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Record No. 1720

In the
Supreme Court of Appeals of Virginia
at Richmond

VIRGINIA PUBLIC SERVICE COMPANY, A
CORPORATION,

v.

PERCIVAL J. STEINDLER AND OTHERS.

FROM THE CORPORATION COURT OF THE CITY OF ALEXANDRIA

"The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements."

The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

166 Va 686

IN THE
Supreme Court of Appeals of Virginia
AT RICHMOND.

Record No. 1720

VIRGINIA PUBLIC SERVICE COMPANY, A CORPORATION, Appellant,

versus

PERCIVAL J. STEINDLER, ARNOLD H. GODSOL AND
FRED W. PRELLER, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE
OF STEINDLER AND PRELLER,
Appellees.

PETITION FOR APPEAL.

To the Honorable Supreme Court of Appeals of Virginia:

Your petitioner, Virginia Public Service Company, a Virginia corporation, respectfully represents to the Court that it is aggrieved by a final decree of the Circuit Court of the City of Alexandria, entered on the 21st day of June, 1935, in a certain Chancery cause therein then pending in which the appellees, Percival J. Steindler, Arnold H. Godsol and Fred W. Preller, co-partners, doing business under the firm name and style of Steindler and Preller, were plaintiffs and your petitioner was respondent.

The decree complained of embodies, by necessary implication, two unique propositions, neither of which, it is submitted, has ever been approved by any reported case in this or any other jurisdiction, viz.:

1. That a corporation which refuses to register a transfer of shares of its stock, pending judicial determination of the respective rights of rival claimants thereto, is under an absolute duty, not only to transfer the stock to the successful claimant and deliver to him the accrued dividends thereon, with interest, but also to pay him, in cash, any difference between the market value of the stock when delivered and the value thereof at the origin of the controversy, although the decline in value is wholly beyond the control of the corporation and results from no act or default of the corporation; and

2. That a purchaser of corporate stock who, upon refusal by the corporation to register the transfer to him thereof on its books, elects to sue in equity to compel the transfer of the stock rather than to proceed at law to recover the market value thereof, is entitled, after the transfer and delivery of the stock to him, to sell it without notice to the corporation at a greatly depreciated price and then to recover from the corporation the difference between the proceeds of such sale and the amount which he could have recovered at law by allowing the corporation to retain the stock as a converter.

Petitioner presents herewith a duly certified copy of the record of all the proceedings in said Court, subsequent to the issuance of the mandate of this Court in a former appeal in the same cause, all former proceedings therein being already of record in this Court in Record Number 1407, Percival J. Steindler and others, appellants, *v.* Virginia Public Service Company, appellee.

STATEMENT OF THE CASE.

This cause originated by a bill, in the nature of a bill for specific performance, filed by the appellees (hereinafter referred to as plaintiffs) against this appellant (hereinafter referred to as defendant) alleging a purchase by the plaintiffs, on August 24, 1931, of eighty (80) shares of seven per cent (7%) Preferred stock of defendant corporation, of which plaintiffs claimed to be *bona fide* purchasers for value without notice, and the refusal of defendant to transfer and register said shares in the name of the plaintiffs, and praying that defendant be required to transfer and register said shares, and to respond in damages for the loss alleged to have been sustained by plaintiffs as a result of the refusal to transfer.

Defendant answered the bill by setting forth that the shares purchased by plaintiffs were shares formerly standing in the

names of two residents of Virginia, Messrs. Dixon and Humphries, who had, on or about the date said shares were offered for transfer by plaintiffs, notified the defendant that their certificates had been fraudulently obtained from them on August 21, 1931, and that they claimed to be still the lawful owners of said shares. Defendant's answer further alleged that it had notified said Dixon and Humphries of the claim of ownership set up by the plaintiffs to said shares and advised them to take such action as might be necessary to establish their rights; that it claimed no interest on its own behalf in the stock or the ownership thereof, and that it was ready and willing to transfer the stock to any person or persons who should satisfactorily establish their right thereto or to whom it should be ordered to make transfer by any Court of competent jurisdiction.

Claimants Dixon and Humphries intervened in the suit alleging their right to the stock in controversy, and on their petition their defrauder, plaintiff's vendor, Kayser, was made a party defendant and proceeded against by publication.

On hearing, the fraudulent dispossession of the intervenors was clearly proven, but the court concluded that plaintiffs were *bona fide* purchasers for value without notice and decreed that the shares be transferred to them. The decree further provided that the defendant pay to the plaintiffs all dividends accrued on said shares, amounting to Eight Hundred and Forty Dollars (\$840.00), with interest at 6% on each dividend from its due date; but refused to allow plaintiffs as damages the amount of the claimed depreciation in market value of the stock pending the suit.

From the court's refusal to allow such damages, this court allowed plaintiffs an appeal, and thereupon reversed that portion of the decree and remanded the cause with directions to the trial court to ascertain the damages, if any, to which plaintiffs might be entitled. (*Steindler et als. v. Virginia Public Service Co.*, 163 Va. , 175 S. E. 888; 95 A. L. R. 220.)

After further testimony taken and submitted on the question of damages, the court below on June 21, 1935, entered the decree now complained of, the terms of which, containing petitioner's grounds of objection thereto, are as follows:

"This cause came on this day to be again heard upon the papers formerly read, and upon the depositions taken and filed on behalf of the plaintiffs and the Exhibits filed therewith, and upon the depositions taken and filed on behalf of the defendant, and was argued by counsel. Upon consideration whereof, and it appearing to the Court that the market

value of the eighty (80) shares of stock purchased by the plaintiffs, at the time when the same were offered to the defendant for transfer, was Eight Thousand Dollars (\$8,000.00), and that the market value of the same at the time of the redelivery of the stock by the defendant to the plaintiffs was the sum of Two Thousand Four Hundred and Forty Dollars (\$2,440.00), and the Court being of opinion that the plaintiffs are entitled to recover as damages the difference between the market value of the eighty (80) shares of stock as of the time when they were offered by the plaintiffs to the defendant for transfer and the depreciated market value of said stock at the time they were actually delivered by the defendant to the plaintiffs, doth

“ADJUDGE, ORDER AND DECREE that the defendant pay to the plaintiffs the sum of Five Thousand Five Hundred and Sixty Dollars (\$5,560.00), with interest thereon from the 24th day of April, 1933, at the rate of six per centum until paid, together with their costs on this behalf expended.

“To which findings and decree of the Court, the defendant duly excepted, on the grounds: that the findings of the Court are without evidence to support them; that said findings are based upon evidence improperly received and considered over the objection and exception of the defendant; that the decree of the Court is based upon an erroneous theory of the measure of damages; that the decree is inconsistent with the plaintiffs’ demand and the relief previously granted; that the amount of damages allowed is excessive; that the award of damages to the plaintiffs should be conditioned upon the tendering back by the plaintiffs to the defendant of the stock involved herein or an equivalent amount thereof at the value thereof at the time of demand for transfer; that the decree fails to require the plaintiffs to do equity and is inequitable and violative of the legal and equitable rights of the defendant; that the decree is contrary to law.

“And the defendant having indicated its intention of applying to the Supreme Court of Appeals for an appeal from this decree, it is further ordered that execution of this decree be and it hereby is suspended for ninety days, provided the defendant shall, within ten days from this date, give bond, with surety, before the Clerk of this Court in the penalty of One Thousand Dollars (\$1,000.00), conditioned, in accordance with Section 6338 of the Code, for the payment of all such damages as may accrue to any person by reason of such suspension, in case a *supersedeas* to this decree should not be allowed, and be effectual within such ninety days.”

GROUNDS OF DEFENDANT'S OBJECTION TO
DECREE.

From the several exceptions of defendant noted in the decree, the action of the Court on each of which is hereby specifically assigned as error, it will be seen that the defendant's objections to the decree fall into three general headings, viz.:

1. The decree is erroneous in point of fact, because based on improper evidence and not supported by any proper evidence.

2. The decree is erroneous in point of law because it adopts an improper measure of damages, is not responsive to the mandate of this Court, and allows damages upon an erroneous theory of the rights of the plaintiffs.

3. The decree is inequitable because it does not require the plaintiffs to do equity, ignores the equitable rights of the defendant, and imposes upon the defendant an unjustifiable burden amounting virtually to a penalty.

These objections will be discussed in the order named.

ERRORS OF FACT.

Upon the hearing to assess damages, plaintiffs presented depositions, over the objection of defendant, showing, in the light most favorable to them, the following facts:

1. That of the eighty (80) shares of stock involved in this suit, certificates for which were issued to plaintiffs on April 24, 1933, forty (40) shares were sold on May third, 1933, *by plaintiffs' transferees*, at Thirty-Two Dollars (\$32.00) a share; twenty (20) shares on April 25th, 1933, at twenty-nine (29); and twenty (20) shares on May first, at twenty-nine (20). (P. 14, Exhibits A, C and D.)

2. That W. D. Yergason & Company (a New York brokerage house), between April twenty-fourth and May ninth, had eight (8) transactions in Virginia Public Service Company seven per centum (7%) preferred stock, at prices ranging from twenty-eight (28) to thirty-two (32), four of these eight transactions having been purchases and sales of a part of the stock issued to the plaintiffs; that from April seventh to April twenty-first, there were six (6) transactions by this firm; from May tenth to May seventeenth, ten transactions; and from May nineteenth to June second, six (6) transactions.

The prices in the transactions during these three latter periods were not proven. (Record, page 31.)

3. That the bid and asked price range of this stock as published in plaintiff's Exhibit "B", the "National Stock Summary", a private compilation of bids and offers on unlisted securities reported by New York dealers, during this period, corresponded approximately to the actual sales prices realized on the several sales proven. (Record, page 37.)

Defendant, saving its exception to the propriety of plaintiffs' testimony, offered the testimony of F. W. King, General Counsel and Chairman of its Board of Directors, which showed the following facts (Record, page 50):

That defendant corporation had outstanding approximately ninety-six thousand (96,000) shares of its preferred stock, of the par value of Nine Million Six Hundred Thousand Dollars (\$9,600,000.00); that full dividends had always and continuously been declared and paid thereon; that the stock was held by about six thousand (6,000) stockholders, more than fifty-two hundred (5,200) of whom were residents of Virginia; that the stock had never been listed by the Company on any exchange, but that there were bid and asked transactions on the Richmond Exchange; that on two occasions he and another officer of the Company had attempted to buy stock at the asked price quoted on the Richmond Exchange, but had been unable to obtain any; that at the time of the issuance to the plaintiffs of certificates for the eighty (80) shares of stock in controversy in this suit, on April 24th, 1933, pursuant to the former decree herein, defendant did not receive any notice of plaintiffs' intention to sell the stock, and did not receive any such notice at any time thereafter until after the decision of this Court on the former appeal herein, and after the stock had already been sold; that the defendant, if advised of plaintiffs' present claim for damages, would have bought the stock if it had been notified of its sale (made for the purpose of fixing the measure of damages), as the only means of protecting itself against such claim, and that the price paid by defendant, under such circumstances, up to the stock's par value, would have been immaterial, if plaintiffs' measure of damages is correct. Tender was also made of the testimony of this witness to the effect that after receiving notice of the sale, defendant, not by way of compromise, but as a liberal solution of the undecided question then before the Court, did offer to pay plaintiffs One Hundred Dollars (\$100.00) per share for an equal amount—viz: eighty (80) shares—of the same stock; that such an arrangement, while favorable to plaintiffs, would be justified by the de-

fendent for the reason that the stock so long as it remained outstanding represented a continuing obligation of the Company to pay Seven Dollars (\$7.00) per year per share thereon. This tender was rejected by the Court below.

Referring to the decree, it will be seen that the Court found—"that the market value of the eighty (80) shares of stock purchased by the plaintiffs, at the time when the same were offered to the defendant for transfer, was Eight Thousand Dollars (\$8,000.00), and that the market value of the same at the time of the redelivery of the stock by the defendant to the plaintiffs was the sum of Twenty-Four Hundred and Forty Dollars (\$2,440.00)".

Defendant, while denying the propriety of any evidence of the value of the stock in question in this case, submits that neither figure is supported by proper evidence.

As to the market value of the stock at the time it was offered for transfer, the only evidence of any quotations or transactions in the stock as of that time (viz., August 25th, 1931), is that plaintiffs paid One Hundred Dollars (\$100.00) per share for it on August 24th, 1931 (Record No. 1407, page 57); and that plaintiffs on or about the same day contracted to sell twenty-eight (28) shares of the stock at one hundred and three-quarters ($100\frac{3}{4}$), and that upon their inability to deliver upon that contract, the vendee paid one hundred one and one-half ($101\frac{1}{2}\%$) for twenty-five (25) shares, the difference between that figure and the contract price of one hundred and three-quarters ($100\frac{3}{4}$) being charged to the plaintiffs (Record No. 1407, page 65); that W. D. Yergason & Company, on August 27th, 1931, made a purchase at one hundred and one-half ($100\frac{1}{2}$); on August 28th, 1931, a sale at one hundred and three-quarters ($100\frac{3}{4}$); on September first, 1931, a sale at one hundred one (101), and on September 27th, 1931, a sale at one hundred and one-half ($100\frac{1}{2}$). Absolutely no other evidence of any kind was produced to show that these prices were fair or reasonable, or were the current market values, or that there was any current market price or quotation, or any market.

"Infrequent transactions fall short of furnishing a satisfactory indication of value of stock." *Virginia v. West Virginia*, 238 U. S. 212.

There being, as shown, no satisfactory evidence as to market value as of the time when the transfer of plaintiffs' stock should have been made, there is no basis in the record for the finding made by the Court, and no basis for the assess-

ment of damages, the burden of establishing which is unquestionably upon the plaintiffs.

For this reason alone, the decree complained of should necessarily be reversed; but defendant further submits that the second element of the damages decreed below—viz., the market value of the time when the stock was finally transferred, on April 24th, 1933—is also unsupported by the evidence.

In the first place, it will be noted that while the language of the decree purports to find “market value”, the sum fixed by the Court is actually the aggregate price realized by two of the individual members of the plaintiff firm upon the disposal by them of the stock in question, although the stock was sold not as a unit but in three separate blocks, at different dates several days apart, and at different prices—viz., forty (40) shares on May 3d, 1933, at \$32.00 per share, \$1,280.00; twenty shares (20), April 25th, at \$29, \$580.00; twenty (20) shares, May 1st, at \$29, \$580.00; total, \$2,440.00. In other words, the Court adopted as “market value” the price actually paid by the plaintiffs in the first instance, and the price received by them in the second instance; and in the guise of fixing damages by the difference in market value, actually awarded the difference between the price paid and the price received, without reference to evidence or lack of evidence of market value.

Passing to its contention that the finding of the Court below as to the “market value” on the date when the stock was actually transferred to the plaintiffs cannot in any event be sustained on the evidence, defendant submits the following points:

(a) That the prices obtained for these shares in the transaction testified to are immaterial, because there were transfers from the plaintiff partnership to two of the individual partners prior to the sales testified to, the consideration for which transfers is not proven (Record, page 14).

(b) The prices realized on these sales are not material, because, under the Court's decree, the damages now claimed should be measured by market value of the entire eighty (80) shares and not by the amount actually received at different times from sales of broken lots by transferees of plaintiff firm.

(c) The amount realized from these sales is not competent evidence of the market value of the stock, because under the plaintiffs' theory they claimed to be entitled to recover from the defendant as damages whatever loss they sustained, which

cannot be shown by proving the price received in broken lots by plaintiffs' vendees or transferees.

(d) The amount realized on these sales is not admissible in evidence, because they were not sales made by plaintiffs but by plaintiffs' transferees, and even if construed to be sales by plaintiffs, the sales were made for the purpose of fixing damages without any notice to the defendant, and with no incentive to obtain the best possible price. *Rosenbaums v. Weeden*, 18 Gratt. 785; *American Hide & Leather Co. v. Chalkley*, 101 Va. 458.

(e) The prices realized on such sales failed to establish the market value, because it affirmatively appears from the depositions that the shares were almost immediately sold at a profit by the purchasers, and the testimony of Mr. Egbert, one of the purchasers, is that he would not have bought the stock at the price he did, had he not considered it a bargain (Record, page 7).

Comparing the negligible volume of trading in defendant's stock as shown by the testimony, with the total of ninety-six thousand (96,000) shares of preferred stock outstanding, defendant submits that the effect of all the plaintiffs' testimony is to show that the volume of dealings in this stock was too small to establish a market value for the purpose of assessing damages at law, especially in view of the fact that the plaintiffs' depositions (Mr. Egbert's in particular), lead to the clear inference that such sales as did take place were at virtually sacrifice prices, which inference is further borne out by the admitted fact that the corporation has continuously earned and paid dividends at the rate of Seven Dollars (\$7.00) per share.

With reference to the bid and asked quotations put in evidence by the plaintiffs, it is submitted that this evidence, if material, is incompetent under the rule laid down in *Norfolk & Western Railway Co. v. Reeves*, 97 Va. 289, which is in accord with the general rule that bids or offers to sell when not accepted are not admissible evidence of the market value. (See also *Wadley's case*, 98 Va. 808.) Particularly is this true in view of the testimony of two of plaintiffs' witnesses—Mr. Egbert and Mr. Preller—to the effect that the so-called "bids" and "offers" listed in the "National Stock Summary", and the daily sheets from which it is compiled, are not considered as binding, but merely as invitations to submit counter-proposals. (See Record, pages 8, 22.)

On the hearing in the Court below, it was contended by plaintiffs' counsel that the defendant had not shown the actual or book value of the stock. It is submitted that the burden

of proof of damages rests wholly on the plaintiffs, whether the damages should be measured by market value, book value, actual value, or any other standard, and that by failure to prove any valuation acceptable in law, plaintiffs have failed to show themselves to be entitled to any damages. See *Brandt v. Buckley* (Court of Appeals of Georgia), 109 S. E. 692, reversing a judgment in an action for breach of a contract to deliver stock for lack of competent evidence of value at the time of breach, and holding it incumbent on the plaintiff to establish actual value by proof of assets and liabilities of the corporation, or its dividend earning capacity, in absence of provable market value.

The foregoing statements and arguments are advanced to show the insufficiency of the evidence relied upon by plaintiffs, assuming that any evidence of the *value of the stock* is admissible in this case. Defendant earnestly contends that in this case, as in all other suits for, or in the nature of specific performance, the *value* of the subject matter of the contract whose performance is sought to be enforced has no place in fixing the incidental damages which equity will award to the prevailing party in such suits. Consequently, defendant's contention is that *all* evidence of the *value* of the stock involved in this case is totally irrelevant and inadmissible to determine the damages, if any, to which plaintiffs are entitled. (*Jones v. Osage Oil & Ref. Co.*, 280 Fed. 696; *Woodcliff Gin Co. v. Kittles*, 173 Ga. 661; 161 S. E. 119.)

ERRORS OF LAW.

The essential error of law in the decree complained of is in the adoption of the theory that plaintiffs, having sued in equity to compel a transfer of the stock to them, and having obtained that relief, with the incidental payment of all dividends accrued thereon with interest, are still entitled to recover as further damages the difference in market value of the stock at the time it was offered for transfer and the time it was actually transferred.

In presenting this contention and attempting to point out the invalidity of this theory, defendant desires at the outset to disclaim any intention to reargue any question decided by this Court on the former appeal in this case or to seek a reversal of the decision of this Court therein. Rather it is the position of defendant that the view adopted by the Court below was based upon a misinterpretation of the scope and effect of the former opinion of this Court; that that opinion does not require the interpretation put upon it by the Court below and was not intended to be so interpreted; that such

interpretation results in the enunciation of a proposition of law wholly at variance with and unsupported by any other authority, and that if intended to be so interpreted the opinion is so far short of showing such intention as to require, in the interest of clearness and definiteness, a further clarification and interpretation by this Court.

Reference to the former record in this Court will show that the theory of plaintiffs' counsel in presenting his appeal to this Court was, in his own language (Record No. 1407, page 3):

"The sole question before the Court on this appeal may be briefly stated as follows:

" 'Where stock is purchased by brokers for immediate resale upon a definite bid and the corporation whose stock is purchased wrongfully refuses to transfer the same on its books and refuses to deliver proper certificates therefor, and the stock, which was purchased for immediate resale, depreciated in value, is it proper for a court of equity, in compelling the transfer of such stock by the corporation to the purchasers on its books, to require the corporation to respond in damages for the loss suffered due to the fall in the market value of the stock; or is the purchaser remitted to his action at law?' "

This question, as phrased, which was the only question presented in plaintiffs' petition for appeal, assumes that the plaintiffs were entitled in any event to compensation for the decline in value, and that the issue was purely whether such compensation could be decreed in the equity suit or must be sought by an independent action at law. The opinion of this Court ignored the question of the measure of damages and confined itself strictly to a decision of the question propounded by plaintiffs' counsel, the whole sum and substance of the opinion being that

Equity having acquired jurisdiction would retain jurisdiction to administer complete relief, legal as well as equitable, and any damages to which plaintiffs could show themselves to be lawfully entitled should be decreed in the equity suit.

Accordingly this Court issued its mandate remanding the cause to the lower Court with directions to ascertain the damages, if any, sustained by the plaintiffs.

As to the ultimate right, as a matter of law, of the plaintiffs to recover as damages the claimed loss resulting from

the alleged decline in market value of the stock, defendant submits that the former record shows that plaintiffs' counsel not only did not present that question to this Court, but that none of the authorities cited on behalf of plaintiffs support it; that the former opinion of this Court does not discuss or decide it, and the mandate of the Court did not establish it; that none of the authorities cited by this Court in its opinion support it; and, finally, that the right has never been established by any reported decision of this or any other Court, and cannot be sustained on any established principle of law.

The defendant, therefore, submits the following question of law, raised by the decree complained of in this case:

Where a party in possession of certificates of corporate stock, whose request for registry of the stock in his name has been refused by the corporation because of notice of an adverse claim to the same stock, elects to sue in equity to compel the corporation to register the stock, and the corporation discloses in such suit the existence of such adverse claim and asserts its own lack of interest in the controversy, and the adverse claimant intervenes in the suit, whereupon the conflicting claims are then adjudicated, is the successful claimant, after receiving the stock in question and all accrued dividends thereon, with interest, entitled to establish a loss by selling the stock, without notice to the corporation, at a greatly reduced market price, and having thus disposed of the subject matter of the suit, which is of definite value to the corporation, to then recover from the corporation damages so established to the extent of the decline in the market value of the stock pending suit, the corporation being in no way responsible for the decline?

Defendant contends that the answer must be in the negative, both on principle and on authority.

On principle, it is settled that the jurisdiction of equity to compel a corporation to register a transfer of its stock is based upon the jurisdiction to compel specific performance, there being between every stock corporation and its stockholders a contract, either express or implied, that the corporation will recognize any valid transfer of any of its shares from a stockholder to a third person, and will perfect the right of such third person as a stockholder by clothing him with proper legal title to his stock by registry of the transfer on its books and issuance to him of a new certificate of ownership. (*Fleckheimer v. Bank*, 79 Va. 80.) For a wrongful breach of this contract the transferee has a right of action

at law for damages, just as one who has contracted to buy or sell real estate has such a right upon a wrongful refusal of the other party to comply with the contract. But, as in the case of real estate, courts of equity have assumed the right to compel specific performance of a contract for its purchase, so in the case of corporate stock equity has assumed the right to compel specific performance by a corporation of its contract to recognize a transferee of its shares as a stockholder.

When a purchaser of land sues for specific performance of his contract, he elects to affirm and retain the equitable title vested in him by the contract, and the Court by decree specific performance affirms that title and requires the vendor to perfect it by executing a conveyance transferring the legal title. Similarly, when a purchaser of stock sues to compel a transfer on the books of the corporation, he elects to affirm and retain the equitable ownership vested in him by the assignment of his assignor, and the Court affirms that ownership and requires the corporation to perfect it by executing and delivering legal evidence thereof.

Where, on the other hand, the purchaser of real estate elects to bring an action at law for damages, he thereby irrevocably repudiates and divests himself of all title to or interest in the land, which thereupon remains vested wholly in the vendor, and in such action he obtains compensation as measured in terms of money for all damages he can show himself to have suffered by not getting the land. Likewise, when the purchaser of stock proceeds at law against the corporation for refusing a transfer he repudiates all rights of ownership he may have had, putting the corporation in ownership of the stock as a converter, and obtains compensation in money for all damages he shows himself to have sustained by not getting the stock. The maximum measure of damages in the case of land is, if the purchase price has been paid, the value of the land (*Wilson v. Spencer*, 11 Leigh 261), or if not, the excess of the value over the contract price. (*Greer v. Doriot*, 137 Va. 589; *Matthews v. LaPrade*, 144 Va. 795.) It is to be noted that all of these cases show that the value is to be determined as of the time of breach of contract. So, in the case of stock, the purchaser is entitled to recover from the corporation the value of the stock at the time of demand and refusal to register a transfer. 14 C. J. 771, and cases there cited.

That the right of action at law for damages and the right to specific performance in equity are mutually inconsistent remedies is elementary; the nature of the rights vindicated and the theories of the respective remedies being, as shown above, wholly dissimilar. (See *Davis v. Beury*, 134 Va. 322,

345.) Thus, in the action at law, which is based on the theory that the purchaser has gotten nothing under his contract, the plaintiff is entitled to recover at most the *value* of the thing contracted for in the nature of damages, but can have no claim for damages on account of matters the right to which is essentially incident to the ownership of the subject of the broken contract—such as rents, issues and profits of the realty in the one case, and dividends, voting rights, and other incidents of stock ownership in the other. Conversely, in the equity suit, the theory of which is that the complainant in the eyes of equity has gotten the thing which he contracted for and only needs the aid of the Court to obtain legal evidence of his ownership, the *value* of the thing he gets has no place in the suit, and he is entitled to obtain compensation only for any essential incidents of that ownership which he should have received by virtue of his ownership but did not—i. e., rents, issues and profits of the realty, in the case of land, and dividends, voting rights and similar incidents of stock ownership, in the case of stock.

Now, with the above distinctions in mind, defendant submits that it is clear that the decree of the Court below in this case, based on the theory contended for by plaintiffs' counsel and accepted by the Court, attains the unique result that, notwithstanding the essential differences between the legal and equitable rights of the plaintiffs on the above principles, *these plaintiffs have obtained in this suit more than they could possibly have gotten in an action at law for damages, and more than they could have gotten in equity under the settled principles established in cases of specific performance for more than two hundred years.* The effect of the decree appealed from is exactly as if plaintiffs had brought an action at law and had been awarded a judgment for the full value of the stock at the time of refusal of transfer, plus the right to require the defendant to surrender the stock itself in part satisfaction of the judgment at its depreciated value at the time of surrender and pay the balance in cash, plus the right to receive all dividends on the stock from the time of its conversion by the defendant.

Or as if, in the equity suit, plaintiffs had obtained a decree for the transfer of the stock, or in the alternative, for the value thereof at the time of refusal of transfer, with the right (after they had elected to take the value) to require the stock at its depreciated value in part payment. An alternative decree for the stock or its value is frequently entered in suits to compel stock transfers, the alternative payment of value being necessary in many cases where the corporation cannot legally issue stock to the plaintiff, but no such

case has been found where it has been suggested even that the plaintiff has the right to choose between the alternatives if the stock could be delivered; much less that the plaintiff, with right to elect between the two, can combine them by requiring delivery of the stock at a depreciated value in part payment of the money award. Yet that is no more nor less than what the plaintiffs in this case have sought and what by the decree of the court below they have gotten.

Such a result, defendant insists, is utterly violative of all sound principles both of law and of equity, and makes a mockery of the whole law of election of remedies.

The vice of the decree complained of is that it fails to recognize the distinction between rights of ownership which are a basis for damages incident to decrees for specific performance, and claims for losses of other kinds which will not be so regarded, which distinction, defendant submits, is clearly borne out by authority.

The former opinion of this Court in this case was selected by the publishers of American Lawyers' Reports for publication and annotation in their valuable collection, and appears in 95 A. L. R., at page 220, with an annotation, at page 228, on the topic, "Power of a Court of Equity which decrees specific performance to award damages due to delay prior to decree". In view of the high esteem in which this series is held, it may be reasonably presumed that the cases collected in the annotation are, if not exhaustive, at least fully representative of the particular field.

Careful consideration of this annotation and the cases therein cited discloses that neither the rule deduced by the annotator nor the particular cases cited sustain the right of the plaintiffs in this case to be awarded damages against this defendant for the alleged decline in market value of the stock.

The rule, as stated by the annotator, is that "a court of equity, having jurisdiction for the purpose of specifically enforcing performance of a contract, has full jurisdiction, in addition to decreeing specific performance, to award such legal damages as have resulted from delay in the performance of the contract". Considering and accepting this proposition as stated, what are "legal damages" resulting from "delay in the performance of the contract"?

It is a primary and fundamental principle of legal liability recognized in every branch of the law, that damages can in general be recovered only for such losses or injuries as are the *proximate* result of the wrong complained of. In this case the "wrong" is the failure of the defendant to transfer the stock on its books when requested, in August, 1931. Can this be said to be the proximate cause of the plaintiffs' alleged

loss? Clearly not. Possibly the loss would not have occurred if the stock had been transferred (although this in itself is purely conjectural, and would have to be determined by the intervening act of plaintiffs, i. e., a sale of the stock). But, this is not sufficient to make the refusal to transfer a proximate cause. The true, real and only *proximate* cause of the alleged loss was the decline in market value, which decline this Court, as a matter of common and general knowledge, should judicially notice as being universal among securities of all types during the period in question. The fact that the decline in market value of the stock in question was not caused or contributed to by any act of defendant clearly distinguishes the instant case from all the other cases cited in the above annotation.

Furthermore, even if the delay in registry of the stock could be considered as a proximate cause of the alleged damages, the delay was, in the last analysis, the result of the adverse claim to the stock, which was asserted and litigated by the intervenors and not by the defendant, which was in the position of a mere stakeholder, as disclosed by its answer in this case. In fact, it was even less than a stakeholder, as the physical possession of the certificates was retained by the plaintiffs, and full legal ownership of the stock could, under the uniform stock transfer act (Code, Sections 3848 (1), *et seq.*) have been passed on indefinitely by mere endorsement and delivery.

Analyzing the cases cited in the A. L. R. note referred to, it appears that in the greater number of them the damages actually awarded or held proper were for rents and profits incident to the realty accrued pending suit for specific performance of contracts for the sale of the land. Clearly such damages were properly allowed and the analogous damages in the case at bar, viz., dividends accrued on plaintiffs' stock pending suit, have also been allowed in the previous decree of the Court below, and have been paid in full with interest. In this class are *Lidikevicz v. Kopala*, 315 Ill. 404, 146 N. E. 461; *McVay v. Castenara* (1928), 152 Miss. 106, 119 So. 155; *Worrall v. Munn* (1868), 38 N. Y. 137; *Taylor v. Taylor* (1871), 43 N. Y. 578; *Bostwick v. Beach* (1886), 103 N. Y. 414, 9 N. E. 41; *Beddow v. Flage* (1911), 22 N. D. 53, 132 N. W. 637; *Elkopolus v. Burger* (1919), 22 Ohio N. P. N. S. 183, 31 Ohio D. N. P. 7; *Haste v. Goodman* (1922), 18 Alberta L. R. 15, 66 D. L. R. 360; *West v. Washington & C. River R. Co.* (1907), 49 Or. 436, 90 P. 666; *Manning v. Cohen* (1909), 124 La. 869, 50 So. 778; *Fleming v. O'Donohue* (1923), 306 Ill. 595, 138 N. E. 183; *Coleman v. Dawson* (1930), 110 Cal. App. 201, 294 P. 13.

Merely the same rule, for the benefit of the seller instead of the purchaser, was applied in *Hamilton v. Carter*, 249 Mass. 391, 144 N. E. 226, and *Pillsbury v. J. B. Streeter Co.*, 15 N. D. 174, 107 N. W. 40, which held that the vendor in enforcing specific performance against the purchaser of real estate is entitled to damages for the loss of interest on the purchase price from the time it should have been paid, and (in the *Hamilton* case) for taxes, insurance and other expenses of maintenance of the property paid by the seller after the time when the contract should have been performed: thus deciding that, the purchaser in claiming specific performance from his vendor is entitled to the revenues flowing from the subject matter from the time he became entitled to it, and the vendor when he enforces specific performance against the purchaser is entitled to have the purchaser charged with the burden of ownership from the time he should have assumed it.

Of slightly different character, but as easily distinguishable from the case at bar, is the case of *Grubb v. Starkey*, 90 Va. 831, decided by this Court in 1894. There land had been sold by the plaintiffs to the defendants for the construction and operation thereon by the defendants of an ore-washer, the contract containing an express covenant, on the part of the purchasers, to lay a pipe line across their land from above the ore-washer to the sellers' land, so as to provide a supply of clear water for the use of plaintiffs' stock. The land had been conveyed, but the pipe-line had not been constructed, and the decision of this Court was that in a suit by the sellers to require specific performance of the covenant to lay the pipe-line they were entitled to damages sustained by reason of the lack of a supply of clear water up to the time of actual construction of the line. There clearly the requirements of proximate causation and of definiteness and certainty were fully met; the breach of covenant was not only the proximate cause, but the sole cause, of the injury compensated; and the prevention of that very injury was the express subject matter and the only purpose of the covenant. The case of *Post v. West Shore R. Co.*, 123 N. Y. 580, 26 N. E. 7, is virtually identical, the covenant there being for the reconstruction and restoration of a public road and the construction of a railroad crossing.

The case of *Real Estate Trust Co. v. Bird*, 90 Md. 229, 44 Atl. 1048, the only case cited where damages were awarded in connection with the enforcement of a transfer of corporate stock, applies exactly the principle now being urged by this defendant—viz., that damages to be recoverable in such a case must be for some injury to the essential rights of stock owner-

ship as such—the damages allowed in that case having been for the loss to plaintiff by reason of the refusal to register transfer, of preferential right as a stockholder to subscribe to his proportionate share of an additional issue of stock. There the plaintiff was the assignee of one of the original subscribers to stock of the defendant corporation. Issuance of additional stock had been proposed and decided on by the incorporators before the assignment, but had not been authorized by vote of the stockholders which was the only legal method of increase. Having found that the corporation was on notice of plaintiffs' claim at the time the vote of stockholders was had, the Court went on, answering the argument of the defendant that the original subscriber was the one who was entitled to subscribe to a proportionate share of the increased stock—"If Mr. Brooks" (the original subscriber) "had agreed * * * to take the one hundred shares (100) instead of waiving his right to do so, can it be said that he, and not the appellee, would have been entitled to the increase? Most assuredly not. He could not have demanded it from the company, for it was an incident to the stock which the appellee then owned and the right to the increase belonged to the latter by reason of the fact that he owned the stock at the time of the increase."

Latimer v. Marchbanks, 57 S. C. 267, 35 S. E. 481, also cited in the annotation, also expressly recognizes that the basis of the damages which may be allowed in connection with specific performance is compensation for rights immediately incident to ownership of the property involved. In that case the defendant vendor had put the purchaser in possession, but had not executed any conveyance. Then, a dispute arising as to the boundary of the tract sold, defendant had dispossessed the purchaser of a portion of the land. The appellate court set aside an award of Seventy-Five Dollars (\$75.00) for damages for the dispossession, as not supported by sufficient evidence, saying, "Only such injury as Marchbanks (the defendant) may have done to the freehold, and such compensation as may be just for the use and detention of the premises, are proper subjects of inquiry in this action. There was no satisfactory evidence, if any at all, as to the value of the occupation and use of the premises". The cause was accordingly remanded with directions to require the defendant to account for the rental value of so much of the premises as defendant took from possession of the plaintiff, and for any substantial injury to the freehold.

In *Orfield v. Harney*, 33 N. D. 568, 157 N. W. 124, the damages allowed did not include, as indicated in the mention

of the case in the A. L. R. note, compensation for depreciation in value of merchandise. That case involved specific performance of a contract for the exchange of land for merchandise to a certain stated value to be selected from a certain lot. In decreeing specific performance at the suit of the purchaser of the land, the Court held that he was also entitled to damages for the expense of storing the merchandise which he was compelled to do in order to have it available for the seller to make his selection in accordance with the contract.

Dills Paper & Pulp Co. v. Willow River Lumber Co., 170 Wis. 19, 173 N. W. 317; *Oklahoma Natural Gas Corp. v. Municipal Gas Co.*, 38 Fed. (2d) 444; and *Peale v. Marian Coal Co.*, 172 Fed. 639, all involved enforcement by equity of contracts of a continuing character, the decrees, while phrased as decrees for specific performance, having the same effect in each case as if rendered in the form of injunctions against further breaches of the contracts involved. In each case the only damages allowed were for expenses incurred by the plaintiffs in obtaining what they were entitled to under their contracts during the prior periods of non-performance. That is, the decree in no case went further than giving the plaintiff compensation for what he had specifically contracted for directly with the defendant.

Serrao v. Noel, L. R. 15, Q. B. Div. 549, an English case cited in the note, and relied on by plaintiffs in the former appeal and cited and quoted by this Court in its former opinion, goes no further than supporting the general proposition that a court of equity having jurisdiction will administer complete relief and decree any damages properly incident to the main relief. In view of the strong reliance placed upon that case by plaintiffs' counsel, a complete copy of the several opinions rendered is, for the convenience of the Court, appended hereto. The facts were, that the plaintiff delivered to his broker for sale certain shares of stock, endorsed in blank, and the latter wrongfully hypothecated them for his own benefit, the shares subsequently coming into the possession of the defendant Noel, who applied for their registry in his name. The plaintiff then brought suit against the defendant and the corporation, to restrain the transfer and recover the original certificates, and that suit was determined by a consent decree in favor of the plaintiff for the return of the stock. There after the plaintiff sold the shares and brought a new action against the defendant (Noel, not the corporation) for damages for the depreciation in value pending defendant's detention of the certificates. A verdict and judgment in favor of plaintiff on this demand was reversed by the

Court of Appeals, on the sole ground that the former suit was a complete bar to any further action based on the detention of the stock by the defendant. The Court of Appeals was not called on to, and did not, pass on the validity of plaintiff's claim or the measure of damages applied, and one of the judges of that Court expressly indicated his serious doubt as to that.

The language of Lord Justice Bowen, quoted in the former opinion of this Court, "If that had been an action of detinue at common law, the jury, in their assessment, could have included, not only damages for the original wrongful detention, but also damages for the detention until the shares be re-delivered", in no way commits the learned Justice to the proposition that damages for the detention would have been measured by a decline in value not caused by any act of the defendant, and it is submitted that the correct measure of damages in that situation would be interest on the value of the property detained, which measure has been fully allowed the plaintiffs in this case in the previous decree of the lower Court by the award of dividends accrued on the stock involved during the entire period of detention; which, it may be noted, were at the rate of seven per cent (7%), or in excess of legal interest which would have been the limit of the allowance in the case of tangible property.

That the Court in deciding that case was fully aware of the above points is clearly shown in the concluding language of the opinion of Lord Justice Bagallay—"Application for the relief now sought ought to have been made in that action, and it would have been successful if such a claim as the present could under any circumstances be upheld".

Prothero v. Phelp, 25 L. J. Ch. 105, the other English case cited in the annotation (which is also quoted in the opinion of Judge Christian in *Nagle v. Newton*, 22 Gratt. 814, cited in the former opinion in this case), goes no further than the other cases cited, the point there under consideration being the jurisdiction of equity to allow compensation for deterioration in property caused directly by acts of the seller.

To deny the plaintiffs in this case the damages allowed by the Court below will not produce any injustice in law or deprive them of any rights to which they are entitled. The decline in value, if there was such a decline, was a risk which the plaintiffs voluntarily assumed, with open eyes, when they chose to perfect their title as stockholders and asked the aid of a court of equity to vindicate their rights in that capacity—a risk which every purchaser of land assumes when he elects to seek specific performance of his contract rather than to consider it as breached and take pecuniary compensation for

his loss. Being by such election in position to realize in full on any enhancement or appreciation of value of the property in question, he must necessarily bear the loss in case of depreciation, the loss resulting in the end from his own act in electing the property instead of money, and not from any act of the other party to the contract. Were it otherwise, there would be no need of or basis for an election—If equity would both give the property and impose on the defendant the full risk of any loss to plaintiff, due to decline in value thereof, at the same time leaving the plaintiff free to enjoy any profit, what possible consideration could lead any one to a court of law, which is wholly unable to compete with such generosity?

It is impossible to perceive any essential difference between the actual situation in the case at bar, and the situation which arises when real property is injured without fault of the vendor, as by fire consuming the premises, pending performance of a binding contract of sale. But in that case, it is settled by the overwhelming weight of authority that the loss must fall on the purchaser. "The rule which is supported by the weight of authority, and which is based on the proposition that a purchaser under a binding contract of sale is in equity regarded as the owner of the property, is that the purchaser is entitled to any benefit or increase of value that may accrue to the property, and must bear any loss, injury or depreciation without fault or negligence on the part of the vendor or of either party." 66 C. J. 1052. This rule is adopted in West Virginia (*Maudra v. Humphreys*, 83 W. Va. 307, 98 S. E. 259), and was impliedly recognized by this Court in *Christian v. Cabell*, 22 Gratt. 82, where an exception to the rule was applied to impose the loss on the seller because at the time of the loss he did not have good title to the property and was not then in a position to put title in the purchaser. The reasons for imposing the risk of loss on the purchaser in the case of real estate require even more strongly that the risk of loss from a general market decline be imposed on the plaintiffs in this case, because here the plaintiffs had not only an equitable interest in the stock, but actual possession of certificates therefor, and, according to the construction placed by this Court in the former opinion in this case on the Uniform Stock Transfer Act (Code, Secs. 3848 (1) *et seq.*), a good and perfect legal title to the stock.

Defendant submits that in the claim now asserted by the plaintiffs, they have wholly abandoned the only theory on which their right to the relief originally sought can be maintained, i. e., that money damages would not give them all they expected to get by their purchase of the stock—and hav-

ing been decreed what they prayed for, are attempting by specious circumlocutions and ingenious subterfuge, without regard to the consequences to defendant, to beguile the Court into giving them not only what they chose to take, but also the benefit of the alternative which they formerly rejected. This is flatly opposed to the doctrine laid down by this Court in the case of *Ewing v. Litchfield*, 91 Va. 575, where the Court said, "The case before us, being in its essence for the recovery of damages for a breach of contract, a court of equity is not to be beguiled into granting the relief sought because it is ingeniously concealed under cover of a prayer to compel the assignment of certain shares of stock".

Suppose the plaintiffs in their original bill had made a full and frank disclosure of the attitude which they now take, and had said, "Your complainants purchased the stock, registry of which in their names was refused, not with any desire to hold it as an investment nor to share in the future fortunes of the corporation, but solely for the speculative purpose of profiting on an early resale; your complainants still have no desire to remain as stockholders of the corporation, but desire registry of the stock only to enable them to dispose of it; your complainants, therefore, pray that the defendant be required to register said stock in their names and issue and deliver to them certificates therefor for resale, and that this Court retain jurisdiction thereafter for the purpose of decreeing to your complainants against the defendant as damages any loss which they may suffer upon such resale". Can there be any doubt that on such a statement a court of equity would have declined to take jurisdiction? Such a proposition—which is no more nor less than the proposition now before this Court—could have been construed in no other way than as a claim for unliquidated damages; and a bill having for its chief purpose the ascertainment and recovery of unliquidated damages cannot be maintained in equity. *Sacks v. Theodore*, 136 Va. 466; *Ewing v. Dutrow*, 128 Va. 416; *Cleaver v. Matthews*, 83 Va. 801; *Ewing v. Litchfield*, 91 Va. 576, *supra*.

Even in the case of a contract to sell real estate (jurisdiction to compel specific performance of which is so well established that it is frequently said not to depend on inadequacy of legal remedies) it has been held that a purchaser who shows by his bill that his sole desire for the land is to enable him to perform another contract whereby he has sold the same property does not make a case for specific performance. *Hazelton v. Miller*, 25 App. D. C. 337. And this Court has recognized that the tendency of all the modern cases is to prefer giving compensation in damages rather than specific

performance, wherever damages will suffice. *Porter v. Shaffer*, 147 Va. 921.

Finally, on the question of the measure of damages, defendant submits that the rule adopted by the Court below imposes on the defendant the risk of depreciation in value during whatever time the plaintiffs by delay in maturing their suit, or the Court by time required for consideration of argument, may defer a final decision, and consequent determination of the quantum of depreciation, although over these delays the defendant has little or no control.

If the decision had been made and the stock sold when the bill was filed, plaintiffs' damages, according to their theory, would have been Eight Hundred Dollars (\$800.00). (Record No. 1407, page 25.)

If decision had been made and the stock sold on January thirteenth, 1932, the date when depositions were taken, plaintiffs' damages on the same theory, would have been One Thousand Nine Hundred and Twenty Dollars (\$1,920.00); (Record No. 1407, page 64), if decision had been made September twelfth, 1932, the date of hearing, and the stock sold then, the damages would have been Two Thousand Eight Hundred Dollars (\$2,800.00); (Record No. 1407, page 97), but because decision was delayed and transfer and sale not made until April twenty-fourth, 1933, the damages, according to plaintiffs' theory, are Five Thousand Five Hundred and Sixty Dollars (\$5,560.00), and while it is not in the record, if the decision had been delayed a few more months, the damages would have been practically cut in half.

The fallacy of plaintiff's contention is their failure to distinguish between their right to obtain their stock, plus incidental damages up to the time of transfer, and their right to be made whole in money damages on the whole transaction, which rights, as above shown, involve wholly different theories and require entirely different forms of action. They had their choice between these two proceedings. They chose their first right and prevailed, but now they seek to augment their first recovery by adding to it all the benefits to which they would have been entitled had they chosen their second right. This, despite their deliberate choice of a remedy which in its origin and essence depended and, in many cases, was expressly conditioned upon the inadequacy of the money damages recoverable at law by reason of the existence of elements of value not measurable in terms of money damages or not reflected in market value. As said in *Westminster National Bank v. Union Electrical Works*, 73 N. H. 465, 62 Atl. 971, 111 Am. S. Rep. 637, 3 L. R. A. N. S. 551:

"It is also contended that the plaintiff is not entitled to a decree for specific performance, since he has a plain and adequate remedy at law. In view of the authorities to the contrary, that proposition does not demand extended discussion. It 'is contrary to the overwhelming weight of authority. An action for damages does not always afford an adequate remedy for the refusal of a corporation to recognize a person as a stockholder; and it is well settled, therefore, that, if a corporation wrongfully refuses to recognize and register a valid transfer of stock, and issue a new certificate to the transferee, he may maintain a bill in equity to compel it to do so'. Clark & M. Priv. Corp. #605; 1 Cook, Cor. #24. It is to be observed that this is not a proceeding to compel a vendor of stock to assign and deliver his certificate to the vendee under a contract of sale (*Eckstein v. Downing*, 64 N. H. 248, 10 Am. Rep. 404, 9 Atl. 626), but to compel the corporation to perform a merely clerical act for the benefit of a vendee who has already purchased and now holds the certificate. To deny him relief by specific performance, upon the ground that he could recover damages at law, would be, in effect, to compel him to sell what he already owns at such a price as a jury might think it was worth. And especially ought a Court of equity to decree specific performance, when, as in this case, the real and prospective value of the stock depends upon the future development and management of the corporate enterprise."

If plaintiffs had sued for money damages, they could have recovered Eight Thousand Dollars (\$8,000.00), plus incidental damages for detention, defendant would have had the stock, worth Eight Thousand Dollars (\$8,000.00) to it, and nobody would have been seriously hurt. But they sue for the stock, get it, and dispose of it at their own volition at a sacrifice price far below its value to the defendant, thereby depriving the Company of the stock, and assuming to fix its liability, not by defendant's act, but by theirs.

Plaintiffs were entitled to recover either the stock or its money value, plus, in either case, appropriate damages for detention. The recoverable damages would be in the one case, legal interest on the money, in the other, dividends or other issues of the stock. Let us assume they had the right to be made whole, that they carefully considered and decided, as they did, what they would rather have the stock, plus dividends, and the possibility of profit from appreciation, than have the money plus interest, but without possibility of profit. When they get the stock, plus detention damages, they are through. They cannot afterwards decide that they want the

money too, and that their election was on a basis of "head I win, tails you lose".

When they elected to sue for the stock they took the risk of the stock depreciating in value. If it had appreciated in value certainly the plaintiffs would have been entitled to all the benefits thereof. This may have decided them in their choice of whether they would sue for stock or for money. It must certainly be presumed from the form of proceeding which they chose, that they preferred to have the stock with prospects of an enhancement, or with its return of seven per cent (7%) on the investment, rather than have merely been made whole on their investment. In fact, they would have not been satisfied to merely get back their money if the stock had enhanced in value. If the defendant could not have satisfied them under those conditions by returning their money, on what principle of equity can the defendant now be required to return their money because the stock depreciated? On what principle of equity can plaintiffs come into court and say, "I want my stock so that if it enhances in value I may get the benefit, but if it depreciates in value, I will hold the defendant for the loss"? Plaintiffs cannot justify, under any principle of law, the recovery of any element of damage in this case other than they could have recovered if they had sued for money.

If, pending the suit which was brought to establish their rights as stockholders, the stock had gone to Two Hundred Dollars (\$200.00) per share, would they have been under any obligation or liability to account or give credit to the defendant for their gain? Why, then, in the single case in which plaintiffs now find themselves, are they entitled both to profit, if the stock goes up, and to protection against loss, if it goes down?

Defendant still maintains, as it has from the beginning of this proceeding, that in no case on record in any common law jurisdiction has such a result been reached as that reached in this case. No such case has been cited on behalf of the plaintiffs, and no such case is cited by this Court in its former opinion. Giving due regard to the language of the Court's opinion and to the authorities therein cited, it is respectfully submitted that it only goes to the extent of holding that the plaintiffs in this case are entitled to the allowance in these proceedings of any damages which they can show as incidental to the establishment of their rights as stockholders.

As against the total absence of express authority to support the decree in this case, defendant offers the case of *Jones v. Osage Oil & Ref. Co.*, 280 Fed. 696, holding definitely

and unequivocally that plaintiff in an equity suit to compel transfer of corporate stock was not entitled to claim damages for depreciation in the market value of the stock, because such a claim was an attempt to obtain the benefits of two mutually inconsistent alternative remedies. And on the same theory, the Supreme Court of Georgia, in *Woodcliff Gin Co. v. Kittles*, 173 Ga. 661, 161 S. E. 119, held that in a suit in equity to compel transfer of stock evidence of the price or value of the stock is wholly immaterial.

Other cases illustrative of the principle of election of remedies as urged by this defendant are the following:

Equitable Trust Co. of New York v. Conn. Brass & Mfg. Co., 290 Fed. 712, holding that the remedies of replevin and trover against a bailee are inconsistent, since all remedies which proceed on the theory that title to property is in plaintiff are substantially inconsistent with those which proceed on the theory that it is in defendant.

Brush v. Norman (Mo. App.), 199 S. W. 721, denying the right of the purchaser of a silo both to rescind the sale and to recover damages for spoiled ensilage resulting from the defectiveness of the silo, the latter claim being based on an affirmance of the contract and, therefore, inconsistent with rescission.

American Woolen Co. of N. Y. v. Samuelson (N. Y.), 123 N. E. 154, holding that a seller, after disaffirming a sale for fraud and bringing replevin for the goods sold, could not claim any damages based on the contract of sale.

Ireland v. Waymire, 107 Kans. 384, 191 Pac. 304, where property is wrongfully obtained from the owner by another and converted to his own use, the former owner may sue for the recovery of the specific property or its value, and when with knowledge of all the facts he sues for its value, the election is complete, and his other remedy of suing for the specific property is no longer available.

Singleton v. Cutting, 107 S. C. 465, 92 S. E. 1047: Suit for specific performance held to be a bar to any claim for damages such as those which could have been recovered in an action at law.

And *McCreary v. Stallworth*, 212 Ala. 238, 102 So. 52, is submitted as strikingly similar to the instant case, in that it involved the same kind of effort to claim that a combination of two forms of relief could be adopted so long as there was no actual duplication of recovery. In that case a purchaser of land, finding that the vendor could not comply fully with his contract because he only owned a five-eighths (5/8) interest in the land, first sued for specific performance of the contract

and obtained a conveyance of the five-eighths (5/8) interest, and then sought to recover damages for the failure of the vendor to convey the remaining three-eighths (3/8) interest. The Court dismissed the claim for damages, rejecting the theory of combination relief.

DEFENDANT'S EQUITIES.

Entirely apart from the legal propositions presented in the preceding section, and irrespective of whether or not this Court feels that further consideration of those questions is foreclosed by its ruling in the former appeal in this case, defendant nevertheless respectfully submits that the record made since that appeal clearly shows that there are equities in favor of the defendant which were wholly disregarded and ignored by the decree of the Court below.

Relying on the settled principle, beloved of chancery since its origin, that "he who seeks equity must do equity", defendant submits that the decree of the Court below violates this maxim in two respects—two aspects so salutary and just that they have been adopted by the law courts: one in the rule imposing upon a plaintiff the duty of minimizing damages, and the other in the related requirement that a plaintiff having the right to fix the measure of his damages by a sale of property must give seasonable notice of such sale to the party to whom he looks for his damages, so that the latter may have an opportunity to reduce his own loss.

In this case plaintiffs have violated both of these cardinal principles. It must be kept in mind always that this defendant is and has always been non-resistant as to registering the transfer of the stock in question as the Court might direct, and has faithfully complied with all orders of the Court in that connection, as well as accounting to the plaintiffs for and the payment to them of all accrued dividends on the stock. It has even gone further and offered to make plaintiffs whole on the loss they sustained by reason of selling their stock on a depressed market, upon the single condition that they return to defendant the stock involved, or a similar number of shares of the same stock, even in the face of defendant's firm conviction that it is in no sense liable in this procedure for any loss growing out of a decline in value of the stock. It is submitted that the refusal of the Court below to consider the testimony offered as to this proposition was erroneous. Even if the offer be construed as a proposition of compromise, which it was not, the law of evidence does not bar evidence of the compromise offer when introduced by the party making it, but only when offered by the other party as an admission.

It is earnestly and confidently submitted that under all the circumstances of this case, this attitude of defendant goes further than equity could fairly demand of it.

In striking contrast is the attitude of plaintiffs whose steps have been as follows:

1. To treat themselves as stockholders, and as such elect to sue in equity to enforce their rights in regard to the registry of their stock.

2. Secure such registry and incidental damages for delay in registration.

3. Secure new certificates for their stock.

4. Sell their stock without notice to defendant, and without making any claim of dissatisfaction with the Court's order.

5. After such sale, which terminated their relation as stockholders, to proceed in the same suit, which could only be maintained by stockholders, to demand such damages as they would have only been entitled to had they left the stock in defendant's hands and sued at law.

It is hard to conceive of a more flagrant failure to do equity on the part of a suppliant for equity.

It is to be borne in mind in this connection that under the law established by this Court a corporation having creditors (as well as several classes of stockholders) has no power to go into the open market and buy shares of its own stock, thereby diminishing its capital. (*Kemp v. Levinger*, 162 Va. 685; *Marshall v. Fredericksburg Lumber Co.*, 162 Va. 136; *Marcuse v. Broad-Grace Arcade Co.*, Va. , 180 S. E. 327.) It, therefore, cannot be said that the defendant here could have protected itself in this case in any way except by getting these shares directly from the plaintiffs in a settlement of the claim asserted by them. Furthermore, not having been given notice of the sale until long after it had been made, defendant was never on notice of any necessity to take such action, if it could have taken it. As a matter of record, defendant did not even have notice of plaintiffs' intention to make any further effort to obtain these damages until after the stock had been sold, the first indication of that intention being the notice of application for a copy of the record, served on defendant's counsel on May 19th, 1933 (Record No. 1407, page 96).

In a case at law where a seller of goods upon default of the purchaser has the right to resell at the risk of the purchaser and fix his damages by such resale, it is well established law in Virginia that notice of such resale must be given. *Rosenbaums v. Weeden*, 18 Gratt. 785; *Am. Hide & Leather*

Co. v. Chalkley, 101 Va. 458. Finding such clear recognition of this principle even in the law courts, it is inconceivable that a court of equity will not be at least equally zealous in protecting the rights of a defendant in such a case. In *Jones and Carter v. Roberts*, 6 Call 187, a suit to compel the execution of a lease, relief was denied upon a showing that the plaintiff tenant had breached some of the terms of the alleged oral lease, on this ground:

"The maxim is, that he who seeks equity must do it. And if a party comes into a court of chancery for relief, he should be compelled to show that he has done all which his adversary has a right to require as the consideration for performance on his part. Otherwise, he is not entitled to the aid of the court; and this argument is *a fortiori*, where he has grossly failed to comply with his engagements to the lasting injury of his adversary; for then the converse of the maxim takes place, namely, that he who has committed iniquity, shall not have equity."

When plaintiffs received the duly issued certificates in obedience to the Court's order, plus all accrued dividends from the shares represented thereby with interest, they received everything which they were entitled to claim, as stockholders, against the Company. Possibly they should also have compensation for their loss of Eighteen Dollars and Seventy-Five Cents (\$18.75), which the record shows they had to pay out to make good a commitment on twenty-five (25) shares which they had entered into before refusal of transfer, and which is the only item of damages specifically pointed out in the former opinion of this Court in this case. When the shares were transferred to them and they found they could not find a purchaser at the price they paid, and that they were faced with a financial loss upon a resale, they had no right to assume to make such resale, even if the Company was responsible for the loss, unless they either—(a) advised the Company of the step they proposed to take at the Company's risk, or (b) took the step at their own risk. By not notifying the Company of their proposal to sell the stock at the Company's risk, they sold at their own risk and must stand the loss.

The testimony taken for the plaintiffs after the remanding of this case to the Court below contains a clear and significant statement of the recognition of these facts by the plaintiffs themselves. Mr. Fred W. Preller, one of the plaintiffs, testifying as to the sale of forty (40) shares of the stock involved in this case for the account of Mr. Arnold H. Godsol,

another of the plaintiffs, says this, "He" (Mr. Godsol) "came into this office and said that '*we finally wound up the Virginia Public Service Company matter. What do you think you could get for my forty (40) shares?*'" This was in April, 1933, immediately after this defendant had fully complied with the original final decree, and before any proceedings toward appeal had been started. Notwithstanding which, the same plaintiffs, after taking what the Court allowed them, and definitely and irretrievably disposing of it and putting it out of their power to restore if the portion of the decree awarding it to them should thereafter be reversed, and terminating their status as stockholders on which their right to bring this suit originally depended, came to this Court and sought and obtained a reversal of the portion of the decree refusing them damages, without disclosing that they no longer had the stock and had placed it out of their power to restore it if this Court on their appeal should find that they were not entitled to it (as this Court could have done under Rule VIII).

Another thoroughly established rule of equity, uniformly adhered to by this Court for many years, is likewise applicable to show, not only that the result reached in this case is inequitable and violative of settled principles, but likewise, by implication, that the risk of depreciation of the stock in this case was a risk of the plaintiffs alone.

The rule in question is that equity will not grant its relief to reward speculation. First enunciated by Chief Justice Marshall in *Garnett v. Macon*, in the United States Circuit Court for Virginia, 6 Call 308, 2 Brock Rep. 185, in the proposition that a material change in the value of land, due to a general declension in values, is sufficient ground for denial of specific performance of a land contract, the rule was immediately adopted by this Court in *Bryan v. Lofftus' Admrs.*, 1 Rob. 12, decided a few years later, and has since been followed and particularized in *Darling v. Cummings' Exr.*, 92 Va. 521; *Gish v. Jamison*, 96 Va. 312; *Newberry v. French*, 98 Va. 479; *Tazewell Coal and Iron Co. v. Gillespie*, 113 Va. 134; and later cases. Consideration of these several opinions of this Court will show beyond question that the fundamental principle is that speculation by one party at the expense of the other will not be countenanced. In *Darling v. Cummings' Exr.*, *supra*, it is said:

"When a vendee delays in completing the contract, in order that he may speculate upon the chances of its proving to be an advantageous bargain, or that, through a rise in value, or

other change of circumstances, his gain may be assured, and then, when he is thus certain that it will be a fortunate speculation, offers to perform, and sues to compel a conveyance by the vendor, a court of equity will refuse to grant him the remedy, even though he may have at an earlier day paid part of the purchase price. And a rise in the value of the land during the interval will always be a fact of much weight tending to show that the vendee's delay was speculative, and for the very purpose of awaiting such a turn favorable to himself. The rule may be laid down as general, applying to either the vendor or the vendee, that where there has been a change of circumstances or relations which renders the execution of the contract a hardship to the defendant, and this change grows out of or is accompanied by an unexcused delay on the part of the plaintiff, the change and delay together will constitute a sufficient ground for denying a specific performance, when sought by the one thus in default. Pomeroy on Specific Performance of Contracts, Sections 407 and 408."

With reference to the element of delay referred to, it is submitted, first, that the opinion of Chief Justice Marshall was rendered in a case where there had been no delay in bringing suit, and delay was not considered by him; secondly, that the theory of the plaintiffs in this case is such that no waiting was necessary to enable them to get the benefit of their speculation; they could sue in equity at once and if the value of the property rose they would have their gain; if it declined they would nevertheless be indemnified by putting the loss on the defendant. If this were true, the rule of the cases here under consideration could never have arisen at all—the element of delay would be immaterial and the bringing of suit would in itself be the speculation with nothing to lose and everything to gain. Plaintiffs' theory is definitely and inescapably contrary to the rule.

In *Gish v. Jamison*, 96 Va. 312, *supra*, this Court said, referring to a decline of land value from about Sixteen Thousand Dollars (\$16,000.00) to Six Thousand Dollars (\$6,000.00) .

"Our conclusion is that, under the changed conditions that have taken place during the period of delay, which conditions are in no degree attributable to any default of Gish, but were produced by circumstances over which he had no control, specific execution of the contract sought to be enforced would be harsh, oppressive and very inequitable."

Equally harsh, oppressive and inequitable is the allowance of the damages awarded in this case in addition to allowing plaintiffs to have specific performance.

It is not even suggested that the stock which the plaintiffs owned after the transfer under the Court's decree was not, so far as the rights between the corporation and its stockholders is concerned, identical in every way with the stock which they had originally purchased and their ownership of which they had sued to establish. Fluctuations in market value of stock produced solely by conditions over which the corporation has no control are risks borne exclusively by stockholders, and not matters in which the stockholders can look to the corporation for protection. That plaintiffs may have cause to regret their choice of remedies is due to no fault of defendant. In strict theory of law, defendant does not believe that they were or are entitled to change their position, after they have gotten what they asked for, and ask for more on the ground that they would now have more if they had asked for something else in the beginning. Nor, especially, that they could be entitled now to demand that relief, in total disregard to the fact that to allow it to them now would put the defendant in an incomparably worse position than it would have been in had the plaintiffs, when they had their choice, elected the proper procedure to obtain what they now ask—i. e., to be made whole in money, and not to be stockholders.

However, waiving this strict view of the law and conceding that equity should not turn the plaintiffs away without making them whole, defendant most emphatically states that the decree of the lower Court cannot be justified as the proper method of relief, because it subjects the defendant to a loss of Five Thousand Five Hundred Sixty Dollars (\$5,560.00), whereas the same relief to the plaintiffs could be attained without imposing such loss.

The final result of this suit to the plaintiffs will be, even if the decree of the Court below be affirmed, that they will have realized on the stock which they originally bought, aside from dividends and interest, the sum of Eight Thousand Dollars (\$8,000.00)—Two Thousand Four Hundred Forty Dollars (\$2,440.00) realized from their sale of the stock, and Five Thousand Five Hundred Sixty Dollars (\$5,560.00) to be paid by this defendant under the decree. This is all they have asked, and presumably with this they will be satisfied.

On the other hand, if the decree be affirmed, the defendant will have paid out Five Thousand Five Hundred Sixty Dollars (\$5,560.00)—and will still have the eighty (80) shares of

stock outstanding, representing to it a liability of Eight Thousand Dollars (\$8,000.00).

Had the plaintiffs brought an action at law for conversion, they would have realized the same recovery—viz., Eight Thousand Dollars (\$8,000.00). The defendant, however, would have had the stock in its treasury, and would have decreased its outstanding stock liability by the amount of Eight Thousand Dollars (\$8,000.00).

Clearly, the result to the plaintiffs is the same in either case; but the defendant will be worse off by the amount of Five Thousand Five Hundred Sixty Dollars (\$5,560.00) under an affirmance of the decree entered in this case than it would have been under a judgment at law.

While the mere fact that an equitable remedy may require more of a defendant than would an alternative remedy at law may not be a valid objection to the enforcement of the equitable remedy, defendant nevertheless submits that where equity can give to the plaintiff the same ultimate relief by two different methods, and one method imposes on the defendant a hardship or burden which will not occur under the alternative method, the whole spirit of equity imperiously demands that the less harmful method be adopted. "Equity delights to do justice, and not by halves", and to look solely at the rights of one party and ignore rights of the other when it would be possible to reach the same end with due regard to the rights of both would surely be a flagrant case of half-justice administered with one eye closed.

In the circumstances of this case, the court of equity could have given the plaintiffs all that they have gotten, and all that they ask, *without* subjecting the defendant to the Five Thousand Five Hundred Sixty Dollar (\$5,560) loss it is faced with if the decree now in question is affirmed. Had the plaintiffs, when the first decree was rendered, then stated that as the stock had gone down they no longer wanted it, but wanted their money back, the Court could, conceding that plaintiffs were not bound to take the loss, have entered an alternative decree awarding the plaintiffs the value of their stock at the time of refusal of transfer—Eight Thousand Dollars (\$8,000.00)—in lieu of the stock, and requiring the stock to be surrendered to the defendant. This would put the plaintiffs in exactly the position they will be in if the present decree is affirmed, but would leave the defendant Five Thousand Five Hundred Sixty Dollars (\$5,560.00) better off from its standpoint.

The same procedure could and should have been adopted after the former remand of this cause by this Court, and can and should still be done. Defendant submits that such

procedure goes to the extreme limit in giving full and complete relief to the plaintiffs, and gives them everything which they have gotten or will get if the present decree be affirmed, and eliminates the wholly unjustifiable loss of Five Thousand Five Hundred Sixty Dollars (\$5,560.00) to the defendant which would result from the enforcement of the decree as rendered.

Under these circumstances, defendant submits that it is clear that the affirmance of the decree would amount in fact to a taking of its property without compensation, as the detriment to the defendant in no way benefits the plaintiffs. The loss so imposed on defendant could only be justified as a penalty or punishment, repugnant to equity.

The only valid objection which can be urged by plaintiffs to these proposals is that, as they have in fact sold the stock they may suffer a loss if they are required to buy back other shares to surrender to the defendant. That the plaintiffs no longer have the stock is no answer: they deliberately disposed of it before the final decision of this suit, in complete disregard of the right of this Court to reverse the decree under which they got it or to require its surrender as a condition of further or different relief. At the time they sold the stock they had no vested right in it. All they had was "An inchoate right, which would become vested upon the happening of one or two events, viz., an affirmance of the decree of the trial court by the Supreme Court of Appeals, or by the expiration of the period allowed at the time in which to take an appeal". *Kennedy Coal v. Buckingham Coal*, 140 Va. 37, 45.

There were two conflicting claimants for registration of the stock involved. The Company was advised either to seek the aid of equity in its dilemma, or await and abide such order of Court as might be entered on the application of either claimant. It chose the latter course and did abide in every respect the order of the Circuit Court of Alexandria. Plaintiffs, then, after accepting the benefits of the Court's order, disposed of the subject matter of the suit, without notice to defendant, perfected an appeal without disclosing that they had changed their status and disposed of the property involved, obtained a reversal of the portion of the decree they objected to, and the cause being remanded, they then threw off the mantle of stockholders which they originally used to get the aid of the Court, and now appear boldly in their true role of speculators pure and simple and demand that they be compensated because their speculation was unsuccessful and they got no profit from getting what they asked for. On the whole case which they now make, equity jurisdiction ap-

pears to have been wrongfully invoked in the first instance, and it would hardly lie in their mouths to complain if the entire proceedings were to be reversed and the suit dismissed *ab initio*. To allow them, nevertheless, all the relief they could have obtained at law, on condition they put the defendant in the position it would then have occupied, is to err, if at all, on the side of liberality.

Their claim is that the stock is regularly and frequently dealt in, so they have only to buy another eighty (80) shares. If they can get it for less than they sold theirs for, they will have a profit after all; if they have to pay more, the difference will be due solely to their own deliberate act of disposing of the stock before their right to it became vested, and then themselves keeping the suit alive by appeal.

In conclusion, passing notice should be given to the dictum of this Court in the case of *Dobie v. Sears-Roebuck & Co.*, 164 Va. , 180 S. E. 289, where it was said:

“In the Steindler case, the amount of damage was easily ascertainable; it was the difference between the market value of the stock at the time the transfer should have been made and its market value at the time the transfer was actually made.”

Of course, this statement can have no bearing upon the question of what are proper damages in the instant case in which, at the former hearing in this Court, the only question presented and decided was the question of equity *jurisdiction* in the matter of damages. The dictum in the Dobie case can only mean that the damages *claimed* by the plaintiffs were easily ascertainable, and by no means can it be construed as an approval of the *right* of plaintiffs to recover the damages claimed. That is the very thing the case was remanded to ascertain, otherwise, this Court could and would have entered final judgment.

Defendant respectfully, earnestly, and confidently submits that the decree of the Court below should be reviewed by this Court and should be annulled and a final decree entered by this Court, dismissing the cause, or awarding the plaintiffs the sum of Eight Thousand Dollars (\$8,000.00) conditioned upon the delivery by the plaintiffs to the defendants of eighty (80) shares of the seven per cent (7%) cumulative preferred stock of the Virginia Public Service Company.

And defendant's counsel further state that they desire to be heard orally upon this application for appeal and *superseas*; that they desire to and do hereby adopt this petition as their brief on appeal, if allowed, and desire the same to

be printed with the record; and that a copy hereof was delivered to counsel for plaintiffs-appellees on the 18th day of September, 1935.

VIRGINIA PUBLIC SERVICE COMPANY,
By LEO P. HARLOW,
MARSHALL H. LYNN.

I, Leo P. Harlow, an attorney, duly qualified to practice in the Supreme Court of Appeals of Virginia, do certify that, in my opinion, the decree complained of in the foregoing petition should be reviewed by the Supreme Court of Appeals of Virginia.

LEO P. HARLOW,
Of counsel for Appellant.

Received Sept. 18, 1935.

M. B. WATTS, Clerk.

Appeal allowed; *supersedeas* awarded. Bond, \$6,000.

EDW. W. HUDGINS.

10/25/35.

Received Oct. 25, 1935.

M. B. W.

SERRAO

v.

L. R. 15 Q. B. D. 549.

NOEL.

FULL TEXT OF OPINIONS OF JUSTICES OF COURT OF APPEALS.

Brett, M. R.:

It is unnecessary now to determine whether there is a fresh cause of action for every day upon which goods are detained, and whether separate actions of detinue can be maintained for each day's detention of them. This is a suit which might have been brought in the Court of Chancery, at least after Lord Cairn's Act, otherwise called The Chancery Amendment Act, 1858 (21 and 22 Vict., Chap. 27), S. 2; in one suit there might have been a decree for restitution of the shares and for damages for the detention of them; both remedies might have been obtained. Now there is no Court of Chancery. Grove, Jr., seems to have supposed inadvertently that the court of chancery still exists, being represented by the Chancery Division: it is true that there are two divisions, the Queen's Bench Division and the Chancery Division; but they are divisions of one Court and that

Court administers one law. The former action was brought in the Chancery Division of the High Court, and the present claim might have been maintained in that action. The plaintiff might have been entitled to several remedies, but they could have been all combined and made available in one action: how can the rule apply that where there are several causes of action several actions may be brought, and that a person entitled to several causes of action cannot be prevented from bringing several actions except by depriving him of, or making him pay, costs, if he has acted vexatiously or oppressively? Even before the Supreme Court of Judicature, Acts 1873, 1875, and still more now, no more actions than one can be brought for the same cause of action; and I am of the opinion that there is but one cause of action in the present case. Where separate rights have been infringed, separate actions may be maintained, because the infringement of separate rights gives rise to separate causes of action: this was elaborately shown in *Brunsdon v. Humphrey*; that was a case in which the majority of the Court of Appeal thought that separate rights had been infringed.

It has been urged for the plaintiff that, at all events, the sum of twenty-two (22) pounds ten (10) shillings for detention subsequent to the order of the Chancery Division in the former action is recoverable by him; but after the making of that order, the mining company was no longer the agent of the defendant; the order was made against the company: the shares were kept back by the company on its account and not by the defendant; the remedy is against the company, for there has been no disobedience by the defendant. I think that judgment must be entered for the defendant, and I am of the opinion that the defendant must have the costs of the cause, and that the plaintiff must have the costs of the issues upon which he has succeeded. The defendant is to have the costs of this appeal.

Baggallay, L. J.:

I am also of the opinion that the defendant is entitled to judgment. This is an appeal from the judgment of Grove, J., and the grounds of the appeal came to this, that a former action has been tried between the same parties, and that an order of the Court made by consent in that former action is a bar to the present action. During the argument for the defendant, reliance was placed upon Lord Cairn's Act (21 and 22 Vict., Chap. 27), S. 2. I do not agree with the contentions of the defendant's counsel as to the effect of this statute; but every remedy necessary for doing complete justice in an action in any division of the High Court is provided by the Supreme Court of Judicature Act, 1873, s. 24,

sub-s. 7. The order, upon which the defendant relies, was made in the course of proceedings in the Chancery Division; every kind of relief could have been given in the Chancery Division; application for the relief now sought ought to have been made in that action, and it would have been successful if such a claim as the present could, under any circumstances, be upheld.

Bowen, L. J. I, too, am of opinion that the defendant is entitled to judgment. The principle is, that where there is but one cause of action, damages must be assessed once for all. The plaintiff relies upon a certain cause of action; was this cause of action capable of being litigated in the suit in the Chancery Division? If that had been an action of detinue at common law, the jury in their assessment could have included, not only damages for the original wrongful detention, but also damages for the detention until the shares be re-delivered; damages might have been assessed once for all. The suit in the Chancery Division was an application to the High Court of Justice for all kinds of relief, in order that the rights of the parties might be adjusted. As soon as the writ was issued and the claim delivered, the Court was empowered to do what was right between the parties. It may be said that the plaintiff did not claim damages in the suit in the Chancery Division. I am not sure that he did; the primary object of the action was that it should be a proceeding to obtain the re-delivery of the shares, and perhaps it did not occur to the plaintiff to make it clear that he intended to include a claim for damages; but if an application had been made, the Court would have amended the claim, so as to enable the plaintiff to claim damages, and, therefore, damages not only could have, but also would have, been assessed at the time of the trial in the Chancery Division. In the present case there was a re-delivery of the shares made upon an arrangement arrived at in the course of the suit; the cause of action now litigated is the detention of the shares; that cause of action was litigated in the action in the Chancery Division, and, therefore, the two actions are in respect of the same cause.

Judgment reversed.

RECORD

VIRGINIA:

In the Circuit Court in and for the City of Alexandria.

NOTICE TO TAKE DEPOSITIONS.

Percival J. Steindler, Arnold H. Godsol and Fred W. Preller,
Co-partners doing business under the firm name and style
of Steindler and Preller, Plaintiffs,

v.

Virginia Public Service Company, a corporation, Defendant.

To Virginia Public Service Company:

Please take notice that on Tuesday, the 11th day of December, 1934, between the hours of 3 P. M. and 7 P. M. of that date, at the office of Arthur Frank, 19 Rector Street, in the City of New York, State of New York, we will proceed to take the depositions of P. J. Steindler, Joseph Egbert, R. B. Tomlins, et al., to be read in evidence in our behalf in the suit in equity in the Circuit Court of the City of Alexandria in which we are plaintiffs, and Virginia Public Service Company is defendant; and if, for any cause, the taking of said depositions be not commenced on that day or if commenced, if they be not completed on that day, the taking of depositions will be adjourned and continued from time to time at the same place and between the same hours until they are completed.

PERCIVAL J. STEINDLER,
ARNOLD H. GODSOL,
FRED W. PRELLER,

By Counsel.

CHRISTOPHER B. GARNETT,

Counsel for Percival J. Steindler, Arnold H. Godsol and
Fred W. Preller, Plaintiffs,

page 2 } Legal service of the above notice is hereby accepted this 5th day of December, 1934.

LEO P. HARLOW,
Counsel for Virginia Public Service Company and Percy G. Dixon and William H. Humphries.

DEPOSITIONS.

The depositions of Joseph Egbert, Francis D. McHugh, Fred W. Preller and Irvin G. Freeman, taken before me, Evelyn V. Swartz, a Notary Public in and for the County of New York, pursuant to notice hereto annexed, at the office of Arthur Frank, 19 Rector Street, in the City of New York, between the hours of 3 P. M. and 7 P. M. to be read in evidence in behalf of plaintiffs in a certain suit pending in the Circuit Court in and for the City of Alexandria wherein Percival J. Steindler, Arnold H. Godsol and Fred W. Preller are plaintiffs, and Virginia Public Service Company its defendant.

Present: Fred W. Preller in person. Arthur Frank and Christopher B. Garnett, Attorneys for the plaintiffs. Leo P. Halow, Attorney for the defendant, Virginia Public Service Company.

It is stipulated between counsel for plaintiff and for defendant that the stenographer may sign the names of the witnesses to the depositions which shall be taken as if they were signed by the deponents themselves.

page 3 } Mr. Garnett: The object of presenting the witnesses for depositions in this case is to prove, first, the actual price at which the eighty shares of Virginia Public Service Company 7% preferred stock delivered to the plaintiffs by the company were sold and, second, the sale price of similar stock, that is, Virginia Public Service Company 7% cumulative preferred, at or near the day of the sale by the plaintiffs.

Mr. Harlow: That, I presume, is on the theory that your measure of damages will be the difference between what you paid for the stock and what it sold for and what you consider to be the market price.

Mr. Garnett: Our contention is that the measure of damages is the difference between the market price of the stock at the time the plaintiffs purchased the same from Kayser and the market price at the time when the original certificates were delivered by the company to the plaintiffs. We intend to prove the price which was realized by the plaintiffs on their shares as being some evidence of the market price and we intend also to prove the prices at which other shares were sold at or about the same time, and also the bid and asked prices about the same time.

Mr. Harlow: These objections are intended to run through

all the depositions taken without necessity of being repeated when each witness testifies, my understanding being that that is agreeable to all parties.

This evidence is objected to, first, on the ground that there is no warrant for the taking of any additional evidence in this case as the evidence was closed when the record was presented to the Court of Appeals and that there is no warrant in law for taking any additional testimony other than

that taken in the transcript of record when the case page 4 } was presented to the lower court and to the Court of Appeals. Second, because there is no showing that the evidence to be taken here today as indicated by Colonel Garnett in his opening statement is competent or material on the question of what measure of damages the plaintiffs sustained in this case and that the alleged market price of this stock as of the date when these particular sales were made is not material or competent to show the measure of damages.

Evidence as to the sale of this stock actually made by Steindler & Preller or their successors is objected to because of the fact that *that* the stock was sold by them, is wholly immaterial and irrelevant, having been the exercise of their own free choice, and is not competent evidence of market value at the time of the sales because the circumstances under which this sale was made, that is, Steindler and Preller claiming at the time a right to be compensated by the Virginia Public Service Company for any loss resulting from the sale, do not meet the test of market value as the price which a purchaser ready, able and willing to buy and a seller willing but not forced to sell, would be willing to take or give.

The evidence is further objected to on the ground that the opinion of the Court of Appeals in this case did not direct or require damages to be assessed for decline in value pending suit and that any evidence of decline in value is incompetent in this case unless the showing is made that the decline is due to some act of the defendant and such evidence does not reflect the decrease in the real intrinsic value of the stock which should be the true test. The evidence is further objected to as immaterial and incompetent because in this case the jurisdiction of equity to compel transfer page 5 } of stock is founded in specific performance and based on inadequacy of money damages in actions at law to fairly compensate for intangible values from other standpoints than merely immediate sales price.

And furthermore, this evidence is objected to on the ground

that it has to do with a decline over the period after suit brought.

JOSEPH EGBERT,

a witness of lawful age, being first duly sworn, deposes and says:

(Questions by Mr. Garnett, Attorney for Plaintiffs:)

Q. What is your name?

A. Joseph Egbert.

Q. Your residence?

A. 142 East 71st Street, New York City.

Q. Where is your place of business?

A. 2 Rector Street, New York City.

Q. Where was your place of business on May 3, 1933?

A. 2 Rector Street, for fourteen years.

Q. You were doing business there before and after that time?

A. Yes.

Q. What is your business?

A. Buying and selling securities, both on commission and for my own account.

Q. Have you dealt in the Virginia Public Service Company cumulative 7% preferred stock?

A. Yes. I have been dealing in securities since 1906, of which time with the exception of eleven years, I was in business for myself.

page 6 } Q. Were you in business for yourself in May, 1933?

A. Yes.

Q. Did you purchase any stock from P. J. Steindler & Co. in May, 1933?

A. I purchased forty shares of Virginia Public Service Company 7% cumulative preferred which shows there (pointing to statement).

Q. I show you here a confirmation statement on the bill-head of Joseph Egbert, 2 Rector Street, dated May 3, 1933,—is that a statement of your office?

A. Yes. When I make a transaction, there is a duplicate statement. One goes to the person I bought it from and the other to the Manufacturers Trust Company for my account.

Q. You identify this as a statement relating to the purchase of 40 shares of Virginia Public Service Company 7% cumulative preferred stock on May 3, 1933, from P. J. Steindler & Co.

A. Yes.

Q. This is the statement which went to whom?

A. P. J. Steindler & Co.

Q. And a copy of it went to the Manufacturers Trust Co. For your account?

A. Yes.

(Mr. Harlow inspects statement.)

Q. Who was the purchaser of the stock as shown by the statement?

A. I.

Q. What price did you pay for it?

A. 32 per share.

Q. Who offered that stock for sale to you?

A. It was either McHugh or Steindler.

page 7 } Q. P. J. Steindler & Co.?

A. Yes.

Mr. Garnett: I ask that that statement be marked plaintiffs' exhibit No. A and filed as a part of the deposition of Mr. Joseph Egbert.

(Statement admitted in evidence, this day, and marked "Plaintiffs' Exhibit #A".)

Mr. Harlow: Objection is made on the ground as previously stated and I further object on the ground that this is not competent evidence because not original and immaterial for the purpose of showing the true measure of damages in this case.

Mr. Garnett:

Q. How much did you pay for that stock, forty shares?

A. I think it is \$1,280.

Q. That is in evidence of the cash purchase by you of forty shares?

A. Yes.

Q. What was the market price of Virginia Public Service Company 7% cumulative preferred stock on May 3, 1933?

Mr. Harlow: I object unless the witness is first qualified.

Mr. Garnett:

Q. If you know, testify as to the market price of Virginia Public Service 7% cumulative preferred stock on May 3, 1933?

A. If I was going to recollect, I would say about 33. There

is a lot of guess goes with that. I didn't buy stock for my own account unless I think it is cheap.

Q. Mr. Egbert, are you familiar with the book called "National Stock Summary" which I hold in my hand?

A. Very familiar.

Q. Of what is that a record?

page 8 } A. It is an indication of the bid and asked prices that—well, you can put bids and asks in that you do not have to make good on. It is an indication in the unlisted market of what the market is at the time those things are put in.

Q. Was Virginia Public Service Company 7% cumulative preferred stock an unlisted stock and so understood in this market?

A. Yes.

Q. Is this accepted by the brokers as a correct indication of the correct bid and asked price?

A. It is. If you get an estate to value as of a certain date, that is the book that is used. Whether the court recognizes it, I do not know.

Mr. Harlow: I make an objection to this testimony as qualifying this book for admittance in evidence on the ground that the bid and asked price is not competent evidence in a matter of this character.

Mr. Garnett:

Q. I show you here on page 2684 of this book which purports to be the "National Stock Summary" for the issue of October, 1933, the quotations for Virginia Public Service Company 7% cumulative preferred stock. In one column under the heading of "Wants" there is a quotation and in another column under the heading of "Offerings" there is a quotation. As of the date of April 29, 1933, there appears this language: "Virginia Public Service 7% cumulative preferred" and on that date April 29, 1933, "P. F. Fox & Co. New York". In one column under the heading of "Wants" is "100 at 32"; in the other column under the head of "Offerings" is "100 at 35". What does that indicate?

page 9 } A. Those are sent to the publication for some few days before that goes to print and that means that that man stands ready to sell at those prices, subject to order.

Q. Under the next item of Virginia Public Service Company there is the name "Gallaher & Co. New York, 5/8/33, 10 at 33½. What does that mean?

A. That he wanted to buy 10 shares at 33½ subject to his

having the order when this publication came out, otherwise the concern that you are trading in might go out of business, but that is the assumption, that that is what he was prepared to do the date when that publication went in.

Q. In other words, if an estate was valued as of the 29th of April, 1933, the valuation would be from this book?

A. Yes.

Mr. Harlow: Objection to the latter part of his statement with regard to the valuation of estates as being material.

Mr. Frank: To what extent do the quotations appearing in the National Stock Summary act as a guide in the making of a market in any given stock?

A. They are always accepted in the "Street".

Q. What do you mean by the "Street"? Wall Street or Nassau Street?

A. I mean the Financial District.

CROSS EXAMINATION.

(Questions by Mr. Harlow, Attorney for Defendant:)

Q. You buy and sell for customers and on your own account?

A. Yes.

Q. This purchase that you made from P. J. Steindler & Co. was for your own account?

page 10 } A. For my own self.

Q. Do you know to whom you resold this stock?

A. I do not recall, but I know that I carried it for some time before I sold it.

Q. Will you be kind enough to furnish for the record here the name and address of the persons and the prices and date on which you sold this stock?

A. Yes.

Q. Thank you. This book to which you have referred, the National Stock Summary, the records that you have testified to here do not purport to be records of actual sales?

A. No.

Q. You have no knowledge of the way these statistics are gathered but you merely know that this is used as authority in the "Street"?

A. Oh, yes, I have knowledge as to the method used.

Q. What is the method? Do you know that personally?

A. Yes, because I supply some of the quotations myself.

Q. So far as your personal knowledge is concerned, what is the method?

A. They supply the dealers with a printed form, a blank to write the name of the stock and to write the bid and asked or both, as you see fit. If you are interested in the purchase or sale, you can indicate on that blank whether you want to buy stock or sell stock and when that is published, when somebody gets an order to sell something, they refer to that book. That does not mean that everybody that is interested in that particular stock is in that book. You are advertising what you want to do. On the stock Exchange you bid
page 11 } and offer. You bid and offer here except that it is not simultaneous.

Q. How often is this book published?

A. I think it comes out twice a year but they publish every month a small book from which this is compiled at the end of the six months. We send offerings or bids in to that publication and the following month it comes out in a small book form and I think at the end of six months it is compiled into that book called "National Stock Summary".

Q. Beyond the fact that these people send you these listings, you do not know anything about the rest of the book?

A. Not unless you are in personal touch with them before you get the book.

Q. They publish in this book the results of all replies from dealers to whom they have sent blank forms?

A. If you are a subscriber to the service you have a certain number of forms sent to you.

Q. And you are supposed to send in those forms when you are interested in the buying or selling of particular stocks?

A. I think you pay so much and are permitted so many listings and if you pay more, you are permitted more listings, so that the fact is that a person may be interested in a great many things that they do not put in the book. And then in addition to that, I think they compile it from the daily sheets.

Mr. Frank: This monthly publication that you speak of, is that the only publication that this concern gets out or is that a compilation of the daily sheets?

A. I think it is a compilation of the daily sheets.
page 12 }

Q. What are those daily sheets called?

A. National Quotation Daily sheets, I would say.

Q. Do the over-the-counter dealers subscribe to that?

A. Yes, almost unanimously.

Mr. Harlow: Mr. Egbert, when you received these certificates, can you recall in whose name they were?

A. No, I do not see them. They go to the Manufacturers Trust Co. I never physically saw the certificates.

Q. They never came into your physical possession?

A. No.

Mr. Garnett: Examine this book again and see what does the title to it show as to the time to which it relates.

A. April 10th to October 10th, 1933.

The witness reports that he sold on the 24th of May, 1933, 20 shares of Virginia Public Service Company 7% cumulative preferred stock at 44; on the 1st of June, 1933, 10 shares of the same stock at 51, and on the 3rd of June, 1933, 10 shares of the same stock at 51.

JOSEPH EGBERT.

Sworn to before me this 15th day of December, 1934.

(Seal)

EVELYN V. SWARTZ,

Notary Public,

N. Y. Co. Clk's No. 603, Commission expires 3/30/35.

FRANCIS D. McHUGH,

a witness of lawful age, being first duly sworn, deposes and says:

(Questions by Mr. Garnett:)

Q. What is your name?

A. Francis D. McHugh.

Q. Where do you reside?

A. 27 Oliver Street, Chatham, N. J.

page 13 } Q. What is your occupation?

A. I am associated with Mr. Steindler in the investment security business.

Q. Under what name does that business operate?

A. P. J. Steindler & Co.

Q. What is Mr. Steindler's first name?

A. Percival J.

Q. And he is one of the plaintiffs in this suit?

A. Yes.

Q. How long have you been connected with Mr. Steindler?

A. Since June, 1932.

Q. What is your capacity?

A. Trader and assistant and partner.

Q. What is Mr. Steindler's condition at present?

A. Mr. Steindler was in an accident last Wednesday and is in the hospital.

Q. Is he able to give depositions at this time?

A. That I cannot say, he is in the hospital with a broken leg.

Q. Are you familiar with the transaction which Mr. Egbert has testified to with reference to his purchase of forty shares of Virginia Public Service Company 7% cumulative preferred stock?

A. Yes, I am.

Q. Is this paper, Plaintiff's Ex. A of this day, evidence of the purchase by Joseph Egbert of 40 shares Virginia Public Service 7% cumulative preferred stock at 32, a total of \$1,280?

A. Yes.

Q. There is no commission because he purchased it for himself?

A. Yes.

page 14 } Q. Are you familiar with the origin of the stock, that is, where P. J. Steindler & Co. got it from?

A. I understand that it was delivered to him by one of Mr. Frank's assistants.

It is stipulated by counsel for both parties that the forty shares of stock which were sold to Joseph Egbert were a part of the eighty shares of stock which were furnished to counsel for the plaintiff by counsel for the defendant in accordance with the decree of the Court in this case.

Mr. Frank states for the record that in about the month of May, 1932, Mr. Preller withdrew from the firm of Steindler & Preller and became associated with Eastman, Dillon & Co., where he still is, and that early in 1933, Mr. Godsol withdrew from the firm and became associated with Ettinger & Brand, of Cleveland, Ohio. However, the transaction concerning the eighty shares of Virginia Public Service Co. has at all times remained the joint transaction of Messrs. Steindler, Preller and Godsol and was specifically referred to in their dissolution agreements. The item was treated as a suspense item in the dissolution agreement between Steindler and Godsol on the one side and Preller on the other and finally between Steindler and Godsol when Godsol withdrew. When the eighty shares of Virginia Public Service Company 7% cumulative preferred stock were delivered, forty of them were received and handled by Steindler and forty of

page 15 } them were handled by Godsol.

On or about the 24th day of April, 1933, Mr.

Frank states that he delivered to P. J. Steindler & Co., 11 Broadway, New York City, the original certificates Nos. 7503 and 7505 of the Virginia Public Service Co. 7% cumulative preferred stock standing in the name of Fred Keyser and purporting to be endorsed in blank by him. Mr. Frank further states that said stock had come to him by registered mail from Colonel C. B. Garnett, who reported that he in turn had received same from Mr. Harlow. There was received at the same time a certified copy of the decree which was likewise delivered by Mr. Frank to Mr. Steindler at said time. In due course, said stock was transferred through the Trust Company of North America into a street name, forty shares in one certificate and forty shares in another certificate. This statement by Mr. Frank has been put into the record by stipulation in order to save time of other witnesses.

Mr. Garnett:

Q. Mr. McHugh, are you familiar with the book which I hold in my hand called "National Stock Summary"?

A. Yes.

Q. How is that compiled, if you know personally?

A. That represents a service to the unlisted dealers and is a summary over a period of time or all their bids and asks, that is, the wants and offerings. To get your wants and offerings you are limited to a certain number depending upon the amount of your subscription.

Q. In what form is the first information brought to the brokers from this service?

page 16 } A. First in the form of daily sheet delivered to the brokers daily, plus additions, summarized into a monthly service and then to a semi-annual edition which is bound in permanent form for record.

Q. You have heard the testimony that was given by Mr. Egbert as to information relating to the bid and asked price of Virginia Public Service Company 7% cumulative preferred stock, have you not?

A. Yes.

Q. Examine page 2684 of this book which is entitled "National Stock Summary from April 10 to October 10, 1933", and say what was the bid price and asked price for this stock first on the 29th day of April, 1933.

A. April 29, 1933, is 32-35. 100 want at 32, 100 offered at 35.

Q. What is the next date on which they are listed?

A. May 8, 1933, 10 wanted at 33½.

Q. What do those figures indicate?

A. They indicate that the brokers named on those listings

are either willing to buy or sell as of that date at those figures.

Mr. Harlow: I would like to have it understood that the general objections and specific objections run through all this testimony.

CROSS EXAMINATION.

(Questions by Mr. Harlow, Attorney for Defendant:)

Q. Mr. McHugh, this book you have been testifying from, as I understand it, is made up from answers furnished by brokers are permitted only so many answers in accordance with the price they pay for the service?

A. Yes.

page 17 } Q. In the case of your firm at the time that these transactions occurred, how many answers were you allowed?

A. I do not remember, but I would say in the neighborhood of thirty or forty daily.

Q. Did you receive these certificates of stock when they came in from Mr. Frank?

A. I don't think I received them, I think they were delivered to Mr. Steindler in person.

Q. Do you know what he did with them?

A. I think he delivered them to the Trust Company of North America who handle all our securities.

Q. Do they attend to the transfer of the stock?

A. They attend to all the deliveries and transfers on the securities owned by P. J. Steindler & Co.

Q. Are you able to testify as to whether or not the certificates were kept with this trust company until he made a sale of them or were transferred to the firm?

A. That I could not say offhand. At that time there had been the dissolution when they came in. They were received by P. J. Steindler & Co. for the account of P. J. Steindler.

Mr. Garnett: I now offer in evidence the book titled on its back, "National Stock Summary from April 10, 1933, to October 10, 1933", and ask that so far as it applies to the Virginia Public Service Co. 7% cumulative preferred stock it be treated as evidence in this case and I ask that the book be marked Plaintiffs' Exhibit No. B with the depositions of Mr. McHugh.

(Book admitted in evidence this day marked "Plaintiffs' Exhibit #B".)

page 18 } Mr. Harlow: The offering of this book in evidence is objected to because the data therein contained is immaterial, irrelevant and incompetent for the reasons heretofore stated.

FRANCIS D. McHUGH.

Sworn to before me this 15th day of December, 1934.

(Seal)

EVELYN V. SWARTZ,
EVELYN V. SWARTZ,
Notary Public,
N. Y. Co. Clk's No. 603.

Comm. ex. 3/30/35.

FRED W. PRELLER,
a witness of lawful age, being first duly sworn, deposes and says:

(Questions by Mr. Garnett, Attorney for Plaintiff:)

Q. What is your name?

A. Fred W. Preller.

Q. Where do you reside?

A. Queens Village, L. I.

Q. What is your occupation?

A. Securities trader.

Q. You are one of the plaintiffs in this suit, are you not?

A. Yes.

Q. You were formerly a partner in the firm of Steindler and Preller at the time this suit was brought?

A. Yes.

Q. What is your present connection?

A. I am employed by Eastman, Dillon & Co. members of the New York Stock Exchange, in the capacity of trader.

Q. How long have you been connected with the firm of Eastman, Dillon & Co.?

page 19 } A. Since June, 1932.

Q. How long have you been engaged in trading in securities in one form or another?

A. I have been in Wall Street since 1916 and trading since 1920.

Q. During that time you have traded in all securities?

A. Yes.

Q. Were you connected with the firm of Eastman, Dillon & Co. on the 1st day of May, 1933?

A. Yes.

Q. Mr. Arnold H. Godsol was formerly one of your partners in the firm of Steindler & Preller?

A. Yes.

Q. I show you here what purports to be a statement of sale by Eastman, Dillon & Co. for the account of Arnold H. Godsol of twenty shares of Virginia Public Service Company 7% cumulative preferred stock at 29 as of May 1, 1933. Will you examine that and say whether that came from the firm of Eastman, Dillon & Co. and what it represents?

A. That is our regular notice, the notice in which they are informed of the fact that we have sold for your account and risk a security against which we charge them commission, we acting as agents only.

Q. To whom was that stock sold?

A. W. D. Yergason & Co.

Q. At what price?

A. 29.

Q. Making a total of \$580?

A. Yes.

Q. The net amount after subtracting commissions page 20 } and taxes \$480 is \$575.20?

A. Yes.

Q. Who is Mr. Arnold H. Godsol referred to there?

A. Mr. Arnold H. Godsol is a firm partner of mine and this was sold for his account.

Q. I show you another statement of similar character, the only change being that it is as of April 25, 1933. Will you examine that? Is that an original paper from your firm?

A. This is a duplicate of the notice sent to Mr. Godsol.

Q. And that shows a sale of how many shares of Virginia Public Service 7% cumulative preferred stock?

A. 20 shares.

Q. At what price?

A. 29.

Q. The net credit was how much?

A. \$575.20.

Q. Are you familiar with where those forty shares came from?

A. Yes. That stock was delivered to us by the Trust Company of North America for the account of Mr. Godsol.

Q. Is this the stock which is part of the subject-matter of this suit?

A. I understand so, yes.

Q. I want to ask you to file these two statements marked respectively, plaintiffs' exhibit C and plaintiffs' exhibit D with your deposition.

(Statements admitted in evidence this day and marked Plaintiffs' Exhibit C (statement marked May 1, 1933,) and Plaintiffs' Exhibit D (statement marked April 25, 1933).)

Mr. Harlow: The introduction of these exhibits in evidence is objected to for the same reason stated during page 21 } the examination of Mr. Egbert.

Mr. Garnett:

Q. Do your records show other sales of Virginia Public Service Company 7% cumulative preferred stock on or about the same dates, that is April 25 and May 1, 1933?

A. Yes.

Q. Mr. Preller, do you have access to the sales records of Eastman, Dillon & Co.?

A. Yes, as a member of their trading department I have access to all of them and in addition, I am here as a representative of Eastman, Dillon & Co. to give you information.

Q. Have you examined those records to verify actual transactions in Virginia Public Service Company 7% cumulative preferred stock?

A. Yes.

Q. Have you made memoranda from those records as to what they show?

A. Yes.

Q. If necessary, could you show us those records?

A. I could produce them at the office for inspection.

Q. Will you take your memoranda and testify as to whether there was a sale through Eastman, Dillon & Co. of this stock on April 29, 1933, and if so what was its price?

A. An actual sale took place and we can substantiate it, on April 29, 1933, at 28½.

Q. How did you find this sale in the records of Eastman, Dillon & Co.?

A. We have a complete card record in unlisted securities in which we show current bid and asked as well as actual purchases and sales for the account of customers, and that sale is picked off that card.

Q. Do your records show any bid and asked prices on this stock from April 24, 1933, to May 1st, 1933?
page 22 }

A. Yes.

Q. What do those records show?

Mr. Harlow: This is objected to because evidence of bid and asked prices is not competent.

A. For that period, the stock was quoted 28 bid, offered at 31.

Q. Are those records of Eastman, Dillon & Co.?

A. No, those are records of bid and asked that appeared in the daily sheets that we keep on our own cards or from telephone inquiries.

Q. Describe for the benefit of the court exactly how those bid and asked prices are acquired in your office.

A. First of all, the daily National Quotation Sheets might show a firm bidding 28 for 100 shares. Our traders, if they have orders to sell at or near that price, call up such firm and confirm whether or not they will pay 28 or higher and then we make them a counter offering depending on what our order is. That is one way. The other way is that we, ourselves, being subscribers to the National Quotation Sheets list in there that we want to buy or sell, which is governed by what actual orders we have and then outside firms seeing our name in there, call us and transactions are made over the 'phone provided the buyer and seller's ideas meet.

Q. These records to which you have testified, were accumulated in that way?

A. Yes.

Q. Do you have similar records from May 3 to May 9, 1933?

A. Yes.

Q. What do those records indicate?

page 23 } A. For that period, the stock was quoted 31 bid.

Q. Do you have a record of an actual sale that took place on May 10, 1933?

A. (Not answered. Discussion off the record.)

Q. Have you a record of the bid and asked price of this stock as of this date, that is December 11th, 1934?

A. I have it as at the close of business on December 11, 1934. The stock is quoted 41 bid, offered 43 in the over the counter market.

Q. Are you familiar with the method by which the National Monthly Stock Summary which has already been introduced in evidence as plaintiffs' exhibit B is compiled?

A. Yes, I know.

Q. Will you state for the record how that computation is secured.

A. The National Quotation Bureau have a service to which a large proportion of the security dealers in the country subscribe. You pay them a sum based on ten listings per day and if your business is large enough and your inquiries are great enough so that you can use forty or fifty listings, you

subscribe for them and pay them accordingly. The inquiries of the securities dealer are put in that service by way of a daily tabulation form that is supplied them by the National Quotation Bureau in which the dealer states that he is interested in a certain security and will pay so much or offer that security at such and such a price. Those daily listings are tabulated by the National Quotation Bureau in a monthly summary which is really a summary of the daily quotations and then placed in semi-annual permanent form. There is one thing I would like to say about those quotations and that is, when a house appears in those National Quotation page 24 } Sheets, stating that they want to buy a given stock at a price or that they offer a given stock at a price, they must be prepared at any time to prove to the National Quotation management that they actually had such an order or inquiry. So that as far as Eastman, Dillon & Co. is concerned, any quotation appearing under their name as bids or offers are as nearly as possible actual.

Q. Were you present when Mr. Steindler testified to this case originally?

A. Yes.

Q. He exhibited and there was filed into the record a sheet from the National Daily Service for the 12th day of January, 1932; that was filed as Plaintiffs' Exhibit #5. Was that one of the daily sheets to which you have been referring in your testimony?

A. Yes.

Q. Was the price that Eastman, Dillon & Co. secured for Mr. Godsol's stock a reflection of the market value of the stock at that time?

Mr. Harlow: I object because it is purely opinion evidence.

A. Yes, I would say that it indicated the market value because our trained order clerks must always try to find the best bid or offer when trying to execute an order.

Q. On the day that the shares were sold for Godsol, was that not the best bid you were able to obtain?

A. That was the best bid at the time the stock was sold. Mr. Godsol left with us an order to sell forty shares of Virginia Public Service Company 7% cumulative preferred stock for his account at a price limit of 29.

Q. What was the previous bid?

page 25 } A. The stock was quoted about 28-31 at the time and he left it to be sold at 29 or better.

CROSS EXAMINATION.

(Questions by Mr. Harlow, Attorney for Defendant:)

Q. Mr. Preller, this memorandum which you have used, is that in your own handwriting?

A. This memorandum was taken from memorandums in various handwritings and then dictated by me on to this sheet so that I would have a record of the information that I thought I would be asked.

Q. These memorandums from which you took this memorandum, were they the original memorandums in your office?

A. They were taken from original memorandums by other clerks.

Q. As I understand it, this memorandum from which you are testifying, was dictated by you from memoranda which in turn had been furnished you by other clerks in the organization and on the basis of that testimony I again renew my objection previously made, to the use of this memorandum in evidence. The memorandum from which you have testified shows, I believe, only one actual sale made by your firm and that was in connection with Mr. Godsol's stock. Is that correct?

A. No, it shows one other. On April 29, 1933, it shows that we sold stock at 28½ for some client.

Q. And that was not the Godsol stock?

A. No.

Q. These sales were made by your firm as agent and not for their own account?

A. That is correct.

page 26 } Q. The memorandum that you made concerning bid and asked prices was based practically upon the statistics contained in this National Stock Summary, were they not?

A. They were not based on statistics, they were based on actual personal and telephone contact in which bids and offers were discussed and then memorandums made.

Q. But none of those, with the exception of the two you have testified about, ever eventuated in actual sales?

A. Not for the period that I recorded here, that is, from April 21, 1933, to May 7, 1933, other than the transaction I told you about.

Q. Mr. Preller, you were a member of the firm of the complainants in this case at the time the suit was filed?

A. Yes.

Q. You stated that Mr. Godsol, who, under arrangements made between the partners, was entitled to one-half of these

eighty shares of stock, left authority with you to sell this at not less than 29 or better. Can you tell us why, before offering that stock on the exchange, you did not offer it to the Virginia Public Service Company?

A. I certainly would have if I had known that Virginia Public Service Co. were interested. The Virginia Public Service Company have never indicated to my own knowledge that they were interested in the purchase of their shares. After all, we only make \$3.00 on this transaction, and I could not call up half a dozen vice-presidents to find out whether they were interested in procuring the stock.

Q. You knew that the stock had never defaulted in dividends?

A. I did not know that, I could have known it page 27 } if I had checked it up but I didn't have time.

Q. You could have, very easily. You don't know, as far as Mr. Steindler is concerned, you don't know if Mr. Steindler offered it to the Virginia Public Service Company before he offered it for sale on the market?

A. I had no interest whatever in his forty shares.

Q. Did you have the actual certificates at the time the sale was made?

A. No.

Q. Where were they?

A. I assume that they were in Mr. Godsol's possession. All that I know is this, that he came into the office and said that "we finally wound up the Virginia Public Service Company matter. What do you think you could get for my forty shares". I quoted the stock and he gave me an order.

Q. Your firm handled the transaction?

A. Yes.

Q. Did your company obtain the stock from Godsol and then send it into Yergason?

A. We obtained the stock in the regular course of delivery after he had a notice that we had sold it. Then he delivered it to us against payment and we delivered it to Yergason.

Q. Does your records show that was one certificate?

A. It shows forty shares sold, twenty and twenty.

Q. Does that mean that you received from Mr. Godsol one certificate for forty shares in his name and that was transferred to Yergason in blocks of twenty each?

A. I would say the forty shares were sent to page 28 } Yergason against two tickets of twenty shares each for which he paid us the round amount of \$1,150.

Q. But you got one certificate from Godsol and that was in his name?

A. I will say this. We received forty shares of stock from Godsol in good delivery form. Whether it was in his name or not, I have no record of that. There might be a record of that in the office but I doubt whether they record that.

Q. Your memorandum does not show whether that was in one certificate?

A. No. Our bookkeepers' statement shows "received forty shares" and that they paid out so much money, debiting Godsol's account.

FRED W. PRELLER.

Sworn to before me this 15th day of December, 1934.

(Seal)

EVELYN V. SWARTZ,
EVELYN V. SWARTZ,
Notary Public,

New York County, N. Y. Co. Clk's No. 603.

Commission expires 3/30/35.

It is stipulated by counsel for both parties that these depositions be adjourned by consent to December 12, 1934, at 10 A. M. at the office of W. D. Yergason & Co., 30 Broad Street, New York City, to take the testimony of Irvin G. Freeman.

IRVIN G. FREEMAN,

a witness of lawful age, being duly sworn, deposes and says:

(Questions by Mr. Garnett, Attorney for Plaintiffs:)

Q. What is your name?

A. Irvin G. Freeman.

Q. Residence?

page 29 } A. 25 Verona Place, Valley Stream, L. I.

Q. Occupation?

A. Trader.

Q. By whom are you employed?

A. W. D. Yergason, 30 Broad Street, New York City.

Q. How long have you been acquainted with the firm of W. D. Yergason & Co.?

A. Possibly about eight years.

Q. What is their specialty?

A. Their specialty for the last five years have been public utility preferred stocks.

Q. And as such they maintain advertisements in the newspapers, have they not, for the last five years?

A. Yes.

Q. Have you examined the records of transactions of W. D.

Yergason & Co. in the sales of Virginia Public Service 7% cumulative preferred stock during the latter part of April, 1933, and the first of May, 1933?

A. I have.

Q. Will you speak for the record? What do those records show as to sales beginning April 18, 1933?

Mr. Harlow: Is this memorandum from which you are about to testify in your own handwriting?

A. No, the handwriting on that card—I am not sure whether the persons who wrote that are here now. They are made from the tickets of the trades during the day by the girl in the office. Those cards are done by either the girl or assistant in the department. Traders themselves do not
page 30 } make entries.

Q. Are you testifying from actual entries or from memory?

A. I am testifying from actual entries.

Q. Have you the cards inside?

A. Yes, sir.

Q. May I see those?

A. I think it will be all right if you do. (Produces cards.)

Mr. Garnett:

Q. Mr. Freeman, you have shown me some of your records of Virginia Public Service Co. 7% cumulative preferred stock which consists of a number of cards and for the year 1933 up to June consists of six cards beginning January 6, 1933, and running to June 2, 1933. On each of these cards there are about seventeen items. These cards indicate in red ink actual transactions, as I understand you to say, and in black ink, inquiries which were not transactions.

A. That is correct.

Q. Taking the card on this list which embrace dates from the 24th of April, 1933, to the 9th of May, 1933, there are, according to your records, eight actual sales, is that correct?

A. Yes.

Q. And there are nine inquiries?

A. That is correct.

Q. Will you state for the record all of the sales, with dates and prices, on this card?

Mr. Harlow: This line of testimony is objected to for the reasons heretofore given and particularly for the reiterated reason that inquiries or information as to bids and asks are immaterial and incompetent to show market value.

page 31 } A. On the 25th of April, 1933, we sold 20 shares at 31. On the same date we bought 20 shares at 29. On the 29th of April, 1933, we bought 10 shares at 28½ and we sold 10 shares at 30½. On May 1st, 1933, we bought twenty shares at 29 and on May 1, sold twenty shares at 29½. On May 2nd, 1933, we sold five shares at 32 and on May 2nd, 1933, we bought five shares at 30.

Mr. Garnett:

Q. Mr. Freeman, there has already been exhibited in this suit two statements from Eastman, Dillon & Co. which are marked for identification Plaintiffs' Exhibits C and D in the testimony of Mr. Preller. These purport to be copies of the statements by Eastman, Dillon & Co. I ask you to examine these statements which purport to show that there were sold to W. D. Yergason & Co. on the 25 of April, 1933, twenty shares of Virginia Public Service Company 7% cumulative preferred stock at 29 and on the 1st of May, 1933, Eastman Dillon & Co. purport to have sold to W. D. Yergason & Co. twenty shares of the same stock at 29. Do these correspond to your records?

A. Yes, sir.

Q. In examining these cards again, on the card from the 19th of May, 1933, to the 2nd of June, 1933, there were six sales of this stock, is that correct?

A. That is correct.

Q. On the card from the 10th of May, 1933, to the 17th of May, 1933, there were ten sales of this stock, is that correct?

A. That is right.

Q. These cards that we are examining relate to 1933, do they not?

Q. On the card from the 7th of April, 1933, to page 32 } the 21st of April, 1933, there were six transactions, which were sales, is that correct?

A. That is right.

CROSS EXAMINATION.

Mr. Harlow:

Q. Mr. Freeman, the records of your office which I am now holding in my hand, do not have any date for the year on them. How do you identify them for the year?

A. The particular top card you are looking at has no date on it but it is joined together with other cards where the date is marked. The dates are in order and connect from month to month and the year date is on the first card of the

year, and is not written on the cards again until the first card of the next year.

Q. These sales, were they made on your own account or for clients?

A. We act as dealers of preferred stocks. We purchase temporarily for our own account. In some cases we do not dispose of the stock, perhaps, until the following day, or we are able to do it ten minutes later.

Q. Are you able to tell from an examination of these records whether these transactions are stock which you purchased for yourself or for clients?

A. I could not tell definitely. In some cases the transactions were done the same day, or at nine in the morning and sold at five in the afternoon. I could not tell you. We do not keep any record of that.

Q. Will you take your cards, Mr. Freeman, and tell me if you have any record of actual sales on the following dates?

On August 26, 1931, have you any actual sales?
page 33 } A. We have one transaction on the 27th day of August, 1931, which is the closest to that, where we purchased stock at par and one-half and sold stock at par and three-quarters on the 28th. On September 1, 1931, we sold stock at 101. Also on the 27th at par and one-half.

Q. Go through October.

Mr. Garnett: Mr. Harlow, I do not object to this line of questioning, but I would like to know what is your object.

Mr. Harlow: To determine the time as to when your damages ought to measure.

A. We sold stock at 91¼ and bought at 91 on October 13.

Q. Any other transactions in October?

A. They were substantially the same price.

Q. Will you turn to September, 1932?

A. The prices are about the same, 66, for that month.

Q. Approximately how many transactions in that month?

A. Eight.

Q. Turn to February, 1933.

A. Yes, sir.

Q. What have you in the month of February? You might first give the approximate number of transactions and the price range.

A. Nine transactions in February, and the prices seem to vary a bit. In the first part of the month they were 54 and a little later on we sold stock at 48.

Q. Does your house specialize in unlisted secured stock?

A. Yes, sir. We trade in a good number of utility pre-

ferred stocks that are listed but do not enjoy good markets.

Q. But the bulk of your business is preferred un-
page 34 } listed stock?

A. Most of the active utility preferred stocks are admitted to "unlisted" privileges on the curb, but never enjoy a market down there at all. But these stocks were very active in over-the-counter markets.

Mr. Garnett:

Q. Will you give us the range of prices for the month of April, 1933?

A. The low sale was 28½ and the high sale was 40.

Q. What was the date of the high sale and the date of the low sale?

A. The high sale was on the 7th of April, 1933, and the date of the low sale was on the 29th day of April, 1933.

Q. Mr. Freeman, you have given prices here both as my witness and Mr. Harlow's witness, which represent three years' range. Are those prices fairly representative of the market?

A. Yes, sir.

Q. Your records show that there are other houses dealing in this stock at the same time?

A. Yes, sir.

Mr. Harlow: I object to that on the ground that it is incompetent and irrelevant.

IRVIN G. FREEMAN.

Sworn to before me this 15th day of December, 1934.

(Seal)

EVELYN V. SWARTZ,
EVELYN V. SWARTZ,
Notary Public,
N. Y. Co. Clk's No. 603.

Commission expires 3/30/35.

State of New York,

County of New York, ss: To-wit:

page 35 } I, Evelyn V. Swartz, a Notary Public, in and
for the County of New York, in the State of New
York, do hereby certify that the foregoing depositions of
Joseph Egbert, Francis D. McHugh, Fred W. Preller and
Irvin G. Freeman were duly taken, sworn to and subscribed

before me at the place and time mentioned therein and in the caption thereto, pursuant to the annexed notice.

Given under my hand and official seal this 15th day of December, 1934.

(Seal)

EVELYN V. SWARTZ,
Notary Public.

New York County, N. Y. Co. Clk's No. 603.

Commission expires 3/30/35.

PLFFS. EX. A

12/11/34

DEP. OF JOSEPH EGBERT
EVS

JOSEPH EGBERT

2 Rector Street, New York
Telephone Whitehall 8460

May 3rd, 1933

CONFIRMATION

MANUFACTURERS TRUST CO.
55 Broad Street, New York
WILL RECEIVE
For Our Account

We Have Today PURCHASED from You

Amount	Security	Principal	Interest	Total
40 shrs.	Virginia Public Service 7% pfd. 32			\$1280.

Very truly yours,

P. J. STEINDLER & CO.
11 Broadway
New York City

E. & O. E.

JOSEPH EGBERT
By
V

PLFFS. EX. D.

o 12/11/34

Praller

EVS

EASTMAN, DILLON & CO.
Members of the New York Stock Exchange
120 Broadway

New York.....

We have this day SOLD for your account and risk subject to agreement printed below:

Sold for Account of	Broker	Line No.	Sold to	Quan.	Description	Price	Amount	Registration Fee	Comm.	Tax		Net Amount
										Federal	State	
A H Godsol	O C	119	W D Yergason As of 5/1/33	20	Va Pub Svc 7% PR Duplicate Notice	29	580 00		300	100	80	575 20

1. That all transactions are subject to the constitution, rules, regulations, usages and customs of the New York Stock Exchange and its Clearing House, or to the market wherein such transactions are executed.
2. That all securities carried in, or deposited to protect, marginal accounts may be loaned or pledged by the broker, separately or together with other securities, for the sum due thereon or for a greater sum, without further notice to the customer.
3. That orders are accepted with the understanding that we have the right, whenever we deem it necessary for our protection, to sell or buy, without demand of payment or notice to you, at public or private sale, any and all stocks, bonds or other securities carried in your marginal account, or deposited to secure same.

Respectfully yours,

MR. A. H. GODSOL

No representations of fact whatsoever will be made by this firm with respect to any security bought or sold by it for customers' account and it must be understood that any such representation made by any employee or agent of this firm is made without authority.

EASTMAN, DILLON & CO.
E. & O. E.

PLFFS. EX. C.
o 12/11/34
Preller
EVS

EASTMAN, DILLON & CO.
Members of the New York Stock Exchange
120 Broadway

New York.....

We have this day SOLD for your account and risk subject to agreement printed below:

Sold for Account of	Broker	Line No.	Sold to	Quan.	Description	Price	Amount	Registration Fee	Comm.	Tax		Net Amount
										Federal	State	
A H Godsol	O C	117	W D Yergason As of 4/25/33	20	Va Pub Svc 7% PR Duplicate Notice	29	580 00		300	100	80	575 20

No representations of fact whatsoever will be made by this firm with respect to any security bought or sold by it for customers' account and it must be understood that any such representation made by any employee or agent of this firm is made without authority.

1. That all transactions are subject to the constitution, rules, regulations, usages and customs of the New York Stock Exchange and its Clearing House, or to the market wherein such transactions are executed.
2. That all securities carried in, or deposited to protect, marginal accounts may be loaned or pledged by the broker, separately or together with other securities, for the sum due thereon or for a greater sum, without further notice to the customer.
3. That orders are accepted with the understanding that we have the right, whenever we deem it necessary for our protection, to sell or buy, without demand of payment or notice to you, at public or private sale, any and all stocks, bonds or other securities carried in your marginal account, or deposited to secure same.

Respectfully yours,

EASTMAN, DILLON & CO.
E. & O. E.

MR. A. H. GODSOL
% Ettinger & Brand
105 West Adams St., Chicago, Illinois

Va. Public Service Co. v. J. Steindler and others.

page 36 } STIPULATION CONCERNING RECORD.

It is hereby Stipulated and Agreed by and between the parties hereto by their respective attorneys of record that in preparing the copy of the record in this cause for presentation to the Supreme Court of Appeals the Clerk of this Court shall copy from plaintiff's Exhibit B, offered in evidence in the depositions taken on behalf of plaintiffs, only that portion of said Exhibit (being a book entitled "National Stock Summary, April-October, 1933"), consisting of the heading "Virginia Public Service Company 7%, Cum. Pfd., etc.", and the several dates and quotations thereunder, the same appearing on pages 2684 and 2685 thereof, it being hereby stipulated and agreed that said portion is all of said Exhibit material to any of the issues in this cause; and it is further stipulated and agreed that a copy of this stipulation shall be included by said Clerk in said record.

CHRISTOPHER B. GARNETT,
Attorney for Plaintiffs.

LEO P. HARLOW,
MARSHALL H. LYNN,
Attorneys for Defendant.

page 37 } "Extract from Plaintiffs' Exhibit 'B,' as per stipulation filed.

"National Stock Summary April-October, 1933, consisting of the Virginia Public Service Company, 7% Cum. Pfd., etc."

VIRGINIA PUBLIC SERVICE CO., PFD 7% Cum (Par \$100). Outstanding, \$4,500,000. Div. \$7-\$1.75 qt. July 1. Redeemable at \$107. Company Office, Charlottesville, Va., Transfer Office, Hanover Bank & Trust Co., New York, and Central Republic Bank & Trust Co., Chicago.

Public Offering A. E. Fitkin & Co., New York, and Stroud & Co., Phila., offered \$1,600,000 at 97 to yield about 6.25% in July, 1926.

P. F. Fox & Co., N. Y.	4-29-33	100 @ 32	100 @ 35	L
Gallaher & Co., N. Y.	5- 8-33	10 @ 33½		E
James J. McLean & Co., NY	6- 2-33		5 @ 55	E
P. J. Steindler & Co., NY	6- 4-33	@ 48	@ 52	E
Parsly Bros & Co., Inc., Phila	6- 7-33	@ 54	@ 58	C
Wardell & Co., Inc., Chgo.	6- 9-33	50 @ 54	50 @ 56	L
Wesly Mager & Co., NY	6- 9-33	100 @ 54		L
H. C. Spiller & Co., Inc., NY	6- 9-33	@ 50		L
James P. Cleaver & Co., Inc., NY	6- 9-33	50 @ 49	50 @ mkt	L

Thornton & Curtis, Bost.	6-13-33		10 @ 54	E
Preston James Yeiser & Co., Inc N Y	7- 6-33	@ 52	@ 55	L
A. E. Fitkin & Sons, NY	7- 7-33	100 @ 52	100 @ 55	L
Hanson & Hanson, N. Y.	7- 8-33	@ 52	@ 55	L
page 38 } E W Clucas & Co, Chgo	7- 8-33	50 @ 52	50 @ 55	L
Berdell Bros, N Y	8-11-33	50 @ 54½		E
N H Horner & Co, Inc, N Y	8-23-33	@ 56½	@ 58	E
Swift Langill & Henke, Chgo	9- 5-33	100 @ 56½	100 @ 57½	L
May & Gannon, Boston	9- 8-33	@ 57	@ 59	L
Allied Distributors, Inc, N Y	9- 9-33	100 @ 57½	100 @ 59	L
Stroud & Co, Inc, Phila	9-27-33		19 @ 54	E
Rogers & Tracy, Chgo	10- 2-33	50 @ 48	50 @ 50	C
Eastman Dillon & Co, Phila	10- 5-33		@ 49	E
Allied Distributors, Inc, N Y	10- 7-33	25 @ 46	25 @ 49	E
Earle A Miller & Co, N Y	10- 9-33	@ 48	@ 51	L
Munds Winslow & Potter, N Y	10- 9-33	@ 46	@ 49	L
H D Knox & Co, N Y	10- 9-33	25 @ 48	25 @ 52	L
W D Yergason & Co, N Y	10- 9-33	@ 46	@ 49	L
Hickey Doyle & Co, Inc, N Y-Chgo	10- 9-33	100 @ 46	100 @ 49	L
Lilley & Co, Phila	10- 9-33	@ 47	@ 50	L
Ryan & McManus, N Y	10- 9-33	25 @ 47	25 @ 49	L
Jas P Cleaver & Co Inc N Y	10- 9-33	50 @ 48	50 @ 51	L
Swart Brent & Co, Inc, N Y	10- 9-33	@ 47	@ 50	L
—PFD 6%. (Par \$100). Listed, Richmond, Outstanding, \$5,477,100.				
Div. \$6—\$1.50 qt July 1. Redeemable at \$110.				
P F Fox & Co, N Y	4-29-33	100 @ 25	100 @ 28	L
William Morris & Co, N Y	5- 2-33	@ 26	@ 29	L
N H Horner & Co, N Y	5- 5-33	50 @ mkt	50 @ 35	E
Wardell & Co Inc, Chgo	5- 9-33	@ 28	@ 30	L
Wesly Mager & Co, N Y	5-13-33	100 @ 29½		E
Thornton & Curtis, Boston	6- 1-33	@ 34		E
page 39 } Fry & Becker, N Y	7- 6-33		@ 42½	E
E W Clucas & Co, Chgo	7- 8-33	50 @ 42		L
Jenkins, Whedbee & Poe, Balto	7-21-33	@ 43		E
J W Oldfield & Co, N Y	8- 9-33	@ 45	@ 48	L
Donny & Co, N Y	8-21-33	10 @ 46½		E
Swift Langill & Henke, Chgo	9- 5-33	100 @ 47	100 @ 48	L
Stryker & Brown, N Y	9- 8-33	@ 47	@ 49	L
Jas P Cleaver & Co, Inc, N Y	9- 9-33	50 @ 47	50 @ 49	L
Rogers & Tracy, Chgo	10- 2-33	50 @ 40	50 @ 43	C
Allied Distributors, Inc N Y	10- 5-33	25 @ 39	25 @ 42	E
Berdell Bros, N Y	10- 6-33	25 @ 40		E
Lilley & Co, Phila	10- 9-33	@ 40	@ 42	L
W D Yergason & Co, N Y	10- 9-33	@ 38	@ 42	L
Hickey Doyle & Co, Inc, N Y-Chgo	10- 9-33	100 @ 41	100 @ 43	L
Ryan & McManus, N Y	10- 9-33	50 @ 39	50 @ 42	L
H D Knox & Co, N Y	10- 9-33	50 @ 40	50 @ 42	L
Earle A Miller & Co, N Y	10- 9-33	@ 40	@ 42	L
Munds Winslow & Potter, N Y	10- 9-33		@ 42	L

page 40 } PROCEEDINGS TAKEN IN OPEN COURT.

Testimony in the above-entitled cause was taken before the Honorable Walter T. McCarthy, Judge of the Circuit Court of the City of Alexandria, Virginia, on Tuesday, January 22, 1935, between the hours of 10:00 A. M. and 11:30 A. M.

Present: Christopher B. Garnett, Esq., for the Plaintiff; Leo P. Harlow, Esq., Marshall H. Lynn, Esq., for the Defendant.

Mr. Garnett: Your Honor will recall that this page 41 } case was before Your Honor upon an appeal to compel the Virginia Public Service Company to transfer to the plaintiff 80 shares of the preferred stock of the Virginia Public Service Company, 7% preferred stock; and in addition there was a prayer for compensation in damages due to the fall in the value of the stock market value of the stock.

Your Honor granted the petition which was in the nature of a petition for specific performance and required the defendant, the Virginia Public Service Company, to transfer to the plaintiff the 80 shares of stock, but refused to grant the prayed-for damages.

The case was duly appealed on that ground; namely, that Your Honor had erred in not giving us damages. The Supreme Court of Appeals heard the case upon appeal, and although there was a cross assignment of error that we were not entitled to stock, held that we were, and that we came into Court with clean hands and that Your Honor erred in not giving us our damages.

The opinion of the Court in the latter part of it, just in conclusion, I will read so as to give the opinion:

“In our opinion the appellants have come into a court of equity with ‘clean hands’ and have done all that the law requires of them. They bought stock under circumstances which under all the rules of modern business they had a right to buy. When denied the right by appellee to have the stock transferred, they offered to indemnify appellee by executing a valid bond. They have paid their money for stock which they were entitled to purchase. That they have incurred a loss by the illegal refusal of appellee to transfer is apparent page 42 } from the proof that a certain amount of the stock had already been sold. The modern trend of the courts is to afford litigants an expeditious remedy in the assertion of their right. Though it may be a departure from the usual result arrived at in a suit for the specific perform-

ance of a contract, we perceive no valid objection to ending the litigation in one proceeding.

"We are, therefore, of opinion that the lower court should have ascertained the damages, if any, to which appellants were entitled. The decree to that extent will be reversed, and the cause remanded for the settlement of the question of damages."

That is the question, therefore, which is before Your Honor today. Shall I open these depositions?

The Court: Yes.

Mr. Garnett: Properly the depositions should be opened by the Clerk and marked "filed".

The Clerk: They are marked "filed" on the outside.

Mr. Garnett: Yes. We took in the City of New York depositions which were designed to establish two propositions. First, that we had sold the stock immediately after receiving it, the 80 shares, and the price at which it was sold. I think my recollection is it was 29 for 40 shares and 40 shares at 32. These shares of stock were divided between the two parties and they held them separately.

The second design of those depositions was to show what was the market value of the stock at the time the stock was transferred on the books to us. The market value of the stock when we purchased it was pretty well established to be what we paid for it. Although we sold stock at a higher price that same date, I think Your Honor will take the market
page 43 } price in the absence of any contrary evidence as the price which we paid for the stock.

Now the question which is involved, of course here, is what is the measure of damages to which we are entitled. After the hearing of this case before Your Honor and the decision of the case by Your Honor, about a month I think it was—the records will show—this defendant complied with Your Honor's decision and transferred the possession of the original shares which we had sold but which had not been transferred to us; and then those 80 shares with an order of the Court were presented to the transfer agent in New York and the shares were transferred out of the name of the defendant into the nominees of this defendant and were sold as soon as possible.

The depositions, copy of which is before Your Honor, were designed, after proving the delivery and the sale by us and the price of sale, to show what was the market value at that time. There may be some evidence there which Your Honor will declare to be improper, but there is enough evidence there to show that the market value of the stock at the time

of the sale was about what we got for it. There were sales below and there were sales above. Your Honor may have to examine that part of the evidence to satisfy yourself whether we did get the market value or not. The best evidence before Your Honor is contained in the deposition which is the last one in the order of taking, a man by the name of
page 44 } Freeman. It is on Page 28. Mr. Freeman is a specialist in a firm which specializes in selling unlisted and special public utility stock, and he brought before the notary the records of his office which showed actual sales of this stock. On Page 29 I examined him with those records before him as follows:

“Q. Mr. Freeman, you have shown me some of your records of Virginia Public Service Co. 7% cumulative preferred stock which consists of a number of cards and for the year 1933 up to June consists of six cards beginning January 6, 1933, and running to June 2, 1933. On each of these cards there are about seventeen items. These cards indicate in red ink actual transactions, as I understand you to say, and in black ink, inquiries which were not transactions.

“A. That is correct.

“Q. Taking the cards on this list which embrace dates from the 24th of April, 1935, to the 9th of May, 1933, there are, according to your records, eight actual sales, is that correct?

“A. Yes.

“Q. And there are nine inquiries?

“A. That is correct.

“Q. Will you state for the record all of the sales, with dates and prices, on this card?”

Mr. Harlow objected to that. The answer is as follows:

“A. On the 25th of April, 1933, we sold 20 shares at 31.”

This is about the time of our sale.

“On the 29th of April, 1933, we bought 10 shares at 28½ and we sold 10 shares at 30½. On May 1st, 1933, we bought twenty shares at 29 and on May 1, sold twenty shares at 29½. On May 2nd, 1933, we sold five shares at 32 and on May 2nd, 1933, we bought five shares at 30.

“Q. Mr. Freeman there has already been exhibited in this suit two statements from Eastman, Dillon & Co.
page 45 } which are marked for identification Plaintiffs' Exhibit C and D in the testimony of Mr. Preller. These purport to be copies of the statements by Eastman,

Dillon & Co. I ask you to examine these statements which purport to show that there were sold to W. D. Yergason & Co. on the 25th of April, 1933, twenty shares of Virginia Public Service Company 7% cumulative preferred stock at 29 and on the 1st of May, 1933, Eastman, Dillon & Co. purport to have sold to W. D. Yergason & Co. twenty shares of the same stock at 29. Do these correspond to your records?

"A. Yes, sir.

"Q. In examining these cards again, on the card from the 19th of May, 1933, to the 2nd of June, 1933, there were six sales of this stock, is that correct?

"A. That is correct.

"Q. On the card from the 10th of May, 1933, to the 17th of May, 1933, there were ten sales of this stock, is that correct?

"A. That is right.

"Q. These cards that we are examining relate to 1933, do they not?

"A. Yes, sir.

"Q. On the card from the 7th of April, 1933, to the 21st of April, 1933, there were six transactions, which were sales, is that correct?

"A. That is right."

I don't think it is necessary, if Your Honor please, for me to ask you to burden yourself with all this evidence right now, but the effect of the evidence was to show that the bid and asked price which is recorded in this book was about the same during this time. In other words, if Your Honor please, you will recall at the former hearing of the case we introduced in evidence daily quotation sheets of this stock to prove its market value at the various times by those daily page 46 } quotation sheets.

It is established by the evidence that this national stock summary is a summary which is gotten up by a service firm that gets the bid and asked price from all their subscribers, and the effect of it is that a man who has got 7% preferred stock and wants to sell it, he will offer that stock at 30. That is sent out through these sheets. Another man wants to buy 7% preferred stock, Virginia Public Service Company stock, and he will offer 31. Those are not, therefore, of course, evidence of actual sales, but they are evidence of what one man is willing to buy for and another man willing to sell for; and the record with reference to the Virginia Public Service Company stock as to these dates is contained in the reference which Your Honor will find in these depositions taken in New York. I think they establish clearly that

the price which we got for the stock was about the market price.

Mr. Harlow: Hadn't we better take the testimony and then argue the case?

Mr. Garnett: In lieu of His Honor's reading the deposition, I have given him the effect of the evidence of the plaintiff. I have finished my evidence. Mr. Harlow is about to take his evidence.

Mr. Harlow: If Your Honor please, I think it might be well in order to refresh Your Honor's recollection in regard to these dates here—this original purchase by Colonel Garnett's clients was made on August 24, 1931. The refusal page 47 } to transfer the stock on the part of the defendant was about August 26, 1931. The suit was filed on October 9, 1931, and the final hearing was on September 12, 1932. That is, that was the date when we submitted our argument to Your Honor and also briefs. The final decree which Your Honor entered was on February 20, 1933, and the stock was transferred in accordance with that decree April 24, 1933. The stock was sold about two weeks or ten days thereafter, around the 29th of April.

Mr. Garnett: Five days.

Mr. Harlow: Yes, sir. Your Honor also will notice that the notice for application to this Court for the transcript of the record on appeal was served on counsel for the Virginia Public Service Company on the 22d day of May, 1933, a month or more after the stock had been sold. We would like to bring and we will bring to Your Honor's attention that this stock was sold without any notice to us and without any opportunity to minimize our damages by bidding the stock in. The stock never missed a dividend and the stock was carried on our books at \$100.00 a share.

Mr. Garnett: I object to that.

Mr. Harlow: I knew you would.

Mr. Garnett: For several reasons, if Your Honor please. In the first place, the book value has nothing to do with it.

Mr. Harlow: We will argue that later.

Your Honor will further note that in the record page 48 } that went to the Court of Appeals and which is referred to by the Court in its opinion the evidence shows that they had contracted to sell to the Old Colony Trust Company at 100 $\frac{3}{4}$, which was 75c a share more than they paid for it. Because of their inability to deliver the stock represented by that sale, they authorized the Old Colony Trust Company to go out and buy on the open market. The Old Colony Trust Company went out on the market and bought

25 shares at 101.50, \$1.50 more per share than they paid for it, and the plaintiffs paid them for that difference \$18.75, which the evidence shows they paid to the Old Colony Trust Company.

Those were the two transactions before the Court of Appeals when this opinion was rendered. First, they made a sale to them on which they would have made a profit of seventy-five cents a share, and because they were unable to consummate that sale they were compelled to pay a loss of 75c a share on 25 shares.

In addition, the record that went to the Court of Appeals contained this stipulation on Page 97 of the record. There were several stipulations, but the last one is the one to which I desire to call Your Honor's attention:

"That, pursuant to final decree entered herein on the 20th day of February, 1933, the defendant Virginia Public Service Company on the 24th day of April, 1933, transferred the 80 shares of Preferred Stock of the said Company, constituting the subject matter of this suit, to the plaintiffs and has executed, issued and delivered to the plaintiffs proper and usual certificates therefor, and that the defendant Virginia Public Service Company has paid to the plaintiffs all dividends accumulated on said stock from, to-wit, August 24, 1931, with interest at 6 per cent on each such dividend from the date that the same became payable until paid, and further that the market price of the 7% preferred stock on September 9, 1932, was 65 bid and 70 asked."

That was the evidence before the Court of Appeals and we desire this morning to ask Senator King, Chairman of our Board and General Counsel, to take the stand, his testimony to cover two general points, the real value of the property as distinguished from the market value, because our contention is there is no market value, because when there are only sporadic sales you must take the real or earning value; the second, the question whether we should have been allowed to minimize our damages.

Mr. Garnett: We make a general objection to the first point that the market value of the stock is the measure of damages, the difference between the market value of the stock at the time the stock should have been delivered to us and the market value of the stock at the time it was delivered to us is the measure of our damages. And as to the second point, we are under no obligation, in order to minimize the damages to the defendant, to offer this stock to the defendant at any

price. We bought the stock in open market and sold it in the open market; and the fact that the Virginia Service Company did not have an opportunity to bid on the stock in our hands is not relevant to the question of what our damages should be.

With the understanding that that objection will
page 50 } apply all through Senator King's evidence, I will
allow him to go on the stand. I do not want to
every now and then interrupt Senator King to register an objection which will apply to the evidence given by him.

Mr. Harlow: It is understood that you have formally offered your depositions in evidence?

Mr. Garnett: I have.

Mr. Harlow: We desire to object to these depositions. The grounds I think are fully set out in the depositions themselves before the testimony was offered. In order to save time, I think we agreed that Colonel Garnett should state what the general design of the testimony was, and I stated my objections to that. They are covered very substantially, and I should like to ask Your Honor's permission, after I have read that record, to offer such further objections as I see fit to do.

Mr. Garnett: I have no objection to that.

Thereupon,

FLOYD W. KING,

a witness of lawful age, being first duly sworn, deposes and says as follows:

DIRECT EXAMINATION.

By Mr. Harlow:

Q. Senator King, will you state your full name, please?

A. Floyd W. King.

Q. Your occupation?

A. Chairman of the Board of Directors of the Virginia Public Service Company and General Counsel.

page 51 } Q. How long have you occupied either of those positions?

A. I have been Chairman of the Board since about March, 1933, and General Counsel of it ever since its organization in 1926.

Q. 1926?

A. Yes.

Q. Will you state to the Court, of your own personal knowledge, the record of this company regarding dividends on its 7% preferred stock?

Mr. Garnett: If Your Honor please, my general objection will apply to that, but of course my specific objection is the record of the company in regard to the payment of dividends has no relevancy to prove the market value.

The Court: I don't think it makes much difference as to the Court's ruling at this time. I will let it be put in the record.

Mr. Garnett: Just so it is understood the objection will apply.

Mr. Harlow: We are not doing this thing to show the market value. Our contention is there is no market value because of the few and sporadic sales, and the only value is real and earning value.

Mr. Garnett: In order that Your Honor will understand—

The Court: Let the objection stay as it is and put the testimony in the record.

page 52 } Mr. Harlow: Will you read the question, please?

Question read by the Reporter as follows:

“Q. Will you state to the Court, of your own personal knowledge, the record of this company regarding dividends on its 7% preferred stock?”

A. They have been regularly declared and have never been passed. This knowledge is gotten from the fact that I have a member of the Board of Directors and voted on that Board since its organization.

Q. At the time the matter first came up, the subject of this suit, where were the various legal matters of the company handled? Here or in New York or how was it handled?

A. All legal matters affecting operation were handled by me here. All matters relative to finance and acquisition of properties were handled in New York in the New York Office and by the New York counsel of the company.

Q. Senator, approximately how many preferred stockholders of this company are there or were there at the time the stock was controverted?

Mr. Garnett: In addition to the other objection, I object on the ground it is irrelevant and immaterial.

A. There have been approximately six thousand stockholders for the last three or four years. I cannot answer definitely, but approximately that number.

Q. What amount of preferred stock is outstanding?
page 53 }

Mr. Garnett: Same objection.

Q. (Continued) Aproximately, I mean?

A. I think there are about ninety-six thousand shares, which would be \$9,600,000.00.

Q. Are you able to state from your own knowledge of the company's record as to where approximately, at least, the majority of the stockholders of this company reside?

Mr. Garnett: Same objection.

A. I had occasion to ascertain that about a year ago, and of the approximately six thousand, fifty-two hundred and some live in Virginia.

Q. Other than the market, if it could be so called, that may exist in New York for the public sale of this stock, have you any knowledge of any other public market for it?

A. There is a market in Richmond. The stock has never been listed on any market by the company, but there are bid and asked transactions on the Richmond Stock Exchange.

Q. Have you had any experience regarding the purchase of this company's 7% preferred stock on the Richmond Stock Exchange?

Mr. Garnett: I object to it for the same reasons. It is for the same reasons. It is irrelevant and immaterial.

A. On two occasions a director of the company and I have attempted to buy some stock at the asked price on the Richmond Stock Exchange.

Q. Did you buy the stock?

page 54 } A. We were not able to get it.

Q. Why?

A. I do not know why except my information that was given me by one of the Richmond brokers.

Mr. Garnett: I object to that on the ground of hearsay.

The Court: I think that is going pretty far.

Mr. Harlow: All right.

Q. I believe you stated that this stock is not listed on any exchange so far as the company is concerned?

A. There has never been any authorization of the company to list this stock.

There followed a discussion which the Reporter was instructed to omit from the record.

Q. Are you able to testify from your own personal knowledge as to whether or not the sales of this company's 7% preferred stock on any public market are frequent or sporadic?

Mr. Garnett: I don't think the Senator is competent to testify to that.

Mr. Harlow: He knows the transfers that were made.

The Court: I am not going to rule on that as long as all the rest of it has gone in.

A. I have no personal knowledge as to that, because transfers would not reflect the sales. Transfers may be made from the settlement of an estate and the division of shares among distributees.

page 55 } Q. Senator King, the record shows that promptly after the entry of the final decree in the lower Court of this case, the company complied with the terms of this decree by issuing certificates to the complainants and paying them the accrued dividends with the interest.

Mr. Garnett: I object, in so far as your questions says "promptly", because it was not done for more than a month.

Mr. Harlow: Well, approximately a month afterwards.

Mr. Garnett: Give the exact time. The order was entered on the 20th of February and they were transferred on the 24th of April.

Q. (Continued) After the transfer of that stock to complainants, was your company ever notified by the complainants that they intended to sell that stock?

A. No.

Mr. Garnett: If Your Honor please, I object to the question and answer as being irrelevant and immaterial, and not affecting the right of the plaintiff to sell in the open market.

The Court: I understood the objection went to all these questions.

Mr. Garnett: All right, sir.

Q. If the company had been given an opportunity by the complainants to purchase that stock, at what price would you have purchased it?

page 56 } Mr. Garnett: That is a different proposition.

Mr. Harlow: I intended to follow that up with an absolute offer.

Mr. Garnett: The offer never was sent to us.

The Court: The objection is sustained. Go ahead and produce the evidence from the depositions.

Mr. Harlow: We want the answer to go in the record. Will you read the question, please.

Question read by the Reporter as follows:

“Q. If the company had been given an opportunity by the complainants to purchase that stock, at what price would you have purchased it?”

Thereupon, the witness, if allowed to answer, would have answered as follows:

A. The company could have afforded to buy at any price under one hundred dollars.

Mr. Garnett: I except to the answer.

Q. After you were advised that the stock had been sold by these people without notice to the company, what, if any, offer was made to them at that time by the company?

Mr. Garnett: You mean the offer made to compromise this suit?

Mr. Harlow: No compromise about it.

Mr. Garnett: You mean the one made recently?

Mr. Harlow: Yes.

Mr. Garnett: You called me up and I wrote to page 57 } my clients and said what they were willing to pay to compromise the suit.

The Court: After the stock was sold?

Mr. Garnett: Yes.

The Court: Objection sustained.

Mr. Harlow: If Your Honor please, let's see about that. I say that is not so. I called him up and told him that they could go out on the open market and buy this stock and we would pay them for the difference.

Mr. Garnett: And that was to be in lieu of our damages.

The Court: After he sold the stock?

Mr. Harlow: Yes.

Mr. Garnett: In the last two months.

The Court: Objection sustained.

Mr. Harlow: If Your Honor please, I want this shown in the record. It was after the stock was sold, but only when we had received notice it had been sold. We had no notice it was

to be sold until we had this from Colonel Garnett and it was then we made the proposition.

The Court: Sustain the objection. If you want to show what the evidence is you wish to tender, go ahead.

Mr. Harlow: Read the question.

Question read by the Reporter as follows:

“Q. After you were advised that the stock had been sold by these people without notice to the company, what, if any, offer was made to them at that time by the company 58 } pany?”

Thereupon, the witness, if allowed to answer, would have answered as follows:

A. After the case had been remanded and I was advised by Mr. Harlow of that fact, I authorized him to offer the plaintiffs the proposition that we would pay one hundred dollars a share for 80 shares, either the original 80 shares in controversy or any other 80 shares of the same issue. If I might state just a little further, the situation on the part of the company is that so long as these 80 shares of stock are outstanding or any stock is outstanding, it is a preferred charge as to the par value of that stock against the assets of the company, a preferred charge up to the extent of 7% a year against the earnings of the company and the acquisition of the stock in controversy by the company would satisfy at one hundred dollars a share any claim of the plaintiffs without injury to the company, because the same transaction would retire that much of the company's obligation.

Mr. Garnett: I object, not only on the grounds already stated, but on the further ground it is argumentative.

The Court: It has already been ruled on.

Mr. Garnett: I understand that, but I want that additional objection in the record.

Mr. Harlow: It is not argumentative but explanatory. That is all.

Mr. Garnett: I would like it to appear in the page 59 } record this offer was made December 3, 1934.

Mr. Harlow: How do you fix that?

Mr. Garnett: I immediately wrote to Mr. Franklin in New York and communicated with him on that date.

The Witness: That is about the date.

Mr. Garnett: No questions.

And further this deponent saith not.

Mr. Garnett: I would prefer for myself not to detain Your

Honor longer, and after the case is written up to give you a written brief.

The Court: I have no objection to being detained longer, but I think it would be well if this testimony and that testimony were taken together, and you gentlemen submit briefs.

Mr. Garnett: That is satisfactory to us.

Mr. Harlow: It is satisfactory to us. It is understood you will submit your brief to us and we will answer.

Mr. Garnett: Oh, yes, but I am going to ask Your Honor to be lenient with me as to time.

The Court: I will be as lenient as you want. You take your time and I will put the limit on Mr. Harlow when you get your brief in.

Mr. Harlow: That is satisfactory to me.

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CERTIFICATE.

I hereby certify that the above and foregoing is a full, complete, and accurate transcript of the proceedings before me in this cause on the 22nd day of January, 1935, and contains all of the testimony then taken and offered before me; and that it appears in writing that due notice of the time and place of tendering this transcript and certificate was given to counsel for the plaintiffs.

Teste, this 22 day of July, 1935.

WALTER T. McCARTHY, Judge.

page 61 } FINAL DECREE ENTERED JUNE 21, 1935.

This cause came on this day to be again heard upon the papers formerly read, and upon the depositions taken and filed on behalf of the plaintiffs and the Exhibits filed therewith, and upon the depositions taken and filed on behalf of the defendant, and was argued by counsel. Upon consideration whereof, and it appearing to the Court that the market value of the eighty (80) shares of stock purchased by the plaintiffs, at the time when the same were offered to the defendant for transfer, was Eight Thousand Dollars (\$8,000.00), and that the market value of the same at the time of the redelivery of the stock by the defendant to the plaintiffs was the sum of Two Thousand Four Hundred and Forty Dollars (\$2,440.00), and the Court being of opinion that the plaintiffs are entitled to recover as damages the difference between the market value of the eighty (80) shares of stock as of the time when they were offered by the plaintiffs to the defendant for transfer and the depreciated market value of said stock at the time they were actually delivered by the defendant to the plaintiffs, doth

ADJUDGE, ORDER and DECREE that the defendant pay to the plaintiffs the sum of Five Thousand Five Hundred and Sixty Dollars (\$5,560.00), with interest thereon from the 24th day of April, 1933, at the rate of six per centum until paid, together with their costs on this behalf expended.

To which findings and decree of the Court, the defendant duly excepted, on the grounds:—that the findings of the Court are without evidence to support them; that said findings are based upon evidence improperly received and con-
 page 62 } sidered over the objection and exception of the defendant; that the decree of the Court is based upon an erroneous theory of the measure of damages; that the decree is inconsistent with the plaintiffs' demand and the relief previously granted; that the amount of damages allowed is excessive; that the award of damages to the plaintiff should be conditioned upon the tendering back by the plaintiffs to the defendant of the stock involved herein or an equivalent amount thereof at the value thereof at the time of demand for transfer; that the decree fails to require the plaintiffs to do equity and is inequitable and violative of the legal and equitable rights of the defendant; that the decree is contrary to law.

And the defendant having indicated its intention of applying to the Supreme Court of Appeals for an appeal from this decree, it is further ordered that execution of this decree be and it hereby is suspended for ninety days, provided the defendant shall, within ten days from this date, give bond, with surety, before the Clerk of this Court in the penalty of One Thousand Dollars (\$1,000), conditioned, in accordance with Section 6338 of the Code, for the payment of all such damages as may accrue to any person by reason of such suspension in case a *supersedeas* to this decree should not be allowed, and be effectual within such ninety days.

Seen.

LEO P. HARLOW,
 Atty. for Deft.

page 63 } NOTICE OF APPLICATION FOR RECORD
 FILED JULY 8, 1935.

To:

Percival J. Steindler,
 Arnold H. Godsol, and
 Fred W. Preller

You will take notice that on the 8th day of July, 1935, I shall

Supreme Court of Appeals of Virginia.

apply to the Clerk of the Circuit Court of the City of Alexandria for a transcript of so much of the record in the above-entitled cause, recently pending in said Court, as will enable the Supreme Court of Appeals in Virginia, or the Judge thereof in vacation, to whom a petition for an appeal from a certain decree entered in said cause on the 21st day of June, 1935, is to be presented, to properly decide on said petition, and enable the Court, if the petition be granted, properly to decide the questions that may arise before it; and that I shall then request the Clerk to embrace in said transcript the following papers:

1. The depositions taken and filed on behalf of the plaintiffs subsequent to the receipt of the mandate of the Supreme Court of Appeals entered herein.
2. Proceedings and depositions taken before the Court January 22, 1935.
3. Final decree entered June 21, 1935.
4. A Copy of this notice, and designation of record.
5. Clerk's certificate.

LEO P. HARLOW,
MARSHALL H. LYNN,
Attorneys for Virginia Public Service
Company, Defendant.

Legal service of above notice acknowledged this 3d day of July, 1935.

CHRISTOPHER B. GARNETT,
Attorneys for Plaintiffs.

page 64 } CLERK'S CERTIFICATE.

I, Elliott F. Hoffman, Clerk of the Circuit Court for the City of Alexandria, do certify that the within papers constitute a true and exact transcript from the records in the Suit of Percival J. Steindler, et als., Co-Partners doing business under the firm name and style of Steindler and Preller v. Virginia Public Service Company, a Corporation, Defendant.

I do further certify that bond with approved surety, dated the 28th day of June, 1935, in the sum of \$1,000.00 as required by court order has been given.

Given under my hand this 4th day of September, 1935.

ELLIOTT F. HOFFMAN,
Clerk, Circuit Court, Alexandria, Va.

A Copy—Teste:

M. B. WATTS, C. C.

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