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REMITTITUR.

Filed June 10, 1930.

New Jersey Court of Errors and Appeals

No. 51, October Term, 1929.

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LINCOLN MATERIALS COMPANY,
INC.,

Complainant,

and

GOODWIN CONSTRUCTION COM-
PANY,

Defendant.

*On Appeal
of Newark
Holding
Company
Mortgagee.
Remittitur.*

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This cause being brought to a hearing on the appeal from the Court of Chancery by Newark Holding Company from an order made in the Court of Chancery on the 23rd day of May, 1929, in the above-entitled cause, settling priorities and ordering distribution and Merritt Lane, Esq., of counsel with appellant Newark Holding Company, and Joseph Steiner, Esq., of counsel with the receiver, and Saul Tischler, Esq., of counsel with Levy Brothers Co., Inc., having been heard and the questions brought up by said appeal having been duly considered:

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It is, on this 19th day of May, 1930, ORDERED, ADJUDGED and DECREED that the finding and determination of the Court of Chancery that the mortgage of the Newark Holding Company is a valid and subsisting lien for the amount as indicated in the receiver's report, and the determination of said court that the mortgage was not recorded before building operations actually

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Remittitur.

commenced and that it was not entitled to priority to the extent of \$5,000 as a purchase money mortgage be approved; and that the proofs before the receiver were not sufficient for a determination as to how much of the moneys which were the consideration for said mortgage
 10 went into the actual construction of the building, all as will appear in the opinion of the Court filed herein.

And it is further ORDERED, ADJUDGED and DECREED that the record be remitted to the Court of Chancery for the taking of further proofs as to the matter aforesaid and as to the validity and priority of the lien claims upon which the proofs are not clear, and the making of a decree not inconsistent with the opinion filed herein.

20 On motion of

JACOB W. SILVERMAN,
 Solicitor of Appellant.
 Newark Holding Company.

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PETITION.

Filed July 15, 1930.

In Chancery of New Jersey

To the Honorable Edwin Robert Walker, Chan- 10
cellor of the State of New Jersey.

The petition of Walter K. Sherwood respectfully shows to the Court:

1. That on the 30th day of March, 1926, your petitioner was appointed Receiver of Goodwin Construction Company and is still acting as such.

2. That Final Decree of Distribution in this cause was made and entered the 23rd day of May, 1929. 20

3. That said Order among other things provided first for the payment of accrued interest on the first mortgage held by one Samuel Werbel and second, the payment of the full amount of claims to a group of lien claimants in said Order more particularly described, and third the payment of a mortgage held by Newark Holding Company and thereafter the payment of claims of general creditors. 30

4. That there was proved before the receiver and allowed as a claim but as a claim subsequent to the claims of twelve mechanic lienors said mortgage held by Newark Holding Company which mortgage was in the sum of \$15,000.00 and which mortgage with interest to the date of the appointment of a receiver amounted to \$16,082.50.

5. That an appeal was taken from the decree of the Court of Chancery on the Final Order of 40

Petition.

Distribution, as made by this Honorable Court, to the New Jersey Court of Errors and Appeals, said appeal being taken by the Newark Holding Company and being based largely and entirely on the finding of the Court of Chancery that the
 10 Company was inferior to the claims of the said lien claimants, whereas the Newark Holding Company insisted that its mortgage should have had priority.

6. That the said appeal came duly on to be heard in the New Jersey Court of Errors and Appeals and the said case was decided May 9, 1930, in an opinion filed by Honorable Joseph Bodine, Justice of the said court, said decision
 20 being recorded in 106 New Jersey Equity, page 326.

7. Under and pursuant to the opinion filed in the said cause it would seem that the Court of Errors and Appeals is desirous of having further testimony taken in the Court of Chancery as is indicated in said opinion.

8. Your receiver is in receipt of a letter from the solicitor representing the Newark Holding Company which reads as follows:

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“July 9th, 1930.

Joseph Steiner, Esq.,
 790 Broad St.,
 Newark, N. J.

Re: Lincoln Materials Co., Inc.
vs. Goodwin Construction Co.

Dear Sir:

I represent Newark Holding Co., one of
 40 the mortgagagees in the above proceedings.

Petition.

No doubt you have received a copy of the opinion of the Court of Errors and Appeals, concerning the appeal recently filed by my client. Among other things the Appellate Court orders that the matter go back for further proofs as to the moneys actually advanced for the construction of the building. There can be absolutely no doubt in any one's mind that we can very easily prove this. All parties may then encounter appeals, cross appeals, additional testimony, and the like, which will eventually not only tend to devitalize the litigants, but also eat up the estate and prolong the winding up of same ad infinitum. 10

For the sake of a speedy disposition I am willing to waive all interest, all costs, all counsel fees, and all other items, and settle all claims and liens of my client, Newark Holding Co., for the sum of \$5,000.00, provided, however, that such offer is acted upon with due expedition. 20

This offer and the contents of this letter are of course written entirely without prejudice to the interests of my client, and solely for the purpose of compromising the matters in dispute between the parties to the above proceedings. 30

Very truly yours,
JACOB W. SILVERMAN''.

9. Your petitioner as receiver is of the opinion that the offer possesses sufficient merit to require the same to be submitted to the creditors and stockholders of the defunct corporation.

10. Your petitioner accordingly prays that an order may issue requiring all of the creditors 40

Petition.

who have filed and proved claims in this matter to show cause why an order should not be made authorizing the receiver to accept said offer and to pay the said Newark Holding Company the sum of \$5,000.00 in full settlement of its claim, the balance of the monies then remaining in the
 10 hands of the receiver to be distributed in accordance with the provisions of the Final Order of Distribution made by this Court subject to such further order as the Court may still make in the premises and that upon distributing the fund remaining in his hands in accordance with the terms of the order to be made on the return of the rule to show cause herein sought, said receiver be discharged from his bond and his bond be cancelled.

20 11. Petitioner also prays that at the same time a further allowance be made to him and to his solicitor for services rendered in this estate since the making of the last allowance to this petitioner and his solicitor.

And your petitioner will ever pray, etc.

WALTER K. SHERWOOD,
 Petitioner.

30 JOSEPH STEINER,
 Solicitor for and of Counsel
 with Petitioner.

ORDER TO SHOW CAUSE.

Filed July 15, 1930.

IN CHANCERY OF NEW JERSEY.

This matter being opened to the Court by Joseph Steiner, solicitor for and of counsel with Walter K. Sherwood, and it being made to appear to the Court that the receiver in this cause is in receipt of an offer by way of compromise and settlement made by counsel for Newark Holding Company and good cause being shown, it is on this 15th day of July, 1930, 10

ORDERED, ADJUDGED and DECREED that the creditors who have heretofore filed claims in this matter show cause before the Chancellor at the Chancery Chambers, 1060 Broad street, Newark, New Jersey, on the 22nd day of July, 1930, at the hour of 10 A. M., why an order should not be made instructing the receiver to accept said offer and to pay forthwith from the monies in his hands the sum of \$5,000.00 to the Newark Holding Company in accordance with the terms in said offer set forth and that after the payment of said money, subject to any further order of this Court, that the order and amount of distribution to the creditors in this cause be as fixed and determined in the order of this Court heretofore made and dated the 23rd day of May, 1929, and that upon the distribution being made in that manner and the filing of a statement in accordance with the practice of this Court, that the receiver be thereupon discharged from his bond, and it is further 20 30

ORDERED that the said creditors and all persons in interest show cause at the same time why an order should not be made fixing and 40

Order to Show Cause.

determining the supplemental fees and allowances of the receiver in the administration of his trust and fixing and determining the supplemental fees and allowances of his attorney, and it is further

10 ORDERED that true copies of this order and the petition upon which the same is based, which need not be certified except by the solicitor of the petitioner, be served upon all claimants who have filed claims or upon their attorneys or solicitors who have appeared for them, either personally or by mailing a copy thereof to their post office addresses within five days from the date hereof.

E. R. WALKER,
C.

20 Respectfully advised,

ALONZO CHURCH,
V.-C.

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FINAL DECREE.

Filed July 28, 1930.

IN CHANCERY OF NEW JERSEY.

This matter being opened to the Court by Joseph Steiner, solicitor for and of counsel with Walter K. Sherwood, receiver, in the presence of counsel representing creditors and other persons in interest, and it being made to appear to the Court that an order to show cause was made July 15th returnable July 22nd, requiring all persons in interest to show cause why a certain offer of compromise and settlement in connection with a certain mortgage held by Newark Holding Company should not be accepted by the receiver, and good cause being shown, and it further appearing to the Court that the receiver and his solicitor are entitled to further allowances for services rendered in this cause since allowances were last made, now after hearing counsel, it is on this 28th day of July, 1930,

ORDERED, ADJUDGED and DECREED that an allowance of \$750.00 be and the same hereby is awarded to Walter K. Sherwood, receiver and an allowance of \$2,500 and the same hereby is awarded to Joseph Steiner, solicitor for and of counsel with the receiver, for his services rendered since allowances were last made, and it is further

ORDERED, ADJUDGED and DECREED that there be paid to Newark Holding Company the sum of \$5,000 in settlement of all claims of any nature, kind or description alleged to be held by said Newark Holding Company against the estate of Goodwin Construction Company and it is further

Final Decree.

ORDERED, ADJUDGED and DECREED that upon payment of the said sum of \$5,000 the said mortgage of Newark Holding Company be surrendered to the receiver duly receipted for cancellation; and it is further

- 10 ORDERED, ADJUDGED and DECREED that the balance of moneys in the receiver's hands after the payment of the sums hereinabove provided for be distributed upon and according to the provisions of the order of distribution made in this cause and dated the 23rd day of May, 1929, and it is further

- 20 ORDERED, ADJUDGED and DECREED that upon the receiver filing a statement of his disbursements of the fund in his possession in accordance with the provisions of this order with the Clerk of the Court of Chancery, that the receiver be discharged of his bond and the bond be and the same hereby is deemed at that time to be cancelled and discharged.

E. R. WALKER,
C.

Respectfully advised,
ALONZO CHURCH,
V.-C.

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NOTICE OF APPEAL.

Filed September 20, 1930.

IN CHANCERY OF NEW JERSEY.

Sat below, A. Church, V.-C.

PLEASE TAKE NOTICE that John R. Blair Company, Inc., appeals from the whole and every part thereof of the order made in this court, in the above-entitled cause, on July 28, 1930, to the New Jersey Court of Errors and Appeals in the last resort in all causes.

KEATING & KEATING,
Solicitors of John R. Blair Company, Inc.

Dated July 31, 1930.

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

M. FRANCIS KEATING,
Of counsel with John R. Blair Company, Inc.

To: Joseph Steiner, Esq., solicitor for Walter K. Sherwood, receiver.

Saul & Joseph E. Cohn, Esqs., solicitors for Samuel Werbel.

Merritt Lane, Esq., solicitor for Newark Holding Company.

Levy, Fenster & McCloskey, Esqs., solicitors for Levy Brothers.

David Silver, Esq., solicitor for Max Chopik.

John Larkin Hughes, Esq., solicitor for Passaic-Bergen Lumber Co.

Notice of Appeal.

Klein & Klein, Esqs., solicitors for Nathan Cohen and Isaac Ginsburg.

Hobart & Minard, Esqs., solicitors for Consolidated Metals Co.

Kearns & Bruder, Esqs., solocitors for Myer-Bez Stone Co.

10 Stickel & Stickel, Esqs., solicitors for Pierce, Butler & Pierce.

Wall, Haight, Carey & Hartpence, Esqs., solicitors for Sterling Engineering Co.

Louis Press, Esq., solicitor for S. Rabinowitz Iron Works.

Max Krueger, Esq., solicitor for Henry R. Isenberg Co.

20 Heyman & Heyman, Esqs., solicitors for Montgomery Plumbing Supply Co., assignee of Louis Schrennell.

William Wackenhuth, Esq., solicitor for Commercial Casualty Co.

Osborne, Cornish & Scheck, Esqs., solicitors for David Litter, receiver of Lincoln Materials Co.

PETITION OF APPEAL.

Filed September 20, 1930.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

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

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The petition of John R. Blair Company, Inc., the appellant in the above-entitled cause, respectfully shows that:

1. Petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor, on the advice of the Honorable Alonzo Church, Vice-Chancellor, bearing date July 28, 1930, in a certain cause in said Court of Chancery wherein the said Lincoln Materials Co., Inc., was complainant, and Goodwin Construction Co., was defendant, in this respect, to wit:

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2. Prior to the entry of the final decree aforesaid, Newark Holding Company, one of the parties in interest in said cause, appealed to the New Jersey Court of Errors and Appeals, from the decree of the said Chancellor, dated May 23, 1929, contending that its mortgage claim was prior to the claims of mechanics' lien claimants, including the mechanics' lien claim of this appellant.

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3. On June 10, 1930, a remittitur from the New Jersey Court of Errors and Appeals was filed in this cause, in the aforesaid appeal of Newark Holding Company (No. 51, October, 1929 Term), wherein said New Jersey Court of Errors and Appeals found and decreed that the

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Petition of Appeal.

mortgage of Newark Holding Company was not recorded before building operations actually commenced, and further that it was not entitled to priority to the extent of \$5,000 as a purchase money mortgage, and further that the proofs were not sufficient for a determination as to
10 how much of the moneys which were the consideration for said mortgage went into the actual construction of the building.

4. Said remittitur further adjudged and decreed that the record be remitted to the Court of Chancery for the taking of further proofs as to the matter aforesaid, and as to the validity and priority of the lien claims upon which the proofs were not clear.

20 5. Notwithstanding the directions contained in said mandate of the Court of Errors and Appeals, the Court of Chancery, on July 22, 1930, issued an order to show cause why \$5,000 should not be paid to Newark Holding Company, in full satisfaction of its claims, and an order of distribution made in accordance with the prior order of distribution dated May 23, 1929.

30 6. On the return of said order to show cause, over the objections of this appellant, and without taking any further or additional testimony or proofs, the final decree of July 28, 1930 was entered, which decreed that there be paid to Newark Holding Company \$5,000 in settlement of all claims against Goodwin Construction Company.

7. Said final decree further decreed that balance of the moneys in the hands of the receiver be distributed in accordance with the prior order of distribution dated May 23, 1930.

Petition of Appeal.

8. Prior to the entry of said final decree of July 28, 1930, Walter K. Sherwood, receiver of the defendant corporation, had received an allowance of \$8,000.

9. No affidavit of services rendered or duties performed by said receiver, was filed, and to petitioner's knowledge no duties were performed by said receiver from the date said \$8,000 allowance was granted him, until July 28, 1930. 10

10. However, said final decree of July 28, 1930, allowed said receiver an additional fee of \$750.

11. Prior to the entry of said final decree, Joseph Steiner, the solicitor for the receiver, had received an allowance of \$6,000.

12. No affidavit of services rendered or duties performed by said solicitor, was filed, and to petitioner's knowledge, no duties were performed by him from the date of said \$6,000 allowance was granted him, until July 28, 1930, except the preparation and filing of two answering briefs, neither of which was argued orally. 20

13. However, said final decree of July 28, 1930, allowed said solicitor an additional fee of \$2,500.

14. Your petitioner humbly appeals from the whole of said final decree of July 28, 1930, upon the ground that the same is erroneous for that: 30

(a) The said Court of Chancery should have followed the mandate of the New Jersey Court of Errors and Appeals, and taken further testimony or proofs to determine what amount, if any, of the moneys which were the consideration of the mortgage of Newark Holding Company went into the actual construction of the building, and said Court should have made it's final 40

Petition of Appeal.

decree, based upon the testimony or proofs submitted.

10 (b) The said Court, also, should have taken further testimony or proofs to determine the validity and priority of the lien claims disputed by Newark Holding Company, and made its final decree, based upon the testimony or proofs submitted.

(c) Taking into consideration the services rendered by Walter K. Sherwood, receiver, as aforesaid, the \$750 additional fee allowed him was excessive.

20 (d) Taking into consideration the services rendered by Joseph Steiner, solicitor for the receiver, aforesaid, the \$2,500 additional fee allowed him was excessive.

Petitioner therefore prays that the said final decree of the said Chancellor may be wholly, or in some of the particulars aforesaid, reversed, set aside and for nothing holden, and that the petitioner may have such other relief in the premises as to this Court shall seem proper.

KEATING & KEATING,
Solicitors for Appellant John R.
Blair Company, Inc.

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M. FRANCIS KEATING,
Of counsel with Appellant.

New Jersey Court of Errors and Appeals

LINCOLN MATERIALS COMPANY,
INC.,
Complainant-Appellee,

vs.

GOODWIN CONSTRUCTION COM-
PANY,
Defendant-Appellee.

On Appeal of
John R. Blair
Company, Inc.

ANSWERING BRIEF OF THE RESPONDENT WALTER K. SHERWOOD, RECEIVER.

Statement.

Walter K. Sherwood was appointed statutory receiver of the Goodwin Construction Company by order of the Court of Chancery on March 30th, 1926. At the time of the receiver's appointment the corporation was erecting an apartment house in East Orange, New Jersey, which apartment house was about twenty per cent. from completion. The title of the Goodwin Construction Company to which the receiver succeeded was affected with land mortgages, construction mortgages, so-called purchase money mortgages, mechanics' liens and judgments. The receiver, acting under the instructions and authority of the Court, completed the building and was actually on hand at the apartment house supervising the construction work and its completion. After its completion the

apartments were rented and the apartment house was ultimately sold by order of the Court and the sum of \$134,102.61 in all passed through the receiver's hands to be applied as instructed by the Court. The receiver filed his report with the Court of Chancery and his accounting on March 24th, 1928. Exceptions were taken to the receiver's report and appeals from the receiver's report were taken to the Court of Chancery, all of which were argued, considered by the Court of Chancery and disposed of by the Court of Chancery in an Order of the said Court made and dated May 23rd, 1929. From the Final Decree of the Court of Chancery confirming the receiver's report, two appeals were taken to the New Jersey Court of Errors and Appeals. One of these appeals was taken by Samuel Werbel. This was case #121 on the calendar of the October 1929 term of the Court. There was a mortgage of \$60,000.00. Interest was due thereon from the date of the making of the mortgage. The receiver found that \$56,000.00 of this mortgage was entitled to priority as a first mortgage lien and that \$4,000.00 of the mortgage was a bonus paid for the making of the loan. The appellant Werbel also claimed \$658.67 on his mortgage as an advance made by him for insurance premium to protect the mortgage. The receiver allowed the sum of \$4658.67 as a general claim only. In this he was affirmed by the Court of Chancery. For the purpose of reversing the Court of Chancery to the end that the sum of \$4658.67 be allowed as a part of the general mortgage, Werbel took his appeal. The order of the Court of Chancery in this respect was affirmed. There was an opinion by Mr. Justice Campbell. The effect of this affirmance so far as the creditors of the estate are concerned will be discussed later.

Another and independent appeal was taken by

the Newark Holding Company which was the holder of a mortgage of \$15,000.00 subordinate to Werbel's mortgage and on which there was said to be due for principal and interest, to the date of the appointment of the receiver, the sum of \$16,082.50. The receiver took the position in his report that there was no proof that the \$15,000.00 mortgage was entitled to priority because of lack of recordation before building began and because of lack of proof that the consideration thereof went into the building and for other reasons. In his report the receiver allowed \$33,936.90 being the aggregate of the amount claimed by twelve lien claimants and judgment creditors including a claim for \$1665.85 filed and proved by the appellant Blair, priority over the claim of the Newark Holding Company on its \$15,000.00 mortgage. This appeal was listed as #51 on the calendar of the October 1929 term of this Court and there was a decision made by this Court May 19th, 1930, the opinion of the Court being written by Mr. Justice Bodine and the case being reported in 106 Equity, page 326. The opinion in which the Court was unanimous remanded the case to the Court of Chancery for the purpose of taking further testimony as to the advances made in the actual construction of the building and as to the validity and priority of the lien claims which proofs were not clear and in all other respects the decree of the Court of Chancery was affirmed. The opinion of Mr. Justice Bodine is not printed by the appellant or made a part of the State of the Case. A remittitur was thereupon entered remanding the case to the Court of Chancery for the taking of further proof and the making of a decree not inconsistent with the opinion filed by the Court of Errors and Appeals. The remittitur was dated the 19th day of May, 1930. July 9th, 1930, the receiver's solicitor re-

ceived a communication from the Newark Holding Company by its attorney Jacob W. Silverman (State of Case, pp. 4 and 5) offering to compromise the claim of the Newark Holding Company for a flat sum of \$5,000.00. The receiver filed a Petition in the Court of Chancery (State of Case, pp. 3 to 6) setting forth the offer and asking that a Rule to Show Cause issue directed to all persons in interest for the purpose of determining whether or not the offer of the Newark Holding Company should be accepted thus ending by compromise all of the litigation involved in the distribution of this estate and precluding the necessity for the taking of further testimony, the cost and expense entailed thereby and the possibility of further appeals on the filing of a supplemental report by the receiver. The Court of Chancery allowed a Rule to Show Cause which was returnable July 22nd, 1930, and an Order of the Court of Chancery was made July 28th ordering the receiver to accept the said offer of compromise and also allowing the receiver \$750.00 and the solicitor \$2500.00 as further allowance, allowances having been prayed in the same Petition upon which the Order to Show Cause hereinabove immediately referred to was based.

Thereafter and by order of the Court of Chancery made upon notice on the 14th day of October, 1930, the record in this case was amended by inserting in the Order of July 28th, 1930, the following before the words "and good cause being shown"

"And the court having considered all of the proceedings in this cause including all testimony taken before the receiver and being of the opinion that it is to the interest of all the creditors of the estate that the compromise offered by the Newark Holding Company should be accepted".

POINT I.

There was no error in entering said Final Decree.

The appellant Blair seems to misconceive and to misunderstand the proceedings in the Court of Chancery subsequent to the decision in the Court of Appeals. The proceedings in the Court of Chancery after the entry of the remittitur were not in disobedience to the remittitur or contrary to its purpose. An entirely new aspect of the case had arisen which was not involved in the taking of new testimony and in the taking of further proofs. The 66th Section of the General Corporation Act, Vol. II Comp. Stat. page 1643 empowers the Court of Chancery to appoint a receiver and in enumerating the duties with which the receiver is vested the statute states that the receiver or receivers shall have full power and authority * * * in his or their discretion to compound and settle with any debtor or creditor of the corporation * * * upon such terms and in such manner as he or they shall deem just and beneficial to the corporation.

The receiver being an officer of the Court and being entitled to rely upon the Court's judgment felt himself justified in petitioning the Court for its advice which was the effect of the Rule to Show Cause dated July 15th, 1930. On the return of the Rule to Show Cause ten of the creditors, either by failing to appear after notice or by actually appearing and urging settlement, indicated their approval. Two objected, one took an appeal and the only dissatisfied creditor now is the appellant at bar. It is submitted that the management of insolvent corporations is conferred upon the Court

of Chancery by statute and that the act of the Court of Chancery complained of in this appeal has ample support by the exact wording of the statute and the practice in vogue in this state since the statute was passed. The appellant does not discuss the reasonableness or unreasonableness of the compromise itself. The appellant stands upon the broad proposition that nothing can be done at this time other than to continue the taking of testimony and the submitting of further proofs irrespective of the convenience of the remaining creditors, ten in number, who are willing to take their share of the estate in prompt settlement after the compromise has been accepted. It is for this reason that we feel that the cases as cited by the appellant in his First Point are not applicable. The learned Vice Chancellor before whom the case was heard below and before whom all of the earlier stages in this litigation have been argued is thoroughly familiar with what has gone before and we submit that upon the record and upon all proceedings heretofore had no creditor should have occasion to complain of the findings of the Court of Chancery in this instance, nor of the finding of the Court of Chancery that it was best for the interests of the entire estate that the offer of compromise be accepted and the litigation ended.

POINT II.

As to the additional allowance.

In the Petition of Appeal (State of Case, page 15, pars. 9 to 12) the appellant contends that the additional allowances of \$750.00 to the receiver and \$2500.00 to his solicitor were excessive, claiming that nothing in this case was done by the receiver or his solicitor excepting the preparation of two answering briefs, neither of which was argued orally. We respectfully call the attention of the Court to the fact that the receiver was not the appellant in either of the two appeals before the Court of Appeals. In the one case Werbel was the appellant and in the other case the Newark Holding Company. In addition the value of the work done by the receiver and by his solicitor in opposing the two appeals mentioned in the state of the case is interesting and should be considered. The receiver has in his hands approximately the sum of \$20,000.00 which is still to be distributed. The result of the affirmance of the Court of Chancery decree in the Werbel appeal leaves \$4658.67 besides interest on \$4000.00 in the estate which would ordinarily have gone to Werbel. The fact that the Newark Holding Company was not successful in its appeal in sustaining its entire mortgage leaves a sum in excess of \$16,000.00 in the estate which, if the appeal of the Newark Holding Company had been successful, would have been paid to the Newark Holding Company in satisfaction of its mortgage. This would have left nothing in the receiver's hands to distribute to approximately \$34,000.00 worth of claims which were given priority in the receiver's report over the mortgage of the Newark

Holding Company and over the claim of Werbel. In other words the appellant Blair would have the Court believe that all that the receiver and his solicitor did during the past year was to write two briefs as a perfunctory discharge of their duties as receiver and solicitor respectively. In the appeal of the Newark Holding Company there are one hundred and eighty pages of testimony and exhibits in the record. The Newark Holding Company had the benefit of eminent counsel and a brief of thirty-three pages replete with authorities and excerpts from the testimony was filed on its behalf. In the appeal of Werbel there was a record of some thirty-four pages and a brief was also submitted on his behalf. Their contentions were opposed by the receiver and his counsel.

In

Unger vs. Newlin Haines Co., 95 N. J. Eq. 16

in a learned opinion by the Chancellor at page 18, we find the following: The Court refers to *In re Eliot*, etc., 196 Fed. Rept. 400 and then goes on to say

“There the doctrine was invoked to keep down the allowance because the estate was small; but the principle works both ways. In *re Hahn*, 84 N. J. Eq. 523, I held that lawyer’s services are not based upon or restricted to mere time service; that they are entitled to fees which will adequately compensate them for their services, especially when those services are favorable to their clients”.

In the two appeals which were before the Court of Errors and Appeals at the October term, we respectfully submit that as a result of the position taken by the receiver and his solicitor there is a

fund in the hands of the receiver which will rebound to the benefit of the twelve creditors. Had the receiver's attitude and that of his counsel been merely perfunctory, had the appeals not resulted as they did and had both appeals been sustained, the funds in the receiver's hands would have been exhausted entirely and nothing left for the judgment creditors and lien claimants. We submit that the receiver represents the corporation generally and all of its creditors and stockholders as a result of his appointment. We also submit with all propriety that counsel handled these appeals carefully and with precision and that the fees allowed to the receiver and his counsel were not unreasonable or improper in the handling of the two separate and distinct appeals in this matter. There were, of course, other and incidental services performed for the benefit of the estate since the first allowances were made and which were in the mind of the Vice Chancellor at the time that the last allowances were granted.

We have examined carefully the mathematical tabulation set up by counsel for the appellant Blair on page 8 of his brief. Standing by itself, it is both unworthy and undignified. We do not believe that counsel fees in this jurisdiction are a matter of mere mathematical computation. The cases cited by the appellant and each of them presented a state of affairs different from our case. Thus in

Eisler vs. Interstate Title Examiners, 106
N. J. Eq. 88

nothing appears to show that the estate was four years in litigation, that an apartment house had to be completed and sold, that testimony of various claimants and disputants was required to be taken

by the receiver and his counsel, nor that there were intermediate or final appeals.

In the case of

Franklin Lumber Co. vs. Anderson, 105
N. J. Eq. 542

a careful reading of this opinion shows absolutely no analogy between the nature of this particular estate and the Goodwin estate.

In the case of

Glaser vs. Achtel Stetters, 106 N. J. Eq.
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the Court stated at the outset that there was no occasion or reason for the appointment of a receiver and that the receivership could be of no benefit to the corporation or its creditors. In the Goodwin case every element was present for the appointment of a receiver: lack of corporate funds, an incomplete apartment house, tax liens, disputed mortgages, mechanics' liens and judgment creditors so that what happened in the Achtel Stetter case has no bearing here.

And so in the other cases cited by the appellant. That which is missing and which is vital to any decision bearing upon allowances in the case at bar is the nature of the estate, the wisdom and judgment of the receiver and his counsel in opposing claims which they feel are unjust and in bending their energy to the striking out of the claims of this kind so that there will be an estate to be distributed among creditors who are entitled to receive. We submit that the earlier allowances to the receiver and his counsel are not arguable here by the appellant because the entire record was not printed in the State of the Case and because if the

appellant felt itself aggrieved it had an opportunity to present its grievance in the earlier appeals. It is likewise submitted that the further allowances made by the Court to the receiver and his counsel in the Final Decree complained of here were reasonable and just considering the amount of work involved and the value of the services rendered to this estate in holding intact funds which can still be distributed to the exclusion of mortgagee claimants.

POINT III.

There is no error in the decree of the Court of Chancery herein complained of and the said decree should in all respects be affirmed.

Respectfully submitted,

JOSEPH STEINER,
Solicitor for and of Counsel with
respondent, Walter K. Sherwood.

New Jersey Court of Errors and Appeals

LINCOLN MATERIALS COMPANY, INC., <i>Complainant-Respondent,</i>	}	<i>On</i> <i>Insolvency.</i>
<i>vs.</i>		<i>On Appeal of</i> <i>John R. Blair</i> <i>Company,</i> <i>Inc., from</i> <i>Final Decree.</i>
GOODWIN CONSTRUCTION COM- PANY, <i>Defendant-Respondent.</i>		

Sat below: Walker, C.; Church, V.-C.

BRIEF FOR APPELLANT, John R. Blair Company, Inc.

(Italics, etc., ours, except where otherwise noted.)

Statement of the Case.

Walter K. Sherwood was appointed statutory receiver of the Goodwin Construction Company on March 30, 1926, and the corporation is being wound up in the Court of Chancery, as an insolvent corporation. At the time of the receiver's appointment, the corporation was engaged in erecting an apartment house on lands owned by it in East Orange, N. J., and said premises were encumbered by several mortgages, including one for \$15,000, held by Newark Holding Company, and also by several mechanics' lien claims, including one claimed by the appellant, John R. Blair Company, Inc., for \$1,665.

Said premises were sold, pursuant to the order of the Court of Chancery, and the proceeds held, subject to the liens of the various creditors. The receiver's report, subsequently confirmed by the Chancellor, on advice of V.-C. Church, allowed

appellant's lien claim; it also allowed the mortgage claim of Newark Holding Company, but, subject to appellant's lien claim.

Thereupon, Newark Holding Company appealed to the Court of Errors and Appeals, claiming priority over the mechanics' lien claimants. The Court of Errors and Appeals found (106 N. J. Equity 326) that the mortgage was not given to secure purchase money, and that the mortgage was not recorded before the actual commencement of the building. The court also held, that while the mortgage might be entitled to some priority by reason of moneys advanced before the filing of any mechanic's lien claim, the proofs were not sufficiently clear. Thereupon, the court directed that the case "*be remanded for the purpose of taking further proofs as to the advances used in actual building constructions, and as to the validity and priority of the lien claims upon which the proofs are not clear.*"

The remittitur (State of Case, p. 1) held that the proofs submitted were insufficient to enable the court to determine what amount of money, which was the consideration for the Newark Holding Company mortgage, actually went into the building, and it ordered "*that further proofs be taken to determine the amount of money that actually went into the building, * * **"

Notwithstanding the mandate of the Court of Errors and Appeals, as set forth in said remittitur, the Court of Chancery took no further proofs in the matter, but issued an order (State of Case, p. 7) directing interested parties to show cause why the receiver should not compromise the claim of Newark Holding Company for \$5,000. Levy Brothers and this appellant ob-

jected to the compromise, but notwithstanding said objections, a final decree (State of Case, p. 9) was entered directing the receiver to pay \$5,000 to Newark Holding Company and to distribute the balance of the funds in his hands to the other creditors.

From the receiver's report, filed herein, it appears that the gross receipts passing through his hands amounted to \$134,102.61.

Although theretofore allowed a fee of \$8,000, the said final decree also made an additional allowance of \$750 to the receiver, and likewise, although theretofore allowed a fee of \$6,000, the said final decree also made an additional allowance of \$2,500 to the receiver's solicitor. Appellant objected to the granting of said additional allowances, but without avail.

We present only two questions for determination by the Court of Errors and Appeals, viz: (1) whether or not the said final decree was properly entered, notwithstanding the mandate of the Court of Errors and Appeals, directing the Court of Chancery to take further proofs; and (2) whether or not said additional allowances, to the receiver, and his solicitor, were warranted, in whole or in part.

I.

The Court of Chancery Erred in Entering Said Final Decree.

The Court of Errors and Appeals is an appellate Court, functioning as such, in order that it may correct the errors of our lower Courts. What is the duty of the lower Court, after the Court of Errors and Appeals has decided an appeal, and remitted the cause to the lower

Court? The determination of this question depends upon a proper construction of the statute, 2 C. S., p. 1710, pp. 17,

“When a cause hath been decided by final decree or order of this Court, it shall be the duty of the Clerk to return to the Clerk of the Court of Chancery all the papers which have been received by him from the Clerk of the Court of Chancery in such cause, for which he shall take a receipt, together with a copy of the order or decree of the Court, *which order or decree it shall be the duty of the Court of Chancery to carry into effect;*
* * *

Corpus Juris, Vol. 4, page 1221, pp. 3271 (b), and Ruling Case Law, Vol. 2, page 289, are authority for the statement that it is the duty of the lower Court, on remand of the cause, to comply with the mandate of the appellate Court, and to obey the directions therein.

Corpus Juris, Vol. 4, page 1222, pp. 3272 (c), is also authority for the statement that generally, after a cause has been determined on appeal and remanded, the lower Court is without power to open, vacate, or modify the judgment of the appellate Court, or to alter, extend or relieve from the precise fulfillment of a specified condition upon which the effect of the appellate judgment is made to depend.

The rule, as we understand it, is that the judgment of the Court of Errors and Appeals is remitted to the Court of Chancery to be carried into literal effect. Van Fleet, *V.-C.*, recognized this rule in *Dringer v. Railway Co.*, 42 N. J. Equity 573, when referring to the Court of Errors and Appeals, he said, “That Court, not being a Court of final process, a judgment pronounced by it, in a cause taken up by appeal from this Court, is sent here to be carried into

effect; and this Court, in performing that duty, is required to confine itself strictly within its allotted sphere."

Green, V.-C., in the case of *McGrail v. McGrail*, 51 N. J. Equity 537, held that the decree to be entered in the Court of Chancery must strictly conform to the decree of the Court of Errors and Appeals, neither adding to nor in any way modifying the same.

In the same case, the Vice-Chancellor said "The Court of Chancery can do nothing more than to give effect to, and carry out, the decree of the Court of Errors and Appeals. If it had directed any further action to be taken in the Court of Chancery, such course would necessarily be pursued."

In an earlier case, *Gilmore v. Tuttle*, 40 N. J. Equity 385, the Chancellor gave effect to the opinion of the Court of Errors and Appeals, and not to the remittitur, which had been erroneously entered. However, the Chancellor was reversed by the Court of Errors and Appeals (see *Tuttle v. Gilmore*, 42 N. J. Equity 369), said Court holding that its remittitur should be given full and literal effect, notwithstanding that it had been entered in error.

The duty of the Court of Chancery is defined as follows:

"* * * It is the duty of the Court of Chancery to carry such order or decree into effect according to its plain intent. In so doing it must confine itself strictly within its allotted sphere, which is the faithful enforcement of the command of the superior tribunal, and must not in any attempt to evade, impede or defeat such command." Kocher's Chancery Practice, page 791.

See, also,

Snowhill v. Executor, 2 N. J. Equity 30;

Jewett v. Dringer, 31 N. J. Equity 586;

Gilmore v. Tuttle, *supra*;

Tuttle v. Gilmore, *supra*;

Dringer v. Receiver, *supra*;

McGrail v. McGrail, *supra*.

In its appeal, Newark Holding Company conceded the validity of the lien claim of appellant and Levy Brothers, although claiming priority.

The Court of Errors and Appeals decreed, by its remittitur, that the mortgage of Newark Holding Company *might* be prior to some extent, but that the proofs were insufficient to determine to what extent, and it directed that further proofs be taken to ascertain to what extent, if any, the mortgage of Newark Holding Company was prior to valid mechanic's lien claims.

In utter disregard for the mandate of the Court of Errors and Appeals, and over the objections of this appellant and Levy Brothers, whose lien claims were conceded to be valid by Newark Holding Company, and who, by the report of the receiver, and the confirmation of said report by the Chancellor, were prior to the Newark Holding Company, the Court of Chancery turned about, and directed payment of \$5,000 to Newark Holding Company, thereby giving it priority over appellant.

The funds in the hands of the receiver, after payment of \$5,000 to Newark Holding Company, will be grossly inadequate to pay mechanic's lien claimants.

We submit that the Court of Chancery erred in entering said final decree, the effect of which was to give priority to Newark Holding Com-

pany over this appellant, notwithstanding that the Court of Errors and Appeals held that on the proofs submitted, the decree of the Court of Chancery giving priority to appellant over Newark Holding Company, was proper.

II.

The Allowances Were Unwarranted And Excessive.

The gross estate passing through the receiver's hands amounted to \$134,102.61, and the total fees allowed the receiver, \$8,750, exceeds 6½% of the gross estate; likewise, the total fees allowed the solicitor for the receiver, \$8,500, exceed 6¼% of said gross estate.

Since receiving the preliminary allowance of \$8,000, the receiver performed no duties whatsoever, except to transfer the funds in his hands, at the insistence of one of the creditors, to another account where they drew 2% more interest.

The solicitor for the receiver filed two answering briefs in appeals to this Court, but neither appeal was argued orally. No other duties were performed by said solicitor, of which we have knowledge, since the allowance of \$6,000 to him as a preliminary fee.

We have studied the fees allowed in the recent cases of

Unger v. Newlin Hines Company, 95 N. J. Equity 16;

Bock v. Columbia Brewing Co., 99 N. J. Equity 617;

Eisler v. Interstate Title Examiners, Inc., 106 N. J. Equity 88;

Franklin Lumber Co. v. Harold Anderson, Inc. 105 N. J. Equity 542;

Glaser v. Achtel-Stetter, 106 N. J. Equity 150;

In Re N. J. Refrigerating Co. (Not yet officially reported) 151 Atl. 445,

and the relation the fees to the receiver and his solicitor bear to the gross estate, are as follows, viz:

Case	Allowance to Receiver	Allowance to Solicitors
Newlin Hines Co.....	2.9%	1.4%
Columbia Brewing Co...	3.5%	4.4%
Interstate Title	4.0%	4.0%
Anderson, Inc.	4.4%	3.4%
Achtel-Stetter	4.4%	3.7%
N. J. Refrigerating....	3.5%	2.0%

In no case has the allowance to either the receiver or his solicitor exceeded 4.4% of the gross estate. However, in the case now under consideration, no affidavit of services was filed by either the receiver or his solicitor to indicate that any unusual service was performed by either, but, nevertheless, the receiver's fee exceeds 6½% and the solicitor's 6¼% of the gross estate.

We submit that no further argument is necessary to indicate that the allowances made in this case are unwarranted and excessive.

Conclusion.

It is respectfully submitted that the Court of Chancery erred in directing the receiver to compromise the claim of Newark Holding Company, and to make distribution in accordance with the terms of the order of May 23, 1929, notwithstanding the mandate of the Court of Errors and Appeals, to the contrary.

It is also respectfully submitted that the Court of Chancery erred in allowing an additional sum of \$750 to the receiver, in addition to the sum of \$8,000 theretofore allowed him.

It is also respectfully submitted that the Court of Chancery erred in allowing an additional sum of \$2,500 to the solicitor for the receiver, in addition to the sum of \$6,000 theretofore allowed him.

It is respectfully submitted that the final decree of July 28, 1930 should be reversed.

Respectfully submitted,

KEATING & KEATING,
Solicitors for Appellant,
John R. Blair Company, Inc.

M. FRANCIS KEATING,
Of Counsel with Appellant.

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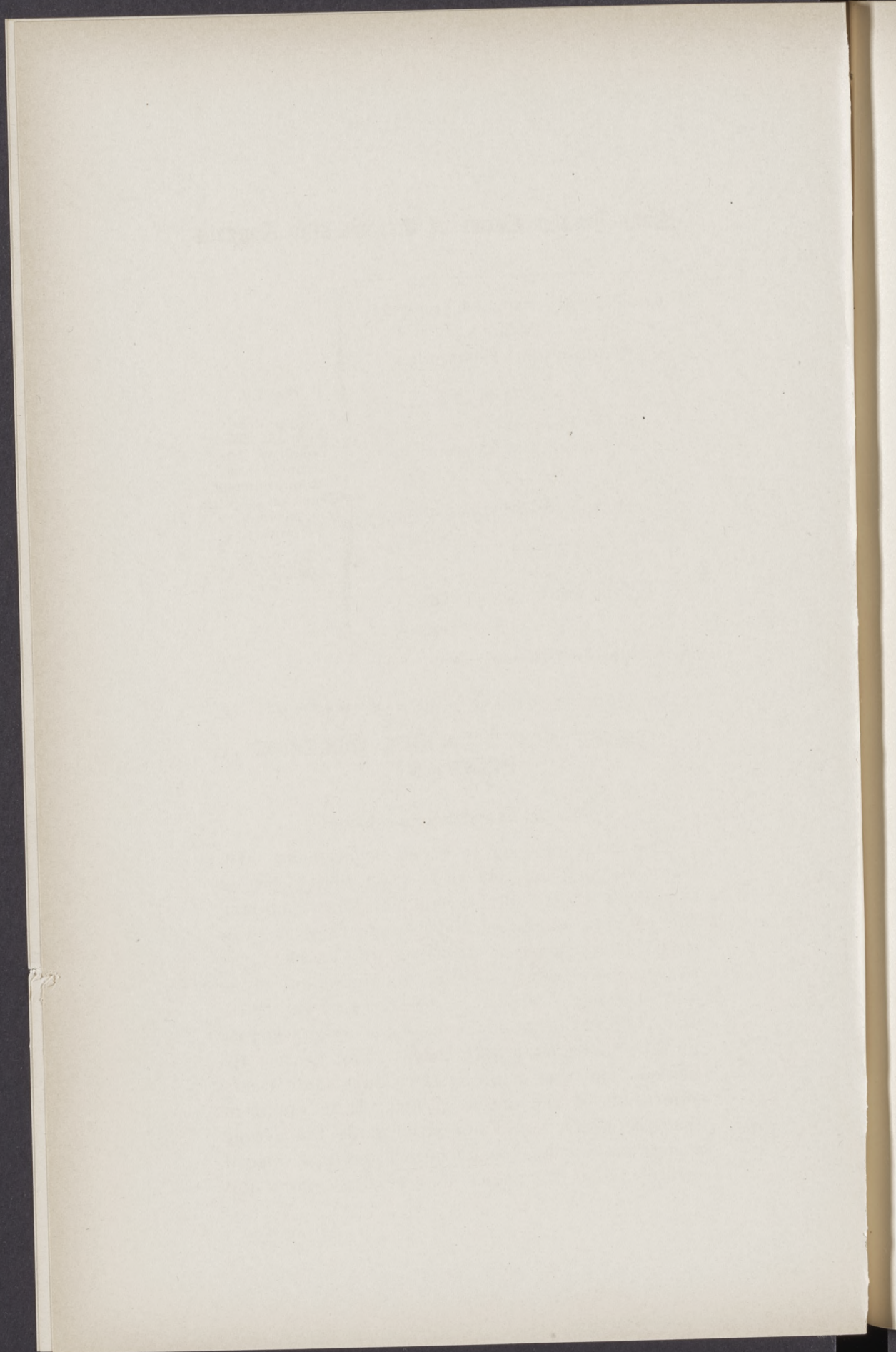
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New Jersey Court of Errors and Appeals

LINCOLN MATERIALS COMPANY, INC., Complainant-Respondent, <i>and</i> GOODWIN CONSTRUCTION COMPANY, Defendant-Respondent.	} On Bill. Appeal of John R. Blair Company, Inc., from Decree Compromising Claim of Newark Holding Company. Sat Below: Church, V. C.
JOHN R. BLAIR COMPANY, Appellant, <i>and</i> NEWARK HOLDING COMPANY, Respondent.	

(Italics, etc., mine, except where otherwise noted.)

BRIEF FOR NEWARK HOLDING COMPANY.

As to the State of Case.

The State of Case prepared by appellant consists only of the remittitur from this Court on the prior appeal of Newark Holding Company, the petition of the receiver submitting the proposed compromise to the Court of Chancery, the order to show cause thereon, the decree and notice and petition of appeal. Objections to this State of Case were promptly served and are presented to this Court with this brief. The decree appealed from was made by the Court after a consideration of the entire record. It is apparent that the Court could not have made the decree except upon such consideration and that record included some 101 pages of printed testimony and

exhibits before the receiver, the receiver's report and account and all of the proceedings which resulted in the order of the Court of Chancery which was appealed from in the prior case, and which appeal this Court decided in its opinion 106 N. J. E. 326. To make it clear that the decree was made after a consideration of the entire record, the Court, on application, on the 14th day of October, 1930, amended the decree appealed from to state the facts which actually existed at the time it was made. A copy of that order is annexed to this brief. The Court had authority to make such an order notwithstanding the appeal.

Bull v. International Power Co., 84 N. J. Eq. 209, and cases therein cited.

Since serving the objections to the state of case the brief of appellant has been received.

It would appear from that brief that appellant raises no question as to the reasonableness of the offer in compromise and its acceptance by the Court, *nor does it question the power of the Court, had the prior appeal not been taken resulting in the remittitur (p. 1), to approve such a compromise as was offered in the instant case and to make the decree appealed from.*

Reference to the petition of appeal (p. 13) will indicate that appellant does not question either the reasonableness of the offer in compromise or the power of the Court to approve such an offer and to make the decree appealed from were it not for the remittitur from this Court upon the prior appeal.

Appellant has elected, notwithstanding the objections to the state of case which were filed, to stand upon the state of case served.

So electing, insofar as the appeal goes to the propriety of the Court approving the offer of com-

promise one question only can be argued, *i. e.*, does the fact that this Court sent down its remittitur upon the prior appeal in the form as appears on page 1 prevent the Court below from approving the offer of compromise which was contained in the letter of the solicitor of the Newark Holding Company of July 9, 1930 (pp. 4, 5).

Newark Holding Company is not interested in the matter of fees and allowances to the receiver and his counsel. That matter will have to be taken care of by the solicitor of the receiver.

The Amount Involved.

Appellant is a lien claimant to the extent of approximately \$1,600. The lien claims aggregate approximately \$33,000. They share in the fund *pari passu*. The amount allowed to Newark Holding Company is \$5,000.

If *none* of the moneys of Newark Holding Company were advanced for and applied to the construction of the building, appellant is interested to the extent of 16/330 of \$5,000 or \$242. But there can be no question upon the record and the testimony taken before the receiver but that large sums of the mortgage moneys advanced by Newark Holding Company were paid for and used in the actual construction of the building. And these sums may have exceeded \$5,000. It was a typical case for compromise and no one appeals except John R. Blair Company with its claim of approximately \$1,600 as against total lien claims of \$33,000 sharing in the fund. Had the Court of Chancery declined to approve the compromise it might have performed an act at the instance of appellant, the holder of a \$1,600 claim, which might have injuriously affected the rights of the remaining \$31,400 of claims. It is true that Levy

Bros. on the hearing in the Court of Chancery objected to the compromise but *it has* not appealed. Its claim was for approximately \$4,000. The compromise, therefore, was objected to by holders of lien claims to the extent of \$5,600 out of a total of \$33,000 and the appeal is by the holder of a lien claim to the extent of but \$1,600 out of a total of \$33,000.

ARGUMENT.

Notwithstanding the direction in the remittitur that the cause be remitted "to the Court of Chancery for the taking of further proofs as to the matter aforesaid and as to the validity and priority of the lien claims upon which the proofs are not clear, and the making of a decree not inconsistent with the opinion filed herein", the Court below had power to make the decree appealed from.

This Court had held in its opinion, 106 N. J. E. 326 (a copy of which is annexed to this brief, not having been printed in the state of case), that the mortgage was entitled to priority over the lien claims to the extent of the advances made and applied to building construction between the date of recording the mortgage and the date of filing the lien claims and that the proofs were not sufficiently clear to indicate how much had been so advanced and applied.

Before further testimony was taken before the receiver, an offer was made by Newark Holding Company to compromise the matter by a surrender of all of its claims for the sum of \$5,000.

An order to show cause went to the parties interested (p. 7), and, upon the return of the order, the decree confirming the compromise was made.

Many cases are cited by appellant under its Point I, page 3, to the effect that it is the duty of the lower Court to comply strictly with the mandate of the Appellate Court. That is conceded under ordinary circumstances.

No case, however, has been cited by appellant, and none can be, to the effect that, where an Appellate Court has sent its mandate to the lower Court *directing the lower Court to take further proceedings*, the lower Court is without power, *upon a change of conditions*, to make such decree as, upon such changed conditions, may seem to be appropriate.

All of the cases cited by appellant are cases in which the Appellate Court assumed to *finally* settle the controversy.

That even after the decree of this Court, which assumes to settle the entire controversy, the Court of Chancery may, in the exercise of its inherent jurisdiction set aside a decree affirmed by this Court is settled in *Pfender v. Pfender*, 7 N. J. Adv. Rep. 142, affirmed 105 N. J. E. 247.

In that case there was a decree of divorce in favor of the husband against the wife on the ground of cruelty and dismissing the wife's action for maintenance. That decree was taken to this Court by appeal by the wife and affirmed 105 N. J. E. 247. Subsequently, upon proceedings in the Court of Chancery, the decree was set aside for perjury and fraud, 7 N. J. Adv. Rep. 142. That decree was taken to this Court and by this Court affirmed, 105 N. J. E. 247. Subsequently the Court of Chancery made a decree in favor of the wife for maintenance, 106 N. J. E. 373.

Another case indicating how far a Court of first instance may go after a decree of an Appellate Court is *Riggs v. Burnrite Coal Briquette Co.* In that case, on appeal to the United States Circuit Court of Appeals for the Third Circuit, the

Appellate Court reversed a decree of the District Court appointing receivers and directed the District Court to discharge the receivers and to dismiss the bill for lack of jurisdiction. 291 Fed. 754. The mandate was in the words of the opinion and, upon motion made in the District Court for a decree on the mandate, that Court directed the receivers to account and thereafter made a decree fixing the compensation of the receivers and counsel and the expenses of the receivers incurred during the operation of the business, the business having been conducted by the receivers at a loss, and directing that the corporation pay the sums so fixed and that, upon such payment, the receivers transfer the property to the corporation and that, in case of failure of the corporation to make such payment, the assets in the hands of the receivers be sold and the proceeds used to liquidate the sums fixed by the decree and any balance be paid over to the corporation and the bill be dismissed.

Upon a second appeal, the decree of the District Court was sustained. 6 Fed. Rep. (2nd) 226. Upon certiorari to the Supreme Court of the United States the action of the Circuit Court of Appeals was affirmed. 274 U. S. 208, 71 L. Ed. 1002.

The reason why the District Court might in that case take the course it did was that the conditions present in the District Court, although they existed during the appeal and might have been brought to the attention of the Appellate Court, were not, in fact, considered by the Appellate Court.

In 2 Ruling Case Law, "Appeal and Error", sec. 244, p. 289, the author states:

"In a case in which the appellate court reverses the decree and remands the cause to the lower court for further proceedings, that court can only carry into effect the man-

date of the appellate court so far as its direction extends; but the lower court *is left free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not presented or settled by such decision.*"

And further, p. 290:

"An affirmance, while conclusive of the matters litigated as between the parties, does not prevent the trial court from opening the judgment for the hearing of a new party and the determination of a new claim to the subject matter of the controversy."

And in *Cunningham v. Ashley*, 16 Ark. 181, 183, 63 American Decisions, p. 62 at p. 63, the Court said:

"Preliminary to this, the question was made by counsel, whether, as this court in its directions to the circuit court, when the case was before us upon a former appeal, made no reference of the question of rents and profits, that court, upon the return of the cause for further proceedings in conformity with the opinion of this court, could do more than to carry into effect the specific decree indicated in the mandate to that court.

We think it very well settled that the circuit court could not, so far as the direction extended; but the question of rents and profits was not then presented for our consideration; no question of law was either discussed or settled with regard to it; and consequently the circuit court was left free to make any order or direction in the further progress of the case not inconsistent with the decision and direction of this court."

When the offer of compromise was made by Newark Holding Company a situation was created quite different from that which had been before this Court on the previous appeal.

The offer was made to end the litigation and to save expenses.

Had such an offer been made prior to the appeal in the original case, the Court of Chancery would have been called upon to act upon it and no question is raised in the instant case but that it would have had authority to have authorized the receiver to accept the compromise.

This Court, on the prior appeal, had only the situation *then* present before it and all that this Court held was, so far as important in this case, that:

1. The mortgage was not recorded before actual commencement of the building and therefore was not entitled to priority over the lien claims on that ground.

2. The proofs did not show that the mortgage was a purchase money mortgage and it was, therefore, not entitled to preference over the lien claims on that ground.

3. It was entitled to preference to the extent of actual advances paid and applied to the erection of the building prior to the filing of the lien claims and that the proofs were insufficient to show how much, if any, of the mortgage moneys had been paid and applied for that purpose.

The determination of this Court has in no wise been ignored by the Court of Chancery.

No preference has been given to the mortgage upon either of the grounds upon which this Court held it was entitled to no preference.

The record before the receiver, which came to this Court upon the prior appeal, showed that *some* of the mortgage moneys had been advanced and applied to the erection of the building. The matter was one of amount. The suggestion of compromise was not in the case.

The direction in the remittitur that the court below proceed to take further testimony to determine how much of the moneys had been actually advanced was for the benefit of Newark Holding Company, appellant on the previous appeal. The Court of Chancery had held that Newark Holding Company was entitled to no preference whatever. This Court differed and sent the case back upon the motion of Newark Holding Company to take proofs. I know of no rule which would prevent Newark Holding Company from then, rather than take the testimony it was permitted to take by the remittitur of this Court, offer to compromise the matter. The remittitur from this Court speaks to the situation which was before this Court and not to a situation which arose after the decision of the appeal.

It was the law of the case and the mandate of this Court that Newark Holding Company was not entitled, as of right, to preference upon the ground that the mortgage was recorded before actual commencement of building operations or upon the ground that it was a purchase money mortgage, and it was the law of this case and the mandate of this Court that Newark Holding Company was entitled to be preferred to the extent of actual advances paid and applied to the erection of the building, but it was neither the law of the case nor the mandate of this Court that Newark Holding Company could not offer to compromise the litigation or that the Court of Chancery could not approve such a compromise. It was, therefore, open to the Court of Chancery to entertain an application of compromise and to act upon it.

Whether it had power to approve the compromise and to make the decree appealed from under general principles of law is not before this Court, for no question is raised as to *that* power and no

question is raised as to the reasonableness of the action of the Court.

It is submitted that the Court, not being precluded by the remittitur or the opinion of this Court, might entertain and act upon the suggestion of compromise and that the decree must be affirmed in so far as it approves the offer of compromise.

Respectfully submitted,

MERRITT LANE,
Of Counsel.
Newark Holding Co.

JACOB W. SILVERMAN,
Solicitor—Newark Holding Co.

Objections to State of Case.

NEW JERSEY COURT OF ERRORS AND APPEALS.

LINCOLN MATERIALS COMPANY,
INC.,
Complainant-Appellee,

and

GOODWIN CONSTRUCTION
COMPANY,
Defendant-Appellant.

} Objections to
State of Case.

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To KEATING & KEATING, Solicitors, Appellant.

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Sirs:

The respondent, Newark Holding Company, objects to the state of case in the above entitled cause because the state of case does not contain the record which was before the New Jersey Court of Errors and Appeals on the appeal of Newark Holding Company and the papers therein specifically referred to and to the omission in the state of case of each of those papers specifically, the order of settlement having been made upon all of the proceedings in the cause.

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Respectfully,

JACOB SILVERMAN,
Solicitor, Newark Holding Co.

Dated: October 1, 1930.

(Served on Keating & Keating, Solicitors of Appellant, on Oct. 1, 1930.)

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Order.

IN CHANCERY OF NEW JERSEY.

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Between

LINCOLN MATERIALS COMPANY,
Complainant,*and*GOODWIN CONSTRUCTION COM-
PANY,
Defendant.On Final Decree.
Order.

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This matter being opened to the Court by Joseph Steiner, solicitor for and of counsel with Walter K. Sherwood, receiver, in the presence of Keating & Keating, Esqs., solicitors for and of counsel with John R. Blair Company, Inc., and it appearing to the Court that a Final Decree was made in this matter on the 28th day of July, 1930, which Decree was based upon an Order to Show Cause heretofore had in this matter dated the 15th day of July, 1930, and it also being made to appear to the Court that the said Order of July 28th, 1930, was based upon all proceedings had in this cause, including the record and the testimony in the Court of Chancery, and the record in the New Jersey Court of Errors and Appeals, and it also being made to appear to the Court that certain recitals were inadvertently omitted from the said Decree of July 28th, 1930, it is thereupon on this 14th day of October, 1930,

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ORDERED that the said Order or Decree made in the above entitled cause on the 28th day of July, 1930, be amended by inserting in said Order or

Order.

Decree the following before the words "and good cause being shown"

"and the Court having considered all of the proceedings in this cause including all testimony taken before the receiver, and being of the opinion that it is to the interest of all the creditors of the estate that the compromise offered by the Newark Holding Company should be accepted", 10

And it is further

ORDERED, ADJUDGED and DECREED that the said Decree of July 28th, 1930, as now amended by this Order be and the same hereby is in all other respects confirmed as the Order of this Court.

E. R. WALKER, 20
C.

ALONZO CHURCH,
V. C.

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Opinion.**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

No. 51, OCTOBER TERM, 1929.

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LINCOLN MATERIAL COMPANY,
INC.,
Complainant,

v.

GOODWIN CONSTRUCTION COM-
PANY,
Defendant.

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Submitted October , 1929. Decided May , 1930.

1. The proofs in this case do not show the re-
cordation of a mortgage before actual commence-
ment of building operations.

2. The proofs in this case do not show that the
mortgage in question was a purchase money mort-
gage.

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3. Upon sufficient proofs being shown a mort-
gage recorded before lien claims are filed will,
under section 15 of the Mechanics Lien Act, be
preferred to the extent of actual advances paid
and applied to the erection of a building.

On appeal of Newark Holding Company
from order dismissing appeal from and ex-
ceptions to Receiver's report.

For Appellant,

JACOB W. SILVERMAN, MERRITT LANE.

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For Receiver,

JOSEPH STEINER.

Opinion.

The opinion of the Court was delivered by
BODINE, J.

A statutory receiver was appointed in the Court of Chancery for the Goodwin Construction Company. At the time of the receivership the company was engaged in building an apartment house on a tract of land on Walnut Street, East Orange, owned by it. The property was encumbered by mortgages and there were several mechanic lien claims. The receiver made a report by which a mortgage to Samuel Werbel, to the extent of actual advances, was allowed as a prior encumbrance. A mortgage to the Newark Holding Company in the sum of \$15,000 was subordinated to certain lien claims but given priority over general creditors. This report was affirmed.

The appellant, the Newark Holding Company, maintains that its mortgage was either recorded before building operations actually commenced and is hence entitled to priority over lien claims, or that it was a purchase money mortgage to the extent of \$5,000; or at least, that it must be preferred to the extent of \$5,000, because it was recorded before any lien claims were filed, and that to the extent of \$5,000 the money secured by it was actually used in the construction of the building in question.

The receiver finds that the mortgage was dated January 2, 1925, recorded April 1, 1925, and recorded April 29, 1925. He further finds that actual building operations had commenced when the mortgage was recorded. The report further states that the proofs do not establish that the mortgage secured moneys used in the purchase of the property, and that there is no evidence that any of the money secured by it went into the actual construction of the building.

Opinion.

10 The court below sustained the mortgage and allowed it as a lien in advance of general creditors. By so doing it disposed of any question affecting the execution of the mortgage and the bona fides of the parties. It is, therefore, not necessary for us to consider suggestions in the receiver's report which may incidentally affect these questions. We think on the proofs that the Court properly held that the mortgage was properly executed and that the charges of lack of bona fides were not sustained.

The conclusions below as to the dates of the mortgage, its recordation and the commencement of building operations seem sustained by the proofs.

20 The finding that the mortgage in suit was to no extent a purchase money mortgage is perfectly consistent with the testimony. The mere circumstances that there may have been a substitution of securities does not establish the substituted mortgage as a purchase money mortgage. A purchase money mortgage is valid to the extent that the money advanced upon it went to pay part of the purchase price of the land. *Franklin Society v. Thornton*, 85 N. J. E. 526. Nor need it be executed at the precise time of the conveyance but must be part of a continuous transaction. 30 *Paul v. Hoeft*, 28 N. J. E. 11. The contemporaneous intention of the parties is dispositive of that question, and our examination of the testimony leads us to the conclusion that the matter was properly settled.

40 Prior to the purchase of the Walnut Street property, the Goodwin Construction Company had owned property on Eagle Rock Avenue, West Orange, which was encumbered with two mortgages owned by a man named Sussman. Suss-

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man released one of these mortgages and assigned the other, when the Walnut Street property was purchased and the Eagle Rock Avenue property was exchanged for it. The mortgage in question was given to secure him. It is claimed that the money from the assignment went into the actual construction of the Walnut Street property.

10

It is apparent that the mortgage was recorded before any lien claims were filed, and it is apparent that cash advances were made upon that mortgage which may have gone into the construction work upon the building. The proofs on these points, the receiver quite properly found, were not sufficiently clear.

Section 15 of the Mechanics Lien Act provides as follows: "Every mortgage given or to be given upon lands in this State shall have priority over any claim that may be filed in pursuance of this act to the extent of the mortgage actually advanced and paid by the mortgagee and applied to the erection of any building upon the mortgaged lands or any alterations * * * provided such mortgage be registered or recorded before the filing of any such claim." The mortgagee is entitled to advances made and applied to building construction between the date of recording the mortgage and date of filing the lien claim. *Bloom v. Thirty-six Berwin Street Corp.*, 101 N. J. E. 142.

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The case will be remanded for the purpose of taking further proofs as to the advances used in actual building constructions, and as to the validity and priority of the lien claims upon which the proofs are not clear.

In all other respects the decree will be affirmed.

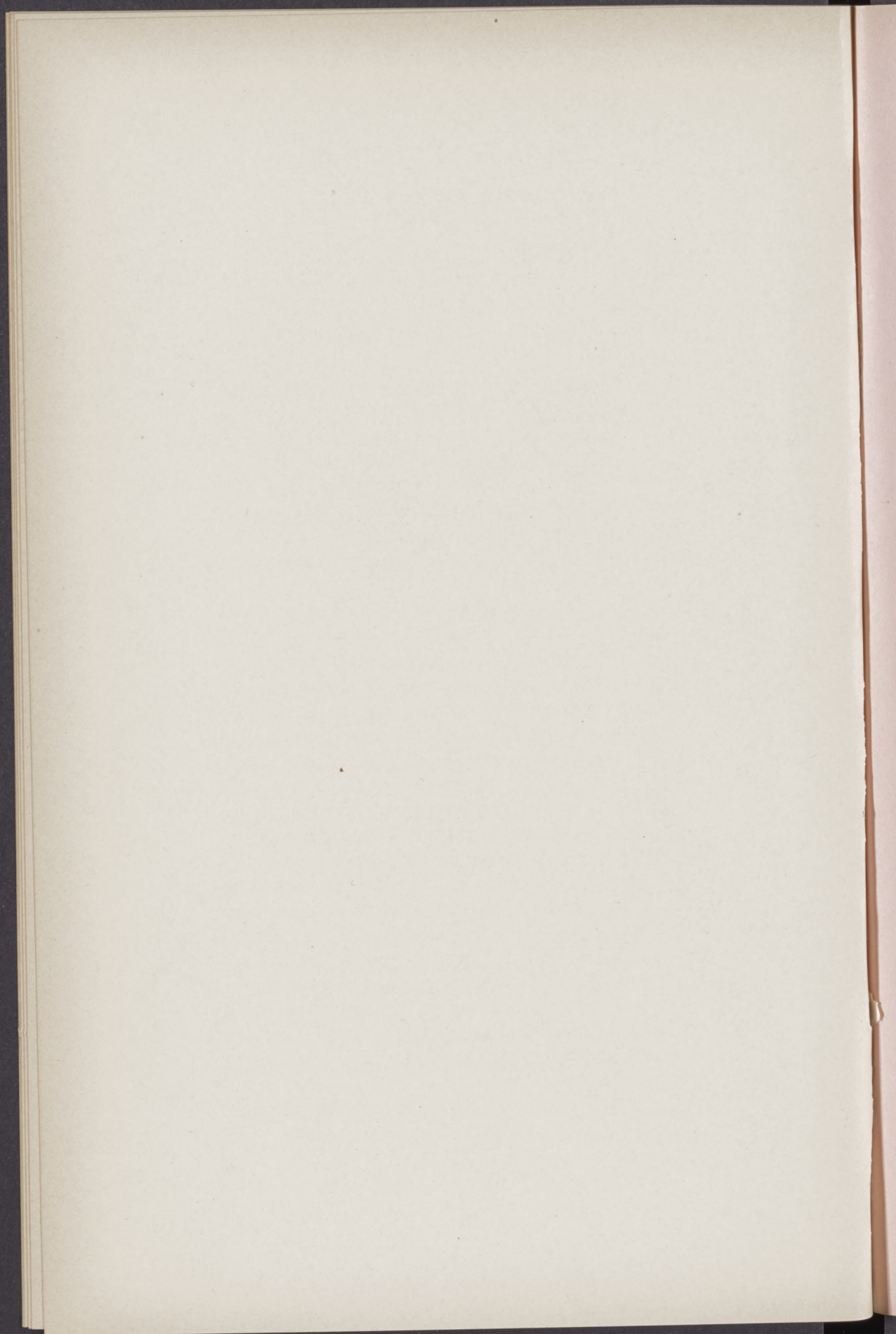
Endorsed:

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"Filed May 19 1930

JOSEPH F. S. FITZPATRICK

CLERK."



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