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BILL OF COMPLAINT.

(Filed July 20, 1926.)

IN CHANCERY OF NEW JERSEY.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

Complainant, Harry Pinsky and Son Company, a corporation organized under the laws of the State of New Jersey, having its principal office in the City of Camden, respectfully shows that:

1. On the 29th day of July, 1922, Walter R. Potts, Harrison W. Potts and Max W. Cooperson, trading as Potts Bros. and Cooperson, entered into an agreement with complainant, in writing, whereby the said Potts Bros. and Cooperson agreed to erect for complainant a certain five-story brick store building, located at the northeast corner of Broadway and Spruce Street, Camden, New Jersey, upon a certain lot of land owned by complainant at that location, upon certain terms and conditions, a true copy of which said contract is hereunto annexed, hereby made part hereof and marked "Schedule A."

2. That before any work was done or materials furnished, in pursuance of the said contract, complainant duly filed said contract, together with the specifications accompanying the same, in the office of the clerk of Camden County, New Jersey, in which said county the said land is situate.

3. That on or about the 27th day of December, 1922, the said Walter R. Potts, Harrison W. Potts

and Max W. Cooperson caused to be incorporated under the laws of the State of Pennsylvania, a corporation known as Potts Bros. and Cooperson, Inc., and as a part of the organization of the said corporation there was assigned to the said corporation, by the said Walter R. Potts, Harrison W. Potts and Max W. Cooperson, all contracts and assets of the said partnership of Potts Bros. and Cooperson, including the said contract made by them with Harry Pinsky and Son Company, hereinbefore referred to as "Schedule A."

4. After the making of the said contract, "Schedule A," complainant contracted with the said partnership of Potts Bros. and Cooperson and with the said Potts Bros. and Cooperson, Inc., which succeeded to the rights of the said partnership, under the said contract, for extra work and material in addition to the work contemplated by said contract; and certain extra work and material were furnished by said partnership and said corporation in and about the erection and construction of the said building referred to in said contract, "Schedule A," under an arrangement by which complainant was to pay for such extra work and material such sums as should be reasonable and should represent a fair price for the same, upon the said extra work and material being properly performed and furnished.

5. The said Potts Bros. and Cooperson, Inc., at sometime prior to the month of April, 1924, claimed to have completed the said building in accordance with the provisions of the said contract, "Schedule A;" and to have furnished certain extra work and material pursuant to subsequent agreements made between the complainant and the said Potts Bros. and Cooperson, Inc.; and the said Potts Bros. and

Cooperson, Inc., claimed there was due to it on that account the sum of $18,536.29.

6. Complainant expressly denied that any such amount was due to the said Potts Bros. and Cooperson, Inc., and further disputed the said claim by reason of complainant's asserting that certain work and material which were to have been furnished under the said contract were of poor workmanship and quality.

7. That under the terms of the said contract, "Schedule A," one Solomon Kaplan was to act as supervising architect in the erection of the said building, and for the reason that the said labor and material were not in accordance with the said contract and specifications, refused to issue any certificate certifying that the said building had been completed in accordance with the said contract and specifications.

8. On or about the 19th day of September, 1923, the said Potts Bros. and Cooperson, Inc., made to Parkside Trust Company a certain assignment of moneys due and to grow due under the said agreement, a true copy of which said instrument of assignment is hereunto annexed, hereby made part hereof and marked "Schedule B."

9. That on or about the 25th day of April, 1924, a petition was filed in the United States District Court for the Eastern District of Pennsylvania, by certain creditors of the said Potts Bros. and Cooperson, Inc., alleging certain acts of bankruptcy committed by the said Potts Bros. and Cooperson, Inc., and praying that they be declared bankrupt for that reason; and such proceedings were had thereon that

on or about the 16th day of May, 1924, the said Potts Bros. and Cooperson, Inc., were adjudicated bankrupt.

10. By an order of the United States District Court for the District of New Jersey, made on or about the 17th day of July, 1924, one Walter Carson was appointed ancillary receiver in the State of New Jersey of the said Potts Bros. and Cooperson, Inc.

11. On the 10th day of October, 1924, the said Parkside Trust Company commenced a suit in the Circuit Court of Camden County, New Jersey, for the purpose of recovering from complainant the sum of $10,000 claimed to be due to the said Parkside Trust Company from complainant under the said assignment, "Schedule B;" a true copy of the summons and complaint issued in said cause being hereunto annexed, hereby made part hereof and marked, "Schedule C."

12. Certain pleadings were filed both by the Parkside Trust Company and complainant in said suit and the cause is at issue, but no judgment has as yet been entered therein; but unless proceedings in said suit are stayed, judgment may be entered against the complainant in the said action at law.

13. On the 16th day of December, 1924, the said Walter Carson, ancillary receiver as aforesaid, instituted an action against complainant in the Circuit Court of Camden County, New Jersey, for the purpose of recovering a balance claimed to be due from complainant to the said Potts Bros. and Cooperson, Inc., under the contract, "Schedule A;" and for certain extra work and material furnished, the aggregate of the said demand being $18,536.29.

14. That certain pleadings were filed by the parties to the said suit; and after the cause was at issue, the same was, by order dated November 21, 1925, referred to William J. Kraft, Esquire, to hear and examine the matters in difference between the parties and to submit a just and true report thereon to the Court, stating the amount that might be due from either party to either or both parties, reserving the right to file exceptions and demand a trial by jury.

15. The parties went to a hearing before the said Referee on several days, to wit; January 29, 1926, April 8, 1926, July 14, 1926 and July 15, 1926; and during the course of the proceedings before the said Referee, Edgar L. Wike, trustee in bankruptcy for Potts Bros. and Cooperson, Inc., was substituted as party plaintiff for the said Walter Carson, ancillary receiver as aforesaid.

16. Such proceedings were had before the said Referee that under date of July 15, 1926, he made his report, a true copy of which is hereunto annexed, hereby made part hereof and marked "Schedule D."

17. That no judgment has been entered against the complainant by the said Edgar L. Wike, trustee as aforesaid, pursuant to the said Referee's report; but unless proceedings therein are stayed, judgment will be entered against complainant in the said action at law by the said Edgar L. Wike, trustee as aforesaid.

18. That on or about the 19th day of October, 1923, Smith-Austermuhl Company gave to this complainant a notice, in writing that it had furnished to

the said Potts Bros. and Cooperson insurance and a surety bond in connection with the erection of the said building, to the amount of $719.76; and requested and notified complainant to retain the said amount before making final settlement with the said Potts Bros. and Cooperson.

19. That on or about the 14th day of January, 1924, one Edwin A. Peterson gave notice, in writing, to this complainant that one Louis A. Liebig, a sub-contractor under the said Potts Bros. and Cooperson, was indebted to the said Edwin A. Peterson in the sum of $107.06, for labor furnished in the erection and construction of the said building and that the said Louis A. Liebig had, upon demand, refused to pay the said amount to the said Edwin A. Peterson; and requiring complainant to retain the said amount out of the amount due or to grow due to the said Potts Bros. and Cooperson; and upon being satisfied of the correctness of the claim to pay the same to the said Edwin A. Peterson.

20. That on or about the 7th day of February, 1924, Pearce Fire Proof Company gave to this complainant a notice, in writing, that it had furnished one Louis A. Liebig, a sub-contractor under the said Potts Bros. and Cooperson, certain materials in the erection of the said building, to the amount of $193.32; and that the said Louis A. Liebig, had, upon demand, refused to pay the said amount to the said Pearce Fire Proof Company; and the said notice required complainant to retain such amount out of the amount due or to grow due to the said Potts Bros. and Cooperson under the said contract; and upon being satisfied of the correctness of the said claim to pay the same to the said Pearce Fire Proof Company.

21. That on or about the 18th day of March, 1924, C. B. Coles and Sons Company gave to this complainant a notice in writing that it had furnished to the said Potts Bros. and Cooperson certain lumber and materials in the erection of the said building to the amount of $3,061.47; and that the said Potts Bros. and Cooperson had, upon demand, refused to pay the said amount to the said C. B. Coles and Sons Company; and the said notice notified and required the complainant to retain the said amount out of the amount owing by complainant to the said Potts Bros. and Cooperson, or which might thereafter become due after having given written notice to the said Potts Bros. and Cooperson, Inc., of said notice and demand and upon being satisfied of the correctness of such demand to pay the same to the said C. B. Coles and Sons Company.

22. That on or about the 20th day of March, 1924, the said C. B. Coles and Sons Company issued a writ of attachment out of the Circuit Court of Camden County, New Jersey, against the said Potts Bros. and Cooperson for the sum of $10,000; and acting under and in pursuance of said attachment, Thomas W. Jack, sheriff of the County of Camden, levied the said writ of attachment upon such moneys as might be due from complainant to the said Potts Bros. and Cooperson and in the hands of complainant.

23. Complainant is ignorant as to whether the debt upon which the said writ of attachment was founded is the same as that upon which the said stop notice of the said C. B. Coles and Sons Company was likewise founded.

24. That no judgment has been entered in said attachment suit.

25. That on or about the 25th day of March, 1924, one Lou A. Liebig gave to this complainant a notice, in writing, that he had furnished the said Potts Bros. and Cooperson plastering, stucco and lathing used in the construction of the said building, to the amount of $2,227.32; and that the said Potts Bros. and Cooperson had, upon demand, refused to pay the said amount to the said Lou A. Liebig; such notice requiring complainant to retain the said amount out of the amount due or to grow due to Potts Bros. and Cooperson under the said contract; and upon being satisfied of the correctness of said claim to pay the same to the said Lou A. Liebig.

26. That on or about the 25th day of March, 1924, Camden Materials Company gave to this complainant a notice, in writing that it had furnished the said Potts Bros. and Cooperson certain materials used in the erection of the said building, to the amount of $276.41; and that the said Potts Bros. and Cooperson had, upon demand, refused to pay the said amount to the said Camden Materials Company; such notice requiring complainant to retain the said amount out of the amount due or to grow due to Potts Bros. and Cooperson under the said contract; and upon being satisfied of the correctness of said claim to pay the same to the said Camden Materials Company.

27. That on or about the 17th day of May, 1924, one George Weiss Company gave to this complainant a notice, in writing, that it had furnished the said Potts Bros. and Cooperson with certain labor and material used in the construction of the said

building, to the amount of $150.00; and that the said Potts Bros. and Cooperson had, upon demand, refused to pay the said amount to the said George Weiss Company; such notice requiring complainant to retain the said amount out of the amount due or to grow due to Potts Bros. and Cooperson under the said contract; and upon being satisfied of the correctness of the said claim to pay the same to the said George Weiss Company.

28. That on or about the 17th day of May, 1924, Hitchner and Holmes gave to this complainant a notice, in writing, that it had furnished the said Potts Bros. and Cooperson with certain materials used in the construction of the said building, to the amount of $866.87; and that the said Potts Bros. and Cooperson had, upon demand, refused to pay the said amount to the said Hitchner and Holmes; such notice requiring complainant to retain the said amount out of the amount due or to grow due to Potts Bros. and Cooperson under the said contract; and upon being satisfied of the correctness of the said claim to pay the same to the said Hitchner and Holmes.

29. That on or about the 28th day of March, 1924, the Emergency Elevator Company filed an affidavit with the clerk of the Circuit Court of Camden County, New Jersey, stating that the said Potts Bros. and Cooperson was indebted to it in the sum of $1,007; and thereupon a rule was entered in the said court admitting the said Emergency Elevator Company as a creditor under the said attachment suit of C. B. Coles and Sons Company against the said Potts Bros. and Cooperson.

30. That on the 1st day of April, 1924, Hitchner

and Holmes filed an affidavit with the clerk of the Circuit Court of Camden County, New Jersey, stating that the said Potts Bros. and Cooperson was indebted to them in the sum of $1,028.87; and thereupon a rule was entered in the said court, admitting the said Hitchner and Holmes as a creditor under the said attachment suit of C. B. Coles and Sons Company against the said Potts Bros. and Cooperson.

31. That on the 8th day of April, 1924, the said Lou A. Liebig filed an affidavit with the clerk of the Circuit Court of Camden County, New Jersey, stating that the said Potts Bros. and Cooperson was indebted to him in the sum of $4,375.99; and thereupon a rule was entered in the said court, admitting the said Lou A. Liebig as a creditor under the said attachment suit of the said C. B. Coles and Sons Company against the said Potts Bros. and Cooperson.

32. That up to the time of the final hearing before the said William J. Kraft, Esquire, Referee, complainant had disputed the amount due to the said Potts Bros. and Cooperson, Inc., and to the said Edgar L. Wike, trustee in bankruptcy as aforesaid, succeeding to the rights of the said Potts Bros. and Cooperson, Inc., under the said contract; but by reason of a compromise offer made by complainant before the said William J. Kraft, Esquire, Referee, and the acceptance thereof by the said Edgar L. Wike, trustee in bankruptcy, the said demand has now become liquidated in the sum of $7500.00; and judgment will be entered against complainant upon the said Referee's report, if such proceeding is not stayed.

33. The said Edgar L. Wike, trustee in bankruptcy as aforesaid, claims that the said sum of $7500.00 is due to and should be paid to him; and the said Parkside Trust Company claims that the said amount should be paid to it by reason of the assignment by said Potts Bros. and Cooperson, Inc. to it, hereinbefore referred to, and the said Smith-Austermuhl Company, Edwin A. Peterson, Pearce Fire Proof Company, C. B. Coles and Sons Company, Lou A. Liebig, Camden Materials Company, George Weiss Company and Hitchner and Holmes also claim that the said fund should be paid to them by reason of the stop notices served upon complainant and hereinbefore enumerated and referred to; and further, the said C. B. Coles and Sons Company claim that its said attachment hereinbefore referred to is a lien upon such moneys as are in the hands of complainant belonging to the said Potts Bros. and Cooperson, Inc.; and the said Emergency Elevator Company, Hitchner and Holmes and Lou A. Liebig make further claim to the said fund by reason of having been admitted as applying creditors under the said attachment suit of the said C. B. Coles and Sons Company.

34. Complainant has been unable and is still unable to determine to whom of the aforesaid claims the said sum of $7500.00 rightfully belongs, for the reason that it is uncertain as to whether the claims of those who have served stop notices are paramount to the assignment or whether the claims of the attaching creditors and of the applying creditors are paramount to those who have filed stop notices, subsequently, or what the various equities of the various claimants to the fund are as to each other and requires the aid of this Honorable Court in the premises.

35. Complainant, ever since the said demand of the said Edgar L. Wike, trustee in bankruptcy as aforesaid, was liquidated, and fixed at the specific sum of $7500.00, has always been willing and still is willing to pay said sum of $7500.00 to such person or persons who is or are lawfully entitled to receive the same and to whom he can pay it with safety; and does hereby offer to pay said sum of money into this Court.

Complainant is without adequate remedy in the courts of law, and therefore prays:

I.

That Edgar L. Wike, trustee in bankruptcy for Potts Bros. and Cooperson, Inc., Smith-Austermuhl Company, Edwin A. Peterson, Pearce Fire Proof Company, C. B. Coles and Sons Company, Lou A. Liebig, Camden Materials Company, George Weiss Company, Hitchner and Holmes, Parkside Trust Company and Emergency Elevator Company, who are the defendants to this suit may answer this bill of complaint and each statement therein made.

II.

That the said defendants may interplead and determine their rights to the said sum of $7500.00.

III.

That complainant may be ordered to pay said sum of $7500.00 into this court.

IV.

That complainant upon payment into this court of said sum of $7500.00 and the procuring of said defendants to interplead and settle their rights to the said sum of money according to law and the practice of this court, may be ordered, adjudged and decreed to be discharged from all liabilities to the said defendants or any of them in the premises.

V.

That complainant may be paid out of said fund its costs of these proceedings and a reasonable counsel fee.

VI.

That a writ of injunction restraining the Parkside Trust Company from the further prosecution of its action at law against complainant may issue.

VII.

That a writ of injunction may issue restraining Edgar L. Wike, trustee in bankruptcy as aforesaid, from the entry of any judgment against complainant upon the report of William J. Kraft, Esquire, Referee as aforesaid.

VIII.

That a writ of subpoena may issue commanding the said defendants to answer this bill and to abide

by such decree as the Court may make in the premises.

D. T. STACKHOUSE,
Solicitor for and of Counsel with Complainant.

"SCHEDULE A"

THIS AGREEMENT, made the twenty-ninth day of July in the year one thousand nine hundred and twenty-two by and between Walter R. Potts, Harrison W. Potts and Max W. Cooperson, trading as Potts, Bros. and Cooperson of Philadelphia, Pennsylvania, party of the first part (hereinafter designated the Contractors), and Harry Pinsky and Son Company of Camden, New Jersey, a corporation under the laws of the State of New Jersey, party of the second part (hereinafter designated the Owner), WITNESSETH, that the Contractors, in consideration of the agreements herein made by the the Owner, agree with the said Owner as follows:

ARTICLE 1. The Contractor shall and will provide all the materials and perform all the work for the building and construction of a 5-story brick store building located at the N. E. Corner of Broadway and Spruce Street, Camden, New Jersey, (with the exception of the heating, plumbing, electric wiring and elevators) as shown on the drawings and described in the specifications prepared by SOLOMON KAPLAN, Architect, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract.

ART. II. It is understood and agreed by and between the parties hereto that the work included in

this contract is to be done under the direction of the said Architect, and that his decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said Architect, and they agree to conform to and abide by the same as far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Art. I.

It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said Architect are and remain his property, and that all charges for the use of the same, and for the services of said Architect, are to be paid by the said Owner.

ART. III. No alterations shall be made in the work except upon written order of the Architect; the amount to be paid by the Owner or allowed by the Contractors by virtue of such alterations to be stated in said order. Should the Owner and Contractors not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in Art. XII of this contract.

ART. IV. The Contractors shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architect or his authorized representatives; shall, within twenty-four hours after receiving written notice from the Architect to that effect, proceed to remove from the grounds or buildings all materials condemned by him whether worked on or unworked, and to take

down all portions of the work which the Architect shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby.

ART. V. Should the Contractors at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owner, shall be at liberty, after three days written notice to the contractors, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractors under this contract; and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractors for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractors shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractors; but if such expense shall exceed such unpaid balance, the Contractors shall pay the difference to the Owner. The expense incurred

by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties.

ART. VI. The Contractors shall complete the several portions, and the whole of the work comprehended in this Agreement by and at the time or times hereinafter stated, to wit: within one hundred fifty working days from the date of this contract.

ART. VII. Should the Contractors be delayed in the prosecution or completion of the work by the act, neglect or default of the Owner, of the Architect, or of any other contractor employed by the Owner upon the work, or by any damage caused by fire or other casualty for which the Contractors are not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the Contractors, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the Architect; but no such allowance shall be made unless a claim therefor is presented in writing to the Architect within forty-eight hours of the occurrence of such delay.

ART. VIII. The Owner agrees to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the Contractors, agrees that it will reimburse the Contractors for such loss; and the Contractors agree that if they shall delay the progress of the work so as to cause loss for which the Owner shall become liable,

then they shall reimburse the Owner for such loss. Should the Owner and Contractors fail to agree as to the amount of loss comprehended in this Article, the determination of the amount shall be referred to arbitration as provided in Art XII of this contract.

ART. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractors for said work and materials shall be One hundred thousand dollars, and for any additional excavations not including shoring or pumping 95 cents per cu. yard. and for excavating where shoring or pumping shall be required $3.50 per cu. yd.; for additional brick work $38.00 per thousand; for additional concrete work not including forms or reinforcement $11.00 per cu. yd.; for additional form work 22 cents per sq. ft.; for additional reinforcement 7½ cents per pound in place, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the Owner to the Contractors, in current funds, and only upon certificates of the Architect, as follows:

Estimates of the work completed, shall be furnished to the Architect by the Contractors on the first day of each succeeding month and when approved by him 80 per cent. of such estimates shall be paid by the Owner on or before the tenth day of the same month, the remaining 20 per cent. of such estimates shall be paid at the time of final payment. The Contractors agree to give to the Owner a bond in the sum of One hundred thousand dollars conditioned for the payment.

The final payment shall be made within sixty days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued.

If at any time there shall be evidence of any lien or claim for which, if established, the Owner of the said premises might become liable, and which is chargeable to the Contractors, the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify it gainst such lien or claim. Should there prove to be any such claim after all payments are made, the contractors shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractors' default.

ART. X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

ART. XI. The Owner shall during the progress of the work maintain insurance on the same against loss or damage by fire, Lightning, Wind or other casualty (and notify Architect of all insurance placed), the policies to cover all work incorporated in the building, and all materials for the same in or about the premises, and to be made payable to the parties as their interest may appear.

ART. XII. In case the Owner and Contractor fail to agree in relation to matters of payment, allowance or loss referred to in Arts. III or VIII of this contract, or should either of them dissent from the decision of the Architect referred to in Art. VII of this contract, which dissent shall have been filed in writing with the Architect within ten days

of the announcement of such decision, then the matter shall be referred to a Board of Arbitration to consist of one person selected by the Owner, and one person selected by the Contractors, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference.

ART. XIII. The Contractors further agree to execute and deliver to Owner contemporaneously with the execution of this agreement, a bond in the sum of $100.000, with National Surety Company as Surety, conditioned for the faithful and complete performance by the Contractor of the terms of the agreement and with such other conditions as shall be satisfactory to the Architect.

The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

In Presence of E. M. Fenn,

Walter R. Potts (Seal)
Harrison W. Potts (Seal)
Max W. Cooperson (Seal)
Trading as Potts, Bros. and
Cooperson,
Harry Pinsky and Son
Company,
By Reuben Pinsky,
President.
(Pinsky Co.)
(Seal)

Attest: John W. Holmes,
Secretary.

"SCHEDULE B."

KNOW ALL MEN BY THESE PRESENTS, That Where the Parkside Trust Company, of Camden, New Jersey, is about to discount a note of Potts, Bros. & Cooperson, a corporation, endorsed by Walter R. Potts, Harrison M. Potts and Max W. Cooperson, in the sum of Ten Thousand Dollars ($10,000.00) and credit the proceeds therefrom to the account of Potts, Bros. & Cooperson, and

WHEREAS Potts, Bros. & Cooperson, a corporation, as contractor and builder has been constructing a building at Broadway and Spruce Street, Camden, New Jersey, for Harry Pinsky & Son Company, a corporation and under the terms of the contract therefore dated July 29th, 1922, there will be due Potts, Bros. & Cooperson, Incorporated, sixty days after the completion of said building, a sum exceeding said sum of Ten Thousand Dollars and

WHEREAS, the discount of said note was necessary to finance the conclusion of said building operation.

NOW, THEREFORE, the said Potts, Bros. & Cooperson, Incorporated, for itself, its successors and assigns, does hereby assign, transfer and set over unto the Parkside Trust Company, its claim, debt or indebtedness to the extent of Ten Thousand Dollars due from Harry Pinsky & Son Company, giving and granting unto the Parkside Trust Company and its successors and assigns, not only the absolute title and right of collection of said moneys, but the privilege and right in its name or its trade name to sue for and recover the same and to receipt therefore.

It being understood and agreed by and between Potts, Bros. & Cooperson, Incorporated and the Parkside Trust Company, that this assignment of said debt is as collateral security to said note of Ten Thousand Dollars and this assignment is to become null and void in the event that Potts, Bros. & Cooperson, Incorporated shall otherwise fully pay and satisfy the obligation created by the discount of said note.

And the Harry Pinsky & Son Company, for itself and its successors and assigns, does hereby consent and agree to said assignment and accept this assignment of said indebtedness by Potts, Bros. & Cooperson, Incorporated to the Parkside Trust Company aforesaid, in accordance with the terms of the contract dated July 29th, 1922.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed by their Presidents, attested by their Secretaries, and their corporate seals affixed hereto, the nineteenth day of September, A. D., nineteen hundred any twenty-three.

Signed, Sealed and delivered in the presence of

POTTS, BROS. & COOPERSON, INC.,
By Harrison W. Potts,
Vice-President.

Attest:
Max. W. Cooperson,
Secretary.

HARRY PINSKY & SON COMPANY,
By Reuben Pinsky,
President.

Attest:
John W. Holmes,
Secretary.

PARKSIDE TRUST COMPANY,
By Alfred L. Sayres,
President.

Attest:
J. Hartley Bowen,
Secretary.

SCHEDULE C.

THE STATE OF NEW JERSEY TO Harry Pinsky & Son Company, a corporation. You are summoned to answer (SEAL) the annexed complaint of Parkside Trust Company, a corporation, in an action at law in the Camden County Circuit Court. And take notice that unless you file your answer to said complaint with the clerk of the Camden County Circuit Court, at Camden within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

WITNESS, Ralph W. E. Donges, Esquire, Judge of the Camden County Circuit Court, at Camden, this tenth day of October, A. D. nineteen hundred and twenty-four.

(signed) Wm. D. Brown, Clerk.

(Signed) Albert S. Woodruff,
Attorney.

CAMDEN COUNTY CIRCUIT COURT.

Parkside Trust Company, a corporation, Plaintiff, v. Harry Pinsky & Sons Company, a corporation, Defendant.	Action at Law. Complaint.

Plaintiff, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, says that:

1. On July 29th, 1922, Potts Bros. & Cooperson, a corporation entered into a contract with defendants to construct for it a building at Broadway and Spruce Street, Camden, New Jersey.

2. In accordance with the terms of said contract Potts Bros. & Cooperson performed labor and furnished materials and became entitled to received from said defendant the sum of $10,000.

3. On September 10th, 1923, an agreement was entered into between plaintiff, defendant and said Potts Bros. & Cooperson, wherein Potts Bros. & Cooperson, assigned, transferred and set over unto the plaintiff its claim, debt or indebtedness to the amount of $10,000 then past due from the defendant to said Potts Bros. & Cooperson, a true copy of

which assignment is annexed hereto and made a part hereof.

4. In accordance with the terms of said assignment said amount, to wit, $10,000 was to be paid the plaintiff by defendant, sixty days after the completion of said building.

Plaintiff has demanded of the defendant the sum of $10,000 which the defendant has refused and still refuses to pay, although said building has been completed for more than sixty days.

Plaintiff demands as damages the sum of $10,000 with interest.

(signed) Albert S. Woodruff
Attorney for Plaintiff.

SCHEDULE D.

CAMDEN COUNTY CIRCUIT COURT

Edgar L. Wike, Trustee in Bankruptcy for Potts Bros. and Cooperson Inc. (formerly Walter Carson, Ancillary, Receiver of Potts Bros. and Cooperson Inc. Bankrupt) v. Harry Pinsky & Sons Company.	Action at Law. Referee's Report.

This matter having been referred to me, by Hon. Ralph W. E. Donges, Judge of the Camden County Circuit Court, as Referee, and I having first sworn that I would faithfully and fairly hear and examine this case in question, and make a just and true report according to the best of my skill and understanding (which oath is on file in this cause); and the parties by their respective attorneys, having appeared before me on January 29, 1926, and April 8, 1926 (two days March 8 & 9, 1926, which was set for the hearing the referee was ill) and the witnesses having been produced and examined before me under oath, and the proofs of the respective parties having been offered and submitted, and counsel for the respective parties having appeared before me on July 14 and July 15, 1926, I do respectfully report;

1. That this suit was brought by the plaintiff to recover the sum of $18,536.29, a balance alleged to be due under a contract for the erection of a certain building for the defendant in Camden, N. J.

2. That the defendant filed an answer and an amended answer and counter-claim, in which it set, among other things, that it was entitled to two additional credits of $2500. each upon two notes given by it to the plaintiff, which it alleged that it afterwards paid on account of the cost price of erecting said building, for which no credit was given in the bill of particulars annexed to the complaint; and claiming damages for defective materials and workmanship, to an amount in excess of $14,000.

3. That the testimony was taken stenographically, through Fred W. Albert, who secured the services of C. R. Myrose of Atlantic City, and he attended 3 days, and his per diem and carfare for the three days he attended me is $40.80.

4. That I heard the case on the portion of three days, and had two conferences with counsel.

5. That on July 14 and July 15, 1926, counsel appeared before me, with a view to a compromise and settlement, and counsel for the defendant, admitted that there was due from the defendant, to the plaintiff, in compromise and settlement of all claims and differences between them in this suit, the sum of seventy-five hundred dollars ($7500.00) and counsel for the plaintiff consented and agreed to accept this sum, in full settlement and satisfaction of all

claims and demands of the plaintiff in this suit, and requested the referee to so report; and I accordingly report that there is due from the defendant to the plaintiff the sum of seventy five hundred dollars ($7500.00) in this suit.

6. That it was agreed by counsel for the respective parties, that no costs should be taxed in this suit and that each party should pay their own costs; and that the fee of the referee and stenographer, should be paid by the plaintiff and defendant, in equal parts.

Respectfully submitted this 15 day of July, 1926.
(signed) William J. Kraft
REFEREE.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN, } ss.

REUBEN PINSKY, of full age, being duly sworn according to law, on his oath says that:

1. I am the President of Harry Pinsky and Son Company, the complainant in the foregoing bill of complaint and its agent in this behalf.

2. Said bill of interpleader is filed against the defendants in this cause without any fraud or collusion between the complainant and the defendants or any or either of them; and the said bill is not exhibited by the complainant at the request of the said defendants or of any or either of them; and the complainant has not been indemnified by the said defendants or by any or either of them; but the said bill is exhibited by the complainant with no other intention than to avoid being sued or molested by the said defendants touching the matters in said bill of complaint contained.

Reuben Pinsky

Sworn and subscribed before me
this 19th day of July 1926
Sydney T. Smith
M. C. C. of N. J.

AMENDMENT TO BILL.

(Filed October 5, 1926.)

IN CHANCERY OF NEW JERSEY.

Between HARRY PINSKY & SON COMPANY, *Complainant,* and EDGAR L. WIKE, Trustee, &c., *et al.*, *Defendants.*	On Bill, &c. Amendment to Bill.

The complainant hereby amends its bill of complaint in the above cause in the following particulars:

1. By inserting the following as paragraph 33a, on page 9.

33a. That Wilfred B. Wolcott, a counsellor at law of the State of New Jersey, who is legal counsel for the defendant, Edgar L. Wike, trustee as aforesaid, has or claims to have some lien upon his client's cause of action hereinbefore set forth.

2. By inserting the name Wilfred B. Wolcott in sub-division I of paragraph 35, on page 10 of the bill of complaint; and adding the said Wilfred B. Wolcott as a party defendant to the said suit.

D. T. Stackhouse,
Solicitor for Complainant.

We hereby consent to the filing of the above amendment.

Wilfred B. Wolcott, 10/4/26
Solicitor Pro Se. and for Edgar L. Wike, Trustee in Bankruptcy for Potts Bros. and Cooperson, Inc.

Bleakly, Stockwell & Burling, 10/4/26
Solicitor for Smith-Austermuhl Company.

David R. Rose, 10/4/26
Solicitor for Edwin A. Peterson.

Edwin S. Sharpless,
Solicitor for Pearce Fire Proof Company.

Joseph Beck Tyler,
Solicitor for C. B. Coles and Sons Company.

Riggins & Davis,
Solicitor for Lou A. Liebig and George Weiss Company.

Sydney T. Smith,
Solicitor for Camden Materials Company.

Albert S. Woodruff, 10/4/26
Solicitor for Parkside Trust Company.

Bleakly, Stockwell & Burling, 10/4/26
Solicitors for Hitchner and Holmes.

Charles W. Letzgus,
Solicitor for Emergency Elevator Company.

SUPPLEMENTAL BILL.

(Filed October 5, 1926.)

IN CHANCERY OF NEW JERSEY.

Between
HARRY PINSKY & SON COMPANY,
Complainant,
and
EDGAR L. WIKE, Trustee, &c., *et al.*,
Defendants.

On Bill, &c.
Supplemental Bill.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

The complainant, Harry Pinsky & Son Company, a corporation organized under the laws of the State of New Jersey, having its principal office in the City of Camden, respectfully shows that:

1. On or about the 20th day of July, 1926, this complainant filed its original bill of complaint in this court against Edgar L. Wike, trustee in bankruptcy for Potts Bros. and Cooperson, Inc., Smith-Austermuhl Company, Edwin A. Peterson, Pearce Fire Proof Company, C. B. Coles and Sons Company, Lou A. Liebig, Camden Materials Company, George Weiss Company, Hitchner and Holmes and

Emergency Elevator Company, as defendants, praying that complainant might be permitted to pay into this court the sum of $7,500.00, which was in its hands as the proceeds of a certain settlement made between complainant and Edgar L. Wike, trustee as aforesaid, in a suit pending in the Camden County Circuit Court by the said Edgar L. Wike, trustee as aforesaid against complainant, its said demand had, however, not at that time been reduced to judgment by the said Edgar L. Wike, trustee as aforesaid; but to which said fund the said Edgar L. Wike, trustee as aforesaid, and the other defendants have since made various and conflicting claims, which said claims complainant, among other things, prayed that they might interplead in this court.

2. Since the filing of the original bill of complaint the same has been amended by adding as a party defendant to the said suit, Wilfred B. Wolcott, he also having or claiming to have some interest in the said fund.

3. That answers were filed on behalf of the defendants, C. B. Coles and Sons Company, Hitchner and Holmes and Smith-Austermuhl Company; but that said answers have since been withdrawn.

4. That statements of claims have been filed by several of the defendants in said cause; but no decree has been entered herein.

5. That since the exhibition of complainant's original bill, Honorable Ralph W. E. Donges, Judge of the Circuit Court of Camden County, acting upon the report of William J. Kraft, Referee in the cause in said Circuit Court between the said Edgar L. Wike, trustee as aforesaid, and complainant did or-

der that the said Referee's report be confirmed and that judgment be entered in the said Circuit Court in favor of the plaintiff, Edgar L. Wike, trustee in bankruptcy for Potts Bros. and Cooperson against this complainant, the defendant in said Circuit Court suit for the sum of $7,500.00 without costs to either party, all of which will more fully and at large appear in a copy of the said rule confirming the said Referee's report, hereunto annexed, hereby made part hereof and marked "Schedule A," which said order was entered on the twentieth day of September, 1926; and that thereupon judgment was entered in the said Camden County Circuit Court, pursuant to the said order.

6. The entry of the said order and of judgment thereon as aforesaid, was had since the exhibiting of its original bill of complaint by this complainant; and complainant sets up the said circumstances by way of supplement to its said original bill.

Complainant, therefore, prays:

I.

That the parties named in its original bill as defendants may answer this supplemental bill and each statement therein made.

II.

That the said Wilfred B. Wolcott may answer both complainant's original bill and this supplemental bill and each statement therein made.

III.

That this complainant may have the same relief against the said defendants as he might have had

were the facts hereinbefore stated by way of supplement, stated in complainant's original bill of complaint.

IV.

That a writ of subpoena may issue demanding the said defendant, Wilfred B. Wolcott, to answer the original bill of complaint and also this supplemental bill of complaint; and that a writ of subpoena may likewise issue demanding the balance of said defendants to answer this supplemental bill of complaint and to abide by such decree as this Court may make in the premises.

D. T. Stackhouse,
Solicitor for and of Counsel with Complainant.

We, the undersigned, defendants in the above cause, do hereby waive order to file the above supplemental bill and process of subpoena thereon, and agree to answer the said supplemental bill within ten days from the date hereof, or to file a statement of our claim to the fund mentioned and set forth in the original and supplemental bill; or in default of such answer or statement of claim, such proceeding may be had in such cause as may be according to law and the practice of the Court of Chancery, provided that if statements of claims have heretofore been filed upon the original bill and no further statements of claims are filed, the statements of claims originally filed shall be permitted to stand as in response to the supplemental bill; the defendant, Wilfred B. Wolcott, agreeing to file an answer

or statement of claim both to the original and supplemental bill within the time above mentioned. Dated October 4, 1926.

WILFRED B. WOLCOTT, 10/4/26
Solicitor Pro Se. and for Edgar L. Wike, Trustee in Bankruptcy for Potts Bros. and Cooperson, Inc.

BLEAKLY, STOCKWELL & BURLING, 10/4/26
Solicitor for Smith-Austermuhl Company.

DAVID R. ROSE, 10/4/26
Solicitor for Edwin A. Peterson.

EDWIN S. SHARPLESS,
Solicitor for Pearce Fire Proof Company.
10/4/26

JOSEPH BECK TYLER,
Solicitor for C. B. Coles and Sons Company.

RIGGINS & DAVIS,
Solicitor for Lou A. Liebig and George Weiss Company.

SYDNEY T. SMITH,
Solicitor for Camden Materials Company.

ALBERT S. WOODRUFF.
Solicitor for Parkside Trust Company.

BLEAKLY, STOCKWELL & BURLING, 10/4/26
Solicitors for Hitchner and Holmes.

CHARLES W. LETZGUS,
Solicitor for Emergency Elevator Company.

STATEMENT OF CLAIM OF PARKSIDE TITLE AND TRUST COMPANY.

(Filed August 21, 1926.)

IN CHANCERY OF NEW JERSEY.

Between HARRY PINSKY & SON COMPANY, *Complainant,* and EDGAR L. WIKE, Trustee, &c., *et al.*, *Defendants.*	On Bill, &c. Statement of Claim of Parkside Title and Trust Company.

Statement of the claim of the defendant, Parkside Title and Trust Company:

1. Defendant Potts Brothers and Cooperson, Inc., by assignment, dated September 19th, 1923, a copy of which said assignment is annexed to the bill of complaint and marked Schedule B, with the consent and knowledge of complainant assigned all moneys due or to become due under the contract entered into between complainant and said defendant, Potts Brothers and Cooperson, Inc., a copy of which contract is annexed to the bill of complaint and marked Schedule A.

2. At the time of said assignment there was due and owing under said contract a sum in excess of $10,000.00 from complainant to defendant, Potts Brothers and Cooperson, Inc.

3. Complainant at the time of said assignment represented to defendant, Parkside Title and Trust Company, that there was due and owing from complainant to defendant, Potts Brothers and Cooperson, Inc., under said contract, a sum in excess of $10,000.00.

4. Defendant, Parkside Title and Trust Company has never received said $10,000.00 or any part thereof and the whole of said sum is still due and owing.

ALBERT S. WOODRUFF,
Solicitor of Defendant, Parkside Title and Trust Company.

Statements of claim against the fund were filed also by the other defendants.

NOTICE OF APPLICATION FOR INTERLOCUTORY DECREE.

IN CHANCERY OF NEW JERSEY.

Between HARRY PINSKY & SON COMPANY, *Complainant,* and EDGAR L. WIKE, Trustee, &c., *et al.*, *Defendants.*	On Bill, &c. Notice of Application for Interlocutory Decree.

To Wilfred B. Wolcott, Esquire, Solicitor Pro Se. and for Edgar L. Wike, Trustee in Bankruptcy for Potts Bros. and Cooperson, Inc., Bleakly, Stockwell & Burling, Esquires, Solicitors for Defendants, Smith-Austermuhl Company and Hitchner and Holmes; David R. Rose, Esquire, Solicitor for the Defendant, Edwin A. Peterson; Edward S. Sharpless, Esquire, Solicitor for Defendant, Pearce Fire Proof Company; Joseph Beck Tyler, Esquire, Solicitor for the Defendant, C. B. Coles and Sons Company; Riggins & Davis, Esquires, Solicitors for Defendants, Lou A. Liebig and George Weiss Company; Sydney T. Smith, Esquire, Solicitor for Defendant, Camden Materials Company;

Albert S. Woodruff, Esquire, Solicitor for Defendant, Parkside Trust Company; Charles W. Letzgus, Esquire, Solicitor for the Defendant, Emergency Elevator Company:

Take notice that I will apply to the Chancellor of the State of New Jersey, at the Chancery Chambers in the Court House, Camden, New Jersey, on Monday, October 25, 1926, at the hour of ten o'clock in the forenoon for an order or decree permitting the deposit in court of the fund mentioned and referred to in the original and supplemental bills of complaint in the above cause, and that the defendants may interplead their claims to said fund as between themselves and for the allowance of the costs of this proceeding and a counsel fee to the solicitor of the complainant, and for such further and other order in the premises as may be proper.

D. T. STACKHOUSE,
Solicitor for Complainant.

(Service of above notice was duly acknowledged by or on behalf of all defendants.)

INTERLOCUTORY DECREE.

IN CHANCERY OF NEW JERSEY.

Between HARRY PINSKY & SON COMPANY, *Complainant*, and EDGAR L. WIKE, Trustee, &c., *et al.*, *Defendants.*	On Bill, &c. Interlocutory Decree.

This matter coming on to be heard upon application on behalf of the complainant to pay into this court the sum of $7,500.00, being the amount in its hands as the result of a settlement and adjustment of certain disputes between the complainant and the defendant, Edgar L. Wike, trustee in bankruptcy of Potts Bros. and Cooperson, Inc., to which fund the other defendants in said cause lay claim:

And it appearing that the complainant holds such fund for the true owner thereof without having or claiming any right or interest therein; and that the bill of interpleader in this cause is properly brought by said complainant; and that said complainant is entitled to relief prayed for by it.

And it further appearing that notice of this application has been duly given all of the defendants in this suit.

It is thereupon on this 25th day of October, 1926, ordered, adjudged and decreed that the said bill of interpleader is properly brought by the complainant in this cause; and that said complainant is entitled to the relief prayed for by it.

And it is further ordered, adjudged and decreed that said complainant be and it is hereby dismissed from the further prosecution of this suit, with its costs to be taxed, including a counsel fee of $150.00, which is hereby allowed the said complainant, to be paid by the clerk of this court out of the said fund to be deposited in the court, as hereinafter provided.

And it is further ordered that the complainant deposit with the clerk of this court the said sum of $7,500.00 mentioned and referred to in the original and supplemental bills of complaint in this cause; and that thereupon the said complainant be released, acquitted and discharged from all claims by or liability to the defendants in this suit or any of them for, upon or by reason of such fund.

And it is further ordered, adjudged and decreed that the defendants in this cause interplead, settle and adjust their several claims, demands and matters in controversy in this suit as between themselves.

Respectfully advised,

E. R. WALKER,
C.

E. B. LEAMING,
Vice-Chancellor.

RECEIPT.

Office of Clerk in Chancery, New Jersey,
Trenton, N. J., Oct. 26th, 1926.

RECEIVED from D. Trueman Stackhouse
Seventy-five hundred and no/100 Dollars,
Pinsky vs. Wike 61-334
$7500.00 Thomas Barber Clerk.
per ABA.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between
HARRY PINSKY & SON COMPANY,
Complainant,
and
EDGAR L. WIKE, Trustee, &c., *et al.*,
Defendants.

On Bill, &c.

LEAMING, V. C.

FINAL HEARING

January 17th, 1927.

APPEARANCES:

D. T. STACKHOUSE, ESQ., for the complainant.
JOSEPH BECK TYLER, ESQ., for C. B. Coles & Sons Company.
ALBERT S. WOODRUFF, ESQ., for Parkside Trust Company.
EDWARD S. SHARPLESS, ESQ., for Pierce Fireproof Company.

DAVID R. ROSE, ESQ., for Edwin A. Peterson.
THOMAS R. SALTER, ESQ., for Smith-Austermuhl Co. & Hitchner & Holmes.
CHARLES W. LETZGUS, ESQ., for Emergency Elevator Company.
FRANK W. DAVIS, ESQ., for Lou. A. Leibig.
WILLIAM C. GOTSHALK ,ESQ., for Edgar L. Wike, Trustee.

Mr. Gotshalk: This is the day set for final hearing in the interpleader suit of Harry Pinsky & Son Company v. Edgar L. Wike, trustee, et al.

The Court: Is this a matter of establishing claims, merely?

Mr. Gotshalk: I think so, your Honor. I think it is a matter of establishing the legal priorities between the claimants.

The Court: Well, now, give me an idea of the status. I assume the money has been paid into court.

Mr. Gotshalk: If the Court please, a judgment was recovered in the Camden County Circuit Court several months ago by Edgar L. Wike, trustee in bankruptcy of Potts Brothers and Cooperson, the subject of the litigation was a building contract entered into by the bankrupts with the Pinsky Company prior to their bankruptcy. Potts Brothers & Cooperson were adjudicated bankrupts on May 16, 1924, and Mr. Wike was appointed trustee. Subsequently ancillary proceedings were taken in New Jersey and Mr. Wike was substituted to liquidate

the amount due on this building contract. There were eight or nine stop notices filed by said creditors and also an assignment by the Potts Brothers & Cooperson, a corporation, to the Parkside Trust Company, which is consented to by the Pinsky Company, of all moneys due or to grow due under the contract ——

The Court: Who is the owner of the property?

Mr. Gotshalk: The owner of the property was the Pinsky Company, the defendant in the Circuit Court suit and the complainant in this interpleader suit.

The Court: They filed the bill of interpleader and procured the necessary order compelling the defendants to interplead?

Mr. Gotshalk: Yes, that is correct.

The Court: And have paid their money into court?

Mr. Gotshalk: The money is paid into court.

The Court: It is simply a matter of determining what the claims are. How much money is there for distribution?

Mr. Gotshalk: $7500, if the Court please, less $170, I believe, which was paid the referee in the Circuit Court suit, less the taxed costs of the complainant in his interpleader bill, he being allowed a counsel fee of $150, and furthermore there is a claim made by the attorney for the trustee in bankruptcy who has conducted the Circuit Court suit in

which he asks his expenses and counsel fee be allowed him for the conduct of that suit.

The Court: That matter will come up here, I suppose. Suppose the different claimants take up the proofs of their claims.

Mr. Rose: We claim to be the first in priority by virtue of the filing of a stop notice.

Mr. Gotshalk: There is a claim for counsel fee, which I don't think can be denied by any of the parties—the other claimants are among themselves disputing their priorities—and if it isn't out of place it occurred to me your Honor might perhaps like to have that heard first.

The Court: Very well, go ahead. What is the application about the attorney's fee? Counsel wants to take up the amount of the attorney's fee first, he said that is the first claim.

Mr. Wolcott: If the Court please, I was the attorney of record in the Circuit Court suit and I am making application for the allowance of my expenses which amount to $124.95, the cost of suit which amounts to $58.29, witness fees and traveling expenses amounting to $35.00—those are the actual costs and expenditures in the suit, and I am making application for a counsel fee of $1,000 for conducting the suit and securing the verdict of $7500, in the Circuit Court on that. I would like to state at length, under oath, if your Honor thinks proper, just what services I performed.

The Court: All right.

WILFRED B. WOLCOTT, sworn.

The Witness: The claim against Pinsky on the building contract was forwarded to me by Mr. Ruby Vale of the Philadelphia Bar in May, 1924, with the request that I secure the appointment of an ancillary receiver in this case and prosecute the suite against Pinsky. I applied to the United States District Court and secured the appointment of Mr. Walter Carson as ancillary receiver. The receiver qualified by giving bond and then took up with me the matter of the suit which was to be filed. It was October before the suit was actually begun. After a number of conferences with Mr. Carson I prepared the summons and complaint and began the suit. In November of that year I had a conference with Mr. Wike, the trustee, and Mr. Vale in Philadelphia at Mr. Vale's office. In January, 1925, it was necessary to amend the pleadings in the Circuit Court due to the fact it appeared the original contract had been made by the partnership, known as Potts Brothers & Cooperson and had been assigned to the corporation. On April 1st, the cause was noticed for trial at the April term, 1925. The case came on for trial but by consent of counsel was referred to Mr. William J. Kraft as referee to state the account between the parties. The case was set down by Mr. Kraft for a hearing and then the matter of the preparation of the case was gone into. There were a great many witnesses and it was necessary to interview——

The Court: This was to determine how much was due from the owner to the contractor?

The Witness: From the owner to the contractor, who was insolvent, and I was representing the receiver in bankruptcy. The preparation of the case involved conferences with a number of the sub-contractors—the defense made in the case was that the work had not been properly completed, it was deficient in a large number of respects, and it was necessary to confer with the sub-contractors who had the sub-contracts for the different work which was complained of, and also with Mr. Cooperson of the firm of Potts Brothers & Cooperson, who was really the most important witness in the case, and also necessary to have conferences with Mr. Wike, the trustee, as he had all the correspondence and papers of the bankrupt concern, and with a Miss Fern, who was the bookkeeper and who had to be used to prove the account. Such conferences and preparation took at least three or four days of actual time and preparation. The case was set down by Mr. Kraft for a hearing on December 15th, and at that time Mr. Stackhouse, representing Pinsky, filed an amended answer and it was necessary to adjourn the case so that a reply could be filed, as he raised a new issue in that answer. The case was adjourned to January 28, 29, 1926, and on January 28, there was a hearing before Mr. Kraft in which the testimony of witnesses was taken. Mr. Kraft did not complete the hearing and adjourned it to March 8th, and then on account of illness it was continued to March 30th. During these continuances an effort was made to settle the case or to agree upon an amount which Pinsky should pay. When the suit was started any liability whatever was denied on account of the defects, but after the testimony had been taken on one or two occasions before Mr. Kraft we were able to talk settlement with Mr. Stackhouse, the attorney for Pinsky, the defendant. After several confer-

ences with Mr. Stackhouse, the last of which was also a conference with the referee, it was agreed that they would pay the sum of $7500, and that the referee should advise that that amount be paid and judgment entered for that amount. This agreement was carried out and Mr. Kraft filed his report recommending that the sum of $7500, be the verdict in the case as agreed upon between the parties. It was necessary to apply to Judge Donges to enter the judgment for that amount, and such application was made. After the entry of the judgment Mr. Stackhouse gave notice of an application to cancel the judgment of record, in the meantime he having filed his interpleader bill, on the theory that the judgment was a lien against the property of Pinsky and the money had been paid into court and Pinsky should be relieved. This application was made before Judge Donges in Trenton, and was opposed by me, but an order was finally entered that the lien of the judgment against the building be cancelled but that the right of the trustee to claim the fund which was awarded to him by the judgment should not in any way be affected by the cancellation of the judgment on the record. After the entry of the judgment the defendant's counsel raised an objection to paying the amount of the judgment to the trustee on the ground that stop notices had been filed prior to the bankruptacy and also an assignment which might affect the judgment had been made by Potts Brothers & Cooperson to the Parkside Trust Company. This resulted in several conferences with counsel for the defendant in the suit in the Circuit Court, and acting on his suggestion application was made to the United States District Court at Trenton to receive the fund and determine the question of the priorities of the claimants against the fund. This application was denied by that Court because the money was not

actually in the United States District Court, and it was then agreed that the interpleader bill should be filed as it appeared that Pinsky could not safely pay the amount of this judgment, at least his counsel felt he could not pay the amount of the judgment to the trustee in bankruptcy on account of these stop notice claimants. In the preparation and conduct of the case at least twelve to fifteen days of actual time was consumed in conferences with witnesses, there were conferences before Mr. Kraft—Mr. Kraft in making his report showed he had spent three full days in taking testimony before adjusting the case. I find I wrote 110 letters and received at least that many. I made numerous 'phone calls, probably 40 or 50, I kept no account of those. As I stated in opening the matter, the taxed costs in the Circuit Court amounted to $58.29, my expenditures for witnesses and traveling expenses were $35.00——

The Court: What was the $124.95?

The Witness: I spent $124.95, being the costs in the United States District Court amounting to $21.95, three payments on the premium on the receiver's bond, the receiver in the Bankruptcy Court, it was necessary to have a receiver appointed, they were $30.00. Thomas L. Gaskill, referee in bankruptcy, $5.00 for approving the bond, and an item of $8.00 paid to Gordon Grey for examining the records. Gordon Grey is an attorney-at-law and I employed him to make a search in connection with the suit. That made a total of $124.95.

The Court: Don't they award any counsel fee in Circuit Court suits of that nature?

The Witness: I spoke to Judge Donges about that

and he said he thought that inasmuch as this money was to be paid into the Court of Chancery on interpleader this Court should dispose of all claims against the fund. He didn't even allow the payment of the amount due the referee. It was agreed by the parties that each should pay one-half of the amount due the referee but Judge Donges wouldn't allow any of the fund to be disposed of and he wouldn't consider the matter of fixing an allowance of counsel fee.

The Court: Have counsel any questions to ask Mr. Wolcott?

Mr. Gotshalk: If the Court please, there are certain matters which are more or less fundamental to the claims of the parties——

The Court: Let us dispose of Mr. Wolcott's claim. What suggestion have any parties in interest to the allowance to Mr. Wolcott of his counsel fee in this case. (After some pause.) Don't all speak at once.

The Witness: If the men feel I am asking too much I want them to feel as though they can say so. There was nothing in sight when we started and we ended with $7500.

The Court: What was the $170, you say?

Mr. Gotshalk: $150, which the referee was allowed by Judge Donges, it being agreed each party would bear half of the expense, and $20.00 stenographic fees.

The Court: That left $7330. You spoke of some

taxed costs yet to come out of that. They were in the other suit?

Mr. Gotshalk: Mr. Stackhouse asked this Court for a fee and the Court allowed him $150.

The Court: That comes out of the $7300?

Mr. Gotshalk: Yes, sir.

Mr. Stackhouse: The amount of the costs was $199, and some odd cents.

The Court: I want to find out how much money there is in court. You may have it all gone. The way it is going it looks as though there won't be any left. How much was taken out of the $7330, which is left with that $170, taken out.

Mr. Stackhouse: I think your Honor will find the original taxed bill of costs in this matter, including a counsel fee of $150, in this matter, in the file there.

The Court: How much was paid into Court?

Mr. Stackhouse: $7500.

The Court: $7500?

Mr. Stackhouse: Yes.

The Court: $7500, was actually paid in. Out of that you claim there ought to be allowed $170, and this taxed bill of costs of $199.96?

Mr. Gotshalk: Yes, sir. There is an order here

from the clerk which will show the exact amount of that.

The Court: I would like to hear anyone else's view as to the allowance to be made to Mr. Wolcott.

Mr. Woodruff: Representing one of the claimants, Parkside Title & Trust Company, I just asked Mr. Wolcott whether or not there was a fund in the Bankruptcy Court out of which expenses and counsel fee might be allowed, and I understand there is some fund, although itis inconsiderable, of course, in the allowance of counsel fee.

The Court: Which fund?

Mr. Woodruff: There is a fund in the Bankruptcy Court made, I presume, by the collection of some of the assets of Potts Brothers & Cooperson and it occurred to me there might be the possibility of duplication of cost items or a duplication of counsel fees that ought to be taken into account. Mr. Wolcott has done a great deal of work in this matter, and although the outcome was unsatisfactory, because the original claim was $18,000, plus, and only $7500, was received, yet that seemed to be the best that could be obtained, and everyone agreed to it at the last moment, so no creditor can have any real objection to that, but the amount that was recovered does not represent the work of Mr. Wolcott, he did a great deal of work, and my only thought was that the Court ought to have in mind there may be another fund out of which counsel fees might be allowed.

The Court: If there is I would like to know it.

The Witness: As to that, the fund is over in Pennsylvania and I don't believe there is any possibility of securing any allowance. My experience was, just after I had the receiver appointed I made application to the referee in bankruptcy for the payment of the premium on the receiver's bond and that was returned with the referee's comment that our court had made the bond too high, the bond was $10,000, and the comment was the bond was too high and the referee refused to pay the premium on the bond and I have personally paid it, and I don't think there is any possibility of securing an allowance there.

The Court: We will make the allowance here and you report it there and get it if you can. Is the amount of $1,000 asked for too high? It is a large percentage of $7500, but it represents that much work. The question is whether the amount being recovered being only $7500, there shouldn't be a scaling down to a proportionate amount attorney's fees that might otherwise be allowed. Attorneys fees are dependent on two things, one, the amount of work, the other, the amount recovered. Now, under all the circumstances is $1,000 too much. Do you think it ought to be scaled down? I think it should. What do you think.

Mr. Woodruff: I spoke before, if the Court please. It seems to me I voiced my feeling with regard to the work that was done. This scaling down is a matter of equity. In view of the fact that the Court of equity has only a small fund to distribute—

The Court: You common law lawyers don't know anything about scaling down. I wish somebody else would express themselves. (After pause.) I will

make it $800, if I don't hear anything to the contrary. Does anybody feel dissatisfied with that?

Mr. Tyler: My claim isn't affected, if the Court please, by any allowance.

The Court: Well then, $800. Now, claim No. 1.

Mr. Gotshalk: May I please the Court, there are several facts that I believe would help the Court in looking at all these claims, one is, it seems to me, the contracts are annexed to the bill in this case. Now, the specifications I have from the County Clerk's office; unfortunately they are too voluminous to obtain certified copies of and I can prove them right here. I understand certain creditors are going to claim I have the certified copy of the order appointing Mr. Wike as trustee, and I have the original claims which all defendants in this suit have filed with the trustee in bankruptcy and it seems to me it would expedite matters if all these were offered and proved at once.

The Court: What?

Mr. Gotshalk: If all these were put in evidence in the order named.

Mr. Stackhouse: I have what appears to be a copy of the specifications if you want to use it.

Mr. Davis: I don't see why we can't stipulate to it. There is no doubt the specifications were filed and the contract was filed.

Mr. Gotshalk: That was my thought.

The Court: Stipulate to that then if no one has any objection. This is a copy of the contract?

Mr. Gotshalk: A copy of the specifications. Annexed to the bill is a copy of the contract.

The Court: Very well, let it be stipulated, if no one objects, that this document now produced is a true copy of the specifications and the contract is in accordance with the copy annexed to the bill. What are the matters in dispute here; simply a matter of requiring proof of the claims?

Mr. Gotshalk: Yes.

The Court: Let No. 1 claim go ahead.

Mr. Woodruff: Mr. Gotshalk has a list of the claims that have been filed in the Bankruptcy Court. by some of the creditors. Some of the creditors have duplicated their efforts and are trying in two different jurisdictions to have their claims paid.

The Court: Yes, they may get something over there. If they do it will be deducted from what they get here. Very well, make the proof of the claims in their order.

ALONZO W. TRUITT, sworn.

By Mr. Salter:

Q. Mr. Truitt, where do you reside?
A. In Haddonfield.
Q. Are you at the present employed by Smith-

Austermuhl Company, insurance brokers in Camden?

A. Yes, sir.

Q. Were you employed by them on October 18, 1923?

A. I was.

Q. I show you a letter dated October 18, 1923, addressed to H. Pinsky & Son Company, Broadway & Spruce Street, Camden, signed, Smith-Austermuhl Company, and ask you if you ever saw that letter?

A. Yes, I delivered this letter to Mr. Pinsky.

Q. When was the letter delivered?

A. On the 18th.

The Court: This is a stop notice, is it?

Mr. Salter: This is an alleged stop notice.

Q. When was it delivered?

A. October 18, 1923.

The Court: Whose claim is this?

Mr. Salter: Smith-Austermuhl & Co.

Q. Mr. Truitt, do you know what this claim is for and what is the basis for it?

A For fire insurance and the surety bond.

Q. On what building or premises was this fire insurance placed?

A. On Mr. Pinsky's building, Broadway and Spruce.

Q. The building that PottsBrothers & Cooperson had under contract?

A. Yes.

Q. Who ordered this insurance?

A. Potts Brothers & Cooperson.

Q. Who ordered the bond?

A. Potts Brothers & Cooperson.

Q. What kind of a bond was that?

A. A bond guaranteeing the completion of the building.

Q. An ordinary contractor's bond they are required to furnish?

A. Yes.

Q. Did you ever make a demand on Potts Brothers & Cooperson for this $719.76?

A. Yes, sir.

Q. On what occasion?

The Court: What is the amount of this claim?

Mr. Salter: $719.76.

A. Yes, each month we sent them a statement.

Q. Did you ever talk either with Potts Brothers or Mr. Cooperson about this account over the telephone?

A. Yes, sir.

Q. And demanded payment?

A. We asked them for payment of it, yes.

Q. Was payment ever made?

A. Not any, no.

Q. Who placed this bond, did you take care of it?

A. No, the man in charge of our bond department.

Q. Who is that?

A. Mr. Kirsher.

Q. Is he here in court?

A. Yes.

Q. I understand you took care of the insurance item, is that correct?

A. My title at that time was credit manager and I handled the account from a credit standpoint, that is all.

Cross-examination.

By Mr. Woodruff:

Q. This claim which was filed in bankruptcy by Smith-Austermuhl & Company bears the signature of Mr. Austermuhl, doesn't it?

A. Yes, sir.

Q. He is what, president of the company?

A. Treasurer.

Q. Did you handle that also, the filing of that?

A. Yes, sir, I handled it through our attorney.

Q. At the time this was filed as an unsecured claim you actually had served this stop notice?

A. Yes, sir.

The Court: This was filed with the referee?

Mr. Woodruff: Yes, as an unsecured claim.

Q. What part of that bill is for insurance, do you know?

A. About $200, and some dollars.

Q. $241.41, is that right?

A. Yes, sir. There is a difference there between the figures and the claim we filed with the referee in bankruptcy as compared with the claim now.

Q. The stop notice was $719.76, can you give us what part of that was for the premium on the bond?

A. $500 was the bond.

Q. $500 for the bond and the difference was for insurance?

A. Yes, sir.

The Court: That would make $541.41?

The Witness: $500 for the bond.

Q. And the stop notice was $719?

The Court: He said the insurance was $241.41, did he?

Mr. Woodruff: I was examining the witness from the claim which he filed with the receiver and he said that was different from the stop notice, that accounts for it.

Q. I understand you to say now your stop notice was filed for premiums for fire insurance in the amount of $219.76 and $500 for the premium, on the contractor's bond?

A. That was in the stop notice, yes.

The Court: Can't we shake these things up a little? Aren't counsel familiar with these things without too much detail? Go ahead and finish about the insurance.

Mr. Salter: I would like to offer this letter in evidence as the stop notice.

(Said letter marked Exhibit S1.)

Edwin A. Peterson, sworn.

By Mr. Rose:

Q. What is your business, Mr. Peterson?

A. Metal lath.

The Court: See if I understand this last claim. What was this insurance on?

Mr. Davis: On the store, the subject of this contract.

The Court: On the building in course of erection?

Mr. Davis: Yes.

The Court: What was the bond?

Mr. Davis: The contractor had to furnish a bond guaranteeing the completion of the work.

Q. Did you perform any labor on the Pinsky building?
A. I did.
Q. Who requested you to do that work?
A. Mr. Leibig, sub-contractor.
Q. Did you say he was the sub-contractor?
A. Yes, sir, sub-contractor.
Q. Did you perform labor there?
A. Only labor.
Q. What was that labor?
A. Why, erecting metal lath and changing some work that had been faulty that was ordered changed by the architect and Mr. Leibig gave me orders to change it.
Q. Have you a copy of the amount due you?
A. I have.
Q. Produce your account, please. Is this your book of original entry?
A. Yes, sir.
Q. Is this a summary from your original entries?
A. That is.

The Court: How much is it?

Q. How much is it?
A. $102.06.
Q. $102.06. Did you make demand on Mr. Leibig for the payment of that money?
A. I did.
Q. Did he pay it?
A. No, sir.
Q. Did you demand on Potts Brothers & Cooperson, the contractors, for payment?
A. I did.
Q. Did they pay it?
A. No, sir.
Q. Did you or didn't you serve a stop notice on H. Pinsky?
A. I did.
Q. Have you a copy of that stop notice with you?
A. I have, sir.
Q. Is that a true copy of the stop notice you served on H. Pinsky?
A. Yes, sir.
Q. On what day?
A. January 14, 1924.

Cross-examination.

By Mr. Gotshalk:

Q. Did you serve it on H. Pinsky or H. Pinsky & Son Company?
A. Harry Pinsky. The head of the firm, anyway, in the presence of Mr. Cooperson who was there at the time.
Q. Did you make demand on Mr. Leibig in writing for payment of the sum due you?
A. In a contract. I have a copy of the contract that I made with Leibig to pay me at the end of each week.

Q. You testified you made demand of him, was that demand in writing?

A. Not each week it was not. It was understood in the contract we had from the start off we were to be paid each week, which he done each week until one week there he couldn't pay and I went to Cooperson and Cooperson paid me.

Q. You served no written demand on Mr. Leibig for payment of the sum due you on this job before you filed your stop notice?

A. I don't remember that I did.

Q. Did you serve a written demand on Potts Brothers & Cooperson, Inc.?

A. I don't remember that I did. I visited their office.

Q. Did you give Potts Brothers, Inc., a notice to the effect you had filed this stop-notice in writing?

A. Mr. Cooperson was present at the time I handed the stop notice to Mr. Pinsky. Mr. Pinsky turned it over to Mr. Cooperson to read.

Q. You didn't serve a copy of that on Mr. Cooperson?

A. No, sir.

The Court: Which is the next in order?

Joseph A. Pond, sworn.

The Court: Whose claim is this?

Mr. Sharpless: Pierce Fireproof Company.

By Mr. Sharpless:

Q. Mr. Pond, by whom are you employed?

A. Pierce Fireproof Company, 1911 N. 2nd Street. Philadelphia.

Q. In what capacity are you there?

A. Bookkeeper and shipper.

Q. Did the Pierce Fireproof Company provide any materials for premises known as 836-40 Broadway, the Pinsky store, Broadway & Spruce, Camden?

A. Yes, sir.

Q. Have you a statement there of the materials supplied—just one moment. For whom did you supply those materials, at whose order?

A. Mr. Leibig.

Q. A sub-contractor?

A. A sub-contractor for the operation.

Q. Have you a record showing the orders as supplied?

A. Yes, sir.

Q. Have you the original orders?

A. Yes.

Q. What is the amount shown by those?

A. Why, $193.32.

Q. Were those orders acknowledged by Mr. Leibig when they were delivered?

A. Yes, sir.

Q. Have you the delivery sheet showing the acknowledgment?

A. Yes, sir.

Q. What kind of material were they?

A. Why, steel channels for plastering work.

The Court: Do you know that they were actually used in the building, or delivered there?

The Witness: I know they were actually delivered there.

The Court: That is all that was necessary.

Mr. Gotshalk: What was the date of the filing of this stop notice?

Mr. Sharpless: He doesn't have that, I have that. If the Court please, the stop notice was filed by me and acknowledged by Rubin Pinsky. I filed that on February 13, 1924, and have the acknowledgment of Rubin Pinsky on back of the copy.

The Court: What is the date of it?

Mr. Sharpless: February 13, 1924.

The Court: File your acknowledgment.

Cross-examination.

By Mr. Gotshalk:

Q. You were a sub-contractor under Mr. Leibig, your company was?

A. We delivered materials to Mr. Leibig for that job.

Q. Did you serve Mr. Leibig with a demand?

A. We wrote to Mr. Leibig for the money.

Q. When did you write to him?

A. I don't have the copies of the letters here, but I know Mr. Leibig acknowledged the bill and sent us a note which was returned as uncollectible.

Q. What was the date of that?

A. What?

Q. The return of that note, the sending of that note?

A. We wrote to Mr. Sharpless on January 31st.

Q. I mean what was the date of the sending of the note to you by Mr. Leibig?

A. Mr. Sharpless has the note.

Q. You don't know then, is that it?

A. That was turned over to Mr. Sharpless here quite some time ago.

Mr. Sharpless: Is this the note you refer to?

The Witness: Yes, sir, that is the note. December 13, 1923.

Q. Now, after December 13, 1923, did your company ever make a demand, to your personal knowledge, on Potts Brothers and Cooperson for the payment of this sum?

A. I don't recall whether we did or not.

Q. In other words, you don't know whether you made any demand on Potts Brothers and Cooperson?

A. No.

LOUIS A. LEIBIG, sworn.

By Mr. Sharpless:

Q. Mr. Leibig, did you purchase supplies for the Pinsky store at Broadway & Spruce Streets from the Pierce Fireproof Company?

A. I did.

Q. Did they make deliveries to you in accordance with your order?

A. They did.

Q. I show you delivery slips, is that your acknowledgment?

A. Yes.

Q. Here is an order of 5/29/23 and that is in the amount of ——

The Court: He can state all the orders are there and tally with the orders on this stop-notice. Let him do that, and anybody who doesn't think that is a fact can work it out.

Q. From the book account is that $193 and some odd cents?
A. That is correct.
Q. Is that the correct amount?
A. Yes, sir.
Q. And that was in accordance with those deliveries which were made to you at the store which you acknowledged?
A. Yes.
Q. And that is your acknowledgment on the order?
A. Yes.
Q. Under date of 5/11/23?
A. Yes.
Q. And also is that your acknowledgment under the receipt of 5/3/23?
A. Yes.
Q. The total amount due then was $193.73, is that correct?
A. Right.
Q. Did you give them a note?
A. I did.
Q. Is this the note you gave them in payment?
A. That is it.
Q. And that was on this job?
A. On that job.

The Court: That was the sub-contractor's note?

Mr. Sharpless: Yes.

The Court: The note is still unpaid and held by the Fireproof Company?

Mr. Sharpless: That is correct.

Mr. Tyler: There is an account of the C. B. Coles & Sons Company of $3,061.47.

JOHN C. ASPHON, sworn.

By Mr. Tyler:

Q. Mr. Asphon, are you an officer of the C. B. Coles & Sons Company?
A. Yes, sir.
Q. What officer?
A. Assistant secretary.
Q. And as such do you have charge of their accounts?
A. Yes, sir.
Q. Have you an account of the C. B. Coles Company with Potts Brothers & Cooperson?
A. Yes, sir.
Q. Does that account show where the goods were furnished?
A. Yes, sir.
Q. Now, have you an account there for goods and materials delivered to H. Pinsky & Son Company's job?
A. Yes.
Q. Will you refer to that, please? How much is it?
A. $3,061.47.
Q. Has any part of that been paid?
A. No.
Q. That is due and owing at the present time?
A. Yes, sir.
Q. Do you know where the materials for which that account stands were delivered?

A. Yes, sir.
Q. Where?
A. Broadway and Spruce.
Q. Whose place is that?
A. H. Pinsky & Son.
Q. Have you made demand from Potts Brothers & Cooperson for the payment of that account?
A. Yes.
Q. Has that demand been complied with?
A. No.
Q. You didn't serve a stop-notice in this case, did you?
A. No, sir.

The Court: You haven't your stop-notice?

Mr. Tyler: I will call Mr. Coles for that.

Cross-examination.

By Mr. Gotshalk:

Q. When was the demand made?
A. The demand was made—I haven't the exact date—sometime in November or December, 1923.
Q. And at that time was the amount of $3,061.47 due your company?
A. Yes, sir.
Q. And was that demand in writing, do you know?
A. I don't know.
Q. Has this claim ever been assigned, to your knowledge, by C. B. Coles & Company to anyone?
A. No.
Q. A proof of claim in bankruptcy has been filed, hasn't it, for this sum?
A. I don't know about the exact sum, but we filed a notice in bankruptcy.

Q. You don't know whether a proof of claim in bankruptcy was filed?
A. No, I think Mr. Tyler filed that afterwards, or part of it.

WILLIAM C. COLES, affirmed.

By Mr. Tyler:

Q. Are you an officer of C. B. Coles Company?
A. Yes.
Q. That is a corporation, isn't it?
A. Yes.
Q. What office do you hold?
A. President.
Q. Did you serve a notice on H. Pinsky & Son Company of the amount due from Potts Brothers & Cooperson to you on the contract for the erection of their building at Broadway and Spruce?
A. I did.
Q. Have you a copy of that notice with you?
A. Yes, right here.
Q. Who did you serve that on?
A. Reuben Pinsky.
Q. Did you make a memorandum of it at the time?
A. Yes, I did.
Q. Signed by you?
A. Yes, sir.
Q. Will you produce it, please?
A. Yes.
Q. This is the notice?
A. Yes, and it has the date.

Mr. Tyler: I offer in evidence notice dated March 18, 1924, addressed to H. Pinsky & Sons Company,

for $3061.47, with the notation, "Served on Reuben Pinsky at store, Broadway and Spruce, at 5.40, March 18, 1924, William C. Coles." Was that written on there by you at the time?

The Witness: Yes.

Cross-examination.

By Mr. Woodruff:

Q. Mr. Cole, that was first put at $3817.79 wasn't it?

A. No, $3061.

Q. $3061.47, and your $1146.46 claim you never served a stop-notice on that?

A. No.

Q. Now, Mr. Cole, C. B. Coles & Sons Company don't own either of these claims now, do they?

A. Well, I can't say about that.

Q. Didn't you on the 14th of April, 1925, assign both of these claims, totaling $5,016.25, to the American Credit Indemnity Company of New York, and didn't you when you filed your first claim in bankruptcy, which was afterward amended, file with it a copy of that assignment and a letter from the American Credit Indemnity Company addressed to Theodore W. Antrim, referee in bankruptcy, notifying him of the assignment to the credit company?

A. I don't know so much about this. Whatever this paper says I suppose speaks for itself. I know we had been doing business with the American Credit Indemnity Company and did have some arrangement with them.

Q. You did actually assign both claims to them, didn't you?

A. It would appear so.

Q. Is this your signature here, or your brother's?

A. No, my signature isn't on this.

Q. Henry Coles is your brother, the treasurer of the company?

A. Yes, sir. When is this dated?

Q. This was the original claim filed in bankruptcy dated Camden, N. J., 24th of June, 1924.

A. We filed a revised claim since then.

Q. Did you ever get back from the credit company a re-assignment of the claims?

A. I can't say, I don't know.

Q. You never had anything filed with the referee whereby the referee would be authorized to acquire the assignments so you could get the money?

A. I don't know anything about this, not the first thing. I don't happen to attend to that end of it.

Q. This copy that was attached to your claim is just a copy in typewriting but it has at the bottom "C. B. Coles Sons Company, Henry B. Coles." Who is he and what connection does he have with C. B. Coles Company?

A. He is the treasurer.

Q. And the affidavit by Mr. Coles reciting he is the treasurer taken by Pauline Frietag, who is she?

A. Notary public in our office.

Q. This assignment was made just as the claim was made?

A. What do you mean?

Q. The execution of this assignment, a copy of which was attached to your claim, that was executed the same way as your claim in bankruptcy was executed, C. B. Coles & Sons Company, Henry Coles, treasurer?

A. It looks so, yes, sir.

Mr. Tyler: I would like those dates on the record. The first claim in bankruptcy, C. B. Coles &

Sons Company v. Potts Brothers & Cooperson, $5,016.25, was filed July 16, 1924. That claim was amended and set forth the stop-notices and claimed against particular funds, and the amended claim was allowed and filed March 31, 1925. That claim is signed by William C. Coles, assistant treasurer, and has attached to it the stop-notices. An amended claim was filed on April 1, 1925, for $1,146.46 for the balance of the unsecured debt, and the amended claim was allowed and filed April 1, 1925.

Q. Now, Mr. Coles, you have a contract, haven't you, with the American Credit Indemnity Company of New York?

A. We take out their credit insurance.

Mr. Tyler: If the Court please, a copy of the contract is attached to their claim which would become part of the evidence here and speak for itself.

Mr. Woodruff: I only want to identify the company, that is all. You don't have the original assignment here? You don't have it, I suppose, the credit company holds it. I think until the original assignment is produced I will not proceed further with the cross-examination.

The Court: How much more is there? It is 24 minutes after one and something suggests to me it is time for luncheon.

Mr. Woodruff: I have possibly three witnesses on our assignment claim.

The Court: Suppose we adjourn until two.

Mr. Davis: If the Court please, there is one thing

I would like to ask. Mr. Stackhouse was subpoenaed here by some other counsel in the case and he only wants to testify about two or three questions.

The Court: What is going to happen to us if we don't get some nourishment?

(At this point a recess was taken until 2 P. M.)

Trial of the cause resumed, pursuant to adjournment, at 2 o'clock, P. M.

The Court: What is the next claim in order?

Mr. Davis: My client, if the Court please, seems to be the next in order of priority, but he must have been stormbound, and if the Court will consent ——

Mr. Letzgus: I may be very brief if counsel for the respective parties will stipulate. I represent the Emergency Elevator Company and have no claim on the fund insofar as any work done on the building itself is concerned. Mr. Tyler, representing C. B. Coles & Company issued a writ of attachment upon the funds in the hands of someone alleging it to belong to Cooperson & Brothers, who were the contractors, I believe, in this case, and naturally I couldn't issue another attachment so I made application for leave to enter as an applying creditor against the funds. I doubt very much whether there will be anything left for me when the time comes to divide, but in case there is anything left that would be my purpose, of offering proof.

The Court: What was this attachment?

Mr. Letzgus: Mr. Tyler issued the original attachment.

The Court: What became of that, Mr. Tyler?

Mr. Tyler: That was an attachment suit, I think, in the Circuit Court for the full amount of our claim and then was abandoned, apparently left in status quo, when the bankruptcy proceeding intervened.

The Court: It was an attachment against what?

Mr. Tyler: That attached the funds in question.

The Court: In the hands of the owner?

Mr. Tyler: In the hands of the owner. It might be advisable to put that file in evidence. That would show who the claimants are, the amount, and also Mr. Letzgus' claim.

Mr. Davis: That is the same claim that has been assigned, isn't it?

Mr. Tyler: There is no proof of the assignment, Mr. Davis. If that assignment question is going to bob up I would want strict proof of the assignment so we could meet it and preserve our rights.

The Court: I guess it would just simply be a matter of to whom it should be paid. I am a little bothered about the attachment, though.

Mr. Tyler: I wasn't bringing up the question. I think there is a question of whether the attachment

doesn't take its proper place with the stop-notices, but it is immaterial so far as our particular claim itself is concerned. It is probable an attachment does take its proper place with the stop-notices. That I don't undertake to argue, but I think it would be advisable to put the file in evidence.

The Court: Can't that be done by stipulation?

Mr. Tyler: Yes, or I can have the clerk bring it up here and show what the claims are and what the applying creditors are. I will do that, I will have the files brought up.

Mr. Salter: I have a copy of the attachment, the amounts, and the dates the rules were entered, if that would be of any use.

The Court: If it can be stipulated it will save time, otherwise ——

Mr. Tyler: Did you make this record?

Mr. Salter: Yes.

Mr. Tyler: Take the stand.

THOMAS SALTER, ESQ., sworn.

The Court: Does anyone object to this method of proof in lieu of the files?

By Mr. Tyler:

Q. You are an attorney-at-law of the State of New Jersey?

A. Yes, sir.

Q. You made an examination of the record in the County Clerk's office with respect to the attachment suit against Cooperson & Brothers?

A. I did.

Q. State what occurred—are these records you have in your hand a correct and accurate copy of the proceedings?

A. They are a copy I made a few days ago and to the best of my knowledge and belief they are correct.

The Court: You said Cooperson & Brothers.

Q. Potts Brothers & Cooperson, I meant. Will you read from the paper you have in your hand, the record as it shows in the clerk's office with reference to this proceeding?

A. March 19, 1924, affidavit filed; sum sworn to $5,016.25.

Q. Is that the plaintiff's?

A. Plaintiff's affidavit.

The Court: That is the attachment of C. B. Coles?

The Witness: Yes. March 19, 1924, same date, that is the date the writ was issued, returnable on April 8, 1924, the amount of the writ was $10,000.

The writ was returned on March 27, 1924. On March 28, 1924.

The Court: Returned when?

The Witness: March 27th. March 28th, 1924, affidavit filed by Emergency Elevator Company, Inc., applying creditor, for $1,007.

The Court: What name?

The Witness: Emergency Elevator Company.

Mr. Letzgus: They are the people I represent.

The Court: How much?

The Witness: $1,007. March 28, 1924, rule admitting Emergency Elevator Company, Inc., as applying creditor entered. April 1, 1924, affidavit filed by Hitchner & Holmes as applying creditor for $1028.87.

The Court: How much?

The Witness: $1028.87. April 1, 1924 ——

The Court: April what?

The Witness: 1st.

The Court: The other was the 8th.

The Witness: April 1st was the other, too. April 1st again rule admitting Hitchner & Holmes as applying creditor entered. April 8, 1924, affidavit filed by Louis A. Leibig as applying creditor for $4,375.99,

and April 10, 1924, rule admitting Louis A. Leibig as applying creditor was entered.

Q. That is the record that you examined and it is complete up to a few days ago when you made your examination?

A. Yes.

Mr. Gotshalk: If the Court please, in connection with this particular claim the date of the adjudication of bankruptcy I can see is going to be very important. As I explained to your Honor, the referee has been ill, or out of town for quite a period of time, and he is expected back tomorrow, and in order to get this matter on the record I think some arrangement ought to be made to file the paper showing the date of the adjudication.

The Court: Doesn't anybody know that?

Mr. Gotshalk: May 16, 1924, is the date of the adjudication. I thought perhaps your Honor might want further proof of that.

The Court: No. If it is not in dispute I can accept the stipulation.

Mr. Davis: There is no dispute about that.

The Court: When was it?

Mr. Gotshalk: May 16, 1924, was the adjudication in bankruptcy.

The Court: All right.

Mr. Tyler: I will offer in evidence the original files to supplement this.

Mr. Letzgus: If counsel are satisfied with my statement, without calling witness, that attachment was issued upon the debts alleged to be due in the original attachment suit, that we didn't perform any work or furnish any material on the particular building in question for which the original contract was made between Potts Brothers & Cooperson and ——

Mr. Davis: I am satisfied.

Mr. Letzgus: That would be my proof.

The Court: What was the name of your claim?

Mr. Letzgus: Emergency Elevator Company.

The Court: That wasn't for work in connection with this building at all?

Mr. Letzgus: No, the materials furnished on another job my clients had with the contractors in this particular case. I am prepared to prove the amount of our bill from the president of the company is $1007.

The Court: Any question about the proof on that?

Mr. Woodruff: No question.

Mr. Davis: We are willing to accept that.

Mr. Letzgus: It is admitted that is the amount of our claim.

LOU LEIBIG, sworn.

The Court: What claim is this?

Mr. Davis: Lou A. Leibig.

The Court: He is one of the applying contractors.

Mr. Davis: Yes. He is also a stop-notice creditor.

By Mr. Davis:

Q. Mr. Leibig, you performed some work for this Pinsky job, did you not?
A. Yes.
Q. I show you a stop-notice addressed to H. Pinsky & Son Company and ask if that is a stop-notice which you instructed me to prepare?
A. It is.

Mr. Davis: I wish to offer that in evidence, if the Court please.

The Court: What was his work?

Mr. Davis: Plastering.

The Court: Let the stop-notice be filed. What is the date of the service?

The Witness: March 25, 1924.

Q. Mr. Leibig, you had a written contract for the work you did, didn't you?

A. Part of it.
Q. You took an assignment of another contract?
A. Yes, an assignment of another contract.
Q. Witness is shown a uniform sub-contract between Hampshire & Fleming and Potts Brothers & Cooperson for the plastering of this building in accordance with the plans and specifications and is asked if this is the contract which was assigned to you?
A. It is.
Q. Witness is shown what purports to be an assignment of an agreement between Potts Brothers & Cooperson and Hampshire & Fleming, and the person named in the assignment is Louis A. Leibig, and is asked if that is the agreement in the form of an assignment whereby this previous agreement between Potts Brothers & Cooperson and Hampshire & Fleming was assigned to you?
A. It is.

Mr. Davis: I ask to offer these in evidence.

The Court: Yes, let them be marked.

(Said papers marked L1, 2, 3.)

Q. You performed the work under this contract, Mr. Leibig?
A. I did.
Q. How much is due to you on this contract?
A. Two thousand and some hundred dollars, $200.
Q. You will have to be explicit. Now, first, let me ask you this. I will withdraw that question. Mr. Peterson who testified here this morning, that claim to which he testified is also included in the balance which would be due to you, is that correct?

A. Absolutely.
Q. The same with the Pearce Fireproof Company?
A. Yes.
Q. Those two claims total ——
A. $193.32 and $102.06.
Q. What is the total?
A. $295.38.
Q. That is to be deducted from the figure which you will now give to us, is that correct?
A. Yes.
Q. What is the total?
A. Deducting those two acceptances I have in my pocket will be $2278.41 less $295.38.

The Court: See what the total amount is that is due to you at this time.

Mr. Davis: He is subtracting it now, if the Court please.

The Court: How much is the total amount due?

Mr. Davis: Leibig can't subtract it correctly, I am doing it for him. $1982.73.

The Court: How much, $1982.73?

Mr. Davis: That is the amount due at this time, $1982.73.

Q. Do you know of your own knewledge whether this stop-notice, Exhibit L1, was served upon Potts Brothers & Cooperson? You didn't serve it, did you?
A. No, I didn't serve it.

Cross-examination.

By Mr. Woodruff:

Q. How much of that bill is for work under the contract and how much is for extras?
A. There is an extra here of $707.40, one for $1150, $305, $125, $476, $22.60, $7.70 for discount on trade acceptance, $7.70 again, and $2.82 on discount on trade acceptance.
Q. They are all extra?
A. Yes.

The Court: Anything left that isn't extra? It seems to me that runs up to pretty nearly the whole thing.

By Mr. Davis:

Q. The contract price was $8500?
A. The extras amount to $2704.02, is that right?
Q. You have one item of $1150 and three $700 ones.
A. No, $7.70 for trade acceptances, $7.70 again, and $2.82 for trade acceptances.
Q. See if I have it right.
A. $707.40, $1150, $305, $125, $476, $22.60.
Q. Mr. Leibig, you were simply paid so much from time to time on account of what you did, not only under the contract but the extras?
A. Yes.
Q. I assume you can't tell how much of this unpaid balance represents the part owing for extras and the contract?
A. No, everything was worked on the 80-20 basis, and the 80 per cent. would amount to $2278.41—that would be the 20 per cent., rather, due on the whole

total bill. I received a trade acceptance and through some mistake—I have the trade acceptance in my pocket—but we didn't get it in the stop-notice and Mr. Davis advised me I would have to take it out. I have the stop-notice here in my pocket, so that would make the $1900 and some still due on the 20 per cent. basis.

Q. I understand you can't say what portion is for extras?

A. No.

Q. And these extras were ordered by who?

A. Mr. Cooperson, and the $1150 extra was by Mr. Pinsky himself.

Q. Who ordered you to do that?

A. I have a faint recollection—I think the $707.40 is the basement, the plastering of the basement, 524 yards at $1.35 a yard, I think he authorized Mr. Cooperson to have that done, too.

Q. And you were authorized to do it all?

A. To do it all, yes, sir.

By Mr. Woodruff:

Q. Did you make any demand on Mr. Pinsky for these items he authorized?

A. No, I did not.

Q. Or the Pinsky Company?

A. No.

By Mr. Davis:

Q. Did you make demand on Potts Brothers & Cooperson for this amount due before you filed the stop notice?

A. I did.

Q. Were all the extras authorized by Potts Brothers & Cooperson?

A. They had the bill there and they seemed to think it was all right at the time.

Q. They knew you were doing it?

A. Yes.

REUBEN PINSKY, sworn.

By Mr. Davis:

Q. Mr. Pinsky, you are the H. Pinsky Sons Company?

A. Yes, sir.

Q. You are president of that company, aren't you?

A. I am, yes.

Q. It is you to whom reference has been made today as being the Pinsky of this company for whom this work was done by Potts Brothers & Cooperson?

A. Yes, sir.

Q. At your new store at Broadway and Spruce Streets, Camden?

A. Yes, sir.

Q. Was or was not this stop-notice of Lou A. Leibig served upon you by me?

A. I can't say. I gave all the stop-notices to Mr. Stackhouse and I didn't make any special memorandum of any particular stop-notice. As soon as I received them I took them to Mr. Stackhouse.

Q. You don't know if it was served on you when it was?

A. No.

Mr. Davis: Are counsel willing to accept my statement that I served that on Mr. Pinsky the 25th of March, 1924.

Mr. Gotshalk: The next claim is the Camden Materials Company, but I understand they have given up this case.

D. Trueman Stackhouse, sworn.

By Mr. Davis:

Q. Do you have any memorandum in your records which will show the date when this stop-notice of Lou A. Leibig's was served upon Mr. Pinsky?

The Court: Everyone accepted your statement that it was served March 25, 1924.

Q. Mr. Stackhouse, what do you know with respect to these other stop-notices in this matter with respect to the service upon Potts Brothers & Cooperson after they were delivered to you by Mr. Pinsky?

A. Each stop-notice as delivered to me by Mr. Pinsky a copy of it was made and a copy served upon Potts Brothers & Cooperson. I believe you were connected with me at that time and served all of these notices for me.

Mr. Davis: That is correct.

T. Millett Hand, sworn.

By Mr. Salter:

The Court: What claim is this?

Mr. Salter: The claim of Hitchner & Holmes Co.

Q. Mr. Hand, you are now an attorney-at-law of the State of New Jersey?

A. Yes.

Q. And on the 24th day of April, 1924, you were employed by who?

A. Bleakly, Stockwell & Burling, Camden.

Q. In what capacity?

A. Law clerk.

Q. I show you a stop-notice dated April 24, 1924, addressed to Harry Pinsky & Son Company, Inc., and signed Hitchner & Holmes, by William S. Holmes, and ask you if you ever saw that duplicate original or an original copy?

A. Yes.

Q. On what occasion was that?

A. On the occasion of the date of the notice when I served it on H. Pinsky & Son, Inc.

Q. I show you an affidavit taken the 25th day of April, 1924, before M. N. Strang, a notary public of New Jersey, signed, T. Millett Hand, and ask if that is your signature?

A. Yes.

Q. Did you serve this notice on Harry Pinsky & Son Company?

A. Yes, sir.

Q. When?

A. April 24, 1924.

Q. On whom did you serve it?

A. On Mr. Pinsky. I don't know whether his name was Harry Pinsky or not. I was there and asked for Mr. Pinsky and was shown to his office and asked him if he was Mr. Pinsky and he said yes.

The Court: What is the amount?

Mr. Salter: $866.77, but I don't believe that entire claim is owing at this time.

Q. Mr. Hand, do you see the gentleman in this courtroom you served this notice upon? Is this the gentleman sitting here?
A. I think so, but I can't say sure.
Q. At any rate, you served the notice on the store?
A. Yes.

The Court: Hadn't you better show what is due on it.

Mr. Salter: I am going to call Mr. Holmes for that.

Cross-examination.

By Mr. Woodruff:

Q. Do you know anything about the account itself?
A. No, I do not, Mr. Woodruff.

By Mr. Salter:

Q. Mr. Hand, did you cause Hitchner & Holmes to be made an applying creditor in a certain attachment suit between C. B. Coles and Potts Brothers & Cooperson?

A. I have a vague recollection of it, but I can't swear to it.

WILLIAM S. HOLMES, sworn.

By Mr. Salter:

Q. Mr. Holmes, you are a member of the firm of Hitchner & Holmes, Camden?
A. Yes, sir, I am.
Q. Did you have a contract with Potts Brothers & Cooperson to furnish labor and material on their building at Broadway & Spruce Streets?
A. Yes, sir.
Q. What is the basis of that contract?
A. Mostly labor, some material.
Q. Did you ever give them an estimate in connection with any material or work you were to do there?
A. Yes, sir.
Q. When was that estimate given; have you a copy of it?
A. Yes. The date of it is February 16th and July 5, 1923.
Q. The letter of February 16th from you to Potts Brothers & Cooperson, turn to that letter in your file.
A. I have it.
Q. In that letter you give Potts Brothers & Cooperson an estimate for the purpose of laying metal flooring, and so on, in their building at Broadway & Spruce, $1650?
A. Yes, sir.
Q. Did you enter into another contract with them?
A. Yes, on July 5th, the same year.

Q. What was the basis of that contract?
A. For work on their bulk window.
Q. What was the amount?
A. $260.
Q. Was there any commission paid to Potts Brothers & Cooperson in connection with that?
A. An allowance of $24.00.
Q. Did you furnish any materials?
A. Furnished a few nails; we were to furnish the labor only.
Q. How much nails?
A. Three kegs of nails and five rolls of paper.
Q. How much were the nails?
A. Three kegs at $6.00 a keg, $18,00; five rolls of paper at .$80, $4.00; and item of eight hours time authorized by Mr. Cooperson, $1.12 1/2, $9.00.
Q. What was the total amount of your claim against Potts Brothers & Cooperson at that time?
A. $1941.
Q. Have you your ledger sheet there?
A. I have.
Q. Can you tell from your ledger sheet how much Potts Brothers & Cooperson paid you on account of this work, that is, the Pinsky job?
A. No, not exactly.
Q. You had a general ledger credit and credit one payment on one account?
A. Yes.
Q. Where is your bookkeeper?
A. She is not with us now. She has been visiting.
Q. In other words, you don't know where she is now?
A. No. I tried to get in touch with her.
Q. Under the terms of this contract how much was to be retained from you on the contract before final payment was made to you?

A. Twenty per cent.
Q. Is that the same amount that was to be retained by Pinsky from Potts Brothers & Cooperson?
A. Supposed to be the same.
Q. Has that twenty per cent. ever been paid to you?
A. No.
Q. What is the amount of that?
A. $383.40.
Q. That twenty per cent. to be paid to you upon the acceptance of the work is in the amount of $383.40?
A. Right.
Q. You can testify for a certainty that that amount is due to you at this time?
A. Yes, sir.

Cross-examination.

By Mr. Woodruff:

Q. Mr. Holmes, you filed a claim in bankruptcy, didn't you?
A. Yes, sir.
Q. You filed that claim as a claim on trade acceptances, two trade acceptances, didn't you?
A. I think there was.
Q. This is your signature to this original claim?
A. Yes.
Q. And it is made on trade acceptances?
A. Yes.
Q. And attached is a copy of the two trade acceptances totaling your claim?
A. Yes. The trade acceptances were given back unpaid.

Mr. Salter: If there is any dispute of this work actually being done I will save a little time by ——

Mr. Tyler: You asked in some detail about the character of this work and your stop-notice is filed for materials furnished. You are not making any claim for preference on account of labor, are you?

Mr. Salter: I understand that labor was not done personally by Mr. Holmes.

Mr. Tyler: Your stop-notice calls for $866.87 for materials furnished and shows nothing about labor.

Mr. Salter: We can't prove any specific labor item because the payments on account were not ——

Mr. Gotshalk: Your claim is limited to $383.40, is that correct?

Mr. Salter: Yes.

MAX W. COOPERSON, sworn.

Br Mr. Salter:

Q. Mr. Cooperson, you are the Cooperson of Potts Brothers and Cooperson?
A. Yes, sir.
Q. Was the 20 per cent. retention ever paid by you to Mr. Holmes as far as you know?
A. No, sir.

Cross-examination.

By Mr. Woodruff:

Q. Mr. Cooperson, was the 20 per cent. under the contract with Pinsky paid to you?
A. Not yet.
Q. The contract called for them holding up always 20 per cent. on you?
A. Yes, sir.
Q. On September 19, 1923, when the assignment was made to the Parkside Trust Company how much was still due you under that 20 per cent. clause, or otherwise, from the Pinsky Company?

Mr. Tyler: It has been adjudicated by a suit between the parties; the matter was adjudicated by judgment. If the Court please, the assignment which Mr. Woodruff refers to is an assignment out of the final payment; it particularly says so in so many words, an assignment from the final payment. I object to it on the further ground it is absolutely immaterial.

The Court: I don't understand. What is the assignment?

Mr. Woodruff: I had thought to save time by asking Mr. Cooperson the question now rather than in the proof of our claim. Our claim is based upon a written assignment which was made by Mr. Cooperson of moneys then due or to grow due, as I construe the contract, and which was accepted by the Pinsky Company to the extent of $10,000, to be paid, however, in accordance with the contract after the job was finished, 60 days after the job was finished. That assignment is ahead in point of time of all of

the stop-notices and at the time that assignment was made—the point of my question was, how much was due from the Pinsky Company to the Cooperson Brothers, who were making this assignment, as of that time.

The Court: I thought the present act gave stop-notices preference to assignments?

Mr. Tyler: That is true.

The Court: It used to be otherwise, but isn't so now.

Mr. Woodruff: I think if money is due and is admitted to be due you can assign that due money. That is my construction.

The Court: Money due from the owner to the contractor and the contractor assigns it?

Mr. Woodruff: Yes, and the owner accepts.

The Court: I thought that was all changed. (After argument.) Make your record on it and you will get the benefit of it, whatever it may be.

Q. My question was on the 19th day of September, 1923, how much was due?

Mr. Salter: Do I understand you are cross-examining Mr. Cooperson as to my matters or are you taking him as your own witness?

Mr. Woodruff: My witness.

Q. How much was due Potts Brothers & Cooperson from Harry Pinsky & Son Company on that date?

A. I don't know the exact amount but it was over $10,000 due at that time.

The Court: At the time the assignment was made?

The Witness: Yes.

The Court: This was an assignment to whom?

Mr. Woodruff: The Parkside Trust Company of Camden.

The Court: That you haven't proved yet.

Mr. Woodruff: No. It was different from the lien claims and I let them go through with the lien claims.

By Mr. Tyler:

Q. Mr. Cooperson, do you mean that amount was due from the final payment on the contract of 20 per cent. that was retained?

A. As long as the work was getting along with the 20 per cent. retained.

Q. This money you speak of was due from the twenty per cent. fund.

A. Yes, sir.

Q. The 20 per cent. fund, the final payment, was subsequently adjudicated in the law suit that was brought against Pinsky, that is true, isn't it?

A. There was some sort of settlement made.

Q. Isn't that true? Don't you know the last 20 per cent. on this contract was the subject of a suit

between your company or the receiver of your company and the owners?

A. Yes, there was a suit.

Q. And it is that final payment you refer to?

A. Yes, sir.

Q. And you knew the owners disputed the amount that was due, Pinsky & Son disputed that?

A. Yes, sir.

Q. They didn't admit anything was due?

A. They admitted there was something due but they had some claims.

Q. They compromised it eventually?

A. Yes, sir.

Q. In the suit that was brought the owners didn't admit there was anything due your company; didn't they deny they owed you anything and didn't they put in a counter-claim?

A. Yes, they put in a counter-claim.

Q. And claimed your company was indebted to them instead of them to you?

A. Not to that much money.

Q. But to some extent?

A. They had some claim against us.

By Mr. Woodruff:

Q. After that assignment, Mr. Cooperson, to the Parkside Trust Company, did you go on and do business in completing the building?

A. Yes, sir.

Q. Did you get other moneys from Mr. Pinsky?

A. Yes, sir.

Q. You went on for how long after September 19, 1923?

A. I can't say just exactly how long but I believe for two or three months, possibly.

Q. Working all the time?

A. Doing actual work, finishing up.

Q. And got paid different amounts during that time?

A. Yes, sir.

Q. Mr. Tyler has asked you about the Pinsky Company disputing your claim at the conclusion of the work, when this matter was in dispute in court. At the time the assignment was made, Mr. Reuben Pinsky, who signed that agreement, and who was president of the company, at that time what did he say about whether or not more than $10,000 was due?

A. He didn't say anything about it, he simply agreed to sign the assignment because there was over $10,000 due there at that time.

By the Court:

Q. That was the 20 per cent. amount that had been held back?

A. The 20 per cent, and as the work went along.

Q. At the time the assignment was made was the $10,000 which you refer to as due comprised entirely of the 20 per cent. holdback? You know what I mean by a holdback?

A. Yes.

Q. Each time a payment would be made to you 20 per cent. would be held back?

A. Yes, sir.

Q. Until the final completion of the contract?

A. Yes, sir.

Q. The assignment was made to the Parkside Trust Company, wasn't it?

A. Yes.

Q. As much as $10,000 was due on these 20 per cent. holdbacks?

A. Yes, sir.

Q. Is that what you mean, or do you mean it was due outside of the 20 per cent holdbacks?

A. It would include the both of them. The 20 per cent. and also the work we done outside of that. It would mean he would owe us 20 per cent. all the time.

Q. Yes.

A. And then we would go on and do some more work.

Q. I want to find out whether the money you refer to as due is all the 20 per cent. money or whether it was other moneys?

A. The 20 per cent. was always included in the moneys due us all the time.

Q. Was there anything in the assignment except the 20 per cent. money?

A. All I can say, your Honor, it would include the 20 per cent. and whatever other work as we were going along.

The Court: I haven't seen the assignment. I suppose it was an assignment of so much money.

Mr. Woodruff: To the extent of $10,000.

The Court: Due on this contract?

Mr. Woodruff: Yes.

By Mr. Woodruff:

Q. Of the 80 per cent. you would be paid at that time had work been done for which you had been paid your 80 per cent?

A. Yes. Some extra work we didn't include until the settlement of the whole job.

Q. And that was due you at that time?

A. Yes, sir.

Q. Even though it hadn't been paid?

A. Yes.

By Mr. Davis:

Q. You weren't to be paid that until final settlement, were you?

A. There was no understanding to that effect but there wasn't any bill rendered. It was on our books and everybody understood it that there was to be some adjustment made.

Q. They were to be made at the time of final settlement?

A. No, we could have made them at any time.

Q. That was your intention, wasn't it?

A. No, we simply didn't do it, that is all, but the amount of money was there and we had the orders to go ahead and do it.

Q. Simply let the extras ride until you got through?

A. Yes.

Q. At the time you made this assignment the only moneys due you was the 20 per cent. of the work which had been done plus whatever extras might have been done?

A. Yes.

Q. And you would get the 20 per cent. at the time of settlement and you were letting your extras ride to final settlement?

A. Yes, sir.

Mr. Tyler: Have you got the assignment there?

Mr. Woodruff: Yes,

By Mr. Tyler:

Q. In the assignment which I show you it says, "Whereas, Potts Brothers & Cooperson, a corporation, as contractor and builder has been constructing a building at Broadway and Spruce Streets, Camden, New Jersey, for Harry Pinsky & Son Company, a corporation and under the terms of the contract therefore dated July 29th, 1922, there will be due Potts Brothers & Cooperson, Incorporated, sixty days after the completion of said building, a sum exceeding said sum of Ten Thousand Dollars." What fund was it you were to get 60 days after the completion of the building; was there any other fund but the 20 per cent?

A. Yes, sir, extras.

Q. The 20 per cent. and extras?

A. Yes, sir.

Q. According to the terms of the contract isn't it true the fund due 60 days after the completion of the building was the 20 per cent fund, the final payment?

A. And the extras.

By Mr. Davis:

Q. All due 60 days after settlement?

A. The extras weren't due 60 days after, we could have put them in any time.

By Mr. Tyler:

Q. So when you signed this contract and referred to the fund 60 days after settlement you had in mind the 20 per cent. fund, isn't that true?

A. Twenty per cent. fund and extras, everything

else that was due us. We seldom cleaned up a job with 20 per cent.

Q. You said 60 days after completion of the building a sum in excess of $10,000 would be due; is that the fund you had in mind when you made this assignment?

A. No, we meant all the money due us when we made this assignment, the 20 per cent. and the extras. We very seldom had a job that left only 20 per cent.

Q. Under your contract what fund was to be paid 60 days after completion?

A. All the funds that were due us.

Q. Was there any particular fund referred to in the contract, do you know? Maybe I had better get your contract for you. Now, in the contract it says, "Estimates of the work completed, shall be furnished to the Architect by the Contractors on the first day of each succeeding month and when approved by him 80% of such estimates shall be paid by the Owner on or before the tenth day of the same month, the remaining 20% of such estimates shall be paid at the time of final payment." "The final payment shall be made within sixty days after the completion of the work." Having read that can you say whether or not the 60 day payment was not the final 20 per cent. payment?

A. No, sir, we would never figure out a job that close.

Q. Let me call your attention again. It says, "Twenty per cent. of such estimates shall be paid at the time of final payment." Is that clear, the final payment is 20 per cent?

A. No, sir, the final payment is 20 per cent. but that doesn't include everything.

Q. I asked you if it isn't true the final payment was the 20 per cent payment?

A. No, sir.

Q. So that contract doesn't mean what it says?

A. Very few of them leaves 20 per cent., they all leave more.

Q. It says the remaining 20% of such estimates shall be paid at the time of final payment.

A. That is put on there to protect the owner, but we never have 20 per cent. left over, we always have more.

Q. That is what your contract says, and it also says the final payment shall be made 60 days after completion of the building, isn't that true?

A. Yes, sir.

By Mr. Woodruff:

Q. At the time this assignment was made the final 20 per cent. was due you?

A. No, it wasn't due us.

Q. What was the work you were still doing there, contract work or extra work?

A. It was contract and extra work.

Q. Both?

A. Yes.

Q. That still continued for two months then?

A. Yes, sir.

Q. You have said more than $10,000 was due; can you tell us how much was due more than the $10,000 at that time?

A. That would be very hard for me to answer.

Q. You don't remember?

A. I don't remember, no.

By Mr. Salter:

Q. If you had $10,000 coming to you from Pinsky, more than $10,000, why did you go to the Parkside

Trust Company and ask them to discount a note for $10,000?

A. Why did we go to the Parkside Trust Company?

Q. Why did you borrow the money if you had all this money coming from Pinsky at this time?

A. We couldn't get it from Pinsky.

Q. Why couldn't you get it from Pinsky, it was due under the terms of the contract, more than $10,000, why wouldn't Pinsky pay it to you?

A. I don't know that.

The Court: Wasn't it because under the contract it didn't become payable until 60 days after the building was completed, wasn't that the reason?

The Witness: Part of that money, yes, sir.

The Court: What part?

The Witness: The 20 per cent. part.

Q. Then it wasn't due from Pinsky then as you said it was, it wasn't due until 60 days after the final completion of the building? At that time that money wasn't due from Pinsky to you?

A. That final 20 per cent. payment, as I understand it, comes due every month, becomes due every month.

The Court: But not payable until the end of the 60 days?

The Witness: That is the end of the whole job, but 20 per cent. is always due and becomes due the first of each month.

By Mr. Davis:

Q. But it is not payable?

A. No, we deduct that when we file our bill, and the next month we add it on again, and the twenty per cent is taken off, but that is always due as the job goes along.

Q. How much was due to you from Pinsky at the time of this assignment?

A. Over $10,000.

Q. How much over?

A. I can't give the exact amount.

Q. As nearly as you can state.

A. I wouldn't want to make a statement, I don't know the figures.

Q. Was it $15,000?

A. If I had my books here I could tell.

Q. You don't know whether it was considerable or slightly in excess?

A. I know there was enough to make Pinsky satisfied to sign that assignment.

Q. You can't assist us at all in giving us an estimate of how much was due?

A. No.

Q. Was it less than $15,000?

A. I can't say.

Q. Was it more than $15,000?

A. I won't answer; I don't know the exact figures.

Q. How much of the money you say was due at that time was due from the 20 per cent. holdback?

A. May I have that question?

Q. You say more than $10,000 was due?

A. Yes, sir.

Q. At that time how much of that sum was represented by the 20 per cent. holdbacks?

A. That would be hard for me to figure out.

Q. Can't you give us an idea? Practically all of it, isn't that true, was represented by the 20 per cent. holdback?

A. The 20 per cent. would include everything, and the extra work besides.

Q. The 20 per cent. would include the extras, would it?

A. The 20 per cent. holdback would include extra work at the windup.

Q. What you did do, as a matter of fact, you included that in your 20 per cent., didn't you?

A. No, our bills would be rendered monthly. At the first of every month we tack on that 20 per cent. and deduct it the following month again.

Q. The bill you would send would include not only your contract work but the extras, wouldn't it? You would send a bill for everything you did?

A. Outside of the approved extra bills.

Q. You would include those in your bill, wouldn't you?

A. No, that was settled up later, agreed upon later.

Q. How did you do it, did you send one bill for your contract work and separate bills for your extra work?

A. The architect never approved any of the extra bills yet and we couldn't send them out, but he knew approximately what they would run. Some money, I believe was paid on the extra work, I don't know.

Q. You didn't send a bill for the extra work?

A. I did on the final completion of the whole job.

Q. At the completion of the whole work?

A. Yes.

Q. And your extras were paid then?

A. Nothing was paid.

Q. It was paid by the payment of the $7500., wasn't it?

A. I don't know.

By Mr. Tyler:

Q. I show you a statement of payments made by Pinsky & Sons to Potts Brothers & Cooperson and ask you whether or not you recognize that as a statement of payments made?

A. It looks something like that.

Q. This list of payments calls for October 5th, cash $2500. Did you get that?

A. That would be hard for me to answer now.

Q. November 2nd, cash $1,000—this is 1923—$1,000, did you get that?

A. I could check it up better if I had the ledger here; I can't swear to exact amounts.

Q. January 19, 1924, cash $1,000, do you remember that?

A. If that is a copy of the ledger it must be correct.

Q. March 29, 1924, $350.00, making a total cash payment from October 5th to March 29th inclusive of $4850., that is correct, as far as you know, isn't it?

A. As far as I know.

Q. Also the Kreyer account $2,358.88, do you remember what that Kreyer account was?

A. That was a charge to be charged against Lou Leibig.

Q. Who paid that, you or Pinsky?

A. I believe Pinsky paid it.

Q. This March 29th, $350.00, did Pinsky pay that to you?

A. If I had the ledger here I could check it up better and tell you exactly what it is.

By Mr. Salter:

Q. Was it your understanding that this money that was retained by Pinsky was due to you even though it was retained and held by him?

A. Was what?

Q. In other words, even though under the terms of the contract that 20 per cent. was retained was it your understanding that money was yours except it was simply held by him, in other words, it was due and payable?

Mr. Gotshalk: If the Court please, the contract speaks for itself.

The Court: It is all right to ask him that.

The Witness: That was due to us.

By Mr. Rose:

Q. When was the job completed, on what date?

A. It is hard for me to answer.

Q. Was it completed on January 14, 1924?

A. I can't answer that.

Q. What is your best recollection?

A. I think we were still there after that.

Q. You were there after January 14, 1924?

A. I believe we were.

Q. Still at work?

A. I believe we were.

By Mr. Davis:

Q. Mr. Leibig testified he did work on this store.

A. I didn't examine the bill.

Q. You heard him testify how much was due him?

A. Yes.
Q. He was working upon that store?
A. Yes, he was working upon the store but I couldn't testify as to the amount.

By Mr. Salter:

Q. And you knew Mr. Holmes was working there?
A. Yes, sir.

J. Hartley Bowen, sworn.

By Mr. Woodruff:

Q. Mr. Bowen, on September 19, 1923, were you secretary and treasurer of the Parkside Trust Company?
A. I was.
Q. And did you execute this assignment?
A. I did.

Mr. Woodruff: I offer this.

(Said paper marked Exhibit P1.)

Q. Mr. Bowen, at the time of the execution of that contract do you know how much was due or whether an amount in excess of $10,000 was due from Pinsky to Potts Brothers & Cooperson?

Mr. Davis: If the Court please, I object.

The Court: It may be material.

Mr. Tyler: I object on the ground that it would be hearsay.

The Court: He will have to state the extent of his knowledge.

Q. What was said by Mr. Pinsky, president of the Pinsky Company, at the time of the execution of this assignment?
A. Mr. Pinsky stated to me that there was an amount in excess of $10,000 due to Potts Brothers & Cooperson at that time and Potts Brothers & Cooperson needed some money for finishing the work and Pinsky said he didn't have any money to give them and if the Parkside would discount a note he was perfectly willing to discount a note and agree to pay the note after the building was completed and the mortgage placed.
Q. Did that precede the actual discounting of the note to Potts Brothers & Cooperson?
A. Yes, Mr. Cooperson wanted to borrow some money and we wouldn't lend him any money because at that time we thought he had nothing as to security.
Q. You didn't put on the note of $10,000 until after you had seen Mr. Pinsky and he made that statement?
A. And the assignment was executed and the note was discounted.

The Court: Who are these endorsers on the note?

The Witness: Walter Potts and Max Cooperson; they are the individual members of the firm of Potts Brothers & Cooperson.

Cross-examination.

By Mr. Tyler:

Q. Mr. Bowen, you signed this for the Parkside, as I understand?

A. Yes, sir.

Q. This agreement referred to $10,000 becoming due 60 days after the completion of the building, you saw that, did you?

A. Mr. Woodruff drew the agreement, Mr. Woodruff being the solicitor, he drew the assignment, rather, and sent it down to us for execution.

Q. This agreement with your name, J. Hartley Bowen, was never read by you?

A. Did I say it was never read; I read the agreement, sure.

Q. You did know the agreement recited the payment of $10,000 60 days after the completion of the building?

A. Yes, sir, that is when the money was to be paid; Mr. Pinsky agreed to pay it.

Q. And when the agreement said there will be due Potts Brothers & Cooperson 60 days after the completion of the building a sum exceeding the sum of $10,000 ——

Mr. Woodruff: If the Court please, Mr. Tyler reads from the recital and not from the assignment itself, and he is doing that with all the witnesses. It recites it will be due and following that assigns the account which is due.

Mr. Tyler: It is all a matter of argument.

Mr. Woodruff: It may be.

Q. Strike that out. "Whereas the discount of said note was necessary to finish the conclusion of said building operation." You understood, didn't you, he was borrowing this $10,000 for the purposes recited in this agreement?

A. If you read the whole thing you will find something different there.

Q. What does this mean: "Whereas the discount of said note was necessary to finance the conclusion of said building operation." Do you mean that was financed for the purpose of completing the building?

A. I don't know.

Q. You don't know what it meant?

A. No, it was not.

Q. The agreement doesn't mean what it says: "Whereas the discount of said note was necessary to finance the conclusion of said building operation." It doesn't mean that?

A. Let me read it.

Q. Yes, sir, read that paragraph, that is all I am asking about?

A. Yes, I presume so, because the building was not completed at that time.

Q. And when it said in the preceding paragraph that 60 days after the completion of the building a sum of $10,000 would be due, isn't it true you weren't relying upon any money then due but the $10,000 after the completion of the building?

A. No, sir, that is true, Mr. Pinsky said there was that much money due at that time.

Q. You understood this agreement signed by Potts Brothers & Cooperson, signed by Pinsky, and signed by you, referred to a sum of $10,000 that would become due 60 days after the building was completed?

A. Yes, sir, but there is a subsequent clause that covers the rest of it.

Q. Point out the subsequent clause which refers to any other $10,000 than that which would become due 60 days after the completion of the building, and any clause in conflict that refers to any sums with reference to the completion of the building, point out any one?

Mr. Woodruff: It is merely a matter of construction.

A. I don't see the clause that I thought was there.

By Mr. Davis:

Q. Mr. Bowen, the note which was given at the time of the execution of this assignment has been taken up, hasn't it?

A. You mean the note has been paid?

Q. It has been taken up and a new note substituted for it?

A. The note was renewed at the end of three months time.

Q. Is that the same note or the same parties on this note still on the note which was substituted for the original note?

A. Yes.

Q. No change of the parties?

A. No.

Q. No additional security?

A. No.

By Mr. Woodruff:

Q. This is the last note, isn't it, Mr. Bowen?

A. I should think it was.

Q. Check up with your card.

A. April 14, 1924.

Mr. Woodruff: I offer that so you will be absolutely certain.

The Court: How much is unpaid on the note?

The Witness: $10,000.

The Court: The whole amount?

The Witness: Yes.

The Court: Never has been paid?

The Witness: No.

Q. Up to the time, Mr. Bowen, you severed your connection with the Parkside Trust Company no part had been paid?

A. No.

SYLVAN J. FLETCHER, sworn.

By Mr. Woodruff:

Q. What is your position with the Parkside Trust Company?

A. Assistant Secretary and Treasurer.

Q. You were there when Mr. Bowen was there and have been there ever since?

A. Yes, sir.

Q. Has anything since been paid on this note?

A. Not to my knowledge.

Q. The whole amount is still due?
A. Yes.
Q. You have the bank records there to show that?
A. Yes.

(No cross-examination.)

Mr. Woodruff: With respect to Coles claim I might say this, I sent a subpoena for Mr. Henry Coles when I found Mr. Coles didn't know about this assignment and he left at the noon recess to go to Moorestown but we haven't yet been able to serve him with a subpoena, but I would like to know before we close about the assignment to the credit company. Your Honor suggested it might mean somebody would be substituted but it seems there are other objections to be made and I would like an opportunity, inasmuch as William C. Coles was produced and Mr. William C. Coles not knowing about this transaction, to produce Mr. Henry Coles.

The Court: We will enable you to get the facts if we can't get them today.

Mr. Tyler: Mr. William C. Coles doesn't know anything about it or we would be very glad to produce the facts, but I can't see that it makes any difference whether we sue in our name or the use and benefit of an assignee. I don't think it makes any difference to us, but if there is an assignment it would be the original assignment and it would be with the American Credit and Indemnity Company of New York and we would probably have to get hold of that in order to prove it. I think we might find out first, if we want to go ahead with the arguments, whether it is material. I have plenty of authority that where a lien claim has accrued and been perfected it is absolutely assignable.

The Court: No doubt about that, and if you sue for the benefit of the assignee, your recovery, if you have one, will be according to whatever interest you may have. If it is simply a guaranty you can subrogate to their rights or they to you. Those matters are not matters of substance.

Mr. Tyler: Even under the assignment, Mr. Woodruff has this copy of it, it states 76 per cent. is for our own use and benefit and 24 per cent. for theirs. Even then we would be 3/4 holders and the other company would be 24 per cent. holders, and even under that view we would sue under our name. I am perfectly willing to let Mr. Woodruff argue it as though it was an assignment and see if it has any force.

The Court: We will conclude the case except as to Mr. Coles' testimony, and he can come in tomorrow morning and put in the record whatever the facts are and we will proceed with this case with that matter left open and you can make up your arguments in whatever way you choose. Any objection to the Smith-Austermuhl claim?

Mr. Davis: I don't think that is a proper claim.

The Court: That is what I am here for, to hear your objections.

Mr. Salter: I believe I neglected to offer the Hitchner-Holmes stop-notice. I want to do that now.

(Said paper marked Exhibit H1.)

The Court: Suppose counsel file their briefs, serve them on one another, and I will get the views of all of you.

Mr. Tyler: Did I understand, your Honor, Mr. Henry Coles will be produced tomorrow morning?

Mr. Woodruff: Not if you are willing to stipulate as you said you were.

The Court: If there is any formal proof anybody wants to put in you can.

Mr. Davis: It is entirely up to Mr. Woodruff.

Mr. Tyler: I suggested we don't put it in unless we find it material, but I understood after that that Mr. Coles was to be produced tomorrow morning.

Mr. Woodruff: I sent somebody chasing him, but it is self-evidence by the filing of that claim there was an assignment.

The Court: You can examine him in the morning on that, if you want.

Mr. Woodruff: I would want to ask the Receiver while he is here to leave all the claims with the court so they might be all in evidence from his original files.

Mr. Tyler: I object to the offer of all papers attached to the claim of C. B. Coles for $5016.25 as not having any binding force against C. B. Coles

Company and not being properly proved, and the assignment being a copy and the original not produced.

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

Between HARRY PINSKY AND SON COMPANY, *Complainant.* and EDGAR L. WIKE, Trustee etc., *et als.*, *Defendants.*	On Bill, Etc. Final Hearing between Claimants under Bill of Interpleader. Conclusions.

The issues in this case call for the ascertainment of the priorities of the several liens of the parties hereto on money which represents the final amount due from the owner of a building to his contractor. The money due from the owner to the contractor has been paid into court pursuant to the prayer of a bill of interpleader, and complainant has been discharged. The several defendants have filed statements of their respective claims against the fund, and at final hearing the facts touching the respective claims have been fully ascertained.

The contract for the erection of the building was duly filed and the classes of claims, in the order of dates, are: first, an assignment of money due or

to grow due from the owner to the contractor, which assignment was accepted by the owner; second, stop notices served pursuant to the third section of our Mechanics' Lien Act; third, a writ of attachment issued against the contractor and served on the owner; fourth, applying creditors in the attachment suit; fifth, additional stop notices served on the owner. Some of the claims under stop notices are for labor and some for materials supplied to the building; one stop notice was served by a sub-contractor, another by a person who supplied the contractor's bond and insurance on the building.

D. T. Stackhouse, Esq., for Complainant.
W. B. Wolcott, Esq., for Wike, Trustee, etc.
Joseph Beck Tyler, Esq., for C. B. Coles & Sons Co.
Albert S. Woodruff, Esq., for Parkside Title & Trust Co.
Bleakly, Stockwell & Burling, for Smith-Austermuhl Co.
Riggins & Davis, Esqs., for Lou A. Leibig.
David R. Rose, Esq., for Edwin A. Peterson.

Leaming, V. C.:

The contract price of the building which occasions this controversy was $100,000, plus the cost of extra work at rates specified in the contract.

The contract also provided that estimates of completed work were to be furnished by the contractor to the architect on the first day of each month and when approved by the latter, eighty per cent. of such estimates were to be paid by the owner on or

before the tenth of the same month; "The remaining twenty per cent. of such estimates" was to be paid at the time of final payment; final payment was to be made sixty days after completion of the work; all payments were to be made on certificates. These provisions touching payments are embodied in section 7 of the contract as filed. These provisions are plain and are not susceptible of misunderstanding. Under these provisions of the filed contract laborers and material men were entitled to rely upon twenty per cent. of the amount earned by the contractor remaining in the hands of the owner for sixty days after the building should have been completed in accordance with the contract; that fund, whatever its amount, they were entitled to impound by stop notices served before the expiration of that sixty-day period, or thereafter except as against any superior rights that may have intervened after the end of the sixty days and prior to the service of the stop notices. Before the expiration of that period the owner could not, as against them, lawfully discharge that obligation to the contractor either by payment to the contractor or by acceptance of an order or assignment of the contractor. The owner is entitled to allowances for defective work; but the amount finally due was necessarily subject to stop notice liens for sixty days after the final completion of the building pursuant to the contract. In a suit between the trustee in bankruptcy of the contractor and the owner that amount has been ascertained to be $7,500. That determination is to be understood as admittedly correct in the present cause, since the bill of interpleader filed herein has not been contested and that amount of money has been paid into court and the owner has been discharged.

It necessarily follows that all stop notices served by laborers and material men prior to the expiration

of the period referred to enjoy a lien on that fund in the order of the dates of service of the respective notices—labor claims taking precedence of claims of material men—as against an assignment of money due or to grow due under the contract made by the contractor at a prior time. That is the plain language of Section 6 of the Mechanics Lien Act, as contained in the 1898 revision of the Act, C. S., p. 3299.

It is my recollection of the testimony that construction work on the building had not been concluded within sixty days prior to the service of the last stop notice here in question. But in any event, it must be said that the building was not finished by the contractor pursuant to the contract until after the last stop notice had been served, since the deductions allowed the owner were for defective work. With the building unfinished pursuant to the contract more than sixty days prior to April 24, 1924, the date of the last notice served, it is my determination that all stop notices otherwise valid are entitled to priority over the assignment.

It seems also clear that liens under such notices must be held to be entitled to priority over an attachment of prior date, since the statute clearly gives to the stop notice claimants an inchoate lien on the final fund here involved, and with those inchoate liens perfected by notice before the money became payable the consummate liens necessarily relate to the earliest instant that the contractor became entitled to the payment. The whole plan and purpose of the statute would be defeated if a judgment or attachment could intervene to defeat the statutory liens thus perfected.

Nor can an attachment take precedence over a prior accepted assignment. Assignments are lawful and create an equitable lien; but that lien is, by

Section 6 of the Act, sub-ordinated to the stop notice liens of laborers and material men; the Act does not further subordinate the assignments.

It follows that the order of distribution of the final fund now in court must be: first, to the several stop notice claimants, whose claims are found to be valid, in the order of the dates of the several notices—preference being given to labor claims; next to the assignment; next to the attaching creditors.

The claim of Smith-Austermuhl Company is for insurance on the building and for supplying to the contractor a bond; both the insurance and the bond being contemplated by the contract.

The statutory right of liens given by the first section of our Mechanics' Lien Act is "for labor performed or materials furnished for the erection and construction" of the building. The statutory right of stop notice liens, in the language of the third section of the Act, arises from the refusal of any master workman, contractor or sub-contractor to pay any person who may have furnished him "materials used in the erection of any such house or other building" or to pay any "laborer" employed by him "in erecting or constructing any building the money or wages due to him." (Amendment P. L. 1917, p. 821.) It has been held that an architect who has drawn the plans for a building and who has also supervised construction of the building is entitled to a lien under the first section of the Act. (*Turck v. Allard,* 87 N. J. Law 721) and that a lien may be acquired under that section of the Act for transportation and delivery of materials used in the building, since the cost of transportation necessarily enters into the price of materials supplied, either inclusive or exclusive (*Davis v. Mial,* 86 N. J. Law

167). But however liberally the statute may be construed because of its remedial nature it seems to me impossible to regard this claimant as either a "laborer" or one who has furnished "material used in the erection" of the building. The statute is for the protection of laborers and material men; in my judgment this complainant is neither a laborer or a material man. The attorney who drew the original contract performed a necessary service, but obviously not as a laborer or material man within the contemplation of our Act.

Objection has been made that the claim of a sub-contractor is not contemplated by the statute. *Adams v. Wells,* 64 N. J. Eq. 211 is cited. Our present Act, as amended, includes sub-contractors, P. L. 1917, p. 821.

The acceptance of a note is not operative to destroy the right of lien of a laborer or material man unless the note is received as payment.

Nor can the claims filed by stop notice claimants with the trustee in bankruptcy, either as general or secured claims, be regarded as destructive of the liens under their stop-notices. The two classes of claims have nothing in common—one seeks the preservation of a lien, the other is *in personam.*

Shoemaker v. Maloney (Errors and Appeals) 132 At. Rep. 606.

Nor does an honest error in amount destroy the validity of a claim, especially where the error has in no way contributed to the circumstance of non-payment.

The stop-notice liens also embrace any part of the $7,500 which may be for extra work, since the contract includes extra work.

(Submitted February 25, 1927.)

(Determined March 25, 1927.)

FINAL DECREE.

(Filed April 8, 1927.)

IN CHANCERY OF NEW JERSEY.

Between HARRY PINSKY AND SON COMPANY, *Complainant.* and EDGAR L. WIKE, Trustee etc., *et als.*, *Defendants.*	On Bill, etc. Final Decree.

This cause, coming on to be heard before this Court in the presence of D. T. Stackhouse, Esq., solicitor for the complainant; W. B. Wolcott, Esq., solicitor for defendant, Edgar L. Wike, trustee for Potts Brother & Cooperson, Inc., bankrupt; Joseph Beck Tyler, Esq., solicitor for defendant, C. B. Coles & Sons Company, Albert S. Woodruff, Esq., solicitor for defendant, Parkside Title & Trust Company; Bleakly, Stockwell & Burling, Esqs., solicitors for defendant, Smith-Austermuhl Company, Riggins & Davis, Esqs., solicitors for defendant, Lou A. Leibig, and David R. Rose, Esq., solicitor for defendant, Edwin A. Peterson, and the several statements of claim of the defendants being read, witnesses examined, and the arguments of the respective counsel heard,

And it appearing that Harry Pinsky and Son Company had in its possession the sum of $7,500; that the said sum, as appears by the bill of complaint of the complainant, was held by it for such person or persons as were lawfully entitled to receive the same; that the said Wilfred B. Wolcott, Edgar L. Wike, trustee for Potts Brothers and Cooperson, Inc., bankrupt, C. B. Coles & Sons Company, Parkside Title & Trust Company, Smith-Austermuhl Company, Lou A. Leibig, Edwin A. Peterson, Camden Materials Company, Pearce Fireproof Company, George Weiss Company, Hitchner-Holmes Co., and Emergency Elevator Company respectively made claim to the said fund;

And it further appearing to the Court that the said last-mentioned sum of $7,500 was, at the time of the filing of the bill of complaint in this cause, paid by the complainant into this court, and that the same, less the costs of the said complainant and the costs and fee paid to Wilfred B. Wolcott, still remains deposited in this court and is subject to the order and direction thereof.

And it further appearing that Wilfred B. Wolcott made claim to a portion of the fund for his costs and services as solicitor for Edgar L. Wike, trustee in bankruptcy for Potts Brothers & Cooperson, Inc.; and that Parkside Title & Trust Company made claim to the fund by reason of an assignment dated September 19, 1923, in the amount of $10,000, said assignment being made by Potts Brothers & Cooperson, Inc., to Parkside Title & Trust Company, whereby Potts Brothers & Cooperson, Inc., assigned to the said Parkside Title & Trust Company $10,000 of the moneys due and to grow due to it under its contract with the complainant; and Smith-Austermuhl Company made claim to the fund in the amount of $719.76 by reason of

a stop notice dated October 19, 1923, which said stop notice was for moneys due to the said Smith-Austermuhl Company for premiums on the contractor's bond of Potts Brother & Cooperson, Inc., and for fire insurance premium for fire insurance policies written by the said Smith-Austermuhl Company insuring the building during its course of construction; and Edwin A. Peterson made claim to the fund in the amount of $107.06 by reason of a stop notice dated January 14, 1924, which stop notice was for moneys due to the said Edwin A. Peterson for labor performed by him in the construction and erection of the said building; and Pearce Fire Proof Company made claim to the fund in the amount of $193.73 by reason of a stop notice dated February 7, 1924, which said stop notice was for moneys due to the said Pearce Fire Proof Company for the furnishing of certain materials used in the construction and erection of the said building; and C. B. Coles & Sons Company made claim to the fund in the amount of $3,061.47 by reason of a stop notice dated March 18, 1924, said stop notice being for moneys due to the said C. B. Coles & Sons Company for the furnishing of certain materials used in the construction and erection of the said building; and C. B. Coles & Sons Company made claim to the fund in the amount of $5,016.25 by reason of an attachment issued out of the Circuit Court of the County of Camden, on March 19, 1924, under which attachment a levy was made by the sheriff of the County of Camden on moneys in the hands of Harry Pinsky & Son Company, complainant, and due to Potts Brothers & Cooperson, Inc., later bankrupt, under which attachment Emergency Elevator Company on the 28th of March, 1924, for the amount of $1,007, and Hitchner-Holmes Co., on the 1st of March, 1924, for the amount of $1,028.87, and Lou

A. Leibig on the 8th of April, 1924, for the amount of $4,375.99, were admitted as applying creditors; and Lou A. Leibig made claim to the fund in the amount of $1,926.53 by reason of a stop notice dated March 25, 1924, which said stop notice represented moneys due to the said Lou A. Leibig under his sub-contract with Potts Brothers & Cooperson, Inc., the contractor, for labor and materials furnished and used in the erection and construction of the said building; and Hitchner-Holmes Co. made claim to the fund in the amount of $866.87 by reason of a stop notice dated April 24, 1924, which said stop notice represented moneys due to the said Hitchner-Holmes Co. for materials furnished and used in the erection and construction of the said building; and Camden Materials Company made claim to the said fund in the amount of $276.41 by reason of a stop notice dated March 25, 1924, which said stop notice represented moneys due to the said Camden Materials Company for materials furnished by it and used in the erection and construction of the said building; and George Weiss Company made claim to the fund in the amount of $150 by reason af a stop notice dated May 17, 1924, which said stop notice represented moneys due to it for labor performed and materials furnished and used in the erection and construction of the said building.

And the Court, being of the opinion that the assignment by Potts Brothers & Cooperson, Inc., to the Parkside Title & Trust Company in the amount of $10,000 is not entitled to priority over the stop notices served by laborers and material men and sub-contractors prior to the expiration of sixty days after the final completion of the building pursuant to the contract, and that since the building was not finished by the contractor pursuant to the contract until after the last stop notice had been served, all

of the stop notices otherwise valid are entitled to priority over the assignment.

And the Court being further of the opinion that the attachment of C. B. Coles & Sons Company and consequently, the applying creditors, thereunder, is and are not entitled to priority over the stop notices served by laborers and material men before the money became payable because all of the stop notices in this case were filed prior to the time the money became payable to the contractor under the contract.

And the Court being further of the opinion that the attachment does not take precedence over the accepted assignment of the Parkside Title & Trust Company.

And the Court being further of the opinion that the stop notice of Smith-Austermuhl Company in the amount of $719.76 should be disallowed for the reasons that the claim of the said Smith-Austermuhl Company is for the premiums for insurance on the building during the course of construction and for the premium for the contractor's bond, both insurance and bond being contemplated by the contract, and because the said stop noticing claimant, Smith-Austermuhl Company is neither a laborer nor a material man within the contemplation of the Mechanics' Lien Act of the State of New Jersey, and therefore, not entitled to the remedy by stop notice under the said statute.

And the Court further being of the opinion that the stop notice claim of Lou A. Leibig, a sub-contractor, is valid because a sub-contractor is given a right by stop under the statute.

And the Court further being of the opinion that the stop noticing claimants are entitled to be paid regardless of the fact that part of their claims may

be due for extra work done because the contract includes extra work.

And the Court further being of the opinion that the order of distribution of the balance of the fund now in court must be, first, to the several stop noticing claimants whose claims are found to be valid in the order of the dates of the several notices—preference being given to labor claims; next, to the assignment; next, to the attaching creditors.

And it further appearing that the sum of $199.96 has been paid from the fund of $7,500 heretofore paid into this court by the complainant, to D. T. Stackhouse, solicitor for the complainant, said sum representing the costs of the complainant.

And it further appearing that the sum of $1,018.24 has been paid from the fund of $7,500 heretofore paid into this court by the complainant, to Wilfred B. Wolcott, solicitor for Edgar L. Wike, trustee in bankruptcy for Potts Brothers & Cooperson, Inc., said sum representing a reasonable fee of $750 for services rendered in this cause as said solicitor, and his costs expended.

And it further appearing that there is, therefore, on deposit in this court, the balance, amounting to the sum of $6,281.80, together with all interest accumulated thereon,

It is, thereupon, on this 8th day of April, 1927, by the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor, by virtue of the power and authority of this Court, does hereby order, adjudge and decree, that the said sum of $7,500 remaining in the hands of the complainant at the time of the filing of the bill in this cause, which said sum has been heretofore paid into this court by the complainant, and from which sum there has been paid to D. T. Stackhouse, solicitor for complainant, the sum of $199.96, and to Wilfred B. Wolcott, solicitor for defendant, Edgar L. Wike, trustee in bankruptcy for Potts Brothers & Cooperson, Inc., the sum of $1,018.24, and the balance, amount to $6,281.80, together with all accumulated interest thereon now remains on deposit in this court, be paid to the said defendants or to their respective solicitors, as follows:

Edwin A. Peterson, laborer, the sum of $107.06 with interest at 6% from the date of the service of the stop notice, January 14, 1924.

Pearce Fireproof Company, material man, the sum of $193.73, with interest at 6% from the date of the service of the stop notice, February 7, 1924.

C. B. Coles & Sons Company, material man, the sum of $3,061.47, with interest at 6% from the date of the service of the stop notice, March 18, 1924.

Lou A. Leibig, sub-contractor, the sum of $1,926.53, with interest at 6% from the date of the service of the stop notice, March 25, 1924.

Balance, if any, to Hitchner-Holmes Co., material man.

And it is further ordered, adjudged and decreed, that the said defendants, Edwin A. Peterson, Pearce Fireproof Company, C. B. Coles & Sons Company, Lou A. Leibig, be paid their costs in this cause to be taxed, and that such costs so taxed be paid out of the fund deposited in this court, and if there be any moneys due to the said Hitchner-Holmes Co., from the said fund after payment of the above-enumerated claims, with interest and taxed costs, then the said Hitchner-Holmes Co. to be paid its costs in this cause to be taxed, and that such costs

so taxed be paid out of the fund deposited in this court.

And it is hereby further ordered, adjudged and decreed, that the complainant, Harry Pinsky and Son Company, be and it is hereby discharged of and from all liability to all of the defendants as to the fund paid into court.

This decree is intended only to adjudicate and determine the rights of the several parties in the distribution of said fund and in no way to adjudicate or determine any rights that may be claimed by the Parkside Title & Trust Company against Harry Pinsky and Son Company, for personal liability on the assignment given by Potts Brothers & Cooperson, Inc., to said Parkside Title & Trust Company.

The injunction against the suit at law by Parkside Title & Trust Company against Harry Pinsky and Son Company is hereby denied unless complainant will stipulate upon appropriate supplemental pleadings to be filed to an adjudication by this Court touching personal liability upon the assignment.

E. R. WALKER,
C.

Respectfully advised:
E. B. LEAMING,
V.-C.

NOTICE OF APPEAL.

(Filed June 23, 1927.)

IN CHANCERY OF NEW JERSEY.

Between HARRY PINSKY AND SON COMPANY, *Complainant-Appellant*, and EDGAR L. WIKE, Trustee &c., *et al.* (PARKSIDE TITLE & TRUST COMPANY, Respondent), *Defendants.*	On Bill, etc. Notice of Appeal.

The complainant, Harry Pinsky and Son Company, hereby appeals to the Court of Errors and Appeals in the last resort in all causes, from so much of the final decree made in the above-entitled cause by the Chancellor, upon the advice of the Honorable Edmund B. Leaming, Vice-Chancellor, on the 8th day of April, 1927, as provides as follows:

> "This decree is intended only to adjudicate and determine the rights of the several parties in the distribution of said fund and in no way to adjudicate or determine any rights that may be claimed by the Parkside Title & Trust Company against Harry Pinsky & Son Company, for personal liability on the assignment given

by Potts Brothers & Cooperson, Inc., to said Parkside Title & Trust Company.

The injunction against the suit at law by Parkside Title & Trust Company against Harry Pinsky and Son Company is hereby denied unless complainant will stipulate upon appropriate supplemental pleadings to be filed to an adjudication by this Court touching personal liability upon the assignment."

D. T. STACKHOUSE,
Solicitor for and of Counsel with Complainant-Appellant.

Dated June 8, 1927.

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

D. T. STACKHOUSE,
Of Counsel with Complainant-Appellant.

PETITION OF APPEAL.

(Filed July 15, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between HARRY PINSKY AND SON *Complainant-Appellant,* and EDGAR L. WIKE, Trustee &c., (PARKSIDE TITLE & TRUST COMPANY, Respondent), *Defendants.*	On Appeal from the Court of Chancery. Petition of Appeal.

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

The petition of Harry Pinsky and Son Company, the appellant in the above-entitled cause, respectfully shows that:

1. Petitioner finds itself aggrieved by a final decree made in the Court of Chancery of the State of New Jersey, by the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date, April 8th, 1927, in a certain cause in the said Court of Chancery wherein petitioner was complainant and Parkside Title & Trust Company, and

ANSWER TO PETITION OF APPEAL.

(Filed August 20, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between HARRY PINSKY AND SON COMPANY, *Complainant-Appellee,* and EDGAR L. WIKE, Trustee &c., *et al.* (PARKSIDE TITLE & TRUST COMPANY, Respondent), *Defendant-Appellant.*	On Appeal from the Court of Chancery. Answer to Petition of Appeal.

The answer of Harry Pinsky and Son Company, the above-named appellee, to the petition of appeal of Edgar L. Wike, Trustee &c., *et al.* (Parkside Title and Trust Company, Respondent), the above-anmed appellant.

This appellee, 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 eighth day of April, 1927, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this

appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said decree is agreeable to equity; and they pray that the same may be affirmed with costs to be taxed in favor of this appellee.

ALBERT S. WOODRUFF,
Solicitor for and of Counsel with Appellee.

and Cooperson afterwards formed a corporation under Pennsylvania laws; and as a part of the organization of the corporation, the latter took over the performance of the contract with the complainant (p. 1, lines 35, *et seq.*).

Some extra work and material were furnished under the contract during the progress of the work (p. 2, lines 13, *et seq.*).

A number of what are comonly called "stop notices" were filed with the complainant by various laborers and material men for labor or material furnished to the job, by which it was claimed that a lien was established upon the fund in complainant's hands (p. 5, lines 35, *et seq.*).

On the 19th of September, 1923, Potts Bros. and Cooperson, Inc., made an assignment to the Parkside Trust Company of moneys due and to grow due under the construction agreement with complainant, which was signed by Potts Bros. and Cooperson, Inc., Parkside Trust Company and the complainant (p. 21).

Before the building was entirely completed, Potts Bros. and Cooperson, Inc., were thrown into bankruptcy and were adjudicated bankrupt, and one Walter Carson was appointed ancillary receiver in New Jersey of said bankrupt corporation (p. 4, l. 4). He was afterwards, however, succeeded by one Edgar L. Wike as trustee.

Suit had been commenced by the said Carson as bankruptcy receiver, against complainant to recover the amount claimed to be due upon the contract and extras, which suit ultimately resulted in judgment by the said Edgar L. Wike, trustee, against complainant for $7500.00, this coming about by virtue of a compromise effected between the parties to such suit, Wike having theretofore been substituted for Carson as plaintiff (p. 5, l. 11).

The Parkside Trust Company, on October 10, 1924, commenced a suit in the Camden County Circuit Court in an attempt to recover from complainant the sum of $10,000.00 claimed to be due to the trust company under the assignment above referred to (p. 23).

After the entry of judgment by the said Edgar L. Wike, trustee, against complainant in the suit upon the construction contract, complainant filed its bill of interpleader in the Court of Chancery of this State, setting forth the facts, and making all parties having any interest in the fund defendants to the suit, including the Parkside Trust Company (now known as West Jersey-Parkside Trust Company); and the bill prayed that the Parkside Trust Company be enjoined from the further prosecution of its suit in the said Circuit Court (p. 13, l. 21).

Neither the West Jersey-Parkside Trust Company or any other of the defendants to the Chancery suit disputed the right of the complainant to interplead, but on the contrary the West Jersey-Parkside Trust Company claimed the fund under the assignment of September 19, 1923, and filed a statement of claim pursuant to Chancery Rule 69 based on such assignment (p. 37).

After the expiration of the time limited by the Chancery rule for filing claims, complainant applied for and, without opposition, obtained, upon due notice to the trust company and all the other defendants (p. 39), an interlocutory decree which permitted it to pay the fund into Court, and thereupon discharged it from all liability to all the defendants by reason of the fund, and required defendants to interplead (p. 41).

Complainant paid the fund into Court in accordance with the interlocutory decree (p. 43).

The interpleader suit was brought on for final hearing before the Honorable E. B. Leaming, vice-chancellor; and a final decree (p. 125) was entered distributing the fund in accordance with the findings which the Vice-Chancellor had theretofore filed (p. 119). The trust company, however, received nothing under the decree by virtue of its assignment, its rights thereunder being postponed to those of the other defendants and the fund being thereby exhausted (p. 131). The trust company, by its counsel and witnesses, participated actively in the hearing (pp. 95, *et seq.*) in its attempt to obtain the fund through its assignment.

The final decree, however, contained the following provision:

> "This decree is intended only to adjudicate and determine the rights of the several parties in the distribution of said fund and in no way to adjudicate or determine any rights that may be claimed by the Parkside Title & Trust Company against Harry Pinsky & Son Company, for personal liability on the assignment given by Potts Brothers & Cooperson, Inc., to said Parkside Title & Trust Company.
>
> "The injunction against the suit at law by Parkside Title & Trust Company against Harry Pinsky & Son Company is hereby denied unless complainant will stipulate upon appropriate supplemental pleadings to be filed to an adjudication by this Court touching personal liability upon the assignment."
>
> (P. 132, lines 8, *et seq.*)

It is from this portion of the decree that the appeal was taken. None of the defendants, other than the West Jersey-Parkside Trust Company, is concerned in this appeal.

GROUNDS OF APPEAL.

The grounds upon which the complainant-appellant bases its right to relief is the refusal of the Court of Chancery to restrain the further prosecution of the suit of West Jersey-Parkside Trust Company against the complainant upon the assignment, and what is claimed to be the erroneous imposition of terms upon the complainant, upon which such restraint might be allowed.

BRIEF OF THE ARGUMENT.

I.

So far as counsel for appellant has been able to ascertain, the point involved in this appeal has never previously been before the courts of this State for adjudication; and consequently it will be necessary to present the case upon principle rather than upon precedent.

The practice which obtains in this State in interpleader suits is peculiar to this jurisdiction, and but little help can be obtained from the decisions in other States.

Rule 69 of the Court of Chancery, so far as it is pertinent to the matters in controversy in this case, provides as follows:

> "Defendant shall not plead to bills of interpleader except to contest the complainant's right to relief * * * * non-answering defendants shall, within twenty days after the return day of the subpoena * * * * file concise

> statements in writing of their several claims to the fund * * * * Causes may be brought on for final hearing by any defendant as provided for in the rules concerning litigated matters."

Thus, there is left to a defendant in an interpleader suit one of three courses.

If he asserts that the complainant has made himself personally liable to him by reason of any of the matters involved in the attempted interpleader, he may file an answer denying the complainant's right to relief; and the only issue as between the complainant and the answering defendant is whether the complainant is entitled to interplead as to the answering defendant.

If, however, the bill shows on its face that the complainant is personally liable to the defendant, the latter may move to strike out the bill as to him for want of equity.

On the other hand, if the defendant conceives that the interpleader bill is properly brought and that he desires to claim the fund in Court, his course is to avoid answering the bill and to file a statement of his claim against the fund.

II.

It should be observed that this was a strict bill of interpleader and not a bill in the nature of a bill of interpleader. The complainant asked for no relief except the protection against the assertion of claims as to which he desired the defendants to interplead.

Among the elements of relief which the complainant sought was the issuance of an injunction against

the then Parkside Trust Company, afterwards West Jersey-Parkside Trust Company, to restrain its action in the law suit. Such relief is incident to a strict bill of interpleader.

Fitzgerald v. Elliott, 18 a. 579 (not in State reports);
Kuhl v. Traphagen, 9 N. J. L. J. 343.

III.

Appellant does not concede that in consenting to the assignment by Potts Bros. and Cooperson to the Parkside Trust Company it made itself personally liable to the trust company; but whether the appellant had made itself so liable or whether the form of the assignment presented a fairly debatable question as to whether there was any personal liability by the complainant to the trust company by reason thereof, we submit is out of the case.

IV.

It is a principle which is inherent in interpleader causes and coeval with their recognition that the *complainant in such suit must have incurred no personal liability to a defendant* in respect to the matter concerning which he asks that the defendants shall be compelled to interplead.

Wakeman v. Kingsland, 46 E. 113; 18 A. 680.

If his bill shows that he has incurred any such personal liability to a defendant, the bill as to such defendant must be dismissed.

Ibid.

> "A good bill of interpleader requires that adverse claims shall be to the same thing and derived from common source; and that persons seeking relief have no claim in subject-matter or have incurred any independent liability to either of claimants."
>
> *Republic Casualty Co. v. Fishmann,* 99 E. 758; 134 A. 179.

It is, therefore, obvious, we submit, that if the defendant chooses to assert his claim against the fund in Court instead of disputing by answer the complainant's right to interplead, he thereby *ipso facto irrevocably commits himself to the position that the complainant's bill of interpleader is properly brought and that it contains all of the elements necessary to sustain a good bill of that description, among which elements is that the complainant has incurred no personal liability to the defendant,* and the Court in acting thereon by the making of a decree in favor of the complainant likewise finally decides that no personal liability exists by the complainant to the defendant by reason of any of the matters set forth in the bill.

If this were not so a defendant who deemed that his chances of success were greater against the fund in Court than they were against the complainant personally could be permitted to claim the fund in Court and then being unsuccessful in maintaning such claim be allowed to pursue his remedy personally against the complainant, which, in legal effect, he had for all time relinquished.

V.

The procedure almost invariably followed, and that which was followed in this case, is that when no dispute is raised as to the right of the complainant to interplead, to apply to the Court for a decree permitting complainant to pay the fund into Court and to have the defendants interplead as between themselves. This is usually called an interlocutory decree; but, as decided in the case of *National Bank v. White,* 93 E. 109; 115 A. 533.

> "In interpleader suits the usually so-called 'interlocutory decree' is interlocutory only as between the defendants; as between complainant and defendants it is a final decree adjudicating complainant's right to relief, compelling defendants to litigate between themselves only, *and discharging complainant not only from further participation in such litigation, but also from all liability to defendants* * * * Such decree is a decree in *personam.*"

The interlocutory decree, therefore, which was made upon due notice to the West Jersey-Parkside Trust Company *adjudicated* that the complainant's bill contained all of the elements of a good bill of interpleader, among which was, *that the complainant had incurred no personal liability to the trust company.*

Thus, we submit, the matter of the liability of the complainant in this suit to the trust company upon the alleged assignment was *res judicata,* and comes within the definition of Lord Hardwicke in *Gregory v. Molesworth,* 3 Atkins 626, which has been considered by many writers the best definition of that term, he stating that:

> "When a question is necessarily decided in effect, though not in express terms between the parties to the suit, they can not raise the same question as between themselves in any other suit in any other form."

The trust company by its act in filing a claim to the fund and not disputing the complainant's right to interplead, practically lured the complainant to paying the money into Court, and has estopped itself from now saying that it has a right to proceed against the complainant personally upon the same ground that it asserted its right to the fund.

VI.

We submit that it is a fair inference to be drawn from the circumstances that the trust company thought that its rights to the fund were paramount to that of any other of the claimants and that by asserting a claim to the fund it would receive the entire amount thereof; being disappointed in the outcome of the suit, it now claims the right to proceed personally against the complainant.

VII.

While the interlocutory decree, as stated in *National Bank v. White, supra.,* is as between the complainant and defendants, a final decree is not, we submit, final to the extent of precluding the Court of Chancery from preventing a disappointed defendant from disregarding the spirit and intent of its interlocutory-final decree by maintaining an action against the complainant based upon the identical claim to the fund in Court.

The matter being thus *res judicata* as between the complainant and the trust company, it was not only the right, but, we submit, the duty of the Court of Chancery to unconditionally prevent such disregard of its decision by appropriate process.

The case of *Sarson v. Maccia,* 90 E. 433; 108 A. 109, was an action to restrain a party from prosecuting an action at law based upon the same ground of ction upon which a decree in Chancery had been made adversely to him; and the Court in answering the contention of the defendant that the complainant had a complete and adequate defense at law, said:

> "*Res judicata* by a decree in equity is, doubtless, pleadable in the action at law, but the party holding the decree is not driven to that defense. It is the settled law of this State (and I quote from the opinion of this Court in Putnam v. Clark, 34 N. J. E. 532, affirmed by the Court of Appeals) that ——
>
> 'If, after a decree in equity, a party shall proceed at law for the same matter, equity will restrain him by injunction. Such suit at law is treated as contempt of Court, for it is gross oppression to vex another with a double suit for the same cause of action.' "

2 Lead. Cas. in Eq. 1319 (635);
Story's Eq. Jur. 889;
Joyce on Inj. 1040;
Simson v. Hart, 1 Johns. Ch. (N. Y.) 91 (a);
Washington Packet Co. v. Sickles, 24 How. 333 (16 L. Ed. 650; Id.) 5 Wall, 580 (18 L. Ed. 550).

We submit that the Court of Chancery, in its final decree, should have awarded the complainant an injunction or injunctive order against the lawsuit of the trust company; and its attempted imposition of terms upon which such injunction might issue was erroneous.

We respectfully maintain that the matter as between the complainant and the trust company was *res judicata* for all time; and that the Court of Chancery had not only precluded the trust company from maintaining its action against the complainant, but, being bound by its own decree, had likewise precluded itself by its interlocutory final decree (which decided that there was no personal liability by the complainant to the trust company) from imposing a potential personal liability by the complainant to the trust company after the distribution of the fund which was claimed by the latter in the interpleader suit. The effect of this was substantially for the Court of Chancery to say to the complainant:

> "You came into this Court with a strict bill of interpleader. We have decided that no personal liability exists by you to the trust company. We now decide that there may still be such personal liability and we will not relieve you from the gross oppression of a double suit for the same cause of action unless you will go back to the beginning and substitute for your strict bill of interpleader a bill in the nature of a bill of interpleader, even though you never intended to file such a bill and are willing to stand or fall upon your strict bill of interpleader."

We respectfully maintain that the complainant has stood and has not fallen by its bill and that the action of the Court of Chancery in refusing injunctive relief to the complainant, and the imposition of the terms contained in the final decree was erroneous.

IX.

It is well settled that an appeal will lie from an order refusing an injunction.

Chegary v. Scofield, 5 E. 525;
Morgan v. Rose, 22 E. 583.

X.

It is, therefore, respectfully submitted that the final decree of the Court of Chancery should be modified to the extent of unconditionally providing that the complainant be entitled to an injunction or injunctive order against the suit at law of the West Jersey-Parkside Trust Company against the complainant.

D. TRUEMAN STACKHOUSE,
Solicitor for and of Counsel with Complainant-Appellant.

See Addenda next Page

ADDENDA TO FOREGOING BRIEF

The Appellant has in effect although not in terms argued upon the action of the Appellee as constituting an election. Noting that the printed argument had not referred to the doctrine of election in terms, it was thought well, upon reconsideration, to make reference thereto.

It is submitted that in this case there was plainly an election by the Appellee of a remedy. Its position as to claiming a personal liability against the Appellant and at the same time asserting its right to the fund by means of the instrument which it claimed created a personal liability was absolutely inconsistent, and under well established principles wherein there are two or more co-existing remedies between which a party has a right to elect, which are inconsistent and which by some decisive act, with knowledge of the facts, it has indicated its choice, this must be deemed conclusive evidence of an election.

20 C.J. pp. 9, 19 and numerous cases in the footnotes.

While the facts in the case of BLUM BUILDING COMPANY, vs. INGERSOLL, 99 E 563 - 134 A 176, are different, the principle is the same and is discussed at length by Vice-Chancellor Backes, citing a number of cases from this and other jurisdictions.

In the case of MAXWELL vs. LEICHTMAN 72 E 780 - 65 A 1007, it was decided that the "right to file a bill of interpleader was not lost by filing pleas in bar in actions brought at law, UNLESS DEFENSE AT LAW WAS PERSISTED IN UNTIL VERDICT". In the instant case, we have, to some extent, the converse of this proposition, as Appellee persisted in pursuing its remedy against the fund until a final decree was entered in the interpleader suit, which was in effect in its favor, although it lost the substantial benefit thereof because the fund was exhausted before its claim was reached in its order of priority.

If defendants interplead without objection and go to trial on the issues, it is too late to raise the objection that the case is not a proper one for interpleader. 33 C.J. 446.

"It is the inconsistency of the demand which makes the election of one remedial right an estoppel against the assertion of the other, and not the fact that the forms of actions are different."

Citing 20 C.J. 11
Kertesz v. Feldheim - 6 Miscl. Rep. 10
139 A 704.

Respectfully submitted
D. T. STACKHOUSE
Solicitor for Appellant

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between
HARRY PINSKY AND SON COMPANY,
Complainant-Appellant,
and
EDGAR L. WIKE, Trustee, &c., *et al.* (West Jersey-Parkside Trust Company, Respondent),
Defendants.

ON APPEAL FROM CHANCERY.

BRIEF FOR RESPONDENT.

STATEMENT OF FACT.

On July 29, 1922, a contract was made by Walter R. Potts, Harrison W. Potts and Max W. Cooperson, as partners, whereby they agreed to erect a certain store building in Camden, New Jersey, for the complainant-appellant, Harry Pinsky and Son Company. The contract was duly filed in the office of the clerk of Camden County. The contract was later assigned by the contractor to a corporation formed by them and hereinafter referred to as the corporation (p. 1, l. 35, *et seq.*).

Before the completion of the building, on the 19th of September, 1923, the corporation to secure a loan from the Parkside Trust Company, the respondent herein, assigned to the trust company monies due and to grow due from appellant to the corporation.

Prior to the completion of the building, corporation was thrown into bankruptcy. Stop notices were filed by material men and for labor furnished in an effort to establish liens upon the monies which ordinarily would be paid to the contractor on the contract.

The respondent commenced suit against the appellant in the Camden County Circuit Court for $10,000, the principal sum of the assignment, basing the suit upon appellant's liability on the assignment.

In the meanwhile, by other proceedings, the amount due from appellant to the corporation, or its successors, was liquidated at $7500 (p. 5, l. 11).

Appellant filed a bill of interpleader in the Court of Chancery setting forth the foregoing facts, making all parties having any interest in the fund, including Parkside Trust Company (now known as West Jersey-Parkside Trust Company) defendants. The bill prayed that the Parkside Trust Company be enjoined from the further prosecution of its suit in the said Circuit Court (p. 13, l. 21). No answer was filed to the bill of interpleader buf after the expiration of the time limited by the Chancery Rules for filing claims, appellant obtained an interlocutory decree permitting it to pay the $7500 fund into court and requiring defendants to interplead (p. 41).

After the final hearing, in accordance with the findings of the Honorable E. B. Leaming, Vice-Chancellor, a final decree was advised distributing the fund. Respondent trust company, which had filed a claim, received nothing under said decree by virtue

of its assignment because of the fact that the other defendants who had priority, exhausted the fund (p. 131).

The final decree, however, contained the following:

> "This decree is intended only to adjudicate and determine the rights of the several parties in the distribution of said fund and in no way to adjudicate or determine any rights that may be claimed by the Parkside Title & Trust Company against Harry Pinsky & Son Company, for personal liability on the assignment given by Potts Brothers & Cooperson, Inc., to said Parkside Title & Trust Company.
>
> The injunction against the suit at law by Parkside Title & Trust Company against Harry Pinsky & Son Company is hereby denied unless complainant will stipulate upon appropriate supplemental pleadings to be filed to an adjudication by this Court touching personal liability upon the assignment" (p. 132, lines 8, *et seq.*).

Appellant appeals from this portion of the decree.

BRIEF OF THE ARGUMENT.

It appears to us that there is only one question involved in this proceeding, which question can be stated as follows:

May the trustee of a fund, by maintaining a bill of interpleader, relieve himself of personal liability to one of the defendants, a claimant of the fund, where complainant's personal liability springs from his conduct and not from the status of custodian of the fund?

Appellant bases its appeal practically upon the proposition that respondent by failing to contest appellant's bill of interpleader, barred itself from asserting personal liability on the part of the appellant to the respondent because of appellant's conduct. And in support of its contention appellant cites the case of *Wakeman v. Kingsland, et al.*, 46 N. J. E. 113, 18 Atl. 680. But in that case Vice-Chancellor Van Fleet in citing Lord Cottenham's definition of interpleader with approval, limits the issues barred to those issues connected with the fund, in the following language:

> "Plaintiff says, 'I have a fund in my possession in which I claim no personal interest, and to which you, the defendants, set up conflicting claims. Pay me my costs and I will bring the fund into court, and you shall contest it between yourselves.' The case must be one in which the fund is matter of contest between two parties, and in which the litigation between those parties will decide all their respective rights with respect to the fund."

The facts here seem to be fully in accord with the facts stated in the foregoing language. Appellant said, "I have a fund in my possession in which I claim no personal interest, and to which you, the defendants, set up conflicting claims." The sole issues involved in the proceedings in this case were with respect to the fund. The question of appellant's personal liability to respondent was not made an issue; it was not made a part of the interlocutory decree in the interpleader suit; and the final decree expressly refused to settle the issue until the facts were stipulated.

Appellant also argues that respondent speculated by claiming the fund and thus should be barred from prosecuting its suit at law.

Respondent's conduct in this respect was such against which appellant could not complain, for it was for appellant's benefit that this was done. In other words, if respondent would have been permitted to have this claim satisfied out of the fund, appellant would have been saved not only the time, expense and embarrassment of further litigation but would have been saved the possibility of having to pay a sum equal to respondent's claim over and above the amount paid into court.

We respectfully submit that appellant's argument under Section V of its brief, does not apply in the present instance because Lord Hardwicke's definition of *res judicata,* upon which that argument is based, restricts its employment to the specific matter determined in the litigation. In the Chancery proceedings heretofore taken in this case, the question of appellant's personal responsibility has not been passed upon. It may, if litigation result favorably to either appellant or respondent. The proceedings heretofore taken and this appeal can in no way add or take from appellant's personal liability.

We respectfully submit that the issue of appellant's present responsibility to respondent has never been passed upon by any court of competent jurisdiction, and that this appeal should be dismissed.

ALBERT S. WOODRUFF,
Solicitor for and of Counsel with Defendant-Respondent.