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BILL OF COMPLAINT.

(Filed Dec. 16, 1931.)

IN CHANCERY OF NEW JERSEY.

To the Honorable, Edwin Robert Walker, Chancellor of the State of New Jersey: 10

The complainant, Public Bancorporation, a corporation under and by virtue of the laws of the State of Delaware, respectfully shows that:

1. It is now, and has been since March 24, 1931, the owner of 2000 shares of the common stock of no par value of Atlantic City Wimsett Thrift Company, the defendant corporation. 20

2. Said defendant corporation exists under and by virtue of the laws of New Jersey, and was incorporated on or about the 17th day of February, 1928, for the purpose, among other things, of engaging in a small loan business as authorized by Chapter 49, Pamphlet Laws of New Jersey, 1914, and the Acts amendatory thereof and supplementary thereto, with a total authorized capital stock of 1500 shares of preferred stock, of the par value of \$100 per share, and 5000 shares of common stock of no par value. 30

3. On or about April 29, 1931, a resolution was duly voted upon and passed by the board of directors of the defendant corporation, whereby it was

Bill of Complaint

resolved, in order to meet certain obligations of said corporation, to issue 1098 shares of the common stock of the defendant corporation, which constituted the balance of the authorized common stock then unissued.

- 10 4. Pursuant to said resolution, and without notice to the complainant, who, to the knowledge of the defendant corporation, was the owner of the shares of stock as aforesaid, and without an opportunity to it to subscribe to the said issue of 1098 shares of common stock in proportion to its then ownership of common stock, the defendant corporation, between April 29th and May 4, 1931, inclusive, issued to the following persons the shares of common stock set opposite their respective names:

20	Date of Issuance	Name	No. of Shares
	1931		
	April 30	William F. Shaw	78
	April 30	Carleton E. Adams	78
	May 4	Dennis Kelly	79
	May 4	Louis St. John	79
	April 30	Joseph Proebstle	34
	April 30	Charles Proebstle	45
	April 30	Edmund R. Smith	78
	April 30	Allen B. Endicott	78
30	April 30	Wendell H. Norris	78
	April 30	Edwin H. Harvey	78
	April 30	Albert H. Darnell	79
	April 30	Charles Godfrey	79
	April 30	Bernard F. Dever	78
	April 30	Emile Estoclet	79
	April 29	Chester Grey	78

Bill of Complaint

5. The complainant was not notified of the purpose of the board of directors to pass the resolution as aforesaid and had no knowledge of it or of the issuance of the stock made pursuant to it until on or about the 11th day of December, 1931.

6. On or about November 30, 1931, there was sent 10 to the various stockholders of the defendant corporation a notice of the regular annual meeting of said corporation, to be held at its offices No. 713 Schwehm Building, in Atlantic City, New Jersey, on Wednesday, December 16, 1931, at 4:00 o'clock in the afternoon, the purpose of said meeting being to elect a new board of directors, and to transact such other business as might properly come before said meeting.

20

7. At said meeting, the holders of the 1098 shares of common stock of the defendant corporation issued as aforesaid intend to vote on such questions as may be properly presented, and intend to exercise the same rights and privileges at that time and in the future as are exercised by all other stockholders.

8. By reason of all as aforesaid, the complainant has been deprived of its valuable right to participate in said issue of 1098 shares of common stock, 30 to which it has always been ready and willing to subscribe its proportionate share, and by reason of said deprivation, its control in the management of the defendant corporation has been destroyed and the value of its holdings materially diminished, and as against the complainant the said issue of 1098

Bill of Complaint

shares of common stock was unlawful and fraudulent.

Complainant is without adequate remedy in the courts of law, and, therefore, prays:

- 10 1. That Atlantic City Wimsett Thrift Company, a corporation of New Jersey, William F. Shaw, Carleton E. Adams, Dennis Kelly, Louis St. John, Joseph Proebstle, Charles Proebstle, Edmund R. Smith, Allen B. Endicott, Wendell H. Norris, Edwin H. Harvey, Albert H. Darnell, Charles Godfrey, Bernard F. Dever, Emile Estoclet and Chester Grey, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.
- 20 2. That the said Atlantic City Wimsett Thrift Company, its officers, agents, servants and employees may be enjoined and restrained from permitting any of the holders of the 1098 shares of common stock issued as aforesaid to vote, and restrained and enjoined from receiving said votes, at the meeting to be held on December 16, 1931, or at any subsequent meeting, and that, William F. Shaw, Carleton E. Adams, Dennis Kelly, Louis St. John, Joseph Proebstle, Charles Proebstle, Edmund R. Smith, Allen B. Endicott, Wendell H. Norris, Edwin H. Harvey, Albert H. Darnell, Charles Godfrey, Bernard F. Dever, Emile Estoclet and Chester Grey be en-
- 30 joined and restrained from voting at the meeting to be held on December 16, 1931, or at any subsequent meeting, the number of shares of common stock

Bill of Complaint

which they acquired by virtue of the issue of said 1098 shares.

3. That the 1098 shares of common stock of the defendant corporation issued between the dates of April 29th and May 4, 1931, inclusive, be cancelled and the certificates of stock in the possession of the defendants other than the defendant corporation be surrendered up for the purpose aforesaid. 10

4. That the defendants other than the defendant corporation be enjoined and restrained from negotiating or transferring the said certificates of stock in any manner or form for any purpose to any other person or purchaser whatsoever.

5. That after the cancellation and surrender of the certificates as above prayed, the defendant corporation be restrained and enjoined from re-issuing them or from issuing any other shares of stock unless and until the complainant be given the right and privilege to subscribe thereto in proportion to its holdings prior to the issue of said 1098 shares. 20

6. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises. 30

CASSMAN & GOTTLIEB,
Solicitors for and of Counsel with Complainant.

Bill of Complaint

State of New Jersey, }
County of Atlantic, } ss.

WILLIAM A. BROPHY, of full age, being duly sworn according to law, on his oath deposes and says:

10

1. I am vice-president of the Public Bancorporation, a corporation under and by virtue of the laws of the State of Delaware, the complainant in the foregoing bill of complaint named, and its agent for the purpose of making this affidavit. I have read the bill of complaint and am familiar with the contents thereof, and the matters and things therein contained are true.

20

2. Said Public Bancorporation is now, and has been since March 24, 1931, the owner of 2000 shares of the common stock of no par value of Atlantic City Wimsett Thrift Company, the defendant corporation.

30

3. Said defendant corporation exists under and by virtue of the laws of New Jersey, and was incorporated on or about the 17th day of February, 1928, for the purpose, among other things, of engaging in a small loan business as authorized by Chapter 49, Pamphlet Laws of New Jersey of 1914, and the Acts amendatory thereof and supplementary thereto, with a total authorized capital stock of 1500 shares of preferred stock, of the par value of \$100 per share, and 5000 shares of common stock of no par value.

Bill of Complaint

4. On or about April 29, 1931, a resolution was duly voted upon and passed by the board of directors of said defendant corporation, whereby it was resolved, in order to meet certain obligations of said corporation, to issue 1098 shares of the common stock of the defendant corporation, which constituted the balance of the authorized common stock 10 then unissued.

5. Pursuant to said resolution, and without notice to the complainant, who, to the knowledge of the defendant corporation, was the owner of the shares of stock as aforesaid, and without an opportunity to it to subscribe to the said issue of 1098 shares of common stock in proportion to its then ownership of common stock, the defendant corporation, between April 29th and May 4th, 1931, inclusive, issued to the following persons the shares of common stock set opposite their respective names:

Date of Issuance	Name	No. of Shares	
1931			
April 30	William F. Shaw	78	
April 30	Carleton E. Adams	78	
May 4	Dennis Kelly	79	
May 4	Louis St. John	79	
April 30	Joseph Proebstle	34	
April 30	Charles Proebstle	45	30
April 30	Edmund R. Smith	78	
April 30	Allen B. Endicott	78	
April 30	Wendell H. Norris	78	
April 30	Edwin H. Harvey	78	
April 30	Albert H. Darnell	79	
April 30	Charles Godfrey	79	

Bill of Complaint

April 30	Bernard F. Dever	78
April 30	Emile Estoclet	79
April 29	Chester Grey	78

6. The complainant was not notified of the purpose of the board of directors to pass the resolution as
 10 aforesaid and had no knowledge of it or of the issuance of the stock made pursuant to it until on or about the 11th day of December, 1931.

7. On or about November 30, 1931, there was sent to the various stockholders of the defendant corporation a notice of the regular annual meeting of said corporation, to be held at its offices No. 713 Schwehm Building, Atlantic City, New Jersey, on Wednesday, December 16, 1931, at 4:00 o'clock in the after-
 20 noon, the purpose of said meeting being to elect a new board of directors, and to transact such other business as might properly come before said meeting.

8. At said meeting, the holders of the 1098 shares of common stock of the defendant corporation issued as aforesaid intend to vote on such questions as may be properly presented and intend to exercise the same rights and privileges at that time and in
 30 the future as are exercised by all other stockholders.

9. By reason of all as aforesaid, the complainant has been deprived of its valuable right to participate in said issue of 1098 shares of common stock, to which it has always been ready and willing to subscribe its proportionate share, and by reason of said

Bill of Complaint

deprivation, its control in the management of the defendant corporation has been destroyed and the value of its holdings materially diminished, and as against the complainant the said issue of 1098 shares of common stock was unlawful and fraudulent.

WM. A. BROPHY. 10

Sworn and subscribed before me this 16th day of December, 1931.

ELIZABETH R. POWELL,
Notary Public of N. J.

20

30

(Filed Dec. 16, 1931.)

10 IN CHANCERY OF NEW JERSEY.

Between
PUBLIC BANCORPORATION,
 Complainant,
 and
ATLANTIC CITY WIMSETT
THRIFT COMPANY, *et als.,*
 Defendants.

}
On Bill, &c.
Order to Show Cause
and Restraint.

This matter being opened to the Court by Cassman & Gottlieb, solicitors of the complainant, and the Court having read the bill of complaint in the above entitled cause and the affidavit thereunto annexed.

It is, on this 16th day of December, 1931, ordered that the defendants, Atlantic City Wimsett Thrift 30 Company, William F. Shaw, Carleton E. Adams, Dennis Kelly, Louis St. John, Joseph Proebstle, Charles Proebstle, Edmund R. Smith, Allen B. Endicott, Wendell H. Norris, Edwin H. Harvey, Albert H. Darnell, Charles Godfrey, Bernard F. Dever, Emile Estoclet and Chester Grey, show cause before

Order to Show Cause and Restraint

the Chancellor, at the Chancery Chambers in the City of Atlantic City, on Tuesday, the 22nd day of December, 1931, at the hour of 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the said defendants should not be restrained and enjoined according to the prayer of said bill.

10

It is further ordered that the defendant, Atlantic City Wimsett Thrift Company, its officers, agents, servants and employees, in the meantime and until the further order of this Court in the premises, desist and refrain from permitting any of the holders of the 1098 shares of stock issued pursuant to the resolution of April 29, 1931, to vote and desist and refrain from receiving said votes at the meeting to be held on December 16, 1931, or at any subsequent meeting, and that the defendants, William F. Shaw, Carleton E. Adams, Dennis Kelly, Louis St. John, Joseph Proebstle, Charles Proebstle, Edmund R. Smith, Allen B. Endicott, Wendell H. Norris, Edwin H. Harvey, Albert H. Darnell, Charles Godfrey, Bernard F. Dever, Emile Estoclet and Chester Grey, desist and refrain from voting at the meeting to be held on December 16, 1931, or at any subsequent meeting the number of shares of common stock which they acquired by virtue of the issue of said 1098 shares.

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It is further ordered that a copy of the bill of complaint and affidavit annexed, and a copy of this order, be served upon the said defendants, said service to be made at least 5 days before the return of this order to show cause, and that for the purpose

Answering Affidavit

of service, copies certified as true copies by complainant's solicitors shall be sufficient.

E. R. WALKER,
C.

Respectfully advised,

R. H. INGERSOLL,

10

V. C.

ANSWERING AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

20

Between

PUBLIC BANCORPORATION,

Complainant,

and

ATLANTIC CITY WIMSETT

THRIFT COMPANY, *et**als.,**Defendants.*

On Bill, &c.

Answering Affidavit.

30

State of New Jersey, }
Atlantic County, } ss.

CHARLES H. GODFREY, of full age, being duly sworn according to law upon his oath, deposes and says:

Answering Affidavit

1. I am one of the defendants in the above-entitled cause and am president of the Atlantic City Wimsett Thrift Company, another of the defendants herein.

2. Around September 12th, 1928, I became interested in the Atlantic City Wimsett Thrift Company, a corporation of the State of New Jersey, which was formed by officers of the National Wimsett Company and National Wimsett Securities Corporation, to engage in the small loan and general finance business, using the system known as the Wimsett System. 10

3. At the time that I became interested, the Atlantic City Wimsett Thrift Company had executed by its then officers, the two agreements dated June 7th, 1928, one with the National Wimsett Company and the other with the National Wimsett Securities Corporation, which was in fact, a subsidiary of the National Wimsett Company, which two agreements are recited at length in the affidavit of Wendell H. Norris. 20

4. The agreement with the National Wimsett Company provided for that company installing the Wimsett System on behalf of the Atlantic City Company for an agreed price of \$5,000.00, while the agreement with the National Securities Corporation appointed that company the fiscal agent of the Atlantic City Company in the sale of its stock and agreed to pay therefor a commission of 15% upon each share of preferred stock sold, at the rate of 30

Answering Affidavit

\$100.00 per share, no commission to be paid for the sale of the common stock. The agreement further gave the National Wimsett Securities Corporation the option to subscribe for 2500 shares of the common stock of the Atlantic City Company, at the rate of \$5.00 per share.

10

5. By the terms of the certificates of incorporation as indicated by the two agreements above mentioned, the Atlantic City Wimsett Thrift Company had a total authorized capital stock of 1500 shares of preferred stock of a par value of \$100.00 per share, and 5,000 shares of common stock without nominal or par value. The certificate of incorporation further provided that the common stock could be issued by the corporation from time to time and
20 for such consideration as would be determined upon by the Board of Directors.

6. Thereafter, on September 12th, 1928, a directors' meeting of the Atlantic City Wimsett Thrift Company was held, at which time, the various officers who had organized the Atlantic City Company resigned and a board, consisting of local people, was appointed, who, in turn, elected me as president, and other local people were elected to the other offices.

30

7. Thereafter, I conferred with the officials of the National Wimsett Securities Corporation and pointed out that the agreement giving that company an option to purchase 2500 shares of the common stock should be amended so as to limit their right to a maximum purchase of 2,000 shares in or-

Answering Affidavit

der that local people, by purchasing the balance of 3,000 shares of common stock would be able to control the affairs of the company; that it was necessary to so limit their option rights, otherwise the local people could not be induced to invest in the stock of the company. The National Wimsett Securities Corporation agreed thereto. In October, 1928, by authority of the board of directors of the Atlantic City Wimsett Thrift Company, an agreement was executed between National Wimsett Securities Corporation and the Atlantic City Company, whereby the agreement of June 7th, 1928, was in part amended so as to limit the option granted to the Securities Corporation to subscribe to a maximum of 2,000 shares of the common stock at \$5.00 per share. A copy of this said agreement is contained in the affidavit of Wendell H. Norris. 20

8. No express resolution was adopted by the board of directors of the Atlantic City Wimsett Thrift Company providing for a sale of the 5,000 shares of common stock at the rate of \$5.00 per share, but it was certainly the express intention and purpose of the board so to do. It was in furtherance of that express intention that the contract amending the option of the National Securities Corporation was executed and it was in furtherance of that express intention that the National Securities Corporation proceeded to solicit local people and endeavored to sell the total issue of preferred and common stock at the rate of \$100.00 per share for the preferred and \$5.00 per share for the common. 30

Answering Affidavit

9. Under these arrangements, the National Securities Corporation disposed of approximately 700 shares of preferred stock and of approximately 1900 shares of common stock. The accounts of the Atlantic City Wimsett Thrift Company, on the one hand and the National Wimsett Company and the
10 National Wimsett Securities Corporation on the other hand were adjusted so that stock totalling 2,000 shares of common together with some cash was given to the National Wimsett Company in full payment of the sum of \$5,000.00 owing to the National Wimsett Company for the installation of the Wimsett System and for the 15% commission owing to the National Securities Company for the sale of the preferred and common stock.

20 10. In furtherance of the express intentions and purposes of the board of directors originally adopted to dispose of the unissued common stock, a series of resolutions were passed by the board of directors as is indicated by the true copies which are recited in the affidavit of Wendell H. Norris, each of which resolutions provided for a sale of the unissued common stock to the preferred stockholders at the rate of \$5.00 per share in certain proportions to the preferred stockholders. These endeavors did
30 not prove successful, but a few shares of common stock were purchased.

11. On April 27th, 1931, the company received a letter from the Second National Bank, a local institution, to whom the company was indebted in the sum of \$11,900.00, the following letter:

Answering Affidavit

“Atlantic City Wimsett Thrift Co.,
Schwehm Building,
Atlantic City, N. J.

Attention: Mr. Wendell Norris.

Dear Mr. Norris:

This is to advise you that we are requesting at the end of this month for a payment on many 10 of our demand notes.

Included in our demand at this time is a request for a payment of at least \$6,000.00 on the note of the Atlantic City Wimsett Thrift Company in the amount of \$11,900.

Interest bills for the demand notes will be forwarded within the next couple of days and it will be convenient for us to have you meet our demands at the time that the interest bill is presented on April 30th. 20.

Very truly yours,

C. E. WOLFINGER

VICE-PRESIDENT”

12. A special meeting of the board of directors was immediately called to consider certain ways and means of meeting the demands raised by the bank. At that time, the company had on deposit in cash, the approximate sum of \$3,700.00. At that time, the earnings of the company, from the time of its 30 commencing business in December, 1928, had not been sufficient to pay in full the semi-annual installments of 8% dividend upon the preferred stock. These installments accrued so that there was owing to the preferred stockholders accrued unpaid cumulative dividends amounting to the approximate sum-

Answering Affidavit

of \$9,800.00. This situation being presented to the board of directors, I urged them to take up the remaining unissued common stock, which consisted of 10908 shares of stock, by each director taking a proportionate share thereof at the full rate of \$5.00 per share and paying therefor either in cash or by
10 means of promissory notes which could be discounted at the bank and the proceeds used in satisfying the bank's requirement of \$6,000.00. After some discussion, and despite the fact that the common stock did not have the value of \$5.00 per share, the various directors who are herein joined as parties defendant, were prevailed upon and passed a resolution dated April 29th, 1931, which said resolution is fully recited in the affidavit of Wendell H. Norris, and which provided for the purchase by the
20 various directors of their pro rata portion of the unissued common stock at the rate of \$5.00 per share. The proceed from the sale of this stock was then immediately used in paying the Second National Bank the sum of \$6,000.00 on account of their indebtedness.

13. At the time the resolution dated April 29th, 1931, was passed and the unissued common stock was disposed of the complainant herein was not
30 registered upon the books of the company as the owner of the 2,000 shares of common stock which was originally conveyed to the National Wimsett Company. On the contrary, the said stock at the said time, was registered in the name of the United Industrial Banestocks Corporation, which was the successor to the National Wimsett Company, and

Answering Affidavit

which United Industrial Banestocks Corporation was at the time of this said resolution in a defunct condition. The said complainant herein, is either the successor to, or the United Industrial Banestocks Corporation or is an assignee of the said stock from that said corporation.

10

14. It was not the intention of this defendant nor of the defendant's company nor of the board of directors of the defendant company to commit a fraud upon any stockholder, but on the contrary the disposal of the said remaining unissued common stock was in complete compliance with its original express purpose of disposing of the entire issue of common stock and was precipitated by the emergency created by the demand of the Second National Bank.

CHARLES H. GODFREY.

20

Sworn and subscribed to before me this 22 day of December, 1931.

(Seal)

JENNIE Y. SCHMIDT,
Notary Public of N. J.

30

Answering Affidavit

ANSWERING AFFIDAVITS.

IN CHANCERY OF NEW JERSEY.

10

Between

PUBLIC BANCORPORATION,

Complainant,

and

ATLANTIC CITY WIMSETT

THRIFT COMPANY, *et**als.,**Defendants.*

On Bill, &c.

Answering Affidavits.

20

State of New Jersey, }
 Atlantic County, } ss.

WENDELL H. NORRIS, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am one of the defendants herein and am secretary of the Atlantic City Wimsett Thrift Company, another of the defendants herein.

2. The following are true copies of an agreement executed between National Wimsett Company and Atlantic City Wimsett Thrift Company, dated June 7th, 1928, of an agreement executed between Na-

Answering Affidavit

tional Wimsett Securities Corporation and Atlantic City Wimsett Thrift Company, dated June 7th, 1928, agreement executed between National Wimsett Securities Corporation and Atlantic City Wimsett Thrift Company, amending agreement dated June 7th, 1928, executed in October, 1928, and of resolutions adopted by the board of directors of the Atlantic City Wimsett Thrift Company, which are pertinent hereto, which said agreements and resolutions are annexed to or contained in the minutes of the minute book of the Atlantic City Wimsett Thrift Company. 10

(a) "THIS MEMORANDUM OF AGREEMENT dated at the city of Chicago, State of Illinois, as of the 7th day of June, 1928, between the NATIONAL WIMSETT COMPANY, a Delaware Corporation, hereinafter referred to as the NATIONAL COMPANY and the ATLANTIC CITY WIMSETT THRIFT COMPANY, a New Jersey Corporation, hereinafter referred to as the ATLANTIC CITY COMPANY, WITNESSETH: 20

WHEREAS, the ATLANTIC CITY CO. proposes to enter into the Industrial or character loan business in the city of Atlantic City, New Jersey, and is desirous of acquiring an adequate and proper system for the conduct of such business, and 30

WHEREAS, the National Wimsett Company, under the terms and provisions of a certain contract in writing under date of May 27th, 1927, acquired from the Peoples Finance & Thrift Company of America, a Delaware Corporation,

Answering Affidavit

10 a license to use 'Wimsett System,' and the right to license other persons, firms or corporations to use the same exclusively in restricted districts in certain cities in the United States, and in connection therewith to use the name 'Wimsett,' and all plans, designs, forms, working sheets and data used by the Peoples finance & Thrift Co. of America in the establishment and operation of Wimsett Loan Companies such as have been used in approximately one hundred and thirty (130) such Wimsett Loan Companies in the United States, together with all improvements, thereon and additions thereto, and

20 WHEREAS, the city of Atlantic City, New Jersey, is one of the cities selected by the National Wimsett Company for the establishment and operation of such a Wimsett Loan Company, and

WHEREAS, the Atlantic City Company desires to acquire from the National Wimsett Company the exclusive right to use said Wimsett System for Atlantic City, New Jersey, and

30 WHEREAS, the Atlantic City Company has been organized with provisions in its charter whereby the total number of shares that may be issued by the Corporation is 6,500, of which 1,500 shares of the par value of \$100 per share amounting in the aggregate to \$150,000 shall be 7% Preferred stock and 5,000 common which shares are without nominal or par value, and may be issued by the Corporation from time to time for such consideration as may be fixed by the Board of Directors thereof, but which is in-

Answering Affidavit

tended to be sold at five dollars (\$5.00) per share.

NOW THEREFORE, in consideration of the mutual undertakings and agreements, of the parties hereto, it is agreed as follows:

(1) The National Wimsett Company agrees to and hereby does grant to the Atlantic City 10 Wimsett Thrift Company an exclusive and perpetual franchise for the city of Atlantic City, New Jersey, for the use of said Wimsett System including all appurtenances thereto as it is authorized so to do by, and under the terms of the aforesaid contract of May 27, 1927, with the Peoples Finance & Thrift Company of America, and in connection therewith, give the Atlantic City Company the advantage of counsel and advice, and provide statement or state- 20 ment forms weekly or monthly reports.

(2) The Atlantic City Company agrees to accept, and does accept the exclusive franchise for the use of Wimsett System, together with all appurtenances, and agrees to use same exclusively in the operation of a Wimsett Loan Company in the city of Atlantic City, New Jersey, and in the conduct of its business it agrees to conform to said system, and in so doing from time to time to advise and consult with the National 30 Wimsett Company or its duly authorized representative; That when it is ready to open for business it will pay to the National Wimsett Company the sum of five thousand dollars (\$5,000.00), the same being consideration for services rendered and to be rendered, and the

Answering Affidavit

10 granting of franchise as herein granted. The Atlantic City Company agrees to have made an audit of its business by a firm of certified Public Accountants, to be agreed upon, quarterly, if considered practical and economical, but in no event less than immediately after the close of each fiscal year, and to furnish the National Wimsett Company a copy of any and all such audits; to systematically use the system of report forms furnished by the National Company, and to send them promptly to the National Company for consideration and advice by the National Company.

20 (3) The National Company will pay all the expenses of the incorporation of the Atlantic City Company. The National Company agrees to select a manager for the said business of the Atlantic City Company subject to the approval of the Board of Directors of the Atlantic City Co.; advise with the said Board in the matter of location for the business, selection and purchase of fixtures, the execution of a proper lease for the premises to be occupied, and all details necessary to the establishment of the business ready for operation; furnish all necessary forms to install the Wimsett System with which to conduct the business; furnish all necessary advisory service through a service man to be employed and paid by the National Company.

30 This service man in addition to teaching the employees of the Atlantic City Company the mechanics of the business under Wimsett System, will call upon business and professional

Answering Affidavit

men of Atlantic City to acquaint them with the advantages they may secure by availing themselves of the service of the Atlantic City Co.; furnish copy of customary advertising program in connection with establishing a loan demand; complete a business structure for such Atlantic City Company with a view of obtaining subordinate or subsidiary capital at favorable rates. 10

The ATLANTIC CITY CO. further agrees that the NATIONAL CO. shall be granted the right to have one representative on the Board of the said ATLANTIC CITY COMPANY.

(4) IT IS AGREED that this Memorandum of Agreement includes within it the entire agreement between the parties hereto, and that no addition or modification hereof shall be binding upon either party hereto, unless such addition or modification be in writing signed by the parties hereto and attached hereto as a rider. 20

IN WITNESS WHEREOF, the Parties hereto have, by their respective and duly authorized officers, hereunto set their corporate signatures and seals, all as of the day and year first above set forth.

NATIONAL WIMSETT COMPANY

By W. B. Pillsbury

President 30

ATTEST:

H. W. ARBAUGH

Secretary

ATLANTIC CITY WIMSETT
THRIFT CO.

By James M. Canning

President

Answering Affidavit

ATTEST

BRUCE BERCKMANS

Secretary''

10: (b) "THIS MEMORANDUM OF AGREEMENT dated at the City of Chicago, State of Illinois, as of the 7th day of June, 1928 between the NATIONAL WIMSETT SECURITIES CORPORATION, a Delaware Corporation, hereinafter referred to as the Securities Corporation, and the ATLANTIC CITY WIMSETT THRIFT COMPANY, a New Jersey Corporation, hereinafter referred to as the ATLANTIC CITY COMPANY, WITNESSETH:

20: WHEREAS, the Atlantic City Company proposes to enter into the industrial or character loan business in the city of Atlantic City, New Jersey, and desires to sell its authorized capital stock for the purpose of providing the necessary capital with which to operate its business, and

30: WHEREAS, the Securities Corporation is engaged in the business of selling the capital stock of corporations entering into the character or industrial loan business under the 'WIMSETT SYSTEM,' and has an organization created and in existence for that purpose, and

WHEREAS, the Atlantic City Co. desires to secure the services of said Securities Corporation for the purpose above set forth.

NOW, THEREFORE, in consideration of the

Answering Affidavit

mutual undertakings and agreement of the parties hereto, it is agreed as follows:

THE ATLANTIC CITY COMPANY hereby appoints the Securities Corporation as its sole and exclusive fiscal agent for the purpose of selling the capital stock of the Atlantic City Company, and the Securities Corporation hereby accepts such appointment and in connection therewith, agrees to put forth its utmost efforts to sell such stock of the Atlantic City Company at as early a date as possible, making available the proceeds thereof for the use by the Atlantic City Company. The basis of such sale shall be as follows:

THE ATLANTIC CITY COMPANY has provided in its articles of incorporation for a capital issue of sixty-five hundred shares (6500) of which fifteen hundred (1500) shares are of a par value of one hundred dollars (\$100.00) per share, amounting in the aggregate, to one hundred fifty thousand dollars (\$150,000.00) is preferred stock intended to be sold by the Company at par, and five thousand (5,000) shares are common stock, which shares are without nominal or par value, and may be issued by the Corporation from time to time for such consideration as may be issued by the Corporation from time to time for such consideration as may be fixed by the Board of Directors thereof, but which is intended to be sold at five dollars (\$5.00) per share. It is understood that the Securities Company shall sell such Pre-

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ferred stock at one hundred dollars (\$100.00) per share, and such common stock at five dollars (\$5.00) per share, and that the Securities Corporation, as consideration for making such sales, shall receive from the Atlantic City Company a commission of fifteen per cent (15%) of the sales price of such Preferred stock sold, and no per cent (%) of the sales price of such Common stock sold, payment of such commission to be made the Securities Corporation by the Atlantic City Company as sales are made and delivered to the Atlantic City Co. and in conformity to the laws and regulations of the State of New Jersey.

The ATLANTIC CITY CO. further agrees that the NATIONAL WIMSETT SECURITIES CORP. shall be granted the right to subscribe for twenty-five hundred (2500) shares of the common stock of the ATLANTIC CITY CO. for which they shall pay five dollars (\$5.00) per share.

IT IS UNDERSTOOD and agreed that this Memorandum of Agreement includes within it the entire agreement between the parties hereto, and that no addition or modification thereof shall be binding upon either party hereto, unless such addition or modification be in writing signed by the parties hereto and attached as a rider.

IN WITNESS WHEREOF, the Parties hereto have by their respective and duly authorized officers, hereunto set their corporate signatures

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and seals, all as of the day and year first above set forth.

NATIONAL WIMSETT SECURITIES CORP.

By K. W. Arbaugh

President

ATTEST:

F. R. GOODWIN

Ass't Secretary

ATLANTIC CITY WIMSETT THRIFT COMPANY

By JAMES M. CANNING

President

ATTEST:

BRUCE BERCKMANS

Secretary

10

20

(c) "AGREEMENT made this day of October, A. D. nineteen hundred and twenty-eight, between NATIONAL WIMSETT SECURITIES CORPORATION, a corporation of the State of Delaware, hereinafter referred to as the 'Securities Corporation,' and the ATLANTIC CITY WIMSETT THRIFT COMPANY, a corporation of the State of New Jersey, hereinafter referred to as the 'Atlantic City Company,' witnesseth:

30

WHEREAS, heretofore, on the 7th day of June, 1928, the Securities Corporation and the Atlantic City Company entered into articles of agreement whereby the Atlantic City Company appointed the Securities Corporation, as its sole and exclusive fiscal agent, for the purpose

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of selling the capital stock of the Atlantic City Company, and the Securities Corporation thereby accepted such appointment; and

10 WHEREAS, said agreement further provided that the Securities Corporation was granted the right to subscribe for twenty-five hundred (2500) shares of the common stock of the Atlantic City Company, for which they should pay Five (\$5.00) Dollars per share; and

WHEREAS, the parties hereto have agreed that before a general campaign for the sale of said stock shall be undertaken, that said articles of agreement shall be amended:

20 NOW THEREFORE BE IT KNOWN, in consideration of the premises, and the further sum of One (\$1.00) Dollar, each to the other in hand paid, the receipt whereof is hereby acknowledged, the parties hereto have, and by these presents do agree as follows:

30 1. That the sole and exclusive fiscal agency by said agreement created is hereby ratified and approved, except that it is limited in point of time to the first day of May, A. D. 1929, at which time all rights of said Securities Corporation thereunder, to act as such sole and exclusive fiscal agent shall cease and determine, and all rights guaranteed under said agreement, of which this is an amendment, not therefore earned, shall cease and end. Provided, however, that nothing herein contained shall deprive the Securities Corporation of the right to receive commissions earned for the sale of stock sold prior to the first day of May, 1929.

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2. That the option granted unto Securities Corporation to subscribe for shares of the Atlantic City Company shall be limited to the right to subscribe to two thousand (2000) shares of the common stock of the Atlantic City Company, for which Atlantic City Company shall receive Five (\$5.00) Dollars per share. Provided, 10 however, that nothing herein contained shall deprive the said Securities Corporation of the right to subscribe to said two thousand shares of said common stock, provided said right is exercised within sixty (60) days after the said Atlantic City Company shall open its office for business at Atlantic City, New Jersey.

IN WITNESS WHEREOF, the parties hereto have by their respective and duly authorized officers, hereunto set their corporate signatures and seals, all as of the day and year first above set forth. 20

NATIONAL WIMSETT SECURITIES
CORPORATION

By K. W. ARBAUGH

President.

Attest:

F. R. GOODWIN

Ass't. Secretary.

ATLANTIC CITY WIMSETT THRIFT 30
COMPANY

By CHAS. H. GODFREY

Attest:

WENDELL H. NORRIS

Secretary."

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10 (d) "Moved by Mr. Adams, seconded by Mr. Dever, that all surplus Common Stock (less a reserve of 1 share of Common for each share of Preferred unissued) be sold at \$5.00 per share and that Preferred Stockholders by first offered surplus Common Stock at ratio of $\frac{1}{2}$ share of Common to 1 share of Preferred or at proper ration. That a letter be drafted and approved by Attorney offering above Stock to Preferred Stockholders for limited period of ten days from date of letter. Motion approved."

20 (e) "Manager reported that letters had been sent to Preferred Stockholders, as directed, offering Common Stock at the rate of $\frac{3}{4}$ of a share to 1 share of Preferred Stock, but that amounts pro rated did not include any fractional shares. Time limit 4:00 P. M., March 10, 1930.

Mr. Charles S. Wholberg, representing the National Wimsett Company and the United Industrial Bancstocks Corporation, was then recognized by the chair.

30 Mr. Wholberg stated that he was opposed to the issuing of surplus Common Stock as authorized in the Minutes of February 17, on the ground that should the remaining Preferred Stock of this Company not be sold the Stock held by the National Company would be depreciated in value pro rata.

Upon the request of the President, Vice-President Darnell, then took the Chair.

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Moved by Mr. Godfrey, seconded by Mr. Endicott, that the proper officers be and hereby are authorized to issue such Common shares of Stock as were authorized to each Stockholder in the February 17 minutes. Officers are also authorized to waive March 10, 1930, time limit in issuing certificates. 10

Chair then called for discussion.

The letter of the Company Attorney, Allen Endicott, dated January 13, 1930, which gave his favorable opinion as to the legality of issuing Common Shares as stated above was read by Mr. Darnell. Motion unanimously approved."

(f) "Manager was instructed to write to all Stockholders who had not sent in their checks 20
subscribing to the shares of Common Stock offered in the letter of March 1, 1930, in order that the record of refusal might be had in the office."

(g) "Moved by Mr. Grey, seconded by Dr. Harvey, 'that letters be sent to all Preferred Stockholders, who have not declined offering of Common Stock as per letter of March 1st offering for sale: 30

1—Unsubscribed Common Stock, less a reserve of 1 share of Common to each share of Preferred unissued.

2—Price of Common Stock—\$5.00 per share.

3—Common Stock to be offered and sold in

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proportion to holding of Preferred Stock held by each Stockholder.

Motion approved.'''

10 (h) "Manager was instructed to write Directors requesting them to take up their first allotment of Common Stock as quickly as possible."

"Manager reported that new letters had been sent out offering re-allotted Common Stock to Stockholders who had purchased Common Stock of previous allotment."

(i) "Meeting called to order at 4:00 P. M. by the President.

20 The following letter from the Second National Bank, dated April 27, 1931, was read:

'Atlantic City Wimsett Thrift Co.

Schwehm Building

Atlantic City, N. J.

Attention: Mr. Wendell Norris

Dear Mr. Norris:

This is to advise you that we are requesting at the end of this month for a payment on many of our demand notes.

30 Included in our demand at this time is a request for a payment of at least \$6,000.00 on the note of the Atlantic City Wimsett Thrift Company in the amount of \$11,900.

Interest bills for the demand notes will be forwarded within the next couple of days and it will be convenient for us to have you meet our

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demands at the time that the interest bill is presented on April 30th.

Very truly yours,

C. E. Wolfinger

Vice-President.'

President reported that the Second National Bank, to whom the Company is now indebted 10 in the sum of \$11,900.00, as evidenced by a promissory note in that sum now held by the bank, had informed him that the bank would require a reduction of \$6000 on the promissory note upon its maturity on April 30, 1931.

The President further reported that E. E. Estoclet, A. H. Darnell, Dennis Kelly, W. F. Shaw, C. E. Adams, E. H. Harvey, E. R. Smith, Charles Proebstle, Chester Grey, Louis St. John, B. F. Dever, A. B. Endicott (Furn. Co.), W. H. 20 Norris and C. H. Godfrey had offered to purchase 1098 shares of the Common non par value Stock of the Company at the rate of \$5.00 per share and to pay for same by check, or promissory note payable within four months.

A general discussion followed.

Mr. Estoclet then offered the following resolution which was seconded by Mr. Proebstle.

'BE IT RESOLVED by the Board of Directors that whereas moneys are necessary to 30 be raised to be applied in payment or reduction of certain promissory notes of the Company now held by the Second National Bank, which notes amount to the sum of \$11,900.00 and will mature on demand, that the offers made by E.

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10 E. Estoclet, A. H. Darnell, Dennis Kelly, W. F. Shaw, C. E. Adams, E. H. Harvey, E. R. Smith, Charles Proebstle, Chester Grey, Louis St. John, B. F. Dever, A. B. Endicott, W. H. Norris and C. H. Godfrey to purchase 1098 shares of Common no par value stock of the Company remaining unissued, at the rate of \$5.00 per share and to be paid by means of promissory notes executed by each of the offerees to the order of the Company in the full amount of their respective purchase and payable within four months from the date of purchase be and the said offers hereby are accepted and the President and Secretary are hereby authorized to issue certificates of Common no par value stock to the offerees in accordance with the provisions of this resolution.'

20

Motion approved.

Motion to adjourn."

30 On April 29th, 1931, the date of the resolution hereinabove recited, the said 2,000 shares of common stock, originally issued to the National Wimsett Company, was registered upon the books of my company in the name of United Industrial Bancstocks Corporation, which was the successor to the National Wimsett Company.

On May 6th, 1931, upon receipt of the said 2,000 shares duly transferred to the complainant, I registered said stock on said date in the name of the said complainant.

WENDELL H. NORRIS,

Conclusions

Sworn and subscribed to before me, this 22 day
of December, 1931.

(Seal)

JENNIE Y. SCHMIDT,
Notary Public of N. J.

10

CONCLUSIONS.

(Filed Feb. 5, 1932.)

IN CHANCERY OF NEW JERSEY.

Between

PUBLIC BANCORPORATION,

Complainant,

and

ATLANTIC CITY WIMSETT

THRIFT COMPANY, *et*

als.,

Defendants.

20

On Bill, &c.
Conclusions.

One who has agreed in writing to act as sales 30
agent for the entire authorized stock of a company,
and who agrees to subscribe for a certain proportion
of said entire amount (and to whom stock in such
amount has been issued), waives the right to sub-
scribe to a pro rata portion of such stock which may

Conclusions

have remained unsold by it and unissued by the corporation.

Order to show cause vacated.

10 MESSRS. CASSMAN & GOTTLIEB, for complainant.

MESSRS. ENDICOTT & ENDICOTT, for defendants.

INGERSOLL, V. C.:

The Atlantic City Wimsett Thrift Company is a corporation of this State, having been incorporated on or about February 17, 1928, for the purpose, among other things, of engaging in a small loan business. Said company has a total authorized capital stock of 1,500 shares of preferred stock of the par value of \$100 per share, and 5,000 shares of common stock of no par value.

Prior to April, 1931, the Public Bancorporation, the complainant, was the owner of 2,000 shares of the common stock of said Atlantic City Company, 1,902 shares having been sold principally to local people in Atlantic City, the remaining 1,098 shares of the original authorized capital stock remaining in the treasury unsold.

On April 27, 1931, a demand was made on the Atlantic City Company by a creditor, a local bank, demanding the payment of at least \$6,000 on a note of \$11,900 held by the bank. A special meeting of the Board of Directors was immediately called to consider ways and means of meeting the demands

Conclusions

of the bank. The defendant company had not earned sufficient to pay the semi-annual installment of dividends upon the preferred stock. At that time there was owing to the preferred stockholders the sum of \$9,800 and the company had on deposit, in cash, the approximate sum of \$3,700.

This situation being presented to the Board of Directors, the president urged upon those present to take up the remaining unissued common stock of 1,098 shares, by each director taking a proportionate number thereof, at the rate of \$5.00 per share paying therefor in cash or by means of promissory notes, which could be discounted in the banks, the proceeds of which could be used in satisfying the bank's demands. 10

The president further reported that E. E. Estoclet, A. H. Darnell, Dennis Kelly, W. F. Shaw, C. E. Adams, E. H. Harvey, E. R. Smith, Charles Proebstle, Chester Grey, Louis St. John, B. F. Dever, A. B. Endicott (Furn. Co.), W. H. Norris and C. H. Godfrey had offered to purchase 1,098 shares of the common non par value stock of the company at the rate of \$5.00 per share, and to pay for the same by check, or promissory note payable within four months. 20

After discussion, the following resolution was adopted:

“BE IT RESOLVED by the Board of Directors that whereas moneys are necessary to be raised to be applied in payment or reduction of certain promissory notes of the Company now held by the Second National Bank, which notes amount to the sum of \$11,900.00 and will 30

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10 mature on demand, that the offers made by E. E. Estoclet, A. H. Darnell, Dennis Kelly, W. F. Shaw, C. A. Adams, E. H. Harvey, E. R. Smith, Charles Proebstle, Chester Grey, Louis St. John, B. F. Dever, A. B. Endicott, W. H. Norris and C. H. Godfrey to purchase 1,098 shares
20 of common no par value stock of the Company remaining unissued, at the rate of \$5.00 per share and to be paid by means of promissory notes executed by each of the offerees to the order of the Company in the full amount of their respective purchase and payable within four months from the date of purchase be and the said offers hereby are accepted and the president and secretary are hereby authorized to issue certificates of common no par value
30 stock to the offerees in accordance with the provisions of this resolution."

In accordance with said resolution, certificates for 78 shares were issued to each of the following: William F. Shaw, Carleton E. Adams, Edmund R. Smith, Allen B. Endicott, Wendell H. Norris, Edwin H. Harvey, Bernard F. Dever and Chester Grey, and 79 shares to Dennis Kelly, Louis St. John, Albert H. Darnell, Charles Godfrey and Emile Estoclet,
30 clet, and 34 shares to Joseph Proebstle and 45 shares to Charles Proebstle.

The bill is filed alleging that the complainant "has been deprived of its valuable right to participate in said issue of 1,098 shares of common stock, to which it has always been ready and willing to subscribe its proportionate share, and

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by reason of said deprivation, its control in the management has been destroyed and the value of its holdings materially diminished, the said issue of 1,098 shares of common stock being unlawful and fraudulent."

Section 124 of the General Corporation Act, as 10 amended, reads as follows:

"Upon the issue of capital stock for cash, unless otherwise expressly provided in the certificate of incorporation, or in by-laws adopted by two-thirds in interest of each class of stockholders, every stockholder shall have a right (unless waived by him), according to the number of shares held by him to purchase his pro rata proportion of the stock to be issued, at such price (which may be in excess of the par value), 20 within such time and on such terms as shall be fixed and determined by the board of directors; provided, that unless otherwise expressly provided in the certificate of incorporation, or by-laws adopted by two-thirds in interest of each class of stockholders, a holder of preferred or special stock entitled to limited preferential dividends and to a fixed sum upon any distribution of the assets of the corporation shall have and be entitled to exercise such preemptive 30 rights only in case of the issue of stock of the same class held by him or of any class which has preference or priority as to assets or dividends over the class of stock held by him. In any such case the board of directors shall have power to determine what disposition shall be

made of any stock to be issued and which shall not be subscribed for by stockholders." *Supplement to Compiled Statutes of New Jersey*, p. 293, Section 124.

10 Counsel for defendants insist that this statute, as well as the general rule of law, applies only to "new issues of stock," and does not refer to original unissued stock in the hands of the corporation, which, by an original act of the directors, is awaiting sale.

There appears to be no adjudication upon this point in this State, although Vice-Chancellor Grey, in *Way v. The American Grease Company*, 60 N. J. Eq. 263, says:

20 "The power of distributing a new issue does not lie at the mere choice of directors. It is not a perquisite which they may use for their private advantage. They may not overthrow or secure for themselves the control of the corporation by means of a new issue of stock. This is true, whether as to a part of the stock authorized by the original incorporation which remains untaken (*Reese v. Bank*, 31 Pa. St. 78), or as to stock issued after incorporation, on a subsequently authorized increase. *Gray v. Portland Bank*, 3 Mass. 364."

30 The reason for this rule is given in 14 C. J., Note 37, p. 394:

(1) "The same rule applies, as we shall see (*infra*, Par. 525), in the case of an issue of an increase of the capital stock, and 'one reason on which the rule in either case rests, is that the

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stockholder has the right to preserve the proportionate interest in the corporation first acquired by him. To dispose of the unissued or added stock to strangers, or to other stockholders, without affording him an opportunity to take his pro rata share, would be, without his consent, to impair his interest and influence in the corporation, and diminish the relative value of his holdings; and this the directors, who are trustees for the stockholders, may not lawfully do.' *Crosby v. Stratton*, 17 Colo. A. 212, 220, 68 P. 130. To same effect *Gray v. Portland Bank*, 3 Mass. 364, 3 AmD 156; *Humboldt Driving Park Assoc. v. Stevens*, 34 Nebr. 528, 52 N. W. 568, 33 AmSR 654; *Jones v. Concord, etc., R. Co.*, 67 N. H. 119, 38 A. 120; *Meredith v. New Jersey Zinc, etc., Co.*, 55 N. J. Eq. 211, 37 A 539; *Reese v. Montgomery County Bank*, 31 Pa. 78, 72 AmD 726. 10

(2) 'This doctrine rests on the idea that, while its own corporate stock is property, so that the sale and disposition thereof involve questions of business policy properly controllable by the directors' or stockholders' meeting, the original issue thereof involves something more; that the latter act goes to underlying organization—modifies the fundamental arrangement and proportions of the members. This doctrine is supported by overwhelming and almost unconflicting array of authority.' *Luther v. C. J. Luther Co.*, 118 Wis. 112, 122, 94 N. W. 69, 99 AmSR 977." 30

A note in American and English Annotated Cases, Vol. 9, p. 746, says:

10 "It seems that when a corporation decides to issue stock which it was authorized to but did not issue at the time of its organization, each shareholder is entitled to subscribe to his proportionate share of such stock. Crosby v. Stratton, 17 Colo. App. 212, 68 Pac. Rep. 130; Morris v. Stevens, 178 Pa. St. 563, 36 Atl. Rep. 151; Eidman v. Bowman, 58 Ill. 444; Reese v. Montgomery County Bank, 31 Pa. St. 78; Montgomery Bank v. Reese, 26 Pa. St. 143. Compare Curry v. Scott, 54 Pa. St. 270. However, in the case of stock which has been once issued and subsequently reacquired by the corporation, the stockholders have no right to a preference over outsiders in subscribing for the same. Crosby v. Stratton, 17 Colo. App. 212; 68 Pac. Rep. 130; Bonnet v. Eagle Pass First Nat. Bank, 24 Tex. Civ. App. 613, 60 S. W. Rep. 325; State v. Smith, 48 Vt. 290. 'The issued stock of a corporation represents its paid-up capital. The holder owns it and disposes of it as he sees fit; and if it finds its way back into the treasury of the corporation it becomes assets in the same sense that the corporation's other property is assets. It is still part of the paid-up capital; and its sale no more affects the value of the other stock, or the standing of the stockholders in the corporation, than the sale of the corporation's tools or machinery.' Crosby v. Stratton, 17 Colo. App. 212, 68 Pac. Rep. 130."

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Still continuing said note:

"A stockholder may waive his right to a preference in the distribution of new stock. This waiver may be express or implied. Thus where a stockholder does not assert his privilege within a fixed time, or if no time is specified within a reasonable time, he will be deemed to have waived his right to a preference. Crosby v. Stratton, 17 Colo. App. 212, 68 Pac. Rep. 130; Eidman v. Bowman, 58 Ill. 444; Real Estate Trust Co. v. Bird, 90 Md. 229, 44 Atl. Rep. 1048; Hammond v. Edison Illuminating Co., 131 Mich. 79, 90 N. W. Rep. 1040; Jones v. Morrison; 31 Minn. 140, 16 N. W. Rep. 854; Bonnet v. Eagle Pass First Nat. Bank, 24 Tex. Civ. App. 613."

Is the complainant in a position to enforce this principle? 20

Three separate agreements were entered into between the Atlantic City Wimsett Thrift Company, the defendant, and the National Wimsett Company, as follows:

"(a) THIS MEMORANDUM OF AGREEMENT dated at the City of Chicago, State of Illinois, as of the 7th day of June, 1928, between the NATIONAL WIMSETT COMPANY, a Delaware Corporation, hereinafter referred to as the NATIONAL COMPANY, and the ATLANTIC CITY WIMSETT THRIFT COMPANY, a New Jersey Corporation, hereinafter referred to as the ATLANTIC CITY COMPANY, WITNESSETH: 30

WHEREAS, the ATLANTIC CITY CO. proposes to enter into the Industrial or character

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loan business in the city of Atlantic City, New Jersey, and is desirous of acquiring an adequate and proper system for the conduct of such business, and

10 WHEREAS, the National Wimsett Company, under the terms and provisions of a certain contract in writing under date of May 27th, 1927, acquired from the Peoples Finance & Thrift Company of America, a Delaware Corporation, a license to use 'Wimsett System,' and the right to license other persons, firms or corporations to use the same exclusively in restricted districts in certain cities in the United States, and in connection therewith to use the name 'Wimsett', and all plans, designs, forms, working sheets and data used by the Peoples Finance & Thrift Co. of America in the establishment and operation of Wimsett Loan Companies such as have been used in approximately one hundred and thirty (130) such Wimsett Loan Companies in the United States, together with all improvements thereon and additions thereto, and

20
30 WHEREAS, the city of Atlantic City, New Jersey, is one of the cities selected by the National Wimsett Company for the establishment and operation of such a Wimsett Loan Company, and

WHEREAS, the Atlantic City Company desires to acquire from the National Wimsett Company the exclusive right to use said Wimsett System for Atlantic City, New Jersey, and

WHEREAS, the Atlantic City Company has

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been organized with provisions in its charter whereby the total number of shares that may be issued by the Corporation is 6,500, of which 1,500 shares of the par value of \$100 per share amounting in the aggregate to \$150,000 shall be 7% Preferred stock and 5,000 common which shares are without nominal or par value, and may be issued by the Corporation from time to time for such consideration as may be fixed by the Board of Directors thereof, but which is intended to be sold at five dollars (\$5.00) per share. 10

NOW THEREFORE, in consideration of the mutual undertakings and agreements of the parties hereto, it is agreed as follows:

(1) The National Wimsett Company agrees to and hereby does grant to the Atlantic City Wimsett Company an exclusive and perpetual franchise for the city of Atlantic City, New Jersey, for the use of said Wimsett System, including all appurtenances thereto, as it is authorized so to do by and under the terms of the aforesaid contract of May 27, 1927 with the Peoples Finance & Thrift Company of America, and in connection therewith, give the Atlantic City Company the advantage of counsel and advice, and provide statement or statement forms weekly or monthly reports. 20 30

(2) The Atlantic City Company agrees to accept, and does accept the exclusive franchise for the use of Wimsett System, together with all appurtenances, and agrees to use same exclusively in the operation of a Wimsett Loan

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10 Company in the city of Atlantic City, New Jersey, and in the conduct of its business it agrees to conform to said system, and in so doing from time to time to advise and consult with the National Wimsett Company or its duly authorized representative; that when it is ready to open for business it will pay to the National Wimsett Company the sum of five thousand dollars (\$5,000.00), the same being consideration for services rendered and to be rendered, and the granting of franchise as herein granted. The Atlantic City Company agrees to have made an audit of its business by a firm of certified Public Accountants, to be agreed upon, quarterly, if considered practical and economical, but in no event less than immediately after the close of each fiscal year, and to furnish the National Wimsett Company a copy of any and all such audits; to systematically use the system of report forms furnished by the National Company, and to send them promptly to the National Company for consideration and advice by the National Company.

20
30 (3) The National Company will pay all the expenses of the incorporation of the Atlantic City Company. The National Company agrees to select a manager for the said business of the Atlantic City Company, subject to the approval of the Board of Directors of the Atlantic City Co.; advise with the said Board in the matter of location for the business, selection and purchase of fixtures, the execution of a proper lease for the premises to be occupied, and all details

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necessary to the establishment of the business ready for operation; furnish all necessary forms to install the Wimsett System with which to conduct the business; furnish all necessary advisory service through a service man to be employed and paid by the National Company. This service man, in addition to teaching the employees of the Atlantic City Company the mechanics of the business under Wimsett System, will call upon business and professional men of Atlantic City to acquaint them with the advantages they may secure by availing themselves of the service of the Atlantic City Co.; furnish copy of customary advertising program in connection with establishing a loan demand; complete a business structure for such Atlantic City Company with a view of obtaining subordinate or subsidiary capital at favorable rates. 10 20

The ATLANTIC CITY CO. further agrees that the NATIONAL CO. shall be granted the right to have one representative on the Board of the said Atlantic City Company.

(4) IT IS AGREED that this Memorandum of Agreement includes within it the entire agreement between the parties hereto, and that no addition or modification hereof shall be binding upon either party hereto, unless such addition or modification be in writing signed by the parties hereto and attached hereto as a rider. 30

IN WITNESS WHEREOF, the parties hereto have, by their respective and duly authorized officers, hereunto set their corporate

Conclusions

signatures and seals, all as of the day and year first above set forth."

(Signatures)

10 “(b) THIS MEMORANDUM OF AGREEMENT dated at the City of Chicago, State of Illinois, as of the 7th day of June, 1928, between the NATIONAL WIMSETT SECURITIES CORPORATION, a Delaware Corporation, hereinafter referred to as the Securities Corporation, and the ATLANTIC CITY WIMSETT THRIFT COMPANY, a New Jersey Corporation, hereinafter referred to as the ATLANTIC CITY COMPANY, WITNESSETH:

20 WHEREAS, the Atlantic City Company proposes to enter into the industrial or character loan business in the city of Atlantic City, New Jersey, and desires to sell its authorized capital stock for the purpose of providing the necessary capital with which to operate its business, and

30 WHEREAS, the Securities Corporation is engaged in the business of selling the capital stock of corporations entering into the character or industrial loan business under the ‘WIMSETT SYSTEM,’ and has an organization created and in existence for that purpose, and

WHEREAS, the Atlantic City Co. desires to secure the services of said Securities Corporation for the purpose above set forth.

NOW THEREFORE, in consideration of the

Conclusions

mutual undertakings and agreement of the parties hereto, it is agreed as follows:—

THE ATLANTIC CITY COMPANY hereby appoints the Securities Corporation as its sole and exclusive fiscal agent for the purpose of selling the capital stock of the Atlantic City Company, and the Securities Corporation 10 hereby accepts such appointment and in connection therewith, agrees to put forth its utmost efforts to sell such stock of the Atlantic City Company at as early a date as possible, making available the proceeds thereof for the use by the Atlantic City Company. The basis of such sale shall be as follows:—

THE ATLANTIC CITY COMPANY has provided in its articles of incorporation for a capital issue of sixty-five hundred shares (6500) 20 of which fifteen hundred (1500) shares are of a par value of one hundred dollars (\$100.00) per share, amounting in the aggregate to one hundred fifty thousand dollars (\$150,000.00) is preferred stock intended to be sold by the Company at par, and five thousand (5,000) shares are common stock, which shares are without nominal or par value, and may be issued by the Corporation from time to time for such consideration as may be fixed by the Board of Di- 30 rectors thereof, but which is intended to be sold at five dollars (\$5.00) per share. It is understood that the Securities Company shall sell such Preferred stock at one hundred dollars (\$100.00) per share, and such common stock at five dollars (\$5.00) per share, and that the Se-

Conclusions

10 securities Corporation, as consideration for making such sales, shall receive from the Atlantic City Company a commission of fifteen per cent (15%) of the sales price of such Preferred stock sold, and no per cent (%) of the sales price of such Common stock sold, payment of such commission to be made the Securities Corporation by the Atlantic City Company as sales are made and delivered to the Atlantic City Co. and in conformity to the laws and regulations of the State of New Jersey.

20 The ATLANTIC CITY CO. further agrees that the NATIONAL WIMSETT SECURITIES CORP. shall be granted the right to subscribe for twenty-five hundred (2500) shares of the common stock of the ATLANTIC CITY CO. for which they shall pay five dollars (\$5.00) per share.

30 IT IS UNDERSTOOD and agreed that this Memorandum of Agreement includes within it the entire agreement between the parties hereto, and that no addition or modification thereof shall be binding upon either party hereto, unless such addition or modification be in writing signed by the parties hereto and attached as a rider.

IN WITNESS WHEREOF, the Parties hereto have by their respective and duly authorized officers, hereunto set their corporate signatures and seals, all as of the day and year first above set forth."

(Signatures.)

Conclusions

“(c) AGREEMENT made this day of October, A. D. nineteen hundred and twenty-eight, between NATIONAL WIMSETT SECURITIES CORPORATION, a corporation of the State of Delaware, hereinafter referred to as the ‘Securities Corporation,’ and the ATLANTIC CITY WIMSETT THRIFT COM- 10 PANY, a corporation of the State of New Jersey, hereinafter referred to as the ‘Atlantic City Company,’ witnesseth:

WHEREAS, heretofore, on the 7th day of June, 1928, the Securities Corporation and the Atlantic City Company entered into articles of agreement whereby the Atlantic City Company appointed the Securities Corporation as its sole and exclusive fiscal agent, for the purpose of selling the capital stock of the Atlantic City 20 Company, and the Securities Corporation thereby accepted such appointment; and

WHEREAS, said agreement further provided that the Securities Corporation was granted the right to subscribe for twenty-five hundred (2500) shares of the common stock of the Atlantic City Company, for which they should pay Five (\$5.00) Dollars per share; and

WHEREAS, the parties hereto have agreed that before a general campaign for the sale of 30 said stock shall be undertaken, that said articles of agreement shall be amended:

NOW THEREFORE BE IT KNOWN, in consideration of the premises, and the further sum of One (\$1.00) Dollar, each to the other in hand paid, the receipt whereof is hereby ac-

Conclusions

knowledge, the parties hereto have, and by these presents, do agree as follows:

10 1. That the sole and exclusive fiscal agency by said agreement created is hereby ratified and approved, except that it is limited in point of time to the first day of May, A. D. 1929, at which time all rights of said Securities Corporation thereunder, to act as such sole and exclusive fiscal agent shall cease and determine, and all rights guaranteed under said agreement, of which this is an amendment, not theretofore earned, shall cease and end. Provided, however, that nothing herein contained shall deprive the Securities Corporation of the right to receive commissions earned for the sale of stock sold prior to the first day of May, 1929.

20 2. That the option granted unto Securities Corporation to subscribe for shares of the Atlantic City Company shall be limited to the right to subscribe to two-thousand shares of the common stock of the Atlantic City Company, for which Atlantic City Company shall receive Five (\$5.00) Dollars per share. Provided, however, that nothing herein contained shall deprive the said Securities Corporation of the right to sub-
30 scribe to said two thousand shares of said common stock, provided said right is exercised within sixty (60) days after said Atlantic City Company shall open its office for business at Atlantic City, New Jersey.

IN WITNESS WHEREOF, the parties hereto have by their respective and duly authorized officers, hereunto set their corporate sig-

Conclusions

natures and seals, all as of the day and year first above set forth."

(Signatures)

A general synopsis of these agreements shows a recital that the Atlantic City Company was authorized by its charter to issue 6,500 shares, of which 10
1,500 shares were to be preferred stock and 5,000 were to be common stock without par value, which might be issued by the Atlantic City Company from time to time for such consideration as might be fixed by the Board of Directors, but which were intended to be sold at \$5.00 per share, and an agreement that the National Company should sell said stock and receive a commission of 15% of the sales price of the preferred stock sold, but no commission on the sale of the common stock, and that the National 20
Company should have an option to subscribe for 2,000 shares of the common stock of the Atlantic City Company; which apparently is the stock now held by said company.

In the minutes of the company appears the following:

"Mr. Charles S. Wholberg, representing the National Wimsett Company and the United Industrial Bancstocks Corporation, was then recognized by the chair. Mr. Wholberg stated 30
that he was opposed to the issuing of surplus common stock as authorized in the minutes of February 17, 1930 (which authorized that all surplus common stock, less a reserve of one share of common for each share of preferred unissued, be sold at \$5.00 per share and that

Conclusions

10 preferred stockholders be first offered surplus common stock at ratio of one-half share of common to one share of preferred or at proper ratio; that a letter be drafted and approved by attorney, offering above stock to preferred stockholders for limited period of ten days from date of letter, which motion was approved), on the ground that should remaining preferred stock of this company not be sold, the stock held by the National Company would be depreciated in value pro rata."

20 On April 29, 1931, the date of the resolution authorizing the sale of this stock to the gentlemen named, the same 2,000 shares of common stock originally issued to the National Wimsett Company were registered upon the books of the Atlantic City Wimsett Thrift Company in the name of United Industrial Bancstocks Corporation, which was the successor to the National Wimsett Company. Upon receipt of the 2,000 shares duly transferred to the complainant, the secretary of the company registered said stock on said date in the name of said company.

30 Insofar as the evidence is now before me, the said National Company, by the above agreements, limited itself to a subscription of 2,000 shares of the 5,000 so authorized to be issued. This raises at least a doubt as to the rights of the complainant, and, as to doubt is to deny, the order to show cause, with the restraint, will be dismissed.

The resolution of the Board of Directors authorizing the issuance of this stock upon the delivery

Order Dismissing Order to Show Cause

of promissory notes is, of course, invalid, as stock must be sold for either cash or for property purchase. However, I deem it unnecessary to comment further upon this, as there is no testimony before me that any of said stock remains unpaid for in cash.

10

ORDER DISMISSING ORDER TO SHOW
CAUSE.

(Filed Feb. 6, 1932.)

IN CHANCERY OF NEW JERSEY.

20

Between

PUBLIC BANCORPORATION,
Complainant,

and

ATLANTIC CITY WIMSETT
THRIFT COMPANY, *et*
als.,

Defendants.

On Bill, &c.
Order Dismissing Or-
der to Show Cause.

30

The Court having read and considered the affidavits filed by the parties herein, and having heard the argument of counsel, and being of the opinion

Order Dismissing Order to Show Cause

that the order to show cause heretofore granted herein should be dismissed,

It is thereupon, on this 6th day of February, 1932, on motion of Endicott & Endicott, solicitors for the defendants herein, ordered that the said order to show cause heretofore allowed to Public Bancorporation, the complainant herein, be and the same is hereby dismissed.

E. R. WALKER,
C.

Respectfully advised,
R. H. INGERSOLL,
V. C.

*Supplemental Order Dismissing Restraint*SUPPLEMENTAL ORDER DISMISSING
RESTRAINT.

(Filed Feb. 17, 1932.)

10

IN CHANCERY OF NEW JERSEY.

Between

PUBLIC BANCORPORATION,
Complainant,

and

ATLANTIC CITY WIMSETT
THRIFT COMPANY, *et*
*als.,**Defendants.*

On Bill, &c.

Supplemental Order 20
Dismissing Restraint.

The Court having by its order dated February sixth, 1932, dismissed the order to show cause granted herein, and being of the opinion that the restraint contained in said order to show cause should also be specifically dismissed, 30

It is thereupon, on this 17th day of February, 1932, on motion of Endicott & Endicott, solicitors for the defendant herein, ordered that the restraint

Notice of Appeal

contained in the order to show cause heretofore allowed, be and the same is hereby dismissed.

E. R. WALKER,
C.

Respectfully advised,
R. H. INGERSOLL,
V. C.

10

NOTICE OF APPEAL.

(Filed Feb. 18, 1932.)

IN CHANCERY OF NEW JERSEY.

20

Between

PUBLIC BANCORPORATION,
Complainant,

and

ATLANTIC CITY WIMSETT
THRIFT COMPANY, *et*
als.,

Defendants.

On Bill, &c.
Notice of Appeal.

30

The complainant, Public Bancorporation, appeals from the interlocutory order made in the above-entitled cause by the Chancellor, Edwin Robert Walker, on the advice of Vice-Chancellor Robert H.

Notice of Appeal

Ingersoll, on February 6, 1932, and the supplemental order made on February 17, 1932, and from the whole and every part of said orders, to the Court of Errors and Appeals in the last resort in all causes.
Dated: February 17, 1932.

CASSMAN & GOTTLIEB,
Solicitors for and of Coun- 10
sel with Complainant,
Public Bancorporation.

I conceive there is good cause for appeal in the above-entitled cause.

HARRY GOTTLIEB,
Of Counsel with Com- 20
plainant, Public Ban-
corporation.

[ENDORSED]

Due and legal service of the within
Notice of Appeal is hereby acknowl- 30
edged this 17th day of February, 1932.

Endicott & Endicott,
Sols. of Deft., Atlantic City
Wimsett Thrift Company.

PETITION OF APPEAL.

(Filed Feb. 23, 1932.)

10 NEW JERSEY COURT OF ERRORS AND
APPEALS.

20	Between PUBLIC BANCORPORATION, <i>Complainant-Appellant,</i> and ATLANTIC CITY WIMSETT THRIFT COMPANY, <i>et</i> <i>als.,</i> <i>Defendants-Appellees.</i>	}	On Appeal from the Court of Chancery. Petition of Appeal.
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*To the Honorable, the Court of Errors and Appeals
in the last resort in all causes:*

30 The petition of Public Bancorporation, the appellant in the above-entitled cause, respectfully shows that:

1. Petitioner finds itself aggrieved by an interlocutory order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date February 6,

Petition of Appeal

1932, and a supplemental order bearing date February 17, 1932, in a certain cause in said Court of Chancery wherein the said Public Bancorporation was complainant and Atlantic City Wimsett Thrift Company and others were defendants, in this respect, to wit, that the said orders adjudge that the order to show cause theretofore allowed to Public Bancorporation, the complainant in said cause, and the restraint therein contained, be dismissed. 10

And petitioner appeals from the orders of the Chancellor, which decree as aforesaid, upon the ground that the same are erroneous in that they, in effect, adjudge that the complainant, the owner of 2,000 shares of the common stock of the defendant corporation, Atlantic City Wimsett Thrift Company, had no right to share in the new issue of 1,098 shares of common stock of said defendant corporation issued pursuant to a resolution of said defendant corporation dated April 29, 1931; in that they, in effect, adjudge that said resolution of April 29, 1931, authorizing the issuance of said new issue in exchange for promissory notes was a valid and legal exercise of power by the directors of the defendant corporation; in that they, in effect, adjudge that the resolution of April 29, 1931, authorizing the issuance of said issue to certain directors of the defendant corporation, in violation of the right of the complainant to participate in subscribing to the same, was a valid and legal exercise of power by the directors of the defendant corporation; in that they, in effect, adjudge that the predecessors in title of complainant to said stocks had waived their right to subscribe to any new or further issue of common 20 30

Petition of Appeal

stock of the defendant corporation; and in that they, in effect, adjudge that any alleged waiver of the predecessors in title of complainant to said stock was binding on the complainant, a bona fide purchaser for value, in good faith, of said stock.

Petitioner therefore prays that the said orders of
10 the Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

CASSMAN & GOTTLEB,
*Solicitors for and of Coun-
sel with Appellant.*

20

[ENDORSED]

Due and legal service of the within
petition is hereby acknowledged this
20 day of February, 1932.

Endicott & Endicott,
Solrs. of Appellees.

30

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between

PUBLIC BANCORPORATION,
Complainant-Appellant,

and

ATLANTIC CITY WIMSETT THRIFT COMPANY, *et als.,*
Defendants-Appellees.

ON BILL, &c.

ON APPEAL FROM THE COURT OF CHANCERY.

BRIEF FOR DEFENDANTS-APPELLEES.

STATEMENT OF FACTS.

The state of facts recited in the appellant's brief omitted a number of undisputed facts vital to a proper determination of this appeal, wherefore we have elected to more fully recite the same herein.

Brief for Defendants-Appellees

On or about February 17th, 1928, the Atlantic City Wimsett Thrift Company, the defendant-appellee herein, was incorporated in the State of New Jersey. By the terms of the certificate of incorporation the company had a total authorized capital stock of 1500 shares of preferred stock having a par value of \$100.00 per share, and 5,000 shares of common stock without nominal or par value. The certificate of incorporation further provided that the common stock could be issued by the corporation from time to time for such consideration as would be determined upon by the Board of Directors.

The company was formed by, and the incorporators consisted of, officers of the National Wimsett Company and its subsidiary, the National Wimsett Securities Corporation, for the purpose of engaging in the small loan and general finance business in the City of Atlantic City, New Jersey, using the system known as the "Wimsett System."

On June 7th, 1928, and before the defendant company had begun business, two written agreements were executed by it, one with the National Wimsett Company and the other with the National Wimsett Securities Corporation.

The agreement with the National Wimsett Company provided for the installation of the "Wimsett System" in the Atlantic City Company for the agreed price of \$5,000.00.

The agreement with the National Wimsett Securities Corporation appointed that company the fiscal agent of the Atlantic City Company in the sale of its stock and agreed to pay therefor a commission of 15% upon each share of preferred stock sold at the

Brief for Defendants-Appellees

rate of \$100.00 per share; no commission to be paid for the sale of the common stock; and further, gave the Securities Corporation the option to subscribe for 2500 shares of the common stock of the Atlantic City Company at the rate of \$5.00 per share.

Thereafter on September 12th, 1928, a directors' meeting of the Atlantic City Company was held, at which time, the various officers of the two mother companies who had organized the defendant company, resigned and a board consisting solely of persons resident in or about Atlantic City was appointed. This board then elected Mr. Charles H. Godfrey, one of the defendants herein, as president, and other local people were elected to the other offices.

Mr. Godfrey then conferred with the officials of the National Wimsett Securities Corporation and pointed out that the agreement giving that company an option to purchase 2500 shares of the common stock of the defendant company should be amended so as to limit their right to a maximum purchase of 2,000 shares in order that local people could always be assured of having control of the company, and that unless the agreement was so amended it would be difficult to induce the local people to invest in the stock of the company. The National Wimsett Securities Corporation agreed thereto, and in October, 1928, a supplemental agreement was executed between that corporation and the defendant company whereby the Securities Corporation was limited to the right to subscribe to a maximum of 2,000 shares of the common stock at \$5.00 per share.

The Securities Corporation then proceeded to so-

Brief for Defendants-Appellees

licit local people and endeavored to sell the total issue of the preferred and common stock at the rate of \$100.00 per share for the preferred and \$5.00 per share for the common. As the result thereof the Securities Corporation disposed of approximately 700 shares of the preferred stock and approximately 1900 shares of common.

The Securities Corporation then exercised its option and received the 2,000 shares of common stock and paid therefor by receiving a credit for the sum of \$5,000.00 owing to the National Wimsett Company for the installation of the "Wimsett System," and a further credit consisting of the commission earned in the sale of the preferred stock.

No original express resolution was adopted by the Board of Directors of the defendant company providing for the sale of the total issue of the common and capital stock but it was the express intention and purpose of the board to so dispose of the said stock. In furtherance of this express intention and purpose the Board of Directors of the defendant company passed a series of resolutions which provided for the sale of the original unissued common stock to the preferred stockholders at the rate of \$5.00 per share in fixed proportions to the respective holdings of the preferred stockholders and letters were sent to the various stockholders urging them to purchase the common stock. These endeavors did not prove successful and but a few shares of common stock were purchased by the stockholders.

On April 27th, 1931, the defendant company received a letter from the Second National Bank, a banking institution located in Atlantic City, to whom

Brief for Defendants-Appellees

the defendant company was indebted in the sum of \$11,900.00. By the terms of this letter the bank requested a payment of at least \$6,000.00 on April 30th, 1931, on account of the monies owing to it by the company.

Immediately upon receipt of this letter a special meeting of the Board of Directors of the defendant company was called for April 29th, 1931, to consider ways and means of meeting the demand raised by the bank.

At that time the company had on deposit in cash the approximate sum of \$3,700.00, and the earnings of the company from the time it commenced business in December, 1928, had not been sufficient to pay in full the semi-annual installments of dividends that had accrued upon the issued preferred stock so that there was owing to the preferred stockholders accrued unpaid dividends amounting to the sum of \$9,800.00. At that time there remained in the company's treasury 1098 shares of unissued common stock.

Mr. Godfrey, who presided at the special meeting of the board, presented the full situation to the directors and urged them to take up the remaining 1098 shares of stock by each director taking a proportionate share thereof at the full rate of \$5.00 per share.

Despite the fact that, by virtue of the company's financial condition, the stock was not worth the price of \$5.00 per share, the directors passed a resolution dated April 29th, 1931, which provided for the purchase by the various directors of their pro rata portion of the unissued common stock at the rate of

Brief for Defendants-Appellees

\$5.00 per share to be paid for either in cash or by means of promissory notes. The stock was forthwith issued and the proceeds from the sale thereof was then immediately used in paying the Second National Bank the sum of \$6,000.00 as demanded by the letter.

At the time the resolution dated April 29th, 1931, was passed and the unissued common stock was disposed of, the 2,000 shares of common stock originally issued to the National Wimsett Company was registered in the name of its successor, the United Industrial Bancstocks Corporation. The Bancstocks Corporation was then in a defunct condition.

The complainant, Public Bancorporation, which is either the successor to the United Industrial Bancstocks Corporation or its assignee of the said stock, was not registered upon the books of the company as the owner of the 2,000 shares of common stock at the time the resolution dated April 29th, 1931, was passed and the stock thereunder issued.

The complainant, on December 16th, 1931, some eight months after the 1098 shares were issued, filed a bill in chancery alleging solely that it is the owner of the 2,000 shares of common stock originally issued to the National Wimsett Company; complained of the fact that the 1098 shares of common stock had been issued without notice to it; alleged that it had been deprived of the right to subscribe to its proportionate share of the 1098 shares of the common stock, and prayed that the defendant company and its fifteen directors be enjoined from negotiating the said stock; that the said certificates of stock be cancelled and the complainant be given the privilege to sub-

Brief for Defendants-Appellees

scribe thereto in proportion to its holdings. As the result thereof the Court of Chancery allowed a rule to show cause and enjoined the defendants herein from voting the said 1098 shares of stock.

The cause coming up before the Court on the return day of the order to show cause, the Court dismissed the order to show cause and accompanying restraint.

ARGUMENT OF LAW.

I.

COMPLAINANT-APPELLANT, PUBLIC BAN-
CORPORATION, WAS NOT ENTITLED TO
SUBSCRIBE TO A PRO RATA PROPOR-
TION OF THE ISSUE OF 1098 SHARES OF
STOCK AND ITS ISSUANCE WAS LAW-
FUL AND PROPER.

The first point argued by appellant in its brief is the proposition that the complainant-appellant was entitled to subscribe to a pro rata proportion of the 1098 shares of stock and its issuance in contravention of that right was unlawful.

We submit that the appellant's contention is fallacious for three reasons:

First. Because at the time the resolution dated April 29th, 1931, was passed and the 1098 shares

Brief for Defendants-Appellees

thereunder were issued, the appellant was not the registered owner of any stock upon the books of the defendant company, and since the 2,000 shares of common stock (now held by appellant) was registered in the name of the United Industrial Bancstocks Corporation, the successor to the National Wimsett Company, which company had by express agreement waived its right to subscribe to additional common stock, no pre-emptive right vested in the appellant with respect to the 1098 shares issued.

Second. Because the pre-emptive right to subscribe for a proportionate share of a subsequent issue of stock is, under the law of our State, limited to a new issue of stock and not to original authorized but unissued stock.

Third. Because even if the law of our State should give a pre-emptive right in original unissued stock, the Board of Directors of the defendant company, under the facts in the instant case, did lawfully and properly dispose of the said stock.

Taking up the first reason, to wit, that the said appellant had no pre-emptive right to subscribe for the said stock because it was not registered on the books of the company at the time the said stock was issued.

Section 124 of the GENERAL CORPORATION ACT as added by P. L. 1926, C. 318, Section 16, is pertinent hereto and reads as follows:

Brief for Defendants-Appellees

“124. Right of stockholder to purchase pro rata proportion of new stock; limitations.

Upon the issue of capital stock for cash, unless otherwise expressly provided in the certificate of incorporation, or in by-laws adopted by two-thirds in interest of each class of stockholders, every stockholder shall have a right (unless waived by him) according to the number of shares held by him to purchase his pro rata proportion of the stock to be issued, at such price (which may be in excess of the par value), within such time and on such terms as shall be fixed and determined by the board of directors; PROVIDED, that unless otherwise expressly provided in the certificate of incorporation, or by-laws adopted by two-thirds in interest of each class of stockholders, a holder of preferred or special stock entitled to limited preferential dividends and to a fixed sum upon any distribution of the assets of the corporation shall have and be entitled to exercise such pre-emptive rights only in case of the issue of stock of the same class held by him or of any class which has preference or priority as to assets or dividends over the class of stock held by him. In any such case the board of directors shall have power to determine what disposition shall be made of any stock to be issued and which shall not be subscribed for by stockholders. (L. 1926, Ch. 318, p. 544, Sec. 16, being a new section added to L. 1896, Ch. 185, p. 277, to be known as Section 124.)”

Brief for Defendants-Appellees

Assuming, for the moment, that this section by its terms gives a pre-emptive right of subscription in either a new issue or an original issue of authorized stock that remains untaken, the pre-emptive right is limited to those stockholders who did not waive their right.

Bearing in mind that the undisputed testimony established that the National Wimsett Company by express agreement waived its right to subscribe to more than 2,000 shares of the common stock; that the United Industrial Bancstocks Corporation was the successor to the National Wimsett Company, and that the 2,000 shares were registered on the books of the defendant company in the name of the United Industrial Bancstocks Corporation on the date that the resolution dated April 29th, 1931, was passed and the 1098 shares were issued, we respectfully submit that no pre-emptive right vested in the appellant in the issue of the said 1098 shares. In other words, the appellant's complaint is necessarily based upon the fact that a notice should have been served upon the United Industrial Bancstocks Corporation, the then registered owner of the 2,000 shares, so as to give it an opportunity to subscribe for its proportionate share of the proposed issue of the 1098 shares and that the defendant company having failed to notify the United Industrial Bancstocks Corporation of the proposed sale of the 1098 shares, the appellant, as the assignee of the United Industrial Bancstocks Corporation, is now entitled to have that sale set aside. We have pointed out to the Court, however, that the latter corporation, as the successor to the National Company, was bound

Brief for Defendants-Appellees

by the terms of the written agreement of waiver and therefore did not have the right to subscribe to the 1098 shares and accordingly no notice of the proposed sale was necessary to be served upon it. (Affidavit of Charles N. Godfrey, beginning p. 12, State of Case.) (Paragraph No. 2 of agreement with Securities Corporation, top of p. 31, State of Case.)

Taking up the second reason, to wit, that the law of our State limits the pre-emptive right of subscription to new issues of stock and not to authorized original stock that remains untaken, we respectfully submit that Section 124 of the General Corporation Act hereinbefore quoted is by its terms limited solely to new issues of stock and does not refer to original unissued stock in the hands of the company which, by an original act of the directors, is awaiting sale. This construction is necessarily borne out by the following facts:

1. The heading of this section specifically recites that it relates to new stock;
2. Because the Act, by its terms, assumes that there is in existence a fully organized corporation consisting of stockholders whose rights are fully vested therein;
3. The language and terms used and the general scheme of this section necessarily limits its construction to new issues.

To hold that this section covers original authorized but unissued stock would create a rather impossible situation and would render the section meaningless.

Taking the instant case as an example, the com-

Brief for Defendants-Appellees

pany, at its formation, placed upon the market the total authorized issue of 5,000 shares of common stock. This stock was open to purchase by anyone in any quantities and the sale remained open to the public down to April 29th, 1931, when, by virtue of the emergency created, the directors were forced to take up the remaining unissued stock.

If, during the period that the common stock was first sold down to the date when the balance was disposed of, small sales of a few shares daily had been made, no contention could seriously have been made by any existing stockholder that notice should have been daily given to him of each sale before the same could lawfully be made to the respective daily purchasers. Certainly Section 124 of the General Corporation Act was not intended to cover any such situation. Now, if instead of the daily sales being made, the intervals elapsing between each sale were a period of one month or two months, could any greater argument be then advanced that a right of pre-emption vested in the other stockholders because of this additional lapse of time between the respective sales?

We submit that so long as the original issue of stock, by the action of the board of directors of a corporation, is open for purchase to the public, no right of pre-emption is vested in any stockholder for the simple reason that the stock is open to purchase by anyone until that particular issue has been exhausted and that Section 124 cannot be construed so as to affect the sale of such original authorized stock that remains untaken but continues to be open for purchase.

Brief for Defendants-Appellees

Counsel for the appellant, in support of the proposition that the pre-emptive right of subscription applies to original authorized unissued stock, cites the case of *Way v. American Grease Co.*, 60 N. J. Equity 263, wherein Vice-Chancellor Grey, in part, said:

“The power to distribute a new issue does not lie at the mere choice of the directors. It is not a perquisite which they may use for their private advantages. They may not overthrow or secure for themselves the control of the corporation by means of a new issue of stock. This is true, whether as to a part of the stock authorized by the original incorporation which remains untaken (*Reese v. Bank*, 31 Pa. St. 78), or as to stock issued after incorporation, on a subsequently authorized increase. *Gray v. Portland Bank*, 3 Mass. 364.”

We submit that the reference made by the Vice-Chancellor, in the opinion just quoted, to stock authorized by the original incorporation which remains untaken is mere dicta because such stock was not in issue in this case. Therein was raised the question of the validity of two new issues of stock purporting to be based upon subsequent authorized increases and did not consist of any stock authorized by the original incorporation which remained untaken. Had the proposition as stated by Vice-Chancellor Grey been recognized by the later cases, it could well have been argued that judicial weight must be accorded to it, but such is not the fact. In the two cases in our State that have cited the *Way* case, the Courts have clearly and consistently

Brief for Defendants-Appellees

recognized only the doctrine relating to a new issue of stock.

In the case of *Wall v. Utah Copper Co.*, reported in 70 N. J. Equity, page 17, Vice-Chancellor Pitney, in rendering his opinion therein, refers to the *Way* case and recognizes only the following proposition:

“In our own State we have the case of *Way v. American Grease Co.*, 60 N. J. Eq. (15 Dick.) 263, decided by Vice-Chancellor Grey in 1900. The headnote is this:

‘The directors of a corporation which is fully organized and in the active conduct of its business are bound to afford to existing stockholders an opportunity to subscribe for any new issue of shares of its capital stock, in proportion to their holdings, before disposing of such new shares in any other way.’ ”

And in the later case of *Grausman v. Porto Rican-American Tobacco Co.*, reported in 95 N. J. Equity, page 155, Vice-Chancellor Bentley specifically says:

“Of course, this entire opinion is predicated upon the disposition of the new shares as required by the rule laid down in *Wall v. Utah*, 70 N. J. Eq. 17; *Morganstern v. American Malt-ing Co.*, 87 N. J. Eq. 358; and *Way v. American Grease Co.*, 60 N. J. Eq. 263.”

The doctrine as laid down in *Wall v. Utah Copper Company*, is in harmony with the law of other States. In the case of *Currie v. Scott*, 54 Pa. 270, the Court held that when a corporation had agreed on a defined capital stock and only a part of that

Brief for Defendants-Appellees

stock is subscribed, the directors have power to raise subscriptions and issue certificates for the untaken stock and an old stockholder's right to subscribe therefor is not superior to that of a stranger; and in the New York case, *Archer v. Hesse*, 164 App. Div. 493, 150 N. Y. S. 296, the Court said:

"A corporation may use its original unissued stock for any legitimate or lawful purpose it sees fit;"

and further on:

"Before making such use it is not obligated to give to existing stockholders an opportunity to purchase * * * it is only when the capital stock is increased by the issue of new shares that each holder of the original stock has a right to subscribe for and demand from the corporation such a proportion of the new stock as the number of shares already owned by him bears to the whole number of shares before the increase."

Corpus Juris, on this same point, in Volume 14, page 394, says:

"The directors of a corporation not only have the right, but it is their duty, to procure subscriptions for the whole amount of the capital stock, and where without fraud, they procure such subscriptions and receive payment therefor at par, one who has previously owned a majority of the issued capital stock cannot complain because the control of the corporation is

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thus taken from him, even though the additional money paid for such stock was not at the time needed for corporate purposes."

Taking up the third point, assuming that Section 124 of the General Corporation Act gave a pre-emptive right of subscription to stockholders in original authorized stock which remains untaken, the Board of Directors of the defendant company lawfully and properly disposed of the said 1098 shares.

The undisputed testimony established that the express purpose and intention of the company was to dispose of the total issue of 5,000 shares of common stock and accordingly the agreement with the National Wimsett Securities Corporation was executed whereby the latter company acted as fiscal agents, solicited local people, and endeavored to sell the common stock; that some of the common stock having remained untaken, the Board of Directors passed a number of resolutions whereby the preferred stockholders were offered the remaining stock in fixed proportion to the respective holdings of the preferred stockholders; that but few sales were effected through this scheme and 1098 shares of the common stock were left untaken.

We respectfully submit that under these facts and by the plain reading of Section 124, to wit, that portion which reads as follows:

"In any such case the board of directors shall have power to determine what disposition shall be made of any stock to be issued and which shall not be subscribed for by stockholders."

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the remaining stock having first been offered generally to all the stockholders and then subsequently being again offered to the preferred stockholders, the Board of Directors were fully empowered to thereafter dispose of the remaining stock as was done in the instant case.

Summing up the foregoing argument, the appellant's contention is fallacious because

First. At the time of the issuance of the remaining 1098 shares of common stock the appellant was not the registered owner of its 2,000 shares of common stock, and since its assignor, the United Industrial Bancstocks Corporation, was expressly barred from the right to subscribe to additional stock, no notice was necessary to be served upon the latter corporation of the proposed sale of the 1098 shares. And, hence, appellant's rights in that issue could rise no higher than that of its said assignor.

Second. The law of our State gives a pre-emptive right of subscription to stockholders only in new issues of stock and since the 1098 shares consisted of stock originally authorized, which down to the time of its issuance remained open for sale but untaken, appellant acquired no pre-emptive right therein.

Third. Even of Section 124 of the General Corporation Act applied to original authorized stock that remains untaken, by the express terms of that Act the Board of Directors had power to determine what disposition should be made of the 1098 shares which were not subscribed

for by the stockholders and accordingly did lawfully and properly issue same.

II.

THE ISSUANCE BY THE DIRECTORS OF THE 1098 SHARES TO THEMSELVES WAS NOT UNLAWFUL AND FRAUDULENT.

Appellant in part II of its brief further contends that the issuance by the directors of the 1098 shares to themselves was unlawful and fraudulent.

It will be noted that the appellant in its bill raised no contention that the actual act of the directors in issuing the stock to themselves was unlawful and fraudulent but based their complaint solely upon the ground that the appellant had been deprived of its right to subscribe for its pro rata proportion of the 1098 shares and the relief prayed for was to have the right to purchase their portion of the stock as aforesaid (Bill of Complaint, beginning p. 1, State of Case).

The ground now raised by appellant is, therefore, improper because it was not in issue at the hearing of this cause in the Court of Chancery.

Under any circumstances, however, appellant's contention is frivolous because the undisputed testimony, far from showing any fraudulent conduct on the part of the Board of Directors, indicated a spirit of sacrifice and loyalty which we submit was highly commendable.

The testimony established that the defendant company, from the time it began business in December,

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1928, to the time of the resolution dated April 29th, 1931, had suffered financial difficulties resulting in an accrual of unpaid cumulative dividends amounting to the sum of \$9,800.00; that the bank had demanded immediate payment of at least \$6,000.00 of the loan owing to it which amounted to the sum of \$11,900.00; that the defendant company has available cash on deposit only the sum of \$3,700.00. Certainly the act of the Board of Directors in taking up the remaining stock for which they had been unable to secure any purchasers although various efforts have been made to sell same, at the full rate of \$5.00 per share when the stock was clearly worth much less than that, and when the purchase was caused solely by the desire of the board to meet the emergency presented without paralyzing the financial condition of the company, can, under no circumstances, be construed as bearing even a suggestion of unmoral practice, let alone fraud or unlawfulness.

III.

THE AGREEMENTS ENTERED INTO BY NATIONAL WIMSETT SECURITIES CORPORATION, PREDECESSORS IN TITLE OF COMPLAINANT-APPELLANT, ALLEGED TO CONSTITUTE A WAIVER OF RIGHT TO SUBSCRIBE TO THE ISSUE OF 1098 SHARES IS BINDING UPON THE COMPLAINANT-APPELLANT.

It seems to us that the contention raised by appellant that the agreements entered into by the de-

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fendant company with the National Wimsett Company and the National Wimsett Securities Corporation are not binding upon the appellant is irrelevant because as was pointed out under the argument in section I the appellant had no standing at the time the 1098 shares of stock were issued.

Assuming that the question raised on this point by appellant is material, we respectfully submit that the appellant, as assignee of the National Wimsett Company and the Securities Corporation, is bound by the agreements entered into by those companies with defendant company.

Appellant in support of its contention cites a series of cases which purport to hold that a bona fide holder without notice of a certificate of stock is unaffected by equities which might have affected the stock in the hands of an intermediate holder.

As a proposition of law we believe that this doctrine is sound and is recognized in our State, but we respectfully submit that that doctrine does not support appellant's contention because it treats with and is limited to the question of equities that may arise *in the stock* that was assigned to the bona fide purchaser for value without notice. But no such question arises in the instant case. No complaint is made that any equities exist in the stock held by the appellant in favor of third parties. On the contrary, the question in issue is whether or not, independent of the title that the appellant may have in its 2,000 shares of stock, the agreement entered into with the predecessor in title of the appellant limiting its rights to subscribe to only 2,000 shares of

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the capital authorized issue of 5,000 shares is binding upon the appellant.

An exhaustive examination of the authorities and the cases in our State and sister States has failed to disclose any law directly treating with this query.

The case of *Real Estate Trust Co. v. Bird*, reported in 90 Md. 229; 44 Atl. Reporter 1048, is alleged by appellant to be directly on point and is relied upon by it as supporting its contention.

Our examination of this case discloses that it is not directly in point and is not of assistance in determining this question. In that case, before a contemplated increase in the capital stock of the corporation was voted upon, the plaintiff's assignor, who was a stockholder in the corporation, signed an agreement with the other stockholders waiving his right to subscribe to an increase *to which the corporation was not a party* and thereafter transferred the stock to the plaintiff who was a bona fide purchaser without notice of such agreement. Prior to the meeting of the stockholders at which the increase of the stock was ordered, plaintiff applied to the company to have the stock transferred on its books to himself. The company refused so to do. The Court held that the act of the company in refusing to transfer the stock upon its books prior to the meeting of the stockholders was wrongful; that the company was not a party to the agreement of waiver and was in no wise bound by it, and, therefore, the plaintiff, as the assignee without notice of the agreement entered into by the assignor with the other stockholders, was entitled to share in the increase. So that the doctrine as recited in the *Bird*

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case was based upon two important facts entirely missing from the instant case:

First. That the plaintiff applied and was wrongfully refused the right to transfer the stock before the meeting of the stockholders to vote upon the increase; and

Second. That the agreement of waiver was not entered into by the company and was, therefore, not binding upon it.

It seems to us that the appellant as an assignee of the 2,000 shares of stock becomes a stockholder subject to and acquires only such rights as its predecessor as a stockholder held.

And so, in the case of *Hodge v. United States Steel Corporation*, reported in 64 N. J. Equity, page 90, Vice-Chancellor Emery in his opinion, in part, said:

“In the absence of such affidavit showing such ownership and the certificate or certificates of shares which he holds, it cannot be known whether or not the previous holders of his shares, or any of them, have assented to the plan. If such previous holders of either the Smith or Curtis shares have assented, then neither Smith nor Curtis is entitled to a preliminary injunction against the execution of the plan assented to, so far as their rights rest on the ownership of these shares.”

And in the case of *Trimble v. American Sugar Refining Co.*, reported in 61 N. J. Equity, 340, Vice-Chancellor Pitney in his opinion, in part, said:

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“With this preliminary observation, I further remark that the bill does not state at what time complainant acquired the one hundred shares of stock which he holds, and it is common knowledge that the stock of this company, and many others of the same class, is daily dealt in on the Exchange. For aught that appears, he may have acquired it a very short time before the filing of the bill, from a holder who has acquiesced in everything that the company had done up to that time and in the policy the carrying out of which the complainant seeks to enjoin. That such acquiescence would bar the original holders of the shares now held by the complainant, if he knew of it, is perfectly well settled.”

In the instant case the previous holders of the stock did not merely assent but entered into an express written agreement limiting its right to acquire no more than 2,000 shares of the common stock.

We submit that the case of *Kingston v. Home Life Insurance Co. of America* decided by Court of Chancery of the State of Delaware and reported in 101 Atlantic Reporter, 898, is analogous to the facts in the instant case and is dispositive of this query. Therein the corporation entered into an agreement with one Bright giving the latter the exclusive right to take at par a large number of shares of the corporate stock of the company without regard to time. After the execution of this agreement the plaintiff acquired his stock in the corporation and sought to have the option contract set aside as in violation of

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his pre-emptive right to share in the new issues of stock. The Court, in its opinion, laid down the law as follows:

“One who acquires shares of stock of a corporation after the corporation by action of its officers, directors and stockholders has given to a stranger an exclusive right to take and pay for at par all of the unissued shares of the company, cannot assert as against the company, or the holder of the option, the general pre-emptive right of shareholders of a corporation. No authority was cited or found for or against the above proposition, but it is clearly sound and based on fundamental considerations. As between the corporation and the holder of the option such a contract is valid, and can be held invalid only at the instance and for the benefit of a stockholder who asserts his right to take the stock, and whose right has been impaired by the giving of the option. If, however, before a particular person became a shareholder another person has acquired an option inconsistent with the pre-emptive right, then the latter is subservient to the former right.”

And further on said:

“It is immaterial that some of the complainants had no knowledge or notice of the existence of the option before acquiring their shares, for there was no representation by the company, or the holder of the option, respecting unissued shares upon which the complainants relied to their detriment or disadvantage.”

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And held accordingly that the plaintiff could not assert his pre-emptive right.

So in the instant case the appellant became a stockholder long after its predecessor had waived the pre-emptive right of subscription to more than 2,000 shares of stock. And furthermore, the appellant did not become the registered owner of its stock until after the resolution of April 29th, 1931, was passed and the 1098 shares were issued. If, as laid down by the doctrine in the Kingston case, the pre-emptive right in a *new* issue of stock is subservient to an option previously granted, certainly any pre-emptive right that appellant may have had in the original authorized issue of stock that remains untaken is subservient and subject to the waiver executed by its predecessor.

IV.

THE RESOLUTION OF THE BOARD OF DIRECTORS DATED APRIL 29TH, 1931, AUTHORIZING THE ISSUANCE OF 1098 SHARES OF THE COMMON CAPITAL STOCK OF THEIR COMPANY WAS LEGAL AND PROPER.

Counsel for appellant in its brief further contends that the resolution dated April 29th, 1931, which provided that the subscribers to the 1098 shares could pay therefor either by cash or by execution of promissory notes payable within four months from the date of the purchase was void and illegal

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because it did not provide that the stock should be payable in cash only.

We respectfully submit that this contention is without merit for two reasons:

First. The bill of complaint and the supporting affidavit sought to have the sale of the 1098 shares of stock set aside solely upon one ground, namely, that the appellant had a pre-emptive right to subscribe for a pro rata share of this issue and that it had not been given the opportunity to so subscribe and accordingly prayed that the Court of Chancery grant to it the right to subscribe to its pro rata share of this issue. No attack was made upon the resolution as is now raised by appellant and no issue was presented upon the hearing of this cause other than the question of whether or not it had the pre-emptive right.

Second. No testimony was presented that would indicate that any of this stock was acquired for promissory notes, or if so acquired that the notes remained unpaid for at the hearing of this cause on December 22nd, 1931. The only testimony presented was that contained in the answering affidavit of Mr. Godfrey who stated:

“The proceeds from the sale of this stock was then immediately used in paying the Second National Bank the sum of \$6,000.00 on account of their indebtedness” (page 18, line 22, State of the Case).

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And as was stated by the Court in its conclusions:

“The resolution of the Board of Directors authorizing the issuance of this stock upon the delivery of promissory notes is, of course, invalid, as stock must be sold for either cash or for property purchase. However, I deem it unnecessary to comment further upon this, as there is no testimony before me that any of said stock remains unpaid for in cash” (page 56, line 35, State of the Case).

But even if it be assumed that some of this stock was first acquired by means of promissory notes such a transaction is not void but voidable and if the promissory notes are paid then the transaction becomes a valid and binding one.

Section 48 of the General Corporation Act is the section pertinent hereto and reads as follows:

“Nothing but money shall be considered as payment of any part of the capital stock of any corporation organized under this Act, except as hereinafter provided in case of the purchase of property, and no loan of money shall be made to a stockholder or officer thereof; and if any such loan be made the officers who make it, or assent thereto, shall be jointly and severally liable, to the extent of such loan and interest, for all debts of the corporation until the repayment of the sum so loaned. (L. 1896, Ch. 185, p. 293, Section 48; C. S., p. 1630, Section 48.)”

An exhaustive search has failed to disclose any case in our State that treats with the question of

stock purchased by means of promissory notes or that construes the effect thereof, with respect to the provisions of Section 48.

A reading of the Act clearly indicates that its language at most can mean that the giving of a promissory note will not be considered as payment for the stock issued therefor. We submit that the language used means that where a promissory note is given in payment, its effect is to render the sale of the stock voidable at the option of the corporation, and further, that if a corporation should suffer any loss by virtue of the promissory notes remaining unpaid and the stock issued therefor being transferred to an innocent purchaser for value, without notice of this transaction, that the directors who permitted such a sale may be held accountable for the loss sustained by the corporation. But under no circumstances can such a sale, by the terms of this Act, be construed to be void *ab initio*, because, if and when the promissory notes are paid, then no loss has been suffered by the corporation and the Act requiring that cash be paid for the stock has been complied with. Such construction must necessarily be made with respect to Section 48 because it is common practice for corporations to issue stock and accept in payment therefor, the draft or check of the purchaser, which draft or check in the usual course of business is deposited to the credit of the corporation and if Section 48, were construed to render a sale of stock other than for cash void, it could be contended that all purchases made by check or draft are void; therefore, the transaction could be set aside.

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That the promissory note transaction is at most voidable but not void is established by the case of *Rubinstein v. Kasprzak*, decided by the Court of Errors and Appeals, recorded in 96 N. J. Eq., page 496, wherein that Court adopted in full the opinion of Vice-Chancellor Fielder which had been appealed from.

In the Rubinstein case, the complainant filed a bill in Chancery alleging that he was the owner of forty shares of Stanley Silk Dyeing Company by purchase from former owners thereof and prayed that the secretary of the corporation be directed to transfer same to his name on the company's books. The other members of the corporation who were joined as parties defendant, set up the defense that the shares were purchased by the company and retired, and that the complainant held these shares as custodian for the company. At the hearing, the Court found that the testimony established that the complainant borrowed money from the corporation and used same in purchasing this stock, which loan was subsequently repaid by the complainant to the corporation. The defendants further contended that the loan made by the corporation to the complainant is prohibited by Section 48 of the Corporation Act and that, therefore, the complainant became trustee for the company not only of the money borrowed but of the stock purchased by the loan. This argument, in effect, meant that since the latter portion of Section 48 prohibited any loan of money to a stockholder or officer thereof, such a loan is void *ab initio*, wherefore, the stock purchased by means of this loan belongs to the corporation and the bor-

rower holds the stock as trustee for the corporation. The Court recites Section 48, and then says:

“The connection in which the prohibition against a loan to a stockholder or officer is placed in this section would indicate that it bears some relation to the requirement that only cash shall be considered as payment for stock, but, however that may be, the statute seems to have been enacted for the benefit of creditors to secure them for their debts as against the dissipation of corporate funds through loans to stockholders and officers, by making the officers, who assent to such a loan, liable for the repayment thereof in case the borrower fails to pay. If such a loan be made and be repaid no creditor can complain, and the penalty prescribed by the statute is ended.”

Accordingly, the Court found that the loan having been repaid, no one had suffered any loss and the complainant was, therefore, entitled to full ownership of the stock and to have same transferred to his name on the books of the corporation.

We wish to point out, that while Section 48 by its language specifically prohibits a loan being made by the corporation to an officer thereof, there is no specific prohibition of selling stock other than for cash. The Act merely says, “Nothing but money shall be considered as payment.”

Corpus Juris in Volume 14, Section 600, page 440, specifically treats with this query as follows:

“While the statute may declare that a stock issued in violation of it shall be void, it does

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not follow that such stock is void in such a sense that there remains no *locus poenitentiae*, that such stock may not be validated by the subsequent payment and receipt of the money for it."

We respectfully submit, therefore, that while it does not appear that any of this stock was purchased by means of promissory notes, yet, as is pointed out by the Court, no testimony was presented showing that if any of this stock was purchased by means of promissory notes, the notes remained unpaid at the time the bill was filed.

V.

TO DOUBT IS TO DENY.

Since this is an appeal from the order of the Court dismissing the order to show cause and accompanying *ad interim* restraint, it seems to us that this appeal must necessarily stand or fall upon the sole question of whether or not the Court properly dismissed the order to show cause.

It is a fundamental proposition of law that the right to a preliminary injunction is a matter of discretion with the trial Court.

Thompson v. City of Paterson, 9 N. J. Eq. 624;

Health Products Corporation v. Weber, 97 N. J. Eq. 159;

Passaic-Athenia Bus Co. v. Consolidated Bus Lines, 100 N. J. Eq. 185.

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And the appellate court will not interfere with the discretionary order of the Court of Chancery except in cases entirely free from doubt.

Fleischman v. Young, 9 N. J. Eq. 622;

Mayor of Jersey City v. Morris Canal & Banking Co., 12 N. J. Eq. 545.

It is also a fundamental proposition of law that a preliminary injunction will not issue where the complainant's right is in doubt.

Hagerty v. Lee, 45 N. J. Eq. 255;

Citizens Coach Co. v. Camden Horse Railroad Co., 29 N. J. Eq. 299.

So in the instant case, as the Court pointed out in its conclusion:

“This raises at least a doubt as to the rights of the complainant, and, as to doubt is to deny, the order to show cause, with the restraint, will be dismissed” (page 56, line 32, State of the Case).

Certainly the facts presented in this cause raised questions of law which construed most favorably in favor of the appellant, raised a doubt as to the right of preliminary injunctive relief, wherefore the Court was bound to dismiss the order to show cause.

It is respectfully submitted, therefore, that upon this fact alone the decree of the Court of Chancery should be affirmed with costs.

ENDICOTT & ENDICOTT,
*Solicitors for and of Counsel
with Appellees.*

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between

PUBLIC BANCORPORATION,
Complainant-Appellant,

and

ATLANTIC CITY WIMSETT THRIFT COMPANY, *et als.*,
Defendants-Appellees.

ON BILL, &c.

ON APPEAL FROM THE COURT OF CHANCERY.

BRIEF FOR DEFENDANTS-APPELLEES.

STATEMENT OF FACTS.

The state of facts recited in the appellant's brief omitted a number of undisputed facts vital to a proper determination of this appeal, wherefore we have elected to more fully recite the same herein.

Brief for Defendants-Appellees

On or about February 17th, 1928, the Atlantic City Wimsett Thrift Company, the defendant-appellee herein, was incorporated in the State of New Jersey. By the terms of the certificate of incorporation the company had a total authorized capital stock of 1500 shares of preferred stock having a par value of \$100.00 per share, and 5,000 shares of common stock without nominal or par value. The certificate of incorporation further provided that the common stock could be issued by the corporation from time to time for such consideration as would be determined upon by the Board of Directors.

The company was formed by, and the incorporators consisted of, officers of the National Wimsett Company and its subsidiary, the National Wimsett Securities Corporation, for the purpose of engaging in the small loan and general finance business in the City of Atlantic City, New Jersey, using the system known as the "Wimsett System."

On June 7th, 1928, and before the defendant company had begun business, two written agreements were executed by it, one with the National Wimsett Company and the other with the National Wimsett Securities Corporation.

The agreement with the National Wimsett Company provided for the installation of the "Wimsett System" in the Atlantic City Company for the agreed price of \$5,000.00.

The agreement with the National Wimsett Securities Corporation appointed that company the fiscal agent of the Atlantic City Company in the sale of its stock and agreed to pay therefor a commission of 15% upon each share of preferred stock sold at the

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Brief for Defendants-Appellees

rate of \$100.00 per share; no commission to be paid for the sale of the common stock; and further, gave the Securities Corporation the option to subscribe for 2500 shares of the common stock of the Atlantic City Company at the rate of \$5.00 per share.

Thereafter on September 12th, 1928, a directors' meeting of the Atlantic City Company was held, at which time, the various officers of the two mother companies who had organized the defendant company, resigned and a board consisting solely of persons resident in or about Atlantic City was appointed. This board then elected Mr. Charles H. Godfrey, one of the defendants herein, as president, and other local people were elected to the other offices.

Mr. Godfrey then conferred with the officials of the National Wimsett Securities Corporation and pointed out that the agreement giving that company an option to purchase 2500 shares of the common stock of the defendant company should be amended so as to limit their right to a maximum purchase of 2,000 shares in order that local people could always be assured of having control of the company, and that unless the agreement was so amended it would be difficult to induce the local people to invest in the stock of the company. The National Wimsett Securities Corporation agreed thereto, and in October, 1928, a supplemental agreement was executed between that corporation and the defendant company whereby the Securities Corporation was limited to the right to subscribe to a maximum of 2,000 shares of the common stock at \$5.00 per share.

The Securities Corporation then proceeded to so-

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licit local people and endeavored to sell the total issue of the preferred and common stock at the rate of \$100.00 per share for the preferred and \$5.00 per share for the common. As the result thereof the Securities Corporation disposed of approximately 700 shares of the preferred stock and approximately 1900 shares of common.

The Securities Corporation then exercised its option and received the 2,000 shares of common stock and paid therefor by receiving a credit for the sum of \$5,000.00 owing to the National Wimsett Company for the installation of the "Wimsett System," and a further credit consisting of the commission earned in the sale of the preferred stock.

No original express resolution was adopted by the Board of Directors of the defendant company providing for the sale of the total issue of the common and capital stock but it was the express intention and purpose of the board to so dispose of the said stock. In furtherance of this express intention and purpose the Board of Directors of the defendant company passed a series of resolutions which provided for the sale of the original unissued common stock to the preferred stockholders at the rate of \$5.00 per share in fixed proportions to the respective holdings of the preferred stockholders and letters were sent to the various stockholders urging them to purchase the common stock. These endeavors did not prove successful and but a few shares of common stock were purchased by the stockholders.

On April 27th, 1931, the defendant company received a letter from the Second National Bank, a banking institution located in Atlantic City, to whom

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the defendant company was indebted in the sum of \$11,900.00. By the terms of this letter the bank requested a payment of at least \$6,000.00 on April 30th, 1931, on account of the monies owing to it by the company.

Immediately upon receipt of this letter a special meeting of the Board of Directors of the defendant company was called for April 29th, 1931, to consider ways and means of meeting the demand raised by the bank.

At that time the company had on deposit in cash the approximate sum of \$3,700.00, and the earnings of the company from the time it commenced business in December, 1928, had not been sufficient to pay in full the semi-annual installments of dividends that had accrued upon the issued preferred stock so that there was owing to the preferred stockholders accrued unpaid dividends amounting to the sum of \$9,800.00. At that time there remained in the company's treasury 1098 shares of unissued common stock.

Mr. Godfrey, who presided at the special meeting of the board, presented the full situation to the directors and urged them to take up the remaining 1098 shares of stock by each director taking a proportionate share thereof at the full rate of \$5.00 per share.

Despite the fact that, by virtue of the company's financial condition, the stock was not worth the price of \$5.00 per share, the directors passed a resolution dated April 29th, 1931, which provided for the purchase by the various directors of their pro rata portion of the unissued common stock at the rate of

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\$5.00 per share to be paid for either in cash or by means of promissory notes. The stock was forthwith issued and the proceeds from the sale thereof was then immediately used in paying the Second National Bank the sum of \$6,000.00 as demanded by the letter.

At the time the resolution dated April 29th, 1931, was passed and the unissued common stock was disposed of, the 2,000 shares of common stock originally issued to the National Wimsett Company was registered in the name of its successor, the United Industrial Bancstocks Corporation. The Bancstocks Corporation was then in a defunct condition.

The complainant, Public Bancorporation, which is either the successor to the United Industrial Bancstocks Corporation or its assignee of the said stock, was not registered upon the books of the company as the owner of the 2,000 shares of common stock at the time the resolution dated April 29th, 1931, was passed and the stock thereunder issued.

The complainant, on December 16th, 1931, some eight months after the 1098 shares were issued, filed a bill in chancery alleging solely that it is the owner of the 2,000 shares of common stock originally issued to the National Wimsett Company; complained of the fact that the 1098 shares of common stock had been issued without notice to it; alleged that it had been deprived of the right to subscribe to its proportionate share of the 1098 shares of the common stock, and prayed that the defendant company and its fifteen directors be enjoined from negotiating the said stock; that the said certificates of stock be cancelled and the complainant be given the privilege to sub-

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scribe thereto in proportion to its holdings. As the result thereof the Court of Chancery allowed a rule to show cause and enjoined the defendants herein from voting the said 1098 shares of stock.

The cause coming up before the Court on the return day of the order to show cause, the Court dismissed the order to show cause and accompanying restraint.

ARGUMENT OF LAW.

I.

COMPLAINANT-APPELLANT, PUBLIC BANK CORPORATION, WAS NOT ENTITLED TO SUBSCRIBE TO A PRO RATA PROPORTION OF THE ISSUE OF 1098 SHARES OF STOCK AND ITS ISSUANCE WAS LAWFUL AND PROPER.

The first point argued by appellant in its brief is the proposition that the complainant-appellant was entitled to subscribe to a pro rata proportion of the 1098 shares of stock and its issuance in contravention of that right was unlawful.

We submit that the appellant's contention is fallacious for three reasons:

First. Because at the time the resolution dated April 29th, 1931, was passed and the 1098 shares

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thereunder were issued, the appellant was not the registered owner of any stock upon the books of the defendant company, and since the 2,000 shares of common stock (now held by appellant) was registered in the name of the United Industrial Bancstocks Corporation, the successor to the National Wimsett Company, which company had by express agreement waived its right to subscribe to additional common stock, no pre-emptive right vested in the appellant with respect to the 1098 shares issued.

Second. Because the pre-emptive right to subscribe for a proportionate share of a subsequent issue of stock is, under the law of our State, limited to a new issue of stock and not to original authorized but unissued stock.

Third. Because even if the law of our State should give a pre-emptive right in original unissued stock, the Board of Directors of the defendant company, under the facts in the instant case, did lawfully and properly dispose of the said stock.

Taking up the first reason, to wit, that the said appellant had no pre-emptive right to subscribe for the said stock because it was not registered on the books of the company at the time the said stock was issued.

Section 124 of the GENERAL CORPORATION ACT as added by P. L. 1926, C. 318, Section 16, is pertinent hereto and reads as follows:

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“124. Right of stockholder to purchase pro rata proportion of new stock; limitations.

Upon the issue of capital stock for cash, unless otherwise expressly provided in the certificate of incorporation, or in by-laws adopted by two-thirds in interest of each class of stockholders, every stockholder shall have a right (unless waived by him) according to the number of shares held by him to purchase his pro rata proportion of the stock to be issued, at such price (which may be in excess of the par value), within such time and on such terms as shall be fixed and determined by the board of directors; PROVIDED, that unless otherwise expressly provided in the certificate of incorporation, or by-laws adopted by two-thirds in interest of each class of stockholders, a holder of preferred or special stock entitled to limited preferential dividends and to a fixed sum upon any distribution of the assets of the corporation shall have and be entitled to exercise such pre-emptive rights only in case of the issue of stock of the same class held by him or of any class which has preference or priority as to assets or dividends over the class of stock held by him. In any such case the board of directors shall have power to determine what disposition shall be made of any stock to be issued and which shall not be subscribed for by stockholders. (L. 1926, Ch. 318, p. 544, Sec. 16, being a new section added to L. 1896, Ch. 185, p. 277, to be known as Section 124.)”

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Assuming, for the moment, that this section by its terms gives a pre-emptive right of subscription in either a new issue or an original issue of authorized stock that remains untaken, the pre-emptive right is limited to those stockholders who did not waive their right.

Bearing in mind that the undisputed testimony established that the National Wimsett Company by express agreement waived its right to subscribe to more than 2,000 shares of the common stock; that the United Industrial Bancstocks Corporation was the successor to the National Wimsett Company, and that the 2,000 shares were registered on the books of the defendant company in the name of the United Industrial Bancstocks Corporation on the date that the resolution dated April 29th, 1931, was passed and the 1098 shares were issued, we respectfully submit that no pre-emptive right vested in the appellant in the issue of the said 1098 shares. In other words, the appellant's complaint is necessarily based upon the fact that a notice should have been served upon the United Industrial Bancstocks Corporation, the then registered owner of the 2,000 shares, so as to give it an opportunity to subscribe for its proportionate share of the proposed issue of the 1098 shares and that the defendant company having failed to notify the United Industrial Bancstocks Corporation of the proposed sale of the 1098 shares, the appellant, as the assignee of the United Industrial Bancstocks Corporation, is now entitled to have that sale set aside. We have pointed out to the Court, however, that the latter corporation, as the successor to the National Company, was bound

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by the terms of the written agreement of waiver and therefore did not have the right to subscribe to the 1098 shares and accordingly no notice of the proposed sale was necessary to be served upon it. (Affidavit of Charles N. Godfrey, beginning p. 12, State of Case.) (Paragraph No. 2 of agreement with Securities Corporation, top of p. 31, State of Case.)

Taking up the second reason, to wit, that the law of our State limits the pre-emptive right of subscription to new issues of stock and not to authorized original stock that remains untaken, we respectfully submit that Section 124 of the General Corporation Act hereinbefore quoted is by its terms limited solely to new issues of stock and does not refer to original unissued stock in the hands of the company which, by an original act of the directors, is awaiting sale. This construction is necessarily borne out by the following facts:

1. The heading of this section specifically recites that it relates to new stock;
2. Because the Act, by its terms, assumes that there is in existence a fully organized corporation consisting of stockholders whose rights are fully vested therein;
3. The language and terms used and the general scheme of this section necessarily limits its construction to new issues.

To hold that this section covers original authorized but unissued stock would create a rather impossible situation and would render the section meaningless.

Taking the instant case as an example, the com-

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pany, at its formation, placed upon the market the total authorized issue of 5,000 shares of common stock. This stock was open to purchase by anyone in any quantities and the sale remained open to the public down to April 29th, 1931, when, by virtue of the emergency created, the directors were forced to take up the remaining unissued stock.

If, during the period that the common stock was first sold down to the date when the balance was disposed of, small sales of a few shares daily had been made, no contention could seriously have been made by any existing stockholder that notice should have been daily given to him of each sale before the same could lawfully be made to the respective daily purchasers. Certainly Section 124 of the General Corporation Act was not intended to cover any such situation. Now, if instead of the daily sales being made, the intervals elapsing between each sale were a period of one month or two months, could any greater argument be then advanced that a right of pre-emption vested in the other stockholders because of this additional lapse of time between the respective sales?

We submit that so long as the original issue of stock, by the action of the board of directors of a corporation, is open for purchase to the public, no right of pre-emption is vested in any stockholder for the simple reason that the stock is open to purchase by anyone until that particular issue has been exhausted and that Section 124 cannot be construed so as to affect the sale of such original authorized stock that remains untaken but continues to be open for purchase.

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Counsel for the appellant, in support of the proposition that the pre-emptive right of subscription applies to original authorized unissued stock, cites the case of *Way v. American Grease Co.*, 60 N. J. Equity 263, wherein Vice-Chancellor Grey, in part, said:

“The power to distribute a new issue does not lie at the mere choice of the directors. It is not a perquisite which they may use for their private advantages. They may not overthrow or secure for themselves the control of the corporation by means of a new issue of stock. This is true, whether as to a part of the stock authorized by the original incorporation which remains untaken (*Reese v. Bank*, 31 Pa. St. 78), or as to stock issued after incorporation, on a subsequently authorized increase. *Gray v. Portland Bank*, 3 Mass. 364.”

We submit that the reference made by the Vice-Chancellor, in the opinion just quoted, to stock authorized by the original incorporation which remains untaken is mere dicta because such stock was not in issue in this case. Therein was raised the question of the validity of two new issues of stock purporting to be based upon subsequent authorized increases and did not consist of any stock authorized by the original incorporation which remained untaken. Had the proposition as stated by Vice-Chancellor Grey been recognized by the later cases, it could well have been argued that judicial weight must be accorded to it, but such is not the fact. In the two cases in our State that have cited the *Way* case, the Courts have clearly and consistently

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recognized only the doctrine relating to a new issue of stock.

In the case of *Wall v. Utah Copper Co.*, reported in 70 N. J. Equity, page 17, Vice-Chancellor Pitney, in rendering his opinion therein, refers to the *Way* case and recognizes only the following proposition:

“In our own State we have the case of *Way v. American Grease Co.*, 60 N. J. Eq. (15 Dick.) 263, decided by Vice-Chancellor Grey in 1900. The headnote is this:

‘The directors of a corporation which is fully organized and in the active conduct of its business are bound to afford to existing stockholders an opportunity to subscribe for any new issue of shares of its capital stock, in proportion to their holdings, before disposing of such new shares in any other way.’ ”

And in the later case of *Grausman v. Porto Rican-American Tobacco Co.*, reported in 95 N. J. Equity, page 155, Vice-Chancellor Bentley specifically says:

“Of course, this entire opinion is predicated upon the disposition of the new shares as required by the rule laid down in *Wall v. Utah*, 70 N. J. Eq. 17; *Morganstern v. American Malt-
ing Co.*, 87 N. J. Eq. 358; and *Way v. American Grease Co.*, 60 N. J. Eq. 263.”

The doctrine as laid down in *Wall v. Utah Copper Company*, is in harmony with the law of other States. In the case of *Currie v. Scott*, 54 Pa. 270, the Court held that when a corporation had agreed on a defined capital stock and only a part of that

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stock is subscribed, the directors have power to raise subscriptions and issue certificates for the untaken stock and an old stockholder's right to subscribe therefor is not superior to that of a stranger; and in the New York case, *Archer v. Hesse*, 164 App. Div. 493, 150 N. Y. S. 296, the Court said:

"A corporation may use its original unissued stock for any legitimate or lawful purpose it sees fit;"

and further on:

"Before making such use it is not obligated to give to existing stockholders an opportunity to purchase * * * it is only when the capital stock is increased by the issue of new shares that each holder of the original stock has a right to subscribe for and demand from the corporation such a proportion of the new stock as the number of shares already owned by him bears to the whole number of shares before the increase."

Corpus Juris, on this same point, in Volume 14, page 394, says:

"The directors of a corporation not only have the right, but it is their duty, to procure subscriptions for the whole amount of the capital stock, and where without fraud, they procure such subscriptions and receive payment therefor at par, one who has previously owned a majority of the issued capital stock cannot complain because the control of the corporation is

thus taken from him, even though the additional money paid for such stock was not at the time needed for corporate purposes."

Taking up the third point, assuming that Section 124 of the General Corporation Act gave a pre-emptive right of subscription to stockholders in original authorized stock which remains untaken, the Board of Directors of the defendant company lawfully and properly disposed of the said 1098 shares.

The undisputed testimony established that the express purpose and intention of the company was to dispose of the total issue of 5,000 shares of common stock and accordingly the agreement with the National Wimsett Securities Corporation was executed whereby the latter company acted as fiscal agents, solicited local people, and endeavored to sell the common stock; that some of the common stock having remained untaken, the Board of Directors passed a number of resolutions whereby the preferred stockholders were offered the remaining stock in fixed proportion to the respective holdings of the preferred stockholders; that but few sales were effected through this scheme and 1098 shares of the common stock were left untaken.

We respectfully submit that under these facts and by the plain reading of Section 124, to wit, that portion which reads as follows:

"In any such case the board of directors shall have power to determine what disposition shall be made of any stock to be issued and which shall not be subscribed for by stockholders."

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the remaining stock having first been offered generally to all the stockholders and then subsequently being again offered to the preferred stockholders, the Board of Directors were fully empowered to thereafter dispose of the remaining stock as was done in the instant case.

Summing up the foregoing argument, the appellant's contention is fallacious because

First. At the time of the issuance of the remaining 1098 shares of common stock the appellant was not the registered owner of its 2,000 shares of common stock, and since its assignor, the United Industrial Bancstocks Corporation, was expressly barred from the right to subscribe to additional stock, no notice was necessary to be served upon the latter corporation of the proposed sale of the 1098 shares. And, hence, appellant's rights in that issue could rise no higher than that of its said assignor.

Second. The law of our State gives a pre-emptive right of subscription to stockholders only in new issues of stock and since the 1098 shares consisted of stock originally authorized, which down to the time of its issuance remained open for sale but untaken, appellant acquired no pre-emptive right therein.

Third. Even of Section 124 of the General Corporation Act applied to original authorized stock that remains untaken, by the express terms of that Act the Board of Directors had power to determine what disposition should be made of the 1098 shares which were not subscribed

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for by the stockholders and accordingly did lawfully and properly issue same.

II.

THE ISSUANCE BY THE DIRECTORS OF THE 1098 SHARES TO THEMSELVES WAS NOT UNLAWFUL AND FRAUDULENT.

Appellant in part II of its brief further contends that the issuance by the directors of the 1098 shares to themselves was unlawful and fraudulent.

It will be noted that the appellant in its bill raised no contention that the actual act of the directors in issuing the stock to themselves was unlawful and fraudulent but based their complaint solely upon the ground that the appellant had been deprived of its right to subscribe for its pro rata proportion of the 1098 shares and the relief prayed for was to have the right to purchase their portion of the stock as aforesaid (Bill of Complaint, beginning p. 1, State of Case).

The ground now raised by appellant is, therefore, improper because it was not in issue at the hearing of this cause in the Court of Chancery.

Under any circumstances, however, appellant's contention is frivolous because the undisputed testimony, far from showing any fraudulent conduct on the part of the Board of Directors, indicated a spirit of sacrifice and loyalty which we submit was highly commendable.

The testimony established that the defendant company, from the time it began business in December,

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1928, to the time of the resolution dated April 29th, 1931, had suffered financial difficulties resulting in an accrual of unpaid cumulative dividends amounting to the sum of \$9,800.00; that the bank had demanded immediate payment of at least \$6,000.00 of the loan owing to it which amounted to the sum of \$11,900.00; that the defendant company has available cash on deposit only the sum of \$3,700.00. Certainly the act of the Board of Directors in taking up the remaining stock for which they had been unable to secure any purchasers although various efforts have been made to sell same, at the full rate of \$5.00 per share when the stock was clearly worth much less than that, and when the purchase was caused solely by the desire of the board to meet the emergency presented without paralyzing the financial condition of the company, can, under no circumstances, be construed as bearing even a suggestion of unmoral practice, let alone fraud or unlawfulness.

III.

THE AGREEMENTS ENTERED INTO BY NATIONAL WIMSETT SECURITIES CORPORATION, PREDECESSORS IN TITLE OF COMPLAINANT-APPELLANT, ALLEGED TO CONSTITUTE A WAIVER OF RIGHT TO SUBSCRIBE TO THE ISSUE OF 1098 SHARES IS BINDING UPON THE COMPLAINANT-APPELLANT.

It seems to us that the contention raised by appellant that the agreements entered into by the de-

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fendant company with the National Wimsett Company and the National Wimsett Securities Corporation are not binding upon the appellant is irrelevant because as was pointed out under the argument in section I the appellant had no standing at the time the 1098 shares of stock were issued.

Assuming that the question raised on this point by appellant is material, we respectfully submit that the appellant, as assignee of the National Wimsett Company and the Securities Corporation, is bound by the agreements entered into by those companies with defendant company.

Appellant in support of its contention cites a series of cases which purport to hold that a bona fide holder without notice of a certificate of stock is unaffected by equities which might have affected the stock in the hands of an intermediate holder.

As a proposition of law we believe that this doctrine is sound and is recognized in our State, but we respectfully submit that that doctrine does not support appellant's contention because it treats with and is limited to the question of equities that may arise *in the stock* that was assigned to the bona fide purchaser for value without notice. But no such question arises in the instant case. No complaint is made that any equities exist in the stock held by the appellant in favor of third parties. On the contrary, the question in issue is whether or not, independent of the title that the appellant may have in its 2,000 shares of stock, the agreement entered into with the predecessor in title of the appellant limiting its rights to subscribe to only 2,000 shares of

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the capital authorized issue of 5,000 shares is binding upon the appellant.

An exhaustive examination of the authorities and the cases in our State and sister States has failed to disclose any law directly treating with this query.

The case of *Real Estate Trust Co. v. Bird*, reported in 90 Md. 229; 44 Atl. Reporter 1048, is alleged by appellant to be directly on point and is relied upon by it as supporting its contention.

Our examination of this case discloses that it is not directly in point and is not of assistance in determining this question. In that case, before a contemplated increase in the capital stock of the corporation was voted upon, the plaintiff's assignor, who was a stockholder in the corporation, signed an agreement with the other stockholders waiving his right to subscribe to an increase *to which the corporation was not a party* and thereafter transferred the stock to the plaintiff who was a bona fide purchaser without notice of such agreement. Prior to the meeting of the stockholders at which the increase of the stock was ordered, plaintiff applied to the company to have the stock transferred on its books to himself. The company refused so to do. The Court held that the act of the company in refusing to transfer the stock upon its books prior to the meeting of the stockholders was wrongful; that the company was not a party to the agreement of waiver and was in no wise bound by it, and, therefore, the plaintiff, as the assignee without notice of the agreement entered into by the assignor with the other stockholders, was entitled to share in the increase. So that the doctrine as recited in the Bird

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case was based upon two important facts entirely missing from the instant case:

First. That the plaintiff applied and was wrongfully refused the right to transfer the stock before the meeting of the stockholders to vote upon the increase; and

Second. That the agreement of waiver was not entered into by the company and was, therefore, not binding upon it.

It seems to us that the appellant as an assignee of the 2,000 shares of stock becomes a stockholder subject to and acquires only such rights as its predecessor as a stockholder held.

And so, in the case of *Hodge v. United States Steel Corporation*, reported in 64 N. J. Equity, page 90, Vice-Chancellor Emery in his opinion, in part, said:

“In the absence of such affidavit showing such ownership and the certificate or certificates of shares which he holds, it cannot be known whether or not the previous holders of his shares, or any of them, have assented to the plan. If such previous holders of either the Smith or Curtis shares have assented, then neither Smith nor Curtis is entitled to a preliminary injunction against the execution of the plan assented to, so far as their rights rest on the ownership of these shares.”

And in the case of *Trimble v. American Sugar Refining Co.*, reported in 61 N. J. Equity, 340, Vice-Chancellor Pitney in his opinion, in part, said:

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“With this preliminary observation, I further remark that the bill does not state at what time complainant acquired the one hundred shares of stock which he holds, and it is common knowledge that the stock of this company, and many others of the same class, is daily dealt in on the Exchange. For aught that appears, he may have acquired it a very short time before the filing of the bill, from a holder who has acquiesced in everything that the company had done up to that time and in the policy the carrying out of which the complainant seeks to enjoin. That such acquiescence would bar the original holders of the shares now held by the complainant, if he knew of it, is perfectly well settled.”

In the instant case the previous holders of the stock did not merely assent but entered into an express written agreement limiting its right to acquire no more than 2,000 shares of the common stock.

We submit that the case of *Kingston v. Home Life Insurance Co. of America* decided by Court of Chancery of the State of Delaware and reported in 101 Atlantic Reporter, 898, is analogous to the facts in the instant case and is dispositive of this query. Therein the corporation entered into an agreement with one Bright giving the latter the exclusive right to take at par a large number of shares of the corporate stock of the company without regard to time. After the execution of this agreement the plaintiff acquired his stock in the corporation and sought to have the option contract set aside as in violation of

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his pre-emptive right to share in the new issues of stock. The Court, in its opinion, laid down the law as follows:

“One who acquires shares of stock of a corporation after the corporation by action of its officers, directors and stockholders has given to a stranger an exclusive right to take and pay for at par all of the unissued shares of the company, cannot assert as against the company, or the holder of the option, the general pre-emptive right of shareholders of a corporation. No authority was cited or found for or against the above proposition, but it is clearly sound and based on fundamental considerations. As between the corporation and the holder of the option such a contract is valid, and can be held invalid only at the instance and for the benefit of a stockholder who asserts his right to take the stock, and whose right has been impaired by the giving of the option. If, however, before a particular person became a shareholder another person has acquired an option inconsistent with the pre-emptive right, then the latter is subservient to the former right.”

And further on said:

“It is immaterial that some of the complainants had no knowledge or notice of the existence of the option before acquiring their shares, for there was no representation by the company, or the holder of the option, respecting unissued shares upon which the complainants relied to their detriment or disadvantage.”

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And held accordingly that the plaintiff could not assert his pre-emptive right.

So in the instant case the appellant became a stockholder long after its predecessor had waived the pre-emptive right of subscription to more than 2,000 shares of stock. And furthermore, the appellant did not become the registered owner of its stock until after the resolution of April 29th, 1931, was passed and the 1098 shares were issued. If, as laid down by the doctrine in the Kingston case, the pre-emptive right in a *new* issue of stock is subservient to an option previously granted, certainly any pre-emptive right that appellant may have had in the original authorized issue of stock that remains untaken is subservient and subject to the waiver executed by its predecessor.

IV.

THE RESOLUTION OF THE BOARD OF DIRECTORS DATED APRIL 29TH, 1931, AUTHORIZING THE ISSUANCE OF 1098 SHARES OF THE COMMON CAPITAL STOCK OF THEIR COMPANY WAS LEGAL AND PROPER.

Counsel for appellant in its brief further contends that the resolution dated April 29th, 1931, which provided that the subscribers to the 1098 shares could pay therefor either by cash or by execution of promissory notes payable within four months from the date of the purchase was void and illegal

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because it did not provide that the stock should be payable in cash only.

We respectfully submit that this contention is without merit for two reasons:

First. The bill of complaint and the supporting affidavit sought to have the sale of the 1098 shares of stock set aside solely upon one ground, namely, that the appellant had a pre-emptive right to subscribe for a pro rata share of this issue and that it had not been given the opportunity to so subscribe and accordingly prayed that the Court of Chancery grant to it the right to subscribe to its pro rata share of this issue. No attack was made upon the resolution as is now raised by appellant and no issue was presented upon the hearing of this cause other than the question of whether or not it had the pre-emptive right.

Second. No testimony was presented that would indicate that any of this stock was acquired for promissory notes, or if so acquired that the notes remained unpaid for at the hearing of this cause on December 22nd, 1931. The only testimony presented was that contained in the answering affidavit of Mr. Godfrey who stated:

“The proceeds from the sale of this stock was then immediately used in paying the Second National Bank the sum of \$6,000.00 on account of their indebtedness” (page 18, line 22, State of the Case).

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And as was stated by the Court in its conclusions:

“The resolution of the Board of Directors authorizing the issuance of this stock upon the delivery of promissory notes is, of course, invalid, as stock must be sold for either cash or for property purchase. However, I deem it unnecessary to comment further upon this, as there is no testimony before me that any of said stock remains unpaid for in cash” (page 56, line 35, State of the Case).

But even if it be assumed that some of this stock was first acquired by means of promissory notes such a transaction is not void but voidable and if the promissory notes are paid then the transaction becomes a valid and binding one.

Section 48 of the General Corporation Act is the section pertinent hereto and reads as follows:

“Nothing but money shall be considered as payment of any part of the capital stock of any corporation organized under this Act, except as hereinafter provided in case of the purchase of property, and no loan of money shall be made to a stockholder or officer thereof; and if any such loan be made the officers who make it, or assent thereto, shall be jointly and severally liable, to the extent of such loan and interest, for all debts of the corporation until the repayment of the sum so loaned. (L. 1896, Ch. 185, p. 293, Section 48; C. S., p. 1630, Section 48.)”

An exhaustive search has failed to disclose any case in our State that treats with the question of

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stock purchased by means of promissory notes or that construes the effect thereof, with respect to the provisions of Section 48.

A reading of the Act clearly indicates that its language at most can mean that the giving of a promissory note will not be considered as payment for the stock issued therefor. We submit that the language used means that where a promissory note is given in payment, its effect is to render the sale of the stock voidable at the option of the corporation, and further, that if a corporation should suffer any loss by virtue of the promissory notes remaining unpaid and the stock issued therefor being transferred to an innocent purchaser for value, without notice of this transaction, that the directors who permitted such a sale may be held accountable for the loss sustained by the corporation. But under no circumstances can such a sale, by the terms of this Act, be construed to be void *ab initio*, because, if and when the promissory notes are paid, then no loss has been suffered by the corporation and the Act requiring that cash be paid for the stock has been complied with. Such construction must necessarily be made with respect to Section 48 because it is common practice for corporations to issue stock and accept in payment therefor, the draft or check of the purchaser, which draft or check in the usual course of business is deposited to the credit of the corporation and if Section 48, were construed to render a sale of stock other than for cash void, it could be contended that all purchases made by check or draft are void; therefore, the transaction could be set aside.

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That the promissory note transaction is at most voidable but not void is established by the case of *Rubinstein v. Kasprzak*, decided by the Court of Errors and Appeals, recorded in 96 N. J. Eq., page 496, wherein that Court adopted in full the opinion of Vice-Chancellor Fielder which had been appealed from.

In the Rubinstein case, the complainant filed a bill in Chancery alleging that he was the owner of forty shares of Stanley Silk Dyeing Company by purchase from former owners thereof and prayed that the secretary of the corporation be directed to transfer same to his name on the company's books. The other members of the corporation who were joined as parties defendant, set up the defense that the shares were purchased by the company and retired, and that the complainant held these shares as custodian for the company. At the hearing, the Court found that the testimony established that the complainant borrowed money from the corporation and used same in purchasing this stock, which loan was subsequently repaid by the complainant to the corporation. The defendants further contended that the loan made by the corporation to the complainant is prohibited by Section 48 of the Corporation Act and that, therefore, the complainant became trustee for the company not only of the money borrowed but of the stock purchased by the loan. This argument, in effect, meant that since the latter portion of Section 48 prohibited any loan of money to a stockholder or officer thereof, such a loan is void *ab initio*, wherefore, the stock purchased by means of this loan belongs to the corporation and the bor-

rower holds the stock as trustee for the corporation. The Court recites Section 48, and then says:

“The connection in which the prohibition against a loan to a stockholder or officer is placed in this section would indicate that it bears some relation to the requirement that only cash shall be considered as payment for stock, but, however that may be, the statute seems to have been enacted for the benefit of creditors to secure them for their debts as against the dissipation of corporate funds through loans to stockholders and officers, by making the officers, who assent to such a loan, liable for the repayment thereof in case the borrower fails to pay. If such a loan be made and be repaid no creditor can complain, and the penalty prescribed by the statute is ended.”

Accordingly, the Court found that the loan having been repaid, no one had suffered any loss and the complainant was, therefore, entitled to full ownership of the stock and to have same transferred to his name on the books of the corporation.

We wish to point out, that while Section 48 by its language specifically prohibits a loan being made by the corporation to an officer thereof, there is no specific prohibition of selling stock other than for cash. The Act merely says, “Nothing but money shall be considered as payment.”

Corpus Juris in Volume 14, Section 600, page 440, specifically treats with this query as follows:

“While the statute may declare that a stock issued in violation of it shall be void, it does

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not follow that such stock is void in such a sense that there remains no *locus poenitentiae*, that such stock may not be validated by the subsequent payment and receipt of the money for it."

We respectfully submit, therefore, that while it does not appear that any of this stock was purchased by means of promissory notes, yet, as is pointed out by the Court, no testimony was presented showing that if any of this stock was purchased by means of promissory notes, the notes remained unpaid at the time the bill was filed.

V.

TO DOUBT IS TO DENY.

Since this is an appeal from the order of the Court dismissing the order to show cause and accompanying *ad interim* restraint, it seems to us that this appeal must necessarily stand or fall upon the sole question of whether or not the Court properly dismissed the order to show cause.

It is a fundamental proposition of law that the right to a preliminary injunction is a matter of discretion with the trial Court.

Thompson v. City of Paterson, 9 N. J. Eq. 624;

Health Products Corporation v. Weber, 97 N. J. Eq. 159;

Passaic-Athenia Bus Co. v. Consolidated Bus Lines, 100 N. J. Eq. 185.

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And the appellate court will not interfere with the discretionary order of the Court of Chancery except in cases entirely free from doubt.

Fleischman v. Young, 9 N. J. Eq. 622;

Mayor of Jersey City v. Morris Canal & Banking Co., 12 N. J. Eq. 545.

It is also a fundamental proposition of law that a preliminary injunction will not issue where the complainant's right is in doubt.

Hagerty v. Lee, 45 N. J. Eq. 255;

Citizens Coach Co. v. Camden Horse Railroad Co., 29 N. J. Eq. 299.

So in the instant case, as the Court pointed out in its conclusion:

“This raises at least a doubt as to the rights of the complainant, and, as to doubt is to deny, the order to show cause, with the restraint, will be dismissed” (page 56, line 32, State of the Case).

Certainly the facts presented in this cause raised questions of law which construed most favorably in favor of the appellant, raised a doubt as to the right of preliminary injunctive relief, wherefore the Court was bound to dismiss the order to show cause.

It is respectfully submitted, therefore, that upon this fact alone the decree of the Court of Chancery should be affirmed with costs.

ENDICOTT & ENDICOTT,
*Solicitors for and of Counsel
with Appellees.*

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And the appellate court will not interfere with the discretionary order of the Court of Chancery except in cases entirely free from doubt.

Fleischman v. Keagy, 9 N. J. Eq. 622;

Mayor of Jersey City v. Morris Canal & Banking Co., 12 N. J. Eq. 545.

It is also a fundamental proposition of law that a preliminary injunction will not issue where the complainant's right is in doubt.

Hagerly v. Lee, 45 N. J. Eq. 255;

Gloucester Coach Co. v. Camden Horse Railroad Co., 29 N. J. Eq. 299.

So in the instant case, as the Court pointed out in its conclusion:

"This raises at least a doubt as to the rights of the complainant, and, as to doubt is to deny, the order to show cause, with the restraint, will be dismissed" (page 55, line 32, State of the Case).

Certainly the facts presented in this cause raised questions of law which construed most favorably in favor of the appellant, raised a doubt as to the right of preliminary injunctive relief, wherefore the Court was bound to dissolve the order to show cause.

It is respectfully submitted, therefore, that upon this that alone the decree of the Court of Chancery should be affirmed with costs.

ENDICOTT & ENDICOTT,

*Solicitors for and of Counsel
with Appellees.*