

## INDEX.

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	PAGE
Notice of Appeal.....	1
Bill of Complaint.....	2
Affidavit Annexed to Bill of Complaint....	6
Order to Show Cause and Restraint.....	9
Affidavit of Jerome Litvak.....	12
Affidavit of Saul N. Schechter.....	14
Affidavit of Charles M. Grosman.....	16
Assignment of Mortgage.....	21
Affidavit of Joseph Pinchak.....	22
List of Defendant's Creditors Annexed to affidavit of Joseph Pinchak.....	25
Affidavit of Isidore Krieger.....	30
Affidavit of Moe M. Fast.....	31
Affidavit of Hyman Kramer.....	32
Order Appointing Custodial Receiver.....	33
Order Appointing Statutory Receiver.....	37
Petition of Appeal.....	40
Answer of Appellees.....	44

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Notice of Appeal.

In Chancery of New Jersey

Between

MATAWAN TILE COMPANY, a corporation,  
Complainant,

and

SECOND UNITED CONSTRUCTION  
COMPANY, a corporation,  
Defendant.

On Bill, &c.  
Notice of Appeal.

10

To GROSMAN & GROSMAN,  
*Solicitors of Complainant:*

20

The defendant, Second United Construction Company, a corporation, and Thomas D. Miller, Hyman Kramer and Moe M. Fast, as trustee for creditors of the Second United Construction Company, a corporation, the defendant herein, hereby appeal from the orders made in the above entitled cause by the Chancellor on the advice of Vice-Chancellor Alonzo Church on the 28th day of November, 1930, and on the 9th day of December, 1930, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

30

Dated: December 18, 1930.

Respectfully,

FEDER & RINZLER,  
Solicitors for and of counsel  
with appellants.

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

40

LOUIS A. FAST,  
of Counsel with appellants.

**Bill of Complaint.**

## IN CHANCERY OF NEW JERSEY

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

10 Complaining shows unto your Honor, your orator, Matawan Tile Company, a corporation of the Town of Matawan, County of Monmouth and State of New Jersey, a creditor of Second United Construction Corporation, a New Jersey Corporation, for and on behalf of itself and all other creditors and stockholders as follows:

20 1. That Second United Construction Corporation was incorporated in the State of New Jersey under the General Corporation Act of this state on the third day of November, 1927. The present officers, directors and stockholders of said corporation, who your complainant is informed, believes it to be true and therefore charges own all of the outstanding stock of said corporation, are as follows: President, Julius Pinchak, secretary, Angelo Ginnuelo and Treasurer, Rebecca Pinchak.

30 2. The said company was organized to engage in the business of buying, selling, leasing and erecting property of unimproved lands and is indebted to your orator on a judgment secured by your orator against said corporation on the 11th day of July, 1929, in the New Jersey Supreme Court in the sum of \$1793.50 damages and \$61.10 costs, amounting in all to the sum of \$1854.60, together with interest to the date hereof and execution fees. That said judgment represents moneys due your orator on certain promissory notes issued by said corporation in August and October,  
40 orator by said Joseph Miglia for value before ma-

*Bill of Complaint.*

turity, said notes having been protested for the non-payment thereof on their several due dates as a result of which your orator recovered judgment thereon as aforesaid. That after the recovery of judgment as aforesaid by your orator, it caused an execution to be issued against said corporation out of the Supreme Court of this State and same was returned unsatisfied. 10

3. Your orator is informed, believes it to be true and therefore charges as follows:

a. That Second United Construction Corporation, the defendant herein has ceased to function and is insolvent.

b. That its liabilities are approximately in the sum of \$34,000 owing to various claimants and judgment creditors for labor and material furnished to it in the erection of several apartment houses. 20

c. That Second United Construction Corporation has disposed of all of its assets and is now without assets with which to meet its liabilities.

d. That the only assets which exist in favor of your orator and the remaining creditors of said corporation is a possible claim against the officers and directors of said Second United Construction Company for having preferred some of the creditors of said corporation by turning over some part of its assets to them in the past, thereby preferring said creditors to the detriment of your orator and some of the creditors of said corporation, contrary to Section 64 of the Corporation Act of the State of New Jersey. 30

4. Your orator further charges that unless a receiver is appointed by this Honorable Court for 40

*Bill of Complaint.*

the purpose of examining into the transfer of the assets of said corporation as aforesaid and for the purpose of attempting to recover same for the benefit of the creditors of said Second Construction Corporation, grave injustice will be done to the creditors of said company.

10

5. That on or about the 28th day of November, 1928, the said Second United Construction Company, a corporation, assigned to Thomas D. Miller, Hyman Kramer and Moe M. Fast, trustees, a certain mortgage in the principle sum of \$28,000 dated November 16th, 1928, and recorded on November 17th, 1928, in Book F-66 of mortgages, in the Essex County Register's Office on page 162, which mortgage covers apartment house premises in the City of East Orange, Essex County, New Jersey.

20

6. Your orator further says that an assignment of said mortgage was executed and delivered at the time when the said company was insolvent and said execution and delivery is a fraud upon the stockholders and creditors of said Second United Construction Company and that in and by the said execution and delivery the said Second United Construction Company stripped itself of practically all of its assets, thereby resulting in the detriment and prejudice to your orator, a creditor of said company.

30

In consideration whereof and in as much as your orator is without adequate remedy without the assistance of this Honorable Court and to the end that the said company may full, true and perfect answer make to all and singular the matters and things hereinbefore stated, and that it may be enjoined from exercising any of its franchises and from receiving any debts due to it and from paying and transferring any of its effects and

40

*Bill of Complaint.*

from continuing its said business, and that it may be declared to be insolvent and that a statutory and custodial receiver may be appointed according to the form of the statute in such case made and provided, and that your orator may have such further or other relief in the premises as the nature of the case may require and as may be agreeable to equity and good conscience. 10

May it please your Honor, the premises considered to grant unto your orator, the State's writ of injunction issuing out of and under the seal of this Honorable Court, directed to the said Second United Construction Corporation, its officers, servants and agents, enjoining and restraining them and each of them from exercising any of the privileges and franchises of said company and from collecting or receiving any debts due to said company or from paying out, selling, assigning or transferring any of the estate, moneys, lands, tenements or effects of said company, and upon the State's writ of subpoena issuing out of and under the seal of this Honorable Court to be directed to the said Second United Construction Corporation therein and thereby commanding the said corporation to appear before your Honor according to law and the course of this Court at a certain day and under a certain penalty therein to be expressed, then and there to answer the premises and to abide and perform such decree as to your Honor shall seem meet. 20 30

And your orator will ever pray, etc.

MATAWAN TILE COMPANY,  
By ALFRED J. EWINGTON,  
Authorized Representative,  
Complainant.

GROSMAN & GROSMAN,  
Solicitors for Complainant. 40

JOHN A. BERNHARD,  
Of counsel with complainant.

*Affidavit Annexed to Bill of Complaint.*

STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } ss.:

ALFRED J. EWINGTON, of full age, being duly sworn according to law, upon his oath deposes and says:

10

1. I am a salesman and authorized representative of Matawan Tile Company, and have been authorized to sign the bill of complaint for the Matawan Tile Company in the foregoing matter and this affidavit supporting same.

20

2. All the facts therein stated are true to the best of my knowledge and belief and I am informed, believe it to be true and therefore allege as authorized representative of the complainant that:

30

3. Second United Construction Corporation was incorporated in the State of New Jersey under the General Corporation Act of this State on the third day of November, 1927. The present officers, directors and stockholders of said Corporation, who your complainant is informed, believes it to be true and therefore charges own all of the outstanding stock of said corporation, are as follows: President, Julius Pinchak, Secretary, Angelo Ginnuelo, and Treasurer, Rebecca Pinchak.

40

4. The said company was organized to engage in the business of buying, selling, leasing and erecting property of unimproved lands and is indebted to deponent's corporation on a judgment secured by deponent's corporation against said Second United Construction Corporation on the 11th day of July, 1929, in the New Jersey Supreme Court in the sum of \$1793.50 damages and \$61.10 costs, amounting in all to the sum of \$1854.60, to-

*Affidavit Annexed to Bill of Complaint.*

gether with interest to the date hereof and execution fees. That said judgment represents moneys due to deponent's corporation on certain promissory notes issued by said Second United Construction Corporation in August and October, 1928, to one Joseph Miglia and endorsed to deponent's corporation by said Joseph Miglia for value before maturity said notes having been protested for non-payment thereof on their several due dates as a result of which your deponent's corporation recovered judgment thereon as aforesaid. That after the recovery of judgment aforesaid, deponent's corporation caused an execution to be issued against said Second United Construction Corporation out of the Supreme Court of this State and same was returned unsatisfied.

10

5. Deponent's corporation is informed, believes it to be true and therefore charges as follows:

20

a. That Second United Construction Corporation, the defendant herein has ceased to function and is insolvent.

b. That its liabilities are approximately in the sum of \$34,000 owing to various claimants and judgment creditors for labor and material furnished to it in the erection of several apartment houses.

30

c. That Second United Construction Corporation has disposed of all of its assets and is now without assets with which to meet its liabilities.

d. That the only asset which exists in favor of deponent's corporation and the remaining creditors of said Second United Construction Corporation is a possible claim against the officers and directors of said Sec-

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*Affidavit Annexed to Bill of Complaint.*

10           ond United Construction Corporation for having preferred some of the creditors of said corporation by turning over some part of its assets to them in the past, thereby preferring said creditors to the detriment of your deponent's corporation and some of the creditors of said corporation, contrary to Section 64 of the Corporation Act of the State of New Jersey.

20           6. Deponent's corporation further charges that unless a receiver is appointed by this Honorable Court for the purpose of examining into the transfer of the assets of said corporation as aforesaid and for the purpose of attempting to recover same for the benefit of the creditors of said Second United Construction Corporation, grave injustice will be done to the creditors of said company.

30           7. That on or about the 28th day of November, 1928, the said Second United Construction Company, a corporation, assigned to Thomas D. Miller, Hyman Kramer and Moe M. Fast, trustees, a certain mortgage in the principal sum of \$28,000 dated November 16th, 1928, and recorded on November 17th, 1928, in Book F-66 of mortgages in the Essex County Register's Office on page 162, which mortgage covers apartment house premises in the City of East Orange, Essex County, New Jersey.

40           8. Deponent further says that an assignment of said mortgage was executed and delivered at the time when the said company was insolvent and said execution and delivery is a fraud upon the stockholders and creditors of said Second United Construction Corporation and that in and by the said execution and delivery the said Second United Construction Corporation stripped it-

*Affidavit Annexed to Bill of Complaint.*

self of practically all of its assets thereby resulting in the detriment and prejudice to deponent's corporation, a creditor of said company.

ALFRED J. EWINGTON.

Sworn and subscribed to before me } 10  
 this 25th day of November, 1930. }

PERCY H. PENN,  
 A Master in Chancery of New Jersey.

**Order to Show Cause With Restraint.**

IN CHANCERY OF NEW JERSEY.

20

Between

MATAWAN TILE COMPANY,  
 a Corporation,  
 Complainant,

and

SECOND UNITED CONSTRUCTION  
 COMPANY, a Corporation,  
 Defendant.

On Bill, Etc.  
 Order to  
 Show Cause With  
 Restraint.

30

This matter being opened to the Court by John A. Bernhard, Esq., of counsel with Grosman & Grosman, solicitors of complainant in the above entitled cause, and it appearing to the Court upon reading and filing the bill of complaint and the affidavit thereto annexed that the said defendant

40

*Order to Show Cause With Restraint.*

10 corporation had discontinued business and cannot continue its business with safety to the public or advantage to its stockholders and is insolvent; and application now being made for the appointment of a receiver for the defendant corporation and for an order restraining and enjoining Thomas D. Miller, Hyman Kramer and Moe M. Fast from transferring, conveying or in anywise disposing of a certain mortgage assigned by the Second United Construction Company, defendant, to said persons as trustees, which said mortgage is dated the 16th day of November, 1928, and more particularly described in the bill of complaint, and the Court having considered the matter, it is thereupon on this 25th day of November, 1930,

20 ORDERED that the defendant corporation, its officers and agents, do show cause before the Chancellor, at the Chancery Chambers, 6th floor of the Prudential Building, 763 Broad Street, Newark, New Jersey, on Friday, November 28th, 1930, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why a receiver should not be appointed to take charge of all of the property, estate, books and paper of said defendant corporation pursuant to the statute in such case made and provided; and why the said  
30 defendant corporation should not be declared insolvent; and it is further

ORDERED that in the meantime the said defendant corporation, its officers and agents, and all persons claiming under it, including Thomas D. Miller, Hyman Kramer and Moe M. Fast, as trustees or otherwise, shall be restrained from disposing of any of the property or assets of said corporation by transferring or conveying the  
40 same, and especially against assigning, transfer-

*Order to Show Cause With Restraint.*

ring, collecting or otherwise disposing of a certain mortgage held by the said Thomas D. Miller, Hyman Kramer and Moe M. Fast, trustees, which said mortgage, made by Joseph Berg to the Second United Construction Corporation and recorded in the Essex County Register's Office in Book F-66 of mortgages on page 162, was assigned to the said trustees by instrument of assignment dated November 28th, 1928; and it is further 10

ORDERED that a copy of this order and a copy of the bill, certified by the solicitor of complainant, be served within one day from the date hereof personally upon any officer or registered agent of said defendant corporation, or by leaving a copy thereof at their place of residence, and that a copy of this order be served within one day from the date hereof upon the said Thomas D. Miller, Hyman Kramer, Moe M. Fast, either personally or by mailing such copy, which may be certified to by the solicitors for the complainant, to their last known post-office addresses. 20

Respectfully advised,

ALONZO CHURCH,  
V. C.

E. R. WALKER, 30  
C.

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(Bill of Complaint and Affidavit annexed to Original Order to Show Cause With Restraint.)

**Affidavit of Jerome Litvak.**

IN CHANCERY OF NEW JERSEY

10	Between MATAWAN TILE COMPANY, a Corporation, Complainant,  <i>and</i>  SECOND UNITED CONSTRUCTION CORPORATION, a Corporation, Defendant,	On Bill, Etc. Affidavit.
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20 STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } ss.:

JEROME LITVAK, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am a practicing attorney at law of the State of New Jersey, located at Newark, New Jersey.

30 2. On Tuesday, November 18, 1930, I appeared at the office of Edward J. Luce, Esq., Supreme Court Commissioner for the purpose of examining the officers of Second United Construction Corporation, pursuant to an order of discovery issued by Hon. William S. Gummere, Chief Justice of the New Jersey Supreme Court, in connection with judgment recovered by Matawan Tile Company, a Corporation, against Second United Construction Corporation.

40 3. I appeared at the office of Edward J. Luce, Esq., Supreme Court Commissioner as aforesaid

*Affidavit of Jerome Litvak.*

at 2 p.m., on the above date and in the presence of Edward J. Luce, Esq., and one Saul N. Schechter, also an attorney of the City of Newark, I proceeded to examine Julius Pinchak, president of Second United Construction Corporation under oath, his testimony being transcribed by the stenographer in Supreme Court Commissioner's office at the hearing, also under oath. 10

4. Julius Pinchak informed me that he was president of Second United Construction Corporation and that said corporation had long since ceased doing business, having been incorporated for the purpose of constructing a certain apartment house in the City of East Orange. Julius Pinchak also informed me that the Second United Construction Corporation had no assets whatsoever on November 18, 1930, nor had it had any assets since the latter part of November, 1928. That the sole assets of said Second United Construction Corporation in November, 1928, consisted of a second mortgage in the original sum of \$28,000 covering the apartment house, which said corporation had erected at East Orange, New Jersey, and which it had sold to one Joseph Berg. That said Second United Construction Corporation immediately assigned said second mortgage of \$28,000 of Joseph Berg, being its only asset to Thomas D. Miller, Hyman Kramer and Moe F. Fast, as trustees for some of the creditors of Second United Construction Corporation. 20 30

5. Deponent further states that said Julius Pinchak informed deponent on November 18, 1930, that Second United Construction Corporation was out of business, had ceased functioning 40

*Affidavit of Jerome Litvak.*

and had no place of business or office of any kind.

JEROME LITVAK.

Sworn and subscribed to before me }  
 this 25th day of November, 1930. }

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HELEN M. VALKL,  
 A Notary Public of New Jersey.

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**Affidavit of Saul N. Schechter.**

STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } ss.:

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SAUL N. SCHECHTER, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am a practicing attorney at law of the State of New Jersey, located at Newark, New Jersey.

30

2. On November 18, 1930, I had occasion to be in the Town of Rutherford, Bergen County, New Jersey, and accompanied Jerome Litvak, Esq., to the office of Edward J. Luce, Esq., where in my presence I heard Jerome Litvak, Esq., proceed to examine Julius Pinchak, president of Second United Construction Corporation, under oath, on supplementary proceeding examination under an order issued by Chief Justice William S. Gum-mere of the New Jersey Supreme Court.

40

3. I heard Julius Pinchak answer the questions propounded to him by Jerome Litvak, Esq., making the following statements, namely: That he at

*Affidavit of Saul N. Schechter.*

all times since the inception of Second United Construction Corporation, was and still is its president; that Julius Pinchak always was and still is familiar with all the affairs of Second United Construction Corporation; that Second United Construction Corporation is out of business and has ceased to function and has no assets of any kind nor has it any officers or place of business; that the only asset of Second United Construction Corporation consisted of a second mortgage of \$28,000 given to it by one Joseph Berg who purchased an apartment house constructed by Second United Construction Corporation located in the City of East Orange in November, 1928, and that Julius Pinchak, as president, together with the officers of Second United Construction Corporation proceeded to immediately assign said second mortgage of \$28,000 given to said corporation by Joseph Berg as aforesaid to Thomas D. Miller, Hyman Kramer and Moe M. Fast as trustees for some of the creditors of Second United Construction Corporation.

SAUL N. SCHECHTER,

Sworn and subscribed to before me }  
 this 25th day of November, 1930. } 30

JENNIE MICHELSTEIN,  
 A Notary Public of New Jersey.

### Affidavit of Charles M. Grosman.

STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } ss.:

10 CHARLES M. GROSMAN, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am a member of the firm of Grosman & Grosman, solicitors of complainant, and am the person actually entrusted with the conduct and management of this cause.

20 2. The firm of Grosman & Grosman were attorneys of record for Matawan Tile Company, the complainant in the foregoing matter on the judgment recovered by it in the New Jersey Supreme Court in July, 1929.

30 3. In an attempt to effect the collection of said judgment, I obtained an order for the examination of the officers of Second United Construction Corporation from Chief Justice William S. Gummere, and the matter was referred to Edward J. Luce, Esq., Supreme Court Commissioner of Rutherford, New Jersey, and an examination of the defendant corporation was arranged for November 18, 1930, at 2 P. M.

4. The examination of Julius Pinchak, president of the defendant corporation in the supplementary proceedings before Commissioner Luce was conducted by Jerome Litvak, Esq., for our office and the details thereof are set forth in the affidavit of Jerome Litvak, accompanying this affidavit.

40 5. Pursuant to the facts disclosed by Julius Pinchak on his sworn testimony before the Supreme Court Commissioner relative to the mort-

*Affidavit of Charles M. Grosman.*

gage of \$28,000 given by Joseph Berg to the defendant corporation and assigned to Messrs. Miller, Kramer and Fast as trustees for some of the creditors of Second United Construction Corporation, I immediately communicated with Moe M. Fast, Esq., a member of the bar of this State and one of the trustees, and sought information from him relative to the trusteeship of said mortgage. Mr. Moe M. Fast informed me that the trustees knew of the existence of the judgment of Matawan Tile Company against the Second United Construction Corporation and that the judgment will be paid as soon as the owner of the premises, Mr. Joseph Berg paid the amount due on the mortgage which he expected to be in sixty days. 10

6. After securing a copy of the mortgage and the assignment at the Essex County Register's Office, I observed that the assignment was made to said trustees for the benefit of some of the creditors only of the Second United Construction Corporation, and that the complainant, Matawan Tile Company was not included in said assignment, nor did it in any way, state that Matawan Tile Company was to receive any benefit from the proceeds of said mortgage. I immediately communicated with Mr. Moe M. Fast and advised him of this fact and he then offered to give me a letter signed by the trustees to the effect that no money would be disbursed when the proceeds of the mortgage will be paid to the trustees until the judgment of Matawan Tile Company in this matter was taken care of. Mr. Moe M. Fast also informed me that there were several other creditors who had claims against Second United Construction Corporation who were not referred to in the assignment of mortgage given to said trustees, 20 30 40

*Affidavit of Charles M. Grosman.*

but that he had undertaken to give letters as above stated to counsel representing various creditors of Second United Construction Corporation who were not included or mentioned in said assignment of mortgage. Mr. Moe M. Fast also informed me that he had received a payment of  
10 \$1,000 within the past week on account of the mortgage indebtedness from Joseph Berg as in evidence of good faith that he intended to pay the balance due. I advised Mr. Fast that I did not see how he could possibly give such letters nor how they could have any legal effect as he, together with the other trustees, were simply trustees for a limited purpose and such letters would not be binding. Mr. Moe M. Fast also informed  
20 me that the assignment made by Second United Construction Corporation to the three trustees hereinabove referred to for the benefit of some of the creditors therein mentioned, was given to secure past debts or labor and material furnished to the defendant corporation in the construction of some real estate and that it was the only asset which Second United Construction Corporation had and was given for past consideration on account of the claims of some of the creditors of said Second United Construction Corporation who  
30 were mentioned in said assignment.

7. I asked Mr. Moe M. Fast what the total liabilities of Second United Construction Corporation to various creditors were and he informed me that he knew that they would not exceed \$34,000.

8. Mr. Moe M. Fast also informed me that there was a balance of \$25,900 due from Joseph Berg,  
40 on the mortgage of \$28,000 hereinabove referred to. I called Mr. Fast's attention to the fact that

*Affidavit of Charles M. Grosman.*

the assignment of the Berg mortgage by Second United Construction Corporation to the trustees recites that after the payment of the moneys due on the claims of the creditors for whose benefit said assignment was given, should be paid to the Second United Construction Corporation, and I asked him how much would be left after paying said claims. Mr. Fast informed me that any excess that might be left had been assigned to Hyman Kramer, one of the trustees, for a past debt due him. 10

9. I then called Mr. Fast's attention to the fact that I could not see how there would be any money left to pay the complainant if this arrangement should be permitted to be carried out. 20

10. Deponent further says that the judgment of Matawan Tile Company was founded on promissory notes given by the defendant, Second United Construction Corporation, the first of said notes being dated August 3, 1928, in the sum of \$1,000 payable September 3, 1928, and protested for the non-payment thereof; the second note being dated October 15, 1928 and payable January 15, 1929 in the sum of \$350; the third note being dated October 15, 1928, and being payable December, 1, 1928, in the sum of \$350, all of said notes having been protested for non-payment on their several due dates and deponent further states that all of said notes were dated prior to and were in existence at the time that Second United Construction Corporation executed the assignment of the mortgage of \$28,000 of Joseph Berg to Messrs. Miller, Kramer and Fast, as trustees for some of the creditors as aforesaid, and notwithstanding the fact that the said Second United Construction Corporation knew that said notes were outstand- 30 40

*Affidavit of Charles M. Grosman.*

ing and that no provision was being made for the  
 payment of same, and some of said notes had al-  
 ready been protested for non-payment and said  
 Second United Construction Corporation at-  
 tempted to prefer some of its creditors by execut-  
 ing said assignment of mortgage to them disre-  
 10 garding completely the claims of complainant  
 against said Second United Construction Cor-  
 poration.

CHARLES M. GROSMAN,

Sworn and subscribed to before me }  
 this 26th day of November, 1930. }

20 HELEN M. VALKL,  
 A Notary Public of New Jersey.

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40

### Assignment of Mortgage.

SECOND UNITED CONSTRUCTION CORPORATION,  <i>To</i>  THOMAS D. MILLER, HYMAN KRAMER and MOE M. FAST, Trustees.	}	Book 205-34. Dated Nov. 28, '28. Ack'd Nov. 28, '28.  Consideration \$1.00. Rec'd Dec. 19, '28.	10
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Assigns mortgage in Book F 66-162. Assignment executed by Second United Construction Corporation, as a corporation and/or Joseph Pinchak and Angelo Giannula, individually and signed by the following creditors:

Thomas D. Miller, Kramer Lumber Corp., Hyman Kramer, Builders Material Supply Company, Louis J. Dunn, President—Thomas D. Miller, Sec. Kramer Lumber Corp., by Joseph Warren, Special Agent. A. Schottenfeld, Per B. Cohen. Max Guitinne, Blech Electric Company, Per J. Blech, Burstein & Winersky. Passaic Iron Works, Inc., Philip Guk. Term—It is distinctly understood and agreed that the trustees will, upon payment of any installments upon said bond and mortgage, within a reasonable time thereafter, send a proportionate part of such principal installment and interest to all of the creditors who have executed this agreement in proportion with the amount due to said individual creditors.

Any excess to go to Second United Construction Corporation.

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30

40

**Affidavit of Joseph Pinchak.**

IN CHANCERY OF NEW JERSEY

10	Between MATAWAN TILE COMPANY, a corporation, Complainant, <i>and</i> SECOND UNITED CONSTRUCTION CORPORATION, a New Jersey Corporation, Defendant.	On Bill, Etc. Affidavits.
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20

STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } ss.:

JOSEPH PINCHAK, of full age, being duly sworn according to law, upon his oath deposes and says:

30 1. I was the president of the Second United Construction Company, the defendant herein, and am acquainted with the conditions of the company from the date of its organization to the date hereof.

2. On November 16th, 1928 the corporation entered into an agreement with the creditors whose names are mentioned therein and which agreement is copied and attached hereto and made a part hereof. The agreement appoints Thomas D. Miller, Hyman Kramer and Moe M. Fast as trustees for the creditors who executed same.

*Affidavit of Joseph Pinchak.*

3. At the execution of this agreement the defendant corporation owned the mortgage assigned to the trustees upon which there was due \$25,900.00. The corporation was also the owner of property located at 367-372 Clarendon Place, Orange, N. J., in which we had an equity of about \$18,836.20. The purchase price of the property which was bought on November 16, 1928, was \$40,000.00. It covered two tracts, one of which carried a mortgage of \$9,000.00 and the other \$10,000.00; there was a mortgage given for \$1,500.00 on the property which carried the \$9,000.00 mortgage. The Orange National Bank had charge of the two first mortgages. By inadvertance the interest on these mortgages was not paid, the Bank foreclosed. I appeared at the Bank with the interest after the 30 days grace period was up but the bank refused to accept it. We were unable to refinance or buy in the property at the Sheriff's sale. This sale took place about July 1929.

4. Appended hereto is a list of the defendant's creditors at the time of the making of the assignment to the creditors. All of the creditors were asked to join in the assignment agreement due to the fact that they had rights to institute mechanic lien suits against the property upon which we had the mortgage. They all joined in the agreement or else consented thereto with the approval of the trustees, signing creditors and the corporation. It is intended, with the approval of the corporation, trustees, and the signing creditors that when the mortgage is paid in full, that all creditors should receive their pro rata share, which from indications will be one hundred per cent.

5. Since the assignment of the mortgage I have made the following payments out of my own funds

*Affidavit of Joseph Pinchak.*

and without any expectation of repayment on account of debts mentioned in the creditors list attached hereto: Fader Cornice Works \$285.00; H. Rossman \$150.00; J. Rose \$104.84; H. Katz \$465.00; Service Trust Company \$650.00; J. Friedman \$150.00.

10

6. At the time of the making of the assignment the corporations only assets were the mortgage and the properties in Orange, N. J. The corporation has not operated in any form whatever since November, 1928. Corporation taxes have not been paid and it is intended that the corporation should no longer continue any further operations.

20

7. There is no necessity or advisability for the safety of the public in view of the corporations discontinuing business, or advantage of creditors or stockholders, to have a receiver appointed.

JOSEPH PINCHAK.

Sworn and subscribed to before me }  
this 27th day of November, 1930. }

WILLIAM S. LAST,  
Notary Public of New Jersey.

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**List of Defendant's Creditors Annexed to  
Affidavit of Joseph Pinchak.**

LIST OF CREDITORS.

Passaic Iron Works.....	\$ 1,250.00	
Blech Electric Company.....	231.00	
Fader Roofing & Cornice Company.....	285.00	
Kramer Lumber Company.....	5,750.93	10
H. Rosman .....	150.00	
Builders Materials Supply Company....	9,700.00	
Bergen County Stone Co.....	900.00	
Garfield Marble Works.....	450.00	
Joseph Miglia .....	1,854.60	
J. Rose & Company.....	104.84	
Royal Hardwood Company.....	313.00	
Max Gurtman .....	75.00	
H. Katz .....	465.00	
Burstein & Winarsky.....	500.00	20
L. S. Vanderbeck.....	500.00	
Cinder Brick & Tile Co.....	382.47	
A. Schottenfeld .....	275.00	
Central Supply Company.....	2,400.00	
Service Trust Company of Passaic.....	2,300.00	
A. & J. Friedman.....	150.00	
	<hr/>	
Total .....	\$28,036.84	

For and in consideration of the sum of One Dollar and Other Good Valuable Consideration, lawful money of the United States of America, the receipt whereof is hereby acknowledged, and in further consideration of the execution by the creditors of the Second United Construction Corporation, a corporation of the State of New Jersey, and/or Joseph Pinchak and Angelo Gian-nula, individually, and as officers of the said Second United Construction Corporation, of their consent to waive any rights that they may have by virtue of mechanics' lien act or any other act against said Second United Construction Cor-

*List of Defendant's Creditors Annexed to  
Affidavit of Joseph Pinchak.*

10 poration, a corporation of the State of New Jersey, having its principal place of business in the Borough of Rutherford, County of Bergen, and state of New Jersey, parties of the first part have granted, bargained, sold, assigned, transferred  
and set over, and by these presents, do grant, bargain, sell, assign, transfer and set over unto  
20 Thomas D. Miller, Hyman Kramer, and Moe M. Fast, as trustees, for all of the creditors who have executed this instrument, their successors and assigns, a certain indenture of mortgage bearing date the sixteenth day of November, 1928, made by Joseph Berg of the City of Orange, County of Essex and State of New Jersey to secure the payment of the sum of Twenty-eight  
Thousand Dollars (\$28,000.00), which mortgage is recorded in Book F-66, page 162 of mortgages in the office of the Register of the County of Essex and State of New Jersey, together with the  
bond or obligation therein described, and the money due and to grow due, thereon, with the interest.

30 TO HAVE AND TO HOLD, the same unto the said parties of the second part and their successors and assigns, forever, subject only to the proviso in the said indenture of mortgage mentioned; AND the Second United Construction Corporation, does hereby make, constitute, and appoint the said parties of the second part, its true and lawful attorneys, irrevocable, in its name, or otherwise, but at their proper costs, and charges, to have, use and take all lawful ways and means for the recovery of the said money and interest; and in case  
40 of payment, to discharge the same as fully as it might or could do if these presents were not made. AND it does hereby covenant, promise and agree

*List of Defendant's Creditors Annexed to  
Affidavit of Joseph Pinchak.*

with the parties of the second part, that there is now due and owing upon the said bond and mortgage the sum of Twenty-eight thousand dollars (\$28,000.00) and interest from November 16, 1928.

It is distinctly understood and agreed that the trustees will, upon payment of any installments upon said bond and mortgage, within a reasonable time thereafter, send a proportionate part of such principal installment and interest to all of the creditors who have executed this agreement in proportion with the amount due to such individual creditors. 10

It is understood and agreed that if there shall be paid to the trustees an amount sufficient to pay each of the creditors their claims in full, that the excess is to be turned over to the Second United Construction Corporation, its successors and assigns. 20

IN WITNESS WHEREOF, the party of the first part has caused these presents to be signed by its President, attested by its Secretary and its corporate seal hereto affixed this twenty-eighth day of November, nineteen hundred and twenty-eight, and IN FURTHER WITNESS WHEREOF, the creditors as well as the parties of the second part have here- 30

*List of Defendant's Creditors Annexed to  
Affidavit of Joseph Pinchak.*

unto set their hands and seals the date hereinbefore mentioned.

ATTEST:

10 ANGELO GIANNULA,  
Secretary.

SECOND UNITED CONSTRUCTION CORPORATION,

JOSEPH PINCHAK, Pres.  
THOMAS D. MILLER,

KRAMER LUMBER CORP.

HYMAN KRAMER

20 BUILDERS MATERIAL SUPPLY Co.  
Lewis J. Dundon, Pres.  
Thomas D. Miller, Sec'y.

KRAMER LUMBER CORP.

By Joseph Warren, Spec. Agt.

A. SCHOTTENFELD

Per B. Cohen

MAX GURTMAN

30 BLECH ELECTRIC Co.

By Leo J. Blech  
BURSTEIN & WINARSKY

PASSAIC IRON WORKS, INC.

Philip Burk

40

*List of Defendant's Creditors Annexed to  
Affidavit of Joseph Pinchak.*

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss.:

BE IT REMEMBERED, That on this twenty-eighth day of November, in the year of our Lord One Thousand Nine Hundred and Twenty-eight before me the subscriber, a Master in Chancery of New Jersey, personally appeared Angelo Giannula who being by me duly sworn on his oath, says that he is the Secretary of the Second United Construction Corporation, the grantor named in the within Instrument; that Joseph Pinchak is the President of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said President, as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in presence of deponent, who thereupon subscribed his name thereto as witness.

ANGELO GIANNULA.

Sworn and subscribed before me, at }  
Newark, N. J., the date aforesaid. }

LOUIS A. FAST,  
A Master in Chancery of N. J.

### Affidavit of Isidore Krieger.

STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } ss.:

ISIDORE KRIEGER, of full age, being duly sworn according to law, upon his oath deposes and says:

10

1. I am a builder and real estate operator and have been such for the last 12 years. I have made my operations almost exclusively in the County of Essex. I am also a specialist with respect to apartment house sites.

20

2. I am well acquainted with the property located at 367-372 Clarendon Place, Orange, N. J. The property has a frontage of 100 feet and a depth of 228 feet and is ideal as an apartment house site. The property was during the month of November 1928 of the value of \$40,000.00.

ISIDORE KRIEGER.

Sworn and subscribed to before me }  
 this 28th day of November, 1930. }

WILLIAM S. LAST,  
 A Notary Public of New Jersey.

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**Affidavit of Moe M. Fast.**

STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX, } ss.:

MOE M. FAST, being duly sworn on his oath, according to law, deposes and says:

I am one of the trustees mentioned in the assignment given by the defendant corporation for the benefit of its creditors. I have spoken with practically all of the creditors of the defendant corporation from practically the beginning of the meeting at which the creditors agree to accept the assignment of the mortgage in lieu of filing mechanics' lien claims and instituting suits against the defendant corporation, excepting, however, the complainant, Matawan Tile Company. All of the creditors excepting the complainant are willing to wait until the payment of the mortgage assigned to the trustees. 10

I have advised Mr. Charles Grosman, one of the solicitors for the complainant that I would call a meeting of the creditors, and felt certain that the claim of his client would be included in the distribution of the mortgage funds. This conversation took place on Monday of this week at his office in the Industrial Office Building. I am informed that the bill for receiver was filed on the following day. 20 30

I am informed by Mr. Anderson, of the firm of Grosso, Brundage and Anderson, that it is expected that this mortgage will be paid in full within sixty days.

MOE M. FAST.

Sworn and subscribed to before me }  
 this 28th day of November, 1930. }

LEO ERTAG, 40  
 An Attorney at Law of N. J.

### Affidavit of Hyman Kramer.

STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX, } ss.:

HYMAN KRAMER, being duly sworn, on his oath,  
 deposes and says:

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1. I am the president of the Kramer Lumber Corporation, one of the creditors of the defendant Corporation and one of the trustees named in the assignment of mortgage mentioned in the bill of complaint. I am unalterably opposed to the appointment of a receiver because it can serve no useful purpose. The appointment of the receiver will entail a useless expense in that his only function would be the collection of the mortgage mentioned in the bill of complaint if the assignment is void. That function is now for the trustees to perform and that is the desire of all creditors excepting for the complainant. The creditors are willing, and if sufficient time were given I would endeavor to obtain and I have reasonable basis to believe from statement made to me by all creditors excepting complainant, that all creditors, whether they signed the agreement or not, should participate in the proceeds of the mortgage.

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HYMAN KRAMER.

Sworn and subscribed to before me }  
 this 27th day of November, 1930. }

WILLIAM S. LAST,  
 A Notary Public of N. J.

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## Order Appointing Custodial Receiver.

IN CHANCERY OF NEW JERSEY.

Between

MATAWAN TILE COMPANY,  
a corporation,

Complainant,

*and*

SECOND UNITED CONSTRUCTION  
CORPORATION, a New Jersey  
corporation,

Defendant.

On Bill, &c.

Order  
Appointing  
Custodial  
Receiver.

10

This matter being opened to the Court by John A. Bernhard, Esq., of counsel with Grosman & Grosman, Esqs., solicitors of the complainant in the above entitled cause on the return date of an order to show cause issued on March 25th, 1930, directing the defendant, Second United Construction Company, to show cause before this Court on the date hereof why a receiver for the defendant company should not be appointed by this Court to take charge of and administer all of its assets or property held in trust for it and proof of service of said order to show cause having been filed, and the Court having considered the matter in the presence of John A. Bernhard, Esq., of counsel and Charles M. Grosman, Esq., of Grosman & Grosman, Esq., solicitors for complainant, Louis A. Fast, Esq., of Fast & Fast, Esq., solicitors for the trustees, and Joseph A. Feder, Esq., of Feder & Rinzler, Esqs., solicitors for Hyman Kramer, and the Court having heard the arguments of counsel and being satisfied with the truth of the facts and allegations contained in the bill;

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*Order Appointing Custodial Receiver.*

It is thereupon, on this 28th day of November, 1930, ORDERED, ADJUDGED AND DECREED as follows:

10 1. That Samuel H. Nelson, of the City of Newark, in the State of New Jersey, be and he is hereby appointed receiver of the said defendant, Second United Construction Corporation, and of all  
20 its assets and property of every character and description wheresoever situate, with full power and authority to demand, sue for, collect and receive and take into his possession all the goods and chattels, rights and credits, money and effects, lands and tenements, books, papers, choses in action, bills, notes and property of any and every description belonging to the said defendant, Second United Construction Corporation, or to which  
20 it may be entitled, and to sell, convey and assign any or all of the real and personal estate of the said company, and to do and perform all the duties imposed upon them and required by law and especially by an act entitled "An Act concerning corporations (Revision of 1896)," and the acts supplementary thereto and amendatory thereof.

30 2. And it is further ordered that the said receiver, before entering upon the discharge of his duties, shall take the oath of office described by law, and shall also enter into bond to the Chancellor of the State of New Jersey, with one or more surety or sureties, in the penal sum of One Thousand Dollars, conditioned for the faithful performance of his duties, which said bond shall be approved as to the form and security thereof by Roy F. Anthony, one of the Special Masters of this Court.

40 3. And it is further ordered that the said receiver shall take possession of all the property and assets of the said defendant company and ac-

*Order Appointing Custodial Receiver.*

count for the same as this Court shall hereafter direct, and that the said defendant company, its officers, directors and agents shall forthwith assign, transfer, convey and deliver to the said receiver all of the property and assets of the said company, both real and personal, wheresoever situated and of whatsoever it may consist.

10

4. And it is further ordered that the said defendant *company*, its officers and agents, and all persons claiming under it, shall be, and they hereby are restrained from interfering with said receiver taking possession of and managing said property, and that all persons whosoever and especially the creditors of the said defendant company, shall be, and they hereby are, restrained from bringing any action of proceeding at law or otherwise against the said corporation and from taking any further proceedings in any action or proceeding heretofore commenced.

20

5. And it is further ordered that Thomas D. Miller, Hyman Kramer and Moe M. Fast, as trustees or otherwise, be and they hereby are restrained, until the further order of this Court, from disposing of any of the property or assets of the said corporation by assigning, transferring or conveying same, and especially shall they be, and hereby are, restrained against assigning, transferring or conveying a certain mortgage held by the said Thomas D. Miller, Hyman Kramer and Moe M. Fast, trustees, which said mortgage was made by Joseph Berg to the Second United Construction Corporation and recorded in the Essex County Register's Office in Book F-66 of Mortgages at page 162 and was assigned to the said Thomas D. Miller, Hyman Kramer and Moe M. Fast by instrument of assignment dated November 28, 1928.

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*Order Appointing Custodial Receiver.*

6. And it is further ordered that the creditors and stockholders of the said company show cause before the Chancellor at the Chancery Chambers, Industrial Building, 1060 Broad Street, Newark, New Jersey, on Tuesday, the 9th day of December, 1930, at ten o'clock in the forenoon, why the ap-  
10 pointment of said receiver should not be continued.

7. And it is further ordered that the said receiver shall within three days from the date hereof, mail to all known creditors and stockholders, at their last known post office address, by unregistered mail, an uncertified copy of this order.

Respectfully advised,

20 ALONZO CHURCH,  
V. C.

E. R. WALKER,  
C.

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*Order Appointing Statutory Receiver.*

ers, and that the prayers for an injunction restraining the defendant from exercising its corporate franchises and privileges and for the appointment of a statutory receiver should be granted; it is, on this 9th day of December, 1930, on motion of John A. Bernhard, Esq., of counsel with said complainant, and in the presence of  
 10 Louis A. Fast, Esq., solicitor for trustees and no other interested party appearing

ORDERED, ADJUDGED and DECREED that the said Second United Construction Corporation, a corporation has suspended its business and is not able to resume its business in a short time with safety to the public and its creditors and advantage to the stockholders, and it is further

20 ORDERED that an injunction issue against the defendant corporation according to the prayer of the bill of complaint and that the said corporation, its officers, servants and agents, absolutely desist and refrain and they are hereby enjoined and restrained from exercising any of its privileges and franchises and from collecting or receiving any debts or paying out, selling, assigning or transferring any of its estate, money, funds, lands, tenements, or effects except to a receiver appointed by this court; and it is further

30 ORDERED that Samuel H. Nelson of the City of Newark, in this state, be and he is hereby appointed receiver for the creditors and stockholders of said corporation with all powers incident thereto and that he do perform all the duties imposed upon him by the statutes of this state in such case made and provided, and it is further

40 ORDERED that the said receiver, before entering upon his duties as such receiver take the oath pre-

*Order Appointing Statutory Receiver.*

scribed by law and give bond to the Chancellor of the State of New Jersey, in the sum of \$1000. conditioned for the faithful performance of his duties, to be approved as to form and security thereof by Roy F. Anthony one of the Special Masters of this Court, and it is further

ORDERED that the restraints heretofore imposed upon Thomas D. Miller, Hyman Kramer and Moe M. Fast, as trustees or otherwise, be and they hereby are continued until the further order of this Court.

And that a notice of this order which need not be certified be mailed to all creditors and stockholders of said defendant corporation, whose names and addresses the said receiver shall be able to ascertain at their last known post office address within three days from the date hereof by unregistered mail.

Respectfully advised,

ALONZO CHURCH  
V. C.

E. R. WALKER,  
C.

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**Petition of Appeal.**

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

10                   MATAWAN TILE COMPANY,  
                      a corporation,  
                                  Complainant,  
                                  *and*  
                      SECOND UNITED CONSTRUCTION  
                                  COMPANY, a corporation,  
                                  Defendant.

                      SECOND UNITED CONSTRUCTION COM-  
                                  PANY, a corporation, and THOMAS  
                                  D. MILLER, HYMAN KRAMER and  
                                  MOE M. FAST, as trustees for credi-  
20                   tors of the SECOND UNITED CON-  
                                  STRUCTION COMPANY,  
                                  Appellants,

*vs.*

SAMUEL H. NELSON, Receiver of Sec-  
                                  ond United Construction Company,  
                                  a corporation,  
                                  Appellees.

On Appeal  
from the Court  
of Chancery.

Petition of  
Appeal.

*To the Honorable Court of Errors and Appeals  
in the Last Resort of All Causes:*

30                   The petition of the Second United Construc-  
                                  tion Company, a New Jersey Corporation, and  
                                  Thomas D. Miller, Hyman Kramer and Moe M.  
                                  Fast as trustees of creditors of the said Second  
                                  United Construction Company, a New Jersey Cor-  
                                  poration, appellants in the above entitled cause,  
                                  respectfully shows:

40                   1. Petitioners find themselves aggrieved by the  
                                  final orders made in the Court of Chancery by  
                                  his Honor Edwin Robert Walker, Chancellor of

*Petition of Appeal.*

the State of New Jersey, bearing date November 28, 1930, and December 9, 1930, in a certain cause in the said Court of Chancery, wherein Matawan Tile Company, a corporation, was complainant, and Second United Construction Company, a corporation, was defendant, in this respect, to wit:

1. That the order entered on November 28, 1930, should not have been signed for the reason that sufficient time was not afforded to the defendant, Second United Construction Company, a corporation, to file affidavits of creditors of the Second United Construction Company, which, if presented to the Court would have shown conclusively that no receiver was necessary or advisable for the protection of the public, the creditors or stockholders of the Second United Construction Company, a corporation.

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2. That the application made in the affidavits filed by the defendant corporation, as well as the application made before the Vice-Chancellor for a continuance until the regular motion day of the Court of Chancery at Newark, on the Tuesday following November 28, 1930, should have been allowed so as to permit the filing of necessary affidavits and answering affidavits to show that no receiver was necessary or advisable for the protection of the public, creditors or stockholders of the defendant corporation, Second United Construction Company.

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3. That the defendant, Second United Construction Company, did not have its day in Court in response to the application returnable on the 28th day of November, 1930.

4. That on said 28th day of November, 1930, there were filed and served upon the appellants

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*Petition of Appeal.*

affidavits of Jerome Litvak, Saul N. Schechter and Charles M. Grosman, which service was made within one hour prior to the order before the Vice-Chancellor on the application which resulted in the Order of November 28, 1930, and therefore no opportunity was given to the defendant and the Trustees for creditors of the Second United Construction Company, a corporation, to properly answer the same, although an application was made for a continuance until the following Tuesday, the regular motion day in Chancery at Newark, for the purpose of making such answer.

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5. There was no proof before the Vice-Chancellor at the time the appointment was made, at the time the Receiver was appointed, that the Second United Construction Company, a corporation, was insolvent.

6. That the Second United Construction Company, a corporation, was not insolvent at the time of the filing of the Order appointing a Receiver on the 28th day of November, 1930.

30  
7. That the Chancellor should not have issued an injunction or appointed a Receiver for the Second United Construction Company, because such course was not necessary or advisable for the protection of the public, creditors or stockholders.

8. That the appointment of a Receiver is an unwarrantable expense.

40  
9. That the appointment of a Receiver for the Second United Construction Company, the defendant herein, merely adds the extra burden upon the corporation and its creditors and intend to eat up an appreciable part of the assets of the Second United Construction Company to the detriment of its creditors and its Trustees.

*Petition of Appeal.*

10. That it was highly inequitable to appoint a Receiver for the said Second United Construction Company, a corporation.

11. That the complainant had adequate remedy at law.

12. That it was apparent at the time of appointment of Receiver that neither creditors nor stockholders could in any wise be benefited by such proceedings, but rather prejudicially harmed. 10

Petitioners therefore pray that the said Orders of the said Chancellor may be wholly reversed, set aside, and for nothing holden, and that petitioners may have such other relief in the premises as to this Court shall seem proper.

FEDER & RINZLER,  
Solicitors for and of Counsel  
with Appellants. 20

LOUIS A. FAST,  
Of Counsel.

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**Answer of Appellees.**

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

10           MATAWAN TILE COMPANY,  
                  a corporation,  
                                  Complainant,  
                                  *and*  
                  SECOND UNITED CONSTRUCTION  
                  COMPANY, a corporation,  
                                  Defendant.

20           SECOND UNITED CONSTRUCTION  
                  COMPANY, a corporation, and  
                  THOMAS D. MILLER, HYMAN  
                  KRAMER and MOE M. FAST, as  
                  trustees for creditors of the  
                  SECOND UNITED CONSTRUCTION  
                  COMPANY,  
                                  Appellants,

*vs.*

30           SAMUEL H. NELSON, Receiver of  
                  SECOND UNITED CONSTRUCTION  
                  COMPANY, a corporation,  
                                  Appellee.

On Appeal  
from the Court  
of Chancery.

Answer of  
Appellees.

40           The appellees, not admitting the truth of all or  
any of the matters in the said petition of appeal  
contained, for answer thereto; nevertheless admit  
that decrees or orders were made on November  
28, 1930, and December 9, 1930, in the Court of  
Chancery of New Jersey in the above entitled  
cause, which decrees or orders have not been fully

*Answer of Appellees.*

set forth in the petition of appeal, but merely mentioned therein; as to the substance and form of said orders and decrees, the appellees beg leave to refer thereto when the same shall be produced.

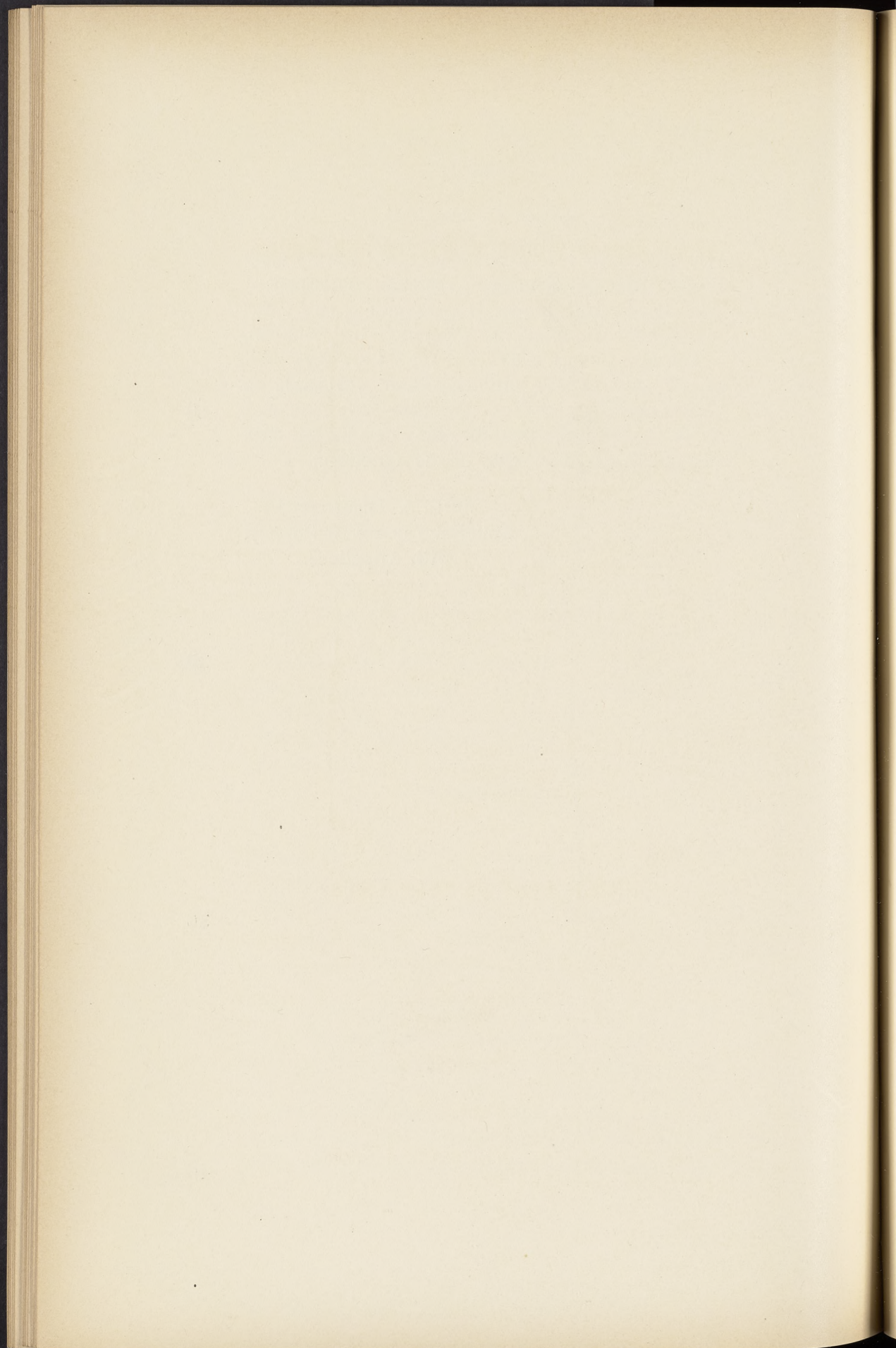
The appellees are advised and believe that each of the said orders and decrees is agreeable to equity and the appellees therefore pray that each of the said decrees or orders may be affirmed with costs to be taxed in favor of the appellees. 10

JOHN A. BERNHARD,  
Solicitor for and of Counsel  
with Appellees.

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**New Jersey Court of Errors and Appeals**

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Between

MATAWAN TILE COMPANY,  
a corporation,  
Complainant,

*and*

SECOND UNITED CONSTRUCTION COM-  
PANY, a corporation,  
Defendant.

SECOND UNITED CONSTRUCTION COM-  
PANY, a corporation, and THOMAS D.  
MILLER, HYMAN KRAMER and MOE  
M. FAST, as trustees of creditors of  
the SECOND UNITED CONSTRUCTION  
COMPANY,

Appellants,

*vs.*

SAMUEL H. NELSON, Receiver of SEC-  
OND UNITED CONSTRUCTION COM-  
PANY, a corporation,

Appellee.

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On Appeal from  
the Court of  
Chancery.

**BRIEF FOR APPELLANTS.**

FEDER & RINZLER, Solicitors for Appellants,  
LOUIS A. FAST, of Counsel.

JOHN A. BERNHARD, Solicitor for and of  
Counsel with Appellees.

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**Facts.**

On November 16th, 1928, the defendant corpo-  
ration, Second United Construction Corporation,

was the owner of certain property located at 367-372 Clarendon Place, Orange, N. J., as well as a certain mortgage in the original sum of \$28,000.00 which covered apartment house premises in the City of East Orange, Essex County, N. J. On that date there was due on said mortgage the sum of \$25,900.00. The Clarendon Place property was worth \$40,000.00 (Affidavit of Isidore Krieger, p. 30, State of Case), which was also the purchase price.

The premises were encumbered by mortgages totalling \$20,500.00 (Affidavit of Joseph Pinchak, p. 23, State of Case, l. 10).

On said date the Second United Construction Company had a number of creditors to whom it was indebted in the sum of \$28,036.

On that date it made an assignment of the mortgage to Thomas D. Miller, Hyman Kramer and Moe M. Fast, as trustees, the first two mentioned being creditors and the latter an attorney at law of this State. The assignment in form reads that the trustees were to hold the same for all creditors who executed the same although it was intended for the benefit of all creditors alike, those signing or those not signing. Those not signing by the consent and with the approval of the trustees, signing creditors and the corporation (State of Case, l. 30). Every creditor except complainant agreed to wait for payment until payment of the mortgage assigned to the trustees (State of Case, l. 19).

Subsequently, and about July, 1929, the company being unable to re-finance the Clarendon Place property, lost the same through foreclosure. Thus the company was without any property in its own name (although if any surplus were remaining after distribution of the assigned mortgage it would go to them) and from that time on did not operate one single venture or use in any manner its corporate franchise (State of Case,

p. 24, l. 10). Pinchak, the president of the company, out of his own funds paid certain creditors to the extent of \$1,804.84 (State of Case, p. 23, l. 40).

The complainant obtained a judgment against the company on July 11, 1929, in the New Jersey Supreme Court for the total sum of \$1,854.60. It filed the bill herein on Tuesday, November 25, 1930, to have the company declared insolvent, and for the appointment of a Receiver. An order to show cause thereon with a restraint against the trustees from transferring or disposing of the assigned mortgage was issued on the same day, made returnable at the Vice Chancellor's chambers on Friday, November 28th, at 10 o'clock in the forenoon. Thanksgiving day fell on November 27th, so that the only day on which the defendants could have obtained affidavits or prepare a defense, was one day, to wit, the 26th of November. Upon the return of the rule to show cause, application was made by the solicitors for the defendant for a continuance and offered an affidavit of Hyman Kramer which was filed wherein he sets forth that if sufficient time were given him he would endeavor to obtain and he had reasonable basis to believe from statements made to him by all creditors excepting complainant, affidavits that all creditors whether they signed the agreement or not, should participate in the proceeds of the mortgage (p. 32).

## LAW.

## POINT ONE.

**It was error for the Court not to grant an adjournment to allow defendant to properly enter its defense.**

It is the contention of the appellants that the hearing of the return of the order to show cause, being in the nature of a final hearing, that sufficient time was not allowed to properly meet the allegations of the complaint. Reasonable time should be allowed.

In *Pierce vs. Old Dominion Smelting Co.*, 67 N. J. Eq. 399, page 409, it is set forth that the court gains jurisdiction by the giving of "reasonable notice" to the defendant corporation, and on page 411 it is set forth that

"the opportunity for the defendant corporation to file an answer and to litigate the whole cause of action set forth in the bill or petition is on the return day of the order to show cause—at the time appointed for the summary final hearing. *Both parties on this hearing under our settled practice are allowed an ample opportunity to present proofs. No surprise is tolerated. The hearing, frequently, may be continued in order that the whole cause may be fully and fairly tried.*"

Again, on page 412, it is set forth that only after the defendant has had a full opportunity to present its answer and proofs, will the matter be heard.

It cannot be seriously contended that in view of the importance of the final hearing and the large number of creditors involved, being about 15 or 20 in number, whom the defendant sought to exe-

cute affidavits (Affidavit of Hyman Kramer, State of Case, p. 32, l. 23) that practically only one day's notice was sufficient.

*In re Martin*, 86 N. J. Eq. 265, is authority for the proposition that

“it is fundamental that in every proceeding of a judicial nature, it is essential that the person whose rights are to be affected, should be the party to the proceeding *and have an opportunity of making a defense.*”

The complaint does not set forth any facts upon which the quick intervention of the Court was required. The defendant corporation owned no property in its own name, so that there could have been no fear of any dissipation or disposition of any assets by it. The sole estate which the corporation owned, according to the complaint, was a possible claim against the officers and the directors of the company for having preferred some of the creditors of the corporation, by turning over part of its assets to them in the past; that the mortgage had been assigned to 3 trustees but there was no allegation nor charge that the trustees intended to make disposition of the same. There was absolutely no reason set forth why a rule to show cause should have been issued with the short notice as prescribed by the Vice Chancellor.

An adjournment should have been allowed for the further reason that 3 of the 4 affidavits submitted by the complainant were served within one hour prior to the order now on appeal, to wit, they were served on November 28, 1930.

Because of the nature of the suit, the fullest opportunity for putting in its best defense should have been allowed the defendant.

## POINT TWO.

**A receiver should not have been appointed, it not being necessary or advisable for the protection of the public, the creditors, or the stockholders.**

At the time of the application for the receivership, there was but one possible asset of the company, that was the mortgage which it had assigned to the 3 trustees. The affidavits submitted by the defendant clearly show that the assignment was made for the benefit of all creditors (Affidavit of Joseph Pinchak, State of Case, p. 23, l. 30; Affidavit of Moe M. Fast, p. 31, l. 12, and Affidavit of Hyman Kramer, p. 32, l. 23).

Therefore, in many respects the case is similar to the case of *Hudson Mattress Manufacturing Company vs. Hingher Manufacturing Company*, 105 N. J. Eq. 607, where the corporation had made an assignment for the benefit of creditors, and subsequently an application was made to have the defendant adjudged insolvent and for an injunction and a receiver. It was held that since it did not appear necessary or advisable for the safety of the public or the benefit of creditors or stockholders, the application was denied. In the cited case the defendant was admittedly insolvent.

In the case of *Rawnsley vs. Trenton Mutual Life Insurance Co.*, 9 N. J. Eq. 95, it was held that an injunction will not issue as a matter of course, although it is made satisfactorily to appear that the company is insolvent; but "he must exercise his best discretion and exert the powers conferred for the safety of the public and advantage of the stockholders and creditors."

It might be well to point out at this time that there is no charge that the trustees were dishonest

or in any way in collusion with the defendant, and in fact there could have been none.

In the very recent case of *Bijur vs. Bijur Motor Appliance Co.*, 121 Atl. Rep. 6 (not officially reported), the insolvency of the defendant was even admitted. The directors were finishing up the business. The question was set forth as follows:

“whether the directors could and would dispose of the defendant’s assets to the best advantage of all stockholders and creditors, or whether the receiver would discharge that function to better advantage, notwithstanding the increased burden and expense.”

The Vice-Chancellor refused to appoint a receiver holding that the directors could well enough finish up the corporation’s business.

In the case at bar, the trustees being the holders of the only admitted asset, are not called upon to perform any discretionary duties, they merely have to collect the mortgage and distribute. We urge the Court that there should be no impediments or restrictions placed in the path of such ministerial duties; certainly not an impediment requiring needless expense.

In the case of *City Pottery Co. vs. Yates*, 37 N. J. Eq. 542, where the corporation was admittedly insolvent, the Errors and Appeals Court held that a Receiver should not be appointed if it appears that the directors are closing its affairs and that such directors are in all respects trustworthy. Chief Justice Beasley, on page 549, sets out

“so far as the case shows or there is reason for believing all the creditors of this company and all its stockholders, with a single exception of the petitioner are satisfied with its present management, a receivership would augment largely the expenses of closing up the business. Under these conditions it seems

to be entirely unnecessary to supersede this board of directors.”

The order appointing the receiver in that case was reversed.

### POINT THREE.

**The receiver should not have been appointed because there was no proof of insolvency.**

The only asset which the company could possibly have as set forth by the complaint was a possible right or action to set aside the assignment of the mortgage to the trustees.

The complaint sets forth that the assignment was made at a time when the company was insolvent. There is no proof to substantiate the allegation. For the defendants, there was produced the affidavit of Joseph Pinchak (p. 22), who sets forth that at the time the assignment was made, it was the owner of property which it had just then purchased for the sum of \$40,000.00, subject to mortgage encumbrances of \$20,500.00; affidavit of Isidore Krieger, builder and real estate operator (p. 30), which sets forth that the property was at the time of the assignment of the value of \$40,000.00. Assuming that the trustees will not disburse the proceeds of the mortgage among creditors other than subscribed to the assignment (as the complainants charge, but which is controverted by the trustees, signing creditors and the corporation themselves), there was at that time sufficient assets to cover the other creditors. *There is no testimony to the contrary.*

#### POINT FOUR.

The bill of complaint does not set forth a cause of action upon which a receiver should be appointed.

#### POINT FIVE.

The appointment of the receiver was highly inequitable in that it only added an extra burden upon the estate and tended to eat up an appreciable part of the assets.

Points Four and Five are argued together. *The crux of the case is not whether the assignment was valid, but should a receiver be appointed at this time.* The bill of complaint sets out that the reason the receiver is needed is for the purpose of examining into the transfer of the mortgage and for the purpose of attempting to recover the same for the benefit of the creditors. In other words, the only asset that the receiver sought to be appointed could obtain would be a right of action to set aside a conveyance on the allegation that the same was in fraud of creditors.

In answer thereto, it may be pointed out at the first instance that no receiver was necessary for that purpose; that the complainant could have then and there instituted a bill itself for that purpose; it could have filed a bill as is usually done for itself and for the benefit of such other creditors that desired to join in. Why then entail the unwarrantable expense of the services of a receiver and the dressing which usually accompanies the same?

In the second instance the defendants' affidavits clearly show that it was not necessary to have such an action even brought; that the corporation,

the trustees and the signing creditors were all willing that all creditors signing or not should participate.

In the case of *Glaser v. Achtel-Stetter's Restaurant*, 106 N. J. Eq. 150, it was determined by the Court of Errors and Appeals that:

1. The appointment of a receiver is not a matter of absolute legal right, and, therefore, sound discretion should be exercised by the Court before any such appointment is made.

2. Where the appointment of a receiver would only add an extra burden upon the estate and tend to eat up all available assets by receivership expenses, it is highly inequitable to appoint a receiver.

3. Equity follows the law and does not supersede it; its mission is to soften the rigor of the law and provide a remedy where, without the interference of a court of equity, the person aggrieved would be remediless.

The same result sought to be obtained by the appointment of a receiver would have been obtained had the complainant started the ordinary suit on its behalf and for joining creditors to have the mortgage decreed to belong to all creditors. The extraordinary suit should therefore not be resorted to.

Inasmuch, as pointed out, as the complainant and joining creditors themselves could have brought the suit to set aside the mortgage for which it sought a receiver, the statement in the case of *Singer v. National Bedstead Mfg. Co.*, 65 N. J. Eq. 290, at page 307, is right in point. It was there held:

“The appointment of a receiver by the court of chancery, after the decree has passed placing an insolvent corporation under disabilities, is entirely discretionary. The receiver is appointed to protect the creditors and stock-

holders. If there are no assets, no receiver is necessary and none will be appointed; if the creditors require no protection in respect of the assets through a receiver in a case like this, there seems to be no reason for the appointment or maintenance of a receiver."

In conclusion, for the reasons set out, we respectfully submit that the orders of the Court appealed from be reversed with costs.

FEDER & RINZLER,  
Solicitors for Appellants.

LOUIS A. FAST,  
Of Counsel.

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51 MAY 7 1931

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

## New Jersey Court of Errors and Appeals

*Between*

MATAWAN TILE COMPANY, a  
corporation,

*Complainant,*

*and*

SECOND UNITED CONSTRUCTION  
COMPANY, a corporation,

*Defendant.*

SECOND UNITED CONSTRUCTION  
COMPANY, a corporation,  
and THOMAS D. MILLER,  
HYMAN KRAMER and MOE  
M. FAST, as trustees of  
creditors of the SECOND  
UNITED CONSTRUCTION COM-  
PANY,

*Appellants,*

*vs.*

SAMUEL H. NELSON, receiver  
of Second United Construc-  
tion Company, a corpora-  
tion,

*Appellee.*

*On Appeal  
from the  
Court of  
Chancery.*

### BRIEF OF RESPONDENTS.

#### Facts.

Defendant company was incorporated under the laws of New Jersey on or about November 3, 1928, to engage in the real estate and building business. On November 28, 1928, defendant was indebted to creditors on matured claims in the sum of \$28,036.84 (p. 23, State of Case, ll. 23

New Jersey State Library

to 30). On said date defendant had no assets other than a second mortgage of \$28,000 which was due and payable on November 17, 1930, and two parcels of real estate encumbered with three mortgages (p. 23, State of Case, ll. 1 to 20). Its creditors were twenty in number (p. 23, State of Case, ll. 20 to 30; p. 25, State of Case, ll. 1 to 30). On November 28, 1928, while thus indebted to its creditors, the defendant assigned the \$28,000 mortgage to three trustees for the express benefit of seven of its said creditors, excluding the remaining thirteen creditors from sharing therein (pp. 25, 26 and 27, State of Case). Thereafter defendant's real estate was foreclosed and sold by reason of defendant's default. Defendant realized nothing from said sale (p. 23, State of Case, ll. 1 to 25). Defendant ceased doing business when the above assignment was made and has not operated in any form whatsoever since November, 1928 (p. 24, State of Case, ll. 10 to 18). Corporate franchise taxes have not been paid since its suspended business (p. 24, State of Case, ll. 10 to 18). The defendant does not intend to continue its business (p. 24, State of Case, ll. 10 to 18). In July, 1929, complainant recovered a judgment against the defendant for \$1,854.60 on promissory notes that became due and payable and were protested prior to the assignment of the \$28,000 mortgage (p. 6, State of Case, ll. 30 to 40; p. 7, State of Case, ll. 1 to 10). Prior to the filing of the bill herein one Samuel Weinstein, holder of a judgment against the defendant, issued execution thereon, and made a levy upon the mortgage of \$28,000 assigned.

**ARGUMENT.**

At the time of the filing of the bill defendant company was clearly insolvent and had suspended its business for lack of funds to carry on same.

It is admitted that the defendant company was insolvent at the time of the filing of the bill and that it had theretofore suspended its business. These facts are clearly set forth in the affidavit filed by the defendant's president (pp. 22, 23 and 24, State of Case), the said affidavit establishes the following facts: (1) That the defendant company on November 28, 1928, owed to its creditors, twenty in number, upwards of \$28,000 on matured claims; (2) that the defendant then owned a second mortgage of \$28,000 which was due and payable on November 17, 1930, and two parcels of real estate on Clarendon Place, East Orange, New Jersey, which were encumbered with three mortgages; (3) that the defendant company on November 28, 1928, assigned said mortgage to three trustees for the express benefit of seven creditors, who joined in the execution of the said assignment; (4) that thirteen of the defendant's creditors were excluded from the benefits of said assignment; (5) that the defendant lost its Clarendon Place real estate through foreclosure by reason of default; (6) that the defendant company suspended its business in November, 1928, and has not resumed since; (7) that the defendant company has not paid its corporate franchise taxes for or since 1928.

On November 28, 1928, the defendant company was and at all times since then has been insolvent in that it then was and has since been generally unable to meet pecuniary liabilities as they matured by means of available assets or an

honest use of its credit, which is the test of insolvency.

*Empire State Trust Co. v. Trustees*, 67 N. J. Eq. 602;

*Wright v. American Finance Co.*, 84 N. J. Eq. 415; affirmed 85 N. J. Eq. 181.

Furthermore, there was a "suspension of business" as used in Section 64 of the Corporation Act. *Hoover Steel Ball Co. v. Schafer Ball Bearings Co.*, 89 N. J. Eq. 433.

**The Court was warranted in appointing a receiver of the defendant company.**

That the Court may appoint a receiver where there is insolvency and/or a suspension of business within the meaning of Section 65 of the Corporation Act is so well established that no citation of authorities is required. The appellants raise the point that even though the defendant company was insolvent and had suspended its business within the meaning of Section 65 of the Corporation Act, that the Court should not have appointed a receiver. A review of the circumstances will furnish convincing proof that a receiver should have been appointed in this case.

At a time when the defendant company was wholly insolvent it assigned its only valuable asset to three trustees for the express benefit of seven of its twenty creditors (pp. 25, 26 and 27, State of Case). The defendant company was to receive any surplus after payment of the claims of the said seven creditors (p. 27, State of Case, ll. 15 to 25) notwithstanding the fact that complainant was a creditor upon a claim which matured prior to the said assignment. Complainant was excluded from sharing in the

said assignment. Under Section 64 of the Corporation Act the said assignment was void in that it was made while the company was insolvent and for an antecedent indebtedness.

89 N. J. Eq. 433 *supra*;

67 N. J. Eq. 602 *supra*;

*Reed v. Helois Co.*, 64 N. J. Eq. 231;

*Evans v. Stanwood Rubber Co.*, 94 N. J. Eq. 630.

Even if it should be argued that the said assignment was for the benefit of all creditors the Court might appoint a receiver for the purpose of marshalling the assets and winding up the affairs of the company. *American, etc. Co. v. Paterson, etc. Co.*, 22 N. J. Eq. 72; *Gilroy v. Somerville Works*, 67 N. J. Eq. 479. It cannot be argued that the assignment in question was for the benefit of all creditors as it expressly recited that it was for the benefit of seven creditors. It clearly sought to prefer certain creditors.

In the case of *Coryell v. President, etc.*, 9 N. J. Eq., 457, the Court held that a transfer of corporate assets by mortgage made by an insolvent corporation to secure certain creditors was void as against a receiver.

The appellants contend that the affairs of the defendant company were being liquidated by trustees and that the Court should not have intervened. That contention is untenable because, first, the trustees were creditors of the defendant company and not directors; second, they were grantees of the corporation and represented creditors; third, they were not liquidating or winding up the affairs of the defendant company; fourth, even if they were liquidating the affairs of the company they had violated Section

54 and Section 64 of the Corporation Act and the Court was therefore warranted in appointing a receiver. Section 54 provides for a ratable distribution among creditors and Section 64 prohibits preferential transfers.

The appellants further contend that no receiver should have been appointed under *Glasser v. Achtel-Stettens Restaurant*, 149 Atlantic Reporter 44, on the theory that there was no estate to wind up. That case is distinguishable from the case at bar. If the respondents' contention is correct that the mortgage assignment was invalid and void under Section 64 of the Corporation Act, it follows that there is an unencumbered estate of \$26,000 which should be administered for the equal benefit of all creditors and not for the benefit of only seven of twenty creditors. If the appellants' argument that the defendant company has no assets is sound then any corporation can convey its assets contrary to Sections 54 and 64 of the Corporation Act and thereby render itself immune from the administration of its affairs by a receiver. Such a result was never intended by the Court in the *Achtel-Stetter* case. In the instant case the receiver's distribution of the proceeds of the assigned mortgage will result in substantial benefit to all creditors. The *Achtel-Stetter* decision held in effect that there were no assets which could legally be administered by the receiver. In *Turp v. Dickinson*, 100 N. J. Eq. 41, the defendant corporation had terminated its business, wound up its affairs and made an assignment of its assets for the benefit of certain creditors. A receiver was properly appointed to recover assets for the equal benefit of creditors.

The appellants, also, contend that complainant might have attacked the mortgage assignment

without applying for the appointment of a receiver. That may be true but there are several good reasons why the Court was warranted in appointing a receiver, viz.: A receiver could marshal the assets and make an equal distribution; multiplicity of suits and proceedings by creditors to enforce payment of their respective claims out of the mortgage proceeds would be eliminated; litigation among creditors for the purpose of determining priorities would be eliminated; all questions touching the rights of creditors could be determined in one suit most advantageously and with the least expense.

**Defendant had sufficient notice.**

An order to show cause was made on November 25, 1930, and promptly served upon the defendant. The order was returnable on November 28, 1930. On the return date the defendant offered four affidavits. The evidence before the Court was clear and convincing that the defendant was insolvent and that a receiver should be appointed. The defendant has never filed any other affidavits. What the said affidavits might have contained is purely speculative. Furthermore the defendant presented offered argument on the return of the order to show cause why a statutory receiver should not be appointed and then offered no further affidavits.

This appeal is from the order appointing the permanent receiver. The objection as to reasonable notice was not raised at that time.

Moreover, the affidavit filed by the president of the defendant company so clearly establishes the defendant's insolvency and the necessity for the appointment of a receiver that the Court was

warranted in disposing of the matter upon the filing of said affidavit.

Respondents contend that the defendant was insolvent at the time of the filing of the bill and for a long time prior thereto and that the defendant had suspended its business for want of funds to carry on same in November, 1928, and that the circumstances warranted the appointment of a receiver to wind up the affairs of the defendant company and make an equal distribution among its creditors.

### CONCLUSIONS.

Conceding that repetition is not argument, a short summary may, however, be helpful in the determination of the issue involved in this litigation.

(a) The mortgage was executed to three creditors for the benefit of seven creditors named therein. These three creditors were not designated as trustees for any other creditors except the seven named.

(b) The principal sum of the mortgage was due within a few days of the application.

(c) More than two years elapsed from the execution of the mortgage to the date of the filing of the bill and during that time, so far as the affidavits disclose, none of the creditors except those nominated in the mortgage knew of its existence.

(d) The timely application for the appointment of the receiver prevented the judgment creditors from selling the mortgage under execution which would have deprived creditors of their right of participation in the proceeds.

(e) If a receiver had not been appointed, the defendant company would have been entitled to the surplus after payment of the claims of seven creditors (p. 27, ll. 15 to 25).

Concededly, the amount of the just claims exceeds the principal due on the mortgage.

From these undisputed facts it is the fair inference that when the balance due on the principal sum of the mortgage had been paid to the mortgagees, that they would have distributed to themselves and the other four creditors named therein the amounts due them and would have disbursed the balance to the officers of the defendant company and the other thirteen creditors would not have been paid.

The financial situation as it existed at the time of the filing of the bill was:

Principal due on mortgage...	\$25,900.00
Total claims .....	29,000.00
Deficit .....	3,100.00

The difference between \$25,900.00 due on the mortgage and the principal sum of \$28,000.00 as stated therein, is represented by certain payments made by one of the trustees, Berg, to lien claimants, amounting to \$2,100.00.

For the reasons herein it is contended that there was no error in the proceedings.

All of which is respectfully submitted this 3rd day of February, 1931.

JOHN A. BERNHARD,  
Solicitor of the Receiver.

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