

New Jersey Court of Errors and Appeals.

AMERICAN MALT CORPORATION
and AMERICAN MALTING COM-
PANY, CORPORATIONS,
Prosecutors-Appellants,

AGAINST

BOARD OF PUBLIC UTILITY COM-
MISSIONERS *et al.*,
Defendants-Appellees.

On Certiorari.

On Appeal from
Supreme Court.

BRIEF FOR PROSECUTORS- APPELLANTS.

Statement of Facts.

The American Malting Company was organized under the general corporation act of the State of New Jersey, on September 28, 1897, and since its incorporation has been engaged in the business of manufacturing, selling and dealing in malt and its by-products. Its authorized capital is \$30,000,000. of which one-half is preferred stock and one-half is common. It has outstanding \$27,840,000. of stock, of which \$14,440,000. is preferred and \$13,400,000. is common (State of the Case, pp. 23 and 24).

The American Malt Corporation was organized under the general corporation act on March 31, 1906. Its certificate of incorporation was amended on July 23, 1913 (p. 24). The certificates of the American

Malting Company and the American Malt Corporation, as amended, confer on the two corporations precisely the same powers in almost identical language with the single exception that the certificate of the American Malt Corporation expressly includes the following powers not expressly included in that of the American Malting Company:

“to acquire by purchase, subscription, or otherwise, and to hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the shares of the corporate stock of, or any bonds, securities or other evidences of indebtedness created by American Malting Company, a corporation organized and existing under the Laws of the State of New Jersey; while owner of such shares of stock to exercise all rights of ownership, including the right to vote thereon; and, so long as the corporation shall hold the shares of stock or other securities of American Malting Company, to aid in any manner said American Malting Company, and to do any acts or things designed to protect, preserve, improve or enhance the value of any of such shares of stock or other securities, of said American Malting Company”; (pp. 29 and 36).

The authorized capital of American Malt Corporation is \$15,000,000. of which \$9,000,000. is preferred stock and \$6,000,000. is common stock (p. 37).

American Malt Corporation prior to September 15, 1913 (the date when the proceedings out of which this appeal grows were begun), had acquired \$14,264,500. out of \$14,440,000. outstanding preferred stock of American Malting Company and \$13,082,400. out of \$13,400,000. outstanding common stock of American Malting Company, so that American Malt Corporation owned over 98 per cent. of the entire outstanding capital stock of American Malting Company (p. 24). These holdings have been acquired by American Malt Corporation from time to time since its incorporation in 1906, by issuing its own stock in exchange for stock of American Malting Company.

In every case this exchange was made by issuing \$62. par value of preferred stock of American Malt Corporation in exchange for \$100. par value of preferred stock of American Malting Company and \$44. par value of common stock of American Malt Corporation for \$100. par value of common stock of American Malting Company. No stock of American Malt Corporation has been issued except to former holders of stock of American Malting Company. By this process of exchange there has been issued, and there is now outstanding, \$8,821,900. par value of preferred stock and \$5,741,500. par value of common stock of American Malt Corporation (p. 25).

The American Malt Corporation has no property or assets save the shares of stock of the American Malting Company acquired as aforesaid. It has no bonds or other indebtedness save a debt to the American Malting Company of about \$41,000 (p. 25).

On July 23, 1913, a majority of the directors of these two companies entered into an agreement of merger and consolidation providing that the two companies should be merged and that the two per centum of American Malting Company stock which remained in the hands of scattered holders should be exchanged for stock of the American Malt Corporation at the ratios of \$100 of American Malting Company preferred stock for \$62 of American Malt Corporation preferred stock, and \$100 of American Malting Company common stock for \$44 of American Malt Corporation common stock (pp. 44-57).

At special meetings of stockholders the agreement of merger and consolidation was approved by the holders of over two-thirds of all the stock of each of said companies (pp. 26, 27 and 44).

Thereupon both companies executed a petition to which were annexed a copy of the certificate of incorporation of each company, a copy of the general balance sheet of the American Malting Company, dated April 30, 1913, and a copy of the said agreement of merger and consolidation; on September 15, 1913, this petition, duly verified, was

presented to and filed with the Board of Public Utility Commissioners of the State of New Jersey, and the said Board was requested to approve the proposed merger in writing pursuant to the provision of Chapter 19 of the Laws of 1913 (pp. 23 to 68).

Hearings were held by the Board on September 30 and October 10, 1913, and on January 6, 1914.

On February 27, 1914, the Board rendered an opinion and order dismissing the application of American Malting Company and American Malt Corporation, in alleged compliance with Chapter 19 of the Laws of 1913 (pp. 6 to 21).

The American Malting Company and the American Malt Corporation thereupon applied to the Supreme Court for a writ of *certiorari* to review and set aside the proceedings of the Board of Public Utility Commissioners. On the return of the writ the order of the Board of Public Utility Commissioners was sustained. The Prosecutors-Appellants appeal from the order of the Supreme Court on *certiorari* affirming the order of the Board of Public Utility Commissioners.

I.

Chapter 19 of the Laws of 1913 is unconstitutional, because it delegates legislative authority to the Board of Public Utility Commissioners.

It is settled that legislative power cannot be delegated. Section I of Article IV of the Constitution provides that,

“The legislative power shall be vested in a senate and general assembly.”

No provision is made for the delegation of that power to any other organ of government.

The leading case upon the delegation of legislative power is *Township of Bernards v. Allen*, 61 N. J. L., 228, decided by the Court of Errors and Appeals in 1897. This case involved the validity of a statute empowering the Governor to name three commissioners, who in turn should have power to levy taxes for such sums as they should deem expedient for certain enumerated purposes. The statute was held unconstitutional because it delegated legislative power. The Court said, at page 242:

"This act does not purport in any sense to confer on local municipal bodies powers of taxation. Its legal effect is to delegate the powers mentioned in the act to three persons appointed by the governor. In making this delegation the legislature prescribed no rule by which the taxation should be laid. The power conferred upon the commissioners was, in express words the 'power to levy taxes,' with no prescription or limitation, except that the taxes levied for any one year for all purposes should not exceed 1 1/4 per cent., and commits to the judgment and discretion of the commissioners the right to determine whether taxes for the purposes mentioned should be laid, and at what rate and upon what property, as they might deem expedient. Plainly the scheme of taxation devised by this act is a delegation of the power of taxation. A decision which would sustain this legislative action would antagonize fundamental principles of constitutional law and in effect overrule *State v. Sickles*; *State v. Koster* and *Munday v. Rahway*, above cited. In this respect the act is unconstitutional."

In declaring this law unconstitutional the Court inquired as to two facts, first, whether the power delegated was legislative in its nature, and second, whether any rule had been laid down to guide the delegates in the exercise of the power. It found that the power was legislative and that no rule had been laid down, and forthwith declared the act unconstitutional. The same rule had been laid down in a number of other cases in the lower courts. In the

case of *Gilhooley v. Elizabeth*, 66 N. J. L., 484, the Supreme Court was required to pass upon the constitutionality of a statute (the Act of March 21, 1901), whereby the Governor was given power in his discretion on the application of one hundred voters to appoint a commission to district or redistrict wards in cities. The Court held the statute an unconstitutional delegation of legislative power on the ground that the districting of wards was a legislative function and that no rule was laid down to guide the Governor or the Commissioners in the exercise of the power. The Court said:

“ * * * He (the Governor) is given an absolute and unlimited discretion, controlled by no rule, to be exercised in accordance with no facts to be ascertained by him, and upon no principle or terms of expediency declared by the legislature.”

This case contains an interesting comment on the propriety of the rule that has been developed by the United States Supreme Court as shown in the case of *Field v. Clark*, 143 U. S., 649.

That case involved the validity of a provision of the Tariff Act of 1890, whereby Congress conferred upon the President authority to suspend the free introduction of certain commodities when he should be satisfied that the countries producing such commodities imposed duties upon the products of the United States which the President might deem to be reciprocally unequal or unreasonable. The United States Supreme Court upheld the validity of this provision by construing the law as leaving nothing except the facts to the determination of the President.

Speaking of the decision in *Field v. Clark* the Court in *Gilhooley v. Elizabeth*, said:

“ The case of *Field v. Clark*, 143 U. S., 692, in my judgment, carries this right of the legislature to delegate a function connected with the operation of the law to its *extreme limit*,

That case was decided by a divided Court. The majority opinion, after citing with approval the language of the Pennsylvania Court in the case last referred to, says:

'Nothing involving the expediency or the just operation of such legislation was left to the determination of the president. * * * He had no discretion in the premises, except in respect to the duration of the suspension so ordered.'

While there is room for difference of opinion as to the effect of the enactment which gave rise to the controversy in that case, there is no departure from the principle announced in the cases before referred to, if we accept the construction of the act of congress adopted by the federal court."

The same rule was laid down in *State, Gaines, Pros., v. Hudson Co. Avenue Commissioners*, 37 N. J. L., 12, in which Beasley, C. J., said:

"The language is this: that such expenses 'shall be raised by tax on all lands in the county of Hudson, and on goods and chattels therein owned by residents thereof; the proportion of such tax to be raised on the lands, goods and chattels in any township or ward of any city or town shall be determined by the said commissioners, and shall be included by the board of chosen freeholders of the county of Hudson, in the amount of tax to be raised for county purposes,' etc.

By force of this language it does not seem possible to avoid the conclusion that the legislature intended to leave the apportionment of this tax to the discretion of these officers. The words used seem incapable of bearing any other interpretation. The quota of each township is to be 'determined' by the commissioners. How determined? The statute is silent upon the subject, and it appears a sheer interpolation to imply that such determination is to be made in any particular mode, or is to be regulated by any fixed standard. The reason why such an intendment cannot be raised up is, because there is nothing in the statute upon which it can rest. It was

suggested on the argument that the purpose was that this official body, thus designated, should perform, with respect to this apportionment, the duty in a similar matter, incumbent on the board of assessors in the several counties. This means that the act impliedly requires the commissioners to apportion the tax among the townships in proportion to the value of their ratables respectively. The difficulty in the adoption of this argument is, in the first place, that it is imposing a restriction on the power of the commissioners to determine the distribution, which is not found in this law.

* * * * *

Holding this opinion, it seems to me necessarily to result that this act cannot be enforced. The reason of this conclusion is, that the legislature has transferred to these commissioners a part of the law making power."

The same rule was reiterated in *Munday v. Rahway*, 43 N. J. L., 338, where the Legislature attempted to delegate to the *court* its legislative power. In this case the statute in question provided that if the creditors of a municipal corporation were unable to collect the amount due to them by execution the Supreme Court should determine how great a tax was required to meet the needs of the municipal corporation and pay its debts and how great a tax could be imposed without injuring the creditors whose debts had not become due, and that the Supreme Court should then mandamus the town authorities to levy such a tax. The Court emphatically declared the law unconstitutional, saying:

"And when the truth appears, the point for determination will still be one to be decided, not by any *known rules of law*, but upon grounds of public policy; what rate of taxation may, in view of these facts, be imposed without working detriment to the community.
* * * Courts can determine whether constitutional or legislative restraints and rules as to taxation have been observed, and whether any individual is called upon to pay

more than his due proportion, and can compel subordinate legislative bodies to exercise the powers conferred upon them for purposes of taxation, but never has it been held that they could either assume or control the legislative function of deciding what sums the public interests require or permit to be raised."

Let us now turn to the statute involved in the case before the Court.

Chapter 19 of the Laws of 1913, so far as pertinent, reads as follows:

" * * * * *

2. Before any merger of corporations can be made, the approval thereof in writing by the Board of Public Utility Commissioners of this State shall be obtained by said corporations and filed in the office of the Secretary of State, with the names of the directors of each of said corporations which assent to the merger.

3. Every corporation, and the directors thereof, procuring or assenting to such merger without complying with the provisions hereinbefore contained, shall be guilty of a misdemeanor and punishable accordingly."

It is first to be observed that the power delegated to the Commissioners by this section is legislative in its nature. The Constitution, in Article IV, section 7, paragraph 11, provides among other things that the legislature

"shall pass general laws under which corporations may be organized and corporate powers of every nature obtained, subject, nevertheless, to repeal or alteration at the will of the legislature."

This provision commits to the legislature the granting and control of corporate powers. The power to merge is clearly a corporate power. The regulation of corporate mergers is therefore, by the mandatory Constitutional provision just quoted,

committed to the legislature. Moreover, the legislature has recognized its authority over the subject, and has, long since, and from time to time, passed laws dealing with the merger of corporations. Sections 104-109 of the "Act Concerning Corporations" provide what corporations may merge, the corporate proceedings which must be taken in case of merger, the powers and liabilities of merged corporations, the rights of stockholders dissenting from mergers, etc., etc. The express language of the Constitution and the practice of the legislature leave not the slightest doubt that the merger of corporations is a subject committed to the legislature.

Next it should be observed that no rule, principle or standard of any kind is laid down by this statute for the guidance of the Commissioners in the exercise of the delegated power. Is not the statute then invalid under the cases above cited as a delegation of legislative power uncontrolled by any rule or standard laid down by the Legislature? The prosecutors submit that it is. The appellees, although admitting that a rule or principle for the guidance of the delegate is necessary in order to support the statute, have asserted that the rule may be read into the statute by construction or implication, although it does not appear there in words. They say that the Court may construe the statute as requiring that the Commissioners make the granting or withholding of their consent dependent solely upon whether the proposed merger does or does not comply with the affirmative requirements of the General Corporation Law, to which Chapter 19 of the Laws of 1913 is an amendment. Chapter 19 does not say that the consent of the Commissioners shall depend upon the compliance by the merging companies with the other requirements of the General Corporation Law. Can the Court read into Chapter 19 such a standard? A similar contention was made in *State, Gaines, pros. v. Hudson Co. Avenue Commissioners*, 37

N. J. L. 12, *supra*. The Court disposed of it promptly and emphatically, saying:

"The quota of each township is to be 'determined' by the commissioners. How determined? The statute is silent upon the subject, and it appears a sheer interpolation to imply that such determination is to be made in any particular mode, or is to be regulated by any fixed standard. The reason why such an intendment cannot be raised up is, because there is nothing in the statute upon which it can rest. It was suggested on the argument that the purpose was that this official body, thus designated, should perform, with respect to this apportionment, the duty in a similar matter, incumbent on the board of assessors in the several counties. This means that the act impliedly requires the commissioners to apportion the tax among the townships in proportion to the value of their ratables respectively. The difficulty in the adoption of this argument is, in the first place, that it is imposing a restriction on the power of the commissioners to determine the distribution, which is not found in this law.

* * * * *

Holding this opinion, it seems to me necessarily to result that this act cannot be enforced. The reason of this conclusion is, that the legislature has transferred to these commissioners a part of the law making power."

Moreover, this "implied rule" theory is inconsistent with the decisions of the other cases above quoted, although it was not expressly advanced in those cases. In the case of Township of Bernards v. Allen, *supra*, the only pertinent decision in the Court of Errors and Appeals, the Court, had it been willing to indulge in such an act of judicial legislation, might easily have implied some rule or standard for the guidance of the Commissioners in the levying of the taxes in question, as for instance that the sum should be such as was appropriate or reasonably necessary for the accomplishment of the

statutory purpose. The Court does not consider such a possibility. It inspects the statute, finds that it does not in itself lay down any rule, and dismisses it as unconstitutional without attempting to assume legislative power for the purpose of supplying the Legislature's omission. How can we assume that the Legislature in passing Chapter 19 of the Laws of 1913 intended to make the consent of the Commissioners dependent upon mere compliance with the affirmative provisions of the General Corporation Law? The statute does not say so. A search for any enlightening statements in the debates of the Legislature has failed to reveal any such intention. As a matter of fact, it is quite probable that the Legislature intended to give the Commissioners unlimited discretion to consent to such mergers as they thought best, uncontrolled by any rule or standard. In view of the entire uncertainty as to what the Legislature meant, any attempt to read a rule or standard into the statute would be an act of legislation by the Court inconsistent with the tripartite division of powers fundamental in our system of government. The implication of a rule for the guidance of Commissioners would not be a mere interpretation of doubtful words actually present in the statute, but an addition of a provision which is entirely absent from the statute.

The case at bar is a good illustration of the unhappy and vexatious results of commission regulation in the absence of an express standard for the guidance of the Commissioners. Acting under the tyranny of an implied standard never debated by the Legislature and never expressly brought to its notice by the terms of the bill, the Commissioners have felt themselves constrained to refuse their consent to a merger, which they themselves say promotes desirable objects and is a step in the direction of safer and sounder management (p. 15), which would have the effect of doing away with a holding company and of reducing from about \$30,000,000 to

about \$15,000,000 the capital of an overcapitalized business.

Let us for a moment consider one other point which has been taken in support of the constitutionality of Chapter 19 of the Laws of 1913,—a point not made by either of the parties below, but which is entitled to grave consideration because raised in the opinion of the learned Justice before whom the matter was argued in the Supreme Court. It is that chapter 19 involves no delegation of legislative power because no statute of the State becomes operative or ceases to be operative as a result of the Commissioners' decision on any particular merger, and because the Commissioners' decision or the rules which they lay down to govern themselves in making the decision are not binding upon the Commissioners in the future, so that they do not amount to a law. It is admitted that no statute of the State becomes operative or inoperative as a result of the Commissioners' decision, and it is admitted that their rules are not binding upon them in the future. The statute does nevertheless involve the delegation to the Commissioners of power to make rules having the force of law, not as to themselves, but as to the corporations which desire to merge. The rules of the Commissioners may not bind the Commissioners, but they do bind the applicants and bind them just as securely as would an express enactment of the legislature itself. If the legislature should purport to confer upon one public service corporation power to forbid security issues or mergers by other public service corporations, would not that be a plain delegation by the Legislature of its legislative power, even though no statute of the State became operative or ceased to be operative as a result of the decision of the board of directors of the favored corporation, and even though the ruling of such board of directors was not binding on the directors in the future? Is the matter changed in principle because the delegate happens to be called a public

utility commission? If the Legislature should delegate to a commission the right of determining what elements should be required to constitute the crime of burglary on each trial for that crime, would that not be a clear delegation of legislative power, even though the rulings of the commission were not binding upon the commission in future cases and though no statute of the State became operative or ceased to be operative as a result of the Commissioners' ruling? In *Township of Bernards v. Allen, supra*, no statute of the State of New Jersey became operative or ceased to be operative as the result of the Tax Commissioners' action in levying taxes, nor was the action of the Commissioners nor were the rules which the Commissioners might lay down for themselves in levying such taxes binding upon them in the future. This action was nevertheless an exercise of legislative power because it related to a legislative subject and because in the particular instance it bound the persons taxed just as the decision of the Public Utility Commissioners in our particular instance relates to a legislative subject and binds the corporations seeking to merge as a statute would bind them.

The rule against the delegation of legislative powers should not now be relaxed. We are going through a transition from the state of almost unrestricted individual freedom, under which we have achieved our greatness, to a condition where almost every phase of human activity is subject to regulation by some administrative officer. The process is inevitable, but it is full of danger. If it be not jealously watched and carefully controlled, it may well result in a bureaucratic tyranny destructive of business, destructive of initiative, destructive of the freedom, of the individual prosperity and of the happiness of our people. We know that a modern state cannot be conducted without delegating to subordinate officers a large measure of authority in connection with subjects which might be acted upon directly by the Legislature in a less com-

plicated community. Such delegation, while it is always vexatious, is not disastrous so long as the rules under which the delegates must proceed are prescribed by the Legislature itself. When, however, the delegates are granted a power to be exercised in their own discretion without control by any principle laid down by the Legislature, we have a situation productive of something more serious than mere annoyance. We have a tyranny under which the substantial rights of the citizens are committed to the whim of officers from whose action no appeal can be had, since there is no rule according to which the validity of their action can be judged. Such a delegation is not necessary to the conduct of a modern State—witness the fact that the rule against delegation has stood unchallenged as a part of our fundamental law up to this day without impairing the operation of government. Some States have relaxed the old rule, have closed their eyes to the danger involved in the rapid and ever accelerated progress of official interference with economic law and human life and action. There are States which have cast aside the chief safeguard against the abuse of this process—the basic rule requiring that the Legislature itself must lay down a definite principle for the guidance of those to whom it delegates its regulative power. The State of New Jersey has not yet followed their example nor should she do so.

II.

The proposed merger does not conflict with Chapter 15 of the Laws of 1913.

Assuming for purposes of argument only that Chapter 19 of the Laws of 1913 may be held consti-

tutional by reading into it a provision to the effect that the Commissioners shall consent or refuse to consent according to whether or not the proposed merger complies with the affirmative requirements of the General Corporation Law as amended, the proceedings of the Commissioners should be set aside because they committed errors of law in arriving at their conclusion that the proposed merger does not conform to the requirements of the General Corporation Law.

The first ground on which the Commission based its refusal to consent was that the proposed merger would not have "assets behind its securities in amount sufficient to conform with the requirements imposed by the State upon companies newly incorporating under its laws" (p. 7).

The Commissioners suggest that in this respect the terms of the proposed merger are in conflict with Chapter 15 of the Laws of 1913. They say (p. 19) that the corporation formed by the merger is a new corporation and suggest that its stock is issued in purchase of the property of the merging corporations and that this is illegal unless the property purchased is equal to the par value of the stock issued. This position is not sound. A new corporation was not created by the merger. It is provided by Section 104 of the General Corporation Law of New Jersey that "Any two or more corporations organized or to be organized under any law or laws of this state for the purpose of carrying on any kind of business of the same or a similar nature, may merge or consolidate into a single corporation, which may be either *one of said merging or consolidating corporations, or a new corporation* * * *." In pursuance of this statutory authority the agreement of merger expressly provided that no new corporation should be formed, but that one of the pre-existing corporations should be merged into the other pre-existing corporation, viz., that the American Malting Company should be merged into the old American Malt Corporation.

The agreement of merger and consolidation provides that: “* * * American Malting Company shall be and the same hereby is merged into and consolidated with said American Malt Corporation, and American Malt Corporation does hereby merge into and consolidate with itself said American Malting Company” (p. 47). Nor was there any issue of stock in purchase of property. As to the present holders of American Malt Corporation stock, who will hold 98 per cent. of the capital of the consolidated corporation, the merger agreement provides on page 5: “All present holders of stock of American Malt Corporation shall continue to hold the same certificates of stock, preferred and common, which they now hold, and such certificates shall represent a like number of shares of the same class of stock of the Consolidated Corporation” (p. 49). As the corporation remains the same, the physical certificates remain the same, and the holders remain the same, this stock cannot be said to have been “issued” as a result of the merger. As to the remaining two per centum of stock of the consolidated American Malt Corporation which is to be issued to holders of American Malting Company stock other than American Malt Corporation, the merger agreement provides (pp. 49-50): “Each and every of the outstanding shares of stock of American Malting Company, except those owned and held in the treasury of said American Malting Company and those owned by American Malt Corporation, shall be forthwith exchangeable for, and convertible into, the stock of the Consolidated Corporation, etc.” This assuredly did not constitute an issue of stock in purchase of property. There was no purchase of the assets of any company; there was a unification of the two owner companies. Even the 2 per centum of American Malting Company shares which was to be exchanged was not to be “purchased.” It was to be *extinguished* by the exchange, as a temporary certificate is extinguished when it is exchanged for a permanent one. The

merger does not fall within the letter or the spirit of the provision of Chapter 15, Laws of 1913, that "Any corporation formed under this act may *purchase* property, real and personal, and the stock of any corporation, necessary for its business, and *issue* stock to the amount of the value thereof in payment therefor," because there is no purchase of property and no real issue of stock. It should also be noted that the provisions of Chapter 15 are general in their nature, while the provisions of Chapter 17 of the Laws of 1913 specifically authorizing a consolidated corporation to base its stock issue on the stock of the component companies, are particular and would therefore override the provisions of Chapter 15, even if they could be so interpreted as to apply to a case like the present merger.

Chapter 17, Laws of 1913, might easily have provided that "The consolidated corporation may issue capital stock, either common or preferred to an amount not exceeding in par value the value of the net assets of the merged corporations, to the stockholders, etc." The statute contains no such provision. On the contrary it expressly provides that "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*, in the manner and on the terms specified in the agreement of merger, or consolidation, which may fix the amount and provide for the issue of preferred stock *based on* the property or stock of the merging or consolidating corporations conveyed to the consolidated corporations, as well as upon money capital paid in."

Could there be a clearer statement that in the case of mergers the amount of the new stock may be "based on" the amount of the old stock for which it is issued "in exchange." The very fact that the statute provides in the disjunctive that the

new stock may be "based on the property or stock of the merging corporations" shows that the possibility of a discrepancy between the assets and capitalization of the merging corporations was contemplated. And it is to be noted that the words "or stock of the merging or consolidating corporations" must mean "outstanding shares of stock." It cannot mean the stock in trade or the stock of other companies owned by the merging corporations, for either of these would be included in the preceding word "property" and the words "or stock" would become tautological and unnecessary. The words "based on" must mean "equal in par value to." That is the common meaning of the phrase in such a context; no other reasonable meaning is apparent; and the words obviously mean this when they refer to the property of the merging corporations and the money capital paid in. The meaning of this Chapter is the same as that of Section 71 of the New York Railroad Law, which provides:

"But in no case shall the capital stock of the corporation formed by such consolidation exceed the sum of the capital stock of the corporations so consolidated, at the par value thereof."

The legislature recognizes, and our own case illustrates, the fact that the exchange of securities in the case of a merger differs greatly from original issues of securities to subscribers. The statutes designed to prevent overcapitalization are not generally retroactive. Public policy is not commonly believed to require an attempt to scale down securities already outstanding. The prevention of any further overcapitalization is the mark at which the legislators aim. This in case of merger is accomplished by providing that the capital of the merged company shall not be greater than the capital of the component companies—shall be "based on the * * * stock of the merging or

consolidating corporations." Any rule more stringent than this is equivalent to going back into the past and requiring the scaling down of securities already in the hands of the public. It may be argued that the par value printed upon shares of stock is of no importance,—that no investor is injured by the scaling down of his stock as long as his relative proportion remains unchanged. It is impossible, however, to make the holders of securities sympathize with this view. The problematical advantage of a retroactive attempt to scale down securities issued in the past cannot be weighed against the disturbance and outrage to the sensibilities of the investors which would result from such a course. In this case the capital of American Malting Company was reduced from thirty to fifteen million dollars. But the Commissioners say to us "That is not enough. You are debarred from destroying your holding company, from getting rid of your costly duplication of organization, from avoiding double taxation,—you are forever debarred from the ordinary corporate right of merger, until you go back into the past and scale down your previously issued stock to a point where you can show by affirmative proof that it is equalled dollar for dollar by the assets." This not only does violence to the words of Chapter 17, but to that wise legislative policy, which decrees not punishment for over issues in the past, but prevention of over issues in the future.

But it has been argued that if mergers are permitted under Chapter 17 of the Laws of 1913 without proof that the assets of the merged company equal its proposed capital dollar for dollar, it will be possible by going through the form of a merger to evade the general rule against the issue of stock for less than par contained in Chapter 15 of the Laws of 1913. This argument overlooks two facts. First, it is not contended that under Chapter 17 of the Laws of 1913 merging companies may issue stock in excess of the capital of the merging companies.

Such a contention would be inconsistent with the provision that the stock of the merged company may be "*based on*" the stock of the merging companies. All that is contended is that under this chapter the stock of the merged corporation may be *equal to* the stock of the merging companies, just as the stock of a merged company formed under Section 71 of the New York Railroad Law may be equal to the stock of the merging corporations. Under such a construction the chapter could not be used as a means of evading the rule against overcapitalization (Section 71 of the New York Railroad Law has not resulted in any defeat of the rule against overcapitalization by indirection). Secondly, it is not contended that the process of merger validates any stock which may have been invalid before the merger or renders fully paid any stock which may not have been fully paid before the merger. The stock of the American Malt Corporation which was outstanding before the merger will merely continue in the hands of the same holders after the merger. It cannot be contended that taking in the Malt-
ing Company relieves the previous holders of the Malt Corporation stock from the obligation to pay up any unpaid portion of their subscriptions. The same thing is true as to the small amount of stock which will be issued in exchange for and in extinguishment of the scattered 2 per centum of American Malting Company stock.

III.

The plan of merger and consolidation is not unfair to the preferred stockholders of American Malting Company.

The difference of view between the appellants and the Board of Public Utility Commissioners on the question of whether the plan of merger is fair to the preferred stockholders of American Malting Company does not depend upon any disputed question of fact. The difference between the parties arises from divergent views of the law. The decision of the Board that its consent should be withheld upon the ground of unfairness, is based first on the proposition of law that it has a right to consider the question of fairness, and second, on a failure to recognize the proposition of law that the American Malting Company is by the merger dissolved, and that the rights of the security holders of American Malting Company under the merger are identical with their rights on dissolution.

Passing upon the fairness of mergers to stockholders and enjoining such mergers if unfair is both in its nature and by tradition a judicial function. It is hard to conceive of a more typical exercise of equity power. Suppose the legislature should purport to delegate to the Board of Public Utility Commissioners power to entertain the complaint of any person who considered himself to have been defrauded of property by a corporation and render judgment against the corporation directing it to restore such property. Would it not be plain that such a statute was an unconstitutional delegation of judicial power? *A fortiori*, is it not plain that such a result should not be reached by construction when it is not required by the terms of the statute? The Board's construction of Chapter 19 would transfer

to the Board of Public Utility Commissioners power to entertain the complaint of any dissatisfied stockholder, and after a hearing conducted by laymen without any regard to the rules of judicial procedure or evidence or to burden of proof, to render what is in substance a judgment or decree enjoining the corporation from proceeding with its merger. The phraseology of the statute should not be allowed to divert us from its substantive effect. The construction for which the Board contends just as plainly confers upon the Public Utility Commissioners one of the important and long recognized powers of the courts of equity as would a statute conferring upon a board of commissioners jurisdiction to entertain suits for foreclosure or specific performance against corporations. Not only is such a step contrary to the fundamental principles of constitutional law, but it is fraught with a very real danger. It substitutes for the perfectly adequate proceeding in equity a proceeding before a board which under the law may be, and probably will be, composed in whole or in part of laymen unskilled in the exercise of the judicial function, untrained in the difficult business of ascertaining the truth from evidence. If the process of *certiorari* and *mandamus* is held to give the courts plenary power to review both as to law and facts the proceedings of the Commissioners, there will in all cases involving the indefinite matter of fairness be an appeal to the courts, and we will have accomplished nothing by our infringement of the constitution save the addition of one more court to the series through which a final adjudication is now obtained. If a plenary review both of questions of fact and law is not permitted to the courts, then the effect of conducting the suit in equity before the lay Commissioners will be irremedial error and injustice.

In the words of the United States Supreme Court

in *Chicago, etc., Ry. Co. v. Minnesota*, 134 U. S., 418 :

“ * * * It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.”

Passing from the right of the Public Utility Commissioners to consider the fairness of the plan to stockholders and turning to the question of whether the plan is in fact unfair to preferred stockholders of American Malting Company, the appellants submit that the failure of the Public Utility Commissioners to find that the plan is fair is based on the failure of the Commission to recognize the proposition of law that the American Malting Company is dissolved by the merger and that the rights of its security holders are to be determined accordingly. The merger *will* dissolve American Malting Company. Two-thirds of the stockholders of a company have a right to dissolve their company by merger just as they have a right to dissolve it by liquidation. They have exercised this power and the question of fairness as between the preferred and common stockholders is to be determined by considering their rights on dissolution. In the case of *Colgate v. United States Leather Co.*, 73 N. J. Eq., 72, we find an effort to merge the United States Leather Co. into the Central Leather Co., extinguishing the name and organization of the former and perpetuating the latter, just as in the present case we have by the express terms of the merger agreement a continuation of the Malt Corporation and an extinction of the name and organization of the Malting

Company. In the Colgate case certain preferred stockholders contended that the merger agreement was unfair because it did not preserve their right to have the accumulated back dividends on their stock paid out of the accumulated profits of the United States Leather Co. In response to this the proponents of the merger claimed that the profits had been set aside as working capital and were not therefore subject to the payment of dividends on the preferred stock. Vice-Chancellor Emory disposed of this answer and sustained the objection of the preferred stockholders on the express ground that the merger worked a dissolution of the United States Leather Co. and that the reservation of profits as working capital did not hold good in case of dissolution. He said on page 95 that the reservation of profits as working capital "is not to be held to affect or control the right of the preferred stockholder, on the termination of the business of the company *by dissolution* otherwise than by liquidation, * * *"; and further that "The provision that the charge for the unpaid dividends is upon the earnings 'prior to the claim of the common stock' includes, in my judgment, and so far as the unpaid dividends are concerned, a priority to any claims of the common stock in any contingency and as well *on dissolution by consolidation* as in any other contingency not specified"; and on page 96 "The preferred stockholders have, *on the termination of the business by the consolidation*, the right to an account, etc." It is settled law that where a merger destroys the organization of a corporation and transfers all its property to another corporation, the merger works a dissolution. As Mr. Justice Moody said in *Rochester Railway Co. v. Rochester*, 205 U. S., 236:

"A corporation without shareholders, without officers to manage its business, without property with which to do business, and without the right lawfully to do business, is dis-

solved by the operation of the law which brings this condition into existence."

In *Central Railway Company v. Georgia*, 92 U. S., 665, Mr. Justice Strong in speaking of the dissolution of companies by merger said:

"Whether such be the effect or not must depend upon the statute under which the consolidation takes place, and of the intention therein manifested."

In our case the statute (Sec. 104, General Corporation Law), provides:

"Any two or more corporations organized or to be organized under any law or laws of this state for the purpose of carrying on any kind of business of the same or a similar nature may merge or consolidate into a single corporation, which may be either one of said merging or consolidating corporations, or a new corporation."

The merger agreement provided on page 3, State of the Case, page 47, that the single corporation should be the pre-existing American Malt Corporation. In other words, two-thirds of the stockholders of American Malting Company, in pursuance of the power conferred upon them by the statutes, entered into a merger agreement which provided that the American Malting Company should be dissolved by merger, that there should in the words of Vice-Chancellor Emory be a "dissolution by consolidation."

When this proposition of law is recognized it becomes patent that the merger agreement is not only fair, but extremely favorable to the preferred stockholders of the American Malting Company. On a present dissolution by liquidation of the American Malting Company the preferred stock would be entitled first to the \$2,141,884.49 of surplus (p. 35).

This right is expressly reserved to them under the merger agreement, so that in respect to this right they neither gain nor lose by the proposed merger (pp. 50 and 51). The preferred stockholders would in addition be entitled to share in the remaining assets equally with the common stockholders. They enjoy no preference except as to dividends (p. 31). Testimony before the Board showed, and the Board in its opinion (p. 9) seems to find, that the tangible assets of the Malting Company amount to \$9,234,000 exclusive of good will. On a dissolution, of course, the good will would be of little value. Striking from the \$9,234,000 of tangible assets the \$2,141,884.49, represented by surplus, we have remaining \$7,092,116 to be divided equally among the preferred and common stockholders. This would yield the preferred stockholders \$3,546,058. The proposed plan gives them a preference as to principal, which would cover the entire \$7,092,116 of tangible assets (p. 38).

In other words, the preferred stockholders of American Malting Company enjoying no preference as to assets, have only a fifty per cent. interest on dissolution in the capital of the Malting Company. Fairness requires that this proportionate interest shall be preserved in the merged company. As a matter of fact, their proportionate interest is *increased* in the merged company. Instead of a fifty per cent. interest in the American Malt Corporation, the preferred stockholders will have an interest of $\frac{9}{15}$ as they will hold \$9,000,000 out of the \$15,000,000 of authorized stock.

Almost 99 per cent. of the preferred stock of the Malting Company has already been exchanged for preferred stock of the Malt Corporation at the ratio of \$100 of the old stock for \$62 of the new (pp. 24 and 25). Nearly 98 per cent. of the common stock of the Malting Company has already been exchanged for common stock of the Malt Corporation at the ratio of \$100 of the old stock for \$44 of the new (pp. 24 and 25). The merger agreement provides that the remaining one per centum of Malting Company

preferred stock and the remaining two or three per centum of Malting Company common stock shall be exchanged for Malt Corporation stock at precisely the same ratios (p. 50), so that 99 per cent. of the preferred stock of the Malting Company has accepted this plan by actually making the exchange. This voluntary and almost unanimous action by the preferred stockholders is the strongest and most conclusive argument in favor of the fairness of the plan. The stock of American Malting Company when the process of exchange for stock of the Malt Corporation was begun was very widely scattered. It was an active stock freely dealt in on the market. The deposit of stock with the Standard Trust Company began in 1903. The stockholders' list compiled for the annual meeting of 1902 shows that there were at that time 1,337 holders of record. The concurrence of more than ninety-eight per cent. of the stock so held cannot be waived aside as insignificant. Never could there be a stronger case for the application of the language of the Court of Errors and Appeals found in the case of *Berger v. United States Steel Corporation*, 63 N. J. Eq., 809, where Van Syckel, J., speaking for a unanimous court, said:

* "In presence of the fact that over 99 per cent. of all the stockholders in attendance at the meeting, personally or by proxy, voted in favor of the resolution, it cannot reasonably be expected that the court is impressed with the belief that the complainant will suffer any substantial injury by the consummation of the scheme. Nevertheless, if it appears that the proposed action is without legal authority, the complainant cannot be denied the relief which she seeks; *but, in passing upon this controversy, the greatest care must be observed that this overwhelming majority of the shareholders are not deprived of their rights by the very few dissentients.*"

Vice-Chancellor Emory said in the memorandum which appears on page 865 of the record in *Colgate v. United States Leather Company et al.*, *supra*:

"I have got to take into account the question of the status of both sides, the con-

venience of the parties, and it seems to me that in this case any business injury to the preferred stockholder would be entirely outweighed by the general loss to the entire body of the stockholders by reason of preventing their acting on this agreement, if they choose to carry them through."

Is it not obvious that no injury is done to the holders of the outstanding 1-1/2 per centum of Malting Company stock, and *a fortiori* to the twenty-five shares actively protesting, which can for a moment be weighed against the damage which is being done to the entire body of stockholders by the holding up of the merger?

It has been argued that the merger is unfair to the preferred stockholders of the American Malting Company because it does not give the preferred stockholders a right to enforce their claim for accumulated unpaid dividends against any fund except the present surplus of the American Malting Company. This argument is unsound as a matter of law. The first response to the objection is that in this regard the present merger agreement follows exactly the merger agreement which was approved by Vice-Chancellor Emory in the case of *Colgate v. United States Leather Co.*, 73 N. J. Eq., 72, 75 N. J. Eq., 229. The provision reserving the right of preferred stockholders against the surplus accumulated at the date of the merger is found on page 51 of the printed State of the Case. The provision preserving the rights of preferred stockholders as to unpaid dividends in *Colgate v. United States Leather Company* is found on pages 820-821 of the record in that case. It reads as follows:

"* * * But the owner of such share or shares shall retain and be deemed to retain, and the said certificate shall continue thereafter to represent and shall be deemed to represent, the said share or shares so far as concerns any lawful right, whether past, present or future, of the holder thereof to demand or receive from The United States

Leather Company or the Central Leather Company any money, value or thing by reason of dividends accrued and unpaid upon the said share, and so far as concerns any lawful right whether past, present or future, of said holder in or by reason of the surplus or surplus earnings of The United States Leather Company accumulated at the said time when this Agreement shall so take effect, or at any time theretofore, or in or by reason of the money or property of which such surplus or earnings shall then consist, or shall at any time theretofore have consisted, or which such surplus earnings shall then represent, or shall theretofore have represented; and thereafter the holder of such certificate shall, with respect to such accrued and unpaid dividends, surplus and surplus earnings, and the money or property of which such surplus or surplus earnings shall consist, or by which they shall be represented, be and be deemed to be the holder of such share and not to have waived any lawful right whether past, present or future, whether against The United States Leather Company or the Central Leather Company or otherwise, with respect to such dividends, surplus earnings, money or property, but shall be and be deemed to be entitled with respect thereto to enforce and exercise such right without prejudice by reason of such receipt of securities of the Central Leather Company in satisfaction of the principal or par of said share or shares. No holder of a share or shares of the preferred stock of The United States Leather Company on a certificate for which shall have been signed the memorandum in the foregoing provision mentioned, and on which bonds and shares of preferred stock of the Central Leather Company shall have been delivered as therein mentioned, shall be entitled to receive the said \$23.50 per share in par value of Common Stock of the Central Leather Company (receivable as aforesaid upon surrender, duly endorsed in blank for transfer of a share of said Preferred Stock of The United States Leather Company) or any part of said \$23.50 or to receive anything further by reason of said principal or par of such share or shares of The United States Leather Company."

The second and conclusive response is that this merger works a dissolution of the American Malting Company, so that obviously the preferred stockholders are not entitled to recourse for their back dividends to any fund except the surplus accumulated to date.

The remaining reason suggested by the intervenor for considering the merger unfair to preferred stockholders, a reason not adverted to by the Utility Commissioners, is that the merger does not expressly reserve to the preferred stockholders any right to sue the directors of the American Malting Company for any dividends which they may have paid out of capital.

There is no reason to believe that any stockholder now has such a right of action, nor to believe that if he had such a right the merger would cut it off. The right to recover from directors the amount of dividends paid out of capital is a corporate right. It is a mere incident that it is enforced by the stockholders directly. The merger agreement provides that all the rights of both merging companies shall vest in the Malt Corporation. If the Malting Company has a right of action against its directors for paying dividends out of capital, that right passes under the merger agreement to the Malt Corporation. Nor can we find any authority for the belief that a stockholder by accepting the securities of the consolidated company loses his power to insist by appropriate procedure on the enforcement by the consolidated company of this right against the directors. Counsel are unable to find any merger agreement where a right to sue the directors for payment of dividends out of principal has been expressly reserved to stockholders, though in all cases there is theoretically the possibility that such a right may exist. In the present case there is nothing in the record or outside of the record to give rise to a belief that the company has at present any right to recover dividends paid out of capital. In the early history of the com-

pany, when the personnel of its management was different, dividends were paid on preferred stock out of capital. They were recovered back in the case of *Appleton v. American Malting Company*, 65 N. J. Eq., 375. Since that time the management has exercised scrupulous care to restrict its dividends within the annual net earnings. The intervenor's argument is based on the supposition that a company overcapitalized in the beginning can never pay a dividend until it has accumulated earnings sufficient to make its assets equal to its original capitalization. This is erroneous.

In *Goodnow v. American Writing Paper Co.*, 73 N. J. Eq., 692 (Court of Errors and Appeals) the Court said:

"Under the act of 1896 there was room to contend that the words 'net profits' were intended to be synonymous with the word 'surplus'; the language used was 'from the surplus or net profits.' Under the act of 1904, this contention is no longer possible; the language used is 'from its surplus, or from the net profits.' The evident intent of the change is to point out two funds from which dividends may be made.

Although the change in language indicates that the legislature made a distinction between surplus and net profits, it does not necessarily follow that net profits mean the difference between gross earnings and what may be called operating expenses. Such profits may be called annual profits, and it may be that by net profits the legislature meant the net profits upon the whole of the company's business from its organization. If either of these meanings is adopted, the declaration of the present dividend is justified. There was an excess of gross earnings over the operating expenses of the current year, and the value of the present assets exceeded the value of the actual assets with which the company began business. The complainant contends, however, that the term 'net profits' is used in neither of these senses, but in the sense of an excess of the value

of the present assets over the par value of the capital stock issued and outstanding; and the claim is that since that stock was issued for property at a gross overvaluation, there can be no dividend until the difference between the actual value of the property and the value at which it was taken over is made up. * * *

* * * The policy to be served by the prohibition of Section 30 is to prevent the frittering away of the actual assets with which the company is to do business, not the nominal assets which it has never received and for which it still has a claim against the subscribers for unpaid stock."

IV.

The merger does not conflict with Section 18 of the General Corporation Law.

The third objection taken by the Board is that owing to lack of proof they cannot finally pass on the question of whether the amount of preferred stock contemplated by the merger may not exceed two-thirds of the total capital paid for in cash or property, and therefore be in violation of Section 18 of the General Corporation Law of New Jersey (Opinion, p. 10). The same considerations which apply to the objection of overcapitalization apply to this objection. No statute provides that the Board shall consent or refuse to consent according to whether the capital of the proposed merger does or does not fall within the provisions of Section 18 of the General Corporation Law. That section being general in its terms, would be modified by the provisions of Chapter 17, Laws of 1913, if it purported to prevent a consolidated company from basing the amount of its stock on the amount of the

stock of its component companies. Moreover Section 18 refers only to increases of preferred stock. There was in this case no increase in preferred stock. The net result of the consolidation is shown by the record to have been that the outstanding preferred stock was to be very much reduced, while the assets were to remain the same so that the merger was to result in a betterment of the ratio which Section 18 seeks to preserve. It is doubtful whether there was in our case anything which can properly be called an issue of preferred stock, 99 per cent. of the preferred stock merely continues to stand in the hands of its old owners, as to the remaining 1 per cent., American Malting Company having been merged into the American Malt Corporation, the issue of new certificates to the holders of American Malting Company stock was in reality not an issue of stock but merely a change in the form of the instruments evidencing existing rights.

V.

American Malting Company and American Malt Corporation were organized for the purpose of carrying on business of a similar nature within the meaning of Section 104 of the General Corporation Law.

At the end of its opinion the Board, although it does not pass upon the question, suggests as a further reason for refusing its consent to the merger, doubt as to whether "The property of the Malting Company is cognate in character and use to the property used or contemplated to be used by the Malt Corporation in the conduct of its own proper business." Presumably this objection refers to Sec-

tion 104 of the General Corporation Law which provides that "Any two or more corporations organized or to be organized under any law or laws of this state for the purpose of carrying on any kind of business of the same or a similar nature, may merge, etc."

Upon this point the opinion of the Court below was favorable to the appellants.

The General Corporation Law of the State of New Jersey provides for the organization of corporations for all lawful purposes with certain definite exceptions. No provision of the law and no policy of the state forbids the organization of a corporation to transact at the same time several different kinds of businesses. The provision of Section 104 of the act, therefore, cannot be intended to enforce any public policy against the transaction of heterogeneous businesses by a single corporation. Its object must be to prevent stockholders who have taken shares on the understanding that they are engaging in one business, from being forced by merger into participation in a business of some different kind, in other words, to prevent a violation through the process of merger of the contract which a stockholder makes with his corporation upon subscribing for stock. This contract is dependent upon the terms of the company's charter and not upon the company's habit of doing business. No one would contend for a moment that a stockholder's rights are impaired when the corporation in which he owns stock begins to transact a business which it has not formerly carried on, but which it has always by its charter been authorized to carry on. There can, therefore, be no invasion of the stockholder's rights and no infringement of the rule laid down in Section 104 of the General Corporation Law when all the charter powers of merging corporations are the same. The charters of the American Malting Company and of the American Malt Corporation occur at pages 29 and 36 of the record respectively. Those charters show that the powers of the two corporations were identical except for the fact that the Amer-

ican Malt Corporation was given certain powers as to the acquisition of securities in American Malting Company, which, of course, were not expressly given to the American Malting Company itself. It is to be observed that the very fact of merger, which extinguishes the American Malting Company, will forever make it impossible for the American Malt Corporation to exercise the power referred to. Of course, it cannot acquire or deal with securities in the American Malting Company after that company has ceased to exist. The charter powers of the two companies are, therefore, for the purposes of this merger, absolutely identical. Even when the practice of the companies as opposed to their charter powers is considered, it will be seen that no right of any stockholder is being impaired. The stockholders of the American Malting Company were directly engaging in the business of manufacturing malt. As stockholders of the American Malt Corporation they will still be engaging directly in that business. The stockholders of the American Malt Corporation were engaging indirectly in the manufacture of malt through a subsidiary corporation. The nature of the business in which they will be engaged, the measure of their rights and liabilities, the factors which will control the success or failure of their enterprise, will be precisely the same after the merger. The only change from their point of view will be that the machinery through which they transact their business will be rendered less cumbersome and less expensive by the elimination of a holding company. No one can read the discussion in *Colgate v. U. S. Leather Co.*, 75 N. J. Eq., 229, without realizing that the present case lies far within the line of the statutory requirements.

VI.

The objects of the merger are worthy.

The results sought to be accomplished by this merger are in absolute accord with the policy of the recent corporate legislation in this State.

The merger will result in the elimination of a holding company and this is its chief purpose; the recent legislation in this State leaves no doubt that holding companies are viewed with disfavor. If any other course can be justified in law, public officials should be loath to set themselves against a corporate proceeding, the main object of which is to do away with a holding company.

Furthermore the merger will result in a sweeping and drastic reduction in the capitalization of this business. The capitalization is reduced from \$30,000,000 to \$15,000,000. It is no easy task to induce upwards of 1,200 security holders to submit voluntarily to such a scaling down of the par value of their holdings. The consents of these stockholders represent a vast amount of patient effort on the part of the officers and directors of the American Malting Company, all of which has been expended for the purpose of complying with the policy of the law respecting capitalization. We submit that a voluntary reduction of the capitalization of a going business from \$30,000,000. to \$15,000,000., with the object of bringing the capitalization into conformity with the policy of the statutes is an undertaking which should excite the commendation of every official charged with the administration of the law. But in this case the Board of Public Utility Commissioners, instead of taking seriously into account the beneficent results to be brought about by this merger, has seen fit to dismiss these broad considerations with the passing remark that the objects are "in the direction of safer and sounder management," and has

refused its consent on technical grounds. Instead of welcoming a plan designed to eliminate a holding company they doubt whether an operating company and a holding company can merge; instead of welcoming a plan contemplating a reduction of \$15,000,000, in the capitalization of this business, they reject the plan on the ground that the reduction is not sufficiently drastic.

The effect of the Board's refusal to approve the merger will inevitably be that the holding company will continue, the business will remain capitalized at \$30,000,000, and an honest and laborious effort on the part of these two corporations to bring their affairs into conformity with the policy of this State will have been frustrated.

VII.

For the reasons given it is respectfully submitted that the judgment appealed from should be reversed and the order of the Board of Public Utility Commissioners should be set aside.

Respectfully submitted,

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ELIHU ROOT, Jr.,
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FREDERICK J. FAULKS,
Of Counsel.

June Term, 1914.

New Jersey Court of Errors and Appeals

AMERICAN MALT CORPORATION AND
AMERICAN MALTING COMPANY,
CORPORATIONS,

Prosecutors-Appellants,

against

BOARD OF PUBLIC UTILITY COM-
MISSIONERS,

Defendants-Appellees.

On Certiorari.

On Appeal

*From Su-
preme Court.*

Brief of Defendants-Appellees.

Statement of Facts.

On July 23, 1913, a majority of the directors of the American Malt Corporation and of the American Malting Company, corporations organized under the General Corporation Act of this State, entered into an agreement of merger and consolidation providing for the merger of the American Malting Company into the American Malt Corporation.

This agreement was approved at special meetings of stockholders by the holders of more than two-thirds of the stock of each of the corporations.

Thereafter application was made to the Board of Public Utility Commissioners under Chapter 19 of the Laws of 1913, for approval of the proposed merger.

The application was dismissed and approval denied.

The grounds assigned for dismissing the application and denying approval are set forth in a report made by the Board, which appears in the printed case at page 6.

A writ of certiorari to review and set aside the proceedings of the Board was granted by the Supreme Court.

On the return of the writ the order of the Board was affirmed.

The Prosecutors-Appellants appeal from this judgment.

Points.

I.

The statute under which the application was made and its constitutionality.

The statute under which application was made by the prosecutors-appellants to the defendants-appellees (Chapter 19 of the Laws of 1913) is a supplement to the General Corporation Act. Its second section provides:

“Before any merger of corporations can be made, the approval thereof in writing of the Board of Public Utility Commissioners of this State shall be obtained by said corporations, and filed in the office of the Secretary of State with the names of the directors of each of said corporations which assent to the merger.”

This statute is attacked by the prosecutors-appellants as involving an unconstitutional delegation of legislative power.

In answering this attack it is admitted that the power to create and control corporations is a legislative power and that this power, with certain limitations upon its exercise, is by the Constitution committed to the Legislature, by Act IV., Section 7, paragraph 11, which provides that, “the legislature shall pass no special act conferring corporate powers, but they shall pass general laws under which corporations may be organized and corporate powers of every nature obtained, subject, nevertheless, to repeal or alteration at the will of the Legislature.”

It is further admitted that the power to merge is a corporate power and that the provision for, and

regulation of, corporate mergers is, therefore, committed to the Legislature.

It is likewise admitted that a purely legislative power cannot be delegated by the Legislature to any other body or authority.

Cooley, *Constitutional Limitations* (7th Ed.) p. 163:

"One of the settled maxims in constitutional law is, that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

It is, however, contended that this fundamental principle is applicable only to powers purely legislative, and that while the power to make a law cannot be delegated, power to determine some fact or state of things upon which the lawmaker intends to make its action depend, can be delegated.

This distinction is fundamental, and is uniformly recognized.

In *Field vs. Clark*, 143 U. S. 649 (1891) it was held that the authority conferred upon the President by act of Congress to suspend by proclamation the free introduction of sugar, etc., when he was satisfied that any country producing such articles imposed duties upon the agricultural or other products of the United States, which he may deem to be reciprocally unequal

or unreasonable, was not open to the objection that it unconstitutionally transferred legislative power.

Mr. Justice Harlan, delivering the opinion of the majority of the court said (692) :

“That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.” * * *

Pointing out that the act was not inconsistent with that principle, he said : (693)

“As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing such proclamation in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of the law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, * * * from particular countries, should be suspended in a given contingency, and that in case of such suspensions certain duties should be imposed.

“‘The true distinction,’ as Judge Ranney speaking for the Supreme Court of Ohio has well said, ‘is between the delegation of power to make the law, which necessarily involves discretion as to what it shall be, and conferring authority or discretion in its execution, to be exercised under

and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' *Cincinnati, Wilmington &c., Railroad vs. Commissioners*, 1 Ohio St. 88.

"In *Moers vs. City of Reading*, 21 Penn. St. 188, 202, the language of the court was: 'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.' So, in *Locke's Appeal*, 72 Penn. 491, 498, 'To assert that a law is less than a law because it is made to depend upon a future event or act is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to know.' The proper distinction the court said was this: 'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation.' "

In *Interstate Commerce Commission vs. Goodrich Transit Co.*, 224 U. S. 194 (1912), it was held that the provisions of section 20 of the act of June 20, 1906, authorizing the Interstate Commerce Commission to require accounts to be kept in a specified manner by interstate carriers were not unconstitutional as delegating legislative power.

Mr. Justice Day said: (214)

"Furthermore, it is said that such construction of section 20, makes it an unlawful delegation of legislative power to the Commission. We cannot agree to this contention. The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress. This rule has been frequently stated and illustrated in recent cases in this court, and needs no amplification here. * * *

"In section 20 Congress has authorized the Commission to require annual reports. The act itself prescribes in detail what those reports shall contain. The Commission is permitted, in its discretion, to require a uniform system of accounting, and to prohibit other methods of accounting than those which the Commission may prescribe, in other words, Congress has laid down general rules for the guidance of the Commission, leaving to it merely the carrying out of details in the exercise of the powers so conferred. This, we think, is not a delegation of legislative authority."

In *State ex rel. Minneapolis, St. Paul & Sault Ste. Marie R. Co. vs. Railroad Commission*, 137 Wis. 80; 117 N. W. 846 (1908) the court had before it the question of the scope of the provision of the Wisconsin Public Utility Act which in effect declares that no corporate stock, stock certificates, bonds, or any other evidences of indebtedness payable in more than one year from the date thereof should be issued by any public service corporation except upon the authority of the Commission first obtained.

The court said, in part, with reference to the section:

"It does, unmistakably, show a purpose to lodge in the Railroad Commission power to pass upon questions of fact involved in whether a public service corporation, desiring to do any of the things mentioned, is competent in that regard, having reference to the written law on the subject. The seat of original power is the Legislature. It cannot legitimately delegate it. It can properly clothe a commission with capacity to determine whether corporate rights created by the Legislature are exercisable, that depending upon the existence of facts satisfying legal conditions precedent in that regard, and give to the corporation invoking its jurisdiction, evidence of its determination. It would be highly unreasonable to conclude that the Legislature purposed empowering the Commission to authorize the doing of the things mentioned in the act in any other sense. 'The grant of power to authorize includes by necessary implication the grant of power to pass upon the underlying question. The former includes the latter.'"

In *State ex rel. Kenosha Gas & E. Co. vs. Kenosha Electric Ry. Co.*, 145 Wis., 337; 129 N. W., 600 (1911), the court in passing upon another provision of the act said:

"True, the Legislature cannot empower the Railroad Commission to exercise legislative or judicial power; but it may clothe it with authority to administer a law requiring the ascertainment of facts in order to determine whether the law applies, and if so, how, to situations as they arise. The administrative power includes necessarily, power to determine the facts necessary to application of the law. That is a familiar principle governing numerous instances of grant of

quasi judicial and *quasi* legislative power. They do not fall within the field of that strictly judicial or legislative power which is undelegable."

In *Township of Bernards vs. Allen*, 61 N. J. L., 228 (1897), where a statute to provide and secure the raising of revenue where the local authorities failed to act provided for the appointment of commissioners by the Governor whose duty it should be to levy taxes for such sums as they should deem expedient for enumerated purposes was declared unconstitutional, the fundamental distinction was recognized.

Mr. Justice Depue said (237) :

"Every system of taxation consists of two parts—one the levying of taxes, the imposition of taxes on persons or property: the other the assessment and collection of taxes. The first is a legislative function controlled by constitutional prescription: the other, the assessment and collection of taxes, is mere machinery by which the legislative purpose is effectuated.

"Whether taxes shall be assessed and collected by officers holding office under some authority is left to the legislative discretion. * * *

"The legislature having prescribed a rule of taxation, may entrust the assessment and collection of taxes, in conformity with the prescribed rules, to officers appointed by other authority."

In *Gilhooly vs. Elizabeth*, 66 N. J. L., 484 (1901), this distinction was likewise noticed.

There a statute which conferred upon the governor power, in his discretion, on the application of one hundred voters, to appoint a commission to district or redistrict wards in the cities of the State was *declared* unconstitutional on the ground, among others, that it involved an unlawful delegation of legislative power.

Justice Van Syckel said (485) :

"We deem it to be the established rule that the districting of a city into wards is a legislative act.* * *

"That this law commits to the governor the determination of an important question of public policy controlling the local government of cities does not admit of controversy, as he is given an absolute and unlimited discretion, controlled by no rule, to be exercised in accordance with no facts to be ascertained by him, and upon no principle or terms of expediency declared by the Legislature.

"The Legislature established under the constitution has the exclusive power to enact the law. * * *

"The act of 1901 is in our judgment an attempt to delegate to the governor the powers which by the mandate of the constitution must be exercised by itself."

In accordance with this distinction, then, it is contended that the Legislature may prescribe the rules under which corporate mergers may be effected, and delegate to an administrative body the duty of ascertaining the facts with respect to each proposed merger, and of applying the rules prescribed to the facts ascertained, and authorize such administrative body to allow a proposed merger if it finds the existence of facts that bring it within the prescribed rules, and otherwise to disallow it.

In *State vs. Great Northern Ry. Co.*, 100 Minn., 445; 111 N. W., 289 (1907), a statute was before the court requiring that the approval of the State Commission be obtained to the increase of the capital stock of any railroad company. The statute was declared unconstitutional on grounds hereafter considered. The court, however, said:

"The Legislature has the undoubted right to enact statutes regulating the increase and dis-

position of their (railroad's) capital stock. In the exercise of this right it may pass a statute providing generally for what purpose and upon what terms, conditions and limitations an increase of capital stock may be made and may confer upon the commission the administrative duty of supervising any proposed increase of stock. It may also delegate to the commission the duty of finding the facts in each particular case, and authorize and require it, if it finds the existence of facts that bring the case within the statute, to allow the proposed increase; otherwise to refuse it."

It is true, that Chapter 19 of the Laws of 1913 does not in itself prescribe the rules under which corporate mergers may be effected.

It is, however, a supplement to the General Corporation Act and this act does prescribe the rules.

The General Corporation Act, then, and other pertinent statutes as, for illustration, Chapter 13 of the Laws of 1913 and Chapter 16 of the Laws of 1913, embody the legislative declaration of the rules governing corporate mergers. The rules thereby prescribed are those which, under Chapter 19 of the Laws of 1913, the board is called upon to apply to the facts found by it in each particular case, in granting or withholding its approval.

These acts define and limit the powers of corporations to merge. They likewise act in definition and limitation of the powers conferred upon the board.

So construed Chapter 19 of the Laws of 1913 involves no unconstitutional delegation of legislative power.

Such construction is fully justified by the following authorities.

In *Iowa L. Ins. Co. vs. Eastern Mut. Life Ins. Co.*, 64 N. J. L., 340 (1900), it was *held* that the statute providing that it shall not be lawful for any life in-

surance company to contract for reinsurance of its own risks, or to reinsure the risks of another company, unless two-thirds in number of the holders of the policies proposed to be reinsured shall assent thereto in writing; and that the contract for such reinsurance shall be utterly invalid *until it shall have been approved by the Secretary of State, which he shall do only after due inquiry and upon satisfactory evidence that the interests of the policyholders are fully protected, and that the proper consent has been given*—was not unconstitutional as attempting to delegate to the Secretary of State a legislative power.

The court, by Adams, J., said (346) :

“It becomes necessary, then, to examine the constitutional objection. The criticism is this—that the Legislature has attempted to delegate to the Secretary of State a legislative power. The brief submitted on behalf of the plaintiff in error further suggests, somewhat tentatively, that the power may be judicial. We think that it is neither legislative nor judicial, but that it is administrative.”

After pointing out the various duties which under the act the Secretary of State was called upon to perform as *ex officio* commissioner of insurance until the establishment of the Department of Banking and Insurance when his duties were devolved upon the Commissioner of Banking and Insurance, the court further said :

“What section 66 calls upon the commissioner to do is not to legislate by laying down a new rule, but to enforce a prescribed rule; not to adjudicate unless every exercise of judgment is called a judicial act, but to perform a duty of ascertainment; to determine, by an examination of values and mathematical relations, whether a safe financial situation exists and whether a certain document has been properly signed. * * *

To hold that the acts required of the Secretary of State by section 66 and similar enactments are anything but administrative, would be at variance with principle and authority. It would certainly paralyze the Department of Banking and Insurance."

In *West Jersey & Seashore R. Co. vs. Board of Public Utility Commissioners*, 89 Atl. Rep., 1017 (1914) the court passed upon section 18 (h) of Chapter 195 of the Laws of 1911 (the Public Utility Act) which provides that no public utility as therein defined shall "without the approval of the board sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part thereof; nor merge or consolidate its property, franchises, privileges or rights or any part thereof, with that of any other public utility as therein defined."

The court in its opinion by Trenchard, J., said:

"The Public Utility Act does not delegate to the board the determination whether the leasing of the road of one company to another shall be sanctioned, without prescribing a general rule by which such board shall be governed in reaching its determination. On the contrary the Legislature by the Public Utility Act has attached to the exercise of privileges and powers granted by it the condition that, in the exercise of such privileges and powers the determination of the board that the limitations and restrictions to which such privileges and powers are subject have not been exceeded, shall first be had. That it may lawfully do."

Re Watertown Gaslight Co., 127 App. Div., 462; 111 N. Y. Supp., 486.

In this case it appeared that statutes existed providing that "no corporation shall issue either stock or bonds except for money, labor done, or property actually received for the use and lawful purposes of

such corporations"; that stock or bonds shall not be issued by any corporation to be formed which is subject to the supervision of the gas commission, until the commission shall certify in writing as to the amount of stock or bonds reasonably required for the purposes of the corporation, and that an existing corporation shall not increase its capital stock or bonded indebtedness without the consent in writing of the gas commission; and that for the purposes of this provision the commission may take testimony and examine the books and papers of the corporation, and require verified statements from the officers thereof pertaining to the value of the property and franchises owned and operated by such corporation.

John M. Kellogg, *J.*, said (489) :

"Prior to the gas commission law the corporation itself was practically the judge of what bonds and stocks were required for the purposes of the company. Section 42 of the stock corporation law, which permitted the issue of stock for property and labor, provided that the stock should be considered full paid, and, in the absence of fraud in the transaction, the judgment of the directors as to the value of the property purchased was conclusive. The fact that the directors of the company might fix the value upon property turned into the company and paid for by stock was a prolific source of stock watering and of fictitious securities issued by the corporation. Section 12 of the gas commission law was intended to make the consent of the commission to the issue of new stock and bonds a certain check upon the directors and stockholders of such companies. While the gas commission law is silent as to what shall guide the commission in consenting to the issue of stock and bonds, except the general provision that it shall be reasonably required for the purposes of the company,

section 42 of the stock corporation law is a further guide which limits the issue for property purchased, labor done, or money supplied to the company. The gas commission, therefore, is charged with the duty, when its consent is asked for the issue of new stock or bonds, of determining whether such stock and bonds are to be issued for property, labor done, or money, and for the reasonable requirements of the company. The duties of the commission are administrative to enforce upon the companies the observance of the provisions of the law. The Legislature had the right to put such duty upon the commission, and to prohibit the issue of stock and bonds until the commission approved of such issue as being within the reasonable requirements of the company. With reference to new companies section 12 of the gas commission law prescribes the condition upon which the certificate may be issued—that is, that the stock and bonds are reasonably required for the purposes of the corporation—and I think, within the fair meaning of the section, the same provision applies to an increase of stock or bonds in case of an existing company, I think, therefore, the constitutionality of this provision of the gas commission law cannot be successfully assailed. Trustees of Saratoga Springs *vs.* Saratoga Gas, etc., Co., 122 App. Div., 203; 107 N. Y. Supp., 341, reversed, 191 N. Y., 123; 83 N. E., 693.”

State vs. Great Northern Ry. Co., 100 Minn., 445; 111 N. W., 289 (1907), referred to *supra*, does not run counter to these cases. The statute there before the court provided that no railway company should increase its capital stock save as it was allowed to do so by the Railroad and Warehouse Commission and further provided that if such commission allowed a proposed increase it should prescribe the manner in

which and the terms upon which the same should be made. At the time the statute was enacted railway companies were authorized to increase their capital stock, but there was no statute limiting the increase to any particular purpose, or prescribing the terms upon which the increase might be made. The statute before the court therefore involved an attempt to confer upon the commission law-making powers and not merely power of administration under an existing law.

II.

The statute under which the merger is proposed to be effected and the grounds for withholding approval.

1. The statute under which the proposed merger is to be effected is section 104 of the General Corporation Act, which reads as follows:

"Any two or more corporations organized or to be organized under any law or laws of this State for the purpose of carrying on any kind of business of the same or a similar nature may merge or consolidate into a single corporation, which may be either one of said merging or consolidating corporations, or a new corporation to be formed by means of such merger and consolidation."

The section contains a proviso excepting from its operation certain classes of corporations. This proviso is not pertinent to the matter under consideration.

The privilege to merge or consolidate accorded by this section is limited to corporations of this State organized for the purpose of carrying on any kind of business of the same or a similar nature.

This section was construed in *Colgate vs. United States Leather Co.*, 75 N. J. E., 229 (1908), where the court said: * * *

"It is plain that the power to merge two corporations is conferred only where they are organized for the purpose of carrying on business of the same or a similar nature. The purpose for which a company is organized is primarily to be sought and found in its charter or certificate of incorporation. Our corporation Acts of 1875 and 1896, while permitting the organization of companies to carry on many kinds of business, require that the certificate of incorporation shall state the 'objects for which the company is formed.' Gen. Stats., p. 912, sec. 11, p. 11; P. L. 1896, sec. 8, p. 111. This statement of the objects of the company is not only a limitation of the franchises that are derived by the corporators from the State, but is likewise a limitation of the purposes to which the corporators as between themselves have agreed that the joint capital shall be devoted."

The court comparing the articles of incorporation of the one company with that of the other found that the one conferred very extensive primary powers that were not at all within the letter or intendment of the other and therefore concluded that the companies involved were not organized for the purpose of carrying on business of the same or a similar nature.

That identify of declaration of purposes in the certificates of incorporation is not the only factor to be regarded in determining whether two corporations are organized for the purpose of carrying on business of the same or a similar nature is indicated by the following further extract from the opinion (240):

"If we were to look beyond the objects expressed in the respective certificates of incorporation, and deal with the purposes of the United States Leather Company and of the Central Leather Company respectively, as manifested by their actual course of business, it does not seem

to us that the case would be bettered for the proposed consideration. For, it appears, the purpose of those interested in the Central Company was simply to secure control of the United States Company and re-organize it in such fashion as to get rid of the limitations contained in its certificate of organization respecting the rights of preferred stockholders and the prohibition of mortgage indebtedness.

"But in the present case we do not need to go beyond the declaration of purposes as contained in the respective articles of association."

The question arises whether the American Malt Corporation and American Malting Company are organized for the purpose of carrying on any kind of business of the same or a similar nature.

Comparing the declaration of objects contained in the certificates of incorporation of the companies it appears that they are framed in almost identical language.

The certificate of the American Malt Corporation, as amended, however, includes the following provision which is not included in that of the American Malting Company:

"To acquire by purchase, subscription or otherwise, and to hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the shares of the corporate stock of, or any bonds, securities or other evidences of indebtedness created by American Malting Company, a corporation organized and existing under the Laws of the State of New Jersey; while owner of such shares of stock to exercise all rights of ownership, including the rights to vote thereon; and so long as the corporation shall hold the shares of stock or other securities of American Malting Company, to aid in any manner said American Malting Company, and to do any acts or things designed to protect,

preserve, improve or enhance the value of any of such shares of stock or other securities of said American Malting Company."

If in this connection it is suggested that under the statute the American Malting Company is vested with like power to acquire, hold, and dispose of its own shares of corporate stock, bonds, securities and other evidences of indebtedness, it may be answered that it cannot exercise the right to vote upon shares of its corporate stock acquired by it.

If we turn from the objects expressed in the respective certificates of incorporation to the purposes of the companies respectively as manifested by their actual course of business we find that the American Malt Corporation is in fact a "holding company"; that since its incorporation in 1906 it has from time to time acquired \$14,264,500 out of \$14,440,000 outstanding preferred stock of American Malting Company and \$13,082,400 out of \$13,400,000 outstanding common stock of American Malting Company, so that it owns 98 per cent. of the entire outstanding capital stock of American Malting Company.

It acquired this stock by issuing its own stock therefor, the exchange being made on the basis of \$62 par value of preferred stock of the American Malt Corporation for \$100 par value of the preferred stock of American Malting Company and \$44 par value of common stock of American Malt Corporation for \$100 par value of common stock of American Malting Company. No stock of the American Malt Corporation has been issued except to former holders of stock of American Malting Company.

It has no property or assets except the shares of stock of the American Malting Company, which it has acquired as stated.

It has not at any time been, and is not now, engaged in carrying on any business other than the acquisition of such shares.

The business for the purpose of carrying on which it was organized was that of obtaining control, through acquisition of ownership of shares of capital stock, of the American Malting Company, and to effect a reorganization through consolidation and a change in the amount of outstanding preferred stock from some fifteen million dollars to some nine million dollars, and in the rate of dividend upon such preferred stock from seven to six per cent.

The American Malting Company, on the other hand, has since its incorporation in 1897, been, and is now, engaged in the business of manufacturing, selling and dealing in malt and its by-products.

Whether viewed in the light of the declaration of objects in the respective certificates of incorporation or from the standpoint of purposes as manifested by the course of business of the companies respectively it cannot be said that they are organized for the purpose of carrying on business of the same or a similar nature.

The position so taken is not met by the suggestion that the object of the statutory provision limiting the power of corporate merger to corporations organized for the purpose of carrying on business of the same or similar nature, is merely to prevent stockholders who have taken shares on the understanding that they are engaged in one business, from being forced by merger into participation in a business of some different kind.

This is a mere incidental consequence and effect of the statutory provision.

The difficulty lies deeper.

The provision declares a general State policy and limits the franchises granted by the statute in which it is found.

Except for it, power to merge or consolidate would not exist.

The grant of power made by it is limited to certain corporations—those organized for the purpose of carrying on business of the same or a similar nature—it is not extended to others.

Riker & Son Co. vs. United Drug Co., 79 N. J. E., 580 (1911).

It is submitted that the proposed merger falls directly within the rule laid down in *Colgate vs. United States Leather Co.*, *supra*.

If the propositions advanced are sound, it appears that the proposed agreement of merger and consolidation is without the competency of the corporations and without warrant under the statute which the defendants-appellees are to apply and it further appears that the denial by the defendants-appellees of approval was justified.

2. Chapter 17 of the Laws of 1913 regulates in general the issuance of securities in merger or consolidation.

It amends section 109 of the general Corporation Act by striking therefrom the following provision:

“The consolidated corporation may purchase, acquire, hold and dispose of the stocks of other corporations of this State or elsewhere, and exercise in respect thereto all the powers of stockholders thereof.”

As amended the section now reads:

“When two or more corporations are merged or consolidated the consolidated corporation shall have power and authority to issue bonds or other obligations, negotiable or otherwise, and with or without coupons or interest certificates thereto attached, 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 effect such merger or consolidation; to secure the payment of

which bonds or obligations it shall be lawful to mortgage its corporate franchises, rights, privileges and property, real, personal and mixed; *provided*, such bonds shall not bear a greater rate of interest than six per centum per annum; 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 corporation in exchange or payment for their original shares, in the manner and on the terms specified in the agreement of merger or consolidation, which may fix the amount and provide for the issue of preferred stock based on the property or stock of the merging or consolidating corporation conveyed to the consolidated corporations, as well as upon money capital paid in."

It is submitted that sections 48 and 49 of the General Corporation Act lay down the fundamental rule with respect to the issuance of shares of capital stock by corporations organized under the act, and that shares of capital stock issued in a merger or consolidation under section 109 are subject to the fundamental rule prescribed by these two sections.

See (semble) *Strickland vs. National Salt Co.*, 76 Atl. Rep. 1048; same *vs. same*, 81 Atl. Rep. 828.

Section 48 declares that "nothing but money shall be considered as payment of any part of the capital stock of any corporation organized under this act, except as hereinafter provided in case of the purchase of property." * * *

Section 49, as amended by chapter 14 of the Laws of 1913, now provides:—

"(1) Any corporation formed under this act may purchase property, real and personal and the stock of any corporation necessary for its business, and issue stock to the amount of the value thereof in payment therefor, subject to the

provisions hereinafter set forth, and the stock so issued shall be full paid stock, and not liable to any further call; and said corporation may also issue stock for the amount it actually pays for labor performed.

*“Provided, that when property is purchased the purchasing corporation must receive in property or stock what the same is reasonably worth at a fair bona fide valuation; and provided further, that no fictitious stock shall be issued; that no stock shall be issued for profits not yet earned, but only anticipated; and provided further, that when stock is issued on the basis of stock of any other corporation it may purchase, no stock shall be issued thereon for an amount greater than the sum it actually pays for such stock in cash or its equivalent; and provided further, that the property purchased or the property owned by the corporation whose stock is purchased shall be cognate in character and use to the property used or contemplated to be used by the purchasing corporation in the direct conduct of its own proper business; and in all cases when stock is to be issued for property purchased, or for the stock of other corporations purchased, a statement in writing, signed by the directors of the purchasing company or by a majority of them, shall be filed in the office of the Secretary of State showing what property has been purchased and what stock of any corporation has been purchased, and the amount actually paid therefor.” * * **

Sections 48 and 49 (as they stood before amendment) were construed in *Donald vs. American Smelting & Refining Co.*, 62 N. J. E. 729, where the court said:

“The meaning of section 48 is not questionable, that money must equal the face value of the

stock. The language of section 49 is even more explicit; the corporation may issue stock to the amount of the value of the property. The value of the property in the one case, just as the value of the money in the other, must at least equal the face value of the stock."

Section 49 before its amendment provided that when stock had once been issued for property purchased, the judgment of the directors of the corporation as to the value of the property purchased should be conclusive, in the absence of actual fraud in the transaction.

This provision has been eliminated in amendment.

The fact that the provision made the judgment of the directors after issue of the capital stock conclusive only as between the shareholders is pointed out in:

Receiver vs. Heppenheimer, 69 N. J. E., 37 (1905) and *Holcombe vs. Trenton White City*, 80 N. J. E. 122 (1912).

Any construction of section 109 which takes the issuance of capital stock thereunder out of the operation of sections 48 and 49 leads to absurd results.

If sections 48 and 49 do not apply, two corporations may be organized. Each of them may issue capital stock in gross violation of the provisions of sections 48 and 49, which are carefully framed to prevent over-capitalization and the evils which flow therefrom.

They may then be merged or consolidated and the consolidated corporation, to which sections 48 and 49 do not apply, may issue its capital stock in the aggregate amount of the outstanding capital stock of the merging or consolidating corporations so issued in violation of the statute.

The over-capitalization of the two corporations originally effected in violation of the statute will then be continued, with the sanction of the same statute, in the capitalization of the corporation in which they are merged or consolidated.

It is hardly conceivable that the legislature after its careful declaration in sections 48 and 49 of the rule designed to prevent over-capitalization deliberately abandoned the rule in section 109 and authorized the issue, in disregard thereof, of capital stock in merger and consolidation.

Section 49 was clearly applicable to the American Malt Corporation in its acquisition in the past of the shares of the capital stock of the American Malting Company through the issue of shares of its own capital stock.

That in such acquisition the provisions of section 49 were violated and that the shares of stock of the American Malting Company so purchased, were not in fact equal in value to the par of the shares of the capital stock of the American Malt Corporation is made clear by the report of the defendants-appellees.

That the shares of the capital stock of the American Malting Company for which shares of the capital stock of the American Malt Corporation are to be issued under the agreement of merger and consolidation are not equal in value to the par of the shares to be issued therefor is likewise established by the defendant-appellees' report.

That the property of the American Malting Company will not equal in value the face of the securities by which it will be represented after the merger or consolidation is conclusively demonstrated by defendants-appellees' report.

It is no answer to the position so taken to say that it is not contended by the prosecutors-appellants that under section 109 the merged company may issue stock in *excess* of the capital of the merging companies.

Either the exercise of the power conferred by the section is limited by the provisions of sections 48 and 49 or the merging corporations are left in its exercise "to determine for themselves how much stock they

will issue or how small a payment they will accept therefor."

The words of the section *standing alone* confer upon the merged corporation power to issue bonds and 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 effect such merger, and to 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, in the manner and on the terms specified in the agreement of merger."

Unless the grant of power so made is limited by sections 48 and 49 it is without limit except as the restriction "to such an amount as may be necessary" (a matter then wholly within the unrestricted control of the merging corporations) may be regarded as a limitation.

The words of the section do not indicate an intent to make a general grant of power broader than that conferred by sections 48 and 49; they do not indicate that in fixing "the amount that may be necessary" the fundamental limitations imposed by sections 48 and 49 shall be inoperative.

The words are in no wise indicative of an intent to remove such limitations even to the extent of permitting the stock of the merged corporation to *equal* the stock of the merging companies where the issue thereof on such basis would otherwise be violative of sections 48 and 49.

To write into the section a provision limiting the stock of the merged corporation to an amount *equal* to the stock of the merging companies would require the exercise by the court of a purely legislative function.

The section grants power to issue stock "to the amount that may be necessary." Either the legislature has made "the amount necessary" in the judgment of the contracting parties, the only limitation upon the exercise of the power conferred or it has imposed upon the power granted the limitations prescribed by it in sections 48 and 49.

Nor does it meet the position so taken to say that the section provides that the stock of the merged corporation may be "*based on*" the stock of the merging companies.

The section contains no such provision.

It does provide that the agreement of merger or consolidation, "may fix the amount and provide for the issue of *preferred stock* based on the property or stock of the merging or consolidating corporations conveyed to the consolidated corporations, as well as upon money capital paid in."

This provision, however, is confined to *preferred stock only*. It was designed to work a modification of the provisions of section 18 of the General Corporation Act which confers power to create two or more kinds of stock *provided* that the classes, designations, preferences, voting powers, or restrictions or qualifications thereof "be stated and expressed in the certificate of incorporation or in any certificate or amendment thereof."

The provision of section 109 permits the designation to be made in the agreement of merger.

Section 18 further provides "that at no time shall the total amount of the preferred stocks issued and outstanding exceed two-thirds of the capital stock paid in for cash or property."

Section 109, however, permits the preferred stock issued by the merged corporation to "*be based*" on either "the *property* or *stock* of the merging or consolidating corporations conveyed to the consolidated corporations, as well as upon money capital paid in."

Under this section the issue of preferred stock is not confined to an amount not exceeding two-thirds of the capital stock paid for in cash or property, but such issue may be *based on*, that is to say, made to the extent of two-thirds of the property conveyed to the merged company, and as well the money capital paid in.

The construction of this provision of section 109, so suggested gives full effect to the words "*based on*" used therein.

If the positions here taken are well founded it appears that the proposed merger and consolidation violates in the respects pointed out the statutes governing the merging corporations which the defendants-appellees are called upon to apply.

3. Section 18 of the General Corporation Act as modified by section 109 as before indicated, is applicable to the merged corporation.

That the effect of section 109 is not to render section 18 wholly inapplicable to a corporation created through merger is so apparent as not to justify extended argument.

Section 109 contains no limitation as to rate of dividend, time of payment thereof, nor prescription of the rights and liabilities of the holders thereof.

Such provisions are found in section 18.

Clearly it was not the legislative intent in the enactment of section 109 to confer power upon the merged corporation to issue preferred stock without limitation as to rate of dividend and time of payment and without definition of the rights and liabilities of the holders thereof.

The proof before the defendants-appellees indicated that the provision of section 18 as to the ratio of preferred stock to common stock had been violated by the merging corporations, and that the provision of section 109 taken in conjunction with section 18, as before construed, as to the ratio of preferred stock to common stock or property to be conveyed to the

merged corporation would be further violated by the proposed merger.

In this situation the defendants-appellees were justified in withholding approval except as satisfactory proof was adduced that violation of these statutory provisions governing the merged corporation, which the defendants-appellees were called upon to apply, was not involved.

III.

The jurisdiction of the board to consider the fairness of the proposed plan of merger.

The adjudications construing and applying the various statutes which contain the rules governing corporate mergers form part of the body of law which the defendants-appellees are to administer.

Insofar as these adjudications lay down rules governing the terms of the merger as between shareholders of the corporations affected and holding such terms to a standard which involves no unfair impairment of legal or equitable rights, I submit that, in approving or disapproving, the defendant-appellees may take these adjudications into account.

Surely they are not required to grant approval to a proposed plan of merger which contains terms which violate the rights of non-assenting shareholders and which would meet the condemnation of the courts.

Such a course does not involve the exercise of a judicial power which may not be conferred upon an administrative body. It involves no adjudication of the rights of the parties.

An order approving a proposed merger will not prevent recourse to the Court of Chancery.

An order disapproving is subject to review and control by the courts.

Consequently no constitutional prerogative of any court is invaded.

Nor is any unconstitutional conferring of judicial power upon an administrative body involved since the consideration of the question of the fairness of the proposed agreement of merger is a mere step in the procedure of an administrative body exercising an administrative function.

IV.

The ground which I have taken in support of the constitutionality of the statute is somewhat narrower than that apparently taken by the defendants-appellees in their report, and by the court below.

Whether the narrower or the broader view is adopted the result is to sustain the action of the defendants-appellees.

In support of the broader ground, I ask consideration of the following case:

In Matter of New York Elevated R. R. Co., 70 N. Y., 327 (1877), the court sustained a statute conferring upon commissioners appointed as specified in the act, power to determine upon the necessity of such railways, to fix the routes and prescribe the plan of their construction, and *held*, that the statute conferred no legislative power upon the commissioners.

Earl, J., said:

"It is objected that the act is unconstitutional, because it delegates legislative power to the Mayor's commissioners. The object of the act was to provide for the construction, &c., of elevated and underground railways. It confers upon the commissioners the power to determine upon the necessity of such railways, to fix the routes upon which they may be constructed, to prescribe the plan of their construction, and to superintend the organization of companies for their construction. It provides for the personal

liability of the stockholders in such companies, and confers upon them the right to take and hold real estate, and provides particularly how they may acquire the same; it specifies the powers which they shall possess, and the duties and obligations which shall rest upon them. The act rests upon the legislative will, and in no way depends for its vitality upon the action of the commissioners. Corporations organized under the act derive their franchises from the Legislature, and in no proper sense from the commissioners. The commissioners perform no legislative acts; they enact no law; they simply perform administrative acts in carrying the law into effect and applying it. The Legislature is required by the Constitution to pass general laws for the formation of corporations (Art. 3, No. 18, Art. 8) and it has passed general laws for the formation of all kinds of corporations.

In such cases, it does not directly confer corporate franchises: it simply provides the mode in which such franchises may be acquired by those desiring them. Ordinarily, individuals desiring to incorporate under a general law determine for themselves the necessity of a corporation, their corporate name, what business they will carry on, where they will transact it, the amount of their capital and the duration of their corporation. In making such determination it was never supposed that they were engaged in acts of legislation, or that they conferred upon themselves corporate franchises. They simply act under, apply and carry into effect a law in reference to which legislative power has been properly evoked. *But*, suppose, instead of leaving the determination of these matters to individuals, the law provides a tribunal to make the determination for the individuals, is there any more delegation of legislative power to the tribunal than to

the individual, under the general laws as they are now usually framed? Cannot the Legislature confer upon a commission the power upon the application of individuals, to make the same determination for the individuals which they could make for themselves? The proper answers to these questions are not doubtful. The arguments made to show that the Legislature was not competent to devolve upon these commissioners the powers given to them in this act, if sound and logically applied, would nullify every general law found upon our statute books for the formation of corporations, and thus nullify the Constitution itself, which commands the passage of such general laws.

"The Legislature could not in a general law determine the necessity of a railway in any particular locality, nor the routes upon which it was to be constructed, nor the amount of capital, or the name which it was to assume, and there is nothing in any constitutional requirement which imposes upon it the duty in a general law to provide the place of construction for any railroad. It may provide the machinery for the determination of these matters, and what that machinery shall be must depend upon its will. It may authorize these determinations to be made by the individuals who desire to incorporate, by the people resident in the locality to be affected, or by the municipal or county government, and it does not thereby abdicate in any proper sense any part of its legislative power."

The judgment below should be affirmed.

Respectfully submitted,

FRANK H. SOMMER,

*Attorney for and of Counsel with
Defendants-Appellees.*

June Term, 1914.

New Jersey Court of Errors and Appeals.

AMERICAN MALT CORPORATION
and AMERICAN MALTING COM-
PANY, corporations,
Prosecutors-Appellants,

against

BOARD OF PUBLIC UTILITY COM-
MISSIONERS *et al.*,
Respondents-Appellees.

On Certiorari.

Brief of Samuel H. Ordway, a preferred stockholder of American Malting Co., objecting to the merger and intervening as a respondent, on his own behalf.

This intervening respondent takes advantage of the permission given him to intervene as a respondent in this proceeding to submit the following brief memorandum of his views on certain points in the case. He will not attempt, however, to cover all of the points involved, being entirely satisfied to leave those which he does not discuss in the hands of the counsel for the Board of Public Utility Commissioners.

He owns twenty-five shares of the preferred stock of American Malting Company, and also represents his brother, who owns twenty-five shares also. This

stock was bought at par, for cash, more than fifteen years ago, and has been held continuously ever since by respondent's father and by respondent and his brother. Counsel for the prosecutors have courteously conceded respondent's good faith in the presentation of his objections (Case on Appeal, pages 81, 82, 89).

I.

The constitutionality of the statute.

I shall not undertake to argue this question, as it is amply covered by Mr. Sommer, counsel for the Board of Public Utility Commissioners. I should like, however, to observe that if, as asserted by the prosecutors on page 9 of their brief below, "the distinction between a valid and an invalid delegation of authority is whether the legislature has sufficiently indicated the rule or principle which is to guide the delegate in exercising the authority vested in him," then a fair construction of the statute in question, Chapter 19 of the Laws of 1913, shows that the Legislature intended that the rule or principle which is to guide the Board of Public Utility Commissioners in approving or disapproving any merger of corporations is obedience to the rules and principles laid down by the General Corporation Law of New Jersey generally, and especially in regard to the merger of corporations, as those rules and principles have been construed by the courts of New Jersey. In other words, the fair and reasonable construction of this act is that in determining whether or not to approve any merger of corporations the Board of Public Utility Commissioners must be governed by the express provisions of the Corporation Law of New Jersey as construed by the New Jersey courts.

It will never be held that an act of the Legislature is unconstitutional if a reasonable construction can be given it under which it is constitutional. The construction suggested above is entirely reasonable and entirely constitutional, and it is unnecessary to assume, as the prosecutors do, that the Legislature intended to give a free hand and uncontrolled discretion to the Board of Public Utility Commissioners in approving or disapproving of any merger.

II.

These two corporations cannot properly be merged under the provisions of the New Jersey Corporation Law.

The Corporation Law of New Jersey, Section 104, provides that "Any two or more corporations organized or to be organized under any law or statute of this State for the purpose of carrying on any kind of business of the same or a similar nature may merge or consolidate into a single corporation." The prosecutors claim that because the objects of these two corporations as stated in their certificates of incorporation are substantially identical, they come within this provision of the statute, and may merge. I submit, on the other hand, that this is not correct.

It is true that the objects of the two corporations as stated in their certificates of incorporation are substantially the same, except that American Malt Corporation has the power and right to hold the stock of American Malting Company and to vote thereon. As a matter of fact, the record shows that the latter is the only power that the American Malt Corporation has ever exercised or is exercising.

ing to-day. It does not carry on any kind of business whatever in the ordinary sense of the term. It certainly does not carry on any kind of business of the same or similar nature as the kind of business carried on by American Malting Company. It fairly appears from the record that American Malt Corporation was not organized for the purpose of carrying on any kind of business of the same or similar nature as American Malting Company, but was organized solely for the purpose of being a holding corporation. It is possible that it may have been in the minds of the organizers that if at some future time they could succeed in forcing all of the stockholders of American Malting Company to exchange their stock for stock of American Malt Corporation, so that American Malt Corporation would become the owner of the entire stock of American Malting Company, then American Malt Corporation might perhaps supersede American Malting Company and begin to exercise the other powers conferred by its charter, but that time has not arrived, and to-day it is a holding company pure and simple.

I submit that it was never intended that the New Jersey law as to the merger of corporations should apply to such a case as this. To permit such a merger is to permit the use of the law to force minority stockholders into accepting whatever stock in the new corporation the controlling element is willing to give them, or to force them to sell their stock for its appraised value. The true object of the merger law, I submit, is to permit under proper conditions the combination of two corporations actually carrying on the same kind of business, and not by its application to the case of an active corporation and a mere form or shell to allow the stockholders of the former to be compelled to accept something different from what they bought and wish to retain. If this is permitted it will al-

ways be possible for the parties controlling a corporation and wishing to get rid of minority stockholders to organize a holding company and then merge the two on such terms as shall be satisfactory to them, however unsatisfactory such terms may be to the minority. I submit that this is an abuse of the provisions of the merger law which should not be approved. It is taking advantage of provisions of the law intended for another purpose to force stockholders to accept in exchange for their stock something which they do not regard as equally valuable, or else to sell their stock at its appraised value, objects which could not be lawfully accomplished in any other way.

III.

The over - capitalization of the merged corporation.

I shall leave the argument of this point to counsel for the Public Utility Commissioners.

IV.

The proposed agreement of merger is not fair and equitable.

I submit that the Board of Public Utility Commissioners not only had the right to consider whether the proposed agreement of merger was fair and equitable to the preferred stockholders, but was bound to consider that question, and if it found that the proposed agreement was not fair and equitable was bound to disapprove of it.

The counsel for the prosecutors say that they cannot find any such provision in the Corporation

Law or other statutes of New Jersey. While it is true that no such provision appears in express words, nevertheless for many years the courts of New Jersey have construed the merger provisions of the Corporation Law of New Jersey as containing such a provision, and have enjoined proposed mergers at the suit of stockholders where the Court found that the proposed merger agreement was unfair and inequitable. In the case of *Colgate vs. U. S. Leather Company*, 73 N. J. Equity, 72, Vice-Chancellor EMERY said:

“My conclusion is that the directors are
 “bound under the Consolidation Act to pro-
 “pose an agreement which does not unfairly
 “or inequitably impair the legal or equitable
 “right of any preferred stockholder, and that
 “such stockholder cannot be required to exer-
 “cise any option of surrendering his stock on
 “compensation until he has had an opportunity
 “of joining in the consolidation under terms
 “and conditions which as to him are legal and
 “equitable.”

This has long been the construction of the law. It will be assumed that this construction was known to the Legislature of 1913, and it must, therefore, be assumed that in adopting Chapter 19 of the Laws of 1913 the Legislature intended that the approval of any merger by the Board of Public Utility Commissioners should be based not only upon that Board's finding that the specific requirements of the statute had been followed, but also that the implied provisions of the statute as found and stated by the courts of New Jersey as being part of the law had also been followed.

The proposed merger agreement is unfair and inequitable to the preferred stockholders in three respects:

(1) The proposed agreement is unfair and inequitable to the preferred stockholders of American

Malting Company in that it reduces their holdings of preferred stock from \$100 par value for each share to \$62 par value for each share, and reduces the dividends upon their stock from 7% to 6%, whereas, it only reduces the holdings of common stockholders from \$100 par value for each share to \$44 for each share. In case of dissolution the preferred stockholders of the consolidated company cannot receive more than the par value of their stock with accrued dividends. The Consolidation therefore reduces the value of their holdings materially. On the other hand, in case of dissolution the common stock is not restricted to receiving its par value—it is entitled to receive its pro rata share of the assets remaining after the payment of debts and of the par value of and accrued dividends on the preferred stock, even though this may be much more than the par value of the common stock. It would make no difference how much the common stock was cut down on the merger, provided each common stockholder of the old company received his pro rata share of the common stock of the new company. The result to him would be exactly the same whether he received \$100 par value of the common stock of the new Company for each share of his stock of the old company, or whether he received only \$1 par value of the common stock of the new company for each share of his stock in the old company, provided that the other common stockholders were cut down proportionately. Under this proposed merger agreement, therefore, the preferred stockholder is compelled to surrender a substantial part of the value of his holdings, whereas the common stockholder is not required to surrender anything of real value. This is, I submit, unreasonable and unjust to the preferred stockholders, and justifies a refusal to approve of the merger agreement.

It is true that the merger agreement contemplates that the new preferred stock shall on dissolution be preferred as to principal, whereas the old preferred stock is simply preferred as to dividends, but I submit that this is not important at this time, when no dissolution is contemplated. The record shows that in no year since the American Malting Company was organized has it earned the full dividends (7%) upon its preferred stock. It may fairly be inferred from the record, and is claimed by the prosecutors, that the old company is never likely to earn the full dividends on its preferred stock. It follows, therefore, that the common stock of the old Company not only never has earned any dividends but is never likely to, and therefore, unless in case of dissolution which is not contemplated, has no substantial value. In fact, counsel for the prosecutors have stated in this proceeding that this merger gives the common stockholder "the only chance he has got" (Case, page 164, lines 30, 31).

This should have been recognized in any fair agreement of merger, and the preferred stockholders should have been given a larger interest in the new Company.

(2) The proposed agreement is unfair and inequitable to the preferred stockholders in that the provisions of Article 4 thereof do not adequately protect the rights of said preferred stockholders in the accrued and unpaid cumulative dividends on their preferred stock, amounting at the present time to more than eighty per cent. (80%). Said Article 4 provides that the preferred stockholders may reserve and retain any lawful rights whether past, present or future, which they may have to demand or receive from American Malting Company or the consolidated Corporation any money value or thing by reason of any dividends accrued

and unpaid upon their shares in or by reason of the surplus or surplus earnings of American Malting Company accumulated *at the time when the said agreement takes effect, or at any time theretofore*. But it does not provide, as it ought to provide, that the preferred stockholders shall be allowed to reserve and retain their rights to demand and receive the present accrued and unpaid dividends upon their stock out of any *future* surplus or surplus earnings of American Malting Company and of the consolidated Corporation. The provisions of the Charter of American Malting Company and of the preferred stock certificates engage to protect the preferred stockholders in their right to cumulative 7% dividends upon their stock whenever earned. This right the preferred stockholders are entitled to have preserved until such accumulated dividends are paid in full, not only as to past or present surplus of American Malting Company, but as to future surplus earnings of American Malting Company, and of the consolidated Corporation of which it is proposed that it will henceforward form a part. Not to protect and preserve this right of the preferred stockholders of American Malting Company is unjust to them, and justifies a refusal to approve of the proposed merger.

It may be claimed that the proposed agreement in this case follows the form prescribed for the merger agreement in the *U. S. Leather* case, *supra*. I have carefully examined the record in *Colgate vs. U. S. Leather Company*, and the briefs of all parties, and find that the point which I now make was not urged or even suggested in that case, and therefore the form prescribed in that case cannot be deemed a controlling precedent in this case. It certainly was not passed upon in this court (75 N. J. Equity, 229).

(3) The proposed agreement is unjust and inequitable to all the stockholders in that it does not

protect and preserve their right to hold the officers and directors of American Malting Company personally liable for unearned dividends illegally paid in the past.

When I first objected to the proposed merger I assumed that the balance sheet of the American Malting Company was honest and to be relied upon, and that the Company had the assets which it claimed to have. If that were so it followed that it was unreasonable to reduce the stock of the preferred stockholders to any extent whatever. In order to meet this point the prosecutors offered evidence to show that the balance sheet of the American Malting Company was not correct or to be relied upon, and that the assets of the American Malting Company were not worth anything like the amounts at which they were carried on their books, or at which they were stated in their balance sheet. They offered evidence to show that there had been not only an over-valuation of their assets in the beginning, but also a large depreciation in the value thereof since, and that they had sold plants or other property of the American Malting Company for less than the amount at which such plants or property had been carried on the books of the corporation. In view of this evidence, I submit that the dividends, amounting to 4% or 5% per annum, which have been paid during the last few years, have been unearned dividends, and have been illegally paid, and the officers and directors of the Company can be compelled to repay the same. These losses and the depreciation which the prosecutors have proved amount not only to an impairment of capital, but to an actual loss in the years in which depreciation should have been charged and in which the losses upon the plants or other property which were sold were established, and should have been deducted from the apparent earnings of those years, with a result that there was a

loss rather than a profit upon the business of each year. In other words, I submit that if the corporations claims that its assets are worth less than the amount at which they are carried on the balance sheets, and this is due either to depreciation or to sales at lower figures than the book values, such losses should have been charged against the ordinary operating profits of the business in each year, with the result that there have been no profits in any year from which dividends could be declared.

Park vs. Grant Locomotive Works, 40 N. J. Eq., 114.

Whittaker vs. Amwell Nat. Bank, 52 N. J. Eq., 400.

Goodnow vs. Amer. Writing Paper Co., 73 N. J. Eq., 692.

If this be so, then the American Malting Company has declared dividends out of unearned profits, and in that case the stockholders have a cause of action against the Company and its directors to recover for the benefit of the Company the amount of such dividends. This is a right of which the stockholders should not be deprived by a merger with some other corporation. If this proposed merger goes through the stockholders of American Malting Company will cease to be such, and will necessarily lose any right that they may have to recover from American Malting Company and its directors dividends improperly paid.

If any merger of these two corporations is legal, I submit that it should be conditioned upon the preservation to the stockholders of American Malting Company of any rights which they may have at the time of the merger to bring suit against the old Company, its officers and directors, to recover for the benefit of the Company, and therefore for their own benefit, dividends improperly paid in the past.

V.

**The judgment appealed from should
be affirmed.**

Respectfully submitted,

SAMUEL H. ORDWAY,
Intervening Respondent.

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New Jersey Supreme Court.

AMERICAN MALT CORPORATION

et al.,

Prosecutors,

VS.

BOARD OF PUBLIC UTILITY COM-

MISSIONERS *et al.*,

Respondents.

On Certiorari.
Notice of Appeal.

10

To FRANK H. SOMMER, Esq., Attorney of the Board
of Public Utility Commissioners; and

SAMUEL H. ORDWAY, Esq., Attorney *pro se.*

20

PLEASE TAKE NOTICE that the prosecutors appeal
from the whole of the judgment entered in this
cause on the following grounds:

(1) Because said judgment was rendered against
the prosecutors and in favor of the respondents
when it should have been rendered in favor of the
prosecutors and against the respondents.

(2) Because the said judgment is contrary to 30
the law of the land.

(3) Because the Board of Public Utility Com-
missioners had no authority in law to make the or-
der which by the said judgment is affirmed.

(4) Because the act entitled "A further supple-
ment to an act entitled 'An act concerning corpora-
tions (Revision of 1896)' approved April 21, 1896,"
approved February 19, 1913, is unconstitutional 40

B

and void for the reason that its object is not expressed in its title.

(5) Because the act entitled "A further supplement to an act entitled 'An Act concerning corporations (Revision of 1896)' approved April 21, 1896," approved February 19, 1913, is unconstitutional and void for the reason that it is in violation of the constitutional provision that no act shall be passed which shall provide that any existing law or any part thereof shall be made or deemed a part
10 of the act, or which shall enact that any existing law or any part thereof shall be applicable except by inserting it in such act.

(6) Because the act entitled "A further supplement to an act entitled 'An act concerning corporations (Revision of 1896)' approved April 21, 1896," approved February 19, 1913, is unconstitutional and void for the reason that it delegates legislative
20 powers.

(7) Because the order of the said Board of Public Utility Commissioners affirmed by the said judgment is in violation of the statute entitled "A further supplement to an act entitled 'An act concerning corporations (Revision of 1896)' approved April 21, 1896," approved February 19, 1913.

(8) Because the order affirmed by said judgment is based upon findings of fact and reasons which do
30 not concern matters within the jurisdiction of the said Board of Public Utility Commissioners.

(9) Because the order affirmed by said judgment is illegal and void and contrary to the statutes in such case made and provided.

Yours respectfully,
LINDABURY, DEPUE & FAULKS,
Attorneys of Prosecutors.

40 Dated June 4, 1914.

Writ of Certiorari.

New Jersey Supreme Court.

AMERICAN MALT CORPORATION
and AMERICAN MALTING COM-
PANY,

Prosecutors,

vs.

BOARD OF PUBLIC UTILITY COM-
MISSIONERS,

Defendant.

10

20

THE STATE OF NEW JERSEY to the BOARD OF PUBLIC UTILITY COMMISSIONERS AND ALFRED [L. S.] N. BARBER, Secretary of said Board, GREETING: We being willing for certain reasons to be certified of a certain order made by the said Board of Public Utility Commissioners on or about the twenty-seventh day of February, nineteen hundred and fourteen, dismissing the 30 petition of the American Malt Corporation and the American Malting Company, corporations organized and existing under and by virtue of the laws of the State of New Jersey, praying for the approval in writing of said Board of Public Utility Commissioners of a certain agreement of merger and consolidation, dated July 23, 1913, duly entered into between said corporations, WE DO COMMAND YOU that the said order so made by 40

Writ of Certiorari.

the Board of Public Utility Commissioners, together with the petition, evidence and all other things touching and concerning the same, as fully and entirely as before you they remain, to our Justices of our Supreme Court of Judicature, at Trenton, on the ninth day of April, 1914, you CERTIFY AND SEND, together with this writ, that therein may be done what of right and according
 10 to the laws of this State should be done.

WITNESS WILLIAM S. GUMMERE, Esq., Chief Justice of our Supreme Court at Trenton, this 23rd day of March, A. D. nineteen hundred and fourteen.

WM. C. GEBHARDT,
Clerk.

20 LINDABURY, DEPUE & FAULKS,
Attorneys.

A true copy

WM. C. GEBHARDT,
Clerk.

30

40

NEW JERSEY SUPREME COURT.

AMERICAN MALT CORPORATION
and AMERICAN MALTING COM-
PANY, corporations,

Prosecutors,

vs.

BOARD OF PUBLIC UTILITY COM-
MISSIONERS,
Defendant.

On Certiorari.
Reasons.

10

The American Malt Corporation and American Malting Company, prosecutors in the above-entitled cause, by Lindabury, Depue & Faulks, their attorneys, come and pray that the order of the Board of Public Utility Commissioners dated February 27, 1914, dismissing the petition of the said American Malt Corporation and the said American Malting Company praying for the approval in writing of the said Board of the consolidation agreement entered into between the said American Malt Corporation and the said American Malting Company, bearing date July 23, 1913, may be reversed, set aside and for nothing holden for the following reasons, namely: 1. Because the Board of Public Utility Commissioners had no authority in law to make the said order. 2. Because the act entitled "A further supplement to an act entitled 'An act concerning corporations (Revision of 1896)' approved April 21, 1896", approved February 19, 1913, is unconstitutional and void for the reason that its object is not expressed in its title. 3. Because the act entitled "A further supplement to an act entitled 'An act concerning corporations (Revision of 1896)' approved Feb-

Reasons.

- ruary 19, 1913, is unconstitutional and void for the reason that it is in violation of the constitutional provision that no act shall be passed which shall provide that any existing law or any part thereof shall be made or deemed a part of the act, or which shall enact that any existing law or any part thereof shall be applicable except by inserting it in such act. 4. Because the act entitled
- 10 "A further supplement to an act entitled 'An act concerning corporations (Revision of 1896)' approved April twenty-first, One thousand eight hundred and ninety-six" approved February 19, 1913, is unconstitutional and void for the reason that it delegates legislative powers. 5. Because the
- 20 said order is in violation of the statute entitled "A further supplement to an act entitled 'An act concerning corporations (Revision of 1896)' approved April twenty-first, One thousand eight hundred and ninety-six", approved February 19, 1913. 6. Because said order is based upon findings of fact and reasons which do not concern matters within the jurisdiction of the said Board of Public Utility Commissioners. 7. Because the said order is illegal and void and contrary to the statutes in such case made and provided.

Dated April 16, 1914.

30

LINDABURY, DEPUE & FAULKS,
Attorneys of Prosecutors.

NEW JERSEY SUPREME COURT

AMERICAN MALT CORPORATION
and AMERICAN MALTING COM-
PANY,

Prosecutors,

vs.

BOARD OF PUBLIC UTILITY COM-
MISSIONERS,
Defendant.

On Certiorari
return of writ.

10

TO THE HONORABLE THE JUSTICES OF THE SUPREME
COURT OF JUDICATURE OF NEW JERSEY:

The Board of Public Utility Commissioners herewith sends to the Supreme Court of Judicature of the State of New Jersey a certain order made 20 by said Board of twenty-seventh day of February, nineteen hundred and fourteen together with the record and proceedings before said Board, and all things touching and concerning the same, as fully and entirely as before said Board they remain, as it is within commanded.

IN WITNESS WHEREOF the seal of said Board is hereto affixed and certified by the subscriber.

30

ALFRED N. BARBER,
Secretary of the
Board of Public Utility
Commissioners.

[SEAL.]

STATE OF NEW JERSEY.

BOARD OF PUBLIC UTILITY
COMMISSIONERS.

10 IN THE MATTER OF THE APPLICATION OF
AMERICAN MALT CORPORATION AND
AMERICAN MALTING COMPANY FOR
APPROVAL OF AGREEMENT OF MER-
GER AND CONSOLIDATION.

REPORT AND ORDER.

February 27th, 1914.

20 IN THE MATTER OF THE APPLICATION OF
AMERICAN MALT CORPORATION AND
AMERICAN MALTING COMPANY FOR
APPROVAL OF AGREEMENT OF MER-
GER AND CONSOLIDATION.

REPORT.

FREDERICK J. FAULKS, Esq. (of Lindabury,
Depue & Faulks), with whom was SILAS
W. HOWLAND, Esq., of the New York Bar,
for petitioners.

30 SAMUEL H. ORDWAY, Esq., of the New York
Bar, for objectors.

Application was made by the American Malt
Corporation and the American Malting Company,
both organized under the general corporation act of
the State of New Jersey, for the approval in writing
of this Board, of a certain agreement of merger and
consolidation, dated July 23d, 1913, duly entered
40 into between the said corporations.

Report and Order.

The petition was filed September 16th, 1913. Objection was filed by Samuel H. Ordway, for himself and another stockholder, on September 27th, 1913. Later objection was made by another stockholder.

Hearings were held on September 30th, October 10th, 1913, and January 6th, 1914.

The statute (Chapter 19, Laws of 1913), making 10 the written approval of this Board a prerequisite to any merger of corporations is silent as to the rule or rules which should govern the Board in granting or withholding approval in such cases. No certain inference can be drawn from the silence of the statute in this particular, as compared with the express direction of the Public Utility Act (Ch. 195, P. L. 1911), regarding the Board's approval of proposed security issues by public utilities. From the fact, however, that Chapter 19 20 of the Laws of 1913 was passed at or about the same time as certain other statutes notably Chapters 13, 14, 15, 16, 17 and 18, which aim at certain common purposes of corporate regulation, it might perhaps be inferred that the Board's action upon mergers submitted for its approval should be in consonance with the public policy indicated in this group of statutes. In general, therefore, the Board is of opinion that, inasmuch as formal approval by 30 a State tribunal is now, of necessity, a requirement in the case of every merger, the company resulting from such merger may properly be required to show at the time of merger, (1) assets behind its securities in amount sufficient to conform with the requirements imposed by the State upon companies newly incorporating under its laws; (2) that such a merger must not by any of its terms subject any security holder in any of the consolidating or merg- 40

Report and Order.

ing companies to an unfair or inequitable condition or arrangement; (3) that in the carrying out of such merger it must be affirmatively shown that each and every statutory requirement applicable in the premises has been complied with.

Has the American Malt Corporation shown that, upon approval of this agreement for merger and consolidation, it will have assets commensurate with its capital stock of fifteen million dollars?

Admittedly, the American Malt Corporation at present has no property or assets (omitting a minor item of some \$41,000) except the shares of stock in the American Malting Company. Of these shares the American Malt Corporation owns one hundred and forty-two thousand six hundred and forty-five shares of the preferred stock and one hundred and thirty thousand eight hundred and twenty-four shares of the common stock. Its holdings amount to over 98 per cent. of the total outstanding capital stock of the operating company. We may therefore closely approximate the value of the assets of the American Malt Corporation by finding the value of the net assets of the American Malting Company.

To ascertain the latter item we obtain no reliable index from the par value of the American Malting Company's securities. Counsel for the petitioners admit that originally it was "grossly overcapitalized." (Record, Jan. 6, 1914, p. 37.) Two of the petitioner's witnesses, Messrs. Vuhlman and Sohngen, admitted that, when they sold their individual plants to the American Malting Company, they each obtained approximately two and one-half times the amount at which they carried said plants on their books. (Record, Jan. 6, 1914, pp. 32-33.) Moreover the greater part of the purchase price

Report and Order.

was paid in cash, not in securities of the American Malting Company. Such stock of the latter corporation as was accepted in payment was taken voluntarily, and some sellers of individual plants "got everything in cash." (Record, Jan. 6, 1914, page 33.) Mr. Vuhlman also testified that he never carried the good-will of his business as an asset on his books. 10

In the light of these facts alone the entry on the books of the American Malting Company of "Property, Plant and Goodwill \$27,589,155.88," cannot be taken conclusively to indicate assets of corresponding value.

The company submitted evidence going to show that the aggregate present value of its various plants amounts to \$6,396,000. While this was *ex parte*, the board, as at present advised, is not disposed to challenge this valuation. If to this sum we add, from the balance sheet submitted as of April 30, 1913, the sum of the cash on hand, accounts and bills receivable, inventories, bonds purchased, mortgages held, securities held, special deposit for sinking fund, and unexpired insurance and taxes, the assets reach \$12,674,000 approximately. 20

From this amount a deduction must be made of first mortgage bonds, accrued interest thereon, 30 underlying mortgages assumed, accrued, taxes due, accrued interest due on underlying mortgages, accounts and bills payable, and reserve account, all as of April 30, 1913, indicated by the balance sheet. These aggregate \$3,436,000 approximately. Subtracting this sum from the value of assets as above, we have a residue of approximately \$9,234,000, indicating the net assets, except such intangibles, if any, as may be properly allowed. 40

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Inasmuch as the capitalization of the American Malt Corporation is \$15,000,000, it is evident that the sum of about \$6,000,000—more exactly \$5,762,000—must be shown to exist unless the Board is to approve of a merger resulting in a capitalization in excess of assets.

- 10 The petitioners have tried to establish that their intangible assets, particularly, but not exclusively, the good-will of the properties of the American Malting Company suffice to make up this amount.

- At the hearing of January 6th, 1914, Mr. Vuhlmann testified that the various concerns in the American Malting Company obtained a higher average price than most of their competitors. (Record, Jan. 6, 1914, p. 17.) He thinks it will
20 run from 2 to 3 cents a bushel higher than that obtained by most of their competitors. There is no evidence however to show that the cost may not be greater per bushel than the cost of most of their competitors. He testifies also to certain advantages obtained in the saving of cross freights, by reason of filling orders from malt houses conveniently located as regards consignees. He also testifies as to the prestige enjoyed by the company's product. Allowing two or three cents per bushel
30 on a yearly turnout of about 11,000,000 bushels, the witness thinks that a yearly profit of \$275,000 or \$300,000 would represent the value of intangibles, consisting largely of good-will. Capitalizing this at 5 per cent. he testifies that from \$5,500,000 to \$6,000,000 is a fair value for this asset.

- Without denying that good-will or other attested intangible assets may be, under certain circumstances, an asset properly to be capitalized, the
40 Board is not convinced by the evidence presented,

Report and Order.

that the intangible assets are of anything like the magnitude claimed.

The reasons for doubting this claim are as follows:

First: The net profits from which it is claimed have been earned of late years by the American Malting Company do not warrant the belief that the value of the total capital employed, tangible and intangible, is anywhere near the value of \$15,000,000. Counsel for petitioners (Record, Jan. 6, 1914, p. 39,) contends that under the present management from 1908 to 1913 the net earnings have averaged \$621,544 per year. If from \$275,000 to \$300,000 is the annual net profit due to intangible assets, only the residue, \$325,000 or \$350,000 at the most, is traceable to tangible assets having, it is claimed, a value of over \$9,000,000. This is less than four per cent. and not much over $3\frac{1}{2}$ per cent. on capital which we are asked to believe is managed with such skill that its good-will is an asset of large magnitude. For the seven years of the previous management the net earnings averaged but \$220,000 a year. This is the averment of counsel for the petitioners (Record, Jan. 6, 1914, p. 39,) although the good-will is represented as having been practically continuous, and customers as having been satisfied and unwilling to leave this source of supply.

Moreover while the result of a number of years is perhaps a fairer basis on which to estimate profits than showing of any one year, the net profits for the most recent year, ending August 31, 1913, were but \$403,367.97.

If good-will and other intangibles are to account for \$300,000 of this sum, the tangible assets ap-

Report and Order.

parently yielded a profit of but little over one per cent. in this year.

The amounts expended in betterment and maintenance appear to be very moderate. They run as follows:

					For year ending Aug. 31, 1909, \$53,564.44
10	"	"	"	"	" 1910, 51,921.78
	"	"	"	"	" 1911, 75,319.71
	"	"	"	"	" 1912, 91,142.80
	"	"	"	"	" 1913, 122,987.18

With the exception of this expenditure, it does not appear that it is customary to charge off an allowance for depreciation. (Record, Sept. 30, 1912, pp. 12, 13.)

20 The inference would seem to be warranted that the net profits as reported by the Auditor are presumably fully as great as any fair estimate thereof would warrant. And the meagre average rate of profit would imply that, with efficient management assumed, the reason is a lesser aggregate of capital assets than the \$15,000,000 which the petitioners ask us impliedly to sanction in giving formal approval of this agreement of consolidation and merger.

30 Objection is made by several holders of preferred stock that the proposed division of stock between the holders of preferred and common stock is inequitable and unfair to the preferred stockholders. The objection is not specific, but alleges generally that the proposed plan is unfair to them.

Of the outstanding stock of the American Malt-
 ing Company, the preferred stock represents about
 fifty-one per cent. or \$14,440,000, as against \$13,
 40 400,000 of common stock.

Report and Order.

In the certificate of incorporation of the American Malting Company, it is provided:

"The preferred stock shall have a preference over the common stock in respect to dividends to the amount of seven (7) per centum per annum, which shall be cumulative, but no other preferences. That is to say, no dividends shall be paid in any year upon the common stock unless and until the preferred stock shall have received dividends at the rate of seven (7) per centum per annum from the time of the issue thereof. The preferred stock shall not be entitled to any dividend in excess of said seven (7) per centum per annum, but only the common stock shall be entitled to share in any further dividend which shall be declared or paid in any year."

Dividends upon the preferred stock have been very irregular. In no year has the full dividend been paid from earnings, so that there are now accumulated unpaid dividends on preferred stock amounting to approximately \$12,000,000 or something over eighty per cent. of the par value thereof. No dividends have ever been paid on the common stock. The surplus applicable to the payment of accumulated dividends on the preferred stock, on dissolution, amounts to \$2,141,884.49, or approximately fifteen per cent. of accumulated unpaid dividends.

The preferred stock enjoys no preference except as to dividends, and would, on dissolution, participate in the distribution of assets on equal terms with the common stock.

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In the amended certificate of incorporation of the American Malt Corporation, it is provided:

10 "The holders of preferred stock shall be entitled to receive from the surplus of net profits arising from the business of the corporation, dividends at the rate of, but not exceeding four per cent. per annum from April 1, 1906, until October 1, 1906, and at the rate of, but not exceeding six per cent. per annum from and after October 1, 1906, payable annually, semi-annually or quarterly, as and when declared by the Board of Directors, the dividends on the preferred stock shall be cumulative and shall be payable before any dividend on the common stock shall be paid or set apart, so that if 20 in any year a dividend at the rate aforesaid shall not have been paid on the preferred stock, the deficiencies shall be payable before any dividends shall be paid or set apart for the common stock. The holders of common stock shall be entitled to receive all moneys appropriated to dividends after the payments of dividends as aforesaid on the preferred stock. In the event of any 30 liquidation or dissolution, or winding up, whether voluntary or involuntary, the holders of the preferred stock shall be entitled to be paid in full, the par amount of their shares and the unpaid dividends accrued thereon, before any amount can be paid on the common stock. After such payment to the holders of the preferred stock, the holders of the common stock shall be 40 entitled to receive the remaining assets and

Report and Order.

funds in proportion to the shares held by them respectively."

It is evident that the primary purpose of those interested in the merging corporations is to secure control of the American Malting Company through the ownership of its stock by the Malt Corporation and then reorganize by consolidating the corporations and changing the amount of outstanding preferred stock and the amount of dividends to be paid upon it. The whole plan is to reduce the obligations imposed upon the present property by the terms on which the preferred stock is held. The amount of such stock is reduced from over \$15,000,000 to \$9,000,000, and the rate of dividends from seven to six per cent. In view of the value of the property owned and the earnings thereon, both objects are desirable. Both steps are in the direction of safer and sounder management.

But, in view of the objection offered by stockholders, it must appear that the proposed exchange of the stock of the resulting corporation on the basis of sixty-two per cent. of the holdings of preferred stock and forty-four per cent. of the holdings of common stock is fair and proper. Is such exchange equitable to the holders of the preferred stock, as well as to the holders of the common stock? The testimony shows that some stock of both classes was issued in exchange for property taken over at two and a half and three times actual value (p. 32 *et seq.*, Rec. Jan. 6). The objectors' stock was paid for in cash at par (p. 1, Rec. Oct. 10). What proportion of each class of stock represents cash or property taken at real value, and what proportion represents stock issued without

Report and Order.

consideration or without equivalent consideration, does not appear.

That the common stock has no present earning value is clear, and the prospect of future dividends is highly improbable. Unless the earnings increase considerably, it is doubtful if sufficient funds will be received to pay dividends on the preferred stock, 10 and meet mortgage requirements and depreciation. The admitted purpose of reorganization is to endeavor to give the common stock some value and an opportunity, if possible, to enjoy dividends.

In view of the value of the property possessed and the financial history of the Malting Company, what is the present value of stock of each class? No attempt has been made to support the proposed plan of exchange on the theory that the issues of 20 stock bear any relation to the cash or property exchanged therefor. No one seems to be aware how the percentages of present holdings to be given each class of stockholders were determined. (P. 56, *et seq.*, Rec. Jan. 6.) It seems to have been an arbitrary allowance based upon the judgment of the managers of the proposed consolidation as to the utmost the holders of preferred stock would be likely to yield.

Since this Board is required to pass upon the 30 question of the fairness of the plan to all parties interested, and should be able to find affirmatively that the proposed scheme is fair and equitable, and in all probability the best obtainable for all concerned, the burden rests upon the petitioners to establish these things. It may be that the plan proposed is the best that can be devised. It is not, however, supported by proof. Facts and reasons 40 establishing it as the most practicable, feasible and fair means of reorganization should be submitted.

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This Board and dissenting stockholders should not be asked to accept conjecture in place thereof.

Section 18 of the corporation act requires, *inter alia*, that "at no time shall the total amount of the preferred stock issued and outstanding exceed two-thirds of the capital stock paid for in cash or property." In view of the findings as to the value of the property taken, and in the absence of proof 10 to the contrary, we think serious doubt exists as to whether the proposed issue of \$9,000,000 of preferred stock would not violate this statutory requirement. Lack of proof makes it impossible to pass finally upon this question, and it is merely pointed out as a possible barrier to approval.

Chapter 15, Laws of 1913, being a supplement to the corporation act, provides:

"(49) 1. Any corporation formed under 20 this act may purchase property, real and personal, and the stock of any corporation, necessary for its business, and issue stock to the amount of the value thereof in payment therefor, subject to the provisions herein-after set forth, and the stock so issued shall be full paid stock, and not liable to any further call; and said corporation may also issue stock for the amount it actually pays 30 for labor performed.

"*Provided*, That when property is purchased the purchasing corporation must receive in property or stock what the same is reasonably worth in money at a fair, bona fide valuation; *and provided, further*, that no fictitious stock shall be issued; that no stock shall be issued for profits not yet earned, but only anticipated; *and provided, further*, that when stock is issued on the 40

Report and Order.

10 basis of the stock of any other corporation
it may purchase, no stock shall be issued
thereon for an amount greater than the sum
it actually pays for such stock in cash or its
equivalent; *and provided, further*, that the
property purchased or the property owned
by the corporation whose stock is purchased
shall be cognate in character and use to the
property used or contemplated to be used
by the purchasing corporation in the direct
conduct of its own proper business; and in
all cases when stock is to be issued for prop-
erty purchased, or for the stock of other cor-
porations purchased, a statement in writing,
signed by the directors of the purchasing
company, or by a majority of them, shall be
20 filed in the office of the Secretary of State,
showing what property has been purchased,
and what stock of any other corporation has
been purchased, and the amount actually
paid therefor.

30 "2. That if any certificate made in pur-
suance of this act shall be false in any ma-
terial representation, all the officers who
signed the same, knowing it to be false, shall
be guilty of misdemeanor, and the directors,
officers and agents of the corporation, who
wilfully participate in making it, shall be
guilty of misdemeanor; *and provided,*
further, that any corporation which shall
purchase the stock of any other corporation,
or any property, for the purpose of restrain-
ing trade or commerce, or acquiring a monop-
oly, and the directors thereof participating
40 therein shall be guilty of a misdemeanor."

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This act is one of the group above referred to, and is designed to prevent the issuance of stock except for value received and to an amount equal to the actual assets of such corporation.

The effect of the consolidation and merger of corporations is to organize a new corporation, clothed with the powers and privileges of the merging corporations, and subject to such limitations as are imposed by law. In passing upon the capitalization, etc., of the resulting corporation the same rules as apply to an entirely new corporation should be regarded.

Does the proposed issue of stock fall under the inhibition of Chapter 15?

The corporation may issue stock for the value of the property or stock purchased by it. If the stock of the American Malting Company is to be exchanged, what is its value? It can have no greater value than is represented by the value of the physical property owned by it, plus the value of intangibles, if any. In this case the property is worth less than the proposed capitalization by some millions of dollars. The preferred stock has earned some dividends but not sufficient to give it a market value equivalent to its par.

The common stock has no value as a dividend payer. The fair value, therefore, of the property to be acquired for which stock is to be issued by the resulting corporation, is as stated in the first section of this report, and is much less than the amount of stock proposed to be issued. We find ourselves unable to conclude that the property which the resulting corporation is to receive is "reasonably worth in money at a fair, bona fide valuation," the sum of \$15,000,000, for which amount stock is to issue.

Report and Order.

In connection with this application the suggestion occurs that the property of the Malting Company is not cognate in character and use to the property used or contemplated to be used by the Malt Corporation, in the conduct of its own proper business. No attempt was made to disguise the fact
10 that, although the certificates of incorporation of both corporations confer power to manufacture, treat and sell malt, etc., the Malting Company is an operating company and the Malt Corporation is a holding company, not having ever engaged in manufacturing and selling any malt products (p. 54, *et seq.*, Rec. 6). It was organized primarily to hold the stock of the Malting Company, and has never exercised any of its powers, except to hold
20 such stock. In the amended certificate of the Malt Corporation there is express provision limiting the holding of stock to that of the Malting Company. If the business done by each corporation is taken as indicative of the purposes for which it was formed, there is nothing in the business of the operating Malting Company and the holding Malt Corporation which can be said to be in the slightest degree similar or cognate in character, within the meaning of the act. In view of the conclusions on
30 other phases of the case, a determination of this question is unnecessary. We think it unnecessary, also, to pass upon other questions that are suggested as reasons for withholding approval.

For the reasons above stated, the Board finds and determines that it cannot approve the merger and consolidation in the form proposed. The application will, therefore, be denied and the petition dismissed. An order will enter accordingly.

40 Dated February 27th, 1914.

Report and Order.

ORDER.

This petition having been duly heard and submitted, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; 10

It is ordered that the petition in this proceeding be and it is **HEREBY DISMISSED**.

Dated February 27th, 1914.

I **HEREBY CERTIFY** the foregoing to be true copies of the **REPORT** and **ORDER** of the Board of Public Utility Commissioners adopted at a meeting held Friday, February 27th, 1914, the originals of which are on file in the office of said Board. 20

Dated March 16, 1914.

ALFRED N. BARBER,
Secretary.

[SEAL.]

IN THE MATTER

OF

10 The petition of AMERICAN MALT
CORPORATION and AMERICAN
MALTING COMPANY for the
Approval in writing of the
Board of Public Utility Com-
missioners of the State of
New Jersey to a certain
agreement of merger and con-
solidation, dated July 23,
1913, duly entered into be-
tween the said companies.

20 PETITION OF AMERICAN MALT CORPORA-
TION AND AMERICAN MALTING COM-
PANY FOR APPROVAL OF AGREEMENT
OF MERGER AND CONSOLIDATION.

FREDERIC J. FAULKS,
SILAS W. HOWLAND,
Counsel.

30

40

Petition.

IN THE MATTER

OF

The petition of AMERICAN MALT CORPORATION and AMERICAN MALTING COMPANY for the Approval in writing of the Board of Public Utility Commissioners of the State of New Jersey to a certain agreement of merger and consolidation, dated July 23, 1913, duly entered into between the said companies.

10

TO THE BOARD OF PUBLIC UTILITY COMMISSIONERS
OF THE STATE OF NEW JERSEY:

20

The petition of American Malt Corporation and American Malting Company respectfully shows:

1. That the principal and registered office of each of said corporations in the State of New Jersey is at No. 15 Exchange Place in the City of Jersey City, County of Hudson, and that Benjamin Treacy is the agent therein in charge thereof and upon whom process against each of said corporations may be served within said State. 30

2. That American Malting Company was duly incorporated under the general corporation act of the State of New Jersey on the 28th day of September, 1897, and a copy of its certificate of incorporation is hereto annexed, marked "Exhibit A"; that the said corporation now is, and continuously 40

Petition.

since its incorporation has been, engaged in the business of manufacturing, selling and dealing in malt, its bi-products and products produced in, or used in or in connection with, or incidental to, the manufacture of malt, which business has extended into and is now conducted in the States of New York, Ohio, Illinois, Michigan and Wisconsin; that it has an issued and outstanding capital stock of
10 \$27,840,000 (not including \$1,100,000. par value of common stock heretofore issued and subsequently returned to, and now owned by, said company and held in its treasury) of which \$14,440,000. par value is preferred stock and \$13,400,000. par value is common stock; that attached hereto marked "Exhibit B" is a copy of the balance sheet of American Malting Company as of April 30, 1913, these being the latest figures as to the financial condition
20 of said company which can be relied upon as accurate.

3. That American Malt Corporation was duly incorporated under the general corporation act of the State of New Jersey on the 31st day of March, 1906, and a copy of its certificate of incorporation with all the amendments thereto is hereto annexed, marked "Exhibit C"; that said corporation, in pursuance of the powers expressed in its said certificate of incorporation, has heretofore acquired and
30 now owns 142,645 shares of the preferred stock and 130,824 shares of the common stock of said American Malting Company; that there are outstanding in the hands of divers persons other than American Malt Corporation 1755 shares of preferred stock and 3176 shares of common stock of American Malting Company, said outstanding shares amounting in the aggregate to less than two
40 per cent. of the outstanding capital stock of Ameri-

Petition.

can Malting Company; that said shares of stock in the American Malting Company owned by American Malt Corporation were acquired by issuing to the holders thereof in exchange therefor \$62. par value of the preferred stock of American Malt Corporation for \$100. par value of the preferred stock of American Malting Company, and \$44. par value of the common stock of American Malt Corporation for \$100. par value of the common stock of American Malting Company; that the American Malt Corporation has an authorized capital stock of \$15,000,000 divided into 150,000 shares of the par value of \$100. each, of which authorized capital stock 90,000 shares of the aggregate par value of \$9,000,000 are preferred stock and 60,000 shares of the aggregate par value of \$6,000,000. are common stock; that of such shares there have been duly issued and are now outstanding 88,219 shares of preferred stock of the aggregate par value of \$8,821,900. and 57,415 shares of common stock of the aggregate par value of \$5,741,500; that said American Malt Corporation has no property or assets save the said shares of stock of American Malting Company, that it has no indebtedness save certain indebtedness to said American Malting Company for advances made from time to time amounting in the aggregate to not more than \$41,000; that said American Malt Corporation, pursuant to the powers conferred upon it by its charter, has been and is engaged, by and through its ownership of the capital stock of said American Malting Company as hereinbefore specified, in the business of manufacturing, selling and dealing in malt, its bi-products, and products produced in, or used in connection with, or incidental to the manufacture of malt.

Petition.

4. That in order to accomplish greater efficiency and economy in management, the two companies desire to consolidate and to merge the American Malting Company into the American Malt Corporation and thereby to vest in American Malt Corporation all the property, real and personal, rights, privileges and franchises of American Malting Company, subject to its liabilities and debts, all to the extent and in the manner provided by law. To that end, and in pursuance of the powers conferred upon the said corporations, which said corporations are organized for the purpose of carrying on business of the same or a similar nature within the meaning of Section 104 of the General Corporation Act of the State of New Jersey and in conformity with the said Section 104 and with the provisions contained in Section 105 of said act, the directors of American Malt Corporation and American Malting Company respectively did on or about the 23rd day of July, 1913, enter into a joint agreement under the respective corporate seals of said corporations for the merger or consolidation thereof under the name of American Malt Corporation. At a special meeting of the stockholders of each of said companies duly convened for the purpose of taking the said agreement into consideration the said agreement was submitted to the said stockholders respectively and considered and approved by over two-thirds of all the stockholders of each of said companies; the said special meeting of stockholders of American Malting Company was held on the 11th day of September, 1913, at the hour of 11 o'clock A. M., and the special meeting of stockholders of American Malt Corporation was held on the 11th day of September, 1913, at the hour of 12 o'clock noon.

Petition.

The meeting of stockholders of American Malting Company and the vote upon the adoption of said agreement were held and taken separately from the meeting of stockholders and vote of the said American Malt Corporation. The duplicate originals of said agreement bearing date, July 23, 1913, to which are attached the original certificates required by Section 105 of the general Corporation act of the State of New Jersey are submitted herewith and a copy of said agreement and certificates is hereunto annexed marked "Exhibit D" and made a part hereof. 10

WHEREFORE, your petitioners pray that the said agreement of merger and consolidation between American Malt Corporation and American Malting Company dated July 23, 1913, be approved in writing by your Honorable Board pursuant to the provisions of Chapter XIX of the Laws of 1913, and that the said corporations may be permitted thereby to consummate the same. 20

Dated September 15, 1913.

AMERICAN MALT CORPORATION,
By WILBERFORCE SULLY,
President.
JOHN C. McCUNE,
Secretary.

[SEAL AMERICAN
MALT CORPORATION.] 30

AMERICAN MALTING COMPANY,
By CHARLES A. STADLER,
President.
JOHN C. McCUNE,
Secretary.

[SEAL AMERICAN
MALTING COMPANY.]

SILAS W. HOWLAND,
Of Counsel.

Petition.

STATE OF NEW YORK }
 County of New York } ss:
 City of New York }

WILBERFORCE SULLY, of full age, being duly sworn, on his oath says:

I am the president of the within named petitioner, American Malt Corporation, and have held
 10 said office since January 24, 1912. I was vice-president of said corporation from April 11, 1907, to January 24, 1912. I am also the vice-president and chairman of the Board of Directors of the within named petitioner, American Malting Company, and have held said office of vice-president since November 13, 1906, and said office of chairman of the Board of Directors since July 9, 1907. I have been directly and actively connected with
 20 the management and conversant with the affairs of American Malting Company since November 13, 1906, and of American Malt Corporation since April 11, 1907. More than ninety-eight per cent. (98%) of the stock of American Malting Company is owned by American Malt Corporation. It has been and is thought desirable by the directors and more than two-thirds of the stockholders of each of said corporations that from the standpoint of
 30 economy and efficiency of management these two companies should be merged and consolidated into one corporation and operate thereafter as a single corporation.

I am well acquainted with the properties, business and financial condition of both of said companies, and I believe that the statements in the foregoing petition with respect to said matters are fair, conservative, just and true. I have also had
 40 personal connection with the various other matters and transactions set forth in said petition so far

Petition—Exhibit A.

as they have occurred since November 13, 1906, and the statements with respect thereto in the foregoing petition are true of my own knowledge. I believe that the terms and conditions of the merger as set forth in the agreement of merger and consolidation are fair and equitable to the stockholders of both companies.

WILBERFORCE SULLY.

Subscribed and sworn to before me } 10
this 15th day of September, 1913. }

HERMAN HUGLE

[SEAL NOTARY PUBLIC.] Notary Public 210

N. Y. C.

Exhibit A.

The undersigned, citizens of the United States, 20
for the purpose of associating ourselves into a corporation to carry on the business hereinafter described under and pursuant to the provisions of an Act of the Legislature of the State of New Jersey entitled, "An Act Concerning Corporations Revision of 1896", approved April 21, 1896, and the other acts amendatory thereof and supplemental thereto, make this certificate, whereby we certify 30
as follows, to wit:

I. The name assumed to designate the corporation and to be used in its business and dealings is

"AMERICAN MALTING COMPANY"

II. The place in this State where the principal office of the corporation is to be situated is Jersey City, in the County of Hudson, and the places in this State where the business of the corporation is 40

Petition—Exhibit A.

to be conducted are said Jersey City and such other place or places as the Board of Directors of the corporation may from time to time determine.

10 III. The objects for which the corporation is formed are the manufacturing, selling and dealing in malt and its bi-products or products incidental thereto and all other products in the manufacture of which malt is or may be used, and the business incidental thereto.

20 The corporation may conduct business in such other State or States than New Jersey, and in such place or places therein, as the Board of Directors of the Corporation may from time to time determine, and may have one or more offices out of this State, and may hold, purchase, mortgage, sell and convey such real and personal property in or out of this State as the Board of Directors may determine to be necessary for its business; and the said Board of Directors may from time to time issue or cause to be issued stock of the corporation, preferred or common, or both, in payment for such property, real or personal, either within or without this State, as the said Board may deem to be necessary to acquire for the business of the corporation.

30 Until the number thereof be increased or diminished in manner provided by law, there shall be five Directors of the corporation, of whom one shall be an actual resident of the State of New Jersey, and all shall be shareholders.

The Board of Directors may hold meetings and may keep the books of the corporation (except the stock and transfer books) without this state.

40 The Directors shall have power to make and alter the by-laws.

Petition—Exhibit A.

IV. The total amount of the capital stock of the corporation is to be thirty million dollars (\$30,000,000) divided into three hundred thousand (300,000) shares of the par value of one hundred dollars (\$100) each.

The amount with which it will commence business is to be ten thousand dollars (\$10,000) divided into one hundred (100) shares of the par value of one hundred dollars (\$100) each. 10

The said capital stock of the corporation, to wit: thirty million dollars (\$30,000,000) is to consist of fifteen million dollars (\$15,000,000) of preferred stock, divided into one hundred and fifty thousand (150,000) shares of the par value of one hundred dollars (\$100) each, and fifteen million dollars (\$15,000,000) of common stock divided into one hundred and fifty thousand (150,000) shares of the par value of one hundred dollars (\$100) each. 20

The preferred stock shall have a preference over the common stock in respect to dividends to the amount of seven (7) per centum per annum which shall be cumulative, but no other preference. That is to say, no dividend shall be paid in any year upon the common stock unless and until the preferred stock shall have received dividends at the rate of seven (7) per centum per annum from the time of the issue thereof. The preferred stock shall not be entitled to any dividend in excess of said seven (7) per centum per annum, but only the common stock shall be entitled to share in any further dividend which shall be declared or paid in any year. 30

The dividends upon the preferred stock shall be paid quarterly, half-yearly or yearly, as the Board of Directors shall from time to time determine. 40

Petition—Exhibit A.

V. The names and residences of the incorporators, and the number of shares subscribed for by each, are as follows; to wit:

	<i>Name.</i>	<i>Residence.</i>	<i>No. of Shares.</i>
	Hamilton H. Durand,	New York City, New York,	Ten
10	John J. Treacy,	Jersey City, New Jersey,	Five
	Frederick Dwight,	Brooklyn, New York,	Ten.

VI. The date on which the existence of the corporation is to begin is to be the date of the filing of this certificate as required by law, and the period limited for its continuance is one hundred years from said date.

IN WITNESS WHEREOF, at Jersey City, in the
20 County of Hudson, in the State of New Jersey,
we have hereunto set our hands and seals the
twenty-seventh day of September, in the year one
thousand eight hundred and ninety-seven.

HAMILTON H. DURAND [L. S.]

JOHN J. TREACY [L. S.]

FREDERICK DWIGHT [L. S.]

STATE OF NEW YORK, }
30 City and County of New York, } ss.

BE IT REMEMBERED that on this twenty-seventh
day of September, in the year one thousand eight
hundred and ninety-seven, before me Samuel F.
Jarvis, Jr., a Notary Public of the State of New
York in and for the City and County of New York,
personally appeared Hamilton H. Durand, John
J. Treacy and Frederick Dwight, who, I am sat-
isfied are the persons named in and who executed
40 the foregoing certificate, and I having first made

Petition—Exhibit A.

known to them the contents thereof, they did thereupon severally acknowledge that they signed and sealed and delivered the same as their voluntary act and deed.

SAMUEL F. JARVIS, JR.,
Notary Public No. 4,
New York County. 10

[SEAL.]

STATE OF NEW YORK, }
City and County of New York. } ss.

I, HENRY D. PURROY, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said City and County, the same being a Court of Record, DO HEREBY CERTIFY, That Samuel F. Jarvis, Jr., whose name is subscribed to the Certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof and acknowledgment, a Notary Public, in and for said County, duly commissioned and sworn, and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine. 20 30

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County the 27 day of September, 1897.

[SEAL.]

HENRY D. PURROY
Clerk. 40

Petition—Exhibit A.

ENDORSED:

"RECEIVED in the Hudson Co. N. J. Clerk's Office
 Sept. 28th A. D. 1897 and Recorded in Clerks
 Record No. on Page .

JOHN G. FISHER,
 Clerk."

"FILED SEPT. 28 1897

10

GEORGE WURTS

Secretary of State."

STATE OF NEW JERSEY

DEPARTMENT OF STATE

Recording, Comparing and
 certifying Division.

COPY CORRECT

20

Original held by M. I. Connell,
 John Lewis Hendricks,
 In charge of division.

30

40

Petition—Exhibit B.

Exhibit B.GENERAL BALANCE SHEET AMERICAN
MALTING COMPANY APRIL 30, 1913.

ASSETS.

Property, Plants and Good Will..	\$27,589,155.88	10
Common Stock returned to Treas- ury	1,100,000.00	
Cash in Banks and on hand.....	705,897.86	
Accounts and Bills Receivable....	1,483,158.40	
Inventories	3,825,806.45	
Bonds Purchased for Account of Treasury	112,000.00	
Mortgages on Real Estate.....	95,000.00	
Securities of Other Companies....	18,725.00	
Special Deposit (Trustees of Sink- ing Fund)	634.21	20
Unexpired Insurance and Taxes..	36,805.25	
	\$34,967,183.05	

LIABILITIES.

Capital Stock, Preferred.....	\$14,440,000.00	
Capital Stock, Common.....	14,500,000.00	
First Mortgage Bonds.....	2,725,000.00	
Accrued Interest on Bonds.....	68,150.00	
Underlying Mortgages.....	114,000.00	30
Accrued Taxes.....	20,963.75	
Accrued Interest on Underlying Mortgages	1,308.34	
Accounts Payable.....	7,355.30	
Bills Payable.....	400,000.00	
Reserve Account.....	100,000.00	
Surplus Account.....	2,141,884.49	
Profit and Loss Account (8 months to April 30, 1913)	448,521.17	
	\$34,967,183.05	40

Petition—Exhibit C.

Exhibit C.**AMENDED CERTIFICATE OF INCORPORATION.**

OF

AMERICAN MALT CORPORATION.

10 We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the Act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)," and the acts amendatory thereof, do hereby certify as follows:

I. The name of such Corporation is

AMERICAN MALT CORPORATION.

20 **II. The location of its principal office in the State is No. 15 Exchange Place, Jersey City, New Jersey. The name of the agent therein and in charge thereof and upon whom process against the Corporation may be served, is John J. Treacy. Said office is to be the registered office of such Corporation.**

30 **III. [As amended July 23, 1913] The objects for which the Corporation is formed are as follows: To manufacture, sell and deal in malt, its by-products, products produced in, or used in or in connection with, or incidental to, the manufacture thereof, and all or any products in the manufacture of which malt is or may be used, and the business incidental thereto; to acquire by purchase, subscription, or otherwise, and to hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the shares of the corporate stock of, or any bonds, securities or other evidences of indebtedness created by American Malting Company, a corporation organized and**
40 **existing under the Laws of the State of New Jer-**

Petition—Exhibit C.

sey; while owner of such shares of stock to exercise all rights of ownership, including the right to vote thereon; and, so long as the corporation shall hold the shares of stock or other securities of American Malting Company, to aid in any manner said American Malting Company, and to do any acts or things designed to protect, preserve, improve or enhance the value of any of such shares of stock or other securities, of said American Malting Company; to acquire, own, hold and dispose of such real and personal property, and to carry on all such works and operations as may be necessary or convenient for the transaction of the business of the Corporation and the exercise of the powers and the accomplishment of the purposes herein set forth. 10

The Corporation shall have the power to conduct its business in other states, territories and possessions of the United States, 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 outside of the State of New Jersey. 20

IV. The amount of the total authorized capital stock of the corporation is \$15,000,000, divided into 150,000 shares of the par value of \$100 each, whereof ninety thousand (90,000) shares of the par value of \$100 each are preferred stock and sixty thousand (60,000) shares of the par value of \$100 each are common stock. The holders of the preferred stock shall be entitled to receive from the surplus or net profits arising from the business of the Corporation, dividends at the rate of, but not exceeding, four per cent. per annum from April 1, 1906, until October 1, 1906, and at the rate of, but not exceeding six per cent. per annum from and after October 1, 1906, payable annually, semi-annually or quarterly as and when declared by the 30 40

Petition—Exhibit C.

board of directors. The dividends on the preferred stock shall be cumulative and shall be payable before any dividend on the common stock shall be paid or set apart, so that if in any year a dividend at the rate aforesaid shall not have been paid on the preferred stock, the deficiency shall be payable before any dividends shall be paid or set apart for the common stock. The holders of common stock shall be entitled to receive all moneys appropriated to dividends after the payments of dividends as aforesaid on the preferred stock. In the event of any liquidation or dissolution, or winding up, whether voluntary or involuntary of the Corporation, the holders of the preferred stock shall be entitled to be paid in full, the par amount of their shares and the unpaid dividends accrued thereon before any amount shall be paid on the common stock. After such payment to the holders of the preferred stock the holders of the common stock shall be entitled to receive the remaining assets and funds in proportion to the shares held by them respectively.

The amount of the capital stock with which the Corporation shall commence business is \$1,000.

V. The names and post-office addresses of the incorporators and the number of shares of common stock subscribed for by each, the aggregate of such subscriptions being the amount of capital stock with which the Corporation will commence business, are as follows:

Names.	Post-office Addresses.	Number of Shares of Common Stock.
John J. Treacy...15	Exchange Place, Jersey City, N. J.	5
Edward B. Bruce...52	William St., New York City, N. Y.	3
Edward C. Palmer..	Morristown, N. J..	2
		—
		10

Petition—Exhibit C.

VI. The duration of said corporation shall be unlimited.

VII. The property and affairs of the Corporation shall be managed by its directors. The number of directors of the Corporation shall be fixed from time to time by the by-laws, but the number, if fixed at more than three shall be some multiple of three. The directors shall be classified by dividing them into three classes each consisting of one-third of the whole number of the board of directors. The term of office of each class of directors shall be three years except that upon the organization of the Corporation the first class shall be elected to serve only until the first annual election after organization, the second class until the second annual election and the third class until the third annual election; and at each annual election after organization the successors to the class of directors whose terms shall then expire shall be elected to hold office for the term of three years. In case of an increase in the number of directors each class of directors shall be increased equally, and the additional directors of each class may be elected by the board of directors, or by the stockholders at an annual or special election, and shall be elected for the unexpired term of each class respectively. The directors shall have power to hold their meetings, to have one or more offices, and to keep the books of the corporation (except the original or duplicate books of the corporation in which the transfers of stock shall be registered, and the original or duplicate books containing the names and addresses of the stockholders and the number of shares held by them) outside of the State of New

Petition—Exhibit C.

Jersey, at such places as may from time to time be designated by them.

The board of directors may designate from its number an executive committee, which shall for the time being, in the intervals between meetings of the board, and to the extent provided by the by-laws, exercise the powers of the board of directors
10 in the management of the affairs and business of the corporation, and the board of directors may designate from their number any other standing committees which shall have and may exercise such power as may be conferred or authorized by the by-laws, or by the board of directors.

The board of directors shall have power to authorize and cause to be executed and delivered
20 mortgages and other liens upon the real and personal property of the Corporation, as security for the bonds or obligations of the Corporation, or otherwise.

The board of directors may, with the consent of the holders of two-thirds of each class of the capital stock, issued and outstanding, sell, assign, transfer or otherwise dispose of the whole of the property of the Corporation to any person or corporation, domestic or foreign, whether for cash or for the stock and securities of any such corporations or for
30 other property.

The board of directors may from time to time fix the number, term of service, duties, powers and rate of compensation of, and elect or appoint all officers and employees of the Corporation as they may deem requisite.

Any officer or employee of the Corporation may be removed at any time by vote of the board of directors, or by any committee or superior officer
40 upon whom such power of removal may be con-

Petition—Exhibit C.

ferred by the by-laws or by a vote of the board of directors.

The board of directors shall have power to determine the time or times for the declaration and payment of dividends and from time to time to fix and determine and to vary the amount of the working capital of the Corporation, and to direct and determine the use and disposition of the working capital, and all rights to dividends from profits shall be subject thereto. 10

The board of directors shall from time to time determine whether, and to what extent, and at what times and places, and under what conditions and regulations, the accounts and books of the Corporation or any of them shall be open to the inspection of the stockholders, and no stockholder shall have any right to inspect any account or book or document of the Corporation, except as conferred by statute of this state or authorized by the board of directors or by a resolution of the stockholders. 20

The board of directors may make by-laws and from time to time may alter, amend or repeal by-laws; but any by-laws made by the board of directors may be altered or repealed by the stockholders at any annual meeting or at any special meeting provided notice of the proposed alteration or repeal be included in the notice of the special meeting. 30

Any action which, prior to the enactment of Chapter 119, Laws of 1901, amending Section 17 "An Act Concerning Corporations (Revision of 1896)," required the consent of the holders of two-thirds of the stock of the corporation at any meeting after notice to them given, or required their consent in writing to be filed, may be taken upon 40

Petition—Exhibit C.

the consent of and the consent given and filed by the holders of two-thirds of the stock of each class represented at such meeting in person or by proxy.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 30th day of March, in the year one thousand nine hundred and six.

10

[SEAL.]

JOHN J. TREACY,
EDWARD B. BRUCE,
E. C. PALMER.

STATE OF NEW YORK, } ss.:
County of New York, }

Be it remembered, that on this 30th day of March, 1906, before me, the subscriber, a notary public in said state and county, personally appeared
20 JOHN J. TREACY, EDWARD B. BRUCE and EDWARD C. PALMER, who I am satisfied are the persons named in and who executed the foregoing certificate of incorporation, and I having first made known to them the contents thereof, they did each acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

30

[SEAL.]

ARTHUR C. CLEMENT,
Notary Public,
Kings County.

Certificate filed in New York County.

STATE OF NEW YORK, } ss.:
County of New York, }

I, PETER J. DOOLING, Clerk of the County of New York, and also Clerk of the Supreme Court for the
40 said County, the same being a Court of Record, do

Petition—Exhibit C.

hereby certify that Arthur W. Clement, whose name is subscribed to the Certificate of the proof or acknowledgment of the annexed instrument and thereon written, was, at the time of taking such proof and acknowledgment, a Notary Public acting in and for said County, duly commissioned and sworn, and authorized by the laws of said State to take the acknowledgments and proofs of deeds 10 or conveyances for land, tenements or hereditaments in said State of New York, and further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County the 30th day of March, 1906. 20

PETER J. DOOLING,
Clerk.

[SEAL.]

ENDORSED:

"Received in the Hudson Co., N. J., Clerk's Office Mar. 30, A. D. 1906, and Recorded in Clerk's Record, No. , on Page .

JOHN ROTHERHAM,
Clerk." 30

"Filed and Recorded Mar. 31, 1906.

S. D. DICKINSON,
Secretary of State."

STATE OF NEW JERSEY,

DEPARTMENT OF STATE.

I, DAVID S. CRATER, Secretary of State of the State of New Jersey, do hereby certify that the fore- 40

Petition—Exhibit D.

going is a true copy of the Certificate of Incorporation of American Malt Corporation, as amended July 23d, 1913, and the endorsements thereon, as the same is taken from and compared with the original filed in my office on the Thirty-first day of March, A. D. 1906, and now remaining on file and of record therein.

10 IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Official Seal at Trenton, this day of , A. D. 19 .

.....
Secretary of State.

Exhibit D.

20

AMERICAN MALT CORPORATION
WITH
AMERICAN MALTING COMPANY.

AGREEMENT OF MERGER AND
CONSOLIDATION.

30

Dated July 23, 1913.

AGREEMENT made and entered into this 23d day of July, 1913, by and between AMERICAN MALT CORPORATION, a corporation of the State of New Jersey, and the directors thereof, parties of the
40 first part, and AMERICAN MALTING COMPANY, a cor-

Petition—Exhibit D.

poration of the State of New Jersey, and the Directors thereof, parties of the second part:

WHEREAS, the principal and registered office of each of said corporations in the State of New Jersey is at No. 15 Exchange Place, in the City of Jersey City, County of Hudson, and Benjamin Treacy, is the agent therein, in charge thereof, and 10 upon whom process against each of said corporations may be served within said State; and

WHEREAS, American Malting Company under the certificate of incorporation of the said Company filed in the office of the Secretary of State of New Jersey on or about the 28th day of September, 1897, has an authorized capital stock of \$30,000,000 divided into 300,000 shares of the par value of \$100 each, of which 150,000 shares are seven per 20 cent. cumulative preferred stock, and 150,000 shares are common stock; and there have been duly issued and are now outstanding certificates for 144,400 shares of said preferred stock and there have been duly issued certificates for 145,000 shares of said common stock—certificates for 134,000 shares of said common stock being now outstanding and certificates for 11,000 shares of said common stock having been returned to, and being now 30 owned by, said American Malting Company and held in its treasury; and

WHEREAS, the American Malt Corporation under the certificate of incorporation of the said Company, filed in said office of said Secretary of State on or about March 30, 1906, has an authorized capital stock of \$15,000,000, divided into 150,000 shares of the par value of \$100 each, of which 90,000 shares are preferred stock (being entitled to 40

Petition—Exhibit D.

cumulative dividends at the rate of, but not exceeding 4 per cent. per annum from April 1, 1906, until October 1, 1906, and at the rate of, but not exceeding 6 per cent. per annum from and after October 1, 1906), and 60,000 shares are common stock; and there have been duly issued and are now outstanding certificates for 88,219 shares of said
10 preferred stock and for 57,415 shares of said common stock; and

WHEREAS, said American Malt Corporation has heretofore acquired stock of American Malting Company as follows: \$14,264,500 par value of shares of its preferred stock, and \$13,082,400 par value of shares of its common stock, said shares of preferred stock having been acquired by the exchange
20 of \$62 par value of its own preferred stock for \$100 par value of the preferred stock of American Malting Company and said shares of common stock having been acquired by the exchange of \$44 par value of its own common stock for \$100 par value of the common stock of the American Malting Company; and

WHEREAS, there are now outstanding shares of stock of said American Malting Company not
30 owned by American Malt Corporation and not owned by and held in the treasury of said American Malting Company, as follows:—\$175,500 par value of shares of preferred stock and \$317,600 par value of shares of common stock; and

WHEREAS, both American Malt Corporation and American Malting Company are organized for the purpose of carrying on business of a similar na-
40 ture; and

Petition—Exhibit D.

WHEREAS, the respective Boards of Directors of said corporations deem it advisable, to the end that greater efficiency and economy of management may be accomplished, and otherwise and generally to the advantage and welfare of said corporations and their several and respective stockholders, to merge and consolidate said corporations under and 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 all Acts supplemental thereto or amendatory thereof;

NOW, THEREFORE, In consideration of the premises and the mutual agreements, provisions, covenants and grants herein contained, it is hereby agreed by and between the said parties hereto, and in accordance with said Act of the Legislature of the State of New Jersey that said American Malting Company shall be and the same hereby is merged into and consolidated with said American Malt Corporation, and American Malt Corporation does hereby merge into and consolidate with itself said American Malting Company;

And the parties hereto by these presents agree to and prescribe the terms and conditions of said merger and consolidation and the mode of carrying the same into effect, which terms and conditions and mode of carrying the same into effect the said parties hereto do mutually and severally agree and covenant to observe, keep and perform, that is to say:

ARTICLE I. The Name of the consolidated corporation is and shall be and remain American Malt Corporation, the same being hereafter called the "Consolidated Corporation."

	<i>Names of Directors.</i>	<i>Residences.</i>
16	Directors of first class to hold office until first annual election hereafter.	

Directors of second class to hold office until second annual election hereafter.

2() Directors of third class to hold office until third annual election hereafter.

The first officers of the said Consolidated Corporation shall be a President, Vice-President, a Secretary, an Assistant Secretary, and a Treasurer, and their names and places of residence are as follows:

	<i>Names.</i>	<i>Residences.</i>
Office: President,	Wilberforce Sully,	375 Park Ave., New York City.
Vice-President,	Charles A. Stadler,	114 West 77th Street, New York City.
Secretary,	John C. McCune,	25 East 124th Street, New York City.
Assistant Secretary,	George M. Charles,	Minneapolis, Minn.
Treasurer,	Henry Eggerking,	1027 Tinton Ave., New York City.

Petition—Exhibit D.

ARTICLE III. The capital stock of the said Consolidated Corporation is and shall be \$15,000,000, divided into 150,000 shares of the par value of \$100 each, of which 90,000 shares are and shall be preferred stock and 60,000 shares are and shall be common stock.

10

The rights, terms and conditions of the shares of said preferred and common stock issued and to be issued shall be respectively the same as those of the shares of the preferred and common stock of the present American Malt Corporation, now outstanding, as set forth in the amended certificate of incorporation of said American Malt Corporation, a copy of which marked "Exhibit A" is hereto annexed and made a part hereof.

20

ARTICLE IV. The manner of converting the capital stock of the corporations, parties hereto, into the capital stock of the Consolidated Corporation shall be as follows:

All present holders of stock of American Malt Corporation shall continue to hold the same certificates of stock, preferred and common, which they now hold, and such certificates shall represent a like number of shares of the same class of stock of the Consolidated Corporation.

No shares of stock of the Consolidated Corporation shall be issued for any of the shares of preferred or common stock of American Malting Company now owned by American Malt Corporation nor for any of the shares of common stock of American Malting Company owned by and held in the treasury of said American Malting Company.

Each and every of the outstanding shares of stock 40

Petition—Exhibit D.

of American Malting Company, except those owned and held in the treasury of said American Malting Company and those owned by American Malt Corporation, shall be forthwith exchangeable for, and convertible into, the stock of the Consolidated Corporation in the proportion and manner following, namely:

Each holder of one share of the preferred stock of American Malting Company, other than said American Malting Company and said American Malt Corporation, upon the surrender of the certificate thereof, duly endorsed in blank for transfer to the Guaranty Trust Company of New York, number 149 Broadway, New York City, which is hereby appointed the agent of the parties hereto for that purpose, shall receive \$62 in par value of preferred stock of the Consolidated Corporation in exchange for and in full of the principal and the accrued and unpaid dividends on such stock. PROVIDED, HOWEVER, and IT IS HEREBY AGREED, that any such holder of any share or shares of said preferred stock of American Malting Company may, at his option, produce to said Trust Company, the certificates for said share or shares with a proper memorandum thereon, signed by such holder showing his receipt on account of said share or shares of \$62 in par value of said preferred stock of the Consolidated Corporation for each such share, and upon such production and the delivery to said Trust Company of a duplicate of such memorandum and receipt likewise signed by such holder and reciting that the same is given pursuant and subject to the provisions of this proviso, the said holder shall have

Petition—Exhibit D.

the right, without surrender or endorsement for transfer of said certificate, to demand and receive the said \$62 in par value of said preferred stock of said Consolidated Corporation for each share, which shall be in exchange for and in full of the principal of each said share of preferred stock of American Malting Company; but the owner of said share or shares shall retain and be deemed to retain, and the said certificate shall continue thereafter to represent and shall be deemed to represent the said share or shares so far as concerns any lawful right, whether past, present or future, of the holder thereof to demand or receive from American Malting Company, or said Consolidated Corporation, any money, value or thing by reason of any dividends accrued and unpaid upon the said share, and so far as concerns any lawful right, whether past, present or future, of said holder in or by reason of the surplus or surplus earnings of American Malting Company accumulated at the said time when this agreement shall so take effect, or at any time theretofore in or by reason of the money or property of which such surplus or earnings shall then consist, or shall at any time theretofore have consisted, or which surplus or earnings shall represent, or shall theretofore have represented; and thereafter the holder of such certificate shall with respect to such accrued and unpaid dividends, surplus and surplus earnings, and the money or property of which such surplus earnings shall consist, or by which they shall be represented, be and be deemed to be the holder of such share and not to have waived any lawful right, whether past, present or future, whether against the American

Petition—Exhibit D.

Malting Company or said Consolidated Corporation, or otherwise, with respect to such dividends, surplus earnings, money or property, but shall be and be deemed to be entitled with respect thereto to enforce and exercise such right without prejudice by reason of such receipt of preferred stock of said Consolidated Corporation in satisfaction of the principal or par of said share or shares.

Each holder of one share of the common stock of American Malting Company, other than said American Malting Company and said American Malt Corporation, upon the surrender of the certificate thereof duly endorsed in blank for transfer, to said Guaranty Trust Company of New York, No. 149 Broadway, New York City, which is hereby appointed the agent of the parties hereto for that purpose, shall receive \$44 in par value of the common stock of said Consolidated Corporation.

In all cases where the stock to be received shall consist of or include fractions of shares of stock of the Consolidated Corporation, scrip certificates duly executed by the Consolidated Corporation shall be issued by that Corporation to the holders of stock of American Malting Company, exchanging the same in accordance herewith. Said certificates shall be in favor of the bearers thereof and the Consolidated Corporation shall in and by each such certificate certify in substance that upon the presentation and surrender to the Consolidated Corporation or to any agent for that purpose named in such certificate of such scrip certificates together aggregating one hundred dollars (\$100) or some multiple thereof, of stock of either class, the Consolidated Corporation will deliver to the person

Petition—Exhibit D.

so presenting such certificates a proper and regular certificate for the number of full shares of stock of the Consolidated Corporation of the class represented thereby, and the Consolidated Corporation shall, for all such scrip certificates at any time outstanding, hold and keep the certificate or certificates for the share or shares of stock represented thereby. 10

ARTICLE V. Except in so far as herein otherwise specifically set forth or as provided by statute, the corporate name, franchise, rights and organization of said American Malt Corporation shall remain intact, and said Consolidated Corporation shall possess the powers, privileges and rights granted by, and shall be governed by, and be subject to the 20 certificate of incorporation of American Malt Corporation, as amended, a copy of which is hereto annexed marked "Exhibit A," and made a part hereof, as aforesaid, with the same force and effect as if the same were here fully set forth at length.

The corporate name and organization of American Malting Company, except in so far as the same shall continue by statute or may be requisite for carrying out the purposes of this agreement shall 30 cease upon the filing in the office of the Secretary of State of the State of New Jersey of this agreement when adopted by the stockholders as hereinafter provided.

ARTICE VI. The by-laws of the said Consolidated Corporation shall be the present by-laws of the said American Malt Corporation until changed or amended, as provided therein.

Petition—Exhibit D.

ARTICLE VII. The declaration and payment of dividends on their stock by either of the corporations, parties hereto, shall not in any way affect any of the terms of this agreement; but dividends so paid, if any, shall be retained by the stockholders receiving the same in addition to the rights, privileges and interests given them hereunder.

ARTICLE VIII. Upon the consummation of the act of merger or consolidation hereby provided for, all and singular the rights, privileges, powers and franchises of each of said corporations, and all property, real personal and mixed, and all debts due on whatever account, as well for stock subscriptions as all other things in action or belonging to each of said corporations, shall be vested in the Consolidated Corporation; and all property rights, privileges, powers and franchises, and all and every other interest, of the two companies parties hereto, shall thereafter be as effectually the property of the said Consolidated Corporation as they were of the several and respective corporations parties hereto, and the title to any real estate, whether by deed or otherwise vested in either of said corporations, shall not revert or be in any way impaired by reason of the said merger and consolidation, provided, that all rights of creditors and all liens upon the property of either of said corporations parties hereto shall be preserved unimpaired, and the respective corporations parties hereto may be deemed to continue in existence in order to preserve the same; and all debts, liabilities and duties of either of said corporations parties hereto shall thenceforth at-

Petition—Exhibit D.

tach to said Consolidated Corporation and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it, it being expressly provided that the merger and consolidation of the corporations parties hereto shall not in any manner impair the rights of any creditor of either of the said corporations. If at any time said Consolidated Corporation shall deem or be advised that any further assignments, assurances in the law, or things are necessary or desirable to vest in the said Consolidated Corporation, the title to any property of American Malt Corporation or of American Malting Company, the said American Malt Corporation or the said American Malting Company (as the case may be) and its proper officers and directors shall and will execute all such proper assignments and assurances in the law and do all things necessary or proper to vest title to such property in the said Consolidated Corporation and otherwise to carry out the purposes of this agreement.

It is expressly declared that said Consolidated Corporation, shall be, and said American Malt Corporation hereby covenants that, as consolidated, it shall be subject to the remedies and liabilities in such case prescribed in the said act entitled "An Act Concerning Corporations (Revision of 1896)" and the said several supplements thereto and amendments thereof.

ARTICLE IX. The Consolidated Corporation shall pay all expenses of merger and consolidation, including proper legal expenses.

Petition--Exhibit D.

ARTICLE X. The principal and registered office of said Consolidated Corporation in the State of New Jersey is at No. 15 Exchange Place, in the City of New Jersey, County of Hudson, and Benjamin Treacy is the agent therein in charge thereof upon whom process against the said Corporation
10 in the State of New Jersey may be served.

ARTICLE XI. This agreement shall be submitted to the stockholders of each of the corporations parties hereto as provided by law, and shall take effect and be deemed, and taken to be the agreement and act of merger and consolidation of the said corporations upon the adoption thereof by the votes of the holders of two-thirds of all the shares of
20 the capital stock of each of said corporations and upon the doing of such other acts and things as shall be required by said "Act Concerning Corporations (Revision of 1896)," and the several supplements thereto and acts amendatory thereof.

ARTICLE XII. This agreement is subject to the approval, in writing, of the Board of Public Utility Commissioners of the State of New Jersey.

30

IN WITNESS WHEREOF, the said parties to this agreement have, pursuant to a resolution passed by the respective Board of Directors of each of said corporations at meetings thereof, duly and regularly held, 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 Vice-
40 Presidents and attested by their respective Secre-

Petition—Exhibit D.

taries or Assistant Secretaries, all thereunto duly authorized, the day and year first above mentioned.

For AMERICAN MALT CORPORATION,

WILBERFORCE SULLY,
President.

(Seal of American
Malt Corporation)

Attest:

JOHN C. McCUNE,
Secretary.

10

Directors

{ ALBT. N. PARLIN
MICHAEL COLEMAN
CHARLES A. STADLER
C. H. ZEHNDER
GEORGE EMLÉN ROOSEVELT
THOS. S. OLLIVE
WILBERFORCE SULLY.

20

For AMERICAN MALTING COMPANY,

(Seal of American
Malting Company.)

CHARLES A. STADLER
President.

Attest:

JOHN C. McCUNE
Secretary.

Directors

{ WILLIAM E. PAINE
ALBT. N. PARLIN
MICHAEL COLEMAN
C. H. ZEHNDER
CHARLES SOHNGEN
CHARLES A. STADLER
JOHN C. McCUNE
GEORGE EMLÉN ROOSEVELT
THOS. S. OLLIVE
WILBERFORCE SULLY.

30

40

Petition—Exhibit D.

Exhibit A.**AMENDED CERTIFICATE OF INCORPORATION**

OF

AMERICAN MALT CORPORATION.

10 We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the Act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)," and the acts amendatory thereof, do hereby certify as follows:

I. The name of such Corporation is

AMERICAN MALT CORPORATION.

20 II. The location of its principal office in the State is No. 15 Exchange Place, Jersey City, New Jersey. The name of the agent therein and in charge thereof, and upon whom process against the Corporation may be served, is John J. Treacy. Said office is to be the registered office of such Corporation.

30 III. The objects for which the Corporation is formed are as follows: To manufacture, sell and deal in malt, its by-products, products produced in, or used in or in connection with, or incidental to, the manufacture thereof, and all or any products in the manufacture of which malt is or may be used, and the business incidental thereto; to acquire by purchase, subscription, or otherwise, and to hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the shares of the corporate stock of, or any bonds, securities or other evidences of indebtedness created by American Malting Com-
40 pany, a corporation organized and existing under

Petition—Exhibit D.

the Laws of the State of New Jersey; while owner of such shares of stock to exercise all rights of ownership, including the right to vote thereon; and, so long as the corporation shall hold the shares of stock or other securities of American Malting Company, to aid in any manner said American Malting Company, and to do any acts or things designed to protect, preserve, improve or enhance the value of 10 any of such shares of stock or other securities, of said American Malting Company; to acquire, own, hold and dispose of such real and personal property, and to carry on all such works and operations as may be necessary or convenient for the transaction of the business of the Corporation and the exercise of the powers and the accomplishment of the purposes herein set forth.

The Corporation shall have the power to conduct its business in other states, territories and 20 possessions of the United States, 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 outside of the State of New Jersey.

IV. The amount of the total authorized capital stock of the corporation is \$15,000,000, divided into 150,000 shares of the par value of \$100 each, where- 30 of ninety thousand (90,000) shares of the par value of \$100 each are preferred stock and sixty thousand (60,000) shares of the par value of \$100 each are common stock. The holders of the preferred stock shall be entitled to receive from the surplus or net profits arising from the business of the Corporation, dividends at the rate of, but not exceeding, four per cent. per annum from April 1, 1906, until October 1, 1906, and at the rate of, but not exceeding 40 six per cent. per annum from and after October 1,

Petition—Exhibit D.

1906, payable annually, semi-annually or quarterly as and when declared by the board of directors. The dividends on the preferred stock shall be cumulative and shall be payable before any dividend on the common stock shall be paid or set apart, so that if in any year a dividend at the rate aforesaid shall not have been paid on the preferred stock, the deficiency shall be payable before any dividends shall be paid or set apart for the common stock. The holders of common stock shall be entitled to receive all moneys appropriated to dividends after the payments of dividends as aforesaid on the preferred stock. In the event of any liquidation or dissolution, or winding up, whether voluntary or involuntary of the Corporation, the holders of the preferred stock shall be entitled to be paid in full, the par amount of their shares and the unpaid dividends accrued thereon before any amount shall be paid on the common stock. After such payment to the holders of the preferred stock the holders of the common stock shall be entitled to receive the remaining assets and funds in proportion to the shares held by them respectively.

The amount of the capital stock with which the Corporation shall commence business is \$1,000.

V. The names and post-office addresses of the incorporators and the number of shares of common stock subscribed for by each, the aggregate of such subscriptions being the amount of capital stock with which the Corporation will commence business, are as follows:

Names.	Post-office Addresses.	Number of Shares of Common Stock.
John J. Treacy....15	Exchange Place, Jersey City, N. J.....	5
Edward B. Bruce..52	William Street, New York City, N. Y....	3
Edward C. Palmer.	Morristown, N. J.....	2
		10

Petition—Exhibit D.

VI. The duration of said corporation shall be unlimited.

VII. The property and affairs of the Corporation shall be managed by its directors. The number of directors of the Corporation shall be fixed from time to time by the by-laws, but the number, 10 if fixed at more than three shall be some multiple of three. The directors shall be classified by dividing them into three classes each consisting of one-third of the whole number of the board of directors. The term of office of each class of directors shall be three years except that upon the organization of the Corporation the first class shall be elected to serve only until the first annual election after organization, the second class until the second 20 annual election and the third class until the third annual election; and at each annual election after organization the successors to the class of directors whose terms shall then expire shall be elected to hold office for the term of three years. In case of an increase in the number of directors each class of directors shall be increased equally, and the additional directors of each class may be elected by the board of directors, or by the stockholders at an annual or special election, and shall be elected for 30 the unexpired term of each class respectively. The directors shall have power to hold their meetings, to have one or more offices, and to keep the books of the corporation (except the original or duplicate books of the corporation in which the transfers of stock shall be registered, and the original or duplicate books containing the names and addresses of the stockholders and the number of shares held by them) outside of the State of New Jersey at such 40

Petition—Exhibit D.

places as may from time to time be designated by them.

The board of directors may designate from its number an executive committee, which shall for the time being, in the intervals between meetings of the board, and to the extent provided by the by-laws, exercise the powers of the board of directors
10 in the management of the affairs and business of the corporation, and the board of directors may designate from their number any other standing committees which shall have and may exercise such power as may be conferred or authorized by the by-laws, or by the board of directors.

The board of directors shall have power to authorize and cause to be executed and delivered mortgages and other liens upon the real and personal property of the Corporation, as security for
20 the bonds or obligations of the Corporation, or otherwise.

The board of directors may, with the consent of the holders of two-thirds of each class of the capital stock, issued and outstanding, sell, assign, transfer or otherwise dispose of the whole of the property of the Corporation to any person or corporation, domestic or foreign, whether for cash or for the stock and securities of any such corporations or
30 for other property.

The board of directors may from time to time fix the number, term of service, duties, powers and rate of compensation of, and elect or appoint all officers and employees of the Corporation as they may deem requisite.

Any officer or employee of the Corporation may be removed at any time by vote of the board of directors, or by any committee or superior officer
40 upon whom such power of removal may be conferred

Petition—Exhibit D.

by the by-laws or by a vote of the board of directors.

The board of directors shall have power to determine the time or times for the declaration and payment of dividends and from time to time to fix and determine and to vary the amount of the working capital of the Corporation, and to direct and determine the use and disposition of the working capital, and all rights to dividends from profits shall be subject thereto. 10

The board of directors shall from time to time determine whether, and to what extent, and at what times and places, and under what conditions and regulations, the accounts and books of the Corporation or any of them shall be open to the inspection of the stockholders, and no stockholders shall have any right to inspect any account or book or document of the Corporation, except as conferred by statute of this state or authorized by the board of directors or by a resolution of the stockholders. 20

The board of directors may make by-laws and from time to time may alter, amend or repeal by-laws; but any by-laws made by the board of directors may be altered or repealed by the stockholders at any annual meeting or at any special meeting provided notice of the proposed alteration or repeal be included in the notice of the special meeting. 30

Any action which, prior to the enactment of Chapter 119, Laws of 1901, amending Section 17 "An Act Concerning Corporations (Revision of 1896)," required the consent of the holders of two-thirds of the stock of the corporation at any meeting after notice to them given, or required their consent in writing to be filed, may be taken upon 40

Petition—Exhibit D.

the consent of and the consent given and filed by the holders of two-thirds of the stock of each class represented at such meeting in person or by proxy.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 30th day of March, in the year one thousand nine hundred and six.

[SEAL]

JOHN J. TREACY.

EDWARD B. BRUCE.

E. C. PALMER.

STATE OF NEW YORK, } ss.:
County of New York, }

20 Be it remembered, that on this 30th day of March, 1906, before me, the subscriber, a notary public in said state and county, personally appeared JOHN J. TREACY, EDWARD B. BRUCE and EDWARD C. PALMER, who I am satisfied are the persons named in and who executed the foregoing certificate of incorporation, and I having first made known to them the contents thereof, they did each acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

30

[SEAL.]

ARTHUR C. CLEMENT,
Notary Public,
Kings County.

Certificate filed in New York County.

STATE OF NEW YORK, } ss.:
County of New York, }

40 I, PETER J. DOOLING, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify that Arthur W. Clement, whose

Petition—Exhibit D.

name is subscribed to the Certificate of the proof or acknowledgment of the annexed instrument and thereon written, was, at the time of taking such proof and acknowledgment, a Notary Public acting in and for said County, duly commissioned and sworn, and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements or heredita- 10
ments in said State of New York, and further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County the 30th day of March, 1906.

PETER J. DOOLING,
Clerk.

20

[SEAL.]

ENDORSED:

"Received in the Hudson Co., N. J., Clerk's Office
Mar. 30, A. D. 1906, and Recorded in Clerk's
Record, No.

, on Page
JOHN ROTHERHAM,
Clerk."

"Filed and Recorded Mar. 31, 1906.

S. D. DICKSON,
Secretary of State."

20

STATE OF NEW YORK, }
County of New York, } ss.:

I, JOHN C. McCUNE, Secretary of American Malt Corporation, a corporation organized and doing business pursuant to an Act of the Legislature of New Jersey entitled "An Act concerning Corporations (Revision of 1896)," DO HEREBY CERTIFY in 40

Petition—Exhibit D.

accordance with the provision of Section 105 of said Act:

1. That the foregoing agreement for the merger and consolidation of said corporation and American Malting Company was made by the directors of said American Malt Corporation at a duly convened meeting called for the purpose.

10

2. That the said agreement was submitted to the stockholders of said American Malt Corporation, at a meeting thereof called for the purpose of taking the same into consideration, of which meeting twenty days' notice of the time, place and object thereof was mailed to the last known post-office address of each of said stockholders.

20

3. That the said agreement was considered by the stockholders at said meeting and a vote of the stockholders was taken by ballot for the adoption or rejection of said agreement, and that stockholders owning more than two-thirds of the shares of the capital stock of said American Malt Corporation voted in favor of the adoption of said agreement.

30

4. That the meeting of stockholders of American Malt Corporation, and the said vote by ballot upon the adoption of said agreement, were held and taken separately from the meeting of stockholders and vote of the said American Malting Company.

40

5. That the principal office of said American Malt Corporation in the State of New Jersey is at No. 15 Exchange Place, Jersey City, and Benjamin Treacy is the agent therein and in charge thereof, upon whom process against said corporation may be served within said State.

Petition—Exhibit D.

IN WITNESS WHEREOF, I have hereunto signed my name as Secretary and affixed the seal of the said American Malt Corporation this 15th day of September, 1913.

(Sgd) JOHN C. McCUNE
Secretary.

[SEAL OF AMERICAN
MALT CORPORATION.]

10

STATE OF NEW YORK, } ss.:
County of New York, }

I, JOHN C. McCUNE, Secretary of American Malting Company, a corporation organized and doing business pursuant to an Act of the Legislature of New Jersey entitled "An Act concerning corporations (Revision of 1896)," DO HEREBY CERTIFY in accordance with the provision of Section 105 of said act: 20

1. That the foregoing agreement for the merger and consolidation of said Company and American Malt Corporation was made by the directors of said American Malting Company, at a duly convened meeting called for the purpose.

2. That the said agreement was submitted to the stockholders of said American Malting Company, at a meeting thereof, called for the purpose of taking the same into consideration, of which meeting twenty days' notice of the time, place and object thereof was mailed to the last known post office address of each of said stockholders. 30

3. That the said agreement was considered by the stockholders at said meeting and a vote of the stockholders was taken by ballot for the adoption or rejection of said agreement, and that stock- 40

Petition—Exhibit D.

holders owning more than two-thirds of the shares of the capital stock of said American Malting Company, voted in favor of the adoption of said agreement.

10 4. That the meeting of stockholders of American Malting Company, and the said vote by ballot upon the adoption of said agreement, were held and taken separately from the meeting of stockholders and vote of the said American Malt Corporation.

20 5. That the principal office of said American Malting Company, in the State of New Jersey is at No. 15 Exchange Place, Jersey City, and Benjamin Treacy is the agent therein and in charge thereof, upon whom process against said Company may be served within said State.

IN WITNESS WHEREOF, I have hereunto signed my name as Secretary and affixed the seal of the said American Malting Company this 15th day of September, 1913.

(Sgd) JOHN C. McCUNE
Secretary.

[SEAL OF AMERICAN
MALTING CORPORATION.]

30

Testimony, Sept. 30, 1913.

BOARD OF PUBLIC UTILITY COMMIS-
SIONERS,

TRENTON, N. J., Tuesday, Sept. 30, 1913.

AMERICAN MALT CORPORATION }
and }
AMERICAN MALTING COMPANY, Merger. }

Before Commissioners DONGES, HILLERY and 10
DANIELS.

For the Petitioners appears FRED J. FAULKES,
Esq., and SILAS W. HOWLAND, Esq.

Commissioner Donges: A protest was filed
by Samuel H. Ordway, who claims to be
the owner of 25 shares of preferred stock of
the American Malting Company. The first
objection seems to be that this objector had
no notice of the meeting of the stockholders 20
at which the agreement was considered.

Mr. Faulks: As a matter of fact notice was
sent him. If he didn't receive it, it miscarried
in the mails or in his office.

Commissioner Donges: He claims it is un-
fair and unjust to preferred stockholders and
reduces the holdings of preferred stock from
\$100. par value to \$62. par value for each
share.

Commissioner Hillery: Is that the plan; to 30
offer stock at \$62. for stock originally issued
at \$100.?

Mr. Faulks: We are giving \$62. for the pre-
ferred and \$44. for the common of the Ameri-
can Malt Company.

Commissioner Hillery: Was there paid \$100.
for the original?

Mr. Faulks: He says his father paid it.
We haven't any knowledge. We don't know. 40

Testimony, Sept. 30, 1913.

Commissioner Daniels: What is the capitalization of the new company?

Mr. Faulks: \$15,000,000. We are prepared to answer objections.

Mr. Howland: As to the failure of Mr. Ordway to get notice, as Mr. Faulks has said, we cannot understand that, because notice has been sent to all stockholders of record with respect to the meeting, and the secretary's certificate to that effect is appended to the merger agreement as required by statute.

Commissioner Daniels: Did you send it by registered mail?

Mr. Howland: Simply through the mails. There were two notices sent, one notice sent five or six weeks before the meeting,—eight weeks before the meeting—and the other four weeks before the meeting, twenty days before the meeting, so we cannot answer that. It may be miscarried in the mails or in his own office but we have the affidavit of the secretary and the certificate here that the notice was mailed. As I remember, the second objection of his is to the effect that he as a preferred stockholder is receiving \$62. in the new company. Everyone is receiving less in the new company than they had in the American Malting Company. The American Malting Company was capitalized at \$30,000,000 of which \$15,000,000 was preferred and \$15,000,000 was common.

Commissioner Daniels: How much was issued of each?

Mr. Howland: About \$28,000,000 outstanding of both kinds, \$28,940,000 outstanding, I think. About \$14,500,000 of each.

Testimony, Sept. 30, 1913.

Commissioner Daniels: The preferred stock is receiving 7%.

Mr. Howland: Yes, sir. The real question seems to be not whether the preferred stock is getting as much in par value as in the old company, but whether it is getting the same representation or a fair representation in the new company. Of course in a \$15,000,000 company, 10 \$100 of stock in a \$30,000,000 company wouldn't get \$100, because there would be nothing left for the common. They stood side by side in the old company, \$14,500,000 and \$14,500,000, and in the new company there are \$9,000,000 of preferred all of which goes to the old preferred stockholders and \$6,000,000 of common, so that the common stockholders suffer, as he indicates in his letter, very much more reduction in par value than the preferred 20 stockholders. I cannot see how he can object to having \$62 in a \$15,000,000 company where he had \$100 in a \$30,000,000 company. His share is larger.

Commissioner Daniels: Does the preferred stock carry the same dividends?

Mr. Howland: The old preferred stock carried 7% cumulative dividends and was not entitled to any preference in the assets on dissolution or distribution of the assets otherwise. The stock which is being offered under this plan carries 6% cumulative dividends and is preferred as to assets or distribution, so there is a loss of 1% in dividend rate and the corresponding gain with respect to right on distribution. 30

Mr. Faulks: In distribution in the new company, the preferred is preferred as to par value 40

Testimony, Sept. 30, 1913.

and as to accumulated dividends, whereas in the old company there was no preference as to either of those.

Commissioner Hillery: It was on a par with the common?

Mr. Faulks: Yes.

10 Commissioner Daniels: What was the actual history of the payments of the old preferred?

Mr. Faulks: We have a statement of that here. In 1898 and 1899 the old company paid dividends at the full rate of 7%. As a matter of fact the Court of Errors in adjudging the case of Appleton against the company thought some portion of those dividends had been paid out of capital. That was under the old management. The dividends were entirely sus-
20 pended from 1900 to 1907. Since then they have been paid at the following rates, 1.56% in 1908; 3.02% in 1909; 2.18% in 1910; 1.86% in 1911; 2.79% in 1912, and thus far this year one dividend of 1.55%. No dividends have been paid on the common stock at all.

Commissioner Daniels: Do the holders of the old preferred waive their rights to arrear-
ages?

30 Mr. Faulks: No, they are expressly reserved to them by the merger agreement.

Mr. Howland: I don't know but what we should qualify that. They are expressly reserved so far as they can be paid out of the accumulated and existing surplus of the American Malting Company; not carried forward. That is one of Mr. Ordway's objections; not carried forward as a burden from the stand-
40 point of the company.

Testimony, Sept. 30, 1913.

Commissioner Daniels: What is the amount of surplus?

Mr. Howland: The back surplus caused by earnings which has arisen entirely during the last seven or eight years amounts roughly to \$2,000,000.

Mr. Faulks: \$1,918,000. The profits for the year ending August 31, 1913, were \$403,000, making the total surplus \$2,321,000.

Commissioner Daniels: There have been five or six years where the actual dividends paid were 2%.

Mr. Faulks: Mr. Ordway states, and he is about right, that there are about 80% of accumulated dividends on this preferred stock.

Commissioner Daniels: Unpaid, but due from surplus.

Mr. Faulks: So far as the earnings will pay them. They are not due by distribution, as we read the charter. ²⁰

Commissioner Hillery: How far will the present surplus go toward reducing that 80%?

Mr. Faulks: Not very far, 10% or 15%.

Commissioner Daniels: It comes to this; a holder of one share of preferred is getting \$62, in the new preferred bearing 6% as against 7% in the old, and surrendering something like ³⁰ \$75. per share of past dividends; isn't that the case?

Mr. Howland: He is giving up these accumulated dividends so far as the hope of ever getting them out of future earnings is concerned. He is obtaining in exchange for that which might appear to be a substantial right, but which as the business is going is a negligible right, and which looks big, but which prac- 40

Testimony, Sept. 30, 1913.

10 tically, he never would expect to realize,—he is getting in lieu of that a distributive representation in the new company, getting \$62, where the common get \$44, in the new company. That counts in dividends and in distribution and in voting power. All those things are given in consideration of his position as holder of the rights which have accumulated in years gone by.

Mr. Faulks: Also, of course he reserves the right in the present surplus, which is all he would have if the company should be dissolved. He has no preference on distribution under the present charter.

20 Commissioner Hillery: The common stockholders of par \$100. get \$44. and the preferred \$62.

Mr. Faulks: Yes, sir.

Commissioner Hillery: As a matter of fact, is there any way of knowing originally what each contributed toward this capitalization?

Mr. Faulks: I don't expect there is, because the company was formed, taking over a good many plants.

Commissioner Hillery: You don't know whether \$100. was paid for every share.

30 Mr. Faulks: There were a great many plants. \$2,800,000 of cash for working capital went into the company, against which practically all of this stock, both preferred and common, was issued.

Commissioner Hillery: Is this the only objection?

Mr. Faulks: Twenty-five shares out of practically 300,000.

40 Commissioner Daniels: We have another

Testimony, Sept. 30, 1913.

question; supposing he should persist in his position; wouldn't that present some difficulty if you didn't have the unanimous consent of the stockholders of record to this merger?

Mr. Faulks: No, he would have to have his stock appraised in accordance with the rights given by the statute; which is, that any dissenting stockholder can have his stock appraised by a certain court. This plan has been under consideration for some time. We think the fairness of it to both preferred and common stockholders is convincingly demonstrated in that over 98½% of all the stockholders in the old company have already seen fit to exchange their stock on these terms. We don't think the merger ought to be defeated by the holder of only twenty-five shares. He can only point out some possible objection in the very distant future, the hope that this company may work out its salvation by paying up 80% of arrearages. 20

Mr. Howland: That would involve \$10,000,000 roughly speaking of earning and nothing to pay 6% on \$9,000,000 of preferred stock. They would have to earn \$540,000 a year for the preferred stock and then work out this accumulated surplus 30 in their earnings.

Commissioner Daniels: Any bonds involved.

Mr. Faulks: No; there is a bond issue which isn't involved at all. Twelve or fourteen years since the full dividend has been paid. We have had good business and bad business and all kinds of business, and it is evident the company can never work out that old 80%; it must increase. We think on the 6% basis, with the 40

Testimony, Sept. 30, 1913.

proposed capitalization and particularly in view of the fact that upon dissolution of that company, if it occurs, the preferred stockholders will be entitled to preference as to their part and accumulated arrearages and dividends, that they are very fairly treated; and their voting power * * *

10 Commissioner Donges: Does the \$15,000,000 represent all the stock of the American Malt Corporation?

Mr. Faulks: Yes, and all issued in exchange, except a comparatively few shares that are held for the 1½% of the stockholders in the old company who have not as yet come in.

Commissioner Donges: The American Malt Corporation has been doing business?

20 Mr. Faulks: Only as a holder of the stock. The charter powers are the same.

Commissioner Daniels: What is the shrinkage of the total capitalization, effected by the merger.

Mr. Howland: Approximately \$15,000,000.

30 Mr. Faulks: As far as the outstanding is concerned it is \$13,500,000. Otherwise the old \$30,000,000 and the new company \$15,000,000. The outstanding of old company was \$28,500,000, and of the new company will be \$15,000,000.

Commissioner Daniels: Have you any estimate of the property values of plant and other apparatus?

40 Mr. Faulks: We have a balance sheet of August 31 of this year, the end of the fiscal year, and that gives as value of the property, plants and good will \$27,585,000. That is the price at which the properties were taken over

Testimony, Sept. 30, 1913.

and paid for in cash at the time the company was organized in 1897. The other items are: cash in bank \$1,258,000, accounts and bills receivable \$1,372,000, inventory \$2,437,000, bonds purchased for account of treasury \$133,000, on real estate \$95,000, securities of other companies \$16,000, unexpired insurance, \$37,000, special deposit * * * . The difference between the balance sheet annexed to the petition and one we are now prepared to file, that is of April 30th. Since then has been the period of the year when the company sells its product and gets in its money, so that you will see the inventory which there is \$3,800,000 is here reduced to \$2,437,000. We have sold our malt. On the other hand our bank balance which I think was then about \$705,000 was on August 31st, \$1,258,000. On the side of liabilities the accounts payable here are \$42,000. I think they were considerably larger in April. There were bills payable of \$400,000. Those have disappeared. They have been paid off, due to the season of the year. The summer season is the time when we sell the malt and make the money that is made.

Commissioner Daniels: You spoke of stock returned to the treasury.

Mr. Faulks: That stock has been held in the treasury since the time of the Appleton case I referred to. There was a decree against the directors of the company under the old management, by reason of the courts having found they declared dividends out of capital and in connection with the settlement of that decree there was cash paid to the extent of several hundred thousand and this stock turned

Testimony, Sept. 30, 1913.

back into the treasury. That is true of \$1,000,000 of the stock and the other \$100,000 was issued in connection with the organization. It was issued to one of the various owners of plants but wasn't taken up and has been in the treasury ever since.

10 Commissioner Daniels: Have you a separate inventory of physical property as distinguished from the goodwill. Can you say what the goodwill stands for?

Mr. Faulks: We have no detailed statement.

Commissioner Daniels: You have an income and expense account attached to your petition.

Mr. Howland: No, the figures as to earnings. I have the annual reports for a number of years.

20 Commissioner Daniels: I would suggest you better file that with the other papers and the income and expenditure account. The more recent years, the last two or three years.

Do you know about what the gross receipts will amount to

Mr. Faulks: Our auditor is here, he can give that.

Mr. McCune (Auditor): About \$8,000,000.

30 Commissioner Daniels: And your gross outgo, not including dividends.

Mr. McCune: The expense account about \$1,400,000. and profits \$403,000. The cost of raw product, plus expenses equals the total amount of outgo, less \$403,000 which will show as net earnings for the year.

Commissioner Daniels: Does that include any allowance for depreciation on the plant?

40 Mr. McCune: No. The organization plan aims to cut that down by one-half, practically.

Testimony, Sept. 30, 1913.

The expense of \$1,400,000 represents all the charges we have. Repairs to machinery and buildings practically leave the home plant in as good condition at the end of the year as at the beginning. No complicated machinery; and the plants are kept up, as good a value as when built.

Commissioner Daniels: Don't you have some 10 property which despite repairs suffers deterioration?

Mr. McCune: None, but the malting plant. The land is increasing in value.

Commissioner Daniels: You must have certain buildings.

Mr. McCune: We do.

Commissioner Daniels: Even though you repair those there would be some depreciation. 20

Mr. McCune: I wouldn't contend that; but I would contend it leaves them in perfectly normal condition to operate and nothing has been charged out for depreciation, because this reorganization has been pending and that would cut the real estate and plant account practically in two.

Commissioner Daniels: Do you remember what the real estate and plant are inventoried at? 30

Mr. McCune: They were all taken over in a lump originally for common and preferred stock, about 2,500,000 of what it now is. The plant in New York City was taken over for cash and stock, but the original book entries are simply real estate and plants on one side, \$2,080,000 turned over in a lump against the original issue of common and preferred, \$12,500,000 of preferred and about that in common. 40

Testimony, Sept. 30, 1913.

Then about \$2,600,000 of the present issue. The present issue is about \$29,000,000; \$14,440,000 preferred and the other common.

Commissioner Daniels: How do the net earnings in the last year compare with the net earnings for a few years previously?

10 Mr. McCune: This year \$400,000 was only half as great as the year before. \$810,000 for the year ending August 31, 1912, and this year \$403,000. For the year before that I have a tabulated statement of the earnings. They averaged \$600,000 for the last six or seven years. We had one large year of \$950,000, then \$550,000, then \$242,000, \$810,000 and \$403,000. That is from memory, it is about right.

20 Commissioner Donges: In view of the objection of Mr. Ordway, and his statement that he is unable to appear today, the feeling of the Board is that the matter ought not to be disposed of until he has a further opportunity to be heard.

Commissioner Daniels: Can the auditor inform us about what percentage of the total malt business of the country the company controls?

Mr. McCune: We do, I should say, about 16%, about one-sixth, or 16%.

30 Commissioner Donges: The companies to be combined.

Mr. McCune: Are just the same, no difference.

Commissioner Donges: The American Malt Corporation is a purely holding company?

Mr. McCune: A purely holding company.

Commissioner Donges: The American Malt-
ing Company is the operating company.

40 Mr. McCune: Yes, sir.

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Commissioner Hillery: This is an attempt to get rid of the holding company.

Mr. McCune: That is one of the objects we have in mind, to abolish the holding company. The primary purpose is to effect economies.

Adjourned until Friday, October 10th, at the
Chancery Chambers, Jersey City, at 10:30 A. M. 10

BOARD OF PUBLIC UTILITY COMMISSIONERS,

JERSEY CITY, N. J., Friday, Oct. 10, 1913.

AMERICAN MALT CORPORATION }
and AMERICAN MALTING COM- } 20
PANY, merger.

Before Commissioners DONGES, HILLERY and DANIELS.

For the petitioner appear F. J. FAULKES, Esq.,
and SILAS HOWLAND, Esq.

For objector, SAMUEL H. ORDWAY, appears in person. 30

SAMUEL H. ORDWAY sworn.

My argument was really a legal argument. If there is any question of fact I am not familiar with the proceeding.

Commissioner Donges: You are the owner of preferred stock?

Mr. Ordway: I am; I own 25 shares of the preferred stock of the American Malting Com- 40

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pany which I have owned for about ten years. I also represent my brother who owns 25 shares of preferred stock, Lucius P. Ordway, of St. Paul, Minnesota. We inherited the stock from our father, Mr. A. L. Ordway, who purchased it in 1898, or about that time, and paid par for it at that time. There are a few other statements of fact in my letter; for a year or two after my father purchased the stock, dividends were paid at the rate of seven per cent. per annum upon it, then the company stopped paying dividends and resumed it, I think, in 1908, but since that time has paid only two or three per cent. a year; at any rate much less than seven per cent. There are now accumulated preferred dividends of which I cannot give the exact amount, but as I calculate, it is over eighty per cent. Probably the other side could state more accurately than I the amount of accrued dividends. I received no notice of the meeting of the stockholders to pass upon this proposed merger agreement although I received other notices from the company showing they had my address. I didn't know of the proposal or of the meeting and didn't attend, but as soon as I learned of it I wrote to the company that I dissented from the proposed agreement and should oppose it. I should be very glad to state my reasons. That is more of an argument.

Commissioner Donges: You say the agreement is unfair?

Mr. Ordway: Yes.

Commissioner Donges: You need not at this time go into any matters of law in the argument, they are embraced in the papers them-

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selves; but you say the agreement or merger is unfair and unjust.

Mr. Ordway: I didn't come here with the intention of making any technical legal arguments. I wanted to present my views as to why I think this agreement is unfair and unjust. I assume it is established law in this State that the statute in regard to mergers of corporations is not to be deemed to give directors or a majority of the stockholders a two-thirds majority, a free hand to make unreasonable or unfair mergers if they see fit. The courts have held here it must be a fair and equitable proposition and if it isn't a fair and equitable proposition it cannot be sustained either by the courts or this Commission; but it is without any attempt to raise any technical points except the point that I have had no notice of the meeting, that I come here, but simply to present my views that the proposed merger is unfair and unequitable to the preferred stockholders. I will try to be as brief as I can about that. There is my objection that the proposed reduction of the preferred stock from \$100 to \$62 is unjust to the preferred stockholders. The statements of the American Malting Company down to the last one which I have here, and I got assurance in one, that all of the stock, preferred and common, is worth 100 cents on the dollar, which shows there is a substantial surplus of \$2,000,000. In case of dissolution of the company all of the stockholders, including the preferred, would receive par for their stock. Under this new merger we cannot in

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any event receive more than \$62 in case of dissolution for every one hundred dollars that they own in the old company. There is a corresponding and greater reduction of the common stock which on the face of it would seem as though it is fair, but it is unfair because the common stockholders own all that is left after the preferred stockholders have received par so if the common stockholders were cut down to one per cent of all holdings they would be as well off as today, because they have all that is left and as long as a fair proposition is preserved there is no difference what the amount is. If the common stockholder owns one one-thousandth of the common stock he will get just as much whether he has one thousand shares or one share. In case of dissolution therefore a reduction of the common stock by which a person takes the shares doesn't affect him in the slightest degree provided his proportion of the total common stock remains the same. That is an unfair arrangement to the preferred stockholder. The preferred stockholder will suffer in case of dissolution. He cannot get a proportionate share of the assets of the company; all he can get is the par value of his stock and the common stockholder can get a proportionate share of what is left, and, therefore, what appears to be a reduction in what is coming to him isn't a reduction at all. A reduction in capitalization falls solely on the preferred stockholder and, therefore, I think it is unjust. It will be argued by the other side that the preferred stockholder under the old corporation had no preference as to assets, but simply as to divi-

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dends and that under the new corporation he is to have preference as to assets. Of course, there is an argument there as to the advantage to be gained by the preferred stockholder by going into the new corporation. If that were the only question involved we would have to go into the question whether that was just, whether that fairly worked out, whether he 10 was called upon to surrender more than he ought to be called upon to surrender for that advantage, but in view of the fact that these statements, which, if the Board pleases, I can file with you, the annual statements of the American Malting Company, will show that there are assets now there to pay par for both classes of stock. Therefore, there is apparently no danger that the preferred stockholder 20 will suffer because of the old arrangement that he is to share equally with the common stockholder and not to have preference. That is my objection, on the first ground, that it is an unreasonable reduction of the rights of the preferred stockholder, and that raises another point which I didn't make clear in my letter, but which I reserved under that somewhat general clause at the end. This merger agree- 30 ment reserves no rights against the directors of the company for improperly declaring dividends. The law of New Jersey provides that directors shall not declare dividends except out of surplus and earnings and shall not reduce the capital below the par value of the stock, and if they have declared dividends in violation of that provision a stockholder has the individual right to sue those directors for the amount so paid out by them and that right 40

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10 simply belongs to the stockholders under the statute, and the moment the man ceases to be a stockholder he loses that right. We are compelled here to surrender our stock except so far as we are allowed to retain it for one other purpose, and that particular purpose does not include the right to sue the directors for improperly declared dividends. I speak of this, because I wish to make it clear what my point is. It bears on my first point. I presume these dividends have not been improperly declared during the last five years, but if my friends are going to take the position that there are not assets enough of the American Malting Company to pay par, then they are admitting that dividends have been improperly paid, and in that case I have a right to sue the directors for improperly declared dividends. If they choose to take the position that their statements are correct and there are enough assets to pay off both classes of stock of the old company in full at par, then it is clear that the preferred stockholders are unjustly discriminated against by a reduction from \$100 to \$62. If there are not assets enough to pay off the preferred stockholders at par and they therefore claim the reduction is a reasonable one, then they are depriving me of my right to sue the directors for improperly declared dividends. It is unjust and unfair in those particulars. One other point which I also think is unjust and unfair in this merger agreement, and that is in regard to the attempt that has been made to preserve the rights of the preferred stockholders as to accrued dividends. This is an accumulative pre-

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ferred stock and there are accumulated and unpaid up to the present time dividends amounting to over 80%. They have provided in this agreement that the preferred stockholder may retain his rights as to the accumulated dividends insofar as there is any surplus at the present time out of which he can collect them. That doesn't go far enough. 10
The recognition which is implied by my rights as a preferred stockholder of accumulated dividends ought to go further than existing dividends. It is based on the contract of the company with me as a preferred stockholder that I shall have the right to those accrued dividends not only out of any existing surplus but any surplus that may be earned in the future. That question has come 20
up, not squarely, but in a way, in the Central Leather Company case, before Vice-Chancellor Emery and went to the Court of Appeals. This particular point did not come up in that case. Vice-Chancellor Emery approved the form of merger agreement which is substantially identical in this respect that I am now talking about with the one submitted by counsel of the malting company. I have examined the record with care 30
and conferred with counsel and I am informed by them and the record bears them out, that this particular point was not raised, was not argued and not passed on by him. The claim that the stockholder made there was that their rights as preferred stockholders could not be cut down in any respect and they were entitled for all future time during the life of the company to the same rate of dividends which 40

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10 they were to receive under preferred stock arrangement of the old company. On that Vice-Chancellor Emery decided against them but decided they had rights as to accumulated dividends. The question as to the extent of those rights was not argued before him or distinctly passed upon by him. It was held by him they had a right to preserve their rights to accumulated dividends in existing surplus which apparently was very large in that case. The question whether or not they were entitled to preserve existing rights in future surplus was not argued by him. If the preferred stockholder is entitled to be protected in the rights to accumulated dividends now accumulated and unpaid, it seems to me he is

20 entitled to protection as to that right not only of existing surplus but as to any surplus the company may earn in the future, which is the nature of the contract entered into by him. It follows from Vice-Chancellor Emery's decision that I am entitled to that additional protection and this agreement should be modified and amended so as to provide, not only as to existing surplus but as to future surplus earnings until the accumulated dividends are paid off.

30 I shall not raise here before this Board the further question as to whether I am not entitled to a seven per cent rate on the preferred stock during the life of the company, because Vice-Chancellor Emery decided that the other way, and I think that very probably your Commission would follow that decision. An appeal was taken to the Court of Errors and Appeals and Vice-Chancellor Emery's decision was reversed, but on another ground. That partic-

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ular point was not decided by the Court of Errors and Appeals. It is still open in this State so far as the highest court is concerned. Therefore I do not wish to raise the point. I wish to reserve the point. I simply press before you the question of my protection as to already accumulated dividends which Vice-Chancellor Emery has held I am entitled to be 10 protected in.

I suppose that no question will be raised as to the good faith of the complainant in this proceeding but as it is not impossible that my friends may feel bound to take any possible position they can, I should like to say I have made no effort to represent any other stockholder here. I am representing simply and solely my own interests and those of my brother. Perhaps, if the Commission thinks it necessary, 20 I might state something personally in regard to myself. I am a member of the Bar of New York City, a member of the Executive Committee of the New York Bar Association; I was a member of Governor Hughes's investigation commission appointed to investigate the stock exchange; a member of the tax commission appointed my Governor Higgins to revise 30 the tax laws of New York State. I am taking this position simply because I think my rights are being invaded and I have a right to call upon the Public Utility Commissioners to protect me if I am right, even if my interest is a small one.

Mr. Faulks: If the Board please, we make no question of any kind as to Mr. Ordway's ownership of stock in this corporation or of his absolutely good faith in the presentation 40

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of his objections to the proposed merger plans. We do think, however, that each and every one of those objections is absolutely without any merit and think your Board should unhesitatingly give its approval to the plan and permit its consummation.

10 First, as to the fairness of the plan. I will take just a moment to recall the situation to your minds as disclosed at Trenton a week ago Tuesday. The American Malting Company, which is the old company, the operating company, was incorporated in 1897 with an authorized capital stock of \$30,000,000, half preferred and half common. For two years beginning immediately on the organization it declared dividends of seven per cent per annum.

20 The Court of Errors and Appeals in the case of Appleton against the American Malting Company decided in 1903 or 1904, found and held that those dividends had been paid largely out of capital and a decree of the Court of Chancery requiring the repayment by the directors who had participated in the declaration of those dividends of a substantial amount into the treasury of the company was affirmed

30 by the Court of Errors and Appeals. The present directors, the present management, were not connected with the inception of the company, and in no way responsible for the condition which existed at that time and which probably led to the purchase of this stock by Mr. Ordway or his father at par. As a result of that decision there was not only a change in the management of the company but since then its operations, including its dividend

40 declaration and payments, have all been kept

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strictly within the law. Dividends were suspended entirely for eight years from 1899 until 1907 and since then they have only been declared at small rates from 1.55% to 3.02%. The largest dividend that has been declared during the last fourteen years has been 3.02%, declared in 1909, so that there are these arrearages of dividends amounting to about 80% 10 to the preferred stockholders, their stock being 7% accumulative stock. As I stated the other day, as a result of the settlement which was made under this decree of the Court of Errors, there came back into the treasury of the company about a million dollars of this common stock. Neither all of the preferred nor all of the common were issued in the first instance. This company was formed through taking over 20 a number of different plants and issued in payment therefor a majority, of about \$29,000,000 of this common and preferred stock, and at that time there was put on the company's books the usual entry in cases of that kind, that the plants, property, and good will of the company constitute an asset of \$27,000,000. As against that stock the company received nothing except the properties and a certain 30 amount of working capital. After this settlement had been made, soon after 1900, in connection with the dividend suit and ever since then the outstanding capital stock of the company has been as follows: preferred \$14,440,000, common \$13,400,000, so you see the common is not quite equal to the preferred in the company, the malting company, the operating company, the company proposed to dissolve as a result of this agreement. The preferred stock- 40

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holders have an interest of $51\frac{1}{2}\%$, \$14,440,000 of stock is $51\frac{1}{2}\%$ of the total outstanding stock. In the new company the capital is to be \$15,000,000, and they will have \$9,000,000 of that stock out of \$15,000,000, the common stockholders getting about \$6,000,000, so there is no question of their losing control of the company. In fact, their control of it is absolutely secured by the fact that they will own two-thirds of all of this stock as against a bare majority now. Mr. Ordway has said quite a good deal about these arrears of dividends. I think that is the chief ground of his position, for surely there is nothing unfair in the change which is proposed to be made as to the rights, the respective rights of preferred and common stockholders on distribution. The present surplus of the company as shown by the figures given to the Board is \$2,142,000. That undoubtedly belongs to the preferred stockholders. That represents earnings, every dollar represents earnings which the preferred stockholders are entitled to have applied, when the moneys are no longer needed for working capital of the company, to the payment of the arrears of these dividends, but that is all they are entitled to. It cannot be that because a corporation says the dividends shall be accumulative at the rate of seven per cent., that if the company doesn't make anything that the preferred stockholders will nevertheless get it. It is abundantly settled under cases in this State, including the recent case of Lloyd against the Pennsylvania Electric Vehicle Company, that on dissolution of the old company if dissolved today, unless conceded by

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Mr. Ordway, that except for these \$2,000,000 the preferred and common stockholders would share equally in the assets. If the assets after the payment of dividends were not enough to pay the par value, the preferred stockholders would have to stand the same loss as the common stockholders. Under the new plan the rights of the stockholders in the consolidated 10 company, the American Malt Corporation, will be quite different and very much more in favor of the preferred stockholders. There on dissolution the preferred stockholders are to get all the arrearages of dividends. If that company is not any more successful than this, they will get first, the arrearages of dividends, then they will get the par value of their stock before the common stockholders come at all. Surely 20 that right is worth a great deal more to the preferred stockholder than any possible right, anything he may possibly lose as a result of giving up his stock in the old company. Here we have had a company which in fourteen years, through good times and bad times, has never been able to earn its dividends, never been able to earn half its dividend, during eight years it has paid no dividend at all and it isn't possible that upon the winding up of 30 that company today this item of \$27,000,000 representing property, plants and good will, wouldn't be of any great value in connection with the winding up of the company; it isn't possible enough would be realized to pay both the preferred and common stockholders, to pay the par value of their stock or anything like it. Mr. Ordway and his brother under the new plan will be sure to receive all arrearages of 40

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dividends from now on and also the par value of their stock. If Your Honors please, not only are these gentlemen going to get that if they come in; they don't have to come in, the statute gives them the independent right to get the value of their stock if they don't care to come in. They are not being forced out; they will always get the value of their stock. If they see fit to come in, they will not only get this two-thirds interest in the new company, they get this \$2,142,000. They have their claim upon that and that, if realized, will be sufficient to pay them an additional dividend of 16%, so it doesn't seem to me there is anything in the plan that can possibly be said to be unfair. Isn't it pretty well demonstrated that there isn't anything unfair about it by the fact already adverted to the other day, that the holders of 98½% of this \$27,840,000 have seen fit to come in already and exchange their stock? They have released their rights in this surplus. They thought the plan was fair enough without insisting on maintaining that right. Mr. Ordway, however, and his brother will be able if they come in to retain that right and get this comparatively large stockholding besides. The smallness of his holdings, of course, is no excuse for your withholding an approval of this plan if unfair. We make no point of that at all, but we do point out that he and his brother together only own less than 35/1000 of 1% of the preferred stock of this company. This preferred stock hasn't been owned by people who were favorable to the plan because they were intimately connected with it. There were some 1100 or 1200

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stockholders of the old company and a great many bought the same as Mr. Ordway, in the open market, with the idea that it would prove a better dividend bearer than it has, and yet all but this 34/1000 of 1% of those preferred stockholders have either come in or failed in any way to evidence that they have any dissatisfaction with the plan. A very large percentage of them have come in and we have no objectors, none here today, but this very small interest and that I think shows as clearly as anything would that the plan in itself is fair. 10

Commissioner Donges: What percentage of the stock is held by the American Malt Corporation?

Mr. Faulks: 98½%.

Commissioner Donges: By the American Malt Corporation? 20

Mr. Faulks: Yes, and that represents stock which has been exchanged under this plan.

Commissioner Donges: What percentage did the American Malt Corporation hold of preferred and common stock prior to the time when the stockholders delivered?

Mr. Faulks: None. This plan has been under consideration for some time and the matter has been submitted to the stockholders in the old company and they have seen fit to exchange their stock to the extent of 98½%. With regard to these accumulations, it is perfectly clear under Vice-Chancellor Emery's decision in the leather company case that Mr. Ordway has referred to, that what he held was this, that you couldn't propose a plan which was essentially unfair. 30

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Commissioner Donges: The American Malting Company was incorporated when?

Mr. Faulks: In 1897.

Commissioner Donges: And the Malt Corporation in 1906, for what purpose?

10 Mr. Faulks: For the purpose, according to its certificate of incorporation, of engaging in the same business as the American Malting Company.

Commissioner Donges: By the provisions of the original certificate?

20 Mr. Faulks: Yes. This is the only change; by the original certificate of incorporation it had authority to own the stocks and bonds of any corporation; by amendment that has been cut down so that its only power to hold stocks and bonds of other corporations are those of the American Malting Company.

Commissioner Donges: Prior to this year it held no stock whatever of the American Malting Company?

Mr. Faulks: It has been acquiring stock of the American Malting Company for several years last past.

Commissioner Donges: Under this plan or otherwise?

30 Mr. Faulks: Not under any particular plan, but with the idea that probably the two companies would be consolidated some day, but bought on the same terms, \$62 for the preferred and \$44 for the common.

Commissioner Donges: Prior to July 23, what were the holdings in common and preferred stock of the American Malt Corporation?

40 Mr. Faulks: Substantially the same as now.

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Commissioner Donges: So at the time of the stockholders' meeting the American Malt Corporation held 98½% of the stock, common and preferred, of the American Malting Company?

Mr. Faulks: That is right, and had owned that stock, practically all of it for some time. It began to acquire the stock of the Malting Company from the time it organized. It 10 gradually increased its holdings by acquiring on the same terms as are offered, to those stockholders who haven't come in, by this plan.

Commissioner Donges: The American Malt Corporation exchanged its stock for that of the Malting Company at \$62 and \$44.

Mr. Faulks: \$62 and \$44 for the preferred and common respectively, but those stockholders who saw fit to exchange stock did not 20 attempt to reserve the right in the surplus of \$2,140,000.

The situation in the leather case was not so very unlike this after all. There were arrearages of dividends in the old company, on preferred stock to the amount of 45%. Here they are larger, approximately 85%. There was a surplus as shown by the books of the company of \$20,000,000, and the dissenting 30 stockholders, who were both common and preferred and who represented a really very substantial interest in the company, several thousand shares, were offered a plan which did not permit them to maintain their rights in any part of the surplus: There was no such provision as there is in this plan. Vice-Chancellor Emery said he would enjoin the plan unless a provision of this kind was put in, a provision which would reserve and secure to the dissent- 40

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ing stockholders whatever rights they may have had at that time in this surplus. The question came up as to what those rights were and his position settles that. In the first place, they were only rights to dividends which had been actually earned, the arrearages cut no figure at all. They cannot pay dividends unless there are earnings, and insofar as there are earnings up to this time they belong to these stockholders. There was a question as to whether the \$20,000,000 was all earnings or not, and he did not pass on that question. There was this situation in the leather case that did not exist here; the merger act had been passed after the original company, the old U. S. Company had been incorporated. We haven't that phase to deal with at all here, for both of these companies have been created at a time when the merger act was in full force. That was passed in 1893 and the first of these companies was not incorporated until 1897, so the provisions of that act became part of the charter of each of these companies, as much as if it had been actually incorporated in them; so Mr. Ordway must be held to have known, to have bought his stock on condition and understanding that his company, the American Malting Company, might be merged into another corporation, that it might be dissolved through a merger. That is what has happened here. The directors of the old company, the operating company, have concluded that it is advisable that that company shall be dissolved, not that its assets shall be distributed, but that it shall go into a partnership, in effect, with a new company and as part of the new company. On dissolution,

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he could not get what this plan is offering. He is not in any position to say that this company shall not dissolve in this way, because the merger act was in force at the time he bought his stock and he can only properly complain if he is not going to get what he would fairly get in case of a dissolution by liquidation. He has no possible standing to say this company must go on and try to make up these back arrearages, the dividends which have never been earned. He has no right to set up his judgment as against that of 98½% of the other stockholders, if not all the other stockholders of the company, and say: 'while you are all satisfied this thing can never be worked out so we can get our full seven per cent. and eighty-five per cent. of arrearages, I think we can, and I am going to insist that you shall continue to conduct this business. I am going to insist that there shall be two companies, a holding company and an operating company; that there shall be none of the economies in the operation and maintenance of these two companies that all of you other stockholders want to get. I am not going to let you dissolve and consolidate, because I, in the exercise of my honest business judgment, think there is a possibility that some day we may work out of this condition of affairs that now seems hopeless and, therefore, I insist we shall stand where we are.' I submit figures, or submit them to the Board, to show that the plan is absolutely fair and we ought to be permitted to carry it out.

Commissioner Donges: What have you to say about Mr. Ordway's objection that the distribution on the basis of \$62 to preferred stock-

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holders is unfair, because it results in making the common stock of greater value than at present?

Mr. Faulks: I thought I had made it clear that it could not possibly have that effect as against 51%—

10 Commissioner Donges: Mr. Ordway took the position that there were sufficient assets now to pay dollar for dollar according to the reports, on the preferred and common stock; that on the basis of \$62 the preferred stockholders, if dissolution should take place now, would receive only 62% of the assets which should properly come to them on such dissolution, whereas the balance being more than 100% would go to the common stockholders.

20 Mr. Faulks: That assumes that this item of \$27,000,000 made up in some considerable part of good will, could on dissolution all be realized.

Commissioner Donges: Mr. Ordway stated as his position that from the reports of the company here the assets were sufficient to pay the full value of the stock.

30 Mr. Faulks: It seems to me the Board must assume that an item which consists of plants, property and good will would not and could not bring at a forced sale had upon dissolution anything like \$27,000,000.

Commissioner Daniels: How would your good will shrink by reason of the merger?

40 Mr. Faulks: It would not shrink by reason of the merger, but if there was a dissolution, the rights of all these parties must be determined as upon an ordinary dissolution. If two-thirds of the stockholders should say, we

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want to stop and want to divide up, they would have the right to do it and he only has such rights now as under those circumstances. If the Malting Company should cease to be a going concern, should sell out its property as upon dissolution for the purpose of liquidation, it is not conceivable that enough would be realized to pay the 16% dividend which the preferred stockholders are first entitled to have as representing back earnings withheld, and also to pay par. As against the right to share equally in the proceeds of the distribution of the assets of the present company, they get in the new company a preference first, as to all unpaid dividends, and second, as to the par value of their stock. We have here a company which in fourteen years has never been able to earn three per cent. but in one case, and for eight years was not able to earn anything at all, and it appears on the face of it that as men of good common business judgment we must recognize that this company could not upon sale realize \$27,000,000 for its assets, and that these preferred stockholders will by this new plan be put in a position where, if there ever is a sale they will get the par value of their stock.

Commissioner Donges: Is there no statement showing how much of the \$27,000,000 is property and plants and how much good will?

Mr. Faulks: There has never been any division of that. That was put on the books at the time the company was formed and has been carried ever since.

Commissioner Donges: There never has been

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any separate inventory of the actual physical property?

Mr. Faulks: No, never.

10 Mr. Ordway: My learned friend suggests that in case of dissolution of the new company the preferred stockholders will get par for their stock but in case of dissolution of the old company they won't. I am not familiar with the record here, but I judge from what has been said that is likely a matter of opinion and that there are no figures that justify such a conclusion. If the dissolution of the old company won't bring par for the preferred stock, it is more likely the dissolution of the new company will, because the stock will be less, but there is no certainty, it is merely a matter of opinion. He is asking this Commission to assume first, that the statements of the American Malting Company do not accurately represent the facts as to the value of the assets, and secondly, that the variation which exists there is reasonably to be figured at 62% for the preferred stockholders. There may be something in the record that may justify that opinion on the part of counsel. I submit it is merely his opinion. But his statement of the merger being equivalent to dissolution of the old company, the statutes provide methods for dissolving. They are merging, but a merger is not a dissolution. As I understand the word, it is a combination of two existing companies into one new company, or the two old companies go on together under a new name. It is not a dissolution of the old company in any true sense of the term.

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40 He has made a statement of the nature of these

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two companies. The new company was formed as a holding company, some idea of a merger, but formed as a holding company. The old company has been the operating company ever since and is operating, owns the plants and runs the business, it makes the money, and the American Malt Corporation is purely and simply a holding company. 10

Commissioner Donges: The American Malt Corporation, Mr. Ordway, never did anything except secure stocks and bonds?

Mr. Ordway: That is all it has ever done as far as I am aware.

Mr. Faulks: The petition shows that.

Mr. Ordway: My learned friend has also intimated in a way, though he has not argued it, the possibility of my being able to get the value of my stock on appraisal if unwilling to come in. In reference to the effect of the provisions of the law of April 10, 1902, providing that stockholders may have their stock appraised; my conclusion is that the directors are bound under the consolidation act to propose an agreement which does not unfairly or unequitably impair the legal or equitable right of a given stockholder, and that such stockholder cannot be required to exercise the option of surrendering his stock on compensation until he has an opportunity of joining in the consolidation on terms and conditions which as to him are legal and equitable. Otherwise, if you didn't like to come into it they could make you sell your stock on appraisal. That is certainly no reason at all, the fact that that remedy is allowed me, for not giving full 20 30 40

Testimony, Oct. 10, 1913.

weight to any objections I present to the merger agreement.

10 Mr. Faulks: With reference to the dissolution we think it is entirely clear that under Section 108-A of the Corporation Act, that the effect of this consolidation will be the dissolution of the old company. I have references to a number of cases which indicate that is clearly the law.

Commissioner Donges: The Board will be very glad to have any suggestion that you have to submit, Mr. Faulks, in writing, and Mr. Ordway, if you desire to submit anything.

Mr. Ordway: If you would like to have a brief I will submit it.

20 Commissioner Donges: Unless you desire to submit something further.

Mr. Ordway: I am not going to submit any authorities, except the arguments.

Commissioner Hillery: If you could be convinced that the assets of the company are not as they have been shown by the statements, that they include an item of good will which could not be cashed, would you still be convinced that this distribution was unfair as far as you are concerned as a stockholder?

30 Mr. Ordway: It would make a difference as to the percentage I would be entitled to; as to whether this 62% would be fair, as to what the value of the assets was.

Commissioner Hillery: Don't you think that is all important?

40 Mr. Ordway: Not all important, important; but my additional point, if it be true that the assets are not worth the amount of stock, then they have been declaring dividends improperly

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the last five years, and I have a right as a stockholder to sue for the amount of those dividends, which right is not preserved in the merger agreement. Then the merger agreement is bad because it doesn't protect my rights as a stockholder.

Commissioner Hillery: If the capital has been impaired?

10

Mr. Ordway: I don't care, in either of them, in either of them the merger agreement is bad; if the capital is worth the amount of the stock then I am not being treated fairly in being cut down to 62%. If it isn't, then I am not being treated fairly, because my right to sue the directors for improperly declared dividends is not preserved.

Mr. Howland: It puts us in a dilemma, in one instance, if the assets are up to the figures here the agreement is unfair; but we, of course, have no idea that those assets could be cashed, as you put it, for anything like \$27,000,000. If that isn't true, then he says there has been a right or action against the directors for the illegal declaration of dividends. He goes one step further and seeks to show that the right of action disappears in the merger because it is a stockholder's right of action. It is a right of action in the corporation, to sue the directors. It can be put in motion by a stockholder but the action which is in the corporation, and every right and franchise of any nature which is in either of those merging corporations today is under the terms of the law, and under the terms of the merger agreement carried forward and continues to exist in the new corporation, the consolidated corporation, so I

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do not think there is a thing to the last point, that a cause of action against somebody or other is disappearing. Rights do not disappear under merger agreements, they are preserved, rights against third parties or directors are specifically preserved by statute and the merger agreement.

10 Mr. Ordway: The rights of the company are preserved, but the rights of the stockholder are not preserved, except insofar as they are really preserved by the language of the agreement. I am not a member of the New Jersey Bar, so I speak with a little doubt, but I question Mr. Howland's statement, and I assert, with due meekness of a foreigner, that I think the New Jersey statute gives the stockholder an individual right. The corporation has a right to
20 sue the directors for improperly paid dividends, but as I read the statute it gives the same right to the stockholder and that he is not protected in.

 Mr. Faulks: I think Mr. Howland is clearly right about that. It is a matter the Court of Errors has settled, that even if the assets are not worth 100% of the capital stock
30 of the company, the company has a right to make earnings and to pay dividends. Everything shows that these dividends have been limited to earnings, and the directors have the right to distribute them.

 Mr. Ordway: I did not know it is unlawful under the New Jersey Corporation Law for a corporation, if it made earnings in a year, to declare dividends although the capital is im-
40 paired.

 Mr. Faulks: If the assets are not equal to the

Testimony, Oct. 10, 1913.

capital stock at the time the company was formed, and the impairment is not due to losses, it is perfectly clear they can divide all of their earnings.

Mr. Ordway: If I understand correctly it amounts to the proposition that although their assets do not equal capitalization and the accounts do not balance, nevertheless they may 10 pay dividends provided they made earnings in the past year.

Commissioner Hillery: The matter of assets was a matter of appraisal. These assets which may be invested in property may have shrunk in value, yet they carry it on the books at the same figure. I think Mr. Faulks is right that although the assets of the company may not be equal to the capitalization, they may declare 20 dividends out of earnings.

Mr. Ordway: I assume there is a certain amount of give and take about that, an asset a little more valuable one year and less valuable the next would not prevent the corporation declaring dividends out of earnings. That is a different proposition. If the good will is substantially worth nothing and there is a very large deficit of assets against capital, in that case I cannot believe the laws of New Jersey 30 will permit the declaration of dividends.

Commissioner Donges: If it should occur to you that you desire to submit any citations, or anything further, we would be glad to receive them.

The matter will go to conference.

Testimony, Jan. 6, 1914.

BOARD OF PUBLIC UTILITY COMMISSIONERS.

TRENTON, N. J., Tuesday, January 6, 1914.

10 AMERICAN MALTING COMPANY and
AMERICAN MALT CORPORATION,
Merger.

Before Commissioners DONGES and DANIELS.

F. H. SOMMER, Esq., Counsel.

For Petitioners appears F. J. FAULKES, Esq.

20 Mr. Faulks: I don't think our matter will
consume a very great deal of your time. The
question upon which we ask to have the pro-
ceedings re-opened was as to the item of \$27,
585,000, appearing in the appraisal of August
31, 1913, already in evidence, as the property of
the plant and good will. We are prepared to
offer proof as to the actual value of the prop-
erty comprised in that and have three witnesses
by which we will prove it. Before we do that
I want, for the information of the Board, to
offer in evidence a copy of the last annual re-
port of each of the companies desiring to
merge. The report is made for the fiscal year
30 ending August 31, 1913, in each case and con-
tains some information which, I think, bears
directly on the merits of the application.

Commissioner Donges: It will be received.

Same is marked Exhibit P1. (See p. 173.)

40 Mr. Faulks: I also wish to offer in evidence
copy of the first mortgage of the American
Malting Company, dated November 20, 1899,
and which comes due December, 1914. The
amount of authorized bonds is \$5,000,000. I

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think only \$4,000,000 were issued and the majority of them are already retired through sinking fund payment. I think that also has a bearing on the issue, as I shall illustrate a little later.

Same is marked Exhibit P2. (See p. 187.)

FREDERICK VULLMAHN, sworn on behalf of Petitioners. 10

DIRECT-EXAMINATION BY MR. FAULKS:

Q. Where do you live?

A. Chicago.

Q. Are you connected with the American Malting Company?

A. I am.

Q. In what capacity?

A. Manager of the Western branches of the company. 20

Q. Your head office being in Chicago?

A. Yes, sir.

Q. How long have you held that position?

A. Since 1901.

Q. Were you connected with the company prior to that time?

A. Yes.

Q. How long prior to that time? 30

A. Since the organization in 1897.

Q. What positions have you held from 1897 to 1901?

A. Manager of the Watertown branch, Watertown, Wisconsin, from 1897 to 1900. Then I became manager of the Milwaukee branch and Watertown was included, where I remained until 1901, when I went to Chicago to take charge of affairs.

Q. Are you a practical malster? 40

Frederick Vullmahn—Direct.

A. I am.

Q. Familiar with all branches of the malting business?

A. I am.

Q. Are you also familiar with all the plants of your company?

A. I am.

10 Q. Where are those plants located? To shorten that I will put the question this way: are those plants shown on this schedule which I hand you and have handed to the Chairman of the Board?

A. Yes, I made it myself.

Q. You have prepared this schedule?

A. Yes.

Mr. Faulks: I will offer that in evidence now.

20 Commissioner Donges: It may be received. Same is marked Exhibit P3. (See p. 257.)

Q. I wish you would state, Mr. Vullmahn, what familiarity you have with the various plants of the American Malting Company shown on this Exhibit P3?

A. In a general way I visit the plants a matter of half a dozen times a year, have known them from the day I went with the Company, almost; have
30 rebuilt some of them; have helped to make over plants that were entirely constructed since the existence of the company: Among other things I have rebuilt the plant at Watertown; rebuilt the Kraus-Merkel plant at Milwaukee. We rebuilt the Kensington plant at Chicago. I helped—

Commissioner Donges: The plant you refer to here as the Markel and Kensington?

Witness: Yes. I helped to rebuild the
40 Childs Street plant at Buffalo.

Frederick Vullmahn—Direct.

Q. Your office is at Chicago, but I understand you visit the various plants several times every year.

A. Yes, sir.

Q. And have made a practice of doing that ever since you have been with the company?

A. Yes.

Q. Are you familiar with the various changes 10 and improvements which have been made at the various plants since that time?

A. Yes.

Q. Are you familiar with the new plants that have been constructed?

A. Yes.

Q. I want you to state to the Board what the character of your familiarity with these plants is, whether it is superficial or general or definite? Do you know the nature of the construction of the 20 buildings and the sizes of the buildings and so forth?

A. Yes, nearly by heart.

Q. Have you been through all these plants a great many times?

A. Oh, yes.

Q. Do you know which of them are modern and which of them are old?

A. Why, yes, of course. It is considered that a 30 so-called floor plant is not of the construction which one would choose today, owing largely to the fact that lower labor is employed and the cost of production is somewhat greater. I have recognized that fact in placing the valuation on those plants of that nature.

Q. You are familiar with the cost of construction of each kind of plant?

A. Yes.

 Frederick Vullmahn—Direct.

Q. You have also, as I understand, made inquiry as to cost of construction in the case where the construction has naturally taken place under your direction?

A. It is this. Plants of a certain description, of a certain size, will cost a given amount of money, and you can estimate it will cost so much at one
 10 place or the other. That is to say, you tell me you are going to construct a pneumatic plant of a certain capacity, tell me what you want to do, what description, how large storage units are going to be, and I can tell you pretty nearly what it is going to cost; so can anyone who is conversant with the business.

Q. Are you also familiar with the size of the tracts of land on which each of these plants is lo-
 20 cated?

A. Yes. I have plotted practically most of them. I believe I have given the square feet of it.

Q. The area as appearing on the schedule is the area of the land of each of the plants, prepared from plots you have examined?

A. Yes.

Q. Are you also familiar with the nature of the depreciation which has occurred in each of the
 30 buildings?

A. Yes, sir.

Q. And the machinery and malting apparatus, what each of them contain?

A. Yes.

Q. And in determining on the value set forth in these schedules have you taken all these matters into consideration?

A. I have.

Q. As far as the land, distinguished from the
 40

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building, is concerned, have you taken any means to verify the estimates you have given of the values?

A. Yes; in the case of our Chicago property I have had appraisals made at various times. I had that verified a few days before my departure by a real estate man who was entirely familiar with that kind of property. In the case of our Milwaukee plant—I have also had a real estate man pass on the valuation of the land, but what is more than that, I have had a fight with the assessors—I don't like to do such things but I did—and I have placed the value on the land at Milwaukee there at its assessed value. That must be low. In the Watertown plant I have placed the price at what we paid for it. I happened to be at Watertown when we paid for the land in 1899; and I guess it should be worth more now than then.

Q. In cases where you haven't direct personal knowledge of the cost of the land or the assessed values, have you made inquiries from real estate experts competent and familiar with land values?

A. I had it done. I had to go to Detroit to the Detroit man to call upon a real estate man to pass on it.

Q. You figured the local appraisal in each case?

A. Yes. I know the property well enough—I appraised it in that way.

Commissioner Donges: You have taken their figures as submitted?

Witness: Yes, just exactly.

Q. Does this statement show the fair value of the various plants of the property of the American Malting Company at this time?

A. Yes, sir.

Mr. Faulks: If the Board please, I am entirely willing to go into this matter at any

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length you desire with Mr. Vullmahn. Mr. Vullmahn is thoroughly familiar with all these plants. He can take them up and describe each plant in detail, nature of the plant and nature of the machinery.

Commissioner Donges: I don't know as that is necessary.

10 Mr. Faulks: There will be other evidence corroborative of this.

Commissioner Daniels: May I put a general question: The values are based on cost figures?

Witness: Not exactly.

Commissioner Daniels: I don't mean actual cost, but cost to replace.

20 Witness: No, not monetary cost, no. The monetary cost is much greater in some instances. I have taken into consideration depreciation and I have taken into consideration also the location of the plant, somewhat. For instance, as a matter of comparison you will find—take the Syracuse plant, which has the same malting capacity, exactly the same, as the plant of Buellin & Gunz.

30 You will find I have the Syracuse plant lower, because the storage capacity is not as valuable. If I should take the capacity in cases alone I would be entitled to put that plant as high as the plant of Buellin & Gunz, which I did not do.

Commissioner Daniels: My thought really was this, whether the valuation was based upon the cost depreciating down to present value or whether based upon the earning power of these plants.

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Witness: The earning power has not been taken into consideration.

Commissioner Daniels: It is what you regard as the present value of the plant and land?

Witness: Taking into consideration somewhat the plant. I have taken a floor house where it costs more to produce as much malt, 10 lower than a pneumatic. We haven't taken them at as high a value to reproduce, or as high a value as the pneumatic house. In that way, you might say, I have taken the earning capacity into consideration.

Commissioner Daniels: But only in a negative way?

Witness: Only in that way.

Commissioner Donges: In each case the value given is not in excess of what it would 20 cost to replace new?

Witness: No. It cannot be reproduced new

Commissioner Donges: At less than what it could now be reproduced?

Witness: Yes.

Q. Just following out that line, take for instance the plant that was built in Buffalo, which appears on the schedule on the second page, you 30 have put that cost—

A. \$1,252,000 is the cost of it.

Q. When was that plant built?

A. Completed in 1906. This plant is of the latest construction. It is constructed of concrete, brick and steel. It has not depreciated in any way, shape or manner. We have added to it and improved it to the extent of about \$100,000, so I felt to-day it is worth just as much as it was then, and the prop- 40

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erty on which that is located I think was bought for \$110,000. I am told it could not be replaced today for less than \$250,000, there being no river front property to be had in Buffalo that has got a deep waterway where they can do business as we can there. I haven't taken into consideration the enhanced value of the land, and have made no deductions for the cost of construction; I have considered them more than enough to make up the cost in the plant.

Commissioner Donges: That is the absolute cost?

Witness: Absolute cost the ledger shows, in that case.

Q. There you showed that plant?

20 A. Because we had the figures of the entire plant and in other cases, where, as in the case of the Kingston plant, where we rebuilt, the rebuilding cost \$350,000, or a little over, at that time. But the books would not prove what the entire original cost of everything was and I had to put a value on it as best I could.

Q. This figure taken as a whole, in the aggregate, is a valuation of \$6,396,000, and shows and is the fair value of all the plants of the American Malt-
30 ing Company, according to the best of your opinion?

Q. Mr. Vullmahn, are you also familiar with the amount of sales and deliveries that the company makes from year to year?

A. I am.

Q. Tell the Board a little about your general knowledge of that phase of the business and the business the company is engaged in?

40 A. I am in charge of the sales department of the

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concern, as well as everything else, and purchase the materials; that is, they are purchased under my supervision in the open market in Chicago, Milwaukee and Minneapolis. I receive from them a statement of the sales they made east or west or anywhere else and a record is in my office, which means the figures are in many cases from houses under my jurisdiction or supervision.

10

Q. So, as a result of the sales made in your department and as a result of the receipts received by you from other offices and agents of the company in the ordinary conduct of its business, you know the nature of and the extent of the sales and deliveries?

A. Yes.

Q. Do you know about the character of the product that is manufactured?

20

A. Yes.

Q. Do you know about the prices obtained and what they have been in the habit of obtaining?

A. Yes, sir, we are a one-price concern.

Q. Tell us first about the volume of sales and deliveries during the period of the last five years? How that compares with those years that are in evidence before the Board already?

A. I haven't any figures before me, but I would say that our deliveries (we will put it that way, rather than say sales) sales with us mean this: We make contracts for supplying brewers; they may overbuy. Where we may sell one hundred thousand bushels we don't deliver one hundred thousand bushels. Our deliveries and sales amount to, in a year, eleven million bushels.

30

Q. Have you averaged that for the last five years?

A. That would be my judgment. I haven't any figures before me. We have sold as high as four-

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teen million bushels. Our shipments average one million bushels a month.

Commissioner Donges: Just what is the character of your business?

Witness: What is the malting business?

Commissioner Donges: Yes, what do you do?

10 Witness: We convert barley into barley malt; we convert wheat, oats, rye, and corn into so-called malt. The process is one of germanization; the grain is steeped, then it is germinated; after it is germinated to the extent it should be it is dried on a so-called kiln at a given temperature; then it is stored and ready to send out to the distiller or brewer.

20 Commissioner Donges: And that is the product you deal in?

Witness: That is the product we deal in.

Commissioner Donges: And that is the only business that is done by your company?

Witness: That is the only business we do.

Q. You sell principally to distillers and brewers?

A. Principally brewers, and also distillers.

Q. You spoke of floor houses and pneumatic plants: Tell us briefly what is the difference be-
30 tween them?

A. As the name pneumatic implies, the process of malting, whether it be done in drying rooms or small compartments, is carried on in a compactor, or say smaller space, than it could be carried on in a floor house, because of one's ability to germinate the grain. In other words, if it were not germinated it would get hot and the process would be over. The air is tempered by running through
40 various sections of coke bed, or other beds, through

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water, and that is passed through the grain to hold the temperature at which it is converted.

Q. What is done in the floor house?

A. In the floor house it is steeped and spread on the floor and turned from time to time. There is no way of passing air through it; the only way of cooling it and airing it is to take a shovel and 10 throw it in the air. It requires very much more handling and very much more floor space.

Q. Take your Buffalo plant?

A. It is a compartment house, pneumatic, yes.

Q. Going back to the matter of sales and deliveries made by this company during the time you have been connected with it. Do you know how the prices it obtains for its product compare with the prices obtained by the majority of its com- 20 petitors?

A. Yes.

Q. Tell us about it; whether it is higher or lower, and if either, what the difference is?

A. We obtain a higher average price, I dare say, than any other maltster, but surely more than the average maltster for our product.

Q. How much higher?

A. There is no fast rule for that. There may be a time when we are more anxious to sell than 30 others when we more nearly meet competition. There are times when conditions are such that the company is inclined to sell. Other times we will ask a premium and may insist on obtaining it.

Q. Can you say what the average would be over a period of years?

A. I would say an average of two or three cents a bushel in price more than most of our competi-

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tors obtain. That is not saying there are not some obtain that high.

Q. What is your ability to accomplish that result—to do that? What is it leads brewers and distillers to pay you more than they would have to pay?

10 A. I believe we have an enviable reputation for square dealing, understanding our business, manufacturing goods right. Our plants are scattered and we make prompt deliveries; we have large storage capacities and very large working capacities, so we can accommodate people.

Q. Does your ability to comply with the terms of your contract as to time of delivery and so forth figure in that way?

A. Somewhat, undoubtedly.

20 Q. You said something about the fact that your plants were distributed as having some bearing on this question?

A. Yes.

Q. Explain that?

A. If a New York brewer puts in an order for a carload of malt it goes without saying that carload will reach New York quicker if shipped from Buffalo than if shipped from Milwaukee. It goes without saying that that would be true of all this
30 eastern territory. So, being able to supply business from Syracuse, from Buffalo and from New York city house, if anybody runs out, it puts us in a position to get malt there much faster than almost anybody could get it to him. That, with the crowded conditions, in the cities, the small capacity the brewer has himself, means a great deal to him. Furthermore, we are so located covering the middle west and various points there that we can ship
40 to better advantage from Milwaukee, and to others

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from Chicago. In other places we have a slight advantage in shipping from Watertown. In other places where we have plants, such as Hamilton, where we buy weather barley, it helps us in having a local house. I think possibly seventy-five per cent. of the trade of that city is ours because we have a house right there and are ready to supply it.

Q. This state of prestige that comes from a particular local plant, is that due in part to the fact that that plant has an old and well established reputation?

A. Yes.

Q. And had such when taken over by the malting company?

A. Yes.

Q. Can you say whether such reputation has been kept up and enhanced since you got them?

A. No question about that. There is a gentleman in this room now who sold out his business to us. He had not so much a malting house,* but good will. That has been maintained in the management.

Q. The good will has been maintained?

A. We sold one hundred thousand bushels of malt per month where his son and himself sell one and a quarter million bushels.

Q. The fact that a number of these plants are old established and popular plants is an important factor in your company?

A. Yes, sir.

Q. An important factor in the business it does as well as the price it is able to obtain?

A. Yes, sir.

Q. Does the fact that these plants are distributed as they are also enhance them in the same respect?

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A. Yes, sir.

Q. Are the plants advantageously distributed, well distributed?

A. Yes.

Q. And well located?

A. Yes.

10 Recess from 1:30 to 2:30 o'clock P. M.

BOARD OF PUBLIC UTILITY
COMMISSIONERS,

TRENTON, N. J., Tuesday, January 6, 1914.

AMERICAN MALTING COMPANY and AMERICAN MALT
CORPORATION. Petition for Merger

20

AFTERNOON SESSION, 2:30 P. M.

Before Commissioner DANIELS.

For Petitioners appeared Frederic J. Faulks and
Silas W. Howland.

MR. FREDERICK VUHLMANN resumed the stand.

DIRECT-EXAMINATION BY MR. FAULKS:

30 Mr. Faulks: I think there is no further
question that I want to ask. Has the Board
any?

Commissioner Daniels: May I ask, do you
intend by the remaining witnesses, to show the
amount of good will and intangible values?

Mr. Faulks: Only in the same way that we
have through Mr. Vuhlmann.

40 Commissioner Daniels: I did not know but
what he had been called to testify as to the
value of the actual physical plants.

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Mr. Faulks: No his testimony we intend to divide into two main parts: first, the value of the plants; second, as to the value of good will.

The other quick assets are shown by the reports in evidence, and I am going to have the accuracy of this shown by the Auditor of the company. Now, I have not asked Mr. Vuhlmann what, in his opinion, was the value of 10 the good will of this company, because it seemed to me that that was a matter that the Board would determine itself from the facts as presented, and not a matter for expert evidence.

Commissioner Daniels: I dare say we shall have testimony, but might it not be helpful, in forming our opinion, to ask the witness if he would care to put an estimate on that.

20

The Witness: I would be very glad to do that. Resuming, then, Mr. Vuhlmann. The latter part of the evidence before recess was directed to the sales and deliveries of the company, the prestige that it has in its business, and the preference that it affords over at least the majority of its competitors, and the advantage in prices that it has obtained and does obtain over at least a majority of its competitors; having those matters all in mind, 30 and having in mind the various plants which came into the company upon its organization and which continue as part of its plants and properties until this time:—are you able to place value, are you able to name the sum which, in your opinion, is the fair value of good will of the company as a going concern?

A. Well, I should think that the way to get at that would be to compute as near as one can the 40

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amount that the company receives on its aggregate sales in excess of the price that it might be able to obtain if they were newcomers in the business, or if they had to compete with almost every competitor; and since I am prepared to say that that amounts to, on an average, from two to three cents a bushel, and our deliveries being a matter of eleven
10 million bushels a year, that the amount that we receive in excess for our goods, that is, in excess of the amount we would obtain if we did not have the standing, amounts to a matter of 275 to 300,000 dollars.

Q. A year, you mean?

A. Yes, a year. Now, if you are willing that we would say that five per cent. would be a fair return on money— 275 or 300,000 dollars, or the
20 return on $5\frac{1}{2}$ to 6,000,000 dollars. If anyone would argue that is not fair-rate of interest, of course I would have to compute it differently.

Q. In your opinion, that figure you mentioned, $5\frac{1}{2}$ to 6,000,000 dollars, is representative of the fair value of good will of the American Malting Company?

A. I think so.

Q. Now, you spoke this morning of the prestige
30 that a number of the old plants have. Can you give us an illustration of how that works out beneficially to the company—what bearing it has upon the value of its good will?

A. Oh, yes.

Q. Can you give us one or two illustrations of that, for the benefit of the Board?

A. For instance, we have a plant at Watertown called the Buchheit Plant, with which I was originally connected before the existence of this com-
40 pany, and while there has not been any personal

Frederick Vullmahn—Direct.

representative of that particular plant, we have a number of customers, old-time customers, who will stipulate when they make a contract with our representatives, that they want the malt shipped from that particular plant, even though it is not solicited that they should get it from there. It is a matter of perfect indifference to us. That holds particularly true of the Pittsburg district, where we had a great deal of trade, and where we 10 have a representative that don't know that plant from Adam, so we find that every contract he sends in stipulates to be shipped from the Buchheit plant. It holds true in the case of the plant at Hamilton, Ohio.

Q. Is that with which Mr. Sohngen—

A. Yes, Mr. Sohngen sold that out to us—what he had reference to this morning when he said that he today, in connection with his son, sells three 20 times as much malt as he did when this company was organized, and the basis of it all is the good reputation the plant had.

Commissioner Daniels: May I ask is not this prestige which the company's plants have represented by this excess in price of from 2 to 3 cents that you realize on the average of your product—would not it be duplicating 30 matters for you to estimate the good will by capitalizing the excess price and then adding thereto an allowance for prestige. Is not one the commercial expression of the other? *

The Witness: No, as I understand it. When we make the statement that we are obtaining more money than most of our competitors, we should have to say, if you wish to inquire into it, why is it—are we not trying to duplicate the statement—which refers to the 40

Frederick Vullmahn—Direct.

statement made in our figures,—by making the statement that here, there and elsewhere we have plants that had an excellent reputation, and that that excellent reputation, and perhaps some, more or less, of the personality enables us to get the price.

10 Mr. Faulks: I do not think that the witness meant to duplicate. I think he meant to take up the different elements. Now, you have spoken just now of the prestige of the old plants and the fact that the old customers had shown their preference and desire to trade with that plant, and to make their purchases there. That, as I understand you, is one of the things that, in your opinion, goes to make up the good will that this company has. Now,
20 this morning you spoke of the uniformity of its products, the large amount of working capital it has, its ability to make prompt deliveries in favorable localities; of its plants, and a number of other things of that kind. Are, or are not, these other elements which, in your opinion, go to make up the good will, which you say has a value of from $5\frac{1}{2}$ to 6 million dollars?

30 A. Yes, of course, they are factors that enter into it.

Q. These are all different factors?

A. Factors, yes. I would call the selling and ability to dispose of the goods at outside prices the largest and greatest factors; the others are contributory.

Q. All these things are different factors or elements in the one thing that makes up the good will of the company?

40 A. Yes.

Mr. Sohngen—Direct.

Mr. Sohngen sworn for the Petitioner.

DIRECT-EXAMINATION BY MR. FAULKS:

Q. Mr. Sohngen, you are connected with the American Malt Company, are you not?

A. Yes, sir.

Q. Have you been connected with it from the time of its organization?

A. From the time of its organization. 10

Q. Are you a practical malt man?

A. Yes, sir.

Q. How long have you been in that business?

A. Thirty-nine years.

Q. Were you connected with one or more of the plants that were taken over by the American Malting Company at the time of its formation in 1897?

A. Yes. I was connected with the Sohngen Malting Company—President. 20

Q. Where was that company's plant located?

A. At Hamilton.

Q. How long had that company been in business at that time?

A. Well, since '58.

Q. Continually?

A. Yes.

Q. And its plant and property and business was taken over by the American Malting Company?

A. Yes, sir. 30

Q. And has been operated by it continually since then?

A. Yes, sir.

Q. What has been your connection with the American Malting Company?

A. Well, I have been a director ever since its organization, and am on the Trade Committee, visiting the different plants, manager of our plant, and attending to the sales of our branch. 40

Mr. Sohngen—Direct.

Q. You are generally familiar with the sales department of the company's business?

A. Well, mostly with the western sales, and also with the eastern, but more so with the western sales.

Q. But you would receive reports from the company of the eastern sales?

10 A. Yes, sir.

Q. At what plant have you been stationed, if any, since the formation of the American Malting Company?

A. At the Hamilton plant.

Q. The same plant that you were connected with before that time?

A. Yes, sir.

Q. Is that Hamilton, Ohio?

A. Hamilton, Ohio.

20 Q. Have you had occasion, from time to time, to visit the various plants of the company?

A. Yes, that is part of my business.

Q. You are familiar with all of them?

A. Practically all. All the western plants and some of the eastern plants.

Q. You are also familiar with the large plant in Buffalo that was built by the company in 1905 or 6?

30 A. Yes, sir.

Q. Are you familiar with the character of construction, the size of the building, the methods of manufacture carried on therein, and the apparatus used in these various plants?

A. Yes, but I am familiar with just the size, not the details.

40 Q. Not the exact dimensions,—the general character of the plant, the general character of the buildings that go to make up the various plants?

Mr. Sohngen—Direct.

A. Yes.

Q. Have you also a knowledge of the capacity of the various plants?

A. Yes.

Q. Have you, at the request of the officers of the company, and in connection with Mr. Vuhlmann, made an appraisal of the fair value of all those plants? 10

A. Yes, I went over the figures with Mr. Vuhlmann and have, from time to time since we have been connected together, been talking over the different valuations of our plants, and the betterments that we have made, and the physical condition of them.

Q. Have you participated in times past in informal appraisements made by the company or the various plants in various parts of its properties? 20

A. Well, through the talks that we had together about the changes we would make and the amount it would cost, and in a general business way.

Q. Are you also familiar with the improvements which have been made to the various plants in recent years?

A. Yes, sir.

Q. I show you Exhibit P. 3, which was referred to and offered in evidence in the testimony of Mr. Vuhlmann, and ask you whether or not you have carefully examined that? 30

A. Yes, sir.

Q. Are you able to state whether or not that exhibit shows the fair value of the various plants of the American Malting Company?

A. Yes, I think that represents about as fair a value as we could put on them. I think the Buffalo plant, possibly, and the Newark plants are 40

Mr. Sohngen—Direct.

worth more than we have got them on there, in my estimation. It is not worth less.

Q. The Buffalo plant may be worth more?

A. May be worth more; that is, the original cost of the plant.

Q. I understand you to say that the fair value of the plant is not less than is shown in that
10 schedule, but that the Buffalo plant may be worth more than the sum shown in that schedule?

A. Yes.

Q. Now, that sum is the actual cost of the plant as it appears on the books of the company?

A. Yes, sir.

Q. What higher valuation of that plant, do you think, might be justified?

A. Well, some weeks ago I was in Buffalo, look-
20 ing for a location for an elevator, and spoke to a gentleman there about buying some property, and I spoke about the price we paid for this ground and he says we cannot duplicate that piece of ground for double the money that we paid for it, and in some cases it is worth more than double; and different ones have spoken of the high value of that class of property, dock property. The ground value is double, in my estimation—from
30 what I learn there, is worth double what we paid for it.

Q. Do you remember what that cost?

A. \$110,000.00, I think, and through the west all building has advanced. We cannot build in the west as cheap as we could six or eight years ago, and the plant is practically better than it was when we started, and I should say that we could not duplicate that plant for that amount. It would
40 cost us——

Mr. Sohngen—Direct.

Q. Apart from the difficulty of duplicating the land?

A. Yes, sir.

Q. Now, you speak of a possible increase over the one shown in the inventory of the value of one of the New York plants. What did you have in mind there?

A. Well, that is the 63d Street plant. That is only from hearsay about the dock property, but it is valuable, the same as in Buffalo, and I spoke with some of our people, and they think that taking into consideration what they have to pay for dock property, that the land appraisal that they had put on that property is too low. 10

Q. Where is that property situated?

A. 63d St., East River.

Q. It extends, does it not, from 63d to 64th Street? 20

A. I think so. I am not so familiar with the streets there.

Q. That is water front property with the dock, frontage?

A. With the dock frontage, yes.

Q. Now, in arriving at these values, then, I understand that you have taken into consideration all of the elements which would go to make up their fair value, and not simply the cost of reproduction of them, or anything of that kind? 30

A. No, we have taken into consideration the depreciation of some of the plants, and some of the plants that we have remodeled, and practically all of our plants are really in better condition today than when we bought them. We keep them in good repair, and many of these plants could not be reproduced at the prices we have got them in there.

Q. Now, coming back to the plant at Hamilton, with which you have been connected so many years, 40

Mr. Sohngen—Direct.

what has been the experience there, so far as you have observed, in regard to the tendency of its old customers to continue to patronize it?

A. The Hamilton plant is well located for the Middle West, close to the large brewery centres. We have been in the business so long, and people that have patronized the company have always got
 10 good treatment, gotten uniformity of goods, quick deliveries, and in the thirty-nine years' experience that we have been in the malt business I am proud to say that we have never lost one customer. We have always been able to get better prices than most of our competitors,—as high as all the way from 2 to 4c. To prove that: Mr. Sully just gave me a telegram that I received yesterday and I took
 20 "73c for 25,000 Standard. Can buy at 72 from all others. Do not think we should lose the business." I wired back that 74c was the lowest we could take, and Mr. Sully just informed me that my son wired that he had taken the order at 74. That is two cents more than any other competitor asks, and that is the condition of practically all of the trade. We do not manufacture but very little in Hamilton, 175 to 200,000, but the balance is delivered
 30 tomer.

Q. What is the total number of bushels that you sell in a year, you and your son?

A. Through our plant we have been selling from 1,200,000 to 1,400,000 bushels.

Q. You understand that you are able to effect these large sales because of your connection with the Hamilton plant, and because of the reputation that the Hamilton plant has?

40 A. The reputation that the company has. The

Mr. Sohngen—Direct.

company has continued to deliver the goods that the Sohngen Malting Company did. By my being a director of the company and the assistance of others we have been able to keep up the cost of the goods.

Q. What have you to say, Mr. Sohngen, as to what, in your opinion, is the fair value of the good will of this company, having in mind all that you know about it? 10

A. Well, I know that to establish a business that sells eleven million bushels of malt, and the kind of trade that we have—it is pretty hard to get, pretty hard to establish, takes years and years to do it, takes lots of money to establish a trade of that kind, and from the way our plants are located through the different cities where barley is,—barley centres, close to the breweries, our customers:—I think 20 that the company is about as well located as we could locate a plant in any place, well located to take care of eastern business, well located to take care of the Middle West business and the southern business—through long years of good treatment; and I think that is the reason that we are able to hold this trade and get a better price than the average of our competitors.

Q. Well, as a result of all that, of the volume of 30 business done by the company and the advantage that it has in prices, what is the fair value of its good will?

A. I think that the value that you placed on it is a very fair value.

Q. I have not placed any value.

A. I mean our value.

Q. You mean $5\frac{1}{2}$ to 6 million dollars?

A. $5\frac{1}{2}$ to 6 million dollars.

Mr. Sohngen—Cross.
 Godfrey Knoche—Direct.

CROSS-EXAMINATION BY MR. DANIELS:

Q. Is this ability to realize a better price per bushel one which attaches to the output of all the plants in the control of the American Malting Company?

A. Well, practically all, yes.

10 Q. I did not know whether it attached only to your plant.

A. No, to all the plants.

Q. To all the plants, without exception?

A. Well I would not say just whether—there may be one or two smaller houses, but we have been able to make good fair goods in all of our houses. There are some one or two plants that possibly are not just as well adapted. But nine-tenths of our capacity
 20 is well adapted to make as good goods as we can at Hamilton or any of the plants.

Q. Do you happen to know what the tax appraisal of the two New York properties is?

A. No, I do not.

Mr. Faulks: I anticipate that the New York properties might stand in a somewhat different position than the others, owing to the extremely large land value. We have an expert with
 30 reference to these two properties alone.

MR. GODFREY KNOCHE sworn for the Petitioner.

DIRECT-EXAMINATION BY MR. FAULKS:

Q. Mr. Knoche, where do you live?

A. I live in Fort Lee, New Jersey.

Q. Are you an architect?

A. Yes.

40 Q. Where have you carried on your profession?

Godfrey Knoche—Direct.

A. I carry it on in Philadelphia and New York, mostly New York.

Q. And how long have you carried on architectural work?

A. Since '84.

Q. That is to say, since that time?

A. Ever since then.

Q. Have you had charge of the making of the 10 plans of a good many large buildings and the oversight of their construction?

A. Yes.

Q. Among others did you build the 71st Street plant of the American Malting Company?

A. Yes, I did.

Q. You are a contractor also, as well as an architect?

A. Yes, I build many large buildings for myself. 20

Q. In New York and Philadelphia?

A. In New York and Philadelphia, yes.

Q. Are you thoroughly familiar with both the 63d and 71st Street plants of the American Malting Company?

A. Yes.

Q. The 71st Street plant was built under your direction?

A. Yes.

Q. According to your plans? Were you the architect? 30

A. Yes.

Q. When was that built?

A. '84 to '85.

Q. And that is located——

A. Half-way between 71st and 72d Streets.

Q. What is the size of the tract of land on which it is located?

A. Sixteen lots, 204'4" x 198.

Godfrey Knoche—Direct.

Q. How much of it is occupied by buildings located there?

A. All of them, except four.

Q. All of the sixteen lots except four?

A. Yes, twelve lots are built upon.

Q. Where is the 63d Street plant located?

A. Between Avenue A, 63d and 64th Streets, and
10 the East River.

Q. Is there a dock frontage?

A. Dock front on the East River.

Q. And, roughly, what is the size of the tract of land occupied by that plant, if you can give me the dimensions?

A. That is about 200' 2" on the Avenue and on 64th it is about 650, and on 63d it is about 550, and where it goes at an angle you cannot get dimensions exactly to a foot,—it comprises about
20 thirty lots.

Q. Are you familiar with the buildings on that tract of land?

A. Yes.

Q. Are they of the same character of construction as those that you built on the 71st Street tract?

A. About the same, yes.

Q. Have you ever bought or sold any land in
30 New York City?

A. Yes.

Q. Frequently or infrequently?

A. Oh, since about twenty years.

Q. Do you mean during the last twenty years?

A. During the last twenty years, yes. I owned quite a lot of property in that neighborhood, and own it still.

Q. And have you sold and bought property in
40 the vicinity of these properties?

Godfrey Knoche—Direct.

A. Yes, I own the neighboring properties there.

Q. Do you know the prices at which properties have been bought and sold in that vicinity in recent years?

A. Yes.

Q. Are you able to place a value on the land comprised in those 63d and 71st Street properties?

A. Yes, I am.

10

Q. What, in your opinion, is the fair market value of the land comprised within the 63d Street plant?

A. May I use this appraisal? I made it carefully in 1911, so it helps me a good deal to give the exact figures. Now, I value it—I value the lots, which is about—it is down here 29, only I say it is thirty——

Q. 29 lots?

20

A. Well, I just figured it out 29. It is between that and 30. I figure \$332,000.00 the value, and then I put an additional value for the use of the dock, and because it is a large plot, which makes it more valuable than similar lots. There is a big difference on that.

Q. What additional value did you put on that?

A. About 50% more. Put an additional value for the dock about \$40,000.00.

Q. Making the total value of the land and dock 30 how much?

A. \$372,000.00. That stands good about this time. There is hardly any change worth while to mention since this was made in October, 1911.

Q. You made a careful appraisal?

A. I made it very carefully, yes. I own a good deal of property, and I think I am competent to do it.

Q. Did you at the same time appraise the value 40

Godfrey Knoche—Direct.

of the buildings on the properties? What value do you place on the 63d Street building?

A. The total value, about, on there is \$369,650.00 on all the buildings, and not this building there.

Mr. Faulks: I do not believe the Board cares—

10 Commissioner Daniels: No, I would not itemize.

Witness: It is all itemized very carefully, and it was further determined—

Commissioner Daniels: Is that the present value, allowing for depreciation?

Witness: Oh, yes, I allow for that, because that was built—well, I don't exactly know when, but a couple of years before the 71st Street was built.

20 Commissioner Daniels: Is 50% allowance for plottage customary or usual?

The Witness: I kept a little memorandum—I am very much interested in that section, so I kept a little memorandum and saw what different people give, and I found that to be about right.

30 Commissioner Daniels: If you had two ordinary lots, side by side, sold as a single plot, you would not put a percentage—

The Witness: If I had given for one lot ten thousand dollars, that would be for two lots twenty thousand dollars,—I would give your plottage fifteen per cent. more.

Commissioner Daniels: Assuming that as a corner lot?

40 The Witness: The corner lot I always count one and one-half to twice. That depends upon conditions. In some parts it is worth twice as

Godfrey Knoche—Direct.

much, some parts one and one-half times as much.

Commissioner Daniels: And you think an assemblage of corner lots, approximately, in that locality, would warrant this 50% plot-tage value?

The Witness: Oh, yes, indeed. That is a big difference, because that is what people are ¹⁰ looking for and cannot get.

Q. Are there any vacant plots of that size in that part of New York City?

A. No, not of that size, but there is one, and I own that myself. That is a corner. It is only twelve lots.

Q. Are there any vacant plots consisting of thirty lots in that vicinity?

A. There are none. That is the reason I men- ²⁰ tion mine, because that is the largest we have.

Q. Are there any other large plots having water fronts, with docks?

A. Only the one left that I have.

Q. That twelve-lot plot is water front? That is the only one left?

A. Yes.

Q. Now, going to the 71st Street property, will you, in the same way, give us the valuation of the 30 land and of the buildings there?

A. The value of the land is \$207,000.00, sixteen lots, and of these eight of them are on the avenue, taking in the whole block frontage and the front of the building. There is no dock property to this here. That is only the land, and that is all. There are sixteen lots. Now, the value of the buildings altogether are \$253,600. There are four or five buildings on there, and that is the combined—

John C. McCune—Direct.

Q. And the valuation that you have given us for buildings and land both, in the case of both the 63d and 71st St. properties, is a fair market valuation at this time, according to your opinion?

A. They are.

JOHN C. McCUNE, sworn for the Petitioner.

10

DIRECT-EXAMINATION BY MR. FAULKS:

Q. Mr. McCune, are you connected with the American Malting Company?

A. Yes, sir.

Q. In what capacity?

A. I am auditor and secretary.

Q. How long have you held these positions?

A. Well, I have been auditor for the company since almost upon its organization.

20

Q. Are its books and accounts kept under your direction?

A. Yes, sir.

Q. And are you thoroughly familiar with them?

A. Yes.

Q. Are you familiar with the balance sheet of the company, which was prepared as to the end of its fiscal year ending August 31st, 1913?

A. Yes, sir.

30

Q. That is already in evidence. A copy of the balance sheet has been offered in evidence in this proceeding. I want you just to state whether or not, of your own knowledge, the figures in the case are correct.

A. They are.

Q. Does that credit show the value of the liquidated assets of your company as of that date?

A. Yes.

40

Q. By the liquidated assets I mean your bank

John C. McCune—Direct.

balance, inventories as set forth. They are correctly shown in that balance sheet?

A. Yes.

Q. Are its liabilities, including the bonded or other funded debt, correctly shown?

A. Yes, sir.

Q. You are familiar with the provisions of this mortgage that was offered in evidence this morning,—the mortgage marked "P-2". I observe that by the fifth clause of that mortgage the company has obligated itself to make certain payments to and constituting a sinking fund; namely, a sum of money equal to one-half the aggregate amount of dividend paid by it in each case. Have these payments been made to the sinking fund regularly?

A. Yes.

Q. In other words, has the company each time it has declared and paid a dividend, paid into the sinking fund an amount equal to 50% of that dividend?

A. Yes, sir.

Q. That mortgage authorizes an issue of five million dollars of bonds. How many bonds were, in fact, issued?

A. Four million dollars were originally issued.

Q. Four million dollars par value?

A. Four million dollars par value. 30

Q. How many of those bonds have been redeemed up to this time through the payments made to the sinking fund that you mention?

A. The four million dollars have been reduced to \$2,616,000 since. There are \$2,879,000 outstanding. Now this has been reduced at different periods. But there were a number of bonds retired in addition to that out of funds realized from the sale of certain properties, so that the difference 40

John C. McCune—Direct.

does not represent the exact amount. I think it was 105. I know that we called some bonds at 105 a number of years ago.

Q. I don't care about the details of that. I want to know the number of bonds still.

A. \$2,529,000.00.

10 Commissioner Daniels: How long has that arrangement been in operation?

The Witness: Since the issue of the bonds, the date of that mortgage; but it was several years before we paid dividends. We did not begin until the Fall of 1908. Thereafter there has been one-half the amount set aside for the redemption of bonds, and bonds have been redeemed in accordance with the mortgage.

20 Commissioner Daniels: Now, in your general balance sheet, in this item of property, plants and good will, you can trace that right back through your books, can you not?

The Witness: When I testified there in regard to that, I testified to book value. I have a statement with me. The original of that balance of \$27,000.00 begins with the original take-over, which was taken over in a blanket form. If you want the exact details—about
30 \$24,000.00. as against an issue of common and preferred stock there was taken over \$2,080,000 in cash and a block of plants.

Commissioner Daniels: And the date of that was——

The Witness: The operations began in the several plants the 11th of October, 1897, but I think the date of incorporation was September 29th before that, in the Fall of 1897.

40 Commissioner Daniels: And do you know

John C. McCune—Direct.

how this particular figure representing plant value was arrived at?

The Witness: Yes, it has been built up from the original figure.

Commissioner Daniels: That original basic figure?

The Witness: That basic figure, \$24,000,000. It was simply taken over by the people. It 10 was turned over in a lump. The books do not show any items, not at all, not a single item, except a legal description of the properties, and there is no separate valuation given whatever, and they were taken over in a blanket form. There was no way of telling. There are no records in the company's office.

By Commissioner Daniels:

Q. But you can identify the several properties 20 that were taken over?

A. How do you mean?

Q. You know just where the plants were?

A. They were specifically stated—the Charles E. Sadler Plant; Purcell, two plants; the Buchheit plant—all the plants were specifically stated there, but there are no figures offered, simply the total.

Q. And the company does not have the books 30 of any of the companies that were absorbed?

A. Not at all. It has not. None of those books were ever turned over, and we had no access to them.

Mr. Sully: May I ask a question—whether the physical properties were bought, and not the companies.

The Witness: I don't understand.

Mr. Sully: The stocks of the various com- 40

John C. McCune—Direct.

panies were not bought, merely the physical properties.

Q. Were the securities or the physical properties of the companies themselves?

A. The companies themselves,—the malt plants, the grounds and property, machinery, etc. That is what I am testifying to.

10 Q. Well, I had assumed that the purchase was a purchase of plants outright.

By Mr. Faulks:

Q. Now, this figure of \$24,000,000 that you mention as the original entry was brought up to the present figure by some purchases that were made shortly after the formation of the company?

A. Yes, sir.

20 Q. And there have been no other properties taken over and included under that item since that time, have there? No, let me withdraw that question. There have been no other properties acquired since shortly after the formation of the company for which payment was made in capital stock of the company?

A. No.

Q. Since then, whatever properties have been acquired or improvements made have been paid for
30 out of current earnings?

A. Current earnings, yes.

Commissioner Daniels: So there is something like three and a half million representing the addition to the plant made out of earnings.

The Witness: That is the way the increases come.

Q. The statement that you mention shows a
40 total surplus in the earning and other funds avail-

John C. McCune—Direct.

able for new construction and improvements—\$3,405,766.59. That is the figure that has just been referred to, is it not?

A. Yes sir.

Q. That represents the current earnings of the company remaining after the payment of dividends out of which——

A. (Interrupting.) Well, I tell you. He first¹⁰ deducts the dividends from the total earnings and then adds the receipts from the sale of plants, insurance, so that brings a balance of \$3,405,766.59.

Q. And is that fund available for the construction of new plants and improvements of the old plants?

A. Yes sir.

By Commissioner Daniels:

Q. In setting up the balance sheet annually, do²⁰ you carry forward to operating accounts allowances that you make for depreciation of the plant or other property?

A. Well, we have not set aside any fund for depreciation of plants. We have an item on that, but it is the depreciation. We charge off each year a large amount into operating expenses for repair, and in that way keep the plants up to their normal efficiency.

30

Q. Well, your charge to repair would not be your property depreciation charge?

A. No, but I find we have not charged off depreciation to that extent.

Q. Well, then, doesn't it come to this, strictly speaking, you charge off no depreciation on the plants?

A. On the plants?

Q. On the plants and property.

40

Testimony, Jan. 6, 1914.

A. Yes, if you wish to put it that way.

Q. Well now, as an expert accountant, wouldn't you say that there should be some amount written off and charged up to revenue annually. Even your buildings will attack the depreciation perhaps one per cent. a year over the life of the building, depending somewhat on the character of the structure.

10 A. Well, there has not been any deduction made. That is one of the reasons why they are trying to effect a reduction of capital. Of course, \$27,000,000 is a bookkeeping item representing all these plants.

Q. Do you have any knowledge of the terms upon which the individual plants incorporated into the American Malting Company were taken over at the time of the formation of the company?

20 A. I have no individual knowledge. About those that were bought since——

Mr. Faulks: Well, by individual knowledge you mean whether anybody connected with the company at that time has.

Commissioner Daniels: I did not want to invalidate the record by asking him to put in hearsay testimony.

30 Mr. Faulks: I might say for your information there was no entry of that at all except this one blanket item.

Commissioner Daniels: I knew there was no item.

The Witness: I knew nothing back of them, had no knowledge whatever. That entry was prepared when I came there, made by an expert accountant, and the books were opened up under his direction. I did not know anything about these plants or the business.

40 Mr. Faulks: The interests controlling the

Testimony, Jan. 6, 1914.

company now, that is, the Board of Directors, are entirely different in their personnel from those who were in control at the time the company was formed?

The Witness: The controlling interests, yes. There are two remaining directors, Mr. Sohngen and Mr.——

10

(After discussion.)

Commissioner Daniels: (To Mr. Vuhlmann): Do you know at what figure, approximately, you carried your property and plant before the consolidation?

Mr. Vuhlmann: Absolutely, I know that perfectly.

Commissioner Daniels: Could you give us that figure?

Mr. Vuhlmann: I think our plant at that time—this company I judge has since then made improvements—was carried at \$155,000.00. and they spent about thirty on it, but then we received considerable in excess of that for payment.

20

Mr. Daniels: I am trying to get the ratio between——

Mr. Vuhlmann: I can give you that, if you are willing to take our case for it. We received about two and one-half times the value of our assets.

30

Commissioner Daniels: In the securities of the American Malting Company?

Mr. Vuhlmann: No sir.

Commissioner Daniels: In cash?

Mr. Vuhlmann: We received 60% in money and 40% in securities, and we subscribed to the securities of our own free will. It was 40

40

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not compulsory. There were others who got everything in cash.

Commissioner Daniels: Did they get a $2\frac{1}{2}\%$ basis?

Mr. Vuhlmann: I think some did better than that, some a little worse.

10 Commissioner Daniels: Well, that is shedding some light on the matter. (To Mr. Sohngen) Would you tell us about your Hamilton plant?

Mr. Sohngen: The book value of our Hamilton plant was about \$100,000 at the time.

Commissioner Daniels: And did you take payment in both securities and cash?

20 Mr. Sohngen: Yes, we took some securities, not very many, at the time. I think about one-sixth of the stock.

Commissioner Daniels: Preferred or common?

Mr. Sohngen: Preferred and common.

Commissioner Daniels: And was the ratio something like two and one-half?

Mr. Sohngen: Well, it was about two and one-half.

Commissioner Daniels: That elicits the specific information I was in quest of.

30 Mr. Vuhlmann: That is not all. Remember that during that time there were no dividends paid for years, owing to the fact that the then Directors largely were of the opinion that money had been earned and dividends were declared.

Commissioner Daniels: They were required to refund some part?

40 Mr. Vuhlmann: Yes, they refunded some of them.

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Mr. Faulks: The dividends had been paid partly out of capital. That was for the dividend period of '97 and '98, until the suspension of dividends until 1907. Since then moderate dividends have been paid on the preferred stock, never any dividends on the common stock.

Commissioner Daniels: May I ask the gentleman one more question. Before you were taken in the American Malting Company, or, rather, before you sold out to the American Malting Company, did you on your books carry at any figure the good will of your company?

Mr. Vuhlmann: No.

Mr. Faulks: You do not know, of your own knowledge, what any other company got, either in cash or securities, for their plant?

Mr. Vuhlmann: No, when you say of my own knowledge. That would mean I had seen their check. I speak only of what I have heard.

Commissioner Daniels: Is it the same with you, Mr. Sohngen?

Mr. Sohngen: Whether I know what any of them got? No, I do not, only hearsay and talk.

Mr. Faulks: (to Mr. Howland) Can you tell, Mr. Howland, whether there is anything in evidence as to the dividends that have been paid?

Mr. Howland: Yes, that is in evidence.

Commissioner Daniels: Doesn't that appear in the statement of the earnings?

Mr. Faulks: I have a statement of the dividends paid on the preferred stock of the Amer-

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ican Malting Company. (To Mr. McCune)
Has this statement of dividends paid on preferred stock of the American Malting Company been prepared under your direction?

Mr. McCune: That was made under my direction.

10 Mr. Faulks: Does that credit show dividends paid on preferred stock from the time of its organization until the end of the last fiscal year?

Mr. McCune: Yes, I think that is a copy of the statement that I had checked myself.

Statement referred to is marked Exhibit P-4. (See p. 259.)

20 Mr. Faulks: That is the only proof that we have felt that it would be necessary to offer. However, Mr. Sully, who is President of the American Malt Corporation and Vice-President of the American Malting Company, is here, and either he or Mr. McCune will be glad to answer any question that you may wish to ask.

30 Commissioner Daniels: I have no additional inquiries to put. I think it was Commissioner Donges who suggested the additional evidence that he thought you ought to put in to complete the information.

Mr. Faulks: His suggestion was that we should put in proof as to the fair actual value of the properties comprised within that \$27,000,000, and the case was only opened for that purpose, and he understands, from the talk that I had with him at the Court House in Newark, that that was the only point on which the Court desired the information.

40 Mr. Sully: I have no statement to make. I

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am quite ready to answer any questions that I may be able to answer, but I do not see anything to add to what has been furnished.

Mr. Faulks: I do not think Mr. Sully has any personal information.

STATEMENT BY MR. FAULKS.

Mr. Faulks: The situation with regard to this company briefly is this: It was incorporated and organized in 1897, which seems to have been a time when combinations of this kind were rife, and when, as my associate, Mr. Howland, has said, they were accomplished through the activities of those whose activities centred in Wall Street and the like. In a great many of the cases the owners of various plants were induced to dispose of them at tempting figures by offering either cash or securities in the new company, and there is no doubt but what this company was grossly over-capitalized at that time. That is, as against the \$24,000,000 of stock that was issued for properties taken in, the company did not receive properties of that value, or of anything like that value.

Now, it appears from the records in the Appleton case, that is, the case of Appleton against the American Malting Company, which was heard both in the Court of Chancery and the Court of Errors, that dividends were paid at the rate of seven per cent on preferred stock for two years after the organization of the company, and, further, that those dividends were paid, in part at least, out of capital. Now, it was at that time that the father of Mr. Ordway, who is the only protestor here, bought his stock, and I suppose a great many other people bought stock in the open market at about the same figure at that time. That is unfortunate,

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but that condition of affairs is one for which the large majority of the directors now in control of the management of this company are in no way responsible, and which they are, through this proceeding, trying to remedy, in so far as it can be remedied; and the question is as to whether or not this Board ought not now to seek any plan which
10 will aid them to fairly accomplish that result.

The result of the over-capitalization and of payments of dividends made subsequent to the formation of the company was that for a period of eight years after 1898, that is, from '99 to 1907, no dividends were paid at all. During those years, and after a change in the management of the company, the directors conserved whatever earnings there were. The report that went in evidence this morning shows the result, in part at least, of their
20 efforts. During the six years from 1901 to 1906, inclusive, the surplus net earnings aggregated shows \$1,901,965.00. In 1907 there was a deficit of \$357,603, so that the total surplus net earnings for that period of seven years was \$1,544,361.78, or an average of only \$220,623.11 for the seven years.

Now, under the present management, from 1908 to 1913, inclusive, the total surplus net earnings
30 have aggregated \$3,729,265.35, or an average of \$621,544.00 for each of these six years. That is, \$621,000 for each of these years as against \$220,000 for each of those earlier seven years. Now, that, to my mind, evidences a desire, and not only a desire but an ability on the part of the officers of this company to rehabilitate it and put it on something like a business footing.

But it is apparent that the net earnings have
40 not been and never can be sufficient to pay the

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seven per cent preferred dividends,—the result of those earlier lean years, coupled with its inability ever since then, except in one year, to earn the full dividend; no, in fact, it has never earned the full dividend. There has been an accumulation of between eighty and ninety a year arrearage on preferred stock; common stockholders these fifteen years have never had any. Now the question is: 10 must the company go along and struggle under this load it received from the way in which it was formed, it has for the last six years, at least, been successful, notwithstanding the fact that it has during that time been able to earn a substantial dividend upon a fair capitalization.

Now, there are two companies. The American Malting Company, of which I have been speaking, is the operating company, with an active capital of 20 between 28 and \$29,000,000 outstanding. This is divided almost equally as between preferred stockholders and common stockholders. The preferred have a little over 51% of the outstanding stock. Now, the Malting Corporation was formed several years ago, five or six years ago, in the hope that some day this plan could be worked out: that there could be a proper capitalization and proper re-arrangement of the interests of the preferred and 30 common stockholders.

Now, I have seen a letter that came to the Board within a day or two from Mr. Ordway, in which he indicates that there is some intention there to drive people into this consolidating company, or else to make them sell their stock at the depreciated value,—whatever the interests, controlling interests, are willing to give for it. Now, it seems to me that that position is an extremely unfair one to take in connection with this plan. It is not a plan 40

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that has been evolved over night, there is no one holding a hammer over anybody's head and saying: "You have got to come into this plan and come along with us, or lose your investment."

Over this period of four or five years that this plan has been brewing, 98½ and even a larger fraction, almost 99% of all preferred stockholders, 10 and all the common stockholders have seen fit to come in and exchange their stock in the Malting Company for stock in the Malt Corporation,—the proposed consolidated corporation. Now, in every case the exchange has been made upon the same basis that it is proposed to be made under this plan, except this, that any one who has not as yet come in, and is either willing to come in or wants to stay out, any preferred stockholder can have 20 a fair proportion of this two million dollar surplus that is shown by the books; that is, the stockholders who have gone in before, the preferred stockholders who have received 62% of stock in the new company for 100% in the old one. That is the offer that is made to Mr. Ordway and to the remaining preferred stockholders, under this plan, except that they will, in addition to that, get their full percentage in these surplus net earnings, about two million dollars.

30 Now, the difficulty, as I understand from the chairman of the Board, that the Board had with the proposition, and the only difficulty, as I understand it from him and Mr. Sommer, was not as to any question of the plan being legal, but as to its fairness to the preferred stockholders. The view that the Chairman of the Board took was this: That it appeared from the annual reports and from the balance sheet of the company that 40 it had an item called "properties, plants and good

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will," showing the value of upwards of \$27,000,000. Now that with the assets shown by the reports and balance sheets, shows the existence of apparent value of over the amount of capital stock outstanding. Now, under the certificate of incorporation of the American Malting Company, upon dissolution the preferred stockholders and the common stockholders would share equally, except in the surplus of two million dollars. This the preferred stockholders would take, that representing percentages available for dividends, and then they share the balance, fifty and fifty.

In that the point that Mr. Ordway made when he was before the Board in Jersey City, and the point that was apparently bothering Captain Don-20
ges was this: He said: "How can we assume upon that showing that if this company should be dissolved tomorrow, Mr. Ordway and the other preferred stockholders would not receive practically dollar for dollar on their investment? Why wouldn't they get the par value of their stock?" Well, he argued then from that, as to dividends, from the experience of fifteen years, including good times and bad times and lean years and fat years, that any business man would be compelled to conclude that that item would not represent the fair value of the assets of the company, described in 30
there. But the Chairman said that he did not think the Board had the right to assume that duty; if this plan was in fact fair to the preferred stockholders, that ought to be demonstrated by showing that upon the dissolution of the company they would not receive more than was offered to them by this plan, and we all agree, and there is no doubt about it, that the result of this merger will be to dissolve the American Malting Company. 40

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Now, can there be any possible question, under the showing that has been made here today, that the plan is fair to the preferred stockholders? In the first place, it seems to me that the Board ought to give a great deal of weight to the fact that nearly 99% of the stockholders of this company have come in, and of the little over one per cent
10 who have not, three-fourths, as appears from this annual report in evidence, three-fourths of those are common stockholders. They are people having small lots, and perhaps have not enough interest, after not having any dividend for fifteen years, to bother making the exchange, but this is only a little over one hundred thousand dollars out of this fifteen million dollars, and out of this fifteen there is only Mr. Ordway, speaking for himself and his
20 brother, having only fifty shares of stock, that objects. Taking their combined earnings, that is 17/1000 of one per cent.

Now, I would not say that the Board ought not to protect some of our stock holders, but I would say that they ought to take into consideration that such a very large percentage of all the stock holders, and even a larger percentage of the preferred stockholders have voluntarily seen fit to
30 come in during the four or five years that this plan has been weighed. Is not that a very strong indication that the plan is fair?

What has been brought out this afternoon has been largely confirmatory of what was said by Mr. Vuhlmann this morning. The other witness was Mr. Sohngen, who has been connected with the company as a manager of a number of its plants ever since its organization, he having also been owner of the Hamilton plant, which was taken
40 over by the company. It is one of the old plants

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that was operated by a concern that has been in business since 1858, and his testimony showed that during the thirty-nine years that he was with that company and the American Malting Company as its successor, it had never lost a customer, and that owing to the good reputation that it has and that the American Malting Company has, while the sales of that plant are comparatively small because 10 it is a small plant,—say 150,000 to 175,000 bushels a year; that plant has controlled and orders have been secured through it for about 1,200,000 to 1,400,000 a year. Now, both he and Mr. Vuhlmann have testified as to the priority, I was going to call it the favors, that this company has been given over its competitors in practically all of its business that is done. They figure that that nets the company from 275 to 300,000 dollars a year, and 20 that, taking a five per cent. basis, that would justify a valuation of from \$5,500,000 to \$6,000,000 as the value of the good will.

As you came in,—(speaking to Commissioner Donges, who had entered the room during Mr. Faulk's statement)—I was directing my attention to the question of the fairness of this plan to the preferred stockholders, because I understand that that was a matter which had given you considerable concern. I had already said to Mr. Daniels 30 that it seemed to us that the fact that almost 99% of the stockholders had come into the plan upon the same terms that are now being offered, that is, before the plan was formally put before this Board, was formally put before the stockholders, was a very strong evidence of its fairness, and of the little over \$400,000.00 par value of stockholders who have not come in, a little over \$100,000 are preferred stockholders. Now I also spoke of Mr. 40

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Ordway's letter, in which he intimates that the interests in control of this company are saying to those who do not come in: "You have got to come in and take the appreciated value for your stock."

10 Commissioner Donges: Mr. Ordway raises the question as to whether or not the statute contemplates a merger where one corporation is a holding company, and into that holding company an operating company desires to be merged—whether it is fair, in view of the statute which makes applicable the rule that a dissenting stockholder may have the value of his interest ascertained and be paid.

20 Mr. Faulks: It seemed to me that he went out of his way a bit to indicate that this plan was being forced down people's mouths. I say that the fact that over a period of four or five years,—this malting corporation having been incorporated in 1906,—that such a very large percentage of both preferred and common stockholders have seen fit to come in on those same identical terms, that those who have not yet come in, preferred stockholders, have their right to the first share of the two million dollars surplus; I say that that in itself is a strong indication of the fairness of the plan.

30

Now, I had also pointed out the circumstances under which this company was organized, that the organization went through at a time when it was the common practice to over-capitalize. While there is not any direct evidence, I think there are strong indications, from the evidence taken this afternoon, that the people who sold out their plants to this company got about two and one-half times
40 what they were fairly worth. We all know that

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that was about the basis under which companies were put together at that time. Now the question is whether this company, as a result of the fact that that was done, has got to struggle along with that over-capitalization, when the present Directors,—(only two out of the thirteen were connected with the company at that time,) are striving so valiently to rehabilitate it and to put it on a basis 10 where it can earn a fair return on its real capital. Now, the showing from this annual report is, you remember, that for two years they paid dividends out of capital, then dividends were suspended altogether for eight years, from 1901 to 1907, inclusive, the net earnings only averaged \$220,000, while for the seven-year period under the present management they have averaged \$621,000 a year. Now, I say that that is a splendid showing, considering the 20 early history of this company, but if it is, and even if these gentlemen are able to make a very much better showing, they never can get out of the woods because of this tremendous amount of arrearages on preferred dividends that are piled up. The common stockholders for fifteen years have not had a cent, and there are eighty to ninety per cent arrearages on preferred stock.

Now, just because a few—one per cent. of all the stockholders of this company—do not see fit to 30 come in and give us a fair chance to live, and live properly, and to let it get in a position where it can earn a fair return on a fair capital,—is that any reason why this Board should not do everything within its power to permit the company? Now, we can on this \$15,000,000 capital almost certainly earn the full dividend, 6%. That will be \$900,000.00. Nine million dollars preferred at 6% will earn \$540,000. Now we have an average 40

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of \$621,000 the last seven years. During all that time every time we paid one dollar to a stockholder we had to put 50% in the savings fund under the mortgage clause provision by which half the amount paid on dividend must also be paid into a sinking fund. In that way we have reduced the mortgage indebtedness from \$4,000,000 to \$2,500,00. In December of this year that mortgage becomes due. We can refund that upon very favorable terms, and it does seem to me that if we are authorized to have capital stock at \$15,000,000 that we can not only earn the full dividend for the preferred stockholders, but there is a chance, at least, and a good chance that the common stockholders will get some return upon their investment. Now, that ought to appeal tremendously to the Board, and as I said the day that I had the pleasure of appearing before you at the Court House in Newark, that even if there was some one particular part of this plan that did not seem to be feasible to a number of the shareholders, it would seem that the plan ought not to be condemned.

Commissioner Donges: I would like to find out how you arrive at the figure of 62% for preferred stock and 40 for common stock

Mr. Faulks: I think that your Honor very properly said, notwithstanding any argument to the contrary, which was that as ordinary business men we must assume that this company did not have any value because of the comparatively small percentage of dividends earned, but you said those were our figures and those were the figures of former reports of the company, and that upon that showing, if the company was dissolved, which it will be by this dissolution, admittedly, the preferred stockholders would receive 100% on their

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stock, and that, therefore a plan which only gave them 62% would not seem to be fair. Well, now, in proof of that there is not any \$27,000,000 and never was. But there is \$15,000,000, and say between nine and ten million dollars of actual assets made up of money in bank inventories and other quick assets of these plants that have been described to the Board today. We think that on 10 the showing made by these witnesses today that a capitalization of \$15,000,000 can be fairly supported. We think that a company which has the old plants that this company has, which has what I think can be fairly stated a peculiar good will, a company dating back to '58, that has never lost a customer, whose customers write in and want their barley and their malt from a particular plant because they have always bought there; we think 20 that on the showing of the fact that a good part of the net earnings of these companies are realized from that particular cause, that a valuation of \$5,500,000 or \$6,000,000 is not at all unfair to represent a good value.

But coming back to the rights of preferred stockholders, to what the accumulation ought to be with regard to this plan. Under the American Malting Company's certificate, the old company's 30 certificate, if there is dissolution, common and preferred stockholders share equal,—fifty and fifty. Preferred stock would have this two million dollars surplus that we have, money that we have, they would get that, and then the balance, which would be the sale of the actual physical assets, because, of course, if we were going out of business the good will would not amount to so much, but the actual physical assets would be seven million dollars, you say. That would mean that the pre- 40

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ferred stock holders would get their two million, plus \$3,500,000, or \$5,500,00 altogether. Now, under this new plan upon dissolution they get 100¢ for the par value of their stock, and also any arrearage of dividends before the common stock holders get anything. That will give, it seems to me, if this plan goes through, a surety that in
10 case of the dissolution of this company they will get appreciably the par value of their stock in it.

Commissioner Donges: That is to say, under the new plan by which the preferred stock holder receives 62%, there should be considerable physical property and assets to receive 100c on the new issue.

Mr. Faulks: Yes, 100¢ on the 62, and I think he
20 is certain of getting this, and reasonably certain of getting arrearages of dividends, if there should be any at the time of dissolution. I do not believe there will be. I believe that we can pay him at 6%, while, if the company were dissolved today the preferred stockholders would only get five million dollars and a half on the investment of fifteen million dollars.

Now, this plan ought not to be defeated, gentlemen, simply because this company made a mistake
30 in the way it did. We ought to have a chance to work it out. If we dissolve neither Mr. Ordway nor the others will lose a large part of their investment if we are given a fair chance. We think that we can work out at least 62% for them, with 6% in the future.

Moreover, I want to point out that the plan is in line with the policy of the state, which requires capitalization at real value. It is also in policy
40 with the spirit of the times to discourage holding

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companies. We have now two companies. One is what Mr. Ordway calls "silent," the other is the operating company. Now there is a large expense that is otherwise unnecessary. We want to get down to one, and that is in the arrangement of both companies by one real company on a fair valuation.

Now, with reference to his letter of this morning, it seems that the decision in the Leather Company case indicates that there cannot be any merit in that point. The Leather Company case, as you doubtless know, was a case where the Central Leather Company and the United States Leather Company tried to merge four or five years ago. There were a large number of objectors. One company had been built up just for the purpose of merging. The complainants in the suit represented 20 shares worth the value of several hundreds of thousands of dollars, and the Court there said that the companies were not engaged in the same or similar business, because their objects were, according to their certificates of incorporation, which was the primary test, very dissimilar. Now, here the certificates are the same. They are identical, except for the fact that the Malt Corporation has authority to hold stock of the American Malting 30 Company, and we think that within his territory, as determined by the Court of Errors in that case, that there is no question but what these companies are engaged in the same or similar business, and that that can be properly arranged.

Commissioner Donges: Well, the fact is that the Malt Corporation is not operated at all.

Mr. Faulks: No, it is not operated at all. 40

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Its only business is the holding of the stock of the American Malting Company.

Commissioner Donges: And only after the merger takes place, the corporation, Malt Corporation, becomes an operating company.

Mr. Faulks: Yes, that is a fact.

10 Commissioner Donges: So that their businesses are not similar.

Mr. Faulks: Well, that depends.

Commissioner Donges: Even though the charter privileges may——

Mr. Faulks: Well, it depends upon what you wish to call the business of the company. In the ordinary, every-day commercial sense they are not. In accordance with the test laid down in the Colgate case they are. The American Malt Corporation could become operative tomorrow.

20

Mr. Donges: Under its charter it may operate?

Mr. Faulks: Yes.

Mr. Faulks: I think that your Honor will be forced to the view that this plan is absolutely fair to the preferred stockholders, and will be tremendously to their advantage to have it go through. 30 As to the common stockholder, it gives him the only chance he has got. For fifteen years there has never been a dividend paid, and during that time there has been between eighty and ninety of accumulations rolling up, which must all be gotten out of the way before he can get anything. We can never get them out of the way if we have got to struggle along. With this capitalization of \$15,000,000 of preferred stock we can pay some of our 40 stockholders something within a few years. It does

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not seem to me that any of them have any objection that is at all real to the plan itself.

Now, as to the basis upon which the 62 and the 44 were determined years ago, Mr. Howland can speak about that.

Mr. Howland: Well, I know that the matter was determined upon years before we had anything to do with it. It was in 1905 that this plan of which 10 Mr. Faulks speaks was formulated, and under which 99%, approximately, of the stockholders have seen fit to exchange at this ratio. By making a few figures it is perfectly evident that they hit upon 62 because that brings the new preferred stock up to \$9,000,000. The next figure they get, 63, would have brought it over \$9,000,000. There was \$14,440,000 of preferred stock of the Malting Company out, and 62% of that makes \$8,952,000. 20 They evidently started out with the idea of dividing the capital into two, and then giving the preferred stockholders three-fifths, or \$9,000,000, and the common stockholders two-fifths, or six million dollars.

Commissioner Donges: I want to know how you figure 62% as what the preferred stockholder should receive.

Mr. Howland: If you were giving any more, 30 —I suppose someone would say he ought to have 75, it comes into the question of whether the common stockholders are being treated fairly, and if the test of the fairness of the merger of the plant is whether or not it properly perpetuates the rights of the old stockholders as upon dissolution, which we have taken to be the test that seems to be laid down thus in the case, it seems to me that they 40 could not have gone any further than they

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10 have gone in this case for the preferred stock-
holders, because of the fact that on dissolution
of the American Malting Company the common
stockholders stand side by side with the pre-
ferred stockholders in the distribution of the
assets, except as to the \$2,000,000 accumulated
surplus. I confess that when we first started
20 to look into this plan we were more apprehen-
sive from the standpoint of the common stock-
holders than of the preferred stockholders.
But from what Mr. Faulks has said this gives
the common stockholders their only chance, is
the only answer from the standpoint of the
common stockholder. But if the test of the
rights of dissolution, the right to share in the
property of the old company, is taken here,
and if you set aside \$2,000,000 surplus, and
30 then give dollar for dollar between the two,
the common stockholders would come out with
more than 42% of the assets of the American
Malting Company.

30 Commissioner Donges: But would they, on
the basis of Mr. Faulk's figures, there being
about \$6,000,000 total of assets, to which
\$2,000,000 of surplus now used as working
capital is to be added—about \$8,000,000 total,
of which something over $5\frac{1}{2}$ is going to the
preferred stockholders and $3\frac{1}{2}$ to the common
stockholders.

Mr. Faulks: There is a little over \$9,000,000.
There would be \$2,000,000 set aside for the
preferred stockholders, \$7,000,000 divided
equally.

40 Commissioner Donges: That would leave,
then, the entire fund to be divided on the basis
of $5\frac{1}{2}$ and $3\frac{1}{2}$?

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Mr. Howland: Well, $3\frac{1}{2}$ is a good deal more than one-half of $5\frac{1}{2}$. 40 to 60 is the ratio in the company, 40 to 62.

Mr. Faulks: If you divide 9 into 55 you get, roughly 62; while if you divide 9 into 35 you get only 40%. Now, that brings it out pretty nearly right. $5\frac{1}{2}$ to $3\frac{1}{2}$ would be the division of this \$9,000,000. 10

Mr. Donges: I wondered on what basis those percentages were reached.

Mr. Faulks: I do not imagine they are reached in that way.

Commissioner Donges: I wondered whether there was any scientific——

Mr. Howland: The preferred stockholders have vote for vote in the company as it stands today. In the new company they have 3 votes 20 to every 2 for the common stockholders.

Commissioner Donges: And your answer to the wiping out of the 80% of accumulated dividends is that they never could get them if the company continued as in the past.

Mr. Faulks: In fifteen years they have never been able to make a dividend, even in the most prosperous year. I think there is this legal answer, that seems to be a fair answer, that 30 the corporation could be dissolved today, and then they would not get them.

Mr. Howland: I should suspect 62 was a combination of what the people thought was fair, and evidently protected itself, giving the preferred \$9,000,000 and the common \$6,000,000.

Commissioner Donges: But not arrived at on any scientific basis?

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Mr. Howland: I know nothing of the history.

10 Mr. Faulks: There is just one more suggestion. Mr. Daniels, you suggested the possibility that it would be fair to work out the capitalization of this company on some basis of the net earnings. This is not in evidence, but can
20 be put in if desired. These people all tell me that this business, like a good many others, is a peculiar business. This company confines itself strictly to a legitimate manufacturing business, and has for a great many years. A great many people engaged in this business carry it on in a speculative sort of way, in which they anticipate shortages in crops and good crops and all that sort of thing, and deal
30 in futures. I imagine it is a good deal like the shellac business, where there are a great many men engaged in manufacturing shellac, while others are engaged in making shellac and buying and delivering shellac six, eight and nine months ahead, and who make or lose a lot of money. Now, there is not a large variation in the earnings of this business, and the returns are small for the amount of capital invested, but it does not seem to us that it
30 would be fair under all circumstances, to try the past capitalization upon its earning power. That ought not to be applied as the sole test here.

(After discussion.)

40 Mr. Faulks:—This is a long step in the right direction, and there is at least a strong justification for this much capital, and we think the Board ought to permit us to have it. I very much fear that if the decision should

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be that we could not have \$15,000,000 it would simply defeat the plan altogether. We would struggle along with the old load.

Commissioner Daniels: Now, of course not forecasting any decision of any kind,—but suppose for five years longer you would go under the present organization and realize your \$600,000 net; that would not afford you 10 enough, of course, to pay your current dividends on the preferred, to say nothing of the arrearage; it would simply build up a surplus for the company, to be taken over the surplus account, would it not?

Mr. Faulks: Yes, in dissolution it would; going to the preferred stockholders. Common stockholders would have no business interest in it, and there would be, perhaps, if the surplus reached an amount, there would be an assessment on the part of the preferred stockholders, that these arrearages should be reduced. 20

Commissioner Daniels: At all events, if you piled your surplus up you would some day in the distant future be coming to the point that, from your argument, capitalization would begin?

Mr. Faulks: No, because we are not earning a dividend in preferred stock. Perhaps we 30 distribute 4% and then add \$500,000 of this capital to the surplus, but we will never make any impression upon that avalanche of accumulation.

Commissioner Daniels: Can one class of common stock holders by themselves effect the dissolution of the corporation?

Mr. Faulks: I think it takes two-thirds of 40

Testimony, Jan. 6, 1914.

10 the entire stockholders, not two-thirds of each class, two-thirds of both, so that here neither the preferred nor the common can ever by themselves, put the American Malt out. Now, if there was any desire on its part to freeze anybody out, that would be an easy way to do it; simply go in dissolution and have the trustees under dissolution sell to the new company, but that would naturally affect the value of the good will and would be unfair. But this plan we think is the fairest one that can be worked out. I know a great deal of thought was given to it before either Mr. Howland and I came into the case, and we had not been able to suggest anything any further.

20 Commissioner Donges: Your theory is that, as Commissioner Danels suggests, if the capitalization be reduced to approximate the actual physical value, the preferred stockholders would complain because the net dividends would be reduced very considerably.

Mr. Faulks: Yes.

Commissioner Donges: And in the same proportion the common stockholders?

30 Mr. Howland: And also the net amount available to them on the subsequent dissolution of the American Malting Company would be seriously affected by any reduction in the par value of their stock.

Commissioner Donges: Would it if they were in the same proportion?

Mr. Howland: Unless we altered our plan. If the same relation between the two classes of stock would obtain they would receive the same.

40 Mr. Howland: We make them on preferred as

Testimony, Jan. 6, 1914.

to the par value of their stock, on anything that is reduced to the par value of their stock.

Commissioner Donges: But if the par value of the common stock were reduced in the same proportion?

Mr. Howland: Common stock take everything that is left.

Mr. Faulks: Here is another difficulty that I think would be insurmountable. We do not know—nobody connected with the company, so far as I know, knows to-day what distribution was made of that stock as it was originally issued. Two of these gentlemen who were present to-day, owners of old plants, testified that they got two and one-half times the value of those plants as they were carried on the books of the company, but is not it safe to assume that the preferred stock that was issued represented something like the real value of the plants, and that the common stock was more or less bonus? Now, if you come to the preferred stockholder to-day and get him to take a further cut in the three-fifths of what he has got left in order that something should be saved for the common stockholder, he is pretty apt to say: "Gentlemen, we do not mean to put up the hard cash."

Mr. Howland: It is perfectly certain that we could not get the votes of two-thirds of the preferred stockholders of the American Malt Corporation which we would have, to a merger which would involve a further cutting down of their stock. That is where it would come, of course, and our plan would have to be modified. We would have to suggest that the outstanding stock of the American Malt Corporation which

has been issued in exchange at the rate of 62 to 100, that would have to be still further cut down.

Commissioner Donges: What is the present capitalization of the Malt Corporation?

10 Mr. Howland: Roughly, \$15,000,000. That is the corporation which would be the new corporation in the merger.

Commissioner Donges: There would be no change in its organization?

20 Mr. Howland: No change in its organization or of the rights of stockholders, but if we would have to do something such as has been talked about we would have to go to those stockholders and get the votes of two-thirds of them for a reduction in the old stockholding, and it would come to them as a great surprise, and I suspect it would be impossible to do anything. Is not that so, Mr. Sully?

Mr. Sully: I am afraid it would be difficult to persuade them to take that view. It would be impossible, as a practical matter to persuade them to consent to any further reduction.

30

40

Exhibit P-1.

Exhibit P-1.

AMERICAN MALT CORPORATION.

DIRECTORS.

10

DANIEL J. CARROLL.	WILLIAM BARCLAY PARSONS.
MICHAEL COLEMAN.	GEORGE EMLÉN ROOSEVELT.
THOMAS S. OLLIVE.	CHARLES A. STADLER.
ALBERT N. PARLIN.	WILBERFORCE SULLY.
CHARLES H. ZEHNDER.	

OFFICERS.

20

<i>President:</i>	<i>Vice-President:</i>
WILBERFORCE SULLY.	CHARLES A. STADLER.
<i>Secretary:</i>	<i>Treasurer:</i>
JOHN C. McCUNE.	HENRY EGGERKING.

Transfer Agent:

30

EMPIRE TRUST COMPANY,
No. 42 Broadway, New York City.

Registrar of Stock:

GUARANTY TRUST COMPANY OF NEW YORK,
No. 140 Broadway, New York City.

General Office:

No. 15 Exchange Place, Jersey City, N. J. 40

Exhibit P-1.

AMERICAN MALT CORPORATION,

No. 15 EXCHANGE PLACE,
JERSEY CITY, N. J., October 22, 1913.

10 TO THE STOCKHOLDERS OF THE
AMERICAN MALT CORPORATION:

Since our last report to you, under date of October 23, 1912, additional amounts of Common and Preferred Capital Stock of American Malting Company have been acquired, so that the total amounts owned by your Company are as follows:

20 Common Stock..... \$13,082,400
Preferred Stock..... 14,264,500

thus leaving outstanding the following amounts of Capital Stock of American Malting Company:

Common Stock..... \$317,600
Preferred Stock..... 175,500

30 (The balance of the Common Stock of American Malting Company, viz., \$1,100,000 is held in the Treasury of that company.)

The amounts shown to be still outstanding in the hands of the public constitute less than 1.78 per cent. of the entire Capital Stock of American Malting Company.

In consequence of these acquisitions, additional amounts of the Common and Preferred Stock of the Corporation have been issued in exchange therefor.

40 The following statement shows the disposition

Exhibit P-1.

thus far made of the Capital Stock of your Company, namely:

	Common.	Preferred.
Issued in exchange for stock of American Malting Company.....	\$5,756,256	\$8,843,990
Reserved for acquisition of outstanding stock of American Malting Com- pany.....	139,744	108,810
Left free in Treasury for gen- eral purposes of the Corporation.....	104,000	47,200
Total.....	\$6,000,000	\$9,000,000

On September 24, 1913, the Directors of American Malting Company declared a semi-annual dividend of \$1.24 per share upon the Preferred Stock of that Company, payable on November 1, 1913. 20

As your Company is the owner of 142,645 shares of the Preferred Stock of American Malting Company, the payment of this dividend will bring into your Treasury the sum of \$176,879.80.

At a meeting of the Directors of American Malt Corporation subsequent to the declaration of the above-mentioned dividend, your Directors declared a semi-annual dividend upon the Preferred Stock of the Corporation of two dollars (\$2.00) per share, payable on and after November 3, 1913. 30

We herewith hand you for your information the Annual Report of the operations of American Malting Company for the year ended August 31, 1913.

By order of the Board,

WILBERFORCE SULLY,

President. 40

Exhibit P-1.

 AMERICAN MALTING COMPANY.

 ANNUAL REPORT

 For the Year Ended August 31, 1913.

 10 AMERICAN MALTING COMPANY.

ANNUAL REPORT.

1913.

 AMERICAN MALTING COMPANY.

 20 DIRECTORS.

DANIEL J. CARROLL.	ALBERT N. PARLIN.
MICHAEL COLEMAN.	WILLIAM BARCLAY PARSONS.
THOMAS B. HIDDEN.	GEORGE EMLÉN ROOSEVELT.
JOHN C. McCUNE.	CHARLES SOHNGEN.
THOMAS S. OLLIVE.	CHARLES A. STADLER.
WILLIAM E. PAINE.	WILBERFORCE SULLY.
CHARLES H. ZEHNDER.	

 30 FINANCE-EXECUTIVE COMMITTEE.

ALBERT N. PARLIN, *Chairman*.
 MICHAEL COLEMAN.
 GEORGE EMLÉN ROOSEVELT.
 CHARLES A. STADLER.
 WILBERFORCE SULLY.
 CHARLES H. ZEHNDER.

Exhibit P-1.

OFFICERS.

<i>President.</i>	<i>Chairman of the Board.</i>	
CHARLES A. STADLER.	WILBERFORCE SULLY.	
<i>Secretary.</i>	<i>Treasurer.</i>	
JOHN C. McCUNE.	HENRY EGGERKING.	10
<i>Transfer Agent.</i>		
GUARANTY TRUST CO. OF NEW YORK, No. 140 Broadway, N. Y. City.		
<i>Registrar of Stock.</i>		
CHASE NATIONAL BANK, 83 Cedar Street, N. Y. City.		
<i>General Offices.</i>		
Sixty-third Street and East River, Borough of 20 Manhattan, New York City.		

1913.

AMERICAN MALTING COMPANY.

ANNUAL REPORT

For the Year Ended August 31, 1913. 30

NEW YORK, October 22, 1913.

TO THE STOCKHOLDERS OF THE AMERICAN MALTING
COMPANY:The Board of Directors herewith submit their
report and statements of account for the fiscal
year ended August 31, 1913: 40

Exhibit P-1.

Profit on malt, barley and other products dealt in, including interest on securities owned, loans and balances	\$777,038 84
--	--------------

DEDUCT.

Interest on Mortgage	
10 Bonds	\$156,840 00
Interest on Underlying	
Mortgages	5,269 44
Taxes	88,574 25
Amount expended in betterment and maintenance	122,987 18
	373,670 87
20 Net profit from year's operations	\$403,367 97

Two dividends were paid by your Company during the fiscal year aggregating \$3.10 per share on the Preferred Stock, and in consequence of the provisions of the mortgage securing its outstanding bonds, the Company became indebted to the Sinking Fund in the sum of \$223,820 and settled the same by the delivery of bonds to the Trustees of the said Fund for cancellation to the amount of \$217,000 (par value), said bonds being credited by the Trustees of the Sinking Fund at par and accrued interest thereon (\$222,425.06) together with cash for the balance of said sum not represented by said bonds at par and accrued interest, namely, \$1,395.

This sum, together with the balance standing in the Sinking Fund at the beginning of the year, was

40 reduced by the purchase for cancellation of \$1,000

Exhibit P-1.

(par value) of the Company's First Mortgage Bonds from those held in the Company's Treasury at par and accrued interest (\$1,024.17), leaving a balance of \$634.21 standing to debit of Sinking Fund.

During the year the Company purchased in the open market \$260,000 (par value) of the Company's Mortgage Bonds for the Treasury. 10

Adding those purchased, and deducting \$218,000 (par value) cancelled through the operation of the Sinking Fund from those in the Treasury, leaves a par value of \$133,000 in the Company's Treasury, which are held free as quick assets.

During the year the item "Securities of Other Companies" was reduced \$2,000 by the sale of securities (at par) acquired in the settlement of a claim. 20

Of the fund amounting to \$100,000 "Reserve Account," reserved out of profits for depreciation, bad and doubtful accounts, \$43,211.97 was written off for bad and doubtful accounts and \$26,256.57 for depreciation, leaving \$30,531.46 still standing to credit of said account.

Your Company begins its present fiscal year under the following conditions:

Cash in Banks and Trust Companies	30
Bonds purchased for account of Treasury	\$1,258,034 40
Mortgages on Real Estate.....	133,000 00
Securities of Other Companies.....	95,000 00
Accounts and Bills Receivable.....	16,725 00
Inventories	1,372,715 11
	2,437,785 88
Total	\$5,313,260 39 40

Exhibit P-1.

Liabilities other than Funded Debt:	
Accounts	
Payable..	\$42,775 62
Accrued	
Taxes....	32,010 74
Accrued In-	
terest on	
10 Bonds....	39,240 00
	<u>\$114,026 36</u>
Less Insurance and	
Taxes anticipated	
against fiscal year	
1913-1914	37,094 60
	<u>76,931 76</u>
Leaving net working capital....	
	<u><u>\$5,236,328 63</u></u>

20

The inventories of barley and malt have been valued at a figure under cost, and since the close of the fiscal year, contracts have been made for the sale of all the malt and barley on a malt basis on hand August 31, 1913, at a profit.

Severe competition cutting heavily into the margin of profit and the character of the barley crop itself which was an expensive crop to handle, together with several other minor causes such as heavier charges for maintenance and repairs, account for the smaller net earnings shown as a result of the operations of the Company for the fiscal year ended August 31, 1913.

In certain quarters there appears to be a misunderstanding as to the policy pursued in the matter of the payment of dividends since the resumption of dividends in September, 1908.

40 Therefore, to make the matter plain and to re-

Exhibit P-1.

fresh the recollection of long time holders of the stock of your company, and for the information and guidance of those who have more recently become holders of the preferred stock of American Malt Corporation, we subjoin tables showing the surplus net earnings in two different periods in the history of the Company and under substantially different managements, and explain the dividend policy pursued by the Board of Directors.

10

The following is a statement of such earnings for the earlier period, being the surplus net earnings in excess of all charges of every kind including maintenance and interest on bonds.

Year ended		
August 31, 1901.....		\$383,261 48
" 31, 1902.....		323,754 14
" 31, 1903.....		410,491 29
" 31, 1904.....		116,514 59
" 31, 1905.....		412,291 40
" 31, 1906.....		255,652 10

20

Surplus net earnings for period of 6 years.....	\$1,901,965 00
August 31, 1907, deficit after pay- ment of all charges.....	357,603 22

Total surplus net earnings for
period of 7 years..... \$1,544,361 78 ³⁰

Average annual surplus net
earnings for the period of
7 years..... \$220,623 11

The following is the record of the earnings of the Company for the later period referred to, namely: For the 6 years ended August 31, 1913, being 40

Exhibit P-1.

the surplus net earnings in excess of all charges including maintenance and interest on bonds:

Year ended		
August	31, 1908.....	\$952,703 79
"	31, 1909.....	557,382 90
"	31, 1910.....	242,451 59
10	" 31, 1911.....	763,040 30
"	31, 1912.....	810,318 80
"	31, 1913.....	403,367 97
Total surplus net earnings for the 6 years last passed....		<u>\$3,729,265 35</u>
Average annual surplus net earnings for the period of 6 years.....		<u>\$621,544 22</u>

When the report of operations for the year ended August 31, 1908, was placed before the Board of Directors in September, 1908, being the result of the operations of the Company in the panic year 1907-1908, the Directors considered that the successful conduct of the Company's business during that year of panic warranted the belief that the
 30 working capital (as of August 31, 1907) and credit of the Company were fully adequate to the handling of the business of the Company in most trying circumstances and the policy was adopted of paying out substantially the full amount of dividends warranted by current surplus net earnings, taking into consideration, however, the fact that by the terms of the mortgage securing the outstanding bonds of the Company an amount equal to 50 per cent. of the
 40 dividends must be paid to the sinking fund for the

Exhibit P-1.

purchase and cancellation of bonds, and that in order to preserve intact the working capital provided by the sale of the bonds in 1899, an amount equal to the payment to the sinking fund should be retained in the surplus net earnings.

The result of this policy would be that *pari passu* with the payments to the sinking fund and the retirement and cancellation of bonds, the working capital originally provided by the fund arising from the sale of bonds would be replaced by surplus net earnings reserved therefor. 10

An inspection of the second table of earnings will show that the surplus net earnings of the Company in excess of all charges including maintenance and interest on bonds for the period from September 1, 1907, to September 1, 1913, aggregated...\$3,729,265 35 20

Dividends on the Preferred Stock of the American Malting Company were paid from November 1, 1908, to May 1, 1913, inclusive, aggregating\$1,885,864 00 30

Retained in surplus net earnings to offset corresponding payments to sinking fund for redemption of bonds... 942,932 00

Total payments and reservations as above in surplus net earnings since September 1, 1907...\$2,828,796 00 40

Exhibit P-1.

	Leaving surplus net earnings accumulated in the period from September 1, 1907, to September 1, 1913, in excess of dividends and payments to the sinking fund free for dividends in accordance with the above policy	\$900,469 35
	Out of this surplus your Directors declared a	
10	dividend on September 24, 1913, of \$1.24 per share, amounting to	\$179,056 00
	Reservation made in surplus net earnings to offset payment to the sinking fund for redemption of bonds	89,528 00
20	Total amount payable November 1, 1913.....	\$268,584 00
	Leaving a balance of surplus net earnings accumulated from September 1, 1907, to September 1, 1913, in excess of all payments on account of dividends and to the sinking fund for redemption of bonds, including the last-named appropriations therefor	\$631,885 35
30	During the year additional amounts of Preferred and Common Capital Stock of your Company have been purchased by American Malt Corporation so that less than 1.78 per cent. of the Capital Stock of American Malting Company remains outstanding in the hands of the public.	

For the Board of Directors.

WILBERFORCE SULLY,
Chairman.

Exhibit P-1.

AMERICAN MALTING COMPANY.

GENERAL BALANCE SHEET.

ASSETS.

	AUGUST 31, 1913.	AUGUST 31, 1912,
		10
Property, Plants and Good-Will.....	\$27,585,001 08	\$27,585,001 08
Common Stock returned to Treasury.....	1,100,000 00	1,100,000 00
Cash in Banks and on hand.	1,258,034 40	723,864 11
Accounts and Bills Receivable.....	1,372,715 11	2,436,466 70
Inventories.....	2,437,785 88	2,401,685 59
Bonds purchased for account of Treasury.....	133,000 00	91,000 00
Mortgages on Real Estate...	95,000 00	95,000 00
Securities of other Companies.....	16,725 00	18,725 00
Special Deposit (Trustees of Sinking Fund).....	634 21	263 38
Unexpired Insurance and Taxes.....	37,094 60	38,667 24
Total.....	\$34,035,990 28	\$34,490,673 10

LIABILITIES.

	AUGUST 31, 1913.	AUGUST 31, 1912.
Capital Stock, Preferred....	\$14,440,000 00	\$14,440,000 00 30
Capital Stock, Common....	14,500,000 00	14,500,000 00
First Mortgage Bonds.....	2,616,000 00	2,834,000 00
Underlying Mortgages.....	14,000 00	114,000 00
Accrued Interest on Bonds...	39,240 00	42,510 00
Accrued Taxes.....	32,010 74	29,446 35
Accounts Payable.....	42,775 62	65,012 26
Reserve Account.....	30,531 46	100,000 00
Surplus Account.....	1,918,064 49	2,365,704 49
Profit for year ended August 31, 1913.....	403,367 97	
Total.....	\$34,035,990 28	\$34,490,673 10

JOHN C. McCUNE, Auditor. 40

Exhibit P-1.

PUBLIC ACCOUNTANTS' CERTIFICATE.

Firm of FARQUHAR J. MACRAE,
Certified Public Accountants,
68 William Street
New York.

10 HASKINS & SELLS,
Certified Public Accountants
30 Broad Street,
New York.

We have examined the books, records, and accounts of the American Malting Company as at the close of business August 31, 1913.

20 The securities of other companies and mortgages on real estate were examined and, in our opinion, are conservatively valued.

The inventories were taken by the Company in the usual way and we have verified the mathematical calculations and prices.

30 We verified the cash in hand and on deposit by count and by certificates obtained from various depositaries, the cash in the hands of the Trustees of the Sinking Fund by certificate of the depositary, and the capital stock and bonds outstanding by certificates obtained from the Transfer Agent and Trustee, respectively.

The bills and accounts receivable were examined and we are of the opinion that sufficient reserve has been provided for all that may prove to be uncollectible.

40 The plants and good-will are stated at their cost to the Company less the amount realized from the property sold and credits for common capital stock returned to the Company. All maintenance and re-

Exhibit P-2.

pair expenditures have been charged to the operating accounts. Subject to the foregoing.

WE HEREBY CERTIFY that the above General Balance Sheet, August 31, 1913, agrees with the books of the Company and is correct.

(Signed) FIRM OF FARQUHAR J. MACRAE,

(Signed) HASKINS & SELLS, 10

Certified Public Accountants.

NEW YORK, September 24, 1913.

Exhibit P-2.

AMERICAN MALTING COMPANY,

TO

WALTER G. OAKMAN AND GEORGE R. 20
TURNBULL,

Trustees.

FIRST MORTGAGE,

\$5,000,000.00.

DATED NOVEMBER 20, 1899.

30

REED, SIMPSON, THACHER & BARNUM,

COUNSELLORS-AT-LAW,

10 WALL STREET, NEW YORK CITY, N. Y.

United States Revenue
Stamps aggregating \$2,500
affixed and cancelled

THIS INDENTURE, made
this twentieth day of
November, one thousand eight hundred and ninety-
nine, between AMERICAN MALTING COMPANY, a cor- 40

Exhibit P-2.

poration created and existing under the laws of the State of New Jersey, hereinafter called the Mortgagor, party of the first part, and WALTER G. OAKMAN and GEORGE R. TURNBULL, both of the City of New York, as Trustees, hereinafter called the Trustees, parties of the second part.

10 WHEREAS, the Mortgagor has deemed it necessary to borrow money for its corporate purposes and to issue its bonds therefor, and to mortgage its property, hereinafter described, to secure the payment of the same, and to that end its Board of Directors has duly directed the issue of a series of five thousand bonds, for the principal sum of one thousand dollars each, payable December 1, 1914, bearing interest at the rate of six per cent. per annum, payable on the first days of June and December in each year,
20 to be signed by its President or Vice-President, sealed with its corporate seal, attested by its Secretary or Assistant Secretary, authenticated by certificate of one of the Trustees, and having interest coupons attached, with the name of its Treasurer thereon; which bonds, coupons and certificates are to be in the forms following, respectively:

[BOND.]

30

UNITED STATES OF AMERICA.

AMERICAN MALTING COMPANY,

SIX PER CENT. GOLD MORTGAGE BOND.

No.

\$1,000.

For value received, the American Malting Com-
40 pany promises to pay to bearer, or, in case this bond

Exhibit P-2.

be registered, to the registered owner hereof, one thousand dollars in gold coin of the United States of America of the present standard, at its office or agency in the City of New York, on the first day of December, in the year one thousand nine hundred and fourteen, and to pay interest thereon, in like coin, at the rate of six per centum per annum from December 1, 1899, on presentation and surrender at 10 said office or agency of the annexed coupons as they become due, on the first days of June and December in each year, until such principal shall be paid. Principal and interest are payable without deduction on account of any tax or assessment which said Company may be required to retain therefrom.

This bond is one of a series of 5,000 bonds of like import and amount, numbered consecutively from 1 to 5,000, and is entitled to the benefits and sub- 20
ject to the provisions of a mortgage or deed of trust of even date herewith, made by said Company to Walter G. Oakman and George R. Turnbull, as Trustees, to secure the payment of said bonds.

As provided in said mortgage or deed of trust, the principal of said bonds may become due in case of default as to interest, and the entire issue of said bonds outstanding may at any time, on notice published once a week, for twelve weeks, be paid or re- 30
deemed at one hundred and five per cent. and interest.

Simultaneously with the declaration of any dividend on the Preferred Stock of said Company, a sum equal to one-half of such dividend shall be paid by it into the Sinking Fund, as provided in said mortgage, to be used in purchasing bonds at the lowest price obtainable not exceeding one hundred and five per cent. and interest, or in redeeming bonds drawn by lot in the manner provided in said 40

Exhibit P-2.

mortgage at one hundred and five per cent. and interest, all bonds so purchased or redeemed to be cancelled.

This bond may be registered on the books of said Company at its said office or agency, and the registration noted hereon, after which no valid transfer hereof can be made, except on said books, until after
 10 registered transfer to bearer. But registration shall not restrain negotiability of the coupons by delivery merely.

This bond shall not be valid until the certificate endorsed hereon shall have been signed by one of the Trustees in said mortgage or deed of trust.

In witness whereof, the said American Malting Company has caused its corporate seal to be affixed hereto, attested by its Secretary or Assistant
 20 Secretary, and these presents to be signed by its President or Vice-President, this twentieth day of November, one thousand eight hundred and ninety-nine.

AMERICAN MALTING COMPANY,

By

[SEAL]

President.

Attest:

30

Secretary.

[COUPON.]

No.

On the first day of
 American Malting Company will pay to bearer thirty
 dollars in gold coin of the United States, at its
 40 office or agency in the City of New York, being six

Exhibit P-2.

months' interest then due upon its first mortgage bond No.

Treasurer.

[CERTIFICATE.]

This bond is one of the series of bonds described in the mortgage or deed of trust in this bond referred to. 10

Trustee.

AND WHEREAS, to secure the payment of said bonds and the interest thereon, the execution and delivery of this mortgage or deed of trust, has been duly authorized and directed by the Board of Directors of the Mortgagor;

AND WHEREAS, the Board of Directors of the Mortgagor has also authorized the issue, before the bonds aforesaid are prepared for issue, of temporary bonds for the principal sum in the aggregate of four million dollars, duly issued and authenticated in like manner as the bonds aforesaid, such temporary bonds to be respectively for such amounts multiples of one thousand dollars, as may be convenient, and otherwise to be substantially in the same form as the bonds aforesaid, the Mortgagor to deliver in exchange therefor bonds for one thousand dollars each, in form as aforesaid, so soon as they can be made ready. 20 30

NOW, THEREFORE, THIS INDENTURE WITNESSETH that the Mortgagor, in consideration of the premises and of the sum of one dollar to it duly paid by the Trustees at or before the ensealing and delivery of these presents, the receipt whereof is 40

Exhibit P-2.

hereby acknowledged, in order to secure the payment of the principal and interest of the bonds aforesaid, according to the terms of said bonds and of the coupons attached thereto, hath granted, bargained, sold, conveyed and confirmed, and by these presents doth grant, bargain, sell, convey and confirm unto the Trustees, and the survivor of
10 them, their successors, and the survivor of them, his heirs and assigns forever, all the following properties—that is to say:

I. All those nine certain Parcels of land situate, lying and being in the State of New York, as follows:

1. Five Parcels in the County of New York, as follows:

20

Parcel One.

All that certain block of land situated in the Borough of Manhattan, City of New York, bounded Westerly by Avenue A, Easterly by the East River, Northerly by Sixty-Fourth Street and Southerly by Sixty-Third Street. *Subject*, nevertheless, to a certain mortgage for One hundred thousand dollars (\$100,000) made by Adam Neidlinger and others to Julius Ehrmann, recorded in the office of the
30 Register of the City and County of New York on June 23d, 1884, in Liber 1857 of Mortgages, page 339. And, also, *subject* to the restrictive covenants as to buildings and against nuisances affecting the Northerly part of said premises as recorded in the office of the Register of the City and County of New York in Liber 1249 of Conveyances, page 326, being the same premises conveyed to the Mortgagor by Adam Neidlinger and wife by deed bearing
40 date the twenty-eighth day of February, 1899,

Exhibit P-2.

and recorded in the office of the Register of New York County, New York, on the third day of March, 1899, in Block Series of Conveyances, Section 5, Liber 60, at page 144;

Parcel Two.

All those certain lots of land situated in the Borough of Manhattan, City of New York, bounded 10 and described as follows: Beginning at a point on the Northerly side of Forty-seventh Street, distant four hundred (400) feet four (4) inches Easterly from the Northeasterly corner of Forty-seventh Street and First Avenue and running thence Northerly and parallel with First Avenue one hundred (100) feet five (5) inches to the centre line of the block; thence Westerly, and parallel with Forty-seventh Street, four (4) inches; thence again 20 Northerly, and parallel with First Avenue, one hundred (100) feet and five (5) inches to the Southerly side of Forty-eighth Street; thence Easterly along said Southerly side of Forty-eighth Street, seventy-five (75) feet; thence Southerly, and parallel with First Avenue two hundred (200) feet ten (10) inches to the Northerly side of Forty-Seventh Street; and thence Westerly, along Forty-Seventh Street seventy-four (74) feet and eight (8) inches, to the place of beginning; said premises 30 being *subject, nevertheless*, to a mortgage now a lien thereon made to secure the sum of \$24,000 and interest, and being the same premises conveyed to the Mortgagor by Charles A. Stadler and wife by deed bearing date the twenty-first day of March, 1898, and recorded in the office of the Register of New York County, New York, on the thirtieth day of March, 1898, in Block Series of conveyances, Section 5, Liber 56, at page 45.

Exhibit P-2.

Parcel Three.

All that lot of land situated in the Borough of Manhattan, City of New York, bounded and described as follows: Beginning at a point on the Southerly side of Forty-Seventh Street distant sixty (60) feet Easterly from the corner formed by the intersection of the Southerly side of Forty-
10 Seventh Street and the Easterly side of First Avenue, and running thence Southerly, parallel with First Avenue, one hundred and twenty-five (125) feet ten (10) inches; thence Easterly, parallel with Forty-Seventh Street, one hundred and fifteen feet; thence Northerly, parallel with First Avenue, one hundred and twenty-five (125) feet ten (10) inches to Forty-Seventh Street, and thence Westerly along Forty-Seventh Street one hundred and fifteen feet
20 to the point or place of beginning, being the same premises conveyed to the Mortgagor by Adam Neidlinger and wife, by two deeds, bearing date the twenty-eighth day of February, 1899, the first thereof conveying the Westerly portion of said premises, twenty (20) feet two (2) inches in width on Forty-Seventh Street, and being recorded in the office of the Register of New York County on the third day of March, 1899, in Block Series of conveyances, Section 5, Liber 59 at page 449; and
30 the second of said deeds conveying the remaining Easterly portion of said premises, ninety-four (94) feet ten (10) inches in width on Forty-Seventh Street, and being recorded in the office of said Register in Block Series of conveyances in Section 5, Liber 60, at page 143.

Parcel Four.

All that certain plot of land in the Nineteenth
40 Ward of the City of New York and bounded and

Exhibit P-2.

described as follows, to wit.: Beginning at a point on the Southerly side of Sixty-First Street distant one hundred and twenty-five feet Easterly from the Southeasterly corner of Second Avenue and Sixty-First Street; running thence Easterly along the Southerly side of Sixty-First Street one hundred and fifty feet; thence Southerly and parallel with Second Avenue one hundred and two feet ten 10 inches; thence Westerly and parallel with Sixty-First Street one hundred feet; thence Northerly and parallel with Second Avenue two feet five inches to the centre line of the block between Sixtieth and Sixty-First Streets; thence Westerly along said centre line of the block fifty feet; thence Northerly and parallel with Second Avenue one hundred feet five inches to the Southerly side of Sixty-First Street, the point or place of beginning. 20

Subject, however, to a mortgage for fifty thousand dollars, and interest, made by Charles A. Stadler and wife to Melitina Taylor, bearing date the twenty-third day of September, 1895, and recorded in the office of the Register of said County in Block Series of Mortgages, Section Five, Liber 51, at page 299, on the twenty-fifth day of September, 1895.

Parcel Five.

All that certain parcel of land in the City, 30 bounded and described as follows: Beginning at a point in the Northerly side of Forty-Eighth Street, distant three hundred and seventy-five (375) feet Easterly from the Northeasterly corner of Forty-Eighth Street and First Avenue, and running thence Northerly parallel with First Avenue one hundred (100) feet and five inches to the centre line of the block between Forty-Eighth Street and Forty-Ninth Street; thence Easterly 40

Exhibit P-2.

through the middle line of the block, and parallel with Forty-Eighth Street, one hundred and eighty-five (185) feet, more or less, to the original line of high water mark of the East River; thence Southerly along said line of high water mark to the Northerly side of 48th Street, thence Westerly along the Northerly side of 48th Street one hundred and sixty-two (162) feet, more or less, to the point or place of beginning;

And also, all the premises, rights and property conveyed to Patrick McCafferty by deed recorded in the office of the Register of the City and County of New York in Liber 617 of Conveyances at page 441, in and to all water rights and land under water in front of and adjoining said premises above described to the extent of the rights conveyed under said conveyance to Patrick McCafferty, said property being described generally therein as All that certain water lot or vacant ground and soil under water, to be made land and gained out of the East River or Harbor of New York, Beginning at the intersection of line of high water mark with a line parallel with the Northerly side of Forty-Eighth street and distant thirty (30) feet Southerly therefrom; thence Easterly along said parallel line one hundred and sixty (160) feet to the Easterly side of Avenue A; thence Northerly along the Easterly side of Avenue A one hundred and thirty (130) feet and five (5) inches; thence Westerly along a line parallel with the Northerly side of Forty-Eighth Street, and distant one hundred (100) feet and five (5) inches therefrom, one hundred and thirty-three (133) feet to the line of high water mark; and thence Southerly along the line of high water mark, as it runs, to the beginning, as described on Map annexed to said deed,

Exhibit P-2.

dated September, 1852, made by John J. Serrell, City Surveyor;

Subject, nevertheless, to a Mortgage made by said Charles A. Stadler and wife to The Germania Fire Insurance Company for Fifty Thousand Dollars and interest, bearing date February thirteenth, 1895, and recorded in the office of said Register on the fourteenth day of February, 1895, in Block Series of Mortgages, Section Five, Liber 45, at page 134, and *also subject* to all the covenants and conditions contained in the grant recorded in Book One of City Grants, in the office of the Comptroller of the City of New York, at page 21, and in the deed recorded in the said Register's office, in Liber 617 of Conveyances, at page 441, as modified by Act of the Legislature of the State of New York, passed in 1889, and *also subject* as to the portion of said lands lying within Avenue A or Forty-Eighth Street, to all existing rights or easements therein, both public and private. 10 20

The aforesaid Parcels 4 and 5 being the same premises conveyed to the Mortgagor by the said Charles A. Stadler and wife, by deed dated September 29, 1897, and recorded in the office of said Register on the first day of October, 1897, in Block Series of Conveyances, Section Five, Liber 50, at page 227; 30

Parcel Six.

2. All that certain lot of land situated in the County of Kings, Borough of Brooklyn, City of New York, bounded and described as follows: Beginning on the Southeasterly side of Wilson Street one hundred (100) feet Southwesterly from the corner formed by the intersection of the Southeasterly side of Wilson Street and the Northwesterly 40

Exhibit P-2.

side of Wythe Avenue, and running thence Southerly, parallel with Wythe Avenue, one hundred (100) feet; thence Westerly, parallel with Wilson Street two hundred (200) feet; thence Northerly and parallel with Wythe Avenue one hundred (100) feet to the Southeasterly side of Wilson Street; and thence Easterly, along Wilson Street, two hundred (200) feet to the place of beginning; said premises being known as Lots Five-hundred-and-twenty (520) to Five-hundred-and-twenty-seven (527) inclusive on Map of the Estate of Abraham A. Remsen, deceased, filed June 14, 1850, and being the same premises conveyed to the Mortgagor by Adam Neidlinger and wife, by deed bearing date the twenty-eighth day of February, 1899, and recorded in the office of the Register of Kings County, New York, on the third day of March, 1899, in Section 8, Liber 10 of Conveyances, at page 431;

Parcel Seven.

3. All that certain lot or parcel of land, situate in the County of Onondaga, in the City of Syracuse, being lot Sixty-one (61) and part of lot Sixty-two (62) of the original Village of Salina, now the First Ward of Syracuse, as surveyed by James Geddes in 1807, and also part of Marsh lot Twenty-eight (28) of the Onondaga Salt Springs Reservation, bounded and described as follows: Beginning at a point formed by the intersection of the Southeasterly side of Free Street with the Southwesterly side of Lodi Street; thence running Southeasterly, along the said Southwesterly side of said Lodi Street about one hundred and ninety-eight (198) feet to the towpath of the Oswego Canal; thence Southerly along the said towpath as

Exhibit P-2.

the same curves to the point of intersection thereof with the Southeasterly side of said Marsh lot 28, produced Northeasterly; thence Southwesterly along said Southeasterly side of Marsh lot 28, and the same produced, about one hundred and five and five-tenths (105.5) feet to a point distant thirty-two and eight-tenths (32.8) feet Northeast-
erly from the original centre of the line of the 10
Syracuse Northern Railroad Company, now owned and in the possession of the Rome, Watertown and Ogdensburg Railroad Company and The New York Central and Hudson River Railroad Company; thence along the lands of said Railroad Company along a line drawn thirty-two and eight-tenths (32.8) feet from and parallel with the said original centre line of the Syracuse Northern Railroad Com-
pany about four hundred and four (404) feet to 20
the Southeasterly side of Free Street aforesaid; thence Northeasterly, along said Southeasterly side of Free Street, one hundred and twenty-seven and sixty-eight hundredths (127.68) feet to the point or place of beginning; together with all the right, title and interest of the said Mortgagor in and to the portion of said Free Street and Lodi Street in front of and adjacent to said premises to the centre line of said streets; and also all the rights, privi-
leges and easements appurtenant to said premises, 30
or any portion thereof, in and to the surplus waters of the Oswego Canal on the Syracuse and Salina level, and to drain away and dispose of all used and surplus waters taken from said canal; *subject, however, to all the covenants and conditions limited upon such rights, easements and privileges; said premises being subject to the right, title and estate of the State of New York in and to the portion of said premises lying between the blue line of said 40*

Exhibit P-2.

Oswego Canal and said Canal; being the same premises, a portion of which was conveyed to the Mortgagor by the People of the State of New York by Letters Patent, dated December 14, 1898, and recorded in the office of the Secretary of State, in Book of Patents No. 46, at page 292, and in the office of the Clerk of Onondaga, N. Y., on the 22
10 day of July, 1899, in Book 341 of deeds, at page 453, and being a portion of the premises conveyed to the Mortgagor by the C. M. Warner Malting Company, by deed bearing date the twenty-ninth day of September, 1897, and recorded in the office of the Clerk of Onondaga County, New York, on the seventh day of October, 1897, in Book 311 of Deeds, at page 239.

Parcel Eight.

20

4. The following described parcel in the County of Ulster, being All that tract of land in the Village of South Rondout, Town of Esopus, bounded Northerly by Rondout Creek three hundred (300) feet; Easterly by the Westerly side of Centre Street three hundred and forty-seven and one-half (347½) feet; Southerly by the Northerly side of First Street three hundred (300) feet; Westerly by the Easterly side of Spring Street three hundred
30 and forty-seven and one-half (347½) feet, be said several dimensions more or less; together with all the right, title and interest of the Mortgagor in and to lands under water in front of said premises, being the same premises conveyed to the Mortgagor by Adam Neidlinger and wife by deed bearing date the twenty-eighth day of February, 1899, and recorded in the office of the Clerk of Ulster County, New York, on the fourth day of March, 1899, in
40 Liber 348 of Deeds, at page 487;

Exhibit P-2.

Parcel Nine.

5. All that tract or parcel of land in the County of Erie, in the City of Buffalo, bounded and described as follows:

Beginning at a point formed by the intersection of the Northerly line of William Street with the Easterly line of Pratt Street; thence Northerly along the said Easterly line of Pratt Street three hundred and thirty-three (333) feet; thence Easterly at right angles with Pratt Street one hundred and twenty-two (122) feet to the Westerly line of a twenty (20) foot alley, known as "Castor Alley;" thence Southerly along the said Westerly line of said Castor Alley to the said Northerly line of William Street; and thence Westerly along the Northerly line of William Street about one hundred and twenty-eight and one-half ($128\frac{1}{2}$) feet to the point or place of beginning; being the same premises conveyed to the Mortgagor by Samuel F. Jarvis, Jr., by deed, dated the 28 day of September, 1897, and recorded in the office of the Clerk of Erie County, New York, on the 5th day of October, 1897, in Liber 795 of Deeds, at page 36; and the Northerly portion of said premises being the same premises conveyed to the Mortgagor by Alexander M. Curtiss and Harlow C. Curtiss, as executors of the last will and testament of Charles G. Curtiss, by deed of confirmation and correction, dated September 28, 1897, and recorded in the office of said Clerk on the 5 day of October, 1897, in Liber 707 of Deeds, at page 508;

II. Also the three following described pieces or parcels of land, situate, lying and being in the State of Pennsylvania, in the City and County of Erie:

Exhibit P-2.

Parcel Ten.

(1) All that certain parcel of land, situate partly in Lot Number Twelve hundred and twenty-four (1224), and partly In Lots Numbers Twelve hundred and twenty-three (1223), and Twelve hundred and twenty-five (1225), in Square Number Fifty-Four (54), and more particularly bounded
10 described as follows—to wit.: Beginning at a point in the North line of Ninth Street, at the Southwest corner of In Lot Twelve hundred and twenty-four (1224); thence Northwardly, parallel with Walnut Street, Two hundred and fifteen (215) feet to a point; thence Eastwardly, parallel with Ninth Street, Fifty-six (56) feet and eight (8) inches to a point; thence Southwardly, parallel with Walnut Street, fifty (50) feet to a point in
20 the North line of In Lot No. 1224; thence Eastwardly, parallel with Ninth Street, sixty-five (65) feet and (10) inches to a point; thence Southwardly, parallel with Walnut Street, one hundred and sixty-five (165) feet to a point in the North line of Ninth Street, and thence Westwardly, along said North line of Ninth Street, one hundred and twenty-two (122) feet and six (6) inches to the place of beginning;

30

Parcel Eleven.

(2) All that certain parcel of land, part of Out Lot Number Two hundred and seventy-eight (No. 278), and bounded and described as follows—to wit.: Commencing at the point of the intersection of the South line of Sixteenth Street with the West line of Parade Street; thence Southwardly, along the West line of Parade Street, sixty-seven and one-
40 half ($67\frac{1}{2}$) feet to a point; thence Westwardly,

Exhibit P-2.

parallel with Sixteenth Street, one hundred and twenty-five (125) feet to an alley; thence Northwardly, along said Alley and parallel with Parade Street, sixty-seven and one-half ($67\frac{1}{2}$) feet to the South line of Sixteenth Street; thence Eastwardly, along the South line of Sixteenth Street, one hundred and twenty-five feet (125) feet to the place of beginning;

10

Parcel Twelve.

(3) All that certain parcel of land part of Out Lot Number three hundred and eighty-three (No. 383) in the general plan of the town (not city) of Erie, and bounded and described as follows—to wit: Commencing at a point where the West line of Parade Street is intersected by the North line of Sixteenth Street; thence Westwardly, along the North line of Sixteenth Street, three hundred (300) feet to a post in the east line of a lot heretofore conveyed to Otto Germer; thence Northwardly, parallel with Parade Street, one hundred and forty-five (145) feet and eleven inches to a post in the South line of land heretofore conveyed to Robert J. Saltsman, by deed dated July 6, 1880; thence Eastwardly, parallel with Sixteenth Street, three hundred (300) feet to the West line of Parade Street; and thence Southwardly, along the West line of Parade Street one hundred and forty-five (145) feet and eleven (11) inches to the place of beginning.

20

30

Said Parcels, 10, 11 and 12 being the same premises conveyed to the Mortgagor by Daniel D. Weschler and others as executors of the last will and testament of Jacob Weschler, deceased, by deed bearing date the twenty-ninth day of September, 1897, and recorded in the office of the Recorder of 40

Exhibit P-2.

Erie County, on the fifth day of October, 1897, in Deed-Book Number 123, at page 105;

III. Also, all those four certain Parcels of land situate, lying and being in the State of Ohio, County of Butler and City of Hamilton, as follows:

10 Parcel Thirteen.

All that lot or parcel of land, known and designated as lot 1584;

Parcel Fourteen.

20 All that lot or parcel of land, being part of lot 1585, and bounded and described as follows: Commencing at the northeast corner of said lot, and running thence southwardly along the east line of said lot, eighty-two and one-half ($82\frac{1}{2}$) feet to the southeast corner thereof; thence westwardly along the south line of said lot, forty-five and one-half ($45\frac{1}{2}$) feet to the southeast corner of that part of said lot now or formerly owned by the heirs of Philip Hartman, deceased; thence northwardly parallel with the east line of said lot and along the east line of that part of said lot now owned by Philip Hartman's heirs, eighty-two and one-half
30 ($82\frac{1}{2}$) feet to the north line of said lot; thence eastwardly along the north line of said lot, forty-five and one-half ($45\frac{1}{2}$) feet to the place of beginning;

Parcel Fifteen.

All that lot or parcel of land, being part of lot 1586, and bounded and described as follows: Commencing at the northeast corner thereof and running thence southwardly eighty-two and one-half
40 ($82\frac{1}{2}$) feet to the southeast corner; thence west-

Exhibit P-2.

wardly along the south line thereof fifty-two and one-quarter ($52\frac{1}{4}$) feet; thence northwardly parallel with the east line thereof eighty-two and one-half ($82\frac{1}{2}$) feet to the north line thereof; thence eastwardly along the north line thereof fifty-two and one-quarter ($52\frac{1}{4}$) feet to the place of beginning;

10

Parcel Sixteen.

All that lot or parcel of land, being part of lot 1587, and bounded and described as follows: Commencing at the northeast corner thereof and running thence westwardly with the north line thereof one hundred and sixty-five (165) feet to the northwest corner thereof; thence southwardly along the west line thereof eighty-two and one-half ($82\frac{1}{2}$) feet to the southwest corner thereof; thence eastwardly along the south line thereof fifty-one (51) feet; thence northwardly and parallel with the east line thereof sixty-one (61) feet to a point; thence northeastwardly forty-eight (48) feet to a point distant sixty-seven (67) feet from the east line of said lot in a line drawn parallel with, and seventy (70) feet north from the south line of said lot; thence eastwardly parallel with the north line thereof sixty-seven (67) feet to the east line thereof; thence northwardly along the east line thereof twelve and one-half ($12\frac{1}{2}$) feet to the place of beginning;

20

30

The aforesaid Parcels 13, 14, 15 and 16, being the same premises conveyed to the Mortgagor by The Sohngen Malting Company, of Hamilton, Ohio, by deed bearing date the twenty-eighth day of September, 1897, and recorded in the office of the Recorder of Butler County, Ohio, on the eleventh day 40

Exhibit P-2.

of October, 1897, in Deed Book No. 125, at page 166;

IV. All those two certain pieces or parcels of land, situate and being in the State of Michigan,
10 County of Wayne and city of Detroit, as follows:

Parcel Seventeen.

(1) All that parcel of land bounded and described as follows: Beginning at a point at the intersection of the Southerly line of Grand River Avenue with the Westerly line of the right of way of the Grand Trunk Railway; thence one hundred and fourteen (114) feet Northwesterly along the
20 Southerly line of said Grand River Avenue; thence Southwesterly on a line parallel with the Westerly line of said right of way of the Grand Trunk Railway and one hundred and fourteen (114) feet therefrom to the intersection thereof with the Westerly line of the Stanton Farm; thence Southerly along the Westerly line of said Stanton Farm to the intersection thereof with Warren Avenue; thence Easterly along the North line of Warren
30 Avenue aforesaid to the intersection thereof with the Westerly line of said right of way of the Grand Trunk Railway; thence Northeasterly along the Westerly line of said right of way to the place of beginning, being the same premises conveyed to the Mortgagor by The Howard-Northwood Malt Manufacturing Company by deed bearing date the twenty-ninth day of September, 1897, and recorded in the office of the Register of Deeds of Wayne County, Michigan, on the thirteenth day of October,
40 1897, in Liber 465 of Deeds, at page 280;

Exhibit P-2.

Parcel Eighteen.

(2) All that certain parcel of land described as follows, to wit: A part of A. E. F. White's subdivision of part of the Stanton Farm, Private Claim four hundred and seventy-three (473), lying South of Grand River Avenue, according to an unrecorded plat of same, and bounded and described as follows: Commencing at a point on a line running south, twenty-eight degrees and forty-one minutes (28 degrees 41 minutes) West, one hundred and twenty (120) feet distant from a point on the Southerly street line of Grand River Avenue one hundred and fourteen (114) feet Westerly of the intersection of said Southerly Street line with the Westerly line of the right of way of the Grand Trunk Railway; thence North, sixty-one degrees and nineteen minutes (61 degrees 19 minutes) West, three hundred and forty-one 84-100 (341 84-100) feet; thence South, twenty-three degrees and one minute (23 degrees 01 minute) East, four hundred and forty-three 58-100 (443 58-100) feet; thence North, twenty-seven degrees and twenty-three minutes (27 degrees 23 minutes) East, two hundred and seventy-four 90-100 (274 90-100) feet to the place of beginning, being the same premises conveyed to the Mortgagor by The Howard-Northwood Malt Manufacturing Company by deed bearing date the twenty-ninth day of September, 1897, and recorded in the office of the Register of Deeds of Wayne County, Michigan, on the thirteenth day of October, 1897, in Liber 494 of Deeds, at page 117;

V. All those twelve certain Parcels of land situate lying and being in the State of Illinois, County of Cook and City of Chicago as follows:

Exhibit P-2.

Parcel Nineteen.

All that parcel of land known and described as Lot Fourteen (14) and the South half of Lot Thirteen (13) in Block Seventy-six (76) of Elston Addition to Chicago. Also, the Southerly half of
10 Lot Eight (8), the Northerly half of Lot Twenty-four (24) and all of Lots Fifteen (15) and Sixteen (16) in Block Seventy-six (76) of said Elston Addition, being the same premises conveyed to the said Mortgagor by the Carden Malting Company, by deed bearing date the twenty-eighth day of September, 1897, and recorded in the office of the Recorder of Cook County, Illinois, on the sixth day of October, 1897, in Book 6120 of Records, at page
20 339, and also conveyed to the Mortgagor by David H. Carden and wife by deed bearing date the twenty-eighth day of September, 1897, and recorded in the office of the Recorder of Cook County, Illinois, on the sixth day of October, 1897, in Book 6195 of Records at page 109;

Parcel Twenty.

All those parcels of land known and described
30 as Lots Eighteen (18), Nineteen (19), Twenty (20), Twenty-one (21), Twenty-two (22) and Twenty-three (23) in J. A. Yale's Re-subdivision of Block Forty-five (45) of Elston Addition to Chicago, being the same premises conveyed to the Mortgagor by John Carden, Jr., and wife by deed bearing date the twenty-eighth day of September, 1897, and recorded in the office of the Recorder of Cook County, Illinois, on the sixth day of October,
40 1897, in Book 6195 of Records at page 112;

Exhibit P-2.

Parcel Twenty-One.

All those parcels of land known and described as the East four hundred seventy-five (475) feet of the West Five Hundred Twenty-five (525) feet of Lots Five (5) and eight (8) in Iglehart's subdivision of the Southwest quarter of Section Seven (7), Township Thirty-eight (38), North, Range Fourteen (14) East of the Third principal meridian, being the same premises conveyed to the Mortgagor by J. Weil Malting Company, by deed bearing date the thirtieth day of September, 1897, and recorded in the office of the Recorder of Cook County, Illinois, on the sixth day of October, 1897, in Book 6117 of Records, at page 361; 10

Parcel Twenty-Two.

All those parcels of land known and described as Lots Sixteen (16) and Seventeen (17) in Block One (1) of Cook and Anderson's Subdivision of the West half of the Northeast quarter of Section Twenty-four (24), Township Thirty-nine (39), North, Range Thirteen (13) East of the Third principal meridian. Also, Lots four (4), Five (5) and Six (6) in Cummings' Subdivision of Lot Twenty (20) in Block one (1) of Cook and Anderson's Subdivision aforesaid, being the same premises conveyed to the Mortgagor by Brand, Bullen and Gund Company, by deed bearing date the twenty-eighth day of September, 1897, and recorded in the office of the Recorder of Cook County, Illinois, on the sixth day of October, 1897, in Book 6050 of Records, at page 492; 20 30

Parcel Twenty-Three.

All those parcels of land, known and described as Lots Seventeen (17), Eighteen (18), Nineteen 40

Exhibit P-2.

(19), Twenty (20), Twenty-one (21) and Twenty-two (22), in Block Seventy-six (76) of Elston Addition of Chicago; *Subject nevertheless* to trust deed made by Hales and Curtis Malting Company to Thies J. Lefens dated October 11, 1895, and recorded Book 5395 of Records in the Recorder's Office of Cook County, Illinois, at page 364, to secure its note for \$65,000, due in five years, thereafter, with interest at six per cent. per annum, payable semi-annually, together with all other liens and charges accrued and to accrue under said trust deed; being the same premises conveyed to the Mortgagor by Hales and Curtis Malting Company by deed bearing date the twenty-eighth day of September, 1897, and recorded in the office of the Recorder of Cook County, Illinois, on the sixth day of October, 1897, in Book 6146 of Records, at page 355;

Parcel Twenty-Four.

All that parcel of land, known and described as follows, to wit.: That parcel of land in Ironworkers' Addition to South Chicago in the South half of Section Eight (8) Township Thirty-Seven (37) North, Range Fifteen (15) East of the Third Principal Meridian, lying within the South line of One-hundred-and-second (102) Street, the Southerly line of the right of way of the Lake Shore and Michigan Southern Railway Company, the West line of Avenue "C," and the Northerly line of the right of way of the Pittsburgh, Fort Wayne and Chicago Railway Company; *excepting* therefrom such part of said premises as were heretofore conveyed by William H. Colehour to the Lake Shore and Michigan Southern Railway Company for a depot and railway station; *and subject*

Exhibit P-2.

to any existing public or private rights or easements in the portion of said premises embraced within One-hundred-and-third Street continued East to Avenue "C," being the same premises the Northerly and greater portion of which was conveyed to the Mortgagor by the L. I. Aaron Company, by deed bearing date the twenty-eighth day of September, 1897, and recorded in the office of the 10 Recorder of Cook County, Illinois, on the sixth day of October, 1897, in Book 6118 of Records, at page 505; and the Southerly portion sixty-six feet in width, known as One-hundred-and-third Street, by Marcus Aaron by deed bearing date the twenty-eighth day of September, 1897, and recorded in the office of the Recorder of Cook County, Illinois, on the sixth day of October, 1897, in Book 6206 of Records at page 73;

20

Parcel Twenty-Five.

All that parcel of land, known and described as: That part of Lot Seventeen (17) in Mackubin's Subdivision of part of the East half (E. $\frac{1}{2}$) of the Southwest quarter (S. W. $\frac{1}{4}$) of Section Four (4), Township Thirty-nine (39) North, Range Fourteen, East of the Third Principal Meridian, which is bounded and described as follows, to wit.: Beginning at a point on the North line of said Lot 30 which is thirty-six (36) feet East of the Northwest corner thereof, and running thence East along said North line Sixteen (16) feet; thence South parallel with the West line of said Lot thirty-five (35) feet; thence West parallel with the North line of said Lot Sixteen (16) feet, and thence North thirty-five (35) feet to the place of beginning; being the same premises conveyed to the Mortgagor by W. H. Purcell Company by deed 40

Exhibit P-2.

bearing date the twenty-eighth day of September, 1897, and recorded in the office of the Recorder of Cook County, Illinois, on the twelfth day of October, 1897, in Book 6061 of Records, at page 632;

Parcel Twenty-Six.

10 All that parcel of land known and described as Lot Twelve (12) and the South forty (40) feet of Lot Thirteen in Peter Hugel's Subdivision of part of the Southeast quarter of the Southwest quarter of Section Four (4), Township Thirty-nine (39), North, Range Fourteen (14), East of the Third Principal Meridian, *excepting* from said premises the East eight (8) feet thereof condemned for an alley;

20 Parcel Twenty-Seven.

All that parcel of land known and described as The North thirty-five (35) feet of Lot Seventeen (17) (except the West fifty-two (52) feet thereof) in Mackubin's Subdivision of part of the East half of the Southwest quarter of Section Four (4), Township Thirty-nine (39) North, Range Fourteen (14) East of the Third Principal Meridian;

30 Parcel Twenty-Eight.

All that parcel of land known and described as That part of the Northwest Fractional Quarter of Section Twenty-seven (27), Township Thirty-seven (37) North, Range Fourteen (14), East of the Third Principal Meridian described as follows: Commencing at a point on the North line of said quarter section eleven hundred and seven (1107) feet West of the stone now standing at the North-
40 east corner thereof; thence South on a line parallel

Exhibit P-2.

to the West line of the East half of said Northwest Fractional Quarter fifteen hundred seventy and eight-tenths (1570 8-10) feet; thence West parallel to the North line of said Northwest Fractional Quarter one hundred and eighty (180) feet, to a point thirty-three (33) feet East of the West line of the East half of said Northwest Fractional Quarter, being the East line of the right of way of the Chicago and Western Indiana Railroad (as described in the partition deed between Huntington W. Jackson and David B. Lyman as Trustees of the Pullman Land Association and the Chicago and Western Indiana Railroad Company, dated July 1, 1880, and recorded January 7, 1881, in book 1049 of Records, page 251), thence North along the East line of said Railroad right of way, being a line parallel with and thirty-three (33) feet East of the West line of the East half of said Northwest Fractional Quarter nine hundred and ninety (990) feet; thence East one hundred and fifty (150) feet; thence North five hundred and eighty and eight-tenths (580 8-10) feet to the North line of said Northwest Fractional Quarter; thence East along said North line thirty (30) feet to the place of beginning; containing four and 4905-10000 acres, more or less, and being situate South of the Indian Boundary Line;

The aforesaid Parcels 25 to 28, inclusive, being *subject* to the trust deed made by the W. H. Purcell Company to Chicago Title and Trust Company, dated September 1st, 1893, recorded in Book 4272 of Records in the Recorder's office of Cook County, Illinois, at page 624, to secure the payment of 200 gold bonds of \$1,000 each, dated September 1st, 1893, and payable September 1st, 1903, with interest at six per cent. per annum, payable semi-annu-

Exhibit P-2.

ally, together with all other liens and charges secured and to accrue under said trust deed;

The aforesaid parcels 26, 27 and 28, being the same premises conveyed to the Mortgagor by W. H. Purcell Company by deed bearing date the twenty-
10 eighth day of September, 1897, and recorded in the office of the Recorder of Cook County, Illinois, on the sixth day of October, 1897, in Book 6137 of Records at page 440;

Parcel Twenty-Nine.

All those lots or parcels of land, known and described as follows:

The South twenty-five (25) feet of the West one
20 hundred (100) feet of the East two hundred thirteen and two-tenths (213 2-10) feet of Lot One (1), and all of Lots Two (2) and Three (3) in Chicago Grain Company's Addition to Chicago, according to Plat thereof, recorded April 30, 1890, as document 1,260,037, in Book 42 of Plats, page 14; being parts of vacated Blocks Two (2) and Three (3) and vacated Street between said Blocks, in Cragin, in the Southeast quarter of Section Thirty-three (33)
30 Township Forty (40) North, Range Thirteen (13), East of the Third Principal Meridian;

Also, the South two hundred and thirty-six (236) feet of the West two hundred (200) feet of Block Three (3) in Cragin aforesaid; being the said premises conveyed to the Mortgagor by Fred F. Bullen Malting Company by deed bearing date the second day of October, 1897, and recorded in the office of the Recorder of Cook County, Illinois, on the sixth day of October, 1897, in Book 6124 of
40 Records, at page 534;

Exhibit P-2.

Parcel Thirty.

All the following described lots, pieces or parcels of land, known and described as follows, to wit.: Lots Thirty-nine (39) to Forty-seven (47), inclusive, in Block Seven (7) of Carter H. Harrison's Addition to Chicago, said Addition being a Sub-division of the West half of the Northeast quarter of the Southeast quarter and of the East half of the Northwest quarter of the South-east quarter of Section Thirteen (13), Township Thirty-nine (39), North, Range Thirteen (13) East of the Third Principal Meridian; 10

Also: A strip of land of the width of one (1) foot six inches lying next North of and adjoining the North line of said Lots thirty-nine (39) to Forty-seven (47) inclusive, bounded on the East by the East line of said Lot Forty-seven (47) extended North, and on the West by the West line of said Lot Thirty-nine (39) extended North, being part of a vacated alley. 20

Also: That part of Lots Four (4) to Nine (9) inclusive, in Block Seven (7) aforesaid, lying Southeast of a curved line (being the Southeasterly line of a right of way for a railroad track) described as follows: Commencing at a point in the South line of said Lot Nine (9), twenty-two (22) feet West of the Southeast corner thereof, and 30 running Northeasterly in a curve to the Northeast corner of said Lot Four (4), said curved line intersecting the lines of said lots at the following points, viz.: the East line of said Lot Nine (9) at a point seven (7) feet two (2) inches North of the South line thereof; the East line of said Lot Eight (8) at a point nineteen (19) feet five (5) inches North of the South line thereof; the East line of said Lot Seven (7) at a point thirty-four (34) feet four (4) 40

Exhibit P-2.

inches North of the South line thereof; the East line of said Lot Six (6) at a point fifty-six (56) feet eight (8) inches North of the South line thereof; and the East line of Lot Five (5) aforesaid at a point eighty-four (84) feet three (3) inches North of the South line thereof; according to a map of said premises recorded September 14, 1897, as Document No. 2,588,209, attached to an agreement between Ambrose Plamondon and the Chicago Pneumatic Malting Company, dated November 1, 1895; being the same premises conveyed to the Mortgagor by the Chicago Pneumatic Malting Company by deed, bearing date the twenty-eighth day of September, 1897, and recorded in the office of the Recorder of Cook County, Illinois, on the sixth day of October, 1897, in Book 6212 of Records, at page 20.

Together with all the right, title and interest of the Mortgagor in and to the switch track or tracks connecting said Parcel 30 with the railroad of the Chicago and Northwestern Railroad; said Parcel 30 being hereby conveyed *subject to, and with the benefit* of an executory agreement with the heirs, and the executors and devisees of and under the will, of Ambrose Plamondon, deceased, relating to the relocation, maintenance and use of said switch track, and to the aforesaid vacated alley, and to the exchange of lands adjacent to such relocated switch track.

VI. Also all those nine certain parcels of land situate lying and being in the State of Minnesota and County of Wabasha, as follows:

Parcel Thirty-One.

The following described tract of land, bounded 40 and described as follows: Commencing at the in-

Exhibit P-2.

tersection of the County road (surveyed in 1878) with the East line at the right of way of the Minnesota Midland Railway; thence Northerly along said East boundary one hundred and eighty (180) feet; thence North eighty-two and one-half ($82\frac{1}{2}$) degrees East, seventy (70) feet; thence South parallel with said right-of-way one hundred and eighty (180) feet; thence South eighty-two and one-half ($82\frac{1}{2}$) degrees West, seventy (70) feet to the place of beginning, being a part of the Southwest Quarter of the Northeast Quarter of Section number Three (3), Township one hundred and nine (109), Range Twelve (12) West, according to the Government Survey, being otherwise known as Auditor's Lot number Three (3) in the Southwest Quarter of the Northeast Quarter of said Section Three (3);

Parcel Thirty-Two.

All that parcel of land known and described as Lots Three (3) and Four (4) in the Northwest Quarter of the Northwest Quarter of Section twenty-seven (27), Township one hundred and nine (109) North of Range Thirteen West, according to Government Survey, and being the same premises conveyed to the H. J. O'Neill Grain Company by H. J. O'Neill and Margaret O'Neill, his wife, by deed bearing date August 11th, 1890;

Parcel Thirty-Three.

All that parcel of land known and described as the North half of Lot Two, and all of Lot Three in Elevator Block of Bryant's Addition to the Village of Elgin, according to the plat thereof on file and

Exhibit P-2.

of record in the office of the Register of Deeds in and for Wabasha County;

Parcel Thirty-Four.

All that parcel of land known and described as Lots number Four (4) and Five (5) in Block number One (1) in Theilmanton, the same being located
 10 in the Southeast Quarter of the Northeast Quarter of Section number Thirty-six (36), Township number One Hundred and Ten (110), Range number Twelve (12) West, according to the recorded plat of the Village of Theilmanton, on file and of record in the office of the Register of Deeds in and for Wabasha County;

Parcel Thirty-Five.

20 All that parcel of land known and described as Lots One (1), Two (2) and Three (3) in Block Nine (9) and a tract of land described as follows: Beginning at the Northeast corner of said Lot Three (3) and running East forty-eight (48) feet; South one hundred and twenty (120) feet; West forty-eight (48) feet, to the Southeast corner of Lot Two (2) in Block Nine (9), all in Darrow's Addition to Millville;

30

Parcel Thirty-Six.

All that parcel of land bounded and described as follows: Beginning at a point established by commencing at the point where the line of the Minnesota Midland Railway intersects with the North line of Lot Three in Section Thirty-one; thence Southeasterly along the line of the railroad, one hundred and seventy-three feet to the aforesaid
 40 point of beginning; thence describing said parcel,

Exhibit P-2.

Southeasterly sixty feet; thence Northeasterly ninety feet; thence Northwesterly sixty feet; thence Southwesterly ninety feet, to the place of beginning, being in⁸ Section Thirty-one, Township One hundred and ten, North of Range Thirteen, West, according to Government Survey.

Parcel Thirty-seven.

All that parcel of land bounded and described as follows: Beginning at the Southwestern line of Eighth street, where the Southeastern line of Marion Street intersects said line; thence, along said line of Eighth Street, South, $49\frac{1}{2}$ degrees East, three hundred feet; thence at right angles in a Southwesterly direction one hundred feet to the line of the railroad; thence along said line of railroad Northwesterly three hundred feet; thence along the line of Marion Street aforesaid, in a Northeasterly direction one hundred feet to the place of beginning; being a part of the Southeast Quarter of the Southeast Quarter of Section Five, Township One hundred and eleven, Range Twelve, West; said last above described property being in the City of Lake City, and said above-described streets being a part of the City of Lake City, according to the recorded plat thereof, on file and of record in the office of the Register of Deeds in and for Wabasha County, Minnesota;

Parcel Thirty-Eight.

All the undivided one-half of a tract or parcel of land bounded and described as follows: Commencing at the corner of Lot One, of Block Twelve, in the City of Lake City, Minnesota, at the corner of Marion and Washington Streets; thence running Southeasterly along Washington Street, sixty-

Exhibit P-2.

five and one-half feet; thence running Northeast-
erly parallel to Marion street, to the rear line of
said Block on the Public Levee; thence running
Northerly, along the said rear line of Lot One on
Marion Street; thence running Southwesterly on
last-named line to the place of beginning: all of the
last above being in the City of Lake City, Minnesota,
said description being based upon the recorded plat
10 thereof on file and of record in the office of the
Register of Deeds in and for Wabasha County,
Minnesota;

The aforesaid Parcels 31 to 38, inclusive, being
the same premises conveyed to the Mortgagor by
the H. J. O'Neill Grain Company, by deed bearing
date the first day of August, 1899, and recorded in
the office of the Register of Deeds of Wabasha
County, Minnesota, on the fifth day of August,
20 1899, in Book 51 of Deeds, at page 148.

Parcel Thirty-Nine.

All those certain lots or parcels of land in the
Town of Minnieska, known and described as Lots
Fifty-three (53), Fifty-four (54), Fifty-five (55),
Fifty-six (56) and Sixty-five (65) in Government
Lot Four (4), in Section number Thirty-four (34),
Township One hundred and nine (109), North,
Range Nine (9), West; being the same premises
30 conveyed to the Mortgagor by Lester R. Brooks
and others by deed bearing date the seventeenth
day of October, 1899, and intended to be recorded
herewith in the office of the Recorder of Wabasha
County, Minnesota;

VII. And, Also, all those four certain parcels of
land, situate, lying and being in the State of Wis-
consin, as follows:

1. Three parcels in the City and County of Mil-
40 waukee:

Exhibit P-2.

Parcel Forty.

All those lots or parcels of land known, bounded and described as follows:

The South half of Lot Nine (9), and all of Lots Ten (10), Eleven (11), Twelve (12), Thirteen (13), Fourteen (14), Fifteen (15), Sixteen (16), Seventeen (17) and Eighteen (18), in Block Sixty-one (61), *except* that part of said Lot Eleven (11),¹⁰ lying East of a straight line drawn from the Northeast corner of said Lot Eleven (11), and running South, parallel with the West line of said lot, to the point of intersection thereof with the South line of said Lot Eleven;

Also Lots One (1) and Two (2) in Block Sixty-seven (67), except so much thereof as lies Southwesterly of a line described as follows: Commencing in the Easterly line of South Water Street (15)²⁰ feet Northerly from the Northwest corner of the Nunnemacher Mill in said block, and running thence Southeasterly, parallel with the Northeast wall of said mill, one hundred and ten (110) feet; thence in a straight line to a point on the dock line of said Lot Two (2), which is fifteen (15) feet distant from the Northeast corner of Lot Three (3) in said Block Sixty-seven (67), both of said Blocks Sixty-one (61) and Sixty-seven (67) being situate³⁰ in the Fifth Ward of the said City of Milwaukee;

Also, all the perpetual right of way (to be used solely for a driveway) over the strip of ground fifteen (15) feet wide adjacent to the land herein last above described, on the Southwest side thereof; being the same premises heretofore conveyed to the Mortgagor by the Kraus-Merkel Malting Company, by deed bearing date the twenty-eighth day of September, 1897, and recorded in the office of⁴⁰

Exhibit P-2.

the Recorder of Milwaukee County, Wisconsin, on the seventh day of October, 1897, in Book 387 of Deeds, at page 473.

Parcel Forty-One.

All those certain lots or parcels of land known, bounded and described as follows:

- 10 Lot Ten (10) and the North eighty-four (84) feet of Lot Thirteen (13) in Block Thirty-eight (38) in the Second Ward of the City of Milwaukee;

Also Lots Two (2), Three (3), Four (4), Eight (8), Nine (9), Ten (10), Eleven (11), Twelve (12) and Thirteen in Block Fifty-six (56) in the Fifth Ward of said city of Milwaukee being the said premises conveyed to the Mortgagor by the Milwaukee Malt and Grain Company by deed bearing
20 date the twenty-eighth day of September, 1897, and recorded in the office of the Recorder of Milwaukee County, Wisconsin, on the seventh day of October, 1897, in Book 387 of Deeds, at page 479;

Parcel Forty-Two.

- All those certain lots or parcels of land known and described as follows, to-wit.: Part of Lot numbered Three (3) in the Southeast quarter of
30 Section numbered Four (4) in Township numbered Six (6) North, of Range numbered Twenty-two (22) East, of the Fourth Principal Meridian, according to United States Survey, being in the Twelfth (12th) Ward of said City of Milwaukee, bounded by a line beginning at the Northwest corner of O'Neill's Subdivision in said Quarter Section; thence running North on the West line of said Southeast quarter of said Section numbered
40 Four (4) seven hundred sixty-eight and ninety-

Exhibit P-2.

three one-hundredths (768 93-100) feet to the Southwesterly right of way line of the Chicago and North Western Railway; thence running South thirty-nine (39) degrees forty (40) minutes East, along said Southwesterly right of way line of said railway five hundred and forty-eight and eighty-four one hundredths (548 84-100) feet; thence South on a line which is three hundred and fifty (350) feet East of and parallel to the West line of said Quarter Section three hundred and forty and five one-hundredths (340 5-100) feet to the North line of O'Neill's Subdivision; thence West on said North line three hundred and fifty (350) feet to the place of beginning, excepting therefrom a strip of land fifteen (15) feet wide lying seven and one-half ($7\frac{1}{2}$) feet on each side of the center line of the main side track of the Chicago, Milwaukee and St. Paul Railway as now located across said tract of land; the premises last above described exclusive of said right of way contains four and three hundred twenty-eight one-thousandths (4 328-1000) acres, more or less;

Also, Lot Eight (8) in Block Five (5) in O'Neill's Subdivision in the Twelfth (12th) Ward of said City of Milwaukee;

Said Parcel Forty-two being the same premises conveyed to the Mortgagor by The Hansen Hop and Malt Company by deed bearing date the twenty-eighth day of September, 1897, and recorded in the office of the Recorder of Milwaukee County, Wisconsin, on the seventh day of October, 1897, in Book 387 of Deeds, at page 476;

Parcel Forty-Three.

2. All those certain lots or parcels of land situated in the County of Jefferson, City of Water-

Exhibit P-2.

town and known and described as follows, to-wit.: Block Thirteen (13) of A. L. Pritchard's Second Addition in the First (1st) Ward of said City of Watertown.

Also that portion of Eighth (8th) Street lying West of and adjoining Lots Three (3) and Six (6) in said Block Thirteen (13), which is covered by
10 the buildings situate mainly upon said Block Thirteen (13), being the same premises conveyed to the Mortgagor by William Buckheit Malting Company by deed bearing date the twenty-eighth day of September, 1897, and recorded in the office of the Recorder of Jefferson County, Wisconsin, on the seventh day of October, 1897, in Book 109 of Deeds, at page 368;

AND ALSO all the estate, right, title and interest
20 of the Mortgagor, including all terms and remainders and renewals of terms, and all rights under leases, in and to the following lands, and in and to all buildings, malt or warehouses, engine houses, coal houses, elevators and other structures and improvements thereon erected, and all engines, boilers, machinery, tools, appliances, fixtures and other appurtenances connected therewith:

I. Three parcels, situate, lying and being in the State of New York, Borough of Manhattan, City
30 and County of New York, as follows:

(a) All that certain lot or parcel of land on the Southerly side of Forty-seventh Street, twenty-five (25) feet in width, Easterly from a point one hundred and seventy-five (175) feet East of the Southeast corner of First Avenue and Forty-seventh Street; being the same premises whereof a lease, made by Hannah G. Gerry, dated May 7, 1889, and recorded May 29, 1889, in the office of the Register
40 of the County of New York, in Liber 2236 of Con-

Exhibit P-2.

veyances at page 55, was assigned to the Mortgagor by Adam Neidlinger by assignment dated February 28, 1899, and recorded March 3, 1899, in the office of said Register in Block Series of Conveyances, Section 5, Liber 60, at page 142.

(b) All that lot or parcel of land on the North-
erly side of Forty-sixth Street, twenty-five (25) feet
in width Easterly from a point one hundred and ¹⁰
seventy-five (175) feet East of the Northeast cor-
ner of First Avenue and Forty-sixth Street, being
the same premises whereof a lease, made by Robert
and Ogden Goelet, dated April 18, 1889, and re-
corded February 24, 1893, in the office of said Reg-
ister in Block Series of Conveyances, Section 5,
Liber 18, at page 471 was assigned to the Mort-
gagor by Adam Neidlinger by assignment dated
February 28, 1889, and recorded March 3, 1899, in ²⁰
the office of said Register in Block Series of Con-
veyances, Section 5, Liber 60, at page 146.

(c) The Bulkhead at the foot of East Sixty-third
Street leased for the term of ten years by the
Mayor, Aldermen and Commonalty of the City of
New York to Adam Neidlinger, and another by
lease dated May 8, 1892, which said lease was there-
after assigned by said Adam Neidlinger to the
Mortgagor by assignment dated February 28, 1899, ³⁰
and recorded in the office of said Register, March 3,
1899, in Block Series of Conveyances, Section 5,
Liber 60, at page 149.

II. Five parcels, situate, lying and being in the
State of Wisconsin, namely:

1. Two parcels in the County of Dane:

(a) A lot or parcel of land at or near Dean-
ville station of the Chicago, Milwaukee and St. Paul ⁴⁰

Exhibit P-2.

Railway Company, being the same premises demised by said Railway Company to the William Buckheit Malting Company by lease dated August 15, 1897.

10 (b) Two lots or parcels of land at or near Marshall station of the Chicago, Milwaukee and St. Paul Railway Company, being the same premises heretofore demised by said Railway Company to the William Buckheit Malting Company, the first of said lots by lease dated July 1, 1896, and the second of said lots by lease dated October 27, 1896.

20 2. A parcel of land situate in Jefferson County, at Watertown station, being a portion of the depot grounds of the Chicago, Milwaukee and St. Paul Railway Company, and being the same premises heretofore demised by said Railway Company to the William Buckheit Malting Company by lease dated August 5th, 1896.

30 3. A lot or parcel of land situate in Dodge County, at Richwood station, being a portion of the depot grounds of the Chicago, Milwaukee and St. Paul Railway Company, and being the same premises heretofore demised by said Railway Company to William Buckheit, by lease dated August 25, 1897.

40 4. Lands situate in the County of Pepin, at or near the station of Durand of the Chicago, Milwaukee and St. Paul Railway Company, being the same premises heretofore demised by said Railway Company to the H. J. O'Neill Grain Company by leases designated in the records of said Railway Company as leases numbers "7970" and "8941," and to the Mortgagor by lease dated November 13, 1899;

Exhibit P-2.

III. Twenty-six parcels situate, lying and being in the State of Minnesota, namely:

1. Seven parcels in the County of Winona:

(a) A lot or parcel of land, being part of Lot 5 of the Northeast Quarter of Section 21, in Township 107, North of Range 7, West of the Fifth Principal Meridian, being at or near Winona Station of the Winona and St. Peter Railroad Company, 10 being the same premises heretofore demised by said Railroad Company to the Mortgagor by lease dated August 2, 1899.

(b) A lot or parcel of land situate at or near St. Charles Station, and part of the depot grounds of the Winona and St. Peter Railroad Company, being the same premises heretofore demised by said Railroad Company and the Chicago and Northwestern Railway Company to the H. J. O'Neill Grain 20 Company by lease dated January 29, 1896.

(c) A lot or parcel of land situate at or near the station of Stockton and part of the depot grounds of the Winona and St. Peter Railroad Company, being the same premises heretofore demised by said Railway Company and the Chicago and Northwestern Railroad Company to the H. J. O'Neill Grain Company by lease dated January 14, 1899;

(d) A lot or parcel of land, being a portion of 30 the depot grounds of the Chicago, Milwaukee and St. Paul Railway Company at Dakota Station, being the same premises heretofore demised by said Railway Company to the Mortgagor by lease dated May 9, 1899;

(e) A lot or parcel of land situate at or near Rolling stone Station of the Winona and Western Railway Company, being the same premises hereto- 40

Exhibit P-2.

fore demised by said Railway Company to the H. J. O'Neill Grain Company;

(f) A lot or parcel of land situate at or near Altura Station of the Winona and Western Railway Company, being the same premises heretofore demised by said Railway Company to the H. J. O'Neill Grain Company;

10

(g) A lot or parcel of land situate at or near Bethany Station of the Winona and Western Railway Company, being the same premises heretofore demised by said Railway Company to the H. J. O'Neill Grain Company.

2. Four parcels situated in the County of Olmsted:

20 (a) A lot or parcel of land situate at or near Planks Station and part of the depot grounds and right of way of the Winona and St. Peter Railroad, being the same premises demised by the said Railroad Company and the Chicago and Northwestern Railway Company to H. J. O'Neill Grain Company by lease dated March 21, 1896;

(b) A lot or parcel of land situate at or near Dover Station and part of the depot grounds of the
30 Winona and St. Peter Railroad Company, being the same premises heretofore demised by said Railroad Company and the Chicago and Northwestern Railway Company to the H. J. O'Neill Grain Company by lease dated January 18th, 1898;

(c) A lot or parcel of land situate at or near the Station of Simpson of the Winona and Western Railway Company, being the same premises heretofore demised by said Railway Company to the H. J.
40 O'Neill Grain Company;

Exhibit P-2.

(d) A lot or parcel of land situate at or near the Station of Stewartville, of the Winona and Western Railway Company, being the same premises heretofore demised by said Railway Company to the H. J. O'Neill Grain Company;

3. Eight parcels in the County of Wabasha:

(a) A lot or parcel of land situate at or near 10 Plainview Station, being part of the depot grounds of the Winona and St. Peter Railroad Company, and the same premises heretofore demised by said Railroad Company and the Chicago and Northwestern Railway Company to the H. J. O'Neill Grain Company by lease dated January 14, 1899;

(b) A lot or parcel of land situate at or near Lake City Station of the Chicago, Milwaukee and St. Paul Railway Company, upon which is situate 20 the warehouse known as "Fletcher House," being the same premises heretofore demised by said Railway Company to the H. J. O'Neill Grain Company;

(c) A lot or parcel of land situate at or near Wabasha Station of the Chicago, Milwaukee and St. Paul Railway Company, being the same premises heretofore demised by said Railway Company to the H. J. O'Neill Grain Company by leases 30 designated in the records of said Company as leases number "1960 New" and "9548 Old," and to the Mortgagor by two leases dated November 13, 1899;

(d) Lands situate at or near Glasgow Station of the Chicago, Milwaukee and St. Paul Railway Company, being the same premises heretofore demised by said Railway Company to the H. J. O'Neill Grain Company by lease designated in the records 40

Exhibit P-2.

of said Company as lease number "8390," and to the Mortgagor by lease dated November 13, 1899;

(e) Lands situate at or near the station of Kellogg of the Chicago, Milwaukee and St. Paul Railway Company, being the same premises heretofore demised by said Railway Company to the H. J. O'Neill Grain Company by lease designated in the
10 records of said Railway Company as lease number "9725" and to the Mortgagor by lease dated November 13, 1899;

(f) A lot or parcel of land situate at Lakey in the Southeast Quarter in the Southwest Quarter of Section No. 34, Township No. 110, North, of Range No. 12 West, being the same premises heretofore demised by Anne Tracey to H. J. O'Neill by lease
20 dated September 1st, 1895;

(g) Certain lots or parcels of land situate at Weaver Station, and part of the depot grounds of the Chicago, Milwaukee and St. Paul Railway Company, being the same premises heretofore demised by said Railway Company to Lester R. Brooks and others composing the firm of Brooks Brothers, and to the Mortgagor by two leases dated
November 13, 1899;

30 4. Two parcels in the County of Dodge:

(a) A lot or parcel of land situate at or near Kasson Station and part of the depot grounds of the Winona and St. Peter Railroad Company, being the same premises heretofore demised by said Railroad Company and the Chicago and Northwestern Railway Company to the H. J. O'Neill Grain Company by lease dated September 9, 1898;

(b) A lot or parcel of land situate at or near
40 Mantorville Station and part of the depot grounds

Exhibit P-2.

and right of way of the Winona and St. Peter Railroad Company, being the same premises heretofore demised by said Railroad Company and the Chicago and Northwestern Railway Company to the H. J. O'Neill Grain Company by lease dated September 9, 1898;

5. Two parcels in the County of Fillmore:

10

(a) A lot or parcel of land situate at or near Chatfield Station and part of the depot grounds of the Winona and St. Peter Railroad Company, being the same premises heretofore demised by said Railroad Company and the Chicago and Northwestern Railway Company to the H. J. O'Neill Grain Company by lease dated November 12, 1897;

(b) A lot or parcel of land situate at or near the Station of Ostrander of the Winona and Western 20 Railway Company, being the same premises heretofore demised by said Railway Company to the H. J. O'Neill Grain Company;

6. A lot or parcel of land situate in the County of Goodhue, at or near Goodhue Station of the Duluth, Red Wing and Southern Railway Company, being the same premises heretofore demised by said Railway Company to Malvina Davis by lease dated May 13, 1891.

30

7. Two Parcels in the County of Mower:

(a) A lot or parcel of land situate at Racine Station of the Winona and Western Railway Company, being the same premises heretofore demised by said Railway Company to the H. J. O'Neill Grain Company.

(b) A lot or parcel of land situate at or near LeRoy Station of the Winona and Western Railway 40

Exhibit P-2.

Company, being the same premises heretofore demised by said Railway Company to the H. J. O'Neill Grain Company.

IV. Two Parcels situate, lying and being in the State of Iowa, County of Mitchell, namely:

10 (a) A lot or parcel of land situate at or near Osage Station of the Winona and Western Railway Company, being the same premises heretofore demised by said Railway Company to the H. J. O'Neill Grain Company.

(b) A lot or parcel of land situate at or near David Station of the Winona and Western Railway Company, being the same premises heretofore demised by said Railway Company to the H. J. O'Neill Grain Company.

20 AND ALSO all other lands, and all estates, rights, privileges, easements and interests in, or appurtenant or appendant to, lands, wherever situated, which the Mortgagor now owns or has contracted for, or may hereafter acquire;

30 Together with all and singular all ways, waters, water-courses, rights, liberties, privileges, hereditaments and appurtenances whatsoever to said properties, or any part thereof, belonging or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all and singular the estate, right, title, interest, use, trust, property, possession, claim and demand whatsoever, either in law or in equity of the Mortgagor, of, in or to the said property and premises, or any part thereof;

40 TOGETHER WITH all and and singular the buildings, improvements and fixtures of the Mortgagor now or hereafter erected on or attached to any of

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the premises hereby conveyed or intended to be, or on any such after-acquired premises, and all present or future permanent belongings thereto, and any and all fixed or movable machinery and tools now or hereafter in said buildings or upon said premises, including fittings, tools, implements, utensils, apparatus, furniture, engines and boilers, pumps and their settings, connections and appurtenances, apparatus and utensils, and all other machinery, utensils and tools and other property, whether fixed or movable, now or hereafter acquired for use in, or in connection with, the operation of any building or plant now or hereafter situated on any of said premises, and all such machinery, tools and other property, now existing or hereafter acquired are hereby declared to be, for all purposes and effects of this mortgage and of the security and enforcement thereof, fixed plant and appurtenant to the real estate on which the same are or shall be situated, and to pass with the same, as part thereof; 20

Also, all and singular, all other buildings, malt-houses, warehouses, elevators, stables, sheds and other structures, property of the Mortgagor, but situate on lands of others, together with all machinery, engines, boilers, tools and fixtures situate therein or appertaining thereto or connected with the use and operation thereof; 30

Also all inventions and patents and all rights and interests in and to and under patents of the Mortgagor;

Also, all books of account, memorandum books, records and papers relating to said buildings and plant or the business thereof:

Certain elevator and warehouse properties hereinbefore conveyed, *being subject*, however, to certain leases for the term of one year from the 40

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eleventh day of October, 1899, made by the Mortgagor to the Great Lakes Elevator and Warehouse Company, a corporation of the State of Wisconsin;

10 EXCEPTING AND RESERVING, however, the lands hereinafter mentioned, which, together with all buildings and improvements thereon, and all machinery, tools and fixtures connected therewith, are not hereby conveyed or included under, or in any way affected by, the lien of this mortgage, that is to say:

20 All that certain piece or parcel of land situate in the Borough of Manhattan, County and State of New York, on the Northerly side of Forty-seventh Street, 75 feet in width, commencing 150 feet Easterly from First Avenue, part of the premises heretofore conveyed to the Mortgagor by Adam Neidlinger and wife, by deed dated February 28, 1899, and recorded in the office of the Register of said county, March 3, 1899, in Block Series of Conveyances, Section 5, Liber 59, page 450.

30 All those ten certain lots, pieces or parcels of land situate in the County of Kings, Borough of Brooklyn, City and State of New York, beginning at the corner of North Seventh Street and Sixth Street, heretofore conveyed to the Mortgagor by the New York and Brooklyn Malting Company, by deed dated September 29, 1897, and recorded in the office of the Register of Kings County, October 2, 1897, in Liber 8, at page 12 of Conveyances, in Section 8, Block 2322;

Also, all those certain tracts or parcels of land, in the County of Onondaga, in the Town of Elbridge, Village of Jordan, and State of New York, 40 part of lots 45 and 46 of the Town of Elbridge,

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being all the premises in said town and village heretofore conveyed to the Mortgagor by the C. M. Warner Malting Company by deed dated September 29, 1897, and recorded in the office of the Clerk of Onondaga County, N. Y., November 7, 1897, in Book 311 of Deeds at page 239, and by the said C. M. Warner Malting Company, and by Charles M. Warner by subsequent deeds of confirmation and correction; 10

And also all those four certain tracts or parcels of land, in the County of Genesee, Town of LeRoy, and State of New York, heretofore conveyed to the Mortgagor by the W. D. Matthews Malting Company by deed dated October 1, 1897, and recorded in the office of the Clerk of Genesee County, October 5, 1897, in Liber 187 of Deeds, at page 304;

And also all those certain lots, pieces and parcels of land in the County of Niagara, City of 20 Lockport and State of New York, known as Nos. 13 and 23, and parts of Lots Nos. 9 and 11, on the city map of Lockport, heretofore conveyed to the Mortgagor by John M. Moser and wife by deed dated March 1, 1899, and recorded in the office of the Clerk of Niagara County, March 13, 1899, in Liber 261 of Deeds, at page 274;

And also all that certain tract of land in the County of Cayuga, Town of Aurelius, and State of 30 New York, heretofore conveyed to the Mortgagor by deed dated February 28, 1899, and recorded in the office of the Clerk of Cayuga County, N. Y., March 4, 1899, in Liber T. of Res. Deeds, at page 579;

And also all those six certain tracts, pieces or parcels of land, in said County of Cayuga, Township of Brutus, and Village of Weedsport, and State of New York, heretofore conveyed to the 40

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Mortgagor by Charles M. Warner, by deed dated March 28, 1898, and recorded in the office of the said Clerk April 7, 1898, in Liber 183 of Deeds at page 18;

10 And also, all those certain pieces or parcels of land in the County of Wayne, Town of Sodus, and State of New York, heretofore conveyed to the Mortgagor by Adam Neidlinger and wife, by deed dated February 28, 1899, and recorded in the office of the Clerk of Wayne County, April 3, 1899, in Liber 181 of Deeds, at page 476;

20 Also, all those two certain tracts or parcels of land situate in Wayne County aforesaid, in the Village of Clyde and the Township of Galen, and State of New York, heretofore conveyed to the Mortgagor; the first by Willard H. Losee and wife by deed dated April 6, 1898, and recorded in the office of the Clerk of Wayne County, April 18, 1898, in Liber 179 of Deeds at page 594; and the second thereof by Joaquin K. Souther and wife by deed dated December 8, 1897, and recorded in the office of the said Clerk December 10, 1897, in Liber 178 of Deeds, at page 617;

30 And also all that tract or parcel of land situate in the County of Wayne aforesaid in the Village of Lyons and State of New York, heretofore conveyed to the Mortgagor by Frederick W. Barker and wife by deed dated February 1, 1899, and recorded in the office of said Clerk of Wayne County, May 4, 1899, in Liber 183 of Deeds at page 96;

40 Also, all that piece or parcel of land in the County of Oswego, State of New York, in the Second Ward of the City of Oswego, heretofore conveyed to the Mortgagor by Adam Neidlinger and wife by deed dated February 28, 1899, and recorded

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in the office of the Clerk of Oswego County, March 4, 1899, in Book 231 of Deeds, at Page 10;

And also those lots or parcels of land in the State of Iowa, County of Polk and City of Des Moines, being portions of lots known as lots numbers "55," "56" and "59" of Brooks & Company Addition to the City of Des Moines, and also the lands given or released by the City Council of Des Moines to George W. Kidd, being all of the lands of the Mortgagor in said City of Des Moines, and the same premises conveyed to the Mortgagor by the American Spirits Manufacturing Company by deed dated August 1, 1898; 10

All of the above-mentioned parcels, so excepted as aforesaid from conveyance hereby and from the lien of this mortgage, being more particularly bounded and described in the respective deeds of conveyance thereof, to which reference is hereby made; 20

TO HAVE AND TO HOLD the said property hereby conveyed, with the reversions, remainders, rents, issues and profits thereof, and all privileges and appurtenances now or hereafter belonging or in any wise appertaining thereto, unto the Trustees, and the survivor of them, their successors, and the survivor of them, his heirs and assigns forever, *in trust*, nevertheless, for those who shall hold the bonds and coupons aforesaid, or any of them, and to enforce the payment thereof when payable, in accordance with the true intent and meaning of the stipulations of this indenture and of said bonds and coupons, and without preference of any of said bonds over any of the others thereof by reason of priority in the time of the issue or negotiation thereof, or otherwise howsoever and for the trusts and purposes herein set forth; 30 40

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Provided, however, and these presents are upon the condition that if the Mortgagor, its successors or assigns, shall pay or cause to be paid unto the holders of said bonds and coupons to be issued as aforesaid, the principal and interest to become due thereon at the times and in the manner stipulated therein, and shall keep, perform and observe all and singular the covenants and promises in said bonds and in this indenture expressed as to be
10 kept, performed and observed by or on the part of the Mortgagor, then these presents and the estate and right hereby granted shall cease, determine and be void, otherwise to be and remain in full force;

And provided, further, that until default in the payment of the principal or interest aforesaid or breach of any of said covenants or promises the
20 Mortgagor shall be suffered and permitted to possess and enjoy the aforesaid property and appurtenances, and to receive and use the income, rents, issues and profits thereof; and shall also have the right to sell or otherwise dispose of, free from the lien of this mortgage, equipment, furniture, machinery, tools and implements which shall have become worn out or unfit for use, or which shall not be required in the management, operation or pres-
30 ervation of the property, rights and franchises of the Company or the conduct of its business.

And provided, further, that any part or parts of the property hereby conveyed, or intended to be, may at any time, at the request of the Mortgagor, be released by the Trustees from the lien of this mortgage or deed of trust, upon the following conditions:

It must appear to the Trustees that the release
40 is desirable in the conduct of the business of the

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Mortgagor; and the Mortgagor must convey, or cause to be conveyed, to the Trustees, further real estate with like effect as if conveyed hereby, or pay money to the Trustees, or both, to an amount equal in value to the property to be released. Any money so paid may, upon the request of the Mortgagor, within one year from the date of payment, be applied to the purchase of real estate by the 10 Mortgagor, or the erection or improvement of buildings necessary or useful for the business of the Mortgagor upon land covered by this mortgage. Any such money not so applied within such year, or which the Mortgagor within such year shall notify the Trustees is not to be so applied, shall be paid to the Depositary hereinafter named, and be added to the sinking fund hereinafter provided for.

The Trustees, except as hereinafter provided, 20 may accept as satisfactory and conclusive evidence, as to the desirability of any such release or as to the value of any property to be released or of any real estate to be purchased or as to cost of any buildings or improvements as aforesaid, or as to any facts necessary or proper for the Trustees to investigate preparatory to taking any action hereunder, the certificate of a majority of the Board of Directors of the Mortgagor, including the Presi- 30 dent or Vice-President.

If, however, in any one calendar year, the Trustees shall be called upon to release property of the Company, the aggregate consideration paid or to be paid for which shall exceed fifty thousand dollars, the Trustees, before executing releases in excess of such total amount of fifty thousand dollars in such year, shall employ at the Company's expense some person by them deemed fully competent to pass upon such matters, and shall re- 40

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quire from him his written opinion, verified before a notary public, (1) whether the property for which the release is asked is no longer desirable for the business of the Company, and (2) whether the price to be paid therefor is fairly in accord with its value; and unless upon both such points (1 and 2) such written opinion shall, in the judgment of
10 the Trustees, clearly justify such release of such property, they shall refuse to release the same.

It is hereby covenanted, declared and agreed by and between the parties hereto and the Mortgagor, for itself and its successors, doth hereby covenant and agree with the persons and corporations, firms and partnerships who shall hold said bonds and interest coupons, or any of them, as follows:

FIRST. The said bonds shall be certified by the
20 Trustees and delivered to the Mortgagor, or, according to its order, together or in lots, upon the demand of the Mortgagor; and the signatures of the President or Vice-President and Secretary or Treasurer of the Mortgagor shall be sufficient evidence of any such order or demand of the Mortgagor; provided, however, that after the delivery of four thousand of said permanent bonds further bonds shall be certified and delivered only upon receipt of a certificate
30 signed by the President and two-thirds of the Directors of the Mortgagor, that the same are to be issued and the proceeds thereof are needed for and will be applied in acquiring or constructing additional plants or furnishing additional working capital necessary or essential for or in the business of the Company.

Whenever requested to certify and deliver any further bonds in addition to said first four thousand, the Trustees may employ, at the Company's ex-
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pense, some person by them deemed fully competent to pass upon such matters, and may require from him his written opinion, verified before a notary public, () whether such bonds are reasonably needed, either for acquiring or constructing additional plants or furnishing additional working capital, and (2) whether the additional plants to be acquired or constructed therewith, or the working capital to be furnished therefrom, is necessary or essential for or in the business of the Company; and unless such written opinion shall, in the judgment of the Trustees, clearly justify the issue of such additional bonds, they may refuse to certify or deliver the same. 10

Additional plants or property acquired or constructed, in whole or in part, with such bonds or the proceeds thereof, shall become subject to the lien of this mortgage. 20

SECOND. The Mortgagor shall pay the principal and interest of all bonds duly issued hereunder, according to the terms hereof, without deduction from principal or interest for any tax or assessment which it may be required to retain from any of said bonds or coupons. As the coupons annexed to said bonds are paid, they shall be cancelled, and no purchase of any coupons nor any advance or loan thereon, nor redemption thereof, by or on behalf of the Mortgagor, shall keep such coupons alive or preserve their lien upon the mortgaged property. 30

Bonds may be redeemed before maturity by application of the sinking fund as herinafter provided; and the Mortgagor or its successors or assigns may at any time redeem all said bonds outstanding by paying to the Depositary of the Sinking Fund hereinafter named, the principal thereof and five per 40

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cent. premium and the accrued interest, provided notice of intention to do so shall have been published once a week for twelve weeks in two newspapers of general circulation published in the City of New York; and after the first publication of such notice the Mortgagor shall be bound to make such payment accordingly, and all of such bonds shall
10 become and be due and payable on the day so fixed. After such payment and notice said bonds shall draw no interest, and shall not be entitled to the benefits of this mortgage, and the lien hereof shall be released; but the said Depositary shall apply the money so paid to it to pay off said bonds as presented and shall cancel the same.

THIRD. The Mortgagor shall keep an office or
20 agency in the City of New York while said bonds are outstanding, for the payment of the principal and interest thereof, and shall keep there books on which the transfer of any bonds shall upon request be registered, without expense to the holder. Each registration of a bond shall be noted thereon, after which no transfer thereof can be made except on said books, until after registered transfer to bearer, when the bond will again become transferable by
30 delivery until again registered in like manner in the name of the holder. The Trustees shall have access to said books at all reasonable times, and upon request in writing shall have a list of registrations shown thereon at any specified date. For the purpose of administering the trust created by this mortgage the person in whose name any bond is registered on said books shall be taken to be the owner thereof. The coupons annexed to any bond
40 issued hereunder, whether the bond be registered or not, will always be transferable by delivery.

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FOURTH. The Mortgagor, its successors or assigns, shall and will pay all taxes and assessments lawfully levied or assessed upon the property hereby conveyed or intended to be, or upon any part thereof or upon any income therefrom, when the same shall become due, and will not suffer any lien to be created upon said property, or any part thereof or the income therefrom, prior to the lien 10 of these presents, and will not suffer any matter or thing whereby the lien hereof might or could be impaired; and shall and will keep all the buildings and other improvements upon said premises and all the other property hereby conveyed or intended to be in good repair and insured for the full insurable value of said property, loss payable to the Trustees, and will cause policies for such insurance to be delivered to the Trustees. The proceeds of any insurance, of whatever nature, on any 20 part of the mortgaged property, which may be received by the Trustees, shall be applied by the Mortgagor, under the supervision of the Trustees, to restoring, repairing, replacing or acquiring or building substitutes for the property injured or destroyed, or at the option of the Mortgagor, shall be paid to the Depositary hereinafter named and be added to the sinking fund hereinafter provided for.

Upon default of the Mortgagor to pay any tax 30 of assessment, or to prevent the creation of any prior lien, or to protect all the property hereby conveyed, or intended to be, against the enforcement of any prior lien, then the Trustees, or either of them, may make advances for the purposes aforesaid, or any thereof, and all sums so advanced shall be at once payable by the Mortgagor, shall bear interest at six per cent. per annum until paid, and shall be secured hereby, having the benefit of the 40

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lien hereby created in priority to the indebtedness evidenced by said bonds and coupons, but such advances shall not be deemed to be payments by or for account of the Mortgagor so as to release it from any default hereunder.

10 FIFTH. For the further security of the said bonds and coupons a sinking fund shall be created and applied as follows:

Whenever the Mortgagor shall declare any dividend upon its preferred stock it shall immediately pay to the Guaranty Trust Company of New York, hereinafter called the Depositary, a sum of money equal to one-half of the aggregate amount of such dividend; and the sums so paid shall constitute a sinking fund, together with other sums which shall
20 be paid to the Depositary under the foregoing provisions relating to insurance and the release of property.

The said sinking fund shall be applied, as rapidly as possible from time to time, to the purchase of bonds issued hereunder and secured hereby at not more than five per cent. above the par value thereof, with interest. Purchase of bonds as aforesaid may be made by the Depositary without notice,
30 provided bonds shall be offered to it at a price in its judgment fair and reasonable, within the above limit. The Depositary may at any time call for offers of said bonds, at prices within the above limit, by publication in one or more newspapers.

Whenever there shall be in said sinking fund ten thousand dollars or more and in the opinion of the Depositary bonds cannot be bought within the above limit of price, the Depositary shall select by lot so many of the bonds then outstanding as
40 the sinking fund will suffice to redeem at five per

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cent. above par, with interest, and give notice of such selection by publication for ten days in two daily newspapers published in the City of New York, and upon the next interest day after such notice the bonds so selected shall be redeemable and cease to draw interest, and the Depositary shall set apart from said sinking fund the amount required to redeem said bonds, at such price, on that day, and hold the same for account of the holders of said bonds so selected, and pay the same out upon said bonds whenever presented and surrendered; and after the setting apart of such amount such bonds shall not be entitled to the benefit of the lien of this mortgage. 10

The delivery by the Mortgagor of bonds secured hereby shall be deemed equivalent to payment of cash to the amount of the principal and accrued interest thereof. 20

All bonds purchased and otherwise received under the provisions of this article shall be at once cancelled, and be deemed to be paid.

The Depositary shall allow interest upon moneys held in said sinking fund at such rates as it shall from time to time allow on other deposits of a similar character.

All expenses incidental to the management of the sinking fund, and reasonable compensation to the Depositary for its services in respect thereto, shall be paid out of such interest, or so far as this may be insufficient, by the Mortgagor. Any balance of such interest shall be applied in like manner as the principal sums in said sinking fund. The assent of the Mortgagor to any charges of the Depositary for expenses or compensation shall bind all parties interested hereunder. 30

If the said Guaranty Trust Company of New 40

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York should refuse to act as such Depositary, or having begun to act as such Depositary, should request to be relieved from the duties thereof, the Mortgagor shall appoint another incorporated trust company in the City of New York to act as such, and this instrument shall then have effect as if the trust company so appointed were named
10 herein, instead of said Guaranty Trust Company, and the said sinking fund, if any there be at the time of such appointment, shall be transferred to it.

SIXTH. In case default shall be made in the payment of any of the interest hereby secured to be paid and such default shall continue six months, then upon the election of a majority in interest of the holders of the bonds hereby secured and then
20 outstanding, evidenced by an instrument or instruments in writing, signed by them and delivered to the Trustees aforesaid or either of them, the entire principal sum secured hereby, and the interest accrued thereon, shall become and be immediately due and payable.

SEVENTH. In case default shall be made in the payment of any money, principal or interest, hereby
30 secured to be paid, and such default shall continue for six months, the Mortgagor upon demand of the Trustees, shall forthwith surrender to the Trustees the actual possession of, and it shall be lawful for the Trustees forthwith to enter into and upon, and take possession of, by their agents or attorneys, all and singular the property and appurtenances hereby conveyed or intended to be, and to have, hold and use, operate and manage the same, and
40 from time to time make all needful repairs, and

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such alterations therein and additions and improvements thereto, as to them shall seem wise, and as the net income coming to their hands shall be adequate to pay for; and to receive the rents, incomes, issues and profits thereof, and out of the said rents, incomes, issues and profits to pay all the proper costs, charges and expenses of so taking, holding and managing the same, and of the execution of the trust herein, including reasonable compensation to the trustees, their agents, attorneys and counsel, and all taxes and assessments and other charges prior to the lien of these presents, and all expenses of such repairs, alterations, additions and improvements, and all indebtedness arising from advances made by them or either of them under the provisions of Article Fourth hereof, and to apply the remainder of the moneys so received by them as follows: First, to the payment of the coupons aforesaid due and unpaid in the order of their maturity; and then to the payment of said bonds, if they shall have become due, and accrued interest thereon, *pro rata*, without any preference or priority whatever; but the Trustees may, if they so elect, after taking possession restore the same to the Mortgagor and pay to it any balance of income received, whenever all the interest due upon said bonds shall have been paid, any election to call the principal due to be thereupon annulled and the provisions hereof to be thereafter operative as if the previous default in respect thereto had not occurred.

Whenever the Trustees shall have become entitled to possession as aforesaid the Mortgagor, its successors or assigns, while remaining in possession, shall be deemed and shall be a tenant or tenants at will of the Trustees, and in case, upon de-

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mand, possession shall not be at once surrendered to the Trustee, they may obtain such possession by forcible detainer or ejectment or other lawful proceedings.

The remedies herein provided are cumulative and not intended to exclude the ordinary remedies of foreclosure by judicial proceedings.

10 EIGHTH. In case of the breach of any of the covenants or conditions of this mortgage, the Trustees—whether having taken possession or not—shall have the right and power to take appropriate proceedings for foreclosure of the lien hereof or the enforcement of their rights and the rights of the bondholders hereunder. It shall be obligatory upon them to take such action, whenever such
20 breach shall have continued for six months, upon being requested so to do by one-fourth in interest of the holders of said bonds then outstanding and upon being indemnified as hereinafter provided. No bondholder or bondholders shall be entitled to take any such proceedings except in case of refusal or neglect of the Trustees to act after such continued breach and such request as aforesaid.

NINTH. Upon the filing of a bill in equity, or other commencement of judicial proceedings to en-
30 force the rights of the Trustees and of the bondholders under these presents, any court of competent jurisdiction may, on application of the Trustees, appoint a receiver or receivers of the lands and other property hereby mortgaged, and of the income, rents, issues and profits thereof, pending such proceedings, with such powers as the Court making such appointment shall confer.

TENTH. In any judgment or decree for the sale
40 of the mortgaged premises or otherwise for the en-

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forcement of the lien hereof, it shall be provided that there shall be paid by the Mortgagor, or out of the proceeds of sale, a reasonable fee for the solicitors or attorneys of the Trustees, in addition to other disbursements and expenses paid and incurred by the Trustees hereunder.

ELEVENTH. Upon any sale being made under judgment or decree in any judicial proceedings for foreclosure or otherwise for the enforcement of this mortgage, the principal of all bonds then outstanding and secured hereby, with interest thereon, if not then due and payable, shall at once become and be due and payable. 10

Any purchaser at any such sale may, in paying purchase money, turn in any of said bonds and matured coupons hereby secured in lieu of cash to the amount which shall, upon distribution of the net proceeds of such sale, be payable thereon, said bonds, in case the amount so payable thereon shall be less than the amount due thereon, to be returned after being properly stamped to show partial payment. 20

TWELFTH. The Mortgagor, for itself and all who may claim through or under it, waives any and all right to have the estates comprised in the security intended to be created hereby marshaled upon any foreclosure of the lien hereof; and agrees that any court having jurisdiction to foreclose such lien may sell the mortgaged property as an entirety, and the request of the trustees or of one-fourth in interest of the bondholders shall be sufficient evidence that said property should be sold as an entirety, and not in parts. 30

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THIRTEENTH. Any declaration, request, election or appointment herein provided to be made by the owners of bonds hereby secured shall be by an instrument or instruments in writing, signed and acknowledged, in such manner as is required in respect to deeds of lands to be recorded in New Jersey or New York, by the bondholder or his duly
10 authorized attorney, who shall in each case file with the Trustees such proof of his authority to act as the Trustees shall deem sufficient. The Trustees may, nevertheless, require any person claiming to be a bondholder to produce his bonds or to prove his ownership by making oath thereto or by other evidence satisfactory to the Trustees.

FOURTEENTH. The Trustees may, and upon request of the Mortgagor shall, cancel and discharge
20 the lien of these presents, and execute and deliver such deeds as shall be requisite to satisfy the lien hereof, and reconvey to the Mortgagor the estate and title hereby conveyed, whenever all the bonds and coupons secured hereby, which shall have been duly issued, shall be paid and canceled or destroyed, and all proper charges hereunder shall have been paid.

30 FIFTEENTH. The Trustees shall be liable only for gross negligence or wilful default, and shall not be responsible for the acts or defaults of any agent employed by them, and shall not be under obligation to file or record this instrument, or to insure against fire any property hereby mortgaged, or to take any action towards the execution of this trust which, in their opinion, would be likely to involve them in personal expense or liability, unless one or
40 more of said bondholders shall, as often as they

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shall require, give them reasonable indemnity to their satisfaction against the same, anything herein to the contrary notwithstanding. The recitals herein are those of the Mortgagor, and the Trustees are not responsible for the accuracy thereof.

SIXTEENTH. The Mortgagor and the Trustees shall, upon reasonable request, execute and deliver 10 such further instruments and do such further acts as may be necessary or proper to carry out more effectually the purposes of this mortgage or deed of trust, or to transfer to any new Trustee or Trustees the estate, powers, instruments or funds held in trust hereunder.

SEVENTEENTH. Either of the Trustees may resign from the trust herein by giving written notice to the other and to the Mortgagor or its successor, 20 but such resignation shall not take effect until his successor shall have been appointed and shall have accepted the appointment. In case of the resignation, or the death, absence from the United States, or disability of either of the Trustees, the holders of a majority of the bonds hereby secured then outstanding may select and designate a successor to act in his place by making and filing with the Depositary hereinbefore named, or its successor, an 30 instrument or instruments in writing, signed and acknowledged before an officer authorized to take the acknowledgment of deeds by the bondholder or his duly authorized attorney, who shall, in each case, file with said Depositary, or successor, such proof of his authority to act as it shall deem sufficient. The Depositary or its successor may require any person claiming to be a bondholder to produce his bonds or to prove his ownership by 40

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making oath thereto, or by other evidence satisfactory to it. Such successor shall thereupon have, possess and be vested with the same rights, powers and estates as his predecessor. If the holders of a majority of the bonds fail for thirty days to make such selection and designation a successor may be appointed by the other of the Trustees, or, if there
10 be no other, by the Mortgagor, by a written instrument of appointment acknowledged and filed with said Depositary or its successor; but a successor so appointed shall be vested with the powers of a trustee hereunder, subject to be divested thereof by the appointment of a successor by the holders of a majority of the bonds in manner as aforesaid.

In case of the temporary absence from the United States of America or disability of either of the
20 Trustees, the other of them may exercise any powers of the Trustees hereunder.

EIGHTEENTH. The term or words "the Trustees," as used in these presents, shall be held and construed to mean the Trustees, parties of the second part, or the survivor of them or their successors, or the survivor of them, for the time being, and said survivor and successors shall have and be possessed
30 of; and shall be competent to exercise, all the estate, rights, property and powers hereby granted to or conferred upon the parties of the second part.

NINETEENTH. The Trustees shall be entitled to reasonable compensation for all services rendered by them in the execution of the trust hereunder.

TWENTIETH. The provisions of this instrument shall bind and benefit the successors and assigns of
40 the Mortgagor.

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IN WITNESS WHEREOF, the Mortgagor has caused its corporate seal to be hereto affixed, attested by its secretary, and these presents to be signed by its president; and the Trustees, in token of their acceptance of the trusts hereby created, have hereto set their hands and seals the day and year first herein written; ten original instruments, all alike and all constituting the same mortgage, being so 10 executed, for convenience in recording.

AMERICAN MALTING COMPANY,

By

[SEAL.]

CHARLES A. STADLER
President.

Attest:

SEYMOUR SCOTT
Secretary.

20

WALTER G. OAKMAN [SEAL.]

GEORGE R. TURNBULL [SEAL.]

Trustees.

Signed, sealed and delivered }
in the presence of }

SAMUEL F. JARVIS JR.

PHILIP J. MCCOOK

30

STATE OF NEW YORK, }
County of New York, } ss:

I, SAMUEL F. JARVIS, JR., a Notary Public in and for said City and County, and in said State, do hereby certify that Walter G. Oakman and George R. Turnbull, to me personally known, and known 40

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to me to be the same persons described in and who executed, and whose names are subscribed to, the foregoing instrument, appeared before me this day in person and acknowledged that they executed, signed, sealed and delivered the said instrument, as their free and voluntary act and deed for the uses and purposes therein set forth, and that they
10 desired the same to be recorded as such act and deed.

Given under my hand and notarial seal this twenty-eighth day of November, 1899.

SAMUEL F. JARVIS, JR.,
[NOTARIAL SEAL] Notary Public No. 4,
New York County.

20 STATE OF NEW YORK, }
County of New York, } ss:

I, SAMUEL F. JARVIS, JR., a Notary Public in and for said City and County, in said State, do hereby certify that Charles A. Stadler, President of the American Malting Company, and Seymour Scott, the Secretary of the same Company, to me personally known, and known to me to be the same persons whose names are subscribed to the foregoing instrument as having executed the same, and known
30 to me to be, respectively, the President and the Secretary of the said Company, appeared before me this day in person and acknowledged that they signed, sealed, with the Corporate Seal of said Company, and delivered the said instrument as their free and voluntary act as President and Secretary of the said Company, and as the free and voluntary act of the said Company, for the uses and purposes therein set forth; and they being by
40 me first severally duly sworn, according to law,

Exhibit P-2.

did depose and say that he, the said Charles A. Stadler, was President of the said American Malt-
 ing Company, the corporation described in and
 which executed the above instrument, and that he,
 the said Seymour Scott, was the Secretary of the
 same Company; that they knew the corporate seal
 of said Company; that the seal affixed to the said
 instrument was the corporate seal of the said Com- 10
 pany; that the said instrument was signed and said
 corporate seal was affixed thereto by the said Sec-
 retary, in behalf of, and by authority of, said cor-
 poration as its act and deed, and by order and
 authority of the Board of Directors of the said
 company, and that they, in the presence of each
 other, signed their names thereto by the like order,
 as President and Secretary of said Company re-
 spectively.

Given under my hand and notarial seal this 20
 twenty-eighth day of November, 1899.

SAMUEL F. JARVIS, JR.,

[NOTARIAL SEAL.]

Notary Public No. 4,
 New York County.

STATE OF NEW YORK, }
 County of New York, } ss.

I, WILLIAM SOHMER, Clerk of the County of 30
 New York, and also Clerk of the Supreme Court
 for the said County, the same being a Court of
 Record, do certify, That Samuel F. Jarvis, Jr.,
 whose name is subscribed to the Certificate of the
 proof or acknowledgment of the annexed instru-
 ment, and thereon written, was, at the time of tak-
 ing such proof or acknowledgement, a Notary
 Public in and for the County of New York, dwell-
 ing in the said County, commissioned and sworn, 40

Exhibit P-2.

and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

10 IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of the said Court and County, the 29 day of Nov., 1899.

[OFFICIAL SEAL.]

WM. SOHMER,
Clerk.

[14539]

U. S. Int. Rev.
Stamp for 10 cents
affixed and
cancelled.

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Exhibit P-3.**CHICAGO PLANTS**

Hales-Carden Plant,—Hickory & Bliss Streets,

Floor system of malting

Germinating floors.....135,000 Sq. ft.

Elevator storage capacity....650,000 bushels

Daily steeping capacity..... 3,650 “

Value of plants..... \$425,000

Land 65500 sq. ft..... 65,000 \$490,000

Purcell, Kensington Plant.—Michigan Central etc.

Galland-Henning pneumatic system, all fire proof

Elevator storage capacity....750,000 bushels

Daily steeping capacity..... 4,440 “

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Value of plant..... \$750,000

Land 195,600 sq. ft..... 15,000 \$765,000

Brand, Bullen & Gund Plant,—13th & Rockwell Streets

Saladin pneumatic system, almost entirely fire-proof

Elevated tracks

Elevator storage capacity....550,000 bushels

Daily steeping capacity..... 2,200 “

Value of plants..... \$400,000

Land 58,000 sq. ft..... 50,000 \$450,000 20

MILWAUKEE PLANTS

Hansen Hop & Malt Co.,—bet. Aldrich & Reynolds Sts.

Floor system of malting

Germinating floors approx...113,000 sq. ft.

Elevator storage capacity....750,000 bushels

Grain shed storage capacity..225,000 “

975,000

Daily steeping capacity..... 3,600 “

Value of plant..... \$425,000

Land 196,700 Sq. ft..... 50,000 \$475,000 30

Kraus-Merkel Malting Co.,—South Dater & Park Sts.

Galland-Henning Pneumatic and Saladin Pneumatic Systems, largely fire proof construction

Elevator storage capacity..1,040,000 bushels

Daily steeping capacity.... 5,000 “

Value of plant..... \$850,000

Land 113,509 sq. ft..... 65,000 \$915,000

Carried forward..... \$3,095,000 40

Exhibit P-3.

	Brought forward.....	\$3,095,000	
	Wm. Buchheit Malting Co., Watertown, Wisconsin		
	Saladin Pneumatic System		
	Daily steeping capacity.....	1,800 bushels	
	Elevator storage capacity....	275,000 "	
	Value of plant.....	\$185,000	
	Land 11,808 sq. ft.....	5,000	\$190,000
	Howard & Northwood Plant, Detroit, Michigan, Grand River Avenue.		
	Floor Plant		
10	Germinating floors.....	70,528 sq. ft.	
	Elevator storage capacity....	275,000 bushels	
	Daily steeping capacity.....	1,600 "	
	Value of plant.....	\$150,000	
	Land 77,520 sq. ft.....	30,000	\$180,000
	Sohnngen Malting Company Plant, Hamilton, Ohio		
	Floor System		
	Germinating floors		
	Elevator storage capacity....	130,000 bushels	
	Daily steeping capacity.....	850 "	
	Value of plant.....	\$75,000	
20	Land 28,935 sq. ft.....	4,000	\$79,000
	Buffalo Plant, Childs Street		
	Saladin Pneumatic System		
	Strictly fireproof construction		
	Elevator storage capacity....	2,250,000 bushels	
	Daily steeping capacity....	10,000 "	
	Value of plant and land—cost.....		\$1,252,000
	C. M. Warner Malt Company, Syracuse, N. Y.		
	Pneumatic compartment system		
	Elevator storage capacity....	500,000 bushels	
	Daily steeping capacity.....	2,200 "	
30	Value of plant.....	\$275,000	
	Land	25,000	\$300,000
	Rondout Plant, Rondout, N. Y.		
	Floor system		
	Elevator storage about.....	200,000 bushels	
	Daily steeping capacity.....	850 "	
	Value of plant.....	\$90,000	
	Land, say 5 acres	10,000	\$100,000
	63rd Street plant, New York City.....		\$740,000
	71st Street " " " "		\$460,000
40	Total.....		\$6,396,000

Exhibit P-4.**STATEMENT OF DIVIDENDS PAID ON PREFERRED STOCK
OF THE AMERICAN MALTING COMPANY.**

Organized September 28th, 1897.

Year.			
1898	4 dividends	1 3/4% each	7%
1899	4	“ 1 3/4% “	7%
1900 to 1907 inclusive, no dividends			
1908	1 dividend	1.56%	1.56% 10
1909	2 dividends	1.56% each	3.18%
1910	2	“ 1.56% and .62%	2.18%
1911	2	“ .62% “ 1.24%	1.86%
1912	2	“ 1.24% “ 1.55%	2.79%
1913	1 dividend	1.55%	1.55%

No dividends have been paid on the common stock of American Malting Company.

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NEW JERSEY SUPREME COURT.

AMERICAN MALT CORPORATION
AND ANOTHER

VS.

PUBLIC UTILITIES COMMIS-
SIONERS.

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Argued May 4, 1914. Decided May 1914.
Before Swayze, J., by consent.

ELIHU ROOT, Jr., and SILAS W. HOWLAND, (of
the New York Bar) and FREDERIC J.
FAULKS, for prosecutors.

FRANK H. SOMMER, for the Commissioners.

SAMUEL H. ORDWAY, *pro se*.

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Per Curiam:

In order to expedite the proposed appeal, I will indicate succinctly the views I hold. The case was argued as if it involved the constitutionality of Chapter 19 of the laws of 1913, which requires that corporations intending to merge shall first secure the approval in writing of the Board of Public Utility Commissioners. It is said that this in-
30 volves a delegation of legislative power. No statute is pointed to which becomes a law or ceases to be a law as the result of any act of the Commissioners. There is none. It seems to be thought that the Commissioners would legislate if they adopted any rules for their own guidance in granting or withholding their approval of a proposed merger of corporations; but such rules would have no binding force even upon the Commissioners themselves since
40 they could rescind them at pleasure; they lack

all semblance of legislation and surely could not render unconstitutional an act of the legislature. The requirement of approval by the Commissioners is no more than the requirement that some judicial or clerical officer shall pass upon the regularity of incorporation papers, or the requirement of the act of the Secretary of State in *Iowa Life Ins. Co., v. Eastern Mut. Life Ins. Co.*, 64 Law, 340, or the requirement of certificates from the Commissioner of Banks and Insurance under our present statutes. If it were necessary to sustain the constitutionality 10 of the act, it would be quite natural to hold that the intent of the legislature was no more than to require an ascertainment by the Commissioners of the fact that the proposed merger was of a character authorized by law. It is not however necessary to go so far as to limit in this way the powers of the Commissioners. The real question is whether the legislature itself had the right to impose as a condition of merger, the approval of the Commis- 20 sioners. To state the question is to answer it. The right to merge is purely statutory and there is no constitutional objection to the legislature fixing such terms as it chooses, including, since that is its pleasure, the written consent of the Commissioners. The legislature is under no compulsion to authorize a merger, and it may impose even fanciful conditions; it might, for instance, prescribe that the approval should be written in red 30 ink. This power of the legislature is not lessened by the fact that section 109 as originally enacted antedates Chapter 19 of the laws of 1913, nor by the fact that Chapter 17 of the laws of 1913, amending section 109 is contemporaneous with chapter 19, requiring the approval of the Commissioners.

It so happens that the provisions are in distinct acts but one is an amendment of, and the other a supplement to, the Corporation Act; they must be read together as part of the same enactment with 40

the section authorizing a merger. It is as if section 104 (C. S. 1659) read: "Upon obtaining the written approval of the Public Utility Commissioners, any two or more corporations may merge or consolidate." No doubt the action of the Board must be reasonable and not arbitrary, but that is because we will not attribute to the Legislature an intent to exercise or permit the exercise of arbitrary power. The action of the Commissioners must have a foundation in reason; it has such foundation when it is
 10 based upon the requirements of the corporation act, or upon settled legal principles, and not upon the mere whim of the Commissioners.

I doubt myself the view of the board that the two corporations concerned were not such as could properly merge. The only difference between the kinds of business authorized to be carried on is that the Malt Corporation is authorized by its charter to buy the stock of the Malting Company. The
 20 merger act does not require that the corporations to be merged carry on the same kind of business; it is enough that the business is of similar nature. How the mere added power to acquire stock can make the two kinds of business dissimilar, I do not see. It is not the business in fact carried on but the business for which the two are organized that determines under section 104, the right to merge. It was not the fact that one corporation was a holding company that condemned the merger in
 30 *Colgate v. United States Leather Co.* 75 Equity, 229. But even this difference between the Malting Company and the Malt Corporation is apparent rather than real; since section 49 (C. S. 1630) authorized any corporation organized under the act to purchase stock of other companies; and the legislature not only reenacted this in 1913 (Chapter 15) but by express provision recognized the right of one corporation to buy stock of another
 40 corporation owning property "cognate in character

and use to the property used or contemplated to be used by the purchasing corporation." The expression seems to me broader than that contained in section 104; for corporations may be dissimilar in the kind of business they are organized to carry on, and may yet own property cognate in character and use to that used by the purchasing corporation, and a *fortiori* to that contemplated to be used. With this broad provision in the act of 1913, the Malting Company had by statute law the same powers as, perhaps more extensive than, the Malt Corporation had by its certificate of organization.¹⁰ It is no answer to say that the Malting Company could not vote on its own stock; neither could the Malt Corporation; but each could acquire and vote on the stock of the other. Nor is it an answer to say that in fact the Malt Corporation was only a holding company; the property contemplated to be used by it was the identical property actually owned and used by the Malting Company; in fact one object of the merger was to do away with the holding²⁰ company. If the action of the Commissioners rested alone on the ground that the business was not similar under the act of 1896, or cognate in character under the act of 1913, I should have difficulty in sustaining it.

I think it may safely be sustained on two grounds: (1) that the scheme of merger involves the issue of stock for less than its par value; (2) it is unfair to the preferred stockholders of the Malt-³⁰ ing Company.

(1) Although the Malt Corporation owns most of the stock of the Malting Company, and as to that no material change is proposed, it will nevertheless be necessary to issue some stock of the Malt Corporation for some stock of the Malting Company, which is worth less than the par value of the stock proposed to be issued therefor. I am not impressed by the argument drawn from the broad language⁴⁰

of section 109. If that argument is to be pressed to its logical result, the merging corporations may determine for themselves how much stock they will issue and how small a payment they will accept therefor; two corporations may accomplish therefore by merger what neither could do alone and issue stock for property worth less than its par value. It needs no argument to show that the necessary result would be to do away with the provisions of the act requiring money or money's worth. Such cannot have been the legislative intent. I think section 109 must be read in connection with the rest of the act and that money or money's worth is required for stock issued upon a merger as well as in other cases.

(2) I am persuaded also that the proposed merger is unfair to the preferred stockholders of the Malting Company for the reasons stated in Mr. Ordway's brief. It is said that the objection on this score is the proper subject for action by the court of chancery, and that equity powers cannot be conferred upon the Commissioners. I do not regard the case as one where judicial power is conferred upon an administrative body. The legislature has seen fit to require the approval of the Commissioners as a condition precedent to a merger. I see no reason why their refusal to approve may not properly be based upon the fact that the scheme is such, that upon recourse to a proper tribunal, it would be enjoined. Surely it is not for this court to say that their refusal to approve in such a case should be set aside. Their approval would not prevent action by the court of chancery. In short the action of the Commissioners is no adjudication of the right of the parties, but a mere step in administrative procedure which is subject to control by the courts.

The result is an affirmance of the order, with costs.

NEW JERSEY SUPREME COURT.

AMERICAN MALT CORPORATION
et al.,

Prosecutors,

vs.

BOARD OF PUBLIC UTILITY COM-
MISSIONERS *et al.*,
Respondents.

On *Certiorari*.
Rule for Judg-
ment.

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The above cause having with the consent of the parties been duly argued before me, one of the Justices of the Supreme Court, at Chambers, and I having duly considered the causes assigned for setting aside the proceedings; and it appearing that the said proceedings brought up by said writ of *certiorari* should not be set aside;

It is, thereupon, on this fourth day of June, 1914, ORDERED that the said proceedings be and they are hereby affirmed with costs.

FRANCIS J. SWAYZE,
J. S. C.

Entered—June 4th 1914.

On motion of

LINDABURY, DEPUE & FAULKS,
Attorneys for Prosecutors.

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WEST VIRGINIA SUPREME COURT

AMERICAN MARINE CORPORATION

et al.

Respondents

vs.

WEST VIRGINIA TRADING COMPANY

Plaintiff

Respondent

On Petition
Filed for Judgment

memorandum

The above named parties having filed the consent of the
parties to a trial by jury before me, one of the
Justices of the Supreme Court, at Charleston, West Virginia,
and having also filed the names of the parties designated for
trial, the proceedings were continued until the next day of
the month of June, 1911, when the parties were brought up by writ and
the trial was held at that time. The trial was held at
Charleston, West Virginia, on the fourth day of June, 1911,
and the jury returned a verdict in favor of the plaintiff and they are
awarded with costs.

FRANCIS J. LEWIS, J.

J. & C.

Filed—June 4th 1911.

On motion of

LEWIS, JAMES E. LEWIS,

Attorneys for Respondent.



