In a few cases the destruction of the expected value of the contract was held to excuse performance. *Krell v. Henry*, [1903] 2 K.B. 740; *Alfred Marks Realty Co. v. Hotel Hermitage*, 170 App. Div. 484, 156 N.Y.S. 179 (1915). A still further category of cases, and the one into which the present case must fall, to be sustained, excuses performance where there is a destruction of the means of performance. *Earn Line S.S.Co. v. Sutherland S.S.Co.*, 254 Fed. 126 (D.C.S.D.N.Y. 1918), affd. 264 Fed. 276 (C.C.A. 2d 1920); *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 Pac. 458 (1916); *Kinzer Construction Co. v. State*, 125 N.Y.S. 46 (Ct.Cl. 1910); *Horlock v. Beal*, [1916] 1 A.C. 486. See 3 Williston, Contracts (1920), 3288, § 1935.

If the absence of interference by the union be considered the "means" to performance of the contract, the strike called by the union could be considered a destruction of such means. But a strike, even though unexpected, does not excuse performance in other types of contracts. *Barry v. United States*, 229 U.S. 47, 33 Sup. Ct. 681, 57 L. Ed. 1060 (1913); *Morse Dry Dock & Repair Co. v. Seaboard Transportation Co.*, 154 Fed. 90 (D.C.S.D.N.Y. 1907), reversed on other grounds, 161 Fed. 99 (C.C.A. 2d 1908); but see Geismer v. L.S.& M.S.Ry. Co., 102 N.Y. 563, 7 N.E. 828 (1886). The strike in the present case must have been not only expected but almost uppermost in the contemplation of the parties; it was an inevitable result of performance of the contract. Yet the defendant was excused from performance because of the existence of the very thing for which in effect it had contracted. The severity of the strike may have greatly increased the difficulty of performance but such could hardly have been considered an "unanticipated circumstance" that would excuse performance. 3 Williston, Contracts (1920), 3337, § 1963. But see 47 Harv. L. Rev. 702 (1934).

GEORGE HERBOLSHEIMER

Corporations—Pre-emptive Rights—Treasury Stock—[New York].—Plaintiff was a shareholder in the American Metal Co. which held 1,685 of its shares as "treasury stock." Defendants, directors in the company, without offering to the other shareholders an opportunity to subscribe for a *pro rata* share of the treasury stock, turned it all over to themselves at a price of $70 a share, thus obtaining control of the company. The company was thereafter sold to another corporation for a sum equivalent to about $661 for each share. Plaintiff then sued for damages resulting from defendants' refusal to allow him to subscribe for a *pro rata* share of the treasury stock. *Held*, the plaintiff had a "pre-emptive right" to at least an offer of the stock before the directors sold it to themselves. *Hammer v. Werner*, 239 App. Div. 38, 265 N.Y.S. 172 (1933).

It is well settled that a stockholder, in order to protect his proportionate interest in the management and assets (which might include a surplus) of the corporation, has the pre-emptive right to be offered a ratable amount of additional shares in the corporation when issued by the directors. *Kingston v. Home Life Ins. Co. of America*, 11 Del. Ch. 258, 101 Atl. 898 (1917); *Stokes v. Continental Trust Co.*, 186 N.Y. 285, 78 N.E. 1090 (1906); Berle and Means, The Modern Corporation (1st ed. 1932) 144; Morawetz, The Preemptive Right of Shareholders, 42 Harv. L. Rev. 186 (1928); Drinker, The Pre-emptive Right of Shareholders to Subscribe to New Shares, 43 Harv. L. Rev 586 (1930).

As an exception to this rule, it is generally stated that stockholders have no pre-emptive right to subscribe to a *pro rata* share of an issue of treasury stock, i.e., those shares which have been issued and repurchased by the corporation. *Borg v. Interna-*

tional Silver Co., 11 F. (2d) 147 (C.C.A. 2d 1925); *Crosby v. Stratton*, 17 Colo. App. 212, 68 Pac. 130 (1902); *Hartridge v. Rockwell*, R. M. Charlton 260 (Ga. 1828); *State v. Smith*, 48 Vt. 266 (1876); 52 A.L.R. 236; Berle and Means, The Modern Corporation (1st ed. 1932) 257; Cook on Corporations (7th ed. 1913), § 286; Fletcher, Cyc. Corp. (rev. ed. 1932), § 5160; Drinker, The Preemptive Right of Shareholders to Subscribe to New Shares, 43 Harv. L. Rev. 586, 603 (1930); Morawetz, The Preemptive Right of Shareholders, 42 Harv. L. Rev. 186, 197 (1928). The reason for this denial of the pre-emptive right to treasury stock is usually based on the ground that the shareholder's proportionate interest is determined by the original authorized issue, and is not, therefore, affected by reissue. 36 Yale L. Jour. 1181 (1927). Cf. Berle and Means, The Modern Corporation (1st ed. 1932), 257; Fletcher, Cyc. Corp. (rev. ed. 1932), § 5136, where it is suggested that all exceptions to the pre-emptive rule are arbitrary, necessitated by the courts' desire to break down a rule they have found too inflexible for modern corporate needs.

A modification of the exception is made by the Restatement on Law of Business Associations (Tentative Draft No. 1, 1928), allowing a pre-emptive right to attach in certain circumstances to the sale of treasury stock: "If . . . . the acquisition of the shares by the corporation is for the purpose of reducing the number of voting shares, then after the reduction takes place, the creation of new voting shares, like any other proposed increase in the number of voting shares, gives to existing voting shareholders pre-emptive rights as to the proposed new shares." § 17, comment (a).

But the cases cited by the Restatement and much of the language of the principal case indicate how vague may become the boundary line between the pre-emptive right and the director's fiduciary obligation. It is unfortunate from the Restatement's point of view that the cases cited by it involve a breach of director's fiduciary obligation, Commentaries on Business Associations (Tentative Draft No. 1, 1928), § 17; since irrespective of the presence or absence of any rule giving pre-emptive rights to shareholders, it is a breach of duty on the part of directors, for which the courts will give relief, to sell treasury shares or to issue authorized but unissued shares for the purpose of giving themselves or their friends an advantage at expense of the other stockholders. *Arkansas Valley Agricultural Society v. Eichholtz*, 45 Kans. 164, 25 Pac. 613 (1891); *Elliott v. Baker*, 194 Mass. 518, 80 N.E. 450; 52 A.L.R. 237 (1907); *Fosgate v. Boston Market Terminal Co.*, 275 Mass. 99, 175 N.E. 86 (1931); *Whitaker v. Kilby*, 55 Misc. 337, 106 N.Y.S. 511 (1907), affd. 106 N.Y.S. 1149; *Provident Trust Co. v. Geyer*, 248 Pa. 423, 94 Atl. 77 (1915); *Glenn v. Kittanning Brewing Co.*, 259 Pa. 510, 103 Atl. 340 (1918); *Luther v. Luther*, 118 Wis. 112, 94 N.W. 69 (1903); *Dunn v. Acme Auto and Garage Co.*, 168 Wis. 128, 169 N.W. 297 (1918); Fletcher, Cyc. Corp. (Rev. ed. 1932) § 5160, notes 87–90; Morawetz, The Preemptive Right of Shareholders, 42 Harv. L. Rev. 186 (1928); Drinker, The Preemptive Right of Shareholders to Subscribe to New Shares, 43 Harv. L. Rev. 586 (1930). See also *Borg v. International Silver Co.*, 11 F. (2d) 147 (C.C.A. 2d 1925); *Federal Reserve Life Ins. Co. v. Gregory*, 132 Kans. 129, 294 Pac. 859 (1931); *Petre v. Bruce*, 157 Tenn. 131, 7 S.W. (2d) 43 (1928). Cf. Frey, Shareholders' Pre-emptive Rights, 38 Yale L. Jour. 563 (1929); note, 36 Yale L. Jour. 1181 (1927). The decision of the instant case allows to the individual shareholders relief for such breach of fiduciary obligation by raising a pre-emptive right to subscribe. Cf. *Dunlay v. Avenue M Garage & R. Co.*, 253 N.Y. 274, 170 N.E. 917 (1930), where it is said that directors cannot issue to themselves authorized but unissued stock

for the purpose of obtaining control of the company without first offering it to all the shareholders.

In support of this decision it may be said that to the average shareholder the pre-emptive right is the only sure protection against dilution of his interest, even though the courts would probably protect him where such right does not exist if he could show breach of duty by directors. But it is often difficult to prove that directors were acting fraudulently, in violation of their fiduciary obligations, when they issued corporate stock to strangers, and it is too expensive a procedure for the small stockholder to bring a suit without certainty of recovery. Frey, Shareholders' Pre-emptive Rights, 38 Yale L. Jour. 563 (1929).

On the other hand, in favor of limiting the pre-emptive right wherever possible, there is the suggestion that under our modern complex corporate systems with many different classifications of stock the pre-emptive right raises too many insoluble problems and hinders the directors in efficient corporate financing. Berle and Means, The Modern Corporation (1st ed. 1932), 176–178; Fletcher, Cyc. Corp. (rev. ed. 1932), § 5136; Drinker, The Preemptive Right of Shareholders to Subscribe to New Shares, 43 Harv. L. Rev. 586 (1930).

But in any event, where the stockholder has been deprived of the pre-emptive right safeguard against dilution through exception, qualification, or waiver, the courts should, as in the principal case, require a high degree of duty on the part of directors, and should be on the alert to prevent fraudulent and inequitable dilution of the stockholder's interest.

NATHAN WOLFBERG

County Boards—Jurisdiction—Collateral Attack Based on Facts outside the Record—[Nebraska].—Compiled Statutes of Nebraska 1929, C. 2, Art. 11, prescribed that if a remonstrance petition be filed with the county board against the allowance of a budget for the county farm bureau, the county board shall place the proposition on the ballot at the next election. After an enumeration of the qualifications for, and number of the remonstrators necessary, the statute provided that "in considering the sufficiency of the remonstrance, the county board shall ignore the names of remonstrators who had previously signed a petition for the organization of the farm bureau." The Fillmore county board determined, upon hearing, that such a petition complied with the statute and ordered the county clerk to place the proposition on the ballot. Plaintiffs, taxpayers of the county, seeking to enjoin the clerk, alleged that many of the remonstrators were in fact disqualified, despite the finding of the county board. On demurrer the lower court granted the injunction. *Held*, that the decree be reversed and the bill dismissed; the county board acted quasi-judicially in determining the sufficiency of the petition and its judgment could not be attacked collaterally but only in a direct proceeding which was available to the plaintiffs. *Everts v. Young*, 251 N.W. 109 (Neb. 1933).

County boards, boards of county commissioners or supervisors, and like inferior tribunals, being creatures of statute, must affirmatively show on the record of their proceedings a compliance with the statutory prerequisites known as jurisdictional facts; otherwise their orders or decisions may be collaterally attacked. *Larimer v. Krau*, 57 Ind. App. 33, 105 N.E. 936 (1914); *Hinton v. Perry County*, 84 Miss. 536, 36 So. 565 (1904); *Adams v. First National Bank of Greenwood*, 103 Miss. 744, 60 So. 770