New Jersey Court of Errors and Appeals

Between COMMERCIAL TRUST COMPANY OF NEW JERSEY, Trustees &c., *Complainant-Appellee,* and L. WERTHEIM COAL & COKE COMPANY, et als, *Defendant-Appellant.*	*On Bill to Foreclose.* *On Appeal from Chancery.*

BRIEF FOR COMPLAINANT COMMERCIAL TRUST COMPANY OF NEW JERSEY, TRUSTEE.

FISK & FISK,

Counsel for Commercial Trust Company of New Jersey, Trustee.

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Points I, II, III, IV, and V raised by the appellant in his brief are fully considered in the briefs of Albert C. Wall, of counsel with Warren Delano and Mill Creek Coal Company, and of Hartshorne, Insley & Leake, of counsel for the East Boston Coal Company and William T. Payne, and require no further discussion by the complainant appellee.

POINT VI.

THE AFFIDAVIT ANNEXED TO THE MORTGAGE COMPLIES WITH THE REQUIREMENTS OF THE STATUTE.

The statute is as follows:

> "The mortgage having annexed thereto an affidavit or affirmation made and subscribed by the holder of said mortgage, his agent or attorney, stating the consideration of said mortgage, and as nearly as possible the amount due and to grow due thereon." 1 Comp. Statutes, page 464.

The affidavit annexed to the mortgage has been omitted from the state of the case, but is printed in full in the briefs of Hartshorne, Insley & Leake, and Albert C. Wall, and is as follows:

> "JOHN W. HARDENBERGH, being duly sworn according to law says, that the Commercial Trust Company of New Jersey is a corporation organized under the Laws of the State of New Jersey and it is the mortgagee and trustee named in the foregoing mortgage and is the holder thereof and that deponent is President

of the said Commercial Trust Company of New Jersey, and is its duly authorized agent in taking and holding the within chattel mortgage and of the business connected therewith, and that the consideration of said mortgage is as follows:

"The L. Wertheim Coal & Coke Company, the mortgagor named in the said mortgage, in order to raise money and pay certain claims, debts and obligations has arranged to deliver certain coupon bonds fully described and set forth in the foregoing mortgage. That said bonds are to be of the par value of One thousand dollars, each bearing interest at six per cent., and by the terms of the mortgage may be issued to the extent of Two hundred and fifty thousand dollars, par value. That all said bonds are to be secured by said mortgage and the said mortgage is further executed to the Commercial Trust Company of New Jersey, as trustee, to secure the payment of each one of the said bonds which may be issued or negotiated to the person or persons who shall hereafter hold the same. The nature of the whole transaction is correctly set forth in the above mortgage to which reference is specifically made hereby. The said bonds and coupons in this indenture have been prepared for issue, but at the present time none of them have actually been issued, nor will any of them be issued until this mortgage is recorded in the Register's office of Hudson County, New Jersey, and therefore, at the present time there is no amount due on the said bonds or any of them or upon the said mortgage. The amount to grow due upon the said mortgage, as nearly as it is possible for this deponent to state at the present time, is said to be an amount not exceeding Two hundred and fifty thousand dol-

lars of principal with interest at six per cent., which may become due upon the said bonds as they shall respectively be issued. The amount hereafter to be due upon the terms of this mortgage will vary from time to time as the bonds are issued, retired or paid, in pursuance of the terms of the mortgage. Deponent cannot further state the amount to grow due upon the said mortgage, for the reason that he does not and cannot know how many of the said bonds will be lawfully issued or negotiated so as to be held as valid obligations against the said L. Wertheim Coal & Coke Company."

The Affidavit was properly made by John W. Hardenbergh, President of Commercial Trust Company of New Jersey, the trustee.

The execution of the affidavit by Mr. Hardenbergh, as President of the complainant, was a valid execution of the instrument. *American Soda Fountain Co.* v *Stolzenbach,* 75 N. J. L. 721.

If a chattel mortgage be made and delivered to a trustee for creditors he, as holder, is competent to make the affidavit required by statute to give the mortgage full effect. *Fletcher* v. *Bonnet,* 51 Eq. 615.

Substantial compliance with the statute is all that is necessary.

"In the absence of fraud instruments so common in the course of commercial transactions by the laity should be sustained whenever there is an honest and substantial compliance with the statute. Criticisms directed to matters of artifice rather than to those of substance ought not to prevail."

American Soda Fountain Co. v. *Stolzenbach,* 75 Eq. 721.
Breit v. *Solferino,* 77 N. J. L. 436.
Simpson v. *Anderson,* 75 N. J. Eq. at 585.

"Prior to the decision of this court in *American Soda Fountain Co. v. Stolzenbach,* the statutory affidavit of consideration of a chattel mortgage had been construed by courts below as a statutory requirement of considerable technicality, but in that case we squarely rejected that doctrine, holding that in the absence of fraud instruments so common in the course of commercial transactions by laymen as chattel mortgages should be sustained whenever there is an honest and substantial compliance with the statute. An affidavit of consideration is not to be tested by the rules of pleading nor treated as a technical requirement. On the contrary it should be the aim of courts when the mortgage is bona fide to preserve and not to destroy, and as Sir Mathew Hale said, 'the court should be astute to find means to make such instruments effectual according to the honest intent of the parties.' "

Howell v. *Stone & Downey,* 75 N. J. Eq. 289.

The Affidavit stating the consideration is sufficient.

The mortgage (page 472) contains recitals that

"The company for the purpose of raising money to make payment of certain claims, debts and obligations against it and other purposes * * * has determined to make and issue its coupon bonds in the aggregate amount of $250,000."

The mortgage then goes on and provides for the terms, issue and redemption of the bond, etc.

The affidavit attached to the mortgage refers to these recitals which makes them part of the affidavit. The affidavit further states: "The nature of the whole transaction is correctly set forth in the above mortgage to which reference is specifically made." The mortgage thus referred to must be regarded as part of the affidavit.

> "The affidavit expressly refers to matters stated in the mortgage and therefore these matters must be regarded as part of the affidavit."
>
> *Fletcher* v. *Bonnet,* 51 Eq. at page 618.
> *Camden Safe Deposit & Trust Co.* v. *Burlington Carpet Co.,* 33 Atl. 479 at 481.

The affidavit in the case of *Camden Safe Deposit & Trust Co.* v. *Burlington Carpet Co., supra,* was as follows:

> "That the true consideration of the above mortgage is the issue of $400,000 in the bonds of the mortgagor for the purpose specifically set forth in the mortgage." 33 Atl. at page 481.

The language in the case before the court in the Hardenbergh affidavit not only refers to the mortgage, but explicitly sets forth the terms of the mortgage and the reasons for the execution of the same, and the plan relating to the issue of bonds.

> "If then the mortgage in this case had simply recited the issue of bonds to the amount of $400,000 upon which bonds loans of money to the company to that extent were to be obtained it seems to me that there could be no question that the affidavit referring to the mortgage which disclosed that fact would sufficiently state the consideration of the mortgage and

the amount due or to grow due. The true consideration would then be the future advances and the amount due or to grow due would be the amount of those future advances made on the bonds up to the limit of the issue authorized." *Camden Safe Deposit & Trust Co.* v *Burlington Carpet Co.,* 33 Atl. at 482.

"I consider the affidavit sufficient under the chattel mortgage act." (Same case at page 483.)

The Statement in the affidavit of the amount due and to grow due is sufficient.

By the terms of the statute these amounts are required to be stated as nearly as possible. (Section 4, Chattel Mortgage act, 1 Comp. Statutes, page 464, set out above.)

The affidavit states that:

"At the present time there is no amount due on the said bonds or any of them, or upon the said mortgage. The amount to grow due upon the said mortgage as nearly as it is possible for this deponent to state at the present time is said to be an amount not exceeding $250,000 of principal with interest at six per cent., which may become due upon the said bonds as they shall respectively be issued; the amount hereafter to be due upon the terms of this mortgage will vary from time to time as the bonds are issued, retired or paid in pursuance of the terms of the mortgage. Deponent cannot further state the amount to grow due upon the said mortgage for the reason that he does not and cannot know how many of the said bonds will be lawfully issued or negotiated so as to be held as valid obligations against the said L. Wertheim Coal & Coke Co."

This states as nearly as possible the amount due and to grow due thereon.

In *Horowitz* v. *Weidner,* 31 Atl. 771-772, the Court said that the language,

> "There is nothing now due and the utmost that may become due is $2,000,"

is a sufficient statement of the amount due and to become due.

In *Camden Safe Deposit & Trust Co.* v. *Burlington Carpet Co.* (33 Atl. at p. 481) the affidavit was,

> "that the true consideration of the above mortgage is the issue of $400,000 in the bonds of the mortgagor for the purpose specially set forth in the mortgage."
>
> "If then the mortgage in this case had simply recited the issue of bonds to the amount of $400,000 upon which bonds loans of money to the company to that extent were proposed to be obtained it seems to me that there could be no question that the affidavit referring to the mortgage which disclosed that fact would sufficiently state * * * the amount due or to grow due."
>
> "The amount due or to grow due would be the amount of those future advances made on the bonds up to the limit of the issue authorized." (33 Atl. 482.)
>
> "I consider the affidavit sufficient under the chattel mortgage act." (33 Atl., p. 483.)

The true consideration of the mortgage is stated in the affidavit.

There is no force to appellant's contention (Brief of appellant, Point VI, pages 51 to 57) that the bonds were issued to secure antecedent indebtedness to Mill Creek Coal Co., East Boston

Coal Co., Isenstein & Dann, and that the affidavit should set out as the statement of the consideration the origin of their indebtedness and the manner of the creation of the relation of debtor and creditor.

The mortgage was not given to secure the notes of East Boston Coal Company, Mill Creek Coal Company, Dann & Isenstein, but was made to secure an issue of bonds. The mortgage was executed on May 6, 1912, and recorded on the same day. The bonds were not delivered in exchange for the notes until July, 1912 (p. 95, line 33; p. 96, lines 2-10-20).

Camden Safe Deposit & Trust Co. v. *Burlington Carpet Co.*, 33 Atl. 479, disposes of appellant's contention. In that case (p. 482) the Court said:

> "The contention of receiver's counsel is that inasmuch as the bonds were to be delivered to such creditors as were willing to accept them in payment of their respective indebtedness and the purpose of the balance was not specified the true consideration of the mortgage and the amount due were not stated and * * * that under the chattel mortgage act the amount of this prior indebtedness and the true origin and consideration of each debt should have been stated."
>
> "Had the mortgage been given to a trustee simply to secure the pre-existing debts which were intended to continue as debts of the company I think this view would be well founded; but the mortgage being one which according to my view was primarily given to secure bonds of the corporation intended to pass from hand to hand in the market as negotiable securities, the fact that the mortgage provided that the bonds should first be given to the creditors who would accept them in payment

of and satisfaction of their prior liens and debts and that only the balance of the $400,-000 bonds should be subject to the control of the directors does not in my judgment constitute the mortgage a mortgage to secure preexisting debts and necessitate the proof of the origin and consideration of those debts as preliminary to the validity of any of the bonds issued or to be issued under the mortgage.

"In other words the true consideration of this mortgage was a loan to the company to the extent of $400,000 for the purpose of paying its indebtedness and procuring funds. Creditors were to have the first right to these bonds at par in satisfaction of their previous liens and debts; but on receiving the bonds in satisfaction or payment they stood so far as subsequent creditors of the company are concerned on the same footing as bondholders who had advanced money to the company for the bonds. The mortgage cannot be considered simply as a mortgage given to and accepted by them for the purpose of securing their debts as existing debts and it was not necessary therefore that the consideration of these debts should be stated in the affidavit; and this objection to the affidavit is not sustained." *Camden Safe Deposit & Trust Co.* v. *Burlington Carpet Co.,* 33 Atl. at pp. 482-3.

POINT VII.

THE COURT DID NOT ERR IN HOLDING THAT THE CHATTEL MORTGAGE IS A LIEN ON BOOK ACCOUNTS THAT AROSE AFTER THE DATE OF THE MORTGAGE AND AS TO CHATTELS ACQUIRED AFTER THE DATE OF THE MORTGAGE.

The decision of the Court on this point is found at page 454, lines 12 to 30.

The Court held the mortgage not only covered all chattels and book accounts then owned by the mortgagor, but provided that the lien should extend to all after acquired chattels and book accounts that should be substituted in the regular course of business for those existing at the date of the mortgage. (Page 454, lines 16 to 20.)

The terms of the mortgage on this point are as follows:

> "Does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer, pledge and set over * * * all * * * rights * * * of any and every kind, name and nature which the said company may have in its possession, or which may have been, or which may hereafter be acquired by it, either by way of renewal of the chattels above described, or by way of addition thereto * * * all bills and accounts receivable, notes receivable, promissory notes * * * money claims, demands, choses in action * * * and all other property or things of value of any kind, name or nature tangible or intangible, legal or equitable of which the company may be possessed or to which it may become entitled." (Case, pages 476-477.)

The appellant admits (page 59 of his brief, Point VII), that "in the granting clause the mortgage does purport to cover every species of property owned by the corporation, or which might thereafter be acquired by it including every manner of chose in action."

The above language sufficiently designates after acquired chattels and book accounts as being within the terms of the mortgage.

In *Buvinger* v. *Evening Union Printing Company*, the language of the mortgage was:

> "All personal property of any kind or character now belonging to the said Evening Union Printing Company or which may hereafter belong to the said Evening Union Printing Company, either by way of renewal of the goods and chattels above described, or by way of additions thereto, including the right of franchise to be a corporation, and also all of the estate, rights, titles, incomes and interest whatsoever as well at law as in equity of the said party of the first part in and to the same." (65 Atl. 482-483.)

Vice Chancellor Leaming said:

> "I think it is clear that the outstanding choses in action of mortgagor are covered by the lien of this mortgage." *Buvinger* v. *Evening Union Printing Co.* (65 Atl. 482-483.)

There can be no question as to the validity of the lien of the mortgage on after acquired chattels and book accounts.

> "No reason is apparent why outstanding choses in action may not in like manner be included in the lien of the mortgage and the

privilege be extended to the mortgagor to collect and apply such choses in action under a stipulation that the lien of the mortgage shall include new accounts arising in the regular course of business."

"In any ordinary commercial business credit transactions are a well recognized necessity, and the privilege of a mortgagor to sell and replace mortgaged goods does not essentially differ in effect from the privilege of collecting and replacing choses in action. I see no reason why the lien of a chattel mortgage should not by appropriate provisions contained in the mortgage be preserved as to book accounts arising after the date of the mortgage." *Buvinger* v. *Evening Union Printing Company*, 65 *Atl.* 482-483.

Nugent v. *McNeil Shoe Co.*, 62 Eq. 583.
Lister v. *Simpson*, 38 N. J. Eq. 438.
Fidelity Trust Co. v. *S. I. Clay Co.*, 70 N. J. Eq. 550.
Smithurst v. *Edmund*, 14 N. J. Eq. 408.

The statement in appellant's brief (bottom of page 60, Point VII), "that the replacement lien is limited to goods and chattels and does not apply to book accounts or the proceeds thereof" is incorrect.

The language of the mortgage is (p. 491, lines 27 to 40):

> "Machinery, tools, fixtures, coal, book-accounts, or any other of the goods and chattels described herein,"

showing that "goods and chattels" is used as a generic term to include the tangible and intangible property therein mentioned. "Goods and chattels" as used later in the same paragraph of the mortgage

> "the lien of this mortgage shall extend to any goods and chattels which may be acquired to replace such goods and chattels"

has the same broad meaning, "goods and chattels" referring to the "machinery, tools, fixtures, coal, book accounts" theretofore termed "goods and chattels."

POINT VIII.

THE DECREE IS NOT ERRONEOUS IN ITS PROVISION REQUIRING THE BANKRUPTCY TRUSTEE TO ACCOUNT IN THE COURT OF CHANCERY FOR MONEYS RESULTING FROM ACCOUNTS RECEIVABLE DUE TO THE BANKRUPT AND INCLUDED WITHIN THE LIEN OF THE MORTGAGE.

The chattel mortgage being valid as to the book accounts acquired subsequent to the mortgage, and these accounts receivable being included within the terms of the mortgage, the moneys resulting from the collection of such accounts by and in the possession of the bankruptcy trustee must be accounted for by the bankruptcy trustee in the Court of Chancery.

The trustee in bankruptcy complains against the following language in the decree:

> "And it is further ordered, adjudged and decreed that the defendant, Albert I. Drayton, trustees in bankruptcy of the L. Wertheim Coal & Coke Co., forthwith account in this cause for all moneys in his possession or received by him from the collection of outstanding accounts and bills receivable due L. Wertheim Coal & Coke Co. or received by him from the receivers in bankruptcy of L. Wertheim Coal & Coke Co." (pp. 469-470.)

and alleges in his brief (page 64, Point VIII) that the above language compels him to account for bankrupt assets. It appears by a recital of the decree that the moneys for which the trustee is to account are moneys derived from the collection of outstanding accounts and bills receivable due the bankrupt, or received by him from the receivers in

bankruptcy, which funds were by order of the District Court, of September 28, 1914, to be deposited in a special and separate account and to be held subject to the lien of complainant's mortgage. (Decree, page 463, lines 28-40; page 464, lines 1-8.)

The statement in appellant's brief (page 64, Point VIII) that "there is nothing in the case to show the source of the moneys received by the trustee from the receivers in bankruptcy" is not correct. The testimony of Albert I. Drayton, trustee in bankruptcy (pages 224-225), shows that he received money from the receiver in bankruptcy as follows:

(a) $1,117.65 moneys collected by Mr. Perry, the bankruptcy receiver.

(b) $1,474.16 called by Mr. Perry, special account of Jersey City collections; and

(c) $12,879.56 special account of collections of New York City.

The testimony of the trustee further shows (page 225) that he has collected book accounts from Jersey City debtors and has collected foreign accounts.

It appears by this testimony that the bankruptcy trustee has in his possession both from collections by the bankruptcy receiver and from collections by the trustee moneys derived from the outstanding accounts and bills receivable covered by the mortgage and due to the company.

There is no testimony in the case to justify the statement in the brief for the appellant (page 64, Point VIII) that "a considerable part thereof was received from an ancillary receiver appointed by the bankruptcy court in New York and is the result of the sale of the Harlem yard in New York."

If it is a fact that any of the moneys in the possession of the trustee come from sources other than those within the lien of the mortgage the bankruptcy trustees on his account in the Court of

Chancery will have full opportunity to state the source from which moneys come and to show if possible that part of the moneys resulted from the sale of the Harlem yard in New York City.

> *The Chancery Court having jurisdiction over the moneys in the possession of the trustee derived from the collection of book accounts and the bankruptcy trustee having submitted himself to the jurisdiction of the Court of Chancery, that Court had the power to decree that he account in that Court for these moneys.*

The mortgage was executed and delivered on May 6, 1912, and was recorded on May 6, 1912, in the office of the Register of Hudson County (pages 471 and 496). This was two years and four months prior to the appointment on September 17, 1914, of the receiver in bankruptcy (Exhibit E-1, page 497), and two and one-half years prior to the appointment of the trustee in bankruptcy (Exhibit E-2, page 497).

> "Rights which vested more than four months prior to the institution of the bankruptcy proceedings were not impaired. *In re Reynolds*, 133 Fed. 585.

The trustee in bankruptcy was not originally a party to the suit. The foreclosure bill was filed on September 16, 1914, before the filing of the petition in bankruptcy (case, page 17, lines 29-30, amended answer of trustee). The bankruptcy trustee voluntarily appeared in the cause and filed his answer, and answer by way of cross bill (case, pages 17-31). By his cross bill, proofs and brief he has among other things contended that the mortgage does not cover accounts due to and bills receivable by the bankrupt subsequent to the mortgage.

After having collected moneys from such accounts and after having litigated this question, and the Court having decided adversely to him, he now contends that the Court is without power to compel him to account for and give up these moneys which the Court decided were within the lien of the mortgage, and over which it consequently had jurisdiction. This the bankruptcy trustee cannot do. He gets, by virtue of being trustee in bankruptcy, no special and peculiar immunity from obligation to obey the decree of the Court of Chancery that he, after having submitted himself and his cause of action to the Court, shall obey the decree of the Court and account for the moneys in his possession collected or received by him from these accounts. He stands on the same footing as any other litigant. There is no rule of comity which prevents the Chancery Court from compelling a trustee in bankruptcy to obey its decree as to a matter within its jurisdiction and which the trustee has submitted and litigated.

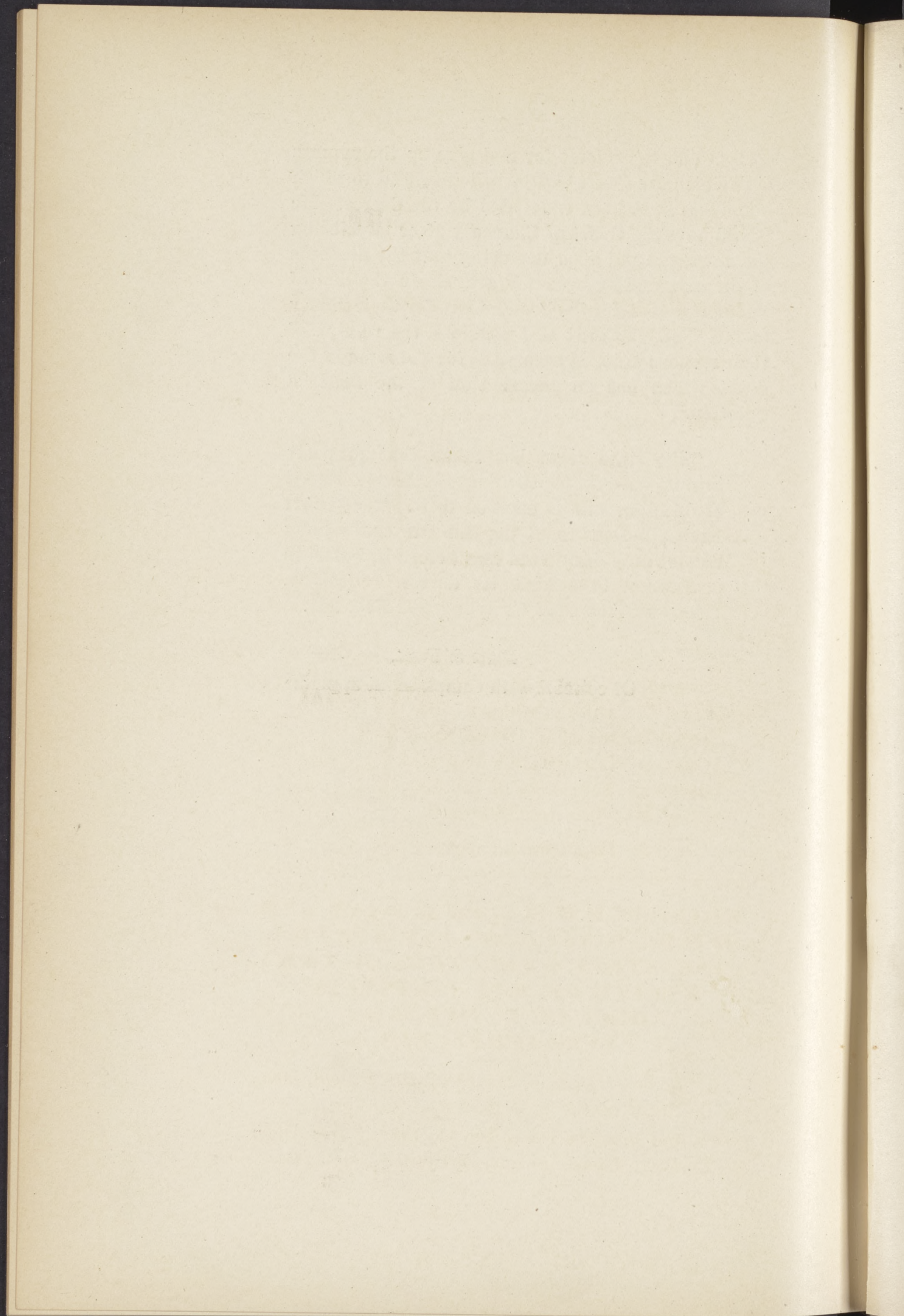
> "The trustee having voluntarily submitted himself and his rights to the jurisdiction of the state court, if he had authority to do this will be bound by the adjudication whether or not the decision of the state court was favorable or unfavorable to him." *In re Reynolds*, 133 Fed. 585 at 587.
>
> "It is not competent for a party to assent to a proceeding in the court below, take his chances of success and upon failure come here and object that the court below had no authority to take the proceeding." *Mays* v. *Fritton*, 20 Wall, 414, 22 Lawyers' Ed. 389.

The trustee admits (page 64, Appellant's brief, Point VIII) that he may be concluded by the decree as to the res which is within the jurisdiction of the Court, but that the Court is powerless to

compel him to account for and give up the moneys over which the Court had jurisdiction, and to which his rights have been concluded by the decree. He would have the Court of Chancery after foreclosing the mortgage and after decreeing that the proceeds of the outstanding accounts are within the lien of the mortgage, refer the bondholders for their money to the District Court and postpone the receipt of their moneys until he accounted for the same in the court which has no jurisdiction of the fund in question."

> "The state court has taken that property into its custody for the purpose, among others, of deciding who is entitled to it. That court having possession of the thing in controversy cannot only decide the case before it, but is in a position to enforce its decree." *Scott* v. *Georges Creek Coal Company,* 202 Fed. 251.

Fisk & Fisk,
Of counsel with complainant-appellee.



5 JUN.T. 1918

New Jersey Court of Errors and Appeals.

Between

COMMERCIAL TRUST COMPANY OF NEW JERSEY,

Complainant-Appellee,

and

ALBERT I. DRAYTON, Trustee in Bankruptcy of L. Wertheim Coal & Coke Company,

Defendant-Appellant,

EAST BOSTON COAL COMPANY, WILLIAM T. PAYNE, MILL CREEK COAL COMPANY, WARREN DELANO, WILLIAM L. DANN and WILLIAM NEUGASS and BERTHA ISENSTEIN, Executors of the Estate of Max Isenstein, deceased,

Defendants-Appellees.

On Appeal, etc.

BRIEF FOR WILLIAM L. DANN AND WILLIAM NEUGASS AND BERTHA ISENSTEIN, EXECUTORS OF THE ESTATE OF MAX ISENSTEIN, DECEASED, DEFENDANTS-APPELLEES.

A full description of the pleadings is contained in the brief of the Appellant.

On and prior to December 15, 1909, the defendants, Max Isenstein and William Dann, were

stockholders and the vice-president, and secretary and treasurer, respectively, of the L. Wertheim Coal and Coke Company.

The defendant, Isenstein, owned stock for which he paid $32,500. (p. 426); and the defendant, Dann, owned stock for which he paid $57,000. (p. 427). These two defendants owned the majority of the stock of the Company. The company was also indebted to the defendants, Isenstein and
10 Dann, in the sum of $24,000 and over (p. 428). At this time the said defendants were receiving as salary the sum of $10,000 a year for their services as officers of the said company.

There was some dissatisfaction between Sanders Wertheim and the defendants, Sanders alleging that said defendants were not practical coal men and he feeling that $10,000 paid them could be saved to the company if these men could be eliminated and practical coal men installed in their
20 places.

The said defendants also desired to have the company repay to them the indebtedness of $24,000 as above stated, and Sanders Wertheim suggested that he would get a purchaser to buy the stock held by these defendants, and the defendants, Isenstein and Dann, stated that they would retire from the company and sell their stock at fifty cents on the dollar, provided they were repaid the amount of money which they had loaned to the
30 company.

In the meantime, Sanders Wertheim was negotiating with the defendants Delano and Payne, whom he knew to be practical coal men. Isenstein and Dann did nothing themselves to consummate this transaction. It was proposed and executed by the Wertheims and their counsel.

Sanders Wertheim went to Mr. Delano and apprised him of the condition of affairs of the com-
40 pany and spoke to him about the elimination of

Isenstein and Dann. Mr. Delano told the Wertheims to make the best terms they could with Isenstein and Dann and he would procure for them a credit or a loan of $20,000. Sanders Wertheim told Mr. Delano that Isenstein and Dann were the largest stockholders of the company and that they would sell their stock at fifty cents on the dollar, provided a cash payment were made to take up notes which they had negotiated for the benefit of the company (p. 228 et seq.; pp. 232-3 et seq.). 10

On December 15th, 1909, the defendants, Isenstein and Dann, resigned as *officers* of the said Company (p. 428).

On December 17th, by arrangement, Isenstein and Dann went to the office of the company's attorney, Mr. Van Winkle, and were told to resign as *directors* of the said company, and they thereupon did so (p. 428). At ten o'clock of that day, Messrs. Delano, Payne and Van Buskirk were elected directors of the company in place of Isenstein and Dann who had resigned, and at eleven o'clock of that same day, Mr. Delano was elected vice-president of the company. After Isenstein and Dann had resigned as directors, they were requested to leave the room and when they returned, they received from Mr. Van Winkle, the company's attorney, a check for $20,000, which they immediately cashed, each receiving one-half of the proceeds (p. 428). This was to liquidate loans to the company. 20 30

For their stock Isenstein received 28 notes of the company for $1,000 each, and Dann received 32 notes of the company for $1,000 each, and they thereupon endorsed the stock in blank and surrendered it to the company's attorney, Mr. Van Winkle (p. 429). It was understood at that time that the $20,000 cash was to be accepted in 40

satisfaction of the amount due from the company, to the defendant, Isenstein and Dann, for moneys advanced by said defendants to the company, and the notes aggregating $60,000 were to be accepted in payment of the stock aggregating approximately $96,000 held by these defendants (p. 429). The notes which aggregated about $60,000 were to be paid off at the rate of $1,000 per month, the defendant Isenstein, to receive $1,000 one month and
10 the defendant, Dann, to receive $1,000 the following month and so on until said notes were fully paid. It will be observed that payments on account of the notes were to be in about the same amounts as had theretofore been paid to Isenstein and Dann as a salary. The notes were not issued by the Wertheim Company until after the election of Delano and Payne and Van Buskirk as directors of the company in place of these defendants who had previously resigned.
20

The situation, on December 17th, was:

(1) That the Wertheim Company purchased $96,000 worth of stock of Isenstein and Dann at fifty cents on the dollar and issued its notes in payment thereof, which notes were to be paid at the rate of $1,000 a month, a sum equivalent to the amount originally paid to defendants, Isenstein and Dann, for services rendered by them to the company;

30 (2) That by reason of the purchase of said stock, the company was able to borrow the sum of $20,000 for which it pledged as collateral security the stock purchased from the defendants, Isenstein and Dann, and *paid in full* the *cash indebtedness due the said defendants for moneys loaned to the company at various times amounting to over $24,000*;

(3) That Isenstein and Dann were eliminated
40 from participation in the company's affairs, which

enabled its stockholders to elect Messrs. Payne and Delano as directors, two men who were known to be coal men of considerable experience.

POINT I.

The issuing of the notes to Dann and Isenstein was not ultra vires.

As to the right of a corporation to purchase its own stock, the Court of Errors, in *Knickerbocker Improvement Company vs. State Board of Assessors,* 74 N. J. Law, pages 583-6, said, 10

> "Under the Corporation Act of 1896, there is an implied grant of power to corporations to purchase shares of their own capital stock, provided such purchase is required for *legitimate purposes* but not otherwise."

As to what is a legitimate purpose, see the case of *Ellerman vs. Chicago Junction Railway etc. Co.,* 49 Equity, 217, 23 Atl. Rep. 287. Quoting from 23 Atl. Rep. 295, the court said: 20

> "The learned counsel strongly presses the provisions of section 3 of the corporations act, as follows: 'In addition to the powers enumerated in the first section of this act, and to those expressly given in its charter or certificate under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given.' The construction to be given to the words 'necessary to the exercise' is settled in this state. Beasley, C. J. delivering the opinion of the Court of Errors and Appeals in *State vs. Hancock,* 35 N. J. L. 537, said, (page 545): 'Power necessary to a corporation does not mean simply power which is indispensable.' 'A power which is obviously appropriate and convenient to carry into effect the franchise granted, has always been deemed a necessary one (p. 547).' 'In short, the term comprises 30 40

a grant of the right to use all the means suitable and proper to accomplish the end which the legislature had in view at the time of the enactment of the charter.' *McCulloch vs. Maryland* 4 Wheat. 316, 414; *Olmsted vs. Morris Aqueduct*, 47 N. J. L. 311; *Crawford vs. Longstreet,* 43 N. J. L. 325; *Morris Canal vs. Love,* 37 N. J. L. 63. While it is true that, when the state challenges the action of one if its corporate creations, it may insist on a clear warrant for its action, (*Chicago R. I.*
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& P. Ry. Co. vs. Union Pac. Ry. Co., 47 Fed. Rep. 15) the application of the doctrine of ultra vires to the acts of a corporation in suits by individuals is not by an inflexible rule. It yields not only to necessity, but to transactions incidental to prescribed powers. Lord Justice James in *Attorney General vs. Railroad Co.* 11 C. H. Div. 449, 479, held, that the arrangement attacked was 'A reasonable and proper, and therefore legitimate, incident of the proper business' of the company. In same case on appeal (L. R. 5 App. Cas.
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473) Selborne Ld. Ch. said: 'I agree with Lord Justice James that this doctrine (ultra vires) ought to be reasonably, and not unreasonably understood and applied; and that whatever may be fairly regarded as incidental to and consequential upon these things which the legislature has authorized ought not, unless expressly prohibited, to be held by judicial construction to be ultra vires' Lord St. Leonards, in *Railway Co. vs. Hawkes,* 5 H. L. Cas. 331, at 380, says: 'I trust that this
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decision and the decisions of this house, during the present session * * * will place the powers and liabilities of directors and their companies in making contracts, and in dealing with third parties, upon a safe and rational footing. They do not authorize directors to bind their companies by contracts foreign to the purpose for which they were established, but they do hold companies bound by contracts duly entered into by their directors for purposes which they have treated as within the objects of their acts, and which
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cannot clearly be shown not to fall within

them.' I Mor. Priv. Corp. Par. 326, says: 'It is a well established general rule that a corporation may carry on the business for which it was chartered in the manner in which a business of that particular kind is usually carried on. What the usual manner of carrying on a business is, cannot be determined by the application of purely legal principles. *It is a question of fact, and not a question of law'* Evidently, therefore, it is impossible to decide abstractly that acts of a particular description are within or without the chartered powers of a corporation. The right of a corporation to perform an act depends in every case *upon all the surrounding circumstances.* No act is authorized under all circumstances and facts can be conceived which would render almost any act justifiable. Thus, a railroad company may usually use coal and material for constructing its road, but it would have no authority to buy coal or anything else as a speculation, with the intention of selling it again. On the other hand, it would clearly be unauthorized, under any ordinary state of facts, to use the funds of a railroad company for building a church or a theatre; yet this use of the corporate funds might be entirely justifiable if a church or a theatre were required for the use of the company's workmen in a part of the world where no church or suitable place of recreation was accessible.

The fact that the Wertheim Company received the advantages hereinabove enumerated proves that the issuance of the notes was a legitimate corporation transaction and that the purposes of the corporation required such purchase of stock from Isenstein and Dann. The economy and good faith underlying the transaction are manifest.

Even though the issuance of the notes had been an ultra vires act, there was *a ratification by all of the stockholders of the company,* and these defendants have fully performed their part of the contract and have surrendered their stock to the

company, have resigned as officers and they cannot be restored to their former status, nor be honestly dealt with otherwise than by holding the notes to be valid. Under such circumstances, the plea of ultra vires is inadmissible.

> *Camden etc. Railway Co. v. Mayslanding etc. R. R. Co.*, 48 N. J. L., 530; and *Chapman v. Ironclad Co.*, 62 N. J. L., 497.

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The defendants, Isenstein and Dann, had ceased to be officers or directors for two or three years at the time the mortgage was given and the bonds issued; during that period they had been out of all actual touch with the corporation and had no knowledge of its financial condition. Their knowledge of the issuance of the bonds was first obtained through Mr. VanWinkle, the attorney of the company, who notified them

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to come to Jersey City and exchange their notes for bonds (p. 429).

POINT II.

There is nothing to show that insolvency was so much as thought of, when the mortgage was given.

The plain purpose of the actors was to continue the business of the corporation under the new ar-

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rangement, designed, as it was, to strengthen the forces within it. It can hardly be doubted that what was sought was the elimination of certain elements honestly believed to be burdensome.

> *Bergen v. Rogers*, 73 N. J. E., 238;
> *Empire State Trust Co. v. Fisher*, 67 N. J. E., 602;
> *Wright v. American Finance and Securities Co.*, 93 Atl. Rep., 862;

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> *Regina Music Box Co. v. Otto*, 65 N. J. E., 582;

Coke v. Walton & Co., 79 N. J. E., 165;
Cogan v. Conover Mfg. Co., 69 N. J. E., 809.

POINT III.

The form of the mortgage, and the affidavit of consideration are in compliance with the statute.

Fletcher v. Bonnett, 51 N. J. E., 615; 10
Camden Safe Deposit Co. v. Burlington etc. Co., 33 Atl. Rep., 479;
Breit v. Salferino, 77 N. J. L., 436.

POINT IV.

The extension of the lien of the mortgage to after-acquired property is valid.

Smethhurst v. Edmund, 14 N. J. E., 408; 20
Lister v. Simpson, 38 N. J. E., 438;
Bouvinger v. Evening Union Printing Co., 65 Atl. Rep., 482.

Respectfully submitted,

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Defendants-Appellees.

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