Pittsburgh Plate-Glass Company should be increased from $600,000 to $1,920,000, to be divided as follows: To J. B. Ford & Co., for Tarentum, $1,120,000; to the stockholders of the Pittsburgh Plate-Glass Company, $200,000; the Tarentum works to be finished by J. B. Ford & Co. A meeting of the board of directors of the Pittsburgh Plate-Glass Company was held on July 2, 1886, at which this proposed arrangement was submitted, and on motion a stockholders' meeting was called for September 6, 1886, to consider the proposal, and the board recommended its acceptance. At the directors' meeting held on July 2, 1886, John Pitcairn asked to be and was excused from voting on account of his personal interest in the transfer of the property. Notice of the stockholders' meeting to be held on September 6, 1886, and of its purpose, was given by public advertisement, and by a circular directed to each stockholder; and on the day appointed for the meeting 5,515 shares out of the whole issue of 5,950 shares were represented. Mr. Barr, the plaintiff, presided at that meeting, and announced to the stockholders present that they had the power to "amend, alter, reject, or affirm the proposition" recommended by the directors. After some discussion J. B. Ford & Co. were requested to state the cost of the Tarentum works, which they refused to do, for the reason that the basis of the proposed transfer was the relative capacity of the two works. Finally, J. B. Ford & Co. submitted the following terms of consolidation, namely: That the capital stock of the Pittsburgh Plate-Glass Company should be increased from $600,000 to $2,000,000, of which Creighton should represent $800,000, subject to a mortgage of $134,000, and Tarentum should represent a capital stock of $1,000,000; that of this stock increase $200,000 should be distributed among the Creighton stockholders at that date as dividend, and that $1,000,000 in stock at par should be issued to J. B. Ford & Co., leaving $200,000 to be issued and sold to the stockholders on September 6, 1886, at par, for a working capital. These terms were approved and accepted by the unanimous vote of the stockholders present, and there is no evidence to show that any shareholder who was not represented at the meeting has ever disapproved of its action. On October 27, 1886, J. B. Ford & Co. conveyed the Tarentum works to the Pittsburgh Plate-Glass Company, and received from the latter the entire purchase consideration, $1,000,000 of its stock at par; but, as the Tarentum works were still incomplete, J. B. Ford & Co. pledged $200,000 of the stock at par with the treasurer of the Pittsburgh Plate-Glass Company as security for the completion of Tarentum. The Pittsburgh Plate-Glass Company took possession of Tarentum, and have operated the same ever since. The Tarentum works were completed by J. B. Ford & Co. in the spring or summer of 1887, but it was not until April 17, 1888, that the firm made a formal demand on the Pittsburgh Plate-Glass Company for the return of the pledged stock, whereupon, at a meeting of the board of directors, a resolution was adopted instructing the treasurer to deliver the stock. This resolution was passed over the protest of Mr. John Scott, one of the directors, and the

treasurer refused to obey the instructions of the board. At a subsequent meeting of the board of directors, held on November 20, 1888, a protest signed by several of the stockholders was presented, stating in substance that J. B. Ford & Co. had, in violation of the duty they owed to the company and its stockholders, voted to themselves and received a price for the works at Tarentum grossly in excess of the cost and value thereof, and have no claim either in law or conscience to the stock now demanded by them; and the protestants requested that a meeting of the stockholders should be called, to have a full and fair investigation of the whole matter. Accordingly, a meeting of the stockholders was held on December 5, 1888, the proceedings of which disclosed much dissatisfaction on the part of several who were present with the alleged excess of price received by J. B. Ford & Co. for Tarentum, whereupon Mr. John Pitcairn stated that, if the stockholders repented the acquisition of Tarentum, his firm would agree to a rescission of the contract of sale, and he submitted a written proposition to that end. In that paper the whole transaction is reviewed, and it concludes with the promise that J. B. Ford and John Pitcairn, who owned a majority of the stock, would refrain from voting on the question of rescission, and leave its settlement to the minority stockholders. At this stage of the proceedings, on motion of a minority stockholder, a committee of five was appointed "to thoroughly investigate all the circumstances connected with this complaint, and this proposition of Mr. Pitcairn's, and also to recommend a course of action for the minority stockholders, and that their report be made at the next regular annual meeting of the company, to be holden in January." This committee consisted exclusively of minority stockholders, who at once entered on the discharge of their duties, and called before them several witnesses, whose testimony is fully reported in the record. The investigation by the committee appears to have been conducted with considerable zeal and industry, and on January 22, 1889, at the annual stockholders' meeting, they presented a unanimous report, stating that by the delay of J. B. Ford & Co. in completing the Tarentum works the company had suffered no estimable damage; that the committee was unable to decide whether J. B. Ford & Co.'s profits were more than they were entitled to or not, as they could not ascertain the cost of the works. The report observes that the building of plate-glass works by the principal stockholders or officers of the Pittsburgh Plate-Glass Company that may hereafter be in competition with the company is, at least, questionable as to the good faith of such transactions; but in the judgment of the committee the acquisition of the Tarentum works has been on the whole favorable to the general interests of the company, and the transaction should not be disturbed; and that the proposition for rescission should not be entertained. This report was adopted by a vote of 19,369 shares out of a total of 20,000 shares represented. J. B. Ford and John Pitcairn then held 12,012 shares, leaving in the hands of the other stockholders 7,988 shares, of which last number 7,357 voted to adopt the report. With the adoption

of this report it would seem that the manner and the terms of the sale of Tarentum had been ratified by the stockholders. The proofs show that the estimated value of Tarentum at $1,000,000 was no greater, proportionately, than the estimated value of Creighton at $800,000, subject to a debt of about $134,000; that, after the consolidation of the two works, the dividends of the Pittsburgh Plate-Glass Company were largely increased, and that there was a marked advance in the price of its stock. These facts have not been controverted.

The real ground of complaint against the defendants is that they made excessive profits on the sale of Tarentum; otherwise there would have been no charge of conspiracy and combination to compel the Pittsburgh Plate-Glass Company to buy a property which has proved to be so advantageous to the stockholders. But if Tarentum was estimated beyond its cost, so also was Creighton. If Creighton was worth $800,000, subject to a debt of $134,000, Tarentum, with its improved machinery and large capacity for production, was equally worth $1,000,000. All this was known to the stockholders of the Pittsburgh Plate-Glass Company on September 6, 1886, when the manner and terms of the sale were agreed upon, and the stockholders subsequently received the very large profits arising therefrom in stock and cash dividends. Two years after the sale a protest was made by some of the minority stockholders against the delivery of the stock which had been pledged by J. B. Ford & Co. for the completion of Tarentum, because of the exorbitant price paid to that firm, and a thorough investigation of the whole matter was demanded by the protestants, under the threats of legal proceedings. The result of that investigation was a reluctant admission, on the part of the committee who conducted it, that the acquisition of Tarentum had been advantageous to the Pittsburgh Plate-Glass Company, and a recommendation that the transaction should not be disturbed, which was approved by an almost unanimous vote at a general meeting of the stockholders. In the light of such evidence it is impossible to sustain the charge of conspiracy and fraudulent combination made against the defendants. Three of the defendants, indeed, had no direct interest in the affairs of J. B. Ford & Co., not being members of the firm. J. B. Ford was personally interested in the property and success of the Creighton works, which were doing a highly lucrative business, and could not fill their orders. He desired to establish other works, for the purpose of extending the business which produced such profitable returns, to be operated in harmony with Creighton, and not to its injury; and being a stockholder of the Pittsburgh Plate-Glass Company did not deprive him of the right to do this. His two sons were also stockholders, and it would be unreasonable to suppose that he intended to defraud or injure a company in which he and his sons were so largely interested. John Pitcairn formed a partnership with J. B. Ford for building the Tarentum works, at the suggestion and with the knowledge and approval of some of the minority stockholders of the Pitts-

burgh Plate-Glass Company, for the express purpose of protecting the interests of the company; and there is no proof that the firm of J. B. Ford & Co. intended to operate the Tarentum works in competition with or to the prejudice of Creighton. The proposal to consolidate the two works came from the Pittsburgh Plate-Glass Company, and not from J. B. Ford & Co. In fact the firm did not at first appear to be inclined to entertain the proposal, Mr. Pitcairn being on the eve of going abroad for his health, and Mr. J. B. Ford preferring to have the Tarentum works operated independently of any other. However, an offer being invited from J. B. Ford & Co., negotiations were begun, and terminated as already stated. There is no proof of fraud in the transaction, or of misrepresentation. J. B. Ford & Co. refused to disclose the cost of Tarentum, because they might want to sell it, or organize another company. This refusal, and the reasons for it, were publicly made at the stockholders' meeting of September 6, 1886, and the request for a statement of the cost was not pressed. No facts are proved by which a resulting trust can be established in favor of the Pittsburgh Plate-Glass Company. J. B. Ford & Co. built the Tarentum works with their own money, and on their own credit and risk; nor did they make themselves trustees by any wrongful acts of their own. They did not use the property or the credit of the Pittsburgh Plate-Glass Company, nor were they under any obligation, legal or equitable, which prohibited them from erecting the new works, and consolidating them with the Creighton works, on terms which have proved to be equally beneficial to all the parties concerned. The purchase of Tarentum appears to have been ratified and settled, and no further objection was made in reference to it until the negotiations were set on foot for the acquisition of what are known as the Ford City works.

2. The purchase of the Ford City works. In the summer of 1887 the defendants, being then stockholders, and, with the exception of J. B. Ford, directors, of the Pittsburgh Plate-Glass Company, in view of the existing and prospective condition of the plate-glass business, concluded that additional works for its manufacture were needed. Creighton and Tarentum were behind with their orders, and could not supply the demand for their products. The making of plate glass in the United States was a comparatively new enterprise, and the home production did not equal one-half of the home consumption. J. B. Ford had been a pioneer in the business, and he and his codefendants, seeing the impossibility of the Pittsburgh Plate-Glass Company retaining a monopoly of the business, and the certainty of an increased importation of the foreign article, were of the opinion that additional works should be erected. The profits which had been already realized by the company on a watered stock of several hundred thousands of dollars would, the defendants thought, be sure to excite competition, and that it would be wise for the company to make provision for meeting such competition by adopting new machinery and appliances for reducing the first cost of production. So strongly convinced

were the defendants of the necessity of extending the company's works that they began to look around for a suitable location for the buildings, and had selected a place in Armstrong county, Pa., and secured options for the purchase of several hundred acres of land. It had already come to the knowledge of John Pitcairn that certain parties in Philadelphia and Pittsburgh had contemplated the organization of glass works near the latter city, which would come into direct competition with the Pittsburgh Plate-Glass works. Such being the condition of things, a special meeting of the board of directors of the company was held on September 8, 1887, at which the following preamble and resolution were adopted, and a special meeting of the stockholders was called for the 20th of September, 1887, to consider the same:

"Whereas, in the judgment of the board the present condition and prospects of the plate-glass business, and the position of this company in relation thereto, are such as to render it expedient that the company should as quickly as possible erect additional works at such point as shall be determined, and with this view inquiries have been made looking to the securing of an eligible location:

"Resolved, that the board recommend to the stockholders the erection of additional works, of a capacity not less than 300,000 feet per month, at such point as shall be selected by the stockholders or directors."

In pursuance of the call a special meeting of the stockholders was held on September 20, 1887, at which the recommendation of the board was fully discussed and rejected, the plaintiff being most earnest in his opposition thereto, and pointing out that under its charter the company had no power to manufacture plate glass outside of Allegheny county. At this meeting, and before the vote was taken, the defendants, being the owners of a majority of the stock, notified the stockholders present that they would not vote their stock, but leave the adoption or rejection of the recommendation of the board to the decision of the minority stockholders, as the defendants did not wish to compel a compliance with their own opinion against a majority of the minority. The proceedings of this meeting, and the good faith of the defendants in calling it, have been severely criticised by the counsel for the plaintiff, but the weight of the testimony satisfactorily proves that the question of building the new works by the company was fairly left to the minority stockholders, and that the recommendation of the defendants was honestly made. The advice of the board having been refused, J. B. Ford and John Pitcairn determined to go on with the Ford City works, and took into partnership with them their three codefendants, Edward Ford, Emory L. Ford, and Artemus Pitcairn, assigning to each of the last three a one-ninth interest, and taking for each of themselves three-ninths interest in the undertaking. The interests of the defendants in the Pittsburgh Plate-Glass Company were so large at this time as to exclude all idea of their intention to depreciate their value or to diminish their profits. On the contrary, they had the strongest motive to protect their interests, to make them still more profitable, and to ward off competition as long as possible. Having purchased the

required land, they proceeded to build the works with their own capital and on their own credit, with the knowledge of and without objection from the plaintiff or any other minority stockholder. At the stockholders' meeting on January 22, 1889, after the Tarentum and other business had been disposed of, a committee was appointed, consisting of the same five members who had acted on the Tarentum committee, and who were adverse to the further extension of the company's works, "to negotiate with J. B. Ford & Co. for a transfer of the plate-glass works located at Ford City," and to report the terms at a special meeting of the stockholders to be called by the president of the company at the request of the committee. This committee held several sessions to consider the subject referred to them. The first offer of J. B. Ford & Co. was to sell the new works for $1,500,000 in the glass company's stock at par, with the condition that they would sell the one-half of this stock to the stockholders of the company at par. As they had done in the sale of Tarentum, J. B. Ford & Co. refused to give the committee a statement of the cost of the Ford City works, and for similar reasons, but they did finally impart to the committee in confidence the best estimate of what the works would cost when finished. Subsequently this offer was modified to this effect: that the defendants would sell the works completed for $750,000 in stock of the company at par, and $750,000 in bonds secured by a mortgage, and payable in three, four, and five years, which offer was reported favorably by the committee to a special meeting of the stockholders held on April 9, 1889, which, after a prolonged discussion on the report, adjourned to meet on the 16th of April, 1889, when the report was accepted, and a resolution was adopted to have the charter of the company amended, authorizing it to manufacture its products in other places than Allegheny county. Before the vote was taken on the adoption of the report, the announcement was made that J. B. Ford & Co. would refrain from voting their stock, which constituted a majority of the whole issue, until the result of the vote by the minority stockholders should be known, when it would be cast with the majority of the minority, in order to constitute a legal vote. The total vote cast was 17,880, of which number 16,706 were in favor of the resolution to adopt the report of the committee, and 1,174 opposed; 2,120 shares not voting. At this meeting J. B. Ford & Co. agreed that $750,000, received by them in part payment of the Ford City works, should not participate in the profits of the Pittsburgh Plate-Glass Company for the year 1889.

On April 17, 1889, a stockholders' meeting was called by the board of directors to be held on June 18, 1889, for the purpose of voting on the increase of the capital stock of the company and the issuing of bonds for the purchase of the Ford City works. In the mean time—May 8, 1889—the plaintiff had filed his bill, and before the day appointed for the next meeting of the stockholders J. B. Ford & Co. addressed a letter to each stockholder, stating, in substance, that they were willing to rescind the contract for the purchase of the Ford City works if a majority of the minority stockhold-

ers sympathized with, or were in favor of, prosecuting the plaintiff's suit. At the stockholders' meeting, on June 18, 1889, the vote in favor of increasing the capital stock was 17,205, and no votes were cast in the negative. The Pittsburgh Plate-Glass Company took possession of the Ford City works on July 1, 1889, and have remained in possession since that date.

The purchase of the Ford City works, up to the close of the evidence as set out in the record, has been highly advantageous and remunerative to the Pittsburgh Plate-Glass Company. Notwithstanding the great increase in the number of shares issued to pay for Tarentum and Ford City works, their market price continued to advance until it had reached the figure of $200 per share. The cost of the Ford City works was about $1,200,000, and when it is considered that, in addition to the outlay of money, the defendants also contributed their time, practical experience, and intelligent personal supervision from the beginning to the completion of the works, and were also subjected to the risks of failure, the price ultimately received by them does not appear to be excessive. It is true that the stock paid to them at par had been selling at a premium, but it does not follow that, if the new issue had been thrown on the market in bulk, the premium would have been maintained. The defendants assumed the risk and labor of the enterprise, and were entitled to a reasonably liberal profit.

The proofs fail to sustain the charge of conspiracy and combination. The defendants acted openly, and made no false representations. They afforded the company the opportunity of building the works, and advised them of the necessity of doing so, and gave notice that if the company did not build they would. As majority stockholders of the Pittsburgh Plate-Glass Company the defendants were more deeply concerned in the prosperity of that company than were the plaintiff and those who agreed with him. The defendants did not use any of the property of the company or employ its credit in the erection of the Ford City works, and here, as in the case of the Tarentum purchase, the proof does not establish a resulting trust, or a trust ex maleficio. There was no conspiracy or combination to compel the purchase of the defendants' works, either at Tarentum or in Armstrong county; nor was the price paid for either one of the properties so large as to give the defendants an excessive or exorbitant profit on their actual outlay of money, time, and labor. There has been no proof of fraud in these transactions, nor of a misuse of the power and influence of the defendants, as majority stockholders, to deprive the minority stockholders of any right.

It has been settled that a director of a joint-stock corporation may make a valid contract with the corporation of which he is a member, provided that, in doing so, he deals fairly and honestly towards the stockholders who have appointed him their agent. Oil Co. v. Marbury, 91 U. S. 587; Leavenworth County Com'rs v. Chicago, R. I. & P. Ry. Co., 134 U. S. 688, 10 Sup. Ct. Rep. 708. The Tarentum and the Ford City works were the property of the de-

fendants, and were bought by the Pittsburgh Plate-Glass Company with a full knowledge of all the circumstances under which they had been erected, and it is evident that the company has not been injured, but has been greatly benefited, by their acquisition. It must not be overlooked, too, that in reference to the purchase of Tarentum the proceedings to set it aside, or to alter the terms thereof, were not taken until after the lapse of more than two years from the execution of the contract,—a delay which, of itself and unexplained, might be fatal to that portion of the plaintiff's complaint. Oil Co. v. Marbury, supra.

The plaintiff's solicitor now asks that his client shall be relieved from the payment of costs in the event of the decree below being affirmed, on the assumption that he has made an honest effort to redress what he considers to be wrongs against his company, and to enforce a restitution of enormous profits made by the defendants out of the company. The authorities cited in support of this request are Trustees v. Greenough, 105 U. S. 527; Warrell v. Railroad Co., 130 Pa. St. 600, 18 Atl. Rep. 1014. These were cases, however, in which a fund had been recovered, or property had been saved by the litigation, and the court allowed the expenses as between solicitor or attorney and client to be paid out of the fund. In each case the statutory costs had been given to the prevailing party. But here the plaintiff has not succeeded in proving his charges, and the rule appears to be settled that, where a bill charges fraud, and the bill is dismissed, the plaintiff must pay the costs. Fisher v. Boody, 1 Curt. 206.

The decree of the circuit court is affirmed.

SOUTHERN PAC. R. CO. v. ARAIZA.

(Circuit Court, S. D. California. July 24, 1893.)

No. 181.

1. PUBLIC LANDS—SOUTHERN PACIFIC GRANT—INDEMNITY LANDS—HOMESTEAD ENTRY.
   Under Act July 27, 1866, (14 Stat. 292,) granting lands to the Southern Pacific Railway Company, public land without the primary limits, but within the indemnity limits of the grant, was not open for homestead entry after an order was issued from the general land office directing the withdrawal of such lands from entry. Buttz v. Railroad Co., 7 Sup. Ct. Rep. 100, 119 U. S. 72, followed. Railroad Co. v. Tilley, 41 Fed. Rep. 729, overruled.

2. SAME—REMEDY AGAINST HOMESTEADER.
   A homesteader who has made such an entry and received a patent therefor against the opposition of the Southern Pacific Railway Company is subject to have his title decreed to be held in trust for said company, when it appears that the lands within the indemnity limits will not make up to the company the loss of lands within the primary limits.

In Equity. Bill by the Southern Pacific Railroad Company against Juana C. Araiza to recover lands wrongfully patented to respondent. Heard on demurrer to bill. Demurrer overruled.