder might be necessary to wind up and dissolve the corporation. Whatever rights the corporation and its members had acquired against the State had been forfeited. The insolvency of the corpor-

ation had brought it under the ban of the law; it had been condemned to death, and its subsequent reprieve was but at the mercy of the State. When the Central Company failed, and a receiver of its property had been appointed, the law of New Jersey was as follows: "Whenever an injunction shall have been granted against any incorporated company, as provided for in this act, and a receiver or receivers, or trustee or trustees shall have been appointed, as further provided for, and said injunction and appointment shall have continued for four months, it shall not be lawful for the stockholders or directors of said corporation, or any other person whatever, to use or exercise the franchise of such corporation, or to transact any business in their name, or by color of their charter, except such as may be necessary to collect their property and assets, and to sell the same, and distribute the proceeds among the creditors and stockholders of said corporation; and that for all other purposes the charter of said corporation, by such injunction, appointment and continuance shall be forfeited and void without any further proceedings or judgment."

That was the condition of the Central Company when Mr. Dinsmore became a shareholder, and although his bill states that the process of receivership was, as to the Central Railroad Company, a process of reinvigoration and rehabilitation, while as to the Philadelphia and Reading Company it was a process of disintegration and decay, so that it was in worse condition after the receivership had ended than it had been before, the fact nevertheless is, as appears from the answer, the only evidence in the case, that the Central Company was in a condition in which its corporate life could have been forfeited at any time at the discretion of the chancellor under the law of the State of New Jersey already quoted and the supplement thereto enacted to meet the case of this very company, both of which will be found printed in my brief.

As an insolvent corporation its railroad franchise was salable or leasable. (See Revision page 192, section 85.)

Now will any one contend that Mr. Dinsmore or any other stockholder of the company could have asked

your Honor to grant an injunction to prevent that franchise from being sold or leased for the purpose of paying the debts of the corporation?

THE COURT:—By the receiver?

MR. JAMES E. GOWEN:—By the receiver. I suppose not. I presume that your Honor would have held that it was a legitimate exercise of the power of the State of New Jersey to order that the property of a corporation which had been judicially declared insolvent should be sold and the proceeds distributed among its creditors. But what was done?

The receiver could have sold the road; or he could have leased it. If Mr. Dinsmore had had a right to insist, and had insisted that the railroad should be sold instead of being leased, it would not have produced enough to pay the company's debts. No railroad put up and sold peremptorily at public auction ever brings anything for distribution among the stockholders. It may be that if time had been afforded and the stockholders had been in accord, some arrangement might have been made for the purchase on behalf of all interested and the organization of a new company in which something would have been conceded to the old stockholders. But as matters stood a peremptory sale would have produced nothing for the stockholders. We must suppose, therefore, that it would have been leased by order of the chancellor, and I presume that even Mr. Dinsmore would have been forced to admit that it should be leased and not sold. But still it would have been perfectly lawful for the chancellor to have ordered it to be sold, and Mr. Dinsmore could not have prevented a sale. But an arrangement was made for paying the creditors, taking the road out of the hands of the receiver, and paying the stockholders an annual interest of six per cent upon their investment, and all this through the company itself being enabled, by the arrangements incident to the lease, to exercise its own powers; and yet Mr. Dinsmore thinks his rights have been disregarded, and asks your Honor to grant an injunction to restrain such an outrageous proceeding.

If the chancellor had ordered the road to be leased for the purpose of paying the debts of the corporation, would a single shareholder have ventured to contend that he had an equitable right to object to being made a party to a new enterprise, and that he must insist upon the road being abandoned if it could not be sold?

Such an attempt would have been simply monstrous, but what less can be said of the attempt of the plaintiff here?

This lease which he endeavors to annul was the means of reinstating the company and withdrawing its property from possession of the Court of Chancery, which was no longer willing to continue the term of probation; and yet on grounds of equity and good conscience the plaintiff objects that it is his constitutional right not to have his property leased, and that, although the receiver might have leased it and devoted the proceeds to paying the company's debts, yet that the corporation shall not make the lease for the purpose of securing dividends.

The review of the New Jersey decisions, which I have made, has shown, I think, that there is nothing in them inconsistent with the decisions of the Supreme Court of the United States, or with the decisions of the courts of other States.

Indeed, in discussing this question, I have not thought it necessary to encumber the printed brief or my argument with citations and references to the decisions of the courts of other States, but have preferred to follow the path which, ordinarily, your Honor is bound to tread, and that is the path marked out by the Supreme Court of the United States. The result of the whole matter seems to be that the charter was subject to alteration or repeal, that the regulation attempted by the leasing act of 1880 might have been inserted in the original charter and is to be so treated; but that in any event it is such a regulation of the public duties or public relations of the company as, according to every authority and every *dictum*, is within the reserved power to alter or amend.

It may be again suggested that the power conferred by the leasing act of 1880 is not exercisable without the consent of all the stockholders.

I have already discussed this, and if my friend on the other side had referred to a single case in which a grant or privilege given to a corporation was held not to be exercisable at the will of the majority, there would be some excuse for my referring again to the subject.

Mr. Gummere thought that he had found such a case. Maury *vs.* The Railroad Company, 4 Bissell Reports, 578. There a stockholder holding a large amount of stock brought a bill to enjoin a proposed consolidation between his railroad company and another railroad company which was proposed to be effected under a general law not in force when the charter of his corporation was granted, although the charter had reserved to the legislature a power to alter or amend.

What was the decision of the court? [Counsel read from the opinion in the case cited.]

Thus you see that the result was that as to a company incorporated under the general railroad law of the State, which contained a similar reservation of the legislative power of alteration and amendment, the subsequent act of consolidation was thought to be a legitimate amendment, and, being a legitimate amendment, the right to consolidate was necessarily conferred upon the majority. But as to the particular company which had been incorporated under the special charter, the court thought that the legislature had not meant to exercise their powers of amendment without the consent of all the stockholders. Why not? How else could they have exercised it under the Constitution of the State of Indiana, except by a general law? They could not pass a special act, and to hold that because the amendment was expressed in a general law and in a permissive way, that therefore it was not obligatory on the company, if the majority chose to make it so, was to hold that the special charter could never be amended except *in invitum* as against the corporation, and that the legislature could not make the consent of the majority the turning-point of its exercise of the reserved power.

The question is one of power; for if the legislature has the power to amend, they may amend a railroad charter by providing that the railroad shall be leased although every stockholder objects, or they may amend by saying that the road may be leased if the majority of the stockholders assent. In the Maury case, the court thought that as regards the company specially chartered the amendatory Consolidation Act was meant to take effect only with the consent of all. Why they thought so and why a distinction was taken as to the effect of the amendatory Consolidation Act, upon companies previously incorporated under a general law, is not clear. The view taken by the court is inconsistent with itself, and inconsistent with the well established rule that a corporation must be governed by the majority of the corporators. And here I may refer again, as I have already done so, to another case in a later volume of Bissell (Pick *vs.* The Chicago and N. W. Railroad Company, 6 Bissell, 131), which was heard before the supreme, circuit, and district judges, and to what was there said by Judge Drummond in delivering the opinion of the court, viz., that a *reserved power to alter or repeal a charter becomes by operation of law a part of every contract or mortgage made by the company. The share and bondholders take their stock or securities subject to this paramount condition of which in law they have notice.*

It has been argued, as it has been elsewhere, that a reservation of the power to alter or amend a charter is a reservation solely for the benefit of the State, and not for the benefit of the corporators. I have already discussed this question, or rather the authorities which I have read have done it for me; but I must add that if Mr. Gummere's view of the rights of a single stockholder in a New Jersey corporation is correct, the right of legislative interference *for the benefit of a majority* is a privilege which every stockholder of a New Jersey corporation should cherish.

If I become a member of a New Jersey corporation created by a special act of the legislature, in which no

power of amendment is reserved, then, according to Mr. Gummere's argument, I am bound to do or omit just what the holder of a single share of stock may require if he keeps within the limits of the enterprise just as it was originally planned. The company may be engaged with a large capital in the manufacture of iron, under a charter which provides that the business shall be carried on for a period of twenty years, but a time has come when it is evident that a threatened rival establishment with new and improved facilities and large capital will, if started, ruin our business and cause the loss of every dollar of our money if we attempt competition.

Our intended rivals offer to buy us out, and pay us dollar for dollar, or even two, three, four, or five dollars for every dollar which we have put in; and although we know that if we do not accept their offer we shall be ruined, yet one ignorant, perverse, or malicious member of our company may say, "Under the constitution and laws of the State of New Jersey, I have a right to hold you to the enterprise in which we started; and it would be an outrage upon my rights that you should either sell or lease our property or discontinue the business, and, appealing to the constitution and the laws, and relying upon the respect for them which the courts of New Jersey have always manifested, I insist upon ruining you and myself." He might even buy one share of stock for the very purpose of taking this position. Who would join a New Jersey corporation if that was understood to be the law of the State?

In the Black case the learned judge who delivered the opinion of the court, seems to have appreciated such a difficulty. He would not admit that one unwilling stockholder could obstruct the growth and development of a railroad enterprise, and thus hinder the union under one management of important public highways required by the necessities of interstate commerce, and the public convenience. But what remedy did he suggest? Why, that the State of New Jersey should take the dissenting shareholder's interest in the property under the power of eminent domain. But for what purpose can property

be taken under the power of eminent domain? A railroad may be taken for public use; and authorizing the road to be leased is a mode in which it may be taken for public use; but if this is so, then undoubtedly an amendment to an amendable railroad charter by which the company is authorized to lease their road, must be an unquestionable exercise of the power of amendment, affecting as it does the public relations of the company, and the contract between the corporation and the State. But how does this relieve the difficulty where the corporation is not a public corporation, has no public franchise, and does nothing for the public benefit. If I and others own $999,999 out of a $1,000,000 invested in a private enterprise, we can not be saved from ruin impending through the perversity or treachery of the owner of the dollar's share, by appealing to the legislature to take his share under the power of eminent domain. I say, therefore, that if Mr. Gummere's view of the law of New Jersey were correct, that not only for the benefit of the State, but still more strongly for the benefit of the association itself, would it be important that the legislature should have the power to authorize the majority of a corporation to sell or lease their property, or otherwise modify their original scheme. What the Supreme Court of the United States has decided, I have endeavored to show. No ingenuity of construction can avoid the conclusion, that this leasing act of 1880 was a legitimate exercise of the power of amendment. If it be said that in the case of the county of Scotland the county subscriptions had been made after the consolidation, I answer again that the county had the right to subscribe for the stock of but one specified railroad company, and if the consolidated company had not been, in contemplation of law, the same company as that to whose stock the subscription had been made, there could have been no enforcement of the bonds which had been given for the subscription paid. Hence the case is precisely the same as that of a single stockholder having subscribed to a railroad which afterwards was consolidated with another, and afterwards refusing to pay his sub-

scription because the consolidation was a fundamental alteration of the original enterprise and a violation of his contract rights under the charter. And in the subsequent county subscription case where the opinion was delivered by Justice Strong, your Honor will remember that referred with approval to a case in which it had been expressly decided that where a subscription had been made, and a consolidation effected afterwards, the subscriber was not released, a power to alter and amend the original charter having been reserved. No ability, no amount of ingenuity can argue away these cases, and if your Honor is bound to follow the Supreme Court of the United States, there need be no further discussion in this suit.

I have endeavored to show you also, there is not a syllable in any New Jersey decision inconsistent with the law as established by the Supreme Court of the United States; but that, on the contrary, wherever the matter has been discussed, whether in the Zabriskie case or the Story case, the conclusions of the learned judges administering the law in New Jersey are in accordance with those expressed by the judges of the Supreme Court of the United States.

But, if it were otherwise; if the plaintiff could produce before you an express decision of the Court of Errors and Appeals in this State, that a corporation situated like this could not lease its property against the will of a single stockholder, then I should contend that on such a question you would be no more bound by the decision of the Courts of Error and Appeals of New Jersey than by that of any court of Oregon or California.

You administer justice in a tribunal of peculiar jurisprudence. In a controversy between citizens of different States, you are not bound by local decisions on questions of general law; and in administering the law as to Federal questions, you are bound by the decisions of the highest Federal court.

It is the well-established doctrine of the Supreme Court of the United States that the decisions of the local State courts are not binding upon the Federal courts in

cases not involving the construction of State constitutions or State statutes, or where they have not become local rules of property, especially with regard to real estate. As to questions not affected by these local constitutions, and especially as to questions of mercantile, commercial or what may be called "business" law, in which is included the law of partnerships or corporations, the Federal courts decide according to their own views.

The question whether there is an implied contract between the members of a corporation which would prevent the majority from abandoning their enterprise in whole or in part, or selling or leasing their property, notwithstanding the objection of the minority, is a question not dependent upon any constitutional or statutory law of the State of New Jersey, but upon principles or analogies of the general commercial law of partnership; and upon such questions the Federal courts are entirely untrammeled by the local State decisions.

It will not be pretended even, that the theory that the majority of the stockholders of a New Jersey mining or manufacturing company can not lease their property against the dissent of a minority is based upon any consideration inherent in or incident to the local status of the corporation. If the courts of New Jersey should hold that the theory was well founded they would apply it to corporations organized under a Pennsylvania or New York charter, if they should happen to acquire jurisdiction, and they would apply it to an assignment of a lease or the transfer of any personal property essential to carrying on the business of the corporation.

But even if it were so pretended, the Federal courts of New Jersey, especially in controversies between citizens of different States, could not attach any importance to the pretense.

Even if it had been finally decided by the highest court in New Jersey that a statute authorizing a railroad company to lease its road by a vote of a majority of its stockholders was an unconstitutional exercise of power, because it was not within the reservation of a power to

alter or repeal the charter, still in the courts of the United States the question would be an open one.

I will state the case as strongly for the other side as I can.

This act of 1846 is a statute of New Jersey, and the question as to the character or extent of the power which it reserves over corporate charters is a question of statutory construction; and if the highest court of the State holds that this reserved power does not permit an amendment to a railroad charter by which the majority of the shareholders are enabled to lease the railroad, then this court is bound to adopt such a construction of the statute.

In answer to this I have to say that the general rule of following the State courts in the construction of the State statutes would not be applicable to such a supposed restriction of the act of 1846, which would not be a construction or interpretation of a statute in the sense in which these terms are used in the rule in question.

In Olcott *vs.* The Supervisors, 16 Wallace, 678, the Supreme Court of the United States refused to follow the decision of the Supreme Court of Wisconsin, that a statute of that State authorizing county subscriptions in aid of a railroad was unconstitutional, because the building of a railroad by a corporation was not an object for which the levy of a tax was lawful under the constitution of the State.

"Now, whether a use is public or private, is not a question of constitutional construction," said Justice Strong, "it is a question of general law. It has as much reference to the constitution of any other State as it has to the State of Wisconsin. Its solution must be sought not in the decisions of any single State tribunal, but in general principles common to all courts."—Page 690.

It must be remembered, too, that such a decision as that which I have supposed would necessarily be predicated of a relation between the State and the corporation, or between the corporators and the corporation, which, although originating in a State act of incorporation, could not possibly be, as a matter of statutory construction, exclusively within the province of the State courts.

Besides, there is inevitably involved in this case a Federal question. As I understand the theory of the complainant's bill it is that there is an implied contract, either between the corporators of the Central Company or between the corporators and the corporation, which would be infringed by a lease made under the act of 1880; and, therefore, that that act, if intended to apply to the Central Company, is unconstitutional, as violating a contract.

But if it is, it violates the Constitution of the United States as well as the Constitution of New Jersey, and the court can not possibly say, we will consider whether the act violates the constitution of New Jersey, but decline to consider whether it violates a similar provision in the Constitution of the United States, and thus avoid being embarrassed by a Federal question.

There being, therefore, in this case a Federal question, viz., whether this act of 1880, the leasing act (assuming that it applies to this company as well as others, and Mr. Gummere admitted that an amendment may be made by a general as well as by a special law), is unconstitutional because it violates the obligation of a contract, your Honor must decide whether there was a contract in the charter and what it was, whether the State had not reserved the power to authorize the lease, or whether the majority of the corporators can not insist that this contract with their associates gave them (the majority) the right to accept any privilege which the State might seem fit to confer.

The decision in the well-known case of the Bridge Proprietors *vs.* The Hoboken Company, 1 Wallace, 116, is directly in point. There the Court of Appeals of New Jersey had held that a statute of New Jersey had not given to the Bridge Company a certain privilege, and that therefore a subsequent statute in derogation of that privilege was not unconstitutional.

The case was taken to the Supreme Court of the United States, where, in the argument of Messrs. Bradley and Gilchrist, everything was said that could be said in favor of the position that, as the State court had simply construed a statute of New Jersey as not conferring the privilege in

question, there was nothing on which the Supreme Court could act; but the court held otherwise, and proceeded to consider whether the statute had been properly construed.

Now can it be thought, if the question at issue in the Bridge Proprietors case had been presented in the Circuit Court of New Jersey, that this court would have been bound to follow the decision of the Court of Appeals on a precisely similar statute?

If so, then the Circuit Court of the United States may be bound to decide one way, and the Supreme Court be bound to reverse their decisions.

On the general question of conflict between Federal and State decisions, the following cases may be referred to: In The Northwestern University *vs.* The People of Illinois *ex rel* Miller, 99 U. S. Repts., 309, the Supreme Court of Illinois had held that a law passed in 1865, exempting certain property of the University from taxation, had not been authorized by the constitution then in existence, and that accordingly a subsequent law passed in 1872, subjecting such property to taxation, had not violated any contract, because such exemption had been unauthorized and was therefore invalid. The Supreme Court of the United States, however, held that for the purpose of determining whether there was a contract between the parties they could review the decision of the Supreme Court of Illinois upon the question of the authority conferred upon the legislature by the constitution then in existence, to pass the exemption act of 1855, and that in the consideration of this question the decision of the latter court construing the constitution of its own State was not binding.

In the case of Lavin *vs.* The Emigrant Industrial Savings Bank, 18 Blatchford, 1, Judge Choate held that the United States courts were not bound by the decisions of the Court of Appeals of New York, upholding as valid a payment made to an administrator appointed under a statute of that State, which provided that the surrogate should be empowered to grant letters of administration when he judicially determined that a party was dead, al-

though it was subsequently ascertained that the creditor was not dead. "It is equally clear" said Judge Choate, "that the point decided was * * * that the meaning of the statute is that such determination of the surrogate is conclusive in favor of an innocent party who has, on the faith of the letters so issued, dealt with the administrator * * * * But while this court must follow and adopt the same construction of the statute of New York, the question whether by these statutes and the proceedings taken under them the plaintiff has been deprived of his property without due process of law, is one on which the decision of the State court is not controlling, and is entitled only to so much weight and authority as the reasoning of the court shall give to their opinion."

Swift *vs.* Tyson, 16 Peters, 1; Railroad Company *vs.* Lockwood, 19 Wallace, 257; Tilden *vs.* Blair, 21 Wallace, and Oates *vs.* The Bank, 10 Otto, are also cases relating to a conflict in discussion between Federal and State courts. I shall merely cite them, for I feel that I have already taken too much of the court's time.

ARGUMENT OF

MR. FRANKLIN B. GOWEN,

On Behalf of the Defendants.

If the Court please:

The complications of this case, the relative positions of the several parties to it, the various occurrences of the last three or four years brought into the cause, either in the bill, the answer, or the testimony taken under an order of the court, are such, that your Honor can not be expected to understand them all sufficiently to administer equity, and especially equity as distinguished from law, without either going to the trouble of reading over this great mass of testimony or listening to some succinct history of the case. This latter I propose to give, and I shall ask your Honor's careful attention to it, because many of the facts to be now stated will be referred to hereafter in my argument, and in the arguments of others who are to follow me in discussing such portions of the case as have not been touched upon by the counsel who preceded me upon our side.

Your Honor doubtless knows, as we all do, the history of the Central Railroad Company of New Jersey in its prosperity, and your Honor probably knows that the great prosperity of the company was owing to the fact that at the western end of its main line it formed connections with two great systems of railroads in Pennsylvania, one known as the Lehigh Valley and the other as the Delaware, Lackawanna and Western, each developing large areas of anthracite coal lands and producing an enormous tonnage of anthracite coal. Both used the Central Railroad Company of New Jersey as their eastern terminus, and fed the latter, from Phillipsburg to the waters of New York Bay, with a large amount of the most profitable traffic.

THE COURT:—Before the building of the Packer road?

MR. F. B. GOWEN:—Yes; I am speaking of the time preceding the construction of the Eastern and Amboy line.

The Central Railroad Company of New Jersey was not then troubled with many unprofitable branch roads, and had not been encumbered with the Southern New Jersey lines. It had on its main line more traffic per mile, I suppose, than any other railroad in the United States. It was earning and paying large dividends, amounting often, for periods of years, to ten per cent. per annum, and it was ruined by its prosperity. It waxed fat and kicked against those who fed it with business. The result was—(how it came about it is now almost impossible to tell, and it would be invidious for me to say whose fault it was)—that these two great railroad companies, which were feeding the Central Railroad Company of New Jersey with business, quarreled with the latter; each of them leased or constructed a new line of railroad; both of them took their business away from their old ally; and from that moment the Central Railroad Company of New Jersey commenced to go down that deep descent which terminated in temporary insolvency, and which would have terminated in absolute ruin, but for the acts of those whom Mr. Dinsmore now seeks to enjoin. The company found itself without business, and had to invest large sums of money in order to get possession from new sources of some of the same kind of traffic which it had been theretofore receiving from others without the expenditure of a dollar of capital on its part. It expended some fifteen or twenty millions or more of dollars in securing coal lands at enormous prices, and these lands, beyond the profit which was derived from the transportation of their products, never yielded any interest upon the investment. This loss of capital, this loss of the earning power of the capital so invested, involved the road in bankruptcy. Judge Packer constructed the Eastern and Amboy road; the Delaware, Lackawanna and Western Railroad Company leased the Morris and Essex Rail-

road, and constructed the Boonton Branch for its coal trade; and the Central Railroad Company of New Jersey had nothing to rely upon except the coal tonnage of the Lehigh and Wilkesbarre and the Lehigh and Susquehanna connections, which were not sufficient, after paying interest on the new capital invested, to enable it to earn anything for its shareholders, and the company became bankrupt. At that time its two principal shareholders, as has been proved in this testimony, were Mr. Edward C. Knight, a gentleman whose name figures very extensively upon the record of this case, and Mr. Edward Clark, the president of the Singer Sewing Machine Company; two gentlemen who owned, I suppose, according to the testimony of Mr. Knox, about as much of its stock as any other ten or twenty of its shareholders put together. They struggled manfully to save their company from ruin. After its insolvency, Mr. Knight was elected its president; he advanced of his own means, three-quarters of a million of dollars, to aid it in its difficulty. Mr. Clark was placed upon the board of directors, but the company was in dangerous waters, and being in such danger it attracted the cupidity of those who did not intend to help it, but who did intend to make profit for themselves out of its misfortunes. The first intimation of this policy was the request that Mr. Knight and Mr. Clark should resign as managers of the road to make place for Mr. Jay Gould and Mr. Dillon. They were asked to do so. They were asked to resign by the receiver, and unfortunately they did resign, although they owned, as I said, more shares, probably, than any ten or twenty other of the shareholders put together. Then began that peculiar system of management, by which the shares were advanced or depressed in the stock market, sometimes up to 110 and sometimes down to 60, as best suited the personal interests of those who controlled the affairs of the corporation, and in utter disregard of the interests of the shareholders.

During the whole of this eventful period, the company lost over two millions of dollars of money. That is, its fixed charges for interest and rentals irrespective of any payments to its shareholders were, during the period of

its insolvency, some two million two or three hundred thousand dollars in excess of its net earnings. Why, there could be but one end to such a career, and there was no way to rescue the property but by taking it out of the hands of those who then managed it, and putting it back into the control of its own shareholders. Mr. Knight and Mr. Clark, with other shareholders, addressed themselves earnestly to accomplish this object.

It has been proved, that in order to get the opportunity to have the shareholders express their opinion on this subject, an application had to be made to the Chancellor, and a peremptory order obtained to hold an election. There were to be two tickets in the field—the old ticket of Mr. Gould, Mr. Dillon, and their associates, and a new one, representing the shareholders.

It is important to bear in mind that during this period, and as an ally of Mr. Gould and the old ticket, Mr. Dinsmore became a stockholder of this company. It is important to bear in mind that prior to the election of 1882, the first one held since bankruptcy, Mr. Dinsmore told the gentleman who called upon him to solicit his proxies that his proxies, or his stock, belonged to Mr. Gould. Of course I suppose he meant the right to vote his stock belonged to Mr. Gould. He was opposed to the new board. He did not become a stockholder on the books of the company until shortly before the election of 1882; in the spring of 1882, for the first time, his name appeared on the books as a stockholder, to the extent of five hundred shares. He testified that he had two thousand shares which was held in different names, that he bought one thousand of it in 1880, and the other thousand of it he bought in February 1882 at the request or at the suggestion of Judge Lathrop, and he became a shareholder during this struggle, and, as we say, for the purpose of taking part in it. Unfortunately for himself and those connected with him, Judge Lathrop died about this time, and before the election was held. At the election of 1882 the ticket of Mr. Knight and Mr. Clark was elected by a unanimous vote of over one hundred and forty-three thousand shares; the old ticket was not even put up to be voted for; and for the first time for five or six

years the people who owned this railroad, the shareholders, were permitted to be represented in its board of directors.

This new board, with the assistance of Mr. Little, who had been appointed the receiver, addressed itself earnestly to the task of rescuing the company from insolvency. It is in evidence upon this record that the Chancellor stated that matters could not continue as they were, that the road must be sold unless it was taken out of his court.

Who could do this? There was a floating debt of over two millions of dollars. The road had earned hardly anything the year before, probably a little over $100,000. The year of Mr. Little's administration it had earned between five and six hundred thousand dollars as Mr. Gummere says, but if he had turned to the testimony of Mr. Little he would have found that there were no earnings which, even had the road been out of insolvency, could have been given to the shareholders, because the matured obligations of the company upon its car trusts and other indebtedness had to be provided for, and nothing could have been given to its shareholders, even if the company had been released from bankruptcy. A union or alliance of some kind with the Reading Railroad Company was the only avenue open through which to escape the threatened sale of the property; and negotiations to bring about such an alliance were commenced on behalf of the shareholders of the Central Railroad Company of New Jersey.

Unfortunately I occupy the position of president as well as counsel of the Reading Railroad Company, and I must not only speak of myself, but must apologize for being in a case as counsel where my name appears as a party upon the record; but for fifteen years I have occupied the position of general counsel of the Reading Railroad, as well as its president—and some people have done me the scant justice of saying that whilst I knew nothing whatever about railroad management, I did know a little, a very little about the law. I am not personally in this case as a party, no decree is asked against me except in virtue of my relations to the company as an

officer, and therefore I shall ask your Honor not to hold me as coming within the rule, "That he who is his own lawyer has a fool for a client."

I was in Europe during the greater part of the year 1882. Mr. Knight was the first man, according to the testimony of Mr. Little, who ever spoke to him about the lease. Mr. Knight had been a large stockholder in the Central Railroad Company of New Jersey long before he had any connection with the Reading Railroad Company, and his interest as a stockholder (according to the testimony) in the Central Railroad Company of New Jersey is far more than his interest as a stockholder in the Reading Railroad Company. And here I will ask your Honor to bear in mind, if any allusion should be made to this by our friends on the other side, that the same amount of shares held in the Central Railroad Company of New Jersey means double the amount of money invested, because the par value of a share of the Central Railroad Company of New Jersey is $100 and the par value of a share of the Reading Railroad Company is only fifty dollars. Mr. Knight was a far larger shareholder in the Central Railroad Company of New Jersey than in the Reading. He suggested the idea of the lease; he knew the Reading Company had an enormous amount of traffic that it could send to New York; he knew that Western and Northern connecting railroads were about to be constructed, and he was anxious to have the benefit of this business for the Central Railroad of New Jersey. He knew perfectly well that no company like the Reading Railroad Company, with its enormous traffic, could afford to have its eastern terminus under the control of another company, liable to be taken away, or interfered with, whenever the majority of stock was held in adverse interests. It is true that the Bound Brook and the North Pennsylvania Railroad Companies had a contract with the Central Railroad Company of New Jersey (it is referred to in this testimony), for the transportation, by the Central Railroad Company of New Jersey, of traffic between Philadelphia and New York, but for none else. The great business to be thrown upon the Central Railroad of New Jersey from the Reading

Road will not only be over the thirty miles between Bound Brook and New York, but will be traffic from the North and West over one hundred and thirty miles from Tamanend and seventy-five miles from Phillipsburg, and for neither of these lines had the Reading Railroad Company even a transportation contract, and even if it had it could not have afforded to let its entire system of roads, and its great traffic, depend for an outlet upon the good will of a changeable constituency of stockholders, who might one year be in its favor and the next year be in favor of its rival—the Pennsylvania Railroad Company. Negotiations were therefore commenced for a lease. There probably never was, in the history of any business transaction, greater publicity given to any preliminary negotiations than there was given to those which resulted in this lease. The negotiations extended over several months. We have offered in evidence, and your Honor will see them annexed as exhibits to the report of the examiner, articles and extracts from the newspapers on the subject, for two months before the lease was made, and for three months before Mr. Dinsmore filed his bill. The fact that the lease was to be made was so notorious that legal proceedings by a creditor were commenced in another court to prevent its being carried into effect. There was no man, woman, or child who read the newspapers, or knew anything about what was going on in the world, that did not know that this lease was to be made. After long negotiations, the terms of the lease were agreed to. The Reading Railroad Company would not agree to pay six per cent. for the first year, and it was agreed that, for the first three months, the lessee was to pay no rent to the shareholders, which practically reduces the rent for the first year to four and a half per cent. upon the stock. The Reading Company then agreed that it would furnish security, to be given to the Chancellor of New Jersey, that the floating debt of this company should be paid by the Central Railroad Company of New Jersey, if the Chancellor would release the company from bankruptcy. Upon application by the Central Railroad Company of New Jersey, stating that it was in a solvent condition,

the Chancellor released the company from insolvency, and handed it over to its shareholders. The Reading Company deposited with Mr. Little, the receiver, who continued under the control of the Court of Chancery, the sum of three millions of dollars of its bonds as security that its floating debt of two millions of dollars, which the Chancellor charged upon the property, should be paid within a few months. Prior to this, however, on May 11th, 1883, the annual meeting of the company took place. The minutes of that meeting are in evidence. I now desire to read from the minutes this statement from the report of the directors made to the stockholders at that meeting :—

"A proposition has been made by the Philadelphia and Reading Railroad Company to lease and acquire the property of the company under a lease and contract for nine hundred and ninety-nine years, which will guarantee six per cent. to the stockholders, commencing to run from September first next, the first quarterly dividend being payable December first next, and the board of directors are of opinion, subject to the proper ratification by the stockholders, that after the termination of the receivership and consequent legal power of the company to act in the premises, the lease and contract should be made."

Following that was this resolution :—

"Resolved, that the stockholders hereby approve of the proposed lease and contract to and with the Philadelphia and Reading Railroad Company, and request the directors to execute and carry the same into effect immediately upon the company acquiring the legal power to act in the premises by the determination of the receivership."

This resolution was passed by a unanimous vote of 139,951 shares, no single stockholder voting against it. Mr. Dinsmore for his whole two thousand shares voted in favor of it. The five hundred that stands in his name and the fifteen hundred which he swears he owned, in the names of others, voted for that resolution by proxies which I have here, and will show to your Honor directly. The board of directors was unanimously elected by 154,333 votes—there was no dissent. The difference between these votes was principally owing to the fact that certain proxies were made out in the New York form,

and were confined to voting for the election of officers. But every person who voted upon the subject of a lease voted in favor of it. There was not a single vote at that meeting cast against it. That meeting was held May 11th, 1883. Shortly afterwards, on the 25th or 26th of May, the road was released from the receivership. On the 29th of May a lease was executed by the directors, and the same day the Reading Railroad Company took possession of the property. Everybody then seemed to be pleased, there had been no dissenting shareholders, there had been no one, as Mr. Little testifies, who ever called upon him even to protest against it. Here was a great property that for five years had fallen so low that it had earned over two millions of dollars, less than enough to pay its interest, and the Reading Railroad Company took it at a price which, counting interest at five per cent., made the property worth 110 millions of dollars. The Reading Railroad Company covenanted to pay an annual rent amounting to from $5,000,000 to $6,000,000, of which about $1,100,000 was to go annually to its shareholders as dividends.

Just at this point let me say something in answer to Mr. Gummere's objections to this lease.

Mr. Gummere is a very able lawyer, a gentleman for whose legal ability I have the profoundest respect and admiration, but for his practical business ability to construe the terms of a railroad contract I must confess, that, since his statements of yesterday, I do not entertain the same unqualified admiration. Mr. Gummere, in the first place, says the lease is a conveyance of a vast amount of property in fee. Now if the court please, the only property conveyed in fee is the outside real estate not connected with, or used for, the purposes of a railroad. All the railroad property and all the real estate connected therewith, and used for the purpose, is demised for the term of nine hundred and ninety-nine years, with a covenant on the part of the Reading Railroad Company, that the lessee will maintain and keep it, during the term, in good order and condition. The relation of landlord and tenant therefore exists, as to all the pro-

perty, real estate, and other that is necessary for the operations of the railroad.

There is, however, an absolute grant in fee of certain detached pieces of real estate, some ten or twelve I think in number, that are outside of and not in any way connected with the railroad property. Houses in the city of New York, some buildings and certain property in Elizabeth, and other outside property, but even as to such the grantee is bound by the trust—a trust that will be enforced relentlessly by any chancellor, that no part of it shall be sold unless the proceeds are applied to the improvement of the demised premises or applied to the payment of the debt of the Central Railroad Company of New Jersey. Mr. Gummere says we have the right to alienate other personal assets, and he points to twenty-five millions of personal assets conveyed by the lease. I wish we could get our hands upon them. These are some twenty-five millions of nominal value, worth probably fifteen or sixteen millions—the Lehigh and Wilkesbarre Company's bonds and stocks, for instance—the terminal property of the Central Railroad of New Jersey at Communipaw, &c., which have been transferred to and are now in the possession of trustees to secure the bondholders of the Central Railroad Company of New Jersey, and we get only the reversion of them. When the debt is paid they become ours. But if we sell them the proceeds must be used to improve the demised property, or applied to the payment of the debt of the Central Railroad Company of New Jersey. Mr. Gummere says that the Reading Railroad Company can sell the real estate that is used for or connected with the railroad; and some one, I think, even said that the lessee could sell the road-bed. We can not do anything of the kind; there is a covenant to keep and maintain all the demised property in good order and condition, and it is only when any of it is no longer necessary for railroad purposes, and of this the Central Railroad Company of New Jersey, not the Reading Railroad Company, must be the judge, because they must join in the conveyance, that any part of it can be

sold, and when so sold the proceeds must be spent upon the demised premises or applied to the payment of the debt of the lessor company. Mr. Gummere says the president of the Reading Railroad Company is made for ever the attorney in fact of the lessor company, and can as such attorney give the consent for such sale. But, if your Honor will read the clause in the lease, you will see at once that the president of the lessee company is simply, as he is, I believe, in many other leases made the attorney in fact to carry out the lessor's covenants in the lease. This is a customary thing in railroad leases. But can it be said that where he is made attorney in fact for specified purposes, and where in the same instrument it is provided that none of the demised property shall ever be sold without the consent of the Central Railroad Company of New Jersey, signified by its thereafter becoming a party to the conveyance, that such power of attorney, created for the purpose of carrying out express covenants, could be exercised for the purpose of binding the principal to a consent which in the very instrument itself is left entirely to the discretion of the principal? Mr. Gummere also says that all the rolling stock of the lessor can be taken away from its line. Why, if the court please, the lease is for nine hundred and ninety-nine years. The rolling stock will be all gone in twenty-five or thirty years, but the Reading Railroad Company has covenanted to keep and maintain on the demised premises an amount of rolling stock equal to what is there now; and so long as it does so, it can use (and that is the usual covenant in every railroad lease) the rolling stock on any other line. If it were not so, it might follow that when a car of freight is to be sent from New York to Pittsburg, it must be stopped at Phillipsburg and unloaded, and the contents loaded in some other car to carry it to its destination beyond the line of the Central Railroad of New Jersey. The cars must of necessity go over the whole system of connecting lines, and at the same time all the rolling stock of the lessee will go over the road of the lessor, and there is a direct covenant in this lease that the Reading Railroad

Company will at all times keep and maintain an amount of rolling stock equal to that now taken upon the lines of the Central Railroad Company of New Jersey, and an appraisement was made according to the terms of the lease in order to maintain a record of its value. I can safely say to your Honor, familiar as you must be with railroad leases, that you will find nothing in this lease that is not properly drawn for the protection of the lessor company. Our friends upon the other side spoke of the lease having been made with "railroad speed." Why, may it please the court, it was the work of months. It was referred to for months in the public press; it was in the mouth of every man, woman, and child who owned stock in this company. Every business man certainly knew all about it. There probably never was a lease made in which such a remarkable vote was cast for it as the vote which was cast for the ratification of this lease. I have called your Honor's attention to the 139,000 out of the 185,000 votes cast for it in the month of May, and when it was submitted to the final ratification of the shareholders in July, 150,828 votes were cast in favor of it and only a little over 4000 votes were then cast against it, including the 2000 which were controlled by Mr. Dinsmore, and which had previously voted for it.

Yesterday Mr. Gummere read some extracts from an opinion of Chancellor Williamson, given as Chancellor, which he thought it would be very difficult for him to answer as a lawyer in this case.

Knowing the high estimation in which the legal opinions of Chancellor Williamson are deservedly held, I now desire to read to you an opinion of his upon the main question in this cause, the original of which is filed among the records of the Central Railroad Company of New Jersey. Of course this lease and the question of the power of the company to make it, were submitted to Chancellor Williamson, as the counsel for the company, for his opinion. I must say that the lease itself was a very different instrument when it came out of his hands, from what it was when it went into them; he cut and slashed at it a great deal, and finally delivered it to the

board of the Central Railroad Company of New Jersey on the twenty-sixth day of May, with his revisions, alterations, and corrections, accompanied by the following opinion, which I am happy to believe will at once remove from the minds of our learned friends on the other side any lingering doubts which may yet oppress them as to the perfect legality of the document:—

"NEW YORK, May 26th, 1883.

"*Henry S. Little, Esq., President,*

"DEAR SIR:—I examined thoroughly the original draft of the lease from the Central Railroad Company of New Jersey to the Philadelphia and Reading Railroad Company. I suggested a number of material alterations and additions, which I considered of importance to the Central Railroad Company of New Jersey. They were acquiesced in and adopted. I am of opinion that the lease now submitted is properly drawn, and after the termination of the receivership the execution of the same is within the power of the Central Railroad Company of New Jersey.

"Yours truly,

"B. WILLIAMSON."

Fortified by this opinion, the lease was executed on the twenty-ninth day of May with the full acquiescence of everybody, including the complainant in this case. The Reading Railroad Company, having deposited $3,000,000 of bonds to secure the payment of the floating debt, immediately made very important new arrangements based upon this lease. The court will see by the affidavit of Mr. Foster, and the agreement annexed to it, that on the 6th of June the Reading Railroad Company entered into a new contract with the Lehigh and Susquehanna Railroad Company, whose line of railroad is indicated on the map in yellow, running from Easton to the Wyoming coal fields, and had been leased to the Central Railroad Company of New Jersey at a rental equal to a fixed percentage on its gross receipts; without any guarantee as to a minimum. The Lehigh and Susquehanna Railroad Company desired the Reading Railroad Company to enter into a new agreement with it, and the Reading Railroad Company, in consequence of its lease of the Central Railroad of New Jersey and by reason of the unanimous consent of every shareholder, including Mr.

Dinsmore, entered into a new contract with the Lehigh and Susquehanna Railroad Company, by which it bound itself to the payment of a minimum of not less than $1,400,000 a year. This was a new obligation which the Reading Railroad Company entered into in consequence of this lease, and at a time when there had not only been no opposition to the lease, but absolute acquiescence in it by every one, including Mr. Dinsmore. The investing public then began to buy the shares of the Central Railroad of New Jersey, and many such investors came before the examiner and swore that on the faith of this lease, on the faith of the six per cent. guarantee by the Reading Railroad Company, they bought shares of the Central Railroad Company to a large amount. It would be difficult to name the amount of pecuniary interests involved in or affected by the changes which took place in consequence of this lease having been made. Everybody seemed to be pleased; and there was no dissent, always excepting the Pennsylvania Railroad Company, which refused to be comforted. The Pennsylvania Railroad Company was then involved in a litigation with the Philadelphia and Reading Railroad Company and the Central Railroad Company of New Jersey, the record of which has been offered in evidence in this case, and of which I can speak to your Honor without improperly calling your attention to the merits of a case which is to be argued before you. The counsel for the Pennsylvania Railroad Company in this litigation were Mr. Green and Mr. Gummere—now counsel for Mr. Dinsmore; and the Pennsylvania Railroad Company, as we say in the answer, and as the testimony sustains us in saying (for when asked the question the witness refused to answer it), tried to get some one else to file a bill to set aside the lease of the Central Railroad of New Jersey. One gentleman, an officer of a company in the interest of and affiliated to the Pennsylvania Railroad Company, who it was known or believed had something to do with this matter, when asked the question whether he had not endeavored to secure some shareholders of the Central Railroad Com-

pany to file a bill to set aside the lease, replied that he declined to answer the question—and we have a right, from that declination, to assume that the answer, if given, would have been in the affirmative.

MR. CONKLING:—Who was that?

MR. F. B. GOWEN:—Mr. Sewall.

MR. ROBESON:—But it is but justice to General Sewall to say that he did state he had no more connection with the Pennsylvania Railroad Company than any one else in New Jersey.

MR. CONKLING:—That it was entirely a personal matter.

MR. F. B. GOWEN:—Yes, he said it was a personal matter of his own, and he was not acting for others. But he was not Mr. Dinsmore, and he could not have been acting for Mr. Dinsmore; and it is proved in this case that he paid the money to procure the affidavits on which this preliminary order or injunction was first granted. Your Honor will see that he had a great deal to do with it. And it is shown that the money thus paid by him was not returned to him until after we had called attention to it in our testimony, and had proved that he paid it.

Then it is part of the history of this case that a number of gentlemen who had been, and are now, connected with the Pennsylvania Railroad Company, sold Central Railroad Company of New Jersey stock short in view of the filing of this bill. This is proved in this case. Mr. William L. Scott, Mr. A. J. Cassatt, and another gentleman met on the 21st day of June, knowing, as Mr. Cassatt admitted, that Mr. Dinsmore was to file his bill. They sold six thousand shares of Jersey Central short, which they did not own, expecting it to go down in consequence of this litigation, and to make money for themselves by reason of the fall. Another gentleman, a vice-president of the Pennsylvania Railroad Company, was put upon the stand and asked if he had not sold the stock short, and he refused, or declined, to answer the question, which, of course, gives us the right to assume that the answer, if given, would have been that he had

also sold short. Well, these gentlemen agreed to sell this stock on the 21st of June, the sales actually took place on the 22d and 23d, but the arrangement to sell them was made on the evening of the 21st, because Mr. Cassatt says it was the evening before, and Mr. Osborne, the broker, who sold the stock and who was present at the meeting, identified the meeting and said he would send to the examiner the date upon which the stock was sold, and subsequently did so, showing it was sold on the 22d and 23d of June last.

Now, on the 1st of July, the Reading Railroad Company had a very large sum of money to pay; the 1st of July and 1st of January are pay-days of the Reading Railroad Company for interest on loans and for large rentals. It is proved in this case that the assistant solicitor of the Pennsylvania Railroad Company, Judge Logan, directed an agent or attorney to get for him a statement of the amount of money the Reading Railroad Company had to pay on the first day of July. These gentlemen then waited, knowing that they intended to file this bill, knowing that the payment of this large amount of money which the Reading Railroad Company had to make on the first day of July required all the resources which at that time were available, they waited until the twenty-ninth day of June, two days before the day of payment, and then without notice to us; without a single affidavit upon anything but the insolvency of the Reading Railroad Company; without even an affidavit that the lease had been made; without any affidavit that Mr. Dinsmore was a shareholder of the company, or that he had not acquiesced in the lease; without even the ordinary injunction affidavit, and purposely, as we allege, with no affidavits or proofs whatever except as to the alleged insolvency of the lessee, so that it could be spread far and wide over the land that the lease was set aside upon no other ground under heaven than that the Reading Railroad Company was an insolvent corporation, they applied to your Honor one month after the lease had been made, and seven weeks after Mr. Dinsmore had voted for it and obtained

not merely an injunction but a mandatory order restraining the Reading Railroad Company from receiving the moneys arising from the operations of the railroad, and directing them to be paid to the Central Railroad Company of New Jersey. Now I call your Honor's attention to this, that never in the whole course of judicial proceedings has an interlocutory injunction been asked for without an affidavit of the material facts stated in the bill. I do not think such a thing was ever heard of in a court of justice, and yet they carefully kept back everything except this; that the Reading Railroad Company was insolvent; that there were judgments against it; that its securities were selling under par; and they even proved to your Honor, by an affidavit, that this very lease which the bill alleged would injure Mr. Dinsmore, took $1,000,000 a year out of the Reading Railroad Company's treasury for the benefit of the Central Railroad of New Jersey, in other words that the Reading Railroad Company had agreed to pay for this property $1,000,000 per annum more than it was worth, and without any affidavits except these; without any affidavit as to any facts upon which a chancellor could act—for as to the solvency of their lessee the shareholders of the lessor company are better judges than the court—purposely withholding all this for the purpose of injuring the credit of the Reading Railroad Company, they obtained a mandatory order based upon no testimony under heaven than that the Reading Railroad Company was insolvent, so that they could say to every one: "Why, the court, without going into the merits of the case, without even an affidavit that the lease was made, without any affidavit that Mr. Dinsmore was a shareholder or was opposed to this lease, the court has simply set this lease aside because the Reading Railroad Company is so insolvent that no court in the wide world would permit a lease to be made to it."

Now this was done in this case in June last, and the large sums of money which would have come into the hands of the Reading Railroad Company were intercepted by the strong arm of the law, and a great corporation that had struggled manfully against insolvency,

and had saved its property for its shareholders, found a precipice yawning at its feet over which it might have thrown to destruction. The honor of a corporation that pledges its name to pay money on a certain day must be maintained; and when, two days before the time fixed for payment, a mandatory order is granted which intercepts the money required for such payment, the company is placed in a position such as I will venture to say, from the knowledge I have of your Honor and of this court, you never for one moment intended. Fortunately for us we came quickly to the rescue—but we could not even get sight of the bill—it was locked up by direction of the counsel of the Pennsylvania Railroad Company. Although the mandatory order was telegraphed over the United States and Europe, the very bill upon which the mandatory order was granted was locked up in a printer's desk; and in defiance of your Honor's order, as is proved in this case by Mr. Kean, in defiance of your Honor's peremptory order that we should have it, the printer told Mr. Kean that that bill had been given to him by Mr. Green (who is counsel for the Pennsylvania Railroad Company), with positive directions to let no one see it, and he could not give it to anybody—and I had to make an argument before your Honor, asking you to relieve us from the injunction, before I had even had an opportunity of seeing the bill under which all this injustice has been brought about.

I have now gone over the facts of this case, and am glad that after so many months we have the opportunity of being heard in our defense. I shall not go over what has been already so well said. I shall not attempt to "gild refined gold" by adding anything to the brief which has been handed to your Honor, and to the argument * to which you have listened, upon the right of the company, under its charter and under the laws of New Jersey, to execute this lease. I believe that argument to be unanswerable. I believe the fact that the charter of this company was subject to alteration by the

* Of Mr. James E. Gowen.

legislature, to be sufficient to take this case out from under the shadow of any decision which, in the wildest flight of the imagination of the most astute counsel, could be invoked against the lease. I further believe this, that even if those decisions are binding upon the courts of New Jersey, they are not binding upon the United States courts. I believe that if there ever was a contract either between the State and this company, or between the company and its shareholders, or between the shareholders themselves, that any protection which our friends on the other side may ask to be thrown around such contract, by reason of any constitutional prohibitions, are protections which in a court of the United States must be applied only under the Constitution of the United States; and your Honor can see very plainly that, sitting as a judge of the United States court, you can not say that that Constitution, which is supreme and binding upon all, is to be decided one way in New Jersey, and another way in Pennsylvania, and another way in Massachusetts, and another way in California, just as the wavering fancies of the judges of these particular States may determine that it shall be decided within the borders of their several Commonwealths. It is not possible that anything in the Constitution of the United States can prohibit a railroad lease in New Jersey when it would not prohibit it in other States. Again, the charter of the Central Railroad Company authorizes it to merge with another—that is, it gives it absolute right to turn the control of its affairs over to the stockholders of another company. It could have merged with the New York Central Railroad Company, it could have merged with the Pennsylvania Railroad Company, it could have merged with the New York and Lake Erie and Western Railroad Company, and the remedy provided by statute for a dissenting shareholder was that he should have compensation, and the protection thrown around a shareholder against such merger was simply that it should be ratified by three-quarters of the shareholders of the company—that is all. Mr. Dinsmore's counsel will not for one moment undertake

to argue that the Central, with its capital of $18,000,000, could not have merged with another company with a capital of nearly a hundred millions of dollars, treating their own stock at market value—say 80—against that of the other stock at 120, which would have given the Central Railroad Company shareholders a much smaller proportion in the merged company than their relative capital stock authorized. They might have merged; that would have been legal; that was in the charter in 1847 or 1848; that could have been done. Now, why under heaven, if they could have done that, could they not have made the lease? Does not the greater include the less? If a corporation holds its real estate for the purpose of conducting a certain business, and the legislature in its charter say they may have the power to sell such real estate, does it not necessarily follow that they may have the right to lease? Why, of course, the greater includes the less—if they can do one they can do the other.

MR. ROBESON:—The last decision of the Supreme Court of the United States decided they could even sell under it.

MR. F. B. GOWEN:—I only desire to impress upon your Honor the point that is struggling in my mind for utterance, and after I get through with my argument I shall print the decisions bearing upon the points I make, and hand them to the court and to the other side; it is unnecessary to mention them now in detail. It would take me a longer time to read than the whole time that I intend to occupy in talking.

Your Honor will notice that everything that was required in the charter to be done, namely, the concurrence of three-fourths of the vote, we had. If Mr. Dinsmore is wronged, he can have his compensation; we tender it ready at any time.

My colleague calls my attention to the fact that this point is made upon the brief already handed you, and that the case of Branch *vs.* Jesup, 16 Otto, 479, cited in the brief, is conclusive upon the subject.

Before entering upon the discussion of that branch of the case assigned to me for argument, I desire to call

your Honor's attention to this: Your Honor is asked here to-day to administer railroad law in the light of the experience of fifty years. It is utterly impossible for a court to say that that can not be done by a railroad company which could not have been done fifty years ago. My colleague has called your attention to this in a great many ways, but what I desire to impress upon your mind is this, that for the last thirty or thirty-five years in England and in this country, the right to lease has been almost invariably granted to railroad companies. It is true that the right to exercise a franchise can not be transferred or assigned without legislative or statutory authority. It has required a statute to authorize leases, mergers, sales, and mortgages, but they are all within the same category, and the reason that requires it in one is the same reason that requires it in another. There is no difference. Any claim by Mr. Dinsmore as a dissenting stockholder, presuming that he is in a position to apply to a court of equity, that legislation without his consent can not authorize the lease of a company, could be made use of by him to prevent subsequent legislation authorizing a mortgage; there is no difference in law. Would your Honor listen for a moment to such application? The right of this company, if it was originally limited to its primal scheme, as he says it was, was to conduct a railroad without any other debt than, say a million of dollars. The shareholder may say: "I bought in this company, because I knew it never could be taken away from its shareholders; its debt was a million, and if the worst came to the worst I could pay that; now they have secured statutory power, and offer a resolution to make its debt twenty millions, and say that it will be profitable, but how do I know that; it is changing the object of the incorporation; I will prevent it." Would your Honor listen for a moment to such an objection against the wishes of the majority? No. Why then listen to objections to a lease authorized by statute and approved by an overwhelming majority of shareholders? Is it not the fact that leasing railroads has become a necessary incident to the ownership of railroad

property; that the leasing of a railroad may be absolutely necessary for its protection against an adverse interest?

The original charter of this company authorized the leasing of railroads—that is, the company could lease another railroad and merge another into its existence in any way. Is not that sufficient even without the protection of the act of 1846? In the year 1883, with all the law and experience we have had upon this subject, it can not be held, if it ever was held, in New Jersey, that a corporation organized to operate a railroad which, in its original grant of power, had the right to merge and had the right to lease other roads, can be restrained by a single dissenting shareholder from taking subsequent legislation authorizing the lease of its own road to another company. And having said this, as to the main point of the case, I have done with it, and shall proceed to call your Honor's attention to the several reasons which, in my judgment and in that of my colleague, are sufficient to prevent a preliminary injunction, and in most cases any injunction whatever being granted to Mr. Dinsmore under this bill, irrespective entirely of the main question.

The first of these reasons is, that Mr. Dinsmore is not such a shareholder as is entitled to relief at all, even admitting to the fullest extent the legal propositions enunciated by Mr. Gummere yesterday. Why is he not? He never acquired or held any interest in this company as a shareholder at a time when the lease of its property was illegal, as I shall show. He never became a shareholder upon the books of this company until the spring of 1882. This is the first time his name appears upon the books. He is not a shareholder, of course, if he holds some stock which is not registered in his own name. The person in whose name the stock is registered is the shareholder. If Mr. Dinsmore bought two thousand shares of stock in some one else's name, and let that name remain upon the book, that man and not Mr. Dinsmore is the stockholder. If it were otherwise, you might have two stockholders for the same stock. And in the United States court certainly he has not a right in equity

to maintain his suit, until he became a shareholder in the company. Now what was the condition of this company when he became a shareholder? Could he say with any propriety that when he became a shareholder—even admitting him to have been such as early as 1880, when he made his first purchase of one thousand shares—could he say he bought into a company of which a lease could not be made? Why, he bought into the company when it was in the hands of the Chancellor; he bought into the company when it was in the possession of the law; he bought into the company when the Chancellor could have put it up at public sale, and it could have been sold out to the highest bidder. Will your Honor say to me that the Chancellor, under the act of 1875, and under the chancery powers of New Jersey, having the right to sell the property as chancellor, even if it had only brought fifty cents on the dollar of its indebtedness, would not have had the right to lease it for a thousand years to some company that would give the shareholders six per cent. per annum for it after paying its indebtedness? Is it possible that in a court of equity any such narrow construction of the powers of the Chancellor can be claimed as would have obliged him to sell the property, even if its shareholders would have lost everything, and would not have authorized him to lease, even if they got six per cent. per annum on the par of their shares? Therefore Mr. Dinsmore, when he bought this stock, bought it in a company which, under its charter and under the laws of New Jersey, could not only have been sold but could have been leased.

MR. ROBESON:—There was a special act authorizing such lease by the Chancellor.

MR. F. B. GOWEN:—I need not argue this point based upon such statutory power, but as resulting from the general powers of the Chancellor under the act of 1875. But my colleague tells me there is a statute authorizing the Chancellor to lease.

THE COURT:—Authorizing the receiver to lease under the protection of the court.

MR. F. B. GOWEN:—I did not know that, although I should have known it.

MR. JAMES E. GOWEN:—That is on the brief, if your Honor please.

MR. F. B. GOWEN:—Therefore Mr. Dinsmore bought his stock in a company which might have been leased or sold, and which would have been sold but for us, and any argument that he may here make through his counsel that the act of 1880, under the protection of the act of 1846, does not apply to the charter of his company, could be equally well urged by him, and his counsel before the Chancellor of New Jersey, to show that the bankruptcy proceedings of 1875 which authorized the sale did not apply to his charter, and that the subsequent statute, of which I had no knowledge, which authorized a lease, did not apply. Can it be possible that in a court of equity upon this shadowy and filmy distinction spun out to overthrow a statute of a great Commonwealth, a man can even be permitted to say to your Honor, "I bought into this company under the protection of the laws of the State of New Jersey that never authorized a lease," when it appears by the statute, and when, irrespective of the statute, it follows from the general equity power of the Chancellor which necessarily resulted from the condition into which this company had fallen, that there existed at the very time he bought his shares the power without even consulting him, without submitting it to his body of co-shareholders, there existed a power to lease and sell this road. Why, if your Honor pleases, the cause should be dismissed upon this first point that I have argued.

The second point is, that Mr. Dinsmore voted for this lease and is estopped from contesting its validity. Now, when I appeared before your Honor on the 30th of May last, I assumed of course from the fact that the bill was filed, that Mr. Dinsmore had not voted for this lease. Mr. Green, if your Honor will remember, called me to task very severely for even suggesting such a thing, but immediately after that, when the records of this company were overhauled, I found that Mr. Dinsmore had voted for the lease. I now hand you the proxies with the original vote annexed to them; both that of Mr. Dinsmore

for his five hundred shares and those for the fifteen hundred shares which are in the names of employés of the Adams Express Company, but which he testifies were his own stock. Now, if it please the court, in a burst of confidence, such as I have sometimes in my life had cause to reproach myself with, I handed these proxies to my friend Mr. Seward, at the meeting at Communipaw, on the 6th of July last. I supposed of course that Mr. Seward would at once say, "This ends the case," and would have apologized for the trouble he had given us. I handed him the proxy, and I said: "Mr. Seward, do you know that your client voted for this lease? How can you ask for a preliminary injunction?" He said: "Will you let me see the proxies?" and he took a copy of them. He has had from July 6th until this time to consider how he should surmount this obstacle; and when Mr. Dinsmore was examined in New York he said: "Oh! I see my mistake; I intended to strike out all the proxies except that which relates to the voting for officers, and I did not do it. I didn't strike out enough."

In answer to the first question on the subject, he said his recollection was that he had erased all the four proxies himself, but subsequently he said he didn't know but what Mr. Babcock, who is treasurer of the Adams Express Company, had done some of it.

I ask your Honor to look at these proxies. Circumstantial evidence on a subject of this kind is often very much more trustworthy than the recollection of a gentleman like Mr. Dinsmore, who says that he swore to his bill because his lawyer said it was right, and I said: "Well, then, do you expect if you are indicted for perjury that your lawyer would go to jail?" Well, he didn't know, but thought that it was probable.

MR. ROBESON:—He said he paid him for that!

MR. F. B. GOWEN:—Yes, I think he said he paid him for that.

MR. ROBESON:—He said he didn't keep a dog and bark himself.

MR. F. B. GOWEN:—I only mention this to suggest that if my learned friend Mr. Seward practiced law in Pennsyl-

vania or in New Jersey he would not permit his client to talk in that manner about the profession.

MR. CONKLING :—I simply desire to say, in the absence of Mr. Seward, that no such question was asked Mr. Dinsmore about his going to prison for perjury, that I heard, and the record does not show it.*

MR. F. B. GOWEN :—Mr. Dinsmore said at first that he thought he had corrected all these proxies, but if your Honor will look at them you will see they are filled up by different hands. Mr. Dinsmore's name in the body of his proxy evidently was written by the gentleman who witnessed it; it is the same handwriting. Mr. Dinsmore, in answer to another question, said he was not certain, but that he only altered his own and left the other three to be altered by Mr. Babcock. If you look at the Dinsmore proxy, you will see it was altered not only by a different pen from that used on the others, but by another penman. You will see that all of the other three, so far as any one who is not an expert can judge, were evidently altered by the same person. Mr. Dinsmore's is altered with a broad-nibbed pen, or by a pen which was held sideways, and pressed heavily on the line, making a broad mark which is not drawn straight,

---

* The following is the actual testimony of Mr. Dinsmore upon the point :—

Q. With regard, then, to these statements and allegations in the bill about which you were asked yesterday, you relied for your general information upon the statement of your lawyers ?

A. I did.

Q. And swore to it on the faith of that ?

A. I did.

Q. In other words, as the old story goes, you expected your lawyer to draw the bill like a lawyer, and you would swear to it like a gentleman ?

A. Yes, sir ; or words to that effect. I did not think it was worth while to keep a dog and bark myself. Excuse the gross expression but that is the idea in my mind.

Q. (By MR. GOWEN.) Do you expect your lawyer to stand up and be responsible for all you swear to ?

A. Yes, sir.

Q. You do ?

A. Yes, sir ; what do I pay him for ?

but undulating or in waves, and such as would probably be made by an elderly gentleman or by a man who held his pen sideways. The others are altered in a different manner, as if they were altered by a different person, and therefore Mr. Dinsmore's subsequent recollection upon that point is very likely the most correct, namely, that he altered his own proxy, and that Mr. Babcock altered the other three. That is one fact from which to draw a deduction in this case, and assuming the fact to be as I say, namely, that they were altered by different persons, then you have this remarkable peculiarity, that where it was the intention of more than one person to alter four proxies in exactly the same manner, so as to strike out everything but that portion concerning the election of officers, that neither of them did what he intended to do. Now one man might make such an omission, but it is not likely that two would do so, especially as, in order to find out at what point they should commence to strike out what they did strike out, each had first to read over the very language which gave the proxy the right to vote upon the question of the lease, all of which was passed over without erasure.* It was not as if they intended to strike out something, and omitted to do it because it came after that which was actually struck out; but they could not find out the place where to begin to erase that

---

* The following is a copy of the proxy showing the actual erasure :—

KNOW ALL MEN BY THESE PRESENTS, That I, W. B. Dinsmore, of New York, do hereby appoint Edward C. Knight, of Philadelphia, or, in his absence, Henry S. Little, of New Jersey, or in the absence of both, Franklin B. Gowen, of Philadelphia, to be my substitute and proxy, for me and in my name and in my behalf to vote at the election of officers of the Central Railroad Company of New Jersey, or on any other business relating to said company, at the next annual meeting, ~~or at any special, adjourned, or other meeting~~ of the stockholders of said company, as fully as I might or could were I personally present, and I hereby revoke any other proxy heretofore given by me.

In Witness Whereof, I have hereunto set my hand and seal this fourth day of May, 1883.

Witness present:
D. B. BARNUM.

W. B. DINSMORE. [SEAL]

which was stricken out, without first reading over the very words authorizing a vote upon the lease, which were left without any erasure. In other words, each had to read the very words authorizing a vote on every subject at the meeting, in order to find out where to commence to strike out what they did actually erase. I think I could convince any jury of the fact that two people who had at different times intended to erase the same portions of these four proxies, never intended to erase anything more than they did erase. And therefore, taken in connection with what Mr. Dinsmore said in this case, taken in connection with the long delay and everything of that kind which has occurred since Mr. Dinsmore erased his proxies, your Honor must find as a question of fact that there was no intention to strike out that part which authorized a vote upon the lease.

Again, the part that was stricken out was a part which is frequently stricken out of proxies. The form is a form that the Reading Railroad Company and a great many railroad companies in Pennsylvania adopt, and in Pennsylvania there is no great objection to signing a proxy, even with the words which were stricken out left in, because under the statute of Pennsylvania no proxy is good for more than three months after its date. You never can vote upon any proxy that is over three months old; therefore, in Pennsylvania, people sign this general proxy, for if it is not voted within three months it expires. Now it is not so in New York, and, I believe, not so in New Jersey; therefore New York and New Jersey forms of proxies do not generally embrace the words here stricken out, which give the right to vote at any subsequent meeting for an indefinite time. Many people would hesitate about giving such a proxy. They might say, "We are willing to give a proxy for the next meeting, but will not give one to be good for ten years." Therefore they strike this clause out. What was stricken out was a very common thing to be stricken out. There were stricken out the words that authorized the proxy to be a continuing proxy forever, and that is what a business man would naturally strike out. Could it be possible

that Mr. Dinsmore would have us suppose that he intended to strike out that which he passed over, namely, that which gave the right to vote on any subject at one meeting, and yet intended to give a right forever to vote at all future meetings on any subject. He never intended to strike out more than the one subject, because, if he intended to strike out both, which would be everything, after the election of officers the moment he came to the words "New Jersey," he would have stricken out everything else.

There were three things in the proxy. First, it was a proxy to vote for officers; second, for any other business that might come before the annual meeting, and third, the continuing proxy for all future meetings. He only intended to strike out the one subject, because, if he intended to strike out both, he would certainly have stricken out everything after that which authorized the vote for officers. The one thing he struck out is that which most business men would naturally strike out. Mr. Dinsmore did intend to consent to and give his proxy for the election of the board of directors who, he knew, were pledged for the lease; why then should he have intended to strike out anything permitting his proxy to vote for the lease itself? He admitted he intended to vote for the officers, and can not deny he knew that the officers intended to make a lease. That was common talk. If he was opposed to the lease he would not have voted for a board intending to put it into effect.

MR. CONKLING:—It is only proper that I should tell the court that the proof is that Mr. Dinsmore did not know these directors were going to make a lease.

MR. F. B. GOWEN:—Where does he tell us he did not know it?

MR. CONKLING:—He has denied it again and again.

MR. F. B. GOWEN:—If he has, I take issue with him, and say his oath is not to be believed.

MR. CONKLING:—That you may do, but you must not tell the court that he did not deny it when he did.

MR. F. B. GOWEN:—If he has denied that fact, then he has denied that which was proved to be of notorious publicity.

He intended to sign a proxy to vote for this board of directors—and why should he have stricken out the right to vote on any other subject at that meeting?

If, as my learned opponent says, he knew nothing about the lease, there was then less reason why he should have stricken out the power to vote for it, because he would have had no reason to suspect it was to be voted for.

Here then is a sealed instrument upon the faith of which great interests have been involved, which is attempted to be changed by parol testimony; and although, like a power of attorney, it is probably susceptible of change or explanation either for fraud or mistake, yet in the absence of any charge of fraud it can not be varied to the injury of innocent parties who have acted upon it; and as, in consequence. of this lease approved of by these proxies, the Reading Railroad Company entered into important business arrangements with other companies, and all these new shareholders bought stock on the faith of that vote, Mr. Dinsmore, who made the mistake if mistake there was, can not now ask to set aside all this vast superstructure that has been erected upon the faith of his act. Never in the wide world has it been claimed that, after a stockholder had voted for a lease and stood by for thirty days after its execution until great interests had been involved, and millions of dollars expended or authorized to be expended upon the faith of his act, he could come into a court of equity and, on the mere ground of his own mistake, ask to be relieved from the consequences of his act to the great injury of innocent parties. If he made a mistake the mistake must be his, and he must suffer, not others. He led us to believe that even if it had been necessary in law to make compensation to dissenting shareholders (which we do not admit), that it was certainly not necessary in this case, because there was no dissent.

The third point to which I desire to call your Honor's attention, and which in my judgment completely estops Mr. Dinsmore in this case, is that he sold some of his

stock to us since he commenced this proceeding. We proved specifically that four hundred shares have been acquired by us, but others of his shares were also proved by the books of the company to belong to us. If the court please, Mr. Dinsmore swears that he had two thousand shares of stock, five hundred in his own name and one thousand five hundred in the names of agents, officers, or employés of the Adams Express Company. He filed his bill for one thousand shares, but of course I need not argue to your Honor that a shareholder, who is bound in good faith to his fellow-shareholders to file his bill not only for his own stock, but for that of everybody else, is also bound in good faith to file his bill in reference to all of his own stock in the company. A shareholder who has ten thousand shares of stock in a company, which has made a lease from which great pecuniary benefits result to the shareholders, can not come into a court and file his bill upon one hundred shares of stock to set aside the lease, and take a profit out of the lease upon his nine thousand nine hundred shares; that would be contrary to all ideas of equity.

Not only must he act with fidelity to the court, but in the interest of all his own shares. If he does not, he can not maintain his bill at all. If anything is done by which he makes a profit upon some of his shares out of the transaction which he seeks to set aside upon others, he is estopped, and has no standing in a court of equity. Above all, if, pending his proceedings in equity, he sells his stock to his adversary, he can not maintain his bill to the injury of his adversary. Your Honor will find, partly in the testimony of Mr. Babcock and partly in that of Mr. Dinsmore, but principally in the testimony of Mr. Babcock, supplemented by the testimony of Mr. Martinez, who was the broker of the complainant, that partly in consequence of this lease, and partly because of short sales, this stock demanded a great premium by borrowers, which Mr. Dinsmore took advantage of. The transaction of loaning stock to a borrower is, that the one who borrows gives the lender a check for the exact market value of the stock on the day the transaction is

made, and takes the stock and has the right to do with it as he pleases. Of course, all this borrowing of stock is done for the purpose of selling it or transferring it, or supplying a demand that exists in the market, very often for the purpose of making the price low by selling it when there is no necessity for such sale. At all events it is a well-known business transaction among brokers and others, and the *modus operandi* has been testified to not only by Mr. Babcock and Mr. Dinsmore, but by one or two brokers who were called to the stand. The fifteen hundred shares of complainant's stock not in the name of Mr. Dinsmore, but some of which was part of the stock upon which he filed his bill, was loaned from time to time by Mr. Dinsmore or by the Adams Express Company. We had an idea that this stock did not belong to Mr. Dinsmore, but he swears it did, and so it must be taken to be his. We are not permitted to contradict it, but it does appear, and it is a remarkable fact in this case, that in these transactions of lending all the checks were made to the order of the Adams Express Company and not to the order of Mr. Dinsmore.

At all events he loaned it, and it was transferred. He received sometimes as much as three-sixteenths of one per cent. per day, and once as high as three per cent. per day for the use of this stock—that is to say, in the latter case in two days, and the others in thirty-two days, he would have received as much for his stock as the other shareholders were entitled to receive under the lease for a whole year. He could not resist that temptation, and probably was not averse to doing anything on the market that would depress the value of the company's stock. Now, having done that, can he maintain his bill? Is he an investing stockholder, holding his stock in good faith, who can use one-fourth of it in this suit to break a lease and yet use the other three-fourths to make a profit, which resulted entirely from the lease? But not only has he parted with his shares, but several hundred of them were bought and are now owned by people who desire this lease maintained. Two hundred of them were proved directly, and one or two hundred more inferentially, to

be the property of the Reading Railroad Company. We own them, and have borrowed money on them. We bought them upon the faith of this lease, because we thought it was wise to buy our obligations at eighty cents on the dollar if we could do it, even if we had to borrow the money to do so.

I refer to the testimony of Mr. Borie, Mr. Williamson, and Mr. Kennedy. Can such a thing be? Can a man owning stock file a bill against the interests of his other stockholders and then sell some of the very stock upon which he files his bill, to his adversary, yet maintain his suit? Why, I never heard of such an idea—never!

I come now to the fourth point, which is, as we used to say in geometry, a corollary of the third.

Mr. Dinsmore's learned counsel must have felt the stress in which their case was placed when, upon the witness stand, it was shown that some of the very stock upon which he had filed his bill had been sold by him to his adversary, and thereupon in hot haste they went upon the street and asked for the return of the fifteen hundred shares. But this transaction of having stock returned is really a new purchase of other shares. The broker brings fifteen hundred other shares, and Mr. Dinsmore gives him a check for the same amount of money that he originally received; Mr. Dinsmore in the meantime having received the income resulting from the loans.

Well, he bought fifteen hundred shares and brought it into court in triumph. Oh, yes! he is a *bona fide*, long-suffering, patient old gentleman, who has held on to this stock through thick and thin, and now brings the fifteen hundred shares into court to prove that he has not parted with his title to be complainant, and out of his fifteen hundred new shares it is discovered that ten hundred and ninety-five of them voted for the lease. And now where does he stand? Is Mr. Dinsmore maintaining his suit upon the stock he held when he filed his bill? If so, he is out of court, for it has gone into the hands of his enemy. Is he maintaining his bill on the stock he bought since and now brings into court? If so, ten hundred and

ninety-five shares of it voted for the lease both at the meeting of the 11th of May and at the meeting of the 6th of July. Now, if my learned friend Mr. Gummere's profound remark yesterday, which may be considered as an axiom—that water can not rise higher than its source—is true, what becomes of poor Mr. Dinsmore? What is sauce for the goose ought to be sauce for the gander. And when Mr. Dinsmore, on the twenty-third day of November, in the guise of a patient, long-suffering, down-trodden shareholder, determined to protest against this infamy and wrong to which he had been subjected, brings into your Honor's court as his title to maintain and continue this suit, fifteen hundred shares of stock which he picked up on the street within the last two or three weeks, and of which ten hundred and ninety-five shares were voted for the lease, will my learned friends on the other side tell me in plain language from what source Mr. Dinsmore derives his power to sue upon such stock; and, further, what position they ask your Honor to occupy in the judicial history of this country, if they have the temerity even to suggest that you can grant a preliminary injunction upon such a state of facts as this? Was there ever a case known or dreamed of where it was sought to restrain the directors of a company from an act alleged to be *ultra vires*, on behalf of stock which had been voted for the act and purchased by the complainant after he had filed his bill?

Again, if the court please, the fifth cause which estops Mr. Dinsmore in this case, is laches and his acquiescence for thirty days in this lease. Now, I do not desire to trouble your Honor with a flood of authorities upon this point. I believe I have upon my brief about eleven pages of them. I shall boil them down very much, and print one or two pages probably, and hand them to your Honor. But, if in the history of corporation law and the equitable administration of justice in the affairs of corporations, there is any one thing more firmly settled than another it is this, that the shareholder who acquiesces in a transaction is not entitled to relief in a court of equity whatever his rights may be in a court of law. This point is en-

tirely different from the point that his vote estopped him. Of course his vote estopped him, there is a direct act, but if he had not voted at all, or even if he had voted against the lease and then waited thirty days before filing a bill, he could not have maintained his suit in a court of equity, no matter how much he might have had the right in a court of law to recover damages for any injury he might have sustained by the wrongful act of his co-shareholders.

The sixth point I desire to make is that his vote and laches together permitted other important interests to attach and be affected, and consequently a court of equity, no matter how it may decide as between the two principals in the case, will never enjoin, especially upon a motion for a preliminary injunction, where the rights of other parties have been affected by the acquiescence or laches of the complainant, unless such other parties are made parties to the bill, which is not the case here.

Now, what has the Reading Railroad Company done in this case? The Reading Railroad Company has employed a new army of workmen to the extent of some six thousand people. The Central Railroad Company of New Jersey has dismissed them. The Reading Railroad Company has entered into the elaborate contract with the Lehigh Coal and Navigation Company by which it guarantees that company to pay a minimum rental of $1,400,000 a year, and may be required to pay nearly two millions a year; that is an engagement of the Reading Railroad Company, entered into because it took the lease of the Central Railroad Company. The Reading Railroad Company and the Philadelphia and Reading Coal and Iron Company, which is affiliated to it, and controlled by it, have entered into an engagement by which they have agreed that they will divert from their own road, if occasion require, and send over the Lehigh and Wilkesbarre Road, such a proportion of the united tonnage of the two as shall be equal to the fixed proportion named in the contract. Therefore the Reading Railroad Company has not only, in consequence of the acquiescence and consent of Mr. Dinsmore, entered into

an engagement which may require it to pay nearly $2,000,000 a year in money, but a conditional engagement to divert from its own line a tonnage that may amount to six or eight hundred thousand tons a year.

Will your Honor now, after Mr. Dinsmore has voted for the lease and has acquiesced in it for this long time, and without making the Lehigh Coal and Navigation Company a party, grant a preliminary injunction at the request of Mr. Dinsmore by which so much mischief may be brought about?

It is a universal principle that where a man claiming relief in a court of equity lies by until other rights have attached, he can never have any relief in equity unless all the people affected by these new rights are brought into court and made parties to his bill.

The seventh point which I desire to make is—and it is hardly necessary to argue it, for your Honor is entirely familiar with it—is that this is not a case for a preliminary injunction. What is a preliminary injunction? It is a writ to prevent something being done and to hold the parties and the case in *statu quo* until the disputed question can finally be determined; but who ever heard of a preliminary injunction to set aside a lease that had already been made and under which possession had been taken by the lessee? What would be the form of it? What shape shall it take? Can your Honor conceive of the form of a writ of preliminary injunction that will answer the purpose of our friend upon the other side in this case? On final hearing a lease could be set aside by final decree, but how will you cause a preliminary injunction to operate as a final decree? Your Honor will remember that we offered to submit this cause to final hearing; we offered to expedite that hearing, and to endeavor to agree with our friends on the other side that a great deal of the testimony already taken might be used at the final hearing before your Honor and the circuit judge, provided that the motion for a preliminary injunction should not be pressed. But our friends would not, and have insisted upon a preliminary injunction. May it please the court, how can Mr. Dinsmore be injured by waiting

for a final hearing? We will give security that he shall not be injured in any amount that your Honor may direct. The injury complained of is only of a character that can readily be compensated by damages; no one will attempt to say that any loss resulting from Mr. Dinsmore's purchase of stock in the Central Railroad Company of New Jersey is something that can not be compensated by damages. No court of equity in the world would grant a preliminary injunction in such a case, if the defendant offers to give security to indemnify the complainant until final hearing.

In the State of New York the legislature has recognized this principle by a statute, which provides that whenever a preliminary injunction is granted for an injury that can be compensated in damages it shall be the duty of the court to dissolve the injunction upon security being entered.

MR. CONKLING:—You do not mean that seriously?

MR. F. B. GOWEN:—There is such a statute as I understand it. At all events, in a proceeding in equity within the last few months, in a New York court, an injunction was granted, and the injury complained of was only to the value of bonds, and we entered bail under the statute, as we supposed, and the injunction was dissolved. I was told by counsel in New York that such a statute existed.

Again, there is nothing before your Honor to justify a preliminary injunction. Every material allegation is denied in the answer; that is, every material allegation so far as affects the rights of the complainant to relief in a court of equity.

He alleges that the lease is made without legal power, and that he didn't acquiesce in it; that no opportunity was ever given to the shareholders to express their opinion, and no vote ever taken upon it. He swears to all this in his bill. The facts are not only as stated in the answer, but as proved in the testimony; that he did vote for it; that two meetings were held—one before he filed the bill, and one since—at both of which this lease was approved by the shareholders.

Every material allegation which the complainant has made in order to maintain his claim for equitable interference is denied by the answer and the proofs. Under the old practice, if a bill was filed and a preliminary injunction issued before answer filed, immediately upon the coming in of the answer denying the equity the injunction was dissolved.

Another point to which I desire to call your Honor's attention is this, that wherever a complainant in equity, one of a body of shareholders, files a bill for relief for an injury for which he can be compensated in damages, a court of equity will not interfere by injunction where such compensation is tendered.

Mr. Gummere argued very feelingly for the protection of Mr. Dinsmore and his stock, because he supposed, and I think he said, that his client's rights to his stock were as sacred as his right to his horse, and I think he said to his mule. At all events he seemed quite sure as to the horse. But suppose Mr. Little, the president of the Central Railroad Company, had taken Mr. Gummere's horse, or invaded the sanctity of his mule, without a shadow of right, and in direct violation of the statute of the State of New Jersey in such case made and provided, would Mr. Gummere have come into a court of equity to get back his property? I think he would have been laughed out of court if he had.

THE COURT:—He would have brought an action for writ of replevin, if he wanted the horse.

[At this point a recess of thirty minutes was taken.]

After recess MR. FRANKLIN B. GOWEN continued his argument as follows:—

I find that I have to apologize to the court for a statement I made with reference to the testimony of Mr. Dinsmore. I find he testified that before the meeting of the 11th of May he had no knowledge that the lease was to be made, and his answer with reference to knowledge of it from the newspapers referred to knowledge acquired after the 11th of May, but your Honor will re-

member that that was long before the lease was executed, and his knowledge upon that subject subsequent to the 11th of May bears upon the question of laches between that date and the filing of his bill.

General Oliphant, the examiner, has here a great number of newspaper articles upon the subject of the proposed lease that have been offered in evidence—I do not know how many (I presume your Honor will look at the testimony—I will not burden you to read it now, it covers over six hundred printed pages), but this large number of newspaper articles were offered in evidence; they extend over the months of April and May, and refer to the expected lease; and we claim that this notice was sufficient to give to every man, especially a man occupying such a position as Mr. Dinsmore did, ample knowledge of what was intended. I venture to say that there was not a business man who read the papers at all, in the city of New York, who did not know that this lease was a matter of public notoriety—we have proved the notoriety.

If your Honor will bear with me I desire to go back a moment to a previous part of my argument, as I find that I have failed to call your Honor's attention to one peculiar result of Mr. Dinsmore's parting with his stock. The friends of this lease now own more or less of Mr. Dinsmore's stock. The testimony of Mr. Borie is that he bought in the month of October for the Philadelphia and Reading Railroad Company a great number of shares of this stock, and among them were three hundred of the shares which had belonged to Mr. Dinsmore. Mr. Williamson, a director of the Reading Railroad Company, bought one hundred shares of Mr. Dinsmore's stock; other of these shares are in the possession of Messrs. C. & H. Borie, as shown by the testimony of Mr. Kennedy. Now what did these purchasers buy when they bought Mr. Dinsmore's stock? They bought his rights to this litigation. Mr. Dinsmore filed his bill, but not for William B. Dinsmore merely as an individual, for as such he has no *locus standi* in this court. He filed his bill as an owner of shares of stock, and his successors in the ownership of that stock succeed to his right, not

only to the stock and its increment, but to this suit, and as I now represent these purchasers I say to my friend Mr. Seward, who is to follow me, that he must consider himself as my counsel and bound to argue for me as the successor of Mr. Dinsmore, and I give him positive directions that he shall argue in favor of maintaining this lease.

MR. SEWARD:—I would rather have the fee, give me that first.

MR. F. B. GOWEN:—How will your Honor get over that? A man files his bill in equity and asserts his title to be a complainant, that he is the owner of certain shares.

THE COURT:—There would be a great deal of force in that argument if it were material whether a man owned a thousand shares or one share; but that is not the question.

MR. F. B. GOWEN:—One share is as good as one thousand if it is all the complainant has, but can the owner of a thousand shares affirm the lease with nine hundred and ninety-nine shares and then set it aside with one share? Can a man sell nine hundred and ninety-nine of his shares to his adversary and thereby entitle the latter to a place upon the record of his suit, and then go on with the case upon one share against the wishes of his vendee?

MR. ROBESON:—It has been held in England that if the complainant associates with himself a man holding such stock he is concluded.

MR. F. B. GOWEN:—Yes; I have that case on my brief. Mr. Seward is retained, not by William B. Dinsmore, but by "William B. Dinsmore, the owner of one thousand shares of stock;" and his great learning, ability, and experience are to be made use of before this court in favor of those shares, and some of them we now own, and he is therefore *pro tanto* our counsel, and I give him notice that he has no right to go against the wishes of his clients, those who have bought Mr. Dinsmore's stock, and if he does I shall before final hearing come into court with the petition of the purchasers to be made parties complainant, and I shall ask your Honor to see that Mr. Seward acts with fidelity towards his new clients.

And now to go on from where I left off at the adjournment, that a motion for a preliminary injunction or interlocutory decree can not be sustained after the matter sought to be restrained has been a thing accomplished.

You can not frame the language of a preliminary injunction so as to require a party to undo something that has already been done. To ask for a preliminary injunction after the act is a thing accomplished is to ask for something that courts of equity have no power to grant; especially when the defendants offer to give security. The authorities upon this point are very clear, and my colleagues who follow me will have something to say upon this part of the case, and will refer more fully to the authorities bearing upon it.

THE COURT:—I am quite familiar with that class of cases.

MR. F. B. GOWEN:—I desire to cite, however, the case of Dinsmore *vs.* The P. & R. R. Co., a peculiar name for a case to be quoted in these proceedings—the same plaintiff and the same defendant. This was a case where Mr. Dinsmore, as president of the Adams Express Co., which had been turned off from the Philadelphia and Reading Railroad as express carriers, endeavored to obtain a preliminary injunction before the United States Court, to enable his company to maintain its position, and Judge McKennan, in delivering the opinion, says:—

"The prayers of these bills are the same. Although in form they invoke the preventive intervention of the court, they are founded upon the alleged denial of certain legal rights claimed by the Adams Express Company, and it is manifest that the only beneficial measure of relief would be a mandatory order, constraining the defendant to concede to the Express Company the exercise and enjoyment of the rights claimed by it. This it may be within the range of the power of the court to decree, but it ought to be done only under circumstances of special exigency to avert the continuing injuriousness of clearly wrongful acts. As a method of enforcing the concession of a mere right, it is inconsistent with the object and appropriate functions of a preliminary injunction.

"In The Lehigh Coal and Navigation Co. *vs.* The Lehigh Valley R. R. Co., referred to in Audenried *vs.* Phila. and Reading R. R. Co., 18 P. F. Smith, 376, Mr. Justice Strong said: 'A preliminary injunction ought never to be granted except in a clear case, and then only to prevent a substantial injury. Its purpose is to keep things in their existing condition until the case can be finally heard. As it is the strong arm of the law, it must be used only when necessity requires it. *And a preliminary injunction can never be necessary when the thing sought to be restrained has been already done, for its province is not to undo but to prevent and preserve.*'

"And in Farmers' R. R. Co. *vs.* Reno, Oil Creek and Pithole R. R. Co., 3 P. F. Smith, 224, the same learned judge said: 'The sole object of such an order is to preserve the subject of the controversy in the condition in which it is when the order is made. It can not be used to take property out of the possession of one party and put it into the possession of the other. That can be accomplished only by a final decree.'

"It is true the allowance of mandatory interlocutory injunctions has, to some extent, the sanction of the modern English practice. It has grown up upon the supposed authority of Lord Eldon, who made such an order for the first time in Lane *vs.* Newdigate, 10 Ves., 193. But he evidently regarded it as exceptional, and while he considered the injury complained of as a clear invasion of the complainant's rights, demanding prompt reparation, he declined to decree a specific correction of it by the defendant, but so avowedly framed his order as to 'create the necessity' for the defendant doing what he was unwilling to order him directly to do. Such a case can not be regarded as evidence of the existence of a uniform practice, or as a warrant for the establishment of one. It has certainly not led to such a result in this country, for in Audenried *vs.* Philadelphia and Reading Railroad Company, *supra*, Mr. Justice Sharswood says with great force: 'There are some few instances in England in which a mandatory order has been made in an interlocutory application, but they have been very extreme cases, and ought not to be followed as precedents.'"

THE COURT:—What is the difficulty in this case, if the court sees proper to do so, in issuing an order or injunction, or whatever you please to call it, to hold the whole thing in *statu quo* until final hearing? That is, to stop you from taking any further steps under the alleged lease until after the court has come to a conclusion?

MR. F. B. GOWEN:—Yes, but the road is running. If these gentlemen are willing to give us the $3,000,000 we have advanced to this company, and supply the money to keep it in *statu quo*, and pay the six thousand employés, we might be willing.

THE COURT:—What is the difference whether the six thousand are paid by the Reading road or the Central?

MR. F. B. GOWEN:—Suppose the Central does not earn enough to pay them. The Central Railroad Company's business has been profitable during the autumn, but now we are coming to a period when the company will lose probably $100,000 a month, and who is to supply the deficiency?

MR. JAMES E. GOWEN:—I would like to read to the court the opinion of Judge Strong in Watson *vs.* P. W. & B. R. R. This was a bill filed by Watson to prevent the use of a spur track from a railroad which had been laid across his property without his consent, and as he alleged without authority of law, and Judge Strong says:—

"Undoubtedly a court of equity will interfere by injunction to prevent private nuisances when the mischief is irreparable. If the right of the complainant has been established at law, or if it be clear, and the injury to it be such as can not be adequately compensated by damages, or if it be such as from its permanent nature or long continuance occasions a constantly recurring grievance, it is usual for a chancellor to enjoin against it.

"The bill in this case charges a private nuisance. It avers that the defendants have constructed a branch railway across an alley, through and along which the complainants have a right of passage, and it prays that they may be restrained from using the same, and may be compelled to take it up and restore the alley to its former

condition. What I might conclude to be my duty on a final hearing of the case I know not, no answer has been put in. The matter before me is a motion for an interlocutory injunction, with the rights of the complainants not established at law, and with the railroad already constructed. The end sought to be secure by an injunction, granted upon motion, is to keep in *statu quo* until a final hearing on the merits can be had. Were I now to order the road to be taken up, I should disturb the present condition rather than prevent it. Besides it is an established rule, to which there is hardly an exception, that a court of equity will not upon an interlocutory application direct a defendant to perform an act.—3 Daniels Chan. Prac., 1882.

"Nor does it seem proper for me to restrain the defendants from using the road as it has been constructed, until final hearing. Such an order would be of little service to the complainants; less a remedy for them than an annoyance to the other party. And it is far from clear under the act of Assembly of April 2d, 1831, and its supplements, together with the city ordinance of May 24th, 1862, the defendants had not a right to build their railway as they have done, and to use it. Indeed, it would rather seem that they had, though whether they should not have made compensation to the owners of the rights of way through the alley, or tendered security for it, before they built their road, is a question which it may be necessary to consider hereafter. As the case stands, I do not think I should be justified in interfering at present, by an injunction.

"The rule for a special injunction is overruled."

Mr. F. B. Gowen:—In the case of Mammoth Vein Coal Co.'s Appeal, 54 Pa. St. Rep., 183, Chief Justice Thompson says:—

"It ought not to be forgotten that a preliminary injunction is a restrictive or prohibitory process, designed to compel the party against whom it is granted to maintain his status merely until the matters in dispute shall by due process of the courts be determined, the sole foundation for such an order being, in addition to

cases of the invasion of unquestioned rights, the prevention of irreparable mischief or injury. As a preliminary injunction is, in its operation, somewhat like judgment and execution before trial, it is only to be resorted to from a pressing necessity, to avoid injurious consequences which can not be repaired under any standard of compensation. It is therefore a preventive remedy only."

The question of compensation for interference with rights I shall come to in the next branch of my argument; at present I say that a preliminary injunction which requires something to be undone, never was heard of; and your Honor can not, now that the lease is in operation, do anything on a preliminary hearing which requires it to be undone. If Mr. Dinsmore, as a holder of two thousand shares or of five hundred shares of this stock fears that he is in any danger that between this and final hearing he will not get his proportion of the earnings of the Central Railroad of New Jersey, we will give him full security for the protection of his rights; we will pay money into court to protect him whenever your Honor says so. Now let me say to your Honor this. The Philadelphia and Reading Railroad Company has six thousand employés in its staff and under its control who are employed upon the Central Railroad Company of New Jersey; the one thing above all others necessary for the protection of life and the safety of property, and which a railroad company should control, is that perfect discipline which results from the unswerving and unalterable obedience of its employés. Does your Honor intend to tell these employés that we have no control over them, and that they are the employés of the Central Railroad Company of New Jersey? Will your Honor do that which may render every train that passes over the road a death-trap for the public? Will you say that the Reading Railroad Company has no right to control its own servants and enable them to say, as we have heard during the last two or three weeks, that some of them have said that we have no control over them?

THE COURT:—The court may think that the Central Railroad in the hands of Mr. Little will be able to furnish the public sufficient protection.

MR. F. B. GOWEN:—Can your Honor put it in the hands of Mr. Little on a motion for a preliminary injunction? Has there ever been a case where, upon a motion for a preliminary injunction, a railroad has been taken out of the control of one company and put into the possession of another? If you should do so would Mr. Dinsmore furnish the money to run the road?

What would result from such an order? Will your Honor say that the Reading Railroad Company shall continue to pay this $1,400,000 a year to the Lehigh Coal and Navigation Company, after you have cut it off from the Central New Jersey connection, for the benefit of Mr. Dinsmore? And what is his injury? Where is he damnified except in money? He says he will take $1,000,000 a share for his stock, but nothing less. He won't take $200 a share, for that which he bought at $90. Will your Honor say $200 per share will not indemnify him? Will your Honor, to the injury of the $18,000,000 of capital invested for this company and which is now earning an income, turn the owners of all this capital over to the tender mercy of Mr. Dinsmore by an interlocutory decree? Suppose, when the case comes to be finally heard, it is decided in our favor? Then what happens? Has Mr. Dinsmore entered security to indemnify us for the loss we will have sustained?

I now come to the eighth point of my case, namely, that where compensation can be had, or recovered in law, or when it is offered by the defendant, it is a sufficient bar to the recovery in equity in a case of this kind. Even where a bill is filed by a shareholder, who is a properly dissenting shareholder, promptly dissenting, and so dissenting as to entitle him to relief in equity, and where he makes his application within time so that a court would listen to it, even there this principle applies to prevent recovery in equity—and of course it applies much more forcibly where there has been laches on the part of the complainant.

MR. CONKLING:—Will you allow me to interrupt you a moment; you have referred two or three times to authorities you have there, none of which you have stated. I do not care to inquire about any excepting one class. I understand you to say that you have many cases holding that the lapse of a month in these proceedings—

MR. F. B. GOWEN:—That laches of the plaintiff—

MR. CONKLING:—Your language was "Having sat by a month." Will you give me any one of those authorities.

MR. F. B. GOWEN:—I will hand them all to you. I stated Mr. Dinsmore's laches for thirty days would bar him.

MR. CONKLING:—Will you give me two or three of your authorities so that I may look at them?

MR. SEWARD:—On the question of thirty days only.

MR. F. B. GOWEN:—I did not say the authorities named thirty days.

MR. CONKLING:—As to the lapse of time, simply the books and the names of cases.

MR. F. B. GOWEN:—I will give you first those from the elementary books.

Abbott's Digest, Corporations, page 783, section 108.

"If a stockholder intends to treat an act of the corporation as illegal, and to hold the directors personally answerable, he must tell them so. He can not stand by and see it done, objecting to it on other grounds, and then hold them responsible for reasons not alleged in opposition at that time."

That is better than anything I have argued in this case. Even if he makes his objections at the proper time and does not give the proper reasons, which he afterwards alleges, his laches will bar recovery.

Hodges *vs.* New England Screw Company, 3 R. I., 9;

Graham *vs.* Birkenhead, &c., Junction Railway Company, 6 English Law & Equity, 132; 20 Law Journal, new series, chapter 445.

"Two shareholders in an incorporated railway company, suing on behalf of themselves and all others,

sought to restrain the company from applying their funds in completing a branch railway, for the construction of which their parliamentary powers had expired; *held*, that an injunction would not lie, an interlocutory application therefor being refused on the grounds that one of the plaintiffs named had acquiesced in the acts complained of; that the injunction would cause considerable inconvenience; that all the land had been purchased, it was not clear that it was illegal to complete the line; and that the suit was not properly framed, being on behalf of all the stockholders, which would include those who had sanctioned the acts sought to be restrained."

Ffooks *vs.* London and South-Western Railway Company, 19 English Law and Equity, 7, 17th Jurist, 365;

Abbott's Digest Corporations, 414, section 21.

"A stockholder is not entitled to a remedy by injunction against a departure from the original objects of the incorporation unless he has shown himself prompt and vigilant in the assertion of his rights; it will not do for him to wait until the mischief of which he complains is accomplished."

Chapman *vs.* Mad. River R. R. Co., 6 Ohio, 119.

In the present case your Honor will notice that, irrespective of what notice Mr. Dinsmore had of the fact of the intended lease prior to the 11th of May, when his proxy was voted for the lease, there can be no question from his own testimony, in which he refers to hearing the report from the newspapers, and from the notoriety that had been given to the fact—there can be no question that, from shortly after the 11th of May and until the 29th of June, when he filed his bill, he had ample knowledge, first, of the intention to execute, and, afterwards, of the actual execution of that which he now seeks to enjoin.

High on Injunction, section 1206.

"A shareholder must, however, use diligence in the assertion of his rights to entitle him to relief in equity against a wrongful diversion of corporate funds or other misconduct on the part of the company, and negligence

on his part in instituting proceedings will deprive him of the relief desired."

MR. CONKLING:—If that is the class of authorities I will not ask you to give any more, I wanted to know the class of authorities you referred to. If you are answering my question I am satisfied, if that is the class of authorities you refer to.

MR. F. B. GOWEN:—I propose to give all of these authorities to you.

THE COURT:—There will be no trouble between the gentlemen, and no difficulty in my mind as to that, the simple question is whether, taking the time that elapsed after the execution of the lease and all the circumstances in the case, there was diligence on the part of the complainant.

MR. F. B. GOWEN:—No, the time begins to run when the complainant first knew it was to be done and not from the execution of the instrument.

THE COURT:—I thought the complainant swore he knew nothing about it.

MR. F. B. GOWEN: Before the 11th of May, but immediately after the 11th of May he did, and the bill was not filed till June 29th. It is the lapse of time between his first knowledge that it was to be done, and his action in filing his bill. If he knew it was to be done before it was done, he had no right to wait until it was accomplished, and then say he did not know of it before the execution of the lease.

MR. JAMES E. GOWEN:—I will refer to the testimony on that point; the question was:—

"Q. When did you first know the subject of the lease in question had been brought to the attention of the stockholders at the meeting of the 11th of May?

"A. In the newspapers. I think.

"Q. After the election?

"A. After the election.

"Q. (By MR. ROBESON.) Immediately after?

"A. Well, it was the common 'news of the day.'

MR. F. B. GOWEN:—Therefore it is not from the 29th of May, but from a time immediately after the meeting

of the 11th of May, that time began to run against Mr. Dinsmore, because it was announced in the newspapers, and General Oliphant has the exhibits from the newspapers, that the meeting of shareholders on May 11th, had voted for the lease. Now let me call your Honor's attention to this one fact in connection with Mr. Dinsmore's actions. From Mr. Little's testimony it appears conclusively that, notwithstanding the fact that he knew the lease had been authorized by the shareholders and executed, he never even called upon an officer of the company to protest or complain or even to inquire about it; he never asked even for information. When I come to argue a later portion of the case, outside of this point, I shall claim that this shows that he was not the real party in the case, that behind him was some greater party, as your Honor will see, who controlled this case. Mr. Dinsmore apparently knew nothing and cared nothing about the matter. If he did, so much the worse for him on the question of laches; if he did not, so much the worse for him on the point that he is the creature of some one else and has no standing in a court of equity.

And now to come back from this discursion, to the eighth point of my argument, that the right to compensation in law, or compensation tendered without requiring the complainant to go through the forms of law, will prevent relief in a court of equity. I ask your Honor's attention to what I believe to be the universally recognized distinction, running through all the cases on this point, and that is this, that if a shareholder files his bill to restrain an act which is *ultra vires*, and it appears that it is filed in the interest of the great body of shareholders, to whom the act complained of will be an injury, courts of equity will frequently interfere even though the party complained of may have the right to damages in law; but where the injury complained of is only to the complainant, and where the other shareholders do not want the injunction, where the relief would not be for the benefit of all, and where the complainant can be satisfied for his injury with damages, a court of equity, against the great majority of shareholders, will never in-

terfere, but will turn the complainant over to his remedy at law, and in this case what the wishes of the majority of shareholders were is shown by their vote of the sixth day of July last, after this bill was filed, when one hundred and fifty thousand eight hundred and twenty-eight shares voted in favor of the lease. That vote should satisfy your Honor as to the wishes of the other shareholders, and that Mr. Dinsmore is prosecuting this suit against the desires of his fellow shareholders.

In the first place he is entitled at law to damages if the right to make this lease existed by virtue of the statutory laws constituting the charter of the Central Railroad of New Jersey, namely, the act of 1847 and its supplement, and is derived therefrom by virtue of the greater power to merge another company into the Central Railroad of New Jersey, because the statute provides that a dissenting shareholder shall have compensation. His remedy is therefore at law, and that remedy is an exclusive one. But, irrespective of his legal rights, I am here to-day in court with gentlemen present of whose sufficiency I am sure your Honor will approve, to enter security in any amount your Honor may name, to indemnify Mr. Dinsmore against any damages that may result to him by reason of this lease, or if he chooses to elect payment for his shares as compensation, to pay him such compensation as your Honor may determine he is entitled to. If it shall be said by anybody on the other side (and Mr. Gummere has not yet said so in his argument) that the act of 1846, which provided that every charter subsequently granted in New Jersey should be taken subject to the right of the legislature to alter it, does not apply to the charter of the Central Railroad Company of New Jersey—if anybody should argue that to your Honor and should say that under the decisions of cases in New Jersey the act of 1880 does not apply to this case, because of the fact that it omitted to provide for compensation to a dissenting shareholder, then I have to say that the act of 1880 is not void, it is only as it were voidable. Suppose the case where there is no dissenting stockholder, will your Honor, sitting as a chancellor, say that

this act of 1880, which authorized a lease of one company to be made to another and which is liable only to the objection that it provided no method of giving compensation to a dissenting shareholder, does not authorize a lease to be made when unanimously ratified by every shareholder and there is no dissent? If not, then the act of 1880 is not void. Suppose the legislature had made a grant of *eminent domain* to a railroad corporation and had omitted to provide any method whereby the compensation of the landowner should be determined, would it be held that the act was void and that no rights could be held under it, even where the railroad company had amicably settled with all the landowners along the line of its road? Could the charter of such railroad company be taken away because it failed to provide a method for compensation?

THE COURT:—There would be nobody to complain if everybody was paid.

MR. CONKLING:—And there would be no action under the statute—it would be a voluntary purchase.

MR. F. B. GOWEN:—That makes no difference, a stockholder might complain. Over and over again—in this country and in England, bills in equity have been filed by stockholders to prevent corporations taking power alleged to be illegal. The Attorney General on behalf of the Commonwealth might complain—and will anybody then say that upon such complaint, such a statute could be set aside because it did not provide for compensation?—I am now talking of a proceeding in equity and not of a suit at law, and the distinction is obvious. If the law could not be set aside for want of providing compensation for dissenting shareholders—can a shareholder object to it for this cause when he did not dissent at the proper time and even actually assented?

Remember, that before the Central New Jersey Railroad Company, under the act of '80, made the lease, and at a general meeting of its shareholders on their annual charter day, when any subject could be brought before them for action, its managers submitted the question to the shareholders, and their decision was unanimous.

What necessity was there then to provide compensation, and if one shareholder, even through a mistake in erasing the proper words in his proxy, leads the company into this false security, can he afterwards come forward and ask to have the lease set aside when compensation is tendered to him?

Now there are cases in the books—and I have some of them on my brief—which say that where rights are granted which should be subject to compensatory damages, and where the method of providing compensation is not given by the statute, that the right to compensation exists at common law, and it certainly must be so. It can not be that the omission to provide for the technicality of determining the measure of damages can destroy the validity of the original grant of power. The right to damages must exist by necessary implication.

The old maxim was "*Quando lex aliquid alicui concedit omnia incidentia tacite conceduntur*," and it can safely be invoked to justify the position I have taken. Some years ago I was retained to argue a very important case between a great mining company and a community using fresh and pure water, which it was expected would be fouled by the operation of the mining company. A bill in equity having been filed to restrain the latter from prosecuting its operations. In that case I had occasion to read the authorities upon the subject of equitable interference to prevent the fouling of water in mining and manufacturing communities. I found cases in England to this effect, that even where before application to a court of equity to restrain a defendant or to prevent the continuance of the wrongful act, the complainant had resorted to legal proceedings, and had established his legal right to have pure water, the courts of equity had refused to interfere by injunction, even for the protection of an established legal right, in cases where the granting of the injunction would do incalculable injury to others, and where the complainant could be compensated by damages at law. A court of equity will not interfere for the benefit of one against the wishes and to the injury of a whole community, no matter how clearly

the complainant has established his legal right, especially when compensation can be obtained. I therefore claim the benefit of the universal principle of equity, that where a bill filed by a shareholder whose only injury is dollars and cents, and where the great majority of the shareholders is against the complainant, a court of equity will not, to the injury of all the others, interfere to restrain the act complained of if compensation is tendered to the complainant. Now such compensation, I, as president of the company, do tender, and we are now ready to enter into any security, not only to give to Mr. Dinsmore his proper share of all the earnings of the Central Railroad Company of New Jersey, which by the closest scrutiny of careful accountants he can possibly be entitled to, but more than that, to pay him any compensation which your Honor, or any assessors whom your Honor may appoint, may determine he is entitled to by reason of his ownership of the stock of the company.

The ninth point I desire to make is this:—That no matter how well settled the right of the complainant may be, even in equity, a court of equity will look beyond the four corners of the pleadings and see what the result of its interference will be upon others, and no relief in equity will be given for the benefit of one man if it results in injury to great numbers of others. This is a general principle of equity. If a man having an undoubted legal claim sues at law his rights must be maintained; it is merely a question of damages; something may have been done which a jury may say should either go in mitigation of damages, or on the other side entitle him to vindictive damages, but his right to recover at law is clear; but when he comes into a court of equity the court will consider the effect of its decree upon others, and often refuse the relief asked for on account of the great injury which might result to others.

The other shareholders do not desire the lease set aside and will be greatly injured if the complainant succeeds; nobody has joined Mr. Dinsmore since the bill was filed. We have since his bill filed taken the expression of opinion of the shareholders. They think the best thing

for this property has been done. What is to become of this company if an injunction be granted? Is this company to be turned adrift so that its control can be secured by the Pennsylvania Railroad Company or by anybody whose interest it is to prevent the business of the Philadelphia and Reading Railroad Company from going over it?

Let me call your Honor's attention on this subject to the testimony of Mr. Cassatt, now a director and formerly an officer of the Pennsylvania Railroad Company, who was examined in this case, a gentleman whom I must say, to his credit, answered every question that he did answer, I believe, frankly and fully; there were some questions that he declined to answer, but when he did answer he answered manfully and openly. As to what may happen the road let us see what Mr. Cassatt said. I read, commencing at page 213, printed testimony:—

"Q. You have said in answer to Mr. Seward that if this lease was cancelled and the Reading Railroad was relegated to its original position with reference to the New Jersey Central there would be no obstruction to this traffic coming into New York?

"A. Yes, sir.

"Q. But suppose somebody else got control of the New Jersey Central and obstructed the Reading Railroad in the exercise of that power, it would be very difficult, would it not?

"A. It would be obstructed.

"Q. The Pennsylvania Railroad Company has several times obstructed the Reading Railroad from taking traffic over roads which it controlled.

"A. Yes, sir; and I think the Reading has frequently obstructed the Pennsylvania.

"Q. If you were in the position of the Reading Railroad Company would you like the last thirty miles of your system, running into New York, under the control of a rival company?

"A. I would prefer to control it myself.

"Q. What effect do you suppose, from your knowledge of this subject, it would have upon the Reading

Railroad Company if, after the cancellation of this lease, the Adams Express Company and the Pennsylvania Railroad Company should turn up as the owners of the New Jersey Central Railroad Company?

"A. I suppose the Reading would build an independent line in to connect with the Morris and Essex, or the Erie; I would if I were in your place."

As a railroad man he saw at once that no company could afford to have its New York terminus under the control of such adverse ownership as might result from the stock being bought by a rival interest.

(Reading from the testimony of Mr. Cassatt.)

"Q. You would not depend on the last link of your road being in the hands of a rival?

"A. No, sir.

"Q. You could make it pretty hot for us?

"A. Yes, sir.

"Q. You would not hesitate to?

"A. Not if I were president."

MR. ROBESON:—Did he not also give an opinion that would destroy the Central?

MR. F. B. GOWEN:—I do not remember; probably he did. But there is no doubt about that.

Your Honor has before you now the case of $18,000,000 of this stock owned in this company satisfied with the revenue of six per cent. per annum which is guaranteed, and you are asked to do something which if done may put the control of the majority of this stock in the hands of the Pennsylvania Railroad Company or the Adams Express Company, to be used, not as a means of making money for the other shareholders at all, but to be used, as Mr. Cassatt puts it, "To make it pretty hot for us." That is, to prevent the Philadelphia and Reading Railroad Company's traffic from going over the New Jersey Central Railroad, so much so that he says, as a railroad expert, that if he controlled the Reading Railroad Company he would build another line and connect with the Morris and Essex, or, probably, a new line into New York. As a chancellor you sit here to do justice and equity. An injunction is asked, against the pro-

test of one hundred and fifty thousand shares of stock, at the request of one man, who owns—well, I can not say what he owns that entitles him to come into this court, but is certainly not more than five hundred shares, for as to the rest he has parted with his rights—an injunction is asked that will destroy the right of nearly $18,000,000 of capital to be in receipt of a revenue of six per cent. per annum upon an allegation in a bill that the company might earn seven per cent. per annum, although the only evidence produced by the complainant on this point is that of a man who swears that the company could hardly earn anything, for he swears vigorously in his affidavit that the Reading Railroad Company has agreed to pay $1,000,000 a year more than the property is worth.

The tenth reason I have to urge, why an injunction should not be granted, is that this bill was filed for stock gambling purposes.

I call your Honor's very serious attention to the evidence upon that point. In the first place we proved by Mr. Cassatt that, having heard that Mr. Dinsmore was to file this bill, he met on the afternoon of that day at the Windsor Hotel, a Mr. William L. Scott and Mr. Charles Osborne, and that they agreed to sell six thousand shares of this stock "short." Of course they explained it to their satisfaction; they said they were "long" of other stock and wanted to "hedge." That is a very funny thing. The object of dealing in stock is to make money. If a man wants to go into a stock speculation, either on one side or the other, it is because he wants to make money. If he buys in order to take advantage of an expected rise who ever heard of his selling at the same time so that he would be safe if the market should fall. They said they were "long," which I believe means that a man buys stock in the hope that it will go up, and therefore because they were long they went "short," and went short on the very day they heard that Mr. Dinsmore was to file his bill. They sold six thousand shares short, Mr. Cassatt thinks, the day before the bill was filed—he would not be certain, but he identified it as the time

when he met Scott and Mr. Osborne at the Windsor Hotel; and each sold one-third of the six thousand shares. We called Mr. Osborne, who was a partner in a broker's office, and who testified that he joined in the transaction and sent us a note to show the date. They sold one-half of the stock on the 22d of June, and the other half on the 23d of June.* This is a very important fact in the case. We called Mr. Frank Thomson, the vice-president of the Pennsylvania Railroad Company, and put him upon the stand and he declined to answer one question. Whether my learned friend who sits opposite to me (Mr. Conkling) frightened him into not saying anything, or whether he did not want to say anything, I do not know, at all events he absolutely refused to answer the question.

THE COURT:—What question?

MR. F. B. GOWEN:—Whether he had sold stock short.

MR. CONKLING:—He declined to answer on the ground that it was wholly his private concern, and said he would answer anything concerning the suit, but would wait until your Honor decided whether he was to give information concerning his private business, before answering that question.

MR. F. B. GOWEN:—I was very much charmed by a remark your Honor made in this case some months ago. I believe your Honor said that if anything was proved to show the bill was filed for stock gambling; of course no court would grant an injunction; and if the gentlemen charged with being guilty of the transaction refused to answer the question when put to them, your Honor would know very well what to do with the application.

Mr. Thomson's testimony, though he said nothing, we think is very clear upon the subject. He refused to answer the question over and over again; therefore we have the right to argue that he did sell stock short upon the faith of the expected decision of the court.

Now, what further? A young lawyer in Philadelphia, named William Henry Patterson, apparently a very intelligent man, was placed on the stand, because other

witnesses who made affidavits in the case had stated that they made them at the request of Mr. Patterson. Mr. Patterson said he was employed by General Sewell to get up affidavits for this bill; that he was told he should go to Judge Logan, the assistant solicitor of the Pennsylvania Railroad Company, who would furnish him with instructions as to what evidence was required; he said he did go on several occasions to Judge Logan and got instructions. He said he had memoranda in writing prepared by Judge Logan as to what he should do and he thought, when he was first examined in Trenton, that he had the memoranda in his possession, and he was asked to produce them. At a subsequent meeting in New York he was asked whether he had made search for the memoranda. He said that he had, but could not find them, and he proved most thoroughly that he had made all the diligent seach necessary, and that they were no longer in existence, or at least could not be found; thereupon I asked him to give the contents of the lost papers. The first one, he said, was as to four subjects.

First.—The value of certain securities of the Reading Railroad Company.

Second.—The standing which the Reading Railroad had in the street.

Third.—The value of the dividend-paying securities of other companies.

Fourth.—To ascertain the amount of money which the Reading Railroad Company had to pay on the 1st of July last.

Those were the four subjects about which he was to gather affidavits, which were upon the first memorandum that Judge Logan—who was afterwards proved to be the assistant solicitor of the Pennsylvania Railroad Company—not practicing law generally, but an officer of the Pennsylvania Railroad Company—gave to Mr. Patterson. Upon the three first subjects, namely, the standing in the street, the value of securities, and the value of other dividend-paying securities, there were affidavits; but there was no affidavit furnished in the case as to the amount

of money which the Philadelphia and Reading Railroad Company had to pay on the 1st of July. That was something they wanted for their own purpose, and not for the information of the court. They knew, then, that the Philadelphia and Reading Railroad Company had to pay on the 1st of July a very large sum of money—something like $1,500,000 to $2,000,000.

MR. CONKLING:—You do not mean that there is any such evidence in the case?

MR. F. B. GOWEN:—There is proof by Mr. Foster of the large amount that had to be paid.

MR. CONKLING:—You do not mean to say there is any proof that Mr. Patterson obtained any such information?

MR. F. B. GOWEN:—No, just the reverse; but he was so instructed—that is proved. He was directed, on his first communication with Judge Logan, to get information on those four subjects, and only upon three of them were affidavits produced.

On the twenty-first day of June we know from Mr. Cassatt and Mr. Osborne that Mr. Dinsmore had agreed to file this bill—Mr. Cassatt had heard it from Mr. Babcock, who was the treasurer of the Adams Express Company, on the twenty-first day of June. Now, this large sum of money was to be paid on the 1st of July, the bill was sworn to on the 26th of June, and on the twenty-ninth day of June it was handed to your Honor, two days before the time at which the money was to be paid. Now I call your Honor's attention to the affidavits filed to procure this preliminary injunction or mandatory order, and to the circumstances connected with the manner in which the bill was treated, and to the manner in which the process of your court was used.

In the first place, the first affidavit filed or printed, annexed to the bill, is the affidavit of Charles E. Smith, a former president of the Philadelphia and Reading Railroad Company, who swears that if this rental is paid it can not result otherwise than in a loss to the Philadelphia and Reading Railroad Company of not less than $1,000,000 a year. Although Mr. Dinsmore had asked in his bill for relief, because this lease had been made to his damage

and injury, because the Central Railroad Company of New Jersey had a great property and could obtain a higher rate for it, the only evidence upon that point is in the shape of the affidavit of a man who had been president of the Philadelphia and Reading Railroad Company, and whom your Honor, I suppose undoubtedly thought knew what he was talking about, to the effect that this lease would result in a loss to the Reading Railroad Company of $1,000,000 a year, because it paid his company $1,000,000 per annum more than the property was worth. He wanted the lease set aside. That is very peculiar, to say the least.

The next affidavit was made by Henry G. Harris, who swears that the liabilities of the Reading Railroad Company are $120,000,000; that the company had lately been declared insolvent, and that its property is heavily mortgaged. But the debt of the United States is very much more than $120,000,000; and who ever heard that the extent of the indebtedness is an evidence of insolvency? Very much generally depends upon the amount of the assets.

The third affidavit was that of Edward Bettle, of Camden, who was a bank director, and testified that the company was in bad credit.

The next is that of William Henry Patterson, who swore that certain securities of the Philadelphia and Reading Railroad Company were not receiving their interest; that they were in default. That is all. There is nothing about anything else. Still harping upon the insolvency of the Reading Railroad Company.

Then William G. Huey, who was a broker, gives the values of the securities of the Reading Railroad Company in the market as compared with those of other companies, although, according to his testimony, you will see that among the obligations of other companies in good standing, which he gives there, are those of several railroad companies, the value of whose obligations depends upon the guarantee of the Philadelphia and Reading Railroad Company. He omitted many others; I do not suppose he had any object in so doing; he was as a

broker asked to give the value of certain securities, but, as I say, among the securities whose value depends on the guarantee of the Philadelphia and Reading, as they are leased by the Philadelphia and Reading, and there are many others to which his attention was probably not called, which he did not give. But that affidavit was procured for the purpose of showing that the value of the securities of the Reading Railroad Company was not as great as those of other companies.

Next, we have the affidavit of William B. Mills, of Trenton, who gives the result of the business of the Reading Railroad Company for a certain month, showing that of course it could not be a very prosperous concern, but he picked out the month of May, showing that it earned net only $700,000 a month, and that is all, and, as other affidavits alleged, that it owed $120,000,000, if May was a fair month to judge by it could be claimed undoubtedly, that the company was not in very good financial condition.

Those are all the affidavits that were given to your Honor; there was not a single affidavit made in this case upon any other subject under heaven, than that of the insolvency of the Philadelphia and Reading Railroad Company, so that, as I claim, it might be said that your Honor acted upon this subject solely because the lessee was insolvent; there was no other evidence before, not a single other affidavit.

THE COURT:—Possibly the solicitor of the complainant may have thought it important to show that fact for the purpose of showing that the lease was of no value, because the guarantee of an insolvent corporation is of no value.

MR. F. B. GOWEN:—Such was undoubtedly the intention, but that is not a legal point—that is for the shareholders to determine, and where one hundred and fifty thousand were satisfied with the solvency of the Reading Railroad Company, such a vote ought to settle the question. There is no law which says that the majority of the shareholders of a company can not extend credit to another corporation without providing compensation for

a dissenting stockholder. What would be the effect upon our courts if the business operations of a corporation, such as the question of the solvency of a company with which it was about to contract, were to be settled by the courts on appeal from shareholders meetings. The shareholders were satisfied with the solvency of the Reading Railroad Company.

THE COURT:—But the complainant was not.

MR. F. B. GOWEN:—But that does not give your Honor jurisdiction of the question. If the complainant was not satisfied as to this question, it could only have been because the guarantee of the Reading Railroad Company, in his opinion, was not good. Therefore, the contention is not that the law does not permit the lease, but that the lease has been made to somebody who will not pay the rent. But for such an injury Mr. Dinsmore has no redress in equity, and he can surely be satisfied if the guarantee is made good. I asked him upon his examination whether if he had twenty years' rental deposited to his credit he would be satisfied, and he said he would not.

MR. CONKLING:—You did not ask him that. You asked him if that was done that would be evidence of the ability of the road to pay, and he expressed his opinion.

MR. F. B. GOWEN:—I asked him if he would be satisfied if he had twenty years' interest deposited in advance. I asked him if he would take two hundred dollars a share for his stock, and he said his price was a million dollars a share.

Now, to go back, I say that all these affidavits were gotten up for stock-gambling purposes, in the interest of the gentlemen who sold the stock short; it was not done by Dinsmore; he did not do it; he had no knowledge of it. If you will turn to his testimony on pages 80 and 81, your Honor will see his answers to the questions upon this subject, as follows:—

"Q. When did you first give directions to file this bill?

"A. I can not give dates, sir.

"Q. To whom did you give that direction?

"A. Mr. Seward.

"Q. Where?

"A. In New York, I think; I come and go from the city at intervals, and could not tell whether I gave it to him here or wrote to him or not.

"Q. How long was it before you signed the bill?

"A. I am bad at dates, sir.

"Q. Do you know that when that bill was filed it was taken from the records of the court, so that the Reading Railroad and its counsel could not see it for two or three days?

"A. I know nothing about it, sir.

"Q. Did you give any directions that such should be done?

"A. No, sir.

"Q. None?

"A. I am not lawyer enough.

"Q. Well, I want to be certain about your answer, therefore, I will ask you again, did you give directions?

"A. I did not.

"Q. That it should be put away so that it ——?

"A. No.

"Q. You did not?

"A. No.

"Q. Did you direct that a copy of this injunction that was obtained was served upon every ticket agent of the Philadelphia and Reading Railroad Company doing business on the Central Railroad of New Jersey?

"A. No, sir.

"Q. You did not?

"A. No, sir.

"Q. Do you know how many of these injunctions were printed and served?

"A. No, sir.

"Q. You do not?

"A. No, sir.

"Q. Did you give any directions as to the number that should be printed and circulated and served.

"A. No, sir.

"Q. Did you give any directions upon that subject at all?

"A. No.

"Q. Did you give any directions that an application should be made without notice to the Reading Railroad or the Central Railroad of New Jersey to obtain a preliminary injunction?

"A. No.

"Q. Do you know that a copy of that injunction was served upon almost every station agent on the line of the road?

"A. No.

"Q. Did you know that an application was to be made for a preliminary injunction without notice to the Reading Railroad or the Central Railroad of New Jersey?

"A. No.

"Q. It was not therefore by your direction that that was done?

"A. No.

"Q. Was it your intention to file that bill, obtain an injunction without notice, and then suddenly serve it so as to prevent the doing of business upon the line of the road?

"A. No.

"Q. At whose direction then if not by yours was such a proceeding taken?"

Then Mr. Conkling interrupted the examination.

"MR. CONKLING:—One moment; I object to that; first, because it assumes what is not proved, and, second, because it implies, in spite of the repeated statement of the witness, that he gave no direction about it whatever himself that he was in some way privy or knowing of some such thing."

"Q. (Last question read to witness.)

"A. I have answered it."

Of course after that objection Mr. Dinsmore did not go on with the same freedom. Here then is a complainant claiming to be injured clamorous for redress and anxious for relief, and yet one who gave no order to

his counsel to apply for a preliminary injunction at all, who gave no order that an application should be made secretly and without notice to the other side, who says it was not his intention to do so, and yet all this was done. Why was it done? Because it was for the interest and benefit of those who hoped that the process of your Honor's court could be made use of to make them a profit upon the six thousand shares which we have proved they sold, and upon what I have a right to say is the larger amount which would have been proved if the witness had answered the question which was asked him. And then there were no affidavits excepting those upon the question of the insolvency of the lessee. No affidavit whatever, to give your Honor the right to say, or to let the public believe that you had granted this injunction for any other reason than those which are asserted in the affidavits, viz., the insolvency of the lessee company, so that it could be promulgated in furtherance of their scheme to depress the value of the securities of the company that your Honor had judicially determined that the Reading Railroad Company was an insolvent corporation, that it had undertaken to pay $1,000,000 more per annum than the leased property is worth, and that its insolvency was so well established that no court would permit it to take a lease. Now why was all this done if not for stock gambling purposes? Can our friends say that it was done because, as Mr. Dinsmore alleged in his bill, the road would earn more money than the lessee agreed to pay for it? Why the only evidence the complainants adduced on that point was that the road would earn $1,000,000 a year less than the lessee had agreed to pay as rent. I leave this for the serious consideration of your Honor.

The last reason against the prayer for an injunction, which I have to urge before your Honor, is that the bill was not filed by Dinsmore in a *bona fide* manner, and for the protection of his own interests, but that it was filed in the interest of a rival corporation, the Pennsylvania Railroad Company.

What is the evidence upon this point? First, that of Mr. Patterson, who swears that at Mr. Bullitt's office, in

Philadelphia, he was introduced by Mr. Bullitt to General Sewell; that General Sewell told him he desired to have evidence upon the subject of the financial condition of the Philadelphia and Reading Railroad Company to be used in this case, and that Judge Logan, the solicitor of the Pennsylvania Railroad Company, would give him instructions as to what he required. Mr. Patterson testifies that at the request of Judge Logan he called upon the latter; that he received his instructions in writing and followed them; that when he had finished his work, having gone, I think, to Washington to get the affidavit of one witness, he sent his bill for services to General Sewell, some sixty odd dollars I think it was; that it was paid for by General Sewell himself. Another witness, Mr. Harris, said that his affidavit was prepared at the request of Mr. Leslie, a young gentleman who is a member of the Philadelphia bar. Mr. Leslie was produced upon the stand; he is a nephew of Mr. Frank Thompson, the vice-president of the Pennsylvania Railroad; he said that he applied for the affidavit of Mr. Harris upon the request of Judge Logan, the assistant solicitor of the Pennsylvania Railroad Company. It is true that when General Sewell was put upon the stand he said that he had acted as he did at the request of Mr. Green, who is counsel for Mr. Dinsmore in this case, but my friend Mr. Green is the regular counsel for the Pennsylvania Railroad Company, and General Sewell said he was refunded the money that he had paid by Mr. Green. He said no more upon that subject, and after his examination-in-chief ended, he was asked on cross-examination when he was paid, "and he admitted that it was within the last two or three days," that is to say the money was refunded after the fact had been proved in this case that General Sewell had originally paid for collecting the testimony, and that was some months after the transaction. He did not tell us that, in his examination-in-chief, he was simply called to prove that he was refunded the money by Mr. Green, but on cross-examination he admitted that the money was not repaid to him until after the meeting before the examiner at Trenton,

at which the fact of his having paid it with his own check was proved by Mr. Patterson; therefore we have the fact proved that a gentleman affiliated to the Pennsylvania Railroad Company, an officer of one of the companies controlled by that corporation, and of which the president of the Pennsylvania Railroad Company is president, was the first person who bestirred himself to procure any testimony in this case or to do anything about bringing this lease into question before your Honor. Further than this, at a subsequent examination, when General Sewell was asked whether he had not solicited other shareholders of the Central New Jersey Railroad Company to file a bill to set aside this lease, he declined to answer that question on the ground it was his private business and had nothing to do with this case. But he declined to answer the question. We have the further fact that the assistant solicitor of the Pennsylvania Railroad Company, a salaried officer of that company, was the person who gave the instructions about preparing the affidavit upon which the first application for an injunction was made. We have the further fact that some of these affidavits are not entitled in any cause. And we say that it is highly probable that our friends had as they supposed a very good case before they had a client. They had a very good cause in their estimation, but unfortunately for them did not have a client, and the difficulty was to get a client, and from the refusal of General Sewell to answer we are entirely at liberty to draw this deduction that the application to procure a client was made to others before Mr. Dinsmore was induced to permit the use of his name for the purpose.

We have also the evidence of Mr. Stewart, who testified that after the filing of the bill he was asked by a gentleman, who is counsel in this case and also counsel for the Pennsylvania Railroad Company in the case of The Pennsylvania Railroad Company *vs.* The Central Railroad Company of New Jersey, to vote against this lease, and further that he was asked if he would do so provided he was paid one hundred dollars per share for

his stock which was then selling at about eighty-two. All this is proved, and what is better almost than direct proof we have the refusal of certain very important gentlemen to answer certain very important questions.

Now then, I ask your Honor to give us the benefit of the principle approved in Pfooks *vs.* the Railway Co., and in a great number of other cases on my brief, that where a bill is filed not *bona fide* and in the interest of the shareholder, but for the benefit of a rival company the court will not listen to the prayer for relief. I shall hand the authorities to your Honor and to our friends on the other side. Having said this much, I have said all I intend to say in the cause, except to reply to some certain charges and allegations which are, I believe, outside of the legal aspect of the case. The first is the alleged insolvency of the Reading Railroad Company. This is an *ignis fatuus*, which the diseased imagination of those affiliated to the Pennsylvania Railroad Company permits them to see, and which is luring them on to destruction. It is denied in the answer, and has no existence in fact. Such a question is a business question for the decision of the majority owners of the New Jersey Central Railroad Company, who have given their opinion upon the subject, and their decision is final. Your Honor has it in evidence in the affidavit of Mr. Foster, and in the testimony of Mr. Huey, that the securities of leased lines guaranteed by the Philadelphia and Reading Railroad Company are selling at from 103 to 130. Nothing under 100 for a six per cent. obligation and up to 136 and 137 for an eight per cent. obligation. This is in evidence, and it does not look like insolvency. Neither the U. S. Courts nor any other courts sit to determine such questions. Business men determine such questions for themselves, and the decision upon this subject by the gentlemen connected with the New Jersey Central Railroad Company who own over $15,000,000 of its stock, is a better determination of the question than can be made by your Honor, or by any other judicial tribunal. The second allegation is contained only in the questions asked of witnesses by one of the gentlemen

on the other side, who constantly injected into the record as part of his questions something which might be construed into a charge by him that the directors of the Central Railroad Company of New Jersey who exercised control over the subject of making the lease were acting solely in the interest of the Reading Railroad Company because they were shareholders and managers of the latter company. There were but two who occupied such dual position, Mr. Knight and myself. I dislike to expose my own poverty, but the fact is proved in this case that I own one hundred shares of the New Jersey Central stock and one hundred and twelve shares of Philadelphia and Reading Railroad Company's stock, and as the former are one hundred dollar shares and the latter only fifty dollar shares, my interest is greater in the Central Railroad Company than in the Reading Railroad Company. Mr. Knight was a larger holder of stock in the New Jersey Central than in the Philadelphia and Reading, and had been so long before he had any connection whatever with the Reading Railroad Company. It is, therefore, proved that the holdings of the parties charged was greater as owners of New Jersey Central Railroad Company stock, than it was as owners of Philadelphia and Reading Railroad Company stock, and therefore, if any interested motive could have made them swerve from an impartial discharge of their duties they would have been in favor of the lessor and not of the lessee. Another grave imputation also contained only in the questions of the examining counsel is that officers of the Philadelphia and Reading had bought stock in the New Jersey Central, the imputation being that it was done in order to make a profit for themselves resulting from their action as directors. One of these questions was, "Did you buy any of this stock? What other directors did? I assume of course Mr. Gowen and Mr. Knight did?" Now Mr. Gowen bought no stock whatever, except his original one hundred shares —Mr. Knight owned his long before, and there is no evidence that any director of the Philadelphia and Reading Railroad, except Mr. Knight, who had been the owner of the stock and Mr. Gowen who bought a year or two

ago, and only bought one hundred shares, which he still holds, ever bought a single share of the stock of the Central Railroad Company of New Jersey until after the lease was executed, and the fact of its execution made public. I am now, at the expiration of a term of service of fifteen years as an officer of a large corporation, during which I have been subjected to some adversity and to very much animosity, about returning to the profession of the law, and as I should like to go back to the bar with a good character, I ask your Honor to believe me when I say, notwithstanding the assertions put upon this record to the contrary, that in all these fifteen years, so help me God, I have never been interested to the extent of one penny, directly or indirectly, in any transaction upon the stock exchange either in the stock of my own company, or in the stock of any company, except in the purchase of the very small amount I have bought as an investment for myself, every share of which I now hold, and I must say that it is not practicing law fairly to place upon the records of this case imputations against the integrity of a man in the form of questions, which it would be impossible to establish by the answers of any mortal being. I might say a great deal more about the personalities which have been indulged in, in this case, but I believe your Honor does not desire to hear of them. I am glad to know that I am here struggling to protect the rights of gentlemen who have held on to their property in the Central Railroad Company of New Jersey, through great vicissitudes for many years, before a tribunal which will not be controlled by personal abuse and will be governed by no other desire than to do justice and to administer equity.

Mr. Dinsmore, in answer to one of our questions, with that freedom or license which exists among certain business men in New York when speaking of the profession of the law said, that he kept his lawyers as dogs to bark for him—and this I suppose should satisfy me. We know that barking dogs do not bite, and, having said this much, the duty which I owe to the cause is performed, and I submit it with great confidence to the decision of the court.

Appendix.

Brief of Authorities in Support of Argument by Mr. Franklin B. Gowen.

As to the fifth point, that the laches of and acquiescence by Mr. Dinsmore from May 11th until the 29th of June, estops him from contesting the validity of the lease.

"If a stockholder intends to treat an act of the corporation as illegal, and to hold the directors personally answerable, he must tell them so. He can not stand by and see it done, objecting to it on other grounds, and then hold them responsible for reasons not alleged in opposition at that time."

Hodges *vs.* New England Screw Company, 3 R. I., 9;

Graham *vs.* Birkenhead, &c., Junction Railway Company, 6 Eng. Law and Equity, 132;

20 Law J. N. S. Ch., 445.

"Two shareholders in an incorporated railway company, suing on behalf of themselves and all others, sought to restrain the company from applying their funds in completing a branch railway, for the construction of which their parliamentary powers had expired; *held*, that an injunction would not lie, an interlocutory application therefor being refused on the grounds that one of the plaintiffs named had acquiesced in the acts complained of; that the injunction would cause considerable inconvenience; that all the land had been purchased, it was not clear that it was illegal to complete the line; and that the suit was not properly framed, being on behalf of all the stockholders, which would include those who had sanctioned the acts sought to be restrained."

Ffooks *vs.* London and South Western Railway Company, 19 Eng. Law and Equity, 7; 17 Jurist, 365.

"A stockholder is not entitled to a remedy by injunction against a departure from the original objects of the incorporation unless he has shown himself prompt and vigilant in the assertion of his rights; it will not do for him to wait until the mischief of which he complains is accomplished."

Chapman *vs.* Mad River R. R. Co., 6 Ohio St., 119.

High on Injunctions, section 1206—

"A shareholder must, however, use due diligence in the assertion of his rights, to entitle him to relief in equity against a wrongful diversion of corporate funds, or other misconduct on the part of the company, and negligence on his part in instituting proceedings will deprive him of the relief desired.

"And where a corporation departs from the original object of its charter, without the consent of all its stockholders, he who would avail himself of the remedy by injunction must show that he has been prompt and vigilant in claiming the aid of equity, since if he waits until the mischief complained of is accomplished or until large sums of money have been expended, and great public interests created, he will be held to have acquiesced in the change.

"Thus an injunction will be refused in behalf of stockholders of a railway company, seeking to restrain its construction upon the ground that the time has expired within which it should be completed, when there has been long acquiescence on the part of the plaintiffs. And in such case a shareholder is bound by the acquiescence of one from whom he has purchased his shares, though he, himself, is chargeable with no delay."

High on Injunctions, section 1229—

"While a court of equity may, as is thus shown, interfere by injunction at the suit of a shareholder in a corporation to restrain the corporate officers from acting *ultra vires*, or transcending their well defined powers, yet the consent and acquiescence of the complaining shareholders may be such as to deprive them of relief in equity. Thus

shareholders in a railway company who have acquiesced in the making of a contract for completing the railway, to be paid for in a certain manner, will not be permitted after completion of the work to enjoin payment in accordance with the contract upon the ground that the proceedings were *ultra vires*. And the relief is properly refused in such case upon the ground that having received the benefits of the contract and having acquiesced therein they are estopped in equity from setting up the doctrine of *ultra vires* as a ground for enjoining such payment. So shareholders in a railway company will not be permitted to enjoin the consummation by the company of the purchase of another railway, when it is apparent that the original purchase was made with the full knowledge of plaintiffs and without objection on their part; especially when it appears that the granting of the injunction would result in great and irreparable injury to others."

Kerr's Injunctions in Equity, page 18, paragraph 2—

"The jurisdiction of the court to interfere by way of interlocutory injunction in support of a legal title being purely equitable, it is governed upon strict equitable principles. The court where its summary interference is invoked, always looks to the conduct of the party who makes the application and will refuse to interfere, even in case where it acknowledges a right, unless his conduct in the matter is free from blame. He must be able to satisfy the court that his own acts and dealings in the matter have been fair and free from any taint of fraud or illegality. A man who by his conduct puts himself in the wrong, or who has by his own conduct brought about the state of things of which he complains, can not invoke the aid of the court. If in his dealings with the person against whom he seeks relief, or with third parties, he has acted in an unfair or inequitable manner, he can not have relief."

Kerr's Injunctions in Equity, page 19—

"Parties who, possessing knowledge of their rights have lain by, and by their conduct have encouraged

others to expend moneys or alter their condition in contravention of the rights for which they contend, can not call upon the court for its summary inteference. Acquiescence by one of several co-plaintiffs in the act complained of precludes the interference of the court upon interlocutory application as much as upon decree; and the rule is the same although some of the plaintiffs are infants."

Kerr's Injunctions in Equity, page 23—

"A less strong degree of acquiescence is sufficient to disentitle a party to an interlocutory injunction than is required to debar him from relief at the hearing of the cause. At the hearing of the cause it is the duty of the court to decide upon the right of parties, and the dismissal of the bill upon the ground of acquiescence amounts to a decision that a right which has once existed is absolutely and forever lost. In dismissing a bill upon interlocutory application, the court does not conclude a right, but merely refuses, in the exercise of its discretion, to interfere summarily in favor of a party who has not shown due diligence in making the application.

"'A short acquiescence,' said Lord Langdale, in Gordon *vs.* Cheltenham Railway Company, 'may properly induce the court not to interfere *ex parte*. A longer acquiescence may, under the circumstances, throw serious doubt upon the right of the plaintiff and induce the court not to interfere by interlocutory order even when applied for on notice. But when acquiescence is used as an argument in support of a demurrer, there must, to make it effective, be such an acquiescence as wholly to disentitle the plaintiff to any relief. It must be assumed that the plaintiff had originally a right, but that he has altogether deprived himself of it, by acquiescence.' Delay, though it may not amount to proof of acquiescence, may be sufficient to disentitle a man to the summary interference of the court by interlocutory injunction. But delay in taking proceedings is not material so long as matters remain in *statu quo*."

Kerr's Injunctions in Equity, page 482—

"A shareholder who seeks to restrain the application of the funds of a company to purposes unconnected with the proper business of the company or corporation, must use due diligence in making the application. Laches in instituting the suit may prove fatal to the application. Shareholders can not lie by sanctioning, or, by their silence, at least acquiescing in, an arrangement which is *ultra vires* of the company to which they belong, watching the result; if it be favorable and profitable to themselves to abide by it and insist on its validity, but if it proves unfavorable and disastrous, then to institute proceedings to set it aside. In Graham *vs.* Birkenhead, Lancashire and Cheshire Junction Railway Company, the suit was instituted by a shareholder to restrain the completion of part only of the company's works. There had been several suits for the same purpose, instituted by other shareholders, but, for reasons to which it is not material to advert, these suits were never effectively prosecuted. It had been known for a considerable time that it was not intended by the directors to complete the company's works as originally contemplated, and that in fact there were not sufficient funds for that purpose.

"It was also well known that the directors had for some time completed part of the works. The court refused to interfere on the ground of the acquiescence of the plaintiff and the other shareholders in the acts complained of for eighteen months. So also in Ffooks *vs.* South Western Railway Co. (1 Sm. & G., 142), the court refused to restrain a railway company from completing works after the parliamentary powers had expired. So also where shareholders complained of acts *ultra vires*, which they had acquiesced in for six years, relief was refused."

Kerr's Injunctions in Equity, page 484—

"Whether the court should, in cases where there has been acquiescence, interfere at the suit of a shareholder to restrain the application of the funds of the company in a manner not authorized by the act of incorporation or

the deed of settlement, or should decline to interfere on the ground of acquiescence, is often a question of much delicacy. In determining the question, the court looks to the peculiar circumstances of each case, and will, as a general rule, adopt that course which is most for the advantage of the whole body of the shareholders."

Pierce on Railroads, page 518—

"An act of incorporation which is *ultra vires*, but not *malum in se* or expressly prohibited by statute, may become valid by the assent of stockholders. This principle is applied only where the act does not involve a public wrong and is *ultra vires* merely as between the stockholders and affects only their interest. Their acquiescence, as well as express assent, works an equitable estoppel upon them. Thus, if they actively participate in the proceedings, or fail to resort in due season to equitable remedies, they are estopped from setting up that a transaction involved the use of corporate funds for a purpose not authorized by the charter, or that the corporation could not lawfully issue preferred stock."

Ffooks *vs.* The London & South Western Railway Company, 19 Eng. Law & Equity Rep. (1853), page 7; and 17 Jurist, 365—

In this case two shareholders in an incorporated company, suing on behalf of themselves and all others, sought to restrain the company from applying their funds in completing a branch railway, for the construction of which their parliamentary powers had expired. An interlocutory application for an injunction was refused on the ground that one of the plaintiffs named had acquiesced in the acts complained of; that the injunction would cause considerable inconvenience; that as all the lands had been purchased, it was not clear that it was illegal to complete the line; and that the suit was not properly framed, being on behalf of all the stockholders, which would include those who had sanctioned the acts sought to be restrained.

"There can be no doubt of the soundness of the principle that the directors and a majority of the company

may be restrained from employing money subscribed for one purpose from being applied to another, however advantageous. That is a general principle founded on the law of contracts; but, like other general principles, it is subject in its application to many qualifications. Acquiescence by those who complain of the violation of the principle will induce the court to refuse relief. In one case, Lord Cottingham held that if any member of the company knowing that the misapplication of the funds was intended, and not coming with diligence to assert his right, thereby give rise to a new equity against himself, depriving him of the right to prevent the company from doing what was contrary to the pre-existing right of the shareholders. * * * If the plaintiff, who would be bound by his own acquiescence and laches, associates with himself as co-plaintiffs the great body of the shareholders, of whose acts he complains even if individually he is not bound by any laches or any acquiescence, it is not easy to understand on what sound principles relief could be given in a suit so constituted.

"It has been suggested that this suit is constituted to serve the purposes of another set of shareholders. If it had been established that the real object of seeking this injunction had been to serve the interests of a rival company I should have considered that circumstance of great importance in determining the rights of the plaintiffs to any relief. No doubt it has been held in several cases that the mere fact that the plaintiffs are shareholders in a rival corporation is no reason for the court, in a proper case, refusing its aid to prevent the violation of contracts; but when the fact is established, that under the pretense of serving the interests of one company, shareholders in a rival company by purchasing shares for the purpose of litigation can make this court the instrument of defeating or injuring the company into which they so intrude themselves, in order to raise questions and disputes on matters as to which all the other members of the company may be agreed, I can not consider that in such a case it is the province of this court ordinarily to interfere. In questions on the law of con-

tract where there is a discretionary jurisdiction in this court, circumstances affecting the condition of the contracting parties and the origin and situation of their rights in relation to the subject-matter of the contract deserve great consideration. * * * * * The plaintiffs, even if their suit had been properly framed, and if their case had been founded on some just cause of complaint, in order to make a proper case for an injunction ought to have come to the court without delay, before acquiescence and before the work or contract had been recognized or the expenditure begun. They ought to have come before any of them had, by conduct, raised that case of equity against themselves which Lord Cottingham has considered as depriving them of the right to an injunction."

Gregory *vs.* Patchett, 33 Beavan's Rep., 595—

This was a suit to annul certain proceedings of a company entitled "The North Devon Shipping Company," on the ground that they were in excess of the powers contained in their deed of a corporation, so that the majority of the stockholders could not bind the minority, and, if necessary, for that purpose, to dissolve the corporation, and wind it up.

"Shareholders can not lie by sanctioning, or, by their silence, at least acquiescing in an arrangement which is *ultra vires* of the company to which they belong, watching the results; if it be favorable and profitable to themselves to abide by it and insist on its validity; but if it prove unfavorable and disastrous then to institute proceedings to set it aside. The evidence satisfies me that the plaintiff knew of and assented to the arrangement, or at least did not dissent from it, and I can not allow its validity to be contested now."

Watts' Appeal, 78 Penna. State Rep., 394—

"The silence of a shareholder when he ought to speak, is such a neglect of duty that he is entitled to no consideration in a court of justice. When the act complained of is to be followed by a large expenditure of money, a

shareholder should not only file his protest within a reasonable time, but should follow up the same by active preventive means. For it obviously against good conscience that one having the power to prevent it, should stand by and see his associates spend money that may result to his benefit, and afterwards charge them therewith; he might thus pocket a gain resulting from his delay, or thus wait in order to observe the result of the speculation, and when it fails to produce the result expected, fall back upon his protest as a saving of his legal remedies. His neglect to act at the proper time bars his right of action as fatally as his neglect to protest."

As to the seventh point, that a preliminary injunction can not be granted after the matter complained of has been done. It is only on final hearing that any relief in equity could be afforded.

High on Injunctions, section 22—

"An injunction, being the 'strong arm of equity,' should never be granted except in a clear case of irreparable injury, and with a full conviction on the part of the court of its urgent necessity."

High on Injunctions, section 23—

"The appropriate function of the writ of injunction is to afford preventive relief only, and not to correct injuries which have already been committed, or to restore parties to rights of which they have already been deprived. It is not, therefore, an appropriate remedy to procure relief for past injuries, and it is only to be used for the prevention of a future injury actually threatened, and to prevent the perpetration of a legal wrong for which no adequate remedy can be had in damages. And if the act sought to be enjoined has already been committed, equity will not interfere, since the granting of an injunction under such circumstances would be a useless act."

High on Injunctions, section 1581—

"An interlocutory injunction, being a harsh remedy, is only allowed upon such positive averments of complain-

ant's equities as establish a clear *prima facie* case, and, while the party seeking the injunction is not required to establish his right to relief with the same precision and certainty that are required upon a final hearing, he must in all cases allege positively the facts on which he relies. Mere augmentative allegations or inferences from facts stated will not entitle him to relief. Nor will general allegations of irreparable injury suffice where he does not state the facts upon which the allegations are based. And plaintiff must show how and why the damages sustained will prove irreparable, since the question of irreparable damage or injury is a question to be decided by the court from the facts stated.

"The injunction is a preventive remedy; if the injury be already done the writ can have no operation, for it can not be applied correctively so as to remove such injury. It is not used for the purpose of punishment, or to compel persons to do right, but simply to prevent them from doing wrong."

Atty. Genl. *vs.* N. J. R. R. and Trans. Co., 2 Gr. Ch. 136;

Rogers, &c., Works *vs.* E. R. R. Co., 5 C. E. Gr., 379, 389;

Southard *vs.* Morris Canal Co., Sax., 518, 522.

"The object of a preliminary injunction is to prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case."

Atty. Gen. *vs.* Paterson, 1 Stock., 624. See Equity, sec. 53.

"Where it does not appear that irreparable mischief is liable to ensue from allowing a party to go on exercising a right which he claims, the court never stops him before it has an opportunity of examining the question of right." *Ibid.*

In Mammoth Vein Coal Co.'s Appeal, 54 Pa. St., 183, which was a bill for an injunction where parties claimed under different leases of the same coal veins, the relief was denied, the court, Thompson, J., saying: "It ought not to be forgotten that a preliminary injunction is a restrictive or prohibitory process, designed to compel the

party against whom it is granted to maintain his status merely until the matters in dispute shall by due process of the courts be determined; the sole foundation for such an order being, in addition to cases of the invasion of unquestioned rights, the prevention of irreparable mischief or injury. As a preliminary injunction is, in its operation, somewhat like judgment and execution before trial, it is only to be resorted to from a pressing necessity, to avoid injurious consequences which can not be repaired under any standard of compensation. It is therefore a preventive remedy only."

"The prayers of these bills are the same. Although in form they invoke the preventive intervention of the court they are founded upon the alleged denial of certain legal rights claimed by the Adams Express Company, and it is manifest that the only beneficial measure of relief would be a mandatory order, constraining the defendant to concede to the express company the exercise and enjoyment of the rights claimed by it. This it may be within the range of the power of the court to decree, but it ought to be done only under circumstances of special exigency to avert the continuing injuriousness of clearly wrongful acts. As a method of enforcing the concession of a mere right, it is inconsistent with the object and appropriate functions of a preliminary injunction.

"In the Lehigh Coal and Navigation Co. *vs.* The Lehigh Valley R. R. Co., referred to in Audenried *vs.* Phila. and Reading R. R. Co., 18 P. F. Smith, 376, Mr. Justice Strong said: 'A preliminary injunction ought never to be granted except in a clear case, and then only to prevent a substantial injury. Its purpose is to keep things in their existing condition until the case can be finally heard. As it is the strong arm of the law it must be used only when necessity requires it. *And a preliminary injunction can never be necessary when the thing sought to be restrained has been already done, for its province is not to undo but to prevent and preserve.*'

"And in Farmers R. R. Co. *vs.* Reno, Oil Creek and Pithole R. R. Co., 3 P. F. Smith, 224, the same learned

judge said: 'The sole object of such an order is to preserve the subject of the controversy in the condition in which it is when the order is made. It can not be used to take property out of the possession of one party and put it into the possession of the other. That can be accomplished only by a final decree.'

"It is true the allowance of mandatory interlocutory injunctions has, to some extent, the sanction of the modern English practice. It has grown up upon the supposed authority of Lord Eldon, who made such an order for the first time in Lane *vs.* Newdigate, 10 Ves., 193. But he evidently regarded it as exceptional, and while he considered the injury complained of as a clear invasion of the complainant's rights, demanding prompt reparation, he declined to decree a specific correction of it by the defendant, but so avowedly framed his order as to 'create the necessity' for the defendant, doing what he was unwilling to order him directly to do. Such a case can not be regarded as evidence of the existence of a uniform practice, or as a warrant for the establishment of one. It has certainly not led to such a result in this country, for in Audenreid *vs.* Philadelphia & Reading R. R. Co. *supra*, Mr. Justice Sharswood says, with great force: 'There are some few instances in England in which a mandatory order has been made in an interlocutory application, but they have been very extreme cases, and ought not to be followed as precedents.'

"Is there anything, then in the circumstances of the present cases to demand a resort to so questionable a mode of interposition?

"Are these questions of such urgent significance as to call for their decision before a final hearing? To decide them now, as must necessarily be done if the present motion is allowed, is, in effect, to decide them finally, because a final decree could not more fully secure to the plaintiff the enjoyment of what it claims than would an interlocutory injunction. Why should this be done in the absence of an answer and of the proofs necessary to a precise adjustment of the relative rights and duties of the parties, or without a trial at law? 'To pre-

serve the subject of the controversy in the condition in which it is now does not require it, but the effect would be to undo what has been done, to take away from the defendants the controverted rights now enjoyed by them and confer them upon the plaintiff. This can be accomplished appropriately only by a final decree."

Camblos *vs.* P. & R. R. R. Co.
Dinsmore *vs.* P. & R. R. R. Co.
} MS. opinion by Judge McKennan, Circuit Judge.

As to the eighth point, that the court will not interfere by injunction where compensation can be made to the complainant.

Pierce on Railroads, page 168—

"The remedy is denied where it is not sought seasonably, or where the complainant has by some agreement given an actual or implied consent to the illegal entry and expensive works have been constructed. It is sometimes withheld temporarily, to give the company an opportunity to obtain the land by negotiation or legal proceedings, and the company has even been allowed, when enjoined for not having complied with the constitutional provision, to obtain a title by paying the compensation found due by the court."

Pierce on Railroads, page 230—

"A court of equity may upon a bill in equity to enjoin a company which has unlawfully entered upon the permanent occupation of private property for the construction of a railroad, without paying compensation, allow, as an incident to equitable relief, and as the alternative of a perpetual injunction, the payment of damages to the land owner for his entire injury; and the company, upon paying the amount, will have the right of permanent use in like manner as if due proceedings had been had, with the appraisement and payment of damages, as provided by the special remedy."

Henderson *vs.* N. Y. Cent. R. R. Co., 17 Hun., 434.

Pierce on Railroads, page 176—

"But some statutes are of a more limited scope, and confine the remedy to cases where land or materials are taken. A statute of New Hampshire, which was construed with reference to acts relating to the assessment of damages to the owners of land required for highways, was held not to extend to injuries to persons whose land was not included in the location of the railroad. Accordingly a land owner owning land outside of the location, which had been flooded in consequence of the company's works within it, was held not entitled to the special remedy; but as his constitutional right had been invaded, without any remedy being given by statute, he was allowed to maintain his action at common law."

Pierce on Railroads, page 196—

"The constitutional provision is considered by some jurists to protect private property against all injuries (except trespasses of a purely technical and nominal character), which would be actionable at common law, but for the authority conferred by the State. It is construed as requiring compensation not only for the land actually taken, but also for injury to the owner's remaining land, to the extent that his entire estate is depreciated in value by the taking. And for actionable injuries the land owner will be entitled to his common law remedies where no special remedy is provided by statute.

"Nor will the relief be granted against a defendant who, in the presence of the court, offers to carry out and perform all that the plaintiff, upon his own showing, is entitled to."

Bayne *vs.* Young, 21 Ga., 207.

As to the ninth point, that a court of equity will not grant an injunction where greater injuries would be done to others by granting it than to the complainant by withholding it, especially where the latter can secure compensation for his injury. There is no principle more firmly established than this that a Court of Equity will

not grant an injunction upon the application of a plaintiff whose injury is mere dollars and cents, where the granting of such injunction would do incalculable injury to others. The following authorities are conclusive on this point:—

An injunction will not be granted when it will be productive of greater injury than the refusal of it; and the damages are susceptible of compensation at law.

Richard's Appeal, 57 Pa. St., 105;

Harkinson's Appeal, 78 Pa. St., 196;

Grey *vs.* Ohio & Penna. R. Rd. Co., 1 Gr., 412;

Monanaqua Coal Co. *vs.* North. Cent. Ry. Co., 4 Breast., 158, s. c. 9 Phila., 250.

Chancery will not restrain an act for which damages are recoverable at law.

Sparhawk *vs.* Union Pass. Ry. Co., 54 Penn. St., 401;

Hawkinson's Appeal, 78 *Ibid.*, 196,

A *mandatory* injunction will not be granted on FINAL hearing, where it will operate oppressively on the defendant, and the injury is capable of compensation in damages.

Mayer's Appeal, 73 Penn. St., 164;

Leibig *vs.* Ginther, 4 Leg. Gaz., 245, s. c. 1 Leg. Chron., 203.

An injunction will not be granted where it would cause great injury to the defendant, and might be of serious detriment to the public, without corresponding advantage to the complainant.

Torrey *vs.* C. & A. R. R. Co., 3 C. E. Gr., 293;

Higbee *vs.* C. & A. R. R. Co., 5 C. E. Gr., 435;

Morris Canal Company *vs.* Cent. R. R. Co., 1 C. E. Gr., 419, 439;

Easton *vs.* N. Y. & L. B. R. R. Co., 9 C. E. G. R., 49, 59;

Morris Canal Company *vs.* Cent. R. R. Co., 1 C. E. Gr., 419, 439;

See Bonaparte *vs.* C. & A. R. R. Co., Bald. C. C., 204, 232.

The granting or refusing of an injunction are matters resting in the sound discretion of the court, and, con-

sequently, no injunction will be granted whenever it will operate oppressively, or inequitably, or contrary to the real justice of the case, or where it is not the fit and appropriate mode of redress under all the circumstances of the case, or where it will or may work an immediate mischief or fatal injury.

Jones *vs.* Newark, 3 Stock., 452.

So, when public interests or the rights of large classes are involved, an injunction will not be granted, except upon hearing and notice, and then only when it clearly appears that the injunction will not prejudice some public or quasi public interest.

Society, &c., *vs.* Butler, 1 Beas., 499, reversing S. C. 1 Beas., 264;

Sugar Refining Company *vs.* Jersey City, 11 C. E. Gr., 247;

Coe *vs.* M. R. R. Co., February, 1877.

As to the eleventh point, that Mr. Dinsmore is the mere puppet of the Pennsylvania Railroad Company.

High on Injunctions, section 1207—

"Nor will the relief be granted in behalf of a single shareholder, when it appears that he is only a colorable plaintiff acting in the interest of other parties who are interested in a rival corporation."

Kerr's Injunctions in Equity, page 480—

"A shareholder in a rival company may maintain the suit, provided the suit is a *bona fide* one, instituted honestly, sincerely, and really for the benefit and common interest of the shareholders whom he claims to represent.

"The fact that the suit may not have been instituted from the best of motives is not sufficient to debar him from suing, but if he appears to be the mere puppet and nominee of the rival company, and the suit appears to be instituted in reality on behalf of the rival company, it is illusory and relief will not be given."

Hare *vs.* London and Northwestern Railway Company, 2 Johnson & Hemming's Chancery Reports, 102—

"This was a bill filed by a stockholder in the defendant company, on behalf of himself and all other shareholders, against defendant and seven other companies, parties to an agreement termed 'An octuple arrangement for regulating the traffic on the different lines.' The bill seeks an injunction against the directors of the London and Northwestern Company to restrain them from carrying this agreement into effect, and from mixing up their revenues with those of the other companies, or alienating their tolls to them.

"The questions raised are two: 1. The legality or illegality of the agreement itself; and, 2. The competency of the plaintiff to have it set aside.

"In the course of the argument in the House of Lords, Lord Cransworth puts it, *prima facie* a corporation may contract under seal. It must be shown that the particular contract is one which the corporation has not power to enter into. It must be shown on the face of it to be a breach of duty, something foreign to the object for which the company was established.

"In the first place let me consider what the shareholder's interest is. His interest is to gain the largest possible amount of profit. As between him and the directors, if the directors find that (without entering into any foreign speculation) the largest amount of profit is to be made by granting to other companies a certain proportion of their traffic, securing corresponding advantages to their own company, it is not very obvious that the shareholder is injured. * * * * When in the judgment of the directors and of the company assembled in general meeting, it is found advantageous to give up certain contingent profits, in order to secure certain other profits expected from the arrangement, an individual shareholder does not seem to have any right to treat such a contract as an injury to himself. Then again with regard to the interests of the public, it is not easy to see that there is any damage to them, considering the benefits they derive from an uniform system of traffic management. * * *

The position of the plaintiff is thus: For several years he was a stockholder in one of the companies in whose favor the arrangement happened for that time to work, and shared in the extra profits which resulted from it. Now circumstances have apparently changed. He has become a shareholder in the London and Northwestern Company, and sees that it may be profitable to that company to break the agreement. *He can find, so far as appears, not a single shareholder* in that company to come forward and support his endeavor to set aside the agreement; for the Midland Company simply maintained a neutral attitude in the argument. There is some evidence that the plaintiff's proceedings have been taken in collusion with that company, and it would be a great aggravation of the case, if the plaintiff were a mere man of straw, to forward or do on behalf of that company, what they themselves could not venture to attempt. This would be very much stronger than the mere purchase by the company of shares in a rival company for the sake of protecting themselves against any attempt of the latter to exceed the limits imposed by Parliament upon it; and what is suggested here, is that a company bound by a special agreement, the benefit of which they have enjoyed, is seeking in the name of the plaintiff, to set it aside. The bill is dismissed with costs."

Fidler *vs.* London, Brighton and South Coast Railway Company, 1 Hemming and Miller's Chancery Reports, 493 (1863)—

"Taking the case before the Lord Chancellor and Colman's case together, I think that the principal to be deduced from them is this: That to entitle a shareholder to maintain a suit of this nature, the risk and responsibility must be on him so that the court can feel that he is acting for the benefit, or what he believes to be the benefit of the company. *Prima facie* every shareholder has a right to come here as representing all the shareholders, and the court does not require any evidence that the remaining shareholders or any of them have concurred in the filing of the bill; because if the act is

illegal, it is presumed to be for the benefit of all that it should be stopped; but if it is made to appear, and the attention of the court is called to the fact, that the plaintiff is not moving in his own behalf, but is set in motion by some one else who undertakes to pay the costs and to indemnify him against all risks, the whole aspect of the case is at once materially altered, because the suit is no longer under the direction of the plaintiff, but of another person whose interests may be utterly adverse to the company and who is thus in a position to control the proceedings. What the court looks to is this: Is the suit *bona fide* the plaintiff's in the suit, or is he merely the hand by which some one else acts?"

Forrest *vs.* The Manchester, Sheffield and Lincolnshire Railroad Company, 4 De Gex, Fisher & Jones' Reports, 126—

"I desire to be distinctly understood that the ground upon which I proceed is entirely that of personal exception to the character of the plaintiff, and the foundation of my decision is contained in this passage of the plaintiff's examination, not attempted to be qualified or extended; 'The directors of the other company directed the institution of this suit and indemnify me against costs.' It is not that they persuade him to institute the suit, not that they instigated the suit, but that the directors of the other company have directed the suit and are to indemnify the plaintiff against the cost of it. To use a familiar expression, the plaintiff is a puppet of that company. It has been a very wholesome doctrine of this court, that one shareholder, having in view the legitimate purposes of the company, may be permitted in this court to maintain a suit on behalf of himself and the other shareholders of the company, but the principle upon which that constructive representation of the shareholders is permitted, indisputably requires that the suit shall be a *bona fide* one, faithfully, truly, and sincerely directed to the benefit and interest of those shareholders whom the plaintiff claims the right to represent. But can I permit a man, who is the puppet of another company, to

represent the shareholders of the company against whom he desires to establish the interests and benefits of a rival scheme? That would be entirely contrary to the principle upon which this constructive representation has been permitted to be founded. When the plaintiff sues in that capacity any personal exception to the plaintiff remains, and it would be in direct contradiction to every principle of truth and justice if I permitted a man to come here, clothed in the garb of a shareholder of company A, but who is, in reality, a shareholder in company B, and has no sympathy whatever with, no real purpose of promoting the interests of, the other company. Such a thing would be so much at variance with the principles of a court of equity that it would be impossible for it to entertain a suit of that description, which is a mere mockery, a mere illusory proceeding. I treat this suit as an imposition on the court. By these words I mean no reflection on the plaintiff himself, because he has told the truth and does not appear at any time to have desired to conceal it. But as he comes here in the character of a shareholder in the company and tells me frankly that the institution of the suit is not his own act, but an act that he has been directed to do by the other company, then, using the words without offense, I denominate that suit an imposition on the court and dismiss it accordingly."

Also see Pfooks *vs.* the London and South Western Railway Company, *supra.*

ARGUMENT OF

HON. GEORGE M. ROBESON,

ON BEHALF OF THE DEFENDANTS.

IF IT PLEASE THE COURT:—

The fact can not be too often stated, that this is a motion for a *preliminary* injunction. It is an appeal, by the complainant, to your Honor for the exercise of the highest and most extraordinary power entrusted to you as a judge of a Court of Equity, and under circumstances where, according to the theory of the law and the progress of legal proceedings, your Honor is of necessity uninformed by proof, and therefore ignorant, of the very right of the case. Proof has indeed been taken of certain facts relating to the status and good faith of the complainant, but the real subject-matter in controversy has not been tested by the knowledge and conscience of witnesses, and is not in a condition to receive the consideration of counsel and of the Court.

William B. Dinsmore, who states in his bill that he is the owner of stock amounting at par to $100,000 (but which is found in fact to amount to $50,000 at par) of the Central R. R. of New Jersey, setting up his judgment and his interest—and I do not deny his strict legal right to a judgment and interest—against the judgment and interests of the owners of $18,500,000 of the same stock, comes into this court, and backed by the assumptions of learned and distinguished counsel, and surrounded by an atmosphere of power, asks your Honor to put in motion the extraordinary weapon of equitable injunction, which the law has placed in your hands, and to strike blindly, on his dictation, not only at the rights of his associates, but at the rights of the people of New Jersey, and the great public and private interests which are involved in this controversy.

Surely when a complainant asks that so extraordinary a remedy be exercised, at an extraordinary time and in an extraordinary manner, it behooves all of us who have any responsibility in the case, to look to it that he stands clearly and squarely, not only within every right which the law gives him, but squarely upon every position which the practice of the courts requires that he should occupy, when he asks this extraordinary exercise of equity power.

In the discussion of this case, I shall not detain your Honor by reciting many of the great army of cases which move upon and control, from a nearer or greater distance, the question here involved. I shall content myself by resting my propositions upon the accepted law of New Jersey as declared by her highest courts, which fixes the practice in this State; and upon the accepted law of the Supreme Court of the United States, which must control and govern the action of this court. If I am able to make good my position by these means, I shall not be frightened by the ghosts of old cases summoned by the invocation of counsel from the lumber garret of obsolete law.

I.

My first proposition is, That the complainant, when he asks this action of the court, must put himself clearly in that equitable attitude from which alone he can invoke the aid of a Court of Equity. His claim must be subjected to certain admitted tests of equitable right, and if he fails to come up to any of them, he has, upon principles clearly established, no foundation for his demand.

First.—His claim must be founded upon some ground, the validity of which as a *legal right* must either be admitted, or must have been decided by a legal tribunal whose decisions govern the action and inform the conscience of this court.

In other words, the ultimate basis of his suit must be a *legal right*, and he can not ask interlocutory action at the hands of a court of equity until he is able to show

that his legal right is admitted, or that it has received the adjudication of a competent legal tribunal.

In the language of the cases, a writ of preliminary injunction will never be granted, nor any preliminary action taken by a court of equity, affecting seriously the rights of other persons, when the rights of the complainant depend upon an *unsettled* question of law; and the legal right advanced, to be effective for such an application, must have its settled character as a *right, because* it has been judicially decided to be right, and not merely because the judge sitting in equity has an impression that it is right.

Upon this particular point, and to avoid referring to it again, I shall take the liberty of calling your Honor's attention to one governing authority in New Jersey, the case of Stevens *vs.* The Paterson and Newark Railroad Company, 5 C. E. Green, 126. I read from the opinion of the court on page 132.

"The Court of Appeals held, that wherever the right "or title upon which an injunction was based depended "upon a principle of law not settled or determined in this "State, and which was proper to be settled by the courts "of law, an injunction ought not to issue until the ques- "tion was so settled and determined, and that it would not "on appeal pause to consider whether such question had "been correctly determined by this court but would re- "verse the order because made on principles before un- "decided without a regard to their soundness. They "declare that it is unnecessary to express any opinion "upon these questions, and the order was reversed without "any examination of the principle on which the right was "based. This determines that a court of equity must not "grant an injunction in cases when the principle of law on "which it depends is disputed and has not been settled in "this State. This, perhaps, is no new rule, but a more "definite and strict application of the rule long established "in courts of equity, that where the right of the com- "plainant is doubtful an injunction should not be granted "until the right was established at law. The error into "which the chancellor had fallen in that case, was in as-

"suming that when the facts were not disputed, and the "law *seemed clear to him*, the right was not doubtful, "although the legal question had never been settled and "decided in the courts of law and might admit of doubt."

Second.—A preliminary necessity for this application is, that the material facts upon which the complainant rests his claim must be embodied in his bill and proved by proper affidavits, and must remain uncontradicted by proper responsive proof in the answer or affidavits of the defendants. In other words, and in the language of the highest courts of New Jersey, when the equity of the complaint is denied by the answer and its affidavits, a preliminary injunction is not proper.

Third.—The injury complained of must be of such an affirmative and oppressive nature that its postponement, until the matter can be fully investigated, and finally determined, can not be provided against by security or compensated by damages.

Your Honor will not misunderstand me upon this proposition. I am not here insisting that we may ultimately, by the mere force of *this* proposition, compel the complainant to abandon his strict right, if he shall be finally found to have any, and to take compensation or damages for it; but I am only saying that, when he appeals for the special aid of this court, and invokes its action before the case is investigated and decided, he must, in such case, show affirmatively that his injury is such that the effect of postponing the interference of this court until the case can be fully investigated and finally decided, can not be guarded by security or compensated by damages.

Fourth.—The injury complained of must be one which is not already accomplished. In the language of the courts, a preliminary injunction will not issue when the injury of the complainant is already done; and the act upon which the legal right rests is accomplished. For a writ of preliminary injunction is only a restraining one to prevent threatened injury, not a writ to redress accomplished wrong, or to restore lost rights.

"It is not to be used," says Mr. Justice Strong in the case of the Lehigh Valley Railroad against the Lehigh Navigation Company, "to change the *status quo* at the "time of the filing of the bill, or to reverse the position of "the parties at that time and to put the defendant in a "different position."

"Nor is it ever to be used," says the learned justice, "to take property out of the hands of one person and "put it into the hands of another."

All these things are the province of a *mandatory* injunction, which is not granted (I believe there are but four cases to the contrary in all the history of English jurisprudence, and these under most extraordinary circumstances) until the case has been examined and decided, on all the testimony and at final hearing, with all the facts and considerations before the court.

Because, and the reason is plain, a mandatory injunction is in the nature of a writ of execution of a court of equity, which issues to compel the performance of its judgments and to see that its requirements are properly complied with.

Fifth.—The injunction will not be granted where the complainant does not present himself in a purely equitable attitude, and appeal frankly and sincerely to the court, without evincing a malicious animus, or without allowing himself to be made the tool of other and inequitable interests.

No man can come—No I will not say that—No man *should* come before a court which respects itself and the law which it administers, asking the exercise of this special power (an exercise which he has no legal *right* in any case to *demand*, since it is always a writ of special grace), when the circumstances which surround his case, and the atmosphere which surrounds him, make it so plain that all who are not blind can see, that his intent is not merely to assert a right, but to do malicious injury, and that for this purpose he submits himself, either actively or passively, to be the tool of other and conflicting interests, whose representatives have themselves neither legal right nor equitable standing.

Sixth.—The writ of preliminary injunction will not be granted where the complainant has acquiesced in the act complained of, or slept upon his rights, till great interests are involved and are threatened by his action.

No man can delay a week or a day, much less a month, till great actions have been completed, till great contracts have been entered into, till great interests are involved, till rights have been acquired and fortunes have been invested, and then come into this court of equity and invoke any special action against the rights he has himself permitted to be born and developed.

He may have the power to say, "This is my right;" "as an individual man I have a right to claim it;" "it is guaranteed to me by the constitution and laws of the State." "This is my pound of flesh, and it is written in the laws of Venice that I may have it, whatever be the consequences;" but he may not say; and he is inequitable as well as odious if he does say, to your Honor, "This is my pound of flesh," and "I ask your Honor, although you are not compelled by any principle of equity, to grant me this special favor, regardless of all consequences; to give it to me without investigation, and at the time and in the manner which will do the greatest injury to my opponent, for he is the enemy of my friends." "I would myself be a murderer; I would grasp the dagger and strike the blow, if I had the power, but I can not wield the weapons, therefore, as your Honor is fully armed and equipped with the tremendous weapons of equitable power, I beseech you, as a matter of grace—of special grace—for me and in my place, to strike this blow; and strike it *now*, and strike it nearest the heart; not that I may receive my ducats, I disclaim them, though proffered three times over, but *that Antonio may bleed to death.*" "Curses on him! he is the enemy of my tribe, and has dared to spit upon my Jewish gabardine."

I have no language to characterize the assumption, the hardihood, shall I say the insolence of such a proposition.

This writ will certainly not be granted where the complainant has given express assent to the acts he

complains of. I care not in what form or in what manner he has given his assent. He may say he was mistaken and did not mean to give his assent, but if he did give it, and other people have acted and other interests accrued under his assent, he can not now throw himself back on his own carelessness or stupidity and say: "I never meant to do as much as that; it is true I have given this assent; it is true that action has been taken upon it; it is true that as a result of it great transactions have been effected, fortunes invested and great interests involved, but I was a stupid old man and I didn't mean to do it."

My friend who last argued this case (Mr. Seward), took exceptions to the assent here set forth, because he said it was given, if given at all, by means of a written power of attorney: and then he cited the common law and the decisions following it; that at common law the holders of stock in a corporation can not vote *at an election for directors* by proxy, unless enabled to do so by some statute. Well! if we admit it, what then? It is not the common law of the land now, and would not it be held so by any court, whatever may have been the strict ruling of our courts fifty years ago? But that is not the question here. If I admit that at common law the members of a corporation could not vote to elect officers for the corporation except in person, that does not mean and it does not follow that they can not transact their individual business or give their own individual assent to the transaction of corporation business, and bind their individual interests in any business, by any means which avails to express and give notice of their assent. Why could the complainant not give his assent to the execution of this lease by means of a letter? Could he not send it by a messenger duly authorized?

The formal movements of the corporate organization, in the election of its officers, may be strictly prescribed and regulated by the common law within the limits stated, but the assent to matters of business which involve his own interests by an individual member of this corporation, at common law, may be given by

power of attorney. It may be given without power of attorney by written authorization; it may be given without written authorization by parol consent. Not at any time specially; not necessarily under any form.

The decision in Taylor *vs.* Griswold, cited by my friend, only decides that the common law was the law of New Jersey when not changed by the statute: and that at common law, the members of a corporation could not elect their officers except by a vote in person: but the common law as it then existed and now exists, and therefore the law of the State as it was then and is now, is that a man may transact his own business and affect his own interests by giving his own assent to the transactions of any ordinary business, by any means which does in fact express and declare his assent.

Who shall dispute that proposition? Upon what principle shall any dissent be founded, and with whatever ability it be urged, what court could assent to it?

Seventh.—A preliminary injunction will not be granted to a complainant who, since he has filed his bill and presented to this court the *corpus* of his suit, has changed the nature of that *corpus*, and has taken any interest in it, from under the control of the court into which he brought it, and has put it in a position where the action of the court which he asks is injurious to or against the wishes of those parties to whom he has parted with it for valuable consideration. I will not now stop to argue these points, which I will notice more fully hereafter, but will pause to cite to your Honor in support of the positions I have taken, the following cases:

The Attorney-General *vs.* Paterson, 1 Stockton, 424, 634.

Babcock *vs.* New Jersey Stockyard, 5 C. E. Green, 296.

Stevens *vs.* Newark and Paterson Railroad Company, 5 C. E. Green, 131.

Trenton Water Power Company *vs.* Chambers, 1 Stockton, 471.

The law of New Jersey upon most of these points is summed up and decided by the Court of Errors of this State in a single recent decision, that of the Citizens'

Coach Company *vs.* the Camden Horse Railroad Company, 2 Stewart, 299.

I shall take the liberty of reading the syllabus of that case.

"1. A preliminary injunction is never granted unless the act threatened to be done will inflict an irreparable injury on the complainant.

"2. Nor will the writ to be issued where the right of the complainant depends on an unsettled question of law.

"3. Also it is a general rule that when the equity of the complainant is disproved by the answer and affidavits a preliminary injunction is not proper."

And each one of these propositions is maintained on principle and authority by an elaborate opinion delivered by Chief Justice Beaseley of this State in the Court of Errors, only four years ago.

MR CONKLING:—It may relieve you if I say I shall not challenge either of those propositions or contend for anything in derogation of either of them. I have no doubt they are the law.

MR. ROBESON:—It is impossible to challenge them now that they are stated and fortified by governing decisions. But the complainant's application assumes to challenge them all; and now the gentleman, since he can not challenge, seeks to confess and avoid them. Since he can not dispute them he can only say that they are not applicable to this case.

Now I say that the complainant must challenge them all or fail in this motion, for they challenge him, and if he fails to come up to any one of these requirements, his case is gone on this application; and I declare, and I will show before I take my seat, that he has not come up to any of them; that he stands directly obnoxious to and challenging every one of them.

I further refer your Honor, for the establishment of one of the propositions, that with regard to a mandatory injunction, to the opinion of Mr. Justice Strong, in the case in 18 P. F. Smith, 376, referred to in the case of the Lehigh Coal and Navigation Company *vs.* The Lehigh Valley Railroad Company, before referred to.

"A preliminary injunction ought never to be granted, "except in a clear case, and then only to prevent substan- "tial injury. Its purpose is to keep things in their exist- "ing condition until the case can be finally heard, as it is "the strong arm of the law which must be used only "when necessity requires it, and a preliminary injunc- "tion can never be necessary when the thing sought to "be restrained has been already done. For its province "is not to undo but to preserve."

In the case of The Farmers' Railroad *vs.* in 3 B. F. Smith, 324, the same learned judge says: "The "sole object of such an order is to preserve the subject of "the controversy in the condition in which it was when "the order was made; it can not be used to take prop- "erty out of the possession of one party and put it in the "possession of another; this can only be done by a final "decree."

And in the opinion of Judge McKenna in the case of Dinsmore and Chamblous *vs.* The Reading Railroad Company, where a preliminary injuntion was asked for under circumstances somewhat similar to this, he said: "To preserve the subject-matter of the controversy in "the condition in which it is now does not require it, but "the effect would be to undo what has been done; to take "away from the defendants the controverted rights now "enjoyed by them and confer them upon the complain- "ants; this could only be accomplished by a final de- "cree."

II.

The main legal question raised by the complainant's bill, and upon which he rests all his rights, is raised by his claim, that the lease executed between the Central Railroad of New Jersey and the Philadelphia and Read- ing Railroad Company was *ultra vires* of the powers, conferred by law upon those companies; and that it can not have any legal effect, by such unauthorized execu- tion, to destroy any of his rights. And, as a part of that question and preliminary to the question whether to lease was or was not *ultra vires*, he of course claims

that he had such legal rights in the premises as are affected by it.

Before entering into that question I desire first to say that the question for your Honor here is not whether this lease was a good one or a bad one for one or the other of these companies. If it were all in favor of the Central Railroad Company—if it were admitted, and without doubt, a good one for them, it would not strengthen our case, and if it should appear not to be favorable to them, it will not weaken it. The question is, had the parties a right to make it, for if they had such a right, and were endowed with such power, they were the persons to judge of its provisions. The two corporations, represented by their directors, acting under the consent of such number of stockholders as is required by law, are the parties to this agreement. If they, in that condition, had the legal right to make the lease, they were the judges of its propriety and its provisions.

We are not therefore asking, and no one can ask in this case, for an investigation of the character of the lease itself. Though that would seem to be the futile attitude of my friends on the other side. The question is simply what were the legal powers of the parties to the lease. Were they clothed with the requisite power by the law of the land to enable them legally to make that contract?

And there is another proposition that I would like to dispose of before entering upon the argument of the main question, a proposition made by counsel, hardly in the way of argument, but rather by suggestion; that Mr. Dinsmore's right is a constitutional right, and therefore, because it is a constitutional right, his position carries with it more incidents for enforcement, or is more sacred, or appeals more strongly to this court, than if it were a legal right.

Now I simply wish to say that the only difference in quality between a constitutional right and a legal right is, that a constitutional right can not be destroyed by law. Not that it is any larger right in

quality or extent, but only that it can not be taken away by law. A legal right is one which, though it may perhaps be taken away, has not yet been taken away by law. It is not an immortal right, but it is one which still lives, but so long as it does live it has all the qualities and is surrounded by all the incidents, and carries with it all the force which belongs to a constitutional right. I do not wish this case to be clouded in any way by any general assumption, that because Mr. Dinsmore's rights, if he has any, rest ultimately upon some restriction of the constitution, they are any more sacred than the rights of other people.

THE MAIN QUESTION in this case then is, whether the lease of the Central Railroad Company of New Jersey, executed on the 29th of May last, to the Reading Railroad Company of Pennsylvania was *intra vires* or *ultra vires* of the powers and rights of these corporations, under the laws of the State of New Jersey and the constitution of this State and of the United States.

If this subject is to be now discussed, it is proper that we should examine, first, the nature and qualities of the lease as executed, and understand what the thing complained of really is. Whether it has the dreadful qualities ascribed to it.

A railroad lease ordinarily, is merely one manner of exercising the public franchise for transportation granted by the legislature to the corporation. To take tolls for the use of its rights and property is a franchise of the company. A lease for years is merely an extending of the ordinary time of the use of the franchises and property for taking tolls. If I buy a ticket for a seat in a parlor car from Philadelphia to New York, I take for the time a lease of that seat. It is only the extension of the term, or time of holding, that makes the lease different in principle (if it is different in principle) from the lease in this case. Both are simply modes of utilizing and exercising the public franchise of taking tolls. This use of the public franchise is not ordinarily held to be the subject of any original contract of the corporation or the stockholders.

The lease in this case differs from the ordinary use only in the length of the term. When this is extended for a period practically indefinite, the lease is said to be equivalent to a sale. But it seems to me, that, however long the term, and however remote the reversion may be, the case differs from an absolute conveyance in much more essential particulars. The books are full of leases essentially perpetual, because renewable forever, but they, like this lease, are at most conditional conveyances, with every condition running with the term, and fully preserved by a right of re-entry for condition broken. Leases with like long terms have been made by the dozen in New Jersey, under the advice of our oldest and ablest counsel; and they have been often recognized by the legislature. Great length of term is essential before the lessees are justified in making the immense expenditures necessary to carry out the franchises granted.

A lease is a legitimate and effective way of carrying on the corporate duties and franchises of a railroad.

1. Because it provides that the *corpus* of the demised property is maintained intact and in good condition.

2. It keeps the property and franchises in the original direction, and devoted to the original objects of the incorporators.

3. It retains the rent, the reversion, and the rights of re-entry and re-possession for breach of any condition.

4. It maintains the organization and machinery to enforce these rights, and to recover them if threatened or denied.

However this may be, it is certainly a method of exercising the public franchise, and, as such, within the control of the legislative power. This is so held in every State, and in all cases where there are no irrepealable contracts, made in or resulting from, the act of incorporation. Upon this point, and to show its recognition by the Supreme Court, I refer your Honor to the cases of Tomlinson *vs.* Jessup, 15 Wallace, 454, and East Lincoln *vs.* Davenport, 94 U. S. Reports, 801. It will be found that as a public franchise it is directly within the power of regulation by the legislature, so long as it impairs the obligation of no contract.

But it is not necessary in this case to argue the questions arising out of the obligation of contracts and their preservation; for there are no contracts here involved, except such as were made expressly subject to legislative control, and under a reserved right expressly subjecting them to it.

To illustrate this last proposition, I now proceed to examine the charter of the Central Railroad Company, its objects and duties, its powers and franchises, the ends for which they were granted, the means by which these ends were to be attained, and the general state of the law in regard to them.

On the 14th of February, 1846, the Legislature of New Jersey passed the following provision, and made it a part of the body of the State law: "The charter of "every corporation which shall hereafter be granted by, "or created under, any of the acts of the legislature, *shall* "*be subject to alteration, suspension, and repeal, in the dis-* "*cretion of the legislature.*"

This provision was made as the result of the experience of the legislature in regard to certain grants of power, by which they had already too completely and too hastily parted with their sovereignty.

The principles established in the Dartmouth College case just then began to press upon and restrain them; and they found they had parted with power too hastily for their own rights, the rights of the State, and the interest of the people, as these were developed in the growing necessities of progressive times.

To facilitate the free and rapid inter-communication of the people, and the cheap transportation of the products of their labor, is among the direct objects of government, for which it is instituted, and to which its powers are properly directed.

Railroad companies, with their chartered rights and privileges, are the results of the exercise of these powers of government, along their proper and legitimate channels. From small enterprises for local objects, with small capital and moderate privileges, they have themselves

grown with the growth of the country which they fostered; and to fulfill their larger mission, each day increased with the growing population and enlarging interests of the country, they have required and received at the hands of the legislative power, larger scope, and the greater powers necessary for that purpose.

By the earlier grants of charters, not subject to alteration or repeal, the sovereignty of the State found itself bound by the will of timid or selfish corporators, and powerless to meet the growing necessities of the times.

New Jersey was, in this respect, particularly unfortunate. We all know how, through a long series of years, the development of our great advantages was trammeled; how the construction of great lines of through transportation; reaching from the metropolis to every portion of this country, running into every locality of our Commonwealth, developing every resource, building up every industry, facilitating the intercourse, and increasing the common knowledge of our people, was checked and restrained, by the unfortunate grant of an exclusive privilege, to a corporation which insisted, as it had a right to insist, that the restriction should be enforced; who contended and successfully maintained that they had an irrepealable contract, by which the right of the government to meet the growing interests and demands of the people was limited and restrained for their benefit; while the State of New Jersey, and the interests of her people lay at the feet of this dominant power, until she became a bye-word in the mouths of the other free people of the republic. The effect has not yet wholly passed away, although the exclusive privilege has died by its own limitation. As lately as when the great case of Black *vs.* The Delaware and Raritan Canal Company, 9 C. E. Green, was finally decided, the old stricture was so strongly felt, that the judge who read the opinion of the Court of Errors in the case was constrained to exclaim:—

"From these conclusions thus far reached must it result, that one unwilling stockholder can obstruct the growth and development of every enterprise in which he is participating, and thus hinder the union under one

management of these important public highways which have been constructed at different periods, and under separate charters, when the necessities of inter-State commerce and the interests of the people unite in urging it?"

"Must a railroad from Philadelphia to Trenton never be extended so as to connect two great cities of our Union, while one obstinate associate stands in the way?"

I read this remarkable statement to show how far-reaching and how long destructive was the irrepealable clause of that contract, with which the legislature of our State—patriotic men, and wise in their day and generation—bound the hands and crippled the powers of this Commonwealth. And I call your Honor's attention to these expressions, because I mean to show that it was that fatal quality of that irrepealable contract which governed the dicta of the court in the case of Black *vs.* The Delaware and Raritan Canal Co. in the Court of Errors, and which constrained that court to declare, that it was of such a nature and of such an irrepealable quality, that the rights resulting from it were only to be taken by the highest power of State sovereignty, the exercise of the power of eminent domain and condemnation, according to the principle and forms of the constitution.

This power of eminent domain is the highest power of sovereignty. It is a power which should be exercised with the greatest discretion and care, and the last which should be parted with by the representatives of the people. It should never be invoked in aid of a great principle even, or even for the furtherance of a great good, if the good can be accomplished in any other way; but in this case the court found the irrepealable quality of these contracts so hardened by time and sanctioned by decision, that they could not, in their opinion, be disposed of without a special act of the legislature applicable to the case, which invoked the sovereign power of condemnation, and provided the proper forms and means for the purpose. The only legal effect of that decision, however, was that the law, as it then stood governing those corporations, did not authorize a lease to a corporation out of the State.

But fortunately for the State, and for all parties, we have no such irrepealable contracts in this case.

The early wisdom of our legislature, admonished by the first pressure of this restraint, placed upon the statute books the provision which I have recited, making all future charters subject to "alteration, modification, or repeal."

A provision not applicable to one charter or to one corporation, but a broad provision written in the body of our law, as the atmosphere in which, and in which only, corporations can here exist.

Every charter granted since the passage of this provision is subject to alteration, although it contains no express words so declaring, and all contracts resulting from the act of incorporation and its acceptance by the stockholders, are presumed to have been made subject to these reservations.

State *vs.* Parsons, 3 Vr., 134, 566;
State *vs.* Douglass, 5 Vr., 33;
Story *vs.* Bergen Plank Road Co., 1 C. E. Green, 14;
State *vs.* Jersey City, 2 Vr., 580.

I shall take the liberty of reading to your Honor, a part of the syllabus in the case of Story *vs.* Bergen Plank Road, which I have cited.

This was an elaborate opinion, delivered by a judge whose memory still lives in the minds of the bar and the people of New Jersey; who, in every quality of a wise lawyer and a great chancellor, came up to the full measure of the experience of our own times, and of what our country has ever seen embodied in character and qualities of any one man. I need not say that I refer to late Chief Justice and Chancellor, Henry W. Green. He declared in this early case—for his mind was one which intuitively grasped principles and their results, and looked far beyond the present to the remote consequences of his decisions.

"When at the time of the grant of a charter to a cor-
"poration, there is a general law in this State, that the
"charter of every corporation granted by the legislature
"shall be subject to alteration, suspension or repeal, in

"the discretion of the legislature. The legislature in "granting such a charter must be deemed to have re- "served to themselves the right of altering, suspending, "or repealing the same whenever, in their discretion, the "public good may require, *as fully as if the reservation "had been inserted in the charter itself* and *all contracts ex- "press or implied resulting from*"—(No better or more far-reaching language could be used.)—"the act of incor- "poration and its acceptance by the stockholders must "be deemed to have been entered into *by all parties sub- "ject to that reservation.*"

There is the perception of a principle and a boldness of annunciation, which in a moment set free by its necessary force and absolute application, the legislative power of the State, and gave it scope and compass to legislate, along the pathway of progressive times for the growing interests and the increasing demands of the public good.

The career of this great judge shines, in the judicial history of our State, like the milky way in the heavens, its course studded with bright stars which yet speak to our hearts, in their now silent but still brilliant eloquence; but if he had never done anything else but this, if no other declaration of his still lived for us and for our children, he would have deserved the honor and been entitled to the gratitude of all the people of the State of New Jersey. For by one touch of his lance of truth, the squat devil of exclusive privilege, which sat like a juggling fiend in the councils of our State, and pressed like a foul incubus upon its prosperity, was developed and displayed in all its naked ugliness, and then destroyed.

The clause of the law is most sweeping in its character, and gives absolute freedom to the legislature for its exercise "*at its discretion.*"

No language of fuller meaning could have been inserted in any law, to reserve to the representatives of the people all the power which belonged to them before they made the grant, and to give them the full authority to withdraw all and every incident of it, whenever the public good demanded it.

Under this provision as a part of the general law of the State, the charter of the corporation now called the Central Railroad Company was granted, for the purpose of completing the line of railroads across the State, from the tide-waters of Newark bay to the Delaware river.

Subscribers to and purchasers of the stock of that company, took their stock subject, as a part of their contract with the legislature and among themselves, to this provision by which it was agreed, as a condition of their original grant, that the corporation and its subscribers should be subject to the general effect of the laws of the State of New Jersey, as they might advance, as well as to any special amendment made by the legislature applicable to themselves alone.

Of course it matters not whether the reservation of power to alter or repeal was made by special amendment or general law, since as a part of the general law of the State, its effect on each charter subsequently passed was the same as if it had been inserted in it.

Upon that subject, in addition to the case above cited, I desire for a moment to call your Honor's attention to the case of The State *vs.* Persons, 3 Vr., 134.

This was under a general tax law, the application of which was resisted upon the ground that it was not in the special charter of the railroad company, and did not affect it at all; and Mr. Justice Elmer, in delivering the opinion of the Supreme Court in that case, held that it was applicable under the reservation of the act of 1846. He says: "In my opinion both acts are in full force, and "the charter of the prosecutors must be construed pre- "cisely as if it had incorporated into it the words of that "section. No decision or principles have been produced "which will justify us in holding a plain enactment of the "legislature, consistent with the constitution of the State "and Union, to be without force and inoperative." This is exactly upon our point, and the decision was affirmed after elaborate arguments in the Court of Errors.

Mr. Justice Vredenburgh in the same volume of reports, page 566, says: "The sixth section of the act of 1846, Nix Dig., 152, provided that every charter thereafter

passed shall be subject to alteration, suspension and repeal in the discretion of the legislature, was, in legal effect, incorporated in this charter at the time of its passage. It was therefore neither breach of contract nor bad faith in the legislature to enact the said section of the act of 1862."

In short, the legislature reserved the right to adapt the policy of the State to the increasing public necessity, and either by general laws or special enactments to give new powers and impose new but cognate and supplemental duties on all corporations, as they might from time to time find it to be necessary.

Thus, it appears that this statutory provision is valid and constitutional, and that under it may be altered the original charters of all corporations granted subject to it.

And your Honor will find upon investigation that there is no limit to this power, except perhaps the simple limit which is stated in effect in the case of Lauman *vs* The Lebanon Valley Railroad Company, that the legislature can not make a man a party to a *new* contract which is entirely foreign to, and in its nature and objects, distinct from, the one he originally agreed to.

But, subject only to this exception, all contracts of subscription between these corporations, and all parties and all contracts of whatever character resulting in any way from the incorporation, are made subject to and affected by these reserved powers. This must be accepted in this case on questionable authority.

Here, then, it will be seen that the stock of the complainant in this case differs in this essential and vital condition from the stock of the complainants in the case of Black *vs.* The Delaware and Raritan Canal, decided in 9 C. E. Green. The bill in the Black case sets out affirmatively that there is not in the charter of the United Companies, or of either of them, any reservation of power by the legislature of the State to repeal, alter or suspend their charters or either of them in the discretion of the legislature: and it also sets out affirmatively that the said charters were granted to the said companies prior to the enactment of the law of 1846, to which I have re-

ferred. Our stock is different in its essential quality: subscribed under a repealable charter, there was no public contract of any kind by the State which affects it. This point is expressly settled by the courts of this State. (State *vs.* Miller, 1 Vroom, 370. *State* vs. *Jersey City, 2 Vroom, 580.*)

Your Honor will pardon me for lingering upon these decisions, because it seems to have been the general opinion of the people of the State of New Jersey; and to some extent the opinion of the bar, that there was something in the case of Black *vs.* The Delaware and Raritan Canal Company, and the questions there decided, which subjected to its principles all the corporations of this State. But when we come to examine it we find that it was a decision upon an exceptional case in regard to stock of exceptional character, and that its principles have no general application to the corporations of the State and their stockholders.

The truth is, that the wise judiciary of this State, from the earliest moment when this question was brought to their notice, saw clearly the governing distinction, and preserved it faithfully down all the line of their decisions. I read now from the case of The State *vs.* Miller, 1 Vroom, 370, from the opinion of Mr. Justice Elmer; and no man was more conservative than he of rights resting upon the constitution of the State; no man stood more firmly, or was capable in his character and the qualities of his mind of standing more firmly by the right; and no man was readier or more able than he to maintain the rights of a single individual, if he believed he had rights which were threatened, against the interest of a whole Commonwealth.

He says: "But the weight of authority is clearly "decisive that if the act reserves the right of repeal the "company takes the charter and the contract thereby im- "plied or expressed, subject to such alterations as a legis- "lature may deem expedient. *No 'irrepealable contract'* "can result from provisions in the charter which are "made in terms subject to be altered, amended or re- "pealed at the pleasure of the power granting them, any

"more than a contract in any other manner entered into, "which contains an express provision that it shall be "subject to be abrogated or altered at the pleasure of one "of the parties, can be considered as an irrepealable con- "tract.

"In the case of E. and R. E. Railroad Co., *vs.* Casey, "26 Penn., 301, and Miner's Bank *vs.* Green, 1st Iowa "Rep., 553, it was held, that where the right to resume "the privileges granted was reserved only in cases of "their abuse or misuse, the legislature were the sole "judges of such abuse or misuse, and could repeal with- "out a judicial investigation.

"The charter in question reserved the right to alter "or amend whenever the public good may require, and "that the legislature is the proper tribunal to determine "what the public good requires in all matters of legisla- "tion is too plain to be questioned."

This opinion was conclusive, and when that case was brought up for review, the Court of Error adopted, sanctioned and approved it without even taking the trouble to put their opinion in any other language.

In the case of the State *vs.* The Mayor and Common Council of Jersey City, 2 Vroom, 575. The principles adopted in that case were examined and confirmed, and in it Chief Justice Beasley says (page 580): "It is also to be "noticed that the entire contract on the part of the State "implied in each one of this line of cases was the supposed "legislative agreement not to alter or recall the privileges "granted. No other stipulation on the part of the State "was ever suggested to exist, and it was the imagined ex- "istence of such stipulation which converted what else in "all its essential qualities, as well as in its form, was an act "of legislation, into a contract on the part of the com- "munity with the corporators. Without some such stip- "ulation having an obligatory force, I am wholly unable "to conceive the ground of the distinction between the "charter of the corporation and another act of legislation. "If the statute lay under obligation on the State to do or "refrain from doing a particular thing or one or more "things, such enactment seems to me to be a pure act of

"legislation, and in no sense a contract. I am not aware "that any court has ever held the charter of an incorpo- "rate company, which was alterable and repealable at the "legislative will, to make a contract on the part of the "public. If from such a subject a contract arises between "the people and the members of a company, of what does "such a contract of the people consist?"

The stockholders of the Central Railroad Company then have no contract with the State, but only a grant, which may be abrogated or amended at the will of the legislature.

And they have none with *each other*, except such as are subject to the provisions, conditions, reservations, uncertainties, and perhaps dangers of the law under which they associated themselves. They trusted themselves to the wisdom of legislative discretion, and they can not legally question its action.

This is the settled law of New Jersey—and under it the effect of this reserved power certainly extends to all and every public franchise and right granted, and to every contract made under or resulting therefrom. And to all and every method, means and provision for the enjoyment and using of these franchises.

These methods, in the absence of special legislation to the contrary, are in their nature subject to the will of the majority of the corporation, as all corporations, in the absence of express provision to the contrary, act by majority.

Now if your Honor will look at the case of Zabriskie *vs.* Hackensack Railroad Company, in 3 C. E. Green, page 192,—relied on by the other side, you will find nothing inconsistent with these principles, nor their application—for in my view of this case it is not necessary that we should run counter to any of the decisions of this State. The decision in Zabriskie *vs.* Hackensack Railroad Company is limited in terms to this: "Upon "the principles of the common law of this State and most "of the States of the Union, when a number of persons "associate themselves as partners for a business, *and for*

"*a time specified* in the agreement between them, or be-
"come members of a corporation for definite objects and
"purposes specified in their charter, which in such cases
"is their contract, *and for a time settled by it;* * * *
"that the objects and business of the partnership or cor-
"poration, can not be changed or abandoned or sold out
"within the time specified, without the consent of all the
"partners or copartners, one partner or copartner, how-
"ever small his interest, can prevent it.

Your Honor will notice the limitations of that opinion to the contract of parties associating themselves together to enter in the business of the corporation *for a fixed time*, which therefore they could not, by the mere will of the majority destroy. That is all the chancellor there decides; and when he comes to give his opinion in Black *vs.* The Canal Company, in 7 C. E. Green, upon that very subject, he calls attention to that point, and so interprets his own opinion in the former case.

In the Black case he held that lease was authorized upon the ground, that since the corporators themselves had a right by the action of their majority to dissolve their corporation, and absolutely abrogate and surrender their franchises, they therefore had the lesser right of leasing or hiring out their exercise for a term. But he carefully says: "In arriving at this conclusion I do not
"change or modify any of the positions laid down in the
"case of Zabriskie *vs.* Hackensack & N. Y. Railroad, ex-
"cept so far as a correction of an inadvertent expression
"heretofore noticed is concerned. * * *
"I hold that a charter which declared that an undertaking
"should be prosecuted *for a definite time, is an contract for*
"*that time*, and binds *all to continue it*, but that on the
"other hand, a charter that sets no such definite time like
"a partnership made in that manner, can be abandoned
"by a majority when there is no contract which prevents
"it; that the will of the majority, which is the law of cor-
"porations, must govern; and if there were no such law,
"that, like any other law, may at any time be enacted by
"the legislature, who may declare that a majority or two-
"thirds of the stock or all the corporation shall govern;

"of course such law would not affect a corporation with "*an irrepealable charter declaring a different rule.*"

This is an explanation of exactly what the chancellor meant in the case of Zabriskie *vs.* The Hackensack Railroad Company; he held that the power of the corporators over that corporation was not unlimited, because they had made a contract together, under a charter which fixed a definite limit of time, not merely a general charter without limit, "continuing forever," as my friend on the other side says; of course, continuing forever, if the corporators wish it, but dissolvable to-morrow if the majority wish to dissolve it.

Under this condition of the law, the Central Railroad of New Jersey is subject, by the joint action of the legislature and the majority of its stockholders, to any and all modifications of its original franchises, and their use, and all and every change in the manner of—though perhaps not in the nature of—their business, extending to dissolution itself, and of course everything short of it.

Guided by these principles, let us look at the situation of this stock when the complainant bought it; for he bought it subject to the state of the law as it then stood, as far as it related to and controlled the corporation.

Let us now see what was, at that time, the charter and authorized scheme of the Central Railroad Company of New Jersey.

The corporation now known as the Central Railroad of New Jersey was originally chartered under the name of the Somerville and Easton Railroad Company, by act of the legislature approved February 26th, 1847. That act created a railroad company with a stock of twelve hundred thousand dollars, to build a railroad from Somerville, in the county of Somerset, to Phillipsburg, in the county of Warren, opposite Easton, in the State of Pennsylvania.

It contained the usual and ordinary provisions of a railroad charter of those days, and was not limited in the time of the duration of its grant.

It was passed in the year 1847, and, of course, passed subject to the act of March, 1846, which provided, that the charter of every corporation which shall hereafter be granted by or under any of the acts of the legislature, shall be subject to alteration, suspension and repeal, in the discretion of the legislature.

By the operation and effect of these two acts of the legislature, the right of the legislature to alter, suspend and repeal any or all the grants of that charter was reserved with exactly the same effect and operation in all respects, upon all persons and conditions of things, as if it had been inserted as a special, final and governing clause in the charter itself.

On the twenty-second day of February, 1849, a supplement to that charter was passed, by which the Somerville and Easton Railroad Company was authorized to purchase the railroad of the Elizabethtown and Somerville Railroad Company, extending from Somerville eastward to Elizabethport, in the then county of Essex; and it was provided that payment for said purchase might be made in the stock of the Somerville and Easton Railroad Company, and that the railroad when so purchased should become a part of the Somerville and Easton Railroad Company; and that the consolidated roads should be henceforward called the "Central Railroad Company of New Jersey," and be governed by and held and used under the charter of the Somerville and Easton Railroad Company.

The purchase of the Elizabethtown and Somerville railroad under this act, and the consequent change of the name, was accomplished on the first day of April, 1849.

The suit of Kean *vs.* Johnson, reported in 1 Stockton, page 401, was a suit which arose out of the protest of a large stockholder of the Elizabethtown and Somerville Railroad Company, which was created and existed under a charter passed on the eighth day of February, 1831, and which contained no reservation of the power of the legislature to repeal the grants therein given, and was, of course, not subject to the provisions of the act of

1846, above quoted, since that act was not passed until fifteen years afterwards.

The complainant in that case presented his rights, upon stock, and the contracts it represented, made under the charter of 1831, when the legislature had neither provided by reserving clause, or in any way given notice of intention to exercise a right of amendment or alteration at their discretien.

By the act of March 17th, 1854, the Central Railroad Company of New Jersey was authorized to "erect, build and extend docks and piers on the Sound, in the State of New Jersey, and to have and hold all wharves, piers, lands, lots, steamboats, and other facilities in the State of New York or elsewhere, as might be necessary for the purpose of facilitating the transhipment of coal, and necessary for the management of their other business."

Thus it became in 1854, by the authority of the legislature, and the assent of the stockholders, without question under the reserve power of the legislature, a road for the transportation of coal, almost the first in this State.

They were authorized to increase their capital stock for this purpose to $5,000,000, and to purchase or lease or operate any railroad (in or out of the State) which might connect with or intersect their road.

They were also authorized to "guarantee the bonds of such company (in or out of the State) or to consolidate the stock of such company with their own, on terms to be mutually agreed upon, provided that such purchase or consolidation (not lease) should not be made without the assent of three-fourths in interest of the stockholders of the Central Railroad Company; and provided that if any stockholder shall be unable or unwilling to consent, his stock should be appraised and paid for."

I use the words "*In or out of the State*" in describing the railroads with whom this company was under this act authorized to lease and purchase or consolidate, because the word "any," as applied, has received its interpretation by the courts of New Jersey, in the case of Stewart *vs.* The Lehigh Valley Railroad Co. (C. E.

Green) and that expression has been held to mean "any" railroad coming within the other restricting clause, whether such railroad was a railroad of New Jersey or of a sister State; and because the provisions of the fourth section, which makes certain provisions in regard to "the railroad so purchased, or consolidated, *if in this State*," are conclusive to show that the legislature used the word "*any*" with a full knowledge of its natural and legal meaning.

By this act of 1854, this company was recognized, authorized and equipped as a road for the transportation of coal, *not from the coal mines of New Jersey*, for God has not given us that blessing, but from its *terminus* at the Delaware river; and through its connections with Pennsylvania roads, reaching to the coal mines of Pennsylvania.

It was authorized for that purpose, not only to operate, lease or purchase any coal road which might intersect with it, *in or out of the State*, but if necessary or found convenient, to *consolidate* or merge its stock with any such road.

By the act of February 23d, 1860, it was authorized to extend its road to New York bay, opposite the city of New York.

By the act of April 6th, 1865, it was authorized to "build bridges across the Delaware river, to hold, use them, and run their trains on them over the Delaware river into the State of Pennsylvania."

By another act of the legislature, approved March 17th, 1870, it was authorized to connect with the Newark and New York Railroad Company, already chartered and built under the laws of the State of New Jersey, and it was authorized to purchase, lease or consolidate with this company without any provision being made in any form for the assent of the stockholders of the Newark and New York Railroad Company to the lease of the same.

It did provide that the provisions of the act of 1854, which required it to have the assent of two-thirds in interest of the stockholders of the Central Railroad of

New Jersey, should be enforced, but it provided nothing in regard to the stockholders of the Newark and New York Railroad Company.

By the act of the 28th of March, 1872, it was authorized to build a branch road to connect the Newark and New York Railroad (which has been leased by it) with the Morris and Essex Railroad Company, thus connecting the Central Railroad of New Jersey and its branches with the Morris and Essex Railroad Company, another coal company, with its connections.

And finally, on the 21st of March, 1874, by an act which recites that the Central Railroad Company of New Jersey hold in perpetuity "the railroad, works and branches of the Lehigh Coal and Navigation Company, in the State of Pennsylvania, the Central Railroad Company of New Jersey was authorized, with the consent of a majority in interest of their stockholders, to guarantee the payment of the bonds of any coal company or companies owning or working coal lands along the line of or adjacent to the Lehigh Coal and Navigation Company with its branches or its works in the State of Pennsylvania."

(Counsel here referred to map, and illustrated his remarks by pointing thereto.)

(Continuing.) Here (indicating) is the Central Railroad Company of New Jersey, and here (indicating) is the Lehigh Coal and Navigation Company with its works, &c., and here (again indicating) is where it guarantees the bonds of the coal company, and here (pointing) is where it touches and connects with the Reading and North Pennsylvania, and their system of railroads.

In the year 1880 the general law of New Jersey, authorizing the leasing of the railroads of the State, was passed. It was of course applicable to the Central Railroad Company of New Jersey, and it has since its passage the same effect upon it, its stock, property and contracts, for all future time, as if it had been inserted as a clause in the original charter of the company.

In the mean time, by several acts, the stock of the Central Company had been increased from $1,250,000 to $20,000,000.

This then was the charter of the Central Railroad Company of New Jersey, its franchises, its rights, its public contracts, *its scheme*, its general object and design as recognized by the State of New Jersey, and all its stockholders, when Mr. Dinsmore purchased his stock.

His stock had been issued under and in furtherance of, and for the purpose of carrying out this scheme. It was stock which, with all its rights of property and contract, was issued for the purpose of carrying out this general idea, or was held or issued subject and assenting to it; stock which was not only held subject and assenting to this general scheme of Pennsylvania coal carrying connections, but which had, half a dozen times, assented to the right of the legislature to authorize, and the right of the directors to carry out, most extraordinary provisions for that purpose.

Stock stamped, and I thank my friend for that word, with a dozen assents, continued through years, to this scheme and project of using the franchises of this company for the very purpose of a coal-carrying road from the coal fields of Pennsylvania, wherever by its connections, or by the connections or intersections of its affiliated roads, it could reach them, and when it did reach them clothed with extraordinary powers (which to an ordinary mind must seem monstrous) of guaranteeing, and making the stock liable for, the bonds of coal companies, anywhere in that foreign region adjacent to any of these new lines. It would, indeed, have been monstrous if it had not been a part of the great scheme of progress which was to bring cheaply to our State, and across it to the metropolis of the country, a great domestic and business necessity, which God has given only to certain regions in the State of Pennsylvania.

Under this condition of things the act of 1880 was passed, giving the express authority of the State for this lease. Its provisions are in effect that any railroad incorporated

under any act of this State may at any time during the continuance of its charter lease its road or any part thereof to any corporation of this or any other State.

This act and its effect is criticized by my friend from New York, on the ground that it is not an amendment to our charter, if I understood him rightly, because it does not comply strictly with certain provisions of our constitution. Now it does not profess to be an amendment to the charter of the Central Railroad Company of New Jersey, specially, but it does profess to make a part of the body of the general law of the State in relation to railroads, and is made in proper form as an amendment to our general railroad law.

This general provision of our law, upon principles heretofore established by argument and unquestionable authority in this case, became in effect an amendment to the charter of every railroad in the State (including the Central Railroad Company of New Jersey) to which it was applicable, and over which the legislature had control, with the same effect for the future as if it had been inserted in the original charter.

Upon this last point I refer again to the case of East Lincoln *vs.* Davenport, 94 U. S., 801.

Your Honor will observe that in the course of this argument, although the books are full of cases, and it is admitted that the rule in almost all the States is on our side of this question, I confine my citations to cases in New Jersey and in the United States courts. I shall cite no others, because I undertake to show conclusively that this lease is authorized by principles established and maintained by the courts of New Jersey, as well as by the courts of the United States. Principles and tribunals which will avail to inform the judgment and control the action of your Honor in the decision of this case.

This act of 1880 was undoubtedly passed in view of the relations of our State to the carrying trade of the country, and of our situation on the line of travel between the great cities, and commanding the access to the metropolis; and with the full understanding and acceptance

of the fact that to properly utilize these advantages our connections must reach beyond our own borders.

And here let me pause to say to my friends on the other side of this case, that they are misinformed of the wishes and mistake the temper of the people of this State, if they think that this prospective development of our great natural advantages is not looked upon with pleasure by our citizens of every connection, and by men of all parties and in every relation of life.

We have too long suffered under the thraldom of exclusive occupation, which only grows more dominant and more irksome as it is controlled by larger foreign connections, and backed by more tremendous power, not to hail with delight the dawn of our deliverance. With the eagerness of patriotic hope, the people of New Jersey await the hour and greet the *man*. And when he comes, a man full armed with native and developed faculty, trained in the school of large affairs, and strengthened by the confidence of the great interests which he represents; pushing forward with the directness of truthful purposes, and inspired with the courage of an honest life, the welcome of our people will not be diverted by misrepresentation, nor their confidence shaken by abuse. The sneers of men, drunk with the power of other people's money, the clamors of an interested clientelle, the slanders of a subsidized press, nor the criticisms of counsel will avail to blacken his character, to divert his purposes, or to defeat their accomplishment. The one is the result and the reward of an open and blameless life, the others are in accord with the spirit of our laws, and subserve the interests and harmonize with the feelings of our people.

The provisions of the act of 1880 were undoubtedly within the power of the legislature who passed the law and who were the legal judges of its propriety.

What is its effect, what is its extent, and under what conditions it is to be operative may possibly be a question; but there is no question but that it is a valid and constitutional law, and that it is at least effective to give

the assent of the State to the leasing of these roads. It is not necessary to discuss the question of its constitutionality, for neither this court, nor any other court of equity would, on a motion for preliminary injunction undertake to decide the legal question of the constitutionality of this law. It is to be presumed to be constitutional, as all the acts of the legislature are, until they are legally set aside by proper tribunals. That question is not within the province of this court, certainly not on this motion.

See Story *vs.* Plank Road, 1 C. E. Greeen, 14.

The efficacy of this law to authorize this lease has been questioned, because it provides no means for making compensation for private property.

The conclusive answer to this objection is that the making of this lease takes no private property; and unlike the lease in Black *vs.* Delaware and Raritan Canal Company, 9 C. E. Green, *it interferes with no irrepealable contract.*

In short, the act of 1880 changes no contract of the Central Company or its stockholders, except such contracts as were subject as a quality of their obligation to this very amendment, and are therefore not impaired.

Upon this point let me refer your Honor to the cases in 15 Wallace, U. S. Reps.

1. Tomlinson *vs.* Jessup, to which I have already referred.

2. Holyoke Company *vs.* Lyman, in which Justice Clifford (than whom no man stood more firmly for vested rights), says: "Vested rights, it is conceded, can not be destroyed or impaired under such a reserved power, but it is clear that the power may be exercised, and to almost any extent, to carry into effect the original purpose of the grant and to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation."

3. Muller *vs.* The State, in which Mr. Justice Clifford again says: "Where such a provision is incorporated in the charter, it is clear that it qualifies the grant, and that

the subsequent exercise of that reserved power can not be regarded as an act within the prohibition of the constitution."

This case was cited with approval in the celebrated Sinking Fund case in 99 U. S. Reps., and from which I read a single line of the opinion of the Chief Justice, in which he says (page 721):

"Giving full effect to the principles, which have thus "been authoritatively stated, we think it safe to say that "whatever rules Congress *might have prescribed in the* "*original charter* for the government of the corporation, "in the administration of its affairs, it retained the power "to establish by amendment."

If these principles are true, and they are established on the highest authority, then, after the passage of the act of 1880, the Central Railroad Company, its corporate rights, powers, franchises, and property, and its stockholders with their contracts and stock, were in all respects in the same position as if the provision of that act authorizing the leasing of the road had been a part of the original charter and franchises of the company.

If this clause had been in the original charter, it would undoubtedly have made this lease lawful by a majority vote, since it would have been a corporate franchise, and corporations act upon these by majority; and this would have been so without taking out of the stock any property which required compensation.

This stock, under this charter, thus subject to amendment, is in the same condition, when the amendment is made, as if the provisions of the amendment had been inserted in the original charter; it has the same qualities and none other, certainly nothing is taken out of it but what was originally agreed should be taken out.

Whatever may be the constitutional limitations of this reserved power of amendment, and they seem, as I have already said, only to restrain the making of a new contract essentially different in its very nature, this amendment only relates to the manner of using and taking toll for the use of corporate franchises, and can not be brought within this limitation.

And it is certainly true that the exercise in this case of the right given by the amendment is directly in the line of the original object and scheme of the company.

At all events it can not be denied that it is exactly in the line of the scheme of the company when the complainant acquired his stock. As against the complainant the scheme must be taken as it was when he purchased: and the provisions and object of this lease are directed exactly to carrying out the scheme which had already been entered upon by the Central Railroad Company and its stockholders, with the sanction of the legislative power, the scheme under which the complainant purchased, "and with which his stock was stamped" to borrow again the very forcible simile of my friend from New York (Mr. Seward).

The lease then changed the condition of no stock, except such as was, in its very nature, and as a condition of its creation, subject to this very change, as fully as a child is subject in its very nature, to growth and development.

Thus all rights acquired and all contracts made under and by virtue of this charter were made under the reservation of the right to make this amendment; and their qualities as property are affected and controlled by it, both in their nature and extent.

Shields *vs.* Ohio, 95 U. S., 319;

Sherman *vs.* Smith, 1 Black, 487;

Pick. *vs.* Cinn. & N. W. R. R. C., 6 Bissel, 131.

I wish to call your Honor's attention for a moment to an expression in the strong opinion of Mr. Justice Swaine, in the case of Shields *vs.* Ohio.

(Page 324.) "It is held that the franchise here in ques-
"tion, was property held by a vested right, and that its
"sanctity as such could not be thus invaded. The
"answer is *consensus facit jus.* It was according to the
"agreement of the parties. The company took the fran-
"chise subject expressly to the power of alteration or
"repeal by the General Assembly. There is, therefore,
"no ground for just complaint."

I read these cases, and detain your Honor by reading them, because they declare the law of the land, as set-

tled by its highest tribunal, sitting in the capitol of the nation, looking over all the country with an eye to the interest of all the people. A tribunal which, whether we agree with its doctrines or not, makes the law and settles the conduct of all United States courts.

This reserved right of amendment affects all parties and all rights. In the language of Chancellor Green: "*All contracts expressed or implied resulting from the act of incorporation and its acceptance by the stockholders*" are affected by it.

It extends to altering every essential quality of the property acquired under the charter subject to it.

To its government and control.

Miller *vs.* State, 15 Wallace, 478.

To its tolls and incomes and their amounts.

Shield *vs.* Ohio, 95 U. S., 319.

To the value and application of its income.

Cemetery case, 2 Supreme Court Reports, 277.

To the liability involved in the guarantee of other people's bonds.

Sherwood *vs.* Smith, 1 Black, 587.

To the liability of the corporation to its stockholders and its creditors.

Sinking Fund case, 99 U. S., 700.

To the sale of its property and franchises.

Story *vs.* Bergen Plank Road Co., 1 C. E. Green, 14.

To the right of consolidation.

Scotland *vs.* Thomas, 94 U. S., 682. (Justice Bradley.)

Hannah *vs.* Cincinnati and Fort Wayne R. R. Co. 20 Ind., 30;

Nugent *vs.* Supervisors, 19 Wallace, 241. (By Justice Strong.)

Bishop *vs.* Brainard, 28 Conn., 259.

And this reserved right of consolidation is held to be the more extraordinary right, and to include the power of sale.

16 Otto, 479. Branch *vs.* Jessup.

Thus it is clear that upon these principles this legislation is clearly effective to authorize this lease.

I doubt not I might stop my argument here and rest my whole case with your Honor upon the authority for the execution of this lease, by the directors of the Central Railroad, to be derived from the provisions of the act of 1880, operating as an amendment to the charter of that company.

III.

But this lease, as it has been executed and ratified by an almost unanimous vote of the stockholders, is authorized, under principles settled by the Supreme Court of the United States, by an older amendment to the charter.

If the decisions of the Supreme Court of the United States are to be taken as declaratory of the law as it exists, then this company was authorized to lease their road to the Reading Railroad Company, with the assent of three-fourths in interest of their stockholders, under the provisions of the act of 1854, amending the charter of the Central Railroad Company: which act, in its third section, expressly authorizes this company to purchase, or lease, or operate any railroad which may intersect with their road, or to guarantee the bonds of said company, or "*to consolidate the stock of such company with their own*, on *terms to be mutually agreed upon*."

The law then provides that this shall be done with the assent of three-fourths in interest of the stockholders, and provides the mode and manner of compensation for such stockholders as shall refuse their assent to such consolidation.

It is hardly necessary that I should argue to your Honor that this right of consolidating the stock of the Central Railroad Company, and incorporating and ab-

sorbing its existence into any other railroad company, whether the same be a corporation of the State of New Jersey or not; or whatever might be the amount of its stock, is a far larger power, and a far more comprehensive authority over the stock and property of the corporation, than any which is exercised in the making of this lease.

The right to be wholly absorbed and swallowed up by another company, or to be amalgamated with its larger elements until it loses, not only its control over its property, but its own identity and independent existence, no matter under what name, is a far larger right than the right of leasing its franchises and property upon conditions, with the reservation of rent, and the right of re-entry for conditions broken.

By every principle of legal construction this larger power over the franchises and property of the corporation includes within its scope the right to exercise all lesser means of controlling and using it—just as the right to sell admittedly includes the right to mortgage or the right to lease property.

I had intended to argue this point with some deliberation, but the lateness of the hour admonishes me that I have already consumed too much of your Honor's time; and fortunately it is not necessary to enter into this elaborate argument, since the point and its application have been authoritatively settled within the last year by the highest tribunal of the country.

I hold in my hand the latest volume of the Reports of the United States Supreme Court [vol. 106], and in it I find this point directly decided in our favor, in the case of Branch *vs.* Jessup, in the October term, 1882, where the opinion of the court was delivered by Mr. Justice Bradley. I read the following extract from that opinion, which settles this case; and which will be found on page 478 of the volume.

"As a general rule, it is true, a railroad company, with "only the ordinary power to construct and operate its "road, can not dispose of it to another company. Legis- "lative aid is necessary to that end. But this company

"had, by its charter, express power to incorporate its "stock with the stock of any other company. This power "has an enlarging effect upon the ordinary power to sell "and dispose of property belonging to the company. Gen- "erally, the power to sell and dispose has reference only "to transactions in the ordinary course of business inci- "dent to a railroad company, and does not extend to the "sale of the railroad itself, or of the franchises connected "therewith. Outlying lands, not needed for railroad uses, "may be sold. Machinery and other personal property "may be sold. But the road and franchises are gen- "erally inalienable, and they are so not only because they "are acquired by legislative grant, or in the exercise of "special authority given, for the specific purposes of the "incorporating act, but because they are essential to the "fulfillment of those purposes; and it would be a derelic- "tion of the duty owed by the corporation to the State "and to the public to part with them. But where, as in "this case, power is given to incorporate the capital stock "with the stock of any other company, a very large ad- "dition is made to the ordinary powers granted to a com- "pany. In this country the creation and exercise of such "a power is well understood. It contemplates, not only "the possible transfer of the railroad and its franchises to "another company, but even the extinguishment of the "corporation itself, and its absorption into a different or- "ganization. The greater power of alienating or extin- "guishing all its franchises, including its own being and "existence, contains the lesser power of alienating its road "and the franchises incident thereto and necessary to its "operation. Its power of alienation and sale extends to a "class of subjects to which it does not ordinarily apply."

The learned justice, in continuing that opinion, proceeds further, to say, that in view of the right of the purchasing company to consolidate its stock with the stock of another company, this right and power of consolidation gave to it the right to purchase the road and franchises of the company with which it was authorized to consolidate, and made the sale by that other company to the road having the right to consolidate with

it, authorized and lawful. Because the right to sell was held to be included in the right to consolidate. If this be true, and it must be accepted as true here, then a right of consolidation which includes a right to sell, must also include a right to lease, which is a smaller and subordinate exercise of the power of alienation.

The power to make this *lease* is sought to be denied to the Central Railroad Company, upon the ground that in duration it amounts practically to a sale, but under the act of 1854, and the powers there given to it, as construed by the Supreme Court of the United States, it had the power to make a sale, and if so, it certainly had the power to make this lease.

It seems hardly necessary to elaborate this point further.

If the premises are true, its statement is argument, and elaboration would serve but to confuse it.

My friends on the other side seem somewhat startled at this proposition, and the confidence with which it is made, but it seems to me to be upon the surface of this case and to have challenged their attention from its commencement.

It is time gentlemen should begin to realize that the interests of the State of New Jersey and the rights of its citizens are no more circumscribed and bound up with the rights of particular individuals and corporations than those of any other State; that the wisdom of our legislation and the forecast of our judges have preserved our freedom, except in the case of certain irrepealable contracts, early made and long repented; that it is our privilege to call upon the courts to preserve that freedom, and their duty to insure it to us, by preserving a line of strong and clear discrimination between those cases which grow out of our old thraldom and still wear its chains, and those which arise out of the exercise of the larger freedom, assured to our legislation and our people by the act of 1846, and the early and broad construction of its principles by our wise judiciary.

We must realize that every interest that was thus set free stands upon exactly the same footing, and is to be

regarded and regulated by the same laws, which are applicable to the rights and govern the conduct of the other citizens of a great growing and progressive commercial republic.

One thing however, is certain, whatever else may be questioned, and that is, that upon this point alone, if upon no other, the claim of the complainant is a claim resting upon an unsettled question of law, and is therefore one which can not afford a basis for his present application for a preliminary injunction.

IV.

Again, the complainant, under the general circumstances of this case and his own attitude in it, is not entitled to his prayer, that this lease shall be set aside, and its operation interfered with; even admitting that the lease itself was originally *ultra vires*, and that he has received legal injury from its execution. Whatever his injury may be, he is, under the circumstance of this case, entitled only to compensation.

The lease of which he complains *was already executed;* the demise accomplished, and, the demised premises in the possession of the lessee, before he filed his bill of complaint. It was executed in good faith, and under color of law, by virtue of the authority of one or the other of the statutes to which I have referred.

It was executed with his assent, at least with his apparent assent, as expressed by his powers of attorney; the parties to the lease, the persons who executed it, and those who accepted its execution, and all other parties affected by it, including the holders of the bonds of the Central Railroad Company, and his associate stockholders, had accepted the lease and its effects under those circumstances.

The complainant knew that these circumstances existed, and that the lease had been executed, the demised premises taken possession of and used, and that this action had been acquiesced in under these circumstances.

And yet he rested for more than a month upon his rights, if he had any, allowed great enterprises to be undertaken, great interests to be involved, great fortunes invested, great rights to harden, before he saw proper to make any complaint to anybody interested, to enter any protest, to assert any rights; or to invoke the aid of any court to enforce them.

By this conduct and through this omission to assert his rights; if he had not lost any rights which he had, he has at least lost the right to assert them in any manner which will seriously affect the great interests which he has permitted, if not encouraged, to become dependent upon the carrying out of the provisions of this lease.

This is not a case of direct, open, violent defiance of accepted law, in which the parties were striving, and knew they were striving by illegal means, to obtain a legal status, but a lease, executed in good faith, under the advice of the best counsel, and upon the authority of provisions of laws which we then thought, and still think, were ample to authorize it; made and entered upon, if not with the formal permission, at least with the practical acquiescence of the complainant himself.

In short, the lease was executed in good faith, under color of law, with the supposed assent of the complainant; and with his acquiescence, great interests have gathered and hardened around it.

If he is in any way injured under these circumstances, he must be held to the strict measure of his legal right, and can invoke no equitable interference to accord him anything else, except that compensation which he can receive without injury to other, and in every legal sense, innocent parties, to transactions of which he was himself informed. *Vigilantibus non dormientibus æquitas subveniat.* This is a maxim which applies to the circumstances of this case and to the complainant's relations to them, and it should specially be applied to transactions so far reaching in their effect, and so important in their results.

I shall not pause to read to your Honor the books full of cases which might be cited to illustrate this position. The leading case in England upon that subject

is the case of the Great Western Railroad *vs.* Oxford, 3 Degex, McNorton & Gordon, page 341, and in the case of Chapman *vs.* the Mad River Railroad, in 6 Ohio, page 137, the principle as applicable to this case is clearly stated by the court in the following language:—

"It is clear that before a stockholder can be entitled "to remedy by injunction against a departure from the "original object of incorporation, he must have shown "himself prompt and vigilant in asserting his rights as a "stockholder. It will not do for him to wait until the "mischief of which he complains is accomplished, for- "tunes expended, and great public interests created; if he "does so wait, he must be held to have acquiesced in the "change or at least to content himself with some other "form of remedy."

A single practical illustration upon this point: Suppose a company was authorized by the State of New Jersey to build a railroad, the route of which road would lead through land belonging to me; suppose the company had not in its grant, or at least did not invoke, the power of condemnation as against my land, but negotiated with me, and received my assent to the building of their road across it; suppose that assent was by parol, and that, acting upon it, the company constructed their road across my land, and in doing so adopted a route which might have been different and less expensive if they had not been led to act upon my supposed assent; suppose I stood by while the road was building without protest or interference, could I, after the road was built, claim that my assent was valueless because not expressed in writing, or because I had not intended to give it as fully as was supposed, or because the company had misunderstood my authority; and could I appeal to a court of equity under these circumstances, and ask that the operation of that road should be enjoined, that its track should be taken up, its route changed, its connections destroyed, its stockholders ruined, because they had relied upon my consent, or misunderstood my action? And further, could I expect to invoke the interterference of the court of equity if, under these circum-

stances, I had waited still longer, until this road so built had made connections with other roads, had entered into heavy contracts, had undertaken great enterprises, and had associated with itself and its success the interests of hundreds of other outside and innocent parties? If, waiting until all these things had happened, I applied to the court of equity could I expect to receive anything more than full compensation for what I claimed was an injury to my rights; and to receive it in such a manner that no injury is done to other interests? I certainly would have no equitable status to ask any other remedy, and if I refused to accept this, I refuse myself to do equity, and will be left by a court of equity to the assertion of my legal rights by such means as law courts can afford me.

Your Honor will pardon me for having paused to make this illustration, but I have done so in the natural desire, not only to bring this case in all its aspects before your Honor's mind, but to present it also in such a manner that it may be fully understood by all who are interested in it.

In this view I again assert that the right of the complainant is at least doubtful, and that he is therefore certainly not entitled to the summary interference of this court.

V.

Again: The complainant has lost all claim to relief in this case, if he ever had any. The *corpus* of his action—that is, the property upon which he founded his claim of right, and with respect to which he invoked the action of this court, was stated to be, and has been proved to be, a thousand shares of the stock of the Central Railroad Company, which he owned either in his own name or the certificates for which were in his own possession.

It was in behalf of this stock and the interests represented by it (as owner of which he claimed he had not in any way assented to this lease), that he invoked the action of the court.

Since the commencement of this suit he has parted, for valuable consideration, with half of the interest upon which it was founded; he has sold it in open market at an advanced price, and has accepted and received a special consideration amounting to more than $3500 in money for parting with it. It is now in the possession of parties who have assented to this lease, who desire its continuance and who object to the prosecution of this suit, or to any action adverse to the lease. They have in reality been made parties in interest to this suit, and to its result, by the action of the complainant himself, who has taken this action for good and valuable consideration to him paid; who has sold his interest in at least one-half of the *corpus* of the suit, and given to the parties purchasing all the right which the stock had before he parted with it. If that stock before it was parted with had any rights, because its owner was the complainant in this suit then its present owners have all the rights which then pertained to the stock, and all the rights which the complainant might have exercised as the owner of the stock before he parted with it. But the present owners of this stock are and have been proved to be persons who assent to this lease, and who desire that it shall be continued and carried out. The complainant then is at least in no better position than if he had filed his bill in this case associating with himself consenting stockholders.

His position is even worse than that, because he has himself for valuable consideration, directly consented to the lease to the extent at least of half his stock, and the question is a serious one, though I do not now propose to argue it at length, whether it is competent for the complainant to give his assent for half his stock, and to receive valuable consideration for doing so, and yet to retain his position as a non-consenting stockholder, seeking to destroy the value of the very stock which he has put upon the market and sold, by the prosecution of this suit.

Certainly under these circumstances the complainant is not entitled to equitable relief; whatever rights of com-

pensation he may retain for the stock which he has not sold, he certainly can not sell a portion of his stock with one hand for valuable consideration and with the other attempt to wield the injunction of a court of equity to interfere with the interests of, and combat the wishes of the owners of the stock, which he has put upon the market himself with full knowledge of all its incidents, and the circumstances which surround it, and sold, for valuable consideration, to parties who were not informed of those incidents, who bought without information and in ignorance of the condition and incidents of this stock.

Suppose this complainant had sold at a profit, nine hundred and ninety-nine shares of the stock, which made the *corpus* of this suit to parties who did not desire its prosecution; his legal right to compensation for the one share might still remain, but could he come into a court of equity under those circumstances, and invoke its extraordinary injunction power in behalf of his one share of stock as against the nine hundred and ninety-nine others which he had sold? Certainly this court will reply at once and with indignation, "You may be entitled to compensation for the value of the share which you still hold, but you have no equitable status from which to invoke the extraordinary power of this court against the owners of the property which you have just sold for valuable considerations. You can not sell with one hand, and strike at the interests you have parted with with the other; and your right hand must be understood to know what your left hand does.

"You have either committed a fraud on the parties to whom you have sold, or you have relinquished any equitable status which you might have had in this suit to combat their wishes or affect their interests." And the principle is the same when he has sold one-half as if he had sold more.

This is certainly a much stronger case than where a complainant had merely brought his suit associating with himself consenting stockholders, and yet in that much simpler case the court of equity refused relief upon the ground that it could not divide its judgment to meet

the wishes of all parties interested. See Ffooks *vs.* The London and South Western Railroad, 19 L. & E., 7; Marker *vs.* Marker, 9 Hare, 16; Kenton *vs.* Jackson, 14 Beavan, 384; Grayham *vs.* Birkenhead Railroad, 2 Mar. & God., 146. Thus upon this point the complainant has again lost all claim for injunction and if he has been injured must be content to receive compensation.

VI.

Again, the complainant in this case does not exhibit himself in an attitude which claims special favor of this court. Even if it be not clearly proved in this case that he directly represented the interests of other and rival corporations, he has at least allowed himself and his case to be made the tool of their purposes and the instrument of their enmities.

It is not necessary that we should show him to be a mere dummy and puppet of the Pennsylvania Railroad Company; it is only necessary that we should show that this suit in equity is not brought merely to invoke the equity power of this court, but is brought for ulterior purposes and to carry out inequitable ends.

It is proved in this case that the complainant is the president of the Adams Express Company, a corporation closely affiliated with the Pennsylvania Railroad Company, a company, rival of and at every point antagonistic to our own; that the bill of the complainant was drawn, signed and presented to this court by the salaried counsel of that corporation: some of whom before the filing of the bill, and before they were employed by the complainant to bring this suit, are proved to have been seeking to obtain posssession of other non-consented stock of the Central Railroad Company, and to influence its action against this lease.

The affidavits attached to the bill upon which it is sought to have this injunction issued, are proved to have been prepared upon memoranda issued from the central office of the Pennsylvania Railroad Company in Philadelphia, prepared and sent out by its salaried solicitor.

The facts were gathered, the witnesses procured, and the affidavits prepared by lawyers affiliated with the Pennsylvania Railroad Company, who did their work at the request and under the direction of the solicitor of that company, on orders and memoranda issued from its main office; and these parties were paid for their labors by the active agents of the Pennsylvania Railroad Company, which payment was not replaced by the complainant until after it had been proved in this case. It is further proved, that as part of the information gathered by these agents *in obedience to the memoranda of the solicitor of the Pennsylvania Railroad Company*, the amount of interest and other moneys, which was to be paid on the first day of July of this year, by the Reading Railroad Company and the Central Railroad Company, was investigated and ascertained, *but not used as a part of the affidavits annexed to the bill; that having acquired this information, this bill was presented to this court, and the restraining order obtained on the twenty-ninth day of June, two days before these heavy payments were to be made;* that immediately upon obtaining the restraining order upon *ex parte* affidavits, and before the defendants were notified of the order, and while the bill of complaint was not on file for their information, hundreds of printed copies were struck off, and special messengers were sent out over the lines of the Central Railroad Company and its tributaries, and service made of these orders upon all its agents, who had or who were supposed to have its money in their hands, restraining its payment to the parties who were to disburse it on the next day; *with the plain object of causing, if possible, a default in the payments then to be made.*

It is also proved that the fact that this bill was to be filed for the purposes of obtaining this injunction, was known to the officers of the Pennsylvania Railroad Company several days before; and that, as much as four days before some of the officers of the company, together with other persons to whom information had been given by them, sold largely of the stock of the Central Railroad Company of New Jersey in anticipation of the de-

cline which was expected to follow this bill and its results.

I have stated these facts without comment, because I think they show better in utter nakedness. But they are all proved or directly derivable from the proof and have not been denied.

This is the atmosphere which surrounds this case as made up from these accompanying facts, and he is blind who can not understand what is the real purpose of this suit; and see the gigantic, though impalpable, figure which looms in the background.

Whether this complainant, whose only interest in this suit is claimed to be his solicitude for the welfare of the Central Railroad Company, and is founded upon the value of its stock, stands in any equitable attitude to invoke the extraordinary interference of this court, your Honor must judge.

It will be admitted on the principles that I have stated that no complainant whose case rests upon a doubtful question of law, and whose attitude is not clearly and in all respects an equitable one, can expect to obtain, as a preliminary to his suit, and before his right is proved, argued and settled, action by the court interfering with the large interests, not only of the defendants, but of other parties largely interested, but not involved in the suit.

As bearing upon this point I desire to direct your Honor's attention to these facts: That while this complainant, representing an interest at par of $50,000, refuses all compensation, and declines to sell his stock for less than "a million of dollars a share," to use his own expression, he is seeking action which he expects to affect the interest of more than $18,000,000 of stock, which has consented to this lease, and is anxious to have it carried out.

That in pursuance of this lease and the arrangements for it, and while the complainant was sleeping on his rights, the Reading Railroad Company has deposited $3,000,000 of security to protect the notes of the re-

ceiver of the Central Railroad Company, without which protection the road could not have been taken out of insolvency. That it has paid $750,000 of those notes. That it has also supplied the Central Railroad Company, to pay supply bills and pay-rolls and for expenditures upon its road-beds and bridges, more than $800,000. That it has, with the consent of all parties, assumed the lease of the Central Railroad Company with the Lehigh and Susquehanna Railroad, and obligations which amount to at least $1,500,000 annually. That it has diverted and is diverting its traffic from its own lines over the line of the Central Railroad Company to the city of New York; and that it has assumed to pay interest and dividends which will accrue before the first of next year, amounting to more than $350,000.

All this the complainant is seeking to interfere with by his application to your Honor, regardless alike of its general consequence or its particular injuries; equally reckless whether he stops great lines of transportation across our State, bearing the necessaries of life for our people and the products of their labor, or snatches from the widow or orphan the dividend upon which they depend for maintenance; the first that has been offered them for six years, and which, if the complainant's wishes be gratified, they will never receive.

And does this complainant, standing on this doubtful right and demanding this more than doubtful remedy, proffer either security or indemnity for the harms which he seeks to do? Does he come forward with his $20,000,000 of security or his $10,000,000 to indemnify the injuries he would inflict? And where are his backers? Do the Pennsylvania Railroad and its officers proffer themselves ready to stand behind him? If they do, I object to the security, and I declare that notwithstanding all that has been said or suggested in affidavit, and in argument against the responsibility of the Reading Railroad Company, I would rather have their guarantee of the rent and conditions of this lease for myself and my children than any guarantee of the Pennsylvania Railroad Company by just so much as the honest adminis-

tration of great interests is better than reckless antagonism to every independent enterprise.

I am now done with the argument of this motion. I have detained your Honor longer, perhaps, than your patience would warrant, but I trust I may be excused in view of the magnitude of the questions involved and the imperfections of the humble individual to whom their illustration has been in part committed.

In casting my mind back over all the positions which have been taken in this case against the action demanded by the complainant, and passing in review the many objections, each one of which would be sufficient to defeat his demand; I must be permitted to say that I stand astonished at the hardihood of my friends upon the other side, who present their propositions with an assurance, which I know is not born of ignorance, and which, therefore, I must be pardoned if I suggest is at least hardihood.

It seems to me that the attitude and demand of the complainant in this cause is an imputation upon the jurisprudence of our State, and almost, may I be pardoned the expression, an insult to this court.

I can not realize to my mind, that these gentlemen are here to-day resting themselves *wholly* upon the law, its principles and the legal rights of their client as derivable from them, but must believe, and yet hesitate to believe, that they have entered upon this campaign—shielded by the evasion of witnesses and armed with the weapons of power—seeking not to *defend* but to *invade*, content not to acquire territory for themselves, if they can leave the country of their enemy in waste and desolation.

With these remarks I leave the interests of my clients with your Honor, asking only a fair application of the plain principles of the law of the land; and in perfect confidence that these will not be perverted, in your hands, to do injurious wrong to any one.

ARGUMENT OF

EX-CHANCELLOR WILLIAMSON

On Behalf of the Defendants.

May it Please the Court:—

I appear on behalf of the Central Railroad Company of New Jersey—of its *stockholders* holding more than $18,000,000 of its stock—of its *creditors* representing a debt of more than $50,000,000 secured by twenty-four mortgages on the leased property and other property—of the *State of New Jersey*, deriving an annual revenue of $100,000—of the Reading Railroad Company upon which is imposed the prompt payment of dividends on stock and interest on its obligations, a default in which will involve both companies in trouble which can hardly be magnified—and of the *public* who have an interest in this issue beyond computation in dollars. I ask for a final hearing by this court before any action shall be taken which may interfere in any way with these rights.

The magnitude of the interests involved is too large, and in comparison with it that of the complainant too insignificant, for any *experiment* or for any action by this court *now*, and on this application.

I will endeavor to satisfy the court that there is no necessity for any action *now*, and that it should be deferred until the *final* hearing; and that such disposition of the motion will be in conformity to the practice of the court.

The position I occupy is an embarrassing one.

The law and facts have been thoroughly and ably discussed by my associates. It would require a degree of ingenuity of which I am not possessed, to discuss *at large* the facts and law of the case, without a repetition which could not be justified before a court which has

extended to my associates and myself so much indulgence.

I must avoid repetition as much as possible, and I shall do so by constant remembrance that we are not discussing the final merits of this case, and of the character of the motion before the court.

This argument is not upon the final hearing of the controversy. That is to be had according to the rules and practice of this court, when the pleadings are perfected, and when the parties have taken the evidence upon the issues involved.

The motion is for a *preliminary* or *temporary* injunction, the object of which is to maintain the *status* as at the time when the bill was filed; it is to *restrain* the defendants from further action in the premises until the final hearing; not to *restore* the complainant to rights to which he alleges himself entitled, and which involve the very questions in controversy. I do not deny the *power* of this court to issue a *mandatory* injunction, but I do say it is a power but seldom exercised and only in exceptional cases; so seldom indeed, that we find the expression frequently made by elementary writers and judges, that "*it is never done.*"

Your Honor has observed this with reference to more than one case in New Jersey. Our chancellor and our judges in the Court of Errors and Appeals have used that very expression, and the Chief Justice among others, "that it is never done." It does not mean that the court had not the power to do it, but the cases in which it should and ought to be done were so extreme that it justified the saying that "*it never was done.*"

Admitting the legal right of one *dissenting* stockholder to defeat the execution of a lease such as is now in dispute, the question remains to be decided in every case as it is presented—whether such stockholder, upon his case as it stands before the court, is entitled to any relief in a court of equity, and if so to what relief is he entitled? It remains for further examination and discussion, whether this complainant is entitled to any relief. While that right is a matter of dispute no preliminary injunction should be granted.

When this bill was filed, the lease was *executed*; $50,000,000 of property had changed hands; the defendant, (the Central Railroad Company,) had discharged seven thousand employés; the complicated accounts in the management of 20 (twenty) railroads, with their branches and appurtenances in this and other States of more than seven hundred miles in length, involving a business in which the public has a daily interest, and from which the State of New Jersey has for the last eleven years derived a revenue of more than $1,000,000, averaging yearly nearly $100,000, and involving conveniences to the public necessary for the enjoyment of life and protection of health and property in value beyond computation. These are all to be taken into account and to be regarded by this court in deciding this motion.

The lease was authorized by a *public* law of the State, and sanctioned by stockholders holding more than $17,000,000 out of $18,000,000 of stock; and yet this complainant, *alleging* himself the *owner* of $100,000 of stock at its par value, in spite of all the consequences to result from such action, asks this court to *ignore* the lease, and to destroy all the relations created by its execution until his rights can be ascertained in the suit which he has instituted, and to inflict an injury on innocent parties greater and more irreparable than any he can possibly sustain under any circumstances.

I need not say the action now asked is hazardous in the extreme.

If the complainant is entitled to relief, he will obtain it at the *final hearing*—the action he now asks may put it beyond the court to protect even him, and involve innocent parties in great loss. The records of the Court of Chancery show that when the decree of insolvency was revoked, it was known that this road was to be managed under the control of persons largely interested in the Reading; and the records of *this* court show that it gave *its* aid to a bill filed, and to proceedings, which on the face of them disclosed the same object. I mention the fact to show that there was no secrecy and no fraudulent concealment about the object in view, and that a majority of the stockholders were the actors.

I refer to the case of *Black* for the purpose of showing the views of the court in deciding that case. That after the lease had been executed it did not follow that though illegally done there should be restoration of the leased property, even upon the final hearing, but that other parties, and other equities, were to be considered and protected as well as the complainants.

In the case of Black and the Delaware and Raritan Canal Company, the bill was filed *before* the execution of the lease by several dissenting or unwilling stockholders and a preliminary injunction was granted to stay its execution. There were no *special* equities involved, and on a hearing upon the bill and answer before the chancellor the injunction was dissolved.

The lease was immediately executed. An appeal was promptly, and on the very day of the order of dissolution, taken from the order of the chancellor. At the hearing of the appeal the defendants took a rule to show that since the hearing before the chancellor new equities had intervened by the *fact of the execution of the lease*, and on the ground of some of the complainants having received their dividends under the lease, and of others having parted with their stock. The court, after affidavits taken and after argument, decided that they must decree upon the case as it stood before the chancellor when the appeal was taken.

But, observe the further action of the court. They *reversed* the decree of the chancellor. They did not decree that an injunction or restoration was the proper remedy, although the parties had executed the lease in face of the fact that the bill was filed prior to its execution, and while an appeal was pending from the order of the chancellor. It would be a monstrous wrong in the administration of equity jurisprudence, if this were otherwise; it would be a disgrace if this court was bound, simply because this complainant had a right at law, to jeopardise all other interests involved, and to say to him, "Yes! equity will give you your legal rights, and you may scatter around you as you please firebrands, arrows and death." I know your Honor is not inclined to do

it. I know if you could find any authority, or number of authorities, that would justify you in doing it you would reluctantly follow them. But in view of all these interests, by the decision of the Court of Errors, and by all the authorities, this court is not confined to the mere remedy of setting aside the lease, but may give to the complainant other relief. It has been said that you can compel the complainant to part with his stock and have it assessed, under the power of eminent domain. Now I don't say that exactly, but I say your Honor can administer justice, can give to this complainant the value of all his rights, and if he refuses to take it let him stand where the other $17,000,000 of stockholders stand, and take the benefit of the lease. I do not recollect that an authority has been referred to where a lease has been executed that a court has made a decree restoring the property that had passed under the lease.

The Court of Errors so modified their decree in the *Black* case so that the chancellor might give such relief, as would give the complainants a remedy without disturbing the lease.

Suppose your Honor should grant the injunction now asked, involving all the embarrassments and disastrous consequences which must necessarily follow, and upon the final hearing should determine that the complainant was entitled to some other relief than the setting aside of the lease, what redress could be offered for the injury done by the preliminary injunction?

While the unwilling stockholder is entitled to protection, the relief afforded must depend upon the circumstances of each individual case. In protecting his rights, those of others, and particularly of innocent parties, are entitled to as much consideration as his, and to much more if there are any embarrassments the result and consequence of his conduct, accidental or intentional.

If his bill is filed *prior* to the execution of the lease, or the delivery of possession, the appropriate remedy is an injunction to enjoin the execution of the lease, or the delivery of possession of the leased property.

May I not make another suggestion which I have no doubt has crossed the mind of your Honor—that your

Honor will exercise such power with very great reluctance from the fact that there is no appeal from your decision.

If a lease is about to be executed, and a stockholder who is dissatisfied promptly appeals to the court for protection, the court will give him adequate protection without interfering with the rights of others, and the granting of a preliminary injunction would be proper in that case, and no defendant could make any objection to it, but if the lease has been executed and possession given, then the redress and the remedy must be determined at the final hearing, and depend upon the equities and the rights, not of the complainant only, but of all parties affected by the decree, and especially protecting the rights of all innocent parties resulting from any laches of the complainant.

These principles upon which equity jurisprudence is admininistered are so obviously just, they can not be questioned. They are too familiar to the court to require any reference to adjudged cases of which the books are full.

An injunction can not be used to compel the lessee to redeliver the lease to the lessors, and to restore or attempt to restore the parties to their former position.

Roger's Locomotive and Machine Works vs. *Erie Railway Co., 5 C. E. G., 379,* in which the chancellor says: "A *man-*
"*datory* injunction will not be ordered on a preliminary
"or interlocutory motion, but only upon final hearing,
"and then only to execute the decree or judgment of
"the court." This language of the chancellor illustrates my suggestion, that while there might be exceptions the rule was so universal and inflexible that when referred to by the court it was without the suggestion that exceptions might exist.

What is said in the decision of the *Black* case, as well as the action of the court are direct to the point.

9 C. E. Green, 474, Judge Van Syckel says: "A bill
"filed *before* the lease is executed, to inhibit such delivery
"of possession, would furnish ample and complete pro-
"tection and is all the relief that a stockholder, under
"*such circumstances* would be entitled to." What circumstances, before the lease is executed?

On page 487, the Chief Justice says, "the purpose of "this process (injunction) is to keep things in the posi- "tion in which they are at the time of the application "for it, until the termination of the suit. This is the "only legitimate scope of the remedy. The claim to "the writ depends upon the equitable *status* of the parties "at the crisis of applying for the aid of the court. * *

"So, too, a plain case must be presented for its inter- "vention. The injunction power is the strong arm of "the court, and is not to be used except in cases of "clear *necessity*."

But the decree of the court in the *Black* case shows that if the lease had been *executed* it did not follow that it was to be decreed void, and restoration made; but that upon the equities it was the duty of the court to give such *different mode of relief as had become necessary*.

The court will read the whole case. In the court there was some difference of opinion, and the matter was a good deal discussed in regard to the effect of the injunction, and whether it ought not to be issued anyhow; but they were unanimous, as appears from the statement of the Chief Justice, that the discretion of the chancellor in further making his decree ought not to be interfered with. The fact of the execution of the lease had come before the court, and they could not close their eyes to it, but they said that under the rule the evidence was not admissible, and therefore they could not take judicial notice of the fact. An application was made to the chancellor to stay further action before the hearing, and I remember it very well, because my friend Mr. Browning made the application, and I opposed it. The chancellor refused to sign an order to stay further action until the decision of the appeal; Judge Van Syckel suggested the parties ought never to have run the risk under such circumstances of executing the lease, but they chose to run the risk, and pending the appeal executed the lease.

In 9 C. E. Green, 483, will be found the substance of the decree made in that case, as follows:—

"In my opinion, therefore, the decree of the chancel- "lor should be reversed; * * * and the case should

"be remitted with an order that the injunction do issue, "*unless it appears by such proceedings as may properly be* "*taken in the court below, that some essential change,* "*since the order now reviewed, has taken place in the status* "*of the case by reason of which the equities are changed or* "*a different mode of relief has become necessary.*"

No doubt the court say the applicants had done wrong to have ever had that lease executed, but they say, too, no matter how wrong they had done, there had been rights acquired under its execution, and by innocent parties who were entitled to protection by the court.

What would the Court of Equity do if the parties who come in here said, "My rights below are so and so, and I demand them at the hands of this Court of Equity, no matter what the consequences may be?" Has your Honor any doubt but that you would have a perfect right to administer some other equity? Why, this complainant asks it at your hands. He prays for specific relief, but he also makes a general prayer for relief, and under that general prayer you may administer any relief to which he may be entitled to, and then if he chooses, he may depart from the court, and say, "I prefer to stand in the position that I do, of a stockholder."

Further in the *Black* case it is said, "If the case is un- "changed the injunction must issue; if any new equities "have attached to the case, which is possible in every "case, or any additional legislation has been had, its "effect must be passed upon by the chancellor before it "can be considered in this court of review."

Now I respectfully submit to the court that that answers every case referred to by counsel, and that he has not referred to a case where new equities are involved, where the court has ever given the complainant the specific relief he prayed for in this case.

It remains for the case to be shown that where a stockholder has delayed filing his bill until after execution of the lease, any court has made a decree of restitution except on the ground of gross fraud. The bill asks for specific and for general relief (look at prayer).

It is apparent upon the facts stated in the bill that no preliminary injunction can issue without partially decid-

ing the final merits of the controversy, and without disturbing and putting in jeopardy property of the value of millions belonging to innocent parties. There is a question of law to be decided which has never yet been decided in New Jersey, and which must be decided in favor of the complainant to entitle him to any relief. I only refer to it as it has been most elaborately discussed by both counsel associated with me.

There are outstanding one hundred and eighty-five thousand six hundred and thirty-two shares of stock, of which the complainant alleges he is owner of a thousand; there are leased roads in Pennsylvania, Maryland, and Delaware which no injunction of this court in this case can reach; there is property sold and delivered under bills of sale, transfers, and deliveries, which *undeniably* the directors had a right to sell, and of which they can not be repossessed, and most if not all of which is necessary to the maintenance and successful exercise of the franchises and property which constitute the *plant*, and which this court can not reach by its *preliminary injunction* or even by its final decree.

Take the Lehigh and Wilkesbarre Coal Company, which is only incidentally alluded to in the complainant's bill, and most mysteriously disappears in that section which states specifically the leasehold property.

Why, if the court please, the very fact of this omission is enough to prevent granting a preliminary injunction. It is admitted—the argument shows, and the evidence all shows, that the Central Railroad Company of New Jersey can not live without the lease of that road; that its capital has been increased more than ten million dollars since its execution for the purpose of giving the company the very facilities of reaching the coal fields, and deriving a benefit from coal transportation. I should like to see Mr. Little or anybody else attempt to run the Central Railroad without the benefit of the property.

The injunction asked for will be the *destruction* instead of the *protection* of the property in dispute.

See the property involved—the leased roads to which the alleged right of the complainant attaches, and in which

he claims a *vested* right as a stockholder, are the railroads from Jersey City to Philipsburg, the Newark and New York Railroad, the Perth Amboy and Elizabeth, and the road from Somerville to Flemington.

The stock of the New York and Long Branch Railroad Company, and of other roads mentioned in the bill, constituted no part of the plant. The Central held them by purchase and lease, whether legally or not is of no consequence to inquire, as the State only can interfere and question such right.

The Central had the right to sell all its interest in these properties, and there is no charge that it was done fraudulently. This is not the *gravamen* of the complaint.

What is the leased property that can be touched by the injunction? It appears that the Central Railroad Company of New Jersey owned no railroad, except the roads from the Hudson River to Philipsburg and from Somerville to Flemington, and from Elizabeth to Perth Amboy, and from Communipaw to Newark; a mere bagatelle when you come to put a value upon the whole of the leased property. No man who wanted his rights protected would ever file a bill like this. The complainant has no expectation or wish to protect the property; he wants to destroy it.

There has property changed hands and attached to the bill is an inventory, and your Honor will see that there are millions of property that passed under this lease which this bill does not touch.

It is argued that all that would have to be done, if this injunction is granted, would be to turn the leased property back to the Central Railroad Company of New Jersey; but some of it has been sold and can not be turned back.

The Central Railroad Company has no control over the Long Branch Railroad Company. It has no interest in the Long Branch Railroad Company except being the owner of the stock, and will it be asked, "What right had they to buy that stock?" That is a question between the State of New Jersey and themselves; no third party can question any right which they have

acquired except the State of New Jersey, which might issue its *quo warranto* for the purpose. And so in regard to every other charter of other railroads embraced in the lease. The Manufacturers' Railroad, which is a railroad in Newark, running from the Newark and New York Road for the purpose of reaching large manufacturing establishments and supplying them with coal, is one; the Central Railroad Company constructed this road, under a charter acquired under the general railroad law.

Now it may, I say, be illegal, but that no one can question but the State or the stockholders, and they never did question it; it was done, and the bill sets out that fact. There is a great part of this property to which objection might be taken as to the right of the Central Railroad Company to hold it, which was acquired by Judge Lathrop, as receiver of the Central Railroad Company of New Jersey, under the direction of the chancellor. Now do not misunderstand me as saying that that road was constructed by the consent or approbation of the chancellor. So far from it, I do not believe he ever dreamt of its being done, and yet it was done.

But can it be questioned for a moment that the Central Railroad Company had a right to sell the stock of the Long Branch Railroad, or to sell the stock of the Manufacturers' Company, or to sell the stock of the High Bridge Company, or to sell the stock of fifteen other railroads of which they acquired the control by owning the majority of the stock?

They purchased it and had the right to sell it. They didn't purchase it by the exercise of any franchise which they had, or by any authority in their charter.

They purchased it for the benefit of the company, and no one has questioned it.

Has your Honor any doubt of the absolute right of the Central Railroad Company to sell the stock of these companies? That is what they have done in this case. It is not called exactly a lease, but an agreement or a lease. In fact it is nothing but a lease of the railroad of the Central Railroad Company of New Jersey, which

they owned under their franchises; and as a sale of all other property; it has all gone into the possession of the Philadelphia and Reading Railroad Company, without any charge of fraud or without any intention of fraud, but *bona fide* and with the consent, as the complainant himself shows, of five-sixths of the stockholders of the railroad.

Let us see what preliminary injunction the complainant needs for his protection, and for what he asks. [The counsel here read the order found on page 97 of the printed bill and affidavits.] This is what was asked for; it was on this that the complainant came before your Honor—it was on this bill, not verified in one single particular according to the rules and practice of this court—that the rule to show cause was obtained. The rule to show cause was granted on the 29th of June, returnable within five days of its date. I will venture to say your Honor did not intend to grant as much as you supposed they might ask on this motion. I ask attention to a part of it: "The Philadelphia and Reading Railroad Company, its officers, servants, agents, and employés, do desist and refrain from collecting, taking, or receiving any moneys, earnings, or tolls paid, payable or to become due for transportation of coal, freight, passengers, or any other thing, over or upon the railroads owned, leased to, or operated by the Central Railroad Company of New Jersey, at and before the execution of an alleged lease by said last mentioned railroad company, to the Philadelphia and Reading Railroad Company, and from anywise intermeddling with said moneys, earnings or tolls except to transmit the same forthwith upon the receipt of the same to the treasurer of the said The Central Railroad Company of New Jersey." That is one portion of the order—but further it orders the employés of the Philadelphia and Reading Railroad Company shall not collect anything that is due from transportation, &c., except for the purpose of remitting the same to the treasurer of the New Jersey Central Railroad Company. But there is another part of this order which declares that the New Jersey Central Railroad

Company shall prevent the Philadelphia and Reading Company and its officers, agents, employés, and servants in any manner whatever from collecting anything. When this inconsistency was pointed out to counsel they said, "Oh, they did not mean that." Mean that! But no other meaning can be attached to it; it admits of no other. We could not see that it did not mean that; strange if it did mean it, for where would there have been any money to operate the road at all? How could there have been any collection of money if the Philadelphia and Reading Railroad Company, its officers and agents, were restrained from collecting any money except to transmit the same to the treasurer of the New Jersey Central Railroad Company; and the New Jersey Central Railroad Company in the same order enjoined from permitting the Philadelphia and Reading Railroad Company to make that collection for any purpose?

(Here counsel further examined critically the order made by the court on presentation of the bill, and commented further upon the consequences of such an order, and of its abandonment now by counsel because it would not bear discussion before an intelligent court.)

Let us discuss then whether such or any injunction can be granted, without irreparable injury to all interested in the property.

The object of a preliminary injunction is to *prevent* some *threatening irreparable* mischief which should be averted until opportunity is afforded for a full and deliberate investigation of the case.

Attorney-General vs. Patterson, 1 Stew., 624.

What is the threatened, irreparable mischief which will be averted in this case?

It is asked that all the moneys collected be returned to the treasurer of the Central. Of all of it so collected but a very *small portion* belongs to the Central.

The mischief there to be remedied is that the money belonging to the Central shall not be appropriated, but kept locked up. It is needed in the maintenance and for running the road. The charge, and the *gross* charge, made in the bill, of misapplication, is not only denied by

the answer, but is proved to be false by affidavits annexed to the bill. The charge is abandoned.

Now, I suppose this case is to be decided according to the rules and practice of the court.

THE COURT:—I hope so.

MR. WILLIAMSON:—I know your Honor will decide it as you understand those rules, and your Honor has said more than once that where the answer is responsive to the bill the defendants are entitled to the benefit of it, but it is not only responsive to the bill, but it has been charged that hundreds of thousands of dollars had been taken from New York to Philadelphia, and the funds of the Central had been misappropriated. The complainant swears to that on information and belief. Why, he had never been informed by any living man that any such thing had been done! Is there anything in this case to satisfy your Honor that there is any necessity for such an order to prevent misapplication? The money is all wanted, and wanted *daily* for use; there is no time or chance for misapplication.

The Philadelphia and Reading Company gave security and continued running the road. It is in evidence that Mr. Little could not run the road without borrowing hundreds of thousands of dollars by getting an order from the court of chancery that the receiver might borrow the money, and that the securities given for it might have precedence over all mortgaged debts, and being made the first lien upon the road in preference to all creditors of every kind. Now I need not go any further—that is an answer to the question as propounded on this argument whether Mr. Little could run the road during this suit.

But *that* is a question your Honor will not speculate about as to what harm it would do, &c. When it is charged that the funds have been misappropriated, and when the charge was abandoned by the complainant, after the defendants, by witnesses, proved the fact that there had been no such misappropriation, I think your Honor will promptly say that the complainant can not get, at your Honor's hands, any injunction on that ground.

It has, I think, been intimated by your Honor that the ground for such an injunction may be the allegation that the "Reading" is insolvent. I can see very plainly what the effect of such a fact would be, and how it would be a ruling reason for granting an injunction.

That allegation is disposed of by the answer and affidavits attached; and there is no evidence, and none offered, to sustain it. If the bill and affidavits constitute any ground for such a belief, and were any inducement for granting the order of the 29th of June, then that foundation of the complainant's *status* has been entirely removed, and, according to the rules and practice of the court, can not be relied or acted upon now, or at any time, without further proof.

I am assuming now that the bill is properly verified. It is alleged that the company is insolvent. Without referring to the evidence at all, look at the surrounding circumstances. I gather from the bill it had been insolvent, and months ago had been restored by the court to its original standing.

(Counsel commented further on this point and continued as follows:)

Now what becomes of that question? Can your Honor act upon it? There is not a particle of evidence of information or knowledge of it, and the rules of the court require that if the complainant has knowledge of the facts he shall so state in his affidavit, and if he has no knowledge of the fact he shall produce affidavits of others, in the verification of the bill, who have knowledge of the fact.

Let me refer to one or two rules, that I may apply them to some further facts I shall state. The injunction is a *preventive remedy;* if the injury be already done, the writ can have no operation, for it can not be applied correctively so as to remove such injury. It is not used for the purpose of punishment, or to compel persons to do right, but simply to prevent them from doing wrong.

2 Green Ch., 136; Rogers, &c., Works vs. *E. R. R. Co., 5 C. E. G., 379, 389.*

Where it does not appear that irreparable mischief is liable to ensue from allowing a party to go on exer-

cising a right which he claims, the court never stops him before it has an opportunity of examining the question of right. The injunction proposed leaves the Reading Railroad, with all the burthens of *managing*, *maintaining*, and operating seven hundred miles of railroad, depending upon the daily receipts for the purpose, and impounds those receipts. Your Honor asked, "Can not Mr. Little run the road as well as the Reading Railroad?" No; not without the men and means, and he has neither. He must have seven thousand men to do it, and money. Who will furnish these? He has no superintendents; no engineers; no passenger or freight agents, and no money or credit with which to employ them.

No man could run this road in the way suggested. When I say it can not be done, I mean that as things stand it is impossible. He must open books of account which will fill a warehouse in ninety days, and employ experts to settle and adjust complicated accounts. He must negotiate with, and open accounts with railroads in all parts of the country. Send agents to Plainfield and Somerville and Phillipsburg, *et cetera*, to take the money and transmit it to the treasurer of the Central, and what does he do with it? Now these returns are all transmitted to headquarters at Philadelphia, where there are men engaged in separating those funds and ascertaining what belongs to the Pennsylvania Railroad Company, what to this company and what to another company. What great confusion there would be in sending all this money to the treasurer of the New Jersey Central Railroad, without any information on his part where and how it belongs, your Honor can readily see.

But it is not proposed or suggested as any remedy by or on behalf of the complainant, that Mr. Little shall run the road. They would not venture such an experiment. He can not run it unless you give him the road, the machinery, the materials, and the men to repair and manage it. He has not the money, he could not have run it when he did without the credit given him by the chancellor—without a bank account of two millions of dol-

lars. But your temporary injunction proposes no such thing; it proposes that the "Reading" shall run it, but that Mr. Little shall take possession, *not of the road*, but the *funds* only in the mean time. I refer to the order drawn up by the opposite counsel, and presented to the court as the evidence of what they want. If they on reflection shrink from the consequences, it only shows the enormity of the great wrong they were and are willing and anxious to inflict upon the defendants. How can Mr. Little run the road, or engage with others in running it, without using the receipts which it is proposed to lock up?

Another rule which I desire to apply to the facts. An injunction will not be granted where it would cause great injury to the defendants, and might be of serious detriment to the public, without corresponding advantage to the complainant. (*New Jersey Eq. Di., 620, numerous New Jersey cases.*)

What is the damage to the defendant the Reading Railroad Company? The average daily collections are about $40,000, but out of it is to be deducted, first, the balances due other railroads through interchange of business; second, the expenses of maintaining and running the road, fifty per cent. of gross receipts, $20,000; third, the annual interest of $3,194,000 on $48,714,000 of debt, funded and secured by bonds and mortgages, the annual amount of $1,414,000 on the Lehigh and Susquehanna lease, and the dividends on the stock of $1,113,792. Total, $5,743,792. Those sums for interest and other expenses are *daily* expenses, and are such expenses as are provided for by *this* and all *other railroads*, and paid out of the daily receipts. Temporary loans are made from banks, based on these receipts, and relying on these receipts to repay them. The proposed injunction will deprive the defendants of the means of payment. The other stockholders are innocent parties; the bondholders and mortgage and other creditors are innocent parties.

If this court impounds the money provided for the payment, will it be the fault of the Reading Railroad Company, and of the Central, or of either of them, if default should be made in any of these payments?

If you take from the Philadelphia and Reading Railroad Company the means of payment, will there be any reproach to them if these dividends and payments are not made?

The Reading covenanted to pay, and with the understanding of both parties, the Reading was to run the roads and manage their properties, and out of the receipts pay the debts and primary liabilities. If the court deprives them of the means, whose fault will it be if they are not paid? I do not say nor do I mean to intimate there will be any default. If the great wrong is done of impounding its resources, the Reading Railroad Company will provide other funds. It certainly will, and bide its time to have justice done it and defeat its enemies. Who can doubt, or who will call for proof of the wrong and great damage which must necessarily follow as the inevitable result of such an injunction. Now I ask your Honor whether these are not serious questions involving serious consequences, and if there is an apprehension that such would be the results, ought not this injunction be denied? Must not the dividends be paid; did not the Philadelphia and Reading Railroad Company covenant to do it, and have they not a right to do it, and have they not the right to have the funds for the purpose of doing it; can they then pay the interest or pay the dividends without receiving the money for the purpose? They are under no obligation to do it, if there is any such interference as is asked for.

The disarrangements of the accounts—money collected daily from hundreds of agents and from scores of other railroads, and paid out by the Reading for current liabilities on account of the demised premises! Who can estimate the damages to result from the disarrangement of the vast scheme by which this great enterprise is sustained and its business is managed?

And are there no damages—no injury to be apprehended on the part of the public? Remember! When you touch the treasury—when you dry up the resources of this company, or of any company—you touch its most sensitive and vital part.

It is the respect the employés have for their employers, the known ability of prompt payment, and many other considerations connected with the relationship between them, that secure a prompt and cheerful discharge of duty so essential to the public convenience and public safety.

What if the men along this road were told they were no longer to pay that money to the Philadelphia and Reading Railroad Company, but were to send it to New York, how many would say, "Who are our masters, and where is our payment to come from; is it the old story about insolvency?" How many would leave the road, how many trains would it be necessary to withdraw? I don't know. I have a right to suggest these questions that your Honor may solve them.

Are not these matters worthy of consideration? And in deciding a motion like this is it not the duty of the court to take into consideration the injury that may be inflicted on the complainant's co-stockholders, and the fact that he is acting in opposition to them in the prosecution of this suit? And where, now, in the language of the authorities, is the *corresponding advantage* to this complainant?

He owns one thousand shares of stock out of one hundred and eighty-five thousand six hundred and thirty-two shares.

He filed this bill on the 29th of June, five months ago. His counsel can suggest no damage he has sustained during that time. This cause can be heard on its merits in six weeks from to-day. Is it for the interest of the complainants, or of the stockholders or creditors of the companies, that the court should act now? Is it wise in view of the magnitude of the property and the interest involved, and of the possible public injury to ensue, that an injunction should issue under circumstances where there are so many well founded apprehensions that great injury to the defendants and the public, will result beyond any possible corresponding advantages to the complainant.

To grant an injunction under the circumstances, I submit with great deference to the court, would violate

the spirit and defeat the very object of the rule of this court, and of the statute which requires an appeal to the stockholders and to the directors before instituting a suit in the name of one stockholder for *himself and others.*

Is not that a reasonable request, and will not your Honor grant it?—to leave matters as they are for six weeks. I say with great respect for this court that the complainant, or his counsel, can never be justified in interfering with a business when it has been demonstrated by the actions of the complainant himself that he will receive no damage by waiting six weeks longer.

(Here counsel referred to and discussed at length the rules of the court, and the statutes respecting and regulating like proceedings.)

Who is responsible for this juncture of affairs, which makes any action of the court so embarrassing?

With what force does the maxim *vigilantibus non dormientibus æquitas subvenit,* apply to this complainant?

Look at his slothfulness and see how in consequence of it he has justly forfeited the *specific* relief he asks, or any relief, even at the final hearing.

1. There is no excuse given for the delay in filing the bill, or why it was not filed prior to the execution of the lease.

2. There is no allegation that he did not know that a lease was to be executed.

3. There is no excuse why he did not make the necessary inquiry.

4. On page 14 of the bill, it is alleged that on the 29th of May, the lease was executed *without* the consent of the stockholders, and especially without the consent of the complainant, and yet on page 20 of the bill it is alleged that at an election of directors on the 11th of May, 1883, most of the shares of stock cast for the election of the present directors were at the same time voted in favor of the scheme to make the lease and the directors elected for the purpose.

He says and declares that the lease was made without his consent, and without the consent of the stockholders,

and yet in the subsequent allegation of the bill he says that on the 11th of May, most of those shares of stock were cast in favor of the lease.

5. The fact is *concealed* that the complainant voted for the *directors* on the 11th of May, and for the resolution to make the lease, and that he appointed Edward C. Knight, Henry S. Little, and Franklin B. Gowen his attornies for the purpose. (Page of answer, 31.)

The answer, which is responsive to the bill, and which is uncontradicted, shows that the lease was in contemplation for more than a year prior to its execution; that it was a matter of *public notoriety* and of discussion in the newspapers; that on the 23d of June, 1882, by an order of the chancellor, an election was held and directors favorable to some arrangement were elected; that it was well known to the complainant *that the lease was in contemplation, and he made no objection to it.*

The public daily newspapers are produced, and testimony taken, and the facts I have stated fully sustained.

The complainant's explanation about the *proxy* only makes his position as a suitor in this court the worse for him.

The pretense that he intended to erase that part of it which authorized its use to sanction the lease, only shows what he was so unwilling to acknowledge in his bill, that on the 4th of May, 1883, the date of the proxy, he knew all about this scheme of the lease, and had no defense or excuse for his action. His silence under such circumstances was *acquiescence* on his part, and estops him from objecting to it. He was notified of the intended lease. The erasure in the proxy which he attempts to explain shows it; his silence is his consent.

He waits nearly two months from the date of the proxy—for one month after the execution of the lease and the delivery of possession under it—during that period he makes no objection. On the 29th of June he files this bill.

If there was any reason for such delay it was incumbent on him to show it. He does not attempt to show it.

STATUS.

What is the status of the complainant in this suit? It is submitted the bill is a *fraud* upon the court; that the suit is prosecuted by the complainant *mala fide*, and with the aid and assistance of a rival corporation; that its object is not to protect the rights of the complainant as a stockholder, but to sacrifice and destroy the rights of others.

We do not say this bill is filed by the Pennsylvania Railroad, but we say it is filed in their interest and in bad faith, and not for the object stated in the bill, and that the complainant must come into a court of equity with clean hands and clean conscience. Will the court when they see on the face of the bill, and on the facts presented to them, that the bill was not exhibited in good faith, and that it is iniquitous, and that no just man could file such a bill—will the court exercise its extraordinary powers in favor of a party filing such a bill?

I allude to the following facts:—

That the complainant is the president of the Adams Express Company.

That in years past that company did its express business on the Reading Railroad.

That the two companies had a serious difficulty and lawsuits, in which the Adams Express Company was worsted, and forcibly ejected from the road.

I refer to the testimony of the complainant, pages 143, &c., to show that he has not forgotten, and that he is sworn *never* to forget the wrongs, whether imaginary or real, in the conflict referred to. I refer to it to show the *animus* of complainant.

I refer to the further facts:—

That the Adams Express Company is doing a business on the Pennsylvania Railroad of several millions yearly.

That the complainant is the owner of $100,000 of Pennsylvania Railroad Company stock.

That the Adams Express Company owns $850,000 of the Pennsylvania stock.

That accidentally, purely so, four counsel of the Pennsylvania Railroad Company have been engaged in the preparation and management of this case;—that one drew the bill,—another sent for witnesses to meet and take directions from him at Trenton;—another issued daily bulletins from the Pennsylvania Railroad buildings, South Fourth street, Philadelphia, called *memoranda of directions;* another, the *president of the West Jersey Railroad Company*, procured affidavits and testimony and paid the bills by his own check; another *drafted* the bill, and then as *mere matter of form filed it*, then took it from the files to the printer, giving orders that no one should be furnished with a copy or should see it; then printed and issued in conjunction with an associate Pennsylvania Railroad counsel, upwards of one hundred orders of this court, concealing the fact from the court and from the defendants, and clandestinely sent a special agent from Trenton to serve them upon *conductors*, *ticket agents*, *freight agents* and *collectors*, and so attempting to close up all sources and avenues of revenue, locking up all money and means, and preventing its use to maintain and operate the road; an officer of the Pennsylvania Railroad having a person to find out how much the Reading had to pay on the first of July, and then getting the court to sign the order. Would your Honor have signed such an order if you had known the facts? In the meantime persons in the secret and connected with the Pennsylvania Railroad Company were selling stock of the Central, *short as it is called*, in anticipation of the effect upon it by the proceedings referred to, and its Vice-President and other officers declining upon examination to state their connection with these stockjobbing operations.

To sum up these *accidental* circumstances briefly:—

1. The counsel of the Pennsylvania Railroad Company drafted the bill.

2. Three counsel of the Pennsylvania Railroad Company advised and consulted, aided and abetted, in instituting and conducting the suit.

3. The officers and employés of the Pennsylvania procured and *paid* for all the affidavits annexed to the

bill, one of them sending an agent to the City of Washington to procure a single affidavit.

4. The leading counsel of the Pennsylvania Railroad Company were as busy as bees in issuing and serving mandates to ruin the two companies defendants, not a man except a counsel or officer of the Pennsylvania Railroad Company doing one single act in the institution or prosecution of this suit.

I say there is not a word of evidence to contradict all this. I say the bill shows that it was done by these parties and nobody else. When one of the witnesses was examined the question was asked him, "Who furnished you with the means to procure this evidence?

"A. Judge Logan.

"Q. How did he furnish it?

"A. Memorandum was sent him in writing."

When he was examined in Trenton, the question was asked him, "Where are those memoranda?

"A. Well some of them I destroyed, and some of them I have kept.

"Q. But have you got any of those?

"A. Yes, sir.

"Q. Are you sure of it?

"A. Yes, sir.

"Q. Where?

"A. At my office."

"Q. Will you bring them?

"A. Yes."

Then he was called another time and the question was asked him, "Will you be kind enough to produce those memoranda?

"A. I could not find them.

"Q. Have you looked for them?"

Of course he looked for them and he could not find them.

Now I direct the attention of the court to the fact that the question was asked him, whether he had seen Judge Logan, and he said "Yes", and whether he had talked with him about this memorandum, and he said "No," and yet when the question was pressed he finally admitted

that Judge Logan had sent for him to ask him what he was examined about, and he told him about the memorandum.

And yet, who is so credulous as to believe that the Pennsylvania Railroad Company had anything to do with instituting or conducting this suit? What court will say the complainant is here prosecuting this suit in good faith, in face of these facts and his own confession?

My distinguished friend from New York, who has addressed the court and given a printed brief (Mr. Seward), had so little to do with the case that, when the bill was presented to us we were very much surprised to find that his name was not printed among the names of the counsel, but the name of C. A. S. Evans was given as counsel, and no doubt the truth is that C. A. S. Evans was just as *bona fide* counsel in this case as Mr. Dinsmore is a *bona fide* complainant.

And again, what did Mr. Dinsmore know about Mr. G. and Mr. G. and the other Pennsylvania Railroad lawyers. When Mr. Dinsmore was asked the question, "How about Mr. G.?" he replied, "How about who? What is that name, Montgomery? I never heard of him. Q. Have you paid him any money? A. Oh! Mr. S. employed them all."

Mr. Conkling:—That reference to C. A. S. Evans is rather a hard cut on Mr. Seward's writing, and as he is not here I will state that it appears in the testimony, that it was a printer's error, who misread the name; it is a little reflection on his handwriting.

Mr. Williamson:—No; the reflection is that the other counsel thought so little of him as counsel that when they discovered that mistake they did not correct it, and it appears so now.

May I ask—if the Pennsylvania Railroad Company is not the real prosecutor, who is? Not Mr. Dinsmore. He is as ignorant of all these proceedings as a child just born. Let Mr. Dinsmore speak for himself; his testimony is as follows:—

"Q. Did you read the bill?

"A. Only a portion of it.

"Q. How much did you read of it?

"A. I can't answer that question.

"Q. You swore to it, did you not?

"A. Yes, sir; the same as you have sworn to papers mechanically.

"Q. What?

"A. I presume you have sworn to papers you have not read—the papers completely through—you have done as we all have done.

"Q. You must speak for yourself on that subject; you swore that the facts stated in the bill, so far as they were derived from your own knowledge, were true?

"A. Yes, sir.

"Q. And so far as they were derived from the information of others, you believed them true?

"A. Yes, sir; as far as I read them, I believe them to be true.

"Q. So far as you read them?

"A. Yes, sir.

"Q. So that in the oath—did you not in the oath say 'that the matters and things set forth and contained in the said bill of complaint, so far as they relate to him are true, and so far as they relate to others, he has been informed and believes them to be true'? * *

"You swore in this bill upon information I suppose as follows; I will read you from page 18, section 20: 'That immediately upon acquiring possession of said properties, rights and franchises,' (Counsel read from the bill as stated down to and including the words, 'as stockholder, the said the New Jersey Railroad Company'). Do you remember that?

"A. I can not say that I do?

"Q. Do you mean to say that you would swear upon information and belief that a man has embezzled $250,000, and not remember anything about it?

"A. I can only say that I do not recollect of reading that; I told you that my memory is very poor; you have found that out already, and I could not answer that I read that particular sentence and none other.

"Q. Did you know that you signed the bill with that charge in it?

"A. I can't say that I did.

"Q. Then you swore that a man had embezzled $250,000 without knowing about it, did you? * * * And yet you swore that you had been informed of it, did you not?

"A. I signed that pamphlet.

"Q. And made yourself responsible, did you not, for what was in it?

"A. Whatever there was—I swore to my knowledge and belief to some things there.

"Q. Had you any knowledge on that subject?

"A. No, sir.

"Q. None whatever?

"A. None.

"Q. Had you ever heard it breathed or whispered by anybody that such a thing had been done?

"A. No.

"Q. Never?

"A. No.

"Q. Then you swore to something you knew nothing about, did you not?

"A. Yes, sir; I swore to my knowledge and belief.

"Q. You said just now you had no knowledge on the subject?

"A. Yes, sir; I took the whole of it there, as it is often done, and swore to that pamphlet.

"Q. Who requested you to do that?

"A. There was no request; I think the commissioner brought the pamphlet to me to sign.

"Q. Did you know what it was when you signed the pamphlet?

"A. *I do not know whether I was told*—whether I read it through entirely or not; I would not swear I did not read so, or would not swear I did.

"Q. Did you know what the document was you were signing?

"A. Not as fully as if I had made a study of it; it was brought to me and I signed it.

"Q. Did you know it was a bill to set aside the Central New Jersey lease to the Reading Railroad Company?

"A. Yes, sir.

"Q. That you knew? * * *

"With regard then to these statements and allegations in the bill about which you were asked yesterday, you relied for your general information upon the statement of your lawyers?

"A. I did.

"Q. And swore to it on the faith of that?

"A. I did.

"Q. In other words, as the old story goes, you expected your lawyer to draw the bill like a lawyer, and you would swear to it like a gentleman?

"A. Yes, sir; or words to that effect; I did not think it worth while to keep a dog and bark myself; excuse the gross expression, but that is the idea in my mind.

By MR. GOWEN:

"Q. Do you expect your lawyer to stand up and be responsible for all you swear to?

"A. Yes, sir.

"Q. You do?

"A. Yes, sir; what do I pay him for."

He admits he had no *knowledge* of the facts stated in the bill, that he had no *information* in regard to them.

He made no inquiry to ascertain the facts.

Mr. S. was his lawyer, and it was his practice to let Mr. S. procure the facts and he would swear to them, even without knowing what they really were.

He does not say Mr. S. *stated* to him the facts, or that he swore to them from *information* received from him. But the very hardest thing in this catalogue was his answer to Mr. S.'s question, "Do you believe if you had time you could procure the facts? A. Yes."

What an answer under the circumstances! What a vivid remembrance of the old grudge! What an illustration to his declaration in his testimony, as to the attitude which in his estimation his counsel bears to him!

What then is the real *status* of the complainant?

He files his bill as a stockholder, under the *ninety-fourth* rule of the court.

His interests are involved with that of all the stockholders, and this suit is for their as well as his benefit.

Even admitting his *legal* right, the court would be reluctant to afford *him* a remedy which must affect all the other stockholders, and to which they are opposed. Did he go to the directors, or to the stockholders? Did he make the effort required of him by the rule to avoid this suit? Did he make the effort to "secure such creditors as he desired," which action was to refrain from executing the lease? No, but he waits until the act is done, and then files his bill.

Does this rule amount to anything?

Can it be disregarded with impunity?

Is he to be the judge whether the application would be available?

Again: Is he such a stockholder as entitles him to relief?

In his bill he alleges himself to be the owner of one thousand shares. His name stands on the book for five hundred only. The statute as between himself and the corporation and other stockholders, makes him the owner of five hundred shares.

The list of stockholders is made from the list thirty days before each election; it is open ten days for inspection to every stockholder; it is the only evidence of ownership, and the stockholder upon the books is recognized as the only owner of the stock. Every right of ownership attaches to such stockholder, and to him alone.

If it turns out from his own statement he owns two thousand shares, one thousand five hundred standing in the name of others.

Why did he conceal the fact in his bill?

Twenty or thirty days before election the secretary is obliged to make out a list of all the stockholders; ten days before the election that list is upon his desk, and every stockholder has a right to come in and look at it, to investigate the right of the stockholders to vote; then on the election that list is *prima facie* evidence of the right of ownership of the stock. Now, when the stock

came to be voted—remember it was by the action of this complainant himself—he voted as the owner of five hundred shares, and those one thousand five hundred were voted in the name of somebody else. Now, he said he was the owner of two thousand shares, and I want to direct the attention of the court to this fact, for the purpose of showing that hardly in one single respect does this man come before the court *bona fide.* Why did he conceal that fact? He stood on the books as the owner of five hundred shares; and he filed this bill in his own name as the owner of one thousand shares. If he was the owner of and as such could file his bill for one thousand shares, why did he not file his bill for two thousand? The subsequent facts revealed the reason. He was unwilling to tie up more than five hundred shares of stock by putting it in his own name, and the rest of that stock was used by his friend Mr. Babcock to loan out for the purpose of speculation. He made upwards of $3000 profit by his loans, and then comes into this court with the very same stock which was voted in favor of these directors and in favor of this lease, and which he has been speculating upon profitably in consequence of the lease, and claims himself the *bona fide* holder of one thousand shares of stock, and as such entitled to relief. I ask again, why the concealment of all these facts?

The fifteen hundred shares not standing in his name were voted on the 6th of May in the name of others. If his own stock had not voted, the votes of the other fifteen hundred would have operated to estop him. Those votes, with the votes of the other stockholders, consented to the lease. The stock was the complainant's; he is responsible for its voting. The complainant could not as owner of two thousand shares of stock consent for fifteen, and then as stockholder of five hundred shares file this bill as a dissenting stockholder. In other words could a man, the owner of two thousand shares of stock, vote fifteen hundred in favor of the lease, and then as a dissenting stockholder file a bill on the remaining five hundred shares? It is worse than this; he claims to attach to his five hundred shares not

voting, five hundred shares that did vote. Such action is a fraud upon other stockholders.

Just here another word as to the proxy. I understand it to be argued that such a proxy did not authorize the attorney to use it for the purpose. Why was not this issue made by the bill? Why conceal the fact of the complainant's ever having given a proxy?

But was any fraud practiced upon him in the use of the proxy? Did not his attorney vote on the proxy in good faith? Did he ever complain that it was wrongfully voted, or question the right of the attorney to vote on it? He knew of all the circumstances when he filed his bill. Does he make any complaint in his bill of imposition or wrong? The legal objection to the use of the proxy urged by counsel may be good as to parties who object to it as having been voted adverse to their interest.

But can the complainant object to it? Is he not estopped? If he made a mistake in the erasure, he alone is responsible for the mistake, and he alone must take the consequences. I submit to the court that a person holding two thousand shares of stock can not hold back fifteen hundred shares, loan it out at a premium, permit it to be voted on in other and *bona fide* hands, and loan it out to be sold to other stockholders voting for the lease, and then file his bill on five hundred shares standing in his own name, as a dissenting stockholder of a thousand shares—five hundred shares upon which he has been speculating, and which he did not hold when he filed the bill.

Such a stockholder is not a *bona fide* suitor in court, for himself and other stockholders, and especially when acting in opposition to the whole body of stockholders.

He is only a *bona fide* suitor when he comes into court for the *bona fide* purpose of maintaining his right. The suit is not an ordinary one.

The complainant files his bill for himself and other stockholders, and to maintain their rights as well as his own. Is he a *bona fide* complainant, and is he here for any such *bona fide* purpose? From his own testimony

it is manifest that no other stockholder can sympathize with him in the object he has in view in the prosecution of this suit. The declaration of his purpose given in his testimony can not meet with the approbation of a court of equity, for he openly and defiantly declares that it is not equity he is seeking, but justice and the protection of his legal rights whether equitable or not. I refer the court to his testimony, which is as follows:—

"Q. If you got $200 a share for that stock, would that compensate you for any injury you suffered from this lease?

"A. I have not estimated my injury yet.

"Q. Will you take $200 a share for that stock if it was offered to you?

"A. I would not sell at any price now.

"Q. No less than $1,000,000 a share?

"A. $1,000,000 a share.

"Q. Why wouldn't you sell it?

"A. Because I don't choose.

"Q. Is there not a sum of money which, if paid to you, would compensate you for any injury you have sustained by this lease?

"A. Yes, sir.

"Q. Would you be willing to accept such a sum of money as would, in your judgment, compensate you for the injury you have sustained by this lease?

"A. No.

"Q. Eh?

"A. I would not.

"Q. Was your object in filing the bill to get compensation for the injury?

"A. No.

"Q. It was not?

"A. No.

"Q. Did you file the bill for any other object than to receive compensation for your injury?

"A. No, I did not sign the bill for that purpose.

"Q. You did not sign the bill for the purpose of receiving compensation for your injury?

"A. No, I did not.

"Q. Am I right in asking you now whether you would refuse any compensation, no matter how great it was?

"A. Under the present circumstances I would refuse.

"Q. You would refuse now?

"A. I would except for a million; I hold to that."

What right has such a suitor in a court of equity?

He does not ask for remuneration or compensation or for justice, but a sword. Another thing—in regard to all this stock it appears that every dollar paid for it was paid by the Adams Express Company; to be sure by some sort of book-keeping it was refunded to them, and the stock was held, except the five hundred shares, by employés of the Adams Express Company; and was loaned out from time to time by Mr. Babcock the treasurer of that company. To be sure Mr. Dinsmore said he had his assent to do it; but there was money in the transaction; there was speculation upon it, and while Mr. Dinsmore was prosecuting the suit in this court as the owner of one thousand shares, fifteen hundred shares were loaned out on the street, and a premium of upwards of $3000 realized. In regard to the vote of the stock he makes no allegation in the bill that it was not used in good faith by Mr. Knight; they were used by the permission of the complainant by his attorney, and by an instrument under his hand and seal which gave consent to that lease. If Dinsmore made a mistake it is his fault; these defendants are the sufferers by it; his attorney acted in good faith, and third persons should not suffer.

I have upon my brief some notes in regard to the act of 1846, but I don't know whether it is necessary for me to say a word upon that part of the case; the construction given by the courts to the act is unanimous as to its effect.

THE COURT:—I think your immediate predecessor (Mr. Robeson) went over that ground very thoroughly.

Mr. WILLIAMSON:—Therefore I shall not go over it.

In deciding this motion for a *preliminary* injunction the court will be governed by the rules and practice of the court.

The application of these rules ought to dispose of this motion.

"1. The facts upon which the injunction is asked must be verified by the oath or affirmation of some person who has knowledge of the facts."

I quote the chancery rule, and ask the court to apply it to the following affidavits annexed to the bill: Mr. Dinsmore says he has no knowledge or information, as to any of the facts and so too the affidavits of Charles E. Smith, Edward Bettle, William Henry Patterson, W. G. Huey, and William D. Mills. I appeal with confidence to the court to say whether ever before such a miserable batch of affidavits was annexed to a bill filed in this court; the proofs to be taken for final hearing may supply the deficiency of the affidavits. This motion must be decided upon the *affidavits* to the bill. The final decree is made upon the *proofs*. These affidavits can only be used on this motion, and for any such purpose they are miserable failures. No fraud is charged in the bill, that is, none is specified. The general averment amounts to nothing. Mr. Gummere's argument or the greater part of it, which are comments on the lease itself, is not warranted by the pleadings. His criticism of the lease is out of place; there is no issue to justify it.

2. The bill is filed in violation of the rule of this court.

3. The familiar rule has been suggested by your Honor more than once during the progress of this application, *that is, that on a motion for a preliminary injunction, the statements of the answer responsive to the bill must be taken as true for the purpose of the motion.*

Every material allegation in the bill is denied, not upon *information*, but from knowledge of the facts, *to wit:*

a. The insolvency of the Reading.

b. The ability of the Central.

c. The concealment of facts.

d. That the lease was executed without the consent of the stockholders, and of the complainant.

I call your Honor's attention to the affidavits of Edward C. Knight, Samuel Knox, Albert Foster, and W. A. Church, which affidavits answer every specific allegation in the bill upon which an injunction could be justified.

It is respectfully submitted that the injunction should be denied.