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Notice of Appeal of Albert I. Drayton, Trustee.

In Chancery of New Jersey.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Trustee, &c., *Complainant,* *vs.* L. WERTHEIM COAL & COKE COMPANY, et als., *Defendants.*	On Bill, &c.

The defendant Albert I. Drayton, Trustee in Bankruptcy of defendant L. Wertheim Coal & Coke Company, hereby appeals from the final decree of the Chancellor made in the above entitled cause under date of March 12, 1917, dismissing the cross-bill of said defendant Albert I. Drayton, Trustee, &c., and from the whole and every part of said decree, to the Court of Errors and Appeals in the last resort in all causes.

McDERMOTT & ENRIGHT,
Solicitors for Defendant Albert I. Drayton, Trustee in Bankruptcy of L. Wertheim Coal & Coke Company.

Dated, May 8, 1917.

I conceive that there is good cause for appeal from the above stated decree.

JOHN M. ENRIGHT,
Of Counsel for Defendant Albert I. Drayton, Trustee, &c.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Trustee,

Complainant-Appellee,

vs.

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

Defendant-Appellant, et als.

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

The petition of Albert I. Drayton, Trustee in Bankruptcy of L. Wertheim Coal & Coke Company, above named defendant, respectfully shows:

That your petitioner finds himself aggrieved by a certain final decree made in the above entitled cause under date of March 12, 1917, wherein and whereby the Chancellor does adjudge that your petitioner is not entitled to the relief sought and prayed for in the cross-bill filed by him in the above cause, and that said cross-bill be dismissed, and by each and every part of said decree.

And your petitioner humbly appeals from each and every part of said decree upon the ground that the same is erroneous and contrary to the evidence in the cause, inequitable and contrary to law.

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

McDERMOTT & ENRIGHT,
Solicitors for and of Counsel with Appellant.

Bill to Foreclose.

IN CHANCERY OF NEW JERSEY.

To his Honor Edwin R. Walker,
Chancellor of the State of New Jersey:

Complaining shows unto your Honor, your orator Commercial Trust Company of New Jersey, a corporation, having its office at Jersey City, Hudson County, New Jersey.

FIRST. Your orator was at the times hereinafter mentioned and is a duly incorporated trust company organized under an act of the Legislature of New Jersey, entitled "An Act Concerning Trust Companies (Revision of 1899)", approved March 24, 1899, and the acts amendatory thereof and supplemental thereto.

SECOND. That L. Wertheim Coal & Coke Company, the defendant herein, was at the times hereinafter mentioned and is a corporation duly created by and organized under the laws of the State of New Jersey and was at said times authorized and empowered under its charter and the laws of the State of New Jersey, among other things, to own and hold lands and personal property suitable for the purposes of the corporation and to carry on the business of buying and selling coal and other merchandise and to issue its bonds and secure the same by mortgage or deed of trust covering its property, or any part thereof as hereinafter set forth.

THIRD. That on or about the twenty-second day of April, nineteen hundred and twelve, the defendant L. Wertheim Coal & Coke Company, in the lawful exercise of its powers and in order to provide for the legitimate and beneficial corporate purposes of said company, and for the purpose of raising money to make payment of certain claims,

debts and obligations against it, due corporate action having first been had as required by law, duly and legally resolved to issue coupon bonds in the aggregate amount of two hundred and fifty thousand dollars ($250,000), payable in gold coin of the United States, of the then present standard of weight and fineness, such bonds to be coupon bonds of the par value of one thousand dollars ($1,000), each and each of the bonds to bear a distinctive number and designation beginning from one upwards, payable twenty years from the first day of April, nineteen hundred and twelve, and bearing interest at the rate of six per cent. per annum from the said first day of April, nineteen hundred and twelve, said interest to be payable semi-annually in like gold coin on the first days of October and April in each year at the office of Commercial Trust Company of New Jersey, in the City of Jersey City, New Jersey, and to secure the payment thereof by executing and delivering to the Commercial Trust Company of New Jersey, the complainant, as trustee, a mortgage or deed of trust, conveying the properties hereinafter described and set forth.

FOURTH. That said L. Wertheim Coal & Coke Company did thereupon and in pursuance of said resolutions, execute and issue the certain bonds before mentioned, in the aggregate amount of two hundred and fifty thousand dollars ($250,000) par value thereof, by each of which said bonds said L. Wertheim Coal & Coke Company promised to pay to the bearer thereof on the first day of April, in the year nineteen hundred and thirty-two, at the office of the Commercial Trust Company of New Jersey, 15 Exchange Place, Jersey City, New Jersey, the sum of one thousand dollars ($1,000) in gold coin of the United States of America equal to the then present standard of

weight and fineness, with interest thereon from April first, nineteen hundred and twelve, at the rate of six per cent. per annum, payable semi-annually in like gold coin at said office on the first days of October and April in each year, but only upon presentation and surrender of the coupons annexed thereto as they shall severally mature.

FIFTH. That on or about the sixth day of May, nineteen hundred and twelve, the said L. Wertheim Coal & Coke Company in pursuance of the resolution above mentioned and in the due exercise of its corporate powers and due corporate action having first been had as aforesaid for the purpose of securing equally the payment of principal and interest and other moneys payable on said bonds at any time outstanding as the same shall become payable, according to their tenor and effect, and for valuable consideration by it received, duly made, executed and delivered to your orator as trustee its mortgage or deed of trust and therein and thereby granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred, pledged and set over unto your orator and to its successor or successors in the trust therein created certain property, goods and chattels particularly mentioned and described in a schedule annexed to the said mortgage or deed of trust and marked "Schedule A", a copy of which Schedule A is hereto annexed and to which your orator refers to the same effect as if herein set forth at length. That in addition to the goods described in said Schedule A there was included all the coal, supplies, goods, wares and merchandise and all other tangible personal property, goods and chattels, rights and franchises of any and every kind, name and nature which the said L. Wertheim Coal & Coke Company might then have

in its possession, or which might have been or which might thereafter be acquired by it, either by way of renewal of the chattels above described, or by way of addition thereof, and all the good will of the business conducted and to be conducted and carried on by the said Company, as well as any and all trade names used by the Company, all books of account of any and every kind, name and nature, then owned and which might thereafter be acquired or kept by the Company in the conduct of its business, all bills and accounts receivable, notes receivable, promissory notes, checks, drafts, money, claims, demands, choses in action, including all damages collected from any common carrier or railroad company for violations, and all other property or things of value of any kind, name or nature, tangible, intangible, legal or equitable of which the company might then be possessed, or to which it might become entitled, also all the rights, privileges, franchises and immunities of the Company, including the right to be a corporation, in so far as it could be lawfully transferred or conveyed, excepting, however, two leases made by the Lehigh Valley Railroad Company to the L. Wertheim Coal & Coke Company, dated respectively June 12th, nineteen hundred and six, and April thirtieth, nineteen hundred and eight.

SIXTH. That the said mortgage or deed of trust was authorized, made, executed and delivered in all respects in conformity with the law and was duly proved as to the execution by the said L. Wertheim Coal & Coke Company and as to the execution thereof by the Commercial Trust Company of New Jersey before Willard C. Fisk, a Master in Chancery of New Jersey, on May six, nineteen hundred and twelve, and that there was attached thereto an affidavit by the President of

said Commercial Trust Company of New Jersey, the mortgagee therein named, setting forth the consideration of the said mortgage and the amount due and to grow due thereon, and on the said sixth day of May, nineteen hundred and twelve, the said mortgage was duly recorded in the Register's office of Hudson County, being the County in which said mortgaged property was and is situated, in Book 305 of Chattel Mortgages, on page 135, and that your orator, the said trustee therein mentioned, duly accepted the trust created in and by the said mortgage or deed of trust now in the possession of your orator and ready to be produced when required, and your orator refers to the said mortgage and to the record thereof for a more particular statement of the terms and provisions of said mortgage or deed of trust and of the bonds issued thereunder and the property conveyed and assigned thereby, the same as if the said mortgage or deed of trust was herein fully set forth at length.

SEVENTH. That in pursuance of the terms of the said bonds and of the said mortgage or deed of trust two hundred and fifty (250) of said bonds of the par value of one thousand dollars ($1,000) each and of the aggregate value of two hundred and fifty thousand dollars ($250,000) were duly signed and executed by the proper officers of the L. Wertheim Coal & Coke Company and delivered to your orator as trustee and thereupon certified by your orator through its appropriate officer duly authorized and delivered in accordance with the written order of the President or Treasurer of the said L. Wertheim Coal & Coke Company in the manner in said mortgage or deed of trust provided, and that the bonds so executed and certified under the mortgage or deed of trust as aforesaid and delivered as aforesaid were duly

and legally issued, negotiated and sold for value, and that the bonds issued as aforesaid excepting therefrom ten bonds of the par value of one thousand dollars ($1,000) each redeemed and paid off under the terms of said mortgage or deed of trust as hereinafter set out, are now outstanding and held, and owned by divers and many different persons, the names and residences of all the respective owners and holders thereof and the amounts of bonds being held by each being unknown to your orator, so that it is impossible for your orator to make the present holders and owners thereof parties hereto.

EIGHTH. That it is further provided in said mortgage or deed of trust that as a sinking fund for the payment of the indebtedness secured thereby, the L. Wertheim Coal & Coke Company would pay monthly to the trustee, beginning on the first day of May, nineteen hundred and twelve, and on the first day of each and every month in each and every year thereafter until the bonds secured by said mortgage or deed of trust should be lawfully fully paid, both principal and interest, the sum of two thousand dollars ($2,000) per month in lawful gold coin of the United States of the then present standard of weight and fineness, to be applied by the trustee on each interest day, to wit, on the first day of October, and the first day of April, in each and every year thereafter, in payment of the interest on said bonds and the balance in redeeming on each interest date, as many of said bonds as said monthly payments, with such interest as the trustee might receive thereon would pay and redeem, and that in case default should be made in the payment of any monthly sum to the trustee for the sinking fund as therein provided, and if any such default shall continue for the period of ninety days, then and in every case

of such continued default, the trustee should by notice in writing delivered to the Company, declare the principal of all the bonds secured by such mortgage or deed of trust and then outstanding, to be due and payable immediately; and upon such declaration by the said trustee said bonds should become and be due and payable immediately, anything in said mortgage or deed of trust or in said bonds to the contrary notwithstanding.

That in pursuance of said conditions of said mortgage or deed of trust said L. Wertheim Coal & Coke Company paid to your orator as trustee two thousand dollars ($2,000) a month up to and including the first day of May, nineteen hundred and fourteen, and that from the payments so made your orator, as trustee as aforesaid, paid in full the interest coupons on said bonds issued and outstanding as they severally matured up to and including April first, nineteen hundred and fourteen, and from the balance of the moneys received as aforesaid and in accordance with the terms of said mortgage or deed of trust redeemed, paid off and cancelled, the principal of ten of said bonds of the par value of one thousand dollars ($1,000) each, so that at this date there is issued and outstanding two hundred and forty (240) of the said bonds secured under said mortgage or deed of trust of the par value of one thousand dollars ($1,000) each and aggregating two hundred and forty thousand dollars ($240,000).

NINTH. That on the first day of June, nineteen hundred and fourteen, there became due and payable to your orator as trustee, under the terms of said mortgage or deed of trust, a monthly payment of two thousand dollars ($2,000) for the sinking fund to pay the interest and principal of said bonds as hereinbefore set out, and that

said L. Wertheim Coal & Coke Company made default in the payment so due as aforesaid, which default has continued since that date and that in accordance with the provisions of said mortgage or deed of trust, said default having continued for a period of ninety days, or over, your orator on or about the thirty-first day of August, nineteen hundred and fourteen, by notice in writing delivered to the said L. Wertheim Coal & Coke Company, declared the principal of all the bonds secured by the said mortgage or deed of trust and then outstanding to be due and payable immediately and thereupon all of the said bonds then outstanding and amounting to two hundred and forty thousand dollars ($240,000) par value became immediately due and payable and still remain unpaid.

TENTH. That it was in and by said mortgage or deed of trust provided that in case default should be made in the payment of any monthly instalment to the trustee for the sinking fund therein provided and if default should continue for a period of ninety days, your orator as trustee under said mortgage or deed of trust might among other things proceed to protect or enforce the rights of the bondholders under said indenture by a suit or suits for the foreclosure of the said mortgage or deed of trust and for the enforcement of any appropriate, legal or equitable remedy and that any sale made under or by virtue of said mortgage or deed of trust under any judicial proceedings, should be a perpetual bar, in law and equity, against the said L. Wertheim Coal & Coke Company, its successors and assigns, and against any and all persons claiming or to claim the property so sold or any demand thereto from, through or to the said company, its successors or assigns, and that the purchase money and proceeds

of any such sale or sales, together with any sums which might then be held by the trustee and under any of the provisions of said mortgage or deed of trust, should be applied as follows:

(1st.) To the payment of the costs and expenses of sale, including reasonable compensation to the trustee, its agents, attorneys and counsel, and all other expenses, liabilities or advances made or incurred by the trustee;

(2nd.) To the payment of the whole amount then owing or unpaid upon the bonds secured thereby for both the principal and interest, and in case such proceeds should be insufficient to pay in full the whole amount so due and unpaid upon said bonds, then to the payment of principal and interest without preference or priority of principal over interest, or of interest over principal, equally, and pro rata to the said bondholders, and if there should be sufficient to pay in full the whole amount due upon said bonds, principal and interest, then the surplus, if any, to be returned to the said L. Wertheim Coal & Coke Company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same.

ELEVENTH. That in and by said mortgage or deed of trust, IT IS PROVIDED, that your orator as trustee thereunder upon any default under the terms of said indenture shall be entitled to the appointment of a receiver of the mortgaged property.

In consideration of the premises and forasmuch as your orator has not a complete remedy in the premises at the common law, and can only have adequate relief in a court of equity where matters of this nature are cognizable and relievable, your orator seeks this honorable court to the end as follows:

Bill to Foreclose.

1. That the said mortgage or deed of trust held by your orator as aforesaid and dated May sixth, nineteen hundred and twelve, may be foreclosed, and that the lien of said mortgage or deed of trust may be decreed and established upon the property described therein and covered thereby and be adjudged to be prior and paramount to any and all other liens and rights or interest in and to the said mortgaged property, and that the amount due for principal and interest upon the said bonds outstanding and secured by said mortgage or deed of trust may be ascertained and determined and that payment of so much thereof as shall be due thereby and from the said defendant L. Wertheim Coal & Coke Company may be decreed by this Court.

2. That in default of the payment of the sum found to be due and payable upon the said bonds due and outstanding and secured by the said mortgage or deed of trust it may be decreed that the defendant and any person claiming or to claim under it may be foreclosed of and from all right, title and equity of redemption in and to the mortgaged property and every part thereof, and that a sale thereof, or of such thereof as may be neces sary, may be ordered in accordance with the law and practice of this court, and that the moneys arising from said sale may be applied to the ex penses of this suit and of the execution of your orator's trust and for all payments for counsel fees and all other necessary expenses provided for under said mortgage or deed of trust and reasonable compensation for the performance of said trust and then to the payment of the amounts found due for principal and interest upon said bonds outstanding and secured by said mortgage or deed of trust and that the balance thereof may be disposed of as this court may direct.

3. That pending this suit some suitable person may be appointed by this court as receiver with the usual powers of receivers in such cases, to take possession of all and singular the said mortgaged property, with power to manage, control and preserve the same, and to collect and receive the income and profits thereof and during the pendency of this suit and with such powers as may seem to this court right and proper, and that the defendant L. Wertheim Coal & Coke Company be decreed to make such transfers and conveyances to such receiver and to the purchasers of said property at any sale as aforesaid, as may be necessary and proper to put them or either of them in possession and control of the said property.

4. That L. Wertheim Coal & Coke Company, the defendant in this suit, may full, true and perfect answer make to all and singular the premises, without oath (answer under oath being herein expressly waived) as if here repeated and they hereto particularly interrogated.

5. That your orator may have such other and further relief in the premises as the nature and circumstances of the case may require, and as to your Honor may seem meet and just.

May it please your Honor, the premises considered to grant unto your orator the State's writ or writs of subpoena issued out of and under the seal of this court to be directed to the said defendant L. Wertheim Coal & Coke Company, commanding it on a certain day to be and appear before this honorable court, then and there to answer the premises and to stand to, abide by and perform such order and decree herein as to your Honor shall seem meet and agreeable to equity and good conscience.

And your orator will ever pray, &c.

FISK & FISK,
Solicitors for and of Counsel
with Complainant.

Schedule A.

All the property situated at the intersection of the Northwesterly line of Pacific Avenue with the Southwesterly line of Grand Street, Jersey City, New Jersey, to wit:

All fencing, open and closed trestle, stable building and ground work, blacksmith shop and ground work, carriage shed, office building and ground work, piping, streams, wire lines, cinders, skylights, pipe covering, planks anl nails, planking south end of N. J. Yd. (Vanderbeek), cinders, for filling Lehigh Valley R. R. Co., 1 galvanized iron skylight (Henningsen), 153 feet 2 inches Zero pipe covering, etc. (Standard Gas Light Co.).

Motors, Boiler, Machinery and Tools.

1 Rudd radiator; 1 oat car; 3 60-gallon oil cans; 200 feet rubber hose; hose reel nozzle, etc.; 1 Gibson oat crusher; 1 7½ H. P. motor (Gen'l Elct. Co.); 1 1½ H. P. motor (Gen'l Elct. Co.); 1 Gillett clipping machine; 1 2-wheel hose reel; 1 boiler, piping, etc., for steaming out coal (T. Smith & Co.); ½ H. P. motor-blower and forge (in blacksmith shop); 1 7½ H. P. motor for running machinery in blacksmith shop; 1 C. E. Wright Co. band saw; 1 C. E. Wright Co. planer; 1 Boynton & Plummer Co. drill; shafting, hangers, belting, pulleys and setting up; 1 tire bender (Champion Blower Forge Co.); 1 tire setter (Champion Blower Forge Co.); grindstone, anvil, vise and sundry tools; 1 hand blower forge and tools in horseshoeing shop; 1 complete conveyor for hoisting coal; 1 double scale.

Office Equipment.

1 safe (Mosler Safe Co.); 1 safe (Halls Safe Co.); 1 standing desk 6 ft. with rack; 1 oak filing cabinet 32 x 12 (Off. Bk. & Lib'y Co.); 1 oak stand 16 x 25; 1 lt. oak table 30 x 59 made by carpenter; 2 oak drop hd. typr's desks 54 x 30 (Underwood); 1 r. t. oak desk (R. H. Macy & Co.); 1 revolving chair (R. H. Macy & Co.); office partition

Schedule A.

(wrought iron) (C. L. Kehsed); I Underwood typewriter No. 4—48098; 1 Underwood typewriter, No. 3; 1 oak table 6 ft. with 2 drawers; 1 flat top desk 48 x 60, Major Steele; 1 letter press and stand; 2 revolving typewriter chairs (Underwood Co.); 1 closet 20 x 60; floor covering, main office; 1 unfinished oak table 24 x 30 (carpenter); 1 revolving oak chair (S. W.'s private office); 1 revolving oak chair (leather back and seat); 1 cherry r. t. desk (S. W.'s private office); 1 leather sofa oak frame (S. W.'s private office); 1 oak bookcase (S. W.'s private office); floor covering (S. W.'s private office); 2 high revolving chairs; 1 low stool leather seat; telephone booth; 1 stove; shades; 4 gas heaters; 1 oak filing cabinet; 1 oak chair with arms; 1 oak settee; 1 time recording clock; 2 office chairs; 2 coat racks; picture frames; 2 telephone arms; 1 gooseneck E. L. fixture; E. L. fixtures and shades (9); 1 electric fan; 1 electric fan, 16″ (Manning); 1 single H. T. desk in weighmaster's office); 1 auto duplograph; 9 fly screens (R. Leonard); 1 R. T. desk (Wall St. Exch. Bldge., N. Y. C.); 2 rugs (Siegel, Cooper Co.); 1 R. T. desk (W. R. Hooper); 1 Bundy time clock and racks.

WAGONS AND HARNESSES.

Single wagons: No. 1, 3, 19, 40H. Coke wagon: No. 18. Patent truck—2 tons: No. 24, 25, 27, 28H, 29H, 37H. Patent truck—4 tons: No. 23, 54, 62, 63. Patent truck—6 tons: No. 20, 21, 55, 56, 57, 58, 59, 60, 17, 26. Carts: 13. Gravity truck—5 tons: No. 1, 30, 32, 35, 36, 39H. Gravity truck—6 tons: No. 44, 74, 33, 34. Gravity truck—7 tons: No. 71. Side dumper—5 tons: No. 77. Side dumper—6 tons: No. 22, 53. Side dumper—7 tons: No. 50H, 51, 52, 70H, 72, 78, 79, 81. Side dumper—8 tons: No. 73, 75, 76, 80 gravity, 82. Harnesses: 90 collars, 22 3-horse set harness, 18 team set harness, 35 breast blankets, 4 pair lead lines, 4 Dutch collars, 4 sets cart harness, 4 patent leather collars, 2 single sets carriage harness, 66 winter blankets, 7 stable blankets, 2 fly nets, 2 single sets harness, 4 second-hand springs (Greenberg) used in mak-

ing truck, 11 patent truck No. 64—4 tons (built), 11 patent truck No. 65—3 tons (built), incomplete set of harness (hand-made), 6 bits (John A. Vill & Son), 1 carriage bit (John A. Vill & Son), 1 auto pump (John A. Vill & Son), 2 new collars (John A. Vill & Son), 6 special extra large collars (John A. Vill & Son), 12 new collars (John A. Vill & Son), 1 carriage apron (John A. Vill & Son), 1 ton capacity Eureka coal wagon (Eureka C. W. Co.), 12 new collars (John A. Vill & Son), 72 winter blankets (John A. Vill & Son), 3 side discharge wagons (Shadbolt Mfg. Co.), 1 set single harness (John A. Vill & Son), 72 new breast aprons (John A. Vill & Son), 72 new breast aprons lettered W. (John A. Vill & Son), 101 signs (Ingram Richardson Co.), 1 gig (built), 1 ambulance.

HORSES.

Seventy-seven horses.

L. WERTHEIM COAL & COKE COMPANY,
By Louis Wertheim,
President.

SANDERS WERTHEIM,
Secy.

Received in the office of the Register of the County of Hudson, New Jersey, at 3:25 o'clock P. M. May 6th, 1912, and recorded in Book 305 of Chat. Mortgs. for said County on page 135.

JOHN J. MAHON,
Register.

Amended Answer and Answer by Way of Cross-Bill of Albert L. Drayton, Trustee, &c.

IN CHANCERY OF NEW JERSEY.

Between

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Trustee,

Complainant,

and

L. WERTHEIM COAL & COKE COMPANY,

Defendant.

On Bill, &c.

The amended answer and answer by way of cross-bill of Albert I. Drayton, Trustee in Bankruptcy of L. Wertheim Coal & Coke Company:

Albert I. Drayton, of Englewood, Bergen County, New Jersey, Trustee in Bankruptcy of defendant L. Wertheim Coal & Coke Company, for an amended answer to the bill of complaint of the complainant, or so much thereof as he is advised that it is material for him to make answer unto, says:

1. That after the filing of the bill of complaint herein and on the sixteenth day of September, nineteen hundred and fourteen, an involuntary petition for an adjudication of bankruptcy under the bankruptcy laws of the United States, was filed against the defendant L. Wertheim Coal & Coke Company (hereinafter referred to as the Wertheim Company), in the United States District Court for the District of New Jersey, and such proceedings were thereafter had in such mat-

ter that said defendant was adjudged bankrupt, and said matter was thereupon referred for further proceedings to the Honorable George R. Beach, one of the standing Referees in Bankruptcy for said District;

That thereafter a meeting of the creditors of the alleged bankrupt was duly called by said Referee for the purpose, among others, of electing a Trustee, and that at said meeting, the creditors failing to elect, said Referee did, on the sixth day of November, instant, appoint Albert I. Drayton, as Trustee of said Bankrupt, and said Trustee did thereupon qualify as such, pursuant to the order of his appointment and the laws of the United States, and did enter into bond as such Trustee, which bond was duly approved by order of said Referee entered in said matter on the seventh day of November instant;

That by virtue of the premises, Albert I. Drayton, Trustee as aforesaid, has succeeded to all the property, property rights and interests of every nature and description of the bankrupt, and in addition thereto is vested with the rights of any creditor of the bankrupt to set aside and avoid conveyances, mortgages or other dispositions made or suffered by said bankrupt of its property, as though such creditor had obtained and levied process against the same; and is further vested with all the powers which may be lawfully vested in any Trustee in Bankruptcy under the bankruptcy laws of the United States aforesaid.

2. The Bankruptcy Trustee admits on information and belief the allegations of the first and second paragraphs of the Bill of Complaint.

3. The Bankruptcy Trustee denies the allegations of paragraphs three and four of the Bill, except that he is informed that the Wertheim

Company did go through the form of issuing its corporate bonds of the aggregate par amount of $250,000, bearing date April twenty-second, nineteen hundred and twelve, and of substantially the form and tenor set forth in said paragraphs, referring, however, to said bonds when actually produced for the exact terms and tenor thereof.

The Bankruptcy Trustee expressly denies that said bonds were issued upon the authority, in the manner, and for the purposes set forth in said paragraphs of the complaint.

4. The Bankruptcy Trustee denies the allegations of the fifth and sixth paragraphs of the Complaint, except that he admits that under date of May sixth, nineteen hundred and twelve, there was recorded in the Hudson County Register's office, a mortgage purporting to have been made by L. Wertheim Coal & Coke Company to the complainant as Trustee and purporting to secure payment of an issue of bonds of the L. Wertheim Coal & Coke Company of the aggregate par value of Two hundred and fifty thousand dollars ($250,000), and purporting to cover the property specified in the fifth paragraph of the Complaint.

The Bankruptcy Trustee expressly denies that such mortgage was executed or delivered in the due exercise of the mortgagor's corporate powers and denies that it was executed after due corporate action, and denies that it was executed or delivered in conformity to law, and expressly charges that said mortgage is void as against the creditors of the mortgagor, and as against the Bankruptcy Trustee.

5. The Bankruptcy Trustee is without knowledge as to the execution, certification and delivery of the bonds of the mortgagor as specified in the seventh paragraph of the complaint, and, there-

fore, denies the same, leaving the complainant to such proof thereof as it may be advised.

The Bankruptcy Trustee expressly denies that said bonds, if executed, certified and delivered at all, were duly and legally issued, negotiated and sold for value, and further expressly denies that said bonds are now owned or held by many different persons, or that the names and residences of such holders and owners, or the amounts held by each, are unknown to the complainant, but on the contrary charges that the holders of said bonds are few in number and are known to the complainant, and further charges that the complainant's bill is filed at the instance and request of such holders and owners.

6. The Bankruptcy Trustee is without knowledge as to the matters and things set forth in the eighth paragraph of the complaint, although he believes such statements to be true, but for accuracy of statement refers to said mortgage when produced.

7. The Bankruptcy Trustee is without knowledge as to the matters and things set forth in the ninth paragraph of the Complaint, and, therefore, leaves complainant to such proof thereof as it may be advised.

8. The Bankruptcy Trustee is without knowledge as to the several matters and things set forth as statements of fact in the tenth and eleventh paragraphs of the Complaint, although he believes the statements with respect to the contents of said mortgage to be true, but for accuracy of statement refers to the text of said mortgage when produced.

9. The Bankruptcy Trustee further answering says that at the time of the execution of the alleged mortgage and from thence hitherto, the

Amended Answer and Answer by way of Cross-Bill of Albert L. Drayton, Trustee, &c.

Directors of the Wertheim Company were Louis Wertheim, Sanders Wertheim, Warren Delano, DeWitt Van Buskirk and William T. Payne; that Warren Delano was a large owner of the capital stock, and the person in absolute control of a certain other corporation known as the Mill Creek Coal Company, a corporation owning or controlling and operating coal mines, and represented its interest upon the Board of Directors of the Wertheim Company; that said DeWitt Van Buskirk was the personal attorney for said Warren Delano and Mill Creek Coal Company, and represented their interest upon said Board of Directors of the Wertheim Company; that William T. Payne was a large owner of the capital stock and was the person in absolute control of the business and affairs of a certain other corporation known as the East Boston Coal Company, which corporation owned and controlled and operated certain other coal mine properties and said Payne represented said East Boston Coal Company upon the Board of Directors of the Wertheim Company; that the Wertheim Company was then and for some years prior thereto had been engaged in the business of selling in Jersey City and New York City the coal furnished to it by said Delano and Payne, through their respective companies; that said Delano and Payne acquired their interest and influence in the affairs of the Wertheim Company by financing the purchase of the capital stock in said Wertheim Company previously held by Max Isenstein and William L. Dann; that the stock of the Wertheim Company so held by Isenstein and Dann constituted a majority of the outstanding capital stock, and the ownership thereof carried with it the control of the Company; that in December, nineteen hundred and nine, said Warren Delano, William T. Payne, Louis Wertheim and Sanders Wer-

theim agreed to and did purchase said shares of stock from Isenstein and Dann for a price amounting, as the Bankruptcy Trustee is informed and believes, to over Seventy thousand dollars, payable Twenty thousand dollars in cash and the balance by a series of promissory notes of the Wertheim Company of approximately One thousand dollars each, maturing monthly; that at the time or immediately prior to said transaction, the directors of the Wertheim Company were Louis Wertheim, Max Isenstein, William L. Dann and Sanders Wertheim, and the officers were Louis Wertheim, President, Max Isenstein, Vice President, and William L. Dann, Secretary and Treasurer. That as part of the transaction said Max Isenstein and William L. Dann surrendered their stock for cancellation and transfer and new certificates therefor were issued in the names of Louis Wertheim and Sanders Wertheim, which certificates were then and there endorsed in blank by said Sanders Wertheim and Louis Wertheim and delivered to the representative of said Delano. The Twenty thousand dollars cash payment was provided for by the issue of a promissory note for that amount by the Wertheim Company, payable to said Delano, or his nominee, which note said Delano did procure to be discounted on his own credit or the credit of the Mill Creek Coal Company and the proceeds paid over to said Isenstein and Dann. The certificates for the stock purchased from Isenstein and Dann, were, as the Bankruptcy Trustee is informed and believes, first held as collateral security for the payment of said Twenty thousand dollar note and later delivered and held by said Delano and Payne, or their representative, as collateral security for the payment of the entire indebtedness owing to them or their respective companies, the Mill

Creek Coal Company and the East Boston Coal Company. That as part of the same transaction said Isenstein and Dann did resign as officers and directors of the Wertheim Company and in their place said Delano was elected Director and Vice President, and said Payne and Van Buskirk were elected Directors, and shares of the Company's capital stock were issued to said Delano and Payne and Van Buskirk in the amount of eight shares each to qualify them as directors.

The Bankruptcy Trustee charges that at all times thereafter said Delano and Payne, or their respective corporations, Mill Creek Coal Company and East Boston Coal Company, controlled the business and affairs of the Wertheim Company, at least until the summer of Nineteen hundred and thirteen, when said Delano tendered his resignation as Director, although thereafter the majority of the stock of the Wertheim Company continued to be held as theretofore as security for the indebtedness due both to said Delano and Payne, or their respective companies. That the aforesaid Delano, Payne, Van Buskirk, Louis Wertheim and Sanders Wertheim, acting as directors of said Wertheim Company, caused and permitted the promissory notes uttered by the Wertheim Company, payable to Isenstein and Dann as aforesaid, to be paid out of the corporate funds of the Wertheim Company, as said notes matured, until April, nineteen hundred and twelve, said notes aggregating upwards of Twenty-five thousand dollars, as the Bankruptcy Trustee is informed and believes, so that upon the twenty-second day of April, nineteen hundred and twelve, there remained unpaid on the notes issued by the Wertheim Company in connection with the purchase of the Isenstein and Dann stock, the following amounts:

Note held by Warren Delano or Mill Creek Coal Company $20,000.00
Notes held by William L. Dann, aggregating 21,189.97
Notes held by Max Isenstein, aggregating 15,818.74

The Bankruptcy Trustee expressly charges, however, that said notes were wholly without consideration and ultra vires and void to the knowledge of said Delano, Payne, Van Buskirk, Sanders Wertheim and Louis Wertheim, William L. Dann and Max Isenstein.

The Bankruptcy Trustee further charges that the acts of the Directors in paying the Isenstein and Dann notes theretofore maturing, were ultra vires, illegal and void and that said Directors are personally chargeable with the moneys so paid.

10. The Bankruptcy Trustee further answering alleges on information and belief that said Delano and Payne after eliminating Isenstein and Dann from the Wertheim Company and securing control thereof as aforesaid, did use said Wertheim Company as a convenience for the sale of the product of their respective mines under an agreement between them, the said Delano and Payne, to furnish jointly and upon credit all coal which might be required by the Wertheim Company, and that on said April twenty-second, nineteen hundred and twelve, said Delano and Payne did claim that there was due to their respective companies for coal sold and delivered as follows:

To the Mill Creek Coal Company $99,454.80
(and in addition thereto $20,000 due upon a promissory note of the Wertheim Company representing money paid to Isenstein and Dann as aforesaid.)
To the East Boston Coal Company ... $88,314.33
That the amount of said claims, including the notes held by Isenstein and Dann, aggregated $245,777.84

that thereupon said Mill Creek Coal Company, represented by Warren Delano, East Boston Coal Company, represented by William T. Payne, and said Max Isenstein and William L. Dann, did agree "to accept in payment of all claims against the company to April 1, 1912, bonds of this company secured by a mortgage on the assets of this company", and the aforesaid Directors did thereupon in form authorize the issue of bonds of the company of the aggregate par value of Two hundred and fifty thousand dollars ($250,000), to be secured by the mortgage or deed of trust set forth in complainant's bill, said bonds, however, to be delivered to the aforesaid Mill Creek Coal Company or Warren Delano, East Boston Coal Company or William T. Payne, Max Isenstein and William L. Dann, in payment of their respective claims.

That the aforesaid Board of Directors did thereupon cause the chattel mortgage set forth in complainant's bill to be executed, delivered and recorded, and bonds purporting to be secured thereby to be delivered to the aforesaid Mill Creek Coal Company or Warren Delano, East Boston Coal Company or William T. Payne, Max Isenstein and William L. Dann, in alleged payment of the claims asserted by them as aforesaid, and the Bankruptcy Trustee does charge that said bonds have ever since continued to be held by them (except such as have been paid), and that said bonds are still so held by them or in their interest or subject to their control.

The Bankruptcy Trustee further expressly charges that such of said bonds as were delivered in exchange for the promissory notes uttered in connection with the purchase of the Isenstein and Dann stock as aforesaid, are without consideration, ultra vires and void, and subject to the same

defenses as the promissory notes for which they were exchanged.

The Bankruptcy Trustee further expressly charges that at the time of the aforesaid bond issue and the execution and delivery of the chattel mortgage securing the same, and from thence hitherto, said Wertheim Company was insolvent; that all of said bonds were delivered in exchange for an antecedent alleged indebtedness and that the transfer of the corporate assets and property by way of mortgage securing said bonds, was and is void as against the creditors of the Bankrupt and as against the Bankruptcy Trustee.

The Bankruptcy Trustee further alleges that some of the Directors who authorized and procured the execution of said mortgage were personally interested therein and benefited thereby and that said Directors, directly or indirectly, thereby obtained a preference and advantage over other creditors of the Wertheim Company and that for such reason said mortgage is ultra vires and void or voidable at the instance of the other creditors and Bankruptcy Trustee, either in its entirety or to the extent of the bonds in which the directors are interested as aforesaid.

11. The Bankruptcy Trustee further answering charges that said chattel mortgage or deed of trust is void as against the creditors and against said Bankruptcy Trustee in that the affidavit of the mortgagee annexed thereto does not truly state the true consideration of said chattel mortgage.

12. That said mortgage or deed of trust, among others, contains the following provisions (page 12):

> "The (Wertheim) Company agrees that it will at all times actively conduct and carry on the business for which it was incorpo-

rated and which it is now carrying on and conducting and that it will keep and maintain in good repair and condition and in active operation its plant, yard and properties."

Page 23:

"While in possession of the mortgaged premises the (Wertheim) Company shall have full power, in its discretion, from time to time and in the ordinary course of its business to use and dispose of, free from the lien of this indenture, any portion of the machinery, tools, fixtures, coal, book accounts or any other of the goods or chattels described herein, and to apply and use the proceeds of sale or any money collected from book accounts in the ordinary course of its business, and the lien of this mortgage shall extend to any goods and chattels which may be acquired to replace such goods and chattels so sold as aforesaid."

The Bankruptcy Trustee shows and charges that subsequent to the execution of said mortgage and continuing until the appointment of Receivers herein, the Wertheim Company did, pursuant to the covenant of said mortgage, actively conduct and carry on the business for which it was incorporated and which it was carrying on and conducting at the time of the execution of said mortgage, which said business did include the purchasing of coal from various coal mine operators upon credit; that subsequent thereto, at the instance of said Delano and Payne, the Wertheim Company did make its purchases upon credit from various outside mine operators besides said Delano and Payne, and that at the time of the filing of the Bill herein there was due from the Wertheim Company to sundry creditors for debts contracted in the ordinary course of its business, the sum of approximately Two hundred thousand dollars.

Amended Answer and Answer by way of Cross-Bill of Albert L. Drayton, Trustee, &c.

The Bankruptcy Trustee further charges that a large part of the assets of the Wertheim Company at the time of the filing of the Complaint herein consisted in horses and wagons acquired subsequent to the date of said mortgage and that substantially all of the outstanding book accounts due to the Wertheim Company are due upon sales of coal made subsequent to the date of said mortgage.

The Bankruptcy Trustee, therefore, charges that under the provisions of said mortgage the claims of the bondholders, if valid at all, are subordinated to the prior claims of the creditors whose debts were created in the ordinary course of business as aforesaid, as to such after-acquired property and book accounts.

13. The Bankruptcy Trustee further answering says that the directors of the bankrupt from time to time have diverted large sums of money from the funds of the bankrupt and realized by it largely from the prosecution of its business of buying coal on long credit and selling the same on short credit, and paid the same to the complainant for the purpose of making payments on account of the principal and interest of the aforesaid mortgage and that large sums from the fund paid to the complainant as aforesaid, have, in turn, been paid by it to the aforesaid holders of the bonds secured by said mortgage, and that at the present time the complainant has in its hands a fund so paid by the Bankrupt, but not yet distributed to bondholders, amounting to Ten thousand dollars and upwards.

The Trustee charges that said payments were illegally received by the bondholders for the reasons aforesaid and recoverable by the Bankruptcy Trustee, and that the moneys now in the hands of

the complainant as aforesaid should likewise be paid over by it to the Bankruptcy Trustee.

The Bankruptcy Trustee further answering by way of cross-bill shows and charges as follows:

1. The Bankruptcy Trustee here charges all the several matters and things specifically set forth in the foregoing answer and prays the benefit of each and every thereof as though here fully repeated, and particularly the allegations and charges set forth in paragraphs 1, 9, 10, 11, 12 and 13 thereof.

2. The Bankruptcy Trustee prays for relief as follows:

That the complainant and Warren Delano, William T. Payne, Mill Creek Coal Company, East Boston Coal Company, William L. Dann and Max Isenstein, may, without oath (answer under oath being hereby expressly waived), full, true and perfect answer make to all and singular the premises, according to the best of their knowledge, information, remembrance and belief, respectively:

That the said mortgage or deed of trust be decreed to be null and void as against the creditors of the bankrupt and the bankruptcy trustee and delivered up for cancellation; and that the bonds secured thereby be delivered up for collection;

That the aforesaid Delano, Payne, Mill Creek Coal Company, East Boston Coal Company, Dann and Isenstein, set forth and discover the serial numbers and par value of the aforesaid bonds now held by them, and if they do allege that any of the unpaid bonds originally held by them are not now so held, then that they discover to whom they did transfer the same and when, and upon what consideration, and the names and addresses of the present holders thereof; that in the event that said mortgage is not decreed to be void in

its entirety, then that the lien thereof be decreed to be subordinate to the claims of the creditors of the bankrupt arising out of the ordinary course of its business subsequent to the date of said mortgage, as to all after-acquired property, including the book accounts owing to the bankrupt and the moneys now in the hands of the complainant, mortgage trustee;

That the receivers appointed herein be decreed to pay over to the bankruptcy trustee all moneys in their hands representing the sale of any of the assets of the bankrupt and the collection of its outstanding accounts;

That the complainant pay over to the bankruptcy trustee the amount of the fund received by it from the bankrupt as aforesaid (and amounting to the sum of Ten Thousand Dollars or some other sum);

That all of the defendants hereto discover all sums of money received by the mortgage trustee from the bankrupt on account of principal or interest alleged to be due under said mortgage, and the disposition thereof, and that the bondholders above named discover all amounts received by them or for their account on any of said bonds, giving the dates and amounts, and that they account for and pay over the same to the bankruptcy trustee;

That an account be taken of the moneys paid by the bankrupt on account of the promissory notes issued in the name of the bankrupt at the time of the purchase of the Isenstein and Dann stock, and that the defendants, or some of them, be decreed to pay over said amount to the bankruptcy trustee;

That the bankruptcy trustee have such other

and further relief in the premises as may be equitable and just;

That the State's writ of subpoena may issue out of and under the seal of this honorable court, directed to the complainant and Warren Delano, William T. Payne, Mill Creek Coal Company, East Boston Coal Company, William L. Dann and Max Isenstein, therein and thereby commanding them and each of them at a certain day and under a certain penalty to be therein expressed, personally to be and appear before your Honor in this Honorable Court, then and there to answer the premises and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet and agreeable to equity and good conscience.

That the State's writ of injunction may likewise issue, directed to the said Warren Delano, William T. Payne, Mill Creek Coal Company, East Boston Coal Company, William L. Dann and Max Isenstein, enjoining and restraining them from negotiating, assigning, transferring, pledging or otherwise disposing of any of the aforesaid bonds.

McDERMOTT & ENRIGHT,
Solicitors for and of Counsel with
Albert I. Drayton, Trustee in
Bankruptcy of L. Wertheim
Coal & Coke Company.

We consent to the filing of the foregoing amended answer and cross-bill.

FISK & FISK,
Sol'rs. of Complainant.

Amended Answer and Answer by way of Cross-Bill of Albert L. Drayton, Trustee, &c.

STATE OF NEW JERSEY, Hudson County. } ss.:

JOHN M. ENRIGHT, being duly sworn, according to law, on his oath says that he is the solicitor for Albert I. Drayton, whose answer to the bill of complaint of Commercial Trust Company of New Jersey, is hereto annexed.

Deponent has personally given much time to the investigation of the records of the bankrupt and to the examination of its officers. Deponent has personally prepared the annexed amended answer and cross-bill, based upon information received by him as aforesaid, and believes the matters of fact therein stated to be true. Deponent has made inquiry of Benjamin Wertheim and is informed by him that to the best of his knowledge the bonds of the bankrupt are still held by the original distributees to whom said bonds were originally delivered or in the hands of their representatives and under their control. Deponent has been unable to ascertain that there is any other bondholder claiming an interest under said mortgage except as set forth in the foregoing amended answer.

JOHN M. ENRIGHT.

subscribed and sworn to before me this 23rd day of December, A. D. 1914.

Henry A. Oetjen,
Notary Public of New Jersey.

Answer to Cross Bill of Albert I. Drayton.

IN CHANCERY OF NEW JERSEY.

Between

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Trustee,

Complainant,

and

L. WERTHEIM COAL & COKE COMPANY,

Defendant.

On Bill &c.

The answer of Commercial Trust Company of New Jersey, Trustee, complainant, to the amended answer by way of cross bill of Albert I. Drayton, Trustee in Bankruptcy of L. Wertheim Coal & Coke Company.

The Commercial Trust Company of New Jersey, answering says:

1. It admits the allegations in paragraph 1 of the amended answer by way of cross bill.

2. It denies on information and belief the allegations in paragraph 9 of the amended answer by way of cross bill.

3. It denies on information and belief the allegations in paragraph 10 of the amended answer by way of cross bill.

4. It denies on information and belief the allegations in paragraph 11 of the amended answer by way of cross bill.

5. It admits that the said mortgage or deed of trust, among other things, contains the provisions set out in paragraph 12 of the amended answer by way of cross bill, and that subsequent to

the execution of said mortgage and until the appointment of receivers in this suit, the L. Wertheim Coal & Coke Company did actually conduct and carry on the business for which it was incorporated and was carrying on and conducting at the time of the execution of the mortgage, but it denies on information and belief the other allegations contained in said paragraph 12.

6. It denies upon information and belief the allegations in paragraph 13 of said amended answer by way of cross bill, except that it admits that in accordance with the terms of the said mortgage or deed of trust certain sums of money have from time to time been paid to it and the interest accruing on the bonds secured by said mortgage and the principal of certain of said bonds have been paid off and discharged.

Further answering it says, that said mortgage or deed of trust contains a covenant and agreement on the part of the mortgagor as follows:

> "As a sinking fund for the payment of the indebtedness hereby secured, the Company covenants and agrees that it will pay monthly to the said trustee beginning on the first day of May, nineteen hundred and twelve, and on the first day of each and every month in each and every year thereafter, until the bonds hereunder secured shall be all fully paid, both principal and interest, the sum of two thousand dollars per month, in lawful gold coin of the United States of the present weight and fineness, to be applied by the trustee on each interest day, to wit, on the first day of October and the first day of April in each and every year thereafter, in payment of the interest on said bonds, and the balance in redeeming on each interest day as many of said bonds as the said monthly payments, with such interest as the trustee may receive thereon, will pay and redeem.

"The bonds to be redeemed as above set forth shall be drawn by lot on the first days of each March and September, of each and every year, or on the next judicial day thereafter, by the President, Vice President, or other executive officer of the trustee.

"The Company shall advertise the numbers of the bonds so drawn, in a daily newspaper published in the City of Jersey City, once a week for two weeks, prior to the said first days of April and October then next ensuing, and a notice that interest on said bonds will cease on the said first days of April and October next ensuing and said notice shall require the said bonds to be presented for redemption. If any bond so drawn, shall be registered, similar notice shall be sent to the registered holder, at his address on the register. Interest upon such bond so drawn shall cease immediately on the first day of April or October first next ensuing, and upon presentation and surrender of such bond so drawn, with all unmatured coupons thereon, the holder of the said bond, or his heirs, executors, administrators or assigns shall be paid the par of said bond, with the accrued interest to the first day of April or October first next ensuing the drawing thereof. When so redeemed the said bond shall be immediately cancelled by the trustee and such evidence of cancellation be given to the Company as may be necessary."

That in accordance with the terms and provisions of said mortgage or deed of trust hereinbefore recited, said L. Wertheim Coal & Coke Company, commencing May seventh, nineteen hundred and twelve, and up to and including the payment due May first, nineteen hundred and fourteen, paid to the mortgagee in said mortgage or deed of trust, being the complainant in this cause, two thousand dollars per month, the total payments so made aggregating fifty thousand dollars. That in accordance with the said provisions of said

mortgage or deed of trust, the complainant, trustee under said instrument, paid from the moneys so deposited with it by the mortgagor the semi-annual interest coupons becoming due on the bonds issued under and secured by said mortgage semi-annually on the first days of April and October, commencing October first, nineteen hundred and twelve, up to and including April first, nineteen hundred and fourteen; that said semi-annual payments of interest coupons so made by the complainant, as trustee, were as follows:

1912, October 1	$7,500.00
1913, April 1	7,440.00
October 1	7,440.00
1914, April 1	7,350.00

That further, in pursuance of the terms and conditions of said mortgage or deed of trust, the complainant as trustee thereunder caused certain bonds issued under and secured by said mortgage to be drawn for redemption semi-annually on March and September first, commencing September first nineteen hundred and twelve, up to and including September first, nineteen hundred and fourteen, and paid the bonds so drawn for redemption, except the bonds drawn September first, nineteen hundred and fourteen, from the moneys so received monthly by it from the L. Wertheim Coal & Coke Company. That the numbers of the bonds and the amounts paid thereon and the dates drawn in redemption are as follows:

1912, Sept. 3, bonds Nos. 64 and 245,	$2,000.00
1913, March 1, none drawn—no funds in hand,	
September 2, bonds Nos. 209, 231 and 234	3,000.00
1914, March 2, bonds Nos. 9, 39, 71, 204 and 207	5,000.00

Answer to Cross-Bill of Albert I. Drayton.

That on September first, nineteen hundred and fourteen bonds Nos. 8, 14 and 178 were drawn for redemption October first, nineteen hundred and fourteen, but that following said drawing, default having been made in the conditions of said mortgage or deed of trust, the bill of complaint in this cause was filed to foreclose the same, and following the filing of said foreclosure bill, and before October first, nineteen hundred and fourteen, the bankruptcy proceedings against said L. Wertheim Coal & Coke Company were filed and an adjudication of bankruptcy entered, and the moneys to pay the said bonds drawn for redemption on September first, nineteen hundred and fourteen still remain in the hands of said trustee, the complainant. That in addition to the moneys received by the trustee under said mortgage or deed of trust from the L. Wertheim Coal & Coke Company, there has been received certain moneys for interest on the deposit of said funds in bank, the total of said interest up to January first, nineteen hundred and fifteen amounting to the sum of five hundred and twenty seven dollars and two cents. That there remains in the hands of said trustee, the complainant, as a balance from the moneys received under the aforesaid provisions of the mortgage or deed of trust from the L. Wertheim Coal & Coke Company and for interest up to January first, nineteen hundred and fifteen on deposits in bank the sum of ten thousand seven hundred and ninty seven dollars and two cents.

7. And the complainant as to said amended answer by way of cross bill prays to be hence dismissed with its reasonable costs and charges in this behalf wrongfully sustained.

FISK & FISK,
Solicitors.

Replication.

IN CHANCERY OF NEW JERSEY.

Between

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Trustee,

Complainant,

and

L. WERTHEIM COAL & COKE COMPANY, *et al.*,

Defendants.

On Bill &c.

The replication of Albert I. Drayton, Trustee of L. Wertheim Coal & Coke Company, to the answer of the complainant to the cross-bill of Albert I. Drayton, trustee.

The defendant Albert I. Drayton, trustee of L. Wertheim Coal & Coke Company, joins issue on the answer of the complainant to the answer by way of cross-bill of said defendant Albert I. [illegible] ton, trustee.

McDERMOTT & ENRIGHT,
Solicitors for Albert I. Drayton, Trustee.

Answer of William T. Payne to the Cross-bill of Albert I. Drayton, Trustee.

IN CHANCERY OF NEW JERSEY.

Between COMMERCIAL TRUST COMPANY OF NEW JERSEY, Trustee, *Complainant,* *and* L. WERTHEIM COAL & COKE COMPANY, *Defendant.*	On Bill &c.

Answer of William T. Payne to the cross-bill of Albert I. Drayton, trustee.

William T. Payne of Kingston, Pennsylvania, for answer to the cross-bill of Albert I. Drayton, Trustee &c., or so much thereof as he is advised it is material for him to make answer unto says:

1. He admits on information and belief the petition in bankruptcy against L. Wertheim Coal and Coke Company, the defendant herein, the reference to George R. Beach, the appointment of Albert I. Drayton as Trustee of said L. Wertheim Coal & Coke Company and the qualification of said trustee by entering into a bond, approved by said Referee; and that said trustee, as aforesaid, has succeeded to the property, rights and interests of the L. Wertheim Coal & Coke Company, with all the powers lawfully vested in a trustee in bankruptcy, under the bankruptcy laws of the United States, but only in the same condition as they were vested in the said company, and sub-

ject to all the liens, charges, claims, debts and demands existing against said property in the hands of said company. This defendant denies that Albert I. Drayton is vested with the rights of creditors of the company, as alleged in paragraph one of the amended answer of Albert I. Drayton, to set aside conveyances, mortgages, or other dispositions of the bankrupt, as though said creditors had obtained and levied process against the same.

2. This defendant admits the allegations of the bill of complaint filed by The Commercial Trust Company of New Jersey, as to the issuance of the corporate bonds by the bankrupt to the aggregate amount of $250,000, bearing date April 22, 1912, and admits the execution and delivery of a mortgage or deed of trust to The Commercial Trust Company to secure the said issue of bonds, dated May 6, 1912 and recorded as alleged in the said bill of complaint.

3. This defendant alleges that said bonds and the deed of trust or mortgage were duly issued, executed, certified, delivered and recorded and negotiated for full value, upon the authority of said L. Wertheim Coal and Coke Company, in the manner and for the purposes set forth in the bill of complaint, in the due, proper and legal exercise of the mortgagor's corporate powers, after full and complete corporate action, and in conformity to law; and that the mortgage or deed of trust covers all the assets, rights, credits, suits, claims, debts and demands, choses in actions of every kind and description of the said L. Wertheim Coal and Coke Company, whether in the possession of the trustee in bankruptcy, or to which he may be entitled now or hereafter, except the leases of said company with the Lehigh Valley Railroad Company covering the property at the

corner of Grand Street and Pacific Avenue, Jersey City, New Jersey; and this defendant denies that said mortgage is void, but says that the said mortgage is a good mortgage, prior to all the rights, claims, estate, title and equities of the said bankruptcy trustee.

4. This defendant denies each and every one of the allegations in the ninth, tenth, eleventh, twelfth and thirteenth paragraphs of the amended answer and all the allegations in the cross-bill of Albert I. Drayton, trustee, except insofar as they are admitted by the designated admissions in this answer. Defendant admits that the names of the directors of the L. Wertheim Coal & Coke Company, at the time of the execution of the mortgage above-referred to, were as stated in said paragraph. Defendant says that he is vice-president of the East Boston Coal Company, and not the person in absolute control of its business and affairs, and that neither he nor any other person represented the East Boston Coal Company on the Board of Directors of the L. Wertheim Coal and Coke Company, and says that he represented the L. Wertheim Coal and Coke Company as a member of its Board of Directors.

5. The East Boston Coal Company in the spring of 1906, at the request of L. Wertheim Coal & Coke Company, quoted prices on 125,000 tons of buckwheat and pea coal and a small quantity of prepared sizes, and thereafter the said L. Wertheim Coal & Coke Company purchased, and the East Boston Coal Company sold, a large tonnage of small sizes of washery coal prepared by the East Boston Coal Company. During all of the period from 1906 to and including the entire year of 1909, the defendant was not a director, officer or stockholder of the bankrupt.

Answer of William T. Payne to the Cross-bill of Albert I. Drayton, Trustee.

6. In the year 1909, the vice-president of the L. Wertheim Coal & Coke Company, Max Isenstein, advised this defendant that their available funds were being used in making improvements to their plants, and on the 17th day of November, 1909, the East Boston Coal Company and the L. Wertheim Coal & Coke Company agreed that thereafter all coal sold by the East Boston Coal Company to the L. Wertheim Coal & Coke Company should be payable within thirty days from the 25th day of the month of sale. Max Isenstein, the vice-president and secretary of the company, prior to November 17, 1909, made a statement in writing of the assets and liabilities of the L. Wertheim Coal & Coke Company, showing their assets at $405,506.60, made up of accounts and bills receivable, $50,223.21, building, plant, trestle, equipment &c., $193,325.65, stock and cash on hand, $27,057.74 and leasehold $135,000; and the total liabilities for accounts and bills in cash, due and payable, $110,338.68, leaving a surplus of $145,267.92 over their paid-up capital stock of $150,000. Defendant believed said statement was a correct and true statement of the assets and liabilities of the L. Wertheim Coal & Coke Company.

7. In the fall or winter of 1909, Sanders Wertheim informed defendant that his relations with Messrs. Isenstein and Dann in the Wertheim Coal & Coke Company, were not pleasant; that Messrs. Isenstein and Dann were not retail coal men, and Sanders Wertheim and his brother wanted to get rid of Messrs. Isenstein and Dann and could finance the proposition if the East Boston Coal Company would sell them coal on ten months' credit, instead of one month, as theretofore, and one or two coal men would identify themselves

with the L. Wertheim Coal & Coke Company; that Warren Delano had agreed to sell them coal on a similar basis and had agreed to become, or had become a director. No agreement was made to finance them by this defendant or the East Boston Coal Company or to supply them with working capital, nor with the coal required to finance them, nor to provide the money for the purchase of the interests of Messrs. Isenstein and Dann. The sale of coal on ten months' credit would enable them to finance their proposition, but the method or details of which were not known to this defendant.

8. Defendant was not a director of the L. Wertheim Coal & Coke Company at the meeting of the directors held on the 17th day of December, 1909, at which time Mr. Warren Delano was elected a director. Defendant says that at that time the directors of the L. Wertheim Coal & Coke Company were Louis Wertheim, Sanders Wertheim and DeWitt Van Buskirk. Defendant was not a director on the 20th day of December, 1909, at which the officers of the company were authorized to execute a promissory note for $20,000, the proceeds of which, it is alleged, were used to purchase the stock of Max Isenstein and William L. Dann; nor did defendant, at these meetings or at any other meetings, vote for any resolution authorizing the issuance or negotiation of said note for $20,000 or any other notes, to Messrs. Isenstein and Dann.

9. Defendant denies that he had any knowledge of the invalidity of, or is chargeable with or responsible for the issuance of the note of $20,000, above-mentioned, or for any payments made on account thereof, or for any other notes issued by the L. Wertheim Coal & Coke Company to Messrs.

Answer of William T. Payne to the Cross-bill of Albert I. Drayton, Trustee.

Isenstein and Dann, or any payments made on account thereof, or for any other notes issued by the L. Wertheim Coal & Coke Company to Messrs. Isenstein and Dann, or any payments made on account thereof, or for any bonds issued in payment of any of said notes or for any payments made on any such bonds, because this defendant did not, as a director or in any other capacity, issue or pay or cause to be issued or paid, or vote for any resolution authorizing the issuance or payment of any sums of money to Messrs. Isenstein and Dann on account of any of the said notes or bonds referred to in the answer of the trustee in bankruptcy. Defendant, subsequent to the authorization and the issuance of the said notes to the Mill Creek Coal Company and Messrs. Isenstein and Dann, was informed that, prior to December, 1909, Messrs. Isenstein and Dann had loaned to the L. Wertheim Coal & Coke Company certain sums of money and had discounted for the benefit of the company certain notes, the amount of which money and notes this defendant had no knowledge, and that the note for $20,000, above-mentioned, and other notes of the company, were issued in settlement of those obligations of the L. Wertheim Coal and Coke Company and the obligation of the company, under its by-laws, to purchase the stock of any officers of the company upon their leaving the company. But this defendant had no knowledge as to the details of the transaction and never had any knowledge of the invalidity of the notes or questioned their invalidity, because he understood that the closing of a transaction with Messrs. Isenstein and Dann and the issuance of the said notes had the approval of the attorney for the L. Wertheim Coal and Coke Company and the

attorney for Mr. Warren Delano. The stock obtained from Messrs. Isenstein and Dann by the Messrs. Wertheim was not pledged to secure any notes or indebtedness of the East Boston Coal Company. Defendant knew that payments were being made from time to time on the notes of Messrs. Isenstein and Dann. Defendant always believed that the said notes were legal obligations of the L. Wertheim Coal and Coke Company and had been approved by all the stockholders of the company, as well as the creditors, and shortly prior to the making of the bond-issue, the matter of the said notes was referred to the counsel for the L. Wertheim Coal and Coke Company, who reported that they were valid obligations of the company.

10. Defendant says that the issuance of said note of $20,000 and the other notes to Messrs. Isenstein and Dann, and the payments made on account of the same, and the making, execution and delivery of bonds in payment of the same, and the payments made on account of said bonds for interest or principal, are not ultra vires and void, and defendant denies that they were not without consideration, because the said notes and the bonds issued as aforesaid, and the payments made thereon, were with the consent and approval of all the stockholders, directors and creditors of the L. Wertheim Coal & Coke Company, except defendant, who, after investigation by counsel for the L. Wertheim Coal & Coke Company at the time of the bond-issue and advice by him that the L. Wertheim Coal & Coke Company had no defence to the said notes of Messrs. Isenstein and Dann, ratified the issuance of bonds in payment of the remaining notes. There are no creditors represented by the trustee in bankruptcy who have

any right to object to the payments aforesaid, who have not been guilty of laches by their long delay in asserting their rights, and no creditors represented by the trustee in bankruptcy who were creditors at the time of the making of the said notes and bonds and at the time of the payments made thereon.

11. Defendant says that said notes are good, sufficient and legal notes of the L. Wertheim Coal and Coke Company, and the bonds issued in settlement therefor were duly and properly issued, and that the payments made on account of the said notes and bonds were proper payments by the L. Wertheim Coal & Coke Company on account thereof, because by Section F of the certificate of incorporation of the L. Wertheim Coal & Coke Company, it was authorized to deal in promissory notes, and by Section 32 of the by-laws, the L. Wertheim Coal & Coke Company was distinctly authorized to use the funds of the L. Wertheim Coal & Coke Company to purchase its own capital stock, and notes issued in payment therefor are good and valid notes of the L. Wertheim Coal & Coke Company.

Section 32 of said by-laws is as follows:

> "In case the services of an employee or officer, who owns at least $9,000 in shares of the corporation, are dispensed with, and he is discharged by the corporation, it shall be obligatory on the part of the corporation to purchase said holdings at par, and in addition thereto, to pay him an amount equal to any dividends which are declared on such holdings while in his possession."

12. Defendant says that Messrs. Isenstein and Dann were both officers of the L. Wertheim Coal and Coke Company, each owning at least $9,000

in shares of the L. Wertheim Coal & Coke Company at the time of the issuance of said notes, and their services were dispensed with.

13. Defendant denies that he agreed to purchase the shares of stock held by Messrs. Isenstein and Dann; and denies that said shares of stock were purchased for or on account of this defendant or the East Boston Coal Company; and denies that the said certificates of stock of Messrs. Isenstein and Dann so purchased, were held as collateral security for the indebtedness of the East Boston Coal Company.

14. Defendant denies that he used the L. Wertheim Coal & Coke Company as a convenience for the sale of the product of the mine of the East Boston Coal Company; and denies that Warren Delano and this defendant, for the Mill Creek Coal Company and the East Boston Coal Company, controlled the business and affairs of the L. Wertheim Coal & Coke Company or used the L. Wertheim Coal & Coke Company as a convenience for the said companies or Warren Delano or this defendant for the sale of coal of either, any or all of the parties above-mentioned. The business and affairs of the L. Wertheim Coal & Coke Company were always controlled by Louis and Sanders Wertheim and with the approval and consent of all the stockholders of the L. Wertheim Coal & Coke Company.

15. Defendant did not assume, at any time, an antagonistic position to the L. Wertheim Coal & Coke Company or its stockholders, nor did he sell coal for the East Boston Coal Company to the L. Wertheim Coal & Coke Company at any prices except fair prices, and in the same manner as he had for three years, from 1906 to 1909, before he became a director; nor did defendant ne-

glect or fail to perform any of his duties as director, but on the contrary, fully performed all of his duties as director of the L. Wertheim Coal and Coke Company, and in addition thereto served without pay, loaned it money for its current uses and for the improvement of its plant; extended large credit on ten months' time, which was nine months more than the normal and customary time extended for credit in the coal trade. Defendant was not guilty of any negligence nor breach of trust, and at all times, all the dealings and acts of this defendant as director of the L. Wertheim Coal & Coke Company were fully disclosed to and were known by all the stockholders of the company, and defendant did not make a profit for himself nor for the East Boston Coal Company from his dealing with the said company, but on the contrary, lost large sums of money for the East Boston Coal Company.

16. Defendant denies that the L. Wertheim Coal & Coke Company was insolvent in 1909, or contemplated insolvency, as alleged by the trustee in bankruptcy, and defendant did not believe it to be insolvent at that time. The statement of Max Isenstein, vice-president of the L. Wertheim Coal & Coke Company, made in November of that year, showing a surplus of $145,267.92, was made before defendant became a director, and defendant relied on said statement, and statements subsequently made, in furnishing extensive credit to the L. Wertheim Coal & Coke Company, to the extent of $91,000.

17. Subsequent to 1909, and after this statement of Max Isenstein, Mr. Warren Delano, one of the directors of the company, had an audit made of the affairs of said company and that

audit showed a surplus of assets above liabilities of approximately $125,000, and at frequent intervals during the time while defendant was a director, statements, balance sheets and reports were made to defendant and the Board of Directors by the treasurer of the company, each one showing a large surplus of more than one hundred thousand dollars of assets above liabilities.

18. Defendant believed all of said statements, reports and balance sheets and frequently inquired of the treasurer about the same, and at times discussed at meetings of the Board of Directors the details of same in pursuance of his duty as a director, and in order to be able to consider the extension of further and additional credit to the L. Wertheim Coal & Coke Company in behalf of the East Boston Coal Company, and relying on said statements, reports and balance sheets, and believing in their accuracy, and in the belief that the L. Wertheim Coal & Coke Company was solvent and had a large surplus of assets over liabilities, continued to extend more and greater credit to the said company until the time of the appointment of the receivers.

19. At the time of the bond-issue in May, 1912, the amount due from said L. Wertheim Coal and Coke Company to this defendant was $91,000.

20. In the summer and fall of 1911, Sanders Wertheim, treasurer, reported to the Directors that the L. Wertheim Coal & Coke Company was not receiving satisfactory shipping service from the Lehigh Valley Railroad Company, and that competitors of the L. Wertheim Coal & Coke Company were receiving rebates of fifteen cents per ton from the Lehigh Valley Coal Company, a coal company affiliated with the Lehigh Valley

Railroad, both of which were a severe handicap to their business, and the L. Wertheim Coal & Coke Company directed proceedings to be taken to set aside the demurrage charges, cause the rebates to be discontinued, and by proceedings in the Interstate Commerce Commission to recover a large sum for the discrimination. In the early part of 1912, it was decided that the company could be operated to greater advantage by having a yard in Harlem, which would save the long haul to uptown New York and enable the tonnage to be handled more expeditiously and profitably. The officers and directors discussed the prospects of a coal strike in the year 1912. There was a decided shortage of coal. The breaker of the East Boston Coal Company had been burned down, and had not yet resumed operations. Many horses of the L. Wertheim Coal & Coke Company were in bad shape and had to be sold. There had been an epidemic of glanders in the stable of the company and it was represented by Sanders Wertheim and Louis Wertheim, representing all stockholders of the company, that if we would accept bonds in settlement of our account, secured by all the assets of the company, that it would enable them to overcome the loss of the horses, the high price and shortage of coal, due to the anticipated strike, and more particularly, would enable them to make a strong showing with the Lehigh Valley Railroad Company in their pending litigation.

21. Defendant denies that at the time of the bond-issue, the L. Wertheim Coal & Coke Company was insolvent or contemplated insolvency. In the months of November and December, 1911, the company had made a profit of more than $1500, and in January, 1912, a profit of more

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than $3700; and although the month of February showed a loss of $1119, there had been charged off during that month for depreciation of losses the sum of $1228. In 1912, the company made a profit of $882.05, and in the month of April, the month immediately preceding the bond-issue, the company made a net profit of $3,759.44, and the statement of assets made by the treasurer and exhibited to the directors, at that time, showed total assets of $516,941.92 and total liabilities of $318,252.86, with a surplus over assets and liabilities of $198,689.06. The L. Wertheim Coal & Coke Company had not defaulted in any of its bills, the plant was in full operation, no payroll had ever been passed. The L. Wertheim Coal & Coke Company had good credit at the banks and the only obligations due were to the East Boston and Mill Creek Coal Company, which both companies had agreed to renew, and the treasurer reported that the acceptance of bonds for notes would place the L. Wertheim Coal & Coke Company permanently in the very best financial condition. Subsequent to the bond-issue, the East Boston Coal Company, on the advice of defendant, continued to sell coal to the L. Wertheim Coal & Coke Company on the faith of the above statement of assets and liabilities and his belief in its accuracy, in large amounts, so that at the end of the year 1912 the said company was indebted to the East Boston Coal Company in the further sum of $19,000, and in June, 1913, in the sum of $31,552.24, without including interest, and at the time of the bankruptcy and receivership in the sum of $52,146.48, besides large accumulations of interest, amounting to an additional $4,218.65.

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22. A further audit of the assets and liabilities of the company was made on December 22, 1913, by a certified public accountant, exhibited to the directors by the treasurer of the company, showing total assets of $519,207.39, and liabilities of $382,742.66, leaving a surplus of $136,464.73 of assets over liabilities, and included within which were losses of more than $35,000 caused by glandered horses and a loss of $7531 to adjust inventory of feed and other items which had already been charged off.

23. It was apparent from the audit that the company had lost money, but the delivery expense in the year 1912 had been exceedingly high, being $50,000 more than in the year 1912, but there was still a surplus of more than $135,000, which defendant believed existed, and relying upon that belief, and in the belief that the L. Wertheim Coal & Coke Company was solvent, the East Boston Coal Company, on the advice of defendant, from March 30, 1913, sold additional coal to the L. Wertheim Coal & Coke Company and increased the indebtedness to the extent of approximately $25,000.

24. In the early part of 1913, the directors learned of the large combination of coal dealers, under the name of Burns Brothers, and it appeared that the prospects of the L. Wertheim Coal & Coke Company in the retail market in New York would be considerably benefited by the elimination of competition with so many dealers, and there would be a tending to maintain the price of coal. The treasurer of the company assured this defendant in said month of March, 1913, that they anticipated doing a large tonnage during the year, of at least 20,000 tons, and that they would be in a position to make profits. That

the company was able to get all the coal it wanted. There had previously been a suspension of mining coal, but operations were resumed and the price of coal dropped materially. The strike period had obliged the company to fill its contracts at old prices. In January of 1914, defendant was informed by the officers that the month would be a good one and they expected to sell from 12,000 to 13,000 tons, and they expected to make a good profit. There was every prospect that the company would do a good business for the year. The L. Wertheim Coal & Coke Company had obtained a contract for supplying the city of New York with a considerable portion of its tonnage, and the treasurer of the company thought it would be a very profitable contract. The case against the Lehigh Valley Railroad Company before the Interstate Commerce Commission had been tried, and the rebates of favored shippers had discontinued, and there seemed to be every prospect of a favorable business prospect for the L. Wertheim Coal & Coke Company. The retail price of coal had advanced, conditions were improved. The treasurer reported that he could get all the tonnage he required and the directors thought the concern would show a substantial profit by the end of the year. The treasurer of the said company subsequently determined that if the bondholders would forego the installments on account of the principal of their bonds it would further finance the said company and would enable a plan of reorganization to be worked out, providing for the payment of one hundred cents on the dollar to the creditors, and place the company in the firmest financial condition, and enable it to enjoy to the utmost the favorable business prospects without the competition of discrimina-

tion. Defendant favored this reorganization but three of the creditors refused to agree to the plan of reorganization, and while the plan of reorganization was under discussion, W. A. Stone & Company and others instituted attachment suits in New York on a five thousand dollar note and seized every book account of the L. Wertheim Coal & Coke Company due from creditors in the state of New York, which book accounts amounted to between $30,000 and $40,000. At the time of the issuance of the attachments the L. Wertheim Coal & Coke Company was solvent and these attachments were the cause of the cessation of the business of the company, and subsequently C. C. Bowman and two other small creditors filed a petition in bankruptcy, the effect of which was to immediately invalidate the valuable lease of the company at the corner of Grand Street and Pacific Avenue, in Jersey City, which had approximately eighteen years to run, and which could readily have been rented for $6,000 a year, and also caused a forfeiture of the trestle, stable, office building of the company and its plant, to the Lehigh Valley Railroad Company, under the terms of its lease. Defendant says that the creditors represented by the trustee in bankruptcy who have requested him to file the answer in this cause, are the same creditors, to wit, Wm. A. Stone & Company, C. C. Bowman and the other creditors, who, in utter disregard of the interests of the L. Wertheim Coal & Coke Company wrecked its good-will, forfeited its plant, and destroyed its business by the proceedings above referred to, and are not entitled to any equitable relief in this court.

25. Defendant denies all of the allegations about the illegality and invalidity of the bonds

and the deed of trust to secure the same, and insists that the said mortgage is a prior lien to the lien of the trustee in bankruptcy, or any of the creditors represented by him, and that all the creditors represented by him had actual and constructive notice of the existence of said bond-issue, and the mortgage to secure the same, prior to and at the time they became creditors; and defendant denies that the bonds were issued and the mortgage made, because he was personally interested in the same, or that he personally benefited thereby, and says that the said bonds and the mortgage secured thereby were not suggested by this defendant, nor by the East Boston Coal Company, nor by the Board of Directors of the L. Wertheim Coal and Coke Company, but this defendant was induced to accept bonds in payment of all the claims of the East Boston Coal Company against the company, up to April 1, 1912, by the representation of the treasurer of the L. Wertheim Coal & Coke Company that the same would be for the benefit of the said company, and all the stockholders and all the creditors of the L. Wertheim Coal & Coke Company, after full consideration, in good faith, believed that the same would be for the benefit of said L. Wertheim Coal & Coke Company and acted solely for that purpose; and the said bonds and deed of trust were authorized by the directors only after the assent of all existing creditors and after they had been approved by unanimous vote of all the stockholders of the L. Wertheim Coal & Coke Company.

26. Defendant further answering says that he never owned any of said bonds secured by the said mortgage; that they were issued to the East Boston Coal Company, and they were sold by

said East Boston Coal Company to William G. Payne, of Kingston, Pennsylvania, for full value, on the twenty-fourth day of April in the year nineteen hundred and twelve, and at no time have any payments of interest or principal on the said bonds been paid to this defendant, or to the East Boston Coal Company, and The Commercial Trust Company is not the trustee for this defendant or the East Boston Coal Company, but trustee for William G. Payne, the owner and holder of said bonds, and under the laws of this state and the rules and the practice of this Court, the trustee in bankruptcy is not entitled, in this proceeding, to set-off, counterclaim or surcharge this defendant or the East Boston Coal Company with any alleged claim, debt or demand of said trustee in bankruptcy; and defendant denies the allegations that the bankruptcy trustee, or any creditor represented by him, are parties or privies to the said mortgage or deed of trust.

27. Defendant denies that the affidavit annexed to the deed of trust, to secure the issue of bonds aforesaid, does not state the true consideration of the said mortgage; and denies that this defendant or Warren Delano desired or requested the L. Wertheim Coal & Coke Company to make its purchases of coal from outside mine operators, and says that the said company and its treasurer and president, who were in full and complete charge of the management of the company always had and exercised the privileges of purchasing coal from operators, other than the East Boston and Mill Creek Coal Company.

28. Defendant denies that he or the East Boston Coal Company is chargeable or responsible for any of the indebtedness of the L. Wertheim

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Coal & Coke Company to the said outside operators, referred to in the answer of the trustee.

29. Defendant denies that some of the assets of the L. Wertheim Coal & Coke Company, at the time of the filing of the bill herein, consisted of horses and wagons acquired after the date of the mortgage, and says that all of the said horses and wagons and all the other assets of the said company were either acquired by the L. Wertheim Coal & Coke Company and owned by it prior to the execution of the said mortgage or were acquired afterwards solely to replace horses, wagons &c., which were owned by said company at the time said mortgage was made, and were covered by it. The book accounts referred to by the trustee in bankruptcy were book accounts existing at the time of the said mortgage and covered thereby, or book accounts in substitution thereof, or book accounts acquired by sale of coal, covered by said mortgage, but says that all of said book accounts had their situs and were payable in New Jersey and were covered by the said deed of trust above referred to, which is prior to all claims, rights and equities of the trustee in bankruptcy, or any creditor represented by him.

Defendant prays to be dismissed with his costs and charges wrongfully sustained.

HARTSHORNE, INSLEY & LEAKE,
Solicitors for Wm. T. Payne.

Answer of Warren Delano and Mill Creek Coal Company to the Cross-bill of Albert I. Drayton, Trustee.

IN CHANCERY OF NEW JERSEY.

Between

COMMERCIAL TRUST COMPANY OF NEW JERSEY, TRUSTEE,

Complainant,

and

L. WERTHEIM COAL & COKE COMPANY, ET ALS.,

Defendants.

On Bill &c.

The joint and several answer of Warren Delano and Mill Creek Coal Company to the amended answer and answer by way of cross-bill of Albert I. Drayton, trustee.

Warren Delano, of Red Hook, Dutchess County, New York, and Mill Creek Coal Company, a corporation of the State of Pennsylvania, for answer to the said cross-bill of Albert I. Drayton, trustee, etc., or to so much thereof as they are advised it is material for them to make answer unto, say:

1. They admit the allegations of paragraph one of the said Cross-bill, excepting the allegation that the bankruptcy trustee has succeeded to all the property, property rights and interests of the bankrupt, and is vested with the rights of any creditor of the bankrupt to set aside and void conveyances, mortgages or other disposi-

tion made or suffered by the bankrupt of its property, as though such creditor had obtained and levied process against the same; and as to this exception these defendants say they have no knowledge concerning the truth of said allegations, and they therefore deny the truth thereof.

2. These defendants deny each and all of the allegations in the ninth, tenth, eleventh, twelfth and thirteenth paragraphs of the amended answer, together with all the allegations in the said cross-bill, excepting in so far as the same are admitted in this answer.

These defendants admit that the names of the directors at the time of the execution of the mortgage were as stated in paragraph nine of the bill; they deny that Warren Delano was a large owner of the capital stock of the Mill Creek Coal Company, and deny that he was in absolute control of said Company, or that he represented its interest upon the Board of Directors of the Wertheim Coal & Coke Company, excepting in so far as its interest was compatible with the interest of the Wertheim Coal & Coke Company.

They admit that DeWitt Van Buskirk was the personal attorney for this defendant, Delano, but deny that he was the attorney of this defendant, Mill Creek Coal Company, and deny that said Van Buskirk represented the interest of these defendants upon the Board of Directors of the Wertheim Coal & Coke Company; they say that they have no knowledge as to whether William T. Payne was a large owner of the capital stock, or whether he was in control of the East Boston Coal Company, or whether he represented said Company upon the Board of Directors of the

Answer of Warren Delano and Mill Creek Coal Company to the Cross-bill of Albert I. Drayton, Trustee.

Wertheim Coal & Coke Company; and these defendants therefore leave the bankruptcy trustee to make such proof concerning the truth of his said allegations as he may be advised is proper.

They admit that the Wertheim Company had been engaged at the time stated, in the business of selling in Jersey City and New York City, coal furnished to it by the Mill Creek and East Boston Coal Companies, but they deny that said coal was furnished by this defendant, Delano, and the said Payne, and they aver that the Wertheim Company, during the period named, was engaged in the localities mentioned, in selling coal furnished to it by other companies as well as said East Boston and Mill Creek Coal Companies.

They deny that the said Delano acquired any interest and influence in the affairs of the Wertheim Company by financing the purchase of the capital stock in said Wertheim Company previously held by Isenstein and Dann; and they also deny knowledge as to whether the ownership of Isenstein and Dann covered a majority of the outstanding capital stock, or what control in the affairs of the Company such ownership of stock carried with it, and they leave the bankruptcy trustee to make such proof concerning those allegations as he may be advised is proper.

They deny that in December, nineteen hundred and nine, this defendant, Delano, had agreed to and did purchase any shares of stock from Isenstein and Dann, and they have no knowledge concerning the allegation with reference to Payne and Louis and Sanders Wertheim, and they have no knowledge as to who the directors and officers of the Wertheim Company were at the time except as set forth in the minute book of the Co.

and immediately prior to the said purchase, and leave the bankruptcy trustee to make such proof thereof as he may be advised is proper. They say that the defendant, Mill Creek Coal Company furnished cash to the extent of twenty thousand dollars, representing moneys which these defendants were credibly informed and believed, and now believe, were to pay certain valid obligations due by the Wertheim Company. The said twenty thousand dollars was procured from the Mechanics' Loan and Trust Company of Bayonne, on the credit of the Mill Creek Coal Company, and certain shares of the Wertheim Company were delivered to the said Trust Company as collateral security for said loan of twenty thousand dollars, but whether said collateral security represented stock formerly held by Isenstein and Dann these defendants have no knowledge and leave the bankruptcy trustee to make such proof thereof as he may be advised is proper.

These defendants deny that they or either of them procured the payment of the said twenty thousand dollars over to Isenstein and Dann, and say that the said moneys went to the Wertheim Company, and that later the Mill Creek Coal Company paid the Trust Company the full amount of said twenty thousand dollars. The defendant, Delano, knew that payments were made from time to time on notes purporting to be held by Messrs. Isenstein and Dann, but these defendants say that the said notes were legal obligations of the Wertheim Company, and the payment thereof had been approved by all the stock holders and creditors.

These defendants deny that the certificates for

the stock purchased from Isenstein and Dann were held as collateral security for the payment of the indebtedness of the Wertheim Company to the Mill Creek Coal Company, excepting in so far as said indebtedness was founded on the loan of twenty thousand dollars, referred to above, and they have no knowledge as to whether the said certificates represented stock originally of Isenstein and Dann, although they believe such to be the case, as to some of said stock.

These defendants admit the resignation of Isenstein and Dann as directors and officers, and the election of this defendant, Delano, as director and Vice-President, as well as the election of Payne and Van Buskirk, and the issue of the eight shares each to qualify such persons as directors.

These defendants deny that the said Delano and Payne, or the Mill Creek Coal Company and East Boston Coal Company, controlled the business and affairs of the Wertheim Company until the summer of nineteen hundred and thirteen, by the exercise of any control prejudicial to the interest of the Wertheim Company, or incompatible with the duties of said Delano and Payne, as directors.

These defendants deny that the majority of the stock of the Wertheim Company was held as security for any indebtedness except the indebtedness upon said twenty thousand dollar note, and they say that when said twenty thousand dollars was paid by the issuance of bonds in like amount, the said collateral was surrendered and has never since been held by these defendants or either of them.

These defendants admit that the defendant,

Answer of Warren Delano and Mill Creek Coal Company to the Cross-bill of Albert I. Drayton, Trustee.

Delano, in company with the other directors of the Wertheim Company, permitted payments to be made out of the corporate funds of the Wertheim Company on notes of Messrs. Isenstein and Dann, but they have no knowledge as to the amounts of said notes upon the twenty-second day of April, nineteen hundred and twelve, or what obligations upon said notes were unpaid upon said day, and they leave the bankruptcy trustee to make such proof thereof as he may be advised is proper.

These defendants say that any notes paid with the knowledge of the defendant, Delano, out of the funds of the Wertheim Company were valid and legal obligations of said Company, approved by the stockholders and creditors thereof, and said notes were not without consideration, and were not ultra vires and void; and these defendants deny that the said Delano was personally chargeable with any moneys so paid; and these defendants say that the payment of any moneys out of the corporate funds of said Company, of which the defendant, Delano, had notice, was ratified and approved by said Wertheim Company and the parties in interest therein, and further, that if any moneys of the Company were used to purchase the stock of said Company, all notes issued in payment for such stock are good and valid obligations of the L. Wertheim Coal & Coke Company, for the reason that Section 32 of the By-laws of said Company, at the time of said alleged purchase, provided as follows:

> "In case the services of an employee or officer who owns at least nine thousand dollars in shares of the corporation, are dispensed with, and he is discharged by the

corporation, it shall be obligatory on the part of the corporation to purchase said holdings at par, and in addition thereto, to pay him an amount equal to any dividends which are declared on such holdings while in his possession."

And these defendants say that this provision of the By-laws was applicable to Messrs. Isenstein and Dann, because they were both officers of the Wertheim Company, each owning at least nine thousand dollars in shares of said Company at the time of the issuance of said notes, and their services were dispensed with.

3. Answering paragraph ten of the cross-bill, these defendants deny that the said Delano and Payne eliminated Isenstein and Dann from the Wertheim Company, or secured control thereof; and they deny that said Delano and Payne used the Wertheim Company as a convenience for the selling of the product of any coal mines; and they deny the existence of any definite agreement to furnish jointly and upon credit, all coal which might be required by the Wertheim Company, although the Mill Creek Coal Company did jointly, with the East Boston Company, furnish coal in large quantities to the Wertheim Company, extending to it unusually advantageous credits, with the result that the Mill Creek Coal Company took at par, for the amounts due it for coal by the Wertheim Company, bonds of the latter Company, and in like manner took bonds at par for the twenty thousand dollars advanced by it to the Wertheim Company, as aforesaid; and these defendants admit that the Mill Creek Coal Company still hold bonds to the extent of one hundred eighteen thousand dollars of the bonds issued under and secured by the mortgage sought to be foreclosed in the above entitled cause. Originally the Mill Creek Coal Company held bonds

Answer of Warren Delano and Mill Creek Coal Company to the Cross-bill of Albert I. Drayton, Trustee.

Nos. 40 to 159, both inclusive; bond No. 62 was called and paid October first, nineteen hundred and twelve; Bond No. 71, April first, nineteen hundred and fourteen, leaving one hundred and eighteen bonds, one of which was held as security for a part of its full value in money owed for coal.

And these defendants further say, that subsequent to the making of said mortgage the Mill Creek Coal Company made large shipments of coal to the Wertheim Company, and was paid monthly in full for all coal shipped during the month of April, nineteen hundred and twelve, to September thereof, and that thereafter the defendant, Mill Creek Coal Company, shipped coal to the amount of thirty-two thousand four hundred and four dollars and eighty-two cents, monthly, from October nineteen hundred and twelve, to July nineteen hundred and thirteen, inclusive, for all of which it has received no pay excepting five hundred sixty-eight dollars and thirty-nine cents, paid on November twenty-seventh, nineteen hundred and twelve, leaving a balance due it, besides interest, of thirty-one thousand eight hundred thirty-six dollars and forty-three cents, payment of all of which was frequently demanded. Finally in July, nineteen hundred and thirteen, the defendant, Mill Creek Coal Company, discontinued its shipments of coal to the Wertheim Company. These defendants have no knowledge how or by whom the other bonds issued under said mortgage are held, but they deny that any bonds of which this defendant, Delano, had knowledge were issued without consideration, or were ultra vires; and they deny that the said bonds are subject to the same defenses as the promissory notes for which they were alleged to have been exchanged.

Answer of Warren Delano and Mill Creek Coal Company to the Cross-bill of Albert I. Drayton, Trustee.

These defendants deny that at the time of the aforesaid bond issue and the execution and delivery of the mortgage securing the same, and from thence to the time of filing the cross-bill, the said Wertheim Company was insolvent; or that said mortgage was issued in contemplation of insolvency; and they further say that the contrary was the case, and that the sole purpose, so far as the Mill Creek Coal Company was concerned, was for the extension of additional time to aid the Wertheim Company to pay the amount it owed the Mill Creek Coal Company, and any subsequent amounts it might owe for coal thereafter delivered, and that except about 200 shares and the qualifying shares held by the defendants, Delano and Payne, all the stock of the said Company was owned by Sanders and Louis Wertheim, and that all steps taken in connection with said mortgage were taken with the concurrence of the creditors and stockholders of the Wertheim Company; and these defendants say that at the time of the delivery of the mortgage the said Company was solvent and continued so to be for a long time subsequent to the month of July, nineteen hundred and thirteen. They admit that the bonds held by the Mill Creek Coal Company were delivered to it in exchange for an antecedent indebtedness, but they deny that the transfer of corporate assets and property by way of mortgage securing said bonds was and is void as against the creditors and as against the bankruptcy trustee, and on the contrary they aver that the said mortgage is valid as against each and all of said persons. They further deny that the defendant, Delano, was personally interested in said mortgage, or that he benefited thereby,

Answer of Warren Delano and Mill Creek Coal Company to the Cross-bill of Albert I. Drayton, Trustee.

and they have no knowledge to the effect that any director, directly or indirectly, obtained any preference and advantage over other creditors of the Wertheim Company, by reason of said mortgage, and deny that for such reason said mortgage is ultra vires or voidable either in whole or in part.

4. Answering paragraph eleven of the said cross-bill, these defendants deny that the mortgage is void as against creditors of the bankruptcy trustee in that the affidavit annexed to the mortgage does not state the true consideration thereof, or for any other reason.

5. Answering paragraph twelve of the said cross-bill, these defendants say that they admit that the provisions quoted from the mortgage are set out with substantial correctness, but beg to refer to the original mortgage for greater certainty. They deny that under the provision of the mortgage the claim of bondholders are subordinated to prior claims of creditors whose debts were created in the ordinary course of business, as to any after acquired property and book accounts; as to the other matters alleged in said paragraph they have no knowledge, and leave the bankruptcy trustee to make such proof thereof as he may be advised is proper.

6. Answering paragraph thirteen of the said cross-bill, these defendants say that they deny the truth of the allegations therein set forth.

7. These defendants say that the mortgage is a prior lien to the lien of the trustee in bankruptcy, or any of the creditors represented by him, and that all the creditors represented by him other than said Mill Creek Coal Company and East Boston Coal Company had actual and con-

structive notice of the existence of said bond issue and mortgage securing the same, prior to the time they became creditors, and that the whole transaction whereby this defendant, Mill Creek Company, became possessed of bonds in payment for coal sold and moneys advanced to the Wertheim Company, emanated from persons interested in the profits of the Wertheim Company, by reason of holding official positions therein and being the owners of nearly all of its capital stock. And these defendants say that the said mortgage and deed of trust were authorized by the directors with the consent of all existing creditors and the universal approval of all the stockholders of the Wertheim Company.

8. And these defendants further aver that the creditors represented by the bankruptcy trustee have slept upon their rights, if any they have, for nearly three years, ever since the said mortgage was made and recorded, and that by reason of the laches of the persons represented by the bankruptcy trustee in that regard, if for no other reason, the said Trustee ought not, nor any or either of the creditors he represents now to be heard in a court of equity, in an attack upon the validity of the mortgage.

And these defendants pray to be hence dismissed with their reasonable costs and charges in this behalf wrongfully sustained.

VREDENBURGH, WALL & CAREY,
Solicitors for Defendants, Warren
Delano and Mill Creek Coal Company.

Answer to Cross-bill.

IN CHANCERY OF NEW JERSEY.

Between

COMMERCIAL TRUST COMPANY OF NEW JERSEY, TRUSTEE,

Complainant,

and

L. WERTHEIM COAL & COKE COMPANY,

Defendant

On Bill, Etc.

The joint and several answer of William Dann and Max Isenstein to the Cross-bill of Albert I. Drayton, Trustee in Bankruptcy of the L. Wertheim Coal and Coke Company.

The said defendants, answering said Cross-bill or so much thereof as they are advised it is necessary or material for them to make answer unto and reserving all benefit and advantage of the errors and insufficiencies of the said Cross-bill say:

1. These defendants admit on information and belief the allegations of the first paragraph of the Cross-bill.

2. These defendants are without knowledge as to the matters and things set forth in the ninth paragraph of the Cross-bill and therefore leave Cross-complainant to such proof thereof as he may be advised, except that (1) they admit that at one time the stock of the Wertheim Company held by them constituted a majority of the outstanding capital stock, (2) they expressly deny that in December, 1909, Warren Delano, William

T. Payne, Louis Wertheim and Sanders Wertheim agreed to and did purchase the stock of these defendants for any sum whatsoever, (3) they admit that in December, 1909, these defendants sold their stock and that for a period prior to such sale the directors of the Wertheim Company were Louis Wertheim, Max Isenstein, William Dann and Sanders Wertheim and the officers were Louis Wertheim, President, Max Isenstein, Vice-President and William Dann, Secretary and Treasurer, (4) they admit that at the time they sold their stock, they surrendered their certificates, but they have no knowledge as to whether new certificates were issued in the names of Louis Wertheim and Sanders Wertheim and endorsed by them in blank and delivered to the representative of Delano and therefore leave cross-complainant to such proof thereof as he may be advised, (5) they admit that at the time they sold and delivered their said stock they resigned as officers and directors of the Wertheim Company, (6) they admit that the Wertheim Company was then and for some years prior thereto had been engaged in the business of selling in Jersey City and New York City the coal furnished to it by the companies represented by said Delano and Payne respectively, (7) they admit that such of the said promissory notes issued in payment for their stock matured prior to April 1912, aggregating upwards of $11,880.00 and were paid by the said company, (8) they admit that upon the 22nd day of April, 1912, the Wertheim Company owed William Dann on notes issued for the purchase of stock, the sum of $21,189.97 and on notes issued to Max Isenstein for the purchase of stock, the sum of $16,818.74, (9) they deny that the notes were without consideration and ultra vires and void, and they deny that the acts of the directors in

paying these defendants the notes theretofore maturing were ultra vires, illegal and void and that the directors are personally chargeable with the moneys so paid.

3. These defendants are without knowledge as to whether Delano and Payne used the Wertheim Company as a conevenience for the sale of the product of their respective mines under an agreement between them and as to whether the said Delano and Payne furnished jointly and upon credit all coal which the Wertheim Company might require and did, on April 22, 1912, claim there was due to their respective companies for coal sold and delivered the amounts mentioned in the tenth paragraph of the cross-bill and did agree to accept bonds in payment of the said claim; therefore defendants leave cross-complainant to such proof thereof as he may be advised; these defendants admit that they agreed to "accept in payment of all claims against the company to April 1, 1912, bonds of this company secured by a mortgage on the assets of the company"; and they further admit that some of the bonds referred to in the tenth paragraph were thereafter duly issued and delivered to the defendants in payment of their respective claims; these defendants are without knowledge as to the execution, delivery and recording of the chattel mortgage set forth in said paragraph, but admit that they received bonds in payment of their claims and that the bonds received by them, except such as have been redeemed, are now owned and held by them; they deny that the bonds delivered in exchange for the promissory notes uttered in connection with the purchase of these defendants' stock were delivered without consideration and are ultra vires and void and subject to the same

defenses as the promissory notes for which they were exchanged; they deny that at the time of the bond issue and the alleged execution and delivery of the chattel mortgage the Wertheim Company was insolvent; they deny that the bonds were delivered in exchange for an antecedent alleged indebtedness and that the transfer of the corporate assets and property by way of mortgage securing said bonds was and is void as against the creditors of the Wertheim Company and the cross-complainant; and these defendants are without knowledge as to the allegations that the directors who authorized and procured the execution of the mortgage were personally interested therein and benefited thereby and that they obtained a preference and advantage over other creditors of the Wertheim Company, and therefore leave the cross-complainant to such proof thereof as he may be advised, but they deny that such alleged facts if established will make the mortgage ultra vires and void or voidable in its entirety or otherwise.

4. These defendants expressly deny the matters and things set forth in the eleventh paragraph of the cross-bill.

5. Except as to the provisions quoted verbatim from the mortgage or deed of trust these defendants are without knowledge as to the matters and things set forth in the twelfth paragraph of the cross-bill and therefore leave the cross-complainant to such proof thereof as he may be advised but deny that defendants' claims are subordinated to claims of other creditors.

6. These defendants are without knowledge as to the matters and things set forth in the thirteenth paragraph of the cross-bill and therefore leave the cross-complainant to such proof thereof

as he may be advised, except that they deny that the payments received by them as bondholders were illegally received and that the moneys now in the hands of the Commercial Trust Company of New Jersey as Trustee, should be paid over to the cross-complainant.

7. The defendant, Max Isenstein, further answering says that he holds the following sixteen bonds of the said company of the par value of $1,000. each, Nos. 1-8 inclusive, 10-17 inclusive, and that he has received from said company on account of bonds held by him the following amount $1,000., redemption value of bond No. 9, April, 1914.

The defendant, William Dann, further answering says that he holds the following twenty-one bonds of the said company Nos. 18-38 inclusive of the par value of $1,000. each; and that he has received from said company on account of bonds held by him the following amount, $1,000., redemption value of one bond, April 1914.

8. These defendants further answering say that in December 1909, the defendant William Dann, was the owner of preferred and common stock of the said company of the value of upwards of $60,000.00 for which he had paid to the company the sum of $50,000.00 in cash and to another the sum of $12,500.00 in cash and that the defendant Max Isenstein was the owner of preferred and common stock of the said company of the value of approximately $56,000.00; that prior to December, 1909, at the request of the said L. Wertheim Coal and Coke Company, these defendants from time to time loaned to the said company large sums in cash aggregating in the case of the defendant William Dann a total of $13,500.00 and in the case of the defendant Max Isenstein a total of $10,600.00 which said sums

remained due and unpaid to these defendants in December, 1909; that on the said date these defendants were liable as endorsers on Commercial paper endorsed for the accommodation of the said company in a large amount; that these defendants, prior to December, 1909, had pressed the said company for the payment of its said indebtedness to them and for their discharge from liability on the said paper; that in the Fall of 1909 the said Sanders Wertheim, who was at the time a director in said company, stated to these defendants that he represented an unnamed principal who desired to purchase the stock in the said company owned by these defendants; that these defendants refused to sell their interest in the said company until the indebtedness of the company to them was paid and discharged, whereupon, after negotiations had, it was agreed between the said parties that the company should forthwith pay to these defendants the sum of $20,000. in full settlement of its indebtedness amounting to $24,100.00 and that these defendants should thereupon sell and deliver their entire stock holdings in said company to the unnamed purchaser, represented by Sanders Wertheim as aforesaid, for the sum of approximately $58,000.00; that in December, 1909, when the transaction was consummated, the L. Wertheim Coal & Coke Company was by the said Sanders Wertheim named to these defendants as the purchaser whom he represented; that thereupon the said company paid to these defendants the sum of $20,000. in settlement and discharge of the indebtedness of the company amounting as aforesaid to $24,100.00 and these defendants duly endorsed their stock certificates in blank and delivered the same to the attorney acting in this transaction for and on behalf of the company

and received from him, as payment therefor, the sum of approximately $58,000.00 in the form of promissory notes duly executed and delivered by the said L. Wertheim Coal & Coke Company, payable at various future dates, interest thereupon being figured and incorporated in the face of the said notes.

That at the times aforesaid, the said company was solvent and all of the stockholders and directors of said company consented and agreed to the purchase of the defendants' stock by said company and to the issuance of the notes aforesaid, and that all debts of said company now existing have accrued since the purchase of said stock by the said company and the delivery of said notes.

These defendants further answering say that on or about April 22nd, 1912, they were notified by the said company that said company proposed to take up such of the said notes held by these defendants as were then unpaid and issue in place therof the bonds of said company secured by the mortgage described in the bill of complaint; that these defendants agreed to said proposal and surrendered their said promissory notes in pursuance thereof; that the defendant William Dann surrendered nineteen promissory notes of the face value of $22,873.77 and received in payment thereof twenty-one bonds of the said company of the value of $21,000 and one bond as collateral security for the payment of $189.97, and the defendant Max Isenstein, surrendered to said company fifteen promissory notes of the face value of $17,800.37 and received in payment sixteen bonds of the said company of the value of $16,000. and one bond as collateral security for the payment of $818.74, which said bonds were secured by the said mortgage mentioned and described in the

said bill of complaint; that at the time of the execution of said mortgage and of the execution and delivery of said bonds, all the stockholders and directors consented and agreed to the execution thereof and to the delivery of said bonds in payment of the said notes held by these defendants, and that all debts of said company now existing were created and have been incurred since the execution and delivery of said bonds and mortgage and the delivery of said bonds in payment of the said notes.

PIERRE P. GARVEN,
Solicitor and of counsel
for defendants.

Replication of Albert I. Drayton, Trustee.

IN CHANCERY OF NEW JERSEY.

Between

COMMERCIAL TRUST COMPANY OF NEW JERSEY, TRUSTEE,

Complainant,

and

L. WERTHEIM COAL & COKE COMPANY,

Defendants.

On Bill &c.

The replication of defendant Albert I. Drayton, Trustee in Bankruptcy of L. Wertheim Coal & Coke Company to the answer of William Dann and Max Isenstein, also to the answer of Warren Delano and Mill Creek Coal Company, also to the answer of William T. Payne, all to the an-

swer by way of cross-bill of said Albert I. Drayton, Trustee, to the bill of complaint herein. The defendant Albert I. Drayton, Trustee in Bankruptcy of L. Wertheim Coal & Coke Company joins issue upon the joint and several answers of Warren Delano and Mill Creek Coal Company, upon the joint and several answers of William Dann and Max Isenstein and upon the answer of William T. Payne, all to the answer by way of cross-bill of said defendant.

McDermott & Enright,
Solicitors of Albert I.
Drayton, Trustee.

Order reviving suit against executors of Max Isenstein.

IN CHANCERY OF NEW JERSEY.

Between

Commercial Trust Company of New Jersey, Trustee,

Complainant,

and

L. Wertheim Coal & Coke Company, et als.,

Defendants.

It being suggested to the Court upon the final hearing of above cause that Max Isenstein, one of the answering defendants herein, died testate pending the final hearing of this cause and that William Neugass and Bertha Isenstein are the Executors appointed by his Last Will and Testament and have duly qualified as such, and that

Order reviving suit against executors of Max Isenstein.

letters testamentary have duly issued to them on December 3, 1915;

And it appearing that said Executors have become interested in the above entitled suit and that defendant Albert I. Drayton, as Trustee in Bankruptcy of L. Wertheim Coal & Coke Company, choses to make the said William Neugass and Bertha Isenstein, as executors of Max Isenstein, deceased, parties defendant to the answer by way of cross-bill filed by him, and Pierre P. Garven, Esquire, appearing for said Executors and consenting hereto,

IT IS on this 18th day of June, 1917, as of December 3, 1915, on motion of McDermott & Enright, of counsel with Albert I. Drayton, Trustee, &c.,

ORDERED that above suit stand revived against William Neugass and Bertha Isenstein, as executors of Max Isenstein, deceased, and that said Executors be and they hereby are made defendants hereto in the place and stead of said decedent and that the appearance of said Executors be entered as of December 3, 1915, and that the answer of the said decedent be deemed and taken as the answer of the said Executors, and that all proceedings herein be taken as binding on said Executors.

Respectfully advised,

VIVIAN M. LEWIS,
V. C.

Decision of Vice Chancellor Lewis.

IN CHANCERY OF NEW JERSEY.

Between

COMMERCIAL TRUST COMPANY,

Complainant,

and

L. WERTHEIM COAL & COKE COMPANY, ET ALS.,

Defendants.

On Bill &c. Memo.

Mr. Willard C. Fisk, for the complainant.

Messrs. McDermott & Enright, for the defendant, Albert I. Drayton, Trustee in Bankruptcy of L. Wertheim Coal & Coke Company.

Messrs. Vredenburg, Wall & Carey, for the defendants, Warren Delano and Mill Creek Coal Company.

Mr. Eugene Leake, for the defendant, William T. Payne.

Mr. Pierre P. Garven, for the defendant, William L. Dann.

Messrs. Collins & Corbin, for the defendant, Lehigh Valley Railroad.

LEWIS, V. C.

I have again examined the testimony and given consideration to the arguments in this case, and have reached the same conclusion regarding it which I entertained at the termination of the oral hearing before me.

The proofs of insolvency are neither clear nor satisfactory. The action of Delano and Payne and the companies which they represent was, in

my judgment, characterized by good faith and fair dealing.

I do not think, from the evidence before me, that this Court would have been justified in appointing a receiver in May, 1912, the date of the bond issue; and this is a test which has been applied in some cases.

But, aside from this, at the time of the hearing, no creditor was in existence whose claim had accrued before the mortgage was made. They owed no one, and in the year immediately preceding the bond issue, they had made a net profit of $5,550.81.

The concern was an active one, and the evidence before me does not indicate a well-laid plan for the cessation of activities. It had never stopped business, and had enough assets to pay its debts if it had liquidated at the time of the bond issue.

There is nothing in the evidence presented that leads me to the belief that insolvency was contemplated. The mortgage undertaking, as it appears to me, was for the purpose of continuing the business under more advantageous circumstances than those which had hitherto prevailed

The project did not emanate from Delano or Payne. It was brought to their attention by the Wertheims and their counsel, Mr. Eugene Leake. It was conceived for the benefit of the Wertheim Company, and there is nothing before me which shows that the Mill Creek Coal Company or the Payne Company improperly secured anything from it or profited on the coal sold.

The plan resulted in the doing away with the large salaries payable to Isenstein and Dann and they released their claims against the Wertheim Company.

Decision of Vice-Chancellor Lewis.

Immediately upon the entrance of the new interests into the Wertheim directorate, regular audits were made of the business; and the business generally conducted in an open and up-to-date manner.

I cannot agree with the view advanced that the life of the Wertheim Company was improperly extended by the entrance of Delano and Payne, or by the financial project which they undertook upon the suggestion of the Wertheims and their counsel. Both continued furnishing it with coal for sometime after the making of the mortgage, and the Company went right on with its ordinary business.

The fact that money is needed to finance the corporation or to continue its life, does not mean that it is compelled to close its doors; and there was every indication that when the mortgage was made, the corporation, if let alone, would have succeeded and progressed.

The trustee in the case under consideration represents only creditors who have sold coal to the Wertheim Company, knowing the mortgage was recorded. They, therefore, had notice. There certainly is nothing fraudulent in this aspect of the case.

Another point raised by the trustee is as to the sufficiency of the mortgagee's affidavit of consideration. I have examined the affidavit in connection with the mortgage, and it seems to me to be in substantial compliance with the Statute.

The cross-bill of the trustees must be dismissed.

Filed March 12, 1917.

Decree on Cross-bill of Albert I. Drayton, Trustee.

IN CHANCERY OF NEW JERSEY.

Between

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Trustee,

Complainant,

and

L. WERTHEIM COAL & COKE COMPANY, ET AL,

Defendants.

On Bill &c.

This cause coming on to be heard on the cross-bill of defendant, Albert I. Drayton, trustee in bankruptcy of defendant, L. Wertheim Coal & Coke Comapny, and exhibited against the complainant, Commercial Trust Company of New Jersey, trustee, William Dann, Max Isenstein, William T. Payne, East Boston Coal Company, Warren Delano and Mill Creek Coal Company, and in the presence of McDermott & Enright, of counsel with defendant Albert I. Drayton, trustee in bankruptcy of L. Wertheim Coal & Coke Company; Fisk & Fisk, of counsel with complainant Commercial Trust Company of New Jersey, trustee; Pierre P. Garven, of counsel with defendants William Dann and Max Isenstein; Hartshorne, Insley & Leake, of counsel with defendants William T. Payne and East Boston Coal Company, and Vredenburgh, Wall & Carey, of counsel with defendants Warren Delano and Mill Creek Coal Company, before Honorable Vivian M. Lewis, Vice-Chancellor, to whom the said cause

was referred to hear and advise the Chancellor what order or decree should be made therein, and the pleadings having been read and the proofs having been taken, and the arguments of the respective counsel having been heard and considered, and the Court having duly considered the said pleadings proofs and arguments, and it appearing to the Court that defendant, Albert I. Drayton, trustee in bankruptcy of L. Wertheim Coal & Coke Company, is not entitled to the relief sought and prayed for by him in his cross-bill exhibited as aforesaid;

It is, on this 12th day of March, 1917, by the Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREED that the cross-bill of Albert I. Drayton, trustee in bankruptcy of L. Wertheim Coal & Coke Company, be and the same is hereby dismissed.

And that the consideration of all further questions and of the costs upon the dismissal of said cross-bill be reserved until the final decree herein upon the complainant's bill of complaint.

Respectfully advised,

VIVIAN M. LEWIS,
V. C.

Testimony.

IN CHANCERY OF NEW JERSEY.

Between

COMMERCIAL TRUST COMPANY,

Complainant,

and

L. WERTHEIM COAL & COKE COMPANY, et al.,

Defendants.

On Bill, &c.

Transcript of testimony taken in the above-entitled cause, at the Chancery Chambers, Jersey City, New Jersey, on Monday, the twenty-second day of November, 1915, before HON. VIVIAN M. LEWIS, Vice-Chancellor.

APPEARANCES:

WILLARD C. FISK, ESQ., for the Complainant.

McDERMOTT & ENRIGHT, ESQS., by Mr. Enright, for the Defendant, Albert I. Drayton, Trustee in Bankruptcy of L. Wertheim Coal & Coke Company;

MR. WALL, of VREDENBURG, WALL & VAN WINKLE, ESQS., for Warren Delano and Mill Creek Coal Company, Defendants;

EUGENE LEAKE, ESQ., for William T. Payne, Defendant;

PIERRE GARVEN, ESQ., for William L. Dann, Defendant;

MR. CORBIN, of COLLINS & CORBIN, ESQS., for the Lehigh Valley Railroad, Defendant.

Opening by Mr. Fisk.
Reply by Mr. Enright.

Colloquy.

MR. WALL: I represent Mr. Delano and the Mill Creek Coal Company. It seems to us that Mr. Isenstein's estate should be made a party, and why cannot it be in some such fashion as this: Why cannot Mr. Enright take the steps now with as much speed as he can to bring in the estate and make it a party; meantime, this case go on, and when Mr. Isenstein's representatives finally arrive at this forum, we can then find out whether they will accept the testimony as taken, or whether they will demand that that portion of the testimony be taken over again.

THE COURT: What is the difficulty, Mr. Enright, with the suggestion of Mr. Wall that we proceed and take the proof?

MR. ENRIGHT: I believe they would have a right to demand that the whole issue be tried over again as to them. However, I should imagine that there is not any great difficulty about that, because, if they do insist on the case being tried over again, as to them, we shall have to do it. We would call the same witnesses and put them through the paces on the record.

THE COURT: I think, as we are all here, it is the time to go ahead.

MR. FISK: I have no objections to proceeding.

MR. GARVEN: We stand mute on that proposition; in other words, we do not speak for Isenstein at all; we have no authority. I think Mr. Bigelow will be able eventually to make an appearance.

MR. WALL: I think we all should be bound very fast to the proposition that nobody here that is represented, objects to this method of disposing of this particular question.

Colloquy.

MR. FISK: On behalf of the complainant, I offer in evidence the record of the minutes of a meeting of the Board of Directors of the L. Wertheim Coal and Coke Company, held February 28, 1912; I do this under arrangement with Mr. Enright and other counsel that I may offer these minutes without calling the secretary to prove their authenticity. I will read this:

"The adjourned regular monthly meeting of the Board of Directors of the L. Wertheim Coal & Coke Company was held at No. 1 Broadway, New York City, on Wednesday, February 28th, 1912, at ten o'clock.

"PRESENT: Messrs. Warren Delano, W. T. Payne, De Witt Van Buskirk, Louis Wertheim and Sanders Wertheim.

"Mr. Eugene W. Leake made a report that the Lehigh Valley Railroad Company had made a tentative offer to cancel all demurrage charges upon the payment of demurrage which has been incurred since September 1st, 1911.

"On motion of W. T. Payne, seconded by Warren Delano, the proposition was refused.

"An agreement signed by the Mill Creek Coal Company, East Boston Coal Company, Max Isenstein and William L. Dann was submitted to the meeting. The agreement provided for the acceptance of bonds of this Company in payment of all indebtedness of this Company to the above mentioned parties up to and including April 1st, 1912.

"On motion duly made and seconded, the agreement was ordered filed.

"On motion of W. R. Payne, seconded by Sanders Wertheim, the following resolution was unanimously adopted:

" 'WHEREAS, The Mill Creek Coal Company, East Boston Coal Company, Max Isenstein and William L. Dann, creditors of the L. Wertheim Coal & Coke Company, have agreed to accept the bonds of this corporation in pay-

ment of the indebtedness of this Company to them,

"'NOW, THEREFORE, BE IT RESOLVED, that with the concurrence of the stockholders of this Company, the President and Treasurer be and they are hereby authorized in the name of the Company and under its corporate seal, to execute coupon bonds of the Company payable twenty years from date in the sum of not exceeding two hundred and fifty thousand dollars, of the denomination of One thousand dollars each, bearing interest at six per cent. payable semi-annually, and

"'BE IT FURTHER RESOLVED, that the said President and Treasurer are hereby authorized and directed to execute and deliver a mortgage covering all present and future assets of this Company, except the lease with the Lehigh Valley Railroad Company, to a trust Company, to be designated by said officers, as security for the said bonds. The said bonds and the trust mortgage shall be in the usual form and shall provide for the payment by this Company of such sum or sums of money to the said Trustees which will with the interest calculated thereon be sufficient to pay the interest on the bonds and accumulate a sinking fund to pay the bonds in full at maturity, and that in the event of a failure to pay such monthly sum by this Company for the period of three months after the same becomes payable, then the bonds shall become immediately due and payable, and

"'BE IT FURTHER RESOLVED, that the said President and Treasurer are hereby authorized to deliver to the Mill Creek Coal Company, East Boston Coal Company, Max Isenstein and William L. Dann, the suid bonds of this Company to the amount of the indebtedness of this Company to the said creditors in exchange for the surrender and cancellation of their evidences of indebtedness against this Company, and

"'BE IT FURTHER RESOLVED, that the said

President and Treasurer are also directed to deliver to the said Mill Creek Coal Company said bonds in the additional amount of Twenty thousand dollars, in exchange for the surrender and cancellation of a note of this Company for Twenty thousand dollars, made to the said Mill Creek Coal Company and discounted by said Company at the Mechanics' Trust Company at Bayonne, Hudson County, New Jersey.' "

I offer in evidence the record of the minutes of a meeting of the Board of Directors of the Company, held April 19th, 1912 adjourned meeting:

"PRESENT: Louis Wertheim, Sanders Wertheim, Warren Delano.

"The meeting on motion was adjourned until Monday, April 22nd, at 3 P. M., to be held at the same place."

I offer in evidence record of a meeting of the Board of Directors held on April 22nd, 1912, adjourned meeting from the meeting of April 19th:

"PRESENT: Louis Wertheim, Sanders Wertheim, Warren Delano, De Witt Van Buskirk and W. T. Payne.

"On motion of Sanders Wertheim the following resolution was unanimously adopted:

" 'WHEREAS, the L. Wertheim Coal and Coke Company is indebted to the Mill Creek Coal Company, in the sum of One hundred nineteen thousand, four hundred fifty-four dollars and eighty cents ($119,454.80), which represents Ninety-nine thousand, four hundred and fifty-three dollars and eighty cents ($99,453.80), the amount due to April 1st, 1912, on eighteen (18) promissory notes of this Company to said Mill Creek Coal Company, and also Twenty thousand dollars ($20,000), being the amount due on a promissory note of this Company, dated December 17th, 1911, payable to said Miil Creek Coal Company, and

" 'WHEREAS, the L. Wertheim Coal and

Coke Company is indebted to the East Boston Coal Company, in the sum of Eighty-eight thousand, three hundred and fourteen dollars and thirty-three cents ($88,314.33), which represents the amount due to April 1st, 1912, on fifteen (15) promissory notes of this Company to said East Boston Coal Company, and

"'WHEREAS, the L. Wertheim Coal and Coke Company is indebted to William L. Dann, in the sum of Twenty-one thousand, one hundred eighty-nine dollars and ninety-seven cents ($21,189.97), which represents the amount due to April 1st, 1912, on nineteen (19) promissory notes of this Company to said William L. Dann, and

"'WHEREAS, the L. Wertheim Coal and Coke Company is indebted to Max Isenstein in the sum of Sixteen thousand, eight hundred eighteen dollars and seventy-four cents ($16,818.74), which represents the amount due to April 1st, 1912, on fifteen (15) promissory notes of this Company to said Max Isenstein, and

"'WHEREAS, the said Mill Creek Coal Company, East Boston Coal Company, Max Isenstein and William L. Dann have agreed to surrender all notes representing the said indebtedness, and to accept in payment of all claims against the Company to April 1st, 1912, bonds of this Company secured by a mortgage on the assets of this Company, and

"'WHEREAS, the form of the bonds and the form of the deed of trust securing the same, has been approved by the Mill Creek Coal Company, East Boston Coal Company, Max Isenstein and William L. Dann,

"'NOW, THEREFORE, BE IT RESOLVED, that the President and Treasurer of this Company be, and they hereby are authorized and directed to make, execute and deliver, under the corporate seal of this Company, a deed of trust or mortgage to The Commercial Trust Company of New Jersey, covering all the property of this Company described in

the deed of trust submitted to this meeting, with such modifications as may be desired by the said Trustee, and

"'BE IT FURTHER RESOLVED, that the President and Treasurer be, and they hereby are authorized and directed to make, execute and deliver, under the corporate seal of said Company, bonds of this Company to the extent of Two hundred fifty thousand dollars ($250,000) in the form mentioned in the said deed of trust above referred to, and

"'BE IT FURTHER RESOLVED, that the form of the bonds and the deed of trust together with all the provisions of the said bonds and the said deed of trust submitted to this meeting, as well as the modifications, if any, which may be required by said Commercial Trust Company of New Jersey, be and the same hereby are approved, and

"'BE IT FURTHER RESOLVED, that the said deed of trust be spread in full upon the minutes of this Company, and

"'BE IT FURTHER RESOLVED, that on the execution of the said bonds and the deed of trust above referred to by the President and Treasurer of this Company, the said bonds and deed of trust be delivered to the Commercial Trust Company of New Jersey, and

"'BE IT FURTHER RESOLVED, that a sinking fund be established, as provided for in the said deed of trust, and that the Treasurer of this Company is hereby authorized and directed to pay to the Commercial Trust Company of New Jersey monthly, on the first day of each and every month beginning May 1st, 1912, the sum of Two thousand dollars ($2,000), provided for in the said trust.'"

THE COURT: That traces it up to the deed of trust.

MR. FISK: That will, when I put in the stockholders' minutes.

THE COURT: How many meetings of the stockholders were held relating to this transaction?

Colloquy.

MR. FISK: I have two; one was a mere adjournment.

I next offer in evidence the record of the minutes of the stockholders of the complainant corporation, April 17, 1912:

"A special meeting of the stockholders of the L. Wertheim Coal & Coke Company, all in pursuance of the by-laws of the Company, by a due and proper notice of which a copy is filed with the Secretary, and which special meeting was called for the purpose of authorizing the bond issue of Two hundred and fifty thousand dollars ($250,000), was held at the office of the Company, corner of Grand Street and Pacific Avenue, Jersey City, New Jersey, on Wednesday, the seventeenth day of April, 1912, at one o'clock, and was adjourned on motion of Sanders Wertheim to Monday, April 22nd, 1912, at one o'clock at the office of the Company in Jersey City, New Jersey.

"PRESENT AT THE SPECIAL MEETING: Sanders Wertheim, Louis Wertheim and Otto Isenstein."

THE COURT: Let us go to the next meeting.

MR. FISK: I also offer in evidence minutes of the stockholders' adjourned meeting, held May 22nd, 1912, at one o'clock:

"PRESENT: Sanders Wertheim, Louis Wertheim, Otto Isenstein, Warren Delano, W. T. Payne, De Witt Van Buskirk, Saul Wertheim, Benjamin Wertheim, the owners of all the capital stock of the Company, and E. A. Bigelow and Eugene W. Leake, attorneys.

"The President, Mr. Louis Wertheim, read the special notice, dated April 6th, 1912, to all the stockholders of the calling of a special meeting of the stockholders for Wednesday, April 17th, 1912, for the purpose of authorizing a bond issue of $250,000 on all the assets of the Company.

"The President ordered the Secretary to read the minutes of the special meeting of the stockholders held on April 17th, 1912,

which was adjourned to Monday, April 22nd, 1912. The minutes of the said meeting of April 22nd, 1912, were approved and the notice of the special meeting was ordered to be filed with the Secretary.

"The Secretary read the agreement of the East Boston Coal Company, Mill Creek Coal Company, Max Isenstein and William Dann, by which the said last-mentioned parties agreed to accept bonds of the L. Wertheim Coal and Coke Company in payment of their notes, accounts and other evidences of indebtedness against the Company, and the agreement was ordered filed.

"The Secretary read the resolution of the Directors of the L. Wertheim Coal and Coke Company adopted at the meeting of the said Board of Directors on February 28th, 1912, authorizing the bond issue of $250,000, secured by a deed of trust, covering all the assets of the Company and each bond to be of the denomination of $1,000, with interest at six per cent., as by reference to the said resolution will more fully appear. And the said resolution of the Board of Directors was adopted by unanimous vote.

"On motion of Sanders Wertheim, the following resolution was unanimously adopted:

" 'WHEREAS, the L. Wertheim Coal and Coke Company is indebted to the Mill Creek Coal Company in the sum of One hundred nineteen thousand, four hundred fifty-four dollars and eighty cents ($119,454.80), which represents Ninety-nine thousand, four hundred and fifty-three dollars and eighty cents ($99,453.80), the amount due to April 1st, 1912, on eighteen (18) promissory notes of this Company to said Mill Creek Coal Company, and also Twenty thousand dollars ($20,000), being the amount due on a promissory note of this Company, dated December 17th, 1911, payable to said Mill Creek Coal Company, and

" 'WHEREAS, the L. Wertheim Coal and Coke Company is indebted to the East Boston Coal Company, in the sum of Eighty-eight

thousand, three hundred and fourteen dollars and thirty-three cents ($88,314.33), which represents the amount due to April 1st, 1912, on fifteen (15) promissory notes of this Company to said East Boston Coal Company, and

"'WHEREAS, the L. Wertheim Coal and Coke Company is indebted to William L. Dann, in the sum of Twenty-one thousand, one hundred eighty-nine dollars and ninety-seven cents ($21,189.97), which represents the amount due to April 1st, 1912, on nineteen (19) promissory notes of this Company to said William L. Dann, and

"'WHEREAS, the L. Wertheim Coal and Coke Company is indebted to Max Isenstein, in the sum of Sixteen thousand eight hundred eighteen dollars and seventy-four cents ($16,818.74), which represents the amount due to April 1st, 1912, on fifteen (15) promissory notes of this Company to said Max Isenstein, and

"'WHEREAS, the said Mill Creek Coal Company, East Boston Coal Company, Max Isenstein and William L. Dann have agreed to surrender all notes representing the said indebtedness, and to accept in payment of all claims against the Company to April 1st, 1912, bonds of this Company secured by a mortgage on the assets of this Company, and

"'WHEREAS, the Board of Directors of this Company has approved the execution of all bonds secured by a mortgage in payment of the above mentioned indebtedness, and

"'WHEREAS, the form of the bonds and the form of the deed of trust securing the same, has been approved by the Mili Creek Coal Company, East Boston Coal Company, Max Isenstein and William L. Dann,

"'NOW, THEREFORE, BE IT RESOLVED, that the President and Treasurer of this Company be, and they hereby are authorized and directed to make, execute and deliver, under the corporate seal of this Company, a deed of trust or mortgage to the Commercial Trust

Company of New Jersey, covering all the property of this Company described in the deed of trust submitted to this meeting with such modifications as may be desired by the said Trustee, and

" 'BE IT FURTHER RESOLVED, that the President and Treasurer be, and they hereby are authorized and directed to make, execute and deliver, under the corporate seal of said Company, bonds of this Company to the extent of Two hundred fifty thousand dollars ($250,000) in the form mentioned in the said deed of trust above referred to, and

" 'BE IT FURTHER RESOLVED, that the form of the bonds and the deed of trust, together with all the provisions of the said bonds and the said deed of trust submitted to this meeting, as well as the modifications, if any, which may be required by said Commercial Trust Company of New Jersey, be and the same hereby are approved, and

" 'BE IT FURTHER RESOLVED, that the said deed of trust be spread in full upon the minutes of this Company, and

" 'BE IT FURTHER RESOLVED, that on the execution of the said bonds and the deed of trust above referred to by the President and Treasurer of this Company, the said bonds and deed of trust be delivered to the Commercial Trust Company of New Jersey, and

" 'BE IT FURTHER RESOLVED, that a sinking fund be established as provided for in the said deed of trust, and that the Treasurer of this Company is hereby authorized and directed to pay to the Commercial Trust Company of New Jersey monthly, on the first day of each and every month beginning May 1st, 1912, the sum of Two thousand dollars ($2,000), provided for in the said trust.'

"On motion the meeting adjourned.

"In accordance with the resolution passed at the meeting held on April 22nd, 1912, providing that the deed of trust approved at the said meeting be spread in full upon the minutes, said deed of trust is herein set out."

JAY S. PERKINS, sworn in behalf of the Complainant, testified as follows:

DIRECT EXAMINATION BY MR. FISK:

MR. FISK: I offer in evidence original mortgage of the L. Wertheim Coal and Coke Company to the Commercial Trust Company of New Jersey as Trustee, dated May 6, 1912, and recorded in the Hudson County Register's office on May 6, 1912, in Book 305 of Chattel Mortgages for the County, on page 135.

Marked "Exhibit C-1".

Q. Where do you reside? A. 115 Bentley Avenue, Jersey City.

Q. You are the Secretary and Treasurer and Trust Officer of the Commercial Trust Company of New Jersey? A. Yes, sir.

Q. The mortgagee named in the mortgage which is offered in evidence? A. Yes, sir.

Q. Have you with you the record of the certification and delivery by the Commercial Trust Company of New Jersey of $250,000 par value of bonds authorized under the mortgage "Exhibit C-1"? A. Yes, sir.

Q. Just produce it. A. (Witness does so.)

Q. What does that record show? A. It shows on June 12, 1912, that Robert S. Ross, as President—Vice-President—certified as Trustee $250,000 of bonds, being numbered from 1 to 250, inclusive.

Q. Now, what does your record show as to the delivery of those bonds? A. On July 24, 1912, on order of the L. Wertheim Coal and Coke Company, signed by its President and Treasurer, $22,000 par value of bonds, 1 to 22, inclusive, were delivered to Ernest A. Bigelow; same date, and under the same order, $17,000 par value of

bonds, No. 23-39, were delivered to Ernest A. Bigelow.

On July 31, 1912, on the order of the L. Wertheim Coal and Coke Company, signed by its President and Treasurer, $120,000 par value of bonds, No. 40 to 159, inclusive, were delivered to the Mill Creek Coal Company.

On August 23, 1912, on the order of the L. Wertheim Coal and Coke Company, signed by its President and Treasurer, $89,000 of par value of bonds, No. 160 to No. 248, inclusive, were delivered to S. Wertheim for account of the East Boston Coal Company.

On October 11, 1912, on the order of the L. Wertheim Coal and Coke Company, signed by its President and Treasurer, $2,000 of par value of bonds, No. 249 and 250, were delivered to S. Wertheim, for account of the East Boston Coal Company.

Now, the record I have referred to is found on page 147.

MR. FISK: I offer this record in evidence.

THE COURT: It will be received.

Marked "Exhibit C-2".

Q. Have you the orders of the L. Wertheim Coal and Coke Company upon which these bonds were delivered? A. Yes, sir.

Q. Will you produce them? A. These five papers which I produce represent the orders I have referred to, and on each paper there is a receipt for the delivery of the bond.

MR. FISK: I offer those five papers as one exhibit.

Marked "Exhibit C-3".

MR. FISK: I will read one:

"The Commercial Trust Company of New Jersey:

"Please authenticate, certify and deliver to Ernest A. Bigelow, or order, for our account, 22 bonds of the L. Wertheim Coal and Coke Company, with all coupons attached; said bonds to be so delivered are each for the sum of $1,000, dated April 1st, 1912, and secured by the deed of trust dated May 6, 1912, to the Commercial Trust Company of New Jersey.

"(Signed)

"L. WERTHEIM COAL AND COKE COMPANY.

"L. WERTHEIM,

"President.

"SANDERS WERTHEIM,

"Treasurer."

Upon which there is a receipt, dated July 24, 1912:

"Received from Commercial Trust Company of New Jersey, 22 first mortgage 6% bonds of the L. Wertheim Coal and Coke Company, No. 1 to 22, inclusive, for $1,000 each, with all coupons attached; certified by the Commercial Trust Company of New Jersey as trustee of the deed of trust, as above stated.

"(Signed) ERNEST A. BIGELOW.

"Witness:

"EUGENE W. LEAKE,

Attorney, Wertheim Coal and Coke Company."

The other four receipts being of similar form.

Q. Mr. Perkins, have you with you one of the bonds certified and issued under this mortgage? A. Yes, sir.

Q. I show you a paper now produced by you, purporting to be bond No. 207, of the L. Wertheim Coal and Coke Company, dated April 1, 1912, due April 1, 1932, with coupons attached, and certified by the Commercial Trust Company of New Jersey as trustee; and I ask you whether that bond is similar in form and nature to all the

bonds certified under this mortgage, with the exception that the bond now produced is cancelled as paid? A. Yes, sir.

Q. Except the "paid" cancellation of this bond, the bonds, as originally issued, were all in that form? A. Yes, sir.

MR. FISK: I offer this bond in evidence.
Marked "Exhibit C-4".

Q. Mr. Perkins, have you with you the record of the Commercial Trust Company of New Jersey as trustee under this mortgage, showing the payments to the sinking fund of $2,000 per month? A. Yes, sir.

Q. This is the original record from the ledger? A. Yes, sir.

Marked "Exhibit C-5".

Q. Now, under that record, what payments were made to the sinking fund by the L. Wertheim Coal and Coke Company, commencing what date? A. The payment commencing May 1st, 1912, up to and including May 1st, 1914.

Q. How much per month? A. $2,000 a month.

Q. And when was the default of payment made to this fund under the mortgage? A. June 1st, 1914, payment of $2,000.

Q. Mr. Perkins, have you with you, and will you produce the record of the Trust Company showing the redemption of bonds from the sinking fund under the terms of the mortgage—you have such record there? A. The redemption is shown on this account, "Exhibit C-5."

Q. When and at what dates, and to what amounts and for what year were redemptions effected under that sinking fund? A. October 1st, 1912, $2,000; bond No. 64, paid October 1; and bond 245, paid October 19. On October 1, 1913, $3,000, bonds No. 209, 231, 234, and paid Octo-

ber 4, 1913. On April 1, 1914, $5,000, bond No. 9 and 39, paid $1,000, April 6, 1914, and $1,000 April 17, 1914. The numbers of these bonds are 39-9-71-204 and 207, for $1,000 each. One paid April 6, 1914—one paid April 17, 1914—one paid April 17, 1914—and two paid April 11, 1914; that is all the redemptions.

Q. Now you have, Mr. Perkins, with you, and now produce, the notices to the L. Wertheim Coal and Coke Company, copies of the notices of the drawing of these various bonds for redemption; and you also have with you the proof of the publication of notice of the redemption of bonds in the newspaper, as required by the mortgage? A. Yes, sir.

Q. And you now produce it? A. Yes, sir.

MR. FISK: I offer those in evidence as one exhibit.

Marked "Exhibit C-6."

Q. Mr. Perkins, under the terms of the mortgage, it became the duty of the trustee, according as the funds were in the sinking fund, to draw bonds for redemption on March 1st and September 1st, annually; the bond was drawn to be redeemed the succeeding April and October 1st? A. Yes, sir.

Q. And to give notice of such drawing to the company and for the company—I refer to the Wertheim Coal and Coke Company, to publish notice of the redemption in the newspapers? A. Yes, sir.

Q. Now, did your company make a drawing of bonds for redemption on September 1st, 1914, and if so, what bonds were drawn? A. Yes, sir, bonds No. 8, 14 and 178, for $1,000 each.

Q. And did you give the notice of that drawing to the L. Wertheim Coal and Coke Company? A. Yes, sir.

Q. And that is it, isn't it? A. This is it.

Q. The paper you see is a copy of the notice of the drawing of these last three bonds and the notice of their redemption given to the Wertheim Company? A. Yes, sir.

MR. FISK: I offer that in evidence.

Marked "Exhibit C-7."

Q. Did the L. Wertheim Coal and Coke Company ever, to your knowledge, advertise as provided by the mortgage, those bonds, for redemption, October 1, 1914, or was any proof of such advertisement ever furnished to you? A. No, sir.

Q. And they have not been redeemed or paid? A. No, sir.

Q. Mr. Perkins, did the Trust Company, as Trustee under the terms of the mortgage, give any notice to the L. Wertheim Coal and Coke Company, declaring the whole number of the bonds due on account of the default in payment to the sinking fund of June 1, 1914? A. Yes, sir.

Q. Have you a copy of that notice here? A. Yes, sir.

Q. That is a duplicate original of the notice that you sent them? A. Yes, sir.

Q. Have you a memorandum on that notice of how it was sent and when it was sent? A. Yes, sir.

Q. What is that memorandum? A. "Originally forwarded by registered mail August 31, 1914, to L. Wertheim Coal and Coke Company, Grand Street and Pacific Avenue, Jersey City, N. J." Initialed with my initials, "J. S. P."

Q. And that memorandum is one made by you at the time? A. Yes, sir.

MR. FISK: I offer this notice in evidence; that is the notice making the whole number

of bonds all due on 90 days' default.

Marked "Exhibit C-8."

Q. Mr. Perkins, how many bonds are now issued and outstanding under the mortgage? A. $240,000.

Q. Par value? A. Yes, sir.

Q. And is that amount of principal now due on the mortgage? A. Yes, sir.

Q. And interest on the bonds is due from what date? A. April 1, 1914, at 6%; due April 1, 1914, at 6%; the first default was October 1st; they paid the interest April 1st.

Q. Then, from April 1st, have you made a calculation of what the interest due on these outstanding bonds is? A. $23,640.00; that is, to November 22, 1915.

Q. Mr. Perkins, what sum is now in the hands of the trustee in the sinking fund? A. $11,039.23.

Q. And that is with interest on the account up to what? A. October 1st, 1915.

CROSS EXAMINATION BY MR. ENRIGHT:

Q. Have you among your papers the request to foreclose, made on behalf of the bondholders? A. No, sir, I have not.

Q. Was a written request made on the Trust Company by the bondholders to foreclose this mortgage? A. I don't know, Mr. Enright.

Q. Has the Trust Company got the physical possession of any of the unpaid bonds secured by this mortgage? A. Some, yes, sir.

Q. Have you got a record of those here? A. Not here, no, sir.

Q. Can you state what unpaid bonds are in the physical possession of the Trust Company? A. I cannot, unless I look up the records; I haven't them here.

MR. FISK: We will find out for you.

Q. Were these $2,000 monthly payments made regularly? A. No, sir, they were not.

Q. How irregularly were they made? A. On May 1st, 1912—payment was made May 7th, the June 1st payment was made on that date. The July 1st payment was made July 2nd. The August 1st payment was made August 2nd. The September payment was made September 3rd. The October 1st payment was made on the 2nd. The November 1st payment was made January 15, 1913. The December 1st payment was made March 3, 1913. The January 1st payment was made April 2nd, 1913. The February 1st payment was made May 1st, 1913. The March 1st payment was made May 31st, 1913. The April 1st payment was made July 1st, 1913. The May 1st payment was made July 30th, 1913. The June 1st payment—

Q. Without going any further into that, is it true that approximately from that time on, they were paid about three months in arrear? A. Yes, sir, the limit of the time allowed by the mortgage.

THE COURT: I would like to have you produce the written request to foreclose.

MR. FISK: We rest.

MR. ENRIGHT: I don't know whether I made a motion to amend the cross-bill by bringing in William T. Payne as a party.

THE COURT: You did not make the motion, but I will consider you have made it.

MR. ENRIGHT: I offer in evidence copy of an order by Thomas G. Haight, Judge in the United States District Court, District of New Jersey, in the matter of L. Wertheim Coal and Coke Company, dated September 17, 1914, being an order appointing Ralph H. Perry Receiver in Bankruptcy.

Marked "Exhibit E-1."

MR. ENRIGHT: I offer in evidence certified copy or order of George R. Beach, Referee in Bankruptcy, in the same proceedings, appointing Albert I. Drayton trustee.

Marked "Exhibit E-2."

MR. ENRIGHT: I also offer copy of order in the same proceedings, dated November 7th, 1914, approving the bond of the trustee.

Marked "Exhibit E-3."

MR. ENRIGHT: I offer resolution of the directors of the L. Wertheim Coal and Coke Company, dated November 30, 1907, as follows:

"RESOLVED, that it is advisable to increase the capital stock of the company from $125,000 to $275,000, divided into 2750 shares of the par value of $100 each, 1500 shares of which shall be preferred stock, and 1250 shares shall be common." That is dated November 30, 1907.

There is nothing in the pleadings on the question of the increase of capital stock.

This is preparatory to showing the stock holdings.

"The holders of the preferred stock shall have no voting powers whatever, nor shall they be entitled to notice of any meeting of the stockholders of the company."

"On motion, duly made and seconded, it was resolved, that the company exchange all its own holdings of common stock for preferred stock." That is November 30, 1907.

I have made an analysis of the subsequent issue of stock so as to bring it down to the date we are inquiring about, and I would put that analysis in as an exhibit, subject to correction.

Marked "Exhibit E-4."

Mr. Warren Delano—Direct.

MR. WARREN DELANO, sworn in behalf of the Trustee in Bankruptcy, testified as follows:

DIRECT EXAMINATION BY MR. ENRIGHT:

Q. You are one of the defendants in this action? A. Yes, sir.

Q. And you are the President of the Mill Creek Coal Company? A. Yes, sir.

Q. You were President of that company throughout the transactions with the L. Wertheim Coal and Coke Company? A. Yes, sir.

Q. Besides being President, you are the General Manager as well? A. President.

MR. WALL: That is the Mill Creek transaction.

THE WITNESS: I don't know that I understand that.

BY THE COURT:

Q. Were you President of the Mill Creek Company while it had transactions with the L. Wertheim Coal and Coke Company? A. Yes, sir.

Q. You became a director of the L. Wertheim Coal and Coke Company in December, 1909? A. December 20, 1909.

Q. And thereafter did you have an audit of the books of the L. Wertheim Coal and Coke Company by the Audit Company of New York? A. Yes, sir.

Q. Will you produce that audit? A. This is it. (Witness examines some papers.) I identify this as the audit.

Q. And that document was received about when? A. About April 1st, I think; no, sir, it must have been about March 1st, 1910, February 28th, I see it is dated, 1910.

Q. Was it brought by you to the attention of the

directors of the L. Wertheim Coal and Coke Company? A. Yes, sir.

MR. ENRIGHT: I offer the audit in evidence.

MR. GARVEN: In behalf of Mr. Dann, I wish to object on the ground that it is immaterial and irrelevant. Mr. Dann was not an officer, director or stockholder on the date memtioned; in other words, he had retired entirely from the firm prior to December 20, 1909.

THE COURT: I will receive it and note your objection to it.

Marked "Exhibit E-5."

Q. Mr. Delano, did you thereafter have another audit by the Audit Company, as of March 31, 1911? A. I did, yes, sir.

Q. And is that the document which you have in your hand? A. This is the document.

Q. Was that also brought to the attention of the directors of the L. Wertheim Coal and Coke Company? A. Yes, sir, I think it was.

MR. GARVEN: Same objection goes to all this evidence.

THE COURT: The objection is overruled.

Marked "Exhibit E-6."

Q. After this time, Mr. Delano, do you recall whether or not the Wertheim Coal and Coke Company continued to make up monthly balance sheets on the same basis of accounting as recommended by the Audit Company? A. They made balance sheets monthly, as recommended by an auditor, but I am not sure that it was recommended by the Audit Company; I think it was an individual auditor.

Q. The copies of those sheets were furnished to you from month to month? A. Yes, irregularly at times, but—

Q. Will you produce the sheets showing the annual statement, I think, as of March 31st, 1912; and also the monthly statement of April 30, 1912, and May 31, 1912?

MR. WALL: They are all arranged in order, Mr. Enright.

MR. ENRIGHT: These are monthly statements; I do not see an annual statement; these are all monthly statements, I think.

Q. Will you produce the monthly statement of April 30th and May 31st, 1912, respectively? A. There is the April 30th and May 31st; these were made up showing the operations of each month.

MR. ENRIGHT: I offer in evidence statement produced by the witness for the month ending April 30, 1912.

Marked "Exhibit E-7."

MR. ENRIGHT: I offer in evidence also statement for month ending May 31, 1912.

Marked "Exhibit E-8."

MR. ENRIGHT: That is all for the moment.

NO CROSS EXAMINATION.

MISS MARY MALONEY, sworn in behalf of the Trustee in Bankruptcy, testified as follows:

DIRECT EXAMINATION BY MR. ENRIGHT:

Q. You were the bookkeeper for the L. Wertheim Coal and Coke Company? A. Yes, sir.

Q. At the time of the bankruptcy? A. Yes, sir.

Q. And for how long before that? A. About 14 years.

Q. Did you make up these monthly statements from the books? A. Yes, sir.

Q. Now the statement marked "E-7," does that show the assets and liabilities as of that date, as they appear upon the books of the company? A. Yes, sir.

Q. Is that also true of the statement for May 31st, 1912, marked "E-8?" A. Yes, sir.

Q. I show you another statement for the three months ending June 30, 1911; did you make that statement up? A. No, sir.

Q. Whose handwriting is that? A. That was a man that they had that came in and installed a system of bookkeeping at this time; that was a man that we had come in at the time to install a new system of bookkeeping, and this is a statement of three months work, on which he based the new system of bookkeeping.

Q. Three months' business? A. Yes, sir.

Q. So this statement of June 30, 1911, that shows the assets and liabilities as of the time that the new system of accounting was put into effect? A. Yes, sir.

Q. And who was this outside auditor that came in? A. H. C. Bentley.

Q. Did you go over it with him? A. Yes, sir.

Q. You assisted him in making this, did you? A. Yes, sir.

Q. And it was made out from the books of the company? A. Yes, sir.

MR. ENRIGHT: I offer this statement in evidence.

Marked "Exhibit E-9."

MR. LEAKE: Leave to object is reserved.

THE COURT: Yes, I will take it subject to objection.

Q. I show you financial statement purporting to be for year ending March 31, 1912; was that made up by you? A. Yes, sir.

Q. And does that correctly show the assets and liabilities as they appear upon the books of the company? A. Yes, sir.

Q. As of that date? A. Yes, sir.

MR. ENRIGHT: I offer that in evidence.

Marked "Exhibit E-10."

MR. LEAKE: Leave to object is reserved.

Q. Turning to the last exhibit, "E-10," in the assets column, plant and equipment, trestle and buildings, will you tell us what that item "Trestle and buildings" describes; what is included under that item?

MR. WALL: Objected to; no qualification to make any such statement as that.

THE COURT: The objection is sustained.

Q. You say before the bankruptcy you had been bookkeeper of this company for 14 years? A. Yes, sir; that was before the yard on Grand and Pacific Avenue was built.

Q. And you were the bookkeeper at the time of the building of that plant? A. Yes, sir, I was.

Q. And the equipping of it? A. Yes, sir.

Q. And you had control of the books after they started in business there? A. Yes, sir.

Q. From the very time they started in business at Grand and Pacific? A. Yes, sir.

MR. WALL; Objected to as leading.

Q. What did you have to do with the books? A. I was the only bookkeeper.

BY THE COURT:

Q. Did you keep every book of the corporation? A. Up to within about four years of the time we went up to Grand Street and Pacific Avenue.

Q. What would that be as to years? A. That would be about ten years ago.

Q. What happened ten years ago? A. I was with them at that time, but they had practically no bookkeeping done at that time; it was simply nothing more than a record of the men.

Q. When did you begin to keep books for them? A. I started to keep books for them about the time Mr. Isenstein came into the concern.

Q. When was that? A. I don't remember what year he came in.

MR. ENRIGHT: Well, "Exhibit E-4," already in evidence, shows the stock was issued to Isenstein in 1907.

BY THE COURT:

Q. Did Isenstein keep the books? A. Yes, sir, and then, after he was eliminated, then I took full charge of them.

FURTHER DIRECT:

Q. Do you remember the date when he was eliminated? A. No, sir, I could not say.

Q. What do you mean by keeping the books under his direction? A. He was bookkeeper, and I simply served under him.

BY THE COURT:

Q. So you had two bookkeepers then? A. Yes, sir.

FURTHER DIRECT:

Q. You made the entries? A. Yes, sir.

Q. Do you know what the L. Wertheim Coal and Coke Company did in the way of preparing this new yard at Grand and Pacific Avenue for business? A. No, sir.

Q. You were in the employ of the company then? A. Yes, sir.

Q. Do you know whether there was any building

operation in which the Wertheims were interested before going up to that new yard? A. No, sir.

Q. Now, do you know—I am calling your attention now to 1912, the balance sheet of 1912—at which time you say you were the bookkeeper—do you know what these different items of assets and liabilities, as entered on the balance sheet, stand for? A. Yes, sir, they are just a copy of the books, as far as I know.

Q. Now, take the first item, "Trestle and buildings;" what is included under that description?

MR. WALL: Objected to; he has not shown any qualification to permit this witness to include the material property that is represented by an item on the books. She simply knows about books; that is all she pretends to.

BY MR. WALL:

Q. All you knew about keeping books, you learned from Mr. Isenstein? A. Yes, sir.

MR. ENRIGHT: This young lady had charge of these books at the time this statement was taken off; these entries stand for something on the books.

THE COURT: If you will ask her the question how she came to enter that in the book; that item; see if you can develop it that way.

FURTHER DIRECT:

Q. How did you come to make entries on the books showing at the time, for instance, "Trestle and buildings, $113,301.79? A. Those entries were all made from a statement given by the New York Audit Company, on which the new ledger was opened; the books of the new ledger were opened from the basis of the audit.

Q. You know that the company had a trestle? A. Yes, sir.

Q. Where was that trestle? A. Grand Street and Pacific Avenue.

Q. You know they had certain buildings? A. Yes, sir.

Q. Where were those buildings? A. At the same place.

Q. What did those buildings consist of?

MR. WALL: I object; he is trying to get testimony as to a material situation when this young lady only knows as to the bookkeeping situation. If he wants simply to show they had a trestle, I will withdraw my objection; but if he wants to show what that phrase included, he is going too far; she has not the knowledge of that.

THE COURT: I think the question is competent and relevant and material to this issue, and if he wants to draw them from this witness, I think he can; I will deal with the other matter afterwards. I will allow the question to be answered with the objection of Mr. Wall—

Q. What did the buildings consist of? A. A trestle, a stable, blacksmith shop, and an office.

Q. And you worked in the office? A. Yes, sir,

Q. How did you know they were the company's buildings? A. I never knew they were the com pany's buildings.

Q. They were the buildings which the company occupied, were they not? A. Yes, sir.

MR. WALL: I ask that that testimony be stricken out.

THE COURT: Strike it out.

Q. Were the trestles occupied by the company? A. Yes, sir.

Q. And the trestle and buildings which you have described are the only trestle and buildings which you know of, occupied by the company, are they not?

MR. WALL: Objected to as leading.

THE COURT: Yes, it indicates the answer; the objection is sustained.

Q. Do you know of any other trestle or buildings occupied by the L. Wertheim Coal and Coke Company at this date, other than those which you have described?

MR. WALL: Objected to as immaterial.

THE COURT: Objection overruled.

A. I know they had a Harlem yard.

Q. Were you ever up there? A. Yes, sir.

Q. What did they have up there? A. They had a few coal pockets and an office.

Q. And if the coal pockets and the office in Harlem, and the trestle and buildings which you have described, in Jersey City, are not the property of the company, then this item would disappear altogether, wouldn't it?

MR. WALL: That is objected to.

THE COURT: The objection is sustained. You can get the original proofs.

Q. Will you tell us what the item "Motors, boiler, machinery and tools" stands for?

MR. WALL: Objected to.

THE COURT: Objection sustained; she is not qualified at all to speak upon it. I shall sustain the objection to it. The witness is not qualified to speak, from this record.

Q. Do you know what this item means: "Mortgages receivable;" do you know the maker of that mortgage? A. Yes, sir.

Q. And what is the name? A. W. D. Adams.

Q. Do you know whether that was a first or a second mortgage?

MR. WALL: I object to that; he can get it out of the minutes much more satisfactorily than he can get it from this witness. There is a minute in the book about it; it is better evidence than this.

THE COURT: Objection sustained.

Q. Do you know how long this item, this Adams' mortgage, was carried along in the books? A. No, sir, I don't remember now.

Q. Was it ever collected? A. Not that I remember.

Q. Now, did your company keep books showing the details, making up the aggregate of the item reading "Accounts receivable?" A. Yes, sir.

Q. And upon the bankruptcy of the company were those books turned over to the receiver, do you know? A. Yes, sir.

Q. Have you assisted Mr. Kreuzer since that time in making an examination of the books? A. Yes, sir.

Q. And are the books which Mr. Kreuzer used, and which you assisted him in using, the books of account of the L. Wertheim Coal and Coke Company? A. Yes, sir.

Q. Showing the details of the items, the aggregate of which appears in this statement? A. Yes, sir.

NO CROSS EXAMINATION.

Joseph A. Kreuzer—Direct.

JOSEPH A. KREUZER, sworn in behalf of the Trustee in Bankruptcy, testified as follows:

DIRECT EXAMINATION BY MR. ENRIGHT:

Q. What is your occupation? A. Expert accountant.

Q. Where do you live? A. East Orange, New Jersey.

Q. Have you made an examination of certain books and records of the L. Wertheim Coal and Coke Company, at the instance of the bankruptcy trustee? A. Yes, sir.

Q. And in making that examination, was your attention particularly called to the monthly statements of April 30th and May 31st, 1912? A. Yes, sir.

Q. Now, calling your attention to the first item, "Trestle and Buildings," that appears in the books at the same amount, doesn't it, in both of these monthly statements; and in the annual statement, as $113,301.79? A. Yes, sir.

Q. Did you make any investigation to trace that item back through the books to its origin? A. Yes, sir.

Q. Could you find the origin of the item? A. I found some of them—considerable entries there; quite a few entries; there was not any detail given.

Q. Did you find where that entry had been increased? A. Yes, sir.

Q. And did you trace back the items of the increase so as to ascertain in what manner and for what purpose the increase was made, as shown by the books? A. Yes, sir.

Q. Will you give the origin of the increased items to which you have referred? A. In August, 1907, this asset was increased by $3,250.00, "Trestle and Buildings" this is; and that amount was

credited to "Surplus," in showing how they—how they arrived at it.

Q. Well, is there anything to indicate in the books, so far as that item is concerned, whether that represents any increase in the physical property, "Trestles and Buildings? A. No, sir.

Q. Is there anything to indicate that that represents a cash expenditure on that item? A. Nothing there to indicate that.

Q. What does it indicate? A. It simply increased that asset and credited to "Surplus"—reduced the surplus.

Q. An arbitrary increase?

MR. WALL: Objected to; that is a very improper question.

THE COURT: Objection sustained. He has said that there is nothing to show that it was for any material increase in anything—anything materially added to the corporation.

Q. Do you find any other item of increase of a similar sort? A. Yes, sir, August, 1907, "Blacksmith shop"—

Q. And what is the origin of that item? A. That was credited to "Surplus" in the same way; the amount is $1,750.00.

Q. Do you find any other similar item? A. In February, 1908, "Stables, $5,000;" also credited to "Surplus;" on February, 1908, "Improvements, $41,035.00; that was credited to "Profits and Loss."

Q. And the amount was what? A. $41,035.00.

MR. LEAKE: Your Honor will understand that, at this period, 1907, our clients were not in the concern.

Q. Now, these items which you have read off, for which you can find no other explanation than that given, aggregate how much? A. $51,035.00.

Q. And are they included in the total carried into the balance sheet of March 31, 1912, and April and May, 1912—totaling $113,301.79? A. Well, later on in June, 1911, there were adjustments made which I could not find what they covered; that may have reduced those items.

Q. Will you state the adjustments? A. The amount is $9,216.50.

Q. Were those adjustments subtracted? A. Yes, sir.

Q. So that the 1912 aggregate, trestle and buildings, $113,301.79, includes these items aggregating $51,035.00, less the adjustments in 1911? A. Yes, sir.

Q. Now, taking out the adjustments of 1911, will you state how much of the item now appearing "Trestle and Buildings, $113,301.79," results from these 1907 and 1908 entries? A. $41,818.50.

By The Court:

Q. What were these adjustments? A. That is all the extension there is.

Q. What do they represent in figures? A. $9,216.00.

Further Direct:

Q. So, taking those items out of the present trestle and building account, would leave how much? A. $71,483.29.

Q. The April 30th statement carries horses at $44,151.09; in tracing that back into the books, did you find any error in that?

Mr. Wall: I do not think that is a proper question; he ought not to characterize these things.

By The Court:

Q. Can you give any explanation of that item; you may remodel the question in that form; what is it made up of? A. My total is not the same as their statement.

Further Direct:

Q. Pass that question altogether. In these statements appears an item for harness and wagons; how do you find that item originates—in the adjustment? A. It was adjusted according to an appraisal by Mr. Sanders Wertheim on June 20, 1911.

Q. When you say that, you mean that the books show that? A. Yes, sir.

Q. Is the appraisal stated on the books in detail? A. Yes, sir.

Q. Now, what changes were made in that item in the adjustment of 1911? A. There was an added expense of $5,587.70.

Q. What for? A. That is for additional equipment.

Q. Was there any depreciation taken off? A. Not since the time of the adjustment.

Q. So that the present item of wagons and harness represents the adjustment of 1911, with subsequent additions and no depreciation; is that right? A. Yes, sir; that is right.

Q. Did you investigate the details of the items carried under "Accounts Receivable"? A. Yes, sir.

Q. Of what month? A. April 30, 1912.

Q. The total of accounts receivable on that statement is what? A. $76,372.89.

Q. Will you state whether or not that item includes the current indebtedness, or what it does include—the current credits, I mean. A.

All of the accounts receivable, including bad and doubtful accounts.

Q. Have you gone through those accounts to take out the bad and doubtful accounts which are still unpaid? A. Yes, sir.

Q. And how much do they amount to?

MR. LEAKE: I object to that.

BY THE COURT:

Q. When did you make your examination to ascertain, and to analyze this "Bills receivable" account? A. I have taken the bad accounts of this date and traced them back to April 30, 1912, and find the same there.

MR. WALL: We should not be bound by this.

MR. LEAKE: And especially as of three years ago.

THE COURT: But I think he may state in detail how he discovered that they were bad or good, and then I think you might be bound by them.

MR. GARVEN: This evidence does not bind us.

RECESS TO 2 P. M.

AFTER RECESS.

JOSEPH A. KREUZER resumes the witness stand.

Q. (Question read.)

MR. LEAKE: My point is this: Does his answer intend to say that he traced back the accounts which to-day are found to be bad, and he still found those on the books of the company in 1912; or is he seeking to say that the accounts of to-day against persons who are either insolvent, or the accounts being uncollectible, that they were in that same condition in 1912?

BY THE COURT:

Q. Did you find them due and owing on April 30, 1912? A. Yes, sir.

FURTHER DIRECT:

Q. Was any separate ledger kept of these accounts that you have separated in this way? A. Yes, sir.

Q. Is this the book—the corduroy and leather back book, that I show you? A. Yes, sir; that is the book.

Q. Was any different book than that kept for current accounts? A. Yes, sir.

MR. ENRIGHT: I offer for identification the first book, with the corduroy back.

Marked "Exhibit E-11."

MR. ENRIGHT: I ask to have marked for identification these two canvas books which the witness has referred to as the current account ledger.

Marked "Exhibits E-12, E-13" and "E-14."

THE WITNESS: There is still another, three in all.

MR. ENRIGHT: The one marked "E-12" has on the cover the words "Accounts receivable, current;" the other books are without distinctive markings on the covers.

Q. Now, do I understand you that these accounts which you have taken out as accounts unpaid at the present time, and which originated prior to April 30, 1912, are all found in the ledger marked "Exhibit E-11?" A. Yes, sir.

Q. Have you made a tabulation of those accounts? A. Yes, sir.

Q. And is this paper before you the tabulation? A. Yes, sir.

Q. And that gives, in the left-hand column, first, the date when the account originated? A. Yes, sir.

Q. Take the first one, July, 1911; does that mean that the account originated on that date, or you find it entered as an existing account on that date? A. It originated on that date.

Q. And this list you have correctly made up from the ledger, as you have stated? A. Yes, sir.

Q. The first item, May 1, 1907, is what? A. "Harding McCausland, $7,046.00."

Q. How is that entered in the book? A. It is marked under the date of May 1st, 1907.

Q. What is the descriptive entry about it in the book? A. It is simply a debit charge in the book; it does not say what it is; it does not refer to any other book, simply blank there, and the amount.

Q. On your tabulation you have entered judgment; where did you get that information from? A. They had an audit to June 6, 1911; it referred to that.

Q. By the Audit Company? A. Yes, sir; judgment obtained.

Q. So far as it is entered in the ledger, however, it is simply shown as an item? A. That is all.

Q. And what is the total of those items which you have taken out as bad and doubtful? A. The total is $18,579.86.

Q. Deduct the doubtful accounts. A. That makes the net amount $18,270.28.

Q. Does that take out anything for deductions held up by the City of New York? A. Yes, sir.

Q. It includes that as well? A. Yes, sir.

Q. Does it include the Adams' mortgage? A. No, sir; that is a separate account.

Q. And you have noted that in the foot-note? A. Yes, sir.

Q. What is this item underneath? A. That is notes receivable from Adams.

Q. And when did that debt originate? A. June and September, 1909, two footings aggregating $520.28.

Q. On the balance sheet of April 30th, is that note shown as a separate item or included in something else? A. Separate item.

MR. ENRIGHT: I offer this sheet in evidence as a tabulation, showing the details of the witness's testimony.

MR. LEAKE: Objected to.

THE COURT: We will receive it, subject to objection.

Marked "Exhibit E-15."

Q. During the recess, have you looked at that balance sheet of April 30th, marked "Exhibit E-7", to see whether there is any error in the item entered there for "horses"? A. They show the horses as $44,151.09.

Q. Does that correspond with the book? A. No, sir.

Q. What does the book show? A. The book shows $32,087.50.

MR. ENRIGHT: I offer in evidence a balance sheet of the same period, which I said the trustee found among the company's papers, which corresponds with what the witness has just stated to be that item. I am now offering such sheet, showing the correct figure, and which sheet corresponds with the book as well.

MR. WALL: Objected to; it has no evidential force against Mr. Delano.

MR. ENRIGHT: The witness has now testified that the sheet found among the company's records corresponds with the company's books and in that one particular it varies from the sheet furnished to Mr. Delano, and the witness has already testified which is correct, according to the book, so I want to offer this sheet of ours as tabulating, in a correct form, for ready reference, what the books show.

THE COURT: I will receive it for that purpose only.

Marked "Exhibit E-16."

Q. Now, referring to the sheet last identified, marked "Exhibit E-16," that is the sheet which correctly transcribes the books; it is not the Delano sheet, and, turning to the item of "horses, $32,087.50," do you find on analyzing that item, and referring to the details in the book, any item which you say ought to be deducted from that? A. Yes, sir.

Q. Now, what items? A. Three horses sold to C. Rheims on April 11th, out of a total of thirteen. These three were not charged off until May 31, 1912. The amount is $300.00. That is

the total amount; and then there was a loss on those 13 horses, costing originally $5,220.00, and sold for $1,300.00, which was not charged off until March 31st, 1913. The horses were sold on April 11, 1912, and the difference in that item amounts to $3,920.00, making a total deduction for the two items of $4,220.00.

Q. And what does that reduce the horse item to? A. There is one more item I found for a horse, which was injured, in November, 1911, and the value of the horse and expenses amounted to $1156.00, and that was not charged against the account until July 21, 1912. That makes the total $5,376.00 less.

Q. Leaving net item for horses what? A. $26,711.50.

Q. In the books, as they existed at the time of this balance sheet, do I understand you to say there was included in the value of the horses those horses which had been sold, and on which a loss had been made?

MR. WALL: Objected to—this man came in at the time of the bankruptcy; he went over the books; he never had anything to do with the books through this course of years, he said; (do I understand) that on the books, as they existed at the time of the balance sheet, now he is moving to tack and tying it to that time? Now, this witness does not pretend to any such knowledge as that.

THE COURT: What period would that carry it back to?

MR. ENRIGHT: April 30, 1912.

MR. WALL: This man is brought in with the bankruptcy proceeding. Mr. Enright employed him after he came into the thing.

THE COURT: I think the question is ob-

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jectionable in its present form; I sustain the objection.

By The Court:

Q. You completed your examination when? A. Last night.

Further Direct:

Q. Take the item of coal on hand, $17,059.20; do you find any inventory or other record with which that can be identified? A. I could not find any inventory; the account was not adjusted since the Audit Company's report of March 31, 1911.

Q. And on that latter report of 1911, there was an adjustment of that item? A. Yes, sir.

Q. What was the next adjustment appearing on the books; when you speak of "adjustment," what do you mean by that? A. They adjusted the books up to that date, according to the inventory; they brought it down to the actual coal on hand; there was another adjustment in August, 1914.

Q. What entries were made then affecting the item of coal on hand? A. They made a journal entry, crediting the account with $29,782.71, which covered the leakage, as they called it, for the 41 months previous.

Q. Now, before making that entry, what was the amount shown to be, according to the books, coal on hand? A. $17,059.20, April 30, 1912.

Q. I mean, before making the entry of August, 1914, what was the amount of the items of coal on hand? A. I did not figure that out.

Q. What was the basis of this, so far as you could tell from the books, of this item of leakage entered in August, 1914; did you look it up? A. Yes, sir; that was the leakage from the last adjustment.

Q. What do you mean by "leakage"? A. It is shortage in the tonnage.

Q. How did you ascertain that? A. Simply from that journal entry.

Q. Is that described as "leakage"? A. They simply called it "adjustment," and Miss Maloney explained what it meant.

Q. You turn to the journal and read that entry. A. (Reading.) The date is August 31, 1914; "Adjustments made on stock—stock record book, August, 1914—see detailed information in (M. J. E.), memorandum filed for August, 1914" and the total is $29,782.71.

Q. And is there an entry on the book to show how that is divided? A. Yes, sir.

Q. How is it? A. "J. C. $26,955.95; Harlem, $2,826.76."

Q. Now, what was that item credited to, what account? A. The purchases.

Q. And the effect of that then was, to reduce by that amount the debit balance in the purchase account? A. Yes, sir.

Q. Is that the account which shows the stock on hand? A. Yes, sir.

Q. And what period do you say that entry covers? A. It does not state what period, but they made periodical adjustments—

Q. What is the last adjustment prior to that date? A. On March 31, 1911.

Q. Was there any way of telling whether they had horse feed, $2,978.72 on hand, as shown by this statement? A. No, sir; there was not any inventory.

MR. ENRIGHT: I would like to offer this tabulation.

MR. LEAKE: I see no objection, subject to verification on inspection by us.

MR. ENRIGHT: These are the claims filed in bankruptcy.

MR. WALL: Are not they all since the mortgage and the issue of the bonds? It will save us a good deal of trouble if we can settle on that.

MR. ENRIGHT: Here is the Erie Railroad, the first item on there is April 11, 1912. The Lehigh Valley is evidently incorrectly stated here.

MR. WALL: That does not show that they were creditors. The mortgage was made 1912; a charge of April 11, 1912, might have been on a 60 days' credit.

MR. ENRIGHT: Do you object to this tabulation?

MR. FISK: You say it is not right yourself.

THE COURT: Who made it?

MR. ENRIGHT: One of the clerk's in Mr. Beach's office.

FURTHER DIRECT:

Q. Mr. Kreuzer, have you looked at the book to see whether John S. Menagh was a creditor of this corporation prior to April 30, 1912?

MR. LEAKE: I object to that, because what difference does it make whether he was a creditor in 1912 or not, when it shows on the statement that his last bill of goods sold was in 1913 or 1914; he may have been a creditor then, but the question alone with that is, whether that debt of 1912 is still unpaid.

THE COURT: I will allow that to go in. Was he a creditor prior to 1912?

Q. Now, what date—how far back does his account go? A. May, 1908.

Q. Do you find that he was a creditor at the time of the bankruptcy?

MR. LEAKE: It is not material whether he was a creditor, but whether he was a creditor with that claim still unpaid.

BY THE COURT:

Q. Do you know whether he was a creditor for that same item? A. I do not.

MR. ENRIGHT: In these fraudulent conveyance cases, for instance, the crucial date is the date when the account is opened. The balance that remains due at the final wind-up of the account relates back to the opening of the account.

MR. WALL: We are not talking about balances of accounts.

THE COURT: The case you have in mind is the rescission case in the Court of Errors, but that deals with a chattel mortgage, which was unrecorded for a year, and which the creditor had no knowledge of.

MR. ENRIGHT: It is a matter of defense, anyway. This witness says he is unable to trace it out as the same item of account.

MR. LEAKE: Then I move that the other question and answer be stricken out.

THE COURT: I will let it stand and note your objection to it for the present.

Is your contention that these accounts, Mr. Enright, that any items standing on an account which is running from any time prior to the giving of the mortgage, which was an unsettled account, stands in the same position as the creditor in the case of a chattel mortgage.

MR. ENRIGHT: My contention is, that those creditors of this corporation now, who were creditors prior to the date of the mortgage, have got a right to challenge this mortgage.

THE COURT: All right.

FURTHER DIRECT:

Q. Did you trace back the indebtedness to the First National Bank of Bayonne? A. Yes, sir.

MR. ENRIGHT: I think that is all.

CROSS EXAMINATION BY MR. WALL:

Q. When did you first see any of the Wertheim books? A. About the time of the failure; I don't know the exact date; September 14, 1914.

Q. That is after the appointment of Mr. Perry as receiver in bankruptcy? A. Yes, sir.

Q. And you were employed by Mr. Enright, the attorney of the receiver, to go and look at the books? A. Yes, sir.

Q. Now, when you mentioned that certain items were charged, or were increased, you don't mean to imply that those were improper increases, do you?

MR. ENRIGHT: Objected to, unless he calls his attention to the items.

Q. Take the item of August, 1907, where there was an increase of $1,750.00 for the blacksmith shop, which was credited to surplus; you don't mean to say that that item was improperly increased, so far as the value was concerned, do you? A. I could not say that.

Q. All you are doing is, to say what the books appear to indicate; isn't that it? A. Yes, sir.

Q. Now, there was an item of $41,035.00 for

improvements, which was credited to profit and loss?

THE COURT: What was the first item he took up?

MR. WALL: The first item he took up was $3,250.00.

Q. Now, directing your attention to these items which I have just read off, your testimony is that nothing appears on the books themselves to indicate the basis for those increases? A. That is right.

Q. But you don't mean to say that there might not be some other basis, some true basis, not appearing on the books?

MR. ENRIGHT: I suppose that is self-evident.

MR. WALL: If you admit it, we will take your admission.

Q. You did not go and look at the stables? A. No, sir.

CROSS EXAMINATION BY MR. LEAKE:

Q. Did you check through the items of cash paid out to see if out of their current cash they paid items for these improvements which have not been charged from day to day, to this account; it might have been lumped after a certain period of time in one amount of $45,000? A. No, sir.

BY THE COURT:

Q. What books did you have that you made this inventory from? A. From the journal and the ledger.

CROSS EXAMINATION (CONTINUED) BY MR. WALL:

Q. Now, then, you spoke of a book which has been designated here as "Bad accounts"? A. Yes, sir.

Q. Now, you don't know when those accounts were assembled under the title "Bad accounts", do you? A. Yes, sir; I can tell you.

Q. Suppose you tell us. A. There is a trial balance book.

THE COURT: You go and look it up.

(The witness steps down and goes to look for it, and having found it, returns to the witness stand.)

THE WITNESS: This "Accounts Receivable" book here gives the dates.

FURTHER CROSS, BY MR. WALL:

Q. Gives what dates? A. The dates when they were first put into this.

Q. What were first put in? A. These accounts considered bad.

Q. Now, when do you say that the accounts considered bad were first assembled under the title, "Bad Accounts"? A. They are all different dates.

Q. Pick out one and show me how you get at it. A. There is one put in, April 1, 1914.

Q. Then, as I understand it, your testimony is, that you don't know when this "Bad Accounts" ledger was first started to be kept under the title, "Bad Accounts' Ledger"? A. No, sir; I don't know.

Q. But, by looking at particular accounts in that ledger, you see a memorandum which leads you to believe that that particular account went

into that ledger at the date that it is stated in that particular account; is that right? A. Yes, sir.

Q. For example: "Account Ascot Hotel" is marked in red ink, "April 1st, to balance, $59.90." You say that that is the date April 1st, 1914, when that particular account was placed in the "Bad Accounts" ledger; is that correct? A. That is not on my list as being bad at that time.

By Mr. Enright:

Q. That particular account is not listed by you in your list of bad and doubtful accounts any way? A. No, sir.

Q. That is one of the accounts which appears to have originated subsequent to April 30, 1912? A. Yes, sir.

Further Cross, by Mr. Wall:

Q. Can you find any account in that "Bad Accounts" ledger which you say was included in a bad account ledger before May, 1912? A. I think I can; here is Harding & McCausland; that was put in here May 1st, 1910.

Q. Now, you say it was put in there? A. Yes, sir.

Q. I am asking you how you know that it was put in a bad account ledger; how do you know that a bad account ledger was kept in 1910? A. I don't know.

Q. Then why do you say it? A. Because, from a custom in accounting.

Q. What is this custom in accounting? A. In accounting they stop balancing it.

Q. Wouldn't they have stopped balancing it if they had kept it in the book called "Good Accounts"? A. No, sir.

Q. Now, then, who of the creditors of the bank-

rupt, of the filed list of creditors, were creditors prior to the date of the mortgage that is under question in this suit, April 1st, 1912; I am not asking you now for the first items of charge, but who were creditors, if you know? A. I have made up a list.

Q. What is your list? A. Here is the first item.

Q. I am not asking you for that— A. Mill Creek Coal Company.

Q. Now, what I am asking you is, first, do you know the names of the persons who were creditors of the Wertheim Company, from an examination of the books, prior or at the date of May 6, 1912? A. Yes, sir.

Q. I am not asking you when the first item of their claims arose, but whether the books show when their credits arose; do you know that; I am not asking for the first item; I am asking you whether you know these things, in the first instance, do you?

MR. ENRIGHT: Objected to.

Q. Did you say you made this list? A. No, sir; I did not.

Q. Well, will you take the books of the L. Wertheim Coal and Coke Company, and point out the name of a creditor who was a creditor of the company on May 6, 1912, for any amount over $1,000.? A. This is the voucher showing entries up to the end of April, 1912, of bills due, Folio 44, I am referring to now; these on the right hand column were the dates of payment; anything that is stamped in April 30, 1912, was due April 30, 1912.

Q. Now, everyone is stamped "Paid"? A. Yes, sir.

Q. Don't pick out any that are paid.

MR. ENRIGHT: The question called for just that situation; he was asked to point out any creditor who had a debt due to him on April 30, 1912.

MR. WALL: That was the first branch of the question.

THE WITNESS: Here is the Mill Creek Coal Company.

Q. Now, that is the only one that you can find whose claim is now unpaid? A. I don't say that.

Q. Now, all those that you have looked at, those creditors' claims, now pick out one that was unpaid at the time of the bankruptcy. A. There are none.

BY MR. ENRIGHT:

Q. Are you sure about that? A. Yes, sir.

CROSS EXAMINATION BY MR. LEAKE:

Q. The item $113,000 for trestle and buildings, which you say you traced back to 1907 and 1908; in all the books for that year, 1909, 1910 and 1911 that item was carried the same, wasn't it? In other words, it did not jump from 1908 to 1912 to this additional amount— A. I shall have to refer to the ledger.

Q. I should like to have you refer to it. A. You mean at the end of each year?

Q. I don't care. A. In 1912 there were about eight or ten items added; it was changed in 1912.

Q. Increased? A. Yes, sir.

Q. Did you trace those items? A. No, sir, I just took the ledger account, that is all.

Q. Were these extra items added in 1912 before or after the date of those two statements that you were testifying about? A. Some of them were added before April 30th, and some not.

Q. Why didn't you then give a correct state-

ment of what the books show, for, I understand you to say the books show $113,000. as the statement represented. Now, you found that some of these extra items added in 1912 were added just before that statement. How much did they increase the value of this trestle and buildings? A. $1,503.49.

Q. So that, when you testified in court that the value of the trestle and building should be reduced down to $71,000. you did not take into consideration those items that had been added, did you? A. I have taken everything in up till that date—

Q. Everything into account? A. Yes, sir.

Q. Don't you know, as a matter of fact, that it is common practice in many businesses to collect at various periods of time the items which have been spent in the development and the improvement of their plant, and then journalize them in one entry? A. Yes, sir.

Q. Over a year? A. Yes, sir.

Q. Well, you knew that was the practice in many concerns, didn't you? A. Yes, sir.

Q. Did you make any inquiry to determine whether that was the practice of the Wertheim Company? A. Only from what I got from the books.

Q. Well, you got from the books the fact that there had been some improvements made on a trestle, didn't you? A. It simply stated "improvements."

Q. Did you go at the books in a sort of prejudiced way, or when you saw the word "improvements," it came to your attention right away that that merely said "improvements," and you paid no attention to it; is that what you say? A. There was not any reference made as to where the detail was to be found.

Q. You saw the word "Improvements," under the heading "Trestle and Building," didn't you? A. Yes, sir.

Q. What did that indicate to you—that the trestle and the buildings had been improved? A. It naturally would.

Q. Then why didn't you investigate the items of cash paid around about that time, or before that time, to determine whether payments had been made for improvements on that trestle and buildings? A. I said before, the books were not on hand prior to that time—1908.

Q. (By the Court.) Is that the last book you could get hold of? A. Yes, sir.

By Mr. Leake:

Q. What about the items of improvements that were made between 1908 and 1912; did you follow those up? A. I only took the ledger account.

Q. You did not go into the journal at all? A. No, sir.

By the Court:

Q. How many books did they keep? A. A ledger, a journal and cash receipts and cash disbursements.

By Mr. Leake:

Q. So, this testimony you are giving is merely from the ledger, without any examination of the cash book or the journal? A. Yes, sir.

Mr. Leake: I merely want to have some testimony which will show how much reliance can be placed on a hurried, incomplete examination made by this witness.

The Court: It is very important.

Q. Now, when you spoke of an adjustment of

coal on hand, you referred to an adjustment made by the Audit Company? A. Yes, sir.

Q. And many of these items that you referred to, both prior to 1908 and after 1908, horses and coal on hand, and improvements, were many of them referred to in the adjustment made by the Audit Company of New York? A. Yes, sir.

Q. So that when you approached these books and took them before you, how many days did you spend on them? A. Saturday and Sunday.

Q. You saw this audit of the New York Audit Company? A. Yes, sir.

Q. How long do you suppose it took them to make that audit? A. It probably took them a week.

By the Court:

Q. How many men? A. I suppose three men.

Q. And you spent a night and a day—Saturday and Sunday? A. Yes, sir.

Further Cross Examination by Mr. Leake:

Q. Now, why didn't you change the adjustment that the Audit Company had made when they started out with this new system of bookkeeping, and with the balance that they found in their examination; why did you go back of that? A. Because they found irregularities, and they reported them in their report.

Q. And didn't they correct those irregularities by this adjustment? A. I could not find them so.

Q. Didn't they so state in their report? A. No, sir.

Q. Didn't they state that they had made these adjustments? A. To some extent, but not the total.

Q. Did you trace back then all the items that

you had been referred to in the Audit Company's report, being adjusted? A. No, sir, I did not trace all of those back.

Q. You did not follow that back at all? A. No, sir.

Q. Has the Audit Company a good reputation? A. Yes, sir, I guess so; I don't know much about them.

Q. You never heard of the Audit Company of New York? A. Yes, sir, I have.

Q. Favorably? A. Yes, sir.

Q. Are they a pretty large concern? A. Yes, sir.

Q. Of good reputation? A. Yes, sir.

Q. About the largest, are they not? A. One of the largest.

Q. And one of the best? A. Yes, sir.

Q. That is all.

RE-DIRECT EXAMINATION BY MR. ENRIGHT:

Q. Didn't you work on these books previous to the examination you made this last week? A. Yes, sir.

Q. When? A. At the time of the bankruptcy.

Q. When was that? A. September, 1914.

Q. And how long were you working on them then? A. About two weeks.

Q. And after that did you make a later examination and report for the trustee? A. Yes, sir.

Q. How much later? A. Probably about three or four months.

Q. How long were you working on the books then? A. January 5th to the 15th.

Q. How long were you working on them then? A. It took me a week.

Q. In the course of those two examinations, or

rather, in the examination which you made this week, did you use any of the material that you had developed on the previous examination? A. Yes, sir, I referred to it.

Q. Now, I show you a book, marked "Monthly Trial Balances"; do you recognize that book? A. Yes, sir.

Q. What is it? A. General ledger trial balance book.

Q. Of this Wertheim Company? A. Yes, sir.

Q. That is one of the books you found? A. Yes, sir.

Q. That began May 1, 1907, and goes down to May 1, 1909, doesn't it? A. Yes, sir.

Q. According to that, what was the balance carried against the plant account May 1, 1907? A. That is $65,200.00.

MR. LEAKE: Now, of course, at this point, in all those periods prior to 1909 we are not interested in this concern prior to that date.

THE COURT: I will permit this testimony to go in.

FURTHER RE-DIRECT EXAMINATION:

Q. The item "Plant. $65,200.00," continued, unchanged, according to this trial balance book, until when? A. Until September 1, 1907.

Q. And then what did it become? A. $70,200.

Q. That is an increase of an even $5,000? A. Yes, sir.

Q. And it continued at that figure how long? A. Until March 1, 1908.

Q. And then what did it become? A. $75,200.

Q. That is an increase of an even $5,000? A. Yes, sir.

Q. And how long did it continue at that figure? A. Until May 1, 1908.

Q. Now, according to the balance, the trial balance, the monthly trial balance of May 1, 1908, what was the figure? A. $75,200.

Q. And on the next page? A. $116,235.00.

Q. The next page is a balance sheet, a general balance sheet of May 1st, 1908? A. Yes, sir.

Q. The same date? A. Yes, sir.

Q. And what is the plant account? A. $116,235.00.

Q. That is on May 1st, 1908, according to the monthly trial balance, that account stood at $75,200? A. Yes, sir.

Q. And on the same date, when the balance sheet was written up, it became $116,235.00? A. Yes, sir.

Q. Were you able to find any book which showed the detail for that increase? A. No, sir.

Q. Did you look? A. Yes, sir.

Q. In fact, was not that one of the things that you were expressly instructed to look for in the examination you made in January, 1915? A. Yes, sir.

BY THE COURT:

Q. What were your directions when you made these various investigations as to what you were to ascertain; what were they made for? A. To find out how the assets of the corporation originated.

Q. That was the direction? A. Yes, sir.

Q. Did you make a report? A. Yes, sir, this is the report.

FURTHER RE-DIRECT EXAMINATION BY MR. ENRIGHT:

Q. And you have that written report before you? A. Yes, sir.

Q. And this report to which you are now referring, is your report to the trustee, dated January 5, 1915, isn't it? A. Yes, sir.

MR. LEAKE: There must be some limit to this sort of thing, for in the leading case of the Music Box Company, the Court said there, that in a suit brought by a creditor interested in upsetting a chattel mortgage, the Court said, that "We are not going to go back and inquire at various stated periods in this company's history what the condition of their assets or liabilities were."

THE COURT: The question is perfectly competent, and is a proper question to put to the witness for the purpose of ascertaining the nature and extent of his investigation of the books. Supposing he rests on that alone, it would be admissible.

MR. LEAKE: Supposing he does find out the fact which he is about to testify to; what difference does it make, what bearing has it on this controversy; how are we interested in it? This stuff that he is testifying about is in 1907. We came in in 1909; the mortgage was made in 1912. Now, we don't care what existed in 1907; we came in with a statement submitted to us by the treasurer of the company, giving its assets and liabilities; what difference does it make to us whether some man added $5,000 to the trestle and buildings in 1907; it has no bearing on us, and the question in this case is not what happened in 1907 or 1908, but what happened in 1912, and what conditions existed in 1912. (Continues argument.) It seems to me that the whole purpose of this thing is to sedu-

lously bring about a lot of things that look more or less suspicious. Someone added $5,000 to the trestle account.

MR. ENRIGHT: The object of the testimony is this: The books show in 1912, the plant and trestle account carried at $116,000. The testimony of this witness tends to show that that plant and trestle account was arbitrarily inflated in 1908. He finds these items in the ledger without anything to support them at all. The items are found in the ledger. This analysis—and we are concerned here with the process of analysis—starts with the item which we desire to analyze. I want to analyze this item. We start out with the assets which the company claims, of $116,000. Now, naturally, we are inquiring what are the component elements that make up that item. We must go first to the ledger. That gives you the key to trace the thing down and back to its source. As I understand the witness, there is nothing in the book at his disposal—that is, there is nothing in the ledger to indicate that the item originates in the journal nor in the cash account.

THE COURT: He said in his cross-examination in reply to Mr. Wall's question, that the examination that he made was of the ledger; and I asked him if he examined any other book, and he said, "No, I have not."

BY THE COURT:

Q. When did you make your examination, and when were you directed to make your examination to ascertain these figures of increased amounts that you speak of, like $117,000? A. In January, 1915.

Q. Have you, in your statement of accounts that you have on your desk, any analysis of these items? A. Yes, sir.

Q. You have? A. Yes, sir.

FURTHER RE-DIRECT EXAMINATION BY MR. ENRIGHT:

Q. Now, turn to the ledger where this entry of February, 1908, "Improvements, $41,035.00" occurs. A. (Witness does so.)

Q. Is that the ledger? A. Yes, sir.

MR. LEAKE: Folio 1, apparently.

Q. Will you read the entry you find there, just as it is? A. "Improvements, $41,035.00."

Q. And that is a debit entry to plant account, isn't it? A. Yes, sir.

Q. And no date at all? A. No, sir.

Q. It occurs between the entry next above February, 1908, and the entry next below May 1, 1908, doesn't it? A. Yes, sir.

Q. Now, turn to "Improvements"; is there any such account by name? A. No, sir.

Q. Where do you find the contra-entry?

THE COURT: What do you mean by that?

MR. ENRIGHT: The against entry.

A. In profit and loss account, page 125.

Q. And what is the entry there? A. It is credited to profit and loss, $41,035.00.

Q. Just read the entry? A. There is not any entry; that is all.

Q. When you found an item like that, did you follow it down and try and analyze it and try and find out what it was made up of? A. I could not follow it.

Q. Isn't it customary in making investigations

of books for the expert when he finds an item in the ledger, to go back to the journal and day book and cash book, and find out what makes it up? A. Yes, sir.

Q. But with these books you could not do it? A. No, sir.

Q. Did you endeavor to locate the other books of the system, as of that date? A. Yes, sir.

Q. What did you do? A. If there were any other books.

Q. Whom did you inquire of? A. Well, the time I made this up I was alone and did not inquire of anyone.

Q. Did you next endeavor to locate any other book that might have a bearing on those entries? A. I have looked through all the books the trustee has.

Q. Have you asked the bookkeeper? A. I think I asked the bookkeeper.

Q. Will you take the item on your account, February, 1908, "Stables, $5,000,'" just read the entries as they exist on the books. A. The plant account was debited February, 1908, "Stables, $5,000," and surplus account, folio 71, was credited; February, 1908, folio 3, $5,000.

Q. Now, did that last entry operate to increase or decrease the surplus? A. It decreased the surplus.

Q. So, the effect of those two items, then, was to decrease the surplus and add it on the plant? A. Yes, sir.

Q. Go back to the $41,000 item. A. Yes, sir.

Q. Was the effect of the entry into profit and loss account to increase or decrease profit and loss? A. It decreased it.

Q. It decreased the profits? A. Yes, sir.

Q. Is not that a credit? A. It increased the plant and reduced the profits.

MR. WALL: One hand washed the other.

THE WITNESS: One balanced the other.

Q. Now, take the items of stables and blacksmith shop, in 1907. A. The plant account, page 3, August, stable $3,250.00 debit. August, blacksmith shop, $1750.00 debit.

Q. And the entries against that? A. Surplus account, page 71, credit August, stable $3,250.00. August, blacksmith shop, $1750.00.

Q. Now, did those entries increase or decrease the surplus? A. They decreased the surplus.

Q. You cannot say, of course, from the books, whether there was any revaluation or re-appraisal, can you? A. No, sir, I cannot.

Q. Can you say whether or not these increases in plant came through expenditures made through the cash? A. I cannot.

Q. Is there a cash account? A. No, sir.

Q. There is a cash account in the book? A. Yes, sir.

Q. And there is nothing that comes out of that cash account as it appears in the book, to go into these improvements, stable and blacksmith accounts, is there? A. There is no detail there—I cannot say.

Q. The account is debited on one side and credited on the other? A. Yes, sir.

Q. Now, a debit in the plant account would be a credit on the cash account, if that increase being debited in the plant account, represented items paid through the cash, wouldn't it? A. It would be included in this amount.

Q. Now step down and turn to this voucher register; was the Lehigh Valley Railroad Company a creditor of this corporation April 30, 1912? A. Yes, sir.

Q. Was it a creditor May 6, 1912? A. Yes, sir.

Q. This particular account you are looking at shows a claim of how much? A. $1015.31.

Q. Paid or unpaid? A. Unpaid May 6th.

Q. When was it paid? A. 1912, paid May 10, 1912.

Q. It is paid May 10, 1912? A. Yes, sir.

MR. WALL: I object to the introduction of any of these creditors whose claims have been paid.

MR. ENRIGHT: The Lehigh Valley Railroad Company is a creditor at the present time for seven or eight thousand dollars; they owed them money all the time. I claim that they are in a position—in the first place, I claim that a trustee in bankruptcy—and this is entirely well settled—is entitled, under the last amendment, to what is called the most favorable creditor position; he has the right to pick out any creditor here, and he has got every right, representing the estate, that that creditor would have if he was suing alone.

MR. WALL: That is a different proposition; but he has not the right to take a man who is a creditor now, and who happened to have a paid credit years before, and tack together those two accidental incidents.

MR. ENRIGHT: I would like to withdraw this witness for a little while.

MR. CLARKSON HOWARD SLATER, sworn in behalf of the Trustee in bankruptcy, testified as follows:

DIRECT EXAMINATION BY MR. ENRIGHT:

Q. You live here in Jersey City? A. Yes, sir.

Q. You always have lived here? A. Yes, sir.

Q. What is your business? A. Real estate.

Q. How long have you been in that business? A. 29 years.

Q. What locality particularly? A. Lafayette section.

Q. Do you know this coal yard of the Wertheim Company? A. Yes, sir.

Q. Were you familiar with that property before it was improved with this coal yard? A. Yes, sir; not intimately.

Q. How near to it are you? A. About five blocks.

Q. Do you pass it daily? A. Yes, sir.

Q. What was the physical condition of the property before this coal yard improvement? A. It was swamp land, cattails growing on it.

Q. Was it much below the present level? A. I don't know that it was; but it was all swamp land with a deep meadow underneath, and still is, although it has a top dressing.

Q. You are speaking now of a matter of your own knowledge and recollection? A. Absolutely, yes, sir.

Q. Now, Mr. Slater, have you bought and sold land of that general character in that locality? A. Yes, sir.

Q. Are you familiar with other sales and purchases in that general locality? A. Yes, sir.

Q. Do you know the value of that land as of April 30, 1912?

MR. WALL: Do you attempt to qualify him as a witness as to the value of the land with a coal trestle on it?

MR. ENRIGHT: No.

MR. WALL: I object to his qualification without cross-examination; I would like to cross-examine him as to his qualification.

CROSS EXAMINATION BY MR. WALL:

Q. Did you ever buy and sell a coal yard? A. No, sir.

Q. Did you ever sell coal? A. No, sir.

Q. Do you know anything about the tide water rates and the free lighterage limits in the harbor now? A. No, sir.

MR. ENRIGHT: The main point of the case is, whether or not this company was solvent on April 30, 1912; whether it was solvent or not depends upon a comparison of its assets with its liabilities. Now, one of the valuations is leasehold—$135,000. Whether that leasehold was valuable or not, if, for instance, if the rent that the company was paying for the use of the land was the exact equivalent of the use it got, then the leasehold is of only nominal value. If the amount of rent which was being paid, was very much less than the rental value, then it was a profitable lease, so long as the two things about evenly balance, it was a *quid pro quo,* but here I am attempting to bring out evidence whether or not the rent reserved under the lease was a fair balance for the rental value which the company got; or whether the rent reserved was very much less than the real rental value, and if less, how much less, and capitalize that sum.

MR. LEAKE: The difficulty with that theory is this: That the question is the value of the leasehold—not the value of the land—not the amount of rent.

THE COURT: I shall rule that any testimony he may give as to the value of the land is immaterial.

MR. ENRIGHT: I think I ought to have the benefit of it; I cannot see any other way of reaching a rental value. Wherever it comes in issue as a thing to be proved in any Court of law what is the fair rental value of real estate, it seems to me the very best evidence must be—what is the land worth; rent is merely the equivalent for the use of the land.

MR. WALL: We think this question is settled, or *res adjudicata* by the case of *Commercial Trust Company vs. Wertheim.*

MR. ENRIGHT: Now, for instance, in trying to find out what is a fair rent for a flat house, for instance,—whether it is paying a fair return on the investment—

THE COURT: Supposing you did ascertain all this; what has it to do with this proceeding here?

MR. ENRIGHT: To show whether $135,000 was the value of that leasehold or not; that is the point. If, through a process of depreciation, the rental value of a store drops down during the continuance of a long-term lease, that leasehold is not worth anything, but it is a liability. Why? Because the value of the use which the tenant has is less than what he has to pay under the lease. Conversely, where you are going to have—where a lease is profitable—where it has an asset value, it must be because the value of the use and occupation—the rental value—what the property could rent for at the very time is more than what the tenant has to pay. If a tenant has a rental value of $1,000 a year, and he only has to pay $500 for it, he has a profit in that lease of $500 a year; and if the lease has ten years to run—

THE COURT: I want to know whether this has any bearing upon the case we have before us here.

MR. ENRIGHT: It has this bearing, sir: if we can show that this lease is valueless, why, then the assets item of $135,000 disappears.

MR. LEAKE: Not at all.

MR. ENRIGHT: I am addressing my argument to April, 1912, which is the crucial date.

THE COURT: I will admit it for the present, and will deal with it on final hearing. You are asking the witness what the value of the land was. I will allow the answer.

FURTHER DIRECT EXAMINATION BY MR. ENRIGHT:

Q. What was the value of the land?

MR. LEAKE: I object, on the ground that it is immaterial and irrelevant.

MR. WALL: I make the same objection, on the ground that the inquiry should be directed to the value of the leasehold and not to the bare land value; this is not a condemnation.

THE COURT: I am inclined to agree with you. I shall deal with it before I dispose of the case; and if it is necessary for you to bring another expert, I will permit you to do it. My present view of the case is, that it is immaterial.

Q. I will ask you to give your opinion of the value of this land in the condition in which it existed before the improvement—

MR. WALL: It ought to be the bare land value.

Q. Will you state your opinion of the value of that land as of April 30th, 1912, considering it as bare land, without any of the improvements which were put upon it in developing this coal yard—taking into consideration its proximity to the railroad—to the streets of the city—to the ferry, and all elements which, in your judgment, go to make up, to influence the value of that land.

MR. LEAKE: Objected to, because, in the cross-examination of his qualification as an expert, he said that he had no knowledge or experience whatsoever, either personally or through other sales of coal yards, or the value of that land for a coal yard; he might say what it is worth for a grocery store or something else.

THE COURT: Reframe the question.

Q. Mr. Slater, have you examined the two leases from the Lehigh Valley Railroad to the L. Wertheim Coal and Coke Company, dated respectively, in 1906 and 1908, for the purpose of ascertaining the exact dimensions of the land covered by those leases? A. I have.

Q. You are familiar with the location of that land? A. I am.

Q. Will you give your opinion of the value of that land as of April 30th, 1912, considered as bare land, without any improvements upon it? A. I find the land consists of 3 19-100 acres, which, in my opinion, is worth $20,000 an acre, as of that date, making a total valuation of $63,800.00. May I say how I arrived at that?

Q. What, in your judgment, as of that date, would have been a reasonable ground rent for that land, not taking into account the taxes; that is to say, the tenants paying the taxes?

MR. LEAKE: Objected to.

THE COURT: The objection is sustained.

CROSS EXAMINATION BY MR. LEAKE:

Q. In determining that value, you have based your price on a sale between an owner who is willing to sell—you have not based it on the value that might be created by an owner who is unwilling to sell, like the Lehigh Valley Railroad? A. No, sir.

Q. So that, your value might very materially differ with respect to that land, if you were fixing a value in a place where it was owned by the Lehigh Valley Railroad Company, and they did not want to sell? A. I base my calculation on an actual sale which I did make.

CROSS EXAMINATION BY MR. WALL:

Q. What did the Lehigh Valley Railroad have that land assessed for by the State taxing authorities? A. $57,000 on the land, and $17,000 on the buildings; that is for this year. Last year it was $55,000 and $17,000, making a total of $72,000.

Q. How did you arrive at that assessment? A. I got it from the books.

Q. Is the assessment on this exact parcel as described in the lease? A. Yes, sir.

Q. And that and no other? A. Yes, sir; it is bounded by two streets and the Lehigh Valley Railroad.

Q. You think it is worth more than that? A. Yes, sir.

Q. You have given us the market value, assuming a willing seller and a willing buyer? A. Yes, sir, absolutely.

Q. Assuming that this was in the market for

sale? A. Yes, sir, and for a similarly situated piece of property within a certain distance of this property.

Q. Is there any other parcel of land except this one of three acres and a fraction on the Lehigh Valley? A. Well, I sold one in June, 1912, a similar piece in June, 1912, consisting of two acres and 18-100 acres, for $50,000; that was at the rate of $22,935.00 an acre; this land is not near as good as the land I speak of, because the land on Johnson Avenue, where I sold it, is solid land, and the other is swamp land.

Q. Good for what? A. For building. I base it on its use for manufacturing purposes.

Q. This soft land diminishes very much the value as compared with fast land, in your judgment, doesn't it? A. Yes, sir.

Q. Because it is a poor foundation? A. Yes, sir.

Adjourned until Tuesday, November 23, 1915, at 10. A. M.

Joseph A. Kreuzer—Re-Direct.

Continuation of the taking of testimony in the above-entitled cause, at the Chancery Chambers, Jersey City, New Jersey, on Tuesday, the twenty-third day of November, 1915, before Hon. Vivian M. Lewis, Vice-Chancellor.

Same appearances as before noted.

JOSEPH A. KREUZER, resumes the witness stand.

RE-DIRECT EXAMINATION (continued) BY MR. ENRIGHT:

Q. Mr. Kreuzer, will you turn to the page of the ledger in which this $41,000 item of "plant" was entered? A. Page 3 of the little red covered book, marked "Ledger."

Q. And the cross entry is on what page? A. Page 125.

Q. Heading is what? A. In the "Profit and Loss."

Q. Now, in the profit and loss account, are there a number of other entries which appear to have been made at the same time and under the same date? A. There is not any date for this entry; there is a number of entries made in that account under the same date, at the top, April 30th.

Q. And do you know whether that was the date for the closing of the fiscal year, as the books were run at that time? A. Yes, sir.

Q. April 30th? A. Yes, sir.

Q. Now, upon the left-hand side of this ledger page, what do the other items there indicate, for instance, "Merchandise, $127,890.43?" A. That represents the purchases for the year.

Q. The aggregate of the purchase account? A. Yes, sir.

Q. And by referring to the purchase or merchandise account, you would find the corresponding entry to that? A. Yes, sir, it is in this book.

Q. Now, likewise, do you find these other items entered on the left-hand side as of that date, to be the closing entries of those particular accounts to which reference is made there? A. Yes, sir.

Q. Now, all of these items entered under that date are debits, except how many items? A. There are four items.

Q. That are not debits? A. That is right.

Q. And the big item of credit is what? A. That is the sales for the year, $313,620.72.

Q. Now, this item of "Plant, $41,035.00" is entered as a credit? A. Yes, sir.

Q. And lease, $17,500? A. Also entered as a credit.

Q. And the credits, summed up, result in exactly balancing the debits, don't they? A. Yes, sir.

MR. ENRIGHT: I offer this book in evidence, and particularly page 3, being the plant account and pages 125 and 126, being the profit and loss account.

BY THE COURT:

Q. Where did you get the book? A. I got it in the Wertheim plant when I made the statement of affairs.

FURTHER RE-DIRECT EXAMINATION:

Q. Did you get that on the occasion of your first examination of the books? A. Yes, sir; Mr. Louis Wertheim gave me those two books, and said, "You will probably have use for those."

Q. Do you remember the month of September in 1914? A. Yes, sir.

Q. At that time you went up there under a joint arrangement with Mr. Cook, the Chancery Receiver, and Mr. Perry, the bankruptcy receiver? A. Mr. Perry—I went up for Mr. Perry.

Q. And at that time did you familiarize yourself with what books there were up there in the office? A. Yes, sir.

Q. Which Mr. Wertheim did you just refer to? A. Mr. Louis Wertheim.

MR. ENRIGHT: He died last week, your Honor.

Q. At that time did you see any Journal corresponding in period with this ledger you have just referred to? A. No, sir.

THE COURT: I guess it is sufficiently identified unless you want the bookkeeper to identify the book. If there is no objection, it will be received.

Marked "Exhibit E-17."

Q. Were you in charge of the office, Mr. Kreuzer, at the time the books were removed from the coal office to the room of the Jersey City Trust Company? A. No, sir, I was not.

Q. Now, have you made an examination of the books for the purpose of ascertaining the amount of liabilities, as shown by the books at the time of the failure? A. Yes, sir.

Q. Will you state the amount, please?

MR. LEAKE: I object to that as entirely immaterial and irrelevant.

MR. FISK: We will admit the company had creditors at that time.

MR. WALL: A case like this always has a strong element of unfairness, anyway, because the directors have these things come

before them, and they pass on them; then comes an acute and merciless counsel, and he studies it through the port-hole of the failure, and he looks back and examines all their acts, and tries to find out where they have slipped, and then he produces his case in court in this way. Now, to pile on the top of that obviously unfair method, which we cannot avoid, which is incident to an examination of this kind, to pile on that the method of judging their acts in 1912 and prior thereto, of the financial condition of a plant that failed in 1914, is absolutely wrong.

THE COURT: What is the object of the inquiry?

MR. ENRIGHT: Of course, coming events project their shadows usually, and I think it is material to show a progressive situation.

THE COURT: How can that affect the case presented by your cross-bill? Of course, you claim the act of the corporation in giving this mortgage at the time they gave it, was *ultra vires,* and that at that time they were insolvent. Those are two of the propositions presented by your cross-bill, and, of course, I presume, underlying that is the proposition which you endeavored to develop yesterday in regard to the renting account.

MR. ENRIGHT: The last proposition relates to the *ultra vires* end of it, and not to the other.

THE COURT: If you will give me a reason to put it in now, I will put it in.

MR. ENRIGHT: It tends to show a progressive condition.

THE COURT: I cannot admit it for that purpose at this time; I think I shall have to sustain the objection.

MR. ENRIGHT: Now, I offer in evidence the original proofs of claims filed in the bankruptcy proceedings in 1914. Those creditors are the *cestuis que trustent* for whom this trustee is acting, of course.

MR. LEAKE: We make the same objection.

THE COURT: I understand that.

MR. LEAKE: No man, or company, can be adjudged a bankrupt unless there are three creditors whose claims aggregate $500.00, and the fact that he is a trustee clearly implies that there are three creditors.

THE COURT: Supposing there was a composition?

MR. LEAKE: There must be creditors in order to file a petition in bankruptcy. Now, we are not interested in twenty or thirty different accounts here. (Continues argument.)

MR. ENRIGHT: I want to show that the identity of the present creditors, who have proved claims—

THE COURT: Supposing you show one or two of those, without going after every creditor.

MR. ENRIGHT: I think I need an orderly procedure to offer these claims, if they are ruled out.

MR. WALL: He maintains that there are certain of those claims there that are held by the same persons now as held other claims prior to the mortgage. He does not maintain that there were any of these claims that were existent before the mortgage.

MR. ENRIGHT: That is exactly what I do claim.

MR. WALL: Then I call on you to pick out

the ones that you refer to. If there are any claims in that bundle which were claims before the making of the mortgage, I call on him to pick those out and not dump this lumber into the case.

MR. ENRIGHT: Now, I have made an offer.

THE COURT: I will rule them out for the present; I regard them as immaterial.

MR. ENRIGHT: I now offer specifically claim No. 92, being one of the claims included in the last offer,—claim of Lehigh Valley Railroad Company. This is a claim for balance due on a miscellaneous lot of transportation charges, demurrage service claims.

Counsel makes an examination of the papers.

MR. LEAKE: Will you turn to the ledger account of the Lehigh Valley Railroad books?

THE COURT: I am inclined to receive that for the present, anyhow. I will receive it for the present.

Marked "Exhibit E-18."

THE COURT: Did you examine that case I spoke to you about, Mr. Enright, *Meding vs. Roe?*

MR. ENRIGHT: No, sir. I now offer in evidence claim No. 90, filed in the bankruptcy proceeding, being the claim of the Erie Railroad Company, for $2,955.34, being one of the claims included in the blanket offer previously made.

THE COURT: Suppose I receive that and give you an opportunity to object to it later?

MR. LEAKE: It had better be admitted subject to cross-examination and objection.

THE COURT: All right.

Marked "Exhibit E-19."

MR. ENRIGHT: I offer in evidence monthly trial balance book covering the period May 11, 1907, to May 1st, 1909, being the book from which the witness cited yesterday, but which was not offered in evidence.

MR. LEAKE: I object to that as being entirely immaterial as to time.

THE COURT: It is material to the issue, if Mr. Enright is going to insist on his proposition.

MR. ENRIGHT: This covers the period covered by this $41,000 item, and shows how it is made up.

THE COURT: I will allow it for that purpose.

MR. ENRIGHT: It shows how these aggregates of these different accounts were treated in the trial balance book before and after the entry which Mr. Kreuzer has identified by the April 30th, 1908 entries; and having a further bearing on another item, in that same capacity, of entries made at that time. I call your attention to the fact, for which I offer it, that the leasehold was already at $117,500.00 on May 1st, 1908, on the monthly trial balance; and on the yearly balance sheet of the same date, reaches $135,000, which you will note exactly corresponds with the item shown in the ledger here of $17,500, credit to leasehold account used to balance, which ties up with the offer made of the ledger, page 125, old ledger.

MR. LEAKE: Because Mr. Kreuzer has made an analysis of some book, some accounts, at a time so far prior to the time when these defendants were directors of this company, and are entirely immaterial so far as the

question of liability of these directors is concerned, is that any justification for Mr. Enright bringing a lot of papers which merely support these immaterial—

MR. WALL: He does not show that this is brought to the notice of these men in any way.

THE COURT: I do not hold that that is necessary.

MR. WALL: If this is admitted, should not it be admitted with the understanding that it is not evidential in any way as against these directors?

THE COURT: I do not take it for the purpose of holding it as evidential against the directors at all, because I understand that some of these directors, Mr. Delano and others, came in after Mr. Payne—came in after these transactions.

MR. WALL: Should it not go in expressly subject to that?

THE COURT: I am receiving it; it identifies by title and by figures an item dealt with from year to year by this corporation. It describes a certain amount and it describes it under the head of "Profit and Loss" in 1908.

MR. WALL: It is altogether immaterial, it seems to me.

THE COURT: I am inclined to think it is, but I am going to let it in for the present. It certainly cannot bind the directors that came into office in 1909, in December, 1909.

BY THE COURT:

Q. This appeared in the trial balance on the same page that it did in the profit and loss account, is that right? A. Yes, sir.

Marked "Exhibit E-20."

MR. ENRIGHT: The Erie is marked "Exhibit E-19"; and the Lehigh Valley is "Exhibit E-18," and the present offer is "Exhibit E-20."

Q. How far did your examination continue? A. April 30, 1908; then, later on, I made a statement of affairs for the receiver.

Q. How late to? A. To the date of failure.

Q. 1914? A. Yes, sir, September 17th.

Q. That is the final statement? A. Yes, sir.

Q. Now, what period does that final statement cover—your final statement of the accounts? You say you made an examination up to 1908; what is the other period you made an examination from? A. From the beginning of this book 1907, May, 1907.

THE COURT: All right, go ahead.

MR. ENRIGHT: I now offer to prove that among the creditors who have proved claims in the bankruptcy proceedings there are a number, the identity of whom I offer to make specific, who were creditors prior to the execution of this mortgage.

THE COURT: You now offer to prove that creditors at the time of the giving of the mortgage, were creditors at the time of the failure?

MR. ENRIGHT: I now offer to prove that among the creditors who have proved claims in the bankruptcy proceedings are a number who were creditors at and prior to the date of the execution of the mortgage.

MR. LEAKE: I object, unless he shows that these creditors had claims, existing and unpaid at the time of the execution of the mortgage; otherwise, it is immaterial.

THE COURT: I do not see in what view of the case that can be material.

MR. ENRIGHT: It is a running account, sir. I take it that if two merchants are dealing together, and one rendering monthly statements, which are paid—subsequently a new purchase is made—the mere fact that the check is sent which paid specific statements, does not take it out of the running account category.

THE COURT: If the corporation owed Smith $100 in 1912, when it gave this mortgage, if that debt still existed in 1914, of course, we know the mortgage would be subsequent. I am inclined to still rule that it is immaterial.

MR. ENRIGHT: This phase of the case, as I view it, is germane only to the Isenstein and Dann proposition.

MR. LEAKE: Have both of these books been offered, Mr. Enright?

THE WITNESS: No, sir.

MR. LEAKE: Which is the one that has been offered?

THE WITNESS: This one that has been marked "Exhibit E-17."

RE-CROSS EXAMINATION BY MR. LEAKE:

Q. Calling your attention to the plant account on page 3 of "Exhibit E-17," what is the value of that plant, at the end of February, 1908, as shown on this book? A. That would be $116,235.-00.

Q. What was the valuation, as shown by this book, of the plant in 1909? A. $117,586.02.

Q. What was the value of the plant, as shown by this book, on May 1, 1910? A. $114,000.

Q. Now, when you made the examination of this exhibit, "E-17," which is the red covered book, did you find among the books of the company any book showing the items of the plant with the valuation placed on each item? A. I found a book of a later period, yes, sir.

Q. I show you a book, marked "Analysis of Fixed Assets, No. 1, L. W. C. & C. Co.," which has on page 2 an item marked "Analysis of buildings and trestles," under date of June 30, 1911; did you come across that in making your examination? A. Yes, sir.

Q. Did you check up the items shown there under "Analysis of buildings and trestles"? A. The book that refers to is missing.

Q. I asked you if you checked up the items on that book? A. As to totals, yes, sir, I added the totals.

Q. Did you examine the cash items to determine whether the amounts represented as the cost of the various items of buildings and trestles, were paid by the Wertheim Company? A. No, sir, I just took the totals at that period; that is the appraisal at that time, June 30, 1911.

Q. Where do you see anything that indicates that it is an appraisal? A. It says, "Details, cost of buildings, trestle, etc."

Q. It says the "Cost of buildings in the appraisal"—why should you be so anxious to say that that represented an appraisal, instead of the actual cost of the building? A. I just made an error.

Q. Did you check up the items shown on this page 2, marked "Details of the cost of buildings and trestles," to determine whether those items

represented the cost to the Wertheim Company of the articles referred to there? A. No, sir, I did not.

Q. What time did your examination of the books conclude; what date did you finish it to? A. September 17, 1914.

Q. In making your report, why didn't you explain these items shown on the red book, by a reference to this analysis? A. In making my report to the receiver?

Q. Yes. A. I was simply to make a statement of affairs; I was not to make an audit of the books.

Q. Didn't you testify yesterday to the effect that there were some items represented by one item of $41,000, which were objectionable, and you found no details of the cost of the buildings and trestle? A. That was not included in this statement of affairs report; it was a later report.

Q. But didn't you testify yesterday to that effect; didn't you testify yesterday that you had examined a red book and found out from that red book that there was a number of items added to the plant account, which were objectionable? A. Yes, sir, I did.

Q. At the time you made that testimony you knew, however, that there was in existence a book marked "Analysis of fixed assets," which gave the details of the cost of the buildings and trestle, didn't you? A. Yes, sir.

Q. Why didn't you explain yesterday in your testimony that there was a book of the Wertheim Coal and Coke Company which gave the details of the cost of every item which went into their buildings and trestles?

MR. ENRIGHT: Objected to as manifestly

unfair, because, in the first place, it is obvious if you look at this book, that Mr. Leake is talking about an analysis made in 1911—that it does not explain these items that the witness testified to as having been entered into the prior ledger in 1908—this is a subsequent write-up. Now, what the witness testified to yesterday was exactly accurate. He was requested to make an analysis of these capital items and see what they traced back to. Now, he testified yesterday that that item had its genesis back in this little ledger of 1907-1908; that it was carried at a particular figure up to a particular date. That on the closing of the books on April 30, 1908, there was injected into that an item of $41,035.00 to balance an account, the profit and loss account of that year. He testified that there was no explanation of that item, and he could not find any.

THE COURT: The Court asked if he could explain how that $41,000 got there.

MR. ENRIGHT: I understood him to testify that it was incapable of analysis.

THE COURT: He said he had not analyzed —is not that correct? You took the lump figure, and you had not gone back through the book or made an investigation to find out what it was made up from.

THE WITNESS: Yes, sir, because there was not any reference to any other book there.

MR. ENRIGHT: Mr. Leake has called his attention to a book made up in 1911, which purports to separate this building and trestle item into certain elements as of that time. That book does not, even on its face, purport

to be an explanation of this $41,000 item put in the books in 1908.

THE COURT: The question deals with the time of bankruptcy.

MR. LEAKE: It is a perfectly proper question.

MR. ENRIGHT: I understand he is trying to discredit the witness.

THE COURT: I think it would be material to show what the purpose of the investigation was made by this man of the books. For that alone, the Court would want to know how he analyzed the books, and how far he searched out. For that purpose it would be material, but the question, as I understand, deals with the lump figure of $113,000, as found at the time in 1911; and he wants to know if, in getting that figure of $113,000 in 1911, he analyzed this account or looked at it, and he says he did not; is not that correct?

MR. LEAKE: That is it.

THE COURT: I will allow the question. You may answer it.

Q. (Question read.) A. I was testifying as to the date of April 30, 1908, where the discrepancy occurs.

Q. If you saw in the red book, under date of May, 1908, an item of $41,000, which was not explained, and you knew at the time that there was in existence another book as of a later date, which had an analysis of that entire account, including the $41,000, wouldn't you consider it your duty as an expert accountant to check up the item shown on this later book, marked "Analysis of Fixed Assets?"

MR. ENRIGHT: Objected to.

Q. Did you consider that an examination of this book would give you any explanation of that item of $41,000? A. I did not consider that, no, sir.

Q. Now, why did you call this an appraisal? A. It was an error on my part.

Q. When you examined this book did you notice that, at the head of page 2, under "Analysis of Buildings and Trestles," that this book stated in this language, the cost of buildings, trestles, etc., as per small black record book May 1st, 1908; did you look at that? A. I just discovered my error when you called my attention to it.

Q. Didn't you look at this page 2? A. Yes, sir.

Q. Did you see on page 2 that there was a reference to the fact that this statement of the cost of these items was taken from the little black record book of May 1, 1908? A. Yes, sir.

Q. Did you look for that little black record book? A. Yes, sir.

Q. Did you find it? A. No, sir.

Q. Then, although the red book had no item to refer you to for the details of the $113,000, this book marked "Analysis of Assets," did refer to another book as of May 1st, 1908? A. Yes, sir.

Q. Which then would indicate that these items of August had been taken from that record book on May 1st, 1908, doesn't it? A. Yes, sir.

Q. Now, did you find in your examination that there was a ledger where a plant account was kept for the years subsequent to May 1, 1910? A. I did, yes, sir.

Q. Will you refer to that book; calling your attention to red covered book marked "Ledger," at page 3, what is the statement of the plant ac-

count as of May 1, 1910, in that ledger? A. That is $114,000.

Q. And what is the statement of the plant account in that ledger as of April 1, 1911? A. $119,562.50.

Q. There being items of improvement to the plant between May 1st and April 1st, of various amounts? A. Yes, sir.

Q. Did you find any ledger of the company showing the plant account subsequent to April 1, 1911? A. Yes, sir.

Q. Have you that with you? A. Yes, sir, it is one of the big ones.

Q. Which one? A. Here it is (witness gets book).

Q. I show you "General Ledger No. 1, L. W. C. & C. Co.," page 1, and ask the amount of the plant account, as shown March 31, 1912. A. That is $113,301.79.

Q. It is called "Trestles and Buildings" in this book? A. Yes, sir.

Q. And on March 31, 1913? A. $114,382.50.

Q. And on April 31, 1914? A. $114,450.67.

MR. LEAKE: I would like to have these last two marked for identification.

Marked "Exhibits L-1 for identification, L-2 for identification."

BY THE COURT:

Q. Reverting to that book that Mr. Enright has now, what inquiry did you make for the small book that it refers to, in 1908? A. I asked Miss Maloney for it, and she stated that it used to be kept in the drawer in the safe by Mr. Louis Wertheim, who held the key.

RE-CROSS EXAMINATION BY MR. FISK:

Q. I show you book marked "Voucher Register No. 1" of the company, which you referred to in your testimony yesterday; briefly, this book is a list of what? A. This is a list of the accounts payable.

Q. Kept by calendar months? A. Yes, sir.

Q. And showing the accounts payable becoming due in that month? A. It does not show the due date.

Q. It shows the name of the creditor? A. Yes, sir.

Q. And the amount of the claim? A. Yes, sir.

Q. And the date of payment? A. Yes, sir.

Q. And indicates whether it was paid by check or in cash? A. Yes, sir.

Q. Turning to the account for the month of May, 1912, can you tell me whether there are any accounts shown in that voucher register for the month of May, 1912, that are not—as appears by that book—paid, and paid before the year 1914? A. Everything is paid.

Q. And before the year 1914? A. Yes, sir.

Q. I ask the same question in respect to the month of April, 1912? A. All stamped "Paid."

Q. I ask you whether, in your examination of this book, you found any accounts that were not marked "Paid," prior to April, 1912—that were not marked "Paid"? You went all over this? A. Yes, sir; I found some, I think; I will tell you in a minute.

Q. Just point them out to me. A. Here is one.

Q. I ask you if you find any accounts back of May, 1912, that are not marked "Paid"?

MR. ENRIGHT: That was not exactly the question.

Q. I ask you over again: in your examination of this book did you find any accounts noted therein, for any month prior to April, 1912, that were not marked "Paid"? A. No, sir.

Q. And this book begins with what month? A. June, 1911.

THE COURT: Better mark that book.

THE WITNESS: It runs from January, 1911.

Q. And the month of June, 1911, in this book apparently covered all previous open accounts, did it? A. Evidently, according to that entry.

Q. So that this book, from June, 1911 to and including May, 1912, apparently includes all the open accounts of the company? A. Apparently.

Q. And apparently, from the record of these books, they have all been paid? A. Yes, sir.

MR. FISK: I ask that that be marked for identification.

Marked "Exhibit F-1." (Counsel stating there was no objection to it being offered in evidence.)

Q. In making up the balance sheet or trial balance, in putting on the side of the assets of the company, did they include the plant account as an asset? A. Yes, sir.

Q. Did they include the profit and loss account as an asset, which surplus, the profit and loss account went on the same side—A. Yes, sir.

Q. That went on the same side as the plant account? A. Yes, sir.

Q. Now, explain to me what this entry in Book E-17, the item of $41,035.00 that you spoke of as being added to the plant account in 1908—A. Yes, sir.

Q. Now, on the profit and loss account, the

same figure went on the credit side? A. Yes, sir.

Q. Was not the effect of that a mere bookkeeping entry, a taking from profit and loss and adding to plant, and made no difference in the total assets? A. It increased the assets.

Q. How? Did you put the charges on both sides of the book? A. The plant was debited with that amount.

Q. Did not one hand wash the other? A. Yes, sir; it increased the plant account and reduced the loss.

Q. Was that a loss or profit, that account? A. It increased the profits, I should say—it reduced the loss.

Q. That profit account showed a profit, didn't it, the total? A. It showed a loss before that was put in—

Q. Let me understand you; do you mean to say that the profit and loss account of that year showed a loss? A. Yes, sir.

Q. On the business? A. Yes, sir.

Q. And that increased the loss, did it? A. No, sir, that reduced the loss.

By the Court:

Q. How is that? A. It is a credit to loss account.

By Mr. Fisk:

Q. I am talking about the total assets; the— A. The only thing is, an asset was increased, and the loss was reduced.

Q. It did not increase the assets or liabilities and the surplus was reduced a corresponding amount—A. No, sir, this is profit and loss.

Q. But the surplus would be reduced by that means? A. Yes, sir.

Q. And the surplus would be reduced, and the

plant would be increased? A. Yes, sir.

Q. But there was a surplus, wasn't there? A. Yes, sir.

Q. Still left after making this entry? A. There was a balance to the surplus, $143,040.50.

Q. Of what date? A. May 1, 1908.

Q. That balance was reduced then, was it, by this entry? A. It was not reduced by that entry; that, deducted from the higher loss, was carried into the surplus account, and reduced the surplus.

Q. So that the effect of that entry of $41,000 on the balance of the company in no way increased the total assets, did it? A. Not the total.

Q. And in no way decreased the total liabilities? A. No, sir.

Q. And it was a mere bookkeeping entry on both sides of the ledger? A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. ENRIGHT:

Q. Turning to page 125 in this ledger "E-17" account, I don't know whether you have got this picture of the account before you or not—under date of April 30th; isn't it true the books were closed for the year by entering in the profit and loss account the debit or credit balances of the different controlling accounts that figure in this system of bookkeeping? A. Yes, sir.

Q. And that is, usually the way—a profit and loss account is always carried? A. Yes, sir.

Q. You carry into profit and loss the net balances of all the component accounts in the book? A. Yes, sir.

Q. And with four exceptions, all of those component accounts showed debit balances when they went into profit and loss? A. Yes, sir.

Q. So profit and loss would not have balanced for the year without these items, plant $41,035.00, and lease $17,500? A. No, sir, it would have shown that much loss.

THE COURT: I don't understand that at this time the account showed a loss.

BY MR. ENRIGHT:

Q. Without these two entries,—profit and loss for the year would have shown a debit balance—that is, a loss of $58,535.00, wouldn't it? A. Yes, sir.

Q. And what would otherwise have been a loss in effect was overcome by these two entries? A. Yes, sir; that balanced the profit and loss account.

Q. And that profit and loss exactly balanced; the surplus account was left untouched for that year? A. Yes, sir.

MR. FISK: You are rather leading him on that.

Q. Now, the other entries which you have testified to, stable and blacksmith shop; I think there were three of them of similar amount; they were not handled the same way—A. No, sir.

Q. They were cross-entries, but instead of going into profit and loss, they went direct into surplus? A. Yes, sir.

MR. WALL: This is very leading.

A. (Continued.) They reduced the surplus account.

Q. On what page does that appear? A. Page 71.

Q. Read from page 71. A. "Surplus account credited August, stable $3,250.00"; it is under

1907; I don't know whether it means that or 1908, and August, blacksmith shop $1750.00; and on the same page, February, 1908, folio 3, $5,000.

By the Court:

Q. These are charges against surplus? A. Yes, sir.

Q. How much did they diminish surplus, and where did they leave it at? A. Those first two entries I mentioned, balanced it at that time; no, sir, it did not, excuse me; that left a balance of $137,400.19, on November 1st. There is no year here. Here is 1908 and here is 1907; it is probably 1907.

Q. And the balance after that other entry—that $5,000 entry, was on May 1st, 1908, $143,040.50; that was the surplus at that time.

Mr. Leake: I offer "Analysis of Buildings and Trestle" in evidence.

Mr. Enright: I have no objection to its being offered in evidence.

Marked "Exhibit L-3."

By Mr. Enright:

Q. Did you find that the whole system of bookkeeping was changed in June, 1911? A. Yes, June, 1911.

Q. And this book referred to as "Analysis of fixed Assets," is that one of the books of the new system? A. That seems to have been an inventory used in the opening of new books.

Q. (Question read.) A. Yes, sir, it is a book of the new system.

Q. That is, the totals here correspond with entries carried into the new system? A. Yes, sir, into the new ledger.

Q. What reason have you for saying that is one

of the books of the new system? A. This is an analysis of the various assets, under date of June 30, 1911, and the total was entered into the new ledger.

Q. And is that the date as of which the new system was put into effect? A. Yes, sir.

RE-CROSS EXAMINATION BY MR. LEAKE:

Q. That new system was put into effect by the New York Audit Company in June, 1911? A. Yes, sir.

BY MR. ENRIGHT:

Q. That was your information? A. Yes, sir.

MR. SANDERS WERTHEIM, sworn in behalf of the Trustee in Bankruptcy, testified as follows:

DIRECT EXAMINATION BY MR. ENRIGHT:

Q. Mr. Wertheim, were you connected with the L. Wertheim Coal and Coke Company? A. Yes, sir.

Q. From the beginning? A. Yes, sir.

Q. The company was incorporated in 1902? A. Yes, sir, I guess that is the time.

Q. And what was your connection with it? A. At that time I was Secretary of the company.

Q. And throughout the existence of the company you continued active in its management, didn't you? A. Yes, sir.

Q. And familiar with its affairs? A. Yes, sir.

Q. The L. Wertheim whose name appeared in the title of the company, was your brother? A. Yes, sir.

Q. And he has since died? A. Yes, sir.

Q. Louis Wertheim? A. Yes, sir.

Q. Do you recall the location of your company

on the corner of Grand and Pacific Avenue, Jersey City? A. Yes, sir.

Q. The land was occupied or leased from the Lehigh Valley? A. Yes, sir.

MR. ENRIGHT: I offer in evidence lease made by the Lehigh Valley Railroad Company to the L. Wertheim Coal and Coke Company, dated June 12, 1906.

MR. LEAKE: No objection.

Marked "Exhibit E-21."

Q. Calling your attention to this lease; the part of the triangle bounded by Grand Street, Pacific Avenue, and the railroad, included in the first lease, is this part in here fronting on Pacific Avenue? A. Yes, sir.

Q. Later, your company, in 1908, obtained the balance of the triangle under a lease from the Lehigh Valley? A. Yes, sir.

Q. Now, under the 1906 lease—the first lease—the stables and trestles were erected? A. Part of them.

Q. Now, just indicate whereabouts—(I am here referring to a diagram attached to the original lease). Now, whereabouts were the trestles? A. The original trestle came to about here (indicating by a cross), I don't remember the number of feet—the original stable, though, was 125 feet here, about—

Q. Along Pacific Avenue? A. Yes, sir.

Q. And the office was where? A. Right about 50 feet away on the same street.

Q. And when were these structures erected? A. The original structures were put up in 1906.

Q. Now, afterwards the company acquired a yard in Harlem? A. Yes, sir.

Q. But that was several years later? A. Yes, sir, it was—what do you mean, after 1906?

Q. Yes; wasn't that in 1911 or 1912? A. Yes, sir, I think it was in 1911.

Q. And for the Harlem yard $5,000 was paid, wasn't it? A. I think that was the price for it.

Q. Now, all of the other trestles or buildings of the company are included on this leased property from the Lehigh Valley, are they not; did the company have any trestles or buildings except those at Harlem, which were purchased in 1911, for $5,000, and those erected on the land leased from the Lehigh Valley Railroad at Grand and Pacific Avenue? A. No, sir, they did not have anything else outside of those two plants.

MR. ENRIGHT: I offer in evidence lease from the Lehigh Valley Railroad Company to L. Wertheim Coal and Coke Company, dated April 30, 1908.

Marked "Exhibit E-22."

Q. I notice in the trial balance of April 1st, 1909, for instance, the item "Leasehold lease $135,000." A. Yes, sir.

Q. Does that item refer to the rights of your company under these two leases from the Lehigh Valley Railroad Company? A. Yes, sir.

Q. And that same item, "Leasehold, $135,000," appears on the books to have been carried as an asset right down to the time of bankruptcy; it is the same item? A. Yes, sir.

Q. Referring to these two Lehigh Valley leases? A. Yes, sir.

Q. Prior to December 17, 1909 did you and your brother control the company through a majority of stock ownership?

MR. LEAKE: Objected to as immaterial and irrelevant—the mortgage being made in May, 1912.

MR. ENRIGHT: This has to do with the Isenstein and Dann stock purchase transaction.

MR. LEAKE: With the understanding that it is not to be considered as evidence against Payne and Delano—

THE COURT: I will allow it to stand, subject to the objection as being immaterial and not affecting the Payne and Delano and the Mill Creek Company.

MR. GARVEN: We object to it as immaterial and irrelevant.

MR. ENRIGHT: It is an introductory question showing the situation of the stock at the time of the turn-over from Isenstein and Dann, accomplished on December 17, 1909.

BY THE COURT:

Q. Were you and your brother in control of the majority of the stock in December, 1909, prior to December 17, 1909? A. No, sir.

FURTHER DIRECT EXAMINATION:

Q. Who did? A. Max Isenstein and William L. Dann.

Q. Max Isenstein has since died? A. So I understand.

Q. Your brother was then President of the company? A. Yes, sir.

Q. And what were you? A. I was not anything.

Q. Were you not assistant treasurer? A. Yes, sir.

Q. And you and your brother were practical coal people, were you not? A. We thought we were.

Q. There was a little friction, then, between yourselves and Isenstein and Dann? A. There was.

Q. Had your company been buying, before that time, from the Mill Creek Coal Company and the East Boston Coal Company? A. Why, yes, we were getting a little coal.

MR. LEAKE: Objected to.

THE COURT: I will allow it to stand, and I will deal with it on final hearing.

A. We were buying a little coal from them.

Q. Did you have any agreement—whether it was written or otherwise, with Mr. Delano and Mr. William T. Payne, about that time, affecting the acquiring of the interests of Isenstein and Dann? A. No, sir, we did not.

Q. The stock of Isenstein and Dann was purchased from them in December, 1909? A. Yes, sir.

Q. And they received some money at the time? A. Yes, sir, they received some cash.

Q. How much? A. I think it was $20,000.

Q. And they received some promissory notes? A. Yes, sir.

Q. Do you remember, approximately, the amount of the notes? A. No, sir.

Q. And those were notes of the L. Wertheim Coal and Coke Company? A. Yes, sir.

Q. What happened to the Isenstein and Dann stock certificates at the time they received the cash and notes? A. What do you mean?

Q. What became of them? A. The stock was turned over to my brother and I, and we indorsed them over—that is, we indorsed the back of the stocks.

Q. And then what did you do? A. I think we

gave them to Mr. Van Buskirk, De Witt Van-Buskirk.

Q. At the same time, did Isenstein and Dann resign as directors? A. Yes, sir.

Q. You and your brother were already directors? A. Yes, sir, all the time.

MR. WALL: It seems to me that the best evidence is the minutes; this all appears in the minutes.

THE COURT: Have you got these stock certificates, too, Mr. Enright?

MR. ENRIGHT: No, sir, we have not got them. If Mr. Wall wants it, I will put in the minutes.

MR. WALL: Just in favor of accuracy.

MR. ENRIGHT: I offer in evidence at this point the following minutes of directors of the L. Wertheim Coal and Coke Company: Minutes of meeting held December 15th, 1909: "Present: Louis Wertheim, Max Isenstein, William Dann, Sanders Wertheim, being all the directors of the company. * * * The resignation of William Dann as Secretary and Treasurer, and the resignation of Max Isenstein as Vice-President, were received and filed.

"On motion, duly made and seconded, Sanders Wertheim was elected Secretary and Treasurer, to fill the unexpired term of William Dann.

"There being no further business before the meeting, the same was duly adjourned."

Also, the minutes about special meeting of the Board of Directors, held December 17th, 1909, at the office of M. Van Winkle, No. 1 Exchange Place, Jersey City, at 10 A. M.:

"Present: Louis Wertheim, Max Isenstein, William Dann, Sanders Wertheim, being all the directors of the company; further present, Mr. M. Van Winkle, attorney at law, and Mr. De Witt Van Buskirk, of Bayonne, N. J. * * *

"The resignations of William Dann and Max Isenstein as directors of the company were received and filed.

"Messrs. Warren Delano of New York, W. T. Payne of Kingston, Pa., and De Witt Van Buskirk of Bayonne, N. J., elected directors to fill the vacancies on the board for the unexpired terms of their predecessors.

"There being no further business before the meeting, the same was duly adjourned."

Q. What connection did Mr. Van Buskirk have with the company? A. He was just there in a legal capacity, I suppose; he had the notes made out that we signed for Isenstein and Dann.

Q. Was he the attorney for anyone? A. I don't know whether he was or not.

MR. LEAKE: We can easily spend four or five hours on all of these Isenstein and Dann transactions; and then, when we get through, find out that, assuming for the sake of argument that some of those notes were *ultra vires* which we deny, but assuming that that is so, the law is so well settled in this State that the acquiescence of all the stockholders and all the creditors at that time, raises a legal point that seems to me makes it unnecessary to go into all this mass of detail. If a note is issued by a corporation, we will say for $1,000, it might have been *ultra vires*, what difference does it make if all the creditors, all the directors, and all the stockhold-

ers approve of that, and there are no creditors to object to it. Now, why spend our time here in going into a mass of detail and a mass of explanation, if, when we get all through with it, it is entirely immaterial, because the law says that this thing has been acquiesced in by the directors and the stockholders?

THE COURT: What do you say as to that?

MR. ENRIGHT: There is no question but what this transaction was *ultra vires*. There was indebtedness due to various people, to the trading community with whom this company dealt, to a very large amount, and these did not consent and there has continuously been such an indebtedness.

THE COURT: I cannot uphold the proposition that a claim that comes into being and life in 1914 or 1913, would affect the situation at all, because of the identity of the person holding the claim in 1912 or 1910, or anything of that kind. I don't see how it is going to affect this situation.

MR. ENRIGHT: This is the proposition, sir: it cannot be argued that this transaction was not grossly *ultra vires*. The question is, whether there is anybody in Court who is in a position to take advantage of that. The proposition would be. So far as an *ultra vires* transaction affects the stockholders of a corporation, they may, by their consent, deprive themselves of the standpoint from which to challenge it. In this case, undoubtedly, all the stockholders did so conclude themselves, with the possible exception of Otto Isenstein. The proofs do not show that he consented. The trustee represents anybody who may be interested in the assets.

THE COURT: You are only representing creditors—who are they?

MR. ENRIGHT: I claim that these assets, as they existed in 1909, were affected with the rights of creditors; that this corporation was largely indebted to people other than the East Boston Coal Company and the Mill Creek Coal Company, and that it has continuously been indebted since that time. The identity of creditors changing to some extent, but not universally; some of the creditors who were creditors then, still being creditors of the company, and having carried on a continuous course of dealing with them; and the proposition is, that if the transaction was *ultra vires* and prejudicial to creditors, it is still open to the trustee in bankruptcy to challenge the transaction, regardless of the absolute identity of the creditor and the absolute identity of the item of claim at the time of bankruptcy, with those existing at the time of the *ultra vires* transaction. (Further argument).

On the question of *ultra vires,* sir, my proposition is this: *ultra vires,* of course, means lack of power; the act is void, because the corporation did not have power to do it. Now, the proposition contended for by Mr. Leake rests on the doctrine of estoppel, the thing being void, the thing not being the act of the corporation at all because *ultra vires,* the doctrine of estoppel does come in and say, as to those people who consented, "They are estopped." Now, as to every stockholder who consented, undoubtedly he is estopped; as to every creditor who assented, undoubtedly he is estopped.

THE COURT: You have got a claim that came into being in 1914, because it came from the same party, that he is a creditor who can attack a mortgage given in 1912, which he had notice of, by reason of its recording, and knew all about, and kept on giving credit, and you can attack it. That is against any proposition that I know of as advanced by this Court.

MR. ENRIGHT: My proposition on the general mortgage situation is this: that under the Corporation Act, Section 64 of the Corporation Act, when a corporation becomes insolvent, it is forbidden to make any transfer of its assets, the single exception being the permit of a transfer to one without notice for a present valuable consideration. The courts have held that the giving of a mortgage to a pre-existing creditor, although not being without consideration—the pre-existing debt is a consideration for the mortgage, —nevertheless, it is not that valuable consideration which is needed to satisfy that provision of the statute.

Now, the statutory language is, that—with that single exception—the transfer by a company while insolvent, of any of its assets, is void as to creditors, and it does not say as to what time those debts must have existed.

I think there is no limitation in the statute as to when these creditors must have acquired their claims, in order to be in a position to attack. I do say, however, that in this particular case, we have a right to show that this corporation was engaged in a continuous course of commercial business with a number of creditors: The commercial trans-

actions consisting continuously of the furnishing of whatever the creditor was furnishing, and payments from time to time—payments, if you please, against specific statements rendered, but always a debt outstanding and unpaid; and that among the creditors who have proved their claims unpaid are a respectable number of creditors of that very description, and quite regardless of whether or not this statutory prohibition against the transfer in making it void as against the creditors, without qualification, requires the creditors who make the attack to have been such at the time of making the transfer; we say we have supplied that under the running account doctrine.

THE COURT: I must say that I cannot agree with you, if that is the only ground of attack.

MR. WALL: The burden is on him to show whom he represents. Now, he says there is one man that we don't know anything about so far as we know now, and he is the man that we pin our whole case to. Now, the burden is on him to show that he stands in somebody's shoes. When your Honor asked him who the names of these creditors were, he made a long speech about *ultra vires* and estoppel but he did not give the names of the creditors. Now, the only right he gets to stand at all as to 1909, is, that he represents some creditors. What this whole question was directed to was 1909, and the situation in 1909, and the notes that were out then. Now, as to that, your Honor asked him what the names were. Now, we want the names. If he cannot give the names he has no stand-

ing. This illustrates the very evil of this sort of thing. (Further argument). This is a lawyer-made lawsuit.

MR. ENRIGHT: I seem to be the issue in this case then, according to Mr. Wall.

THE COURT: Tell me who these creditors were that had claims at that time that are unsatisfied.

MR. ENRIGHT: The Lehigh Valley was a creditor right straight along every month.

THE COURT: I do not find it to be.

FURTHER DIRECT EXAMINATION:

Q. Isn't it true that you were constantly indebted to the Lehigh Valley Railroad Company?

MR. WALL: Objected to; the books are the best evidence.

THE COURT: Show the books, Mr. Enright.

Q. Are you familiar with the books? A. No, sir, I would not be familiar enough to testify.

MR. LEAKE: Ask him the simple question of whether any debt that was due in December, 1909, is now unpaid.

MR. ENRIGHT: I do not adopt that question.

Q. Mr. Wertheim, didn't your company deal constantly with the Lehigh Valley Railroad Company from the time that you started in business at the Grand and Pacific Avenue location? A. Yes, sir, we used to get our coal over there right straight through.

Q. And you were always indebted to them; or were you always indebted to them in some amount for current bills.

MR. WALL: The books are the best evidence.

THE COURT: Objection sustained.

MR. ENRIGHT: I offer to show by this witness that the bankrupt company in December, 1909—

THE COURT: Strike out any matter of offering to show.

Q. Did the Wertheim Company deal continuously with the Lehigh Valley Railroad Company, from and prior to December, 1909, down to the time of the bankruptcy?

MR. WALL: I object to that; he has already answered it; he said they did.

THE COURT: Objection sustained.

Q. Did your company have a line of credit with the Lehigh Valley Railroad Company? A. Yes, sir.

Q. From December right down to 1914? A. I think we did.

Q. And was there always something due on that account from your company to the Lehigh Valley?

MR. LEAKE: Objected to.

THE COURT: The books are the best evidence of that; you will have to prove it by the books, Mr. Enright.

MR. ENRIGHT: The 1909 books are not here. They superseded the old books with this new system of accounting.

Dropping that for a moment, I offer in evidence the minutes of directors' meeting February 23rd, 1910; that is a minute showing how this new system of accounting was put into effect.

MR GARVEN: We object to that; we certainly were out of the company at that time; it is immaterial as regards the answer filed by us.

MR. ENRIGHT: (Reading minutes):

"Present: Louis Wertheim, Sanders Wertheim Warren Delano, De Witt Van Buskirk
* * *

"Mr. Delano stated that since the last meeting of the Board, he had called upon 'The Audit Company of New York' to make an examination of and report on the books and business of this Company. He regretted that he was unable to submit any results to this meeting, although he understood the examination had been practically completed.

"By the next meeting he hoped to have definite statements to show and in time to develop a system by which the results of each month's business would be presented at the Board meeting the following month."

Also, the minutes of March 16, 1910 Same attendances. * * *

"Mr. Delano presented the report of the Audit Co. of New York and stated that he had requested the said Company to devise a simplified method of keeping the accounts and following up the business of the said Company so that monthly statements could be readily drawn off to show the financial results of the previous month in time for the consideration of the Board."

For the purpose of fixing the date, I read the minutes of December 21, 1910:

"Present: Mr. L. Wertheim, President, Mr. Sanders Wertheim, Secretary, and Messrs. Delano and Payne. * * *

"The President reported the purchase of the McWilliam Coal Plant and Lease, at East 115th St., for $5,000.—cash—with an understanding with the city representatives that said lease would be extended for an additional term of five years upon the expiration of the present contract—which will give us eight years."

Also from the minutes of the meeting of the Board of Directors, on June 16, 1911:

"Present: Mr. L. Wertheim, President,

Mr. S. Wertheim, Treasurer and Secretary, Mr. W. T. Payne, Mr. Warren Delano. * * *

"Mr. Delano presented a report from the Audit Company, covering fifteen months, from January 1st, 1910 to March 31st, 1911. The examination of the books by the Audit Company was made at the request of Mr. Delano.

"On motion of Mr. Payne, duly seconded, it was resolved that this report be accepted by the Company and the cost thereof—$375. —be assumed.

"Mr. Delano then read various portions of the report which showed a loss in the fifteen months of $18,789.39 equal to 11 cents per ton of coal and coke sold.

"A very full discussion of the report, and various questions growing out of same was had, and the President and Treasurer were requested to consider carefully where and how the cost of selling could be reduced and to make every effort to decrease the price of the sales.

"The audit figures were taken by the Treasurer with a request that he compare them with his own books with a view to discussing them later with Mr. Delano and a representative of the Audit Company, there being certain differences which were not readily apparent."

I read from the minutes of August 15, 1911—same attendances.

"Mr. Delano stated that he had met representatives of the Audit Company on August 2nd, with the Messrs. Wertheim, and that, in his opinion, the balance sheet and results of the year's business as shown by said audit were in accordance with the facts."

Q. Mr. Wertheim, the books of the company show as an asset a charge against "L. and S. W." of $57,344.34, as of April 30th; that was outstanding April 30, 1912; who are "L. and S. W."? A. Myself and my brother.

Q. Your brother Louis? A. Yes, sir.

Q. Do you know what that item is for?

MR. GARVEN: We object to it, so far as Mr. Dann is concerned.

BY THE COURT:

Q. All right. Do you know what the item is for? A. Yes, sir.

FURTHER DIRECT:

Q. What is it for? A. For the Isenstein and Dann stock.

Q. Were Louis and Sanders Wertheim able to pay $57,344.34 on April 30, 1912? A. No, sir.

Q. As a matter of fact, did you and your brother have any resources outside of your investment in this company? A. None.

Q. And your investment in this company was that of a stockholder, wasn't it? A. That is all.

Q. So that whatever you had in the way of financial resources is what would be left after the creditors were taken care of in this company? A. Yes, sir.

Q. Now, there is an item carried along here as an asset—a mortgage, $4,000; is that the Adam's mortgage? A. Yes, sir.

Q. That represents an old debt? A. Yes, sir.

Q. Do you know about that transaction? A. I think that was handled during Mr. Isenstein's time.

Q. The company never realized anything out of that? A. I don't think they did.

Q. Was that a first or second mortgage? A. I don't know; I could not tell you whether it was a first or a second mortgage; I imagine it was a second mortgage.

Q. What do you know about it? A. I am not sure.

MR. LEAKE: If you want to know, I can tell you.

Q. Mr. Leake was the attorney for the company at that time? A. Yes, sir.

Q. And the mortgage was put in his hands for collection? A. Yes, sir.

MR. LEAKE: And the first mortgage was foreclosed, and there was no surplus for any payment to the second; and there were large accumulations of taxes against the property.

MR. ENRIGHT: I am accepting that as a statement on the record—do you recall, Mr. Leake, when that foreclosure took place?

MR. LEAKE: I do not.

Q. There is a note carried in the accounts as due from Adams, was that ever collected? A. I don't suppose it was; I don't know.

Q. It is the same Adams, isn't it? A. Yes, sir.

Q. And do you know whether or not that was uncollectible at the time? A. I dont know; I suppose when they took it, they thought it was collectible, but I had nothing to do with that note, so I would not know anything about it: I did not take it, so I would not give you any evidence on it.

Q. Now, you say that in 1909, at the time Isenstein and Dann went out, their stock certificates were turned over, you think, to Mr. Van Buskirk? A. They were turned over.

MR. LEAKE: I object; here we have this same thing; we are coming back now and rehearsing all this early transaction—

MR. ENRIGHT: Maybe you won't object to one or two questions; I think it is material to show where the control of the company was.

THE COURT: I do not see that it makes any difference myself; what is your point in the matter, Mr. Enright?

MR. ENRIGHT: I want to show where the control of the company was during this period from 1909 down to 1912. The control rested in this stock that was taken over from Isenstein and Dann, and as part of this transaction, apparently, it was pledged at that time to secure the East Boston and Mill Creek Companies.

THE COURT: From my view of this case, I will say it does not make a particle of difference who controlled it in 1909. I don't think it makes any difference who controlled it in 1912, particularly; there is no attack on the validity of the mortgage, as I understand, as a mortgage.

Q. Now, Mr. Wertheim, in the beginning of 1912—recalling to your mind that this mortgage is dated as of April, 1912, and recorded May 6, 1912—in January, 1912, your company was largely indebted upon notes to the East Boston Coal Company and the Mill Creek Coal Company, Mr. Isenstein and Mr. Dann? A. Yes, sir.

Q. Now, up to that time, had any of the Isenstein and Dann notes been defaulted when they came due? A. I don't think so.

Q. Do you recall the exchange of the notes held by Isenstein and Dann, Mill Creek Company and the East Boston Company, for the bonds of the company? A. Well, I was not there when they were exchanged, if that is what you mean.

Q. Well, you recall that event, don't you? A. I remember it was done, yes, sir.

RECESS TO 2 P. M.

AFTER RECESS.

SANDERS WERTHEIM, resumes the witness stand.

DIRECT EXAMINATION (CONTINUED) BY MR. ENRIGHT:

Q. Mr. Wertheim, I show you four sheets; do you recognize those as the detail showing the indebtedness to East Boston Coal Company, Mill Creek Coal Company, Dann and Isenstein, upon which the distribution of bonds was made? A. Yes, sir; I think those are right.

MR. ENRIGHT: I offer these four sheets in evidence. These are sheets which came into the possession of the trustee from the office of the company.

THE COURT: Is there any objections? They will be received.

Marked "Exhibits E-24, 25, 26."

Q. I call your attention to the sheet showing the debt to the East Boston Company, marked "Exhibit E-25;" will you state which of the notes held by the East Boston Company had matured prior to April 1st, 1912? A. According to this statement it would be—do you want me to read these off?

Q. Yes. A. It would be a note dated January 12, 1911, and due on March 12, 1912, for $268.75.

Q. And what is the other item; I mean, the next item that had come due? A. February 25, 1912, $15,176.70.

Q. And the next? A. March 25, 1912.

Q. That is the due date? A. Yes, sir.

Q. And the amount is what? A. $10,447.03.

Q. And all of those notes remained unpaid

from the time of their maturity until exchanged for the bonds? A. I think that is right.

Q. And calling your attention to the sheet showing the indebtedness to the Mill Creek Company, will you state whether any of the notes held by that company had come due and were unpaid prior to April 1st? A. February 25, 1912, $5,780.99; March 25, 1912, $6,536.63.

Q. Mr. Wertheim, in the financial statements of your company there is carried along an item of coal on hand? A. Yes, sir.

Q. Was any actual inventory made of that from month to month? A. No, sir; it was just carried along.

Q. That is, when new purchases were made, a record was kept of the purchase, and when sales were made, a record was kept of the sales? A. Yes, sir.

Q. And the difference between the two would give you your tonnage on hand? A. Yes, sir.

By The Court:

Q. How did you know about it? A. I only explained it to him how it was kept—that is, the tonnage; I cannot tell anything about the book end of it; the tonnage was carried on the books.

Q. You knew it from examination of the books? A. Yes, sir.

Further Direct:

Q. Then, wasn't it true from time to time you would take an actual inventory of coal on hand? A. Yes, sir; I think we did two or three times, possibly four.

Q. And did the amount of coal actually on hand when you made a physical examination, agree

with the amount supposed to be on hand, which you kept track of in the way you have described? A. No, sir.

MR. WALL: Objected to, unless the question is made more definite as to time.

Q. In August, 1914, there appears to have been written off for leakage—

MR. WALL: Objected to; that was the word used by Mr. Kreuzer; there is no such word in the book. The question is also objected to on the ground that it is too far removed in time from the period in question.

THE COURT: I will hear the question.

Q. I call your attention to the item in the journal, August, 1914 "Adjustment made on stock (Stock record book), August, 1914—see the detailed information in M. J. E. Memo. filed, and the figure is $29,782.71.;" will you state whether you know that the coal actually on hand in August, 1914, was then ascertained to be less in amount than the amount shown on the books?

MR. WALL: Objected to, on the ground that it is immaterial.

THE COURT: I don't understand it at all. (Question withdrawn.)

Q. What was the reason for making an adjustment in the stock account in August, 1914, of $29,782.71?

MR. LEAKE: Objected to; it is entirely immaterial as to what adjustment was made in 1914, unless it is shown that that adjustment relates back, or has something to do with the condition in May or April, 1912.

THE COURT: Answer the question.

A. At that time the creditors had all gotten together, and were going to reorganize the company, and we took stock to get at the actual figures of what we had.

Q. Made a physical inventory at that time? A. Yes, sir.

Q. And did that differ from the book inventory?

10 A. Oh, yes.

Q. And this item of $29,000 represented the difference? A. That represents the difference; I suppose that must be right.

Q. Do you know? A. I am not positive whether that is the difference or not, but there was some difference between the physical and the book.

Q. Was it a large difference, do you remember?

20 MR. WALL: Objected to.

THE COURT: What are you connecting this up with?

MR. ENRIGHT: It is already in evidence that in 1911 there was an adjustment of the paper inventory with the actual coal on hand; that there was no other adjustment until August, 1914, at which latter time this adjustment of $29,000 was made.

THE COURT: What is the object of this?

30 MR. ENRIGHT: I want to show by this witness, sir; as I have reason to suppose the fact to be, that in the handling of coal there is always what the coal dealers call leakage, that it is a pretty constant uniform thing; that is, between what they buy and what they sell, there is this shrinkage. Now, we have established already the limits; there was an adjustment in 1911; the next adjustment in 1914.

40

Q. Whose handwriting is that? A. It looks to me like Miss Maloney's handwriting.

MR. ENRIGHT: I will withdraw this witness, then, and ask Miss Maloney about that.

MARY MALONEY, recalled.

DIRECT EXAMINATION BY MR. ENRIGHT:

MR. ENRIGHT: You see they were carrying as an asset coal on hand, which is a paper performance and periodical—

THE COURT: Unless it was there—

MR. ENRIGHT: Now, in August, 1914, it was not there by $29,000 worth.

THE COURT: We don't know that; he did not say that he knew that.

Q. Did you make this entry in the journal under August, 1914? A. Yes, sir.

Q. Will you explain what that item means, what it represents? A. It represents an adjustment on all the different sizes of coal which we carry.

Q. Now, an adjustment between what? A. Between the actual stock on hand and what our books show.

Q. And in what way were your accounts kept so as to determine what the book showed as stock on hand? A. We carried a stock record, which gives each size of coal separately—the tonnage on hand.

BY THE COURT:

Q. What are we to understand by the entry on this book? A. That is given in detail in the stock record.

FURTHER DIRECT:

Q. Is that the amount on hand of coal? A. That was the adjustment that was made—the adjustment of the stock account.

Q. Do you mean to say that represents an amount in excess paid for coal? A. No, sir; it means that that much stock was less on hand than what our books showed, according to the inventory that was taken at that time.

Q. Your book inventory showed $29,000 more of coal than the physical inventory showed? A. Yes, sir.

Q. And that is what that entry in the journal means? A. Yes, sir.

MR. WALL: Is that all there is to that?

MR. ENRIGHT: From this witness, yes.

SANDERS WERTHEIM, resumes the witness stand.

DIRECT EXAMINATION (CONTINUED) BY MR. ENRIGHT:

Q. Mr. Wertheim, will you explain how this discrepancy occurred between the coal actually on hand and the book account of coal on hand? A. Well, there is a difference in the weights between the mine weights and our weights; and also, in that account is profit and loss; it is the screenings of large sized coal that comes out—refuse; we sell it, and that, of course, should appear in this record, whatever they brought these figures from, and show how many hundreds or thousands of tons, or whatever it was that was disposed of as dirt; Miss Maloney said there was an item that gave this in detail, and that should all appear in that. It should be deducted, but

it evidently had not been deducted. You see, for instance, coal that you use in your home, a good part of that is screenings.

By The Court:

Q. Do you mean pea coal? A. No, sir, what we call pea and dirt; it is all the fine coal below pea size that comes through the screen—

Q. Now you have said several times you made an adjustment between your book account of coal on hand and the physical inventory? A. There was an adjustment made by the auditors each time they audited our books—

Q. Each year— A. They were audited in 1910, in 1911, 1912 and 1913.

Q. Who audited in 1911? A. Mr. Moyer, George Moyer of Pierson's Limited.

The Court: Now find the adjustment in 1913.

The Witness: Whenever the auditors audited the books they used to take a physical inventory. Of course, if there was any adjustment made on the books that I don't know, but this particular adjustment was made at the time they were going to reorganize—the creditors—prior to this bankruptcy.

Q. And there was an actual inventory then made of the coal actually on hand? A. Yes, sir.

Q. Where is the inventory? A. I don't know; it must be in our stock ledger here, some place, it should show and it should show this pea and dust that I spoke of.

Q. When you get the adjustment, you generally get the cash for the adjustment; what was the object of adjusting it? A. The idea at that time was to go over the whole thing to arrive at the worth of the plant and everything that they

had, in order to turn over to the creditors, in order that they could see just where they stood.

Q. Is not there always a loss in handling coal of the kind your company was principally dealing in, a loss anyway? A. Yes, sir; there is, as a rule, a loss in weight.

THE COURT: This is a novel proposition, that people should lose $29,000 in a few years and not put up any claim.

THE WITNESS: On 400,000 tons of coal, it would only take a very small percentage of that.

Q. About what tonnage were you handling during the year 1914?

MR. LEAKE: Is there any limit to which he may go?

A. We averaged, I think, around 100,000 tons a year.

Q. This shrinkage, is that something that occurs at any particular time, or is it something that runs along month by month?

MR. LEAKE: I object to that; he has not qualified as an expert on shrinkage.

MR. ENRIGHT: He is an expert on coal business, I should think.

THE COURT: I think it is entirely immaterial to this; I will rule it out on the ground that it is immaterial when it occurs.

Q. There always is a certain amount of refuse from the mere handling of the coal, isn't there? A. Of the domestic sizes, yes, sir.

Q. Now, I am asking you whether that shrinkage is something that runs along fairly uniform as an incident to the handling of the business?

MR. WALL: Objected to as being the same question.

THE COURT: I think it is immaterial.

MR. ENRIGHT: Here in 1911, the books show an adjustment made. In August, 1914, another adjustment. Now, between those two dates there appears this large shrinkage of nearly $30,000, and this question is directed to showing that as an incident of the physical handling of the business there is more or less constant element of shrinkage. Now, they claim as one of their assets on paper, in April, 1912, coal on hand—there was no inventory made then, and the only basis for that claim at all is the difference between what their invoices showed they had bought and what their books showed they had sold. If, in the conduct of this business there is a basis for averaging up a loss, August, 1914 was the date when it was written up, but it was a loss that was accumulating all the time.

THE COURT: Wouldn't you have to show the loss to be an actual loss, and not appearing on the books in 1912?

MR. ENRIGHT: I think we have shown that the item carried of coal on hand in 1912, was not an item based on physical valuation at all, but on a process of bookkeeping. We have also shown that the process of bookkeeping is inaccurate, due to an incident of the physical handling of the business, but now this question is directed to showing —

THE COURT: How much was the actual adjustment in 1911?

THE WITNESS: I think I can explain that, if you want me to.

THE COURT: If I follow you correctly,

the object of the witness is to show that the company was insolvent in 1912, isn't it; it is a part of your proof to show it was insolvent in 1912?

MR. ENRIGHT: Yes, sir. It goes to show that that item shown on the statement ought to be depreciated to some extent.

THE COURT: I think it is immaterial to this issue.

MR. ENRIGHT: How about the depreciation from 1911 to 1914?

THE COURT: Well, I have let you go and make a general lump sum of it.

If the proof is to show the company was insolvent when it gave this mortgage, and, therefore, has violated this statute, then it is only necessary to take proof up to 1912.

MR. ENRIGHT: Is the question overruled?

THE COURT: I am inclined to rule that the last question is immaterial.

MR. LEAKE: I move that it all be stricken out as to this adjustment as of 1914, because he has not connected it by any evidence with the condition in 1912.

THE COURT: I am inclined to believe that is entirely immaterial, all the evidence relating to the adjustment, and this witness's testimony relative to the adjustment of 1914 is immaterial.

MR. LEAKE: I move that it be stricken out.

MR. WALL: I make the same motion.

THE COURT: That course will be taken; strike it out.

BY THE COURT:

Q. Is it a custom among coal dealers—are there suits for shortage in coal deliveries as between dealers? A. I have never heard of any.

FURTHER DIRECT:

Q. Now, in 1912, the balance sheet shows a total for wagons and harness; were those same wagons largely in use at the time of bankruptcy? A. In 1912?

Q. Yes.

MR. LEAKE: I object to that; what difference does it make?

MR. ENRIGHT: If the same things were in existence in 1914, this testimony tends to identify them. Now, we know what there was in 1914.

THE COURT: What is the object?

MR. ENRIGHT: To show the valuation of the bankrupt's estate.

THE COURT: What value will that be to us in determining this suit here?

MR. ENRIGHT: If certain physical property existed in 1912, and is identical in description and character with certain physical property in 1914, the question is material as one of identification, so as to enable us then to refer to the valuation in 1914, and you can determine with respect to physical things—making allowance for depreciation.

MR. LEAKE: The difficulty is, that Mr. Enright starts everything from the bankruptcy and then works back.

THE COURT: He represents the trustee in bankruptcy, and therefore, naturally he would start from that point. I am inclined to think that is immaterial.

MR. ENRIGHT: I don't think I have made clear the theory.

THE COURT: You say they have put out a certain figure of valuation on these articles

in 1912. In 1914 there would be a different valuation if the same articles still existed, of course, and have been used from time to time; but how does that affect your case, that is what I am trying to get at.

MR. ENRIGHT: In this way, sir; to give an illustration: suppose you have a piece of land, and it becomes material to value that as of 1912, as it is in this case with respect to the wagons; now, it certainly is material to say to some witnesses who had personal knowledge of that land at both times: "Is this land here in 1914 the same as is referred to on a paper schedule of assets as of 1912—identify the physical property with the inventory;" then, when we have made that identity of description we, for the first time, have the opportunity of forming a judgment and have testimony as to what that physical property which we see in 1914 was fairly worth in 1912.

THE COURT: I think that is a roundabout way of going to it; I think it is not the best proof we can have in this case. I shall rule it out.

MR. ENRIGHT: I offer in evidence a report of R. H. Perry as ancillary receiver for the bankrupt company, under appointment of the United States District Court for the Southern District of New York, showing the details of moneys received for physical property and some outstanding accounts of the bankrupt.

MR. WALL: I object to it as being immaterial.

MR. ENRIGHT: It is for the purpose of showing what was realized.

MR. WALL: Just as cash, without reference to what was sold?

MR. ENRIGHT: Just as cash realized from what was sold.

MR. WALL: I object to it as immaterial.

THE COURT: This is part of the money which is now claimed under this bill of foreclosure.

MR. WALL: He wants to judge the condition in 1912 by a forced sale value in bankruptcy.

THE COURT: I think it may be received for the purpose of showing what was received from the sale of these goods.

MR. FISK: I object to it further because it is not an official copy.

THE COURT: I would receive it, if it is simply offered for the purpose of showing the amount brought at the sale; and, of course, if it is objected to, and there is going to be a conflict about it on the ground that it is not the best evidence—

MR. FISK: The point I am making is, that we have never seen this detailed return until now. I have obtained from Mr. Drayton, the trustee, the gross amount that he has on hand, and have stated that to the Court, and it was understood by every body; but we may have objections to this when we come to pass upon it in the United States Court.

THE COURT: Then I shall have to sustain the objection.

MR. ENRIGHT: Then I ask leave to have the proofs held until I can produce proof by an exemplified copy.

MR. FISK: I am objecting on the ground, that if admitted without objection by us as

to its competency or relevancy, it might put us in the position of being bound by that later in the United States Court; that is the reason I insist.

MR. ENRIGHT: I shall have to get an exemplified copy.

THE COURT: You will.

MR. ENRIGHT: I offer a copy of the report of Ralph H. Perry as receiver, appointed in the United States District Court. District of New Jersey, on file with Mr. Beach as referee in bankruptcy in this district. A report showing his receipts and disbursements—receipts from the sale of the property and collection of outstandings.

MR. LEAKE: This is a Court of Chancery here.

MR. FISK: This is utterly incompetent and irrelevant here; this, it seems to me, is utterly irrelevant here; it has no sale of physical assets in this report, and it simply shows that he collected some book accounts. He sold no physical assets of this estate.

MR. ENRIGHT: A sale of physical assets was made in Chancery; physical assets located in this State were sold by the Chancery receivers. The Chancery receivers collected some outstandings. The New Jersey bankrupt receiver collected some outstandings under his general authorization. It was my thought to exhibit just what money the bankruptcy administration has, and the source from which received.

We have got to know what this mortgage is operating on—upon what your foreclosure decree can operate, if at all.

THE COURT: Is this included in any other

report that we have before us—this amount that he has turned over; is there any other record of it?

MR. FISK: Our difficulty is this: these funds, as I take it—there has been no showdown in the United States Court, as yet, in relation to these assets—in relation to this mortgage; that is held under an order of the Court awaiting determination. Mr. Perry, under the order of the United States Court, was permitted to collect accounts due from debtors in New York. The Chancery receivers were permitted to collect any accounts due from citizens of New Jersey, or any accounts from citizens in New York that were paid at the New Jersey office through the mail or otherwise. The United States Court made that order that Mr. Perry could collect New York accounts, but he must specially deposit them and keep them as a special fund to await the official determination, presumably, of this case, which was then pending. Now, Mr. Drayton has received all the money that Mr. Perry had on hand—is that true?

MR. ENRIGHT: Yes, that is true.

MR. FISK: Mr. Enright is intimating now that the order of the United States Court here permitting Mr. Perry to operate in New York, and to hold this fund pending the determination of this case, that that is going to raise the question of whether he has got to turn those funds over. That is a United States Court question.

Mr. Drayton succeeded as trustee, and has taken in hand all money that Mr. Perry had, both as receiver in New York and in New Jersey.

The ancillary receiver is discharged; he is the custodian of all the funds the ancillary receiver had.

MR. ENRIGHT: You may have to pass on whether a clause in the mortgage, purporting to cover book accounts, is not affected by another clause in the mortgage. I want to get before the Court in this record a description of what the property consists of, upon which your decree, if any, must operate.

THE COURT: I will admit it for that purpose, and for that purpose only.

CROSS EXAMINATION BY MR. LEAKE:

Q. Mr. Wertheim, between 1906 and 1908, were there improvements made to your buildings on your plant on the corner of Grand Street and Pacific Avenue? A. Yes, sir.

Q. Will you state in a general way, what these improvements and additions were? A. Why, we added on 275 feet to the stable.

Q. When? A. 1908; we added on 200 feet to the trestle; and we refilled the original yard, and also filled in the new yard that we took in. That was the second lease in 1908. We added on to the blacksmith shop, and we replanked the whole yard.

Q. What was the value of the trestle and improvements on that land in April or May, 1912? A. It must have been in the neighborhood of $35,000 or $40,000.

Q. All the improvements? A. Yes, sir; that is, the additional—what was the question?

Q. Strike that question out. Now, what, in your opinion, was the total value of all the improvements, including trestle, buildings, office buildings and other improvements on your prop-

erty at or just before the time of the making of the bond issue in May, 1912?

MR. ENRIGHT: Objected to on the ground that it is not cross examination, and the witness has not been qualified as an expert.

THE COURT: It is not cross examination.

MR. LEAKE: It is cross examination on the point of their bringing out from him testimony with reference to the trestle and its condition at that time.

THE COURT: I do not recall any such testimony, in the first place.

MR. LEAKE: I shall not press it for the moment.

THE COURT: You may make him your own witness, if you wish.

Q. At the time of the issuance of the notes to Isenstein and Dann by the Wertheim Company, was Mr. Otto Isenstein a stockholder of the Wertheim Company? A. Yes, sir.

Q. Did he participate with any negotiations with you or with Messrs. Isenstein and Dann in reference to issuing notes to Isenstein and Dann for their stockholding interests?

MR. ENRIGHT: Objected to on the ground that that subject matter was excluded from my examination, my inquiry on the direct examination, under objection from the other side.

Q. (Question read.)

THE COURT: That question was not objected to on the direct examination, was it?

MR. ENRIGHT: Yes, sir.

THE COURT: What have you to say about that?

MR. LEAKE: This difficulty arises from the fact that part of my recollection of the testimony of Mr. Wertheim was due to testimony made by him, and the other part on statements made by Mr. Enright as to the names of the people who had not been estopped, and he gave the name of Otto Isenstein; it seems to me to be perfectly proper on cross examination to bring out an answer to the statement made by the attorney for the trustee, that Otto Isenstein—

MR. ENRIGHT: Mr. Leake has stated the situation accurately when he says that he is cross examining this witness with reference to statements that I made in argument.

MR. GARVEN: I think you will find in the minutes that we introduced, just previous to the issuance of the bonds that he read off—it is already in proof, the matter that Mr. Leake is trying to prove, apparently.

THE COURT: I am inclined to allow it to be answered. I will note Mr. Enright's objection.

Q. (Question read.) A. Do you mean prior to the time of the issuing of the notes?

Q. At or prior to that time. A. Yes, sir; he knew all about the transaction.

Q. And did he attend a meeting of the stockholders at the time of the resignation of Mr. Isenstein and Mr. Dann?

MR. ENRIGHT: Objected to, on the ground that the minutes are the best evidence.

Q. Did he attend any meetings of the stockholders at which the subject of Mr. Isenstein and Mr. Dann's notes were discussed?

MR. ENRIGHT: Same objection.

THE COURT: Objection sustained.

By Mr. Leake:

Q. Now, on your direct examination your attention was called to some yellow statements, particularly to one marked "Exhibit E-25, and more particularly to a note for $14,454.00, due February 25, 1912, payable to the East Boston Coal Company, and dated April 25, 1911; before the maturity of that note of February 25, 1912, had the subject of the East Boston Coal Company taking bonds in payment of its notes been discussed by you with them? A. I do not just remember the date just exactly, what date I talked to him.

Q. Wasn't it before that time? A. I think it was.

Q. Do you remember when you first discussed the subject of giving bonds to the East Boston and the Mill Creek Company? A. It was during the time of the Lehigh Valley Railroad suit.

Q. You knew at the time that suit was— A. Well, either at that time or right after it.

Q. Is there anything from which you can refresh your memory on that subject, other than during the time of the Lehigh Valley suit? A. Well, I don't know, unless there was some correspondence on it.

Q. Do you remember when the Lehigh Valley suit started? A. No, sir; I do not.

By The Court:

Q. What suit are you speaking of? A. A suit for the overcharge of the freight rate.

Q. Was it in 1911 the suit was started? A. I think it was around that time—1911 or the first part of 1912.

Mr. Leake: It was in 1911 I know, when it was started.

THE COURT: What month?

MR. LEAKE: I cannot give you the exact date, but I think there is a reference here in the minutes to it.

FURTHER CROSS, BY MR. LEAKE:

Q. Now, I call your attention to a meeting of the Board of Directors of the Wertheim Company, held on Wednesday, September 20, 1911, at 11 o'clock, and I will ask you whether anything in the minutes refreshes your memory as to when the subject of the suit against the Lehigh Valley was first discussed? A. Let me see.

MR. ENRIGHT: I object to that as immaterial and irrelevant and not cross examination.

THE COURT: I don't think it is cross examination.

MR. LEAKE: It seems to me it is cross examination; here Mr. Enright produced a yellow slip for the purpose of showing those two notes of the East Boston Coal Company and two or three other people, have matured prior to or on February 25, 1912, and then he will argue from that, that this company was insolvent, because their notes were maturing and they were not meeting them; and, if it is not cross examination to ask the witness who makes that statement whether at the time that note was maturing there was something else involving the payment of that note under discussion, namely, the acceptance of bonds in lieu of those notes—

MR. ENRIGHT: He has already answered that.

MR. LEAKE: He says he does not know the time.

THE COURT: I think that is a roundabout way of reaching the proposition.

Q. How long before February, 1912—the maturity of this note to the East Boston Company—was the subject of the acceptance of the bonds by the East Boston and the Mill Creek Company taken up with those companies by you? A. It must have been a month or two before that, or more.

CROSS EXAMINATION BY MR. WALL:

Q. I call your attention to the minutes of the stockholders' meeting of May 27th, 1912, in which it is recited that you and Otto Isenstein and others were present at the meeting when the mortgage itself was authorized, and I ask you whether that Otto Isenstein referred to in those minutes is the only Otto Isenstein that was ever a stockholder in the L. Wertheim Coal and Coke Company? A. Yes, sir; he is the only one.

FURTHER CROSS EXAMINATION BY MR. LEAKE:

Q. Are any claims against the L. Wertheim Coal and Coke now due and unpaid which were due and unpaid at the time of the issuance of these notes to Isenstein and Dann in July, 1909?

MR. ENRIGHT: Objected to as not cross examination; and, following the objection that has been urged against me, I urge that the books are the best evidence.

THE COURT: The objection is sustained.

MR. FREDERICK DUNHAM, sworn in behalf of the Trustee in Bankruptcy, testified as follows:

DIRECT EXAMINATION BY MR. ENRIGHT:

Q. What is your business or profession? A. I am a civil engineer.

Q. How long have you been a civil engineer?

MR. FISK: He is qualified; we admit his qualification as a civil engineer.

Q. What is the name of the firm? A. Formerly Harrison and Dunham; I am now in business for myself.

Q. You are also the County Engineer—the engineer to the Boulevard Commission? A. Yes, sir; at times; I do engineering work for both the county and the city.

Q. In the course of your profession, have you had occasion to familiarize yourself with the cost and values of building, structures, such as the stable buildings and coal trestles at the Wertheim plant? A. I have.

Q. And have you made a physical examination of the structures now upon the L. Wertheim plant at Pacific Avenue and Grand Street, Jersey City? A. I have.

Q. What do those structures consist of, as you found them at the time of your examination?

MR. LEAKE: It is immaterial and irrelevant, what is there now.

MR. ENRIGHT: If the Court please, it seems to me we are refining this entirely too much.

BY THE COURT:

Q. What is the condition of this building and stable and scaffolding that is spoken of? A. As to age?

Q. Yes, what is the conditon of this scaffolding and building? A. From the appearance of the building, and from my own personal knowledge, they are the same structures that were there in 1912.

Q. Did you ever see them before? A. Many times.

Q. Did you see them in 1912? A. Yes, sir.

FURTHER DIRECT:

Q. What do these structures consist of? A. Coal pockets, trestle approach to the coal pockets, office building, scales, stables, blacksmith shop, carriage building, and planking over the yard; in other words, a plank roadway.

BY MR. FISK:

Q. Is there a fence around? A. A fence, yes, in a more or less dilapidated condition.

FURTHER DIRECT:

Q. I will ask you, Mr. Dunham, whether you are able to tell from the buildings which you found upon the premises, and from your knowledge of the actual conditions as they existed in 1912—first, I will ask you whether you can give us an opinion of the replacement value of those structures as of April 30, 1912?

MR. FISK: Objected to, because the witness has not qualified himself to give an opinion. I do not know anything in the profession of civil engineering that qualifies a witness to give the value of structures and of offices and stables.

THE COURT: You may cross examine him.

CROSS EXAMINATION BY MR. WALL:

Q. What, in your judgment, are the factors of valuation of such a yard as that? A. The cost of reproduction, less depreciation.

Q. That is your sole standard of valuation, is it? A. Of buildings and structures, yes, sir.

Q. Of these particular buildings which you say you knew in 1912? A. Yes, sir.

Q. And have you ever bought and sold any properties with coal trestles and yards upon them? A. No, sir; but I have designed and built coal trestles.

Q. How many? A. One or two, I think it was two.

Q. Nearer one than two? A. No, sir; two that I can recall now.

Q. Whereabouts were those? A. On the Raritan River Railroad.

Q. That is a single track railroad? A. It is a railroad that is paying 8 per cent. dividends on its stock.

Q. Now, you say that you know nothing about the sales of coal trestles and coal pockets? A. I never sold any.

Q. Did you ever buy any? A. No, sir.

Q. Did you ever know of any sales of such property; that is, know of them by being so intimately concerned in them that you could swear to the price? A. All I know about coal trestles is what it costs to build them.

Q. Well, now, how about stables; have you had a limited experience in that, too? A. I have built stables, sheds; I spent ten years valuing stables and sheds and freight houses, and things of that kind, for the State of New Jersey, for the purpose of taxation.

Q. Based on the cost of reproduction, less depreciation? A. Yes, sir.

MR. WALL: He certainly has not qualified himself; he has not shown any qualification here to testify, for instance, to the proximity value of this yard.

MR. ENRIGHT: I am not offering him as an expert on the yard; the only purpose for which this witness has been called, is to put a physical valuation upon the buildings, the structures, independent of the land or the business transacted there, and I asked him, I think, to give us the reproduction value of those structures. Now, certainly, the physical structures cannot be worth more than they can be reproduced for—put back in identically the same situation. Now, Mr. Wall is confusing the issue here by suggesting that the value of these structures, which are entirely capable of reproduction, is something dependent upon nature of the tenure of the person who erects the structure on the land. I do not call this witness to ask what would be the buying or selling value of these buildings divorced from the land: I am asking him to give us an approximation, as nearly as his expert knowledge permits, of the reasonable cost of reproduction of these very strutures. First, I am asking him the cost of reproduction.

THE COURT: I allowed the witness yesterday to testify to the value of the land, and I think I shall allow this witness to testify simply to the value of the reproduction of these buildings, and I will rule later as to its materiality.

DIRECT EXAMINATION (CONTINUED) BY MR. ENRIGHT:

Q. What would be the valuation to reproduce these buildings, the barn and the scaffolding, in April, 1912; just give us the cost of reproduction? A. The cost to reproduce new in 1912; I have got to put two estimates, a minimum and a maximum, owing to the fact that I cannot tell exactly what is under the buildings.

Q. Have you been over there? A. Yes, sir; an examination does not disclose what sort of a foundation is under the buildings.

Q. All right. A. I place a minimum cost of $25,000, and a maximum cost of $40,000.

Q. Why is that? A. Because of the foundation; it may be a 15-foot pile; a 25-foot pile, or maybe none at all.

Q. And $40,000 allows for the maximum? A. Yes, sir.

Q. And that is the actual cost and value that you place upon this scaffold and barn? A. Yes, sir; the cost of reproduction.

Q. Will you state what you include in making up that total? A. I include the coal pocket, trestle approach to the coal pocket, the office, scales, stable, blacksmith shop, carriage building, and the plank laid over the yard for a roadway, and the grading of the yard.

Q. Have you allowed for the fence? A. No, sir, I did not.

Q. Can you give us the outside—the maximum cost of reproducing that fence, as of April, 1912? A. About $1,000, I should say. It is in a very dilapidated condition now. About $1,000 would build a new fence.

BY MR. FISK:

Q. How many feet of fence are there? A. There are about 900 feet all together.

Q. How high? A. It is about six to seven feet high.

Q. About $1.00 a foot? A. Yes, sir.

FURTHER DIRECT:

Q. Assuming that these structures were placed there in a period beginning in 1906, and ending in 1908 or 1909, what would you say as to the amount of depreciation that should be charged against that replacement value, to give you actual valuation under normal conditions of wear and tear?

MR. WALL: I object to that; all he can do is to ask this witness how much should be taken off for depreciation due to wear and tear of the elements; he does not know anything about the use, coming from the coal use.

THE WITNESS: I do.

Q. Assuming that that property was used in the handling of, approximately, 100,000 tons of coal a year, received in cars over the trestle and distributed through the pockets, assuming such a use as that, what would be the reasonable allowance for wear and tear? A. Five per cent. depreciation on the coal pockets, and three per cent. per year depreciation for the other structures.

CROSS EXAMINATION BY MR. WALL:

Q. Are those your own figures? A. Those are figures that I have used elsewhere.

Q. How many loads of dirt do you estimate went into that land in order to fit it for its use as a coal yard? A. About 12,000 cubic yards.

Q. How do you estimate that? A. By the depth of the fill as near as I could ascertain it.

Q. What steps did you take to ascertain this? A. Inspection of the property—inspection of the surface.

Q. How could you tell by that? A. Because the property is not all filled in; it is about two-thirds filled, as I estimate it, and as near as I could ascertain, the filling is about four feet in depth, and there is about two acres of it filled.

Q. You mean you took the unevenness of the yard, and assumed that the lowest point was the point from which it was filled? A. No, sir, I know what the elevation of the meadow is there, before it was filled, and the present elevation of the yard is about three feet—from 2½ feet to 3 feet above the meadow; and then I allow a settlement of about 30%.

Q. What do you figure the fill of a cubic yard in place? A. I figure that fill at 25 cents a cubic yard.

Q. Does that include cartage? A. No, sir.

Q. Did you figure that you could get fill for nothing? A. No, sir; I figured that it cost about 25 cents on the average; some of it may have cost as high as 50 cents a yard.

Q. Did you make inquiry about it? A. No, sir.

Q. Did you include the cost of the fill in your $25,000 estimate? A. No, sir, I did not.

Q. Why not? A. That was the cost of the buildings and structures.

Q. Why didn't you include that in your $25,000 item? A. Well, I did not; I was giving you the cost of the structures at that time and the planking.

Q. And your $40,000 was the cost of the structures, too? A. The $40,000 item never included the filling in there.

Q. Have you got an item on your sheet for it? A. Yes, sir.

Q. What length of pile did you figure on in your $40,000 item? A. $10.00 a piece for the piles, running 35 feet to 40 feet.

Q. What number? A. The actual number of piles under the trestle—the piling I included in the trestle and the coal pockets; I could see some of the piles under there; there are seven piles to the bent, and four piles to the bent under the trestle; those I could see, and I have estimated them.

Q. Did you figure those that you could see in your $25,000 estimate? A. Yes, sir.

Q. You put those in? A. Yes, sir.

Q. Now, you have a regular figure for the number of piles in a given area, haven't you? A. Yes, sir.

Q. What number of piles did you use as your standard? A. For the buildings, 300 piles at $10.00 each—$3,000.

Q. Is that just the cost of the piles? A. That is the cost of the piles in place—35 feet to 39 feet.

Q. Is not that pretty cheap? A. Not exactly, where there is a large quantity of them.

Q. When you say "in place," you mean driven? A. Yes, sir. After you get over 40 feet, they may run anywhere from $12.00 to $15.00 a pile, and as high as $20.00.

Q. What would you say the cost of pile 65 to 80 feet would be? A. 65 foot pile would cost $28.00 to $35.00 a pile.

Q. That is, in place? A. Yes, sir.

Q. And what would an 80 foot pile cost? A. If you could drive an 80 foot pile there, readily, in the mud, it would cost about, anywhere from $36.00 to $38.00, depending on what kind of driving it was.

Q. What is the diameter of 80 foot pile at

the foot? A. I always specify them not less than 16 inches at the foot.

CROSS EXAMINATION BY MR. LEAKE:

Q. How much a running foot did you figure the value of that trestle— A. From $12.00 to $15.00 a running foot; that is, of the trestle approach.

Q. What about the trestle? A. The coal pockets.

Q. Yes. A. Put a maximum cost on that of $40.00 a running foot.

Q. What do you figure the stable at, a running foot? A. 80 cents per square foot, minimum.

Q. Did you estimate any concrete flooring for the stable? A. There was some concrete in there —I made 20 cents a square foot for that.

Q. For how many feet—over the entire stable? A. The whole surface; I do not think the whole surface is covered; I put in 20 cents a square foot allowance for the concrete floor.

Q. Would it surprise you if the stable ground work actually cost $32,400 for the ground work and the stables? A. It would surprise me very much.

Q. What was the total cost of the trestle and pockets and piles? A. I put a maximum cost on the coal pockets of $10,120.00, including foundation.

Q. That does not answer the question; I asked you for the total cost of the coal pockets, trestle and piles; what is the total amount of the trestle and coal pockets, including the piling and ground work? A. I gave you that.

BY MR. FISK:

Q. He wants you to do the adding. A. $13,360.00.

Q. That cannot be right. A. That is, the coal pockets and trestles, including the pile foundation,

FURTHER CROSS, BY MR. LEAKE:

Q. Now, when you made your estimate of the blacksmith shop and the other buildings, did you include anything for plumbing? A. No, sir; I did not.

Q. Did you look inside to determine whether there was any plumbing there? A. I could not get inside; I looked through the windows.

MR. ENRIGHT: Is it contended that there was plumbing in the blacksmith shop?

MR. LEAKE: The blacksmith shop and the stable are all supplied with plumbing.

THE WITNESS: I could not see any expensive plumbing arrangement; there may be a faucet or two.

Q. In estimating the cost or reproducing the the pockets, did you figure in screens? A. Yes, sir; chutes.

Q. Did you figure the screens? A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. ENRIGHT.

Q. Why do you assume piles 35 feet to 39 feet in length? A. From my knowledge of the territory through there, I think that is about the right length. There may be some deeper holes in there that I don't know about.

Q. Did you figure in the estimate the cost of reproducing the scales and the scale pit? A. Yes, sir.

Q. How much did you allow for that? A. $1,500.00 for the scales.

Adjourned to Wednesday, the twenty-fourth day of November, 1915, at 10 o'clock A. M.

Continuation of the taking of testimony on the above-entitled cause, at the Chancery Chambers, Jersey City, New Jersey, on Wednesday, the twenty-fourth day of November, 1915, before Hon. Vivian M. Lewis, Vice-Chancellor.

Same appearances as heretofore noted.

MR. ALBERT I. DRAYTON, sworn in behalf of the Trustee in Bankruptcy, testified as follows:

DIRECT EXAMINATION BY MR. ENRIGHT:

Q. You are the trustee in bankruptcy of L. Wertheim Coal and Coke Company? A. Yes, sir.

Q. Did you receive certain moneys from R. H. Perry, as receiver in bankruptcy of that corporation? A. Yes, sir.

Q. Since your qualification, have you endeavored to collect such further assets as you could? A. Yes, sir.

Q. State what you received from Mr. Perry? A. I received from Mr. Perry three accounts—one in the amount of $1117.65—that was called the regular account, being money collected by Mr. Perry before the order of September 28, 1914, in the United States District Court for the District of New Jersey. Another amount, $1,474.16 —being called by Mr. Perry, "Special account of Jersey City collections;" and another, from Mr. Perry, of $12,879.56,—being a "special account of collections in New York City."

Q. Is that the item received from him as ancillary receiver under the order of the United States District Court for the Southern District of New York? A. Yes, sir.

Q. Does that comprise all of the moneys received by you from the receiver? A. Yes, sir.

Q. Have you reduced any of the assets to money? A. Yes, sir.

Q. To what extent? A. I have collected book accounts from Jersey City debtors in the amount of $253.26; and foreign accounts in the amount of $68.26; and I have received also from an insurance agency the return premium on the receiver's bond in the amount of $35.17.

MR. FISK: Give us the total for that whole thing.

THE WITNESS: Total receipts, excepting the return premium on receiver's bond, was $15,792.89.

Q. Have you any further assets in hand? A. Yes, sir, outstanding book accounts that I am attempting to collect.

Q. But thus far, these moneys represent all you have been able to collect? A. Yes, sir.

Q. You have not that amount of money on hand now, have you? A. No, sir.

BY THE COURT:

Q. Some of it has been spent? A. Yes, sir.

NO CROSS EXAMINATION.

COMPLAINANT RESTS.

WARREN DELANO, recalled.

DIRECT EXAMINATION BY MR. WALL:

Q. Mr. Delano, prior to 1909, what relation did your company, the Mill Creek Coal Company, have with the L. Wertheim Coal and Coke Company? A. We sold coal.

Q. And your company is a wholesale dealer in coal? A. Miners and shippers.

Q. And with mines in Schuykill County, Pennsylvania? A. Yes, sir.

Q. Have you any memorandum from which you can give the business by years from 1906 to 1909, inclusive, of the tonnage that you sold to L. Wertheim Coal and Coke Company? A. I have.

Q. Will you state it?

MR. ENRIGHT: Objected to as immaterial and irrelevant.

THE COURT: Upon what ground?

MR. ENRIGHT: I understand that the Court has already, under objection from the other side, excluded testimony going back to that date—except on the head that we spent some time on in tracing the inventory back to its origin—certain items of the inventory—though not on the ground that we are inquiring into a condition of the inventory as of 1908, but finding a certain inventory in 1912, ascertaining what it meant.

THE COURT: The bonds issued to the Mill Creek Company under this mortgage given to the Commercial Trust Company, are attacked by you?

MR. ENRIGHT: The bonds, yes, sir.

(Further argument.)

MR. WALL: He wants to convict Mr. Delano by a "state of mind."

MR. ENRIGHT: We are not questioning—we have not raised an issue upon whether there was any indebtedness due to the Mill Creek Coal Company.

THE COURT: Isn't it part of his proof to establish that indebtedness?

MR. ENRIGHT: It is not questioned.

THE COURT: I think he should establish it. You may note the objection to it, that it is immaterial on practically the same ground as the other.

MR. GARVEN: Do I understand that all the

evidence relating to the December, 1909 proposition, that is, the selling of stock, the giving of notes, etc., has been excluded?

THE COURT: It has not all been excluded; I cannot state exactly now without going over the record what has been excluded.

MR. GARVEN: I judge from the statement of Mr. Enright, that all testimony relating to the sale of the Isenstein and Dann Stock, and the giving of notes of the corporation, that that is all out of the case.

THE COURT: What went out of the case yesterday, was the evidence relative to transactions of Isenstein and Dann in regard to these stocks; that went out as immaterial.

MR. GARVEN: That is what I am referring to.

THE COURT: But not the subsequent issue of bonds.

FURTHER DIRECT BY MR. WALL:

Q. Now, can you lay your hand on the exact memorandum; if you can, suppose you tell us approximately. A. I have it in years. In 1906 we sold them—apparently the tonnages are not footed, but the amount was $5,586.78; that was the total amount of sales for 1906.

Q. What was it for 1907? A. 1907—the total was $21,631.97, apparently.

Q. 1908? A. $36,833.48; yes, I can give the tons, if necessary.

Q. There is no need of the tonnage. Now, 1909? A. $61,329.18.

Q. A total of over $125,000 in those four years; is that correct? A. $125,000, yes.

Q. Now, how did you come to have any relation, other than the relation as a seller of coal, to the

Wertheim Company? A. The matter was first brought to our general sales agent by Mr. Sanders Wertheim, that there was friction in their company; the statement was made by Mr. Wertheim that Messers. Isenstein and Dann were not practical coal men, and that the salaries which were paid to them were not earned; I think this was sometime in November, probably, but I have been unable to fix the date; it was simply reported to me—in 1909; the thing was brought to me by our general sales agent, who subsequently brought Mr. Sanders Wertheim to repeat this thing; and my conversation with Mr. Sanders Wertheim occurred early in December.

Q. And he said what you are detailing now? A. Yes, sir.

Q. Proceed. A. He was a good deal excited at the time, and said, that either they were going to sell out to Messers. Isenstein and Dann, or that they would, if they could, buy out Isenstein and Dann, and he came to me with the proposition that if they could get a loan of a certain amount to pay cash down, they could buy the Isenstein and Dann stock very advantageously. I asked Mr. Wertheim whether there was not someone else with whom they had had dealings, who would join in the proposition, and he mentioned the East Boston Coal Company, the Messrs. Payne, and he said he would talk it up with them and see how they felt about it, and he thought they might.

Q. Give the initials of Messrs. Payne. A. The East Boston Coal Company.

Q. Who are the Messrs. Payne? A. Mr. W. G. Payne, of Kingston, and Mr. W. T. Payne was the active manager of the company.

Q. Had you had any dealings with them at that time? A. I had never met either of the gentlemen at that time; I had never had any dealings with

them. The result of that proposition on Mr. Wertheim's part was, that on December 8th, Mr. Wertheim brought the two Messrs. Payne to my office, and we discussed the matter very thoroughly. I had never met Mr. Louis Wertheim at that time; and I had only met Mr. Sanders Wertheim, I think twice, or three times at the outside; but Mr. W. T. Payne knew both gentlemen, and I depended a good deal upon his judgment at that time; and the judgment of my general sales agent was very favorable towards the Wertheims personally; and that impression was strengthened in my mind after talking with the Paynes. Mr. W. G. Payne met me again five days later, December 13th, and we had a talk; and on December 14th we had a meeting, at which the details were practically agreed upon. At that meeting, Mr. W. T. Payne was not present, but Mr. W. G. Payne, the father, was.

Q. In this interview you had with Sanders Wertheim, in which he mentioned the relations that the Wertheims had with Isenstein and Dann, what did he state to be the salary of Isenstein and Dann? A My memorandum at the time was, that these salaries were about $12,000 per annum—the two salaries.

Q. Were those salaries to be continued in any new arrangement that would be made, or not? A. No, sir, they were to be paid to the company, absolutely. I did not go into the details of the company prior to when we decided to help them; I looked upon it simply as a business proposition. Here was a yard doing a very good business, apparently, handling 120,000 or 130,000 tons of coal per annum, and with a practically nominal rental on a long term lease—it seemed to me.

MR. ENRIGHT: I object to what it seemed to him.

MR. WALL: I think it is a very pertinent inquiry.

THE WITNESS: It was a very promising business proposition, it seemed to me.

MR. ENRIGHT: I move that that be stricken out.

THE COURT: I think it should be stricken out.

MR. WALL: The question is, whether he has discharged his duty as a director; can he say what his judgment was that a thing was good or not, and would be good in the future?

Q. What has been your business for the last twenty years? A. I have been in the coal business.

Q. And that consists in what? A. Mining coals, shipping the coal—wholesale coal—we do not retail any.

Q. Are you familiar with the location of the coal fields in Pennsylvania? A. Very.

Q. Have you ever had occasion to study the convenience of access to these coal fields by different railroads? A. I have.

Q. In your judgment, does proximity through a carrier who is connected with the coal fields in Pennsylvania, reflect any value to the person who has the business carried on under such proximity? A. The proximity of what?

Q. Of the coal yard. A. Yes, sir.

Q. Did you know of the existence of this trestle and the location of it? A. Yes, sir.

Q. Have you seen many other trestles in your time? A. Yes, sir.

Q. Have you bought trestles of that character? A. No, sir, this is my first entry into the retail business.

Q. Are trestles only used in the retail business? A. Yes, sir, I should say so, practically, except where they are used for private purposes.

Q. You sold as a wholesaler to retailers, didn't you? A. Very largely; that was our principal business.

Q. So, when you say this was your first entry into the retail business, you mean that this is the first time where you were connected with a company which was engaged in retailing coal? A. Yes, sir.

THE COURT: I think he is qualified to testify.

Q. Now, what, in your judgment, were the factors that made it seem to you as though the Wertheim Company could make money?

MR. ENRIGHT: I object to that as immaterial and irrelevant—calling for a state of mind, an opinion.

THE COURT: I think the question might be framed differently.

Q. What was the conclusion you reached after the investigation you made at that time of the probabilities of success of the Wertheim Company?

MR. ENRIGHT: Objected to as immaterial.

THE COURT: I will allow that to stand.

A. It was favorable to the proposition.

Q. Why? A. I thought I saw a good deal of money in the operation of the yard under the conditions that I have stated—the lease—tenure—location of property.

Q. Why was the lease valuable? A. The lease was a very low lease.

MR. ENRIGHT: I ask to have that struck out; I think it is incompetent. If the company was

insolvent at the time the mortgage was made, the mortgage is void, regardless of good faith; if there was bad faith in addition, it cannot be any more void than otherwise.

MR. WALL: Another phase of his case is, that these directors should not have allowed money to be paid out to Isenstein and Dann.

MR. FISK: In the cross-bill he attacks the good faith of the officers and directors of the company in the incurring of this indebtedness, the execution of this bond and mortgage, and says it is part of a scheme of the East Boston Coal Company and Mr. Delano's company to unjustly and improperly grab the assets of the company.

MR. ENRIGHT: I don't think there is any such allegation in the cross-bill.

THE COURT: If counsel will disclaim any such purpose, we won't waste any more time; I think we shall have to go into it; the objection will be overruled.

BY MR. WALL:

Q. Well, now what was your opinion of Sanders Wertheim as a salesman? A. My personal opinion was simply what I took from our own general sales agent.

THE COURT: Don't let us have that.

Q. Now, then, you got down to the 14th of December, 1909; now, then, what was done after that with reference to your entry into the Wertheim business? A. The Wertheims were authorized to make the best terms they could with Messrs. Isenstein and Dann, and I, as president of the Mill Creek Coal Company, agreed to procure for them a credit, or a loan of $20,000, if that was the least that they could get—

Q. What did Mr. Sanders Wertheim represent to you was the status of Isenstein and Dann at that time? A. The largest stockholders of the Wertheim Company. Their proposition was, to sell their stock, their preferred stock, at 50 cents on the dollar—not the common—provided a cash payment were made to take up notes which they had negotiated for the benefit of the company.

Q. And what was the amount of that cash payment? A. That was finally settled at $20,000—it was something less than the amount of the notes.

Q. You acted throughout as President of the Mill Creek Coal Company? A. Yes, sir, personally I had no interest whatever.

Q. Did you ever have any interest in the Wertheim Company, personally? A. No, sir, never.

Q. What was your total stock holding in the Wertheim Company? A. I held eight shares.

Q. Did you ever hold any more than that? A. No, sir, never.

Q. Who held the majority of the stock? A. The Wertheims held all but 224 shares.

Q. How much was the total stock holdings? A. (No answer.)

MR. WALL: $150,000 it was finally reduced to.

Q. Now, when you had made this statement of what they were authorized to do, what was done; how about the $20,000, tell us about that. A. That was the period—it was on that account that I invited Mr. Van Buskirk, as President of the Mechanics' Trust Company, on whose board I was—I invited him to participate in this hearing on the 14th, in order to acquaint himself with the conditions.

Q. Did he also act as your attorney? A. He did, a little later than this, when it came to looking

over certain papers, stock holdings, etc. I wanted to be sure that everything was straight—the minutes of the company—I turned them all over to Mr. Van Buskirk, and he reported on them; but at this period, he was not acting as my attorney; and he never was the attorney for the Mill Creek Coal Company.

Q. What word came back after you had authorized the Wertheims to make this arrangement—what word came back as to what Isenstein and Dann would do? A. Sanders Wertheim reported that the terms he had already quoted were the best that could be carried out—that they would accept the $20,000 in cash, and a monthly payment of $1,000 on the stock; and it was agreed that $1,000 notes should be issued by them with interest to date of payment, and extending over several years.

Q. By whom? A. By the Wertheim Coal and Coke Company. That was carried out entirely before the reorganization of the company, and the entry of Messrs. Delano and Payne, and Mr. Van Buskirk, to the Board of the Wertheim Coal and Coke Company.

Q. Now, what did you do about getting the $20,000? A. I asked Mr. Van Buskirk if he would discount the note of the Wertheim Coal and Coke Company, which he agreed to do with the indorsement of the Mill Creek Coal Company; at the same time he suggested that it would look better—

Q .Just tell us what was done? A. The Wertheims made such a note payable to the Mill Creek Coal Company, the Wertheim Coal and Coke Company drew a note for $20,000, payable to the Mill Creek Coal Company; this note was indorsed by the Mill Creek Coal Company, and was discounted by the Mechanics' Trust Company, and the money was paid to Mr. Marshall Van Winkle, who was the attorney at that time for the L. Wertheim Coal and Coke Company.

Q. Was he also the register of this stock and the agent in this State upon whom process against the corporation might be served? A. He was registrar of the stock; I can only presume that he was the agent in this State upon whom process against the corporation could be served; I don't know positively. There was a little further action connected with that $20,000. Mr. Van Buskirk thought it would look better—

Q. Just tell what was done. A. The Mill Creek Coal Company at the same time opened an account with the Mechanics Trust Company, with whom they had never had any relations prior to that time, by deposit of a check for $20,000.

Q. And then you left that money—the Mill Creek Coal Company left that money in there until when? A. That money was on deposit, and we added to it, and we carried a deposit for months, and I am not sure that we have not one yet.

Q. Did the Mill Creek Coal Company ever pay the $20,000 to the Mechanics' Bank? A. That particular note was paid in the summer of 1913 by the Mill Creek Coal Company; I took it up.

Q. As indorser; and that $20,000 as $20,000 par of the bonds that you are going to mention later in your testimony? A. Yes, sir.

Q. Now, what day was it that the money got by this method was handed to Mr. Van Winkle, the attorney of the Wertheim Company? A. My recollection is, the 17th day of December, 1909.

Q. Have you the original check? A. Yes, sir, from the Mill Creek Coal Company; it was dated December 16th, deposited to—

Q. Suppose we read it in. A. "New York, December 16, 1909. New York Life Insurance and Trust Company, Pay to the order of De Witt Van Buskirk, $20,000, and charge the same to the

account of Mill Creek Coal Company. (Signed) Warren Delano, President."

MR. WALL (reading): "$20,000"—down in the left-hand corner, and no number on the check; stamped across its face, "Paid December 18, 1909, N. Y. Life Insurance and Trust Co.," indorsed "De Witt Van Buskirk, Pay to Hanover National Bank, N. Y., or order—the Mechanics' Trust Company, Bayonne, N. J."

Q. Is this other check the check of Van Buskirk that was delivered to Mr. Van Winkle? A. Yes, sir.

MR. WALL (reading): "Bayonne, N. J., December 17, 1907, No. 5,214 (over to the left). The Mechanics' Trust Company of N. J.,—payable through the New York Clearing House—pay to the order of D. W. Van Buskirk, $20,000. (Signed) De Witt Van Buskirk—certified December 17—(Indorsed). Pay to the order of Marshall Van Winkle, Atty. (Signed) De Witt Van Buskirk.

"Pay First National Bank of Jersey City, or Order, Marshall Van Winkle"—and below that "Received Payment," "First National Bank of J. C., December 17, 1909, through N. Y. Clearing House."

Q. Well, then, after that you became a member of the Directorate of the Wertheim Company? A. Yes, sir, on the 20th of December, 1909.

Q. Have you the by-laws? Haven't you a copy of the by-laws? A. I have, yes, sir.

Q. Won't you produce them? A. Here they are.

Q. Where did you get this copy of the by-laws? A. They were given to me by Mr. Sanders Wertheim during the period of these negotiations.

MR. ENRIGHT: I object to the offer as incompetent. Of course, the trustee knows nothing about the by-laws. I think somebody ought to make a statement who knows these are the by-laws.

MR. FISK: Sanders Wertheim was the secretary of the company.

THE COURT: Then let him prove them.

MR. WALL: They look to me as though they come from Mr. Van Winkle's office.

THE COURT: Mark them for identification for the present.

Marked "Exhibit W-1 for identification."

Q. At the time you became a director, was this paper handed to you at that time? A. Yes, sir.

Q. And you have retained it in your possession ever since? A. Yes, sir, except while it was in the possession of my counsel. They were amended after we went in; I think they were amended twice after we went in. After 1910, after January of 1910, I think we amended them twice.

Q. Now, let us go on after this meeting; then you had some action taken with reference to the stock, didn't you? A. That was after the audit; my first step was to have an audit made of the company's account, something that we could start from.

Q. That is the audit that has already been placed in evidence? A. Yes, sir; that was to cover the period up to the 31st of December, 1909, at which time we took an interest, practically.

Q. Before you had the stock decreased, is that correct? A. That followed the audit; it took something over a year to do that.

Q. Don't you recollect what was done with the stock specifically? A. I don't understand your question.

Q. Well, what was it reduced to? A. The stock consisted originally of $125,000, par value of common stock, and $150,000 par value of preferred stock. When we first went in, I submitted the first question, which—Mr. Van Buskirk acted as my personal attorney—was to go over the minutes and see whether the various actions of the Board of the Stockholders up to that time had been correct. He threw a good deal of doubt on a certain increase of stock which had been made, and after talking over the matter with him, I decided that we should reduce the stock. Mr. Payne agreed with me, and we undertook the reduction, and it was finally carried out in 1911, I think.

Q. That was carried out by certificate filed in the office of the Secretary of State of New Jersey, on September 22nd, 1911, wasn't it? A. Yes, sir, after the reduction was made the stock consisted of $150,000 par value of common stock, no preferred stock.

Q. And then, Max Isenstein and Mr. Dann having been eliminated, how was the stock held? A. The stock was held entirely in the hands of the Wertheims, with the exception of the 200 shares in the name of Otto Isenstein, another brother; and the twenty-four qualifying shares belonging to Messrs. Payne, Van Buskirk and myself, eight shares each.

Q. Well, just follow it down to the time of the decrease of the stock until the making of the first mortgage; I mean, follow the condition of the company in your relations to it. A. There was no particular change; we did not make the money that we had hoped to make, but there was nothing essentially improbable in the conditions changing; in other words, there were some very strong, as we thought, very strong excuses for not making money at the time.

MR. ENRIGHT: I object to that. In the first place, it is not responsive to any question asked, so the answer could not be anticipated; I move that the latter part of the answer be stricken out.

THE COURT: Yes, it will be stricken out.

MR. WALL: It seems to me I am entitled to have everything in connection with this company spread upon the record.

Q. What was the strong reason that you had in mind that was the basis for belief in ultimate success?

MR. ENRIGHT: I object to that, as calling for a condition of the witness's mind.

MR. WALL: That is what we are just investigating.

THE COURT: If he will tell us some reason why he thought the business might be a success, I will accept that in evidence.

MR. WALL: We ought to make it as specific as we can.

Q. What was the reason that you thought that that thing would be a success during that period?

MR. ENRIGHT: I object to that question and that line of question which seeks to develop the witness's thought; you cannot cross-examine a thought, and it seems to me that the testimony must be limited under the accepted rules of evidence, to the detailing of facts from which the Court can conclude what the witness's thought was; it is not competent for him to testify what his thought was; if that is an issue in the case, it is a fact to be determined in view of proven facts.

Q. Give us the factors that entered into your

opinion. A. We had been very unfortunate in the line of horses; the stable became infected with glanders, and we lost many horses, between twenty and thirty thousand dollars was the loss in horses.

Q. What year was that? A. That was December, in 1911, and it may have partly been in 1912; but the thing that impressed my mind at the time was, what I thought was an unfair discrimination of the Lehigh Valley Railroad against the Wertheims; not the freight rate, but the demurrage—bad delivery of coal; the allowing of cars to stand a long distance from the trestle, but charging them as being delivered, and then charging demurrage on deliveries.

By the Court:

Q. When did you first observe a change of attitude and of charges upon the part of the Lehigh Valley Railroad towards the Wertheims? A. It was brought to my attention more specifically in 1911.

Q. What part of the year 1911 did it come to your attention that there was a change on the part of the Lehigh Valley Railroad in its charges? A. The change came coincidently with the ruling of the Interstate Commerce Commission; I do not recall the exact time; I do not think there was, necessarily, any intentional attitude on the part of the railroad or its officials against these people, but they began following more closely the rules laid down by the Interstate Commerce Commission; and their records of delivery, etc., were inaccurate—the records which came to their office from underlings.

Q. Who brought this to your attention? A. Mr. Sanders Wertheim; I used to see him at times every day.

Q. Can you give us any figures to indicate the loss in that regard? A. No, sir, I cannot, because

I do not find any in my correspondence, and I have to rely entirely on that.

Q. Was there any estimate put upon it by Mr. Sanders Wertheim at any meeting? A. I can say this, your Honor, that in 1911, there were large bills rendered, and my recollection is, that there was a bill that ran up to something like $4,000, for demurrage alone, in one month, which they finally compromised at a ridiculously low amount. It was at this time that Mr. Leake was brought to us by the Wertheims, with the request that Mr. Leake be employed as the counsel for the company. I find that Mr. Leake called on me first early in August with Mr. Wertheim. The matter of demurrages was taken up at that time, and I found among my papers copies of letters between Mr. Leake and the railroad, and finally a settlement was made—I cannot find the amount, but it was a very small percentage of the claim. I thought that these things could be adjusted.

BY THE COURT:

Q. Any other reason? A. No, sir, no more than the belief that conditions warranted the making of money in that business at that locality.

FURTHER DIRECT:

Q. Mr. Delano, who first suggested the bond proposition? A. That was brought about on the first of January, 1912, during the winter, we will say, by Mr. Leake, as the representative of the Wertheims.

Q. What do you mean when you say "the Wertheims"? A. He was, in one sense, the representative of the Wertheim Company; he was both; he was the counsel for the Wertheim Company and also for the Wertheims individually.

Q. Did you have any other lawyer for the Wertheim Company at that time? A. No, sir.

Q. Well, what was the proposition in reference to the bonds? A. Mr. Leake said that one great trouble—Mr. Leake claimed to have made a very careful study of the Wertheim situation; he had gone over all the books and satisfied himself that they had a good business and that they were getting fair prices, and that they were buying coal at good prices, reasonable prices. He said the great trouble, as it appeared to him, was that their time was taken up in meeting their indebtedness—borrowing money from the banks—discounting here and there, and arranging with their creditors; that they were overwhelmed by a mass of indebtedness; and that that took away their energies and time from the prosecution of the business; he said he believed there was a way in which relief could be given them to the benefit of all parties in interest. You will recall that when we started this business we started with a large number of notes which were coming due month after month. We had given the Wertheim Company, that is we, the two coal companies, had given to the Wertheim Coal and Coke Company practically ten months' credit on all of their monthly bills, so that they were always outstanding—at least ten months' bills—to each company; then there were ten months' notes, or notes for ten months,—I mean ten notes outstanding owing to each of the coal companies.

Q. They did not do any business in a coal way with anyone except Payne and your company—purchasing coal? A. They were not restricted absolutely. Very frequently we were unable to give them the sizes of coal that they required, and then they would go outside and buy, or sometimes we would go outside and buy for them; we bought a great deal of coal for them.

Q. When you bought it, you assumed it? A.

Yes, sir, and it went in on the ten months' credit business. There was one thing that I forgot to mention, and that was, the burning of Mr. Payne's breaker, which put them out of business for a time; but after that happened, he did all he could to buy coal outside; the breaker being burned, he could not ship anything. The proposition that Mr. Leake finally worked out for the carrying of the Wertheim Company towards the two creditor companies was, that we, the creditor companies, should give up our notes and take in lieu thereof this bond issue, which was to be secured by all the assets which the company had. It meant that we were surrendering notes on which we could have sued and closed up the company at any moment, and giving them a twenty year lease, where they could not be touched, practically, and continuing without previous agreement to give them all the coal we could. We continued under the same agreement to furnish them coal.

Q. At that time they owed you—that is, the Mill Creek Company, the amount of— A. They owed us directly about $100,000; of course, there was still this note of $20,000, on which we were responsible as indorsers.

Q. Roughly, about $119,000? A. Yes, sir.

Q. That they owed you at that time? A. Yes, sir.

Q. Now, then, before you went into this scheme, that is, before you gave your adherence to it, did you investigate or have investigated, the question of the consideration of the Isenstein and Dann notes? A. Yes, sir.

Q. Tell us about that. A. I took it up with Mr. Leake.

Q. When was that? A. That was early in January, 1912.

Q. What was his advice to you concerning the

liability of the Wertheim Company on the paper held by Isenstein and Dann?

MR. ENRIGHT: Objected to as immaterial and irrelevant.

THE COURT: The objection is overruled.

A. He advised me that, in his opinion, we were —the company was liable—that the Wertheim Coal and Coke Company was liable, and that the notes could not be attacked.

Q. Well, then, you took the bonds for the amount that you had sold in coal prior to the bond issue, and the $20,000? A. Yes, sir.

Q. And part of it was some $2500.00 that you had—that the Mill Creek Company, had advanced? A. Yes, sir, I understand; we had advanced $2500.00, not for coal, but to cover the lease of the property in Harlem.

Q. You had advanced it? A. Yes, sir, each company advanced $2500.00; that is the only money that we received notes for that was not for coal.

BY MR. ENRIGHT:

Q. And that was in 1911, wasn't it? A. Yes, sir.

FURTHER DIRECT, BY MR. WALL:

Q. Did you ever get a penny of salary out of any relation that you had with the Wertheim Company? A. No, sir.

Q. Did you have any agreement or understanding by which you, personally, were to make a dollar out of the transaction? A. No, sir.

Q. Did you ever make a dollar out of it? A. No, sir.

Q. Well, then, after you funded the indebtedness of the Mill Creek Company in this fashion, and changed the ten months' period of payment to

a twenty-year payment by the acceptance of the bonds, did you continue to sell coal to the Wertheim Company? A. We did, yes, sir.

Q. In what amount?

MR. ENRIGHT: Objected to as immaterial and irrelevant.

THE COURT: What is the object of the inquiry, Mr. Wall?

MR. WALL: This bears directly on the question of the mortgage. It certainly is a pertinent fact. When a man takes a bond which gives him a preference, it makes a great deal of difference. (Continues argument.)

THE COURT: If it is put forward here as showing his good faith and his belief in this transaction which he had with the other directors of the corporation been a party to, then I will allow it for that purpose.

MR. ENRIGHT: So far as the mortgage itself is concerned, the charge is that that mortgage was given at the time the corporation was insolvent. Now, a question of intent is immaterial.

MR. WALL: In *Regina vs. Otto,* in which I happened to be for the mortgage, in that case it was considered very important that a sum of money was paid in cash at the time of the taking of the mortgage; Vice-Chancellor Stevens considered that very important. Now, then, what I want to show here is, that he believed what he has testified to to-day.

THE COURT: His giving credit therefor would certainly indicate to the Court's mind, and would indicate to anyone, that he believed the corporation was solvent, and as to his good faith in the transaction, it goes to that point, I think.

(Further argument of counsel.)

THE COURT: The general frame of your cross-bill is, that there is a general attack upon this entire transaction as being *ultra vires;* as being the work of men who got control of a corporation, and then proceeded to protect themselves and shut out other creditors, and that the whole attack is against the good faith of these parties.

MR. ENRIGHT: That is not the whole point. The question of *ultra vires* is raised solely with respect to the Isenstein and Dann notes. It is contended that they were notes given by the corporation for the purchase of its own stock, or to enable two of the directors to purchase stock—whichever way you choose to look at it, that was an *ultra vires* transaction, that affects about $50,000 worth of these bonds.

Now, the other notes, those held by the Mill Creek Coal Company, rest on an utterly different transaction—they are merchandise notes, except for that $20,000 item—the $2500 item—and as to those the charge is that the mortgage is void, not that the debt is void, but that the mortgage is void because the corporation is insolvent.

THE COURT: I am inclined to allow it in.

MR. WALL: The question with these companies is not book insolvency, not the matching of figures, but whether they can, with safety, resume their business, to their stockholders and creditors; and if Mr. Delano, after giving this mortgage, gave this company credit to a large amount, and counsel say that did not affect their solvency—(continues argument).

THE COURT: I will allow it.

By Mr. Wall:

Q. Let us have the figures by months, of the coal sold by the Mill Creek Coal Company subsequent to May, 1912. A. In May, 1912, $659.19; in June, 1912, $2,529.95; in July, 1912, $2,837.20; in July again, $345.06; September, $2305.23; October, $4,423.36; November, $1801.32; December, $1513,-10; January, 1913, $3,773.36; February, 1913, $6090.37; March, 1913, $4,672.17; April, 1913, $2,116.03; in May, 1913, $4,119.47; in June, 1913, $3,753.19; in July, 1913, $142.45; that was the last sale.

Q. You never sold them any coal after that? A. No, sir.

Q. How much did those figures total? A. $31,836.43, less cash payments on them.

Q. Now, the last cash you were paid was on November 27, 1912, when you were paid $568.39? A. Yes, sir.

Q. Leaving the total that you have already given? A. Yes, sir.

By the Court:

Q. Well, did you continue to be a stockholder and director to the end? A. (No answer.)

Q. When did you resign as director? A. I resigned from the board on July 14, 1913.

Q. And you had previously resigned as Vice-President? A. I resigned as Vice-President, I think, in 1912, before the suit against the Lehigh Valley was brought.

Q. And that was accepted, as Vice-President, at the meeting of June 19, 1912, wasn't it? A. Yes, sir.

Q. Meeting of directors? A. Yes, sir.

Q. Was that the date the resignation was tendered? A. I think that was the date it went

before the meeting—wait a second, and I will tell you the date; I have that among my papers somewhere, but I cannot find it.

FURTHER DIRECT:

Q. What was the contention with the Lehigh Valley? A. The contention with the Lehigh Valley grew out of the freight discrimination to Jersey City.

Q. Well, now, Mr. Delano, you have not had anything to do with the company after this date on July 14, 1913? A. No, sir, I wiped my hands of the company, and on several occasions when parties wrote for information as to the company—

MR. ENRIGHT: I object to that.

Q. You have not had anything to do with the company after you severed your connection with the company July 14, 1913? A. No, sir.

Q. Now, reverting again to the $20,000 note transaction—(interrupted).

BY THE COURT:

Q. What did you do with your stock? A. I had already transferred it to Marshall Van Winkle in blank; I never had possession of it; it was recognized as belonging to the Wertheims; it was part of their stock, which was simply put in our names as qualifying stock; there was never any money paid for the stock; it was simply qualifying stock.

FURTHER DIRECT:

Q. Now, reverting to the $20,000 note loan transaction; you had a paper marked No. 142, which gave a list of the payments due Isenstein and Dann at that time; have you that paper? A. No.

Q. Where did you get that from? A. That was handed me at the time, in December, 1909.

Q. By whom? A. By Mr. Wertheim; they show the amount which Isenstein and Dann had advanced—claim to have advanced to the company.

MR. WALL: I offer it in evidence.

THE WITNESS: Perhaps, I should say—to have raised for the company on their credit.

Marked "Exhibit W-2, for identification."

Q. Now, you also had some releases, original releases, that were executed by Isenstein and Dann to the Wertheim Coal and Coke Company, didn't you? A. Yes, sir.

Q. Are these they? A. Yes, sir, those are they.

MR. WALL: I offer release from Max Isenstein to the Wertheim Company and Louis and Sanders Wertheim; and another release from Dann, of the same character, bearing the same date, the 15th of December, 1909.

Marked "Exhibit W-3 for identification.

MR. WALL: One of the points in the bill—the charge is made that Mr. Delano and Mr. Payne allowed this company to go on when they should have stopped its career, and thereby did a wrong to some of the creditors. Now, I did not hear anything in the main case which seemed to uphold that contention, and it seems only right that counsel should state whether he intends to make any such charge as that.

MR. ENRIGHT: That is undoubtedly the complaint of some of the general creditors, but I was not under the impression that that was one of the issues involved in this suit at all, and I have not offered any proof in support of it.

MR. WALL: And, therefore, it is out?

MR. ENRIGHT: It seemed to me it was im-

material in a foreclosure suit to bring up a question of that sort. In other words, I had assumed that the only issues that can be tried here are the issues affecting this mortgage.

THE COURT: Yes, that is all.

Q. Mr. Delano, did not the amount of coal sold by the Mill Creek Company to the Wertheim Company, prior to January 1st, 1910, total $125,381.00, and the amount sold since January 1, 1910, including tonnage to the 115th Street yard, amount to $225,392.71? A. Yes, sir.

MR. ENRIGHT: I object to that line as immaterial and irrelevant.

THE COURT: How much coal was sold from January 1, 1911, to January 1, 1913; how much of this $200,000 amount is included in that?

MR. WALL: All except $71,038.47, being the amount for 1910.

THE COURT: Some is included in that amount?

MR. WALL: Yes.

CROSS EXAMINATION BY MR. GARVEN:

Q. Mr. Delano, at the meetings in December, 1909, namely, the meeting of December 8, 13, 14, was Mr. Dann or Mr. Isenstein present at any of the meetings? A. No, sir, these meetings were informal meetings, not meetings of the board.

Q. And the purpose was to discuss the condition of the Wertheim Company and the terms of the sale of stock, etc., is that it? A. Yes, sir.

Q. Did I understand you to say that Mr. Sanders Wertheim had stated that neither Mr. Isenstein or Mr. Dann were practical coal men? A. Were not practical coal men.

Q. And you knew that? A. No, sir, but I accepted the statement.

Q. And I suppose they informed you that the $25,000 was due them for money loaned, and they went into other details as to the condition of the company's affairs? A. Yes, sir.

Q. And was it at that time—this meeting of December 14—that you suggested to Mr. Wertheim to obtain the best settlement possible in order to get those two men out of the company? A. Yes, sir.

Q. In other words, I suppose you did not want either Mr. Isenstein or Mr. Dann in the company, because of the fact that they were not practical coal men? A. I was not interested one way or the other; if it had not been for the Wertheims wishing to buy them out, they would never have come to me to ask help. I did not care who managed the company. It was brought to me as a proposition with them out—based on their being out. I knew nothing about Messrs. Isenstein and Dann, either for or against.

Q. From the information you received from the Wertheims, you wanted their services dispensed with before you went into the company? A. Mr. Wertheim wanted them dispensed with; I was not interested in that feature at all.

Q. You were interested in getting into the company, were you not? A. I cannot say whether I was or not; the point was this: would I finance them if they could come to me with a company which they would guarantee on the faith of the knowledge that the coal business was going to be a very profitable one.

Q. But you were so interested, that you agreed to come in as Vice-President, as Director and Vice-President? A. Yes, sir.

Q. And isn't it a fact that you considered it necessary to have Isenstein and Dann out of the company? A. No, sir, because I had never heard of them until December, 1909.

Q. Did you know that they controlled the majority of the stock at that time? A. Yes, sir, and I had been told that the company had not been successful, and the reason for its not being successful was because it was overofficered.

Q. In other words, because of the fact that Isenstein and Dann were not practical men, they could not get along with the other two men who were practical? A. They were drawing the principal salaries from the company, and the Wertheims claimed that they, the Wertheims, were doing the business.

Q. Did they tell you that Isenstein and Dann had paid in cash $92,500 for stock of the company? A. No, sir, we did not go into that at all.

Q. You knew, however, that they had loaned considerable sums of money? A. I did not go into the history of the company up to that time.

Q. Isn't it a fact that you, as well as the Wertheims, wanted Isenstein and Dann out of the company? A. No, sir, I did not care one way or the other.

Q. You wanted to go into the company with Mr. Payne and Mr. Wertheim? A. I agreed to go into it after Mr. Payne had agreed to stand with me.

Q. And you did not want men who were not practical in the company? A. The whole thing was based on their going out.

Q. So that the next day after this meeting, namely, on December 15, Dann and Isenstein resigned as officials of the company, is that so? A. Yes, sir, but I did not know at the time; I had nothing to do with the meetings of the 15th, 16th or 17th; we had nothing to do with the company until the 20th.

Q. It was understood, that both those men should resign as officials, is not that so? A. I understood they were going to buy them out.

Q. Now, on the 17th, haven't you a recollection that both Isenstein and Dann resigned as directors of the company, and that you and Mr. Van Buskirk and Mr. Payne were elected directors of the company? A. It may have been the 17th.

Q. At ten o'clock on December 17, 1909, didn't you go in as a director of this company? A. I was not present at any meeting until the 20th; I was elected on the 17th, I think.

Q. And both these men had resigned so that you and others could take their places? A. Yes, sir, they had to resign, and they had to elect me to the board.

Q. Now, at the same time, or immediately after ten o'clock of that day, didn't you sign a waiver of a notice of a meeting of the directors for 11 o'clock of that same day? A. I may, possibly.

Q. And was not a meeting held at 11 o'clock that day, and you were elected Vice-President of the company in place of Mr. Isenstein? A. Was this a directors' meeting or a board meeting?

Q. Directors' meeting. A. I have no record of that; my first record is on December 20th, that was the day we put through the reorganization; that is according to my docket, and I thought it agreed with the minutes.

Q. You won't say it was not the 17th? A. No, sir, not if you say it was; I signed a waiver of the meeting of the 20th.

Q. You did not sign one for the 17th? A. No, sir, that is marked No. 1 on my memorandum.

Q. I show you what purports to be a waiver of notice, dated December 17, 1909, and ask you if that is your signature? A. Yes, sir, that is my signature.

MR. GARVEN: A meeting of the same date at eleven o'clock.

New Jersey State Library

MR. WALL: The minute is already in; that is already in evidence.

MR. GARVEN: I asked him first whether he was elected at 10 o'clock on the morning of the 17th as director, and he said "Yes"; now, I ask him if he did not sign a waiver for the meeting of the directors at 11 o'clock—a waiver of a notice for 11 o'clock on that day?

THE WITNESS: Yes, sir.

Q. You signed that? A. Yes, sir.

Q. And at that meeting you were elected Vice-President in the place of Mr. Isenstein? A. Yes, sir, but I was not present at the meeting; that is what I said.

Marked "Exhibit G-1."

Q. Now, at that time, the meeting of December 17, 1909, or rather, on that day, did not the Wertheim Company give notes to Isenstein and Dann for the stock, the consideration of the stock? A. I must refer to the minutes; I was not present and that was a matter that I supposed had been done before this; I don't think they resigned until after they had received their stock and their money and their notes.

Q. You mean, it is your idea that they held on to the stock? A. I think that the stock was turned over and the notes due against it, before they went out of the company; that is my understanding.

Q. Wasn't it your understanding that they should turn over all their stock, resign from the company and turn over all their stock, and then these notes were issued? A. No, sir, my understanding was that they were to turn over the stock and receive the notes as one operation, and I thought that was done prior to the election of the board, of the change in the board.

Q. Was it the 17th of December that all this took place?

MR. WALL: The witness says he does not know about these things.

THE WITNESS: The first meeting that I attended was the 20th; that is all I can say from my personal knowledge; now, whatever is on the record I presume is correct. The first action I took at any meeting was on the 20th.

Q. Now, it was agreed to purchase the stock of Isenstein and Dann at 50 cents on the dollar; that was done— A. That was done by the Wertheims individually; it did not come up before the board, as far as I know.

Q. You said you were not there on the 17th? A. I was not.

Q. Did you hear it at that time? A. I probably heard of it on the 20th.

CROSS EXAMINATION BY MR. LEAKE:

Q. Mr. Delano, do you remember whether before the bond issue in May, 1912, do you recall whether a report was made to you that Mr. Barrett, of the Lehigh Valley Coal Company, or Railroad Company, had recommended the purchase of the Wertheim plant?

MR. ENRIGHT: Objected to as immaterial and irrelevant.

MR. LEAKE: The purpose of that is very material, and that is this, that another reason why the directors gave the bond issue and continued the business was, that there was a purchaser in existence at that time, prior to May, 1912, it might have a very great bearing on what these directors would do.

THE COURT: I will allow it.

BY THE COURT:

Q. Did you have that information? A. I remember the information, but cannot place the time, your Honor.

Q. You did not know, then, whether it was prior to the issuance of these bonds? A. It was, probably, about that time.

CROSS EXAMINATION BY MR. ENRIGHT:

Q. Mr. Delano, in your connection with the Wertheim Company, you had no other interest except as representative of the Mill Creek Coal Company? A. No, sir.

Q. And the Mill Creek Coal Company had no other interest except as a seller of coal? A. No, sir.

Q. The Wertheim Company was indebted to your company to some extent in December, 1909, before this transaction, wasn't it? A. Yes, sir.

Q. And you were of the opinion that they had a satisfactory tonnage at this yard, were you not? A. Yes, sir.

Q. Your company had been dealing with them since 1906, I think you have said? A. Yes, sir.

Q. That is, from the time they opened up this yard in Jersey City? A. Very soon after.

Q. You knew before this deal in December, that the Wertheim Company had been losing money, didn't you? A. No, sir.

Q. Do you remember being examined as a witness in the bankruptcy proceedings? A. Yes, sir.

Q. And being asked the question: "You knew when you went in, under the old management, that it had been a losing business," and answering "Yes"? A. At the time, in December; it was so stated to us by the Wertheims.

Q. So that you had information, at any rate,

from the Wertheims? A. It was during those negotiations that I learned that they had not been successful.

Q. That it had been a losing business? A. I should say to-day, that I knew they had not been successful, but I cannot say that I knew that they had been losing money; in fact, I think they had a good deal more property at the time we went in than they had in 1906.

Q. I am asking you whether you recall being asked the question: "You knew when you went in under the old management that it had been a losing business"; and answering, "Yes"? A. I recall the examination and I don't recall the questions or answers.

MR. WALL: I object to any question addressed to this witness on the basis of his testimony given in the bankruptcy proceedings, under Section 219 of the Bankruptcy Act, on the ground that such an examination as that is not one where you can use the testimony. The witness is not allowed counsel as a right, and it is an inquisitorial thing, and not designed to have the sanctity of testimony given in open court.

MR. ENRIGHT: I have a right to ask this witness at this time any question which is proper upon cross-examination.

THE COURT: I think any testimony that he may have given in any court in the presence of witnesses, relative to this transaction, is evidential here; the objection will be overruled.

MR. WALL: We were not allowed in that proceeding any right to counsel; I was there, but I did not have any control over the thing. There is another objection, and that is, that

this transcript is of such a miserable character from a stenographic point, that I do not think it should form the basis of the question.

THE COURT: I will allow the question.

BY MR. ENRIGHT:

Q. I do not understand that you have definitely answered the question. Do you recall being asked that question and answering it?

THE COURT: Read the question to the witness.

Q. Do you recall being asked, in the bankruptcy proceedings, before George R. Beach, referee in bankruptcy, on or about November 20, 1914, the question (page 73 of the record): "Q. You knew when you went in under the old management, that it had been a losing business?" And do you remember answering, "Yes"? A. I have already answered that I remember being questioned on that occasion, but I cannot recall the specific questions and answers. I assume that I might have answered that, but if I did, it was not an accurate answer.

Q. But to the best of your ability at that time you answered the questions put to you in that examination truthfully, didn't you? A. The point is this: it depends on the way the question was put, exactly; I knew they had not made money, but I had no reason to say that I knew that they had lost money, which I apparently am made to say by that question.

Q. In this sort of business where the magnitudes are of the size that seem to prevail here, a company must either make money or lose money, mustn't it? A. Not exactly; they had put a great deal of money into their physical property.

THE COURT: How about that profit and loss account?

MR. ENRIGHT: That shows losses, all right.

THE WITNESS: In point of fact, I never looked at a single statement of account of their business prior to January 1, 1910, until the audit was handed to me by the auditors.

RECESS TO 2 P. M.

AFTER RECESS.

WARREN DELANO resumes the witness stand.

CROSS EXAMINATION (Continued) BY MR. ENRIGHT:

Q. Prior to your coming into the company in 1909, the Wertheim Company had been purchasing from other shippers than your company and the East Boston, hadn't it? A. I don't know anything about their business up to that time.

Q. Were you not informed that they had been dealing with other companies than these two? A. I assume that they had; I had no talk on that subject; I know they did not get all their requirements from us.

Q. On what terms of credit had you been selling them? A. The usual 30 days' terms.

Q. Wasn't it understood between yourself, representing your company, and Mr. Payne, that after the elimination of Isenstein and Dann, your two companies would substantially divide the tonnage and sell on long term credit? A. We undertook to give them all the coal we could to fill their requirements, so far as possible.

Q. And substantially divided the business be-

tween the two companies? A. In dollars and cents, yes, not in tonnage.

Q. And what terms of credit were you to give them? A. We gave them ten months' credit.

Q. And that was understood as part of the deal? A. Yes, sir; they were short of ready cash.

Q. You have said it was immaterial to you whether Isenstein and Dann were eliminated or not? A. My understanding of the situation was, that they came to us with the property in their hands, without Isenstein and Dann.

Q. But, on cross-examination by Mr. Garven, you said it was immaterial to you whether Isenstein and Dann stayed with the company or not? A. Whether they remained as stockholders.

Q. Was it immaterial to you whether or not they continued to draw salaries? A. No, sir, that was material.

Q. And it was understood by you as part of this deal, that these salaries be eliminated? A. That the salaries were to be reduced to those received by the two Wertheims—there were to be no more salaries than they drew.

Q. Wasn't it your idea, with which you went into this deal with the Wertheim Company, that this new management might be made profitable? A. Yes, sir; there were four salaries before, and two after.

Q. And at that time, what you looked at chiefly was the tonnage that the company was doing and the facilities it had for handling the tonnage, wasn't it? A. And the expense at which it could do business.

Q. Your chief concern was the tonnage, wasn't it? A. Not in the way in which I think you gave it; it was a very small amount of tonnage, as far as we were concerned—I mean in proportion to our tonnage; we could have sold that elsewhere equally well.

Q. Were you not desirous at that time of obtaining an outlet for the particular sizes that they were taking in this New York market? A. We had to give them a great deal of coal that was not included in that particular tonnage.

Q. But, in the beginning wasn't it your idea that this company would afford an outlet for the junior sizes? A. Yes, sir.

Q. That is what you call steam coal? A. Yes, sir; but that did not have a very weighty influence; we thought it was a good retail proposition, and we went into it in the belief that we could make money out of the retail end.

Q. And you thought there was sufficient tonnage for that, if the company were properly managed? A. Yes, sir.

Q. Immediately after going in, the company opened an office in the building occupied by your company in New York? A. Very soon after.

Q. For a time occupying one of the offices in your suite? A. Not in our own suite.

Q. The directors' meetings were all held, so long as you continued with the company— A. They were held in my office.

Q. Now, at the time the Isenstein stock was purchased, were not the certificates turned over to Mr. Van Buskirk as collateral security for the $20,000 item? A. Turned over to the Mechanics' Trust Company, I understand.

BY THE COURT:

Q. Those certificates of stock issued to these Wertheims? A. Yes, sir.

FURTHER CROSS, BY MR. ENRIGHT:

Q. That is, the stock certificates transferred from Isenstein and Dann went to the Mechanics' Trust Company as collateral? A. There was a

certain amount of stock transferred, but whether it was the exact amount that came from Isenstein and Dann I cannot state, but it was the majority stock.

Q. You think it may have been more than that acquired from Isenstein and Dann? A. Yes, sir, I think it may have been more.

Q. Were there not three collieries operated by your company on the Lehigh Valley Railroad? A. Yes, sir.

Q. And sometime in the early part of 1912, two of these collieries reverted to the Lehigh Valley, didn't they? A. I think it was in 1910.

Q. Quite sure about that? A. Yes, sir, I am pretty sure about that, December 31, 1910. We continued to take the tonnage from there for two years longer.

Q. Until 1912? A. Yes, sir.

Q. I have directed your attention in the last few questions to the Mill Creek Coal Company; now, the junior sizes shipped to the Wertheims came usually from these two collieries, didn't they, which reverted to the Lehigh Valley Railroad, and from which you lost the tonnage in 1912? A. Yes, sir.

Q. So that, from the time you lost the tonnage of these two collieries, isn't it true that it ceased to be so desirable to the Mill Creek Coal Company to have this outlet through the Wertheim Company? A. No, sir, in point of fact, it was more desirable, because we had the new Boston colliery in operation at that time, and the junior sizes from the new Boston have always been the difficult sizes to sell.

Q. They are of an inferior quality? A. They have been a little off color.

Q. And was it one of the troubles of the Wertheim Company, as reported to you by Sanders

Wertheim, the difficulty of disposing of this inferior coal from the East Boston? A. As a fact, in 1912 they had very little East Boston coal; they had nearly all Lehigh Valley coal.

Q. You knew that Mr. Sanders Wertheim was complaining of the quality of some of this coal that came from your companies? A. Yes, sir.

Q. And his complaints were based on the theory that all bad coal came from East Boston? A. As a matter of fact, very little came from them; he got good merchantable coal; we were not responsible for the kicks.

Q. Isn't it a fact, that the Wertheim Company had to suffer deductions of large penalties for inferior quality of coal furnished under some of these contracts?

MR. WALL: I object to that, and under the statement made by counsel this morning, I apprehend that that is not relevant. Now, he is going into the question of whether the Coal that the Mill Creek Company sold them was coal that was up to some standard or other.

MR. ENRIGHT: It is cross-examination of the testimony assigning certain reasons for the troubles of the company; you called the witness. It is cross-examination.

THE COURT: I think it is admissible on that ground.

MR. WALL: We will withdraw the objection.

Q. (Question read.) We will say prior to April 30, 1912? A. I don't think so.

Q. Don't you know that the Wertheim Company was furnishing coal to certain of the municipal departments in New York City before that date? A. Well, possibly; I thought dealings with the

municipal department were afterwards, but I do not admit that it was due to bad coal.

Q. I have not asked you to admit that; but, were not deductions made on that contention? A. They were so reported; it was not all our coal; we only furnished part of the coal.

Q. Were there complaints that the coal being furnished by the East Boston Company was of inferior quality? A. These complaints were complaints made by the Wertheims—according to the drift of the question—based on statements made by the customers.

Q. You say it was all of prime quality? A. Yes, sir; the coal that we sold that was not of prime quality, was sold as second quality, and we have sold a great many thousand tons.

Q. Was not part of the difficulty of the Wertheim Company merchandising that inferior quality of coal? A. When they got that coal, they paid less for it, and when they did not want it, we did not send it to them.

Q. Did your Mill Creek Company, after you became a director of the Wertheim Company, not sell considerable coal to the Wertheim Company which had to be mixed with other coal in order to make it merchantable? A. I won't say that they may not have mixed coal with the coal that we sold, but not because it was not merchantable.

Q. Why? A. Simply because they may have had other coal that needed bringing up to quality as much as ours; I did not run the yard for them.

Q. Don't you know that the Wertheim Company, after you became a director, was having, all the time, considerable difficulty with its customers because of the complaints its customers were making as to the quality of coal?

MR. WALL: Now, I object to that, unless he lays some foundation to show what the

terms were under which Wertheim sold. We cannot get anything out of this until we know the terms under which Wertheim sold. He is trying to get this witness to be judged by the fact that somebody made complaints about coal that originally came from this witness's company.

MR. ENRIGHT: It is cross-examination.

THE COURT: You are talking about a time subsequent to his directorship, and during that period up to the time he withdrew himself as a director of the corporation.

MR. ENRIGHT: It is cross-examination of a line brought out by Mr. Wall attempting to give certain reasons through the mouth of this witness for the failure of the Wertheim Company to realize the hopes that the witness said he had got when he became a director.

THE COURT: All right.

Q. (Question read.) A. I heard more or less about complaints; I never paid much attention to them, because I did not believe they were well founded.

Q. At these directors' meetings, Sanders Wertheim did frequently report these complaints, didn't he? A. Whatever is in the minutes; I saw Sanders Wertheim sometimes every day; I cannot tell whether he reported the things to me at a meeting, or out of a meeting, but I kept in pretty close touch, and I never paid much attention to these little complaints; if he did not like the Boston coal, we did not ship it to him. If we shipped the Buck Mountain coal, that had a better reputation, and he got thousands of tons of it.

Q. I call your attention to a minute of the directors' meeting of September 20, 1911, reciting you as present, and I ask you if you recall this resolution:

"On motion, the Register and Transfer Agent was authorized to receive and cancel all certificates issued for the old Common and Preferred stock and reissue, in lieu of the latter, certificates for the new Common stock.

"On motion, duly seconded, it was ordered that corresponding certificates, properly endorsed, shall be pledged in lieu of the original certificates given as collateral security to the $20,000 loan from Miil Creek Coal Co."

A. I recall that.

Q. That refers to the stock certificates which were issued of the Wertheim Company at the time of the reduction of the capital stock, given in exchange for the old certificates purchased from Isenstein and Dann? A. No, sir, the old certificates that were cancelled.

Q. Now, I call your attention also to a minute of a directors' meeting of December 20, 1911, which appears to have been approved at a later meeting held December 28, 1912, at which you were present, reading as follows:

"On motion of W. T. Payne, the following resolution was duly seconded and adopted by unanimous vote:

"RESOLVED, the minutes of the meeting of September 20th, 1911, be amended by striking out the following words:

" 'On motion duly seconded, it was ordered that corresponding certificates, properly endorsed, shall be pledged in lieu of the original certificates given as collateral to the $20,000 loan from Mill Creek Company,' and by inserting in lieu thereof the following words which correctly represent the resolution, which was actually introduced and actually adopted at the said meeting of September 20th, 1911:

" 'On motion duly seconded and regularly adopted, it was ordered that corresponding certificates, properly endorsed, shall be pledged to the East Boston Coal Company

and Mill Creek Coal Company pro rata in lieu of the original certificates which were intended to be given as collateral to secure pro rata the obligations of the East Boston Coal Company and the Mill Creek Coal Company against the L. Wertheim Coal and Coke Company.' "

Now, do you recall the ratification of that meeting at the meeting of December 28th, 1911? A. I am familiar with it. The reason that I approved of this—not because I approved actually of the wording of that, but the first resolution had been acted on and the thing had been carried out in accordance with the first resolution, and I did not care whether it was changed or not.

Q. But you did approve this latter resolution? A. Yes, sir, I do not recall the meeting specially, but I am willing to admit it, because I am stated to have been present.

Q. And the stock there referred to was a majority of the total outstanding stock? A. I think so; it was the same amount that we have been talking about before; I do not think that the second resolution was ever carried out or acted on at all—the second minute, I mean.

Q. Later, under date of June 19, 1912, the minutes of a directors' meeting at which you are recited as having been present, show a resolution as follows:

"Upon motion of Mr. W. T. Payne and duly seconded, it was resolved to accept the resignation of Mr. Warren Delano as Vice-President of the company, he still retaining the office as director.

"There was a general discussion as to a stock trust agreement and it was decided to leave the matter in the hands of Mr. Warren Delano and Mr. W. T. Payne, to draft a satisfactory agreement, the understanding being that it would be a fair agreement and would

protect all concerned, namely, the Messrs. Wertheim, Delano and Payne."

Do you recall those transactions recited in the minutes? A. Yes, sir.

Q. And first, the resignation as Vice-President is the resignation to which you referred in your direct testimony? A. Yes, sir.

Q. And you were never, after that date, Vice-President? A. No, sir.

Q. Was there a trust agreement drawn up in accordance with that resolution? A. I think there was, although my copy does not show whether it was ever executed or not.

Q. Now I call your attention to a directors'—minute of a directors' meeting under date of February 21, 1912, as follows:

"The resignation of Mr. Warren Delano, a Director of the Company, was read and laid upon the table."

Now, that resignation was never acted upon by the company? A. No, sir.

Q. You did hand in the resignation at that time? A. Yes, sir.

Q. And it was tabled, and subsequently, until July, 1913, you continued to act as a director? A. Yes, sir.

Q. Now, Mr. Delano, do you recall whether the company, the L. Wertheim Company, in the first part of 1912, was not having considerable difficulty in meeting the maturing notes of Isenstein and Dann? A. I think they had met them; I think there were other notes that were allowed to run over while those were paid.

Q. Didn't you object at that time to further going on and meeting these Isenstein and Dann notes while other obligations of the company could not be met? A. I questioned whether it was neces-

sary—whether they should not stand on the same —I put that question up at the time as to what the responsibilities of the company were with relation to the Isenstein and Dann notes as compared with notes given for coal, etc.

Q. Didn't you, about that time, come to the conclusion that you were unwilling to have the Mill Creek Coal Company go on increasing its indebtedness for which it was not being paid, while Isenstein and Dann were being paid their notes just as they matured? A. On the basis that I wanted to know what the obligations of the company were in relation to the two classes of notes; that was at the time we were discussing the funding of the notes.

Q. Did you, personally, ever have any discussion with Isenstein and Dann respecting the funding of their notes? A. No, sir, I never met Mr. Dann until the day before yesterday.

Q. As I understand you, I thought there was a general discussion among the directors and officers of the company in regard to all creditors in the early part of 1912? A. When this question of the bond issue was formulated.

Q. And all the claims against the corporation were, at that time, taken under consideration and talked of and discussed? A. Yes, sir.

Q. There were debts at that time other than the debt owed to the Mill Creek, East Boston, Isenstein and Dann? A. Current, yes.

Q. You recall the second audit made by the Audit Company under date March 31, 1911? A. Yes, sir.

Q. It was made under your direction? A. Yes, sir.

Q. And after it was received, you gave it careful consideration, didn't you? A. Yes, sir.

Q. Brought up a discussion at the directors'

meeting with Mr. Payne and with the Wertheims? A. Yes, sir.

Q. And you discussed the statement in that audit, "Loss for 15 months to March 31, 1911, $18,789.39"? A. Yes, sir.

Q. The next item underneath that is, "Reserve, for doubtful accounts, $10,000"? A. Yes, sir.

Q. Now, you understood that to be an item which the accountant set up as a reserve against the item on the other side, entered as an asset of doubtful accounts receivable, $17,000? A. Well, it does balance that in part, but I don't know that it is set up against that; they thought that a prospective reserve; it was questioned by the treasurer of the company. They found $17,000 which they thought doubtful—

Q. Don't you know that subsequently, all of that $10,000 reserve was eaten up in accounts which actually did prove bad, and charged off against it? A. I never had another audit after that.

Q. Not by the Audit Company? A. No, sir.

Q. But you saw other financial statements? A. I saw the treasurer's statement.

Q. Based on the system of accounting put into effect by the Audit Company? A. By Mr. Bentley.

Q. And he was the accountant representing the Audit Company in this audit? A. He represented the company in the audit, I believe, but did not make the new system as an officer of the Audit Company; he did that, I think, individually.

Q. So you understood, on analysis of this audit of March 31, 1911, that if the reserve for doubtful accounts turned out to be afterwards required to meet these doubtful accounts entered as an asset, the total loss would be $28,789.39? A. Yes, sir.

Q. Now, didn't you subsequently receive a finan-

cial statement from the treasurer for the three months ending June 30, 1911, showing the entries at hand in the paper which I lay before you, marked "Exhibit E-9"? A. I have already identified that; I have seen all the statements that they ever made up to 1913.

Q. And you examined that at the time? A. I examined all the statements. I think these are the statements that came from me.

Q. And that statement is also true of all these statements; they were taken up and discussed at the directors' meetings, were they not? A. No, sir, as a rule they came in after the meeting; they did not get there in time.

Q. But you examined them, at any rate? A. Yes, sir.

Q. And you noted the entry there, "Net loss for three months ending June 30, 1911, $6,453.74"? A. Yes, sir.

Q. You also had the treasurer's financial statement, annual statement for the year ending March 31, 1912? A. Yes, sir.

Q. Marked "Exhibit E-10"? A. Yes, sir.

Q. And that was examined by you? A. Yes, sir.

Q. And you noted the statement there, "Net loss for year, $27,561.33"? A. Yes, sir.

Q. So that this company, to your knowledge, made an annual loss from the time you became a director in 1909, down to the time of this mortgage in 1912, didn't it? A. It made an aggregate loss; it did not make an annual loss, because there were some months that we had made a profit; the aggregation of the losses and profits aggregate a loss, however.

Q. The fiscal year of the Wertheim Company ended March 31, 1912, didn't it?

Q. When you became connected with the busi-

ness, there was an item carried on the books as an asset "Good will," of $125,000, wasn't there? A. Yes, sir.

Q. Did you direct that that be taken off? A. I think I did.

Q. You did not think the company had any good will? A. I think that was used to issue more stock on, and it was a question of the validity of that additional issue of stock that I acted on; my counsel told me it was of doubtful validity, and I had the stock wiped out, and, consequently, the good will wiped out.

Q. Now, after you got your bonds—the Mill Creek Company got its bonds under this mortgage of April, 1912, you say your company continued to sell coal to the L. Wertheim Coal and Coke Company? A. Yes, sir.

Q. On what terms of credit? A. The same terms as before.

Q. Ten months? A. No, sir, they were to pay monthly after that.

Q. And they did, in fact, pay everything down to November or December, 1912? A. They paid everything, including the shipments of September, and, on a part of the shipments in October, the last payment being made in the month of November, 1912.

Q. At the time you took this mortgage, you knew that the company could not pay off the amount of indebtedness to you in money, didn't you? A. Not in cash.

Q. And the only way they could get money to pay you was by keeping on doing business, wasn't it? A. Yes, sir.

Q. And the only way they could keep on doing business was to supply coal from somebody? A. Yes, sir.

Q. Isn't it true that about that time the Wer-

theim Company began to make purchases more extensively from other dealers than the Mill Creek and East Boston? A. I don't know anything about the purchases outside of the purchases of the Mill Creek Coal Company.

Q. Wasn't it a matter of some little friction between yourself and Mr. Payne as to whether your company was not being required to furnish more than its pro rata of coal? A. Not at that period, as I recall it.

Q. There was a period that that did become a matter of friction? A. Yes, in the earlier days, the question of dividing the shipments so that the proportion of each company's bills should be about the same amount.

Q. But along in 1912 isn't it true that you were not so very anxious to furnish any more coal than you had to to keep the company going? A. I don't think that came up until the friction that you refer to in regard to the payment of the bills; I felt that during the winter of 1912-1913, that Mr. Payne was getting more than his share of money, and we were getting none.

Q. Wasn't there a time when you began to complain to Mr. Sanders Wertheim that the Mill Creek Company was being required to furnish more than its fair share of the coal required by the Wertheim Company? A. There may have been some such, later; it was not a continuing condition; I think Mr. Payne took care of his share on the whole very well. There were times I know that Mr. Payne's colliery—well, the question of buying coal outside came up several times, and at that time he was unable to produce coal, consequently, he had to buy; sometimes he had difficulty in finding the amount of tonnage that I considered he was bound to furnish.

Q. And about when was that? A. It is very

hard to say; I should say in the early part of 1912, and again in 1913.

Q. Well, now, taking up the early part of 1912, at that time you were beginning to feel that it was something of a burden to furnish coal for that company? A. I think 1912 was the year of the strike, and just before the strike, which occurred on the first of April, or the latter part of March, practically, because the men all went out, it was very difficult to get coal in the quantities that were demanded, because everybody was putting in stock against what was expected, known to be a long tie-up for months; nobody knew how long; and the business that spring was entirely dislocated; nobody could be blamed.

Q. Isn't it a fact that it was burdensome to you to furnish the coal which this company required to keep it in business, as early as 1912? A. In the spring of 1912 it was extremely burdensome.

Q. And the only reason you did it was to keep the company afloat? A. Certainly, we were interested in the company making the money; there was no other object in our being behind it.

Q. You were interested at that time in getting your money out, were you not? A. Put it that way, I don't see much difference.

Q. And you knew the only way you could get your money out of the company was to keep the company afloat and give it a chance to make money, and if you had not kept on supplying coal, you knew the company would have to shut down and you would lose the money you had in it already? A. Yes, sir.

MR. WALL: At what period was this?

Q. You were getting interest on these bonds up to what time? A. May, 1913, I think, the last interest was paid.

Q. Are you sure about that? A. 1914, I mean—the May before the failure.

Q. Isn't it true that at the time of the bond issue you realized that something had to be done to relieve the company's condition, the Wertheim Company's condition? A. The Wertheims certainly thought so.

Q. Didn't you? A. Well, I don't know that I should have thought of doing anything of that kind if it had not been brought to us.

Q. I will ask you if you remember being asked the question in the bankruptcy examination: "Q. At that time something had to be done to relieve the company's condition?" and you answered "Yes". Do you recall that? A. That was brought to us from the other side that something had to be done.

Q. (Question read.) A. I don't recall it.

Q. You don't deny that you may have given that answer? A. No, sir.

Q. I am going to ask you about several of your answers in the bankruptcy proceedings, and I shall call your attention to your examination before George R. Beach as referee in bankruptcy, at an examination held December 4, 1914, in the bankruptcy court room, 75 Montgomery Street, in the matter of L. Wertheim Coal and Coke Company, a bankrupt; all the questions I may hereafter ask you referring to the bankruptcy proceedings, are to be understood as referring to the examination in that matter and at that time and at that place. Now, was the company, at or prior to the time of the agreement on the bond issue, being pressed by Isenstein and Dann? A. I don't think so; I never heard so.

Q. Well, in answer to a question, as follows: "Q. The company was being pressed by Isenstein and Dann notes? A. We could not have done as

we had been doing, piling up notes, but we thought it would put them in a better financial condition. All the paper, you see, was wiped out. Even before this time, sometime before this, the company had been unable to meet its obligations." Do you remember giving that answer? (See page 78 of testimony.) A. That has nothing to do with Isenstein and Dann.

Q. You don't dispute giving that testimony? A. No, sir.

Q. And if it is here in the record of that examination— A. I read over that record, and I will say there was a great deal in that that I did not understand, much less to know what I had testified to; I did not even understand the question; at the time I answered the question, I thought I understood what the question meant.

Q. Do you wish to deny or change that answer? (Question read again.) A. That could not have been an answer to the question you read about Isenstein and Dann.

Q. Do you wish to deny that you testified, whether it was a responsive answer or not, at that time and place to which I have called your attention: "A. Even before this time, sometime before this, the company had been unable to meet its obligations"? A. To meet all its obligations, I would say yes; that is, it had increased its obligations; it was paying its obligations all the time.

Q. Mr. Delano, what I am asking you now is, whether you deny that you testified at the time and place to which I have called your attention, to this sentence: "A. Even before this time, sometime before this, the company had been unable to meet its obligations." Do you deny that you so testified? A. I deny that I made that answer to that question.

Q. You deny that you spoke those words, do

you? A. No, sir, I cannot deny that, if it was taken down at the time, but I deny that I made any such answer to that question; now, it may have been some other question that I answered in that way, although I do not think the answer is a very happy one, or correct.

Q. Do you recall the question and answer: "Q. But you had been renewing all the time? A. Yes. The outstandings had been increasing all the time." A. That is right.

Q. You don't deny you gave that answer? A. No, sir.

Q. And it is a fact? A. Yes, sir.

Q. "Q. By 'outstandings', you mean bills payable? A. Accounts receivable—under the old arrangement these notes given to Isenstein and Dann came due $1,000 a month, and those were being paid at our expense and to our prejudice, and there still remained quite a lot of that outstanding." A. It is a mistake in the person who took down the notes—it does not mean anything when you put "receivable" in there among the "payable".

Q. Do you deny that you made this statement which I have read to you: "Under the old arrangement these notes given to Isenstein and Dann came due $1,000 a month, and those were being paid at our expense and to our prejudice, and there still remained quite a lot of that outstanding"? A. I will admit that, yes.

Q. So that, at that time, you did consider that the payment of these monthly notes to Isenstein and Dann was prejudicial to the Mill Creek Coal Company, didn't you? A. It was taking so much money out of the business when they could not afford to pay it.

Q. The Mill Creek and the East Boston were selling most of the coal to the Wertheim Company? A. Yes, sir.

Q. And Isenstein and Dann were getting their notes paid while the notes payable to the Mill Creek and the East Boston were piling up; that is true, isn't it? A. That is true.

Q. (Reading from page 78): "Q. The Isenstein and Dann notes weren't renewed? A. No; we put them on the same footing with ourselves; they took bonds, so it was a perfectly fair thing to them." "Q. They extending a long time for payment. A. Yes." "Q. If they were getting payments as they became due, I do not see the incentive to them. A. I had the club over them. We could throw the thing in bankruptcy." Do you remember those questions and answers? A. No, sir, but I will admit that.

Q. And that was the situation before this bond issue, that you were holding a club over Isenstein and Dann to bring them into the scheme, were you not? A. Well, they owed us money.

Q. Who did? A. The L. Wertheim Coal and Coke Company owed us for notes that antedated by far the notes of Isenstein and Dann; we could have thrown those notes on the bank, and have put them into bankruptcy; it seems so to me; I did not use that club; I merely said, that is what we could have done, and I think they recognized that fact; it was better to take half a loaf than no bread.

Q. And in taking these bonds, you considered this as half a loaf? A. I don't think the bonds were as good as the notes.

Q. From the standpoint of a creditor at that time, you considered in taking bonds that that was half a loaf?

MR. WALL: He has said that already.

A. I spoke of it as being a half a loaf to Isenstein and Dann; I said it was better for them to take half a loaf.

Q. And it was better for the Mill Creek, too, wasn't it? A. No, sir; I am very sorry now that we did not.

Q. Do you remember this question and answer: "You and Mr. Payne were prepared to use the club if Isenstein and Dann didn't come in? A. I was very much in favor of it; I was representing a number of stockholders and did not feel that we could extend that indebtedness indefinitely." Do you remember that? A. No, sir, I cannot remember it. I don't quite understand it, to tell the truth.

Q. Do you deny it? A. No, sir, I said something, but I don't understand the answer.

Q. Were you, as a fact, representing any stockholders at that time? A. I suppose it means representing the Mill Creek Company stockholders; the thing is very blind; I don't understand the answer, although I may have made it.

Q. Again (reading): "Q. You realized that they were really exhausting the property at your expense? A. Yes, I believe money can be made over there to-day, in Jersey City"? A. There is not much sense in the answer to that question; that answer does not answer the question; I may have made it.

Q. (Question read.) A. I cannot say that I did, and I don't want to say that I did not.

Q. Do you remember this question and answer: "Q. You had no idea that this property would liquidate the amount of your claim? A. Not liquidate them, but I think it would work out Mr. Leake's idea." Do you remember that question and answer; did you make that answer in response to that question? A. I don't remember it; and I don't deny it. The answer is a negation.

Q. Do you remember, that in April, 1912, Mr. Wertheim desired to purchase coal from Huyler

and Son? A. I don't remember the date; I know he wanted it at about that period.

Q. And Huyler and Son refused to sell unless your company, the Mill Creek Company, would guarantee the account? A. Yes, sir; Huyler is the only one who sold any coal under those terms, and I think it happened three times.

Q. At page 162 of the bankruptcy examination, you were asked with respect to a letter from the Wertheim Company, enclosing to your company a check for $1577.00? A. I will take your word for it.

Q. Purporting to be in payment of Huyler and Son's account? A. That would identify the date; the fact I cannot dispute at all.

Q. Huyler and Son would not sell to Wertheim without having the account guaranteed, would they? A. That is right; Mr. Huyler has an office next to mine, and I guaranteed it, and it was paid by my company; as a rule, when they wanted coal that we did not have for them, we went out and bought it and paid for it, and billed it direct.

Q. Now, after you became connected with this company in 1909, and prior to the bond issue, isn't it true that Mr. Sanders Wertheim was managing another retail concern for the Mill Creek Company, known as L. and S. Wertheim, Incorporated? A. Yes, sir.

Q. That was a retail delivery proposition? A. A yard in Brooklyn.

Q. And all of the capital stock of that company belonged to the Mill Creek Coal Company? A. Yes, sir, they managed it.

Q. And by "they," you mean L. Wertheim and Sanders Wertheim? A. Yes, sir, the two brothers.

Q. They were simply salaried men? A. Yes, sir.

Q. You say that was simply a yard in Brooklyn? A. Yes, sir; they billed it as Middle Lehigh; it was L. and S. Wertheim, Incorporated.

Q. That was a New York corporation? A. Yes, sir, and we leased the yard to them; they paid rental for the yard. It was after they went out that we incorporated it as the Middle Lehigh Company. I am ahead of my dates. Now, in operating mines, there are certain seasons of the year when you have a congestion of the junior sizes.

Q. When is that? A. In the summer there is much less used.

Q. And it is very desirable, then, from the standpoint of an operator, to move the coal from the mines and get it to a retail point? A. Yes. sir.

Q. Isn't it true that these large demurrage charges made by the Lehigh Valley Railroad, were made upon cars shipped from your mines and the East Boston Company's mines, which the Wertheim Company was unable to handle in its yard, and, therefore, the coal had to remain in the cars, because you had sent too much to the Wertheim Company? A. That was not claimed by the Wertheims at the time; they claimed that the Lehigh Valley did not make the physical delivery of the coal.

Q. Didn't they claim that you were sending it too fast to them at times? A. I don't remember that we ever sent coal too fast; they often would order coal—complain of coal not coming in fast enough; and then, after the coal began coming in, shut it off quickly on the grounds that they were getting it faster than they could handle it in the yard, but as soon as they would tell us to stop we would stop, but the trouble was with the Lehigh Valley Railroad; they would not bring the coal in here in Jersey City, but would hold it at Oak

Island Junction, and yet charge it against them as a physical delivery; that is what the railroad called constructive placement; and, under the rulings of the Interstate Commerce Commission, they are entitled to charge demurrage on constructive placement.

MR. WALL: Objected to.

THE COURT: The objection is sustained.

Q. You have said that these railroad charges that the Lehigh Valley Railroad Company made, were due to a stricter enforcement of the regulations of the Interstate Commerce Commission; do you recall that? A. Yes, sir.

Q. Was your idea in the future, that the Wertheim Company could get the Lehigh Valley Company to become more lax in enforcing the Interstate Commerce Commission ruling? A. I thought a better understanding of the situation would enable us to regulate the business of shipping coal, and more successfully.

Q. You were not looking forward to getting the railroad company to disobey or become lax in enforcing the Interstate Commerce Commission's rulings? A. No, sir, that was not my idea.

RE-DIRECT EXAMINATION BY MR. WALL:

Q. At the time that Mr. Huyler came into your office and wanted you to guarantee some shipments to be made by his company to the Wertheims, that was in April, and I think you said, 1912; was that time about the time of the strike? A. Yes, sir.

Q. Did the strike create any condition which made it difficult to get coal? A. Very.

Q. Was the Huyler transaction in any way related to the difficulty of getting coal? A. Mr. Huyler had coal afloat at the time that he had bought ahead, and it was about the only coal of

that size that could be had at the time in the market.

Q. Now, Mr. Enright asked you about a trust agreement for the trusteeing of the stock; was any such arrangement ever entered into, so far as you know? A. I cannot recall that it was ever carried out; I have a copy of the document that was discussed; and I find by reference to correspondence, that it was passed upon by two or three lawyers, but I cannot find that it was absolutely executed, although it may have been; I don't say it was not; it has never been in my hands since it was executed.

Q. Mr. Enright called your attention to a motion passed at the meeting of December 20, 1911, of the directors, to the effect that certificates should be pledged with the Boston Coal Company and the Mill Creek Coal Company, pro rata, in lieu of the original certificates which were intended to be given as collateral; do you recall that resolution? A. Yes, sir.

Q. Was that ever done; was the thing provided for in that resolution ever done? A. That I cannot say, but I thought it was, and I thought that that stock was subsequently held by the Mechanics' Trust Company; it may not have been.

Q. Were certificates of the Wertheims, to your knowledge, pledged to both the East Boston Coal Company and the Mill Creek Coal Company, pro rata, as collateral to secure the Wertheim obligations to these respective companies; was that ever done? A. In the original stock—when the original stock was purchased from Messrs. Isenstein and Dann, there was such a deposit of stock with the Mechanics' Trust Company that was on the note; now, when that stock was called in and was surrendered by the Mechanics' Trust Company at the time of the change in the capital stock,

we passed a resolution authorizing the new stock to be deposited with the Mechanics' Trust Company for this same purpose and to the same amount; I thought that had been done, but I am not sure that it was done; it should have been done. In December, three months after that meeting, the action was rescinded—

Q. But what I am asking is, whether the stock of the Wertheim Company was ever pledged for obligations of the Wertheim Company, due both to the East Boston and the Mill Creek Coal Company? A. I think not.

Q. The transaction is as you have described it? A. As I understand it, yes, sir, I have a copy of that paper, if you will ask for it; I don't know whether a copy is of any use.

MR. WALL: I will ask you to put these by-laws in evidence.

I offer a copy of the by-laws of the company.

Marked "Exhibit W-4."

Q. And I call your attention, Mr. Delano, to a slip pasted on top of by-law No. 32, which slip has a notice upon it: "Amendment December 20, 1909," and I ask you if you placed that slip there? A. Yes, sir, that was typewritten in my office.

Q. Well, is or is it not the fact, that before that amendment—by-law No. 32 was as follows:

> "32. Repurchases of stock—in case the services of an employee who owns at least 9,000 in shares of the corporation are dispensed with, and the same be discharged by the corporation, it shall be obligatory on the corporation to purchase such holdings at par, and in addition thereto, an amount equal to any dividends which are declared on such holdings while in his possession. This Section 32 is not to be amended unless by a vote of at least ninety per cent. of the stock"?

A. Yes, sir, it was, so far as I was advised.

RE-CROSS EXAMINATION BY MR. ENRIGHT:

Q. You have referred to the minute authorizing the pledging of this stock for the $20,000 Mill Creek note, as having been rescinded; isn't it true that that resolution, after rescission, as you have stated, was replaced by the substitute set forth in the minute of December 20, 1911? A. I would like to answer that by handing you a paper; one minute was rescinded by another minute at a subsequent meeting, but the question was, whether the first minute was acted upon or the second minute, and that I said that I thought the first minute had been acted upon and not the second. I may be wrong; that will show.

Q. You have just referred to a paper which you say will show; it is dated September 30, 1907, and appears to be signed by you, and acknowledges receipt to Messrs. L. and S. Wertheim for stock certificate No. 11—477 shares; and No. 12, 477 shares, making 954 shares. Now, under the paper to which you have just referred, you actually received the certificates there described, didn't you? A. I receipted for them.

Q. And did you ever turn them back to the Wertheims? A. I must have, because they have them now.

Q. How do you know that? A. I don't know; they have had them since.

Q. You agreed, however, to the resolution set forth in the minute of December 20, 1911, pledging this stock for the indebtedness due both to your company, the Mill Creek Coal Company, and the East Boston; you agreed to this resolution as set forth in the minutes? A. I approved the minutes; I had the stock—

Q. You held your stock, but did not think it made any difference whether you approved a min-

ute for a different disposition of it or not? A. Well, it was partly an academic subject, Mr. Enright.

Q. As long as you held the stock it was academic, wasn't it? A. No, sir, the facts leading to the whole thing—and the holding of the stock as security, was purely academic, and I held the stock.

MR. LEAKE: It seems to me the question is this—the railroad's contention is against whichever side the trustees—

THE COURT: What do you mean; if the mortgage is upheld, it is against the trustees.

MR. ENRIGHT: In my view of the issues raised here, this is fundamentally a foreclosure suit brought to foreclose this particular mortgage; we interposed a defence, and say this mortgage is void. Now, the complainant in the foreclosure suit has brought the Lehigh Valley Railroad in as a party, because the railroad company claims to have succeeded to certain of the chattels which are, in terms, covered by the mortgage; therefore, the foreclosure suit properly proceeds against the railroad company, so long as the action remained an action *in rem*. Now, it is only in that aspect that the foreclosure suit affects the railroad company at all. The minute this ceases to be a foreclosure suit (continues argument).

THE COURT: I am inclined to believe that it will simplify matters if, when we reach the conclusion of Mr. Leake's case, we should sum up the question.

MR. LEAKE: Yes, I think so. It seems to me that Mr. Enright overlooks this fact: that the reason for making the railroad company a defendant in the foreclosure suit is its pos-

session of the property claiming the title thereto which is included in the mortgage. Now, they make no claim against the mortgage; they make no charge of illegality.

THE COURT: What does their answer set up?

MR. LEAKE: Simply the forfeiture.

THE COURT: By reason of the terms of the lease.

MR. LEAKE: Now, the trustee in bankruptcy comes in here and says: "No, this mortgage is not good"; now, if he is bowled out of Court and this mortgage is upheld, that is the end of the trustee; he is not interested in whether the Lehigh question is settled or not.

THE COURT: If the mortgage is sustained, then the trustee is bowled out.

(Further argument.)

PIERRE F. COOKE, sworn in behalf of the Trustee in Bankruptcy, testified as follows:

DIRECT EXAMINATION BY MR. ENRIGHT:

Q. You are one of the receivers appointed in this present suit, are you not? A. Yes, sir.

Q. And as such receiver have you sold the horses and wagons at the Jersey City plant of the L. Wertheim Company? A. Yes, sir.

Q. You have certain moneys in hand unadministered at the present time? A. Yes, sir.

Q. Will you just state what those moneys are and the sources of them? A. In the general account, which covers a lot of miscellaneous items and some collections of the sale of the horses, we have a balance in the Commercial Trust Company standing to our credit as receivers of $1703.35;

and in the same account, which we have indicated as a horse account, which represents the sale of the horses at the Wertheim yard, we have a balance on hand of $7,572.00, which is represented by receipts for horses of $7,730.00, less an auctioneer's fee of $125.00, and veterinary surgeon's fee of $48.00.

Q. How about the horses and wagons? A. Well, I have just testified as to the horses.

Q. I mean the wagons and harness. A. The wagons are included in the account of which there is a balance left of $1703.35, and as an item of $2111.50 received from John J. Erwin, auctioneer, for the sale of wagons, etc., harness and a lot of moving truck, exclusive of horses.

Q. Did you sell all the horses, wagons and harness and other movable property up at the yard, except those horses that were glandered? A. Yes, sir.

Q. How many of those were there; were there four? A. The veterinary surgeon said, as I recall it, that there were six, and there was one horse that there was a good deal of doubt about, and he consented to pass him through, and we sold him. All we had to do was to take the veterinary surgeon's "O. K." on the horses; but my recollection is that there were six—either four or six that were forfeited and were shot.

Q. And with that exception, you have sold all of the movable property at the plant? A. Yes, sir.

Q. Have you also collected some accounts? A. Yes, sir.

Q. How much have you realized from those collections? A. I can have a statement made up for you.

Q. Are they included in the balance of $1703.35? A. Yes, sir, at least they are included in the sum

from which that balance is taken; there were a good many disbursements from that account; we had to run the place for awhile and pay the watchman, etc.

Q. Will you give me the total of those collections of outstanding accounts? If you cannot do it, you can hand me a slip at the next hearing.

THE COURT: There will be no objection to that at all.

THE WITNESS: I will furnish that to you.

MR. GARVEN: I only have one witness.

THE COURT: I will fix another day for the next hearing, if you will come in next Monday.

Adjourned to a day to be fixed.

Continuation of the taking of testimony in the above-entitled cause, at the Chancery Chambers, Jersey City, New Jersey, on the sixteenth day of May, 1916, before Hon. Vivian M. Lewis, Vice-Chancellor.

Same appearances as hitherto noted.

WILLIAM T. PAYNE, sworn in his own behalf, testified as follows:

DIRECT EXAMINATION BY MR. LEAKE:

Q. Where do you reside? A. Kingston, Pennsylvania.

Q. What office do you hold in the East Boston Coal and Coke Company? A. Vice-President and Treasurer.

Q. When did the East Boston Coal and Coke Company first commence dealings with the L.

Wertheim Coal and Coke Company? A. In 1906.

Q. When did you become a director of the Wertheim Coal and Coke Company?

MR. ENRIGHT: I think, perhaps, at the outset we ought to state on the record what has been arranged with counsel, and that is, that the executors of Max Isenstein, who was one of the original defendants, and who died shortly before the trial, are to be made parties. Mr. Garven is to give me the names and the necessary facts to make the record complete in that respect.

And secondly, that William G. Payne is to be added as a party and admitted to put in any answer necessary to conform to the proofs.

THE COURT: All right.

Q. Did you have any discussion with Sanders Wertheim prior to your becoming a director in reference to a Culm Bank, known as the Waddell Culm Bank?

MR. ENRIGHT: Objected to as immaterial and irrelevant; there ought to be some opening as to how that is material.

THE COURT: Objection overruled; I will admit it for the present and deal with it later.

A. Yes, sir, we had numerous conversations about it, as early as 1906.

Q. Did Sanders Wertheim say anything to you about what familiarity he had with that Waddell bank? A. Yes, sir, he told me that he was very familiar with the bank, and that he had been employed at the Waddell Colliery for some little time during the making of the bank.

Q. What did he say to you in reference to obtaining coal from that bank? A. He said he was familiar with the quality of the coal mine—familiar with the material deposited there, and had seen a great quantity deposited and knew there was a great quantity of very merchantable coal there, and that it could be easily sold in this territory.

Q. Did you say anything to him in reference to the development of that bank? A. Yes, sir; I told him that I was in a position to make a lease for that bank and would be glad to go on and do so providing I could arrange for the marketing of it down in this territory; this is the natural outlet for a large proportion of all the steam sized coal produced in the anthracite region.

Q. What suggestion did he finally make to you? A. He said if I would make the lease, he would be glad to sell it all.

Q. After that conversation what did you do? A. I made a lease of the colliery and built a washery and commenced washing it out and preparing it and shipping it.

Q. When did you make the lease? A. In the latter part of 1906, or the early part of 1907; I don't recollect accurately.

Q. When was the washery completed? A. It was completed, and we commenced in August, 1906.

Q. After the completion of the Waddell plant, how much of the Buckwheat coal from that washery was shipped to the Wertheims? A. Practically all of it.

Q. In what year? A. In the years 1908-1909, right along.

Q. Did he take any considerable proportion of

the Rice coal? A. Took practically all of that also.

Q. Were samples of that coal, after the washery was completed, sent to Wertheim at Jersey City? A. Yes, sir, the moment that I had the washery completed and started in operation, the first cars of each size were shipped to him, and I told him that I had the washery completed, and this was the first coal shipped, and I would be glad to have him examine it carefully and report on it as to its quality and marketability.

Q. Were there discussions between you and Sanders Wertheim in reference to slate or cinders in that washery coal, prior to your becoming a director? A. Yes, sir, there were discussions of that prior to my making a lease of the bank, and it was owing to Sanders familiarity with the bank and my knowledge that there was more or less fire in the bank, which would make some cinders, knowing that he also had the same knowledge was the reason that I discussed it with him before making the lease at all.

Q. Did he say anything at all about fire or cinders in the bank—

MR. ENRIGHT: I will renew my objection; this is going to be a long line of testimony, evidently, and it is not apparent to me how it is material to the issue.

THE COURT: I don't understand how it is germane to the issue myself, it is a new departure.

MR. LEAKE: The materiality of it, as I view it, is this: that the cross-bill of the trustee in bankruptcy sets out that these people acquired this Wertheim plant for the purpose of using it as a convenience to themselves, and that they then immediately did

use it as a convenience to themselves; now, part of the testimony which is before the Court as to what that convenience was, consisted in the over-shipment—

MR. ENRIGHT: The real issue raised here is, as to whether or not this mortgage is valid or invalid; and the grounds of invalidity are, that the company was insolvent at the time the mortgage was made; also that the affidavit is not in compliance with the statute.

THE COURT: It is rather remote.

MR. LEAKE: He does not frame his cross-bill solely on the ground of insolvency, but he frames it also on the ground: "We are directors of the Wertheim Company and also officers and agents, as he alleges, in control of the Boston Company and the Mill Creek Company; he says they were personally interested. What Mr. Enright does is to seize here and there an occasional minute, and an occasional fact. Now, what I want to do is to show the connecting links between all of those facts which will satisfy anyone that the facts that he has are only half the proofs —of the story of this company—and all of the cases—

THE COURT: Well, you may proceed to show this connection. The objection is overruled.

Q. Did you obtain financial statements of the Wertheim Coal and Coke Company prior to your becoming a director? A. Oh, yes, sir, frequently.

Q. In what years? A. Well, when we first commenced selling them in 1906, I got a statement, and then at various times after that, practically, always annually, and sometimes more frequently.

Q. I show you a paper on the letterhead of the L. Wertheim Coal and Coke Company, dated August, 1909, commencing "Buildings, plant, trestle, etc." and purporting to be a statement, and I ask you if you received that from the Wertheim Company? A. Yes, sir.

MR. LEAKE: I offer this in evidence.

MR. ENRIGHT: I make the same objection, as too remote.

Marked "Exhibit L. A. 1."

Q. I also show you statement, marked "Statement L. Wertheim Coal and Coke Company, New York and Jersey City," dated October 1st, 1909? A. Yes, sir, that statement was sent to us.

MR. LEAKE: I offer this in evidence

MR. ENRIGHT: I make the same objection.

THE COURT: The objection is overruled.

Marked "Exhibit L. A. 2."

Q. Did you receive other statements from the L. Wertheim Coal and Coke Company prior to your becoming a director? A. Yes, sir, several other statements.

Q. Were they substantially similar to those? A. Yes, sir.

Q. Did you examine those statements and the others which you received? A. Yes, sir, very carefully.

Q. Do you recall whether you relied upon these, and the similar statements of the sale of coal to the L. Wertheim Coal and Coke Company, prior to your becoming a director? A. Yes, sir.

Q. Do you recall the date of the first meeting that you attended of the Board of Directors of the L. Wertheim Coal and Coke Company? A. I think it was January 19, 1910.

Q. Do you recall whether a statement of the financial condition of the company was submitted at that first meeting that you attended? A. My recollection is, that there was one submitted then.

MR. LEAKE: I want to offer in evidence page 24 of the minutes of the meeting of the Board of Directors of the Wertheim Coal and Coke Company, held on the 19th of January, 1910:

"Present: Lewis Wertheim, Sanders Wertheim, Warren Delano, William T. Payne," from which minutes I read: 'The treasurer furnished balance sheet with detailed list of bills and accounts payable and receivable'; that is the meeting of January 19, 1910."

Q. Do you recall whether the balance sheet submitted at that meeting substantially corresponded with reference to plant and other assets as compared with these statements I have just shown you?

MR. ENRIGHT: Objected to on the ground that the balance sheet itself is the best evidence.

MR. LEAKE: We have not the balance sheets; we don't know where they are; have you got them, Mr. Enright?

MR. ENRIGHT: We have received no notice to produce, but I can say confidently that we have no sheet with anything of that sort.

MR. LEAKE: I will withdraw the question for the present.

Q. Were you at the meeting of the Board of Directors of the L. Wertheim Coal and Coke Company, at which the vote was taken on the issuance of the $20,000 note for payment to Isenstein and Dann? A. No, sir, I was not present.

Q. Did you ever purchase, or authorize to be purchased for you, or the Boston Coal Company, the stock of Isenstein and Dann? A. No, sir.

Q. What stock interest did you have in the L. Wertheim Coal and Coke Company? A. I think there were eight shares put in my name, which was immediately retransferred in blank on the back.

Q. Did you ever own, directly or indirectly, any other stock of the L. Wertheim Coal and Coke Company? A. No, sir.

Q. Were you ever paid a salary as a director of the L. Wertheim Coal and Coke Company? A. No, sir.

Q. Did you agree for yourself or the Boston Coal Company, or anyone else, to finance the L. Wertheim Coal and Coke Company? A. No, sir.

Q. What, if anything, did Sanders Wertheim say to you before you became a director of the L. Wertheim Coal and Coke Company in reference to Isenstein and Dann transaction? A. He said that he and Lou were anxious to acquire the entire concern—were anxious to acquire the whole concern; that they were both experienced retail coal men, and they felt that they were doing the majority of the work, and that Isenstein and Dann were inexperienced coal men, and that they were drawing a comparatively large salary and doing very little for it, and if the two brothers owned the concern entirely it would save this salary, and that the work that Isenstein and Dann were doing was more or less clerical, and could be done very much cheaper, and they would have a valuable concern of their own eventually; that is the long and short of it, I think.

Q. Did you know anything about the details of the Isenstein and Dann transaction with the Wertheims, personally? A. In what way.

Q. Did you know from your personal knowledge anything about how the stock or shares of Isenstein and Dann were acquired, before you became a director? A. No, sir, I did not; Sanders Wertheim told me items of discussion he had had with them, but it was a matter between Sanders and Louis Wertheim, and Isenstein and Dann entirely, and I would hear a little of this and of that, but no connected story about it.

Q. When you became a director of the L. Wertheim Coal and Coke Company, did you believe that they had among their assets, buildings, plant, trestle, etc., of approximately $116,000? A. Yes, sir, I did.

Q. Did you believe, before you became a director, that they had equipment of horses, trucks, harness, etc., of approximately $75,000? A. Yes, sir.

Q. And did you believe that they had a value in leasehold interest, 22 1-2 years, at $6,000, $135,000? A. Yes, sir.

Q. Did you believe that they had a capital and surplus of approximately $300,000? A. Yes, sir.

Q. Did you sell them coal relying upon that belief and those statements? A. Yes, sir.

Q. Did you consider the ability of Sanders Wertheim as a retail coal man, before you became a director? A. Yes, sir, I did.

Q. What was your belief about that? A. I thought he was a very excellent retail coal man.

Q. Did you know anything about his experience as a coal man? A. Yes, sir, both by hearsay and by individual connection with him for some three or four or five years prior to that time.

Q. Did you know from him that he had actually worked in the coal regions? A. Yes, sir.

Q. Did you form any opinion as to the prospect

of a retail coal business in Jersey City and New York, before you became a director? A. Yes, sir.

Q. What opinion did you form about that?

MR. ENRIGHT: Objected to as immaterial.

MR. LEAKE: I am asking what inquiries, or what opinions he formed; I think it is very important evidence, because the allegation is in the cross-bill, that these men acquired this business for the sole purpose of using it as a convenience; now, I may show that he went in, not for the purpose of becoming a director to use this company, but because he believed that there was a future in the retail coal business; that the man who was there to run that business was an experienced, practical man. This issue involved his intention; they allege that his intention was to acquire the business to use it as a convenience.

THE COURT: They have to show that from his conduct, and from what he said regarding the transaction.

MR. LEAKE: If a man is charged with what is substantially a fraud, he is entitled to state what his intention was in entering that business.

THE COURT: Not his opinion.

(After further argument.)

MR. WALL: Has your Honor considered the language of the statute? Mr. Enright in this case has frequently said that a state of mind does not make a difference; but state of mind does make a difference. The whole case is: Was that mortgage a dishonest use of the credit of this company? That is the nub of the case.

(After further argument.)

MR. WALL: Of course, your Honor won't allow a man to place his hands on his heart and say "I believe so and so," and not give any reason; but if he says, "I believe this was insolvent," or "I believe this was solvent"—

(After further argument.)

THE COURT: Of course, this man is almost qualified as an expert; I am inclined to sustain the objection to the question.

Q. Mr. Payne, prior to your becoming a director of the Wertheim Company, on what time or credit did you sell coal to the Wertheim Company? A. Thirty days.

Q. After you became a director, on what time or credit did you sell coal to the company? A. Ten months.

Q. Was that by an understanding with Sanders Wertheim? A. Yes, sir.

Q. Was that the method by which Sanders Wertheim stated that he would finance the company?

MR. ENRIGHT: Objected to as leading; almost all these questions are leading.

BY THE COURT:

Q. You had conversations with Sanders Wertheim regarding this subject? A. Frequently.

FURTHER DIRECT EXAMINATION:

Q. What conversation did you have with him with reference to a ten months' credit for coal? A. Well, that was the method that he proposed would enable him to finance the company and

take care of his indebtedness to Isenstein and Dann, and his company's indebtedness for some old coal bills and for some other things they owed, and put him in good easy-going financial shape; he also stated to us that time, that he was of the opinion that it would be unnecessary for him to continue to ask for ten months' credit beyond eighteen months to two years. After that time he would gradually reduce the length of this credit until he got back on the thirty days' basis with us as well as everyone else.

Q. Was the L. Wertheim Coal and Coke Company insolvent when you became a director of it?

MR. ENRIGHT: Objected to, as involving a conclusion; the fact must be brought out.

THE COURT: The objection is sustained.

Q. Were the assets of the L. Wertheim Coal and Coke Company more than its liabilities when you became a director?

MR. ENRIGHT: I make the same objection.

MR. LEAKE: I think I am entitled to ask a director of the company at the time he became a director whether the assets were more than the liabilities.

THE COURT: I think the question is improper under all theories that are before the Court; I shall sustain the objection to that.

Q. I show you paper marked "Trial Balance, April 30, 1910," and ask you if you received that from the L. Wertheim Coal and Coke Company in the spring of 1910? A. Yes, sir, we did.

MR. LEAKE: I offer this in evidence.

THE COURT: That is at the time of your entrance into the company?

MR. LEAKE: Three months after.

Q. Do you recall from what officer of the L. Wertheim Coal and Coke Company you received that? A. Sanders Wertheim.

Q. What position did he occupy? A. Secretary and treasurer.

Marked "Exhibit L. A. 3."

BY THE COURT:

Q. You had the balance sheet before? A. The balance sheet that was shown at this meeting that I attended, I don't remember accurately whether I kept a copy of it, or had a copy of that or not; but during the first two months that we were in, there was a lot of readjustment of their credit and they were very busy, and it seems to me there was some little delay in our getting a statement in that time; the retail coal business was very active during the winter months, naturally. I am not positive whether I had a statement between that January 19th and April 30th or not.

FURTHER DIRECT EXAMINATION:

Q. I show you paper, a bundle containing seven sheets, marked on the back "Wertheim Statement, March 31, 1910, net profit $1528.72," and I ask you whose handwriting that is on the back of the statement? A. That is my writing.

Q. Did you receive that statement from any officer of the L. Wertheim Coal and Coke Company? A. From Sanders Wertheim, Secretary and Treasurer.

MR. LEAKE: I would like to offer this batch.

Marked "Exhibit L. A. 4."

Q. I also show you statement marked "Profit and Loss statement, April 30, 1910," indorsed on the back "No. 33, Wertheim Profit and Loss statement, April 30, 1910; profit $1080.05," and I ask you if you received that from any officer of the Wertheim Coal and Coke Company? A. Yes, sir, I received that from Sanders Wertheim.

Q. At what time? A. At the time it was issued, approximately.

MR. LEAKE: I offer this.

Marked "Exhibit L. A. 5."

Q. I show you statement, marked "Trial Balance, April 30, 1910," and ask you if you received that from any officer of the Wertheim Company about the time it was dated? A. I received that from Sanders Wertheim.

MR. LEAKE: I offer this.

Marked "Exhibit L. A. 6."

MR. LEAKE: Now, if you want to save time, there is a batch of them, all received by Mr. Payne, showing the profits and losses, monthly statements, or a trial balance, received during the year 1910. I can give you a recapitulation here; they are here in a bunch.

MR. ENRIGHT: Is everything there in this bunch?

MR. LEAKE: No, from No. 33 to No. 75—they are numbered 35 to 59.

BY MR. ENRIGHT:

Q. Were all these documents received by you at about the dates indorsed on the back, from Sanders Wertheim? A. Yes, sir.

MR. ENRIGHT: These appear, your Honor, to be statements, some of them are trial balances, some of them statements of coal on

hand, some of them statements of account and notes payable.

THE COURT: Relating to what time?

MR. ENRIGHT: All during the year 1910.

THE COURT: Is that the time—

MR. ENRIGHT: The mortgage was made on May 6, 1912.

THE COURT: Two years thereafter, practically?

MR. ENRIGHT: Yes. On my case you limited the testimony I was allowed to produce as to conditions when these people came into the company. I object that these are too remote; they have some bearing, I will concede, since insolvency is a continuing condition.

THE COURT: I think I shall allow those to go in.

MR. ENRIGHT: I think they might conveniently be marked as one exhibit then.

THE COURT: All right, put a band around them.

MR. LEAKE: All right, and I will reserve the right of submitting to the stenographer a memoranda of what that particular exhibit contains, giving the items of each one.

Now, may it please your Honor, I notice that one of the experts is in the room, and I would like to withdraw Mr. Payne for the moment and put Mr. Ryer on the witness stand.

THE COURT: All right.

Witness withdrawn for the present.

Thomas Ryer—Direct.

THOMAS RYER, sworn in behalf of Mr. William T. Payne, testified as follows:

DIRECT EXAMINATION BY MR. LEAKE:

Q. What is your business? A. Real estate.

Q. Have you had any experience in appraising real estate for either municipalities or railroads in Hudson County?

MR. ENRIGHT: Objected to as immaterial; I don't think his experience as an appraiser counts; it seems to me the fact that he has been acting as an appraiser does not qualify, him in the market value of real estate.

THE COURT: Not necessarily. It may help to.

A. I have sold about ten million dollars' worth of property in Jersey City, and I have appraised at least one hundred million dollars' worth in the last fifteen years.

Q. Have you made any appraisals for the County of Hudson? A. I have.

Q. In condemnation proceedings? A. Yes, sir.

Q. Have you made any appraisals for the City of Jersey City? A. Yes, sir; I purchased the Fifth Ward Park in the City of Jersey City, and I represented the City of Jersey City for four years; I purchased the Fifth Ward Park for the City of Jersey City; I went out and saw the owners, and I represented the city in the condemnation proceedings.

Q. Have you appeared as an expert for any railroads in tax or valuation of real estate affairs? A. Yes, sir, of all the railroads in Jersey City at various times, and I am so employed now.

Q. Enumerate some of them. A. The Delaware, Lackawanna and Western Railroad, the Erie Railroad, the Pennsylvania Railroad, the Lehigh Valley Railroad, and the Central.

Q. Are you under a regular retainer for Jersey City? A. Not at the present time; I am just completing an appraisal for the Public Service Company of about four and a half million dollars.

Q. Have you examined the land at the intersection of Grand Street and Pacific Avenue, Jersey City, known as the Wertheim tract? A. I have.

Q. When did you examine it? A. I have seen it and know it intimately for the last fifteen years.

Q. When did you examine it? A. I looked at it the other day at the request of Mr. Leake, and as I say I have been past that property fairly frequently.

Q. When last? A. On Saturday, the 13th instant.

Q. Have you made a sketch or diagram of that property? A. I have, yes, sir.

Q. I show you a sketch here, marked "Plot E, Block 2143," and ask you if that is the sketch which you have made? A. Yes, sir.

Q. What, in your opinion, is the value of the land without reference to any improvements or buildings thereon? A. $96,600.

Q. And what, if anything, is the difference between the value at this time, and in the year 1912? A. I don't think there would be much difference in the value between 1912 and today, if any.

Q. This property which you examined has a frontage of 586 88-100 on Grand Street, and 606 86-100 on Pacific Avenue, and 519 31-100 along

the line of the National Docks Railway Company? A. Yes, sir.

CROSS EXAMINATON BY MR. ENRIGHT:

MR. LEAKE: I would like to offer this sketch for the purposes of identification.

MR. ENRIGHT: No objection.

Marked "Exhibit L. A. 6 1-2."

Q. When were you tax expert for Jersey City? A. From 1908 to 1912.

Q. Under a regular salary? A. No, sir, just employed by the day.

Q. Throughout the year 1912? A. Yes, sir.

Q. How much was this property assessed at for the purposes of taxation in 1912, I mean the land? A. I don't remember all the assessments, Mr. Enright.

Q. It was not over $50,000, was it? A. I don't know.

Q. What is the assessed value for purposes of taxation today? A. $57,000—on the land.

Q. It was not any more than that in 1912, when you were tax expert for Jersey City? A. I hardly think so; I don't think the assessments have changed in the last five or six years on Grand Street; they have remained about the same.

Q. You think, as a real estate man, there has not been any enhancement in value for property of this sort since 1912 to the present time? A. There may be a slight enhancement in this class of property.

Q. Isn't there considerably more demand at the present time for acreage property in Jersey City with access to the ferries, than there was in 1912? A. There is a very considerable increase in the demand.

Q. And that leads to an increase in value, doesn't it, the market value? A. I have not seen any indications of the increase yet.

Q. As a real estate man, you don't think the market value of land depends on the supply and the demand? A. Yes, sir, largely.

Q. There is a very much larger demand for property of this class at the present time than there was in 1912? A. Yes, sir.

Q. The supply has not increased any, has it? A. No, sir.

Q. It has diminished some, hasn't it? A. To some extent, yes, sir.

Q. So with a diminished supply and an increased demand, you still think there has been no enhancement in value between 1912 and the present time? A. Very little.

Q. How many acres did you assume to be in this plot? A. 138,000 square feet.

Q. In arriving at the valuation, how did you do that, on a square foot valuation? A. Yes, sir, 70 cents a square foot, $1750.00 a lot.

Q. You took into consideration in fixing that value, the physical condition as it is today, that is, filled in? A. Yes, sir, and as it was in 1912, as I remember it; there has been very little change in there, if any.

Q. What do you consider the value to be of vacant building lots, directly across the street, on the North Side of Grand Street? A. $1500, without railroad connection; they are only assessed for $1,000 apiece; assessments are sometimes no indication of value.

Q. They were when you were tax expert for Jersey City? A. Not necessarily, because I did not make the assessments; if I had done, they would have been some indication.

Q. Whenever you were consulted as tax expert, you gave an opinion of full value, didn't you? A. Yes, sir, and I decreased many an assessment and increased many.

Q. Did you take into consideration that this land is meadow land that has to be piled for structures of any considerable weight? A. Yes, sir, it would require about a 50 foot pile there.

Q. If it had not been for that circumstance, you would have valued it still higher? A. Yes, sir.

Q. The land on the other side of the street is firm land, isn't it? A. No, sir.

Q. Are all those buildings piled? A. Yes, sir, some of them run as deep as 60 feet piles.

Q. Do you know when this property was acquired by the Lehigh Valley Railroad Company? A. I do not.

Q. You don't know what was paid for it? A. I don't know what they paid for it; I have not the slightest idea; I know I tried to buy it from them once.

CROSS EXAMINATION BY MR. WALL:

Q. Mr. Enright asked you a question with regard to the supply and demand of this class of property, but he asked you next with reference to the supply and demand for property of this location; now, what can you say with reference to the demand for property in this location, as compared between 1916 and 1912? A. Very little land in there with railroad connection; you take the Manhattan Electric Supply Company on Johnson Avenue; they purchased a piece there, and they have now some for sale at $2,000 a lot; that price has remained the same; and this particular

tract is about the only tract in there of the kind in this section; that is on Grand Street; there is plenty of land north, and some land south, but there is very little manufacturing property in there, unless you go north of Grand Street.

Q. Are you the Mr. Ryer who was employed by the City of Jersey City and by certain of the railroads at the same time in the valuation of different classes of property? A. I was employed by both the railroads and the City of Jersey City during the four years that I worked for the city.

Q. Was there any other expert in Hudson County that was similarly employed by both the railroad and the city, to value different classes of property in 1912? A. I have never heard of a similar case.

RE-CROSS EXAMINATION BY MR. ENRIGHT:

Q. Do you mean to say, that while you were working for the city as a tax expert you were working for the railroad company? A. Yes, sir.

Q. You think that was a unique instance? A. Very unique, in my judgment.

RE-CROSS EXAMINATION BY MR. WALL:

Q. That employment by both sides was with the full knowledge of both sides, wasn't it? A. The City of Jersey City tried to employ me to take care of their tax matters, and I explained that I had already been employed by the railroad, and they asked me if I would take what I could take, as they would like to employ me for that work; and, consequently, I took such work as I could do for them, and I appeared before the different boards; that was from 1905 to 1912.

Q. Inclusive? A. Yes, sir.

WILLIAM T. PAYNE, resumes the witness stand.

DIRECT EXAMINATION (continued) BY MR. LEAKE:

Q. After the receipt of these various papers during the year 1910 from Sanders Wertheim, did you continue the sale of coal, or did the East Boston Coal Company? A. The East Boston Coal Company sold them during the entire year, regularly.

Q. Did you rely upon these statements of surplus values of plants and lease in the sale of that coal? A. Yes, sir.

Q. Did you attend a meeting of the Board of Directors of the L. Wertheim Coal and Coke Company on February 15, in the year 1911, at which time the matter of the Robert Gordon Coal property was discussed? A. I attended such a meeting, and I had a lot of talk about the Robert Gordon property.

Q. And a talk in connection what, in reference to that property? A. Purchasing the property.

Q. For what purpose? A. As a coal yard.

Q. In addition to the yard at Jersey City? A. Yes, sir, as an extension of the business.

MR. LEAKE: I offer page 152 of the minutes of the directors of the L. Wertheim Coal and Coke Company, held February 15, 1911, and from which I quote:

"Mr. Delano reported that he had been approached with a proposition to look into the purchase of the 'Robert Gordon & Son' coal property and business."

Q. Were you present at a meeting of the Board of Directors of the L. Wertheim Coal and Coke Company, at which the subject of building or acquir-

ing pockets at East 115th Street, New York, was discussed? A. Yes, sir.

Q. What was under discussion with reference to pockets in New York? A. Well, it looked like a proper extension for the business; the Wertheim Company had considerable business above 59th Street, and it made a very long haul from Jersey City, and we all believed it to be desirable to have a yard and pockets there where coal could be lightered, with the idea of cutting down the hauling expense and making it a more profitable transaction.

Q. Do you recall whether, in the spring of 1911, there was any discussion among the directors with reference to repairing the buildings in Jersey City, or with reference to blacksmithing in Jersey City, or wagon work? A. Yes, we had; about the time Sanders Wertheim suggested that the blacksmith shop should be increased, and some wood-working machinery and iron-working machinery should be purchased and installed there, for the building and repairing of trucks; and it was done, and the plant was made large enough and complete enough so that they could build a truck entirely, excepting the wheels; they purchased considerable machinery, and increased the size of the blacksmithing shop about that time.

MR. LEAKE: I want to offer so much of page 157 of the minutes of the Board of Directors of the L. Wertheim Coal and Coke Company, held Wednesday, May 17th, 1911, from which I quote:

"The Treasurer reported having received contract for sale of coal to Jersey City schools."

"The Treasurer also reported a net profit

of $1974.56 as having been earned for the twleve months ending March 31st, 1911, after charging off depreciation on horses, discounts, penalties, etc."

MR. LEAKE: There is another page, Mr. Enright, to these statements which were received by Mr. Payne from Sanders Wertheim, one of April, 1911; one of May, 1911,—two of May, 1911 that should be; one on March, 1911; one on February, 1911, and one on January, 1911; I would like to offer those in a batch.

Marked "Exhibit L. A. 9."

MR. ENRIGHT: No objection.

Q. Were they all received by you from Sanders Wertheim at or about the time they are dated? A. Yes, sir.

Q. I show you a letter dated September 5, 1911, on letterhead of the L. Wertheim Coal and Coke Company, addressed: "My dear Mr. Payne," and signed "Sanders Wertheim, Secretary," and I will ask you if this is a letter you received from Sanders Wertheim, of the L. Wertheim Coal and Coke Company? A. Yes, sir.

Q. Calling your attention to the reference in that letter in regard to purchasing a horse from Renes, does that call to your attention anything with reference to the acquisition of horses during that period? A. The L. Wertheim Coal and Coke Company purchased several horses during 1911; they purchased some in the spring; some again in the summer, and a considerable quantity of them in the early fall.

Q. Had there been any disease among the horses of the L. Wertheim Coal and Coke Company around about that period? A. Yes, sir, it was an epidemic of glanders.

Q. And were those horses that were purchased around in the fall of 1911, acquired for the purpose of taking the place of those horses which had been killed by the glanders? A. I am not quite sure; I know that several of them were acquired for that purpose, but I think they rather increased their number of horses at that time, owing to additional business they were taking on.

MR. LEAKE: I offer this letter of September 5th.

Marked "Exhibit L. A. 10."

MR. ENRIGHT: No objection.

Q. This letter refers to the fact of fumigating the stable? A. The glanders had been in the stable for some little time previous to that time.

Q. Mr. Enright wishes me to ask you, in order to save time on cross-examination, whether that reference in that letter does not fix an approximate date when the glanders was in existence in the stable, in September, 1911? A. Yes, sir, the glanders was in the stable in September, 1911.

Q. Mr. Payne, I show you a letter, I show you a carbon copy of a letter addressed to "Mr. L. Wertheim, the L. Wertheim Coal and Coke Company, No. 1 Broadway, New York City," and ask you if you recall receiving that carbon copy from Sanders Wertheim on or about the day of its date, May 25, 1911? A. Yes, sir; Sanders Wertheim made that as a report to the President of the company, and sent me a carbon copy of it at the same time, as a matter of information to me.

MR. LEAKE: I will read this letter: "However, the conditions now are much brighter, as the market conditions, so far as the retail prices are concerned, are in a much

healthier condition, and if we should have luck with our stock this year, and continue to get the better prices which we are now receiving, we should show up a good, prosperous year."

We offer this letter in evidence.

Marked "Exhibit L. A. 11 1-2."

Q. Where do the marks at the top of this letter indicate from what file that letter was taken? A. Taken from our files—the East Boston Coal Company's files.

Q. I show you a letter, dated July 25, 1911, on the letterhead of the L. Wertheim Coal and Coke Company, and addressed to W. T. Payne, Kingston, Pennsylvania, signed "Sanders Wertheim," and I ask you if you received that letter from Sanders Wertheim? A. Yes, sir.

Q. And I ask you if that letter calls to your mind any attitude of Sanders Wertheim with reference to an audit made by the Audit Company of New York, which has been introduced in evidence? A. Yes, sir, he mentioned that audit.

Q. What was the attitude of Sanders Wertheim with reference to that audit of the Audit Company?

MR. ENRIGHT: Objected to as immaterial.

THE COURT: Objection overruled.

Q. What did Sanders Wertheim say with reference to that audit of the New York Audit Company? A. He found serious fault with the way they charged up depreciation.

BY THE COURT:

Q. What did he say about it to you? A. He said that they depreciated their property, depreciated their accounts back prior to a longer period

than the audit was supposed to cover, and my recollection is—

MR. ENRIGHT: I think he should be limited to what Sanders Wertheim said.

A. (Continued.) That that depreciation of the Audit Company went back over a period of 36 or 38 months, while the audit only gave him credit on the other side for 27 months; the showing of the audit disagreed with his previous financial statement, and this was in explanation of this disagreement. There was considerable discussion at the time between Sanders Wertheim and Mr. Delano and Louis and myself about the matter, and I know we finally accepted Sanders' contention and version as the correct contention and version.

Marked "Exhibit L. A. 12."

MR. LEAKE: I want to offer in evidence the minutes of the Board of Directors of the L. Wertheim Coal and Coke Company, page 161, meeting of the company held August 15, 1911, from which I quote:

"Treasurer's letter of July 24th was then read, quoting from tariff sheet of the Central R. R. of N. J. to show a 15c discrimination in favor of coal from that road entering New York City by team over the C. R. R. of N. J. ferries."

Q. Were you present at that meeting, Mr. Payne? A. I think I was.

Q. Do you recall whether, after that meeting, the directors of the company decided that a suit should be instituted for the purpose of removing that discrimination by the Central Railroad? A. Yes, sir.

Q. In that connection, did Sanders Wertheim say anything to you about the alleged discrimination between Greenville and Jersey City? A. I think he made that report at the same time.

Q. What was that statement that he made with reference to that? A. Five cents a ton.

Q. In favor of Greenville? A. Yes, sir, and against their Grand Street yard.

Q. Greenville being part of Jersey City? A. That was the contention that he made; they were all in one town, and there should not be that 5 cents a ton differential.

Q. Do you recall whether at any time during the latter part of the year 1911 Sanders Wertheim made any report to you about the Lehigh Valley Railroad Company desiring to purchase and acquire the L. Wertheim Coal and Coke Company? A. Yes, sir; he said that the matter of purchase of the L. Wertheim Coal and Coke Company by the Lehigh Valley Company was up two or three different times, and under two or three different phases; if I recollect correctly, this was when he had it up with Mr. Barrett.

Q. Was this before or after the institution of the suit? A. It was before the institution of the suit; it was suggested then that they take up this matter of rebate before instituting the suit at all, and see what could be accomplished along those lines, and, in other words, to see if some settlement could be arrived at.

Q. Do you know whether Sanders did take up that question? A. I understood that he took it up along with you (indicating the counsel); and then Sanders reported a little bit later that Mr. Barrett said: "Let the matter rest for the time being, and we will see what can be done along those lines." And later on, came back with a

suggestion that they buy the yard, and that was understood as fixing up all these old claims and damages.

Q. Now, I have some more of these statements, and I ask you if you received a statement of January, 1912, showing a profit of $3730.74 for the month; a loss in February, 1912, of $1119.44; a profit in March of $882.05; and a statement in April, 1912, showing a profit for the month of $3759.40; were those received from Sanders Wertheim? A. Those statements were all received from Sanders Wertheim.

MR. LEAKE: I would like to offer those in evidence; that same batch,—they are all similar—we have No. 102, 103, 104 and 105.

Q. I show you financial statements marked No. 102, 103, 104, and ask you if each one of them contained a pencil memorandum on the outside? A. Yes, sir.

Q. In whose handwriting? A. Mine.

Q. From whom did you receive these statements? A. Sanders Wertheim.

Q. At or about the time they are dated? A. At approximately their date.

MR. LEAKE: I offer these.

Marked "Exhibits L. A. 13, L. A. 14, L. A. 15, L. A. 16."

MR. LEAKE: I would like to withdraw Mr. Payne for a moment. There is another expert here.

JOHN T. ROWLAND, JR., sworn in behalf of William T. Payne, testified as follows:

DIRECT EXAMINATION BY MR. LEAKE:

Q. Have you done any work for municipalities in this county? A. Yes, sir, public schools.

Q. For how many years? A. 16 years.

Q. Are you now supervising any work for the County of Hudson? A. The Parental School, and I drew plans for the Hudson County Jail.

Q. Have you, as architect, drawn plans and supervised plans for any other large buildings or factories in Hudson County?

MR. ENRIGHT: I will admit that he is an expert.

MR. LEAKE: All right. Thank you.

Q. Did you, on or about the 3rd of February, 1913, make an examination and appraisal of the buildings and trestle of the L. Wertheim Coal and Coke Company at the intersection of Pacific Avenue and Grand Street, Jersey City? A. I did of the buildings; I made an approximation of the trestles through information, but did not check it up, but on the buildings themselves I made an investigation through plans that I had, and through looking over the buildings at the time; that was the latter part of January, 1913.

Q. I show you a letter, dated February 3rd, on your letterhead, signed "John T. Rowland, Jr.," addressed to "Eugene Leake," and I ask you if this is the estimated cost or valuation of the buildings of the Wertheim Coal and Coke Company, made at that time? A. Yes, sir.

MR. LEAKE: I offer this in evidence.

Marked "Exhibit L. A. 17."

Q. Were the values in May, 1912, substantially the same as those on February 3, 1913? A. Yes, sir.

Q. Did you prepare at that time a diagram of the buildings and trestles on the property? A. Yes, sir, this is it; and the diagram shows a rough outline sketch, indicating the size of the building.

Q. But not including the trestle? A. No, sir, it has no reference to the trestle at all.

Q. Was this sketch made in February, 1913? A. It was made in the latter part of January, 1913, or about the first of February.

MR. LEAKE: I offer this in evidence.

Marked "Exhibit L. A. 18."

Q. Now, Mr. Rowland, in April and May, 1912, what, in your opinion, was the value of the stable and the extension? A. The same as on this date on which the estimate was made; the estimate was made some time in July, 1913; there had been no change, so far as I know, between the early part of 1912 and the first of 1913, so that these figures would stand for 1912.

CROSS EXAMINATION BY MR. ENRIGHT:

Q. The structures would have very little value, if removed from the property? A. That is generally true of every structure.

Q. Isn't it particularly true of this? A. It is very true of this, too.

Q. Can you give us your best approximation of what the structures would be worth if removed?

MR. LEAKE: Objected to as being entirely immaterial and irrelevant.

THE COURT: What is your idea about that, Mr. Enright?

MR. ENRIGHT: I don't know what view you are going to take of this lease when we get to the argument.

MR. LEAKE: It is not cross-examination.

MR. ENRIGHT: I will make him my witness for this purpose.

MR. LEAKE: He may want to charge Mr. Enright for that; he is my expert; I object to that. I think he is entitled to call his own witness.

MR. ENRIGHT: It is cross-examination, anyhow.

BY THE COURT:

Q. Your value is placed on these buildings as they stood in 1913? A. Yes, sir.

Q. Are you able to place a value on the property if they were disconnected?

MR. LEAKE: I object to that, your Honor.

MR. ENRIGHT: The only purpose for which this witness is called is to prove what the value of this asset is.

THE COURT: I think I shall sustain the objection; you may prove that in your own way, if you desire to.

WILLIAM T. PAYNE resumes the witness stand.

DIRECT EXAMINATION (continued) BY MR. LEAKE:

Q. Do you know whether a coal strike was expected by the operators in the winter of 1911 and the spring of 1912? A. I will admit that a coal strike was expected by the operators, as they announce to the public every spring—

THE COURT: Answer the question.

Q. (Question read.) A. It was expected by the trade generally on April 1, 1912.

Q. And did it actually occur in that year, 1912? A. Not a strike—what was known as a suspension; the mines were idle for about seven weeks; there was an entire suspension of mining for about seven weeks.

Q. Was the fact that that suspension or strike was expected, mentioned by Sanders Wertheim in connection with the bond issue? A. Yes, sir, they urged the acceptance of the bond issue, of the bonds, by the various creditors.

Q. Did you suggest the making of this bond issue, and the securing of it by a mortgage? A. No, sir, it was suggested by Sanders Wertheim.

Q. By Sanders Wertheim? A. Yes, sir.

Q. What did he say about it? A. Well, he said it would strengthen their showing; that owing to this suit that had been brought against the Lehigh Valley Railroad Company, and the way they were delaying any settlement, or of allowing it to go to trial, that it looked to him as if they were trying to tire him out, and if he was strong financially, it would aid him in these negotiations; that practically everyone that had anything to do with the trade, fully expected that there would be a strike on the first of April, and that possibly would be of long duration if declared; it was six months in 1902, and it looked as if it would be as long that time; he further suggested that he had taken it up with two banks with whom he had discounts, and that they had advised him to make a bond issue and lengthen out his credit, a ten months' credit, to the East Boston Coal Company and the Mill Creek Coal Company, to a twenty years' credit; that it would strengthen him with them; the bond issue was for twenty

years. He brought many arguments to bear, and was very anxious to have us accept them.

By Mr. Leake:

Q. I show you statement marked "97" on the back, and also marked "Financial Statement, L. Wertheim Coal and Coke Company, month ending December 30, 1911," and indorsed "Wertheim Statement, December, 1911"; is that in your handwriting; your own indorsements? A. Yes, sir.

Q. Did you receive this statement from any officer of the Wertheim Company? A. I received that statement from Sanders Wertheim early in January, 1912.

Mr. Leake: I offer this.

Marked "Exhibit L. A. 19."

Q. Did you believe that that represented the condition of the company in 1912? A. I believed it thoroughly.

Q. Did you think that any change had occurred, or know of any change that had occurred between January, 1912, and May, 1912, with reference to the assets of the company? A. No material change.

By the Court:

Q. Did you know of any? A. No, sir, I did not know of any change.

Further Direct Examination:

Q. And were the assets the same in May, 1912, substantially, with reference to the trestle, lease and other things, as they were in January, 1912? A. Substantially the same, yes, sir.

Q. Was it the intention to abandon the business of the L. Wertheim Coal and Coke Company, at or before or after the time of taking these bonds? A. Oh, no—to go right on with the business.

Q. Was there any idea of suspending the business? A. No, sir, not the slightest.

Q. Had the company defaulted in any of its pay-rolls that you knew about? A. No, sir, never.

Q. Had it ever stopped business? A. Not to my knowledge; they did business daily.

MR. LEAKE: I offer page 186 of the minutes of the directors of the L. Wertheim Coal and Coke Company, dated July 17, 1912, at which time "The Treasurer reported that he had made arrangements with the First National Bank of Bayonne, N. J., for a discount."

That will be marked.

Marked "Exhibit L. A. 20."

MR. ENRIGHT: I think the whole minute ought to go in.

MR. LEAKE: That is entirely satisfactory. (Reading): "New York City, N. Y., July 17th, 1912.

"Minutes of the regular meeting of the Board of Directors of the L. Wertheim Coal & Coke Company, held at Mr. Warren Delano's office, 1 Broadway, New York City, on Wednesday, July 17th, at 3 P. M.

"Present: Warren Delano, Louis Wertheim, Sanders Wertheim.

"Minutes of the last monthly meeting were read and approved. The Treasurer reported that he had made arrangements with the First National Bank of Bayonne, N. J. for a discount. A motion was made and duly seconded and passed, approving of the Treasurer's course in doing this. After further discussion in regard to the discounts, it was unanimously decided that the bank account should be left entirely to the Treasurer's own

discretion, in regard to keeping the account at the Third National Bank, Jersey City or the First National Bank, Bayonne, or both if necessary. The Treasurer also reported that he thought it advisable to get possession of the 115th Street Yard, if possible, as it would help things in general. On account of the very poor tonnage being done at Jersey City, the Treasurer thought that by obtaining the 115th Street Yard again, it would help out. After a thorough discussion, the motion was duly made and seconded, to leave this matter in the Treasurer's hands, and if the yard could be obtained, to do so. The Treasurer reported that he had sent a monthly financial statement to both Messrs. Delano and Payne.

"After a general discussion, upon motion the meeting adjourned.

"S. WERTHEIM,
"Treasurer."

MR. LEAKE: I also offer the minute of the meeting of the Board of Directors of September 18, 1912, which is marked on my book page 189:

"The regular monthly statement for August was presented by the Treasurer. The Treasurer also reported that there was progress in regard to the repairs to the trestle at Jersey City. The Treasurer also reported his inability to get domestic coal.

"On motion of Mr. Sanders Wertheim, which was duly seconded and unanimously carried, it was resolved to borrow from the First National Bank of Bayonne, up to $15,000.00.

"Present: Warren Delano, Louis Wertheim, Sanders Wertheim."

Q. Did Sanders Wertheim say anything in connection with the bond issue having any bearing on the suit against the Lehigh Valley Railroad? A. At what time, now?

Q. When the bond issue was under discussion did he speak of any bearing that the bond issue might have on the suit against the Lehigh Valley Railroad Company? A. Yes, sir.

Q. What did he say? A. He said that it would strengthen his position very materially because it made him so much stronger financially, and his opinion, that it would aid him very materially in his discussions with the officers of the Lehigh Valley Railroad Company in bringing about some settlement.

Q. Did Sanders say anything to you about what the acceptance of the bonds by you or the East Boston Company and the Mill Creek Company would do, as to the future of the company? A. He said it would put him in magnificent shape.

Q. At the time of the bond issue, or shortly before that, did you receive any opinion as to the validity of the notes of Isenstein and Dann that were to be exchanged for bonds? A. Yes, sir, we received a legal opinion from you.

Q. To what effect? A. That they were entitled to exchange their notes for the bonds, and that their notes were good.

Q. Did the East Boston Coal Company continue, during these years of 1911 and 1912, to sell coal to the L. Wertheim Coal and Coke Company? A. Yes, sir, sold them coal regularly each month.

Q. And do you know whether, after the bond issue, the East Boston Coal Company continued to sell coal to the L. Wertheim Coal and Coke Company? A. We continued to sell them coal

after the bond issue just the same as we had sold them coal prior to the bond issue.

Q. And to what extent after the bond issue? A. As a total do you mean?

Q. Yes. A. Around $52,000 or $53,000. We sold them more coal than that after the bond issue, Mr. Leake, considerably more coal, because they made us some payments along—At the time that the bankruptcy proceedings were instituted they owed us $53,000 on open account.

Q. Now, I show you statement marked on the back, "325," and marked "L. W. Coal Notes, payable March 31, 1912, East Boston Coal Company," and I ask you if that statement was prepared by your company or the L. Wertheim Coal and Coke Company? A. That was prepared by the L. Wertheim Coal and Coke Company.

Q. And is that the statement sent you by the L. Wertheim Coal and Coke Company as to the amount due the East Boston Coal Company at the time of the exchange of the bonds for the notes? A. Yes, sir.

MR. LEAKE: I offer that.
Marked "Exhibit L. A. 21."

Q. What were those various notes of the L. Wertheim Company to the East Boston Coal Company for? A. For coal furnished.

Q. All of them? A. Yes, sir, all of them.

Q. Was the L. Wertheim Coal and Coke Company actually indebted to the East Boston Coal Company to the amount of those notes at that time? A. Yes, sir.

Q. Did Sanders Wertheim make any explanation to you about the first seven months of 1912, as to whether the strike affected their business? A. Yes, sir, he made several explanations at var-

ious times, that owing to the cutting off of all tonnage it affected his business very materially.

Q. I show you letter of March 28, 1912, addressed to "Warren Delano, 1 Broadway, New York City," and indorsed in pencil "For W. T. P."; do you know where that letter came from? A. It is a carbon copy of a letter that Sanders wrote to Mr. Delano and sent me the carbon copy of it, and I had that letter—it was through our files—

Q. Does that letter call your attention to where the L. Wertheim Coal and Coke Company was buying coal prior to March, 1912, from persons other than the Mill Creek and the East Boston Coal Company? A. Well, it calls my attention to two facts, that they purchased coal from other people during that period, and had been compelled to pay a considerable premium for the coal.

Q. Name some of the other people from whom they had purchased coal prior to March, 1912. A. This letter shows: "Huyler Sons; W. R. McPark and Company; Kelly and Company"—

Q. Do you know of any others? A. They always purchased more or less coal from the outside, from the time that I first knew them in 1906 down to that date; they purchased from Meaker and Company; A. H. Dollard; The Pine Hill Coal Company; Whitney and Kemmerer; Thorn, Neale and Company; from Mr. Schlosser; from practically all the wholesale people.

Marked "Exhibit L. A. 21 1-2."

Q. I show you what purports to be a letter from W. T. Payne to "Sanders Wertheim, Secretary, August 27th, 1912," copy of a letter, and I ask you where that came from? A. I wrote it to Sanders Wertheim.

Q. Does that call to your mind anything with reference to the improvement of the Jersey City Yard in August, 1912, or repairs? A. Sanders reported that several repairs and some renewals were necessary, and he asked me if I would approve of that being done, in writing, which I immediately did; that was the occasion for that letter.

Q. Mr. Payne did you have any accident to your breaker in 1912 at the mine? A. Our East Boston breaker burned down.

Q. When were shipments resumed from that breaker? A. The very end of December, just a few days before the first of January, 1913.

Q. Had you and Sanders Wertheim had any discussions or correspondence with reference to the regularity or irregularity of his orders for coal? A. We had discussions on that point steadily from 1906 down to the time they ceased doing business.

Q. Of what did you complain to him about—the method of ordering the coal? A. The irregularity of his orders; Sanders would expect to get a large contract, and on that expectancy he would arrange with me for comparatively large shipments, and generally without saying that he was ordering them on expectancies, and then, oftentimes, he would not get the contract, and after I had all the arrangements made he would suddenly decide that he could not take it, and he would be unable to take it, owing to not having obtained contracts that he expected: he was continuously arranging for very large shipments, and and I would arrange to produce the tonnage and ship it to him, and sometimes in the same month he would ask us to stop all shipments again: that was a regular thing from the time we commenced down to the time we stopped.

Q. Were the negotiations with the Lehigh Valley Railroad Company, or the Coal Company, resumed at any time after the bond issue, and if so, when? A. They were resumed again in the fall of 1912, running into the spring of 1913.

Q. And at that time did Sanders prepare for you and Mr. Delano and the Lehigh Valley Coal Company, a statement of the assets of the L. Wertheim Coal and Coke Company, particularly the details of the buildings and trestle, the cost of the buildings and trestle? A. Yes, sir.

Q. I show you what purports to be a carbon copy of a statement marked "L. Wertheim Coal and Coke Company, Assets totalling $487,108.02," and containing a number of sheets, and I ask you if that is a copy of a similar statement that you had? A. Yes, sir, I received a similar statement to that, each building being itemized with the exact contents, exact costs, the number of horses shown—

MR. LEAKE: I offer that.

MR. ENRIGHT: I object to that; it seems to me there must come some point at which these defendants cannot build up a case by showing communications or declarations from one director to another; this corporation kept books; it kept corporate records, and they deal to some extent with book assets, book liabilities, also, to some extent, with changeable property; now, the inquiry must be directed to the actual fact, and not to communications from Sanders Wertheim, a secretary and director, to another director.

THE COURT: They relate to the situation of the corporation, don't they, at that time?

MR. ENRIGHT: They are declarations made

by one officer to another, and they are not corporate records at all; they are hearsay. Sanders Wertheim cannot make this corporation solvent by telling Mr. Payne that it is so.

THE COURT: I will allow it to go in.

Marked "Exhibit L. A. 22."

Q. Was there any discussion by the officers of the company with reference to the right of the Lehigh Valley Railroad Company to cancel the lease of the L. Wertheim Coal and Coke Company? A. Yes, sir.

Q. Did you receive any opinion? A. Yes, sir, we had a legal opinion from you on the subject.

Q. Do you recall what, in substance, was the discussion about; was it about the right of the railroad to cancel the lease? A. My recollection of that opinion was, that it could be—the Railroad Company had the right to cancel it, on a comparatively small payment, provided it was needed for railroad purposes, but that they could not cancel it on any other ground, excepting a receivership or insolvency or bankruptcy.

Q. Do you remember whether the figures for the value of the cancelled lease to be paid by the Railroad Company should govern, or whether the value of the improvements on the buildings should be paid? A. The value of the improvements and the buildings on the property.

Q. I show you a carbon copy—paper marked "Improvements $119,000. cancellation value of lease $142,500," and I ask you if you received a copy of that from anyone? A. I received a copy of that from Sanders Wertheim.

Q. Is that the opinion which you referred to when you say that— A. That is the opinion that I referred to.

MR. LEAKE: I offer this.

MR. ENRIGHT: We object to this; we are not trying this case on the issue of what Mr. Leake's opinion was of the rights of the parties.

MR. LEAKE: All the cases refer to the question of intent as part of the whole issue, and I certainly think we are entitled to show, especially in answer to the allegation of Mr. Enright, that these men practically abused their position.

THE COURT: You can testify if you want to.

MR. LEAKE: I want to show that he had these figures before him.

THE COURT: I shall sustain the objection.

MR. LEAKE: I want to call your Honor's attention to the case of Bergen vs. Rogers, 73 Eq., on page 230, and particularly on on page 238, where Vice-Chancellor Garrison, in a case involving the very question of whether a fund of $15,000 given by the company, was given in contemplation of insolvency, or while insolvent, under the 64th section of the Corporation Act; this is the very act that he is operating under here; where Vice-Chancellor Garrison permitted a man named Colonel Rogers, who was one of the promotors of this company, a concern that proposed to build a trolley line and a park in Atlantic City with several Philadelphia capitalists, and where the Vice-Chancellor permitted all the intentions of the parties to be shown—

THE COURT: You show the intention by their conduct—by the records of the corporation and he says he was guided in the transaction by your opinion; but now, you are

asking to put your opinion in and make it part of the case; I don't think that is admissable.

Q. Mr. Payne, I show you a carbon copy of a letter directed "Messrs. Payne and Delano, No. 1 Broadway, New York City," dated January 31, 1913, and I ask you if you received that letter from anyone in the Werthein Coal and Coke Company? A. I received a copy of this letter from Sanders Wertheim.

Q. And do you recall why you received that letter?

MR. ENRIGHT: I object; the letter speaks for itself.

BY THE COURT:

Q. Do you know how it came to be sent to you? A. It was during the time of the negotiations with the Lehigh Valley Railroad Company, and it was Sanders' analysis; it was sent as a matter of guidance of these values.

FURTHER DIRECT:

Q. Mr. Payne, I show you a letter—

MR. ENRIGHT: I object to this letter of January 31st, 1913, on the ground that it is incompetent against the Trustee in Bankruptcy, being merely a communication between directors, and it is dated subsequent to the time of the mortgage.

THE COURT: I will allow it to go in, and note your objection to it.

MR. LEAKE: I will say concisely to your Honor, that it is an explanation of that other itemized statement of the buildings, giving the reasons for arriving at the figures.

Marked "Exhibit L. A. 22½."

Q. I show you letter dated January 9, 1913, addressed to "W. T. Payne, Kingston, Pennsylvania" and signed "Sanders Wertheim, Secretary;" did you receive that letter from Mr. Wertheim? A. Yes, sir.

Marked "Exhibit L. A. 23½."

MR. ENRIGHT: I make the same objection to that.

THE COURT: It will be admitted.

MR. LEAKE: Said letter reads as follows:

"Jersey City, N. J.,
"January 9th, 1913.

"W. T. Payne, Esq.,
"Kingston, Pa.

"Dear Mr. Payne: I enclose you a clipping of the coal combination that Burns Brothers have just put through. This is what I spoke to you about quite some time ago. One of the large bondholders and stockholders of this Company, called me on the 'phone to-day and asked me if I would not call to see him about 11 o'clock Monday. I do not know what he wants, but will let you know later just what is said. In the meantime, we want to move all the tonnage we can and get all the business we can, so as to prepare for a large sale of coal. The more we sell and deliver, the stronger it will make us.

"There were two engineers here to-day who went over our plant. They were sent here by Mr. T.

"Hoping to see you soon, I beg to remain,
"Sincerely yours,
"S. Wertheim,
"Secretary."

Q. I show you letter dated March 21, 1913, addressed to "W. T. Payne," signed "L. Wertheim Coal and Coke Company," (reading letter): "Dear Mr. Payne: No doubt you will be pleased

to know that there were only two bidders for the schools in Jersey City. The following prices were quoted: E. L. Young Coal Company: Egg-Stove-Nut, $5.84 per ton. Pea, $4.19 per ton, No. 1 Buckwheat, $3.69 per ton. Wertheim Coal & Coke Co.: Egg-Stove-Nut, $5.74, Pea, $4.39, No. 1 Buckwheat, $3.49. We feel quite sure of getting the contract". Did you receive that letter from Sanders Wertheim? A. Yes, sir.

MR. LEAKE: I offer that in evidence.

MR. ENRIGHT: I object to that as entirely immaterial.

THE COURT: Objection overruled.

Marked "Exhibit L. A. 24."

Q. I show you letter of Sanders Wertheim to Mr. Payne, dated March 20, 1913, and I ask you if you have such a letter as that in your files? A. Yes, sir.

MR. LEAKE: I quote from that (reading): "We have plenty of coal on hand now, and anticipate doing a large tonnage. We are trying to close contracts in order that we may be assured of the tonnage during the coming year, of about 120,000 tons; then we will be in position to make profits. Conditions are such, that we will be able to get all the coal we want, to do our business with. The coal market, so far as the wholesale end is concerned, has all gone to pieces, and the wholesalers are willing to sell coal at any price, which, of course, is of great advantage to us."

Marked "Exhibit L. A. 25."

Q. Did Sanders Wertheim report to you subsequent to that letter of March 21, 1913, that he actually had obtained the Jersey City School contract? A. Yes, sir.

Q. During this year 1913, did you continue to sell coal; I mean, did the East Boston Coal Company continue to sell coal to the L. Wertheim Coal and Coke Company? A. Yes, sir; right along.

Q. And I show you letter dated December 31, 1913, to the East Boston Coal Company, and I ask you if you received that letter from Sanders Wertheim? A. Yes, sir.

MR. LEAKE: I quote from that (reading): "If we can only get the sizes of coal we want, and sufficient tonnage for our purpose, we will have no trouble in paying our bills and will make profit. We will start off January with all the tonnage we need to do business with. We ought to then get in good shape."

Marked "Exhibit L. A. 26½."

Q. I also show you letter dated March 31st, 1914, signed in pencil "Sanders Wertheim," directed to "Dear Mr. Payne," and ask you if you received that letter from Sanders Wertheim? A. Yes, sir.

MR. LEAKE: (Reading): "I am cutting out all our tonnage that we have been selling coal at low prices. We are getting good grades of coal now, and this enables us to stand on better prices.

"Part of the government contract is finished, and the balance will be through this month. This the cheapest contract that we have, that is, the most unprofitable, but the only reason I took it, I had to have some business, and this was on soft coal, and the only coal I was able to get, and be sure of getting, and another thing, when we went out for contracts last May, everything was gone.

"From to-day we have advanced everything we have outside of the city and the Government from 10 cents to 35 cents per ton, with the exception of those who were paying high prices. As soon as we get this government contract out of the way and get healthy business to take its place, and get our supply of coal, which I think we will get this year for the first time, then I think the rainbow will begin to shine. I do not contemplate handling any more domestic coal at this yard.

"I have decided to only handle soft pea, 1, 2 and 3 Buck, and get my domestic sizes as I need it elsewhere in one ton or more lots."

Marked "Exhibit L. A. 27."

RECESS TO 2 P. M.

AFTER RECESS.

SANDERS WERTHEIM, recalled.

DIRECT EXAMINATION BY MR. LEAKE:

Q. Mr. Wertheim, how long have you been in the coal business retail or wholesale? A. About 18 years.

Q. Have you had experience in renting and leasing coal yards? A. Yes, sir.

Q. Do you know the rental value of coal yards? A. Yes, sir.

Q. What, in your opinion, was the rental value of your coal yard at the corner of Grand Street and Pacific Avenue, in May, 1912?

MR. ENRIGHT: Objected to on the ground that the witness is not qualified; and I also

call the attention of the Court to the fact that when I tried to show that same thing by Mr. Slater, the other side objected to the rental value going in at all, and it was excluded.

THE COURT: Qualify the witness anyhow.

MR. LEAKE: He says that his qualifications are, that he has been in the rental and wholesale coal business for eighteen years, and knows the values of properties for leasing as a coal yard.

BY THE COURT:

Q. Have you ever leased or bought a coal yard? A. I have bought one over in New York at 115th Street, East River, 115th Street.

Q. Does it bear the same characteristics as this coal yard? A. It adjoined the river front.

Q. Have you any switches there? A. No, sir; no railroad connections of any kind; it is brought in by boats, and unloaded by steam diggers into a pocket.

FURTHER DIRECT:

Q. Have you ever leased coal yards? A. Yes, sir.

Q. For yourself and for coal concerns in which you have been interested and identified.

BY THE COURT:

Q. How many? A. Five I have leased.

Q. Where are they? A. One at 20th Street and East River, one at 30th Street and East River, New York; one at 115th Street and East River; one at Elmarol Avenue and Long Island Railroad, Brooklyn; and one at Avenue I, at Long Island, Brooklyn, and this Grand Street and Pacific Avenue place, Jersey City.

FURTHER DIRECT:

Q. What was the rental value of the yard in 1912, the Grand Street and Pacific Avenue yard, what was it?

MR. ENRIGHT: Objected to on the ground that the witness has not qualified.

THE COURT: It is a grave question, however, I will let him testify; do you want to cross examine him on that?

MR. ENRIGHT: Yes, I do.

THE COURT: Cross examine him about all that.

CROSS EXAMINATION BY MR. ENRIGHT:

Q. Are these yards that you have just listed as having been leased, the only yards that you have leased? A. Yes, sir.

Q. The 115th Street yard, is that the one where you acquired the lease for the Wertheim Company? A. Yes, sir.

Q. And those are all either in New York City or in Long Island City? A. Yes, sir.

MR. ENRIGHT: I press the objection; the witness is not qualified.

THE COURT: I will let him testify.

FURTHER DIRECT, BY MR. LEAKE:

Q. What is the fair rental value—what was the fair rental value of the Wertheim yard at the corner of Grand Street and Pacific in the year 1912? A. We averaged our rental on the tonnage basis, regular railroad tonnage basis, which is 10 cents a ton.

FURTHER CROSS EXAMINATION BY MR. ENRIGHT:

Q. What does that make the leasehold value of that yard? A. About $7,500 a year.

FURTHER DIRECT, BY MR. LEAKE:

Q. Is there any custom in the coal trade of fixing the value of a land suitable for coal purposes, by reference to the tonnage done?

MR. ENRIGHT: Objected to as not being within the scope of trade testimony.

MR. LEAKE: Question withdrawn.

Q. Is there any custom in the coal yard of fixing the leasehold value of a retail coal yard with reference to the annual tonnage done at that yard?

MR. ENRIGHT: Same objection.

THE COURT: The objection is overruled.

A. Yes, sir; there is a custom.

Q. And what is that custom? A. Some of the railroads charge 10 cents a ton for dumpage, and others charge 15 cents a ton; that means, that if you go in there and the railroad company constructs the plant they charge you that dumpage as rental; if you go in and build your own plant, there is no rental; that is, on the tonnage basis; no charge of rental by the railroad; you build your own plant.

Q. And in 1912, in your opinion, was that retail coal yard of the L. Wertheim Coal and Coke Company in 1912, worth $7,500 a year to the company?

MR. ENRIGHT: Objected to on the ground that the witness is not qualified to give an expert opinion.

Q. That is $7,500 per annum? A. Yes, sir.

Q. Did you make an estimate of that at that time, in 1912? A. We used to take the 10 cents a ton to work on a basis there; of course, some of the years we did business there, the tonnage was as great as 125,000 to 150,000 tons.

Q. Did you make an estimate in 1912? A. I don't remember.

Q. Then how do you get at it? A. Because I know our tonnage was over 75,000 tons in a year.

CROSS EXAMINATION BY MR. ENRIGHT:

Q. So, in your opinion, the market value of this property depends on how much tonnage you handle during the year? A. Yes, sir.

Q. If business was poor, say you only did 50,000 tons a year, the rental value of the yard would be, in your judgment, $5,000? A. Yes, sir.

Q. And if you did 150,000 tons a year, the rental value would be $15,000 a year? A. Yes, sir.

Q. If you did 250,000 tons a year at Grand and Pacific Avenue, you would say the rental value of that property was $25,000 a year? A. No, sir; I would average it up.

Q. I asked you about what you considered the rental value of that coal yard, and you say it is 10 cents a ton on the tonnage handled? A. Yes, sir.

Q. So that the rental value changes from year to year? A. Yes, sir.

Q. But the land and the trestles and equipment remain the same? A. Yes, sir.

Q. And you have qualified as an expert by referring to leases you have made in New York City and Brooklyn; is that your idea, that a yard in Jersey City has the same rental value as a yard in New York City, provided the amount of busi-

ness you do is the same? A. No, sir; I don't think so.

Q. Didn't you say it is 10 cents a ton? A. Yes, sir; when coal is handled by rail, but the water delivery is an entirely different proposition.

Q. So there is no comparison between the rental value of a water-front yard in New York City and Brooklyn with this railroad access yard at Grand and Pacific Avenue? A. The conditions are entirely different.

Q. And there is no comparison between the two? A. Very little.

Q. So that whatever knowledge you have of the rental values of a water-front yard in New York, would not assist you in arriving at a rental value of a yard in Jersey City? A. No, sir.

Q. The only rail yard that you ever had any experience in renting was this one on Grand and Pacific Avenue? A. No, sir; the two in Brooklyn are rail yards.

Q. If you fix the rental value of this yard at 10 cents a ton, would you say that the rental value of a coal yard in Brooklyn, likewise is to be figured at 10 cents a ton on the tonnage you handled? A. It would be if the conditions were the same for Brooklyn as they were in Jersey City.

Q. They are not the same, are they? A. Not at those particular places, the property was not owned by the railroad company.

Q. So in fixing the rental value of a rail yard, your opinion depends on whether or not the landlord is a railroad company or not? A. That is the idea.

Q. You do not fix rental value with reference to the value of the land or the structures, but simply with reference to whether it is owned by a railroad company, and with reference to the

amount of tonnage you do through the yard; those are the elements, are they not? A. I don't know how to answer that question; we fix the rental on the 10 cents a ton basis.

By The Court:

Q. You say, in view of your fixing the rental value on the tonnage that you handle. that that is the custom? A. I don't know what the conditions are now with the railroad companies, but at the time we made that particular lease, they were all done with the idea of giving the railroad company a tonnage, and if the railroad company would construct the buildings they would charge a rental of 10 or 15 cents a ton.

The Court: That was more of an understanding than a custom.

The Witness: Possibly not; our understanding was a positive understanding as to the tonnage; we had to guarantee a certain tonnage to go over the plant; our guarantee started with thirty and went up to a hundred and thirty thousand a year.

Q. And the railroad company accepted that guarantee of tonnage as equivalent to rent, didn't it?

Mr. Leake: Objected to.

The Court: The objection is overruled.

A. Yes, sir; that is it; the lease will show that.

Q. And if you do not guarantee the railroad company a certain tonnage, then you have to pay more rent; is that it? A. That I don't know; we did not have any such arrangement as that with them.

Q. What the railroad company wants to get is the tonnage? A. Yes, sir.

Q. And under these leases you were paying in

freight over one hundred thousand a year? A. A good deal more than that.

Q. Now, how much a year? A. Well, some years the tonnage was high; it must have been in the neighborhood of $175,000.

Q. So the railroad company, in order to get the freight to charge you that much money, was willing to hand the use of the yard over to you for a nominal sum; that is about the size of it? A. Yes, sir; if we constructed the buildings, yes, sir.

RE-DIRECT EXAMINATION BY MR. LEAKE:

Q. There was another element in connection with that lease, showing there was a conveyance by you to the railroad company of some land? A. Yes, sir.

Q. Was that conveyance by you to the railroad company of that land, part of the consideration of the lease? A. Yes, sir.

MR. ENRIGHT: Objected to; I think it should be proved by the record.

MR. LEAKE: The railroad company has that.

THE COURT: If the objection is pressed, I don't think it is proper, I shall have to sustain the objection.

RE-CROSS EXAMINATION BY MR. ENRIGHT:

Q. What is the maximum amount of tonnage you could handle through that yard, assuming you had all the orders that there were to be had? A. I don't think we could handle, over, possibly, 160,000 tons.

Q. Assuming that you had no trouble in getting orders, and that you had all of the horses and wagons necessary to move the coal, suppose

the business was coming to you so that you had all that you could run through that yard, how much could you get through the yard in the course of a year? A. Between 150,000 and 160,000 tons.

Q. Couldn't you get more than that, assuming you had all the horses and wagons— A. I suppose that we could.

Q. And if you had the coal running through the yard as fast as you could handle it, and with all the customers to sell it to that you wanted? A. Do you mean near by, so that we could make prompt deliveries to them?

Q. Yes. A. Oh, we could do a good deal more than that; I should think that we could do 175,000 tons, providing we got drill service and all that.

Q. Assuming you could get all of the steam plants in Lower Manhattan, and you could get all the drilling service that you wanted, and you had all the horses and wagons to move the coal that you wanted, how much, at the outside, could you get through that yard in the course of a day?

MR. LEAKE: Objected to as immaterial and irrelevant.

THE COURT: I shall overrule the question.

RE-DIRECT EXAMINATION BY MR. LEAKE:

Q. Just one question: do you know of any people making offers for that yard after the Wertheim Company went into the hands of a receiver? A. Do you want me to tell that under oath—do I know it personally?

Q. I want to know if you know of anyone who was seeking that yard? A. The only thing is, that I don't like to answer that question.

THE COURT: You are compelled to answer it, if the question is properly put to you.

By The Court:

Q. Did anyone, through you, or anyone that you know of, negotiate for the leasing of this yard? A. No, sir; no one negotiated through me.

Further Re-Direct:

Q. Do you know anyone who desired to get that yard for a retail coal yard after the receivership in the Wertheim case?

Mr. Enright: Objected to as immaterial and irrelevant.

The Court: Objection overruled.

A. I don't know.

Q. In addition to your experience in leasing coal yards in Brooklyn and New York, are you familiar with, or have you made efforts in your retail coal business in endeavoring to secure yards in Jersey City? A. I don't think so.

Q. Have you never had any other coal business in Jersey City other than this yard at Grand Street and Pacific Avenue? A. Yes, sir.

Q. And had yards? A. Had a yard.

William T. Payne, resumes the witness stand.

Direct Examination (Continued) by Mr. Leake:

Q. Have you had prepared statements of the account of the East Boston Coal Company with the L. Wertheim Coal and Coke Company from 1906 down to, the bond issue—the exchange of notes for bonds April 1, 1912? A. Yes, sir.

Q. I show you this statement, and ask you if that is a true copy of the account between the Wertheim Company and the East Boston, with monthly sales and monthly remittances? A. Yes, sir; this is the settlement.

MR. LEAKE: I offer this.

Marked "Exhibit L. A. 28."

MR. ENRIGHT: Subject to supervision of the books, which are in evidence, I have no objection to that; it is a convenient tabulation.

Q. Have you also prepared a tabulation of the sales from your East Boston Coal Company, to the Wertheim Coal and Coke Company, monthly from the date of the bond issue down to the date of the bankruptcy, showing the sales by the month and the payments made each month? A. Yes, sir; we have.

Q. I ask you if this is the statement? A. Yes, sir; this is the statement.

MR. LEAKE: I offer this.

Marked "Exhibit L. A. 29."

MR. ENRIGHT: I have no objection to it, with the same understanding.

Q. I also ask you if you have prepared a calculation showing the balance due each of the months after the bond issue, from the Wertheim Coal and Coke Company to the East Boston Coal Company? A. Yes, sir.

MR. LEAKE: I offer this.

Q. Is this the statement? A. Yes, sir.

Marked "Exhibit L. A. 30."

MR. LEAKE: Now, Mr. Enright, have you the cash books of the L. Wertheim Coal and Coke Company that we had at the last trial, showing the receipts and disbursements since April 1, 1912?

MR. ENRIGHT: I have not any of the books in Court; none have been called for; I presume they are in my office.

MR. LEAKE: I would like to have the right to introduce some pages of that.

MR. ENRIGHT: Such of the books as are in my office will be up in a moment; there is a great lot of these books, and most of them are at the office of the Jersey City Trust Company.

Q. Mr. Payne, were you at any time, as alleged by the cross-bill of the trustee in bankruptcy, in the sole control of the East Boston Coal Company? A. No, sir; never.

Q. Did you ever own a majority of the stock at that time? A. No, sir.

Q. Did you hold any other office than Vice-President and Treasurer? A. No, sir.

MR. LEAKE: Mr. Enright, will you accept the treasurer's proof of these by-laws, in lieu of bringing the Secretary down? It will save a lot of time and expense.

MR. ENRIGHT: I object to the by-laws of the East Boston Coal Company as being entirely immaterial and irrelevant.

MR. LEAKE: He has alleged in his cross-bill that Mr. Delano and Mr. Payne are the sole owners, in absolute control.

Q. Did you use the L. Wertheim Coal and Coke Company, as alleged by the trustee in bankruptcy, as a convenience to yourself, or the East Boston Coal Company? A. Certainly not.

Q. Did you stand to make any profit out of the business with L. Wertheim Coal and Coke Company, except for yourself? A. For myself personally?

Q. Yes. A. No, sir.

Q. Did you stand to make any profit for the East Boston Coal Company, out of the L. Wertheim Coal and Coke Company, except a profit on the quantity of coal that was sold by that

company to the L. Wertheim Coal and Coke Company? A. That was the only profit that the East Boston Coal Company stood to make.

Q. At various times during your directorship in the L. Wertheim Coal and Coke Company, were you ordered to stop shipments of coal by Sanders Wertheim? A. Yes, sir.

Q. And did you divert the tonnage at that time which had theretofore gone to the L. Wertheim Coal and Coke Company, to other concerns? A. Always, just as rapidly as it could be done.

Q. And in 1914, when the business stopped, did you divert this tonnage to other sources? A. Yes, sir.

Q. And have you since been selling that tonnage? A. Since sold it to other customers, to other buyers.

Q. At more or less than the prices at which you sold to the Wertheim Company? A. Some at the same prices and a large quantity at higher prices.

Q. Some at how high a premium, since— A. Some Buckwheat for one dollar a ton more.

MR. ENRIGHT: Objected to.

MR. LEAKE: The question is withdrawn.

Q. During the time you were a director of the L. Wertheim Coal and Coke Company, did you sell coal to them at a higher or a lower price than you sold to other people? A. Sometimes at the same price, sometimes at lower prices.

BY THE COURT:

Q. Why at lower prices? A. Well, there were frequent times when there were urgent demands for coal, and that trade that was not regular with us, we took advantage of it and got very much higher prices, the Wertheim trade was regular,

and so we charged them regular prices right along; prior to the coal strike of 1912, we sold them coal for several months for 50 cents a ton less than we were getting in other quarters for it.

Q. The same coal? A. Yes, sir.

FURTHER DIRECT:

Q. Did you, during your directorship, when your breaker had burnt down, did you purchase coal from other people and sell that to the Wertheim Company? A. Yes, sir.

Q. At a profit or at the same price? A. During the time the stringency in 1913 took place, when they were unable to get any coal at any place, I went through the region and found some coal for them, and was compelled to pay that operator a premium for that coal, and turn it over to the Wertheim Company at exactly what we paid for it.

Q. How long before the failure of the Wertheim Company did you discontinue the sale of Buckwheat coal from the Washery? A. For some considerable time prior to that time?

Q. More than a year? A. Yes, sir.

Q. And did you divert that entire Buckwheat tonnage to other customers? A. Yes, sir.

Q. Did you receive the same price, or more for the tonnage after it was diverted? A. Approximately the same price.

Q. Did you have any difficulty in disposing of it? A. No, sir.

Q. On the Board of Directors besides you were Mr. Delano, Mr. Van Buskirk, and the two Wertheims? A. Yes, sir.

Q. Mr. Van Buskirk very rarely attended the meetings? A. Very rarely.

Q. Did you and Mr. Delano run that concern, or did Sanders and Louis Wertheim run it?

MR. ENRIGHT: Objected to as leading, and as involving a conclusion.

THE COURT: Objection sustained.

Q. Who was the managing officer of the L. Wertheim Coal and Coke Company while you were a director? A. Sanders Wertheim.

Q. You acquiesced in his suggestions as to what was best for the business of that company? A. Very largely.

Q. Whose custom was it to make the financial reports and statements of the profits and losses and the assets of the company during all the time you were in that directorship? A. Sanders Wertheim.

Q. Who, during the time you were a director, determined the quantity of coal that was desired for the use of the company? A. Sanders Wertheim.

Q. Who proposed that the bonds be taken in lieu of those notes.

MR. ENRIGHT: That is already in several times.

Q. So far as you know, was anything done that did not have the approval of the stockholders of the company while you were a director? A. No, sir.

MR. LEAKE: I would like at this point to have in the record, that I may have the privilege of offering this batch of statements that were identified by this witness, and also reserving the right of putting in the analysis of the cash account; and with that batch of exhibits I would like to offer and have marked the minutes of the meetings of the directors which I read and made the offer of at the time.

THE COURT: All right.

MR. ENRIGHT: I don't know what he means by referring to a "batch of exhibits"; if he is referring to these which have already been offered, they are in.

MR. LEAKE: Only those that I read, that is all.

MR. ENRIGHT: They are all in.

MR. LEAKE: But they are not marked.

THE COURT: I don't think you need to offer them again. You may consider that you have offered them.

MR. ENRIGHT: This batch of statements I want him to offer, if marked.

THE COURT: All right. What about these books? You have got them up, here now.

MR. LEAKE: That batch of exhibits to which I referred, if you want me to read them, I will call them off one by one; they are statements rendered from March, 1910 up to the date of the bond issue; this is a batch of monthly statements, trial balances, coal on hand, accounts payable, forwarded by Sanders Wertheim, Treasurer of the L. Wertheim Coal and Coke Company, to this witness, Mr. Payne as follows:

Statement of March 10, 1910 (reading).

(See end of case.)

CROSS EXAMINATION BY MR. ENRIGHT:

Q. You have said you are not in sole control of the East Boston Coal Company; who are the other officers of that company? A. W. G. Payne, President; J. E. Nugent, Secretary.

Q. And Mr. W. G. Payne is your father? A. Yes, sir.

Q. He is the largest stockholder? A. Yes, sir.

Q. Before you became a director of the L. Wert-

heim Coal and Coke Company in 1909, you and your father had a conference with Mr. Delano in New York, didn't you? A. And at that time the proposal which Mr. Wertheim had under consideration, namely of buying the stock of Isenstein and Dann, and thereafter getting ten months' credit from your company and Mr. Delano's company, was talked over and agreed to? A. Yes, sir; that is correct.

Q. And although you say that the first meeting you attended was in January, 1910, you do not wish to deny—that you and your father had a thorough agreement with Mr. Delano and Mr. Wertheim before that time, as to the acquiring of the Isenstein and Dann stock by Wertheim? A. No, sir; I don't say that.

Q. You do not deny that? A. I say I do not say that.

Q. Did you or didn't you? A. No, sir—

Q. You have answered it.

THE COURT: Let him answer the question

Q. (Question read.) A. May I answer that in my own way?

Q. Yes. A. Mr. Delano and my father and myself did have a conference relative to our going ahead in supplying this corporation, this Wertheim corporation, with coal; Sanders had talked to me previously, that he was anxious to buy out the Isenstein and Dann interests, now, the details of how that purchase was to be made was not discussed, and I was never entirely familiar with the transaction until along in January; Mr. Van Buskirk, Mr. Van Winkle, Sanders Wertheim and Mr. Delano, worked out all that detail, and it was a matter of history.

Q. You did know, however, that on or before

this conference in December, that at that time Isenstein and Dann held a majority of the stock of the company; you knew that, didn't you? A. I am not sure that I knew that they had a majority; I knew that they had a large holding.

Q. Didn't you know they had the control? A. No, sir; I am not sure that I knew.

Q. Isn't it your present recollection that you did not know it? A. No, sir; my recollection is not clear on the subject.

Q. You don't wish to either affirm or deny such knowledge? A. No, sir; I knew they had large holdings, but actually what their holdings were, I did not know.

Q. Did you know they were drawing large salaries? A. Yes, sir; I knew that from Sanders Wertheim and from Louis Wertheim.

Q. And you knew Sanders Wertheim desired to acquire their stock? A. Yes, sir; I knew that.

Q. And that he would require some financial backing in order to do it; you knew that? A. Yes, sir; I knew that.

Q. So, the purpose of this conference in New York was to determine whether or not you gentlemen would give Sanders the financial backing he needed, wasn't it? A. Not exactly.

Q. Well, what was it? A. The purpose of that conference was, that they had got to about the state in their negotiations where Sanders Wertheim had his mind pretty thoroughly made up what would be necessary to accomplish that; and we were asked if we would be willing to supply coal on a 10 months' credit, instead of 30 days credit, as we had previously been furnishing them; that would make sufficient loose money, in Sander's opinion to thoroughly finance his concern and finance his proposition.

Q. Was Sanders Wertheim at this conference?

A. Well, I won't say positively whether he was or whether he was not.

Q. What is your best recollection? A. It seems to me that he was not; but there were two or three talks at that time; I only recollect being present at one talk with Mr. Delano, and there were two or three talks with Sanders Wertheim.

Q. Didn't you know at the time of that conference that $20,000 cash would be required in order to acquire the Isenstein and Dann stock? A. No, sir; I have no recollection of that.

Q. What was the first time that you heard about this $20,000 cash? A. My recollection of it is—the first time I heard about it was along sometime early in January; a little bit previous to that meeting.

Q. But it was after you had been elected a director? A. Yes, sir.

Q. At the time you were elected a director, didn't you know that the company was to issue notes to the amount of $40,000 or $50,000 in addition to a payment of $20,000 cash to go to Isenstein and Dann to acquire their stock? A. My recollection is not entirely clear on that, Mr. Enright; I knew it along at this time, and I have forgotten just how the information came to me. As I said a moment ago, practically all of this came to me second-hand; I was not present at any of these conversations; they worked out all this detail—

Q. What I am trying to get at is, whether this whole plan was not settled upon, including the $20,000 cash, and the issue of notes to go to Isenstein and Dann, before you agreed to become a director of the company? A. I don't think that it was, but I am not absolutely clear on it; I have no memorandum to which to refer.

Q. At the time you agreed to extend the

credit from three months to ten months, was it not agreed that you should become a director of the company? A. Yes, sir.

Q. And it was also agreed that Mr. Delano should become a director? A. Yes, sir.

Q. And the third man should be Mr. Van Buskirk? A. Yes, sir.

Q. The total number of directors was five? A. Yes, sir.

Q. And that Sanders and Louis Wertheim were to be the other two? A. Yes, sir.

Q. Wasn't it also understood at that time, that your company and the Mill Creek Company were to divide between them substantially the coal to be furnished to this company? A. Not exactly that, no; we were supposed to be their most favored source of supply—our two companies; but there was never any real understanding, there was never any positive understanding that we should furnish all the coal, for, as a matter of fact, right at that time, and forever afterwards, they always bought more or less coal from other sources.

Q. But they did not buy as much from other sources as they did before, did they? A. No, sir; I think not.

Q. Wasn't it understood, that in value, at any rate, the value of coal purchased from your company was to be about the same as that purchased from the Mill Creek Company? A. That understanding was arrived at later, yes, sir.

Q. Well, later, it was put in the form of a writing, a resolution, wasn't it? A. It seems to me there was a resolution about it later, yes, sir.

Q. But, from the very start there was this understanding resulting from this conference, wasn't there? A. No, sir; my recollection of that is, that that did not come about until some two

or three or four months or more after this January meeting; as a matter of fact, Sanders Wertheim always went on and ordered his coal, and we shipped it.

Q. Now, you were elected a director according to the minutes, on the 17th of December, 1909; that is correct, isn't it? A. Well, I presume it is if the minutes say so, I don't recollect the date

Q. Now, I call your attention to a waiver of notice of a stockholders meeting, which is signed December 20, 1909; is that your signature? A. Yes, sir.

Q. "William T. Payne"? A. Yes, sir.

Q. And those are the signatures of the other stockholders, are they not? A. Yes, sir.

Q. Now, I call your attention to that waiver: "Notice is hereby waived of stockholders' meeting of the L. Wertheim Coal and Coke Company, to be held at the office of Warren Delano, No. 1 Broadway, New York City, on the 20th day of December, 1909, at two o'clock P. M., for the purposes following and other purposes, namely (1) to form the by-laws with respect to what officers shall be empowered to sign checks. (2) To authorize the giving of a note for $20,000 to Warren Delano." Now, does not that mean that you knew all about both the $20,000 item and the issue of notes, before this meeting in January? A. Certainly; my recollection of it is, it was mailed up to me in Pennsylvania, and I signed it and returned it.

Q. You knew what the $20,000 was for, didn't you? A. Yes, sir; I think I must have known what it was for.

Q. Now, you never had any means of making a profit out of the Wertheim Company except through the coal which your East Boston Coal Company sold to it? A. That is right.

Q. And your father never had any chance to make a profit except through the sales of coal? A. No, sir.

Q. That was true at the begining and continued throughout your connection with the company? A. Yes, sir.

Q. And your sole purpose in going on the Board of Directors of the Wertheim Company was to look after the interests of the East Boston Coal Company? A. Not entirely—to the contrary—when Isenstein and Dann went out of the company, these vacancies occurred on the Wertheim Company's board, and Sanders and Louis were anxious to have someone go on the board that was more experienced in the coal trade, and had more knowledge of the region, as a matter of consultation and advice; and I was asked to become a director for that reason.

Q. Did you have any interest, sir, either definite or contingent, in the Wertheim Company, except that of a seller of coal? A. Well, I had the same interest that I imagine any director would have in anything; he would like to see it succeed and do well; he would like to see them do things wisely.

Q. But you could not make any profit or reap any advantage from that except as a seller of coal? A. I could not make any profit out of it.

Q. And if it had not been for your interest in the East Boston Coal Company, you would not have gone on that board, would you? A. It is very doubtful whether I would.

Q. And, being upon the Board of Directors, wasn't it your purpose at all times to look out for the interests of the East Boston Coal Company? A. No, sir; I always endeavored to look after the interests of the Wertheim Company; I gave them a lot of time; I inspected the stores

for them, and I went over their plant with them; I passed on renewals; I did a great many things for the Wertheim Company in which there was no profit to me.

Q. In fact, you kept yourself pretty well informed about their affairs, didn't you? A. I went to their office frequently, and I went to their yard frequently.

Q. Their yard in Jersey City? A. Yes, sir.

Q. And you looked their property and plant over there? A. Yes, sir.

Q. You gave a great deal of time to them, didn't you? A. Yes, sir.

Q. Did you get your expenses back from the Wertheim Company? A. No, sir.

Q. They were charged up to the East Boston Company? A. No, sir.

Q. You did those out of your own pocket? A. Yes, sir; I always paid my own expenses out of my own pocket.

Q. Was not your presence at this Board of Directors a business proposition? A. Certainly.

Q. And the business you had to serve—the only business interests you had to serve, were those of the East Boston Coal Company?

MR. LEAKE: He just said they were.

THE COURT: He said at the outset of his testimony, that his interest in the Wertheim Company was the selling of coal. The objection will be overruled.

A. I presume that is correct.

Q. You were the nominal holders of eight shares of stock of the Wertheim Coal and Coke Company? A. Yes, sir.

Q. Had you indorsed that over? A. I think it was signed in blank.

Q. To the Wertheims? A. No, sir; I think it was just signed in blank; I never saw it again; I saw it at one of the early meetings.

Q. It was not attached in a book? A. No, sir.

Q. This stock acquired from Isenstein and Dann was indorsed over by the Wertheims and held as security, wasn't it, for the protection of your company and Mr. Delano? A. I think not; I think that was signed over, as I learned after, originally, as collateral stock for this $20,000 note, and remained there.

Q. Where? A. I don't know just where it was held.

By The Court:

Q. Did the East Boston Coal Company ever have it? A. No, sir.

Further Cross:

Q. Don't you remember, at a directors' meeting in December, I think it was, 1911, you had a minute revised so as to show the deposit of this stock as joint security for what might be owing to your company and to Mr. Delano's company? A. The details of this original arrangement were worked out, as I have already stated, and I was not at all familiar with it; I learned afterwards that this Isenstein stock had been deposited as collateral security for this $20,000 note, and I think it was so held; I did not know about that until some time after that, because I was not present when the thing happened. Along in 1911 as you stated, there was a minute passed at a meeting, as I recollect it now; is not that correct, Mr. Enright?

Q. I will call your attention to a minute of the directors made December 20, 1911, and will let you read it and see if that does not refresh

your memory. A. This is correct (reading): "The minutes of the meeting of Wednesday, September 20th, 1911, were read. After the reading thereof, Mr. W. T. Payne moved a resolution which was duly seconded and unanimously adopted, that the minutes be not approved, because of an error in the resolution reported on page 2 of the minutes of the meeting of that day, relating to the deposit of certificates of stock of this company as collateral to the loan of $20,000 to the Mill Creek Coal Company.

"On motion of W. T. Payne, the following resolution was duly seconded and adopted by unanimous vote:

"Resolved the minutes of the meeting of September 20th, 1911, be amended by striking out the following words:

" 'On Motion duly seconded, it was ordered that corresponding certificates, properly endorsed, shall be pledged in lieu of the original certificates given as collateral to the $20,000 loan, from Mill Creek Coal Company' and by inserting in lieu thereof the following words, which correctly represent the resolution, which was actually introduced and actually adopted at the said meeting of September 20th, 1911.

" 'On motion duly seconded and regularly adopted, it was ordered that corresponding certificates, properly endorsed, shall be pledged to the East Boston Coal Company and Mill Creek Coal Company pro rata in lieu of the original certificates which were intended to be given as collateral to secure pro rata the obligations of the East Boston Coal Company and Mill Creek Coal Company against the L. Wertheim Coal & Coke Company.' "

Q. Now, having refreshed your memory by reading the directors' minutes of September 20th, 1911, and December 20th, 1911, I ask you whether it is not a fact that when the stock of the company was readjusted in 1911 by the cancellation of the old common stock, and the old certificates were turned in, a resolution was adopted at a meeting in September, at which you were present, providing for the pledging of the substitute stock with the Mill Creek Coal Company; that is right, isn't it? A. That is right.

Q. And in December, at a subsequent meeting when you were present, and the recorded minutes of the September meeting were read, you objected, because the minutes as read provided for a pledge only to the Mill Creek Coal Company? A. That is right.

Q. And then the Board corrected the minutes so as to make this substituted stock a pledge to secure the indebtedness both of your company and the Mill Creek Coal Company? A. That is right.

Q. Now, this arrangement with respect to the new stock issued in 1911 in lieu of the old stock, is substantially the arrangement which prevailed from the time you became a director, isn't it? A. No, sir.

Q. What is the difference? A. It was originally just as I stated before; this stock, as I understand it, was originally pledged entirely for this $20,000 and as collateral to it; then this thing came up in September, and it came up then after this change of certificates was made, and Sanders Wertheim at that time had something to say about Mr. Ross coming to him with some proposition from the Lehigh Valley, of taking over this plant without regard to the Mill Creek Coal Company or the East Boston Company, and Mr.

Delano—and he suggested that it be pledged then as a guarantee of good faith on his part, and nothing of this kind could be done, and this resolution was then passed; as far as I know, the stock never was pledged; it was never changed from its original place of deposit, wherever that was, and there was nothing further done about the matter.

Q. Was not the original place of deposit with the $20,000 note? A. I think it was, although I don't know that except as a matter of hearsay.

Q. And it stayed there until this September, 1911 arrangement, when it was agreed that it should stand as security for the debt due to your company and the Mill Creek Company? A. Yes, sir; as far as I know it stayed in that bank up to date; I never saw the stock.

Q. Now, in 1909, when you went into the company, there was owing some amount to the East Boston Company, wasn't there? A. A small amount, yes, sir; I have forgotten just what it was.

Q. And before that time they had been slack in their payments to you hadn't they? A. Well, at times, and prompt at other times.

Q. You made some inquiry at that time into the amount of tonnage they were doing, didn't you? A. I don't recollect making that inquiry, Mr. Enright, no, sir.

Q. You were sending them a good deal of this washery coal? A. Yes, sir.

Q. That is generally regarded as an inferior coal, isn't it? A. Not always.

Q. Isn't it generally considered so in the trade? It sells for less, doesn't it? A. Sometimes it sells for more; it is all a question of supply and demand, and of the absolute qualities of the coal, irrespective of what the general impression might be, Mr. Enright.

Q. Well, a customer would not take washery coal at the same price if he could get fresh coal? A. Sometimes he would prefer to have it at the same price.

Q. It is generally harder to get rid of, isn't it? A. I don't think that it is; it is all according to the particular coal.

Q. Your object in going into this concern as a director, and extending your credit, was to increase your sales, wasn't it? A. No, sir; I would not say that, because we were selling considerable quantities prior to that time.

Q. You sold them a good deal more afterwards? A. It was simply that they asked more from us, because their requirements were larger.

Q. You were not in danger in 1909 of losing their trade, were you? A. Not that I know of.

Q. Your best recollection is, that you did not have any expectation of increasing your sales by reason of this unusual arrangement you were making with them? A. Yes, sir; we thought we would increase our sales, because I thought that the business would grow; it had only been going a year or so, or two or three years.

Q. You knew they had not been very successful? A. No, sir; I did not know that; it was a new concern, just starting, their business was increasing.

Q. Well, now, after you and Mr. Delano went in, and Mr. Delano very shortly employed the Audit Company to make an audit, didn't he? A. That was some little time, yes.

Q. And you were informed of the report made by the Audit Company? A. Yes, sir.

Q. That audit was brought up for discussion at a meeting of the Board of Directors at which you were present? A. Yes, sir.

Q. And that audit showed that the company had made a loss? A. Yes, sir.

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Q. Then do you recall that subsequently the Audit Company made a second audit to cover the first fifteen months of operation under your management? A. I remember there were two or three or four different audits made; my recollection is that there was an audit made—the second audit I think was made of the following year; I am now referring to the audit dated June 6, 1911, covering the period to March 31, 1911.

Q. That audit was brought to your attention about the time it was received? A. It was brought to my attention that summer.

Q. And it was made a matter of discussion at a meeting of the directors at which you were present? A. Yes, sir.

Q. And the fact that the audit showed a loss for the fifteen month's period after you became a director, or some $18,000, was brought to your attention? A. Yes, sir.

Q. And also the fact that the auditor reported that, in addition to that loss there should be made a reserve for doubtful accounts of $10,000? A. As a future method, yes.

Q. You understood the auditor, reporting outstanding accounts, reported doubtful accounts of $17,000? A. Yes, sir.

Q. And he recommended that there be carried a reserve against those of $10,000? A. Yes, sir.

THE COURT: I have some other matters to take up, and we will take a recess now until to-morrow morning.

Adjourned to Wednesday, May 17, 1916.

Continuation of the taking of testimony in the above-entitled cause, at the Chancery Chambers, Jersey City, New Jersey, on Wednesday, the seventeenth day of May, 1916, before Hon. Vivian M. Lewis, Vice-Chancellor.

Same appearances as hitherto noted.

WILLIAM T. PAYNE resumes the witness stand.

CROSS EXAMINATION (continued) BY MR. ENRIGHT:

Q. You say this auditor's report made by the Audit Company in 1911, showing a loss, was known to you, and was it discussed at meetings of the Board of Directors, wasn't it? A. It was known to me, and it was discussed considerably, because Sanders had a great deal to say.

Q. He had an explanation? A. He had more than an explanation; he had a criticism.

Q. And on your direct examination didn't you say, that after hearing Sanders it was agreed by everybody that the audit was wrong?

MR. LEAKE: Objected to, because he did not say that.

BY THE COURT:

Q. Did you say that? A. There was considerable discussion about it, and my understanding of everybody's theory of it was, that Sanders' explanation was more correct than the audit was; that his criticism was well taken.

Q. And what was the nature of the criticism of Sanders as to this audit? A. My recollection now is, that they charged up depreciation for a longer period than the audit covered.

Q. A depreciation on outstanding accounts, was

it? A. I don't recollect actually just what that depreciation covered.

Q. I call your attention to a minute appearing in the book of the directors' meetings, of a meeting held June 16, 1911, and to the following minute: "Mr. Delano presented a report from the Audit Company, covering fifteen months from January 1st, 1910 to March 31st, 1911. The examination of the books by the Audit Company was made at the request of Mr. Delano.

"On motion of Mr. Payne, duly seconded, it was RESOLVED that this report be accepted by the Company and the cost thereof—$375—be assumed.

"Mr. Delano then read various portions of the report which showed a loss in the fifteen months of $18,789.39 equal to 11c per ton of coal and coke sold.

"A very full discussion of the report, and various questions growing out of same, was had, and the President and Treasurer were requested to consider carefully where and how the cost of selling could be reduced, and to make every effort to decrease the price of the sales.

"The audit figures were taken by the Treasurer with a request that he compare them with his own books with a view to discussing them later with Mr. Delano and a representative of the Audit Company, there being certain differences which were not readily apparent."

You were present at the meeting at which that business was transacted, were you not? A. Yes, sir.

Q. And to the best of your recollection, is that a correct minute? A. Yes, sir, I think it is, excepting that it does not fully cover all my recollection of the discussion at that time. Sanders, at that meeting, as I remember it, said that he

could not believe that that was correct; and it was also understood at that time, that he was going to go over this audit very carefully and compare it with his own books and report further.

Q. You did make a motion to accept the audit, though, didn't you? A. My understanding of that motion, Mr. Enright, was, not so much accepting the audit, as the company accepting the bill for the labor of making the audit; that was what I meant by the audit was made really for the benefit of the Wertheim Company, as I viewed it.

Q. I call your attention to the minute of the next following directors' meeting, held Wednesday, August 15, 1911, at which you are reported to have been present, and to this statement therein: "Mr. Delano stated that he had met representatives of the Audit Company on August 2nd, with the Messrs. Wertheim, and that, in his opinion, the Balance Sheet and results of the year's business, as shown by said audit, were in accordance with the facts." Do you remember that? A. No, sir, I don't remember that.

Q. You do recall, however, don't you, attending at a subsequent directors' meeting, at which the matter of this audit showing a loss was brought up, after Sanders Wertheim had an opportunity to criticise it? A. Yes, sir, I remember that.

Q. You don't wish to deny that this is a correct minute, do you? A. No, sir.

Q. And the signature attached on the end, "Sanders Wertheim, Secretary," is in his handwriting? A. Yes, sir, that is his handwriting. It seems to me that I was at another meeting, either a directors' meeting or a formal meeting, where the representatives of the Audit Company and Sanders and Mr. Delano and myself were all present, during which there was considerable dis-

cussion relative to this audit. Sanders never accepted it; he always criticised it, and his criticism always seemed well founded to me, Mr. Enright.

Q. You don't deny, however, that Mr. Delano came to the contrary conclusion, do you? A. That is what the minute reads.

Q. So you were in error—A. What I had in mind when I mentioned that was, that as Sanders went through with his criticism and his discussion of the Audit report, and his balance sheet, and explained them to Mr. Delano and myself, Mr. Delano apparently accepted it; he made no further comment on it, and that is what was left in my mind.

Q. Mr. Delano made no further comment except to say in the Directors' meeting that he was satisfied that the audit was correct? A. No, sir, the meeting that I had in mind was later, because the discussion over that audit ran through the entire summer.

Q. It was a pretty important thing, wasn't it, that the first audit, covering that period after the Delano and Payne management, should show a loss? A. I don't know of there ever being any Delano and Payne management.

Q. You regarded it as a pretty important thing that the audit covering the period after yourself and Mr. Delano became directors, should show a loss? A. Yes, sir.

Q. And it was a matter of pretty frequent discussion as to how that loss came about? A. Yes, sir.

Q. When you became a director in the company, you naturally expected that the company would show a profit on future operations, didn't you? A. I thought so, and after all, Sanders' balance sheets were made up from the book, all

showed that up to that time; and it was a very strange thing to me, that these sheets which I accepted as correct and discussed with him, disagreed with this audit.

Q. And when you found that the Audit Company produced a contrary result, it was a matter of a good deal of concern to you? A. Yes, sir.

Q. And also to Mr. Delano? A. I presume that it was.

Q. When you went into the concern, your idea was that on the amount of tonnage that the company had, provided they were eased up on their credit in the way that you and Mr. Delano proposed, then there would be profit, didn't you? A. Yes, sir.

Q. Didn't you come to the conclusion that one of the things that contributed to this loss was excessive operating charges at the Jersey City yard? A. When you see a statement and you find a loss, you naturally go through it to see how that result can be changed, and the whole thing was discussed.

Q. And isn't it true, that one of the expedients thereafter adopted to meet this situation, was the acquiring of a yard in Harlem to handle deliveries in up-town, New York? A. That was obtained not only for that reason, but also with an idea of increasing their tonnage, which would naturally reduce their overhead.

Q. And also with the idea of shortening the haul? A. Yes, sir.

Q. The $5,000 that was to be paid to acquire the Harlem yard, was advanced in equal proportions by your company and by the Mill Creek Company? A. Yes, sir.

Q. Isn't it true that Sanders was making complaints about the quality of coal you were deliver-

ing? A. Yes, sir, he always complained at various times about the quality of the coal, providing he was not able to sell all that he had expected to sell.

Q. Part of his complaint was, that he had contracts for coal in New York, which required the coal to measure up to a certain test, and that the coal did not measure up to that test; was not that part of his complaint? A. No, sir, practically all coal is sold on that basis of measuring up to certain standards, but that does not make the sale possible or impossible; it fixed the price more than anything else; but as early as 1906, he complained that the quality was bad, and then it was very good. I came to the conclusion eventually, that it was more on account of his orders on hand than on the real quality of the coal.

Q. I am not asking you now whether his complaints were well founded or not; I am asking you whether one of his complaints was, that you were furnishing him with coal below standard, so that he had to submit to deductions on certain of his contracts? A. That was one of his complaints off and on, from 1906—down to 1914.

Q. He also complained, didn't he, that you were overloading the yard here with shipments, so that he had to submit to demurrage charges? A. Yes, sir, that was one of his complaints.

Q. Now, on your direct examination, didn't you state that one of your complaints against him was, that he was giving you excessive orders, and then abrupt cancellation? A. Yes, sir.

Q. And that that course of business necessarily resulted in, sometimes congestion, and sometimes scarcity in the Jersey City yard? A. Yes, sir, that is true.

Q. When did that condition begin? A. I think

that was practically all true from the time we commenced down to the end.

Q. And that was the condition at and prior to the audit of 1911, wasn't it? A. Yes, sir, he would order large quantities and make a contract for a year for a large quantity in monthly shipments, and then he would suddenly want all shipments stopped, and then he would want them resumed again, and so it ran.

Q. You would consider that bad management, wouldn't you? A. Not exactly bad management, but the retail condition here was in a chaotic condition for some little time, and was cutting prices and one thing and another of that kind going on here; he would make a contract with people down here, and someone would come along a little bit later and offer a lower price, and they would take the contract from him, and he would have the coal bought,—he would certainly lose a sale. Now, those conditions still occurred.

Q. Well, I understood you on your direct examination to give as an explanation for the irregular conditions of coal at the Jersey City yard, that he would give you orders ahead for excessive amounts, and then chop them off short? A. That is correct.

Q. And he would cut them off so short that sometimes you could not stop the coal from coming? A. That is correct.

Q. And that would result in congestion in Jersey City? A. Yes, sir; that was not the only congestion that they had in Jersey City.

Q. Now, I want to know whether you do not consider that bad management?

MR. LEAKE: Objected to as being an academic question entirely—what he considers to be bad management.

MR. WALL: And he is judging as of a date after the fact.

THE COURT: I would like to know what he considers—whether that is evidence. I cannot allow him to testify to what he considered bad management; I shall sustain the objection.

Q. Well, now, after this Audit Company in 1911, the company made up a balance sheet at the conclusion of the next quarter, the next three months—do you recall that—the three months ending June 30, 1911? A. My recollection is, those balance sheets were made up monthly.

Q. And you got copies of them? A. At that time, I think I got copies completely.

Q. I call your attention to the financial statement for the three months ending June 30, 1911, already in evidence, and particularly to the items "Net loss for three months, ending June 30, 1911, $6,453.74."? A. About this time—my recollection of these balance sheets that I got is, that they were made up monthly, and that this audit was made with the idea of having such accurate account that there could never be another argument about an audit. This system of bookkeeping was installed because of that, and it seems to me there was some little delay in the sheet being sent out.

Q. Now, the system of accounting was changed so as to give you more prompt information of the condition? A. Yes, sir.

Q. And a regular printed form was adopted? A. Yes, sir.

Q. That is the form on which the three months' statement on "Exhibit E-9" is made out? A. Yes, sir, that is the form.

Q. Didn't you know that for the three months ending June 30, 1911, a further loss of over $6,000

was shown by the books? A. As I said a moment ago, I have no recollection of ever seeing a sheet made up for a three months' period.

Q. I ask you if you did not know that for that period a further loss had been made? A. I knew that during the summer of 1911, there were losses made there, occasioned by the horses commencing to die of glanders.

Q. The letter which you have already identified on your direct examination as fixing the date of the glanders epidemic, is in the fall of 1911? A. No, sir, I think that was simply a report of it—I think the glanders commenced early in 1911.

BY THE COURT:

Q. I thought you said it began in May? A. It was early in 1911.

MR. LEAKE: What is the exhibit number?

MR. ENRIGHT: "Exhibit L-10."

FURTHER CROSS EXAMINATION:

Q. The letter from Mr. Wertheim to you, dated September 5th, "Exhibit L. 10," referring to the glanders, has this statement: "When you were down, there was apparently nothing in sight from his reports to me, and from my own observation, but in the last two weeks it has cropped out, and we are doing everything that man can do to change the situation. I think we now have it well in hand." Does not that remind you that this epidemic of glanders was about the time of this letter, or say, a month or two months prior?

MR. LEAKE: He ought to have the privilege of reading the whole letter.

A. To the contrary, Mr. Enright, he says also in this letter; "In regard to the purchasing of

horses from Rheims, Mr. Eckroth and I went over to Rheims and Company yesterday a week ago, and picked out twelve horses." Now, this man Eckroth, as I recollect it, I found him late in the spring, or very early in the summer, I should say in April or May, and I selected this man for Sanders as being a very expert horseman to take care of his stable. Now, Mr. Eckroth was a man that I located for Sanders, and after Sanders had talked to him, he hired him; and my recollection of that is, that that was late in the spring or very early in the summer, and these twelve horses I remember going down and looking over them myself; afterwards they built a new stable that summer, and these horses were over in this new stable. The glanders had been in the stable for some time previous to September.

Q. Well, about how long prior? A. Well, now, that is the only way I can fix the date; I should say five or six or seven months prior to September; it was some little time prior to that time.

Q. I call your attention to the statement of Sanders in this letter: "It is pretty tough that this thing should come to us just when we were beginning to see daylight." Does not that refer to the darkness that had preceded the daylight due to this auditor's report?

MR. LEAKE: Objected to.

A. Let me read the letter. (Witness reads the letter to himself.) I don't remember accurately, but I think that what that refers to is the glanders breaking out again just after they commenced to see daylight; and I think what he refers to there is, that he thought he commenced to see daylight after this epidemic of glanders; the glanders had been substantially wiped out,

and it would reappear several times, and I think that is what he referred to.

Q. You do not think that referred to the financial condition of the company which up to that time had shown a loss? A. No, sir, I think the reference there is to the glanders there.

Q. In the retail coal business, some seasons of the year are naturally more profitable than others, are they not? A. Yes, sir; I would say that you can deliver coal cheaper in the summer months than you can in the winter months, and you can sell for higher prices in the winter months than in the summer months, the only way that steam size can be really sold to good advantage in this market is on yearly contract, at fixed prices, so that the season of the year does not make a great deal of difference.

Q. And the best way of gauging your operations is by the returns for the whole year averaged up? A. Yes, sir, I would think so.

Q. The fiscal year of the Wertheim Company ended March 31st of each year? A. Yes, sir.

Q. The Audit Company's report brought the business down to March 31st, 1911; that is right, isn't it? A. Yes, sir.

Q. And showed a loss of $18,000, without taking into account bad or doubtful accounts; that is what it shows? A. If you say so.

MR. LEAKE: I think the trustee in bankruptcy ought to realize that this is a court of equity.

Q. (Question read.) A. Yes, sir, that is correct; it did not take into account doubtful accounts; there is nothing in this audit about bad accounts.

Q. For the purpose of stating the loss at $18,-

000, it assumed "Doubtful accounts" to the amount of $17,000 as being good, doesn't it? A. Yes, sir.

Q. Now, at the close of the next year's business, you saw the annual statement, didn't you? A. Yes, sir.

Q. And that showed a still further loss, didn't it? A. That showed a loss, but that was during the year that they lost so many horses with the glanders, and I think it was about that time that this rebate was discovered, wasn't it?

Q. I show you the financial statement for the year ending March 31st, 1912, already in evidence, and marked as "Exhibit E-10"; a copy of that came to your attention, didn't it? A. Now, I don't recollect getting a yearly statement; I got a lot of monthly statements, and this does not agree with that.

BY THE COURT:

Q. Did you ever see that statement? A. I don't recollect of getting any financial statement from the Wertheim Company excepting the monthly statements and these assets.

FURTHER CROSS EXAMINATION:

Q. Did you get this statement? A. I don't recollect of ever having had a yearly statement from them.

Q. Do you recollect ever having seen that statement? A. No, sir, I do not.

Q. But your recollection is that you did get, during the year from March 31, 1911 to March 31, 1912, the monthly statements? A. Yes, sir.

Q. On the same sort of form as this? A. The same form, yes, sir.

Q. And from those monthly statements, of

course, you could tell by summing them up, the amount of profit or loss for that year? A. Yes, sir.

Q. I call your attention to the concluding statement on this annual statement of March 31, 1912, "Net loss for the year, $59,095.38" you knew the company made a loss as shown by those books of approximately that amount for that year, didn't you? A. May I answer that by an explanation?

Q. Answer the question. A. The monthly statement that I received—

Q. I think I ought to have a responsive answer. (Question read.) A. I knew that they made a loss during that year; my monthly statement does not show any such loss as this statement shows.

Q. Have you produced in Court all of your monthly statements for the year from March 31, 1911 to March 31, 1912? A. My monthly statements, all that I have, are in Mr. Leake's hands.

Q. You don't know whether they have been offered in evidence? A. I don't recollect that accurately.

Q. Do you know how much of a loss your monthly statements show for the year ending March 31, 1912? A. My recollection is, that they did not show a loss; I have a memorandum in my pocket.

Q. And the memorandum which you are now referring to is made up from the monthly statement you say you got? A. Yes, sir, the memorandum was made up from these monthly statements.

Q. From April 1, 1911 to April 1, 1912? A. Yes, sir, they show a profit of $5500.00.

Q. I will now ask you to produce any statements in your possession from which you figured

up a profit of $5500.00 for that year, from April 1, 1911 to April 1, 1912.

MR. LEAKE: I am going to put them all in on re-direct examination.

THE COURT: Have you those statements, Mr. Leake?

MR. LEAKE: Yes, sir.

THE WITNESS: It is from April 1, 1911, to April 30, 1912.

FURTHER CROSS EXAMINATION:

Q. How much, all told, did the company lose through the glanders epidemic? A. I don't know accurately, $40,000 or $50,000, I would say; a large number of horses.

Q. By the spring of 1912, you were pretty well dissatisfied with the condition of the Wertheim Company, were you not? A. No, Mr. Enright, I thought they had been through a lot of hard work and a lot of trouble.

Q. You knew that from the time you became a director up to April 1, 1912, that the company had lost money, didn't you? A. Yes, sir.

Q. And you knew that the indebtedness of the Wertheim Company to your company for coal, had been increasing all the time? A. It had increased.

Q. The payments to you were unsatisfactory, were they not? A. Yes, sir, they were.

Q. And the debt had gotten up to a figure far beyond what you originally contemplated? A. I won't say that, because I don't think I ever had any contemplated amount in mind.

Q. You originally contemplated selling, approximately, half their requirements on ten months' credit? A. Yes, sir.

Q. And the amount you had in the company in April, 1912, exceeded a ten months' credit, didn't it? A. Yes, sir, it did.

Q. So, at that time, you were trying to get your money out, were you not? A. No, sir, we were not.

Q. You were not pressing the company at all? A. Yes, sir, we were asking them for payment.

Q. Isenstein and Dann at this time were drawing their money out at the rate of $1,000 a month were they not? A. I think they were.

Q. That is, Isenstein got $1,000 one month, and Dann got $1,000 the next month? A. Yes, sir.

Q. And the debts to your company and the Mill Creek Company were increasing? A. Yes, sir.

Q. That situation was unsatisfactory to you, wasn't it? A. Yes, sir.

Q. You objected to having the Wertheim Company use the proceeds of the coal you were furnishing them, to pay off Isenstein and Dann? A. I won't say that, Mr. Enright.

Q. Wasn't that what it amounted to? A. No, sir, it did not just amount to that, but there had been some discussion as to about the Isenstein and Dann notes, and owing to this loss from glandered horses, and this loss on account of the rebates that they were suffering, this new financial scheme was suggested, and it seemed fair to us that if one accepted it, that all should accept it.

Q. You considered it put the company in better condition? A. Very much better condition.

Q. Isenstein and Dann had been collecting their notes promptly, hadn't they? A. Yes, sir.

Q. And you and Mr. Delano were extending favors, if you had to; that was about the situation? A. Yes, sir.

Q. Now, this proposed bond issue, instead of

the $1,000 a month, which previously had to be paid to Isenstein and Dann, required a payment of $2,000 a month into the sinking fund? A. Yes, sir, but it funded this ten months' indebtedness into a twenty years' indebtedness.

Q. But it put the company under the obligation, the absolute obligation, of paying $2,000 a month, instead of $1,000 a month that previously they had paid to Isenstein and Dann? A. The old situation was, that they would have had to pay $200,000 to the Mill Creek and East Boston Coal Company in ten months' time; that would be about $20,000 a month, wouldn't it?

Q. Had the East Boston and the Mill Creek Company pressed for their payment? A. Yes.

Q. Now, I want to know from you whether or not, at the time this bond issue was up, that the East Boston and Mill Creek Company were pressing for the collection of their debts? A. We asked for payment, certainly, but extended them as it was necessary.

Q. Isn't it true, that so long as the East Boston and the Mill Creek Company were not pressing for their debts, the payments required under the sinking fund provision of the mortgage were more burdensome to the company than the payments they previously had to make? A. I would not think so.

Q. You knew at that time that if your company and Mr. Delano's company pressed for collection, the company would have to go into liquidation, didn't you? A. Yes, sir, they would have to liquidate.

Q. And if they did liquidate, you knew that there would not be sufficient assets to pay the debts? A. No, sir, I thought there would be enough to pay the debts, if they liquidated properly.

Q. You were thoroughly familiar with the provisions of the lease from the railroad company? A. Yes, sir, I was.

Q. You knew that the lease could not be assigned? A. The stock of the company could be sold, though, couldn't it?

Q. The question is, you knew that the lease could not be assigned, didn't you? A. My understanding is, that the lease could not be assigned; it was made to the Wertheim Company.

Q. And you knew that the lease could be terminated by the railroad company if the Wertheim Company did not continue to furnish tonnage of 120,000 tons a year? A. That was a lease provision.

Q. You knew that the trestle and buildings, according to the terms of the lease, reverted to the railroad company if the lease terminated?

MR. LEAKE: I object to that, because that is not according to the terms of the lease. There are two clauses in the lease that are absolutely inconsistent.

THE COURT: Do you ask the court to construe the lease?

MR. LEAKE: I do not.

BY THE COURT:

Q. Did you read the lease? A. Yes, sir, and I have had a written opinion from Mr. Leake on the subject.

MR. LEAKE: Let him state his impression, let him state what his impression is of the lease.

FURTHER CROSS EXAMINATION:

Q. You knew that the trestle and buildings, according to the terms of the lease, reverted to

the railroad company? A. At the termination?

Q. Yes. A. My understanding of the lease, and Mr. Leake's interpretation of it was, that they could terminate the lease if they actually needed the lease for railroad purposes, and they could not terminate it for any other reason.

Q. It was your understanding, that if the Wertheim Company ceased to do business, that that did not work a forfeiture of the lease? A. If they ceased to do business that would work a forfeiture.

Q. And if that worked a forfeiture, wasn't it your understanding that the buildings reverted to the railroad company? A. I am not sure just what would happen to the buildings under those circumstances; I am not well enough informed--

Q. You understood that the utmost right you had was to remove the buildings, upon the railroad company's giving you notice that they required the property for railroad purposes?

MR. LEAKE: I thought that the lease was a good and sufficient lease, and I thought that it was practically impossible to take it away from them, if they continued as a going concern. That was my opinion of it.

A. (No answer).

Q. You have just said, you thought at the time of this bond issue, that if the company had gone into liquidation, it could pay its debts in full? A. If it was liquidated properly, yes, sir.

Q. In order to accomplish that result, how much did you figure on realizing from the lease? A. Anywhere from six to ten thousand dollars a year from the time it had to run.

Q. How could you liquidate that from the lease? How, in case of liquidation, could you realize

that from the lease? A. You would have to sell the plant.

Q. But you understood the lease had a provision in it prohibiting assignment? A. Well, that would not prevent you selling the plant by transferring the stock of the company, Mr. Enright.

Q. So that was your idea about the way this company could be liquidated—by selling the stock of the company? A. Yes, sir.

Q. And at that time, the company owed, according to the books, $343,000; you knew that, didn't you?

MR. FISKE: I object to that statement, that "according to the books"; he has not shown the witness anything to found that statement on; he has a statement he is reading from, which the witness has never seen.

THE COURT: Go ahead, and lay the foundation before you put the question.

Q. You knew the company was largely indebted at this time, didn't you? A. Yes, sir.

Q. And you satisfied yourself as to the amount of that indebtedness, didn't you? A. Yes, sir.

Q. Do you now recall what that amount was? A. No, sir.

Q. The indebtedness of the Wertheim Company was supposed to be correctly shown by its book account, wasn't it?

MR. LEAKE: I object to that; that is an expert opinion, isn't it?

THE COURT: Now, what is the objection?

MR. LEAKE: He says were the books of the Wertheim Company supposed to be correct entries; is not that absolutely academic; is that a fact to be brought out in evidence?

THE COURT: I do not think the witness is qualified to tell, anyhow; he did not keep the books.

MR. LEAKE: He is talking from some paper that has appeared—

MR. ENRIGHT: I am asking him in his capacity as a director; a director has some responsibility.

THE COURT: Yes, a good deal of responsibility.

MR. ENRIGHT: I want to know whether he thinks the books were correctly kept.

THE COURT: Ask him if he has ever examined the books.

MR. ENRIGHT: I don't suppose he has.

Q. You have stated that you believed that the assets were sufficient, if properly liquidated, to pay the debts of the company? A. Yes, sir.

Q. And you came to this conclusion at the time this mortgage was put on, did you? A. Yes, sir.

Q. So you must have known at that time the amount of the debt, didn't you? A. I knew what my monthly statements showed.

Q. Well, didn't you get a current statement showing the current amounts of debts? A. Yes, sir, I knew what they showed.

THE COURT: Let him see your statement of April 30, 1912, Mr. Leake.

MR. LEAKE: April 30, 1912, (Mr. Leake hands paper to Mr. Enright).

Q. Calling your attention to the monthly statement of April 30, 1912, just produced by your counsel, that shows total liabilities of how much? A. $318,000—that includes the capital stock.

Q. No, it does not.

MR. LEAKE: There we have an argument between the trustee's counsel and the witness. The statement ought to speak for itself.

THE WITNESS: No, sir, it does not.

MR. LEAKE: Is the counsel to be the judge of whether he is in error?

THE COURT: The witness has answered.

Q. You say that $318,000 includes the capital stock at $115,000. I call your attention to the first item on this statement, "Capital Stock," and ask you if the total liabilities, including capital stock, did not amount to $504,000? A. It amounted to $468,000, didn't it?

Q. $468,000? A. Yes, sir.

Q. And your first statement that liabilities of $318,000, included capital stock, was incorrect? A. Yes, sir, it was incorrect.

Q. The total liabilities, without including capital stock, amounted to $318,000? A. Yes, sir.

Q. Now, how did you think the assets could liquidate any such sum as that? A. Because the total assets of this same balance sheet, show $504,000 as the total assets of the company.

Q. And that included a valuation of the lease at $135,000, didn't it? A. Yes, sir.

Q. And it included as a good asset a claim against the Wertheims of $57,000? A. Yes, sir.

Q. And it included as a good asset a second mortgage of $4,000 made by Adams? A. I don't know whom it was made by.

Q. In order to enable the company to then liquidate and pay its debts, it would have been necessary to realize for these trestles and buildings, $113,000? A. Yes, sir.

MR. FISKE: I object to that statement in the question; it is a misrepresented statement.

A. My answer meant that in order to realize $504,000 of assets you would have to do these things: my understanding of his question was, in order to realize $504,000 worth of assets, you would have had to do these things-

THE COURT: That is a different proposition entirely.

Q. In order to pay the debts, would you not have had to realize—A. $318,000.

Q. And in order to realize—A. In order to pay the debts you would have had to realize $318,000.

Q. Now, in assuming that the company could have liquidated that amount at that time, did you assume that $113,000 could have been realized for trestle and buildings? A. My feeling was that they cost more than that.

Q. (Question read.) A. I understood they cost more than that—had been appraised at that amount, and I could see no reason why they would not realize that amount.

Q. Your answer is "Yes"? A. Yes, sir.

Q. You assumed, in concluding that the assets of the company could have liquidated enough to pay the debts, you assumed that the company could have realized, upon liquidation, $113,000 for trestle and buildings; is that correct? A. I am not sure that I understand the question.

Q. Does that mean that you could sell these items for that amount?

THE COURT: Yes.

THE WITNESS: As a whole?

Q. Yes? A. Yes, sir, I can see no reason why it should not be sold as a whole for that amount.

Q. I am calling your attention to a particular item, "Trestle and buildings"; did you assume that if the company had liquidated on April 30,

1912, it could have realized for "Trestle and Buildings" $113,000?

MR. LEAKE: He has answered that.

A. This property all had value as a coal yard.

Q. I ask for an answer on the particular question? A. Yes, sir, I think that that trestle and buildings were worth $113,000.

Q. The question is, could it have liquidated that? A. Well, now, I don't know the fine distinction you are trying to draw.

Q. By "liquidate", I mean turning into money. A. Yes, sir, I believe that whole thing could have sold as a whole for that amount.

Q. Did you assume, in coming to your conclusion, that the assets would have liquidated enough to pay the debts; did you assume that the leasehold could have been sold for $135,000? A. I thought that leasehold was worth from $6,000 to $10,000 a year.

Q. On April 30, 1912, you thought it could have been sold for $135,000, is that right? A. Yes, sir, I believed it was worth that amount of money.

Q. And, in coming to your conclusion, that the assets would have liquidated enough to pay the debts, did you assume that on April 30, 1912, there could have been collected from Louis and Sanders Wertheim $57,000? A. My thought on that was this, Mr. Enright—

Q. I think I am entitled to a responsive answer.

Q. (Question read): And, in coming to your conclusion, that the assets would have liquidated enough to pay the debts, did you assume that on April 30, 1912, there could have been collected from Louis and Sanders Wertheim $57,000? A. I believe the plant could have been sold for more than it was, than the books valued it at. If it

were sold for that amount, Louis and Sanders Wertheim, who owned practically all the stock, would have plenty of money and could easily pay this indebtedness.

Q. (Question read). A. My thought was this: that Louis and Sanders Wertheim owned practically all the stock of this company; if the company was sold at anywhere near a correct valuation—outside of this amount—it would give them ample money to more than pay for such an indebtedness.

Q. In other words, if the company had gone into liquidation, and all of the assets, except this account against the Wertheims, could have been made to realize more than $318,000, which was the sum of the debt; then that surplus would belong to the Wertheims? A. That is my understanding, because they owned the company.

Q. And the claim against the Wertheims was no good until after a surplus had been realized out of the Wertheim Company's assets over and above $318,000? A. I would not say that exactly I don't think the two Wertheims were good outside of this ownership in this stock for that full amount; I think they both had some responsibility.

Q. During the period you were director of the company, that debt against the Wertheims stood at the same figure the whole time, didn't it? A. Yes, sir.

Q. You did not use your influence as a director to have that asset collected in, did you? A. There was never much done about it one way or the other.

Q. And during this time you were anxious to have the Wertheim Company receive as much money as possible to pay the debts of the company? A. Yes, sir; to pay everyone.

Q. You also assumed that all of the accounts

receivable, as listed on this statement were good and collectible, didn't you? A. Yes, sir; there were some of them, as far as I knew they were good accounts.

Q. You never heard of that old judgment of some $7,000 against a customer in Philadelphia? A. Yes, sir; I heard about that; Sanders was always positive that that could be eventually collected.

Q. It had been in the shape of an uncollected judgment, however, for several years before this time? A. Yes, sir.

Q. And you knew there was also inability to collect considerable amount of other indebtedness from other customers, didn't you? A. I knew that some of them were slow.

Q. You knew some of them were bad, didn't you? A. No, sir; I did not know any one being actually bad; I understood there were bad accounts; the majority of them they expected to collect.

Q. Do you remember being examined as a witness in the bankruptcy proceedings? A. Yes, sir.

Q. Before Referee Beach? A. I don't recollect his name, but I remember being examined.

Q. Now, I will ask you whether you gave the following answers to the following questions at an examination in the bankruptcy proceedings held before Referee Beach, at 75 Montgomery Street, on December 4, 1914 "Ques. (p. 116) These monthly statements failed to show a single gain, since May, 1912, recall that? Ans. No, I don't recall that. Aren't those the lot you read off this morning? Ques. You mean you still thought the company was solvent? Ans. Yes, because I always believed and I was advised by attorney, and a man in whom I had every faith, that this claim they had against the Lehigh Val-

ley Railroad Company was a correct one." Do you remember giving that answer? A. Yes, sir.

Q. So the reason you thought the company was solvent, was because you expected to collect a lot of money on this rebate claim against the Lehigh Valley Railroad, isn't it? A. No, sir; not necessarily so, sir.

Q. The claim against the Lehigh Valley Railroad Company referred to in this answer, was the claim you have testified to in the present trial as a claim to recover a rebate, wasn't it? A. Yes, sir.

Q. Again I call your attention to the record: "Ques. At this time, although you saw these losses piling up and knew the business was unprofitable, you thought with what might be recovered by them from the railroad, it might be able to make up the losses and make the company solvent? Ans. Yes, sir". Do you recall that question and answer?

MR. LEAKE: I object to that because he reads a question, and refers to "At that time" —a certain time, which is not fixed, and it is not fair to the witness to ask that question unless some preceding question and answer is read that will fix the time.

MR. ENRIGHT. The time is fixed by the preceding record that I have read to him—since May, 1912.

THE COURT: Now, read the question.

Q. (Question read.)

MR. LEAKE: The question preceding that is, "Since May, 1912;" I want to get my objection on the record.

Q. The question is, whether you gave that answer to that question? A. I think that is correct; I think I answered it that way, "Since 1912."

William T. Payne—Cross.

Q. So you can see just what the context of this is, I will read some of the questions and answers before that, to fix the time; in order to fix the time to which the last question and answer were directed, I will read the following questions and answers from the bankruptcy examination on page 115.

MR. LEAKE: Now, is this fixing the time now for new questions or the old ones?

THE COURT: No.

MR. LEAKE: I object to counsel fixing the time after the witness has answered.

Q. (Reading from page 115): "Ques. You knew when the audit for the first fifteen months was put in, you knew during that interval the company had lost money? Ans. I know that was what the audit said. Ques. You did not have any information to the contrary? Ans. Yes, Sanders criticised the audit in the showing it made. Ques. Criticised in the meeting? Ans. Yes. Ques. You were present, and you concluded from that discussion, or rather, the result of that discussion, in your own mind, that the audit was wrong and Sanders Wertheim was right? Ans. As I recollect that, they made a lot of charges in that audit which were an accumulation of a long time previous, and it was all charged against that particular time of the business, and, as I recall, his criticism was that it was an unfair deduction. Ques. And the auditor was there? Ans. I think not. Ques. The minutes so state. Ans. If it does, I don't recollect him being there. Ques. Mr. Sanders Wertheim took exception to the figures presented, and said the auditor had included losses before the period? Ans. I think that was considered as being a correct criticism on his part. Ques. Well, we

will say you did believe the audit as being incorrect. Then some monthly statements got to you showing current losses, didn't they? Ans. I did not receive them regularly; I received some, showing profits and losses. Ques. Those losses showed to be more numerous than profits? Ans. Not immediately after; it was during the time the horses died from glanders. Ques. These monthly statements failed to show a single gain since May, 1912, recall that? Ans. No, I don't recall that. Aren't those the lot you read off this morning? Ques. You mean you still thought the company was solvent? Ans. Yes, because I always believed, and I was advised by attorney, and a man in whom I had every faith that this claim they had against the Lehigh Valley Railroad Company was a correct one. Ques. At this time, although you saw these losses piling up and knew the business was unprofitable, you thought what might be recovered by them from the railroad, it might be able to make up the losses and make the company solvent? Ans. Yes, sir." You made those answers to those questions, didn't you?

MR. FISKE: I object to it as irrelevant and immaterial. It relates to transactions subsequent to the execution and delivery of the mortgages.

THE COURT: I will let it stand, as far as that objection goes.

MR. LEAKE: I move that it be stricken out on the ground that it is manifestly unfair to the witness, because it is intended to shrewdly leave on the record the first answer of the witness, which very plainly was explained to him by relating to May, 1912, and then going back and reading.

THE COURT: I won't compel this witness

to answer that question; I think it is very confusing to the witness. If you want to put those questions to him one after the other, and they relate to the subject matter of this litigation and are germane, then go ahead. I will strike out the question in the way it has been put.

Q. Do you recall in the bankruptcy proceedings in your examination being asked the following question and giving the following answer: "Ques. You knew when the audit for the first fifteen months was put in, you knew during that interval the company had lost money? Ans. I knew that was what the audit said." A. I don't recollect all these questions and answers accurately, but I have no doubt I said just that.

Q. (Reading) "Ques. You did not have any information to the contrary? Ans. Yes, Sanders criticised that audit in the showing it made." Were you asked that question and made that answer?

MR. FISKE: I object to that as irrelevant; there is no purpose in it.

THE COURT: The objection is overruled.

A. I presume I did.

Q. Were you asked the following question, and did you make the following answer: "You were present and you concluded from that discussion, or rather the result of that discussion, in your own mind, that the audit was wrong and Sanders Wertheim was right? Ans. As I recollect that, they made a lot of charges in that audit which were an accumulation of a long time previous, and it was all charged against that particular time of the business, and as I recall, his criticism was that it was an unfair deduction."

Were you asked that question and did you make that answer? A. I presume that is correct also.

Q. Were you asked the following question and did you make the following answer? "Ques. Mr. Sanders Wertheim took exception to the figures presented and said the auditor had included losses before the period. Ans. I think that was considered as being a correct criticism on his part." A. Yes, I presume I said that.

Q. Were you asked and did you answer: "Ques. Well, we will say you did believe the audit as being incorrect. Then some monthly statements got to you showing current losses, didn't they? Ans. I did not receive them regularly, I received some showing profits and losses." A. That is correct.

Q. (Continuing reading): "Ques. Those losses showed to be more numerous than profits? Ans. Not immediately after; it was during the time the horses died from glanders." A. That is right.

Q. (Reading): "Ques. These monthly statements failed to show a single gain since May, 1912, recall that? Ans. No; I don't recall that. Aren't those the lot you read off this morning?" A. That is correct.

Q. (Reading): "Ques. You mean you still thought the company was solvent? Ans. Yes, because I always believed and I was advised by attorney, and a man in whom I had every faith, that this claim they had against the Lehigh Valley Railroad Company was a correct one." A. That was referring to practically the summer of 1914.

Q. I asked you whether you were asked that question and made that answer. The question following next after what I have read before? A. I presume that I made those answers just as they are there.

MR. LEAKE: Objected to.

THE COURT: I will let that stand just as it is.

Q. You don't deny that you made the answer in the form which I have read in reply to the question in the form that I have read it, do you? A. No, sir; I would not deny that, certainly not.

Q. And next following that question and answer you were asked: "At this time, although you saw these losses piling up and knew the business was unprofitable, you thought what might be recovered by them from the railroad, it might be able to make up the losses and make the company solvent? Ans. Yes, sir."

MR. LEAKE: I think there is a typical one of Mr. Enright's questions. You see, it involves two things, one question is: "Although you saw these losses piling up and knew the business was unprofitable, you thought what might be recovered by them from the railroad"—then he talks on the insolvency question.

A. I assumed that he read me all this record to see if I had made those answers, with the idea of my explaining exactly what I understood he was asking me. I have no doubt that I made those answers.

THE COURT: When was the bankruptcy hearing?

MR. ENRIGHT: December 4, 1914.

Q. Again, I ask you whether at the same hearing you were asked the following question and made the following answer: (page 121, bankruptcy record): "Ques. That was the real embarrassment, you and Mr. Delano felt you were virtually carrying Isenstein and Dann? Ans. I heard Mr. Delano state that this morning." A. I presume I said that.

Q. (Reading): "Ques. Wasn't that your idea too? Ans. No, they had a valuable plant and a valuable opportunity, and they simply needed the time to go on and work it out, and that is the way the proposition was put up to them and us, and it is because I believed that, that we accepted the bonds." Did you make that answer? A. I presume so.

Q. Then next following: "Ques. You knew if the concern shut down it could not pay up, but if it went ahead they might work out their salvation? Ans. Yes."

MR. LEAKE: That is another one of those doubleheaders.

A. I presume I made that answer.

THE COURT: You can take it up on redirect, Mr. Leake.

Q. Were you asked and did you answer the next following question: "Ques. That was the condition when the bond issue was put out? Ans. Yes." Did you make that answer? A. I presume I did.

Q. And next following: "Ques. So the question of solvency or insolvency boiled right down in your mind whether they were allowed to go on and do business and work themselves out? Ans. Yes, that is it exactly." Did you make that answer? A. Yes, sir, I made that answer.

Q. Next following, were you asked this question and did you make the following answer: "Ques. Starting out with that situation as of the date of the bonds, I want to see what condition you thought they were in, whether they were working themselves out in 1912. According to the company's trial balances some of which you got and some you say you did not get, there

was not a single month from the time of that bond issue until the time of the final collapse when the company failed to show a loss. I ask you whether in your judgment as a business man, you considered that it was working itself out? Ans. It was not from the time of the bond issue, during the immediate future, but I made allowances for that which I doubt would appeal to you. You will recollect the labor agreement, the anthracite labor agreement, expired in April, 1912, and the mines were all idle throughout the outside region and until the first day of June, and like everyone else they had no coal, and from the time the mines did resume until January or February, 1913 coal sold at a very large premium from the majority of the collieries, and it was very difficult to obtain, and I think practically every detail dealer did business at a loss during that time." Were you asked that question and did you make that answer? A. I think so.

Q. Were you asked the next following question, and did you make the following answer: "Ques. I don't doubt that there are reasons why this condition existed, I am not asking you about what the reasons are. The facts appear to be this company for one reason or another, instead of working itself out was getting worse from month to month from the date of the bond issue to the date of the bankruptcy? Ans. I believed that you were seeking for the exact truth. I gave you the exact information I have. It might seem strange in knowing this and still they were losing money, but I made every reasonable allowance, and as a matter of fact, I believe they lost less than other dealers." Did you make that reply? A. I think I did.

Q. Then next following (reading): "Ques. You

were not impressed with the fact that they were losing, because everybody else was losing it? Ans. Yes." Did you make that answer to that question? A. Yes, sir.

Q. Again next following: "Ques. You knew they were getting worse off, but being familiar with the conditions there was a reasonable explanation, and you hoped the tide would turn? Ans. That is it." Did you make that answer to that question? A. I presume so.

Q. Were there not times when you exchanged checks, you or your company exchanged checks with the Wertheim Company, so that the financial condition of the Wertheim Company should not be known to your father?

MR. LEAKE: Objected to, because it does not fix any time. It may be material and it may be entirely immaterial.

THE COURT: Can you fix the time, Mr. Enright?

Q. Around the spring of 1912, didn't you exchange a check or checks with the Wertheim Company, so as to enable the Wertheim Company to meet an obligation to the East Boston Company?

THE COURT: Do you mean: did this witness?

Q. Well, did you or the East Boston Company? A. I personally exchanged a check at one time with the Wertheim Company, because they had promised to make a payment which we were needing at the East Boston colliery for our pay-roll, and they sent us a check for a comparatively large amount, and owing to their failure to get a payment from the city they were a trifle short and I personally exchanged a check with them at that time.

Q. Did you tell your father about it? A. I don't recollect whether I did or whether I did not; I don't recollect whether he was home; I don't believe he was at home.

By The Court:

Q. What do you mean by exchanging a check? A. I handed over my check and took their check of even date.

Q. It was not the company? A. No, sir.

Further Cross:

Q Didn't they begin to get behind on your coal bills, ten months' coal bills, as early as the spring of 1911? A. I don't think so, Mr. Enright, but I don't recollect just when that was.

By the Court:

Q. Were they ever prompt pay? A. Never really prompt pay, no, sir; in the first place, I think they were a litle bit short of capitalization —that is, before I had anything to do with the concern—when I commenced selling them; I am not positive that is correct, but that is the impression I gained.

Further Cross:

Q. After this bond issue was put on, calling for a sinking fund payment of $2,000 a month, you knew they were getting behind in those payments, didn't you? A. I think Sanders Wertheim wrote me once or twice that he could not make a payment because he had to make this payment, or something of that kind.

Q. Did you or your company make advances to the Wertheim Company to enable them to make up the sinking fund payments? A. Well, I don't

remember, Mr. Enright, I don't think so; I don't remember that.

MR. ENRIGHT: Now, will you let me see "Exhibit L-2," please; it is a statement of August or October, 1909, which you introduced yesterday. (Speaking to Mr. Leake.)

Q. I call your attention to a minute of a directors' meeting, of November 16, 1910, at which you are recited as present, and to this entry: "After a discussion of financial needs and the difficulty of meeting the payments falling due this month and next, the treasurer was authorized to seek additional accommodation to the extent of $20,000—at the Third National Bank where we now have $10,000. outstanding." Is that a correct minute? A. I think it is.

Q. And even at that time, the company was having difficulty in meeting its payments, was it? A. No, sir; may I explain that now?

THE COURT: You have answered it.

Q. I call your attention again to the bankruptcy examination at the same time, page 107, the same meeting November 4, 1914, before George R. Beach, Referee in Bankruptcy, 75 Montgomery Street, Jersey City, (reading): "Ques. That was in the summer of 1913? Ans. I think they were hard up before that time. Ques. When do you think they were first getting hard up? Ans. My recollection of it is, that when we were asked to take the bonds in place of our ten months' notes which were maturing more rapidly than they were able to take care of, and they lengthened their indebtedness." Did you give that answer to that question? A. I think I did.

Q. Now, after the bond issue, Mr. Payne, your great desire was to work your money out in this proposition as fast as you could, wasn't it.

MR. LEAKE: I object to that—first on the ground that it is immaterial and irrelevant; and secondly, nothing could justify the question in that form. There is no direct examination of his from which any such conclusion could be drawn that Mr. Payne desired to work his money out in this proposition as fast as he could. Now, you may ask him if that was his desire, I suppose. You may ask him that, but I don't like you to put it in that form.

THE COURT: I understood counsel to ask him that question.

A. I had many shares; I wanted to see that business go on and be successful, and I wanted to see them pay everybody.

Q. Then, it was not your great desire to get your money out? A. No, sir.

Q. At the time of the bond issue, you had about $90,000 in it? A. Approximately, yes, sir.

Q. And up to that time, from the time you first became a director, the company had been making a loss, hadn't it? A. My statements don't show that exactly, Mr. Enright.

Q. On the total period, don't they? A. From January 1st, 1910—on the total period? Well, it was a very near thing either way, one way or the other.

Q. You had been trying to keep down the amount of the indebtedness of the company to you as far as possible, hadn't you? A. I presume so, to us and to everybody.

Q. Now, you have testified, that if the company had been liquidated properly, you think there was enough to have paid everybody; dinn't you consider that the best way of liquidating your claim was to have the company go on and do business until conditions got better?

MR. LEAKE: There are two questions there.

MR. ENRIGHT: The question is withdrawn.

Q. Now, in April, 1912, you have testified that you were, as I understand it, trying to keep the indebtedness of the Wertheim Company, to keep it down; that is right, isn't it? A. I think so.

Q. You were trying to reduce it, rather than to increase it, the indebtedness of the Wertheim Company to your company, I mean? A. I was trying to keep that indebtedness down at all times; to us and to everyone.

Q. You were trying to reduce the amount that was owing to you, were you not? A. Yes, sir.

Q. You knew if you shut down on selling coal to them, the company would practically have to quit business? A. No, sir; I did not know that.

Q. If your company and Mr. Delano stopped selling coal on credit, do you mean to say the company could have gone on in the condition it was in in April, 1912? A. Well, it is so difficult to answer a question of that kind; they always could buy coal and always did buy coal, and they changed their source of supply at various times. Now, if they would be able or unable at that time to again change their source of supply, I am unable to say that, Mr. Enright.

Q. Well, wasn't your attitude in April, 1912, that of a creditor who was trying to collect his debt in the best possible way for all concerned? A. Why, I don't know that I had any particular attitude or took any particular position on the matter one way or the other.

Q. Well, as appears from what you have answered in the bankruptcy examination, you knew the company was hard up when you were asked to take the bonds? A. I knew that they were short of current funds to do business with.

Q. And you knew they owed you $90,000? A. Yes, sir.

Q. And you knew you were anxious to reduce that? A. Yes, sir.

Q. Now, didn't you know from your connection with this company, that the only way that you could cut down the indebtedness of the Compnay to you was to have the company go on and do business? A. No, sir; I cannot say that I knew that.

Q. That did not enter your mind? A. I cannot say that I knew that, Mr. Enright.

Q. After the bond issue was put on, and you understood that that mortgage covered all of the assets of the company except the leasehold, didn't you? A. Yes, sir.

Q. Do you mean to say that the Wertheim Company could have gone into the market, and purchased its requirements, its coal requirements, on credit? A. I believe they probably could—I know they always did buy coal.

Q. They always seemed to have bought it from yourself and Mr. Delano? A. No, sir; I think you are mistaken about that.

Q. Most of the coal—up to the time within a year of the bankruptcy—was purchased from your company and Mr. Delano's company, wasn't it? A. I don't accurately know what these proportions were; they purchased a large quantity of coal from us, and also from Mr. Delano's company, and also a large quantity from a great many wholesale yards and shippers; now, I think the East Boston Company and the Mill Creek Company probably furnished more than anyone else did.

Q. After the bond issue went up, you put them on 30 days' credit? A. Yes, sir.

Q. That is practically cash in the coal trade, isn't it? A. No, sir; cash is cash.

Q. Then, after a while, Mr. Delano refused to sell any more coal, didn't he? A. So I understood.

Q. You knew that at the time? A. Approximately at the time.

Q. When did you shut down on your sales? A. Continued right along.

Q. Well, in August, 1914, didn't you shut down? A. I have forgotten the date of our last shipment, but it was right up to the time they were thrown into bankruptcy.

Q. In very much diminishing quantities, however, in the few months before the bankruptcy? A. No, sir; I think not. From the date of the bond issue down to about the time of the bankruptcy proceedings, we furnished them with approximately $100,000 worth of coal.

Q. Are you sure of that? A. I think so.

RECESS TO 2 P. M.

AFTER RECESS.

WILLIAM T. PAYNE, resumes the witness stand.

RE-DIRECT EXAMINATION BY MR. WALL:

Q. In the spring of 1912, did you have any knowledge of the customers—who the customers were, of the Wertheim Coal Company? A. Only in a very general way.

Q. Did you know anything as to whether they were good customers or bad customers? A. No, sir; I cannot say that I did.

Q. Did you know anything with reference to the ability of the company at that time, or prior thereto, to obtain credit from banks? A. That

was a matter that Sanders Wertheim always took care of entirely, but, as he reported it, he was able to obtain such discounts as he needed from time to time.

Q. Mr. Payne, was this venture of yours and of the East Boston Coal Company, the first venture that you had made in the retail coal business? A. Yes, sir.

Q. Up to that time, had your experience been confined exclusively to wholesaling? A. Wholesaling and mining.

Q. After the bond issue did anyone else, any other leader besides your company and the Mill Creek Company, extend substantial credit for coal sold to the Wertheim Company? A. I think so; I think there were several other shippers that shipped them large quantities of coal and entended large credits.

Q. Can you approximate the amount in any of those credits in money? A. I think it ran up into several thousand dollars; they bought a lot of coal from Whitney and Kemmerer.

Q. When you say "a lot of coal" how much do you mean? A. I would say several thousand dollars' worth.

Q. How many? A. I would not state definitely I know they would buy from them all the while, and buy in large amounts from them, and buy from Stone and Company, and buy in large amounts from Van Pelt.

Q. How much did Stone and Company's amount to? A. $12,000, $15,000, $18,000.

Q. Didn't they buy it from a man named Bowman? A. Yes, sir.

Q. Now, then, Mr. Enright asked you about Sanders Wertheim's complaints to you about overloading the yard; what control did you have as to the way that shipments were taken in by

the railroad company to the yard? A. Absolutely none; as a matter of fact, no one seemed to have any control of that; that was one of Sanders Wertheim's regulation complaints, that the railroad company would not deliver coal as he wanted; in other words, they gave him switch service at their convenience, rather than at his convenience. They would leave him without coal entirely and then overload him with it.

Q. What was the posture, as far as your company was concerned—you got orders for coal? A. Sanders would send us orders for coal, and we would send shipments out.

Q. Now, after the bond issue and the elimination of Isenstein and Dann, the salaries stopped, didn't they? A. Yes, sir; the salaries to Isenstein and Dann.

Q. Then, there were no salaries of officers, excepting the salaries to Louis and Sanders Wertheim? A. That is right.

Q. Did not the Isenstein and Dann salaries, prior to the bond issue, amount to a considerable sum? A. That would be prior to the time that they sold out their stock.

Q. When they were in? A. While they were in, my recollection of it is, that their salaries amounted to $11,000 annually.

By Mr. Enright:

Q. That is Isenstein and Dann? A. Yes, sir.

Re-Direct Examination by Mr. Leake:

Q. I show you thirteen statements, commencing April, 1911, and for successive months thereafter until April, 1912, and ask you to look at those and see whether those are the monthly statements that you received from Mr. Sanders Wertheim?

A. Yes, sir; those are the statements, all indorsed in my handwriting.

Q. I will ask you if you have made a calculation of the profits and losses shown on each one of these statements for that peroid? A. Yes, sir.

Q. And what does it show for the period from April 1, 1911, to April, 1912, inclusive? A. It shows profits amounting to $11,510.77, and losses of $5,959.96; excess of profits over losses of $5,550.-81.

MR. LEAKE: I offer each one of these, and I would like to have them marked, either in a batch or separately.

TH COURT: Mark them in a batch.

Marked "Exhibit L. A. 28." (A batch.)

Q. I ask you if, annexed to that statement of April 30, 1912, is a letter which you received from Sanders Wertheim, directed to "W. T. Payne," dated May 27th, 1912? A. Yes, sir; that is correct.

Q. (Reading) "Enclosed, please find corrected statement for month of April. You will notice an additional depreciation on the surplus, on account of all horses not being written off."

MR. LEAKE: I offer that.

Marked "Exhibit L. A. 29."

Q. Have you also made a calculation of the profits and losses from January, 1910, when you first attended a directors' meeting, down to the date of the bond issue? A. Yes, sir.

Q. As shown from these statements? A. Yes, sir.

Q. In these statements that I am now referring to as of April, 1911, to April, 1912 and from other statements received by you during the period of January, 1910 and April, 1911, what

do these statements show as to the profits and losses of the Wertheim Company from January 1, 1910, to April, 1911? A. It shows the profits exceed the losses by $536.00.

Q. What do all of the monthly statements that you have received from January, 1910, down to the date of the bond issue, April 30, 1912, show as to the profits or losses? A. They show a total profit of something over $6,000.

Q. Did you ever receive from the Wertheim Company, or from anyone else, a statement similar to the one exhibited to you by Mr. Wertheim, and that Mr. Enright marked "Exhibit E-10," showing a loss for the year ending March 31, 1912, of $39,095.38? A. I never saw that statement until this morning.

Q. I show you a statement marked "List of Orders and Contracts for Coal on hand," and ask you if you received that from Sanders Wertheim? A. Yes, sir.

MR. LEAKE: I offer this; this is a list.

Q. Do you know when it was received? A. I am not positive of the date it was received but from other information that I have, I imagine it was about April 1, 1911.

MR. LEAKE: I offer this.
Marked "Exhibit L. A. 30."

Q. I show you letter of Sanders Wertheim, directed to W. T. Payne, dated May 13, 1911, as follows: "The contract for the schools of Jersey City has been awarded to us. Please also add to your list the Runkel's Co. 12 tons No. 3 Buckwheat Coal daily to $2.75 per gross ton, and 6 tons Soft Coal daily at $3.85 per gross ton." Did you receive that from Sanders Wertheim? A. Yes, sir.

Q. Does that indicate whether he gave you at that time any list of the customers that they had, or their list of their contracts? A. He gave me very little information, either by letter or by list of the business that they were doing and the prices they were selling coal for.

Marked "Exhibit L. A. 31."

Q. Did you continue to get these reports of coal on hand and contracts or names of customers up to and after the time of the bond issue? A. Yes, sir.

Q. Did they, or didn't they, in April and May of 1912, have good business and a number of customers? A. Yes, sir; the outlook was very promising at that time.

Q. I show you a statement marked "W. Statement, March 31, 1910, net profit $1,528.72", and ask you if that was received by you from Sanders Wertheim? A. Yes, sir.

Q. I show you another statement, dated April 30, 1910, showing a profit of $1,080.05, and ask you if you received that from Sanders Wertheim? A. I did, yes, sir.

Q. I show you a trial balance of April 30, 1910, and ask you if you received that from Sanders Wertheim? A. I did.

Q. I show you a statement marked "W's P. & L. May, 1910, profit $1064.61," and ask you if you received that from Wertheim? A. I did.

Q. I show you a statement marked "Coal on hand, May, 1910", and ask you if you received that statement from Sanders Wertheim? A. I did.

Q. Was it his custom to send you lists of the tonnage on hand in the yard, and the list of tonnage in cars, from time to time? A. Yes, sir.

Q. During your while connection with the company? A. Yes, sir.

William T. Payne—Re-Direct.

Q. I show you paper marked "W. Trial Balance, May 31, 1910," and ask you if you received that from Sanders Wertheim? A. Yes, sir.

Q. I also show you statement marked "W. P. & L. Statement, June, 1910, Profit $157.58;" annexed to it is a statement of coal on hand in cars, and in the yard, and the profit and loss statement for June, including the selling expenses, and ask you if you received that from Sanders Wertheim? A. Yes, sir.

Q. I show you another one, dated June 1, 1910; I show you another one, dated July, 1910; I show you two, dated August, 1910, one, profit and loss, and the other, coal on hand; another trial balance of August, 1910; another coal on hand December 1, 1910; W. Statement of profit, $454.18 September 30, 1910; and another October 1, 1910 marked "Coal on Hand and Trial Balance"; another Profit and loss for October, 1910, profit $1,207.31; another marked "Profit and Loss" for November, 1910, profit $1,914.34; another marked "October, 1910, Trial Balance;" another marked "Trial Balance, November, 1910;" another marked "Profit and Loss, December, 1910, profit $1160.-38; another, "Coal on hand, December 1, 1910;" another trial balance, December, 1910, Accts. and Bills payable, etc.;" another marked, "Coal Purchases, December, 1910," marked from a period December 1, 1910, to December 31, 1910, and purporting to be purchases of coal from all sources? A. Yes, sir; that is correct.

Q. I show you another paper, marked "Trial Balance of January, 1911"; another, marked "Coal Purchases, February, 1911;" I would like to read the list from that: "Altoona Coal & Coke Co., Hatfield & Hilles, Weston Dodson & Co., Inc., Jagele & Bellis, East Boston Coal Co., Burns Bros., Vinton Colliery Co., Yorkville Coal Co.,

Camden Coke Co., Mill Creek Coal Co., Clark & Wilkins, J. P. Gluck, Consolidated Coal Co; Vinton Colliery and East Boston Coal Company".

THE COURT: That is 1911?

MR. LEAKE: Yes, sir; that is 1911.

Q. I show you another one, marked "Trial Balance, February, 1911", and another marked "Coal on hand March 1, 1911; and another marked "Coal purchases, Bills and Accounts Receivable and Payable, March, 1911"; and I ask you if you received all of those from Mr. Sanders Wertheim, the Treasurer of the L. Wertheim Coal and Coke Company? A. Yes, sir; I received those.

Q. I show you another paper, marked "Sanders' Comparative Statement, Jan. 1st, 1910 to March 31st, 1911," and I will ask you if you received that from Sanders Wertheim? A. I did.

Q. I read from this; it shows "Gross Sales, $567,864.42, Cost plus freight, $416,132.88, Gross profit $151,731.54; Expense account $151,194.87"; leaving a gain of $536.67.

MR. ENRIGHT: It has been read into the record that the coal purchased in February, 1914, includes a number of different people; I think it also should be made to appear that out of a total of $20,000, $18,000 is to the Delano-Payne Companies.

MR. LEAKE: I have no objection to letting that fact go in.

Q. I show you another one, marked "Coal on hand March 31, 1911"? A. I received it.

Q. "Trial Balance of March, 1911"? A. I received that from Sanders Wertheim.

Q. I show you another statement, "L. Wertheim Coal and Coke Company, as per monthly statements, April 1, 1910, to March 31, 1911, net

profit $1,974.56;" and I ask you if you received that from Sanders Wertheim? A. I did.

Q. I show you a statement marked "Horses and Wagon Account, June 30, 1911", and I ask you if you received that from Sanders Wertheim; this purports to be a statement of dead horses from January 1, 1910 to June 30, 1911, with the number of the horses, the kind of horses, and the date destroyed, and the reason for the destruction of the horses purchased from January 1, 1910 to July 1, 1911, with the date of the purchase and the character of each horse, and the amount paid, and the name of the person from whom the purchase was made, and a list of the horses on hand, dated June 30, 1911, specifying the color and number of each horse, whether mare or horse, and a list of the wagons, as of June 30, 1911, and I ask you if you received that from Sanders Wertheim? A. Yes, sir; that Sanders sent to me as an inventory of the horse and wagon account.

Q. Now, I ask you if Sanders ever made an appraisal for you of the horses they had on hand? A. Yes, sir.

Q. I show you paper marked "June, 1911, Analysis of Horse Account. Appraised value of horses owned as of June 30, 1911, as per inventory, furnished by Mr. Sanders Wertheim, and valued by him: Appraised value June 30, 1911", I ask you if you received that from Sanders? A. Yes, sir.

Q. Does that list contain an appraisal of the wagons and harness as of the same date? A. Yes, sir; it was sent to me as an itemized statement showing how the horse and wagon account was arrived at in his monthly statements.

MR. LEAKE: I offer all of those in a batch.

THE COURT: All right, they will be received.

William T. Payne—Re-Direct.

Q. I show you trial balance of the L. Wert- 1911, marked "Wertheim Statement, No. 258, December, 1911," and I ask you whose pencil indorsement is that on the back? A. I am not sure; it looks like our bookkeeper's—no, it is not, either—that is my father's writing, W. G. Payne.

Q. Does that suggest anything to your mind as to where that paper was on or about December, 1911, or January of 1912? A. That is a trial balance that Sanders Wertheim brought to a conference there was with my father and myself when he was asking us to accept these bonds for the East Boston Coal Company in place of our notes.

Q. And where was that conference? A. Over in the Waldorf; I should say it was along in January.

Q. Did you discuss with Sanders the details of that trial balance of December 31, 1911, at that conference? A. Yes, sir; we discussed practically every item, discussed it very thoroughly, at a two or three hours' talk that we had.

Q. When you say "discussed," what do you mean; did you ask him— A. We asked him how he arrived at these values; we tried to verify these values as shown all the way through.

Q. What did he say about them? A. He said they were all correct, and he supported some of them with other statements; he supported them to our satisfaction at that time.

Q. What statements? A. He had some other papers there itemizing the costs of various things down on the plant, and inventories of the horses and wagons, and this statement was verified by us at that time.

Q. By you alone? A. No, by my father and I.

BY THE COURT:

Q. You had the leasehold marked "$135,000"? A. Yes, sir.

Q. The trestle the same? A. Yes, sir.

MR. LEAKE: I offer that

Marked "Exhibit L. A. 32." (That is the trial balance of December 31, 1911.)

FURTHER RE-DIRECT, BY MR. LEAKE:

Q. Did you, in December, 1911, receive from Sanders Wertheim a statement of anthracite coal purchases? A. Yes, sir.

Q. I read from that also: "Outside purchases, Albert H. Dollard, $724.00; O. H. Perry & Son, $252.93; Heilner & Son, $110.93; E. C. Altchul, $49.65; Burns Bros. $256.25; Bergen Coal Co., $343.85; Whitney & Kemmerer, $1,084.62; Bergen Coal Company, $403.30; Mill Creek Coal Company, $8,029.14."

MR. LEAKE: I offer this.

Q. Did you receive this from Sanders Wertheim? A. I did.

Marked "Exhibit L. A. 33."

Q. I show you tria lbalance of the L. Wertheim Coal and Coke Company of November 30, 1912, and ask you if you received that from Sanders Wertheim? A. Yes, sir.

MR. LEAKE: I offer that also.

Marked "Exhibit L. A. 34."

Q. I call your attention to a statement marked "L. A. 29," and ask you if that is the statement prepared by the East Boston Coal Company? A. Yes, sir.

Q. Of coal sold to the Wertheim Company from

May, 1912 to July, 1914, and I ask you if you will state the exact amount of coal sold to the Wertheim Company between those periods? A. (No answer.)

MR. ENRIGHT: That is already in evidence; that statement is in evidence.

MR. LEAKE: I want it on the record, in reference to Mr. Enright's cross examination of him in reference to the amount of the coal that he sold.

A. From May 1, 1912 to August 1, 1914, we sold them $100,935.85 worth of coal.

BY MR. ENRIGHT:

Q. Does that show the amount of money you received? A. Yes, sir.

FURTHER RE-DIRECT, BY MR. LEAKE:

Q. And against which you received— A. Total received was $48,789.35.

Q. Has any part of that entire balance been paid to the East Boston Coal Company since that time? A. No, sir.

Q. Have you ever had any conversation with Sanders Wertheim or received any papers from him in reference to the account due to the Wertheim Company, as carried on their books? A. Accounts payable—

Q. No, accounts receivable? A. Yes, sir; I think we received some statements.

Q. Did you have any conversations with him about it? A. Yes, sir.

Q. Did you ever ask him whether the accounts receivable as they were carried on the books in the spring of 1912, represented substantially good accounts, or whether they were part good or part bad, or any other discussion about them? A. My

understanding from Sanders about his accounts receivable was, that while there were some of them slow, those that were not good had been written off, those that were absolutely bad. I had some conversation particularly about a judgment, that is, over in Philadelphia; that was very old; there was a lot of other matters that came into that, that, in his opinion, would eventually make that account good and collectible.

Q. And that understanding, was it in the early part of the year 1912, before or after the bond issue?

MR. ENRIGHT: Objected to as leading.

MR. LEAKE: That is not leading; I asked him whether it was before or after.

Q. When did the conversation take place? A. As a matter of fact, I think I talked with Sanders Wertheim various times, right down all the time from the time I became a director, about the collectibility of the various accounts on his books—before the bond issue, and I think after the bond issue.

Q. In your cross-examination, Mr. Enright asked you if you did not understand that the lease of the Wertheim Company provided that it could not be assigned; did you understand that, or did you understand that it might be assigned with the consent of the railroad company? A. That was what I understood, that it could be assigned, with the consent in writing, or something of that kind, of the railroad company.

Q. Your attention was called on your cross-examination to a question and answer in the bankruptcy hearing, relating to the solvency of the company depending upon a suit against the railroad; is it your belief that the suit against

the railroad in 1912, or the prospect of recovery in that suit, was the only thing that would make that company solvent? A. No, sir, my recollection of what Mr. Enright had in mind when he was asking me this question in the bankruptcy proceedings was, to dig up for him, and to think up for him everything that I could to help him just at the time of the bankruptcy—

Q. What do you mean? A. Help out the concern—what money could the company get—could the Wertheim Company get from all sources, and this was a comparatively large amount.

By the Court:

Q. As I understand your statement now, you were anxious to make a full and complete disclosure of everything? A. Yes, sir, and I thought he was asking me at that time of August and September, 1914.

Q. As a friendly counsel? A. No, sir, but as a matter of information.

Q. Would you have stated differently, if you thought he was asking for any other purpose? A. No, sir, I would have given him every information that I had on the subject.

Further Re-Direct Examination by Mr. Leake:

Q. Did you believe, prior to the date of the bond issue of May, 1912, that the company was solvent even if they did not recover a cent against the railroad? A. Yes, sir, that was always my belief.

Q. Did you think that the solvency or insolvency of the Wertheim Coal and Coke Company depended on the success or failure of the suit against the Lehigh Valley Railroad Company? A. No, sir, I did not.

Q. Do you know whether or not the Wertheim

Company, after the bond issue, discounted any notes on bank? A. I think that they did.

Q. Do you know whether their credit was good after the bond issue, either for discount or for purchase of coal? A. I think their credit was excellent after the bond issue. Sanders Wertheim informed me that he had taken the bond issue up with a couple of different bank representatives, and that they had told him that it would improve their financial condition, in their opinion, and they would be glad to give him any discount desired in reason.

Q. On your cross-examination, Mr. Enright asked you a question in relation to a question answered by you in the bankruptcy hearing, on page 121, in which the question was (reading): "That was the real embarrassment, you and Mr. Delano felt you were virtually carrying Isenstein and Dann? Ans. I heard Mr. Delano state that this morning." Didn't you also at that time, at that bankruptcy examination, immediately following that question and answer—they propounded to you, the following question, and didn't you make the following answer: "Ques. Wasn't that your idea too? Ans. No, they had a valuable plant and a valuable opportunity, and they simply needed the time to go on and work it out, and that is the way the proposition was put up to them and us, and it is because I believed that, that we accepted the bonds." Did you make that answer to that question? A. Yes, sir.

Q. And immediately following that, was not the following question put to you, to which you made the following answer: "Ques. You knew if the concern shut down then it could not pay up, but if it went ahead they might work out their salvation? Ans. Yes. Ques. That was

the condition when the bond issue was put on? Ans. Yes. Ques. So the question of solvency or insolvency boils right down in your mind whether they were allowed to go on and do business and work themselves out? Ans. Yes, that is it exactly." A. Yes, sir.

Q. Mr. Enright called your attention on cross-examination to the question and answer in the bankruptcy proceedings on page 123: "You knew they were getting worse off, but being familiar with conditions there was a reasonable explanation and you hoped the tide would turn? Ans. That is it." A. Yes, sir.

Q. Didn't you, immediately following that question and answer, have propounded to you the following question, and didn't you make the following answer: "Ques. When did you first conclude that it was useless to expect the tide to turn? Ans. Early last summer. Ques. That is August of the present year? Ans. I would say sometime during the summer months. Sanders came to me with a plan of reorganization and stated very fully that they could not go on unless he had help again." A. Yes, sir.

Q. Now, to what year did you refer at that time; Mr. Enright said when he examined it yesterday, on December 4, 1914? A. That would be August, 1914—after the attachments were issued over in New York City.

Q. On the same day of the bankruptcy hearing, you were asked a question by Mr. Enright relating to your testimony, and I ask you if you did not, at that same time, on that same page—I quote from the same page,—did not you answer as follows to this question: "Ques. If they liquidated, did they have enough assets to pay? Ans. If they had liquidated properly, I think so. Ques.

That was in April, 1912, when the bond issue was put up? Ans. Yes, I think so." A. I answered that way as far as I can remember; that sounds correct.

Q. And then, on page 108: "Ques. In order to make that the company would have to liquidate its debts and leave something for the stock-
10 holders? Ans. Yes." A. That is all right.

MR. ENRIGHT: That relates to a claim of the company against L. and S. Wertheim.

RE-CROSS EXAMINATION BY MR. ENRIGHT:

Q. What bank officers told you that the placing of this mortgage on the property improved the company's credit?

20 MR. LEAKE: I object to that, because he did not say.

Q. Did Sanders Wertheim tell you what bank officers stated to him this mortgage improved the company's credit? A. Mr. Morgan, of the Third National Bank, Jersey City; and he told me that he also discussed the matter with an officer of the Bayonne Bank.

Q. Now, at the time of the bond issue, Mr. Morgan's bank had a loan of $30,000 to this com-
30 pany, didn't it? A. I don't recollect that.

Q. Well, it was about that. Don't you know that the Wertheim Company, before the bond issue, had a loan on security with the Third National Bank of Jersey City? A. Yes, sir, I know that.

Q. Isn't it your recollection that the amount was about $30,000? A. I don't recollect what the amount was at any of these particular times.

40 Q. Don't you know that after the bond issue,

the Third National Bank required the Wertheim Company to pay off its loan? A. I don't know that—these loan discounts—that I only knew about incidentally—

Q. Now, you have stated that some other concerns sold coal to the Wertheim Company after the bond issue, and you have given the amounts of those sales; now, do you know approximately, how much money the Wertheim Company owed outside of the bonds at the time of the bankruptcy? A. Not offhand, no, sir, I do not.

Q. Don't you know even approximately? A. No, sir, not approximately.

Q. Didn't you ascertain the amount of the claims proved in the bankruptcy hearing—bankruptcy proceedings? A. I cannot recall all these figures to mind, there is such a mass of them.

Q. It is a matter of record, and subject to confirmation—a matter of record in the bankruptcy court, and I ask you whether it is not a fact that the indebtedness of the Wertheim Company at the time of the bankruptcy, outside of the bonds, was $240,000? A. Well, I don't keep all these figures in mind; I don't know that.

Q. Now, in going over those statements which Sanders Wertheim gave you, the monthly trial balances from April 1, 1911 to April 30, 1912, do you recall whether they took into account the adjustments which were made at the time the Audit Company completed its audit as to March 31, 1911? A. Which adjustment have you in mind?

Q. You know after the Audit Company's audit of March 31, 1911, there was a complete readjustment of the company's system of accounting? A. Yes, sir.

Q. And that happened some time during the summer of 1911, didn't it? A. Yes, sir, that is right.

Q. Several months after the beginning of the fiscal year? A. Well, I think they carried it back, as I recollect it now.

Q. They dated the books back? A. No, sir, my understanding is that they got their books straightened out through this new system of accounting, as of April 1st.

Q. But the time when it was actually done was several months later? A. Well, it was along in the summer—after several months.

Q. These statements you got from Sanders, you got concurrently month by month? A. Yes, sir.

Q. Now, when the Audit Company straightened out the system of accounting—sometime in the summer of 1911—they made adjustments in a number of accounts, didn't they? A. Which accounts?

Q. For instance, the item of the coal on hand; don't you know that the book inventory of coal on hand was considerably different from the amount ascertained upon actual inventory; you know that? A. My understanding is, that when the new statements were started out, they started on the basis laid out by the Audit Company, and were correct as adjusted from that time on.

Q. What I mean is, the statement you got from Sanders, you got month after month? A. I did not commence getting them immediately; I did not get them until the Audit Company had installed and completed this new system of bookkeeping.

Q. And you don't know whether the statements that you got, reflect the adjustment made by the Audit Company in starting the new system or not? A. My understanding is that they do.

Q. Have you analyzed them in preparation for this testimony here, so as to be able to say whe-

ther they do or not? A. No, sir, I just have that general understanding, that when the Audit Company installed these things it was kept absolutely accurate after that time.

Q. Now, you have identified an inventory of wagons; that included all the wagons the company had, didn't it? A. That is my understanding.

Q. Now, don't you know that there was a considerable number of old wagons in the yard over there that were absolutely unserviceable? A. My understanding of the inventory was that they were going wagons in use.

Q. Don't you know about those wagons that were out of use up there in the yard, that were carried along in the inventory? A. No, sir; I did not.

Q. You know there was a number of wagons in the yard that were absolutely out of commission? A. I knew there were two or three old wagons at the back end of the yard, but I never understood they were being carried in the inventory.

Q. You have said you always understood the Wertheim Company was solvent; you don't quite mean that, do you; you do not claim it is solvent now; do you? A. No, sir.

Q. When do you think it became insolvent? A. When the attachment was put on in New York and bankruptcy proceedings were started here.

Q. You think the company was solvent up to that time as you understand solvency? A. Yes, sir.

MR. LEAKE: Now, I want to offer this "Analysis of the Horse Account, as appraised by Sanders June 30, 1911.

Marked "Exhibit L. A. 34."

MR. LEAKE: I also want to offer the cash receipt No. 1 book of the L. Wertheim Coal

and Coke Company, showing the monthly cash receipts of the concern, as follows:

Cash Receipts.

July, 1911, ...	$38421.42
August, 1911	39917.93
Sept. 1911	66651.45
Oct. 1911	33375.97
Nov. 1911	39199.12
Dec. 1911	73390.15
January, 1912	58534.04
February, 1912	37792.54
March, 1912	70187.52
April, 1912	59016.99

Net Receipts.

May, 1912	40955.79
June, 1912	40245.92
July, 1912	35965.46
Aug. 1912	25009.89
Sept. 1912	41818.04
Oct. 1912	24887.28
Nov. 1912	31973.77
Dec. 1912	47154.54
January, 1913	29778.75
February, 1913	29601.25
March, 1913	63514.50
April, 1913	32352.41
May, 1913	34595.74
June, 1913	58977.20
July, 1913	25195.52
August, 1913	22411.32
Sept. 1913	61934.14
Oct. 1913	51630.30
Nov. 1913	46367.69
Dec. 1913	53744.84
January, 1914	48654.97
February, 1914	51500.99

March, 1914 ..... 59684.99
April, 1914 ..... 48314.08
May, 1914 ..... 51648.50
June, 1914 ..... 40740.49

MR. LEAKE: This represents either discounts money received from discounting notes, or money received from accounts receivable.

MR. LEAKE: I want to offer this red ledger, which is marked "L. I. for identification."

THE COURT: What is the book?

MR. LEAKE: It is a book showing plant account, leasehold; it is a ledger,—particularly page 3 of the ledger, which shows the plant account on the books of the company at $119,562.50.

I also want to offer the trial balance book of the L. Wertheim Coal and Coke Company for the period of June 30, 1913, down to December, 1914, and will furnish a compilation of that; the object of the offer being to show that the books of the company showed the trestles and buildings $111,000 to $119,000 during that entire period, and all the other assets of the company are as shown on the monthly statements which were rendered by Mr. Wertheim to Mr. Payne; that they are copies of the book marked "General Ledger of the L. Wertheim Coal & Coke Company," which contains their semi-annual trial balance.

Book marked "Exhibit L. A. 35."

MR. LEAKE: I also offer No. 2 and No. 3, which were marked for identification, but which have not been offered.

THE COURT: All right.

William Dann—Direct.

WILLIAM DANN, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GARVEN:

Q. When did you first learn of the Wertheim Company? A. In the summer of 1907.

Q. Who spoke to you about it? A. Mr. Max Isenstein and his brother, Otto Isenstein.

Q. Did you finally go into the company? A. Yes, sir.

Q. How much stock did you purchase? A. $50,000 worth.

Q. What did you pay for it? A. $50,000.

Q. Cash? A. Yes, sir.

Q. Do you know how much at that time Max paid for his stock? A. He went in there, I think, seven or eight months before I did, and paid $32,500 for it.

Q. Did you subsequently purchase additional stock? A. Yes, sir; from Otto, about a year later.

Q. How much did you pay for that?

MR. ENRIGHT: Objected to as immaterial; this did not go to the company.

MR. GARVEN: This stock was afterwards sold to the company.

THE COURT: This is stock that he purchased?

MR. GARVEN: Yes, sir.

THE COURT: I will allow it for the present; I am not familiar with this phase of the case, and I will permit it for the present and deal with it on final hearing.

A. I paid $12,500, and I gave him two notes of $6,100.00, and I paid the first note; and the second note I was unable to pay in its entirety; that was $6,700.00.

Q. How much cash, all together, did you pay for that stock of the Wertheim Company? A. Both lots?

Q. Yes. A. About $57,000.

THE COURT: I don't understand specifically what your claim is, Mr. Garven.

MR. GARVEN: I did not open. (Mr. Garven then opened his case.)

Q. Now prior to July, 1909, just tell the Court your relations with the Wertheim people. A. Just prior to my getting out?

Q. Yes, what about it? A. I was practically forced out of the company.

BY THE COURT:

Q. What were you? A. I was nominally treasurer, but Mr. Isenstein performed all the duties of the treasurer; I tried to sell coal; that was my work; I worked outside.

Q. Were your relations with the Wertheim friendly or not? A. Not towards the end.

Q. And they, apparently, tried to put you out of the company? A. Yes, sir.

Q. Now, prior to the 15th day of December, 1909, did you have any conversation with anyone in reference to the purchase of your stock? A. Sanders Wertheim said he could get a purchaser.

Q. And did you have frequent conversations with him in reference to the sale of the stock? A. Yes, sir.

Q. Did he at any time tell you that he had purchasers for that stock? A. Several times he told me so.

Q. Did he mention any names? A. Burns Brothers; and then he said he went up to Wilkesbarre to see Mr. Payne, and I have for-

gotten the other name that he mentioned that he thought he could sell the stock to.

Q. And were any of those transactions consummated? A. Not those, no, sir.

Q. Did you make an offer for the sale of your stock? A. Yes, sir; I told him I would be glad to get out, if he could sell the stock at fifty cents on the dollar.

Q. In the meantime, had you loaned any money to the Wertheim Company? A. $38,500.

Q. Do you know whether Mr. Isenstein had loaned money to the company? A. I believe about $10,000.

Q. The total aggregated about how much? A. About $24,000.

Q. Now, did you resign from the Wertheim Company? A. On December 15th I resigned as treasurer.

Q. As secretary and treasurer? A. Yes, sir.

Q. And in the meantime, had you made an agreement for the sale of your stock? A. Yes, sir.

Q. And what date was the sale actually made? A. Two days after that—on December 17th.

Q. Where? A. At Mr. Van Winkle's office in Jersey City.

Q. How did you come to go there? A. I was told to go over there by Mr. Van Winkle.

Q. State what took place there. A. We went to Mr. Van Winkle's office and were told to resign as directors, and were told to leave the room a little while, and when we came back we were handed these notes and $20,000, a check for $20,000 to cover our loans to the company.

Q. Was Mr. Isenstein there? A. Yes, sir.

Q. Do you know how much he received at that time in cash? A. $10,000, the same as I did.

Q. You received how much? A. $10,000; it was made out in one check, and we were taken

downstairs to the bank and two checks were made of it.

Q. What was the agreement? A. That was to cover the cash loan we had made to the company.

Q. When you came back, after you were asked to leave the room, just tell what transpired there. A. We were handed these notes and this check, and that seemed to be the end of it.

Q. Anything said in reference to the stock? A. We were handed over our stock.

Q. How was it indorsed? A. In blank.

Q. What did you receive for that? A. The notes and cash.

Q. Whose notes? A. The Wertheim Coal and Coke Company.

Q. And for how much? A. There were thirty notes, aggregating, I think, $32,000.

Q. And Mr. Isenstein, he received notes at the same time? A. Yes, sir.

Q. Aggregating about what? A. I think $28,000, around there.

Q. And those notes were the notes of the Wertheim Company? A. Yes, sir.

Q. Who handed those notes to you? A. Mr. Van Winkle, the attorney for the Company.

Q. Now, two years later, 1912—three years later—did you receive any notice from the company in reference to your notes? A. Yes, sir.

Q. What? A. Request to exchange them for bonds.

Q. From whom did that request come; who told you to come over and surrender your notes? A. I think it was Mr. Van Winkle.

Q. Can you recall the date that you came over here? A. I cannot recall that; it was some time in 1912.

Q. The early part of 1912? A. I don't know.

Q. And at that time what was the amount of

notes you then held of the Wertheim Company? A. $21,000, I think.

Q. Was Mr. Isenstein with you at the time? A. Yes, sir.

Q. And can you recall the amount of the notes at that time, about? A. Slightly less.

Q. Did you then receive bonds? A. Yes, sir.

Q. Company bonds? A. Yes, sir.

Q. How many bonds? A. 22.

Q. How many did Mr. Isenstein receive? A. 18, I think, I am not sure.

Q. These notes that you speak of, how did they mature; how often did they mature? A. Every other month.

Q. And now these bonds, when did they mature? A. They were twenty year bonds.

CROSS EXAMINATION BY MR. ENRIGHT:

Q. The first you knew that these notes would be surrendered for bonds was when Mr. Van Winkle told you to come over to Jersey City? A. I am not sure whether it was here that I met him or in New York; that is the first I knew of it.

Q. Didn't you have any negotiations with anyone else except Mr. VanWinkle about the exchange of the notes for bonds? A. No, sir.

Q. Was not this supposed bond issue discussed with you at all? A. No, sir; it was never discussed with me.

Q. When you first heard about it, when the matter was first brought up to your attention, you understood the mortgage was there, and the bonds issued all ready to deliver, did you? A. Yes, sir.

Q. When you first heard about it, the mortgage had been put on the property and the bonds executed? A. I did not know anything about the mortgage on the property.

Q. You knew these bonds were secured by mortgage, didn't you? A. Yes, sir.

Q. And you were invited to come over to Jersey City and make the exchange? A. Yes, sir.

Q. You did not make any question about how many bonds there were? A. I saw Mr. Bigelow, my attorney, in New York, and he had attended to the matter for me.

Q. Did you have any talk with Sanders Wertheim about it? A. No, sir.

Q. You don't know whether Sanders Wertheim saw Mr. Bigelow? A. I don't know.

Q. In fact, the matter of this exchange was in Mr. Bigelow's hands? A. Yes, sir.

Q. Whatever negotiations there were, he carried on? A. Yes, sir.

CROSS EXAMINATION BY MR. FISK:

Q. Have the bonds been paid? A. One.

Q. Paid by the company? A. I was told to go to the Commercial Trust Company, and one bond was paid.

RE-DIRECT EXAMINATION BY MR. GARVEN:

Q. How much is due you on those bonds now? A. $21,000.

MR. WALL: I have two releases from Isenstein and Dann, Dann releases which were marked for identification, and I don't suppose it is necessary to have him identify those signatures. They are already marked "W. 3 for identification."

Marked "Exhibit W. 3"—"Exhibit W. 3½."

MR. GARVEN: I am authorized to appear for the executors of the Max Isenstein Estate.

MR. ENRIGHT: The executors being William

Negass and Bertha Isenstein, under will admitted to probate New York County, December 2, 1915, letters issued December 3, 1915.

MR. GARVEN: I would like to have Mr. Enright admit that Mr. Isenstein surrendered notes aggregating $17,800 at the time the bonds were delivered to him—notes due him from the company.

MR. GARVEN: I offer a statement showing notes payable by the L. Wertheim Coal and Coke Company March 31, 1912, to Max Isenstein, aggregating $17,800.37—and notes payable to William Dann by the L. Wertheim Coal and Coke Company on March 31, 1912, aggregating $22,873.77.

Marked Exhibit G-1.

MR. WALL: Now, your Honor, there was a set of by-laws which were marked "W. 1 for identification." I now offer these by-laws, subject, so far as the correctness of the by-laws themselves is concerned, to a comparison with the by-laws which Mr. Enright has put in evidence—not subject to correction so far as Mr. Delano says that this copy was given to him.

MR. ENRIGHT: The minute book does not contain any by-laws at all.

By-laws marked "Exhibit W. 1"

MR. WALL: I also desire to offer the memorandum produced by Mr. Delano, showing the amount of notes of the company to Isenstein and Dann, together with memoranda to obligations which Isenstein and Dann were liable on for the company.

William T. Payne—Direct; Joseph A. Kreuzer—Direct.

WILLIAM T. PAYNE recalled.

DIRECT EXAMINATION BY MR. LEAKE:

Q. How long after the making and recording of the deed of trust or bond issue, did the East Boston Coal and Coke Company and the L. Wertheim Coal and Coke Company finally come to an adjustment, as to the amount that was due from the Wertheim Company to the East Boston Company? A. I don't recollect exactly; it was some two or three months after the meeting at which the bonds were approved; there was some little difference between the bookkeepers, and took some correspondence to get that adjusted.

MR. ENRIGHT: We rest.

REBUTTAL.

JOSEPH A. KREUZER, recalled.

DIRECT EXAMINATION BY MR. ENRIGHT:

Q. In your examination of the books of the Wertheim Company did you make an investigation to find out how much money was paid after the bond issue by way of principal and interest upon bonds issued to the East Boston Coal Company? A. Yes, sir.

Q. Will you state the amount? A. $16,740.00 even.

Q. State how much was paid to the Mill Creek Coal Company. A. $16,310.00.

Q. Does that include the amount of money paid by the Wertheim Company to the Commercial Trust Company and still held in the sinking fund? A. No, sir; it does not.

Q. The Wertheim Company, of course, made these payments directly to the Commercial Trust Company? A. Yes, sir.

Q. Now, I call your attention to the financial statement, year ending March 31, 1912, marked "Exhibit E-10;" is that one of the documents you found among the papers of the L. Wertheim Coal and Coke Company? A. Yes, sir.

Q. What part of the office was it kept in when you went up there? A. They were in the safe at the time.

Q. This sheet, together with other sheets? A. Yes, sir.

Q. Do you remember covering what period? A. I think there were about one dozen of them.

Q. Now, this particular sheet, being the annual statement of 1912, did you check this up with the books? A. Yes, sir.

Q. Does that correctly summarize the books of the company? A. Yes, sir; it does.

Q. I show you a number of other statements, and ask you if you identify those as statements found by you at the same time and place among the records of the L. Wertheim Coal and Coke Company; they purport to be statements of the same years, 1912, some in 1913, and some in 1914? A. Yes, sir; they were there.

Q. You made an audit of the books for the bankruptcy receiver as of September 17, 1914? A. Yes, sir.

Q. Did you make that audit from the books of the Wertheim Company? A. Yes, sir.

Q. Will you state the total of accounts and bills payable, not including bonds, as you ascertained on this audit?

MR. WALL: I object to that on the ground that that was offered, I think, at the last

hearing and the Court rejected it. It is not true rebuttal.

THE COURT: Are you rebutting anything? If you are, I will let it go in subject to the objection, otherwise not.

MR. ENRIGHT: So far as the order of proof is concerned, that is always a matter within the discretion of the Court, and I attempted, so far as counsel was concerned, to bring it in, in time enough. I made the offer. I, in the meantime, have studied that Otto case, and one of the elements upon which the Court there acted was the condition of the company, the subsequent history of the company, subject to the mortgage that was under attack; the Court there drew some deductions from the fact that after the mortgage the company did not go behind, but continued in business, and continued to make a small profit. Now, it seems to me, that we ought to have the record here complete and this subsequent history before the Court, in order that you may draw whatever deduction therefrom the facts justify. Now, as to whether it is rebuttal or not, it was not my cross examination that brought all this mass of stuff as to statements subsequent to 1912, as to purchases from other concerns; that was brought out by Mr. Leake.

THE COURT: But is this rebuttal?

MR. ENRIGHT: It is rebuttal in this sense; if it was material for them, to show the partial condition subsequent to 1912, it must be competent for me to show the complete fact. They have not any right to foreclose this record by just picking out an account here and there of a subsequent dealing, an isolated account, or an isolated dealer, with-

out opening the door for me to show the total of subsequent dealings with all dealers; they have admitted a partial exhibit of subsequent dealings.

THE COURT: I am inclined to think this is not rebuttal.

MR. ENRIGHT: I offer in evidence the balance sheets of the company, monthly balance sheets of the company, as identified by the witness as having come from the files of the company—for the months subsequent to May, 1912, subsequent down to 1914. I want to get my offer clearly on the record.

THE COURT: All right. I won't receive them now—as not rebuttal.

MR. ENRIGHT: I offer to prove by the records of the bankruptcy court, the record of the claims proved in bankruptcy of the L. Wertheim Coal and Coke Company. I have here a transcript of those claims, 94 in number, and I offer to prove that by the official records of the Court.

MR. LEAKE: That was objected to before, because the books of the company are the best evidence of that.

MR. ENRIGHT: That is absolutely untrue; it cannot be true, because the court of bankruptcy is a court of competent jurisdiction. Now, I offer to prove by the official records of the bankruptcy court, the amount of the claims in the bankruptcy proceedings.

MR. WALL: That is objected to as outside the issue.

THE COURT: I will rule them out as immaterial and irrelevant.

MR. ENRIGHT: I make the offer also as a renewal of the original offer made on the main case.

THE COURT: I shall overrule the offer.

MR. ENRIGHT: I also offer the monthly trial balance sheets for the year 1911.

MR. LEAKE: There is no objection to that.

MR. ENRIGHT: As found by the witness in the safe of the Wertheim Company.

THE WITNESS: Yes, sir.

Q. You checked these up by the books? A. I checked 1912.

Q. The statements, annual and monthly, are statements offered from the ledger of the company, are they not? A. I can only say as to this one.

MR. ENRIGHT: I offer in evidence the ledgers of the L. Wertheim Coal and Coke Company, four books, purporting to be summarized by the statements and also the related books and records of the company.

MR. WALL: I accept, so far as those books show conditions at the time of, or prior to the making of the mortgage.

MR. ENRIGHT: May I offer to prove the minutes of the examination of Mr. Delano in the bankruptcy proceedings, to the extent that they show the questions and answers with which Mr. Delano was confronted in his cross examination?

MR. LEAKE: Objected to as not rebuttal.

THE COURT: I shall sustain the objection on the ground that it is not rebuttal, and I think the record already shows these statements.

MR. LEAKE: I want to ask this witness one question—the statement marked "Exhibit E-10"—

MR. FISK: That statement shows for itself.

BY MR. LEAKE:

Q. I ask you, whether in this loss for the year of $39,095.38 there is not a depreciation charged off for horses year after year, of $28,753.59? A. The statement shows that, yes, horses and wagons.

MR. WALL: That closes the case.

MR. ENRIGHT: I am willing to go ahead and argue it now.

THE COURT: I think I will give you twenty days to get ready.

MR. FISK: After the Court has decided as far as it has gone, it may become necessary for Mr. Corbin to put in his case afterwards.

THE COURT: Yes.

MR. ENRIGHT: We shall argue that the books of the company are to be taken as showing its condition, subject to such modification, of course, as a challenge of the entries produces, showing the condition at the time of the mortgage.

Second, that the company was then actually insolvent upon a proper analysis of its books.

Third, that the annual balance sheet of March 31, 1912, when properly analysed, shows that the apparent solvency of the company was unreal.

Fourth, that the asset items of trestle and buildings and leasehold were largely fictitious. That the asset items of the Wertheim claim was wholly fictitious as a live asset; likewise, the Adams mortgage; and upon a readjustment of the account as shown on the books of the company to accord with actual facts as proven by the witnesses here, the fair value of the assets was much less than the

liabilities of the company upon that date, so that a case of actual insolvency then existed; showing that under the statute, it is our contention, that the mortgage is wholly void as against the creditors generally of the bankrupt.

MR. LEAK: No matter when their claims are proved, whether subsequent or before.

MR. ENRIGHT: That it is wholly void.

In the second place, we insist that the affidavit atached to the mortgage does not state the true consideration of the mortgage within the requirements of the statute.

MR. LEAKE: In what respect?

MR. ENRIGHT: It does not state the true consideration.

It is also my contention, that the mortgage was given in contemplation of insolvency, within that other clause of the statute.

THE COURT: All right; I will fix a day then.

IN CHANCERY OF NEW JERSEY.

Notice of Appeal of Albert I. Drayton from Final Decree of Dec. 17, 1917.

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Trustee,

Complainant,

and

L. WERTHEIM COAL & COKE COMPANY, et. als.,

Defendants.

On Bill, &c.

The defendant Albert I. Drayton, Trustee in Bankruptcy of L. Wertheim Coal & Coke Company, hereby appeals from the final decree of the Chancellor made in the above entitled cause under date of December 17, 1917, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

McDERMOTT & ENRIGHT,
Solicitors of Defendant Albert I. Drayton, Trustee &c.

JOHN M. ENRIGHT,
Of Counsel.

Dated February 11, 1918.

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

JOHN M. ENRIGHT,
Of Counsel with Albert I. Drayton, Trustee.

Petition of Appeal of Albert I. Drayton from Final Decree of Dec. 17, 1917.

NEW JERSEY COURT OF ERRORS AND APPEALS.

COMMERCIAL TRUST COMPANY OF NEW JERSEY,

Complainant-Appellee,

vs.

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

Defendant-Appellant,
et als.

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

The petition of Albert I. Drayton, Trustee in Bankruptcy of L. Wertheim Coal & Coke Company, one of the defendants above named, respectfully shows:

That your petitioner finds himself aggrieved by a certain Final Decree made in above entitled cause under date of December 17, 1917, wherein and whereby it is adjudged that complainant's mortgage dated May 6, 1912 constitutes a valid and subsisting lien upon all and singular the property described in the schedule annexed to said mortgage; and also upon all other tangible personal property, rights and franchises then in possession of L. Wertheim Coal & Coke Company or thereafter acquired, and all the good will of the business then and thereafter conducted; all books of account then owned or thereafter acquired; all bills and accounts receivable; money, claims, demands and choses in action and all other proper-

ty or things of value of any kind, name or nature, tangible, intangible, legal or equitable of which the Company then was possessed or to which it thereafter became entitled; and also the rights privileges, franchises and immunities of the corporation, including the right to be a corporation, and that said lien is prior and paramount to any and all other liens, rights or interests of the parties to this cause in and to said property; and further adjudging that said mortgage is a valid and subsisting lien upon all moneys in the possession of complainant as Trustee constituting the sinking fund provided for in said mortgage and that said lien is prior and paramount to any and all other liens, rights or interests of the parties to this cause;

And further adjudging that said mortgaged property be sold by the receivers appointed in this cause; and further adjudging that Albert I. Drayton, as Trustee in Bankruptcy aforesaid, stand debarred and foreclosed of all equity of redemption in said property when so sold; and further adjudging that the sum of $1500. be allowed to the solicitors of complainant and be included in the taxed bill of costs and be paid by the Receivers in this cause out of the moneys in their hands and the proceeds of the mortgaged property; and further adjudging that the Receivers pay over the moneys in their hands, after accounting, to the complainant, to be applied as provided in complainant's mortgage; and further adjudging that defendant Albert I. Drayton, the Trustee in Bankruptcy 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 Company or received by him from Receivers in Bankruptcy of said Company and that said Dray-

ton, Trustee as aforesaid, after the allowance of said account, pay the amount shown thereby to the complainant to be applied as provided in complainant's mortgage; and further adjudging that said Drayton, Trustee in Bankruptcy, deliver to the Receivers herein all the books of account and other books and records of the Bankrupt; and further adjudging that the sum of $1500 be allowed to the solicitors for defendant William T. Payne and East Boston Coal Company and included in the taxed bill of costs, and paid by the Receivers herein out of the moneys in their possession and the proceeds of the sale of the mortgaged property; and further adjudging that the sum of $1500 be paid to the solicitors of the defendants Warren Delano and Mill Creek Coal Company, and included in the taxed bill of costs and paid by the Receivers in this cause out of the moneys in their possession and the proceeds of the sale of the mortgaged property; and further adjudging that the sum of $500 be paid to the solicitor of defendants Isenstein and Dann, and included in the taxed bill of costs, and paid by the Receivers in this cause out of the proceeds of the sale of the mortgaged property.

And your petitioner appeals from said decree adjudging and decreeing the matters and things aforesaid upon the ground that the same is erroneous and contrary to the evidence in the cause, inequitable and contrary to law.

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

McDermott & Enright,
Solicitors for and of Counsel
with Appellant.

Memorandum of Vice Chancellor Lewis.

IN CHANCERY OF NEW JERSEY.

Between

COMMERCIAL TRUST COMPANY,

Complainant,

and

L. WERTHEIM COAL and COKE COMPANY, et al.,

Defendants.

On Bill, &c.

Mr. Willard C. Fisk, for the complainant.

Messrs. McDermott & Enright, for the defendant, Albert I. Drayton, Trustee in Bankruptcy of L. Wertheim Coal and Coke Company.

Messrs. Vredenburg, Wall & Carey, for the defendants, Warren Delano and Mill Creek Coal Company.

Mr. Eugene Leake, for the defendant, William T. Payne.

Mr. Pierre P. Garven, for the defendant William L. Dann.

Messrs. Collins & Corbin, for the defendant Lehigh Valley Railroad.

LEWIS, V. C.

The bill in this case was filed to foreclose a mortgage made by L. Wertheim Coal and Coke Company to the Commercial Trust Company to secure a bond issue of 250 bonds of $1,000 each. The mortgage was dated and recorded on May 6, 1912. On September 16, 1914, the Wertheim Company was declared a bankrupt, and the Trustee in Bankruptcy filed an answer and cross-bill to the bill to foreclose, in which he claimed:

Memorandum of Vice Chancellor Lewis.

1. That the Wertheim Company was actually insolvent upon a proper analysis of its books and balance sheet of March 31, 1912.
2. That the proper analysis which the Trustee has in mind is the marking down of various asset items, viz: trestle, buildings, leasehold, claim against Wertheims Adams' mortgage.
3. That the mortgage is wholly void as against creditors generally, irrespective of the fact whether the creditors' claims all came into existence long after the date of the mortgage or not.
4. That the affidavit attached to the mortgage does not state the true consideration within the requirements of the Chattel Mortgage Act.
5. That the mortgage was given in contemplation of insolvency.
6. That the officers who authorized the mortgage were directors, and had a self interest.

The undisputed pertinent facts in this case are as follows: "By leases, dated June 12, 1906 and April 30, 1908, the Lehigh Valley Railroad Company leased to the defendant corporation certain real estate in Jersey City to be used as a coal yard. The terms of these leases were for fifteen years from November 1, 1906, and the annual rental reserved was one dollar per year, with the right reserved to the lessor to terminate the lease on giving not less than one year's written notice if the leased lands should be required by the lessor for railroad purposes. Under the lease of April 30, 1908, it was further provided that the lessee should pay all taxes and assessments to be levied and assessed upon all buildings and property placed upon the demised premises, and in case of failure to pay such taxes after the same became payable, the right was reserved to the lessor to pay the same and to recover the taxes from the lessee in the same manner rent was re-

coverable. In the event of breach of covenant of the lease the right of re-entry was reserved to the lessor, and a like right was reserved if the property was taken in execution or attachment by creditors, or an assignment for the benefit of creditors should be made if the lessee should become bankrupt. There were further conditions giving the lessee the right to remove any structures placed there by it upon the property if the same could be removed without damage to the land; and a covenant by the lessor in the event of determination of the lease, by notice or otherwise, to purchase the improvements placed on the land by the lessee, and valuation to be fixed by agreement or by arbitration not exceeding $30,000 for the first five years of the terms: $25.000 for the second five years, and $20,000 for the last five years of the term. Improvements by way of railroad trestles, office buildings, stables, etc., were placed on the land by the lessee at its expenses, the cost of these improvements being greatly in excess of the amount at which the lessor in the lease agreed to take them.

On May 6, 1912, the Wertheim Company executed a trust mortgage to the complainant to secure an issue of bonds, including in the mortgage the coal trestles buildings and other improvements placed on the leased land, but excluding the leases themselves, which were under their terms non-assignable.

On December 20, 1913, taxes for the years 1913-1914 upon the improvements on this property became payable to Jersey City, and under the thirty days' clause of the lease should have been paid by January 19, 1914. The Wertheim Company defaulted in the payment of these taxes and has never paid them.

Memorandum of Vice Chancellor Lewis.

On September 16, 1914, default having been made under the mortgage, the complainant's bill to foreclose was filed in this cause, and on the same date receivers were appointed with directions to take possession of the mortgaged assets and to collect in the assets to be held by the Court pending foreclosure. The receivers qualified, and on September 17, took actual physical possession of the coal trestles, office buildings and other structures on the leased lands.

At about noon on September 17, 1914, the railroad company caused a notice of termination of the lease to be served upon one of the officers of the Wertheim Company, and subsequently on the same day attempted to take possession of the trestles and other buildings in question, but found the receivers appointed by this Court then in actual physical possession of the property.

On September 25, 1914, the railroad company paid to Jersey City the tax which became due December 20, 1913.

On September 17, 1914, as already set forth, an involuntary petition in bankruptcy was filed against the Wertheim Company and on that day a receiver was appointed and qualified.

Prior to November 1, 1914, the Lehigh Valley Railroad Company sent a bill to the Wertheim Company which was received by the receivers, dated November 1, 1914, being a bill for the rent of the site for the coal trestles and yard in Jersey City for one year, the term ending October 31, 1915, with directions to forward payment to the Treasurer of the company at Philadelphia. This was the annual rental reserved under the lease for the year ending November 1, 1915. The receivers forwarded the amount of the rent and received

back a receipt therefor, dated November 4, 1914, which they now hold.

The Lehigh Valley Railroad Company has also filed a cross-bill asking that it be decreed that the railroad company is in lawful possession of the trestles and permanent structures on the leased property, and has been in such possession since September 17, 1914; or in the event that the court should decree that the railroad company has not been in possession since September 17, 1914, that it then decree that the railroad company has a prior lien on the proceeds of sale of the chattels under the foreclosure for taxes and interest thereon paid by the railroad company subsequent to September 17, 1914.

On and prior to December 15, 1909, two of the defendants, Max Isenstein and William Dann, were stockholders, and the Vice-President, Secretary and Treasurer, respectively, of the L. Wertheim Coal and Coke Company.

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

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

Memorandum of Vice Chancellor Lewis.

Isenstein and Dann wished to have the company repay to them the indebtedness of $24,000, and Saunders Wertheim suggested that he would get a purchaser to buy this stock held by Isenstein and Dann, and they 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 company.

Saunders Wertheim went to Mr. Delano and apprised him of the condition of affairs of the company 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.

On December 15, 1909, Isenstein and Dann resigned as officers of the Wertheim Company.

On December 17, 1909, by arrangement, Isenstein and Dann went to the office of the attorney of the Wertheim Company, and were told to resign as directors of the company, and they did so. 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, 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 the company's attorney a check for $20,000 which they immediately cashed, each receiving one-half of the proceeds. 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 indorsed the stock in bank and surrend-

ered it to the company's attorney. It was understood at that time that the $20,000 cash was to be accepted in satisfaction of the amount due from the company to the defendants Isenstein and Dann for moneys advanced by the defendants to the company, and the notes aggregating $60,000 were to be accepted in payment of the stock aggregating $96,000 held by these defendants, Isenstein and Dann. 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 the defendant Dann to receive $1,000 the following month, and so on untl the notes were fully paid. 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.

The situation on December 17 was, that the Wertheim Company purchased $96,000 worth of stock of Isenstein and Dann at fifty cents on the dollar and issued the notes in payment thereof.

By the purchase of stock of Isenstein and Dann the company was able to borrow the sum of $20,000 for which it pledged as collateral security the stock purchased from these defendants, and paid in full the indebtedness due Isenstein and Dann for moneys loaned to the company at various times.

Isenstein and Dann had been out of the Board of Directorate two years and several months at the time when the mortgage was given and the bonds issued, and their knowledge of the issuance of the bonds was first obtained through the attorney of the Wertheim Company, who notified them to come to Jersey City and exchange their notes for bonds, which they did.

The first question is, whether at the time of the

mortgage the corporation was actually insolvent, as shown by a comparison of its assets and liabilities.

The Trustee in Bankruptcy contends that the Wertheim Company was unable to pay its maturing debts in due course and had actually defaulted upon its promissory notes; that the effect of the mortgage was to transfer to the mortgagee every transferrable asset as security for a debt, which far exceeded the value of the assets, leaving the corporation wholly without assets on which it was fairly entitled to seek future credit; that the directors, nevertheless, actually intended the corporation to continue in business by seeking certain new credit, although they must be chargeable with knowledge that the corporation would have no asset with which to pay such new debt unless either to bondholders permitted the mortgage security to be exhausted for that purpose, or the corporation reversed its prior existence and made profit, out of which to pay such debt; that the burden of proof of the legality of this mortgage, at least to the extent of the bonds held by the companies represented by Mr. Delano and Mr. Payne rests upon them since the directors in executing the mortgage were virtually dealing with themselves.

I am unable to accept these propositions of the Trustee in Bankruptcy. I have again examined the testimony and given consideration to the arguments in this case, and have reached the same conclusion regarding them entertained at the termination of the oral hearing before me.

The proofs of insolvency are neither clear nor satisfactory. The action of Delano and Payne and the companies which they represented was, in my judgment, characterized by good faith and fair dealing.

Memorandum of Vice Chancellor Lewis.

I do not think from evidence before me, that this court would have been justified in appointing a receiver in May, 1912, the date of the bond issue; and this is a test which has been applied in some cases.

But, aside from this, at the time of the hearing, no creditor was in existence whose claim had accrued before the mortgage was made. They owed no one, and in the year immediately preceding the bond issue they had made a net profit of $5550.81.

The concern was an active one, and the evidence does not indicate a well-laid plan for the cessation of activities. It had never stopped business, and had enough assets to pay its debts if it had liquidated at the time of the bond issue.

The project did not emanate from Delano or Payne. It was brought to their attention by the Wertheims and their counsel, Mr. Eugene Leake. It was conceived for the benefit of the Wertheim Company, and there is nothing which shows that the Mill Creek Coal Company or the Payne Company improperly secured anything from it or profited on the coal sold.

The plan resulted in the doing away with the large salaries payable to Isenstein and Dann, and released their claims against the Wertheim Company.

Immediately upon the entrance of the new interests into the Wertheim directorate regular audits were made of the business; and the business generally conducted in an open and up-to-date manner.

I cannot agree with the view advanced that the life of the Wertheim Company was improperly extended by the entrance of Delano and Payne, or by the financial project which they undertook up-

on the suggestion of the Wertheims and their counsel. Both continued furnishing it with coal for sometime after the making of the mortgage, and the company went right on with its ordinary business.

The fact that money is needed to finance the corporation or to continue its life, does not mean that it is compelled to close its doors; and there was every indication that when the mortgage was made, the corporation, if let alone, would have succeeded and progressed.

The trustee in the case under consideration represents only creditors who have sold to the Wertheim Company knowing the mortgage was recorded. They, therefore, had notice. There certainly is nothing fraudulent in this aspect of the case.

There is nothing presented that leads me to the belief that insolvency was contemplated. The mortagage undertaking, was for the purpose of continuing the business under more advantageous circumstances than those which had hitherto prevailed.

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

Another point of attack by the trustee is as to the sufficiency of the mortgagee's affidavit of consideration. I have examined the affidavit in connection with the mortgage, and it seems to be in

substantial compliance with the statute. It not only refers to the mortgage, but in express language sets forth the terms of this instrument and the cause of its execution. The plan relating to the issue of bonds is also clearly explained.

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

A further question raised is as to the power to mortgage afteracquired property. The complainant's mortgage is like many others in this regard. The instrument not only covered all chattels and book accounts then owned by the mortgagee, but provided that the lien should extend to all afteracquired chattels and book accounts that should be substituted in the regular course of business for those existing at the date of the mortgage. In the case of *Smethhurst v. Edmund,* 14 N. J. E. 408, the right to mortgage afteracquired property was first established in this State, and that case has been followed by a long line of subsequent decisions.

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

My conclusion is, that the chattel mortgage was a lien as against creditors on book accounts that arose after the date of the mortgage and as to chattels acquired after the date of the mortgage. To hold otherwise, seems to me would be to destroy the lien of any mortgage of this character.

The last question to be decided is presented by the Lehigh Valley Railroad Company, which company contends that the receivers have no right in

the trestles and permanent structures which, it claims, are part of the real estate leased by them to the Wertheim Company and which it claims to be lawfully in its possession since September 17th, 1917.

I am in accord with the complainant's views in this regard. In the first place, the default under the lease for the nonpayment of tax for 1913, was effective January 19th, 1914, and no action to enforce a forfeiture was taken by the railroad company until September 17th, 1914, at which time the receivers of this court were in possession of the property. This delay is, in effect, a waiver of the default in equity where forfeitures are not regarded with favor. (*Grigg v. Landers,* 21 N. J. E. 494). Some definite action must be taken to claim a forfeiture, and it is well settled that if such action is taken after a lapse of time, this constitutes a waiver of the right to declare a forfeiture (24 Cyc., 1364). It has been held that the lessor may waive the forfeiture by neglecting to assert his right within a reasonable time after the default (24 Cyc., 1364). Furthermore, the railroad company has never taken possession of the trestles and structures under the default in the lease for the nonpayment of taxes, because service of the notice on one of the officers of the Wertheim Company on September 17th, 1914, after the appointment of receivers in this cause, was of no effect, and the subsequent service of notice on the receivers or any attempt to oust them from possession was ineffective without the permission of this court first obtained for such action.

The tender of a bill for rent reserved under the lease for the year commencing November 1, 1914, and the acceptance by the railroad company of payments thereunder, was a waiver of any de-

faults under the lease which existed prior to that date. It is claimed by the company that the agent who mailed the bill for rent had no authority; but it would appear that the company is estopped from denying this authority by the acceptance of the rent. In *Levy v. Blackmore,* 67 Atl. Rep. 1022, Vice Chancellor Howell says:

> "But even conceding the position of the landlord, and conceding that the tenant did violate the covenant, and conceding still further that the violation operated as a forfeiture, and that due notice was given thereof, and everything done by the landlord to conserve what he thought were his rights, it still appears that the landlord has accepted the rent from the beginning of the lease down to the present time. This operates as a waiver of any forfeiture which may have been incurred during that period".

Equity will relieve against forfeiture where compensation can be made. The Lehigh Company was entitled to rent and taxes. The former had been paid, and my conclusion as to the latter is that the company had a prior lien on the proceeds of the sale of the chattels under forfeiture for taxes and interest thereon paid by the company subsequent to September 17th, 1914.

A decree may be entered in accordance with the above views.

Final Decree of Dec. 17, 1917 (for Complainant).

IN CHANCERY OF NEW JERSEY.

Between

COMMERCIAL TRUST COMPANY OF NEW JERSEY, Trustee,

Complainant,

and

L. WERTHEIM COAL & COKE COMPANY, et als,

Defendants.

On Bill &c.

This cause coming on to be heard on complainant's bill of complaint and the amended answer of Albert I. Drayton, trustee in bankruptcy of L. Wertheim Coal & Coke Company, and on the cross bill of Lehigh Valley Railroad Company, a defendant herein admitted by the Court and exhibited against the complainant, Commercial Trust Company of New Jersey, trustee, and against the defendant, Albert I. Drayton, trustee in bankruptcy of L. Wertheim Coal & Coke Company, and in the presence of Fisk and Fisk, of counsel with complainant, and of McDermott and Enright, of counsel with defendant Albert I. Drayton, trustee in bankruptcy of L. Wertheim Coal & Coke Company; Hartshorne, Insley & Leake, of counsel with defendants William T. Payne and East Boston Coal Company; Vredenburgh, Wall & Carey, of counsel with defendants, Warren Delano and Mill Creek Coal Company; Pierre P. Garven, of counsel with defendants, William Dann and Max Eisenstein; and Collins & Corbin, of counsel with Lehigh Valley Railroad

Company, before Honorable Vivian M. Lewis, Vice-Chancellor, to whom the said cause was referred to hear and advise the Chancellor what order or decree should be made therein, and the pleadings having been read, and the proofs having been taken, and the arguments of the respective counsel having been heard and considered, and the Court having duly considered the said pleadings and proofs and arguments;

And it appearing to the Court that by decree made herein on the 12th day of March, 1917, it was ordered, adjudged and decreed that the cross bill of Albert I. Drayton, trustee in bankruptcy of L. Wertheim Coal & Coke Company, be and the same was thereby dismissed, and that the consideration of all further questions and of the costs upon the dismissal of said cross bill were reserved until the final decree herein upon the complainant's bill of complaint;

And it further appearing to the Court that the trestles, buildings and permanent structures included within complainant's mortgage or deed of trust are erected on lands leased by the defendant, Lehigh Valley Railroad Company to L. Wertheim Coal & Coke Company by leases bearing date June 12, 1906, and April 30, 1908 respectively, and recorded in Deed Books 1003 page 392, and 1009, page 229 respectively in the Register's office of Hudson County; and that in and by said leases it was provided that as part of the rent thereunder L. Wertheim Coal & Coke Company should pay all taxes and assessments levied or imposed upon said lands and upon any and all buildings and property of L. Wertheim Coal & Coke Company placed or erected on said lands within thirty days from the day the same became due and payable; and that taxes for 1913

on said lands and on the trestles, buildings and structures of L. Wertheim Coal & Coke Company placed and erected thereon became due and payable on December 20, 1913, and were not paid within thirty days thereafter and remained unpaid until September 28, 1914, on which date they were paid by Lehigh Valley Railroad Company; and that the defendant Lehigh Valley Railroad Company waived the failure and default of L. Wertheim Coal & Coke Company to pay said taxes and waived any forfeiture under said leases by reason thereof; and that the attempted entry on and attempt to take possession of said trestles, buildings and structures by the Lehigh Valley Railroad Company on September 17, 1914, by reason of such failure and default was of no effect because said trestles, buildings and structures thereon were then in the possession of the receivers in this cause appointed by this Court; and said attempt to take possession thereof was made without permission of this Court first obtained therefor; and that L. Wertheim Coal & Coke Company has not surrendered to Lehigh Valley Coal & Coke Company said trestles, buildings and structures or the possession thereof;

And it further appearing that said taxes for 1913 upon said trestles, buildings and permanent structures amounted to $360.91; and that the interest thereon on September 28, 1913, amounted to $19.52; and that the Lehigh Valley Railroad Company paid thereafter on January 4, 1915 taxes for 1914 in the sum of $359.21 and on December 20, 1915 taxes for 1915 in the sum of $348.16; and on December 27, 1916 taxes for 1916 in the sum of $329.12; and that said taxes for 1913 upon said lands amounted to $1,167.65, and that the interest thereon on September 28, 1913 amounted to $63.16, and that the Lehigh

Valley Railroad Company paid on said lands on January 4, 1915 taxes for 1914 in the sum of $1,162.15, and on December 20, 1915 taxes for 1915 in the sum of $1,167.36, and on December 27, 1916 taxes for 1916 in the sum of $1,103.52, and that all said taxes with interest to date amount to $6,926.44; and that taxes for 1917 will be due and payable on December 20, 1917.

And it further appearing to the Court that complainant's mortgage or deed of trust, dated May 6, 1912, and recorded in the office of the Register of the County of Hudson, in Book 305 of Chattel Mortgages, page 135, and the bonds issued thereunder, were authorized, made executed, issued and delivered by L. Wertheim Coal & Coke Company in the lawful exercise of its corporate powers and to provide for the legitimate and beneficial corporate purposes of said Company and not when insolvent or in contemplation of insolvency, and in all respects in conformity with the law and in full compliance with the statutes governing the execution thereof;

And it further appearing that complainant's mortgage or deed of trust is a first and paramount lien on all the premises and property described therein, and on all moneys derived from the sale, collection or reduction to cash of any of the property described therein and prior and paramount to the alleged lien or claim of Albert I. Drayton, trustee in bankruptcy of L. Wertheim Coal & Coke Company, or any of the creditors of L. Wertheim Coal & Coke Company represented by the said trustee in bankruptcy;

And it further appearing that in pursuance of the terms of complainant's mortgage or deed of trust and the terms of the bonds issued thereunder, that 250 of said bonds of the par value of

$1,000. each and of the aggregate value of $250,000. were duly and legally issued, negotiated and sold for value, and that 240 of said bonds of the aggregate value of $240,000., issued as aforesaid are now outstanding, and that there is due for principal upon said bonds the sum of $240,000. and interest thereon at the rate of six per centum per annum from April 1, 1914;

And it further appearing that the complainant's mortgage or deed of trust provided that as a sinking fund for the payment of the indebtedness secured thereby L. Wertheim Coal & Coke Company agreed to pay monthly to complainant as trustee, beginning on May 1, 1912, and on the first day of each and every month in each and every year thereafter until the bonds secured by said mortgage or deed of trust should be fully paid, both principal and interest, $2,000. per month to be applied by complainant on each interest day in payment of the interest on said bonds and the balance in redeeming on each interest date as many of said bonds as said monthly payments with such interest as the trustee might receive thereon would pay and redeem, and that in case default should be made in the payment of any monthly sum to the trustee for the said sinking fund, and if such default should continue for the period of ninety days, then the trustee should by notice in writing delivered to L. Wertheim Coal & Coke Company declare the principal of all the bonds secured by said mortgage or deed of trust and then outstanding to be due and payable immediately, and upon such declaration by complainant said bonds should become and be due and payable immediately anything in the mortgage or deed of trust or in the bonds to the contrary notwithstanding. And that on the first day of June, 1914, there became due and payable

to complainant as trustee under the terms of the mortgage or deed of trust a monthly payment of $2,000. for the said sinking fund with which to pay the interest and principal of the said bonds, and that L. Wertheim Coal & Coke Company made default in the payment due as aforesaid, which default continued for a period of ninety days therefrom, and that complainant on August 31, 1914, by notice in writing delivered to L. Wertheim Coal & Coke Company, declared the principal of the bonds, secured by the mortgage or deed of trust and then outstanding, to be due and payable immediately, and that upon the notice aforesaid by complainant to L. Wertheim Coal & Coke Company the principal of said bonds and interest thereon became immediately due and payable and are now unpaid;

And it further appearing that Clarence M. Schwerin and Pierre F. Cook, receivers in this cause appointed by this court, have in their possession moneys derived from the sale pursuant to an order made herein November 2, 1914, of the tools, harness, equipment, coal, supplies on hand, office furniture, fixtures and other movable chattels, excepting books, records or papers of L. Wertheim Coal & Coke Company, and excepting the buildings, trestles and structures aforesaid, and from interest on bank accounts and from outstanding bills and accounts receivable, all of which moneys are held in the possession of said receivers in a separate "general account," the balance of which account on September 11, 1917, the date of the receivers' fourth report, amounted to $1,555.06;

And it further appearing that said receivers have in their possession a further fund which is held in a separate account which is entitled, "Horse Account," which was derived by the sale

by the receivers under order herein on October 5, 1914, of forty-one working horses in the possession of the receivers, and being part of the property covered by complainant's mortgage, the balance of which Horse Fund on September 11, 1917, the date of the receivers' fourth report, amounted to $8,015.57, and that under said order of October 5, 1914, the funds in the said Horse Account are held in a separate account, and held subject to the same lien and equities as the property sold;

And it further appearing that the complainant, as trustee under said mortgage or deed of trust, has in its possession moneys in the sinking fund provided for by said mortgage or deed of trust and which moneys were paid into said sinking fund of L. Wertheim Coal & Coke Company, as provided in and by said mortgage or deed of trust, and that said mortgage or deed of trust is a first and paramount lien upon moneys in said sinking fund and prior to the alleged lien or claim of Albert I. Drayton, trustee in bankruptcy of L. Wertheim Coal & Coke Company, or any of the creditors of L. Wertheim Coal & Coke Company represented by said trustee in bankruptcy;

And it further appearing that the defendant, Albert I. Drayton, trustee in bankruptcy of L. Wertheim Coal & Coke Company, has in his possession moneys derived from the collection of outstanding accounts and bills receivable due L. Wertheim Coal & Coke Company, or received by him from the receivers in bankruptcy of L. Wertheim Coal & Coke Company, which funds were by order of the United States District Court of New Jersey made on September 28, 1914, to be deposited in a special and separate account and to be held subject to the lien of complainant's

mortgage or deed of trust under foreclosure in this suit; and it further appearing that said moneys held by the said trustee in bankruptcy are subject to the lien of complainant's mortgage, and that said mortgage is a first and paramount lien thereon;

And it further appearing that by order of this Court made on November 16, 1914, it was ordered that all the books of account and all other books and records of the L. Wertheim Coal & Coke Company be delivered over to Albert I. Drayton, trustee in bankruptcy of L. Wertheim Coal & Coke Company, and that said order provided that the ultimate right to possession or disposition thereof was not determined thereby; and it further appearing that said books of account and all other books and records of L. Wertheim Coal & Coke Company are included in the property described in complainant's mortgage or deed of trust and are subject to the lien thereof;

And it further appearing that by order made herein on December 13, 1915, the said receivers were authorized in conjunction with the defendant, Lehigh Valley Railroad Company, to lease to E. L. Young Company for the period of six months, at the monthly rental of $100., all the right, title and interest of said receivers in and to the structures erected on the lands aforesaid, and that the tenant pay the rent reserved thereunder until the further order of this Court to the Clerk of the Court, there to be held subject to the disposition thereof by the decision of the Court in this cause, and that the making of said order and of the lease and the payment of the rent were to be without prejudice to the rights of the receivers or of any of the parties to this suit, and that by the orders of this Court of March 20, 1916,

Final Decree of Dec. 17, 1917 (for Complainant).

June 12, 1916, November 6, 1916, March 20, 1917 and May 15, 1917, the said lease was extended to December 16, 1917, and further extended for six months from December 16, 1917, and that the tenant has paid rental thereunder from December 17, 1915, at the rate of $100. per month, and is to pay further rent thereunder at the same rate, and that there is in the hands of the Clerk of this Court the sum of $2,300. as rent under said lease and continuation thereof, and that part of the said moneys collected and to be collected are subject to the lien of complainant's mortgage or deed of trust;

And it appearing that complainant is entitled to the relief sought and prayed for in its bill of complaint, and that complainant's mortgage or deed of trust ought to be foreclosed;

It is, on this seventeenth day of December, nineteen hundred and seventeen, by the Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREED:

That the defendant Lehigh Valley Railroad Company is not in lawful possession of the lands and any structures authorized to be removed by L. Wertheim Coal & Coke Company under the terms of the said leases of April 30, 1908 and June 12, 1906, included in and described in complainant's mortgage or deed of trust, and has not been in such possession since September 17, 1911, and acquired no rights or interests therein by reason of any default or forfeiture under the leases of the lands whereon the same are erected.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that complainant's mortgage or deed of trust, dated May 6, 1912, constitutes a valid and subsisting lien upon all and singular the property, goods and chattels mentioned and described

in the schedule annexed to complainant's mortgage or deed of trust and marked "Schedule A" and made a part of said mortgage or deed of trust, and in addition to the goods described in said Schedule A, also upon all the coal, supplies, goods, wares and merchandise, and all other tangible personal property, goods and chattels, right and franchises of any and every kind, name and nature which the said L. Wertheim Coal & Coke Company then had in its possession, or which it thereafter acquired either by way of renewal of the chattels above described or by way of additions thereto, and all the good will of the business then conducted and thereafter conducted and carried on by the said Company, as well as any and all trade names used by the Company, all books of account of any and every kind, name and nature, then owned and thereafter acquired or kept by said Company, in the conduct of its business; all bills and accounts receivable, notes receivable, promissory notes, checks, drafts, money claims, demands, choses in action, including all damages, collected from any common carrier or railroad company for violation, and all other property or things of value of any kind, name or nature, tangible, intangible, legal or equitable of which the Company then was possessed, or to which it thereafter became entitled, and also all the rights, privileges, franchises and immunities of the Company, including the right to be a corporation, insofar as it could be lawfully transferred and conveyed, and upon all moneys derived from the sale, collection or reduction to cash of any of said property, and that said lien of complainant's mortgage or deed of trust is prior and paramount to any and all other liens, rights or interests of the parties to this cause in and to said mortgaged property, and in and to

said moneys excepting only the lien of Lehigh Valley Railroad Company upon the proceeds of the sale to be made of any structures authorized to be sold and removed under the terms of the aforesaid leases, for the taxes and interest thereon paid by it as aforesaid upon said trestles, buildings and permanent structures, and interest on said taxes as hereinbefore specified.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that complainant's mortgage or deed of trust constitutes a valid and subsisting lien upon all moneys in the possession of complainant as trustee and constituting the sinking fund provided for in said mortgage or deed of trust, and that the said lien of complainant's mortgage or deed of trust upon said moneys in the sinking fund is prior and paramount to any and all other liens, rights or interests of the parties to this cause in and to said moneys,

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that there are issued and outstanding 240 of the bonds issued pursuant to the terms of complainant's mortgage or deed of trust, aggregating $240,000., each of the par value of $1,000. and interest thereon from April 1, 1914, and that the total amount due for principal and interest is two hundred and ninety three thousand six hundred dollars ($293,600.).

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that all and singular the said mortgaged property that has not been sold by the receivers in this cause, or so much thereof as may be necessary to raise the amount of principal and interest due thereon, the costs of this suit to be taxed, and of the execution of complainant's trust and all other expenses provided for under said mortgage or deed of trust, and the expenses of the

sale, be sold by or under the direction of Pierre F. Cook and Clarence M. Schwerin, receivers in this cause appointed by this Court, either at public or private sale, and in the event of public sale that they give public notice of the time and place of sale in such manner and for such length of time as may seem most for the interest of the parties; and that they forthwith after sale, make report thereof to this Court, and after their report of sale shall have been confirmed by this Court make and execute unto the purchaser or purchasers good and sufficient bills of sale for the said mortgaged property, upon their complying with the conditions of such sale.

AND IT IS FURTHER ORDERED, ADJUDGED AND DCREED, that the defendants, L. Wertheim Coal & Coke Company, and Albert I. Drayton, trustee in bankruptcy of L. Wertheim Coal & Coke Company, Lehigh Valley Railroad Company, and all persons claiming under, through or from them stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged property when sold as aforesaid.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that out of the proceeds of the sale of any structures authorized to be sold and removed under the terms of the aforesaid leases, and after confirmation thereof, that the receivers pay, first to defendants, Lehigh Valley Railroad Company, or its solicitors, the sum of $6,926.44, being the taxes paid by it as aforesaid on the leasehold aforesaid, together with interest at six per cent. per annum from November 12, 1917, and taxes for 1917 when paid by the Lehigh Valley Railroad Company.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the sum of $1,500.00 be allowed and

paid to Fisk and Fisk, the solicitors of complainant, and that the same be included in the taxed bill of costs, and that said taxed bill of costs and counsel fee, and complainant's taxed bill of costs on its answer to the cross bill of Lehigh Valley Railroad Company be paid by the receivers in this cause out of the moneys in their possession, and out of the proceeds of the sale of any structures authorized to be removed and sold under the terms of said leases.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Pierre F. Cook and Clarence M. Schwerin, receivers as aforesaid, make report showing the moneys in their possession arising from the sale of any structures authorized to be removed and sold under the terms of said leases, after paying the expenses of said sale, and showing the moneys in their "General Account" and in their "Horse Account" after making the payments herein ordered, and that said moneys after deducting such amounts as the Court may allow by way of receivers' allowance or otherwise, be paid by the receivers to the complainant or its solicitors, to be applied as provided in complainant's mortgage or deed of trust.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the defendant, Albert I. Drayton, trustee in bankruptcy of L. Wertheim Coal & Coke Company, 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 Company, or received by him from the receivers in bankruptcy of L. Wertheim Coal & Coke Company, and that Albert I. Drayton, trustee as aforesaid, after the allowance of said account, pay the amount shown thereby to the complainant or its

solicitors, to be applied as provided in complainant's mortgage or deed of trust.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Albert I. Drayton, trustee as aforesaid, deliver forthwith to the receivers herein, all the books of account and all other books and records which have come to the possession of said Albert I. Drayton, trustee as aforesaid, or which were delivered to him by the receivers in this cause.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the moneys in the possession of the Clerk of this Court arising from the rental of said lands and structures as aforesaid, be held by the Clerk pending the further decree of this Court as to the apportionment thereof between the complainant and Albert I. Drayton, trustee in bankruptcy as aforesaid, and that upon such decree the Clerk pay to the complainant, or its solicitors, its respective amount thereof to be applied as provided by said mortgage or deed of trust.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the sum of $1,500. be allowed and paid to Hartshorne, Insley & Leake, solicitors of defendants, William T. Payne and East Boston Coal Company, and that the same be included in the taxed bill of costs and be paid with said costs by the receivers in this cause out of the moneys in their possession and out of the proceeds of the sale of any structures authorized to be removed and sold under the terms of said leases.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the sum of $1,500. be allowed and paid to Vredenburgh, Wall & Carey, solicitors of defendants, Warren Delano and Mill Creek Coal Company, and that the same be included in the taxed bill of costs and be paid with said costs by

the receivers in this cause out of the moneys in their possession and out of the proceeds of the sale of any structures authorized to be removed and sold under the terms of said leases.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the sum of $500. be allowed and paid to Pierre P. Garven, solicitor of defendants, William Dann and Max Eisenstein, and that the same be included in the taxed bill of costs and be paid with said costs by the receivers in this cause out of the proceeds of the sale of any structures authorized to be removed and sold under the terms of said leases.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that complainant and the defendants, Lehigh Valley Railroad Company and Albert I. Drayton, trustee as aforesaid, each pay their own costs on the cross bill of Lehigh Valley Railroad Company.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that any of the parties are to be at liberty to apply to this Court as the occasion may require.

Respectfully advised.

VIVIAN M. LEWIS,
V. C.

Exhibit C-1.

THIS INDENTURE made the sixth day of May, in the year of Our Lord One Thousand Nine Hundred and Twelve, by and between L. WERTHEIM COAL & COKE COMPANY, a corporation duly created and existing under and by virtue of the Laws of the State of New Jersey, hereinafter called the Company, party of the first part, and the COMMERCIAL TRUST COMPANY OF NEW JERSEY, a corporation duly created and existing under and by

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virtue of the Laws of the State of New Jersey, hereinafter called the Trustee, party of the second part:

WHEREAS, the Company, for the purpose of raising money to make payment of certain claims, debts and obligations against it and other purposes and in the exercise of powers in that behalf possessed by it and in accordance with resolutions adopted by its Board of Directors at a meeting duly and regularly called and held on the twenty-second day of April, in the year nineteen hundred and twelve, and in accordance with resolutions duly adopted by its stockholders at a meeting duly and regularly called and held on the twenty-second day of April, in the year nineteen hundred and twelve, has determined to make and issue its coupon bonds in the aggregate amount of two hundred and fifty thousand dollars, payable in gold coin of the United States of the present standard of weight and fineness, such bonds to be coupon bonds of the par value of one thousand dollars each, and each of the bonds to bear a distinctive number and designation, beginning from one upwards, payable twenty years from the first day of April, nineteen hundred and twelve, and bearing interest at the rate of six per cent. per annum from said first day of April, nineteen hundred and twelve, and which said interest shall be payable semi-annually in like gold coin on the first days of October and April in each year; and

WHEREAS, the said Company, under and pursuant to the power and authority aforesaid, has determined to secure the prompt payment of the principal and interest of all said bonds by executing and delivering to the trustee a mortgage or deed of trust, in the terms of this indenture, conveying the properties hereinafter described and set forth, and to that end a mortgage or deed of

trust securing said bonds in the form of this indenture was submitted to, and approved by, the Board of Directors, and by the holders of the entire capital stock of the Company, at the above mentioned meetings of said Directors and said stockholders respectively, duly and regularly called and held for such purpose, and the President and Secretary of the Company were duly authorized at said meetings, on behalf of this Company, as its act and deed, and under its corporate seal, to execute, acknowledge and deliver the same to the Trustee; and

WHEREAS, the form of the bonds and of the coupons to be attached thereto, and of the certificate to be signed by the Trustee for the authentication of said bonds, were at said meetings severally and respectively submitted to and approved by said resolutions of the Board of Directors and of all the stockholders of the Company, and are substantially of the following tenor, to wit:

(Form of Bond.)

No..... $1000.

UNITED STATES OF AMERICA.

STATE OF NEW JERSEY.

L. WERTHEIM COAL & COKE COMPANY.

First Mortgage.

Total issue, $250,000.00 Six per cent. coupon bond.

KNOW ALL MEN BY THESE PRESENTS, that L. Wertheim Coal & Coke Company, a corporation of the State of New Jersey, hereinafter called the Company, for value received promises to pay to the bearer, one thousand dollars in gold coin of the United States of America, equal to the present standard of weight and fineness, on the first day of April in the year

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1932, at the office of the Commercial Trust Company of New Jersey, 15 Exchange Place, Jersey City, New Jersey, and to pay interest thereon from April 1, 1912, at the rate of six per cent. per anum, payable semi-anually in like gold coin, at said office, on the first days of October and April in each year, but only upon presentation and surrender of the annexed coupons as they severally mature.

Both principal and interest of this bond are payable without deduction for any tax or taxes of the United States or of any State, County or Municipality thereof, which the said Company may be required to pay or to retain therefrom, under any present or future law.

This bond is one of a series of bonds of the Company, issued to an amount of $250,000.00 all of which bonds are issued under and equally secured by a first mortgage or deed of trust dated May 6, 1912, executed by the Company to the Commercial Trust Company of New Jersey, as Trustee, to which mortgage or deed of trust reference is made for the description of the properties and franchises mortgaged, the nature and extent of the security, the rights of the holders of the bonds under the same, and the terms and conditions upon which the bonds are issued and secured.

This bond shall not become effective or obligatory for any purpose unless and until it shall have been authenticated by the Trustee, by certificate thereon endorsed by the said Trust Company as said Trustee.

This bond may be registered on the books of the Company at the office of the Company, by endorsement duly certified thereon.

Before such registration, the ownership shall pass by delivery, but after such registration certified thereon, the ownership shall not pass by delivery unless the last transfer on the books of the Company shall have been to bearer. This bond is subject to successive registration and transfer to bearer, at the option of the lawful bearer. The registration

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shall not affect the negotiability of the coupon.

This bond is subject to redemption on any interest day before maturity at par, with the interest then accrued to said interest day, under the operation of a sinking fund which requires the Company to pay two thousand dollars per month on account of the principal and interest of said bonds, in the manner and upon the terms and conditions set forth in the deed of trust above referred to, to all the terms of which reference is had and is also subject to redemption on the terms and in the manner provided in said deed of trust.

IN WITNESS WHEREOF, said L. WERTHEIM COAL & COKE COMPANY has caused these presents to be signed on its behalf by its President and its seal to be hereunto affixed, and attested by its Secretary, and coupons for said interest with the engraved signature of its Treasurer to be hereunto attached this first day of April, 1912.

L. WERTHEIM COAL & COKE COMPANY,
By Louis Wertheim,
President.

Attest:
Sanders Wertheim,
Secretary

(Form of Interest Coupon.)

No..... $30.00

L. WERTHEIM COAL & COKE COMPANY will pay to bearer, at the office of the Commercial Trust Company of New Jersey, in the City of Jersey City, New Jersey, on the first day of October, 1912, thirty dollars, in gold coin, being six per cent. interest, then due on its first mortgage six per cent. gold bond due 1932, No.....

Sanders Wertheim,
Treasurer.

(Form of Trustee's Certificate.)

This bond is one of a series of bonds described in the within-mentioned mortgage or

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deed of trust, executed by the L. Wertheim Coal & Coke Company to the undersigned as Trustee.

COMMERCIAL TRUST COMPANY OF N. J., Trustee,
By.....
Vice President.

NOW THEREFORE, this indenture witnesseth, that to secure the payment of the principal and interest of said bonds, according to their tenor and effect and to declare the terms and conditions upon which said bonds are to be issued, the Company, party of the first part, in consideration of the premises, and of the purchase and acceptance of such bonds by the holders thereof, and of the sum of one dollar, lawful money of the United States of America, to it duly paid by the Trustee, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has executed and delivered these presents, and has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred, pledged and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer, pledge and set over unto the party of the second part and to its successors or successor, in the trust hereby created, all and singular, the property, goods and chattels mentioned and described in the schedule annexed and marked Schedule "A", which is made a part of this Indenture, and in addition to the goods described in said Schedule "A", also all the coal, supplies, goods, wares and merchandise, and all other tangible personal property, goods and chattels, rights and franchises not hereinbefore conveyed, of any and every kind name and nature, which the said compay 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 ad-

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dition thereto, and all the good-will of the business conducted and to be conducted and carried on by the said company, as well as any and all trade names used by the company, all books of account of any and every kind, name and nature, now owned or which may hereafter be acquired or kept by the company, in the conduct of its business, all bills and accounts receivable, notes receivable, promissory notes, checks, drafts, money claims, demands, choses in action, including all damages, collected from any common carrier or railroad company for violation. If any laws of any State of the United States, or for any other cause whatsoever, said action or actions to be prosecuted by the L. Wertheim Coal & Coke Company until any default hereunder, and all other property or things of value of any kind, name or nature, tangible, intangible, legal or equitable of which the company may be possessed, or to which it may become entitled, also all the rights, privileges, franchises and immunities of the Company, including the right to be a corporation, in so far as it can be lawfully transferred and conveyed, excepting that the two leases made by the Lehigh Valley Railroad to the L. Wertheim Coal & Coke Company, dated respectively June 12, 1906 and April 30, 1908, are not to be included in this mortgage or deed of trust.

It is intended that the grants of the several classes of property contained in the Schedule and in the several paragraphs and sub-paragraphs hereinbefore set forth, shall each be construed and treated as separate and distinct grants, for the purpose of securing the bonds issued hereunder, the same as though each of the said classes of property were mortgaged and transferred to the trustee hereunder by a separate and distinct Indenture, so that if it should at any time

appear or be held that this indenture fails to transfer the title to said several and distinct classes of property, or any part thereof, as against the creditors of the said company, other than the holders of said bonds, said failure shall not operate to in any wise affect the transfer of the other classes of property, or any part thereof, but nothing herein contained shall be construed as requiring the trustee or bondholders to resort to any particular property for the satisfaction of the indebtedness hereby secured, in preference or priority to any other property hereby conveyed to it, but they may seek satisfaction out of all such property, or any part thereof, in its or their own absolute discretion.

TO HAVE AND TO HOLD the said good-will, personal property, rights, privileges, franchises, assets and appurtenances hereby conveyed and assigned unto the Trustee, and its successor or successors, in the trust hereby created, forever, but in trust, nevertheless, for the equal and proportionate benefit and security of any and all bonds issued hereunder, without regard to the number, so that each bond shall have, under and by virtue of this indenture, the same right, lien and privilege as any other bond issued hereunder, and as though all had been delivered simultaneously with the execution and delivery of this indenture.

AND IT IS FURTHER COVENANTED AND AGREED, that all said bonds hereby secured shall be issued, certified, delivered, received and negotiated, and the said mortgaged premises and property so conveyed, assigned and transferred, are to be held by the trustee, subject to the further covenants, conditions, uses and trusts hereinafter set forth, as follows:

All bonds to be secured hereby shall be signed by the President, under the corporate seal and

name of the Company, attested by the Secretary, and the coupons to be attached to said bonds shall be authenticated by the engraved signature of the Treasurer of the Company.

All of said bonds executed by the Company, shall be delivered to the Trustee to be authenticated by it.

Bonds to the amount of Two hundred and fifty thousand dollars with all coupons for interest thereto attached, shall forthwith be executed by the L. Wertheim Coal & Coke Company and delivered to the Trustee for authentication, and the Trustee shall immediately and without awaiting a recording of this Indenture, certify and deliver the same in accordance with an order in writing signed or purporting or believed by it to be signed by the President and Treasurer of the L. Wertheim Coal & Coke Company. The form of the Trustee's certificate shall be in the form heretofore referred to.

Only such bonds as shall bear thereon the certificate of the Trustee shall be secured by this Indenture or entitled to any lien or benefit thereunder, and such certificate upon any such bond shall be conclusive evidence that the bond so authenticated has been duly issued hereunder and is entitled to the benefit of the trust hereby created, the aggregate amount of all the bonds to be issued and outstanding under this Indenture shall not exceed at any one time the sum of two hundred and fifty thousand dollars.

The L. Wertheim Coal & Coke Company covenants and agrees that it will fully and entirely pay off and satisfy the whole of the said bonds, principal and interest according to the terms thereof, and that after the redemption or payment of any bond, no other bond shall be issued hereunder in place thereof.

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In case any bond issued hereunder, with a coupon, shall be lost, destroyed or mutilated, the Company may upon such terms and conditions as it may deem advisable to be prescribed by resolution of its Board of Directors, execute and issue in lieu of the lost, mutilated or destroyed bond, a new bond of like date, tenor and amount and bearing the same serial number, which bond when so issued, shall be certified by the Trustee without any liability on its part and be one of the series of the bonds prescribed herein, and the sole exclusive evidence to the Trustee of its duty to certify said new bond, shall be a certified copy of the resolution of the Board of Directors of the Company expressing that it has been proved to the satisfaction of said Board, that one of said series of bonds has been lost, mutilated or destroyed, and authorize the issue of and request the Trustee to certify said new or substituted bond.

The Company covenants that it will duly and punctually pay the principal and interest of every bond issued hereunder and secured thereby, at the dates and places and in the manner specified in said bonds, or in the coupons thereto belonging, according to the true intent and meaning thereof, without deduction from either principal or interest of any tax or taxes imposed by the United States, or any State, County or Municipality which the Company may be required to pay or retain therefrom, under and pursuant to any present or future laws.

The interest on the bonds shall be payable only upon presentation of the several coupons for such interest as they respectively mature, and when paid shall forthwith be cancelled.

The Company covenants that it is well seized of the property hereinafter described of a good,

sure and absolute estate, and that it is the sole owner thereof, and that the said property and rights are free and clear of any incumbrances, lien or charge, and that it will not create or suffer to be created any lien or charge having priority to or preference over the lien of these presents upon the said premises, or any part thereof, or upon the income therefrom.

And the company further covenants, that it will warrant and forever defend such property and rights against the claims of all and every person or persons claiming or to claim any part thereof.

The company from time to time will pay and discharge all taxes, assessments, governmental charges lawfully imposed upon the property hereby mortgaged, or upon any part thereof, and upon the income or portions thereof, the lien of which would be prior to the lien thereof, so that the priority of this indenture shall be fully preserved in respect to such properties.

The company shall also pay and discharge all taxes, assessments, governmental charges lawfully imposed upon the interest of the trustee, or any holder of any bond or bonds secured hereby on the mortgaged property; provided, however, that nothing contained in this section shall require the company to pay any such taxes, so long as the company in good faith and by appropriate legal proceedings shall test the validity thereof.

The company, upon written demand of the trustee, or its successor or successors, will make, execute, acknowledge and deliver, all such further acts, covenants, transfers and assurances in the law as may be reasonably advised, devised or required for effectuating the intents of these presents and for the better assuring and confirming unto the trustee, its successor or successors,

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in the trust hereby created, all and singular the property hereby conveyed, assigned and transferred to the trustee, or intended so to be.

The company agrees to at all times keep the trestle, buildings, fixtures, horses, wagons and all other tangible, destructible property covered by this indenture, insured in responsible and approved insurance companies, to at least eighty per cent. of its full insurable value, and to cause the policies for all such insurance to be made payable to the trustee hereunder, for the benefit of the holders of the bonds secured hereby, and will deliver to said trustee all such policies of insurance. If the Company shall fail to comply with this covenant the trustee may procure such insurance, and the sums paid therefor shall be a charge upon the mortgaged premises, prior and paramount to the bonds hereby secured.

The company agrees that it will at all times actively conduct and carry on the business for which it was incorporated and which it is now carrying on and conducting, and that it will keep and maintain in good repair and condition and in active operation its plant, yard and properties.

As a sinking fund for the payment of the indebtedness hereby secured, the company covenants and agrees that it will pay monthly to the said trustee beginning on the first day of May, nineteen hundred and twelve, and on the first day of each and every month in each and every year thereafter, until the bonds hereunder secured shall be all fully paid, both principal and interest, the sum of two thousand dollars per month, in lawful gold coin of the United States of the present weight and fineness, to be applied by the trustee on each interest day, to

wit, on the first day of October and the first day of April in each and every year thereafter, in payment of the interest on said bonds, and the balance in redeeming on each interest day as may of said bonds as the said monthly payments, with such interst as the trustee may receive thereon, will pay and redeem.

The bonds to be redeemed as above set forth shall be drawn by lot on the first days of each March and September, of each and every year, or on the next judicial day thereafter, by the President, Vice-President, or other executive officer of the trustee.

The Company shall advertise the numbers of the bonds so drawn, in a daily newspaper published in the City of Jersey City, once a week for two weeks, prior to the said first days of April and October then next ensuing, and a notice that interest on said bonds will cease on the said first days of April and October next ensuing and said notice shall require the said bonds to be presented for redemption. If any bond so drawn, shall be registered, similar notice shall be sent to the registered holder, at his address on the register. Interest upon such bond so drawn shall cease immediately on the first day of April or October first next ensuing, and upon presentation and surrender of such bond so drawn, with all unmatured coupons thereon, the holder of the said bond, or his heirs, executors, administrators or assigns shall be paid the par of said bond, with the accrued interest to the first day of April or October first next ensuing the drawing thereof. When so redeemed the said bond shall be immediately cancelled by the trustee and such evidence of cancellation be given to the company as may be necessary.

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In addition to the redemption of the bonds by the sinking fund as herein provided, the company shall have the right, at its option, to redeem all or any of the bonds of this issue, on any first day of April or October in any year until maturity, upon payment of the principal of the said bond or bonds with the accrued interest thereon to the date of redemption. And in case such option is exercised the provisions of the foregoing paragraph for the redemption shall apply to the redemption of such additional bonds.

No coupon belonging to any bond hereby secured, which in any way at or after maturity shall have been transferred or pledged, separate and apart from the bond to which it relates, shall, unless accompanied by such bond, be entitled, in case of a default thereunder, to any benefit of or from this indenture, except after the prior payment in full of the principal of the bonds issued hereunder and of all coupons and interest obligations not so transferred or pledged.

In case default shall be made in the payment of any interest on any bond or bonds hereby secured and oustanding, or in case default shall be made in the payment of any monthly sum to the trustee for the sinking fund as herein provided, and if any such default shall have continued for the period of ninety days, then and in every case of such continuing default the trustee shall, by notice in writing, delivered to the company, declare the principal of all the bonds hereby secured and then outstanding to be due and payable immediately; and upon such declaration by the said trustee the same shall become and be due and payable immediately, anything in this indenture or in the said bonds to the contrary notwithstanding.

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In case default shall be made in the payment of any interest hereby secured, and such default shall continue for a period of ninety days, and in case the default shall be made in the due and punctual payment of the principal of any bond hereby secured, or in case default shall be made in the payment of any monthly instalment to the trustee for the sinking fund herein provided, and shall continue for a period of ninety days, or in case default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by the company, and if such last-mentioned default shall continue for a period of six months after written notice thereof to the Company by the said trustee, and in every such case, either personally or by its attorney or agent, the said trustee may, in its discretion, enter upon the company's property and premises hereby conveyed, or which may at any time become subject to this indenture, and take possession of all the property of said company of every kind and description whatsoever, and exclude the officers, agents and employees of the company therefrom, and have, hold, use, operate and manage the same as the agent of the company, and conduct the business of the said company, execute contracts, perform all other duties, obligations and exercises of powers, privileges and franchises, in the same manner and to the same extent as the officers and agents of the company might do, and to manage the property and business and receive all earnings, incomes, issues and profits and every part thereof. Or the said trustee, in the name of the company, and as its attorney in fact for that purpose, by these presents duly constituted, may sell at public sale to the highest bidder, all and singular the good-will, rights, privileges, goods,

chattels and all other property held by or conveyed to it under this indenture, and all right, title and interest, claim and demand therein, to the right of redemption thereof, either in one lot as an entirety or in separate lots, as the trustee shall deem best, and in one sale or in any number of separate sales, held at one time or any number of times, and which said sale or sales shall be made at public auction at such place in the City of Jersey City in the State of New Jersey, and at such time and upon such terms as the trustee may fix, briefly specified in the notice of sale to be given or required by law, or proceed to protect or enforce the rights of the bondholders under this indenture by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement or in aid of the execution of any power herein granted, or for any foreclosure hereunder, or for the enforcement of any other appropriate legal or equitable remedy, as the trustee, being advised by counsel learned in the law, shall deem most effectual to enforce the rights aforesaid.

Notice of any sale by the trustee pursuant to any provision of this indenture shall state the time and place when and where the same is to be made, shall contain a brief general description of the property to be sold, and notice of the same shall be sufficiently given if published once a week for four successive weeks in two daily newspapers circulated in the City of Jersey City, in the State of New Jersey, anything in this indenture contained to the contrary notwithstanding. A copy of said published notice shall be mailed within one week from the date of the first publication to such bondholders as shall have registered their bonds.

The holders of two-thirds in amount of the

bonds hereby secured and then oustanding from time to time shall have the right to direct and control, subject to the limitations above described, the method and place of conducting any and all proceedings for any sale of the property hereby pledged, or for the foreclosure of this indenture, or for the appointment of a receiver, or for the taking possession of the assets and management of the business, or for any other purpose whatsoever.

The trustee from time to time may adjourn any sale or sales by it to be made under the provisions of this indenture, by announcement at the time and place appointed for such sale, and without further notice or publication it may make such sale or sales at the time and place to which the same shall be as adjourned.

Upon the completion of any sale or sales under this indenture, the trustee shall execute and deliver to the accepted purchaser or purchasers, all such deeds, conveyances, bills of sale or other instruments in writing as may be requisite, convenient, necessary and desirable to vest in the purchaser or purchasers complete title to the property sold.

The trustee, its successor or successors, are hereby appointed the true and lawful attorney or attorneys, irrevocably, in the name of the company, in its stead or otherwise, to make, execute, acknowledge and deliver all such deeds, conveyances, bills of sale or other written instruments, hereby ratifying and confirming all that its said attorney or attorneys shall lawfully do by virtue hereof.

Any such sale made under or by virtue of this indenture, whether made under the power of sale hereby granted or conferred under and by virtue

Exhibit C-1.

of judicial proceedings so brought and advised, and all right, title, interest, claim and demand whatsoever, either at law or in equity of the company acquired thereunder of, in and to the property so sold, shall be a perpetual bar both at law and in equity against the company, its successors and assigns and against any and all persons claiming or to claim the property so sold, or any demand thereto from, through or under the company, its successors or assigns, and the receipt of the trustee for the consideration money paid at any such sale or sales shall be sufficient discharge to the purchaser without any liability upon the purchaser to see to the application of the purchase money or to be bound to inquire as to the authorization, necessity, expediency or regularity of any such sale or sales.

The purchase money and proceeds of any such sale or sales, together with any sums which may then be held by the trustee, under any of the provisions of this indenture, shall be applied as follows: First, to the payment of the costs and expenses of the sale, including a reasonable compensation to the trustee, its agents, attorneys and counsel, and all other expenses, liabilities or advances made or incurred by the trustee; second, to the payment of the whole amount then owing or unpaid upon the bonds hereby secured for both principal and interest; and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon said bonds, then to the payment of such principal and interest without preference or priority of principal over interest or of interest over principal, equally and pro rata, to the said bondholders. If there shall be sufficient to pay in full the whole amount due upon said bonds in full for principal and interest, then the surplus, if any, shall be returned to the

company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same.

In case of any sale hereunder, any purchaser, for the purpose of making settlement of payment for the property purchased, shall be entitled to use and apply any bonds not matured and unpaid coupons hereby secured, by presenting such bonds and coupons, in order that there may be credited thereon the sums applicable to the payment thereof out of the net proceeds of said sale, and as much of said bonds and coupons as is his rightful share of said net proceeds, after making the deductions for the costs, expenses, compensation and other charges as above provided, and thereupon such purchaser shall be credited on account of such purchase price payable by him with the sums applicable to such proceeds out of the bonds and coupons so presented.

The said company shall have the right at any time to surrender, but with the consent of the trustee, possession of all the properties hereby conveyed and to authorize the trustee to proceed to dispose of the same in such manner as may be lawful and proper, and apply the proceeds of said disposition to the satisfaction and payment of the principal and interest of the said bonds secured hereby.

The Trustee shall be entitled to obtain judgment for the enforcement of the lien of this indenture on the pledge property and shall be entitled to the appointment of a receiver on any default as provided herein.

The holders of a two-thirds in amount of the bonds issued and outstanding are hereby given the absolute right to control the action of the trustee in the enforcement or waiving of any of

the provisions of this indenture, except payments required to be made for the sinking fund, which cannot be waived by bondholders or trustee.

No remedy herein contained, conferred upon or reserved to the trustee, or to the holders of bonds hereby secured, is to be exclusive of any other remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given hereunder or hereafter existing, in law or at equity, or by statute.

No recourse under or upon any obligation, covenant or agreement in any bond or coupon hereby secured, or cause of the creation of any indebtedness hereby secured, shall be made against any incorporator, stockholder, officer or director of the company, either directly or through the company, or by the enforcement of any assessment, or by any legal or equitable proceeding by virtue of any statute or otherwise, it being hereby agreed and understood, that this mortgage and the obligations hereby secured, are solely corporate obligations, and that no personal liability whatever shall attach to or be incurred by any incorporator, stockholder, officer or director of the company, or any of them, because of the incurring of the indebtedness hereby authorized, or under or pursuant to any of the obligations, covenants or agreements herein contained or implied herefrom, and any and all rights or claims against every said incorporator, stockholder, officer, or director whether arising at common law or in equity or created by statute, are hereby expressly released and waived as a condition of and as a part of the consideration for the execution of this indenture, and of the issuing of the bonds and interest obligations secured hereby.

From time to time the holders of two-thirds in

Exhibit C-1.

amount of all the bonds hereby secured, and for the time being outstanding, by their votes at a meeting of the bondholders, by instrument in writing signed by such holders, shall have the power, with the written approval of the said Commercial Trust Company of New Jersey, as trustee, to modify, change or alter any of the provisions of this instrument except the provisions relating to the monthly payments for the sinking fund, and any such action taken shall be binding upon the holders of all the bonds hereby secured, and upon the trustee, as fully as though such action were specifically and expressly authorized by the terms of this indenture.

If at any time any of the property described herein cannot be advantageously used in the proper and judicious operation of the business of the Company, or if the sale or disposition thereof has become necessary or advisable for any cause, the same, or any interest therein, may be sold or exchanged with the consent of the trustee, which consent the trustee is hereby authorized to give upon order of the board of directors of the L. Wertheim Coal & Coke Company.

While in possession of the mortgaged premises, the company shall have full power in its discretion, from time to time, and in the ordinary course of its business, to use, dispose of, free from the lien of this indenture, any portion of the machinery, tools, fixtures, coal, book accounts, or any other of the goods or chattels described herein, and to apply and use the proceeds of sale or any money collected from book accounts in the ordinary course of its business, and the lien of this mortgage shall extend to any goods and chattels which may be acquired to replace such goods and chattels so sold as aforesaid.

It is further covenanted and agreed, and this

trust is accepted, upon the express condition that neither the said trustee, nor any successor in the trust, shall incur any responsibility or liability whatsoever, except for its wilful or intentional breach of the trust herein expressed and conveyed, and the said trustee shall not at any time be bound or required to undertake any proceeding at law or in equity, nor do anything for the protection of the bondholders, involving expenditures of or liability for the payment of money, unless adequate indemnity against such liability or outlay be first furnished it by the bondholders, or some of them.

The trustee may select and employ, in and about the execution of this trust, suitable agents, and attorneys, whose reasonable compensation shall be paid to the trustee by the company, or in default of such payment, shall be a charge against the premises and upon the property hereby pledged and the proceeds thereof, paramount to the said bonds.

The trustee shall not be responsible for the recording or filing of this indenture, and the bonds secured hereby may be authenticated and delivered by the trustee prior to any such proceeding or recording.

The trustee shall not be under obligation to effect insurance upon the property, unless requested so to do and furnished funds for that purpose, and the trustee shall have a first lien upon the property and the funds deposited with it monthly for sinking funds, for its reasonable expenses, counsel fees and compensation incurred in and about the execution of the trust hereby created, and the exercise and performance of its powers and duties hereunder, and the said trustee shall have the right to pay out of the moneys paid

Exhibit C-1.

to it for said monthly instalments as provided herein all such expenses, counsel fees and compensation.

The trustee shall be under no obligation to perform any act or defend any suit unless requested so to do by two-thirds of the bondholders, and the said trustee shall be entitled to first receive from the said bondholders proper and reasonable indemnification for all expenses, damages and claims of every kind whatsoever.

The trustee shall not be bound to recognize any person as a bondholder unless the bonds are submitted to the trustee for inspection, if required, and his title satisfactorily established, if disputed.

The recital of facts contained in the mortgage and in the bonds secured thereby, shall be taken as statements of the company and shall not be construed as statements of the Trustee.

It shall not be part of the duty of the Trustee to keep itself informed and advised as to the payment of the taxes or assessments that may be imposed upon the property affected by the mortgage, or to require the payment of such taxes and assessments.

The Trustee shall be protected in any action taken by it upon any notice, request, consent, certificate, bond or other paper or document believed by it to be genuine and to have been signed by the persons whose names are appended thereto.

The Trustee or its successor or successors may resign and be discharged of the trust hereby created, by written notice thereof to the company and by publication at least twice in each week for two successive weeks in a daily newspaper, published in the City of Jersey City.

The Trustee or any Trustee hereinafter appointed may be removed at any time by an in-

strument in writing, signed by the holders of not less than two-thirds in amount of the bonds hereby secured and then oustanding and signed also by the L. Wertheim Coal & Coke Company. In case the Trustee or any Trustee hereinafter appointed shall resign or shall be removed or shall otherwise become incapable of acting, a successor may be appointed by the holders of two-thirds in amount of the bonds hereby secured and then outstanding, by an instrument signed by such bondholders or their attorneys in fact, duly authorized, provided, however, that it is agreed that in case at any time there shall be a vacancy in the office of the Trustee hereunder, the L. Wertheim Coal & Coke Company, by an instrument executed by its Board of Directors, may appoint a Trustee to fill such vacancy until a new Trustee shall be appointed by the bondholders as herein authorized. Every such Trustee appointed by the bondholders or by the L. Wertheim Coal & Coke Company shall always be a Trust Company in Jersey City in good standing, if there be such trust company, willing and able to accept the trust upon reasonable or customary terms. Any new Trustee appointed hereunder shall execute and deliver to the Trustee in office and also to the L. Wertheim Coal & Coke Company, an instrument accepting such appointment and thereupon such new Trustee without any further act, or conveyance shall become vested with all the estates, properties, rights, powers, trusts, duties and obligations of its predecessor, with like effect, as if originally named as Trustee herein, but the Trustee ceasing to act, shall nevertheless, on the written request of the L. Wertheim Coal & Coke Company or of such new Trustee, execute and deliver an instrument transferring to such new Trustee upon the trusts herein expressed, all the

estates, properties, rights, powers and trusts of the Trustee so ceasing to act and shall duly assign, transfer and deliver all properties and moneys held by such Trustee to the new Trustee. Should any deed, conveyance or instrument in writing be required from the L. Wertheim Coal & Coke Company by any new Trustee for the more and fully certainly vesting in and confirming to such new Trustee, such estate, rights, powers and duties, any and all such deeds, conveyances and instruments in writing, shall on request be made, executed and acknowledge and delivered by the said L. Wertheim Coal & Coke Company.

If, when the bonds hereby secured shall have become due and payable, the Company shall well and truly pay, or cause to be paid, the whole amount of the principal, moneys and interest due upon all the bonds and coupons for interest thereon, hereby secured, then outstanding, or shall provide for such payment by depositing with the trustee hereunder for the payment of such bonds and coupons, the entire amount then due thereon for principal and interest, and also shall pay or cause to be paid all other sums payable hereunder by the Company, and shall well and truly keep and perform all the things herein required to be kept and performed by it, according to the true intent and meaning of this indenture, then and in that case all the property, rights and interest hereby conveyed or pledged shall revert to the Company and the estate, right, title and interest of the trustee shall thereupon cease, determine and become void; and the trustee in such case, upon demand of the company, and at its cost and expense, shall execute proper instruments acknowledging satisfaction of this indenture and such deeds of release or conveyance as

shall be necessary, proper or requisite to revest in the Company the property then subject to this indenture free and discharged from the lien thereof.

IN WITNESS WHEREOF, the said L. Wertheim Coal & Coke Company, party of the first part, has caused its corporate seal to be hereunto affixed and the same to be attested by the signatures of its President and Secretary; and the said Commercial Trust Company of New Jersey, party of the second part, has caused its corporate seal to be hereunto affixed and the same to be attested by the signatures of its President and Secretary to designate its acceptance in the said trust, the day and year first above written.

L. WERTHEIM COAL & COKE COMPANY,
By Louis Wertheim,
President.
(Seal.)

Signed, sealed and delivered
in the presence of
SANDERS WERTHEIM,
Secy.

COMMERCIAL TRUST COMPANY OF N. J.
By W. Hardenbergh,
President.

W. J. FIELD,
Secy.
(Seal.)

(There is attached to the mortgage a schedule describing the mortgaged property in identical form with the schedule attached to the bill of complaint.)

Received in the office of the Register of the County of Hudson, N. J., at 3:25 P. M., May 6, 1912, and recorded in Book 305 of Chat. Mtgs. for said County on page 135.

JOHN J. MCMAHON,
Register.

Exhibit C-2.

Trustee's record of certification and delivery of bonds.

Exhibit C-3.

Order from Wertheim Company to Commercial Trust Company, Trustee, to deliver bonds.

Form printed in testimony at page 97.

Exhibit C-4.

Form of bond secured by mortgage.

Printed as part of mortgage. See page C-1.

Exhibit C-5.

Trustee's record of payment into sinking fund.

Exhibit C-6.

Trustee's notices of drawing of bonds and publication of redemption notices.

See testimony, page 99.

Exhibit C-7.

Trustee's notice of redemption of bonds.

Exhibit C-8.

Trustee's notice declaring principal of all bonds due.

Exhibit E-1.

Order of U. S. District Court, District of New Jersey in re *L. Wertheim Coal & Coke Company, Bankrupt,* dated September 17, 1914, appointing Ralph H. Perry receiver.

Exhibit E-2.

Order of U. S. District Court, District of New Jersey, in same proceeding, dated November 6, 1914, appointing Albert I. Drayton trustee in bankruptcy.

Exhibit E-3.

Order in same proceedings, dated November 7, 1914, approving trustee's bond.

Exhibit E-4.

On December 1, 1907, new stock was issued as follows:

Certificate No.	29	to William Dann ...	299 shares
"	"	30 to Max Isenstein ...	144 "
"	"	31 to Otto Isenstein ...	94 "
"	"	32 to Louis Wertheim ..	44 "
"	"	33 Sanders Wertheim ..	44 "
			625 "

On same date, December 1, 1907, preferred stock was issued as follows:

Certificate No.	P-1	William Dann.....	500 shares
"	" P-2	Max Isenstein.....	300 "
"	" P-3	Max Isenstein.....	160 "
"	" P-4	Max Isenstein.....	60 "
"	" P-5	Louis Wertheim.....	160 "
"	" P-6	Otto Isenstein.....	100 "
"	" P-7	Otto Isenstein	60 "
"	" P-8	Sanders Wertheim...	160 "
			1500 "

On March 17, 1908, Otto Isenstein surrendered Certificate P-7 for 60 shares and there was issued to Otto Isenstein Certificate P-9 for 40 shares and P-10 to Otto Isenstein for 20 shares.

On March 17, 1908, Certificate P-4 to Max Isenstein for 60 shares, and Certificate P-9 to Otto Isenstein for 40 shares were transferred and a new certificate issued P-11 to Martha Isenstein Davidsohn for 100 shares.

Exhibit E-4.

October 13, 1908, Otto Isenstein resigned as a director (page 108).

Certificate P-10 to Otto Isenstein, 20 shares, is endorsed in blank under date of October 1, 1908, but was not surrendered for reissue until December 20, 1909.

On December 20, 1909, all preferred stock held by Dann and Max Isenstein, as well as 20 shares standing in the name of Otto Isenstein (Certificate No. 10) were transferred equally to Louis Wertheim and Sanders Wertheim, 490 shares to each.

This put all preferred stock in the name of Louis and Sanders Wertheim except 100 shares held by Otto Isenstein and 100 shares held by Martha Isenstein Davidsohn.

On December 17, 1909, the Dann and Isenstein common stock was transferred to Louis Wertheim and Sanders Wertheim, 481 shares each, who separated from their own shares the stock issued the same day to Delano, Payne and Van Buskirk.

On December 21, 1910, a special meeting of stockholders was held for the purpose of reducing the stock issue (page 38, Stockholders' Minute Book) which recites stockholdings then as follows:

Name	Common Stock	Preferred Stock
Louis Wertheim	612	650
Sanders Wertheim	612	650
William T. Payne	8	—
Warren Delano	8	—
Otto Isenstein	—	100
Martha I. Davidsohn	—	100

It was resolved to reduce the capital from $275,000 (being $150,000 preferred and $125,000

common) to $150,000 all common, by the retirement and cancellation of the present common stock and exchanging the present preferred stock for new common stock, share for share.

This was not carried into effect until September 20, 1911, when new common stock was issued as follows:

Certificate No.	4	Louis Wertheim.....	160	shares
" "	11	Louis Wertheim.....	477	"
" "	5	Sanders Wertheim....	160	"
" "	12	Sanders Wertheim....	477	"
" "	6	Warren Delano	8	"
" "	7	William T. Payne....	8	"
" "	8	DeWitt Van Buskirk..	8	"
" "	9	Saul Wertheim.....	1	"
" "	10	Benjamin Wertheim ..	1	"
" "	13	Otto Isenstein.....	100	"
" "	14	Otto Isenstein.....	100	"

This is the present outstanding stock issued.

Exhibit E-5.

THE AUDIT COMPANY OF NEW YORK.

165 Broadway

The certificates or reports upon audits or examinations made by the Audit Company of New York are delivered to clients with the understanding in each case that any advertisement or publication of such certificates or reports, or published reference thereto, shall be in a form to be approved by the president of this Company.

Warren Delano, Esq., President,
Mill Creek Coal Company,
1 Broadway, New York City.

Dear Sir:

Agreeably to your request, we have examined the books and accounts of L. Wertheim Coal and

Exhibit E-5.

Coke Company of Jersey City for the year ending December 31, 1909.

The results of this examination are presented, attached hereto, together with our comments upon the examination, in two exhibits and accompanying schedules, as follows:

Exhibit

"A" Balance sheet as of December 31, 1909.

Schedule

1.—Statement showing adjustments applied to surplus account as of December 31, 1908.

"B" Income account for the year ending December 31, 1909.

Very truly yours,

THE AUDIT COMPANY OF NEW YORK,

A. W. DUNNING,

President.

G. H. Bowers,

Secretary.

New York, February 28, 1910.

THE AUDIT COMPANY OF NEW YORK.

Report on L. Wertheim Coal and Coke Company.

Comments upon the Examination.

Plant and Property:

The value of the plant and property is presented as shown by the books without any appraisal having been made by us. In this respect we acted in accordance with your instructions.

The value of the leasehold should be written off during the life of the lease in an equal amount each year. A uniform annual reserve for depreciation should be set aside to provide for impairment in the value of the plant and equipment. Such a

method is preferable to the arbitrary amounts such as you have charged off.

Good-Will:

The Capital Stock liability as shown by the company's ledger is $150,000.00, while that shown by the certificate books is $150,000.00 preferred and $125,000.00 common.

The offset to the common stock liability on the accompanying balance sheet is the item of good-will with a like amount.

Accounts Receivable:

Statements showing the balances due as of December 31, 1909 were sent to all customers who had not paid their accounts up to this date before February 14, 1910. Of one hundred and two statements sent, thirty-five minor differences. firmed to date and five report minor differences. The doubtful accounts receivable aggregate as amount of $2,185.87, for which a reserve is shown on the accompanying balance sheet.

Mortgage Owned:

This mortgage is presented, as shown by the books, without our having inspected the same. We are informed that it is a mortgage made by W. D. Adams to secure his account and has been turned over to Mr. Delano to sell.

Inventory of Coal and Coke on Hand:

This amount is the result of a careful calculation made by us of the cost of coal and coke on hand on the trestle and is based on the inventory shown by the books as of December 31, 1908. The accuracy of this amount is dependent upon the accuracy of the inventory at the beginning of the period.

Exhibit E-5.

Cash:

The cash in bank and on hand, amounting to $8,519.35, was confirmed by us. The amount shown by the check book was reconciled with a certificate received from the bank. The amount on hand was counted. Disbursements during the period under review are not made on vouchers and, in many cases, receipts are not on file. A complete verification of the cash is, therefore, impossible.

Surplus:

The surplus shown in the accompanying balance sheet, as of December 31, 1908, contains entries made in a period prior to our examination, as follows:

Surplus credited and plant debited	$41,035.00
Surplus credited and leasehold debited..	63,250.00
Surplus credited and stables debited....	5,000.00
	$109,285.00
Capital stock credited and surplus debited	$37,500.00

It will be noted in the accompanying balance sheet that, while dividends in an amount of $10,500.00 have been paid since August 1908, $9,590.00 of this amount has been returned to the company.

Recommendations:

The present system of accounts of the Company is cumbersome and requires more clerical work than is necessary. The installation of a modern system of accounting with a proper classification of accounts would enable the officials to obtain monthly statements from the books, which would show the result of operations.

New York, February 28, 1910.

Exhibit E-5.

THE AUDIT COMPANY OF NEW YORK.

Report on L. Wertheim Coal and Coke Company.

EXHIBIT "A".

Balance Sheet as of December 31, 1909.

	ASSETS:		
	Plant and Property as per Books:		
10	Plant consisting of trestle, buildings, machinery, etc.	$116,729.00	
	Equipment consisting of horses, wagons, harness, tools, etc.	80,248.70	
	Office furniture and fixtures	1,500.00	$198,477.70
	Leasehold as per Books (Capitalized Value of Ground Lease—25 Years from November 1, 1906) ..		135,000.00
	Good-Will		125,000.00
	Inventory and Current Assets:		
	Coal and Coke on hand (Cost on trestle)	21,632.75	
	Cash	8,519.35	
	Accounts Receivable:		
	Good $60,002.53		
20	Doubtful 2,185.87	62,188.40	
	Mortgage Owned	4,000.00	
	Notes Receivable	846.09	97,186.59
	Deferred Charges to Operation:		
	Interest prepaid on Notes Payable	7,047.93	
	Repair and construction supplies on hand (estimated)	1,500.00	
	Insurance premiums unexpired ...	1,170.52	
	Horse feed, straw, etc., on hand ..	491.90	
	Ferry Tickets on hand (estimated)	200.00	10,410.35
			$566,074.64

30

40

Exhibit E-5.

THE AUDIT COMPANY OF NEW YORK.

Report on L. Wertheim Coal and Coke Company.

Balance Sheet as of December 31, 1909.

EXHIBIT "A".

LIABILITIES:			
Capital Stock:			10
1,500 shares preferred at par value of $100.00		$150,000.00	
1,250 shares common at par value of $100.00		125,000.00	$275,000.00
Current Liabilities:			
Accounts Payable		63,162.06	
Notes payable		99,216.45	162,378.51
Reserve for Doubtful Accounts Receivable			2,185.87
Surplus:			
Balance, Dec. 31, 1908, as adjusted		136,587.07	
Deduct:			
Reserve for Doubtful Accounts Receivable	$2,185.87		20
Arbitrary Amn't charged off by Company for Depreciation of Plant and Equipm't May 1, 1909.	7,343.15		
Dividends Paid:			
Aug. 1908	$2,625.00		
Dec. 1908	2,625.00		
Mch. 1909	2,625.00		
June 1909	2,625.00		
	10,500.00		
Dividend checks returned in Aug. '09	9,590.00	910.00	10,439.02
		126,148.05	
Add—Net Profit, Year end'g December 31, 1909 before deducting Depreciation, if any—See Exhibit "B"		362.21	30
Balance December 31, 1909			126,510.26
			$566,074.64

Subject to Contingent Liability as follows:

Notes issued to Max Isenstein and William Dann in part payment for stock of the L. Wertheim Coal and Coke Company assigned by them to Messrs. L. and S. Wertheim, signed by this corporation and endorsed by Messrs L. and S. Wertheim $31,900.00 40

Exhibit E-5.

Demand note held by Mill Creek Company to secure money borrowed to pay Max Isenstein and William Dann on account of stock purchased from them by Messrs. L. and S. Wertheim.	20,000.00
Total (including interest)	$51,900.00

This Exhibit is subject to our Comments upon the Examination, dated February 28, 1910.

Exhibit "A"

THE AUDIT COMPANY OF NEW YORK.

Report on L. Wertheim Coal and Coke Company.

EXHIBIT "A"—SCHEDULE 1.

Statement Showing Adjustments Applied to Surplus Account as of December 31, 1908.

	Debit.	Credit.
Balance per books December 31, 1908, after eliminating dividends paid in August and December of 1908, amount to $5,250.00 as they are shown separately on Exhibit "A"		$128,351.99
Adjustments shown in Books August 31, 1909; Items charged to Expense Account prior to December 31, 1908, which should have been charged:		
Plant: $1,729.00		
Equipment 4,598.75		6,327.75
Adjustments by Accountants:		
1908 Freight Charges paid and charged in 1909	4,638.44	
Net adjustment of inventory as of December 31, 1908.....		10,156.00
1908 taxes not entered in books	1,388.16	
Interest charges applicable to 1908..	4,337.61	
Interest prepaid as of Dec. 31, 1908		2,083.97
Wages paid January 1, 1909, applicable to 1908	799.52	
Expense items applicable to 1908 charged in 1909	338.40	
Coal sold in 1908 and returned in 1909	330.51	
Estimated cost of materials and supplies for construction and maintenance purposes, no inventory December 31, 1908, but about same stock is carried at all times		1,500.00
Adjusted Balance—See Exhibit "A"..	136,587.07	
	$148,419.71	$148,419.71

This Exhibit is subject to our Comments upon the Examination, dated February 28, 1910.

Exhibit "A"—Schedule 1.

Exhibit E-5.

THE AUDIT COMPANY OF NEW YORK.

Report on L. Wertheim Coal and Coke Company.

EXHIBIT "B".

Income Account for the Year Ending December 31, 1909.

Total Sales:		
101,082.05 gross tons coal..... }		
797.14 net tons coke..... }	398,375.55	
5½ cords wood..... }		
Deduct—Cost of coal, coke and wood sold	281,371.34	
Gross Profit on Sales (average of $1.15 per ton		117,004.21
Other Income:		
Hire of teams, fees for weighing, etc.	139.94	
Items of over-payment on customers' accounts	13.87	153.81
		117,158.02
Deduct:		
Expenses:		
Wages of drivers, laborers, foreman, weighmaster, etc.	35,550.63	
Feed for horses	18,974.82	
Stable supplies and veterinary.....	1,107.59	
Repairs and maintenance of Equipment	1,399.55	
Light, heat and power	461.88	
Ferriage	11,269.92	
Truck hire and carting	573.50	
Commissions	10,009.95	
Salesmen's salaries and Expenses..	2,409.37	
Officers' salaries	19,541.62	
Taxes (1909)	1,351.44	
Office help	1,382.02	
Insurance	2,487.77	
New York office rent	600.00	
Telephone	948.22	
Water taxes	213.60	
Office supplies and stationery	405.13	
Collecting bad debts	196.90	
Miscellaneous items	1,424.94	110,308.85
Net Profit before deducting Interest Charges and Loss of Bad Debts		6,849.17
Deduct:		
Interest on borrowed money	5,512.45	
Bad accounts charged off	974.51	6,486.96
Net Income—Year ending December 31 1909. —Subject to depreciation, if any—See Exhibit "A"		$362.21

This Exhibit is subject to our Comments upon the Examination, dated February 28, 1910.

Exhibit "B"

Exhibit E-6.

THE AUDIT COMPANY OF NEW YORK. Report on L. Wertheim Coal & Coke Co.

EXHIBIT "A" *Balance Sheet as of March 31, 1911.*

ASSETS.			LIABILITIES:			
Plant as per Books:			**Capital Stock:**			
Trestle, buildings, machinery, etc...	$119,562.50		1,500 Shares preferred, par value $100.00 each		$150,000.00	
Horses, wagons, harness, tools, etc...	93,391.74		1,250 Shares common, par value $100.00 each		125,000.00	$275,000.00
Office furniture and fixtures	1,476.88	$214,431.12				
Leasehold as per books:			**Current Liabilities:**			
Period expired 4 years, 5 months, period to run 20 years, 7 months to November 1, 1931		135,000.00	Accounts Payable		54,291.90	
Good-will, as per books		125,000.00	Notes Payable		253,557.75	
L. and S. Wertheim		51,900.00	Wages		1,058.47	308,908.12
Mortgage, as per books		4,000.00				
Inventory and Current Assets:			**Reserve for Doubtful Accounts and Notes Receivable:**			10,000.00
Coal and Coke	33,811.37		**Surplus:**			
Supplies	5,593.00		Balance, December 31, 1909		128,696.13	
Cash	3,897.01		Deduct:			
Accounts Receivable:			Loss for 15 months to March 31, 1911	$18,789.39		
Good $92,296.28			Reserve for Doubtful Accounts	10,000.00	28,789.39	99,906.74
Doubtful 17,077.46						
	109,373.74					
Notes receivable—W. D. Adams, due in 1909	520.28					
		153,195.40				
Deferred Charges to Operation:						
Unexpired proportion of interest included in Notes Payable	8,695.53					
Unearned Insurance Premiums	1,084.48					
Ferry Tickets on hand (estimated) ..	300.00					
Rent of Harlem Yard paid in advance, Unexpired Proportion	208.33	10,288.34				
		$693,814.86				$693,814.86

This Exhibit is subject to our Comments upon the Audit, dated June 6, 1911.

Exhibit E-6.

EXHIBIT "A"

THE AUDIT COMPANY OF NEW YORK.

Report on L. Wertheim Coal & Coke Co.

EXHIBIT "B"

Income Account for the Fifteen Months ending March 31, 1911.

Gross Sales	$567,865.42	
Deduct—Allowances and Cash Discounts	1,244.88	
Net Sales	566,620.54	
Cost to Purchase Plus Freight	423,461.39	
Gross Profit on Sales		$143,159.15
Expenses:		
Labor	59,411.09	
Depreciation and Maintenance, as per books	15,849.91	
Fodder, Bedding and Stable Supplies	17,904.91	
Light, heat and Power	767.51	
Ferriage	15,286.72	
Truck Hire and Carting	3,363.67	
Salesmen's Commissions, Salaries and Expenses	12,752.34	
Officers' Salaries	11,936.64	
Taxes for the year 1910 on property leased from Lehigh Valley Railroad Company	1,425.00	
Officers' Salaries	2,796.37	
Insurance	2,560.42	
Telephone and Postage	1,079.80	
Office Supplies and Expense	899.31	
Rent, Harlem Yards	802.73	
Miscellaneous	4,416.46	
Interest	10,685.66	161,948.54
		$ 18,789.39

This Exhibit is subject to our Comments upon the Audit, dated June 6, 1911.

Exhibit E-6.

EXHIBIT "B"

THE AUDIT COMPANY OF NEW YORK.

165 Broadway

The certificates or reports upon audits or examinations made by the Audit Company of New York are delivered to clients with the understanding in each case that any advertisement or publication of such certificates or reports, or published reference thereto, shall be in a form to be approved by the president of this Company.

WARREN DELANO, ESQ.,
President, Mill Creek Coal Company,
1 Broadway,
New York City.

Dear Sir:

Agreeably to your request, we have made a general audit of the books and accounts of the L. WERTHEIM COAL & COKE CO. of Jersey City for the fifteen months ending March 31, 1911.

The results of this audit are presented, attached hereto, together with our Comments upon the Audit in three Exhibits, as follows:

Exhibit
"A"—Balance sheet as of March 31, 1911
"B"—Income account for the fifteen months ending March 31, 1911
"C"—Adjusting journal entries necessary to bring the books into agreement with our report

Very truly yours,
THE AUDIT COMPANY OF NEW YORK
G. W. Bowers,
Secretary.

A. W. Dunning,
President.

New York, June 6, 1911.

THE AUDIT COMPANY OF NEW YORK.
Report on L. Wertheim Coal & Coke Co.
COMMENTS UPON THE AUDIT

Exhibit E-6.

Plant and Property:

The value of the plant and property is presented, as shown by the books, without a physical appraisal having been made by us.

During the period under review there was charged to the Plant Account the sum of $5,000.00 for the purchase of the McWilliams Coal Plant and Lease at East 115th Street, New York City. We could not obtain any information from the Company as to what this property consisted of.

On April 30, 1910 there was written off this account the sum of $2,729.00 without supporting explanation.

During the period under review there has been charged to the Equipment Account an aggregate of $26,059.90, which covers not only the additions of the new equipment but the repairs and maintenance of the old equipment as well. Of the above amount $13,143.04 was subsequently written off.

Inasmuch as the Company manufactures much of its additional equipment, as well as repairing the old equipment and keeps no reliable record as between additions and renewals, it would seem important that an inventory of the Company's equipment be taken with a view of having the books correctly reflect the value of this asset. Also that a distinction be made in the Company's bookkeeping as between additions and renewals.

On March 17, 1911 Check Number 166 was drawn in favor of Cash for $250.00 and cashed by M. Maloney who gave the money to the Treasurer. This amount appears as a charge in the Equipment Account but there is no supporting voucher for the same.

Exhibit E-6.

Leasehold:

We renew the suggestion made in our former report that the value of the Leasehold be written off during the life of the Lease in an equal amount each year. No reduction has been made in this account during the period under review.

Good-Will:

The Common Stock liability of the Company does not show on its books, our adjusting entry given a year ago not having been recorded.

As in the case of our previous report the offset to the Common Stock liability on the accompanying Balance Sheet is shown in the item of Goodwill.

Accounts Receivable:

We show on the attached Balance Sheet Accounts Receivable of a doubtful character, aggregating $17,077.46 but inasmuch as it would seem that a considerable amount would be realized on these accounts, we have set up a reserve of only $10,000.00. The accounts were reviewed with both the Company's Treasurer and the Bookkeeper and an explanation of the $17,077,46 is as follows:

On the Purchase Ledger there appears an old debit balance against the Estate of Lemuel E. Wells amounting to $1,487.43. The Treasurer informed us that the account represented a balance on a Coal contract and that it was in the hands of Messrs. Eiseman, Levy, Corn and Levy, Attorneys, 135 Broadway. New York City.

In our previous report a reserve for doubtful accounts was established of $2,185.87. None of these accounts have been paid or written off.

Included in the doubtful accounts are those in suit and on which judgments have been obtained

amounting to $7,171.47. The largest account is with Messrs. Harding and McConstand amounting to $7,046.00. The Treasurer advised us that he believes this judgment will be collected eventually but we were also informed that the collection is contingent upon the death of another person.

The Treasurer informed us that a verbal agreement was made with the retail Sales Agent whereby one-third of his monthly commissions is to be applied to accounts aggregating $1,601.42 until such accounts are paid. No such commissions, however, have been so applied during the period under review.

In addition to the above there are accounts aggregating $4,631.27, which would seem to be extremely doubtful of collection.

Salesmen's Commissions, Salaries and Expenses:

There has been charged to selling expenses monthly, disbursements of Cash aggregating $7,272.02. These disbursements are made by drawing checks to the order of "Cash," the Bookkeeper cashing them and turning the proceeds over to the Treasurer without supporting data.

New York June 6, 1911.

Plaintiff's Exhibit E-7.

Identical with Exhibit E-16 except the asset item "Horses $44,151.09", instead of $32,087.50 in E-16, with corresponding change in footings.

Plaintiff's Exhibit E-8.

Balance Sheet (month ending May 31, 1912).

L. WERTHEIM COAL & COKE CO.

FINANCIAL STATEMENT

Month ending May 31st, 1912.

BALANCE SHEET.

ASSETS:

	Plant and Equipment:		
	Trestle and buildings	113,301.79	
	Motors, boiler, machinery and tools	6,655.00	
	Horses 31,266.50		
	Wagons & H. 35,176.70	66,443.20	
	Office equipment	2,258.66	
		188,658.65	
	Less:		
	Reserve for depreciation and extinguishment	110.00	188,548.65
	Leasehold	135,000.00	
	Goodwill		135,000.00
	Commercial Trust Company		4,000.00
	Current Assets:		
	Cash	9,287.56	
	Accounts receivable	58,984.34	
	Notes receivable	620.28	
	Coal on hand	29,936.88	
	L. & S. Wertheim	57,344.34	
	Mortgages receivable	4,000.00	160,173.40
	Deferred Charges to Profit and Loss:		
	Horse feed	2,778.67	
	Harlem ground rent	107.49	
	Insurance	1,025.84	
	Dredging Harlem dock	17.26	
	Repair and construction supplies	2,679.75	
	Interest prepaid	4,992.92	
	Demurrage on cars	26.00	
	Ferry Tickets	250.88	
	New accounting system	639.73	
	Miscellaneous deferred charges	2,603.04	15,121.58

LIABILITIES:

	Capital Stock:		
	Common		150,000.00
	Preferred		
	Current Liabilities:		
	Accounts payable	30,724.50	
	Notes payable	285,508.87	
	Freight (on cars not dumped)	3,016.11	
	Taxes accrued	535.69	
	Payroll (labor accrued but not due)	1.75	
	Reserve for doubtful accounts	309.58	320,096.50
		36,625.47	

Exhibit E-8.

Surplus:

May & June, 1911— W. Delano—Dec./ 11	875.00			
Balance May, 1912 —M. & J. Tracey	212.90			
Sept./11—Dr. T. E. Smith	123.00	1,210.90	35,414.57	
Surplus for month			2,667.44	32,747.13
				502,843.63

PROFIT AND LOSS STATEMENT.

Sales:

	Gro. Tons.	Selling Price.	Cost.		
Broken ..					
Egg	89.03	615.32	452.72	162.60	
Stove ...	73.02	509.10	369.14	139.96	
Nut	79.16	558.14	422.55	135.59	
Pea	131.18	669.43	553.43	116.00	
Buck No. 1	1,318.11	8,487.66	4,240.55	}	
Buck No. 2	810.17	1,465.86	2,203.18	} 3,509.79	
Soft	1,051.17	4,403.45	3,138.46	1,264.99	
Geo. Creek	4.19	29.33	14.85	14.48	
Dust	44.08	96.80	6.24	90.56	
Coke	77.09	559.62	317.65	241.97	
	3,682.00	17,394.71	11,718.77		
Gross profit on sales				5,675.94	
Miscellaneous income				73.20	5,749.14

Deduct:

Selling and Delivery Expenses:		
Salaries and expenses of salesmen ...	687.03	
Commissions	124.85	
Hoisting & Wharfage	471.44	
New York office rent and expenses ..	41.66	
Telephone and postage	105.96	
Power, heat & light	29.10	
Wages of drivers, laborers, weighmaster, etc.	1,443.56	
Feed for horses	1,112.34	
Stable supplies and veterinary	61.70	
Depreciation of horses	300.00	
Outside charges, shoeing, repairing, etc.	77.44	
Repairs to wagons and horse shoeing	250.00	
Water tax	48.75	
Truck hire and carting	83.00	
Insurance on horses	172.43	
Ferriage	265.66	
Miscellaneous	983.16	
Total selling and delivery expenses	6,092.08	
General Expenses:		
Treasurer's salary and office help	731.33	
Dredging Harlem dock	18.00	

Office supplies and stationery ..	29.00		
Wages trestlemen, yardmen ...	578.50		
Repairs and main. of buildings	200.45		
Insurance on trestle, buildings and coal	172.42		
Taxes	150.00		
New accounting system	25.00		
Legal services	25.00		
Miscellaneous	175.37	2,055.07	
Allowances on sales		227.67	
Interest on notes & discounts		41.76	8,416.58
Net Loss for Month			2,667.44

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Plaintiff's Exhibit E-9.

Balance sheet (three months ending June 30, 1911.).

L. WERTHEIM COAL & COKE CO.

FINANCIAL STATEMENT

3 Months ending June 30th, 1911.

20

BALANCE SHEET.

ASSETS:

Plant and Equipment:			
Trestle and buildings		111,798.30	
Motors, boiler, machinery and tools		6,655.00	
Horses		39,985.00	
Harnesses and wagons		29,609.00	
Office equipment		1,654.51	
		189,701.81	
Less: Reserve for depreciation and extinguishment		.....	189,701.81
Leasehold		135,000.00	
30 Goodwill		125,000.00	260,000.00
Current Assets:			
Cash	4,512.77		
	86.86	4,599.63	
		6.60	
Accounts receivable		84,304.37	
Notes receivable		3,270.89	
Coal on hand		45,282.05	
Mortgages receivable		4,000.00	
L. & S. Wertheim		56,124.34	197,587.88

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Deferred Charges to Profit and Loss:		
Horse feed	5,265.58	
Insurance	486.70	
Repair and construction supplies	2,500.00	
Interest prepaid	7,552.63	
Harlem rent paid in advance	208.33	
Ferry tickets	258.27	
New accounting system	275.00	16,546.51
		663,836.20

LIABILITIES:

Capital Stock:		
Common	125,000.00	
Preferred	150,000.00	275,000.00
Current Liabilities:		
Accounts payable	33,213.27	
Notes payable	271,292.79	
Freight (on cars not dumped)	6,685.91	
Reserve for Harlem boat freight	771.09	
Taxes accrued	949.99	
Payroll (labor accrued but not due)	.....	
Reserve for doubtful accounts	10,000.00	322,913.05
Surplus:		
Balance March 31, 1911	72,376.89	
Net loss for 3 months ending June 30/11	6,453.74	65,923.15
		663,836.20

Plaintiff's Exhibit E-10.

Balance sheet (year ending March 31, 1912).

L. WERTHEIM COAL & COKE CO.

FINANCIAL STATEMENT

Year ending March 31st, 1912.

BALANCE SHEET.

ASSETS:

Plant and Equipment:		
Trestle and buildings	113,301.79	
Motors, boiler, machinery and tools	6,655.00	
Harness & Wagons	35,176.70	
Horses	33,427.50	68,604.20
Office equipment	2,258.66	190,819.65
Leasehold		135,000.00
Goodwill		

Current Assets:		
Cash	9,110.47	
Accounts receivable	95,210.76	
Bills receivable	520.28	
Coal on hand	18,872.04	
L. & S. Wertheim	57,344.34	
Mortgages receivable	4,000.00	185,057.89
Deferred Charges to Profit and Loss:		
Horse feed	4,487.34	
Insurance	1,515.44	
Repair and construction supplies	2,590.84	
Dredging Harlem dock	53.26	
Interest prepaid	4,992.92	
Miscellaneous deferred charges	2,787.12	
Ferry tickets	329.23	
New accounting system	689.73	
Harlem ground rent prepaid	315.83	17,761.71
		528,639.25
LIABILITIES:		
Capital Stock:		
Common		150,000.00
Preferred		
Current Liabilities:		
Accounts payable	35,567.69	
Notes payable	307,415.41	
Freight (on cars not dumped)	130.67	
Taxes accrued	1,858.69	
Payroll (labor accrued but not due)	107.18	
Reserve for doubtful accounts	309.58	345,389.22
Surplus:		
Balance March 1st, 1911	99,906.74	
Less adjustments	27,561.33	72,345.41
Net loss for year	39,095.38	33,250.03
		528,639.25

Plaintiff's Exhibits E-11, E-12, E-13, E-14, E-15.

These exhibits are books of accounts and tabulation therefrom showing bad accounts carried in the balance sheet of April 30, 1912, aggregating $18,270.28.

Plaintiff's Exhibit E-16.

Balance sheet (month ending April 30, 1912).

L. WERTHEIM COAL & COKE CO.

FINANCIAL STATEMENT

Month ending April 30th, 1912.

BALANCE SHEET.

ASSETS:		
Plant and Equipment:		
Trestle and buildings	113,301.79	
Motors, boiler, machinery and tools	6,655.00	
Horses 32,087.50		
Wagons & H. 35,176.70	67,264.20	
Office equipment	2,258.66	
	189,479.65	
Less:		
Reserve for depreciation and extinguishment	40.00	189,519.65
Leasehold	135,000.00	
Goodwill		
		135,000.00
Current Assets:		
Cash	6,794.89	
Accounts receivable	76,272.89	
Notes receivable	520.28	
Coal on hand	17,059.20	
L. & S. Wertheim	57,344.34	
Mortgages receivable	4,000.00	162,091.60
Deferred Charges to Profit and Loss:		
Horse feed	2,978.72	
Freight	1,304.66	
Insurance	1,370.69	
Ferry tickets	513.61	
Repair and construction supplies	2,698.83	
Interest prepaid	4,992.92	
New accounting system	664.73	
Harlem rent prepaid	107.49	
Dredging Harlem dock	35.26	
Miscellaneous deferred charges	3,100.17	18,267.08
		504,878.33
LIABILITIES:		
Capital Stock:		
Common	150,000.00	
Preferred		
		150,000.00

Current Liabilities:		
Accounts payable	23,302.01	
Notes payable	293,995.40	
Freight (on cars not dumped)	.....	
Taxes accrued	385.69	
Payroll (labor accrued but not due)	260.18	
Reserve for doubtful accounts	309.58	318,252.86
Surplus:		
Balance April 30th, 1912	32,866.03	
Net profit for month	3,759.44	36,625.47
		504,878.33

Exhibit E-17.

PRIVATE LEDGER, MAY 1, 1907-1910 (Old System).

"PLANT" (p. 3).

	Dr.		Cr.	
1907				
May 1	.....	65,200.00	By Balance	116,235.00
Aug.	Stable	3,250.00		
"	Blacksmith Shop ..	1,750.00		
1908				
Feb.	Stables	5,000.00		
	Improvements	41,035.00		
		116,235.00		116,235.00
May 1	To Bal.	116,235.00	By P. & L.	2,586.02
May	.....	255.75	" Balance	115,000.00
June	.....	152.35		
Sept.	.....	365.00		
October	.....	529.00		
December	.....	48.92		
1909		117,586.02		117,586.02
1909				
May 1	To Bal.	115,000.00	By P. & L.	2,729.00
Aug.	" See Surplus % ..	1,729.00	" Balance	114,000.00
1910		116,729.00		116,729.00
May 1	To Bal.	114,000.00		

"PROFIT & LOSS A/C" (pp. 125, 126, &c.).

1907				
June	.....	128.06		
August	.....	17.65		
September	.....	45.90		
October	.....	1.72		
November	.....		.....	290.43
December	.....	72.75		

Exhibit E-17.

1908				
January	.....		.....	133.24
February	.....	8.44		
March	.....		.....	11.00
April	.....	317.29		
April 30	Insurance	136.92		
	Equipment	2,622.51		
	Fixtures	893.98		
	Mchdse	127,890.43		
	Surplus	36,221.42		
	% Payable	13,136.63		
	% Receivable		.....	609.00
	% Plant		.....	41,035.00
	% Lease		.....	17,500.00
	Interest	1,360.91		
	Discount	238.39		
	General Exp.	24,438.56		
	Salary "	12,937.50		
	Selling	5,574.98		
	Forward	226,044.04	Forward	59,578.67
April 30	Labor Exp.	28,783.67		
	Feed	10,933.90		
	Freight	105,687.78		
	Dividend	1.750.00		
	Sales		.....	313,620.72
		373.199.39		373.199.39

Exhibit E-18.

Proof of claim of Lehigh Valley Railroad Company in the Matter of L. Wertheim Coal & Coke Company, bankrupt for $17,049.26 "for freight and car service charges on shipments of freight delivered to the bankrupt; charges for trimming and towing of coal shipped; coal storage charges; cash advances and the value of coal sold to bankrupt as set forth in detail in the schedules hereto attached."

The schedules attached cover charges dating from December 1909 to February 1914, including one item in 1909; 24 items in 1910 and 37 items in 1911. The schedules also include charges for "car service," the items running from July 23, 1910 to January 30, 1912, aggregating $7937.

(The other items relate to charges subsequent to April 30, 1912.)

Exhibit E-19.

Proof of claim of Erie Railroad Company in bankruptcy of L. Wertheim Coal & Coke Company for $2955.34, for "freight, demurrage and trimming charges etc. as shown on bills hereto attached and made part hereof."

The bills referred to show charges of the following dates for trimming cargoes: May 5, 9th and 13, 1911; March 2 and 5, 1912; November 14, 1912; January 17, 1913; June 1913.

Also transportation, demurrage and storage charges May 1913.

Also demurrage charges in September and October, 1912.

Exhibit E-20.

MONTHLY TRIAL BALANCE BOOK (Old System).

"MAY 1st, 1908" (Monthly Trial Balance).

		Dr.	Cr.
1	Capital Stock		150,000.00
3	Plant	75,200.00	
5	Leasehold	117,500.00	
7	Equipment	60,709.63	
17	Fixtures	2,606.48	
21	Merchandise	144,603.54	
25	Cash	8,926.12	
29	Insurance	512.92	
32	Accounts Receivable	41,775.64	
35	Bills Receivable	4,001.54	
41	Accounts Payable		16,480.65
59	Bills Payable		60,778.25
71	Surplus		106,819.08
74	Interest	1,360.91	
78	Discount	238.39	
83	Sales		313,620.72
102	General Expenses	24,438.56	
106	Officers' Salaries	12,937.50	
110	Selling Expenses	5,574.98	
114	Labor	28,783.67	
117	Feed	10,933.90	
121	Freight	105,687.78	
126	Profit & Loss	157.14	
129	Dividend	1,750.00	
		647,698.70	647,698.70

"BALANCE MAY 1st, 1908."

1	Capital Stock		150,000.00
3	Plant	116,235.00	
5	Leasehold	135,000.00	
7	Equipment	58,087.12	
17	Fixtures	1,712.50	
21	Merchandise	16,713.11	
25	Cash	8,926.12	
29	Insurance	376.00	
32	Accounts Receivable	42,384.64	
35	Bills Receivable	4,001.54	
41	Accounts Payable		29,617.28
59	Bills Payable		60,778.25
71	Surplus		143,040.50
		383,436.03	383,436.03

Exhibit E-21.

THIS AGREEMENT made this 12th day of June, in the year One thousand Nine Hundred and Six (1906), between the LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY (hereinafter called the Lessor), party of the first part, and the L. WERTHEIM COAL & COKE COMPANY (hereinafter called the Lessee), party of the second part:

WITNESSETH,

That the said Lessor has let and demised and by these presents does let and demise unto the said Lessee, ALL THAT CERTAIN tract or parcel of land, situate in the City of Jersey City, Hudson County, New Jersey, bounded and described as follows:

BEGINNING at a point in the Northwesterly line of Pacific Avenue, where the same intersects the Southerly line of Grand Street; thence along said Northwesterly line of Pacific Avenue South 54° 31′ West 607.62 feet to a point in the Easterly right of way line of the Lessor, formerly National Docks Railway; thence along the same North 7° 30′ West 132 feet to a point; thence by a curve to the right with a radius of 279 feet for a distance of 283 feet more or less, to a point; thence North 80° 13′ East 305 feet to place of beginning. Containing 1.42 acres, more or less. Shown colored in yellow on Chief Engr's Map "J. J. M. 87" property to be leased to L. Wertheim Coal & Coke Co., Jersey City, June 5, 1906; scale 1″= 100 ft., attached and made a part hereof.

For the term of fifteen (15) years from the first day of November, One thousand Nine Hundred and Six (1906), (unless sooner terminated as hereinafter provided), at the annual rent or sum of One Dollar ($1.00).

TOGETHER with all taxes and assessments that may be levied against any property of the said Lessee placed or erected upon said premises.

TO HAVE AND TO HOLD the said premises to the

Exhibit E-21.

said Lessee, to and for the use of the said Lessee, for and during the said term (or other period of occupation under the provisions hereof), yielding and paying therefor and thereout the said rent reserved as aforesaid; and the said Lessee hereby covenants and agrees to and with the Lessor as follows, viz:

FIRST: To pay to the Lessor the rent reserved as the same becomes due.

SECOND: Not to assign this lease in whole or in part nor to underlet the demised premises, or any part of portion of the same, without the written consent of the Lessor first had and obtained.

THIRD: To waive and the said Lessee hereby does waive all right to the benefit of any existing law or laws hereafter to be made, exempting personal property from distress and sale for arrears of rent.

FOURTH: Not to use or occupy said premises for any other purpose than as a site for trestle, coal yard and appurtenances incidental thereto, and not to sell or permit the sale of any vinous, spirituous or malt liquors thereon.

FIFTH: To deliver up peaceable possession of the demised premises to the Lessor immediately upon any termination of the tenancy hereunder, in good order, reasonable wear and tear and damage by accidental fire excepted, whether such termination be by expiration of the term or by reason of notice given by the Lessor as hereinafter provided, either before or after the expiration of the said term or otherwise howsoever.

SIXTH: The Lessee if not in default under any covenant of this lease and if notice of termination has not been given under any of the provisions hereof, shall have the right and privilege of renewing this lease for a further period of ten years after the expiration of the term hereinbefore provided for, upon like terms and conditions and provisions as herein contained (except that there shall be no further privilege of renewal) upon giving to the said Lessor notice in writing at least three months before the expiration of said term of its election to renew.

Exhibit E-21.

SEVENTH: The Lessor expressly reserves the right at any time during said term or during any extension thereof to terminate the lease upon written notice of not less than one year, provided it shall require said premises for its own railroad purposes, and provided further that in the event of said notice being given and this lease being so terminated and the Lessor repossessing itself of the said premises, it shall pay to the said Lessee, and the said Lessee shall receive from the said Lessor in full payment of all claims, damages and demands which the said Lessee may or shall have against the said Lessor in any way arising in or out of this Lease and the termination thereof and for the structures on said premises, the fair value of the structures left on said premises which the said Lessee may and shall at that time have upon the said demised premises and cannot remove therefrom without damage to the said structures or to other structures on said premises; the fair value of the said structures at the time of such termination (if the same can not be amicably agreed upon by and between the parties hereto), shall be fixed by arbitration to be arranged in the usual and ordinary manner, and upon the payment of such agreed or appraised value the Lessor shall become the owner of the said structures free and clear from all liens and encumbrances and shall have all the right, title and interest of the Lessee therein; the said payment so to be made for the property of the Lessee shall not in any event, whether determined by agreement or appraisal, exceed the sum of thirty-five thousand dollars ($35,000), if the said lease shall be terminated under the provisions of this clause at any time during the first five years of the term herein demised; the sum of thirty thousand dollars ($30,000) if the said lease shall be so terminated during the second period of five years of the term herein demised; and the sum of twenty-five thousand dollars ($25,000) of the said lease shall be so terminated at any time after the expiration of the first ten years of the said term.

Any notice of termination shall be good if

Exhibit E-21.

served personally upon any officer or agent of the Lessee or posted upon the leased premises.

EIGHTH: The Lessee further covenants and agrees that it shall and will during the first year of the term of this lease handle or cause to be transported by rail to the said premises a minimum tonnage of thirty thousand (30,000) tons of coal; during the second year of this lease a minimum tonnage of fifty thousand (50,000) tons of coal; during the third year thereof a minimum tonnage of seventy-five thousand (75,000) tons of coal and during the fourth and every year thereafter so long as this lease shall be in force a minimum annual tonnage of one hundred thousand (100,000) tons of coal, due allowance being made for riots, strikes or stoppage of labor in the mines or on the railway of the Lessor company or its allied lines.

If the said Lessee shall fail during any year to deliver the guaranteed minimum tonnage hereinbefore provided for, the Lessor shall have the right to terminate and cancel this lease upon giving six months notice of termination to the said Lessee anything herein to the contrary notwithstanding.

NINTH: The said Lessee hereby covenants and agrees during the continuance of this lease to ship or cause to be shipped over the railroad of the Lessor and over connecting and forwarding transportation lines preferred by the Lessor to the exclusion of all other means of transportation whatsoever, and in such manner as to give the Lessor the long haul, all the freight shipped from the above described premises to its ultimate destination or shipped from its point of departure to the said premises. PROVIDED ALWAYS, that the freight rates on such shipments be as low as the rates charged to other shippers by the Railroad Company for like contemporaneous service.

TENTH: If the said Lessee shall fail and perform any of the covenants of this lease or if the premises shall be used for any other purpose than as above stated, or if the said premises shall become vacant during the said term or during

Exhibit E-21.

any extension thereof or in the event of the termination of this lease by expiration of the term or after notice as aforesaid, the Lessor may re-enter upon the demised premises as of its first and former estate and may put out and remove the Lessee from the same without further notice and without any liability to the said Lessee for so doing.

ELEVENTH: It is agreed that if the term hereby created shall be at any time seized, or taken in execution or attachment by any creditor of the said Lessee, or in any suit or proceedings or if the said Lessee shall make any assignment for the benefit of creditors, or becoming bankrupt or insolvent shall take the benefit of any act that may be in force for bankrupt or insolvent debtors, or shall be adjudicated a bankrupt in any proceeding, voluntary or involuntary, the then current rent shall immediately become due and payable, and the said term shall, at the option of the Lessor, immediately terminate and the said Lessor shall have the right to immediately enter upon the said premises and put out and remove the said Lessee and all premises whomsoever therefrom.

TWELFTH: The Lessee covenants and agrees that it shall and will at once construct a trestle on the property herein demised for the purpose of conducting a coal business, said trestle to cost not less than twenty-thousand dollars ($20,000) and it is agreed that upon the termination of this lease by expiration of the term or after notice as aforesaid or upon breach of covenant by the Lessee, the said trestle, improvements and structures shall revert to and become the property of the said Lessor; excepting that if the said lease be terminated as provided for in the Seventh Clause hereof, the said Lessor shall pay for the structure as in said Seventh Clause provided.

THIRTEENTH: The Lessor agrees to construct and maintain the trestle from its railroad tracks to the westerly line of the lands above described and further agrees to furnish the rails for the trestle to be constructed by the Lessee upon the

Exhibit E-21.

land herein described. The said Lessee to construct and maintain at all times to the satisfaction of the Lessor, the trestle upon the land herein described.

Any waiver at any time of the rights of the Lessor as to anything herein contained shall not be deemed a waiver of any breach of covenant or other matter subsequently occurring.

All rights and liabilities herein given to or imposed upon either of the parties hereto shall extend to the successors and assigns of such party.

In Witness Whereof, the said parties hereto have duly executed these presents, the day and year first above written.

Signed, sealed and delivered
in the presence of
W. J. BURTON,

LEHIGH VALLEY RAILROAD COMPANY,
of New Jersey,
By E. B. Thomas,
President,
Attest:
D. G. BAIRD,
Secretary.

L. WERTHEIM COAL & COKE COMPANY,
By Louis Wertheim,
President,

September .

Attest:
SAUL WERTHEIM,
Secretary.

Approved as to form
J. F. SHAFENSTOETER.

Exhibit E-22.

THIS AGREEMENT, made this thirtieth (30th) day of April in the year One thousand nine hundred and eight (1908), Between the LEHIGH VALLEY RAILROAD CMPANY OF NEW JERSEY, (hereinafter called the Lessor), of the first part, and the L. WERTHEIM COAL AND COKE COMPANY, (hereinafter called the Lessee), of the second part.

WHEREAS, By lease, dated the 12th day of June, 1906, the Lessor herein did demise and let to the Lessee herein a tract of land, situated in the City of Jersey City, Hudson County, New Jersey, containing one and forty-two hundredths (1.42) acres, more or less, as more fully described in said lease, which said lease is recorded in the Office of the Register of Deeds in and for Hudson County in Deed Book No. 1003, page 392, etc., reference being thereunto made as though the said lease were herein set out at length; and

WHEREAS, the Lessee has made application to the said Lessor to lease additional land adjoining that described in the aforesaid lease.

NOW THIS AGREEMENT WITNESSETH:

That the Lessor has let and demised, and by these presents does let and demise, unto the said Lessee, ALL that certain tract or parcel of land, situate in the City of Jersey City, County of Hudson and State of New Jersey, bounded and described as follows:

> BEGINNING at a point in the northwesterly line of Pacific Avenue where the same intersects the southerly line of Grand Street; thence (1) along the southerly line of Grand Street North Seventy-four degrees five minutes West (N. 74° 5′ W.) five hundred eighty-four and eight tenths (504.8) feet, more or

Exhibit E-22.

less, to a point in the easterly right of way line of the lessor, formerly National Docks Railway; thence (2) along same south seven degrees thirty minutes East (S. 7° 30′ E.) three hundred eighty-five and five tenths (385.5) feet more or less, to a point; thence (3) by a curve to the right with a radius of two hundred and seventy-nine (279) feet for a distance of two hundred and eighty-three (283) feet, more or less, to a point; thence (4) North eighty degrees thirteen minutes East (N. 80° 13′ E.) three hundred and five feet to the place of beginning.

Containing one and seventy-seven hundredths (1.77) acres, more or less, and shown colored in yellow on Chief Engineers' map "JJM 87 property to be leased to L. Wertheim Coal & Coke Company. June 5th 1906. Scale 1″=100′", attached and made a part hereof;

for the term of thirteen (13) years and six months from the first day of May, Nineteen hundred and eight (1908) at the annual rent or sum of One dollar ($1.00). The Lessee agrees, as further consideration herefor, to pay all taxes and assessments levied or imposed upon the tract of land herein described, and also to pay all taxes and assessments levied or imposed upon the said land described in the said lease, dated the 12th day of June, 1906. The Lessee further agrees to pay all taxes and assessments that may be levied upon any and all buildings and property of the said lessee placed or erected upon the premises herein described.

TO HAVE AND TO HOLD the said premises to the said Lessee, its successors and assigns, to and for the use of the said Lessee, its successors and assigns, for and during the said term, or other period of occupation under the provisions hereof, yielding and paying therefor and thereout the

Exhibit E-22.

said rent reserved and taxes as aforesaid; and the said Lessee hereby covenants and agrees to and with the Lessor as follows, viz:

FIRST: To pay to the Lessor the rent reserved as the same becomes due and to pay all taxes and assessments as aforesaid within thirty days from the date on which the same are due and payable, and if not so paid by the said Lessee, they may be paid by the Lessor, and recovered from the Lessee as rent due hereunder.

SECOND: Not to assign this lease in whole or in part nor to underlet the demised premises or any part or portion of the same without the written consent of the Lessor first had and obtained.

THIRD: To waive and the said Lessee hereby does waive all right to the benefit of any existing law or laws hereafter to be made, exempting personal property from distress and sale for arrears of rent.

FOURTH: Not to use or occupy said premises for any other purpose than as a site for trestle, coal yard and appurtenances incidental thereto, and not to sell or permit the sale of any vinous, spirituous or malt liquors thereon.

FIFTH: To deliver up peaceable possession of the demised premises to the lessor immediately upon any termination of the tenancy hereunder, in good order, reasonable wear and tear and damage by accidental fire excepted, whether such termination be by expiration of the term or by reason of notice given by the Lessor as hereinafter provided, either before or after the expiration of the said term or otherwise howsoever.

SIXTH: The Lessee, if not in default of any covenant of this lease, and if notice of termination has not been given under any of the provi-

sions hereof, shall have the right and privilege of renewing this lease for a further period of ten (10) years, after the expiration of the term hereinbefore provided for, upon like terms, conditions and provisions as herein contained (except that there shall be no further privilege of renewal) upon giving to the said Lessor notice in writing at least three months before the expiration of said term of its election to renew.

SEVENTH: The Lessor herein expressly reserves the right at any time, during the said term and during any extension thereof, to terminate this lease by written notice of not less than one (1) year, provided, it shall require said premises for its own railroad purposes, and provided further that it shall comply with the provisions contained in the seventh clause of the aforesaid lease, dated June 12th, 1906.

EIGHTH: The Lessee herein, as a further consideration for this lease, further covenants and agrees that it shall and will, during the year beginning November 1st, 1908, handle or cause to be transported by rail over the railroads of the Lehigh Valley Railroad System, to the said premises described in the aforesaid lease, dated June 12th, 1906, or to the premises herein described, a minimum annual tonnage of ninety thousand (90,000) tons of coal and during the ensuing year and during every year thereafter a minimum tonnage of one hundred and twenty thousand (120,000) tons of coal due allowance being made for riots, strikes or stoppage of labor in the mines or on the railroad of its Lessor Company or its allied lines. The intention of this clause being to increase by twenty per cent (20%) the minimum annual guaranteed tonnage provided for in the aforesaid lease, dated June 12th, 1906.

If the Lessee shall fail during any year to

Exhibit E-22.

deliver the guaranteed minimum tonnage herein provided for the Lessor shall have the right to terminate and cancel this lease and the said lease of June 12th, 1906, upon giving six month's notice of termination to said lessee anything herein or therein contained to the contrary notwithstanding.

NINTH: The said Lessee hereby covenants and agrees during the continuance of this lease, to ship or cause to be shipped over the railroad of the Lessor and over connecting and forwarding transportation lines preferred by the Lessor to the exclusion of all other means of transportation whatsoever, and in such manner as to give the Lessor the long haul, all the freight shipped from the above described premises to its ultimate destination or shipped to its point of departure to the said premises; PROVIDED ALWAYS that the freight rates on such shipments be as low as the rates charged to other shippers by the Railroad Company for like contemporaneous service.

TENTH: If the said Lessee shall fail to keep and perform any of the covenants of this lease, or if the premises shall be used for any other purpose than as above stated, or if the said premises shall become vacant during the said term or during any extension thereof, or in the event of the termination of this lease, by expiration of the term or after notice as aforesaid, the Lessor may re-enter upon the demised premises as of its first and former estate and may put out and remove the Lessee from the same without further notice and without any liability to the said Lessee for so doing.

ELEVENTH: It is agreed that if the term hereby created shall be at any time seized or taken in execution or attachment by any creditors of

Exhibit E-22.

the said Lessee, or in any suit or proceeding, or if the said Lessee shall make any assignment for the benefit of creditors, or becoming bankrupt or insolvent shall take the benefit of any act that may be in force for bankrupt or insolvent debtors or shall be adjudicated a bankrupt in any proceeding, voluntary or involuntary, the then current rent shall immediately become due and payable, and the said term shall, at the option of the Lessor, immediately terminate and the said Lessor shall have the right to immediately enter upon the said premises and put out and remove the said Lessee and all persons whomsoever therefrom.

TWELFTH: It is understood and agreed that the Lessor shall be under no liability or obligation to pay to the said Lessee the value of any structures erected by the said Lessee on the premises herein demised. The said Lessee shall have the right at or before the termination of this lease or of any renewal thereof, to remove therefrom any structures or improvements erected by it, provided that such removal can be effected without damaging the property of the Lessor, and without damaging any property which the Lessor, under the terms of the aforesaid lease, dated June 12th, 1906, may be obligated to purchase or pay for.

THIRTEENTH: It is understood by both parties hereto that the above described premises are in dangerous proximity to the tracks and other property of the Lehigh Valley Railroad Company of New Jersey, and that there is danger of injury or destruction by fire or other causes incident to the operation of a railroad. The party of the second part accepts this lease subject to such danger and in consideration of the low

Exhibit E-22.

rental herein reserved, agrees to and does remise, release and quit-claim the Lessor from all claims or actions for damages arising from the construction, location or operation of the said railroad and its appurtenances.

FOURTEENTH: Except as herein changed or enlarged, all the terms, covenants and conditions of the said lease, dated June 12th, 1906, between the parties hereto, shall remain in full force and effect.

Any waiver at any time of the rights of the Lessor as to anything herein contained shall not be deemed a waiver of any breach of covenant or other matter subsequently occurring.

All rights and liabilities herein given to or imposed upon either of the parties hereto shall extend to the successors and assigns of such party.

IN WITNESS WHEREOF, the said parties hereto have caused their respective corporate seals to be hereunto affixed, duly attested, the day and year first above written.

Sealed and delivered
in the presence of

LEHIGH VALLEY RAILROAD COMPANY
OF NEW JERSEY,
By E. B. Thomas,
President.

Attest:
D. G. BAIRD,
Secretary.

(Corporate seal.)
M. B. C.
J. A. M.

L. WERTHEIM COAL & COKE COMPANY,
By LOUIS WERTHEIM,
President.

Approved as to form
T. H. Jannier,
Ass't. Gen'l. Solicitor.

Attest:
M. ISENSTEIN,
Secretary.

Exhibit E-23.

William Dann

Interest at 6%

L. WERTHEIM COAL & COKE COMPANY.

Notes Payable 3/31/12.

Date Drawn	Payee	Date Due	Amount Total	Principal	Int.	Total Time From Date Drawn to date due.	Unexpired Prop. of Interest Time	Amt.	Net Liabty.
Dec. 17/09	Wm. Dann	April 12/12	1140.	1000.	140.	27 mths 12 days	12 days	1.98	1138.02
" 17/"	do do	June 12/12	1150.	1000.	150.	29 " 12 "	73 "	12.04	1137.96
" 17/"	do do	Aug. 12/12	1160.	1000.	160.	31 " 12 "	134 "	22.11	1137.89
" 17/"	do do	Oct. 12/12	1170.	1000.	170.	33 " 12 "	195 "	32.18	1137.82
" 17/"	do do	Dec. 12/12	1180.	1000.	180.	35 " 12 "	256 "	42.24	1137.76
" 17/"	do do	Feby. 12/13	1190.	1000.	190.	37 " 12 "	318 "	52.47	1137.53
" 17/"	do do	April 12/13	1200.	1000.	200.	39 " 12 "	377 "	62.20	1137.80
" 17/"	do do	June 12/13	1210.	1000.	210.	41 " 12 "	438 "	72.27	1137.73
" 17/"	do do	Aug. 12/13	1220.	1000.	220.	43 " 12 "	499 "	82.33	1137.67
" 17/"	do do	Oct. 12/13	1230.	1000.	230.	45 " 12 "	560 "	92.40	1137.60
" 17/"	do do	Dec. 12/13	1240.	1000.	240.	47 " 12 "	621 "	102.46	1137.54
" 17/"	do do	Feby. 12/14	1250.	1000.	250.	49 " 12 "	683 "	112.70	1137.30
" 17/"	do do	April 12/14	1260.	1000.	260.	51 " 12 "	742 "	122.43	1137.57
" 17/"	do do	June 12/14	1270.	1000.	270.	53 " 12 "	803 "	132.50	1137.50
" 17/"	do do	Aug. 12/14	1280.	1000.	280.	55 " 12 "	864 "	142.56	1137.44
" 17/"	do do	Oct. 12/14	1290.	1000.	290.	57 " 12 "	925 "	152.62	1137.38
" 17/"	do do	Dec. 12/14	1300.	1000.	300.	59 " 12 "	986 "	162.69	1137.31
" 17/"	do do	Feby. 12/15	1310.	1000.	310.	61 " 12 "	1048 "	172.92	1137.08
" 17/"	do do	April 12/15	823.77	624.45	199.32	63 " 12 "	1107 "	110.70	713.07

Exhibit E-24.

Max Isenstein

L. WERTHEIM COAL & COKE COMPANY.

Notes Receiv

Notes Payable 3/31/12.

Date Drawn	Payee	Date Due	Amount Total	Principal	Int.	Total Time From Date Drawn to date due.	Unexpired Prop. of Interest Time	Amt.	Net Liabty.	
Dec. 17/09	Max Isenstein	Mch. 12/12	1135.	1000.	135.	26 mths 12 days			1188.14	19 days' Int. to March 31/12
" " "	do do	May 12/12	1145.	1000.	145.	28 " 12 "	42 days	6.93	1138.07	
" " "	do do	July 12/12	1155.	1000.	155.	30 " 12 "	103 "	16.80	1138.20	
" " "	do do	Sept. 12/12	1165.	1000.	165.	32 " 12 "	165 "	27.32	1137.68	
" " "	do do	Nov. 12/12	1175.	1000.	175.	34 " 12 "	226 "	37.29	1137.71	
" " "	do do	Jan. 12/13	1185.	1000.	185.	36 " 12 "	287 "	47.36	1137.64	
" " "	do do	Mch. 12/13	1195.	1000.	195.	38 " 12 "	346 "	57.09	1137.91	
" " "	do do	May 12/13	1205.	1000.	205.	40 " 12 "	407 "	67.15	1137.85	
" " "	do do	July 12/13	1215.	1000.	215.	42 " 12 "	468 "	77.22	1137.78	
" " "	do do	Sept. 12/13	1225.	1000.	225.	44 " 12 "	530 "	87.45	1137.55	
" " "	do do	Nov. 12/13	1235.	1000.	235.	46 " 12 "	591 "	97.51	1137.49	
" " "	do do	Jan. 12/14	1245.	1000.	245.	48 " 12 "	652 "	107.58	1137.42	
" " "	do do	Mch. 12/14	1255.	1000.	255.	50 " 12 "	711 "	117.32	1137.68	
" " "	do do	May 12/14	1265.	1000.	265.	52 " 12 "	772 "	127.38	1137.62	
" " "	do do	July 12/14	1000.37	785.12	215.25	54 " 12 "	883 "	110.37	890.00	

Exhibit E-25.

East Boston Coal Co. L. WERTHEIM COAL & COKE COMPANY.

Interest at 6% Bills Payable 3/31/12.

Date Drawn	Payee	Date Due	Total	Amount Principal	Total Time From date drawn Int.	of Int. to date due Time	Unexpired Prop. Amt.	Net Liabty.	
Jan. 12/11	E. Bost. C'l Co.	Mch. 12/12	268.75	250.	18.75	14 mths		269.51	Int. to Mch. 31/12 .76
" 12/11	" " " "	Apl. 12/12	270.40	250.	20.40	15 " 12 days	48	269.92	
" 12/11	" " " "	May 12/12	271.25	250.	21.25	16 " 42 "	1.68	269.57	
" 12/11	" " " "	June 12/12	272.50	250.	22.50	17 " 73 "	2.52	269.98	
Apl. 25/11	" " " "	Feb. 25/12	15,176.70	144.54	722.70	10 "		15,262.45	Interest to Mch. 31/12 85.75 from 3/25/12
								10,457.11	Int. to Mch. 31/12 10.08
May 25/11	" " " "	Mch. 25/12	10,447.03	9,949.55	497.48	10 "			
June 25/11	" " " "	Apl. 25/12	9,781.59	9,315.80	465.79	10 " 25 "	37.50	9,744.09	
July 25/11	" " " "	May 25/12	6,180.68	5,886.36	294.32	10 " 55 "	53.90	6,126.78	
Aug. 25/11	" " " "	June 25/12	7,329.67	6,980.64	349.03	10 " 86 "	96.32	7,233.35	
Sep. 25/11	" " " "	July 25/12	5,398.67	5,141.59	257.08	10 " 116 "	98.98	5,299.69	
Oct. 25/11	" " " "	Aug. 25/12	3,175.70	3,024.48	151.22	10 " 147 "	73.50	3,102.20	
Nov. 25/11	" " " "	Sep. 25/12	5,363.25	5,107.86	255.39	10 " 178 "	136.55	5,226.70	
Dec. 26/11	" " " "	Oct. 25/12	7,271.44	6,850.33	346.26	10 " 208 "	232.96	7,038.48	
Jan. 25/12	" " " "	Nov. 25/12	7,192.85	6,850.33	342.52	10 " 239 "	264.09	6,928.76	Int. from 1/25 to 3/31/12
Mch. 25/11	" " " "	Jan. 25/12	8,028.32	7,646.02	382.30	10 "		8,116.76	88.44
Feb. 25/12	" " " "		2,588.33	2,588.33		35 "	15.65	2,598.98	
Feb. 25/12	" " " "	Mch. 31/12	2,981.38	2,964.38	17.00	35 "		2,981.38	
			91,993.51	87,829.52	4,163.99			91,195.71	
			15.65						
			92,009.16						

Exhibit E-26.

Mill Creek Coal Co. — L. WERTHEIM COAL & COKE COMPANY.

Interest at 6% — Notes Payable 3/31/12.

Date Drawn	Payee	Date Due	Total	Amount Principal	Total Time From date drawn to date due Int.	Unexpired Prop. of Int. Time	Amt.	Net Liabty.	
Jan. 12/11	Mill C'k C'l Co.	Apl. 12/12							
" "	" " " "	May 12/12	271.25	250.00	21.25 16 m. 12 d. 42 d's.		1.75	269.50	
" "	" " " "	June 12/12	272.50	250.00	22.50 17 " 12 " 73 "		3.04	269.46	35 days at .92 32.20
Apl. 25/11	" " " "	Feb. 25/12	5,780.99	5,505.70	275.29 10 "			5,813.19	Int. up to March 31/12
May 25/11	" " " "	Mch. 25/12	6,536.63	6,625.36	311.27 10 "			6,537.26	Int. up to Mch 31/12 .63
June 25/11	" " " "	Apl. 25/12	8,709.12	8,294.40	414.72 10 "	25 "	34.50	8,674.62	
July 25/11	" " " "	May 25/12	5,002.70	4,764.48	238.22 10 "	55 "	44.00	4,958.70	
Aug. 25/11	" " " "	June 25/12	4,381.28	4,172.65	208.63 10 "	86 "	59.77	4,321.51	
Sept. 25/11	" " " "	July 25/12	5,534.65	5,271.10	263.55 10 "	116 "	102.08	5,432.57	
Oct. 25/11	" " " "	Aug. 25/12	6,829.51	6,504.30	325.21 10 "	147 "	159.15	6,670.36	
Nov. 25/11	" " " "	Sep. 25/12	12,049.96	11,476.15	573.81 10 "	178 "	339.98	11,709.98	
Dec. 25/11	" " " "	Oct. 25/12	8,655.24	8,243.09	412.15 10 "	208 "	286.56	8,368.68	
Jan. 26/12	" " " "	Nov. 25/12	8,430.60	8,029.14	401.46 10 "	239 "	320.26	8,110.34	
Jan. 25/12	" " " "		4,126.13	4,126.13				4,171.67	
Jan. 26/12	" " " "		1,308.62	1,308.62				1,323.14	
Feb. 25/12	" " " "		6,824.33	6,824.33				6,951.07	
Feb. 28/12	" " " "	Dec. 26/12	9,610.86	9,153.20	457.66 10 "	269 "	395.43	9,215.43	
Mch. 25/12	" " " "	Jan. 25/13	6,978.32	6,646.02	332.30 10 "	300 "	321.00	6,657.32	
Dec. 17/11	" " " "	On Demand	20,000.00						
			121,573.09	97,294.67	4,278.42		2,068.06	99,724.66	

Less 270.40
P'd by L. W. C. & C. Co, to Mechanics' Trust Co. to 3/31/12. 219.63 — Paid 269.86

Renewed without int. from 1/26/12. — 99,454.86
Int. included from 1/26/12. — 99,453.80
Int. included from 1/26/12 to 2/31/12.
Renewed without interest from 1/26/12 to 3/31/12 14.52

Renewed without interest from 12/26/12 to 3/31/12.
Int. on 8824.33 to 2/25 88.24
Int. on 6,824 to 3/31/12 38.50

Exhibits W-1. & W-4.

By Laws of the L. Wertheim Coal & Coke Company as amended and approved November 30, 1907.

Further amended December 20, 1909: The By-law to which attention is directed in the evidence is as follows:

Section 32, Stock and Transfers:

The Stock and Transfer Books of the Company shall be kept at the office of Marshall Van Winkle, No. 1 Exchange Place, Jersey City, N. J.; and he shall be the authorized register and transfer agent; and all stock shall be countersigned by him (Amendment Dec. 20, 1909).

Exhibit W-2.

List showing advances by Isenstein & Dann to L. Wertheim Coal & Coke Co. of Dec. 1909.

Exhibit W-3.

General release Wm. Dann to L. Wertheim Coal & Coke Company, Louis Wertheim and Sanders Wertheim Dec. 15, 1909, acknowledged Dec. 16, 1909, "Except by reason of certain promissory notes dated the day of the date hereof and signed by the said L. Wertheim Coal & Coke Company and endorsed by said Louis Wertheim and Sanders Wertheim, said notes being thirty (30) in number and delivered simultaneously herewith".

Exhibit W-3½.

General release from Max Isenstein to L. Wertheim Coal & Coke Co., Louis Wertheim and Sanders Wertheim, dated Dec. 15, 1909, acknowledged Dec. 17, 1909, excepting 25 notes signed by L.

Wertheim Coal & Coke Co. and endorsed by Louis Wertheim and Sanders Wertheim, dated Dec. 15, 1909.

Exhibit G-1.

Waiver of notice of meeting of L. Wertheim Coal & Coke Co. dated Dec. 17, 1909.

Exhibit G-1½.

Copies of lists of notes identical with Exhibits E-23 and E-24.

Exhibit L-3.

Analysis of Buildings and Trestles.

Date 1911		Details:		
June	30	Cost of buildings, trestle, etc., as per small black record book—May 1, 1908:		
		Stable ground work		$10,000.00
		Stable buildings		22,400.00
		B'smith ground work		2,500.00
		" buildings		1,250.00
		Trestle ground work		35,000.00
		Trestle open and close work		24,000.00
		Carriage shed		200.00
		Office ground work		1,500.00
		" building		850.00
		Grading and planking yard		8,900.00
		Fence		900.00
		Screns		200.00
		Fire lines		250.00
		Cost of Harlem coal pocket		2,096.00
				110,346.00
"	30	Planks and nails (Apr. & May)—		
		Planking south end of N. J. yard	629.91	
		(Vanderbeek & Sons)	722.59	
				1,352.50
		do (May) Labor per pay roll		99.80
July	1	Cinders for filling Lehigh V. R.R. Co		125.00
Oct.	31	1 galvanized iron skylight—Henry Henginsen		29.25
1912				
Jan.	16	153 ft. 2 in, zero pipe covering, etc. Standard Gas L, Co.		19.83
July	18	120 ton overhead suspension scale, Fairbanks Co.		800.00

Aug.	31	Concrete work in new stable, Hudson Concrete Co.	325.00
Sept.	30	New Stable Constructed David Lerner..	500.00
Nov.	30	" " Plumb'g w'k W. W. Farrier Co.	100.00
"	29	New Stable, Roof	42.00
"	29	Planks and labor, Harlem yard	127.41
Jan.	30	Plumbing, Stable, J. C.	25.00
Feb.	29	" " W. W. Farrier.....	50.00
Mch.	30	" " " " "	160.00
Sept.	30	Concrete work Sacle N. J.	225.00
1913		Fairbanks Co.	
Jan.	31	1 set extension levers for overhead scale	25.00
Feb.	28	Electric wiring etc., Harlem plant V'79..	7.33
"	28	" " " " "	23.38

10

Unnumbered Exhibits

Showing Profit and Loss Statements for the year 1910, summarized as follows:

March	1910	Profit for month.....	$1,500.00
April	1910	" " "	1,080.00
May	1910	" " "	1,000.00
June	1910	" " "	157.00
July	1910	" " "	78.00
Aug.	1910	" " "	106.00
Sept.	1910	" " "	454.18
Oct.	1910	" " "	1,207.31
Nov.	1910	" " "	1,914.34
Dec.	1910	" " "	1,160.38

20

Exhibit L.A.-1.

August, 1909.

Buildings, Plant, Trestle, etc...	$116,729.00		
Equipm'ts, Trucks, Horses, etc.	74,604.87		
Fixtures, etc.	1,500.00	192,833.87	
Accounts Receivable	44,566.82		
Bills Receivable	578.75		
Mortgage at 6% for 3 yrs. ...	4,000.00	49,145.57	
Property, Lease 22½ yrs.		135,000.00	
Stock of coal on hand	24,600.00		
Stock of fed on hand	2,200.00		
Cash on hand	2,040.66	28,840.66	405,420.10
Bills due for construction ...	3,927.00		
Bills due for Equipments	7,624.41	11,551.41	
Accounts Payable		28,752.59	
Cash due to banks	27,500.00		
Cash due to officers, etc.	49,903.06	77,403.06	
Capital Stock		150,000.00	267,707.06
			$138,113.04

30

40

Exhibit L.A.-2.

STATEMENT.

L. WERTHEIM COAL & COKE COMPANY. NEW YORK & JERSEY CITY.

October 1st, 1909.

ASSETS.			LIABILITIES.		
Accounts Receivable	$44,278.00		Accounts Payable		37,903.68
Bills Receivable	802.38		Bills due for Buildings	2,590.00	
Mortgage for 3 years at 6%	4,000.00	49,080.38	Bills due for equipments, etc.	5,747.06	8,337.06
Buildings, Plant, Trestle, etc.	116,729.00		Cash due to Banks	27,500.00	
Equipments, horses, trucks, harness, etc.	75,096.65		Cash due to Officers, etc.	36,433.17	63,933.17
Fixtures, safes, etc.	1,500.00	193,325.65			
					110,173.91
Stock of coal on hand	27,500.00				
Stock of feed on hand	2,450.00		Capital Stock paid in	150,000.00	
Insurance paid ahead for year	2,134.41		Lease, cost to us $1.00 per annum	135,000.00	
Cash on hand	2,788.64	34,873.05	Undivided Profits	17,105.17	
		277,279.08	Capital and Surplus		302,105.17
Property Lease, 22½ yrs. at 6,000.00		135,000.00			
		412,279.08			412,279.08

Certified correct,
M. ISENSTEIN,
Vice-Pres. & Secy. pro temp.
(Seal.) October 25, 1909

Exhibit L.A.-3.

TRIAL BALANCE, APRIL 30, 1910.

1	Capital Stock		$150,000.00
3	Plant	$116,729.00	
5	Leasehold	135,000.00	
8	Equipment	81,795.84	
13	Tax %	2,739.60	
17	Fixtures	1,504.05	
22	Mdse.	157,147.04	
26	Cash	5,996.07	
29	Insurance	2,457.45	
32	Acct. Receivable	64,760.27	
37	Bills "	853.29	
42	Acct. Payable		8,673.72
71	Surplus		137,989.18
73	Interest	18,812.09	
78	Discount	603.22	
84	Sales		387,471.91
95	Wertheim, L. & S.	49,000.00	
102	General Expenses	21,037.28	
106	Officers Salesman	15,874.96	
110	Selling Expenses	11,828.45	
114	Labor Expense	35,066.34	
118	Feed "	18,700.87	
122	Freight	133,129.74	
128	Profit & Loss	693.50	
129	Dividend %	175.00	
135	Mortgage %	4,000.00	
149	Bills Payable		193,769.25
		$877,904.06	$877,904.06

Exhibit L.A.-4.

PROFIT AND LOSS ACCOUNT, MARCH, 1910.

Coal.	Tonnage.	Cost per Ton.	Total Cost.
Broken	43.16	4.80	210.28
Egg	297.17	5.05	1504.15
Stove	267.09	5.03	1350.61
Nut	71.00	5.05	358.55
Pea	563.09	3.25	1631.21
No. 1 Buck	1500.00	2.50	3750.00
No. 1 Buck	3684.07	2.45	9026.65
No. 2 Buck	1480.19	1.90	2813.80
Soft	870.00	2.95	2566.50
Coke	100.00	2.25	225.00
Coke	188.09	4.25	800.92
Cannel	1.00	8.50	8.50
Dust	272.19	1.50	409.42
Coal	9051.16	Gross	24855.59
Coke & Cannel	289.09	Net	10.56
Cost of Coal			24,866.15

Total Sales	35112.66
Cost	24866.15
Gross Profits	$10246.51

Expenses.

Salaries and expense salesman	601.75	
Selling Expenses	731.08	
Advertising, postage, petty expense	92.37	
N. Y. office rent and expenses	35.25	
Telephone N. Y. & Jersey City	41.25	
Wages of Drivers, Laborers, Weighmaster, Veterinary	2929.66	
Harness room supplies	25.00	
Feed for horses	1328.95	
Stable supplies	18.50	
Material Wagon and horse shoer	76.54	
Water Tax, N. Y. Tax	13.90	
Ferriage	972.39	
Treasurer's Salary and office help	495.00	
Office supplies and stationery	20.00	
Light, power and heat	57.35	
Insurance, trestle, buildings, coal, horses and accident insurance	165.92	
Taxes to R. R. Co.	110.00	
Interest on notes	945.22	
Lawyer's Fee, Coal Assn., Mercantile Agency, coal given away	57.66	
	8717.79	
		8717.99
Net Profit		$ 1528.72

Exhibit L.A.-5.

PROFIT AND LOSS STATEMENT.

April 30th, 1910.

Total sales, April,				$35,413.79
642.03	tons	Broken at $3.88	$ 2,490.96	
476.06	"	Egg 4.06	1,925.64	
805.19	"	Stove 4.06	3,272.16	
114.08	"	Nut 4.06	524.44	
1611.06	"	Pea 2.90	4,672.77	
2500.00	"	Buck 2.19	5,475.00	
993.00	"	Buck 2.23	2,214.39	
1266.18	"	Rice 1.69	2,139.54	
97.14	"	Barley 1.34	130.96	
200.05	"	Dust 1.34	268.30	
124.00	"	Dust 0.00	.....	
789.09	"	Soft 2.63	2,076.24	
200.00	"	Coke 4.25	850.00	
76.17	"	Coke 2.25	172.87	
			$26,213.27	
		Less Freight	322.28	
				$25,890.99

Selling and Delivery Expenses.

Salaries and expenses of salesman	$575.00	
Selling account	473.77	
Advertising, postage and petty cash	81.90	

N. Y. office rent and expenses	37.50		
Telephone, New York and Jersey City	42.75		
Wages of Drivers, Laborers, Weighmaster, Veterinary, etc.	3,167.08		
Feed for horses	1,368.15		
Harness supplies	225.00		
Stable "	18.50		
Horse shoeing, wagon material	75.00		
Water tax and New York tax	13.90		
Insurance on horses, trestle, bldgs., accident, etc.	165.93		
Ferriage	946.08		
Treasurer's salary and office help	524.00		
Office supplies and stationery	20.00		
Light, power and heat	37.59		
Taxes, Railroad	110.00		
Lawyer's fee, Mercantile Coal Assn.	37.50		
Interest on notes	723.30	8,442.75	34,333.74
Net profit for month			$ 1,080.05

Exhibit L.A.-6.

TRIAL BALANCE, APRIL 30, 1910.

1	Capital Stock		$150,000.00
3	Plant	$116,729.00	
5	Leasehold	135,000.00	
8	Equipment	81,795.84	
13	Tax %	2,739.60	
17	Fixtures	1,504.05	
22	Mdse.	157,147.04	
26	Cash	5,996.07	
29	Insurance	2,457.45	
32	Acct. Receivable	64,760.27	
37	Bills "	853.29	
42	Acct. Payable		8,673.72
71	Surplus		137,989.18
73	Interest	18,812.09	
78	Discount	603.22	
84	Sales		387,471.91
95	Wertheim, L. & S.	49,000.00	
102	General Expenses	21,037.28	
106	Officers Salesman	15,874.96	
110	Selling Expenses	11,828.45	
114	Labor Expense	35,066.34	
118	Feed "	18,700.87	
122	Freight	133,129.74	
128	Profit & Loss	693.50	
129	Dividend %	175.00	
135	Mortgage %	4,000.00	
149	Bills Payable		193,769.25

Exhibit L.A.-6½.

Sketch showing ground plan of property of L. Wertheim Coal & Coke Co.

Exhibits L.A.7. & 8.

No exhibits were offered under these numbers.

Exhibit L.A.9.

Financial statements of L. Wertheim Coal & Coke Co. of January, February, March, April, and May, 1911 not printed.

These statements show profits as follows:

January	1911	Profits	for	month	$2,260.22
February	1911	"	"	"	554.56
March	1911	"	"	"	1,835.73
May	1911	"	"	"	573.76

Exhibit L.A.-10.

Jersey City, N. J., September 5th, 1911.

My dear Mr. Payne:

I have your letter of September 2nd to hand. We delivered 793.$^{980}/_{2240}$ gross tons of #2 Buckwheat Coal to the City during the month of August. Note what you say in regard to the quantity of prepared coal, and will be governed accordingly. However, do you intend shipping the Stove Coal I ordered to Perth Amboy, or will I order it from the Mill Creek Coal Company? We need this coal very badly.

In regard to purchasing of horses from Rheims, Mr. Eckroth and I went over to Rheims & Company yesterday a week ago, and picked out twelve (12) horses. One of them I don't know whether we will take or not, as I did not like the shape of his legs, but the other eleven I liked very much. Mr. Eckroth thought that this twelfth horse I

Exhibit L.A.-10.

did not like would prove a good horse, so I thought I would take a chance and let him come over and try him. I do not know what their weights are, but they all should weigh anywhere from 1700 to 1900 pounds. Our stable is just completed today, and I am going to have these horses brought over tonight or in the morning. The reason we were delayed so long with the stables, is on account of fumigating it, and putting it in an absolute positive condition, so that what we have had in the other stable will not get into the new one. We intend keeping this stable entirely separate from the other one, feeding the horses separately, watering them separately, in fact, using it as though it were an entirely foreign stable to the other one, even to the harness. We have had five or six cases of crop out, and although some of these horses were killed against my judgment, the doctor insisted upon killing them. I suppose he is scared to death to have anything around, whose appearance would give it away. When you were down, there was apparently nothing in sight from his reports to me, and from my own observation, but in the last two weeks it has cropped out, and we are doing everything that man can do to change the situation. I think we now have it well in hand. It is pretty tough that this thing should come to us just when we were beginning to see daylight. It is something that we cannot control. I heard of a case the other day, where one of the State Health Doctors wanted to close up the stable for a few days and fumigate it, and get rid of two horses that he claimed had been affected. The owner refused, and not only tore his stable down, but destroyed every animal in it. This is only to give you an idea of how cautious I must be, and how careful we must be in keeping our place observed by a doc-

Exhibit L.A.-10.

tor, of good standing. I have to be very careful with what I say to Doctor Smith, and kind of jolly him along, and let him use his best judgment. As stated above, I think we have got the thing checked now, and hope it will be unnecessary to destroy any more horses, but I just wanted you to know that the delay in getting this new stable ready was this chief cause, as I am positively not going to let any horses that we buy out of that one stable, unless he has the written O. K. of Doctor Smith. We are going to test the horses that come in to the new stable.

In regard to the cost, the average of the twelve horses, was $385.20 per horse. In regard to their actual weights, I cannot tell you what they weigh until they come over. I have not as yet made the final definite terms with Rheims, but will not take the horses unless the payments are arranged, so that we can take care of them without jeopardizing our other notes: If I can make proper terms with Fiss-Doer & Carroll Horse Company, and can get the horses and the price, I am going to take some of the horses from them. Am waiting now to hear from them, as to whether we can get these long terms from them.

In regard to Mr. Eckroth, he is a very fine man, and you know that a stable with around 100 head of horses, with a possibility of having 130 head within a very short time, is quite an undertaking for any man to take ahold of, and it will be a little while before he gets this situation in hand. However, he is getting along fine, and he no doubt thoroughly understands a horse. I have gone almost entirely on his judgment on this first lot of horses, which we purchased, explaining to him the price of each horse, I picking the horses out, telling him that if he saw anything whatsoever on a horse, that he did not think would be

suitable for our work, that he was to throw it out, which he did. Am quite sure that he will make a valuable man for this Company, and will be a great help to me. So far as his personality is concerned, I like him very much, and in regard to your wanting to know whether he is making good or proving a failure, so far he has been making positively good.

You no doubt will be surprised to learn that we are not purchasing any Soft Coal from the Vinton Colliery Company, and have not taken any since the 17th of August. I took this matter up with Mr. Delano, in regard to the terms, and a lower price, and he could not see his way clear to lower the price, or to give us any better terms. I have made a contract with the Altoona Coal & Coke Company for one-half our supply at five (5) cents per ton lower than the Vinton Colliery Company were charging us, and I think our terms will be a great deal better.

I expect to close today for a cheaper grade of coal, which will answer our purpose, and some of our customers, at 25 cents per ton lower than the Vinton service.

I will give your regards to "Och Louie," as you request and am sure it will be appreciated.

Yours sincerely,

S. WERTHEIM, Secretary.

Exhibit L. A. 11.

No Exhibit offered under this number.

Exhibit L.A.-11½.

L. Wertheim Coal & Coke Co.

Jersey City, N. J. May 25th, 1911.

Mr. L. Wertheim, Pres.,
L. Wertheim Coal & Coke Co.,
No. 1 Broadway,
New York City.

Dear Sir:

I am enclosing you a report for the year ending March 31st, 1911. I wish you would send copies of this report to Mr. Delano and Mr. Payne. The report in itself so far as the profits are concerned will no doubt appear in your eyes very poor, but in my eyes and mind, taking into consideration the very poor year that we have passed through, as to trade conditions, this report is better than I anticipated. We have been compelled to sell our coal on a very low market at the same time paying the top prices for coal. We of course do not have the same advantage that other dealers do in getting any coal other than at the regular circular prices. You understand that most of the larger dealers in New York City, buy on the market, and the Tidewater market is really any price, and they can therefore buy coal much lower than we can, and make a greater profit on the low market than we can ourselves, for the reason stated above.

However, the conditions now are much brighter, as the market conditions so far as the retail prices are concerned are in a much healthier condition, and if we should have luck with our stock this year, and continue to get the better prices, which we are now receiving, we should show up a good prosperous year.

I wish also to state, that it is really necessary

Exhibit L.A.-11 1/2.

from experience this year, to have a system of bookkeeping, where it is possible for one to come in and get off a monthly profit and loss statement, showing just what our profits or losses are, any one month in the year, without digging out here and there to get at the cost, and the expense of delivering, etc. The chief auditor of the Audit Company, when we last audited books drew up a profit and loss statement, which we have practically carried out, and I wish to say that while there is no doubt this is a very good thing, it would be far better if we had it installed in our bookkeeping, so as to get everything accurate, and in fact get things so that most anyone could get at our profit and loss, and which cannot be done now without a great deal of work and then, these statements will not jibe with our books on account of the various accounts which do not go through our books. The writer has taken it upon himself to make arrangements to install a new system of bookkeeping, which will include a profit and loss statement, and a trial balance, so that they will be positively correct each month, and agreeing with our books. I sincerely hope that yourself and the rest of the officers of our company, will approve of this step, as it does not seem possible in our way of bookkeeping to get at these different accounts accurately. While I have no fault whatsoever to find with the way our books are being kept. They are being kept A. No. 1, but this is something that we have never been able to positively get at, and I think that whatever the cost, it would be a good investment for this company to make.

Very truly yours,

Secretary.

Exhibit L.A.-12.

L. Wertheim Coal & Coke Co.

Jersey City, N. J. July 25, 1911.

Mr. W. T. Payne,
Kingston, Pa.

Dear Sir:

Answering your favor of July 22nd, if you will look up our letter of the 20th inst., you will find that the only accounts that the writer went over were the accounts as stated in that letter. We have written to the Audit Company, and requested them to send an itemized list of how they arrived at the miscellaneous items. We have sent you the Commission Account and Salesmen's Salaries and Expenses each month, but could get these items out for you if you wanted them.

In regard to the depreciation and maintenance, this is composed of as follows:

$1,932.23 for the three months ending March 31, 1910, and $8,121.00 for the twelve months ending March 31, 1911. You will note that I divided the twelve months ending March 31, 1910 into twelve equal parts giving the depreciation for each month and then charged these three months in with the twelve months ending March 31, 1911, and these added gave me the total $10,053.23.

The Audit Company in making their audit including the one previous to the last one, was of twenty-seven months and they took the depreciation for thirty-six months and this caused the difference between their depreciation and our depreciation. It is not right or fair, in my mind, if you are arriving at the profit for a stated time to take the depreciation for any other time but the time in audit, which, in our case, was twenty-seven months. If our books were being

audited for three years then it would be a different case. It would not be right to take the nine months depreciation and put it in during the time of audit unless they credit us with any profit that may have been made during the nine months. The Audit Company charged the depreciation for thirty-six months instead of twenty-seven months which made a difference of considerable money.

We would be pleased to give you the itemized list of the Selling Account, but before we would do this, we would prefer to see you when you call during this week.

Yours truly,

L. WERTHEIM COAL & COKE COMPANY,

S. Wertheim,

Secretary.

SW/FJB

Exhibit L.A.-13.

BALANCE SHEET

MONTH ENDING MARCH 30, 1912.

ASSETS:

Plant and Equipment:		
Trestle and buildings	$113,301.79	
Motors, boiler, machinery and tools	6,655.00	
Horses 45,491.09		
Wagons 35,176.70	80,667.79	
Office equipment	2,258.66	
	202,883.24	
Less:		
Reserve for depreciation and extinguishment	11,225.90	$214,109.14
Leasehold		135,000.00
Good-will		
Current Assets:		
Cash	9,110.47	
Accounts receivable	95,210.76	
Notes receivable	520.28	
Coal on hand	18,872.04	
L. & S. Wertheim	57,344.34	
Mortgages receivable	4,000.00	185,057.89

Deferred Charges to Profit and Loss:			
Payroll		1,597.88	
Horse feed		12,018.49	
Harlem ground rent		315.83	
Insurance		1,515.44	
New accounting system		689.73	
Repair and construction supplies		2,500.00	
Ferriages		641.72	
Interest prepaid		4,892.92	
Dredging Harlem dock		53.26	
Miscellaneous deferred charges		3,327.32	
Freight		443.75	
Shop, labor and materials		90.84	28,087.18
			$562,254.21

LIABILITIES:

Capital Stock:			
Common			$150,000.00
Preferred			
Current Liabilities:			
Accounts payable		35,567.69	
Notes payable		307.415.41	
Freight (on cars not dumped)			
Taxes accrued		1,858.69	
Payroll (labor accrued but not due)			
Reserve for doubtful accounts		309.58	345,151.37
Surplus:			
Balance March 30th, 1912		66,220.79	
Net profit for month		882.05	67,102.84
			$562.254.21

Exhibit L.A.-14.

BALANCE SHEET

Month Ending February 29, 1912.

ASSETS:

Plant and Equipment:			
Trestle and buildings		$113,141.79	
Motors, boiler, machinery and tools		6,655.00	
Horses	47,631.09		
Wagons	35,266.70	82,897.79	
Office equipment		2,258.66	
		204,953.24	
Less:			
Reserve for depreciation and extinguishment		9,638.12	$214,591.36
Leasehold		135,000.00	
Good-will			
			135,000.00

Exhibit L.A.-14.

Current Assets:		
Cash	4,254.41	
Accounts receivable	106,835.00	
Notes receivable	545.28	
Coal on hand	16,506.15	
Mortgages receivable	4,000.00	
L. & S. Wertheim	57,041.01	189,181.85
Deferred Charges to Profit and Loss:		
Horse feed	11,628.84	
Freight	1,085.03	
Insurance	1,823.94	
Ferry tickets	688.70	
Repair and construction supplies	2,253.98	
Payroll	554.98	
Interest prepaid	5,547.13	
New accounting system	714.73	
Harlem ground rent	524.17	
Dredging Harlem dock	71.26	
Misc. deferred charges	3,191.09	28,083.65
		$566,856.86
LIABILITIES:		
Capital Stock:		
Common	$150,000.00	
Preferred		
		$150,000.00
Current Liabilities:		
Accounts payable	39,248.79	
Notes payable	309,278.01	
Freight (on cars not dumped)		
Taxes accrued	1,799.69	
Payroll (labor accrued but not due)		
Reserve doubtful accounts	309.58	350,636.07
Surplus:		
Balance February 29th, 1912	67,340.23	
Net loss for month	1,119.44	66,220.79
		$566,856.86

Exhibit L.A.-15.

BALANCE SHEET

Month Ending January 31, 1912.

ASSETS:

Plant and Equipment:			
Trestle and buildings		$113,091.79	
Motors, boiler, machinery and tools		6,655.00	
Horses	35,314.70		
Wagons & H.	47,806.09	83,120.79	
Office equipment		2,258.66	
		205,126.24	
Less:			
Reserve for depreciation and extinguishment		9,816.43	$214,942.67
Leasehold		135,000.00	
Good-will			
			135,000.00
Current Assets:			
Cash		13,221.24	
Accounts receivable		95,292.31	
Notes receivable		570.28	
Coal on hand		25,306.87	
L. & S. Wertheim		57,041.01	
Mortgages receivable		4,000.00	195,431.71
Deferred Charges to Profit and Loss:			
Horse feed		11,288.42	
New accounting system		739.73	
Insurance		2,211.76	
Res. Harlem boat freight		187.27	
Repair and construction supplies		2,253.30	
Dredging Harlem dock		89.26	
Interest prepaid		6,069.64	
Payroll		313.84	
Ferry tickets		489.89	
Harlem ground rent		732.50	
Miscellaneous deferred charges		2,374.34	26,749.95
			$572.124.33

LIABILITIES:

Capital Stock:			
Common		$150,000.00	
Preferred			
			$150,000.00
Current Liabilities:			
Accounts payable		41,052.32	
Notes payable		309,218.39	
Freight (on cars not dumped)		2,561.67	
Taxes accrued		1,649.69	
Payroll (labor accrued and not due)			
Reserve for doubtful accounts		302.03	354,784.10

Surplus:		
Balance January 31st, 1912	63,609.49	
Net profit for month	3,730.74	67,340.23
		$572.124.33

Exhibit L.A.-16.

Financial Statement Month

Ending April 30, 1912.

This Exhibit is identical with Exhibit E-7.

Exhibit L.A.-17.

JOHN T. ROWLAND, JR. ARCHITECT

Jersey City, N. J. Feb. 3/13.

Mr. Eugene Leake,
Jersey City, N. J.

Dear Sir:

In accordance with your instructions I have examined into the cost which would be involved in replacing buildings and trestle of Wertheim Coal & Coke Co., Pacific Av., Jersey City.

The amounts involved would be as follows:

A—Trestle & Pockets: In order to get a definite estimate on this work Mr. Brigham of my office telephone Steers & Co. of New York City and Mr. Snell of that company estimated the cost at $36 per running foot not including the pockets. This would make a total cost of $20,520 plus the cost of the pockets.

B—Buildings: A rough plot plan of the buildings is enclosed with this letter. The stables with extensions are estimated at $15,868 including all piling, etc. but not including the stalls. The stalls are estimated at $35 each making a total of

$3500 for same which added to the cost of the building makes a total of $19,368 for the stable.

The office building with scales, scale pit, etc. is estimated at $6347. The blacksmith shop is quite a rough building and is estimated at only $1460.

Your attention is called to the fact that in these estimates the coal pockets and trestles are omitted.

I shall require additional time to render a proper estimate on these.

Very truly yours,

JOHN T. ROWLAND JR.

R/H
enc

Exhibit L.A.-18.

Sketch of buildings of L. Wertheim Coal & Coke Co.

Exhibit L.A.-19.

BALANCE SHEET

MONTH ENDING DECEMBER 30, 1911.

ASSETS:

Plant and Equipment:		
Trestle and buildings	$113,046.96	
Motors, boiler, machinery and tools	6,655.00	
H. & W. 35,314.70		
Horses 48,706.09	84,020.79	
Office equipment	2,254.06	
	205,976.81	
Less:		
Reserve for depreciation of horses	9,681.64	$215,658.45
Leasehold	135,000.00	
Good-will		
		135,000.00
Current Assets:		
Cash	4,560.92	
Accounts receivable	88,156.82	
Notes receivable	595.28	
Coal on hand	44,426.16	
Mortgages receivable	4,000.00	
L. & S. Wertheim	57,041.01	198,780.19

Deferred Charges to Profit and Loss:		
Horse feed	8,869.53	
Insurance	1,924.09	
Ferry tickets	213.21	
Repair and construction supplies	1,945.57	
Payroll	598.54	
Interest prepaid	6,367.94	
New accounting system	764.73	
Harlem ground rent	273.33	
Dredging Harlem dock	107.26	
Misc. deferred charges	804.60	21,868.80
		$571,307.44
LIABILITIES:		
Capital Stock:		
Common		
Preferred	$150,000.00	
		$150,000.00
Current Liabilities:		
Accounts payable	45,660.02	
Notes payable	306,010.51	
Freight (on cars not dumped)	275.20	
Taxes accrued	3,950.50	
Payroll (labor accrued but not due)	1,499.69	
Reserve for doubtful accounts	302.03	357,697.95
Surplus:		
Balance December 30th, 1911	63,156.21	
Net profit for month	453.28	63,609.49
		$571,307.44

Exhibit L.A.-20.

New York City, N. Y. July 17th, 1912.

MINUTES of the regular monthly meeting of the Board of Directors of the L. WERTHEIM COAL & COKE COMPANY, held at Mr. Warren Delano's office, 1 Broadway, New York City, on Wednesday, July 17th, at 3 P. M.

Present:

WARREN DELANO
LOUIS WERTHEIM
SANDERS WERTHEIM

Minutes of the last monthly meeting were read and approved. The Treasurer reported that he had made arrangements with the First National

Bank of Bayonne, N. J., for a discount. A motion was made and duly seconded and passed, approving of the Treasurer's course in doing this. After further discussion in regard to the discounts, it was unanimously decided that the bank account should be left entirely to the Treasurer's own discretion, in regard to keeping the account at the Third National Bank, Jersey City or the First National Bank, Bayonne, or both if necessary. The Treasurer also reported that he thought it advisable to get possession of the 115th Street Yard, if possible, as it would help things in general. On account of the very poor tonnage being done at Jersey City, the Treasurer thought that by obtaining the 115th Street Yard again, it would help out. After a thorough discussion, the motion was duly made and seconded, to leave this matter in the Treasurer's hands, and if the yard could be obtained, to do so. The Treasurer reported that he had sent a monthly financial statement to both Messrs. Delano and Payne.

After a general discussion, upon motion the meeting adjourned.

S. WERTHEIM,
Treasurer.

Exhibit L. A. 21.

Identical with Exhibits E-23, E-24, E-25, E-26.

Exhibit L.A.-21½.

Letter head of L. Wertheim Coal & Coke Co.

Jersey City, N. J. March 28, 1912.

Copy.

Warren Delano, Esq.,
1 Broadway,
New York City.

My dear Mr. Delano:

I enclose you statement for the month of February. You will notice that we had a loss of $1119.44. We attribute this loss to our being compelled to buy extra coal as follows:

Mill Creek Coal Co.	2300 tons at .30	$ 690.00
Heilner & Son	525 " " .35	183.00
W. R. McTurk & Co.	750 " " .25	187.50
Gregory C. Kelly Co.	350 " " .25	87.50
Heilner & Son	250 " " .20	50.00
Total		$1,198.00

You will notice that if we had received Buckwheat Coal even up to the amount we delivered, we would not have had a loss. You will also notice that we put in $1200.00 for depreciation.

Of course, you understand the conditions we have been working against for the last few months, being continually short of coal, and if we had plenty of coal in February under regular conditions, it would certainly have shown a good profit. This letter is merely to show the conditions.

Yours very truly,

Secretary.

SW/AK

Exhibit L.A.-22.

L. Wertheim Coal & Coke Company.

ASSETS:

Trestle and buildings	$114,326.79	
Motors, boilers, machinery and tools	7,153.82	$ 4,680.00
Harness and Wagons	35,206.70	
Horses	31,875.00	
Office equipment	2,260.66	
Cash in bank	3,955.97	
Petty cash on hand	100.00	
Accounts receivable	53,126.87	
Notes receivable	520.28	
Mortgages	4,000.00	
Coal on hand	37,085.35	
Horse feed	1,289.04	
Supplies	2,895.22	
Ferry tickets	152.76	
Prepaid insurance	1,354.47	

Exhibit L.A.-22.

Due from Lehigh Valley Railroad Co., 643,367 tons at .15	96,505.09
Lease of property—19 yrs at $5,000 per yr.	95,000.00
Total	$487,108.02

This statement of figures is submitted without any prejudice whatever to the claims of the L. Wertheim Coal & Coke Company now pending before the Interstate Commerce Commission.

L. WERTHEIM COAL & COKE COMPANY.

10

L. Wertheim Coal & Coke Company.

ANALYSIS OF BUILDINGS AND TRESTLES.

Cost of Buildings, Trestle, Etc., as per Small Black Record Book—May 1, 1908:

Stable ground work		$ 10,000.00
Blacksmith ground work		2,500.00
Trestle ground work		35,000.00
Trestle open and close work		24,000.00
Carriage shed		200.00
Office ground work		1,500.00
Office building		850.00
Stable buildings		22,400.00
Blacksmith buildings		1,250.00
20 Grading and planking yard		8,900.00
Fence		900.00
Screens		500.00
Fire lines		250.00
Cost of Harlem coal pockets		2,096.00
		$110,346.00
Nails and planks (April and May)—		
Planking	$629.91	
South end of N. J. yard	722.59	1,352.50
Do. labor per pay roll		99.80
Cinders for filling		125.00
1 galvanized iron skylight		29.25
153 ft. 2 in. zero pipe covering, etc.		19.83
120-ton overhead suspension scale—J. C.		800.00
Concrete work scale—J. C.		225.00
30 Concrete work in new stable		325.00
Carpenter work in new stable		500.00
Plumbing work in new stable		335.00
Roof work in new stable		42.00
Planks and labor—Harlem yard		127.41
Total		$114,326.79

40

Exhibit L.A.-22.

L. Wertheim Coal & Coke Company.

ANALYSIS OF MOTORS, BOILER, MACHINERY & TOOLS.

ACQUIRED.

Appraised Value of Motors, Boiler, Machinery and Tools on Hand 6/30/11, as Inventoried by Mr. Sanders Wertheim and H. C. Bentley, and as Valued by Mr. Sanders Wertheim.

Items	Appraised Value as of 6/30/11	Cost of Additions as of 6/30/11
1 Rudd radiator	$ 75.00	
1 Oat car	25.00	
3 60-gal. oil cans	15.00	
200 ft. rubber hose	200.00	
Hose reel, nozzle, etc.	5.00	
1 Gibson oat crusher	350.00	
1 7½ H. P. motor	125.00	
Installing crusher and motor	75.00	
1 1½ H. P. General Electric motor	50.00	
1 Gillett clipping machinery	50.00	
1 2-wheel hose reel	15.00	
1 Boiler, piping, etc., for steaming out coal	1,100.00	
½ H. P. motor, blower and forge (in blacksmith shop)	75.00	
1 7½ H. P. motor for running machinery	125.00	
1 C. E. Wright Co. band saw	125.00	
1 C. E. Wright Co. planer	185.00	
1 Boynton & Plumber Co. drill	125.00	
Shafting, hangers, belting and pulleys and setting up	350.00	
1 Tire bender	20.00	
1 Tire setter	40.00	
Grindstone, anvil, vise and sundry tools	150.00	
1 Hand blower, forge and tools in horseshoeing shop	50.00	
1 Complete conveyor for hoisting coal	800.00	
1 Double scale	550.00	
Total appraised value—N. J.	$ 4,680.00	

L. Wertheim Coal & Coke Company.

ANALYSIS OF OFFICE EQUIPMENT.

PURCHASED.

	Appraised Value.
On Hand March 31, 1911:	
1 Safe (Mosler)	$ 400.00
1 Safe (Hall)	175.00
1 Standing desk with rack	15.00
1 Oak filing cabinet	10.00
1 Oak stand	2.00
1 Light oak table	8.00

Exhibit L.A.-22.

	2 Oak drop typewriter desks	56.00
	1 roll top oak desk	31.50
	1 Revolving chair	4.53
	Office partition—wrought iron	33.60
	1 Underwood typewriter No. 4	75.00
	1 Underwood typewriter No. 3 N. Y. O.	75.00
	1 Oak table—6 ft. with 2 drawers ...	18.00
	1 Flat top desk—48 x 60	50.00
	1 Letter press and stand	10.00
	2 revolving typewriter chairs	14.00
	1 Closet	10.00
	Floor covering—Main office	
10	1 Unfinished oak table	4.00
	1 Revolving oak chair	6.00
	1 Revolving oak chair	10.00
	1 Cherry roll top desk	10.00
	1 Leather sofa—Oak frame	40.00
	1 Oak bookcase	15.00
	Floor covering	13.78
	2 High revolving chairs	10.00
	1 Low stool—Leather seat	2.00
	Telephone booth	35.00
	1 Stove	10.00
	Shades	7.50
	4 Gas heaters	16.00
	1 Oak filing cabinet	20.00
	1 Oak chair with arms	5.00
	1 Settee	8.00
20	1 Time recording clock	20.00
	2 Office chairs	2.50
	2 Coat racks	2.00
	Picture frames	7.00
	2 Telephone arms	3.00
	1 Gooseneck electric fixture	3.00
	Electric fixtures and shades	9.00
	1 Electric fan	5.00
	1 Electric fan	12.50
	1 Single roll top desk—In Weighmaster's office	10.00
	1 Auto dupligraph—In Weighmaster's office	10.00
	9 Fly screens	8.10
	1 Roll top desk—N. Y. O.	30.00
	2 Rugs Do.	25.00
	1 Roll top desk Do.	60.00
30	1 Bundy time clock and racks	111.50
	Total New York & N. J. Offices ..	$ 1,533.51
	Harlem Office:	
	1 Standing desk	20.00
	1 Safe	60.00
	1 Safe	40.00
	2 Chairs	1.00
	Appraised Total Value	$ 1,654.51
	Additions Subsequent to 3/31/11:	
	1 Remington typewriter No. 11 and Whal adder	292.50
40	1 Burroughs adding machine No. 3 and stand	253.50

Exhibit L.A.-22.

2 Stoves	22.05
1 Frame	1.50
Mat, carpet, hassocks and door mat	5.10
1 Oak table	2.00
1 Check protector	30.00
Total	$ 2,261.16

TONNAGE OF JERSEY CITY YARD FROM 1906 TO NOVEMBER, 1912.

643,367 tons, 480 lbs., at .15 per ton .. $96,505.09

L. WERTHEIM COAL & COKE COMPANY.

NOVEMBER 30th, 1912.

75 Horses on hand at $425.00 ea. $31,875.00

L. WERTHEIM COAL & COKE COMPANY.

ANALYSIS OF WAGONS AND HARNESSES.

ACQUIRED.

Appraised Value of Wagons and Harnesses as furnished by Mr. Sanders Wertheim:

Items	Appraised Value as of 6/30/11	Cost of Additions after 6/30/11
Single wagons—		
No. 1	$ 125.00	
3	225.00	
19	225.00	
40h	275.00	
Coke wagon—		
No. 18	325.00	
Patent trucks—2 tons—		
No. 24	325.00	
25	325.00	
27	325.00	
28h	325.00	
29h	325.00	
37h	325.00	
Patent trucks—4 tons—		
No. 23	425.00	
54	425.00	
62	425.00	
63	425.00	
Patent trucks—6 tons—		
No. 20	575.00	
21	575.00	
55	575.00	
56	575.00	
57	575.00	
58	575.00	
59	575.00	
60	575.00	
17	575.00	
26	575.00	
Carts—13 carts at $50	650.00	

Exhibit L.A.-22.

Gravity trucks—5 tons—		
No. 1		525.00
30		325.00
32		325.00
35		325.00
36		325.00
39h		325.00
Gravity trucks—6 tons—		
No. 44		475.00
74		475.00
33		475.00
34		475.00
Gravity trucks—7 tons—		
No. 71		500.00
Side dumper—5 tons—		
No. 77		500.00
Side dumper—6 tons—		
No. 22		525.00
53		525.00
Side dumper—7 tons—		
No. 50h		575.00
51		575.00
52		575.00
70h		575.00
72		575.00
78		575.00
79		575.00
81		575.00
Side dumper—8 tons—		
No. 73		625.00
75		625.00
76		625.00
80 gravity		575.00
82 gravity		575.00
	$24,750.00	
Harness:		
90 Collars at $6.50	585.00	
22 3 H. sets harness at $115	2,530.00	
18 Team sets harness at $60	1,080.00	
35 Breast blankets at .50	17.50	
4 Pr. lead lines at $2.50	10.00	
4 Dutch collars at $7.50	30.00	
4 Sets cart harness at $18.00	72.00	
4 Patent collars at $5.00	20.00	
2 Single sets carriage h. at $25.00	50.00	
66 Winter blankets at $5.50	363.00	
7 Stable blankets at $3.50	24.50	
2 Fly nets at $1.00	2.00	
2 Single sets harness at $27.50	55.00	
Total appraised value of wagons and harness 6/30/11		$29,589.00
Additions After 6/30/31:		
4 Second hand springs		20.00
Patent truck No. 64—4 tons—built		405.00
Patent truck No. 65—3 tons—built		360.00
1 3-Horse set harness—hand made, at $125		125.00
Bits, collars, supplies		124.05
1 Ton Eureka coal wagon		235.00

Collars, blankets	663.40
Pressed aprons	104.40
1 Set single harness	32.00
3 Side discharging wagons	1,300.00
Wheels and supplies	425.00
101 Signs	244.35
1 Gig—built	75.00
1 Ambulance—built	550.00
15 Signs	30.00
1 Harness—hand made	125.00
Nose bags	62.50
Total value of wagons and harnesses	$34,469.70

Exhibit L.A.-22½.

(Letter head of L. Wertheim Coal & Coke Co.)

Jersey City January 31st, 1913.

Messrs. Payne & Delano,
1 Broadway,
New York City.

Gentlemen:

I have your request to go over the figures and make explanations of how we arrived at same on the list of "Analysis of Buildings & Trestle."

Item No. 1 *Stable—ground work and buildings* —which was inventoried on May 1st, 1908 at $32,400. is composed of, as near as I can find, as follows:

The General Contracting & Engineering Co., who had the original contract to build this building, agreed to build a stable 126 ft. long x 30 ft. and an office 15 ft. x 30 ft. with two (2) scale pits at a cost with iron shingles, of $10,123. On our books, we carried the office building at $2,350.00, which left the stable costing us $7,873.00, or $62.50 per running foot, but this did not cover the lining of the barn, oak floors, oak sides nor any of the extras that are needed in building a barn of this kind. Since that time we have made five (5) additions to this barn, identically the same as originally built, or in other words we

Exhibit L.A.-22 1/2.

have added 244 running feet to same, and figuring this out at $62.50 per foot, gives the amount of $15,250.00. I wish further to state that in the original estimate of the General C. & E. Co., they did not include a floor on the loft, which was also extra on 370 running feet x 30 ft. figuring the barn to cost the same rate of $62.50 per running foot, outside of the extras, which would bring the cost of these buildings to $23,123.00, exclusive of any extra work done inside of the barn, exclusive of any of the fire lines, feed crushers, motors, electric lights, gas heating appliances or steam heating appliances. It does not include the filling in of 30 feet x 370 running feet of marsh land, which we had to fill in to the extent of between three and four feet with cinders purchased partly from the Lehigh Valley Railroad Company and partly had it carted to our yard by teams, which was very expensive. The difference between our figures of $23,123. and $32,400. as shown on our books is $7,600. which is for extras in the buildings, as explained and the filling in of this land over the place explained. We wish further to state that since the original building of the office by the Contracting Co., we put on an addition of 10 x 15 ft.

Item No. 2 *Blacksmith shop—ground work and buildings*—Our blacksmith shop is composed of two (2) buildings, which are up to date in every particular for this class of work. The buildings are 55 ft. wide x 38 ft. deep and there is a double concrete floor in the main building on account of the heavy work it is used for. It is equipped with up to date machinery in every respect and for every purpose in the truck building line. In fact, as you know we turn out brand new trucks from this plant, outside of the

Exhibit L.A.-22 1/2.

wheels. Adjoining this building is a horseshoeing shop, which is up to date in every respect. We disagree with the people who inspected this plant, as to the remark that these buildings were a menace to our main building and if this is so, we would be unable to get the low insurance rate that we have had placed on our plant, which is extra low for our class of business. The blacksmith shop and the buildings with contents, are estimated in my opinion very low. The buildings are absolutely substantial and in A. No. 1 condition.

Item No. 3 *Trestle*—The figures of the trestle are evidently made up of an estimate which in my mind is entirely too high. I wish further to state that I have no recollection of ever making these figures. According to our original contract with the General Cont. & Engineering Company, which we enclose herewith, the trestle was to cost $19,100., to which I should judge there has been added with our conveyors at each end of same about $2,500.00 additional. We also paid the General Contracting & E. Company, $3,631.54 for the concrete work, etc. to the pockets and also building a trestle-way from our pockets to our stable, which is a distance of about 150 ft. and at a cost of about $600.00, which we use for unloading grain and hay to our stable, making the figures on the trestle $25,831.54.

Item No. 4 *Carriage shed*—The carriage shed is in 100% condition.

Item No. 5 Office buildings etc.—We have explained this in item No. 1.

Item No. 6 *Grading & planking*—The grading and planking of the yard, as you will notice on our original contract with the General C. & E. Company, was for the drive-way, only and they charged us $3,800.00 for the drive-way. In other

Exhibit L.A.-22 1/2.

words, they charged $3,800. for the part of the yard which is covered by the pockets, proper on the approach of the scale and the rear of those pockets, but this did not cover the planking of our approach to the trestle, which is about 1½ times the size of the planking at the trestle, proper. The above shows you how we arrive at this item.

Item No. 7 *Fence*—The fence of $900.00 is estimated very small, as you will see that the Contracting Company charged us $680. but this was only on a fence around the original property, which we originally leased in 1906. Since that time we have added on twice as much property, which is all fenced in and which costs considerably more money than what we had this charged.

Item No. 8. On our pockets which number 22, we have twenty-two up to date screens and some of the pockets have no meshes and the cause of this is that we do not screen our small sizes.

Item No. 9. The fire lines need no explanation, as this was the actual cost.

On our statement we have included the cost of Harlem coal pockets, which is $2,096.00. This should not be included in the Jersey City item. The item of nails and planks—April and May for planking south end of New Jersey yard, which costs $1,352.50 and $99.80 for labor: These planks we used to take place of the planks that had rotted.

Item No. 9. The item of $125.00 for cinders: These cinders were used to fill part of the yard and purchased from the Lehigh Valley Railroad Company. The galvanized iron sky light was used on building No. 4 and has already been covered in item No. 1.

Item No. 10. The 20 ton suspension scale is

Exhibit L.A.-22 1/2.

in 100% condition and within the last two months, the City has raised the grading of the street. Therefore, causing this scale to be lower than the street level and all we have to do is to raise it to the level of the street which we are now doing.

Item No. 11. The item of $225.00, is for the concrete work on this particular scale. The several items in the new stable should not be included, as they have already been included in item No. 1. Planking and labor of Harlem yard should not be included, as this has nothing to do with the Jersey City plant.

I wish further to state that we have explained to you the cost of filling in in item No. 1 and item No. 2. Our piece of property covers 3½ acres of land and when we originally took hold of it, we had to fill this entire property in with cinders. The depth practically ran of clear water from three to four feet. No doubt, in our original estimate of the trestle and ground work, they figured a great deal of money for this work, which must at least have cost us in the neighborhood of $5,000.00 for the carting, price of cinders and the labor of spreading this large amount over this property.

I enclose you the original agreement with the General Contracting & Engineering Company, dated September 27th, 1906. At the same time I also enclose you quotation from P. Sanford Ross, showing the quotation for the same work of trestle, only of $32,600. I wish further to state that you will notice by the quotation given us by the General Contracting & Engineering Co., we paid part cash and part notes, everything of which was paid at maturity and cleaned up some years ago. We of course, in our above estimate have not figured the interest, which was in the

neighborhood of $4,000.00 and which no doubt, our predecessor included in his estimate of 1908. I also hand you the original book with these figures in it.

Yours very truly,

Secretary.

ENC'S

Exhibit L. A. 23.

No exhibit offered under this number.

Exhibits L. A. 23½, 24, 25.

Read in evidence.

Exhibit L. A. 26.

No exhibit offered under this number.

Exhibits L. A. 26½, 27.

Read in evidence.

Exhibit L.A.-28.

L. Wertheim Coal & Coke Company account East Boston Coal Company. (This exhibit is a statement of purchases by months, October, 1906, to April, 1912, classifying the different grades of coal.)

The following summary gives the monthly totals:

1906			
October	637.14 tons	$ 913.33	
November 24	By Check		$ 913.33
November	139.19 tons	238.70	
December 29	By Check		238.70
December	59.08 tons	207.90	
1907			
January 30	By Check		207.90
January	630.17 tons	1,504.04	
February	440.14 tons	1,309.14	
March 27	By Check		1,000.00
March	265.18 tons	455.79	
April 5	By Check		504.04
May	Interest on monthly accounts January and February	23.54	

Exhibit L.A.-28.

May 17	Check to Balance February, March, April, with interest		1,788.46	
May	418.12 tons	1,127.29		
	Discount of 2% on May account		22.37	
	Allowance		8.88	
			1,096.05	
June 13	Check for May account ..	505.18		
June	203.09 tons	769.82		
July & Aug.	175.18 tons	310.81		
September	88.16 tons	2.99		
	Interest August and Sept.		505.18	10
September 14	By Check for June acct. ..		171.76	
October 12	By Check for July acct. ..	309.75		
November	88.10 tons		598.06	
December 13	By Check for Aug. acct. ..		313.80	
December 16	By Check for Sept. acct. ..		309.75	
1908				
February 11	By Check for Nov. acct. ..	231.52		
April	102.04 tons		231.52	
May 26	By Check for Apr. acct. ..	543.30		
May	191.05 tons		543.30	
June 27	By Check for May acct. ..	1,245.35		
June	618.11 tons	276.75		
July	154.14 tons		1,245.35	
August 1	By Check for June acct. ..	221.74		
August	249.03 tons		276.75	
September 1	By Check for July acct. ..	1,582.39		20
September	581.03 tons		20.75	
	Allowance		221.74	
October 27	By Check for Aug. acct. ..	1,018.90		
October	402.12 tons		1,561.64	
November 28	By Check for Sept. acct. ..	1,048.36		
November	640.09 tons	2,151.73		
December	1,052.12 tons		1,018.90	
1909				
January 2	By Check for Oct. acct. ..	2,963.04		
January	1,425.07 tons		1,048.36	
February 10	By Check for Nov. acct. ..		1,000.00	
February 27	By Check for Dec. acct. ..	2,498.18		
February	7,733.19 tons		1,151.73	
March 10	By Check to balance Dec. account	2,704.91		
March	2,138.10 tons		2,963.04	30
April 9	By Check for January, 1909, account	2,789.95		
April	2,123.12 tons		1,583.07	
May 11	By Check on Feb. acct. ..	2,410.44		
May	1,842.05 tons	3,453.82		
June	2,290.11 tons		3,638.12	
July 15	Cash for Note due July 14, 1909	18.26		
	Interest on same	1,724.33		
July	1,418.12 tons	2,086.92		
August	1,463.08 tons	1,409.72		
September	1,391.12 tons	3,157.60		
October	2,352.01 tons		2,359.41	
October 12	By Check on April acct. ..		29.50	
October 16	By Check on April acct. ..		4.98	
November 26	By Check on account	4,194.15		40
November	3,484.17 tons	3,217.95		
December	2,375.16 tons			

New Jersey State Library

Exhibit L.A.-28.

1910				
January	3,949.14 tons	6,213.21		
	Interest on Ledger acct. included in their note dated January, 1910	1,105.05		
February	By shortage			3.00
February	4,814.01 tons	6,760.30		
March	By error			89.23
March	4,384.02 tons	5,483.14		
April 22	Cash on note due April 25			2,955.75
April	4,314.10 tons	6,859.47		
May 25	Cash in payment of note due May 25th			3,593.36
	Interest on note	274.01		
May	3,143.02 tons	5,236.70		
June	Interest on 10 month note for May acct.	275.66		
June	3,800.06 tons	6,667.60		
June 27	Cash on note due June 25th			1,794.00
June 30	Cash on note due July 25th			2,222.77
July	Interest on note	254.63		
July	1,891.14 tons	2,778.68		
July 29	Cash on note due Aug. 25th			1,473.87
	Interest	56.72		
July 29	Cash on note due Sept. 25th			3,315.48
	Interest	149.80		
July 29	Cash on note due Oct. 25th			4,403.86
	Interest	209.75		
July 29	Cash on note due Dec. 25th			3,378.85
	Interest	176.18		
August	Interest on July, 1910 acct. ($2,778.68)	138.93		
August	3,608.10 tons	4,150.24		
August 27	Cash on note due Dec. 25th			6,523.80
	Interest	310.65		
September	Reconsignment charge ...	2.00		
September	3,881.05 tons	5,069.17		
	Interest on $6,317.69	315.88		
	Interest on $5,479.82	273.99		
September 17	Check on account			2.00
October	3,261.03 tons	4,977.89		
October 29	Cash on note due Feb. 25th			5,754.15
	Discount and Interest	274.00		
November	Interest on note $4,977.89..	248.89		
November	3,127.10 tons	4,656.39		
December	Interest on Nov. acct. ...	245.74		
	Loan on demand note	2,500.00		
December	4,019.03 tons	6,691.26		
1911				
January	Interest on note Dec., 1910 ($7,025.83)	334.56		
January 24	Cash on acct. note due Nov. 25th			5,000.00
January 26	Check on account			1,000.00
January	6,003.06 tons	14,605.91		
February 8	Check on account			1,000.00
February 15	Check on account			1,164.93
February	5,566.10 tons	8,966.88		
February 28	Interest on note for $10,761.14	538.06		
March 25	Interest on note for $7,646.02	382.30		

Exhibit L.A.-28.

March	5,738.19 tons	8,856.07		
March 25	By Check		3,000.00	
April	Interest on note for $14,454.00	722.70		
April 11	6,917.17 tons	9,951.55		
April 14	Check on account		2,202.44	
April 14	Cash for note date April 25		5,788.95	
May	Interest on note April acct. for $9,949.55	497.48		
May	5,561.08 tons	9,315.80		
May 25	Cash on note due May 25		5,347.23	
June	Interest on note May acct. for $9,315.80	465.79		**10**
June	2,815.12 tons	5,988.28		
	Note due June 25 discounted		2,917.61	
	Note due Aug. 25 discounted		5,578.28	
	Note due Sept. 25 discounted		5,226.78	
	Note due Oct. 25 discounted		5,160.63	
July	3,848.08 tons	7,322.05		
July 24	Cash on note due July 25th for $6,317.68		6,633.57	
August	2,216.09 tons	5,141.70		
August 26	Cash for note due Nov. 25th		7,025.83	
June	Commissions on coal		101.74	**20**
July	Commissions on coal		141.34	
	Allowance on coal		98.33	
September	Interest on note for $3,024.48	151.48		
September	1,729.17 tons	3,024.48		
	Interest on note for $5,149.59	257.08		
	Protest fees	1.62		
September 2	Check on account		101.92	
September 13	Cash on note due Sept. 12th for $250		261.25	
September 27	Check on account protest fees		1.20	
October 17	Cash on note due Oct. 12th for $250		262.50	
October	3,039.17 tons	5,077.86		**30**
	Interest due on note $5,107.86	255.39		
November	4,456.09 tons	7,164.40		
	Interest on note for $6,924.68	346.76		
November 14	Check for note due Nov. 12th		250.00	
	Check for interest on note due Nov. 12th		13.75	
	Interest on note due Nov. 12th	13.75		
	Deductions on coal June and July		257.94	
December	4,675.08 tons	6,490.82		
	Omission in September account	30.00		**40**

Exhibit L.A.-28.

		Error in charge November		239.72
		Chack for note due Dec. 12th, for $250		250.00
	1912			
	January	Interest on note for $6,850.33	342.52	
	January	1,887.18 tons	3,208.12	
		Interest on note January acct. for $5,886.36	294.32	
	January 9	Check on account		2,000.00
	" 10	Check on account		1,000.00
	" 15	Check on account		1,500.00
10	" 15	Check on account		250.00
		Interest on note January 12th		16.25
	February	1,833.44 tons	2,583.33	
		Interest on note due Feb. 11	17.50	
	" 1	Check on account		2,000.00
	" 12	Check on account		2,000.00
	" 12	Check for note due Feb. 12		267.50
	" 17	Check on account		1,000.00
	" 24	Check on account		2,200.00
	March 4	Check on account		332.27
	March	3,404.03 tons	4,301.17	
		Interest on notes	249.20	
20		Interest and difference in weight in coal shipped January, February and April, 1911		97.87
		Interest on notes	68.53	
	1912			
	April 2	Checks on March account		3,636.63
	July	Interest on notes	188.08	
	1910			
	December 12	Interest on notes	82.50	
	1912			
		Interest on February coal bill	2.15	
		Interest on January coal bill	18.71	
	March 31	Interest on various notes		1,022.44
		Check on March account ..		427.66
		Total Charges	$231,765.29	
30		Total Credits	140,765.25	
		Balance Due	$ 91,000.04	

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Exhibit L.A.-29.

		Amt.	Total.	Amt.	Total.
1912					
May	To Mdse.	4,538.29			
June	By Cash			2,000.00	
"	" " "			1,000.00	3,000.00
"	To Mdse.	5,138.17	9,676.46		
July	By Cash			2,538.29	5,538.29
"	To N. Y., O. & W. R. R. Co. bill for trimming boat Oxford	8.37			
"	To Mdse.	5,475.41	15,160.24		
Aug.	By Cash			1,438.17	6,976.46
"	To Mdse.	1,102.52	16,262.76		
Sept.	By Cash			2,000.00	
"	" "			700.00	
"	" "			1,500.00	11,176.46
"	To Mdse.	3,066.01			
"	" Loan	1,500.00	20,828.77		
Oct.	To Mdse.	3,940.18	24,768.95		
Nov.	By Yorkville Coal Co. Note			577.21	
"	By D. Davis Note			837.00	
"	" Cash			1,701.76	14,292.43
"	To Mdse.	6,564.49			
Dec.	By Cash			3,484.47	17,776.90
Nov.	To Mdse.	2,150.00	33,483.44		
Dec.	" "	3,389.27	36,872.71		
1913					
Jan.	By Note			705.00	
"	" Cash			2,706.92	
	" D. Davis Note			750.00	21,938.82
"	To Mdse.	7,971.52	44,844.23		
Feb.	By Cash			2,246.74	24,185.56
"	To Mdse.	8,231.20	53,075.43		
Mch.	By Cash			4,238.25	28,423.81
"	To Mdse.	2,695.61			
Apl.	" "	1,696.79	57,467.83		
May	By Cash			2,217.01	30,640.82
"	To Mdse.	1,053.58			
June	" "	3,671.65			
July	" "	5,233.09			
Aug.	" "	4,996.83	72,422.98		
Sept.	By Cash			1,500.00	
"	" Allowance on 38,603 Tons Rice Coal @ 35c			135.15	
"	" Bernstone & Levy Note			516.07	32,792.04
Sept.	To Cash	1,500.00			
"	" Mdse.	1,539.67	75,462.65		
Oct.	By Cash			2,300.00	35,092.04
"	To Mdse.	3,194.54			
"	" Cash	1,500.00	80,157.19		
Nov.	By Cash			516.95	35,608.99
"	To Mdse.	4,846.34	85,003.53		
Dec.	" Mdse.	3,848.21	88,851.74		

1914					
Jan.	By Cash			587.00	36,195.99
"	To Mdse.	512.29	89,364.03		
Feb.	By Cash			2,462.76	38,658.75
"	To Mdse.	1,222.86	90,586.89		
Mar.	By Cash			3,051.47	41,710.22
"	To Mdse.	2,318.03	92,904.92		
Apl.	By Cash			2,746.25	44,456.47
"	To Mdse.	2,582.88	95,487.80		
May	By Cash			2,832.88	47,289.35
"	To Mdse.	3,543.04	99,030.84		
June	By Cash			1,500.00	48,789.35
"	To Mdse.	1,871.44	100,902.28		
July	" "	33.55	100,935.83		
	From May 1, 1912, to Aug. 1, 1914,				
	Total amount Coal furnished ..		100,935.83		
	Total amount Cash paid		48,789.35		
	Balance unpaid		52,146.48		
	Interest to Sept. 10, 1914		4,218.65		

Exhibit L. A. 30.

Statement of monthly sales by East Boston Coal Co. to L. Wertheim Coal Co. from April 1912 to time of Bankruptcy with monthly balances.

Covers same date as L. A. 29.

Exhibit 30-a.

List of contracts of L. Wertheim Coal & Coke Co. with customers also unfilled orders.

Exhibit L. A. 30a.

Exhibit L. A. 30a.

Net Tons.					
5,000	#1 Buck	Hotel Seville	$3.00	net	to May 1st, $3.15 beyond. No Contract.
1,600	Stove	J. C. Fire Dept,	5.75	"	April—10 cent advance ea. mo. No Contract.
800	#1 Buck	Hotel Mansfield	3.30	"	No Contract.
15,458	#2 Buck	City of New York	2.90	gross	Contract.
384	Pea	" " " "	4.10	"	Contract—Expires Dec. 31, 1911
298	Broken	" " " "	5.26	"	Contract.
2,500	#1 Buck	N. Y. Taxi Cab Co.	3,10	net	No Contract; Advance May 1, 3.25
1,200	#1 Buck	National Casket Co.	3.55	gross	No Contract.
1,000	#1 Buck	Raynor & Perkins	3.30	net	Contract. Expires April 1, 1912
600	#1 Buck	A. & M. Robbins, Inc.	3.20	"	No Contract. Advance May 1, $3.25
2,500	#1 Buck	Royal Insurance Bldg.	3.25	"	Contract.
1,200	#1 Buck	A. Silz. Inc.	3.15	"	No Contract. Advance May 1, $3.25
2,000	#2 Buck	Trust Co. of America	2.65	"	No Contract. Advance May 1, $2.90
3,500	Soft	U. S. Government	3.31	gross	Contract. Expires July 1, 1911
1,800	#1 Buck	Washington Bldg,	3.35	"	**No Contract. Advance May 1, $3.50**
6,000	#1 Buck	Wall St. Exchange Bldg.	3,10	net	No Contract. Advance May 1, $3.25
1,500	#1 Buck	Young Women's C. Assn.	3.35	"	No Contract.
200	Broken	Arnstein	5.70	gross	April delivery.
2,500	#1 Buck	Astor House	3.25	net	to December 1, 1911. Contract expires April 1, 1912
300	Stove & Egg	Astor House	5.50	net	to December 1, 1911. $5.75 rest,
4,000	Soft	J. F. Boyle Co,	3.35	gross	No Contract.
2,500	Soft	Edwards & E. W. Barnes	3.75	net	Contract. Expires April 1, 1912
250	Pea	" " "	4.00	"	Contract. Expires April 1, 1912
2,400	Pea	City Hall	3.85	"	No Contract.
5,000	Soft	Colgate & Co.	3.40	gross	Contract. Expires April 1, 1912
100	Pea	N. Y. Public Library	4.40	"	Contract. Expires this month (April).
5,000	#1 Buck	H. C. Hallenbeck	3.15	net	to May 1, $3.30 net beyond. No contract.
300	#1 Buck	Hotel Pallasco	3.25	"	No Contract.
800	Soft	Est. T. Hamilton	3.75	"	No Contract.
3,500	#1 Buck	Hotel Bristol	3.25	"	Contract. Expires April 1, 1912
2,500	#1 Buck	Hotel Chelsea	3.25	"	No Contract.
2,400	#1 Buck	Charles Hellmuth	3.60	gross	Contract. Expires April 1, 1912
1,200	#2 Buck	Hotel Touraine	2.90	net	No Contract.
1,500	#1 Buck	" Woodstock	3.15	net	No Contract.
2,400	#1 Buck	" New Weston	3.50	gross	No Contract.
7,500	#1 Buck	" Savoy	3.15	net	No Contract.
2,400	#1 Buck	Huyler's	3.30	"	No Contract.
12,000	#1 Buck	Geo. A. Fuller Co.	3.30	gross	Contract. Expires April 1, 1912
3,000	#1 Buck	Hanover National Bank	3.40	net	No Contract.
500	Stove, Egg and Broken	Kuhn, Loeb & Co.	5.50	"	Contract. Expires April 1, 1912
900	Egg	M. Garfunkel	5.50	"	April delivery.

Exhibit L. A. 31.

Letter stating coal orders and contracts (additional) May 13, 1911.

Jersey City, N. J., May 13th, 1911.

L. WERTHEIM COAL & COKE COMPANY.

W. T. Payne. Esq.,
Kingston, Pa.

My dear Mr. Payne:

The contract for the schools of Jersey City has been awarded to us. Please also add to your list the Runkel's Co., 12 tons No. 3 Buckwheat coal daily at $2.75 per gross ton, and 6 tons soft coal daily at $3.85 per gross ton.

We expect that they will change to No. 2 Buckwheat coal.

Yours truly,
L. WERTHEIM COAL & COKE CO.
SANDERS WERTHEIM,
Secretary.

Exhibit L.A.-32.

L. WERTHEIM COAL & COKE CO.

Trial Balance—December 31, 1911.

Trestle and buildings	113,046.96
Motors, boiler, machinery, etc.	6,655.00
Horses	48,706.09
Harness and wagons	35,314.70
Office equipment	2,254.06
Leasehold	135,000.00
Reserve for depr. of horses	9,681.64
Cash in banks	4,560.92
Accounts receivable	88,156.82
Notes receivable	595.28
Coal on hand	44,426.16
Mortgages receivable	4,000.00
L. & S. Wertheim	57,041.01
Horse feed	8,869.53
Insurance	1,924.09
Ferry tickets	213.21
Repairing—Const. supplies	1,945.57
Payroll	598.54
Interest prepaid	6,367.94

New accounting system	764.73	
Harlem ground rent	273.33	
Dredging Harlem dock	107.26	
Misc. deferred charges	804.60	
Preferred stock		150,000.00
Accounts payable		45,660.02
Notes payable (notes running 10 mths. to 4 years)		306,010.51
Freight cars not dumped		4,225.70
Taxes accrued		1,499.69
Reserve for doubtful accounts		302.03
Surplus		63,609.49
Total	571,307.44	571,307.44

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Exhibit L.A.-33.

L. Wertheim Coal & Coke Co.

December, 1911.

Anthracite Coal Purchases.

Mill Creek Coal Company:				
249.10 tons Egg Coal	at 3.45	860.78		
175.05 " Egg "	" 3.45	604.61		
43.16 " Pea "	" 1.80	78.84		
41.02 " Buck "	" 1.25	51.38		
233.03 " Egg "	" 3.45	804.37		20
228.18 " Stove "	" 3.45	789.71		
21.08 " Stove "	" 3.50	74.90		
746.05 " Buck "	" 1.25	932.81		
131.00 " Egg "	" 3.45	451.95		
138.12 " Egg "	" 1.80	249.48		
357.05 " Buck "	" 1.25	446.56		
143.17 " Egg "	" 3.45	496.28		
117.18 " Pea "	" 1.80	212.22		
180.01 " Buck "	" 1.25	225.06		
268.16 " Pea "	" 1.80	483.84		
458.04 " Egg "	" 3.40	1,557.88		
Total		8,320.67		
By Credit—(84.10 tons Egg	at 3.35)	291.53	8,029.14	
Albert H. Dollard:				30
295.07 gross tons Buck	at 2.35	694.07		
Towing & Trimming on boat		30.60	724.67	
O. H. Perry & Son:				
43,200 lbs. Stove Coal	at 5.25 gr.	101.25		
96,300 " Pea "	" 3.50 "	150.47		
		251.72		
Ferry Tickets		1.21	252.93	
Heilner & Son:				
76.10 tons Buck Coal	at 1.45	110.93	110.93	

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E. C. Altshul:				
10,900 lbs.	Stove Coal	at 5.35 gr.	26.03	
4,000 "	Broken	" 4.60 "	8.20	
12,150 "	No. 1 Buck	" 2.85 "	15.42	49.65
Burns Bros.:				
6,000 lbs.	Egg Coal	at 5.25	15.75	
50,000 "	Pea "	" 3.40	85.00	
56,000 "	Stove "	" 5.25	147.00	
2,000 "	Nut "	" 5.50	5.50	
1,000 "	R/Nut "	" 6.00	3.00	256.25
Bergen Coal Co.:				
65½ tons Mixed Coal (gr.)		at 5.60	366.80	
Less .35 per ton commission			22.95	343.85
Whitney & Kemmerer:				
699.15 tons No. 1 Buck		at 1.55	1,084.62	1,084.62
Bergen Coal Company:				
110½ tons gross Pea Coal		at 4.00	442.00	
Less .35 per ton commission			38.70	403.30
Total				$11,255.34

Exhibit L. 34.

"Analysis of Horse Account."

"Appraised value of horses owned as of June 30 1911 as per inventory, furnished by Mr. Sanders Wertheim and valued by him."

Showing list of 103 horses with valuations totaling $39,985.

"Analysis of Wagons & Harness."

"Appraised value of wagons and harnesses as furnished by Mr. Sanders Wertheim June 30, 1911."

Here follows list of wagons and trucks totaling $29,589.00.

New Jersey Court of Errors and Appeals

Between COMMERCIAL TRUST COMPANY OF NEW JERSEY, *Complainant,* *and* L. WERTHEIM COAL & COKE COMPANY *et als.*, *Defendants.*	On Bill to Foreclose. Appeal from Chancery.

BRIEF FOR MILL CREEK COAL COMPANY

—and—

WARREN DELANO.

This is a bill to foreclose a mortgage dated and recorded May 6th, 1912, made by L. Wertheim Coal & Coke Company to the Commercial Trust Company to secure a bond issue of 250 bonds at $1,000 each. More than two years and four months after the delivery of the mortgage (September 16th, 1914) the Wertheim Company was declared a bankrupt. Later Mr. Drayton was appointed as Trustee and as such filed an answer and cross-bill to the bill to foreclose.

Of the issues raised in the cross-bill, the ones on which the Trustee relies are (Page 438):

1. That the Wertheim Company was actually insolvent upon a proper analysis of its books and balance sheet of March 31st, 1912.

2. That the proper analysis which the Trustee has in mind is the marking down of various asset items, viz.: trestle, buildings, leasehold, claim against Wertheims, Adams mortgage.

3. That the mortgage is wholly void as against creditors generally irrespective of the fact whether the creditors' claims all came into existence long after the date of the mortgage or not.

4. That the affidavit attached to the mortgage does not state the true consideration within the requirements of the Chattel Mortgage Act.

5. That the mortgage was given in contemplation of insolvency. This point has now been abandoned.

Facts.

The Mill Creek Coal Company, of which Mr. Delano is and was President during the period adverted to in the proofs, owns $118,000 of the bonds secured by the mortgage. Originally it held bonds No. 40 to 159 both inclusive. Bond No. 62 was called and paid October 1st, 1912; bond No. 71, April 1st, 1914, leaving 118 bonds, one of which was held as security for part of its face value, as it represented in part moneys owed for coal. These bonds were taken at par by the Mill Creek Coal Company for amounts due it for coal furnished to the Wertheim Company and for $20,000 in cash advanced to the Wertheim Company, and for a further sum of $2,500 advanced in cash at the time of the purchase of the Harlem Yard in 1911 (Page 244, l. 10-25).

At the time of the hearing, no creditor was in existence whose claim had arisen before the mortgage was given (Kreuzer, accountant called by Trustee in Bankruptcy, page 133, l. 10-20).

The Mill Creek Company was a wholesale dealer in coal and also a miner and shipper of coal. Its only relation prior to 1909 to the Wertheim Company was that it sold that company coal. (Delano, page 225). The amount of indebtedness, subsequently represented by bonds, was not disputed. (Page 226, l. 30-35.) It sold coal as follows:

1906	$5,586.78
1907	21,631.97
1908	36,833.48
1909	61,329.13

Or a total of over $125,000 in those four years (Delano, page 227, l. 30-40).

The Wertheim Company in 1909 was in charge of Louis and Sanders Wertheim and Messrs. Isenstein and Dann.

Early in December, 1909, Sanders Wertheim called on Mr. Delano and reported that there was friction in the company owing to the fact that Isenstein and Dann were not practical coal men and that the Wertheims wished to buy them out. He then presented to Mr. Delano a proposition that if they could get a loan of sufficient cash down, they could buy the Isenstein and Dann stock advantageously.

Mr. Delano asked whether there was not someone else with whom the company had had dealings who would join in the proposition, and was told by Sanders Wertheim that he would take it up with the East Boston Coal Company and the Messrs. Payne, whom he thought might be interested. (Delano, page 228, l. 1-35.)

Mr. Delano had had no dealings with the Messrs. Payne at that time. (Page 228, l. 38-41.)

On December 8th, 1909, Mr. Wertheim brought the Messrs. Payne to Mr. Delano's office and the matter was discussed. He had met Sanders Wertheim only two or three times at that time. They talked the matter over. Mr. Delano's judg-

ment was favorable to the Wertheims because of Mr. Payne's knowledge of them and the judgment of the general sales agent of the Mill Creek Company was very favorable toward the Wertheims personally. (Page 229.)

The salaries of Isenstein and Dann were stated to be $12,000 per annum (page 229, l. 21-29), which were to be saved to the company absolutely in any new arrangement.

Mr. Delano considered the matter as a business proposition. The yard was doing a good business, apparently handling 120,000 to 130,000 tons of coal per annum with a practically nominal rental on a long term lease from the Lehigh Valley. (Page 229, l. 35-38.)

Mr. Delano has been in the business of mining and shipping coal as a wholesaler for the past twenty years. (Page 230, l. 15-22.)

After an investigation he made at the time of the probabilities of success of the Wertheim Company, his conclusion was favorable to the proposition. The lease and location he considered valuable (page 231, l. 25-32). He agreed as President of the Mill Creek Coal Company, to obtain credit or a loan of $20,000 to consummate the project by which Isenstein and Dann, the largest stockholders of the Wertheim Company, sold their preferred stock at fifty cents on the dollar, provided a cash payment was made to them to take up notes which they had negotiated for the benefit of the company. The amount of the cash payment was finally settled at $20,000. (Page 232, l. 30-40.)

Personally Mr. Delano had no interest whatever in the Wertheim Company. His total stock holding never exceeded eight shares. (Page 233, l. 10-20.)

Sanders Wertheim reported that Isenstein and Dann would accept $20,000 in cash and a monthly payment of $1,000 on the stock and $1,000 notes to be issued by the Wertheim Company

with interest to date of payment, extending over several years. (Page 234, l. 14-21.)

Mr. Delano arranged with Mr. Van Buskirk to discount the note of the Wertheim Company for $20,000, endorsed by the Mill Creek Company, and discounted by the Mechanics Trust Company, of which Mr. Van Buskirk was president, and the money was paid to Mr. Van Winkle, of this Bar, who was the attorney at that time for the Wertheim Company and its Registrar of stock. (Page 234, l. 27-41).

In the summer of 1913 the Mill Creek Company paid the $20,000 note. (Page 238, l. 23-28.) Copy of cheque for the same amount dated December 17th and made by Van Buskirk to his own order, endorsed payable to the order of Marshall Van Winkle, Atty., and duly paid, appears on page 206.

On the 20th of December, 1909, Mr. Delano became a director in the Wertheim Company (Page 236, l. 33). His first step was to have an audit made of the company's affairs (Page 237, l. 26-31). The audit covered the period up to the end of December, 1909. This audit is Exhibit E-5 (Page 505). It was made by the Audit Company of New York (Page 104, l. 31), whom Kreuzer (Page 137, l. 19) testified was an audit company of the best standing.

Following the audit, the stock was reduced. Originally it consisted of $125,000 par of common and $150,000 par of preferred. At Mr. Delano's instance, the stock was reduced (Page 238, l. 14-17) so that it consisted of $150,000 par of common stock with no preferred (Page 238, l. 19-22).

The stock was held entirely by the Wertheims with the exception of 200 shares in the name of Otto Isenstein, another brother, and 24 qualifying shares in the names of Messrs. Payne, Van Buskirk and Delano—8 shares each. (Page 238, l. 23-30.)

The company was unfortunate in having its stable become infected with glanders by which it lost between twenty and thirty thousand dollars in horses in December, 1911. (Page 240, l. 1-5.) There was also an unfair discrimination of the Lehigh Valley Railroad Company against the Wertheims for demurrage on bad delivery of coal, and allowing cars to stand a long distance from the trestle but charging them nevertheless as being delivered and then charging demurrage on deliveries (Page 240, l. 9-17). For example, a bill for something like $4,000 for demurrage in one month in 1911 was charged by the Railroad Company but compromised at a low figure. (Page 241, l. 4-11.)

Mr. Leake then appeared as counsel of the company and called on Mr. Delano in August and the matter of demurrage was taken up at that time (Page 241, l. 12-22).

Mr. Delano believed that conditions warranted the making of money by the company in that locality. The idea of the mortgage was first suggested to Mr. Delano by Mr. Leake as the representative of the Wertheims and as counsel for the company. (Page 241, l. 29-40.)

Mr. Leake reported to Mr. Delano that he had made a careful study of the Wertheim situation; had gone over all the books and satisfied himself that it had a good business, was getting fair prices and was buying coal at reasonable prices; that the great trouble was that the time of the active men was consumed in arranging to meet their indebtedness, borrowing money from banks, etc., and that this work took away their energies and time from the prosecution of the business.

At this time there were a large number of notes due the Mill Creek and East Boston Companies for coal which was coming due month after month. The two coal companies had given the Wertheim Company ten months' credit so there were always

ten months' bills outstanding to each company and notes for these bills. (Page 242.) Most of the coal was furnished by these two companies, although the Wertheim Company was free to go outside and buy. At times the Mill Creek bought large quantities of coal for the Wertheims and then put it in on a ten months' credit. (Pages 242-243.)

When Mr. Payne's breaker burned up, he bought coal outside. (Page 243.)

The proposition that Mr. Leake finally worked out was that the two creditor companies should surrender their notes and take in lieu bonds covering the company's assets. (Page 243, l. 10-21.) This meant that the Mill Creek and East Boston Companies surrendered notes on which they could have taken judgment and accepted in place of these bonds deferring payment for twenty years.

The coal companies also continued their previous arrangement to furnish the Wertheims with coal. At this time the Wertheims owed the Mill Creek about $119,000. (Page 243, l. 28.)

Mr. Delano investigated the question of the consideration of the Isenstein and Dann notes. He took it up with Mr. Leake early in January, 1912. (Page 243, l. 30-40.)

Mr. Leake advised him that the Wertheim Company was liable to Isenstein and Dann and that the notes could not be attacked. (Page 241, l. 9-12.)

Mr. Delano received no salary from the Wertheim Company; never made a dollar out of it and had no agreement or understanding by which he personally was to make a dollar out of it. (Page 244, l. 30-38.)

After funding the indebtedness of the Mill Creek and changing the ten months period of payment of the notes to a twenty year payment by the acceptance of the bonds, the Mill Creek continued to sell coal to the Wertheim Company (Page 244,

l. 38-41, and top of 245), as follows (Page 247):

In May, 1912	$659.19
June, 1912	2,529.95
July, 1912	2,837.20
July, 1912	345.06
September, 1912	2,305.23
October, 1912	4,423.36
November, 1912	1,801.32
December, 1912	1,513.10
January, 1913	3,773.36
February, 1913	6,090.37
March, 1913	4,672.17
April, 1913	2,116.03
May, 1913	4,119.47
June, 1913	3,753.19
July, 1913	142.45

From which it appears that subsequent to the date of the mortgage, the Mill Creek Companies sold to the Wertheims more than $41,000 worth of coal amounting, after deducting the total cash payments received thereon, to $31,836.45. The last cash paid was on November 27th, 1912, amounting to $568.39. (Page 247, l. 19-22.) The $31,836.45 was due at the time of the bankruptcy and was altogether unsecured.

On July 14th, 1913, Mr. Delano resigned as a director of the Wertheim Company. (Page 247, l. 29.) He had nothing further to do with the company after his resignation. (Page 248, l. 15-18.) His stock had never been in his possession and was recognized as belonging to the Wertheims. (Page 248, l. 25-34.)

The total amount of coal sold by the Mill Creek Company to the Wertheim Company prior to January 1st, 1910, was $125,381, and the total amount sold since January, 1910, and including tonnage to the 115th Street yard in New York, amounted to $225,392.71.

So far as Mr. Delano and Mr. Payne were

concerned, each testified that it was his first venture in the retail coal business. Their experience had been confined to wholesaling, shipping and mining.

After the bond issue, other dealers besides the Mill Creek and East Boston extended substantial credits for coal sold to the Wertheim Company. (Payne, page 405, l. 13-36.)

The company bought from Stone & Company, large amounts from Van Pelt. They bought from Bowman.

POINT I.

The burden is on the Trustee in Bankruptcy to show that the mortgage was a dishonest use of credit. This he has failed to do.

In *Bergen* v. *Rodgers*, 73 Eq. 238, Vice Chancellor Garrison said:

> "I do not find that the complainant has "borne the burden of showing that this cor- "poration was insolvent or that the bond was "given in contemplation of insolvency."

What is the test of insolvency under Section 64 of the Corporation Act? It should be remembered that we are not dealing with any test, Federal or otherwise, except the test of insolvency under this particular section as adjudicated by the New Jersey Courts.

Fortunately there is no doubt whatever about the rule. It is laid down by Justice Dixon for the Court of Errors and Appeals in the case of *Empire State Trust Co.* v. *Fisher*, 67 Eq., 602. On page 604, after quoting Section 64 of the Corporation Act, the Court says:

> "In enforcing this statute we are not con- "trolled by the definition of insolvency con-

"tained in the Bankruptcy Act, but must ac-
"cord that term the meaning ascribed to it in
"the courts of this state. Here it denotes a
"general inability to meet pecuniary liabil-
"ities as they mature by means of either
"available assets or *an honest use of credit.*"
(Italics ours)

National Bank of Metropolis v. *Sprague,* 21 N. J. Eq. 530-538.

Skirm v. *Eastern Rubber Mfg. Co.,* 57 N. J. Eq. 179-184.

This case has been frequently cited and followed.

A late application of the definition is found in *Wright* v. *American Finance & Securities Co.,* 93 Atl. 862, quoted on page 867.

In the case at bar the company actually made an honest use of its credit by meeting practically all its pecuniary obligations except those which it funded through the instrumentality of the mortgage.

In the period *following the date of the mortgage,* that is, after May 6th, 1912, it obtained a credit of $41,000. for coal from the Mill Creek Company. Was this honest or dishonest? In like manner it obtained a large credit from the East Boston Company.

In July, 1913, the Mill Creek Company discontinued selling the Wertheim Company coal, and on the 14th day of that month Mr. Delano resigned. The Wertheim Company went on until September, 1914, fourteen months later. During all this period the Mill Creek Company and its President, Mr. Delano, had nothing whatsoever to do with the company. Still it went on. It did business. No judgments were obtained against it. It received large credits from banks, practical coal men and others. Was it sustained during all this period by a dishonest use of credit? There

is no proof on which to rest a suspicion. The case is silent as to this. It is clear, therefore, that during all the period beginning with the time of the mortgage until a considerable time after the Mill Creek stopped selling coal, the corporation was solvent within the meaning of the act, viz: it either met its obligations or extended them by an honest use of credit.

The deductions in the value of the assets sought to be made by the Trustee in Bankruptcy, are not justified by the evidence.

The evidence, if it indicates anything, indicates that the New York Audit Company exercised more skill and a higher degree of care than has been exhibited by any critics of their performance.

POINT II.

The action of the Mill Creek Coal Company in dealing with the Wertheim Company was characterized by absolute good faith. (Decree, p. 451, l. 37-40.)

The scheme for the mortgage was not its project. It was a plan which emanated from the Wertheims and the Wertheim Company and conceived in their interest. It was suggested by Mr. Leake, counsel of the Wertheim Company and the Wertheims individually. It was a sagacious and practical plan, advantageous to the Wertheim Company and financially generous on the part of the Mill Creek Company.

The capital stock of the Wertheim Company was owned by the Wertheims. The bonds issued to the Mill Creek represented dollar for dollar of coal sold and $22,500. of cash advanced. By

accepting the bonds, the Mill Creek exchanged a short term indebtedness roughly of $100,000. for bonds maturing in twenty years. The association of The Mill Creek and East Boston Coal Companies with the Wertheim Company resulted in doing away with the large salaries payable to Isenstein and Dann, both of whom released their claims against the company.

Mr. Delano received no salary for his services as Vice President or director. Neither he nor his company could make under any circumstances any more than the profit on the coal sold, which according to the proof, was sold at market prices.

Obvious facts are weakened by argument. Can anything be plainer than that it is advantageous for a company to be allowed to buy $100,000. worth of coal and fund the indebtedness in twenty year bonds?

More than this, after the mortgage was made, the Mill Creek Company sold $41,000. more of coal on ten months' credit on open account, receiving payment thereon which left a balance of $31,000. which has never been paid.

Is it not too absurd to contend that such an action emanated from anything else than good faith?

As soon as Mr. Delano came in to represent his company, he procured audits to be made by the New York Audit Company. The system of book keeping was changed. The matter was freely discussed at meetings and references were spread upon the minutes.

These are actions which seemed strangely inconsistent with the Trustee's theory that through the guile of the Mill Creek and East Boston Companies, the Wertheim Company was enabled to lure other members of the business community into extending it credit because its life was wrongfully lengthened.

The theory of the Trustee in Bankruptcy is that if he can show book insolvency at the date of the mortgage, it is sufficient. His method of showing book insolvency is to take the figures shown in the audits of the New York Audit Company (which according to the testimony were prepared with exceeding care) and arbitrarily scale down these figures by a retrospective view from the stance of the bankruptcy.

The challenger of the Audit Company is Kreuzer.

Slater, with no knowledge of the value of the leasehold, testifies as to bare land values.

Dunham, with no knowledge of the value of the leasehold, testifies as to structural cost of trestles, piling, &c.

But apart from this method of proof, the proposition that book insolvency at the time of the giving of the mortgage would avoid the mortgage, is not correct under our decisions.

As already pointed out, the idea of insolvency is negatived by an honest use of credit, which permits the corporation to meet its maturing obligations. This definition excludes book insolvency as a test.

In Russell & Irwin Mfg. Co. v. *E. C. Faitoute, &c. Co.*, 62 Atl. 421, the attempt was made to show solvency by showing book solvency. "Such valuation is entitled to little or no credit," Vice Chancellor Emery said.

Obviously, if solvency cannot be proved by the books, no more can insolvency.

Again, in *Skirm* v. *Eastern Rubber Co.*, 57 Eq. 179-184, the Court held that it did not follow that one might not be insolvent because he may ultimately have a surplus after winding up his affairs. This case was quoted by Vice Chancellor Backes in *Wright* v. *American Finance & Co.*, *supra*. Obviously, in such a case, the books would show solvency.

One of the great facts in this case is that the corporation went on for a long period, and it went on naturally in a business sense. Such being the case there is no warrant for the proposition that the Trustee in Bankruptcy can search the history of the company, mark down its assets at the time of the mortgage, and avoid the mortgage on the theory that at that moment the corporation was insolvent.

In *Sandford Fork & Tool Co.* v *Howe, Brown & Co.*, 157 U. S. 312; 39 Law Ed. 713-717, Justice Brewer said:

> "for here the corporation was a going con-
> "cern and intending to continue in business,
> "and the mortgage was given with a view of
> "enabling it to so continue and to prevent
> "creditors whose debts were maturing from
> "invoking the aid of the courts, to put a stop
> "thereto. Can it be that if at any given time
> "in the history of a corporation engaged in
> "business, the market value of its property
> "is in fact less than the amount of its indebt-
> "edness, the directors, no matter what they
> "believed as to such value or what their ex-
> "pectations as to the success of the business,
> "act at their own peril in taking to them-
> "selves indemnity for the further use of their
> "credit in behalf of the corporation? Is it
> "a duty resting upon them to immediately
> "stop business and close up the affairs of the
> "corporation? Surely a doctrine like that
> "would stand in the way of the development
> "of almost any new enterprise. It is a fa-
> "miliar fact that in the early days of any
> "manufacturing establishment and before its
> "business has become fully developed, the
> "value of the plant is less than the amount
> "of money which it has cost, and if the di-
> "rectors cannot indemnify themselves for the
> "continued use of their personal credit for

"the benefit of the corporation, many such "enterprises must stop at their very begin- "ning."

While the above dealt with the rights of directors to indemnify themselves, it is a strong authority against the proposition the Trustee contends for.

In *Regina Music Box Co.* v. *Otto*, 65 Eq. 582-592, Vice Chancellor Stevens quoted Chancellor Green in a previous case as follows:

"The act respecting insolvent corporations "under which these proceedings were insti- "tuted, looks to the suspension of the ordin- "ary business of the company or some overt "act by which its insolvency can be ascer- "tained and declared. The Court cannot, "upon an inquiry of this nature, undertake to "investigate the financial ability of the com- "pany at previous periods founded upon a "mere failure to meet its engagements, or "the actual state of its finances after its bus- "iness has been suspended."

Vice Chancellor Stevens continues:

"This language has been quoted with ap- "proval in subsequent cases (citing them). "If these decisions do not cover the construc- "tion of Section 64, they at least suggest "caution in undertaking to avoid securities "given a considerable time before suspension "of business."

The Vice Chancellor says on the same page:

"There are a great many solvent compan- "ies, I imagine, which at some period or an- "other of their existence have been pressed "for money and have, because of such press- "ure, been obliged to ask for time. If the "test be present inability to pay *in cash* all

"maturing claims, then a successful effort to "obtain further time by a pledge of their "property is a demonstration of their insol- "vency."

Even if the proofs had raised a real question—had made the transaction open to two constructions—the law is that the construction which comports with honesty is the one that the court will adopt.

In *Gray* v. *Folwell, vs. Dick,* 454, Vice Chancellor Pitney said:

"It is a well settled rule that if a transac- "tion of this character is capable of two con- "structions, one that comports with honesty "and one with dishonsty, the former should "be adopted by the court; and I think that the "rule is especially applicable to a transac- "tion so old as the one here attacked."

In that case the Court was dealing with an alleged fraudulent conveyance about ten years old.

The mortgage was not given in contemplation of insolvency. This point, while now abandoned by the Trustee, bears on the good faith of the transaction.

In the *Regina case, supra,* 65 Esq. 586, Vice Chancellor Stevens illustrates:

"To contemplate insolvency within the "meaning of the act, is to have in mind some- "thing more than the mere possibility of in- "solvency. The failure of debtors to make "prompt payment, the occurrence of some un- "expected event, the stringency of the money "market, may create an apprehension in the "mind of the manufacturer that he may be "unable to meet his obligations as they ma- "ture. He may for the moment be doubtful "whether he will or will not be able to go on.

"If he succeeds in borrowing enough money "to pay his obligations and goes on, he can- "not be said to have contemplated insolv- "ency at the time he borrows the money "merely because he had in mind at some "former time the possibility of becoming in- "solvent in case he failed to borrow it. This "is the language of common sense no less "than of the authorities."

"When his company executed the mort- "gage, he contemplated not insolvency, but "the reverse. Any other construction of the "statute would make it impossible for a cor- "porate manufacturer temporarily in need of "money, to procure it by pledge of his prop- "erty, although by procuring it he would "terminate his embarrassment." (Top of Page 588)

The theory of the Trustee's brief is that the Wertheim Company was insolvent at the time of the mortgage and that by taking bonds the Mill Creek Company hoped to realize more than it believed it could by forcing a liquidation of the company.

Undoubtedly Mr. Delano believed in the ability of the company to succeed if given a chance. On what other theory can his sales of coal be explained? The sales, subsequent to the mortgage, amounted to $41,000, over $31,000 of which is still unpaid—a curious result if the Trustee's definition of his purposes be correct.

In the course of the argument below, the Court asked Mr. Enright why these gentlemen had taken this course, whether they wanted to lose their money, and so far as my recollection serves, Mr. Enright was at a loss for an answer.

Mr. Payne likewise believed in the company. He delivered large quantities of coal subsequent to the making of the mortgage. Mr. Enright states

in his brief, that he delivered over $100,000 worth, of which amount over $52,000 was due at the time of the bankruptcy. It was all part of a carefully laid self-serving plan according to the Trustee's brief. These great losses of the Mill Creek and East Boston Companies represented in part by bonds and in part by open account, resulted from the far sighted selfishness of Messrs. Delano and Payne. Surely such a characterization seems strained, but for further refutation Mr. Bowman appears on the scene. He is not a bondholder; he has no concern with the company, but as a dealer in coal in the ordinary course, he extends large credit—$50,000—to the company. And there were other merchants—Stone & Company, Van Pelt, who also extended credit to the company at a time after the Mill Creek had discontinued selling coal because Mr. Delano felt he was not receiving the same percentage of payment on coal delivered as was Mr. Payne. The facts cry aloud. These subsequent extenders of credit, like Delano and Payne, believed the company would pay. The continuance of the ordinary business existence of the company from May, 1912, to September, 1914, was not a sham. It was not a fraudulent device. It was achieved by "an honest use of credit," as the Fisher case puts it, and the Fisher case is the leading case.

The Trustee cites the Regina Music Box cases to the effect that the assets were over $477,000 and the liabilities $268,000. These figures were taken from a statement in this case prepared by Yalden & Walker, certified accountants, and the figures of the accountants were followed. If the same method be applied to the figures of the New York Audit Company, the accountants in this case, the assets will be taken as $187,000 greater than the liabilities. The method followed by the Trustee is to quote the Yalden & Walker figures, which were unchallenged, and compare them with the New

York Audit Company figures of which the Trustee challenged nearly every item, and armed with the wisdom of the bankruptcy, scales them down to the vanishing point. He also, to avoid the effect of the statement of assets and liabilities by the New York Audit Company, adopts a self-serving comparison—for example, he compares *floating* debt with quick assets. This makes the test of solvency the ability to pay in full at forced sale. It is difficult to see what possible contribution to the real settlement of the questions in this case is effected by such a comparison. Ability to pay in full at forced sale is not the test of common sense. How many going concerns, if liquidated at forced sale, could pay fifty cents on the dollar?

It seems to us that the arbitrary scaling down of the assets and liabilities attempted by the Trustee is beside the main questions of the case. For example, it is very easy, now that the concern has gone to pieces, to assign a small value to the lease; but the lease was a device for transacting business and all these practical men—coal dealers and creditors—apparently attached great value to it.

The Trustee's brief suggests that the Mill Creek and East Boston Companies profited by the mortgage. It is sufficient to point out that at the bankruptcy Mill Creek was a creditor on

bonds	$118,000
On open account	31,000
Total	$149,000
East Boston was a creditor on bonds and open account	150,000
Total	$299,000
Due to outside creditors	$126,000
Excess loss of Mill Creek and East Boston over outside creditors	$173,000

But all these consideration are of trifling value in view of the fact that—

1: The attack on the mortgage is by subsequent creditors and there is no case in New Jersey which upholds the right to make such an attack.

2: The corporation was not insolvent because it actually went on by an honest use of credit extended in part by persons who are bondholders and in part by persons who had no connection with the mortgage.

POINT III.

It is controlling that no creditor in existence at the time of the bankruptcy was such at the time of the mortgage.

This matter is discussed by the Trustee on p. 47 of his brief. He is able to cite one case only for his proposition; but *Cope* v. *Walton Company*, 79 N. J. Eq. 165, is not an authority to the effect that a transfer while insolvent is void even as to *subsequent* creditors. It was a bill to enforce a municipal lien. April 14, 1908, bids for the construction of a road were opened. April 25, 1908, there was a contract between the County and the Company. May 13, 1908, the Company gave an order on the County Collector to one Allen, by way of assignment of moneys to grow due on the contract "until the completion of all work contracted for the year 1908" the order read. The Walton Company proceeded with the work and did not pay for materials used on the job. The persons who furnished materials filed liens. The question was whether a fund in the hands of the County Collector belonged to Allen, the assignee, or the lien claimants. *Held*, the Company was

insolvent when it gave the order on the County Collector, and that that order was void under the 64th section of the Corporation Act. The Court also held that the right to a lien arises when the material is supplied. Apparently the material was supplied before there were any moneys due under the assignment on which the assignment acted operate. The order or assignment acted in *futuro in praesenti.* It was not an assignment of anything in existence at the time. All the Company had when it gave the order was a contract with the County. The moment the material was furnished the right to lien arose. Obviously no moneys grew due until subsequently. So we have the case of the right to lien antedating the time when the moneys on which the order was to operate became due. Therefore the lien creditors' rights antedated the moneys to grow due. The case is distinctly not an authority for the proposition that porsons who become creditors subsequent to the delivery of a bond secured by a mortgage can attack it. That question played no part in the case,—was not adverted to. The common sense of the proposition that subsequent creditors cannot attack a prior recorded mortgage is that in no conceivable way are they hurt. They take with notice. The assignment in the Walton case was a latent equity. None of the lien claimants had notice of it. Ordinarily creditors have no such lien. In the Walton case the assignee had notice of the insolvency from such facts as these: Arrears of taxes; inability to pay insurance premium; default on its mortgage interest; bank balances reduced $3.60, $6.91, $2.61 in its three different banks of deposit. A year before the date of the assignment, the Company conveyed its entire property to Allen, the assignee, as security. The Company was without funds.

The order was at most an equitable assignment of money to be earned and so operated upon the funds "as soon as it was earned".

Cogan v. *Conover Mfg. Company*, 69 Eq. 809, 813.

POINT IV.

The affidavit annexed to the mortgage states the true consideration.

It is as follows:

"STATE OF NEW JERSEY,
County of Hudson, } ss.:

"JOHN W. HARDENBERGH, being duly sworn ac-
"cording to law, says that the Commercial Trust
"Company of New Jersey is a corporation or-
"ganized under the laws of the State of New Jer-
"sey 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 Jer-
"sey 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 ex-
"tent of Two Hundred and Fifty Thousand Dol-
"lars, par value; that all said bonds are to be
"secured by said mortgage, and the said mort-
"gage 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 refer-
"ence is specifically made hereby. The said bonds
"and coupons in this indenture have been pre-
"pared 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
"Jersey, and therefore, at the present time there
"the Register's office of Hudson County, New
"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 exceed-
"ing Two Hundred and Fify Thousand Dollars of
"principal with interest at six per cent., which
"may become due upon the said bonds as they
"shall respectively be issued. The amount here-
"after 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 law-
"fully issued or negotiated so as to be held as
"valid obligations against the said L. Wertheim
"Coal & Coke Company.

"John W. Hardenbergh.

"Sworn and subscribed to before
"me this 6th day of May, 1912.
"Willard C. Fisk, Master in Chancery of New
Jersey."

The cases of *Fletcher* v. *Bonnet*, 51 Eq. 615, and *Camden Safe Deposit Co.* v. *Burlington, &c., Co.*, 33 Atl. 479-481, *Breit* v. *Salferino*, 77 L. 436 amply

support the form of affidavit, which is quite in accordance with regular practice. It would be strange if it were otherwise because, in the nature of things, the officers and attorneys of the Commercial Trust Company pass upon large numbers of such affidavits in the course of a year. We understand there is a fuller discussion of the cases in the memorandum submitted for the complainant below.

PONT V.

The after acquired property clause of the mortgage is good.

The Vice Chancellor so found on the authority of—

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

PONT VI.

The decree should be affirmed.

Respectfully submitted,
ALBERT C. WALL,
Of Counsel, with
WARREN DELANO
and
MILL CREEK COAL CO.,
Respondents.

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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 MAX ISENSTEIN, deceased,
Defendants-Appellees.

On Appeal, etc.

BRIEF FOR APPELLANT.

The Pleadings.

The bill is filed by Commercial Trust Company, as Trustee, to foreclose a chattel mortgage made by L. Wertheim Coal & Coke Company, a New Jersey corporation, dated, proved and recorded May 6, 1912, purporting to secure an issue of coupon bonds in the aggregate amount of $250,000, dated April 1, 1912, payable in twenty years from the date thereof, to the bearer thereof, with interest thereon

at the rate of six per cent., payable semi-annually.

It is alleged that said bonds and mortgage were duly authorized and executed and that said mortgage covers all the property of every kind then owned or which might thereafter be acquired by the Wertheim Company, including good will and franchises, excluding only two leases made by the Lehigh Valley R. R. Co., dated June 12, 1906, and April 30, 1908, respectively; that said mortgage contained a provision requiring the payment of $2,000 monthly to the Trustee, out of which the Trustee should pay the interest accruing on the bonds and accumulate the balance as a sinking fund, with a provision for maturing the entire mortgage upon a three months' default in any monthly payment; that the monthly payment due June 1, 1914, remained unpaid for three months, whereupon the mortgage became due.

The bill prays for the foreclosure of the mortgage and sale of the mortgaged property for the benefit of the bondholders and for the appointment of a receiver *pendente lite*.

The answer of Albert I. Drayton, Trustee, alleges that on September 16, 1914, subsequent to the filing of the bill, an involuntary petition in bankruptcy was filed against the Wertheim Company and that subsequently said mortgagor was adjudged bankrupt and appellant duly appointed Trustee in Bankruptcy, thereby becoming vested with all the powers which may be lawfully vested in any trustee in bankruptcy;

That the bonds secured by said mortgage were issued to and are still held by Mill Creek Coal Co., represented by Warren Delano; East Boston Coal Company, represented by William T. Payne; and Max Isenstein and William Dann, to secure antecedent indebtedness; that so much of such indebtedness as was held by Isenstein and Dann was *ultra*

vires; that at the time of the mortgage the Wertheim Company was insolvent and that said mortgage was, therefore, void as to all bondholders; furthermore, that the affidavit annexed to said mortgage failed to state the true consideration thereof, and that said mortgage was therefore void under the Chattel Mortgage Act; that in any event the lien of said mortgage upon current book accounts and after-acquired property was subordinate to current business debts by reason of certain provisions of the mortgage requiring the Company to continue business and permitting the collection and sale of assets in so doing.

The answer by way of cross-bill brought in as parties defendant Mill Creek Coal Company, East Boston Coal Company, Warren Delano, William T. Payne, Max Isenstein and William Dann, and prayed that the mortgage be decreed void and cancelled.

Mr. Delano and the Mill Creek Coal Co. filed a joint and several answer, as did Max Isenstein and William Dann.

These answers admit that bonds were issued to and still held by Mill Creek Coal Company and Isenstein and Dann for a prior indebtedness, as charged in the cross-bill, but putting the other allegations thereof in issue.

William T. Payne filed a separate answer admitting the issue of bonds to East Boston Coal Company for a prior indebtedness, as alleged in the cross-bill, but alleging the subsequent sale thereof to William G. Payne, and putting the other allegations of the cross-bill in issue.

East Boston Coal Company did not file any answer.

At the hearing William G. Payne was added as a party and leave given to him to file an answer.

No answer was filed by him, however, and no proof offered to support the allegation that East Boston Coal Company sold the bonds originally received by it to William G. Payne, or in fact ever parted with the ownership thereof.

The Court first decided the issues raised by the answer by way of cross-bill, filing a separate memorandum (p. 79) on which a separate decree was entered (p. 82).

Later the Court filed a complete memorandum dealing with all issues in the suit, including issues raised by the Lehigh Valley R. R. Co. not involved in this appeal (p. 444).

This last memorandum incorporates the earlier memorandum in practically identical language, and upon this last memorandum a decree was entered sustaining the mortgage and not only decreeing a foreclosure against the Bankruptcy Trustee, but decreeing that the Bankruptcy Trustee account in the Court of Chancery for all moneys in his possession.

Statement of Facts.

The Wertheim Company was incorporated under the General Corporation Act of the State of New Jersey in 1902, and engaged in the retail coal business.

In 1906 it leased from the Lehigh Valley Railroad Company a tract of vacant land in Jersey City adjoining the railroad. (Exhibit E-21, p. 524.)

The lease was for fifteen years, with privilege of renewal for ten years.

The rent was nominal, but required the Wertheim Company to erect a trestle on the leased property for the purpose of conducting a coal business, to cost not less than $20,000, which trestle and other improvements should become the property of the lessor upon expiration of the lease or prior termination for lessee's default.

The lease also bound the Wertheim Company to do all of its business over the Lehigh Valley Railroad and to furnish a specified annual tonnage.

There was also a provision entitling the Railroad Company to terminate the lease on notice whenever it should require the premises for railroad purposes, in which event compensation was to be made for improvements, not exceeding in any event $35,000, and diminishing with lapse of time.

Under this lease the Wertheim Company erected trestle and coal pockets, a stable, blacksmith shop, office and scale house.

Under date of April 30, 1908, the Wertheim Company leased from the Railroad Company an adjoining tract of land for a term to expire in correspondence with the first lease, and with generally similar provisions, including, however, the guaranty of a much larger annual tonnage. (Exhibit E-22, p. 530.)

This second parcel was partially filled in by the Wertheim Company and the surface planked.

The substantial structures, however, were erected almost, if not quite, entirely on the land covered by the first lease.

The business of the Company consisted in the purchase of coal from various coal mining companies located on the Lehigh Valley, handling the same through the Jersey City yard, and selling to various customers in New York City and Jersey City.

The bulk of the business consisted in handling "junior sizes" or steam coal and the principal customers were located in the City of New York.

Prior to December 15, 1909, the Company made considerable purchases from the East Boston Coal Company, controlled and managed by William T. Payne, and his father William G. Payne; and the Mill Creek Coal Company, controlled and managed by Warren Delano, but also purchased largely from other mines.

On and prior to December 15, 1909, the Company had outstanding $150,000 par value of preferred stock without voting power, and $125,000 of common stock.

The Company was then controlled by William Dann and Max Isenstein, who held a majority of the stock, and by reason of that fact drew salaries of $11,000 per year, although they were not practical coal men.

Louis Wertheim and Sanders Wertheim were practical coal men and were the active managers of the business. They held about 25 per cent. of the voting stock (p. 499).

The Company had worked up a large volume of business but from a financial standpoint was unsuccessful.

Mr. Payne says that prior to this time he had been furnished with financial statements which showed apparent prosperity and that he relied upon them.

Mr. Delano, however, frankly says:

> "I had been told that the Company had not been successful and the reason for its not being successful was because it was over-officered" (p. 252, line 1).
>
> "Q. You knew when you went in, under the old management, that it had been a losing business? * * * A. Yes. * * * A. At the time in December; it was so stated to us by the Wertheims. * * * It was during those negotiations that I learned that they had not been successful" (p. 256, line 35; p. 257, line 1).
>
> "A. The point is this: it depends on the way the question was put, exactly; I knew they had not made money, but I had no reason to say that I knew that they had lost money, which I apparently am made to say by that question" (p. 258, line 30).

Shortly prior to December 15, 1909, the Wertheims ascertained from Isenstein and Dann the terms upon which the latter would sell their interest in the Company, and thereupon the Wertheims applied to Mr. Delano and the Paynes for financial assistance.

Mr. Delano says that on December 8, 1909, there was a conference between himself, the two Paynes and the Wertheims, and that there was a later conference, December 14th, 1909, attended by W. G. Payne, but not W. T. Payne, at which the "details were practically agreed upon" (p. 229).

At that meeting the "Wertheims were authorized to make the best terms they could with Messrs. Isenstein and Dann, and I, as President of the Mill Creek Coal Company, agreed to procure for them a credit, or a loan of $20,000, if that was the least that they could get" (p. 232, line 30).

It was further agreed that Isenstein and Dann should sell their preferred stock for fifty cents on the dollar, payable in the Company's promissory notes maturing at the rate of $1,000 per month (pp. 233-234).

(These notes amounted to $60,000) (p 429).

To cover the $20,000 cash, the Wertheim Company made its promissory note to the order of Mill Creek Coal Company and pledged as security therefor the stock purchased from Isenstein and Dann, being the controlling or majority stock.

The note was then discounted by Mechanic's Trust Company of Bayonne, of which Mr. Delano was a Director, and Mr. DeWitt VanBuskirk, President (p. 234). Mr. VanBuskirk was the personal attorney of Mr. Delano (p. 233, line 35; p. 238, line 10).

Thereupon Isenstein and Dann resigned as officers and directors, their salaries were terminated, and Mr. Delano, Mr. William T. Payne and Mr.

VanBuskirk became Directors, constituting a majority of the Board. The remaining Directors were Sanders Wertheim and Louis Wertheim. Louis Wertheim was elected President, Warren Delano, Vice-President and Sanders Wertheim, Secretary and Treasurer.

It was also understood as part of the deal that the Mill Creek Company and the East Boston Coal Company were to substantially divide the business of the Wertheim Company between them, and instead of selling on the customary thirty days' credit, as theretofore, each would sell on ten months' credit (pp. 259, 260; Payne, p. 355).

The motive of the mining companies is made clear by Mr. Delano. They desired an outlet for the "junior sizes" or steam coal (p. 261). Mr. Delano says:

> "We went into it in the belief that we could make money out of the retail end" (p. 261, line 15).
>
> "He thought there was sufficient tonnage for that, if the Company was properly managed" (p. 261).
>
> "Mr Delano understood that as a result of the transaction, he was practically taking an interest in the Company" (p. 237, line 30).

An illuminating instance of the control which the Delano-Payne interests thereafter exercised is shown by Mr. Delano's testimony that in 1911, when a lawsuit was contemplated against the Lehigh Valley, "it was at this time that Mr. Leake was brought to us by the Wertheims with the *request* that Mr. Leake be employed as the counsel for the Company (p. 241, line 15).

Mr. Delano kept in close touch with the business and saw Sanders Wertheim sometimes every day (p. 265). Mr. Payne also gave a great deal of time to the Company (p. 358).

Mr. Delano and Mr. Payne both testify that they had no personal interest in the Wertheim Company, but were acting throughout for the Mill Creek Coal Company and the East Boston Coal Company, respectively (p. 233, line 15; p. 256, line 15).

The new management promptly arranged to start with an independent audit of the books by the Audit Company of New York.

> "* * * my first step was to have an audit made of the company's account, something that we could start from. * * * that was to cover the period up to the 31st of December, 1909, at which time we took an interest, practically." (Delano, p. 237.)

The audit was presented at the Directors' meeting March 16, 1910.

Mr. Delano requested the Audit Company to devise a simplified method of keeping the accounts (p. 188). This was not done, however, until the next year.

This audit (Exhibit E-5) states that the value of the plant and property "is presented as shown by the books without any appraisal having been made by us. In this respect we acted in accordance with your instructions" (p. 501, line 35).

> "A uniform annual reserve for depreciation should be set aside to provide for impairment in the value of the plant and equipment" (p. 501).
>
> "The inventory of coal on hand was the result of calculation and not actual inventory" (p. 502).
>
> "The audit recommended the installation of a modern system of accounting" (p. 503).
>
> "This audit shows: 'Net profit year ending December 31, 1909, before deducting depreciation, if any, $362.21' " (p. 505).

Statements were thereafter furnished more or less regularly by Sanders Wertheim to Mr. Delano

and Mr. Payne and a subsequent audit was made by the Audit Company to cover the first fifteen months of the new management, viz.: from January 1, 1910, to March 31, 1911.

This was presented at the Directors' meeting of June 16, 1911, and on motion of Mr. Payne the audit was accepted by the Company and the cost thereof assumed. The minute shows:

> "Mr. Delano then read various portions of the report which showed a loss in the fifteen months of $18,789.39, equal to eleven cents per ton of coal and coke sold. A very full discussion of the report and various questions growing out of the same was had and the President and Treasurer were requested to consider carefully where and how the cost of selling could be reduced and to make every effort to decrease the price (cost was evidently intended) of the sales" (p. 189, line 20).

The minute shows that the audit was taken by the Treasurer for the purpose of comparison with his own books and with a view of discussing it later with Mr. Delano and a representative of the Audit Company, "there being certain differences which were not readily apparent" (p. 189).

On September 20, 1911, at the instance of Mr. Delano, the certificate of incorporation was amended so as to retire the entire common stock, leaving the former preferred stock as the only stock of the Company (pp. 238, 500).

The purpose of this was to wipe out the item of good will which Mr. Delano thought was improperly carried as an asset, and was apparently so advised by Mr. VanBuskirk (p. 272).

The old certificates of stock were turned in and cancelled and new stock certificates issued.

The minute of September 20, 1911, directs that the corresponding certificates of the new issue "be pledged in lieu of the original certificates given as

collateral security to the $20,000 loan from Mill Creek Coal Company" (p. 266).

William T. Payne afterward objected to that minute, which was corrected December 28, 1911, to read that the new certificates corresponding to the old cancelled certificates be pledged to the East Boston Coal Company and Mill Creek Coal Company, *pro rata,* in lieu of the original certificates "which were intended to be given as collateral to secure *pro rata* the obligations of the East Boston Coal Company and the Mill Creek Coal Company against the L. Wertheim Coal & Coke Company" (p. 267).

(We do not understand that these latter minutes indicate a pledging of the stock by the corporation as such, but are merely a memorial showing the character in which Mr. Delano or the Mechanic's Trust Company held the majority stock purchased by the Wertheims from Isenstein and Dann.)

In the following year apparently the stock of the Company was put under some sort of stock trust agreement.

The Directors' minute of June 19, 1912, shows that there was then a discussion as to a stock trust agreement and that the matter was left in the hands of Mr. Delano and Mr. Payne "to draft a satisfactory agreement, the understanding being that it would be a fair agreement and would protect all concerned, namely, the Messrs. Wertheim, Delano and Payne" (p. 267).

Mr. Delano thinks that a stock trust agreement was drawn up in accordance with that resolution (p. 268).

Returning to the occurrences of 1911, it is evident that Sanders Wertheim disputed the accuracy of the second audit.

Mr. Payne, in substance, says that he personally concluded that the results as shown by Mr. Wert-

heim's books were correct and that the audit was wrong (pp. 364, 365, 366, 367, 368).

However, the Directors' minutes of the meeting of August 15, 1911, at which the Wertheims, Payne and Delano were all present, state:

> "Mr. Delano stated that he had met representatives of the Audit Company on August 2d, with the Messrs. Wertheim, and that, in his opinion, the balance sheet and results of the year's business as shown by said audit were in accordance with the facts" (p. 189).

This audit, among other things, shows a loss for the fifteen months of the Payne-Delano management, ending March 31, 1911, amounting to $18,-789.39, after allowing as an asset accounts receivable separately listed as "doubtful" amounting to $17,077.46. If the "doubtful" accounts proved bad (as they did subsequently) the loss for the period would be so much greater.

A Mr. Bentley, who was the auditor in charge for the Audit Company, was then employed on his own account to establish a new system of accounting on the basis of his audit.

An entirely new set of books was opened by Mr. Bentley July 1, 1911, and a statement of operations and balance sheet was made up under Mr. Bentley's direction, to bring the operation of the Company from March 31, 1911 (the termination of the Audit Company Audit No. 2) down to date.

This statement (E-9), which (taken with the audit of March 31, 1911) was the basis of the new system of accounting, shows: "Net loss for three months ending June 30, 1911, $6,453.74" (p. 517).

Mr. Delano admits that he received a copy of this statement.

Mr. Payne thinks he did not receive any such statement.

After the installation of the new system, the bookkeeper made up monthly statements, on the form devised by the auditor, and copies were sent to both Delano and Payne. (Payne, p. 372, line 18; Delano, p. 105; 271, line 5.)

During this time, Sanders Wertheim was complaining that coal furnished him by the Mill Creek and East Boston Companies was of poor quality, and that this quality resulted in serious losses. (Delano, pp. 263, 264, 265; Payne, p. 370.)

In the latter part of 1911, and early part of 1912, it appears that the company was having trouble in meeting its obligations.

Isenstein and Dann notes were being met, but "there were other notes that were allowed to run over while those were paid." (Delano, p. 268.)

The company was exceeding its agreed ten months' credit with the Mill Creek and East Boston Companies.

In the early part of 1912 (and again in 1913), there was some little friction between Mr. Delano and Mr. Payne, because of the fact that Mr. Payne's company was not furnishing the amount of coal to the Wertheim Company that Mr. Delano considered "he was bound to furnish." (Delano, pp. 273, 274.)

In the Spring of 1912, it was "extremely burdensome" for the Mill Creek and East Boston Companies to furnish the amount of coal to keep the Wertheim Company in business. (Delano, p. 274, line 20.)

Mr. Delano says that at that time he was interested in getting his money out, and that he knew the only way he could get his money out was to keep the Wertheim Company afloat and give it a chance to make money, and that if he did not keep on supplying coal, the company would have to shut down, and his company would lose the amount of money it had already put in (p. 274).

The Directors' minutes of February 21, 1912, shows that Mr. Delano then tendered his resignation as a director of the company, and that the resignation was laid upon the table.

Mr. Delano states that he did then hand in his resignation, but that it was not acted upon and he continued to serve until July, 1913 (p. 268, line 20).

Prior to April 1, 1912, the following notes were defaulted and remained unpaid:

Notes held by East Boston Coal Company:

Due February 25, 1912	$15,176.70
" March 12, 1912	268.75
" March 25, 1912	10,447.03

Notes held by Mill Creek Coal Company:

Due February 25, 1912	$5,780.99
" March 25, 1912	6,536.63

(See Exhibits E-25, p. 539; E-26, p. 540; Wertheim testimony, pp. 193, 194.)

On the close of the year's business, the annual statement made up for the year ending March 31, 1912, showed "Net loss for year $39,095.38." (Exhibit E-10, p. 518.)

Mr. Delano states that he received a copy of this annual statement, Exhibit 10 (p. 271, line 25), as well as all the statements that they ever made up to 1913 (p. 271, line 10).

Mr. Payne says he did not receive such annual statement, although he received monthly statements.

There seems no reason why he should not have received the annual statement, inasmuch as a copy was furnished Mr. Delano, and it would seem probable that he is mistaken.

At any rate, there was evidently no attempt at concealment, since a copy was given to Mr. Delano.

The progressive character of the company's financial difficulties is shown by comparison of floating

debt with quick assets at the three accounting periods preceding the mortgage.

The first audit as of Dec. 31, 1909, Exhibit E-5, shows floating debts of..	$162,378.51
and quick assets, *i. e.,* cash, bills and accounts receivable and coal aggregating	97,186.59
Excess of debts over quick assets ..	$65,191.92
The second audit as of March 31, 1911, Exhibit E-6, shows floating debts of	$308,908.12
and quick assets—cash, bills and accounts receivable, including "doubtful" accounts, L. & S. Wertheim claim, Adams note and mortgage, aggregating	209,095.40
Excess of debts over quick assets ..	$99,812.72
The annual statement for year April 1, 1911, to March 31, 1912, Exhibit E-10, shows floating debts of	$345,079.64
and quick assets, including same items as above, aggregating	185,057.89
Excess of debts over quick assets ..	$160,021.75

Referring to the period preceding the mortgage, Mr. Delano testified:

> "Even before this time, some time before, the company had been unable to meet its obligations" (pp. 276, 277).
>
> "The outstandings had been increasing all the time." (Referring to items "payable," p. 277.)

"Under the old arrangement, these notes given to Isenstein and Dann came due $1,000 a month, and those were being paid at our expense and to our prejudice, and there still remained quite a lot of that outstanding" (p. 277, line 30).

"Isenstein and Dann were getting their notes paid, while the notes payable to the Mill Creek and the East Boston were piling up" (p. 278, line 1).

"I had the club over them (Isenstein and Dann). We could throw the thing in bankruptcy" (p. 278, line 15).

"The L. Wertheim Coal and Coke Company owed us for notes that antedated by far the notes of Isenstein and Dann; we could have thrown those notes on the bank, and have put them into bankruptcy; it seems so to me; I did not use that club; I merely said, that is what we could have done, and I think they recognized that fact; it was better to take half a loaf than no bread" (p. 278, line 20).

"Q. You and Mr. Payne were prepared to use the club if Isenstein and Dann didn't come in? A. I was very much in favor of it; I was representing a number of stockholders (evidently referring to Mill Creek Company) and did not feel that we could extend that indebtedness indefinitely" (p. 279, line 5).

Mr. Delano did not believe that the assets of the Wertheim Company would liquidate the amount of the debts, but did think it would work out Mr. Leake's idea (*i. e.*, pay off bonds in twenty years with a sinking fund provision) (p. 279).

Mr. Delano says, in substance, that he thought part of the trouble of the Wertheim Company was due to discrimination by the Railroad Company in making irregular deliveries and charging demurrage on constructive placement permitted under then recent rulings of the Interstate Commerce Commission (p. 282).

Mr. Delano admits that he knew that the company, from the time he became a director down to

the time of the mortgage, made an aggregate loss (p. 271, line 35).

Mr. Payne's testimony respecting losses is somewhat contradictory.

He says that he knew that the company had lost money from the time he became a director up to April 1, 1912, and that the indebtedness of the Wertheim Company to the East Boston Company had been increasing all the time, and that the payments to the East Boston Company were unsatisfactory (p. 378, line 25).

The debts to East Boston and Mill Creek Companies were increasing and the situation was unsatisfactory to him (p. 379, line 15).

> "Q. You were not pressing the company at all? A. Yes, sir, we were asking them for payment" (p. 379, line 10).

When the bond issue proposal came up, both the East Boston and Mill Creek were asking for payment of their debts, but extended them as it was necessary (p. 380, line 20).

He knew that if Mill Creek and East Boston pressed for the collection, the company would have to go into liquidation, but says he thought the company would have sufficient assets to pay the debts if they liquidated properly (p. 380, line 40).

Although he says he has no recollection of ever having seen the accountant's statement for the three months ending June 30, 1911, he knew that during the summer of 1911 there were losses occasioned by horses beginning to die of glanders (p. 373).

Mr. Payne offers a Directors' minutes of May 17, 1911, stating:

> "The treasurer also reported a net profit of $1,974.56, as having been earned for the twelve months ending March 31st, 1911, after charging off depreciation on horses, discounts, penalties, etc." (p. 311).

However, the audit of the Audit Company subsequently accepted, covering the fifteen months ending March 31, 1911, shows loss of $18,789.39, not including "doubtful" accounts. (Exhibit E-6, p. 508.)

Mr. Payne offers in evidence a series of monthly statements furnished to him by Sanders Wertheim from the time he became a director, January 1, 1910, to the time of the bond issue, and computes therefrom the following:

That the profits exceeded the losses during the period January, 1910, to April 30, 1912, by over $6,000 (p. 408, line 10).

That the profits exceeded the losses during the period January 1, 1910, to April, 1911, by $536 (p. 408).

(The Audit Company reported a loss during this same period of $18,789.39.)

That the excess of profits over losses during the year April 1, 1911, to April, 1912, amounted to $5,550.81 (p. 407).

(The annual statement of the company covering same period (Exhibit E-10) shows loss of $39,095.38.)

The discrepancy between these figures and the actual accounts is due to the fact that the company prior to July 1, 1911, depended on an erroneous system of bookkeeping.

The monthly balance sheets or statements furnished to Mr. Payne did, in fact, show profits, whereas in truth the audit by the Audit Company revealed very heavy losses.

This situation was necessarily recognized by all concerned, including Mr. Payne, when they threw out the old books and inaugurated a new system devised by the public accountant.

This system, while dating the fiscal year from April 1, 1911, was, in reality, inaugurated on July

1, 1911, and the interval bridged by the three months' statement, Exhibit E-9.

Subsequent to the inauguration of the new system, July 1, 1911, Mr. Payne received the same monthly statement as Mr. Delano.

He has combined those statements covering nine months with statements made up under the old discarded system for three months.

Every one of Mr. Payne's tabulations therefore is a tabulation incorporating statements taken from the old discredited system of books.

None of the bondholders make any attempt to contradict the evidence that the quarterly balance sheet ending June 30, 1911 (Exhibit E-9), the annual balance sheet ending March 31, 1912 (Exhibit E-10), and the monthly balance sheets of April 30, 1912 (Exhibit E-16), and May 31, 1912 (Exhibit E-8), are correctly taken from the company's books of account (new system).

Mr. Payne apparently does not contend that the profits tabulated by him were actually made. His testimony goes no further than the statement that the monthly balance sheets furnished to him by Sanders Wertheim, including those taken off from the discredited and abandoned books, total profits to the amount testified.

Plainly there were two phases to the connection of Messrs. Payne and Delano with the Wertheim Company.

During the first phase they were anxious to sell as much coal as possible.

In Mr. Payne's language they were the "favored source of supply" (p. 355).

This phase probably continued until the summer of 1911 when the audit for the period ending March 31, 1911, was completed.

Mr. Payne says he thought the company was making a profit until this report of the Audit Company.

> "Q. And when you found that the Audit Company produced a contrary result, it was a matter of a good deal of concern to you? A. Yes, sir.
>
> Q. And also to Mr. Delano? A. I presume it was" (p. 369).

From that time on there developed the second phase of the situation in which the motive of the Delano-Payne interest was to work out of a bad investment.

During this latter phase, their purpose was to supply no more coal than necessary to enable the company to continue in business and work out.

Mr. Delano says that in the Spring of 1912 he was interested in getting his money out of the Wertheim Company; that he knew the only way he could get his money out was to keep the company afloat and give it a chance to make money, and that if he had not kept on supplying coal, the company would have had to shut down and he would have lost the money he had in it already (p. 274, line 25).

At the time of the mortgage he knew the company could not pay off the indebtedness to his company in money and that the only way it could get money was to keep on doing business (p. 272, line 30).

These two phases of their connection with the company are no doubt reflected in the volume of sales.

Mr. Delano submits a statement (p. 250) showing total of sales to the company by Mill Creek from January 1, 1910, to July, 1913, totalling $225,392.71

Total sales from May 1, 1912, to July, 1913 (p. 247) 41,081.45

The difference necessarily gives Mill Creek sales from January 1, 1910, to May 1, 1912, aggregating.....	184,311.26
These figures reduced to monthly averages give average monthly sales January 1, 1910, to May 1, 1912.....	6,500.00
Average monthly sales May 1, 1912, to July, 1913.....	2,934.00
The sales of the East Boston Company for comparative purposes may be deduced from Exhibits L. A. 28, p. 576, and L. A. 29, p. 599, as follows.	
Total sales January 1, 1910, to April, 1912	$167,542.00
Total sales from May, 1912, to August, 1914.....	100,935.83
These figures give average monthly sales by East Boston, January 1, 1910, to April, 1912.....	6,200.00
May, 1912, to August, 1914.....	3,740.00

Mr. Payne says:

> "Q. You knew if the concern shut down then it could not pay up, but if it went ahead they might work out their salvation? A. Yes.
>
> Q. That was the condition when the bond issue was put on? A. Yes.
>
> Q. So the question of solvency or insolvency boils right down in your mind whether they were allowed to go on and do business and work themselves out? A. Yes, that is it exactly" (p. 396).

In this situation, the four principal creditors, Mill Creek Coal Co., East Boston Coal Co., Isenstein and Dann, holding debts aggregating $245,677.88 (Exhibits E-23; E-24; E-25; E-26) out of a total outstanding indebtedness of $317,297.41 (Exhibit E-16, p. 519), agreed to take a mortgage for

their indebtedness, covering all of the assets, except the leases which were non-assignable.

After the bond issue, the company continued to lose money.

Mr. Payne says:

> "Q. Starting out with that situation as of the date of the bonds, I want to see what condition you thought they were in, whether they were working themselves out in 1912. * * * I ask you whether in your judgment as a business man, you considered that it was working itself out? A. It was not from the time of the bond issue, during the immediate future, but I made allowances for that which I doubt would appeal to you. You will recollect the labor agreement, the anthracite labor agreement expired in April, 1912, and the mines were all idle throughout the outside region and until the first day of June, and like everyone else they had no coal, and from the time the mines did resume until January or February, 1913, coal sold at a very large premium from the majority of the collieries, and it was very difficult to obtain, and I think practically every retail dealer did business at a loss during that time (p. 397).
>
> * * * * * * * *
>
> Q. You were not impressed with the fact that they were losing, because everybody else was losing it? A. Yes.
>
> Q. You knew they were getting worse off, but being familiar with the conditions there was a reasonable explanation, and you hoped the tide would turn? A. That is it" (p. 398).

In July, 1913, Mr. Delano ceased selling coal, resigned as a director, and, to adopt his language, "I wiped my hands of the company" (p. 248).

Mr. Payne, however, continued to sell until August of 1914.

The deterioration of the company between the date of the bond issue and the time of bankruptcy

is indicated by a comparison of the indebtedness on April 30, 1912, and the time of closing the books, as indicated by the trial balance book (Exhibit L. A. 35).

April 30, 1912, the total indebtedness was	$317,297.41
Sept. 17, 1914, the total indebtedness was	456,661.56
	$139,364.15

The loss during the same period can be deduced from this same trial balance book (L. A. 35) by comparing the "surplus" account on April 30, 1912, with that existing on closing the books.

On the balance sheet of April 30, 1912, "surplus" account showed a credit balance of	$ 32,866.03
On September, 1914, balance "surplus" account showed a *debit* balance of	95,356.10
The deterioration or loss during the period is the sum of these items, amounting to	128,222.13

(This surplus account may be relied upon as showing the *relative* change in the company's condition between two periods. It does not indicate the *real* surplus or deficit, however, for the reason that items of fixed assets are carried at the same inflated value throughout.)

Argument

POINT I.

The Court erred in holding that the company was solvent at the time of execution of the mortgage.

The mortgage is dated and recorded May 6, 1912. The bonds, however, are dated April 1, 1912, and the indebtedness which they were given to secure was computed to April 1, 1912.

The proofs show balance sheets as taken from the books as of March 31, 1912 (Exhibit E-10, p. 517), April 30, 1912 (Exhibit E-16, p. 519), and May 31, 1912 (Exhibit E-8, p. 514).

The most favorable of these three statements to the bondholders is that of April 30, 1912, which is also nearest in date to the actual execution of the mortgage. We therefore accept it for the purpose of analysis.

The statement of April 30, 1912, shows total liabilities consisting of accounts payable and notes payable amounting to the sum of $317,297.41.

The correctness of this item is not disputed by any party to this cause.

The assets are listed as follows:

Trestle and buildings	$113,301.79
Motors, boiler machinery and tools	6,655.00
Horses	32,087.50
Wagons and harness	35,176.70
Office equipment	2,258.66
Leasehold	135,000.00
Cash	6,794.89
Accounts receivable	76,372.89
Notes receivable	520.28
Coal on hand	17,059.20

L. & S. Wertheim.....	57,344.34
Mortgages receivable.....	4,000.00
Deferred charges to profit and loss:	
Sundry items totaling.....	18,267.08
Total....	$504,878.33

Apparent surplus of assets over debts, $187,-580.92.

These assets will be discussed under the captions used on the balance sheet.

Deferred Charges to Profit and Loss.

It is apparent that some of the items included under this head are not proper assets in determining the question of solvency. They are bookkeeping entries, representing expenditures, proper no doubt to be taken into account in writing up the profit and loss account, but not indicating asset values.

An instance is the item called "New accounting system." That represents the fee paid to an expert accountant for auditing the books and starting a new system. It undoubtedly stands for money paid out, but not for any increment in the value of the property of the company.

Likewise the item of "Freight $1,804.66." Tracing this back to the books, it is apparent that the item is simply a credit balance in the freight account as carried by the company.

Since the coal company was always in arrears to the railroad company, it is probable that this balance simply means that the coal company in order to get coal was compelled to pay disputed charges to the railroad company for freight or demurrage. Mr. Delano in his testimony makes it entirely clear that these railroad items were continually in dispute.

At least the item of *freight* and *new accounting system* should be eliminated as assets, totaling $2,469.39.

Accounts Receivable $76,372.89.

This item includes bad and doubtful accounts. The company kept a separate book in which it entered its bad and doubtful accounts as distinguished from its collectible current accounts (p. 119).

Mr. Kreuzer, an expert accountant, analyzed this bad and doubtful account ledger and traced back all accounts contained therein and tabulated such as originated prior to April 30, 1912, and still remain uncollected. These are set forth in detail in Exhibit E-15, introduced in evidence page 121, and total $18,270.28.

The defendants have not introduced any evidence whatever in contradiction of this testimony so it must be taken as a conceded fact that this item of accounts receivable as carried on the books includes uncollectible accounts, and should, therefore, be depreciated as an asset by subtracting at least $18,579.86.

Horses $32,087.50.

A balance sheet produced by Mr. Delano lists this asset at $44,151.09. This, however, is an error. The balance sheet found as part of the company's records shows the item totaling $32,087.50. Mr. Kreuzer verified this entire balance sheet, including the horse account, by reference to the original books and establishes that the amount shown upon the books conforms to the company's balance sheet (Exhibit E-16). See also trial balance book L. A. 35 introduced on behalf of defendant Payne. (See Kreuzer's testimony, pp. 121, 122).

Mr. Kreuzer testifies that this account as shown on the books should be further reduced by three items totaling $5,376. These items represent losses on horses sold and injured (Kreuzer, p. 123).

This testimony is not disputed and it is therefore to be taken as proved without contradiction that the horse account should be reduced $5,376.00.

The discrepancy between the statement furnished to Mr. Delano (presumably the same as furnished Mr. Payne) is explained by the letter of Saunders Wertheim to Mr. Payne of May 27, 1912, enclosing "corrected" statement for April, noting an additional depreciation on account of "all horses not being written off" (p. 407).

L. & S. Wertheim $57,344.34.

Wertheim testifies that this item represents the amount paid upon the purchase of the Isenstein and Dann stock in December, 1909 (p. 190).

Inasmuch as the stock was paid for with the notes of the company (subsequently exchanged for its bonds) the amount was charged against the Wertheims.

No attempt was ever made to collect it, even though Delano and Payne controlled the company and were most anxious to collect all money possible for their own companies.

Saunders Wertheim testifies that neither he nor his brother had any financial resources outside of their stockholding in the company (p. 190). Mr. Payne practically testifies to the same effect (p. 388). It will be recalled that their stock, if it had any value at all, was held as collateral for the payment of the debts due to the Mill Creek Company and the East Boston Company.

Since this stock in any event could have no value unless the company was solvent, manifestly the claim against the Wertheims is worthless for the

purpose of computing solvency of the company, since the Wertheims were individually worthless until after the company was proved solvent.

Defendants made no effort to meet this testimony. Therefore it is to be taken as both proved and conceded that this asset is worthless and should be deducted *in toto,* $57,344.34.

Mortgages Receivable $4,000.

This is the so-called Adams mortgage which was carried along as an asset from a time long antedating the bond issue (p. 190) and dating back to the Isenstein management (p. 190). It appears in the audit of Dec. 31, 1909, Exhibit E-5.

Mr. Leake conceded upon the record that it was a second mortgage covering a piece of real estate heavily encumbered with taxes and that the foreclosure of the first mortgage wiped out the second entirely and that nothing was realized thereon (p. 191).

This asset item should, therefore, be deducted *in toto,* $4,000.00.

Notes Receivable $520.28.

This item is a note made by the same Adams who made the mortgage and has been carried from a date long antedating the bond issue and is manifestly a bad asset (p. 191). It should be deducted *in toto,* $520.28.

Coal on Hand $17,059.20.

It is certain from the testimony that this item is excessive in some considerable amount, but it is impossible from the testimony which the Trustee was permitted to introduce to determine to what extent.

The item was not made from any actual inventory, but was arrived at by a comparison of the record of coal purchased and coal sold (p. 194). The difference between the two accounts was supposed to give the tonnage on hand. Very occasionally an actual inventory of coal was taken and on such occasions the actual inventory was always less than the amount which the books indicated should be on hand (p. 194, l. 40). When the new system of accounts was installed in July, 1911, a physical inventory was taken, and the item was then adjusted to correspond with inventory. No other inventory was taken until August, 1914 (p. 124).

On the latter date the coal actually on hand was less than the book asset to the amount of $29,782.71, and the asset was again adjusted by deducting that amount (pp. 196, 197, 198).

Between the two periods of adjustment (almost exactly three years) a shrinkage of approximately $30,000 occurred in this item, or at the rate of $10,000 per year. The retail handling of coal always shows a loss in weight (p. 200, l. 3).

At this rate the item of coal on hand April 30th, 1912, should be depreciated to the amount of $7,500.

Wagons and Harness $35,176.70.

This item is based on the figures written in the book at the time the new accounting system was adopted, July 1, 1911.

No depreciation was thereafter credited to the account (p. 117, l. 30).

Inasmuch as no appraisal was made of the property described by this item in April, 1912, the only practical way of determining such value at the time of trial was to establish the physical identity of the property described by the book entry, with the

wagons and harness which came into the possession of the Receivers and were then inventoried. Upon the establishment of such identity there would have been no great difficulty in determining from the witnesses who inspected the property in 1914, what its approximate valuation was in April, 1912, making all due allowance for intervening wear and tear.

The Court, however, excluded testimony which tended to identify the property covered by this item in the account of April, 1912, with the physical property possessed at the time of bankruptcy (pp. 203, 204).

The Trustee has, therefore, been deprived of the opportunity to show anything respecting the actual value of this property in 1912.

It is certain, however, that the book entry is excessive to some extent, inasmuch as it is established without contradiction that nothing was written off for depreciation between June, 1911, and May 1, 1912.

The report of Receiver Cook further shows that the actual amount realized by him upon the sale of the wagons and harness was only $2,111.50.

Trestle and Buildings $113,301.79.

This item, as hereafter pointed out more fully, cannot be claimed as an asset for any amount, inasmuch as under the terms of the lease the buildings and trestle became absolutely the property of the Railroad upon the termination of the lease.

The tenant as a condition of its tenure was required to erect the structures, so that whatever money was invested in this item is to be regarded as a pre-payment of rent. Their value is, therefore, reflected in the value of the leasehold. Plainly the tenant cannot claim as an asset *both* the amount of rent which he has prepaid and a valuation of the lease on the basis of rent prepaid.

The single contingency in which the tenant could ever realize anything for the trestle and buildings as such was the termination of the lease by the Railroad Company, in order to devote the property to railroad purposes.

In that event, the tenant was to receive the appraised value of the structures on a diminishing scale, which could not have exceeded in 1912 $30,000.

Such termination would, however, immediately destroy the value of the lease, and in such contingency (which did not in fact occur) the utmost which could have been realized by the tenant upon *both* lease and structures was $30,000.

In the event of termination in any other manner, the structures became the property of the Railroad Company without any payment, so that they had no asset value whatever.

Aside from legal considerations, however, the value ascribed on the books is grotesquely excessive.

The inflation occurred prior to the advent of Mr. Payne and Mr. Delano, and probably occurred by entries made at several different times as needed to improve the appearance of the balance sheet. The unusual nature of the entries brought forth special notice from the Audit Co. (p. 503).

The principal inflation took place at the end of the fiscal year April 30, 1908.

Before readjustment, the profit and loss account for the year (Ex. E-17, p. 520) showed a debit balance or loss of $58,535 (p. 173). This was overcome by increasing the value of the lease by adding $17,500, and by adding to the plant $41,035 (p. 173). These two increases together exactly balanced what would otherwise have been a loss and enabled the Company to avoid showing a loss, and

also avoided the reduction of its so-called surplus (p. 173).

There is no supporting or explanatory entry for these items. In the ledger there is no folio reference opposite the entries to show their origin. They stand upon the ledger as bald, arbitrary entries, with nothing to support them. Much was attempted to be made of the fact that the expert did not search for explanation in the journal or cash book. The fact is, however, that neither the cash book nor journal of this period were delivered to either the Chancery or Bankruptcy Receiver and the Trustee has been unable to locate them. All bookkeepers, however, in making cross-entries indicate the folio of the explanatory or cross-entry, and the fact that in this instance there is no such folio reference is strong indication that the cash book and journal, if produced, would fail to show anything supporting the entry.

In August, 1907, "Trestles and Buildings" was increased, *i. e.,* the account was debited with $3,250, which amount was credited to surplus (p. 114). At the same time the blacksmith shop account was increased, *i. e.,* debited with $1,750, and the same amount credited to surplus (p. 115). There is no entry to indicate any increase in physical property or actual expenditure (p. 115).

Apparently an arbitrary inflation of $5,000 took place and the amount was split between the two accounts as indicated.

At the same time the stable account was likewise increased, *i. e.,* debited with $5,000 and that amount credited to surplus, without supporting entry (p. 115). The even figures of this increase, totaling $10,000, is indicative of its arbitrary character.

Nor can these increases be ascribed to extensions to the trestle and stable, since Saunders Wertheim testified that these extensions were built upon the

land included in the second lease, which was not delivered until some time later than May 13, 1908 (p. 176, Ex. E-22). All of the questionable entries were made before that date.

In June, 1911, when the new accounting system was adopted, the "Trestle and Buildings" account was adjusted by deducting from the total $9,216.50 (p. 116).

The basis of this adjustment is not disclosed by the books, but in its most favorable aspect it did nothing more than reduce the inflation to that extent.

If we assume that the entire reduction then made is to be treated as reducing the prior inflation of $51,035, it would leave $41,818.50 of the alleged inflation existing in the trestle and buildings account as carried into the balance sheet of April 30, 1912 (p. 116).

Deducting this would leave the "Trestle and Buildings" account standing at $71,483.29.

Defendants made much of the fact that at the time the accounting system was changed, a new book was written up called "Analysis of fixed assets."

This book does not, however, rest on any actual inventory and is valueless except as showing the basis upon which the accountants distributed the "Trestle and Buildings" account or asset in starting their accounts.

Obviously it simply divides and distributes under various subheadings an aggregate previously swollen by arbitrary entries, as above stated.

This "Analysis of Buildings and Trestles" is printed as part of Exhibit L. A. 22 p. 564.

The even figures indicate that no attempt was made at exactness.

Apparently Messrs. Delano and Payne did not accept the figures and when a negotiation for the

sale of the yard to the Lehigh Valley R. R. Company was under discussion in 1913, they called upon Saunders Wertheim for an explanation.

This explanation is contained in a long letter, Exhibit L. A. 22½, p. 569.

Comment on a few of the larger items of this "Analysis" and "Explanation" will be sufficient for the present purposes:

Item No. 1—Stable-ground work and buildings, carried at $32,400.

The actual cost of the original building, said to have been built under contract with General Contracting & Engineering Co., dated September 27, 1906, is stated at $7,873.

Saunders Wertheim explains the large discrepancy by stating that afterward additions were made which at the same rate per running foot would bring the cost to $15,250.

For some reason, however, he does not give the *actual* cost of the extension.

He then argues that there was an additional cost for flooring on the loft, which he estimates by comparison with the original contract price, but for which he does not give *actual* cost.

The utmost of cost which he can produce by this method of reasoning, without giving actual cost, is $23,123, which is still over $9,000 short of the "analysis."

Item No. 3—Trestle, he is compelled to admit "is entirely too high." He further disclaims any "recollection of ever making these figures" (p. 571).

He states the original contract price was $19,100, and after adding all other items he can think of his total of assumed cost for this item is $25,831.54.

The valuation carried in the "Analysis" (p. 564) is:

Trestle-ground work,	$35,000.
Trestle-open and close work,	24,000.
	$59,000.

Furthermore, Mr. Wertheim is assuming the original cost under the 1906 contract and no depreciation is allowed.

These two items alone show inflation of over $40,000, according to the best explanation Mr. Saunders Wertheim was able to make to his associates at a time when it was to their interest to show as large values as possible.

The book entries of plant values are further thoroughly discredited by the expert testimony as to the actual value of the trestle and buildings.

Frederick Dunham, a civil engineer of established standing and actually familiar with these structures from their erection, qualified not only from the standpoint of expert engineering knowledge but from actual experience in building coal trestles and pockets and many years' experience in valuing this class of property in various railroad tax litigations, testified that the reproduction cost of all structures in 1912 was between $25,000 and $40,000, depending upon the length of piling used (p. 218), and that this was subject to a depreciation of five per cent per year for the coal pockets and three per cent per year for other structures, from the time when constructed (p. 219).

He further valued the reproduction value of the fence at $1,000 (p. 218), and the value of the filling at twenty-five cents per yard for 12,000 yards, or $3,000 (p. 220).

Assuming the maximum cost and the minimum depreciation, the actual value of the structures in 1912 would be:

Trestle, pockets, stable, office and scale,	$40,000
Fence,	1,000
	$41,000

Depreciation 1906 to 1912, six years at 3%, equals 18%,		7,380
	Net value,	$33,620
Filling,		3,000
		$36,620

This is only the expert valuation offered in the case, covering the entire plant.

Defendants offered on the same subject the evidence of Mr. Rowland, an architect who made an appraisal of the stable, office and other buildings, exclusive of the trestle and pockets, in February, 1913, for Mr. Leake.

This appraisal gives the assumed *reproduction* cost new.

The testimony in the case indicates that this appraisal was made in connection with negotiations with the Lehigh Valley for the sale of the yard, so no doubt the standard of valuation was sufficiently high.

Mr. Rowland puts the reproduction value of the buildings, exclusive of trestle and pockets, at $20,828.

He does not pretend to have any expert knowledge as to the value of the trestle and pockets and therefore states that one of his assistants telephoned to a Mr. Snell of Steers & Company, who, apparently without looking at the structures, the character of the ground, extent of piling, etc., gave him a value of $36 per running foot, which would make a total for trestle of $20,520 upon some assumed length not in evidence.

Of course, this is not testimony in any sense, and Mr. Rowland does not pretend to give a sworn expert opinion upon it. (Ex. L. A. 17, p. 559.)

The Rowland figures, including the Steers figures, make a total reproduction cost of $41,348, without depreciation.

Or if we take Mr. Rowland's appraisal of all buildings (other than the trestle and pockets which he excluded), viz.: $20,828 and add to that the actual cost of the trestle and pockets, conveyors and concrete work as fixed by Saunders Wertheim $25,-831.54 (p. 571), we have a total valuation of $46,-659.54 against a valuation of $114,326.79 carried on the books.

The assessed valuation of the same structures for purposes of taxation was $17,000 (p. 151).

The maximum value for the structures fixed by agreement of the parties in the event of termination of the lease by the Railroad Company was $35,000.

We submit that the only complete testimony as to actual value of this asset in 1912 is furnished by the testimony of Mr. Dunham, which, with depreciation, would give a valuation of $36,620, which very closely approximates the maximum agreed valuation of $35,000 under the lease with the Railroad Company.

This would necessitate *deducting* from the book value (if the item is a proper asset at all) the sum of $76,681.79.

Leasehold $135,000.

It is obvious this is an arbitrary valuation, and all of the factors are just as available for valuation today as when the item was first written in the books.

Part of this valuation, to the extent of $17,500, was arbitrarily created in 1908 by an entry of that amount in profit and loss to help balance a very large loss for that year.

The money value of a leasehold, we take it, must be the difference between the money value of the

right to occupy the land as tenant, and the amount of money which has to be paid for the privilege, by way of rent.

Very few leases have any considerable money value, since, as a general rule, the amount of rent is equivalent to the rental value. It is only in those cases where the fixed rent is less than the rental value that the lease has a money or asset value, and the only practical way of certainly ascertaining the amount of that value is to discount the annual profit in the lease. Obviously in no case can a leasehold be worth more than the fee. A part can never be greater than the whole.

The utmost possible value of this lease on April 30, 1912, must have been considerably less than the value of the land.

The highest valuation placed on the land is that of Mr. Ryer, called as an expert by the bondholders, who testified that the value at time of trial was $96,600, and that the value was the same in April, 1912. On cross examination he admitted, however, that the demand for this class of property at the time of trial had much increased over the demand for such property in 1912, and that the supply was much less (p. 307).

Since all values depend on supply and demand, it is obvious that, according to his own standard, if the property was worth $96,600 in November, 1915, it was worth very much less in the stagnant times of 1912.

Furthermore, he valued the property as filled in, whereas the filling was done by the Wertheim Company at its own expense.

Mr. Dunham fixed the cost of filling at about $3,000.

Mr. Slater, a real estate expert of ample qualification, called by the Bankruptcy Trustee, fixed the value of the land in 1912 at $63,800 (p. 150).

The assessed valuation of the land for taxation purposes in 1914 was $55,000 (p. 151), and it is a notorious fact that tax valuations in Jersey City of recent years, particularly of railroad property, closely approximate full actual value, and in many cases exceed it..

We are entirely confident that Mr. Slater's valuation is very liberal and that the Court would not be justified in assuming any larger valuation of the bare land, unfilled, as of April, 1912.

Ground rent in the metropolitan district is usually figured at between four and five per cent., plus taxes.

Since under these leases the tenant paid the taxes, we may assume five per cent. net on say $64,000 as the annual rental value of the bare land, or $3,200 per year.

Assuming that the rent was fully prepaid by the erection of buildings so that this rental value would be realized throughout the term, without further payment, the present value in 1912 of an annual profit of $3,200 for twenty years (nineteen annual payments discounted) would be $39,736.54.

The tenant, however, was entitled to something more, namely the use of his own structures, charged with the burden of paying taxes and keeping in repair.

Assuming the replacement cost in 1912 at $40,000, a fair rental value, taxes, repairs, &c., all paid by the tenant, would be five per cent. or $2,000 per year. This, likewise, should be discounted to the present time, 1912, and would amount, when discounted, to $24,835.34.

Total present value of leasehold, including use of structure, as of May 1, 1912, $64,571.88.

The only evidence introduced by the bondholders claimed to furnish a basis for valuation of the leasehold is that of Saunders Wertheim He testifies

that where railroad companies own land adjacent to their tracks and themselves construct the necessary structures, they charge ten cents per ton for coal handled. On this basis Wertheim averages the rental value of the Wertheim yard at $7,500 per year (p. 339).

He further states that where the retail dealer takes a lease from the Railroad Company for vacant land and erects the structures at his own expense, that the Railroad Company does not make any charge for the use of the land, but is sufficiently compensated by the profit in the freight (pp. 339, 343).

If the Wertheim theory be adopted, it follows that in the present instance, inasmuch as the structures became the property of the Railroad Company and all that the tenant had was the right to use the land with the structures during the lease, rental value should be figured on the same basis as a yard fully equipped with buildings, which value Wertheim places at $7,500 per year on a tonnage basis.

Inasmuch as the tenant was required to pay all taxes, both on the real estate and structures, it is obvious that the annual profit under the lease as estimated by Wertheim is $7,500, diminished by the amount of annual taxes, approximating $1,500 per year, leaving an annual net profit on the lease of $6,000.

(The tax item is approximated at 2% on assessed valuation for real estate, $55,000, and structures $17,000.)

Assuming that this annual profit could be realized throughout the twenty years, its present value is to be computed as the present value of nineteen annual profits discounted to the date of the mortgage, which amounts to $74,506.02.

On any theory the annual profit of the lease must diminish with the years because of the deterioration of structures, lessening their use value and increasing the maintenance and repair charges.

The above computations assume an indefeasible lease for a term of twenty years.

This lease was non-assignable and was expressly avoided by the insolvency or bankruptcy of the lessee, or seizure upon legal process, and was terminable on notice by the Railroad Company whenever the property was needed for railroad purposes.

It was a purely personal privilege under which the lessee was entitled to occupy the premises so long as it continued to do a particular kind of business, and furnish to the Railroad Company a stipulated amount of freight. And the Railroad Company did not need the property.

The moment that a necessity arose for realizing upon this asset by the Wertheim Company its value disappeared. A true asset must, necessarily, be something out of which at need money can be raised to pay debts, either by the debtor or through a judicial process. This lease, however, could not be sold or mortgaged by the lessee and it became void the moment legal process was invoked against it.

Grant that it was the vital thing which enabled this company to do business, but so long as it was a purely personal privilege, it was like the life of a merchant, valuable no doubt, and yet no one would think of writing down the life of a successful merchant as a capital asset in his balance sheet.

Again, this lease was voidable in the event that the tenant did not ship 120,000 tons of coal over the lessor railroad. An inspection of the books indicates that that condition was seldom compiled with. Saunders Wertheim places the average at approxi-

mately 75,000 tons per year, so that the lease instead of being a lease for twenty years had become virtually a tenancy at will, under which the Railroad Company could enter at any time for the default.

The plain fact is that neither trestle, buildings nor lease had any asset value whatever, except either in the event that the company should do a profitable business, in which event, the buildings must be considered as prepayment of rent and the money value of the lease including the buildings with rent thus prepaid, would be as above stated $64,571.88, or in the event that the Railroad Company terminated the lease by notice, in which event the maximum value which the Wertheim Company could realize for the buildings was $30,000.

To a losing business as this was, they were utterly valueless because they could not be sold, and no company can long continue to do business at a loss.

As a concluding argument tending to show the gross over-valuation of this lease and the structures erected thereunder, we point to the fact that the Railroad Company and the Receiver, both being anxious to rent the property pending this litigation, finally made a joint lease for the entire property, land and structures, under the direction of the Court of Chancery, for $100 a month.

Summary.

Comparison of assets as carried on company's books as per Balance Sheet, Exhibit E-16, with true values:

	Per Books	True Value
Trestle and Buildings	$113,301.79	
Leasehold	135,000.00	$64,571.88
Motors, boiler, machinery and tools	6,655.00	6,655.00
Horses	32,087.50	26,711.50
Wagons and Harness	35,176.70	
(Deduct depreciation, say 10%)		31,659.03
Office Equipment	2,258.66	2,258.66
Cash	6,794.89	6,794.89
Accounts Receivable	76,372.89	
(Deduct bad accounts $18,579.86)		57,793.03
Notes Receivable	520.28	Worthless
Coal on hand	17,059.20	
(Deduct average shrinkage since last inventory, $7500)		9,559.20
Claim against L. & S. Wertheim	57,344.34	Worthless
Adams Mortgage	4,000.00	Worthless
Sundry deferred charges to profit & loss	18,267.08	
Deduct items for freight and accounting system—$2469.39		15,797.69
Depreciation and Extinguishment a/c	40.00	40.00
TOTAL ASSETS	$504,878.33	$221,840.88
Total Debts		317,297.41
DEFICIT		$95,456.53

POINT II.

The Court erred in finding that the giving of the mortgage resulted in doing away with the large salaries payable to Isenstein and Dann.

The Vice-Chancellor in marshaling his reasons for sustaining the mortgage, among other things, says: "The plan resulted in the doing away with the large salaries payable to Isenstein and Dann," etc. (p. 452, line 25).

If this were true, it might be argued that there was a present consideration to that extent for the mortgage.

The statement, however, is a palpable error, due to a confusion in the Court's mind of the plan under which Mr. Delano and Mr. Payne became interested in the company in December, 1909, and the plan pursuant to which the mortgage was executed in May, 1912.

The Wertheims in December, 1909, sought and obtained the financial assistance of Mr. Delano and Mr. Payne and their respective corporations, which enabled the Wertheims to acquire the Isenstein and Dann stock in the company.

As part of the plan, Isenstein and Dann immediately resigned as directors and officers, and their salaries stopped (p. 428).

The giving of the mortgage in May, 1912, did not have the slightest relation to the elimination of Isenstein and Dann, which occurred in 1909.

POINT III.

The Court erred in holding that "at the time of the hearing no creditor was in existence whose claim had accrued before the mortgage was made. They owed no one, and in the year immediately preceding the bond issue they had made a net profit of $5,550.81."

(a) The proofs disclose at least two large creditors who have running accounts, some of the items of which certainly antedate the mortgage.

The claim of the Lehigh Valley R. R. Co., amounting to $17,049.26, shows one item in December, 1909; 24 items in 1910; 37 items in 1911.

The items for "car service" alone running from July 23, 1910 to January 30, 1912, aggregate $7937 (Exhibit E-18, p. 522).

The claim of the Erie R. R. Co. for $2955.34 shows charges antedating the mortgage (Exhibit E-19, p. 522).

The bankruptcy trustee further offered to prove that the greater part of the creditors at the time of the mortgage were dealing with the Wertheim Company on running accounts and that the company was indebted to them on such running accounts at the time of the bankruptcy, although the particular invoices outstanding at the time of the mortgage were covered by subsequent payments on the account.

This offer was overruled.

(b) It is not clear what the Court intended in saying: "they owed no one."

If a finding was intended that the company was not indebted at the time of the mortgage, except to the creditors secured thereby, the statement is clearly erroneous.

The balance sheet Exhibit E-16 shows total debts of $317,943.28, of which $245,677.84 was due to Mill Creek, East Boston, Isenstein and Dann, leaving a balance of $72,265.44 due to outside creditors.

(c) The finding that the Company made a net profit of $5,550.81 in the year preceding the bond issue is erroneous.

That figure is taken from the testimony of Mr. Payne to the effect that he had compiled the monthly balance sheets furnished him by Saunders Wertheim and that the excess of profits over losses was as stated.

Mr. Payne does not pretend to say that these statements are correct, nor that the company actually did make a profit. Indeed, at one place, he admits that he knew the company suffered a loss (p. 378).

Furthermore, it is undisputed that at least three of the monthly statements used in the computation were taken from the old books which were abandoned by reason of their errors and an entirely different system installed.

The undisputed fact is that the books of the company show a *loss* for the year of $39,095.38 (Exhibit E-10, p. 518).

POINT IV.

It is immaterial whether or not the creditors in existence at the time of bankruptcy became such before or after the mortgage.

The Corporation Act, Par. 64, provides that whenever any corporation shall either become insolvent or suspend its business, its officers shall not thereafter transfer any of its property, and that every such transfer shall be "utterly null and void as against creditors," saving only a *bona fide* purchase for valuable consideration before actual suspension of business, by a person without notice.

The transfer is rendered "utterly null and void" as against *all* creditors.

The principle was directly involved in *Cope* v. *Walton Co.*, 77 N. J. Eq., 512; affirmed 79 N. J. Eq., 165.

In that case an insolvent corporation obtained a contract for a public improvement and *before* incurring any debt with respect thereto made an assignment of the contract in order to borrow money, with which to do the work. *Thereafter* the corporation incurred a debt to the complainant for materials, and the complainant filed a lien under the Municipal Lien Law.

The present Chancellor held that the assignment being prior in time would have taken precedence except that the assignee had knowledge of the insolvent condition of the corporation, and therefore held the assignment void under the statute as against creditors.

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This was unanimously affirmed, the opinion of the Chief Justice stating:

> "Considering Allen as a purchaser for value, * * * his knowledge of the company's insolvency at the time he took the assignment, excludes him by the very words of the proviso from the protection afforded by it."

This is a controlling precedent in the present case, inasmuch as the lien creditors as to whom the assignment was avoided, without exception, acquired their rights subsequent to the assignment.

POINT V.

The Court erred in excluding evidence to show that the indebtedness existing at the time of bankruptcy was upon the same running accounts in existence at the time of the mortgage.

In *Vol. 20 Cyc.,* page 422, the General Rule is stated as follows:

> "In cases of running accounts the earlier indebtedness being paid by the proceeds of the later, the continuing indebtedness stands upon the same footing as an indebtedness existing at the time of the conveyance, and the right of a pre-existing creditor to attack a conveyance for fraud is not affected by a renewal or change of form of the evidence of debt."

In *Spaulding, assignee,* v. *McGovern,* U. S. Circuit Ct., 1878, District of New Jersey, Vol. I, N. J. Law Journal, p. 259, Judge NIXON, dealing with a transfer of New Jersey real estate, said:

> "The principle is well settled in law and common sense that a voluntary settlement by a man who is indebted is fraudulent and void if the debts and contingent liabilities existing

> at the time of the conveyance are paid by contracting other obligations which afterward result in insolvency." (Citing *Amtrim* v. *Kelly,* 4 N. B. R., 587) * * * The consequence is that all subsequent creditors are led in to share in the fund *pro rata* on the principle of equal apportionment on marshalling of assets." (Citing *Kehr* v. *Smith,* 20 Wallace, 86.)

In *Adoue* v. *Spencer,* 59 N. J. Eq., p. 231, Vice-Chancellor Pitney held in a fraudulent conveyance case where debtor's transactions with his banker consisted of current deposits and current drafts of money (the drafts exceeding the deposits) that the doctrine of application of payments was not applicable. Page 243:

> "I think these circumstances forbid the application of the rule that the first payment must be applied to the older indebtedness. There was in this case no older indebtedness. It was one continuous thing fluctuating in amount, but notwithstanding that fluctuation, continuous."

This case was reversed on an entirely different ground, namely: that the conveyance was to be treated as a mortgage to secure a valid debt, and not as a voluntary gift, as held by the Vice-Chancellor. The running account doctrine was not, however, criticised.

In *Spuck* v. *Logan,* Md. Court of Appeals, 1903, 97 Md., p. 152; 54 Atl., 989, the debtor each month paid the creditor in full for the purchases of the preceding month. The Court said:

> "It cannot be said, therefore, that the appellees were not subsisting creditors of Spuck when he made the deed of January 11, 1898, although the amount owing to them at that time was subsequently paid. But before it was paid Spuck had in the meantime incurred other indebtedness to them for a larger amount, and that course of dealing continued between them

> until finally Spuck was indebted to the appellees in the sum stated. If that was all, we would find difficulty in reaching the conclusion contended for by the appellants that the appellees were merely subsequent creditors. In *Paulk* v. *Cooke,* 39 Conn., 572, it was contended that the debts which existed at the time of the conveyance attacked was made had been paid with one exception, and that a voluntary conveyance could only be impeached by existing, and not by subsequent creditors. But that Court thus replied: 'This principle clearly has no application where there has been a continued, unbroken indebtedness. The debts are owed, though they may be due to new creditors. It is a most unsubstantial mode of paying a debt to contract another of equal amount. It is the merest fallacy to call such an account getting out of debt.' In *Wait on Fraudulent Conveyance,* par. 103, that author, in speaking of the subject says, 'The case should be treated as if the prior indebtedness had continued throughout, or as a case of a continued or unbroken indebtedness.' * * * "

In *Savage* v. *Murphy,* 34 N. Y., 508, the Court in a fraudulent conveyance case said:

> "And consequently the conclusion of fraud is not repelled by the circumstance that the debts owing by him at the time of the transfers were paid with the proceeds of credit subsequently acquired by the means above stated. The indebtedness then existing was merely transferred, not paid, and the fraud as palpable as it would be if the debts now unpaid were owing to the same creditors who held them at the time of the transfers."

POINT VI.

The affidavit annexed to the mortgage does not state the true consideration thereof and the mortgage is therefore void.

The President of the trustee-mortgagee makes affidavit that the consideration is that the mortgagor

> "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 "may be issued to the extent of $250,000 par value"; * * * that the mortgage is executed to the Trust Company "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"; * * * that "at the present time there is no amount due on said bonds or any of them or upon said mortgage. The amount to grow due upon said mortgage * * * *is said to be* an amount not exceeding $250,000 * * * which may become due upon the said bonds as they shall respectively be issued. The amount hereafter to be due * * * will vary from time to time as the bonds are issued, retired or paid."

The only part of the mortgage which defines the purpose is as follows (p. 472):

> "Whereas the Company for the purpose of *raising money* to make payment of certain claims, debts and obligations against it and other purposes"—and in accordance with resolutions of the Directors adopted April 22, 1912, and adopted by the stockholders same day, etc.

The Company's minutes show conclusively that there never was any purpose to sell the bonds or raise money thereon or devote them to any other purpose than the securing of the antecedent indebtedness to Mill Creek Coal Co., East Boston Coal Co., Isenstein and Dann (see p. 88), nor were any of said bonds in fact sold, nor in fact was any money ever raised thereon, the entire issue being delivered to above creditors.

We think this language does not comply with the requirement of the statute.

In *Ehler* v. *Turner,* 35 N. J. Eq., 68 (1882), VAN FLEET, *V. C.,* dealt with identical language under an earlier statute. The Court says:

> "The statute was designed to prevent the use of chattel mortgages as a means of fraud. It was intended as a guard against dishonesty and to secure fairness and good faith in such transactions. To this end the mortgagee, his agent or attorney, is required to state, under oath, the consideration of the mortgage; that is not simply to state the amount or sum for which the mortgage is given, but to state *how the debt on which it is founded arose;* what was the *cause* of the debt, or *how the relation of creditor and debtor was created between the parties.* The Legislature, I think, meant to compel the mortgagee to commit himself to a statement or disclosure of his debt or claim, when he made his mortgage a matter of public record, sufficiently precise and explicit to afford the creditor of the mortgagor, in case fraud was suspected, a fair opportunity to ascertain by legal investigation or otherwise whether the mortgage was an honest security or a mere fraudulent cover."

The Vice-Chancellor concludes that this requirement of an affidavit has the same historical source

as the requirement of an affidavit on confession of judgment, and observes:

> "A statement of the *manner in which the debt arose* is obviously called for. Not merely what *evidence* has been given of the debt, * * * but what is the price of the debt, the cause of the indebtedness. Thus if a loan of money, a sale of goods or lands, a difference of value in the exchange of horses, or whatever else it may be, is the price of the debt, or the manner in which it occurred, the affidavit should set forth one or the other, according to the fact, and in doing so general terms may be used, for the Legislature has not required a specification, yet it must be sufficiently precise to disclose the real nature of the transaction. * * * Simply affirming under oath that the consideration of a mortgage is the sum for which it is given, without disclosing how the debt on which it is founded arose or was incurred—whether it arose out of a loan or a sale, or in any other of the numerous modes by which one person may incur a pecuniary obligation to another—cannot, in my judgment, be regarded as either a literal or substantial compliance with the statute, but should be regarded as an evasion of it."

In *Graham Button Co.* v. *Spielmann* (1892), 50 N. J. Eq., 120, *V. C.* VAN FLEET held void an affidavit stating the consideration to be

> "the indebtedness of the mortgagor to the mortgagees, consisting of a present indebtedness of $1,500, and of money hereafter to be advanced by said mortgagees to said mortgagor during the pendency of this mortgage, not exceeding in all $1,500."

(Quoting from the language of the opinion in *Ehler* v. *Turner, supra.*)

In *Tropp* v. *Knight,* 28 Atl. Rep., 1037 (1894), Chancery, the affidavit read that the consideration

> "is the endorsement of notes by deponent for the accommodation of the (mortgagor) * * * and such endorsements as he may hereafter make for the accommodation and benefit of the said (mortgagor) and any liability or obligation assumed by the deponent for the benefit of the said (mortgagor) now existing or which may hereafter exist; that this deponent is now liable on promissory notes for the benefit and accomodation of the said (mortgagor) to the amount of $4,280.32, and that the amount due and to grow due on the said mortgage is such sum as deponent may be compelled to pay by reason of any endorsement, security or assumption undertaken or incurred for the benefit of the said (mortgagor) not exceeding the sum of $4,280.32."

The Court said:

> "The affidavit states the whole amount of the contingent liability of the mortgagee, but in no sense does it apprise creditors of the persons to whom the mortgagee is so liable, nor the amount which may be due to creditors separately. It does not state to whom the notes were given, nor when they were given, nor the amount of them, severally. My impression is that, to comply with the statute, it is necessary to show the amount of each note, and the date thereof, as near as may be, and also the name of the payee or holder. I think the creditors are entitled to some certainty in these respects. If the affidavit, as it now stands, should be regarded as sufficient, it certainly leaves a very wide door for the manufacture of a case to suit the necessities of the parties in interest."

In *Horowitz* v. *Weidner,* 31 Atl. Rep., 771, *V. C.* PITNEY, the affidavit stated the consideration to be the securing of the due performance of an agreement by the mortgagor to manufacture materials for the mortgagee.

The Vice-Chancellor says:

> "In cases of this class the affidavit must conform as nearly as practicable to the letter, and must fulfill the spirit of the act. * * * My paraphrase of it (the rule laid down in *Ehler* v. *Turner*) as applied to a case of this kind, would be that the legislature intended to require a disclosure, under oath, of the actual transaction between the parties, including the object and purpose of the instrument, with sufficient precision to enable the creditors of the mortgagor to have a reasonable opportunity to ascertain its true character."

In *Dunham* v. *Cramer* (1902) GRAY, *V. C.*, 63 N. J. Eq., 151, the affidavit stated the consideration as the securing of the payment of a promissory note, giving date and amount.

Held insufficient, the Court saying:

> "Nothing in this affidavit shows whose promissory note is secured by the chattel mortgage in question, nor who is the holder of that promissory note, nor for what consideration, whether a loan of money or a sale of goods, or how otherwise the promissory note or chattel mortgage came to be given, nor how the debt was created to secure which the chattel mortgage was made. An affidavit so markedly deficient in the statement of the transaction out of which the mortgage arose affords no opportunity to inquiring creditors of the mortgagor to ascertain whether the chattel mortgage was given for a valuable consideration, which would be binding upon them or for a merely voluntary one, which would not be obligatory upon them. It was settled in the case of *Graham Button Co.* v. *Spielmann* that the affidavit of consideration annexed to a chattel mortgage must substantially show how the relation of creditor and debtor between the mortgagor and mortgagee was created."

In *Tingley* v. *International Dynelectron. Co.* (1908) EMERY, *V. C.*, 74 N. J. Eq., 538, the affidavit

and mortgage alleged the consideration to be $5,000, represented by ten notes of $500 each, giving date and maturity. The affidavit stated that the consideration "is the sum of $5,000 *paid* to the said" (mortgagor). The proofs showed that the mortgagee was a trustee; that all notes were made payable to him or order; that a firm of bankers had agreed to take the notes before the formal execution of the mortgage, and in anticipation of execution had advanced $2,000, and shortly subsequent to execution paid the balance, receiving all the notes. No money was actually paid coincident with the mortgage.

The Court held:

> "that this was not a true statement of the status and consideration of the mortgage at the time of recording it, which is the time when it must be true."

This was affirmed on the opinoin below (76 N. J. Eq., 337).

In *Simpson* v. *Anderson* (1909) E. & A., 75 N. J. Eq., 581, the mortgagor had previously given a real estate mortgage to a third party, which was assigned. Coincident with the assignment, the mortgagee executed a chattel mortgage to the assignee. The affidavit stated the amount of the original bond and mortgage and the amount paid by the chattel mortgagee upon taking the assignment.

It was objected that the nature of the indebtedness on the original transaction between mortgagor and mortgagee should have been stated. The Court held, however, that the real consideration for the chattel mortgage was the money paid out by the chattel mortgagee upon taking an assignment of the real estate bond and mortgage.

The Court reiterated the test of the Spielmann case, saying the affidavit

> "is sufficiently precise and explicit to afford the creditors of the mortgagor, in case fraud was suspected, a fair opportunity to ascertain by judicial investigation or otherwise, whether the mortgage was an honest security or a mere fraudulent cover, which is the primary object of the statute."

Collard v. *Tully*, 77 N. J. Eq., 439, GARRISON, *V. C.*, affirmed, 78 N. J. Eq., 577, SWAYZE, *J.* (1911), is particulary instructive.

The affidavit stated the consideration as a balance of $700 due upon a judgment recovered by W. against T., and assigned to deponent, and also $700 which T. owed C., and which indebtedness C. assigned to deponent.

The Vice-Chancellor, reviewing all the cases, stated the rule as follows (p. 447):

> "And our cases all hold that this affidavit must show *how* the debt arose on which the mortgage is founded; how the debt came into existence and how the relation of debtor and creditor, as between the mortgagor and mortgagee, was created."

He held, however, that since the judgment was a debt of record, it was unnecessary for the affidavit to show the nature of the cause of action for which judgment was recovered.

The Court of Errors, though affirming the decree, expressly overrules this particular holding, Justice SWAYZE saying:

> "The affidavit ought to show either the origin of the debt upon which the judgment was based or the amount, if any, paid by the mortgagee for the assignment of the judgment."

The affidavit is defective in not stating the amount due or to grow due.

Under this head we call attention to the fact that the affiant merely states "the amount to grow due * * * *is said to be* an amount not exceeding $250,000."

There should be a positive averment of the amount.

The entire mortgage is bad unless the affidavit is good in its entirety.

Collard v. *Tully, supra.*

The affidavit states the consideration to be "to raise money and pay certain claims, debts and obligations."

The body of the mortgage states the purpose to be "raising money to make payment of certain claims, debts and obligations against it, *and other purposes.*"

As a matter of fact no money was raised, nor was it contemplated that any money should be raised, nor was any other *purpose* contemplated than the turning over of the entire issue to the four creditors.

POINT VII.

The Court erred in holding that the mortgage covered the outstanding accounts acquired in the usual course of business subsequent to the mortgage.

The Vice-Chancellor considered that the point raised was "the power to mortgage after-acquired property" (p. 454, line 15).

The question presented, however, is whether this particular mortgage, properly construed, does in fact cover book accounts and other outstandings acquired in the usual course of business, to the prejudice of those creditors whose debts were contracted in the usual course of business.

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, and including the good will of the business and the franchise to be a corporation, excluding only the two leaseholds, for the obvious reason that they would be forfeited by any attempted transfer thereof (pp. 476-477).

The mortgagor remained under the obligation of the leases to continue the business, to pay all taxes assessed both on the leased property and the building improvements, and to conduct a business which would give the Railroad Company a coal tonnage of at least 120,000 tons per year.

The mortgagor covenanted that it would "at all times actively conduct and carry on the business for which it was incorporated, and which it is now carrying on and conducting and that it will keep and maintain in good repair and condition and in active operation its plant, yard and properties" (p. 482, line 20).

The mortgage further provided that in case of default, the Trustee might enter upon the mortgaged property, or any property which might at any time become subject to the mortgage "and take possession of all the property of said company of every kind and description whatsoever" * * * "and have, hold, use, operate and manage the same as the agent of the company, and conduct the business of the said company, execute contracts, perform all other duties, obligations and exercises of powers, privileges and franchises, in the same manner and to the same extent as the officers and agents of the company might do, and to manage the property and business and receive all earnings, incomes, issues and profits and every part thereof" (p. 485, line 25).

Or, in the alternative, the Trustee might sell the mortgaged property as agent of the mortgagor or proceed to enforce the rights of the bondholders by recourse to legal process (pp. 485-486).

A later provision gives the mortgagor the right to surrender the mortgaged property to the Trustee, but only with the consent of the Trustee (p. 489, line 20).

Thereafter follows this provision:

> "While in possession of the mortgaged premises, the company shall have full power, in its discretion, from time to time, *and in the ordinary course of its business,* to use (and) dispose of, free from the lien of this mortgage, any portion of the machinery, tools, fixtures, coal, book accounts or any other of the goods or chattels described herein, and to apply and use the proceeds of sale or any money collected from book accounts, *in the ordinary course of its business,* and the lien of this mortgage shall extend to any *goods and chattels* which may be acquired to replace such goods and chattels so sold as aforesaid" (p. 491, line 25).

(It will be observed that the replacement lien is limited to "goods and chattels" and does not apply to book accounts or the proceeds thereof.)

We submit that this mortgage, properly construed, requires the mortgagor to continue its normal business of buying and selling coal upon credit, and permits it to use the merchandise and book accounts which might otherwise be subject to the mortgage, free from the mortgage, so far as such use was incident to the "ordinary course of its business."

Since the ordinary course of business was the purchase of coal upon credit, it would seem that such coal, when purchased, or the outstanding book accounts representing such coal when sold, or the money in bank representing such sales, or the collection of such outstandings, is necessarily appropriated to the payment of such debts.

Otherwise, the continuation of this company in its business of purchasing on credit (which continuation is required by the mortgage) could not operate otherwise than a fraud.

In *N. Y. Security & Trust Co.* v. *Saratoga Gas & Electric Light Co.*, 159 N. Y., p. 137; 53 N. E., p. 758, the mortgage was held broad enough to cover after-acquired moneys and choses in action, but also provided that the mortgagor should remain in possession until default, for the purpose of conducting the business. The report does not indicate that the mortgage contained the express covenant to continue the business, which we find here:

> "This must mean that it had a right to sell and transfer the future products of its operation as its own, free and clear from any lien of the mortgagee. The intention was that it should purchase materials for its business, employ labor, contract debts and discharge all obligations arising therefrom by the use of the products of the business or the earnings of the plant. * * *
>
> That right, it seems to me, is entirely inconsistent with the existence of any lien upon future products or earnings by the mortgagee.

> The latter could not have a lien upon such earnings or products while the mortgagor was permitted to use them for the conduct of its business and the payment of its current debts. We think that the true construction of the instrument is this: Where a mortgage by a corporation to secure the payment of the principal and interest of its bonds, such as this is, is made, although in terms purporting to include future earnings and products, it does not, as against general creditors, operate as a lien upon such earnings until actual entry and possession under the mortgage by the mortgagee. This results from the stipulation in the instrument that until default the mortgagor shall have the use of the earnings in the conduct of its business, and that upon default the mortgagee may go into possession, exercise the corporate franchises, and appropriate the earnings to the payment of the debt secured by the mortgage. The right of the mortgagor in the meantime to the use of the earnings amounts, practically, to absolute ownership, and hence the mortgage cannot operate as a lien upon such earnings, to the prejudice of the general creditors, until actual entry and possession taken, *and then only upon what is earned after that time.* The lien of the mortgage upon future earnings is consummated as against other creditors only by the fact of the possession of the property, and cannot have any retroactive operation, since it would then deprive the unsecured creditor of the fund, upon the faith of which he may have given credit to the mortgagor during the time when the latter was permitted to deal with and use it as his own."

The opinion then cites the following as some of the cases supporting the proposition:

> *Railroad Co.* v. *Cowdry,* 11 Wall., 459;
> *Gilman* v. *Telegraph Co.,* 91 U. S., 603;
> *Bridge Co.* v. *Heidelbach,* 94 U. S., 798;
> *U. S. Trust Co.* v. *Wabash Ry. Co.,* 150 U. S., 287, 307; 14 Sup. Ct., 86;
> *Teal* v. *Walker,* 111 U. S., 242; 4 Sup. Ct., 420;

Dow v. *Railroad Co.,* 124 U. S., 652; 8 Sup. Ct., 673;
Sage v. *Railroad Co.,* 125 U. S., 361; 8 Sup. Ct., 887;
Trust Co. v. *Shepard,* 127 U. S., 494; 8 Sup. Ct., 1250;
Ellis v. *Railroad Co.,* 108 Mass., 1;
Smith v. *Railroad Co.,* 124 Mass., 154;
Holmes v. *Turner's Falls Co.,* 142 Mass., 590; 8 N. E., 646;
Emerson v. *Railroad Co.,* 67 Me., 387;
Miss., Va. & W. R. Co. v. *U. S. Exp. Co.,* 81 Ill., 535;
DeGraff v. *Thompson,* 24 Minn., 432;
Governments, Stock & Other Securities Inv. Co. v. *Manila Ry. Co.* (1897), App. Cas., 81.

We think the present case is analogous to the authorities above cited and indeed is much plainer.

Furthermore, the present mortgage is essentially different in the provisions above referred to from the mortgage dealt with in *Lister* v. *Simpson,* 38 N. J. Eq., 438, and the New Jersey cases which have followed that decision.

In addition to the important variation in the language of the mortgage itself, it is to be observed that a mortgage by a corporation which covers everything it has or which by any possibility it can acquire, including its franchise to a corporation, is a different thing from a mortgage executed by an individual. The latter does not mortgage his life, and, it may be assumed, that creditors dealing with an individual may do so upon his personal credit, or upon the strength of other assets than those involved in the mortgage or property acquired in replacement thereof.

Under a corporate mortgage of the character here considered, there is no possible basis of credit remaining if the mortgage is given the drastic interpretation enforced by the Court below.

POINT VIII.

The decree is clearly erroneous in its provision requiring the bankruptcy trustee to account in the Court of Chancery for bankrupt assets which have lawfully come into his hands.

There is no question but what the monies in the hands of the bankruptcy trustee represent assets of the bankrupt.

The only question is whether those assets are to be distributed to the mortgage creditors or to the general creditors of the bankrupt.

Unquestionably the Court of Chancery in this foreclosure action may conclude the trustee as to any *res* within the jurisdiction of the Court of Chancery.

This decree, however, not only is a decree *in rem,* but is a decree *in personam* against the bankruptcy trustee, requiring him to account in the Court of Chancery "for all monies in his possession" or received by him from the collection of outstanding accounts and bills receivable due (the bankrupt) or received by him from the receivers in bankruptcy of (the bankrupt).

There is nothing in the case to show the source of the monies received by the trustee from the receivers in bankruptcy.

In fact, 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, with respect to which the mortgage cannot possibly be a lien, because it was never recorded or filed in the State of New York.

Nevertheless, the bankruptcy court is in terms excluded from further jurisdiction over its own trustee, with respect to his account of bankrupt assets received by him under the decree of the bankruptcy court.

POINT IX.

The bankruptcy trustee is vested by operation of law not only with the title of the bankrupt but with every right which might be asserted by any creditor.

The Bankrupt Act, paragraph 70 (a) expressly vests the trustee with the title of the bankrupt.

Section 70 (e) provides:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided."

Paragraph 70 (a), class 5, vests the trustee with all property which

> "The bankrupt could by any means have transferred or which could have been levied upon and sold under judicial process against him."

Paragraph 67 (a) provides:

> "Claims which for want of record or other reasons would not have been valid liens as against the claims of any creditor of the bankrupt shall not be liens against his estate."

Paragraph 67 (b) provides:

> " * * * wherever a creditor is prevented from enforcing his rights as against the lien created or attempted to be created by his debtor, who afterwards becomes bankrupt the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of said creditor for the benefit of the estate."

Paragraph 47 (a) (2), amendment of 1910, provides:

> "And such trustee as to all property in the custody or coming into the custody of the Bankruptcy Court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable pro-

ceedings thereon; and also as to all property not in the custody of the Bankruptcy Court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

The interpretation of the Bankruptcy Act by the Federal Courts is stated *In re Farmers' Co-operative Co.*, 202 Fed., 1008.

"A fair interpretation of the statute in the light of the weight of authority * * * gives to the trustee all the rights of the most favored creditor under the local law and any property thus held by the trustee becomes a part of the general estate to be apportioned among all creditors in accordance with the provisions of the Bankruptcy Act on that subject."

McDERMOTT & ENRIGHT,
Of counsel with Appellant.

New Jersey Court of Errors and Appeals

Between
COMMERCIAL TRUST COMPANY OF NEW JERSEY, Trustee, etc.,
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 and others,
Defendants-Appellees.

BRIEF FOR WILLIAM T. PAYNE AND EAST BOSTON COAL COMPANY, APPELLEES.

Statement of Facts.

The L. Wertheim Coal & Coke, hereafter called the Company, was a New Jersey corporation engaged in the retail coal business at Jersey City, New Jersey.

On May 6, 1912, the company issued $250,000 six per cent. coupon bonds, secured by a deed of trust

to the Commercial Trust Company of New Jersey, covering all the assets of the Company (pages 471-496), in pursuance of the unanimous resolution of the Board of Directors of February 28, 1912 (pages 86, 88), and the unanimous resolution of the stockholders (page 91).

The deed of trust required the payment of $2,000 per month (page 9) to the Commercial Trust Company of New Jersey to establish a sinking fund for the payment of the principal and interest of the bonds. More than two years after the execution of the deed of trust pages 10 line 9) the Company defaulted in the payment of the sinking fund payment for the month of June, 1914, and a bill to foreclose the mortgage was filed by the Commercial Trust Company of New Jersey. Later a petition in bankruptcy was filed, and on November 6, 1914, Albert I. Drayton was appointed Trustee in Bankruptcy of the L. Wertheim Coal & Coke Company. He filed an answer contesting the mortgage on the ground that the Company either was insolvent or contemplated insolvency at the time of the execution of the mortgage, and that the affidavit did not state the true consideration of the mortgage (pages 438, 439).

The condition of the Company on April 30, 1912, six days before the execution of the mortgage, is shown in Exhibit E 16, at page 519, and may be summarized as follows:

ASSETS.

Plant and equipment	$189,519.65
Leasehold	135,000.00
Current assets	162,091.60
Deferred charges	18,267.08
Total Assets	$504,878.33

LIABILITIES.

Current Liabilities	$318,252.86	
Surplus of assets over liabilities, including capital stock	186,625.47	
Total		$504,878.33

During the fiscal year immediately preceding the execution of the mortgage, April 1, 1911, to April 1, 1912, the Company made a net profit of $5,550.81 (page 407, line 10; page 377, line 38).

An epidemic of glanders causing a loss of horses to the extent of $40,000 or $50,000 (page 378, line 18), resulted in the distribution of these loses in the final statement of the year (Exhibit 10, pages 517, 518; pages 377, 378).

During the five months immediate preceding the bond issue the following net profits were made by the Company:

December 30, 1911—Net Profit—$453.28 (page 561, line 20).

January 31, 1912—Net Profit—$3,730.74 (page 559, line 2).

February 29, 1912—Net Loss—$1,119.44 (page 557, line 28).

March 30, 1912—Net Profit—$882.05 (page 556, line 21).

April 30, 1912—Net Profit—$3,759.44 page 520, line 10).

From the date of the bond issue, May, 1912, to June, 1914, the date of the default in the payment of the sinking fund, the Company received in cash more than $1,000,000 (page 424).

At the time of the bond issue the directors of the corporation were Warren Delano, William T. Payne, DeWitt Van Buskirk, Sanders Wertheim and Louis Wertheim, Mr. Delano was president of the Mill Creek Coal Company and William T. Payne was vice-president of the East Boston Coal Company. These two companies had been selling coal to the Wertheim Company for many years, and at the time of the bond issue the Wertheim Company was indebted to the Mill Creek Coal Company on ten-month promissory notes amounting to $119,454.86, East Boston Coal Company, $91,195.71, William L. Dann, $18,624.45, besides interest, and Max Isenstein, $14,785.12, besides interest.

The bond issue did not originate from either Payne or Delano, but was proposed by Sanders Wertheim to provide working capital, by converting the ten-month notes into twenty-year bonds, and place the Company on a strong financial basis to meet the anticipated coal strike and the pending litigation against the Lehigh Valley Railroad Company for a discrimination of fifteen cents per ton on all coal shipped for transportation to New York City.

Payne, Delano, Isenstein and Dann all exchanged their notes for bonds in July, 1912, and Payne and Delano continued to sell coal to the Wertheim Company on credit until the appointment of the receiver.

In September, 1914, more than two years after the execution of the mortgage, the Company went into bankruptcy, and at the time of bankruptcy the Company owed the Mill Creek Coal Company (Mr. Delano's concern) $31,000, and the East Boston Coal Company (Mr. Payne's company), $53,000,

besides all the bonds of Delano, Payne, Isenstein and Dann, amounting to $240,000. Bonds to the amount of $10,000 had been retired through the sinking fund provided for in the mortgage.

ARGUMENT.

POINT I.

The company was not insolvent at the time of the bond issue.

The Company had sufficient assets to pay its debts on liquidation (page 384, line 20; page 382, line 33; page 380, line 40; page 419, line 40).

The credit of the company was excellent (page 418, line 5).

The Company discounted notes after the bond issue (page 418, line 2).

The Company purchased on credit after the bond issue $100,935.85 worth of coal from the East Boston Coal Company (page 415, line 13), the account of which is set forth in Exhibit LA-29, at page 579.

The Company purchased from the Mill Creek Coal Company on credit after the bond issue, coal amounting to $31,836.43 (page 247, lines 1 to 18).

Several other shippers sold them large quantities of coal and extended large credit after the bond issue (page 405, lines 17 to 20). Among the shippers were Whitney & Kemmerer, who sold them several thousand dollars' worth of coal on credit (page 405, line 23); Stone & Company, who sold the Company coal to the extent of $12,000, $15,000 and $18,000 (page 405, line 33), and a man named Bowman (page 405, line 35).

The Company had never stopped business (page 323, line 8).

The Company had never defaulted in any of its payrolls (page 323, line 5).

The Company made a net profit of $8,753 for the five months preceding the bond issue.

The Company was solvent at the time of the bond issue (page 417, line 33).

> "The fact of insolvency is far from being clearly and satisfactorily established. * * * The court looks to the suspension of the ordinary business or some overt act by which its insolvency can be ascertained and declared."
>
> *Regina Music Box Co.* vs. *Otto,* 65 Eq., 582.

The court would not have appointed a receiver at the time of the bond issue. This test has been applied in some cases. *Trust Co.* vs. *Trustee,* 67 Eq., 602.

POINT II.

The company did not contemplate insolvency.

The Lehigh Valley Railroad Company was negotiating for the purchase of the Company (page 316, line 20).

No suspension of the business was contemplated (page 322, line 41).

The business outlook was very promising (page 409, line 18).

An additional yard in Harlem, New York, was

obtained to handle increased tonnage (page 369, line 28).

The bond issue put the Company in magnificent shape (page 325, line 22).

Shortly before the bond issue horses were purchased (page 312, line 37) and buildings and equipment were improved (page 311, line 25).

After the bond issue a new discount was obtained (page 323, line 33). The contract for supplying the Jersey City schools was secured by the Company (page 334, line 1).

The Company had plenty of coal on hand and anticipated doing a large tonnage (page 324, lines 22-38). The price of coal was advanced and the prospects were good (page 336, lines 1-12).

> "Certainly there was no contemplation of insolvency because the testimony of every witness is that they did not contemplate insolvency. They were planning to run boats away into October; had engagements for picnics and excursions, which were profitable to them, and had every prospect, so far as ascertaining the operating expenses, of a good season."
>
> *Bergen* vs. *Rogers,* 67 Atl., 290. Affirmed in 70 Atl., 1100.

POINT III.

Are directors required to institute insolvency or bankruptcy proceedings whenever the company needs financial assistance?

This Company had suffered a loss of $50,000, caused by an epidemic of glanders among its

horses (page 312, line 40; page 373, line 9; page 378, line 18; page 438, line 2).

An audit made by the Audit Company of New York for fifteen months ending March 31, 1911, showed a loss of $18,789.39 (page 509), but after deducting this loss and a reserve of $10,000 for doubtful account, there was a net surplus of $99,906.74 (page 508) over and above $275,000 of capital stock.

The Company had been handicapped by a discrimination in favor of a competitor, arising from a preferential railroad tariff of fifteen cents per ton (page 315, line 29). Suit was instituted for the rebate (page 316, line 30) and negotiations were opened for the purchase of the yard by the railroad company to settle the claims and damages (page 317, line 2).

One of the reasons for the bond issue, which converted ten months' notes into twenty-year bonds (page 321, line 37) was to prevent the railroad company from wearing out the coal company and to put it in a strong financial condition (page 321, line 25).

The Trustee in Bankruptcy has not produced any evidence of suspension of activities; nor does he controvert the overwhelming evidence, set forth under Points I and II, of the splendid prospects of business. The Trustee in Bankruptcy does not produce any evidence that the Company contemplated insolvency or dissolution, and all the evidence indicates that the Company would be able to shortly overcome the losses caused by the epidemic of glanders and the rate discrimination.

> "It did not contemplate insolvency, but contemplated proceeding with the business. * * *

"The court looks to the suspension of the ordinary business or some overt act by which its insolvency can be ascertained and declared. The court cannot, upon inquiry, undertake to investigate the financial ability of the Company at previous periods, founded upon a failure to meet its engagements or upon the actual state of its finances after its business has been suspended."

Regina Music Box Co. vs. *Otto,* 65 Eq., 582, 592.

"Can it be that at any time in the history of the corporation engaged in business the market value of its property is less than its indebtedness, the directors, no matter what they believe is its value or their expectations of its success, act at their own peril in taking indemnity to themselves for the further use of their credit in behalf of the corporation? Is it their duty to immediately stop business and close up the affairs of the Company?"

Sanford Fork & Tool Co. vs. *Home Brown Company,* 15 Supr. Court Reporter, 621.

"Still, the right of a company to continue its business and retrieve its failures, if possible, must be conceded to it, as well as to natural persons, and this right extends the power to give a mortgage to such as are unwilling to give further time unless so secured."

Damann & Co. vs. *Huron Ins. Co.,* 47 Ohio State, 581.

"The evidence shows that the parties were all acting in the utmost good faith with the intent and purpose to save the enterprise from faiulre and ruin and to pay all its debts in full and in the expectation or realizing a profit from its operation."

McKee vs. *Title Ins. & Trust Co.,* 113 Pac. Rep., 141.

"It is very plain to be seen that a bank may be in such a condition as to render it proper for the court to interfere by injunction under the act, and yet without such interference, the directors might go on bona fide in the ordinary transaction of its business, and all transfers made under such circumstances would be good. Why? Because they were not made in contemplation of bankruptcy but to prevent that very catastrophy."

Receivers of Peoples Bank vs. *Paterson Savings Bank,* 10 N. J. E., 13.

"Directors can loan money or credit and take security even when the corporation is temporarily embrrassed, when acting in good faith, in order to enable the corporation to overcome temporary embarrassments and to carry on its business and in the expectation that the corporation will ultimately continue as a solvent concern."

In re *Salvatore Brewing Co.*

POINT IV.

The case of the trustee in bankruptcy depends almost entirely upon the testimony of expert witnesses.

The Trustee in Bankruptcy relies upon the testimony of three expert witnesses: An Accountant, a real estate dealer and an engineer. The expert accountant Kreuzer was produced primarily to criticise the assets of the Company set forth in the trial balance made by the Audit Company of New York. Kreuzer's examination was made two years after the date of the bond issue. It was more than superficial. He questioned improvements, but didn't mean to say that the improvements were not made (page 128, line 37); nor did he check the cash items to ascertain whether they were paid for (page 129, line 33). He didn't trace any items of trestle and buildings (page 133, line 35).

"Q. Did you trace those items?

A. No, sir. I just took the ledger account. That is all" (page 133, line 36).

By the Court:

"Q. How many books did they keep?

A. A ledger, a journal and cash receipts and cash disbursements.

Q. So this testimony you are giving is merely from the ledger, without any examination of the cash book or the journal?

A. Yes, sir" (page 135, lines 25 to 35).

"Q. So that when you approached these

books and took them, how many days did you spend on them?

A. Saturday and Sunday.

Q. You saw this audit of the New York Audit Company?

A. Yes, sir.

Q. How long do you expect it took them to make that audit?

A. It probably took them a week" (page 136, lines 10-15).

"Q. Can you say whether or not these increases in plant came through expenditures made in cash?

A. I cannot.

Q. Is there a cash account?

A. No, sir.

Q. There is a cash account in the book?

A. Yes, sir" (page 144, line 20).

This expert accountant, Joseph Kreuzer, was an important witness for the Trustee in Bankruptcy. He was employed to wipe out the surplus and depreciate all of the assets. He attempted to do this without tracing the items (page 133, line 36) and by an examination of the ledger without an examination of the journal or cash book (page 135, lines 25 to 35). It is evident, from the question of the Vice-Chancellor following the question and answer set forth on page 135, lines 20 to 27, that Kreuzer's evidence was not entitled to much weight.

The partisan attitude of Kreuzer will appear from the folowing comparison of his direct testimony with his cross-examination:

Direct:

"Q. Isn't it customary in making investigations of books for the expert when he finds an

item in the ledger to go back to the journal, day book and cash book and find out what makes it up?

A. Yes, sir.

Q. But with these books you could not do it?

A. No, sir.

Q. Did you endeavor to locate the other books of the system as of that date?

A. Yes, sir.

Q. What did you do?

A. If there were any other books.

Q. Whom did you inquire of?

A. Well, the time I made this up I was alone and did not inquire of anyone" (page 143, lines 1 to 20).

Cross Examination:

"Q. I show you a book marked 'Anaylsis of Fixed Assets, No. 1, L. W. C. & C. Co.' which has, on page 2, an item marked 'Analysis of buildings and trestles,' under date of June 30, 1911; did you come across that in making your examination?

A. Yes, sir" (page 163, line 10) * * *

"Q. Did you check up the items shown on this page 2 marked 'Details of the cost of buildings and trestles' to determine whether those items represented the cost to the Wertheim Company of the articles referred to there?

A. No, sir; I did not" (page 163, line 40) * * *

"Q. In making your report, why didn't you

explain these items shown on the red book by a reference to this analysis?

A. In making my report to the receiver?

Q. Yes.

A. I was simply to make a statement of affairs; I was not to make an audit of the books" (page 164, line 10) * * *

"Q. At the time you gave that testimony you knew, however, that there was in existence a book marked 'Analysis of fixed assets,' which gave the details of the cost of the buildings and trestles, didn't you?

A. Yes, sir" (page 164, line 30) * * *

"Q. Why didn't you explain yesterday in your testimony that there was a book of the L. Wertheim Coal & Coke Company which gave the details of the cost of every item which went into their buildings and trestles? (page 164, line 35).

A. I was testifying as to the date of April 30, 1908, where the discrepancy occurs" (page 166, line 28).

Compared with the testimony of this witness, the attention of the court is called to the detailed analysis of the buildings and trestles, taken from the book of the Company shown in Exhibit L. A.-22, at page 564, the analysis of motors, boilers, machinery and tools shown on pages 565 and 566 and an itemized statement of the horses and wagons set forth on pages 567, 568 and 569.

In addition to these details, the trestles and buildings are further analysed in Exhibit L. A.-22½ on pages 569, 570, 571 and 573.

The books of the Company were audited each year (page 199, line 18). One audit was made by

Pearson's, Ltd., and the other by the Audit Company of New York, which even Mr. Kreuzer admitted to be one of the largest and one of the best (page 137, lines 10 to 20).

The trial balance of December 31, 1911 (pages 560 and 561) showed a surplus of assets over current liabilities of $213,609.49 and a net surplus of $63,609.49, after charging the entire capital stock of $150,000 in the liabilities.

This statement was brought to William T. Payne and W. G. Payne, the president and treasurer of the East Boston Coal Company, at a conference in the Waldorf, when Wertheim requested the East Boston Coal Company to accept twenty-year bonds for their ten months' notes (page 413, line 10).

"Q. Did you discuss with Sanders the details of that trial balance of December 31, 1911, at that conference?

A. Yes, sir; we discussed practically every item, discussed it very thoroughly, at a two or three hours' talk that we had.

Q. When you say 'discussed' what do you mean; did you ask him—

A. We asked him how he arrived at these values; we tried to verify these values as shown all the way through.

Q. What did he say about them?

A. He said they were all correct, and he supported some of them with other statements; he supported them to our satisfaction at that time.

Q. What statements?

A. He had some other papers there itemizing the cost of various things down on the

plant and inventories of the horses and wagons, and this statement was verified by us at that time" (page 413, lines 20 to 40).

Another expert called by the Trustee in Bankruptcy depreciated the value of the land, exclusive of all the trestles, buildings and improvements, to $63,800 (page 150, line 35), and the Jersey City tax expert valued it at $96,600 (page 305, line 30).

The third expert of the Trustees in Bankruptcy valued the improvements, which cost more than $100,000, at a minimum of $25,000 and a maximum of $40,000.

In connection with this attempt to depreciate the assets, we invite the attention of the court to the fact that the contract for the erection of the trestle alone was $19,100 (page 571, line 22) and the cost of the stable buildings was $23,123 (page 570, line 10).

John T. Rowland, Junior, valued the trestle at $20,520 and the stable at $19,368. This estimate did not include the coal pockets, filling in the yard (which cost $5,000), concrete or ground work under buildings, trestle, etc., additional conveyors and blacksmith buildings, all the details of which are set forth on page 564.

POINT V.

Is the validity of the deed of trust of 1912 to be determined by the conditions at that time or by the conditions two years later?

"The court cannot, upon inquiry, undertake to investigate the financial ability of the company at previous periods, founded upon

a failure to meet its engagements or upon the actual state of its finances after its business has been suspended."

Regina Music Box Co. vs. *Otto,* 65 Eq., 582, 592.

The court would not have appointed a receiver of the Company at the time of the bond issue in May, 1912.

At that time its assets were $504,878.33 and its liabilities, $318,252.86 (pages 519, 520, E. 16). The trestle and buildings of $113,000 were carried at cost, and are detailed on pages 569, 571 and 573. The horses and wagons are detailed on pages 567, 568 and 569. The motors, boilers and machinery are detailed on pages 565 and 566. The leasehold was carried on the books at $135,000 but was worth $7500 per year, and with nineteen years to run represented a total value of $142,500 (page 339, lines 1 and 2; page 340, line 1).

The lease provided for rental at the rate of one dollar per year, and the consideration of the rental was the conveyance to the railroad company of part of the land in question (page 343, lines 17, 22). The value of $7500 a year is based on a custom of the coal trade of from ten to fifteen cents per ton for dumpage (page 339, lines 22 to 32). Another consideration of the nominal rental was guaranty of tonnage to the yard, running up to 120,000 tons per year (page 342, lines 20 to 25; page 533, lines 20 to 30). The lease contained a clause that it might be terminated upon notice of one year, provided the premises were required for railroad purposes, and in that event the railroad company agreed to pay "THE FAIR VALUE OF THE STRUCTURES LEFT

ON SAID PREMISES" (page 526, lines 16, 17). It was insisted by the Company that inasmuch as the fair value of the structures was required to be paid by the railroad, any statement of a fixed amount in the lease would be regarded as a penalty and not as limiting the fair value of the structures.

The Company could have liquidated and paid everybody in full; it was making a profit on its business; its credit was good and it was discounting notes and buying coal from wholesalers; there was no intention of abandoning the business; it had never stopped business and had never defaulted in any of its payrolls; improvements were being made to its yards, and more than a million dollars in cash was received by the corporation after the bond issue. The pages of the case verifying these details are set forth under Points I and II.

POINT VI.

There was no clear and satisfactory proof of insolvency, required to be shown to justify the appointment of the receiver, nor is there any evidence introduced by the trustee in bankruptcy that the prospects of the company's business were not excellent.

> "If the managers are honest and capable and are striving to the best of their ability, with a fair prospect of success, to relieve the corporation from its embarrassment, a receiver will not be appointed."
>
> *Atlantic Trust Co.* vs. *Consolidated Storage Co.*, 49 Eq., 402, 407.

"The New Jersey courts have also refused to appoint a receiver unless the proof of insolvency is clear and satisfactory and unless also, it appears that there is no reasonable prospect that the corporation, if left alone, will be placed by the efforts of its managers in a condition of solvency."

Trust Co. vs. *Trustee,* 67 Eq., 602.

POINT VII.

The trustee in bankruptcy has no better rights than creditors.

"Under the provisions of the bankrupt act, the Trustee in Bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued"

York Mfg. Co. vs. *Cassell,* 201 U. S., 244.

"The bankruptcy act provides that a trustee may avoid any transfer by the bankrupt of his property *which any creditor of such bankrupt might have avoided.*"

Empire State Trust Co. vs. *Fisher,* 67 Eq., 602.

POINT VIII.

All indebtedness due at the time of the bond issue has been paid in full. Subsequent creditors have no rights and, consequently, the trustee in bankruptcy has no equities.

At the time of the bond issue the Company owed the following:

Mill Creek Coal Company	$119,454.80
East Boston Coal Company	88,314.33
William L. Dann	21,189.97
Max Isenstein	16,818.74
Total	$245,777.84

(pages 92 and 93).

These accounts were all represented by notes.

Warren Delano, with the Mill Creek Coal Company, and William T. Payne, of the East Boston Coal Company, were directors of the L. Wertheim Coal & Coke Company. Max Isenstein and William L. Dann had been directors of the Company.

The other indebtedness at the time of the bond issue was as follows:

Notes payable	$48,217.56
Accounts payable	23,302.01
Total	$71,519.57

(pages 520, lines 1-10).

Messrs. Payne, Delano, Isenstein and Dann received bonds for their notes and all the other creditors of the Company were paid in full.

"Q. Now, all those that you've looked at, those creditors claims, now pick out one that was unpaid at the time of the bankruptcy.

A. There are none.

By Mr. Enright:

Q. Are you sure about that?

A. Yes, sir" (page 133, lines 12-20).

"Q. I ask you over again; in your examination of this book, did you find any accounts noted therein for any month prior to April, 1912, that were not marked paid?

A. No, sir.

Q. And this book begins with what month?

A. June, 1911" (page 170, lines 1-5).

"Q. Turning to the account for the month of May, 1912, can you tell we whether there are any accounts shown in that voucher register for the month of May, 1912, that are not, as appears by that book, paid, and paid before the year 1914?

A. Everything is paid")page 169, lines 20-25).

The above testimony was made by Kreuzer, the expert employed by the Trustee in Bankruptcy.

The Trustee in Bankruptcy produces no evidence of any single creditor's claim existing in 1912 which has not been paid in full. He offers in evidence, to give some color to his representation of creditors existing in 1912, two proofs of claim filed in the Bankruptcy Court, one by the Lehigh Valley Railroad Company and the other by the

Erie Railroad Company. These proofs had attached the running accounts between the L. Wertheim Coal & Coke Company and the two railroad companies; on the one side there being shown the items of freight, coal storage, car service and demurrage, and on the other side the payments by the L. Wertheim Coal & Coke Company. Attention is called to the fact that the exhibits are not printed in full, and the mere filing of two proofs of claim with the Referee in Bankruptcy showing running accounts, is no evidence against the L. Wertheim Coal & Coke Company of the existence of any claim in 1912, and is not sufficient to overcome the positive proof of the books of the L. Wertheim Coal & Coke Company, introduced in evidence at page 170, marked "Exhibit F 1," and the testimony of the witness of the Trustee in Bankruptcy, Joseph A. Kreuzer, that all claims existing in 1912 had been paid prior to 1914 (page 133, line 14; page 170, line 1).

> "A mortgage may be sustained as against all except creditors whose claims existed at the time it was given, although it was intended merely as a gift."
>
> *Campbell* vs. *Tompkins,* 32 Eq., 170.
>
> "It is objected to the mortgage of 1890 that it was a preference by an insolvent corporation and therefore void under the law of Tennessee. The only bank creditor of the railroad in the whole case is the Mechanics National Bank, on a draft discounted after the mortgage was given. It cannot object to the previous conveyances by its debtor to secure a valid debt." Mr. Justice Taft in *Central Trust Co.* vs. *Bridges,* 57 Fed., 753.

"Property of a debtor alleged to have been transferred in fraud of creditors cannot be subjected to a debt against him unless it is shown that the debt existed prior to the transfer."

Burne vs. *Kunzman,* 19 Atl., 667.

"Subsequent creditors cannot attack the transaction. They are not injured. They gave credit to the debtor in the status which he had after the conveyance was made."

Graham vs. *Railroad Co.,* 102 U. S., 148.

"The evidence wholly fails to show that at the time this action was brought there was a single debt or liability of the defendant outstanding or undischarged which existed at the date of the deed."

"There were, therefore, when the complainant sued, no antecedent creditors nor creditor whose equity he could invoke or whose wrongs he could display as a foundation for relief personal to himself."

Claflin vs. *Mess,* 30 Eq., 211.

POINT IX.

Fraud must be proved to set aside a mortgage in favor of subsequent creditors.

"We see no reason why the disposal by a corporation should be questioned by subsequent creditors any more than a like disposal by an individual of his property should be. The same principals of law apply to each."

Graham vs. *Railroad Co.*, 102 U. S., 148.

"The burden is upon subsequent creditors to prove an actual intent in the minds of the parties at the time of making the conveyance, to hinder, delay or defraud creditors."

Kinsey vs. *Feller*, 64 Eq., 367.

"The true rule is that when a conveyance is attacked by a subsequent creditor, the question to be determined is whether the conveyance was fraudulent."

Hageman vs. *Buchanon*, 45 Eq., 292.

"All the claims of creditors which have been proved seem to be based upon liabilities of the company arising after the date of the conveyances; and the conveyances in payment of the directors' debts are, therefore, valid as to the receiver and the creditors he represents, unless actual intent to defraud be proved that they were made in actual contemplation of the subsequent insolvency."

Tennant vs. *Appleby*, 41 Atl., 110.

POINT X.

Fraud was neither alleged nor proved.

There is not the slightest evidence of anything but the utmost good faith in all the dealings of the

directors with this Company. The Vice-Chancellor in his opinion, in speaking of the deed of trust to secure the issue of bonds, says:

> "It was conceived for the benefit of the Wertheim Company, and there is nothing which shows that the Mill Creek Coal Company or the Payne Company improperly secured anything from it or profited on the coal sold (page 452, line 22).
>
> "The action of Delano and Payne and the companies which they represented was, in my judgment, characterized by good faith and fair dealing."

POINT XI.

Payne and Delano sold coal on credit to the company after the bond issue.

William T. Payne became a director of the Company on December 17, 1909. He had been selling coal to the Company since 1906 (page 290, line 1) relying upon financial statements of the Wertheim Company, showing the trestle and buildings, horses and wagons, leasehold and other assets substantially the same (page 543, lines 20 to 40, E. L. A. 1) as the statement at the time of the bond issue (page 519, E. 16). Similar statements were submitted during the years 1910 (pages 545, 546 and 547) and also during the year 1911 (page 560, Exhibit L. A. 19), as well as during each month of the year 1912 prior to the bond issue page 558, L. A. 15; page 519, E. 16; page 517, E. 10).

Mr. Payne, prior to his becoming a director of the Company, sold coal to the Company on thirty days' credit (page 299, line 18). After he became a director, he sold coal to the Company on ten months' credit (page 299, line 20).

In 1909, when Payne became a director of the Wertheim Company, the indebtedness of that Company to the East Boston Coal Company, of which Mr. Payne was Vice-President, was $12,000. At the time of the bond issue in 1912, the indebtedness was $90,000, and in 1914 the indebtedness was $140,000 (page 574, lines 5, 6, 7, 8, 9 and page 539).

Payne always sold coal to the Wertheim Company at the same or lower prices paid by other customers (page 348, line 30), and in many circumstances the Wertheim Company received coal at 50¢ to $1.00 per ton less than paid by other customers (page 349, lines 1-15; 348, lines 20-25). When the East Boston breaker burned down, Payne purchased coal and sold it to the Wertheim Company (page 349, lines 10 to 20).

POINT XII.

The trustee in bankruptcy cannot repudiate the bonds and retain for the company the benefit of $100,000 of indebtedness arising from coal sold by the bondholders.

It is inequitable to permit the L. Wertheim Coal & Coke Company to receive the benefit of the bond issue, including the substitution of twenty-year bonds for ten-month notes, as well as the purchase of coal on credit amounting to more than $100,000, from the directors on the faith of the bond issue

and then permit the Trustee in Bankruptcy to repudiate the entire transaction without restoring the directors and bondholders to their former position.

Perkins vs. *Trinity Realty Co.*, 69 Eq., 723.

"The kind of plunder which holds on to the property but pleads *ultra vires* as to it has no recognition.

"The evidence shows that the parties were all acting in the utmost good faith with the intent and purpose to save the enterprise from failure and ruin and to pay all debts in full, and in the expectation of realizing a profit from its operation."

McKee vs. *Title Insurance & Trust Co.*, 113 Pac., 140.

POINT XIII.

The honesty and good faith of Payne and Delano are not questioned.

The point was made by the Trustee in Bankruptcy that Payne and Delano were not only directors of the Wertheim Company, but also directors of operating coal companies, but there is not the slightest evidence of their failure to act always in the interest of the Wertheim Company.

"In matters of business management within the powers of the board, its judgment, if honestly exercised, must control."

Merriman vs. *Nat'l Zinc Co.*, 86 Atl., 764.

"These directors continued the business for two and one-half years, loaned money without security, and so far as the record discloses, transacted business openly and squarely and with the single end in view of securing their own debts and that of the plaintiff in error as well. Cases arise, and the one now under consideration fairly illustrates them, in which by reason of the financial condition of their principal, it becomes impossible to borrow money from outsiders and when a timely loan or forbearance in the enforcement of demands may bridge it over and start it on a successful career. The directors, of all others, know the conditions and circumstances and may be the only ones from whom succor can come. To say that they are bound by a strict rule prohibiting a contract with themselves as to foreclose the possibility of securing aid, is, in our opinion, carrying the rule beyond its reason."

American Exchange Nat'l Bank vs. *Ward*, 111 Fed., 782.

"These directors not only forebore to assert their claims for a long time but advanced money in the earnest and honest effort to extricate the mercantile company from its difficulties. They had not injured the plaintiff in error but had improved his condition."

Gould vs. *Railroad*, 52 Fed., 680.

POINT XIV.

The deed of trust is valid.

"In most cases there is a period of struggle during which efforts are made to rescue the enterprise from threatened insolvency. The transfer of the company's property may be the only means of averting the insolvency which is feared, and the capacity legally to make such an instant conversion may be necessary to the financial salvation of the corporation. The officers of the company, who are most intimately acquainted with its financial embarrassment and its future prospects, are naturally the persons who would be most likely to furnish the money necessary to relieve the corporation from its threatened danger."

Reed vs. *Heloise Carbide Specialty Co.*, 64 Eq., 231.

"The corporation was still a going concern. There was no purpose to abandon the business. The creditors and directors believed it could be made secure by a mortgage given not only to secure a past indebtedness but also to secure a renewal or extension of its obligations. Thus, they prevented a suspension of business and enabled the company to continue its operations, and did so believing that by such continuance the corporation would work itself out of its temporary difficulties. All this was done in good faith. It was the application by the debtor to secure creditors and not the act of the agents to protect themselves. Can it be that at any time in the history of a corpora-

tion engaged in business the market value of its property is less than its indebtedness, the directors, no matter what they believe is its value or upon their expectations of its success, act at their peril in taking to themselves indemnity for the further use of their credit in behalf of the corporation? Is it their duty to immediately stop business and close up the affairs of the Company?"

Sanford Fork & Tool Co. vs. *Home Brown Co.*, 15 Supr. Ct. Rep., 621.

POINT XV.

A precedent debt is a good consideration for a deed of trust.

"It has been held by this Court that a precedent debt is a good consideration for a chattel mortgage."

Collerd vs. *Tully*, 78 N. J. E., 557.

"All that is necessary is to show a consideration for the chattel mortgage, and the antecedent debt suffices for that purpose. No new consideration is necessary to sustain the validity of these chattel mortgages."

Knowles Loom Works vs. *Vacher*, 57 Law, 490; Affirmed 59, Law 586.
Muchmore vs. *Budd*, 53 Law, 369.

POINT XVI.

Directors, acting in good faith and believing their corporation to be solvent, may secure their past indebtedness and other indebtedness of the corporation, with the view of improving the financial condition of the company.

The deed of trust was not conceived by the directors, Payne and Delano, but by the Wertheims, who had no claims against the corporation (page 321, lines 15-40; 241, line 30). The bonds were issued in payment of notes held by the East Boston Coal Company, Mill Creek Coal Company, Max Isenstein and William L. Dann (pages 537, 538, 539 and 540). All other creditors at that time were paid in full (page 170, lines 1-5).

The most convincing evidence of the good faith of Payne and Delano is the sale of coal on credit to the Company by Delano, amounting to $31,836.43, and by Payne to the amount of $53,000 (page 326). These amounts were owing to Payne and Delano, as unsecured creditors, at the time of the bankruptcy (page 326, lines 8 to 12).

The object of the deed of true and the substitution of the bonds for notes, was to put the concern in magnificent shape (page 325, line 22), make it strong financially (page 325, line 12), protect it in the pending suit against the Lehigh Valley Railroad (page 325, line 7) and convert its short term notes into long period bonds to better meet the anticipated coal strike (page 320, line 33; 321, lines 10-20).

"The right of a company to continue its business and retrieve its failures, if possible, must be conceded to it as well as to natural persons, and this right extends the power to give a mortgage to such as are willing to give further time unless so secured. When the power is fairly and honestly exercised, with no purpose at the time of immediately abandoning the business, the validity of the security so obtained cannot be questioned."

Damann & Co. vs. *Huron Insurance Co.,* 47 Ohio State, 581.

"I am aware of no principle of law which would void an honest transaction between a director, conducted openly and having as its motive some presumable benefit to the corporation.

"In this case the advancement was made after conference with persons interested in an honest belief that the company as a going concern might be tided over its embarrassments.

"In short, the honesty of the intention and the absence of any attempt to oppress or gain some undue advantage should weigh in favor of such a transaction."

Converse vs. *Sharp,* 161 N. Y., 571.

"Certainly there was no contemplation of insolvency, because the testimony of every witness is that they did not contemplate insolvency at that time."

Bergen vs. *Rogers,* 67 Atl., 290.

"But a corporation acting in good faith and without any purpose of defrauding its creditors, but with the sole purpose of continuing a business which promises to be successful, may give a mortgage to directors who have lent their credit to it, in order to induce a continuance of that credit and in order to obtain renewals of maturing paper at a time when the corporation, although it may not be then, in fact, possessed of assets equal at cash prices to its indebtedness, is, in fact, a going concern and is intending and expecting to continue in business."

Cook on Corporations, Vol. 2, page 2121.

The deed of trust was not made for the purpose of preferring the directors in contemplation of insolvency, nor with actual intent to defraud. It was, therefore, valid.

Tenant vs. *Appleby,* 41 Atl., 110.
Montgomery vs. *Phillips,* 53 Eq., 203.
Savage vs. *Miller,* 39 Atl., 665.
Camden Trust Co. vs. *Citizens Ice & Coal Storage Co.,* 69 Eq., 718.
Perkins vs. *Trinity Realty Co.,* 69 Eq., 723.

"When the mortgages were executed and delivered the assets of the Company were in excess of its liabilities, and with the aid which the money procured from the sale of those bonds, it could and did continue to pay its current obligations as they arose."

Bergen vs. *Porpoise Fishing Co.,* 42 Eq., 397.

Regina Music Box Co. vs. *Otto,* 65 Eq., 582.

Reed vs. *Heloise Specialty Co.,* 64 Eq., 231.

"The corporation was still a going concern. There was no purpose to abandon the business. The creditors and directors believed it could be made secure by a mortgage given not only to secure past indebtedness but to secure a renewal or extension of its obligations. Thus they prevented a suspension of business and enabled the company to continue its operations, and did so believing that by such continuance the corporation would work itself out of its temporary difficulties. All this was done in good faith. It was the application by the debtor to secure creditors and not the act of the agents to protect themselves."

Sanford Fork & Tool Co. vs. *Home Brown Co.,* 15 Supr. Court Rep., 621.

"The evidence was that the parties were all acting in the utmost good faith, with the intent and purpose to save the enterprise from failure and ruin and to pay all debts in full and in the expectation of realizing a profit from its operation."

McKee vs. *Title Ins. & Trust Co.,* 113 Pac., 140.

Hadley vs. *Bank of Ellenberg,* 67 Wash., 680.

New Memphis Gas Light Co., 105 Mass., 268.

Corey vs. *Wadsworth,* 99 Ala., 68.

Sabin vs. *Columbia Fuel Co.*, 25 Ore., 15.
Whittaker vs. *Amwell Bank*, 52 Eq., 400.
Receivers of Peoples Bank vs. *Patterson Savings Bank*, 10 Eq., 13.
Cogan vs. *Conover*, 69 Eq., 815.
Howell Bros. vs. *McMullin Lumber Co.*, 153 N. C., 52.
Amer. Exchange Nat'l Bank vs. *Ward*, 111 Fed., 782.

POINT XVII.

The trustee in bankruptcy cannot question the notes and bonds of Isenstein and Dann because of the laches for five years and the absence of any creditor whose claim existed when the notes were issued.

The answer of the Trustee in Bankruptcy to the bill of complaint raised some question about the validity of the notes of Isenstein and Dann and the bonds given in exchange therefor. This point was apparently abandoned by the Trustee, and at the conclusion of the trial the solicitor of the Trustee made no mention of it in his statement of the points relied upon by the Trustee (pages 438 and 439).

The precise point raised in answer was that the notes and bonds were *ultra vires*. It seems to be well settled that:

> "The plea of *ultra vires* will not avail where the company has received the consideration and the status quo ante cannot be restored."

Perkins vs. *Trinity Realty Co.*, 69 Eq., 723.

Camden Trust Co. vs. *Citizens Ice & Coal Storage Co.*, 69 Eq., 718.

"A mortgage may be sustained as against all except creditors whose claims existed at the time of giving it. These notes were given as accommodation notes. The mortgage could not be sustained if attacked by any creditor or stockholder who did not assent to it. But since it is not shown that there are any creditors, and no question of public policy intervenes, and every stockholder assented to this disposition of the Company's property, I find that this mortgage, given for a valuable consideration, should not be declared invalid at the instance of this defendant."

Perkins vs. *Trinity Realty Co.*, 69 Eq., 723.

The notes were issued in 1909. They were approved by all the stockholders and no creditor exists who had any claim at the time of the issuance of the notes. This amounts to laches sufficient to bar any relief.

Stephany vs. *Marsden*, 75 Eq., 90.
Also 76 Eq., 611.
Arnold vs. *Searing*, 78 Atl., 762.

POINT XVIII.

The deed of trust covers all book accounts.

It has been repeatedly held in New Jersey that a chattel mortgage may permit the mortgagor to

transact business, sell part of the assets and provide that the lien of the mortgage shall attach to the chattels purchased, to replace the chattels sold.

Nugent vs. *McNeil Shoe Co.*, 62 Eq., 583.
Lister vs. *Simpson*, 38 Eq., 438.
Bouvinger vs. *Evening Journal Prtg. Co.*, 65 Atl., 483.
Fidelity Trust Co. vs. *S. I. Clay Co.*, 70 Eq., 550.

"A chattel mortgage may also be made a lien on outstanding book accounts as well as those which thereafter become due in the regular course of business."

Bouvinger vs. *Evening Journal Printing Co.*, 65 Atl., 482.

POINT XIX.

The affidavit annexed to the deed of trust complies with the statute.

In the answer of the Trustee in Bankruptcy, and at the trial, it was contended that the affidavit annexed to the deed of trust did not comply with the statute. We assume that this point is not raised on the appeal, because the counsel for appellant has omitted the two acknowledgments as well as the affidavit annexed to the deed of trust (page 496). The affidavit 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 dollars 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 refers to the recitals in the deed of trust. These recitals are set forth on page 472 and refer to the raising of funds to pay claims, debts and obligations. The reference to the mortgage in the affidavit is approved in the case of *Fletcher* vs. *Bonnet*, 6 Dick., 615. We quote the following from that decision:

"The affidavit must show on its face, or read in connection with the mortgage, to show how the relation of creditor and debtor arose between the parties to the mortgage."

The note holders were East Boston Coal Company, Mill Creek Coal Company, Max Isenstein and

William L. Dann. The mortgage was not given to secure their notes, but was made to secure an issue of bonds to the Commercial Trust Company of New Jersey as Trustee. The bonds were not delivered in exchange for the notes until July, 1912 (page 95 line 33; 96, lines 2, 10 and 20). The mortgage was executed on May 6, 1912, and recorded on the same day.

The affidavit was made by John W. Hardenbergh, President of the Commercial Trust Company of New Jersey, as Trustee. This is recognized practice and has the approval of our courts.

> "If a chattel mortgage be made and delivered for a trustee for creditors, he, as holder, is competent to make the affidavit required by statute to give the mortgage full effect.
>
> "That he may not have had personay knowledge is no reason for distorting the provision that the holder may make the affidavit. Had the statute indicated that the person to make the affidavit was not cognizant of the facts it might be different, but here the person designated is without reference to his knowledge. It may often happen that no person within the claims is cognizant of the consideration of the mortgage and the amount due and to grow due thereon, as in the case of an assignee of a debt, or an executor or an administrator, yet, certainly, such a person may become the holder and must be competent to make the affidavit. His conscience is charged to the extent of the information. The affidavit refers to matters in the mortgage and indicates the times when designated sums will grow due, and nothing was due at the date of the mortgage."
>
> *Fletcher* vs. *Bonnet,* 51 Eq., 615.

In the case of *Camden Safe Deposit Co.* vs. *Burlington Park Co.*, 33 Atl., 479, an affidavit was upheld which stated that the true consideration was the issue of $400,000 of bonds for the purposes set forth in the mortgage, and creditors were to have first right to the bonds at par in satisfaction of their debts.

> "Prior to the American Soda Fountain case, the statutory requirement was regarded technically, but in that case we rejected that doctrine and held that instruments so come in the course of commercial transactions and should be substantiated whenever there is an honest and substantial compliance with the statute.
>
> "The affidavit is not to be tested by rules of pleadings, nor treated as a technical requirement. It should be the aim of the Court when a mortgage is bona fide to preserve, and not destroy it."

Howell vs. *Stone*, 59 Atl., 33.

POINT XX.

The decree of the Court of Chancery should be affirmed.

We respectfully submit that the Company was not insolvent at the time of the bond issue; none of its officers or directors believed it to be insolvent, nor did they contemplate any suspension or insolvency. The mortgage was made in the utmost good faith, for the purpose of benefiting the Company by providing working capital. The confidence

of the directors in the prospects of its business cannot be more forcibly expressed than by the sale of more than $100,000 additional coal on credit. The Trustee in Bankruptcy represents no creditors except those who became creditors after the record of the mortgage, with notice of the mortgage, and the decree of the Court of Chancery declaring the mortgage to be valid, should be affirmed with costs.

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HAMMERMILL