

421
1907

NEW
Court of Errors and Appeals

Between

WILLIAM A. SQUIRE,

Complainant,

and

PRINCETON LIGHTING COM-
PANY,

Defendant.

On Appeal from
Order of Court of
Chancery.

WESTINGHOUSE ELECTRIC AND
MANUFACTURING COMPANY,

Petitioner-Appellant,

and

RICHARD STOCKTON, Receiver,
Respondent.

BRIEF OF FRANK S. KATZENBACH, JR.,
FOR RESPONDENT.

STATEMENT OF FACTS.

On April 12th, 1904, the Westinghouse Electric and Manufacturing Company recovered a judgment against the Princeton Lighting Company upon which an execution was issued, and under the execution the sheriff of Mercer county on April 13, 1904, levied on sufficient personal property of the Princeton Lighting Company to satisfy the judgment.

On April 11th, 1904, a bill was filed in the Court of Chancery against the Princeton Lighting Company for a writ of injunction and the appointment of a receiver, and on the same day an order to show cause, returnable on April 19th, 1904, was allowed. The order to show cause restrained the defendant from paying or transferring its money and effects and from assigning or transferring its property. On April 19th, 1904, a receiver was appointed upon the facts as alleged in the bill. The appellant contends that it is entitled to be paid in full the amount of its judgment out of the moneys in the hands of the receiver on the theory that until the actual appointment of a receiver the title of the property of the insolvent corporation is still in the corporation and the liens of creditors can attach thereto. The receiver contends that the Westinghouse Electric and Manufacturing Company is not entitled to the preference it claims for the following reasons:

ONE.

When, on April 11th, 1904, the bill containing allegations of the insolvency of the Princeton Lighting Company was filed for the appointment of a receiver and a writ of injunction the court could have appointed forthwith a receiver (Sec. 66 General Corporation Act) instead of allowing an order to show cause with the restraining feature. The court did, however, pass upon the question of insolvency and was satisfied with the sufficiency of the proof of the insolvency of the corporation at the time of allowing the order to show cause, but desiring to give the corporation an opportunity to be heard allowed the rule to show cause instead of forthwith appointing a receiver, as the court had the power to do. Had the court believed that by so doing an opportunity was being afforded the Westinghouse Company to secure a preference over other creditors the court would have no doubt at once appointed a receiver, so as to prevent the injustice of the Westinghouse Company securing this preference over general creditors when the insolvent condition of the Princeton Lighting Company was disclosed by the bill and affidavits presented to the court on April 11th. That a receiver was

not forthwith appointed was due to the fact that the Court of Chancery has, as far as can be ascertained, proceeded on the theory that no preference could be obtained by a creditor after the filing of the bill and that the rights of creditors became fixed at the time of filing the bill rather than at the time of the appointment of the receiver.

The practice of allowing an order to show cause would seem to be fairer to the corporation than that of forthwith appointing a receiver without giving an opportunity to the corporation of being heard, and for this reason this practice has been followed. No injustice to any creditor by such a course is done if the time of insolvency is held to be that of the filing of the bill, so as to prevent a creditor who obtains a judgment and lien by execution after the filing of the bill and before the appointment of a receiver from obtaining a preference.

It has always been believed since the decision of *Doane vs. Millville Insurance Co.*, 16 *Stewart* 522, that no preference could be secured by a creditor after the filing of a bill and the granting of the restraining order. In this case the learned Vice Chancellor said, on page 534: "It seems to me that the true spirit and intent of the act to limit the period at which a judgment may be recovered and the creditor secure the benefit of the priority contemplated by the statute, is whenever the court, according to the directions of the statute, wholly or partially, takes control of the company and of its assets, either by injunction or other preliminary order, thereby depriving the company of all power to act in the premises, except under the direction and by the consent of the court itself. When the court takes either of these steps, the hands of all parties—the company and its agents and creditors, including judgment and execution creditors—are all alike stayed; no one of them can proceed with any effect toward the payment of a debt, or the enforcing of a judgment by execution or otherwise. It is true the creditor may obtain his judgment, and thereby certify his claim, but he cannot seize upon the assets of the company, nor can the company discharge the judgment by payment. Therefore, at and after the juncture of filing the bill and issuing a restraining order or injunction, it would seem that no proceedings

could be made effectual by a suitor against the company or its assets, both being in the custody of the law. This very wise and salutary principle is universally recognized."

The discussion of this question may be considered a dictum. While this case was reversed on appeal (18 *Stewart* 274), yet this question was not considered and no disapproval of the position of the court below on this point was rendered. The Court of Errors and Appeals held that judgment creditors, only so far as they had acquired liens, would be preferred in the distribution of assets.

A careful examination of the reports fails to reveal any case in which this question has been raised and decided. In several cases the court has used such expressions as "the adjudication and the appointment of the receiver fastens the debts of the general creditors on the assets" (*Button Co. vs. Speelman*, 5 *Dick.* 120; *Crews vs. U. S. Car Company*, 12 *Dick.* 357), but these cases were not decided with such a situation confronting the court as in the present case, and furthermore, the use of the expression "adjudication and the appointment of the receiver" are conflicting. It seems to me that the adjudication of insolvency may be actually before the appointment of the receiver and that the allowance of an order to show cause is the adjudication of insolvency. The court before the allowance of the order must be satisfied that the corporation is insolvent. In making the order the court is in effect adjudging the corporation insolvent and merely giving the corporation an opportunity to prove, if it can, the contrary. It seems most inequitable to permit one who is a general creditor at the time of the filing of the bill and the allowance of the order to secure, between that time and the appointment of a receiver, a preference which, in this case, takes almost the entire funds in the hands of the receiver, leaving nothing for the other creditors whose claims are as meritorious as that of the petitioner, especially in view of the fact that the insolvency proceedings were probably instituted for the very purpose of preventing just what a reversal of the decree of the Court of Chancery will bring about. Why should not the rights of creditors be fixed at the time of the allowance of the order which, as has been said, is the time when the court satisfies

itself of the insolvency of the corporation? At that time the corporation is enjoined from making preferences by the payment of its funds or transferring its property. As Vice Chancellor Bergen said in his opinion: "It seems inequitable to permit to be done by indirection, that which the corporation is directly restrained from doing."

In the absence of any express statutory provision upon this point it would seem to be more equitable to fix as the time after which no preference can be obtained by a general creditor the time of the allowance of the order rather than the time of the appointment of the receiver.

TWO.

The section of the Corporation Act relied on by the petitioner is the sixty-eighth. The petitioner's contention is that this section fixes the time of the appointment of a receiver as the time of divesting the corporation of its property and therefor up to that time any creditor can, by securing a judgment and levy, secure a lien upon the property of the corporation notwithstanding that a bill for the appointment of a receiver may have been filed and the Court of Chancery have thus taken jurisdiction and control of the assets of the corporation for the benefit of creditors and stockholders. This section was not enacted for the purpose of fixing the time up to which a creditor could secure a preference, but to determine the question as to whether the receiver did or did not take title to the property of the insolvent corporation, it having been held in several cases that a receiver only took a power to take charge of the corporation's property and sell it.

(See notes on this section in *Dill on Corporations*.)

The enactment of this section has no bearing upon the question under consideration. The fact that this section fixes the time of passing of title to the receiver does not in any way prevent the Court of Chancery from protecting the assets of the corporation against which insolvency proceedings have been commenced and preserving those assets for an equitable distribution.

THREE.

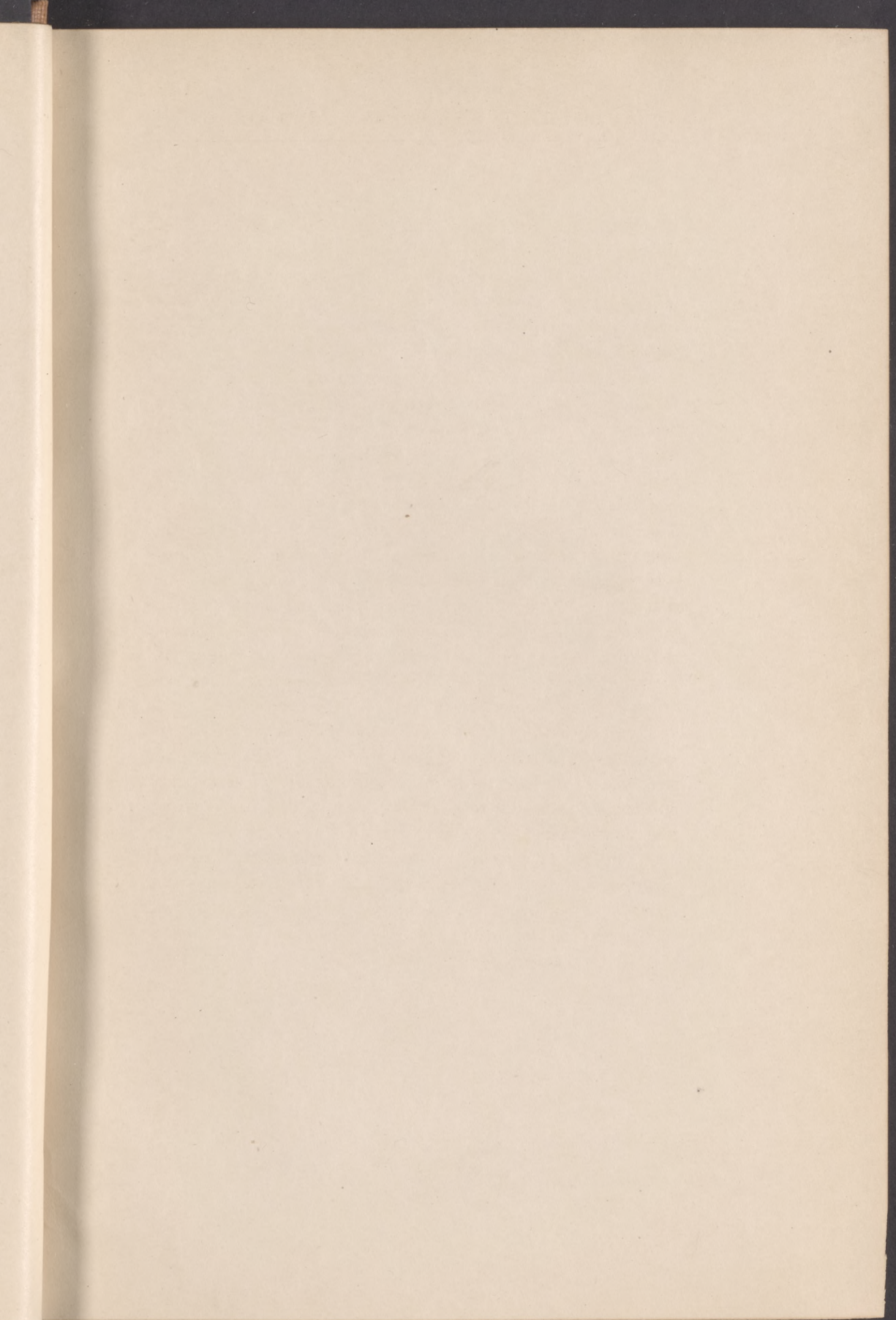
It was stated in the case of *Hooper vs. Basic*, 61 *At. Rep.*, p. 981, that the sections of the corporation act of New Jersey relating to proceedings against insolvent corporations have been taken from the New York act. The New York case relied upon by the petitioner to support its contention for priority is "*In the Matter of Waterbury*," 8 *Paige* 380. A study of this case will reveal that the proceeding was one for the dissolution of the corporation and no restraining order had been issued by the court. The facts, therefore, upon which the court based its opinion, are essentially different from those in the present case.

The petitioner also relies upon the New Jersey case of *Minchin vs. Second National Bank*, 9 *Stew.* 436. In this case the corporation was a foreign corporation and its property in this state had been attached. While the court held that the lien of the creditors under the attachment was entitled to preference as against the receiver, yet the court in rendering its decision made this significant statement, that "in this case, it may be remarked, the proceeding at law was by attachment, which, in its nature, is for the benefit of all applying creditors. Moreover, when the bill was filed, the case made by it was not sufficient to warrant even an injunction, and so the case stood for five weeks, so far as appears, without action, and a receiver was not appointed until nearly two months after the filing of the bill."

At this time no preference could be obtained by a plaintiff in attachment. The plaintiff and applying creditors shared equally. This was a controlling circumstance in rendering the decision, as can be seen from the statement above quoted.

Respectfully submitted,

FRANK S. KATZENBACH, JR.



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THE NEW YORK
COURT OF COMMON PLEAS

IN SENATE
JANUARY 1884
REPORT OF THE
COMMISSIONERS OF THE
LAND OFFICE

ALBANY: J. B. LIPPINCOTT & CO.
PUBLISHERS
1884

STATE OF NEW YORK
OFFICE OF THE COMMISSIONER OF THE LAND OFFICE
ALBANY

THE COMMISSIONER OF THE LAND OFFICE
HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF
THE REPORT OF THE COMMISSIONERS OF THE LAND OFFICE
FOR THE YEAR 1883, AND TO STATE THAT THE SAME
HAS BEEN FORWARDED TO THE SENATE AND TO THE
HOUSE OF REPRESENTATIVES.



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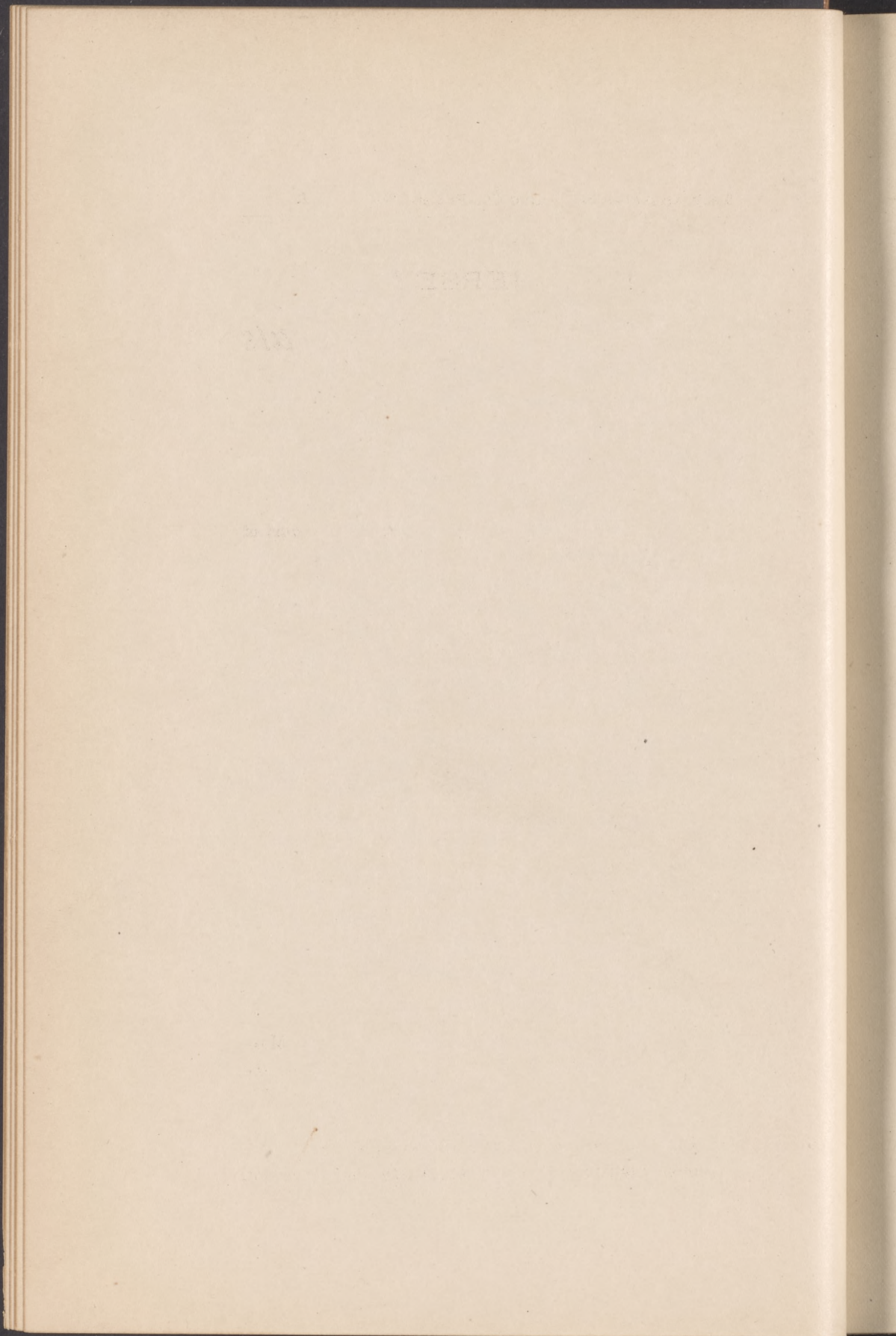
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At this time no preference could be obtained by a plaintiff in attachment. The plaintiff and applying creditors shared equally. This was a controlling circumstance in rendering the decision, as can be seen from the statement above quoted.

Respectfully submitted,

FRANK S. KATZENBACH, JR.





New Jersey Court of Errors and Appeals.

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PRINCETON LIGHTING COMPANY,
Defendant.

No. 60.

March Term,
1907.

On Appeal
From
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WESTINGHOUSE ELECTRIC AND MANUFACTURING
COMPANY,

Petitioner-Appellant.

RICHARD STOCKTON, Receiver,

Respondent.

Brief for Petitioner-Appellant.

Statement.

This is an appeal by the petitioner from an order of the Court of Chancery dated July twenty-fourth; nineteen hundred and six, advised by Honorable J. J. Bergen, Vice Chancellor, dismissing the appeal of petitioner from the decision of the receiver of the Princeton Lighting Company, rejecting petitioner's claim for priority in payment on its judgment for Four thousand, four hundred and eighty-seven dollars and fourteen cents, against the Princeton Lighting Company. The above entitled action is the statutory one under Sections Sixty-five and Sixty-six of the New Jersey Corporation Laws, by a creditor, for the appointment of a receiver, and

dissolution of an insolvent corporation. There is no dispute on the facts, which are as follows:

On March first, nineteen hundred and four, petitioner, not having any intimation of defendant's insolvency, served on it a summons and declaration in a suit in the Mercer County Circuit Court, and on April twelfth, nineteen hundred and four, recovered judgment against the Princeton Lighting Company, in said court, for Four thousand, four hundred and eighty-seven dollars and fourteen cents, the court having stricken out the pleas entered by the defendant. Execution was duly issued to the sheriff of that county, and on April thirteenth, nineteen hundred and four, he levied upon sufficient personal property of the defendant to satisfy the judgment, including tar, coke, coal, tools and supplies contained on the property of the defendant, which was engaged in furnishing gas and electricity for light and power, in the Borough of Princeton and surrounding towns. Petitioner did not cause the immediate removal of the personal property from the grounds, because that would have stopped the operation of the plant, and put the streets and buildings in the surrounding towns in darkness, but relied on its right to priority in payment out of the proceeds of said supplies, and of the operation of the plants. This personal property was retained by the receiver thereafter appointed, and used for the benefit of the insolvent estate, and the receiver does not question the right of the petitioner to have so much of the funds in hand as may be necessary for that purpose, applied toward the satisfaction of petitioner's judgment, if it be decreed that its lien was so established as to entitle it to priority in payment.

While the defendant was delaying petitioner's suit, its counsel, apparently, was preparing a bill for the appointment of a receiver, and actually filed the same for a creditor on the same day, April eleventh, nineteen hundred and four, that it

defaulted on the motion to strike out its pleas.

On April eleventh, nineteen hundred and four, when this bill was filed, the usual order therein was granted by the Court of Chancery, returnable April nineteenth, nineteen hundred and four, to show cause why the statutory injunction should not issue, and a receiver be appointed under Sections Sixty-five and Sixty-six of the Corporation Laws. This order was the usual one to bring the defendant into Court, and merely restrained it from paying or transferring its money and property, and from contracting debts, except in connection with the running of the plants, which were kept going. On April nineteenth, nineteen hundred and four, on the return of said order to show cause the statutory trial or hearing was had, the company declared insolvent and an injunction ordered. Richard Stockton was appointed receiver under the statute, and took possession of and operated the plants for almost a year, using the personal property found on the premises, selling the tar, coke, and other products, and thereby accumulating quite a large sum of money, which, however, was not sufficient to pay all the creditors in full.

There is now due upon petitioner's judgment against defendant, the sum of Three thousand seventy-one dollars and sixty-nine cents, with interest from July thirteenth, nineteen hundred and four, petitioner having realized on certain collateral which it had in its hands, and applied the proceeds on account of the judgment.

On these facts the Court of Chancery decided that when the Court issued the order to show cause, its restraining order had the effect of a preliminary injunction, and that the court must have virtually made a declaration of insolvency, and have taken possession of the assets, as a trust fund, for the creditors, even though the receiver was not appointed until later, and that therefore

the judgment of petitioner entered between the issuance of the order to show cause and the appointment of a receiver was not entitled to priority in payment out of the funds in the hands of the receiver.

The petitioner maintains that it is entitled to priority in payment, by reason of its judgment, for the following reasons:

First: The assets of the corporation were not a trust fund for the benefit of all the creditors, until the actual appointment of the receiver and formal decree of insolvency.

Second: The issuance of the order to show cause was not such a finding or declaration of insolvency, as to give the court control or possession of the assets, or to make the assets a trust fund for the benefit of all the creditors.

Third: That such a priority exists is clearly shown by the decisions of our courts, and those of other states.

Fourth: Reason and justice demand that the petitioner should have priority in payment on its judgment.

POINTS.

I.

The Assets of the Corporation were not a trust fund for the benefit of all the Creditors until the actual appointment of the Receiver.

Much confusion has arisen by reason of the elusive doctrine referred to in some judicial opinions, to the effect that the assets of an insolvent corporation are a trust fund for the equal benefit of all the creditors. Whatever may be the law in

some states, this doctrine thus broadly stated has been repudiated time and again by the New Jersey Courts.

In *Gallagher vs. Asphalt Paving Company*, 65 New Jersey Equity, pages 258, 264, 265, 266, 269, Vice Chancellor Stevenson discusses this theory at length, and cites the authorities rejecting it. He shows that the assets of an insolvent company are not a trust fund for creditors, *ipso nomine*, and that New Jersey recognizes no such theory; that its statute has the same result, only so far as it expressly provides for such division among the creditors. At page 270, he said:

"I think it is safe to say that in New Jersey, apart from the direct effect of statutes, an insolvent corporation has the same dominion over its assets, and its creditors have the same power to reach those assets for the payment of their claims that we find exhibited in the case of an insolvent natural person. The modifications and limitations of this dominion of the corporation over its property, and of this power of the creditors to reach that property preferentially, are derived from our statutes, and not from any theory that immediately upon the insolvency of a corporation anything that can properly be described as a trust is created in respect of the corporate assets. Of course, when by reason of insolvency, or of the dissolution of a corporation, or from any other cause, the assets of the corporation are placed in the possession of a receiver, or have become vested in him by law, a trust of a high character at once is created. But neither the insolvency or other condition of the company, nor the commencement of a suit to establish a receivership and the trust connected therewith, has the effect to establish such a trust."

Section Sixty-eight of the Corporation Law distinctly provides that all the real and personal property of the insolvent corporation becomes vested in the receiver, upon his appointment, and the corporation is then divested of the title thereto. The act itself thus specifies the condition upon which the assets become a trust fund for the creditors, that is, upon the appointment of the receiver.

Section Sixty-six provides that receiver shall hold and dispose of the proceeds of the property under the directions of the Court.

Section Eighty-six provides:

"After payment of all allowances, expenses and costs and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, the creditors shall be paid proportionally to the amount of their respective debts, *excepting mortgage and judgment creditors, when the judgment has not been by confession for the purpose of preferring creditors.*"

In *Crews vs. U. S. Car Company*, 12 Dick., 357, the Court held that the date of the adjudication and appointment of the receivers was the date when the receivers took title to the assets as a trust fund for creditors; whereas the date under which the priority of wages claims is fixed, is the date of the commencement of the insolvency proceedings.

In *Corrigan vs. Trenton Delaware Falls Company*, 7 New Jersey Equity 489, the Court fixed the date of the Receiver's title as of the time of his appointment in determining what rents the receiver should get, and what rents were subject to prior disposition by the defendant.

In *Graham Button Company vs. Spielman*, 5 Dick, 120, it was held that the adjudication and the appointment of the receiver fastens the debts of the

general creditors on the assets.

In *Linn vs. Dixon Crucible Co.*, 59 New Jersey Law 28, it was held that after bill filed and injunction issued, and before declaration of insolvency and appointment of receiver, a corporation preserves its identity and corporate powers, and can incur liabilities for re-organization; can appear in Court, and move to transfer a suit to the United States Courts.

The Receiver contended that the corporation could not file a plea, and defend a judgment, but the authorities are directly to the contrary.

In *Minchon vs. Second National Bank of Paterson*, Chancellor Runyon held that the appointment of the receiver operated as a transfer of title, and the liens secured by judgment or attachment after the issuing of the injunction and filing of the bill, but before the appointment of the receiver were not disturbed by the latter. Citing, in re *Waterbury*, 8 Paige, 380.

In *Freeholders vs. State Bank*, 2 Stew. 268, it was held that the title of the corporation was divested as of the date of the Receiver's appointment.

In *Wood vs. McCardell Company*, 4 Dick., 433, a receiver was directed to pay rent due the landlord at the time of the declaration of insolvency and appointment of the Receiver, not exceeding one year's rent, on the ground that the landlord had a lien for his rent until that time, and was preferred.

In *Coogan vs. Conover Company*, 60 At. Rep., 408, Vice Chancellor Garrison, in speaking of the New Jersey Corporation Act said, at page 416:

"But, with respect to creditors against the funds in his hands, I think that their rights are fixed as of the time of his appointment, and that those who had priorities then must be first paid, and the others must be paid equally."

He also held that our New Jersey Act was copied literally from the New York Act, except that in New York the plaintiff is the Attorney General. Vice Chancellor Stevenson also held the same with reference to the two Acts in *Hoopes vs. Basic Company*, 61 At. Rep. 979.

In *Schuyler Steam Tow Boat Company*, 136 N. Y. 16, it was held in a proceeding for dissolution of a corporation and appointment of receivers that the date upon which the Court acquired jurisdiction in the matter and over the corporation's assets was the date of the order appointing receivers.

In *Van Alstyne vs. Cook*, 25 N. Y. 489, in a bill filed for dissolution of an insolvent corporation, it was held that the Court did not take possession of the assets until the order was made appointing the receiver, and the assets did not become trust funds for creditors until the Court had taken possession of them by its receiver.

In the matter of *C. J. Company*, 128 N. Y. 550, it was held in a proceeding for dissolution of an insolvent corporation that the date of the appointment of a receiver was the time when the assets were *in custodia legis* and the Court then had the power to preserve and protect them.

In *Smith vs. N. Y. Consolidated Stage Co.*, 18 Abb. Pr. 419, it was held that the Court took control of the subject matter from the time of the decision directing the appointment of the receiver.

In *Gallagher vs. The Asphalt Company of America*, subsequent opinion, 58 Atlantic Reporter 403, at p. 408, Vice Chancellor Stevenson further said:

"The man who is appointed receiver upon the return day of the order to show cause, or upon the appearance of the corporation upon the filing of the bill, is the statutory receiver. He is appointed after the summary final hearing prescribed by the

statute has been held, and this summary final hearing under our practice and under the general principle of law and justice can only be held after the corporation has been brought into court by notice, or has voluntarily appeared. The receiver so appointed takes title to the assets, and the further proceeding on notice to all the stockholders and creditors effects or may effect, merely a substitution of another person as receiver. There is no distinction between the titles of these two receivers, and the use of the term 'Temporary Receiver,' as applied to the first appointed, is liable to mislead."

In *Alderson on Receivers*, p. 179, the law is stated as follows:

"Section 148. *When the Order Takes Effect—Relates Back—*

"The order appointing a receiver relates back to the time of the decision directing such an order, so as to give the court control of the subject matter from that time. But as against third persons, or interested parties not notified, it cannot date or relate back beyond the order appointing him, and it is irregular and improper to insert such a clause in the order of appointment, as it would be unjust to vest the receiver with title at a period previous to his appointment."

In *Rutter vs. Tallis*, 5 Sanford's Super. Ct. Rep. (N. Y.) 610, it was held that title of receiver in suit to dissolve insolvent partnership took effect as of the date of order directing the appointment of a receiver.

To the same effect *West vs. Frazer*, 5 Sanf. Sup. Ct. Rep. 653.

In *Artizans Bank vs. Treadwell*, 34 Barb., 553, a

judgment was entered against an insolvent partnership and execution issued after a suit in equity was begun for receiver but before appointment of receiver. Held that the judgment took precedence, and that the order appointing receiver could not relate back beyond the time of its entry; also that the assets were not a trust fund for all the creditors as against any creditor who perfected his judgment before the appointment of the receiver.

II.

The issuance of the order to show cause was not such a finding or declaration of insolvency as to give the court control or possession of the assets or to make the assets a trust fund for the benefit of all the creditors.

It is undeniable that the title to the assets was in the Princeton Lighting Company until the appointment of the Receiver on April 19th.

Section 66 of the Corporation Act provides that the Court at the time of ordering the injunction, after the summary hearing, or at any time afterwards, may appoint a Receiver.

Section 68 provides that all of the real and personal property of an insolvent corporation, where-soever situated, and all its franchises, rights, privileges and effects shall *upon the appointment of a receiver* forthwith vest in him, and the corporation shall be divested of the title thereto.

There is no provision making his title relate back to the filing of the bill or the entry of the order to show cause. To so construe the section would be to do violence to its plain meaning; nor is there any provision in the Act providing for an injunction against creditors levying execution on the assets after the filing of the bill and the entry of the order to show cause, and before the declaration of

insolvency and appointment of Receiver.

It is clear that neither the filing of the bill nor the issuance of the order to show cause operated as a transfer of the title to the assets under the act. In other bankruptcy and insolvency acts the title of the Receiver or Trustee has never been held to relate back to the beginning of the action, or proceeding, unless specifically so provided by the statute, as in the National Bankruptcy Act of 1867, which provided that the title of the assignee related back to the commencement of the proceeding. There was so much confusion and uncertainty in dealing with a person against whom a petition was filed but never pressed, that the Bankruptcy Act of 1898 omitted this objectionable provision, and provided that the Trustee's title should be as of the date of actual adjudication of Bankruptcy, which is equivalent to our Declaration of Insolvency—(See Loveland on Bankruptcy, Second edition, p. 365.)

In *Keegan vs. King*, 96 Fed. 758-760, the Court said:

"The bankruptcy act does not generally impair in any way the jurisdiction of State Courts; and in cases where the officers of State Courts prior to an adjudication in bankruptcy, have seized property of the bankrupt under state process, such levy cannot be interfered with by a federal court, unless it is fraudulent or contrary to the bankruptcy act, or upon some equitable ground. The moment, however, that an adjudication of bankruptcy has been made, the title to all the property of the bankrupt, as of that date, passes to the person who is subsequently chosen trustee."

Section 68 of the New Jersey Act first appeared in the law of 1896, and was intended to do away with the confusion which had arisen in our Courts

as to whether the Receiver took title, and when he took title. (*Falk vs. Whitman Cigar Company*, 10 Dick. 396.).

This section had not been adopted when Vice Chancellor Bird made the decision in *Doane vs. Millville Insurance Company*, 16 Stewart 532, upon which the Receiver relies, and which was reversed by the Court of Errors in 18 Stewart 274. In the meantime the Chancellor had already held that the title of the Receiver did not relate back to the filing of the bill, or the issuance of the order to show cause in *Minchon vs. Second National Bank*, 9 Stewart 436, and this decision has never been reversed or overruled by any case which is now authoritative.

To prove that the legislature, when it intended a lien or title to relate back to the beginning of the proceedings, has so specifically provided, we call the Court's attention to Section 83 of the New Jersey Corporation Act, which provides that in case of insolvency, laborers, etc., shall have a prior lien upon assets for labor performed "or rendered within two months next preceding the date when proceedings in insolvency shall be actually instituted and begun against such insolvent corporation."

The presence of this clause in Section 83, and its absence from Section 68 prove that title of the Receiver does not relate back, but is as of the date of his appointment.

By what subtle process of reasoning did the Vice Chancellor hold that the issuance of the order to show cause was a transfer or taking possession of the assets? The order to show cause was the usual one issued in Chancery to bring the defendant into Court, and merely restrained the defendant from disposing of its property or incurring liabilities, except in the conduct of its business pending the hearing thereof, so as to preserve matters *in statu quo*. The Vice Chancellor speaks of it as equal-

ent to an injunction, but an injunction is a process of the Court. (Chancery Revision, section 3; Chancery Rules 122-130). The order to show cause was merely a substitute for a motion, and it is spoken of as a motion in rule 122. It would not operate even as a *lis pendens*. There had been no summary hearing of the case provided for by the Corporation Act when this order to show cause was issued; all that the court did when it was issued was, to consider that there was a fair chance of success by the moving party, and that the defendant would not be greatly damaged by the restraint pending the hearing, and actual determination of the question of insolvency. It did not enjoin defendant from exercising its franchises which is what is contemplated by the injunction provided for in Sec. 65. The order was not even a preliminary injunction, for that as we have seen is a process.

In *Pierce vs. Old Dominion Copper Co.*, 58 Atlantic Rep., 319, 324, 325, Vice-Chancellor Stevenson held that the granting of the usual order to show cause is not the determination on the summary hearing required by the statute to decree insolvency, issue injunction and appoint a receiver. He said at page 325:

"It is perfectly plain that a mere restraining order, or a preliminary writ of injunction, 'limited' in its operation, is not a sufficient basis for the making of an order appointing the statutory receiver."

Even if it were regarded as a preliminary injunction, the doctrine of Courts of Chancery in relation thereto is well summed up in the head note of *Harriman vs. Northern Securities Company*, decided in the United States Circuit Court of New Jersey, 132 Fed. 464:

"Where, in a doubtful case, the denial of a

preliminary injunction will, on the assumption that the complainant ultimately would prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant, through its allowance, the injunction usually should be granted.

The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction.

Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree as between, the showing of the complainant and of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction.

Where the sole object for which an injunction is sought is the preservation of a fund in controversy, or the maintenance of the *status quo*, until the question of right between the parties can be decided on final hearing the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant."

The court said at page 475:

"The legitimate object of a preliminary injunction, preventative in its nature, is the preservation of the property or rights in controversy until the decision of the case upon a full and final hearing on the merits or a dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional."

At page 476 the Court said:

"Where, however, the sole object for which

an injunction is sought, is the preservation of a fund in controversy, or the maintenance of the *status quo*, until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. Its allowance in the latter case is a provisional measure, of suspensive effect and in aid of such relief, if any, as may finally be decreed to the complainant. These views are supported by abundant authority to which, were it not for the importance of the case, I should refrain from adverting."

In *Russell vs. Farley*, 105 U. S. 433, 438, 26 L. Ed. 1060, the court, through Mr Justice Bradley, said:

"It is a settled rule of the Court of Chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused. Kerr on Injunctions, 209, 210."

In *Huffman vs. Hummer*, 2 C. E. Greene, 263, it was held that a court of equity will issue a preliminary injunction to preserve property *in statu quo* pending the suit even when it is not clear that the complainant will succeed at the hearing, if there is ground for supposing that relief will be given.

In *City of Newton vs. Levis*, 79 Fed. 715, the court said:

"The preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be im-

mediate, certain and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted."

In *Glascott vs. Lang*, 3 Myl & C., 451, 455, Lord Chancellor Cottenham said:

"In looking through the pleadings and the evidence, for the purpose of an injunction, it is not necessary that the court should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient if the court finds, upon the pleadings, and upon the evidence, a case which makes the transaction a proper subject of investigation in a court of equity."

In *Hadden vs. Dooley*, 74 Fed. 429, 431, 20 C. C. A. 494, the Circuit Court of Appeals for the Second Circuit, through Judge Shipman said:

"When the questions which naturally arise upon the transactions make them a proper subject for deliberate examination, if a stay of proceedings will not result in too great injury to the defendants, it is proper 'to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined' by evidence and proofs which have the merit of accuracy."

In *Great Western R. Co. vs. Birmingham, etc.*, R. Co. 2 Phil. Ch. 597, Lord Chancellor Cottenham said:

"It is certain that the court will in many cases interfere and preserve property in *statu quo* during the pendency of a suit, in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opin-

ion as to such rights."

In *Shrewsbury & Chester R. Co. vs. Shrewsbury R. Co.*, 1 Sim. N. S., *410, *426, *427, *432, the Vice Chancellor, Lord Cranworth, said:

"When the court is called on to interfere to preserve property *pendente lite*, there are I apprehend, two points on which the court must satisfy itself. First, it must satisfy itself, not that the plaintiff has, certainly, a right, but that he has a fair question to raise as the existence of such a right. * *"

To the same effect:

"*Denver & Rio Grande R. Co. v. United States*, 124 Fed. 156, 59 C. C. A. 579;

Allison v. Corson, 88 Fed. 581, 32 C. C. A. 12.

Buskirk v. King, 72 Fed. 22, 18 C. C. A. 418;

Sanitary Reduction Works v. California Reduction Co., (C. C.) 94 Fed. 693;

Southern Pacific Co. v. Earl, 82 Fed. 690. 27 C. C. A. 185;

New Memphis Gas & Light Co. v. Memphis (C. C.) 72 Fed. 952;

Indianapolis Gas Co. v. Indianapolis (C. C.) 82 Fed. 245;

Georgia v. Brailsford, 2 Dall. 402, 1 L. Ed. 433."

In *Willmer vs. R. R. Co.*, 2 Woods (U. S.) 420, 427, Justice Bradley said:

"Service of process gives jurisdiction over the person. Seizure gives jurisdiction over the property; and until it is seized, no matter when the suit was commenced, the court does not have jurisdiction."

In *Wheeler vs. Walton & Whan Co.*, 65 Fed., 720,

it was held that the mere filing of a Bill in Equity with notice thereof and of a motion for a receiver to the defendant did not give jurisdiction over the parties or subject matter, that there could be no *lis pendens* until the subpoena, that is, the process, was served, and there could be no seizure of the subject matter till the receiver was appointed. Hence it was held that a judgment entered after motion for receiver but before his appointment was entitled to priority.

In *Edwards vs. Edwards*, Law Reports, II Chancery Division, 291, an order was made in a suit that upon giving certain security a receiver be appointed of certain chattels. After this order was entered, but before security had been given, an execution was levied on the chattels. *Held*, that the execution took precedence of the Receiver, because he had not yet qualified.

In *Defries vs. Creed*, Law Journal, new series, Vol. 34 Equity, p. 607, a suit was brought for dissolution of partnership and appointment of a receiver. After the suit was begun, and after a receiver had been nominated, in the Judge's Chambers, but before he was actually appointed by order, an execution was issued, and it was *held*—That the execution took effect ahead of the receivership, and that the receiver had no right to the property levied upon.

In *Maynard vs. Bond*, 67 Missouri, 315, the Court held: That the title of the Receiver was as of the date of the order directing his appointment. He is spoken of as the hand of the Court and the property or funds entrusted to his care is regarded as in *custodia legis*, and his appointment an equitable execution. (See High on Receivers, Sections 1 and 2).

In *Steele vs. Sturgis*, 5 Abbott's Prac. Rep. 442, it was held: That the title to the property vested in the Receiver from the date of his appointment.

In *Smith vs. Nursery & Seed Co.*, 109 Iowa, 51,

the stockholders applied for the appointment of a Receiver of the Company, and an injunction was issued enjoining the Company from disposing of its property. Thereafter, and before the appointment of the Receiver, attachments were levied on the property of the Company. The Court held that the attachments were entitled to priority, and that the title and right to dispose were not affected by the application for the Receiver, but continued at least until the making of the order of appointment. Citing *Cook vs. Cole*, 55 Iowa, 72; *Thompson on Corporations*, Section 6919; 20 Am. & English Enc. of Law, 132.

In *Matter of Lewis & Fowler Mfg. Co.*, 89 Hun. 209, creditors obtained a judgment against the Company on January 21st, and execution was issued and levied on the same day. Their suit had been begun on Jan. 12, and on the 18th a demurrer was served on behalf of the Company. On Jan. 21st the demurrer was over-ruled as fraudulent and the judgment entered. On Jan. 18th a petition for the voluntary dissolution of the Company was presented to the Supreme Court, and on the next day the order to show cause was issued, with injunction, and a temporary receiver was also appointed, but his bond was not filed until Jan. 22nd. It was held that the interposition of the demurrer was a fraud upon the plaintiffs and upon the due administration of justice, and that the Receiver took title to the property subject to the lien of the judgment of plaintiffs, who should have same paid out of the property before any right of the receiver attached.

In *Rich vs. Loutrell*, 18 Howard's Practice, 121; 9 Abbott's Prac. 356, it was held—That where in an action to dissolve a partnership a receiver is appointed, and a judgment has been entered, and execution issued on the property after the suit for dissolution was begun, and motion for Receivership

made, and an order of reference made to appoint a receiver, but before his actual appointment, the judgment and execution have priority, and the Receiver will be required to first pay the amount of the execution out of the property in his possession.

In *re Atlas Insurance Co.*, 26 Barbour, 55, suit was brought against insolvent corporation for receiver; order to show cause was issued on March 5, 1856; on March 11, 1856, order was entered that receiver be appointed and it was referred to a referee to appoint the receiver and take the security; it was held that the *estate of the corporation rested in him so as to prevent liens of judgments at the time of the entry of the order directing that a receiver should be appointed.*

In *Van Alstyne vs. Cook*, 25 N. Y. 489. A bill in equity was filed for the dissolution of a special partnership and the appointment of a receiver and to distribute the assets among the creditors, in which action an injunction was obtained and a receiver appointed. After the commencement of the equity suit but before the appointment of the receiver a judgment was recovered by a creditor and a levy made. Held that the judgment took precedence, that the equity court did not take possession of the assets till the order appointing the receiver was made, that the assets do not become trust funds till the court has taken possession of them by its receiver.

In *Matter of Muchfeld, etc., Piano Co.*, 12 App. Div. (N. Y.) 492. A judgment was entered and execution issued against an insolvent corporation after a proceeding had been begun and an order to show cause issued (for in this proceeding there must always be such order to show cause) for dissolution and appointment of a receiver, but before the receiver was appointed. Held that the creditor was entitled to hold the property levied upon as against the receiver and had priority.

In *Doane vs. Millville Co.*, 16 Stew., 522, upon

which the receiver relied, and which was unanimously reversed by this Court, 18 Stew., 274, the order to show cause expressly restrained the defendant from exercising its privileges and franchises, which is the restraint contemplated by Section 65 of the Corporation Act. This may have led the Vice Chancellor into the error of assuming that the summary hearing required by the Act had been held. In the case at bar, all of the following requisites found in Section 65 to authorize the Court to take control were wanting:

1. There was no summary hearing.
2. There were no proofs. The other party was not present.
3. The Court did not find the defendant insolvent.
4. The Court did not issue any "injunction to restrain the corporation and its officers or agents from exercising any of its privileges or franchises."

III.

That Petitioner's judgment is entitled to priority is clearly shown by the decisions of our courts and those of other States.

We have already shown in the previous points that the assets of an insolvent corporation are not a trust fund for creditors until the receiver has been appointed or the decree of insolvency entered.

The following decisions have held that where the judgment is entered after the order to show cause, but before the appointment of receiver or decree of insolvency, the judgment creditor is entitled to priority.

The case of *Doane vs. Millville Insurance Com-*

pany, 16 Stew., 522, upon which the receiver relied in the court below, was unanimously reversed by the Court of Errors in 18 Stew. 274. Moreover, in that case the order to show cause restrained the company from exercising its franchises, or performing any duties whatever thereunder, not merely from disposing of its assets. Moreover it was an insurance Company incorporated apparently under special act.

Against this case we have the learned opinion of Chancellor Runyon in *Minchon vs. Second National Bank of Paterson*, 9 Stew., 436, which has never been reversed or overruled. In that case a bill was filed against a foreign corporation doing business here, under the provision of the Corporation Act that foreign corporations doing business in the State should be subject to all the provisions of the Act so far as they could be applied to such corporations (p. 440). Therefore, it made no difference that the Company was a foreign corporation, so far as the question here to be determined is concerned.

After the filing of the bill and the issuance of the injunction against the corporation, but before the appointment of a receiver a creditor levied an attachment against the property of the Company. The Court held that the lien under the attachment was entitled to preference as against the receiver. The lien of an attachment would have the same effect as the lien of a judgment. The Chancellor said:

“The mere filing of a bill in such case, does not divest the Company of its property. The appointment of a Receiver under the statute, operates as a transfer, said Chancellor Halsted, in *Corrigan v. Trenton Del. Falls Co.*, 3 Hal. Ch., 489, 496, “The statute and the appointment of receivers under it are a conveyance or transfer of all

the property of the insolvent Company to the receivers for the benefit of the creditors of the Company, to be distributed in the mode pointed out by the statute." See, also, to the same effect *Freeholders of Middlesex vs. State Bank at New Brunswick*, 2 Stew. Eq., 268, 274.

"In the matter of Waterbury, 8 Paige, 380, it was held that where a creditor of a corporation, by legal diligence, and without any voluntary assistance from the corporation or its officers, obtained a legal lien on its real or personal estate by judgment, or the levying of an execution, before the order of the Court was obtained for the appointment of a receiver and the dissolution of the corporation, he could not be deprived of the preference he had thus acquired. In the case in hand, the filing of the bill of course did not prevent the corporation from removing its property out of the jurisdiction, and so beyond the reach of its creditors here. And how were such creditors to know that the bill had been filed? Are the creditors in such cases required to wait before taking steps to secure a lien on the property, until they can ascertain by search of the files of this Court, whether a bill has been filed in insolvency against the corporation? Or, are they at liberty to proceed at law with what dispatch they may, to secure a lien on the property? Surely the latter. And having obtained the lien, they are entitled to the benefit of their diligence."

In *Woodland vs. Fuller*, 11 Ad. & Ellis, 859, judgment was entered, and execution delivered to the sheriff. On the same day but later, an assignee of the defendant was appointed in an insolvency proceeding who took possession of property.

Afterwards the sheriff seized it under the execution. It was held that the sheriff's execution had priority, because the execution was delivered to him before the insolvent's assignee was actually appointed, and the assignee was not a bona fide purchaser for value.

The case of the *Matter of Waterbury*, 8 Paige, 380, opinion by Chancellor Walworth, is exactly in point with the one at bar.

In this case a judgment was obtained in a regular way against the Company after the presenting of a petition for a receiver and dissolution of the corporation, and issuance of an order to show cause, but before the actual appointment of the Receiver and decree of insolvency. It was held, that the lien of the judgment was valid, and came in ahead of the general creditors.

The Chancellor said, at page 383:

"I think, however, the Vice Chancellor erred, if he supposed this provision, as to the distribution of the fund in the hands of the receiver, was intended to divest the lien which any creditor had previously obtained upon any part of the personal estate of the corporation. So far as respects judgments voluntarily confessed after the commencement of the proceedings for a dissolution, I have before stated they cannot create a valid lien either upon the real or personal estate, as to the receivers or creditors generally. But if any creditor had acquired a specific lien upon the personal estate of the corporation, by virtue of a valid judgment and execution, which execution had been levied upon the property before the order for the dissolution of the corporation, I think this court has no power to divest that lien, and to take the property out of the hands of the sheriff, for the purpose of giving it to the

receiver discharged of the lien. The statute, to a certain extent, has protected the corporate funds, for the equal benefit of all the creditors, from the time of presenting the petition for a dissolution. But as it has not given to this Court any control over the property until the coming in of the Master's Report, and the dissolution of the corporation, if any creditor by his legal diligence, and without any voluntary assistance from the corporation or its officers, is able to get a lien either upon the real or personal estate in the mean time, I think it would be an assumption of a power which the legislature has not given to this Court, to deprive him of preference which he has thus acquired."

In *Whitner vs. Universal Life Insurance Company*, 4 Abb. New Cases 23, Plaintiff sued an insurance company. The Company answered that it could not pay the money due, because it was restrained in proceedings to wind it up for insolvency from paying out any moneys except salaries of employees. Held: Insufficient as against plaintiff, since he could not be enjoined from collecting a just debt, and a receiver had not yet been appointed, pending the application to wind up the affairs of a company the court could not stay proceedings by creditors. Judgment was given for plaintiff.

In *Cook on Corporations*, Fourth edition, Section 871, p. 2049, it is stated that in insolvency proceedings the receivership takes effect from the date of the order of appointment.

To the same effect, *Connecticut River Banking Company vs. Rockbridge Company*, 73 Fed., 709.

To the same effect, *Beverley vs. Brooke*, 4 Grat., 187, Also, High on Receivers Section 4.

IV.

Reason and Justice demand that Petitioner should have priority in the payment of its judgment.

If the law were as the receiver contends, conditions would be intolerable in this state so far as doing business with corporations is concerned.

In the case of *Minchon vs. Second National Bank*, supra, months intervened between the filing of the bill and the issuance of the injunction and appointment of receiver.

In *Hoopec vs. Basic Company*, supra, the bill was filed and order to show cause issued in April, 1905, and it was not finally decided by the Court of Errors as to whether a receiver should be appointed until the last term of the Court of Errors. In the mean time, what is the situation of the Company? Must persons contract with it under the proviso that if a receiver is finally appointed his title will relate back to the filing of the order to show cause? If so, bills might be filed by persons friendly to a corporation so as to keep it immune for the time being, just as was done in the case at bar, the attorney for the defendant appearing as the solicitor for the complainant in the equity suit.

The reasons given by the receiver why the law should be as he contends, seem hardly serious. There is never sufficient time between the issuance of the order to show cause and the return thereof to get to judgment in a suit. Some definite time must be fixed which does not depend upon a contingency. The time is the appointment of the receiver as provided by Section 68, and not such a time as antedates something which may never happen.

If we follow the receiver's reasoning to its conclusion, what would occur if the sheriff seized and

sold the assets levied on before the appointment of the receiver? Could the receiver, who was not appointed at the time, sue to obtain them? Could the Court of Chancery interfere by injunction when it had not decreed the Company insolvent or appointed a receiver? Ample provision is made by the Corporation Law for dealing with the situation in an emergency. Section 65 of the Corporation Act, permits the Court of Chancery to proceed in a summary way to hear the affidavits and proofs without notice, and issue an injunction restraining the corporation from exercising any of its privileges or franchises and to appoint a receiver. If there is any danger of the assets being dissipated to any extent the statute itself has provided a course to be pursued to obtain immediate injunction and receiver. If that course was not followed in this suit, the receiver cannot complain. The remedy was there but not used. In this case the order to show cause did not enjoin the corporation from exercising its franchises but merely from disposing of its property.

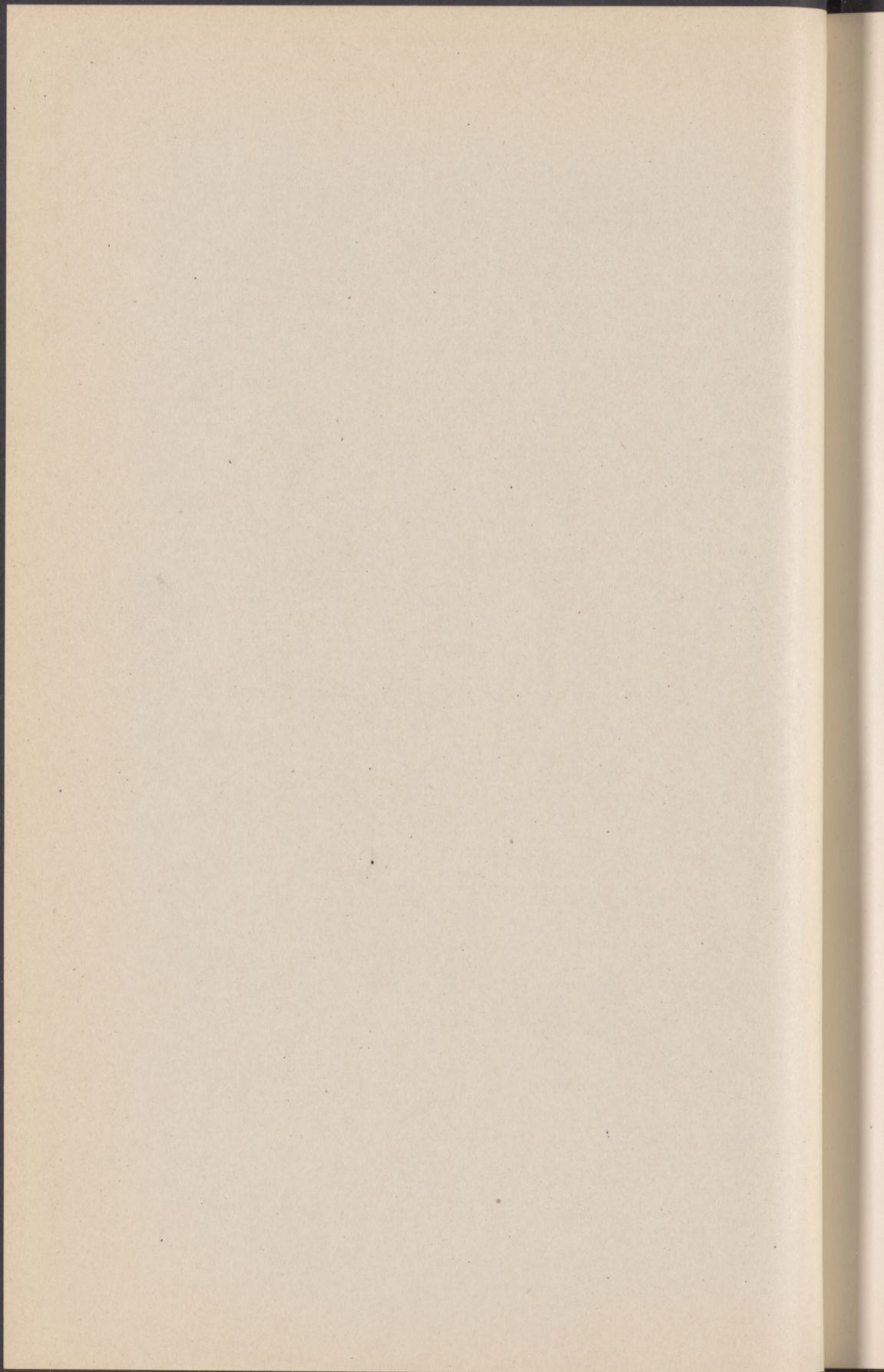
The Court, therefore, did not take control of the assets but merely preserved the status.

It is respectfully submitted that the order appealed from should be reversed and that the petitioner should receive priority in the payment of its judgment.

Respectfully submitted,

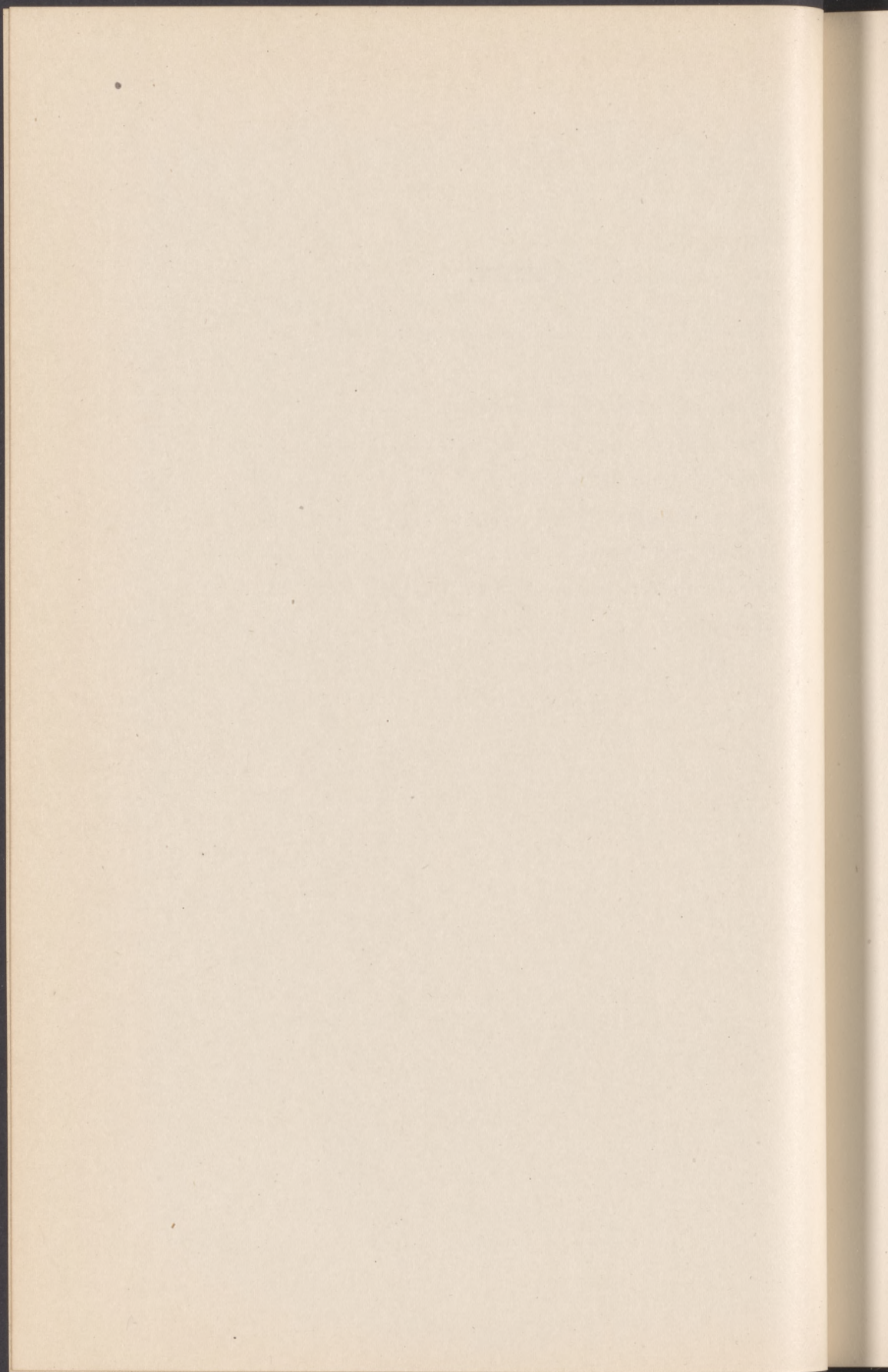
GEO. WHITEFIELD BETTS, JR.,
Solicitor and Counsel for Petitioner,
Westinghouse Electric & Manufacturing Co.

Dated, March 8, 1907.



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Petition to Receiver for Priority in Payment. Filed June 9, 1906.

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM A. SQUIER,
Complainant,

and

PRINCETON LIGHTING COMPANY,
Defendant.

10

The petition of the Westinghouse Electric and Manufacturing Company respectfully shows to the receiver as follows:

20

First: That on the twelfth day of April, nineteen hundred and four, your petitioner recovered a judgment against the defendant herein in the Mercer County Circuit Court for Four thousand, four hundred and eighty-seven dollars and fourteen cents, the Court having stricken out the pleas entered by the defendant, and holding that the defendant had no defense in the suit. Thereupon, and before the appointment of the receiver herein, execution was duly issued to the sheriff of Mercer County, and on April thirteenth, nineteen hundred and four, he made a levy upon all the real and personal property of the defendant, including the coal, tar, coke, tools on hand, office furniture, machinery, contents of the power house and gas plant and other property; to wit, upon sufficient personal property not covered by the mortgages to satisfy said judgment.

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Second: That on the eleventh day of April, nine-

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teen hundred and four, an order to show cause herein was entered returnable on April nineteenth, nineteen hundred and four, why an injunction should not issue and a receiver be appointed to take charge of the property of defendant pursuant to the statutes.

That on the nineteenth day of April, nineteen hundred and four, Richard Stockton was appointed receiver under such statute.

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Third: That before April nineteenth, nineteen hundred and four, said receiver had no title or possession of any of said property of defendant, and his title did not relate back to the filing of the bill.

20

That there is now due and unpaid on said judgment the sum of Three thousand and seventy-one dollars and sixty-nine cents with interest from July thirteen, nineteen hundred and four, for which amount the petitioner claims a preference as a judgment creditor on the payment of the dividend herein.

GEORGE WHITEFIELD BETTS, JR.,
Solicitor and Counsel for Petitioner.

Westinghouse Electric & Manufacturing Co.,
By T. W. SIEMON,
Petitioner.

30

State of New York, }
County of New York. } ss.:

T. W. SIEMON, being duly sworn, deposes and says that he is the treasurer of the Westinghouse Electric & Manufacturing Company, the petitioner herein; that he has read the foregoing petition, and that the same is true to the best of his knowledge, information and belief.

T. W. SIEMON.

40

Sworn to and subscribed before me a

Notary Public duly sworn and commissioned and authorized to take affidavits and administer oaths in the County and State of New York on the 8th day of June, nineteen hundred and six.

Robert McLeod Jackson,
Notary Public,
New York County.

10

Rejection of Petition.

The above petition to receiver for priority in payment is endorsed on back as follows: The within claim for priority is rejected.

RICHARD STOCKTON,
Receiver Princeton Lighting Co. 20

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**Appeal from Receiver's Decision.
Filed, June 12, 1906.**

IN CHANCERY OF NEW JERSEY.

	Between	}
	WILLIAM A. SQUIER,	
	Complainant,	
10	and	
	PRINCETON LIGHTING COMPANY,	}
	Defendant.	

Sir:

PLEASE TAKE NOTICE, that the petitioner,
Westinghouse Electric and Manufacturing Com-
pany, appeals to the Chancellor from the action of
the Receiver of the defendant company in refusing
20 priority of payment on its judgment claimed
against the Princeton Lighting Company.

Dated June 12th, nineteen hundred and six.

Yours respectfully,

GEORGE WHITEFIELD BETTS JR.,
Solicitor for Petitioner.

To:

Richard Stockton, Esq.,
30 Receiver of Princeton Lighting Company.

Conclusions. Filed, July 20, 1906.

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM A. SQUIER,
Complainant,

and

PRINCETON LIGHTING COMPANY,
Defendant.

On Bill, Etc.

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Petition of judgment creditor for preference in payment.

Mr. George W. Betts, Jr., for Petitioner.

Mr. F. S. Katzenbach, Jr., for Receiver.

BERGEN, V. C.

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The Westinghouse Electric and Manufacturing Company having recovered a judgment against the defendant company, an insolvent corporation, demanded of the receiver that the judgment be paid in full, in preference to the general creditors, and the receiver not being in funds to satisfy all creditors in full, rejected the application, from which determination this appeal was taken. The facts which are not disputed, are, that on April 12th, 1904, the petitioner recovered a judgment against the defendant company, and by virtue of an execution issued thereon, the sheriff of the County of Mercer, on the following day, levied upon sufficient personal property to satisfy the judgment, which property was retained by the receiver, and used for the benefit of the estate of the corporation. The receiver does not question the right of the petitioner, to have so much of the funds in hand, as may be necessary for that purpose, applied towards the satisfaction of the judgment, if it be decreed that

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its lien was so established as to entitle it to priority in payment. On April 11th, 1904, two days before the levy was made, the bill of complaint was filed in this cause alleging the insolvency of the corporation, praying for the appointment of a receiver, and on the same day an order was made by this court restraining the defendant from paying, or transferring its money and effects, or contracting any debts, and from selling, assigning or
 10 transferring its property, and also requiring the defendant to show cause, on April 19th following, why an injunction should not issue, and a receiver be appointed, and on the day last mentioned an order was made appointing a receiver with the usual injunctive restraint.

The appellant insists that until the receiver was appointed, the title to the property remained in the corporation subject to levy, and having perfected its lien previous to the appointment, it is entitled
 20 to the proceeds of its levy, at the expense of the general creditors. The receiver contends that from the making of the original restraining order the property was in the hands of the Court, awaiting the appointment of its receiver to administer the assets, as a trust fund for the benefit of all creditors, and that thereafter no priority could be obtained by any creditor. The appellant urges that as Sec. 68 of the Corporation Act divests an
 30 insolvent corporation of the title to its property upon the appointment of a receiver, the corporation remains vested with it, by virtue of the Act, until such appointment, subject to the fastening of judgment liens thereon. I do not take this view of Sec. 68, but rather that it was intended to settle the question about which there seems to have been some judicial difference, as to the actual status of a receiver in his relations to the insolvent's property, and that in either case the holding of the bare title is not conclusive as to the rights of the credi-
 40 tors, for this Court has ample power to protect the

property, which by its restraining order it has required the corporation to hold undisturbed, and to hold the property for the benefit of creditors, in whose behalf it is justified in interfering.

In this case, before the judgment was entered, the Court had issued its preliminary injunction, for its restraining order has that effect. To authorize the issuing of this preliminary injunction the court must find that the corporation was insolvent within the meaning of our act, this finding might be reversed upon the coming in of an answer, or upon satisfactory affidavits showing that its preliminary act was improvident, but until reversed it stands as the judgment of the court, and the postponement of the appointment of the receiver does not qualify it. The Court could have appointed the receiver when the preliminary injunction was allowed, that it did not do so at once does not prevent the operation of its restraining order. Having thus prevented the corporation from paying any of its general creditors it seems inequitable to permit to be done by indirection, that which the corporation is directly restrained from doing. I am of the opinion that the moment this Court determines a corporation to be insolvent and restrains it from disposing of its property, it, in effect, takes possession of it as a trust fund for the benefit of all its creditors, and the mere fact that it has not appointed its agent to administer the property does not permit one, who at that time was a general creditor, to obtain an advantage over others who were then of like degree. The declaration of insolvency by the Court, and the issuing of its restraining order, prevented the payment of this creditor before judgment was entered, and if paid in violation of the order, the creditor would have been required to refund. To allow the present claim amounts to a payment, out of the funds of the corporation, which the corporation itself was forbidden to make before the judgment

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had been recovered. My conclusion is, that under our Corporation Act, and according to the view expressed by our Courts, the property of an insolvent corporation is a trust fund to be administered for the equal benefits of its creditors, and the trust cannot be encroached upon by a creditor, whose diligence falls short of obtaining a lien before the Court has determined that insolvency exists, and by its restraining has taken control of the disposition of the property of the insolvent corporation.

10 The priority claimed by the appellant does not exist and the appeal will be dismissed with costs.

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Order Denying Preference.
Filed July 25, 1906.

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM A. SQUIER,
 Complainant,
 and

THE PRINCETON LIGHTING COM-
 PANY,
 Defendant.

On Bill, &c.,
 On Petition of
 Judgment
 Creditor for 10
 Preference.
 Order.

This matter being opened to the Court by George W. Betts Jr., solicitor for the petitioner, The Westinghouse Electric and Manufacturing Company, and the receiver of the Princeton Lighting Company, the defendant having been heard through Frank S. Katzenbach, Jr., his solicitor, and it appearing to the Court that the receiver had rejected the claim of the said petitioner for preference and that the said petitioner had appealed from the decision of the said receiver and the Court having heard argument upon the said question of preference and having considered the same, 20

It is, on this twenty-fourth day of July, Nineteen Hundred and Six,

ORDERED, that the appeal of the said Petitioner, the Westinghouse Electric and Manufacturing Company from the decision of the said Receiver as aforesaid, be dismissed with costs. 30

W. J. MAGIE, C.

Respectfully advised,

J. J. BERGEN, V. C.

Notice of Appeal. Filed July 31, 1906.

IN CHANCERY OF NEW JERSEY.

Between WILLIAM A. SQUIER, Complainant, and 10 PRINCETON LIGHTING COMPANY, Defendant.	}	On Bill, &c. Notice of appeal.
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20 The petitioner, Westinghouse Electric and Manufacturing Company, hereby appeals to the Court of Errors and Appeals in the last resort in all causes, from the order made by this Court dated July twenty-fourth, nineteen hundred and six, and entered on or about July twenty-sixth, nineteen hundred and six, dismissing with costs the appeal of petitioner from the decision of the receiver of defendant, Richard Stockton, rejecting the claim of the petitioner for preference on its judgment against defendant.

GEO. WHITEFIELD BETTS JR.,
 Solicitor and counsel for petitioner,
 Westinghouse Electric and Manufacturing Company.

30 Dated, July 28, 1906.

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

GEO. WHITEFIELD BETTS JR.,
 Of Counsel with petitioner.

Petition on Appeal. Filed July 31, 1906.
IN THE COURT OF ERRORS AND APPEALS.

Between

WILLIAM A. SQUIER,
 Complainant,

and

PRINCETON LIGHTING COMPANY,
 Defendant.

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To the Honorable the Court of Errors and Appeals, in the Last Resort in all causes:

The petition of Westinghouse Electric & Manufacturing Company, the petitioner appellant in the above stated cause, respectfully shows that your petitioner finds itself aggrieved by an order made in the Court of Chancery by the Chancellor, advised by the Vice Chancellor, James J. Bergen, bearing date the twenty-fourth day of July, nineteen hundred and six, and entered on or about the twenty-sixth day of July, nineteen hundred and six, wherein the said Westinghouse Electric & Manufacturing Company filed a petition with Richard Stockton, receiver of the defendant, claiming a preference in payment, on its judgment for three thousand seventy-one dollars and sixty-nine cents, against the defendant, which petition was denied by said receiver in this respect, to wit, that the said order adjudges and directs that the appeal of the above petitioner from the decision of the receiver, rejecting the said claim for preference, be dismissed with costs, and deciding that petitioner has no valid claim for preference on said judgment.

And your petitioner humbly appeals from all of said order which decrees and orders, as aforesaid,

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upon the ground that the same is erroneous, for that said receiver should have decided and the Court of Chancery should have decreed that the petitioner, Westinghouse Electric & Manufacturing Company was entitled to preference in payment of its claim on said judgment, over the general creditors of defendant, and that said decision of the receiver should have been reversed by the said Court, and that the relief prayed for in the petition should be granted.

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Your petitioner therefore prays that the said order of said Court of Chancery may be in the particulars aforesaid, reversed, set aside and for nothing holden, and your petitioner decreed to have preference; and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

GEORGE WHITEFIELD BETTS, JR.,

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Solicitor and Counsel for petitioner,
Westinghouse Electric and Manufacturing Company.

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Answer to Petition on Appeal.
Filed, October 24, 1906.

NEW JERSEY COURT OF ERRORS AND
 APPEALS.

Between

WILLIAM A. SQUIER,
 Complainant,

and

PRINCETON LIGHTING COMPANY,
 Defendant.

On Appeal.
 Answer.

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The answer of Richard Stockton, receiver of the Princeton Lighting Company, to the petition of appeal of the Westinghouse Electric and Manufacturing Company.

Richard Stockton, receiver as aforesaid, not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, says and admits, that an order was on the twenty-sixth day of July, nineteen hundred and six, made and entered in the Court of Chancery in the above stated cause for the purpose mentioned in the said petition of appeal, as is therein stated; but as to the substance and form thereof, Richard Stockton, receiver as aforesaid, prays to refer thereto when the same shall be produced,

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And the said Richard Stockton, receiver as aforesaid, is advised and believes that the said order is agreeable to equity and he prays that the same may be affirmed, with costs to be adjudged to him.

FRANK S. KATZENBACH, JR.,

Solicitor for and of counsel with Richard Stockton, Receiver of the Princeton Lighting Company.

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Stipulation.

IN THE COURT OF ERRORS AND APPEALS.

	Between	}
	WILLIAM A. SQUIRE,	
	Complainant,	
	and	
10	PRINCETON LIGHTING COMPANY,	}
	Defendant.	

IT IS STIPULATED by and between the parties hereto that the foregoing shall be the state of the case on appeal herein, and that the facts stated in the opinion of Vice Chancellor Bergen and the petition of Westinghouse Electric and Manufacturing Company are the facts agreed upon for the argument of the cause.

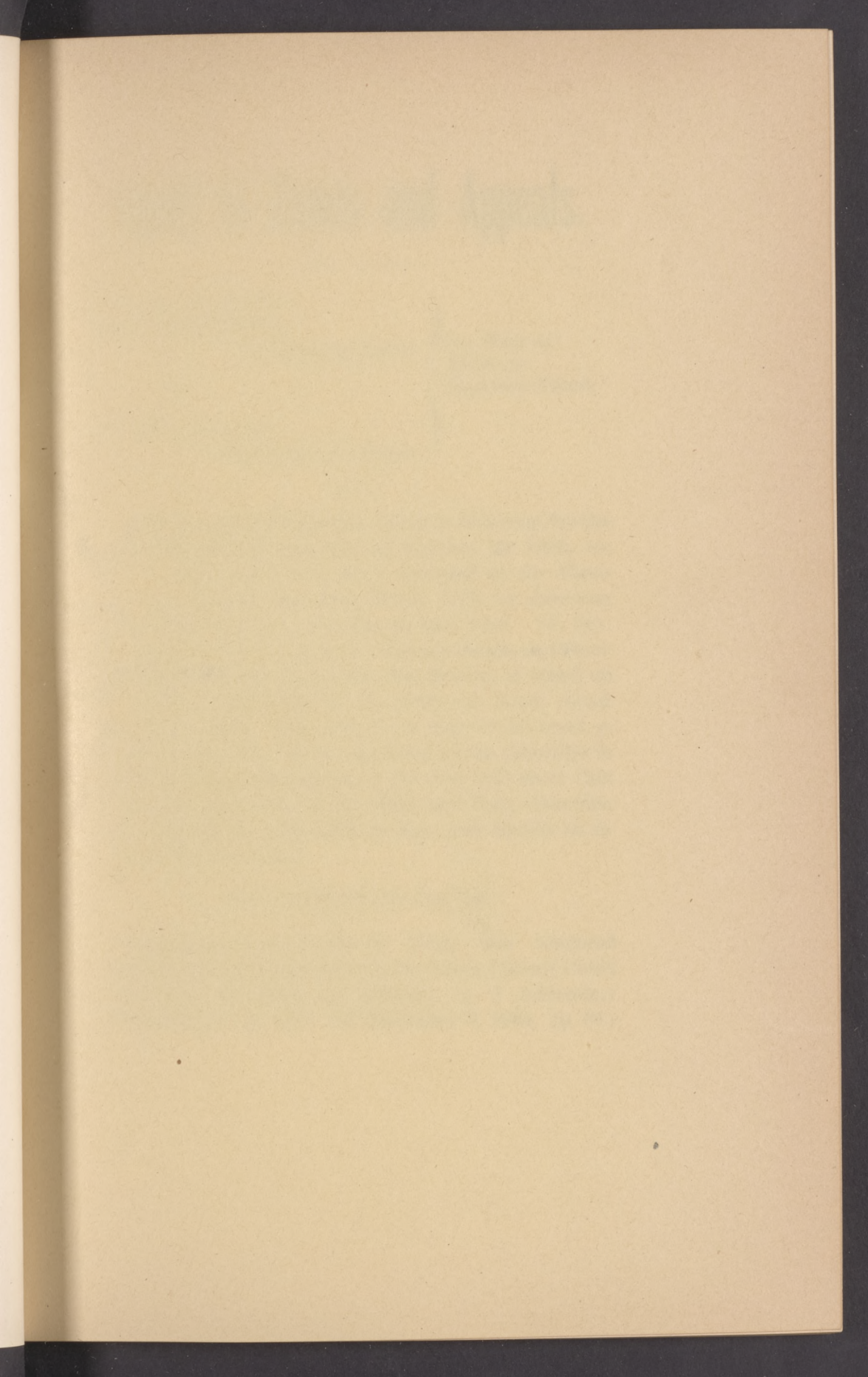
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GEO. WHITEFIELD BETTS, JR.,
Solicitor and counsel for petitioner
Westinghouse Electric and Manufacturing Company.

FRANK S. KATZENBACH, JR.,
Solicitor for and of counsel with
Richard Stockton, Receiver of
Princeton Lighting Company.

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APPENDIX

THE HISTORY OF THE CITY OF BOSTON

FROM THE FIRST SETTLEMENT TO THE PRESENT TIME

BY SAMUEL JOHNSON

IN TWO VOLUMES

VOLUME THE SECOND

LONDON: PRINTED BY J. JOHNSON, ST. PAUL'S CHURCH-YARD, 1790

THE HISTORY OF THE CITY OF BOSTON, FROM THE FIRST SETTLEMENT TO THE PRESENT TIME, BY SAMUEL JOHNSON, IN TWO VOLUMES, VOLUME THE SECOND, LONDON: PRINTED BY J. JOHNSON, ST. PAUL'S CHURCH-YARD, 1790.

THE WATERFORD BETTS

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