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Notice of Appeal.

Filed Marh 28, 1935.

In Chancery of New Jersey.

90/69.

Between
ELECTROL INCORPORATED, a corporation,
Complainant,
and
BEATTY, MARSH & MOYER, a corporation,
Defendant.

On Bill, Etc.

To LLOYD G. BEATTY, Solicitor for Harold J. Marsh, Receiver, and A. WILBERFORCE EGNER, Solicitor for John Henry Miller.

The complainant, Electrol Incorporated, hereby appeals from so much of an Order made in the above entitled cause on March 2nd, 1935, as overrules objections made to the Receiver's Report of Claims and as affirms the priority as set forth in the Receiver's Report of Claims and gives priority to the claim of John Henry Miller, landlord, ahead of and prior to the claims of general creditors, to the Court of Errors and Appeals in the last resort in all causes.

Dated: March 22nd, 1935.

WARREN DIXON, JR.,
Solicitor for and of Counsel with
Complainant, Electrol Incorporated.

Notice of Appeal.

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

WARREN DIXON, JR.,
Of Counsel with Complainant,
Electrol Incorporated.

(Deposit of $100 made April 16, 1935.)

Service of a copy of the within Notice of Appeal is hereby acknowledged this 22 day of March, 1935.

LLOYD G. BEATTY,
Solicitor for Receiver.

Affidavit of Service.

State of New Jersey }
County of Bergen } ss.:

Warren Dixon, Jr., being duly sworn on his oath according to law, deposes and says:

On Friday, March 22nd, 1935, I served on A. W. Egner, Esquire, solicitor for John Henry Miller, a copy of the Notice of Appeal hereto annexed by leaving the same at his office, 17 Academy Street, Newark, with Lloyd G. Beatty, who was then in charge of said office.

WARREN DIXON, JR.

Sworn and subscribed before me
this 27th day of March, 1935.
Anchen Wulstein,
Notary Public
of N. J.

Petition and Grounds of Appeal.

Filed August 24, 1935.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ELECTROL INCORPORATED, a corporation, Complainant-Appellant, and BEATTY, MARSH & MOYER, a corporation, Defendant-Appellee. HAROLD J. MARSH, Receiver of Beatty, Marsh & Moyer, Appellee, JOHN HENRY MILLER, Appellee,	On Appeal from the Court of Chancery.

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

The petition of the complainant, Electrol Incorporated, the appellant in the above entitled cause, respectfully shows:

1. Petitioner finds itself aggrieved by an Order made in the Court of Chancery by his Honor Luther A. Campbell, Chancellor of the State of New Jersey, advised by his Honor Vivian M. Lewis, Vice-Chancellor, bearing date March 2nd, 1935, in a certain cause in the said Court of Chan-

cery wherein Electrol Incorporated was the complainant and Beatty, Marsh & Moyer, a corporation of New Jersey was defendant, in this respect, to wit:

That said Order adjudges that the claim of John Henry Miller against the insolvent defendant corporation, Beatty, Marsh & Moyer, is a preferred and prior claim ahead of general creditors and approves a report filed by Harold J. Marsh, Receiver of the defendant, Beatty, Marsh & Moyer in which said report the claim of John Henry Miller is allowed as a preference as against general creditors.

2. Petitioner appeals from the Order of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that:

(a) It adjudges that the report of Harold J. Marsh, Receiver of Beatty, Marsh & Moyer, wherein priority is allowed to John Henry Miller for rent due in the sum of $1133.38 is a prior and preferred claim ahead of general creditors, and confirms said report.

(b) It adjudges that the exceptions taken by the appellant to the report of the said Harold J. Marsh, allowing the claim of John Henry Miller as a preferred claim, should be over-ruled.

(c) It determines that the creditor, John Henry Miller is entitled to priority ahead of general creditors in the sum of $1133.38 for rent accrued prior to the appointment of Harold J. Marsh as Receiver of Beatty, Marsh & Moyer an insolvent corporation, although said claim was for rent accrued prior to the appointment of the Receiver, and although said claimant never made any dis-

tress against the goods and chattels of the defendant corporation for rent, nor filed any claim against removal thereof, at any time.

(d) In that said Order allows the claim of John Henry Miller as a preferred claim, whereas it should have over-ruled the report of the Receiver, Harold J. Marsh, and sustained the exceptions of the appellant and adjudged that said claim was a general claim against the said corporation and not a preferred claim.

Petitioner therefore prays that the said Order may be reversed as to so much thereof as approves the report of the Receiver allowing the claim of John Henry Miller as a preferred claim instead of a general claim, and that petitioner may have such other and further relief in the premises as to this court may seem just and proper.

WARREN DIXON, JR.,
Solicitor for and of Counsel with
Complainant-Appellant.

Affidavit of Service.

State of New Jersey }
County of Essex } ss.:

Irving Miller being duly sworn, according to law, on his oath, deposes and says:

That on Aug. 22, 1935, I served a copy of the

within on Lloyd G. Beatty, by leaving same with Miss Anderson, in charge of the office.

(Signed) IRVING MILLER.

Sworn and subscribed to before me
this 22nd day of August, 1935.
Helen Steger,
A Notary Public
of N. J.

Affidavit of Service.

State of New Jersey }
County of Essex } ss.:

Irving Miller being duly sworn, according to law, on his oath, deposes and says:

That on Aug. 22, 1935, I served a copy of the within on A. Wilberforce Egner by leaving same with Miss Anderson, in charge of the office.

(Signed) IRVING MILLER.

Sworn and subscribed to before me
this 22nd day of August, 1935.
Helen Steger,
A Notary Public
of N. J.

Order Appealed From.

Filed March 2, 1935.

IN CHANCERY OF NEW JERSEY.

90-69

Between
ELECTROL INCORPORATED, a corporation,
Complainant,
and
BEATTY, MARSH & MOYER, a corporation,
Defendant.

On Bill, &c.

The Receiver of the above-named defendant corporation, having presented his report of proofs of claims as filed, setting forth creditors of the said insolvent defendant corporation who had proved their claims before the Receiver, totaling $16,856.49, of which he has allowed as having priority and preference as against general creditors, four claims totaling $1219.98, and the solicitor of the complainant having taken exception to the claim filed by John Henry Miller, as landlord, amounting to the sum of $1133.38, being allowed as a preferred claim:

And the matter coming on for hearing before Hon. Vivian M. Lewis, one of the Vice Chancellors of this Court, in the presence of Warren Dixon, Jr., Esq., solicitor for the complainant, and Lloyd G. Beatty, Esq., solicitor for Harold J. Marsh, receiver, and the Court having heard and considered the argument and briefs of respective counsel, and being of the opinion that the Receiver has correctly allowed the landlord's claim

of $1133.38 as a preferred claim as against the general creditors:

It is, on this 2nd day of March, nineteen hundred and thirty-five, ORDERED, ADJUDGED and DECREED that the said claim filed by John Henry Miller, landlord, be and the same is hereby allowed as a preference as against general creditors.

And it is further ordered, adjudged and decreed that the said report of claims be approved as filed.

Respectfully advised,
VIVIAN M. LEWIS,
V. C.

L. A. CAMPBELL,
C.

Receiver's Report of Proofs of Claims as Filed.

IN CHANCERY OF NEW JERSEY.

Between
ELECTROL INCORPORATED,
Complainant,
and
BEATTY, MARSH & MOYER, a corporation of the State of New Jersey,
Defendant.

The following is a list of proofs of claims filed in the above entitled cause, according to priority and preference:

Receiver's Report of Proofs of Claims as Filed.

CLAIMS WHICH HAVE PRIORITY

1.	Taxes due to the Town of Montclair, New Jersey	$33.20
2.	Wages due Lewis Kendall	18.00
3.	Wages due Harold J. Marsh	35.40
4.	Rent due John Henry Miller	1133.38
		$1219.98

GENERAL CLAIMS

1.	Baker Printing Company, supplies	45.92
2.	Allen E. Beals Corporation, reports	30.00
3.	Bottfield Refractories Company, notes	43.20
4.	Boynton Furnace Co., parts	36.00
5.	Continental Oil Co., notes	68.22
6.	Electrol Distributing Corporation, note	5469.30
7.	Electrol Incorporated, stock	4293.51
		$9986.15
		$9986.15
8.	C. Feuser & Son, stock	94.65
9.	Fischer-Layte, Inc., stock	64.80
10.	Fyr-Fyter Products, stock	23.64
11.	Gorton Heating Corp., stock	77.13
12.	Heyer Garage, repairs	25.45
13.	John Heyrich, Inc., metal work	36.75
14.	Industrial Supply Co., stock	52.82
15.	Thomas J. Lee, Inc., stock	257.02
16.	Maxweld Corporation, note	263.80
17.	Minneapolis-Honeywell Reg. Co., stock	231.19
18.	Monarch Fuel Oil Co., oil	17.00
19.	The Montclair Times Co., advertising	116.07

Receiver's Report of Proofs of Claims as Filed.

	20.	Montclair Tire Service, supplies	264.79
	21.	Luther McG. Moyer, note	285.00
	22.	National Auto Accessories Co., supplies	4.84
	23.	Parr Electric Co., Inc., stock	18.00
	24.	Permatex Company, Inc., stock	3.60
	25.	Preferred Utilities Mfg. Co., stock	25.71
10	26.	The Price & Lee Co., directory	25.00
	27.	Prospect Boiler Co., tanks	2161.65
	28.	Public Service Gas & Elec. Co.	79.08
	29.	Charles E. Reep, Inc., note	82.42
	30.	William S. Roe, Inc., stock	548.45
	31.	Charles H. Stewart, legal services	231.30
	32.	United Tank Installation Co., installations	548.00
	33.	M. D. Valentine & Bro., stock	27.75
20	34.	Whitehead Metal Products Co., Inc., stock	84.45

Total general claims	$15,636.51
Total preferred claims	1219.98

HAROLD J. MARSH,
Receiver.

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Supplemental Proof of Preferred Claim.

IN CHANCERY OF NEW JERSEY.

Between ELECTROL INCORPORATED, Complainant, and BEATTY, MARSH & MOYER, a corporation of the State of New Jersey, Defendant.	On Bill, &c.

To HAROLD J. MARSH, ESQ., Receiver of Beatty, Marsh & Moyer:

Please take notice that Beatty, Marsh & Moyer, of which you are receiver, is indebted to John Henry Miller in the sum of $93.38 for additional insurance premium in accordance with bill rendered by F. M. Crawley & Brothers, insurance brokers. This is in accordance with the terms as set forth in paragraph six of a certain lease and letting covering premises 31 Valley Road, Montclair, New Jersey, which in part reads as follows:

> "And, in the event, the new business involves extra hazard so that insurance rates are increased, or in any way causes additional expense to the landlord for the upkeep of said building, such additional expense shall be borne by the tenant."

This item is not included in the proof of preferred claim previously filed by John Henry Miller for rent for the premises known as 31 Valley Road, Montclair, New Jersey, on which there is a balance due of $1040.00, for which the said John

Supplemental Proof of Preferred Claim.

Henry Miller, as landlord, claims priority and preference.

(Signed) A. WILBERFORCE EGNER,
Solicitor for John Henry Miller.

Rent for premises 31 Valley Road, Montclair, New Jersey, occupied by Beatty, Marsh & Moyer, for the months of January, February, March, April and May, 1932, at the rate of $325.00 per month, in accordance with a certain lease and letting of said premises			$1625.00
Received from Lionel L. Jacobs, custodial receiver, rent covering period from April 8 to May 5, 1932	$303.34		
Received from Harold J. Marsh, receiver, rent covering period from May 5 to June 1, 1932	281.66		585.00
Balance			$1040.00
Increase in insurance premium as per statement of F. M. Crawley & Brothers, Plaza Building, Montclair, New Jersey, in accordance with paragraph 6 of said lease			93.38
			$1133.38

State of New Jersey }
County of Essex } ss.:

John Henry Miller, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am the creditor in the foregoing claim

mentioned, and the said Beatty, Marsh & Moyer is indebted to me in the sum of $93.38 for additional insurance premium in accordance with bill rendered by F. M. Crawley & Brothers, insurance brokers. This is in accordance with the terms as set forth in paragraph six of a certain lease and letting covering premises 31 Valley Road, Montclair, New Jersey, which in part reads as follows:

> "And, in the event, the new business involves extra hazard so that insurance rates are increased, or in any way causes additional expense to the landlord for the upkeep of said building, such additional expense shall be borne by the tenant."

2. This is not included in the proof of claim previously filed by me for rent for the premises known as 31 Valley Road, Montclair, New Jersey, in the sum of $1321.66

3. There has been paid on account of said claim of $1321.66 by Harold J. Marsh, receiver, the sum of $281.66, for rent for the period from May 5 to June 1, 1932, leaving a balance due under said claim of $1040.00, making the total amount now due $1133.38.

4. No part of the said sum of $1133.38 has been paid to me but the entire amount is due and owing, as aforesaid.

JOHN HENRY MILLER.

Sworn to and subscribed before me
this 9th day of July, 1932.
J. F. Caradine.

Proof of Preferred Claim.

IN CHANCERY OF NEW JERSEY.

Between ELECTROL INCORPORATED, a corporation, Complainant, and BEATTY, MARSH & MOYER, a corporation of the State of New Jersey, Defendant.	On Bill, &c.

To HAROLD J. MARSH, ESQ., Receiver of Beatty, Marsh & Moyer:

Please take notice that Beatty, Marsh & Moyer, of which you are receiver, is indebted to John Henry Miller in the sum of $1321.66, for rent due for premises occupied by Beatty, Marsh & Moyer, at 31 Valley Road, Montclair, New Jersey, for the months of January, February, March, April and May, 1932, at the rate of $325.00, in accordance with a certain lease and letting covering the said premises as appears from an itemized statement of said indebtedness hereto annexed; and for which said sum of $1321.66 the said John Henry Miller, as landlord, claims priority and preference.

(Signed) A. WILBERFORCE EGNER,
Solicitor for John Henry Miller.

Rent for premises 31 Valley Road, Montclair, New Jersey, occupied by Beatty, Marsh & Moyer, for the months of January, February, March, April and May, 1932, at the rate of $325.00 per

month, in accordance with a certain lease and letting of said premises	$1625.00
Received from Lionel L. Jacobs, custodial receiver, rent covering period from April 8 to May 5, 1932	303.34
	$1321.66
Of the above amount the sum of $281.66 is due from Harold J. Marsh, Receiver for rent from May 5th to June 1, 1932. Paid.	281.66
	$1040.00

State of New Jersey }
County of Essex } ss.:

John Henry Miller, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am the creditor in the foregoing claim mentioned, and the said Beatty, Marsh & Moyer, is indebted to me in the sum of $1321.66, for rent due for premises occupied by said Beatty, Marsh & Moyer at 31 Valley Road, Montclair, New Jersey, and owned by me, under a certain lease and letting of said premises made between this deponent and the said Beatty, Marsh & Moyer. There is due rent, under said lease and letting, for the months of January, February, March April and May, 1932, at the rate of $325.00 per month, making a total of $1625.00, against which there is a credit of $303.34, for rent received from Lionel L. Jacobs, custodial receiver, covering the period from April 8 to May 5, 1932; leaving a balance due of $1321.66. Of the said sum of $1,321.66, the sum of $281.66 is due me from Harold J. Marsh, receiver, for rent for the period from May 5th to June 1, 1932.

Proof of Preferred Claim.

2. No part of the said sum of $1321.66 has been paid to me, but the entire amount is due and owing for rent as aforesaid.

JOHN HENRY MILLER.

Sworn to and subscribed before me
this 24th day of June, 1932.
Myrtle M. Trube,
Notary Public
of N. J.

Service of the within proof of claim is hereby acknowledged this 24th day of June, 1932.

HAROLD J. MARSH,
Receiver.

Opinion.

IN CHANCERY OF NEW JERSEY.

90-69.

September 4, 1935.

Between
ELECTROL INCORPORATED, a corporation,
Complainant,
and
BEATTY, MARSH & MOYER, a corporation of the State of New Jersey,
Defendant.

(SYLLABUS)

1. The phrase or "other process", as used in Section 4 of the Landlords and Tenants Act, includes an order of the Court of Chancery directing the Receiver by it appointed for an insolvent corporation-tenant to take possession of the latter's goods and chattels then being upon the premises occupied by it.
2. The landlord's right to a preference for not exceeding one year's rent for the demised premises emanates from the provisions of Section 4 of the Landlords and Tenants Act and exists quite independent of and even in the absence of his having acquired, pursuant to the provisions of the Act concerning Distresses, a lien upon the goods and chattels of his insolvent corporation-tenant.

WARREN DIXON, ESQ., Solicitor of Complainant.
MESSRS. EGNER & BEATTY, Solicitors of Defendant.

Opinion.

LEWIS, *V. C.:*

Complainant, a general creditor of the insolvent defendant corporation, prosecutes this appeal from the Receiver's determination allowing the landlord's claim of $1,133.88 for rent due for the premises occupied by said defendant as a preferred claim.

Neither the amount of this rent claim nor the fact that it represents less than one year's rent is in anywise here question or disputed. The sole ground of complaint and the only one upon which the present appeal is founded and prosecuted is that the Receiver erroneously allowed the claim in question a preference or priority in payment over that of complainant and the other general creditors of the defunct defendant corporation.

I am unable to agree with appellant's contention that the landlord, in consequence of his failure to distrain the defendant corporation's goods and chattels or to give the notice prescribed by Section 5 of the Landlords' and Tenants' Act (Comp. St. p. 3067), is not entitled to the preference or priority in payment which the Receiver has accorded to his claim.

The right to the preference and priority here sought by and allowed to the landlord does not, as appellant has obviously misconceived, emanate from any lien upon the tenants goods and chattels effected by their distraint for non-payment of rent pursuant to the provisions of An Act Concerning Distresses (Comp. St. p. 1939), nor from the giving of the notice prescribed by Section 5, Comp. St. p. 3067, which is only applicable to and required in cases where, as not here, the goods and chattels have been taken *and removed* from off the demised premises.

By the provisions of Section 4 of An Act Con-

cerning Landlords and Tenants (Comp. St. p. 3066) the taking by virtue of any execution, attachment or *other process* of any goods or chattels then being upon any lands or tenements which are or shall be leased is absolutely prohibited, unless the party at whose suit the execution or other process is issued out shall, before the removal of the goods from off the said premises by virtue of said process, pay to the landlord or his bailiff all rent due for said premises at the time of said taking or removal not exceeding one year's rent. The phrase, "other process" as used in this section, unquestionably includes an order of this court directing the Receiver by it appointed for the insolvent corporation-tenant to take possession of the latter's goods and chattels then found upon the demised premises. Wood v. McCardell, et al., 49 N. J. Eq. 433.

It is the foregoing statutory enactment—and not the acquisition of a lien upon the defendant company's goods and chattels pursuant to provisions of the Act Concerning Distresses, supra, as appellant erroneously insists—that constitutes the basis of the right to a preference or priority which the landlord here sought and the Receiver properly allowed, Franz Realty Co. vs. Welsh, 86 N. J. Eq. 228, and which right, in cases such as the one at bar, exists quite independent of and even in the absence of the landlord's acquisition of any lien upon his tenants' goods and chattels. Wood v. McCardell et al., supra.

The considerably different circumstances presented in Finneran v. Fitzgerald, 112 N. J. Eq. 260, precludes any analogy between that case and the one at bar to which it is thus rendered wholly inapplicable.

An order sustaining the Receiver's determination and dismissing the petition of appeal will be advised.

Notice of Argument.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
ELECTROL INCORPORATED, a corporation,
Complainant-Appellant,

and

BEATTY, MARSH & MOYER, a corporation,
Defendant-Appellee,

HAROLD J. MARSH, Receiver of Beatty, Marsh & Moyer,
Appellee,

JOHN HENRY MILLER,
Appellee,

On Appeal from the Court of Chancery.

To LLOYD G. BEATTY, Esquire, Solicitor of Harold J. Marsh, Receiver of Beatty, Marsh & Moyer, Appellee, and A. WILBERFORCE EGNER, Esquire, Solicitor of John Henry Miller, Appellee.

Take notice that the argument of the appeal in the above entitled cause will be brought on at the next term of the Court of Errors and Appeals to be held at the State House, Trenton, New Jersey, on Tuesday, October 15th, 1935, at the hour of eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard.

WARREN DIXON, JR.,
Solicitor for and of Counsel with Appellant.

Affidavit of Service.

State of New Jersey }
County of Essex } ss.:

Irving Miller being duly sworn according to law, on his oath, deposes and says:

That on Aug. 26, 1935, I served a copy of the within on Lloyd G. Beatty, by leaving same with Miss Rose Eas, in charge of the office.

(Signed) IRVING MILLER.

Sworn and subscribed to before me
this 26th day of August, 1935.
Helen Steger,
A Notary Public
of New Jersey.

Affidavit of Service.

State of New Jersey }
County of Essex } ss.:

Irving Miller, being duly sworn according to law, on his oath, deposes and says:

That on Aug. 26, 1935, I served a copy of the within on A. Wilberforce Egner, by leaving same with Miss Rose Eas, in charge of the office.

(Signed) IRVING MILLER.

Sworn and subscribed to before me
this 26th day of August, 1935.
Helen Steger,
A Notary Public
of New Jersey.

New Jersey Court of Errors and Appeals

Between ELECTROL INCORPORATED, a corporation, Complainant-Appellant, and BEATTY, MARSH & MOYER, a corporation, Defendant. HAROLD J. MARSH, Receiver of Beatty, Marsh & Moyer, Appellee, JOHN HENRY MILLER, Appellee,	On Appeal from the Court of Chancery.

BRIEF OF COMPLAINANT-APPELLANT.

Statement.

This is an appeal from an Order of the Court of Chancery approving a report of Harold J. Marsh, Receiver of Beatty, Marsh & Moyer, an insolvent corporation, which report and order determined that the claim of John Henry Miller for rent, was a prior claim and entitled to payment ahead of general creditors. No facts appear to be in dispute.

The appellant was a general creditor and excepted to the Receiver's Report insofar as it established priority in favor of the landlord. The order (S. of C., pp. 7 and 8) overruled the appellant's exception and approved the order of priority as set forth in the Receiver's Report of claims. (S. of C., p. 8, l. 20 to p. 10, l. 28).

The appellant contends that the order giving the landlord priority for the full amount of his claim in the sum of $1,133.38 is erroneous for two reasons. First, that in order for the landlord to be entitled to priority of payment of rent accrued prior to insolvency it must appear that the landlord has made a distress before insolvency or that he has given notice within ten days after removal of the goods of the amount of his rent and claim the same. No notice was given in this connection nor was any action tantamount thereto taken. Secondly, appellant contends that the order is erroneous even if priority exists without either distraint or notice, because such priority would be only as to the value of the chattels on the premises, and it does not appear in this case whether there were any chattels and if so what their value was, or what amount, if any, was realized from their sale. The Receiver has filed no report of the assets in his hands, and if the order giving priority to the landlord stands, it means that the landlord has priority ahead of general creditors irrespective of the value of the goods and chattels on the premises. Such, the appellant contends, is not the law.

THE ARGUMENT.

POINT ONE.

A landlord is not entitled to priority of payment of rent in arrears from the Receiver of an insolvent corporation which was the landlord's tenant, unless he has made a distress on the tenant's goods in the demised premises prior to the adjudication of insolvency, or has served a notice after removal of the goods within ten days thereof, not to sell the same unless his rent be paid, or has taken other action tantamount to such notice.

In April 1932 by an Order of the Court of Chancery, Beatty, Marsh & Moyer was adjudicated an insolvent corporation and Harold J. Marsh was appointed permanent Receiver thereof.

The insolvent corporation occupied premises as a tenant which were owned by John Henry Miller, and the latter filed with such Receiver a proof of claim. The proof of claim shows the same to have been acknowledged by the Receiver June 24th, 1932 (S. of C., p. 16, l. 13). Miller thereafter filed an amended proof of claim upon which there does not appear to be an acknowledgment by the Receiver, but the jurat of which is dated July 9th, 1932. That portion of the claim which is for rent under the Receiver's occupancy has been paid, and appellant concedes this to have been proper. That portion of the claim which is for rent accrued prior to the Receiver's occupancy has been allowed as a preferred claim and the appellant contends that under the circumstances of this case, this is erroneous.

The General Corporation Act gives no priority to a landlord. It gives priority to laborers whose

services have been performed within two months of adjudication of insolvency. (2 C. S. p. 1650 section 83). The distribution of other assets after administration expenses, "and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority", is among the general creditors proportionately, with certain exceptions not here pertinent. (Section 86, 2 C. S. p. 1652). *Therefore if a landlord is entitled to a priority of claim it must be by reason of some other statute as the Corporation Act does not so provide.*

It is the contention of the Receiver and the landlord, that the landlord is entitled to priority by virtue of Sections 4 and 5 of the Landlord and Tenant Act, 3 C. S. pages 3066 and 3067. Section 4 provides "that no goods * * * which shall lie or be * * * (upon any leased premises) * * * shall be liable to be taken by virtue of any execution, attachment or other process unless the party at whose suit the said execution or other process is sued out, shall, before the removal of such goods * * * pay to the landlord * * * all rent due for the said premises at the time of the taking such goods or chattels by virtue of such process * * *" provided the amount of rent shall not exceed one year.

Section 5 provides that if any goods shall be removed from any demised premises by virtue of any execution, attachment or other process, the party at whose suit the goods are removed shall pay to the landlord the rent accrued at the time of removal "provided the landlord or his bailiff shall before the expiration of the said ten days from the time of said removal, give notice to the Sheriff or other officer holding such execution or other process, of the amount of the rent in arrears and claim the same * * *."

It must be assumed that in the case at bar, the

landlord did nothing except file his proof of claim and his amended proof of claim (S. of C., pp. 11 to 16).

In *Woods* vs. *Carriage Company,* 49 N. J. Eq. 433, it was held that the appointment of a Receiver of the tenant, the tenant being an insolvent corporation, was within the meaning of the phrase used in the statute above quoted "or other process" and where the landlord petitioned the court for the payment of his rent as a condition precedent to the removal of the goods, this petition was a compliance with section 5 of the Statute requiring the giving of notice before sale, and that therefore the landlord was entitled to be paid his rent before a sale of the goods.

This case, has, on occasion, been referred to as authority for the proposition that a landlord is entitled to priority from the assets of an insolvent corporation, merely by reason of the fact that he is a landlord, but the case, it is respectfully submitted, does not so hold.

In *Franz Realty Co.* vs. *Welsh,* 86 N. J. Eq. 228, (E. & A. 1916) the doctrine of the *Wood* case was approved, and it was there held that a wage claimant was entitled to priority ahead of the landlord. It does not appear that the priority of the landlord ahead of general creditors was disputed nor does it appear to what extent there was a compliance with Section 5 of the Statute. Judge WHITE, speaking for this Court, at page 230, said:

> "The right of the landlord under section 4 of the Landlords and Tenants Act, is, in the absence of an actual distress, not a lien at all. *Woodside* vs. *Adams,* 40 N. J. L. 417. It is a statutory right arising under certain conditions. It might, prior to the institution of the insolvency proceedings, have been defeated by the tenant himself by a *bona fide* sale or chattel mortgage of the

> goods and chattels in question, or by their consumption. At most, it was but a statutory right, possibly in the nature of an inchoate lien, maturing, in effect, into an actual lien only under certain conditions prescribed by the statute."

A similar result was reached in the case of *Bryson* vs. *Miller Realty Company,* 108 N. J. L. 434 (Supreme Court 1932). In this case Mr. Justice Parker succinctly stated the effect of sections 4 and 5 of the Landlord and Tenant Act when he said at page 437:

> "It, (the landlord) can claim no title by virtue of the so-called lien arising under the Landlord and Tenant Act, and which is, as we have said, merely a right to veto the removal of the goods, or, if removed, to veto their sale under certain circumstances, unless the rent is paid."

These cases seem clearly to indicate that there is neither a lien nor priority by virtue of sections 4 and 5 of the Landlord and Tenant Act, but merely that the landlord can veto the removal of the goods unless his rent be paid, or veto their sale if removed, and they certainly do not hold that a landlord has priority or a lien on the goods unless he vetoes their removal or their sale.

Vice-Chancellor Lewis, who advised the order in the case at bar, apparently adopted this view of the law in the case of *Finneran* vs. *Fitzgerald,* 112 N. J. Eq. 260. In this case there was an adjudication of the insolvency of the tenant on March 7th, 1932. The landlord filed his claim April 6th, 1932. On May 27th, 1932 the Receiver disposed of the remaining assets and on that day the landlord petitioned for priority of payment, which was denied. The Court said at page 261:

> "No effort was made to restrain the sale,

nor did the landlord at any time make any effort to exercise any right of distraint.

"In the absence of any action by way of distraint or otherwise to prevent the goods from being removed by the Receiver, I do not consider that the landlord has brought himself within the provisions of Sections 4 and 5 of the Landlord and Tenant Act. *Bryson* vs. *Miller Realty Co.*, 108 N. J. L. 434. The Statute does not give the landlord a preference over other creditors but only under certain circumstances a lien, so that it is not entitled to a priority. I consider that the landlord, by his failure to protect its rights, by appropriate action, has waived any claim it might have had under the Landlord and Tenant Act."

That a landlord is not entitled to priority ahead of general creditors appears to be the rule in bankruptcy in this State. In the case of *In Re. Conrad Keil & Son,* 7 Fed. Supp. 922, Referee BEACH disallowed a claim of priority for rent of a landlord who did not distress nor give any notice to the Receiver or Trustee as provided by Section 5 of the Landlord and Tenant Act. The Referee's ruling was affirmed by Judge FAKE for the United States District Court for the District of New Jersey. The Referee upon whose opinion affirmance was entered, said at page 922:

"The solution of the question here presented turns on the construction of sections 4 and 5 of the Landlord and Tenant Act, 3 Com. Stat. 1910, pp. 3066, 3067, as it is admitted that without this statutory provision the landlord would have no better right than any other creditor. It is interesting to note in passing that aside from New Jersey and Pennsylvania there is scarcely a State in the Union which gives the landlord any greater rights for unpaid rents than any other creditor of the bankrupt."

The Referee then refers to Sections 4 and 5 and then says:

> "It can readily be seen from this section that the landlord must take some affirmative action."

The Referee then goes on to say that it is unquestioned that the appointment of a Receiver constitutes a removal within the purview of the act and says then:

> "Claimant must now rely on Section 5 of the above Act, for any claim to priority which he may have. From the cases which I have already cited, it must appear that unless the landlord actually distresses upon the goods of the tenant prior to the adjudication in bankruptcy, he has no lien whatsoever upon the goods and chattels upon the demised premises. This doctrine is also approved in the case of Spies-Alper Company (D. C. N. J.) 231 Fed. 535, 36 Am. Bankr. Rep. 470. The most the landlord is entitled to under Section 5 of the Landlord and Tenant Act is a priority claim and that only if he adheres strictly to the terms of said section. * * * It would seem to me, therefore, that it was the duty of the claimant desiring the priority to notify the officers of the Court within ten days of the sale of the goods of the amount of rent in arrears and to claim the same as provided in Section 5. Nothing of this kind was done by Abrams. In fact, the notice that the Trustee had, of such priority claim, was when it was filed on January 21st, 1933.
>
> "In the light of the foregoing, the landlord's claim for priority must be disallowed."

There has been a similar holding by Judge Fake in the matter of *The Non-Pariel Dye Corporation, Bankrupt.* The opinion is not yet offi-

cially reported, nor is it at this writing available, but it will, if possible, be added hereto.

This court has recognized the desirability of a uniform administration of the assets of an insolvent corporation and the need, therefore, of similarity of result in the State and Federal Courts where the administration of insolvent corporations is involved.

> *Block* vs. *Bell Furniture Company,* 111 N. J. Eq. 551, 561.

In the case at bar, the landlord did not distrain nor did he veto any removal, nor did he notify the Receiver of the amount of his rent and claim the same, and it does not appear by what manner the chattels of the demised premises were disposed of, nor what the result thereof was. The most that the landlord did in this case was to file a claim. It appears therefrom that the Custodial Receiver went into possession April 8th, 1932 and continued to May 5th, and that the Permanent Receiver continued possession of the premises to June 1st, 1932. (S. of C., p. 15, ll. 4 to 13). The claim was not filed with the Receiver until June 24th. (S. of C., p. 16, l. 15)

Section 4 of the Landlord and Tenant Act directs that the goods shall not be removed by process unless the rent be paid. Section 5 directs that they shall not be sold unless the rent be paid providing claim be made by the landlord therefor within ten days after removal. It is apparent that if there be a wrongful sale after notice given, that the landlord's damages cannot exceed the value of the goods. If he distrains, the best he can obtain is a lien on the goods and the profits from the sale thereof. Without a distress, he has no lien.

> *Woodside* vs. *Adams,* 40 N. J. L. 417.
> *Bryson* vs. *Miller,* 108 N. J. L. 434.

It follows therefore that if a landlord is given a preferred claim against an insolvent corporation when he has not distrained and when he has not given the notice required by Section 5, he is placed in a better position than was intended either by the Landlord and Tenant Act, or by the Distress Act. There does not seem to be any justification for this doctrine.

It appears from the landlord's claim, that the Receiver vacated the premises June 1st, 1932 (S. of C., p. 15, ll. 4 to 13). There was no endeavor by the landlord to comply with Section 5 of the Statute, and in the absence of so doing, he is entitled to neither a lien nor priority.

It is respectfully submitted therefore, that the order approving the priority in favor of the landlord was erroneous and should be reversed.

POINT TWO.

Assuming, for the purpose of argument, that by virtue of Sections 4 and 5 of the Landlord and Tenant Act, the landlord was entitled to priority of payment, such priority can be had only from the proceeds of the goods on the leased premises. There was nothing before the court in this case on which the court could base a determination that the goods on the premises were of sufficient value to pay the landlord's claim, and in the absence thereof, the Order was erroneous.

As has been contended heretofore, the Corporation Act does not give the landlord any priority. If such priority exists, it must be by virtue of the Landlord and Tenant Act and then cannot exceed the value of the goods on the premises. The entire theory of Sections 4 and 5 of the Landlord

and Tenant Act is based upon the landlord's control of the goods on the premises.

There was nothing before the court in the case at bar indicating that there were goods of any value on the demised premises, or if so what their value was.

Although the Receiver, Harold J. Marsh was appointed in May, 1932, the first and only report which he has filed to date in the report on claims contained in the State of Case at page 8 *et seq.* It does not appear whether the goods on the demised premises constituted a substantial or an insignificant part of the assets of the corporation, nor whether their value or the amount realized from their sale, if a sale has been held, either in bulk or in the course of business, was sufficient to meet the landlord's claim.

If, in the absence of such proof, the landlord is entitled to priority of payment out of the assets of an insolvent corporation, it must be by judicial determination and not by legislative enactment, because the Corporation Act which has set forth the priority of creditors of an insolvent corporation makes no provision therefor. In the syllabus to the case of *Massey* vs. *Camden and Trenton Railway Company,* 78 N. J. Eq. 539, (E. & A. 1911) it is stated:

> "The preferential claims to be allowed by a Receiver of an insolvent corporation, are those set forth in Section 83 of the Corporation Act."

Research has disclosed no case holding that a landlord is *per se* entitled to priority of payment out of the general assets of the corporation, and it is submitted that such is not the law, yet the order appealed from is an adjudication to that effect because there was nothing before the court from which it could determine that the Receiver

had any funds or assets derived from chattels on the landlord's premises at the time of the adjudication of insolvency.

It is respectfully submitted that in the absence of a compliance by the landlord with Sections 4 and 5 of the Landlord and Tenant Act, that he is not entitled to priority of payment ahead of general creditors of an insolvent corporation; and that in the absence of proof of a removal or sale of goods from the demised premises and that as a result thereof the Receiver has funds representing the proceeds of the sale of such goods, sufficient to meet the landlord's claim for rent, that an order which adjudicates priority to the landlord despite the absence of such proof is erroneous.

It is respectfully submitted that the Order appealed from should be reversed.

Respectfully submitted,

WARREN DIXON, JR.,
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with Appellant.

E. W. Stillman, Pompton Plains, N. J., Tel, Pompton Lakes 500

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

New Jersey Court of Errors and Appeals

Between

ELECTROL INCORPORATED, a corporation,
Complainant-Appellant,

and

BEATTY, MARSH & MOYER, a corporation,
Defendant,

HAROLD J. MARSH, Receiver of Beatty, Marsh & Moyer,
Appellee,

JOHN HENRY MILLER,
Appellee.

On Bill, &c.

On Appeal from the Court of Chancery.

BRIEF OF APPELLEE, JOHN HENRY MILLER, Landlord.

(Italics ours unless otherwise noted.)

As to the Facts.

The statement contained in appellant's brief does not correctly reflect facts or the matters involved in the present controversy because, understated. While it may be that no substantial dispute exists as to the facts, it is important, however, that they be presented fully.

The entire question on this appeal appears in the following succinct statement of Vice-Chancellor Lewis in his conclusions filed below (S. C. p. 18, ll. 10, 20).

> "Neither the amount of this rent claim nor the fact that it represents less than one year's rent is in anywise here questioned or

disputed. The sole ground of complaint and the only one upon which the present appeal is founded and prosecuted is that the Receiver erroneously allowed the claim in question a preference or priority in payment over that of complainant and the other general creditors of the defunct defendant corporation."

Appellant's statement argues that it must affirmatively appear that the landlord, as a condition precedent to obtaining priority in respect to his claim for unpaid rent, "has given notice within 10 days"; and, that it does not appear that such notice was given. Not only is there nothing in the State of the Case to support that statement, but, no exceptions appear in the record, although the petition of appeal makes reference to "exceptions" (S. C. p. 4, l. 28).

While the fact happens to be that the Receiver did have notice, the appellee maintains that the giving of such notice was in no event a necessary prerequisite to his right to the preference which he is entitled to under the statute (C. S. 3066, 3067, Secs. 4 and 5). The appellee's right to the preference claimed and allowed by the Receiver, did not grow out of any "lien," but, under the provisions of the statute making it incumbent upon those taking a tenant's goods or chattels by execution, attachment or other process, to pay the rent due the landlord at the time of the taking and removal, for a period not exceeding one year. That the taking of possession by a Receiver duly appointed by the Court of Chancery in insolvency proceedings, comes within the meaning of the term "process" referred to in the statute, is too well settled to invite discussion.

Distraint is not the *sine qua non* to the right of priority over the claims of general creditors; nor, is the requirement of notice within ten days.

Whether or not a "lien" was acquired is of no moment. The single question with which we are concerned on the present appeal is:

> Is the appellee entitled to the payment of past due rent as a preferred creditor for the period preceding the receivership not exceeding one year?

Appellant suggests that there being no proof as to the value of the chattels at the time the Receiver took possession thereof, it follows that the claim for preference must fall. The Receiver having recognized and allowed the claim in question, it must be assumed, particularly in the absence of any proof to the contrary, that the value of the tenant's goods was greater than the claim filed for rent. Official acts are presumed to have been correctly done.

The entire appeal rests upon alleged "absence of facts" and speculative inferences deduced from such absence.

The whole controversy may be summarized as follows: The landlord filed its proof of claim with the Receiver for unpaid rent for a period less than a year preceding the receivership (S. C. pp. 14, 15) and claimed a preference which the Receiver duly allowed in the amount of $1,133.38. The question is: "Was the appellee entitled to a preference and the Receiver justified in allowing the same?" The appellee says, "Yes." The appellant says, "No."

As to the Law.

No better or more thorough resumé of the facts and the law applicable thereto can be had than that contained in the opinion filed by Vice-Chancellor Lewis.

Appellant finds fault with the Order of March 2nd 1935 (S. C. p. 7) approving the allowance by the Receiver of appellee's rent claim, basing its complaint upon the following two propositions: (1), that the landlord must either actually distrain upon the tenant's goods, or serve notice within 10 days; and, (2), that there was nothing before the Court below indicating the value of the tenant's goods in the premises. The answer to the first proposition, is, that the landlord's right to a preference does not rest exclusively upon a prior "impressment of a lien," but, upon the statute (Secs. 4 and 5, C. S. pp. 3066, 3067). The goods in question, while taken possession of by the Receiver, were not removed. Secondly, there is nothing in the record indicating that the Receiver had not received timely notice. Such notice need not be in writing. As stated in *State (Hand Pros.)* vs. *Howell,* 61 N. J. L. 142,

> "Section 5 of the act does require notice in writing, but that section, enacted after Ayres *v.* Johnson, supra, and doubtless because of that decision, is only applicable to cases *where there has been an actual removal by the officer,* from the demised premises, of a tenant's goods, before sale, and before notice of rent due. The notice, under section 5, must be given within 10 days after such removal. Under the statute of Anne, and section 4 of our act, *formal notice is not necessary. In one case the court of king's bench held that notice might be inferred from the sheriff's conduct.* Andrews *v.* Dixon, 3 Barn. & Ald. 645. *Credible information sufficient to put the officer on inquiry seems to be all that is requisite.* Tayl. Landl. & T. Sec. 598."

The Receiver recognized and allowed the claim. It must be assumed, therefore, in the absence of an affirmative showing to the contrary, that the claim was in all respects valid and legal, and,

that the appellee complied with every requirement. That is the legal effect and result of the Receiver's allowance of the claim. As to the presumption that official acts have been properly done, the Court of Errors & Appeals in *Mayor, &c.*, ads. *State, Batten, et al.*, 32 N. J. L. 453 at 458, said as follows:

> "Where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favor of their due execution: it is said on such occasions 'omnia presumuntur rite acta.' The books afford numerous instances of the application of this principle."

As to the second proposition, *i. e.*, the alleged absence of proof that the tenant's goods were of a value sufficient to pay the landlord's claim—the fallacy of that contention is that it assumes from such alleged absence, that the value was insufficient. Not only is there equal, if not greater justification for the assumption that there was a sufficiency of assets in the tenant's premises when the Receiver took possession, but the fact is, that an amount far in excess of the appellee's claim was turned over to the Receiver. We have, moreover, the recognition and allowance of the claim by the Receiver in the proper administration of the estate.

As stated above, the presumption being that the Receiver acted properly and correctly, the burden of showing otherwise rests upon the appellant; and, he must do so by clear and affirmative proof.

The appellant leans heavily upon the bankruptcy case of *Conrad Keil & Son*, 7 Fed. Supp. 922, decided by Referee Beach wherein a landlord's claim for priority was disallowed. While this is a bankruptcy matter and not applicable

in the Chancery proceedings, in that case, it was the *Trustee himself* who refused to recognize the landlord's claim and rejected it. In the case at bar, the Receiver recognized, acknowledged and approved the landlord's claim. In the Conrad Keil & Son case, *supra,* it was affirmatively established that no notice had ever been given to the Trustee prior to the filing of the claim. In the instant case there is no such affirmative showing. Summed up, the appellant's position seems to be that this Court should (1), assume, an absence of notice; and (2), based upon such assumption, reverse the acts of the Receiver in allowing the claim and the Chancellor in approving the Receiver's acts.

The Receiver having accepted as valid, and, having approved the allowance of the claim of the landlord, those acts should be permitted to stand. No affirmative proof has been presented by the appellant warranting an inference of "lack of notice" in the Receiver, or, for that matter, any impropriety on the Receiver's part in approving and allowing the claim as filed, but, rather, upon things purely negative in character and upon inferences equally negative.

The Conrad Keil & Son case, *supra,* was decided by a bankruptcy Referee in a Federal Court proceeding. It is in no sense controlling or binding upon the Court of Chancery, particularly in the light of positive decisions in the Chancery Court of this State respecting the preferential right of a landlord over general creditors. The present proceedings are pending in the Court of Chancery and the determinations of that tribunal apply and govern.

In the case of *Whitehead* vs. *Whitehead Pottery Co.,* 115 N. J. E. 257, BUCHANAN, *V.-C.,* as

late as February, 1934, expressly holds that while the landlord may have no lien in the absence of a distraint prior to insolvency,

> "* * * *he has nevertheless a preferential right or claim, ahead of the claims of general creditors, against the assets in the hands of the receiver;* * * *"

As to the question whether the decisions of our state courts or those of the Federal Courts should apply, the Vice-Chancellor in the latter case says as follows:

> "The case now sub judicae is under our State Corporation Act, and the other statutes of our State amending or affecting provisions thereof. The present determination must be controlling by the pertinent decisions of the State Courts."

In the case of *Bloch* vs. *Bell Furniture Co.*, 11 N. J. E. 551, where the provisions of a lease obligated a tenant to pay as part of the total rent, accruing taxes, it was held that the payment was mandatory for the benefit of the landlord; and, having accrued before the appointment of the Receiver, and remaining unpaid, *he was entitled to an allowance as a preferred claim.* The claim was filed by the landlord against the Receiver and the case decided that *"the claim should have been allowed in full and given preference."*

Franz Realty Co. vs. *Welsh*, (E. & A.), 86 N. J. E. 228, quoted and relied upon by the appellant, settled the question that a wage claim (not exceeding two months) is superior to the right of the landlord instead of only on a parity with it, but nevertheless holds that the landlord of an insolvent corporation is entitled to priority for arrearage of rent not to exceed one year.

The mere fact that no distraint was issued prior to the appointment of a Receiver, did not affect the landlord's right to a preferential claim.

Another case singularly in point and directly applicable to the present situation, is that of *Wood* vs. *McCardell*, 49 N. J. E. 433, wherein it was held that in proceedings against an insolvent corporation, *the owner of the premises is entitled to an order directing the Receiver to pay the amount of rent due at the time of the decree of insolvency not exceeding one year's rent as against the claims of general creditors.* BIRD, *V.-C.*, who wrote the opinion in the latter case, said:

> "Upon the argument it was considered important that the landlord had not secured a lien or taken steps to that end. This I think, is not essential to his protection * * * I am assured that it has been the practice of the court to recognize the claim of the landlord for preference under the fourth section of the act respecting landlords and tenants."

See also, *Hatch* vs. *Van Dervoort*, 54 N. J. E. 511.

In the case of *Greenspan & Greenberger Co.* vs. *Goerke Co.*, 112 N. J. E. 391, it was held that *a landlord has a right of priority over general creditors* in the distribution of assets; and, that such right exists even though there was no distraint.

In *Bryson* vs. *Miller Realty Co.*, 108 N. J. L. 434, the Court said:

> "*The landlord in the absence of distress is entitled to priority of payment out of the proceeds of a bankrupt sale,* but must prove his claim like other creditors."

To the same effect is *Albert & Davidson Pipe Corp.* vs. *Gibney Iron & Steel Co.*, 110 N. J. E.

285, holding that a landlord's claim for one year's rent *should be filed and allowed as a preferred claim.*

The case of *Chase Brass & Copper Co.* vs. *Bart Reflector Co.*, 111 N. J. E. 59, where a landlord's claim was subordinated to the lien of taxes, Vice-Chancellor Backes who wrote the opinion in that case, also recognized the landlord's right to a preference.

The appellant's contention being obviously without merit either in law or fact, it is respectfully submitted that the decree of the Court of Chancery be affirmed.

Respectfully submitted,

A. WILBERFORCE EGNER,
Solicitor for Appellee,
John Henry Miller, Landlord.

GEORGE H. ROSENSTEIN,
Of Counsel.

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

New Jersey Court of Errors and Appeals

Between ELECTROL INCORPORATED, a corporation, *Complainant-Appellant,* *and* BEATTY, MARSH & MOYER, a corporation, *Defendant,* HAROLD J. MARSH, Receiver of Beatty, Marsh & Moyer, *Appellee,* JOHN HENRY MILLER, *Appellee.*	*On Bill, &c.* *On Appeal from Order Made by Court of Chancery Approving Receiver's Report On Claims.*

BRIEF OF HAROLD J. MARSH, RECEIVER, APPELLEE.

Facts.

The pertinent facts in this case are succinctly set forth in the conclusions of the Chancellor (pages 17-19 S. C.) and need no further reference.

ARGUMENT.

The Chancellor's conclusions contain citations of the authorities relied upon by the Receiver, appellee, in sustaining the decree of the Court of Chancery.

The appellant has obviously misconceived the point at issue, as very aptly expressed in the opinion of Vice-Chancellor Lewis. The right to the preference and priority of the landlord's

claim does not emanate from any lien upon the tenant's goods and chattels effected by distraint * * * nor from the giving of notice.

The appellant relies upon the case of *Finneran* vs. *Fitzgerald,* 112 N. J. E., page 260. Vice-Chancellor Lewis, who rendered the opinion in that case, correctly stated in the present case that the Finneran case is not analagous but wholly inapplicable, the Finneran case being based on the conclusions in *Bryson* v. *Miller,* 108 N. J. L., page 434, where the claim was not for rent, but title to the property. The distinction being that where the landlord has distressed prior to the receivership, he has a priority to the property (goods and chattels) even ahead of the receiver, by right of lien, and notice is required to prevent removal of the goods and chattels. However, where the landlord has not distressed (or given notice within ten days if the goods and chattels be removed) the landlord has preference ahead of the general creditors only.

Furthermore the said Receiver-appellee relies upon the arguments and things set forth and contained in the brief of the appellee, John Henry Miller, so that further reference thereto is deemed unnecessary.

The Receiver-appellee respectfully submits that the order appealed from should be affirmed.

Respectfully submitted,

LLOYD G. BEATTY,
Solicitor for and of Counsel with
Appellee, Harold J. Marsh,
Receiver.