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PETITION.

Filed January, 1929.

In Chancery of New Jersey

#68-520.

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Between

WILLIAM LUNSKY,
Complainant,

and

CRITERION CONSTRUCTION Co.,
a corporation,

Defendant.

*On Bill, etc.
Petition.*

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The petition of Edward R. McGlynn, respectfully shows:

1. That he is the duly appointed, qualified and acting receiver for the creditors and stockholders of the defendant corporation.

2. That as such receiver, your petitioner did heretofore take into his possession a certain contract made between Sixty-seven South Munn, Inc., a corporation of New Jersey, and Criterion Construction Co., the defendant corporation.

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3. By the terms of said contract, the defendant corporation agreed to construct, as general contractor, an apartment house upon the land and premises commonly known and designated as #67 South Munn avenue, East Orange, Essex County, New Jersey, for the accommodation of one hundred thirteen families, for which the Sixty-seven South Munn, Inc., a corporation,

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William Lunsky vs. Criterion Construction Co.

agreed to pay to the defendant corporation a sum to be computed on the "cost plus" basis, all of which will more fully appear from an examination of the said contract.

10 4. That the said land and premises upon which the apartment house hereinabove mentioned was to be constructed were at the time of the appointment of the receiver, and still are owned by the Sixty-seven South Munn, Inc., a corporation of New Jersey, and are encumbered by the lien of two mortgages.

20 5. The first mortgage is in the sum of \$1,250,000. and was executed and delivered by the said Sixty-seven South Munn, Inc., to Guardian Trust Company, a corporation, as trustee, which mortgage is dated October 1, 1927, and is recorded in the office of the Register of Essex County. At the time of the appointment of your petitioner as receiver, all of the bonds, the payment of which the mortgage was given to secure, were held by the Bankers Bond & Mortgage Company, a corporation of Pennsylvania, having its principal office in the City of Philadelphia and there was still approximately \$369,000. to be advanced by the mortgagee at the time of the appointment of your petitioner as receiver.

30 6. The Second mortgage was given by Sixty-seven South Munn, Inc., a corporation of New Jersey, as trustee, and was dated December 14, 1927 and was recorded on December 14, 1927, in Book N 63 of mortgages for said county, on pages 56-60, which mortgage is in the nominal sum of \$865,000. Your petitioner alleges that no moneys have been advanced by the mortgagee on account of this second mortgage.

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Petition of Receiver.

7. Immediately after the appointment of your petitioner as receiver, your petitioner held several meetings with the officers of the defendant corporation and with the contractors and creditors and all were of the opinion that it would be for the best interests of all the creditors and stockholders that the building hereinabove mentioned be completed as quickly as possible. Your petitioner thereupon, on the tenth day of July, 1928, filed a petition with this Honorable Court, alleging that the receiver had entered into certain agreements with said sub-contractors for the completion of the said building and for that purpose would be obliged to expend the aggregate amount of \$600,572.03. 10

8. The petition further alleges that the persons who would perform labor and furnish materials for the completion of the building after the appointment of the receiver should be paid first, and that your petitioner had agreed to pay to those sub-contractors, approximately 60% of the amount of their contracts, in cash, as the work progressed, this said cash amount to be paid out of the moneys which were available from the proceeds of the first mortgage and from certain other moneys, in the amount of \$70,000., which the receiver borrowed upon executing and delivering to the lender first concurrent participuating certificate for said amount, in the mortgage hereinabove more particularly described. 20 30

9. Your petitioner further alleges that an order was thereafter made on July 17, 1928, authorizing, empowering and directing the receiver to carry out the plan set forth in the petition filed herein for the completion of the 40

William Lunskey vs. Criterion Construction Co.

said apartment-house building at #67 South Munn avenue, East Orange, Essex County, New Jersey, and to do all things necessary to carry out the said plan.

10 10. Your petitioner shows that immediately upon the entry of the said order, your petitioner proceeded to complete the said apartment house. During the progress of the work, your petitioner found it necessary, in order to have certain of the work performed and materials furnished, to pay all cash therefor, and a result of which the amount of cash required was greater than was anticipated.

20 11. Your petitioner also encountered considerable difficulty with certain contractors and because of conditions beyond the control of your petitioner, which conditions were unforeseen, the cost of completing the said apartment house and preserving the property and equities for the stockholders and creditors has exceeded the amount which your petitioner estimated would be necessary for the completion of the building.

30 12. Your petitioner further alleges that as a further condition for the entry of the order herein recited, it is understood and agreed that the creditors of the above-named defendant corporation would furnish materials and labor for the erection of said building prior to petitioner's appointment as receiver, were to receive a second participating interest in the second mortgage herein described in payment of their claims for such labor and material and that if any further interest was left in said second mortgage, it was to be known as a third participating interest and was to be used for the benefit of

Petition of Receiver.

general creditors for the above-named defendant corporation.

13. Your petitioner further shows that in accordance with the terms of the order herein recited, he incurred a large number of obligations and has partially paid said obligations by cash and the balance by an agreement to furnish a first participating interest in the second mortgage described in this petition. 10

14. Your petitioner further alleges that since the entry of the order herein recited, he has been informed by one Harrison Improvement Company that they claim an assignment in the sum of \$40,000. of the second mortgage herein recited, although your petitioner alleges that he has physical possession of all the notes intended to be secured by said second mortgage and that the amount of claims for materials delivered and labor furnished in the erection of the building described in this petition will, in the opinion of petitioner, more than exceed the amount due on said mortgage, and that therefore, the claim of the said Harrison Improvement Company if any, is subsequent to the participating certificates or interests authorized by the order of July 17, 1928, and should be subsequent to the interest which your petitioner desires to create by this petition and order. 20 30

15. Your petitioner alleges that the Maryland Casualty Company, a corporation, alleges to have an interest in the property which is the subject of this petition, which interest is indefinite.

16. Your petitioner now finds that it is absolutely necessary, in order to preserve the 40

William Lunsky vs. Criterion Construction Co.

assets of this estate, and in order to complete the said apartment house building in accordance with the plans and specifications, and in order for your petitioner to pay the obligations created by him as receiver, and the administration expenses, to borrow the sum of \$56,000., and to execute and deliver for that purpose a receiver's certificate, not to exceed said sum of \$56,000., which receiver's certificates shall be in the form to be approved by this Court, and shall constitute a lien upon the property, known as #67 South Munn avenue, East Orange, New Jersey, which property is more particularly described in Schedule "A" annexed hereto and made a part hereof, and shall be subsequent and second in priority to the mortgage held by the Guardian Trust Company of New Jersey, as trustee, in the sum of \$1,250,000., which mortgage is dated October 1, 1927, and is recorded in the Office of the Register of Deeds for Essex County, and shall be prior and superior to the lien of the second mortgage given by Sixty-seven South Munn, Inc., as trustee, to Guardian Trust Company of New Jersey, as trustee, which mortgage is more particularly described in paragraph 6 hereof, and shall be prior to the first and second concurrent participating interests in said mortgage, and shall also be prior to the alleged claim of the Harrison Improvement Company, and/or any claims or rights of the Maryland Casualty Company, a corporation.

WHEREFOR, your petitioner prays that he may be authorized empowered and directed to borrow the sum of \$56,000., and to execute and deliver for that purpose a Receiver's certificate, not to exceed said sum of \$56,000., which receivers' certificate shall be in the form to be approved

Petition of Receiver.

by this Court, and shall constitute a lien upon the property hereinabove described, and shall be subsequent and second in priority to the mortgage held by the Guardian Trust Company of New Jersey, as trustee, in the sum of \$1,250,000., which mortgage is dated October 1, 1927, and is recorded in the Office of the Register of Deeds for Essex County, and shall be prior and superior to the lien of a second mortgage given by Sixty-seven South Munn, Inc., as trustee, to Guardian Trust Company of New Jersey, as trustee, which mortgage is more particularly described in paragraph 6 hereof, and shall be prior to the first and second concurrent participating interests in said mortgage, and shall also be prior to the alleged claim of the Harrison Improvement Company, and/or any claims or rights of the Maryland Casualty Company, a corporation.

And your petitioner will ever pray, etc.

EDWARD R. McGLYNN,
Petitioner.

SCHEDULE "A."

All that certain tract or parcel of land situated, lying and being in the City of East Orange, in the County of Essex and State of New Jersey, bounded and described as follows:

BEGINNING at a point in the westerly side of South Munn avenue, at the northeasterly corner of lands conveyed to John W. Burgess by James N. Platt and Charles H. Jewett, surviving Executors under the last Will and Testament of John Jewett, deceased, by deed dated December 15, 1890, and recorded in Book Y-20 of Deeds for

William Lunskey vs. Criterion Construction Co.

Essex County, at page 205, said point of beginning being also five hundred and eighty-two and forty-four one-hundredths feet (582.44) northerly, as measured along the westerly side of South Munn avenue, from the corner formed by its intersection with the northerly side of Central avenue, and running thence (1) along the northerly line of lands conveyed to John W. Burgess as aforesaid, north sixty-two degrees thirty-three minutes west three hundred and five and twenty-one one hundredths feet (305.21) to the easterly side of St. Agnes lane; running thence (2) along the easterly side of St. Agnes Lane, north thirty-one degrees fifteen minutes, east one hundred and ninety-five and ninety-five one-hundredths feet (195.95) more or less, to a point in the division line between the lands herein described and the property now or formerly of Anna B. Baldwin, wife of Wilmer A. Baldwin, which line was determined and established by an agreement between said Anna B. Baldwin and Wilmer A. Baldwin, her husband, and Frederic C. Reynolds, Ethel R. Smith and Robert D. Reynolds, Executors under the Last Will and Testament of James E. Reynolds, deceased, dated March 7, 1924, and recorded in Book G-71 of Deeds for Essex County at page 34; running thence (3) along said division line south sixty-seven degrees thirty-eight minutes east, two hundred and seventy-five feet (275) to the westerly side of South Munn avenue, south twenty-two degrees forty-two minutes west two hundred and twenty and sixty-two one-hundredths feet (220.62) to the point or place of beginning.

Petition of Receiver.

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

EDWARD R. MCGLYNN, being duly sworn on his oath according to law deposes and says: that he is petitioner named in and who subscribed the foregoing petition, that he has read the said petition and knows the contents thereof and that the same is true, except as to the matters herein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

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EDWARD R. Mc GLYNN.

Subscribed and sworn to before
 me this 17th day of January,
 1929.

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S. C. DEIXEL,
 Notary Public of New Jersey.

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William Lunsky vs. Criterion Construction Co.

ORDER TO SHOW CAUSE.

Filed January, 1929.

IN CHANCERY OF NEW JERSEY.

68-520.

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Between

WILLIAM LUNSKY,

Complainant,

and

CRITERION CONSTRUCTION Co.,
a corporation,

Defendant.

On Bill, etc.

*Order to
Show Cause.*

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30 Upon reading and filing the duly verified petition of Edward R. McGlynn, the receiver herein, from which it appears among other things that the said receiver is desirous of borrowing an additional \$56,000., for the purpose of completing the building at #67 South Munn avenue, East Orange, Essex County, New Jersey, in order to preserve the assets of the estate, and to pay the obligations created by him as receiver, and to issue for that purpose a Receiver's certificate in the following form:

40 "THIS IS TO CERTIFY, that there is due to the bearer hereof from Edward R. McGlynn, Receiver for the creditors and stockholders of Criterion Construction Company, a corporation, as such Receiver, and not personally, the sum of FIFTY-SIX THOUSAND DOLLARS (\$56,000.00), with interest at six per centum per annum, from the date hereof, the principal sum to be payable on

Order to Show Cause.

the first day of October, 1929, unless previously discharged by moneys in the hands of the said Receiver.

This certificate is in the sum of FIFTY-SIX THOUSAND DOLLARS (\$56,000.00), and is issued under authority and by virtue of an order of the Court of Chancery of the State of New Jersey, dated, 1929, made in a suit where- 10
 in William Lunskey is complainant, and Criterion Construction Company, a corporation, is defendant, on notice duly given by order of said Court, which certificate and the amount thereof and secured thereby is declared to be a debt of the Receiver, incurred for the benefit, protection and preservation of the lands, premises, property and estate and for the best interests of the defendant corporation and its creditors, and which is to be a lien on all of the lands, prem- 20
 ises, property and assets of the said defendant corporation, commonly known and designated as #67 South Munn Avenue, Essex County, E. Orange, N. J. of such priority as is particularly specified in the aforementioned order of 1929, entered in the cause aforesaid, which cause is identified by reference to Chancery Docket-68, page 520. This certificate shall not be valid until countersigned by a Special Master of this Court. 30

IN WITNESS WHEREOF, I, EDWARD R. MCGLYNN, as such Receiver, but not personally, have signed this certificate this day of , 1929.

 As Receiver for the creditors
 stockholders of Criterion Con-
 struction Company, a cor-
 poration.

William Lunsby vs. Criterion Construction Co.

Countersigned: The within Certificate is issued under and by virtue of an order of the Court of Chancery, hereinabove more specifically set forth.

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Special Master in Chancery.”

It is on this 17th day of January, 1929, on motion of Edward R. McGlynn, receiver,

ORDERED, that the stockholders, creditors, receiver's contractors, sub-contractors, mortgagees, Harrison Improvement Company, Maryland Casualty Company, and all persons in interest, show cause before the Chancellor, at Chancery Chambers, Eighth floor, #1060 Broad street, Newark, New Jersey, on Tuesday, the 22nd day of January, 1929, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be made herein, authorizing, empowering and directing the receiver to borrow the sum of \$56,000., and to execute and deliver for that purpose a receiver's certificate, not to exceed said sum of \$56,000., which receivers' certificate shall be in the form approved by this Court, and shall constitute a lien upon the property hereinabove described, and shall be subsequent and second in priority to the mortgage held by the Guardian Trust Company of New Jersey, as trustee, in the sum of \$1,250,000., which mortgage is dated October 1, 1927, and is recorded in the Office of the Register of Deeds of Essex County and shall be prior and superior to the lien of the second mortgage given by Sixty-seven South Munn, Inc., as trustee, to Guardian Trust Company of New Jersey, as trustee, and shall be prior to the first and sec-

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Order to Show Cause.

and concurrent participating interests in said mortgage, and shall also be prior to the alleged claim of the Harrison Improvement Company, and or any claims or rights of the Maryland Casualty Company, a corporation; and it is further

ORDERED, that a copy of this order be served 10
upon all stockholders, creditors, receiver's contractors, sub-contractors, mortgagees, Harrison Improvement Company, Maryland Casualty Company, and all persons in interest, either personally or by mailing a copy there of to said persons, postage prepaid, addressed to their last known address within two days from the date hereof; and it is further

ORDERED, that a copy of the petition upon which 20
this order is based, shall be deposited with William L. Mullins, Sergeant-At-Arms at Chancery Chambers, 1060 Broad street, Newark, N. J., for inspection by any person in interest between the date of its issuance and the return date herein.

E. R. WALKER,
Chancellor.

Respectfully advised,

ALONZO CHURCH,
V.-C.

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William Lunsky vs. Criterion Construction Co.

PETITION.

Filed February, 1929.

IN CHANCERY OF NEW JERSEY.

68-320

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Between

WILLIAM LUNSKY,
Complainant,

and

CRITERION CONSTRUCTION Co.,
a corporation,

Defendant.

*On Bill, etc.
Petition.*

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

The Petition of EDWARD R. MCGLYNN, respectfully shows:

1. That he is the duly appointed, qualified and acting receiver for the creditors and stockholders of the defendant corporation.

30 2. That as such receiver, your petitioner did heretofore take into his possession a certain contract made between Sixty-seven South Munn, Inc., a corporation of New Jersey, and Criterion Construction Co., the defendant corporation.

3. By the terms of said contract, the defendant corporation agreed to construct, as general Contractor, an apartment house upon the land and premises commonly known and designated as #67 South Munn avenue, East Orange, Essex

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Petition of Receiver.

County, New Jersey, for the accomodation of one hundred thirteen families, for which the Sixty-seven South Munn, Inc., a corporation, agreed to pay to the defendant corporation a sum to be computed on the "cost plus" basis, all of which will more fully appear from an examination of the said contract.

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4. That the said land and premises upon which the apartment house hereinabove mentioned was to be constructed were at the time of the appointment of the receiver, and still are owned by the Sixty-seven South Munn, Inc., a corporation of New Jersey, and are encumbered by the lien of two mortgages.

5. The first mortgage is in the sum of \$1,250,000., and was executed and delivered by the said Sixty-seven South Munn, Inc., to Guardian Trust Company a corporation, as trustee, which mortgage is dated October 1, 1927, and is recorded in the office of the Register of Essex County. At the time of the appointment of your petitioner as receiver, all of the bonds, the payment of which the mortgage was given to secure, were held by the Bankers Bond & Mortgage Company, a corporation of Pennsylvania, having its principal office in the City of Philadelphia, and there was still approximately \$369,000. to be advanced by the mortgagee at the time of the appointment of your petitioner as receiver.

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6. The second mortgage was given by Sixty-seven South Munn, Inc., a corporation of New Jersey, to Guardian Trust Company, a corporation, as trustee, and was dated December 14, 1927, and was recorded on December 14, 1927, in Book N-63 of mortgages for said County, on pages 56-60, which mortgage is in the nominal

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William Lunsky vs. Criterion Construction Co.

sum of \$865,000. Your petitioner alleges that no moneys have been advanced by the mortgagee on account of this second mortgage.

10 7. Immediately after the appointment of your petitioner as receiver, your petitioner held several meetings with the officers of the defendant corporation and with the contractors and creditors and all were of the opinion that it would be for the best interest of all the creditors and stockholders that the building hereinabove described be completed as quickly as possible. Your petitioner thereupon, on the tenth day of July, 1928, filed a petition with this Honorable Court, alleging that the receiver had entered
20 into certain agreements with said sub-contractors for the completion of the said building and for that purpose would be obliged to expend the aggregate amount of \$600,572.03.

30 8. The said petitioner further alleged that the persons who would perform labor and furnish materials for the completion of the building after the appointment of the receiver should be paid first, and that your petitioner had agreed to pay to those sub-contractors, approximately 60% of the amount of their contracts, in cash, as the work progressed, this said cash amount to be paid out of the moneys which were available from the proceeds of the first mortgage and from certain other moneys, in the amount of \$70,000., which the receiver borrowed, upon agreeing to execute and deliver to the lender first concurrent participating certificate for said amount, in the mortgage hereinabove more particularly described, and to pay to the said sub-contractors
40 of 40% by agreeing to execute and deliver first

Petition of Receiver.

concurrent participating interests in said second mortgage.

9. Your petitioner further alleges that an order was thereafter made on July 17, 1928, authorizing, empowering and directing the receiver to carry out the plan set forth in the petition filed herein for the completion of the said apartment house building at 67 South Munn avenue, East Orange, New Jersey, and to do all things necessary to carry out the said plan.

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10. Your petitioner shows that immediately upon the entry of the said order, your petitioner proceeded to complete the said apartment house. During the progress of the work, your petitioner found it necessary, in order to have certain of the work performed and materials furnished, to pay all cash therefor, as a result of which the amount of cash required was greater than was anticipated.

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11. Your petitioner also encountered considerable difficulty with certain contractors, and because of conditions beyond the control of your petitioner, which conditions were unforeseen, the cost of completing the said apartment house and preserving the property and equities for the stockholders and creditors has exceeded the amount which your petitioner estimated would be necessary for the completion of the building.

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12. Your petitioner further alleges that as a further condition for the entry of the order herein recited, it was understood and agreed that the creditors of the above-named defendant corporation who furnished materials and labor for the erection of said building prior to your petitioner's appointment as receiver, were to re-

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William Lunskey vs. Criterion Construction Co.

ceive a second concurrent participating interest in the said second mortgage herein described, in payment of their claims for such labor and material, and that if any further interest were left in said second mortgage, it was to be known as a third participating interest, and was to be
10 used for the benefit of general creditors of the above-named defendant corporation.

13. Your petitioner further shows that in accordance with the terms of the order herein recited, he proceeded to complete the said building, and incurred a large number of obligations and has partially paid said obligations by cash, and the balance by an agreement to furnish a first concurrent participating interest in the said second mortgage described in this petition.

20 14. Your petitioner further alleges that since the entry of the order herein recited, he has been informed by one Harrison Improvement Company, a corporation, that it claims that it has an assignment of a \$40,000. first interest in the second mortgage herein recited, although your petitioner alleges that he has physical possession of all the notes intended to be secured by said second mortgage and that the
30 amount of claims for materials delivered and labor performed in the erection of the building described in this petition will, in the opinion of your petitioner, more than exceed the amount due on said mortgage, and that therefore, the claim of the said Harrison Improvement Company, if any, is subsequent to the participating certificates or interests authorized by the order of July 17, 1928, and should be subsequent to the interest which your petitioner desires to create by this petition and the order that may be entered
40 thereon.

Petition of Receiver.

15. Your petitioner alleges that the Maryland Casualty Company, a corporation, alleges that it has an interest in the mortgage and property which is the subject of this petition, which interest is indefinite.

16. Your petitioner now finds, that inasmuch as the only valuable asset of the estate is the interest of your petitioner in the aforementioned contract and mortgage, and inasmuch as no benefit will be derived therefrom unless the building is completed in accordance with the terms of said contract; that it is absolutely necessary in order to preserve said asset, and in order to complete said apartment house building in accordance with the plans and specifications, and in order for your petitioner to pay the obligations created by him as Receiver, and the administration expenses, to borrow the sum of \$56,000.00.

WHEREFORE, your petitioner prays that an order may be made herein, authorizing, directing and empowering your petitioner to borrow a sum of money not to exceed \$56,000.00, and either (a) to execute and deliver for that purpose a Receiver's certificate in this sum, but not to exceed \$56,000.00, which receiver's certificate shall be in the form to be approved by this court, a copy of which proposed certificate is annexed hereto and made a part thereof, marked Schedule "A," and shall constitute and be secured by a first lien upon, in and to the second mortgage given by Sixty-Seven South Munn, Inc., a corporation, to Guardian Trust Company, a corporation, as trustee, and shall be prior and superior to the first, second and third concurrent participating interest and certificates in said mortgage, and shall also be prior, superior and

William Lunsky vs. Criterion Construction Co.

paramount to the alleged claim of the Harrison Improvement Company, a corporation of New Jersey, and/or any claims or rights of the Maryland Casualty Company, a corporation, or (b) To execute to the lender an assignment of the second mortgage hereinabove more particularly described, as collateral security to the lender for the repayment of the said sum so borrowed; or (c) To execute and deliver for that purpose a Receiver's certificate, not to exceed said sum of \$56,000.00, which Receiver's certificate shall be in the form to be approved by this court, and shall constitute a lien upon the property known as No. 67 South Munn avenue, East Orange, New Jersey, and shall be subsequent and second in priority to the mortgage held by the Guardian Trust Company of New Jersey, as trustee, in the sum of \$1,250,000.00, which mortgage is dated October 1, 1927, and is recorded in the office of the Register of Deeds for Essex County, and shall be prior and superior to the lien of a second mortgage given by Sixty-Seven South Munn, Inc., to Guardian Trust Company of New Jersey, as trustee, and shall be prior to the first, second and third participating interests in said mortgage, and shall be prior and superior to the alleged claim of the Harrison Improvement Company, a corporation of New Jersey, and/or any claims or rights of the Maryland Casualty Company, a corporation; or (d) To give to the lender such security for said loan as to this Monorable Court may seem just equitable.

And your petitioner will ever pray, etc.

E. R. McGLYNN,
Petitioner.

Petition of Receiver.

SCHEDULE "A."

THIS IS TO CERTIFY, that there is due to the bearer hereof from Edward B. McGlynn, Receiver for the creditors and stockholders of Criterion Construction Company, a corporation, as such Receiver, and not personally, the sum of FIFTY-SIX THOUSAND DOLLARS (\$56,000.00), with interest at six per centum per annum, from the date hereof, the principal sum to be payable on the first day of October, 1929, unless previously discharged by moneys in the hands of the said Receiver. 10

This certificate is in the sum of FIFTY-SIX THOUSAND DOLLARS (\$56,000.00), and is issued under authority and by virtue of an order of the Court of Chancery of the State of New Jersey, dated 1929, made in a suit wherein William Lunsky is complainant, and Criterion Construction Company, a corporation, is defendant, on notice duly given by order of said Court, which certificate and the amount thereof, and secured thereby is declared to be a debt of the Receiver, incurred for the benefit, protection and preservation of the lands, premises, property and estate and for the best interests of the defendant corporation and its creditors, and which is to be a lien on all of the property and assets of the said defendant corporation, of such priority as is more particularly specified in the aforementioned order of 20 30

1929, entered in the cause aforesaid, which cause is identified by reference to Chancery Docket 68, page 520. This certificate shall not be valid until countersigned by a Special Master of this Court.

William Lunsby vs. Criterion Construction Co.

IN WITNESS WHEREOF, I, EDWARD R. McGLYNN, as such Receiver, but not personally, have signed this certificate this day of 1929.

10 As Receiver for the Creditors and Stockholders of Criterion Construction Company, a corporation.

COUNTERSIGNED: The within certificate is issued under and by virtue of an order of the Court of Chancery, hereinabove more specifically set forth.

Special Master in Chancery.

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

EDWARD R. McGLYNN, being duly sworn on his oath according to law deposes and says: that he is the petitioner named in and who subscribed the foregoing petition, that he has read the said petition and knows the contents thereof and that the same is true, except as to the matters herein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

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E. R. McGLYNN.

Subscribed and sworn to before me
this 7th day of February, 1929.

S. C. DREXEL,
A Notary Public of N. J.

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Order to Show Cause.

ORDER TO SHOW CAUSE.

Filed February, 1929.

IN CHANCERY OF NEW JERSEY.

68-520.

10

Between

WILLIAM LUNSKY,
Complainant,

and

CRITERION CONSTRUCTION Co.,
a corporation,

Defendant.

On Bill, etc.
Order to
Show Cause.

20

Upon reading and filing the duly verified petition of Edward R. McGlynn, the receiver herein, from which it appears among other things that the said receiver is desirous of borrowing an additional \$56,000 for the purpose of completing the building at No. 67 South Munn avenue, East Orange, Essex County, New Jersey, in order to preserve the assets of the estate, and to pay the obligations created by him as receiver and to issue for that purpose a receiver's certificate in the following form:

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This is to certify that there is due to the bearer hereof from Edward R. McGlynn, receiver for the creditors and stockholders of Criterion Construction Company, a corporation, as such receiver, and not personally, the sum of fifty-six thousand dollars (\$56,000), with interest at six per centum per annum, from the date hereof, the principal sum to be payable on the 14th day of

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William Lunsky vs. Criterion Construction Co.

December, 1932, unless previously discharged by moneys in the hands of the said receiver.

10 This certificate is in the sum of fifty-six thousand dollars (\$56,000), and is issued under authority and by virtue of an order of the Court of Chancery of the State of New Jersey, dated
 20 , 1929, made in a suit wherein William Lunsky is complainant, and Criterion Construction Company, a corporation is defendant, on notice duly given by order of said Court, which certificate and the amount thereof, and secured thereby, is declared to be a debt of the receiver, incurred for the benefit, protection and preservation of the lands, premises, property and estate and for the best interests of the defendant corporation and its creditors, and which is
 30 to be a lien on all of the property and assets of the said defendant corporation, of such priority as is more particularly specified in the aforementioned order of , 1929, entered in the cause aforesaid, which cause is identified by reference to Chancery Docket 68, page 520. This certificate shall not be valid until countersigned by a Special Master of this Court.

30 IN WITNESS WHEREOF, I, Edward R. McGlynn, as such receiver, but not personally, have signed this certificate this day of , 1929.

As Receiver for the Creditors and Stockholders of Criterion Construction Company, a corporation.

Countersigned: The within certificate is issued under and by virtue of an order of the Court of Chancery, hereinabove more specifically set forth.

Order to Show Cause.

It is on this 13th day of February, 1929, on motion of Edward R. McGlynn, receiver,

ORDERED, that the stockholders, creditors, receiver's contractors, sub-contractors, mortgagees, Harrison Improvement Company, a corporation; Maryland Casualty Company, Sixty-seven South Munn, Inc.; Guardian Trust Company of New Jersey, and all other persons in interest show cause before the Chancellor, at Chancery Chambers, Eighth floor, No. 1060 Broad street, Newark, New Jersey, on the 26th day of February, 1929, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be made herein, authorizing, empowering and directing the receiver to borrow a sum of money not to exceed \$56,000, and either

(a) To execute and deliver for that purpose a receiver's certificate in this sum, not to exceed \$56,000, which receiver's certificate shall be in the form to be approved by this Court, and shall constitute and be secured by a first lien upon, in and to the second mortgage given by Sixty-seven South Munn, Inc., a corporation, to Guardian Trust Company, a corporation, as trustee, and shall be prior and superior to the first, second and third concurrent participating interest and certificates in said mortgage, and shall also be prior, superior and paramount to the alleged claim of the Harrison Improvement Company, a corporation of New Jersey, and/or any claims or rights of the Maryland Casualty Company, a corporation; or

(b) To execute to the lender an assignment of the second mortgage hereinabove more particularly described, as collateral security to the lender for the re-payment of the said sum so borrowed; or

William Lunsky vs. Criterion Construction Co.

(c) To execute and deliver for that purpose a receiver's certificate, not to exceed said sum of \$56,000, which receiver's certificate shall be in the form to be approved by this Court, and shall constitute a lien upon the property known as No. 67 South Munn avenue, East Orange, New Jersey, and shall be subsequent and second in priority to the mortgage held by the Guardian Trust Company of New Jersey, as trustee, in the sum of \$1,250,000, which mortgage is dated October 1, 1927, and is recorded in the office of the Register of Deeds for Essex County, and shall be prior and superior to the lien of a second mortgage given by Sixty-seven South Munn, Inc., to Guardian Trust Company of New Jersey, as trustee, and shall be prior to the first, second and third participating interests in said mortgage, and shall be prior and superior to the alleged claim of the Harrison Improvement Company, a corporation of New Jersey, and/or any claims or rights of the Maryland Casualty Company, a corporation; or

(d) To give to the lender such security for said loan as to this Honorable Court may seem just and equitable.

And it is further ORDERED, that a copy of this order be served upon all stockholders, creditors, receiver's contractors, sub-contractors, mortgagees, Harrison Improvement Company, a corporation; Maryland Casualty Company, Sixty-seven South Munn, Inc.; Guardian Trust Company of New Jersey, a corporation, and all other parties in interest, either personally, or by mailing a copy thereof to the said persons, postage prepaid, addressed to their last known address within five days from the date hereof; and it is further

Order to Show Cause.

ORDERED, that a copy of the petition upon which this order is based, shall be deposited with William J. Mullins, sergeant-at-arms, at Chancery Chambers, 1060 Broad street, Newark, N. J., for inspection by any persons in interest between the date of its issuance and the return date herein.

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E. R. WALKER,
Chancellor.

Respectfully advised.

JOHN H. BACKES,
V.-C.

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William Lunsky vs. Criterion Construction Co.

**AFFIDAVIT ON BEHALF OF HARRISON.
IMPROVEMENT COMPANY, MORTGAGEE.**

Filed February 26, 1929.

IN CHANCERY OF NEW JERSEY.

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Between

WILLIAM LUNSKY,
Complainant,

and

CRITERION CONSTRUCTION Co.,
a corporation,

Defendant.

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On Bill, etc.

*Affidavit on
Behalf of
Improvement
Company,
Mortgagee,
In re:
Petition for
Receiver's
Certificates.
Docket 68,
Page 520.*

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

WILLIAM OKIN, of full age, being duly sworn, on his oath, according to law, deposes and says:

30 I am the Vice-President of the Harrison Improvement Company, a New Jersey corporation, and had charge of the matters and things herein-below set forth for said Harrison Improvement Company.

40 On or about December 14, 1927, The Sixty-seven South Munn, Inc., a New Jersey corporation, executed a trust mortgage in the sum of \$865,000 to the Guardian Trust Company of New Jersey, trustee, covering the lands and premises in the City of East Orange, known as No. 67 South Munn avenue, and more particularly described in said mortgage, which on December 14,

Affidavit of Harrison Imp't Co., Mortgagee.

1927, was recorded in the Essex County Register's office in book N-63 of Mortgages for Essex County, page 57. This is the mortgage which is described as the second mortgage in the petition of Edward R. McGlynn, receiver of the Criterion Construction Co. in the above-entitled cause.

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Said mortgage recited that it was made for the purpose of securing the notes representing moneys which will be due and owing by the Sixty-seven South Munn, Inc., a corporation, to the Criterion Construction Company, a corporation of New Jersey, under the terms, covenants and conditions of a certain contract for building, dated September 7, 1927, and described in said mortgage.

Upon information and belief said mortgage was also accompanied by and secured the bond (as further evidence of said indebtedness) of The Sixty-seven South Munn, Inc., to the Guardian Trust Company of New Jersey, trustee, in the penal sum of \$1,730,000 conditioned for the payment of said sum of \$865,000 five years from its date, the said bond being likewise dated on or about December 14, 1927.

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On or about December 13, 1927, said Criterion Construction Company for valuable consideration to it paid by the Harrison Improvement Company assigned to the Harrison Improvement Company a superior interest of \$40,000 in and to said \$865,000 mortgage aforescribed and recorded in book N-63 of Mortgages for Essex County, page 57, and the obligations secured thereby.

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The consideration mentioned in the preceding paragraph consisted of the following:

On or about December 13, 1927, the Harrison Improvement Company loaned to the said Cri-

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William Lunsky vs. Criterion Construction Co.

terion Construction Company the sum of \$40,000 and to secure repayment of said sum to Harrison Improvement Company, Criterion Construction company assigned said superior interest of \$40,000 as aforesaid to Harrison Improvement Company.

10 The Criterion Construction Company paid \$16,500 to Harrison Improvement Company in reduction of said indebtedness and also some interest payments and Harrison Improvement Company is still entitled to a superior interest of \$23,500 by way of principal plus accrued and accruing interest in and to said mortgage and the obligations secured thereby.

20 Said Criterion Construction Company has earned more than enough moneys under the terms and conditions of said mortgage to cover said superior interest of \$40,000 in and to said mortgage and the obligations secured thereby; that the entire contract mentioned in said mortgage is substantially completed so that the entire sum of \$865,000 by way of principal is owing under said mortgage.

30 On or about June 27, 1928, Edward R. McGlynn was appointed statutory receiver of the Criterion Construction Company by order of the Court of Chancery of New Jersey. At that time the Criterion Construction Company held a contract, as contractor, with The Sixty-seven South Munn, Inc., a New Jersey corporation, as owner, to erect upon the lands and premises in question a large apartment house and when said receiver was appointed the said apartment house building was about two-thirds or more completed.

40 The contract for the erection of said apartment house building was made some time in or about September, 1927, and the arrangement for

Affidavit of Harrison Imp't Co., Mortgagee.

financing same was substantially as follows: A first mortgage in the sum of \$1,250,000 mentioned in paragraph 5 of the receiver's petition was executed and delivered by the said The Sixty-seven South Munn, Inc., to the Guardian Trust Company, as trustee, to secure bonds held by the Bank Bond and Mortgage Company, a Pennsylvania corporation, for which said Bankers Bond and Mortgage Company then and there paid to the Guardian Trust Company, as trustee, the sum of \$1,250,000 in payment of said bonds less the premium on same and certain other deductions, leaving the cash payment to the trustees about \$1,100,000; at the same time, The Sixty-seven South Munn, Inc., executed and delivered to the Guardian Trust Company, as trustee, a mortgage in the sum of \$867,000 which mortgage was a second lien on the premises in question, being a subsequent lien to the mortgage of \$1,250,000, together with a series of notes totaling the sum of \$67,000, secured by said second mortgage, said notes being made payable to the Criterion Construction Company, said notes being delivered to the Guardian Trust Company, as trustee. The building contract between The Sixty-seven South Munn, Inc., as owner and Criterion Construction Company, as contractor, provided that payments be made on the building contract monthly on requisitions certified by certain architects to the Guardian Trust Company, as trustee, which trustee was then to make such certified payments to the Criterion Construction Company, the contractor, as follows: Fifty-five per cent. of said payment in cash from the \$1,250,000 first mortgage fund and forty-five per cent. of said payment in promissory notes from the series of notes totaling \$865,000 in its posses-

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William Lunskey vs. Criterion Construction Co.

sion as trustee and secured by the said second mortgage. The Criterion Construction Company commenced work under said contract and went ahead with same until the appointment of Edward R. McGlynn, as receiver of the Criterion Construction Company, as aforesaid, on or about
10 June 27, 1928.

The work done under said contract by the Criterion Construction Company and not paid for in cash and secured by said second mortgage when the receiver herein was appointed amounted to approximately \$500,000.

In paragraph 5 of the receiver's petition herein, it is stated that approximately \$369,000 remained to be advanced on the first mortgage of \$1,250,000 when said receiver was appointed
20 herein, indicating that about \$700,000 worth of work was paid for in cash and since only about fifty-five per cent. was paid in cash, the work done and not paid for in cash and secured by said second mortgage amounted to at least the sum of \$500,000 at the time of the appointment of the receiver herein.

Said receiver has been informed of the interest of the Harrison Improvement Company in and to said second mortgage of \$865,000, he having
30 examined deponent in connection with this matter on January 15, 1929.

When deponent was examined by said receiver said receiver told him that the premises were substantially completed and that he had incurred some obligations in connection with the completion of same.

Deponent further says that said apartment house building, No. 67 South Munn avenue, East Orange, is now about forty per cent. rented and
40 occupied.

Affidavit of Harrison Imp't Co., Mortgage.

Deponent alleges for and on behalf of the Harrison Improvement Company that one of the prime purposes of the petition of the receiver is to imperil the equity of the Harrison Improvement Company by placing a new lien in the sum of \$56,000 ahead of its superior interest in said \$865,000 mortgage.

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WILLIAM OKIN.

Sworn and subscribed to before
me this 19th day of January,
1929.

JEREMIAH F. HOOVER,
Master in Chancery of
New Jersey.

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William Lunsky vs. Criterion Construction Co.

ORDER AUTHORIZING RECEIVER TO BORROW \$56,000, AND TO ISSUE RECEIVER'S CERTIFICATE.

Filed February 27, 1929.

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IN CHANCERY OF NEW JERSEY.

68-520.

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Between

WILLIAM LUNSKY,
Complainant,

and

CRITERION CONSTRUCTION Co.,
a corporation,

Defendant.

On Bill, etc.

*Order
Authorizing
Receiver to
Borrow
\$56,000, and
to Issue
Receiver's
Certificate.*

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This matter being opened to the Court by Edward R. McGlynn, Receiver herein, in the presence of Louis N. Batoff, Esq., of Sundheim, Folz & Sundheim, appearing for Bankers Bond & Mortgage Co., Aaron Marder, of Marder & Okin, solicitors for the Harrison Improvement Company; Samuel H. Meisterman, Esq., solicitor for J. Rose & Company; Archie H. Ormand, Esq., solicitor for Van Keuren & Son; Lindabury, Depue & Faulks, solicitors for creditors, and it appearing that the Receiver has heretofore filed his petition herein, from which it appears that the Receiver is desirous of borrowing an additional sum of \$56,000.00, for the purpose of completing the building at 67 South Munn avenue, East Orange, Essex County, New Jersey, in pursuance to the terms of a contract made by and

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Order Authorizing Receiver to Borrow \$56,000.

between Sixty-Seven South Munn, Inc., a corporation, and Criterion Construction Company, the defendant corporation, dated October 10, 1927, in order to preserve the assets of the estate, and to pay the obligations created by him as Receiver, and to issue for that purpose a Receiver's certificate in the form hereinafter more particularly described, and praying that he may be authorized, directed and empowered to borrow a sum not in excess of \$56,000.00, and to secure the lender thereof, and the Court having examined the petition on file herein, and having heard argument of counsel, and being of the opinion that it is necessary that the Receiver borrow the sum of \$56,000.00 in order to preserve the assets of the defendant estate, and in order to complete said apartment house building in accordance with the said contract, and in order for the Receiver to pay the obligations created by him, and the administration expenses, it is on this 26th day of February, 1929, on motion of Edward R. McGlynn, Receiver,

ORDERED, that the Receiver be and he is hereby authorized, empowered and directed to borrow a sum not to exceed \$56,000.00, and to execute and deliver to the lender for that purpose a receiver's certificate in this sum, which receiver's certificate shall be in the following form:

This is to certify that there is due to the bearer hereof from Edward R. McGlynn, Receiver for the creditors and stockholders of Criterion Construction Company, a corporation, as such Receiver, and not personally, the sum of Fifty-six Thousand Dollars (\$56,000.00), with interest at six per centum per annum, from the date hereof, the principal sum to be payable on the 14th day of

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Order Authorizing Receiver to Borrow \$56,000.

Countersigned: The within Certificate is issued under and by virtue of an order of the Court of Chancery hereinabove more specifically set forth.

Special Master in Chancery.

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which shall constitute and be, and the same is hereby ordered, adjudged and decreed to be a first lien upon the assets of the company, and upon, in and to the second mortgage given by Sixty-Seven South Munn, Inc., a corporation, to Guardian Trust Company, a corporation, as trustee, and shall be prior and superior to the first, second and third concurrent participating interest and certificates in said mortgage, and shall also be prior, superior and paramount to the alleged claim of the Harrison Improvement Company, a corporation of New Jersey, and/or any claims or rights of the Maryland Casualty Company, a corporation; and it is further

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ORDERED, that the order heretofore entered herein on July 17, 1928, insofar as the same is affected by this order, be and the same is hereby modified; and it is further

ORDERED, that the Receiver be and he hereby is authorized, empowered and directed to execute such instrument or instruments as may be necessary to carry out the purpose of this order.

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E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

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William Lunsky vs. Criterion Construction Co.

**ORDER APPOINTING RECEIVER AND
ORDER TO SHOW CAUSE.**

Filed June 27, 1928.

IN CHANCERY OF NEW JERSEY.

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Between

WILLIAM LUNSKY,
Complainant,

and

CRITERION CONSTRUCTION Co.,
a corporation of New Jer-
sey,

Defendant.

*On Bill, &c.
Order
Appointing
Receiver and
Order to
Show Cause.*

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This matter being presented to the Court, and it appearing that a bill of complaint has been filed herein together with affidavit, from which it appears to the Court that the defendant has suspended its ordinary business for want of funds to carry on the same, and is not about to resume its business within a short time hereafter, and application being made for the appointment of a receiver; and it further appearing that the defendant corporation has filed here-

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with an answer, admitting the allegations of said bill and its consent to the appointment of receiver and the Court being satisfied of the sufficiency of the said application, and of the truth of the allegations contained in said bill,

It is on this 27th day of June, 1928, on motion of Nicholas La Vecchia, Esq., solicitor for and of counsel with the complainant,

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ORDERED, that the Criterion Construction Co., a New Jersey corporation, be and it is hereby

Order Appointing Receiver, &c.

declared to have suspended its ordinary business for want of funds to carry on the same, and is not about to resume its business within a short time hereafter, and it is further

ORDERED, that an injunction issue against the said company, according to the prayer of the bill of complaint and that said Criterion Construction Co., a corporation, its officers, servants and agents absolutely desist and refrain, and they are hereby enjoined and restrained from exercising any of its privileges or franchises and from collecting or receiving any debts, or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects, except to a receiver appointed by this court; and it is further

ORDERED, that Edward R. McGlynn, of Newark, N. J., be and he is hereby appointed receiver for the creditors and stockholders of the said defendant corporation, with all the powers incident thereto, and that he do and perform all the duties imposed upon him and required by law and especially by an act entitled "An Act Concerning Corporations (Revision of 1896)" and the acts supplementary thereto and amendatory thereof; and it is further

ORDERED, that the said receiver, before he shall enter upon his duties as such receiver, shall take the oath prescribed by law, and give a bond to the Chancellor of the State of New Jersey, in the sum of \$50,000 conditioned for the faithful performance of his duties, to be approved as to form and security thereof by a Special Master of this Court; and it is further

ORDERED, that this order shall supersede and take the place of an order heretofore entered in this cause dated June 26, 1928; and it is further

William Lunsky vs. Criterion Construction Co.

ORDERED, that said receiver shall have the power to conduct the business of the above named defendant corporation and for that purpose, make contracts for the completing of the building or for the preservation of any property of said defendant corporation and if, in his discretion, the same becomes necessary, have the power to borrow a sum not exceeding the sum of \$10,000 for the purpose of protecting and preserving the property of said defendant corporation; and it is further

ORDERED, that the said receiver shall take possession of all the property and assets of the said defendant corporation and account for the same as this Court shall hereinafter direct, and that the said defendant company, its officers, directors and agents shall forthwith assign, transfer, convey and deliver to the said receiver all of the property and assets of the said corporation, both real and personal, wheresoever situated, and of whatsoever it may consist; and it is further

ORDERED, that the said receiver have full authority and power to demand, sue for, collect and receive and take into his possession all the goods, chattels, rights, credits, moneys and effects, lands and tenements, books, papers and records, choses in action, notes and property of any and every description, belonging to the said defendant corporation, or to which it may be entitled, and to sell, convey and assign any or all of the real estate of the said corporation, and to do and perform all duties imposed upon him, and required by law, and especially by an act entitled "An Act Concerning Corporations (Revision of 1896)" and the acts supplementary thereto and amendatory thereof; and it is further

Order Appointing Receiver, &c.

ORDERED, that the said defendant company, its officers and agents, and all persons claiming under it, shall be and they are hereby restrained from interfering with said receiver taking possession of and managing said property, and that all persons whosoever and especially the creditors of the said defendant corporation, shall be and they are hereby restrained from bringing any action or proceeding at law or otherwise against the said defendant company, and from taking any further proceedings in any action or proceeding heretofore commenced; and it is further

ORDERED, that the creditors and stockholders of the defendant corporation show cause before this Court on July 3, 1928, at ten o'clock in the forenoon, of that day, or as soon thereafter as the matter can be heard, at Chancery Chambers, Industrial Building, No. 1060 Broad street, Newark, N. J., why the said receiver should not be continued, or why some other person should not be appointed receiver in his place, or with him as co-receiver, and that a copy of this order, which need not be certified, be mailed to all creditors and stockholders of the defendant corporation, at their last known post office addresses, within two days from the date hereof.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

William Lunsky vs. Criterion Construction Co.

**ORDER CONTINUING APPOINTMENT
OF RECEIVER.**

Filed July 3, 1927.

IN CHANCERY OF NEW JERSEY.

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Between

WILLIAM LUNSKY,
Complainant,

and

CRITERION CONSTRUCTION Co.,
a corporation of New Jer-
sey,

Defendant.

*On Bill, &c.
Order Con-
tinuing Ap-
pointment of
Receiver.*

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This matter coming on regularly to be heard in the presence of Nicholas La Vecchia, solicitor for and of counsel with the complainant, Harry Green, of the law firm of Green & Green, solicitor for and of counsel with the defendant corporation, Edward R. McGlynn, receiver herein, and others, and it appearing to the Court that an order was made herein on June 26, 1928, which order was superseded by an order of this Court made on June 27, 1928, by which it was ordered, adjudged and decreed that the Criterion Construction Co., a New Jersey corporation, be and it is hereby declared to have suspended its ordinary business for want of funds to carry on the same, and is not about to resume its business within a short time hereafter, and Edward R. McGlynn was appointed receiver for the creditors and stockholders of the defendant corporation, and which order further required creditors and stockholders of the defendant cor-

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Order Continuing Appointment of Receiver.

poration to show cause before this Court on July 3, 1928, at ten o'clock in the forenoon, or as soon thereafter as counsel could be heard, to show cause why the receiver should not be continued, or why some other person should not be appointed receiver in his place, or with him as co-receiver; and it appearing that due notice was given to the creditors and stockholders of the defendant corporation as was required, and it further appearing that the defendant corporation has filed its answer admitting the allegations of the bill of complaint and consenting to the appointment of the receiver, it is on this 3rd day of July, 1928, on motion of Nicholas La Vecchia, solicitor for and of counsel with the complainant, 10

ORDERED, that Edward R. McGlynn, of Newark, N. J., be and he hereby is appointed and continued as receiver for the creditors and stockholders of the defendant corporation, with all powers incident thereto, and that he do and perform all the duties imposed upon him and required by law, and especially by an act entitled "An Act Concerning Corporations (Revision of 1896)" and the acts supplementary thereto and amendatory thereof; and it is further 20

ORDERED, that in addition to the foregoing, the receiver have all of the powers as are more particularly set forth in the order made herein on June 27, 1928. 30

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

William Lunsky vs. Criterion Construction Co.

PETITION.

Filed July 10, 1928.

IN CHANCERY OF NEW JERSEY.

10 *Between*

WILLIAM LUNSKY,
Complainant,

and

CRITERION CONSTRUCTION Co.,
a corporation,
Defendant.

On Bill, &c.
Petition.

20 To His Honor, Edwin Robert Walker, Chancellor
of the State of New Jersey:

The petition of Edward R. McGlynn, respectfully shows:

1. That your petitioner is the duly appointed, qualified and acting receiver for the creditors and stockholders of the defendant corporation.

30 2. That as such receiver your petitioner has taken into his possession certain real estate and property of the defendant corporation.

40 3. That among the assets of the defendant corporation your petitioner has taken possession of a certain contract made between Sixty-Seven South Munn, Inc., a corporation and Criterion Construction Co., the defendant corporation, by the terms of which, among other things, the defendant corporation agreed to construct, as general contractor, an apartment house upon the property commonly known and designated as 67 S. Munn avenue, East Orange, Essex County,

Petition of Receiver.

New Jersey, for the accommodation of 113 families, for which the Sixty-Seven South Munn, Inc., a corporation, agreed to pay to the defendant corporation upon the "cost-plus" basis, and your petitioner is advised that if the apartment house were fully completed in accordance with the terms of the contract, the defendant corporation would have been entitled to receive approximately \$1,800,000, all of which will more fully appear from an examination of the original contract. 10

4. Your petitioner has made an investigation, and finds that the property which is now owned by the Sixty-Seven South Munn, Inc., is encumbered by the lien of two mortgages.

5. The first mortgage is in the sum of \$1,250,000, and was given by the Sixty-Seven South Munn, Inc., to Guardian Trust Company of New Jersey, a corporation, as trustee, which mortgage is dated October 1, 1927, and is recorded in the office of the Register of Essex County. 20

6. Your petitioner is advised and verily believes that all of the bonds, the payment of which this mortgage is given to secure, are held by the Bankers Bond & Mortgage Company, a corporation of Pennsylvania, having its principal office in the City of Philadelphia, and your petitioner is advised that all of the funds have not yet been advanced by this mortgage, and that there is still approximately \$369,000 to be advanced, which sum will be available and will be paid to your petitioner, to be used for the completion of the building. 30

7. The second mortgage was given by Sixty-Seven South Munn, Inc., a corporation, to the 40

William Lunsky vs. Criterion Construction Co.

Guardian Trust Company, as trustee, dated December 14, 1927, and was recorded on December 14, 1927 in the Register's office of Essex County, in Book N-63 of Mortgages for Essex County, pages 56-60, which mortgage is in the sum of \$865,000, in which mortgage this defendant will, upon completion become entitled to an interest of approximately \$565,000.

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8. Your petitioner is advised that no moneys have been advanced upon this second mortgage, and that this mortgage may be used by your petitioner in arranging for the payment of the claims of certain creditors, in accordance with the plan for completing the building, as is hereafter more particularly set forth.

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9. Your petitioner has held meetings with the officers of the defendant corporation and with the sub-contractors, and all agreed that it would be for the best interests of all of the creditors and stockholders that the building hereinabove mentioned be completed as quickly as possible.

10. To this end your petitioner has entered into certain agreements with the following sub-contractors for the completion of the said apartment house and building:

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Otis Elevator Co.
 New York Cornice & Skylight Works
 R. T. Donaldson, Inc.
 Van Kueren & Son
 Sheridan & Milko
 Orange Lighting Fixture Mfg. Co.
 Levy Bros. Co., Inc.
 C. J. Moll & Co.
 Rudolph Bloomfield
 Abe Fiedler

40

Petition of Receiver.

Dyer Hardware, Inc.
 Art Decorating Co.
 Louis Menkof
 Solondz Bros.
 Henry Belden & Max Lunsky
 Albert & Kernahan, Inc.
 M. Leavitt
 Beach Electric Co.

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11. In addition to the amounts of the contracts with the above sub-contractors, your petitioner will be obliged to expend other moneys in this connection, the aggregate amount and cost of completing the building is \$600,572.03.

12. In order that the building may be completed, your petitioner has agreed, subject to the approval of this Honorable Court, to pay the several sub-contractors, and to provide for the payment of those persons who performed labor and furnished materials in connection with the erection of this building prior to the appointment of the receiver, in accordance with the following plan:

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13. The estimate which your petitioner has received for the completion of the work is \$600,572.03.

14. The aggregate amount still due to the creditors who performed labor and furnished materials prior to the appointment of the receiver upon this building is approximately \$142,000.

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15. Your petitioner is of the opinion that those creditors who will perform labor and furnish materials for the completion of the building should be paid first, and to this end has agreed, subject to the approval of this Honorable Court, to pay to those sub-contractors

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William Lunsky vs. Criterion Construction Co.

approximately sixty per cent. of the amount of their contracts in cash as the work progresses, this amount to be paid out of the \$360,000 now available. For the balance of their claims, your petitioner has agreed, subject to the confirmation and approval of this Honorable Court, to execute and deliver to each sub-contractor a first concurrent participation certificate in the mortgage made by Sixty-Seven South Munn, Inc., a corporation, to Guardian Trust Company of New Jersey, a corporation, as trustee, dated December 14, 1927, and recorded December 14, 1927 in Book N-63 of Mortgages in the Register's office of Essex County, at pages 56-60.

16. Your petitioner is of the opinion that the amount of cash available will not be sufficient to pay approximately sixty per cent. in cash on all of the claims, but your petitioner can arrange to borrow \$75,000, upon executing and delivering to the lender a first concurrent participating certificate in the mortgage hereinabove more particularly described, for this amount.

17. For the payment of the persons who performed labor and furnished materials upon this building prior to the date of the appointment of the receiver, your petitioner has agreed, subject to the approval of this Honorable Court, to execute and deliver concurrent participating certificates in the above mentioned mortgage, which concurrent participating certificates shall be second and inferior to the first concurrent participating interests.

WHEREFORE, your petitioner prays that:

(a) An order may be made authorizing, empowering and directing your petitioner to enter into and execute agreements with the several

Petition of Receiver.

sub-contractors hereinabove more particularly described, for the completion of the building commonly known and designated as No. 67 S. Munn avenue, East Orange, Essex County, N. J., and to enter into such other contracts as may be incidental and necessary to the completion of the said building.

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(b) That the contracts already entered into by and between your petitioner and the several contractors, all of which is more particularly set forth in this petition be approved by this Honorable Court.

(c) That your petitioner be authorized, empowered and directed to obtain the sum of \$75,000 in cash by executing and delivering to the lender a first concurrent participating certificate to the mortgage hereinabove more particularly described.

20

(d) That your petitioner be authorized, empowered and directed to pay to the several sub-contractors who are to perform labor and furnish materials in the completion of this building the sum of approximately sixty per cent. of the amounts of their several contracts, in cash, as the work progresses, out of the cash now in the hands of your petitioner, and the sum of \$75,000 to be borrowed by your petitioner.

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(e) That your petitioner be authorized, empowered and directed to do all things necessary in order to carry out the plan hereinabove set forth, and in order to effectively and expeditiously complete the said building.

And your petitioner prays for such other and further relief as may be equitable and just in the premises.

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William Lunskey vs. Criterion Construction Co.

And your petitioner will ever pray, etc.

EDWARD R. McGLYNN,
Petitioner.

10 STATE OF NEW JERSEY, }
COUNTY OF ESSEX. }ss.

EDWARD R. McGLYNN, being duly sworn on his oath according to law, deposes and says: that he is the petitioner named in and who subscribed the foregoing petition, that he has read the said petition and knows the contents thereof and that the same is true, except as to the matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

20 EDWARD R. McGLYNN.

Subscribed and sworn to before
me, this 10th day of July, 1928.

ISRAEL B. GREENE,
Master in Chancery of N. J.

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Order for Receiver to Complete Building, &c.

ORDER PERMITTING RECEIVER TO COMPLETE BUILDING, ETC.

Filed July 17, 1928.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p style="padding-left: 40px;">WILLIAM LUNSKY, <i>Complainant,</i></p> <p style="padding-left: 80px;"><i>and</i></p> <p style="padding-left: 40px;">CRITERION CONSTRUCTION Co., a corporation, <i>Defendant.</i></p>	}	<p><i>On Bill, &c.</i></p> <p><i>Order Per-</i> <i>mitting Re-</i> <i>ceiver to</i> <i>Complete</i> <i>Building at</i> <i>No. 67 South</i> <i>Munn Ave.,</i> <i>East Orange,</i> <i>and to Enter</i> <i>into Agree-</i> <i>ments with</i> <i>Sub-Con-</i> <i>tractors.</i></p>	<p>10</p> <p>20</p>
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This matter coming on to be heard in the presence of Edward R. McGlynn, receiver herein, and Nicholas La Vecchia, Esq., solicitor for the complainant herein and Insley, Vreeland & Decker, solicitors of Federal Terra Cotta Company, Carlyle Garrison, solicitor of Reliance Fireproof Door Co., Zucker & Goldberg, solicitors for creditors, Jacob I. Kaplan, Simon L. Fisch, Elias B. Kanter and others, solicitors for creditors,

And it appearing that the receiver herein has heretofore filed a petition, from which it appears that the receiver has taken possession of a certain contract made by and between Sixty-Seven South Munn, Inc., a corporation, and Criterion Con-

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William Lunsky vs. Criterion Construction Co.

struction Co., the defendant corporation, and that there is still due approximately \$369,000 to be advanced out of the proceeds of a certain first mortgage affecting the property located at No. 67 South Munn ave., East Orange, N. J., upon which there is in the course of construction an apartment house for the accommodation of 113 families, which sum will be available and will be paid to the receiver, to be used for the completion of the building, and that the said property is encumbered by the lien of a second mortgage, in the sum of \$865,000, which mortgage was given by the Sixty-Seven South Munn, Inc., a corporation of New Jersey, to the Guardian Trust Company, as trustee, on December 14, 1927, and was recorded on December 14, 1927, in the Register's office of Essex County in Book N-63 of Mortgages for Essex County, pages 56-60, in which mortgage the defendant will, upon completion of the building, become entitled to an interest of approximately \$565,000;

And it appearing that the receiver has entered into certain agreements with certain persons for the completion of said apartment house and building, and that the receiver will be obliged to expend other moneys in completing the building, the aggregate amount and cost of completing being approximately \$600,572.03;

And it appearing that the receiver has agreed, subject to the approval of this court, to pay the said several sub-contractors and to provide for the payment of those persons who performed labor and furnished materials in connection with the building prior to the appointment of this receiver, in accordance with a certain plan which is more particularly set forth in the petition filed herein, and in the several contracts

Order for Receiver to Complete Building, &c.

entered into by and between the receiver and the several sub-contractors;

And it appearing that in order to pay in cash to the said several sub-contractors a sum equal to approximately sixty per cent. of the amount necessary to complete the building, the receiver will be obliged to arrange to borrow \$75,000 upon executing and delivering to the lender a first concurrent participating certificate in a certain second mortgage hereinabove mentioned for this amount;

And it appearing that due notice of the filing of the petition and the making of this application has been given to all sub-contractors, creditors, stockholders, and mortgagees and Maryland Casualty Company, and all persons in interest and the Court having heard argument of counsel and being satisfied that it is for the best interests of all stockholders and creditors that the plan set forth in the petition filed herein be carried out by the receiver,

It is on this 17th day of July, 1928, on motion of Edward R. McGlynn, receiver herein,

ORDERED, that the receiver be and he hereby is authorized, empowered and directed to carry out the plans as set forth in the petition filed herein for the completion of the apartment house building at No. 67 South Munn ave., East Orange, Essex County, New Jersey, to wit, as follows:

The receiver be and he hereby is permitted and authorized to expend the entire balance of the proceeds of the first mortgage made by Sixty-Seven South Munn, Inc., to Guardian Trust Company of New Jersey, on October 1, 1927, amounting to approximately \$369,000 and in addition thereto be authorized and empowered to borrow the sum of \$75,000 in cash by executing and de-

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William Lunskey vs. Criterion Construction Co.

livering to the lender a first concurrent participating interest and certificate in the second mortgage hereinabove more particularly described, and to use said loan together with the proceeds of the first mortgage loan above described for the payment insofar as the same
10 will apply, of the labor and materials necessary to complete said contract of construction, and is authorized and empowered to execute and deliver for the balance of the cost of completion of said contract of construction first concurrent participating certificates in and to the second mortgage which second mortgage was made by the Sixty-Seven South Munn, Inc., to Guardian Trust Company of New Jersey, as trustee on December 14, 1927, recorded December 14, 1927 in Book N-63
20 of Mortgages, pages 56-60, and the receiver is further authorized and empowered to pay for all labor performed and material used in the construction of the said building up to the date of the appointment of the receiver, by executing and delivering to the several laborers and materialmen who have performed labor and furnished material in connection with the erection of the said building, second concurrent participating certificates in and to said second mortgage hereinabove described which participating interest
30 shall be second and subsequent in priority to the first participating interest hereinabove described, and

It is further ordered that the remaining interest in said second mortgage, if any, which interest shall be third and subsequent to the first and second participating interests hereinabove mentioned, shall be held by the receiver, together with all other assets of said defendant corporation, for the payment of claims of general
40 creditors,

Order for Receiver to Complete Building, &c.

And it is further ordered that the making of this order shall not in any manner operate to prejudice the rights of the receiver and/or the mortgagee, and/or creditors, and/or owner as against the Maryland Casualty Company, a corporation, and it is further

ORDERED, that the receiver enter into agreements with the several sub-contractors as is more particularly set forth in the petition filed herein for the completion of the said work; and it is further 10

ORDERED, that the agreements which the receiver has heretofore made with Otis Elevator Co., New York Cornice & Skylight Works, R. T. Donaldson, Inc., VanKueren & Son, Sheridan & Milko, Orange Lighting Fixture Mfg. Co., Levy Bros. Co., Inc., C. J. Moll & Co., Rudolph Bloomfield, Abe Fiedler, Dyer Hardware, Inc., Art Decorating Co., Louis Menkof, Solondz Bros., Henry Belden & Max Lunsky, Albert & Kernahan, Inc., Beach Electric Co., who are the several contractors for the completion of the said apartment house be and the same are hereby approved; and it is further 20

ORDERED, that the receiver be and he hereby is authorized and empowered to borrow the sum of \$75,000 in cash by executing and delivering to the lender a first concurrent participating interest and certificate in the second mortgage hereinabove more particularly described; and it is further 30

ORDERED, that the receiver be authorized, empowered and directed to pay to the said several sub-contractors who are to perform labor and furnish materials, the sum of approximately sixty per cent. of the amounts of their several contracts, in cash, as the work progresses, out of 40

William Lunsky vs. Criterion Construction Co.

the cash now in the hands of the receiver and out of the sum of \$75,000 to be borrowed by the receiver; and it is further

10 ORDERED, that the receiver be and he hereby is authorized, empowered and directed to do all things necessary to carry out the plan herein-
above set forth and in order to effectively and expeditiously complete the said building.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

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Testimony.

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM LUNSKY,
Complainant,

and

CRITERION CONSTRUCTION COM-
PANY,

Defendant.

On Bill, &c.

*Receiver's
Hearing.*

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Transcript of stenographer's notes of testi-
mony in the above-entitled cause, taken before
Edward R. McGlynn, Esq., receiver, at the offices
of Stein, McGlynn & Hannoeh, 17 Academy
street, Newark, New Jersey, on Tuesday, the
fifteenth day of January, A. D. 1929, at three
o'clock in the afternoon. 20

Appearances:

Aaron Marder, Esq., attorney for Harrison
Improvement Company.

(Julian Coval sworn as stenographer.)

In re the alleged assignment of the Harrison
Improvement Company.

Mr. Marder: We are here for the Harrison
Improvement Company, ready to give to the
receiver all the information and knowledge that
we possess in connection with the \$865,000 trus-
tee second mortgage on premises 67 South Munn
avenue, East Orange, in order to facilitate the
administration of the estate; but we claim an
absolute prior interest in and to said second
mortgage and the obligation secured thereby, and
by giving this information and submitting to this
examination, we do not submit to the jurisdiction 40

William Lunsky vs. Criterion Construction Co.

of the receiver to pass upon the validity of our interest in and to the said mortgage and the obligation secured thereby. Our position is that the sole way in which such validity can be established is by a plenary action.

10 The Receiver: The only purpose of this hearing is to ascertain the facts in connection with the claim made by the Harrison Improvement Company, as evidenced by a letter of December 13, 1927, addressed to the Guardian Trust Company, to 67 South Munn, Inc., and to the New Jersey National Bank and Trust Company.

WILLIAM OKIN, being duly sworn according to law, on his oath testified as follows:

20 *By the Receiver.*

Q Mr. Okin, what office do you hold in the Harrison Improvement Company? A I am vice-president and treasurer.

Q You have been so for how long? A Since the company first incorporated, I think.

Q That is quite some time ago, isn't it? A A number of years.

30 Q The paper that you have and which you produced before me purports to be an assignment made by the Criterion Construction Company to the Harrison Improvement Company of a superior interest of \$40,000 in a mortgage made by 67 South Munn, Inc., a corporation of New Jersey, which mortgage was given to secure the payment of \$865,000 and recorded in the Register's office of Essex County and assigned to the Criterion Construction Company by the Guardian Trust Company. It appears to be dated December 13, 1927, signed by the Criterion
40 Construction Company, William Lunsky, presi-

Testimony of William Okin.

dent, Phil J. Lifspchutz, and acknowledged on the 13th day of December, 1927, and not recorded. It bears the stamp of
 Is that the assignment in which the Harrison Improvement Company claims an interest? A Yes.

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(Paper referred to was received in evidence and marked Exhibit P. 1 of this date.)

Q How much do you claim is due under this assignment? A There is due \$23,500 and accrued interest.

Q What were the circumstances under which the claim arose? A They paid us on account of this \$40,000, or on account of a debt—

Q Suppose you give me all the facts in connection with the matter? A The Harrison Improvement sold to Lunsky's company the plot on Munn avenue on which this apartment house is built, and for part of the purchase money took back a forty-thousand-dollar purchase money mortgage. We sold it to one of Lunsky's companies. 20

Q You took back the purchase money on the plot on Munn avenue? A Yes. This sale was made to him some time either in December, 1926, or January, 1927; that is my recollection— in the winter of 1926 or 1927. The following year Lunsky came to me and told me that he had prepared plans for a ten or twelve-story apartment house and had made a mortgage loan of a million and a quarter from the Bankers Bond and Mortgage Company of Philadelphia, that the mortgages were executed and that he had arranged to get a completion bond for the erection of the building by his Criterion Construc- 30 40

William Lunsky vs. Criterion Construction Co.

tion Company or a building contract with the company holding the title, and that the Bankers Bond and Mortgage Company was to make a first payment at the time the mortgages were recorded, in order to clear up the then existing liens on this building, so that their mortgage would be a first lien. He told me that he had told them about the mortgages prior to ours which I think totaled \$95,000 and that they were prepared to pay these mortgages off, but that the payments he was getting would not be sufficient to pay our mortgage off, and he wanted to arrange with us to cancel our mortgage at that time and give us some other security for the debt. After some negotiations with him we finally agreed to cancel this mortgage on payment of the \$40,000 to us and agreed further to loan him that \$40,000 immediately, in order to aid him in putting up the amount of cash he had to put up at the time to clear this property of the mortgage debts, to pay for the completion bond and other items in connection with the matter that he had to pay for. He explained to me at that time, as I remember, that he had to put up about \$46,000 or \$47,000 in order to close this transaction and get this first payment, and it was arranged that for this \$40,000 which we were to get in payment of this mortgage and which we would loan back to his Criterion Construction Company, he would give us as security a prior interest of \$40,000 in this mortgage of \$865,000, which was explained by him and by Mr. Cohen, who handled the transaction, was already an executed instrument payable to the Guardian Trust Company as trustee under this arrangement. He gave us this assignment and, in addition, to secure this debt, executed to us a

Testimony of William Okin.

mortgage of \$40,000. I had better correct that. He allowed us to use as additional security for this debt, a mortgage which had already been executed to us in anticipation of this thing, made by the Criterion to us for \$40,000 and covering the property on Central avenue, between—

Q Burnett and Eppert streets? A Yes.

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Q Was that mortgage to the Harrison Improvement or to the Berwyn Estates? A I don't remember.

Q Which ever name it is, it would not make any difference, because both companies are controlled by you and your associations? A Yes, sir; they are the same stockholders. As a matter of fact, the stock of the Harrison Improvement Company is owned by Berwyn Estates. That is the actual situation there.

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Q So the mortgage on Central avenue had been given in anticipation of this arrangement?

A I wasn't quite correct on that statement. As I think of it now, it comes a little clearer to me.

When he first came to us with this proposition, he told us that our mortgage of \$40,000 on Munn avenue was supposed to run for two or three years, that in order to close this deal with the Bankers Mortgage Company it was necessary to get our mortgage out of the way, because they

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wanted a first lien, and when I suggested that we subordinate our mortgage to the million and a quarter Bankers Mortgage Company's, he said

that would not do, because as part of this arrangement with the Bankers Mortgage Company

the mortgage of \$865,000 also had to be executed and it had to be a second lien, and it appearing

that we either had to cancel our mortgage entirely or to subordinate it to both mortgages, so that

ours would be a third lien, which we didn't want

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William Lunsky vs. Criterion Construction Co.

to do, he finally arranged to give us \$20,000 on account, and for the other \$20,000 he would give us an assignment in this prior interest of \$865,000 and execute to us a mortgage on the Central avenue property.

10 Q Why was the Central avenue mortgage made for \$40,000? A For the simple reason that at that time he wasn't sure he could pay us anything. We told him we wanted \$20,000. He said he was going ahead with this arrangement and he didn't want to be held up at the last minute, so it was suggested that a mortgage for \$40,000 be drawn and whatever he paid us at the time would be so much less. The day he closed this in Joe Cohen's office—I think Joe Cohen closed this for the U. S. Mortgage and Title, who
20 were closing for the Bankers Mortgage and Bond Company—or, rather, the date he came to us he said he could not give us the twenty but he could give us the twenty out of the next payment he got from the Bankers Mortgage Company. So we closed the matter in this way: He executed this assignment of \$40,000 to us and authorized us to use this \$40,000 Central avenue mortgage by them to secure this loan of \$40,000 we made him. We made the loan in this way: We authorized Joe Cohen to take the forty thousand
30 that he got from the Bankers Bond and Mortgage Company in settlement of our mortgage and loan it to Lunsky, so that Lunsky would be able to pay out the moneys he had to pay out at that closing. As I understand, in addition to this \$40,000 Lunsky gave Cohen something like six or seven thousand dollars to make it a total of \$46,000 or \$47,000 that Cohen had to pay out for him at the time. This \$20,000 that he was to give us out of the following payment he did
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Testimony of William Okin.

not pay in full. However, when he did get that following payment, he sent us a check for \$15,000 and a note for \$5,000. Subsequently, when that note came due, he reduced it and renewed it again, and when it came due the second time he made another reduction on it, and there is now due on that note, in addition to interest, thirty-five hundred; so I figure that we got from him on account of the debt \$16,500, reducing it to \$23,500. 10

Q That sum of \$23,500 is secured by a mortgage on Central avenue? A By this assignment and a mortgage of \$40,000 covering the Central avenue property.

Q That Central avenue property is property which the Towne Holding Company— A Owns.

Q (Continuing.) Purchased from the receiver? 20

A Right.

Q What connection has the Towne Holding Company with the Berwyn Estates and the Harrison Improvement Company? A The Towne Holding Company is a company of which we are the stockholders company—that is, the individuals in the Berwyn Estates control, anyway—and we left the title in the Towne Holding Company, so that the title and the mortgage won't merge. 30

Q You knew, then, as vice-president of the Harrison Improvement Company, that the Criterion Construction Company was in the hands of the receiver? A I knew when it occurred.

Q Shortly afterward? A Shortly afterward.

Q This letter which was written to the parties mentioned in the first part of the hearing is the first notice you have given to anyone since the receivership of any claim to be made under this assignment which has been produced here 40

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today, is it not? A That is the first formal notice we made to either the receiver or the bank.

10 Q You never brought it informally to the receiver before? A I thought that the receiver knew of it, because I was under the impression that Lunsky had told him about it. I never bothered notifying the receiver.

20 Q You never recorded this assignment? A I never recorded that assignment, because that in itself would have been useless to do. I knew that the mortgage had been made in the name of the Guardian Trust Company. I knew that under the arrangement with the Bond and Mortgage Company and the general plan worked out at the time this thing was first started, the mortgage would not come into the possession of the Criterion Construction Company until the building was completed. Then it was to be assigned. I figured we would not record our assignment until the bank's assignment to the Criterion was recorded.

30 Q But you were informed at the time, as you have related, that Mr. Lunsky spoke to you, of the general nature of this \$865,000 mortgage? I knew about what it was given for. Mr. Cohen and Mr. Lunsky told me.

Q Were you told at that time that it was to secure notes which were to be given to the Criterion Construction by 67 South Munn avenue, representing part of the contract price for the erection of the building? A Yes.

Q Representing the difference between the cash payment on the mortgage— A He had read a copy of the agreement.

40 Q So you knew that the general scheme of that mortgage was to secure notes? A I knew that the plan was to secure notes.

Testimony of William Okin.

Q Were you given any of the notes secured by that mortgage? A No, the notes—I was told by Mr. Cohen that it was in possession of the Guardian Trust Company and was to be turned over to the Criterion with cash as each payment was made to the Criterion.

Q The time when you made your arrangements with Lunsky was before any work had been started on the building, naturally? A Before any work had been started on the building, yes. I think some work had been started on the garages before that. 10

Q You knew that the mortgage of a million and a quarter was a construction mortgage and was to be advanced as the building progressed? A I knew that. 20

Q You say you read a copy of the agreement under which the \$865,000 came into being? A The building agreement, yes, sir. 20

Q Now, the Towne Holding Company, or corporation, really holds title to this property for the benefit of the stockholders of the Berwyn Estates and the Harrison Improvement Company, do they not? You said it was a mere holding company which was designed to keep the title, so that the mortgages and title would not merge, isn't that so? A The object of getting the Towne Holding Company was to prevent the Workmen's Building and Loan Association from proceeding with this foreclosure. 30

Q The fact is that the Towne Holding Company took title from the receiver of this real estate on Central avenue subject to the Workmen's Building Loan and subject to the \$40,000 mortgage that you described here? A Yes. 40

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By Mr. Marder.

Q How long have you been in the real estate business? A Twenty years or more.

Q Will you tell us whether in your opinion that \$40,000 mortgage has any real equity?

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The Receiver: What mortgage?

Mr. Marder: Covering the Central avenue property.

The Witness: Well, my best answer to that is that if the building loan was to proceed with its foreclosure, we who held the \$25,000 mortgage prior to this forty, would not attempt to protect them and let it go at a sheriff's sale.

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Q The building and loan mortgage has due how much? A There is due the building and loan association at the present time in excess of half a million dollars.

Q The taxes were paid? A Including the taxes there is \$510,000 due the building and loan association with interest.

Q On top of that, is your mortgage of twenty-five— A Twenty-five, which we have, and then this mortgage of forty thousand.

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Q Did you get any other security at all in connection with this transaction? A No.

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Contract.

CONTRACT.

THIS AGREEMENT made and concluded this 7th day of Sept., 1927, by and between THE SIXTY-SEVEN SOUTH MUNN, INC., a corporation of the State of New Jersey, hereinafter called *OWNER*, and CRITERION CONSTRUCTION COMPANY, a corporation of the State of New Jersey, hereinafter called *CONTRACTOR*. 10

W I T N E S S E T H :

That the *CONTRACTOR* in consideration of the agreements herein made with the *OWNER* as follows:

ARTICLE I—The *CONTRACTOR* shall and will provide all the materials and perform all the work and labor required for the erection, construction and completion of a certain ten-story and basement steel, brick and stone apartment dwelling house, and one-story garage on the lot of ground known as 67 South Munn Avenue, East Orange, New Jersey, in strict accordance with the drawings, plans and specifications prepared by Harold F. Clark, hereinafter called *ARCHITECT*, which drawings, plans and specifications have been approved in writing, thereon endorsed by the *ARCHITECT* and/or engineer of BANKERS BOND AND MORTGAGE COMPANY, a Pennsylvania corporation, hereinafter called *BANKERS*, and are further identified by signatures of the parties hereto, and are hereby made part of this contract—a copy of which so approved and so identified is on file with *BANKERS*. 20 30

ARTICLE 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 and to the satisfaction of the said 40

William Lunsby vs. Criterion Construction Co.

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 so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Article I hereof.

ARTICLE III—No work shall be considered as extra, nor shall any extra charge or claim be made for any work done or for materials supplied, unless a separate estimate in writing for the same shall have been submitted by the *CONTRACTOR* to the said *OWNER* and the approval in writing of the *OWNER* and *BANKERS* obtained thereto or unless an agreement with respect thereto shall, before the work is done and materials are supplied, have been first reduced to writing and approved in writing by the *OWNER* and the *BANKERS* stipulating the amount of the labor and work to be done and material to be furnished and the amount therefor to be paid. The *OWNER* shall have the right with the approval of the *BANKERS* to order additions to or deviations or eliminations from or changes in the plans and specifications without in any other respect or particular varying this agreement, but no extra charge shall be made by the *CONTRACTOR* for any such additions, deviations, changes or eliminations from the plans and specifications of any sort or kind, except upon written order signed by the *OWNER* and approved by the *BANKERS*,

Contract.

stipulating the amount of the extra cost to be paid by the *OWNER* therefor. If, by reason of deviations or changes or eliminations, a saving can be effected by the *CONTRACTOR* in the cost of construction, allowance for such saving shall be made therefor, and the contract price shall be thereby reduced. Should the *OWNER* and *CONTRACTOR* not agree as to the amount or cost of extra work or deviations or changes, or of the savings therefrom or from eliminations, the work shall proceed under the written order of the *OWNER*, approved by *BANKERS*, and the cost or amount of said extras or savings shall be referred to the *ARCHITECT*, whose decision thereon shall be final, and the contract price shall be increased or diminished by the amount as thus determined by the *ARCHITECT*. If, by reason of any changes of any kind in the plans and specifications made in conformity with the above provisions, the time for the completion of the building should properly be extended, claim therefor shall be made by the *CONTRACTOR* in writing, addressed to the *ARCHITECT*, and a copy thereof shall be delivered by *CONTRACTOR* to *BANKERS* and the *OWNER*, in conformity with the provisions of Article VIII, and the *ARCHITECT'S* decision as to whether any, or, if any, how much, additional time shall be allowed for the entire completion of the building, shall be final and conclusive. It is expressly understood and agreed by and between the parties hereto that the contract price hereinafter mentioned for the erection, construction and completion of the improvement shall not be increased or extras claimed by reason of any changes in the foundation, excavation, or by reason of any changes in plans and specifications required to

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William Lunsky vs. Criterion Construction Co.

be made in order to conform to the rules, regulations or ordinances of the Bureau of Building Inspection or other governmental authority, all of which orders shall be complied with by the contractor without additional cost to the owner.

10 *ARTICLE IV*—The said *CONTRACTOR* shall be considered an independent contractor and shall be answerable for any loss or damage caused by itself or its sub-contractors, or the agents or employees of it or its sub-contractors, and the said *CONTRACTOR* agrees fully to indemnify, protect and save harmless the said *OWNER* against loss, damage or expense as to all claims, damages or liabilities resulting from accident, negligence or any other cause whatever on the part of the said *CONTRACTOR*, its sub-contractors, or any of them during and in and about
20 the performance of this contract and any contract for extra work or supplementary hereto. The said *OWNER* shall not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said work or any part thereof, or to any of the materials or other things done, furnished or supplied by the said *CONTRACTOR* by reason of any casualty or by reason of any act, default or omission of the said
30 *CONTRACTOR* or of any sub-contractor under it, them or their agents or employees, or of any other party who may be engaged in furnishing any work or supplying any materials under this contract in the erection and construction of the said structure.

40 *ARTICLE V*—The *CONTRACTOR* shall provide, or cause to be provided, sufficient, safe and proper facilities at all times for the inspection of the work by the *OWNER*, *BANKERS*, and/or the *ARCHITECT*, and its or their authorized

Contract.

representatives, and 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 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, at *CONTRACTOR'S* expense, make good all work damaged or destroyed thereby.

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ARTICLE VI—Should the *CONTRACTOR* at any time refuse or neglect to supply or cause to be provided 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 *CONTRACTOR*, to provide any such labor or materials, and to deduct that cost thereof from any money then due or thereafter to become due to the *CONTRACTOR* 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 *CONTRACTOR* 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

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William Lunsky vs. Criterion Construction Co.

the employment of the *CONTRACTOR*, it 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
10 the *OWNER* in finishing the work, such excess shall be paid by the *OWNER* to the *CONTRACTOR*; but if such expense shall exceed such unpaid balance, the *CONTRACTOR* 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 con-
20 clusive upon the parties.

ARTICLE VII—In case the *OWNER* and *CONTRACTOR* fail to agree in relation to matters of payment, allowance or loss referred to in this contract, or should either of them dissent from the decision of the *ARCHITECT* referred to in Article VIII hereof, 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
30 Board of Arbitration to consist of one person selected by the *OWNER* and one person selected by the *CONTRACTOR*, 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.

ARTICLE VIII—The *CONTRACTOR* shall commence work hereunder on or before the 15th day of Sept., 1927, upon receiving written notice
40 from the *OWNER* to proceed with the work, and

Contract.

shall complete the entire performance of this contract as speedily as possible, working with the utmost diligence and promptness, and with such expedition that on or before September 15th, 1928, the performance of this contract shall be completed. Should the *CONTRACTOR* be delayed in the completion of the work by the act, neglect or default of the *OWNER*, by fire or other cause or casualty for which *CONTRACTOR* is not responsible, by strikes or lockouts in no wise caused by or resulting from default or collusion on the part of *CONTRACTOR* 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 of the causes aforesaid, but no allowance or extension of time for the completion of this contract shall be made to the *CONTRACTOR* unless a claim therefor is presented by the *CONTRACTOR* to the *ARCHITECT* in writing within forty-eight hours after the discovery by the *CONTRACTOR* of the occurrence causing such delay, and the parties agree that the *ARCHITECT'S* decision, whether there shall be any extension and the duration of it, shall be final and conclusive. Copies of all such claims for extension of time shall be delivered by the *CONTRACTOR* to *BANKERS* and to *OWNER* simultaneously with the filing of said claims with the *ARCHITECT*.

If in the opinion of the *ARCHITECT* the contract is not substantially completed by September 15, 1928, the *CONTRACTOR* shall pay to the *OWNER* the sum of Three Hundred Dollars (\$300.00) for each day's delay thereafter until the contract is completed, said sum of money being agreed on by the parties hereto to be the liquidated damages for delay in substantially

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William Lunsky vs. Criterion Construction Co.

completing the contract, and the *OWNER* shall have the right to deduct the amount of such liquidated damages from any moneys due and payable by the *OWNER* to the *CONTRACTOR* after September 15, 1928.

10 *ARTICLE IX*—The *CONTRACTOR* expressly agrees for itself, its successors and assigns, that it will execute a postponement in writing of its claim or rights to any mechanics' lien or claim upon the premises for materials furnished or labor performed as against the lien of the first mortgage to be executed by the owner to the *GUARDIAN TRUST COMPANY*, as Trustee, and hereinafter referred to, and further expressly agrees for itself, its successors and assigns, that it will procure from all sub-contractors and persons, firms or corporations furnishing materials or labor in connection with the erection of the said building, a like postponement in writing of their right to mechanics' liens or claims upon the aforesaid premises as against said first mortgage. This covenant and agreement that all persons, firms or corporations, who furnish materials or perform labor shall execute in writing a postponement of their right to mechanics' lien or claim in favor of the said mortgagee shall be an independent covenant and shall operate and be effective as well with respect to work and labor done and materials furnished under any supplemental agreement or contract for extra work in the erection and construction of said buildings as to work and labor done and materials furnished under the within contract.

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This contract, or a duplicate thereof, together with plans and specifications accompanying same, or copies thereof, shall be filed and recorded in the Office of the Clerk of the County of Essex

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Contract.

before any work is done or materials furnished for the building. But in case any work is so done or any materials are so furnished, then the *CONTRACTOR* shall produce and deliver to the *OWNER* the written postponements, in duplicate, of all persons who may have done work or furnished materials postponing any lien which they might or could have on said building and/or said land to the lien of the first mortgage hereinabove referred to, with an affidavit by the *CONTRACTOR* thereto annexed that no person or persons other than those named in said postponement or postponements have any lien upon the building or land for work done or materials furnished for the erection of said building. One original postponement shall be deposited by the *OWNER* with the GUARDIAN TRUST COMPANY OF NEW JERSEY, hereinafter more particularly referred to.

ARTICLE X—In consideration of the faithful performance of this contract by the *CONTRACTOR* and the performance of the work and supplying of materials as herein set forth, the *OWNER* agrees to pay to the *CONTRACTOR* the sum of One Hundred and Fifty Thousand Dollars (\$150,000.00) in addition to the actual net cost of the buildings as herein defined. By actual net cost set forth herein is meant all sums which the *CONTRACTOR* shall expend in the erection and completion of the buildings as called for by the plans, excepting office expenses, rent, salaries, light and other office charges of the *CONTRACTOR* at its main office in East Orange, New Jersey. The *CONTRACTOR* will not include in the cost of the building the salaries of the executive officers of the corporation, but the salaries of its superin-

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William Lunsby vs. Criterion Construction Co.

tendent in actual charge of the erection of the building herein set forth and such foremen and clerks who may be located at the buildings on this contract, shall be included in the cost of the buildings. As part of the net cost of the buildings, the *CONTRACTOR* will include the
10 actual cost to the *CONTRACTOR* in the preparation, inspection, delivery and removal of materials, tools and equipment; all expenditures for superintendence and payrolls, the cost of equipment and expense of temporary office at the buildings; the cost of liability and compensation insurance. All perishable tools, materials and supplies delivered to the buildings by the *CONTRACTOR* for temporary purposes shall be
20 charged to the cost for the work not exceeding standard market prices. All lumber and other materials and supplies left over after completion shall be sold for the best prices obtainable and the proceeds will be paid to the *CONTRACTOR* and credited as a reduction in the cost of the buildings.

ARTICLE XI—WHEREAS, it has been decided to erect the buildings above described, and whereas a careful and conservative estimate of the entire cost of the buildings shows that
30 it should not exceed the sum of One Million Seven Hundred Thousand Dollars (\$1,700,000.00) exclusive of the aforementioned sum of One Hundred Fifty Thousand Dollars (\$150,000.00) the *OWNER* agrees to pay to the *CONTRACTOR* twenty-five percent (25) of any saving effected below the figure. The *OWNER* agrees to pay to the *CONTRACTOR* the aforesaid approximate sum of One Million Eight Hundred Fifty Thousand Dollars (\$1,850,000.00) in the
40 following manner:

Contract.

(a) On or before the 5th day of each month, the *CONTRACTOR* shall submit to the *ARCHITECT* and to *BANKERS* a detailed statement of the value of the work done, labor furnished, and materials delivered and put in place, during the preceding month, proportioned to contract price. This statement shall then be checked over by the *ARCHITECT* who shall thereupon determine the correctness of the items and fix the proper amount thereof; and on or before the 10th day of each month issue his certificate for ninety per centum (90%) of all the items embraced within the said monthly statement, which certificate shall then be approved by *BANKERS*; and on or before the 15th day of each month when so certified and approved, shall be paid by the *OWNER* to the *CONTRACTOR* at the times and in the manners as follows:

(b) Of said contract price, the sum of One Million Seventeen Thousand Five Hundred Dollars (\$1,017,500.00) shall be paid in cash by the *OWNER* to the *CONTRACTOR*, ninety per centum (90%) in monthly installments as hereinbefore provided, and the balance upon completion, as hereinafter provided. The balance of said contract price, to wit, the sum of Eight Hundred Thirty-two Thousand Five Hundred Dollars (\$832,500.00) shall be paid by the *OWNER* to the *CONTRACTOR*, ninety per centum (90%) in monthly installments, the balance upon completion, as hereinafter provided, in notes of the *OWNER* with interest thereon at six per centum (6%) per annum, payable semi-annually, maturing within five (5) years from the date thereof, to be secured by a second mortgage in the form attached hereto, marked "A", and made a part hereof, and said second

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William Lunsby vs. Criterion Construction Co.

mortgage shall be subject only to the lien of One Million Two Hundred Fifty Thousand Dollars (\$1,250,000.00) first mortgage bonds and the mortgage securing the same to be given and executed by *OWNER* to *GUARDIAN TRUST COMPANY OF NEW JERSEY*, as trustee, and

10 more particularly described in a certain proposal made by *OWNER* to *BANKERS* dated the 25th day of April, 1927, and accepted with certain modifications by *BANKERS* on June 8th, 1927. The said notes and the said second mortgage, securing the same shall at all times be subordinate to the lien, liens, title and security of the said first mortgage bonds and of the first mortgage securing the same, regardless of the time

20 of the negotiation, sale or disposition of all or any of the said first mortgage bonds, and of the time when the proceeds thereof shall have been received. The said amount of Eight Hundred Thirty-two Thousand Five Hundred Dollars (\$832,500.00) shall be diminished to the extent that a saving is effected in the net cost of the building below One Million Seven Hundred Thousand Dollars (\$1,700,000.00) after granting the *CONTRACTOR* twenty-five percent (25%) after such saving is effected. In the event the net

30 cost of the said buildings as herein stated shall exceed the sum of One Million Seven Hundred Thousand Dollars (\$1,700,000.00), the excess thereof shall be deducted from the fee of One Hundred Fifty Thousand Dollars (\$150,000.00) to be paid by the *OWNER* to the *CONTRACTOR* and for the purpose of securing the *OWNER* against such excess, the balance of ten percent (10%) to be paid by the *OWNER* to the *CONTRACTOR* shall be retained until a

40 complete statement is rendered to the *OWNER*

Contract.

of the net cost of the buildings, same to be rendered within thirty days after the completion of the buildings. The *CONTRACTOR* will render to the *OWNER* on or before the fifth day of each and every month a statement of the expense, payrolls, bills for materials, tools, etc. This statement will constitute the *CONTRACTOR'S* application for payment and shall be checked and approved by the *ARCHITECT* and *OWNER*. 10

(c) Within thirty days after the substantial completion of the work called for by this contract, the balance due under the contract, provided the work be then fully completed and this contract fully performed, shall be paid to the *CONTRACTOR* by the *OWNER* on the *ARCHITECT'S* CERTIFICATE in the form set forth in paragraph (a) of this Article. 20

(d) All moneys due for extra work ordered shall be paid in the same way and manner, and subject to the same terms and conditions as are above described for the payment of the original contract price.

(e) By "substantial completion" as herein used, shall be meant such completion as shall enable the use of the building for the purposes for which it is intended, although the building may be lacking in slight details. 30

ARTICLE XII—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 *CONTRACTOR*, 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 against such 40

William Lunsky vs. Criterion Construction Co.

lien or claim. Should there prove to be any such claim after all payments are made, the *CONTRACTOR* 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 *CONTRACTOR'S* default.

ARTICLE XIII—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.

ARTICLE XIV—The *OWNER* shall, during the progress of the work procure and maintain fire insurance, including lightning, insurance against loss or damage from tornadoes, elevator insurance and boiler insurance, covering the value of the work done hereunder, in amounts and in standard insurance companies satisfactory to *GUARDIAN TRUST COMPANY OF NEW JERSEY*, the trustee under the first mortgage as aforesaid, the loss to be payable to the said *GUARDIAN TRUST COMPANY OF NEW JERSEY*, the trustee, and the policies shall cover all work incorporated in the building and all materials for the same in or about the premises. The *CONTRACTOR* shall procure and maintain at its own cost and expense sufficient compensation insurance in accordance with the statutes of the State of New Jersey, or other governmental authority having regulation over same, and public liability insurance in the sum of Twenty-five Thousand Dollars (\$25,000.00).

Contract.

ARTICLE XV—The *CONTRACTOR* shall forthwith procure and deliver to GUARDIAN TRUST COMPANY OF NEW JERSEY, as trustee under the aforesaid first mortgage, at *OWNER'S* expense a bond with corporate surety in the penal sum of One Million Two Hundred Fifty Thousand Dollars (\$1,250,000.00) in form, and with surety satisfactory to the *OWNER* and to *BANKERS*, conditioned for the true and faithful performance of this contract, and unconditionally guaranteeing the construction and completion of the aforesaid premises in strict accordance with the plans and specifications, free and clear of all mechanics' liens and/or other liens. Until such time as said bond is delivered no work shall be done by *CONTRACTOR* nor shall any liability of any sort or kind rest upon the *OWNER* herein;

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ARTICLE XVI—All work and materials delivered on the premises to form part of the work, whether actually incorporated therein or not, shall be considered the property of the *CONTRACTOR* until the same shall have been paid for in accordance with the terms hereof, unless said *CONTRACTOR* shall after receiving a payment thereon, have refused to proceed with the work in accordance with the provisions of this contract. The *CONTRACTOR* shall have free access at all reasonable times to the said materials and the said work until the same shall have been fully paid for as provided in this contract. The *CONTRACTOR* shall remove all surplus materials after completion of the work.

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ARTICLE XVII—Whenever building permits shall be required by any municipality or be necessary under any law, ordinance or other regulation for the erection, alteration or repair of

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William Lunsky vs. Criterion Construction Co.

any building, the same shall be procured by the
OWNER.

ARTICLE XVIII—Any notice required by the
terms hereof to be given to any other party
mentioned herein, shall be addressed to such
party at the following address:

10 OWNER, 60 Park Place, Newark, New Jersey.
CONTRACTOR, 437 Central Avenue, East Or-
ange, New Jersey.

ARCHITECT,

GUARDIAN TRUST COMPANY OF NEW
JERSEY, 900 Broad Street, Newark, New
Jersey.

20 BANKERS BOND AND MORTGAGE COM-
PANY, 1313 Walnut Street, Philadelphia,
Pennsylvania.

IN WITNESS WHEREOF, the parties to this
agreement have caused these presents to be
signed by their duly authorized respective of-
ficers and their respective corporate seals to
be hereunto affixed the day and year first above
written.

THE SIXTY SEVEN SOUTH MUNN, INC

BY: HERMAN H. GOLDSTEIN
PRESIDENT.

30 ATTEST:

BENJAMIN S. APPEL
SECRETARY

CRITERION CONSTRUCTION COMPANY

BY: WILLIAM LUNSKY
PRESIDENT.

ATTEST:

PHIL LIPCHUTZ
SECRETARY.

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Opinion of Vice-Chancellor.

OPINION.

FOR THE APPEAL.

BACKES, *Vice-Chancellor*:

The Criterion Construction Company contracted to build for The Sixty-Seven South Munn, Inc., an apartment house, to accommodate 113 families, on a cost-plus basis. Two mortgages, one, a first, for \$1,250,000 to secure bonds, the other to secure \$865,000 in notes, were executed by the owner to the Guardian Trust Company, trustee, to finance the operation. The bonds secured by the first mortgage were taken by the Bankers Bonding and Mortgage Company of Philadelphia. The notes secured by the second are in the hands of the receiver. In the course of construction the Criterion Company became embarrassed. A receiver was appointed, who, under the Court's order, completed the building and the notes belong to him for finishing the job. The sub-contractors continued to perform their contracts under an arrangement with the receiver to pay them for the work to be done, 60 per cent. in cash and 40 per cent. in a first participating interest in the second mortgage, and for past work, before the receivership, a second participating interest. The general creditors have a third participating interest. The cash was obtained from a balance of \$360,000 due on the first mortgage and \$70,000 borrowed by the receiver on the security of a first participating interest in the second mortgage. The receiver underestimated the cost of completion by \$56,000 and owed that sum and he was allowed to borrow the amount to pay his debts on receiver's certificates secured by the assets of

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William Lunsky vs. Criterion Construction Co.

the estate, the second mortgage; the interest therein of the first, second and third participants being subordinated. They are content. The Harrison Improvement Company claimed to have a lien on the second mortgage and its claim, too, was subordinated. It has appealed. Its
10 lien is based on an assignment of an interest in the mortgage to secure \$40,000, upon which it was claimed there is due \$23,500, alleged to have been lent to the defunct company, and the contention was that having been given by the company, before the appointment of the receiver, it was superior to the participating interest held under the receivership. The claim is in litigation in a bill pending to enforce a lien against the Guardian Trust Company, to which the re-
20 ceiver became a party upon his appointment. Orders to show cause issued to restrain the Trust Company and the receiver from parting with the mortgage or doing anything with it to affect the complainant's rights, and on the return the rules were dismissed and restraint denied. The Harrison Company appealed. The facts are not disputed.

As to the order to subordinate. The notes and second mortgage are assets in the hands of
30 the receiver, subject to administration expenses; a primary lien *Attorney-General v. Linden Cemetery Asso.*, 90 N. J. Eq. 404. The \$56,000 debt incurred by the receiver in completing the building is an administration expense and as such a first lien on the assets and superior to the lien of the Harrison Company, though its assignment antedates the receivership. The completion of the building not only added to its security, it was essential, for without completion the
40 second mortgage would have been valueless.

Opinion of Vice-Chancellor.

The borrowing of money on receiver's certificate to pay the receiver's debts merely shifted the nature of the administration expense from a debt for merchandise to one for borrowed money to pay the merchandise debt. The certificate impaired no rights, was a mere commercial convenience that tends to maintain the credit of our receivers and as a purely administrative act is not the subject of criticism by creditors or lien holders. The Harrison Company can suffer no harm. If it has a lien on the second mortgage superior to the participating interests, as it contends, and is sustained, it will be paid first out of the assets in the receiver's hands upon distribution, for the receiver must first realize on the mortgage before distribution can be made. The Court will then adjust the equities.

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As to the restraint. The mortgage on its face is in trust to secure the notes of the mortgagor owned and in possession of the receiver. It is not the subject of an assignment except perhaps to another trustee or to the receiver. An *ad interim* restraint against the trustee was denied because unnecessary. An injunction against the receiver, who is to administer the estate under the supervision of the Court, would be novel. The Court will not tie its own arm. If the complainant has a lien prior to the participants, nothing that the receiver can do can affect it. Its rights, if any, are fixed, all that remains is to determine that question.

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William Lunskey vs. Criterion Construction Co.

NOTICE OF APPEAL.

Filed February 28, 1929.

IN CHANCERY OF NEW JERSEY.

10 *Between*

WILLIAM LUNSKY,
Complainant,

and

CRITERION CONSTRUCTION Co.,
a corporation,

Defendant.

On Bill, etc.

*Notice of
Appeal.*

*Docket 68,
Page 520.*

20 To Edward R. McGlynn, Receiver of Criterion
Construction Company, a corporation:

Harrison Improvement Company hereby appeals from the interlocutory order authorizing the receiver to borrow fifty-six thousand (\$56,000.00) dollars and issue a receiver's certificate made in the above-entitled cause on February 26, 1929, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

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Said order was made by the Chancellor on the advice of Vice-Chancellor Backes.

Dated: February 27, 1929.

MARDER & OKIN,
Solicitors of Harrison Improvement Company.

AARON MARDER,
Of Counsel with Harrison
Improvement Company.

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Notice of Appeal.

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

AARON MARDER,
Of Counsel with Harrison
Improvement Company.

Service of a copy of the within notice of appeal is hereby acknowledged this 27th day of February, 1929.

(Signed) EDWARD R. McGLYNN,
Receiver of Criterion Construction Company.

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William Lunsky vs. Criterion Construction Co.

PETITION OF APPEAL.

Filed March 19, 1929.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10	<p style="text-align: center;"><i>Between</i></p> <p style="text-align: center;">WILLIAM LUNSKY, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">CRITERION CONSTRUCTION Co., <i>a corporation,</i></p> <p style="text-align: center;"><i>Defendant.</i></p>	}	<p><i>On Bill, etc.</i></p> <p><i>On Appeal</i> <i>by Harrison</i> <i>Improvement</i> <i>Company</i> <i>from the</i> <i>Court of</i> <i>Chancery.</i></p> <p><i>Docket 68,</i> <i>Page 520.</i></p> <p><i>Petition of</i> <i>Appeal.</i></p>
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To the Honorable The Court of Errors and Appeals in the last resort in all causes:

The petition of Harrison Improvement Company, appellant in the above-entitled cause, respectfully shows that:

- 30 1. Petitioner finds itself aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 26th day of February, 1929 in a certain cause in said Court of Chancery where in William Lunsky is complainant and Criterion Construction Co., a corporation, is defendant, in which cause Edward R. McGlynn, Esq., was appointed receiver of the Criterion Construction Company, in this respect,
- 40 to wit, that said order adjudges and authorizes,

Petition of Appeal.

empowers and directs said receiver to borrow a sum not to exceed \$56,000.00 upon receiver's certificate, which shall constitute and be and is by said order ordered, adjudged and decree to be a first lien upon the assets of the Criterion Construction Company and upon, in and to a second mortgage given by the Sixty-Seven South Munn, Inc., a corporation, to Guardian Trust Company, a corporation, as trustee, and to be prior, superior and paramount to the alleged claim of the Harrison Improvement Company.

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And petitioner appeals from the whole of the order of the Chancellor which orders, empowers, adjudges and directs as aforesaid upon the ground that the same is erroneous in that (a) it adjudges the said receiver entitled to the relief, directions, powers and authority sought for by the order to show cause upon which said order is based, when it should have denied same and dismissed and discharged said order to show cause; (b) the interest of your petitioner in and to said second mortgage is superior to any interest the receiver may have therein; (c) the court did not have the jurisdiction to make the order in question; (d) there was and is a plenary suit pending in the Court of Chancery to determine the rights of the petitioner in and to said second mortgage as against said receiver; (e) the allegations in the petition of the receiver upon which said order is based are not sufficient in fact or law for the issuance of receiver's certificates and the making of the order from which this appeal is taken; (f) the allegations in the petition upon which said order is based are not separately and distinctly set forth; (g) the allegations in the petition upon which said order is based are not verified or proved.

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William Lunsky vs. Criterion Construction Co.

Petitioner therefore prays that the said order of the said Chancellor be reversed, set aside and for nothing holden, and that the petitioner may have such other relief in the premises as to this court may seem proper.

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MARDER & OKIN,
Solicitors of Appellant,
Harrison Improvement Company.

AARON MARDER,
Of Counsel with Appellant,
Harrison Improvement Company.

Service of the within petition of appeal acknowledged this 18th day of March, 1929.

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EDWARD R. McGLYNN,
Receiver of Criterion Construction Company.

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Answer to Petition of Appeal.

ANSWER OF EDWARD R. MCGLYNN, RECEIVER, &c., TO PETITION OF APPEAL.

Filed March 27, 1929.

NEW JERSEY COURT OF ERRORS AND APPEALS. 10

<p><i>Between</i></p> <p>WILLIAM LUNSKY, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>CRITERION CONSTRUCTION Co., a corporation, <i>Defendant.</i></p>	}	<p><i>On Bill, etc.</i></p> <p><i>Answer of</i> <i>Edward R.</i> <i>McGlynn,</i> <i>Receiver of</i> <i>Criterion</i> <i>Construction</i> <i>Co., to Peti-</i> <i>tion of Ap-</i> <i>peal of</i> <i>Harrison</i> <i>Improvement</i> <i>Company.</i></p>	20
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Answer of the above-named respondent, to wit: Edward R. McGlynn, Receiver of Criterion Construction Co., to the petition of appeal of the above-named appellant.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that an order was on the twenty-sixth day of February last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and be-

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Answer to Petition of Appeal.

lieves, that the said order is agreeable to equity,
and he prays that the same may be affirmed,
with costs to be adjudged to this respondent.

E. R. McGLYNN,
Receiver.
Solicitor and of Counsel *per se.*

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Bill of Complaint.

BILL OF COMPLAINT AND AFFIDAVIT.

Filed January 16, 1929.

IN CHANCERY OF NEW JERSEY.

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

Harrison Improvement Company, a New Jer-
sey corporation, with its principal office in the
City of Newark, County of Essex and State of
New Jersey, respectfully shows that:

1. The Guardian Trust Company of New Jer-
sey is a corporation organized and existing un-
der the laws of the State of New Jersey, having
its principal office in the City of Newark, County
of Essex and State of New Jersey. 20

2. On or about December 14, 1927, The Sixty-
Seven South Munn, Inc., a New Jersey corpora-
tion, executed a trust mortgage in the sum of
\$865,000.00 to the Guardian Trust Company of
New Jersey, trustee, covering the lands and
premises in the City of East Orange, known as
67 South Munn avenue, and more particularly
described in said mortgage, which on December
14, 1927, was recorded in the Essex County Reg- 30
ister's office in book N-63 of mortgages for Essex
County, page 57.

3. Said mortgage recited that it was made for
the purpose of securing the notes representing
moneys which will be due and owing by the
Sixty-Seven South Munn, Inc., a corporation, to
the Criterion Construction Company, a corpora-
tion of New Jersey, under the terms, covenants
and conditions of a certain contract for build-
ing, dated September 7, 1927, and described in 40
said mortgage.

Harrison Imp't Co. vs. Guardian Trust Co.

4. Upon information and belief said mortgage was also accompanied by and secured the bond (as further evidence of said indebtedness) of the Sixty-Seven South Munn Avenue, Inc., to the Guardian Trust Company of New Jersey, trustee, in the penal sum of \$1,730,000.00 conditioned
10 for the payment of said sum of \$865,000.00 five years from its date, the said bond being likewise dated on or about December 14, 1927.

5. On or about December 13, 1927, said Criterion Construction Company for a valuable consideration to it paid by the Harrison Improvement Company, the complainant, assigned to the complainant a superior interest of \$40,000.00 in and to said \$865,000.00 mortgage aforescribed and recorded in book N-63 of mortgages for
20 Essex County, page 57, and the obligations secured thereby.

6. The consideration mentioned in paragraph 5 above consisted of the following:

On or about December 13, 1927, complainant loaned to the said Criterion Construction Company the sum of \$40,000.00 and to secure repayment of said sum to complainant, Criterion Construction Company assigned said superior interest
30 of \$40,000.00 as aforesaid to complainant.

7. The Criterion Construction Company paid \$16,500.00 to complainant in reduction of said indebtedness and also some interest payments and complainant is still entitled to a superior interest of \$23,500.00 by way of principal plus accrued and accruing interest in and to said mortgage and the obligations secured thereby.

8. Said Criterion Construction Company has
40 earned more than enough moneys under the terms and conditions of said mortgage to cover

Bill of Complaint.

said superior interest of \$40,000.00 in and to said mortgage and the obligations secured thereby, above mentioned, and complainant is informed that the entire contract mentioned in said mortgage is substantially completed so that the entire sum of \$865,000.00 by way of principal is now owing under said mortgage.

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9. Upon information and belief, the rights, duties and obligations of the Guardian Trust Company of New Jersey, as trustee, in, to and under said mortgage and the obligations secured thereby passed to and were assumed by the New Jersey National Bank and Trust Company, a corporation of the United States with its principal office in the City of Newark, County of Essex and State of New Jersey.

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

1. That the Guardian Trust Company of New Jersey, a corporation, and New Jersey National Bank and Trust Company, a corporation, who are the defendants to this suit may answer this bill of complaint and each statement therein made.

2. That a decree may be made enjoining the defendants from assigning said superior interest of \$23,000.00 by way of principal plus accrued and accruing interest in said mortgage and the obligations secured thereby, to any person, firm or corporation other than the complainant.

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3. That a decree may be made adjudging that the defendants are holding a superior interest of \$23,500.00 by way of principal plus accrued and accruing interest in and to said mortgage and

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Harrison Imp't Co. vs. Guardian Trust Co.

the obligations secured thereby, for the benefit of and in trust for the complainant.

10 4. That a decree may be made adjudging that the complainant is entitled to a superior interest of \$23,500.00 by way of principal plus accrued and accruing interest in and to said \$865,000.00 mortgage recorded in book N-63 of mortgages for Essex County, and the obligations secured thereby and that the said defendants or one of them be directed to execute an assignment of such a superior interest in and to said mortgage and the obligations secured thereby, to the complainant.

20 5. That the complainant be given such other and further relief as may be equitable and just in the premises.

6. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as the Court may make in the premises.

MARDER & OKIN,
Solicitors for Complainant.

AARON MARDER,
Of Counsel with Complainant.

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

WILLIAM OKIN, of full age, duly sworn on his oath according to law, deposes and says:

I am the Vice-President of the complainant in the foregoing bill of complaint mentioned.

40 I have read the foregoing bill of complaint and am familiar with the contents thereof and the matters and things therein set forth are true.

Affidavit of William Okin.

On or about December 14, 1927, The Sixty-Seven South Munn, Inc., a New Jersey corporation, executed a trust mortgage in the sum of \$865,000.00 to the Guardian Trust Company of New Jersey, trustee, covering the lands and premises in the City of East Orange, known as 67 South Munn avenue, and more particularly described in said mortgage, which on December 14, 1927, was recorded in the Essex County Register's office in book N-63 of mortgages for Essex County, page 57.

10

Said mortgage recited that it was made for the purpose of securing the notes representing moneys which will be due and owing by the Sixty-Seven South Munn, Inc., a corporation, to the Criterion Construction Company, a corporation of New Jersey, under the terms, covenants and conditions of a certain contract for building, dated September 7, 1927, and described in said mortgage.

20

Upon information and belief said mortgage was also accompanied by and secured the bond (as further evidence of said indebtedness) of the Sixty-Seven South Munn Avenue, Inc., to the Guardian Trust Company of New Jersey, trustee, in the penal sum of \$1,730,000.00 conditioned for the payment of said sum of \$865,000.00 five years from its date, the said bond being likewise dated on or about December 14, 1927.

30

On or about December 13, 1927, said Criterion Construction Company for a valuable consideration to it paid by the Harrison Improvement Company, the complainant, assigned to the complainant a superior interest of \$40,000.00 in and to said \$865,000.00 mortgage aforescribed and recorded in book N-63 of mortgages for Essex County, page 57, and the obligations secured thereby.

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Harrison Imp't Co. vs. Guardian Trust Co.

The consideration mentioned in the preceding paragraph consisted of the following:

10 On or about December 13, 1927, complainant loaned to the said Criterion Construction Company the sum of \$40,000.00 and to secure repayment of said sum to complainant, Criterion Construction Company assigned said superior interest of \$40,000.00 as aforesaid to complainant.

The Criterion Construction Company paid \$16,500 to complainant in reduction of said indebtedness and also some interest payments and complainant is still entitled to a superior interest of \$23,500.00 by way of principal plus accrued and accruing interest in and to said mortgage and the obligations secured thereby.

20 Said Criterion Construction Company has earned more than enough moneys under the terms and conditions of said mortgage to cover said superior interest of \$40,000.00 in and to said mortgage and the obligations secured thereby, above mentioned, and complainant is informed that the entire contract mentioned in said mortgage is substantially completed so that the entire sum of \$865,000.00 by way of principal is owing under said mortgage.

30 Upon information and belief, the rights, duties and obligations of the Guardian Trust Company of New Jersey, as trustee, in, to and under said mortgage and the obligations secured thereby passed to and were assumed by the New Jersey National Bank and Trust Company, a corporation of the United States with its principal office in the City of Newark, County of Essex and State of New Jersey.

(Signed) WILLIAM OKIN.

Affidavit of William Okin.

Sworn and subscribed to before
me this 15th day of January,
1929.

IRENE P. DALY,
A Notary Public of New
(SEAL) Jersey.

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A true copy.

MARDER & OKIN,
Solicitors of Complainant.

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Harrison Imp't Co. vs. Guardian Trust Co.

ORDER ADDING PARTY DEFENDANT.

Filed January 31, 1929.

IN CHANCERY OF NEW JERSEY.

10

Between

HARRISON IMPROVEMENT COM-
PANY, a New Jersey corpo-
ration,

Complainant,

and

GUARDIAN TRUST COMPANY OF
NEW JERSEY, a corporation,
et al.,

20

Defendants.

On Bill, etc.

*Order Adding
Party De-
fendant.*

*Docket 72,
Page 77.*

This matter being opened to the court by Aaron Marder, of Marder and Okin, solicitors of the complainant, and upon reading the consent hereunder written, it is on this 31st day of January, 1929,

30 ORDERED, that Edward R. McGlynn, Esq., Receiver of Criterion Construction Company, be and is hereby added as a party defendant to the above-entitled suit, and it is further

ORDERED, that the complainant be and is hereby permitted to amend its bill of complaint heretofore filed herein in connection with the adding of said Edward R. McGlynn, Esq., receiver of

40

Order Adding Party Defendant.

Criterion Construction Company, as a party defendant hereto.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

10

We hereby consent to the making and entry of the foregoing order.

STEIN, McGLYNN & HANNOCH,
Solicitors of Edward R. McGlynn,
Receiver of Criterion Construction Company.

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Harrison Imp't Co. vs. Guardian Trust Co.

AMENDMENT TO BILL OF COMPLAINT.

Filed January 31, 1929.

IN CHANCERY OF NEW JERSEY.

10 *Between*

HARRISON IMPROVEMENT COM-
PANY, a New Jersey corpo-
ration,

Complainant,

and

GUARDIAN TRUST COMPANY OF
NEW JERSEY, a corporation,
et al.,

20

Defendants.

*On Bill, etc.
Amendment
to Bill of
Complaint.*

*Docket 72,
Page 77.*

Pursuant to the order of this court, dated January 31, 1929, adding Edward R. McGlynn, receiver of the Criterion Construction Company, as party defendant, the complainant hereby amends its bill of complaint by adding thereto the following paragraphs:

30 10. On or about June 27, 1928, Edward R. McGlynn was appointed statutory receiver of the Criterion Construction Company by order of this court.

40 11. Complainant has recently been informed that said Edward R. McGlynn, receiver of the Criterion Construction Company, claims an interest in said superior interest of \$23,500.00 by way of principal, plus accrued and accruing interest in and to said mortgage and the obligations secured thereby, adverse to that of complainant.

Amendment to Bill of Complaint.

12. Complainant is further informed and believes that said Edward R. McGlynn, receiver of the Criterion Construction Company, has possession of the notes mentioned and described in paragraph 3 of the bill of complaint.

Also by changing paragraph 1 in the prayer of the original bill of complaint so that same shall read as follows: 10

1. That the Guardian Trust Company of New Jersey, a corporation, New Jersey National Bank and Trust Company, a corporation, and Edward R. McGlynn, receiver of the Criterion Construction Company, who are the defendants to this suit may answer this bill of complaint as amended, and each statement therein made.

Also by adding the following paragraph to the prayer: 20

2a. That a decree may be made enjoining the defendants to desist and refrain from in any way assigning or disposing of in whole or in part and from doing anything in anyway affecting the superior interest of \$23,500.00 by way of principal, plus accrued and accruing interest in and to said \$865,000.00 mortgage made by the Sixty-Seven South Munn, Inc., to the Guardian Trust Company of New Jersey, the trustee, covering the lands and premises in the City of East Orange, known as No. 67 South Munn avenue, which mortgage is recorded in the Essex County Register's office in Book N-63 of mortgages for Essex County, page 57, and the obligations secured by same. 30

MARDER & OKIN,
Solicitors of Complainant.

AARON MARDER,
Of Counsel with Complainant. 40

Harrison Imp't Co. vs. Guardian Trust Co.

ORDER TO SHOW CAUSE.

Filed January 16, 1929.

IN CHANCERY OF NEW JERSEY.

10 *Between*

HARRISON IMPROVEMENT COM-
PANY, a New Jersey corpo-
ration,

Complainant,

and

GUARDIAN TRUST COMPANY OF
NEW JERSEY, a corporation,
et al.,

20

Defendants.

On Bill, etc.

*Order to
Show Cause.*

*Docket 72,
Page 77.*

This matter being opened to the Court by Marder and Okin, solicitors of the complainant, and the Court having read the bill of complaint in the above-entitled cause, and the affidavits thereunto annexed;

30 It is on this 16th day of January, one thousand nine hundred and twenty-nine, ORDERED that the defendants, Guardian Trust Company of New Jersey, a corporation, and New Jersey National Bank and Trust Company, a corporation, show cause before the Chancellor, at the Chancery Chambers, in the Industrial Building, Newark, New Jersey, on the 29th day of January, one thousand nine hundred and twenty-nine, at the hour of 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the said defendants, Guardian Trust Company of New Jersey, and New Jersey National Bank and Trust

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Order to Show Cause.

Company, should not be restrained and enjoined according to the prayer of the bill of complaint.

It is further ORDERED that the said defendants, Guardian Trust Company of New Jersey and New Jersey National Bank and Trust Company, and their agents and servants, in the meantime, and until the further order of this Court desist and refrain from in any way assigning or disposing of in whole or in part the \$865,000.00 mortgage made by the Sixty-Seven South Munn, Inc., to the Guardian Trust Company of New Jersey, the trustee, covering the lands and premises in the City of East Orange, known as No. 67 South Munn avenue, which mortgage is recorded in the Essex County Register's office in Book N-63 of mortgages for Essex County, page 57, and the obligation secured by same.

It is further ORDERED that true but uncertified copies of the said bill of complaint and the affidavit thereunto annexed, and of this order, be served on said defendants, Guardian Trust Company of New Jersey, a corporation, and New Jersey National Bank and Trust Company, a corporation, within five days from the date hereof.

E. R. WALKER,

C. 30

Respectfully advised,

ALONZO CHURCH,
V.-C.

A true copy.

MARDER & OKIN,
Solicitors of Complainant.

Harrison Imp't Co. vs. Guardian Trust Co.

ORDER TO SHOW CAUSE.

Filed January 31, 1929.

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i>	<i>On Bill, etc. Order to Show Cause. Docket 72, Page 77.</i>
	HARRISON IMPROVEMENT COM- PANY, a New Jersey corpo- ration, <div style="text-align: right;"><i>Complainant,</i></div>	
	<i>and</i>	
20	GUARDIAN TRUST COMPANY OF NEW JERSEY, a corporation, <i>et al.,</i> <div style="text-align: right;"><i>Defendants.</i></div>	

This matter being opened to the Court by Marder and Okin, solicitors of the complainant, and the Court having read the bill of complaint in the above-entitled cause, and the affidavits thereunto annexed (heretofore filed), and having also read the amended bill of complaint;

30 It is on this 31st day of January, 1929, ORDERED that the defendant, Edward R. McGlynn, receiver of the Criterion Construction Company, show cause before the Chancellor, at the Chancery Chambers, in the Industrial Building, Newark, New Jersey, on the 13th day of February, 1929, at the hour of 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the said defendant, Edward R. McGlynn, Receiver of the Criterion Construction Company, should not be restrained and enjoined according to the prayer of the bill of complaint.

40

Order to Show Cause.

It is further ORDERED that true, but uncertified copies of said bill of complaint and the affidavits thereunto annexed, and the amendment thereto and of this Order be served upon the said defendant, Edward R. McGlynn, receiver of the Criterion Construction Company, within five days from the date hereof.

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E. R. WALKER,

C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

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Harrison Imp't Co. vs. Guardian Trust Co.

AFFIDAVIT.

Filed February 28, 1929.

IN CHANCERY OF NEW JERSEY.

10 *Between*

HARRISON IMPROVEMENT COM-
PANY, a New Jersey corpo-
ration,

Complainant,

and

GUARDIAN TRUST COMPANY OF
NEW JERSEY, a corporation,
et al.,

20

Defendants.

On Bill, etc.

Affidavit.

Docket 72,

Page 77.

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

AARON MARDER, of full age being duly sworn on his oath deposes and says:

I am a member of the firm of Marder and Okin, the solicitors of the complainant in the above-entitled matter, and on January 17, 1929, I served true copies of the bill of complaint herein and the affidavit annexed thereto and of the order to show cause issued herein, dated January 16, 1929, upon the defendant, Guardian Trust Company of New Jersey, a corporation, by delivering said true copies to Clarence G. Appleton, president of the Guardian Trust Company of New Jersey. On January 17, 1929, I served true copies of the bill of complaint herein and the affidavit annexed thereto and of the order to show cause issued herein, dated Janu-

Affidavit of Aaron Marder.

ary 16, 1929, upon the defendant, New Jersey National Bank and Trust Company, a corporation, by delivering said true copies to John C. Alvey, vice-president of the New Jersey National Bank and Trust Company.

AARON MARDER.

10

Sworn and subscribed to before me
this 1st day of February, 1929.

THEODORE EBRENLARANZ,
(SEAL) A Notary Public of N. J.

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Harrison Imp't Co. vs. Guardian Trust Co.

ACKNOWLEDGEMENT OF SERVICE.

Filed February 28, 1929.

IN CHANCERY OF NEW JERSEY.

10 *Between*

HARRISON IMPROVEMENT COM-
PANY, a New Jersey corpo-
ration,

Complainant,

and

GUARDIAN TRUST COMPANY OF
NEW JERSEY, a corporation,
et als.,

20

Defendants.

On Bill, etc.

*Acknowledg-
ment of
Service.*

*Docket 72,
Page 77.*

30

We hereby acknowledge service this 1st day of February, 1929, of true copies of the bill of complaint and affidavits thereunto annexed, of a true copy of the amendment to the bill of complaint herein, and of a true copy of the order to show cause made herein bearing date January 31, 1929, directing Edward R. McGlynn, receiver of the Criterion Construction Company, to show cause, etc.

(Signed) E. R. MCGLYNN,
Solicitors of Edward R. McGlynn, Re-
ceiver of Criterion Construction Com-
pany.

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Order of Continuance.

ORDER OF CONTINUANCE.

Filed January 29, 1929.

IN CHANCERY OF NEW JERSEY.

- Docket 72, Page 77.

Between

HARRISON IMPROVEMENT COM-
PANY, a New Jersey corpo-
ration,

Complainant,

and

GUARDIAN TRUST COMPANY OF
NEW JERSEY, a corporation,
et als.,

Defendants.

10

On Bill, etc.

*Order of
Continuance.*

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On motion of Aaron Marder, of Marder and Okin, solicitors of complainant, it is, on this 29th day of January, A. D. 1929, ORDERED that the hearing on the order to show cause herein, dated January 16, 1929, be, and the same hereby is, continued to the Thirteenth day of February, A. D. 1929, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard thereon, in the Chancery Chambers, Newark, N. J.

30

And it is further ORDERED that the *ad interim* restraints in said order to show cause be, and the same hereby are, continued until the further order of the Court.

E. R. WALKER,

C.

Respectfully advised,
MAJA LEON BERRY,
V.-C.

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Harrison Imp't Co. vs. Guardian Trust Co.

ORDER OF CONTINUANCE.

Filed February 13, 1929.

IN CHANCERY OF NEW JERSEY.

10 *Between*

HARRISON IMPROVEMENT COM-
PANY, a New Jersey corpo-
ration,

Complainant,

and

GUARDIAN TRUST COMPANY OF
NEW JERSEY, a corporation,
et als.,

20

Defendants.

On Bill, etc.

*Order of
Continuance.*

On motion of Aaron Marder, solicitor of complainant, it is on this 13th day of February, 1929,

ORDERED, that the hearing of the order to show cause herein dated January 31, 1929, be and the same is hereby continued to the 19th day of February, 1929, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard at the
30 Chancery Chambers, Industrial Building, Newark, New Jersey.

And it is further ORDERED that the hearing on the order to show cause herein dated January 16, 1929, be, and the same hereby is, continued to the Nineteenth day of February, A. D. 1929, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard thereon, in the Chancery Chambers, Newark, N. J., and that the *ad interim* restraints in said order to show cause

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Order of Continuance.

be, and the same hereby are, continued until the further order of the Court.

E. R. WALKER,

C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

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Harrison Imp't Co. vs. Guardian Trust Co.

ORDER OF CONTINUANCE.

Filed February 19, 1929.

IN CHANCERY OF NEW JERSEY.

10 *Between*

HARRISON IMPROVEMENT COM-
PANY, a New Jersey corpo-
ration,

Complainant,

and

GUARDIAN TRUST COMPANY OF
NEW JERSEY, a corporation,
et als.,

20

Defendants.

On Bill, etc.

*Order of
Continuance.*

*Docket 72,
Page 77.*

On motion of Aaron Marder, solicitor of complainant, it is on this 19th day of February, 1929,

ORDERED, that the hearing of the order to show cause herein dated January 31, 1929, be and the same is hereby continued to the 26th day of February, 1929, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard at the Chancery Chambers, Industrial Building, Newark, New Jersey.

30

And it is further ORDERED that the hearing on the order to show cause herein dated January 16, 1929, be, and the same is hereby continued to the twenty-sixth day of February, A. D. 1929, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard thereon, in the Chancery Chambers, Newark, N. J., and that the *ad interim* restraints in said order to show cause be, and

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Order of Continuance.

the same hereby are continued until the further order of the Court.

E. R. WALKER,
C.

Respectfully advised,

(Signed) ALONZO CHURCH,
V.-C.

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Harrison Imp't Co. vs. Guardian Trust Co.

ORDER.

Filed February 27, 1929.

IN CHANCERY OF NEW JERSEY.

10 *Between*

HARRISON IMPROVEMENT COM-
PANY, a New Jersey corpo-
ration,

Complainant,

and

GUARDIAN TRUST COMPANY OF
NEW JERSEY, a corporation,
et als.,

20

Defendants.

*On Bill, etc.
Order.*

30 This matter being opened to the Court by Aaron Marder, of Marder & Okin, solicitors of the complainant, in the presence of Edward R. McGlynn, receiver for the creditors and stockholders of Criterion Construction Company, and the Court having heard the argument of counsel, and being of the opinion that the rule to show cause heretofore issued against Edward R. McGlynn, Receiver, and against Guardian Trust Company of New Jersey, should be dismissed, and that the restraint contained therein as to the Guardian Trust Company of New Jersey should be dissolved; it is on this 26th day of February, 1929, on motion of Edward R. McGlynn, Receiver for the creditors and stockholders of Criterion Construction Company,

40 ORDERED, that the rule to show cause heretofore issued against Edward R. McGlynn, Receiver,

Order Dismissing Rule to Show Cause.

and against Guardian Trust Company of New Jersey, be and the same is hereby dismissed; and it is further

ORDERED, that the restraint contained in the aforementioned rule to show cause be and the same is hereby dissolved.

E. R. WALKER,
C.

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Respectfully advised,

JOHN H. BACKES,
V.C.

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Harrison Imp't Co. vs. Guardian Trust Co.

NOTICE OF APPEAL.

Filed March 1, 1929.

IN CHANCERY OF NEW JERSEY.

10 *Between*

HARRISON IMPROVEMENT COM-
PANY, a New Jersey corpo-
ration,

Complainant,

and

GUARDIAN TRUST COMPANY OF
NEW JERSEY, a corporation,
et als.,

20

Defendants.

On Bill, etc.

*Notice of
Appeal.*

*Docket 72,
Page 77.*

To Edward R. McGlynn, Receiver of Criterion
Construction Company, a corporation:

30 The complainant, Harrison Improvement Com-
pany, hereby appeals from the interlocutory
order, dismissing the order to show cause here-
tofore issued in this cause, etc., made in the
above-entitled cause on February 26, 1929, and
from the whole and every part thereof, to the
Court of Errors and Appeals in the last resort
in all causes.

Said order was made by the Chancellor on the
advice of Vice-Chancellor Backes.

Dated: February 28, 1929.

MARDER & OKIN,
Solicitors of Harrison Improvement Company.

40

AARON MARDER,
Of Counsel with Harrison
Improvement Company.

Notice of Appeal.

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

AARON MARDER,
Of Counsel with Harrison
Improvement Company.

Service of a copy of the within notice of appeal is hereby acknowledged this 28th day of February, 1929. 10

(Signed) E. R. McGLYNN,
Receiver of Criterion Construction
Company, a corporation.

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Harrison Imp't Co. vs. Guardian Trust Co.

NOTICE OF APPEAL.

Filed March 15, 1929.

IN CHANCERY OF NEW JERSEY.

10

Between

HARRISON IMPROVEMENT COM-
PANY, a New Jersey corpo-
ration,

Complainant,

and

GUARDIAN TRUST COMPANY OF
NEW JERSEY, a corporation,
et als.,

20

Defendants.

On Bill, etc.

*Notice of
Appeal.*

*Docket 72,
Page 77.*

To Messrs. Stein, McGlynn & Hannoeh, solicitors
of Guardian Trust Company of New Jersey
and New Jersey National Bank and Trust
Company:

30 The complainant, Harrison Improvement Com-
pany, hereby appeals from the interlocutory
order, dismissing the orders to show cause here-
tofore issued in this cause, etc., made in the
above-entitled cause on February 26, 1929, and
from the whole and every part thereof, to the
Court of Errors and Appeals in the last resort
in all causes.

Notice of Appeal.

Said order was made by the Chancellor on the advice of Vice-Chancellor Backes.

Dated: March 13, 1929.

MARDER & OKIN,
Solicitors for Harrison Improvement Company.

AARON MARDER, **10**
Of Counsel with Harrison
Improvement Company.

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

AARON MARDER,
Of Counsel with Harrison
Improvement Company.

Service of a copy of the within notice of appeal 20
is hereby acknowledged this 13th day of March,
1929.

(Signed) STEIN, McGLYNN & HANNOCH,
Solicitors of Guardian Trust Company
of New Jersey and New Jersey Na-
tional Bank and Trust Company.

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Harrison Imp't Co. vs. Guardian Trust Co.

PETITION OF APPEAL.

Filed March 19, 1929.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

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Between

HARRISON IMPROVEMENT COM-
PANY, a New Jersey corpo-
ration,

Complainant-Appellant,

and

GUARDIAN TRUST COMPANY OF
NEW JERSEY, a corporation,
et als.,

20

Defendants-Respondents.

On Bill, etc.

*On Appeal
from the
Court of
Chancery.*

*Petition of
Appeal.*

*Docket 72,
Page 77.*

To the Honorable The Court of Errors and Ap-
peals in the last resort in all causes:

The petition of Harrison Improvement Com-
pany, appellant in the above-entitled cause, re-
spectfully shows that:

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1. Petitioner finds itself aggrieved by an
order made in the Court of Chancery by his
Honor, Edwin Robert Walker, Chancellor of the
State of New Jersey, bearing date the 26th day
of February, 1929, in a certain cause in said
Court of Chancery wherein said Harrison
Improvement Company is complainant and
Guardian Trust Company of New Jersey, a cor-
poration; New Jersey National Bank and Trust
Company, a corporation, and Edward R. Mc-
Glynn, receiver of the Criterion Construction

40

Petition of Appeal.

Company, are defendants, in this respect, to wit, that the said order adjudges and directs that the orders to show cause heretofore obtained in said cause against said defendants be dismissed and dissolves the restraints contained in said orders to show cause.

And petitioner appeals from the whole of the order of the Chancellor which orders as aforesaid upon the ground that the same is erroneous in that: (a) it dismisses said orders to show cause and dissolves the restraints contained in same, when the said orders to show cause and the restraints sought by same should have been allowed, pending final hearing and the determination of the suit; (b) the affidavits upon which said orders to show cause were obtained were not contradicted or contraverted in any way; (c) the affidavits upon which said orders to show cause were obtained entitled petitioner to the restraints sought by said orders to show cause pending the final determination of this suit; (d) at the hearing of said orders to show cause there were no counter-affidavits submitted by the defendants; (e) at the hearing of said orders to show cause, no one appeared for the defendants, Guardian Trust Company of New Jersey, a corporation, and New Jersey National Bank and Trust Company, a corporation.

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

MARDER & OKIN,
Solicitors of Complainant-Appellant.

AARON MARDER,
Of Counsel with Complainant-Appellant.

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Harrison Imp't Co. vs. Guardian Trust Co.

Service of the within petition of appeal is hereby acknowledged this 18th day of March, 1929.

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STEIN, McGLYNN & HANNOCH,
Solicitors of Guardian Trust Company
of New Jersey, a corporation, and New
Jersey National Bank and Trust Com-
pany, a corporation, and Edward R.
McGlynn, Receiver of Criterion Con-
struction Company.

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Answer to Petition of Appeal.

ANSWER TO PETITION OF APPEAL.

Filed March 28, 1929.

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

#3045—3/27/29—B

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<p><i>Between</i></p> <p>HARRISON IMPROVEMENT COMPANY, a New Jersey corporation,</p> <p style="text-align: right;"><i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>GUARDIAN TRUST COMPANY OF NEW JERSEY, a corporation, <i>et al.,</i></p> <p style="text-align: right;"><i>Defendants.</i></p>	<p><i>On Bill, etc.</i></p> <p><i>Answer of</i></p> <p><i>Guardian</i></p> <p><i>Trust Com-</i></p> <p><i>pany of New</i></p> <p><i>Jersey,</i></p> <p><i>New Jersey</i></p> <p><i>National</i></p> <p><i>Bank & Trust</i></p> <p><i>Company of</i></p> <p><i>Newark,</i></p> <p><i>Edward R.</i></p> <p><i>McGlynn,</i></p> <p><i>Receiver, to</i></p> <p><i>Petition</i></p> <p><i>of Appeal.</i></p>	<p>20</p>
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Answer of the above-named respondents, to wit: Guardian Trust Company of New Jersey, New Jersey National Bank & Trust Company of Newark, and Edward R. McGlynn, Receiver of Criterion Construction Co. to the petition of appeal of the above-named appellant. 30

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit that an order was on the twenty-sixth day of February 40

Harrison Imp't Co. vs. Guardian Trust Co.

last past, made and entered in the Court of Chancery, in the cause for the purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised
10 and believe, that the said order is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

STEIN, McGLYNN & HANNOCH,
Solicitors for Respondents.

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83 MAY.1.1929

84 MAY.1.1929

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

New Jersey Court of Errors and Appeals

Between

WILLIAM LUNSKY,
Complainant,
and
CRITERION CONSTRUCTION Co.,
a corporation,
Defendant.

On Bill, etc.
On Appeal by
Harrison
Improvement
Company.

Between

HARRISON IMPROVEMENT COM-
PANY, a New Jersey corpo-
ration,
Complainant-Appellant,
and
GUARDIAN TRUST COMPANY OF
NEW JERSEY, a corporation,
et als.,
Defendants-Respondents.

On Bill, etc.
On Appeal
from the
Court of
Chancery.

BRIEF ON BEHALF OF APPELLANT.

These are two appeals from two orders of the court below made on orders to show cause which were argued together and involve common questions. In the Lunsky case above, the appeal is from an order (p. 34) authorizing the Receiver of the Criterion Construction Co. to borrow \$56,000.00 and to issue a Receiver's certificate therefor, making said Receiver's certificate a "first lien upon the assets" of the Criterion Construction Co. and upon, in and to the second mortgage given by Sixty-seven South Munn, Inc., a corporation, to Guardian Trust Company, a corpora-

tion, as trustee, and "prior, superior and paramount to the alleged claim" of the Harrison Improvement Company, the appellant. In the Harrison Improvement Company case the appeal is from an order (p. 116) discharging the orders to show cause obtained by the appellant wherein the appellant sought to restrain the transfer of its prior interest in and to the above-mentioned mortgage and the obligations secured thereby pending the determination of its suit.

Statement of Facts.

Appellant will, for the most part, state the facts chronologically.

In December 1926 or January 1927 the appellant sold to one of the Lunsky companies the premises in question, situate at South Munn avenue in the City of East Orange, and took back a purchase money mortgage of \$40,000.00 (p. 59, ll. 20-32).

By contract dated September 7, 1927 the Sixty-seven South Munn, Inc., a New Jersey corporation, as owner, contracted with the Criterion Construction Co., as builder (pp. 67-82, particularly pp. 75-79 as to cost and payments), for the erection of a ten-story basement steel, brick and stone apartment dwelling house and a one-story garage upon the premises in question, on a "cost-plus" basis, at an estimated "actual cost" of about \$1,700,000.00 plus a fee of \$150,000.00 and 25% of certain savings, to be paid as follows: \$1,071,500.00 to be paid in cash to be raised out of a \$1,250,000.00 bond issue to be secured by a first mortgage on the premises in question, and the balance of \$832,500.00 to be paid with interest (payable semi-annually) bearing notes, maturing five years from the date of the contract

and to be secured by a second mortgage on the premises, which second mortgage was to be subject only to the lien of the \$1,250,000.00 bond issue first mortgage. Both mortgages were to be given by the owner to the Guardian Trust Company, as trustee; said moneys and notes were to be paid proportionately to contract price in monthly installments to the extent of 90% of the work done as the building progressed.

In the event the net cost of the building exceeded \$1,700,000.00 the excess thereof was to be deducted from the fee of \$150,000.00 and the balance of 10% was to be retained by the owner for the purpose of securing the owner against such excess.

The contract also provided (pp. 71 and 72) that in the event the contractor defaulted, etc., the owner could finish, in which event the contractor was not entitled to receive *any further payment* until the work was entirely finished, and if the unpaid balance of the amount to be paid under the contract should exceed the expense incurred by the owner in finishing, the excess was to be paid by the owner to the contractor or if such expense exceeded the unpaid balance, the contractor was to pay the difference to the owner. (This provision, it is submitted, is limited in effect by the other provisions of the contract, especially the cost plus feature thereof; and can be construed, it is submitted, as affecting only the fee of \$150,000.00 and the additional fee of twenty-five per cent. of saving in actual cost below \$1,700,000.00; and as not affecting, in any way that part of the cost already paid for, including both cash and notes, as represents the "actual cost"; and since ten per cent. was to be retained, substantially all of the contract price

paid for from time to time, including both cash and notes, is not in any way affected or lessened by this provision, or otherwise.)

Another pertinent provision of the contract was that the contractor was to procure a bond with corporate surety in the penal sum of \$1,250,000.00 and deliver same to the Guardian Trust Company in form and surety satisfactory to the owner and the Bankers' Bond and Mortgage Co., conditioned for the true and faithful performance of the contract and unconditionally guaranteeing the construction in strict accordance with the plans and specifications and free and clear of all mechanics' liens and other liens and until said bond was delivered no work was to be done (p. 81). Said bond was delivered and entered into by the Maryland Casualty Co. mentioned in the various petitions by the Receiver herein.

The first mortgage in the sum of \$1,250,000.00 was executed and delivered by the owner to the Guardian Trust Company, as trustee, and is dated October 1, 1927 and is recorded in the office of the Register of Essex County. The second mortgage (which it will be noticed for some reason was made for \$865,000.00 instead of \$832,000.00) was executed and delivered by the owner to the Guardian Trust Company, as trustee, and is dated December 14, 1927 and recorded on December 14, 1927 in Book N-63 of Mortgages for Essex County, pages 56-60) Receiver's petition, p. 15). The second mortgage recited that it was made for the purpose of securing the notes representing moneys which will be due and owing by the Sixty-seven South Munn, Inc., a corporation, to the Criterion Construction Company, a corporation of New Jersey, under the

terms, covenants and conditions of a certain contract for building, dated September 7, 1927, and described in said mortgage (p. 29, ll. 10-20).

About that time, Lunskey, President of the Criterion Construction Co. came to William Okin, Vice-President and Treasurer of the appellant and told him about his deal and that he had to put up a considerable sum of money, to wit, \$46,000.00 or \$47,000.00 and it was also necessary to get the appellant's aforementioned purchase money mortgage out of way to close the transaction, and after some discussion as to the method of the Criterion Construction Co. raising this money, etc. it was finally arranged that the Criterion Construction Co. assign to the appellant a first and prior interest of \$40,000.00 by way of principal in and to said \$865,000.00 second mortgage for a loan of \$40,000.00, which the appellant made to the Criterion out of the moneys it got in payment of its purchase money mortgage when the transaction was closed in the office of Joseph Cohn, a lawyer in Newark, which money was turned over by the appellant to the Criterion to enable it to financially go through with the deal, and the Criterion assigned to the appellant a first and prior interest of \$40,000.00 in and to said \$865,000.00 second mortgage given by the owner to the Guardian Trust Co., as trustee, to secure the notes to be earned from time to time in accordance with the progress of the building. The assignment was examined and is described by the Receiver (p. 58, l. 28; p. 59, l. 12). Before the receivership, appellant's interest in said mortgage was reduced to \$23,500 plus interest thereon by reason of payments made by the Criterion Construction Company (p. 63).

There had been paid out something like \$700,000.00 in cash under the first mortgage for the work done by the Criterion Construction Company before the appointment of the Receiver, indicating that about \$500,000.00 was earned and paid in notes, secured by the second mortgage before the Receiver was appointed herein (p. 32, ll. 15-25).

A statutory receiver was appointed of the Criterion Construction Company on July 3, 1928, because of the insolvency of the Criterion Construction Company (p. 42).

On July 17, 1928 said Receiver was authorized to complete the contract and building in question and to enter into agreements with sub-contractors (p. 51, *et seq.*).

On or about December 13, 1928, the Receiver, learning of the interests of the appellant in the \$865,000.00 mortgage, examined William Okin, Vice-President and Treasurer of the appellant (pp. 57-66) and shortly thereafter filed his petition (pp. 1-9) seeking permission to issue a certificate in the sum of \$56,000.00 to be impressed as a lien on the real estate subsequent and second to the \$1,250,000.00 bond and mortgage and prior and superior in lien to the \$865,000.00 mortgage for the purposes expressed in said petition, of completing the apartment house building and paying the obligations created by the Receiver and administration expenses. This petition was filed in January 1929. At that time (see affidavit of William Okin, p. 32, ll. 35 to 40) the apartment house was completed and about 40% rented.

The Receiver, realizing that he had no rights to the fee, shortly thereafter filed another petition (pp. 14-21) wherein he sought permission to issue Receiver's certificates in the sum of \$56,000.00 for the purposes, as expressed therein, of completing the building, paying the obligations incurred by him as Receiver and administration expenses. This petition was filed February 1929 and thereupon an order to show cause was issued (p. 23) and it was upon the return of this order to show cause that the order appealed from was made reciting that the \$56,000.00 was needed by the Receiver in order to complete the building and in order for the Receiver to pay the obligations created by him and administration expenses. The papers in no way show any detailed itemization of said sum asked for by the Receiver but generally state the purposes as above set forth. The verifications to the petitions (pp. 9 and 22) are most general.

Appellant filed a plenary bill (p. 93, etc.) on January 16, 1929 setting up its interest in said \$865,000.00 second mortgage etc.; making parties defendants the Guardian Trust Company, as trustee, the holder of said mortgage, and its successor trustee, the New Jersey National Bank and Trust Company, and also the Receiver (p. 100) and praying that its superior interest in and to said mortgage, which had been reduced to \$23,500.00 plus interest, be assigned to it together with the notes or obligations secured thereby, and that in the meantime and until the determination of said suit the defendants be restrained from in any way interfering with or disposing of said superior interest and notes and obtained orders to show cause (those against the banks containing ad interim restraints, pp.

104 and 106) which orders to show cause were argued and discharged at the same time the Receiver's order to show cause to issue a certificate was argued and granted.

POINT I.

The Receiver's interest in the second mortgage is subsequent to that of the appellant; he cannot do anything which in any way may affect the prior interest of the appellant in and to the second mortgage.

In *Cogan v. Conover Manufacturing Co.*, 69 Eq. 358 the facts are partly stated as follows on pp. 359 and 360:

"These are appeals by certain creditors from the adjudication of the receiver of the defendant company upon their claims.

The main case was an action under the Corporation act for an injunction and a receiver upon the ground of the defendant's insolvency.

The Greenville Banking and Trust Company, the Greenville Coal and Ice Company and Thomas Cogan each filed claims asserting preference with respect to certain moneys, which claims for preference the receiver in each instance disallowed.

Each of the claimants has appealed to this court, and, after order of reference, a hearing was accorded each.

The appeals were heard upon the testimony taken before the receiver.

The receiver was appointed on the 1st day of August, 1904.

The Conover Manufacturing Company was engaged in the business of manufacturing condensers and other machines at Greenville, in Jersey City.

About July, 1903, the Conover company contracted to build six condensers for the Public Service Corporation.

Prior to January 1st, 1904, the company had completed these machines and had delivered all but two of them.

Upon those two there was due the sum of \$6,300.

Of this \$6,300 the Public Service Corporation had prior to the appointment of the receiver, paid all excepting \$2,100. This sum of money is one of those in controversy.

The Conover company, by an exchange of letters, the final one being dated April 18th, 1904, agreed to manufacture two No. 29 condensers for the Public Service Corporation for the total sum of \$16,500. of which one-half was to be paid on bill of lading, or when condensers were ready to be shipped, thirty per cent. in thirty days thereafter, and the final payment on erection and test.

At the time of the appointment of the receiver some work had been done upon those two No. 29 condensers.

On the 1st of August, 1904, the receiver obtained an order from this court permitting him to issue receiver's certificates for a sum not exceeding \$5,000.

The receiver obtained money upon these certificates and completed the machines and delivered them to the Public Service Corporation.

Under an order, dated the 13th day of October, 1904, the receiver collected from the Public Service Corporation the \$2,100 balance due on the first order, and the \$8,250, the first payment due under the second order, and holds the same pending the determination of this matter, when distribution is to be made in accordance with the order of this court."

With respect to the \$2,100.00 fund claimed by the Trust Company by reason of the assignment dated January 5th, 1904 (set forth on p. 810 of the opinion of this Court by Mr. Justice Swayze, 69 Eq. 809), the facts and conclusions of this Court are as follows (pp. 811-812):

“Prior to January 5th, 1904, the company had contracts with the Public Service Corporation amounting to \$25,200, and had assigned to the trust company as security \$10,000. of the amount. On January 5th, 1904, \$18,900. of the total had been paid by the Public Service Corporation, of which the trust company had received its due proportion, \$7,500. There was still due or to grow due from the Public Service Corporation \$6,300, of which the trust company's proportion was \$2,500. The intent of the paper of January 5th was to cover the balance of the money to grow due, as clearly appears from the recital in the last paragraph. There was an error in assuming that \$2,520. was payable to the trust company under the earlier assignment. The real amount was only \$2,500, and the actual balance remaining of the final payment was \$3,800. instead of \$3,780, but the intent is so clear that we think the paper is to be construed as including the whole balance.

The first objection made to the claim of the trust company is that the paper does not amount to an assignment, but is a mere covenant to pay out of the proceeds of the contract with the Public Service Corporation. We do not question the distinction between the rights acquired under a mere covenant to pay and under an assignment. In our judgment the paper now in question amounts to an assignment. There is an ‘actual appropriation which confers a present right on the assignee, although the circumstances may not admit of its immediate exercise.’ 2 Lead. Cas. Eq. 1644. The language of the paper is that of an absolute assignment, and the fact that the Conover company also agrees to act as agent in collecting the money does not militate against the plain construction of the preceding paragraph. The Conover company does not thereby retain authority over the fund. Whatever it may do is to be done not in its own right, but as agent, and the very fact that it agrees to

act as agent precludes the construction that the fund is to remain its own, or subject to its control except as agent.

The fact that the money was not yet due affords no argument against our construction. Such is the ordinary case of an equitable assignment. The very fact that the money is not due so that the assignment is not effective in a court of law is sometimes relied on to give jurisdiction to the court of equity. *Bower v. Hadden Blue Stone Co.*, 30 N. J. Eq. (3 Stew.) 171; affirmed by this court on the vice-chancellor's opinion, 30 N. J. Eq. (3 Stew.) 340.

It is argued that the only effect of the assignment was to secure a loan of \$3,780, made two days after its date, and that as that loan was afterward paid, the right of the trust company to the amount assigned was at an end. We do not so read the assignment. The language is general and the debt secured is not specified. The new loan probably was the inducement to the Conover Company to make the assignment, but it was not extraordinary for them to agree with the trust company that the fund should be held as security generally. We think they did so agree.

There is in the hands of the receiver \$2,100, the proceeds of this account. The debts from the Conover company to the trust company which were in existence on January 5th, 1904, exceed that amount. The trust company is entitled to the fund."

As to the second assignment which was dated April 26th, 1904, and set forth on page 810 of the opinion of this Court, the facts and conclusions of this Court are as follows (p. 812, *et seq.*):

"The only authority for the assignment of April 26th, 1904, is a resolution of the board of directors, which authorized a loan of \$5,470 from the trust company and an assignment of such contract or contracts

of the company as might be necessary to further secure the loan. It is now urged by the trust company that the president of the Conover company had power by virtue of his office to assign this fund generally as security for the indebtedness. The evidence does not justify this conclusion. The parties relied upon the resolution of the board as the authority for the assignment, and that limited the power to securing the loan of \$5,470.

The resolution authorized an assignment of the contract and not in terms of the money to be earned, but we agree with the vice-chancellor that the evident intent of the resolution was to authorize an assignment of the fund, and that was actually done in terms by the paper of April 26th. This was an equitable assignment of money to be earned, and operated upon the fund as soon as it was earned. *Bower v. Hadden Blue Stone Co.*, 30 N. J. Eq. (3 Stew.) 171; affirmed, 30 N. J. Eq. (3 Stew.) 340; *Bank of Harlem v. Bayonne*, 48 N. J. Eq. (3 Dick.) 246; affirmed, 48 N. J. Eq. (3 Dick.) 646; *Terney v. Wilson*, 45 N. J. Law (16 Vr.) 282.

Whether the fund was earned by the Conover company was one of the disputed questions, and was decided by the vice-chancellor adversely to the claim of the trust company. The solution of the question depends on the facts of the case.

The contract was for two condensers for a price of \$16,500, payable one-half cash on bill of lading or when condensers were ready to ship, thirty per cent. in thirty days thereafter, and the final payment on erection and test not later than ninety days from the time the condensers were ready for shipment. *One condenser was completed and, with the exception of certain attachments, delivered prior to the appointment of the receiver. The other was completed by the receiver at a cost of \$3,000.* Both were paid for by the Public Service Corporation.

It is unnecessary to decide upon the respective rights of the receiver and the assignee where the work contracted for has not been completed at the time the receiver is appointed and where no debt exists to which the assignment can attach until work has been done by the receiver.

In the present case one condenser had already been completed and delivered to the purchaser, which recognized its liability by subsequently paying therefor in full. To the extent of the value of the one condenser the money was earned by the Conover company. It was at the time of the appointment of the receiver an account receivable. Even if the contract was an entire contract for two condensers, the delivery to and acceptance by the Public Service Corporation made that corporation liable for the price. The amount paid afterward for this condenser, which was the first delivered, may fairly be regarded as the first payment on the contract, within the meaning of the assignment of April 26th.

It is now argued that the assignment was not effective because notice was not given to the Public Service Corporation. As between the assignor and assignee and those standing in the shoes of the assignor, notice to the debtor or holder of the fund is not necessary. The English cases to that effect are *Beavan v. Lord Oxford*, 6 De G. M. & G. 492 (at pp. 524, 532), where *Watts v. Porter*, 3 El. & B. 743, is disapproved; *Pickering v. Ilfracombe Railway Co.*, L. R. 3 C. P. 235; *Crow v. Reeves*, L. R. 3 C. P. 264; *Scott v. Lord Hastings*, 4 K. & J. 633. Cases in which notice to the debtor or holder of the fund becomes important are cases where the question is one of priority between different assignees, as in *Loveridge v. Cooper* and *Dearle v. Hall*, 3 Russ. 1, and cases arising under the *English Bankruptcy acts*, *Ryall v. Rowles*, 2 Lead. Cas. Eq. 1533.

The object of notice is discussed by Vice-Chancellor Pitney, in *Board of Education v. Duparquet*, 50 N. J. Eq. (5 Dick.) 234, and his view was approved by this court in *Miller v. Stockton*, 64 N. J. Law (35 Vr.) 614 (at p. 622), where Justice Lippincott distinctly said that notice was not an essential part of the assignment.

The controversy in this case is between the receiver of the assignor on one side and the assignee on the other. The receiver represents the creditors, but the creditors as such have no lien upon the fund. Their position is not as favorable as that of the judgment creditor and the attaching creditor in the English cases above cited.

One of the reasons urged for postponing the claim of the trust company to the claim of the general creditors is that the failure to notify the Public Service Corporation gave the Conover company a delusive appearance of credit, like the retention of the possession of personal chattels and the withholding from record of a conveyance. There is no proof that any creditor was actually misled, and it is by no means certain that a notice to the Public Service Corporation prior to the time when the debt came into existence, on the eve of the appointment of the receiver, would have been effective. The retention of possession of personal property and the withholding of conveyances from record do not necessarily make the transfer void as to general creditors. That result is reached only in cases of fraud. *Miller ads. Pancoast*, 29 N. J. Law (5 Dutch.) 250; *Flemington National Bank v. Jones*, 50 N. J. Eq. (5 Dick.) 244; affirmed, 50 N. J. Eq. (5 Dick.) 486.

There is no evidence of fraud in the present case.

It is also argued that the assignments are invalid because the company was insolvent at the time, but the proofs fail to disclose a condition of insolvency. The case is much

stronger than *Regina Music Box Co. v. Otto*, 65 N. J. Eq. (20 Dick.) 582, which has since been affirmed by this court.

We think the assignment of April 26th, 1904, entitled the trust company to be paid the amount of the note for \$5,470, dated April 20th, 1904, out of the money paid the receiver by the Public Service Corporation." (Italics ours.)

It will also be noted that in the *Cogan* case it even appeared that the Trust Company had notice of the application to issue Receiver's certificates for the completion of the two condensers; that the Trust Company bought some of these certificates and further that the Trust Company did not inform the Receiver of its assignment (bottom of p. 382 and top of p. 383 in 69 Equity).

The result in the *Cogan* case was that the Trust Company received the entire \$2,100.00 under the assignment of January 5th, 1904, thus laying down the rule that the Receiver took subject to the Trust Company's rights and since the Trust Company was entitled to the entire \$2,100.00 the Receiver got nothing out of this fund. As to the second assignment of April 26th, 1904, it was held that since the only authority for same was a resolution of the board of directors of the defendant company which authorized a loan of \$5,470.00 from the Trust Company and an assignment of such contract or contracts as might be necessary to further secure the loan, it was held that said assignment of \$5,470.00 to the Trust Company was prior and paramount to the Receiver's interest in the \$8,250.00 which was the first payment due under the second order, despite the fact that the Receiver had expended \$3,000.00 by way of Receiver's certificates for the purpose of completing the other condenser.

In the case at bar when the Receiver was appointed, the contract was about two-thirds completed and approximately \$500,000.00 was earned and paid by way of notes and given substance to under the second mortgage, which was subject and inferior in lien only to about \$700,000.00 by way of principal under the first mortgage of One Million and a quarter. The case at bar is well within the facts and law as laid down in the Cogan case. Like in the Cogan case when the assignment was given to the appellant no moneys were due and owing under the second mortgage; when the Receiver was appointed a large part of the second mortgage had been given substance to—perhaps twenty times as much as the prior interest of the appellant in said second mortgage.

It will be noted that the case at bar is much stronger than the Cogan case for the reason that in that case both funds were in the possession of the Receiver. In the case at bar although the notes earned paid, and secured by the mortgage were turned over to the Receiver upon his appointment, nevertheless notes to the extent of \$40,000.00 or such less sum—depending upon how much the original \$40,000.00 loan by the appellants was reduced—should have been turned over from time to time by the company to the appellant and so far as those notes were concerned the Receiver is simply a custodian. As to the mortgage itself the Receiver did not acquire legal title to same. He succeeded the insolvent corporation as *cestui qui trust* for an inferior interest behind that of the appellant. That is all he has. It is submitted that the situation is analogous to a situation that would be presented if the superior interest of the appellant were represented by one mortgage superior to a mortgage owned by the corporation, which upon its in-

solvency was vested in the Receiver, and as to the notes secured by such prior mortgage which might be in the possession of the corporation before insolvency, the Receiver would only be the custodian and not be vested with legal title thereto.

A case illustrative of the title and possession of a Receiver is the case of *Barthen v. Lodi Corporations et als.*, 94 Eq. 177. It was held that the holder of an executory contract for the sale of goods by a corporation is nevertheless still entitled to the benefits of his contract upon the appointment of a Receiver of said corporation when it is adjudged insolvent. The opinion of Mr. Justice Black reading in part as follows (p. 180):

“The result flows from a consideration and application of the following settled legal principles: Upon the appointment of a receiver he takes the property of the corporation, including its franchises, *in the same condition and subject to all the duties, obligations and liabilities that rested upon the corporation itself.* *New Jersey Southern Railroad Co. v. Railroad Commissioners*, 41 N. J. Law 235, 249. He holds the title to the property for the common benefit of all interested therein.

Placing the property of a corporation in charge of a receiver does not, ipso facto, work its dissolution, nor does it extinguish its corporate life. The appointment of a receiver is a mere mode of procedure for the administration of justice. *Ibid.* The corporation continues to exist until its dissolution is effected, either by surrender or judicial decision. *Kirkpatrick v. State Board of Assessors*, 57 N. J. Law 53; *Rosenbaum v. United States Credit System Co.*, 61 N. J. Law 543; *Spader v. Mural Decoration, &c. Co.*, 47 N. J. Eq. 18.

A decree of insolvency against a corporation does not work a rescission or termination of its contracts. *Bolles v. Crescent Drug, &c., Co.*, 53 N. J. Eq. 614." (Italics ours.)

Clearly then in the case at bar since all the corporation had in the mortgage in question was an equitable inferior interest second to the interest of the appellant, upon the adjudication of insolvency the Receiver succeeded only to that same inferior equitable interest and could do nothing in any way to affect appellant's superior interest in the mortgage, which it retained for all purposes against the Receiver.

POINT II.

The Court below had no power to order the issuance of a Receiver's certificate to be prior in lien to the paramount interest of the appellant in and to the second mortgage.

The Court below (opinion, p. 84, ll. 28 to 30) assumes "that the notes and second mortgage are assets in the hands of the Receiver." It is submitted that this assumption is not sustained by the facts in the case, that as to the mortgage the Receiver is simply the holder of an equitable interest therein inferior to the equitable interest therein of the appellant and as to the notes Receiver is simply custodian of such as are sufficient to cover appellant's charge and that the Receiver cannot do anything which might in any way affect appellant's superior interest in and to the second mortgage.

Nevertheless conceding this assumption by the Court below to be correct, appellant contends that the Court below did not have the power to make the order appealed from.

The Court below (see opinion pp. 83-85)—assuming for the purpose of the Receiver's application (but not deciding) the validity of the appellant's interest in and to the second mortgage—nevertheless authorized and directed the Receiver to issue a \$56,000.00 certificate to be prior in lien to the appellant's interest in the second mortgage in accordance with the Receiver's petition for the purposes set forth in the order (p. 35, ll. 19-22) to wit: "In order to complete said apartment house building in accordance with the said contract and in order for the Receiver to pay the obligations created by him, and the administration expenses."

In *Lockport Felt Company v. United Box Board and Paper Company*, 74 Eq. 686, V.-C. Howell, citing numerous cases, discusses the displacement of liens by Receivers' certificates. His opinion reads partly as follows (p. 690, *et seq.*):

"With regard to corporations of a quasi-public nature, such as railway and telegraph companies and other corporations which belong to the public service class, there appears to be little difficulty either on authority or in reason as to the right to displace prior liens by receivers' certificates. These corporations, their stockholders and bondholders, hold subject to the public right, and if corporations of this class become insolvent and thereby fail in the performance of their duty to the public, the court has the right to pledge the property and all the interests of the owners and lienors to raise money with which to enable the receivers to carry out the public duties and obligations of the corporation. It will be sufficient to cite on this point the opinion of Mr. Justice Bradley in the Supreme Court of the United States, in the case of *Wallace v. Loomis*, 97 U. S. 146. See, also, *Fosdick v. Schall*, 99 U. S. 235.

The cases as to this class of corporations are numerous and will be found collected in 3 *Cook Corp.*, Sections 876, 877. The same rule prevails in the English courts. *Greenwood v. Algeiras Railway*, 2 Ch. 205; 63 L. J. Ch. 670 (1894).

*There is, however, in principle and on authority, a wide distinction between the power of the court to authorize the displacement of subsisting mortgages and liens in the case of public corporations and its power in the case of mere private enterprises which have taken the corporate form. The general power to authorize the issue of receivers' certificates of indebtedness for the purpose of continuing a business which exists in the case of a public corporation does not exist in the case of a private corporation. When a receiver is appointed of a private corporation under our statute the court may authorize him to continue the business temporarily, but with the purpose of winding up, provided the receiver has in his possession sufficient assets to enable him to go on; but if he should find it necessary to borrow money with which to continue the business, the rule undoubtedly is that he shall not be authorized to issue receivers' certificates to raise money therefor which shall displace the lien of a subsisting encumbrance. The reason for this is very obvious. It would be a gross violation of that clause of the federal constitution which prohibits the states from passing laws violative of the obligations of contracts. There is, however, one circumstance which will justify the court in issuing these certificates and displacing prior liens thereby. That occurs in a case in which the money is required not for the purpose of operating the business but for the purpose of saving the property from destruction. A brief examination of the cases will demonstrate the validity of this position. In *Porch v. Agnew*, 70 N. J. Eq. (4 Robb.) 328, the question came under the consideration of Vice-Chancellor Grey; the suit related to the receivership of a large*

and valuable frame hotel property at Atlantic City. The principal value of the property was in the building, and there was no income from it with which the receiver could pay insurance premiums and the services of a watchman, which were indispensable under the terms of the insurance policies. The bondholders opposed the receiver's application, but the vice-chancellor granted it upon the principle that it was necessary for the preservation of the property. A similar application was dealt with by the court of appeals of New York in the case of *Raht v. Attrill*, 106 N. Y. 423. There a receiver had been appointed for the purpose of winding up an insolvent corporation whose property consisted largely of an unfinished hotel building at Rockaway Beach. The receiver sought authority to borrow money for the purpose, among other things, of paying off workmen who in default thereof had threatened to burn the building. The court of appeals denied the power of the court of first instance to supersede the lien of the first mortgage to raise money to pay the laborers, and said 'the act of the court in taking charge of property through a receiver is attended with certain necessary expenses of its care and custody, and it has become the settled rule that expenses of realization, and also certain expenses which are called expenses of preservation, may be incurred under the order of the court on the credit of the property, and it follows from necessity in order to the effectual administration of the trust assumed by the court that these expenses should be paid out of the income, or when necessary out of the corpus of the property before distribution or before the court passes over the property to those adjudged to be entitled.' The court held further that there was no paramount necessity arising out of the fact that the workmen had threatened to burn the building, but that this situation must be dealt with by the ordinary legal methods.

In *Karn v. Rorer Iron Co.*, 86 Va. 754; 11 S. E. Rep. 431, the property in question consisted of a mine which had no marketable value independent of a railroad constructed and used by its owner for the transportation of ore. The court authorized its receiver to protect the title to the railroad and to repair it, and to borrow money on certificates which should be a first lien on all the company's property. The court of appeals gave this reason for holding the action valid: 'It was necessary to raise money in some way to preserve the property from destruction or serious injury, and to put it in salable condition, and the only practical mode of accomplishing that fact was by issuing receivers' certificates.' In *Dalliba v. Winschell*, 11 Idaho, 364; 82 Pac. 107, it was said that courts of equity have power to direct their receivers to care for, protect and preserve the property and to decree that the charges and expenses thereof be prior and preferred liens over other subsisting liens, mortgages or encumbrances, but to go beyond the preservation of the property and issue certificates for money to be used in paying running expenses is beyond the power of the court. The supreme court of Maryland, in an opinion by Mr. Justice McSherry, in *Hooper v. Central Trust Co.*, 81 Md. 559, goes further. He says: 'When the property of private corporations or of individuals has been placed in the hands of a receiver, all expenses for safekeeping and preservation are properly payable out of the income, if there be any, if there be none, then out of the proceeds of the corpus of the estate when sold; *but this necessary power by no means includes authority in such instances to allow the creation of liens through the medium of receivers' certificates which will take priority over existing antecedent liens. Extensive as are the powers of the courts of equity, they do not authorize the chancellor to thus impair the force of solemn obligations and destroy vested rights.*'

Other cases in the state courts are: *Osborne v. Bigstone Company*, 96 Va. 58; 30 S. E. Re. 446; *International Trust Co. v. United Coal Co.* (Colo.) 60 Pac. 621; *Merriam v. Victory Mining Co.*, 37 Oreg. 321; 60 Pac. 997.

The point has received the largest illustration in the federal jurisdiction, and there are many cases in the circuit court of the United States in the several circuits in which the doctrine above stated has been adhered to. In *Farmer's Loan and Trust Co. v. Grape Creek Coal Co.*, 50 Fed. Rep. 481, the subject-matter of the suit was the foreclosure of a mortgage on the property of a coal mining company. The receiver sought an order authorizing him to issue receivers' certificates which should be a first lien on the trust property to enable him to pay taxes then due, to take up certain outstanding certificates, and to continue the operation of the mine. Gresham, circuit judge, quotes the words used by Judge McSherry in the Maryland case, and after discussing the right of the court to deal with public corporations he proceeds: '*Private corporations owe no duty to the public, and their continued operation is not a matter of public concern. It is only against railroad mortgages that the supreme court of the United States has sustained orders giving priority to receivers' certificates representing particular indebtedness, and, as already stated, then only on principles having no application to a mortgage executed by a private corporation owing no duty to the public.*'

In the case of *Fidelity Insurance Trust and Safe Deposit Co. v. Roanoke Iron Co.*, 68 Fed. Rep. 623, the complainant was foreclosing a mortgage on the property of the defendant, a private corporation engaged in the production of iron, a receiver was appointed who petitioned for leave to issue receivers' certificates and to borrow money thereon for the purpose of carrying on the

business of the company. The prayer of the petition was denied upon the principle that it was beyond the authority of the court to authorize the receiver of a private corporation to issue certificates which should displace the lien of a subsisting mortgage for any such purpose. In the case of *Hanna v. State Trust Co.*, 70 Fed. Rep. 2, the court appointed a receiver for a private corporation engaged in business of irrigation and colonizing arid lands. In a suit brought to foreclose a second mortgage, it was held that the court appointing the receiver had no authority to authorize its receiver to issue certificates to raise money to carry on the business of the insolvent corporation and improve its lands already covered by a mortgage. In *Doe v. Northwestern Coal Co.*, 78 Fed. Rep. 62, it was held that receivers' certificates issued by the receiver of a private corporation cannot be made a charge upon the assets of the corporation in preference to existing liens and as against lienors who have not given their consent thereto.

In *International Trust Co. v. Decker*, 152 Fed. Rep. 78, the insolvent company, a Maine corporation owning property in Alaska, mortgaged the same to the complainant, a Massachusetts corporation. Proceedings were taken to foreclose the mortgage, in which proceedings the receiver was authorized to issue certificates on which to borrow money with which to carry on the company's business, and they were by their terms made a first lien upon the property of the corporation. It was held by the circuit court of appeals that the mortgage could not be displaced, following *Baltimore Building and Loan Association v. Alderson*, 90 Fed. Rep. 142, in which the circuit court of appeals said: 'In case of private corporations the court cannot authorize the issue of receivers' certificates for the purpose of improving, adding to or carrying on the business of the company without first having the consent of the creditors whose liens would be affected thereby.'

The English rule will be found in the judgment of Mr. Justice Kekewich in *Securities and Properties Corporation v. The Brighton Alhambra*, 62 L. J. Ch. 566; *Kerr Rec.* 195.

From the cases above cited and from the constant course of practice in this state the rule may be deduced that in case of private corporations the court may authorize its receiver to borrow money upon the faith and credit of all the property of the corporation and authorize the issuing of securities which shall displace all prior liens and encumbrances, but only for one purpose, viz., the preservation of the property and the expenses of realizing upon it by a sale. *This necessity should be imperative and paramount and under no other circumstances can a court justify itself in attempting to undermine prior liens.*

The rule which forbids the displacement of prior liens by receivers' certificates, at all events, in the case of private corporations, is not the reasonable rule. It goes too far. It may well be that one of the chief reasons for appealing to the court to appoint a receiver is that the property may be preserved from spoliation or destruction, and if, after the court shall have assumed to care for the property, it finds that there is no income to support it, and that the court has no power to pledge the property for its own preservation or realization, the original action in appointing the receiver would be futile.

Under no circumstances would the court be justified in authorizing its receiver to borrow money and make the obligation thereof a first lien on the property of a private corporation by the displacement of existing liens for the mere purpose of continuing the business in which the company was engaged, unless possibly in a case in which it satisfactorily appeared that the continuation of the business was absolutely essential to the

preservation of the property in the receiver's custody. In the case of a private corporation this necessity is made the criterion.

In addition to the limitations thus set to the power of the court it may be well to add that in every case the power now appealed to is an extraordinary one and is liable to abuse unless exercised with the utmost caution. The court should be satisfied by a preponderance of circumstances that no other course could be successfully adopted, and that practical ruin would ensue if the authority were withheld. All the facts should be exhibited which make the necessity apparent; all the parties affected should be notified and a full hearing accorded to all objectors." (Italics ours.)

In *Raht v. Attrill and others*, 106 N. Y. 423—13 N. E. 282 (N. Y. Court of Errors & Appeals) the following are excerpts from the opinion by Judge Andrews for the Court of Appeals:

"Andrews, J.: The scheme set on foot by the principal stockholder, with the consent of the trustees of the Rockaway Beach Improvement Company, for the administration of its affairs, and for the completion, finishing, and operating the hotel through the instrumentality of a receiver appointed by the court, has proved a signal and disastrous failure. The receiver was appointed August 2, 1880, within six months after the organization of the company. Prior to that date the company had expended more than \$350,000, raised on the sale and hypothecation of its bonds, secured by the trust mortgage to Soutter, leaving the hotel building and structures but partially completed, and had exhausted all its available means, and was indebted in the sum of nearly \$300,000 for labor, materials, and furniture, which it had no means to pay. The receiver, a few days after his appointment, made his first application to borrow money on receiver's certificates; and on the seventeenth day of August

an order was made ex parte, at special term, authorizing him to borrow \$130,000 for the 'purpose of paying the employes of said company,' and to issue therefore certificates containing on their face a declaration that the debt represented thereby was 'a debt of the receiver incurred for the benefit and protection of the property in his hands, and a first lien thereon, prior to the mortgage to William K. Soutter, trustee, for \$700,000, executed April 1, 1880, and to the interest on said mortgage.' From time to time thereafter, and up to May, 1881, orders of a similar character were obtained, authorizing the issuing of further certificates for money to 'furnish, finish, and operate the hotel'; also with priority of lien over the Soutter mortgage. Certificates were issued, under the various orders, to the amount in all of between \$350,000 and \$400,000; the proceeds of which presumably, were used to carry forward the hotel enterprise. In May, 1881, while the Attrill suit, in which the orders were granted, was pending, an action was commenced by the attorney general to dissolve the corporation; thereafter, in September, 1881 an action was commenced by Raht, executor, to foreclose the original purchase-money mortgage of \$72,000 which went to a decree April 10, 1882, and under which the hotel property was sold January 31, 1883; making a surplus of \$86,283.39, the distribution of which is the subject of the present controversy.

It will be seen, from this general statement, that the efforts of the receiver to administer the property 'for the benefit of all concerned,' were terminated, after a million dollars had been expended in improving it, in a sale of the whole property of the corporation for a sum of less than \$200,000; and all that is left from the wreck for the payment of creditors, whose aggregate claims exceed \$800,000, is the salvage of \$86,000. *This case illustrates what I apprehend has been the common experience where*

a court, departing from its appropriate judicial function, has undertaken to manage and carry on the business of a failing and insolvent corporation.

The principal controversy is between the mortgage creditors under the Soutter mortgage and the holders of the \$110,000 of certificates issued under the order of August 17, 1880. There is a controversy between the holders of the different classes of certificates. The holders of certificates issued under the orders subsequent to August 17, 1880, insist that they are entitled to share ratably in the surplus with the holders of the certificates first issued; which claim has been adjudicated against them in this action. The question becomes unimportant if it shall be held that the mortgage creditors have the first lien on the fund in question, as their claims largely exceed the whole surplus. Except for the provision in the order of August 17, 1880, giving to the certificates issued thereunder priority of lien to the Soutter mortgage, there of course could be no question as to the right of the bondholders to a preference. As between creditors by mortgage and general creditors, the former are entitled to priority of payment out of the mortgaged property by their contract, and by law of the land. * * *

It would be difficult to define, by a rule applicable in every case, what are expenses of preservation which may be incurred by a receiver by authority of the court. It was said by James, *L. J.*, in *In re. Iron-Works Co.*, 3 Ch. Div. 427, that 'the only costs for the preservation of the property would be such things as the repairing of the property, paying rates and taxes which would be necessary to prevent any forfeiture, or putting a person in to take care of the property'. Wherever the true limit is, we think it does not include the expenditure authorized by the order of August 17th, and that such an expenditure is and ought to be excluded from the definition. There must be some-

thing approaching a demonstrable necessity to justify such an infringement of the rights of the mortgagees as was attempted in this case. * * *

“These cases furnish, we think, no authority for unholding the order of August 17th, or for subverting the priority of a lien which, according to the general rules of law, the bondholders acquired through the trust mortgage on the property of the company. It would be unwise, we think, to extend the power of the court, in dealing with property in the hands of receivers, to the practical subversion or destruction of vested interests; as would be the case in this instance if the order of August 17th should be sustained. It is best for all that the integrity of contracts should be strictly guarded and maintained, and that a rigid, rather than a liberal, construction of the power of the court to subject property in the hands of receivers to charges, to the prejudice of creditors, should be adopted.

There is no ground for alleging an estoppel against the bondholders, barring their right to a review of the action of the court. The claim of estoppel is based upon the assumed fact that the trustee knew that a receiver had been appointed, and did not intervene to prevent the issuing of the certificates. The trustee at the time was not a party to the action, and had no notice of the application for the order, or of the issuing of the certificates, until after. He was designated as a trustee by the company before the bonds were issued, and was one of the directors of the corporation,—positions which might bring his duty and interest into conflict. It would be most unjust, under the circumstances, to conclude the bondholders by his inaction, or for the reason that, after the advances on the certificates had been made, he, as one of the board of directors and as a stockholder of the company, participated

in the action of meetings of directors and stockholders in which the order for the issuing of certificates was approved.

We perceive no valid reason why the expenses incurred by the reorganization committee under the reorganization scheme of 1881, and for which it is claimed a large portion of the bonds and other securities were pledged, may not be adjusted in this proceeding, and the lien therefor, if any, be enforced. *It is claimed that in any event there are certain expenses of the receivership chargeable against the fund in court. We do not perceive, upon the facts presented, that this claim has any foundation.* However, we think a proper disposition of the appeal will be made by modifying the order of the general term so as to make the reversal of the order of the special term absolute, leaving the parties to apply for a new reference, as they may be advised, on which all questions, except that of priority between the bondholders and creditors holding certificates, may be considered." (Italics ours.)

The cases dealing with this question are collected in Vol. 40 A. L. R. p. 244 *et seq.* and on page 247 the following appears:

"The Supreme Court of the United States has not as yet expressly declared that receivers' certificates cannot be given priority in the case of a purely private corporation; but it has so strongly observed the distinction in that relation between the two characters of corporations that there is left but little room for conjecture as to what its determination, in a case calling for a decision in the premises, would be. In *Wood v. Guarantee Trust & S. D. Co.* (1888) 128 U. S. 416, 32 L. ed. 472, 9 Sup. Ct. Rep. 131, the court said: 'The doctrine of *Fosdick v. Schall* (1879) 99 U. S. 235, 25 L. ed. 339, has never yet been applied in any case except that of a railroad. The case lays great emphasis on the consideration that a railroad

is a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern. We do not undertake to decide the question here, but only point it out.' And in *Kneeland v. American Loan & T. Co.* (1890) 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950, it was said: 'It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens.'

In *Board of Education of Elizabeth v. Zinc*, 101 Eq. 79, Vice-Chancellor Backes holds that a Receiver who under court directions, carries on the business of a bankrupt concern, is entitled to his expenditures and remuneration out of the funds his efforts helped to create before payment to an assignee of the fund by assignment, *when at the time of the appointment of the Receiver there were no funds to which the lien by way of assignment could attach.* The opinion on page 81, recognizing the doctrine here contended for to its full extent, reads in part as follows:

"This was not a case of disturbing a fixed lien to carry on the corporate affairs in the hope and expectation of saving something for general creditors, as counsel argues, and supports his argument with worthy authority (*International Trust Co. v. Decker Brothers*, 152 Fed. Rep. 78; *In re Clarke Coal and Coke Co.*, 173 Fed. Rep. 658; *Lockport Felt Co. v. United Box, Board and Paper Co.*, *supra*), nor one where a lien was displaced, *for here, at the time the receiver was appointed, there was no funds to which the indemnity company's lien attached.*" (Italics ours.)

Even in the case of a railroad which, as the cases point out, is a quasi-public corporation, it was held improper to order the issuance of Receiver's certificates to complete a railroad one-third completed, said Receiver's certificates to be prior to mortgage liens. *Bibber-White Co. v. White River Val. Electric R. Co.*, 115 Fed. Rep. 786.

It is respectfully submitted that the true rule is that a Receiver's certificate cannot be given priority over a vested lien in the case of a purely private corporation and the displacement of a vested lien by such a certificate is contrary to the Federal Constitution.

However, appellant need not contend for this doctrine to its fullest extent in the case at bar.

The Receiver completed the contract and finished the building only in the hope and expectation of saving something for general creditors and also the corporation itself, by procuring money under the first mortgage and adding to the amount secured by the second mortgage. This is clearly evidenced by the original petition of July 10th, 1928 (pp. 44, *et seq.*) wherein the Receiver seeks permission to continue the contract and complete the building and the order of July 17, 1928 attendant thereon (p. 51) permitting the Receiver to complete the contract and finish the building.

It will be noticed also that the contract was on a cost plus basis; and if the cost exceeded the Receiver's estimate for completion, the owner is liable therefor, and if necessary, the Receiver can file a mechanic's lien under his contract, and it is submitted it is his duty so to do and to claim additional compensation from the owner

for the additional cost thereof instead of endeavoring to supplant a fixed lien by a Receiver's certificate.

Even if this contract were not a cost plus contract, and the amount thereof were fixed, nevertheless the case is well within the doctrine and facts of the cases above cited and the Court has no power to supplant a fixed lien as the result and consequence of an endeavor to help out the general creditors and possibly the stockholders.

The following appears in the opinion of the Court below (p. 84):

“The completion of the building not only added to its security, it was essential, for without completion the second mortgage would have been valueless.”

It is respectfully submitted that there is no proof supporting this conclusion and that the same is not true as a matter of common knowledge and business experience. When the Receiver was appointed the building was about two-thirds completed and was subject to a first mortgage to the extent of about \$700,000.00 and the second mortgage was a valid lien to the extent of about \$500,000.00. Only ninety per cent. of the contract value of the work done was paid for by way of the proceeds of the first mortgage bonds and the notes secured by the second mortgage, leaving an equity of ten per cent. plus the land value. Surely the building as it then stood had a considerable value and its value perhaps would be best measured by the value of the building if completed less the cost necessary to complete the same. The land value was always present. By completing the building the Receiver added to the amount of the first mortgage which was superior to the second.

It is evident that the second mortgage had a real substantial value when the Receiver was appointed, much more than the appellant's interest therein, and the appellant gained nothing by the Receiver's completion; *this is all the more true and absolutely beyond dispute as to the claimed expenditures of less than \$56,000.00.*

The Court below also intimates in its opinion (p. 85) that distribution can only be made by a sale of the second mortgage. It is submitted that the second mortgage was salable before completion of the building in view of the above; whether the mortgage on the completed building would bring its full face value depends upon many facts and conditions as to the value of the building, the period of the mortgage &c., a mortgage on an uncompleted building is likewise affected by its terms and the facts and conditions in connection with the premises.

It might also be pointed out that a sale of the mortgage is not the plan of the Receiver; *that is evidenced by all of his petitions*; the Receiver's plan is to distribute by various participating interests in the second mortgage; it might be noticed in this regard that the certificate provided for in the order appealed from provides (p. 35, l. 40; p. 36, l. 2) that the same is *payable on December 14th, 1932, exactly the maturity date of the second mortgage.* (The order continues to read—"unless previously discharged by money in the hands of the said Receiver"—counsel believes this last to be in the usual form—it is submitted that the date is the important part as to expectation of liquidation and is controlling as to right to repayment.)

It is respectfully submitted that if such a distribution be carried out the \$56,000.00 charge clearly should not be allowed to supplant the vested prior interest of the appellant.

POINT III.

The Receiver has no power to incur indebtedness without authorization by the Court; there is no itemization or sufficient verification of the \$56,000.00 charge which the Receiver seeks to impress as a first lien on the second mortgage, or sufficient verification of the allegations in the petition.

The allegations in this petition are all, except as to some statements in connection with the mortgages, most general; gross amounts are given; no names, dates or particulars of any kind are given.

As before pointed out the Receiver in his petition (p. 19, ll. 15 to 21) states that he desires to borrow the sum of \$56,000.00 "in order to complete said apartment house building in accordance with the plans and specifications, and in order for your petitioner to pay the obligations created by him as Receiver, and the administration expenses." The opinion of the Court below states that its order was based on the theory that the \$56,000.00 would be required by the Receiver for expenses incurred by him in completing the building and also for administration expenses. As before pointed out, the building was substantially completed and about forty per cent. rented when the Receiver made his first application for a \$56,000.00 certificate (p. 32, ll. 30-40).

In the *Lockport Felt Co.* case *supra*, the opinion by Vice-Chancellor Howell on page 696 reads as follows:

"There are some questions of practice which may well be referred to here. Counsel will find in many of the cases that receivers have undertaken to borrow money on re-

ceivers' certificates without the authority of the court. *It is, perhaps, unnecessary to say that in this jurisdiction a receiver has no such power by virtue of his office, nor has he any power to issue any form of evidence of indebtedness which shall create a specific lien on the property in his custody as an officer of the court. He may only do so by the formal enabling decree of the court which has jurisdiction over the receiver and over the property. It may be stated as a general rule that a receiver's powers are limited by the terms of the order of his appointment or by the statute which authorized it. Runyon v. Farmers' &c. Bank, 4 N. J. Eq. (3 Gr. Ch.) 480; Verplanck v. Mercantile Insurance Co., 2 Paige 438; Quincy, &c. Railroad v. Humphreys, 145 U. S. 82; Sm. Rec. Sec. 25. No receiver, therefore, would be justified in incurring any indebtedness on the faith of the property and in issuing obligations therefor unless the act were sanctioned by the order of the proper court. Vilas v. Page, 106 N. Y. 439. It must likewise be remembered that the court has no authority to hear an application of this nature unless notice thereof shall have been given to all the security holders whose rights are sought to be affected. As has already been noted, such notice was given in this case. Laughlin v. United States Rolling Stock Co., 64 Fed. Rep. 25; Third Street Railway v. Lewis, 79 Fed. Rep. 196."*

Clearly the Receiver who incurred obligations without notice and without order of the Court, should not be allowed to charge this \$56,000.00 certificate as a lien on the second mortgage prior to the appellant's interest, in order to pay said expenditures.

The verification of the petition is just as general, if not more so, than the petition itself (p. 50).

In *McMahon v. Pneumatic Transit Co.*, 85 Eq. 544, this Court holds as follows (on p. 547):

“In order to justify the allowance of an injunction, the affidavits upon which the application is made should disclose the material facts which should be verified by the oath or affirmation of some person who has a knowledge of them, the common form of verification not being sufficient. *Youngblood v. Schamp*, 15 N. J. Eq. 42.”

What the items are which are comprised in said \$56,000.00 charge is not disclosed in any way, shape, manner or form. Clearly before any charge should be permitted as against the property of any person or corporation such charge should be established by competent and sufficient evidence. A bill of particulars—properly verified, needless to say, is always essential, when a claim is contested. A receiver in submitting an account for approval by the Court must accompany same by proper vouchers and such account will be carefully audited before it be approved. *Conover v. West Jersey Mortgage Co.*, 96 Eq. 441.

It seems clear that before a Receiver be authorized to expend moneys he first itemize and properly verify the amounts he seeks to expend, especially where some of the moneys he seeks to expend are for obligations already incurred by him. This should all the more be the rule where the Receiver seeks to subordinate a lien to such expenditures and obligations.

POINT IV.

The Receiver's compensation, especially for completing the contract, should not be charged against or be prior to the appellant's interest in the second mortgage.

It is submitted first that it is not proper at the present time to fix the Receiver's compensation. The estate is not ready for winding up. Moreover how much of the \$56,000.00 is Receiver's compensation is not set forth.

Appellant is aware of the rule laid down by this Court in *Seidler v. Branford Restaurant*, 97 Eq. 531, to the effect that the general expenses of receivership are payable out of the *funds* in the Receiver's hands prior to the payment of the mortgage debt. It is respectfully submitted that that decision does not embrace a situation where the property is not converted into cash. Section 86 of the Corporation Act cited in the *Seidler* case speaks of *funds*, indicating the rule contended for.

In *Lembeck v. Jarvis Terminal Coal Storage Co.*, 68 Eq. 352—the opinion by Vice-Chancellor Stevenson, reads partly as follows:

“The case is peculiar. The case was started on behalf, undoubtedly, of the stockholders and creditors of this corporation, and if the cause had proceeded, as such causes generally do, these questions would not have been before the court; *the receiver would have taken the property subject to the liens that were upon it, and would have sold that property, and what he got would have been the fund out of which, primarily, he would receive his compensation. If he did not get any fund he might not get any compensation; it would be what has been termed a dry receivership, and it is proper in such cases for the complainant to be compelled, often times, to put up a bond*

to secure the fees of the receiver whom the court appoints at his instance." (Italics ours.)

The opinion then goes on to say that the suit became one to foreclose the liens and adjust the priorities and the Receivers should be allowed the same compensation which they would have been entitled to receive if they had been appointed in a suit to foreclose the mortgage.

In *Bliss et al. v. Linden Cemetery Association*, 91 Eq. 329, the per curiam opinion of this Court, affirming the decree below, reads partly as follows (p. 330):

"And the next section clearly indicates that such allowance precedes all liens, special and general, upon the funds of the corporation. *There is no claim that the receiver ought not to have continued the business; no doubt he had the express direction of the court so to do.*" (Italics ours.)

indicating, it is submitted, that if the Receiver's continuance in business was of no benefit to the lien claimant, his lien would not be subjected to administration expenses.

Collier on Bankruptcy 13th Ed. Vol. 2 pp. 1437 et. seq. discusses this question as follows:

"Priorities versus Liens.—Some of the early cases seem to hold the broad doctrine that these priorities are superior to valid liens. *It is now settled however that priorities are not superior to valid liens*, unless given a superior right by local law. Thus it is well settled that claims for wages given priority by subdivision 4a—(4) are not superior to valid liens, unless made superior by local law. It has also been held that subdivisions (4) and (5) relate exclusively to the subject of the right to priority of payment arising among those whose claims would, in the absence of such subdivisions, stand on terms of equality before the law

as general unsecured claims, and that such subdivisions have no reference whatever to the subject of liens. But in some cases the costs of administration have been construed, upon equitable grounds, to be entitled to priority of payment, even out of the proceeds of property incumbered by valid liens. But only such costs as are necessarily incident to the preservation of the estate, its conversion into money and payment thereof to lienors are entitled to priority. It is true that the whole estate is or may be marshaled and administered and liens paid through the trustee. *But the rule that the bankrupt's assets come to his trustee charged with all bona fide liens, even if within the four months' period, seem to negative the doctrine of the cases cited at the beginning of this paragraph.* The question is often one of extreme difficulty. Equity may step in and charge against property affected by liens the 'cost of preserving it,' or a proportionate share of the 'attorney's fees'—this, however, only on a showing that his service was beneficial to the property of the lienor—but equity presumably will not declare the 'filing fees' or 'wages' or 'State priorities' superior to valid liens. *The lien creditor is prior in right, and should, therefore, unless directly benefited by the acts or disbursements for which priority is claimed, be prior in distribution.*" (Italics ours.)

In *Fagan Iron Works v. Calumet Construction Company*, 82 Eq. 345 the head-note reads as follows:

"The only asset of an insolvent corporation was a chose in action then in litigation; assignments of portions of this claim had been made to several creditors at different times. The claim was settled by authority of the court of chancery for an amount insufficient to pay the receiver's costs, allowances and fees, and the full amount due the assignees. Held, that the costs, allowances and fees should be charged against each

assignee in proportion to the amount of his claim and that the balance should be paid to the assignees in the order of priority."

It is submitted that the appellant gained nothing by the Receiver's continuation of the contract and did not benefit by the receivership in any way, consequently its lien should not be subordinated to the Receiver's claim for compensation and administration expenses.

Moreover, as above pointed out, the appellant contends that all the Receiver succeeded to was an equitable interest in the second mortgage inferior to the interest of the appellant, which interest the Receiver could not affect in any way.

Also, as above pointed out, there is sufficient equity in the second mortgage to compensate the Receiver without disturbing the appellant's interest in said second mortgage.

Nor, as indicated by the proceedings and as above pointed out will there be any fund for distribution; the Receiver expects to distribute by way of participating interests in the second mortgage.

POINT V.

The restraints in the suit brought by the appellant should have been continued pending final hearing.

This, it is submitted, is clearly so as against the trustees, which did not in any way contradict or controvert the affidavits annexed to the bill of complaint.

As against the Receiver, the Court below (p. 85) says that a restraint is not necessary and would be novel. Nevertheless the Court below proceeds to adjudicate that the Receiver may

issue a certificate to the extent of \$56,000.00 to be prior and paramount in lien to the claim of the appellant. Appellant should be afforded protection against such an adjudication when its claim is that its interest in the mortgage is prior to any interest that the Receiver might have or might create.

In *Schuster v. Ventnor Gardens, Inc.*, 6 A. R. 593 on page 597, it was held that a Receiver may be sued by leave of the Court which appointed him, and if a Receiver may be sued at all, it is conceivable that a state of facts may present a situation where the only proper remedy sought against a Receiver would be to restrain him from doing a certain thing.

Vol. 34 Cyc. which is cited in the *Schuster* opinion contains the following on pp. 417-418:

“(C) Suit in Same Court. It has been held also that the rule requiring one to apply for redress against a receiver to the court which appointed him in the case in which he was appointed is met in a proper case by an original bill filed in the same court. *And where mandamus proceedings against the receiver of a quasi-public corporation are instituted in and entertained by the court which appointed him, for the purpose of compelling the performance of a public duty of the corporation, it is held that he cannot object that the relief sought might have been obtained by a more summary and less formal remedy.*” (Italics ours.)

note No. 8 reading as follows:

Ft. Dodge v. Minneapolis, etc. R. Co., 87 Iowa 389; 54 N. W. 243, to compel construction of street crossing.

It is submitted that if a mandamus can issue against a Receiver, a restraint should also be allowed.

In conclusion it is respectfully submitted that the orders appealed from in both of the above cases should be reversed and that the appellant should be granted the restraints sought by it.

Respectfully submitted,

MARDER & OKIN,
Solicitors of Appellant.

AARON MARDER,
Of Counsel with Appellant.

1881

New Jersey Court of Errors and Appeals

Between

WILLIAM LUNSKY,
Complainant,

and

CRITERION CONSTRUCTION Co.,
a corporation,
Defendant.

On Bill, etc.

On Appeal

from the

Court of

Chancery.

Between

HARRISON IMPROVEMENT COM-
PANY, a New Jersey corpo-
ration,

Complainant-Appellant,

and

GUARDIAN TRUST COMPANY OF
NEW JERSEY, a corporation,
et als.,

Defendants-Respondents.

On Bill, etc.

On Appeal

from the

Court of

Chancery.

APPELLANT'S REPLY BRIEF.

The appellant respectfully begs leave to submit the following by way of reply to some of the matters set forth in respondents' brief and not anticipated in appellant's brief.

1.

The receiver states in his brief (p. 18) that appellant in the argument before the learned Court below did not raise any question with regard to the verification of the allegations in the receiver's petition; etc. Appellant in the Court below did not complete its argument when the Court below announced that it would grant the receiver's application; further all the points raised by appellant are set forth in appellant's petition of appeal (pp. 88 to 90) and the state the case was sent to the Court below at the

request of the Court below for the purpose of its opinion for this appeal.

2.

Further, as to receiver's failure to itemize, he even *fails to itemize in his present brief*, although said brief contains quite a few allegations outside of the record, for example, the allegations not taken from the record and which appear on page 15 of the brief. Appellant's counsel consulted the receiver as to the state of the case and put everything in same that the receiver wanted.

3.

The receiver further says that his petition does not indicate that any portion of the receiver's compensation is included in the \$56,000 charge (receiver's brief, p. 19). The petition and the order both speak of "the obligations created by the receiver *and* the administration expenses." It is clear that "administration expenses", in addition to receiver's obligations, must include receiver's compensation either as an administrator or as an attorney or solicitor. The receiver himself uses the term "administration expenses" as including his compensation, etc., in his brief (p. 10) where he says:

"So that practically the sole asset in the possession of the Receiver available for distribution to creditors and for the payment of administration expenses and costs, was the second mortgage," etc.

Clearly the term administration expenses is broad enough to include receiver's compensation.

Further, if the \$56,000 charge does not include receiver's compensation, it is clearly inferior to appellant's interest in the second mortgage. Further, the completed building and the language from the receiver's brief, (p. 10) above quoted, clearly indicate that the receiver is getting ready to wind up the

estate, and that naturally would be worked out by one certificate, instead of piecemeal.

4

The receiver in his brief (p. 9) claims some kind of a merger because other security, to wit: the Central Avenue mortgage, was also held for the same indebtedness, etc. There clearly was no merger under the facts and further the Central Avenue security was practically valueless, (testimony of William Okin, pp. 65-66). It is further submitted that additional security does not enter into the case at all. Nor does the fact that the appellant might have made no proof of claim (point made by the receiver in his brief at the bottom of p. 10 and top of p. 11—although appellant does not recall such point being brought to the attention of the Court below) enter into the case at all.

5.

Receiver in his brief also argues (p. 12) that the creditors had stop notice rights. Under Sections 3 and 4 of the Mechanics' Lien Acts (vol. 3 C. S. 3296, etc.) such right, if any, have no effect on and do not attach to the payments made and paid out in cash and notes before the receivership.

6.

As to knowledge of the receivership. Appellant was under the impression that the receiver knew of appellant's interest in the second mortgage (receiver's brief, bottom of p.9). It is submitted that appellant had a right to rely on the proposition that the receiver would not do anything which might affect the appellant's interest in the second mortgage. There is nothing in the record indicating that the appellant knew by what method the receiver was financing the completion. The contract was "cost-plus". The appellant could properly assume that the receiver was relying upon the cash and notes which he would continue to receive under the contract *for the completion*; and that no division of the receiver's interest in the mortgage would be made until the time for distribution arose; the Court below was of the

opinion that the mortgage had to be sold before distribution could be made (p. 85 11. 15-20).

It is submitted that the case at bar is well within the facts of the *Cogan* case set forth in appellant's main brief.

Moreover, to paraphrase from the opinion by Mr. Justice Swayze (bottom of page 814, in 69 Eq.), it is by no means certain that even if the receiver actually knew of the appellant's interest in the second mortgage at the time of his appointment that he would not have completed the contract; on the contrary the large surplus of \$270,000.00 for what the receiver calls "general creditors of defendant corporation and stockholders" (receiver's brief, page 15) in this second mortgage indicates most clearly that the receiver would have completed and not have been much bothered by the appellant's superior interest.

Moreover, as is held by the *Cogan* case, the appellant was not under any duty of informing either the trustee bank or the receiver of its prior interest.

7.

It is respectfully submitted that the Receiver's brief avoids the point at issue. Although admitting that before the insolvency the second mortgage had real substance, the brief gives no adequate reason why appellant's prior interest in same should be subordinated because the receiver increased the amount of the second mortgage. Appellant does not argue that the receiver had no right to complete the contract; appellant insists, however, that if the receiver saw fit to complete the contract in the hope and expectation of saving something for the creditors and stockholders, he should not by reason of such completion be permitted to supplant the prior interest of the appellant.

Respectfully submitted,

MARDER & OKIN,
Solicitors of Appellant.

AARON MARDER,
Of Counsel with Appellant.

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

New Jersey Court of Errors and Appeals

Between

WILLIAM LUNSKY,
Complainant,

and

CRITERION CONSTRUCTION CO.,
a corporation,
Defendant.

Between

HARRISON IMPROVEMENT COM-
PANY, a New Jersey cor-
poration,
Complainant-Appellant,

and

GUARDIAN TRUST COMPANY OF
NEW JERSEY, a corporation,
et als.,
Defendants-Respondents.

On Bill, etc.

RESPONDENTS' BRIEF.

This is an answering brief on behalf of the Guardian Trust Company of Newark, New Jersey National Bank & Trust Company of Newark, and Edward R. McGlynn, Receiver of the Criterion Construction Company.

These appeals which are being argued together are from two orders of the Court of Chancery, advised by Hon. Vice-Chancellor John H. Backes. Both orders were the results of orders to show cause issued in each of the respective causes noted above. Both orders to show cause came

on for argument before the Vice-Chancellor at the same time and inasmuch as they involved practically the same situation, were argued together and disposed of at the same time.

In the first case the order to show cause was issued on a petition of Edward R. McGlynn, Receiver. In that case, an order was advised granting the relief prayed for in the petition, and in the second case noted above, the order to show cause which had been issued upon the filing of the bill therein was dismissed and the restraint contained therein was vacated.

We respectfully urge that the facts of the matter which are quite involved are most important and will therefore be set forth in detail.

Facts.

In the receivership action, being the first case noted above, the Receiver was appointed upon a creditors' bill under the statute on June 27, 1928. See order, State of Case, page 38. Shortly after his appointment, the Receiver filed a petition (State of Case, pp. 44-50), which developed the following facts:

A company called "67 South Munn, Inc." was the owner of a piece of property located at No. 67 South Munn Ave., East Orange, N. J., upon which it contemplated the erection of a ten-story brick apartment house for the accommodation of 113 families. The corporation just named entered into a written contract with the defendant corporation, Criterion Construction Co., for the furnishing of all material and labor necessary for the erection of this contemplated structure on what was known as a "cost-plus basis," viz: the cost of all material and labor with a guar-

anted fee of \$100,000.00 and it was calculated that the contract price would approximate \$1,800,000.00. The final cost was to be computed at the completion of the building operation, at which time certain adjustments were to be made between the owner and the contractor.

The financing of this building operation was to be accomplished by the raising of a first mortgage on the land and building to be erected, in the sum of \$1,250,000.00 to be given to the Guardian Trust Company as trustee, which was to secure bonds, all of which bonds had been purchased by the Bankers Bond & Mortgage Company of Philadelphia. The proceeds arising from the sale of these bonds, after all deductions, were to be approximately \$1,000,000.00 and were to be paid to the contractor from time to time as the work on the building progressed. The balance of the contract price for the erection of the building was to be paid to the contractor by notes of 67 South Munn, Inc., secured by a second mortgage covering the land and contemplated building.

Both of these mortgages just described were placed upon the property before any work was commenced and the notes to be secured by the second mortgage were executed and delivered to the Guardian Trust Company as trustee and were to be delivered to the contractor from time to time as the work progressed, in accordance with the building contract, which provided for certain percentages of the contract price to be paid in cash and the balance by way of the notes secured as just described (see contract, State of Case, pp. 67-82).

During the course of construction, the Criterion Construction Co. became financially em-

barrassed, which led to the filing of the bill in the Lunsky case and the appointment of the Receiver. At the time of the appointment of the Receiver there was approximately \$369,000.00 in cash still to be advanced on the first mortgage, and a substantial amount of notes secured by the second mortgage remained in the possession of the Guardian Trust Company as trustee. At that time there was due to creditors who had performed labor and furnished materials to the Criterion Construction Co. approximately the sum of \$142,000.00. The Receiver estimated that it would cost \$600,000.00 to complete the building. An order to show cause was issued upon the Receiver's petition and after notice to all creditors, a hearing was held thereon which resulted in an order (State of Case, pp. 51-56), permitting the Receiver to complete the contract between the Criterion Construction Co. and 67 South Munn, Inc., a corporation, and permitting the Receiver to expend the entire balance of cash to be derived from the first mortgage of \$369,000.00 and permitting the Receiver to borrow a further sum not exceeding \$75,000.00, also providing that the balance of the cost of completion was to be paid by creating three participating interests in the second mortgage covering the building at 67 South Munn Avenue, East Orange, which had been recorded in the nominal sum of \$865,000.00 as herein described.

A first participating interest was to be used for the purpose of borrowing the \$75,000.00 just described and for the balance of the payments to the contractors or materialmen who would perform labor or furnish material in completing the building.

A further provision in the order was that the creditors who had furnished materials and per-

formed labor upon said building for the Criterion Construction Co. prior to the appointment of the Receiver, were to receive a second participating interest in said mortgage.

The third participating interest, if there should be such, would, of course, upon distribution have gone to general creditors.

After completion of the building, it was ascertained that the Receiver, because of a situation which arose during the course of construction over which he had no control and which he could not reasonably have foreseen, had created obligations in the discharge of his duty, which amounted to \$56,000.00. A petition was thereupon filed (State of Case, pp. 1-9) and an order to show cause was issued thereon.

Subsequently, it having been discovered that the prayer in the original petition was not broad enough to cover the situation, the Receiver filed a second petition (see State of Case, pp. 12-22), which is practically identical with the first petition, except in its prayer for relief. An order to show cause was issued on said second petition (see State of Case, pp. 23-27).

Upon the return of the last-mentioned order to show cause, a hearing was held before Hon. John H. Backes, Vice-Chancellor, which resulted in the order of February 26, 1929, which is the order from which appellants took an appeal. This order permitted the Receiver to borrow \$56,000.00 for the purpose of paying the obligations created by him as Receiver and made the Receiver's certificates issued for that purpose a first lien upon the assets of the defendant corporation, especially upon the second mortgage which has been described herein, and prior to the participating interest already created in said

second mortgage, and prior to the alleged interest of the Harrison Improvement Co.

The other order from which an appeal has been taken resulted from a filing by the appellant of a bill of complaint (see State of Case, pp. 93-99). On the filing of this bill an order to show cause was issued (see State of Case, pp. 106-107). This order to show cause came on for argument the same time as the first one just described and after hearing, resulted in an order dismissing the order to show cause and vacating the restraint contained therein (see order of February 26, State of Case, pp. 116-117). The facts in connection with this bill of complaint, briefly, are as follows.

It appeared that on December 13, 1927, the Criterion Construction Co. executed a paper purporting to be an assignment of a superior interest of \$40,000.00 in and to the \$865,000.00 second mortgage which has been described herein. This alleged assignment was given, according to the allegations of the Harrison Improvement Company, as partial security, for a loan of \$40,000.00 made by the Harrison Improvement Co. to the Criterion Construction Co. This assignment was never recorded.

It will be recalled that the second mortgage of \$865,000.00, an interest in which was alleged to have been assigned by the agreement of December 13, 1927 just referred to, was not made to Criterion Construction Co. but was made by the owner of the land, 67 South Munn, Inc. to the Guardian Trust Company as trustee, although the notes secured by this mortgage were made by the mortgagor to the order of the Criterion Construction Co.

When the Receiver was appointed some of these notes were in the possession of the Criterion Construction Co. and were then delivered to the Receiver and the balance of the notes were in the possession of the Guardian Trust Company, to be delivered when and as the work on the building at 67 South Munn Avenue, East Orange, progressed and was completed. At the time of the hearing of the rule to show cause on this matter, all notes secured by this second mortgage were in the possession of the Receiver, although the mortgage itself had not been assigned by the Guardian Trust Company to the Receiver.

According to the allegations of the bill of complaint, \$16,500.00 of the alleged indebtedness secured by this alleged assignment had been repaid and the bill of complaint prayed for a decree restraining the Guardian Trust Company and the New Jersey National Bank & Trust Company of Newark, its successor, from assigning the superior interest in said second mortgage and for a decree adjudging that the said Harrison Improvement Co. was entitled to a superior interest of \$23,500.00 by way of principal and accrued interest in and to the said second mortgage of \$865,000.00.

Subsequently, the Receiver of the Criterion Construction Co., by proper amendment was made party to this suit and to the order to show cause.

The claim of the Harrison Improvement Co., by way of this alleged assignment, came to the Receiver as a complete surprise. The first notice which had been given to him of any claim of this nature was shortly before the fifteenth day of January, 1929. Not only had the assignment

never been recorded but no notice of the assignment or of any alleged claim on the part of the Harrison Improvement Co., either to the Receiver or to the Guardian Trust Company or the New Jersey National Bank & Trust Company of Newark had ever been made prior to that time.

Immediately upon receipt of the notice of this claim, the Receiver caused to be examined before him William Okin, who was vice-president and treasurer of the Harrison Improvement Co. and also an officer and director of two other corporations whose connection with the Harrison Improvement Co. was quite important. A reading of the testimony taken by the Receiver, which is in State of the Case, pages 58-66, and which testimony was before the Vice-Chancellor when the orders to show cause referred to herein were argued, established the following facts: That the stockholders, officers and directors of the Harrison Improvement Co., a New Jersey corporation, were also stockholders in two other New Jersey corporations, one called the Berwyn Estates and the other called the Towne Holding Co. The important connection between these corporations was that the Berwyn Estates was the owner and holder of a mortgage of \$40,000.00 made by the Criterion Construction Co. covering certain property in East Orange, N. J., located on the southerly side of Central avenue, extending from Eppirt street to Burnett street, and upon which was erected a four-story brick building covering the entire block. This \$40,000.00 mortgage had been given as additional security for the payment of the loan secured by the alleged assignment of the superior interest in the second mortgage covering 67 South Munn avenue.

This particular property had come into the possession of the Receiver upon his appointment

and it having developed that there was very little equity in the property so far as the Receiver was concerned, a petition was filed by the Receiver, which resulted in an order being made in the Lunsky case, permitting the Receiver to sell to the Towne Holding Co. this property on Central avenue, subject to the \$40,000.00 mortgage held by the Berwyn Estates.

This definitely established that the officers of the Harrison Improvement Co. not only had direct knowledge of the fact that the Criterion Construction Co. was in the hands of a Receiver, but also established that a portion of the security which had been given by the Criterion Construction Co. in re-payment of the original loan of \$40,000.00 made to the Harrison Improvement Co. by the Criterion Construction Co. was liquidated or merged, or at least taken into consideration when the Receiver conveyed the Central avenue property to the Towne Holding Co.

The examination of Mr. Okin by the Receiver also established the fact that the officers of the Harrison Improvement Co. knew that the Criterion Construction Co. was in the hands of a Receiver. The following is quoted direct from the testimony just referred to:

“Q This letter which was written to the parties mentioned in the first part of the hearing is the first notice you have given to anyone since the receivership of any claim to be made under this assignment which has been produced here today, is it not? A That is the first formal notice we made to either the receiver or the bank.

Q You never brought it informally to the receiver before? A I thought that the receiver knew of it, because I was under the impression that Lunsky had told him about it. I never bothered notifying the receiver.

Q You never recorded this assignment?

A I never recorded that assignment, because that in itself would have been useless to do. I knew that the mortgage had been made in the name of the Guardian Trust Company. I knew that under the arrangement with the Bond and Mortgage Company and the general plan worked out at the time this thing was first started, the mortgage would not come into the possession of the Criterion Construction Company until the building was completed. Then it was to be assigned. I figured we would not record our assignment until the bank's assignment to the Criterion was recorded" (State of Case, p. 63, l. 36 to p. 64, l. 25).

The suit of the Harrison Improvement Co. against the Guardian Trust Company and others was not at issue when the rule was argued and the order entered dismissing the order to show cause, but since that time answers have been filed and the case is now at issue but no date for final hearing has been set.

It was also brought to the attention of the Vice-Chancellor, upon the return of the two rules which have just been described, that practically all of the other assets of the Criterion Construction Co. which had come into the possession of the Receiver upon his appointment had been sold, or in a great many instances, abandoned because of the fact that there was no equity in them for the creditors of the Criterion Construction Co., so that practically the sole asset in the possession of the Receiver available for distribution to creditors and for the payment of administration expenses and costs, was the second mortgage covering the property at 67 South Munn Ave., East Orange.

It was also brought to the attention of the Vice-Chancellor that at the time of the hearing

on the two rules to show cause just described, that an order barring creditors of the Criterion Construction Co. had been entered and that no claim had been filed either before the entry of the order barring creditors or thereafter on behalf of the Harrison Improvement Co., either by virtue of its alleged assignment or by virtue of the alleged indebtedness or claim which the assignment was supposed to secure.

**Respondents' Answers to the Argument
Advanced by Appellant in Its Brief.**

Answer to Point I.

Neither the extremely long citation from the case of *Cogan v. Conover Manufacturing Co.*, 69 N. J. Eq. 358, nor the case of *Barthen v. Lodi Corporation, et al.*, 94 N. J. Eq. 177, are applicable to the situation now presented to the Court by these appeals.

In the *Cogan* case the Vice-Chancellor's determination of the validity and priority of the Bank's assignment was in the nature of a final hearing and was decided on the merits of the assignee's claim, while in the case now before the Court there had been no hearing, no determination and no adjudication of any kind either by the Receiver or by the Court of Chancery with respect to the validity of the alleged claim of the Harrison Improvement Co. and the Receiver then and now vigorously contends that the claim has absolutely no merit and is satisfied that upon final hearing it will be so determined.

Respondents agree with the law laid down in the *Barthen* case, just cited, but it must be remembered that between June 27, 1928, the date

the Receiver was appointed herein and February 26, 1929, the date the orders appealed from were filed, that not only had the Receiver borrowed \$70,000.00 of the \$75,000.00, which he had been authorized to borrow, but had also expended the \$369,000.00 balance due on the first mortgage which was available when he was appointed, and had also given certificates of a first participating interest in the second mortgage of \$865,000.00 to the contractors and materialmen who had completed the building under agreements made with the Receiver, pursuant to an order of the Court of Chancery, which certificate amounted to approximately \$170,000.00 and also gave certificates of a second participating interest in the second mortgage to creditors and materialmen who had performed labor and furnished materials prior to the appointment of the Receiver, amounting to approximately \$190,000.00.

It must also be remembered that this last class of creditors, viz: contractors and materialmen, had liens on the proceeds of the contract between 67 South Munn, Inc. and the Criterion Construction Co. by virtue of Section 3 of the Mechanics Lien Act. It was to avoid having such creditors file stop notices with the owner that a provision was inserted in the order of July 17, 1928 (State of Case, pp. 51-56), creating a second participating interest in the second mortgage so that all such claims could be satisfied.

Appellant apparently knew, all during this period of time while all these interests were being created in the second mortgage and all this money was being expended by the Receiver, exactly what the Receiver was doing and yet it stood idly by and then, after the results of the Receiver's efforts and expenditures had been accomplished, stepped in and attempted to place

itself in a position of priority above all the creditors of the corporation and the contractors employed by the Receiver, and even now, ahead of administration expenses, bills and costs of \$56,000.00.

In this connection, the language of Vice-Chancellor Backes, in the case of *Board of Education of Elizabeth v. Zinc*, 101 N. J. Eq. 80 and 81, is most significant and absolutely applicable to the present case.

“Moreover, it stood by and without protest, saw the Receiver expend the money to its advantage, for at that time it was chargeable with the cost of finishing the work. It was silent then and cannot be heard now.”

It is respectfully urged that appellant's position is unfair, unequitable and is not supported by any decisions of this or any other court.

Answer to Point II.

Appellant is absolutely wrong in stating that the Court below (opinion of the State of Case, pp. 28-36) *assumed* “that the notes and second mortgage are assets in the hands of the Receiver.” There was no necessity for any assumption because it was a fact. The Receiver, upon his appointment came into possession of the notes already delivered and upon completion of the building received the full balance of the notes and they were then and are now in his possession. The mortgage, although given to the Guardian Trust Company as trustee, after completion of the building, belonged to the Receiver and the Trust Company and its successor were and are now ready to assign the mortgage to the Receiver.

There is an intimation all through appellant's brief that the Receiver should not have com-

pleted this contract but upon his appointment apparently should have realized upon his right of mechanics lien for the work then completed and intimates that the owner of the building had a completion bond issued by a surety company. This is a ridiculous argument and absolutely untenable.

When the Receiver was appointed, the building in question was about two-thirds completed. If the Receiver had abandoned the contract, the contractor would then have been in default and not in any legal position to file a mechanics lien claim on the property or even sue for the reasonable value of the work performed up to that time. It does not need any citation of authority to sustain the argument that a contracting party who is in default cannot make his default the basis of a legal recovery.

The Receiver, in the proper discharge of his duties, brought the entire situation as it then existed to the attention of the Court of Chancery and the creditors and stockholders of the defendant corporation by the filing of the petition of July 10, 1928. (See State of Case, pp. 44-50.) On this petition an order to show cause was issued and notice thereof given to all parties in interest then known to the Receiver (appellant was not known to have any interest, but as before stated, another corporation, Berwyn Estates, connected with appellant corporation did receive notice). After a full hearing by the Court of Chancery an order was advised (see State of Case, pp. 51-56.), authorizing him, among other things to complete the building at No. 67 South Munn Ave., East Orange and providing, as before stated, to borrow a sum not exceeding \$75,000.00 and creating three participating interests in the second mortgage, which would be

created by the completion of the building. The Receiver, by carrying out the terms of the order made what was really a liability when he was appointed, an asset having approximately a value of \$700,000.00, because after final adjustment between the Receiver and the owner of the property, that sum was the amount which was agreed upon as the sum secured by the mortgage originally given in the sum of \$865,000.00 and is now a valid and subsisting lien to that extent on the largest and one of the most beautiful apartment buildings in the State of New Jersey, being ten stories in height, now fully completed and occupied by tenants and producing revenue which gives real life and value to the second mortgage.

This second mortgage is now held by the Receiver for the benefit of creditors as follows:

First participating interest:

- (a) To secure Receiver's loan \$70,000.00
- (b) In payment of contractors' balances for completion170,000.00

Second participating interest:

- (a) Payment of claims for materialmen and laborers due at the time of the appointment of the Receiver190,000.00

Third participating interest:

- (a) Interest of general creditors of defendant corporation and stockholders270,000.00

Respondents contend that the *Lockport case*, 74 N. J. Eq. 686, cited by appellant, is in reality an absolute justification for the orders now under review.

Let us repeat briefly, however, from the opinion of Vice-Chancellor Howell:

“Under no circumstances would the court be justified in authorizing its receiver to borrow money and make the obligation thereof a first lien on the property of a private corporation by the displacement of existing liens for the mere purpose of continuing the business in which the company was engaged, unless possibly in a case in which it satisfactorily appeared that the continuation of the business was absolutely essential to the preservation of the property in the receiver’s custody. In the case of a private corporation this necessity is made the criterion.

In addition to the limitations thus set to the power of the court it may be well to add that in every case the power now appealed to is an extraordinary one and is liable to abuse unless exercised with the utmost caution. The court should be satisfied by a preponderance of circumstances that no other course could be successfully adopted, and that practical ruin would ensue if the authority were withheld. All the facts should be exhibited which make the necessity apparent; all the parties affected should be notified and a full hearing accorded to all objectors.”
N. J. Eq. 74, 695.

Respondents contend that all the tests indicated in this opinion were fully met. We respectfully contend that the learned Vice-Chancellor, in advising the two orders now under review was satisfied by the preponderance of circumstances that no other course could have been successfully adopted and that practical ruin would ensue if the authority were withheld. All the facts were exhibited which made the necessity apparent. All the parties affected were notified and full hearing accorded to any objectors.

Under this point of appellant’s brief it is stated that there is no proof supporting the con-

clusion of the learned Vice-Chancellor that the completion of the building not only added to its security but that it was essential, for without completion the second mortgage would have been valueless. There were no contentions made at the hearing on the rule to show cause which resulted in the orders now under review with respect to this point and it was readily admitted by appellant's counsel that the learned Vice-Chancellor was extremely familiar with all the facts in connection with the receivership of the Criterion Construction Co., for the simple reason it had been before him every week in connection with one kind of an order or another from the time the Receiver was appointed up to the time of the hearing of the rules.

This, as the court can readily understand, was perfectly possible, as the case involved a considerable and substantial sum of money with legal ramifications of all kinds, nature and descriptions and the learned Vice-Chancellor, as well as the Receiver, proceeded cautiously with reference to every step taken in the receivership. It is an absolute fact which cannot be controverted that if the Receiver had not completed the building in accordance with the terms of the order here referred to the second mortgage which had originally been in the nominal sum of \$865,000.00 would not have been worth the paper it was written on. Under the plan approved by the court and the creditors, everyone who was interested in this case as a creditor, except appellant, was absolutely and entirely satisfied with the administration of the receivership by the Court of Chancery.

The question of what disposition the Receiver will make of the second mortgage now in his possession has not been determined and before

anything can be done with reference to its disposition, due regard will have to be given to the participating interests created in the said second mortgage and a full hearing had by the Court so that all persons having interests in the second mortgage will be protected and a course of action followed which will eventually ensure a full payment of all claims secured thereby.

When the Receiver petitioned the Court to borrow \$56,000.00 to pay off the balance of the liabilities created by him in the completion of the building and asked for permission to issue Receiver's certificates for that purpose, said certificates naturally had to have a maturity date. Inasmuch as the Receiver knew that the maturity date of the second mortgage was December 14, 1932, it was a natural exercise of business prudence to have the maturity date of the Receiver's certificates fixed for the same time.

Answer to Point III.

In the argument before the learned Vice-Chancellor who advised the orders now under review, appellant at no time raised any question with regard to the verification of the allegations in the petition, nor to the fact that the petition did not contain an itemization of the names and amounts of the creditors whose claims the Receiver desired to pay by the borrowing of \$56,000.00.

It is respectfully urged that had this question been raised in the court below, the Receiver could have promptly furnished to the Court and appellant all information which was desired. It is also respectfully pointed out that this is not a final determination with regard to the ex-

penditures by the Receiver of the \$56,000.00 to be borrowed and should appellant be aggrieved in any way it can accomplish its result by filing an exception to the Receiver's report on receipts and disbursements when same is filed and comes on for approval.

Answer to Point IV.

This is no indication in any petition filed herein and set forth in the State of Case filed in connection with these appeals that any portion of the Receiver's compensation was included in the \$56,000.00 indebtedness which the Receiver desired to liquidate. This contention was never raised by appellant in the court below and respondents cannot understand how any disbursement can be made by the Receiver of any portion of the \$56,000.00 to pay the Receiver's compensation without first filing a Receiver's report of receipts and disbursements and having issued thereon a rule to approve the same and pray for an allowance. On the return of such an order, any creditor can be heard both with reference to the question of the amount of the compensation and the fund from which the same is payable.

Answer to Point V.

As has been pointed out previously, the interest of the Guardian Trust Company as trustee and its successor, New Jersey National Bank & Trust Company of Newark, was so nominal in connection with the second mortgage of \$865,000.00 that the court below hardly considered the fact that the preliminary restraint had been not only against the Receiver but against these other parties. The position of the learned Vice-Chancellor was that there was no necessity for a restraint against the Receiver because the same

was absolutely novel. If, upon final hearing of the case of the Harrison Improvement Co. against the Guardian Trust Company and the Receiver, a decree is entered that the complainant therein has a superior lien of \$23,500.00 in the second mortgage originally in the nominal sum of \$865,000.00, nothing that the Receiver can do or has done can affect the position of the priority thus afforded by the final decree. Therefore, it was unnecessary to restrain the Receiver in the Court of Chancery.

Respondents' Argument Why Orders should be Affirmed.

Taking up the order under review in the opposite order from which they have been argued, respondents contend that the rule to show cause in the case of Harrison Improvement Co. against Guardian Trust Company and others, which was the *ex parte* order issued at the time the bill was filed, was properly dismissed by the court below.

First, because its issuance originally was discretionary with the learned Vice-Chancellor with whom the bill was filed and the learned Vice-Chancellor who heard the matter upon the return of the rule to show cause, was apparently satisfied and the record does contain sufficient evidence to sustain his conclusions that the complainant was not entitled to preliminary restraint.

Secondly, because it is apparent from the facts of the case which have been explained in detail herein that it is questionable whether or not the complainant in that case will, upon final hearing, be entitled to a decree.

Thirdly, because the conduct of the complainant in not recording its alleged assignment and

in purposely remaining silent when it knew that serious and substantial changes were being made in connection with the mortgage on which its assignment was supposed to operate, does not entitle it to any equitable relief, especially of a preliminary nature; and

Fourthly, because it was proven conclusively in the examination of Mr. Okin, an officer of the complainant company, that the complainant had received other security for the payment of its alleged debt and taken title in the name of another corporation to the land on which said mortgage was a lien. The court will recall this last statement is based on the fact that the Berwyn Estates was the owner of a \$40,000.00 mortgage covering the Central avenue property referred to in this brief and which property the Receiver had conveyed by proper order to the Towne Holding Co., subject to the \$40,000.00 mortgage held by the Berwyn Estates.

Respondents urge that with respect to the other order now under review, to wit: the order permitting the Receiver to borrow \$56,000.00 and to issue Receiver's certificate in that sum which was to be a lien on the assets in the possession of the Receiver, and especially on the second mortgage covering property #67 South Munn avenue, East Orange, prior to the lien of participating interests in that mortgage and prior to the alleged lien of the Harrison Improvement Co. by virtue of its alleged assignment, was a proper order and the same should be affirmed.

Respondents rest their argument not only upon all the reasons which have been urged in the various parts of this brief, but because the Receiver had been duly authorized by proper orders of the Court of Chancery to complete the build-

ing at 67 South Munn avenue., East Orange, and in the administration of his trust had incurred administration expenses due to contractors and materialmen in the sum of \$56,000.00 and the order which is now under review merely changed the character of these administration expenses from a debt for materials and labor to one for borrowing money to pay those debts.

As was stated clearly and correctly in the learned Vice-Chancellor's opinion:

"The completion of the building not only added to its security, it was essential, for without completion the second mortgage would have been valueless. The borrowing of money on receiver's certificate to pay the receiver's debts merely shifted the nature of the administration expense from a debt for merchandise to one for borrowed money to pay the merchandise debt. The certificate impaired no rights, was a mere commercial convenience that tends to maintain the credit of our receivers and as a purely administrative act is not the subject of criticism by creditors or lien holders. The Harrison Company can suffer no harm. If it has a lien on the second mortgage superior to the participating interests, as it contends, and is sustained, it will be paid first out of the assets in the receiver's hands upon distribution, for the receiver must first realize on the mortgage before distribution can be made. The Court will then adjust the equities."

It is respectfully urged that both orders now under review should be affirmed with costs.

Respectfully,

STEIN, McGLYNN & HANNOCH,
Solicitors of Respondents.

E. R. McGLYNN,
Of Counsel.

