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TESTIMONY.

For Complainant.

For Defendant.

EXHIBITS.

BILL OF COMPLAINT.

Filed April 3, 1926.

In Chancery of New Jersey

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

Complainant, R. H. Perry & Co., a corporation created by and existing under the General Corporation Act of the State of Delaware, having its principal office and place of business at 442 Grand street, Jersey City, New Jersey, complaining against Burns Brothers, body corporate, says:

1. On and for sometime prior to March 1, 1920, defendant, Burns Brothers, a New Jersey corporation, was engaged in the business of retail dealers in coal in the City of Jersey City and adjacent territory, and also in the City of New York and vicinity, maintaining a number of depots and yards for the receiving, storage and distribution of coal at different points within the territory served.

The principal business of said Burns Brothers was located in the City of New York and the executive and principal office of said Burns Brothers was and still is located at 50 Church street, in the City of New York.

Said Burns Brothers received large quantities of the coal sold by it over the line of the Central Railroad of New Jersey, at yards located in the City of Jersey City, one of said yards being used exclusively for deliveries by truck to customers in the City of New York, and two of said yards, located at the foot of Jersey avenue, and

also at Communipaw avenue near Garfield avenue, Jersey City, being used for the delivery of coal in the City of Jersey City and vicinity.

2. On January 16, 1920, Ralph H. Perry, having entered into certain arrangements for acquiring the assets and good will of the coal business theretofore carried on by E. L. Young Company in the Cities of Jersey City and New York, and in anticipation of the organization of a new corporation for the purpose of conducting and continuing the retail coal business in the City of Jersey City and vicinity, entered into a contract in writing with Burns Brothers, dated January 16, 1920, said Perry acting for the benefit of such new corporation to be organized, wherein and whereby said Burns Brothers did agree to sell to the new corporation, when organized, and to transfer by proper instruments of transfer, all of its interest in lands, leaseholds, office furniture and fixtures, tools and parts and other fixed assets, owned or operated by it at its yards located on Jersey avenue and Communipaw avenue near Garfield avenue, Jersey City, and used in connection with its Jersey City business; also, all of its Jersey City customers' books of account and all other books and records relating to the two Jersey City yards last mentioned; and, also, to sell all the good will of the coal business then conducted by it in the City of Jersey City and vicinity, specified to include therein all sales where ultimate delivery is made to consumers in Jersey City or adjacent territory (not including New York); and said Burns Brothers did further expressly agree "not to engage directly or indirectly in the business of buying, selling or delivering coal for consumption within the limits of the City of Jersey City and the territory

adjacent thereto, which may be conveniently served by wagon deliveries from Jersey City, for a period of twenty years from the time of passing title hereunder."

Said contract did further provide that in consideration thereof the new company should issue to said Burns Brothers certain specified shares of its common and preferred stock, upon a basis of computation therein specified.

A true copy of said contract is hereto annexed, marked Schedule "A," and made part hereof.

In performance of said agreement, said Ralph H. Perry did cause the complainant to be incorporated under the laws of the State of Delaware, by certificate of incorporation dated January 20, 1920, duly filed in the office of the Secretary of State of Delaware, January 24, 1920, with an authorized capital stock of 10,000 shares of preferred stock, of the par value of $100 each, and 40,000 shares of common stock, without nominal or par value, and said corporation was thereafter organized for business by the adoption of by-laws and the election of directors and officers on January 30, 1920.

At a meeting of the directors of complainant duly held on January 30, 1920, attended by all directors, it was unanimously resolved that the aforesaid contract be accepted and that all of the obligations thereof be assumed by this complainant, and that complainant in all respects be bound by said contract, as though complainant corporation were originally a party thereto, and that the officers of complainant corporation be instructed to execute and deliver from time to time such further instruments and documents as may be necessary or proper to carry said contract into full effect, and that the corporation issue its

capital stock, common and preferred, from time to time in compliance with the provisions of said contract.

3. Thereafter, on March 1, 1920, said contract was performed by both parties thereto (except as to such matters as required continuing performance), and said defendant Burns Brothers, by instruments in writing, did sell, assign, transfer and set over unto R. H. Perry & Co. the assets and good will of its aforesaid business in Jersey City, and said R. H. Perry & Co., did issue to the defendant its capital stock, common and preferred, in the amounts then computed as payable under said contract, said Burns Brothers receiving 688 shares of preferred stock and 3,001 shares of common stock.

4. Complainant did then and there upon the aforesaid consideration take over the business assets and good will of Burns Brothers pertaining to its Jersey City business, and said Burns Brothers did discontinue the same, and complainant has ever since continued said business and has invested large sums of money therein and has actively conducted the same, and said defendant Burns Brothers has heretofore kept and performed its covenant not to engage directly or indirectly in the business of buying, selling or delivering coal for consumption within the limits of the City of Jersey City and the territory adjacent thereto which may be conveniently served by wagon deliveries from Jersey City, except as hereinafter stated.

5. Under date of March 31, 1926, defendant, in violation of its aforesaid covenant, gave public notice of its intention to resume said business of buying, selling and delivering coal for consumption within the limits of the City of Jersey City, by a public advertisement appearing in the Jersey Journal under said date, of which advertisement a copy is hereto annexed, marked Schedule "B," and made part hereof.

Said defendant has followed up said notice by a further advertisement appearing in said Jersey Journal on April 2, 1926, announcing that it will receive orders for sales of coal in said city beginning Monday, April 5, 1926, a copy of which advertisement is hereto annexed, marked Schedule "C" and made part hereof.

Complainant alleges that so far as it has knowledge or information, defendant has not as yet actually engaged in any such business, but intends to begin the transaction thereof on the date specified, viz: April 5, 1926.

6. Complainant alleges that the acts threatened by the defendant under said advertisement, and confirmed by information given by the President of the defendant, Burns Brothers, are in violation of defendant's covenant as aforesaid, and, if permitted, will work irreparable injury to this complainant.

7. Complainant being without remedy at law, therefore, prays for relief as follows:

1. That defendant, Burns Brothers, body corporate, make answer to this bill of complaint, but without oath, as fully as though the several allegations thereof were here repeated.

2. That said defendant, its officers, agents and servants, be enjoined and restrained from engaging, directly or indirectly, in the business of buying, selling or delivering coal for consumption within the limits of the City of Jersey City and the territory adjacent thereto which may be

conveniently served by wagon deliveries from Jersey City, until March 1, 1940.

3. That complainant may have such other and further relief as may be equitable and just.

4. That process of subpoena to answer issue against the said defendant according to the course and practice of this Court.

McDERMOTT, ENRIGHT & CARPENTER,
Solicitors for and of Counsel
with Complainant.

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

RALPH H. PERRY, being duly sworn according to law, on his oath says that he is President of R. H. Perry & Co., the within-named complainant, and is the individual named in the contract annexed to said bill of complaint and that he is personally familiar with the facts therein stated; that he has carefully read the foregoing bill of complaint and that the matters and things therein set forth are true.

The copy of contract, Schedule A, annexed to said bill of complaint is a true copy of the original contract between the respective parties thereto, to deponent's knowledge.

That deponent is familiar with all of the proceedings incident to the organization of the complainant corporation, and that the statements made in said bill respecting the assumption of the obligations of said contract by the corporation and the consummation of said contract by delivery of instruments of transfer and issue of stock, are true, and that said contract has been fully performed by deponent and said complainant, and that the defendant has heretofore observed the covenant therein contained except for the public announcements which deponent has clipped from the Jersey Journal issues of March 31st and April 2nd, respectively.

Deponent further says that if the defendant is permitted to resume the transaction of business in the City of Jersey City, in accordance with said public notices, it will seriously interfere with the business of the complainant corporation and will, of necessity, cause to the complainant great and irreparable injury.

RALPH H. PERRY.

Sworn and subscribed before me this
third day of April, A. D. 1926.

HENRY A. OETJEN,
Notary Public of New Jersey.

SCHEDULE A.

O. K.
M. F. B.

Memorandum of Agreement made this 16th day of January 1920, between BURNS BROTHERS, a corporation of the State of New Jersey, hereafter referred to as "Seller," party of the First Part; RALPH H. PERRY, acting for the benefit of a New Corporation to be hereafter organized, party of the Second Part; and RALPH H. PERRY, acting as Manager of an Underwriting Syndicate, party of the Third Part;

Whereas, Ralph H. Perry and certain associates are about to organize a corporation under the laws of the State of Delaware, or such other State as counsel may advise, for the purpose of carrying on the business of buying and selling

coal in the City of Jersey City, N. J., and adjacent territory; and

Whereas, Burns Brothers is engaged in such business in the City of Jersey City as well as in the City of New York and adjacent territory, operating two yards and pockets for handling its Jersey City business located at the foot of Jersey Avenue and also on Communipaw Avenue near Garfield Avenue, Jersey City, respectively; and also operating a certain other yard and pockets located on Johnston Avenue, Jersey City, within the terminal yards of the Central Railroad of New Jersey, which latter yard and pockets are now used exclusively for handling New York business of Burns Brothers and are not now used nor adaptable for use in handling Jersey City business; and

O. K.
M. F. B.

Whereas, Burns Brothers does not now operate or control any other yard or pockets in the City of Jersey City, or in territory so nearly adjacent as to permit wagon deliveries to customers in the City of Jersey City (except for its stock control in William Horre & Company of Hoboken, (N. J.) and does not contemplate the operation, control or interest in any such additional yards or pockets; and

Whereas, it is expected that such New Corporation will be organized with an authorized capital stock of 10,000 shares of 8% preferred stock of the par value of $1,000,000 and 40,000 shares of Common stock of no par value, of which authorized stock, however, the amount of preferred stock actually issued will not exceed at par the fair value of the fixed assets of the Corporation (such as real estate, trestles, horses, wagons and trucks) plus the amount of cash

working capital with which the Corporation begins business; and the number of shares of common stock without par value, actually issued, will not exceed five and one-third shares for each $100 of such working capital, and such additional amount as equivalent to three shares for each one hundred tons of estimated average annual tonnage, as hereafter defined; and

Whereas, the New Corporation expects to acquire the business, property and good will of E. L. Young Company, which business as now conducted includes sales and deliveries both in the City of Jersey City and the City of New York; and

Whereas, it is desirable that the New Company confine its operations, as far as practicable, to the City of Jersey City; and

Whereas, said Perry has organized a Syndicate for the purpose of underwriting the obligations of divers parties to contribute to the working capital of the New Company and is the Manager thereof, duly authorized to bind the several members of said Syndicate in the matters hereinafter specified, and which Underwriters' obligations said Perry does hereby personally guarantee;

NOW, THEREFORE, IT IS AGREED BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. This agreement is understood to be for the benefit of the New Corporation when organized as fully as though a party hereto, and said New Corporation when organized will be entitled to receive all benefits hereunder and will assume all obligations hereof.

O. K.
M. F. B.
Rider "A"

It is expressly understood that all of the terms, covenants and conditions of this agreement are to be assumed by the New Corporation, and that in the event of the New Corporation failing or refusing to perform or carry out any of said terms, covenants and conditions, the Seller, Burns Bros., will thereby be relieved from any and all obligation whatever under this contract.

It is mutually understood that Ralph H. Perry assumes no personal obligation except to use his best endeavors to bring about the organization of such Corporation and if and when organized, said Perry undertakes to have such New Corporation assume the obligations hereof.

It is further mutually understood and agreed that in consideration of this agreement, said Perry will proceed to render services and advance moneys in the promotion of such New Corporation and the organization and financing of the Underwriters Syndicate herein referred to.

2. Seller agrees:

(a) To sell to the New Corporation and transfer by proper instruments of transfer all its interest in lands, leaseholds, trestles, office furniture and fixtures, tools, and parts, and other fixed assets (as hereafter defined), owned or operated by it at its two aforesaid yards located on Jersey avenue and Communipaw avenue near Garfield avenue and used in connection with its Jersey City business; also all its Jersey City customers' books of account and all other books and records relating to the two Jersey City yards last aforesaid and Seller's Jersey City Business.

In connection with the assignment of the leaseholds or other contracts carrying the right to

OK.M.F.B.

possess and operate the two yards last aforesaid, and pockets, Burns Brothers, will use its best efforts to secure whatever new leases or other documents are necessary to be executed by Central Railroad of New Jersey to evidence the latter's assent thereto.

(b) To sell all the good will of the coal business now conducted by it in the City of Jersey City and vicinity, meaning to include therein all sales where ultimate delivery is made to consumer in Jersey City or adjacent territory (not including New York).

3. Seller and Underwriters together agree to pay to the New Company a total sum equivalent to forty-five cents per short ton of Seller's average annual tonnage, as hereinafter defined, in manner following:

(a) Underwriters will pay absolutely and in all events one-third of said amount.

(b) Seller will pay at its option the remaining two-thirds of said amount, or such part thereof as it may elect.

(c) Underwriters will pay the balance thereof which Seller does not elect to pay.

4. The New Company will issue its capital stock for Seller's account, as follows:

(a) To Seller, preferred stock equal at part to the appraised value of Seller's fixed assets which are taken over hereunder.

(b) To Seller, preferred stock equal at part to all moneys paid by Seller to the New Company under paragraph 3-b.

(c) To Underwriters, preferred stock equal at part to the amount of money paid by Underwriters under paragraph 3-a and 3-c.

(d) To Underwriters, 8 shares of common stock for each $100 paid by Underwriters to the New Company under paragraph 3-a.

(e) To Underwriters, 4 shares of common stock for each $100 of money paid by Underwriters to the New Company under paragraph 3-c.

(f) To Seller, 4 shares of common stock for each $100 of money paid by Seller to New Company under paragraph 3-b.

(g) To Seller, 3 shares of common stock for each one hundred short tons of Seller's average annual tonnage.

5. For the purpose of facilitating settlements under this agreement, it is mutually agreed that the "fixed assets" of the Seller shall include all real estate, trestles, stables and other business buildings owned and used in connection with Seller's Jersey City business; likewise, all delivery equipment, including horses, harness, wagons, trucks, automobiles, tools and parts and all yard equipment of every sort likewise owned and used in connection with Seller's Jersey City business.

The value of such fixed assets shall be determined by an inventory and appraisal by an appraiser to be mutually agreed upon, at their fair money value, having regard to depreciation and obsolescence.

In case either party is not satisfied with such appraisal, it may call for a new appraisal which shall be made by the original appraiser and two other appraisers selected by the Seller and the New Company, respectively.

Although Seller is to transfer all leasehold interest in or other right to occupy the business

properties occupied by or operated by it, as aforesaid, no appraisal of the value thereof shall be made, it being deemed that the value of such leasehold or occupation rights is part of Seller's good will.

The "average annual tonnage" of Seller shall be determined by averaging all sales and deliveries from the two yards aforesaid, to consumers located in the City of Jersey City, as shown by Seller's books, for a period of 3 years, ending October 31, 1919;

And the same shall be computed and certified by an auditor to be mutually agreed upon.

6. For the purpose of facilitating the transfer of Seller's good will to the New Company, it is agreed: (a) The New Company shall have the right to retain Seller's name upon the office structures, wagons and trucks transferred hereunder, as at present, for a period of at least six months, the New Company using in connection therewith its own name.

The new company agrees that Burns Bros. shall have the right to use the name of E. L. Young Co. insofar as the new company's contract will permit.

(b) The New Company shall take over all customer's accounts of the Seller and collect the same in its name or in the name of Seller, as it may deem best, but for Seller's account.

All such accounts may be billed in the name of Seller (New Company Yards) and the New Company will undertake to use its best endeavors to collect the same, remitting or crediting the net amount collected to Seller without any charge for its own services.

(c) All coal on hand belonging to Seller at the time of passing title shall be inventoried at time of passing title, or its quantity ascertained by actual weight at the time of subsequent sale thereof to customers (whichever method may be mutually agreed upon), and shall be accounted for in either case by the New Company to the Seller as follows: Anthracite at the wholesale company price prevailing for such coal delivered to pockets at the time of passing title; bituminous in yards and all coal in transit at the mine price, plus freight.

(d) All supplies belonging to Seller pertaining to its business not included under the classification of "fixed assets," shall be taken over by the New Company and accounted for in cash by it at the appraised value thereof, as determined by aforesaid appraisers.

7. New Company will account to Seller for all collections of outstanding accounts made pursuant to paragraph 6-b hereof, at the end of each month and will pay to Seller for all coal and supplies taken over under paragraphs 6-c and 6-d within thirty days after the ascertainment of the value thereof, as aforesaid.

O. K.
M. F. B.

Pending the ascertainment of the amount payable to the New Company to Seller under paragraphs 6-b, 6-c, and 6-d, Seller may defer payment of its obligations to contribute to working capital under exercise of option specified in paragraph 3, to the extent of the probable amount due from the New Company as the same may be tentatively settled by mutual agreement. In case of such deferred payment, New Company shall apply all moneys payable to Seller as received, to Seller's obligation under paragraph 3.

8. The New Company shall indemnify Seller against all claims and demands which may be made against it in any way growing out of the use of Seller's name by the New Company after the date of passing title hereunder, and will defend at its own expense all suits which may be brought against Seller to enforce any such claims and demands and will pay the amount of any such liability upon recovery of final judgment in case suit is brought to enforce the same.

9. New Company agrees to sell, assign, transfer and set over to "Seller" Burns Brothers:

(a) The good will of the New York business of E. L. Young Company to be acquired by the New Company under a certain contract with E. L. Young Company.

(b) All delivery equipment now maintained by E. L. Young Company for the purpose of transacting such New York business and which may be acquired by New Company under the aforesaid agreement.

10. Seller, Burns Brothers, will pay to New Company for such good will and equipment as follows:

(a) A sum of money equal to 55 cents per short ton of average annual tonnage of such New York business.

(b) The appraised value of such delivery equipment to be determined by appraisal, as provided in paragraph 5.

The identity of such delivery equipment as is incidental to such New York business of E. L. Young Company shall be determined by George Hardcastle, at the time of its transfer.

The "average annual tonnage" of such New York business shall be determined by averaging

all sales and deliveries by the E. L. Young Company, as shown by its books, to customers located in the City of New York, during a period of 3 years, ending October 31, 1919, and shall be computed and certified by the same auditor as provided for under paragraph 5.

11. "Seller" Burns Brothers further agrees to purchase all coal of following steam sizes, which may be delivered by Lehigh Valley Coal Sales Company at tidewater in the free lighterage district of New York Harbor, for account of the New Company, pursuant to a contract between said Sales Company and Ralph H. Perry, dated December , 1919 (to which contract reference is hereby made) not exceeding, however, approximately 70,000 long tons per year, in the proportion of 10,000 tons of pea; 10,000 tons of No. 2 Buckwheat and 50,000 tons of No. 1 Buckwheat; deliveries to be made in approximately equal monthly quantities.

It is agreed that such tidewater coal may be shipped by the Coal Sales Company to and in the name of the New Company, care Burns Brothers, New York, and that such coal will be at the expense and risk of Burns Brothers from the time that it ceases to be at the expense and risk of said Coal Sales Company and that the New Company will be relieved of all expense and risk with respect thereto.

Such coal will be billed to Burns Brothers at the same price at which it is billed to the New Company by the Coal Sales Company and Burns Brothers agrees to pay the New Company therefor on terms of thirty days net.

O. K.
M. F. B.

12. It is mutually agreed that the New Company will have the right to employ such of the old employees of Burns Brothers in its two Jersey City yards sold hereunder as it may desire without interference from Burns Brothers, in order to better accomplish the transfer of the good will of the Jersey City business of Burns Brothers.

13. Seller Burns Brothers agrees not to engage, directly or indirectly, in the business of buying, selling or delivering coal for consumption within the limits of the City of Jersey City and the territory adjacent thereto which may be conveniently served by wagon deliveries from Jersey City, for a period of twenty years from the time of passing title hereunder, and further agrees to procure like contracts to be approved by counsel for the New Company, binding for a period of ten years, the following individuals:

This paragraph does not affect the interest of Burns Brothers in William Horre & Company.

14. Title shall be passed and all exchanges and payments herein provided for shall be made within three months from the date hereof, at a time and place to be designated by said Perry or said New Company.

Rider "B"
O. K.
M. F. B.

15. It is mutually agreed that the new Company, its successors or assigns, will immediately upon its organization, execute an agreement not to engage directly or indirectly in the business of buying, selling, or delivering coal for consumption within the limits of the City of New York, said agreement to be identical in all other respects with the covenant of Burns Bros. contained in Paragraph 13 above, with the exception that the New Company shall have the right to sell coal to wagons coming from N. Y. City or vicinity.

O. K.
M. F. B.

16. It is expressly understood and agreed that none of the terms, covenants or conditions of this agreement shall, in any way, bind or affect Wm. Horre & Co. or the interest of Burns Bros. therein.

IN WITNESS WHEREOF, the parties have caused these presents to be executed the day and year above written.

BURNS BROTHERS

By M. F. Burns
President

(SEAL)

Attest:

Jos. V. Chambers,
Secretary.

Ralph H. Perry (L. S.)
acting for the benefit of
a New Corporation &c.

Witnesses:

Ralph H. Perry (L. S.)
acting as Manager of an
Underwriting Syndicate.

ANSWER.

Filed July 13, 1926.

IN CHANCERY OF NEW JERSEY.

Between

R. H. Perry & Co.,
Complainant,

and

Burns Brothers.
Defendant.

On Bill, &c.
Answer.

The answer of Burns Brothers, a corporation of the State of New Jersey, to the bill of complaint of R. H. Perry & Co.

This defendant to so much of said bill as it is advised is material for it to make answer unto, answering says:

1. It admits that for sometime prior to March 1, 1920, the defendant was engaged in the business of retail dealers in coal in the City of Jersey City and throughout the County of Hudson in the State of New Jersey, and also in the City of New York and its vicinity, maintaining a number of depots and yards for the receiving, storage and distribution of coal at different points within the territory served; that its principal office and a large part of its business was located in the City of New York, where the principal office still is. It further admits that the defendant received large quantities of the coal sold by it, over the line of the Central Railroad of New Jersey, at yards located in the City of Jersey City, but it denies that one of said yards was

used exclusively for deliveries by truck to customers in the City of New York.

2. It admits that on or about the 16th of January, 1920, it entered into a contract in writing with Ralph H. Perry, but it specifically refers to the original of said agreement, or a copy thereof, for an ascertainment of its provisions. It believes a true copy of the said contract, or agreement, is annexed to the said bill of complaint, but for greater certainty refers to the original thereof. It is ignorant of the other facts set out in the second paragraph of the bill of complaint, and calls upon the complainant to prove the same.

3. This defendant calls upon the complainant to prove the instruments in writing by which the defendant did, as is in the third paragraph of the bill alleged, sell, assign, transfer and set over unto R. H. Perry & Co. the assets and good will of its business in Jersey City. It admits that said R. H. Perry & Co. did issue to the defendant its capital stock, common and preferred, in the amounts in the third paragraph of said bill stated.

4. It believes it to be true that the complainant, as successor to the said Ralph H. Perry, did take over the business assets of Burns Brothers pertaining to a portion of its Jersey City business, and said Burns Brothers did discontinue such portion, and that the complainant has ever since continued the same, but what investments have been made therein by the complainant, this defendant is unable to state. It admits that it has kept and performed its covenant in said agreement contained, not to engage directly, or indirectly, in the business of buying, selling or

delivering coal for consumption within the limits of the City of Jersey City, and the territory adjacent thereto which may be conveniently served by wagon deliveries from Jersey City. This defendant states, however, that under and pursuant to the provisions of said contract, or agreement, with the knowledge and approval of the said complainant, the said defendant has been, since the execution of said agreement, selling coal to Jersey City dealers for consumption in Jersey City, and it likewise has been selling coal from one or more of its coal yards in the County of Hudson to consumers thereof, except in the City of Jersey City aforesaid, and claims the right so to sell, as well as to sell coal to other dealers for resale in Jersey City, provided delivery is not made in wagons bearing the name "Burns Bros." This defendant claims that the entire restrictive covenant contained in paragraph thirteen of said contract is meaningless and void, illegal and of no effect.

All of which matters and things this defendant is ready to aver, maintain and prove, and prays to be hence dismissed with its reasonable costs in this behalf most wrongfully sustained.

McCARTER & ENGLISH,
Solicitors for and of Counsel with Defendant.

[Common Replication.]

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between	
R. H. PERRY & Co., *Complainant,*	*On Bill, &c.*
and	*Testimony.*
BURNS BROTHERS, *Defendant.*	

Transcript of testimony taken in the above-entitled cause, at the Chancery Chambers, Jersey City, New Jersey, on the 2nd day of June, nineteen hundred and twenty-seven, before Hon. Vivian M. Lewis, Vice-Chancellor.

Appearances:

McDermott & Enright, Esqs., for the complainant.

Robert H. McCarter, Esq., and Kent & Kent, Esqs., for the defendant.

RALPH H. PERRY, being duly sworn, testified as follows:

Direct examination by Mr. Enright.

Q Where do you live? A Montclair, New Jersey.

Q What is your business? A The coal business.

Q How long have you been in that business? A Twenty-eight years.

Q In the New Jersey and New York territory? A Yes, sir.

Q Are you the president of R. H. Perry & Co., the complainant in this case? A Yes, sir.

Q Have you been their president from the time that the company started in its actual commercial business? A Yes, sir.

Q You were one of the organizers of the company? A Yes, sir.

Q Did you negotiate a contract with Burns Brothers for acquiring its Jersey City business in anticipation of the organization of R. H. Perry & Co.? A Yes, sir.

Q With whom did you personally negotiate that matter? A Mr. Michael F. Burns.

Q What was his position? A He was president of Burns Brothers.

Q Had you known him for a great many years? A Yes, sir.

Q Had you been familiar in a general way with the sort of business conducted by Burns Brothers? A As a competitor, I was quite familiar with it.

Q You had been in the business before the negotiation of this contract? A Yes, sir.

Q What was the character, the general character, of the business then being conducted by Burns Brothers?

Mr. McCarter: Objected to as immaterial.

The Court: Objection overruled.

A The character of their business was selling coal in the yard and by delivering it by their own equipment to customers. Their principal business was located in New York City.

Q What local business did they have to your knowledge, generally speaking, in the Jersey City territory? A They covered the entire city.

Q Where was their coal received? A They had one plant at Jersey avenue and Morris Canal; also at Communipaw avenue and Morris Canal; and one at the foot of Johnson avenue at the Hudson River; they still have.

Q Along what line of railroad? A They are all on the Central Railroad of New Jersey.

Q What sort of business was being handled out of the Communipaw yard? A That yard is used entirely to sell to dealers who did not have their own coal trestle or pockets, and carted coal from Burns' pockets to their own customers—to the peddlers' customers.

Q In the coal business how do you describe that character of sales? A We call that a yard sale.

Q Where the customer comes to the yard and takes his coal out and re-sells it to his own customer? A Yes, sir.

Q What sort of business was being done out of the Jersey avenue yard? A Both delivery to Burns' own customers by Burns' delivery equipment and also the yard sale to the dealers coming in there.

Q What yard business was being done by Burns Brothers out of the Johnson avenue yard? A That yard is used entirely for New York delivery.

Q What do you mean by New York delivery? A By carting the coal to New York to their own customers; or New York dealers coming over and taking the coal from the yard and taking it back to New York.

Mr. McCarter: The contract is admitted. We don't require proof of the execution of the contract.

Mr. Enright: I then offer in evidence contract between Burns Brothers, referred to as "sellers," and Ralph H. Perry, dated January 16, 1920, a copy of which is attached to the bill of complaint.

Marked "Exhibit C. 1."

Q By referring to the minute book of the company, will you state when complainant, R. H. Perry & Co., was incorporated?

Mr. McCarter: If you say so, just read from the book; you need not bother about proving that by Mr. Perry.

Mr. Enright: I will read the following data from the minute book of the company:

"Certificate of incorporation under the laws of the State of Delaware, dated and acknowledged January 20, 1920: First meeting of incorporators held January 30, 1920, at which directors were elected. First meeting of directors January 30, 1920, at which officers were elected; and there was laid before the meeting contracts with a number of local yards (including Burns Brothers—being the contract introduced in evidence as 'C. 1.'), and the following resolution adopted:

On motion, duly seconded, it was unanimously resolved, that in the opinion of the Board of Directors, each of the aforesaid contract is beneficial to this company, and that it is for the best interests of this company that each of said contracts made for the benefit of this company be accepted, and that the obligations of each of said contracts, so far as they relate to the new company referred to therein be assumed by this

corporation, and that this corporation in all respects be bound by each of said contracts as though this corporation were originally a party thereto.

"Further unanimously resolved, that the officers of this corporation be instructed to execute and deliver from time to time such further instruments and documents as may be necessary or proper to carry the foregoing contracts into full effect;

"Further unanimously resolved, that this corporation issue its capital stock, common and preferred, from time to time, in compliance with the provisions of the aforesaid contracts, upon receipt by this corporation of the consideration therefor, as stipulated in said contracts; which stock shall be full paid and non-assessable.

"Further unanimously resolved, that the good will, leasehold, contract rights, and the benefit accruing to this corporation under each of the foregoing contracts, is hereby fixed as the consideration for the issue of the common capital stock of the corporation to the extent that the same is required to be issued under each of said

Q Now, following the execution of this contract with Burns Brothers, was an auditor designated for the purpose of ascertaining the tonnage of the Burns Brothers' business to be sold under this contract, as well as other dealers? A Yes, sir.

Q Was that by agreement between yourselves and Burns Brothers as well as the others? A Yes, sir.

Q And have you the audit as made up by the auditor? A Yes, sir.

Q Who is he? A Elmer Davies.

Q And did that determine the average tonnage of Burns Brothers, among others, as defined under this contract? A Yes, sir.

Mr. Enright: I offer so much of the audit, which is dated March 26, 1920, as refers to the Burns Brothers' tonnage, being the two final sheets.

Mr. McCarter: May we look at that? Whose handwriting is that, Mr. Enright—"Jersey Avenue Yard" and "Morris Canal"?

Mr. Enright: It looks to me like Mr. Perry's. I do not offer the pencil marks.

Mr. McCarter: The two pages of this report that are offered are at the top of each in typewriting designated (1) "Communipaw Avenue Yard," and the other "Hudson Street Yard." It does not seem to us very material; but I do not know why they should put in a report upon some Hudson street yard.

Mr. Enright: I withdraw the offer and ask these explanatory questions.

Ralph H. Perry, cross.

Q I refer you to the caption "Commuipaw Avenue Yard"—do you know what yard that refers to?

Mr. McCarter: How can he know?

Cross examination by Mr. McCarter.

Q Mr. Perry, were you personally with the auditor when he made his examination? A A large part of the time; yes, sir.

Q You swear you were with him at the time he made the examination? A He did the work, a very large part of it, in our office.

Q And he inspected the yards of this concern in your office? A No, sir, he did not inspect the yards at all; he accepted the figures from the books of the various companies; he made the audit in the Burns Brothers' office; as far as the yards goes, Burns Brothers' yards were designated as the "Communipaw Avenue Yard"—the yard located at Communipaw avenue and Morris Canal. This lead pencil writing is in my handwriting.

Q I understand all that. Hudson street is a different thing altogether; you did not make up that report? A No, sir.

Q You did not typewrite it? A No, sir.

Q You were not present when it was dictated? A No, sir.

Mr. McCarter: I don't see how he can say what somebody else meant by Hudson Street Yard.

The Court: I am inclined to think you are correct. Where is the man that made this table up?

Ralph H. Perry, direct.

Mr. Enright: The last I heard of him he was in Chicago.

Direct examination (continued) by Mr. Enright.

Q Was there any yard of Burns Brothers on Hudson street? A No sir.

Mr. McCarter: There is more in this than would appear. You observe that this contract provided for the sale, not only of the Burns Brothers' properties, but also for other properties. That may be some other property that was gotten by mistake mixed up with this property; and I don't think this gentleman should surmise what was in the mind of the compiler of this document as to the property of Burns Brothers.

Mr. Enright: At the top of the sheet it says "Burns Brothers"; there never was a yard of anyone on Hudson street; but there was formerly a Hudson Coal Company, that was acquired by Burns Brothers—

The Court: The auditor has made a mistake in his caption?

Mr. Enright: Yes, sir, that is all; this tonnage audit here went through the yard that perhaps is designated on the Burns Brothers' books as the Hudson Company yard. The general caption here is "Burns Brothers"; the tonnage audit under this is to distinguish it from the other yard called by this auditor, "Hudson Street Yard"; there never was a yard in Jersey City anywhere on Hudson street. This is the Hudson Coal Company yard; and on the basis of this audit they got their pay.

Mr. McCarter: We respectfully urge, if there is anything in this idea, that this tonnage business has any relevancy or pertinency on the principle of law underlying the defense here, then it is very important it should be right; and it is within the purview of the situation as now developed that this auditor and his clerical assistants should hove gotten mixed in the thing and that this page may apply; I don't know; by somebody else; and there were other companies in this company, and before this thing gets in, that should be shown.

The Court: The expert is in Chicago. Is he alive, Mr. Enright?

Mr. Enright: I have not heard of his being dead.

The Court: If there is any significance to this part of the case, it is not the best evidence. Unless you can agree upon it I suppose I shall have to sustain the objection of Mr. McCarter. I don't see that it is going to be of great significance at present.

Mr. Enright: They know this is the tonnage that passed through that yard.

The Court: The Hudson Company yard?

Mr. Enright: Yes, sir; and this man knew it; and both parties closed the contract on the basis of this as being Burns Brothers' tonnage; and Burns Brothers paid out a sum of money as provided for by the contract and got capital stock based on a certain pro rata.

The Court: I shall sustain the objection.

Q I will refer you to this audit under the caption "Burns Brothers' Communipaw Avenue Yard" and call your attention to the first column of figures: "Yard and team sales"; do you know what class of sales are included under that caption "Yard and team sales"? A No.

Mr. McCarter: That we object to.

The Court: He has testified to that very fact a few minutes ago.

Mr. Enright: I am asking as to this audit.

Mr. McCarter: That question calls for this witness to interpret a couple of columns on the page of a report, which according to the theory of counsel—

The Court: The objection will be sustained.

Q Did Mr. Davies submit a summary of his audit under a separate enclosure?

Mr. McCarter: Objected to as immaterial.

The Court: The objection will be overruled.

A Yes, sir.

Q And is this report signed by him, dated February 25, 1920, the summary? A Yes, sir.

By the Court.

Q Was that presented to you? A Yes, sir.

The Court: Have you seen that report, Mr. McCarter?

Mr. McCarter: No, I never have seen it.

The Court: Is not this the result of the audit?

Ralph H. Perry, direct.

Mr. Enright: Yes, sir; it is designated by the auditor as "Summary."

The Court: If it is the report of the auditor, I can receive it.

Mr. McCarter: We are not objecting to the appraisal and the audit; we are objecting to something else—

The Court: That is the report?

Mr. Enright: Yes, sir.

The Court: The other is the detailed statement.

By the Court.

Q The copies were sent to each of the companies that came into this consolidation? A Yes, sir.

Mr. McCarter: I don't want your Honor to get the impression that we are standing on technicalities; we are bound by this paper, which we never saw before; bound by the appraisals and audit of this man; now, this is not either of those things; it is a summary of sales. That is not the audit. It is a summary of sales. The audit is the other paper.

The Court: This is part of the audit. I will receive it, noting your objection to it.

Mr. McCarter: We are not trying to keep out legal testimony; we must insist on illegal testimony being excluded.

The Court: I may have to rule it out afterwards.

Mr. Enright: This offer is made, so far as it refers to the Burns Brothers. There were duplicates at the time.

Marked Exhibit C. 2.

Ralph H. Perry, direct.

The Court: I don't think you need to analyze that report. It is now in evidence and received by the Court, noting Mr. McCarter's objection to it.

Further direct.

Q I am calling your attention to Exhibit C. 2; are the figures there stated as the average annual sales of Burns Brothers the figures that were used in closing the transaction between Burns Brothers and Perry & Co. under the contract, C. 1? A Yes, sir, that was the annual average tonnage.

Q And those were the figures that were used in the closing? A Those were the figures used in issuing the stock.

By the Court.

Q Who was present at the time of the closing of the contract? A Mr. Moose and I were present, and Mr. Brooks; he was vice-president of Burns Brothers, and Mr. Enright.

Q Was Mr. Lavine there? A No, sir.

Q Was Mr. Brooks alive? A Yes, sir.

The Court: Is Mr. Moose connected with your company?

Mr. Kent: No, sir; he is not.

Q Under the caption of "Burns Brothers" on this summary appears Hudson avenue yard; is there any Hudson avenue in Jersey City, so far as you know? A Not that I know of.

Further direct.

Q Was there at the time of the contract or the closing, or at any other time that you know

of, any Hudson avenue yard of Burns Brothers? A Never, that I know of.

Q Do you know what that caption refers to?

Mr. McCarter: That is the same question. I object to it.

The Court: That is the same question; I have ruled on it.

Mr. Enright: It is a palpable typographical error.

The Court: I have received the audit because of the agreement in the contract.

Q On what date was the contract closed and the property delivered and the money paid and the stock issued? A I don't recall the date.

Q Is this document called "Bill of Sale" the document that was delivered at the time of closing? A Yes, sir.

Mr. Enright: I offer this in evidence. Have you a copy of it, Mr. McCarter?

Mr. McCarter: No, I have not. (Examines it.) No objection.

Marked Exhibit C. 3.

By the Court.

Q That is the contract under which your people took possession? A Yes, sir.

Further direct.

Q At the same time was this assignment of lease for the two yards executed by Burns Brothers and delivered? A Yes, sir.

Mr. Enright: I offer this in evidence.

Marked Exhibit C. 4.

The Court: Don't you think it is necessary to prove the consideration in view of the case?

Mr. Enright: I am going to do it.

Q On or subsequent to the closing were the books of account showing customers and sales of these two yards of Burns Brothers delivered to you? A The list of customers; yes, sir.

Q Prior to this contract with Burns Brothers, had you entered into a contract with E. L. Young Company and E. L. Young individually, providing for the acquiring of the coal business of Mr. Young and the Young Company in Jersey City?

Mr. McCarter: Objected to as immaterial.

The Court: Objection overruled.

Q Was this the contract dated January 2, 1920? A Yes, sir.

Mr. Enright: I offer that in evidence.

Mr. McCarter: Same objection.

The Court: Objection overruled.

Mr. Enright: The contract with Burns requires us to turn over to him as part of the transaction the New York business we were under contract to acquire from the Young Company, so I feel I have to prove that; that is the only purpose of offering it.

Marked "Exhibit C. 5."

Q Was this contract with Young, Exhibit C. 5, consummated and performed at the same time as the Burns contract, March 1, 1920? A Yes, sir.

Q And on that date, consummating that contract, did the E. L. Young Company and E. L. Young, execute a bill of sale to R. H. Perry & Co., covering the business and property of E. L. Young and E. L. Young Company; and is this the document? A Yes, sir.

Mr. Enright: I offer that in evidence.

Mr. McCarter: It is objected to.

The Court: The objection will be overruled.

Marked Exhibit C. 6.

Q Did R. H. Perry & Co., at the same time, March 1, 1920, transfer by written assignment the New York business and assets of E. L. Young, acquired from E. L. Young and E. L. Young Company?

Mr. McCarter: Same objection.

A Yes, sir.

Q Is this document the duplicate original retained by Perry & Co., of the assignment delivered on that day by Perry & Co. to Burns Brothers? A This is the original.

Q The document was executed in duplicate? A Yes, sir.

Q And one duplicate copy kept by you, and one delivered to Burns Brothers? A Yes, sir.

Q This document now produced is the one kept by you? A Yes, sir.

Mr. McCarter: Objected to as immaterial.

Marked Exhibit C. 7.

Mr. Enright: I call your Honor's attention to paragraph 5 in that agreement, which

is: "In consideration of the premises, R. H. Perry & Co. agrees for itself, its successors and assigns"—(reads paragraph 5).

Q At the time of closing, their common and preferred stock issued by Perry & Co. to Burns Brothers in accordance with the amounts computed at that time by both parties under this contract that has been introduced in evidence, you were present at the time? A Yes, sir.

Q And by reference to the stock ledger, will you say how much preferred stock was issued to Burns Brothers? A 688 shares.

Q And how much common stock? A 3,001 shares.

Q Calling your attention to Preferred Certificate book, I ask you whether Certificate No. 1, as now pasted back in the book, cancelled, dated March 1, 1920, in the name of Burns Brothers for 687 shares, is one of the certificates then issued? A Yes, sir.

Q That was delivered to Mr. Brooks— A To Mr. Brooks on the day of closing.

Q That remained outstanding until what date? A March 5, 1923.

Q It was then surrendered for cancellation and put in transfer to other holders? A Yes, sir.

Q And that stock, up to the time of the reorganization of the company, when it was superseded by another form of stock, has always remained outstanding? A Yes, sir.

Q And in its substituted form is it still outstanding? A Yes, sir.

Mr. Enright: I offer this certificate in evidence.

Marked Exhibit C. 8.

Ralph H. Perry, direct.

Q I show you a cancelled stock certificate for common stock, "Exhibit C. 1," in the name of Burns Brothers, for 3,001 shares, dated March 1, 1920; is that the certificate which was delivered to Burns Brothers at the time of closing? A Yes, sir.

Q And did that remain outstanding until it was surrendered for transfer on March 5, 1923? A Yes, sir.

Q And is that stock in its substituted form still outstanding? A Yes, sir.

Q At the time of closing, were there money payments also made? A No, sir, not at the time of closing—I am quite sure not at the time of closing; there was a money adjustment for the tonnage of the E. L. Young Company.

Q Was there a money payment made for the Young tonnage as a part of this same transaction? A Yes, sir.

Q By referring to the minute of the meeting on March 1, 1920, using that to refresh your memory, will you state how much money was paid by Burns Brothers to R. H. Perry & Co.? A The sum of $72,307.73.

Q Following this closing on March 1, 1920, did your company take possession of these two yards of Burns Brothers? A Yes, sir.

Q As far as you know, did Burns Brothers discontinue business in Jersey City from that date? A Yes, sir.

Q What character of business did you continue to do through the Communipaw avenue yard taken over from Burns Brothers? A We only sold to smaller dealers coming into the yard there; we made no deliveries with our own trucks.

Ralph H. Perry, direct.

Q Did you continue some of the employees of Burns Brothers at that yard? A I don't recall whether we did or not.

Q Was the character of business which you transacted through that yard on and after March 1, 1920, the same character of business as had been previously transacted there by Burns?

Mr. McCarter: We object to that, your Honor; that is a conclusion.

Q How much time did you spend about that yard? A I would go from New York and see the character of the business.

Q What kind did you see? A Saw yard sales being made; it is not a very large yard.

Q That was all you did there—yard sales? A Yes, sir.

Q What character of business did you transact through the Jersey avenue yard on and after March 1, 1920? A We continued the same business, delivering in our own equipment and selling to customers in the yard as well.

Q Approximately, what volume of sales through Jersey avenue were yard sales, and what volume was delivery sales? A That audit will give it exactly; about 25% were yard sales; we delivered with our own trucks.

Q You took over at both yards the old customers of Burns Brothers? A Yes, sir.

Q And continued to serve the customers that came to these yards, the Burns' customers? A Yes, sir.

Mr. Enright: I offer in evidence the newspaper announcement of Burns Brothers, annexed to the bill of complaint as Schedule

B, and also the newspaper announcement annexed to the bill of complaint as Schedule C.

Marked Exhibits C. 9, C. 10.

Q I ask you whether you saw those newspaper advertisements, and if so, in what newspapers? A Yes, sir, I remember seeing these.

The Court: Let me look at them. (Examines them.)

Q Do you remember what newspapers? A In the Jersey Journal and the Observer, I think; I am sure of the Jersey Journal.

Q Do you know Sanders Wertheim? A Very well.

Q Was he president of Burns Brothers at the time those advertisements appeared? A Yes, sir.

Q Did he have any connection with Burns Brothers at the time of the contract which you made for acquiring the Jersey business? A No, sir.

Q Who is Rafferty, whose name appears on the bottom of these advertisements? A He was an employee of Burns Brothers, associated with them.

Q Prior to the appearance of those advertisements, so far as your knowledge goes, had Burns Brothers made any attempt to sell coal in Jersey City for consumption in Jersey City, subsequent to March 1, 1920? A No, sir.

Q So far as your knowledge goes, up to the time of the appearance of these advertisements, had Burns Brothers made any attempts to sell coal to peddlers at their yard for delivery in Jersey City? A Not to my knowledge.

By the Court.

Q Has the contract been observed up to date? A No, sir.

Mr. McCarter: The situation is this: the restraint was imposed by Vice-Chancellor Fielder upon the audit, and after that we did observe the restraint.

The Court: You may strike it out, if you like. It is not prejudicial.

Further direct.

Q I ask you whether you have seen a form of circular letter over the signature of Sanders A. Wertheim, and the letterhead of Burns Brothers, under date of April 6, 1926, in the form which I now show you?

Mr. McCarter: After the issuance of the restraint by Vice-Chancellor Fielder, our attention was called to the fact that there had apparently been a violation of the restraint, and an order to show cause issued why he should not be adjudged guilty of contempt, and that was entirely explained; it was due to some error in management, and I understood the matter was adjusted with perfect satisfaction to both sides. Ever since that mistake we have observed the restraint, which is in the same language as the contract. Is it worth while to go into that?

Mr. Enright: There is another aspect in which I want to offer that letter: The circular contains this statement: (Reading Exhibit C. 11.) I think that is competent evidence. It is Wertheim's letter addressed

to the Coal Consuming Companies of Hudson County, offering to sell coal through this very yard, the Hudson Coal Company yard.

Mr. McCarter: It is immaterial and irrelevant.

The Court: I will mark it for identification now, on the ground that it is not properly proved here.

Mr. Enright: I can take the witness stand myself and prove it.

The Court: You may take the witness stand, if you desire. Under the circumstances I see no impropriety in it; it is not properly proved.

Mr. McCarter: I will not require Mr. Enright to take the witness stand to prove that his firm received the circular letter to which reference was made in the offer.

The Court: I will receive it, noting the objection.

Marked Exhibit C. 11.

Mr. Enright: I also offer in evidence undated circular letter signed Burns Brothers, Sanders A. Wertheim, addressed Dear Sir.

Marked Exhibit C. 12.

Q Were dividends paid to Burns Brothers on the common and preferred stock issued to them, so long as they continued to be the owners of that stock? A Yes, sir.

Q At the same time that dividends were paid to all the stockholders? A Yes, sir.

Cross examination by Mr. McCarter.

Q Mr. Perry, anterior to your going into Burns Brothers, and anterior to the formation of the R. H. Perry & Co., what was your occupation? A Coal business.

Q Under what name? A R. H. Perry & Co.

Q And that was a New Jersey concern? A Yes, sir.

Q And it operated in Jersey City, New Jersey? A Yes, sir.

Q Did you have an office in New York at that time? A No, sir.

Q Now, won't you describe the location of the three yards that the Burns Brothers controlled or leased or used anterior to the making of this contract? A One yard, known as the Hudson yard was at Jersey avenue and the Morris Canal—

Mr. McCarter: I move the answer "known as the Hudson yard" be excluded.

A One yard was located at Jersey avenue and Morris Canal.

Q Where is that, roughly speaking? A If you are familiar at all with Jersey City, it is at the foot of Jersey avenue; do you know where the Morris Canal was—right at that junction corner there; that is one yard; another yard was at Communipaw avenue and Morris Canal.

Q How far was that from the first one? A Two miles I should think.

Q Then there was a third one known as the Johnson avenue yard? A Yes, sir, that was on Johnson avenue, the central yard.

Q How far was that from the other two? A By road I should think it was two miles.

Q It was on the other side of the Gap? A Yes, sir.

Q Wouldn't it be more than two miles? A I hardly think so.

Q What was the distinction in the coal business in Jersey City at the time this contract was made, between wholesale and retail business? A Wholesale was executed in carload lots and retail is where you distribute from half a ton up to several hundred tons; but you deliver it by your own equipment.

Q Now, your place of business under the old enterprise was where, in Jersey City? A Our principal office was at 588, or rather, 908 Newark avenue, Jersey City.

Q How far was that from the Johnson avenue yard of Burns Brothers? A Probably four miles; I am only judging distances.

Q Now, you were not every day at the Johnson avenue yard? A No, sir.

Q I mean anterior to the making of this contract? A No, sir.

Q How often had you been there in your lifetime? A I had never been in the Johnson avenue yard in my lifetime.

Q So that any part of your evidence based upon the character of the business that was transacted at Johnson avenue by Burns Brothers anterior to the making of this contract, is entirely hearsay or surmise? A Until recently, yes, sir.

Q I say, anterior to the contract? A Yes, sir.

Q Do you know who the directors were of Burns Brothers anterior to the contract or at the time of the making of it? A I knew some of them.

Q Who were they? A Mr. Burns, Mr. Michael F. Burns and Frank L. Burns, and Mr. Brooks; I am quite sure Mr. Allison Dodd was a member of the board at that time; that is all I recall.

Q Had your attention ever been called to this copy of the resolution of the Board of Directors of the Burns Brothers that was sent to your counsel anterior to the making of this contract? A No, sir.

Q So that this is the first time you have ever observed that? A Yes, sir.

Q Well, now, after the transfer, who became your manager of the different yards that you took over from Burns in Jersey City? A I don't recall of Communipaw avenue, who was manager of that yard.

Q Did you have a manager for each yard? A Yes, sir.

Q Who were they? A At Jersey avenue yard, the Hudson yard, Jersey avenue, we had Mr. Hough continuously; he was in charge of that yard.

Q Is he still in your employ as manager of that yard? A Yes, sir.

Q In charge of it? A Yes, sir, under a superintendent; we have a general superintendent.

Q Who was in charge of the other? A I don't recall.

Q Who was the general superintendent? A Ralph Pettit.

Q And he is still? A Yes, sir.

Q Now, at the time of the making of the contract in suit, you have spoken of other contracts. Were contracts of purchase made by the com-

plainant company with James Coyle, Inc.? A Yes, sir.

Q Bergen Coal Company? A Yes, sir.

Q Lehigh Valley Coal Sales Company? A Yes, sir.

Q And R. H. Perry Co.—your old enterprise? A Yes, sir.

Q So that after the consummation of the deal, the present complainant became the owner of all of those enterprises? A Yes, sir.

Q Is there any other company in Jersey City, or was there at that time, of any size, than those I have mentioned? A Yes, sir, a great many.

Q Name some. A The Greenville Coal Company; the MacNeill Coal Company; the Altshul Coal Company; the Jersey City Coal Company; Coughlin Coal Company; William Horre Co.; Halste & Platt.

Q In addition to the transfer of stock, capital stock, preferred and common, by the complainant company to Burns Brothers, there was a payment of cash by Burns Brothers to your concern, wasn't there? A Yes, sir.

Q Of upwards of $21,000? A I don't recall what the amount was.

Q Don't you recall it was upwards of $21,000? A A few minutes ago I testified to the payment of Burns Brothers to the R. H. Perry & Co., of $71,000 for the tonnage of the E. L. Young Co.—

Q Was there not a further cash payment? A Not that I recall—yes, there may have been for the equipment of E. L. Young Co., which we sold to Burns Brothers, which went with the New York business.

Q What was the character of the delivery vehicles that were in use by Burns Brothers at

the time of the making of this contract, its consummation? A Horse-drawn equipment, I think, principally.

Q There were trucks as well? A I think principally they were horse drawn trucks.

Q Will you say there were no motor trucks? A I won't say, because I don't recall exactly.

Q Don't you recall that there was a payment of $21,000 and upwards into the capital fund by Burns Brothers at the time the transfers were made? A I cannot remember that. I remember we sold the Burns Brothers the delivery equipment that went with the E. L. Young tonnage; we did not need it; it was a different style of equipment that we needed over here, and I don't recall any $21,000 in payment; but that may be what it was for.

Q What is a peddler in the language of the coal business? A A small dealer, and as a rule, he has his own delivery equipment; he may own it or he may hire it, I don't know; sometimes it is in the form of a horse and wagon and sometimes in the form of an automobile.

Q And he buys, not for his own consumption, for sale to his customers, the consumers? A Yes, sir; he is very often in the ice business, and he may sell a customer ice as well, and he will come to our yard and get her a ton of coal—

Q He might sell to a store? A Yes, sir.

Q Or he might sell to a dealer, a small dealer? A He would not sell to a small dealer.

Mr. McCarter: Have you your books here which will indicate, Mr. Enright—can you straighten that out about that $21,000?

Mr. Enright: I will concede that that was paid.

Re-direct examination by Mr. Enright.

Q It was a payment under the contract? A Into the capital stock of Perry & Co.; there was at the time of closing a number of things to be done under the contract, and one of those things was the payment of a sum of money by Burns Brothers to Perry & Co., the amount to be computed on the basis of this audit that we have had so much discussion about; it was a payment under the contract.

Q Your company, R. H. Perry & Co., ever since this date, March 1, 1920, has continued and is still engaged in the coal business in Jersey City? A Yes, sir.

COMPLAINANT RESTS.

FRANCIS A. HUNT, being duly sworn, testified as follows:

Direct examination by Mr. Kent.

Q What is your business? A Coal dealer; I put it up in small bags and deliver it to stores.

Q Where is your place of business, your office? A 509 Jackson avenue.

Q You are in partnership with a man named Leucht? A Yes, sir.

Q What is your firm name? A Hunt & Leucht.

Q How long have you been in the coal business in Jersey City? A Almost six years.

Q Have you purchased coal from R. H. Perry & Co.? A In 1922, during the months of September and October, I purchased from R. H. Perry.

Q After you purchased from them, did you purchase coal from the Burns Brothers? A Yes, sir; I went from Perry to Burns Brothers to do business.

Q To what yard did you go? A The Johnson avenue yard.

Q From what yard of R. H. Perry & Co. did you purchase coal? A The yard known as the Hudson yard at Jersey avenue.

Q And who was the man in charge of that yard? A Hugh Donnelley.

Q After you left Perry & Co. did you have any conversation with Mr. Donnelley? A At times, yes, sir; I did work with him in Burns Brothers, and many a time we met.

Q Did you have any conversation with him in reference to your again purchasing coal from Perry & Co.? A Mr. McHeffey, who was sales manager for Perry, as far as I understood at that time—

Mr. Enright: Objected to.

A Yes, sir.

Q What was that talk with Mr. Donnelley? A Mr. McHeffey—

Q Never mind that—what was the talk with Mr. Donnelley; did Mr. Donnelley tell you about Mr. McHeffey? A Yes, sir.

Q Tell us what he said. A Mr. McHeffey, as sales manager—

By the Court.

Q What did you say to Donnelley and what did he say to you? A Outside of Donnelley

telling me that McHeffey wanted to see me, that was all the conversation.

Q Did Mr. Donnelley say anything to you about your purchasing coal from Perry? A At times; yes, sir. He would ask us if we had any intention of coming back and I told him I was satisfied where I was.

Q After you spoke to Mr. Donnelley, did you see Mr. McHeffey? A No, sir; I never saw him afterwards.

Q Did you talk to him at all about it? A No, sir.

Q Did you talk to Mr. McHeffey? A No, sir.

Q What did you say then to Mr. Donnelley in addition to whether you were coming back to purchase coal from them? A I said I was perfectly satisfied where I was, as far as I can remember it.

Q That was about 1922? A Yes, sir.

Q Did you see him in 1923 in reference to the same thing? A A few times; it was right after we had left there; we left there in about November.

Q And did you, in driving into the Johnson avenue yard; did you have to go by the Perry offices? A Yes, sir; I passed from four to six times a day.

Q How many wagons have you got? A Five.

Q All your wagons roll into the yard of Burns Brothers? A Yes, sir.

Q And they go by the yard and office of the Perry Company? A When making Jersey City deliveries; yes, sir.

Q And you did this thing from 1922, on, after you left Perry? A Yes, sir.

Q From what yard of Burns Brothers did you get your coal? A The Johnson avenue yard.

Cross examination by Mr. Enright.

Q The office of Perry & Co. is on Grand street? A Yes, sir.

Q And your horse and wagon in passing that office, your horses and wagons, are no more conspicuous than thousands of other wagons that pass back and forth every day? A I should not think so; they are quite conspicuous with a load of paper bags on.

Q There are thousand of wagons go past the Perry office every day? A Yes, sir.

Q And this Jersey avenue yard is near the water front—the Central Railroad yard? A Yes, sir.

Q Don't you know that of the thousands of wagons that go by the Grand street office of Perry & Co., only a very small number go down into the Central Railroad yard? A There is quite a few.

Q Most of them go to Newark, New Jersey? A Yes, sir.

Q And various parts of Jersey City? A Yes, sir.

Q After passing the Perry office, you have to make a turn into Pacific avenue, and then go down Pacific avenue perhaps three-quarters of a mile before you turn again to get into the Central Railroad property? A Yes, sir.

Q How far is this Johnson street yard of Burns Brothers away from the Perry office? A One and three-quarters miles, I should think.

Frank R. Leucht, direct.

FRANK R. LEUCHT, being duly sworn, testified as follows:

By the Court.

Q You are a partner of the last witness, in the coal business? A Yes, sir.

Direct examination by Mr. Kent.

Q You are a partner of Mr. Hunt, who was just on the witness stand? A Yes, sir.

Q Do you know Mr. McHeffey, the sales manager or superintendent of Perry? A I met him once in Perry's office at the corner of Grand and Brunswick.

Q Did you have a talk with him? A Yes, sir.

Q Was it in reference to your buying coal from him? A He wanted us to buy coal at the Hudson yard.

Q When was that conversation? A In November.

Q In what year? A About 1922.

Q And where were you buying coal at that time? A From Coughlin Brothers.

Q Did you see him at any time after you had been buying coal from Burns Brothers? A No, sir.

Q Whom did you see after you started buying coal from Burns Brothers? A To tell the truth, I did not see anyone.

Q Do you know a Mr. Donnelley? A I saw Mr. Donnelley, yes, sir.

Q Did you talk with him? A Yes, sir, but not about the coal business.

Edward Wagner, direct.

Cross examination by Mr. Enright.

Q You also took coal to New York? A Yes, sir.

Q Isn't that the principal part of your business, peddling coal in New York? A No, sir; about half and half—Jersey City, New York, Bayonne and Brooklyn.

Q By New York, I mean Brooklyn as well. A Yes, sir.

EDWARD WAGNER, being duly sworn, testified as follows:

Direct examination by Mr. Kent.

Q What is your business? A Shipping clerk for Burns Brothers.

Q In New York or here? A New York at the present time.

Q In the year 1920, at what yard of Burns Brothers were you employed? A The yard known as the Weehawken yard.

Q That is in Hudson County? A Yes, sir.

Q And what sort of business did you do out of that yard? A Shipping coal to customers, retail, and also selling coal wholesale to peddlers.

Q Where did you send coal in your own wagons? A To different towns in Hudson County—the town of West New York—the town of Weehawken—the town of Union Hill—Hoboken and West Hoboken—Jersey City and Jersey City Heights.

Q Did you do that after the year 1920? A Yes, sir.

Edward Wagner, cross.

Q When was that yard closed? A What yard?

Q Your yard—the Weehawken yard? A In the latter part of 1922.

Q And you continued doing business in the same manner you have described until the yard was closed? A Yes, sir.

Cross examination by Mr. Enright.

Q Are you sure that after 1920 you made any sales—sale deliveries, into Jersey City and Jersey City Heights? A Yes, sir.

Q Are you sure of that? A I am positive.

Q Many? A Well, I could not tell you just how many I did make, but I made some.

Q Will you give the names of any customers to whom you are sure you made deliveries in Jersey City after March 1, 1920, giving their names and addresses? A I don't remember any of them.

Q How far is this Weehawken yard from the Jersey City line? A I should judge it is about eight miles.

Q That is a pretty long haul, isn't it? A Yes, sir.

Q What sort of equipment did you have, after 1920? A We delivered coal by trucks drawn by horses and automobiles.

Mr. Enright: Are the original files in this case here?

Mr. Kent: May I ask one omitted question?

Mr. Enright: I would like to get through with him first.

Q You are Edward Wagner? A Yes, sir.

Wilfrid J. Kenyon, direct.

Q You have already made an affidavit in this case? A Yes, sir.

Q Will you read that over and see if you recognize that as a copy of your affidavit?

Mr. McCarter: We will admit it.

Q In that affidavit you state the places to which you made deliveries to customers, didn't you, for Burns Brothers? A Yes, sir.

Q In that affidavit you don't say anything about having made any deliveries to customers in Jersey City, do you? A No, sir.

Q So far as that affidavit goes, you confined your statement of deliveries to customers in West New York, Weehawken, Union Hill, West Hoboken and Hoboken? A That is right.

Re-direct examination by Mr. Kent.

Q Mr. Wagner, the wagons that went out of your yard, were they painted or not? A They had signs on.

Q What were the signs? A Burns Brothers.

Q Both the horse-drawn vehicles and the automobiles? A Yes, sir.

WILFRID J. KENYON, being duly sworn, testified as follows:

Direct examination by Mr. Kent.

Q By whom are you employed? A Burns Brothers.

Q Where? A Edgewater.

Q Are you in charge of the Edgewater yard of Burns Brothers? A Yes, sir.

Wilfrid J. Kenyon, direct.

Q How long have you been there? A About twenty years; and I have been in charge about ten years.

Q Were you there during the year 1920? A Yes, sir.

Q In that year, where were you making deliveries? A In the southern part of Bergen County.

Q Did you run into Hudson County at all? A Not while we had the Weehawken yard.

Q When was that yard closed? A In 1922.

Q What did you do after that? A I made deliveries in Hudson County, occasionally.

Q And where did you make deliveries from your Edgewater yard? A Union City, Weehawken, West New York, North Bergen.

Q Did you deliver in your own wagons? A Yes, sir.

Q And did your wagons have any signs on them? A The regular Burns Brothers' signs.

Q Just state how large were the signs on the wagons. A About six feet long, and maybe 18 inches high.

Q What was the color? A Red and white.

Q Is that the usual Burns Brothers' sign? A Yes, sir.

Q What Burns Brothers' outfit took care of the other business in Hudson County during that period; do you know? A During that period there were deliveries made by the Horre Company.

Q Where did that company deliver? A They delivered in the northern part of Hudson County; they delivered in the towns that Burns Brothers discontinued delivering in to a large extent from West New York yard, when they discontinued the West New York yard.

J. F. Atkinson, direct.

Q Where was the yard of the Horre Company? A Hoboken or Jersey City; I think it is Hoboken.

Q It is just on the line of Jersey City and Hoboken? A I believe so.

Q How far down the line in Hudson County did their wagons go? A I could not tell you that; I am not familiar with it; they may have come into Jersey City; I would not be positive about that.

No cross examination.

J. F. ATKINSON, being duly sworn, testified as follows:

Direct examination by Mr. Kent.

Q You are connected with Burns Brothers? A Yes, sir.

Q In what capacity? A Salesman.

Q During the year 1920, did you have anything to do with any of the Jersey City yards of Burns Brothers? A I was a sort of a manager, I stopped over there for two or three hours every morning.

Q Do you know where the yard of Horre and Company at that time was located? A Yes, sir.

Q Tell us. A I don't know the street; it was Hoboken on the D., L. & W. road.

Q Where did the wagons of Horre and Company go—as far as Jersey City is concerned?

Mr. Enright: I object to that line of testimony as being entirely incompetent; this contract we are dealing with here expressly ex-

cepts from its operation this separate corporation of Horre and Company; we don't claim any restraint as to that; the contract excepts them.

Mr. Kent: I will withdraw the question.

No cross examination.

JOHN F. HOGAN, being duly sworn, testified as follows:

Direct examination by Mr. Kent.

Q You are employed by Burns Brothers? A Yes, sir.

Q And you are in charge of what yard? A Communipaw yard.

Q Were you in charge of that yard in 1920? A Yes, sir.

Q Your yard is the one that Messrs. Hunt and Leucht operated from? A Yes, sir.

Q That is the Johnson avenue yard? A Yes, sir.

Q Do you sell any other dealers in that yard? A Yes, sir.

No cross examination.

Mr. Kent: We rest.

Mr. McCarter: I don't know when counsel offered Exhibit C. 1 if he also offered a letter and a copy of a resolution which are attached to it. Such papers are marked; neither that letter and that resolution nor the supplementary contract is in evidence, and I don't want any doubt about it. If they are already offered, I don't have to offer them; otherwise, we will offer the letter and the resolution.

The Court: Is that the resolution you referred to as having been sent to counsel of the corporation?

Mr. McCarter: Yes. We offer in evidence the letter from M. F. Burns to McDermott and Enright, dated January 26, 1920, upon the letterhead of Burns Brothers attached to Exhibit C. 1.

Marked Exhibit D. 1.

Mr. McCarter: We also offer in evidence certified copy of the resolution of the Board of Directors of Burns Brothers, certified to by Mr. Chambers, secretary, with the corporate seal attached on a yellow sheet of paper, also attached to Exhibit C. 1, and make that Exhibit D. 2.

Marked Exhibit D. 2.

Mr. Enright: I want to call Mr. Young for a moment.

EDWARD L. YOUNG, being duly sworn, testified as follows:

Direct examination by Mr. Enright.

Q You are the E. L. Young that has been referred to in the contract as selling your property to R. H. Perry & Co., Exhibit C. 6,—disposing of coal business in Jersey City and New York? A Yes, sir.

Q Since March 1, 1920, you have been the chairman of the Board of Directors of R. H. Perry & Co.? A Yes, sir.

Q And you are still such chairman? A Yes, sir.

Q After transferring your business and your coal business property to R. H. Perry & Co., did you cease to do such business both in Jersey City and New York?

Mr. McCarter: Objected to as immaterial.

The Court: Objection overruled.

A I did not do any business.

Q You knew of the transfer of your New York equipment and tonnage to Burns Brothers by R. H. Perry & Co.? A Yes, sir.

Q And after the transfer of that business and tonnage, did you make any demand to engage in a competing coal business in the City of New York? A No, sir.

Q You have observed the terms of that contract, have you? A Yes, sir.

The Court: Is there anything further you want to offer, Mr. Enright?

Mr. Enright: There is, if your Honor will give me a moment.

RALPH H. PERRY recalled.

Direct examination by Mr. Enright.

Q Mr. Perry, from the time that R. H. Perry & Co. was organized, up to the time when the Burns Brothers' stock was transferred, which appears to have been, by the indorsement, March 5, 1923, will you state whether the corporation

paid its dividends regularly at the rate of 8% per annum upon the preferred stock? A Yes, sir, always paid it, 8% annually.

Q And those dividends were paid at the rate of $2.00 quarterly? A Yes, sir.

Q On what dates? A January 1st, April 1st, July 1st and October 1st.

Q On what date was the first dividend paid on the common stock? A October 1, 1920.

Q And the rate was? A $1.00 per share.

Q What was the next common dividend? A January 1, 1921.

Q At what rate? A $1.00 per share.

Q No, no; look at your book.

Mr. Kent: What is the materiality of that, may I ask?

Mr. Enright: It shows that the Burns Brothers received the dividends—

A We paid $1.50 on January 1, 1921.

Q The next dividend? April 1, 1921? A $1.00 per share; October, $1.00 per share; January 1, 1922, $1.00 per share; October 1st, $1.00 per share; January 1st, 1923, $1.00 per share.

Q And were those dividends paid at those rates upon the stock held by Burns Brothers? A Yes, sir, on all stock.

No cross examination.

BOTH SIDES REST.

Mr. McCarter: We are prepared to argue it now.

Mr. Enright: I am prepared to argue it now. The argument will be a reiteration.

Ralph H. Perry, direct.

Mr. McCarter: I will call the Court's attention to two significant facts.

The Court: I am perfectly willing to take the briefs. Do you want to go over the testimony? I think the Court ought to have the benefit of this testimony.

Mr. Enright: It seems to me that this testimony has merely supplied what we assumed to be the facts in the argument before you.

The Court: You have put in a line of testimony—both sides have put in testimony today, and, of course, upon oral arguments I might be able to pass upon it and find its logical connection with the case, but at present I am unable to do that without the benefit of some argument.

Mr. McCarter: The oral argument would be only ten or fifteen minutes, which I am prepared to make whenever your Honor wishes to hear it, or I can add a supplemental brief.

The Court: I think that will be an aid to the Court, to file a supplemental brief; then you need not have an oral argument. I think Mr. McCarter should make a brief on the testimony that has been taken, and then Mr. Enright can reply to it. Send it to Mr. Enright so that he can reply, and send one to me.

Mr. McCarter: We do not believe there can be any restraint beyond the bounds of jurisdiction for retail business in any event. If we can get a speedy decision we shall appreciate it.

The Court: All right, I will dispose of it speedily.

OPINION.

IN CHANCERY OF NEW JERSEY.

Between

R. H. PERRY & Co., *Complainant,*

and

BURNS BROTHERS, *Defendant.*

Opinion.

On bill, etc.; on pleadings and proofs.

McDermott, Enright & Carpenter for complainant.

McCarter & English for the defendant.

LEWIS, *V.-C.*

The bill in this case is filed by complainant to restrain the defendant corporation from engaging in the business of buying, selling or delivering coal within the limits defined in a restrictive covenant, entered into by the defendant as part of the terms of sale of a certain portion of its business to the complainant in the year 1920. The covenant appears in both the agreement to sell, and the bill of sale (dated March 1, 1920), in practically the same form; and its pertinent provisions, applicable to the present proceeding, are to the effect that the defendant, for itself, its successors and assigns, will not "engage, directly or indirectly, as principal, agent or investor in the business of buying, selling or delivering coal for consumption within the limits of the City of Jersey City, and the territory adjacent thereto, which may be conveniently served by wagon, de-

liveries from Jersey City (not including, however, the City of New York) for a period of twenty years from the date hereof. Nothing herein contained, however, shall be deemed in any way to bind or affect William Horre & Co., of Hoboken, or the interest of Burns Brothers therein."

Subsequently, the defendant, according to the contention of the complainant, essayed to conduct a competitive business with complainant within the limits specified in the prohibited area, and thereupon complainant sought injunctive relief in this court. A rule to show cause why a preliminary injunction should not issue was allowed with *ad interim* restraint. Upon the return of the rule the restraining order was continued to final hearing, by acquiescence of the parties; thus avoiding the formality of the issuance of a preliminary injunction.

Upon final hearing the proofs adduced satisfied me that the defendant had clearly signified its intention to engage in business within the restricted territory, in disregard of the terms of its covenant, unless prevented by the injunctive powers of this Court.

It is the contention of the defendant, however, that the true construction of the restrictive obligation, does not prevent it from invading the territory specified in the covenant; and the basis of its contention in this respect seems to be that the covenant in its entirety is too vague, and uncertain to admit of specific application; and that it is indivisible in its nature, and that, therefore, the covenant should not be enforced.

To my mind, however, it seems clear that the defendant sold the business in question to the complainant and took its pay therefor, which it still retains. Under the law applicable to that

situation I think that the covenant "was clearly necessary for the protection of the business as it existed at the time of the sale; and to that extent is not in opposition to public policy, and may be enforced."

Fleckenstein Bros. Co. v. *Fleckenstein,* 76 N. J. L. 613;

Trenton Potteries Co. v. *Oliphant,* 58 N. J. Eq. 514.

The proofs also clearly indicate to my mind the nature and extent of the business conducted by the defendant at the time of the sale, and the general territory within which it was conducted, and within which it was the undoubted intent of the parties that the vendee's operations should be protected by the terms of the restrictive covenant agreed to. The restraint is neither total nor perpetual. It is limited in area, and in the time of its operation. It seems to me to be reasonable both as to territory and duration, and no more than is necessary to protect the vendee in the enjoyment and pecuniary advantage of the business purchased, and for which the consideration between the parties was paid, and which is still retained by the defendant.

Under these circumstances I am convinced that the prayer of the complainant's bill should be granted, and I will advise a decree accordingly. The terms of the decree may be settled upon application.

FINAL DECREE.

Filed November 15, 1927.

IN CHANCERY OF NEW JERSEY.

R. H. Perry & Co., *Complainant,*	60/444.
vs.	*On Bill, &c.*
Burns Brothers, *Defendant.*	*Final Decree.*

This cause coming on to be heard on bill, answer, replication and proofs in the presence of John M. Enright, of counsel with complainant, and Robert H. McCarter, of counsel with defendant, and it appearing to the Court that under date of January 16, 1920, the defendant did enter into a certain contract in writing with Ralph H. Perry acting for the benefit of a New Corporation to be organized for the purpose of carrying on the business of buying and selling coal in the City of Jersey City, New Jersey, and adjacent territory, wherein and whereby the parties did agree that said agreement should be for the benefit of the New Corporation when organized as fully as though a party thereto, and the defendant did agree to sell and transfer to such New Corporation its Jersey City business, together with certain assets pertaining thereto as defined in said agreement, and said defendant did therein and thereby, among other things, agree not to engage, directly or indirectly, in the business of buying, selling or delivering coal for consumption within the limits of the City of Jersey City, and the territory adjacent thereto which

may be conveniently served by wagon deliveries from Jersey City, within a period of twenty years from the time of passing title thereunder;

And it further appearing that the complainant herein is the New Company referred to in said agreement, and that thereafter defendant sold and transferred to the complainant herein its business and assets, pursuant to the terms of said agreement, on the first day of March, 1920, for a valuable consideration, and that in the instrument of transfer thereof defendant, for itself, its successors and assigns, did covenant with the complainant not to engage, directly or indirectly, as principal, agent or investor in the business of buying, selling or delivering coal for consumption within the limits of the City of Jersey City, and the territory adjacent thereto which may be conveniently served by wagon deliveries from Jersey City (not, however, including the City of New York), within a period of twenty years from the date thereof;

And it further appearing that complainant did enter upon the enjoyment of the business and assets transferred to it as aforesaid, and has ever since continued to carry on said business;

And it further appearing that the defendant, prior to the filing of the complaint herein, did give public notice of its intention of opening an office for the carrying on of the retail coal business in the City of Jersey City and delivering coal to customers in the County of Hudson, including the City of Jersey City, from and after the fifth day of April, 1926;

And it further appearing from the answer of the defendant that the said defendant, notwithstanding the terms of its covenant, prior to the date of filing said bill has sold coal to Jersey City dealers for consumption in Jersey City;

And it further appearing from the proofs herein that the defendant subsequent to March 1, 1920, and prior to the filing of the complaint herein, and subsequent thereto has on numerous occasions sold coal in the City of Jersey City to Francis A. Hunt and Frank R. Leucht, partners doing business as Hunt & Leucht, and delivered the same in said City of Jersey City to said firm of Hunt & Leucht for consumption within the limits of the City of Jersey City;

And it further appearing to the Court that the complainant is entitled to relief against the defendant;

It is on this 15th day of November, 1927, on motion of McDermott, Enright & Carpenter, of counsel with complainant, Ordered, Adjudged and Decreed, and the Chancellor by virtue of the power in him vested does hereby Order, Adjudge and Decree that the defendant, Burns Brothers, and its officers, agents and servants, be and they hereby are enjoined and restrained from engaging, directly or indirectly, as principal, agent or investor in the business of buying, selling or delivering coal for consumption within the limits of the City of Jersey City until the first day of March, 1940, provided, however, that such restraint shall not be deemed in any way to bind or affect William Horre & Co. of Hoboken, or the interest of the defendant Burns Brothers therein, and that the restraint herein decreed shall be deemed to include and prohibit sales by the defendant, directly or indirectly, to Jersey City dealers who sell to consumers within the limits of the City of Jersey City.

Further Ordered, Adjudged and Decreed, that said defendant be enjoined and restrained from hereafter, directly or indirectly, selling coal to

Francis A. Hunt and Frank R. Leucht, partners doing business as Hunt & Leucht, and delivering the same to said firm of Hunt & Leucht, or anyone on their behalf, for consumption within the limits of the City of Jersey City.

Further Ordered, Adjudged and Decreed that the defendant account to the complainant for all sales of coal made by the defendant since March 1, 1920, to Jersey City dealers for consumption within the limits of the City of Jersey City, including all such sales made to said Francis A. Hunt and Frank R. Leucht, partners doing business as Hunt & Leucht.

Further Ordered that it be referred to James J. Murphy, Esq., one of the Masters of this Court, to take and state an account of all such sales made by the defendant since March 1, 1920, including all such sales made to said firm of Hunt & Leucht, and the profits realized thereon by the said defendant, to the end that further order and decree may be made with respect thereto upon the coming in of the report of said Master.

Further Ordered, Adjudged and Decreed that the complainant recover against the defendant the costs of this suit to be taxed, including a counsel fee to solicitors and counsel for the complainant upon this decree, and that execution issue therefor according to the course and practice of this Court.

Further Ordered that the settlement of the amount of costs and counsel fee be reserved until the coming in of said Master's report.

E. R. WALKER,
C.

Respectfully advised,

Vivian M. Lewis,
V.-C.

NOTICE OF APPEAL.

Filed December 24, 1927.

IN CHANCERY OF NEW JERSEY.

Between R. H. PERRY & Co., *Complainant,* *and* BURNS BROTHERS, *Defendant.*	60/444. *On Bill, &c.* *Notice of Appeal.* *Sat Below:* VIVIAN M. LEWIS, *V.-C.*

The defendant, Burns Brothers, a corporation, hereby appeals from the final decree of the Chancellor, advised by Vice-Chancellor Lewis, in the above-entitled cause on November 15, 1927, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated December 21, 1927.

McCARTER & ENGLISH,
Solicitors for and of Counsel
with Defendant.

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

ROBERT H. McCARTER,
Of Counsel with Defendant.

PETITION OF APPEAL.

Filed December 23, 1927.

New Jersey Court of Errors and Appeals

Between R. H. PERRY & Co., *Complainant-Respondent,* *and* BURNS BROTHERS, *Defendant-Appellant.*	*On Appeal from Chancery.* *Petition of Appeal.*

The petition of Burns Brothers, a corporation, respectfully shows that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, advised by Vice-Chancellor Lewis, on the 15th day of November, 1927, in that said decree orders and adjudges that the defendant in the cause, Burns Brothers, its officers, agents and servants, be enjoined from engaging directly or indirectly, as principal, agent or investor in the business of buying, selling or delivering coal for consumption within the limits of the City of Jersey City, until the first day of March, 1940, with the proviso that such restraint shall not be deemed in any way to bind or affect William Horre & Co., of Hoboken, or the interest of the said defendant, Burns Brothers, therein, and that the restraint therein decreed shall be deemed to include and prohibit sales by the defendant, Burns Brothers, directly or indirectly to Jersey City dealers for sale to consumers within the limits of the City of Jer-

sey City, and that it adjudges that the said defendant, Burns Brothers, be enjoined and restrained thereafter from directly or indirectly selling coal to Francis A. Hunt and Frank R. Leucht, partners doing business as Hunt & Leucht, and delivering the same to the said firm of Hunt & Leucht, or anyone on their behalf, for consumption within the limits of Jersey City, and that said decree further orders that the defendant, Burns Brothers, account to the complainant for all sales of coal made by it since March 1, 1920, to Jersey City dealers for consumption within the limits of the City of Jersey City, including all sales made to said Francis A. Hunt and Frank R. Leucht, partners doing business as Hunt & Leucht, and in that said decree directs that it be referred to James J. Murphy to take and state such account, and in that said decree directs that the said defendant, Burns Brothers, pay the complainant the costs of this suit to be taxed, including a counsel fee.

And your petitioner appeals from the said decree, and from every part thereof, on the ground that no such decree should have been entered, and that it should have directed that the complainant's bill of complaint be dismissed.

Your petitioner therefore prays that the said decree may be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

McCARTER & ENGLISH,
Solicitors for and of Counsel
with Appellant.

ROBERT H. McCARTER,
Of Counsel.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between R. H. PERRY & Co., *Complainant-Respondent,* *and* BURNS BROTHERS, *Defendant-Appellant.*	*On Appeal from Chancery.* *Answer to Petition of Appeal.*

R. H. Perry & Co., the complainant-respondent above-named, joins issue on the petition of appeal of the defendant-appellant Burns Brothers.

McDERMOTT, ENRIGHT & CARPENTER,
Solicitors for and of Counsel
with Respondent.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between R. H. Perry & Co., *Complainant-Respondent,* *and* Burns Brothers, *Defendant-Appellant.*	*On Appeal from Chancery.* *Sat Below,* Vivian M. Lewis, *V.-C.*

BRIEF FOR DEFENDANT-APPELLANT.

On the 16th of January, 1920, an agreement between Burns Brothers, a New Jersey corporation, Ralph H. Perry, acting for the benefit of a new corporation (the complainant in this cause) to be thereafter organized and Ralph H. Perry, acting as manager of an underwriting syndicate was entered into containing several provisions, including an agreement by Burns Brothers to sell to the proposed new corporation, the coal business then conducted by it at its Communipaw avenue and Jersey avenue yards in Jersey City. The thirteenth clause of this agreement provides as follows:

> "13. Seller Burns Brother agrees not to engage, directly or indirectly, in the business of buying, selling or delivering coal for consumption within the limits of the City of Jersey City and the territory adjacent thereto which may be conveniently served by wagon deliveries from Jersey City, for a period of twenty years from the time of passing title hereunder, and further agrees to procure like contracts to be approved by counsel for the New Company, binding for a period of ten years, the following individuals:"

This agreement was subsequently consummated among other things, by the delivery to the complainant, the proposed new corporation which in the meantime had been organized under the laws of the State of Delaware, of a bill of sale dated the 1st of March, 1920, under the corporate seal of Burns Brothers and signed by its president and attested by its secretary (Exhibit C. 3).

This bill of sale thus expresses the idea of the thirteenth clause in the contract, namely:

> "8. Seller for itself, its successors and assigns, hereby covenants not to engage, directly or indirectly, as principal, agent or investor in the business of buying, selling or delivering coal for consumption within the limits of the City of Jersey City and the territory adjacent thereto which may be conveniently served by wagon deliveries from Jersey City (not including, however, the City of New York) for a period of twenty years from the date hereof.
>
> Nothing herein contained, however, shall be deemed in any way to bind or affect William Horre & Co. of Hoboken or the interest of Burns Brothers therein."

The ninth clause of the bill of sale provided for further assurance

> "for the purpose of effectuating this instrument and to do all such further acts and things as may be reasonably requested by the buyer for the purpose of carrying into full effect this instrument as well as the agreement made by the seller with Ralph H. Perry for the benefit of buyer, dated January 16, 1920."

It does not appear that the bill of sale (accompanied as it was by an assignment of leases of the two yards (Exhibit C. 4)), did not in all ways effectuate the intention of the parties in making it, and the law presumes, therefore, that a bill of sale or deed made and accepted in fulfillment of an executory contract, fully expresses the final intention of the parties as to so much of the contract as it purports to execute. *Blum* v. *Parson Manufacturing Co.,* 80 New Jersey Law 390; *Davis* v. *Clark,* 18 Vroom 338.

The complainant, entirely ignoring the bill of sale, filed the bill of complaint in this cause, relying wholly upon the contract, setting up certain advertisements of the defendant in the Jersey City papers, and seeking an injunction:

> "That said defendant, its officers, agents and servants, be enjoined and restrained from engaging, directly or indirectly, in the business of buying, selling or delivering coal for consumption within the limits of the City of Jersey City and the territory adjacent thereto which may be conveniently served by wagon deliveries from Jersey City, until March 1, 1940."

Upon the filing of this bill an order to show cause issued with a temporary restraining order in the broad language of the thirteenth paragraph of the contract. Later argument was had upon the rule to show cause, but no determination was reached by the Court thereon, probably in response to the contention of the complainant that the *status quo* should be preserved until final hearing.

The evidence having been taken the decree in favor of the complainant which is here the subject of appeal, was made.

I.

The eighth clause of the bill of sale above-quoted, seeking to limit and restrain the defendant from engaging directly or indirectly as principal, agent or investor in the business of buying, selling or delivering coal for consumption within the limits of the City of Jersey City and the territory adjacent thereto which may be conveniently served by wagon deliveries from Jersey City (not including the City of New York) for a period of twenty years, is illegal and void, because too general and unspecific.

It is well known that at common law, all agreements that sought to restrain freedom of trade, particularly in the necessities of life, like coal, were void, as being in restraint of trade. Whatever be the rule in other states, it is too well settled to be longer questioned that in New Jersey, the true principle is that a contract restraining one's activities, and therefore in restraint of trade, is legal insofar as the restraint is necessary for the protection of the covenantee in the carrying on of his, its or her business, and not so far as to interfere with the interests of the public. Any restraint that goes beyond such fair necessity is illegal. *Trenton Potteries Co.* v. *Oliphant,* 58 N. J. Equity 506; *Rosenbaum* v. *U. S. Credit System Co.,* 65 N. J. Law 255; *Fleckenstein* v. *Fleckenstein,* 76 N. J. Law 613. This is the modern view and harmonizes with the larger horizon which modern methods have given to the scope of a business enterprise. Under this rule, no empiric limitation of time or space can be assumed. Everything depends upon the extent of the business that the covenantee seeks to protect, and the necessity in a given case of the proposed protection by the given covenant.

Under this rule, a limitation either in time or space, or both, may or may not be valid, depending upon the circumstances of the case, and the *quantum* of protection necessary and required for the protection of the covenantee. Hence, if there be a limitation as to time, but too broad a territory is sought to be included, the covenant cannot stand. *Wyder* v. *Milhomme,* 96 N. J. Law 500. In other words, as succinctly stated by Vice-Chancellor Leaming in *American Ice Company* v. *Lynch,* 74 N. J. Equity 298, "The territory of restraint and the period of restraint must be reasonable." See also *Oregon Steam Navigation Co.* v. *Winsor,* 87 U. S. 64; *Gamewell Fire Alarm Tel. Co.* v. *Crane* (Mass.), 35 N. E. 98; 13 *Corpus Juris,* Section 415.

It has, moreover, been uniformly held, for the purpose of enabling the Court to ascertain whether or not the restriction is reasonably necessary for the protection of the contractee, that the contract must be specific and certain in its terms.

In 13 *Corpus Juris,* page 488, we find, speaking of valid provisions contained in contracts restraining freedom of action in trade:

> "The contract must be sufficiently specific to permit the determination of whether its effect is reasonable. In North Carolina it has been held that the limitation as to space must be set out with the same definiteness as would be required in a deed of conveyance."

The case in North Carolina referred to is that of *Shute* v. *Heath,* 42 Southeastern Reporter 704. There the Court, speaking of contracts restricting activity in trade, said:

> "There must be a definite limitation as to space and the reasonableness of such

limitation will depend upon the nature of the business and good will sold."

The Court then quotes from the contract, which provided that the defendant, after selling to the plaintiffs a tract of land and machinery, agreed with them that they—

> "would not erect, conduct, or carry on the business of ginning and baling cotton or making brick *in any territory now occupied by them, or from which they secure their patronage,* so as to compete with them or injure their business in any of the lines of ginning and baling cotton or making brick, either for ourselves, or as agents for another or others."

It was contended that the contract was too indefinite. The Court said:

> "We think the motion must be allowed. The infirmity of the contract does not consist in the reasonableness as to the extent of territory in which the plaintiffs were to conduct their business free from competition on the part of the defendants, but it is in the indefiniteness of that territory. No rule can be laid down by which the area can be made certain. No instructions could be given, even to an expert surveyor, by which he could define the abounds of the space. It is without shape—without course or distance from any object or pointer. The fixing of the bounds would depend upon the testimony of witnesses, each testifying as to what he knew as to who were the patrons of the plaintiffs, and where they resided. The attempted enforcement of such contracts would, in the nature of things, be likely to produce litigation between the assignor and assignee as to the extent of the territory with the probability that large numbers of witnesses would be called, and great expense incurred both by the litigants and the public. A retrospect of the course of the law in respect to contracts in restraint of trade confirms us in the view we have taken of the contract in the present case as to the limitation as to space therein set out; that is, that the agreement that the limitation as to space shall be so definitely set out in the contract as that the bounds must be determined by the same rules as apply to the description of real estate in deeds. Contracts in general restraint of trade with English-speaking peoples have always been void; and while the doctrine has been in modern days modified to the extent of permitting such contracts, to operate in limited territory, to be made and enforced, yet in all the cases we have found, except one hereinafter referred to, the space has been definitely fixed in the contract, with as much certainty as is required in the description of deeds. The evil consequences likely to flow from such contracts to the parties, as well as to the public, induce us to construe the requirement of definiteness as to space strictly, and that the contracts themselves shall set out such a description as shall be definite without the aid of testimony dehors, except such as is allowed in establishing the boundaries to real estate conveyances."

In *Hoff* v. *Leneerman*, 143 Ill. Appeals 170, an action was brought to recover damages for alleged violation of a written contract, by which the defendant agreed that he would not "run or have any interest in any engine, threshing machine or corn sheller for a term of three years from date, in the territory contiguous to Guthrie, Illinois." The Court sustained a demurrer to the complaint, based upon the indefiniteness of the territory within which the restraint was, by the contract, sought to be imposed. The Court said:

> "We are of opinion that the action of the trial court was proper. It is a well settled rule that contracts in partial restraint of

trade, if reasonable as to time, place and terms, are not in violation of public policy and are valid and binding. Southern Fire Brick Co. *v.* Sand Co., 223 Ill. 622. By the terms of the present contract, appellee agreed not to run a corn sheller 'in the territory contiguous to Guthrie, Illinois.' The word contiguous is defined as 'adjacent, in actual contact, touching, near.' Am. & Eng. Law, Vol. 7, 79.

"It is obvious that the word when employed as descriptive of territory, renders the extent or scope intended to be included thereby, so indefinite as to make it impossible to determine with certainty whether the restriction provided by the contract is reasonable as to place, or whether or not appellee had violated the same. For this reason we are constrained to hold that the contract is void for uncertainty, and incapable of enforcement."

In no court has this rule been more strictly adhered to than in the Court of Chancery of this State.

In *Messinger* v. *Franzblau,* 118 Atl. Reporter 260, a contract had been made by which the defendant agreed:

"I myself, or my husband, will not open, conduct or be employed or interested in any way in any store selling at retail those things which are usually sold by a grocery or delicatessen store within an area of at least ten city blocks of above described store for a period of five years."

A business had been opened in claimed violation of the agreement, and within the prohibited ten city blocks. Vice-Chancellor Backes, in denying relief, said:

"The restrictive words 'within an area of at least ten city blocks,' are as elastic as city blocks are variant. There is no uniformity in city blocks, as is well known. If

'city blocks' has a technical meaning, it has not been brought to my attention. The language does not permit of the construction that ten blocks lineally measured along Bloomfield avenue was intended. If that had been the case, it would have been a simple matter to have said so. Obviously the parties were not so minded, for then there would be no violation of the covenant if the covenanter engaged in trade in the next cross street one block removed from Bloomfield avenue. That would be a greater grievance than the one now complained of. Then, too, the limitation of the covenant to the 'area' of the blocks precludes the lineal measurement. It seems to me, therefore, that the covenant is not violated if the defendant's store is beyond, as it is, the area of the ten blocks immediately surrounding the protected store. This view may not fully meet the understanding of the complainant, but it does fulfill the intention of the parties as expressed in the covenant."

In *Tsangas* v. *Broogos,* 95 N. J. Equity 499, a party covenanted that he would not enter the restaurant business "within ten city blocks" of the complainant's place of business. The complainant sought an injunction to restrain the defendant from engaging in the restaurant business at the designated place, or any other place within ten city blocks of the complainant's business. Vice-Chancellor Church, in declining relief, said:

"It seems to me that, in so far as this court is concerned, the question is *res adjudicata,* under the case of Messinger *v.* Franzblau, which was decided by Vice-Chancellor Backes and reported in 118 Atl. Rep. 260.

"In that case the covenant was not to engage in the same business within an area of ten city blocks. I cannot see that there is any material difference between the words

'ten city blocks' and 'an area of ten city blocks,' and I therefore feel compelled, under the decision above cited, to advise a decree for the defendant with costs."

Again, in *Weliky* v. *Zakrzewski,* 96 N. J. Equity 203, a contract included a clause by the seller not to resume a similar business "within a radius of ten city blocks, for five years, east, west, north or south." An injunction was sought to prevent a violation thereof, VICE-CHANCELLOR CHURCH declined to grant an injunction, saying:

"The principle involved in this case was decided in Messinger *v.* Franzblau (N. J. Ch.), 118 Atl. 260. I, myself, filed an opinion in a case very similar to this in Tsangas *v.* Broogos, 123 Atl. 247. There is a slight variation in the wording of these restrictions, 'ten city blocks,' and 'area of ten city blocks,' and in the instant case, 'within a radius of ten city blocks, north, east, south and west' changes the situation which has been decided in the other cases. Moreover, there is another reason why this injunction should be denied. The business that was sold was in Newark; the business that the defendant reopened was in Irvington. Irvington is not a city, but a town, and how can one measure in the Town of Irvington any distance by city blocks?

"I shall therefore deny the motion for the injunction."

The covenant in the instant case, so far as space is concerned, prohibits the buying, selling or delivering coal "within the limits of the City of Jersey City, and territory adjacent thereto which may be conveniently served by wagon deliveries from Jersey City."

Observe that it is one covenant excluding "Jersey City *and* the territory adjacent thereto, which may be conveniently served by wagon deliveries from Jersey City." Now the word

"adjacent" is of itself flexible and uncertain in meaning. In the *Standard Dictionary* it is defined as

"lying near, close at hand, adjoining, bordering."

In *Webster's,* it is defined as that which is "near or bordering upon, adjoining."

In the *Century Dictionary,* it is defined as "contiguous, adjoining."

In *Bouvier's Law Dictionary* it is defined as "next to, or near, neighboring."

In 1 *Corpus Juris,* at page 1196, it is said:

"The natural and primary meaning of the word is near to, or neighboring. It is not inconsistent with the idea of something intervening, and has been defined as lying near to but not actually touching, in the vicinity or neighborhood of.

"However, it is often used in the sense of adjoining, abutting, or touching, and the purpose of its use is to be gathered from the context.

"The term is a relative and not a definite and absolute one, and the exact meaning of the word is determinable principally by the context in which it is used, and the facts of each particular case, or by the subject matter to which it is applied and the object which the legislature is seeking to carry out."

In *Hewey, County Treasurer,* v. *Cudahy Packing Co.,* 269 Federal Reporter 21, the Circuit Court of Appeals for the Eighth Circuit held that the word "adjacent" as used in a statute authorizing cities to attach property outside the city limits, but adjacent thereto, has a broader meaning than contiguous, and signifies also neighboring, or in close proximity, although not touching.

These definitions indicate how flexible is the meaning of this particular word, "adjacent," but the far greater uncertainty arises from the words "which may be conveniently served by wagon deliveries from Jersey City." The date of the bill of sale is March 1, 1920. Since then, we know that trucks have largely superseded the use of wagons, and, of course, the radius of convenient delivery has become thereby greatly enlarged. The yardstick measuring the extent of the excluded area is, however, fixed by the contract, as that which might, on the first day of March, 1920, be conveniently served by wagon deliveries. There is no fixed and determined rule by which the limit of convenient service can be ascertained. What one zealous driver could do with an energetic, well-fed team, would not apply to a lazy, disinterested driver controlling a slow and unambitious team. Moreover, assuming the certainty did exist with reference to that, how could such certainty be ascertained in 1930, or 1935, or 1940, the period during which this sliding, unspecific, uncertain rule for ascertaining the extent of the territory is to govern?

II.

Nor can it be claimed that the covenant can be divided and the restraint applied to Jersey City alone.

Such a suggestion would necessarily only be available when the Court can conclude that the covenant is divisible. This contention, however, cannot here prevail. The contract is one and entire. It provides for a sale by Burns Brothers of its Jersey City business, including its good will, to be paid for in a given quantity of capital stock, and is accompanied by the clause seeking

to confine the future activities of the defendant, not only to the limits of Jersey City, but also the territory adjacent thereto, which may be conveniently served by wagon deliveries from Jersey City. The two localities—Jersey City and the adjacent territory that can be conveniently served—are not stated in the disjunctive, but make a composite whole, and in such a situation the courts have declined to apportion the covenant and validate it so far as it is legal, and ignore the balance.

The distinction is plainly brought out in the opinions of the Court of Chancery and the Court of Errors in the *Potteries* case. In the court below, Vice-Chancellor Grey (56 N. J. Equity 680, 720), construed the words of the covenant there under consideration "within any State of the United States, or within the District of Columbia, except the State of Nevada and the territory of Arizona" as one contiguous area, and declined to consider it as divisible, admitting that in a large number of cases where covenants naming two or more separate areas of exclusion, the courts have enforced them as to one, notwithstanding that as to other space it was unreasonable, saying that in all these cases the several character of the valid stipulations as distinct from the invalid ones, is apparent in the contract as expressed by the parties themselves, so that the Court is not called upon to give a construction to ambiguous phrasing, and perhaps impose upon the contractors a stipulation to which they would not have agreed.

This Court, however, (58 N. J. Equity 507, 518) read the language of the covenant differently, Chief Justice Magie saying:

> "I have reached the conclusion that, without doing any violence to the language or

> straining its import, it may be, and ought to be held to be a divisible description, embracing not one whole area but several areas disjunctively described. * * * Looking at the subject of the contracts, their presumed intent and the purpose of any agreement to restrain respondents from engaging in a competitive business, the description can be read as applicable disjunctively to different areas, as within the State of Maine, within the State of New Hampshire, or within the State of New Jersey, etc."

This conclusion was reached after calling attention to the fact that "the area or areas within which the restraint upon respondents is engaged for in these contracts, is described as being not as stated in the opinion below within any State *of* the United States of America, but 'within any State *in* the United States of America.' "

Reliance was had by the Court of Errors, and strong emphasis laid upon the English case in the Court of Appeal of *E. Underwood & Son* v. *Barker,* 1 Law Reports Ch. (1899) 300, where the covenant was not to engage in a similar business "in the United Kingdom *or* in France, *or* in the Kingdom of Belgium, *or* Holland, *or* in the Dominion of Canada." Because of this language in the disjunctive, the Court of Appeal held that the covenant was a separable one, and not unreasonable so far as it applied to the United Kingdom. Reliance by the court below was had in the *Fleckenstein* case, 76 N. J. Law 613. That case really helps us, for the Court construed a contract forbidding trading five hundred miles from Jersey City, as meaning, *ex necessitate, in* Jersey City *or* five hundred miles from it, and concluded it was therefore severable.

The subject arose again in the Court of Appeals in the more recent case of *Wyder* v. *Milhomme,* 96 N. J. Law 500, where Milhomme in entering into a contract, undertook to bind himself for the period of ten years "not knowingly to aid, assist or advise in any way whatsoever, any business, individual, firm or corporation engaged in the same or similar line of business." An effort was made to get the Court, following the *Trenton Potteries* case and the *Fleckenstein* case *supra,* to hold that the covenant was divisible, and good, so far as part of the territory was concerned. This Court, however, declined to adopt this view, saying, with reference to the two cited cases:

> "in both cases, the court adopted a rule of selective construction of the contract whereby it was enabled to confine the operation of the contract to a territory deemed reasonable; in the one case the State of New Jersey, and in the other the City of Jersey City. The present covenant admits of no such construction, for where it mentions any territory at all, it speaks of the 'United States of America' without any hint of a subdivision thereof."

In a recent case in the English House of Lords, *Mason* v. *Provident Clothing and Supply Company, Limited,* Law Reports, Appeal Cases 1913, page 724, there was for consideration by the Court, a contract containing a covenant that bound the party not

> "to be engaged or assist or help, either directly or indirectly, any person or persons, who shall be employed, whether for remuneration or not, by any person or persons, firm or firms, company or companies carrying on the same or a similar business as aforesaid, or who shall be assisting or helping, either directly or indirectly in the carrying on of the same or a similar business."

After intimating, but not deciding that this covenant was too uncertain to admit of enforcement, Lord Moulton, on page 745, said:

> "It was suggested in the argument that even if the covenant was, as a whole, too wide, the court might enforce restrictions which it might consider reasonable (even though they were not expressed in the covenant), provided they were within its ambit. My Lords, I do not doubt that the court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only in the cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause. It would in my opinion be *pessimi exempli,* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the courts were to come to his assistance and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required."

See also 22 *Cyc.* 866, where, as the result of an examination of the authorities it is stated:

> "If a contract in restraint of trade is divisible and valid as to one part, although invalid as to the other, an injunction against a breach of the valid part is proper."

On this same principle, the Supreme Court in the very recent case (May 13, 1926,) of *Lehigh Valley Railroad* v. *United Lead Company,* 4 N. J. Advance Reports 1025, had occasion to consider this question of the divisibility of contracts, and held that the conceded illegality of one feature of the contract there under review permeated and vitiated the entire writing.

We therefore feel confident that this Court cannot sustain the action of the Court of Chancery and segregate this covenant and hold it good so far as Jersey City is concerned. The complainant is seeking to enforce a particular contract. It cannot escape the difficulties it meets in so doing, by scratching out, or giving a new and unexpected meaning to the contract than that which the parties have themselves agreed to. The whole case made by complainant in its bill is based upon the other view, and the Court cannot, regardless of the frame of the bill and the theory of the case, disregard the contract the parties made, and make a new one for them.

The effort of the complainant to make a new contract by giving a meaning other than that which the parties made or upon which it relies in its bill of complaint, is futile. In neither of the cases in the Court of Errors and Appeals upon which it relied for the view that the Court should interpret the language so as to apply to Jersey City alone, was the contract in the conjunctive form that here obtains. It reads:

> "within the limits of Jersey City *and* the territory adjacent thereto which may be conveniently served by wagon deliveries from Jersey City."

It is impossible to sever one part of this covenant from the other without re-making the contract of the parties. So to do, would be to fly directly in the teeth of the decision of the Court of Errors and Appeals in *Wyder* v. *Milhomme,* 96 N. J. Law 500 (the last word of that court upon questions of this character), as well as the other cases cited above.

III.

The covenant in any event can only be construed as prohibiting a retail business to consumers in Jersey City, and cannot be held as prohibiting the sale to peddlers in Jersey City from any yard the defendant may have, or from selling to any one consumer or otherwise from defendant's Johnston Avenue Yard.

The proofs show that Burns Brothers were operating, at the time the contract was made, three yards in Jersey City, namely Jersey avenue, Communipaw avenue and Johnston avenue. The resolution (Exhibit D. 2) authorizing the president to make the sale reads as follows:

> "Resolved, That the President, at his discretion and on such terms as he may approve, is hereby authorized to dispose of the *Hudson and Communipaw Avenue Yards* in Jersey City."

The bill of sale does not mention the Johnston avenue yard, and expressly confines its operation to the business carried on, and assets located at the Jersey avenue and Communipaw avenue yards. There was a complete reservation in the seller of whatever business it might desire thereafter to do from Johnston avenue. So plain is this that in the seventh clause of the bill of sale the words "which was sold to buyer" are interlined in manuscript after the words "All the right, title and interest of the seller in trestles, pockets, buildings, lands and tenements used or held for use by it, or for its benefit in connection with the business heretofore carried on by it." So, too, in the fourth clause of the same paper, the language is "the good will of the business heretofore carried on by the seller at *aforesaid yards.*"

The same thing is true if we are to look at the contract itself, except that in the second recital, at the beginning of the contract, we find that the Johnston avenue yard is stated to be "now used exclusively for handling New York business, and is not now used, nor adaptable for use in handling Jersey City business." How, therefore, can the language of the covenant be extended to have any reference to any business that might thereafter be conducted from the Johnston avenue yard? This Court has settled that a sale, even of the good will of a business, does not prevent the vendor from starting a competitive business in the absence of a restrictive covenant. *Hilton* v. *Hilton,* 89 N. J. Equity 182.

Moreover, the parties have, by their conduct, practically construed the covenant in this way.

The evidence of Hunt (p. 49) and Leucht (p. 52) shows that they, as dealers, selling both to consumers and to merchants, in the latter part of 1922, after the bill of sale was made, purchased coal from Burns Brothers, at the Johnston avenue yard for the purposes of their business, and that the general sales manager and foreman of the complainant were aware thereof, and sought to lure them back to one of the complainant's yards. No contradiction whatever is made of this fact by Mr. Perry, or anyone else. We, therefore, contend that the complainant, whatever be the correct construction of the contract as between Jersey City and its adjacent territory, has no right whatever to prohibit Burns Brothers from doing any kind of business that they desire to do from the Johnston avenue yard.

Again, the language of the covenant is:

> "not to engage * * * in the business * * * of selling or delivering of coal for

consumption within the limits of the City of Jersey City."

This must mean a sale to the consumer. Mr. Perry's evidence shows that before, and since, the sale, the business carried on at the Jersey avenue and Communipaw avenue yards was to the consumer direct, or to dealers or peddlers who came with their own wagons and purchased for sale to others. The covenant obviously cannot apply to the latter class. Surely this contract does not comply with the legal requirements as to specificness and certainty referred to in the early part of this brief, if it be construed as permitting sales to peddlers, whose intention at the time of the making of the sale, is to sell to consumers outside of Jersey City, but to prohibit such sales if the intention of the peddler be to sell to consumers within Jersey City's limits. Such a contract would be too vague and uncertain to be capable of enforcement. It would require a superintendency and censorship by the Court over the ultimate intention of a wholesale purchaser as to the disposition of coal he buys, and would necessarily make the contract impracticable, unascertainable and incapable of enforcement—a construction no court will adopt, it being the recognized purpose to sustain rather than vitiate contracts.

The very fact that the defendant's subsidiary, Horre & Company, was not prevented from doing business—retail or wholesale—shows that all that was intended by the covenant to interdict was the sale to consumers, not to jobbers, at wholesale, in the territory. We are not claiming the right to use wagons bearing the name of Burns Brothers for sales at wholesale, but we do think that there is no basis whatever for the interdiction of a wholesale business in any part of the

territory throughout Hudson County, and of a retail business as well from the Johnston avenue yard.

IV.

The most that can be claimed in any event is that the covenant forbids the selling or delivering of coal for consumption in Jersey City. That is, the sale must be to the knowledge of the vendor for consumption in Jersey City.

The only sale that is interdicted, is one by a vendor with the knowledge that the coal sold will be consumed in Jersey City. The language is "sold for consumption in Jersey City." This involves the idea that the vendor shares with the vendee the knowledge that the sale is for consumption in Jersey City. A sale made to a peddler from any yard the defendant may now have, in the making of which the vendor is not aware that the purpose of the vendee (the peddler) is to sell to a consumer in Jersey City, must necessarily be exempt from the prohibition.

Of course, we do not concede that the covenant has this narrow construction, but we think that at the worst this is all that can be claimed for it.

As shown in the introduction to this brief, originally all contracts of this character were repugnant to the views of the Court because they tended to monopoly. The burden is upon one who seeks to interfere with, or restrict the freedom of trade. We feel the more inclined to urge this principle because of the very significant language of the resolution of the Board of Directors of Burns Brothers (Exhibit D. 2, offered on p. 59) authorizing the president of the

company, Mr. Burns, to make the sale in question. It reads:

> "Resolved, That the President at his discretion and on such terms as he may approve, is hereby authorized to dispose of the Hudson and Communipaw Avenue Yards in Jersey City."

Surely, a resolution authorizing the disposition of a business, will not justify the Court in giving an unduly broad and unnecessary construction to the contract in question.

To summarize then, our contention is:

1. That the broad language of the covenant undertaking to prohibit the sale of coal "for consumption within the limits of the City of Jersey City and the territory adjacent thereto which may be conveniently served by wagon deliveries from Jersey City" is void as being unspecific, uncertain and incapable of definition.

2. That the contract is entire and incapable of severance as applicable to Jersey City alone.

3. That even if it is capable of such severance, it has no application whatever

(a) To the business of any kind the defendant may desire to carry on from its Johnston avenue yard, or

(b) To a peddler business from any yard the defendant may now own or control in Jersey City.

4. Even if capable of such severance, which we deny, as it is only sales for consumption within the limits of Jersey City that is interdicted, the contract thus sought to be confined and to prohibit sales to peddlers who in turn might sell for consumption in Jersey City, would be void for uncertainty, and incapable of judicial enforcement.

5. That in the last ditch, assuming but not conceding the severability of the contract, the only sales to peddlers that can be within the prohibition of the covenant would be such sales to peddlers as Burns Brothers knew at the time the sale was made that the coal was intended for ultimate consumption in Jersey City.

We presume that counsel for the complainant will in his brief, as he did in the court below, ignore the terms of the bill of sale, and fall back upon the quotations from the earlier agreement to sell. For the reasons already stated, and because of the authorities in this court there referred to, we contend that the Court cannot consture the deed by reference to an anterior contract merged into it.

It is true that Mr. Perry (pp. 23 *et seq.*) undertook to testify concerning the character of the business that previous to its sale Burns Brothers had carried on at the three Jersey City yards; but this testimony was rendered valueless by his cross examination, which showed that he had never been at either the Johnston avenue or the Jersey avenue yards, and all he knew about the business was hearsay. But assuming (not conceding, however) that the contract may be looked at, the representation made therein as to what business *had* been carried on at the Johnston avenue yard, gives no basis for the contention that business of another kind or character could not in the future be there conducted, in view of the fact that there is no pretense of any sale of the business conducted at the Johnston avenue yard.

The language of the decree is:

> "It is on this 15th day of November, 1927, on motion of McDermott, Enright & Carpenter, of counsel with complainant, Ordered,

ADJUDGED and DECREED, and the Chancellor by virtue of the power in him vested does hereby ORDER, ADJUDGE and DECREE that the defendant, Burns Brothers, and its officers, agents and servants, be and they hereby are enjoined and restrained from engaging directly or indirectly, as principal, agent or investor in the business of buying, selling or delivering coal for consumption within the limits of the City of Jersey City until the first day of March, 1940, provided, however, that such restraint shall not be deemed in any way to bind or affect William Horre & Co. of Hoboken, or the interest of the defendant Burns Brothers therein, and that the restraint herein decreed shall be deemed to include and prohibit sales by the defendant, directly or indirectly, to Jersey City dealers who sell to consumers within the limits of the City of Jersey City.

"FURTHER ORDERED, ADJUDGED and DECREED, that said defendant be enjoined and restrained from hereafter, directly or indirectly, selling coal to Francis A. Hunt and Frank R. Leucht, partners doing business as Hunt & Leucht, and delivering the same to said firm of Hunt & Leucht, or anyone on their behalf, for consumption within the limits of the City of Jersey City."

The opinion of the Vice-Chancellor contents itself with an expression of the view that as in his view the covenant limiting in area and in time is reasonable, he concludes that the prayer of the bill should be granted, ignoring all of the questions hereinbefore argued, and which were raised before him.

It is confidently submitted that the decree below should be reversed.

ROBERT H. McCARTER,
KENT & KENT,
ALVIN UNTERMYER,
Counsel for Appellant.

May Term, 1928.

New Jersey Court of Errors and Appeals

Between
R. H. PERRY & Co.,
Complainant-Respondent,
and
BURNS BROTHERS,
Defendant-Appellant.

ON APPEAL FROM CHANCERY.

BRIEF FOR COMPLAINANT-RESPONDENT.

This appeal brings up a Final Decree of the Court of Chancery advised by Vice Chancellor Lewis, restraining the defendant Burns Brothers from violation of a restrictive covenant not to engage in competing business, which covenant is contained in an executory contract for sale and in the bill of sale given pursuant thereto covering the sale of a retail coal business in Jersey City.

Statement of the Case.

On and prior to January 16, 1920, Burns Brothers, a New Jersey corporation, was extensively engaged in the coal business in Jersey City and in New York City.

Its principal business was located in New York City (p. 23, l. 35).

Its business also covered the entire city of Jersey City (p. 23, l. 40). It received its supply of coal, both for the Jersey City business and the New York business, over the line of the Central

Railroad of New Jersey, and maintained three coal handling plants in Jersey City, one at Jersey Avenue and Morris Canal, one at Communipaw Avenue and Morris Canal, and one on the Hudson River at the foot of Johnston Avenue (p. 24).

The Communipaw Avenue yard was used entirely for serving peddlers—small dealers who take delivery at the yard in their own trucks or wagons. These sales are denominated "yard sales" (p. 24).

The Jersey Avenue yard was used both for sales to such peddlers and as a depot for the direct delivery to consumers by means of Burns Brothers delivery equipment (p. 24).

The yard at Johnston Avenue and the Hudson River (which is a part of the Central Railroad terminal close to its ferry to New York) was used entirely for New York deliveries, i. e., for carting the coal to New York for direct delivery or by New York dealers taking the coal from the yard and delivering to New York customers (p. 24, l. 35).

In January of 1920, Ralph H. Perry entered into contracts with several coal dealers doing business in Jersey City, for the purpose of acquiring their plants and businesses in the interest of a New Company to be organized by him, he acting for himself and as manager for an Underwriting Syndicate which was to furnish the cash capital or so much thereof as should not be furnished by the selling corporations.

These selling corporations included the defendant Burns Brothers and E. L. Young Company, which latter Company had a yard in Jersey City from which it sold to customers both in the City of Jersey City and in the City of New York.

These agreements to purchase included only the Jersey City business of Burns Brothers and plants

serving the same, but included the entire business of E. L. Young Company both in Jersey City and New York.

Mr. Perry, in turn, agreed to sell to Burns Brothers the New York business and equipment acquired from E. L. Young Company.

The contract between Burns Brothers and Perry is printed at page 7 of the case.

The contract of E. L. Young Company with Perry is Exhibit C-5, page 9 of exhibits.

The Burns Brothers' contract recites that Perry and associates are about to organize a corporation (p. 7)

> "for the purpose of carrying on the business of buying and selling coal in the City of Jersey City, N. J., and adjacent territory"; . . .
> that "Burns Brothers is engaged in such business in the City of Jersey City as well as in the City of New York and adjacent territory, operating two yards and pockets for handling its Jersey City business located at the foot of Jersey Avenue and also on Communipaw Avenue near Garfield Avenue, Jersey City, respectively; and also operating a certain other yard and pockets located on Johnston Avenue, Jersey City, within the terminal yards of the Central Railroad of New Jersey, *which latter yard and pockets are now used exclusively for handling New York business of Burns Brothers and are not now used nor adaptable for use in handling Jersey City business*"; . . .
> that "the New Corporation expects to acquire the business, property and good will of E. L. Young Company, which business as now conducted includes sales and deliveries both in the City of Jersey City and the City of New York" . . .
> that "it is desirable that the New Company confine its operations, as far as practicable, to the City of Jersey City."

The agreement then provides:

(1) That it is "understood to be for the benefit of the New Corporation when organized as fully as though a party hereto, and said New Corporation when organized will be entitled to receive all benefits hereunder and will assume all obligations hereof."

(2) Seller (Burns Brothers) agrees "to sell to the New Corporation and transfer by proper instruments of transfer all its interest in lands, leaseholds, trestles, office furniture and fixtures, tools, and parts, and other fixed assets (as hereafter defined), owned or operated by it at its two aforesaid yards located on Jersey Avenue and Communipaw Avenue near Garfield Avenue and used in connection with its Jersey City business; also all its Jersey City customers' books of account and all other books and records relating to the two Jersey City yards last aforesaid and *Seller's Jersey City business.*" . . .

". . . all the good will of the coal business now conducted by it in the City of Jersey City and vicinity, meaning to include therein all sales where ultimate delivery is made to consumer in Jersey City or adjacent territory (not including New York)."

(3) The Seller (and Underwriters to the extent that the Seller did not so elect) agreed to pay to the New Company for working capital a total sum equivalent to forty-five cents per short ton of Seller's average annual tonnage as defined in the agreement.

In consideration of the premises, Perry agreed that the New Company would issue to the Seller, Burns Brothers, 8% preferred stock equal at par to the appraised value of the physical assets and the cash contributed, and common stock without par value in an amount to be determined on the basis of Seller's annual average tonnage to be determined by audit of Seller's books.

It was also agreed that the New Company should transfer to Burns Brothers all the good will of the New York business to be acquired from the E. L. Young Company and the delivery equipment pertaining thereto, for which Burns Brothers agreed to pay in cash fifty-five cents per ton for the average annual tonnage of the New York business, to be ascertained in the same manner, and also the appraised value of the New York delivery equipment.

Paragraph 13 of the contract (p. 17) provides:

"Seller Burns Brothers agrees not to engage, directly or indirectly, in the business of buying, selling or delivering coal for consumption within the limits of the City of Jersey City and the territory adjacent thereto which may be conveniently served by wagon deliveries from Jersey City, for a period of twenty years from the time of passing title hereunder" . . .

"This paragraph does not affect the interest of Burns Brothers in William Horre & Company."

Paragraph 15 provides:

"It is mutually agreed that the New Company, its successors or assigns, will immediately upon its organization, execute an agreement not to engage directly or indirectly in the business of buying, selling, or delivering coal for consumption within the limits of the City of New York, said agreement to be identical in all other respects with the covenant of Burns Brothers contained in paragraph 13 above, *with the exception that the New Company shall have the right to sell coal to wagons coming from New York City or vicinity.*"

The complainant herein is the New Company organized pursuant to the above agreement, and

duly assumed all obligations of the Perry contract (p. 25).

The physical assets of the yards were appraised and the tonnage or volume of sales from each yard determined and title passed March 1, 1920, at which time Burns Brothers, among other things, delivered a bill of sale and assignment (Ex. C-3, p. 1 of exhibits), transferring to R. H. Perry & Co. (1) all goods and chattels identified by an inventory; (2) all outstanding contracts of the Seller for the purchase of coal or other property or supplies incidental to the business of its two yards located at the foot of Jersey Avenue, Jersey City, and also at Communipaw Avenue near Garfield Avenue, Jersey City, subject to payment of the unpaid contract price of such property not then delivered; (3) all outstanding contracts of the Seller for the sale of coal for delivery to customers in the City of Jersey City; (4) the good will of the business heretofore carried on by the Seller at aforesaid yards, together with the right to retain Seller's name upon the office, structures, wagons and trucks transferred; (5) all outstanding book accounts due to Seller for coal heretofore sold by Seller from the aforesaid yards (subject to an accounting therefor); (6) all books of account, muniments of title, mailing lists and business records of every kind and description belonging to the Seller and relating in any way to the business theretofore carried on by it at the aforesaid yards; (7) all the right, title and interest of the Seller in trestles, pockets, buildings, lands and tenements used or held for use by it for its benefit in connection with the business heretofore carried on by it, which was sold to buyer, etc.;

(8) "Seller for itself, its successors and assigns, hereby covenants not to engage, directly or indirectly, as principal, agent or investor in the business of buying, selling or delivering coal for consumption within the limits of the City of Jersey City and the territory adjacent thereto which may be conveniently served by wagon deliveries from Jersey City (not including, however, the City of New York) for a period of twenty years from the date hereof.

Nothing herein contained, however, shall be deemed in any way to bind or affect William Horre & Co. of Hoboken or the interest of Burns Brothers therein.

(9) Seller further covenants to execute all such further instruments as may be requested by the Buyer from time to time in confirmation of or for the purpose of effectuating this instrument, and to do all such further acts and things as may be reasonably requested by the Buyer for the purpose of carrying into full effect this instrument *as well as the agreement made by the Seller with Ralph H. Perry for the benefit of Buyer, dated January 16, 1920.*"

Auditors submitted an audit of the average annual sales of Burns Brothers at the two yards mentioned, which audit included yard sales as well as delivery sales (Ex. C-2), and such audit was used as the basis for closing title upon which the amount of capital stock delivered to Burns Brothers and money paid, was determined.

Burns Brothers received on closing 688 shares of preferred stock and 3001 shares of common stock, which it retained until March 5, 1923, when it disposed of the same (p. 37).

During the interval it received regular dividends at the rate of 8% per annum on the preferred stock; also substantial dividends on the common stock (p. 61).

Complainant entered into possession of the yards and property acquired under the above

documents and has ever since been engaged in the business acquired (p. 38).

The above agreements which were negotiated by Michael F. Burns on behalf of Burns Brothers were honorably lived up to by it during his lifetime, with the single exception of sales made to a firm of peddlers named Hunt & Leucht, who, it seems, did some business in Jersey City, as well as in New York.

After the death of Mr. Burns, however, the defendant corporation, under the presidency of Sanders A. Wertheim, publicly advertised its intention of opening an office for retail sales at Journal Square, and that it would be in a position after April 5, 1926, to receive orders and make deliveries in Jersey City (Exs. C-9, C-10 and C-11).

The complaint herein was filed prior to the advertised date and a preliminary restraint allowed, and, on final hearing, the Final Decree appealed from was made restraining the defendant from proceeding with the threatened business.

This Final Decree is limited to the City of Jersey City and does not assume to cover any territory adjacent thereto.

ARGUMENT.

POINT I.

The covenant is sufficiently specific to support the decree appealed from.

Under this head we intend to meet the first point of appellant's brief.

By agreement Exhibit C-1, page 11, Burns Brothers agreed to sell its yards, leaseholds and

other physical assets "used in connection with its Jersey City business", also all its Jersey City customers' books of account, and all other books and records relating to the two Jersey City yards specified, and seller's Jersey City business, and specifically "all the good will of the coal business now conducted by it in the City of Jersey City and vicinity, meaning to include therein all sales where ultimate delivery is made to consumers in Jersey City or adjacent territory (not including New York)", and "further agreed not to engage directly or indirectly in the business of buying, selling or delivering coal for consumption within the limits of Jersey City and the territory adjacent thereto which may be conveniently served by wagon deliveries from Jersey City" (p. 17).

The covenant of the bill of sale is substantially identical.

It is therefore apparent that the restrictive covenant is not more extensive than the business which was sold.

No contention is made either in the proofs or argument that the restriction is unreasonable in either time or space.

The stress of the argument is that the "limits of the City of Jersey City and the territory adjacent thereto which may be conveniently served by wagon deliveries from Jersey City" is too indefinite for enforcement.

The decree appealed from, however, is limited to the City of Jersey City and does not assume to enforce the covenant as to adjacent territory, and the sole question therefore presented under this head is whether the contract is capable of such "selective" construction.

We think the case is controlled by the following authorities:

The *Trenton Potteries Company* vs. *Oliphant,* 58 N. J. Eq. 507, E. & A., Magie, C. J.

In that case Oliphant & Co. were engaged in the pottery business in Trenton and gave an option to sell its business to an individual, who afterward organized complainant corporation which brought the suit, as in the case at bar. The contract of the seller was to refrain from engaging in the business of manufacturing pottery ware "within any State in the United States of America or within the District of Columbia, except in the State of Nevada and the territory of Arizona" for the period of fifty years.

It was contended that the contract was an illegal restraint of trade and in any event that the area comprised the whole United States except Nevada and Arizona, and was unreasonable in extent.

The Court said (p. 514):

> "It is of public interest that every one may freely acquire and sell and transfer property and property rights. A tradesman, for example, who has engaged in a manufacturing business and has purchased land, installed a plant and acquired a trade connection and good will thereby, may sell his property and business with its good will. It is of public interest that he shall be able to make such a sale at a fair price and that his purchaser shall be able to obtain by his purchase that which he desired to buy. Obviously, the only practical mode of accomplishing that purpose is by the vendor's contracting for some restraint upon his acts, preventing him from engaging in the same business in competition with that which he has sold. * * * Contracts of this sort which have been sustained and enforced by courts have been generally declared to be such as restrain trade, not generally, but only partially, and no more extensively than is reasonably required to protect

> the purchaser in the use and enjoyment of the business purchased, and are not otherwise injurious to the public interest. * * * Thereupon, it is contended with great force that the true test of the validity of such contracts in restraint of trade is to be found alone in their being reasonably essential to the protection of the purchaser, and that, considering the vast extent of the area of some trades, there are cases in which a general restraint cannot be held to be unreasonable" (Citing cases).

The Court did not, however, consider the nature of the business there under consideration as requiring a general restraint of trade throughout the United States.

The Court said (page 516):

> "If, by the true construction, the contracts are divisible and bind respondents to a restraint in one or another of separately described areas, and, as applied to one or more of such areas, the restraint is not unreasonable, the suggested question need not be solved. * * * In seeking the meaning of this description we are to be guided by the ordinary rules of construction. We may presume that the contracting parties *intended to make a valid contract,* and, in this case, under the doctrine enunciated in Brewer *vs.* Marshall, that they designed to contract for a restraint which would be partial and not general and reasonable, in their judgment, for the protection of the purchaser in the enjoyment of the subject of the purchase. The contracts are to be construed *so as to give them validity,* if such construction does no violence to their language, and the subject-matter of the contracts is to be considered and their terms are to be construed in reference thereto. Here the transaction was the sale and purchase of an established business, with its good will, and the contracts in question were plainly intended to furnish protection to the purchaser

in the enjoyment of the things purchased. * * * Examining thus the description of the area within which the restraint agreed to by respondents is to operate, I have reached the conclusion that, without doing any violence to the language or straining its import, it may be and ought to be held to be a divisible description, embracing not one whole area but several areas disjunctively described. * * * Looking at the subject of the contracts, their presumed intent and the purpose of any agreement to retrain respondents from engaging in a competitive business, the description can be read as applicable disjunctively to different areas as within the State of Maine, within the State of New Hampshire or within the State of New Jersey &c., or within the District of Columbia, excepting &c. and such should be its construction. Thus read, the contracts in question are applicable to all the described areas and are enforceable in those of them within which the restraint contracted for *is reasonably required for the protection of appellant in the use and enjoyment of the business and good will acquired from respondents.*" (Italics ours.)

The Court then reached the conclusion that a restraint beyond the area of the State of New Jersey was unreasonable and continues (p. 519):

> "But while it results from this view that the contracts in question, so far as they restrain respondents from engaging in the same business in localities in which the business purchased by appellant of them had never been carried on may be opposed to public policy, it does not follow that they are wholly unenforceable. Contracts including distinct and separable obligations, some of which are legal and some prohibited, are enforcible as to such obligations as are legal." (Citing cases) "These contracts, as to areas described therein in which the acquired business had been carried on, may be enforced upon proper proofs."

In *Rosenbaum* vs. *United States Credit System Co.*, 65 N. J. Law, 255, E. & A. 1900, Collins, J., an agent agreed in connection with an employment contract that he would not engage in like business for three years after terminating his employment. The employment was unlimited in territorial extent. The Court says (p. 258):

> "How far the ancient doctrine that contracts in general restraint of trade are void has been modified need not be discussed. The modern doctrine seems to be that the restraint may properly be made as extensive as the reasonable need of protection". * * * "Contracts in undue restraint of trade are loosely spoken of in the books as illegal contracts. It is more accurate to style them unenforceable contracts. It is not against the law to make such a contract, or illegal to perform it. As was said by Chief Baron Pollock, in Green *vs.* Price, 13 *Id.* 694: 'It is not like a contract to do an illegal act; it is merely a covenant which the law will not enforce, but the party may perform it if he choose'. In the case cited there was a covenant to pay £1,500 liquidated damages if the vendor of a London business should engage in like business in the cities of London and Westminster, or within six hundred miles from them, respectively. The restriction as to the cities was held good, and the stipulated damages were awarded the plaintiff, although the other restriction was held void as unreasonable. On affirmance in the Exchequer Chamber in Price *vs.* Green, 16 *Id.* 346, Mr. Justice Patteson said 'The restriction as to six hundred miles from London and Westminster is only void, not illegal, and therefore the rest of the restriction formed a sufficient consideration for the agreement to pay £1,500'. The same distinction underlies this court's decision in Trenton Potteries Co. *vs.* Oliphant, * * * where a covenant by vendors not to engage in a like business to that sold in any state or territory except Nevada and Arizona, was held disjunctive and separable

> as to place. Being good as to New Jersey, where the vendors had their factory, this court compelled, by injunction, its performance here, and refused to inquire into the validity of the restraint elsewhere."

In *Fleckenstein* vs. *Fleckenstein,* 76 N. J. Law, 613, E. & A. 1908, Gummere, C. J., vendor of a sausage business located in Jersey City, and selling products in Jersey City and surrounding places, agreed with purchaser

> "I will not directly or indirectly engage in, promote or give my name to any business of the same kind or character as that now carried on by said company within five hundred miles from the city of Jersey City, N. J., at any time within the period of twenty years from the date hereof."

Within the time limited the defendant became interested in a competing business in Jersey City and suit was brought to recover damages. The trial Judge ruled that the contract was an unreasonable restraint of trade and that it was indivisible and therefore unenforceable even within the territory of Jersey City. In reversing, this Court says, page 616:

> "By the terms of the agreement sued upon the defendant promised not to engage in a competing business 'within five hundred miles from the City of Jersey City'. Taken literally this language does not include the city of Jersey City within the area of protection, and yet, when it is remembered that the principal business of the corporation was carried on in that city, it cannot be doubted that both parties intended by the words used to include it in the territory within which the defendant agreed not to carry on a competing business. So construed, the contract may fairly be read as binding the defendant not to engage in a

> business of the character conducted by the corporation 'either in the city of Jersey City or within five hundred miles from that city'. Reading it thus the description of the area within which the contract restrains the defendant is a divisible one, embracing not one whole area, but two areas disjunctively described. Assuming that the restraint contracted for, so far as it embraces territory outside of Jersey City, is unreasonable, and that the contract is, to that extent, invalid, nevertheless, in respect to Jersey City, it was clearly necessary for the protection of the business as it existed at the time of the sale, and to that extent is not in opposition to public policy and may be enforced. Trenton Potteries Co. *vs.* Oliphant, *supra.*
>
> It is said that a construction which makes the area embraced in this contract divisible is a forced one; that the words used in the contract describe an indivisible area, and express the intention of the parties in that regard. I cannot think so. Ordinarily it is a reasonable presumption that parties intend to make a valid contract; that in a case like the present they design to provide a restraint which will be reasonable, in their judgment, for the protection of the purchaser in the enjoyment of the subject of the purchase (Trenton Potteries case, 517), and I see nothing in the language used by these parties which requires the conclusion that their intention was that unless the full measure of protection afforded to the plaintiff by the contract was capable of enforcement against the defendant, there should be no protection at all against competition by the latter. The construction of this contract which makes the description of the restricted area divisible is certainly a possible one, and it seems to me that when a vendor endeavors to steal from his vendee the business which he has sold, having in his pocket the moneys which were paid to him for it, courts should be diligent in the endeavor to find a way to prevent the consummation of

so fraudulent a scheme. As was said by Lord Macnaghten in Nordenfelt *vs.* Maxim, &c. Co. (1894), App. Cas. 573, in speaking of a case like the present, it seems almost absurd to talk of public policy in connection with such a case. It is a public scandal when the law is forced to uphold a dishonest act, and the public suffers no injury in being deprived of the privilege of dealing with a man who is carrying on his business in violation of his solemn engagement not to do so.

The construction of the present contract, which makes the territory it embraces divisible, is, as I have said, a possible one. That being so, public policy, which is best subserved by the administration of *justice*, requires that it should be adopted."

In *Wyder* vs. *Milhomme,* 96 N. J. L. 500, E. & A. 1921, Parker, J., the covenant was against engaging in business "in the United States of America". The Court said, p. 502,

> "It is claimed for appellant that the silk finishing business is confined to a somewhat restricted territory, surrounding New York City. This, as we view it, is an important reason for holding that a restriction covering the entire nation is unreasonable as to space."

The Court then proceeds to cite and follow *Trenton Potteries* vs. *Oliphant,* and *Fleckenstein* vs. *Fleckenstein, supra,* saying

> "In both of those cases the contracts examined were upheld, not because the territory mentioned, taken in its full extent, was not unreasonably large, for the plain implication in each case, if not the explicit declaration, was that if applied to all the territory, the contract could not stand; but in both cases the court adopted a rule of selective construction of the contract whereby it was enabled to confine the operation of the contract to a

> territory deemed reasonable; in the one case the State of New Jersey; in the other the city of Jersey City. The present covenant admits of no such construction, for where it mentions any territory at all it speaks of 'the United States of America', *without any hint of a subdivision thereof.* Consequently there is no room for such a construction as was adopted in the cited cases." (Italics ours).

All that was said in the Fleckenstein case as to selective construction applies with greater force to the case at bar.

The covenant there was not to engage in business within five hundred miles from the City of Jersey City and the Court construed that as a covenant not to engage in business *either* in the City of Jersey City *or* within five hundred miles from that city.

The present covenant can with greater ease be construed as an agreement not to engage in business within the limits of the City of Jersey City and (not to engage in the business within) the territory adjacent thereto which may be conveniently served by wagon deliveries from Jersey City.

The decree appealed from affects the definite territory of Jersey City only, so that discussion of the other area is unnecessary.

POINT II.

The decree properly follows the language of the contract and should not exclude yard sales to peddlers, as contended for by appellant.

The recital of the contract of sale with purpose sets forth that Burns Brothers was then engaged in business in the City of Jersey City and the City of New York, that it maintained two specified

yards for the handling of its Jersey City business, also a third yard on Johnston Avenue, "which latter yard and pockets are now used exclusively for handling New York business of Burns Brothers and are not now used or adaptable for use in handling Jersey City business"; also that "Burns Brothers does not now operate or control any other yard or pockets in the City of Jersey City or in territory so nearly adjacent as to permit wagon deliveries to customers in the City of Jersey City * * * and does not contemplate the operation, control or interest in any such additional yards or pockets" (p. 8).

The sale agreement in comprehensive language covers the leaseholds for the two yards described as handling the Jersey City business, and all assets and books of account relating thereto, and also under a special heading "all of the good will of the coal business now conducted by it in the City of Jersey City and vicinity" without special limitation to the two yards.

The testimony shows that at the time of the sale the Communipaw Avenue yard was used *entirely* for sales to dealers or peddlers, and that the Jersey Avenue yard was used partly for yard sales and partly for wagon delivery sales by Burns Brothers equipment (p. 24).

The audit of tonnage preceding the closing of title shows that about 25% of the volume of sales through the Jersey Avenue yard were yard sales (p. 39, l. 40). In other words, the entire tonnage of the Communipaw Avenue yard and 25% of the tonnage of the Jersey Avenue yard consisted of yard sales, which are sometimes referred to in the testimony as "peddlers' sales". This yard tonnage was expressly included in the audit which was made the basis of payment to Burns Brothers under the contract of sale.

Thereafter both parties apparently agreed in their construction of the contract and no attempt was made by Burns Brothers at any time to sell to Jersey City dealers with the single exception of Hunt & Luecht, who were apparently classed as New York peddlers.

These sales were unknown to Mr. Perry (p. 38, l. 35; p. 40, l. 35).

The decree should be affirmed.

McDermott, Enright & Carpenter.

John M. Enright,
Of Counsel with Respondent.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.
(4871)

INDEX

EXHIBITS

Exhibit C. 1.—Already printed as Schedule A attached to the Bill of Complaint, pages 7 to 18.

Exhibit C. 2—By agreement not printed.

Exhibit C. 3.

KNOW ALL MEN BY THESE PRESENTS:

That BURNS BROTHERS, a corporation of the State of New Jersey, hereafter referred to as Seller, for and in consideration of the sum of One dollar and other good and valuable consideration to it in hand paid by R. H. PERRY & CO., a corporation of the State of Delaware, hereinafter referred to as the Buyer, the receipt whereof is hereby acknowledged, does hereby bargain, sell, assign, transfer, set over, grant and convey unto said R. H. Perry & Co. (of Delaware), its successors and assigns, forever.

1. All goods and chattels and personal property of every kind and description, as more particularly enumerated in a certain inventory and appraisal made by Prudential Engineering Corporation, dated February 12th, 1920, and identified by the signatures of the respective parties hereto.

2. All outstanding contracts made by the Seller for the purchase of coal or other property or supplies incidental to the business of its two yards located at the foot of Jersey Avenue, Jersey City, and also at Communipaw Avenue near

Garfield Avenue, Jersey City, respectively, subject, however, to payment of the contract price therefor for so much thereof as remains to be delivered after the date of delivery of this instrument.

This paragraph does not affect coal or other property or supplies ordered for any other yard than the two yards above specified.

3. All outstanding contracts of the Seller for the sale of coal for delivery to customers in the City of Jersey City, together with the right to receive payment of the purchase price for all coal delivered under such contracts, subsequent to the date of delivery of this instrument, for Buyer's own account.

4. The good will of the business heretofore carried on by the Seller at aforesaid yards, together with the right to retain Seller's name upon the office, structures, wagons and trucks transferred hereunder, as at present, for a period of at least six months, the Buyer using in connection therewith its own name.

Buyer agrees, however, to indemnify Seller against all claims and demands which may be made against Seller in any way growing out of the use of Seller's name by Buyer after the date of delivery of this instrument; and Buyer agrees to defend, at its own expense, all suits which may be brought against Seller to enforce all such claims and demands, and agrees to pay the amount of any such liability upon the recovery of final judgment against the Seller, provided timely notice of the bringing of such suit and opportunity to defend the same, is given to Buyer.

5. All outstanding book accounts due to Seller for coal heretofore sold by Seller from the aforesaid yards, together with all moneys due and growing due thereon and all books of account and documents evidencing the same, with power and authority to demand, collect, sue for, receipt and give acquittance for the same in the name of Seller or of the Buyer, and, with Seller's consent, compromise and adjust the same.

The proceeds of all such book accounts shall be received, held and accounted for pursuant to the terms of a certain contract between the Seller and Ralph H. Perry, dated January 16, 1920.

Buyer may, however, at its option decline to accept the assignment of any or all of said book accounts, by written notice mailed to the Seller at any time before the collection thereof, and from time to time, in which event title thereto shall revert or revest in Seller and Buyer shall be relieved from any further responsibility with respect thereto, notwithstanding any efforts which it may have made in the meantime to collect the same.

6. All books of account, muniments of title, mailing lists and business records of every kind and description belonging to the Seller and relating in any way to the business heretofore carried on by it at the aforesaid yards, and the property used in connection therewith.

Said books and records shall be preserved by the Buyer and shall at all times be open to the inspection and use of the Seller. If, for any reason, such books and records are so combined with the books and records pertaining to other business of the Seller, then Seller agrees to deliver transcripts thereof, if required, to the Buyer and permit Buyer to inspect and use the originals thereof to the extent necessary.

7. All the right, title and interest of the Seller in trestles, pockets, buildings, lands and tenements used or held for use by it or for its benefit in connection with the business heretofore carried on by it, which was sold to buyer including all leases, leaseholds and contracts securing the same and all rights and easements of every kind and description held or controlled by Seller with respect thereto, including particularly:

Leasehold interest and term of years of Burns Brothers, in and to the above described premises, arising out of and under a certain indenture of lease made by Central Railroad of New Jersey to Burns Brothers, dated June 15, 1910, for a term of ten years from the date thereof, demising the above described premises, therein further designated as Parcel 1 and Parcel 2, with the appurtenances, (together with certain other premises not affected hereby), subject, nevertheless, to the written consent of the lessor to the assignment of said term and also subject to all the other terms and conditions of said lease, including the payment of rent reserved, so far as the same affect said Parcels No. 1 and No. 2, which terms, conditions and obligations, so far as they affect said Parcels No. 1 and No. 2, are hereby assumed by the Buyer.

Pending the formal consent of the lessor to the assignment of said term or underletting said premises, the Seller hereby grants a license to the Buyer to use said premises and appurtenances in such manner as may not be inconsistent with the terms of said lease, and further agrees to use its best endeavors to procure the consent of the lessor to the assignment of said terms or the underletting of said premises or the substitution of a new lease from the lessor, direct to the

Buyer, upon substantially the same terms as specified under Seller's present lease.

TO HAVE AND TO HOLD the same for Buyer's own sole use and benefit, except as herein limited.

8. Seller for itself, its successors and assigns, hereby covenants not to engage, directly or indirectly, as principal, agent or investor in the business of buying, selling or delivering coal for consumption within the limits of the City of Jersey City and the territory adjacent thereto which may be conveniently served by wagon deliveries from Jersey City (not including, however, the City of New York) for a period of twenty years from the date hereof.

Nothing herein contained, however, shall be deemed in any way to bind or affect William Horre & Co. of Hoboken or the interest of Burns Brothers therein.

9. Seller further covenants to execute all such further instruments as may be requested by the Buyer from time to time in confirmation of or for the purpose of effectuating this instrument and to do all such further acts and things as may be reasonably requested by the Buyer for the purpose of carrying into full effect this instrument as well as the agreement made by the Seller with Ralph H. Perry for the benefit of Buyer, dated January 16, 1920.

IN WITNESS WHEREOF, the Seller, BURNS BROTHERS has caused its corporate seal to be hereto affixed and attested by its Secretary and

Exhibit C. 4.

these presents to be signed by its President the first day of March, 1920.

BURNS BROTHERS,

(Corporate Seal) By M. F. Burns, Pres't.

Attest: Jos. V. Chambers,
Secretary.

BILL OF SALE.

BURNS BROTHERS,
—to—
R. H. PERRY & CO.
Dated March 1st, 1920.

Exhibit C. 4.

KNOW ALL MEN BY THESE PRESENTS, that BURNS BROS., a corporation of the State of New Jersey, in consideration of the sum of ONE DOLLAR ($1.00), lawful money of the United States, to it paid before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has sold, assigned, transferred and set over, and by these presents does sell, assign, transfer and set over unto R. H. PERRY & CO., a corporation of the State of Delaware, so much of a certain indenture of lease bearing date the fifteenth day of June, one thousand nine hundred and ten, made by THE CENTRAL RAILROAD COMPANY OF NEW JERSEY to it, said Burns Bros., wherein and whereby said Railroad Company LEASED, DEMISED AND TO FARM LET, to said Burns Bros., certain parcels of land and premises in the CITY

Exhibit C. 4.

OF JERSEY CITY, in the COUNTY OF HUDSON AND STATE OF NEW JERSEY, so far and to the extent that said lease relates to the following described parcels, to-wit:

"PARCEL NO. I

That certain portion of Plot B, Block 2040, on the tax maps of the said City of Jersey City as more clearly shown outlined in yellow on blue print marked 'Plan No. (1)' hereto attached and hereby made a part hereof, together with the use of the trestle beneath the main track of the Lafayette Railroad adjoining the above mentioned portion of said Plot B," and

"PARCEL NO. II

All that certain plot known and designated as Plot A, Block 60, on said tax map of said City of Jersey City, together with the two coal trestles and sidings erected thereon, as more clearly shown on blue print marked 'Plan No. (2)' hereto attached and hereby made a part hereof,"

and also all its, said Burns Bros., estate, right, title, term of years yet to come, claim and demand whatsoever, of, in, to, or out of said parcels of land and premises and to hold the same, unto the said R. H. Perry & Co., its successors and assigns, for the residue of the term therein mentioned, subject, nevertheless to the rents, covenants, conditions and provisions therein also mentioned relative thereto.

Dated: New York, March 1, 1920.

BURNS BROS.,
by M. F. Burns,
President.

Attest:
Jos. V. Chambers,
(Corporate Seal) Secretary.

Exhibit C. 4.

R. H. PERRY & CO., a corporation of the State of Delaware, does hereby agree to keep, perform, fulfill and observe all the conditions and covenants contained in the said indenture of lease from The Central Railroad Company of New Jersey to said Burns Bros., dated June 15, 1910, so far and to the extent that said lease relates to said two above mentioned and described parcels of land and premises, so much whereof has been assigned to the said R. H. Perry & Co. as of March 1, 1920.

It is hereby stipulated that the rental for said parcels so taken over by the undersigned Company to be paid to the Railroad Company is at the rate of Two Thousand Dollars ($2,000.00) per annum.

R. H. PERRY & CO.
by R. H. Perry,
President.

Attest:
John M. Enright,
Secretary.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY hereby consents to the assignment of the above mentioned lease to said R. H. Perry & Co., so far and to the extent that said lease relates to said two above mentioned and described parcels of land and premises for and in consideration of the rental stipulated above to be paid by said R. H. Perry & Co.

THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY,
By W. G. Besler,
President.

Attest:
F. T. Dickerson,
(Corporate Seal) Secretary.

Exhibit C. 5.

Exhibit C. 5.

O. K. as to form
Jan. 3rd, 1920
George R. Beach

MEMORANDUM OF AGREEMENT, made this 2nd day of January, 1920, between E. L. YOUNG COMPANY, a corporation of the State of New Jersey, and E. L. YOUNG (individually) hereafter referred to as "Sellers," party of the First Part: RALPH H. PERRY, acting for the benefit of a New Corporation to be hereafter organized, party of the Second Part: and RALPH H. PERRY, acting as Manager of an Underwriting Syndicate, party of the Third Part:—

Whereas, Ralph H. Perry and certain associates are about to organize a corporation under the laws of the State of Delaware, or such other State as counsel may advise, for the purpose of carrying on the business of buying and selling coal in the City of Jersey City, N. J., and adjacent territory; and

Whereas, E. L. Young is engaged in such business, operating yards and pockets at the corner of Pacific Avenue and Grand Street, Jersey City, being the Yard formerly operated by L. Wertheim Coal & Coke Company, and E. L. Young Company is likewise engaged in such business, maintaining an office, with yard facilities, at the yard of Lehigh Valley Coal Sales Company, Grand Street, Jersey City, and an office at 90 West Street, Borough of Manhattan, City of New York; and

Whereas, Sellers do not now operate or control, directly or indirectly, any other yard or pockets or coal business in the City of Jersey City or in the City of New York, or in territory

Exhibit C. 5.

so nearly adjacent thereto as to permit wagon deliveries to customers located therein and do not contemplate the establishment or control or the acquiring of any interest in any such additional yards or pockets or coal business; and

Whereas, it is expected that such New Corporation will be organized with an authorized capital stock of 10,000 shares of 8% preferred stock of the par value of $1,000,000. and 40,000 shares of common stock of no par value, of which authorized stock, however, the amount of preferred stock actually issued will not exceed at par the fair value of the fixed assets of the Corporation (such as real estate, trestles, horses, wagons and trucks) plus the amount of cash working capital with which the Corporation begins business; and the number of shares of common stock without par value, actually issued, will not exceed five and one-third shares for each $100 of such working capital, and such additional amount as equivalent to three shares for each one hundred tons of estimated average annual tonnage, as hereafter defined; and

Whereas, said Perry has organized a Syndicate for the purpose of underwriting the obligations of divers parties to contribute to the working capital of the New Company, and is the manager thereof, duly authorized to bind the several members of said Syndicate in the matters hereafter specified, and which Underwriters' obligations said Perry does hereby personally guarantee:—

NOW, THEREFORE, IT IS AGREED BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. This agreement is understood to be for the benefit of the New Corporation when organized as fully as though a party hereto, and said New Corporation when organized will be entitled to receive all benefits hereunder and will assume all obligations hereof.

Exhibit C. 5.

It is mutually understood that Ralph H. Perry assumes no personal obligation except to use his best endeavors to bring about the organization of such corporation and if and when organized, said Perry undertakes to have such New Corporation assume the obligations hereof: otherwise this agreement will not be binding on "Sellers."

It is further mutually understood and agreed that in consideration of this agreement, said Perry will proceed to render services and advance moneys in the promotion of such New Corporation and the organization and financing of the Underwriters Syndicate herein referred to.

2. Sellers agree:

(a) To sell to the New Corporation and transfer by proper instruments of transfer all their interest in lands, leaseholds, trestles, office furniture and fixtures, books of account, tools and parts and other fixed assets (as hereafter defined) owned or operated by them at the aforesaid yards and used in connection with their aforesaid business.

This agreement shall not be construed to include lands owned by E. L. Young adjacent to the pockets of the Lehigh Valley Coal Sales Company.

(b) To sell all the good will of their coal business wherever transacted.

(3) Sellers and Underwriters together agree to pay to the New Company a total sum equiva-

lent to forty-five cents per short ton of Sellers' average annual tonnage, as hereinafter defined, in manner following:

(a) Underwriters will pay absolutely and in all events one-third of said amount.

(b) Sellers will pay at their option the remaining two-thirds of said amount, or such part thereof as they may elect.

(c) Underwriters will pay the balance thereof which Sellers do not elect to pay.

(4) The New Company will issue its capital stock for Sellers' account, as follows:—

(a) To Sellers, preferred stock equal at par to the appraised value of Sellers' fixed assets which are taken over hereunder.

(b) To Sellers, preferred stock equal at par to all money paid by Sellers to the New Company under paragraph 3-b.

(c) To Underwriters, preferred stock equal at par to the amount of money paid by Underwriters under paragraphs 3-a and 3-c.

(d) To Underwriters, 8 shares of common stock for each $100 paid by Underwriters to the New Company under paragraph 3-a.

(e) To Underwriters, 4 shares of common stock for each $100. of money paid by Underwriters to the New Company under paragraph 3-c.

(f) To Sellers, 4 shares of common stock for each $100. of money paid by Sellers to New Company under paragraph 3-b.

(g) To Sellers, 3 shares of common stock for each one hundred short tons of Sellers' average annual tonnage.

5. For the purpose of facilitating settlements under this agreement, it is mutually agreed that the "fixed assets" of the Sellers shall include all real estate owned and used in connection with Sellers aforesaid business (excepting aforesaid lots owned by E. L. Young); all trestles, stables and other business buildings owned; all delivery equipment, including horses, harness, wagons, trucks and automobiles and all tools and parts; also all yard equipment of every sort.

The value of such fixed assets shall be determined by an inventory and appraisal by an appraiser to be mutually agreed upon, at their fair money value.

In case either party is not satisfied with such appraisal, it may call for a new appraisal which shall be made by the original appraiser and two other appraisers selected by the Sellers and the New Company, respectively.

Although Sellers are to transfer all leasehold interest in or other right to occupy the business properties occupied or operated by them, no appraisal of the value thereof shall be made, it being deemed that the value of such leasehold or occupation rights is part of Sellers' good will.

The "average annual tonnage" of Sellers shall be determined by averaging all sales and deliveries from the aforesaid yards of Sellers, as shown by Sellers' books, for a period of three years, ending October 31st, 1919. Such amount shall be computed and certified by an auditor to be mutually agreed upon.

6. For the purpose of facilitating the transfer of Sellers' good will to the New Company, it is agreed:—

Exhibit C. 5.

(a) The New Company shall have the right to retain the name of E. L. Young Company upon the office structures, wagons and trucks transferred hereunder, as at present, for a period of at least six months, the New Company using in connection therewith its own name.

(b) The New Company shall take over all customers' accounts of the Sellers and collect the same in its name or in the name of Sellers as it may deed best, but for Sellers' account.

All such accounts may be billed in the name of Sellers (New Company Yards) and the New Company will undertake to use its best endeavors to collect the same, remitting or crediting the net amount collected to Sellers, respectively, without any charge for its own services.

(c) All coal on hand belonging to Sellers at the time of passing title shall be inventoried at time of passing title, or its quantity ascertained by actual weight at the time of subsequent sale thereof to customers, (whichever method may be mutually agreed upon) and shall be accounted for in either case by the New Company to the Sellers as follows: anthracite at the wholesale company price prevailing for such coal delivered to pockets at the time of passing title; bituminous in yards and all coal in transit at the mine price, plus freight.

(d) All supplies belonging to Sellers pertaining to its business not included under the classification of "fixed assets" shall be taken over by the New Company and accounted for in cash by it at the appraised value thereof, as determined by aforesaid appraisers.

(e) The New Company shall, also, take over all unexpired insurance and reimburse Sellers for unearned premiums thereon, pro rata.

Exhibit C. 5.

7. New Company will keep all collections of outstanding accounts made pursuant to paragraph 6-b hereof, in a separate bank account and account for same at the end of each month and will pay to Sellers for all coal, supplies and insurance taken over under paragraphs 6-c, 6-d and 6-e within thirty days after the ascertainment of the value thereof, as aforesaid.

Pending the ascertainment of the amount payable by the New Company to Seller under paragraphs 6-b, 6-c, 6-d and 6-e, Sellers may defer payment of their obligation to contribute to working capital under paragraph 3, to the extent of the probable amount due from the New Company as the same may be tentatively settled by mutual agreement. In case of such deferred payment, New Company shall apply all moneys payable to Sellers as received, to Sellers' obligation under paragraph 3.

8. The New Company will indemnify Sellers against all claims and demands which may be made against them in any way growing out of the use of Sellers' name by the New Company after the date of passing title hereunder, and will defend at its own expense all suits which may be brought against Sellers to enforce any such claims and demands and will pay the amount of any such liability upon recovery of final judgment in case suit is brought to enforce the same.

9. The New Company will pay to Seller, E. L. Young, in cash, within thirty days from the ascertainment thereof, the net amount of money expended by E. L. Young in obtaining the lease now held by him covering the pockets and yards formerly occupied by L. Wertheim Coal & Coke Company at Grand Street, Jersey City, and the

Exhibit C. 5.

amount expended by said Young in the rebuilding and repair of said pockets and yard, but shall not exceed in the aggregate $30,000. R. H. P. Witness J M E

Said amounts shall be determined from E. L. Young's books and shall be certified by the auditor designated under paragraph 5.

This provision is based upon the understanding that the ownership of the trestles and structures at the Wertheim yard is in the Lehigh Valley Railroad Company, and that the right to occupy and use the same will be secured to the New Company under an assignment of the lease held by E. L. Young.

The value of the aforesaid improvements is not to be included in determining the amount of preferred stock to be issued by the New Company under paragraph 4-a.

10. Sellers agree not to engage, directly or indirectly, in the business of buying, selling or delivering coal within the limits of the City of Jersey City and the City of New York and the territory adjacent thereto which may be conveniently served by wagon deliveries therefrom, for a period of ten years from the time of passing title hereunder.

11. Title shall be passed and all exchanges and payment herein provided for shall be made within three months from the date hereof at a time and place to be designated by said Perry or said New Corporation.

12. This agreement shall be binding upon and enure to the benefit of the executors, administrators, successors and assigns of the respective parties hereto.

Exhibit C. 5.

IN WITNESS WHEREOF, the parties have caused these present to be executed the day and year above written.

E. L. Young Company,

By E. L. Young,
President.

Attest:

E. I. Edwards,
(SEAL) Secretary.

E. L. Young, (L. S.)

Witness:

John M. Enright.

Ralph H. Perry, (L. S.)
acting for the benefit of a New Corporation, &c.

Witness:

John M. Enright.

Ralph H. Perry, (L. S.)
Manager Underwriting Syndicate.

Exhibit C. 6.

Exhibit C. 6.

KNOW ALL MEN BY THESE PRESENTS:

That E. L. YOUNG COMPANY, a corporation of the State of New Jersey, and E. L. YOUNG, individually, hereafter referred to as "Sellers," for and in consideration of the sum of One dollar and other good and valuable consideration to them in hand paid by R. H. PERRY & CO., a corporation of the State of Delaware, hereinafter referred to as the "Buyer," the receipt whereof is hereby acknowledged, do hereby bargain, sell, assign, transfer, set over, grant and convey unto said R. H. Perry & Co. (of Delaware), its sucessors and assigns, forever:

1. All goods and chattels and personal property of every kind and description, as more particularly enumerated in a certain inventory and appraisal made by Prudential Engineering Corporation, dated February 12, 1920, and identified by the signatures of the respective parties hereto;

2. All outstanding contracts made by the "Sellers" for the purchase of coal or other property or supplies incidental to its or his business, subject, however, to payment of the contract price therefor, for so much thereof as remains to be delivered after the date of delivery of this instrument.

3. All outstanding contracts of the Sellers for the sale of coal together with the right to receive payment for Buyer's own account, of the purchase price for all coal delivered thereunder subsequent to the date of delivery of this instrument.

Exhibit C. 6.

4. The good will of the business heretofore carried on by the Sellers, together with the right to use the trade name and trade-mark of the Sellers in continuing and extending the business heretofore carried on by the Sellers, either at Sellers' place of business or at any other place of business to which Buyer may desire to transfer the same. The right to use Sellers' tradename shall expire in six months.

Buyer agrees, however, to indemnify Sellers against all claims and demands which may be made against Sellers in any way growing out of the use of Sellers' name by the Buyer after the date of delivery of this instrument; and Buyer agrees to defend at its own expense all suits which may be brought against Sellers to enforce all such claims and demands and agrees to pay the amount of any such liability upon the recovery of final judgment against the Sellers, or either of them, provided timely notice of the bringing of such suit and opportunity to defend the same is given to the Buyer.

5. All customers books of account, muniments of title, mailing lists and business records of every kind and description belonging to the Sellers and relating in any way to the business heretofore carried on by them and the property used in connection therewith. Said books and records may temporarily remain in the custody of Sellers to facilitate liquidation of their business and after delivery to Buyer shall at all times be open to the inspection and use of the Sellers and shall be preserved by Buyer for a reasonable time.

6. All the right, title and interest of the Sellers in trestles, pockets, buildings, lands and tenements used or held for use by them or for their

Exhibit C. 6.

benefit in connection with the business heretofore carried on by them, or either of them, including all leases, leaseholds, and contracts securing the same and all rights and easements of every kind and description held or controlled by Sellers with respect thereto, including particularly, without excluding others, the right to occupy and use certain coal pockets located on the premises held by Lehigh Valley Coal Sales Company at Grand Street, Jersey City, together with the right of ingress thereto and egress therefrom; also the right to occupy a certain other part of said lands now occupied as an office by E. L. Young Company, together with all appurtenant rights;

Also, a certain indenture of lease made by Lehigh Valley Railroad Company to E. L. Young, dated April 21st, 1919, demising certain lands at the junction of Grand Street and Pacific Avenue, Jersey City, and the structures thereon (being the yard formerly occupied by L. Wertheim Coal & Coke Company) for a term of years ending October 31, 1931, subject, however, to the rent reserved therein and the covenants and conditions therein contained, which obligations Buyer does hereby assume; together with all buildings, structures, easements, rights and privileges of every description to which said E. L. Young is entitled or to which he might become entitled under and pursuant to the terms and provisions of said lease.

Seller, E. L. Young, on his part covenants and agrees that he is now in undisputed possession of said premises situate at the corner of Grand Street and Pacific Avenue, Jersey City, known as the Wertheim Yard, and the trestles, railroad tracks, stable, office and all other structures thereon, and appurtenances thereto, under the

Exhibit C. 6.

foregoing lease, and that he has not done any act whereby his rights under said lease are subject to diminution or forfeiture, and that said lease and leasehold interest are free and clear of all liens and encumbrances.

Nothing herein contained shall be construed as including certain lands owned by E. L. Young individually situate adjacent to the pockets of the Lehigh Valley Coal Sales Company, which lands front on Woodward Street, Jersey City.

TO HAVE AND TO HOLD the same for Buyer's own sole use and benefit, except as herein limited.

And Sellers for themselves, their respective successors and assigns, heirs, executors and administrators, hereby covenant not to engage, directly or indirectly, in the business of buying, selling or delivering coal within the limits of the City of Jersey City and the territory adjacent thereto which may be conveniently served by wagon delivery from Jersey City, for a period of ten years from the delivery hereof, and further covenant to execute all such further instruments as may be requested by the Buyer from time to time in confirmation of or for the purpose of effectuating this instrument, and to do all such further acts and things as may be reasonably requested by the Buyer as incidental to carrying into full effect this instrument as well as the agreement made by the Sellers with Ralph H. Perry for the benefit of the Buyer, dated January 2, 1920.

IN WITNESS WHEREOF, E. L. Young Company, a corporation, and E. L. Young, individu-

ally, have executed these presents this first day of March, 1920.

E. L. Young Company,

By E. L. Young,
President.

(Corporate Seal)

Attest:

E. I. Edwards,
Secretary.

E. L. Young (L. S.)

Witness:

George R. Beach.

Exhibit C. 7.

KNOW ALL MEN BY THESE PRESENTS:

That R. H. Perry & Co., a corporation of the State of Delaware, for and in consideration of the sum of One Dollar and other good and valuable consideration to it in hand paid by BURNS BROTHERS, a corporation of the State of New Jersey, the receipt whereof is hereby acknowledged, does hereby sell, assign, transfer and set over unto Burns Brothers, its successors and assigns:

1. The good will of the coal business heretofore carried on by E. L. Young Company, a corporation of the State of New Jersey, and E. L. Young individually, in the City of New York, intending to include thereby the coal business heretofore carried on by said E. L. Young Company and E. L. Young from offices at 90 West

Street, Borough of Manhattan, City and State of New York and office and yards in Jersey City, with customers buying for consumption in the City of New York, to the full extent and to the extent only that such good will has been transferred to R. H. Perry & Co. by said E. L. Young Company and E. L. Young individually, under a certain agreement dated January 2, 1920, and a certain bill of sale delivered to said R. H. Perry & Co. by E. L. Young Company and E. L. Young, concurrently herewith, including the right to use the name of E. L. Young Company in connection with such New York business to the extent that the same may be granted and assigned under the agreements above referred to.

2. All delivery and office equipment heretofore maintained by E. L. Young Company and E. L. Young, individually, for the purpose of transacting their New York business, and which equipment has been transferred to R. H. Perry & Co. by bill of sale delivered concurrently herewith.

A schedule of such equipment intended to be transferred hereby, is hereto annexed as part hereof.

3. All outstanding contracts made by E. L. Young Company and/or E. L. Young for the sale and delivery of coal to customers located in the Greater City of New York, together with all moneys payable thereunder by said customers for coal to be delivered subsequent to the date of delivery of this instrument, to the full extent that R. H. Perry & Co. may assign and transfer the same.

Burns Brothers, on its part, does hereby assume the obligations of all such contracts with re-

Exhibit C. 7.

spect to coal to be delivered subsequent to the date of delivery hereof.

4. All books of account, customers lists and other documents and records relating to the coal business heretofore conducted by E. L. Young Company and E. L. Young with customers located in the Greater City of New York, to the extent that R. H. Perry & Co. is able to transfer and deliver the same under the bill of sale and agreement above referred to.

In the event that it is impracticable to deliver any such books of account and records because of their relation to other business than that affected hereby, it is agreed that copies of customers lists and other records will be furnished to the extent that R. H. Perry & Co. is able so to do, and that convenient access and inspection of originals will be likewise afforded.

5. In consideration of the premises, R. H. Perry & Co. agrees for itself, its successors and assigns, not to engage, directly or indirectly, as principal, agent or investor, in the business of buying, selling or delivering coal for consumption within the limits of the Greater City of New York, for a period of twenty years from the date of delivery hereof.

Nothing herein contained, however, shall be construed as preventing said R. H. Perry & Co. from selling coal in Jersey City to pedlers who may deliver the same to customers within the limits of the Greater City of New York.

6. R. H. Perry & Co. further covenants and agrees to execute and deliver to Burns Brothers such further documents or instruments of transfer as may be proper to confirm the title of Burns

Exhibit C. 7.

Brothers to the property hereby transferred, or to otherwise carry this instrument into full force and effect, according to the true intent and meaning hereof.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be duly executed, this first day of March, 1920.

R. H. Perry & Co.,

By John M. Enright,
President.

(Corporate Seal)

Attest:

Secretary.

BURNS BROTHERS,

By M. F. Burns,
President.

(Corporate Seal)

Attest:

Jos. V. Chambers,
Secretary.

Exhibit C. 7.

Schedule of Office and Delivery Equipment Sold by R. H. Perry & Co. to Burns Brothers and Referred to in the Annexed Bill of Sale.

25 horses designated by the numbers

164	161
165	261
227	229
202	228
230	246
226	206
141	192
149	252
40	127
218	223
170	183
231	249
	240

(appraised value $5115.)

12 7 ton trucks—steel side dump (appraised value $7350.)

4 6 ton trucks—Patent—Wood (appraised value $2430.)

3 6 ton trucks—Patent—Steel (appraised value $1822.50)

11 4-5 ton trucks—Patent—Wood (appraised value $6187.50)

2 4-5 ton trucks—Patent—Steel (appraised value $1125.)

2 2 horse tow gigs (appraised value $75.)

25 Sides harness (appraised value $1250.)

3 Extra sets double harness (appraised value $300.)

5 Extra collars (appraised value $40.)

33 Feed bags (appraised value $39.60)

29 Horse blankets (appraised value $417.60)

29 Breast Pads (appraised value $46.40)

31 Halters (appraised value $62.)

Exhibit C. 7.

15 Curry Combs (appraised value $3.42)

15 Brushes (appraised value $3.90)

Also all office furniture, fixtures and supplies in the New York office of E. L. Young Company, 90 West Street, New York City. (appraised value $876.51)

Total Appraised Value.....$27,144.43

We, E. L. YOUNG COMPANY and E. L. YOUNG, individually, having, among other things, sold, assigned and transferred all delivery equipment and all good will of the coal business heretofore conducted by us, including outstanding customers contracts, to R. H. Perry & Co., (a corporation of the State of Delaware) do now hereby consent to and concur in the assignment and transfer by R. H. Perry & Co. to Burns Brothers of certain of said assets pertaining to the business heretofore carried on by us in the Greater City of New York, pursuant to the instrument hereto annexed, and in consideration of the purchase of said assets and the payment of the purchase price therefor by Burns Brothers to R. H. Perry & Co., and as incident to the same, we do each for itself and himself, respectively, and our respective successors, executors, administrators and assigns, covenant and agree to and with said Burns Brothers that during the period of ten years from the date of delivery hereof, neither of us, directly or indirectly, either as principal, agent, employee or investor, will engage in the business of buying, selling or delivering coal within the limits of the City of New York, and the territory adjacent thereto which may be conveniently served by wagon deliveries therefrom, nor will we, or either of us, permit the use of our respective names in any such business;

Exhibit C. 7.

And we do further agree to execute all such further documents and do all such further acts as may be reasonably requested by said Burns Brothers in order to confirm it in the enjoyment of the good will, business and property covered or intended to be covered by the annexed instrument, according to the true intent and meaning thereof.

WITNESS our hands and seals this first day of March, 1920.

E. L. Young Company,

By

(Corporate Seal) President.

Attest:

Secretary.

..... (L. S.)

Witness:

ASSIGNMENT.

R. H. PERRY & CO.

—to—

BURNS BROTHERS.

Dated March 1st, 1920.

Exhibit C. 8—By agreement not printed.

Exhibit C. 9.

Exhibit C. 9.

SCHEDULE "B."

ANNOUNCEMENT

BURNS BROS.

COAL

JERSEY CITY OFFICE:

100 SIP AVENUE, At Journal Square

We Will Be Fully Equipped to Supply the Best Grade of the Famous

Lehigh and Wilkesbarre Company's Coal

FOR STEAM AND FAMILY USE IN A FEW DAYS

Hold Your Orders—Watch For Further Announcement

MAIN OFFICE:

50 CHURCH ST., New York City

Phone 8500 Cortlandt

WILLIAM A. RAFFERTY, Resident Manager
SANDERS A. WERTHEIM, President

New Jersey Yards at

EDGEWATER
BRADLEY BEACH
LONG BRANCH
RED BANK
LAKEWOOD

Exhibit C. 10.

Exhibit C. 10.

SCHEDULE "C."

BURNS BROS.

COAL

SANDERS A. WERTHEIM
President

100 SIP AVENUE

At Journal Square

TELEPHONE DELAWARE 3660—3661

We take this opportunity of announcing to the public of Hudson County that we will be in a position on Monday, April 5th, to receive orders and make deliveries of our famous grades of Anthracite and Bituminous Coal. Phone or write. Our representative will call.

Watch this paper for further announcement

WILLIAM RAFFERTY
President Manager

Exhibit C. 11.

Exhibit C. 11.

BURNS BROTHERS

COAL

Main Office 50 Church Street

Jersey City, N. J., April 6th, 1926.

To the Coal Consuming Public of Hudson County:

We beg to advise that we are now ready to deliver the very best grades of fresh mined Scranton, Wilkesbarre and Pittston coal. This coal will be delivered from our Johnston Avenue yard, foot of Johnston Avenue and C. R. R. of N. J., Jersey City, and from our yard at Edgewater, N. J. In addition we will be ready very shortly with two new plants within this territory.

We want to call your attention to the fact that Burns Bros. delivered you coal in the past through the Manhattan Coal Co., Communipau Coal Co., and Hudson Coal Co., all of which we own but that on account of the heavy demands on us in Manhattan, Bronx and Brooklyn districts we discontinued delivering in Hudson County.

We have now, however, secured additional sources of supply to such an extent that we can again deliver coal to our old friends and are therefore asking you to favor us with your business, which will have our most careful and prompt attention. No order too large or too small.

We are specializing in only low ash coals. A trial order will convince you of the quality of our goods.

Exhibit C. 11.

In addition to the offices mentioned above we have established our headquarters at 100 Sip Avenue, Jersey City.

Very truly yours,
Sanders A Wertheim
President.

William Rafferty,
District Manager.

BURNS BROS.
COAL
Main Office 50 Church Street

ORDER FORM

The price of coal will be that prevailing on the date of delivery

Address Where Coal Is to be Delivered	Size of Coal	No. of Tons	Date Wanted
.....			
.....			
.....			
.....			

If you desire coal charged, and have no charge account with us, please give two business references.

Reference No. 1.....
Reference No. 2.....
Remarks .....
.....

(To insure promptness in opening account fill in below)

Date.....
Business Address .....
Name of Firm.....
.....
Name .....
Billing Address .....
.....

Exhibits C. 12—D. 1.

Exhibit C. 12.

BURNS BROS.
COAL
Main Office 50 Church Street

Dear Sir:—

We recently mailed you a circular letter enclosing an order blank and soliciting your order for coal.

We now wish to recall this circular, and have to advise you that we are not in a position at this time to solicit your order or accept your trade.

Yours very truly,

BURNS BROS.
Sanders A. Wertheim
President

Exhibit D. 1.

(Letterhead Burns Brothers.)

BURNS BROS.
COAL

Dictated M. F. B.

New York, January 26, 1920

McDermott & Enright,
75 Montgomery Street,
Jersey City, N. J.

Gentlemen:

I am in receipt of your favor of the 24th and agreeable thereto am enclosing herewith certified copy of the resolution passed by the Board of Directors of Burns Bros. at a meeting held by

Exhibit D. 2.

them on November 11th, 1919, in reference to the sale of our coal yards known as Hudson and Communipau Avenue, Jersey City, and trust it is what you require.

Very truly yours,

(Signed) M. F. Burns.

Exhibit D. 2.

I hereby certify that the following is a true and correct copy of a Resolution passed by the Board of Directors of Burns Bros., at a Meeting held by them on November 11th. 1919:

"RESOLVED, that the President, at his discretion and on such terms as he may approve, is hereby authorized to dispose of the Hudson and Communipau Avenue Yards in Jersey City"

Witness my hand and the seal of this Corporation this 24th day of January, 1920.

(Signed) Jos. V. Chambers,
Secretary.