

NEW JERSEY
Court of Errors and Appeals

MAX MORGENSTERN ET. AL.,
Appellants,

vs.

AMERICAN MALTING COMPANY,
Appellee.

On Appeal.

Brief of Appellants.

This case comes before the Court on an appeal from the order of the Court of Chancery made on the 25th day of May, 1916, the effect of which was to deny the application for a preliminary injunction.

The facts of the case are as follows:

Prior to December 13th, 1915, American Malting Company was a corporation of the State of New Jersey, with an authorized capital stock of \$30,000,000 divided into 300,000 shares of the par value of \$100 each (page 9), the most of which stock on or about December 13th, 1915, was issued and outstanding. That the appellants were stockholders prior to December 13th, 1915, owning all together about 900 shares of the common stock of the American Malting Company. Most of the complainants have been stockholders for ten years prior to December 13th, 1916 (page 18).

The said authorized capital stock of 300,000 shares was divided into two classes of stock, namely, preferred and common, there being 150,000

shares of common stock and 150,000 shares of preferred stock.

The preference in the preferred stock being in respect to dividends which carried dividends at 7% per annum which were cumulative, but carried no other preference.

At a meeting of the Board of Directors, held November 24th, 1915, a resolution was passed, the purport of which was to effect a reduction in the capital stock of the American Malting Company from 300,000 shares, to 150,000 shares, or, from \$30,000,000 to \$15,000,000.

The classification of the two classes of stock under the reduction were to be on a different basis than that which existed in the original certificate of incorporation.

That is, instead of being an equal amount of shares in each class of stock, the same was to be divided as follows: 90,000 shares of preferred stock and 60,000 shares of common stock, making a total of 150,000 shares to be the total amount of capital stock of the company.

The following is a true copy of the resolution passed:

Resolved, That the capital stock of the American Malting Company be reduced from \$30,000,000, consisting of \$15,000,000 preferred stock divided into 150,000 shares of the par value of \$100 each and \$15,000,000 of the common stock divided into 150,000 shares of the par value of \$100 each, to \$15,000,000 consisting of \$9,000,000 of preferred stock divided into 90,000 shares of the par value of \$100 each, and \$6,000,000 of common stock divided into 60,000 shares of the par value of \$100 each.

One of the appellants attended a meeting of the

stockholders at which the above resolution was passed (page 21), and protested and voted on behalf of himself and the other complainants against the adoption of the resolution. At that meeting, the American Malt Corporation, which is known as a holding company, voted 142,650 shares of preferred stock and 130,824 shares of common stock in favor of said resolution (page 21). The effect of this reduction was to place the preferred and common stock upon an unequal basis, they having theretofore been on an equal basis.

At the hearing upon the application for preliminary injunction, to restrain the corporation from proceeding or acting under said resolution, the Court adopted the view that such a reduction would be illegal as against a common stockholder. The defendant corporation thereupon offered to deliver to the complainants additional stock, so that the common stock holdings of the complainant after the reduction, would be the same as though under the reduction of the capital stock; the preferred and common stock had been divided into equal proportions, and under the order of the Court (page 35) it appeared that the complainant, Morgenstern, would receive ninety-six additional shares if the stock were classified in equal proportions, and each of the other three complainants would receive sixteen additional shares of stock, that is, assuming that reduction of common stock had been \$9,000,000 or 90,000 shares instead of \$6,000,000 or 60,000 shares.

The Court determined, that upon the defendant making this offer in open Court, no injury would be done to the complainant and directed that the complainants accept this stock together with a bond conditioned to save harmless the complainants from any claims or demands or damages by reason of any

assessment on the additional shares of common stock so offered, and that the motion for the injunction be denied. And further ordered that costs of the motion abide the result of the suit.

The two points presented on appeal are as follows:

1. That it is inequitable to compel the complainants to accept the additional shares of stock.

2. That if the defendant desires to do equity by offering additional stock, then all of the expenses, including counsel fees and Court costs, to which the complainants were subjected by reason of the defendant's wrong, should be paid by the defendant to the complainants.

I.

The reduction of stock of a corporation as between two classes of stockholders must be pro rata.

Under the reduction made in this company in which no assets were distributed after the reduction went into effect, nor is it conceded that any assets will be distributed, the common stockholders who, prior to the reduction, held an equal interest in the company with the preferred stockholders, both as to their share in the assets and in the control and management of the company, were deprived of that interest in the ratio that nine fifteenths bear to six-fifteenths.

“The reduction of stock in a corporation as between different classes of stockholders must be made on a pro rata basis.”

Cook on Corporations, 7th Ed., Vol. 1, Sec.
289, p. 842.

That a reduction had upon any other basis is inequitable, is supported by the following cases:

“The capital stock of a corporation may be increased or reduced as authorized by statute; but, in the absence of express statutory provision, the right of the individual stockholder to the proportionate voice in the conduct of the affairs of the corporation and equitable interest in its property which his stock gives him when he becomes a stockholder must be preserved. The interest of the plaintiff in the property, if dissolution were to take place now, might not be affected by the action taken, because on dissolution the preferred stock was first to be paid in full; but the right of a stockholder to a voice in the management of a corporation in which he has invested money is a property right and vested interest entitled to protection under the Constitution.”

Page vs. American & British Manufacturing Company, 113 N. Y. Supp., 734.

In the case of Niagara Shoe Company vs. Tobey, 71 Ill. App., 250, it was held that equality between the stockholders should be preserved in the reduction of the capital stock.

The theory upon which the ruling in the above cases is based is the doctrine of pre-emption by virtue of which an existing stockholder, upon an increase in the capital stock of a corporation, has the option of purchasing his pro rata share of the contemplated increase, and that rule is based upon the theory that a stockholder is entitled at all

times to maintain his position in the company as it was at the time he purchased his stock.

“It seems that if a corporation resolves to increase the amount of its capital by issuing and selling new shares, every stockholder has a right of pre-emption of a fractional part of the new issue proportionate to his fractional share in the company’s entire voice in the management of the company’s affairs.”

Wall vs. Utah Copper Co., 70 N. J. Eq., 28.

Way vs. American Grease Co., 60 N. J. Eq.,
263, citing Gray vs. Portland Bank, 3
Mass., 364.

The preferred stock in the case at bar is preferred as to dividends and not as to assets, and hence shares the same in the assets as the common stockholders.

Prior to the reduction both classes of stock shared equally in the assets, but after the reduction the preferred represents nine-fifteenths of the assets while the common stock represents but six-fifteenths. The voice in the management and control of the company which the common stock had is decreased by three-fifteenths, or, in other words, the control and management of the company (which was a majority vote) is placed absolutely in the hands of the preferred stockholders.

It is hardly necessary to argue that it is inequitable to take away these rights from the common stockholders and to change their position in the company and make it other than that which it was at the time they purchased their interest in the corporation.

That portion of the order of the Court which di-

rects the complainants to accept any additional shares of stock, which would place them in the position as though the reduction of the common stock was made pro rata with the preferred, namely, on the basis of \$9,000,000, cannot be equitable or with safety to the complainant's interest, carried out.

It must be borne in mind that the controlling voice in the company is by a majority vote. Neither the preferred nor the common stock had a majority prior to the reduction, they being equally divided.

Under the offer of the additional shares, it is true that the complainants received stock as though their holdings of common stock had been reduced pro rata, but the common stock as a class is still left in a position of having one-third less outstanding stock than the preferred, and still leaves the preferred, by virtue of having one-third stock issued and outstanding, in absolute control of the management and business and affairs of the company. The rights of the preferred stockholders and common stockholders are decidedly different. The preferred has a dividend of 7% per annum which is cumulative; the common stockholders receive a dividend on the earnings, after the preferred stockholders are paid, and although the complainants are offered additional shares, still the common stock as a class is left in a position where it cannot have any voice in the management of the affairs of the company.

This is an entirely different situation than that which existed at the time the complainants purchased their stock. The complainants have a right to say and to maintain as a matter of contractual relation, that if they purchased stock in a company which has two classes of stock, equally divided, where one class has the same voice in the management of the affairs of the company as the

other, that then such balance of power shall always be maintained.

The effect of the reduction of the stock to the unequal proportions in the case at bar is to place absolutely into the hands of the preferred stockholders the entire voice and management of the company, not only for those things which a majority vote is necessary, but also for those matters which require a two-thirds vote under the Corporation Law of this State, as, for instance, the dissolution of a corporation.

In addition thereto, the defendant company, prior to this reduction, paid a cumulative dividend of 7% on one-half of the capital stock, or, to state it more correctly, they did not pay, but the dividends accumulated yearly at the rate of 7% in one-half of the total authorized capital stock.

Under the reduction the company will permit to accumulate or will pay dividends at the rate of 7% per annum on two-thirds of the total capital stock.

Therefore, to pay dividends on more than one-half of the total capital stock simply decreases the amount of dividends which might otherwise be earned and payable to the common stock.

Certainly the giving of additional shares to the complainants, of the common stock, will not relieve the situation regarding the balance of voting power, nor will it relieve the injury done to the complainants in a matter of payment of dividends.

II.

The defendant, in its offer to do equity, did not offer to do complete equity.

It is practically admitted by the defendants that

without the consent of all the stockholders they could not make the reduction in the unequal proportions as provided by the resolution. Therefore, if we assume that the offer of the defendants by giving additional stock will tend to do equity, so far as the legal relations of the complainant and stockholders of the corporation, and the corporation are concerned, we come to the question, then, whether the order of the Court does complete equity to the complaints.

The complainants were obliged to go into Court because of this illegal method of reduction of stock. In other words the wrong of the company brings the complainants into Court. If, therefore, the defendant offers to do equity, they must place the complainants in the same position they would be in if this unlawful reduction had not been made. Offering them additional shares of stock, may make the reduction as to them, the same as though it had been in equal proportions, but because of the defendant's wrong, the complainant should not be obliged to pay counsel fees and costs of Court or expenses in bringing the proceedings in Court. We do not mean only taxed costs in the suit, but the fees which the complainants were obliged to pay counsel to institute the proceedings to correct the wrong committed by the defendant, and to protect their equities.

If it is the wrongful act of the defendants which bring the complainants into Court, the doing of equity then must be to make the complaints whole, as they stood before the reduction was contemplated, and hence, the order of the Court should have directed not only that the defendant gave the additional shares of stock and a bond to secure the defendant against any assessment or claim by reason of their accepting additional shares of stock,

but in addition thereto, the payment to the complainants of their counsel fees and other expenses incurred in bringing the defendant into Court to remedy the injury done to them by reason of this reduction.

This should form a part of their offer to do complete equity, for otherwise the complainants have received their additional stock, but because of the wrong of the defendant they have been put to the expense of going to Court to receive an offer of equity on the part of the defendant, and they would still be subjected to this expense unless the order of the Court should direct full and complete equity to be done.

It is respectfully submitted:

1. That the reduction of stock in its inception was illegal.

2. That the offer of stock does not cure the illegality of the reduction of the stock, nor fully protect the equity of the complainants after reduction has been made.

3. That the defendant should be ordered, in order to do complete equity, to pay the expenses of litigation and counsel fee as a part of their offer to do full and complete equity.

RUNYON & AUTENRIETH,
Solicitors for and of Counsel
with Appellants.

NEW JERSEY
Court of Errors and Appeals

BETWEEN

MAX MORGENSTERN ET. AL.,
Appellants,

and

AMERICAN MALTING COMPANY,
Respondent.

Brief of Respondent.

The American Malting Company's authorized capital on December 13, 1915, was \$30,000,000, consisting of 300,000 shares of the par value of \$100 each, of which there was outstanding \$28,940,000, divided into 144,400 shares of preferred stock and 145,000 shares of common stock. Of the common stock, however, the company had acquired 11,118 shares so that the amount of that class in the hands of the public on December 15, 1915, was 133,882 shares. On that date the company, at a meeting of stockholders, duly called for that purpose, reduced its authorized capital to \$15,000,000 consisting of \$9,000,000 preferred and \$6,000,000 common stock. Holders of 142,665 shares of preferred stock and 130,878 shares of common stock, voted for the resolution reducing the stock, while the complainants, representing 900 shares of common stock, were the only stockholders who voted against it. It thus appears that almost 99 per cent. of the preferred stockholders and 98 per cent. of the common stock-

holders voted for the reduction of capital and the three complainants, holding two-thirds of one per cent. of the common stock constituting about one-third of one per cent. of the entire stock opposed it. While 2,222 shares of common stock were not voted at the meeting, at the time of the hearing (p. 33, line 30, and p. 34, line 30) some of those had assented to the plan because there then remained only 1,413 shares of those not voted at the meeting which had not expressed assent or dissent.

A company called the American Malt Corporation, composed of 1,600 stockholders, who are former stockholders and assignees of former stockholders of the American Malting Company, holds 142,650 shares of the outstanding 144,400 preferred and 130,824 shares of the 133,882 shares of common stock in the hands of the public.

The complainants' objection was that the two classes of stock should be reduced proportionately and that the reduction of the common stock to \$6,000,000 while the preferred was reduced to \$9,000,000 destroyed the ratio which the two classes of stock bore to each other and because of this fact they would receive less stock on the reduction than they would have gotten if the common stock were only reduced to \$9,000,000.

On behalf of the 99 $\frac{2}{3}$ per cent. the counsel for the company (p. 33, lines 1-17), before the hearing and in order to avoid litigation, made an offer to complainants' attorneys to deliver to the complainants the amount of stock to which, according to complainants' claim, they would be entitled, if both classes of stock were reduced in the same proportion, namely, to \$9,000,000. This was refused. The same offer was made in Court at the hearing

and again refused. The order appealed from was then made.

I.

It was not necessary that the reduction of the stocks should be pro rata, if complainants will not suffer on distribution of assets.

We do not dispute the statement that the reduction of the capital stock on the plan proposed would result in case of dissolution in the preferred stockholders receiving about 16 per cent. more than the common stockholders. We contend, however, that the offer to the complainants of the additional shares necessary to place complainants on a parity with the preferred stockholders gives them the same distributive share in the assets in case of dissolution that they would receive if they were preferred stockholders, and the same as they would receive if the common stock was reduced to \$9,000,000 instead of \$6,000,000. The complainants hold 900 shares of common stock. If they held 900 shares of preferred stock they would receive under the plan attacked 540 shares. As the holders of common stock they receive under the plan 396 shares, together with 144 shares more under the offer, so that they will receive 540 shares. If the common stock was fixed according to their wish, there would be \$9,000,000 common as well as \$9,000,000 preferred, and they would receive in the event of dissolution of the company $\frac{54}{18000}$ of the assets, whilst under the plan, plus the offer of the other stockholders, they will receive $\frac{54}{15000}$, owing to the fact that all the other common stockholders are taking their proportions on the basis of a reduction of the common stock to \$6,000,000, instead of \$9,000,000.

Assuming that it is the rule that upon reduction

of capital stock, all stockholders shall receive the same proportion in the reduced capitalization that they hold in the original capitalization if all the stockholders except 9/2894 agree upon a different division, but the 9/2894 are given the amount which they would receive if the reduction were made; according to their demand no injustice is done to the 9/2894.

II.

No change is made in the control of the company, but if such a change were made no right of complainants is affected.

The proposed reduction of capital stock does not change the positions of the two classes of stock. The preferred stock now has and has had for years, greater voting power and therefore greater opportunity to control the company than the common stock. The number of shares of preferred stock issued and having voting power is 144,400. The number of shares of the common stock issued is 145,000, but as 11,118 shares of this amount are treasury stock owned by the corporation, and not entitled to a vote, it will be seen that the preferred stock even without the reduction has had 10,518 votes more than the common for at least ten years preceding the meeting (p. 25, lines 10-25).

At this point we deem it proper to say that the statement that "neither the preferred or common stock had a majority prior to the reduction" in complainants' brief is incorrect.

But even if it were true that the outstanding stocks of the two classes were equal and through the reduction were made unequal and the preferred stock were to assume control, we fail to see what loss the complainants would suffer.

Change of relative voting power standing alone is not a sufficient reason for asking the Court to interfere. We do not know of any case of increase or reduction of stock where the Courts have interfered solely upon that ground. Whenever that ground has been mentioned in the cases it has been as incidental to the discussion of property rights. If the stockholder's property rights are preserved and he receives, as he does here, the number of shares that he claims to be entitled to on the reduction of stock, he cannot ask that the relativity of the voting power of the class of stock which he holds to that of another class shall never be changed.

If complainants' contention were sound it would never be possible to reduce one class of stock of a corporation which had more than one class, without the consent of every share. The very thing, however, which complainants deny can be done is that which is prescribed by the statute as the first method by which a decrease of the capital of a company may be effected. Section 29 of the Corporation Act provides that "the decrease of capital stock may be effected by retiring *or reducing any class of the stock,*" for which a two-thirds vote of each class of the stock is required by Section 27. If, therefore, the American Malting Company saw fit to retire a part or all of its common stock it could do so without reducing its preferred stock. Section 18 of the Corporation Act provides that "the power to increase or decrease the stock * * * shall apply to *all or any of the classes of stock.*" These sections were in the Corporation Act at the time of the incorporation of the American Malting Company, and are, therefore, to be read into its charter.

The 27th section of the Corporation Act provides that every corporation may change its common

stock into preferred stock by a two-thirds vote of the stock. By such change, of course, the control of the corporation and relative voting power may be taken from the common stock. So that in that section, as well as in Section 29, permission to change the relative voting power and control of the common stock is authorized.

In Section 149 of the Corporation Act the Legislature again provides for a change of the relativity of classes of stock to one another by providing that with the consent of two-thirds in interest of each class the preferred stock may be retired with the consent of the holder by the issue of bonds to him which are convertible into the common stock. In such case the non-assenting preferred stockholders' relative voting power is changed.

But the discussion of the relative balance of the two classes of stock is really academic in this case. As stated before, the American Malt Corporation represents 99% of the preferred and nearly the same percentage of the common stock of the Malting Company. The Malt Corporation holds approximately \$14,300,000 of the \$14,440,000 preferred stock, and approximately \$13,100,000 of the \$13,382,000 common stock that is out (leaving out the 11,118 shares of common stock in the Malting Company's treasury and which cannot vote). There is nothing to prevent the Malt Corporation or any other stockholder of the Malting Company from surrendering and having cancelled any or all of the stock held by it. The complainants surely cannot contend that all other stockholders besides themselves must for all time hold their stock and not surrender any of it because such surrender by other holders will disturb the relativity of the classes of stock or affect the relative voting power of complainants' stock. The American Malt Cor-

poration has the right to surrender to the Malting Company for retirement every dollar of that company's stock owned by it. That is what is happening in this case. The American Malt Corporation is, by the plan of reduction, giving up approximately \$5,300,000 preferred stock of the Malting Company and \$7,100,000 common stock. Speaking for the great body of the Malting Company stockholders whom it represents, we may say all the stockholders, except complainants, because the few non-voting stockholders may be presumed to acquiesce in the plan, the American Malt Corporation says to the Malting Company, "We realize that your capitalization is greatly excessive and that your stock is probably not worth half what it is carried at on your books. We hand you back \$5,500,000 of your \$14,400,000 preferred stock and \$7,100,000 of your \$13,338,200 and ask that it be retired and cancelled, thus bringing your outstanding common stock down to \$6,000,000 and your preferred stock to \$9,000,000." It could do that if the meeting of the Malting Company stockholders had never passed the resolution of December 13th, and had not formally filed the certificate of reduction of stock. The mere fact that the Malting Company held the statutory meeting authorizing the reduction and filed the certificate of decrease of capital certainly does not make any difference. The complainants cannot be heard to say that the holders of the other 99 2/3 per cent. of the stock shall be restricted to the surrender of \$5,000,000 common stock instead of \$7,100,000 because the surrender of any more than \$5,000,000 will affect the voting power of the common stock as a class.

The complainants in making their claim that the relative voting power of the two classes of stock shall be maintained speak for no one but themselves.

The other holders of common stock repudiate the complainants and oppose their claim in this respect. They cannot be heard to ask that the relativity of the common stock to the preferred stock shall be maintained for the benefit of the 99 $\frac{1}{2}$ per cent. who do not want it preserved, and who prefer the plan of reduction adopted.

The case of *Page vs. The American & British Manufacturing Company*, 113 N. Y. Supp., 129 App. Div. N. Y., 1st Dept., cited in complainants' brief, provided for the reduction of the 80,000 shares of common stock of the defendant company to 20,000 shares. There was no offer to the dissenting stockholders to give them the amount of stock which they claimed they were entitled to. If there had been any such offer the Court would have dismissed the complaint because in *Russell vs. American Gas & Electric Company*, 152 App. Div., decided by the same Court, the same Judges sitting, an injunction was refused to a dissenting stockholder who complained that upon an increase of capital stock he did not receive the amount that he claimed to be entitled to, the defendant company offering to the protesting stockholder at the hearing the number of shares he claimed he should receive.

Complainants' brief quotes as follows from the Page case:

“The capital stock of a corporation may be increased or reduced as authorized by statute, but in the absence of express statutory provision the right of the individual stockholder to the proportionate voice in the conduct of the affairs of the corporation and equitable interest in its property which his stock gives him when he becomes a stockholder must be preserved.”

That quotation does not apply to the case at bar because not only is the reduction of capital in the present case made *as authorized by statute* as we have pointed out supra but "the equitable interest and the proportionate voice" of the complainants are also preserved under the order of the Court of Chancery by the delivery to them of 144 additional shares which will bring their stock holdings up to the same amount as they would receive if they were the holders of preferred stock, and the two stocks were reduced to \$9,000,000 each.

In *Way vs. The American Grease Company*, 60 N. J. Eq., 263, there was an issue of new stock by the directors for the fraudulent purpose of securing to themselves control and assuring their continuance in office. The very purpose of the new issue of stock in that case was to change control. In the case at bar, however, there is no fraud on the part of the directors or the stockholders; there is no attempt on the part of the preferred stockholders to obtain control; the control, that is, the possession of a majority of the stock, has for ten years at least been with the preferred stockholders.

In the case of *Wall vs. Utah Copper Company*, the object of the issue of the \$3,000,000 bonds which were convertible into common stock was likewise to give control of the Utah Copper Company to the Guggenheimer Exploration Company and take it away from the stockholders, but the Court in that case makes a distinction between that case and a case like the present one where a stockholder has been offered the amount of stock which he claims he should receive, for Vice Chancellor Pitney, who decided the Utah Copper Company case, says, referring to the case of *Meredith vs. N. J. Zinc & Iron Company*, 55 N. J. Eq., 211, decided by himself, that he refused to grant the injunction asked for in

the Meredith case because, first, the complainants were the holders of less than one per cent. of the whole stock of the corporation, "*and second, the defendants offered at the hearing to give them (complainants) an opportunity to purchase their proportion of the new stock at par.*"

III.

The objects of the decrease of capital are worthy.

The results sought to be accomplished by the decrease of capital are in accord with the policy of the State of New Jersey. The public policy of this State as well as that of most of the States of the Union, is opposed to the over-capitalization of corporations. Over 1,300 security holders have been induced to submit voluntarily to cutting down of the capitalization of the company and the reduction in amount of their stock. 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 be encouraged, not hindered.

We believe that the complaint of the Board of Directors and particularly the officers of this company that they should not be compelled to carry the capitalization of this company at an excessive valuation upon their books should also receive the consideration of the Court. These officers should not be compelled to certify, in their official reports, to a

capitalization which they know to be over double the true valuation of the company's assets.

We further urge that the directors and stockholders of this company who have effected the reduction of capital are all acting in good faith for the best interest of the company; 98% in preferred stock dividends amounting to \$14,000,000 had accumulated. Since the time of the impairment of the capital of the company through the payment by its first Board of Directors of dividends out of capital (*Appleton vs. Am. Malting Co.*, 65 N. J. Eq., 375), it has been the hope and endeavor of each succeeding Board to bring about a reduction of its capital. In order to bring about the much needed decrease of capital it was necessary that all stockholders should give up some proportion of their stock. The reduction which was consummated by the filing of the certificate is that which seemed proper and fair to the directors and to all the stockholders, common as well as preferred, except the complainants. It results in a considerable lessening of the annual expenditure of the company for franchise taxes. It will cut off \$345,000 a year in preferred stock dividends which heretofore was payable before any common stock dividend.

Before a Court of Equity will lend its aid to restrain what seems to 99 $\frac{2}{3}$ % best for the company, it must find irreparable and substantial injury to complainants for which an adequate remedy cannot otherwise be had, and it must regard the extent of the injury alleged and on the other hand the effect of its interference upon the interests of others.

IV.

The complainants were not entitled to costs and counsel fees.

The counsel for the company "in order to avoid litigation," before the hearing, made the same offer as was made at the hearing (p. 33, lines 1-17) and which the Vice-Chancellor, considering equitable, approved. When the application for costs and counsel fees was made to the Vice-Chancellor he thought that, in any event, if the complainants should be allowed costs to the time of the offer, the defendant should be allowed costs from that time and that one would balance the other.

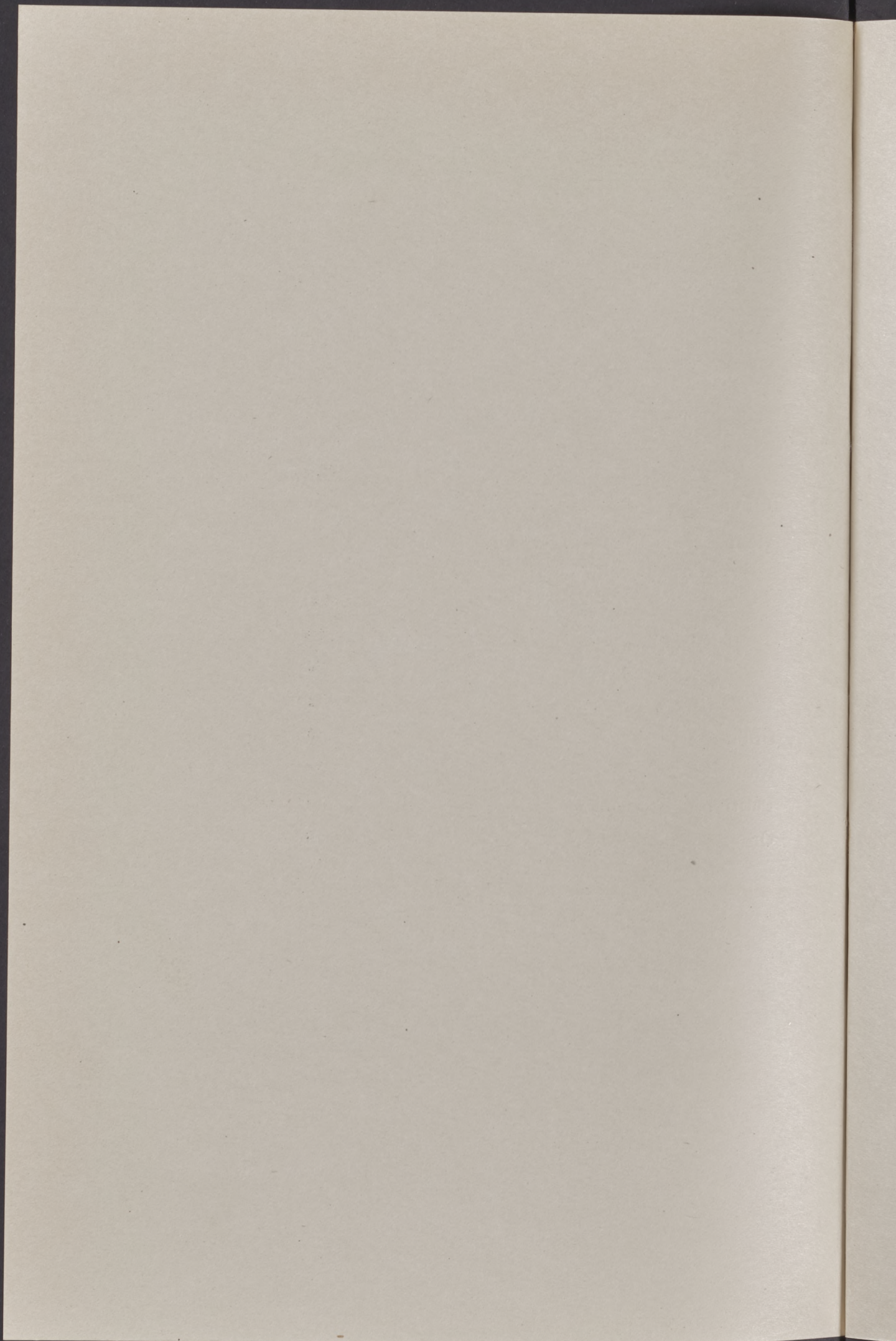
V.

It is respectfully submitted that the order of the Court of Chancery should be affirmed.

TREACY & MILTON,
Solicitors for and of Counsel with Respondents.

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In Chancery of New Jersey.

MAX MORGENSTERN ET AL.,
Complainants,

vs.

AMERICAN MALTING CO.,
Defendant.

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BILL OF COMPLAINT.

*To the Honorable Edwin Robert Walker, Chancellor
of the State of New Jersey:*

The complainants, Max Morgenstern, Bernhard Kupfer, Israel De Kayser, individually and as executor of the estate of Simon Steininger, of the City of New York, in the State of New York, respectfully shows that—

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1. The American Malting Company, a corporation, was organized under the laws of the State of New Jersey by certificate of incorporation filed in the office of the Secretary of State, of the State of New Jersey, on September 28th, 1897. A true copy of said certificate of incorporation is attached hereto and made part hereof.

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2. That the objects for which said corporation was formed were the manufacturing, selling and dealing in malt and its bi-products incidental thereto, and all other products in the manufacture of which malt is or may be used, and the business incidental thereto.

3. The total amount of authorized capital stock of said corporation was the sum of \$30,000,000 divided into 300,000 shares of the par value of \$100 each.

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BILL OF COMPLAINT

4. The said capital stock of \$30,000,000, as aforesaid, was divided into preferred and common stock; \$15,000,000 of said stock was created as common stock, and \$15,000,000 was designated as preferred stock, in accordance with the terms of said charter of the corporation, the preferred stock had the following preferences, viz.: "The preferred stock shall have a preference over the common stock in respect to dividends to the amount of 7 per cent. 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 7 per cent. per annum from the time of the issue thereof. The preferred stock shall not be entitled to any dividend in excess of 7 per cent. 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.

5. The said American Malting Company has been engaged in the business of the manufacture and selling of malt and its bi-products from the time of its organization, and still is engaged in the business indicated by its certificate of incorporation.

6. The said complainants are the owners of record of common stock of the said corporation as follows: Max Morgenstern, 600 shares common stock; Bernhard Kupfer, 100 shares common stock; Israel De Kayser, 100 shares of common stock; Israel De Kayser, executor of the estate of Simon Steininger, 100 shares common stock.

7. That on the 13th day of December, 1915, the said American Malting Company, pursuant to a resolution of its Board of Directors, a true copy of which is attached hereto, called a meeting of stock-

BILL OF COMPLAINT

holders, the purpose of which meeting, as expressed in said resolutions, was to effect a reduction of the capital stock of said corporation, the said reduction, as proposed in said resolution, to be made in the manner following:

\$15,000,000 preferred stock then issued and outstanding was to be reduced by number of shares to 90,000 shares of the par value of \$100 each, and to establish the preferred stock issued and outstanding on the basis of \$9,000,000. The \$15,000,000 of common stock was proposed to be reduced by reduction of shares to 60,000 shares of the par value of \$100 each, and to leave outstanding \$6,000,000 worth of common stock of said company. 10

8. At the said meeting of stockholders of the American Malting Company, the said resolution was voted upon and declared to have been carried and adopted by the stockholders of said company. That the complainant, Max Morgenstern, attended said meeting of stockholders, and on behalf of himself and as representing Bernhard Kupfer and Israel De Kayser, the complainants herein, and the estate of Simon Steininger, voted against the adoption of said resolution, the said Max Morgenstern holding the proxies of the above mentioned complainants at the time of said meeting. 20

9. A large part of the stock of the American Malting Company is held by another corporation, known as the American Malt Corporation, which is known as a holding company, and at the meeting of stockholders aforesaid, wherein the said resolution concerning the reduction of stock was voted upon, the said American Malt Corporation voted 142,650 shares of preferred stock and 130,824 shares of common stock in favor of said resolution. The said stock voted by the said American Malt 30 40

BILL OF COMPLAINT

Corporation exceeded two-thirds of the capital stock of the American Malting Company.

10 10. The charter of said American Malting Company was by virtue thereof amended in respect to the capital stock, both preferred and common of said company, which certificate of amendment was filed in the office of Secretary of State of the State of New Jersey, on December 13th, 1915. A true copy of said amendment is attached hereto and made a part hereof.

20 11. That in pursuance of said amendment the said American Malting Company has notified the stockholders of both classes of said stock to present their respective certificates of stock to the Guarantee Trust Company of New York City, so that the reduction of the number of shares of the capital stock may be evidenced on the certificates outstanding by stamping them in such a manner as to indicate the number of shares held under the reduction made as aforesaid, and that no certificates of stock would thereafter be transferred on the books of the company unless said reduction had been made and was evidenced by stamping on the certificates the reduction and number of shares aforesaid by the reduction and amendments to the
30 charter as aforesaid.

12. That on the said reduction of stock in number of shares no distribution of assets was made by the company to the extent of the reduction in the total amount of the capital stock of said company from \$30,000,000 to \$15,000,000, but all of the assets of the company still remain in its treasury and are to be held by the said company in continuing its business.

40 13. The said reduction and the said amendment

BILL OF COMPLAINT

of the charter of said company is in contravention of law and in violation of the rights of the complainants as holders of the common stock of said company. That the said preferred stock of the said American Malting Company under its original issue was preferred as to dividends only; the same had no preference whatever in the assets of the company. 10

14. That prior to the said reduction the shares of common stock and preferred stock were equal in number, to wit, 150,000 shares each. That the said reduction of the number of shares of the capital stock in effect creates an increase of the preferred stock with respect to the number of shares of the common stock, that is to say, by virtue of the amendment there is now 90,000 shares of preferred stock outstanding against 60,000 shares of common stock. That by virtue thereof the said preferred stock is practically preferred as to assets in the said company to the extent of the said increase over the common stock. That upon dissolution of the said company the said preferred stock would receive nine-fifteenths of the assets of said company, whereas the common stockholders will receive only six-fifteenths thereof. That the said preference thereby created is unlawful and in violation of the rights of the complainants herein to share equally with the common stockholders in the assets of said company. 20 30

15. That under and by virtue of the by laws of said company, a majority vote of the stockholders controlled the election of officers and directors of said company and that by reason of said reduction of the two classes of said stock from a basis of equal holdings of each class to the reduction which has been effected, whereby the said preferred stock is in- 40

BILL OF COMPLAINT

creased 30,000 shares more than the common stock the control and management of said company was placed solely and entirely in the hands of the preferred stockholders. That the same is unlawful and in violation of the rights of the complainants herein. That it would compel the complainants as holders
10 of the common stock to submit their rights in said corporation solely to the will of the holders of the preferred stock in said corporation.

16. That the American Malt Corporation was incorporated March 31st, 1906, and its objects, business and purposes were the same as those with respect to which the American Malt Company was incorporated, and at the time of the stockholders' meeting herein mentioned of the American Malting
20 Company. The stock of the American Malting Corporation consisted of \$15,000,000 worth of stock divided into 150,000 shares, 90,000 shares being preferred and 60,000 shares being common stock. The preferred stock of the American Malt Corporation was preferred as to dividends and also preferred over the common stock as to assets. These complainants charge that the purpose of reducing the stock of the American Malting Company was to place its capital stock on an equal basis of that of
30 the American Malt Corporation, and that the said American Malt Corporation, by virtue of its stockholdings in the American Malting Company intends to effect a dissolution of the American Malting Company, and acquire the properties and assets of said American Malting Company. That to effect a dissolution in this manner of the American Malting Company, is contrary to law and deprives these complainants of the true value of their interest as
40 common stockholders without giving full compensation.

BILL OF COMPLAINT

18. The complainants are without adequate remedy in the courts of law and therefore pray that the said defendant, American Malting Company, may be enjoined and restrained from carrying out or proceeding under the said resolution of reduction of stock or the certificate of amendment to charter and that they may be enjoined and restrained from reducing the number of shares of said common stock in the manner and form as provided by said resolution. 10

19. That the said resolution and certificate of amendment of the charter of said corporation be declared to be null and void and set aside and that the said defendant company may be enjoined and restrained from issuing or transferring any further shares of the common or preferred stock of said company, upon the reduced capital stock as set out in the resolution hereinbefore mentioned, or proceeding with or acting under said resolution reducing the capital stock. And that these complainants may have such other and further relief in the premises as the nature of the case may require. 20

That a writ of injunction may issue out of and under the seal of this Court, to be directed to the said American Malting Company, the defendant herein, its officers and agents, strictly enjoining them from issuing or transferring shares of the capital stock of said company, and proceeding with or acting under said resolution, by virtue of which the said capital stock was reduced, and that a writ of subpoena may issue commanding said defendant to answer the bill of complaint, and to abide by such decree as this Court may make in the premises. 30

Solicitors for and of Counsel with
Complainants. 40

BILL OF COMPLAINT

(Copy).

10 The undersigned, citizens of the United States, 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 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."

20 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 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.

30 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 to may be used, and the business incidental thereto.

40 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 officers 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

BILL OF COMPLAINT

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. 10

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.

The Directors shall have power to make and alter the by-laws. 20

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. 30

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. 40

BILL OF COMPLAINT

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.

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.

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, N. Y.	Ten
John J. Treacy,	Jersey City, N. J.	Five
Frederick Dwight,	Brooklyn, N. Y.	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 County of Hudson, in the State of New Jersey, we have hereunto set our hands and seals the twenty-seventh day

BILL OF COMPLAINT

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, }
CITY AND COUNTY OF NEW YORK, } ss. 10

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 satisfied
are the persons named in and who executed the
foregoing certificate, and I having first made known
to them the contents thereof, they did thereupon
severally acknowledge that they signed, sealed and
delivered the same as their voluntary act and deed. 20

SAMUEL F. JARVIS, JR.,
[SEAL] Notary Public, No. 4,
New York County.

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } ss. 30

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 therein written, was, at
the time of taking such proof and acknowledgment,
a Notary Public in and for said county, duly com-
missioned and sworn, and authorized by the laws of 40

BILL OF COMPLAINT

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
 10 acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said
 [SEAL.] Court and County the 27th day of Sept.,
 1897.

HENRY D. PURROY,
 Clerk.

ENDORSED:

Received in the Hudson Co., N. J., Clerk's Office
 Sept 28th, A. D. 1897, and recorded in Clerk's
 20 Record No. on page

JOHN G. FISHER,
 Clerk.

Filed Sep. 28, 1897.

GEO. WURTS,
 Secretary of State.

(Copy.)

RESOLUTION OF BOARD OF DIRECTORS.

30 "*Resolved*, That the capital stock of American Malting Company be reduced from \$30,000,000, consisting of \$15,000,000 of preferred stock divided into 150,000 shares of the par value of \$100 each and \$15,000,000 of common stock divided into 150,000 shares of the par value of \$100 each, to \$15,000,000, consisting of \$9,000,000 of preferred stock divided into 90,000 shares of the par value of \$100 each, and \$6,000,000 of common stock divided into 60,000 shares of the par value of \$100 each.

40 "*Resolved*, That a meeting of the stockholders be called to take action thereon."

BILL OF COMPLAINT

(Copy.)

CERTIFICATE OF DECREASE OF CAPITAL STOCK OF
AMERICAN MALTING COMPANY.

American Malting Company, a corporation of the State of New Jersey, by its President and Secretary, does hereby certify:

10

(1). That the principal office of the company is at 15 Exchange Place, Jersey City, New Jersey, and that the name of the agent in charge thereof and upon whom process against the corporation may be served, is Benjamin Treacy.

(2). That the Board of Directors of said corporations, at a meeting duly convened and held on the 24th day of November, 1915, passed a resolution declaring that the decrease of the capital stock hereinafter set forth is advisable and calling a meeting of the stockholders to take action thereon.

20

(3). That said resolutions of the Board of Directors are as follows:

Resolved, That the capital stock of American Malting Company be reduced from \$30,000,000 consisting of \$15,000,000 of preferred stock divided into 150,000 shares of the par value of \$100 each and \$15,000,000 of common stock divided into 150,000 shares of the par value of \$100 each, to \$15,000,000 consisting of \$9,000,000 of preferred stock divided into 90,000 shares of the par value of \$100 each, and \$6,000,000 of common stock divided into 60,000 shares of the par value of \$100 each.

30

Resolved, That a meeting of the stockholders be called to take action thereon."

(4). That thereafter, and on the 13th day of December, 1915, pursuant to said call of the Board of Directors, a special meeting of the stockholders

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BILL OF COMPLAINT

of the company was duly held at which meeting the holders of 142,665 shares of the preferred stock and 130,878 shares of the common stock of the company issued and outstanding, and having voting powers, being more than two-thirds in interest of each class of stockholders, voted in favor of the decrease of the capital stock of said company as follows:

10 “*Resolved*, That the capital stock of the American Malting Company be reduced from \$30,000,000, consisting of \$15,000,000 of preferred stock divided into 150,000 shares of the par value of \$100 each and \$15,000,000 of common stock divided into 150,000 shares of the par value of \$100 each to \$15,000,000 consisting of \$9,000,000 of preferred stock divided into 90,000 shares of the par value of \$100 dollars each and \$6,000,000 of common stock
20 divided into 60,000 shares of the par value of \$100 each.”

(5). That at said meeting of stockholders the foregoing resolution decreasing the capital stock of said company as therein stated was assented to in writing by the holders of 142,665 shares of the preferred stock of the company, and 130,878 shares of the common stock of the company, which said written assent is hereto annexed.

30 (6). That 144,400 shares of preferred stock and 145,000 shares of common stock of said corporation are issued and outstanding.

IN WITNESS WHEREOF, the said American Malting Company has caused this certificate to be signed by its President and Secretary and its corporate seal to be affixed this 13th day of December, 1915.

[COR. SEAL]

AMERICAN MALTING CO.,

CHARLES A. STADLER, President.

40 W. A. McCARTHY, Secretary.

BILL OF COMPLAINT

STATE OF NEW JERSEY, }
 COUNTY OF HUDSON, } ss.

Be it remembered, that on this 13th day of December, 1915, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared William A. McCarthy, who, being by me duly sworn, does depose and make proof to my satisfaction that he is the Secretary and well knows the corporate seal of American Malting Company, the corporation named in the instrument hereto annexed; that the seal thereto affixed is the proper corporate seal of said corporation and that the same was so affixed thereto and that the said instrument was signed by Charles A. Stadler who was at the date of the execution thereof, President of said corporation, in the presence of the said deponent, as a voluntary act and deed of said corporation, and that thereupon deponent signed the same as a subscribing witness. 10

WILLIAM A. McCARTHY.
 W. A. McCARTHY.

Subscribed and sworn to this }
 13th day of December, 1915. }

JOHN MILLOR,
 Master in Chancery of New Jersey.
 (10c. I. R. Stamp Can.) 20

ASSENT OF STOCKHOLDERS. 30

The undersigned, being holders of 142,666 shares of the preferred stock and 130,878 shares of common stock and being the last two-thirds in interest of each class of the stockholders of American Malting Company having voting powers, having at a meeting regularly called for that purpose voted in favor of the decrease of the capital stock of American Malting Company from \$30,000,000, consisting of \$15,000,000 of preferred stock divided into 40

BILL OF COMPLAINT

150,000 shares of the par value of \$100 each, and \$15,000,000 of common stock divided into 150,000 shares of the par value of \$100 each to \$15,000,000, consisting of \$9,000,000 of preferred stock divided into 90,00 shares of the par value of \$100 each and \$6,000,000 of common stock divided into 60,00 shares of the par value of \$100 each, do now, pursuant to the statute, hereby give our written assent to such decrease of capital stock.

Dated December 13, 1915.

		<i>Shares.</i>	
		<i>Preferred.</i>	<i>Common.</i>
	American Malt Corporation	142,650	130,824
	By Russell H. Tardel, Proxy.		
	Estate of John Banks	15	25
	By Russell H. Tardel, Proxy.		
20	James A. Clerks, by Russell H. Tardel, Proxy		10
	Michael Coleman, by Russell H. Tardel, Proxy		1
	B. A. Franklin, by Russell H. Tardel, Proxy		1
	B. J. Hallahan, by Russell H. Tardel, Proxy		1
	Fred'k A. Rees, by Russell H. Tardel, Proxy		1
	Estate of J. P. Shafer, by Russell H. Tardel, Proxy		10
	Charles Sohngen, by Russell H. Tardel, Proxy		1
	G. A. Schriefer, by Russell H. Tardel, Proxy		1
	H. Montague Vickers, by Russell H. Tardel, Proxy		1
30	Russell H. Tardel		1
	Wilberforce Sully		1

ENDORSED:

“Filed and recorded Dec. 13, 1915.

THOMAS F. MARTIN,
Secretary of State.”

STATE OF NEW JERSEY, }
DEPARTMENT OF STATE. }

I, THOMAS F. MARTIN, Secretary of State of the State of New Jersey, do hereby certify that the

BILL OF COMPLAINT

foregoing is a true copy of certificate decreasing the capital stock of the American Malting Company from \$30,000,000.00 to \$15,000,000.00 and the endorsements thereon as the same is taken from and compared with the original filed in my office on the thirteenth day of December, A. D. 1915, 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 nineteenth day of February, A. D. 1916.

THOMAS F. MARTIN,
Secretary of State.

AMERICAN MALTING COMPANY,
120 Broadway,
New York. 20

*To the holders of preferred and common stock of
American Malting Company:*

You are hereby notified that the capital stock of American Malting Company has been reduced from \$30,000,000, consisting of \$15,000,000 of preferred stock divided into 150,000 shares of the par value of \$100 each; and \$15,000,000 of common stock divided into 150,000 shares of the par value of \$100 each, to \$15,000,000 consisting of \$9,000,000 of preferred stock divided into 90,000 shares of the par value of \$100 each, and \$6,000,000 of common stock divided into 60,000 shares of the par value of \$100 each. 30

Stockholders are hereby requested to present the certificates representing the preferred and common stock held by them to the Guaranty Trust Company of New York, 140 Broadway, New York City, in order that the reduction in the number of shares 40

AFFIDAVITS

of capital stock evidenced thereby may be stamped thereon.

No transfer of stock will be made unless and until each certificate representing the stock to be transferred shall be so stamped.

10 All certificates of stock issued after January 1, 1916, will represent shares of the reduced capital stock.

W. A. McCARTHY,
Secretary.

January 12, 1916.

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

20 MAX MORGENSTERN, being duly sworn according to law, on his oath deposes and says, I am one of the complainants mentioned in the foregoing bill of complaint. I am a stockholder of record in the American Malting Company, the defendant mentioned in the foregoing bill of complaint, to the extent of holding six hundred shares of the common stock of the said American Malting Company. I purchased said stock ten years ago and have been the holder of said stock since that time, both in
30 my brother's name and now in my own name.

The amount of authorized capital stock of the said American Malting Company, prior to December 13th, 1915, was \$30,000,000 made up of 300,000 shares of the par value of \$100 each. The said 300,000 shares of stock were divided into two classes of stock, namely, 150,000 shares of preferred stock and 150,000 shares of common stock. This was in accordance with the charter of said American Malting Company, filed by the incorporators of said company at the time of its incorpora-
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AFFIDAVITS

tion, September 28th, 1897. The two classes of stock, preferred and common, remained in this condition until December 13th, 1915, nearly all of the stock of said company on the last mentioned date being issued and outstanding.

On November 24th, 1915, at a meeting of the Board of Directors of said company, a resolution was passed, a true copy of which is annexed to the bill of complaint attached hereto, wherein it was resolved that the capital stock of the American Malting Company should be reduced from 300,000 shares to 150,000 shares, and that upon the said reduction the said 150,000 shares should be divided into 90,000 shares of preferred stock and 60,000 shares of common stock, and it was ordered that a meeting of stockholders be called to act on said resolution. I received, therefore, a notice of a meeting of stockholders to pass upon the resolution authorizing the reduction of the capital stock of said company by reducing the number of shares, said meeting being called for December 13th, 1915. On December 13th, 1915, I attended the meeting of stockholders held at the registered office of said company, 15 Exchange Place, Jersey City, N. J., representing at that time, by proxy, duly executed and delivered to me, the other complainants herein, namely, Bernhard Kupfer, Israel DeKayser, and Israel DeKayser, as executor of the estate of Simon Steininger; said proxies authorized and directed me to vote in addition to the shares held by me, which at the time of said meeting was 600 shares of the common stock of the said American Malting Company, the following:

Bernhard Kupfer	100 shares	10
Israel DeKayser	100 shares	20
		30
		40

AFFIDAVITS

Israel DeKayser, executor of estate of Simon Steininger . . . 100 shares

in all 900 shares of the common stock of said company

10 The resolution presented at that meeting was as follows:

20 “*Resolved*, That the capital stock of American Malting Company be reduced from \$30,000,000 consisting of \$15,000,000 of preferred stock divided into 150,000 shares of the par value of \$100 each and \$15,000,000 of common stock divided into 150,000 shares of the par value of \$100 each, to \$15,000,000, consisting of \$9,000,000 of preferred stock divided into 90,000 shares of the par value of \$100 each, and \$6,000,000 of common stock divided into 60,000 shares of the par value of \$100 each.”

30 Prior to that time, the preferred stock and the common stock of the American Malting Company was divided into \$15,000,000 of each class. That the proposed resolution intended to establish the preferred stock in a position of \$3,000,000 more than that of the common stock. Under the charter of the company the preferred stock is preferred as to dividends only, namely, seven per cent. per annum, said dividends being cumulative and a charge against the company when earned and until paid, but both classes of stock then shared equally in the assets of the company. The proposed reduction tended to create an unequal share in the assets of the company in favor of the preferred stock. At the meeting of stockholders I stated, on behalf of myself and those stockholders whose proxies I held

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AFFIDAVITS

as heretofore mentioned, that I protested against the enactment of such a resolution, which reduced the stock in unequalled proportions, and accordingly voted against the adoption of the resolution. The said resolution, however, was declared to be carried by a vote of the stockholders of said company, and the certificate of charter was amended accordingly by certificate filed in the office of the Secretary of State filed on December 13th, 1915. At said meeting the American Malt Corporation, which is known as a holding company, voted 142,650 shares of preferred stock and 130,824 shares of common stock in favor of said resolution. At the time of said meeting of stockholders, I had a conversation with Mr. Russell H. Landale, who is one of the directors and counsel for said company, and as counsel conducted the meeting aforesaid, in which he stated to me that the purpose of reducing the stock of the American Malting Company was to place the stock on the same basis as the stock of the American Malt Corporation, and that the issue of stock of the American Malt Corporation was \$9,000,000 preferred and \$6,000,000 common, and that when that was done, and the reduction made, it was intended to dissolve the American Malting Company and transfer its assets, properties and business to the American Malt Corporation as above set forth. Both classes of the stockholders of American Malting Company would have shared equally in the assets of the said company upon dissolution, prior to the passing of the resolution reducing the stock of said company by number of shares. Since the passing of the said resolution reducing the number of shares of the capital stock of said company from 300,000 to 150,000 shares or from \$30,000,000 to \$15,000,000 of authorized capital stock, the rights of the respective stockholders

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AFFIDAVITS

in the assets of the company have been substantially changed, there being now 90,000 shares of preferred stock authorized to be issued as against 60,000 shares of common stock authorized to be issued, so that now upon dissolution, the common stockholders will receive in proportion to their share holdings six fifteenths of the assets of the said company and the preferred stockholders will receive nine-fifteenths, or in other words each share of the preferred stock has been preferred as to assets over the common stock to the extent of three-fifteenths. The assets of the company remained the same, there being no distribution of assets, so that the effect of said resolution deprives the common stockholders of a part of the real value of their stock, without compensation being made, which increases the amount of the preferred stock over the common to the extent of \$3,000,000 without any additional assets going into the company to represent such increase and which prefers the said preferred stock as to assets to the extent of such increase.

Deponent further says, that prior to the adoption of said resolution reducing the stock aforesaid, that the election of officers and other proceedings in the management of said company, so far as controlled by stockholders, was by majority vote, and neither the preferred nor the common stock held a majority but were equally divided. Since the reduction, however, the majority lies solely in the hands of the preferred stockholders, and the control of the company is now placed solely in the hands of the preferred stockholders.

MAX MORGENSTERN.

Sworn and subscribed to)
 before me this)
 40 day of March, 1916.)

AFFIDAVITS

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

ISRAEL DEKAYSER, being duly sworn according to law, on his oath deposes and says, that I am one of the complainants named in the foregoing bill of complaint, that I have read the same and so far as ascertainable, the facts therein set forth are true. That I am the holder of record of one hundred shares of the common stock of the American Malting Company, the defendant named in said bill of complaint, and have been the holder of said stock for at least five years past. That I have executed proxies to Max Morgenstern, authorizing him to attend a meeting of stockholders of the American Malting Company, on December 13, 1915, to vote on a certain resolution regarding the reduction of stock as contemplated by the said resolution, namely, from 300,000 shares to 150,000 preferred and 150,000 common to 150,000 shares of 90,000 preferred and 60,000 common. That I am executor of the last will and testament of Simon Steininger, deceased, and as such executor, was the holder of one hundred shares of the common stock of said company for the estate of said Simon Steininger, and that I duly executed a proxy on behalf of said estate, to the said Max Morgenstern, with the same powers and directions as above set forth.

ISRAEL DEKAYSER.

Sworn to and subscribed }
 before me this }
 day of March, 1916. }

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

BERNHARD KUPFER, being duly sworn according to law, on his oath deposes and says, I am one of

AFFIDAVITS

the complainants mentioned in the foregoing bill of complaint and have read the same and the facts therein set forth, so far as ascertainable to me, are true. That I am the holder of record of one hundred shares of the common stock of the American Malting Company, and for the purpose of having
 10 someone attend a meeting of stockholders called for December 13, 1915, concerning the reduction of the capital stock of the said American Malting Company, I executed a power of attorney to Max Morgenstern, authorizing and directing him to attend said meeting and vote for me on said reduction. I have been a holder of said one hundred shares of common stock of the American Malting Company for five years last past.

BERNHARD KUPFER.

20 Sworn to and subscribed }
 before me this }
 day of March, 1916. }

IN CHANCERY OF NEW JERSEY.

30 BETWEEN
 MAX MORGENSTERN ET AL.,
Complainants,
 and
 AMERICAN MALTING CO.,
Defendant. } *Affidavit.*

STATE OF NEW JERSEY, }
 COUNTY OF HUDSON, } ss.

40 RUSSELL H. LANDALE, being duly sworn on his oath says: I am Director and member of the Executive

AFFIDAVITS

Committee of the American Malting Company, the defendant herein. I am also a Director of the American Malt Corporation. I am the Russell H. Landale who made the affidavit in this matter dated March 24, 1916.

I am familiar with the amount of stock of the American Malting Company issued and outstanding and having voting power. The amount of preferred stock issued outstanding and having voting power is 144,400 shares. The number of shares of the common stock issued as appears by the statement annexed to my affidavit of March 24th, 1916, is 145,000 shares, but of this number 11,118 shares are in the treasury of the company and owned by the company, and have been so owned by the company for more than ten years last past. This treasury stock has no voting power and has not been voted at any time during the last ten years. The preferred stock having voting power has been for the past ten years at all times in excess of the common stock having voting power to the extent of 10,518 shares.

The American Malt Corporation is composed of stockholders formerly of the American Malting Company who exchanged their stock in the Malting Company for stock in the Malt Corporation, and some others who have purchased stock from time to time since.

The American Malt Corporation stockholders' list at the last annual election showed that there are over 1,600 stockholders of that company; the situation as to the holdings of stock is practically the same at the present time, except that since October last about two hundred additional shares of the

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AFFIDAVITS

Malting Company have been exchanged for stock of the Malt Corporation.

RUSSELL H. LANDALE.

Sworn and subscribed to before me this 27th day of March, A. D. 1916.

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IN CHANCERY OF NEW JERSEY.

BETWEEN

MAX MORGENSTERN ET ALS.,
Complainants,

and

AMERICAN MALTING COMPANY,
Defendant.

Affidavit.

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STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.

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WILLIAM B. FRANKLIN, being duly sworn, says: I am the President of the American Malting Company and have been such since January, 1916. I have been a Director of the Company for a period of two years. I am familiar with its financial affairs. The American Malting Company was organized in 1897 with an authorized capital stock of \$30,000,000, consisting of 300,000 shares of the par value of \$100 each, divided in \$15,000,000 preferred and \$15,000,000 common stock. The amount of preferred stock issued was \$14,440,000, and the amount of common stock issued was \$14,500,000. Although dividends at the rate of seven per cent. per annum were paid upon the preferred stock for

AFFIDAVITS

two or three years immediately following its organization by the then Board of Directors, it appears in the case of Appleton vs. The American Malting Company, decided in 1903 by the Court of Errors and Appeals of this State, that said dividends were not earned, but were paid largely out of capital (65 N. J. Eq , page 375). The full preferred dividend has not been earned in any year since organization of the company. There are cumulative preferred dividends due to the holders of that stock at the present time to the amount of about \$14,000,000. The preferred dividend payable annually amounts to \$1,010,800. After the decision in the Appleton case the membership of the Board of Directors was changed and the new board made an attempt to reduce the capital of the company to \$15,000,000, and the method adopted was the formation under the laws of the State of New Jersey of a corporation called the American Malt Corporation, with a capital of \$15,000,000 divided into \$9,000,000 preferred stock and \$6,000,000 common stock. Efforts were made by that board to persuade all the stockholders of the American Malting Company to exchange their holdings for preferred and common stock of the American Malt Corporation on the following basis: Each share of preferred stock of the American Malting Company to receive 62% in preferred stock of the American Malt Corporation, and each share of common stock of the American Malting Company to receive 44% in common stock of the American Malt Corporation. By October, 1913, more than 98½% of the preferred and common stock of the American Malting Company was exchanged under that plan as aforesaid, and subsequently more of the stockholders of the American Malting Company have agreed to exchange their stock so that the entire

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AFFIDAVITS

capital stock of the American Malting Company, with the exception of about 1% is controlled by the American Malt Corporation.

In October, 1913, as is shown by the books of the company, the stock of the company was held as follows:

10	American Malt Corporation:	
	Common stock	\$13,082,400
	Preferred stock	14,265,000
	Treasury stock common	1,100,000
	Other stockholders:	
	Common stock	\$317,600
	Preferred stock	175,000

There were then two companies in existence with a combined issue and outstanding capital of \$43,000,000, whose total assets were the assets of the American Malting Company which do not exceed \$15,000,000. That management then attempted to do away with the excessive capitalization of the American Malting Company by merging the two corporations into the American Malt Corporation, bringing the capitalization down to \$15,000,000, divided on the basis above stated of \$62 for each share of preferred and \$44 for each share of common stock of American Malting Company and leaving the reduced capitalization about \$9,000,000 preferred and \$6,000,000 common stock. On application to the Board of Public Utility Commissioners for approval of the merger it was held by that board and the finding in that respect was sustained by the Court of Errors and Appeals that the assets of the American Malting Company were not even worth \$15,000,000, and therefore the issue of \$15,000,000 of stock of the American Malt Corporation for the \$28,910,000 stock of the American Malting Company would be contrary to the provisions of the

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AFFIDAVITS

statute requiring that stock shall be issued for cash or property at its fair value. In the said merger proceedings the assets of the American Malting Company, including both real estate and personalty, but excluding good will, were valued at \$9,234,000. The present management of the company was elected in September, 1915. It also determined that it would be for the best interest of the company to reduce, if possible, its capitalization to figures approximating the value of its assets. The management of the American Malt Corporation is practically identical with that of the American Malting Company and the Board of Directors of the two companies are identical. 10

In November, 1915, the present management of the American Malting Company determined that this excessive capitalization of some \$43,000,000 should be reduced, and as a preliminary step it was determined to first reduce the capitalization of the American Malting Company to a similar amount to that of the American Malt Corporation, so that later efforts could be made to persuade the stockholders of the American Malt Corporation to exchange their stock back again and eventually do away with the American Malt Corporation, which, as a holding company, is not only useless but expensive. 20 30

A special stockholders meeting of the American Malting Corporation was called on the thirteenth day of December, 1915, and at this meeting there were present in person, or by proxy, 142,665 shares of preferred stock and 131,778 shares of common stock, and the resolution annexed to the bill of complaint was adopted by the affirmative vote of 12,665 shares of preferred stock and 130,878 shares of common stock. 40

AFFIDAVITS

The only opposition to this resolution was made by Mr. Morgenstern, who represented his own stock and that of the other complainants, amounting in all to 900 shares of common stock.

10 Thereafter, and on or about January 1, 1916, a proper certificate having been executed by the officers of the company and filed with the Secretary of State at Trenton, New Jersey, the capital stock of the American Malting Company was reduced to \$9,000,000 preferred stock and \$6,000,000 common stock. The attorneys for Mr. Morgenstern had some conferences with the attorneys of the American Malting Company, and an offer was made to Mr. Morgenstern to the effect that in view of his
20 opposition the American Malting Company had made arrangements with the American Malt Corporation, so that the 900 shares of common stock represented by Mr. Morgenstern would be reduced to 540 shares instead of 360 shares. The offer of 180 shares of the common stock of the American Malting Company would make the complainants' holdings the same as if the common stock were reduced to \$9,900,000, the same as the preferred stock. This offer was refused.

30 The scheme of reduction as proposed seems fair to the Board of Directors and all the other stockholders; by the reduction of the preferred stock from \$14,400,000 to \$9,000,000 the company is relieved of the burden of paying the dividends on five and one-half million dollars, amounting to \$400,000 annually and payable with accumulations before the common stockholders can receive any dividends. In the judgment of the Board, dividends on preferred stock, even under the most careful and prudent management can never be paid at
40 the capitalization of \$14,440,000, and it is con-

AFFIDAVITS

vinced that the common stock under the old capitalization will never receive any dividends. If the plan of reduction of the capital stock is permitted to be carried out, the preferred dividends will amount to approximately \$600,000 per annum instead of \$1,010,800 per annum, thus bringing the prospects of dividend payments closer to the common stock. The reduction of capital stock, as proposed, will save to the company the franchise tax on about \$15,000,000 of capital stock. It will do away with the dual organization of the two corporations and the double-franchise tax effecting a saving in franchise taxes alone of \$5,250 per annum, and will accord with that of the Board of Directors believe to be the public policy of the State of New Jersey with reference to over capitalization. 10

This deponent and the entire management of the company feel that they should not be compelled to carry the capitalization of the company at \$30,000,000, or thereabouts, when he knows that the assets of the company are not worth more than \$15,000,000, necessitating the making of the statutory reports to the State and Federal officers and affidavits by this deponent and other officers, as to the amount of capital. They believe they should be required to make such reports at a closer approximation to the true value of the assets and that they should be permitted to carry the capital stock on their books at the reduced figures. 20 30

WILLIAM B. FRANKLIN.

Subscribed and sworn to this }
 24th day of March, 1916, }
 before me.

JOSEPH H. MCGUINNESS, Jr.,
 Notary Public of
 New Jersey. 40

AFFIDAVITS
IN CHANCERY OF NEW JERSEY.

10	<p>BETWEEN MAX MORGENSTERN ET ALS., <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>AMERICAN MALTING COMPANY, <i>Defendants.</i></p>	} <i>Affidavit.</i>
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STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.

RUSSELL H. LANDALE, being duly sworn, says:

20 I am a member of the Board of Directors of the American Malting Company and have, since the change in management of the company in September, 1915, had charge of the legal affairs of the company.

30 I attended the Special Meeting of Stockholders of the American Malting Company held on December 10, 1915, and as proxy for 130,876 shares of common stock and 142,665 shares of preferred stock, I voted in favor of the resolution reducing the authorized capital stock of the company to \$9,000,000 preferred stock and \$6,000,000 common stock.

40 In reply to the objection raised by Mr. Morgenstern, on behalf of himself and some associates, I explained that it was the intention of the new management of the American Malting Company to reduce the authorized capital stock of the company in order to effect certain savings to the company, and to bring nearer together the capitalization of the company and the actual value of its assets.

AFFIDAVITS

Subsequently, at an interview between Mr. Morgenstern's attorneys and myself, I offered, on behalf of the company, in order to avoid litigation and expedite the plans of the management of the company, to cause to be given to Mr. Morgenstern and his associates a sufficient number of shares of common stock to make his and his associates reduced common stock holdings equal to sixty per cent. of their present amount, thus giving him the same amount as if the common stock had been reduced in the same proportion as the preferred. After laying this proposition before their clients, Mr. Morgenstern's attorneys notified me that Mr. Morgenstern was not interested in the proposition. 10

The plans of the management of the company are to effect reduction of the common stock to \$6,000,000, retiring and cancelling the \$1,100,000 of treasury stock, and by reducing to forty-four per cent. (44%) the remaining \$13,400,000 of common stock, which will result in there being issued and outstanding \$5,896,000 of common stock, showing the distribution of the outstanding stock of the American Malting Company—that holders of 131,569 shares assent to the proposed plan that 11,118 shares are in the treasury of the company and hence have no vote and that of the 2,313 shares remaining, the holders of 900 shares only oppose the plan. 20 30

I have read the allegation in the complaint that it is the intention to dissolve the American Malting Company and the allegation of Max Morgenstern that I stated to him at a meeting that such was the intention of the management of the company. I deny that such is the intention of the management of the company and I deny that I made such statement to Mr. Morgenstern. On the contrary it is the intention of the management if the plan is per- 40

AFFIDAVITS

mitted to eventually dissolve the American Malt Corporation.

RUSSELL H. LANDALE.

Subscribed and sworn to this 24th }
day of March, 1916, before me. }

10 BENJAMIN TREACY,
Attorney at Law of New Jersey.

Stockholders American Malting Company—Common.

Total issued and outstanding \$145,000

Assenting to plan:

American Malt Corporation.....	\$130,855
J. B. Clews	10
S. K. Nestor (exchanging)	9
Charles J. Wojahn "	100
20 John Bauer.	25
L. Z. Lester.	500
Richard H. Reid.	70

\$131,569

Treasury Stock (non-voting)

In name of H. Eggerking,
treasurer. \$11,000

In names of Chas. Pfaff,
H. H. Short and others 118 \$11,118 \$142,687

30	Balance	2,313
	Complainant represents ..	900

\$1,413

ORDER

IN CHANCERY OF NEW JERSEY.

 BETWEEN

 MAX MORGENSTERN ET AL.,
Complainant,
and

 AMERICAN MALTING COMPANY,
Defendant.

Order.

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The order to show cause why an injunction should not issue, as prayed for in the bill of complaint, made herein on the 6th day of March, 1916, coming on to be heard in the presence of Runyon & Autenrieth, solicitors and of counsel for the complainants, and Treacy & Milton, solicitors and of counsel for the defendant, and the matter having been heard on affidavits on the return of said order to show cause, and the Court having heard the argument of counsel,

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And it appearing that on December 13th, 1915, the defendant, by a resolution passed at a meeting of the stockholders held on that date, and a certificate filed in the office of the Secretary of State of New Jersey, reduced its capital stock from \$15,000,000, authorized preferred stock, to \$9,000,000, authorized preferred stock, and its common stock from \$15,000,000, authorized common stock, to \$6,000,000, authorized common stock, thus reducing the capital stock of said defendant from \$30,000,000, authorized stock, to \$15,000,000, authorized stock, and it appearing that the complainant, Max Morgenstern, is the holder of 600 shares of common stock, the complainant Bernhard Kupfer,

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ORDER

100 shares of common stock; the complainant, Israel DeKayser, 100 shares of common stock, and the complainant, Israel DeKayser, as executor of the estate of Simon Steininger, 100 shares of common stock, and it appearing that under said resolution and certificate of reduction of capital stock the number of shares which the said Morgenstern will receive is 264 shares, and the other complainants will receive 44 shares each, and it appearing that if the common stock were reduced in the same proportion as the preferred stock, the said Morgenstern would receive 96 shares in addition to said 264 shares, and each of the other complainants would receive 16 shares in addition to the 44 shares which he will receive under said plan of reduction, and it appearing that the defendant offers to the complainants the said additional shares, which will make their holdings the same as if the common stock were reduced to the same proportion as the preferred stock, and it further appearing that the complainants, in addition to the above offer of the defendant, moved that the defendant pay to the complainants the taxed costs and expenses of the complainants, and it further appearing that about ninety-nine per cent. of the stock of said company consent to said corporate action reducing the same,

30 It is, on this 25th day of May, 1916, ordered that—

1. In the event that the complainants shall surrender the certificates of stock held by them respectively to the defendant for the purpose of having said stock reduced in accordance with the resolution and certificate of reduction of capital stock above set forth, within fifteen days from the date hereof, and the defendant shall within two days

ORDER

after such surrender of stock by complainants issue and deliver to the complainants respectively the additional shares of common stock offered by said defendant, together with a bond conditioned to save harmless the complainants from any and all claims, demands or damages by reason of any assessment on the said additional shares of the common capital stock of the defendant, to be delivered as aforesaid, by reason of the non-payment in full of the par value, according to law to defendant, the said order to show cause be discharged and the motion of the complainants for an injunction be denied. 10

2. In the event that the complainants shall not deliver to defendant the certificates of stock held by them for the purpose of having said stock reduced in accordance with the said resolution and certificate of reduction of capital stock within fifteen days that said order to show cause be discharged and the motion of complainants for an injunction be denied. 20

3. In the event that the defendant shall fail to deliver to said complainants the additional shares of common stock above set forth, within two days after the surrender by complainants of their stock for reduction in accordance with said resolution and certificate of reduction of capital stock, together with the bond conditioned as above set forth, namely, 96 shares to Max Morgenstern and 16 shares each to the other complainants, then the said order to show cause shall become absolute and an injunction shall issue in accordance with the prayer of the bill of complaint. 30

It is further ordered, that the costs of this motion abide the result of the suit.

EDWIN ROBERT WALKER, C.
EUGENE STEVENSON, V. C. 40

NOTICE OF APPEAL
IN CHANCERY OF NEW JERSEY.

10	<p style="margin: 0;">BETWEEN MAX MORGANSTERN ET AL., <i>Complainants.</i></p> <p style="text-align: center; margin: 5px 0;"><i>and</i></p> <p style="margin: 0;">AMERICAN MALTING COMPANY, <i>Defendant.</i></p>	<p style="font-size: 4em; line-height: 1;">}</p> <p style="margin: 0;"><i>Notice of Appeal.</i></p>
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20 The complainants hereby appeal from the order made in the above entitled cause, on the twenty-fifth day of May, 1916, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated June 1st, 1916.

RUNYON & AUTENRIETH,
Solicitors for and of Counsel
with Complainants.

I conceive there is good cause for appeal in the above stated cause.

JOS. A. AUTENRIETH,
Of Counsel with Complainants.

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PETITION OF APPEAL
IN CHANCERY OF NEW JERSEY.

BETWEEN

MAX MORGANSTERN ET AL.,
Complainants,
and

AMERICAN MALTING COMPANY,
Defendant.

*Petition of
Appeal.*

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*To the Honorable Judges of the Court of Errors and
Appeals, in the last resort in all causes:*

The petition of Max Morganstern, Bernhard
Kupfer and Israel DeKayser, in dividually, and
Israel DeKayser, executor of the last will and
testament of Simon Steininger, deceased, the appel-
lants in the above stated cause, respectfully shows:

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1. That your petitioners find themselves aggrieved
by an order made in Court of Chancery, by his
Honor Edwin Robert Walker, Chancellor of State
of New Jersey, bearing date the twenty-fifth day
of May, 1916, wherein your petitioners were com-
plainants and the said American Malting Company
was defendant, in this respect, to wit, that the said
order adjudges:

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1. In the event that complainants shall surren-
der the certificates of stock held by them
respectively to the defendant for the pur-
pose of having said stock reduced in ac-
cordance with the resolution and certi-
ficate of reduction of capital stock above
set forth, within fifteen days from the date
hereof, and the defendant shall. within

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PÉTITION OF APPEAL

two days after such surrender of stock by complainants, issue and deliver to the complainants respectively the additional shares of common stock offered by said defendant together with a bond conditioned to save harmless the complainants from any and all claims, demands or damages by reason of any assessment on the said additional shares of the common stock of the defendant to be delivered as aforesaid by reasons of the non-payment in full of the parvalue, according to law to defendant, the said order to show cause be discharged and the motion of the complainants for an injunction be denied.

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2. In the event that the complainants shall not deliver to defendant the certificates of stock held by them for the purpose of having said stock reduced in accordance with the said resolution and certificate of reduction of capital stock within fifteen days, that said order to show cause be discharged and the motion of complainants for an injunction be denied.

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3. In the event that the defendant shall fail to deliver to said complainants the additional shares of common stock above set forth within two days after the surrender by complainants of their stock for reduction, in accordance with said resolution and certificate of reduction of capital stock, together with the bond condition as above set forth, namely, 96 shares to Max Morgenstern and 16 shares each to the other complainants, then the

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PETITION OF APPEAL

said order to show cause shall become absolute and an injunction shall issue in accordance with the prayer of the bill of complaint,

a copy of said order being attached hereto and made a part of this appeal. And your petitioners humbly appeal from said order of the Chancellor as aforesaid upon the ground that the same is erroneous in law and that it is inequitable. 10

2. That the said order denies to the complainants the injunction prayed for in the bill of complaint filed herein, except upon terms which are inequitable and improper in law.

3. Because said order requires the complainants to accept additional shares of stock of the defendant company, and upon their refusal to accept the same the rule to show cause heretofore entered in this cause why an injunction should not issue shall be discharged. 20

4. Because said order denied to the complainants the restraining order or denied the writ of injunction to the complainants upon terms that were inequitable.

5. Because the said order denied to the complainants the right to costs and expenses of the litigation up to the time that the said defendant offered in open Court, the additional shares of stock as recited in said order. 30

Your petitioners therefore pray that the said order of the said Chancellor may be in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

RUNYON & AUTENREITH,
Solicitors for and of Counsl with Appellant. 40

ORDER

IN CHANCERY OF NEW JERSEY.

BETWEEN

MAX MORGENSTERN ET AL.,
Complainants,

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*and*AMERICAN MALTING COMPANY,
*Defendant**Order.*

20 The order to show cause why an injunction should not issue as prayed for in the bill of complaint made herein on the sixth day of March, 1916, coming on to be heard in the presence of Runyon & Autenrieth, solicitors and of counsel for the complainants, and Treacy & Milton, solicitors and of counsel for the defendant, and the matter having been heard on affidavits on the return of said order to show cause and the Court having heard the argument of counsel,

30 And it appearing that on December 13, 1915, the defendant, by a resolution passed at a meeting of the stockholders held on that date, and a certificate filed in the office of the Secretary of State of New Jersey, reduced its capital stock from \$15,000,000 authorized preferred stock to \$9,000,000 authorized preferred stock and its common stock from \$15,000,000 authorized common stock to \$6,000,000 authorized common stock, thus reducing the capital stock of said defendant from \$30,000,000 authorized stock to \$15,000,000 authorized stock; and it appearing that the complainant, Max Morgenstern, is the holder of 600 shares of common stock, the complainant, Bernhard Kupfer, 100 shares of common stock, the complainant, Israel DeKayser, 100

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ORDER

shares of common stock, and the complainant, Israel DeKayser, as executor of the estate of Simon Steinger, 100 shares of common stock; and it appearing that under said resolution and certificate of reduction of capital stock the number of shares which the said Morgenstern will receive is 264 shares and the other complainants will receive 44 shares each, and it appearing that if the common stock were reduced in the same proportion as the preferred stock the said Morgenstern would receive 96 shares in addition to said 264 shares and each of the other complainants would receive 16 shares in addition to the 44 shares which he will receive under said plan of reduction, and it appearing that the defendant offers to the complainants the said additional shares which will make their holdings the same as if the common stock were reduced in the same proportion as the preferred stock, and it further appearing that the complainants in addition to the above offer of the defendant moved that the defendant pay to the complainants the taxed costs and expenses of the complainants, and it further appearing that about ninety-nine per cent. of the stock of said company consent to said corporate action, reducing the same.

It is, on this 25th day of May, 1916, ordered, that

1. In the event that the complainants shall surrender the certificates of stock held by them respectively to the defendant, for the purpose of having said stock reduced in accordance with the resolution and certificate of reduction of capital stock above set forth, within fifteen days from the date hereof, and the defendant shall, within two days after such surrender of stock by complainants, issue and deliver to the complainants respectively the additional shares of common stock offered by said defendant,

ORDER

together with a bond conditioned to save harmless the complainants from any and all claims, demands or damages by reason of any assessment on the said additional shares of the common capital stock of the defendant, to be delivered as aforesaid by reason of the non-payment in full of the par value,
10 according to law to defendant the said order to show cause be discharged and the motion of the complainants for an injunction be denied.

2. In the event that the complainants shall not deliver to defendant the certificates of stock held by them for the purpose of having said stock reduced, in accordance with the said resolution and certificate of reduction of capital stock, within fifteen days, that said order to show cause be discharged and the
20 motion of complainants for an injunction be denied.

3. In the event that the defendant shall fail to deliver to said complainants the additional shares of common stock above set forth within two days after the surrender by complainants of their stock for reduction in accordance with said resolution and certificate of reduction of capital stock, together with the bond conditioned as above set forth, namely, 96 shares to Max Morgenstern and 16 shares each to the other complainants, then the said order
30 to show cause shall become absolute and an injunction shall issue in accordance with the prayer of the bill of complaint.

It is further ordered, that the costs of this motion abide the result of the suit.

Respectfully advised,
EUGENE STEVENSON,
V. C.

