The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

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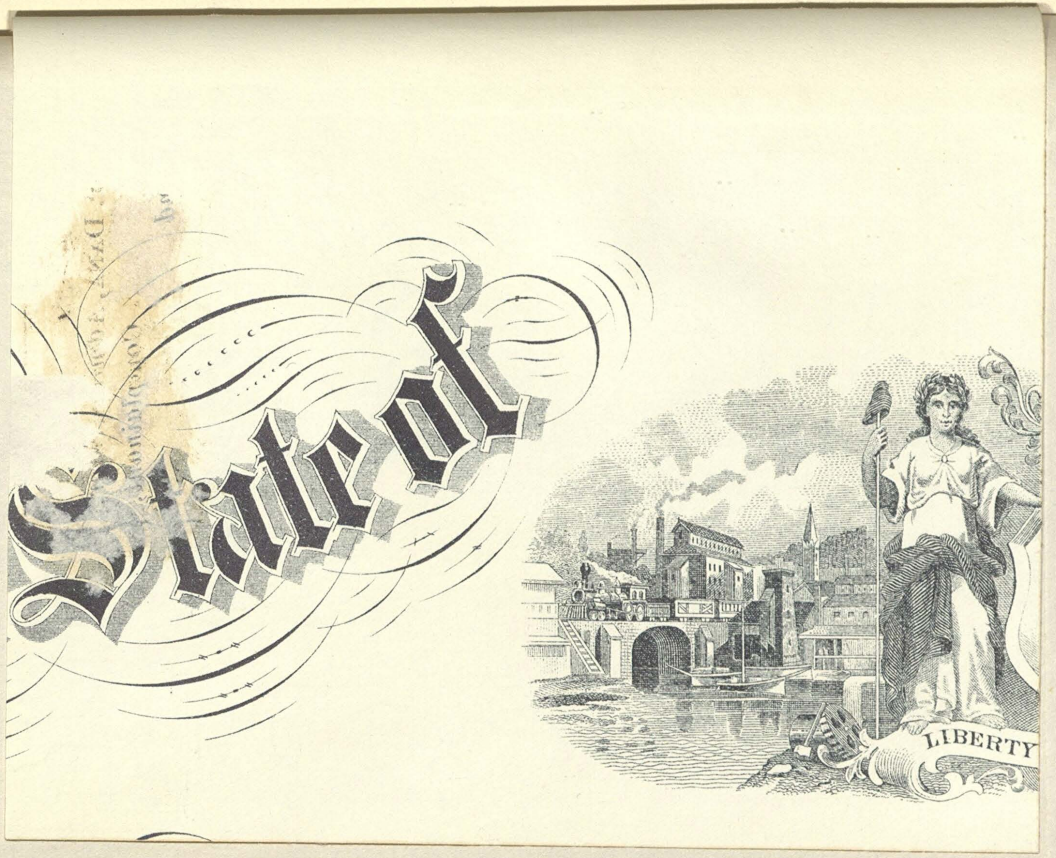
State of
LIBERTY

The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

Between

RICHARD T. DANA, *Administrato*
Com *a*
a.

THE AMERICAN TOBACCO COMPANY *and others*,
Defendants.

BRIEF FOR DEFENDANTS.

The complainant is a stockholder holding fifty shares of the preferred stock of the American Tobacco Company, which was incorporated in 1890, and claims that as such stockholder he has certain contract rights, and prays that these rights may be specifically enforced. This preferred stock was entitled to annual dividends at 8%, if earned, and to a preference in the final distribution of assets. (p. 40, lines 15 to 25.) The company is to terminate January 20th, 1940. (p. 41, line 20.) The contract right claimed is, therefore, to have at most $8.00 per year per share, if earned, and $100.00 per share in 1940. The complainant is not satisfied either to have that relief secured to him, or to have the value of his shares paid to him. He demands that as an incident to securing to him his contract rights the consolidation made in 1904 of the American Tobacco Company with the Continental Tobacco Company and the Consolidated Tobacco Company shall be set aside, and that the old American Tobacco Company shall be reinstated with its separate property and be carried on during its corporate term until 1940 as an independent concern.

At the time of consolidation, the capital of the three companies was as follows:

American Tobacco Co., (Preferred)	$14,000,000.00
" " " (Common)	54,500,000.00
Continental Tobacco Co., (Peferred)	48,844,600.00
" " " (Common)	48,846,100.00
Consolidated Tobacco Co., (Common)	40,000,000.00

The new American Tobacco Company was formed by the merger of these three into a new company with a capital of $180,000,000, of which $100,000,000 is common, and $80,000,000 is preferred, with 6% dividends cumulative. The merger was made pursuant to the General Corporation Act of 1896, sections 104 to 109, by agreement of the directors, ratified by a vote of two-thirds of the stockholders of each company.

By the terms of this agreement, the holders of the 8% preferred non-cumulative stock of the American Tobacco Company were to receive $133.33 1/3 in bonds payable October 1, 1944, with interest at 6%, payable half-yearly.

This bond issue was made a first charge upon the income and property of the consolidated corporation, and the total issue was made large enough to take up the preferred stock of the American Tobacco Company at $133 1/3 and of the Continental at $116 2/3. (Case, pp. 23 & 24.) It will be seen that this secures to the preferred stockholder interests on bonds exactly equal to his preferred dividend, with the added advantage that while the dividend is payable only in those years when earned, the interest must be paid at all events, and that upon the winding up of the company the principal of the bonds will be 1/3 more than the face value of the stock, which is all that the preferred stockholder can receive upon dissolution, as we will hereafter point out.

This arrangement was ratified by a vote of nearly all stockholders, and, under the terms over 99 per cent. of the stockholders gave up their preferred stock for cancellation, and received the bonds. On March 20th, 1905, when the bill herein was filed, there had been exchanged of the preferred stock of the American Tobacco Company, $13,644,500, and in November, 1906, when this case was tried, there had been exchanged $13,879,500, out of the total issue of $14,000,000, leaving $120,500 at that time not exchanged (pp. 153, 154.)

These bonds as well as the other securities of the consolidated company were placed on the stock and bond market in Nov., 1904, and were widely sold. The market price of the bonds has been always more than the price of the equivalent amount of preferred stock when outstanding, (pp. 144, 174, l. 23.)

The conversion of stock into obligations by a consolidation agreement is clearly authorized by the Corporation Act. (Sections 105, 109).

I.

THE AGREEMENT IS FAIR AND JUST TO THE PREFERRED STOCKHOLDERS.

It was argued by complainant before the vice-chancellor that upon the dissolution of the corporation, the preferred stockholder would share equally with the common stockholder in the surplus, if any, after satisfying the par value of all shares, and that this surplus might much exceed the increase of one-third of the par value of the stock which was added on the exchange into bonds. This argument is without force, for three reasons:

(*First*) On final distribution, the preferred stockholder is entitled to the par value of his shares only, and this is plainly indicated by the terms of section 86 of the present corporation act, which sets forth that after the payment of creditors and preferred stockholders, the surplus shall be divided among the general stockholders. This section was in force in 1890 when the American Tobacco Company was formed (G. S. 923, section 80).

(*Second*) The common stockholders had power to divide up all the surplus in dividends so that the preferred stockholders would have no right to require any surplus to be held for their benefit upon dissolution. Whether the surplus earnings, after payment of preferred dividends, are divided each year among the common stockholders or are accumulated as a surplus fund, cannot alter the equitable rights of the common stockholders to receive them, and as they held a decided majority of all the shares, they had the power at any time to order the surplus divided among themselves.

(*Third*) By the terms of the certificate of incorporation of the old American Tobacco Company, the preferred stock is entitled to preference in the final distribution of assets (p. 40, lines 15 to 25). There could be no preference, if the preferred stockholders shared *pro rata* with the common stockholders.

The provision implies that preferred stock represents a definite sum like a debt, and this sum must be the par value of the stock.

II.

THE CORPORATION ACT OF 1896 APPLIES TO THE AMERICAN TOBACCO COMPANY, AND BINDS ITS STOCKHOLDERS.

The complainant claims that inasmuch as the American Tobacco Company was formed in 1890, the merger sections which have been since enacted cannot operate to enable the other stockholders to bind him without his consent to the consolidation.

If this argument were well founded, it would by no means follow that the complainant could destroy the consolidation, as we shall hereafter point out. We think, however, that the act does bind the complainant so as to authorize such a transaction as has taken place here, where every possible financial right of the complainant has been guarded so that he will receive an equivalent in value for the utmost which he could obtain by the continuance of the company. If the consolidation had been on terms which sacrificed the possible advantages to complainant of a continuance of his status as stockholder, his contention would have more plausibility.

There can be no doubt that the merger sections 105 to 109 of the corporation act of 1896 do apply to all corporations whenever formed whether they apply to all stockholders so as to bind them against their consent or not.

The attorney general could not attack the consolidation and merger as unauthorized in face of the terms of the statute which expressly extends to all corporations. As a part of this consolidation, the statute authorized the exchange of old shares for new ones, or their conversion into bonds or obligations of the new company. Of course, the contract must be fair,

and the court may protect the minority against imposition or oppression by the majority stockholders; but where, as here, the transaction is fair and equal among stockholders, that ground of chancery intervention need not be considered.

The complainant contends that he has vested rights as a stockholder which cannot be defeated by any change in the statutes, and that among these rights is included the right to have the old company continued until the end of its term, and to retain his relative share in its capital stock, and the earnings and management.

It is no doubt true that the mere reserved right of the legislature to alter and repeal the charter does not carry with it the unrestricted right to deprive a stockholder of his property without compensation; but, we contend, that in view of the state of the law in 1890, when the original American Tobacco Company was formed, such a change in the status of the complainant as has taken place under this merger act was within the reserved power under the general corporation act of 1875.

Section 6 of that act merely provided that the charter of every corporation should be subject to alteration, suspension and repeal (G. S. 911, section 6).

Section 35 of the same act is broader. It enacts that the provisions of the act may be amended or repealed at the pleasure of the legislature, and that every corporation created under the act shall be bound by the amendment (G. S. page 914, section 35).

Both of these sections are incorporated in the revision of 1896, sections 4 and 5.

The rights of stockholders are determined by the provisions of the act, and the power to amend at

pleasure necessarily involves to some extent the rights of stockholders.

In *McKee* vs. *Chautauqua Assembly,* 130 F. R. 536, 539, the court said the rights reserved in an incorporation act to amend, extended to all alterations not substantially impairing the object of the grant or the rights vested under it.

In *Berger* vs. *U. S. Steel Corp.,* 18 Dick. 809, 825, this court said that it was difficult to perceive how any force could be given to sections 4 and 5, unless some amendments might be made which would affect the rights of stockholders *inter sese* to some extent.

We submit that an alteration changing the form of the security representing the stockholder's interest is permissible, if it does not take away pecuniary value from the shares. The proof in this case shows that the consolidation gave to the preferred stockholders a security of increased value.

Furthermore, it must be observed that, in substance, the consolidation is the winding up of the old American Tobacco Company and the formation of a new company. The complainant is not required to accept the bonds of the new company, although it is his privilege to do so, and would be for his advantage, in view of the liberal terms of the consolidation. He may, if he chooses, demand the value of his shares, on the theory of a winding up of his company, and the privilege to accept such value was given him by the terms of the consolidation agreement, and is also tendered him by the defendant in the answer, and the offer is still open.

If, therefore, the corporation formed in 1890, had the power to dissolve by the vote of a majority of the stockholders, the complainant cannot complain of such dissolution; and, if he is bound by the dissolution,

he cannot complain because his fellow-stockholders see fit to invest their assets in a new corporation, so long as he has the option either to make such new investment or to accept the fair value of his shares on dissolution.

The power to dissolve, at the time the American Tobacco Company was organized in 1890, was given to two-thirds of the stockholders, and will be found in section 34 of the corporation act of 1875, as amended in 1877 (G. S. page 932, section 122).

By this act, on a vote of dissolution, the directors shall adjust the affairs of the company in the same manner as though the same had been dissolved by the expiration of the time mentioned in the certificate of incorporation.

It appears, therefore, that two-thirds of the stockholders of the American Tobacco Company had power to dissolve that company, both under the act in force when it was incorporated, and under the revision of 1896, and that such dissolution was accomplished by such vote as a part of the scheme of consolidation. The vested right of the complainant which must be protected is the right to receive out of the assets on that distribution the full equivalent of his interest in those assets. If he were a common stockholder, the ascertainment of the value of that interest might be difficult. As he is a preferred stockholder, the problem is one of no difficulty whatever, but is a mere matter of calculation, as much so as if he were a creditor of the company, provided we solve in his favor the doubt that must exist, whether the company would be able to pay the preferred dividend in each year of its existence.

The offer made to him by the answer, as well as the rights reserved to him in the contract itself, solves this doubt in his favor.

It follows that the complainant had no contract right to require the continuance of the company; his statutory contract with his fellow-stockholders is that it may be dissolved by the vote of two-thirds. He cannot complain of any statutory change in the procedure, so long as a two-thirds vote for the dissolution is fairly taken.

He may either require the payment to him of the value of his shares, as upon dissolution, or may accept the securities tendered him in lieu of such compensation. If he declines to enter into the new company, he cannot interfere with its formation by his fellow-stockholders.

It should be noted also that by act of 1902, page 700, the dissenting stockholder has the right to an appraisement to be made in the manner prescribed by the statute.

The argument that we have presented to show the restriction upon the rights of a stockholder arising out of the privilege of dissolution given to other stockholders, was made by Chancellor Zabriskie in his opinion in *Black* vs. *Del. & Rar. Canal Co.*, 7 C. E. Gr. 130, 415. Although there was a reversal on the ground that in that case the combination complained of was without statutory authority, yet, there is nothing in that reversal to impair the reasoning of the chancellor as to the rights of the stockholder which was based on the theory that there, such statutory authority existed, as clearly it does exist here.

The Chancellor said:

> "Two-thirds of these corporators have deter-
> "mined that they do not desire to go on with
> "these enterprises, under the charters, and that
> "they wish to abandon them, and are willing to
> "accept as their share of the corporate
> "property a yearly rent or annuity secured by a

"provision like that contained in this proposed "lease. Some stockholders are not willing; and "although the majority can effect the abandon- "ment, they can not compel the dissentients to "accept like compensation for their stock; it "might be compelling them to embark their capi- "tal in a new enterprise. Provision is therefore "made to pay or return to them the full value of "their share of the whole property of the cor- "poration. This is all they would have if the "works were sold out. The provision is a most "equitable one, and without it the transaction, "even if valid and legal, would not be equitable "and just."

In this case, the old corporation has been dissolved, and as a part of the same transaction, under statutory authority, a new corporation has been set up. The complainant is bound by the dissolution and may assert his rights as a stockholder in a dissolved corporation; but he has no status whatever to complain of his fellow-stockholders because they have organized a new corporation, nor has he any standing whatever to attack that organization. He is not a stockholder of the new company; he is at most a creditor of it for the amount to which he was entitled on dissolution of the old company. The new company is ready to pay to him the full amount due him, but, so far, he has declined to accept it.

III.

THE COURT OF CHANCERY HAS NO JURISDICTION TO ANNUL THE CONSOLIDATION.

We have pointed out that the transaction complained of makes full provision for the protection of all the contract rights of the complainant, and that the specific performance of his contract as a stockholder does not involve any attack upon the new corporation which has been formed by his fellow-stockholders.

We now further contend that the Court of Chancery has no jurisdiction to destroy this new corporation.

The proceedings for the consolidation are the formation of a new company This company is formed pursuant to express statutory authority. Where a corporation is formed under color of either a general law or special charter, it is a complete defense to any attack upon its organization to show that it is a corporation *de facto*. Only the State, on *quo warranto*, can inquire whether it exists *de jure*.

In Elizabethtown Gaslight Co. v. *Greene*, 1 Dick. 118, 123, Van Fleet, *V. C.*, says:

> "A court of equity has no authority in virtue of "its general jurisdiction, to dissolve a corpora- "tion because it was not organized in strict ac- "cordance with the requirements of the statute "by which it was created, but in violation of them. "The power to so adjudge belongs exclusively "to another tribunal, and the Court of Chancery "can in no case, unless especially authorized by "statute, try the validity of a corporate organiza- "tion existing under the forms of law." *Affirmed* 4 Dick. 439, on this opinion.

In *Stout* v. *Zulick*, 19 Vr. 599, 601, Court of Errors and Appeals, the Chancellor said:

> "Where it is shown that there is a charter or "law under which a corporation with the powers "assumed might lawfully be incorporated, and "there is a questionable compliance with the "charter, or law, and a user of the rights claimed "under the charter, or law, the existence of a "corporation *de facto* is established; and it is "entirely settled that the corporate existence of "such corporation *de facto* cannot be inquired in- "to collaterally. It is as to all who contract with "it to be assumed to be a corporation *de jure*. "The legality of its corporate existence may be "inquired into by the state, but not by any one "else, and this is as true where the corporation is

> "formed under a general law as it is where the "corporate existence is formed under special "charter."

These principles apply in the fullest manner to the case where a new corporation is formed by consolidation. So long as the new corporation has not entered upon its business, and become a *de facto* corporation, any stockholder of the original corporation may enjoin the consolidation for lack of the performance of conditions precedent, but as soon as the new corporation has become a *de facto* corporation under color of the statute, its authority cannot be assailed by any one except the state

In *Terhune* vs. *Midland R. R. Co.*, 11 Stew. 423, 425, certain stockholders of the Midland R. R. Co., of New Jersey complained of the consolidation of that company with other companies to form the New York, Susquehanna & Western R. R. Co. They alleged that the consolidation was made fraudulently, and that the proceedings were defective. The Chancellor said that whether the consolidation was legally effected or not could not be decided. The company is a *de facto* corporation existing under the forms of law.

In *Toledo etc., R. R. Co.* vs. *Continental Trust Co.*, 95 F. R., 497, 508, Lurton, *J.*, said: (Circuit Court of Appeals, 1899).

> "The test is this: Was there a law under which "there might have been a *de jure* corporation of "the kind and class to which that in question ap- "parently belongs. It is the apparent legality of "the organization which gives it a *de facto* char- "acter. If there was no law under which an Illinois "consolidated corporation could exist, there could "be no *de facto* corporation. The possibility of "a *de jure* corporation is the only condition re- "quisite to a *de facto* corporation. It is not a "sound test that the particular constituents could "not have become a *de jure* consolidated corpora-

"tion. That would open every such organization "to parol attack and destroy its *de facto* charac- "ter, not by showing the impossibility of a *de jure* "corporation of the kind in question, but by evi- "dence affecting the internal history of the parts "composing the whole."

In *Swartout* v. *Michigan Air Line Co.*, 24 Mich., 389, 394, it appeared that Swartout had subscribed for stock of one railroad company which was afterwards consolidated with another, and suit was brought by the new company on the subscription. Swartout defended on the ground that the consolidation was invalid by law. But Cooley, *J.*, said, that as the company had acted and become *de facto* the state alone could dispute the validity. See further, *McCarter, Receiver,* vs. *Ketcham*, 43 Vr., 247, 253. *Bell* vs. *Penn. S. & N. R. Co.*, 10 Atl., 741; 10 N. J. L. J., 336. 2 *Clark & Marshall*, 1058.

In the present case it is evident that the consolidation was authorized by statute, and would have constituted a *de jure* corporation at least if there had been a consent or waiver by every stockholder. Sections 105 and 109. There was, therefore, statutory authority to create such a corporation, and it is a *de facto* corporation because created under color of statutory authority, and because in the actual exercise of the corporate business.

The validity of its organization, can, therefore, be attacked by the state alone.

1 *Thompson on Corporations,* sections 503 to 507.

A stockholder who delays until various transactions have been consummated, cannot have the aid of equity, even where the jurisdiction of equity to aid him exists.

4 *Thompson*, 534.

It is to be noted that no advantage was gained by complainant by his letters written in January and February to officers of the defendant. Such notices are not the equivalent of the commencement of a suit.

IV.

THE COMPLAINANT IS BARRED BY DELAY AND ACQUIESCENCE.

Although notice of the stockholders' meeting and a copy of the merger agreement were duly forwarded to the address of complainant's intestate, it appears that, for some reason or other, neither reached the complainant. Just when the complainant actually received notice of the proposed merger is left uncertain by the proofs, but from his own testimony it appears that while he obtained no definite information in regard to it until the tenth day of November, 1904, he read of it in the New York newspapers and consulted one or two of his friends about it as early as the middle of October and in this way learned of the stockholders' meeting of October ~~20th~~ 17th (Consolidated), before it was held (case p. 72, ll. 23-31; p. 75, ll. 16-20; p. 76, ll. 27-34; p. 97, ll. 17-40; p. 98; p. 99, ll. 1-30). He was also aware that the dividend due the first of October had not been paid (case p. 76, l. 2-13; p. 100, ll. 30-40; p. 101, ll. 1-10).

The complainant did nothing, however, to inform himself further or protect his rights until November 10th. On this date, he called upon the Morton Trust Company and was told that the merger had been completed. He immediately consulted his New York attorney (case p. 100) and within two or three days thereafter returned to the Morton Trust Company with his attorney and obtained a copy of the merger agreement and the circulars that had previously been

sent with it to the stockholders (case p. 102). Toward the end of November, he called upon Mr. Parker, one of the attorneys of The American Tobacco Company, and discussed with him the features of the merger plan and particularly the taxability of the bonds issued in exchange for the old preferred stock. Again in December, he had another interview with Mr. Parker on the same subject. Not until January 27, 1905, (case p. 126, ll. 8-9) did he make any objection to the merger. Although he discussed the plan of merger from time to time with his New York attorney, he did not employ New Jersey counsel until the 10th or 15th of March, 1905, (case p. 126, ll. 27-40; p. 127). His bill was finally filed on March 20, 1905, six months and ten days after notice had been sent to the stockholders of the meeting to vote upon the merger plan, five months after he himself heard of the proposed merger and over four months after he called at the office of the Morton Trust Company with his attorney and received a copy of the merger agreement.

Meantime, and while the complainant was thus dallying, the merger agreement was adopted and filed; the temporary certificates of the new company were issued and later exchanged for the stocks and bonds of the new company, and these latter were listed and sold in enormous quantities on the New York Stock Exchange (case p. 146, ll. 3-26). By the time the bill was filed, as stated at the commencement of this brief, there had been deposited with the new company, under the terms of the merger agreement, for exchange for the new securities, over thirteen and one-half million of the preferred stock of the old American Tobacco Company out of a total of fourteen million; over thirty-nine and one-half million of the capital stock of the Consolidated Tobacco Company,

and over one hundred and fifty-one and a half million of its 4% bonds; of the preferred stock of the Continental Tobacco Company, there had been deposited over thirty million eight hundred thousand. The new company had issued in exchange for these securities seventy-eight million and upwards of its preferred stock; thirty-eight million and upwards of its common stock; seventy-two million and upwards of its 4% bonds, and fifty-two million and upwards of its 6% bonds (case pp. 152, 153 and 154). The temporary certificates were issued in November, 1904 (case p. 156, ll. 20-23), and the new securities by January 9, 1905, (case p. 156, ll. 1-15). In January, 1905, the new securities were listed on the New York Stock Exchange (case p. 141, ll. 25-32). And those things were done at the times, in the manner and pursuant to the plan fully disclosed in the papers given to the complainant by the Morton Trust Company not later than November 13th and under his very eyes.

It would be difficult to conceive of a situation which more imperatively called for the application of the maxim that equity aids the vigilant and not those who slumber on their rights. After delaying during the important months when the rights of third parties were attaching to the knowledge of the complainant and when millions of dollars were being pledged to the new enterprise, the complainant, as the holder of fifty shares of the stock of one of the consolidating companies, came into the Court of Chancery asking for relief which would result in upsetting the entire merger scheme, when the prompt filing of his bill would have entirely avoided the confusion and damage which must result from the granting of the relief prayed for. His delay of over four months, with full and accurate knowledge of the situation is, we

submit, fatal to the present application. It is a familiar principle that in cases of this kind, relief will be granted only upon showing that the complainant has employed the utmost vigilance in the pursuit of his remedy.

In the case of *Rabe* vs. *Dunlap,* 6 Dick., 40, under a merger similar to the one under consideration, which had been passed subsequent to the issuance of stock to the complainants' a consolidation of three corporations had been effected. The complainants had notice of the meeting at which the merger was effected, but did not attend it. The merger agreement provided that the complainants might exchange their stock for stock in the new corporation, share for share, but the complainants never did exchange their stock, although they had notice of their right to do so, and did nothing for a period of time, during which the merger was completely effected and business transacted by the new company. A suit having been instituted by one Dunlap to foreclose certain mortgages given by the new company to secure loans made to it by him, the complainants applied for an injunction to protect their shares in one of the consolidating companies. Vice Chancellor Van Fleet, in denying the relief prayed for, said:

> "It is at this point in the history of the new corporation that the complainants for the first time, ask for judical protection of their rights, and the relief they now seek is of the most destructive kind to every right and interest standing opposed to their interests. They ask to have the new corporation ripped up from bottom to top, and that everything which it has done, affecting their rights, may be undone. Stated in detail, what they ask is this—that the new corporation may be declared to have been void from the beginning; that the deed by which the property of the corporation in which they are inter-

ested was conveyed to the new corporation, may be declared to be a nullity, and that the property conveyed by it may be restored to the grantor or to a trustee to be appointed for that purpose; that the new corporation may be required to account for all property of their corporation which it has disposed of; that the mortgages of the defendant may be decreed to be no lien on the land which their corporation conveyed to the new corporation, and that he may, in addition, be commanded and required to execute a release, releasing such land from the operation of his mortgages; and that in the meantime, and as preliminary to the principal relief sought, the further prosecution of his foreclosure suit in this court may be stayed or restrained.

"That the conveyance by the complainants' corporation of all of its property to the new corporation, for the purpose of appropriating it to new and different purposes from those for which the grantor corporation held it, was without power or right and a plain misappropriation of the property, as against non-assenting stockholders, is a proposition that was not disputed on the argument. It cannot be; it is incontestable. * * * * There can be no doubt, therefore, that had the complainants applied for an injunction promptly, and while it was in the power of the court to extend protection to them, without doing wrong or injustice to others, it would have been granted. A corporation holds its property as the trustee of its stockholders, and they, like any other *cestui que trust*, have a right to have the trust property judiciously and honestly managed and preserved from waste and misappropriation.

"But stockholders, to be entitled to the summary interference of the court in cases where they seek protection against acts which are merely in excess of the power of the corporation, and are not prohibited by law, must be diligent; they must apply so recently after the doing of the

act of which they complain that the court may stop or undo the wrong to them without doing equal or greater wrong to some other person. The principle which must control the action of a court of equity in cases where the defense is laches, was laid down by Lord Camden, many years ago, in these words: Nothing can call forth the activity of a court of equity but conscience, good faith and reasonable diligence. Where these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction there was always a limitation to suits in equity.' *Smith* vs. *Clay,* reported in a note to *Deloraine* vs. *Brown,* 3 Bro. C. C., 639 (Amb., 645). This principle, as it is applied to stockholders who are tardy in seeking protection against acts *ultra vires* of the corporation, was expressed by Sir John Romilly, master of the rolls, in *Gregory* vs. *Patchett,* 33 Beav., 595, 602, in this form: 'Shareholders cannot lie by, sanctioning, or by their silence at least acquiescing in an arrangement which is *ultra vires* of the company to which they belong, watching the result; if it be favorable and profitable to themselves to abide by it and insist on its validity; but if it prove unfavorable and disastrous to them to institute proceedings to set it aside.' And Lord Justice Turner's statement of the rule is equally pertinent to the case in hand. In *Great Western Ry. Co.* vs. *Oxford, Worcester and Wolverhampton Ry. Co.,* 3 De G. M. & G., 341, 359, he said: 'Where the summary interference of this court is invoked, in cases of this nature, it must be invoked promptly. Parties who have lain by and permitted a large expenditure to be made, in contravention of the rights for which they contend, cannot call upon the court for its summary interference. The jurisdiction to interfere is purely equitable, and it must be governed by equitable principles. One of the first of those principles is that parties coming into

equity must do equity; and this principle more than reaches to cases of this description. If parties cannot come into equity without submitting to do equity, a *fortiori* they cannot come for the summary interference of the court when their conduct, before coming, has been such as to prevent equity being done.' The cases in which this principle, as it is applied to stockholders, has been discussed are numerous. The doctrine they establish is, that where an act is done openly, and especially on notice, and without evil intent, though clearly in excess of the power of the corporation, a non-assenting stockholder will not be allowed to pause to speculate upon the chances—to wait until he can see whether such act is likely to result in profit or loss—but to be entitled to the summary interference of the court he must ask for it promptly, and before the act of which he complains has become the foundation of rights or equities which must be destroyed or greatly impaired if the act be nullified or undone. Or, stated with greater brevity, and in its simple essence, the rule is this: If he wants protection against the consequence of an *ultra vires* act he must ask for it with sufficient promptness to enable the court to do justice to him without doing injustice to others."

V.

INDEPENDENT OF THE QUESTION OF LACHES A COURT OF EQUITY, IN THE EXERCISE OF ITS DISCRETION, WILL ORDINARILY REFUSE SPECIFIC PERFORMANCE OF A CONTRACT WHERE ITS ENFORCEMENT WOULD INFLICT INJURY UPON INNOCENT THIRD PERSONS.

In *Pomeroy on Contracts,* at section 181, it is said:

> "A second series of contracts which will not be enforced on account of this inherent inequity, are those whose provisions, when carried into operation, would defeat or materially injure the rights of third persons who have vested interests in the property as successive owners, remaindermen, reversioners, and the like."

In *Fry on Specific Performance,* at section 404, it is said:

> "One kind of that unfairness which stays the interference of the court arises where the enforcement of the contract would be injurious to third persons. Therefore, where an estate was settled in strict settlement, giving to the settler a life estate and an ultimate remainder, and the tenant for life entered into a contract for the sale of the fee, the court refused to allow the purchaser to take the interest of the tenant for life with compensation, on the ground that a father and a stranger would be likely to use an estate without impeachment of waste in a different way, and therefore the sale might prejudice the interests of the persons in remainder."

In *American & English Encyclopedia of Law,* (2d Ed.) Vol. 26, page 68, it is said:

> "Nor will a court of equity enforce a contract according to its terms * * * * * where a decree would be inequitable as to innocent third persons, whose interests have intervened since the making of the contract."

In *Story's Equity Jurisprudence,* (12th Ed.) at section 778 c. it is said:

> "Nor will courts of equity specifically enforce any contract between the immediate parties, which would operate incidentally as a fraud upon others."

In a note to section 1405 of Pomeroy's Equity Jurisprudence, (3rd Ed.) speaking of the circumstances under which a court of equity will refuse to decree the specific performance of a contract, it is said:

> "The remedy will therefore be refused when the performance of a contract would * * * * * work injury to third persons."

Johnson vs. *Hubbell,* 2 Stock., 332, is regarded as the leading case on this subject. It arose upon a bill to compel the specific performance of an agreement made by a father with his son to make a will leaving his property to him and his sister in equal shares, providing the son would agree that his mother's property, of which he had received a larger share than his sister, should be equally divided between him and his sister. To carry out this agreement on the part of the son, deeds were drawn under the direction of the father and mutual releases between the son and daughter were executed, conveying from the son to his sister a sufficient portion of his mother's estate to make their holdings thereof equal. The father subsequently died, leaving a will by which he entirely cut off his son from all participation in his estate, except as to a small part thereof, of which he died intestate. By this will, the greater part of the father's property was devised to his said daughter for life, and at her death to her children, or in case of their death to other devisees named in the will, and the residue of the real estate mentioned in the will was devised to nephews. The son filed the bill to secure specific performance of the agreement made be-

tween him and his father, and prayed that the defendants might be decreed to convey to him the equal one-half part of the father's estate, or if it be deemed more equitable, that the sister be decreed to reconvey to him the lands which she received from him to equalize the portion of the mother's estate received by each of them. To this bill a demurrer was interposed. Chancellor Williamson sustained the demurrer upon the ground that it would be inequitable under the circumstances of the case to enforce the agreement, saying in his opinion as follows:

> "This agreement, then, made between the complainant and his father was a legal agreement. And this court should decree its execution, if, in the exercise of its legal discretion, it can do it without violating any principle of equity or doing injustice to any third party who may be innocently involved in the transaction. * * *
>
> "There are difficulties in the way of enforcing the performance of this agreement specifically, which appear to me to be insurmountable. The complainant has a right to the protection of this court, and to its aid in establishing and enforcing his rights. But if that protection and aid cannot be afforded him without invading and disregarding the rights of others, this court may not, in its anxiety and desire to relieve one party, inflict a wrong and injury upon another entirely innocent in the transaction. * * *
>
> "How can I carve out of this estate, devised as it is, the portion which the complainant claims without doing an injury and injustice to Mrs. Hubbell (the sister)? Mrs. Hubbell is not in any way responsible for the will of her father. It is not alleged that she controlled him, or endeavored to control him, in making his will. She is an innocent party, and entitled as much to the protection of the court as the complainant. Suppose I was to take out of this estate one-half of it for the complainant, I could not alter the character

of the estate which the devisees have under the will to the other half. Mrs. Hubbell then would necessarily have a life estate only in a little more than one-half of what is given her by the will; and yet, retaining all the will gives her, it is not equal to the absolute property in one-half of the estate which, if the agreement had been performed, she would have been entitled to. * * *

"Now although the agreement upon which the bill is filed is a legal one, it does not follow that a Court of Chancery will decree its specific performance. It is not a matter of *right,* in either party, that the court should make such a decree; but it is a matter of discretion in the court, which withholds or grants relief, according to the circumstances of each particular case, when the general rules and principles which govern the court will not furnish any exact measure of justice between the parties. * * *

"In this case the situation of the property to which the contract is attached is such, and the rights of third parties are so involved in the subject matter of the controversy, as to render it extremely embarrassing and difficult to carry into effect a decree for specific performance. I arrive at this conclusion with less reluctance than I otherwise should from the consideration that the complainant is not entirely remedy less in the premises."

In *Cella* vs. *Brown,* 144 Federal, 742, (Circuit Court of Appeals, 8th Circuit, 1906) it was held as follows:

"The remedy by specific performance, lying within the domain of judicial discretion not arbitrarily exercised, may be refused whenever there is any uncertainty or doubt about the terms of the proposed contract, or a well-founded conviction that its specific enforcement, under the facts and circumstances of the case, would be harsh and unreasonable, or more hurtful to the

rights of others in interest than its denial to the suitor."

This was a suit in equity by a stockholder to compel the re-organization of two street railway companies, in one of which the complainant was largely interested in a manner substantially different from that provided in the re-organization agreement. It appeared by the proofs that a failure to carry out the plan as originally drawn would necessarily result in inequality between the complainant and the other shareholders. In affirming a decree dismissing the bill of complaint the court said:

"While it is to be conceded that, no matter how others may be affected by a decree, it should not the less entitle the suitor to the relief the law of the land affords him as an individual; yet, where the particular relief sought involves injustice and disaster to others having a direct interest in the subject-matter on which the decree is to operate, common right demands that such suitor should come not only with clean hands, but his right should leave no reasonable doubt in the judicial mind of its absolute justice. For the remedy by specific performance is not an unqualified right. It lies within the domain of judicial discretion, not arbitrarily exercised. Within this limitaton the court may refuse its assistance whenever there is any uncertainty or doubt about the specific terms of the proposed contract, or any well-founded conviction that its specific enforcement, under all the facts and circumstances of the case, would be harsh and unreasonable, or more hurtful to the rights of others in interest than its denial to the suitor. * * * * The obstruction, if not the disruption, of the plan of reorganization, or an allotment in kind of an aliquot portion of the securities intended to be managed as a unit by the syndicate for promoting the interests of all the subscribing stockholders might thwart the entire scheme, and certainly would operate as

> an inequality between the claimants and the other shareholders. The evidence shows that out of 210 shareholders the complainants are the only active dissenters, and only four other shareholders, of small holdings, failed to execute the agreement."

Curran vs. *Holyoke Water Power Company,* 116 Mass., 90 (1874). This case arose upon a bill in equity to enforce specific performance of a contract for the sale of a parcel of land. The proofs showed that at the time the defendant had agreed to make the conveyance of which performance was sought to be compelled, it contemplated changing the line of the street on which the property abutted; that it had inadvertently omitted to provide for such change in the contract, but after it was executed had made several other conveyances, the value of which would be seriously affected if the complainant was permitted to enforce his contract as drawn. In refusing to decree specific performance of the contract, Wells, *J.*, said:

> "The defendant, when refusing to deliver a deed in conformity with the claim of the plaintiff, and also by the answer to the suit, and at the hearing before the master, has offered to make reasonable compensation to the plaintiff, not only by moving back his building, but also by paying him for the land claimed by him which is cut off by the line of the street. This the plaintiff refuses to accept, but does not show that he may not thus be fully indemnified. His right to a specific performance of the agreement is not absolute, but rests in the discretion of the court, to be exercised upon equitable considerations in view of all the circumstances of the case. * * * The rights of other parties, who have in good faith purchased lots upon East street, and, as the defendant alleges, have erected buildings thereon, have intervened; and although those rights are subsequent in time, and therefore subordinate to those of the plaintiff, yet they furnish

equitable considerations to be regarded in adjudicating the rights between the parties to this suit. If the plaintiff can have full and complete indemnity upon his contract otherwise, equity does not require that he should have specific performance by which he will inflict great and unnecessary injury upon other persons who are in no way responsible for the position in which he is placed."

Owens vs. *McNally*, 45 Pacific, 710 (Sup. Ct. of Cal., 1896). This action was brought against the administratrix of an estate to compel a conveyance to the plaintiff of all of the decedent's property upon the ground that he had agreed that he would by his will bequeath it to the plaintiff if she would live with him and take care of him until his death, which it was claimed she had done. Subsequent to the making of the alleged agreement the decedent married and at the time of his death his wife was still living. In affirming a decree denying the plaintiff specific performance of the alleged agreement, the court, after quoting from and approving *Johnson* vs. *Hubbell*, *supra*, said:

"The defendant widow married McNally in ignorance of the contract and it appears continued in ignorance of the contract until after his death. She acquired distinct rights of heirship and succession. There might have been children born of the marriage with similar rights. It is true that these rights vested after the contract was made, but, where a bill is brought for the specific performance of a contract the after acquired rights of third parties are equitable considerations to be regarded in adjudicating the questions. A specific performance of this contract cannot therefore be decreed without sweeping aside as of no moment or avail the rights of the wife and widow, vested under a contract most strongly favored by the law. Specific perform-

> ance as we have said, is not to be decreed under strict rule and formula. Every consideration which may properly be urged upon the court is to be weighed and passed upon, and it will be decreed only when no other adequate relief is available to plaintiff, and even then it will be denied if it operates by way of a hardship upon the innocent."

A similar case to the one just cited, and in which the same judgment was rendered, is *Wallace* vs. *Rappleye,* 103 Ill., 229. In that case Mr. Justice Sheldon said:

> "A contract, to be specifically executed, must be fair, just and reasonable. One kind of unfairness which stays the interference of the court arises where the enforcement of the contract would be injurious to third persons."

Gall vs. *Gall,* 19 New York Sup., 332 (Sup. Ct. Gen. Term, 1892), was another case of the same kind, in which a decree denying specific performance of an agreement to make a will in favor of the plaintiff was affirmed. Barrett, *J.,* in his opinion, said:

> "There is another rule which should be strictly adhered to in this class of cases, and that is that the remedy is a matter of judical discretion and that the relief should be withheld where a decree for specific performance would work injustice to innocent third persons or where it would be contrary to public policy."

Thomas vs. *Dering,* 1 Keen, 729. This was a suit in equity to compel specific performance of an agreement to convey land in which the vendor had only a life estate coupled with an ultimate reversion in fee in default of male issue. In refusing to grant the desired decree Lord Langdale, master of the rolls, said:

> "I apprehend that, upon the general principle that the court will not execute a contract, the performance of which is unreasonable, or would

be prejudical to persons interested in the property, but not parties to the contract, the court, before directing the partial execution of the contract by ordering the limited interest of the vendor to be conveyed, ought to consider how that proceeding may affect the interests of those who are entitled to the estate, subject to the limited interest of the vendor. Here the vendor has a life estate without impeachment of waste, with remainder to his sons in tail male, and having regard to the settlement and the protection intended to be afforded to the objects of it—conceiving that the consequence of a partial execution of this contract might be prejudical to those objects—seeing the difficulty of ascertaining upon satisfactory grounds, the just amount of abatement from the purchase money, and considering, also, that nothing has been done upon the contract, so that the purchaser, though suffering the disappointment of not making himself owner of an estate he desires to possess, has sustained no damage for which compensation may not be given by a jury, it appears to me that, in this case, I ought not to decree a conveyance of the vendor's life estate and ultimate reversion to the purchaser."

As to the impossibility of restoring the situation existing before the merger and the effect upon innocent third persons, see the testimony of Mr. Duke on pages 156 to 176 of the case.

We respectfully submit that the decree appealed from should be affirmed with costs.

CHARLES CORBIN,
RICHARD V. LINDABURY,

November term, 1907.

Appeal Printing Co., 32-34 Vesey St., N. Y.

New Jersey Court of Errors and Appeals.

Between

Richard T. Dana,
Complainant and Appellant,

and

The American Tobacco Company, *et als.*,
Respondents and Defendants.

SUPPLEMENT TO STATE OF THE CASE.

Exhibit C21.

MERGER OF THE AMERICAN TOBACCO COMPANY, CONSOLIDATED TOBACCO COMPANY AND CONTINENTAL TOBACCO COMPANY.

The success of Consolidated Tobacco Company, and of The American Tobacco Company and Continental Tobacco Company since the formation of Consolidated Tobacco Company and the consequent addition, first, of $30,000,000 and then of $10,000,000 additional, of cash to the working capital of these companies, has been very great. It is believed that a merger of the three companies into one company

would work to the increased security and simplification of the whole investment and business, as well as economy of management. A plan has been devised for this purpose which recognizes existing priorities on the earnings and assets of the respective companies, and which it is thought is also otherwise fair and just in its treatment of resepctive holders of the stocks and bonds of the three companies.

The stocks and bonds of the three companies now outstanding, are as follows:

(*a.*) American 8% non-cumulative preferred stock.....	$14,000,000 00
(*b.*) Coninental 7% non-cumulative preferred stock.....	48,844,600 00
(Of which $16,767,100 at par is held in treasuries of American and Consolidated.)	
(*c.*) Consolidated 4% 50 year gold bonds	157,378,200 00
(*d.*) Consolidated common stock..	40,000,000 00
(*e.*) American common stock.....	54,500,000 00
(Of which Consolidated holds $54,274,550, leaving held by others $225,450.)	
(*f.*) Continental common stock...	48,846,100 00
(Of which Consolidated holds $48,829,100, leaving held by others $17,000.)	

The preferred stocks of The American Tobacco Company and Continental Tobacco Company have as against all other present securities, a first claim on the earnings of the respective companies, as well as a first lien, upon dissolution, ~~earnings of~~ the assets of such companies. It is proposed that in the merger of the three companies these preferred

stocks be converted into 6% forty-year Gold Bonds. Under the merger statute of New Jersey, 6% is the maximum interest which bonds issued in the act of merger can bear, and in order to equalize the income from these 6% bonds with the income heretofore derived by the holders of the preferred stocks, it is proposed that the conversion of preferred stocks into bonds be at the rate of $116-2/3 of bonds for each share of Continental preferred stock and $133-1/3 of bonds for each share of American preferred stock. The Continental preferred stock held by the American and Consolidated companies, amounting at par to $16,767,100, will be cancelled upon the merger and the bond issue will, therefore, amount to $56,090,416, or a decrease in the face value of these first securities of $6,754,183, and a decrease in annual interest charge, as compared with the present dividend charge, of $1,173,697.50.

It is proposed to convert the stock of Consolidated Tobacco Company ($40,000,000) and the American common stock and Continental common stock not held by Consolidated Tobacco Company ($242,450) into the common stock of the new company at par.

It is proposed as an essential part of the plan that the holders of one-half of the Consolidated Tobacco Company 4% bonds, exchange such bonds for 6% cumulative preferred stock of the new company at par, leaving such 4% bond issue subject to the prior lien and charge of the 6% bonds as against the earnings and assets of the new company, but converting these bonds into the direct obligation of the operating company, and reducing by one-half the amount of said 4% bonds outstanding, so that the bonds outstanding will be $78,689,100 instead of $157,378,200. This exchange of one-half of Consolidated bonds outstanding for 6% preferred stock of the new company will be effected by an agree-

ment which has already been signed by the holders of one-half of said bonds that they will take in exchange for their bonds, at par, either 6% per cent. preferred stock, or, in lieu thereof, bonds to the extent of not over 50% thereof, so that the bondholders who have not signed the agreement may have an option of taking their holdings either in the bonds, or partly in bonds and partly, but not to exceed 50% thereof, in said 6% preferred stock.

The coosummation of this plan will make the outstanding securities of the new company in the order of their priority, as follows:

6% Gold Bonds.....	$56,090,416 00
4% Gold Bonds.....	78,689,100 00
6% Preferred Stock.....	76,689,100 00
Common Stock.....	40,242,450 00

Provision is made in the plan of merger for additional common stock, which of course may hereafter be issued or not issued as the Directors see fit, but its issuance, if it is issued, cannot impair the prior securities.

The bonds will be secured by covenants on the part of the new company against mortgaging any of the property of the new company, or creating any specific charge upon its earnings, except in direct and express subordination to the rights of the holders of both of said issues of bonds; also covenants requiring the new company to pay to a Trustee annually the sum of $500,000 to be used by the Trustee in the purchase in the open market for retirement of said 6% bonds at a price not to exceed 120, with a proviso that in case the said 6% bonds cannot in any instance be purchased at that price, the said money shall be returned to the company; said covenant to continue until all of said 6% bonds shall have matured or been retired. Said bonds shall also contain a provision for the matur-

ing thereof at the option of a majority in amount of the bondholders upon the default by the company in any of said covenants, or in the payment of interest.

Notwithstanding very large expenditures of the three companies for extension of business and development of new lines, the earnings of the companies in 1903 were as follows:

The American Tobacco Company (not counting dividends received on Continental preferred stock held by it)	$8,485,584 64
Continental Tobacco Company	12,756,784 06
Consolidated Tobacco Company (not counting dividends received on American or Continental common, or preferred stocks held by it)	985,813 39
Total	$22,228,182 09

Without taking into account the probability of the growth of the volume of business, under the plan of merger there would, therefore, be a total income applicable, in order of priority, to the 6% bonds, the 4% bonds, the 6% preferred stock and the common stock, amounting to... $22,228,182 09

Amount required to pay interest on $56,090,416 of 6% bonds	3,365,424 96
Amount in excess of interest on 6% bonds and applicable first to interest on 4% bonds	$18,862,757 13
Amount required to pay interest on $78,689,100 of 4% bonds	3,147,564 00
Amount in excess of interest on all bonds and applicable first to dividend on 6% preferred stock	$15,715,193 13

Amount required to pay dividends on $78,689,100 of 6% preferred stock	4,721,346 00
Amount (in excess of all interest charges and preferred dividends) applicable to dividends on $40,242,450 Common stock	$10,993,847 13

From their knowledge of these earnings of 1903, and their acquaintance also with the present prosperous and promising condition of the companies, those most familiar with this condition are willing to accept in exchange for their bonds a security subsequent to the 4% bonds but bringing a larger income. They realize also that the plan proposed would greatly enhance the security of the bonds left outstanding, and they are willing that the bondholders unfamiliar with the conditions of the business should have the option to exchange half of their bonds for such 6% preferred stock, so that if such bondholders so elect, they may share equally with the bondholders who are more familiar with the condition of the business in the issue of securities carrying a higher income whereas, if they do not so elect, they may retain their bonds carrying an income equal to the present, with the security very much enhanced.

September 9, 1904.

W. W. FULLER,
General Counsel of
The American Tobacco Co.
Consolidated Tobacco Co.
Continental Tobacco Co.

Appeal Printing Co., 32-34 Vesey St., N. Y.

New Jersey Court of Errors and Appeals.

Between
Richard T. Dana,
Complainant and Appellant,

and

The American Tobacco Company, *et al.*,
Defendants and Respondents.

Brief of Appellant.

This is a bill in equity brought by Richard T. Dana, as Administrator of the estate of Richard S. Dana, deceased, on his own behalf and on behalf of other stockholders of The American Tobacco Company to have a certain so-called merger agreement of said Company declared null and void as to said Company, to have the lien of a mortgage removed from the property of said Company, and to have other and further relief for the protection of the rights of complainant and other stockholders.

Statement.

The American Tobacco Company was organized on January 21st, 1890, pursuant to the provisions of an act of the Legislature of the State of New Jersey, approved April 7th, 1875, and the several supplements thereto and acts amendatory thereof.

The certificate of incorporation provided that the amount of capital stock was to be $25,000,000, which was to be divided into 400,000 shares. Of this stock $15,000,000 was to be common stock divided into 300,000 shares of $50 each, and the remaining $10,000,000 was to be preferred stock divided into 100,000 shares of $100 each. The capital stock was subsequently increased, so that in 1904 there were outstanding $54,500,000 common stock, and $14,000,000 preferred stock.

The certificate of incorporation further provided the objects for which the Company was formed, the number of directors, who were classified in respect to the time for which they should hold office, and also contained the following provision:

"The period at which said Company shall commence is the twenty-first day of January, A. D. Eighteen hundred and ninety, and the period at which it shall terminate is the twentieth day of January, A. D. Nineteen hundred and forty."

From the time of its organization the holders of the preferred stock of The American Tobacco Company were entitled to and enjoyed the right to vote at all meetings of stockholders, the right to inspect books, and all the other rights and privileges of stockholders.

There was no provision in the certificate of incorporation of The American Tobacco Company authorizing any merger or consolidation of that Company with any other company, and it was the intention of the incorporators, as clearly evidenced by their certificate, that the business of the Company should continue until January 20th, 1940.

At the time of the organization of The American Tobacco Company there was no law in the State of New Jersey under which the Company could be merged or consolidated, nor was any such law passed until the year 1893.

On April 7th, 1892, prior to the passage of any merger law applicable to this Company, complainant's intestate, Richard S. Dana, purchased fifty shares of the preferred stock of the Company, and the same were transferred to him on the books, and a certificate issued to him therefor. From that date the stock has stood and now stands in the name of said Richard S. Dana on the books of the Company, and from that date and until the year 1904 the dividends accruing upon the stock were regularly paid to him during his lifetime, and after his death were paid to complainant until October, 1904.

The certificate issued to Richard S. Dana certified that he was the owner of fifty shares of $100 each of the preferred capital stock of The American Tobacco Company, and that he was entitled to dividends not exceeding 8% for each year, payable quarterly before any dividends on the general or common stock, out of the net profits of the Company for each year, and that he was also entitled to preference on the assets of the Company on the final distribution or disposition thereof.

On January 19th, 1904, Richard S. Dana died intestate, a resident of the City of New York, and on February 16th, 1904, Letters of Administration upon his estate were duly issued to complainant by the Surrogates' Court of New York. Complainant thereupon qualified as Administrator, and as such became entitled to said fifty shares of stock.

Some time before his death, Richard S. Dana purchased fifty more shares of stock of The American Tobacco Company. These also passed into the hands of the Administrator.

In the spring of 1904, complainant went to Europe. Prior to his departure, and on May 28th, 1904, he wrote to the Company, enclosing a Surro-

gate's certificate showing his appointment as Administrator of the estate of Richard S. Dana, and requesting that all dividends on the preferred stock standing in the name of Richard S. Dana be deposited with the Morton Trust Company to the credit of the account which the estate had with that depository. On June 2d, 1904, the Farmers' Loan & Trust Company, which was the transfer agent of The American Tobacco Company, acknowledged the receipt of complainant's letter, and on June 3d, 1904, complainant wrote again to The American Tobacco Company in the care of the Farmers' Loan & Trust Company.

These letters of complainant were written upon his office stationery, showing his business address as 15 William Street, New York City, and were ample notice to the officers and agents of The American Tobacco Company of the death of Richard S. Dana, the appointment of complainant as Administrator, and complainant's correct business address.

Complainant remained in Europe until September 29th, 1904, when he sailed from Queenstown on S/S Majestic. This steamer did not arrive in New York until October 5th, 1904. Upon his return to this country, complainant was much occupied with engineering work at Livingston County, New York, and Perth Amboy, New Jersey, and with other matters, and it was not until some time after his return that complainant first heard of some change in The American Tobacco Company.

While complainant was absent in Europe, his office was kept open, and his mail was preserved for him, excepting certain personal letters which were forwarded.

During complainant's absence in Europe, and without his knowledge, the officers of The Ameri-

can Tobacco Company formed a plan for the merger or consolidation of the Company with two other companies organized under the laws of the State of New Jersey, and known as Consolidated Tobacco Company and Continental Tobacco Company. Under this plan the proposed merger or consolidation was to be effected under the Act of the New Jersey Legislature, known as the Revision of 1896, which included the merger statute of 1893, above referred to, and on September 9th, 1904, an agreement purporting to be a merger agreement, was entered into by The American Tobacco Company and the other two companies referred to, pursuant to a resolution passed by the Directors of each of said companies. This document provided that the three companies were thereby consolidated into a single corporation under the name "The American Tobacco Company," and set forth the objects and powers of the merged corporation, the number and names of the directors and officers, the amount of capital stock, and other matters relating to the organization of the merged Company, which it was thereby intended should be created. It was provided that the merged Company should be vested with all the property, real, personal and mixed, of the three original corporations, and should assume all the liabilities of said corporations. It also provided for the conversion of the capital stock of each of said corporations into common stock, preferred stock, and bonds of the new merged corporation. Under its provisions, complainant and the other holders of the eight per cent. preferred stock of The American Tobacco Company were entitled for each share of preferred stock of the par value of $100 to the obligation or bond of the new merged corporation in the sum of $133.33 1/3 due

and payable on October 1st, 1944, with interest from October 1st, 1904, at the rate of six per cent. per annum and payable semi-annually. The bonds were to be issued in such denominations as the merged corporation should see fit, and the holders of the preferred stock of The American Tobacco Company, who accepted the terms of the merger, were to receive the sum of $2 for each share held by them in lieu of the regular quarterly dividend to which they would in any event be entitled.

In regard to the seven per cent. preferred stock of Continental Tobacco Company, of which $2,560,000, were held by The American Tobacco Company (p. 157), and also any other stocks of the merged companies held by the companies themselves, the agreement provided as follows:

"By the act of merger the stocks of the companies parties hereto, held by any of the companies parties hereto, shall stand and be cancelled."

The merger agreement further provided that the merged Company might, by resolution of the Board of Directors, guarantee dividends of stock, and endorse and guarantee the principal and interest of any bonds, securities, or other evidence of indebtedness created by any corporation in which the merged Company had an interest. The power to make by-laws was conferred upon the Directors, the Directors were given most liberal powers with respect to dividends, and the acquisition of property, and were given power to proscribe the number of Directors necessary to constitute a quorum, and that such number might be less than a majority.

After this proposed merger had been passed upon by the Directors of complainant's Company, a meeting of stockholders was called for September 30th, 1904, for the purpose of ratifying the same. At this meeting a large majority of the stockholders voted

in favor of the merger, although some voted against it. Although complainant had given notice of his appointment as Administrator and his ~~contract~~ correct address, no notice whatever was sent to him or received by him of the stockholders' meeting held on September 30th, 1904. The officers of the American Tobacco Company, knowing that Richard S. Dana was dead, knowing that complainant had been appointed Administrator, and knowing complainant's correct address, carelessly sent their notice of this important stockholders' meeting to the deceased, and failed to give complainant any notice whatsoever.

The dividend due complainant upon his stock was not paid in the regular course, and on November 12th, 1904, he called on the Morton Trust Company to make inquiries. He then learned for the first time that there had been a merger or consolidation of his Company with the other two companies. He had never before heard of a merger and did not understand such a transaction, and it was not until about November 15th that he obtained copies of the merger agreement, trust indenture, and other papers. Complainant was somewhat indignant that the dividend which was due should be withheld. He demanded this at the Morton Trust Company, but the Secretary informed him that it could not be paid, that he had no alternative, that he must take the bonds of the new Company in exchange for his stock, as no further dividend would ever be paid on the stock.

Complainant at once consulted his attorney in regard to bringing suit to recover the dividend. At that time he was, of course, entirely unaware that the merger was unlawful and in violation of his rights. He was entirely unaware that he had any election to reject the same. He assumed that the Directors of his Company had done nothing un-

lawful, nothing *ultra vires,* that the stockholders had not violated their contract with him, and that the Secretary of the Morton Trust Company correctly informed him when he gave him to understand that he had no alternative.

Complainant made investigations with due diligence. He called upon the Farmers' Loan & Trust Company, and after making several demands was finally allowed to inspect the stock ledger. He called at the office of The American Tobacco Company, and he and his attorney obtained copies of the certificate of incorporation of his Company, amendments to the same, and investigated the assets of the merging corporations in various books of reference.

The matter was a most complicated one, and it was not until January 7th, 1905, that complainant realized that his rights were being violated to his damage. On that day he caused a written protest, addressed to the Officers and Directors of his Company, to be duly served upon the Vice-President, protesting against the situation which had been brought about, and against their action in bringing it about, and demanding that the books of the Company be properly kept and the officers perform all their legal duties as such.

This protest on the part of complainant was delivered to the Vice-President of The American Tobacco Company two days before the Morton Trust Company began to issue the stock and bonds of the new Company in exchange for the old securities or the certificates of deposit which had been delivered when the old securities were surrendeded (pp. 146, 156).

Upon receipt of complainant's protest, the defendants made no effort whatsoever to persuade him that the merger was fair and just, and made no effort to obtain his consent to the same. Instead

of this, they ignored complainant's rights, and, knowing that the merger was invalid without complainant's consent, commenced the issue of the new securities, and allowed them to be placed upon the market and offered for sale. Although the Vice-President stated that he would reply to complainant's protest, no reply was received, and complainant was obliged to write again. The answer to the second letter was evasive, and complainant wrote a third time, and then made a specific demand for the transfer of his stock, and on March 20th, 1905, filed his bill of complaint.

POINT I.

The Merger Law of 1893 (included in "an act concerning corporations" revision of 1896) has no application to the American Tobacco Company.

The Merger Law contained in "An Act Concerning Corporations" (Revision of 1896), was first enacted in 1893 (P. L., 1893, p. 121). At the time of the passage of this law the constitution of the State of New Jersey contained the usual provision prohibiting the Legislature from passing any law impairing the obligation of contracts, and the Courts in many leading and well considered cases had settled the meaning of this constitutional provision in its application to the rights of stockholders. The Merger Law provided that any two or more corporations might merge upon a two-thirds vote of the capital stock of each. Such a law was clearly unconstitutional as to corporations previously organized, unless under some prior statute they were authorized to merge. We may conclude, therefore, that the Merger Law was intended to apply only to corporations subsequently organized, and to corporations which were author-

ized to consolidate under some former statute. Any other construction must render the Merger Law null and void. The Court will therefore sustain the statute by holding that its application is limited as above stated, and that it does not apply to The American Tobacco Company.

POINT II.

The said Merger Law did not authorize the merger of the American Tobacco Company provided for in the agreement of September 9th, 1904.

The so-called merger agreement of September 9th, 1904, provided that complainant's stock and the stock of the other holders of the preferred stock of The American Tobacco Company should be converted into bonds of the merged or consolidated Company. That is, that the holders of the preferred stock should receive in exchange for their stock, not stock of the new Company, but bonds or obligations. Under this agreement the *status* of the preferred stockholders was to be changed from that of partners or joint owners in one business to creditors of another business. Grants of authority must be strictly construed, and to effect such a radical change the statute authorizing the same should be clear and explicit in its terms. An examination of the statute, however, will show that there is no express authority for this provision of the agreement. That part of the statute which authorizes the issue of bonds reads as follows:

"* * * the consolidated corporation shall have power and authority to issue bonds or other obligations * * * to an amount sufficient with its capital stock to provide for all the payments it will be required to make or obligations it will be required to assume in order to affect such merger or consolidation."

By this provision it is clear that bonds were to be issued only to provide for payments which it would be necesary to make or obligations which it would be necessary to assume. It is no authority for compelling the stockholders to abandon their joint ownership of the properties and relegating them to the position of creditors. The following provision of the statute shows clearly that the Legislature intended no such summary disposition of the joint owners of the old companies. It shows clearly that it was intended that the *status* of the stockholders of the consolidating corporations was to remain unchanged, and that they were to receive in exchange for their shares the stock of the new corporation. The provision reads as follows:

" * * * the consolidated corporation * * * may issue, capital stock, either common or preferred, or both, to such an amount as may be necessary, to the stockholders of such merging or consolidating corporations in exchange or payment for their original shares." * * *

The fact that the former section of the statute refers to "the manner of converting the capital stock of each of said merging or consolidating corporations into the stock or obligations of such new or consolidated corporation" is immaterial. That is no authorization, no grant of power. The word "obligations" was not inserted deliberately to express legislative intent. It was included in this law through a careless use of a part of the language of the merger statute of 1883 (P. L., 1883, p. 242). That statute, which has no application to The American Tobacco Company, contained the same reference to the manner of converting the old shares "into the Stock or obligations" of the new Company, but in that statute the reference was entirely proper for there followed a provision that the bonds, which the new Company was expressly authorized to issue, might be given "in lieu, ex-

change and in satisfaction of and for all bonds, mortgages or other debts, or claims, or *stocks,* or obligations against the corporations thus consolidated and merged."

The use of the words "or obligations" in the present law is obviously a verbal error occasioned by using a part of the language of the former statute. The fact, however, that in the new law the provision of the old law expressly authorizing the exchange of bonds for stock was omitted, must, according to familiar principles of statutory construction, be taken to indicate a clear intention on the part of the Legislature to put a stop to the practice. The provision authorizing the issue of bonds for stock was carefully eliminated from the new statute, and under these circumstances authority cannot be inferred from the fact that the Legislature failed to perfect the amendment by eliminating also the words "or obligations" in the former part of the statute. Mere verbal or grammatical errors cannot defeat a grant, and surely such errors cannot be held to constitute a grant of such unusual and drastic power, especially where a clear intention to the contrary is manifest.

The most that can be said is, that Section 2 of the Merger Act of 1893 (which has become Section 105 of the present Corporation Act), is a mere permissive thing, giving the consent of the State to a matter which, to become effectual, must be agreed to by every stockholder of the corporation. This is evident from the powers given to the corporation under Section 6 of the Act of 1893 (which became Section 109 of the present Corporation Act), and this authorizes capital stock only to be issued to the stockholders of the merging corporations in exchange for their original shares. There is no authority in Section 109 to the merged corporation to issue bonds and compel the shareholders of the

merging corporations to exchange their stock for those bonds.

As we have already seen, The American Tobacco Company owned several millions of dollars' worth of the preferred stock of Continental Tobacco Company. This stock was valuable property of complainant and the other stockholders of his Company. They owned it jointly as copartners or shareholders in the Company, and, together with the other property, it was intrusted to the care of the Officers and Directors. The Officers and Directors might dispose of this stock for value, but they had no right to cancel or destroy it. They had no more right to do this than they had to give away or burn one of the Company's factories.

The merger agreement provides as follows:

"By the act of merger the stocks of the Companies parties hereto, held by any of the Companies parties hereto, shall stand and be cancelled."

This provision of the agreement provides for the cancellation and destruction of the valuable property above referred to, and is entirely unauthorized by the Merger Law, or any other statute of the State of New Jersey.

If we assume that the Merger Law applies to complainant's Company, that it is a valid law, and that the merger agreement in all other respects conforms to its provisions, it is nevertheless impossible to justify or find authority for this provision of the agreement, which provides for the destruction of valuable property in which complainant had an interest.

The defendants will, no doubt, contend that the stock of the Consolidated held by The American Tobacco Company passed to the merged corporation and that that corporation, as owner, might cancel the same or dispose of it in any other man-

ner. The cancellation, however, is not at all the act of the new corporation. It is provided for in the agreement of the three original Companies. Even if we assume the agreement to be the act of the new Company, nevertheless the wilful destruction of valuable property is entirely without legal sanction.

It is submitted that under the provisions of the Merger Law complainant was entitled to stock of the new Company in exchange for the stock held by him, and that complainant was also entitled to his proportionate share of stock in the new Company issued in exchange for the shares of Consolidated Tobacco Company stock held by complainant's Company, and, in so far as the merger agreement fails to make such provision, and provides otherwise, it is entirely unauthorized by the Merger Law.

The agreement of the Officers and Directors of The American Tobacco Company, although ratified by a majority of the stockholders, is nevertheless invalid as to complainant and other dissenting stockholders unless authorized by the Merger Law, and that statute, as a grant of corporate power, must be strictly construed.

Wright v. Carter, 3 Dutch., 76.
State v. Elizabeth, 4 Dutch., 103.
Jersey City Gas Light Co. v. Consumers Gas Light Co., 13 Stew., 427.
National Trust Co. v. Miller, 6 Stew., 155.

POINT III.

If the Merger Law does apply to the American Tobacco Company and does authorize the merger agreement then it is unconstitutional and void.

The American Tobacco Company was organized on January 21st, 1890, by the filing of a certificate of incorporation pursuant to the provisions of the Act of 1875 and the several supplements thereto and Acts amendatory thereof. The granting of this charter by the State of New Jersey and its acceptance by the Company constituted a contract between the State and the Company.

> Dartmouth College v. Woodward, 4 Wheat., 518.
>
> Montclair v. N. Y. & Greenwood Ry. Co., 45 N. J. Eq., 436.

By the organization of the Company other contractual and property rights were also created. The Company issued its certificates of stock to the shareholders and thereby entered into contractual relations with them. The certificates issued to the holders of preferred stock certified that such holders should be entitled to dividends not exceeding eight per cent. for each year, payable quarterly, before any dividends on the common stock, and also that the preferred stockholders should be entitled to preference on the assets of the Company on final distribution thereof.

Contractual relations were also entered into by the corporators or shareholders *inter sese*. The name, objects and amount of capital of the Company were agreed upon, and it was agreed that the business should be conducted by ten Directors, and

that it should commence January 21st, 1890, and terminate on January 20th, 1940.

The capital of the Company was the valuable property of the stockholders jointly and the stockholders had vested property rights in their certificates of stock, in the earnings, the dividends and the right to vote their shares for the control and management of their joint property.

The deceased purchased and held said stock with all the guarantees for the protection of contractual and property rights of the State and Federal constitutions. These are as follows:

"No State shall pass any * * * law impairing the obligation of contracts."

Cons. of U. S., Art. 1, Sec. 10.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Cons. of U. S. Amendment 14, Sec. 1.

"The legislature shall not pass any * * * law impairing the obligation of contracts or depriving a party of any remedy for enforcing a contract which existed when the contract was made."

Cons. of N. J., Art. 4, Sec. 7, Par. 3.

It is true that the Act of 1875 contained the usual reservation of power to the Legislature of the State. This reservation was as follows:

"That the charter of every corporation which shall hereafter be granted by or created under any acts of the legislature shall be subject to altera-

tion, suspension and repeal in the discretion of the legislature."

The effect of the merger has been to destroy complainant's Company, to deprive complainant and his Company of all their property rights, and to wholly destroy the contractual obligations between the Company and complainant and the stockholders *inter sese*. If such a condition is authorized by the merger law, the law is clearly unconstitutional and void, unless authorized by the reservation of power to the Legislature.

The decisions in the State of New Jersey have limited in no uncertain terms the reserved power of the State in its application to the rights of stockholders. This power extends only to the modification or destruction of the contract between the State and the corporation. The reservation of power does not authorize any impairment of the rights of the stockholders *inter sese*. This is so well settled that it cannot be questioned, and we will merely refer to two leading cases where the rule is stated.

In Zabriskie v. Hackensack & N. Y. Ry. Co., 18 N. J. Eq., 178 (pp. 185-6), in regard to the reserved power, the Chancellor said:

"The object and purpose of these provisions are so plain and so plainly expressed in the words that it seems strange that any doubt could be raised concerning it. It was a reservation to the State for the benefit of the public to be exercised by the State only. The State was making what had been decided to be a contract and it reserved the power to change, by altering, modifying, or repealing the contract. Neither the words nor the circumstances, nor apparent objects for which the provision was made, can by any fair consideration extend it to giving a power to one part of

the corporators as against the other, which they did not have before."

In Berger v. U. S. Steel Corporation, 63 N. J. Eq., 809, at page 824, the Court said:

"It must be conceded that it is firmly settled in our jurisprudence that the right reserved in the sixth section to amend, alter or repeal charters extends only to the modification or destruction of rights as between the State and the corporation, but that the rights of the stockholders *inter sese* can in no respect be impaired except in so far as impairment may result from an alteration required by the public interest."

It is clear that if the Merger Law does apply to the Company in question, and does authorize the merger, it is unconstitutional and void. Therefore, we must regard the alleged merger, which has been attempted by the Directors and a large majority of the stockholders, as an act entirely unauthorized by law.

POINT IV.

The merger, without the authority of any valid law, is a flagrant violation of complainant's most fundamental rights.

When complainant's intestate purchased shares of the preferred stock of the old American Tobacco Company he acquired certain property rights and entered into contractual relations with the Company and with the other stockholders. Complainant's intestate became the owner of the preferred stock purchased by him, and became entitled to dividends when earned, and to his proportionate share of the assets on final dissolution. He and the other stockholders of his Company had vested property rights jointly in all the properties of the

Company, and they had as a necessary incident to the ownership of their shares, a voice in the management of the properties.

The contractual relations between complainant's intestate and the corporation, and complainant's intestate and the other shareholders, carried with them the obligations of the contracts. The corporation and the other shareholders were bound by their contract to continue the business as organized during the term agreed upon, that is, from January 21st, 1890, to January 20th, 1940, to pay dividends on the preferred stock when earned, and upon final dissolution to distribute the assets among the shareholders in accordance with their interests.

These property and contractual rights of complainant's intestate, and to which complainant succeeded, are among the most sacred and fundamental rights known to the law, and their protection is guaranteed by the Constitution of the United States in Article I, Section 10, by the Fourteenth Amendment, and by the Constitution of the State of New Jersey, Article 4, Section 7.

Of such rights Blackstone in his Commentaries said:

"So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; not even for the general good of the whole community. * * * In vain may it be urged that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in *nothing* more essentially interested, than in the protection of every individual's private rights as modeled by the Municipal law."

The property rights and contractual rights and obligations of stockholders have been frequently de-

clared by the Courts of New Jersey. In the leading case of

Kean v. Johnson, et al., 1 Stockton, 401,

the learned Master said:

Page 407:

"As stockholders, they own the road in common, to be employed in specific uses. Each owns a share in the whole, and is to have a proportionate share in its profits. They have invested a portion of their capital in it, and in it alone. They have a right in the road, and in every dollar it earns. The Directors are their Trustees, to employ the joint capital in the management of the road, and the road only, to the end that from the investment the stockholders have chosen they may reap the contemplated profits. And this is the agreement of the stockholders among themselves. They each contract with the other that their money shall be so employed. What the majority determine within *the scope of this mutual contract*, they each agree to abide by, but there their mutual contract ends, and *no majority, however large, has a right to direct one cent of the joint capital to any purpose not consistent with, and growing out of this original fundamental joint intention.*"

Page 413:

"Is it the law that the majority of stockholders in any corporation, however its business affairs may be, can, at their own mere caprice, sell out the whole source of their emoluments, invest their capital in other enterprises, and that, however, the minority may desire the prosecution of the business in which they had engaged, they have no injury to complain of, at law or in equity, so long as they obtain their proportion of the proceeds of the sale?

On principle this position seems to me unsound.

If it be true, a minority is entirely in the power of a majority, and the moment a rich man or a few rich men see what they deem a better investment for their money than the corporation in which they are already stockholders, they may compel the poorer members of the company to abandon profits satisfactory to them, and either risk the little they have, according to views from which they differ, or take back their money to lie profitless on their hands, until they find another investment."

Page 414:

"That the majority should have the power claimed for them, does not seem to me to be the contract between the stockholders, for there *is* a contract as already shown, in the case of every corporation, between them. That contract is, that their joint funds shall, under the care of specified persons, generally called directors, be employed, and that for certain specified purposes. Sometimes the duration of such employment is limited in the charter, and then, *until that time*, it must continue so employed, unless, perhaps in case of clear loss."

Pages 416, 417:

"And the opinion the Lord Eldon in Natusch v. Irving, is expressly in point, unless there be a difference in the rights of partners in a joint stock association and in a corporation. In that case, the defendants had offered to pay back all that the orator had paid into the company, with interest, and also fully to indemnify him against all loss by the transactions of the company in the business which was beyond the original articles. Lord Eldon to this part of the case replies in substance, as already stated, that it is not competent for any number of persons in a partnership (unless so provided for) formed for specific purposes, to affect that formation by calling upon some of the part-

ners to receive back their capital stock and interest and quit the concern; which, in effect, would be merely compelling them to retire upon such terms as should be dictated to them, so as to form a new company; and he further says, that *it is the right of a partner to hold his associates to the specified purposes whilst the partnership continues*, and not to rest upon indemnities with respect to what he had not contracted to engage in; and that a partner cannot be compelled to part with his shares, though for double what he originally gave for them; and that it may be his principal reason for keeping them, to have the partnership carried on according to the original contract. If a majority of partners, corporate or incorporate, can sell out all their property and satisfy the rights of a dissenting partner, by a simple payment to him of his share, they "can compel him to retire," and "form a new company" and utterly waive and set at naught his "right to hold his associates to the specified purposes," and *can* "compel him to part with his shares" "at any sum they choose."

Appendix to Gow on Part 576 Am. Ed., 1830.

This case, Kean v. Johnson, has been cited with approval in Zabriskie v. Hackensack & N. Y. R. R. Co., 3 C. E. Gr., 178; Black v. Delaware, etc., Canal Co., 7 C. E. Gr., 130; Mills v. The Central R. R., 41 N. J. Eq., 1; Rabe v. Dunlap, 51 N. J. Eq., 40; Berger v. U. S. Steel Corporation, 63 N. J. Eq., 809, and almost all the leading cases on the subject in the State of New Jersey. It has also been cited in many other jurisdictions and by text writers, and so far as we have ascertained the law as stated by the learned Master in his opinion has been uniformly approved and upheld.

Indeed, some of the opinions in the State of New Jersey have gone so far as to say that the rules laid down in Kean v. Johnson and in Zabriskie v. Hackensack & N. Y. are founded upon such estab-

lished principles that they cannot be changed consistently with good faith and justice.

Acting with no authority, other than the Merger Law of 1893, passed subsequent to the time when complainant's intestate acquired his stock, the officers of complainant's Company and a majority of at least two-thirds of the stockholders have, without complainant's knowledge or consent, merged his Company with two other companies. They have caused the existence of complainant's Company to terminate thirty-five years before the time provided in its charter. They have wholly destroyed complainant's joint ownership of the assets of his Company. They have rendered his stock worthless as such. They have stopped the payment of his dividends, although due and earned. They have deprived him of his right to transfer his stock and his right to vote, and they have destroyed the contract between the State and the Company, the contract between the Company and complainant's intestate, and all the contractual relations of the complainant and the other stockholders *inter sese*.

In addition to this, they have charged the properties of complainant's Company with the payment of all the obligations and liabilities of two other companies. They have cancelled some $2,560,000 of preferred stock of the Continental Tobacco Company which was held by complainant's Company and owned jointly by complainant and the other stockholders (pp. 157, 25). They have forced upon complainant and upon the properties of his Company a new corporation differently organized, with different powers, and in the management of which complainant can never have a voice.

Under the new arrangement, complainant's property and contractual rights have ceased to exist, and he is offered in exchange a certain amount in bonds or obligations. There is no alternative. Complainant may have the bonds or nothing, for all his

old property and contract rights have been destroyed and rendered worthless.

It has been suggested that the case at bar differs essentially from the case of Kean v. Johnson, and the other cases cited. The argument has been made that in Kean v. Johnson and some of the other cases, the change was a change in the location of a railroad, and that in this case there has been no such change. This distinction is not substantial. The essential principle in Kean v. Johnson is that there can be no change in the contract between the stockholders. The particular violation of the contract in that case was the change in the location of the road, but the principle upon which the case was decided was that there could be no change or modification whatever in the agreement between the stockholders under which the stockholders had contributed their capital. It is true, that in the case at bar the particular violation of the contractual rights and obligations of the stockholders *inter sese* is differet from the particular act in Kean v. Johnson and some of the other cases cited. It is, however, a clear violation of the contractual obligations of the stockholders, and, therefore, comes well within the principles of those decisions. In Kean v. Johnson, the principal violation of the agreement was the change in the location of the road. In the case at bar, the changes have been even more serious. Instead of a modification of the contract between the stockholders, the contract relations have been wholly destroyed. The complainant's interest as a stockholder has ceased to exist, he has no longer any of the rights and privileges of a stockholder, his stock is worthless, and the properties of his Company have become subjected to the management and control of a new corporation with different powers, a greatly increased capitalization, a larger number of Directors, owning and operat-

ing new factories and assuming the payment of the enormous obligations of other companies.

Of course, it is true, that the business carried on by the new corporation may be a similar business to that carried on by the old corporation, namely, curing and selling tobacco. This similarity, however, does not alter the fact that there has been a most serious change, if not total destruction, in the contractual relations which existed between complainant and the other stockholders.

In the Dartmouth College case and in many of the other decisions upon this subject, the change has not been precisely the same as the change which was attempted in Kean v. Johnson. But, in all cases where the proposed change has amounted to a fundamental alteration or impairment of the contractual relations of the stockholders, it has been held to be unlawful.

In the case at bar the modification of the contractual rights is most extreme, for not only is there a fundamental and radical change in the corporate entity, in its organization, capitalization, Directors and powers, but, in addition, complainant's interest and rights as a stockholder are wholly destroyed and all he is entitled to is a bond or a certain amount of money due, with interest, at a future date. That is, complainant is forced out of the corporation, his property rights are taken from him, and he is offered in exchange an obligation to pay a certain sum of money which is claimed to be of the same value as his property.

It must be remembered that this attempted merger is without the authority of any valid law. It is an attempt by the majority of the stockholders to terminate the corporate existence of complainant's Company, to transfer all the assets of that Company to another corporation, to de-

prive the complainant of his stock, his dividends, and his proportionate share of the assets on final dissolution, and the attempt is wholly unauthorized by any valid law. It is submitted, that under these circumstances, such an attempt is a flagrant violation of complainant's most fundamental rights.

POINT V.

If complainant and the other stockholders similarly situated are compelled to accept the terms of the merger agreement they will suffer considerable pecuniary loss.

Under the merger agreement complainant may surrender his stock and receive in exchange for each share of the par value of $100 the bond or obligation of the new Company for $133.33-1/3.

The preferred stock paid dividends at the rate of eight per cent. (8%) per annum, and as the bonds bear interest at the rate of only six per cent. (6%) per annum, the difference is adjusted by giving bonds of a greater par value. There is no advantage in this to complainant from the standpoint of security or market price. *And there is a great pecuniary loss in the net return.*

In New York City, which was the residence of complainant's intestate and is also complainant's residence, the preferred stock held by him is not taxable, while the bonds offered him in exchange are taxable. The rate of taxation is about 1½%. Complainant would receive in exchange for his 100 shares of stock bonds of the par value of $13,333.-33-1/3.

On this basis, assuming the bonds to be worth par, complainant would be taxed each year the sum of $200. The total amount of this tax for the forty year period of the bonds would be $8,000.

As the bonds have been selling ten points or more above par, they would, no doubt, be assessed accordingly, and the tax would then be even greater. There is, moreover, no assurance that the tax rate will not be increased.

On the same basis, however, if we assume that the holders of the $14,000,000 of preferred stock also reside in New York City, the annual tax upon the bonds received in exchange would be $280,000 and for the period of the bonds would amount to $11,200,000.

Of course, the total amount of the tax during the period of the bonds is more than the actual present loss to complainant and other stockholders. A fair way to estimate the present loss is by computing the value of an annuity which, at a usual rate of interest—say three and one-half per cent. (3½%), would pay the amount of the tax annually for forty years and then vanish. We have made this calculation and find that, on such a basis, complainant's present loss is $4,270. On the same basis, the present loss to all the stockholders would be $5,978,000.

Another considerable loss which will result to complainant and the other preferred stockholders, if they are obliged to accept the terms of the merger, arises from the difference in the *status* of a bondholder and stockholder.

The owner of a bond is a creditor. All he is entitled to is interest during the life of the bond and the principal upon maturity. The position of a stockholder is totally different. He is not a creditor, but, jointly with the other stockholders, owns all the property of the Company. He is entitled to dividends out of the earnings as long as the Company continues, and upon final dissolution is entitled to his proportionate share of the property of the Company.

The defendants contend that, aside from the right

to participate in the management of the properties, a preferred stockholder is substantially the same as a bondholder, and upon final dissolution is only entitled to receive the par value of the stock, no matter how large the surplus may be. There is no authority for this position, nor is there anything in the certificate of incorporation which deprives a holder of the preferred stock of his equal share of the surplus.

It is provided in the certificate of incorporation that the preferred stock shall have a preference on the assets of the Company. If no such provision was made and a stock was preferred as to dividends only, the holders would then be entitled to share equally with the common stockholders in the entire property and surplus upon dissolution. It is difficult to see how the giving to the preferred stockholders of a further preference upon the assets can be held to deprive them of their just share of any surplus.

There is no statute which is authority for such a proposition. The provision relating to the distribution of property upon dissolution reads as follows:

> "That on the final dissolution of any corporation created under this Act, all its real and personal estate, not legally disposed of, shall be vested in the individuals, who may be stockholders at the time of such dissolution, in their respective proportions, and they shall hold the same as tenants or owners in common."
>
> Act of 1875, Sec. 64.

Section 80 of the same Act, as amended by the Act of 1877, does not provide that preferred stockholders shall only receive the par value of their shares. It is true that this section provides that the "surplus funds," after payment of creditors and preferred stockholders, may be divided among the common stockholders. This section, however, re-

lates exclusively to insolvent corporations and the administration of their properties by Receivers and Trustees for the benefit of creditors. The words, "surplus funds," mean the funds on hand after the payment of all creditors, costs, expenses, etc. These words have no reference to an accumulated surplus in addition to the capital, which must be distributed among all the shareholders upon dissolution.

In the absence of an agreement or statutory provision to the contrary, the shareholders of a corporation, just as the partners of a firm, are entitled upon dissolution to *pro rata* shares of the assets in accordance with their interests. If some of the shareholders are given a preference upon the assets, they are entitled to receive the par value of their shares before any other distribution is made. After this is done, the holders of the common stock are entitled to receive the par value of their shares and the remaining assets are then distributed *pro rata* among all the stockholders. It would be highly absurd to hold that the giving of a preference to certain of the stockholders should deprive them of their proportionate interest in the surplus assets of the corporation after all the stockholders had been paid the par value of their shares.

If the preference only extends to dividends, the stockholders of all classes share equally upon dissolution.

In re London India Rubber Co., L. R., 5 Eq., 519.

There is no reason or authority for holding that upon a dissolution a certain class of the stockholders are at a disadvantage in the distribution of assets, because they have been given a preference. .Indeed, in the few causes where the ques-

tion has arisen, a contrary view seems to have been taken.

Re Bridgewater Navigation Co., L. R., 39 Ch. Div., 1.

The defendants contend that even if the preferred stockholders are entitled upon dissolution to an equal share in the assets of the Company, such a right is of no value, because prior to dissolution the common stockholders may distribute all the accummulated surplus as dividends upon the common stock. This contention is quite fallacious. However plausible the argument may appear, such action on the part of the stockholders, is practically impossible. In the year 1940 the most valuable of the Company's properties will be, even more so than they are to-day, not the cash assets and convertible securities, but the Company's factories, machinery, patents, well-known brands, trade-marks, trade-names, trade-rights, and all the other advantages included in what is known as the good-will. Such property and rights are inseparably connected with the Company's business, and cannot possibly be paid out to the stockholders as dividends upon the common stock.

POINT VI.

The relief which complainant asks will not damage third parties.

The complainant prays in his bill that the so-called merger agreemennt be declared null and void as to him and the other stockholders of his Company, and as to the assets of that corporation, and that the lien of the mortgage made by the merged corporation to the Morton Trust Company be removed from the property of the original American Tobacco Company. This relief is the

only relief which will adequately protect the interests of complainant and the other stockholders similarly situated.

The defendant contends that if complainant prevails, incalculable damage will result to third parties. Counsel for the Morton Trust Company, the Trustee of the mortgage, urged at the hearing that if complainant succeeds, the $134,789,100 of bonds secured by the mortgage will be seriously damaged or rendered worthless. He stated that these bonds had been dealt in in the market, that they had passed into the hands of the innocent third parties, and that although complainant had some small legal right, the Court should, nevertheless, deny him relief because of the incalculable loss to third parties whose interests are so enormous that complainant's interest seems by comparison infinitesimal.

As complainant served his written protest against the merger two days before the issue of the new bonds, as he had already made his dissatisfaction with the merger quite clear to the Secretary of the Morton Trust Company, and as that Company well knew that the merger could not be legal without the unanimous consent of all the stockholders, it seems strange that they should not have considered the injury which might result to third parties before issuing the bonds. As complainant's protest preceded the bond issue, it is submitted that any damage to innocent purchasers of the bonds is not the fault of complainant, but the fault of the Morton Trust Company and its co-defendants. And, as the Morton Trust Company are to blame for any injury which may result, it is preposterous that they should urge this injury as a reason why adequate relief should be denied complainant.

But, as a matter of fact, the injury which will

result to third parties is purely fanciful and has no foundation whatever. And the argument that the enormous bond issue will be rendered worthless if complainant succeeds is obviously advanced by the defendants for the purpose of frightening the Court.

If the prayer of complainant's bill is fully granted, the enormous bond issue of the new merged corporation will be just as well secured as it is at present. The bonds will not depreciate in value one cent. They may be even better secured, and no loss or injustice will result to third parties.

The outstanding capital stock of the old American Tobacco Company was $54,500,000 common, and $14,000,000 preferred. Of this, $54,274,550 of the common was held by the Consolidated Tobacco Company. Only the small balance of the common, amounting to $225,450, and the $14,000,000 preferred, were held by others.

If the merger is declared invalid as to complainant's Company, and the lien of the mortgage upon that Company's property cancelled, the result will be as follows:

There will be taken from the property of the new merged corporation and from the security for the bonds all the properties of the old American Tobacco Company, but there will be held in lieu of the properties $54,274,550 of the common stock of the old American Tobacco Company which was the property of Consolidated Tobacco Company, and which would therefore be the property of the new merged corporation and subject to the lien of the mortgage. The balance of the common stock, amounting to $225,450, would be re-issued to the old stockholders or their assigns, and there would be a corresponding reduction in the amount of outstanding common stock of the new merged corporation. The preferred stock of the old Company would be issued to the old preferred stockholders

or their assigns, and the bonds of the new merged corporation which were given in exchange would be cancelled. As the bonds were given on a basis of $133 in bonds for $100 of stock, there would be a reduction in the bond issue of $18,666,666.

Such a situation certainly could not prejudice holders or purchasers of the new bonds. It is true that the security for the payment of the bonds would be reduced by the properties of complainant's Company, but there would be substituted in place of the properties almost all of the common stock. It is true that that proportionate share of complainant's Company which is represented by the preferred stock (plus a small amount of common stock), would be taken from the security of the bonds, but there would be at the same time a reduction of the total bond issue amounting to $18,666,666. Such a change could not possibly injure the security of the remaining bondholders, especially if the defendants are right in their contention that the preferred stockholders would never be entitled to more than the par value of their shares. If defendants are right in that contention the security for the bonds would be reduced by only $14,000,000 (plus the small amount of common stock), while the total bond issue would be reduced $18,666,666. That is (excepting the small amount of common stock), the bond issue would be reduced $4,666,666 more than the reduction in the security. This would render the remaining bonds even better secured than they are at present. If we include in our calculation the $225,450 common stock outstanding, there will of course be some difference in the figures, but the result cannot be substantially changed.

We can well understand that although complainant's right is well founded, the Court might hesitate to grant him relief if the result would be to seriously damage or render worthless bonds

amounting to $134,789,100. The defendants appreciate this, and have sought to defeat complainant by giving the Court the impression that incalculable damage and financial panic would result if complainant's rights were enforced. As we have seen, this is wholly erroneous. There will be no damage to third parties, no financial panic whatever.

POINT VII.

There has been no laches on the part of complainant.

The defendants contend that complainant is in laches, and that therefore no matter how fundamental are his rights, no matter how great his damage, he should be denied relief.

The evidence shows that about the middle of November, 1904, complainant learned of the merger and obtained copies of the merger agreement, trust indenture and other papers. He was at that time concerned solely about the dividend on his stock which was due and unpaid. He demanded payment of the dividend and consulted his attorney at once in regard to recovering the same.

At that time complainant did not understand the terms of the merger, the unfairness of the provision made for him or that his rights were being violated. It is urged by the defendants that complainant should have at once elected to reject the merger. But complainant was entirely unaware that he had any such election. Mr. Francis of the Morton Trust Company informed complainant, in effect, that he must accept the merger, that there was no alternative. Complainant, moreover, had the right to assume that the Directors of his Company had not violated their trust, that nothing *ultra vires* had been done or attempted, that the other stockholders had not disregarded their contractual obligations, and that his rights had not

been ignored. He was certainly not bound to suspect all these things, and to employ a lawyer at once at the expense of the estate to make an investigation.

It was impossible for complainant to make an election in regard to the merger agreement until he understood its provisions and the effect of its provisions, and until he understood what were his rights in the matter. The transaction was most involved and complicated. The merger agreement, trust indenture and other papers require considerable study before their provisions can be comprehended, and the transaction cannot at all be understood from these papers alone. The fairness of the merger, the basis upon which the defendant Companies were taken into the consolidation, cannot be understood without a knowledge of the assets and liabilities of the three consolidating Companies. This required a search for reliable information in regard to the assets and liabilities. In addition, it was necessary for complainant to understand his legal position. He could not ascertain this by merely asking a lawyer. No lawyer could correctly advise him without an examination of the Company's certificate of incorporation at Trenton, the amendments to the same, the merger agreement, the trust indenture, the statutes of New Jersey in force in 1891, the Merger Law of 1893, and a number of authorities. Several difficult questions of law would have to be passed upon before complainant's rights could be understood. For example complainant would have to be advised as to the rights of a preferred stockholder to a full share of the assets upon dissolution. This seems to be a difficult question in regard to which counsel differ, and yet, this, as well as all the other points, would have to be fully understood before complainant could act intelligently. De-

fendants can hardly maintain the position that complainant was bound to elect to reject the merger immediately, unless they concede that the merger was an obvious violation of complainant's rights.

The defendants also contend that complainant should have at once consulted New Jersey counsel, but New Jersey counsel would have had to make the same examination of the facts before he could have given advice, and he would, no doubt, have had to make some examination of the law. This contention, however, is based upon the incorrect assumption that complainant from the first knew the merger agreement was invalid as to him, and knew that he might reject it. Complainant, as we have seen, did not know this, and only consulted counsel at first for the purpose of recovering the dividend due upon his stock. For this purpose a New York lawyer was just as competent as a New Jersey lawyer. Even after complainant understood the matter sufficiently to reject the merger agreement, he was still under no duty to consult New Jersey counsel, because complainant might have brought his action in the Federal Courts or in the Courts of New York. Complainant was most prompt in consulting his lawyer, and surely it cannot be said that he, a New York Administrator, was under any duty to put the estate to the further expense of employing foreign counsel until it was decided to bring the action in New Jersey and such an expense became necessary.

Complainant was fully diligent. He called on the Morton Trust Company, The Farmers' Loan and Trust Company and The American Tobacco Company. He consulted with his attorney and his broker and made inquiries among his acquaintances. He obtained all the printed matter he could

get, and he and his attorney examined financial records and other books of information.

Notwithstanding that complainant as Administrator had no personal knowledge in regard to the Company and its organization, notwithstanding the unusual nature and complicated details of the transaction, the difficult problems involved, and the difficulties of obtaining any reliable information, complaint investigated and studied the matter so diligently that on January 7th, 1905, he became convinced that the merger was unlawful, that it would cause him pecuniary loss, and on that day he caused a formal protest in writing, addressed to the Officers and Directors of his Company, to be delivered to the Vice-President. The delivery of this written protest was only fifty-three days after complainant received a copy of the merger agreement. This was certainly no unreasonable length of time, and it must be remembered that up to the time of this protest the merger had not been consummated. The merger agreement, it is true, had been filed, and a quantity of the stock of the three consolidating Companies had been deposited with the Morton Trust Company, and certificates of deposit given for the same. The new stock and the new bonds, however, had not been issued, and the certificates of deposit represented and were the equivalent of the old securities only, although entitling the holders to receive the new when issued.

Complainant's protest of January 7th, was notice to the defendants that he rejected the merger. The defendants knew when they received that protest that complainant would bring this action unless there was something to justify or explain what complainant believed to be a violation of his rights, and they knew there was no justification or explanation. They knew complainant's rights had been disregarded, they knew the merger was invalid, and

they knew that the new securities, if issued, would not be secured by any valid lien on the properties of complainant's Company.

Under these circumstances, the defendants might well have gone to complainant and tried fairly to obtain his consent. But they did not do this. They ignored complainant's rights, and deliberately proceeded to issue the new stock and the new bonds.

Defendants have been at fault from the first. They sent no notice of the stockholders' meeting to complainant. They sent the notice to the deceased, knowing him to be dead. They attempted to make a merger which was unlawful and in violation of the rights of minority stockholders. They ignored complainant's protest and went ahead and issued the new securities. When complainant's first protest was received, the defendants made no reply, although a reply was promised. Complainant was obliged to write again, and, as defendants' answer was then evasive, a third letter became necessary. If there was any delay before the filing of the bill of complaint, the defendants are far more to blame for that delay than is the complainant. After the bill was filed, the defendants caused further delay. The service of the answers was delayed, and one answer was defective and exceptions were necessary, and then a further answer was filed.

In the case of Kean v. Johnson, the sale or merger complained of was consummated in April, 1849. The bill of complaint in that case was not filed until November 30th, 1850. That is, one year and seven months after the act complained of. The case does not seem to have been disposed of until February, 1853.

In Mills v. Central R. R., 14 Stow., page 1, the lease was made May 29th, 1883, and ratified

on June 14th. The bill of complaint was not filed until August 29th, 1883, fifty-four days after the lessee had taken possession. In that case, moreover, unlike the case at bar, the complainant knew all about the proposed lease some time before it was made, and some time before it was ratified by the stockholders.

In neither of the foregoing cases was laches held to be a sufficient defense, and we can find no authority which would justify such a decision in the case at bar.

The case of Rabe v. Dunlap, 51 N. J. Eq., 40, is a case which correctly illustrates the application of laches. There was a delay of over three years, and an apparent assent to what had been done. There was nothing in that case which could be authority for defeating complainant in the case at bar.

It will no doubt be claimed by the defendants that third parties have relied upon complainant's inactivity to their damage. Such a proposition is entirely untenable. There was, as we have seen, no inactivity on the part of complainant. Third parties, moreover, did not rely on complainant, they relied upon defendants. Third parties undoubtedly thought that the defendants had properly given notice to all the stockholders of the meeting which was called to ratify the merger, third parties undoubtedly believed that the defendants were not attempting anything illegal. They relied upon the acts of the defendants, upon the two-third majority which voted in favor of the merger, upon the filing of the merger agreement, the trust indenture, and the issuing of the bonds and new securities by the Morton Trust Company.

Third parties did not rely upon complainant, but, in any event, if relief is granted complainant, no damage will result to third parties (Point VI).

Complainant used due diligence as soon as he learned that a merger of his Company had been attempted. He protested in writing as soon as he could understand the nature of the transaction and his position in the matter, and under all the circumstances, he filed his bill with reasonable promptness.

POINT VIII.

Complainant has no adequate remedy at law.

The defendants contend that this action is an attack upon the charter of the merged corporation and that, therefore, a Court of equity is without jurisdiction and that proceedings must be had at law, upon information in the nature of *quo warranto.*

The object of this bill is to restore to complainant and to complainant's Company the properties of the Company, and to have the lien of the new Company's mortgage upon those properties cancelled. Complainant does not question the validity of the merged corporation's charter. He does not question that it is a valid merger of the Continental Tobacco Company and the Consolidated Tobacco Company. All he seeks to do is to have the properties of his Company restored. As the merger is valid as to the other companies, and as complainant has no interest in those other companies, he would have no standing to make an attack upon the charter of the new Company.

So far as complainant is concerned, the new merged corporation exists *de facto* and *de jure.* Complainant's grievance is that this new corporation has unlawfully obtained possession of the properties of his Company and has charged the same with the lien of the new Company's mortgage.

In the recent case of Jones v. Missouri Company, (144 Fed. Rep., 765), a bill was filed in equity by a stockholder of one of two consolidating railroads, for the purpose of having the consolidation declared invalid. The defendants raised the point that the Court had no jurisdiction because the bill was in effect an attack upon the charter of the consolidated corporation. The Court, however, by Judge SANBORNE, overruled this contention, and held that a court of equity had plenary power to grant the relief asked. In that case fraud was alleged to invalidate the merger, while in the case at bar, the alleged merger is wholly unauthorized by any valid law, and therefore no proof of fraud is necessary.

The case of Terhune v. Midland R. R. Co. (38 N. J. Eq., 423), which was cited by the defendants, presents an entirely different state of facts and is no authority for the defendants' contention.

Another error in the defendants' contention arises from the fact that the remedy known as *quo warranto*, or information in the nature thereof, can only be had in the case of *de facto* corporations. It is well settled that there can be no *de facto* corporation, unless there is a valid law under which the corporation could be formed and a *bona fide* attempt to organize under such law. In the present case, there is no valid law under which complainant's Company could have been merged. This was known to defendants when the merger was attempted. Therefore, so far as the new corporation is a merger of complainant's Company, it is not even a *de facto* merger or a *de facto* corporation, and *quo warranto* would not lie.

The Directors, and a majority of the stockholders of the complainant's Company, have transferred all the assests of the complainant's Company to the new merged corporation. The transfer was unlawful and *ultra vires*. It was affected by means

of an alleged merger under color of the Merger Law, which is either invalid or inapplicable. Complainant could undoubtedly have enjoined the transfer had he been aware that the same was contemplated. As he did not know of it until afterward, a Court of equity will set the same aside just as it will set aside a sale or lease which is unlawful and *ultra vires*. This is the only relief which will be an adequate remedy to complainant.

POINT IX.

Although authorized by statute, no majority of the stockholders can dissolve a corporation which is a going concern and not insolvent, for the purpose of depriving minority stockholders of their interest.

In October, 1904, the American Tobacco Company was in a most prosperous condition. It had commenced business with a capital stock of $25,000,000. This had been increased, and at the time of the alleged merger there were outstanding over $68,000,000 in common and preferred stock. The preferred was selling many points above par and had regularly paid an eight per cent. (8%) dividend. The common was selling at even a much greater price.

There was no suggestion of dissolving the corporation or discontinuing the business. The merger which has been attempted manifests no intention to abandon the business which was carried on by the American Tobacco Company or to wind up its affairs and distribute its assets. On the contrary, the merger contemplates a continuance of the business by the new merged corporation.

Under these circumstances, it is absurd for the defendants to contend that complainant was at any

time liable to be deprived of his stock by dissolution. It was then and it is now, impossible to effect a dissolution of the American Tobacco Company. The Company, as we have seen, was in a most prosperous condition, and it is very improbable that a single vote would be cast in favor of a dissolution.

The merger which has been attempted is not a dissolution. There can be no valid dissolution of a corporation unless the statute which authorize the same have been complied with.

Coler v. Tacoma, 20 Dickinson.

As a matter of fact, the defendants' contention is wholly erroneous. There was no dissolution; the majority will not vote in favor of a dissolution. And the alleged merger is substantially different in that there has been no distribution of the assets in proportionate shares to complainant and the other stockholders.

But, as a matter of law, and as a purely theoretical argument, the defendants' contention is contrary to principles of law as announced by the best authorities. In Cook on Corporations. Fifth Edition (1903), Volume 2, Section 670, the learned author states the law as follows:

> "Neither the directors nor a majority of the stockholders have power to sell all the corporate property as against the dissent of a single stockholder, unless the corporation is in a failing condition. Ever since the case of Abbott v. American Hard Rubber Company the law has been clearly established in this country that a dissenting stockholder may prevent the sale of all the corporate property by the directors or by a majority of the stockholders, where the corporation is a solvent, going concern. And even where a dissolution is the purpose in view, yet, if the corporation is a prosperous one, such a sale cannot be made. In-

deed it is very doubtful whether a dissolution can ever be had at common law by a majority of the stockholders when the corporation is a going, prosperous concern. And certainly if the purpose of such dissolution is not the *bona fide* discontinuance of the business, but is the continuance of that business by another new corporation, then the rule is that a dissenting stockholder may prevent the sale, even though it is made with a view to dissolution of the corporation. This is the law as laid down in the well considered case of Kean v. Johnson. Such a dissolution is practically a fraud on dissenting stockholders. It seeks to do indirectly that which cannot be done directly."

He cites many authorities in support of this statement of the law, and among others, the following:

Abbott v. American Hard Rubber Co., 33 Barb., 578; 4 Blatchf., 489, s. c., 1 Fed. Cas., 13.

People v. Ballard, 134 N. Y., 269.

Re Sovereign S. Ass. Co., L. R., 42 Ch. Div., 540 (1889).

Smith v. N. Y., etc., Co., 18 Abb. Pr., 419, 435.

Rollins v. Clay, 33 Me., 132.

Middlesex R. R. v. Boston, etc., R. R., 115 Mass., 347.

Harding v. American, etc., Co., 182 Ill., 551.

Boston, etc., R. R. v. New York, etc., R. R., 13 R. I., 260.

At Section 629 of the same work, Mr. Cook says:

"* * * Where the dissolution is merely a device to effect a consolidation which otherwise would be *ultra vires*, it has been held that the majority cannot dissolve the corporation in opposition to the wishes of the minority."

In this connection, he cites the following:

Polar Star Lodge v. Polar Star Lodge, 16 La. Ann., 27 (1861).
Mobile, etc., R. R. v. State, 29 Ala., 573 (1857).

It is well settled that, although authorized by statute, the dissolution of a prosperous corporation cannot be had for the purpose of freezing out a minority.

Treadwell v. United, etc., Co., 47 N. Y. App. Div., 613.
Elbogen v. Gerbereux, etc., Co., 30 N. Y. Misc. R., 264.

This proposition has recently (on January 5, 1904), come before the Supreme Court of Washington State, in Theis v. Spokane Falls Gas Light Company, 74 Pac. Rep., 1004. In that case an attempt was made by a majority of the stockholders to dissolve a corporation for the purpose of transferring the business to another corporation. The statute authorized a dissolution by a vote of two-thirds of the stockholders, and the majority complied with the statute and transferred the business to a new corporation. A minority stockholder objected, and filed a bill in equity to have the transfer set aside, and the Court held that he was entitled to relief. The rule was broadly stated that, although a dissolution was authorized by a vote of two-thirds of the stockholders, that this could only be had where the majority in good faith desired a dissolution for the purpose of terminating the corporation's business, and that such a statute does not authorize the dissolution of a corporation which is a going concern and not insolvent, without the consent of all the stockholders.

The only authority cited by the defendants in

support of their contention is the case of Black v. Delaware, etc., Canal Company, 7 C. E. Gr., 130, but that case is no authority at all for such a proposition. In that case, the Court expressly said at pages 415 to 416:

> "I hold that a charter which declared that the undertaking should be prosecuted for a definite time, is a contract for that time, and binds all to continue it."

It is submitted that the authorities referred to correctly state the law, and that it would be very wrong in principle to allow any majority, although authorized by statute, to dissolve a corporation when no *bona fide* winding-up of the corporation's affairs is intended, and when it is obvious that the dissolution is had solely for the purpose of depriving minority stockholders of their interests.

POINT X.

An offer of money or an obligation to pay money cannot justify an unlawful taking of private property or destruction of contractual obligations.

Under the terms of the merger complainant is offered bonds or obligations of the merged corporation. He is asked to accept these in exchange for his property rights and in lieu of the contractual obligations of the old Company and his fellow-stockholders.

In the defendants' answer complainant is offered the market value of his stock at the time of the alleged consolidation, or the present worth of his stock and all dividends that could possibly be earned thereon until the expiration of the original

charter (the offer of present worth is ambiguous unless the rate of discount is also stated).

As we have already seen, complainant is entitled upon dissolution to a full share of the assets of his Company, and in view of this fact it is doubtful if the bonds or cash offered are the equivalent in value of complainant's stock.

It will be observed that the offer in the answer is substantially the same as the offer under the merger agreement. That is, the answer offers a present payment of cash, while the merger agreement offers an obligation to pay a certain amount of cash at a future day with interest. The legal significance of these two offers is the same, and the question to be decided is as follows:

Does the offer of money or an obligation to pay money at a future day justify an unlawful taking of private property or destruction of contractual obigations?

The value of the bonds or the amount of cash offered is all beside the point. The question to be determined is not the advisability or expediency of accepting the offer, but the right of the defendants to compel its acceptance.

It is submitted that the question can only be answered in the affirmative by holding that private property can be taken without due process of law.

We respectfully assert that it is not the province of the Court to pass upon the fairness or advisability of accepting the obligation or money offered complainant in lieu of his property. Complainant is the sole judge as to this. And if complainant is forced to accept the offer and obliged to part with his property and relinquish his contractual rights, he is being deprived of property without due process of law, and contractual obligations are being impaired.

The right of a majority of the stockholders to force a minority stockholder to relinquish his property upon being adequately compensated or indemnified was first considered in the case of Natusch v. Irving; Gow on Partnership, 398; 2 Cooper's Ch., 358. In that case, Lord ELDON denied that the majority had any such right, and expressly held:

"It is the right of a partner to hold his associates to the specified purposes whilst the partnership continues."

This decision was referred to by the learned Master in Kean v. Johnson, and was recognized as sound law.

The only case which we can find where it was held that a majority might force a minority to relinquish his property rights upon being given security for the value of his property is Lauman v. Railroad Co., 30 Pa., 42, and the decision in that case has been expressly repudiated by the Courts of New Jersey and by other leading authorities.

In Black v. Delaware, etc., Canal Co., 7 C. E. Gr., 130, at page 405, the learned Chancellor referred to the decision in Lauman v. Railroad Co. (*supra*), and expressly declared that he did not concur with the views of the Pennsylvania Court.

The author of Cook on Corporations, Fifth Edition, Volume 2, Section 502, says in regard to the case of Lauman v. Railroad Co. (*supra*):

"This decision, however, has been doubted, and hardly seems consistent with well-established principles protecting persons in their right to retain their property, except as taken from them under the power of eminent domain."

In support of this, the author cites Mowrey v. Indianapolis, etc., R. R., 4 Biss., 76; s. c., 17 Fed. Cas., 930.

POINT XI.

No specific performance is asked.

The defendants have argued that complainant seeks to have specific performance of his contract with the Company and the other stockholders, and it has been suggested that a Court of equity has no power to decree specific performance of such a contract.

The error here arises from a misunderstanding of the prayer of complainant's bill. Complainant does not ask for a decree directing that the Company and his fellow stockholders perform their contracts with him. He does not ask for a decree directing that the officers perform their duties. The essence of complainant's prayer is not that a contract be performed, but that an alleged contract which was unauthorized by law and *ultra vires* be declared illegal and void. Such a decree would not direct specific performance. After the alleged merger of complainant's Company, and the alleged transfer of the assets of his Company to the merged corporation, has been declared illegal and void, it will then be time enough for complainant and the other stockholders to consider the question of continuing the business of his Company as formerly. We have no doubt that after the alleged merger is declared illegal that the other stockholders will be only too willing in their own interest to see that Directors and Officers are chosen who will properly conduct the business for which the corporation was organized. If, after the merger is declared illegal, the officers should neglect their duties, it is vain to suppose that the majority of the stockholders would support them in their neglect, or that complainant and the other stockholders would not then be amply pro-

tected by the general laws relating to the management of corporate enterprises.

The relief which complainant asks it to have the alleged merger declared invalid, and the properties of his Company restored to the Company free from the lien of the mortgage. This is no more of a demand for specific performance of the charter than is any other suit by a stockholder to have any other fraudulent or *ultra vires* sale, lease or contract declared null and void. The same objection might have been urged in all the leading cases on this subject, but, so far as we can ascertain, such an objection has never been held to deprive a complaining stockholder of his right to have an *ultra vires* and illegal contract declared null and void.

The Remedy.

The relief which complainant asks in this case is to have the so-called merger agreement declared null and void as to complainant, as to the other stockholders, as to the American Tobacco Company and as to the assets of that corporation; to have the lien of the mortgage made by the merged corporation removed from the property of the American Tobacco Company; to have an ascertainment under the direction of the Court of the real and personal property owned by the American Tobacco Company at the time of the supposed merger, a separation of the same from the property of the new merged corporation, and an ascertainment of the amount of loss and damage which has been sustained by complainant's Company and its stockholders; to have the merged corporation account for all property, income, profits, etc., of complainant's corporation, and that the merged corporation may be enjoined from using the name of complainant's Company.

This relief is the only form of relief which will

adequately protect complainant, and is the only form of relief which will recognize complainant's rights in the matter and do complete justice under the facts of this case.

It must be remembered that complainant's rights are of the most sacred and fundamental character. That he has no adequate remedy at law and that he comes into this Court diligently and with clean hands.

It is true that complainant's interest, although of substantial value, is small when compared to the enormous interests of others, but this consideration can have no bearing upon the decision unless might is to make right.

The circumstance which we have called attention to in Point VI, namely, that nearly all the common stock of complainant's Company was owned by the Consolidated Tobacco Company, and will, therefore, be the property of the merged corporation, is an important consideration. In view of this fact, the prayer of complainant's bill can be fully granted without the slightest risk of injury to the bondholders. And if no injury can result, surely complainant's rights must be enforced and he must be granted full relief.

There can be no great practical difficulties which could interfere with granting complainant the relief to which he is entitled. The stock of the old American Tobacco Company can be easily reissued to the old holders or their assigns, as pointed out in Point VI, and the stock and bonds of the new Company, which were given in exchange, can be received back in exchange for the stock of the old Company. There must be some record showing which bonds were given in exchange for the certificates when they were deposited, and the bonds or stock could be easily located as in the hands of

those parties to whom the interest or dividends are paid.

There can, moreover, be no great difficulty in separating the factories of the old Company and in ascertaining what part of the profits of the merged corporation are justly due complainant's Company.

It will, moreover, be easy enough for the new merged corporation to assume the name of the old Consolidated Tobacco Company or Continental Tobacco Company.

But, even if there were great practical difficulties and objections to the granting of the prayer of complainant's bill, nevertheless, if his right is clear, if he has no adequate remedy at law, and comes into Court diligently and with clean hands, relief should be granted. The consideration of practical difficulties should never prevent the Court from granting complainant a decree, especially when all of those difficulties are the result of the defendants' unlawful act and persistence in consummating that act after receiving complainant's written protest.

In the case of the Northern Securities Company, the practical difficulties were enormous. They were very much greater than in the case at bar, and yet such considerations did not prevent the United States Supreme Court from declaring the Company illegal, and in effect directing a complete readjustment of the interests of the different stockholders.

In Mills against the railroad company, the lessee had been in possession and operating the railroad for some time. The practical difficulties if a decree were granted, must have been enormous, and, yet, the Court held the lease invalid. The same practical difficulties must have been encountered in many of the other cases also cited, and yet there is no case where these difficulties alone have been held sufficient to defeat complainant's rights.

The complainant is entitled to the relief prayed for in the bill.

Respectfully submitted,

COULT & SMITH,

Solicitors for Complainant and Appellant.

GROSVENOR NICHOLAS,

Of Counsel.

[2788]

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New Jersey Court of Errors and Appeals

Between RICHARD T. DANA, *Complainant and Appellant,* *and* THE AMERICAN TOBACCO COMPANY, AND THE MORTON TRUST COMPANY, *Defendants and Respondents.*	*On Appeal from Decree in Chancery.*

MEMORANDUM FOR THE MORTON TRUST COMPANY.

The bill of complaint in this cause was filed on the twentieth of March, 1905, and was designed to set aside a certain agreement of merger made and entered into between The American Tobacco Company, (a former company of that name), The Continental Tobacco Company and the Consolidated Tobacco Company, filed in the office of the Secretary of State of New Jersey on the nineteenth day of October, 1904. This agreement is printed on page 17 of the record, and it is undisputed that a meeting of the Directors of the old American Tobacco Company was held on the tenth day of September, 1904, at which the advisability of said company's entering into said agreement of consolidation was unanimously agreed to, and the matter being after due notice, submitted on September 30th, 1904, to the stockholders, the same was ratified by a vote of 1,157,214 shares of stock, out of a total issue of 1,230,000 shares, against 1720 shares in opposition. The same formalities were gone through

with by the respective directors and stockholders of the two other constituent companies, the project receiving practically unanimous support from their stockholders. The greatest possible publicity was given to the whole transaction. Not only was a notice mailed to each stockholder of record, but advertisement thereof was made in several New York daily papers. The statutory requirements having been in all respects complied with, and no serious objection to the plan having been manifested (the owners of the 1720 shares which were voted in opposition having later, upon fuller information, changed their minds, and exchanged their holdings (p. 155), the new company organized and pursuant to the plan, authorized, on or about October 20th, 1904, the issuance of $56,100,000 6% bonds, and $78,689,100 4% bonds, secured by a deed of trust, whereby a charge on all the then present or after acquired property, net income, earnings and profits of the company, was created in The Morton Trust Company as Trustee for all the bondholders. Nearly if not quite all of these bonds had been delivered to the proper holders prior to the commencement of this suit. These bonds as well as the issue of nearly $80,000,000 of preferred stock and $40,000,000 of common stock of the new company had been duly listed on the New York Stock Exchange, and had been generally dealt in by the investing public, so that a large part of the bonds (as well as of the stock) was at the time of the filing of complainant's bill, owned by persons who had no connection whatever with any of the Tobacco Companies, and who had invested therein on the faith of the merger. In addition to that $151,636,200 (p. 153) of the 4% bonds of the Consolidated Tobacco Company (out of a total of $157,378, 200) had been surrendered and the lien of that mortgage (Defendant's Exhibit A No. 5)

relinquished in exchange for an equivalent amount par value of the preferred stock and 4% bonds of the new company,— and this too, with the sanction of the Court of Chancery in the Ichelheimer suit (p. 160) wherein the fairness of the plan, which involved this exchange, was attacked and sustained by the Court of Chancery. Meantime a complete fusion of the business previously carried on by the old companies had been effected, so that—according to the testimony of Mr. Duke—it would be an impossibility to dissect the business, and to restore to the three several constituent companies their respective contributions to the merged company.

Now, who is the complainant, and what interest has he in the situation, and why should he invoke equitable relief to tear down this enormous business structure? He is the son of Richard S. Dana, who died January 19, 1904, owning one hundred shares of the preferred stock of the old American Tobacco Company. The complainant is the administrator of his father (who died in New York City); but instead of having the decedent's stock transferred to himself as administrator, he gave his brother a certificate for fifty shares, and retained the certificate for the remaining fifty shares himself, and it is these remaining fifty shares which give him his alleged right to the desired equitable relief. No one, not even his brother, the owner of the other fifty shares, or his mother, or his grandmother, both of whom own shares, has availed himself or herself of the privilege the bill offers of coming into the litigation and sharing the expense of its prosecution. This stock was never transferred on the company's books, and hence stood, at the time of the merger, in the name of the decedent. A clerk of the company (p. 128) swears that he mailed notices of the meeting of the stockholders, fully explaining the

proposition of merger to every stockholder of record, and presumably such a notice was duly sent, addressed to the father, at his address appearing on the company's books, which was his late residence in New York City. The agent or clerk of the company charged with the duty of sending out these notices was of course entirely ignorant of his death. The notices were mailed in Jersey City on September 10th, 1904. At that time the late residence of the decedent was empty (save for a caretaker), the complainant being abroad, and his brother and mother, the decedent's remaining next of kin, being at Lenox, Massachusetts. Notwithstanding, the brother states (p. 118) that he had given directions to the New York Post Office to have the mail addressed to his father forwarded to him at Lenox, yet the complainant admits (p. 94) that some mail went to the New York house and was lost.

The complainant, shortly before going abroad in the spring of 1904, sent a letter (Ex. C. 3, p. 200) to the New York office of the old American Tobacco Company (not the office in this state where the stock books are by law required to be kept), requesting dividends on all stock standing in the name of his late father to be sent by mail to the address given below, which was the Morton Trust Company. The letter contained a copy of the letters of administration that had been issued to the complainant. About one week after mailing that letter, complainant went abroad (p. 72) returning on October 5. Although about a week after his return and consequently before the merger became effective, he heard of some impending change in the American Tobacco Company or read about it in the papers (p. 97), he apparently made no further inquiries until he examined the pass-book in the Morton Trust Co. and found there the entry of the payment of the July dividend (p. 101), but not of the October divi-

dend, so he called on the Morton Trust Company, and about November tenth for the first time learned of the merger, which had become effective in the preceding month, and of the fact that he was entitled to his share of the securities in the merged company (the defendant) in accordance with the plan. Complainant then instituted an investigation calling upon the Farmers Loan and Trust Company to inquire, as well as upon the counsel of the Tobacco Company, and was immediately furnished with full information as to the exact situation. He employed Mr. Nicholas, a New York lawyer, who studied the documents, and set about advising the complainant of his legal rights in the premises. He did not at once protest against the transaction; on the contrary his letter to the Morton Trust Company (p. 204) indicated that he contemplated making the exchange. The complainant admits (p. 77, line 23) that he became irritated at a remark made by Mr. Francis, the Secretary of the Morton Trust Company, but not of the Tobacco Company, (p. 151), and hence, notwithstanding it is true that the income provided for under the plan of merger would be greater from the substituted securities than had been paid or was agreed to be paid on the preferred stock of the old company (p. 77) the complainant who determined to change his residence to New York City from New Jersey, where he had resided for a number of years, after he had learned that the bonds of the new company which he would receive in exchange for his fifty shares of stock would be taxable in New York (p. 92), made up his mind (which was still probably somewhat "irritated" at Mr. Francis' remark), that he did not like the plan of merger.

Well, the months of November and December 1904, and January, February and nearly all of March, 1905, passed. The merger had been as complainant knew

on November 10th, 1900, a *fait accompli.* The papers had been in his possession all this time, and he and his New York counsel, who was employed November 10th, 1904, had studied them carefully and must have learned of the proposed exchange of securities, and of the fact that they were to be listed on the New York Stock Exchange; and they could not but have realized that, when the plan had received the sanction of the required two-thirds of the stockholders. A vast number of shares of stock and negotiable bonds of the new company had both been issued to the old holders, and subsequently dealt in and purchased by strangers. The market price of these securities (which by the way was relatively considerably higher than that of the old preferred stock) was daily quoted, and the immense number of transactions therein was necessarily brought to the knowledge of the complainant and his New York counsel.

Finally (p. 125, line 40) Mr. Nicholas doubtingly concluded, about January 1, 1905, that inasmuch as the act permitting the merger had been passed a short time after the incorporation of the old American Tobacco Company, that the attempt to operate thereunder was violative of the rights of the stockholders of that company *inter sese.* Mr. Nicholas says (p. 126, line 7):

> "I told him there was some doubt in my mind, I had never had a case of the kind before, and he and I discussed the question of what we should do."

Some correspondence ensued (pp. 48-55) between the complainant and the former vice president of the old company, of protest on the complainant's part, and of insistence by the latter, that the transaction was entirely legal. It must be borne in mind that the complainant had had several interviews with Messrs.

Burroughs and Parker of the law department of the Tobacco Company, at which the completest explanation was given him, prior to this time.

Finally, on February 23, 1905 (Ex. C 17, p. 55) the complainant in a letter announces to the company that he "is reluctantly obliged to put the matter in the hands of his attorney who is Mr. Grosvenor Nicholas of 141 Broadway, New York City, with instructions to proceed as he sees fit to protect my interests." Mr. Nicholas after another month concluded (I don't know whether "reluctantly" or not), (p. 126, line 15), that the Court of New Jersey was the best tribunal to bring the action in, and so on the 10th or 15th of March, New Jersey counsel was retained and requested to take action; whereupon on the twenty-fourth of the same month the bill in this case was filed, designed to have the court declare *inter alia* the merger agreement null and void, and violative of complainant's rights as a stockholder in the original American Tobacco Company; also to declare that the lien of the mortgage by the merged company be null and void, so far as the complainant's rights and those of other stockholders of the original American Tobacco Company are concerned.

In view of the admitted fact that the value of complainant's holdings has greatly increased since the merger went into effect—and of course the same thing is true of the comparative value of his stock in the old company and its equivalent in the securities of the new—in view of the fact that on the day of the filing of complainant's bill in this cause, there had been deposited $13,644,500 of the preferred stock of the old American Tobacco Company, out of a total issue of $14,000,000; $39,745,400 of the stock of the old Consolidated Company, and $151,636,200 of its bonds; and $30,831,100 of the preferred stock of the old

Continental Company; in return for which there had been issued $78,178,100 in preferred and $38,563,100 of common stock of the new company, and $73,370,950 four per cent., and $52,573,300 six per cent. bonds of the new company, and of the fact that these new securities had been largely dealt in by new holders; in view of the fact that the physical assets of the three several constituent companies had in the meantime become, as Mr. Duke swears, inextricably mixed, and were all subject to a mortgage charge, securing bonds which are held by hundreds of innocent holders; the court should hesitate to make a decree that will upset this enormous transaction, when the owner of fifty shares of stock in the old company alone complains, and he, too, is guilty of delay in action of five months during which so much has occurred, and the rights of the holders of millions of dollars worth of securities have supervened.

By no possibility can these innocent holders, who accepted the new securities or bought them in the open market, while the complainant was thus hesitating, be restored to their original rights.

There were outstanding before the merger $157,378,200 of the 4% bonds of the old Consolidated Tobacco Company. These were secured by $48,829,100 par value common stock of the old Continental Tobacco Company and $108,549,100 par value of the common stock of the old American Tobacco Company —practically all the common stock of these companies. These bonds were all or nearly all surrendered and this collateral by the terms of the merger agreement became cancelled. These bonds are now represented partly by 6% preferred stock and partly by 4% bonds of the new company. The holders of this new stock bargained for and expected to receive a 6% security; it would be most unfair to relegate them to a security

similar to the old 4% bond. The holders of the new 4% bonds bargained for a bond secured by a direct lien on all the property of the new merged company; it would be most unjust (even if it were possible) to give them the lien of the old bonds, which was only a collateral trust lien on the stock of two of the companies. But such a result would bear most of all unjustly on the holders of the new 6% bonds, the securities which were offered to the complainant and rejected. These holders bargained for a first lien on all this vast combined property relying, of course, on the fact of the combination to increase the strength of their security; they bargained for a permanent mortgage obligation yielding them 6% until 1940. If the complainant were to succeed they would find themselves transmuted (if a reconversion were possible) into mere stockholders and as stockholders at the mercy of their fellow stockholders for a continuance of the investment, stockholders moreover in one of the constitutent companies and with an interest in parts only of a dismembered whole, and finally they would find the principal of their investment cut down one-third.

The complainant is relying on the contract, which he claims was written in his certificate for fifty shares of the stock of the old American Tobacco Company, that that company would continue its business until 1940, when its charter expired by limitation, and on the claim that the passage of the merger act, subsequent to the incorporation of the old American Company, violates such contract right. It will, however, be remembered that the law permitted two-thirds of the stockholders of the old company to wind up and dissolve that company at any time prior to the year 1940, and of course the charter was subject to alteration or amendment by the legislature. Was the grant

of the right to merge an improper amendment to the charter as against an unwilling stockholder, when the right to dissolve already existed?

This court, in the celebrated case of *Berger* vs. *U. S. Steel Co.*, 18 Dick., 809, 825, in speaking of the reserved right to amend charters of corporations in connection with contractual interest *inter sese* of stockholders in the original charter, remarked:

> "It is difficult to perceive how any substantial force can be accorded to it (i. e., the right to amend) unless some amendment may be made which may affect the rights of stockholders *inter sese* to some extent."

Reference in the opinion of Mr. Justice Van Syckel is then made to several English cases, and he continues:

> "While these cases are not controlling in this forum, they are instructive, as the declarations of very learned Judges, exercising broad equity power that the original articles of the company do not constitute such a fast bound contract between the shareholders *inter sese* as to create vested rights, which could not be unfavorably affected by an alteration of the articles in pursuance of the power given by section 50 of the companies' act of 1862. * * * * * * It is unnecessary however to determine in this case, what the true limitation upon the legislative power is; where the boundary line is which cannot be overstepped. * * * The law upon this subject, which is of great moment, is as yet in a formative state; a general rule upon a subject of so wide a range can be implanted in our jurisprudence only by gradual development, as questions arise for adjudication. Vice in a legislative act can not safely be predicated upon the mere fact that it may not be unreasonable to apprehend that some depreciation in the value of shares may flow from it. The legislature may impose addi-

> tional burdens; it may withdraw the right to engage in some remunerative branch of business, and may repeal the entire charter."

We venture to suggest, in view of this authoritative deliverance of this court, that the addition of the right to merge the company, (with a right of appraisal of the value of stock belonging to a dissentient), is not an unlawful amendment of the company's charter.

But suppose it be? Does that naked fact entitle this complainant to the extraordinary equitable relief he here desires? He is not seeking to prevent the consummation of a plan that he thinks is illegal as to him, but to undo an accomplished fact, which by reason of his delay in properly and promptly asserting his rights, has become so completely and inextricably finished that it is now practically impossible to tear down the structure. The court in such cases, will weigh consequences, and refuse the complainant the extraordinary relief he seeks, when the consequences will be so burdensome, and that too, largely if not altogether, through the delay and failure to act, of the complainant. If the complainant had employed his New Jersey counsel in November, who was familiar with the law applying to the situation and the practice of the Court of Chancery, he would doubtless have been in season. The securities were then in process of exchange, and had not been listed. Instead of doing that, he dallied with a New York lawyer who was naturally unacquainted with our law and practice and who had to spend months in familiarizing himself therewith.

In such cases the proper action of a Court of Equity is, to remit the complainant to his remedy at law, to recover the damage if any, he has suffered by reason of the alleged illegal conduct of which he complains. The Morton Trust Company, on behalf of the holders of

$124,944,250 of bonds of this Consolidated Company, respectfully urges the court to affirm the wise conclusion of the court below in this regard.

Respectfully submitted,

ROBERT H. McCARTER,

BRONSON WINTHROP,

Of counsel with The Morton Trust Company.

November Term, 1907.

INDEX.

TESTIMONY.

DEFENDANTS' EXHIBITS:

The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

Bill filed March 20, 1905.

IN CHANCERY OF NEW JERSEY.

To the Honorable William J. Magie,
Chancellor of the State of New Jersey:

In Chancery complaining shows unto your honor your orator, Richard T. Dana, in his capacity of administrator of the goods, chattels and effects of Richard S. Dana, deceased, of the city, county and state of New York, who sues not only on his own behalf, but on behalf of all other stockholders of the American Tobacco Company, a corporation which was organized under the laws of the state of New Jersey on or about the 21st day of January, 1890, who are similarly situated with him and who may come in and contribute to the expense of this suit.

1. That on the 21st day of January, 1890, the American Tobacco Company was organized under the general corporation laws of the state of New Jersey, being an act entitled "An Act Concerning Corporations," approved April 7, 1875, and the several supplements thereto and acts amendatory thereof, by the recording of a certificate of incorporation in the office of the county clerk of the county of Essex and filing the same in the office of the secretary of state, by virtue of which the said The American Tobacco Company became a corporation under that name, having its principal office and place of business in the city of Newark, in the county of Essex and state of New Jersey, and in the city of New York in the state of New York, and having for its objects the curing of leaf tobacco, the buying, manufacturing and selling of tobacco in all its forms, the establishment of factories, agents and depots for the sale and distribution thereof and the transportation of the same, with a right to do all things incidental to the business of trading and manufacturing aforesaid, and with authority to carry on its business outside of this state, and that it

had a total capital stock of $25,000,000, divided into 400,000 shares, of which $15,000,000 of said stock was divided into 300,000 shares of $50 each and was general or common stock, and $10,000,000 divided into 100,000 shares of $100 each, the same being preferred stock, which entitled the holders to receive in each year a dividend at the rate of eight per cent. per annum, payable half yearly before any dividend should be set apart or paid on said general or common stock, and that the said certificate gave to the holders of the preferred stock a preference on the assets of the company, and your orator now refers to a certified copy of the said certificate of incorporation in his possession for greater certainty, and begs leave to refer further thereto whenever it may be necessary to do so.

2. That on the 28th day of July, 1901, the capital stock of the said company was increased to $35,000,000 and a further increase was made on the 6th day of August, 1901.

3. That immediately after the organization of the said corporation it acquired a large amount of real estate and personal property and began the prosecution of the business for which it was organized, and carried on the said business with great profit and advantage to the stockholders from the date of its organization down to the autumn of the year 1904, as hereinafter more particularly set out.

4. That on the 7th day of April, 1892, Richard S. Dana, now deceased, whose administrator your orator is, purchased and became the owner of fifty (50) shares of the preferred capital stock of the said The American Tobacco Company, and that immediately after his purchase and on the same day, the same was transferred to him upon the books of the company, and a certificate therefor was issued to him on the same day, and that from said date the said stock has stood and now stands in his name on the books of that company, and that from said date and until the year 1904 the dividends accruing upon the said stock were paid to him and after his death to your orator out of

the profits of the said company's business, and at the times when the same were regularly due and payable.

5. That on or about the 19th day of January, 1904, the said Richard S. Dana died intestate, a resident of the city, county and state of New York, and that thereafter and on or about the 16th day of February, 1904, letters of administration of the goods, chattels and credits of the said Richard S. Dana were duly granted and issued to your orator by the Surrogate's Court of the county of New York, and that immediately after his appointment your orator qualified therefor by filing the necessary bond and that he thereupon took upon himself the burthen of the administration of the estate of the said deceased, and your orator shows that by virtue of the premises the legal title to the said stock devolved upon your orator by operation of law and that he has now and since the date of the said letters of administration has been, the legal owner thereof, subject only to such disposition as is required to be made thereof by the laws of the state of New York.

6. That on the 10th day of December, 1898, a corporation was organized under the General Corporation Laws of New Jersey, called the Continental Tobacco Company, and that on the 5th day of June, 1901, another corporation was formed under the General Corporation Laws of New Jersey, under the name of Consolidated Tobacco Company, which corporations are the same corporations which are hereinafter mentioned.

7. That on the 9th day of September, 1904, an agreement was entered into between the above mentioned The American Tobacco Company, Consolidated Tobacco Company and Continental Tobacco Company, in and by which it was agreed that the said three corporations should be consolidated into a single corporation under the name of the American Tobacco Company, which company is hereinafter called the merged corporation, and that the said merged corporation in addition to the powers conferred by the New Jersey Corporation act, should have certain other powers and be subject to certain limitations which are in the

said agreement fully set out, and that the Board of directors of the said merged corporation should be twenty-eight in number and that their names are as follows:

George Arents,	Pierre Lorillard,
Anthony N. Brady,	Thomas J. Maloney,
Paul Brown,	William H. McAlister,
John B. Cobb,	Rufus L. Patterson,
Thomas Dolan,	Oliver H. Payne,
Benjamin N. Duke,	Frank H. Ray,
James B. Duke,	Thomas F. Ryan,
Caleb C. Dula,	Grant B. Schley,
Robert B. Dula,	Robert A. C. Smith,
Charles E. Halliwell,	Robert K. Smith,
William R. Harris,	Charles N. Strotz,
George A. Helme,	George W. Watts,
Percival S. Hill,	Harry Weissinger,
Herbert D. Kingsbury,	Peter A. B. Widener.

And that the capital stock of said merged corporation should be $180,000,000 divided into common stock and preferred stock, and that the then indebtedness of each of the said corporations should be assumed in full by the said merged corporation, and that all the property, real, personal and mixed, of the said three corporations should vest in the said merged corporation immediately upon the adoption of said agreement by the stockholders of the said three corporations, and that the capital stock of each of the said corporations should be converted into the common stock, the preferred stock at the obligations of the said merged corporations, which should be apportioned among the stockholders of the said corporations according to the shares held by them in the said corporations, as more particularly set out in said agreement, and that the Morton Trust Company of the city of New York should be the transfer agent of the stock and obligations of the said merged corporation and the Farmers' Loan and Trust Company of the city of New York should be appointed registrar of the stock of the said corporation, and that its principal office should be at No. 104 First street, in the city of Jersey City, in the county of Hudson, as by the said agreement, a true

copy whereof is hereto annexed and made part hereof, reference being thereunto had, will more fully and at large appear.

8. That the said agreement, as your orator is informed and believes it to be true, and charges the truth to be, was promoted by a small number of individuals who were interested to a greater or less extent as stockholders and security holders of the three corporations above mentioned, and that so far as your orator knows or has reason to believe there was no imperative or business necessity or requirement of the tobacco market or the state of the finances of the country which required any such agreement or any such consolidation, but that the promoters of the said agreement, for reasons unknown to your orator, induced the directors of The American Tobacco Company to vote in favor of the same and that on or about the day of its date the said agreement was presented to a meeting of the Board of Directors of The American Tobacco Company, called specially for the purpose of considering it, at which meeting there were present:

James B. Duke,	Charles E. Halliwell,
Benjamin N. Duke,	Percival S. Hill,
George Arents,	Peter A. B. Widener,
John B. Cobb,	Rufus L. Patterson,
George B. Cobb,	William R. Harris,
George W. Watts,	Williamson W. Fuller,
Caleb C. Dula,	William L. Walker,
Thomas F. Jeffress,	Thomas F. Ryan,
Oliver H. Payne,	Anthony N. Brady,

all of whom voted in favor of the execution thereof, and that in pursuance of the action of the said board of directors, which action your orator conceives to be wholly illegal, the said agreement was finally executed by Percival S. Hill, its first vice-president, and Charles N. Strotz, its secretary.

9. That at the said meeting of the directors of the American Tobacco Company or at another meeting of the said board called specially for the purpose a resolution was passed directing the secretary to call a meeting of the stockholders of the said company to be

held at its office in Jersey City on the 30th day of September, 1904, to consider the said agreement and to vote for the adoption or rejection of the same. That your orator does not know and cannot state whether twenty days' notice of the said meeting was mailed to the last known post-office address of each of the stockholders or not, or whether the vote thereon was taken by ballot, but your orator shows that the said board of directors and the officers of The American Tobacco Company give out and pretend that the stockholders of The American Tobacco Company ratified the said agreement by a very large majority, and they claim that thereby The American Tobacco Company lawfully assented to be merged with the Continental Tobacco Company and Consolidated Tobacco Company into the above mentioned merged corporation.

10. That your orator is informed and believes it to be true and charges the truth to be, that the said agreement was at some time or other submitted to the stockholders of the Consolidated Tobacco Company and to the stockholders of the Continental Tobacco Company, and that it was ratified by the stockholders of the said companies by majorities equivalent to those required by the statute and that the officers of the last two companies give out and pretend that those companies also assented to the said consolidation or merger, but your orator shows that he has no accurate knowledge in relation to the action of the Consolidated Tobacco Company and the Continental Tobacco Company, and he prays that the defendants or such of them as have knowledge thereof may disclose fully to the court the proceedings taken by said companies in that behalf.

11. That on the 19th day of October, 1904, the said so-called merger agreement was filed in the office of the secretary of state, and that thereupon, as it is claimed, by the defendants hereto, the said merged corporation came into existence and that it is likewise claimed that from and after that date George Arents, Anthony N. Brady, Paul Brown, John B. Cobb, Thomas Dolan, Benjamin N. Duke, James B. Duke, Caleb C. Dula, Robert B. Dula, Charles E. Halliwell,

William R. Harris, George A. Helme, Percival S. Hill, Herbert D. Kingsbury, Pierre Lorillard, Thomas J. Maloney, William H. McAlister, Rufus L. Patterson, Oliver H. Payne, Frank H. Ray, Thomas F. Ryan, Grant B. Schley, Robert A. C. Smith, Robert K. Smith, Charles N. Strotz, George W. Watts, Harry Weissinger, and Peter A. B. Widener became directors thereof, and that certain persons named in the said so-called merger agreement in that behalf became officers thereof, and that the properties of the various corporations and the various corporations themselves became merged and consolidated into the said merged corporation, but your orator shows and charges the fact to be that there is no law which permits, allows, suffers or commands any such consolidation of the said corporations, and that while there is on the statute books of the state of New Jersey statutes which permit corporations to merge and consolidate, your orator shows and charges the fact to be that the said statutes have no application to the facts hereinabove set out; that the corporations above named do not come within the purview thereof, and that if it should be held that the said statutes which are hereinafter more particularly described do apply to the said corporations or one of them, then your orator insists that such statute is a violation of that provision of the Constitution of the United States which prohibits any state from passing any law impairing the obligation of contracts and deprives your orator of his property without due process of law, and is a violation of similar provisions and other provisions of the constitution and laws of the state of New Jersey.

12. That by virtue of the said so-called merger agreement provision is made for mortgaging and pledging the property and assets of the so-called merged corporation, including the property and assets of The American Tobacco Company, for the purpose of providing ways and means for effecting the said alleged consolidation, which provisions are found in Article VII of the said consolidation agreement, and that in pursuance of the plan of merger or consolidation set out in the said agreement, The American To-

bacco Company (the merged corporation) on the 20th day of October, 1904, made, executed and delivered to the Morton Trust Company, a corporation created and existing under the laws of the state of New York, as trustee, a mortgage to secure an issue of bonds of the said merged corporation to an amount not exceeding $56,100,000, bearing six per cent. interest and running for a period of forty years, and to secure a further issue of bonds not exceeding $78,689,100, bearing four per cent. interest, wherein and whereby the said merged corporation attempted to mortgage and pledge all the property of The American Tobacco Company, which the merged corporation claims title to by virtue of the said supposed merger agreement, and including all the property of The American Tobacco Company, in which corporation your orator is a stockholder, and your orator charges and insists that the said mortgage is null and void so far as it attempts to include and cover the assets and property of The American Tobacco Company, and that irreparable loss and damage has accrued to your orator and the other stockholders of The American Tobacco Company who have refused to consent to the said consolidation or merger, and that the directors of The American Tobacco Company (the original corporation) whose names are hereinabove given, and should be by the decree of this court made liable to your orator and the other non-assenting stockholders and to The American Tobacco Company, for all loss and damage which have so accrued by reason of their unlawful action.

13. That your orator did not attend the meeting of the stockholders of The American Tobacco Company held on the 30th day of September, 1904, for the purpose of considering the said agreement, and that he did not receive any notice thereof, for the reason that he was at that time sojourning in foreign lands; that he arrived home in the early part of the month of October, 1904, and did not hear of the proposed consolidation of the company in which he was a stockholder as aforesaid until after the said alleged consolidation

had been effected and the agreement filed in the office of the secretary of state.

14. That as soon as he was informed of what had taken place he called at the office of the Morton Trust Company in the city of New York and demanded information about the said consolidation, and that the officers of the said Morton Trust Company refused to give to your orator any information whatever in relation thereto excepting that your orator would receive no further dividends on his shares of stock and that they gave to your orator printed copies of the merger agreement and consents of stockholders to the conversion of their stock into bonds in accordance with the terms of the merged agreement, and that at the same time and on the same occasion the officers of the said trust company while informing your orator that no more dividends would be paid to him on his capital stock so long as he held it, did inform him that if he would surrender his stock and join in a consent to the merger agreement a sum would be paid to him which would be equivalent to the dividend payable at that time.

15. That about the time when your orator so called upon the Morton Trust Company, as hereinabove set out, he called at the office of the Farmers' Loan and Trust Company of New York, which company had been, and as your orator is informed and believes, still was then the transfer agent of The American Tobacco Company, the original corporation, for information in regard to the said alleged merger, and was there told by the vice-president of the said company that the stock and transfer books of The American Tobacco Company, the original corporation, had been closed in perpetuity and that no more stock of that company would be transferred on its books and that the company itself had gone out of existence.

16. That later in the year 1904, and as your orator now remembers, in the month of December of that year, your orator called at the office of The American Tobacco Company, No. 111 Fifth avenue, in the city of New York, and there had a conversation with one of

the officers and one of the attorneys of the said company, and that he was then and there told by them or one of them that the American Tobacco Company, the original corporation, had gone out of existence by the act of merger above mentioned; that none of its stock would be or could be transferred; that there were no certificates to be issued by that company.

17. That on the 7th day of January, 1905, your orator made a written demand on the officers and directors of the corporation in which he is a stockholder, in and by which your orator notified them that he was the holder of the said fifty shares of preferred stock and protested as a stockholder of The American Tobacco Company against the said alleged merger with the Continental Tobacco Company and the Consolidated Tobacco Company and demanded that the dividend then due according to the terms of his stock certificates should be paid to him and that the stock books be properly kept according to law, to which demand your orator received no reply, and that he repeated the same on the 19th day of January, 1905, and received a letter from Percival S. Hill, on the 23rd day of January, 1905, merely acknowledging receipt of his former letters and that on the 3rd day of February, 1905, your orator made another protest against the action of the company and another demand that his right as a shareholder of the said corporation should be recognized and repeating the demands in his former letters, to which your orator received another reply from the said Percival S. Hill, vice-president, and that the said correspondence between your orator and the said so-called merged corporation has continued down to the 17th day of March, 1905, on which day your orator made a specific demand on the Farmers' Loan and Trust Company, the transfer agent of the original American Tobacco Company and the registrar of the stock of the merged company for the transfer of the said fifty shares of your orator, as administrator, and your orator shows that the said American Tobacco Company and the merged corporation, the Morton Trust Company and the Farmers' Loan and Trust Company have each and all refused and neglected to

comply with the lawful demands made upon them as hereinabove stated by your orator, and that as the situation now is your orator's shares are to him practically worthless pieces of paper.

18. That your orator is informed and believes it to be true and charges the truth to be, that at the time of the consummation of the alleged merger of the said three corporations full and specific inventories were made and taken of all the property which had belonged to The American Tobacco Company (the original corporation), and which was taken over by the said merged corporation, and that such inventory and all the accounts in relation thereto are in the possession of the said merged corporation and that it is entirely practicable at this time to separate the property of The American Tobacco Company which went into the possession of the said merged corporation from the property of the Consolidated Tobacco Company and the Continental Tobacco Company, which was also taken over by the said merged corporation, and that your orator is likewise informed and believes and charges the truth to be, that the accounts of the business transacted by The American Tobacco Company (the original corporation) since the said alleged merger have been kept in such a manner as to make it practicable and comparatively easy to determine what proportion of the business of the merged corporation has been transacted with the capital and assets of the original American Tobacco Company, and your orator charges that it is entirely feasible and practicable to separate at this time the assets of The American Tobacco Company from the other assets of the merged corporation.

19. That the officers and directors of the said merged corporation now claim and pretend that under the statutes of the state of New Jersey your orator has no remedy whatever against the said merged corporation or any of its constituent corporations except to apply to the proper court or the judge for the appointment of commissioners to condemn his stock and compel the said corporation to pay him the full market value thereof; but your orator shows that the thirty

days within which the statute requires such action to be taken has long since elapsed and that the remedy now rendered impossible by the lapse of time is likewise impracticable and unconstitutional in that it violates the provisions of the constitution of the United States which are hereinabove recited, and deprives your orator of his property without his consent.

20. That your orator has not requested the board of directors of either the original American Tobacco Company or of the merged corporation to bring any suit in respect of the matters and causes of action herein set out, for the reason that all the persons who were directors of the original American Tobacco Company, with the exception of George B. Cobb, Thomas F. Jeffress, Williamson W. Fuller and William S. Walker, are made directors of the said merged corporation by the said supposed agreement of merger, and that they have accepted their appointment as such directors and have qualified therefor, and are now acting as such directors and that it would be futile to request them or any of them to bring any suit or suits or to take any action or proceedings with reference to the matters hereinabove set out and the causes of action herein contained.

21. That the said merged corporation since the date of the said supposed merger has used and employed the assets and property of The American Tobacco Company (the original corporation) in the management and conduct of its own business, and has appropriated to its own use all the income and profits derived therefrom; that this action on the part of the said merged corporation is wholly illegal and that the said merged corporation should account to your orator and to the said original corporation therefor and be required to pay back to the said The American Tobacco Company and its officers and shareholders the full amount thereof.

22. That by the terms of the said supposed merger agreement and the law under which the same has been attempted and the action of the said merged corporation thereunder, the said merged corporation claims

that all the property which was at the time of the said supposed merger owned by the said three corporations is now made subject to all the debts and obligations of the said three corporations without distinction or discrimination as between the said debts or the said property, but your orator shows that under the constitution and laws of this state neither the said corporations nor the legislature have any right whatever to incumber the property of The American Tobacco Company (the original corporation), with any of the debts or liabilities of the other two corporations, and that if any such thing has been done or attempted the same should be declared illegal and void.

Wherefore, inasmuch as your orator has no remedy by the strict rule of the common law, he prays:

1. That The American Tobacco Company, the Morton Trust Company, George Arents, Anthony N. Brady, Paul Brown, John B. Cobb, Thomas Dolan, Benjamin N. Duke, James B. Duke, Caleb C. Dula, Robert B. Dula, Charles E. Halliwell, William R. Harris, George A. Helme, Percival S. Hill, Herbert D. Kingsbury, Pierre Lorillard, Thomas J. Maloney, William H. McAlister, Rufus L. Patterson, Oliver H. Payne, Frank H. Ray, Thomas F. Ryan, Grant B. Schley, Robert A. C. Smith, Robert K. Smith, Charles N. Strotz, George W. Watts, Harry Weissinger, Peter A. B. Widener, George B. Cobb, Thomas F. Jeffress, Williamson W. Fuller and William S. Walker, may without oath (oath being waived) answer the premises and each fact above stated; and that they, or such of them as have knowledge thereof, may set forth and discover in detail all the proceedings taken by the officers or directors and the shareholders of the American Tobacco Company (the original corporation) looking to the said so-called merger, and that they, or such of them as have knowledge thereof, may set forth and discover what property, real and personal, belonging to the said original American Tobacco Company was transferred either by deed or by the operation of the said supposed merger to the said merged corporation, and the amount and value thereof.

2. That the so-called merger agreement, bearing date the 9th day of September, 1904, hereinabove mentioned, may be declared to be null and void as to your orator, and the other stockholders of the said original American Tobacco Company, and as to the assets of that corporation.

3. That the said so-called merger may be declared to be and to have been null and void and to be and to have been a violation of your orator's legal and constitutional rights as specified herein.

4. That the lien of the mortgage made by the said merged corporation to the Morton Trust Company may be removed from the property of the original American Tobacco Company and declared null and void as a lien thereon and null and void so far as the rights of your orator and the other stockholders of the said original the American Tobacco Company are concerned.

5. That there may be an ascertainment under the direction of this court of the specific items of real and personal estate and other assets which were owned by the said original American Tobacco Company at the time of the said supposed merger, and that the same may be separated from the property of the said merged corporation and be re-delivered to the officers and directors of The American Tobacco Company, the said original corporation.

6. That there may be an ascertainment under the direction of this court of the amount of loss and damage which has been sustained by the American Tobacco Company, the original corporation of that name, and its stockholders, and that the directors of the said original corporation whose names are given in the 7th paragraph of the foregoing bill may be made liable therefor and charged therewith by the decree of this court.

7. That this court will issue its mandatory injunction to compel the performance of the final decree herein.

8. That the said merged corporation may account for all the property, income, profits and moneys de-

rived by it from the assets of the said The American Tobacco Company, the original corporation.

That your orator may have such other relief as the nature of his case demands and as shall be agreeable to equity.

May it please your Honor to grant unto your orator not only the state's writ of subpoena to be issued out of and under the direction of this court, but also the state's writ of injunction, as hereinabove prayed, directed to the said the American Tobacco Company, Morton Trust Company, George Arentz, Anthony N. Brady, Paul Brown, John B. Cobb, Thomas Dolan, Benjamin N. Duke, James B. Duke, Caleb C. Dula, Robert B. Dula, Charles E. Halliwell, William R. Harris, George A. Helme, Percival S. Hill, Herbert D. Kingsbury, Pierre Lorillard, Thomas J. Maloney, William H. McAlister, Rufus L. Patterson, Oliver H. Payne, Frank H. Ray, Thomas F. Ryan, Grant B. Schley, Robert A. C. Smith, Robert K. Smith, Charles N. Strotz, George W. Watts, Harry Weissinger, Peter A. B. Widener, George B. Cobb, Thomas F. Jeffress, Williamson W. Fuller and William S. Walker, commanding them to appear in court to answer the premises and abide such decree as shall be made against them.

COULT, HOWELL & TEN EYCK,
Solicitors for and of Counsel with Complainant.

AMENDMENT.

The clerk will amend the bill of complaint herein by striking the name of George B. Cobb from the list of directors of The American Tobacco Company, which is contained in paragraph 8 of the bill of complaint, and inserting in the place thereof the name of Charles N. Strotz.

The clerk will further amend the bill of complaint by striking the name of George B. Cobb from the twentieth paragraph of the said bill of complaint, and also from the prayer for answer and relief and the prayer for process.

The clerk will amend the original bill of complaint herein by adding at the end of the 12th paragraph thereof the following:

"And your orator shows that the property which the said merged corporation covered or intended to cover by the said mortgage is scattered over the whole United States and is under the separate jurisdiction of such of the states in which portions of it may be respectively situated, and that among other places there is a large amount of such property within the state of New Jersey which is within the jurisdiction of this court, and that this court may, by its final decree, annul the same so far as the said property in New Jersey is concerned."

Add a new paragraph and number it 23:

"That the said merged corporation has adopted the name The American Tobacco Company, which was the name of the original company in which your orator, as such administrator as aforesaid, was and is a shareholder; that the use of such name was and is illegal and was and is an infringement upon the rights of the said original corporation and should be enjoined."

In the prayer for answer add the following:

"That the said defendants may set forth and discover what property is covered and conveyed by the mortgage herein above mentioned, made to the Morton Trust Company, and particularly what property situated in the state of New Jersey is affected by the said mortgage or intended so to be, and that the defendants may give a true account and statement of all such property."

In the prayer for process add the following:

"That the said merged corporation may be enjoined from using the name The American Tobacco Company as its corporate name, and that it may be compelled to assume some other name which shall be distinct and separate from the name of the corporation in which your orator is a stockholder as aforesaid."

MERGER AGREEMENT.

An agreement, made and entered into this ninth day of September, in the year nineteen hundred and four, between The Amerian Tobacco Company, a corporation of the State of New Jersey, by its directors; Consolidated Tobacco Company, a corporation of said State of New Jersey, by its directors; and Continental Tobacco Company; a corporation of said State of New Jersey, by its directors:

Whereas, the principal and registered office of each of said corporations in the State of New Jersey is at No. 104 First street, in the City of Jersey City, County of Hudson, and C. A. Hopman is the agent therein and in charge thereof, upon whom process against each of said corporations may be served within said state; and

Whereas, said The American Tobacco Company was organized pursuant to the provisions of an act of the Legislature of the State of New Jersey, entitled "An act concerning corporations," approved April 7, 1875, and the several supplements thereto and acts amendatory thereof; and the said Consolidated Tobacco Company and Continental Tobacco Company were organized pursuant to the provisions of an act of the Legislature of the State of New Jersey, entitled "An act concerning corporations (revision of 1896)," and the several supplements thereto and acts amendatory thereof; and all of said corporations were organized for the purpose of carrying on business of a similar nature, to wit: the manufacture and sale of tobacco and the products therof; and

Whereas, the respective boards of directors of the said corporations deem it advisable, for the purpose of greater efficiency and economy of management as well as for the general welfare of the said corporations, to merge and consolidate them under and pursuant to the provisions of said act entitled "An act concerning corporations (revision of 1896)," and the several supplements thereto and acts amendatory thereof;

Now, therefore, in consideration of the premises and of the mutual agreements, covenants, provisions and grants herein contained, it is hereby agreed by and between the said parties hereto, as follows:

Article I. The said The American Tobacco Company, the said Consolidated Tobacco Company, and the said Continental Tobacco Company, are hereby consolidated into a single corporation, under the name of "The American Tobacco Company" (hereinafter called the "merged corporation").

Article II. The said merged corporation, in addition to the powers conferred by section 1 of the act concerning corporations (revision of 1896), shall have the powers herein set out, and said merged corporation shall be subject to the limitations on said powers herein set out, to wit:

To dry, and cure, leaf tobacco, and to buy, manufacture, sell and otherwise deal in tobacco and the products of tobacco in any and all forms; to construct or otherwise acquire and hold, own, maintain and operate warehouses, factories, offices and other buildings, structures and appliances for the drying, curing, storing, manufacture, sale and distribution of tobacco and its products; to guarantee dividends on any shares of the capital stock of any corporation in which said merged corporation has an interest as stockholder, and to indorse or otherwise guarantee the principal and interest, or either, of any bonds, securities or other evidence of indebtedness created by any corporation in which said merged corporation has such an interest, provided that authority for any such indorsement or guaranty be first given by resolution adopted by vote of at least two-thirds of the whole board of directors of said merged corporation; to carry on any business operations deemed by said merged orporation to be necessary or advisable in connection with any of the objects of its incorporation or in furtherance of any thereof, or tending to increase the value of its property or stock; but nothing herein set forth is to be construed to authorize the formation hereby of an insurance, safe deposit or

trust company, banking corporation or savings bank or corporation deemed to possess any of the powers prohibited to corporations formed under the statutory provisions aforesaid; to conduct business in all other states, territories, possessions and dependencies of the United States of America, and in all foreign countries, and to have one or more offices out of the State of New Jersey, and to hold, purchase, mortgage and convey real and personal property out of said state as well as therein; the said merged corporation shall have power to purchase or otherwise acquire and hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock of or any bonds, securities or other evidences of indebtedness created by any other corporation or corporations of this or any other state or government, and to issue its own obligations in payment or in exchange therefor, or for any purpose of its incorporation, and to secure such obligations by pledge or mortgage under deed of trust or otherwise of the shares of capital stock or bonds, securities or other evidences of indebtedness so acquired, or of any property of the corporation. The power to make and alter by-laws of said merged corporation is conferred upon the directors. The directors of said merged corporation may hold their meetings and have an office and keep the books of the corporation (except the stock and transfer books) in the city of New York or elsewhere outside of the State of New Jersey. The directors of said merged corporation shall have the power to fix and determine from time to time and to vary the sum to be reserved, over and above its capital stock paid in, as a working capital, before declaring any dividends among its stockholders, and to fix the time of declaring and paying any dividend, and the amount of any dividend shall be determined by the directors, unless otherwise provided by the by-laws of the corporation; and to direct and determine the use and disposition of any surplus or net profits or earnings, over and above the capital stock paid in. All sums so reserved may be applied from time to time to the acquisition of property as the directors shall from time to time de-

termine, and neither the property so acquired nor any of its capital stock held by the corporation shall be regarded as accumulated profits, for the purpose of declaration or payment of dividends, unless otherwise determined by the directors. In case of any increase in the number of the directors of said merged corporation, pursuant to its by-laws, which may provide for such increase by vote of the directors, vacancies in the board shall be deemed to be thereby created which the existing directors shall have the power to fill until the next election by stockholders, or until successors shall be otherwise chosen. The by-laws of said merged corporation may prescribe the number necessary to constitute a quorum of the directors, which may be less than a majority of the directors. No period is limited for the duration of said merged corporation, but its existence shall be perpetual.

Article III. The board of directors of said merged corporation shall be twenty-eight in number, and the names and places of residence of the first directors and officers thereof, who shall hold office until their successors are chosen or appointed as provided by the by-laws of said merged corporation, are as follows:

DIRECTORS.	RESIDENCES.
George Arents,	104 First street, Jersey City, N. J.
Anthony N. Brady,	104 First street, Jersey City, N. J.
Paul Brown,	104 First street, Jersey City, N. J.
John B. Cobb,	104 First street, Jersey City, N. J.
Thomas Dolan,	104 First street, Jersey City, N. J.
Benjamin N. Duke,	104 First street, Jersey City, N. J.
James B. Duke,	104 First street, Jersey City, N. J.
Caleb C. Dula,	104 First street, Jersey City, N. J.
Robert B. Dula,	104 First street, Jersey City, N. J.
Charles E. Halliwell,	104 First street, Jersey City, N. J.
William R. Harris,	104 First street, Jersey City, N. J.
George A. Helme,	104 First street, Jersey City, N. J.
Percival S. Hill,	104 First street, Jersey City, N. J.
Herbert D. Kingsbury,	104 First street, Jersey City, N. J.
Pierre Lorillard,	104 First street, Jersey City, N. J.

Thomas J. Maloney, 104 First street, Jersey City, N. J.
William H. McAlister, 104 First street, Jersey City, N. J.
Rufus L. Patterson, 104 First street, Jersey City, N. J.
Oliver H. Payne, 104 First street, Jersey City, N. J.
Frank H. Ray, 104 First street, Jersey City, N. J.
Thomas F. Ryan, 104 First street, Jersey City N. J.
Grant B. Schley, 104 First street, Jersey City, N. J.
Robert A. C. Smith, 104 First street, Jersey City, N. J.
Robert K. Smith, 104 First street, Jersey City, N. J.
Charles N. Strotz, 104 First street, Jersey City, N. J.
George W. Watts, 104 First street, Jersey City, N. J.
Harry Weissinger, 104 First street, Jersey City, N. J.
Peter A. B. Widener, 104 First street, Jersey City, N. J.

OFFICERS. RESIDENCES.

President, James, B. Duke, 104 First street, Jersey City, N. J.
Vice-President, John B. Cobb, 104 First street, Jersey City, N. J.
Vice-President, Caleb C. Dula, 104 First street, Jersey City, N. J.
Vice-President, Charles E. Halliwell, 104 Frst street, Jersey City, N. J.
Vice-President, William R. Harris, 104 First street, Jersey City, N. J.
Vice-President, Percival S. Hill, 104 First street, Jersey City, N. J.
Secretary, William H. McAlister, 104 First street,
Assistant Secretary, Josiah T. Wilcox, 104 First street, Jersey City, N. J.
Assistant Secretary, Charles K. Faucette, 104 First street, Jersey City, N. J.
Treasurer, John M. W. Hicks, 104 First street Jersey City, N. J.

Article IV.—The capital stock of the said merged corporation is one hundred and eighty million ($180,000,000) dollars, divided into one million, eight hundred thousand (1,800,000) shares of the par value of one hundred ($100) dollars each. One million

(1,000,000) shares shall be common stock, and eight hundred thousand (800,000) shares shall be preferred stock. The rights of the holders of the said common stock and preferred stock respectively, shall be as follows: The holders of the preferred stock shall be entitled to receive out of the surplus of net earnings, and the merged corporation shall be bound to pay theron, as and when declared by the board of directors, a dividend at the rate of, but never exceeding, six (6%) per centum per annum, cumulative from and after the first day of October, nineteen hundred and four, payable yearly, half-yearly or quarterly, before any dividend shall be set apart or paid on the common stock; Provided, however, that when all accrued dividends on the preferred stock shall have been paid, the directors shall, if in their judgment the surplus or net profits after deducting the amount of dividends to accrue on the preferred stock during the current year shall be sufficient for such purpose, have power in their jurisdiction to declare and pay a dividend or dividends on the common stock. In case of liquidation or dissolution or distribution of assets of the said merged corporation, the holders of preferred stock shall be paid the par amount of their preferred shares and the amount of dividends accumulated and unpaid thereon, before any amount shall be payable or paid to the holders of the common stock; the balance of the assets of said merged corporation shall be divided ratably among the holders of the common stock.

The preferred stock shall not confer on the holders the right to attend or vote, either in person or by proxy, at elections of directors, or at any meetings of stockholders, except meetings convened for increasing or decreasing the capital stock, dissolving the corporation, or passing upon other matters with respect to which the statute expressly gives the power to preferred stockholders to vote.

Article V.—The said corporations are merged and consolidated upon the understanding and agreement that the present indebtedness of each of said corpora-

tions shall be assumed in full by the said merged corporation.

Article VI. All property, real, personal and mixed, of the said corporations, parties hereto, shall vest in the said merged corporation immediately upon the adoption of this agreement by the stockholders of the said corporations, as provided by the provisions of the said act entitled "An act concerning corporations (revision of 1896)" and the several supplements thereto and acts amendatory thereof; but if the said merged corporation shall deem or be advised that any further assignments, assurances in the law, or things are necessary or desirable to vest the title to such property in the said merged corporation, the said corporations parties hereto shall execute and do all such assignments, assurances in the law, and things necessary to vest the title to such property in said merged corporation, and otherwise to carry out the purposes of this agreement.

Article VII.—The capital stock of each of the said corporations parties hereto shall be converted into the common stock, the preferred stock or the obligations of said merged corporation, and the common stock, preferred stock and obligations of said merged corporation shall be apportioned among the stockholders of the said corporations, parties hereto, according to the shares held by the respective stockholders of said corporations, and shall be delivered to them upon the surrender of their certificates of stock, as follows:

There shall be apportioned to each of the holders of the eight per cent. preferred non-cumulative stock of the said The American Tobacco Company, party hereto, for each share of said preferred stock of the par value of $100 held by him, the obligation or bond of the said merged corporation of one hundred and thirty-three dollars, thirty-three and one-third cents ($133.33 1-3) in gold coin of the United States of the present standard of weight and fineness, due and payable on the first day of October, 1944, at the office or agency of the said merged corporation in the city of

New York, with interest thereon from October 1, 1904, at the rate of six (6%) per centum per annum, said interest to be payable to the holder of such bond or obligation, or to the holder of a coupon representing such interest, at said office or agency in like gold coin, semi-annually, on the first days of April and October in each year. Said bonds shall be issued in such denominations as the merged corporation shall see fit, and they shall along with the bonds provided for in the next paragraph hereof constitute a first charge upon the income and property of the merged corporation. There shall also be paid to the holders of said preferred stock of said The American Tobacco Company, party hereto, in lieu of dividend, an amount in cash equal to two dollars for each share of said preferred stock held by him.

There shall be apportioned to each of the holders of the seven per cent. non-cumulative preferred stock of said Continental Tobacco Company, party hereto, for each share of said preferred stock of the par value of $100 held by him, the obligation or bond of said merged corporation for one hundred and sixteen dollars, sixty-six and two-thirds cents ($116.66 2-3) in gold coin of the United States of the present standard of weight and fineness, due and payable on the first day of October, 1944, at the office or agency of the said merged corporation, in the city of New York, with interest thereon from October 1, 1904, at the rate of six (6%) per centum per annum, said interest to be payable to the holder of such bond or obligation or to the holder of a coupon representing such interest, at said office or agency in like gold coin, semi-annually, on the first day of April and October in each year. Said bonds shall be issued in such denominations as the merged corporation shall see fit, and they shall along with the bonds provided for in the next preceding paragraph constitute a first charge upon the income and property of the merged corporation. The holders of the said preferred stock of said Continental Tobacco Company, party hereto, shall also be entitled to receive and enjoy the dividend of one and three-quarters

(1¾%) per centum already declared on said preferred stock payable October 3, 1904.

There shall be apportioned to each of the holders of the common stock of the said The American Tobacco Company, party hereto, for each two shares of said common stock of the par value of $50 each held by him, one share of the common stock of said merged corporation.

There shall be apportioned to each of the holders of the common stock of said Continental Tobacco Company, party hereto, for each share of said common stock of the par value of $100 held by him, one share of the common stock of said merged corporation.

There shall be apportioned to each holder of the stock of said Consolidated Tobacco Company, party hereto, for each share of said stock of the par value of $100 held by him, one share of the common stock of said merged corporation.

By the act of merger the stocks of all the companies, parties hereto, held by any of the companies, parties hereto, shall stand and be canceled.

The preferred stock of the merged corporation herein provided for may be issued for the redemption and retirement at par of debts that by the act of merger become the debts of said merged corporation, and such preferred stock shall be issued only for such redemption or at par for cash to be used in such redemption.

Article VIII.—The Morton Trust Company of the city of New York is hereby appointed the transfer agent of the stock and obligations of the said merged corporation in the city of New York, and the Farmers' Loan and Trust Company of the city of New York is hereby appointed registrar of the stock of said merged corporation; and any stockholder of any of the said corporations, parties hereto, upon presenting to the said transfer agent his certificate of stock and surrendering the same to be canceled, shall be entitled to receive a certificate for the proper number of shares of the capital stock of said merged corporation, or to the bond or obligation of said merged corporation, pursuant to Article VII of this agreement.

Article IX.—The said merged corporation shall pay all expenses of consolidation and all preliminary expenses, including legal expenses.

Article X.—The principal and registered office of said merged corporation in the state of New Jersey is at No. 104 First street, city of Jersey City, county of Hudson, and C. A. Hopman is the agent therein and in charge thereof, upon whom process against said merged corporation within the state of New Jersey may be served.

In witness whereof, the said parties to this agreement have in pursuance of a resolution passed by the board of directors of each of the said corporations, at a regular meeting of the board of directors of each of said corporations, at which a quorum was present, caused the respective corporate seals of said corporations to be hereto affixed and these presents to be signed by their respective presidents or first vice-presidents and attested by their respective secretaries all duly authorized thereto, the day and year first above written.

THE AMERICAN TOBACCO COMPANY,
(SEAL) By PERCIVAL S. HILL,
First Vice-President.

Attest:
CHARLES N. STROTZ,
Secretary.

CONSOLIDATED TOBACCO COMPANY,
(SEAL) By JAMES DUKE,
President.

Attest:
CHARLES S. KEENE,
Secretary.

CONTINENTAL TOBACCO COMPANY,
(SEAL) By CHARLES E. HALLIWELL,
First Vice-President.

Attest:
WILLIAM H. MCALISTER,
Secretary.

IN CHANCERY OF NEW JERSEY.

Between

RICHARD T. DANA,

Complainant,

and

THE AMERICAN TOBACCO COMPANY, *et als.*,

Defendants.

On Bill, etc.

ANSWER.

The answer of The American Tobacco Company, George Arents, Anthony N. Brady, Paul Brown, John B. Cobb, Thomas Dolan, Benjamin N. Duke, James B. Duke, Caleb C. Dula, Robert B. Dula, Charles E. Halliwell, William R. Harris, George A. Helme, Percival S. Hill, Herbert D. Kingsbury, Pierre Lorillard, Thomas J. Maloney, William H. McAlister, Rufus L. Patterson, Oliver H. Payne, Frank H. Ray, Thomas F. Ryan, Grant B. Schley, Robert A. C. Smith, Robert K. Smith, Charles N. Strotz, George W. Watts, Harry Weissinger, Peter A. B. Widener, Thomas F. Jeffress, Williamson W. Fuller and William S. Walker to the bill of complaint of Richard T. Dana, complainant.

These defendants, answering unto so much and such parts of the complainant's bill of complaint as they are advised is material and necessary for them to make answer unto, say:

1. They admit that on the twenty-first day of January, 1890, a corporation called The American Tobacco Company was organized under the general corporation act of the state of New Jersey by the filing of a certificate of organization in the office of the secretary of state, a copy of which certificate is hereto annexed and made a part hereof and is marked "Exhibit A."

2. They deny that on the twenty-eighth day of July, 1901, the capital stock of said company was increased to $35,000,000, or that a further increase was made on the sixth day of August, 1901. They say that the said capital stock was in fact increased to $35,000,000 on the twenty-eighth day of July, 1902, and that said increase was effected by the addition of $10,000,000 of stock, divided into 120,000 shares of general or common stock of the par value of $50 each, and 40,000 shares of preferred stock of the par value of $100 each. They also say that a further increase in the capital stock of the said company to $70,000,000 by the addition of $35,000,000 of stock, consisting of 700,000 shares of general or common stock of the par value of $50 each, was duly authorized on the twenty-eighth day of March, 1899, but that the total amount of capital stock actually issued by the company was $68,500,000 divided into $54,500,000 of common stock and $14,000,000 of preferred stock.

3. They admit that immediately after the organization of the said corporation it acquired a large amount of real and personal property and began the prosecution of the business for which it was organized and that it carried on the said business with great profit and advantage to its stockholders from the date of its organization down to the autumn of 1904.

4. They admit that on the seventh day of April, 1892, fifty shares of the preferred capital stock of the said company were transferred upon the books of the company to one Richard S. Dana and that a certificate for said shares was issued to him on that date, and that the said stock has stood in the name of the said Richard S. Dana on the books of the said company ever since. They also admit that the dividends on said stock were paid to the said Richard S. Dana until his death in January, 1904, and that thereafter they were paid to his executor, or upon his order.

5. They admit that on the tenth day of December, 1898, a corporation was organized under the general corporation laws of the state of New Jersey, called Continental Tobacco Company. They say that

the said company was organized with a capital stock of $75,000,000 divided into 750,000 shares of the par value of $100 each, of which shares 375,000 were preferred and 375,000 general or common. On the twenty-first day of April, 1899, an increase of the capital stock of said company to $100,000,000 by the addition of $25,000,000, divided into 125,000 shares of preferred stock and 125,000 shares of general or common stock, each of the par value of $100 was duly authorized. The total preferred stock of said company, however, which was issued was $48,844,600 and the total common stock $48,846,100.

6. They admit that on the fifth day of June, 1901, another corporation was formed under the general corporation laws of the state of New Jersey called Consolidated Tobacco Company. They say that the capital stock of said company was $40,000,000, divided into 400,000 shares of the par value of $100 each, and that all of said stock was common or general stock.

7. They admit that on the ninth day of September, 1904, an agreement was entered into between the said The American Tobacco Company, Continental Tobacco Company and Consolidated Tobacco Company, in and by which it was agreed that the said three corporations should be merged and consolidated into a single corporation under the name of "The American Tobacco Company," and that the paper annexed to said bill of complaint and purporting to be a copy of said agreement is in fact a true copy thereof.

8. They deny that the said consolidation agreement was promoted by a number, either large or small, of individuals, or that any persons as promoters induced the directors of The American Tobacco Company to vote in favor of said agreement. They say that the matter of consolidating said companies was under consideration for at least a year before said agreement was made and was discussed frequently during said year among the directors and stockholders of all three of the companies and was finally accomplished by the general and common action of the stockholders and directors of said companies without

any promotion on the part of anybody and without promoters and without the expenditure of a single dollar for promotion expenses of any kind whatsoever. They say that all of said corporations were organized for the purpose of manufacturing and selling tobacco and the products thereof and that each was engaged in some line of said business; that of the Continental preferred stock $16,467,100 at par was held by the American and Consolidated Companies; that of the American common stock $54,274,550 was held by the Consolidated Company, and that of the Continental common stock the Consolidated Company held $48,829,100. On account of these circumstances and because of the greater efficiency and economy of management that would result therefrom it was believed by the directors and nearly all of the stockholders of all the companies to be for the best interests of the said companies and their several stock and security holders that they should merge and consolidate under the plan set forth in said agreement.

9. It is true, as stated in said bill of complaint, that all the directors of The American Tobacco Company present at the meeting of September 9th, 1904, voted in favor of the execution of said agreement. It is not true, however, that George Arents or Oliver H. Payne, directors of said company, were present at said meeting, or that Thomas F. Jeffress, Williamson W. Fuller or William S. Walker then were or at any time since have been directors of said company.

10. They admit that at the meeting of the directors of The American Tobacco Company held on said ninth day of September, 1904, a resolution was passed directing the secretary to call a meeting of the stockholders of the company to be held at the company's office in Jersey City on the thirtieth day of September, 1904, to consider the said agreement and to vote for the adoption or rejection of the same. They say that on the tenth day of September, 1904, notice of said meeting was sent by mail to every stockholder then of record of The American Tobacco Company at the last known postoffice address of such stockholder given on said books; that accompanying said notice

was a printed copy of said agreement and that the notice was in the following form:

"THE AMERICAN TOBACCO COMPANY.

"NEW YORK, N. Y., September 9th, 1904.

"Notice is hereby given that there will be a special meeting of the stockholders of The American Tobacco Company at the office of the company at 104 First street, Jersey City, N. J., on the 30th day of September, 1904, at 11 o'clock A. M. The purpose of such meeting is that there may be submitted to the stockholders to be adopted or rejected by them an agreement for the merger and consolidation of The American Tobacco Company with Consolidated Tobacco Company and Continental Tobacco Company, which agreement was adopted by the directors of the American Tobacco Company on September 9th, 1904. A copy of said agreement has been sent to each stockholder of the company, and a copy may be seen at the office of the secretary of the American Tobacco Company at 111 Fifth avenue, New York City.

"By order of the board of directors.

"CHARLES N. STROTZ,

"Secretary."

That in addition to the giving of said notice, notice of the meeting was also published in *"The Evening Post,"* a newspaper published in the city of New York, on the said tenth day of September, 1904, and once a week in each of the two succeeding weeks. Notice was also published in *"The Sun,"* a newspaper published in the city of New York, September 12th, 19th and 26th. At the meeting so called stockholders were present in person or by proxy to the number of 370, representing a total of 1,158,934 shares out of 1,230,000 shares outstanding. Of the stock so represented 1,157,214 shares were voted for the adoption of said agreement and 1,720 shares were voted for the rejection of the same, the voting being by ballot.

11. They admit that the said agreement of September ninth was duly submitted to the stockholders of Consolidated Tobacco Company and Continental Tobacco Company was ratified by stockholders owning

more than two-thirds of the shares of the capital stock of each of the said companies. The meeting of Consolidated Tobacco Company at which said agreement was ratified was held at the company's office in the state of New Jersey October 17th, 1904. More than twenty days' notice of the time, place and object of said meeting was given according to law and the vote thereat was taken by ballot. The meeting of the stockholders of Continental Tobacco Company was held at that company's office in the state of New Jersey September 30th, 1904. More than twenty days' notice of such meeting, stating the time, place and object thereof, was given according to law and the vote thereat was taken by ballot.

12. They admit that on the nineteenth day of October, 1904, the said merger agreement was filed in the office of the secretary of state and that they, the defendants, claim that upon the filing of such agreement the said merged corporation came into existence and that from and after that date the persons named as directors became and were the directors of said merged corporation. Defendants deny that said agreement is illegal or invalid, or that the statutes of the state of New Jersey, authorizing corporations to merge, have no application to the corporations entering into said agreement of September ninth. They also deny that the statutes of the state of New Jersey permitting such merger are contrary to the provisions of the Constitution of the United States or the Constitution of the state of New Jersey.

13. They admit that in pursuance of the plan of merger or consolidation set out in the agreement of September ninth, The American Tobacco Company, created by said merger, did, on or about the twentieth day of October, 1904, make, execute and deliver to the Morton Trust Company, as trustee, an indenture to secure the issues of bonds in the said consolidation agreement provided for, a copy of which indenture is hereto annexed and made a part hereof and marked "Exhibit B," and these defendants refer to the said indenture for a correct ascertainment of the terms, conditions and effects thereof. They deny that the

said indenture is invalid or that the making thereof occasioned irreparable loss or damage or any loss or damage whatsoever to the complainant or any other stockholder of The American Tobacco Company.

14. They admit that at the time of the consummation of the said merger full inventories were made and taken of all the property belonging to the said several corporations which was taken over by the merged corporation, but deny that it is practicable or possible at this time, or that it was practicable or possible at the time the complainant's bill was filed, to separate the property in the hands of the merged corporation received from the original American Tobacco Company from that received from Consolidated and Continental Companies. They also deny that the accounts of the business transacted by the merged corporation since the merger have been kept in such a manner as to make it practicable or possible to determine what proportion of the business of the merged corporation has been transacted with the capital and assets of the original American Tobacco Company, and they deny that it is either feasible or practicable to separate the assets of the original American Tobacco Company from the other assets of the merged corporation, or that it was so at the time the complainant's bill was filed. They say that since the filing of the said merger agreement on October 19th, 1904, the business theretofore carried on by the said three companies separately has been carried on by the merged corporation as an entirety; that a large amount of the property received by the merged corporation from the constituent companies has been sold, exchanged or converted into other forms and the receipts therefor have been so commingled that it is impossible now to either identify or separate the same. Much of the cash received from the sale of the property so commingled has been expended in the purchase of other property held by the merged corporation and otherwise disbursed in the ordinary course of business of the said corporation and it is therefore impossible at the present time, and was impossible at the time the complainant's bill was filed, to restore to any of the

constituent companies the property received therefrom by the merged company or to account to the constituent companies, or any of them, for the proceeds of the property disposed of, much less the earnings derived from the use and by the employment of the property received from such company.

15. Defendants deny that they claim or pretend that under the statutes of the state of New Jersey the complainant has no remedy whatever against the merged corporation or any of its constituent corporations except to apply to the proper court for the appointment of commissioners to condemn his stock and to compel the merged corporation to pay him the full marked value thereof. They admit that the thirty days within which the statute requires condemnation proceedings to be taken in cases of corporate consolidation had elapsed before the complainant's bill was filed, but say it had not elapsed before complainant was made aware of said consolidation or before he had opportunity to have the value of his shares appraised as provided by the said statute. They also deny that the said provision for ascertaining the value of corporate shares under the merger act violates the provisions of the Constitution of the United States in that it deprives a stockholder of his property without his consent. They say that the complainant had no vested right to remain a stockholder in the American Tobacco Company; that by the law of the state of New Jersey as it existed when the American Tobacco Company was formed, the complainant was liable to have his relations to the American Tobacco Company as a stockholder terminated either by the voluntary dissolution of the said corporation upon the affirmative vote of two-thirds in interest of the stockholders, or by the retirement of his stock by a like vote. Upon such action being taken his only right was to receive the value of his stock, and the provision of the merger act for the ascertainment and payment to the stockholder of the value of his stock had no other effect upon him or his contract rights than to regulate the method by which upon the dissolution of his relations with the company his proportion of its assets

should be ascertained and paid over to him. Defendants further say that the complainant has never applied to The American Tobacco Company to waive the bar of the statute to the appointment of appraisers to ascertain the value of his stock and that said company in fact has been willing and is now willing to consent to such an appraisement notwithstanding the expiration of said period of thirty days. The American Tobacco Company is also willing and hereby offers to pay to the said complainant the market value of his stock at the time of the said consolidation or to pay him the present worth of the said stock and of all dividends that could possibly be earned thereon until the expiration of the charter of the original American Tobacco Company. They say that the complainant did not apply for the appraisement of his stock pursuant to the merger act for the reason that the said stock steadily rose in market value during the period of thirty days within which such condemnation proceedings were required to be taken, as it has continued to rise in market value ever since, so that the complainant could have at any time since the said consolidation sold his stock at a higher price than he could have obtained for it at the date of consolidation or indeed at any other time since his purchase of the same in 1892.

Defendants also say that complainant is not without a remedy for any injury done to him by said consolidation since he has a complete and adequate remedy at law to recover either the market value of his said shares or their intrinsic value, which at most cannot exceed the present worth of the par value, of the shares at the expiration of the charter on the twentieth day of January, 1940, plus the present worth of a dividend of eight per cent. thereon each year for a period of thirty-five years.

And the defendants pray that they may have the same benefit of this defense as if they had pleaded the same in bar of said bill or had demurred thereto.

16. Defendants admit that since the date of the said merger the merged corporation has employed and used the assets and property of the original American

Tobacco Company in the management and conduct of its own business and has appropriated to its own use all the income and profits derived therefrom. They deny, however, that said action on the part of the merged corporation is illegal or that the defendants should account to the complainant or to the original American Tobacco Company therefor, or should be required to pay back to the original American Tobacco Company, its officers and shareholders, the amount thereof and say that no such accounting or return would at this time be possible, or if it were possible be fair and equitable to the present stockholders and security holders of the merged company. They say that at the said meeting of stockholders of the original American Tobacco Company held on the thirtieth day of September, 1904, no objection was made to the said merger on the ground that the merger act did not apply to The American Tobacco Company, or could not be availed of by said company. On the contrary the vote of the stockholders was in effect a vote to accept and avail themselves of the privileges of said act, and those who voted against the merger did so for business reasons only and upon the said vote being taken acquiesced in the judgment of the majority and have not opposed the same at any time since; that of the $14,000,000 preferred stock of The American Tobacco Company, $13,808,500 have been exchanged for the six per cent. bonds of the merged corporation provided for in said agreement and secured by the said indenture to the Morton Trust Company, hereinbefore referred to; that of the $225,450 of the common stock of the original American Company held by others than the Consolidated Company, $178,450 have been exchanged for the common stock of the merged corporation according to said agreement; that of the $32,077,500 of Continental preferred stock, $31,715,700 have been exchanged for the six per cent. bonds of the merged corporation provided for in said merger agreement; that of the $17,000 common stock of the Continental Company held by others than the Consolidated Company, $16,500 have been exchanged for the common stock of the merged company; that of

the $157,138,200 of the four per cent. fifty-year gold bonds of the Consolidated Company, $151,642,300 have been exchanged for the preferred stock and four per cent. bonds of the merged company, and of the $40,000,000 stock of the Consolidated Company $39,855,700 have been exchanged for the common stock of the merged company; that the bonds of the said corporation of both classes and also its preference shares were listed on the New York Stock Exchange immediately after said merger and have been actively dealt in on said Exchange and elsewhere ever since that time, and said bonds and preference shares and also the common shares (which latter though not listed on the Stock Exchange have also been actively dealt in) are now held and owned and at the time complainant's bill was filed were held and owned in large amounts by a great number of investors who had no connection whatever with any of said merging corporations as stockholders or otherwise either at the time of said merger or at any other time before.

Defendants submit:

(1) That the corporation merger act is constitutional and applied to the original American Tobacco Company, notwithstanding said company was formed before its enactment, since in effect it merely provided a method for dissolving one corporation and forming another and regulated the procedure by which the stockholders' interest in the dissolved corporation should be ascertained and discharged.

(2) That the vote of the stockholders at the September 30th, 1904, meeting was in effect a vote to accept the said merger act and that such vote being taken upon full notice to every stockholder and no stockholder appearing or objecting thereto, the vote amounted to an acceptance of the act which bound as well those who were absent as those who were present, and warranted the corporation in thereafter proceeding under the act.

(3) That the complainant is guilty of laches in having waited six months after notice of said agreement of September ninth was published before filing his bill and that it would be inequitable and unfair to

the merged corporation and to the stockholders and bondholders thereof to interfere at this time with the said consolidation; that the injury which would result from such interference at this time would be incalculable and that in comparison therewith the value of the complainant's stock is infinitesimal.

(4) That if the complainant does not choose to accept the offer hereinbefore tendered he has a complete and adequate remedy at law either to recover the market value of his stock at the time of the consolidation, or its intrinsic value at that time, whichever may be the greater.

And defendants pray to be hence dismissed with their costs.

THE AMERICAN TOBACCO COMPANY,
By Percival S. Hill,
Vice President.

[L. S.]
Attest:
W. H. McALISTER,
Secretary.

LINDABURY, DEPUE AND FAULKS,
Solicitors for and of Counsel with answering defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss:*

The answer of the defendant The American Tobacco Company was taken this tenth day of July, in the year one thousand nine hundred and five, before me, a master in chancery of the state of New Jersey, under the common seal of the said corporation as by its said seal hereto affixed appears.

LUTHER V. STRYKER,
Master in Chancery of New Jersey.

EXHIBIT "A."

CERTIFICATE OF ORGANIZATION.

This is to certify that we, Lewis Ginter, John Pope, George Arents, James B. Duke, Benjamin N. Duke, George W. Watts, Francis S. Kinney, William H. Butler, William S. Kimball and Charles G. Emery do hereby associate ourselves into a company under and by virtue of the provisions of An Act of the Legislature of New Jersey entitled "An act concerning corporations" approved April 7th, 1875, and the several supplements thereto and acts amendatory thereof for the purposes hereinafter mentioned and to that end we do by this our certificate set forth:

First. That the name which we have assumed to designated such company, and to be used in its business and dealings is: "The American Tobacco Company."

Second. That the place in the state of New Jersey where the business of such company is to be conducted is Newark, in the county of Essex. The principal part of the business of said company within said state is to be transacted at Newark, in the county of Essex. The principal office and place of business of the said company out of said state is the city of New York in the state of New York.

Third. The objects for which the company is formed are to cure leaf tobacco, and to buy, manufacture and sell tobacco in all its forms, and to establish factories, agencies and depots for the sale and distribution thereof and to transport or cause the same to be transported as an article of commerce and to do all things incidental to the business of trading and manufacturing aforesaid.

The portion of the business of said company which is to be carried on out of said state is to cure leaf tobacco, and to buy, manufacture and sell tobacco in all its forms, to establish factories, agencies and depots for the sale and distribution thereof and to transport the same as an article of commerce and to do all other things incidental to the business of the company which

must necessarily be transacted out of said state. The company proposes to carry on its operations in all other states and territories in the United States, and in Canada and in Great Britain and in all foreign countries.

Fourth. The total amount of the capital stock of said company is twenty-five million dollars ($25,000,000) and the number of shares into which the same is to be divided is four hundred thousand. Of said stock fifteen millions of dollars, divided into three hundred thousand shares of fifty dollars each shall be general or common stock, and ten millions of dollars, divided into one hundred thousand shares of one hundred dollars each shall be preferred stock. Said preferred stock shall entitle the holders to receive in each year a dividend of eight per cent payable half yearly before any dividend shall be set apart or paid on said general or common stock, and if the net profits in any year shall not be sufficient to pay a dividend of eight per cent on said preferred stock, then such dividend shall be paid thereon as the net profits of the year will suffice to pay. The holders of the preferred stock shall have a preference on the assets of the company, but the dividends thereon are not to be cumulative, but shall be payable each year only out of the profits of that year and such preferred stock and the certificates therefor may be issued by the board of directors by resolution. The amount with which said company will commence business is ten thousand dollars which is divided into two hundred shares of the par value of fifty dollars each of general or common stock.

Fifth. The names and residences of the stockholders and the number of shares held by each are as follows: (all such shares being shares of general or common stock).

		Shares.
Lewis Ginter,	Richmond, Va.,	Twenty
John Pope,	Richmond, Va.,	Twenty
George Arents,	New York City,	Twenty
James B. Duke,	New York City,	Twenty
Benjamin N. Duke,	Durham, N. C.,	Twenty
George W. Watts,	Durham, N. C.,	Twenty
Francis S. Kinney,	Butler, Mor. Co., N. J.,	Twenty
William H. Butler,	Brooklyn, N. Y.,	Twenty
William S. Kimball,	Rochester, N. Y.,	Twenty
Charles G. Emery,	Brooklyn, N. Y.,	Twenty

Sixth. The directors of the company shall be classified in respect to the time for which they shall severally hold office and the several classes shall be elected for different terms, namely: Two shall be elected for one year; three shall be elected for two years, and five shall be elected for three years.

Seventh. The period at which said company shall commence is the twenty-first day of January A. D. one thousand eight hundred and ninety, and the period at which it shall teminate is the twentieth day of January, A. D. one thousand nine hundred and forty.

In witness whereof, we have hereunto set our hands and seals this twentieth day of January, A. D. one thousand eight hundred and ninety.

Signed, sealed and delivered in the presence of George H. Taylor.

LEWIS GINTER,	[L. S.]
JOHN POPE,	[L. S.]
GEORGE ARENTS,	[L. S.]
JAMES B. DUKE,	[L. S.]
BENJAMIN N. DUKE,	[L. S.]
GEORGE W. WATTS,	[L. S.]
FRANCIS S. KINNEY,	[L. S.]
WM. H. BUTLER,	[L. S.]
WM. S. KIMBALL,	[L. S.]
CHARLES G. EMERY,	[L. S.]

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } ss:

I, George H. Taylor, a commissioner for the state of New Jersey, residing in the city, county and state of New York, do certify that on this twentieth day of January, in the year one thousand eight hundred and ninety in the city and county of New York aforesaid, personally appeared before me Lewis Ginter, John Pope, George Arents, James B. Duke, Benjamin N. Duke, George W. Watts, Francis S. Kinney, William H. Butler, William S. Kimball and Charles G. Emery, known to me to be the individuals described in and who executed the foregoing instrument and the contents thereof being by me first made known to them, they severally acknowledged to me that they had signed, sealed and delivered the said instrument as their voluntary act and deed.

In witness whereof, I have hereunto set my hand and official seal, in the city of New York in the county and state aforesaid this twentieth day of January, one thousand eight hundred and ninety.

[L. S] GEORGE H. TAYLOR,

A Commissioner for New Jersey in New York.

We, the undersigned, hereby severally agree each with the other, and others, that we will take the number of shares in the general or common stock in The American Tobacco Company proposed to be formed set opposite our respective names and pay for such shares as may be called for by said company. It is agreed that said The American Tobacco Company shall be organized under the laws of the state of New Jersey, with a certificate of incorporation substantially in the form hereto annexed.

New York, January 20th, A. D. 1890.

		Shares.
LEWIS GINTER,	[L. S.]	Twenty
JOHN POPE,	[L. S.]	Twenty
GEORGE ARENTS,	[L. S.]	Twenty
JAMES B. DUKE,	[L. S.]	Twenty
BENJAMIN N. DUKE,	[L. S.]	Twenty
GEORGE W. WATTS,	[L. S.]	Twenty
FRANCIS S. KINNEY,	[L. S.]	Twenty
WM. H. BUTLER,	[L. S.]	Twenty
W. S. KIMBALL,	[L. S.]	Twenty
CHARLES G. EMERY,	[L. S.]	Twenty

Endorsed:

Received in the Essex County Clerk's Office January 21st, 1890, and recorded in book No. 4 of Incorporated Business Co.'s on page 159, etc.

S. A. SMITH,

Clerk.

Filed January 21st, 1890.

IN CHANCERY OF NEW JERSEY.

Between RICHARD T. DANA, *Complainant,* *and* THE AMERICAN TOBACCO COMPANY, *et al.*, *Defendants.*	*On Bill, etc.*

FURTHER ANSWER.

The further answer of The American Tobacco Company, George Arents, Anthony N. Brady, Paul Brown, John B. Cobb, Thomas Dolan, Benjamin N. Duke, James B. Duke, Caleb C. Dula, Robert B. Dula, Charles E. Halliwell, William R. Harris, George A. Helme, Percival S. Hill, Herbert D. Kingsbury, Pierre Lorillard, Thomas J. Maloney, William H. McAlister, Rufus L. Patterson, Oliver H. Payne, Frank H. Ray, Thomas F. Ryan, Grant B. Schley, Robert A. C. Smith, Robert K. Smith, Charles N. Strotz, George W. Watts, Harry Weissinger, Peter A. B. Widener, Thomas F. Jeffress, Williamson W. Fuller and William S. Walker to the bill of complaint of Richard T. Dana, complainant.

These defendants further answering unto the complainant's bill of complaint, pursuant to the order of this court made in this cause on the twenty-eighth day of December, nineteen hundred and five, say:

1. That they are informed and believe that some time in the month of November, nineteen hundred and four, the complainant called at the office of the Morton Trust Company in the city of New York and had a conversation with Mr. H. M. Francis, secretary of said company; that said Francis was the only officer of the Morton Trust Company who saw the complainant on that occasion or on the occasion of any visit of the complainant to the Morton Trust Company, referred to in said bill of complaint; that said Francis

then told the complainant that there would be no further dividends paid on the shares of stock of The American Tobacco Company held by him, and gave the complainant printed copies of the merger agreement and consent of bondholders to the conversion of their bonds into stock in accordance with the merger agreement, and further informed the complainant that if he surrendered his stock, bonds would be issued to him in accordance with the merger agreement, and a sum of money would be paid to him in lieu of dividends in accordance with such agreement. Said Francis declined to discuss with the complainant the matter of the rightfulness of the said merger, but referred him to The American Tobacco Company for information on that subject. Defendants deny the allegations contained in the fourteenth paragraph of the complainant's bill of complaint except as above.

2. Defendants further answering say that they are also informed and believe that some time in the month of November, nineteen hundred and four, the complainant called at the office of the Farmers Loan & Trust Company and had an interview with Mr. Samuel Sloan, Junior, the secretary of said company, which was the occasion referred to in the fifteenth paragraph of the complainant's bill of complaint. Defendants admit that the Farmers Loan & Trust Company of New York was at that time transfer agent of the original American Tobacco Company. They are informed and believe that upon the occasion of said visit the complainant inquired of Mr. Sloan regarding the merger of the original American Tobacco Company with the Consolidated and Continental Companies, and in the course of a conversation with respect to said merger, asked the said Sloan if complainant's stock would be transferred. Said Sloan in response to said inquiry referred the complainant to The American Tobacco Company and told him that the stock books of said company had been permanently closed and that no further transfers of stock could be made. These defendants deny that said Sloan was the vice president of the Farmers Loan & Trust Company or that the

said complainant on the occasion referred to or on any other occasion in that connection, saw the vice president of said company. Defendants also deny the allegations contained in the fifteenth paragraph of said bill of complaint except as above.

3. Defendants further answering the allegations contained in the sixteenth paragraph of said bill of complaint admit said allegations to be true.

4. Answering unto the seventeenth paragraph of said bill of complaint, these defendants admit that on or about the seventh day of January, nineteen hundred and five, the complainant made a written demand on the former officers and directors of the original American Tobacco Company, a copy of which is annexed hereto and marked Exhibit A; they admit that no reply was made to said demand and that on or about the nineteenth day of January, nineteen hundred and five, the complainant made a second demand, a copy of which is annexed hereto and marked Exhibit B; they admit that on or about the twenty-third day of January, nineteen hundred and five, Percival S. Hill, named in said bill of complaint, wrote a letter to the complainant acknowledging the receipt of complainant's said two demands, a copy of which is annexed hereto, marked Exhibit C. Defendants also admit that on or about the third day of February, nineteen hundred and five, complainant sent another communication to the said officers and directors of the original American Tobacco Company, a copy of which is annexed hereto, marked Exhibit D. Defendants further admit that further correspondence ensued between the complainant and the former officers and directors of the original American Tobacco Company, a full copy of which is annexed hereto and marked Exhibit E. Defendants are informed and believe that on or about the seventeenth day of March, nineteen hundred and five, the complainant made a demand on the Farmers Loan & Trust Company for the transfer of his shares of stock mentioned in said bill of complaint, and that the original American Tobacco Company, the present American Tobacco Company, the Morton Trust Company and the Farmers

Loan & Trust Company, each and all refused to comply with complainant's demands. They deny, however, that said demands were lawful or that it was proper or possible for them or any of them to comply with the same, and they deny that in consequence of said refusals or of the said merger, complainant's shares in the original American Tobacco Company were, either at the time of the filing of said bill of complaint or now are or ever were, worthless pieces of paper. On the contrary they say that the effect of said merger was to increase both the market and intrinsic value of said shares.

And defendants pray as they prayed in their original answer to be hence dismissed with their costs.

[L. S.] THE AMERICAN TOBACCO CO.
by Percival S. Hill.,
Vice-President.

ATTEST:
W. H. MCALISTER,
Secretary.

LINDABURY, DEPUE & FAULKS,
Solrs. for and of Counsel with Defendants

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } *ss*:

The further answer of the defendant The American Tobacco Company was taken this fifteenth day of January, in the year one thousand nine hundred and six, before me, a master in chancery of the state of New Jersey, under the common seal of said corporation as by its said seal hereto affixed appears.

LUTHER V. STRYKER,
Master in Chancery of New Jersey.

EXHIBIT A. (C-11.)

RICHARD T. DANA,
Assoc. M. A. M. Soc. C. E.,
Civil and Consulting Engineer,
15 William Street.
New York, N. Y., January 7th, 1905.

To the President and Directors of The American Tobacco Company (a corporation organized under the laws of the state of New Jersey on or about January 21st, 1890), 111 Fifth avenue, New York City.

Gentlemen:

As administrator, etc., of the estate of Richard S. Dana, deceased, I am the holder of fifty shares of the preferred stock of The American Tobacco Company (a corporation organized under the laws of the state of New Jersey on or about January 21st, 1890). I am informed that you, the president and directors of this company, have on behalf of this company and on or about the ninth day of September, 1904, entered into a certain alleged merger agreement with two other corporations known as The Consolidated Tobacco Company and The Continental Tobacco Company. I am also informed that under this alleged merger agreement you have attempted to consolidate The American Tobacco Company with these two other corporations into a single corporation under the name "The American Tobacco Company." I am also informed that under this alleged merger agreement you have attempted to charge the assets of the corporation in which I hold stock with the obligations of these two other corporations and of the new merged corporation and have attempted to subject the properties of the corporation in which I hold stock to the management, possession and control of an entirely different corporate entity with different powers and differently organized.

The dividend upon my stock, which has been earned, would have been paid in the regular course last November. When it was not paid I made inquiries and was informed that no dividend would at any time be

paid upon my stock. I was also informed that the stock books of the company were closed, that no entries had been made since October 21st, 1904, that none would be made in the future, that my stock could not be transferred, and that it was claimed that the company in which I hold stock had, by reason of this alleged merger agreement, been absorbed and had ceased to exist.

I am aware that under the alleged merger agreement, I may exchange my stock in the original American Tobacco Company for the bonds of this new merged corporation. The bonds, however, are subject to taxation in this state, and will not, therefore, net me the same return that I have been getting on the stock. In any event I prefer the stock in the old company to the bonds of this new company of which I know little.

I have never in any way consented to this alleged merger agreement and have never in any way waived any of my rights in the matter. You have brought about a situation, without my consent, which deprives me of the income earned by the properties owned by the corporation of which I am a stockholder; and you, in effect, say to me, "give up the stock which you now hold and receive in exchange the bonds of this new company which we have created, or else no dividends will ever be paid to you." You say in effect, "relinquish your position as a stockholder in a company whose earnings have always been ample, and accept the position of a creditor of this new company, or continue to hold your stock in the old company, which has been put out of existence, and never receive any further interest on your investment."

I respectfully protest against this situation which you have brought about and against your action in bringing it about. I do not believe that such a situation can exist except in violation of my rights.

I respectfully protest against charging the assets of the company in which I am a stockholder with the obligations of any other company. I respectfully protest against applying the income derived from the properties of this company to the payment of the dividends on the stock of any other company, to the pay-

ment of the interest on the obligations of any other company, to the payment of the debts of any other company, or to any other misapplication of such income.

I respectfully demand that any dividend which has been earned by the company in which I hold stock be paid forthwith to me and the other stockholders. I respectfully demand that the stock books and other books of this company be properly kept up to date, and I respectfully demand that you perform all your legal duties as officers of this company.

In conclusion, I may say, that if I am incorrectly informed or if I have overlooked anything which may explain or justify your actions in this matter, I trust that you will correctly inform me.

Kindly acknowledge receipt of this letter and oblige,

Yours very truly,

Richard T. Dana.

EXHIBIT B. (C-12.)

New York, N. Y., January 19th, 1905.

Percival S. Hill, Esq.,
111 Fifth avenue,
New York City.

Dear Sir:

On the 7th inst. I addressed a letter to the President and directors of the American Tobacco Company (a corporation organized under the laws of the State of New Jersey, on or about January 21st, 1890). I caused this letter to be delivered to you personally on that day, and the bearer has informed me that you stated to him that you would acknowledge the receipt of the same by mail. I have received no such acknowledgement and no reply to my letter, and am therefore obliged to call the matter to your attention.

I send you herewith copy of my letter of the 7th inst. and respectfully repeat all my protests and demands.

It seems to me that my letter is, under the circumstances, a perfectly proper one, and that you and the

other officers of the Company in which I hold stock, occupying as you do positions of trust, might well have replied to the same. I do not at all understand your failure to acknowledge the receipt of the letter in accordance with your promise to the bearer.

Very truly yours,

Richard T. Dana.

(Enc)

EXHIBIT C. (C-13.)

New York, January 23, 1905.

R. T. Dana, Esq.,
15 William Street, City.

Dear Sir:

I have your letter of the 19th inst. There was delivered to me on or about the 7th of January, a letter addressed to the President and Directors of The American Tobacco Co., a copy of which letter, or substantially a copy, is attached to yours of the 19th inst.

Notwithstanding the request at the bottom of the letter that receipt of the letter be acknowledged, I did not deem it necessary to acknowledge receipt, because, in the first place, you had taken the precaution to deliver it by messenger and therefore could have no doubt of its having been received, and, in the second place, I was informed, upon inquiry, that you had discussed some matters referred to in that letter with gentlemen connected with the Law Department of the Company.

I now have to say that I have received both your letter of the 7th inst. and your letter of the 19th inst.; that I am informed that there has been a courteous discussion of the matter involved between you and gentlemen connected with the Law Department of this company, and that I do not deem this a proper time or manner in which to attempt to explain or justify actions taken by the Board of Directors of the company.

Very truly yours,
Percival S. Hill,
Vice-President.

EXHIBIT D. (C-14.)

New York, N. Y., February 3, 1905.

Percival S. Hill, Esq.,
111 Fifth Avenue, City.

Dear Sir:

I am in receipt of your letter of the 23rd ult. Some time ago you and the other officers of the company in which I hold stock, brought about a situation which seemed to me to be unfair to me as a stockholder. It seemed to me that your actions in bringing it about must be illegal and in violation of my rights and that you had subjected the properties of the corporation entrusted to your management to the control of a different organization and had neglected and were neglecting your duties as officers of the company in which I hold stock. It seemed to me that, in violation of my rights, you had attempted to charge the properties of the corporation in which I hold stock with obligations and liabilities of other corporations, that you were applying the income derived from these properties to the payment of the dividends on the stock and the interest on the bonds of another corporation, and otherwise misapplying such income.

All this I felt confident must be illegal and in viotion of my rights. However, as I was by no means so familiar with this matter or so expert in matters of this kind generally as the officers of the company, I addressed my letter on the 7th ult. to the president and directors. In this letter I pointed out the things that seemed to me to be unfair and in violation of my rights. I respectfully protested against what seemed to me to be wrong and I respectfully demanded that any dividend due me be paid and that the officers perform all their legal duties. In conclusion I suggested that if I had been incorrectly informed or if I had overlooked anything that might explain or justify the actions of the president and directors of the company in the matter, they would correctly inform me.

This letter was delivered to you personally on the 7th ult. and I awaited a reply. As I received nothing from you (not even your promised acknowledg-

ment I was obliged to address you again on the 19th ult. I then received your letter of the 23rd ult. which contains nothing but an acknowledgment of the receipt of my letters, for which I thank you, and the statement that you "do not deem this a proper time or manner in which to attempt to explain or justify actions taken by the board of directors of the company." It seems to me that my letter of the 7th ult. was a perfectly proper and respectful examination from a stockholder to the officers of the company in which he holds stock, and I am inclined to regard your failure to reply as an attempt to ignore my rights, and your letter of the 23rd ult. as an evasion. I am inclined to believe from your letter that you cannot explain or justify the actions taken by the board of directors in bringing about the situation which I outlined in my letter of the 7th ult. However, so that there will be no misunderstanding between us, permit me to ask you. What is the proper time and what is the proper manner in which to attempt to explain or justify actions taken by the board of directors of the company?

As you must be aware from my letter, I think that my rights are being grossly violated. The stock which I hold was issued many years ago. I do not believe that any law has authorized the directors, officers, or any majority of the stockholders of the corporation in which I hold stock, to bring about such an unfair situation as has been brought about. If any law has attempted to authorize such a thing, I am confident that it must be unconstitutional. I cannot permit my rights to be flagrantly violated as I believe that are being in this matter. If, however, I have been incorrectly informed, or if there be anything to explain or justify the situation, I shall be glad to be correctly informed and not obliged to carry the matter into the courts.

I respectfully repeat all the protests and demands contained in my letter of the 7th ult. and trust that you will give this matter your immediate attention.

Very truly yours,

Richard T. Dana.

EXHIBIT E. (C-15.)

New York, February 6, 1905.

Mr. Richard T. Dana,
15 William street, New York City.

Dear Sir:

I have your letter of the 3rd inst.

The Merger of The American Tobacco Company, Continental Tobacco Company and Consolidated Tobacco Company, was done under the advice of lawyers, both those who are our regular counsel and New Jersey lawyers specially employed. We do not believe that there was anything done illegal or in violation of the rights of any stockholder. I am informed that you have discussed the matters involved in your letters with someone or more of our counsel and I do not believe that I could profitably, therefore, enter into a discussion with you of the legal matters involved.

I and no other officer of this company desire to be in any way discourteous to nor heedless of the rights of the holders of the securities of the company. You can well understand though that I would be unwilling to enter into a discussion with you as to the merits of the Merger and consolidation referred to, lest my silence as to some suggestion made by you be taken as an assent to the correctness of such suggestion. I am not sure whether you have it or not, but I am taking the liberty of handing you herewith copy of application made to list various securities on the New York Stock Exchange, which application, I believe, contains as thorough an epitome of the situation as any I could give.

Yours truly,
P. S. Hill, Vice-President.

(C-17.)

New York, N. Y., February 23, 1905.

Percival S. Hill, Esq.,
111 Fifth avenue, New York City.

Dear Sir:

I have your letter of the 6th inst. enclosing copy of application to list certain securities of The American Tobacco Company on the New York Stock Exchange, and thank you for the same.

I am obliged to conclude that you find it impossible to explain or justify the actions taken by the board of directors in the matter to which your attention was directed in my letter of the 7th ult. The copy of application made to list various securities on the New York Stock Exchange does not settle my doubts as to my rights, and I am reluctantly obliged to put the matter in the hands of my attorney, who is Mr. Grosvenor Nicholas of 141 Broadway, New York City, with instructions to proceed as he sees fit to protect my interests.

Very truly yours,
Richard T. Dana.

IN CHANCERY OF NEW JERSEY.

Between RICHARD T. DANA, *as Administrator etc.*, *Complainant,* *and* THE AMERICAN TOBACCO COMPANY, MORTON TRUST COMPANY, *et al.*, *Defendants.*	*On Bill, &c.*

ANSWER OF MORTON TRUST COMPANY.

The answer of Morton Trust Company to the bill of Richard T. Dana, complainant.

This defendant answering unto so much and such parts of the complainant's bill of complaint, as it is advised is material and necessary to make answer unto, says:

1. It admits that on the 20th day of January, 1898, a corporation called "The American Tobacco Company" was organized under the general corporation act of the State of New Jersey, by filing a certificate of incorporation in the office of the secretary of state, and for greater certainty as to the powers and duties of said corporation it begs to refer to the charter thereof to be produced at the hearing.

2. It admits that the authorized capital stock of the said corporation has been increased since its incorporation, but for greater certainty as to the conditions, terms and amounts of such increase, it begs to refer to the records and certificates effecting such increase.

3. It admits that immediately after the organization of the said corporation, it acquired a large amount of real and personal property and began the prosecution of the business for which it was organ-

ized, and that it carried on the said business with profit and advantage to its stockholders from the date of its organization down to the autumn of 1904.

4. It denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in the paragraphs of the said bill marked "4" and "5."

5. It admits that on the 10th day of December, 1898, a corporation was organized under the general corporation act of the State of New Jersey called "Continental Tobacco Company;" and that on the 5th day of June, 1902, another corporation was organized under the said laws under the name of "Consolidated Tobacco Company."

6. It admits that on the 9th day of September, 1904, an agreement was entered into between the said The American Tobacco Company, Continental Tobacco Company and Consolidated Tobacco Company, in which it was agreed that the said corporation should be merged and consolidated into a single corporation under the name of "The American Tobacco Company;" and that the paper annexed to said bill of complaint purporting to be a copy of said instrument is in fact a true copy thereof, to which paper for greater certainty as to the terms and effect of said merger agreement this defendant refers.

7. It denies that it has any knowledge or information as to the manner in which or reasons for which said agreement was executed other than those recited in said agreement; or whether the execution thereof was promoted by a small number of individuals or otherwise; or whether the business necessities or requirements of the tobacco market or the state of the finances of the country did or did not require any such agreement or consolidation.

It admits that at a special meeting, regularly called on or about September 9th, 1904, all of the directors of The American Tobacco Company there present, being a quorum of the board, voted in favor of the execution of the said agreement; but it is ignorant

as to which of the directors were present, or whether all of those named in the eighth paragraph of the bill of complaint were in fact directors of said company at that time; and it denies that the said action of the board was illegal.

8. It is informed and believes, and therefore admits, and, on information and belief, alleges that at the said meeting of the said directors of The American Tobacco Company a resolution was passed directing the secretary to call a meeting of its stockholders to be held at its office at Jersey City, on the 30th day of September, 1904, to consider the said agreement and to vote for the adoption or rejection of the same. That pursuant to said direction twenty days notice of the time, place and object of said meeting was duly mailed to the last known post-office address of each of the stockholders of The American Tobacco Company; that in addition to such notice, notice of the meeting was also published in two daily newspapers published in the City of New York; that at the meeting so called stockholders were present in person or by proxy to the number of 370, representing a total of 1,158,934 shares out of 1,230,000 shares of stock outstanding; that of the stock so represented 1,157,214 shares were voted for the adoption and only 1,720 shares were voted for the rejection of the same, the vote being by ballot.

9. It is also informed and believes, and therefore admits, and on information and belief alleges that the said agreement of September 9th, 1904, was, in the manner provided for by statute relating to the same, also duly authorized by the directors of Consolidated Tobacco Company and Continental Tobacco Company and was after due notice duly submitted separately to the stockholders of said companies and was duly ratified by vote of the stockholders holding more than two-thirds of all the capital stock of each of said companies at meetings duly held for that purpose.

10. It is informed and believes and therefore admits and alleges that on the 19th day of October, 1904, said merger agreement was properly filed in the office of the Secretary of State of New Jersey, and that all steps have been regularly and properly taken, whereby the said several corporations should be duly merged, according to law; and this defendant claims that thereupon the said merged corporation "The American Tobacco Company" came into existence and that from and after that date the persons named in the said agreement as directors and officers became and were the directors and officers of said merged corporation, and that all of the rights, powers and franchises of each of said merging corporations and all of their respective property, real, personal and mixed, and all debts due on whatever account, became vested in said merged corporation and became its property.

This defendant denies that the said agreement or the said merger is illegal or invalid, or that the statutes of the State of New Jersey authorizing corporations to merge have no application to the corporations aforesaid or to the facts of said merger. It also denies that the said statutes are contrary to the provisions of the constitution of the United States or of the constitution of the State of New Jersey; and it denies each and every other allegation contained in paragraph marked "11" of the bill of complaint not hereinbefore specifically alleged, admitted or controverted.

11. It admits that pursuant to the agreement of merger above mentioned, The American Tobacco Company, created by said merger, did on or about the 20th day of October, 1904, make, execute and deliver to this defendant, as trustee, the indenture to secure the issues of bonds in the said merger agreement provided for, to the original of which indenture to be produced at the trial this defendant begs to refer for a correct ascertainment of the terms, conditions and effect thereof.

It denies that the said indenture is invalid in any way, but alleges that it created a valid charge in favor of this defendant, as trustee, and for the benefit of the holders of the bonds to be issued under said indenture, upon all the property and present and future net income, earnings and profits of the said The American Tobacco Company. It denies that any loss or damage whatsoever to the complainant or to any other stockholder of The American Tobacco Company has been occasioned thereby.

12. This defendant denies that it has any knowledge or information as to any of the allegations contained in the paragraphs of complainant's bill marked "13," "14," "15," "16," "17," "19" and "20," except that this defendant is informed that on or about the 22nd day of November, 1904, the complainant called at the office of this defendant in the City of New York, had an interview with the secretary of this defendant, who is now in Europe, and received from said secretary a printed copy of the merger agreement; and this defendant denies that it has ever refused or neglected to comply with any lawful or proper request or demand made upon it by the said complainant.

13. This defendant has no knowledge or information as to whether at the time of the consummation of the said merger any inventories were made or taken of the property belonging to the several merging corporations, but it denies that it is practicable or possible at this time, or was practicable or possible at the time the complainant's bill was filed, to separate the property in the hands of the merged corporation received from the original American Tobacco Company from that received from the Consolidated and Continental Companies. It also denies that accounts of the business transacted by the merged corporation, since the merger, have been kept in such a manner as to make it practicable or possible to determine what proportion of the busines of the merged corporation has been transacted with the capital

and assets of the original American Tobacco Company; and it denies that it is either feasible or practicable to separate the assets of the original American Tobacco Company from the other assets of the merged corporation, or that it was so at the time the complainant's bill was filed.

14. This defendant admits that since the date of the said merger the merged corporation has used and employed the assets and property of the original American Tobacco Company in the management and conduct of its own business and has appropriated to its own use all of the income and profits derived therefrom; but it denies that such action on the part of the merged corporation is illegal, or that the said corporation should account to the original American Tobacco Company therefor, or should be required to pay back to the original American Tobacco Company, its officers and shareholders the amount thereof; and it alleges on information and belief that no such accounting or return would at this time be possible or practicable, or if it were possible or practicable be fair and equitable to the present stockholders and security holders of the merged corporation.

15. For further answer to the bill of the complainant this defendant repeats each and every allegation heretofore made and further says:

This defendant is informed and believes and therefore alleges, that at the meeting of the stockholders of The American Tobacco Company held on September 30th, 1904, as above set forth, no objection was made on the part of any stockholder to the said merger on the ground that the Merger Act did not apply to The American Tobacco Company or for any reason could not be availed of by said company or by the merging companies, or that the said statute impaired the obligation of any contract. That, on the contrary, those who at said meeting voted against the merger did so for business reasons only, and upon the said vote being taken acquiesced in the judgment of the majority and have not opposed the same at any time since.

That thereupon the stockholders in the respective merging corporations, having duly adopted the said merger agreement as aforsaid, and the same having been filed in the office of the Secretary of State, and all the steps prescribed by the laws of New Jersey governing the merger or consolidation or corporations having been duly taken, the various stockholders and other parties interested in the said merging corporations and in the merged corporation proceeded to carry out and act under the said merger as follows:

(a) The officers and directors named in the merger agreement as officers and directors of the merged corporation assumed the direction of the business and the management of the plants formerly carried on and operated by the merging companies, and the various officers of said merging companies resigned and relinquished the control thereof into the hands of said new officers and directors.

(b) The businesses formerly carried on separately by the merging corporations were unified and consolidated; offices formerly required were abandoned; the three separate rolls of employes formerly existing were reduced to a single roll of officers and employes; the various separate agencies and agents formerly maintained throughout the United States were consolidated and duplicate agencies abolished; business was no longer done under any name except that of The American Tobacco Company.

(c) A vast amount of tobacco and other supplies and property used in the business of these companies and formerly owned in severality was at once commingled, and has since been manufactured into other forms of property, dealt with and sold without any attempt whatever to keep separate and distinct the portions thereof formerly owned by the merging companies. The cash belonging to the respective companies was deposited to the single account of The American Tobacco Company. Much of said cash has been expended in the purchase of other property held by the merged corporation and otherwise disbursed in the ordinary course of business of said corporation.

No separate account of the profits derived from the business or assets of the respective merging corporations has been kept, but the accounts of the profits of the entire business have been kept together. In short, the business received from the merging corporations has been unified into a single business, which, at the time of the filing of the complainant's bill, had been conducted for a period of many months as a single and united business, and it would be quite impossible now to trace these portions of the assets, good-will or profits of the said business which formerly belonged to or were the proceeds of the assets or business of the respective merging corporations.

(d) On or about October 20th, 1904, pursuant to the said merger agreement, said The American Tobacco Company did duly execute and deliver to this defendant as trustee a certain corporation assumed the direction of the business $56,100,000 of six per cent gold bonds and not exceeding $78,689,100 of four per cent gold bonds, by virtue of which indenture said The American Tobacco Company imposed a charge in favor of the said trustee upon all of its property and present and future net income, earnings and profits for the benefit of the said bonds, including under said charge all of the property received from each of the merging companies. The said bonds were thereupon duly executed by the American Tobacco Company, certified by this defendant as trustee, and before the complainant's bill was filed nearly all of said six per cent bonds had been delivered to and received by the former holders of the preferred stocks of the original American Tobacco Company and of the Continental Tobacco Company in exchange for their stocks respectively; and before the complainant's bill was filed nearly all of the said $78,689,100 of four per cent gold bonds had also been delivered to and received by the former holders of the four per cent bonds of the Consolidated Tobacco Company in exchange for their bonds.

Out of the $80,000,000 par value of the preferred stock which is authorized by the said merger agreement to be issued by the merged corporation, $78,689,100 of such preferred stock had, before the complainant's bill was filed, been issued to and received by the former holders of the four per cent gold bonds of the Consolidated Tobacco Company in exchange for said bonds; and out of the common stock of the merged corporation authorized by said merger agreement nearly $40,000,000 of such common stock had, before the complainant's bill was filed, been issued to and received by the former holders of the common stock of the original American Tobacco Company, of the Continental Company, and of the Consolidated Company in exchange for their stock, leaving a very small fraction of said former stocks outstanding.

Both classes of the said bonds of the said merged corporation and also its preferred stock had been listed on the New York Stock Exchange immediately after the said merger and have been actively dealt in on such exchange and elsewhere since that time, and said bonds and preferred stock, and also the common stock (which latter though not listed on the Stock Exchange has been actively dealt in) are now held and owned, and at the time complainant's bill was filed, were held and owned in large amounts by a great number of investors who had no connection whatever with any of such merging corporations as stockholders or otherwise, either at the time of said merger or at any time before, but who had purchased said bonds and the said stock, relying upon the validity of said merger and the validity of said bonds and trust indenture and of the charge or lien created by said last named instrument upon the assets and earnings of the merged corporation.

That substantially all of the stockholders of the original American Tobacco Company as well as substantially all of the stockholders and bondholders of the other merging corporations, as well as the officers of such corporations, have thus approved, acquiesced in and ratified the said merger, and in reliance there-

upon have accepted the stock and securities of the merged corporation, have bought, sold and dealt in the same, and have in many other ways changed their positions in reliance upon said merger.

That during the five months when substantially all of the said changes were taking place the complainant stood by and failed to make any attempt to prevent or enjoin the same. That it would be quite impossible, and even if it were possible it would be wholly inequitable and unjust, to set aside the said merger or the said trust indenture, or to attempt to re-distribute the assets and business of the merging corporations, or to re-distribute their stock and securities.

16. This defendant further says that under and by virtue of the merger aforesaid none of the purposes for which the original American Tobacco Company was incorporated have been changed, but as this defendant is informed and believes the said merged corporation possesses the same powers, rights and duties, is pursuing the same business, and exists for the same ends as those for which the said original company was incorporated. This defendant denies that the said merger has deprived the complainant or any stockholder of his property without his consent. It avers that the complainant had no vested right to remain a stockholder in The American Tobacco Company, nor did he have a vested right to have the capitalization of that company remain unchanged. That by the law of the State of New Jersey as it existed when The American Tobacco Company was formed, the complainant was liable to have his relations to The American Tobacco Company as a stockholder terminated, either by voluntary dissolution of the said corporation upon the affirmative vote of two-thirds in interest of the stockholders, or by the retirement of his stock by a like vote. That he was also liable to have the stock of the said company increased, or decreased, or its corporate existence extended, by such an affirmative vote.

This defendant further says that complainant is not without a remedy for any injury done to him by said consolidation, since he has a complete and adequate remedy at law to recover either the market value of his said shares or their intrinsic value, which at most cannot exceed the present worth of the par value of the shares at the expiration of the charter on the twentieth day of January, nineteen hundred and forty, plus the present worth of a dividend of eight per cent. thereon each year, for a period of thirty-five years, and defendant prays that it may have the same benefit of this defence as if it had pleaded the same in bar of said bill.

And this defendant prays to be hence dismissed with its costs.

(Signed) MORTON TRUST COMPANY,
By J. K. CORBIERE,
Vice-President.

McCARTER, WILLIAMSON & McCARTER,
Solicitors of Defts.

ROBERT H. McCARTER,
HENRY L. STIMSON,
Of Counsel.

[SEAL]
Attest:
J. I. BURKE,
Asst. Secretary.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss:

The answer of the defendant the Morton Trust Company, was taken this 11th day of August, one thousand nine hundred and five, before me, a master in chancery of the State of New Jersey, under the common seal of the said corporation, as by its said seal hereto affixed appears.

(Signed) ANDREW S. TAYLOR,
Master in Chancery of New Jersey.

IN CHANCERY OF NEW JERSEY.

November 2, 1906.

Between
RICHARD T. DANA, ADMINISTRATOR OF RICHARD S. DANA,
Complainant,
and
THE AMERICAN TOBACCO COMPANY, THE MORTON TRUST COMPANY AND THE PERSONS CONSTITUTING THE BOARD OF DIRECTORS OF THE AMERICAN TOBACCO COMPANY,
Defendants.

APPEARANCES:

James E. Howell and Grosvenor Nicholas (of the New York bar) representing the complainant.

Robert H. McCarter and Bronson Winthrop representing the Morton Trust Company.

Richard V. Lindabury, Charles L. Corbin and Junius S. Parker (of the New York bar) representing The American Tobacco Company, and for the individual directors.

Transcript of shorthand notes of testimony taken in the above entitled cause at Chancery Chambers, Newark, N. J., before Hon. Henry C. Pitney, Vice Chancellor, on November 2, 1906.

Mr. Howell. We offer in evidence for, the certificate of incorporation, a certified copy of certificate of incorporation of The American Tobacco Company.

The Court. Is that in print?

Mr. Howell. No. It is rather a short affair.

Mr. Lindabury. That is annexed to the answer.

The Court. That don't matter. He can put the original in. (Marked Exhibit C 1.)

Mr. Howell. Second, the letters of administration to the complainant, and that is with the files in the case; that was filed here before the filing of the bill—exemplified copy of letters of administration.

Marked Exhibit C 2.

Now, we ask you to produce letter written by Mr. Dana to The American Tobacco Company under date of May 28, 1904.

Mr. Parker. We couldn't find it; we haven't that.

Mr. Lindabury. Have you got copy?

Mr. Howell. We have got copy; yes. Here is copy of letter, with the exception that it isn't signed, the copy is not signed.

Mr. Lindabury. We do not find the letter, but we remember it.

Marked Exhibit C 3.

Mr. Howell. Here is copy of the surrogate's certificate that accompanied that letter.

Marked Exhibit C 4.

Mr. Howell. A specimen of the letterhead on which the letter was written.

Marked Exhibit C 5.

Mr. Howell. Then letter from the Farmers Loan and Trust Company dated June 2, 1904, in reply to the letter that Mr. Dana writes to The American Tobacco Company under date of May 28th.

Marked Exhibit C 6.

Mr. Howell. And then there is another letter in reply to the Farmers Loan and Trust Company letter.

Exhibit C 7.

Next is certificate of stock for fifty shares standing in the name of Richard S. Dana, certificate of preferred stock issued by The American Tobacco Company to Richard S. Dana for fifty shares, dated 7th day of April, 1892.

Marked Exhibit No. 8.

Preferred stock issued for property purchased numbered B 1161. Fifty shares. The American Tobacco Company, fifty shares. Incorporated under the laws of the State of New Jersey. "This certifies that Richard S. Dana is owner of fifty shares of one hundred dollars each of the preferred capital stock of The American Tobacco Company, transferable only on the books of the said company, in person or by attorney upon the surrender of this certificate. This preferred stock is entitled to dividends, not exceeding eight per cent for each year, payable quarterly, before any dividend on the general or common stock out of net profits of the company for such year (but such dividends shall not be cumulative), and is also entitled to preference on the assets of the company on the final distribution or disposition thereof. This certificate is valid only when counters'gned by the Farmers Loan and Trust Company, of New York, transfer agent. In witness whereof the said company has caused this certificate to be signed by its president and its treasurer this seventh day of April, 1892. J. B. Duke, president; J. Arents, treasurer. (On the margin) Countersigned and registered this seventh day of April, 1892. The Farmers Loan and Trust Company, transfer agent. R. O. Sandford, registrar."

Mr. Howell. Now the merger agreement.

Marked Exhibit C 9.

The trust mortgage made with it, mortgage made by The American Tobacco Company to the Morton Trust, dated October 20, 1904.

Exhibit C 10.

Mr. Howell. We ask you to produce a letter written by Mr. Dana to the president and directors of The American Tobacco Company, January 7, 1905.

Letter produced.

I offer in evidence letter written by Mr. Dana to the president and directors of The American Tobacco Company under date of January 7, 1905, the original produced by the other side—four sheets.

Marked Exhibit C 11, C 11-1, C 11-2 and C 11-3.

Now, a letter written by Mr. Dana to Mr. Hill under date of January 19.

Marked Exhibit C 12.

Now, Mr. Nicholas, the letter from Mr. Hill in reply to that one dated January 23, 1905. This is a reply to Mr. Dana's two letters.

Marked Exhibit C 13.

Now, Mr. Parker, a letter from Mr. Dana to Mr. Hill under date of February 3, 1905.

Exhibit C 14.

Now, Mr. Nicholas, there is a letter from somebody dated February 6, from Mr. Hill. Mr. Hill replies to Mr. Dana under date of February 6.

Marked Exhibit C 15.

And the paper that came with it.

Marked Exhibit C 16.

Mr. Dana's letter of February 23, produced by Mr. Parker. I produce a letter from Mr. Dana to Mr. Hill dated February 23, 1905.

Marked Exhibit C 17.

Now I ask you to produce letter written by Mr. Dana to the secretary of the Morton Trust Company under date of November 18, 1904. Produced by Mr. Winthrop.

Exhibit C 18.

Now a letter written by H. M. Francis, secretary of the Morton Trust Company, to Mr. Dana under date of November 19.

Exhibit C 19.

Letter to the Farmers Loan and Trust Company dated March 17, 1905?

Mr. Lindabury. We haven't that.

Mr. Howell. So you don't produce it. Do you object to my putting in a copy of it?

Mr. Lindabury. I have no doubt that is all right, Mr. Howell.

Letter of March 17, 1905, marked Exhibit C 20.

RICHARD T. DANA sworn.

Direct examination by Mr. Howell.

Q Where do you live?
A Manhattan, New York City.
Q What is your occupation?
A Civil and consulting engineer.
Q Where is your office?
A 15 William street, New York City.
Q How long has your office been there?
A About three years.
Q You are the complainant in this suit?
A I am.
Q And administrator of the estate of Richard S. Dana?
A Yes, sir.
Q And Richard S. Dana was your father?
A Yes, sir.
Q When did he die?
A On January 19, 1904.
Q There came into your possession as administrator of your father's estate some shares of stock of The American Tobacco Company, we understand?
A Yes.
Q How many shares?
A One hundred shares.
Q And who holds those certificates now?
A I do.

Q You wrote a letter to the Morton Trust Company under date of May 28, 1904; after the writing of that letter did you remain in the United States?

A For about a week only.

Q Where did you go?

A I went to Europe.

Q And when did you return?

A I returned on the 5th of October, 1904.

The Court. What was the purport of that letter?

Mr. Howell. It was a letter written on his letterhead directing The American Tobacco Company to remit dividends on the preferred stock held by him to the order of the Morton Trust Company for account of the estate of Richard S. Dana.

The Court. That was before the consolidation?

Mr. Howell. Oh, yes; month of May, 1904, and enclosing a copy of the certified letters of administration.

Q When did you first hear that anything had happened to The American Tobacco Company?

A Probably about a week after I returned. Wait a moment. I don't know that I heard anything had happened to it at that time. I heard some talk about a something that might concern The American Tobacco Company, or that would concern it or had concerned it, and I don't remember which; I heard something about it.

Q (*By the Court*) Did you get any of these notices that were sent out by the Tobacco Company?

A No, sir.

Q (*By the Court*) None of them forwarded to you in Europe?

A No, sir.

Q I was going to have him explain that fully. You might as well do it now. When you went to Europe what disposition did you make of your office?

A I left it in charge of Mr. Mills.

Q Who was Mr. Mills?

A Mr. Mills was assistant draughtsman in my office.

Q And what happened, as far as you know, to the letters that were addressed to you at your office during your absence?

A They were held in the office to await my return, with the exception of one or two personal matters referring to my residence in New Jersey, Ridgewood, at that time.

Q (*By the Court*) Where did you live in New Jersey?

A Ridgewood.

Q Did you find any letters awaiting you when you got home, at your office?

A I did.

Q Large number or small number?

A A large number.

Q Was there any package in the bundle in the lot of letters, anything from The American Tobacco Company or any of its officers?

A There was not.

Q (*By the Court*) No notices?

A No notices.

Q No notice?

A No, sir.

Q Was there awaiting you any notice?

A There were no notices from that company, sir; there were notices from other companies.

Q (*But the Court*) What other companies?

A Other companies in which the estate held stock.

Q (*By the Court*) Nothing to do with the Tobacco Company

A There was no notices of the Tobacco Company; I think there were—no, nothing to do with The American Tobacco Company.

Q (*By the Court*) Your father had been dead some time then?

A From January until October.

Q (*By the Court*) Was his house kept open? Did he have an office, business office?

A He had no office; no, sir.

Q (*By the Court*) Had no business office?

A No business office.

Q (*By the Court*) He had a house?

A He had a house.

Q (*By the Court*) Where did he dwell?

A 338 West 88th street, New York.

Q (*By the Court*) Was that house occupied?

A Only for a short time after his death.

Q (*By the Court*) What became of it then?

A It was closed up and put on the market for sale by my mother.

Q (*By the Court*) Then during the summer of 1904 there was no—that wasn't his address, the address of your father at all?

Mr. Howell. His father was dead.

The Court. I know, but there was nobody there to represent him?

A Part of the time there was a caretaker there.

Q After your return what disposition did you immediately make of your time?

A I was busy on engineering matters for some time, and with other matters pertaining to the estate. I had to see the attorney for the estate in regard to getting securities transferred to me as administrator. My surety was the American Surety Company, and it took a great deal of time to get coupons cut off and such few transfers made as I thought wise to make at the time.

Q (*By the Court*) The assets then of the concern were put in charge of the American Surety Company?

A They were.

Q (*By the Court*) In the ordinary course of business the surety company required perhaps, I imagine they might have required that you should deposit the securities of the estate under their control?

A They did, and I had them all deposited there with the exception of a few which I withdrew from time to time to make transfers.

Q Where was this engineering work that you speak about?

A Some of it was in Livingston county, New York, some of it in Perth Amboy, New Jersey, some of it, I think some of it was out in Hohokus and Ridgewood, New Jersey.

Q And how long were you engaged in this work outside of the city?

A Between what dates?

The Court. After you got home?

A I was engaged from time to time right along, more and more as the winter wore on.

Q (*By the Court*) I will ask you a question. When did you first hear of that merger?

A I first heard of the merger when I saw Mr. Francis at the Morton Trust Company on November 10.

Mr. Howell. 1904.

Q (*By the Court*) Did you examine your bank account to see whether any dividend had not been passed?

A I did.

Q (*By the Court*) What were the dividend days?

A I think the dividend days, one of them was first of November and the others were quarterly after that.

Q (*By the Court*) And quarterly before that?

A Quarterly before that.

Q (*By the Court*) First of November, that would be the first of August?

A Yes, sir.

Q (*By the Court*) Did you inquire and look at your bank account to see if there had been any dividend put to your credit the first of August?

A Yes, sir.

Q (*By the Court*) There had been?

A Yes, sir.

Q (*By the Court*) You didn't miss any dividend until first of November?

A I did not.

Q On what day do you say you went to the Morton Trust Company?

A On the 10th of November.

Q What did you go there for?

A I went primarily to inquire about the dividend.

Q Which had not been paid on the first of November?

A Which I did not find as having been paid?

Q Who did you see there?

A I saw Mr. Francis.

Q What position did Mr. Francis occupy?

A He told me he was secretary of The American Tobacco Company, the Continental Tobacco Company and the Consolidated Tobacco Company.

Q What position did he occupy in the Morton Trust Company?

A He was secretary.

Q And you had a conversation with him?

A I did.

Q You may state it, the whole conversation.

A I saw upon entering the office a barred window with the legend over it, The Tobacco Merger.

Q (*By the Court*) With a what?

A With a legend over the window on a piece of card-board "Tobacco Merger," which, so far as I remember, was the first time that I had seen the term "Merger" as applied to the Tobacco Company.

Q (*By the Court*) Or heard of it?

A I am not positive that I did not hear about it; I don't remember hearing about it before. I went to this window and asked the man behind the window, told the man behind the window that I was interested in an estate as administrator which had some of the stock, preferred stock of The American Tobacco Company, that my mother had a few shares, I think thirty, if I remember rightly, of the same stock, and that I thought my grandmother had some, some few shares,

something like ten, I don't remember the number of shares my grandmother held, and I had understood —I didn't say that I had understood—but I say now that I had understood that what I have subsequently found to be a merger was a combination such as a holding company; that was the extent of my information on those matters at the time— and I said to Mr. Francis that we had rather—

Q (*By the Court*) Was Mr. Francis behind the bar?

A He was the man behind the bars, behind the pigeon-hole. I said that we had this stock, which had been satisfactory to us for a number of years, and that I didn't think that we wanted to turn our stock into the combination. Mr. Francis said "All right, Mr. Dana." I had previously given him my name, and I turned to go away, having temporarily entirely forgotten the question of the dividend, and I was called back by Mr. Francis, who said "I may say for your information that there will not be one cent more dividends paid upon any of those three old companies' stock," and I said, "Well, now, that is the object that I came here for, to find out about those dividends. Now," I said, "can you compel us to come into the combination?" He said, "Well, you can lead a horse to water, but you can't make him drink." I was a little irritated at the tone with which he said this and the way in which he said it, and I said, "I don't like the way in which you are maintaining this conversation at all. If you consider me a horse, and that you are going to make— that you can lead me to water, you are very much mistaken. I will investigate this matter and you will hear from me later." Mr. Francis then apologized for having been impertinent and said that he was secretary for the three companies which had been merged and that he could not afford to injure the feelings, or words to that effect, of a stockholder, and I think that was about the end of the conversation.

Q (*By the Court*) Did you ask him what the nature of the transaction was?

A He told me. I asked him what the nature of the transaction was and my recollection is that he told me in a few days there would be some literature which I could get.

Q (*By the Court*) You say before you went there you had understood there had a holding company been formed?

A Yes; I should say this; he then told me the three companies had been merged, and that—I don't remember whether he gave me then or whether he offered to give me later a copy of what he called the merger agreement. I remember that that was the first time I ever heard the term "merger agreement;" and I said, "Do you mean to say that the companies" —Just strike that out.

The Court. Don't strike anything out. He has got it down.

A (Continuing) I said "What is this merger agreement?" or "What is the merger?" He said, "The three companies went out of existence on the— I think he said the 19th of October, or some date approximating that, and that the stocks of the old companies, the preferred stock were all canceled. I said, "Do you mean to say that my stock is now no longer in existence?" and he said, "Yes, that is what I mean to say," and I said, "Well, perhaps you mean that I am no longer in existence," and he said "no, your stock is no longer in existence." I said, "Here is the stock." "Well," he said, "it has been canceled." I said, "How can it be canceled when I have got it?"

Q (*By the Court*) You do not distinguish between a certificate of stock and the actual stock?

A I did not.

Q (*By the Court*) No. Go on.

A At the time.

Q That is the whole of my interview with Mr. Francis.

The Court. You better not say it is the whole, because you have been thinking of more all the time.

A Yes. I don't think of any more now.

Q When, if at any time, did you see anybody else in relation to this affair?

A This was on a Thursday. The following Saturday, two days later, I asked my mother to meet me down town with her certificate of stock and go with me to the Morton Trust Company and ask for information of the same kind, which she did, I accompanying her. Mr. Francis on this second occasion suggested that I obtain information either from the office of the company, which he said was 111 5th avenue, or from the transfer agent of the stock of the old company, namely, the Farmers' Loan and Trust Company. My mother told me immediately that she knew—

Q Never mind what your mother told you.

Mr. Lindabury. Let him tell it.

The Court. Yes; the object of the examination is to ascertain how rapidly he acquired information.

A My mother told me she happened to know Mr. Samuel Sloan, who was, I have since ascertained, secretary of the Farmers' Loan and Trust Company.

Q (*By the Court*) What, old Samuel Sloan?

A His son. We went down to the office of the Farmers' Loan and Trust Company and my mother introduced me to Mr. Sloan. I said, "Mr. Sloan, my mother has a few shares in the stock of The American Tobacco Company, and I represent her, and I understand you are the transfer agent of that company." Mr. Sloan said, "I don't know whether we are the transfer agents of that company or whether the company itself in existence, that if anybody is the transfer agent of the company we are." That is my recollection. I said, "All right, Mr. Sloan, we would like to see the list of stockholders of that company." Mr. Sloan said, "Now, are you asking this question from a legal point of view, as a legal right?" I said, "I don't know, but I want to see the list of stockholders," and he said, "Well, if that is the case I will have to consult our attorney, our regular

attorney is out of town, but I will consult another one." I think the regular attorney was playing golf. This was about eleven o'cleck, or a little later, on Saturday. Mr. Sloan went out of the room and was gone some little time, when he came back, either with him or a few moments after him there came a gentleman who followed him into another room, or else accompanied him into another room, where they, I believe, remained some ten or fifteen minutes. Then they emerged and I was introduced to this Mr. Horan, and Mr. Horan then asked me what I wanted. I said that I had already asked Mr. Sloan for a view of the list of the stockholders of The American Tobacco Company, of which I understood that his company was the transfer agent. Mr. Horan asked me a large number of questions, and finally said, as I recollect, that he would inform me on the following Monday whether he would show me the list of stockholders or not. I took out a piece of paper and pencil and I proceeded to make a note, asking him to tell me whether he refused to show me that list. He seemed to be rather angry, and he asked me what I was making the note for, and I said, "You have no right to ask me that question, I am making the note in order to refresh my memory if I should ever want to refresh it." I said "Now, do you or do you not refuse to show me that list of stockholders?"

Q (*By the Court*) Had you presented any certificate as stockholder there?

A I had exhibited that certificate belonging to my mother to Mr. Sloan some half hour before; I don't know whether or not Mr. Horan saw the certificate. Mr. Horan then said, "Well, at all events, I have not refused to show you that list until" looking up at the clock, and I said, "You will remember, I am sure that I" or words to that effect, "that I made the request of Mr. Sloan some little time before 12 o'clock;" I said, "I don't wish to take advantage of any one, or the fact that it is 12 o'clock or after or before, but I would like to know whether I can see that list," and he said "We will tell you Monday." On Monday they showed me the list.

The Court. I don't see the importance of all this; it is a mere splitting of hairs, spending a great deal of time about nothing. Mr. Howell, they had a perfect right to time to consider whether even a stockholder was entitled to see a list of shareholders.

Mr. Howell. That may be true, but I think it is very essential that Mr. Dana should explain in this cause the pains he took.

The Court. If he had said they wanted time to consider until Monday that would have been all down.

Q Did you go there again on Monday?

A I went there on Monday, and after a delay of about an hour they showed me the book.

Q Did you examine the list of stockholders?

A I did.

Q Did you find your father's name there?

A I did.

Q Did you find any memorandum to the effect that your father was dead?

A No.

Q I mean on the book?

A No.

Q Or any memorandum that you were the administrator?

A No.

Q (*By the Court*) Before you went to Europe in May, 1904?

A It was in June that I went to Europe, sir.

Q (*By the Court*) Well, before you went to Europe, anyhow. To whom did you apply at the Farmers' Loan and Trust Company?

A I wrote a letter to the Farmers' Loan and Trust Company.

The Court. That is the letter that has been put in here?

Mr. McCarter. No, sir.

Q Letter to the Farmers' Loan and Trust Company?

A To The American Tobacco Company, and I got an answer from the Farmers' Loan and Trust Company.

The Court. Has that letter been put in evidence?

Mr. Howell. That is in evidence. There are three letters in evidence (handing court letters).

The Court. That letter was addressed to The American Tobacco Company at its office in Fifth avenue, and the receipt was acknowledged by the Farmers' Loan and Trust Company as if the letter had been addressed to them?

Mr. Howell. Yes, that is right.

Q Now, did you ever visit the office of The American Tobacco Company in relation to this affair?

A I did.

Q When?

A Some time I think in December, early in December.

Q Where was their office?

A 111 Fifth avenue.

Q Whom did you see there?

A I saw a gentleman who is an assistant, as I understood it at the time, to Mr. Parker.

Q Mr. Parker is what?

A Mr. Parker is the attorney for the company, I believe.

Q Did you have any conversation with him about the matter?

A I did.

Q What was it?

A I asked him about the merger, this assistant to Mr. Parker, as I understood it.

Q (*By Mr. Lindabury*) Do you know the name, was it Mr. Burroughs?

A That is my recollection, Mr. Burroughs; my recollection of my conversation with Mr. Burroughs is not particularly distinct. I inquired about the clause which was on the old Continental Tobacco Company bonds; there were some Continental To-

bacco Company bonds of which the estate held four or five.

Q (*By the Court*) That you had in your possession?

A That I had in my possession, and I wished information as to the meaning of a clause or guarantee which mentioned the name of H. B. Howlands & Co., I think.

Q Did you mention The American Tobacco Company business that we are now complaining about?

Mr. Lindabury. I think we ought to have the whole of that interview, what he went there about.

The Court. Oh, yes; of course.

Q Go ahead.

A I went there about the bonds, and after Mr. Burroughs had gone into Mr. Parker's office I believe to ask him about it he came back and explained to me that that clause—about the value of an annuity in the event of those bonds being defaulted upon, or I don t remember just what he said about that, but that I could get information of H. B. Howlands & Company and see a copy of the agreement mentioned on those bonds, which I subsequently did. I think that I then asked Mr. Burroughs about the fact that in the bonds which were offered in exchange for the preferred stock of the original American Tobacco Company such bonds were taxable in the state of New York, and that the net return would not be the same as the net return on the old preferred stock. Mr. Burroughs I quite distinctly recollect said to me, "We have tried to make as careful and equitable an arrangement for the stockholders in this merger as we could; we have done the best we could, and I don't know what more we can do," or words to that effect.

Q (*By the Court*) Had you seen the terms of the merger before that?

A By that time I had read the merger agreement, yes; this conversation was some time in December, or very late in November.

Q (*By the Court*) How did you get that copy?

A That was given to me by Mr. Francis at a subsequent—of the Morton Trust Company.

Q When did you get that from Mr. Francis?

A I think I received that some time about the middle of November.

Q (*By the Court*) You were there first on the 10th, and then Saturday was the 12th, and Monday was the 14th, then you saw the list of stockholders. How soon after you saw the list of stockholders was it that you got a copy of the agreement?

A Probably four or five days.

Q (*By the Court*) Didn't hand it to you at that time, eh?

A I don't think so.

Q (*By the Court*) One was by the Farmers' Loan and Trust Company; did you get it from the Farmers' Loan and Trust Company?

A I got nothing from the Farmers' Loan and Trust Company excepting a look at the books.

Q (*By the Court*) You got it subsequently of Mr. Francis of the Morton Trust Company?

A Yes, sir.

Q Go on with your conversation with Mr. Burroughs.

A That was about the extent of my conversation with Mr. Burroughs. Later on, probably ten days later, I wished to have those same Continental Tobacco Company bonds transferred to me as administrator, no, transferred to bearer, so that I could distribute them in the estate in accordance with the court order, and I went up to the office of The American Tobacco Company at 111 Broadway accompanied by my brother to ask them to transfer those bonds to bearer.

Q They were registered then?

A They were registered at the time.

Q And they were Continental bonds?

A They were Continental bonds.

Q Go ahead; tell us what was done?

A There was some little delay about registering the bonds to bearer and some little delay as to my identity; the clerk said he wasn't quite sure, as I had

no credentials except letters of administration, that I was the administrator that I purported to be; he thought I might perhaps be some one else, and he made some demurrer, I requesting him, if possible to do it if he could. I was then ushered into the office of Mr. Parker and Mr. Parker questioned me a moment or two; I think I showed him my business card and a letter or two; I don't remember that exactly, and then Mr. Parker said he was satisfied I was what I purported to be and that he would have the bonds transferred, and I might wait a few moments in his office while the transfer was being made. While we were chatting there I asked Mr. Parker if he would tell me, if he could give me any light on the matter of the bonds which were offered in exchange for the stock being taxable, whereas the stock was not, telling him that I considered that the security for the stock was just as good as the security for the bonds, and that it looked to me as if we would get less net return on the bonds, the bonds being taxable, and Mr. Parker said in effect that he did not consider that a very important matter. Is that right, Mr. Parker?

The Court. Never mind. Don't telegraph there at all.

A I then asked him another question. I asked him how I could transfer half of the stock of the estate held in The American Tobacco Company to one part of the estate and another half of the stock to another part of the estate; in other words, how I could divide it. He said that the stock had been canceled, that there were no longer any stock certificates that could be issued in exchange for the old certificates, and that he didn't see how that could be done, or words to that effect.

Q Is that all your conversation with Mr. Parker?

A I think Mr. Parker suggested that I could endorse over the two certificates, signing them with my name as administrator; and I think that is the extent of the conversation with Mr. Parker.

Q Now did you see anybody connected with The American Tobacco Company after that in relation to this stock business?

A No.

Q Now, what else did you do, Mr. Dana, from the time you first heard there was something being done with The American Tobacco Company down to the time you brought your suit, what else did you do beside what you have told us in the way of attempting to get information about it?

A I asked quite a number of my friends if they knew anything about the tobacco merger, and they all told me that they did not; they told me, as I recollect, that they considered it very difficult to obtain information.

Q (*By the Court*) I will interrupt you. Did you ask Mr. Parker about the details of the thing over and above what you saw in the agreement?

A I think not.

Q (*By the Court*) He knew all about it, you would naturally suppose, Mr. Parker knew all about it, didn't he?

A Oh, I should say this, that Mr. Parker at the outset of my conversation with him about the stock and bonds stated that he was the attorney for the company, and warned me that anything he might say might be prejudiced in favor of the company, and that in the event of my wanting an unprejudiced statement I had better consult my own attorney. That is the reason I didn't ask him more fully I think.

Q (*By Mr. Lindabury*) That was of the law you mean, don't you, this question about the taxation?

A Question of the law or anything else.

The Court. I asked him why he didn't inquire into the details of the merger from Mr. Parker, or meant to ask him that question, and he said that one reason was that Mr. Parker told him that anything he might tell him about it might be considered as not very reliable, because he was counsel for the company.

Mr. Lindabury. I did not understand him that way. Whether this referred to matters of fact or matters of law.

The Court. Matter of fact I was asking him about, the details of matter of fact.

Mr. Lindabury. I didn't understand him so, your honor, and that was the reason I asked.

The Court. Probably the witness did not understand me.

A I don't remember Mr. Parker saying that his recollection as to facts would not be reliable.

The Court. Or his statements as to facts?

A Or his statements, anything of that kind. However, I didn't think that I ought to ask questions of an attorney of The American Tobacco Company with reference to the rights that I thought had been infringed upon perhaps.

Q What else did you do in the way of finding out or attempting to find out, get information about this business?

A I consulted with my attorney a number of times; I asked him to send for a copy of the charter of the company; I read a good deal of it—I carefully read the merger agreement and one or two other printed slips that Mr. Francis had given me, and I talked— asked my broker if he knew anything about the company.

Q Are these the printed papers that you got from Mr. Francis (handing witness papers).

A I believe so; yes, sir.

Mr. Lindabury. What did you give him, Mr. Howell?

Mr. Howell. I don't know.

The Court. Have they been put in?

Mr. Howell. No.

A I am not certain that those are, but I think they are.

Mr. Howell. One is Mr. Butler's circular of September 9, 1904; I will put it in now.

Marked Exhibit C 21.

Mr. Howell. And the other is American Tobacco Company's circular, dated October 20, 1904.

Marked Exhibit C 22.

Q Well, I show you another paper. Did you subsequently get that from Mr. Francis?

A I got it from some one, I didn't know who, presumably Mr. Francis.

Q How near its date?

A Probably shortly afterwards.

Q (*By the Court*) What is the date of that?

A Dated January 3, 1905.

Mr. Howell. Morton Trust Company, notice to the holders of the certificate of deposit.

A I hold no certificates of deposit.

Marked Exhibit C 23.

The Court. That is, I suppose, for the purposes of the consolidation all the stock was deposited with the Morton Trust Company or some other trust company?

Mr. Howell. Yes; and they issued certificates of deposit which were transferrable.

The Court. They voted on it, I suppose?

Mr. Lindabury. Oh, no.

Mr. Parker. They didn't vote on the stock, (handing court papers).

The Court. Oh, bond, yes.

Mr. Lindabury. Notice of the consummation of the financial scheme.

Q (*By the Court*) This circular, October 20, 1904, issued by Mr. Duke as president of The American Tobacco Company, addressed to the holders of the stock of the American, Continental and Consolidated

Tobacco Companies, from whom did you receive it, marked Exhibit C 22, from whom did you receive that?

A From Mr. Francis, I think, sir.

Q (*By the Court*) That is after the interview you had with him, eh?

A Yes, sir.

Q (*By the Court*) The interview was in November?

A Yes, had a subsequent interview.

Q (*By the Court*) Yes. Well, now, how much had you known about it before you got that circular letter?

A Practically nothing.

Q (*By the Court*) Mr. Francis had told you and Mr. Sloan had told you something about it?

A Mr. Sloan told me this.

Q (*By the Court*) Well, they had told you something about it?

A I think not, sir.

Q (*By the Court*) Hadn't Mr. Francis told you there had been a merger?

A Mr. Francis had told me there had been a merger, yes, sir.

Q (*By the Court*) And Mr. Sloan, didn't he tell you the same thing in effect, that The American Tobacco Company was out of existence?

A He said he believed it was.

Q (*By the Court*) Yes, exactly, and then this was the first information you had of the true inwardness of the transaction?

A Except what I heard from Mr. Sloan and Mr. Francis.

Q (*By the Court*) Yes.

A Yes, sir.

Q Do you know what the tax rate in the city of New York is for the current year, 1906?

The Court. What difference does it make?

Mr. Howell. I want to show—

The Court. I understand your statement. You don't have to prove anything except there is a

tax rate. Your statement he had preferred stock, 8 per cent preferred stock, and he was offered bonds at 6 per cent; that made it exactly the same if I have done the sum right in my head, haven't got misled by decimals, he got bonds paying him 8 per cent; he had stock paying 8 per cent; he complained one was taxable and one was not. You can prove one was taxable and one was not. The amount of the taxes are of no consequence here; everybody knows it is high enough, up to the point of endurance. I won't keep you from proving one is taxable in New York and the other one is not.

Mr. Lindabury. Legally or actually?

Mr. Howell. Actually.

The Court. I suppose that is an admitted fact, but I don't know as the court takes judicial notice of it. How is that?

A They are; bonds are taxable and stock is not.

Mr. Howell. If the court please, I renew my offer to ask Mr. Dana—

The Court. Go on?

Mr. Howell. I want to make it the basis of a calculation showing the amount he would lose in case he accepted the offer made by the merger agreement.

Mr. Lindabury. I object.

The Court. I was merely thinking it was perfectly rediculous, but you can proceed.

Mr. Lindabury. I object to it as irrelevant.

Q (*By the Court*) About two per cent, isn't it, in New York?

A About one and a half, sir.

The Court. Nobody knows what it will be the next year or the year after.

Q Calculating the rate at one and a half per cent—

The Court. I will do that sum in arithmetic.

Q How much—

The Court. Why, it reduces the interest just that much. Don't take up the time of the court with that.

Mr. Howell. I want to show—

The Court. I refuse to have it shown to me, because the presumption is the court knows himself.

Mr. Lindabury. Little sum in arithmetic.

A It is a sum in annuity, sir.

The Court. I can apply the annuity tables to it.

Cross examination by Mr. Lindabury.

Q Have you a copy of your father's will with you?
A No.
Q He left a will; you were executor I understand?
A No; I was administrator.
Q And what other children did your father leave?
A He left my brother.
Q Where does he live?
A He lives in Lennox, Massachusetts.
Q And you lived in New Jersey?
A I lived in New Jersey then, yes.
Q When did you leave New Jersey?
A In October 1904.
Q (*By the Court*). When you came back from Europe?
A When I came back from Europe.
Q How long had you lived in New Jersey?
A Five or six years.
Q Are you married?
A Yes, sir.
Q Were then?
A Yes.
Q How long had you been married?
A Since April 1902.

Q So that you kept house in New Jersey?

A Yes.

Q Did you take up your residence in New York in October 1904

A I did; yes.

Q Keep house?

A Well, if living in an apartment is keeping house, I did.

Q You know whether it is or not, it depends, and have you been keeping house there ever since?

A In New York City?

Q Yes?

A No; not this last summer.

Q I know, but are you a resident of New York now?

A I am.

Q (*By the Court*). Where do you vote?

A In New York City; that is where I am going to vote this coming election.

Q Have you ever voted there?

A Not yet.

Q Haven't ever voted there?

A No.

Q Did you conclude that that was your residence until this question of taxation took possession of you?

A What do you mean by that question, please?

Q Of course if you lived in New Jersey the bonds that came to you would not be taxable in New York, nor would the bonds that came to your brother be taxable in New York, as he came from Massachusetts. I say did you conclude you resided in New York before this question of taxation took possession in your mind?

A No, I did not.

Q Where has you mother lived since the death of your father?

A In Lennox, Massachusetts, I believe.

Q With your brother?

A Yes.

Q And when did she go to live there, shortly after your father's death?

A I don't know.

Q Before you went to Europe?

A I don't know.

Q Don't you know whether she was living in the house on 88th street when you left for Europe?

A She was not.

Q It was closed then, or was in the hands of some caretaker?

A It was either closed or in process of being closed.

Q Your father had lived there some time, hadn't he?

A Yes.

Q That was the address which appeared opposite his name on the transfer books of The American Tobacco Company, wasn't it?

A I think so.

Q It was the address where notices of corporate meetings had been sent all the time he held the stock, wasn't it?

A I don't know.

Q As far as you know, it was?

A I don't know that it was not.

Q Don't you know anything about it?

A I don't know whether—I don't know what notice my father received at that address.

Q Well, after your father's death did you ever give The American Tobacco Company for entry upon its transfer books any other address than that for stock which stood in your father's name?

A I gave them my address on the letter that I wrote before I left for Europe.

Q Did you request that notices of stockholders' meetings be sent to that address?

A I don't think that I specifically made that request.

Q (*By the Court*). Give copies of letters of administration to the transfer agent, and a notice of his address, 15 William street.

Q Did you ever give The American Tobacco Company any other address than that which appeared opposite your father's name on the transfer books, at which notices or corporate meetings or any other stockholders' notices were to be sent?

The Court. He says he has given nothing but that letter.

Q Perhaps he has answered it then. Now do you know what was done with mail that came during that summer to your father's address in 88th street?

A Some of it was forwarded, I think, to Lennox, Massachusetts, to my brother, and I think some of it was lost.

Q What makes you think some of it was lost?

A Because I recollect that, I recollect faintly the query in my mind as to why I had not received more notices than I did; there were certain matters that I had to look up myself which I do not now recollect, but I recollect the fact which led me to think that probably some letters had been lost; I have no knowledge that some letters were lost, but I think there may have been.

Q You mean letters from other corporations?

A Other corporations or creditors of the estate in some small amounts like coal dealers and wood dealers and that sort of thing.

Q Letters from corporations or creditors that would have come to your father's old residence in his name, I suppose?

A I think so, yes.

Q And many such went to Massachusetts?

A I don't know.

Q Were you sole executor or sole administrator?

A I was sole administrator, yes.

Q Why didn't you arrange before you went to have them sent to your office?

A I think that some of them were sent to my office.

Q Did you make any arrangement about it before you went as to what should be done with the mail that came in your father's name in your old residence?

A I think I asked my brother to attend to that, and I think that some mail while I was in Europe was sent to me.

Q So you told us, and some sent to you do you think, or was none sent you to your office?

A I think he had some sent to me about the time he expected he to return from Europe, but I don't know.

Q So your idea is that up until shortly before you returned the mail all went to him in Massachusetts?

A Not all of it; some of it.

The Court. He has already said he thought some was lost.

Q Yes, unless it was lost.

The Court. I have forgotten again when your father died?-

A January 19th.

Q (*By the Court.*) There wouldn't naturally be much correspondence after he died in January; by the month of June correspondence with his father would be mostly over with.

A Perhaps I can explain that by saying that my brother was with my father more than I was for some weeks before his death and he attended to some business matters for him, so that some matters pertaining to the estate were dealt with by my brother directly and some by me as administrator.

Q Now, your mother was a stockholder in the American Tobacco Company?

A Yes, sir.

Q Of record?

A I don't know that.

Q Her stock was recorded in her name?

A I believe so, yes.

Q That was your understanding, wasn't it?

A Yes, sir.

Q Didn't you find her name when you saw the books at the Farmers' Loan and Trust Company?

A I didn't look for it

Q Your brother also was a stockholder?

A I don't know.

Q I thought you said so this morning?

A I said I thought my grandmother might have some small amount of stock.

Q You don't know whether your brother was or not?

A I don't know.

Q But your grandmother, is she still living?

A She is.

Q Where did she live at this time, Lennox?

A I think she lived in New York.

Q Well, don't you know, no mere legal residence; where did she actually reside?

A She actually resided part of the year in New York and part of the year in Lennox.

Q In New York with whom?

A With herself.

Q Not with some relative?

A In her own house.

Q And in Massachusetts with whom did she live?

A With my mother, or in my mother's house.

Q I see; then during the summer you were away was she at Massachusetts, Lennox?

A Yes, sir.

Q And did you say how much stock your grandmother had?

A I did not.

Q Did you see your grandmother shortly after you returned?

A I did, yes.

Q How soon?

A Well, it wasn't very long, sir, probably three weeks; I don't know that she had returned from Lennox when I returned from Europe.

Q You didn't see her until she came back to New York?

A I didn't—I won't say that; I am not certain that I did not run out to Lennox for a day or so that fall.

Q Your mother was there, your mother was at Lennox?

A Yes, sir.

Q (*By the Court*) Your mother was in New York?

A She was at Lennox at that time, I believe.

Q Do you recall that you went up to Lennox?

A I do not.

Q Well, did you hear from neither your grandmother or brother or your mother anything about this merger before you went around to the Morton Trust Company?

A Not that I recollect.

Q Who did you hear about this from about a week after your return from Europe?

A I think I saw some mention of it in the financial column of one of the papers.

Q Do you remember which paper?

A No, I do not, it was either the Times or the Sun or the Evening Post.

Q That naturally attracted your attention because you were interested in the corporation, didn't it?

A It did; it attracted my attention.

Q And did you make any inquiries then?

A Not immediately.

Q Well, how soon?

A Probably in the course of a week or ten days, I asked one or two of my friends what they knew about the company.

Q Do you remember what statement it was you saw in the financial column?

A No, I do not.

Q Nothing at all about it?

A I remember it said something about a meeting, a stockholders' meeting; it might have mentioned something about—no, I think it said something about stockholders' meeting.

Mr. Howell. Don't guess at anything; just tell what you remember.

The Court. What time do you set up in your answer the stockholders' meeting was held?

Mr. Lindabury. 30th of September one was held, and another 17th of October.

Q Had the stockholders' meeting been held then yet, or was it to be held?

The Court. The notice that you saw?

A Which stockholders' meeting do you mean?

Q I think you said you saw in the paper, didn't you?

A Something about a stockholders' meeting.

Q Yes.

A And I saw that in the paper probably about the middle of—

Q October?

A About the middle, or week or so later than the middle of October.

Q I think you said that was about a week after you returned.

The Court. Got back 5th of October.

Q And was it a week after that?

A Week or two.

Q Was this an advertisement of the stockholders' meeting?

A I don't remember; I don't think so.

Q Do you remember which paper you saw it in?

A I think I said that this was in the financial column; I don't think it was in the advertising column.

Q Don't think it was a legal notice, but financial note?

A I think so, but I don't recollect distinctly.

Q When did you speak to your broker about it?

A Probably about the middle or a few days later than the middle of October.

Q Before you had seen Mr. Francis or after?

A I didn't see Mr. Francis until the tenth of November.

Q Who was the broker that you consulted a little after the middle of October?

A A Mr. Meredith.

Q What is his first name?

A William F. Meredith.

Q He told you about it, didn't he? How old a man is he about?

A Thirty-four.

Q Did he tell you about it?

A No; he said he didn't know anything about it.

Q Nothing at all about it, eh?

A No.

Q Well, did he tell you where you could find out?

A I don't think he did; I think he may possibly have mentioned the Morton Trust Company, but he said he didn't know anything about it, except that—

Q Now, is that all he told you?

A Yes, sir.

Q That he didn't know anything about it, didn't know where you could find out, put you on track of information or anything?

A He did tell me one other thing.

Q Well, what was that?

A He said he didn't think I would make any mistake if I wanted a few weeks, that I would probably get more information from the company in the course of a few weeks if I waited.

Q Now, who else did you speak to about the matter in October?

A In October, I don't know that I spoke to any one else; I may have—no, I don't think I spoke to any one else about it.

Q When did you conclude that this was not a favorable arrangement because the bonds would be subject to taxation, when was it that idea struck you?

A I think that idea struck me just before I saw Mr. Parker.

Q And when was that?

A Probably a week or so before I spoke to Mr. Parker.

Q And it arose out of a study of the agreement?

A Yes, sir.

Q And these circulars?

A Yes, sir.

Q When did you first consult a lawyer?

A I think I consulted a lawyer first about twenty minutes after my conversation with Mr. Francis.

Q And that was the first conversation you had with him?

A On this subject.

The Court. On the 10th of November.

Q First conversation you had with him on this subject, yes?

A With whom?

Q Mr. Francis?

A Yes, sir.

Q And that was the tenth of November, if I recollect you aright?

A Yes, sir.

Q What lawyer did you consult then?

A Mr. Nicholas.

Q The one whom you have consulted since?

A Yes, sir.

Q And had he a copy of the agreement?

A I don't think so.

Q And did you take any papers from Mr. Francis to him, any of these papers?

A I don't know. What I consulted him about then was the question of the dividend that the estate should have received, but did not.

Q And when do you say it should have received that dividend but had not?

A On the first of November, as I recollect.

Q Don't you know you are mistaken. I don't mean don't you know, because—

A No, I don't know that I am mistaken about that.

Q Aren't you mistaken about that?

A I don't think so; I don't know whether I am or not; I haven't looked up that date when that dividend was due.

Q You said awhile ago the dividend was due in August and paid then; isn't that a mistake?

A I think it was due in August.

Q July one was due, and wasn't another due in October and not paid because of the merger?

A I don't know whether it was October or Novvember or July or August.

Q You said awhile ago it was November; I thought you said you were positive?

A If I was very positive I shouldn't have been very positive; I am not very positive whether October or November; I had it in mind to look it up, but I hadn't looked it up; I can look that up and give you information from record easily.

Q When was it you say you consulted your lawyer then the first time?

The Court. About twenty minutes after he had seen Mr. Francis, and for that purpose he used his diary fixing the date with Mr. Francis.

Q Your diary shows that you had an interview with Mr. Nicholas at that time?

A Yes, sir.

Q Well, upon which point was it you say you consulted him?

A About the dividend.

Q How could you do that without putting the papers before him?

A Well, I told him that I understood that there was a merger or a combination of some kind of a company in which the estate was interested, and that the dividend was being held up, and I thought that it was being held up unjustly.

Q I don't care for the details of the conversation, but didn't he ask you to bring the papers?

A I think he went with me later to see Mr. Francis and get the papers.

Q The same day?

A I don't think so, but I don't remember.

Q Well, within a day or so?

A I don't remember that.

Q You know whether it was a day or two or several weeks, don't you?

The Court. That your lawyer—

A That is my lawyer, yes, sir.

Q He went with you to Mr. Francis?

A I know it wasn't several weeks.

Q Suppose you look at that diary again; I think that will tell.

A No, it doesn't.

Q Not when you went to Mr. Francis again with the lawyer?

A No.

Q Nothing about that interview?

A No.

Q Can't you give us any idea about how soon it was after that first interview?

A Yes, I can.

Q Do it then?

A A few days.

Q And you got the papers then, didn't you?

A I believe so, yes.

Q Now, what did you get, the agreement, the merger agreement?

A I got the merger agreement and two or three other papers.

Q Mr. Fuller's circular?

A I believe so.

Q (*By the Court*) Mr. Duke's circular.

Q One signed by Mr. Fuller?

The Court. He says he got it from Mr. Sloan or Francis after the 10th of November.

Q Now, Mr. Francis gave you all those?

A He gave me a copy of the merger agreement and two or three other documents; what those others were I don't remember specifically.

Q Those others being the ones you put in evidence here this morning?

A I don't remember them specifically.

Q Was one of them signed by W. W. Fuller, counsel?

A I think it was, but I am not certain.

Q And one was J. B. Duke, president?

A I took all he gave me; I don't remember the details.

Q (*By the Court*) He wants to find out when you first got this circular signed by Mr. Fuller and dated September 9?

A I am quite sure I got that around the middle of November.

Q I am not talking about around the middle of November; I am talking about a few days succeeding the 10th of October.

The Court. No; he hasn't sworn to anything about the tenth of October.

Q Then I got confused about that. All right then, a few days after the tenth of November, if that was it; I thought it was October; that was when you got them?

A I think so.

Q Now did you come back with your attorney after getting those papers and go over them with him?

A Excuse me just a moment, at that time, at the time we got those papers I didn't make a specific note of just what papers I got; I do remember specifically getting the merger agreement and some other papers; I don't remember distinctly, specifically just what the other papers were, but I know they were bearing on the subject.

Q Now, did you go back with your attorney and examine them?

A Examine what?

Q The papers that you got?

A Did I go back where?

Q To your attorney's office?

A I did.

Q And he read them?

A I don't know whether I went back immediately to his office or whether he took the papers and went to his office and I saw him later; I saw him later at different times.

Q And he then explained them to you, I suppose?

A He explained parts of them.

Q You discussed the papers thereafter with him, I suppose?

A I did; yes, sir.

Q I think you said that at the time your father died his estate owned one hundred shares of this stock?

A Yes, sir.

Q Do I understand you that it still owns the hundred shares?

A Yes.

Q Haven't you sold any of the stock?

A No.

Q Have you divided it?

A No.

Q So that the title is in the estate of the whole hundred shares still?

A I believe so, yes, if it hasn't been annulled.

Q Well, you haven't attempted to sign away or pass away fifty of the shares?

A I think that I signed a power, a stock power for fifty shares.

Q When?

A I don't remember when, probably in last December or something like last December.

Q In whose favor?

A In favor of my brother.

Q The one who lives in Lennox?

A Yes, sir.

Q Well, was that for the purpose of transferring it to him or showing that he had thereafter the equitable interest in that?

A That was for the purpose—the hundred shares of stock were in two certificates, and I asked him to keep one in his safe deposit box while I kept the other in mine, and I gave him this certificate and attached power so that in the event of my death—

The Court. Declaration of trust. Go on.

Q Blank transfer, I suppose, wasn't it?

A Yes, sir.

Q Substantially that.

The Court. I suppose it was a division, as far as you could, of the shares between you two as next of kin of your father?

A Yes, but when I say I believe that hundred shares are still in the estate—

The Court. Oh, it is a matter of law; you need not trouble your head about that at all.

Q I suppose you and your brother—

The Court. He and his brother are the sole next of kin of their father, as I understand.

Q So you practically divided the stock, you taking one-half and he the other half?

A Yes.

Q Therefore, this is your individual suit rather than the suit of the estate?

A No, I don't consider it so.

The Court. The legal title is still in him. That is a question of law, Mr. Lindabury, you need not stop to question this witness about; I don't think you ought to. Any way, the paper is not here; he is stating the contents of it, and he ought not to be bound by it, or his brother ought not to be bound by it unless the paper is produced.

Q When did you first understand that these bonds might be taxable in New York, do you remember that?

A I think I have answered that question, sir.

Q I was wondering if you haven't; I am not very clear that you had. Will you answer it again?

A Something like a week before I saw Mr. Parker the question came up in my mind.

Q Had you any objection at that time to the transfer, except what arose out of that fact?

A I don't recollect that I had.

The Court. That is the objection he made to Mr. Parker.

Q When you saw Mr. Burroughs did you talk over the matter of the consolidation or merger with Mr. Burroughs?

A To a limited extent; yes.

The Court. Mr. Lindabury, you might as well know what is in my mind. I should want to hear argument on it if it is of any consequence in this

case, but am not at all sure that that certificate of stock does not give him an equal share with all the other stockholders in the assets of the company when it is wound up.

Mr. Howell. We propose to argue that.

The Court. Yes; I am not ready to accept as the law of the case that it don't give any more; it gives them a preference, that is all.

Mr. Lindabury. Preference to what extent?

The Court. I asked the question some time ago when you were opening your case, and you said, "Oh, the certificate provides for that and the certificate limits him to the amount of the stock." I looked at it right away as soon as I got hold of it; it didn't strike me your assertion of the law was borne out by the language of the certificate.

Mr. Lindabury. Certificate of incorporation?

The Court. Certainly. I should want to hear a great deal of argument before I decided he was not entitled to some share of the assets of that corporation when it it wound up, as in there it gives him preference if there isn't enough assets on the division at the end of the term of the corporation to pay all at par, all the shareholders, then he has to be paid at par, but it doesn't say he shall not have a share of the surplus if there is more than enough.

Q Now, to finish the subject I was on. You discussed with Mr. Parker, or at least sought light from Mr. Parker on this question of the taxability of the bonds, I think, did you?

A I repeated as nearly as I could my conversation with Mr. Parker some time ago, sir.

Q And in your talk with your other friends was one point of objection you had this matter of taxability of the bonds?

A Yes.

Q And did that continue to be the ground of your objection down to March?

A That continued to be one objection in my mind against accepting the bonds for the stock.

Q How soon did any other objection arise to your mind against the transfer?

A Well, probably not long after the bond objection.

Q You mean the tax objection, don't you?

A Yes, the bond tax objection.

Q Now, what other objection arose?

A Well, I understood that the old preferred stock had voting power, and I knew that the bonds did not have voting power; I thought that that voting power might be a right, although I didn't know what value it might have, but I thought it was a right; that arose as an objection.

Q That arose pretty soon after the taxation objection arose?

A Pretty soon before or pretty soon after.

Q Perhaps before, did it?

A Perhaps before.

Q Now, did any other objection arise?

A But I don't think before, I don't think that that matter came up until some little time after, some short time after the tax ability of the bonds objection.

Q Did any other objection arise in your mind that you think of now?

A Well, I don't know at the present moment what objections, what other objections exactly arose in my own mind and what other objections arose in the mind of my attorney; they probably arose as a result of conversations that I had with my attorney; just how much of that were due to him or how much to me I don't know.

Q Well, what other objections at any time came to your mind?

A Came into mind or were told me by my attorney?

Q Either one; came to your mind either by your own promptings or from your attorney?

A Well, another objection was this. On fifty shares of stock there would be allowable under the terms of the merger $6,666.67 in bonds; the lowest

denomination of any bond to be issued was fifty dollars, as I recollect,—so that the nearest amount to the offered value in bonds would be $6,650 in bonds and $16.67 in cash. I didn't understand what right the company or the companies or the Morton Trust Company had to compel me to accept bonds and a little cash in payment for my stock, or a larger amount of stock, I paying a certain return in cash.

Q Well, you could buy or sell at the market rates and adjust that, couldn't you?

A I could buy or sell at the market rates anything that I had that was marketable; yes.

Q When did this objection strike you?

A I don't remember.

Q Was it in November?

A I have previously stated, sir, that I don't know whether that objection arose in my own mind, whether it struck me whether it struck my attorney or whether it arose in his mind.

Q When did it take possession of your mind, I don't care how communicated?

A I don't think it ever took possession of my mind; I think my mind took possession of it.

Q Well, when did your mind take possession of it?

A I don't know, as I said before.

Q What month?

A I don't know that.

Q What year?

A Well, it was in the year 1904.

The Court. There is no objection to this line of evidence, and I don't know that the objection can be sustained if it were made, but it doesn't interest me much, Mr. Lindabury. I confess I don't see what difference it makes what objections this gentleman had or how long they were maturing in his mind; but it may be very important, and I don't want to stop you, but I want to say to you at present I can't see the value of it.

Mr. Lindabury. It seems to me it was important.

The Court. In what point of view is it important?

Mr. Lindabury. Showing that all objections that he ever had to this merger agreement were fully in his mind as early as November, and yet he waited until the 20th of March before he filed his bill. He certainly understood the situation—

The Court. If he didn't have them he was bound to have them. He got this notice here some time about the 15th or 20th of November he had the merger agreement and two circulars, all that sort of thing, handed to him about that time. Now a few days is sufficient for any man of business to make up his mind whether he wishes to accept or reject, subject to what Mr. Howell, his side may say, it seems to me he was bound to make inquiry, examine into the whole transaction and see what might be done. That is the way it seems to me, and I don't see why you want to ask all these questions; that is the reason why I am not interested.

A I think I may be able to answer your last question.

Q Just a question or two more on another branch. Did you know when you went away the market price of the preferred shares of The American Tobacco Company, when you left?

Mr. Howell. You mean June, 1904?

Mr. Lindabury. Yes.

A Yes, I probably did know.

Q Before you went?

A I read the papers.

Q And did you understand the price of them when you got back from Europe?

A Yes, sir.

Q And the price of the bonds that had been exchanged for preferred stock?

A No, when I got back from Europe the bonds had not been exchanged for the preferred stock, and I don't think there was any price on them.

Q But I suppose that you were aware of the fact in November that the price of the preferred stock was affected by the public knowledge of the merger, didn't you?

A I believe it was effected by something, I don't know what.

Q And the shares had gone up in the market, hadn't they?

A I believe they had.

Q And they were from time to time rising, weren't they?

A Together with the rest of the entire market, yes, sir.

Q They were all the time rising while you were holding this consultation with yourself and your counsel with regard to whether you would exchange or not?

A No, they were not all the time rising.

Q Well, didn't they continue to rise until after you brought this suit from the time of your return from Europe?

A I don't think so; I think they rose and fell like; I don't think they rose continuously; I don't know that they did or that they did not.

Q Was there any time after you got back before you brought the suit when they were not higher than they ever were before the merger?

The Court. Which, the bonds?

Q Yes, the bonds that were given in exchange for that, higher than the stock had been?

A Will you please repeat that question, sir.

Q (*By the Court*) The question is this, whether you could not at any time after you had the option to take these bonds have sold them for more than you could your stock before you went away?

Mr. Lindabury. At any time.

A I think so; I may say I don't think I could have sold them for what they were worth.

Cross examination by Mr. McCarter.

Q Mr. Dana, did Mr. Fracis say to you that he was the secretary of the three tobacco companies?

A Yes, sir.

Q Are you quite sure he said that?

A Yes, I remember that distinctly; the way he expressed it was, "I am secretary for the three companies" or "I am secretary of the three companies."

Q Did he use the word "secretary" or did he say, "I am the representative of them?"

A I remember distinctly the word "secretary."

Q Didn't he say he was secretary of the Morton Trust Company and he represented the three tobacco companies in this stock transfer matter?

A No; I think the first time that I knew definitely that he was secretary of the Morton Trust Company was a few days later. I thought at the time he was secretary or had been secretary for the three companies, and I didn't know just what his connection with the Morton Trust Company was.

Q (*By Mr. Corbin*) Don't you think you might have misunderstood him about that?

A My recollection of that particular remark is very positive; I don't know just why it is very positive, but I do remember that particular thing as standing out; I remember thinking about it at the time.

Re-direct examination by Mr. Howell.

Q Where did your father reside at the time of his death?

A In New York City.

Q How long had he resided there prior to his death?

A I don't know.

Q (*By the Court*) Several years?

A I think so; he had been living in Lennox until sometime before his death, and moved to New York.

Q How long, three or four or five years?

A Probably three or four years.

Q Have you made arrangement to become a permanent resident of New York City?

A Yes, sir.

Q What arrangements have you made?

A Well, I registered there and I bought a house there.

ELLSWORTH L. MILLS sworn.

Direct examination by Mr. Howell.

Q Where do you live?

A New York City, sir.

Q What is your occupation?

A Draughtsman.

Q And where are you now employed?

A New York Central and Hudson River Railroad.

Q Do you know Mr. Dana, the complainant in this suit?

A Yes, sir.

Q Did you ever have any business relation with him?

A Yes, sir.

Q What?

A I was assistant to him for about two years in his office down on 15 William street.

Q During what two years were they?

A Nineteen hundred and three and 1904.

Q Do you remember Mr. Dana went to Europe in the summer of 1904?

A Yes, sir.

Q And who remained in his office while he was gone?

A I did, sir.

Q Who looked after the mail?

A I did.

Q Was his mail delivered at the office by the postman or did you go to the post office for it?

A It was delivered by the postman.

Q What did you do with it?

A I opened it and put it in his basket on the desk.

Q And did you ever hear during that summer of The American Tobacco Company?

A That I can't say, sir.

Q Did you put all the letters that you received in the basket for Mr. Dana on his return?

A Well, there were a few exceptions, personal matters that I wrote to him about and forwarded just after he had left.

Q You don't remember any papers coming from The American Tobacco Company by mail?

A That I can't say; no, sir.

Q And what you had preserved during the summer you gave to Mr. Dana on his return?

A I did.

Q Did you give him everything?

A Everything.

Q Circulars and advertisements and everything?

A Yes, sir.

Q (*By the Court*) You preserved the circulars as well as other things?

A Yes, sir.

Q (*By Mr. McCarter*) Any other clerks there, Mr. Mills, besides you?

A No, sir.

RECESS.

MAURICE J. MOORE, sworn.

Direct examination by Mr. Howell.

Q You are a counselor at law of the Supreme Court of New York?

A I am.

Q Have you brought here the statutes and laws of New York in relation to the taxability of bonds and stocks of corporations among the laws of New York?

A I have.

Q You may turn to the statute now in force which relates to that subject and read it?

A If you will show me just the part here.

Mr. Lindabury. I would like an objection entered to this line of proof, for the reason that there is no claim in the bill of complaint that this merger agreement is unfair to the preferred American stockholder on this or any other ground, unfair as between him and the other.

The Court. For myself, I don't see the relevancy of it, but I won't rule it out. I don't think the question of unfairness has anything to do with it, except it may prove acquiescence on that ground, of course it may affect that; that is the idea.

Q What book do you read from?

A This is volume 2 of the session laws of 1896.

Q What section do you read?

A Chapter 908 laws of 1896, section 4, sub-division 16: "The owner or holder of stock in an incorporated company liable to taxation on its capital shall not be taxed as an individual for such stock."

Mr. Corbin. That doesn't apply to non-resident companies.

Mr. Howell. Let me get through with my proof, if you please.

Q Now, when did that come into the law of New York, the statutory law of New York?

A Well, this particular statute was passed in 1896.

Q The section that you just read, when was that first enacted in New York.

The Court. The marginal note I suppose shows it.

A No, it doesn't.

Q You have got it here, haven't you, in the revised statutes?

A It has been in the statute before the year 1859.

Q (*By the Court*) Way back, eh?

A Way back.

Q Have you any interpretation of the statute by the New York courts?

A Yes, sir.

Q What case have you?

A The people on relation of Trowbridge against the commissioners of taxes and assessments, in the city and county of New York.

Q What court is that in?

The Court. Give the volume and page?

A Four Hun.

Q And what court is it in?

A Page 595 of the Supreme Court.

Q (*By the Court*) Give the year?

A Eighteen hundred and seventy-five was the day of the decision.

Q Did that go to the Court of Appeals?

A It did.

Q What happened to it there?

A It was affirmed.

Mr. Howell. I offer in evidence the revised statutes of New York and the laws of 1896, and this case that is referred to, Trowbridge against the commissioners.

The Court. What is the head note on it?

A "Residents of this state owning shares of stock in a corporation created by the laws of this state or any foreign state are not subject to be personally assessed or taxed thereon under the laws of this state."

Cross examination by Mr. Lindabury.

Q This was an interpretation of the law before it was passed?

The Court. No. The law was passed somewhere way back; been carried forward and reenacted in 1896. This decision was on the same statute made before when it was a part of the old revised statutes. That is about it, isn't it, young man?

A Yes, sir.

Q Is the statute copied in 4 Hun?

A No; it is not.

Q Are you able to swear that—

The Court. He has got the statute here, got a copy of the old revised statutes.

A I have both the statutes and the report.

Q (*By the Court*) Haven't you got the old revised statute?

A I have.

Q (*By the Court*) Refer to that, which edition, and all about it?

A Sixth edition, and in the 5th edition of the revised statutes.

Q Which have you got, 5th?

A Both; both 5th and 6th.

Q (*By the Court*) What years were they published?

A The 5th was in 1859 and the 6th was in 1875.

Q (*By the Court*) And how many volumes?

A First volume of each.

Q (*By the Court*) First volume of each?

A Of each edition.

Q Which edition covers the date of the Hun decision?

A The 5th edition.

Q And in that statute you say in the same language as it is—

The Court. Find it; that is the best way.

Direct examination by Mr. Howell.

Q There is no doubt but what that is the law of the state of New York to-day, is it?

A Yes, it is.

The Court. Give the grounds of it.

Mr. Howell. If the court please, let me withdraw Mr. Moore; let him find it and come back on the stand.

Mr. Lindabury. Let me ask on other points a question or two.

Cross examination by Mr. Lindabury.

Q Mr. Moore, do you mean to say that by the laws of the state of New York no stock owned by a resident of New York in a foreign corporation is taxable there?

A That is my understanding of it; yes, sir.

Q Have you any decision to that effect?

A None except this one here.

Q You say that decides that?

A Yes, I do.

Q Suppose that a resident of New York worth a million dollars invests all of it in the stock of a New Jersey corporation and continues to own that stock in New York and draw dividends on it, is he exemt from taxation, say that is all his property, is he entirely exempt from taxation?

A Under that decision he would be; yes, sir.

Q I don't mean under that decision. Do you say that is the law of New York to-day?

A I believe it to be; yes.

Mr. Lindabury. I didn't understand it so. I wouldn't want to question your sincerity. It may be right, but that has not been my understanding of New York law.

DAVID T. DANA, sworn.

Direct examination by Mr. Howell.

Q Where do you live?

A In Lennox, Massachusetts.

Q You are a brother of Mr. Richard T. Dana?

A Yes, sir.

Q Do you remember that your brother Richard T. Dana was in Europe during the summer of 1904?

A Yes.

Q And where were you living at that time?

A Lennox.

Q Did you during that summer receive any letters, any mail that related to your father's estate?

A Yes.

Q And what did you do with it?

A All the mail that was not of a—not belonging to the estate that I could not attend to myself I kept and gave to my brother when he came back; all small matters I attended to myself, small bills.

The Court. Let me interrupt you, Mr. Lindabury; this case goes the whole length what the witness claims it does. Whether it is the law now or not, I don't know anything about it; but it undoubtedly goes the whole length deliberately, and the opinion was by presiding Judge Davis, Noah Davis, and concurred in by Judge John R. Brady and Daniels, all good men, and the gentleman says it was affirmed by the Court of Appeals; it doesn't say so here.

Q Do you remember seeing any notice or notices or papers of any kind coming from The American Tobacco Company during that summer?

A I have no recollection of any definite notice; no, sir.

Q Nothing of the sort?

A No, sir.

Q (*By the Court*) Where were you during the summer?

A Lennox, Massachusetts.

Q (*By the Court*) What means did you take to get letters that might be sent to your father in New York?

A My brother being away, I had all mail addressed to my father sent to me.

Q (*By the Court*) You ordered it?

A Yes, sir.

Q (*By the Court*) With whom did you leave the order?

A I left the order with the Post Office Department.

Q (*By the Court*) At the city of New York?

A Yes, sir.

Q (*By the Court*) Written order?

A Yes; as far as I remember it was written.

Q (*By the Court*) Did they come to you open?

A Yes, sir.

Q (*By the Court*) Many of them, were there many?

A Not particularly many; no, sir; not very many.

Q (*By the Court*) Well, did you have any arrangements at the house where your father had lived to have them sent to you?

A Yes, sir.

Q (*By the Court*) What was that order?

A It was the order to the post office department.

Q (*By the Court*) No, but did you have any order left at the house provided that if any letters did come there to have them taken care of?

A There was a caretaker in the house.

Q (*By the Court*) That is what I am asking you, any orders left with that caretaker?

A Yes.

Q (*By the Court*) What were the orders?

A The orders were to forward them to my address, order was left there and left with the post office not to send any letters, the order was left with the post office department not to send any letters.

Q (*By the Court*) I know; you have told me that four or five times, but I am trying to find out what order was left with the caretaker if they did go to the house?

A Yes, sir.

Q (*By the Court*) What was it?

A To send all mail to me.

Cross examination by Mr. Lindabury.

Q Did you own any stock in The American Tobacco Company in your own name?

A No, sir.

Q (*By the Court*) Did you then?

A No, sir.

Q Your mother did?

A She had a few shares.

Q She was with you, she lived with you then, didn't she, that summer?

A Yes, sir.

Q Your grandmother, was she with you that summer?

A Yes, sir.

Q Did you see the notices that came to them?

A I didn't necessarily see their notices; no, sir.

Q (*By the Court*) Did you see any notice coming to your mother or grandmother?

A I don't remember of any.

Q Your recollection is a blank on that subject?

A It isn't clear on seeing a notice from The American Tobacco Company to my mother or grandmother; no, sir.

Q It isn't clear about it?

A No, sir.

Q (*By the Court*) Did you know at that time that your father was a stockholder and that your brother held the stock as administrator?

A Yes, sir.

Q (*By the Court*) You knew that?

A Yes, sir.

Q When did you have fifty shares endorsed over to you?

The Court. He hasn't said that he had.

Mr. Lindabury. His brother testified about it, and I assumed it was so. Did you have fifty shares of the stock held by the estate endorsed over to you?

A I believe a power of attorney was made out which was not used.

Q When?

The Court. Where is the certificate of fifty shares?

A It is in my safe deposit.

Q (*By the Court*) In New York?

A Yes, sir.

The Court. The way to deal with that, Mr. Lindabury, is to ask him to go and bring it here at the next meeting of the court. It is impossible to transfer it, and the legal title stands in the complainant. All that the brother could possibly do would be to sign a paper which amounted to a declaration of trust, as it is not transferrable from your point of view, nothing

that he could do any more than simply make a declaration of trust.

Q I was asking for the date that was done?

A It was done some time after my brother's return from Europe, if I remember correctly.

Q I suppose it was. Can't you fix the time, approximately?

A I can't say with any certainty within one or two months, no, sir.

MAURICE J. MOORE recalled.

Direct examination by Mr. Howell.

The Court. Give me the book. Volume 1, 5th edition of the revised statutes of New York. Give the date of the print?

A Eighteen hundred and fifty-nine.

Q (*By the Court*) Right. Now, then, what is the subject?

A The subject is taxes.

Q (*By the Court*) Taxes in the first volume?

A Yes; they are not in alphabetical order in the old statutes, chapter 13, title 1, section 14.

Q (*By the Court*) Read it.

A "The owner or holder of stock in an incorporated company liable to taxation on its capital shall not be taxed as an individual for such stock."

Q (*By the Court*) Now get the statute of 1896 and read that.

A "The owner or holder of stock in an incorporated company liable to taxation on its capital shall not be taxed as an individual for such stock."

Cross examination by Mr. Lindabury.

Q Is a foreign corporation liable to taxation in New York on its stock?

A On its capital?

Q Well, on its capital?

A Yes, in the State.

Q Whether it is in business there or not?

A All capital in the state.

The Court. The language is exactly the same, I think Mr. Lindabury.

Mr. Lindabury. Your honor has told us what that decision is. I thought that the owner of stock in a corporation is not liable for the corporation itself is liable to taxation in the State.

The Court. It doesn't say in the State.

Mr. Lindabury. I supposed that is what it meant, though.

The Court. The question is whether the language of the statute of 1859 or earlier is precisely the same as the language of the statute of 1896.

A It is.

The Court. As far as my ear could catch it, it is precisely the same. Now the decision of the Supreme Court, which was affirmed by the Court of Appeals of New York, was on the earlier statute; the question is whether it covers the subsequent statute, and the general rule of law is that it does if it is the same.

Mr. Howell. And it covers both stock and bonds.

The Court. Holds the bonds are liable.

Mr. Howell. Holds bonds are liable and the stock is not.

Mr. Lindabury. If you pardon me, because I haven't seen it, and your honor has.

The Court. Yes, it holds—there was an asset in the case in 4 Hun which included both bonds and stocks, foreign stock and foreign bonds; the court held that the foreign stock was not assessable and the foreign bonds were.

Mr. Lindabury. Now, in that case wasn't the capital of the corporation taxed in New York, because it was doing business there, or something of that kind?

The Court. No; I think not. I read the book; you better read it.

Mr. Howell. I say it was affirmed in 62 New York page 630.

The Court. But I have a very strong impression, Mr. Howell, that the legislature of New York has taken care of that since, and I guess that says, the corporation "for all its property in New York;" I think that is the way it is.

GROSVENOR NICHOLAS, sworn.

Direct examination by Mr. Howell.

Q Where do you live?
A Fourty-four Park avenue, New York City.
Q What is your occupation?
A Lawyer.
Q How long have you been practicing?
A Since 1898.
Q And where do you practice?
A My office is at 141 Broadway; I practice generally.
Q You are a counselor at law of the New York Supreme Court?
A Yes, sir.
Q Do you know Mr. Richard T. Dana?
A I do.
Q Do you know anything about his holding as administrator shares of stock in The American Tobacco Company?
A I do.
Q Mr. Dana says in his testimony——

The Court. Never mind. I won't allow you to do that at all. I won't allow you to repeat to one witness what another witness says. That is a fad of mine.

Mr. Howell. I merely wanted to fix a day.

The Court. No. Call his attention to something, but I won't allow you to repeat what one witness said.

Q Were you consulted at any time by Mr. Dana with reference to the agreement that we have been discussing here?

A I was.

Q When? When first?

A Mr. Dana first consulted about the middle of November, but it was not in regard to the merger agreement; it was on the question of his dividend.

Q Did you ever see this merger agreement?

The Court. Printed copy of it?

A Yes.

Q When first, as nearly as you can state?

A About the 17th of November 1904.

Q Where did you get it from?

A I think Mr. Dana brought it to me; it may be that I went with him and got it.

Q (*By the Court*) From whom did you understand it came at the time?

A From the Morton Trust Company. Mr. Dana called on me on about the 15th of November; he called on me then in regard to the dividend that was due upon his stock. A few days after that he either brought the merger agreement in to me or I went with him and got it.

Q (*By the Court*) How do you fix it as the middle of November?

A My recollection of it, your honor, is all.

Q Beginning at that point, you may state what you did and what inquiries you made, and what you discovered from time to time in relation to the merger agreement and Mr. Dana's stock in the Tobacco Company?

A At first the question which I looked into was the dividend, and Mr. Dana consulted me in regard to suing the company for the dividend, and I remember we considered whether we had a claim, whether we had an action at law for the dividend or whether the old company had been wiped out. Then some time, some month or six weeks after that Mr. Dana consulted with me in regard to the securities which were offered in exchange, the fact that they were taxable, and

then he wanted to know latter than that whether they had a right to do this thing that they were doing.

Q Now, when was that?

A It was more than a month after the first interview that I had with him, can't give the exact date, and he requested me to look into the matter for him. I then obtained a copy of the certificate of incorporation, thereafter I looked into other certificates that were on file at Trenton.

Q Certificates of this company?

A I corresponded with some attorneys in Trenton for the purpose of obtaining copies; I remember one of those certificates was some 58 pages long, and there was some delay in getting them. Then I looked into the merger law to see how it authorized the issue of bonds in exchange for stock, and examined that carefully. Then Mr. Dana and I went to the Bar Association in New York City, the Library, and we looked into the old Session Laws of the State of New Jersey to see whether there was any earlier law similar to—any earlier merger law similar to the merger law which was contained in Dill, which was the first book I looked it up in. I looked up the constitution of the state, and Federal constitution and Hooleys Constitution Alterations, and other such books, and a great many decisions relating to the right of the State to alter the contradictional relations of the stockholders *inter se se* by some subsequent legislation, and then I asked Mr. Dana to get me such information as he could in regard to the properties of these three companies and the dates of their charters and so on, and from time to time he furnished me with clippings from the Financial Chronicle, and references to such books as Moody's Manuel, and I made a careful examination of Moody's manuels for different periods, and other similar books.

Q Well, when did you come to a conclusion in regard to the whole matter?

A About the first of January, 1905, I did, yes, sir.

Q Well, what did you do?

A I advised Mr. Dana that, in my opinion, the merger law did not authorize what had been done, and that it either did not apply to this company or else that it was invalid under the decisions in the state of New Jersey; but I told him there was some doubt in my mind, I had never had a case of the kind before, and he and I discussed the question of what we should do. Finally Mr. Dana wrote to the company, I think on January 7th.

Q Go on.

A I think in that letter Mr. Dana asked for—

Q Never mind. We have the letter in evidence.

A We waited for a reply; we didn't get one, and wrote again, and then subsequently, when no further information was forthcoming we decided that the court—I advised Mr. Dana that the court of New Jersey was the best tribunal to bring his action in, and somewhere around the 10th or 15th of March, somewhere between the first and fifteenth we asked Mr. Howell to—came over and consulted Mr. Howell and asked him to take action.

Q Well, in a general way, that is what you did about it yourself. Did you do anything more, any other investigation that you made?

A I can't think of any more now; no.

Cross examination by Mr. Corbin.

Q I understand that you were first consulted in this matter in November 1904?

A Yes, sir.

Q And when did you, or Mr. Dana by your advice, consult New Jersey counsel?

A Some time between the 10th and 15th of March I should say about somewhere around the 10th.

Q Meanwhile you had yourself examined New Jersey law, had you?

A Yes, sir.

Q Are you a member of the New Jersey bar?

A No, sir.

Q Are you accustomed to give advice with reference to New Jersey law?

A No, sir.

Q Then from the 15th of November to the middle of March you did not take advice from any New Jersey counsel?

A No, sir. You see, at that time we had not decided to take action in the state of New Jersey.

Q You were considering remedies you had in the state of New York?

A. Yes, or in the Federal Court.

Q Can you tell, Mr. Parker, how much of those sixteen millions of Continental stock was in the treasury of the American and Consolidated?

Mr. Parker. It says sixteen million.

Q Altogether, but how much was in the treasury of the American.

Mr. Parker. I really can't tell; I can find out and tell you.

Q Isn't there somebody here that can tell?

Mr. Parker. I don't believe there is any one here.

Mr. Howell. I would like to reserve the right to introduce just one other fact. It appears by the answer that at the time of the consolidation The American Company had sixteen million seven hundred and sixty-seven thousand and one hundred dollars at par. The American and Consolidated have stocks and bonds of other corporations which in this merger agreement were canceled, and I would like to show just exactly how much of the stock there was that The American Company was interested in.

The Court. Reserve the right to prove that hereafter?

Mr. Howell. Yes.

The Court. Any objection to that, gentlemen?

Mr. Lindabury. No.

The Court. The reservation is made.

COMPLAINANT RESTS.

CHRISTIAN A. HOPMAN, sworn.

Direct examination by Mr. Lindabury.

Q Where do you live?

A Thirty-two Bergen avenue, Jersey City.

Q Are you connected with The American Tobacco Company?

A I am employed by The American Tobacco Company.

Q Were you in the employ of that company in the summer of 1904?

A Yes, sir.

Q Did you have anything to do with the sending out of notices of the stockholders' meetings called for September 30?

A I had, sir.

Q Would you recognize a copy of those notices if shown you?

A Yes, sir.

Q Look at the paper which I hand you now and state whether or not that is a copy?

A Yes; that is a copy.

Q To whom did you send those?

A I sent these to all stockholders of The American Tobacco Company, Continental Tobacco Company and Consolidated Tobacco Company.

Q How were you informed as to who the stockholders of The American Tobacco Company were?

A By the stock ledgers that were in my possession.

Q Have you the stock book here of The American Tobacco Company?

A I have; yes, sir.

Q I am now informed that you were the New Jersey agent of that company at the time?

A Yes, sir.

Q And the keeper of those books?

A Yes, sir.

Q Do you know whether or not Richard S. Dana was then a stockholder of record of The American Tobacco Company?

A No, sir.

Q Have you got the book open at the place where his name was recorded?

A Yes, sir.

Q What is the page, what is the book?

A It is Ledger No. 3, Preferred, A to K, Stock Ledger No. 3, preferred, A to K.

Q And what page?

A Two hundred and thirty-six.

Q What is the entry?

A The entry is "May 1st, 1900, by balance Ledger No. 2, folio 196."

Q No, but above that, the name and address?

A Richard S. Dana; the address has been changed. Give the changed address?

Q (*By the Court*) What is written there?

A Well, 19 William street, New York City; that address was changed afterward to 338 West 88th street.

Q When was the change made?

A I really couldn't tell.

Q Was it before this meeting of stockholders?

A Oh, yes; prior to the meeting of stockholders.

Q And did you send a notice to Mr. Dana at that address?

A I certainly did.

Q How?

A By mail.

Q Were the others sent by mail?

A All were sent by mail.

Q Do you know anything about the publication of these notices in the New York newspapers, Sun and others mentioned?

A No, sir.

Q You had nothing to do with that?

A I had nothing to do with that.

Q Was there any card on the envelope in which these notices were, any return card, anything printed?

A No, sir.

Q American Tobacco Company, or anything else?

A No, sir.

Q Nothing printed on them?

A No, sir, they all bore a four cent stamp.

Q No; the question is whether there was any print?

A No printing; no.

Q (*By the Court.*) Plain envelope?

A Plain envelope.

Q (*By the Court.*) Did any ever come back that you know of, or didn't you have anything to do with that?

A I had; I never received any in return.

Q They wouldn't come to you, would they, a great many clerks in that place?

A Not where I am located; I am the only one there.

Q They would have come to you if they hadn't been delivered, would they?

A I doubt it very much, for they had no return card on, no stamp.

Q If they had been returned by the post office they would have been returned to you?

A Yes, sir.

Cross examination by Mr. Howell.

Q Now show me the entry?

A Here is the entry, sir (indicating).

Q And the account is below the blue lines?

A Yes, sir.

Q And that shows at some date Mr. Dana owned some shares of stock in this company?

A It shows—

Q How many shares of stock did he hold?

A On May 1st, 1900, he held one hundred.

Q That was the state of his account on May first, 1900, and it hasn't been changed at all on your books?

A No, sir.

Q Does the company keep a set of books like this over in the New York office?

A I haven't any knowledge of that.

Q (*By the Court.*) You hold the office in Jersey City?

A Yes, sir.

Q (*By the Court.*) Stay there all the time?

A Yes, sir.

Q In whose handwriting is the pencil mark which appears to change the location of the office, of the address?

A Well, that is in the handwriting of the young lady that was employed there at the time, an assistant.

Q (*By the Court.*) You have got here the New Jersey stock ledger?

A Yes.

Q (*By the Court.*) Kept at the office—

A One hundred and four, First street, Jersey City.

Q (*By the Court.*) And you make your headquarters there?

A Yes, sir.

Q How do you find out when a stockholder changes his address?

A Well, it is customary for them to notify either the treasurer of The American Tobacco Company or the transfer agents.

Q How do you get hold of it?

A If the transfer agent is notified I am notified; if the secretary of the company is notified he notifies the transfer agent and sends me a copy.

Q (*By the Court.*) Then the source of your information is the transfer agent?

A Yes, sir.

Q And who is the transfer agent of this company now, The American Tobacco Company?

A Morton Trust Company.

Q (*By the Court.*) At that time?

A The farmers' Loan and Trust Company.

Q (*By the Court.*) At that time?

A At that time.

Q How long have you kept this book, how long have you been transfer agent, or whatever you call it?

A Resident agent.

Q Yes; resident agent?

A Past eight years.

Q That would take you back to 1898.

Copy of the agreement, with notice annexed, offered in evidence by Mr. Lindabury.

Marked Exhibit D 1.

Examined by Mr. Howell.

Q How do these papers get into your possession?

A They were brought to me by Mr. Parker.

Q And you had direction from him to send them to all the people whose names appear as stockholders on your books?

A Yes, sir.

Q (*By the Court.*) When did you mail them?

A On the tenth day of September.

Q Nineteen hundred and four?

A Nineteen hundred and four.

Q (*By the Court.*) The notice is dated the 9th?

A The notice is dated the ninth.

Q Were you able to get up envelopes and send them all by the 10th?

A Yes, sir.

Re-direct.

Q The envelopes were addressed beforehand, were they not?

A The envelopes were addressed beforehand so as to get them off on the 10th.

Q (*By the Court.*) Who addressed them, you or somebody else?

A No; I helped to address them, I superintend.

Q (*By the Court.*) The work was done in your office?

A The work was done in my office.

Q (*By the Court.*) How do you know that Mr. Dana's envelope was among them now?

A I am willing to take my affidavit—

Q (*By the Court.*) The question is, on what is your affidavit based?

A My affidavit is based on my checking the envelope back with the book.

Q (*By the Court.*) Did you check them back?

A I checked them back with the book.

Q (*By the Court.*) Who took the letters to the post office?

A I followed them to the post office on a truck; there were too many, I couldn't possibly carry them.

Q How many were there?

A I couldn't recall just how many.

Q (*By the Court.*) Took a truck to take them?

A Yes, sir.

Q (*By the Court.*) You are sure you checked them all off?

A Yes, sir.

Q (*By the Court.*) Check mark on the ledger there?

A No, nothing on the ledger to show.

Q (*By the Court.*) Where would it be?

A I checked them off as I went along, just ran my finger along this way, (indicating.)

Q (*By the Court.*) Then there is no check mark?

A There is really no check mark on the ledgers.

Examined by Mr. Howell.

Q You say you followed them down to the post office. What do you mean by that?

A I saw they were delivered at the post office.

Q (*By the Court.*) How delivered?

A How delivered? Put them on a truck; I jumped on the truck; the envelopes were in a large packing case and the truck took the envelopes and myself to the post office, and they were delivered at the back entrance of the Jersey City Post Office.

Q Were they tied up in bundles or loose in the box?

A No, sir, they were loose in the box.

Q Did you see the box delivered in the back door?

A Yes, I did; I helped to pull it in the back door there.

Q Who received it there?

A I really couldn't tell you; one of the postal officials, one of the clerks there, regularly uniformed.

Q (*By Mr. Lindabury.*) I suppose you understood you had to make proof of this mailing?

A Yes, sir.

Q (*By Mr. Lindabury.*) You did make legal proof of it, I suppose in course of the proceedings?

A I did, yes, sir.

JOSIAH T. WILCOX, sworn.

Direct examination by Mr. Lindabury.

Q What is your connection with The American Tobacco Company?

A Assistant secretary.

Q How long have you held that position?

A Since 1900, or with the merged company since the merger.

Q And before that which company did you serve?

A The American Tobacco Company.

Q And that from when?

A I have been with it ever since the organization, but assistant secretary since 1900.

Q And before that what was your position? Before that what had you done?

A Well, assisting the secretary, but with no title.

Q Do you remember of the action of the directors of The American Tobacco Company looking toward consolidation with the Consolidated and Continental, do you remember hearing of it?

A Yes, sir; I remember hearing of it.

Q And do you remember about the publication of notices of that meeting, in addition to the sending of them to the stockholders?

A I remember very well the publication; I remember seeing the publication in the newspapers.

Q What newspapers?

A The mailing I know was done.

Q (*By the Court*) He is asking you about the newspapers now only. In what newspapers was the publication made?

A I know it was,—I saw it in the Sun and other papers?

Q Do you remember the Evening Post or any other papers?

A Well, I can't swear to those papers now, because I don't usually read them, but I do usually read the Sun.

Q Do you know how long it was published in the Sun?

The Court. How long was it published in the Sun? How many insertions?

A Well, it was published three times, for three weeks.

Q (*By the Court*) Once each for three weeks?

A Yes, sir.

Q (*By the Court*) Did you see it yourself three times in the paper?

A That I will have to say I can't say now; I know I saw it at least once, that I am certain of.

Q (*By the Court*) Did you have anything to do with inserting the advertisement in the paper?

A Not this special one; no.

The Court. Counsel for the defendants assert the publication was duly made in the New York Evening Post and the New York Sun, and that the legal proof is on file at Trenton. Counsel for complaint says he does not propose to dispute that the publication was made according to those affidavits, and for three weeks.

Mr. Howell. Yes; I will go as far as that.

The Court. Will you admit it; the dates?

Mr. Howell. Yes.

The Court. The precise dates are set out in the answer?

Mr. Howell. No.

Mr. Lindabury. Yes; in the Evening Post on the 10th of September 1904, and once a week in each of the two succeeding weeks; in the Sun on September 12th, 19th and 26th.

Q Do you remember seeing the agreement itself published in the New York newspapers. I don't know whether you do or not?

The Court. Do you recollect seeing the consolidation or merger agreement itself printed and published at length in any New York paper.

Mr. Howell. I object.

The Court. That is the question Mr. Lindabury meant to put, and I thought I could make it—

Mr. Lindabury. I don't care, if counsel objects, about it.

Q Were you present at the stockholders meeting on the 30th of September called by that notice?

A Yes, sir.

Q I think you acted as secretary of the meeting, did you not?

A Yes, sir.

Q And have you the minutes of that meeting here?

A I have.

Q Will you turn to them. Do your minutes show the number of stockholders who were present in person or by proxy at that meeting?

A Yes, sir.

Q Will you give it?

A The combined representation by person and by proxy 1,158,334 shares.

Q (*By the Court*) That is in person and by proxy?

A Yes, sir.

Q (*By the Court*) How many are proxies and how many were in person, if you have got it?

A Five hundred and four in person, 1,157,830 by proxy.

Q Altogether 1,158,334?

A Yes, sir.

Q Now what was the total nunmber of outstanding shares? The answer says twelve hundred and thirty thousand; see if you have anything there?

A That doesn't show here.

It is admitted the total number of outstanding shares was 1,230,000.

A 1,230,000 outstanding. I am only quoting from memory.

Mr. Howell. How many stockholders do you say was there in person.

Mr. Lindabury. That question is what I have just asked.

The Court. How many stockholders were in person or by proxy were present?

A That I would have to count up.

Q The minute book shows, don't it?

A It will show it.

Q Never mind then; we will put that in evidence; the answer says 370. Now what was the vote at the stockholders meeting?

A On the only question before the meeting of course you mean?

Q On the question of the adoption or rejection of the merger contract?

A One million, one hundred and fifty-seven thousand, two hundred and fourteen shares for the adoption of the agreement; 1,720 for rejection of the agreement.

Q (*By the Court*) Was that by ballot?

A Yes, sir.

Q (*By the Court*) Have you preserved the ballots?

A Yes, sir.

Q (*By the Court*) Have you preserved the proxies?

A Yes, sir.

Q Have you there a minute, or does your minutes show who voted against the consolidation?

A Yes, sir.

Q Will you please give us the name and amounts?

A R. W. Applegarth, five shares; Samuel H. Kissam, two hundred shares; S. J. Lanahan, two hundred shares; Edmund M. Parker, fifty shares; Gertrude P. Sheffield, fifty shares; Lelia G. Cayce, two hundred and twelve shares; A. B. Cayce, one hundred and ninety shares; A. B. Cayce, trustee, two hundred and thirteen; George P. Butler, six hundred; total, seventeen hundred and twenty.

Q I suppose you don't yourself know who of these have turned in their stock and made the exchange since, do you?

A No, sir.

Q Do you know of any objection heard from any of them since that meeting?

A No.

Objected to by Mr. Howell.

The Court. Whether they objected or not is of no consequence in this case, as I can see. That is your objection, isn't it, Mr. Howell?

Mr. Howell. Entirely irrelevant.

Mr. Lindabury. We say everybody who appeared and opposed has acquiesced or changed his stock.

Mr. Howell. You can't prove it by him.

The Court. I don't think it is competent, but I shall not rule it out.

Q Now do you know of the new company taking over the property of the old companies upon the merger?

A Took that over immediately.

Q How soon did it do that?

A Co-incident with the merger, immediately.

Q And how has the business been carried on since that?

A As The American Tobacco Company.

Q Has the business of the old companies been kept separate since.

A Not in the slightest degree.

Q Can you tell us whether or not on the 20th of March last it was possible to separate the business done by The American Tobacco Company and to distribute it according as it was carried on by the three companies before the merger?

Mr. Howell. Now, if the court please, I must object to that; that calls for all kinds of conclusion of fact, and not of the fact itself, not a single fact; opinion of this witness whether the thing could be done or not.

The Court. I suppose the object is to get his judgment as to whether it could be done or not, and I suppose counsel will put it on the ground that as a business man having some connection with the running of the machine, his judgment would be good for something. That is it, I suppose, Mr. Lindabury, isn't it?

Mr. Howell. He hasn't qualified at all.

The Court. He said he was secretary. The question has been gone into; it strikes me we have got a pretty big job before us, and that should not deter us from going into it if it is necessary for a decision of the case, perhaps on the ground of estoppel it is; I won't decide anything about it now. I will allow the question to be put, subject to the objection of the counsel for the complaint, and with the remark that the answer is not of much consequence. The question may be answered.

Q (*Question read*).

A Impossible, I will say.

Q (*By the Court*) Eh?

A I should say impossible.

Q Why?

A Because of the fact that there was so many things which had been brought together under one head which had been theretofore kept separate, separate charges against separate companies, take accounting of officers, some charges went into the common expense charges; the selling arrangements were

changed some in that three or four months doing business under the new,—if I take your question to mean to put it back where it would have been had they continued the old, I think it would have been impossible.

Q Is the American a holding company, the old American, was it a holding company, a stockholding company?

A It held stock.

Q I know, but it manufactured, didn't it?

A It was a manufacturing company.

Q And how about the Continental?

A The Continental was also a manufacturing; the Consolidated did no manufacturing.

Q The Consolidated was the only holding company. Now have you any idea what the purchase of raw material of this new company amounts to a month, roughly?

A No.

Q Leaving out any subsidiary companies, the amount purchased of raw material per month or year? Are you able to tell us how the purchases are made, whether they are made on account of one division or another, having relation to the old—can you tell us how the purchases are made, whether they are made on account of any classification having reference to the old division, or whether they are made generally for the new company and then distributed as occasion may require?

A Some contracts are made generally for supplies, material, for certain specified time,—and you are talking about The American Tobacco Company only?

Q The present one, yes.

A And they are ordered to whatever factories need them; some small supplies are ordered direct to the factories without the intervention of any general contract.

Q (*By the Court*) You can tell what tobacco every factory has had, can't you, every factory that belongs to the present corporation,—you have an account by which you can show how much tobacco that factory has had, and what it cost, haven't you?

A Well, I am afraid I will have to be excused there; I don't know enough of that account to answer that question.

Q (*By the Court*) Don't know enough of that account?

A Of that account to answer that question, no.

Q (*By the Court*) Don't you keep some accounts by which you can tell whether any factory, particular factory is making money or losing money?

A There are such accounts kept, that is to say, whether such and such brands are making or losing money.

Q Were any particular changes made in the organization of the business after the consolidation, selling department or anything?

The Court. He says it was. Of course that is where the trouble comes in. The three companies, as I suppose, giving you the state of my mind, had each one had its separate arrangements for selling; they consolidated, and the selling of one particular brand, I suppose, of cigars, tobacco, cigarettes or any other mode of distributing nicotine, the separate selling was broken up, except as to the classification of kinds; I suppose that was it. But I should suppose that in the purchase and delivery of the tobacco every factory, the books of the company would show how much tobacco each factory had and how much it cost, and what the product of that factory was. If it did not I don't believe the thing is carried on according to Mr. Duke's ideas of business. I think you will find there is an account with every factory, just what its cost of material was, and the product, and the cost of running that particular factory. When you get beyond that, the general cost of agents for buying and gathering the tobacco together and of selling the product, a very different state of affairs may arise. Now, I am only guessing at this. I don't know whether I hit it or not; Mr. Parker knows.

Mr. Lindabury. He is just remarking to me you had it pretty near right, but you can see how they may have varied the products of the different factories somewhat after the merger.

The Court. Oh, yes; they may have run one factory more than another because they had the demand for that kind of goods, and may have tied some up, may have dropped it entirely out.

Mr. Lindabury. The merger may have changed those things considerably.

The Court. Undoubtedly, the merger may have changed it. The American Tobacco Company when separated may not have earned near as much money after separation as before, and the other companies may have earned more. I don't mean to say it would be difficult at all.

Q Do you know whether a tobacco crop was purchased after the merger and before March 20?

The Court. I should think so.

A That is not the time for purchasing, between October and March.

Q (*By the Court*) When do you buy?

A It is brought early in the year, in August, so I understand.

The Court. What time is it purchased?

Mr. Parker. Different crops at different times. Berla tobacco is in process of buying now, but our purchases are made of course between October and March.

The Court. I should think so.

Q Have you kept track of the price of securities of The American Tobacco Company?

A So far as the daily papers give it.

Q Well, can you tell us what the price of the Amer-

Q Well, can you tell us what the price of the American, preferred, was before the merger, for some little time before it became known?

time before it became known?

A Well, in the early part of 1904, up to October, it ranged between 130 and 140.

Q (*By the Court*) That is the preferred?

A Preferred stock.

Q When was public attention called or public discussion had in the newspapers with regard to the merger?

A When?

Q When did it get out in the newspapers?

A It was published on the 9th of September.

Objected to by Mr. Howell.

The Court. They want to show the fairness of the trade. I doubt the relevancy, but, Mr. Howell, I dislike to rule it out, because the Court of Appeals may disagree with me.

Mr. Howell. I don't object to having it in if you get it in by a witness who knows something about it. He is guessing, this man is guessing at almost everything he has sworn to for the last half hour, pure guess work.

The Court. If a gentleman connected with it watches the quotations he may tell the general result. I believe these 4's are selling at about 78 or 79, these new 4's.

Mr. Lindabury. They have no connection with the preferred stock.

Q Can you tell us what the preferred stock was selling at during the year before the consolidation?

Mr. Howell. I object to that also.

A I have got something that I can refer to here.

Q What have you got?

The Court. Have you got a memorandum.

A I have here the quotation record, which is very generally used.

Q Published by whom?

A The C. M. Benton Company.

Q Is that used in New York at the broker's office and elsewhere?

A It is very generally used by brokers for distribution among their customers.

Q You may use that to refresh your recollection, if you choose, and tell how the stock was selling in 1904 before the merger.

The Court. Preferred stock.

Mr. Howell. Let me have a look at that book before you swear from it.

Mr. Lindabury. I want the quotations of the stock.

A Nineteen hundred and four it ran from 130—

Q Give us the months?

A Well, January 1904, high 134¼, low, 133; February, high, 135¼, low 130¼; March, 135—130; April 140—134; May, none; June, 139 and 137; July 140—138½; August 140—135¾; September 147 and 140; October 146—140; November 149—143¼; December 148—147¼.

Q Now when was the fact of the merger made public?

A It was published on the 9th of September.

Q Published where? Was it in the newspapers?

A In the newpapers.

Q So that it became generally known?

A Became generally known.

The Court. You have only given us the rate since.

Mr. Lindabury. No, before and since.

Q Now, go to bonds, and give us the quotations as to the new six per cent bonds.

A October, 1904, 108-107½; November, 111¾-106¾; December, 112½-108; January, 114-110¾; February, 117½-113⅞; March, 118¼-115¼.

Q Now, I think we might as well ask you, to get it on the record here, what amount of bonds were given for a share of stock of these bonds?

A American preferred stock?

Q Certainly; that is what we are talking about.

A One thirty-three thirty-three and a third cents for one hundred of stock.

Q Now will you give us the amount of American common and American preferred there was originally the old corporation, the time of the merger?

A At the time of the merger?

Q At the time of the merger, the amount of each class of stock?

A Preferred stock, fourteen million dollars; common stock, fifty-four and a half million dollars.

Q Now, Consolidated?

A I don't know.

Q You don't know Consolidated?

A No.

Q Do you know Continental?

A No, not familiar with Continental outstanding.

The Court. It is all in that circular, isn't it?

Mr. Parker. Yes, sir.

Q Now, about that circular, do you know whether or not when this circular was sent out the figures in there were accurate? This circular is in evidence.

Mr. Howell. What do you want me to admit?

Mr. Lindabury. The correctness of the figures. Then it is admitted the figures given in the Fuller circular of September 4, 1904, in evidence, of the stocks of the various companies, is correct?

Mr. Howell. Yes; there can be no doubt about that.

Cross examination by Mr. Howell.

Q Going first to these quotations, these quotations that you have given, what do you say the six per cent. bonds sold for in October of 1904?

The Court. Before they were actually issued, but when certificates were given for them.

Q I want him to tell.

A One hundred and seven and a half low, 108 high.

Q When were those bonds actually issued?

A This is Morton Trust Company certificate this is headed.

Q When were those bonds actually issued?

A I can't give the exact date.

Q Don't you remember that it was in the month of January, 1905?

A I don't remember.

Q Did you ever know?

A Yes.

Q If I should show you a circular,—just look at Exhibit C 23 and see if that refreshes your memory on the subject—Morton Trust circular—does that refresh your memory at all as to when the bonds were issued, as to the date when the bonds were actually issued?

A It says the bonds will be ready on January 9; it doesn't refresh my memory.

Q They hadn't been issued in October, had they?

A That is right.

Q What was issued in the place of them?

A Temporary certificates.

Q And those are the things that were dealt in?

A Yes, those things.

Q Did you ever see an inventory of the property of The American Tobacco Company that went into this merger?

A No.

Q There was such an inventory?

A I don't know.

Q You don't know whether there was such an inventory or not?

A No.

Q Didn't you ever hear any of the officers say that they had taken an inventory of all the property of The American Tobacco Company that went into the merger?

A No.

Q Was there an inventory made of the property of the Continental that went into the merger?

A I was not connected with the Continental; I don't know.

Q And you are now connected with the merged corporation, aren't you?

A Yes.

Q And you never have seen either of those inventories?

A No, sir.

Q Is there any book which you have ever seen which contains a list of the property of The American Tobacco Company that went into the merger?

A No, sir.

Q Did you never see any book which purported to keep the property of The American Tobacco Company separate from the property,—I mean in a separate account from the property of the other two companies?

A No, sir.

Q What are your duties as secretary of this company?

A Assistant secretary.

Q Well, as assistant secretary, what do you do in there?

A Simply assist the secretary of the company, and I am also interested in the selling end of the business.

Q What do you do as assistant secretary, what are your duties?

A They vary; anything that the secretary wants done.

Q You mean you write in the minute books, don't you?

A I don't write it; no, I direct it.

Q Do you keep the books of the concern?

A No, sir.

Q Do you sell goods?

A I don't sell goods personally; I direct the selling of goods.

Q What do you do? Let us know what you do. What are your duties in the office of the company?

The Court. Just give in detail what you actually do.

A I have an interest in directing the sale of one portion of the company's product.

Q Now, what is that?

A That is the high grade smoking tobaccos. I guess that is all you want.

Q That is all you do then as assistant secretary?

A That is one.

Q That is one thing. Tell us another thing you do.

A The direction of the keeping of the minutes; the keeping of the factories in straight line as to their connections and obligations of the United States law and internal revenue laws.

Q I don't understand what that means. Just explain what that means.

A Why, our factories are all run under the internal revenue law, and I simply see that they fulfill their obligations to that law.

Q That is two things you do. Is there anything else you do?

A I do anything that comes up that needs to be done; I can't itemize every thing that I do.

Q What is there about your duties that gives you an opportunity to form an opinion as to whether these properties can be separated?

A Well, I have been with the American Tobacco Company ever since it was organized; I was in the business before. I gave my opinion as such that it would be impossible to have that, simply because I have known the business for a long while.

Q Now if you knew that there was an accurate inventory of all the property that was owned by the American Tobacco Company that went into this consolidation, wouldn't you think that the property that is mentioned in that inventory could be picked out and sent apart from the other property,—yes or no?

A You must recollect the question as I understood—

Q Answer my question.

A (Continuing). Was not put that way.

Q Answer my question, please.

Q (Question read).

A To a certain degree, yes.

Q To a very great degree, couldn't it?

A To a large degree.

Q Couldn't it all be separated, couldn't it all be separated except such portion of it as was engaged in active daily business of the concern—take that out.

The Court. Such as would be used up.

Q If the factories were all put down in that inventory they could all be separated, couldn't they?

A Yes, sir.

Q And if the amount of tobacco that there was in such factory was put in an inventory you could put the same amount of tobacco in those factories again, couldn't you?

A Pound for pound.

Q And so with the machinery, couldn't you?

A To a certain degree.

Q And if any of the properties had been sold you have got a record of how much the property was sold for, haven't you?

A Undoubtedly they have.

Q You could pick that out and set that out in the other pile, too, couldn't you, and if there were any profits made upon it the profits to be divided up between the three companies in proportion to the amount of capital they put in the business?

A There you come to an arbitrary division there.

Q An arbitrary division?

A Yes.

Q How do you mean an arbitrary division?

A You see according to the capital they put in the business.

Q Yes.

A You would have to divide it up that way then.

Q That is what I say, can't you divide it that way? It can be divided that way, couldn't it?

A It could be.

Q You could divide it by six, couldn't you?

A Yes.

Q Then why do you say it is impossible to separate the properties of these three companies from each other?

The Court. He didn't say that.

A That question was not asked me.

Q The Consolidated Company didn't own any tobacco factories, did it?

A No.

Q No; it only owned stock in other companies?

A So I understand.

Q So there was no property to deal with there?

A So far as I know.

Q So you have got the property of only two companies to divide up between those two companies if this thing is broken up, haven't you?

A Yes, sir.

Q Now don't you think that is possible?

A You must recollect that question was not asked me.

Q I am asking you now?

A Divide up the property? You can arbitrarily, yes, divide up the property.

Q Don't you know the properties that The American Tobacco Company owned before the merger?

A I know generally.

The Court. Don't spend time on that.

Mr. Howell. I want to show his statement when he says it is impossible is an impossible statement.

The Court. He don't state it just in that way; it wasn't put to him that way. Mr. Lindabury is too smart to ask it that way.

Q Do you remember how that question was put to you by Mr. Lindabury?

A My recollection of the question is Mr. Lindabury——

Q What is the highest price of this preferred stock that you quoted here?

Mr. Lindabury. During 1904 it was.

A November, 149.

Q What is it now?

A Preferred stock?

Q Yes.

A There is no price that I know of.

Q What was it the last time you heard anything about it?

A I havn't heard of it for a year and a half or two years.

Q Have you heard of it since the merger?

A Only as far as this goes.

Mr. Lindabury. Down to January.

Q Is it not quoted there since the month of November 1904?

A That is the quotation I gave you, 149.

Q Is there any quotation since then?

A December, 148—147¼, that is the last.

Q That is the last, then it went down?

A It did.

Q How about the bonds? What was the highest price at which the bonds were quoted, according to the statement which you just gave here?

A March, 118¼.

Q When was that?

A March 1905.

Q What are they now?

A One hundred and ten and one-half or three-quarters.

Q They have gone down too, haven't they?

A They have gone down.

Q Yes; quite so.

Mr. Lindabury. That isn't fair; they have been way up very much since that.

Cross examination by Mr. McCarter.

Q Was Mr. Francis, the secretary of the Morton Trust Company, ever secretary of The American Tobacco Company?

A No, sir.

Q Or of the Continental?

A I don't know about the Continental; I am certain about the American; I don't think he was of the Continental.

Q Or the Consolidated, so far as you know?

A No.

ERICK S. DALLIMORE, sworn.

Direct examination by Mr. Lindabury.

Mr. Lindabury. Before we go on with this, we have this witness here from the Morton Trust Company to show the amount of securities deposited for exchange to-day and including March 20, 1905, the day you filed your bill. Shall we go through it with him, or shall I give you these lists and you admit it?

Mr. Howell. I think we will admit that.

Mr. Lindabury. Suppose I let him verify this as a whole?

Mr. Howell. All right.

Q What is your business?

A Coupon clerk and bookkeeper of the transfer department of the Morton Trust Company of the City of New York.

Q Have you prepared a list or statement of the securities deposited under the tobacco merger plan to and including March 24, 1905?

A Yes, sir.

Q (*By the Court*) The certificates of stock?

A Yes, sir.

Q Stocks and bonds?

A Bonds and stock.

Q Look at the paper which I show you and tell me whether or not that is it?

A This is up to March 20, 1905, and this is a deposit and exchange of securities up to November 1, 1906, which of course I prepared.

Q That is the third sheet; the second sheet shows amount of deposits up to March 20th?

A The first sheet.

Q This is the first?

A No, that isn't in it.

Q The first sheet—

The Court. Shows deposits up to March 20, 1905, and the next to November 1, 1906?

A Yes, sir.

Q And the second, November 1st, 1906?

A Yes, sir.

Q Now, what is the third?

A This is just a general resume of these; this is right up to November 1st, securities deposited to date under plan of merger against which we have issued new securities right up to date.

Q Well, when did you issue new securities against these deposits of March 20? Does it show here?

A We had issued, taken in the old stock and issued our certificates of deposit, and we had also redeemed our certificates of deposit and issued the new stock.

Q (*By the Court*) In other words, you had issued so many certificates of stock, so many certificates of receipts?

A Certificates of deposit.

Q (*By the Court*) Promise to issue the bonds?

A Yes, sir.

Q (*By the Court*) And you had issued a certain number of these bonds in redemption of the certificates to March, 1905?

A Yes, sir.

Q (*By the Court*) Both things shown?

A Yes, sir.

Q Now on March 20 how much of the American preferred stock had been deposited?

A You mean of the old American Tobacco Company?

Q Yes.

A $13,644,500.

Q That was out of a total of fourteen million. And how much common?

A $176,450.

Q And of the Consolidated how much?

A $39,745,400.

Q That is consolidated stock?

A Capital stock.

Q Consolidated bonds how much?

A Consolidated 4 per cent. bonds?

Q Yes.

A $151,636,200.

Q And of Continental preferred?

A $30,831,100.

Q And common?

A $15,500.

Q Now in exchange for this you had issued your certificates?

A Certificates of deposit.

Q And had redeemed those certificates and issued instead what?

A The new engraved securities.

Q What were they that you had issued at that time?

A Preferred stock.

Q Preferred stock of what?

A Of the new American Tobacco Company.

Q And how much?

A $78,178,100.

Q And common stock?

A $38,563,100.

Q And 4 per cent. bonds?

A $72,370,950.

Q And 6 per cent. bonds?

A $52,573,300.

Q Six per cent. bonds were issued for what?

A Issued in exchange for old American preferred stock and Continental preferred stock.

Q Now the next page brings it down to November 1st, 1906?

A Yes.

Q In the same manner?

A Yes.

Q (*By the Court*) You may say how much is outstanding now that has never been presented for redemption, of the old American stock.

Mr. Lindabury. How much of the American preferred is in? Perhaps that is just as good a way.

A The old American preferred stock surrendered under the plan of merger is $13,879,500.

Mr. Howell. That is out of fourteen million.

The Court. I don't recollect that it is exactly fourteen million. Have you got a statement there how much is outstanding?

A No, sir.

Q How much is outstanding of the old American?

A I haven't got those figures.

Q Can you tell me whether or not Samuel H. Kissam has exchanged his stock?

A Yes, sir.

Q His American preferred?

A Yes, sir.

Q S. J. Lanahan?

A Yes, sir.

Q Two hundred shares?

A Two hundred shares.

Q Kissam was 200?

A Yes, sir.

Q Edmund M. Parker?

A Fifty shares.

Q He has exchanged?

A Yes, sir.

Q Gertrude P. Sheffield?

A Exchanged.

Q Lelia G. Cayce?

A Yes, sir.

Q Two hundred and twelve shares?

A Two hundred and twelve shares.

Q A. B. Cayce, 190 shares?

A Ninety shares exchanged, leaving 100 out.

Q A. B. Cayce, trustee?

A That is all surrendered.

The Court. Those are the ones that voted against it in the meeting.

Cross examination by Mr. Howell.

Q When did the Morton Trust Company begin issuing the new securities of the new company?

The Court. Actually delivering them out?

A The new engraved securities you mean, don't you?

Q Yes, new engraved securities?

A January 1st, 1905.

Q And have all your deposits receipts been redeemed?

A Not yet, no.

Q Now let me show you a paper. Did you ever see that circular before?

A Yes, sir.

Q Well, don't that state January 9th?

A It does, sir; when I said January 1st I was relying on my memory.

Q Now you know it is later than January 1st?

A Now I see it is January 9th; I was under the impression it was on the first.

Examined by Mr. Lindabury.

Q When were the certificates issued that those were issued to redeem?

A What is that, sir?

Q When were the temporary certificates issued, about?

A As soon as we began taking in the old securities.

Q As early as November?

A I believe so, yes, sir; I won't be sure; I haven't the figures here.

Q Do you know when the stocks and bonds, new stocks and bonds were listed in the Stock Exchange?

A No, sir, I do not from my memory.

Q Well, was it in January? This is in evidence, the stock list, and I see it bears date January 11.

A Yes; January 1905.

Q You say it was about the middle of January?

A Yes, sir.

Adjourned until next Monday, November 5, 1906, at Chancery Chambers, Newark, N. J.

November 5, 1906.

Between
RICHARD T. DANA, ADMINISTRATOR OF RICHARD S. DANA,
Complainant,
and
THE AMERICAN TOBACCO COMPANY, MORTON TRUST COMPANY, and the persons constituting the Board of Directors of The American Tobacco Company,
Defendants.

Continuation of examination, pursuant to adjournment, at the place and in the presence of the parties as before.

Mr. Howell. At the close of my case on Friday I asked Mr. Parker to furnish me with a bit of information about some Continental Tobacco Company preferred stock, and he has furnished me with the information this morning, and I want the matter put on record. On October 19, 1904; the old The American Tobacco Company held two million five hundred and sixty thousand dollars in par value of the stock of the Continental Tobacco Company preferred.

JAMES B. DUKE, sworn.

Direct examination by Mr. Lindabury.

Q You are the president of The American Tobacco Company, are you not?

A Yes, sir.

Q And were you connected with the old American Tobacco Company?

A Yes, sir; I was president of that company.

Q One of the organizers of it, were you not?

A Yes.

Q And president during its whole existence?

A Yes, sir.

Q Were you also connected with the Consolidated and the Continental Companies?

A I was president of each of those companies.

Q (*By the Court*) At that time, eh?

A Yes, sir.

Q Each of them were manufacturing companies?

A Continental and American.

Q What did the Continental manufacture, principally I mean?

A Plug tobacco at the time of the merger.

Q And what did the American manufacture?

A Manufactured smoking tobacco and cigarettes and fine cut smoking tobacco, chewing.

Q Was the Consolidated a manufacturing company?

A No, sir; it was not.

Q What was that?

A It was a holding company.

Q What did it hold principally in the way of stocks?

A Principally the stocks, common stocks of The American Tobacco Company and Continental, American Tobacco Company some preferred stock.

Q (*By the Court*) That is the Consolidated; there were three; the Consolidated was a holding company?

A Yes.

Q (*By the Court*) And held principally the stocks of the American and the other companies?

A And the Continental, yes.

Q Did the Consolidated own property beside the stocks of the other two companies?

A Yes, sir.

Q About how much did it have invested outside of those stocks?

A I couldn't really remember.

Q Some forty million I was thinking, is that approximately right, cash capital which was invested largely outside?

A Yes, more than that, I suppose, counting the surplus.

Q Now there were some papers not put in the other day that I would like to have in evidence. Do you remember an offer being made at the time of the consolidation to the 4 per cent bondholders of the Consolidated Company.

A Yes.

Q Look at the paper which I show you dated October 20, 1904, and signed by the Tobacco Company, yourself as president, tell me, is that the offer made?

A Yes, sir.

Q Was that sent out to all the bondholders?

The Court. That is of the Consolidated.

A It was ordered to be sent out.

Q Well, yes, and you understand it was sent, do you not?

A Yes, that is my information.

The Court. The actual sending is not in question here.

Q No, not at all. Now was there an agreement made between the companies to provide for the exchange—notified in this notice?

A Yes.

Q That notice provided what, generally, what was the scheme?

The Court. The one you called his attention to a moment ago you mean?

Q Yes; what was the scheme covered by that notice?

Mr. Howell. I understand, if the court please, this is an offer by some company to the holders of the 4 per cent bonds of the Consolidated Company, and I don't see its relevancy to the controversy that we are now trying.

The Court. Without asking him to open it, I supposed what Mr. Lindabury is aiming at, he wants to show that before your client intervened

actively an irretrievable step had been taken with the Consolidated Company which it would be imposible now to tear up.

Q With the bond holders.

The Court. Yes, with the bond holders; I suspect that, because while I whiled away the time while you were putting in the evidence looking at an oral opinion I delivered on that very matter, I think this exchange that was made was held up, tried to be held up, and I declined to hold it up.

Mr. Lindabury. That is right—the Akelheimer case.

The Court. Akelheimer case.

Mr. Howell. I have a feeling that it is not admissible testimony in our controversy, and I would like to have my objection noted.

The Court. Certainly; I don't know that it is or is not. I suppose it is part of the defence set up that it would be impossible, impracticable now to readjust things; it is in aid of their defence of estoppel.

Q Now what was that plan?

A This is an offer made by the new American Tobacco Company to the Consolidated bond holders offering to give them certain new bonds and certain preferred stocks in exchange for their old bonds.

Q Now was there a consent in order to do that required from any of the stockholders or bond holders?

The Court. Of the Consolidated?

Q Yes; bond holders of the Consolidated?

Mr. Howell. What is the date of that?

Q October 20, bond holders agreement was there not, to provide for that?

A Yes, sir.

Q And look at the paper which I show you now which covers the first four pages of a pamplet now shown, which has the mark Exhibit 2 of this date.

Mr. Howell. I would like to have you note my objection to the admissibility of these two documents.

The Court. Yes; objected to as incompetent, this line of evidence.

Q Was there an agreement required in order to enable you to do that, from a majority of the bond holders?

A Yes, sir.

Q Look at the paper which I show you, and which I have marked for identification Exhibit 2 of November 5, and tell me whether or not that is a copy of the same, consisting of four printed pages?

A Yes, sir; that is the paper.

Mr. Lindabury. I will offer these in evidence unless Mr. Howell wants to cross examine first.

The Court. Do you want to look at them?

Mr. Howell. I would like to look at them, yes, sir.

The Court. This last paper is the one that was before me in the Akelheimer suit.

Mr. Howell. I would like to ask Mr. Duke a question or two about it.

Mr. Lindabury. Here is another that really goes with it. Suppose you wait until I put them in.

Mr. Howell. All right.

Q I suppose of course that the original consolidated bonds which were exchangeable under that offer were secured by mortgage to somebody, some trust company?

A Yes, sir.

The Court. My recollection is it was not; they were secured by stock lodged in some trust company.

Mr. Lindabury. Trust indenture rather than an ordinary mortgage. They were secured by trust indenture, were they not?

A Yes, sir.

Q Look at the paper which I show you, dated June 15, 1901, do you identify that as the trust indenture covering those?

A Yes, sir.

Mr. Lindabury. Now this is the original, Mr. Howell, and I have a printed copy, with everything but the signatures; you will consent to that?

Mr. Howell. Yes; I don't stand on those things.

The Court. What you are putting in now is original trust indenture or statement of deposit of June 15, 1901?

Mr. Lindabury. Yes, sir.

The Court. What was the trustee, what trust company?

Mr. Lindabury. Morton Trust Company.

The Court. Issued from the Consolidated bonds that were in existence at the time of this transaction which is here in question?

Mr. Lindabury. That is right; the bonds which were surrendered and in exchange for the new bonds.

The Court. Got the original here, but he shows you copy?

Mr. Howell. Yes, sir. I can't read this now. This is what they call a collateral trust mortgage, isn't it?

The Court. That is it exactly.

Mr. Howell. Made by The Consolidated Tobacco Company to the Morton Trust Company June 15, 1901. Now I object to the introduction of that.

Mr. Lindabury. Would you like to cross examine just now on those three papers? I suppose you do.

Mr. Howell. No, I don't think I will just now. I will reserve my cross examination.

The Court. What you now offer in evidence is, first, trust collateral, June, 1901, showing the security which was given for the Consolidated bonds, bonds of the Consolidated Tobacco Company?

Mr. Lindabury. Yes, your honor.

The Court. Second, the notice sent out by the new American Tobacco Company to those bondholders proposing to exchange those bonds for a new issue by the new American Tobacco Company of a different kind of bonds and stock, and, third, the agreement of the bondholders to accept that offer. Is that it?

Mr. Lindabury. Agreement of a majority of the bondholders.

The Court. What date was that last agreement?

Mr. Lindabury. September, 1904.

The Court. Those papers are all admitted in evidence, subject to Mr. Howell's objection as irrelevant and immaterial, with no bearing on the present issue.

Marked A, B and C, November 5.

Q Mr. Duke, how has the business of the new American Tobacco Company been carried on since the consolidation, as one business, or otherwise?

A As one business.

Q You have kept in touch with the actual operation of the business of the company, have you not?

A I have.

Q What do you say as to whether or not it would be practicable at this time, as to whether or not it would have been practicable on the 20th of March—

The Court. Last, you mean?

Q In 1905, yes, to divide the business of the new company up among the companies from which it was created?

A It would not be possible to do it except by a trade, make a trade, if you could get everybody to agree to it.

Q That is, you mean agreement?

A Yes.

Q Why not?

A Well, because the business has been so merged and run in from one end to the other that you couldn't separate it, many of the different lines.

Q Now I would be glad if you would instance any particulars of the difficulties that would be encountered in an attempt to separate the business?

A Well, the matter of the leaf tobacco would be one of the hardest.

Q Now explain why?

A Well, a great many of the grades of leaf tobacco is used by brands manufactured by the plug and by the smoking, one of which belonged to the Continental before, and the other, the smoking, the plug belonged to the Continental before the merger, and the smoking belonged to The American Tobacco Company. And then the purchase of our stock of tobacco, from October up to March, we wouldn't know which one would own it, whether the Consolidated would own it or the American would own it, or the Continental, or how it would be; it would be according to the way the money would figure out.

Q About how much of the leaf tobacco did you purchase up to March 20th?

A Well, that I would have to guess at it, but it would be up in several millions.

Q Approximately a number of millions?

A Probably ten or twelve millions, maybe more.

Q You purchase ten or twelve million dollars worth?

A I am guessing at that; it may be a good deal more or less, I couldn't say.

Q Well, could you state the minimum?

A I should say it would not be less than ten millions.

Q That was purchased for use in the lines of manufacture carried on both by the Continental and the American before the merger, was it?

A Yes, sir.

Q And was it used in those lines by the new company?

A Yes, sir; well, it was some time after that. We buy the tobacco, some of it, two years before we use it, some of it only a year before we use it.

Q Now with what money was that purchased? Where did the money come from, if you know?

A From the Consolidated Companies.

Q (*By the Court*) From the new company?

A Yes, sir.

Q If you were to undertake to trace up the source from which it came originally could you do it?

A I think that the money could be traced.

Q Where do you think it came from for the most part?

A I should judge that is came from the Consolidated mainly, because that was the concern that financed the others at that time largely.

Q So that this leaf tobacco was purchased largely with the money that had come down to you from the Consolidated, and for the use of the American, we will say, and the Continental?

A Yes.

Q Or for use in the lines of business that had been previously carried on by them?

A Yes, sir.

Q Now I suppose you can tell how much had been used by each?

The Court. Don't your books show how much tobacco was delivered to each factory?

A The tobacco is not delivered to the factory until it is manufactured, ready for manufacture.

Q (*By the Court*) For purposes of manufacture?

A Yes, sir; the purchase of our stock, we purchase it ahead for use, and while we are delivering older tobacco for the factory we are buying new tobacco and putting in the storehouse, and during that period we are buying two or three times as much tobacco

as we are using because that is the season when the farmers sell their crop, from August on to April, that is, the large part of it.

Q Now assuming then that there was on the 20th of March, that on the 20th of March all this tobacco was still on hand and had not been used up, what do you say as to the practical difficulty of separating and dividing it between the three companies?

A Well, if it had been done by a matter of agreement, because really we couldn't tell who owned the the tobacco, how much each one would be entitled to.

Q For instance, we will say it was bought, three quarters of it, with the Consolidated Company's money would the Consolidated have any use for it?

A No, sir, unless it could sell it.

The Court. It was all capable on the 20th of March of an appraisement of value, the tobacco you had on hand, you kept account of stock, knew how much it was worth in money?

A Yes; didn't know probably what the fluctuation in the market was, we knew exactly what it had cost.

Q Well, could it have been divided between the American and the Continental in such way that it would have been a valuable asset to them, a useful asset?

A Yes, I think they would both wanted to take more or less of it maybe, if the price was up they would want less than their proportion; if the price had been down they would have wanted more; that would have been a matter of agreement, trade you would have had to make.

The Court. You may call it a cash asset; that is the trouble in my mind. Of course you can bring it out, but I would suggest to you the difficulty don't lie there, in dividing the cash assets.

Mr. Lindabury. If you regard it as a cash asset, yes.

A Yes, it would be a very hard matter to do, to satisfy two different concerns.

Mr. Lindabury. Ten or fifteen million in tobacco at that time is perhaps quite different from in the bank.

A It is a good asset.

Q Would there be any other purchasers for such a quantity of tobacco at such a time, except this company?

A No; I don't think so.

Q Now what other difficulties have occurred to you in the way of dividing the business?

A I think it would be a matter of impossibility to divide the expenses in operating, especially the head office, the New York office.

Q Why?

A Because the people that operated it are operating for both businesses, that is, operating for one business, but be part come from all three of the different companies, and if you go to divide that out so as to arrive at the profits of the Continental and American and Consolidated you would have had to guess at how much should be charged to one or the other.

Q Have you any other difficulties in mind as of the 20th of March?

A Well, the money, the interest on the money.

Q I suppose the money gotten from all sources has been kept indiscriminately since the consolidation?

A Yes, sir.

Q (*By the Court*) But the cash account must show where all the money come from, the cash account must show where the money come from?

Mr. Lindabury. Yes, perhaps so; but having gotten it, I suppose it was not kept in separate banks.

The Court. The money that you and I individually deposit in bank from day to day is all mixed up, and get one fee from Mr. Duke and the other from somebody else, but your accounts show how much.

Mr. Lindabury. He was speaking of interest, different rates of interest.

The Court. Rates of interest?

Mr. Lindabury. Mr. Duke made some allusion of that kind that I was about to have him follow up; that is what I meant.

Q What is the fact about that?

A Some of the moneys loaned at 6 per cent. and some of it was deposited and we get 2 per cent. on it, some we get none on, and some we get 3 per cent. on, and others is loaned at 5 per cent.

Q And I suppose it would be impossible to tell where the 5 per cent. or 6 per cent. or the no per cent. money came from?

A Yes.

Q Is that right?

A I think so; yes, sir.

Q Now with regard to the transaction of the business, coming down to the present time?

The Court. Let me interrupt you. I didn't understand you that he had any proof that any new bonds or stock was issued to the bondholders of the Continental Company?

Mr. Lindabury. Yes, your honor; Mr. Dallimore the other day gave the issue, just at the end.

The Court. Never mind; it is all on the record. I am not trying to recollect anything in this case.

Q I think I had partly asked a question. Now, with regard to the transaction of the business, coming down to the present time, has it been carried on in such way as to make the earnings and the losses, if there are any, on each branch at all equal or even?

A Well, we have carried it on so as to make all the profit we could; of course some branches of it has been more profitable than others.

Q And have losses been sustained on some branches or brands?

A Losses have been sustained on some brands, and profits on others have been increased.

Q Can you give us any instances? For instance, take between the lines carried on by the Continental,

that is plug, and the chewing tobacco, is it manufactured by the American, have any changes taken place?

A Well, some of the brands have gone up and some have gone down.

Q (*By Mr. Howell*) That is in profits you mean?

A No, in point of quantity sold, and profit, too.

Q Popularity. Have any brands of the American gone up at the expense of the brands of the Continental, or vice versa, have any changes of that kind been made?

A No, I don't think the American brands have affected Continental, unless some people have smoked more pipes and chewed less tobacco, because the Continental was doing a chewing business entirely when the merger took place.

Q The plug of course is chewing tobacco?

A Yes, sir.

Q And the American made chewing tobacco, too, didn't it?

A They made fine cut.

Q Has there been any change in development in fine cut trade at the expense of the plug?

A Yes; I think the fine cut business has increased, whether it has come from plug or not, I can't tell that.

Q How about scrap?

A Large increase in scrap business.

Q What is that?

A That is cigar clippings made into, sweetened up for chewing purposes.

Q Was that a business of the American, not the Continental, was it?

A Well, the American was manufacturing it; the American used to manufacture scrap.

Q Now has the scrap trade increased greatly since the consolidation?

A Very largely; yes, sir.

Q How much, what per cent., double, triple, or what?

A I think in the last four or five years it has doubled.

The Court. Hasn't been but two years.

A Well, the last two years I should say it has gained 25 or 30 per cent., maybe more; it is all guess, because I don't know how much the other people's trade has increased.

Q That is used for chewing, is it?

A Yes.

Q Do you make fine cut, the American made fine cut beside?

A Yes, sir.

Q Has that business increased?

A Yes, sir.

Q Greatly?

A Not very greatly; it has increased some though.

Q Now has money been spent to push brands without success, have there been gains or losses, the creation of new brands or the dropping out of old ones since?

A We have created new brands, pushed them and spent money on them and lost money on them; some of them have caught on and some have not.

Q New brands of tobacco manufactured previously by the American?

A Yes, and Continental also.

Q And the Continental also?

A Yes, sir.

Q Some have succeeded and some have not?

A Yes. Some of the brands have gone up in sale and some gone down, both concerns.

Q Now that to such an extent to be a material matter, the losses occasioned by those, I want to know whether a few dollars or many?

A We lose a great deal of money when we put out a new brand if it don't hold its trade afterwards.

Q Can you give me any idea in figures?

A Sometimes it goes into millions; I can't tell just what it has done the last two years exactly.

Q Can you approximately, the amount that has been lost by the new company altogether in attempts to introduce new brands or push old ones that were unsuccessful, of either Continental or American, since the merger?

A I haven't really had time yet to tell how many of them will be successes or failures that has been put out since the merger; got a great many out we are losing money on every day.

The Court. There is no objection to this evidence, but, Mr. Lindabury, I don't see the relevancy of it myself. The question is the condition of things you may say about the first of January 1904, and as at present advised, if the court goes back to that time. The question is whether these affairs could have been disentangled at that time; the question is whether material is left by which a Master of this court could determine what the situation was at that time, the time the complainant's right, if he had any, vested, somewhere then. There is no objection made to it and I am not going to interpose any, but I call your attention to it. You have got a right to make you case as you choose, but for going into an account before this court of all that sort of thing, I don't see—

Mr. Lindabury. I didn't want to do that, but to show in quite a general way the situation.

The Court. The court will take notice of that, I think.

Mr. Lindabury. I have no doubt that is so.

Q Now, Mr. Duke, was The American Tobacco Company at the time of the merger possessed of stocks in other companies?

A Yes, sir.

Q Now have stocks in other companies been acquired since the merger, that is, were they acquired between the date of the merger and the 20th of March?

A I couldn't say as to that; I can't recall as to that.

Q They have been acquired some time since the merger?

A Yes, sir.

Q Did the American own stocks in a British company before the merger?

A Yes, sir.

Q What is that called?

A British American Tobacco Company and the Imperial Tobacco Company.

Q Were the holdings in those companies large?

A Yes.

Q Approximately how much in value?

A Between two and three million dollars in the two concerns, I should judge; I don't remember the figures.

Q Has the business carried on by those companies been specially prosperous since the merger?

A Yes, very prosperous.

Q Very prosperous?

A Yes, sir.

Q Now, with regard to the preferred stock, I suppose you know what it was selling at in the market before the consolidation?

A Yes, from time to time.

The Court. Go back from the first of January, 1904; up to the first of July; that was before the merger was conceived, thought of, I suppose. Go back to the period from the first of January to the first of July, 1904, before the merger.

Q Now then, did the stock of The American Tobacco Company at any time between January 1st, 1904, and the date of the merger—

The Court. I don't say you shouldn't go further back.

Q (Continuing) Sell for as much as it has since the merger, or as the bonds exchangeable for it have sold for?

Mr. Howell. I object to that question, because I don't think the answer to it gets us anywhere.

The Court. No; the range of the prices I think is a better way. I think the gentleman who was on the stand Friday, the old deaf gentleman, gave the range of prices for each month.

Mr. Lindabury. For part of the time.

The Court. Part of the time, but he didn't go back to the first six months, if I recollect right.

Mr. Lindabury. He did, you honor; he went from the first of January 1904, down.

Mr. Howell. I still object to it because I don't think it is relevant or material to the case.

The Court. I doubt it myself, but I believe it is the habit of courts to inquire into what the market value is; I believe the Court of Errors and Appeals took notice of that in the copper case.

Mr. Lindabury. In the McDonald case against the Smelting Company.

The Court. But without attempting to compare this case to that, which, if I recollect right, had a sort of an atmosphere around it which I hope this case has not got, that is, a scheme to float stocks more than they are worth on the market,—still the value of a stock of this kind is to a certain extent, measurable at least. At least I won't rule out the evidence of what it sells for in the market. I am not aware whether this was ever the tobacco stocks ever really speculative stocks, except the one that was before me in which those brokers in New York whose names have been mentioned here, Howlands,—I had a little suspicion in that case when it was before me that the whole thing was very highly speculative and intended to operate on the stock market. When you get into those cases, speaking for myself, I don't think what the sales on the market are amounts to anything at all. With a kind of mental protest, which I have tried to indicate very roughly, I admit the evidence.

Q Do you know the highest point reached by the preferred stock of the American during the year of the merger before the merger was announced?

A No, I don't know; I don't remember the price of the stock; I do remember that the price of it went up as soon as it was announced, and I do remember that the bonds have sold for more than the stock was selling for.

Q (*By the Court*) On 133 to a hundred the bonds have sold for?

A Yes, sir.

Q Well, how soon did the bonds go up, were they ever any lower than the stock?

Mr. Howell. The court understands I object to this whole line of examination. I don't want to object to every question.

The Court. Yes.

Q After the bonds began to be sold do you remember how they started, that is, what I mean, as compared with the price of stock?

The Court. He said they sold at more.

A I think the stock started off, the bonds started off at about 107, somewhere around that; they have sold as high as 118.

Q (*By the Court*) If I recollect right, Mr. Duke, the evidence on Friday in effect was that before the merger the preferred stock was selling at about 140 to 150?

A Well, it touched 150 a few times; the bonds have sold for more than the stock ever sold for, and the price of the bonds has averaged more than the price of the stock ever sold for, the same length of time.

Q (*By the Court*) I will ask you this, Mr. Duke, subject to Mr. Howell's objection. How closely was this proposed merger kept? How long before the circular of September 9 was sent out was it know around among the knowing ones that this merger was contemplated, and the terms of it?

A There had been some discussion of the merger I think a year before that, but that was during panic and we didn't think we could carry it through.

Q (*By the Court*) Any terms mentioned?

A I don't believe there had been any decision about it.

Q (*By the Court*) When were the terms of the merger, substantially the terms of the merger first known?

A Well, it was around about the time we got it out.

Q (*By the Court*) Not until then?

A No, sir.

Q (*By the Court*) What I want to get at, Mr. Duke, is, and I think you are a candid man, was the price, the selling price, of the preferred stock affected prior to the actual disclosure of the merger by the understanding in the air among the holders of the stock that there was going to be a merger?

A I don't think—you want to know whether there was much speculation in stock?

Q (*By the Court*) Did the stock go up any for a month or two months, short time before the merger was published, occasioned by a rumor that there was to be a merger?

A I don't know how soon the stock went up in the price, but I know it did go up as soon as it was out.

Q Wasn't it a fact that the terms of merger and the fact of merger was kept secret until it was announced on the 9th of September?

A We always try to keep everything secret.

Q Don't you remember that very great care was exercised to keep the thing absolutely secret until it was announced publicly to all the world on that one day?

A Yes, it was.

Q (*By the Court*) Go back to the first three months of 1904, January, February, March, April, May, along there. Is it your judgment now, and according to your recollection was the selling price of the preferred stock of the American at all affected by any anticipated merger?

A No, sir; I don't think it was at that time.

Q Now was there any underwriting scheme connected with this merger or any profit to anybody in bringing it about, any commission, any broker any underwriting syndicate or other syndicate of any kind

A There is an underwriting syndicate for the purpose of taking in preferred stock.

Q That is the one that we have here?

A Yes.

Q The agreement we have in evidence now?

A Yes; and the only other underwriting, we paid half a million dollars for a call on twenty millions of money I think in case anybody should want to have their securities valued so we would have plenty of money to protect them.

Q Did this syndicate that you say arranged to take the stock or the bonds have any profit for it, any commission or anything?

A Not that I know of.

Q Don't you know there was not?

A No.

Q Those who signed that paper put in evidence this morning agreed to take the bonds if the minority bond holders wanted to take stock?

A The Consolidated bond holders had a right to take 50 per cent of the amount of bonds they held in 4 per cent and 50 per cent in 6 per cent preferred stock and that syndicate had arranged to give their preferred stock, their bonds to anybody that wanted all bonds, and they would take the preferred.

Q (*By the Court*) That is simply persons interested in the Consolidated?

A No.

Q (*By the Court*) Didn't include the preferred stock of the American, did it?

A No, sir; it is the new preferred stock issued by the American.

Q (*By the Court*) The new preferred?

A We issued seventy-eight or nine million dollars preferred stock and seventy-eight or nine preferred bonds by the new American to take up one hundred and fifty-five or six millions Consolidated 4 per cent bonds.

Cross examination by Mr. Howell.

Q Mr. Duke, you were president of the old American Tobacco Company?

A Yes, sir.

Q Also of the Continental?

A Yes, sir.

Q Also of the Consolidated?

A Yes.

Q And did you fill the office of president of those three companies during the whole period of their existence respectively.

A Yes.

Q Where was the office of The American Tobacco Company on September 9, 1904?

A 111 Fifth avenue.

Q Where was the office of the Consolidated?

A In the same building.

Q Where was the office of the Continental?

A In the same building.

Q The three companies occupied practically the same suite of rooms, did they not?

A No.

Q Did they have separate offices?

A Separate offices.

Q And kept separate accounts?

A Oh, yes, certainly.

Q Weren't the accounts kept under the superintendence of the same men?

A No.

Q All entirely different, were they?

A Yes, sir.

Q Just exactly what were your duties in connection with your presidency of these three companies?

A Supervise and direct the policies of the corporation of the business.

Q Under the direction of the board of directors, of course?

A Oh, yes, whenever they wanted to interfere, but they never interfered with me much.

Q They did interfere occasionally?

The Court. He said they never did.

Q You were the commander in chief then of the whole business?

A Yes.

Q How far did you acquaint yourself with the details of the business?

A I understood pretty well what was going on.

Q How much time did you spend at the office of the corporations, these corporations?

A The best part of my time.

Q You lived in the neighborhood?

A Yes, I lived here; my home is here in Somerville, New Jersey.

Q (*By the Court*) As I understand it, Mr. Duke spent all of his time there when he was at the Somerville place, kept very early and late hours at his Somerville place, when he stayed there at night, except Fridays, Saturdays and Sundays, and sometimes Thursdays; that is right, I guess?

A That is about right.

Q Who were the other officers of the three companies beside yourself at the time this merger was closed?

A Mr. Hill was vice-president of The American; Mr. Strotz was the secretary; I think Mr. Hicks was the treasurer, and Mr. Halliwell was vice-president of the Continental and Mr. Dula was the second vice-president, Mr. McAllister was secretary, Mr. Kingsbury was the treasurer.

Q Now what business was The American Tobacco Company engaged in?

A Manufacture of tobacco and cigarettes.

Q In any one place, or were their factories pretty well scattered?

A They had quite a number of different factories in different places.

Q How many?

A I will have to think it up, count it up; I couldn't remember now.

Q Well, a dozen?

A I should think more than a dozen.

Q Twenty?

A I am guessing at it; I could have a list made and give you, accurate.

Q I am just getting your general recollection?

A The American Tobacco Company owned one factory in Durham, and it owned in Richmond one factory, also a lot of stemmers and leaf houses also in Durham.

Q I don't care for a list of them at all.

A Baltimore, two or three.

Q I just want to know about how many there were?

A I couldn't guess within 25 per cent, because I haven't had that on my mind.

Q I guess you have guessed pretty straight on it.

A I don't know; about 15 or 20, I suppose, maybe 40 or 50.

Q They made what kind of tobacco?

A Long cut, plug cut, granulated, scrap, fine cut, little cigars and cigarettes.

Q And that, in a general way, was about the extent of their manufacture?

A Yes.

Q Do you remember what the total output of all the factories of The American Tobacco Company were for the year ending say October, 1904?

A In pounds you mean?

Q No, in value, in dollars?

A No, sir; I do not.

Q What did the Continental Company make?

A Made plug tobacco.

Q Only?

A Yes, sir.

Q How many factories did they have? I am speaking now as of the date of the merger?

A You mean manufacturing plants?

Q Yes.

A I would have to guess at that; eight or ten, I suppose.

Q And did they make anything beside plug tobacco?

A No; no, not at that time; they had sold their smoking business to the American.

Q When did that sale take place?

A I think it was in January 1904.

Q Now I understand you to say the Consolidated Company was a holding company and did no manufacturing at all?

A No, sir.

Q In fact, did they own any property, except the stocks and bonds of other corporations?

A Well, cash.

Q And cash, yes?

A I don't think they owned any property; in fact, I am almost sure they did not.

Q When this consolidation was made up wasn't there an inventory made of all the properties of these three corporations?

A Yes, sir.

Q Have you that inventory here?

A No, sir.

Q Who made the inventory of the property of The American Tobacco Company?

A I suppose that was made at each one of the different branches where we held the property.

Q What does that inventory include?

A It includes all the property they had.

Q Well, that includes the several factories that they owned and operated, and did it include also all the stock in trade that the various companies owned, all the manufactured goods?

A Yes, included everything they had.

Q Everything they had, yes. Well, was a similar inventory made of the property of the Continental Tobacco Company?

A Yes.

Q And a similar inventory of the stocks and bonds and cash and other property that was owned by the Consolidated Company?

A Yes, sir.

Q And have those been entered upon the books of the various companies, of the three old companies?

A I suppose they have, although I don't know the form of doing it; I don't go into all those details.

Q You don't bother with so small a detail as that?

A No, sir; that is in the hands of the auditing departments.

Q Now I call your attention, Mr. Duke, to the papers that were put in evidence this morning. There is a paper marked Exhibit B of November 5, which appears to be a circular signed by yourself and addressed to the holders of the 4 per cent gold bonds of The Consolidated Tobacco Company, and is dated October 20, 1904?

A Yes, sir.

Q Who prepared that circular?

A I suppose some of the coursel of the company

Q When was it sent out?

A I suppose around the date that it is stated.

Q October 20, 1904?

A Yes, sir.

Q That was the day after the consolidation was effected, wasn't it?

A I don't recall the dates of all these things.

Q Did this circular or its contents ever come before the board of directors of The American Tobacco Company, the new company?

A I couldn't recall; I don't recall whether it did or not.

Q Was there a meeting of the board of directors of the new company on October 20, 1904?

A I couldn't remember dates; I know there were a number of meetings at that time.

Q Wasn't that circular prepared prior to October 20, 1904?

A I couldn't say that.

Q What did you have to do with the circular itself?

A I signed it, I suppose it was discussed with me.

Q On October 20, 1904?

A I can't remember the date it was done.

Q Do you know how many of those were sent out?

A I do not.

Q Do you say that that had relation to this paper which I now show you which is marked Exhibit C of November 5? Now I ask you whether this circular

which I have just shone you has anything to do with the Exhibit C 4 of this date? (Meaning defendant's Exhibit of C Nov. 5.)

The Court. Just tell what the paper is.

Mr. Howell. I don't know what it is.

The Court. Agreement of the bondholders of the Consolidated Tobacco Company.

Mr. Howell. That is what they said it was.

A The papers really show their relation, I suppose, themselves.

Q Yes; you don't know?

A I didn't say—

Mr. Lindabury. What is that?

Mr. Howell. He says the papers show their relation, he don't know.

A I didn't say that; you said that. I understand it is plan of merging those three companies.

Q These papers we will call the 4 per cent Consolidated bond holders agreement, that was dated September 9, 1904, wasn't it?

A Yes, I saw the dates just now.

Q And that was prepared prior to any public notices of the consolidation, wasn't it?

A I don't know when the first notice of the consolidation got out; I know there was an agreement prepared and a majority of the bond holders, signatures of a majority of the bond holders gotten so that they could change that trust indenture with the Morton Trust Company.

Mr. Lindabury. You can assume it was not only prepared, but executed before the plan was announced.

A As soon as that was prepared we had a circular issued making the offer, I think for every thousand dollars bonds we was going to give 4 per cent, $500 of new 4 per cent bonds, $500 of 6 per cent preferred stock, and anybody that didn't want the preferred stock they could take it all bonds, and we had a syndi-

cate or something arranged to furnish the bonds and take up that preferred stock that anybody didn't want.

Q Then this agreement we call the consolidated bond holders' agreement is not an agreement to accept bonds, is it, or stocks?

The Court. It is a pretty complicated agreement.

A I haven't heard of the agreement, paid any attention to it in two years now, and there are a lot of agreements I have to deal with, I can't remember.

Q Is this consolidated bond bolders agreement that is marked Exhibit C 4 (meaning defendant's Exhibit of C Nov. 5) of this date an agreement by the bond holders to accept the provisions of the merger agreement?

Mr. Lindabury. Oh, no; shall I tell you what it is in just a word?

Mr. Howell. Mr. Duke ought to know what it is.

The Court. Agreement to accept the offer.

A No; my understanding is it required a majority of the bond holders to change the mortgage of the trust company, and we had to get, before we could change it we had to get the consent of a majority.

Q I see. Then this was sent out for the purpose of getting the bond holders to consent to a change in the mortgage?

Mr. Lindabury. It was not sent out at all.

A It was not sent out. We got hold of the people we knew had nore than 50 per cent of the bonds, they signed it and produced their bonds, they produced them at the trust company, and I think from this court somebody sent there to see whether we had them or not.

Q Then this circular which I showed you first which is addressed to the holders of the 4 per cent gold bonds of The Consolidated Company, that was a circular that was sent out after the consolidation and

gave the holders of the 4 per cent bonds, or rather the holders of the 4 per cent bonds agreed to take the merger agreement?

The Court. The question was whether the minority was bound by a majority in that case.

Mr. Lindabury. If you let me tell you in just a word. Mr. Duke don't recall it. It was this way. Here was this great block of 4 per cent consolidated bonds out, one hundred and fifty-six millions. We thought that that ought to be reduced to the extent of 50 per cent and replaced by preferred stock, but we thought those bond holders could not be asked or required to take stock in place of their bonds if they didn't want to, so we got a majority of the holders of that hundred and fifty-six millions to agree that if the minority didn't like the plan and exacted bonds for bonds, rejecting preferred stock, they would take all preferred stock or whatever was necessary so as to give the minority all bonds if they wanted, and that is what that agreement is. And then this notice notified the minority holders that they could have either bonds or stock, which I think just gave them the election, the person signing this agreement agreeing to take what was left. Now that is that and all of that. It was a benevolent scheme.

Mr. Howell. I see. It was a scheme of philantrophy, in other words.

Mr. Lindabury. It gave the option to the other fellows.

Q Now let us get back to these factories again. You say that the old American Tobacco Company had fifteen or twenty factories. Is the new American Tobacco Company operating all those factories now?

A I don't know whether there has been any of the factories closed since then or not.

Q Has the new American Tobacco Company sold any of those factories?

A I don't believe it has.

Q Are all the factories of The Continental Tobacco Company, the old Continental company which came into the merger, being operated by the new American Company?

A I am not certain whether some of them have been closed or not.

Q Have any of the old Continental Tobacco Company's factories been sold?

A I don't recall.

Q Have you a system of bookkeeping at each one of those factories?

A Have factory accounts kept at each one of the factories; they have nothing to do with the sales department.

Q Is there an account kept somewhere, either, at the factory or at the main office in New York, of the product of each of the factories?

A Yes; we keep thorough accounts about everything.

Q You have a factory in Jersey City, haven't you?

A No; that belongs to the P. Lorillard Company, if that is the one you refer to.

Q You had a factory at Richmond?

A Yes.

Q The American Tobacco Company owned a factory at Richmond?

A Yes.

Q Now is there somewhere an account of all the product of that factory?

A Oh, yes.

Q Either at the factory itself or at the office in New York?

A They know all about what was done at the Richmond factory and every other factory.

Q And that is true of every other factory, isn't it?

A Yes, sir.

Q So that it would be possible, would it not, to take the Richmond factory and ascertain just exactly how much money had been made at the Richmond factory from the time of the consolidation down to the present, wouldn't it?

A No, because the Richmond factory don't show any of the profits or the losses; it shows the cost of the goods.

Q Where is the profit and loss account kept?

A That is shown in books that are kept at the New York office.

Q That is kept, I suppose, as one account for all the factories?

A We keep it by brands mainly, profit and loss account each brand.

Q You know which brand is made then, in which factory, don't you?

A Yes; sometimes one brand is made in more than one factory.

Q Then wouldn't it be entirely possible to separate the profit and loss account into the brand accounts so that you could tell just exactly how much you lost or made on each brand?

A Yes; we do that.

Q And then knowing where each brand was made, wouldn't it be possible by one further step in the mathematics of the case to ascertain just how much each factory had made or lost since the consolidation?

A I suppose it could be worked up that way, but we could get it different from that. We couldn't do that either, because there are certain expenses taken out after manufacturing, and selling expenses, which is a very large item, that the factory has nothing to do with.

Q It is possible to apportion those selling expenses between the brands, isn't it?

A It is possible to do almost anything.

Q Please don't talk that way. I want to get at the fact.

A I mean it; that is the fact; there is chance of doing it either one way or the other.

Q I am asking you whether it is possible?

A I don't know whether our system of bookkeeping, whether it is possible to change it about as you propose or not.

Q Wouldn't it be possible to apportion equitably and fairly the expenses that you have been speaking about among the various brands that are made by the present company?

A Well, you take the matter of the New York office; I don't think you could apportion that out really; you could guess at it; we do do that; we guess at it.

Q You have to do that. Everybody has to do that more or less, don't they?

A You take the freight; you can't figure that out exactly; you have to guess at it some.

Q Everybody has to do more or less guessing?

A In operating your business you do some of that, but when you buy something you don't or sell something.

Q You come pretty near doing it when you take an inventory of your tobacco, you don't know—

A We take it at cost.

Q That don't tell you what it is worth?

A It shows what is worth to us.

Q When you come to make an actual inventory, based on the record of values, you have to guess to get the actual value, don't you?

A No; we take the cost, we take the tobacco cost.

The Court. Estimate is the word.

Q Now you speak on your direct examination about the purchasing. Is the purchasing done any differently now from what it was done before the consolidation, before the merger, the purchasing of your tobacco and supplies?

A Well, there are changes all the time from time to time; we try to improve everything we do.

Q Yes, but you purchase about the same grades of tobacco all the time for the various manufacture, don't you?

A Yes, sir.

Q For instance, if you buy a large quantity of tobacco, suppose you buy a large quantity of tobacco

to-day, you take that and divide it up amongst the factories where it ought to go, don't you?

A No.

Q What do you do? How do you do that?

A We grade it and put it in the leaf tobacco; it remains there until the factory needs it, then it is put out from the leaf tobacco to the factory.

Q That is the way you used to do it before the consolidation, isn't it?

A Yes, sir.

Q The same plan exactly.

A There is a big difference where you buy tobacco that is mixed, mixed hogsheads of tobacco where you pick out certain grades, you take one grade and put a valuation on it, and another another, and another another, you don't know, you are guessing at it largely, and you may figure out a profit on that hogshead, or loss, valuing some grades too high or too low.

Q You had to do that before the consolidation, didn't you?

A Yes, of course you did, when you go to work and sell that tobacco to somebody, you can do it that way when you are going to use it yourself, but if you are going to sell it you can't be governed by that, you may lose or make by it.

Q You are doing it now just about the same as you did it before, aren't you?

A There are changes all the time; I don't know what they are from time to time.

Q They are rather immaterial and minor changes, are they not?

A Some of them are very important.

Q Now you spoke about the American on your direct examination, about the American Company holding stocks in other companies, do you remember what amount of Continental stock preferred the American held?

The Court. You have got that statement there.

A No, I don't know what it held exactly; it varied in quantities, some times more, some times less; it

did hold a lot one time, but had to have money, and sold it.

Q When was it that this matter or consolidation was first stirred by any of the companies?

The Court. Merger, as you call it.

Q The merger?

Mr. Lindabury. You mean publicly or privately?

A The companies didn't know anything about it; the first I heard about it was Mr. Fuller talked with me I think six months or a year before we did it; he said it ought to be done; he said it ought to be done to get the company in more legal shape in accordance with this merger decision.

Q And you think it was under consideration for six months or more before the terms of it was finally agreed on?

A Yes, taken up, at the time we didn't think we could finance it and carry it through, so it was dropped and nothing more said about it, and Fuller and myself thought we could, and then we called the crowd together and did it.

Q How long before September 9 was it that the plan matured and was ready to present to the stockholders of the various companies?

A It wasn't long, only a short time.

Q How long did it take to mature the plan?

A Not long after we got at it.

Q How long was that?

A I couldn't tell you.

Q Two or three months?

A No; I don't believe it was a week.

Q That is, when you really got down to details?

A Yes; no, when we really started in to do it.

Q (*By the Court*) That is to say, you had there all under one roof, and under your own thumb, so to speak, the officers and the books and all the facts in regard to each one of these companies?

A Yes, sir.

Q (*By the Court*) You had no difficulty in very shortly arriving at what you thought would be a fair term for the merger?

A Yes, because it was really, it was something that really didn't affect the companies themselves, it was dealing between the stockholders and the companies,

Q You come pretty near dictating the terms of it, didn't you?

Mr Lindabury. Mr. Duke personally?

Mr. Howell. Yes.

A No; I had good advisers.

Q I know you had good advisers, no doubt about that, but when it came to saying what should be done you were the man that had the final say, weren't you?

A No, no; in a matter of that kind I think there are other people know more about it than I do. We know we did this though, we helped everybody's situation.

Q (*By the Court*) How is that?

A We helped everybody's situation, each class of stock, we helped their situation, as it has proved out.

Q (*By the Court*) That is, you improved everything?

A Yes, sir; we gave bond holders a larger amount of securities that paid the same income, and when they come to the time of maturity they will get more for it than they would what they had. The bond holders, the 4 per cent bond holders, we gave them a million and a half a year income more on the bonds than they had before, and the thing resulted in adding largely to the common stock profit, so I consider everybody has been benefited by the deal; I don't consider that anybody has been hurt.

Q What was the price of common stock prior to the merger, what was the market price of it?

A American Tobacco Company stock, I don't really know; there was very little of it, about a couple

of hundred thousand dollars, The Consolidated Tobacco Company held all except that.

Q Which company held the stock of the two British companies?

A I think the consolidated held some of it and The American held some, and I don't know whether the Continental held any of it or not.

Q You say the American held some of it?

A Yes, sir.

Q What were the names of those companies?

A Imperial Tobacco and British America; I am not certain whether the American had sold some or all of its Imperial stock.

Q Had the arrangement between the two British companies and your companies here been changed any at all?

A The American Tobacco Company has sold some of the securities of The Imperial Tobacco Company; it hasn't sold any of the securities of the British American.

Q And what there is out, with the exception of what you speak of as having been sold, is still owned by the new American Tobacco Company?

A It is at this time; yes.

Q And the accounts of all profits that have been brought into The American Tobacco Company from that source are on your books?

A Yes, sir.

The Court. Did The American Tobacco Company furnish most of the material to these two British Companies?

A They don't furnish any to The Imperial Tobacco Company; they buy some of the British American's leaf in this country.

Q (*By the Court*) Where do they get their material, those two companies over there, where do they get their main material?

A The Imperial Tobacco Company, they buy mainly their materials in North Carolina.

Q (*By the Court*) Not through you?

A No, sir.

Q (*By the Court*) And the other one, where do they get theirs?

A They get theirs mainly in North Carolina also.

Q (*By the Court*) Then they are independent manufacturing companies?

A Yes, separate and distinct; our interest is held in them by the stock we hold; they pay us for all we do for them.

Q I asked you about the common stock, and you said you didn't know the market value of it before the merger, but don't you know that since the merger the market value of the common stock has very much increased?

A The market value of which stock?

Q Common stock?

A Of which Company?

Q Of the old American Company say?

A The old American, because there is offered in this merger agreement a share of the new American common for a share of the old.

The Court. He wants to know whether it has increased in value?

A That has increased in value.

Mr. Lindabury. The old or the new?

A I don't know whether all of the old has been turned in or whether any of it is out or not; I don't know whether there has been a sale of the old American Company at all.

Q It was share for share, wasn't it, in the merger?

A Yes, but we gave them more than they were entitled to.

Q You gave them more than they were entitled to?

A Yes, sir.

Q I see. And that is what made the price go up?

A Yes; that is, if there is any of the old American common out; I don't know whether there is or not.

Q (*By the Court*) What he wants to know is this: Whether the new American common is not worth more than the old American common?

A Yes, sir.

Q (*By the Court*) And you say that is due to your having given them in effect more, that is, there was more, the old American common was subject to the old American preferred, and in the new deal the proportion between the preferred and the common was changed, there is less preferred in per cent with the amount of common, is that it?

A No; I mean this, there is more earnings to the common stock of the new American than there was to the old American.

Q (*By the Court*) General prosperity of the concern is greater?

A Yes, good deal of it on account of the merger.

Q (*By the Court*) That is to say, you, as an experienced business man, been at the helm all the time, think that the merger was a great success in its effect upon the actual producing capacity of the concern?

A Yes, sir.

Q (*By the Court*) Manage it better and make more money?

A Yes, and easier.

Q (*By the Court*) Eh?

A Manage it easier; there isn't as much work as there was before.

Re-direct examination by Mr. Lindabury.

Q I think you made a mis-statement by a slip of the tongue awhile ago when you were talking about the benefit to the old security holders, and I think you intended to state how you thought the American preferred stockholders are benefitted; you didn't do it, and I will ask you to now state it?

A They got a benefit in more principal and they got the same income.

Q You stated that as a bond holders' benefit.

The Court. They got 8 then and get 6 per cent now, but the bonds are thirty-three per cent more than the stock.

A Which gives them the same 8 per cent, and then they get more principal when expiration time comes.

The Court. That depends on how the thing will wind up, assured principal.

Mr. Howell. That we say is not so.

Q (*By the Court*) I understood Mr. Duke to say there wasn't much common stock?

A I mean this old common stock out.

Q (*By the Court*) I understood you at the time there wasn't much common stock?

A The Consolidated hold it.

Q (*By the Court*) Was there a large amount of common stock?

A Eighty per cent of the whole capital was common stock.

Q Give the figures, fifty-four million, and fourteen?

A Yes, sir.

Q Fifty-four millions of common and fourteen of preferred?

A Yes, sir.

Q (*By the Court*) Then your idea of the situation was this, that the preferred stockholders had only the power, by appeal to the courts now, I mean, first to have their eight per cent a year, if it was earned, and second, had the power to prevent the common stockholders from declaring dividends to such an extent as to impair the capital of the company?

Mr. Lindabury. That is it.

The Court. So they were entitled to have the stock kept as nearly as practicable at par for winding up purposes?

Mr. Lindabury. Yes, and the common stockholders are entitled if they choose to divide the rest.

Q Mr. Duke, are the new bonds, 4's and 6's, coupon or registered bonds, if you know?

A They can have them either way.

Q (*By the Court*) Option?

A Yes, sir.

Q Do you know whether some are issued one way and some the other?

A Yes, sir.

Q You, I suppose, have the bonds yourself and you actually know some of the bonds have been issued both ways?

A Yes, sir.

Mr. Lindabury. We want to offer the by-laws of the old American Tobacco Company.

Q Do you know whether these new bonds have been actually dealt in, bought and sold?

The Court. He says there has been a market price given for them.

A Yes; I have bought and sold some of them myself.

The Court. Started at 107, he says, and the rest of them were given by the witness on the stand on Friday.

Mr. Lindabury. I thought so, and at that time thought that was sufficient proof of that, but if we could add a bit to it I thought it would be desirable.

Q (*By the Court*) You have known of other sales besides your own of the bonds?

A Yes, sir.

Q Are you able to say whether they have been quite extensively dealt in on the Stock Exchange or elsewhere since they have been issued?

A I wouldn't say very extensively, but steadily.

The Court. The court has knowledge that comparatively only a fraction of dealing in bonds is reported on the Stock Exchange. There is a class of brokers who make a business of dealing in bonds in this way. Somebody wants to sell a block of twenty or a hundred bonds, and the broker undertakes it, and he has customers and writes around and says I can let you have a lot of bonds,—and I am quite sure a large trade is done in that way. I get my knowledge not only from being president of an ordinary national bank, but being a manager of a savings bank, and we get

these circulars all the time; I get them; they are sent to me as president of the Iron Bank. I am called upon as a member of the executive committee of the savings bank to meet the question all the time. People are sending out notices don't you want to buy so and so; and I think I am not mistaken—the gentlemen can correct me if I am—that there is a quotation, there is a sheet published of what the range of these bonds are every day, but they are taken not only from the public sales but from private, large amount of private sales not sold on the Stock Exchange. I don't know whether I am getting it right, Mr. Duke?

A I don't really believe, Vice-Chancellor, I don't think a list of active bonds are offered around that way, I don't know, as far as I know myself. The company has bought and retired a half million of those bonds each year.

Q (*By the Court*) The American?

A Yes, sir; under the trust indenture; and then they have also bought and retired about fifteen million.

Q (*By the Court*) Do you know the run of the price of them, what they have sold for on the market?

A They have run from 112 to 117 or 118, and until recently, when the interest was paid, they went down to 109½ I believe.

Q (*By the Court.*) All the interest bearing bonds have fallen in market value in the last three or four months, six months?

A Money has been worth more than the interest on the bonds.

Q (*By the Court*) People are tying up their money in real estate. Not only do I know this of the New Jersey Central, but I know it of other bonds.

A Oh, yes, I get the same circulars too.

The Court. There is a very active speculative and reliable set of men in Wall street that do a large business—how it compares with the stock list I don't know; I imagine it is very large.

A I haven't thought of it in that way talking about it, but I get the same things.

Q How many of these bonds of both issues have been retired by the new American Tobacco Company?

A I guess there is a million of the 6's; I think upwards of fifteen million was retired last year of the 4's, and we have about two and a half million which have not been actually canceled, but will be canceled.

Q (*By the Court*) You haven't done that out of your earnings, have you?

A Yes, sir.

Q Those bought in the open market? How were those acquired, in open market, or bought—

A Yes, bought.

Q Now you said that the bonds have been steadily dealt in, I think was your term?

A Yes.

Q Do you know whether that was true of the stock also, the new stock, I mean?

A Yes, but of course the new stock is not very active; it is not dealt in to any great extent; the preferred stock is, not the common.

Q Because a few of you own the common, I suppose, and don't let it get active?

A For speculation.

Q I don't mean for speculation, for investment.

The Court. You pay dividends on your common all the time?

A Yes, sir; we have been holding back the earnings; that is one of the reasons the company is doing so well; we have held the earnings and profits.

Q (*By the Court*) You put your earnings in the bonds, I understand?

A Put a good deal of it in that; yes.

Q I show you a pamphlet entitled "The articles of incorporation and by-laws American Tobacco Company, March 4, 1904;" does that contain the by-laws of the The American Tobacco Company in force at the time of the merger?

A Yes, sir.

Mr. Lindabury. I offer it in evidence.

Q (*By the Court*) That is the old Tobacco Company?

A Yes, sir.

Mr. Howell. What particular portion of it do you call attention to?

Mr. Lindabury. All of it, to show the relative rights of the preferred and common stockholders.

The Court. You mean to say that is the charter articles of association and by-laws?

Mr. Lindabury. Yes

The Court. You mean to say it is dated 1904, but it dates back to 1900, don't it?

Mr. Lindabury. Yes; it is the edition of 1904. These are the by-laws as they existed at the date of the merger; that is what I wanted?

A Yes, sir.

Mr. Lindabury. And the charter, that is already in evidence, but this is a convenient way to use it, that is annexed to the answer, the charer.

Marked Exhibit D November 5.

Re-cross examination by Mr. Howell.

Q Mr. Duke, in answer to a question that was put on re-direct examinaton to you by Mr. Lindabury you said that a few of you owned the common stock, and you didn't let it get on the market. Now, what did you mean by that?

A Well, I don't think that anybody is very anxious to part with the common stock.

Q When you say a few of you owned the common stock, how many do you mean?

The Court. You mean at present?

Mr. Howell. Yes, at present.

The Court. At this time?

Mr. Howell. Yes, sir.

A I don't know; it might be a hundred or two hundred; I don't know just how many stockholders there are.

Mr. Lindabury. Mr. Parker says there are about four hundred common stockholders. Do you know whether that is about right?

The Court. He said two hundred.

A I haven't seen the stock list; I could only guess.

ALL REST.

EXHIBITS

C-1.

Printed at page 39.

C-2.

Exemplified copy of letter of administration to complainant.

(Omitted.)

C-3.

May 28, 1904.

"To The American Tobacco Co.,
No. 111 5th Ave.,
New York City.

Dear Sirs,—

Please remit by mail to the address as below, all dividends due or to become due on all preferred shares now standing or that hereafter may stand in name of Richard S. Dana on the books of The American Tobacco Co., until this order be revoked in writing.

Check to the order of the Morton Trust Co., for account of the estate of

Richard S. Dana,
No. 38 Nassau St.,
New York City.

I enclose certificate of my letters of administration."

Administrator for the Estate of Richard S. Dana.

C-4.

"THE PEOPLE OF THE STATE OF NEW YORK.

To all to whom these presents shall come, or may concern:

Send Greeting:

KNOW YE, That we having inspected the Records of our Surrogates' Court in and for the County of New York, do find that on the 16th day of Feb'y, in the year one thousand nine hundred and four by said Court, Letters of Administration of the goods, chattels and credits of Richard S. Dana, late of the

County of New York, deceased, were granted and committed unto Richard S. Dana of Ridgewood, N. J., and that it does not appear by said Records that the said Letters have been revoked.

IN TESTIMONY WHEREOF, we have caused the Seal of office of the Surrogates' Court of the County of New York to be hereunto affixed.

WITNESS, Hon. Frank T. Fitzgerald, a Surrogate of our said County, at The City of New York, the 23rd day of November in the year of our Lord one thousand nine hundred and four.

[SEAL.]

James W. Donnelly,
Clerk of the Surrogates' Court."

C-5.

"RICHARD T. DANA,
Assoc. M. Am. Soc. C. E.
Civil and Consulting Engineer
15 William St.

Plans, Specifications, Estimates, Reports.

Telephone
1948 Broad.

New York, N. Y.,.....190 "

C-6.

"The Farmers' Loan and Trust Company,
16, 18, 20 & 22 William Street.
P. O. Box 1510. Cable Address: Farmtrust.
Edwin S. Marston, President.
Thos. J. Barnett, 2d Vice Pres't.
Samuel Sloan Jr. Secretary.
Augustus V. Heely, Ass't. Sec'y.
William B. Cardozo, Ass't. Sec'y.
Cornelius R. Agnew, Ass't. Sec'y.

New York, June 2, 1904.
[Stamped, June 3, Rec'd.]

Richard T. Dana, Esq.,
36 Nassau Street,
New York City.

Dear Sir:

We beg to acknowledge receipt of your favor of the 28th ultimo enclosing certificate showing your appointment as Administrator of the Estate of Richard S. Dana, and have made note of your request to have checks in payment of dividends on stock of The American Tobacco Company in the name of Richard S. Dana, mailed to you at the above address.

Yours very truly,
The Farmers' Loan and Trust Company,
By C. R. Agnew,
Ass't. Sec'y."

C-7.

"June 3, 1904.

The American Tobacco Co.,
In care of The Farmers' Loan & Trust Co.,
No. 22 William St.,
New York City.

Dear Sirs,—

In regard to your favor of the 2nd I would say that the checks in payment of dividends on Stock of The American Tobacco Co. are not to be sent to me but to The Morton Trust Co., No. 38 Nassau St.,

New York, for the account of the Estate of Richard S. Dana.

I enclose a copy of my letter of the 28th ult. which must have been misunderstood.

Yours very truly,

Administrator of the Estate of Richard S. Dana."

C-8.

"PREFERRED STOCK.

Issued for property purchased.

No. B. 1161.

THE AMERICAN TOBACCO COMPANY, 50 shares. Incorporated under the laws of the State of New Jersey. This certifies that Richard S. Dana is the owner of fifty shares of one hundred dollars each of the Preferred Capital Stock of The American Tobacco Company, transferable only on the books of the said Company in person or by attorney, upon the surrender of this certificate.

This preferred stock is entitled to dividends not exceeding eight per cent. for each year payable quarterly before any dividend on the general or common stock, out of the net profits of the company for such year (but such dividends shall not be cumulative), and is also entitled to preference on the assets of the Company on the final distribution or disposition thereof.

This certificate is valid only when countersigned by the Farmers' Loan & Trust Company of New York transfer agent.

IN WITNESS WHEREOF, the said Company has caused this certificate to be signed by its President and its Treasurer this 7th day of April, 1892, 189—

GEO. ARENTS, *Treasurer.* J. B. DUKE, *President.*

American Bank Note Company
shares $100 each.

Countersigned and registered this 7th day of April, 1892. The Farmers' Loan & Trust Co., Transfer Agent.

R. O. SANFORD, *Registrar.*"

C-9.

Merger agreement printed at page 16.

C-10.

Trust mortgage made by American Tobacco Company to Morton Trust Co. Dated October 20, 1904.

(Omitted.)

C-11.

(1, 2, 3.)

Letter printed at page 48.

C-12.

Letter printed at page 50.

C-13.

Letter printed at page 51.

C-14.

Letter printed at page 52.

C-15.

Letter printed at page 54.

C-16.

Paper accompanying C-15. Application to list various securities on N. Y. Stock Exchange.

C-17.

Letter printed at page 55.

C-18.

"November 18, 1904.

To the Secretary of the Morton Trust Co.,

38 Nassau St., New York City.

Dear Sir:—

Will you kindly inform me by return mail whether the offer made to preferred stockholders of the Old American Tobacco Co. to exchange the stock for bonds of the new Company has any limit of time, and if so what is the last date on which preferred stockholders may avail themselves of the offer?

In answering this question you will greatly oblige,

Your obedient servant,

Richard T. Dana."

C-19.

"MORTON TRUST COMPANY,
38 Nassau Street,
New York, Nov. 19, 1904.

Richard T. Dana, Esq.,
15 William Street, New York City.

My dear Mr. Dana:—

Replying to your esteemed communication of November 18th, I beg to state that no limit of time is set for the conversion of the old American Tobaccco Company Preferred stock into the 6% bonds of the new Company.

The desirability of the exchange at once arises of course from the fact that the old Companies have ceased to exist and will not pay any further dividends, and holders will naturally desire to continue to receive their income regularly. Of course this can only be done by making the exchange.

Very truly yours,
H. M. FRANCIS,
Secretary."

C-20.

"New York, March 17, 1905.

The Farmers' Loan & Trust Co.,
22 William Street, City.

Gentlemen:—

I hereby demand that you transfer to me upon the books of the Company as Administrator, etc., of Richard S. Dana deceased, fifty shares of preferred stock of The American Tobacco Company, a corporation organized under the laws of the State of New Jersey, on or about January 21st, 1890, and issue to me in place of the certificate issued to said Richard S. Dana deceased, a new certificate in my name as such Administrator.

Very truly yours,
Richard T. Dana,
Admr."

C-21.
(Omitted.)

C-22.
(Omitted.)

C-23.
(Omitted.)

DEFENDANT'S EXHIBITS.

D-1.

Merger agreement printed at page 16.
Notice printed at page 31.

A. November 5.

Mortgage.

Consolidated Tobacco Company to Morton Trust Company, Trustee. Dated June 15, 1901.
(Omitted.)

B. November 5.

"To the Holders of the 4 per cent. gold bonds of the Consolidated Tobacco Company:

The American Tobacco Company hereby offers to the holders of the outstanding 4 per cent Gold Bonds of Consolidated Tobacco Company maturing August 1st, 1951, to acquire their holdings of such bonds in exchange, at par, for the 4 per cent Gold Bonds of The American Tobacco Company maturing August 1, 1951, and carrying interest from August 1, 1904.

Said bonds are issued according to the terms of the indenture executed by The American Tobacco Company to the Morton Trust Company, trustee, the form of which indenture and of said bonds is now on file with said Trust Company and is open to inspection. This offer will remain open until the close of business on January 31st, 1905, and thereafter no bonds will be received for exchange except in the discretion of The American Tobacco Company, and on such terms as it may prescribe.

Depositors of said Consolidated Tobacco Company 4 per cent bonds who make their deposits before the

close of business on December 10th, 1904, may, at their option, take in exchange for their said 4 per cent Gold Bonds of Consolidated Tobacco Company, bonds of The American Tobacco Company as above described, or partly in such bonds and partly, but not to exceed fifty per cent of their deposit of Consolidated Tobacco Company 4 per cent bonds in the 6 per cent cumulative preferred stock of The American Tobacco Company at par. Dividends on such preferred stock will be computed from October 1st, 1904. Depositors making such deposits before the close of business on December 10th, 1904, and taking in exchange for any part of their bonds such preferred stock, will receive from the Trust Company at the time of deposit in lieu of interest for August and September, 1904, an amount in cash equal thereto, to wit, two-thirds of one per cent on the Consolidated Tobacco Company 4 per cent bonds exchanged for The American Tobacco Company 6 per cent. cumulative preferred stock.

To accept the offer hereby made, bondholders must deposit with Morton Trust Company, New York City, within the time hereinbefore fixed, their bonds, and, as to registered bonds, duly endorsed in blank for transfer, and accept in lieu thereof the Trust Company's receipts transferable by delivery, upon surrender of which bonds and preferred stock will be delivered so soon as they are engraved and ready for delivery.

Coupon bonds will be issued in denominations of $1,000 and $5,000, and registered bonds will be issued in denominations of $50, $100, $500, $1,000, $5,000, $10,000, $50,000 and $100,000. Shares of stock are of the denomination of $100. Fractions of bonds or of shares of stock will not be issued, but a depositor at the time of such deposit may either buy from or sell to the Trust Company an amount necessary to eliminate such fraction.

THE AMERICAN TOBACCO COMPANY,

By J. B. DUKE,
President."

Dated New York, October 29, 1904.

C. November 5.

"WHEREAS, it is proposed that there be a merger and consolidation of THE AMERICAN TOBACCO COMPANY, CONTINENTAL TOBACCO COMPANY and CONSOLIDATED TOBACCO COMPANY, under the statutes of the State of New Jersey relative to the merger and consolidation of corporations; that the agreement of merger be executed by the three several companies in substance and form substantially as is shown by the paper hereto attached marked "Exhibit A" and made hereby a part hereof; that the bonds mentioned in said merger agreement to be issued in exchange for the Preferred Stocks of The American Tobacco Company and Continental Tobacco Company, shall be in the matter of priority of charge, superior to the bonds issued by Consolidated Tobacco Company under its Trust Agreement of June 15, 1901, to which the Morton Trust Company is trustee; that the said bonds issued under said Trust Agreement of June 15, 1901, shall be replaced as to one-half thereof by the Preferred Stock of the said merged corporation and as to the other half thereof by new bonds of the merged corporation maturing August 1, 1951, and bearing interest from August 1, 1904, at the rate of 4% per annum, interest payable semi-annually; that an amount of the said preferred stock and the said new bonds, equal at par to the par value of the present outstanding bonds be deposited with the trustee, Morton Trust Company to be exchanged at par for outstanding bonds, so that at all times the said trustee shall hold said preferred stock or new bonds, or both, equal in amount at par to the then outstanding bonds of the present issue, and that the present bonds left outstanding and the new 4% bonds issued in exchange for present outstanding bonds shall be subject to and deemed issued under the said Trust Agreement of June 15, 1901, as amended hereby, or as amended in the manner herein contemplated.

AND WHEREAS, it is further proposed that the common stock of The American Tobacco Company and the common stock of Continental Tobacco Company

owned by Consolidated Tobacco Company and deposited with the trustee as security for said bonds, be cancelled, and that the trust agreement of June 15, 1901, be amended so as so permit the cancellation of said stocks and the issue of said 6% bonds referred to in the said merger agreement in an amount sufficient to take up the said Preferred Stocks of The American Tobacco Company and Continental Tobacco Company under said merger agreement, not exceeding however, $56,100,000 at par of said 6% bonds; said amendment to expressly recognize and assent to the priority of said 6% bonds over the bonds of Consolidated Tobacco Company issued under the trust agreement of said June 15, 1901, as a charge upon the property, income and earnings of The American Tobacco Company, Consolidated Tobacco Company and Continental Tobacco Company and the said merged corporation.

NOW, THEREFORE, in consideration of the premises and of the benefits to accrue to us by the consummation of said plan, we, the undersigned, as holders of said Four Per cent. Bonds of Consolidated Tobacco Company aforesaid to the amount set opposite our respective names, severally assent to and authorize the release of property deposited with or held by the trustee appointed by Consolidated Tobacco Company by said trust agreement of June 15, 1901, hereinbefore referred to, as well as assent to and authorize the modification of compromise of the rights of the bondholders and of the trustee against Consolidated Tobacco Company, or against any property subject to said indenture, whether such rights arise under the said indenture or otherwise, in so far as said property is or will be released, or the said rights are or will be modified or compromised by the complete carrying out and consummation of said merger agreement and said plan of effecting the same hereinbefore set out, and we severally request the trustee to use, transfer and dispose of all or any of the shares of stock deposited with it under said trust agreement as aforesaid, in so far as the carrying out and con-

summation of said plan will involve the use, transfer or disposition of such shares of stock.

And if a more formal or other instrument or instruments is or are necessary or deemed advisable to effect this assent, authorization and request, we hereby severally covenant to and with each other and with said Consolidated Tobacco Company and Morton Trust Company, trustee, and the said merged corporation, that we will at any time within ninety (90) days from the date hereof upon the written request of the trustee, execute such other or more formal instruments, as the holders of the number of bonds set opposite our respective names. And if any meeting of bondholders is convened by the trustee to take action with respect to the release of any part of the property deposited with or held by the trustee; or any modification or compromise of the rights of the bondholders and of the trustee against the Consolidated Tobacco Company or against any property subject to said trust indenture, whether such rights arise under said trust indenture or otherwise, as provided for in Article Five of said trust indenture, at any time within six months from the date hereof, in order to effectuate said plan of merger, we, as the holders of the number of bonds set opposite our respective names, do hereby severally appoint Oliver H. Payne, and W. W. Fuller and each of them our proxy and attorney to vote upon the said bonds owned by us and set opposite our respective names, at such meeting or any adjourned meeting thereof, on all matters that may come before such meeting or any adjourned meeting thereof, and to sign for us and in our names any assent or other instrument evidencing to the trustee our consent and agreement as aforesaid.

The assent, authorization and request hereby given is and shall be deemed immediately operative, but if this instrument, or an instrument or instruments of like tenor, is not within ninety (90) days from the date hereof executed by bondholders holding in the aggregate at least a majority of the Consolidated Tobacco Company bonds issued under said trust agree-

ment of June 15, 1901, and filed with Morton Trust Company, trustee, then this instrument is, at the expiration of said ninety (90) days to be and become void and henceforth of no effect.

Dated this ninth day of September, 1904."

EXHIBIT A.

Copy of merger agreement attached to above.

D. November 5.

Articles of incorporation and by-laws of The American Tobacco Company, Ed. March, 1904.

Extract from by-laws.

"ARTICLE XII.

SHARES OF STOCK AND CERTIFICATES.

Section 1. Each holder of capital stock of the company shall be entitled to a certificate, signed by the treasurer and by the president or a vice-president.

All such certificates shall be issued from a certificate book, kept for each class of stock, duly numbered and registered in the order of their issue opposite each certificate in the margin of said books. It shall be the duty of the secretary to enter the name and address of the owner of each certificate, and, in case of the cancellation thereof, the date of such cancellation. At the time of the issue of any certificate it shall be receipted for on the margin in said certificate book by the owner, or by his duly authorized agent.

Section 2. The shares in the company shall be transferable only on the books of the company upon surrender and cancellation of the outstanding certificates for the shares so transferred, or a new certificate issued therefore, and not until all claims and demands of every kind existing in favor of the company against the holder of such share shall have been first paid and discharged.

Section 3. The transfer book and stock ledger of the company shall be the only evidence as to who are the stockholders entitled to vote at any meeting of the company or its directors.

ARTICLE XIII.

DIVIDENDS.

Dividends payable out of the net earnings of the company upon the preferred and general or common stock of the company shall severally be declared on the last Wednesdays of March, June, September and December in each and every year, and at such other times and to such amounts at the Board of Directors shall from time to time determine.

ARTICLE XIV.

CAPITAL STOCK.

The company shall not increase its capital stock or issue any bonds, or execute any mortgages to secure the same, unless thereunto authorized by a vote of two-thirds in value of the stockholders at any regular or special meeting thereof."

Opinion in case of *Bealing* vs. *American Tobacco Company.*

GEORGE AUGUST BELING
vs.
THE AMERICAN TOBACCO COMPANY, *et als.*

Final hearing on bill and answer.

Mr. Thomas L. Raymond and Mr. William M. Seabury, of New York, for the complainant.

Mr. R. V. Lindabury and Mr. Charles L. Corbin for the defendants.

PITNEY—*V. C.*

This is, in substance and effect a bill for the specific performance of a continuing contract in writing, consisting of a certificate of capital stock, dated February 28th, 1894, issued by the then American Tobacco Company to one Fannie Soule, by which it was certified that she was the owner of one hundred shares of one hundred dollars each of the preferred capital stock of The American Tobacco Company, which stock was entitled to dividends not exceeding eight

per cent for each year out of the net profits for such year, payable quarterly, in preference to the common stock, and also a preference on the assets of the company on the final distribution or division thereof (1940).

Fannie Soule, the beneficiary named in this certificate, died February 28th, 1895, and one J. Forbes Potter became the owner and holder of said certificate of stock by virtue of letters testamentary of the will of the said Fannie Soule, and held the said certificate until the latter part of the month of January, 1905, when he sold and assigned it to one Schalk, who held it until the 15th day of February, 1905, and on that day sold and assigned it to the complainant Beling.

In the meantime the ownership of the stock stood on the books of the company in the name of the said Fannie Soule, and dividend checks were sent to her at her address as recorded on these books four times each year until the month of September, 1904. These checks were presumably received by the executor and collected by him in the ordinary course of business.

The business of The American Tobacco Company, as declared in its articles of association, was "to cure leaf tobacco and to buy, manufacture and sell tobacco in all its forms and to establish factories, agencies and depots for the sale and distribution thereof and to transport or cause the same to be transported as an article of commerce and to do all things incident to the business of trading and manufacturing aforesaid."

On the 9th day of September, 1904, The American Tobacco Company entered into an agreement of consolidation and merger with two other companies engaged in the tobacco business, to wit, the Continental Tobacco Company and the Consolidated Tobacco Company, to consolidate and merge those three companies into a new company to be known as The American Tobacco Company, all the said corporations being New Jersey corporations, and said agreement of merger was afterwards approved by a meeting of the

stockholders of The American Tobacco Company held, after due and legal notice to each stockholder, on September 30th, 1904.

The agreement of merger was filed in the office of the secretary of state on the twentieth day of October, 1904.

The proceedings were had in pursuance and by virtue of section 104 *et seq.* of the Corporation Act of 1896 and the supplements thereto of April 10th, 1902, P. L. page 700; Dill on Corporations, 4th Edition, page 128 *et seq.*

The merger agreement provided that the new corporation, the present American Tobacco Company, should assume all the obligations of the old corporations and provided for the satisfaction of the preferred stock of the old companies, amounting to $14,000,000, of which the complainant is the holder of $10,000 by the issuance of six per cent bonds maturing in 1940, the date of the expiration of the original American Tobacco Company's corporate existence, such bonds to be delivered to the holders of the preferred stock in the proportion of $13,333 of face value of the bonds to $10,000 of the face value of the stock, with a provision for fractions. So that complainant had the option to receive for his certificate of stock six per cent bonds maturing at the time that his certificate of stock, so to speak, would have matured which would produce him precisely the same income that his preferred stock under the most favorable circumstances could have produced him and insure him at its maturity one-third more than its face value. Further, as appears by an examination of the consolidation agreement, the security for its payment would have been much better than that for the payment of dividends on his certificate of stock. Then comes the fact, distinctly alleged in the answer, that the market value of complainant's stock was at once increased as the result of the merger, so that presumably Potter received a greater price on his sale to Schalk than he otherwise would have received.

The only respect in which the holders of such preferred stock could have been the losers by the exchange was in the loss of the right, if any, to participate in the division of the surplus assets of the old American Tobacco Company, at its winding up in 1940, over and above sufficient to pay all classes of stock at par.

The question of this right so to participate was discussed at length, but I do not deem it worth while to express a definite opinion upon it, since it abundantly appears that the shares of common stock were more than three times the number of that of the preferred stock, and the control of the company was absolutely in the common stockholders, and the directors, being elected by the holders of the common stock, would naturally see to it, by the exercise of their power to declare dividends, that the preferred stockholders should receive no more than the par value of their stock at the end of the corporate existence of the company.

It sufficiently appears from the pleadings, exhibits and schedules that the property of the company is composed so much of general merchandise and of individual units quite susceptible of being sold in pieces as to present no obstacle to the consummation of what would almost necessarily be the natural desire of the common stockholders. And this circumstance makes the case a complete contrast to that of *Birch* vs. *Cropper*, 39 Ch. Div. 1 (1888) 14 App. Cases (1889) 525, which is an authority relied upon in support of the proposition that preferred stockholders have an equal right with the common stockholders to share in surplus assets.

I am satisfied that the allotment of bonds to the complainant or his predecessor in ownership was a fair equivalent for his stock.

This offer however the complainant declined to accept, and his bill charges that the whole proceedings to merge, though taken and carried through strictly according to the terms of the act of 1896 were absolutely void as to him and the then holder of his cer-

tificate of stock, for the reason that that act was passed after the organization of the original American Tobacco Company and after the issuance of the certificate of which he is now the owner.

His argument is the simple one so often advanced, viz., that his certificate of stock was a contract into which must be read the provisions of the corporation act of the State of New Jersey at the time (1890) that the original American Tobacco Company was organized, and that no more than those provisions can be so read into it. That at that time it was not competent to merge that particular corporation with any other corporation. Hence, he argues, the act of 1896 was absolutely void as to him and his contract and the proceeding taken under it to merge were as to him absolutely void.

On this basis he prays that the whole proceeding may be set aside, and that the original American Tobacco Company may be compelled to transfer on the books of that company the one hundred shares of such stock to him, and that the merger agreement may be declared null and void as to the complainant and as to the assets of the original corporation; and that the merger itself may be declared to be void; and that the property of the original American Tobacco Company may be declared free and discharged of all liens by mortgage or otherwise made thereon since the merger, and that all such liens, as to the complainant, may be declared to be void, and that there may be an ascertainment under the direction of this court of the personal and real estate and other assets of the original American Tobacco Company at the time of the merger; and that the same may be separated from the property of the merged corporation and be redelivered to the officers and directors of the original American Tobacco Company; and that there may be an ascertainment of the amount of loss and damage sustained by the original company and that a receiver may be appointed to take charge of all the property and assets of The American Tobacco Company and to recover from the merged corporation all of the assets of the original company; and that a

mandatory injunction may issue to compel the performance of the decree to be made by the court and also for other relief.

With regard to any liens put upon the property by the new corporation the inability of the court to grant the prayer in that behalf appears when we consider that no holder or trustee of any such lien is made party hereto.

A consideration of the wide sweep of the prayer and the task it asks the court to perform is sufficiently startling when we consider that the terms of the merger have been accepted by 13,808,500 shares of the preferred stock out of a total issue of 14,000,000 leaving only 191,500 outstanding and that all the other provisions of the merger for exchanging preferred stock of one or the other of the merger corporations for bonds of the new corporation and for the exchange of the stock of the old companies has been carried out to an extent equal in proportion to that of the preferred stock of The American Tobacco Company and that the new bonds and new preferred stock of the merged company have been put upon the general security market and dealt in to a large extent, all before any notice to the defendants or public of the claim now made on behalf of the complainant by his bill.

The first notice was in a letter dated March 4th, 1905, nearly six months after the merger agreement, and it appears that in the meantime not only had these securities been put upon the security market in New York, but, as appears by the answer, after the filing of the merger contract October 20th, 1904, the business theretofore carried on by the three constituent companies separately has been carried on by the merged corporation as an entirety; that a large amount of the property received by the merged corporation from the constituent companies had been sold, exchanged or converted into other forms and the receipts therefor have been so commingled that it became impossible to either identify or separate the same, and that the funds in general have been

so commingled and otherwise disbursed in the general course of business that it was impossible at the time the complainant's bill was filed to restore the affairs of the company to their original condition.

Before considering the question whether the court under such circumstances ought to undertake to grant the prayer of the bill it is necessary to notice a point made by the defendants.

The complainant in his bill, apparently feeling that the point would be made against him that his predecessors in title had been guilty of laches, alleges that Potter, the previous holder "received no notice of the said allegal meeting of the stockholders held on the 30th day of September, 1904 and that he had never voted on said stock at any time upon any proposition presented to the stockholders to be voted on, nor had he at any time given any proxy to any person to vote for him"—"that he received no notice from the officers of said company or from any other source whatsoever of the said merger agreement or its proposed adoption" and "that all the proceedings taken to carry out said merger was done without the knowledge, connivance or consent of Potter and that he was never notified of the closing of the books of the original American Tobacco Company until the month of February 1905" and it alleges the same as to Schalk, the intermediate owner between Potter and the complainant, and it then says that complainant himself has never given his consent by word or act to the merger.

This allegation, it will be observed, is of a fact or series of facts not within the knowledge of the defendants and therefore not admitted by a failure to deny.

The complainant in his argument makes the cardinal mistake of presuming that because these allegations are not specifically denied by the answer they must be taken to be admitted. But this is not the rule. If no answer at all had been filed and a decree *pro confesso* taken, that decree would not have availed the complainant to the extent of entitling him to a

decree. By the well settled practice of the court he would have been obliged to adduce proofs *ex parte* to sustain every material allegation in his bill.

It appears, however, by the answer that, as already stated, the stock all the while stood on the books of the company in the name of Mrs. Soule and that the regular quarterly dividends had all the time been sent to her at the address found on the books of the company in connection with her name as a stockholder. And then, in answer to the specific allegation of non notice to Potter of the proceedings in merger, the answer states that the defendants have no knowledge as to what notice J. Forbes Potter had of said merger, agreement or of the stockholders meeting called to ratify the same, but says that notice of said meeting and a copy of said agreement were mailed to the said Fannie Soule at her post office address given on the books of the company, which is the same address at which notices of every other stockholders meeting have been sent to her since the said stock was transferred to her in 1894. Then further on is another allegation charging Potter with actual notice through the public prints, wherein it was widely discussed.

Now, these allegations, taken in connection with the fact that dividend checks were sent to Mrs. Soule four times a year, and that it appears by the exhibit annexed to the bill that at least two stockholders' meetings were held between 1895 and 1903, and the fact that it does not appear that Potter has ever complained that he did not receive his dividends, amounts to an averment of facts from which I feel bound to infer that Potter did receive actual notice of the meeting of September 30th, 1904.

Counsel for the complainant made the mistake in his argument of supposing that the positive allegation in the bill of non notice to Potter, unless explicitly denied, stood as if proven, but, as before observed, this is incorrect.

That rule applies only to allegations of matters within the knowledge of the defendants and the de-

fendants answer herein to the allegation put the complainant on proof of non notice, the right to make which proof he waived by going to hearing on bill and answer.

I must therefore hold that Potter did have actual notice of the meeting of September 30th, 1904, and certainly if he did not it was his own fault and not that of the defendants, since he permitted the ownership of the stock to stand on the books of the company all these years in the name of his testatrix at her original address.

The answer further alleges "This defendant alleges however, that both the said Rudolph Schalk and the said complainant had notice of the said merger before they acquired the said stock and the said stock was acquired by them not as an investment but for the sole purpose of bringing such a suit as the present one."

Now, this allegation, distinctly made in the answer, is admitted by the complainant.

Before considering its effect one other fact set up in the answer and likewise admitted is worthy of notice, namely, that at the meeting of September 30th, 1,158,934 shares of both classes of stock out of a total of 1,230,000 outstanding were present or represented by proxy, and of those so present 1,157,214 shares voted for the adoption of said agreement and seven hundred and twenty shares voted for the rejection of the same.

It thus appears that nearly ninety-five per cent. of all the shares voted in favor of the merger and of those actually voting nearly ninety-nine per cent. voted in favor of it.

Now, taking all these circumstances together and the fact that the agreement has been acted upon to the extent I have previously mentioned, and the extreme difficulty, if not the impossibility, of practically granting the complainant the relief he asks, and that the old American Tobacco Company has practically ceased to exist, the question arises whether, admitting to the fullest extent the complainant's legal right, this

court ought to attempt to grant him the relief he asks for. That relief amounts to a decree for the specific performance of the contract implied in the certificate of stock that The American Tobacco Company would, by its regular organization, its directors and officers, proceed to carry on the business provided for in its certificate of organization until the end, in 1940, of the term of its existence also provided for.

Now in order to carry out that agreement as prayed for it will be necessary not only to perform the well nigh impossible task of taking the account previously mentioned, but also to revivify the old company whose existence was ended by the merger agreement, by calling the stockholders together to elect a new set of directors, after those stockholders have surrendered all their stock and taken in its place new stock and bonds in the new company in pursuance of the elaborate scheme set forth in the merger agreement, and, if they fail to do so, to submit the old company to the management of the small fraction of the stockholders of the old company who may yet have refrained from accepting the securities provided for them by the merger agreement.

Now, I conceive that the case presented is one in which the court is thoroughly justified in refusing to give specific performance.

It is well settled that the court will not in all cases grant specific performance. It is always, in a sense, a matter of judicial discretion. The difficulty of specifically performing the contract and its effects and consequences to the parties; the comparative injury to the one party and the benefit to the other are to be taken into consideration.

The latest illustration of this rule is found in *Speer* vs. *Erie Railroad Company*, 68 N. J. Eq. (2 Rob.) 619. The subject is touched upon by Professor Pomeroy, section 303 *et. seq.* of his work on specific performance, and the general subject is dealt with in section 36 *et seq.*

I shall not go into the authorities and will content myself with saying that this is a case in which the court ought not to assist the complainant to the extent which he asks.

The complainant's assignor, Potter, is chargeable with negligence in not coming forward and asserting his rights in time to have prevented the merger from being so far carried out as to render it practically impossible to grant the relief which he asks.

This view renders it perhaps unnecessray to take notice and pass upon another point made by the defendants, and that is that while the act of 1896, providing for a merger, was not in existence at the time the original company was organized, the law then in force did provide for the winding up of a company before the time provided for in its charter or certificate of organization, and that this agreement of merger amounted to a winding up of the old company.

The act then in force was that of April 7th, 1875, Revision, page 175, which in the seventh sub-division of the first section gives express power to any corporation to wind up and dissolve itself or be wound up and dissolved in the manner thereinafter mentioned. The provisions for dissolution are found in the 34th section of that act on pages 182 and 183. This section was slightly amended by the act of February 21st, 1877, P. L., page 20 and this section was substantially re-enacted by the act of 1896, section 31, Dill on Corporations, page 51.

Now, the existence of this act shows clearly the fallacy of the complainant's argument that, by the contract, he is entitled to have the old company carried on until the time limited in its original certificate of organization and it meets and disposes of many of the *dicta* cited in his argument and relied upon to support his position. That right to have the business carried on until the natural death of the corporation is subject to the will of the majority of two thirds provided for in the statute.

Now, while the merger proceedings here attacked do not amount, strictly speaking, to a legal winding up, their effect was in substance precisely the same,

and the only difference to the complainant is that he did not receive the share of the proceeds of the winding up which he would have got under formal proceedings under the statute.

But the large vote for the merger shows conclusively that, if the winding up proceedings had been necessary, they would have been taken and pursued to the end, and it further indicates with sufficient certainty for present purposes that if the decree asked for by the complainant were granted its practical effect to the complainant would be immediately met by formal winding up proceedings.

The complainant argues with great force that the negligence or laches of his predecessor in title cannot, upon any legal or equitable principle, be extended so far as to forfeit his rights. Granting the general proposition to be as claimed by him, yet the complete answer is that the refusal to grant his decree does not work any forfeiture of his rights, but simply has its weight, in connection with other circumstances, in debarring him from the special and extraordinary relief which he is asking. For it must be borne in mind that not a single stockholder of those who appeared at the meeting did anything more than vote against the merger; no formal protest was made or proceeding taken to prevent the merger; the small minority quitely acquiesced in the action of the great majority, and that majority, acting on that acquiescence, proceeded with the merger and so far altered the situation as to render it now well nigh impossible to grant the relief asked for by the complainant.

Complainant relies as a precedent for his decree upon the familiar cases of *Kean* vs. *Johnstone*, 1 Stock. 401, *Zabriskie* vs. *Hackensack Railroad Company*, 3 C. E. Gr. 178 and *Black* vs. *Morris Canal Company*, 7 C. E. Gr. 416 and *Mills* vs. *Central Railroad Company*, 14 Stew. 1.

The principles established by those cases do undoubtedly apply here but neither of them are precedents for the relief asked for in the present case. In the first place the subject matter of the contract was, in each case, quite different, as well as the char-

acter of the business carried on, from that in this case. The subject matter was a unit which had a continued existence in its original condition and was incapable of daily change in form or substance. In neither case had that form and substance been changed or the mode of its use altered. In the Black case and in the Zabriskie case the remedy asked for was purely one of restraint against the consummation of a proposed change in the contract. In the Mills case the relief prayed for was simply to set aside a lease of the subject matter and was accomplished without the least disturbance of the operation of the subject matter. And Mr. Mills attended the meeting and voted against the lease. In the case of *Kean* vs. *Johnston* the prayer went a little farther but not so far as asked for here. It did not in anywise disturb the existence or operation of the subject matter. It simply prayed an account of the original road under the new organization and that the purchase complained of and the bonds and mortgages issued might be declared void and for an injunction against further issue of bonds and mortgages. The cause was heard on general demurrer to the equity of the bill. No mortgagee or holder of any of the bonds was made a party and there was no demurrer for want of parties. The demurrer was simply overruled, and no further proceedings were ever had in the cause, so far as the records of the court show. So that the case is not precedent for the decree here asked for.

Counsel were unable, as I must presume, to produce any case where a decree like that asked for here has been made by a court of equity.

Defendant offers to pay complainant in cash the market value of his stock at the time of the consolidation or the present worth of his stock, with all dividends that can be possibly received thereon up to the expiration of the old charter, meaning by this last the value of the coming payments discounted. Of course complainant can have the six per cent. bonds originally allotted to him.

The only decree other than that offered by the defendant which I have been able to conceive can be properly made in favor of the complainant in this cause is a decree for the payment quarterly of the eight per cent. dividend on the amount of the stock from the date of the last payment up to the termination of the charter of the old company and the payment of the par value of the stock at that time. Such a decree was not suggested at the argument and I am not ready, without argument, to say that I will advise it. I am willing, if complainant shall so wish it, to hear argument on the propriety of such a decree. If he does not wish it I must advise that his bill be dismissed without prejudice to his right to his action at law, which, in my judgment, is ample to give him the full value of his stock at the time of the merger. If the complainant chooses to accept either of the offers made by the defendant in its answer, a proper decree will be advised without costs.

IN CHANCERY OF NEW JERSEY.

RICHARD T. DANA, ADMINISTRATOR OF RICHARD S. DANA, DECEASED,

vs.

THE AMERICAN TOBACCO COMPANY, THE MORTON TRUST COMPANY, *et als.*

Final hearing on bill, answer and proofs.

OPINION.

Mr. James E. Howell and Mr. Grosvenor Nicholas, of New York, for the complainant.

Mr. Charles L. Corbin and Mr. Richard V. Lindabury for The American Tobacco Company and the individual defendants.

Mr. Robert H. McCarter and Mr. Bronson Winthrop, of New York, for the Morton Trust Company.

PITNEY—*V. C.*

This bill is almost identical in frame and prayer with that of *Beling* vs. *The American Tobacco Company,* just decided.

The certificate of preferred stock held by the complainant was issued to his intestate in 1892 and the intestate died in 1904. The stock was never transferred.

The prayer of the bill, though varying somewhat in verbiage from that in the Beling case, is in substance the same. It prays that the merger agreement and the merger itself, in all its aspects, may be held to be void as against the complainant. That the lien of the mortgage made by the new company to the Morton Trust Company may be removed from the property of The American Tobacco Company and be declared null and void as a lien thereon, so far as regards the rights of the complainant; that

there may be an ascertainment of the specific items of real and personal estate and other assets owned by the original company at the time of the merger, and that the same may be separated from the property of the merged corporation and be redelivered to the officers and directors of The American Tobacco Company; that there may be an ascertainment of the loss by reason of the merger, and that the stockholders of the original company who are made parties to the bill may be made liable therefor and charged therewith by the decree of this court, and that the court will issue a mandatory injunction to compel performance of its decree; and that the merged corporation may account for all the profits, income, properties and moneys derived by it from the assets of the original corporation, and for other relief.

The defendants' answer is much the same as the answer to the Beling bill.

At the hearing a large amount of evidence was taken verifying in detail the allegations of the answer, which were admitted by the complainant in the Beling case.

It was further proven that most of the few stockholders who had voted against the merger agreement had come in and accepted the terms of that agreement.

With regard to the attitude of the complainant and his conduct, the case differs from that of Beling. The complainant's father died in January, 1904, and complainant took out letters of administration and about the first of June complainant wrote a letter to the company stating that he was about to leave for Europe, to be gone during the summer, and wished his dividends put to his credit in a bank which he named. This letter at its head stated his business address at an office which he occupied in New York City. But the complainant did not have his stock transferred to his name. It consisted of two certificates of five thousand dollars each, and he contented himself with handing over one of those certificates to his brother, who was, besides his mother, the sole next of kin.

No entry having been made upon the stock ledger of this change of ownership and address, the notice of the meeting and the copy of the contract of merger were sent to the residential address of his late father in New York City, which, at the time, September 9th, that they were sent, was in the hands of a caretaker. The widow, who was also a stockholder, and who resided there, was, at that time, still stopping at her country place in the Berkshires.

Affirmative proof was given tending to show that for some unexplained reason neither the notice to the complainant's intestate nor to his widow was ever actually received.

The complainant returned from Europe on the evening of October 5th, entirely ignorant of what had taken place in his absence, but after attending to his own private affairs and business, which occupied a few weeks, he seems to have bethought himself of his dividends on the tobacco stock, and applied to the Farmers Loan and Trust Company, the transfer agent, on or about the tenth day of November and then and there learned that the company was no longer in existence, and very shortly—two or three days afterwards—received copies of the merger agreement which contained all the particulars. He had, however, some few days or weeks before that heard indefinite rumors of some change in the organization or management of the company. He immediately consulted his New York counsel and with him alone undertook to study the situation and his rights. He also interviewed counsel of the tobacco company and correspondence ensued running over into January, 1905, and early in that month he served a written protest on the company, which was the first that he had made a definite declaration of his position.

In the meantime the transactions provided for in the agreement of merger had been carried through by the surrender of the original certificate of stock and bonds and the issuing in place thereof, as usual in such cases, temporary negotiable certificates to be delivered to the trustees when the permanent securi-

ties had been engraved, prepared and signed to be exchanged therefor. The complainant's protest reached the company before the actual exchange for temporary certificates for permanent securities had taken place, but in the meantime those temporary certificates had become an article of mercantile dealing.

Now under these circumstances each party charges the other with negligence and *laches*. The defendants charge the complainant with *laches* in not having the certificate of stock formally transferred to him, and giving his address to be entered on the stock ledger, and next in not immediately, upon receipt of a copy of the merger agreement and being informed, as he was, that the merger had been or was being consummated, and being aware, as he must have been, that changes were daily taking place in the situation, both of the business conditions of the new company and in the ownership of the securities issued by it, he did not immediately take advice of counsel learned in New Jersey law as to his rights and remedies thereon.

On the other hand the complainant complains that the defendants ought, on the receipt of his letter asking them to have his dividends put to his credit in the bank, to have made such memorandum of it as would have resulted in the notice of the meeting of September 30th being sent to his business address, in which case, he claims, it would have reached him at that address in New York City.

The defendants reply to that is that that letter referred wholly to dividends and did not at all call their attention to his business address but to the address of his bank, the former appearing only in print at the head of the letter, and hence that it was misleading. I find by examinating the correspondence that it does seem to have mislead them; and they farther claim that the regular course of business and the terms of the statute require them to send the notice to the party in whose name the stock stands on the books of the corporation, and that they were

not justified or required to change the address upon an implied notice of that sort.

I am inclined to think that the defendants position is sound, and that the complainant's duty was either to have the stock transferred on the books of the company or to have given them distinct notice that any notice sent to him as a stockholder should be sent to a certain address. But the evidence leaves me in doubt whether he would have received the notice under any circumstances. The only effect of his receiving it on his return from Europe would have been to enable him to have filed a bill in this court to restrain the merger before it was consummated as it was on October 20th by the filing of the dissolution papers in the office of the secretary of state.

The positive negligence with which I think the complainant is chargeable consisted in his failure to immediately employ New Jersey counsel, and to make a prompt decision and take prompt action thereon. By failing in that respect and occupying some eight weeks or so in determining what ground and course he would take, he undoubtedly seriously increased the difficulties in the way of granting the relief here asked for. For not only were the temporary securities issued by the company dealt in in the meantime, but the mercantile subjects of its business were being changed and the difficulty of a separation were increasing daily.

The present case is not so strong against the complainant in the matter of acquiescence and *laches* as was found in the Beling case. But while I find that fact I am still of the opinion that it is a case in which relief as prayed for should not be granted. The injury and disturbance to business affairs is too great and serious as compared to the benefit to be derived therefrom by the complainant to justify that extraordinary remedy.

I have said the complainant prayed for specific performance of a contract—I will add that the decree prayed for much resembles a decree for the specific performance of a continuing contract. Complainant

asks for a mandatory injunction to compel the officers and directors of the extinct tobacco company to resume their functions, to take charge of the property of the old company, and, as I understand the scope of the prayer, to carry on that company's business until the year 1940, unless sooner dissolved. That is a sort of function that this court is very cautious about undertaking and I am unable to bring my mind to adjudge that it ought to do it in this case.

I will advise the same decree in this case as that proposed in the Beling case.

IN CHANCERY OF NEW JERSEY.

Between
RICHARD T. DANA,
Complainant,
and
THE AMERICAN TOBACCO COMPANY, *et als.*,
Defendants.

On bill, etc.

FINAL DECREE.

This cause coming on to be heard in the presence of Mr. James E. Howell and Mr. Grosvenor Nicholas of counsel for the complainant, and Mr. Charles L. Corbin, Mr. Richard V. Lindabury and Mr. Junius Parker of counsel for The American Tobacco Company and the individual defendants, and of Mr. Robert H. McCarter and Mr. Bronson Winthrop of counsel for the Morton Trust Company, and the pleadings having been read and the witnesses for the respective parties having been examined in open court, and counsel having been heard and the court having taken time to consider the said pleadings, evidence and arguments, and being of opinion that the complainant is not entitled to the particular relief prayed for in his bill of complaint or to any other relief in this cause except that relief or one of those offered in the answer of the defendant, The American Tobacco Company, and the complainant having refused to accept a decree in accordance with the said offer of The American Tobacco Company,

IT IS thereupon on this thirty-first day of January, nineteen hundred and seven, ORDERED that the complainant's bill of complaint be and the same is hereby dismissed without prejudice to the complainant's right of action at law without costs.

W. J. MAGIE,
Chancellor.

Respectfully advised,
H. C. PITNEY,
Vice Chancellor.

IN CHANCERY OF NEW JERSEY.

Between RICHARD T. DANA, *Complainant,* *and* THE AMERICAN TOBACCO COMPANY, *et als.*, *Defendants.*	*On Appeal from Chancery.*

NOTICE OF APPEAL.

To Lindabury, Depue & Faulks and Robert H. McCarter, Solicitors for Defendants:

The complainant hereby appeals from the final decree made in this court in the above stated cause, dismissing the bill of complaint, to the Court of Errors and Appeals in the last resort in all cases.

COULT, HOWELL & SMITH,
Solicitors of Complainant.

JAMES E. HOWELL,
Of Counsel.

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

JAMES E. HOWELL,
Of Counsel with Complainant.

New Jersey Court of Errors and Appeals.

Between

RICHARD T. DANA,

Complainant and Appellant,

and

THE AMERICAN TOBACCO COMPANY, *et als.*,

Respondents.

On Appeal from Chancery.

PETITION OF APPEAL.

To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The petition of Richard T. Dana, the appellant in the above entitled cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by William J. Magie, Chancellor of New Jersey, bearing date the thirty-first day of January, in the year of our Lord one thousand nine hundred and seven, wherein the said Richard T. Dana was complainant and The American Tobacco Company, *et als.* were defendants in this respect, to wit, that said final decree dismissed the bill of the complainant; and your petitioner humbly appeals from the aforesaid final decree on the ground that the same is erroneous in the dismissal of the said bill of complaint for that the court should have sustained the said bill of complaint, and should have granted the relief prayed by said bill. Your petitioner therefore prays that the said final decree of the

said chancellor may be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

COULT, HOWELL & SMITH,
Solicitors for Appellant.

JAMES E. HOWELL,
Of Counsel.

Formal answer filed.