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Agreed State of Facts.

New Jersey Court of Errors and Appeals

Between ALBERT & KERNAHAN, INC., Complainant, *and* FRANKLIN ARMS, INC., Defendant.	On Appeal. Agreed State of Facts.

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The following is an agreed state of facts, agreed upon by all of the parties to this appeal: 20

1. On September 10, 1926, complainant, Albert & Kernahan, Inc., a corporation, filed a bill of complaint against Franklin Arms, Inc., a corporation, defendant, praying for the appointment of a receiver for said defendant corporation.

2. Said bill alleged that complainant was a general creditor to the extent of $8,799.22 for goods sold and delivered to defendant and that defendant was insolvent. 30

3. On the date above mentioned an order appointing James Haines and M. DeForest Soverel, receivers of defendant corporation and requiring the creditors and stockholders of said defendant to show cause on September 17, 1926, why the appointment of said receivers should not be continued was entered upon the advice of Vice Chancellor Church. 40

4. Pursuant to a resolution of the Board of Directors of defendant corporation on September 9, 1926, said defendant consented to the appointment of a receiver.

5. On September 17, 1926, an order was entered upon the advice of Vice Chancellor Church continuing the receivers heretofore named.

6. On October 6, 1926, James Haines and M. DeForest Soverel, receivers, filed a petition praying that an order to show cause be issued directed to stockholders, creditors, lienholders and mortgagees why an order should not be made permitting petitioners to complete the building which constituted defendant's principal asset or to sell said building free and clear of all liens.

7. Said petition alleged that the principal asset of defendant consisted of a four-story brick apartment house which was about 60 percent complete; that the only liens recorded against said property were two mortgages, one in the sum of $215,000 held by Rollin J. Francis, trustee, with which there was recorded an agreement between defendant and G. L. Miller & Co., Inc., under which mortgage and agreement moneys were to be advanced to defendant from time to time as the erection of the building progressed; the other in the sum of $9,500, second in priority to the mortgage held by Rollin J. Francis, trustee, held by Hudson & Essex Construction Company.

8. Said petitioners further alleged on information and belief, that G. L. Miller Co., Inc., advanced money under said mortgage and agreement to defendant and retained a sum of money for ex-

penses and services incident to the execution of the mortgage and agreement.

9. Petitioners further alleged that a question of priorities between the mortgagees hereinbefore mentioned and creditors holding mechanics lien claims had arisen, and there was a question as to how much money was advanced on the first mortgage and that because of its uncompleted state the building was open to the elements and if allowed to remain in that condition, deterioration and substantial damages would result.

10. On October 6th, 1926, an order to show cause was entered on the advice of Vice Chancellor Church requiring that the creditors and stockholders, The Hudson & Essex Construction Company, Rollin J. Francis, trustee of G. L. Miller & Co., Inc., and Edward Maxon and Lawrence Berenson, receivers of G. L. Miller & Co., Inc., show cause why the prayers in the aforementioned petition should not be allowed.

11. On November 9th, 1926, on motion of E. R. McGlynn of Counsel with the receivers, an order was entered on the advice of Vice Chancellor Church, empowering and directing the receivers to sell defendant's building hereinbefore referred to, free and clear of all liens. Said order providing that the amount due the Hudson & Essex Building & Construction Co., on its mortgage, the sum of $9,500 with accrued interest, shall be paid in full from the proceeds of the sale without any deductions for administration expenses or costs of sale, which provision is in full force and effect.

12. On November 16, 1926, an order was entered on the advice of Vice Chancellor Church

empowering and directing the receivers to sell at public sale, the building hereinbefore mentioned for a sum not less than $110,000, free and clear of all liens and providing that the claim of Hudson & Essex Building Construction Company be recognized as a valid lien to the extent of $9,500.00 and that said lien shall be subsequent in priority to such amount, if any, which the Court may determine is due on the first mortgage held by Rollin J. Francis, trustee and prior to the claims of Mechanics lienors.

13. The receivers then filed a report with the court to the effect that the only bid received at the public sale was in the sum of $75,000, but that they had received two private bids, one in the sum of $80,000 and one from a committee of mechanics' lien creditors as follows:

Said committee offered the sum of $110,000, payable as follows:

(a) $5,000 upon acceptance of bid.

(b) $45,000 upon confirmation.

(c) $60,000 by the assignment or release of the mechanics lien claims against defendant, said assignment or release to act as security to the receivers for the payment to said receivers of any amounts which may be directed by the Court to be paid to mortgagees, lienors or creditors whose claims are ascertained to be prior liens to the mechanics liens in excess of the $50,000 in cash described in the offer.

14. On December 29, 1926, an order was entered on the advice of Vice Chancellor Church requiring all the creditors, stockholders and mortgagees to show cause why the proceedings

theretofore had for the sale of the property should not be vacated and why the receivers should not be authorized to accept one of the bids hereinbefore referred to.

15. On February 17, 1927, an order was entered as of January 11, 1927, on the advice of Vice Chancellor Church, above the objection of a committee representing the bondholders under the mortgage held by Rollin J. Francis, trustee, changing the mode of sale from public to private and authorizing and directing the receivers to accept the $110,000 bid of the committee representing the Mechanics' lien creditors hereinbefore mentioned. Said order provided that the proceedings already had with reference to the sale of defendant's real estate in all respects be and are ratified and confirmed except the method of sale, which is changed from public sale to sale on private bid and further provided that the conveyance shall be free and clear of liens, including mechanics' liens, and lien of the mortgage in the sum of $215,000 held by Rollin J. Francis, trustee; and the lien of Hudson & Essex Building Construction Co., in the sum of $9,500 which mortgage has been postponed to the mortgage held by Rollin J. Francis, trustee, by a postponement dated June 3, 1926, recorded in Book 88 of Postponements of Mortgages at page 315.

16. On January 12, 1927, an order to show cause was entered on the advice of Vice Chancellor Church requiring interested parties to show cause why an order should not be made substituting Service Trust Company of New Jersey as trustee in place of Rollin J. Francis.

17. On February 1, 1927, an order was entered on the advice of Vice Chancellor Church substituting Service Trust Company of New Jersey in the place and stead of Rollin J. Francis as trustee under the mortgage made by defendant to said Rollin J. Francis, as trustee. Said order further provided that the compensation of Messrs. Wall, Haight, Carey & Hartpence in full for their services as solicitors and counsel with said trustee be $1,000 "said fees to be paid to the said solicitors as the Court may direct out of any funds which may come into the hands of the receivers herein and said fees shall constitute a lien upon said funds first in order after the lien of the receivers' fees herein".

18. On May 25, 1927, the receivers filed a petition for an order of reference to a special Master to determine priorities of the various claimants and on said date an order was entered on the advice of Vice Chancellor Church requiring interested parties to show cause why said order of reference should not be made.

19. On May 31, 1927, an order was entered on the advice of Vice Chancellor Church referring the question of priorities between the mortgages and the mechanics lien claims to Roy F. Anthony, a Special Master of the Court of Chancery.

20. On January 8, 1928, said Master's report was filed which contained the following summary:

> "In summary I find and report that various parties are entitled to the following liens and the following priorities:

To be firstly paid:

Rollin J. Francis, Trustee	$44,700.00	
Interest from May 15, 1927	2,059.92	$46,759.92

To be secondly paid:

Concrete Steel Co.	1,577.57	
Interest	126.21	1,703.78
Albert & Kernahan, Inc.	8,799.22	
Interest	703.94	9,503.16
Hudson Structural Iron Works, Inc.	6,717.40	
Interest	537.39	7,254.79
Orange Hardware Co.	254.82	
Interest	20.40	275.22
Juliano Construction Co.	30,000.00	
Interest	2,400.00	33,400.00
Joseph Amorose	12,000.00	
Interest	960.00	12,960.00

being concurrent liens and to be paid pro rata

To be thirdly paid:

Rollin J. Francis, Trustee	$55,485.12	
Interest from May 15, 1927	2,566.93	58,052.05

To be fourthly paid:

Hudson & Essex Building & Construction Company	$ 9,500.00	
Interest from April 9, 1926	840.00	10,340.00

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All which is respectfully submitted this day of January, 1928.

Roy F. Anthony,
Special Master in Chancery."

21. On January 12, 1928, Hudson & Essex Building & Construction Company filed exceptions to the Master's report. On May 19, 1928, an order was entered on the advice of Vice Chancellor Church confirming the report of the master. Said order further provided:

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"Ordered that the receivers herein, after the filing of their final report and account, and after the payment of all administration expenses and fees, and the fees and expenses of said Special Master as hereafter set forth, shall distribute the funds in their possession in the following order and priority and in the following proportions, to wit:

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First, To pay to Roland J. Francis, Trustee, or Service Trust Co., substituted trustee, or its solicitors, the sum of forty-four thousand seven hundred dollars ($44,700) with interest from May 15th, 1927;

Secondly, To the following named mechanic lien claimants said claims to be concurrently paid in the pro rata proportion that each of said claims bear to the aggregate of said claims, to wit:

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Concrete Steel Co.	$ 1,577.57
Albert & Kernahan, Inc.	8,799.22
Hudson Structural Iron Works, Inc.	6,717.40
Orange Hardware Co.	254.82
Juliano Construction Co.	30,000.00
Joseph Amorose	12,000.00

with interest:

Thirdly, To pay to Roland J. Francis, Trustee, or the Service Trust Co., substituted trustee, $55,485.12, with interest from May 15th, 1927;

Fourthly, To the Hudson & Essex Building & Construction Company, $9,500.00 with interest from April 9th, 1926."

22. The Hudson & Essex Building & Construction Company and Service Trust Company of New Jersey appealed from said order of confirmation and the matter was argued at the May, 1929 term of the Court of Errors and Appeals.

23. The Court of Errors and Appeals in 7 N. J. A. R. 717, 146 Atl. 213 (1929) decided as follows:

"In our opinion, the fund in the hands of the receiver should be first appropriated to the payment to the trustee of the sum of $44,700 advanced by him for the purpose of being used in the erection of the apartment house of the Franklin Arms, with interest thereon, and that, out of the moneys remaining in the hands of the receiver after making such payment, there should then be paid to the present appellant, the Hudson & Essex Building and Construction Co., the amount of principal and interest due upon its mortgage. What the relative rights of the trustee and the several mechanics' lien holders may be in that part of the purchase money which will remain in the hands of the receiver after making such payments is a matter with which the

Hudson & Essex Company is not concerned and is not involved in its appeal.

For the reason indicated, the order under review will be reversed.''

24. On June 28, 1929, an order to show cause
10 was entered on the advice of Vice Chancellor Church why an order should not be made, fixing and determining the order of priority of the various claimants; why the final account of the receivers should not be allowed and why an order should not be made with reference to allowances. Annexed to said order was the final report of the receivers which showed a cash balance in the hands of the receivers of $51,102.98 and $60,000 due from the lien claimants as the balance of the
20 purchase price hereinbefore referred to, making in all $111,102.98 as the net balance available for distribution. The solicitors of Hudson & Essex Construction Company served notice returnable at the same time as above order that they would apply for the allowance of taxed costs including a counsel fee to be charged against the entire fund or against the distributees as the Court might direct.

30 25. On November 22nd, 1929, a petition was filed and an accompanying order to show cause was entered on the advice of Vice Counsellor Church requiring Service Trust Company, the receivers, Hudson and Essex Building & Construction Company, lien claimants, they being represented by Stein, McGlynn and Hannoch and others to show cause why an order should not be made substituting Savings Investment and Trust Company in the place and stead of Service Trust Com-
40 pany of New Jersey as substituted trustee.

26. On December 3, 1929, an order was entered on the advice of Vice Chancellor Church that Savings Investment and Trust Company be and is substituted in the place of Service Trust Company of New Jersey, as trustee under the mortgage or deed of trust dated May 15, 1926, made by Franklin Arms, Inc., to Rollin J. Francis as trustee. 10

27. Said mortgage or deed of trust dated May 15, 1926, made by defendant, Franklin Arms, Inc., to Rollin J. Francis as trustee, hereinbefore referred to was a first mortgage on the building and land hereinbefore referred to in the face amount of $215,000 and provided for the issuance of bonds to the general public to be secured by said deed of trust or mortgage; and further provided for 20 the payment of interest on said mortgage and the obligation of defendant, secured by said mortgage at the rate of 7% per annum.

28. On December 14, 1929, on motion of Edward R. McGlynn of Counsel with the receivers, above the objections of Savings Investment & Trust Company, substituted trustee, an order was entered approving the receivers' account, making allowances of counsel fees, providing for distrib- 30 ution, etc., and discharging the receivers. Said order is hereinafter set forth in full and is made a part hereof. Said order failed to allow costs or a counsel fee to the solicitors for Hudson and Essex Construction Company for the reasons stated in the opinion of Vice Chancellor Church.

29. Savings Investment & Trust Company has duly filed a notice and petition of appeal herein-

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before set forth in full. Hudson and Essex Construction Company has duly filed a notice and petition of appeal hereinbefore set forth in full.

E. R. McGlynn,
Solicitor of Receivers of Franklin Arms, Inc.

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Stein, McGlynn & Hannoch,
Solicitors of Lien claimants.

Arthur T. Vanderbilt,
Solicitor of Savings Investment and Trust Company, substituted trustee.

Gross & Gross
Solicitors of Hudson & Essex Building and Construction Co.

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Order Approving Receivers' Account, Making Allowance of Counsel Fees, and Providing for Distribution, Etc., and Discharging Receivers.

IN CHANCERY OF NEW JERSEY.

61-722. 10

Between ALBERT & KERNAN, INC., a corporation, Complainant, *and* FRANKLIN ARMS, INC., a corporation, Defendant.	On Bill, etc. Order Approving Receivers' Account, Making Allowance of Counsel Fees, and Providing for Distribution, Etc., and Discharging Receivers.

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An order to show cause having been made herein on the twenty-fifth day of June, nineteen hundred twenty-nine why the report and account of the receivers of the above named defendant company should not be approved and allowed, and why an order should not be made fixing and determining the fees and allowances of the receivers in the administration of their trust, and fixing and determining the fees, costs and allowances of counsel of the receivers and other interested parties and the method of apportioning such fees and costs, and directing a distribution of the balance of the funds in the hands of said receivers, if any, among the holders of mortgages and mechanic liens claimants and creditors who have presented claims to said receivers; and it appearing that copies of said order to show cause, together

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with a notice of filing of said account and a statement of the allowances to be asked for have been mailed to each of the creditors of said defendant company who have filed claims with said receivers, or to their attorneys, so far as the same could be ascertained, in accordance with the provisions of said order; and it appearing that said receivers' account is correct and that the same should be allowed, and no reason appearing or being shown to the contrary, it is, thereupon, on this 14th day of December, 1929, on motion of Edward R. McGlynn, of counsel with said receivers, and in the presence of Gross & Gross, solicitors of Hudson & Essex Building & Construction Co., Weinberger & Weinberger, solicitors of Service Trust Co.; and Arthur T. Vanderbilt, solicitor of Savings Investment & Trust Co., substituted trustee; Albert C. Wall, solicitor of Roland Francis, trustee;

ORDERED, ADJUDGED AND DECREED that the account filed by said receivers in said cause, be and the same is hereby allowed and confirmed; and it appearing that the cash balance in the hands of the receivers amounts to $52,336.33, in addition to which the receivers have a guarantee in the sum of $60,000.00 executed by the mechanic lien claimants, making a total fund available for distribution and fees of $112,336.33; and it appearing that an order was heretofore entered confirming the report of Roy F. Anthony, Esq., a Special Master, which order fixed and determined the amounts due and the order of priority of various mortgagees and mechanic lien claimants, and which order was appealed to the Court of Errors and Appeals, which Court handed down an opinion reversing

said order and fixing and determining the amount and order of priority of said claimants; it is therefore further

ORDERED, that the amounts due and the order of priority of the various mortgagees and mechanic lien claimants be fixed and determined in the following order and manner, to wit:

1.	Roland J. Francis, Trustee, or Service Trust Co., substituted Trustee, on account of mortgage lien, with interest	$44,700.00
2.	Hudson & Essex Building & Construction Co. on mortgage lien, with interest	9,500.00
	The following lien claims, #3-8, to be pro rated if not paid in full:	
3.	Concrete Steel Co., on account of mechanic lien claim	1,577.57
4.	Albert & Kernahan, Inc.	8,799.22
5.	Hudson Structural Iron Works, Inc.	6,717.40
6.	Orange Hardware Co.	254.82
7.	Juliano Construction Co.	30,000.00
8.	Joseph Amorose	12,000.00
9.	Roland J. Francis, Trustee, or Service Trust Co., substituted Trustee, on account of Balance advanced on mortgage loan	55,485.12
	PREFERRED CLAIMS.	
10.	James Haines, salary as Supervising Engineer and Superintendent from 7/10/26 to 9/10/-26, at $125.00 per week	1,125.00

11.	Julius Haines, salary as Purchasing Agent, etc., from 7/10/26 to 9/10/26 at $75.00 per week..	675.00
12.	John Haines, salary as assistant superintendent from 7/10/26 to 9/10/26 at $100.00 per week	800.00

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General Claims.

13.	Charles Staedtle	100.93
14.	Fidelity & Deposit Co. of Maryland, contingent	220,000.00
15.	Tuorto Cut Stone Co.	2,000.00
16.	U. S. Fidelity & Guaranty Co.	100.00
17.	Henry D. Dietz Co.	1,752.87
18.	Seaborn J. Flournoy	200.00
19.	John Haines	1,200.00
20.	Harold Hudsoe	500.00

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And it is further

Ordered, that inasmuch as the receivers in this case upon their appointment offered to act as receivers without the payment of any compensation, no compensation will be allowed them for their services herein; and it is further

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Ordered, that Edward R. McGlynn be allowed for his services as solicitor for said receivers, the sum of $10,000 in addition to the partial allowance of $2,500.00 heretofore made to him, together with the costs in these proceedings to be taxed; and it is further

Ordered, that Edward R. McGlynn as solicitor for the complainant be allowed the sum of $500 for his services; and it is further

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Order Approving Receivers' Account, Making Allowance of Counsel Fees, and Providing for Distribution, Etc., and Discharging Receivers.

Ordered, that the counsel fee of $1,000.00 heretofore allowed to Wall, Haight, Carey & Hartpence, as solicitors for Roland J. Francis, as Trustee, be paid by said receivers, to be deducted from the distributive share of the Savings Investment & Trust Co., substituted Trustees; and it is further

Ordered, that inasmuch as this Court, by previous order entered herein, provided that the mortgage of the Hudson & Essex Building & Construction Co. should be paid in full with interest, without any deduction for any of the administration costs, that there be no deduction from the payment by the receivers to the said Hudson & Essex Building & Construction Co.; and it is further

Ordered, that the aggregate amount of the allowances made herein and in the previous orders to counsel for the receivers and any other fees made to counsel herein, and fees of Special Masters, except to Wall, Haight, Carey & Hartpence, solicitors for Roland J. Francis, as Trustee, be deducted from the claims of the Savings Investment & Trust Co., substituted Trustee, and the mechanics lien claimants to the extent that each will be paid by the receivers in the final distribution of the funds in their possession in the same proporton that each of said claims, to wit: Savings Investment & Trust Co. and the mechanics lien claimants shall bear to the total amount of the claims sharing in the final distribution of the funds in the possession of the receivers, to wit:

Order Approving Receivers' Account, Making Allowance of Counsel Fees, and Providing for Distribution, Etc., and Discharging Receivers.

(a) Savings Investment & Trust Co., substituted trustee (total claim with interest—$53,865.84) 39%

(b) Mechanics lien claimants (total amount of claim with interest $69,883.46) 53%

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And it is further

Ordered, that after paying the amounts as hereinbefore awarded to various counsel, the said receivers pay and disburse to the mortgagees and mechanics lien claimants and general or common creditors of said defendant company who have filed their claims with said receivers, the surplus remaining in their hands, first in the order of priority as fixed herein, after deducting therefrom the percentage of the allowances heretofore fixed and determined, and of the balance, if any, pro rated in proportion to the several and respective claims as approved and allowed before said receivers; and it is further

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Ordered, that said receivers file with the clerk of this court a statement of their fees and disbursements and costs of this proceeding, together with the statement and report of the distribution and disposition of the moneys that have come into their hands in this cause, and in case the receivers shall be unable to comply with the directions of this order in the payment or disbursement of any of the moneys aforesaid, they shall, in such case, deposit the balance of the moneys with the clerk of this court, pursuant to the rules thereof; and it is further

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Ordered, that the entry of this order shall be without prejudice to the rights of either the re-

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ceivers or any of the mechanics lien claimants or creditors against the Fidelity and Deposit Company of Maryland, with respect to any claim any of the above parties may have by virtue of the bond executed by said company; and it is further

Ordered, adjudged and decreed, that upon making the payments and disbursements aforesaid, and carrying out the directions of this decree, the said receivers be discharged from all obligations in relation to said trust, except as to any money directed to be held by them and except as to any which may hereafter come to their hands as said receivers.

E. R. Walker,
C.

Respectfully advised,
Alonzo Church,
V. C.

Memorandum.

IN CHANCERY OF NEW JERSEY.

Between

10 ALBERT & KERNAHAN, INC.,
a corporation,
Complainant,

and

FRANKLIN ARMS, INC.,
a corporation,
Defendant.

Memorandum.
(Not for print)

20 THIS MEMORANDUM IS NOT TO BE PUBLISHED IN THE OFFICIAL OR UNOFFICIAL REPORTS.

Mr. ARTHUR T. VANDERBILT, for Service Trust Company of New Jersey, Substituted Trustee.

Messrs. GROSS & GROSS, for Hudson & Essex Building & Construction Company.

Messrs. STEIN, MCGLYNN & HANNOCH, for Receivers of Franklin Arms, Inc.

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CHURCH, V. C.

This matter is before the Court on an order to show cause issued upon the filing of a final report and account of the receivers.

One phase of the case dealing with priorities as beween certain mortgages and mechanics' lien claims has been before the Court of Errors and Appeals (See Albert & Kernahan *vs.* Franklin
40 Arms, 6 N. J. Adv. Rep., page 717).

Memorandum.

The order to show cause brought up for determination several questions in connection with the receivership, but the only two which are important in view of the pending appeal are as follows:

1. Refusal to allow counsel fee to solicitors of Hudson & Essex Building & Construction Company, holders of a second mortgage on the property of the defendant corporation. 10

2. Method of apportioning administration costs of the receivership as between mortgagees and mechanics' lien claimants and distribution of the balance of the receivership funds.

The receivers' report showed there was a cash balance in their hands amounting to $52,336.33, in addition to which the receivers had a guaranty executed by mechanics' lien claimants in the total sum of $60,000.00, which was to be available in the event the cash in the hands of the receivers was insufficient to pay administration costs and claims of mortgages found to be prior to mechanics' lien claims, making a total fund available for distribution and fees of $112,336.33. 20

The determination of the amounts due and the order of priority of the various mortgages and mechanics' lien claims was fixed in accordance with the opinion of the Court of Errors and Appeals and the only ones which are important now are the following: 30

1. Mortgage originally held by Roland J. Francis, Trustee, now held by Savings Investment & Trust Co., substituted trustee (plus interest)	$44,700.00
2. Mortgage of Hudson & Essex Building & Construction Co. (plus interest)	9,500.00

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3. Six mechanics' lien claims aggregating	59,349.01
4. Balance on account of money advanced on first mortgage, not entitled to priority over mechanics' lien claims	55,485.12

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The aggregate amount of these claims is more than the balance in the hands of the receivers available for distribution, even before the fixing of any fees and allowances in connection with the administration of the receivership.

Gross & Gross, solicitors of Hudson & Essex Building Co., requested an allowance of $5,000.00 on the theory that it was absolutely necessary for them, on behalf of their client, not only to prove its claims before a Special Master, but also to file a brief in support of their contention, also to prosecute the appeal before the Court of Errors and Appeals. Inasmuch as they were successful before the Court of Errors and Appeals, they claim to be entitled to an allowance. The amount of their client's mortgage was $9,500.00 with interest.

While it may be true that these solicitors rendered very valuable services to their client, I think that outside of allowances to the receivers and counsel, no other allowances should be made.

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In this case, where the solicitor of a mortgagee litigated in a receivership the priority and amount of the client's lien, no counsel fee should be paid. The creditor or lienor who sustained his position should compensate his own solicitor.. I therefore refuse to make any allowance to the solicitors of Hudson & Essex Building & Construction Co.

The next question was what amount or proportion of the fees and disbursements in connection with the administration should be charged against

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the claims of mortgagees and mechanics' lien claimants. Should the fees so fixed be paid from the funds in the hands of the receivers and then the balance distributed to mortgagees and lien claimants in the amount and order of priority already determined?

On February 1, 1926, Roland J. Francis, the original trustee for bondholders, whose bonds were secured by this mortgage, resigned and the Service Trust Company was appointed substituted trustee (later on the Savings Investment & Trust Co. was substituted in place of Service Trust Company). An order was made providing for an allowance of $1,000.00 to Wall, Haight, Carey & Hartpence, for services rendered to the said Roland J. Francis, as trustee. Inasmuch as the services rendered by the solicitors of the trustee were for the sole benefit of the trustee and the bondholders secured by his mortgage, this allowance should be paid from whatever amount is eventually paid to the Service Investment Company as substituted trustee for bondholders.

At the time of the appointment of the receivers, the defendant corporation was the owner of a piece of real estate in Bloomfield, upon which there was being erected a large four-story brick apartment house. The receivers discovered that there was a first mortgage recorded against this real estate in the nominal sum of $215,000.00, held by Roland J. Francis, trustee for bondholders, and a second mortgage of $9,500.00 by the Hudson & Essex Building & Construction Co., also a large number of mechanics' lien claims aggregating at that time approximately $70,000.00.

In most of these priority was claimed as against both the first and second mortgages. The principal contention with reference to priority

over the first mortgage was that the money said to have been advanced at the time of the appointment of the receivers, which was approximately $100,000.00, had not, in accordance with the provisions of the Mechanics' Lien Act, been invested in the building, but represented charges for bonus, premiums, interest in advance and various other items. It was admitted that the erection of the building had been commenced before the recording of the first mortgage and that there were no building contracts recorded in the County Clerk's Office. The matter was referred to a Special Master to fix the amounts due on various mortgages and mechanics' lien claims and fixing the order of priority.

The amount now determined as being due and owing on the first mortgage, second mortgage and mechanics' lien claims is more than the full amount in the hands of the receivers available for distribution, even before the fixing of fees and costs. If the fees and costs are ordered to be paid by the receivers from the funds in their possession and the balance distributed to the holders of mortgages and lien claims, the practical effect of such an order will be to place upon mechanics' lien claimants the entire burden of the expense of the receivership. If, however, the fees and costs are apportioned between the first mortgagee, second mortgagee and mechanics' lien claimants in the proportion each of said claims bears to the aggregate amount of claims which will share in the distribution, a much fairer and more equitable solution will be reached.

The case of *Lembeck* v. *Jarvis Terminal Cold Storage Company,* decided by Vice Chancellor Stevenson, in 68 N. J. Equity, 352, lends support to this theory. In that case various lienors laid

claim to funds in the hands of the receiver. The Court held that the expenses of administration should be borne according to the benefit received. The learned Vice Chancellor said:

> "But where the encumbrance is finally adjudged valid, then that part of the services of the insolvency receiver and his counsel which have directly benefited the encumbrancer, and have corresponded precisely with similar expenses which he would have been obliged to incur on his own behalf in his own suit, plainly should be charged against the fund upon which the encumbrance is fastened."

Vice Chancellor Berry, in the case of *Meister* v. *J. Meister, Inc.,* reported in 142 Atl. Rep., page 312, approved this method of distribution in the case then before him, by apportioning the expenses of the receivership between the two funds which were available for distribution by the receiver.

In the case of *Franklin Lumber Co.* v. *Harold Anderson, Inc.,* reported in 145 Atl. Rep., page 477, an appeal was taken from another part of the order and modified by the Court of Errors and Appeals in 105 N. J. E. 542. The modification in no way, however, affected that portion of the order which dealt with the distribution of the money in the hands of the receiver.

In that case, the Court approved the recommendation of the receivers that the general expenses of administration, including receiver's fees and those of receiver's counsel, should be pro rated among three funds. In 34 Cyc. 369, it is stated:

> "The expense of the receivership must be shared by all the lien-holders for the estab-

lishment and foreclosure of whose liens the receivership proceedings were instituted, and no property in the hands of a receiver can be exempt from its share of the proper and necessary expenses of the receivership unless it be affirmatively shown that no part of such expense was incurred for the benefit of said property. Where there are several funds, and the receivership is as necessary for the conservation of the one as of the other, they should bear the expense in proportion to the benefit received by them, and, in the absence of facts justifying such course, it is error to charge the whole of the expense on one fund."

There was brought to my attention in connection with this argument, that by an order entered in the proceedings prior to the receivers' sale of the property, a provision was made that the mortgage of the Hudson & Essex Building & Construction Co., if found a valid and subsisting lien, should be paid in full without any deduction for administration expenses. In view of the provision in that order the receivers should not deduct from any money eventually to be paid to the Hudson & Essex Building & Construction Co. any proportion of the administration expenses. Taking from the receivers' account such items as are purely administration expenses, and adding thereto the allowances now being made, it appears that the total cost of administration is $14,000.00.

The total amount of claims sharing in the eventual distribution by the receivers will be as follows (this is with interest approximately figured to the date of the order):

1. Savings Investment & Trust Co., Substituted trustee, first mortgage, with interest ..... $53,865.84 or 39%

Memorandum.

2. Hudson & Essex Building & Construction Co., second mortgage with interest	11,590.00 or	8%
3. Mechanics' lien claims, with interest	69,883.46 or	53%

Added to the gross amount shown by the receivers' account now available for distribution is the sum of $2,500.00 already paid to the solicitor of the receivers, making the gross amount for calculating these deductions, the sum of $114,836.33. An order was therefore advised directing the receivers to pay (1) Savings Investment & Trust Co., substituted trustee, the amount found due on its mortgage, to wit: $44,700.00 with interest to date of payment, deducting, however, from such amount the sum of $1,000.00 allowed as counsel fee to Wall, Haight, Carey & Hartpence, solicitors for the original trustee, and further deducting 39% of the administration expenses; to pay (2) the Hudson & Essex Building & Construction Co. the amount of its mortgage, to wit: $9,500.00 with interest without any deductions; and (3) pro rate the balance in the hands of the receivers among the mechanics' lien claimants, after first deducting from the amount of their claim 53% of the administration expenses.

Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

61-722.

10 Between

ALBERT & KERNAHAN, INC.,
Complainant,

and

FRANKLIN ARMS, INC.,
Defendant.

Notice of Appeal.

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Savings Investment & Trust Company, substituted trustee, hereby appeals from the final decree made December 14, 1929, in the above entitled cause by the Chancellor on the advice of Vice-Chancellor Alonzo Church, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, December 24, 1929.

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ARTHUR T. VANDERBILT,
Solicitor for Savings Investment & Trust Company, substituted trustee.

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

ARTHUR T. VANDERBILT,
40 Of Counsel with Savings Investment & Trust Company, substituted trustee.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ALBERT & KERNAHAN, INC., a corporation, Complainant, *and* FRANKLIN ARMS, INC., a corporation, Defendant.	On Appeal from the Court of Chancery. Petition of Appeal.

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

The petition of Savings Investment & Trust Company, the appellant in the above entitled cause, respectfully shows:

Petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice Chancellor Church, dated December 14, 1929, in a certain cause in said Court of Chancery wherein Albert & Kernahan, Inc. is complainant, and Franklin Arms, Inc. is defendant in this respect, to wit, that said decree orders and adjudges that the account of the Receivers be allowed and confirmed; that said decree orders and adjudges that Roland J. Francis, Trustee, or Service Trust Company, Substituted Trustee, be paid on account of mortgage lien Forty Four Thousand Seven Hundred

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Dollars ($44,700.00); that said decree orders and adjudges that the counsel fee allowed to Wall, Haight, Carey & Hartpence be deducted from the distributive share of the Savings Investment & Trust Company, Substituted Trustee; that said decree orders and adjudges that the mortgage of the Hudson and Essex Building & Construction Company be paid in full with interest without any deduction for any of the administrative costs and that there be no deduction from the payment of the Receivers to the said Hudson and Essex Building & Construction Company; that said decree orders and adjudges that 39% of the aggregate amount of the allowances made in this cause be deducted from the claim of Savings Investment & Trust Company, Substituted Trustee; that said decree orders and adjudges that distribution be made to Savings Investment & Trust Company, Substituted Trustee, only after deducting from its claim the aforesaid percentage of the allowances.

And petitioner appeals the aforesaid decree of the Chancellor on the ground that the same is erroneous in the following respects:

1. The Lower Court erred in decreeing that the amount due Roland J. Francis, Trustee, or Service Trust Company, Substituted Trustee, on account of the mortgage lien is Forty Four Thousand Seven Hundred Dollars ($44,700.00);

2. The Lower Court erred in decreeing that the counsel fee to Wall, Haight, Carey & Hartpence be deducted from the distributive share of Savings Investment & Trust Company, Substituted Trustee;

3. The Lower Court erred in decreeing that Hudson and Essex Building & Construction Company be paid in full with interest without any deduction for any of the administration costs;

4. The Lower Court erred in decreeing that any share of the allowances made in this cause be deducted from the prior claim of Savings Investment & Trust Company, Substituted Trustee, on its mortgage lien; 10

5. The Lower Court erred in decreeing that 39% of the allowances made in this cause be deducted from the claim of Savings Investment & Trust Company, Substituted Trustee, on its mortgage lien;

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6. The Lower Court erred in decreeing that distribution be made only after deducting said 39% of the allowances from the prior claim of Savings Investment & Trust Company, Substituted Trustee;

7. The Lower Court erred in failing to decree that Savings Investment & Trust Company, Substituted Trustee, be paid interest on its claim at the rate provided in its mortgage from the dates of advances under said mortgage; 30

8. The Lower Court erred in failing to decree that the mechanics' lien claimants be required to pay interest on the sum of Sixty Thousand Dollars ($60,000.00) unpaid purchase price from the date on which the property was conveyed to them;

9. The Lower Court erred in failing to decree that the allowance to Wall, Haight, Carey & Hartpence be paid from the entire fund and not from 40

the distributive share of Savings Investment & Trust Company, Substituted Trustee;

10. The Lower Court erred in failing to decree that Savings Investment & Trust Company, Substituted Trustee, be paid the sum of Forty
10 Four Thousand Seven Hundred Dollars ($44,-700.00) with interest at the rate provided in the mortgage from the dates of the advances under said mortgage in full, after payment of allowances;

11. The Lower Court erred in failing to decree that no portion of the costs and allowances to Solicitor for Complainant and Receiver and to the Special Master be deducted from the prior claim
20 of Savings Investment & Trust Company, Substituted Trustee, on account of its mortgage lien;

12. The Lower Court erred in failing to decree that after the payment of allowances, Savings Investment & Trust Company, Substituted Trustee, and other secured creditors be paid in full in the order of their priority until the entire fund be exhausted.

ARTHUR T. VANDERBILT,
30 Solicitor for and of Counsel with Savings Investment & Trust Company, Substituted Trustee.

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Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between ALBERT AND KERNAHAN, INC., Complainant, *and* FRANKLIN ARMS, INC., a corporation, Defendant.	On Bill, &c. Notice of Appeal.

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To EDWARD R. MCGLYNN, Esq.,
Solr. of receivers and of mechanics lien claimants.

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To ARTHUR T. VANDERBILT, Esq.,
Solr. of Savings Investment & Trust Company, substituted trustee.

Hudson & Essex Building & Construction Company hereby appeals from a decree made in the Court of Chancery in the above stated cause by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice Chancellor Alonzo Church on December 14th, 1929, upon the ground that said Chancellor failed and refused in and by said decree, to award or allow to appellant, its costs in said Court of Chancery, and also a counsel fee to be taxed and included in said costs, to be taxed as against Service Trust Company, substituted trustee, or

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its successor, or against both, or to be paid out of the funds in the hands of the receivers herein.

Dated April 9th, 1930.

GROSS & GROSS,
10 Solrs. and of Counsel with Hudson & Essex Building & Construction Co., appellant.

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

ISAAC GROSS,
Of counsel with Hudson & Essex Bldg. & Cons. Co., appellant.

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Petition of Appeal of Hudson & Essex Building & Construction Company.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ALBERT AND KERNAHAN, INC., a corporation, Complainant, *and* FRANKLIN ARMS, INC., a corporation, Defendant.	On Appeal from the Court of Chancery. Petition of Appeal of Hudson & Essex Building & Construction Company.

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To the Honorable, the Court of Errors and Appeals in the Last Resort of all Causes.

The petition of Hudson & Essex Building & Construction Company, one of the appellants in the above entitled cause, respectfully shows:

1. Petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey on the advice of Vice Chancellor Church, which decree is dated December 14th, 1929, in a certain cause in said Court of Chancery wherein Albert and Kernahan, Inc., is complainant and Franklin Arms, Inc., is defendant in this respect, to wit: That the Chancellor in and by said decree, failed and refused to allow unto this petitioner, its costs in the Court of Chancery or a counsel fee to be included in and

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taxed as part of said costs, although legally and equitably your petitioner was entitled to such allowance to be taxed either against Service Trust Company, substituted trustee, or its successor, or against the mechanics lien claimants, or both, or to be paid out of the funds in the hands of the receivers herein.

2. Your petitioner therefore prays that the said decree of the said Chancellor may be in the particulars aforesaid, modified and that your petitioner should be awarded its costs in the Court of Chancery to include a reasonable counsel fee, and that your petitioner may have such relief in the premises as this Honorable Court shall seem meet.

GROSS & GROSS,
Solicitors and of Counsel with
Appellant, Hudson & Essex
Building & Construction Company.

ISAAC GROSS,
Of Counsel with Appellant
Hudson & Essex Building &
Construction Company.

Answer to Petition of Appeal of Hudson & Essex Building & Construction Company.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ALBERT & KERNAHAN, INC., a corporation, Complainant, *and* FRANKLIN ARMS, INC., a corporation, Defendant.	On Appeal from the Court of Chancery. Answer to Petition of Appeal of Hudson & Essex Building & Construction Company.

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The answer of Savings Investment and Trust Company, substituted trustee, to the petition of appeal of Hudson & Essex Building and Construction Company.

Savings Investment and Trust Company, substituted trustee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless, admits that a decree was on the 14th day of December, 1929, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purpose among others in said petition mentioned and as therein set forth; but as to the substance and form of said decree, Savings Investment and Trust Company, substituted trustee, begs leave to refer thereto when same shall be produced.

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Savings Investment and Trust Company, substituted trustee, is advised and believes that the

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said decree in so far as it fails and refuses to allow unto Hudson & Essex Building and Construction Company its costs or a counsel fee, is agreeable to equity; and therefore prays that said decree in so far as it denies and refuses to allow said costs or a counsel fee be affirmed with costs to be taxed in favor of Savings Investment and Trust Company.

ARTHUR T. VANDERBILT,
Solicitor for and of Counsel with Savings Investment and Trust Company.

Answers to petitions of appeal of Savings Investment and Trust Company, substituted trustee and Hudson & Essex Building & Construction Co. have been duly filed by all of the parties hereto.

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New Jersey Court of Errors and Appeals

Between ALBERT & KERNAHAN, INC., Complainant, *and* FRANKLIN ARMS, INC., Defendant.	On Appeal from Chancery.

BRIEF FOR SAVINGS INVESTMENT AND TRUST COMPANY, SUBSTITUTED TRUSTEE.

Preliminary Statement.

Savings Investment & Trust Company, Substituted Trustee, has filed a brief, as appellant, on another phase of the order involved in this appeal. This brief is by way of answer to the brief filed on behalf of appellant, Hudson & Essex Building and Construction Co. in which the contention is made that the Vice-Chancellor erred in failing to award to appellant costs or a counsel fee.

ARGUMENT

The lower court did not err in refusing to allow costs or a counsel fee, to be paid in any part from the substituted trustee's distributive share, to appellant.

Appellant was a secured creditor, a mortgagee who had postponed its $9500 mortgage to the mortgage held by the trustee, for whom Savings

Investment & Trust Company was ultimately substituted (S. C., p. 31, ll. 25-32). Mechanic lien claimants contended that by the aforesaid postponement appellant was relegated to a position inferior to their position. The Master to whom the matter was referred to ascertain priorities concurred in that view and found that appellant was last in the order of priority. The Master's report was then confirmed by the Vice-Chancellor.

Contending that the report was erroneous, in that appellant's claim should have been placed immediately after the substituted trustee's prior claim of $44,700 with interest, appellant filed exceptions to the Master's report and appealed from the order confirming said report. Its appeal was sustained (S. C., p. 9). All of the work done by its counsel and expense incurred was necessitated by its appeal and was not in any manner caused by the substituted trustee.

It must be remembered that appellant's appeal involved a conflict chiefly between lien claimants and appellant. Appellant was not particularly interested in the substituted trustee's attempt to enlarge its prior claim for the fund would probably have been sufficient to pay the substituted trustee's claim, even if enlarged and the claim of appellant. Appellant was, however, interested in establishing its priority over lien claims totalling $60,000 for if it had failed in that, there would be no distribution to appellant.

It is indeed a novel proposition and it would be a far sweeping development to hold (as appellant suggests) that a subsequent lienor whose appeal is sustained, thereby advancing its position in the order of priority, should be allowed its counsel fees and costs (even in part) from the distributive share of a prior claimant.

It would serve no useful purpose to answer in detail the statements contained in appellant's

brief. Appellant's position is no different from innumerable creditors in receivership proceedings who have appealed. In no case that we have been able to find, and appellant cites none, has any court ever held that a creditor in receivership is entitled to even a portion of his costs and counsel fee from the distributive share of another creditor. Indeed we have found no case in which that contention was even made.

In some adjudicated cases the contention has been made by creditors that their costs and counsel fees should be paid from the *entire fund,* the same as other receivership expenses. If any counsel fee or costs is allowed to appellant it should unquestionably be paid from the entire fund with other receivership expenses, and then creditors should be paid in their order of priority. The reasons and authorities in support of this view are fully stated in the brief filed by the substituted trustee on its appeal.

Not only do our courts refuse to allow counsel fees to creditors from distributive shares of other creditors but also uniformly hold that no counsel fee should be allowed from the entire fund. It is the duty of the respective creditors to pay their own counsel fees.

> *Unger* v. *Newlin Haines Company,* 95 N. J. Eq. 16 (Ch. 1923);
> *In Re New Jersey Refrigerating Co.,* 99 N. J. Eq. 155 (Ch. 1926).

In the latter case the court at page 156 said:

> "If the solicitors desired to participate in the various litigations on behalf of their respective clients, in my opinion, their respective clients should pay them.
>
> In fact, this matter has been so decided in the case of *Unger* v. *Newlin Haines Co.,* 95 N. J. Eq. 16, wherein Chancellor Walker held:

> 'Out of the funds in his hands a receiver will be compensated for his services in such sum as they are fairly and reasonably worth, somewhat apportioned to the amount which he has received and administered; and allowances will be made to the counsel retained by him, for the services to the receiver in relation to the trust; but no allowance can be made to counsel for creditors, or bidders at the receiver's sale, even though the services of such counsel have directly inured to the benefit of the estate; they must look to their clients for their compensation.' "

As stated in appellant's brief the reasonableness of the requested counsel fee was not questioned since the Vice-Chancellor concluded that no fee should be allowed.

It is respectfully submitted that the lower court did not err in refusing to allow costs or a counsel fee, to be paid in any part from the substituted trustee's distributive share, to appellant.

Respectfully submitted,

ARTHUR T. VANDERBILT,
Solicitor for and of Counsel
with Savings Investment & Trust
Company, Substituted Trustee.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

(4177)

New Jersey Court of Errors and Appeals

Between ALBERT & KERNAHAN, INC., a corporation, *Complainant,* and FRANKLIN ARMS, INC., a corporation, *Defendant.*	On Appeal from the Court of Chancery.

Brief for Appellant, Hudson & Essex Building & Construction Co.

Hudson & Essex Building & Construction Co. having filed exceptions to a Master's report, which were overruled by the Court of Chancery, was required to appeal to this Court where its contention was sustained and where an appeal taken by Service Trust Company, the predecessor in trust of Savings Investment & Trust Co., substituted trustee and now an appellant here, was dismissed. The Court below refused to allow this appellant its costs and a reasonable counsel fee to reimburse itself for the expense of this costly and protracted litigation, which in fact was a contest between lienors as to their respective priorities, and hence Hudson & Essex Building & Construction Co. appeals.

The Facts.

Upon bill filed by the complainant, a general creditor, Franklin Arms, Inc., was adjudged insolvent and receivers appointed. Upon petition of the receivers, and because of the objection of this appellant (there having been no question as to the validity or legality of its mortgage), an order was made, as recited in paragraph eleven of the agreed state of facts (State of Case, p. 3) for the sale of the property free and clear of all liens, and providing that the amount due this appellant, to wit, the sum of $9,500, with accrued interest, shall be paid in full from the proceeds of the sale, without any deduction for administration expenses or costs of sale. This provision is in full force and effect and was ratified and confirmed by subsequent order of the Court. No appeal therefrom was ever taken. The precise language of the order, which was before this Court on the previous appeal in this case, is as follows:

> "Ordered, that the amount due the Hudson & Essex Building & Construction Co. on its mortgage herein recited, the sum of $9,500 with accrued interest, shall be paid in full from the proceeds of said sale, without any deduction for administration expenses or costs of said sale."

After the sale of the property by the receivers, the Court of Chancery, on the advice of Vice-Chancellor Church, referred to a Master the determination of the priorities of the respective parties. The Master reported that there be first paid to Roland J. Francis, trustee, or Service Trust Company, substituted trustee, on account of its mortgage—$44,700 with interest; secondly, to mechanics'

lien claimants, concurrently, a sum in excess of $65,000; thirdly, to Roland J. Francis, trustee—$55,485, with interest, and lastly, to Hudson & Essex Building & Construction Co.—$9,500 with interest. The item directed to be thirdly paid to Francis, trustee, amounting to $55,485, consisted principally of commissions for the loan, bond issue expenses, disbursing and selling expenses, premium on completion bond, and other similar items. The receivers having realized in all $110,000 for the sale of the property, the first two items of the Master's report alone would have exhausted the fund. This appellant filed exceptions to the Master's report and argued them before the Vice-Chancellor, who overruled the exceptions and ordered the confirmation of the Master's report. In order to protect its interests, this appellant was then required to have the Vice-Chancellor's order, confirming the Master's report, reviewed by this Court, resulting in a reversal of the said order and in sustaining this appellant's contention that it was entitled to be paid the amount due to it immediately after the payment to the trustee of $44,700, with interest, thus placing the lien of this appellant's mortgage second in order of priority instead of fourth.

It is apparent that general creditors had no interest whatever in the contest, since the mortgages and mechanics' liens amounted to a sum far in excess of what was in the hands of the receivers. The question before the Court was as to the order in which the liens should be paid. The receivers had or should have had, no interest in that contest, the situation being similar to one where the same contest would have arisen upon the foreclosure of one of the mortgages. This appellant having been successful in its contest, although required to carry

it to the highest court, applied to the Court of Chancery to be allowed its costs and a reasonable counsel fee to be fixed by the Court, and included in its taxed bill of costs, so that it might reimburse itself for part of the expense which it was compelled to incur in order to sustain its right.

POINT I.

This appellant should have been allowed its costs and counsel fees.

Keeping in mind the fact that early in the receivership proceedings before the Court of Chancery, an order was made in unambiguous express language, providing for the payment to this appellant of the amount due on its mortgage, the exact provisions of which order are hereinabove set forth, it seems to us clear that the subsequent efforts made by mechanics' lien claimants and Rolland J. Francis and Service Trust Co. trustees, to place the lien of the appellant's mortgage in the fourth place, so that it could not be paid at all, was highly inequitable. The rights of this appellant were by that order fixed, presumably to the knowledge of all parties in interest, and no party ever found cause to quarrel with it. This appellant had the right to expect that an order of the Court solemnly made and in full force, would be respected and that it would be paid its money without the necessity of incurring further expense or suffering undue delay, immediately after the sale of the property. The receivers' duties, upon the sale of the property for a sum insufficient to satisfy the admitted liens thereon, might have ended by their applying to the Court to pay their fees and that of their counsel, and deposit the balance of

Glasser vs Achtel, Ste Restaurant 149 Atl. (Feb. 10, 1930)

the moneys to abide the result of the contest between the lienors. They did not undertake to determine the priorities as between the parties, but applied to the Court to have the matter referred to one of the Masters. In spite of the aforesaid order requiring payment to this appellant, of the amount due it, it was required to make appearances before the Master, prove its mortgage, and then orally and by brief argue before the Master that it was entitled to be paid, as this Court subsequently found it should be paid. After the filing of the Master's report, this appellant was obliged to file exceptions thereto and argue these exceptions before the Court orally and by voluminous brief and reply brief. After such argument the Court of Chancery overruled the exceptions and confirmed the Master's report, necessitating the taking of an appeal to this Court. At the same time Service Trust Company likewise appealed from the order of the Court of Chancery and insisted that in addition to the $44,700 with interest which the Court found it was entitled to be firstly paid, it should also be paid the item of $55,485 for commissions, disbursing and selling expenses, bond issue expenses, &c., prior to the mortgage of this appellant. It assumed this inequitable position in spite of the order of the Court aforementioned. The trustee sought, by its appeal, and its attitude anterior thereto, to recover the entire fund in the hands of the receivers and leave this appellant without anything on account of its mortgage.

On the opening day of the terms of this Court when the original appeal came on, counsel, representing Service Trust Co. as substituted trustee, moved before this Court to strike out of the printed book this appellant's amended petition of appeal because therein was set forth one of the principal

objections to the decree which point had been urged in the Court below, and which all parties in interest knew presented the real meritorious point at issue, and which said point, by inadvertence, was incorrectly stated in the original petition of appeal, although in preparing the material for printing, counsel had agreed that the same be included. This Court denied the motion to strike from the printed book the amended petition of appeal and the case was thereupon agreed to be submitted on briefs. Thereupon the printed books and briefs of all parties were handed to the sergeant-at-arms and it was presumed that the case had then been submitted for the consideration of the Court. On the last day provided by the rules for the filing of a state of case and briefs, where cases are submitted on briefs, the trustee served upon this appellant a supplemental state of case containing 165 pages of printed matter and an entirely new brief of 31 pages of printed matter, in which said brief entirely new points were raised, to which, under the rules, no opportunity would have been afforded for a reply. Application had to then be made to this Court for leave to file answering briefs and such answering briefs had to be prepared to meet the new points thus raised. The appeal of Service Trust Company, as substituted trustee, was dismissed and the appeal of this appellant was, by the opinion of this Court, held to be meritorious. These facts are recited for the purposes of showing the inequitable conduct on the part of the trustee and also of the lien claimants in seeking to defeat the just claim of this appellant fortified by the order of the Court of Chancery aforesaid made early in the proceedings.

As the matter resolved itself there was a contest as to the priorities between lien holders against a

particular parcel of real estate, or the proceeds of sale thereof. It is common practice that the successful party in such a contest is entitled to his costs.

Thus, it is held by this Court in

Sanford v. *Clarke,* 38 N. J. Eq. 265,

in an opinion by Chief Justice BEASLEY, that a party who succeeds in a substantial particular on exceptions to a Master's report is, as a general rule, entitled to his costs in such proceeding.

In *15 Corpus Juris,* page 35, the text supported by innumerable cases in the notes, is as follows:

> "The general rule in suits in equity, as well as in actions at law, is that the prevailing party is entitled to costs, and it will be applied unless the losing party can show that equity requires a different judgment.
>
> "The general rule that the successful party is entitled to costs, applies ordinarily when the complainant is successful in a suit which is necessary to protect or to enforce his rights.
>
> "It applies where defendant's denial of complainant's rights makes it necessary for the latter to resort to a Court of Justice for the establishment of such rights, and to be placed in a position to enjoy them.
>
> "So where defendant makes an unreasonable or unconscientious defense, if plaintiff is successful, he is entitled to costs."

Section 91 of the Chancery Act provides that counsel fees may be allowed to either party. The purpose of such allowance being to assist a party who has been unjustly put to expense of litigation, to partly reimburse himself for such expense, and in effect to make the party responsible for the necessity of their incurrence, by fostering or carrying on the litigation, pay them. In other words,

to try to make the injured party as nearly whole as justice will permit.

The allowance of such counsel fee may be discretionary, but we respectfully submit that under the circumstances existing in this case, their denial to this appellant is an abuse of discretion.

The Vice-Chancellor in his memorandum (State of Case, 22, at line 27), says:

> "While it may be true that these solicitors rendered very valuable services to their client, I think that outside of allowances to the receivers and counsel, no other allowances should be made."

We respectfully submit that under the order of the Court of Chancery, from which the relevant excerpt is hereinabove set forth, this appellant was entitled to its $9,500 with interest, without deduction for expenses of administration or costs of sale, and this, within a reasonable time after such sale. Now, because of the attitude of the trustee and of the lien claimants, this appellant was obliged over a period of over three and a half years to carry on a litigation to recover what was due it, to the Court of last resort once, and now again a second time.

This appellant should be made whole, as far as it is possible so to do, so that it will receive its money, with as little loss therefrom for the services of its counsel, which it will have to pay, by requiring those who unsuccessfully contested its right, to pay a substantial sum by way of counsel fee, to be included in the taxed costs, and collected as an item of such costs.

This appellant applied for a counsel fee of $5,000, to be paid either generally out of the funds in the hands of the receivers, or partly out of the funds to which the trustee is entitled and partly

out of those to which the mechanics' lien claimants are entitled, and it is respectfully submitted that such should be the order.

The reasonableness of the amount so applied for by this appellant was not questioned by any of the counsel or the Court below.

Respectfully submitted,

GROSS & GROSS,
Of Counsel with Hudson & Essex Building & Construction Co., appellant.

ISAAC GROSS,
Of Counsel.

New Jersey Court of Errors and Appeals

Between ALBERT & KERNAHAN, INC., Complainant, *and* FRANKLIN ARMS, INC., Defendant.	On Appeal from the Court of Chancery.

BRIEF FOR RESPONDENTS.

Facts.

While it is true that the facts in connection with this appeal had been agreed upon in writing (See Agreed State of Facts, State of Case, pages 1 to 12), respondents respectfully insist that some of the inferences contained in the statement of the case in the brief for appellant, Savings Investment & Trust Company, Substituted Trustee, are erroneous.

No clearer statement of the facts connected with the early stages of this litigation can be given than that contained in the opinion of Chief Justice Gummere, reported in 146 Atl. 213; 7 N. J. A. R. 717:

> "The bill in this case was filed by a creditor of the Franklin Arms, Inc., for the purpose of obtaining a decree adjudging it to be insolvent, for the appointment of a receiver, and for an order directing the receiver to sell the property and assets of the bankrupt

corporation and distribute the proceeds of such sale among its creditors. No answer being filed to the bill of complaint, an *ex parte* hearing was had, which resulted in an adjudication of insolvency and the appointment of a receiver. An order was subsequently made directing the receiver to sell the property and assets of the defendant corporation; and, pursuant to this mandate, the receiver made such sale, the purchase price received by him thereon being $110,000.00. The receiver having reported the sale, an order was then made referring it to a master to take an accounting of the moneys due to the various holders of incumbrances upon the defendant corporation's property and to state the order in which they were entitled to be paid. It appeared on the hearing had before the master that there were two mortgages upon the property, one for $215,000, made to Rollin J. Francis, as trustee (for whom Service Trust Company of New Jersey was afterwards substituted) to secure an issue of bonds to be made by the mortgagor, and that the purpose of making this mortgage and the issuing of the bonds was to raise money to enable the Franklin Arms to erect a large apartment house upon a tract of land owned by it in the town of Bloomfield. The other mortgage was for $9,500, and was held by the Hudson & Essex Building & Construction Company. It further appeared that there were certain mechanics' liens upon the property, amounting altogether to about $70,000. The mortgage of the Hudson & Essex Building & Construction Company was concededly prior in point of time to the trust mortgage, and also prior to the several mechanics' liens. The proofs further showed that, when the making of the trust mortgage of $215,000 for the purpose above stated was under consideration, the Hudson & Essex Company entered into a written agreement with the owners of the property, by the terms of which their mortgage was to be postponed and subordinated to that to be

given to the trustee, who agreed that the money to be advanced thereon should be appropriated to the payment of expenses incurred in the erection of the apartment house. The proofs submitted by the trustee showed that he had advanced moneys to the Franklin Arms to the extent of $44,700, to be used in the payment of moneys due and to become due to contractors engaged in the erection of the apartment house; and, also, that the Franklin Arms owed the trustee the further sum of $55,485, which was secured by the mortgage, but no part of which was used in or intended to be used in the construction of the building.

A consideration of the facts above stated led the master to the conclusion that the proceeds of sale in the hands of the receiver should be appropriated as follows: First, to the payment of the $44,700 advanced by the trustee, which had gone into the erection of the defendant's apartment house, together with interest thereon; second, to the payment of the various mechanics' liens upon the property; third, to the payment of the $55,485 which was due the trustee and was also secured by the trust mortgage; and, lastly, in satisfaction of the mortgage of the Hudson & Essex Building & Construction Company. Reaching this conclusion, the master so reported to the Chancellor. The Hudson & Essex Building & Construction Company excepted to the master's report; but none of the other parties in interest filed any exceptions thereto. A hearing was had before Church, V. C., on the exceptions filed. His consideration of them led him to the conclusion that they were without merit, and he advised an order confirming the master's report. Both the Hudson & Essex Building & Construction Company and the trustee have appealed from the order of confirmation.

(1) Taking up for consideration the appeal of the trustee: Our conclusion is that it should be dismissed. As has just been

pointed out, no exception was taken by him to the master's report, and such failure is, by implication, a consent to its confirmation, and, consequently, a bar to an appeal from the order under review. The Vice Chancellor has a right to assume that the adjudication of the master is acceptable to all parties who do not except thereto; just as a trial court in an action at law has a right to assume that the charge to the jury is approved by litigants who do not take exception to any part of it.

(2) The appeal of the Hudson & Essex Building & Construction Company, in our opinion, is meritorious. The effect of the order of confirmation is to wipe out any claim to the fund based upon its mortgage, the total amount of the moneys in the hands of the receiver being much less than the amounts directed to be paid to the trustee and the various holders of mechanics' liens. Such an appropriation of the fund is, as we consider it, in violation of appellant's legal rights. Its consent to the postponement of the lien of its mortgage to that of the trust mortgage was limited to so much of the moneys advanced under the latter instrument as was used in the erection of the proposed apartment house of the Franklin Arms. As to moneys advanced upon the trust mortgage to be used for any other purpose, it still retained its priority of lien. The finding of the master so far as it established the priority of the lien of the trust mortgage over that of the appellant to the extent of $44,700, was entirely justified under the proof taken before him; but his finding that the additional indebtedness of the Franklin Arms to the trustee was also entitled to priority of payment over the mortgage of the appellant is without legal support.

(3, 4) We consider also that there was error in the finding of the master that the holders of mechanics' liens on the property were entitled to priority of payment as

> against the appellant. By the contract of the latter with the Franklin Arms, its mortgage retained its priority over all existing or subsequent liens, except that of the trust mortgage, to the extent already indicated. It did nothing which deprived it of its status as the holder of the first incumbrance upon the property, except to that extent, and no additional burden can be put upon the mortgaged premises to its financial injury, either by the act of the holder of the trust mortgage, or by the act of the holders of the mechanics' liens, or by the joint act of the holders of these incumbrances. In other words, no subsequent lien upon the property can be advanced to its detriment unless it consents thereto. *Hoag* v. *Sayre,* 33 N. J. Eq. 552, 561."

This Court, in the opinion just referred to, reversed the order of the Court of Chancery which confirmed the report of the master in the following language:

> "In our opinion, the fund in the hands of the receiver should be first appropriated to the payment to the trustee of the sum of $44,700 advanced by him for the purpose of being used in the erection of the apartment house of the Franklin Arms, with interest thereon, and that, out of the moneys remaining in the hands of the receiver after making such payment, there should then be paid to the present appellant, the Hudson & Essex Building & Construction Company, the amount of principal and interest due upon its mortgage."

The order which this Court was reviewing in that appeal, although not set forth in the present agreed State of Facts, contained the following paragraphs (Order Confirming Master's Report, advised May 19, 1928, State of Case, original appeal, pages 93 to 96):

> "Ordered that no distribution shall be made by the receivers in accordance with the

terms of this order until after their final report has been filed and all fees and allowances fixed by this Court. And it is further

Ordered that nothing herein contained shall bar the receivers from making application at the time of the hearing on their final report to have the fees and expenses of the administration of the receivership charged pro rata against the various claims of the defendants, whose claims were reported upon by the Special Master in his report, which is confirmed by this order."

No report or account of the receivers had been filed at the time of the first appeal heard by this Court. Upon the filing of the opinion by this Court, heretofore quoted, the receivers filed their report and account (State of Case, page 10), and upon the filing of their final report and account, an order to show cause was taken, requiring the holders of the various liens on the real estate of the defendant company, which had been sold free and clear of such liens, to show cause why the receivers' account should not be approved, and why allowances, counsel fees, etc., should not be made; why distribution should not be made and why the receivers should not be discharged.

After a hearing on the rule to show cause and filing of briefs by counsel representing various parties, including appellants, an order was entered thereon which will be found in State of Case, pages 13 to 19. A reading of this entire order will disclose that it was the intent of the receivers and the Vice Chancellor who advised the order, to carry out to its fullest extent the opinion of this Court as disclosed in its opinion heretofore quoted.

The order from which this appeal is taken, just referred to, was based on an order to show cause issued June 25th, 1929, which contained the following provisions:

"Ordered that the creditors of said defendant company who have filed claims with said receivers, show cause before the Chancellor, at the Chancery Chambers, 1060 Broad Street, Newark, on the 28th day of June, nineteen hundred twenty-nine, at ten o'clock in the forenoon of that day (Daylight Saving Time), or as soon thereafter as counsel can be heard, why the report of said receivers should not be approved and the account of said receivers allowed, and why an order should not be made fixing and determining the order of priority of the claim of the Service Trust Co., substituted trustee, the Hudson & Essex Building & Construction Co. and the mechanics lien claimants designated and named in the final report of the receivers, in accordance with the recent opinion of the Court of Errors and Appeals in vacating and modifying the terms of an order heretofore entered, fixing and determining the priority of said claims; and why an order should not be made fixing and determining the fees and allowances of said receivers in the administration of their trust, and fixing and determining the fees, costs and allowances of their counsel, and that of the solicitors of the complainant; and why an order should not be made vacating and modifying or confirming a previous order made herein under the terms of which a counsel fee of $1,000.00 was allowed to Wall, Haight, Carey & Hartpence as solicitors for the original trustee, and also determining the question of the order of priority of payment of such counsel fee if the same is confirmed; and also fixing and determining what the amount or what proportion of the above described fees and disbursements should be charged against the claims of the mortgagees and mechanics lien claimants as set forth in the receivers' final report, and directing the distribution of the balance of the funds in the hands of said receivers, if any, first, among the priority creditors as set forth in said report, and the balance, if any, among the several creditors who have presented their valid

claims to said receivers, in proportion to the amount of their respective claims, and why said receivers should not be discharged from further duties and liabilities in connection with said trust;"

Inasmuch as the receivers had not, prior to the order to show cause on June 28, 1929, filed any final report and as no adjudication had been made in the case fixing the expenses of administration or the order of priority in which they should be paid, it is respectfully contended that the Court of Chancery in the order now under review, for the first time passed upon the question and not as intimated in the brief filed by appellant, Savings Investment & Trust Co., Substituted Trustee, in the order of May 19, 1928, which is erroneously called by the appellant just named, an "Order of Distribution". The order of May 19, 1928, was not an "Order of Distribution", but was an "Order Confirming the Special Master's Report". The Order of Reference which had been issued prior thereto, merely directed the Master to:

"Order that the question of the amount due if anything on the mortgage made by the defendant corporation to Roland J. Francis, Trustee, in the nominal sum of $215,000, and the amount due if anything, on the mortgage held by the Hudson & Essex Building & Construction Company in the sum of $9,500, and the amounts due if anything, on the mechanics' lien claims of Albert & Kernahan, Inc., Juliano Construction Co., Concrete Steel Co., Henry R. Dietz Co., Tuorto Cut Stone Co., Fidelity & Deposit Co. of Maryland, Hudson Structural & Iron Works, Inc., Joseph E. Amorose and Orange Hardware Co., and also the question of priorities as between several mortgagees and mechanics lien claimants above mentioned, be referred to Roy F. Anthony, one of the Special Masters of this court

for the purpose of taking testimony. And it is further

"Ordered that said Special Master shall return his report together with the facts taken by him thereon, with all convenient speed" (State of Case, on original appeal, pages 80 and 81).

This same statement of facts holds true with regard to contention of appellant, Savings Investment & Trust Company, Substituted Trustee, that the allowance of $1,000 to Wall, Haight, Carey & Hartpence, as solicitors of Rollin J. Francis, Trustee, was also directed to be paid in what said appellant erroneously designated as the first "Order of Distribution".

This is also quite apparent from a reading of the memorandum filed by the learned Vice Chancellor (State of Case, pages 20 to 27), wherein he says:

At page 21:

"The determination of the amounts due and the order of priority of the various mortgages and mechanics' lien claims was fixed in accordance with the opinion of the Court of Error and Appeals." * * *

At page 22:

"The next question was what amount or proportion of the fees and disbursements in connection with the administration should be charged against the claims of mortgagees and mechanics' lien claimants. Should the fees so fixed be paid from the funds in the hands of the receivers and then the balance distributed to mortgagees and lien claimants in the amount and order of priority already determined?"

The only questions raised in the appeal of the Hudson & Essex Building & Construction Company is as to the refusal of the Court of Chancery to allow its counsel a counsel fee.

Argument.

The entire argument advanced by the Savings Investment & Trust Company, Substituted Trustee, as appellant, under Point 1 of its brief, is based upon its interpretation of the order of May 19, 1928, which, as has already been pointed out, is erroneously designated as an "Order of Distribution."

It is respectfully contended that an examination of the order in question will disclose no provision which justifies the conclusions advanced by appellant under Point 1 of its brief.

It is respectfully contended that the learned Vice Chancellor in the order advised by him, which is now under review, and which is dated December 14, 1929, conscientiously endeavored to carry out the opinion of this Honorable Court, referred to in the early part of this brief. As has already been indicated herein, the order of May 19, 1928, expressly reserved to the receivers the privilege of making an application to have the expenses of administration charged *pro rata* against the various claims reported upon by the Special Master.

Answering the argument advanced by the above named appellant under Point 2 of its brief, respondents respectfully state that they are in absolute accord with the principle of law laid down so clearly by Vice Chancellor Backes in *Attorney-General* v. *Linden Cemetery Association,* 90 N. J. Eq. at page 408, which rule was adopted by this Court in its affirmance of that opinion, which reads as follows:

> "The rule is thoroughly settled that when a court of equity takes possession of property for the purpose of protecting and preserving it for the benefit of the parties interested, the costs of administration are entitled to priority of payment, regardless of the nature of the

> liens and claims thereon of the litigants. This is so fundamental to the administration of justice and so generally recognized that citation of authority is unnecessary.''

Most of the cases quoted by appellant under this point merely restate into different situations the same general theory and principle. With this principle as had already been stated, respondents have no quarrel.

It must be remembered that in the case now under review, the theoretic balance in the hands of the receivers available for distribution amounts to $112,336.33, and that the aggregate amount of the claims of the Savings Investment & Trust Company, Substituted Trustee, Hudson & Essex Building & Construction Company and the Mechanics' lien claimants, is more than the balance in the hands of the receivers available for distribution even before the fixing of any fees and allowances in connection with the administration of the receivership.

Respondents desire briefly to review the situation as it existed at the time of the filing of the appeal in this case and just what the receivership accomplished for lien holders and creditors.

At the time of the appointment of the receivers, defendant corporation was the owner of a piece of real estate in Bloomfield, New Jersey, upon which there was being erected a large four story brick apartment house, which, at the time of the filing of the bill, was only partially completed. The receivers discovered that there was a first mortgage recorded against this real estate in the nominal sum of $215,000.00, held by Rollin J. Francis, Trustee for bond holders (Savings Investment & Trust Co. now acting as Trustee in place and stead), see State of Case, page 2.

In connection with this mortgage there had been recorded an agreement between defendant

corporation and one G. L. Miller & Co., Inc., under which agreement, moneys were to be advanced in connection with this first mortgage to the defendant, from time to time as the erection of the building progressed.

There was also a second mortgage in the sum of $9,500.00 held by the Hudson & Essex Building and Construction Company, and numerous mechanics' lien claims aggregating approximately $70,000.00. In all of these mechanics' lien claims, priority was asserted as against both the first and second mortgages.

The principal contention with reference to priority over the first mortgage was that the money said to have been advanced at the time of the appointment of the receivers which the trustee under the first mortgage claimed was $100,000.00, had not in accordance with the provisions of the Mechanics' Lien Act, been invested in the building, but represented charges for bonus premiums, interest in advance and various other items. It was admitted that the erection of the building had been commenced before the recording of the first mortgage and that there were no building contracts recorded in the County Clerk's Office. It therefore became necessary for the receivers not only to preserve the uncompleted structure being erected on the land, but also to determine what action if any, would be taken with reference to the completion of the building, or its sale in its uncompleted state; also to determine the legality of the claims being asserted as liens, both as to their amounts and the order of their priority.

The mortgagees took no action with respect to the situation which they could have done by the filing of petitions requesting permission to foreclose either or both of their respective mortgages, and having the receivers made party defendants.

But the receivers proceeded to bring about a practical solution of the difficulty by having a sale of the premises in its then state, free and clear of all liens, and having the liens of the various claims retain their position against the funds which would be created by the sale in the same way and manner as the liens existed against the real estate.

As has been pointed out and as will be ascertained from an examination of the agreed State of Facts, the receivers took proceedings after the sale to determine the amounts due the various lienors and their respective order of priority, and the same was reviewed by this Honorable Court, so that there is now no dispute as to the amount due each of the contending lienors and their respective order of priority.

If the fees and costs of administration by the Court of Chancery in its order of December 14, 1929, from which incidently, no appeals were taken, are to be paid by the receivers from the funds in their possession, and the balance distributed to the holders of mortgages and mechanics' lien claimants, the practical and the real effect of such an order will be to place upon the mechanics' lien claimants the entire burden and expense of such receivership. If, however, the fees and costs are apportioned among the first mortgagee, second mortgagee and mechanics' lien claimants in the proportion each of such claims bears to the aggregate amount of claims which will share in the distribution, a much fairer and equitable solution will be reached. That is the reasoning which prompted the learned Vice Chancellor to advise the order now under review.

From the very time the bill in this case was filed, up until this Court rendered its opinion heretofore quoted, the trustee, under the first mortgage now represented by the Savings Investment & Trust Company, Substituted Trustee, took

the position that the entire $100,000.00 due on its mortgage was a first and prior lien, not only to the second mortgage on the property but also as to all the mechanics' lien claims which were being asserted against the property.

An examination of the State of Case filed on the first appeal will disclose hundreds of pages of testimony taken and hundreds of pages of printed exhibits consisting of a long mortgage and building agreements, under the terms of which one G. L. Miller & Co., acting as the agent of the bond-holders under the first mortgage, was to advance the money under the first mortgage into the building. The respondents contend that this most material fact must have been given serious consideration by this Honorable Court at the time of rendering its opinion, herein set forth.

It was absolutely essential that the receivers, representing all parties in interest and occupying the semijudicial position that receivers do, should, for the protection of every one, not only the mortgagees but mechanics' lien claimants and general creditors, ascertain not only the amount due each creditor; not only the order of priority as between creditors, but should also, if in their opinion the facts in this particular case made it equitable, fair and just, distribute the expenses of administration, even tho they were prior to the payment of all claims, in some fair proportion among those creditors who would share in the final distribution of the funds in the receivers' possession.

Respondents respectfully urge that the order should be affirmed under the fundamental principles of justice and equity and that there is judicial authority to uphold the order.

The following citation is taken from 34 Cyc., pages 369-370:

"3. Apportionment. The expense of the receivership must be shared by all the lienholders for the establishment and foreclosure of whose liens the receivership proceedings were instituted, and no property in the hands of a receiver can be exempt from its share of the proper and necessary expenses of the receivership unless it be affirmatively shown that no part of such expense was incurred for the benefit of said property. Where there are several funds, and the receivership is as necessary for the conservation of the one as of the other, they should bear the expense in proportion to the benefit received by them, and, in the absence of facts justifying such course, it is error to charge the whole of the expense on one fund."

The case of *Lemback* v. *Jarvis Terminal Cold Storage Co.,* decided by the late Vice Chancellor Stevenson, and reported in 59 Atl. Rep. beginning on page 565, was the principal case relied upon by respondents in the Court below. A reading of the opinion will disclose the following excerpts which are deemed important. At page 565:

"The case is peculiar. The case was started on behalf, undoubtedly, of the stockholders and creditors of this corporation; and, if the cause had proceeded as such causes generally do, these questions would not have been before the court. The receiver would have taken the property subject to the liens that were upon it, and would have sold that property, and what he got would have been the fund out of which primarily he would receive his compensation. If he did not get any funds, he might not get any compensation; it would be what has been termed a 'dry receivership'; and it is proper in such cases for the complainant to be compelled oftentimes to put up a bond to secure the fees of the receiver, whom the court appoints at his instance. But in this case I think I may rely on my memory to say that practically from

the start it was apparent to all parties interested that there was no equity to administer for the general creditors at all, and that the proper course to take was to have the property sold under this statute, and have all the proceeds brought into court by the receiver, to await the same sort of adjudication in regard to the title to the fund which would be made upon a suit or suits of foreclosure—suits to foreclose mortgage liens. From the time when that situation was declared, and I think it was apparent at the start, this whole proceeding was practically converted into a mortgagees' suit—lienors' suit to foreclose their liens, have their priorities adjusted, to have the property sold to the best advantage, and meanwhile have the property preserved for them, not preserved for the general creditors. The general creditors practically disappeared from view at the very start.

Every person who accepts a mortgage or a bond secured by a mortgage from a corporation, or in any way acquires a lien upon the property of a New Jersey corporation, takes subject to the effect of insolvency proceedings which may subsequently be commenced, and in which a receiver may be appointed of all the corporate assets, including the property upon which the incumbrance has been so acquired. This mortgagee—these bondholders—accepted their securities, knowing that in future insolvency proceedings against this cold storage company the legality of their incumbrances might be called in question, the whole property might be administered by the receiver, and not the equity only, and their liens, if found valid, would attach to the proceeds which would result from the receiver's sale. Where, under our statute, the receiver sells, not the equity, but the property itself, he is acting, not for the stockholders or unsecured creditors, necessarily, but for whatever class of creditors may finally be adjudged entitled to the fund in his hands. Where this kind of a sale is had under our

statute, the proceedings amount to a foreclosure suit for the benefit of the incumbrancer in case the validity of the incumbrance is established. In this case not one dollar of compensation is allowed out of the fund to the receiver or to his counsel which was not earned in the care and sale of the mortgaged property. If, instead of taking advantage of the insolvency proceedings to realize upon their pledge, these bondholders or, rather, their trustee, the mortgagee, had filed a bill, is it not perfectly plain that precisely this same receivership, with its attendant expenses, including compensation to counsel, would have been incurred? My recollection is that the mortgage covered the whole plant, practically as a going concern; but, if it did not, then the incumbrancers may have secured a more valuable receivership in insolvency proceedings than they would have been able to get in their own suit to foreclose.

The rule upon which I have acted in cases of this class a number of times is to allow to the receiver and his counsel at least the same compensation which they would have been entitled to receive if they had been appointed in a suit to foreclose the mortgage or other incumbrance which receive the benefits of the receiver's care and the receiver's sale. Where the incumbrance is finally adjudged invalid, no difficulty arises, because the entire proceeds of sale stand as a fund for the benefit of the unsecured creditors. But where the incumbrance is finally adjudged valid, then that part of the services of the insolvency receiver and his counsel which have directly benefited the incumbrancer, and have corresponded precisely with similar expenses which he would have been obliged to incur on his own behalf in his own suit, plainly should be charged against the fund upon which the incumbrance is fastened. Where the insolvency receiver has had other assets besides those found to be subject to the mortgage, the effort of course, should be to make each class—the incumbrancers and the general creditors—

pay for the services of which it derived the benefit.

I do not know that there has been any published adjudication on this subject, but the matter came up directly before the late Chancellor McGill in the case of Boehme, Receiver of the New York Silk Ribbon Manufacturing Co. *v.* Rall, about ten years ago (51 N. J. Eq. 541, 26 Atl. 832). In that case the mortgagees accepted from the corporation a mortgage of doubtful validity upon the entire assets, and thereupon the corporation was immediately put into insolvency, and a receiver was appointed. Before the mortgagees could file a bill to establish and foreclose their mortgage, the receiver filed a bill to have it declared void. Meanwhile the receiver was obliged to care for the plant and operate it for the completion of goods, all of which were covered by the mortgage, if there was any mortgage. After a time the statute was invoked, and the whole property was converted into cash by the receiver. The litigation between the receiver and the mortgagee then proceeded to a conclusion, and the result established the mortgage as a valid lien. The entire fund in the hands of the receiver was thus subjected to the mortgage, and was not sufficient to pay the amount due thereon. Nevertheless, upon an application by the receiver, which was resisted, Chancellor McGill allowed substantial compensation to the receiver and to his counsel. Whether the late Chancellor, in fixing the counsel fee, consciously compensated the receiver's counsel out of the mortgagees' money for trying to defeat the mortgage, I do not know. I have never been obliged to decide this precise point, and it is not raised in this case, because no allowance is made to the receiver or his counsel for any services rendered to the stockholders or general creditors in any proceeding hostile to the interests of any mortgagee, bondholder or lienholder who will take any part of the fund in the receiver's hands, or who would receive any part thereof

> if no compensation were allowed to the receiver or his counsel. The allowance is made on the theory that the incumbrancers, who have had the advantage of this receivership, to have their pledge cared for, kept in shape for sale, and sold to advantage, and have thus been saved similar expensive proceedings in a suit on their own behalf, ought, in equity, to pay for the advantages which they have received. The fund has been administered by this court, through its officers, for their benefit, and they acquired their incumbrances subject to the very condition which has occurred."

It will be noted that no receivers' fees were allowed in this case because of the fact that the complainant, when the bill was filed, urged the appointment of receivers who would serve without compensation.

The general administration expenses of this receivership were paid from the sale of assets other than the property covered by the liens now under review, and the only expense of administration which the Court charged against the three lienholders was the fees allowed to counsel for the complainant and the receivers.

It will also be noted that no proportion of such expense was charged against the appellant, Hudson & Essex Building & Construction Company, because of the fact that in an earlier order in the case provision was made for the payment of its mortgage free of any charge of administration expense.

Respondents deny the contention of this appellant that the adjudication of this Honorable Court in *Lyle* v. *Staten Island Terra Cotta Lumber Company,* 62 N. J. Eq. 797, is an absolute authority that in all cases after payment of receiver's expenses creditors should be paid in full in the order of their priority until the fund in the

hands of the receiver is exhausted. A reading of that case will disclose that there was a very peculiar situation involved in that case, and the practical result was that the offer of $100,000.00 which was made by the bidder meant that each preferred creditor would get the full amount of his claim, and that each general creditor other than the bidder would get a cash dividend on his claim, charged with the proportionate part of the expense.

Respondent insists that a reading of the opinion will disclose the fact that it does not fix any general rule but can only be held to be applicable to the peculiar facts therein involved.

Another case cited by this appellant, *Bankers Trust Co.* v. *Maxson,* 100 N. J. Eq., page 1, is not applicable to the situation now before the Court, because in that case it was a foreclosure suit in the first instance, and, secondly, there were no facts involved therein which were at all similar to the facts in the present case. As a matter-of-fact, respondents contend that the principle which the Chancellor laid down in that opinion inferentially supports their argument in the present case, because it will be found from a reading of the opinion that the Chancellor, having apparently found as a fact that the mortgagee's interest had been benefited by the services of the insolvency receiver, imposed a lien upon the proceeds of the sale of the mortgaged premises for such sum as the receiver expended for betterment of the mortgaged premises, and for the preservation thereof, and for his compensation and costs of suit.

The two cases of

> *Meister* v. *J. Meister, Inc.,* 6 N. J. A. R. 1136; 142 Atl. 312;
>
> *Franklin Lumber Co.* v. *Harold Anderson, Inc.,* 7 N. J. A. R. 545; 145 Atl. 477,

modified by this court in 105 N. J. Eq. 542, while they are not perhaps opinions which directly uphold the principle being contended for respondents, it is urged inferentially they are, because, if the Court of Chancery in the two opinions just quoted held that funds in the hands of insolvency receivers should be separated for the purpose of charging against each of said funds its proportionate part of the expenses of the receivership, then, when, as in the case now under review, there is one fund, but three claimants and each of their respective liens have been protected and benefited by the receiver, it is urged that it is proper to charge against each one of said liens its proportionate part of the expense thus incurred.

It is also respectfully contended that the recent opinion of Vice Chancellor Fallon in *Ciavatta* v. *Munn Realty Corporation,* reported in 106 N. J. Eq. 21, is inferentially an authority in favor of the contentions now being advanced, because, in that case, the Court of Chancery held that where an insolvency receiver performed services which resulted in benefit to the mortgagee, and there was insufficient funds in his hands to pay his costs and expenses, the mortgagee should be charged and ordered to pay into the funds of the receiver, sufficient moneys to pay his costs and expenses.

Using practically the same language that was used by Vice Chancellor Stevenson in the case of *Lembeck* v. *Jarvis Terminal Cold Storage Co.,* cited *supra,* respondents contend that the facts in the case now before the Court were peculiar. There is no doubt that it started originally as an ordinary stockholders' and creditors' suit, and if the receivers had sold the property subject to all the liens, it is doubtful if anything would have been realized for the payment to the receivers of the receivership expenses. However, when the Court of Chancery advised the order which is now

under review, the Vice Chancellor who advised that order, being familiar with all the facts in the case from the very filing of the bill, knew as did everyone else interested in the case, that from the very start this whole proceeding was practically converted into a lienors' suit to foreclose their respective liens; to have their priorities adjusted; to have the property sold to the best bidder, and meanwhile, have the property preserved for them and not preserved for the general creditors. The general creditors practically disappeared from view at the very start.

Respondents further contend that if the first mortgagee in this case had filed its bill to foreclose and the mechanics' lien claimants had filed proper answers setting up the priority of their claims to the claim of the first mortgagee, especially to the full amount claimed thereon, to wit: $100,000.00, and if the same hearings which were held by the receivers in this case before the Special Master had been held in such a foreclosure suit, and the mechanics' lien claims had been just as successful in that hypothetical foreclosure suit as they were in these proceedings, the Court of Chancery would undoubtedly have been justified in allowing to the solicitors representing the mechanics' lien claimants, substantial counsel fees for their successful reduction of the amount due on the first mortgage prior to mechanics' lien claims, to wit: from $100,000 to $44,700.

It is therefore respectfully contended that for all the reasons herein cited, the order of the Court of Chancery now under review, should be affirmed with costs.

Argument as to Counsel Fee of $1,000.00 allowed to Messrs. Wall, Haight, Carey & Hartpence, as Solicitors of Rollin J. Francis, Original Trustee.

The only argument apparently advanced by appellant, Savings Investment & Trust Company, Substituted Trustee, as to the $1,000.00 counsel fee allowed Messrs. Wall, Haight, Carey & Hartpence, is set forth on page 16 of its brief.

Respondents desire to briefly set forth the facts in connection with this phase of the case.

When the bill in this case was first filed, Wall, Haight, Carey & Hartpence appeared as solicitors for Rollin J. Francis, who was the original trustee named in the first mortgage executed by the defendant corporation, and which covered its property in Bloomfield, New Jersey.

On January 12th, 1927 (See State of Case, page 5) an order to show cause was entered why the Service Trust Co. of New Jersey should not be named as trustee in place of said Rollin J. Francis.

On February 1st, 1927 (See State of Case, page 6) an order was entered substituting the Service Trust Company in place of Rollin J. Francis as trustee, and the order further provided that the compensation of Messrs. Wall, Haight, Carey & Hartpence, in full for their services *as solicitors and counsel of said trustee,* be $1,000.00. Said fee was to be paid to said solicitors as the court may direct, out of any funds which may come into the hands of the receivers herein, and said fee was constituted a lien upon said funds first in order of priority after the lien of the receivers' fees herein. It was urged before the Court below that inasmuch as the services rendered by Messrs. Wall, Haight, Carey & Hartpence were peculiarly for

the benefit of the trustee under the first mortgage, that such compensation and fee should be paid out of the funds which would be paid by the receivers to the now substituted trustee. This was not an administration expense in any sense of the word, and clearly, the order of the Court below which directed that this counsel fee should be paid by the receivers, and be deducted from the claim of the Savings Investment & Trust Company, Substituted Trustee, was equitable and just, and should be affirmed.

Appellants cite no authority in support of their argument, and respondents contend that the matter is so elementary that their argument needs no citation of authorities to uphold it.

Argument Answering Brief of Appellant, Hudson & Essex Building and Construction Company.

As was heretofore stated in this brief, the only point raised by the appeal of the Hudson & Essex Building and Construction Company was as to the refusal of the Court below to allow appellant costs and counsel fee.

Respondents have no serious dispute with the facts set forth in the brief of this appellant, but as has already been stated, under the peculiar facts of this case, it is urged that the receivers did have an interest in the contest between the lienors, both as to the amount of their claims and their order of priority.

It will be noted that this appellant does not cite a single authority in favor of its contention that the Court below erred in refusing to allow it a counsel fee and costs, except the case of *Sanford* v. *Clark*, 38 N. J. Eq. 263, which apparently deals only with the question of costs, as to which respondents assert there was never any dispute.

There is nothing so far as these respondents know, in the record in the Court below, which indicates that this appellant was seriously interested in costs, or urged an allowance of costs, but that its primary and exclusive interest seemed to be in an allowance of a $5,000 counsel fee to its solicitors for their services.

It is respectfully urged that the citation from Corpus Juris and from Section 91 of the Chancery Act is applicable to general suits in equity, but should not be extended to receivership actions.

It is respectfully contended that Section 85 of the Corporation Act, which reads as follows:

> "Before distribution of the assets of an insolvent corporation among the creditors or stockholders, the Court of Chancery shall allow a reasonable compensation to the receiver for his services, and the costs and expenses of administration of his trust, and the costs of proceedings in said court to be first paid out of said assets,"

is an authority only for allowances which are incurred strictly in the administration of the receivership.

Respondents further state that outside of allowances to the receiver, solicitors of the receiver, and solicitors of the complainant in connection with the filing of the bill, it has not been the practice of the Court of Chancery to allow counsel fees to solicitors representing creditors, whether secured or unsecured, with the possible exception of cases where solicitors of interested parties have, by virtue of their services, been successful in bringing into the receiver's funds, assets which have become available for distribution to the creditors of the defendant corporation.

Clearly, there is nothing in the record contained in the State of Case, or any argument advanced by appellant, Hudson & Essex Building and Con-

struction Company, which demonstrates that the refusal of the Court below to grant its solicitors a counsel fee, was an abuse of discretion.

As is stated in 18 Corpus Juris at pages 1137-1138:

> "When it is said that something is left to the 'discretion of a judge,' it signifies that he ought to decide according to the rules of equity and the nature of circumstances, and so as to advance the ends of justice."

Respondents have no dispute with the argument advanced by this appellant, that because of the inequitable conduct on the part of the original trustee, and the substituted trustee representing the first mortgagee in this case, the funds to which the substituted trustee is entitled, should be charged with a counsel fee payable to the solicitors of this appellant for the services rendered by them in upholding the validity and priority of their client's mortgage.

Respondents respectfully urge that the appeal of the Hudson & Essex Building and Construction Company be dismissed.

Respectfully submitted,

EDWARD R. MCGLYNN,
Solicitor for and of
Counsel for Receivers of
Franklin Arms, Inc.

STEIN, MCGLYNN & HANNOCH,
Solicitors for and of
Counsel for Mechanics'
Lien Claimants.

New Jersey Court of Errors and Appeals

Between ALBERT & KERNAHAN, INC., Complainant, *and* FRANKLIN ARMS, INC., Defendant.	On Appeal from Chancery.

BRIEF FOR APPELLANT SAVINGS INVESTMENT & TRUST COMPANY, SUBSTITUTED TRUSTEE.

Statement of Case.

The facts in the matter have been agreed upon by the parties hereto (S. C., p. 1). Complainant Albert & Kernahan, Inc., filed a general creditor's bill against defendant Franklin Arms, Inc., to have that company adjudged insolvent and for the appointment of a receiver. Receivers were duly appointed on the advice of Vice-Chancellor Church, and pursuant to an order of the Court of Chancery entered, over the objection of a committee representing the bondholders for whom this appellant is trustee, sold the property of defendant, Franklin Arms, Inc., consisting of one apartment house, free and clear of all encumbrances for $110,000 (S. C., p. 5, ll. 9-32).

Subsequent to the aforesaid sale the matter was referred to a Master to report upon the validity and priority of various encumbrances. It appeared at the hearings before the Master that Rollin J. Francis, trustee, for whom appellant Sav-

ings Investment & Trust Company was ultimately substituted, held a first mortgage in the face amount of $215,000, on which mortgage there had been advanced to defendant approximately $100,000. Hudson & Essex Building and Construction Co. held a second mortgage in the face amount of $9,500, and there were mechanics' lien claims approximating $60,000.

The Master found that of the $100,000 advanced under the first mortgage, the trustee was entitled to a first lien to the extent of $44,700 with interest from May 15, 1927; that the mechcanics' lien claims were next in the order of priority; and that Hudson & Essex Building and Construction Co., was last (S. C., pp. 6-8).

On May 19, 1928, an order was entered confirming the report of the Master and providing in effect, for the following order of distribution:

> First: Receivership expenses.
>
> Second: $44,700 with interest to the substituted trustee.
>
> Third: Mechanics' lien claims.
>
> Fourth: Remainder of claim of substituted trustee.
>
> Fifth: Claim of Hudson & Essex Building & Construction Co. (S. C., pp. 8, 9).

Hudson & Essex Building & Construction Co., appealed from said order on the sole ground that its claim should come third in the order of distribution, immediately following the prior claim of the substituted trustee. The contention of Hudson & Essex Building and Construction Co., was sustained by this Court in *Albert & Kernahan, Inc.* v. *Franklin Arms, Inc.*, 7 N. J. A. R. 717, 146 Atl. 213 (E. & A., 1929).

In its opinion this Court expressly stated that the sum of $44,700 with interest should first be paid to the substituted trustee and that out of the moneys remaining in the hands of the receivers the Hudson & Essex Building and Construction Co., should next be paid (S. C., p. 9, ll. 25-40).

After the foregoing opinion was rendered, an order was entered in the Court of Chancery on the advice of Vice-Chancellor Church which provides that 39% of receivership expenses totalling approximately $14,000 and a $1,000 counsel fee allowed to Wall, Haight, Carey & Hartpence should be deducted from the substituted trustee's prior claim, and that the balance only should be paid to the substituted trustee.

The fund now in the hands of the receivers is sufficient to pay all receivership expenses, the first and second mortgages in full and subsequent lien claims in part.

Specification of Grounds of Appeal.

The grounds of appeal relied upon by appellant Savings Investment & Trust Company, as substituted trustee, and set forth in the petition of appeal (S. C., p. 39) may be summarized as follows:

1. The Court below erred in failing and refusing to decree that Savings Investment & Trust Company, substituted trustee, be paid the sum of Forty-four Thousand Seven Hundred Dollars ($44,700) with interest after the payment of receivership expenses.

2. The Court below erred in ordering that 39% of the allowances and fees be deducted from the prior claim of Savings Investment & Trust Company, substituted trustee.

3. The Court below erred in ordering that the allowance of $1,000 to Wall, Haight, Carey & Hartpence be deducted from the prior claim of Savings Investment & Trust Company, substituted trustee.

ARGUMENT.

POINT I.

The lower Court erred in refusing to abide by the portion of the decree dated May 19, 1928, which ordered the payment of $44,700 with interest to the substituted trustee after the payment of receivership expenses.

The first order of distribution in this cause was entered on May 19, 1928, and provided that after the payment of all receivership expenses the order of distribution should be in the following order and priority:

1. $44,700 with interest to the substituted trustee.
2. Mechanics' lien claims.
3. Remainder of claim of substituted trustee.
4. Claim of Hudson & Essex Building and Construction Company (S. C., pp. 7-9).

Hudson & Essex Building & Construction Company appealed from said order on the sole ground that its claim should be paid immediately subsequent to the prior claim of the substituted trustee. In its petition of appeal filed on May 29, 1928, Hudson & Essex Building Construction Company appealed:

> "Upon the ground that the same is erroneous in that the said order should have pro-

> vided, ordered and adjudged that there be paid to Hudson & Essex Building & Construction Company the sum of $9,500 with interest thereon from April 9, 1926 secondly and only after the payment to Roland J. Francis, trustee, or Service Trust Company, substituted trustee, of the sum of $44,700 with interest from May 15, 1927."

This court sustained the contention of Hudson & Essex Building & Construction Company and held that its claim should be paid by the receivers after the payment of $44,700 with interest to the substituted trustee (S. C., p. 9). See *Albert & Kernahan, Inc.* v. *Franklin Arms Inc.,* 7 N. J. A. R. 717, 146 Atl. 213 (E. & A. 1929).

The order dated May 19, 1928 insofar as it ordered that after the payment of receivership expenses the substituted trustee should be paid $44,700 with interest from May 15, 1927 was never appealed, and this court in its opinion on the appeal of Hudson & Essex Building & Construction Company expressly stated that $44,700 with interest should be paid to the substituted trustee in accordance with said order (S. C., p. 9). The order dated May 19, 1928, and the opinion of this court thereon established the law of the case which could not be modified by the court below. See *Morris* v. *Taylor,* 23 N. J. Eq. 131 (Ch. 1872).

Contrary to the provisions of the order dated May 19, 1928, which were not appealed from and the directions contained in the opinion of this court rendered on the appeal of Hudson & Essex Building and Construction Co., the court below ordered on December 14, 1929, that a sum representing 39% of the receivership expenses and $1,000 (being the allowance to Wall, Haight, Carey & Hartpence as solicitors for the trustee) should be deducted from the prior claim of Savings Investment & Trust Company, substituted trustee.

This order provides that after said deductions are made the balance only shall be paid to Savings Investment & Trust Company, substituted trustee (S. C., pp. 17, 18).

Since the order dated January 12, 1928 insofar as it orders the payment of $44,700 with interest to the substituted trustee, after the payment of receivership expenses has never been appealed and was restated by this court in its opinion rendered on the appeal of Hudson & Essex Building & Construction Company it is apparent that the court below had no power to enter the order dated December 14, 1929 reducing the substituted trustee's claim and said order should be reversed.

It is respectfully submitted that the lower Court erred in refusing to abide by the portion of the decree dated May 19, 1928, which ordered the payment of $44,700 with interest to the substituted trustee, after the payment of receivership expenses.

POINT II.

The lower Court erred in refusing to order the payment of $44,700 with interest to the substituted trustee, after the payment of receivership expenses.

The law of New Jersey is well settled that under the facts presented here the receivership expenses must be paid before distribution to mortgagees, lien claimants and general creditors. Section 85 of the Corporation Act (2 C. S. 1652) provides that:

> "Before distribution of the assets of an insolvent corporation among the creditors or stockholders, the Court of Chancery shall allow a reasonable compensation to the receiver

for his services and the costs and expenses of the administration of his trust, and the costs of the proceedings in said Court to be first paid out of the assets."

Section 86 of the Corporation Act (2 C. S. 1652) provides that:

"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 proportionately to the amount of their respective debts."

And our courts have enunciated the doctrine that under general equity principles, the expenses of receivership are to be paid out of the fund before any distribution of assets takes place.

In *Seidler* v. *Branford Restaurant,* 97 N. J. Eq. 531, 128 Atl. 166 (E. & A. 1925) this Court said:

"The appellant urges on this appeal, however, that the expenses of the receivership may not be preferred in the distribution of the proceeds of the sale of the assets over incumbrances existing at the time of the appointment of the receiver, and particularly under the facts of this case. To this contention we cannot assent. On the general principles of equity themselves such expenses may properly be given preference in distribution. In the nature of things, the cost of administration and of just distribution, where the court has jurisdiction, must be placed ahead of the claims of creditors, whether secured or unsecured, and so say the text-writers. Pomeroy in his book on Equitable Remedies (2d Ed.), Sec. 1641, says:

'In general, expenses of the receivership are payable out of the fund in the receiver's hand prior to the payment of a mortgage debt. The reasons for such a rule are apparent. The receiver represents the court and acts for the interest of all concerned.'

High in his treatise on Receivers, at pages 961, 962, states the rule to be that:

> 'The costs of the appointment of the receiver are entitled to priority of payment out of the fund realized by him before all other demands, and the costs of receivership are properly given a preference over prior liens, although the appointment of the receiver was made without prejudice to prior liens.'

In our own Court of Chancery numerous cases are found where in practice this course has been pursued. In the case of *Attorney General* v. *Linden Cemetery Association,* 90 N. J. Eq. 408, 107 A. 596, Vice Chancellor Backes declares the rule to be 'thoroughly settled that, when a court of equity takes possession of property for the purpose of protecting and preserving it for the benefit of the parties interested, the costs of administration are entitled to priority of payment, regardless of the nature of the liens and claims thereon of the litigants. This is so fundamental to the administration of justice and so generally recognized that citation of authority is unnecessary.' "

In accord see *Attorney General* v. *Linden Cemetery Association,* 91 N. J. Eq. 329, 109 A. 500 (E. & A., 1920); *Conover* v. *West Jersey Mortgage Co.,* 96 N. J. Eq. 441, 126 Atl. 855 (Ch. 1924).

From the foregoing authorities, it is evident that all of the receivership expenses should first be paid from the fund of $112,000 in the hands of the receivers. And it is equally clear that after the payment of receivership expenses creditors should be paid in full in the order of their priority until the entire fund is exhausted. Indeed, Sections 85 and 86 of the Corporation Act, quoted above, require that result. Under Section 85, the first step is to pay receivership expenses; under

Section 86 special and general liens are next to be paid, necessarily in the order of their priority; and if there is any fund remaining, general creditors participate. The cases cited above all recognize the propriety of the procedure as thus outlined.

Aside from the statutory provisions and authorities above cited, it is well established in this state that after payment of receivership expenses creditors should be paid in full in the order of their priority until the fund is exhausted. The adjudication of the Court of Errors and Appeals in *Lyle* v. *Staten Island Terra Cotta Lumber Co.*, 62 N. J. Eq. 797 (E. & A., 1901), is expressly to that effect. There, as in our case, the fund was sufficient to pay all receivership expenses in full, preferred claims in full and general claims in part, and the Court's decision expressly resulted in that order of distribution. In *Bankers Trust Company* v. *Maxson,* 100 N. J. Eq. 134, Atl. 875 (Ch. 1926), Chancellor Walker, in accordance with the decision of this Court in the *Lyle* case, decreed that mortgagees, lien claimants and other creditors should be paid in full in the order of their priority, after receivership expenses were paid. At page 882, the Chancellor said:

> "Counsel for the complainant may present a decree, on notice to counsel for the defendants Edward Maxson, receiver, and Charles Albert Company, Inc., adjudging that the Charles Albert Company's mortgage is subsequent and subject to the lien of the complainant's mortgage on the chattels mentioned and described in both mortgages and in the bill of complaint; that the complainant's mortgage is a lien upon the lots, the legal title to which is in the name of Mrs. Latz, and that the sale thereof under the *fi. fa.* passed a valid title to the purchaser; that the receiver is entitled to impose a lien upon the proceeds of the sale of the mort-

> gaged premises, real and personal, prior to the lien of the complainant's mortgage, for such sum as he expended for betterments to the mortgaged premises and for the preservation thereof, *and for his compensation and costs of suit.*"

In *Meister* v. *Meister,* 6 N. J. A. R. 1136, 142 Atl. 312 (Ch. 1928), the Court held that after the payment of receivership expenses, mortgages, etc., are to be paid in full in the order of their priority until the fund is exhausted.

In the *Meister* case, there were two funds, each encumbered by a separate line of encumbrances. The Court first decided that each fund should bear its proportionate share of the receivership expenses. This holding was obviously correct, for otherwise one fund would be required to bear the expense incurred by another fund, and the latter would avoid payment of expenses incurred by it. As to this point, which is merely a corollary of the rule that where, as in our case, there is but one fund, it bears the entire receivership expenses, the *Meister* case was followed in *Franklin Lumber Co.* v. *Harold Anderson, Inc.,* 7 N. J. A. R. 545, 145 Atl. 477 (Ch. 1928), modified in 105 N. J. Eq. 542 (E. & A., 1930). After apportioning the expenses to the respective funds, the Court decreed that after the payment of receivership expenses creditors were to be paid in full (from the respective funds which their liens encumbered) in the order of their priority until the funds were exhausted.

In the memorandum filed by Vice-Chancellor Church (S. C., pp. 20-27) the *Meister* and *Franklin Lumber Co.* cases are cited in support of his ruling that creditors are not to receive full payment of their claims in the order of their priority after the payment of receivership expenses, but that proportionate shares of said expenses should

be deducted from their claims (S. C., p. 25). A proper reading of those cases however, shows that they support our contention and deny the validity of the proposition enunciated by the court below.

In the *Meister* case after the apportionment of the expenses between the two funds, the facts of that case as to each fund became identical with the facts in our case in which there is only one fund and accordingly that fund properly bears all of the receivership expenses. The opinion in the *Meister* case shows that the following claims, among others, against one fund, were allowed by the receiver:

Harold Holding Company Mortgage	$5,950.00
Plaza Realty Company Mortgage	$8,400.00

The decree allowed the Harold Company $6,535.79 and the Plaza Company $9,101.40 which were the full amounts of their claims plus interest.

Obviously, therefore, the claims of the creditors were not reduced by a proportionate share of receivership expenses (as the court below did in this case) but were paid in full in the order of their priority until the fund was exhausted. In the *Meister* case, as in our case, the fund was sufficient to pay receivership expenses and the first and second mortgages in full, but was insufficient to pay all lienors.

In *In re Cornell Co.,* 201 Fed. 381 (D. N. Y., 1912), and *Pusey & Jones* v. *Pennsylvania Paper Mills,* 173 Fed. 634 (D. Pa., 1909), affirmed *sub nom Newhall Engineering Co.* v. *Egolf,* 185 Fed. 48 (C. C. A. 3rd, 1911), the courts ordered that creditors be paid in the order of their priority in full after the payment of receivership expenses.

In the memorandum filed by the court below, the only authorities cited besides the *Meister* and *Franklin Lumber* cases already referred to, are *Lembeck* v. *Jarvis Terminal Cold Storage Company,* 68 N. J. Eq. 352 and 34 Cyc 369, neither of which sustains the Court's ruling.

In the *Lembeck* case the Court stated that where there is more than one fund there should be an apportionment of receivership expenses. As we have already stated that doctrine is unquestionably sound. The Court in the *Lembeck* case expressly recognized, however, that where as in our case there is but one fund and all of the encumbrances necessarily attach to that fund, receivership expenses are charged against the whole fund to be first paid therefrom. The portion of the opinion in the *Lembeck* case quoted by the court below (S. C., p. 25) is interesting.

> "But where the encumbrance is finally adjudged valid, then that part of the services of the insolvency receiver and his counsel which have directly benefited the encumbrancer, and have corresponded precisely with similar expenses which he would have been obliged to incur on his own behalf in his own suit, plainly should be charged against the fund upon which the encumbrance is fastened."

It should be noted that the Court found it necessary to justify the charging of any receivership expenses upon the entire fund on the ground that the mortgagee would have incurred similar expenses in a foreclosure suit of his own. If a first mortgagee forecloses, it is permitted to add the costs of suit to the amount of its claim; *Marsh* v. *Vanness,* 75 N. J. Eq. 607 (E. & A., 1909). And under the prevalent practice a counsel fee would be included in its decree; see *I. C. S.,* 445 §91.

Thus the mortgagee's decree would generally not only cover the full amount of its claim, but also its costs and generally a counsel fee.

When a receivership proceeding is brought and defendant's property is sold free and clear of the first mortgage, the first mortgagee must actually bear the receivership expenses, if the fund is insufficient to pay the expenses and the first mortgagee. And this may be justified as the court does in the *Lembeck* case on the ground that it would have incurred similar expense in a foreclosure suit.

Where, however, the fund is sufficient to pay expenses and the first mortgage, then even under the reasoning of the *Lembeck* case the first mortgagee should be paid in full after the payment of receivership expenses. If it had foreclosed, its expenses would have been included in its decree and would have been collected from the fund, which is *ex hypothesi* sufficient.

In the recent case of *Ciavatta* v. *Munn Realty Corporation,* 106 N. J. Eq. 21 (Ch. 1930), Vice-Chancellor Fallon adopted the reasoning of the *Lembeck* case. In the *Ciavatta* case there were two buildings. The Franklin Mortgage & Title Guaranty Company held a first mortgage on one building and Boardman & Henn held a first mortgage on the other building. There were subsequent encumbrances on both buildings. The two buildings were sold subject to mortgages, and the proceeds of the sale above the mortgages were insufficient to pay receivership expenses. The court held that receivership expenses should be paid first since the mortgagees would have been required to bear identical expense in foreclosure suits. However, where the fund is sufficient to pay all receivership expenses and the first mortgagee in full, even the reasoning of the Vice-Chancellor recognizes that the first mortgagee should be paid

in full, for if it had foreclosed it would have received its expenses and counsel fee in its decree.

In our case, admittedly, the fund is sufficient to pay administration expenses and the prior claim of the substituted trustee in full. Accordingly, even under the reasoning of the cases relied upon by the court below, our contention should be sustained.

The court in the *Ciavatta* case also stated that there should be an apportionment of expenses among the mortgagees. Since there were two funds that statement may be justified. It would be as inequitable to place the burden of all of the expenses on the first mortgagee, Franklin Title, as it would be on the first mortgagee, Henn & Boardman. Since there were two funds each fund should bear its share of the expenses; conversely where there is but one fund, as in our case, it should bear all expenses. After expenses are paid the first mortgagee and other creditors should be paid in the order of their priority and the *Ciavatta* case does not deny that proposition.

The lower court's remaining citation (*34 Cyc.*, 369) expressly refers to suits instituted for the establishment and foreclosure of liens. In our case the bill was brought by a general creditor alleging insolvency and was not brought for the benefit of the first mortgagee (S. C., p. 1). A reading of the cases cited in *34 Cyc.*, 369, shows that the circumstances there presented were entirely foreign to ours, and not one of those cases has any bearing on our question.

When a bill for the appointment of a receiver is brought, as in our case by a general creditor, it is apparent that no material benefit will result to the first mortgagee. In our case there was no real dispute as to the priority of the $44,700 item and most of the receivership expenses were incurred by matters with which the subsequent encumbrancers and general creditors were chiefly

interested. The rule established by our courts and now urged on behalf of the substituted trustee burdens the first mortgagee to the extent that where the fund is insufficient to pay expenses and the first mortgagee's claim, his recovery is accordingly reduced below the amount due him. It would be highly inequitable to burden him with a fixed charge necessarily reducing his recovery below his claim in every instance where, as here, receivership proceedings are instituted by a general creditor, which could not and did not benefit the first mortgagee.

The lower Court's rule of distribution not only violates equitable principles but is arbitrary in result. It is impossible to ascertain with any degree of certainty whether the first mortgage was benefited and to what extent. The arbitrary nature of the rule adopted below is well illustrated in this case. The substituted trustee as first mortgagee was charged by the Court below with 39% of the receivership expense even though it did not institute the proceedings and was not and could not have materially benefited thereby. On the other hand the rule of the Court below exclusively benefits subsequent lienors who were most likely to benefit by the receivership proceedings.

Why the subsequent lienors should be benefited in this case is difficult to see. When they accepted their liens they knew that their interests were subject to that of the substituted trustee. They knew that if the substituted trustee, as first mortgagee, foreclosed, its costs and counsel fee would be added to the amount of the first mortgage. They knew that if a receivership proceeding were instituted their interests would ordinarily be deferred to receivership expenses and the first mortgage. In view of all of the foregoing, it is difficult to see why in a situation where the fund is sufficient to pay receivership expenses, the first mortgage and second mortgage in full and subsequent liens in

part, the subsequent lienors may insist that the amount of the mortgage claim be reduced beneath the amount due thereon so that the amounts distributed to them may be increased.

Besides ordering that 39% of the receivership expenses be deducted from the claim of the substituted trustee, the Court below ordered that its allowance of $1,000 as counsel fee to Wall, Haight, Carey & Hartpence should also be deducted from the claim of the substituted trustee. The allowance to Wall, Haight, Carey and Hartpence is merely a receivership expense which should be paid out of the entire fund before any distribution to creditors takes place. In effect, the Court below by directing that $1,000 be deducted from the claim of the substituted trustee and paid to Wall, Haight, Carey and Hartpence is directing it to pay that sum to the trustee's solicitors for services rendered. Such procedure is indeed novel and if sustained would be a far reaching development in the law.

As a receivership expense, the $1,000 referred to should, along with the remaining receivership expenses, be paid out of the $110,000 fund in the hands of the receivers. The substituted trustee as first mortgagee should then be paid the amount of its prior lien, namely, $44,700 with interest from May 15, 1927. Payment should then be made to the second mortgagee and the lien claimants in the order of their priority until the entire fund is exhausted.

It is respectfully submitted that the lower Court erred in refusing to order the payment of $44,700 with interest to the substituted trustee after the payment of receivership expenses and that accordingly its decree should be reversed.

Respectfully submitted,

Arthur T. Vanderbilt,
Solicitor for and of Counsel with Appellant Savings Investment & Trust Company, Substituted Trustee.