STATE LIBRARY
OF
NEW JERSEY

PROPERTY OF
RECEIVED
AUG 14 1944
NEW JERSEY STATE LIBRARY
TRENTON

6 9 MAR.T.1914

ADDITIONAL INDEX.

Trustee Exhibit D-1—Petition in bankruptcy 774

Trustee Exhibit D-1—Adjudication in bankruptcy 774

Trustee Exhibit D-1—(Case, page 721) Corrected 773

Trustee Exhibit D-3—(Case, page 755) Corrected 773

Exhibit C-12 (Summarized) 773

Contract—Board of Education and Glen Co., Case, page 12

Assignment—Glen Co., to First Nat'l Bank, Case, page 102

Sample Check, Case, page 749

Judgment—New Dorp, S. I. 780

2

ADDENDA.

Exhibit Trustee D-1,

on page 721 of case has marked thereon in ink the letter "H," in the upper left hand corner, in Hilbert's handwriting.

Exhibit Trustee D-3,

on page 755 of case, the second clause thereof is interlined and corrected in lead-pencil in Hilbert's handwriting.

Exhibit C-12 (Summarized).

NAME.	AMOUNT.	Filed with Board of Education and Comptroller.
Brick Terra Cotta & Tile Company,	$ 5,535.60	Sept. 19, 1910
Bake Stone Company,	510.10	Sept. 26, 1910
Dillistin Lumber Company,	1,513.76	Nov. 2, 1910
Harbinson Walker Refractory Co.,	1,160.00	
James Healey,	761.20	Sept. 21, 1910
Ingalls Stone Company,	2,115.00	Sept. 22, 1910
John Agnew Company,	11,933.29	Nov. 28, 1910
Frank Miller Lumber Company,	10,955.14	Dec. 9, 1910
Herringbone Metal Lath Company,	761.25	Dec. 10, 1910
Joseph Sharpe Construction Company,	3,037.00	Dec. 10, 1910
Cortlandt Engineering Company,	2,537.00	Dec. 12, 1910
Fred G. Ebsary,	900.00	Dec. 12, 1910
Architectural Plastering Company,	1,680.00	Dec. 12, 1910
American Lumber Company,	242.90	Dec. 12, 1910
George A. Myers Company,	523.96	Dec. 12, 1910
Sutphen & Myers,	2,400.00	Dec. 12, 1910
McKiernan & Bergin Company,	1,148.80	Dec. 13, 1910
Martin Troost,	626.75	Dec. 14, 1910
J. A. VanWinkle Company,	313.37	Dec. 15, 1910

In addition to the above there were many workmen's claims, and the total liens filed aggregate $49,983.44.

2

TRUSTEE EXHIBIT D-1.

Petition in Bankruptcy and Adjudication.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

The petition of *BEVERLY D. HOVEY, of the Borough of Manhattan, City of New York, JOHN H. ROSS, of the Borough of Manhattan, City of New York, and EDMUND J. O'CONNOR, of the Borough of Manhattan, City of New York, respectfully shows*:

1. That the Glen Engineering Construction Company, a corporation organized and existing under the Laws of the State of New York, has for the greater portion of the six months next preceding the date of the filing of this petition, had its principal place of business at 156 5th Avenue, in the Borough of Manhattan, City of New York, State and District aforesaid, and owes debts to the amount of Two hundred thousand Dollars and upwards, and is insolvent, and is neither a wage earner or a person engaged principally in farming or the tillage of the soil, but is a business corporation, engaged as contractors in building construction, and is not a municipal, railroad, insurance or banking corporation.

2. That your petitioners are creditors of the said Glen Engineering Construction Company, having provable claims against it, amounting in the aggregate in excess of securities held by them, to

the sum of $500, and upwards; that none of your petitioners is entitled to priority of payment of his said claim within the meaning of Section 64-b of the United States Bankruptcy Act and the amendments thereof; nor has any of your petitioners received a preference within the meaning of Section 60-a-b of such law as amended.

3. That the nature and amount of your petitioners' claims are as follows:

BEVERLY D. HOVEY: The claim of petitioner is for the sum of Six thousand ($6,000) Dollars, due him for money loaned to Glen Engineering Construction Company prior to September 29th, 1910, and is evidenced by a promissory note in writing made, executed and delivered by Glen Engineering Construction Company on September 29th, 1910, and which he now owns and holds, said note being payable by its terms fifteen days after September 29, 1910, and was presented at maturity thereof and payment demanded and that no part thereof has been paid.

JOHN H. ROSS: The claim of petitioner is for the sum of Ten thousand ($10,000) Dollars, due him for money loaned to Glen Engineering Construction Company prior to September 19th, 1910, and is evidenced by a promissory note in writing made, executed and delivered by Glen Engineering Construction Company on September 19th, 1910, and which he now owns and holds, said note being payable by its terms thirty days after September 19, 1910, and was presented at maturity thereof and payment demanded and that no part of same has been paid.

EDMUND J. O'CONNOR: The claim of petitioner is for the sum of Five thousand ($5,000) Dollars, due him for money loaned to Glen Engineering Construction Company prior to August 25th, 1910, and is evidenced by a promissory note in writing, made, executed and delivered by Glen Engineering Construction Company on August 25th, 1910, and which he now owns and holds, said note being payable on demand and was presented at maturity thereof and payment demanded and that no part thereof has been paid. And your petitioners represent that the said Glen Engineering Construction Company is insolvent and that while insolvent, within four months next preceding the date of this petition, the said Glen Engineering Construction Company committed an act of bankruptcy, in that it did heretofore, to wit, on the 9th day of December, 1910, admit in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground.

4. That the probable value of the assets herein is $50,000.

WHEREFORE, your petitioners pray that service of this petition with a subpoena may be made upon said Glen Engineering Construction Company, as provided in the Acts of Congress relating to bankruptcy, and that it may be adjudged a bankrupt within the purview of said acts.

Dated, New York, December 9th, 1910.

BEVERLY D. HOVEY,
JNO. H. ROSS,
EDMUND J. O'CONNOR,
Petitioners.

MARSHALL S. HAGAR,
Attorney for Petitioners,
Office & P. O. Address,
34 Pine Street,
Borough of Manhattan,
New York City.

State of New York, }
County of New York, } ss.:

BEVERLY D. HOVEY, JOHN H. ROSS and EDMUND J. O'CONNOR, the petitioning creditors mentioned and described in the foregoing petition, do hereby severally make solemn oath that the statements of fact contained in the foregoing petition are true according to the best of their knowledge, information and belief.

BEVERLY D. HOVEY,
JNO. H. ROSS,
EDMUND J. O'CONNOR.

Subscribed and sworn to before me
this 9th day of December, 1910.

ISIDORE GRAY HEAD,
Notary Public,
(Seal) N. Y. Co.

(The above is an exemplified copy.)

Trustee Exhibit D-1.

IN THE DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter of GLEN ENGINEERING CONSTRUCTION COMPANY, Bankrupt.	In Bankruptcy. No. 14393.

At New York City, in said District, on the 27th day of December, A. D. 1910, before the Honorable Learned Hand, Judge of the said Court in Bankruptcy, the petition of Beverly D. Hovey, et al., that Glen Engineering Construction Company be adjudged an involuntary bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, and a subpoena having been issued herein on December 10, 1910, and the same having been duly served, and no answer having been filed, and the time to do so having expired, the said Glen Engineering Construction Company hereby declared and adjudged bankrupt accordingly.

AND IT IS FURTHER ORDERED that the said bankrupt file schedules in triplicate as required by law within ten days from the date hereof.

AND IT IS FURTHER ORDERED that the said matter be referred to Seaman Miller, Esq., one of the referees in bankruptcy of this court, to take all such further proceedings therein as are required by said Acts of Congress, and all such acts therein as the Court might take or perform, except such as by law or the general orders of the Supreme Court are required to be performed by the Judge; and that the said bankrupt shall attend before said referee on the 3rd day of January, 1911, at 10 o'clock A. M., and thenceforth shall submit to such orders as may be made by said referee or by the Court relating to its said bankruptcy.

WITNESS, the Honorable Learned Hand, Judge of the said Court, and the seal thereof, at the City of New York, in said District, on the 27th day of December, A. D. 1910.

LEARNED HAND,
District Judge.

THOS. ALEXANDER,
Clerk.

(The above is an exemplified copy.)

Judgment at New Dorp, S. I.

At a Special Term of the Supreme Court held at Borough Hall in the County of Richmond on the 13th day of February, 1912.

Present—Hon. TOWNSEND SCUDDER, Judge.

DANIEL P. REGAN and HUGH F. McGRATH, co-partners, trading under the name of REGAN McGRATH COMPANY, Plaintiff,

against

ST. JOHN'S GUILD, GLEN ENGINEERING CONSTRUCTION COMPANY, JULES FEHR, HERBERT S. BROWER, WILLIAM S. VAN CLIEF, THE BANKERS' SURETY COMPANY, JOHN DOUGLAS COMPANY, THE LOCKWOOD COMPANY, THE STRUCTURAL SUPPLY COMPANY, WILLIAM C. LEIBER, HENRY S. SCHRENKEISEN and FRANCIS H. NOBBE, co-partners, doing business under the firm name and style of LEIBER, SCHRENKEISEN AND NOBBE; FREDERICK G. EBSARY, WILLIAM H. SPELMAN, JAMES GILBY, CHARLES L. STRONG, as Trustee in Bankruptcy of Glen Engineering Construction Company, bankrupt, and MARY McROBERTS,

Defendants.

The issues in this action having come on regularly for trial before Hon. Townsend Scudder, one

of the Justices of this Court, at a Special Term thereof, held at the Borough Hall in the County of Richmond, on the 13th day of February, 1912, all the defendants having been personally served with the summons or voluntarily appeared herein, and the plaintiffs having appeared at said trial by Holt, Warner & Gaillard, their attorneys, and the defendant, St. John's Guild, having appeared by John W. Weed, its attorney, the defendant, Jules Fehr, having appeared by William F. Kimber, his attorney, the defendant, Herbert S. Brower, having appeared by Philip Carpenter, his attorney, the defendant, William S. Van Clief, having appeared by Thomas G. Prioleau, his attorney, the defendant, The Banker's Surety Company, having appeared by Edward J. Dowling, its attorney, the defendant, John Douglas Company, having appeared by H. Schieffelin Sayers, its attorney, the defendant, The Lockwood Company, having appeared by Wilmer, Canfield & Stone, its attorneys, the defendant, Structural Supply Company, having appeared by William L. Sayers, its attorney, the defendants, William C. Leiber, Henry S. Schrenkeisen and Francis H. Nobbe, partners under the name of Leiber, Schrenkeisen and Nobbe, having appeared by William L. Sayers, their attorney, the defendant, Frederick G. Ebsary, having appeared by Charles W. McCandless, his attorney, and the defendant, Charles L. Strong, as trustee in bankruptcy, of Glen Engineering Construction Company, bankrupt, having appeared by Frank H. Hall, his attorney, and proofs having been made by the plaintiffs that the amended summons, together with a copy of the amended com-

plaint herein, was duly personally served upon the defendants, Glen Engineering Construction Company, William H. Spelman, James Gilby and Mary McRoberts, and that the defendants, Glen Engineering Construction Company and James Gilby, have failed to appear or answer and that their time to do so has expired, and they are in default therefor, and that the defendant, William H. Spelman, appeared by Samuel Sturtz, his attorney, but failed to answer herein, and that the defendant, Mary McRoberts, appeared by George W. Stake, her attorney, but failed to answer herein, and that the time of said defendants, Spelman and McRoberts, to answer has expired and they are in default therefor, and the said defendants, St. John's Guild, Jules Fehr, Herbert S. Brower, William S. Van Clief, The Bankers' Surety Company, John Douglas Company, The Lockwood, Company, the Structural Supply Company, William C. Leiber, et al., partners under the name of Leiber, Schrenkeisen and Nobbe, Frederick G. Ebsary and Charles L. Strong, as trustee in bankruptcy of Glen Engineering Construction Company, bankrupt, being all of the defendants who have appeared and answered herein, having consented to the entry of this judgment and the Court having made its findings of fact and conclusions of law, directing judgment as hereinafter provided;

NOW, on motion of Holt, Warner & Gaillard, attorneys for the plaintiffs, it is

ORDERED, adjudged and decreed, that on the 26th day of May, 1910, or at the time of the filing

of the notice of lien by the plaintiffs in this action, there was due and unpaid or thereafter became due and unpaid, by the defendant, St. John's Guild, as owner of the premises, described in the complaint, to the defendant, Glen Engineering Construction Company, upon the contract for the erection and construction of certain buildings, upon said premises, the sum of $9,085.26; that there was due by the defendant Glen Engineering Construction Company to the plaintiffs, Daniel P. Regan and Hugh F. McGrath, co-partners under the name of The Regan-McGrath Company, the sum of at least $2,398.20; that there was due by the defendant, Glen Engineering Construction Company, to the defendant, Jules Fehr, at the time of the filing of the notice of lien of the said defendant, Jules Fehr, the sum of $1,848.00, that there was due from the defendant, Glen Engineering Construction Company, to the defendant, Herbert S. Brower, at the time of the filing of the notice of lien of the said defendant, Herbert S. Brower, the sum of at least $918.12; that there was due from the said defendant, Glen Engineering Construction Company, to the defendant, William S. Van Clief, at the time of the filing of the notice of lien by the said defendant, Van Clief, the sum of at least $1,906.00; that there was due from the defendant, Glen Engineering Construction Company to the defendant, John Douglas Company, at the time of the filing of the notice of lien by the said defendant, John Douglas Company, the sum of at least $841.82; that there was due from the defendant, Glen Engineering Construction Company, to the defendant, The Lockwood Company, at the time of the filing of the notice of lien by the said defendant, The

Lockwood Company, the sum of at least $562.50; that there was due from the defendant, Glen Engineering Construction Company to the defendant, The Structural Supply Company, at the time of the filing of the notice of lien by the defendant, The Structural Supply Company, the sum of at least $430.06; that there was due from the defendant, Glen Engineering Construction Company, to the defendants, William C. Leiber, Henry S. Schrenkeisen and Francis H. Nobbe, partners under the name of Leiber, Schrenkeisen and Nobbe, at the time of the filing of notice of lien by the said defendants, Leiber, Schrenkeisen and Nobbe, the sum of at least $115.56; that there was due from the defendant, Glen Engineering Construction Company, to the defendant, Frederick G. Ebsary, at the time of the filing of notice of lien by the said defendant, Ebsary, the sum of at least $65.00; that the plaintiffs and the said defendants, Jules Fehr, Herbert S. Brower, William S. Van Clief, John Douglas Company, The Lockwood Company, The Structural Supply Company, William C. Leiber, Henry S. Schrenkeisen and Francis H. Nobbe, partners under the name of Leiber, Schrenkeisen and Nobbe, and Frederick G. Ebsary, have good and valid liens upon the premises described in the complaint herein.

And it is further ordered, adjudged and decreed that the plaintiffs have judgment against the defendant, St. John's Guild, for the sum of $2,398.20, and judgment dismissing the counterclaim interposed by defendant, Strong, as trustee.

And it is further ordered, adjudged and decreed that the defendant, Jules Fehr, have judgment against the defendant, St. John's Guild, for the sum of $1,848.00.

And it is further ordered, adjudged and decreed that the defendant, Herbert S. Brower, have judgment against the defendant, St. John's Guild, for the sum of $918.12.

And it is further ordered, adjudged and decreed that the defendant, William S. Van Clief, have judgment against the defendant, St. John's Guild, for the sum of $1,906.00.

And it is further ordered, adjudged and decreed that the defendant, John Douglas Company, have judgment against the defendant, St. John's Guild, for the sum of $841.82.

And it is further ordered, adjudged and decreed that the defendant, The Lockwood Company, have judgment against the defendant, St. John's Guild, for the sum of $562.50.

And it is further ordered, adjudged and decreed that the defendant, The Structural Supply Company, have judgment against the defendant, St. John's Guild, for the sum of $430.06.

And it is further ordered, adjudged and decreed that the defendants, William C. Leiber, Henry S. Schrenkeisen and Francis H. Nobbe, partners under the name of Leiber, Schrenkeisen and Nobbe, have judgment against the defendant, St. John's Guild, for the sum of $115.56.

And it is further ordered, adjudged and decreed that the defendant, Frederick G. Ebsary, have judgment against the defendant, St. John's Guild, for the sum of $65.00.

And it is further ordered, adjudged and decreed that the defendant, St. John's Guild, pay, and it is hereby ordered and directed to pay the sum of $9-085.26, hereby adjudged to be in its hands, within five days from the date of the service of this judgment and notice of entry thereof, upon and tender of satisfactions of their several liens to its attorneys, as follows:

1. To the plaintiffs, Daniel P. Regan and Hugh F. McGrath, partners under the name of The Regan-McGrath Company, or their attorneys herein $2-398.20.

2. To the defendant, Jules Fehr, or his attorney herein, the sum of $1,848.00.

3. To the defendant, Herbert S. Brower, or his attorney herein, the sum of $918.12.

4. To the defendant, William S. Van Clief, or his attorney herein, the sum of $1,906.00.

5. To the defendant, John Douglas Company, or its attorney herein, the sum of $841.82.

6. To the defendant, The Lockwood Company, or its attorney herein, the sum of $562.50.

7. To the defendant, The Structural Supply Company, or its attorney herein, the sum of $430.06.

8. To the defendants, William C. Leiber, Henry S. Schrenkeisen and Francis H. Nobbe, partners under the name of Leiber, Schrenkeisen and Nobbe, or their attorney herein, the sum of $115.56.

9. To the defendant, Frederick G. Ebsary, or his attorney herein, the sum of $65.00.

And it is further ordered, adjudged and decreed that said payments, when made as above directed, shall be in full satisfaction of all claims, interests and costs which the said plaintiffs and the said defendants in this action, or any of them, may have against the defendant, St. John's Guild, under and by virtue of their respective notices of claim and liens, and in full satisfaction and discharge of all notices or liens filed by them as in said complaint and in the said several answers specified, against the premises mentioned in said respective liens and in the complaint and in the said several respective answers herein.

And it is further ordered, adjudged and decreed that upon such payments being made by the defendant, St. John's Guild, as hereinbefore directed, and proof of such payments by certificates of satisfaction or by affidavit filed with the Clerk of the County of Richmond, the said Clerk of the County of Richmond cancel and discharge, and he is hereby ordered and directed to cancel and discharge of record on the books in his office, the notice of pendency of this action, filed in his office on the 19th day of May, 1911, and to cancel and discharge of record on the books in his office the mechanics' liens filed by the plaintiffs and the several defendants in the office of the Clerk of the County of Richmond, against the property of the defendant, St. John's Guild, affected by this action as follows:

1. Daniel P. Regan and Hugh F. McGrath, partners under the name of The Regan-McGrath Company, $3,566.44, filed May 27th, 1910.

2. Jules Fehr, $2,113.00, filed September 15th, 1910.

3. Herbert S. Brower, $1,774.00, filed September 16th, 1910.

4. William S. Van Clief, $2,839.86, filed September 16th, 1910, and January 17th, 1911, for $2,117.77.

5. John Douglas Company, $935.35, filed December 7th, 1910.

6. The Lockwood Company, $625.00, filed December 16th, 1910.

7. The Structural Supply Company, $829.00, filed February 28th, 1911.

8. William C. Leiber, Henry S. Schrenkeisen and Francis H. Nobbe, partners under the name of Leiber, Schrenkeisen and Nobbe, $200.00, filed December 15th, 1910.

9. Frederick G. Ebsary, $75.00, filed December 12th, 1910.

10. William H. Spelman, $760.65, filed January 4th, 1911.

11. James Gilby, $64.00, filed March 2nd, 1911.

12. Mary McRoberts, $157.50, filed March 20th, 1911.

And it is further ordered, adjudged and decreed that upon payment by St. John's Guild of the amount directed to be paid plaintiffs, the bond of the defendant, The Bankers' Surety Company, aforesaid, be cancelled.

And it is further ordered, adjudged and decreed that any party to this action may hereafter apply to this Court at the foot of this judgment for such other and further judgment, order or relief as he may deem himself entitled to in the premises.

Enter in Richmond County,

T. S.,
Justice Supreme Court.

New Jersey Court of Errors and Appeals.

Between

JOHN AGNEW COMPANY,

Complainant,

and

BOARD OF EDUCATION of the City of Paterson, *et al.*, FRANK MILLER, doing business under the name and style of FRANK MILLER LUMBER COMPANY; JOSEPH SHARPE CONSTRUCTION COMPANY, *et al.*,

Respondents,

THE FIRST NATIONAL BANK of the Town of Union, and MARTIN S. PAINE,

Appellants.

On appeal from Chancery.

BRIEF ON BEHALF OF FRANK MILLER, DOING BUSINESS AS THE FRANK MILLER LUMBER COMPANY, RESPONDENT, AGAINST THE FIRST NATIONAL BANK OF THE TOWN OF UNION.

This Brief is joined in by Counsel for Joseph Sharpe Construction Co. and Counsel for the Trustee in Bankruptcy and is exhaustive and inclusive

New Jersey State Library

in order to avoid the submission of several briefs and repetition.

STATEMENT.

This is an appeal from a decree in chancery made, dated and filed the 7th day of November, 1913 (p. 684). Vice-Chancellor's opinion (p. 658).

This is an action to foreclose the liens of subcontractors and materialmen acquired under the Municipal Improvements Lien Act of 1892 of the State of New Jersey, granting a lien to those who performed labor or furnished material in the making of a public improvement in any of the municipalities of the State of New Jersey. The lien granted is upon the money in the control of the municipality due or to grow due for such improvement.

The public improvement in this case was the erection of a high school in Paterson, N. J. The fund in the hands of the financial officer of the Board of Education of Paterson, amounts to $29,639.21 (Ex. C-4; 718-719). This sum is the amount remaining upon the contract between the Glen Engineering Construction Company, a corporation of New York, carrying on a contracting and constructing business, almost exclusively in New Jersey, and the Board of Education of the City of Paterson, for the erection of said high school, in the amount of $285,423.

The Glen Engineering Construction Company failed and ceased work on this contract on the 10th day of December, 1910, and was put into involuntary bankruptcy, and a receiver was appointed on that date in the United States District Court, for the Southern District of New York,

which receiver was thereafter made ancillary receiver in New Jersey, by the United States District Court of New Jersey, on the 12th day of December, 1910 (Trustee Exs. D7-8; 735-741).

After the failure and bankruptcy of the Glen Engineering Construction Company, the contract was completed by the Board of Education of the City of Paterson (174). Prior to the failure of the Glen Engineering Construction Company, and prior to its bankruptcy, and the filing of a petition in bankruptcy against it, the following liens were filed against the fund in the hands of the Board of Education exclusive of those paid or compromised some time prior to the bankruptcy.

James Healy, September 21, 1910, 4.20 P. M. with the Board of Education, and October 10, 1910, at 2.14 P. M. with the Comptroller of the City of Paterson. The amount of this lien is $761.20 (166).

Ingall Stone Company, September 22, 1910, 2 P. M. with the Board of Education, 2.20 P. M. with the Comptroller of the City of Paterson. The amount of this lien is $2,115 (166).

John Agnew Company, November 28, 1910, filed with the Board of Education 5.25 P. M., and with the Comptroller of the City of Paterson at 4 P. M. The amount of this lien is $11,933.29 (166).

Frank Miller Lumber Company filed December 9, 1910 with the Board of Education at 3.25 P. M. and with the Comptroller of the City of Paterson, together with the bond at 3.15 P. M. The amount of this lien is $10,955.14 (166).

The liens of the Ingall Stone Company and of James Healy, above stated, are not involved in the distribution of the fund herein, because they have been bonded and released.

Subsequent to the bankruptcy of the Glen En-

gineering Construction Company, various liens were filed aggregating in amounts a sum in excess of $20,000 (166-167).

Among the liens filed subsequent to the bankruptcy, are the liens of laborers who did work on the Paterson High School—they are not appealing from the decree.

In addition to the lienors, two assignees of the Glen Engineering Construction Company made claim upon the fund. The first assignee is the First National Bank of the Town of Union, which claims under an assignment signed and executed on the 15th day of September, 1910, and delivered upon that date, and filed with the Board of Education in Paterson on or about the 21st day of September, 1910 (97-103). This assignment is an assignment of reserve percentages to become due to the Glen Engineering Construction Company upon its contract with the Board of Education of the City of Paterson, after the completion thereof, and providing, "It being understood that moneys so collected shall be placed to the credit of the Glen Engineering Construction Company at the First National Bank of the Town of Union, and the amount due said Bank to be deducted therefrom." The Bank claims under this assignment the sum of $15,000, $10,000 of which was advanced on a note of the Glen Engineering Construction Company to the Bank on the 19th day of April, 1910, and $5,000 which was advanced personally to P. H. Downey upon his own personal credit, and which was credited in Downey's account in the bank, and not a transaction of the Glen Engineering Construction Company at all (399-407).

The other assignment relied on in this proceeding was made by the Glen Engineering Construction Company to M. S. Paine, on the 1st day

of December, 1910, for the amount due or to grow due to the Glen Engineering Construction Company for work done in November, 1910 (Ex. C9; 729). This assignment was not filed until December 9, subsequent to the filing of the lien of the Frank Miller Lumber Company. Mr. Paine, who is the assignee, was a director of the Glen Engineering Construction Company, and while he took three assignments at this time of everything due to the Glen Engineering Construction Company from any source, either in the name of Edward Gunnell, his representative, or himself, he merely claims now in the amount of $4,950. The important item to be noted about the Paine assignment is that he took three of them just a week before he, through his own manipulations, put the company into bankruptcy, after he had done everything in his power as a director, to secure himself, and endeavor to grasp everything in sight, and when he, as a director, knew the condition of the company (C7, C8, C9) (pp. 723 to 731). *The validity of the assignment to the Bank—and of the assignments to Paine are the only questions involved in these appeals.*

The evidence will be discussed fully at another place in this brief.

The Frank Miller Lumber Company, in behalf of whom this memorandum is filed, makes claim in this proceeding under a notice of lien in evidence, filed with the Board of Education of the City of Paterson, on December 9, 1910, at 3.25 P. M., and with the Comptroller of the City of Paterson, together with a bond of the American Surety Company in the amount of $2,200, 20% of the lien claim on the 9th day of December, 1910, at 3.15 P. M. (p. 266). The amount of the lien claimed by the Frank Miller Lumber Company as set forth in the lien notice is $10,955.14.

The action was begun by Frank Miller, doing business as Frank Miller Lumber Company within the statutory period in compliance with Section 4 of the Act of 1892, and was consolidated with the present action by order of the Court (p. 161). A notice of pendency of said action was served and filed with the Comptroller of the City of Paterson on the 6th day of March, 1911, at 3.20 P. M., and with the Board of Education on the same day at 3.21 P. M. (p. 266). Said action was begun with the permission and by order of the United States District Court of New Jersey, and leave granted to sue as a defendant therein the Ancillary Receiver and receiver of the Glen Engineering Construction Company (266).

It is not the purpose of this memorandum to analyze the proof submitted by the Frank Miller Lumber Company in support of its lien. Its proof is uncontrovertible and has not been assailed. The lien of the Frank Miller Lumber Company herein has been established by witnesses, who testified of their own personal knowledge that material consisting of woodwork and trim, flooring, and extras in the amount of $10,955.14 was delivered to the Glen Engineering Construction Company in Paterson, and was used and actually went into the construction of the Paterson High School prior to December 1, 1910, and that the sum of $10,955.14 has been due since the first day of December, 1910, without offset and counterclaim against the same (witnesses, Frank G. Funkie, Elliott P. Livermore, pp. 243-267).

It is not necessary in this memorandum for the Frank Miller Lumber Company to analyze its lien notice. No question has been raised to the sufficiency of it, or can be raised. Every step required

by the statute has been done, and the only question remaining is the question of priority.

The only lien in this proceeding entitled to share in the fund prior to the Frank Miller Lumber Company, is the lien of John Agnew Company in the amount of $11,933.29, filed on November 28, 1910.

The main issue, therefore, is whether or not the assignee, the Bank of the Town of Union, is entitled to share in the fund prior to the Frank Miller Lumber Company, and another question is, whether or not M. S. Paine is entitled to share in the fund under the assignments given him as a director of the Company on December 1, 1910, and November 30 of everything the Glen Co. had upon which he claims $4,950.

The undersigned, in behalf of Frank Miller Lumber Company, will in this memorandum point out to the Court that the First National Bank of the Town of Union is not entitled to share in the fund prior to the Frank Miller Lumber Company, or prior to any lien creditor, or to the Trustee in bankruptcy. The Frank Miller Lumber Company with the leave of the Court, has amended its answer and set up therein that the assignment to the First National Bank of the Town of Union is void under Section 64 of the New Jersey Corporation Act, and if by any chance the New York law is applied thereto, under Section 66 of the Stock Corporation Law of the State of New York, and also under the United States Bankruptcy Statute (pp. 62-79).

The undersigned in behalf of the Frank Miller Lumber Company will devote this memorandum to the consideration of the questions of the validity of the assignment to the First National Bank of the Town of Union, *and will submit a separate memorandum establishing the invalidity of the assignment to M. S. Paine.*

The undersigned for the respondent, Frank Miller will, in this brief establish:

First: That the validity of the assignments to appellants must be determined by the Law of the State of New Jersey;

Second: That the assignment to the First Nation Bank of the Town of Union was given without present consideration (p. 25 of this brief) is void under the Law of New Jersey (p. 61 of this brief), under the Law of New York (p. 81 of this brief) and the Federal Bankruptcy Act (p. 93 of this brief).

POINT I.

The validity of the assignment to the bank of the Town of Union and the validity of the assignment to Martin S. Paine are determined by the law of the State of New Jersey.

The fund in this case is a definitely appropriated fund under the statutes of the State of New Jersey for the erection of a High School building in the City of Paterson.

The money was appropriated definitely when the contract was entered into, and held by the Comptroller of the City of Paterson, and the Board of Education of the City of Paterson as a separate fund to be used for the special purpose only.

The contract for the erection of the High School in question, under which the money was earned, was made in the State of New Jersey at the City of Paterson, and entirely performed there, and is governed by the laws of New Jersey (448-449).

The money earned under the contract was payable in the City of Paterson on requisition and

production of the certificate of the architect of said city (163-164).

During the time of the performance of the contract, and until fifteen days after the work is completed and accepted by the Municipality, the fund in question is given a definite and absolute situs in New Jersey by statute under the Municipal Improvement Lien Act of 1892. Under that act a right to lien the fund itself in the control of the Municipality is given in favor of laborers, mechanics, materialmen and sub-contractors engaged upon the work, provided the provisions of the statute were complied with.

And the proceeding to enforce the liens and claims against the fund is a proceeding *in rem,* in which a personal judgment cannot be secured.

Delafield Co. *v.* Sayre, 31 Vroom, 449.

In this case Judge Dixon writing for a unanimous Court of Errors and Appeals, said in interpreting the statute of 1892:

> "The right is one granted to those who perform labor or furnish material in the making of a public improvement in any municipalities of this state, and it consists of a lien upon the money in the control of the municipality due or to grow due for such improvement, to the contractor who owes for such labor or materials."

And held that because the proceeding was distinctly *in rem* upon the fund, it was cognizable solely in the Court of Chancery. This is the well-settled law of the State of New Jersey.

Norton *v.* Sinkhorn, 16 Dick., 508; 18 Dickenson, 766;

Garrison *v.* Borio, 16 Dick., 236;

National Fireproof Co. *v.* Daly, 74 Atlantic, 152.

Now, it is contended by appellants, the Bank of the Town of Union and M. S. Paine, that the validity of the assignments to that Bank and to Paine should be governed by the law of New York and not the law of New Jersey where the property assigned was concededly located. The written assignments were made in New York—in September to the Bank—and in December, to Paine, it is true, but they were made by a corporation which was subject to the laws of New Jersey, because it was doing all its business in New Jersey.

Section 96, New Jersey Corporation Act. The assignment to the Bank was made to a New Jersey resident, the Bank of the Town of Union, and immediately after it was made, was brought to New Jersey and filed to give it effect. The Bank, the assignee, proposed to collect on it in New Jersey; the same is true of appellant Paine except that he is a resident of New York.

The Frank Miller Lumber Company and other creditors hostile to the assignment, contend, as the Vice-Chancellor found, that the question of the validity of the assignments is governed by the law of New Jersey, the *lex rei sitae* of the fund sought to be assigned, and that the assignments are void under New Jersey Corporation Act, Sec. 64. This brings into issue the old fiction of the common law.

"*Mobilia Personam sequuntur.*"

It is needless to point out that this fiction has been almost, if not altogether, abrogated. The present rule of the law is summed up by the leading text writers as follows:

Wharton, 3rd Edition, pp. 759 to 761.

> "This rule, however, is not universal, and is subject to a broad exception or qualification which is frequently stated in the form

that *the assignment must not violate the statutory law or known and settled public policy of the state where the property is situated.* The exception in this form may, upon a first impression, seem as broad as the rule; but what is meant is that the assignment must not be contrary to a local law which expressly covers assignments made elsewhere, or embodies such a distinctive public policy as requires its extension to such assignments. As subsequently shown, not every law relating to assignments embodies a distinctive public policy in this sense; and, therefore, the assignment, in respect to many of its elements and incidents, is governed by the law of the place where it is made, notwithstanding that such law differs from the law of the place where the property is situated. The following sections show the application of the rule and of the exception to various specific matters relating to voluntary assignments for creditors. *For the purpose of applying the exception based upon the local policy of the place where the property is situated, debts due the assignor are generally regarded as having their situs in the state where the debtor resides,* and are, therefore, regarded as subject to the same principles as chattels. Smith *v.* Lamson Bros., 82 Ill. App., 466; *contra,* Fenton *v.* Edwards, 126 Cal., 43, 46 L. R. A., 832, 77 Am. St. Rep., 141; Cf. Crouse *v.* Phoenix Ins. Co., 56 Conn., 182, 7 Am. St. Rep., 298, 14 Atl., 82. See also Varmun *v.* Camp, 13 N. J. L., 326, 25 Am. Dec., 476."

And at another place

"Money into which immovables by action of law are converted, and which represent such immovables, is governed by the *lex situs.*"

Dicey—Am. Edition, J. B. Moore, p. 537:

"The law of the owner's domicil does not determine the validity of a transfer of mova-

bles, if 'there is some positive or customary law of the country where they are situate providing for special cases (as is sometimes done), or, from the nature of the particular property, it has a necessarily implied locality.' *Among the latter class have been placed contracts respecting public funds* or stock, the local nature of which requires them to be carried into execution according to the local law. No positive transfer can be made of such property except in the manner prescribed by the local regulations."

Minor—Conflict of Laws, p. 280.

"But in ascertaining the 'proper law' regulating voluntary transfers and assignments of choses in action, and in fixing it as the *lex loci contractus,* the reader must not overlook the exceptions to the enforcement of the proper law, already so frequently referred to. In these cases, it will be remembered, the *lex fori* will be substituted; and since the question will always arise upon an attempt to enforce the debtor's obligation to pay, the *lex fori* and the actual situs of the debts will coincide.

"The most usual instances of these exceptions are those which arise from danger to the interests of the forum or its citizens, should the proper law be enforced. Hence, if the assignment of the chose in action, though valid where made, would injuriously affect the interests of the State where the debt is sought to be enforced (forum and actual situs of the debt), or the interests of its citizens, or would contravene its settled policy or express statutory provisions, or would be *contra bonos mores,* or if such assignment is rendered invalid where made, as a penalty for wrong-doing; in all these cases, the law of the actual situs of the debt, that is, the actual situs of the debtor when sued (in a proceeding in *personam*), being also the forum, will be substituted for the 'proper

> law.' If the debt be sought to be recovered by a proceeding *in rem*, the actual situs of *res* (and the forum) will be the actual situs of the debt.''

It can be stated, therefore, that where the property, whether movable, or a fund or debt, has in fact, or is given by law a fixed definite situs, the law of that state where the property is in fact, governs the determination of the validity of transfers of that property, made outside of that state, when such transfers are contrary to the settled policy or statutory law of the state where the property has its situs in fact.

It was concededly for the Court of Chancery as the forum to determine the primary question of the situs of the property, and then to determine whether the law of New York or New Jersey applied.

The rule of law above stated is unquestionably the established law of the State of New Jersey, and the validity of the assignment to the Union Bank in the case at bar and to M. S. Paine is, under the decided cases and authorities, determined by the law of the State of New Jersey.

The leading authority in this state is the case of

> Varmun *v.* Camp, 13 New Jersey Law, 326.

In that case a voluntary assignment of personal property in New Jersey was made by the owner thereof, and delivered in New York to the assignee on December 1, 1828. The assignor and the assignee were both residents of New York.

In February, 1829, a judgment was secured in New Jersey against the assignor and the Sheriff

levied by virtue of an execution on the assigned property which was located at Paterson, New Jersey.

The validity and effect of the assignment was the principal question at issue. It was concededly valid in New York, where it was made, and invalid under the statutes of New Jersey.

The Supreme Court held that the validity of the assignment, although executed in New York, was determined by the law of New Jersey, where the property was situated, and held the assignment invalid. The case gives a remarkably clear review of the earlier authorities, and states the rule as above given. The Court said:

> "Now, a transfer of this nature by a domestic debtor, would undoubtedly be fraudulent and void according to the very terms of the statute and if a foreign debtor cannot fraudulently put his property out of reach of our process any more than the domestic debtor, how can the merchandise now in question be out of reach of the execution. And if a foreign debtor has precisely the same control over his property here as a domestic debtor, how can he make such an assignment as in the hands of the domestic debtor would be fraudulent and void.
>
> "While then I am prepared to give full weight to the principles which sustain foreign contracts and foreign transfers and especially when made in other states of the Union whether it be on the ground of comity as some place it, or of international law as others choose to call it, I do not feel authorized to give validity to this assignment, which would effect a transfer of property under the control of our laws, in violation of their policy, in hostility with their provisions, and which they declare to be fraudulent and void."

The rule as stated in Varnum *v.* Camp, *supra,* was applied to a voluntary assignment made in New York of an indebtedness due the assignor from a resident of New Jersey, but relief was denied the complainant in the case on the ground that he was a resident of New York, where the assignment was made, and was valid, and could not, therefore, impeach it.

Moore *v.* Bonnell, 31 N. J. Law, 90.

In that case the Court said:

> "In Varnum *v.* Camp it was, after mature deliberation, decided by this Court that a general assignment, made in a foreign jurisdiction by a debtor in favor of his creditors, was not valid so as to pass title to the personal effects of the debtor situated within our territory, as against the creditors of the assignor, if it contravened the essential provisions of the statute of this State, regulating such assignments. The fact that the assignment was made in the place of the domicil of the debtor and that it was lawful by the law of such domicil was considered not to render the transfer effectual so far as regarded the property of the debtor which was subject to our laws.
>
> "As the case now under consideration in *one of its aspects* presents facts which call for the application or rejection of the principle adopted in Varnum *v.* Camp, I shall briefly review in connection with some of the more recent adjudications, the legal grounds of that decision."

The Court then reviewed the decisions in various states and then said:

> "In this state of the authorities after the lapse of thirty years since Varnum *v.* Camp was decided, it seems to me that the point settled by it is scarcely open to debate. It

> certainly would require the most complete demonstration of its fallacy before this Court could be brought to reverse a doctrine which for so great length of time has been regarded as the settled laws of this state. But as has been before commended not only by the greater weight of authority, but is sustained by correct principles."

The Court then took up the point in the case that the complainant was a resident of New York where the assignment was made, and could not impeach it, and decided against the complainant upon that ground alone.

The case has occasionally been cited as holding that the rule of Varmun *v.* Camp sometimes does not apply to the transfer of a chose in action. It in fact holds no such thing, but the contrary, and the foreign assignment was sustained solely upon the ground that it could not be impeached by a resident of a state where the assignment was made, if such assignment were there held valid.

That point in the case does not apply to the case at bar against Frank Miller, doing business as Frank Miller Lumber Company, lienor, because the answer and bill of complaint show that he is a citizen and resident of Connecticut, and not of New York, where the assignment in the case at bar was made (p. 133).

Since the decision of the Supreme Court of New Jersey in

Moore *v.* Bonnell, *supra,*

there have been a number of cases decided in New Jersey, such as

Green *v.* Wallis Iron Works, 49 N. J. Eq., 48;

Bentley *v.* Wittermore, 19 N. J. Eq., 462;

which have attempted to limit the rule laid down in

Varmun *v.* Camp, *supra,*

and

Moore *v.* Bonnell, *supra,*

so that it could not be invoked in favor of any contesting creditor, who was a non-resident of the State of New Jersey. This proposition has been considered in the United States Supreme Court in a number of decided cases, and it has been held that the principles laid down in the cases above cited, that a non-resident creditor was not entitled to object to the validity of a transfer of property situated within the state which was void under the laws of that state, but not void under the laws of the state where the transfer is made, was violative of the provisions of Sec. 2 of Art. IV of the Constitution of the United States, declaring that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states.

Green *v.* Van Buskirk, 3 Wallace, 458; 5 Wallace, 307; 7 Wallace, 189;

and

Blake *v.* McClung, 172 U. S., 239.

In the first cited case, which was an appeal from a decision of the Court of Appeals of the State of New York, it was held that where personal property was situated in Illinois, and was owned by a resident of the State of New York, a transfer made there by a mortgage to another resident of the State of New York, and subsequently attached by another creditor, a citizen of New York, in Illinois, the Illinois law which made void such transfer, determined the validity thereof, and that the attaching creditor in Illinois, even though he

were a citizen of the State of New York, was entitled to have the benefit of the laws of the State of Illinois, and that the mortgage invalid under those laws was invalid as to him, and that the decision of the Court of Appeals of the State of New York to the contrary was violative of the provisions of the United States Constitution and was, therefore, reversed.

Further, the doctrine contended for in the cases of

Bentley *v.* Wittermore, *supra;*
Green *v.* Wallis Iron Works, and
Moore *v.* Bonnell,

as to non-residents, was disapproved and overruled by this Court of Errors and Appeals of New Jersey, in a very recent case.

Schmidt *v.* Perkins, 74 N. J. Law, 785.

This case is, as regards the Frank Miller Lumber Company, contesting the assignment herein, on all fours with the case at bar, and it states unquestionably the true rule of law applicable to the case at bar. The opinion is by Justice Swayse and is concurred in by all the other Justices of the Court of Appeals. The facts in that case were as follows:

The Whitehead Machinery Company, an Iowa corporation, had certain engines and machinery stored in New Jersey. On the 4th day of October, 1905, the corporation at its home office in Iowa, transferred this property by a written bill of sale to two of the directors of that company. The bill of sale was executed and delivered in Iowa, and notice was immediately given to the Pennsylvania Railroad Company, with which the goods were stored. Thereafter, and on the 7th day of Octo-

ber, 1905, an attachment was sued out by a non-resident of the State of New Jersey in the Courts of that State, and the property there attached. It was conceded in the case that if the law of Iowa was applicable to the transfer, it was valid, and if the law of New Jersey, where the goods were situated, was applicable, it was invalid. It was not claimed in the case that the Whitehead Machinery Company was doing business in New Jersey, or was subject to the New Jersey corporation Law, and yet the Court held, applying the rules laid down in Varmun *v.* Camp, that the validity of the transfer of the property made in Iowa was to be determined by the law of New Jersey, where the property actually was, and that as such transfer in New Jersey was repugnant to the Statutes of New Jersey, it was invalid and void as against the subsequent attaching creditors, even though such attaching creditors were non-residents of the State of New Jersey. The Court said:—

> "We think the case was tried by counsel on an erroneous theory. The title to tangible personal property is ordinarily governed by the law of its situs. The *maxim mobilia personam sequuntur* states a mere fiction of law, which it is sometimes necessary to apply in order to do justice, but it ought not to be extended beyond that necessity."

The Court reviews the authorities, and holds specifically that the decision of Bentley *v.* Wittermore, *supra,* and the cases which follow it, never went so far as to hold that a non-resident creditor could not object to the validity of a foreign transfer of property situated within the State of New Jersey, which was repugnant to the laws of the State of New Jersey, but mere-

ly held that where the transfer was valid under the laws of the state where made, and valid under New Jersey, a non-resident creditor could not be heard to object in New Jersey *to the method of distribution under the transfer.* And the Court, therefore, held that as the transfer of the machinery by the Whitehead Company was contrary to the laws of the State of New Jersey, Corporation Act Public Law 1892, page 298, in that directors of an insolvent corporation could not use the property of the corporation for their own benefit, that the transfer by the Whitehead Machinery Company while insolvent in Iowa would not be sustained, and would be declared invalid under the laws of the State of New Jersey.

The only difference between that case and the case at bar is that in the case cited, there was tangible personal property, and in the case at bar there is a definitely fixed and established fund, having, as has already been pointed out, a definite situs in the State of New Jersey, just as the machinery in the case cited had. Like the case cited, the assignment in the case at bar was made by an insolvent foreign corporation in a foreign state. It was to operate upon property in the State of New Jersey, and such transfer, under the laws of the State of New Jersey, is expressly declared to be invalid under section 64 of the Corporation Act, and therefore, under the authority of the case cited, because the transfer and assignments in the case at bar made in New York to operate upon the fund in New Jersey, are contrary to the expressed statutes of the State of New Jersey, the law of New Jersey must be applied to determine the validity thereof, and un-

der that law the assignments must be set aside as invalid.

It is to be noted in the case of

Schmidt *v.* Perkins, *supra,*

that the Court in its opinion says that choses in action are sometimes subject to the maxim "*mobilia personam sequuntur,*" and cites as an authority the case of

Moore *v.* Bonnell.

As has already been pointed out, Moore *v.* Bonnell holds the contrary doctrine and was decided against the complainant in that case upon another ground. There is no decision in the State of New Jersey which makes or draws any distinction between choses in action and tangible personal property as regards the application of the rule that they are governed by the law of their situs. And even if there were such a distinction made holding that choses in action followed the person of the owner, and are governed by the law of the residence of the owner, they would not apply to the case at bar for two reasons; first, because the fund in the case at bar is made a definite fund by statute, and is given by statute, and has in fact, a definite and absolute situs in New Jersey, and is not a mere indebtedness as has already been pointed out, and further, because the Glen Engineering Construction Company was at the time for all purposes domiciled in the State of New Jersey, because it transacted all its business there, had all its property there, and was by the statutes of New Jersey subject to its laws, and made expressly by the statutes of New Jersey subject to the provisions of the Corporation Act of that state, including Section 64 thereof, upon which

Frank Miller, doing business as the Frank Miller Lumber Company, the complainant and other lienors rely to set aside the assignment made by the Glen Engineering Construction Company to the Bank of the Town of Union.

The New Jersey Corporation Act, Section 96 reads as follows:—

> "Foreign corporations doing business in this state, shall be subject to the provisions of this act, so far as the same can be applied to foreign corporations."

The Glen Engineering Construction Company, although it was incorporated under the laws of New York and had an office at 156 Fifth Avenue, New York City, was in fact and in reality a corporation of New Jersey, doing business there within the provisions of the above quoted section, and subject to the New Jersey Corporation Act. The Company did a general building and contracting business and during the years 1909 and 1910, and up to the time of its failure, made all its contracts, and did all its work in the State of New Jersey (pp. 304-305, 321, 409, 448-449). One of its principal contracts was the Paterson contract, out of which the fund in suit arose. That contract was made and signed and performed in Paterson (pp. 448-449). The other contract was the Newark contract in the amount of $377,448, and that contract was made and signed at Newark and performed there (p. 449). The Glen Company kept all its bank accounts in New Jersey during the year 1910 (p. 449). The president and general manager of the company, Smith Alford, was on the Newark or the Paterson job nearly all the time (p. 449). The Company had a superintendent on the work in Newark and Paterson (p. 449). It maintained an office in New-

ark (p. 449) and an office in Paterson (p. 449) and during the year 1910 all the company's plant and property was in New Jersey (p. 449).

Before the Newark and the Paterson contracts were taken, the Company performed other contracts, all but one of which were made and performed in New Jersey (p. 492). One of these contracts was for the erection of a school in Bergenfield in New Jersey in the amount of $37,000 (p. 492). Another of these contracts was a contract for the construction of a church at Hackensack, New Jersey, in the amount of $60,000 (p. 493), and another was for a school and academy at Mt. Clair in the amount of $40,000 (p. 493).

The only contract that the company had outside of New Jersey was at New Dorp, Staten Island. The only property which the company had in New York, was its office furniture (p. 747).

From the above state of facts, it is clear that the Glen Company was, in fact, no matter where incorporated, a corporation of the State of New Jersey. It clearly was doing business in the State of New Jersey within the statute.

Groel *v.* United Electric Co., 69 N. J. Eq., 397;

Delaware River Quarry Co. *v.* Bethlehem & Pass R. Co., 204 Pa. St., 22; 53 Atlantic, 533.

And is made subject by the law of New Jersey to the provisions of the New Jersey Corporation Act, Section 96. The provisions of that act under Section 64 thereof, declare invalid a transfer or assignment similar to the one given by the Glen Company in September to the Bank of the Town of Union, and the Glen Company, as a foreign corporation doing busi-

ness in New Jersey, was subject to that law at the time that assignment was made, and the validity of that assignment is, therefore, to be determined by the law of the State of New Jersey, where the property sought to be transferred is actually situated (opinion 662-663).

There can be no question that the law of the State of New Jersey applies in determining the validity of the assignment to the Bank of the Town of Union, and further it can be established that if this case were being tried in the Courts of the State of New York, the courts there would apply the law of New Jersey in determining the validity of the assignments.

Warner *v.* Jaffrey, 96 N. Y., 248;
Keller *v.* Paine, 107 N. Y., 83;
Hibernia Nat. Bank *v.* Lacombe, 84 N. Y., 367.

There are a number of cases in N. Y. holding that where the situs of a debt, bank account, or a chose in action is in fact in that state, its transfer will be governed by the law of that state, irrespective of the residence of the parties.

Blakesly *v.* Miller, 171 N. Y., 682; 188 U. S., 189.
In the Matter of Haudayer, 150 N. Y., 38;
In re Romaine, 127 N. Y., 80-89;
India Rubber Co. *v.* Katz, 65 App. Div., 349;
Flynn *v.* White, 122 App. Div., 780;
Morgan *v.* Mutual Life Ins. Co., 189 N. Y., 447;
Matter of Wilcox, 123 App. Div., 86;
Oishei *v.* Pennsylvania R. R. Co., 117 App. Div., 110;

Under the above authorities it is clearly established that if this case had been tried in the State of New York, the Courts of that state would have applied the law of New Jersey in determining the validity of the assignments herein, because the fund has a definite situs in the State of New Jersey, and it would make no difference that the corporation assigning was of New York, because since it was transacting most of its business in New Jersey it was a resident of that state and subject to the laws thereof.

POINT II.

The assignment made by the Glen Engineering Construction Company to the First National Bank of the Town of Union, of the reserve percentages upon the Paterson High School Contract on the 16th day of September, 1910, was without consideration and was made solely to secure an antecedent debt and was a preference.

The answer filed by the Bank of the Town of Union in this proceeding, in which it sets forth its claim to the fund herein, is based solely upon a written assignment to it by the Glen Engineering Construction Company, made on the 16th day of September, 1910, of the reserve percentages held upon the contract between the Glen Company, and the City of Paterson, for the erection of a High School (p. 99). *The record shows, and it is conceded that at the time this written assignment*

was given upon which the Bank of the Town of Union relies in its answer, *no consideration passed* between the Bank and the Glen Company. All the documentary proof in the case shows that this assignment was given three months after the loans which the Bank of the Town of Union is endeavoring to recover in this proceeding were made. The record shows that the Glen Engineering Construction Company opened its account in the Bank of the Town of Union on February 17, 1910 (Trustee's Ex. D-5—764), with the deposit of $3,000 (F. M. L. Co Ex. D-5—752). The Bank was very inconvenient for the transaction of the business of the Company. It was more than two hours from the Company's office in New York, and more than two hours from all the Company's contract work which was done in New Jersey, in Newark and in Paterson (p. 450). The Glen Company went there only because they had been promised accommodation up to $10,000 (p. 458).

The business of the Glen Engineering Construction Company, and its account was solicited on behalf of the Union Bank by N. William Hilbert, who was the assistant cashier, director, secretary of the Board of Directors and of the Discount Committee of the Union Bank (pp. 293, 295, 341, 345, 346). He was also, it appears, a bank account broker for the Union Bank, and for the Merchants National Bank of Jersey City (pp. 305, 318), which latter bank was closely allied with the Union Bank, was its reserve agent, and was the bank through which most of the checks of the Union Bank were made payable (p. 318—form check Union Bank in evidence, p. 749). It is undisputed that Hilbert, the officer of the Union Bank, exploited and hawked the accounts, and

the loans, of the Glen Engineering Construction Company, both in the Union Bank and in the Merchants Bank, during the year 1910.

The Glen Engineering Construction Company made its first application for a loan to the Bank of the Town of Union on the 10th day of March, 1910. This loan was in the amount of $6,000, and was made, as shown by the bank book, on the 22nd day of March, 1910 (Trustee's Ex. D-5; p. 764). It was paid subsequently on the 12th of April (p. 750). The loan was made on a demand note, which was written out on the form used by the Bank of the Town of Union (Trustee's Ex. D-1; p. 721) and typewritten and drawn up and signed in the New York office of the Glen Engineering Construction Company at 156 Fifth Avenue (p. 454). It was taken over to the Bank by Hilbert, and initialed by him (p. 455). The note was endorsed by Smith Alford and P. H. Downey, the officers of the Glen Engineering Construction Company individually.

The next loan was in the amount of $10,000, was made on a demand note, of similar character to Trustee's Exhibit D-1, and with the same endorsements (Ex. Bank of T. of U. D-1; p. 750), was drawn up in the office of the Glen Engineering Construction Company on the 19th day of April, 1910, which was on a Tuesday, and was taken over to the Bank by Hilbert and credited to the Company's account in its pass book the next day (pp. 455-456, 764 line 30). The application for both these loans was made by the Company to the Bank through Mr. Hilbert, and he conducted the negotiations with the Bank. *This he admits* (pp. 293-294, 298, 305), and Smith Alford, President, and Miss Conroy of the Glen Engineering Construction Company also so testified (pp. 455-456, 530-531-532).

Subsequent to these transactions, no further loans were made by the Bank to the Company, but in the following June, the Bank loaned $4,000 on a note of Mr. P. H. Downey personally, (the Treasurer of the Glen Company) made to the order of N. William Hilbert, and endorsed by Hilbert, P. H. Downey and Smith Alford personally (F. M. L. Co. Ex. D-1; p. 753). This loan was paid on July 8th (p. 419). (Ex. D-4; p. 754).

In the following July, the Bank loaned upon the note of P. H. Downey individually the sum of $5,000, which was credited to P. H. Downey *in his personal account* in the Bank (Exhibit First Nat. Bank of Town of Union D-2; pp. 751, 407). This loan was never paid by Mr. Downey to the Bank (p. 406).

On the 19th day of August, 1910, the Bank further loaned $5,000 upon the note of Smith Alford and endorsed by Mr. Alford and P. H. Downey (F. M. L. Co. Ex. D-3; p. 751), which said note was paid on the 22nd of August (F. M. L. Co. Ex. D-4; p. 420).

During the time of these transactions, the bank book which is in evidence (Trustee's Ex. D-5; p. 764) shows that the Glen Company deposited large sums in the Bank, including payments on the Paterson contract up to the 22nd day of August, 1910, and that after that time no further deposits were made, and the balance of the Glen Company from that time on was $160 or less.

During all the note transactions above stated, there is no evidence, other than the conflicting, contradictory and unbelievable statements of the three officers of the Bank, that any thing was ever said or done concerning the Bank's getting any security for these loans until September, 1910, after the Glen Company's account had been re-

duced to $160, and no further deposits were made therein. *There is not a scrap of documentary proof or of paper in existence, or in evidence, tending in any way to prove that at the time these loans were made by the Bank of the Town of Union, it wanted any other security than the endorsements it had thereon. Nothing was ever done by the Bank, or any of the officers of the Glen Company, to give the Bank any security until more than four months after the $10,000 loan* to wit Sept. 15th, 1910 (pp. 102-103).

When the answer of the Bank of the Town of Union was filed in this action, it relied solely upon a written assignment of the final payment of the moneys due, or to become due to the Glen Engineering Construction Company on its contract with the Board of Education, as security, and under this answer which has never been amended it is claimed that the bank, by reason of this written assignment, is entitled to share in the funds now in the hands of the Comptroller of the City of Paterson (p. 99).

The bank is bound by its answer—

It is conceded by the Bank officers and proved by the Bank records and books, that $5,000 of the amount claimed by the Bank was not loaned to the Glen Company at all, but to Downey individually; was not loaned upon the credit of the Glen Engineering Construction Company, but was loaned upon the personal note and credit of P. H. Downey (Ex. 1st N. Bank of T. of U. D-2; p. 751; pp. 301,396, 398, 399, 407).

As this case came up for trial, the Bank faced about entirely, and changed the theory of its claim, without amending its answer, and it now pretends that *a promise was made* by Smith Alford of the Glen Company to give an assignment in April,

when the $10,000 loan *was made. It is queer that if such a promise had been made,* the Bank did not allege it in its answer. It is apparent that the change of front was caused by the later developed exigencies of the litigation, because in this case the issue is between the creditors of the Glen Engineering Construction Company, *which is in bankruptcy,* and not between the Glen Company and the Bank, and not only between creditors, but between *lien creditors under the Lien Statute of New Jersey of 1892,* as well as between the Bank and the Trustee in Bankruptcy of the Glen Company.

It will hardly be contended in this proceeding that the Glen Company was not insolvent in September when the assignment was given, and it will hardly be contended that an assignment given by an insolvent corporation to secure an antecedent indebtedness, will take the precedence over lien creditors. For that reason, undoubtedly, the Bank changed its claim, forsook the position taken in its filed answer, and attempted to rely upon a promise to give an oral assignment, which is not pleaded, is not within the issues, no amendment having been made, and has not been proved.

The contention of the Bank is preposterous on the face of it. Every act of the Bank, and of its officers and of the Glen Company, and all the conduct of the parties are at war with the existence or recognition of any oral promise to give an assignment. The testimony upon which the claim of the Bank is rested could not be more contradictory, unsatisfactory, inconclusive or unbelievable. It is rested upon the testimony of Hilbert, Conway (then president of the Bank), and Hoffman (the vice-president), and no three men ever went on the stand to endeavor to prove the same

fact, and so conclusively and absolutely contradicted themselves and disproved the story they attempted to tell. Under the circumstances of this case, it can be stated that no jury could possibly believe the testimony. Here were three interested witnesses, who went on the stand to save something for the National Bank of which they were officers, and trustees, and who were most anxious to cover up their own manipulations and negotiations, and who attempted to prove but one fact, an oral promise, made by Smith Alford, and yet who absolutely contradicted each other.

It is impossible to spell out any agreement, promise, or contract to give an assignment on the part of the Glen Company from their testimony.

Hilbert, who was the assistant cashier, director and secretary of the Board of Directors (p. 335), and of the Discount Committee of the Union Bank (p. 345), and who also acted as broker for the Glen Engineering Construction Company in securing loans from the Union Bank (p. 305) and the Merchants National Bank (p. 318), with which the Union Bank was closely allied (pp. 318, 324, 336), and through which most of the Union Bank's checks were paid (p. 749), and which was the reserve agent of the Union Bank (p. 318), and which held the notes of Hilbert and other officers of the Union Bank, on which they secured the money to buy the stock in that bank (p. 386), and who also acted as a manipulator of the loans of the Glen Engineering Construction Company to his own profit to the extent of $250 on a $5,000 loan (p. 329), *testifies* that the note of $10,000 was signed in the office of the Glen Engineering Construction Company at 156 Fifth Avenue, New York City, on the 19th day of April, 1910 (pp. 293, 307), and at that time Albert Hoffman, who was the Vice-

President of the Bank, was present (p. 293), and that P. H. Downey, Treasurer of the Glen Company, was also present (p. 298). Downey would have been a disinterested witness but the bank did not call him—although he was in the court room throughout the trial, there was no reason for the lienors to call him because it was not claimed that he made the oral promise.

Hilbert fixes the same conversation at various times and places—has different people present at the same conversation at different points in his testimony.

For instance, he testified later under cross examination:

> "M. Wm. Hilbert (1st Nat. Bank of Union) (pp. 308-309).
>
> Q. Now, will you give us, please, just what you said and what Mr. Alford said in April, 1910, with regard to the assignment at the time of the $10,000 note transaction? A. I said to him that the First National Bank was insisting upon securing that assignment that he agreed to give me when they made the first loan and that the officers of the bank had put it up to me at one of the meetings that I was to secure an assignment. He said that he would agree to give it to me and he would talk over matters with his uncle, who was the Treasurer of the Glen Engineering Construction Company and explain matters to him.
>
> Q. Is that all he said? A. He said that he would see that I would get the assignment.
>
> Q. Now was Mr. Downey present at that time? A. Mr. Downey was not present at that particular time.
>
> Q. And that conversation took place in the Glen Company's office in New York? A. In the Glen Company's office in New York.
>
> Q. Who else was there besides yourself and Mr. Alfred? A. At this first conversation

there was nobody present but Mr. Alford and myself.

Q. Miss Conroy wasn't there? A. No; not at that conversation.

Q. Now, when was the next time after that that you recall having referred to this assignment, or referring to getting an assignment? A. A few days after the $10,000 loan was granted—the loan had been granted in the meantime and Mr. Hofmann, the vice-president, together with Mr. Conway and myself went over to the office of the Glen Engineering Construction Company, and Mr. Hofmann made another demand upon Mr. Alford for this assignment.

Q. What did Mr. Hofmann say? A. He said, 'You people agreed to give us an assignment and you have not done it. We must insist upon having an assignment.' And Mr. Alford said, 'all right' that he would take care of it.

Q. Now, that was within a few days after the $10,000 note was discounted, I understand? A. Yes.

Q. (By the Court.) At the New York office? A. At the New York office of the Glen Engineering Construction Company."

After this he testifies that the assignment was not referred to again, except when it was executed (p. 309), and he admits that at the time of the $5,000 loan to Downey on July 27, there was nothing said about an assignment (p. 300), although he negotiated this particular note, and took it over to the bank (p. 396).

He admits that he does not recall anything being said about an assignment, when the $4,000 loan was made in June, although that loan shows that it was on a note of an officer of the Glen Company, to his (Hilbert's) order, and endorsed by him personally (F. M. L. Co., D-1, March 7, 1912)

(p. 313), or when the other $5,000 note was discounted for an officer of the Glen Company in the early part of August (p. 313).

He testifies that he acted as broker for the Glen Engineering Construction Company in taking that company's account to the Merchants' National Bank (p. 318) on the 25th of August, which was the date when the account was opened (F. M. L. Co. Ex. D-20; p. 767). This account was opened, it appears, after the Glen Company's credit had been exhausted with the Bank of the Town of Union (pp. 346-347). He further testifies that at the time he took the account to the Merchants' National Bank, that Bank said they would lend the company more money on getting an assignment (p. 318). He knew then that the Merchants' Bank wanted an assignment when the account was opened on August 25th, and he left the getting of that assignment to the Merchants' Bank (p. 318).

He testifies that no letter was written in reference to getting the assignment for the Bank of the Town of Union (p. 342) and he does not think that anything was put on paper and sent out demanding it (p. 342), which is the fact because if there was any written evidence the bank would have produced it. Furthermore, while he testifies that he thought a resolution was passed by the Board of Directors (p. 342) directing Mr. Conway to get the assignment, it was conceded by counsel that the minute book of the Board of Directors and of the Discount Committee of the Board of Directors of the Bank, contains no such resolution or any reference to an assignment at this time (p. 430).

Hilbert's testimony and the uncontrovertible exhibits show that it was after the credit of the

Glen Company had been entirely exhausted with the Bank of the Town of Union (p. 347) and after the Glen account had been drawn down at that bank for more than a month below $160 (Trustee's Ex. D5) and after Hilbert had taken the Glen Company to the Merchants' Bank to obtain credit, and the Merchants' Bank had agreed to loan money on securing an assignment (p. 318) and after Hilbert and the president of the Merchants' Bank had arranged to mulct the Glen Company for more than $750 for a $5,000 loan (pp. 340-501) and after an assignment to the Merchants' Bank was arranged for (p. 318) that the Bank of the Town of Union asked for or got an assignment. Before the assignment was given to the Bank of the Town of Union, the Glen Company's account in that Bank had been practically closed. Before that assignment had been given, Hilbert, of the Bank, had examined the Glen Company's books (p. 350) and found that the Company was insolvent (Trustee's Exhibits D-2, D-5 end of stated case), and before that assignment was given, the Merchants' National Bank had arranged for an assignment, and before the assignment was given, Hilbert had secured for the Glen Company the first loan from the Merchants' National Bank, and had received a commission of $250 and wanted a commission of $500 on a $5,000 loan (p. 340), all of which shows the motive of the Union Bank in getting the assignment in September, and shows that the strongest probabilities are that no desire for an assignment had been expressed upon the part of the Bank of the Town of Union before September, and that no promise had been made prior to that time to give an assignment.

In February, March and April of that year

(1910) the Bank of the Town of Union was only too glad to get the account and the business, and only got it after they had promised accommodation. In September, the account had not turned out as profitable to this little country bank as they thought it would, and it was then, and then only, that they attempted to scramble to cover.

The next witness called by the Bank to prove the alleged oral agreement to give an assignment, was Conway, who was the president of the Union Bank at that time. We cannot call the Court's attention to Conway's conduct on the stand, and his method of testifying—it could not be recorded. Every time he began to testify to a conversation, his mind reverted to September when the assignment was given, and he ran every conversation, with reference to which he attempted to testify, into September.

Conway, it appears, was also contractor, doing business with the Glen Company, in selling them slate, under the title, the Structural Supply Company. His testimony, it will be noted, is absolutely contradictory of Hilbert's in the main particulars. Conway says he had the first conversation with Alford at the Bank when the account was opened (p. 355). He said that Hilbert and Hofmann were present (p. 356). Hofmann said he was not (p. 402). Hilbert does not say he was there, but says he had the conversation in New York (pp. 308-309-310). Conway says that this conversation took place before the $6,000 loan was made (p. 356); that at this time, nothing was said about an assignment, but that merely the standing of the Glen Company was talked over (p. 355), and that at that time Alford furnished him with a copy of the contract for the Paterson job to let him know something about the Glen

Company's standing (p. 356) and not as security (pp. 376-384), and then he says that a copy of this contract was furnished to him, a month earlier and that Hilbert brought it over to him (p. 359). Alford, president of the Glen Company, says he gave the contract to Hilbert, to show the amount of the contract and when the payments would fall due and not as security (pp. 488-489). Then again Conway testifies that Alford gave him the contract (p. 384). He claims that the conversation was had with Alford at the time the $10,000 loan was made. He fails to state the conversation except that he injects his own conclusion that Alford agreed to give him the "excess of balance over 15%" whatever that may mean (p. 356). He testifies then that Hilbert opened the subject at the time of this $10,000 note, and that he sent Hilbert to New York and had Hilbert bring Alford over to the Bank (p. 357), and that he, Conway, told Alford that he wanted an assignment of some payments on the Paterson job (p. 357), but Alford said, "I will give you an assignment of the balance," and then he runs this conversation right into September, when Judge Stuhr drew the assignment (pp. 357-358).

He then contradicts himself again by saying that this conversation was had at the time the $10,000 note was discounted, but he does not remember the time of the conversation (pp. 359-360). Then he says that he told Mr. Hilbert that he would have to have some security, and that Hilbert told Alford, and that Alford came over to the Bank, but he does not say that Alford promised to give an assignment at this time (p. 360). This conversation he brings right into September at the time the assignment was given, which shows the obvious operation of his mind,—which

was, as the fact was, that the first conversation that he had with Alford, or anyone, was in September, when the assignment was given.

Then in an attempt to straighten himself out, he claims that "security" was talked over with Alford two or three days after the $10,000 note was exhibited to him and to the Board of Directors. His testimony on this is as follows:

"Q. Was this note brought to your attention before the note was discounted? A. Yes, sir.

Q. (By the Court.) Was it brought before the Board? A. Before the whole Board, yes.

Q. And was the note then present at the meeting of the Board? A. Yes, sir; the note was present.

Q. And exhibited? A. And exhibited.

Q. And then there was action taken by the Board? A. Action was taken by the Discount Committee.

Q. Now, perhaps you can answer the question put to you a little while ago; when with reference to that Board meeting at which this note was accepted and discounted, did the conversation occur between you and Mr. Alford in which he promised to give the bank an assignment upon the final payment on the school? Was it on that day, the day before, or three days before, or the day after, or when? A. Security was promised maybe two or three days afterwards, but before the note was discounted. I had to wait to see. I don't know whether the note came in on Monday or Wednesday" (pp. 362-363).

Hilbert absolutely contradicts Conway and swears that the note was drawn in the office of the Glen Company on April 19th (pp. 293, 308) and the bank book shows that it was discounted and credited to the company the next day (Trustee's Ex. D-5). Hilbert took the note over to the

bank. The note was brought over and made on Tuesday, the 19th of April (pp. 293, 308), and the Discount Committee met on Wednesday, the 20th of April (p. 402), the day the amount of the note was credited to the Glen Company, and Hilbert swears that he had the first conversation on the matter the day the note was drawn (pp. 293-308).

Conway then attempts to say that he had the conversation before the matter was presented to the Board at all (p. 363), but he will not say it was before the note was made (p. 363), and he further testifies that he cannot state the month or the day when the matter come before the Board, but he suggests July and not April (p. 385).

His testimony became so involved and contradictory, that his own counsel gave up an effort to get a statement from him, and then he attempts to go over the whole matter again and dates the conversation as of the time when he says he had Hilbert bring Alford over to the Bank (pp. 363-364). Mr. Conway does not say anything about Hofmann being present at any of these conversations, nor at any conversation after the time of the opening of the account (p. 356).

It must be remembered, too, that Hilbert never testified that he was present or brought Alford over to the Bank at all, and as a matter of fact testified on the fairest interpretation of his contradictory testimony that there were only three occasions at the most, when the assignment was spoken of, first at the time the $6,000 note was made (p. 306) which he later contradicts (pp. 309-310); second, at the time the $10,000 note was made on April 19th, when he claims no one was present but himself and Mr. Alford, and Alford said he wanted to talk it over with his uncle (p.

307), and third, a few days after the $10,000 loan was made when he says Conway and Hofmann went over with him to the Glen offices in New York (p. 308). Hilbert also claims that all these conversations took place in the New York office. In this, Hilbert, who was the man who had all the business transactions with the Glen Company contradicts Conway and Hofman absolutely.

Conway then testifies that every time that he called at the office of the Company after his alleged conversation, he asked for security (p. 365), but later he admits that when he called at the Glen Company's offices in New York, he never talked about bank business (p. 377).

On cross examination he testified that he had the conversation about security with Alford when the Glen Company was first brought to the Bank as a customer, and before it had any deposits there (p. 371), and that he had this conversation a few days prior to the $6,000 note, and that the account was opened two or three days before this note was discounted (p. 372), and then when shown the bank book, he admits that nothing was said about an assignment or security at the time the account was opened (pp. 374-375), and he is unable to say whether the conversation was a week, or a day or a month after the account was opened (p. 373).

He says that he did not talk wih Alford about the form of assignment at all when he claims the conversation was had when Alford is claimed to have promised an assignment, but that he had his attorney draw it (p. 376), and then he says he did talk over the question whether or not his attorney, or the Bank attorney should draw it when he and Alford first talked about the matter (p. 376), and Alford showed him a copy of an assignment

which they did not use (p. 376). He then swears that this was a week or two before the assignment was drawn by Judge Stuhr in September (p. 377).

In an attempt to corroborate himself, he said he thought that Hilbert wrote letters asking for the assignment. Hilbert says that he did not do any such thing (p. 342). *Conway admits that when he asked Judge Stuhr to draw an assignment, he had heard that the Merchants' Bank was to get one.* He went to Judge Stuhr a week or two before he had the assignment signed in September and then again he testifies that it was only a day or two before (p. 377). He makes a claim that they were going to and did call the loan, although the notice of protest shows that the loan was not called until February, 1911 (fol. 384). He says that the time Alford showed him a form of assignment which he says was when he and Alford first talked about giving an assignment (p. 376), was about a week before he got the assignment from Judge Stuhr, which was September, 1910; that he does not remember whether he asked Mr. Alford to prepare one like it; that at that time they were just talking about the kind of security, and that there was no arrangement between him and Alford about the form of assignment, and that this was about three weeks prior to the time when he heard that the Merchants' Bank was going to get an assignment (pp. 376,391). He admits that he was in the office of the Glen Company quite often during the summer on his own business, and during that time he never asked for an assignment (pp. 377, 380, 382). His testimony on the face of it is absolutely contradictory.

It is impossible to read Conway's testimony and fix any time when any conversation was had, or spell any promise, or agreement, out of it to give

an assignment. *His testimony shows that he is attempting to date back a conversation had in the latter part of August, or the first part of September, to the previous April in order to conform with an afterthought.*

The only other witness called by the Bank to prove the alleged promise to give an assignment, was the witness Hofmann, vice-president and director of the bank. His attitude on the stand stamped him as entirely biased in his testimony. He testifies that the first conversation took place at the Bank office two or three days before the $10,000 loan was made, and he said Hilbert and Alford were present at that time (p. 393). Hilbert does not testify that he was there, but says that he and Hofmann and Conway were in New York and had the conversation two or three days after the loan was made (p. 308). Hofman's testimony on the face of it must be false, because the note was made in New York on April 19th, at which time it was first spoken of to Hilbert (pp. 293, 309-310), and discounted on April 20, and the Discount Committee met on Wednesday, April 20 (p. 402), so there was no long discussion between the time that Hilbert had the note drawn in New York on the 19th, and brought it over to the Bank, and the time the note was discounted on April 20th. Hofmann says that at this conversation Hilbert, Alford and Conway were present, he did the talking, and that Alford promised to give him an assignment (p. 393). Conway in his testimony does not say a word about Hofmann being there at all but he does say that the note for $10,000 was exhibited at the conversation at the bank at which he was present and the alleged promise was made (pp. 362-363), so that if the note was drawn on April 19th as Hilbert says (p.

293) and was discounted the next day as the Bank Book shows, Hofmann is not telling the truth when he says it was at that time that the loan was discussed in the bank office three or four days before it was passed by the discount committee, and that the promise was then made to give an assignment. Hofmann convicts himself when he says that the discount committee met on Wednesday (p. 402). He forgot that this was April 20th—the very day after the note was made and the day it was credited to the Glen Co. on its pass book. Hofmann contradicts both Conway and Hilbert when he says that no conversation was had by him with Alford about an assignment either when the account was opened, or when the $6,000 note was discounted.

The first conversation Hofmann testifies to, he alleged to be sometime before the making of the $10,000 loan (p. 393), although Hilbert testified that he opened the discussion at the time the note was made in the office in New York on the 19th (pp. 293, 308), and that Hofmann was there and that the matter was not referred to again until a few days after the loan had been granted (p. 309), when Conway and Hofmann went with Hilbert to the New York office (p. 308). Hofmann testifies that he called Alford on the telephone some time after the $10,000 loan had been granted, and asked him for an assignment (p. 394); that Alford promised him on the telephone to give him the assignment. He does not say anything about any conversation at the time of the $10,000 loan, or around that time in the New York office of the Glen Company, concerning the assignment when he and Hilbert or Conway were present. He contradicts Hilbert, who stated that the conversation took place in New York after the $10,000 loan was granted (pp. 293, 308), and that Conway and Hof-

mann were present, and Hilbert contradicts him when he says the conversation took place in New York, and does not say anything about any conversation taking place in the bank.

Conway does not testify as to any conversation at all at which Hofmann was present at the time of the granting of the $10,000 loan.

Conway attempts to testify to a conversation, when he says he had it no one could tell. At one time it was at the opening of the account, at another time it was at the granting of the $6,000 note, and at another time before the $10,000 note, when Hilbert brought Alford over to the bank. He says these conversations took place in the bank, and not in the Glen office. He does not say anything about Hofmann being present, except at the time of the opening of the account (p. 356).

Hilbert testifies at one time that there were two conversations, and at another time that there were three conversations, one in New York when the $10,000 note was made. He says Hofmann was present at this one (p. 293), and Hofmann says he was not; and the other contradicting himself when the $10,000 note was made in the New York office, when he was alone with Alford (p. 308), and the other after the $10,000 note was granted in the New York office, at which Conway and Hofmann were present (p. 308). Conway and Hofmann do not testify to any such conversations. Conway and Hilbert testify that there were two conversations, Hilbert testifying that the conversations were with him in the New York office (pp. 293, 308, 309), and that he did the talking,—Conway at one of them (p. 308), and Hofmann there at both (pp. 293, 308),—Conway testifying that the conversation was with him in the Bank's office, and that Hilbert was there, and

that he, Conway, did the talking. He does not say anything about Hofman being there; Hofman testifying that there was but one conversation at which Hilbert and Conway were present and that that was at the Bank's office, and that he, Hofmann, did the talking (p. 393), and Hilbert contradicts him in this by testifying that the only conversation at which the three were present was in the New York office, a few days after the $10,000 loan had been made (p. 308).

Out of none of this testimony can anyone spell out any agreement or contract to give an assignment upon the part of the Glen Company,—concededly there was no action by the Board of Directors of the Glen Company at the time, formal or informal, approving or ratifying any agreement—and no direct evidence that Downey, the treasurer of the Glen Company ever made an agreement or ratified any.

The fact that no such conversation ever took place and the fact that no promise was ever made to give an assignment to the Bank of the Town of Union prior to the first part of September, 1910, more than five months after the loan of the $10,000 by the Bank to the Glen Company, is proved, not only by the contradictory and inconsistent testimony of the interested and biased officers of the Bank, but by the clear, convincing and direct testimony of Smith Alford, who was President of the Glen Engineering Construction Co., and with whom it is claimed the alleged conversation was had, and by whom it is claimed the alleged promise was made.

Smith Alford was an entirely disinterested witness in this proceeding. He had no interest in the success of any party to it. He has no claim against the company or of the estate of the bankrupt, and

no interest in the claim of any lienor. *In fact his testimony was entirely against his own interests, because Alford was an endorser on the notes claimed on by the bank in this proceeding.* (Exh. Town of Union D-1; Exh. Town of Union D-2; pp. 750-751), *and it is clear that Alford will become primarily liable as such endorser to the Bank for the amount of said notes, if the Bank fails to establish its claim in this proceeding.*

His testimony, therefore, has every stamp of truth and veracity, and the clear and convincing and straight-forward manner in which he testifies establishes beyond a doubt that the contention of the Bank, made clearly as an afterthought, in a hopeless effort to work out a present consideration for the written assignment given on September 16, 1910, is entirely without any basis in fact.

Alford testifies that he was the President and General Manager of the Glen Engineering Construction Company during the years 1908, 1909 and 1910, and up to the failure and bankruptcy of the company on December 10, 1910 (p. 447); that the other officer of the company was P. H. Downey, treasurer (p. 448), and that the members of the Board of Directors were himself, P. H. Downey and M. S. Paine (p. 448); he testifies that the account of the First National Bank of the Town of Union was opened on February 17, 1910, with a deposit of $3,000 (p. 449), (Exh. F. M. L. Company, D-5; p. 752); that the Glen Company was asked to bring their account to the Union Bank by M. William Hilbert (p. 451). He testifies that he had a conversation with Hilbert at the time of the opening of the account; that he had no conversation with him in reference to an assignment at that time (p. 453); that he did not go to the First National Bank at the time the account was

opened (p. 453); that at the time Hilbert solicited the account Miss Conroy and Mr. Downey were present (p. 453), and that neither he or any one in his presence said anything at that time about an assignment (pp. 453-454); he testifies that the first note of $6,000 (Trustee's Exh. D-1) was the first loan which the First National Bank made to the Glen Co. That the note was signed in the office of the Glen Co. (pp. 454-455) and that Miss Conroy wrote it out on her machine, and that Hilbert, Downey and he were present. That at the time the note was signed he had no conversation with Hilbert about an assignment, and Hilbert never said anything to him or any one in his presence, either to Mr. Downey or Miss Conroy, about an assignment (pp. 454-455), that Hilbert took the note over to the Bank to get it discounted, and wrote his initials on it (p. 455), and that at the time the loan was made he, Alford, did not go over to the Bank (p. 455).

That the note of $10,000 was drawn on April 19, and signed in the office of the Glen Co. in New York. Mr. Downey, Mr. Hilbert and he were present, and he thinks Miss Conroy (p. 455). Hilbert took this note over to the First National Bank to get it discounted. He, Alford, did not take it over (p. 455). At the time the note was signed Hilbert said nothing to him about an assignment or security, and he said nothing to Hilbert about an assignment or security and Hilbert said nothing to Mr. Downey in his presence about an assignment or security, and Mr. Downey never mentioned anything to Hilbert about an assignment or security (p. 456). That the time the $10,000 note was signed he did not go over to the Bank of the Town of Union (p. 456). He was not sent for to come over there. He never met Mr. Hof-

mann, the Vice-President of the Bank at that time at all, either in the offices of the company or in the offices of the Bank, and had no conversation with him (p. 456). He was not called on the telephone or asked by Mr. Hilbert to come over to the bank in connection with this $10,000 note (p. 457), and he had no conversation with any officer of the bank with reference to an assignment at that time. Mr. Hofmann never came to the office of the Glen Company in April while Alford was there. That the note of $6,000 was paid before the $10,000 note was discounted (p. 457).

Alford gave a copy of the Paterson contract to Mr. Hilbert because he, Hilbert, asked for it, to show them the amount of the contract and when the payments were coming due (p. 457) and not that he thought it would be security (p. 489). At the time Hilbert asked the Glen Co. to come over to the Bank he promised them accommodation to the amount of $10,000, and Hilbert said at the time he would like a copy of the contract (p. 458). During June and July, Conway, President of the Union Bank had business relations with the Glen Co. through the Structural Supply Co. and he was in their office frequently. While he was there and when he came in there he never made any request for an assignment (p. 459). That Alford first met Hofmann, the Vice-President of the Bank, in July or August. He was introduced to him in the office of the Glen Co.; that at the time he met him Hofmann did not say anything about an assignment. That he had not met Hofmann at the time the $10,000 note in April was discounted, and had no conversation with him at that time about an assignment (pp. 459-460), and that Hofmann never said to him that he would not vote to pass the $10,000 unless the bank got an assignment, and that at that time no assignment

was under discussion whatever (p. 460). The officers of the Glen Co. got further money from the bank after the discounting of the $10,000 note in April. That this money was gotten subsequent to April, on three notes (p. 461), and that at the time these loans were made on these notes no assignment was ever mentioned by any officer of the bank (p. 461).

That the Merchants National Bank account was opened August 25th, 1910. That Hilbert brought them to that bank (p. 461), and that prior to the time that they went to the Merchants National Bank he, Alford, had no conversation with any officer of the Bank of the Town of Union with reference to an assignment or security. That at the time the Merchants National Bank account was opened on August 25, the Glen Co. was pinched for money (p. 462), and they were promised by that bank up to $20,000. The account was opened there by Hilbert (p. 462). That at the opening of the account with the Merchants Bank a request was made for an assignment, and around that time an assignment was agreed upon with the Merchants National Bank (pp. 363-364, 482). That it was after that, or about that time (August 25th, 1910), that the First National Bank of the Town of Union first asked for an assignment (p. 464), and that Hilbert was the first one to ask for an assignment in the latter part of August or first of September, and that was the first time an assignment was ever spoken of to Alford (p. 465), and that when Hilbert asked him for an assignment he protested against it and said that an assignment gotten from the Glen Co. and filed in Paterson would mean that the bank would lose everything they had advanced. Before that time he never had any notice that the Bank of the

Town of Union wanted an assignment (p. 464). This was the first opening of the matter with him (p. 465), and the first opening of the matter between the Bank and the Glen Engineering Construction Company. After this he had a conversation in September with Conway and Hofmann, and that was the day on which the assignment was executed (p. 465). Conway may have been there three or four days before while it was in process, but he remembers that Conway, Hofmann and Hilbert came and got the assignment in September. Judge Stuhr acted for the Merchants National Bank in getting their assignment, and he also prepared the assignment for the Bank of the Town of Union (p. 466). *At the time the assignment was given by the Glen Co. to the Bank of the Town of Union in September, or when it was first talked over the latter part of August or the first of September, the Glen Co. borrowed no money from the Bank of the Town of Union* (p. 466), *nor did they borrow any after the assignment was given* (p. 466) *from the Bank of the Town of Union. The latter part of August or the first of September was the first time an assignment was ever spoken about by Alford to the First National Bank of the Town of Union.* That in the latter part of August when Hilbert first asked him for an assignment he said that they would like to have an assignment inasmuch as the Merchants National Bank was going to get an assignment (p. 484). That the Glen Co. had borrowed money from the Union Bank and that the Glen Company's account there was very small at the time, and that the Bank wanted an assignment, and that first a paper was prepared in which they made some changes and the bank was not satisfied with it and said they wanted Judge Stuhr to

draw up an assignment, and that he, Alford, told Hilbert that the record or filing of the assignment would bring the materialmen and people with whom the Glen Company had done business down on top of them and that the Glen Company could not meet any such situation (p. 474). That at the time Hilbert said the Bank of the Town of Union wanted an assignment he said that the bank required a resolution in order to make it in proper form, and such a resolution was dictated by Mr. Hilbert and written out by Miss Conroy in the Glen Company's offices, although there was no meeting of the Board of Directors of the Glen Co., either formal or informal at any time. Mr. Paine who was a director was not present and no directors' meeting was held (pp. 354, 355, 475, 476).

On cross examination Mr. Alford testimony was not shaken in the least. He said he used to go over to the Bank of the Town of Union and get payrolls, and saw Mr. Hilbert several times, and Mr. Conway sometimes, and did not remember seeing Mr. Hofmann (p. 478). The only occasion on which he remembers being in the private office occupied by Mr. Conway was when he went over there to see about a personal note of Mr. Hilbert's which Hilbert admits Alford endorsed for him (p. 333).

Mr. Alford was asked by the attorney for the bank several question worded in the form "Do you remember being there on an occasion, etc.?" and he answered those questions "That he did not remember, etc." which of course was the proper answer because he was not asked to testify as to the fact, and in answering in that form on cross examination he testified as follows: that he did not recall that any $10,000 note was discussed and

that Mr. Hofmann said he would not be a party to the making of the loan unless the assignment was forthcoming (p. 479). The attorney for the bank put his questions in such a peculiar form that he did not ask for a direct answer as to the fact. However, when counsel for the bank did ask a direct question as to the fact, he got a direct answer.

> "Q. Why did you say in answer to Counsel's question that you spoke to Mr. Conway in June or July, but that he did not ask you then for the assignment; now when you made that answer did you consider that he may have spoken to you about it but that you did not remember it being so long ago? A. No, I had no talk with Mr. Conway or Mr. Hofmann or Mr. Hilbert previous to the latter part of August about any assignment to the First National Bank of the Town of Union" (p. 480).

He further testified that he did not mean to give any impression that he had heard about the assignment before August. That the first time he had ever heard about any agitation or request for an assignment from the Bank's officers was some time about the latter part of August or the first of September. That the latter part of August was the first time he heard of it (p. 481), and that the form of resolution was drawn up in the latter part of August when the assignment was first spoken of. That at that time some one from the First National Bank came to Alford and said that they wanted an assignment, because the Merchants National Bank was getting one.

Alford explained to the attorney for the bank that he gave the copy of the Paterson contract to Hilbert so that he could see how the payments were falling due (p. 489), and not that he thought

that the contract would be any security (p. 489). The bank never asked for any security at the time. He did not make the inquiry for the $10,000 loan at the bank. He spoke to Mr. Hilbert about it. He testifies positively that at the time the $10,000 loan was made the Glen Company was not to give any security (pp. 489-490). That in the latter part of August the company was pinched for money, and could get no more money from the Bank of the Town of Union (pp. 499-500), and that then Hilbert of the Union Bank took them over to the Merchants National Bank, which was closely allied with the Bank of the Town of Union, and held the notes of the directors of the Bank of the Town of Union for the money with which they bought their stock in the Union Bank and that the Glen Company had to pay for every $5,000 loan $250 in addition to interest, and one loan of $5,000 cost them $500 and that Hilbert of the Bank of the Town of Union got one of these $250 (pp. 501, 340).

Alford's testimony is corroborated by Miss Conroy who was the office manager of the company in the years 1908, 1909 and 1910, and who had charge of the books (p. 525), and checked up the bank accounts, and drew all the checks. She remembers when the Glen Engineering Construction Co. account was opened with the Bank of the Town of Union in February (p. 529). The first note was made in March and was made out by her and was signed in the office. That Mr. Hilbert was present at the time, representing the Bank of the Town of Union (pp. 529-530), and that she was present at the time of the conversation and that during that time there was nothing said about an assignment (pp. 530). That Mr. Hilbert usually made the deposits for the Glen Co. with the Bank

of the Town of Union (p. 530), and took the notes over there (p. 530). That he would come over to the office and get the deposit and take it back to the bank and then make the entry in the book. That Mr. Hilbert was present at the time the $10,000 note was signed (p. 531), and so was she. The others present were Mr. Downey and Mr. Alford (p. 531). It was signed on April 19th in the offices of the company, 156 Fifth Avenue. That she was there during all the time and she did not hear Mr. Hilbert say anything about an assignment to Mr. Alford, and Mr. Downey said nothing about an assignment (p. 531). The first time she heard about an assignment being made or to be made to the First National Bank of the Town of Union was about the first part of September. The Court asked the question

> "Q. (by the Court.) Do you know when you first heard an assignment made or to be made by the Glen Co. to the First National Bank of the Town of Union? A. Yes, about the first of September."

She testifies that Mr. Hilbert took the $10,000 note over to the bank, and does not remember that Alford went over there with the note (p. 532). She testifies that Mr. Hofmann did not telephone about the $10,000 loan. She answered the telephone in the office (p. 532). That there was money borrowed from the bank after the $10,000 note by the officers of the Glen Co. and that Mr. Hilbert took these notes over to the Bank (pp. 532-533), and that at the time these notes were made out in the office there was no conversation about any assignment or security (p. 533). The first time she saw Mr. Hofmann in the office of the Glen Co. was in the early part of July and that he came in to be introduced at this time and did not say

anything about an assignment (p. 533). That she remembers when the assignment was executed in September (p. 533). That it was talked of only a short time before it was executed (p. 534), and that when it was executed Mr. Conway, Mr. Hofman and Mr. Hilbert were present (p. 534). That the Merchants National Bank account was opened on August 25. That the assignment to the First National Bank of the Town of Union was first talked of shortly after the opening up of the account with the Merchants National Bank (p. 535). Mr. Hilbert first asked for the assignment (p. 535), and that at the time the assignment was executed on September 16, no money was received from the bank at or around that time (pp. 536-537). That Mr. Conway was frequently in the office during July and August and June, and she never heard him asking for an assignment while he was there before the latter part of August.

On cross examination, the attorney for the bank, while making every unfair effort possible to discredit the witness, utterly failed to do so. She testified she did not think that there was any conversation between Mr. Alford, Mr. Downey and Mr. Hilbert that she did not hear. She did not hear any conversation about an assignment (p. 540). If there was any talk about an assignment the company would have told her afterwards (p. 541). That she usually heard all the conversations in the office about business (p. 541). That she did not remember the details of the conversation the time the assignment was executed, but she remembered who was there. She remembered she first saw Mr. Hofmann in July, because it was warm weather and not very long before her vacation (pp. 547-548). That at the time Mr. Hofmann first came in he came in with Mr. Conway.

That at that time nothing was said about an assignment (p. 549), because she would know if anything had been said about that (p. 549). She testifies that they did not discuss business at all when Mr. Hofmann first came in and certainly if any assignment was talked of or any agreement was made to give an assignment by any officer of the Glen Company in April at the time of the $10,000 loan Miss Conroy would have known of it—because she practically controlled the New York office management of the company and knew all about its affairs. Miss Conroy contradicts Hilbert the bank witness absolutely.

As absolute corroborative proof of the fact that no such conversation was had in April we have all the circumstances of the case. There is no scrap of writing in existence or in evidence, signed by the Glen Engineering Construction Co., or by any officer of the Glen Engineering Construction Co., referring to an assignment in any way, which shows that no such assignment was every spoken of, and particularly does it show this, because when an assignment was first spoken of in the latter part of August, after the Merchants National Bank account had been opened, the Bank of the Town of Union through its agent, Hilbert, endeavored to get immediately a written statement from an officer of the Glen Co. that an assignment was authorized by the Glen Co. Board of Directors (p. 538). If Hilbert knew so much about the law of corporations as to ask for a written resolution authorizing an assignment on the 29th of August, two weeks before the assignment was actually executed and before the bank had consulted its attorney, it seems clear that he would not have rested upon a mere oral conversation without a scrap of corroborative evidence if he had in fact

spoken of the assignment in April. The conduct of the officers of the bank when this assignment was in fact first spoken of in September, shows, that they determined to ask for it not because any promise had previously been made to give an assignment, but because the Glen Co.'s account in their bank was practically closed and the Glen Co.'s credit there practically exhausted, and because the Merchants Bank had practically taken over the account and was going to get an assignment at this time, they did everything in their power to get everything they could in reference to an assignment, and if any oral promise had been made to them in April, or if they had asked for an assignment in April they would have done everything in their power at that time to tie up the matter. Although one of them, Hofmann, claims that just at the time the $10,000 note was discounted he voted for the loan in the Discount Committee on the sole condition that an assignment was promised, yet there is no record of any such vote or of any such condition imposed by the Bank in the minutes of the Board of Directors, or of the discount committee of the bank. There is no letter in evidence or in existence, written by any officer of the Bank at any time, asking for any assignment or referring to any promise to give an assignment. The record shows that after the $10,000 loan was made there were three other loans made by the Bank to officers of the Glen Co.; one in June, one in July, and one in the first part of August, yet it is admitted that no demand for an assignment was made at this time when this money was advanced. The bank had complete leverage upon Glen Co. at this time and upon its officers. If they had been promised an assignment previously they could have held up

any one of these loans, and they would have held up any one of these loans until the assignment was forthcoming; and yet it is admitted at the time these loans were made nothing was said about an assignment. Hofmann's conduct as a member of the Discount Committee of the bank in approving these three loans without ever asking the Glen Company for an assignment, and without getting an assignment, and without conditioning the granting of the loans upon the getting of an assignment, contradicts absolutely his testimony that at the time of the $10,000 loan he voted for the loan solely on the condition that an assignment would be given, and he is contradicted by the records of the bank and of the Discount Committee which show that he never conditioned the $10,000 loan upon any such thing.

One of the strongest corroborative circumstances of the fact that no assignment was promised or talked of until August or September is the face of the assignment itself, which makes no reference whatever to any previous promise, or to being given in pursuance to any previous arrangement or agreement. We must remember that in every case the most convincing evidence is documentary evidence. The face of a document speaks for what it is. A document does not lie and all the documents in this case corroborate absolutely the testimony of Alford and Miss Conroy that no assignment was ever promised or talked of prior to the first of September. The face of the $10,000 and of the $6,000 notes do not refer to collateral security. The fact that the bank at the time these notes were signed had the endorsement of the officers of the Glen Co. thereon, to comply with the custom of bankers to loan money on endorsed paper, shows that the loans were

made to the Glen Company upon endorsement and not as collateral loans. If the loans had been collateral loans and secured or intended to be secured they would not have been endorsed. The resolution dictated by Hilbert on the 30th of August, authorizing an assignment, and the assignment itself, dated September 15, neither of which papers refer to any previous agreement, are strong evidence of the fact that no such agreement or conversation or alleged promise ever took place or was made as was the fact. Still stronger corroborative circumstance is the fact of the absence of any documentary evidence on the part of the Bank showing that any alleged promise was made at the time the $10,000 loan was made or within three or four months thereof. There is no record on the books of the Bank, and no record of the Glen Co., no letter, no scrap of paper of any kind, to the effect that in the previous April the Glen Co. had promised an assignment; no statment was made by Conway to Judge Stuhr about any previous agreement. All Conway said to Judge Stuhr was that because the Merchants National Bank was getting him to draw an assignment he, Conway, wanted him to draw one for the Union Bank (p. 351); nothing said to any third party. The fact too that when the Bank got the written assignment on September 15, and although it is uncontradicted that at that time Alford said that they ought not to file it, they rushed over to Paterson and did file it, shows that they were not inclined to take any chances and wait and rely upon a mere hazy conversation with one officer of the Glen Company for more than three months before they got it. The fact that the Glen Company was changing its accounts to the Merchants National Bank and was depositing no more with

the Bank of the Town of Union after the middle of August, and the fact that the Bank of the Town of Union was losing what little hold it had on the Glen Co. shows beyond question that it was after Hilbert of the Union Bank had examined the books and found the company insolvent that the officers of the Bank of the Town of Union for the first time wanted to get an assignment. It is preposterous for them to claim that they were willing to wait for three months and then on a mere hazy oral promise. Their conduct when they got the assignment and their endeavor to get everything they could to sustain it, and their hurry in filing it, contradicts their claim absolutely. No jury in the world would find upon the evidence in this case that an oral agreement to give an assignment was made by Smith Alford in April. No jury would find in this case that there was any conversation with any one about an assignment prior to September or the latter part of August. The motive of the bank officers endeavoring to make out such a conversation is clear. If they did not make such an attempt their claim absolutely falls in this case. They know it, and everybody knows it. It is their last effort to save what they can, and no stronger motive for the exercise of the imagination to relate back conversations from the latter part of August and September to April could not possibly be devised.

The burden of proof lies clearly upon them and they have not even made a *prima facie* case.

POINT III.

The assignment made by the Glen Engineering Construction Company to the Bank of the Town of Union on September 16, 1910, was made when the corporation was insolvent and to secure an antecedent indebtedness, and is void under Section 64 of the New Jersey Corporation Act.

The New Jersey Corporation Act, Section 64, which as we have shown under Point I of this brief, applies to the acts of the Glen Company, in making the assignment in suit, provides as follows:—

> "Whenever any corporation shall become insolvent, or shall suspend its ordinary business for want of funds to carry on the same, neither the directors or any officer or agent of the corporation shall sell, convey, assign or transfer any of its estate, effect, choses in action, goods, chattels, rights or credit, lands or hereditaments; nor shall they or either of them make any such sale, conveyance, assignment or transfer in contemplation of insolvency and every such sale, conveyance assignment or transfer shall be utterly null and void as against creditors; provided that a bona fide purchase for valuable consideration before the corporation shall have actually suspended its ordinary business, by any person without notice of such insolvency or of the sale being made in contemplation of insolvency shall not be invalidated or impeached."

This section was enacted in New Jersey in the year 1829, and continued in force until the year 1875, when it was omitted from the revision of

that year. It was re-enacted in exactly the same words in the year 1895. After its re-enactment in 1895, it received the same construction from the courts as it had previously, and the cases decided before its first repeal, are authorities upon its construction now.

Frost *v.* Barnert, 56 N. J. Eq., 291.

The purposes of the statute is to prohibit any transfer or assignment made by the corporation at any time when any one of three conditions exist,—

1. When the corporation is in fact insolvent,

2. When it shall have suspended its ordinary business for want of funds, or

3. When the transfer is made in contemplation of insolvency,

and the one exception contained in the Act is that a sale made by the corporation before it shall have suspended its ordinary business, which is a bona fide purchase for a valuable consideration by a person without notice of the insolvency, or of the sale being made in contemplation of insolvency, shall not be invalidated or impeached.

Any transfer or assignment made by a corporation while it is in fact insolvent, for an antecedent indebtedness, or any assignment made by a corporation in contemplation of insolvency for an antecedent indebtedness, is utterly null and void as against creditors.

Wells *v.* Rahway Rubber Co., 19 N. J. Eq., 402;

Miller *v.* Gourley, 65 N. J. Eq., 352;

Empire State Trust Co. *v.* Trustees of Wm. F. Fisher & Co., 67 N. J. Eq., 602; 60 Atl., 940;

Frost *v.* Barnert, 56 N. J. Eq., 291;

Regina Music Box Co. *v.* Otto & Sons, 65 N. J. Eq., 582; aff'd 68 N. J. Eq., 801;
Russell & Erwin Mfg. Co. *v.* Faitoute Hardware Co., 62 Atl., 421;
Skirm *v.* Eastern Rubber Mfg. Co., 57 N. J. Eq., 179;
Barrett *v.* Perth Amboy Shipbuilding Co., 73 N. J. Eq., 62; 67 Atlantic, 757;
Holmes *v.* Sheridan, 56 Atl., 308; Aff'd 65 N. J. Eq., 765.

The case of

Empire State Trust Co. *v.* Trustees of Fisher, *supra,*

is exactly in point with the case at bar. In that case the corporation gave a mortgage to the Broadway Trust Company on September 10, 1902, to secure a debt created on May 20th, 1902. The Court of Errors and Appeals found that as the mortgage was given to secure an antecedent debt, the trust company was not a bona fide purchaser for a valuable consideration, and as the corporation was in fact insolvent at the time, the mortgage was void under Section 64 of the Corporation Act, notwithstanding that the Trust Company had acted in good faith.

Judge Dixon after quoting the statute and defining insolvency, said:—

> "Under these circumstances, it is beyond question that the mortgage made by the directors of the Fisher Company to the Trust Company was rendered by our statute 'utterly null and void as against creditors' unless it served 'as a bona fide purchase for a valuable consideration within the provisions of Section 64. This saving clause is of the same import as the corresponding clause in the paragraph above quoted from Section 70 of the Bankruptcy Act as will presently be seen

on reference to the cited cases. I do not think the bona fides of the trust company has been successfully impugned, but the company does not hold the mortgage for a 'a valuable consideration.' The general rule is that one who acquires property (outside of commercial paper) as a mere security for antecedent debts is not a holder for value. This rule prevails in New Jersey.

Knowles Loomworks *v.* Vacher, 57 N. J. Law, 490; Aff'd 59 N. J. Law, 586;
Protection B. & L. Ass'n *v.* Knowles, 54 N. J. Eq., 519-528; Aff'd 55 N. J. Eq., 822.

The same doctrine is maintained in the United States tribunals. * * *

In the light of these adjudications, we must conclude that the Trust Company is not 'a purchaser for a valuable consideration' or 'a holder for value' within the true intent of the exceptions in Section 64 of the New Jersey Corporation Act, and Section 70 E of the Bankrupt law. Hence the Trust Company mortgage must be held void as against the trustee in Bankruptcy of the Fisher Co."

In the case of

Regina Music Box Co. *v.* Otto & Sons, *supra,*

the Court, in construing the statute above set forth, said:—

"This section is identical with Section 2 of the old act to prevent frauds by incorporated companies, and it must receive the same construction. It forbids the preference of any creditor after insolvency known, or contemplated, but does not invalidate the bona fide purchase for value made before the company had actually suspended its ordinary business by a person not having notice.

Complainant's contention is that at the time

the mortgage herein was made, insolvency existed or was contemplated. Of the $115,000 secured, $40,000 was for cash paid at the time, and $75,000 was for a pre-existing indebtedness. As to these, there is this distinction. If the company be in fact insolvent, or if it contemplate insolvency, it cannot secure a pre-existing debt whether the mortgagee have or have not notice. But if the mortgagee advance money to an insolvent company, or to a company contemplating insolvency and take a mortgage at the time of the making of the advance, then if he has no notice, the security will stand." * * *

And at another place, p. 588, the Court said:—

"Section 64 does indeed make a distinction between the case of an antecedent debt, and the case of a bona fide purchase for valuable consideration paid at the time by a person without notice. In the former case if the company be in fact, insolvent, or if it contemplate insolvency, the ignorance of the creditor is immaterial. (Bower *v.* Harbeck, 9 N. Y., 594), while in the latter want of notice will protect it."

In

Miller *v.* Gourley, *supra,*

the Court set aside a mortgage given by a corporation at a time when it was in fact insolvent, to secure a past indebtedness to the extent of at least $14,000. The Court said in construing the statute:—

"A reading of the terms of Section 64 will show that the prohibition it contains becomes applicable whenever the corporation becomes insolvent, *or* suspends its ordinary business for want of funds to carry on the same, *or* when a prohibited act is done in contemplation of the company's insolvency. Here are

three contingencies, any of which existing, the company's officers are precluded from transferring its property."

Under the above authorities it is beyond dispute that if at the time the assignment to the Bank of the Town of Union was given, the Glen Company was in fact insolvent, or if the assignment was made in contemplation of insolvency, it is utterly null and void in this proceeding. The financial condition of the company at the time the transfer was made is practically undisputed. The books show as set forth in the testimony of Morgan Wake, a certified public accountant (p. 604-622), that the company's liabilities greatly exceeded its assets from the 25th of August to the first of September, 1910, when the assignment was first talked of, and on the 16th of September, when the assignment was made. The accountant has made up from the books alone a statement of what the assets and liabilities were on these dates, and that statement is in evidence (Trustee's Ex. D-2, March 21, and Trustee's Ex D-6, March 21, set forth at the end of the stated case).

These statements show that by the books themselves (which were in evidence p. 527), on these dates, the liabilities of the company exceeded the assets as follows:—

On August	25,	1910		$41,295.37
" "	26,	"		37,356.46
" "	27,	"		37,356.46
" "	28,	"		37,356.46
" "	29,	"		40,533.93
" "	30,	"		38,533.93
" "	31,	"		37,533.93
" September	1,	1910		39,533.93
" "	15,	"	the day of the assignment	46,682.60

These facts being undisputed on the record, are conclusive evidence of insolvency in fact under the statute in question.

Holmes *vs.* Sheridan, *supra,*
Miller *v.* Gourley, *supra,*
Cope *v.* C. B. Walton Co., 76 Atl., 1044;
Skirm *v.* Eastern Rubber Mfg. Co., *supra;*
Trust Co. *v.* Trustees of Wm. Fisher & Co., 67 N. J. Eq., 602.

In

Holmes *v.* Sheridan, *supra,*

this Court set aside the transfer under Section 64 of the Corporation Act, when it was shown by the books that the liabilities exceeded the assets from anywhere between $17,000 to $4,500 at the time. The opinion of the Vice-Chancellor shows that the evidence of insolvency was the report of the accountant that the books showed that the liabilities exceeded the assets. The case was affirmed on appeal on the opinion of the Vice-Chancellor.

In

Skirm *v.* Rubber Man. Co., *supra,*

the court said on the point of insolvency:

> "It is to my mind obvious that in May, 1896, the Company was insolvent. The valuation of the property of this corporation taken at different times coupled with the fact that the sum realized from its subsequent sale was less than one-half its valuation displays, clearly, that it was not possible to realize enough to pay its debts. But if upon winding up there had been a surplus nevertheless a condition of insolvency existed at the time of the execution of this mortgage.

The company was so conditioned that it could not pay its debts and it was only by forebearance of its creditors, who hoped to realize more by the mortgage than by pressing their claims at once, that it was permitted to draw on for some months longer."

Trust Co. *v.* Trustees of Wm. F. Fisher & Co. (Ct. of Err. & App., 1904), 67 N. J. Eq., 602,

at page 604, Dixon, J., in delivering the opinion of the court said:—

"In enforcing this statute we are not controlled by the definition of insolvency contained in the bankruptcy act, but must accord to that term the meaning ascribed to it in the Courts of this state. Here, it denotes a general inability to meet pecuniary liabilities as they mature, by means of either available assets or an honest use of credit. National Bank of Metropolis *v.* Sprague, 21 N. J. Eq. (6 C. E. Gr.), 530, 538; Skirm *v.* Eastern Rubber Manufacturing Co., 57 N. J. Eq. (12 Dick.), 179, 184.

In this sense the Fisher company was undoubtedly insolvent when the mortgage was executed. It then owed $12,943.57 of accounts payable; $29,252.26 of promissory notes, of which notes amounting to $8,995 had been protested, and $39,000 of business debts secured by mortgages upon its manufacturing plant. Its available assets were insignificant; its legitimate credit was practically exhausted, and within a month thereafter a petition was filed upon which it was adjudged bankrupt."

In the statement of the accountant as of these dates above referred to, many liabilties of the company are not set forth because they did not appear on the books (pp. 621, 654). For instance, the Agnew Company, whose account did not appear

on the books, on September 15th was a creditor of the Glen Company somewhere around $9,000 (pp. 521-522). The statement of the accountant, as shown by the books, is the most favorable condition that could possibly be shown of the company's affairs. As a matter of fact at this time the company had no assets, except whatever assets there might have been in the reserve percentages or balance held in Newark, Paterson and the New Dorp contracts, and there was in fact no assets in the balances held on any of these contracts. The amount of the Newark contract was $377,438. The Glen Company up to the time they had failed in December, 1910, had received $120,000 (p. 434). The contract was completed by Fred Kilgus after the Glen Company was removed from the work by the Board of Education in Newark in February, 1911 (p. 435). The balance left to complete the contract at the time the Glen Company failed, in the hands of the Board of Education, was $256,000 (p. 443). Kilgus completed the contract for $247,700 (p. 438) leaving a balance of but $8,300, and the liens filed against the work by materialmen for labor, work and material furnished up to December 10, 1910, when the Glen Company quit, amounted to $33,538.49 (p. 437), so that under this contract, the balance was not enough to pay the lienors, and there is a loss to them of more than $20,000. The Glen Company from the time of the assignment to the Bank in September, to the time it quit work in December, 1910, suffered no loss on this contract (p. 497), except a possible loss of $1,100 (p. 505), so that it is plain that in September, as regards the Glen Company, the balance on this contract was not an asset.

The amount of the Paterson contract was $285,423 (Ex. C-1; p. 12). The Glen Company re-

ceived up to the time it quit on this contract $203,-871.50 (p. 163). The balance left to complete the contract was $81,551.50, and the cost of completing was $52,000 (pp. 719, 636) leaving a balance of $29,551.50 in the hands of the Board of Education (Ex. C-4, C-3; p. 719), and against this balance, liens have been filed for work done up to the time the Glen Company quit, aggregating over $45,000 (pp. 166-167), and it has further been shown that the cost of the work to complete the contract done by the City of Paterson was the reasonable value thereof (pp. 637-638). From September, to the time the Company quit in December, it suffered no loss on this contract (p. 497). There was, therefore, no assets for the Glen Engineering Construction Company in the Paterson contract.

The only other contract which the company had was its contract in New Dorp, Staten Island. There was a balance due on that contract of $9,085.26 (p. 638) and the liens filed against that sum aggregate more than that amount (p. 639).

The record shows further that there was a matter of fact, in August and September, no profit in these contracts, and that the Company had no assets other than its plant and cash on hand (p. 633) (Ex. D-2—10, March 21, 1912; p. 744), and the plant was not carried on the books at more than $3,000 and the cost was the same. This shows conclusively that the company was absolutely insolvent, shown by the fact that the corporation suffered no loss between the first of September and the time it failed in December, 1910 (p. 497), and yet in December, went into bankruptcy, and had no available assets except its plant and office furniture, because as has already been shown, the balances on the contract were

more than eaten up by liens and the plant and office furniture were not of any great value, because the book value of them was only $3,000 and the company had liabilities of nearly $200,000 (Ex. D-6, end of stated case).

Not only, however, was the company in fact insolvent at the time the assignment to the Bank of the Town of Union was given, but the assignment was given in contemplation of insolvency, and not only that, but the Bank of the Town of Union knew that the Glen Company was insolvent. Hilbert, whom we have seen was a main factor in the Bank of the Town of Union at the time, a director, assistant cashier, and broker, admits that the books of the company were placed in his possession (p. 320) and that he glanced over them (pp. 320, 328); that he had a memorandum of what he found, although he did not produce the memorandum. He does not recall what it showed the indebtedness of the company was (p. 321) but he knew what the accounts receivable were (p. 321) and knew that there were three contracts (p. 321). He first says that he does not remember the time he made this examination (p. 320), and then he says it was when the Paterson contract was nearly completed in September, 1910 (p. 321). He attempts to say he made this examination after the bank got the assignment from the Glen Company on September 16th (p. 322). He says he made the examination at the request of the Merchants Bank, which was going to loan more money to the Glen Company, and wanted to know what its assets and liabilities were (p. 322). He says he made a report to the Merchants Bank (p. 323) but he kept no copy. He admits that he was connected with the Union Bank at the time of this examination (p. 325), and then he admits that *he made the examination of the Glen books for*

the first loan made by the Merchants National Bank (p. 342), *and that it was made between the 25th and 30th of August* (pp. 349-350). It is undisputed that he, Hilbert, had access to the books and that he was making a statement from the books (p. 470). He was in a position to see what the company was doing (p. 472). He spent more than two hours on the books (p. 539) and had them all before him (p. 539).

As has already been pointed out, the evidence shows that at this time when he examined the books and made this statement, the books themselves showed that the company was insolvent anywhere from $37,000 to $40,000, which could be learned in an examination of two or three hours (p. 611). Hilbert further knew the company was very weak, because when he got the first loan from the Merchants National Bank, August 25th, which was through his agency, he made the Glen Company put up $250 commission to him in addition to interest, the day before the loan was secured (p. 329), and then he had the effrontery to claim that business houses in good standing paid bonuses of $250 on $5,000 loans (pp. 330-331). He claims he was to get $500 on this first $5,000 loan but it was never paid him (p. 333). He not only got money from the officers of the Glen Company as a bonus, but he forced them to endorse his personal note, and his conduct in getting the assignment and in attempting to get a statement over the signature of an officer that a meeting of the Board of Directors was held when this was not the fact, and his eagerness to get it, displayed by the fact that he dictated it himself in the office of the company, show that he knew that something was wrong, and this is borne out by the fact that when the as-

signment was given the whole Board of Officers of the bank came over to New York, and left their bank and their business to get it.

It appears, too, that the President of the Merchants Bank, which was making the loan, held the Glen Company up for $250 on every $5,000 (p. 340). Would a solvent concern pay a bonus of 5% in addition to interest for accommodation in a bank? Hilbert knew the condition of the company; he knew they were weak and insolvent, he examined the books and saw it, and then he began to mulct them, in which he was joined by the President of the Merchants Bank, which was making the loan. The Glen Company had to begin to pay these bonuses on August 25th (p. 330). At the time the Merchant's account was opened on August 25th, the Glen Company was in need of money. Liens were filed in September around that time (p. 470) and the payment in Paterson was held up more than a month (p. 471). Liens were filed the same day as the assignment (Ex-C-12 supplemental case). At the time of the giving of the assignment, the Glen Company owed a lot of money and had payments coming in, and as Alford, the President of the Company expressed it, "Had a fighting chance" to get through (p. 472).

At the time the assignment was given to the Bank of the Town of Union, Alford protested against it, and told Hilbert that he did not see why the Bank wanted it, because an assignment gotten from the Glen Company and filed in Paterson would mean that the Bank would lose everything, probably, that they ever had advanced (p. 464). Alford asked the Bank not to file the assignment, because it would jeopardize the interest of the Bank and of the Glen Company (p. 474); that it

would bring materialmen and people with whom the Glen Company did business down on top of them, and that the Glen Company could not meet any such situation as that (pp. 474-475).

In the face of these statements, the Bank, nevertheless, took the assignment. The Court asked Alford:

> "Did you, at the time you had this conversation with Mr. Hilbert in which you advised him you thought not to file the assignment as a creditor of the company, consider that the filing of the assignment would be liable to precipitate insolvency upon the company? A. Why, yes; certainly" (pp. 475-6).

He testifies that he told Hilbert not to file the assignment, because of the bad effect it would have on the Glen Company (pp. 483-484).

He testified that he did not think the Glen Company had enough capital to perform the Newark and the Paterson contracts (p. 493); that it was almost impossible to get money from either of these contracts during the summer of 1910 (p. 494); that it was always the experience of contractors that the money comes easier in the beginning of the contract than it does when they are half through. The Glen Company got no money from the Paterson contract from August to October (p. 494). According to the architect's figures of the money allowed them on requisition, they were earning very little money at this time. The Company could not pay its current bills, except that the creditors held off (pp. 495-496). The officers of the Company had to put their hands in their pockets quite frequently at this time (p. 496). The creditors, including the Frank Miller Lumber Company, one of the contesting lienors in behalf of whom this brief is filed, made frequent

demands during August and September (p. 496). Alford admits that at the time the Company took the Newark and the Paterson contracts they needed money from outside sources to carry on these contracts (p. 499), and that at the time the Newark contract was taken, Downey promised money (p. 380), but the demand at a later date was much greater than anybody thought (p. 499).

This was in August and September, 1910. There was no money coming in from the Paterson contracts, and the demands were the greatest in the history of the Company (pp. 499-500), and it was because of these circumstances that the Company had to go to the Merchants' Bank and pay commissions for loans to Mr. Hilbert, and to the president of the Bank at the rate of $250 for every $5,000 loan, and $500 for one $5,000 loan (p. 500), and these loans were not for more than two weeks or a month (p. 501). The Merchants' National Bank in fact refused one of these loans until $250 which had been paid to Hilbert was repaid again to the president of the Merchants' Bank (p. 501) and leaving out the first $250 to Hilbert, they had to pay $500 more than the face of the note with interest (p. 501). This began on August 25th. Alford said that at this time this sum was almost negligible, because the situation looked almost hopeless to him from the end of August on when these bonuses had to be paid. He says he knew then that it was only a question of time when the Company had to quit (p. 502). He says that it was almost hopeless to him at the end of August, but he still thought it was no time for the company to quit, and that they would have more money if they drove the contracts through (p. 502).

In October the Company got but $4,000 from the Paterson contract, which went immediately into

pay-roll (p. 504). Mr. Fallon, for the Bank, in cross examining Alford, asked him this question:

> "Now, the fighting chance that you thought the Company had is it not a fact that the fighting chance was right near the end, meaning by that the latter part of November, or the first of December? A. No, I said when we began paying bonuses it looked sort of hopeless to me" (p. 505).

This he testified began with the first loan on the first of September (p. 505). He says the Company always had trouble in getting along before, but when it began to pay bonuses, it was a great deal worse off. He says that the only reason why he thought that the Company was getting along in the spring of 1910 was on the assumption that thee was a profit in the three contracts (p. 510). The record shows that the Merchants' Bank account was opened with money borrowed from Mrs. Downey (p. 534).

Miss Conroy, who knew the affairs of the Company well, says that the Company, in August, could not pay current bills which were then due; that the Company was worse off during the last year than it ever was (p. 551).

Under the foregoing state of facts, it is clear not only that the Glen Company was in fact insolvent at the time the assignment was given, but that the Bank of the Town of Union, through its director and officer, Hilbert, knew that it was insolvent, and not only that, but that the officers of the Glen Company, when they gave that assignment, gave it in contemplation of insolvency, because they were forced into it, and they so informed the Bank. These being the facts, under Section 64 of the Stock Corporation Law, the assignment must be set aside as null and void.

Under this Act, it is clear that even if the Court could possibly find that an agreement to give the assignment was made in the previous April, that would make no difference, because the New Jersey Corporation Act makes void the actual transaction, and refers to the condition of the company at the time of the actual sale and transfer, and if at that time the Company was insolvent, the fact that a previous promise or agreement was made is of no consequence.

Wells *v.* Rahway Rubber Co., 19 N. J. Eq., 402;
Miller *v.* Gourley, 65 N. J. Eq., 252;
Frost *v.* Barnert, 56 N. J. Eq., 291.

In Wells *v.* Rahway Rubber Co. *supra,* a mortgage was given to trustees for the holders of bonds of the Company. The mortgage was executed on August 14th. A judgment was secured by the creditors seeking to set aside on August 5th. It was shown in the evidence that a meeting was held authorizing the mortgage on February 21. The Court held the mortgage void and said:

"The other ground that the mortgage is void on account of the insolvency of the Company, and their having suspended business for want of funds, must next be considered. This mortgage was given on the 14th of August, 1867; that the resolution under which it was executed was passed in February, or that another mortgage had been executed sometime before the date of this which was given up and destroyed because invalid, or that some of the bonds may have been issued and paid for before that date, is of no consequence. The second section of the act to prevent frauds by incorporated companies, on which these defendants rely, makes void all sales and transfers of property by corpora-

tions after they become insolvent, or suspend business or made in contemplation of insolvency. The time referred to by the words of the act, and which must be fixed from the object of the act, is the actual time of the sale or transfer. Else mere intentions or promises to prefer favored creditors of corporations would repeal the act so far as directors and their friends are concerned, and the act was no doubt intended to specially protect the general creditors from such favored preferences.

If the construction of the act would permit us to look to the time of the execution of the first mortgage, or the issue of the bonds, the evidence on this point is so indefinite and unsatisfactory that no decree could be founded on it. The principal evidence of the witnesses on this subject, who are the principal bondholder and his son, is evasive and abound with want of recollection of amounts, dates and transactions, which they should recollect, or as to which their deficiency of memory could have been supplied by reference to means within their power. No Court could be satisfied to make a decree which depended upon it. For aught that appears most of the money advanced on these bonds by the person to whom they were issued, may have been advanced after the date of the mortgage. In fact from the manner of testifying by these witnesses, I am far from satisfied that any money or valuable consideration was advanced upon the faith of these bonds at all."

This case is exactly in point with the case at bar; first, in establishing that it makes no difference what the transactions were prior to the assignment to the Bank of the Town of Union on September 15th, 1910, and second, in showing that the evidence of the officers of the Bank which is absolutely contradictory and unreliable as has

already been pointed out, is not sufficient to found a decree upon it, even if it could be considered.

While this case was decided, when the insolvency act was first passed, it has been followed and approved since the act was re-enacted.

Frost *v.* Barnert, 56 N. J. Eq., 291.

In this case the Court said in setting aside a mortgage:

> "The mortgage in question was given after the re-enactment in 1895 of Section 2 of an act to prevent frauds by incorporated companies found in the revision of 1846. Section 2 of that act which prevents corporations from selling, conveying, assigning or transferring any of their estate or effects after they have become insolvent or in contemplation of insolvency, except to *bona fide* purchasers for a valuable consideration, was construed in Holcomb's Executors *v.* Manigar, 1 Stock, 457; Wells *v.* Rubber Co., 4 C. E. Green, 402, and in other cases cited and approved in Wilkinson *v.* Baule, 14 Stewart's Eq., 635, Court of Errors and Appeals. On the construction put upon the act in those cases, the mortgage in question cannot stand, except as security for the $250 paid at the time it was given."

And at another place, the Court said:

> "The act under consideration has through a long series of years received a set construction. It must be assumed that when the legislature re-enacted the old provision in the old words they were satisfied with that construction, and meant that it should continue."

To show that that construction given to the act in the above cited case has continued, in

Miller *v.* Gourley, *supra,*

the Court said:

> "The statute applies to the financial situation of the corporation at the time the challenged transfer of the company's property is actually made. Wells *v.* Rahway Rubber Co., 4 C. E. Green, 405."

Under the New Jersey Law, it is, therefore, clear that the assignment made to the Bank of the Town of Union by the Glen Engineering Construction Company on the 15th day of September, 1910, is null and void, and of no effect. It was made when the Company was in fact insolvent, and in contemplation of insolvency, and was given for an antecedent debt without present consideration to the Bank of the Town of Union, which not only was not a *bona fide* purchaser, but which, as a matter of fact, had actual knowledge of the insolvency of the Glen Company.

The only thing required by the Section 64 of the New Jersey Corporation Act to be shown in order to set aside this assignment was that the Glen Company was in fact insolvent at the time the assignment was given and that the assignment was for an antecedent indebtedness and without present consideration. The contesting creditors have established this and much more.

POINT IV.

Even if the validity of the assignment to the Bank of the Town of Union could possibly be determined, under the law of the State of New York it is null and void under the provisions of section 66 of the Stock Corporation Law of the State of New York, in that it was given for a past consideration in contemplation of insolvency and while the Glen Construction Company was in fact insolvent.

The Bank of the Town of Union relies in this proceeding upon a decision of the Appellate Division of the First Department of the State of New York, as follows:

> Matter of Rogers Construction Co., 79 App. Div., 419; aff'd. in the Court of Appeals without opinion.

This case was based upon the following state of facts:

The Rogers Construction Company was doing a building business and it did its banking with the German-American Bank of Tonawanda. On the 4th day of December, 1895, it owed the Bank $8,500. The secretary of the Construction Companied applied to the Bank for an additional loan, and the Bank demanded security for the existing indebtedness, as well as the new loan. Thereupon a verbal agreement was made by the secretary to transfer to the Bank as security its claim against the Buffalo Kenmore Tonawanda R. R. Co., for $7,000. In April, 1896, a judgment was secured

on this claim, which was subsequently compromised at the sum of $4,500. In the month of June, 1896, the Board of Directors of the Construction Company met and directed the assignment of this judgment to the Bank, and on the 12th of September, following, the written assignment was made.

Prior to the recover of the judgment in April, the law firm which had charge of the claim was notified by the construction company that they had assigned the claim to the Bank. On the 30th of September, the Construction Company went into the hands of a receiver. The Bank made claim under the assignment on the 3rd of September, 1896, which was contested by the Receiver upon the ground that it was void, being a transfer in contemplation of insolvency, the Court laying down a proposition of law which is directly contrary to the law of the State of New Jersey, as pointed out under Point III of this brief in the cases of

Wells *v.* Rahway Rubber Co., 19 N. J. Eq., 402;
Miller *v.* Gourley, 65 N. J. Eq., 252;
Frost *v.* Barnert, 56 N. J. Eq., 291,

that the assignment took effect as an oral assignment on the date it was made, and as the corporation was not insolvent at that time, it was valid. As has already been pointed out under the cases above cited, in New Jersey the Law is that the validity of the transfer is determined as of the time that it is actually made.

This case, however, on which the Bank relies, is entirely distinguishable upon the facts from the case at bar. In that case there was no issue of fact as to whether or not the oral assignment had

been made. The officers of the Bank, the officers of the Construction Company, and the attorney who had been notified of the transfer at the time, all testified that it was made, and no contrary evidence was offered. The Court pointed this out, and said:

> "While transactions of this kind should always be subjected to careful scrutiny, yet they are peculiarly questions of fact. The evidence bearing upon this oral agreement depended not entirely upon the officers of the Bank and the Construction Company, but as already suggested, it was corroborated by other proof, which tended to show that the agreement was not made in contemplation of the insolvency of the Company, nor with any design or intent to secure a preference over other creditors, which is the vice rendering such agreement invalid."

In the case at bar, the only ones who testified to the oral promise or agreement as has been pointed out under Point II of this brief, are the officers of the Bank. Their testimony is absolutely contradictory and unbelievable, and their statements are absolutely denied by Smith Alford, the president of the Glen Company, by whom they claim the promise was made, and by Miss Conroy, the office manager, and by all the documentary evidence, and particularly by the lack of any affirmative documentary evidence in the case on point in favor of the Bank. The testimony offered to establish the assignment by the Bank, is inconclusive, and contradictory, and the Court could not find even if it was determined, that the New York law applied, that such an oral promise had been made. It has been held that such evidence

as this is not sufficient evidence upon which to found a decree.

Wells *v.* Rahway Rubber Co., 19 N. J. Eq., 402,

in which the Court said:

> "If the construction of the act would permit us to look to the time of the execution of the first mortgage, or the issue of the bonds, the evidence on this point is so indefinite and unsatisfactory that no decree could be founded on it. The principal evidence of the witnesses on this subject, who are the principal bondholder and his son, is evasive and abound with want of recollection of amounts, dates and transactions, which they should recollect, or as to which their deficiency of memory could have been supplied by reference to means within their power. No court could be satisfied to make a decree which depended upon it. For aught that appears most of the money advanced on these bonds by the persons to whom they were issued, may have been advanced after the date of the mortgage. In fact, from the manner of testifying by these witnesses, I am far from satisfied that any money or valuable consideration was advanced upon the faith of these bonds at all."

It is clear then that the Court cannot, upon the review of the evidence made under Point II of this brief, and under the authorities find that any oral promise to make an assignment was made in April. It would seem to be the obvious purpose upon the part of the Bank in offering this evidence, to build up a case under the facts of

Matter of Rogers Construction Co., *supra,*

and such proceedings are not favored by the Courts, and are looked o nwith suspicion.

Adams *v.* N. Y. City Ry. Co., 125 App. Div., 551.

In that case the Court said that the testimony offered to meet a certain state of facts, and to cure defects in a case pointed out upon a former appeal, must be examined with great scrutiny, and be very convincing or otherwise be disregarded by the Court.

It can be stated then that it must be determined as a fact that no oral promise was given to make the assignment in April, or at any time prior to the first of September, 1910. The Bank had the burden of proof upon it to sustain this claim, and even under the case upon which it relies, it did not do so, because clearly the testimony offered is contradictory and unbelievable, and is absolutely controverted by the testimony of disinterested witnesses. No oral promise having, therefore, been given, we will consider the question of the validity of the written assignment given to the Bank at the time it was made under the law of the State of New York.

Section 66 of the Stock Corporation Law, which is pleaded in defendant, Frank Miller Lumber Company's amended answer provides as follows:

> "§66. PROHIBITED TRANSFERS TO OFFICERS OR STOCKHOLDERS. No corporation which shall have refused to pay any of its notes or other obligations, when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. *No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it, or by any officer, director or stock-*

holder when the corporation is insolvent, or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid, except that laborers' wages for services shall be preferred claims, and be entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or incumbrances. No corporation formed under or subject to the banking, insurance or railroad law, shall make any assignment in contemplation of insolvency. *Every person receiving by means of any such prohibited act or deed any property of the corporation, shall be bound to account therefor to its creditors or stockholders or other trustees.* No stockholder of any such corporation shall make any transfer or assignment of his stock therein to any person in contemplation of its insolvency. *Every transfer or assignment or other act done in violation of this section shall be void.* No conveyance, assignment or transfer of any property of a corporation, formed under or subject to the Banking Law, exceeding in value one thousand dollars, shall be made by such corporation, or by any officer or director thereof, unless authorized by previous resolution of its Board of Directors, except promissory notes or other evidences of debt issued or received by the officers of the corporation in the transaction of its ordinary business, and except payments in specie or other current money or in bank bills made by such officers. *No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice.* Every director or officer of a corporation who shall violate or be concerned in violating any provisions of this section, shall be personally liable to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of any loss they may respectively sustain by such violation."

The statute above quoted declares the assignment or transfer void in case the same is made in contemplation of insolvency. The question to be determined is not one of fraud, or of an intent on the part of the creditor to obtain a preference in the payment of his debt; but the simple inquiry is, was there actual or contemplated insolvency and a transfer of the property of the corporation. If both these facts are establshed, the transfer is void.

Montagne *vs.* Hotel Gotham Co., 208 N. Y., 442;
Kinglsey *v.* First Nat. Bank of Bath, 31 Hun, 329, 335;
Munson *v.* Genessee Iron & Brass Wks., 37 App. Div., 203;
Cole *v.* Millertown Iron Works, 133 N. Y., 164.
Robinson as Receiver *v.* Bank of Ithaca, 21 N. Y., 400;
Olney *v.* Baird, 7 App. Div., 95.

In Munson *v.* Genesee Iron & Brass Wks., *supra*, the Court said in construing the statute:

"But it is said that the statute does not apply unless the transfer is fraudulent as to creditors, which the Referee has not found and the proofs do not disclose. That the creditors were simply seeking to recover just debts which they were entitled to as vigilant creditors. This contention is answered in Kingsley *v.* First National Bank of Bath, *supra*, where Judge Barker says: 'The statute declares the assignment or transfer void in case the same is made in contemplation of insolvency. The question to be determined is not one of fraud or of an intent on the part of a creditor to obtain a preference in the

payment of his debt; but the simple inquiry is, was there actual or contemplative insolvency and a transfer of property for the benefit of creditors. If both these facts are established, then the transaction is void.'" (Citing many cases.)

The leading case upon the question of what is a transfer in contemplation of insolvency, is the case of

Paulding *v.* Chrome Steel Co., 94 N. Y., 341,

in which it was held that the statute does not make the question depend upon the knowledge or the intent of the creditor, but "what was passing in the minds of the officers of the company when the mortgage was executed."

In the case at bar, the assignment was made on the 15th day of September, 1910, at the time the Glen Engineering Construction Company was in fact insolvent (see Point III of this brief). Not only, however, was the Company in fact insolvent at the time the assignment to the Bank of the Town of Union was given, but the assignment was given in contemplation of insolvency, and not only that, but the Bank of the Town of Union knew that the Glen Company was insolvent (Point III of this brief).

Under the facts and circumstances under which the assignment was given as stated in Point III of this brief, it is clear not only that the Glen Company was in fact insolvent at the time the assignment was given, but that the Bank of the Town of Union, through it director and officer, Hilbert, knew that it was insolvent, and not only that, but that the officers of the Glen Company, when they gave that assignment, gave it in con-

templation of insolvency, because they were forced into it, and they so informed the Bank. These being the facts, under Section 66 of the Corporation Law, the assignment must be set aside as null and void.

From the above statement of facts, it is clear that the Glen Company was insolvent at the time the transfer was made; that the assignment was given with the intent on the part of the Glen Company to give a preference, and while the intent of the creditor, the Union Bank, or its knowledge of insolvency is immaterial under the statute above quoted, nevertheless, the facts show that the Bank knew the condition of the Glen Company at the time. The assignment, therefore, is void, even if the New York law is applied thereto.

The terms of the act are very simple. All that is necessary in order that it shall become operative is that the corporation shall be insolvent or its insolvency imminent, or that the payment shall have been made or the security given with the intent on the part of the debtor to give a preference. The intent of the creditor or his knowledge as to the insolvency of the debtor, or of the intent of the debtor, is immaterial. There are numerous cases in New York giving this construction to the statute.

Hurd *v.* N. Y. & C. Steam Laundry Co., 167 N. Y., 89;
Throop *v.* The Hatch Lithographic Co., 125 N. Y., 530;
Hilton *v.* Ernst, 38 App. Div., 94;
Salt *v.* Ensign, 79 Hun, 108;
Paulding *v.* Chrome Steel Co., 94 N. Y., 334;
Concord Construction Co. *v.* Plante, 137 App. Div., 243.

New Jersey State Library

Upon the above authorities, and the above facts, it is clear that even if the New York law is applied to the assignment in question, it must be set aside as invalid. The intent of the Glen Company is established from Alford's testimony, his knowledge of the condition of the company, and what he knew would be the effect of the transfer to the Bank. The presumption is that a man intends the natural consequences of his acts, and as the effect of the assignment to the Bank was to give a preference and to deprive the Glen Company's creditors of the means of collecting their debts, the intent to give a preference will be presumed.

Bailey *v.* Fransioli, 101 App. Div., 140, at 145.

POINT V.

The assignment to the Bank of the Town of Union is void and without effect, because it was not a corporate act authorized by the board of directors of the Glen Engineering Construction Company, and was never ratified as a corporate act.

The contention in this proceeding as to the invalidity of the assignment is between the creditors of the Glen Engineering Construction Company, and the Bank of the Town of Union, the assignee. The Bank of the Town of Union cannot rely upon the act of one corporate officer or two corporate officers. They must establish a corporate act to give the assignment as against the lienors and this defendant. The lienors and this defendant are clearly not estopped from raising the point that

the assignment was not a corporate act. They do not stand in the shoes of the corporation, but are strangers and third party creditors. It will be conceded and the fact shows that there were three directors of the corporation at the time—Alford, Downey and Paine—and it is testified by all the witnesses that Paine was never present at a meeting or discussed in any way the question of the assignment to the Bank of the Town of Union, or ever consented to it. This being the fact, the assignment was merely the act of an officer, and there is nothing in the case to show that the officer had authority to make such an assignment.

It has been held in New Jersey that where a mortgage was executed by a president of the corporation without the knowledge of the directors, and not ratified by such directors until after the corporation became insolvent, and suspended business, such mortgage is invalid.

Bennett *v.* Keen, 59 N. J. Eq., 634;
Cogan *v.* Conover Manufacturing Co., 69 N. J. Eq., 358,

in which the Court said:

> "The action of the directors is shown by the minutes quoted above, and was correctly set forth in the paper dated January 5, 1904. There is no evidence whatever to show any power lodged in the president of the Conover Company to make any such assignment as the one he did make under date of January 7th, 1904. Without such authority lodged in him by the directors, a president of a corporation is without power to make any such assignment, pledge or disposition of the company's property. Stokes *v.* N. J. Pottery Company, 46 N. J. Law, 247, Raub *v.* Blairstown Creamery Association, 56 N. J. Law, 262; Bennett *v.* Keen, 59 N. J. Law, 634."

The case was reversed on appeal, but the opinion of the Court below upon the point at issue, and upon which it is cited here, was approved.

69 N. J. Eq., 809, at 812;
Mansert *v.* Christian Fiegenspan, 68 N. J. Eq., 671;

The law of New York is similar.

Palmer *v.* Ring, 113 App. Div., 643;
Cook on Corporations, Section 717.

The above authorities establish that the officers of a corporation as such cannot assign property of the corporation. It may be that in a case where a corporation gets the benefit therefrom, and has been in the habit of so transacting business, that the corporation would be estopped from raising the point, but the defendant lienors in this proceeding are not so estopped, because as regards the corporation they are third parties, and to divest the corporation of its property, and so deprive them of their rights against that property, a definite corporate act to transfer it must be established. This has not been done by the Bank of the Town of Union in this case, and the assignment is, therefore, invalid upon that ground.

The statement in the appellant's Brief that the Glen Co. Board of Directors passed a resolution authorizing an assignment on August 29th is not in accordance with the fact.

No meeting of Directors was ever held (P. 533 542-543)

The alleged resolution J of U. D-4 (P. 722) was never received in evidence and was excluded by the Court. P. 544-545

POINT VI.

The assignment to the Town of Union Bank having been made at a time when the Glen Engineering Construction Company was insolvent and within four months prior to the filing of the petition in bankruptcy and the Bank having had reasonable cause to believe that the assignment was intended to give a preference and the effect of the enforcement of the assignment being to enable the Bank to obtain a greater percentage of its debt that other creditors of the same class, the assignment is voidable at the suit of the trustee in bankruptcy, who was a party to this cause and took part in the trial.

Section 60 of the United States Bankruptcy Act of 1898 provides as follows:

> "(A) A person shall be deemed to have given a preference if being insolvent he has, within four months before the filing of the petition * * * made a transfer of any of his property and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.
>
> (B) If a bankrupt shall have given a preference and the person receiving it or to be benefited thereby or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

The facts with relation to the insolvency of the Company at the time of giving the assignment to the Town of Union Bank have been fully analyzed and set forth in Point III of this brief.

It is apparent from the evidence in this case that the enforcement of the assignment held by the Bank of the Town of Union would not only enable that Bank to obtain a greater percentage of its debt than any other unsecured simple contract debtor would obtain, but also would enable it to obtain a greater percentage of its debt than employees holding claims for wages and lien claimants who by the Laws of New Jersey are entitled to priority, but whose notices of lien were filed after the giving of the assignment.

That the Bank had reasonable cause to believe that by the assignment it was intended that the Bank should receive a preference and that the assignment was made upon account of an antecedent indebtedness is also fully covered under Point III of this brief and it is unnecessary to repeat them here.

It is thus apparent that all of the necessary elements of a voidable preference under Section 60 of the United States Bankruptcy Act have been proven with respect to the assignment of the Town of Union Bank.

The effort on the part of the Bank to show that the assignment was given pursuant to an agreement made at the time of the creation of the indebtedness has been thoroughly reviewed in Point II of this brief.

Even if the facts did establish that the assignment was given pursuant to a previous agreement made at the time of the creation of the indebtedness, *it would, nevertheless, be voidable under Section 60 of the United States Bankruptcy Act in as*

much as agreements for liens or other tranfers made before the four months' period or at the time of the passing of the original consideration, but not effective until within the four months' period, are voidable as preference if the other elements of a preference co-exist.

In re Great Western Manufacturing Company, 18 A. B. R., 259, 152 Fed., 123;
In re Smith, 23 A. B. R., 864, 176 Fed., 426;
In re Page *vs.* Rogers, 211 U. S., 575.

In Great Western Manufacturing Company, 18 A. B. R., 259, at page 263, the United States Circuit Court of Appeals, Eighth Circuit, says:

"An agreement to mortgage or to transfer is not a mortgage or a transfer. The title remains in the owner unincumbered by the mortgage until the mortgage or transfer is effected. When the agreement is made before, and the mortgage or transfer within, the four months, the title stands unincumbered by the latter at the commencement of the four months, and the proceeds of that title are pledged under the bankruptcy law for the benefit of all the creditors *pro rata*. Any subsequent mortgage or transfer withdraws that title or a portion of its value from these creditors, and a just and fair interpretation and execution of the act demands that such a mortgage or transfer should be adjudged voidable if it is otherwise so, and that the mortgagee or transferee should be remitted to his original agreement. In this way the property at the commencement of the four months and its value may be preserved for the general creditors, and the mortgagee or transferee may retain every lawful advantage his earlier contract confer upon him. Any other course of decision opens a new and enticing way to se-

cure preferences, nullifies every provision of the law to prevent them, and invites fraud and perjury. Hold that transfers within four months in performance of agreements to make them before that time do not constitute voidable preferences, and honest debtors would agree with their favored creditors before the four months that they would subsequently secure them by mortgages or transfers of their property, and just before the petitions in bankrutpcy were filed they would perform their agreements. Dishonest men who made no such contracts might falsely testify that they had done so and thus by fraud and perjury sustain preferential transfers and mortgages made within the four months to relatives or friends. The great body of the creditors would be left without share in the property of their debtor and without remedy, and a law conceived and enacted to secure a fair and equal distribution of the property of debtors among their creditors would fail to accomplish one of its chief objects. This court will hesitate long before it approves a rule so fatal to the most salutory provisions of the bankruptcy law, and our conclusion is:

A mortgage or transfer of his property by an insolvent debtor within four months of the filing of a petition in bankruptcy against him, which otherwise constitutes a voidable preference, is not deprived of that character or made valid by the fact that it was executed in performance of a contract to do so made more than four months before the filing of the petition."

The evidence shows that the assignment was actually executed and delivered on September 16th, 1910, and the petition in bankruptcy against the Glen Engineering Construction Company was filed in the United States District Court for the Southern District of New York December 10th, 1910 (see Trustee's Exhibit D-1, March 21/12, p.

537). The assignment was, therefore, actually executed and delivered within four months before the filing of the petition in bankruptcy.

This court has jurisdiction to determine whether or not said assignment is a preference under the Bankruptcy Act and decree that the trustee is entitled to recovery of the property assigned thereby.

Under Bankruptcy Act, Section 60, it is provided:

> "(B) * * * and for the purpose of such recovery any Court of Bankruptcy as hereinbefore defined and any State Court which would have had jurisdiction if Bankruptcy had not intervened shall have concurrent jurisdiction."

The Town of Union Bank and the Trustee in bankruptcy having filed answers in this cause and submitted to the jurisdiction of the Chancery Court have thereby elected to have the validity of said assignment as against the Trustee litigated here and are bound by the decree. The trustee has not appealed, and approves the decree.

The Glen Engineering Construction Company was insolvent within the definition of insolvency as contained in the Federal Bankruptcy Act of 1898, at the time of executing and delivering the assignment to the Union Bank.

Paragraph 15, Chapter 1, Section 1 of the Federal Bankruptcy Act provides as follows:

> "A person shall be deemed insolvent within the provisions of this Act wherever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed or permitted to be concealed or removed, with attempt to defraud, injure or delay his creditors, shall not at a fair

valuation be sufficient in amount to pay his debts.''

The summary of the assets and liabilities of the Glen Engineering Construction Company as made by Mr. Wake, the expert accountant, showing the condition of that Company as of September 15th, 1910 (Trustee's Exhibit D-5 of March 21/12, end of stated case) shows that by the books of the corporation its property or assets were not sufficient to pay its liabilities including capital stock, by $35,647.71, or exclusive of the capital stock, by $25,647.71.

The testimony of Mr. Alford, reviewed under Point III, shows that the Glen Co. was absolutely insolvent.

POINT VII.

The allowances to counsel for the respondent Miller and the Sharpe Construction Company were properly granted and are reasonable in amount.

The entire trial of this case was carried on by the attorney for the Trustee in bankruptcy and the solicitor and counsel for Frank Miller and the solicitor and counsel for The Joseph Sharpe Construction Company. The main issues in the trial involved the validity of the assignments to the Bank of the Town of Union and the validity of the assignments to Martin S. Paine. In advancing their claims under these assignments, the Bank and Paine put the burden of the trial upon counsel of the lienors and the Trustee, and having been defeated in that trial, it is but reasonable that they should bear the expense of a reasonable counsel fee, particularly in the Chancery Court.

CONCLUSION.

It is submitted upon the above arguments and authorities that the validity of the assignment to the Bank of the Town of Union is to be determined by the law of New Jersey, and that said assignment was properly declared void by the Vice-Chancellor under the Law of New Jersey, the Law of New York and the Bankruptcy Act, and the decree herein should, therefore, be affirmed with costs to the respondent Miller, and a reasonable counsel fee.

Respectfully submitted,

DAVID F. EDWARDS,
Solicitor for Frank Miller Lumber Company.

CHARLES THADDEUS TERRY,
EDWARD WARD MCMAHON,
of the New York Bar,
of Counsel.

FRANK H. HALL,
Solicitor for Charles L. Strong,
Trustee in Bankruptcy of Glen Co.

WILLIAM I. LEWIS,
Solicitor for Joseph Sharpe Construction Co.

New Jersey Court of Errors and Appeals

Between:

JOHN AGNEW COMPANY,
Complainant-Respondent,

and

THE BOARD OF EDUCATION OF THE CITY OF PATERSON, et als.,
Defendants-Respondents,

and

THE FIRST NATIONAL BANK OF THE TOWN OF UNION,
Defendant-Appellant.

On Appeal From Chancery. Appeal of The First National Bank of the Town of Union

BRIEF ON BEHALF OF THE FIRST NATIONAL BANK OF THE TOWN OF UNION.

This is an appeal from a decree advised by Vice Chancellor Stevenson, made on November 1st, 1913. The appellant, The First National Bank of the Town of Union, appeals from so much of said decree as recites "that the lien claimed by the defendant, The First National Bank of the Town of Union, under its assignment is void"; and from so

much of said decree as (briefly) adjudicates (1) that the assignment dated September 15th, 1910, made by Glen Engineering Construction Company to The First National Bank of the Town of Union is void and not a claim upon the fund in controversy; (2) that the priorities of the claimants to said fund are as stated in the decree; and (3) that the counsel fee of several of the claimants to said fund be taxed and entered as a personal judgment against this appellant (pages 692-3).

The decree in question was entered in a consolidated suit for the foreclosure of various liens filed under the mechanics lien act against the fund which was in custody of the Board of Education of the City of Paterson, arising out of a contract dated July 2, 1909, made by and between the Board of Education of the City of Paterson and the Glen Engineering Construction Company, for the erection of a high school building in Paterson, New Jersey. The fund in controversy amounted to the sum of $29,696.31. To this sum the Board of Education of the City of Paterson made and makes no claim (see decree appealed from).

The Glen Engineering Construction Company (hereinafter referred to as Glen Company) was and is a New York corporation. On July 2, 1909, a contract was made by and between the Board of Education of the City of Paterson and Glen Company for the erection of the Paterson High School, and the Glen Company prosecuted its work thereunder up to December 9, 1910 (pages 603-4), and on December 10, 1910, a petition in bankruptcy was filed against the Glen Company in the Southern District of New York, and on the same day an order was made and entered in that Court appointing Mr. Benjamin Barker of New York City, Receiver, and adjudicating the Glen Company a bank-

rupt. On December 12, 1910, Mr. Barker was appointed Ancillary Receiver in the State of New Jersey (Trustee's Exhibits D7, D8 and D9).

The claims filed against the fund in question, which are in controversy in this appeal, with their respective dates of filing and the amount stated therein, are as follows:

Claim	Claimant	Date	Date of Filing	Face Amount
Assignment	First National Bank	Sept. 15/10	Sept. 22/10	$42,813.45
Mechanic's Lien	John Agnew Company		Nov. 28/10	11,933.29
Mechanic's Lien	Frank Miller Lumber Company		Dec. 9/10 3:25 P. M.	10,955.14
Assignment	Martin S. Paine	Dec. 1/10	Dec. 9/10 4:30 P. M.	4,950.00

The First National Bank of the Town of Union claims in this suit, by virtue of the assignment which was made to it by the Glen Company, the sum of $10,000.00, with interest thereon from September 20, 1910 (Exhibit T, of U.-D1).

The testimony in this case evidences that the Glen Engineering Construction Company, a corporation organized under the laws of the State of New York, with a capital stock of $10,000.00, was engaged in the contracting business for a period of years and had executed contracts involving more than a million dollars. It was what is termed a "close corporation." The stockholders were P. H. Downey, his nephew Smith Alford, Alford's wife, and Martin S. Paine (page 485). Mr. Paine held one share of stock. The business of the company was managed solely by P. H. Downey and Smith Alford (page 632).

The assignment of The First National Bank of the Town of Union is a valid claim upon the fund to the extent of $10,000.00 with interest from September 20, 1910.

On March 10, 1910, the Glen Company obtained a loan of $6,000.00 from The First National Bank of the Town of Union, on its demand note (Exhibit Trustee, D1, page 721), and Smith Alford, President, and P. H. Downey, Secretary and Treasurer of the Glen Company, then promised to give an assignment to the bank as collateral security (pages 310-356-357). About April 19, 1910, Mr. Alford, the President of the company, wanted to obtain an additional loan of $10,000.00, and he was then told by M. William Hilbert, Assistant Cashier of the bank, that additional moneys would not be loaned to his company without an assignment being given, and he agreed to give such assignment (pages 297-299). Mr. Downey, the Secretary and Treasurer of the company was also spoken to about the assignment (page 298).

Smith Alford and P. H. Downey, the officers of the Glen Company, kept promising, from time to time, that the Glen Company would execute and deliver to The First National Bank of the Town of Union, the assignment in question (pages 298 to 303-308-310-311-344-355-356-357-359-360-361). Not only is such testified to by M. William Hilbert, assistant cashier, and John Conway, president of the bank, but also by Albert Hoffman, First Vice President, who testified (page 393) "that that when Mr. Alford sought the loan of $10,000.00 from the bank he, Hoffman, stated to Alford that he had previously heard through Mr. Conway and Mr. Hilbert that he, Alford, had offered an assignment on the Paterson high school on a $6,000.00

loan the bank had previously made, which assignment the bank didn't get, and Hoffman then told Alford that if he would make an assignment such as he proposed, he, Hoffman, would vote in favor of passing the $10,000.00 note. Mr. Alford stated he would guarantee that the assignment would be forthcoming. On the strength of that guarantee from Mr. Alford we put the note before the Discount Committee and passed it." Mr. Hoffman testified that the question usually came up at the monthly meeting of the bank whether the assignment had been obtained, and Mr. Conway, the President would say "No, it hadn't been obtained yet but the Glen Engineering Construction Company promised to get it the following week" and the matter was put off from week to week and month after month until Hoffman said, "I will make it my business now to get it" (pages 394-395-397).

Notwithstanding the repeated promises of the President and Secretary and Treasurer of the Glen Company who had been exclusively managing and controlling the affairs of the company, to give to The First National Bank of the Town of Union the oft promised assignment, but had failed to do so, the oral agreement to make such assignment, together with the action of the board of directors of the Glen Company on August 29, 1910, in passing a resolution thereby assigning to the bank all retaining moneys for any work completed or to be completed on the Paterson High School Building, was a good assignment in equity (Exhibit T. of U.-D4, page 722). See Cope vs. C. B. Walton Co., 77 N. J. Eq., page 512.

It was not, however, until September 15, 1910 that the Glen Company executed and delivered to The First National Bank of the Town of Union

the assignment (Schedule "A" page 102) which was filed with the Paterson authorities.

It will be noted that the loan of $10,000.00 was made on April 19, 1910, upon the promissory note of the Glen Company, payable on demand (Exhibit T. of U.-D1, page 750). If the bank had any suspicion whatever that the Glen Company was not solvent there was nothing whatever to prevent its demanding the immediate payment of the moneys payable to it on the said note, throughout the period of six months (April to September) during which the officers of the Glen Company repeatedly promised to give to the bank the assignment of the retained percentage on the Paterson High School contract. It is manifest from the testimony of Smith Alford, the President of the Glen Company, that the giving of the assignment to the bank on September 15, 1910, was not prompted by the fear of liens (bottom of page 471 and top of page 472). He says (page 495) that while in September 1910 his company was not in a position to pay its bills, yet all the bills were not requested at the one time, and the company had a line of credit. While there is some reference in the case to the paying of a bonus by the Glen Company for loans obtained through the Merchants National Bank, yet Alford distinctly testified (page 505) that no bonus whatever was paid to The First National Bank of the Town of Union for any loan made by said bank. The first intimation that Alford had of any apparent insolvent condition of the company was in the latter part of November, 1910, when the company was being pressed for money. He further testified that it was not until December 1910 that his company considered that it would have to suspend business

and this condition was evidently brought about by reason of the demands of Mr. Paine, one of the directors of the company, who, it appears, was then having an examination made of the books of the company.

It will be observed that the parties who are adverse to the claim of the bank did not call P. H. Downey, the Secretary and Treasurer of the Glen Company, as a witness, to refute the testimony of the several witnesses who testified in behalf of the bank as to the conversation had between Alford and Downey, officers of the company, with reference to the oral agreement to execute and deliver to the bank an assignment, and the promises made by them from time to time throughout the period between April and September 1910 to give such assignment to the bank.

POINT I.

The oral agreement made in April 1910 by Smith Alford, President, and P. H. Downey, Secretary and Treasurer, of The Glen Company, when said company was solvent, to assign to The First National Bank of the town of Union the retained percentage of the moneys due to said company under its contract with The Board of Education of The City of Paterson was valid and enforcible in equity, and the subsequent insolvency of The Glen Company did not invalidate or make void such oral assignment.

In Rogers Construction Company, 79 N. Y. S., 444 (affirmed in 175 N. Y., 509) it appears that

a corporation, while solvent, was indebted to a bank, which refused to make a further loan unless collateral was given for the existing indebtedness and the new loan. The Secretary orally agreed to transfer to the bank as general collateral a claim against a railroad company, on which the corporation subsequently obtained judgment. The bank, on the faith of such oral agreement, renewed the existing indebtedness, and made the further loan, part of which was subsequently paid before the corporation's insolvency. Shortly after the judgment was recovered, the board of directors of the corporation passed a formal resolution, directing the assignment of the judgment to the bank, which was subsequently made, at which time the corporation was insolvent, and in the same month was placed in the hands of a receiver. HELD, that since, at the time the oral agreement was made, the corporation was not insolvent, the agreement was not made with intent to create a preference, and was not void under Corporation Laws Sec. 48 (Laws 1892 Chapter 688) prohibiting preferential transfers under such conditions.

Section 66 of the present New York Corporation Law is practically a re-enactment of Section 48 of the same act referred to in the foregoing decision.

In the case of Congleton vs. Schriehofer, 54 Alt. Rep., 144, it appears that the debtor evidently intended the conveyance therein referred to as a preference to his sister, and the Court says, "But he also intended it, I think, to carry out his promise made to her in July" * * *. "At the furtherest it could only give rise to a suspicion of insolvency, and suspicion is not reasonable cause for belief."

There is no proof whatever in this case that the First National Bank of the Town of Union had

any knowledge of any possible insolvency of the Glen Company, nor was any statement made to the bank to indicate such condition; but even though the bank had suspicion of the insolvency of the company such would not deprive it of its security. Mr. Wake, the Accountant who was offered as a witness by the parties who were adverse to the bank's claim, testified that it would take him a week *or perhaps a month* to ascertain the condition of the company (page 621).

Reasonable cause to "suspect" insolvency is not sufficient to bring the case within the bankruptcy law. The proof must be of "reasonable cause for belief."

See case of

Gnichtel vs. First National Bank 77 Atl. Rep., 508.
Barbour vs. Priest, 103 U. S., 193.

The taking of security by a money lender, for money loaned, either presently or previously, is not evidence that the lender believes the borrower is insolvent.

The case of Grant vs. First National Bank, 97 U. S., 80 established the doctrine that a creditor dealing with a debtor whom he may suspect to be in failing circumstances, of which he may have no sufficient evidence, may receive payment or security without violating the bankruptcy law.

Justice Bradley, in the aforesaid case, says: "It is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt.

To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further, he may feel anxious about his claim, and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by the law." See also Stucky vs. Bank, 108 U. S., 74.

In Pirie vs. Chicago Title & Trust Co., 182 U. S., 438, it appears that merchants, being aware that they were insolvent, made a payment to a creditor on account of his debt within four months of their bankruptcy, which payment created a preference, to its extent, to their creditor who had no reasonable cause to believe their debtors were insolvent. *It was held, that the creditor was entitled to retain the payment so made.*

The learned Vice Chancellor, in declaring void the assignment made to the First National Bank of the Town of Union, says, "My conclusion of law and of fact in regard to the validity of this assignment is that it was made to secure a pre-existing indebtedness when the assignor was insolvent or in contemplation of insolvency, and that therefore it is void under the 64th Section of the Corporation Act of New Jersey. I also conclude that this assignment is void under the present U. S. Bankrupt Act" (page 661).

While the aforesaid declaration is found in the memoranda of conclusions filed by the Vice Chan-

celler, yet, the decree does not adjudge the assignment of the First National Bank of the Town of Union to be void, though such was doubtless intended.

It is respectfully urged that the New Jersey Corporation law is inapplicable to this case, and that Section 64 of the New Jersey Corporation law is applicable only to corporations organized under the laws of the State of New Jersey. The assignment in question was made in New York, by the Glen Company, a New York corporation, and the validity of the assignment should be decided under the law of the State of New York, except so far as the Bankruptcy Law may intervene.

The transfer of intangible property such as a chose in action or debt is valid or invalid according to the law of the State where made and where the transferer is domiciled.

Moore vs. Bonnell, 31 N. J. Law, 90;
Cooper vs. Philadelphia Co., 68 N. J. Eq., 626;
Schmidt vs. Perkins, 74 N. J. L.,785.;
Story on Conflict of Laws, Secs. 395-397.

The case of Empire State Trust Company vs. Trustee of William F. Fischer and Company, et al., 1 Robbins, page 602, does not apply to this case.

POINT 2.

The assignment to The First National Bank of The Town of Union should take precedence over all other claims and liens.

The oral assignment which it is submitted is enforcible in equity, was made in April, 1910. The

written assignment was made September 15, 1910, and was filed September 22, 1910, although there is no legal requirement for the filing thereof.

A mechanics lienor acquires his right only upon the filing of a statutory notice. New Jersey Lien Law, Sec. 5; Somers Brick Co. vs. Souder, 71 N. J. Eq., 759; National Fire-Proof Co. vs. Daly, 74 Atl. Rep., 152.

The assignment having been made prior to the filing of the lien claims, and the Paine assignment, has priority over them.

POINT 3.

It was error for the Court to tax counsel fees against The First National Bank of The Town of Union.

The Court decreed that the First National Bank of the Town of Union pay, in lieu of fee allowed by law, a counsel fee of $375.00 to the defendant, Frank Miller, trading as Frank Miller Lumber Company, and a like counsel fee to the defendant Joseph Sharpe Construction Company. While Section eleven of the mechanics lien act provides that costs "shall be awarded to or against the plaintiff or defendants, or any or either of them, as may be just," it is respectfully urged that the award of counsel fees to the defendants, Frank Miller Lumber Company and Joseph Sharpe Construction Company, against the defendant The First National Bank of the Town of Union, was and is entirely unwarranted. All claimants were necessary parties to the action, and the bank was brought into Court, as were the other defendants, by the complainant, John Agnew Company, where-

upon the Frank Miller Lumber Company and the Joseph Sharpe Construction Company attacked the validity of the assignment made to the bank by the Glen Company. The bank was necessarily obliged to produce proof as to the legality of the assignment. Why then should it be penalized by being mulcted for counsel fees to the extent of $750.00 for the benefit of other defendants whose claims were adverse to the claim of the bank, and who, in support of their own claim, necessarily attacked the validity of the assignments prior to their liens, and submited proof as to its own lien claims. Not more than sixty-five pages of the testimony contained in the state of the case relate to the claim of the bank. While the record is voluminous the bank is not responsible therefor.

As was said in Hall Co. vs. Jersey City, 64 N. J. Eq. 769: "All claimants were necessary parties to the action, and it would be unjust to mulct any or either of them in costs, for no other reason than that notice was given to the City of a just claim that was rendered unavailable merely because either like notices, previously given by other claimants in the same institution, or later notices, given by the favored class of laborers, had created paramount liens."

The bank did not attack the claim of any other claimant, and as was said in Hall Co. vs. Jersey City, supra, "The costs of the bill, the proceedings to get jurisdiction and the decree are inevitable in any case. Where a claimant, in the litigation invited, asserts his own claim and unsuccessfully contests that of any other claimant, he should bear the costs of that litigation, but nothing more. In other words, the expenses he, by his resistance, incurs, including subpoenas and witness' fees in-

curred by his adversary, should be borne by him, but the normal costs should be paid out of the fund."

For the reasons above stated, it is respectfully submitted, that the decree appealed from should be reversed, as to the appellant, The First National Bank of the Town of Union, and that the claim of said bank, to the extent of $10,000.00 with interest thereon, from September 20, 1910, should be re-instated as a valid claim against the fund in question, and the record should be remitted to the Court of Chancery to have order made to such effect.

JOHN J. FALLON,
Solicitor and of Counsel
for the Appellant, The First
National Bank of the Town of Union.

14171

PRESS OF FREMONT PAYNE, 47 Broad St.—'Phones, 2277-78-79 Broad.

New Jersey Court of Errors and Appeals

Between

JOHN AGNEW COMPANY,
Complainant-Respondent,

and

BOARD OF EDUCATION OF THE CITY OF PATERSON, et al.,
Defendants-Respondents,

and MARTIN S. PAINE,
Defendant-Appellant.

On Appeal from Chancery Appeal of Martin S. Paine.

BRIEF ON BEHALF OF APPELLANT, MARTIN S. PAINE.

This is an appeal from a decree advised by Vice-Chancellor Stevenson, made and dated and filed herein on the 7th day of November, 1913. The appellant Paine appeals from so much of said decree as (briefly) adjudicates (1) that the assignment dated December 1, 1910, made by Glen Engineering Construction Company to Paine is void and not a claim upon the fund herein involved; (2) that the priorities of the claimants to said fund are as stated in the decree; and (3) that the counsel fee of several of the claimants to said fund be taxed and entered as a personal judgment against this appellant (pages 692-3).

Statement.

The decree from which this appeal is taken was entered in a consolidated suit for the foreclosure of various mechanics' liens against the fund then in the control of the Board of Education of the City of Paterson, New Jersey, arising out of a certain contract dated July 2, 1909, made by and between the Board of Education of the City of Paterson and the Glen Engineering Construction Company for the erection of a certain High School Building at Lee Place, Hamilton and DeGrass Streets, Paterson, New Jersey.

The fund in controversy amounted to the sum of $29,696.31. To this sum the Board of Education of the City of Paterson made and makes no claim. (See decree appealed from).

We will not here attempt a lengthy statement of the facts appearing in the testimony as the briefs of the various counsel herein engaged will doubtless point out the various facts applicable to their respective claims. More pointed reference to the facts appearing in the record, as far as they concern this appellant, will be hereinafter made under the appropriate points. The Glen Engineering Construction Company (which we will hereinafter describe as "Glen Co.") was and is a New York Corporation. On July 2, 1909, a contract was made, dated on that day, by and between the Board of Education of the City of Paterson and Glen Co. for the erection of the Paterson High School above mentioned. After having entered into the said contract Glen Co. prosecuted the work thereunder up to December 9, 1910 (pages 603, 634), and on December 10, 1910, a petition in bankruptcy was filed against the Company in the Southern District of New York, and on the same day an order was entered in that Court appointing Mr. Benja-

min Barker of New York City Receiver, and adjudicating that Glen Co. was bankrupt. Thereafter Mr. Barker was duly appointed Ancillary Receiver in and for the State of New Jersey (Trustee's Exhibits D7, D8 and D9).

The claims filed against the fund prior in point of time of filing to the Paine assignment, with their respective dates of filing and the amounts stated therein, are as follows:

Claim	Claimant	Date	Date of Filing	F Am
Assignment	First National Bank	Sep. 15/10	Sep. 22/10	$42,8
Mechanic's Lien	John Agnew Company		Nov. 28/10	11,9
Mechanic's Lien	Frank Miller Lumber Company		Dec. 9/10 3:25 P.M.	10,9
Assignment	Martin S. Paine	Dec. 1/10	Dec. 9/10 4:30 P.M.	...

The claimant Paine asserts in this suit a claim for the sum of $4,950, with interest thereon, under the assignment which was executed and delivered on December 1, 1910, as above stated, and this claimant presses this claim for the reason, as it appears in the record, that on December 1, 1910, he actually advanced to Glen Co. the sum of $4,950 in cash, which sum was actually used for the pay-roll coming due on December 3, 1910, and for the reason that this advance was made in exchange for the assignment above referred to and in reliance upon the security so given by Glen Co.

We shall not consider in this brief the validity of the assignment made by Glen Co. to the First National Bank. We shall confine our attention to the question of the validity of the Paine assignment,

its priority with respect to the other claimants and the propriety of taxing, in this instance, counsel fees against the appellant Paine personally.

POINT I.

The Paine assignment is a valid claim upon the fund to the extent of $4,950, the amount of cash advanced at the time of the making of the assignment, and the Court below erred in holding that it was void.

From the record it appears that on December 1st, 1910, Downey, Alford and Paine were the only Directors of the Glen Co. and further that Downey was the Treasurer and Alford the President.

On December 1, 1910, the said persons met in New York City (pages 554, 555) and at that time Paine was requested by Downey and by Alford to advance or loan to Glen Co. the sum of $4,950 for the weekly pay-roll of the Company coming due on December 3, 1910 (pages 555-556). Upon receiving such request Paine insisted upon securing an assignment of the reserved percentages due on the Glen Co.'s jobs as security for the advance about to be made (pages 556-557). At the meeting referred to the assignments (Exhibits C8 and C9) were prepared and signed by Alford and Downey as officers of the Company and sealed with the seal of the Glen Co. At the same meeting these assignments were delivered to Paine in return for his check to the order of Glen Co. for $4,950 (Exhibit M. S. P. D2). This was all one transaction.

The check so received, which is in evidence as M. S. P. D2, was endorsed by Glen Co. and the funds represented thereby went into the account

of Glen Co. and were used by that Company to pay the weekly pay-roll coming due on December 3, 1910. As the witness Miss Conroy testified, $4400 of that check was used for pay-roll and of that amount $1044 was applied to the weekly pay-roll on the Paterson job (page 602). At the time the said check was given Glen Co. was actively prosecuting its business in ordinary course (page 603).

Alford, the President of Glen Co., called as a witness by the Frank Miller Lumber Company, testified that on December 1, 1910, Downey, Paine, Alford and Hardy were present at the meeting and that when Mr. Paine was asked to loan the Company the money needed for the pay-roll referred to, an assignment of the reserved percentages was suggested (page 628) and that upon Paine giving his check to the order of the Company for $4,950 for the coming pay-roll, Paine received the assignment referred to (pages 628, 629) and he testified further that the money was actually used in and for the payment of the workmen on Glen Co's. jobs (pages 628, 631).

It also appears from Alford's testimony that Mr. Downey and Mr. Alford were the only active men of Glen Co. and that Mr. Paine had absolutely nothing to do with the affairs of the Company (page 632).

Mr. Paine's only interest in the Company was one share of stock and he attended only two, or possibly three, meetings of the Board of Directors and he never received any notice of any other meetings. It further appeared that he never saw the books of the Glen Co. as they were at all times kept at No. 156 Fifth Avenue, New York City.

At the time Paine gave the check for $4,950 to the officers of Glen Co. he was informed by Alford

and Downey that large payments were expected on the jobs then in the course of completion (pages 560, 587, 633).

As a matter of fact, Paine never knew of the condition of the Company until at least a week after he gave the check upon which he now makes claim (pages 570, 583, 584, 585, 587, 590, 591).

Alford substantiated all the facts testified to by Mr. Paine and further stated that on the occasion of the meeting of December 1, 1910, when Paine gave his check to the Glen Co. for $4,950 both he (Alford) and Downey expected to receive large payments from the Paterson and Newark jobs and in particular expected to receive a payment from the Paterson job on account of labor and materials performed and furnished during the month of November 1910, for which requisition had at that time been made, and Alford admits that he made such statements to Paine and that upon the strength of those statements Mr. Paine made the advance referred to (p. 628 et seq). Bearing this out is the assignment which is in evidence, wherein and whereby Glen Co. assigned to Mr. Paine moneys due and to grow due on the contract with the City of Paterson "and particularly the payment to which Glen Engineering Construction Company is entitled under its said contract for work done and materials furnished during the month of November, 1910, and for which it has made its requisition."

It is further to be noted in this connection that the first unbonded lien appearing against the Newark job was filed December 3, 1910, and the first unbonded lien appearing against the Paterson job was filed November 28, 1910, and the next lien filed on that job was filed on December 9, 1910.

From the record in connection with the Paine

assignment two things are to be particularly noticed:

(1) That at the time of receiving the assignments Paine made an actual advance of $4,950 in cash;

(2) That Paine advanced such money, and such money was used to pay the workmen of Glen Co. for weekly wages due December 3, 1910.

A discussion of the observations of the Vice Chancellor, in his memorandum opinion, will hereinafter appear.

Although we are prepared to say that the assignment to Paine is valid under the Bankruptcy Law, the Law of New Jersey and the Law of New York, yet we are of the view that the assignment to Paine having been made in New York, and Glen Co. being a New York Corporation, the validity of the assignment should be decided in the light of the Law of the State of New York, except so far as the Bankruptcy Law may intervene.

The transfer of intangible property such as a chose in action or a debt is valid or invalid according to the law of the State where made and where the transferrer is domiciled.

Moore vs. *Bonnell*, 31 N. J. Law, 90.
Cooper vs. *Philadelphia Co.*, 68 N. J. Eq., 626.
Schmidt vs. *Perkins*, 74 N. J. Law., 785.
Story on Conflict of Laws, Secs. 395-397.

An objection to the effect that rights of creditors resident in New Jersey are not to be affected by the application of this rule is hardly tenable in this case in view of the fact that most of the creditors here represented are non-residents.

We submit, however, that under the Law of New York, the Bankruptcy Law and the Law of the State of New Jersey, the assignment to Paine is valid and should be sustained.

As to the New York Law:

A director may loan money to his company and receive security therefor.

> *First National Bank* vs. *Commercial Home,* 108 A. D., 78; affd., 185 N. Y., 575.
> *Converse* vs. *Sharpe,* 161 N. Y., 571.
> *Duncomb* vs. *Railroad Co.,* 88 N. Y., 1.

Our opponents will doubtless contend that the assignment to Paine is void under Section 66 (formerly Section 48) of the Stock Corporation Law of the State of New York, but we submit that that law specifically sanctions the transaction herein involved. The intent of that statute is to prevent any transfers for any other than a present cash consideration and to prevent transfers or liens made or created for the purposes of preferring one creditor over another.

> *O'Brien* vs. *East River Co.,* 161 N. Y., 539.

In cases involving this section it has been repeatedly held that a transfer to an officer or director or other party as security for a present loan does not constitute a violation of the section referred to.

In

> *Converse* vs. *Sharpe,* 161 N. Y., 571,

the officers of a company loaned certain moneys to the company and received certain securities as collateral. The corporation was, in fact, insolvent. The case is very similar to the case at bar. Gray, J.:

> "Nor should the distinction be lost sight of that the assignment of the directors in pledge to the plaintiff was to secure present loans, agreed to be made upon the faith of the pledge, and that it was, in nowise, to secure the payment of some precontracted debt which might entail the condemnation of the law, as a transfer of corporate property for the purpose of giving a preference to certain of its creditors. I am quite unable to perceive how any policy of the law of this state is violated by upholding these transactions. * * *
>
> "That the director of a company is chargeable in law with a knowledge of its actual condition may be true; but in adjudging the consequences to follow upon a dealing with the company in good faith, for its supposed benefit, and without personal advantage taken, the fact of his actual ignorance should have a determining force."

In

Swan vs. *Styles*, 94 A. D., 117,

a somewhat similar transaction was involved. The Court there said:

> "The man who voluntarily and without profit inuring to himself endeavored to accede to the wishes of the directors and stockholders by as-

sisting them to raise the money needed to surmount a crucial plight in the affairs of the company is now attacked for his conduct. There is no pretense that he was personally the gainer by the deal. To cap the climax he is to be despoiled of his property without the return to him of what he paid for it."

In

Perry vs. *Van Norden Co.*, 192 N. Y., 189,

the Court of Appeals took occasion to say:

"The object and result of what was done was doubtless the protection and relief of the indorser. But however this may be, we see no escape from the conclusion that the appellant in perfectly good faith has surrendered its notes and lost a perfectly good indorsement in consideration of the transfer to it of other property by the maker of those notes, and that under such circumstances it is not subject to the provisions of the statute prohibiting preferences, but is within the protection of those other provisions enacted for the benefit of purchasers for a valuable consideration and without notice."

Gordon vs. *Southgate Co.*, 109 A. D., 838.
French vs. *Andrews*, 81 Hun, 272.

Likewise, a transaction which does not result in a diminution of the Company's assets or estate does not come within the condemnation of the statute. See

Agnelli vs. *Schatzin*, 68 Misc., 329.

That Section 66 of the Stock Corporation Law of the State of New York does sanction transactions such as the Paine assignment is plain and obvious from a reading of the Section itself. It is as follows:

> "No corporation which shall have refused to pay any of its notes or other obligations when due in lawful money of the United States, or any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt or upon any other consideration than the full value of the property paid in cash."

Under the Bankruptcy Law:

Under the Bankruptcy Law a corporation, even if insolvent, may dispose of its property even up to the time of the bankruptcy if the transfer is made for a valid present consideration and with honest motive.

In re Benjamin, 15 Am. Bank Rpt., 351.

> "And even up to the moment of bankruptcy a party may make a valid disposition of his property where it is done for a fair consideration and with an honest motive."

Under Sections 60 and 67 of the Bankruptcy Law it is well settled that there is no preference where a fair present consideration moves to the insolvent unless actual fraud be shown.

In

Debus vs. *Waite,* 193 Fed., 427,

the Court, in referring to Section 60-a, said:

"By 'one of his creditors' is meant one then holding a past debt due against him. It does not include one who, for the first time, credits him on the faith of a transfer then made."

In the case entitled

In re Clifford, 136 Fed., 475,

the Court, in considering the same Section, said:

"The purposes of this Section is to prohibit the giving of a preference by a bankrupt to existing creditors and it does not apply to transactions whereby the bankrupt receives a present consideration."

In re Sayed, 26 Am. Bank. Rpt., 444-447,

the Court said:

"The Trustee has another difficulty to overcome. A security is not a preference unless it puts one creditor ahead of others of the same class, and one who receives security in exchange for a present loan is not one of the same class as an existing creditor. Hence a security given for a present loan is not a preference, no matter how insolvent the debtor may be."

See also

Furth vs. *Stahl*, 10 Am. Bank. Rpt., 442.
McDonald vs. *Clearwater Co.*, 21 Am. Bank Rpt., 182.
Vollman vs. *Page*, 26 Am. Bank. Rpt., 593.
In re Cobb, 96 Fed., 821.

In re Durham, 114 Fed., 752.
First National Bank vs. *Penn Co.,* 124 Fed., 968.
In re Noel, 137 Fed., 694.

Moreover there can be no preference nor can there be a fraudulent transfer under the Bankruptcy Law where the estate of the debtor is not diminished.

In

McDonald vs. *Clearwater Co., supra,*

the Court said:

> "Transfers which do not diminish the estate of the bankrupt, but which constitute only a fair exchange of property are not preferences (Cook vs. Tullis, 85 U. S., 332; In re Mahland, 26 Am. Bank. Rpt., 81; Mills vs. Fisher Co., 159 Fed., 897; Yaple vs. Dahl Co., 193 U. S., 526)."

The correctness of the rule immediately above stated is apparent. For instance, if one receive a white horse from an insolvent and give a black horse of equal value in exchange there has obviously been no change in the bankrupt's financial condition. Likewise, where, as in this case, a person has given to the insolvent cash and received from the insolvent a then uncollectible account of equal amount, there has been no change in the bankrupt's assets unless it be a change for the better.

Repeating the observations hereinbefore made, we call attention to the fact that Paine's money paid the claims of laborers—preferred creditors. The payment of such wages, either directly or indirectly, does not constitute a preference and he who pays such wages under equitable principles is

entitled to be subrogated to the rights of such creditors.

Collier, in his work on bankruptcy, *8th Edition, page* 661, passing on Subdivision 4 of Section 64 of the Bankruptcy Law, says:

> "Payment of wages by a bankrupt is not a preference. The payment of checks given by a corporation to its president for present advances with which to pay its workmen their weekly wages is not a preference."

See also,

In re Union Feather Co., 112 Fed., 774.
In re Read, 7 Am. Bank. Rpt., 111.
In re Abrahams, 110 Fed., 738, affd. 112 Fed., 406.

As to the Law of New Jersey:

As remarked above, we submit that the Laws of New Jersey are not applicable to this case.

The observations of the Vice-Chancellor on this subject, if followed to their natural and logical conclusion, would result in this: That a New York corporation which does some, but not all, of its business, in the State of New Jersey would not be able to make any transfer of its assets unless that transfer conformed to the law of New Jersey. His observations also set at naught the well-established rule that personal property, such as choses in action, follow the domicile of the owner thereof. It may well be that the New Jersey Laws referring to taxation may levy a tax upon a foreign corporation doing business within the borders of the State of New Jersey but we fail to see how this applies by analogy or otherwise to a situa-

tion where a New York corporation has made an assignment or a transfer of a chose in action to a resident of the State of New York, and where that assignment or transfer has been made, executed and delivered outside of the territorial limits of the State of New Jersey. If the observations of the Vice-Chancellor are correct in principle, this situation arises: That had the Glen Co. actually collected the sums due to it from the Board of Education of the City of Paterson and deposited said sums in its bank account in New York it could not then make any transfer or use said funds so derived from New Jersey business in contravention of the statutes of the State of New Jersey. This proposition is obviously untenable. An attempt to say under what circumstances a New York corporation may, or may not, in the State of New York assign a debt would amount to an attempt to impose upon a foreign corporation regulations quite different from those imposed by the State of its creation, and would lead to endless difficulty in making absolutely good *bona fide* transfers.

We are prepared to say, however, that the transaction involving the Paine assignment was not within the prohibitions of Section 64 of the Corporation Law of the State of New Jersey. That statute was designed, as were its predecessors, to prevent the preference of one creditor over others of the same class. When the Legislature re-enacted that statute it obviously re-enacted it in the light of the judicial construction of the old statute.

Frost vs. *Barnert*, 56 N. J. Eq., 290.
Holcomb vs. *New Hope*, 9 N. J. Eq., 457.
Van Wagenen vs. *Bank*, 10 N. J. Eq., 13.
State Bank vs. *Receiver*, 3 N. J. Eq., 266.
Receivers vs. *Paterson Gas Co.*, 23 N. J. Law, 291.

Kinsella vs. *Cataract Co.*, 18 N. J. Eq., 158.
Vail vs. *Jameson*, 18 N. J. Ep., 648.
Reed vs. *Heloise Co.*, 53 Atl., 1054.

The restrictions upon conveyances and transfers appearing in the statute do not apply to honest transactions where a present consideration passes.

In

Reed vs. *Heloise Co., supra,*

an action to foreclose a mortgage was involved and certain creditors intervened and set up Section 64 as a defense. The Court said:

"The prohibition is against transfers of a corporation's property in contemplation of its insolvency. I don't understand this prohibition to be applicable to conveyances made in good faith by the officers of a corporation at a time when the financial embarrassments of the company are such that its insolvency may be within contemplation, if, as incidental to and essentially a part of the conveyance, a present consideration moves to the company.

"For instance, if a mortgage be given to secure the payment of money paid in good faith to the company coincidentally with the delivery of the mortgage or a purchase money mortgage be given to secure the payment of purchase money of land, conveyed to the company coincidentally with the making of the mortgage, or if property be in good faith transferred to the company, and its property or money be given in exchange therefor. In such cases the value of the assets of the company is

not materially changed. It is as solvent after such a transaction as before."

In

Miller vs. *Gourley,* 65 N. J. Eq., 250,

it appeared that a mortgage had been given to Mr. Gourley, Sr., the defendant. The defendant's son was an officer of the company. In the course of his opinion Mr. Justice Grey observed:

> "All the knowledge touching the company's financial embarrassments which came to the son is clearly imputable to the father, for whom he acted. In addition to this, the father's own knowledge * * * showed that it (the mortgage) was taken because the company was known to be unable to meet its pecuniary liabilities."

It further appeared in that case that the mortgage referred to was given partly for a present consideration and partly for a past consideration. In considering this phase of the case in connection with Section 64, the Court said:

> "The proofs show that some money at least was passed by the mortgagee to the company's officers or paid by him to its order coincident with their delivery of this mortgage to the mortgagee, induced by the security he tendered. * * * The acceptance of the defendant's money paid on the giving of its mortgage estops to the extent of the moneys so paid the company from denying the validity of the mortgage used to obtain that money.
>
> The defendant's mortgage should, I think, be held to be valid to the extent that, relying

upon its security, he actually advanced or paid money or values to or for the R. S. Hobbs Co. * * * It is not the purpose of the Act to deprive the officers of an incorporated company of the power to conduct the business of the company by so disposing of its property that its insolvency may be avoided or remedied, if such action is taken in good faith and secured to the company a full and fair consideration passing coincidentally with the transfer of its property in the conduct of its business. Such dealings are in no sense frauds. The company's assets after such a transaction though changed in their nature are still intact as to value and ability to respond to creditors. * * * But the act is intended to prevent the officers from disposing of the company's assets to those of its creditors who are favored by its officers. * * * The result is that the defendant's mortgage should be held to be a valid lien only upon the real estate * * * That it should be held to be good only to the extent of the money actually paid out by the defendant as a new consideration induced thereto by the security of this mortgage."

In

Frost vs. *Barnert, supra.*

a mortgage was given partly for an antecedent debt and partly for a present consideration. The mortgage was held good as to the present consideration under Section 64.

In

Barrett vs. *Perth Amboy Co.*, 73 N. J. Eq., 62,

Pitney, Master, held that where a corporation insolvent, and known to the mortgagee to be insolvent, gave a mortgage said mortgage was valid as to $1,500, the amount of a present consideration. This case was considered squarely under Section 64. See also

Richards vs. *Halliday,* 112 Fed., 86.
Savage vs. *Miller,* 56 N. J. Eq., 432.

In considering this subject we are not unmindful of the case of *Cope* vs. *Walton Co.,* decided by this Court, but we think that that case is distinguishable from the present as in that case, at the time of the assignment, there was no present *cash* consideration from the assignee to the corporation.

To hold that an individual may not advance moneys to a corporation which is then doing business in ordinary course to tide it over a short period of financial embarrassment without running the risk of losing the security received for the present advance will create a situation which will obviously be intolerable. There are thousands of cases, especially among contracting concerns, where the loan of cash at a particular time would enable the company to pass over a financially perilous situation and bring it to a situation where it can collect funds from its debtors and thereafter proceed to a stage where its financial condition is absolutely sound. To hold otherwise, would mean that when once a company becomes slightly embarrassed it can never recover and its only resort is to the insolvency or bankruptcy courts.

We contend that the advance made by Mr. Paine of $4,950 was not made in contemplation of the insolvency of the Glen Co. but was made in good faith and for the purpose of tiding the Glen Co.

over a short period of financial embarrassment. We contend further that if the Glen Co. was financially embarrassed at the time in question that fact was not known and was not shown to be known to Mr. Paine. He was a director, and presumably had knowledge of the company's affairs. However, that presumption is in nowise conclusive. His actual, not presumptive knowledge is the question here.

Converse vs. *Sharpe*, 161 N. Y., 571,

> "When the validity, as against other creditors, of a transaction between a corporation and its directors, depends upon their belief in its solvency, their actual knowledge of its condition, as distinguished from that imputed to them by reason of their relation to it as directors, is of determining importance."

See also

Rudd vs. *Robinson*, 126 N. Y., 116.
Martin vs. *Webb*, 110 U. S., 7.
Thompson on Corporations, Section 4607.

There is nothing to show, nor is it the fact, that Paine knew of the financial condition of the company at the time he made the advance in question. Mr. Paine stated that he had no knowledge of the company, or of its condition, except what knowledge he gained from Mr. Alford and Mr. Downey. (.)

Paine was a man of large interests, held only one share of stock, was on the directorate of the Glen Co. and up to November 30, 1910, had loaned to the Glen Co. $21,000 simply out of his friendship for Mr. Downey. Mr. Paine had never seen nor examined the books of the company. He relied

entirely upon what Mr. Alford and Mr. Downey told him (pages 584, 587).

Is it conceivable that Mr. Paine, without anything to gain from the transaction, would have advanced on December 1, 1910, $4,950 to the Glen Co. if he knew that the company was hopelessly insolvent and could not continue its business? The company was at that time prosecuting its business in ordinary course.

On December 1, 1910, Mr. Downey told Mr. Paine that the Glen Co. was short for a pay-roll that was to come due on December 3rd. He also told him that the Glen Co. had been held up on their payments by the Board of Education of Paterson and by a similar Board in Newark. He was also told that ths advance of the payroll would help the Company out (pages 629, 630, 631). They told him on that occasion that the amount to be advanced by him for pay-roll would be needed for only a few days (pages 589, 631), and further told him that the Company had finished a job in New Dorp, Staten Island, and that here was something in excess of $6,000 coming to the Company from that job. On that occasion Mr. Alford and Mr. Downey informed Mr. Paine that there was a considerable profit accumulated on the job at Newark, where 15% was being held back. They also told him that they expected to receive some $30,000 or $40,000 in extras (pages 560, 587, 633). They also told him that they expected a large payment from the Paterson job for work done during the month of November, 1910, for which requisition had been made and that they expected this payment in a few days (pages 630, 631, 633).

Mr. Paine did not know the actual condition of the Company until December 8th, when Mr. Gunnell reported to him. Mr. Alford, who was

called as a witness on behalf of the Frank Miller Lumber Company, testified that Mr. Paine on December 1 made an advance by check of $4,950 and that this advance was made for payroll; that he, Alford, President of the Glen Co., expected to reimburse Mr. Paine for this advance; that he expected to reimburse Mr. Paine out of the payment coming to the Glen Co. on the Newark job which, as stated by Alford, "was all but due" (pages 629, 630, 631). He also testified that they had made requisition for work done in November on the Paterson High School and that there was a payment coming due from that source. He, the President of the Glen Co., said that he would not have asked Mr. Paine to advance $4,950 if he believed that the Company was in a hopeless condition and thereafter he testified on cross-examination as follows (pages 628, et seq.).

"Q. And you did expect that if you could get this payroll paid it would carry you over until you got this payment from Newark? Wasn't that your expectation?

A. It was.

Q. And didn't you so express it to Mr. Paine?

A. I did.

Q. So that your expressions on that occasion to Mr. Paine, as to the condition of the company, was not that it wasn't solid but that you could tide this over until you could get this payment—until you could complete your jobs; is not that a fact?

A. It is.

Q. And on that statement Mr. Paine advanced $4,950 to your Company, didn't he?

A. He did.

Q. And that money which you received from that check was disbursed how, for payroll?

A. For payrolls.

Q. And that was the payroll, I believe, of December 3, 1910, was it not?

A. December 1st or 2nd—the first week.

* * * * * * *

Q. Of the four gentlemen who were present at this conversation that has been related as occurring December 1st, 1910, who were the active men in the business of the Glen Company?

A. Why, Mr. Downey and I.

Q. And you were the only active men, were you not?

A. We were.

Q. And Mr. Paine, who was there on that occasion, had not had anything to do with the business end of the concern, had he?

A. No.

* * * * * * *

Q. Mr. Alford, how soon after December 1st, did you expect to receive your payment from the Newark or Paterson contracts?

A. The Newark contract we expected to get the following week. The Paterson contract was problematical.

Q. On December 1st, or at the time of the loan by Mr. Paine of the $4,950, your expectation was that before the next payroll came due on your various contracts you would have received sufficient payment to meet those payrolls and also repay Mr. Paine the $4,950?

A. I did.

Q. You thought the payments would be large enough?

A. Yes, the Newark payment was $21,000, if I remember right."

Miss Conroy, who was the bookkeeper of the Glen Co., and obviously a witness hostile to the claimant

Paine, testified that the $4,950 received from Mr. Paine was to take care of the pay-roll in December; that at that time the Company was doing business in its regular course (pages 602, 603).

Many of the observations of the Vice Chancellor contained in his opinion are entirely graiuitous and founded on no facts appearing in the record. There is no foundation in the record for the statement that Mr. Gunnell had, prior to December 1st, examined in part the books of the Glen Co. and "discovered that its financial condition was perilous and that Mr. Paine had received this partial report." What the testimony did disclose was that Mr. Paine had employed Gunnell to examine the books of the Glen Co. on November 29th or 30th, 1910, and that on December 1st Gunnell had reported to Paine that he could give him no information as to the condition of the Company (page 579).

The Vice Chancellor says that "Mr. Alford testifies that Mr. Paine's attorney, Mr. Hardy, told him at the interview or meeting of Directors, when the assignment was arranged, that from what he had learned from the hasty examination of the books, presumably by Mr. Gunnell, it appeared that 'things looked rather bad' and Mr. Hardy further stated that to loan the $4,950, 'might be losing just that much more.' ".

Mr. Alford, as the record plainly discloses, did not testify positively as to these matters at all. At page 624, which is the page referred to by the Vice Chancellor, Mr. Alford was asked whether, at the meeting of December 1st, anything was said about the condition of the Company and he answered—

"Well, I think it was stated—

Q. Who stated it, please?

A. Mr. Hardy, I think, said, from the hasty report he had been able to get it looked rather bad, or *something to that effect.*

Q. What did he say again?

A. He said from the report—hasty report—he had been able to get that it looked rather bad. That was the idea.

Q. And Mr. Paine was there at that time?

A. *Yes, I think so.*"

It will be observed from this quotation that Mr. Alford was plainly guessing as to what was said. But, regardless of this, it does affirmatively appear that no matter what may have been said by Mr. Hardy on this occasion, Mr. Alford, who was the President of the Glen Co., himself had no expectation of the Company's discontinuing its business and going into bankruptcy and he told Mr. Paine, on the occasion when Mr. Paine advanced the $4,950, that there were large and very large sums of money coming to the Glen Co. and that the advance about to be made by Mr. Paine would tide the Company over until these payments came in and on these statements Mr. Paine relied in making his advance. This was testified to by Mr. Paine and admitted by Mr. Alford (pages 628, et seq.), and Mr. Alford further testified that he would not have asked Mr. Paine to make this advance if he had viewed the situation as hopeless, so this situation appears: That Mr. Gunnell was not on December 1, 1910, able to give Mr. Paine information as to the condition of the Company and Mr. Paine turned, and naturally turned, to Mr. Alford and Mr. Downey to ascertain the conditions that obtained and these two gentlemen, who were in a position best to know the condition of the Company (one of them Mr. Downey, the friend of Mr. Paine, in whom he had implicit confidence and upon

whom he had a right to rely) told Mr. Paine that the sum asked was a temporary loan to tide the Company over an embarrassing situation and that the Company had large sums of money coming to it and if the work could be carried along a little further still larger sums would be realized for the Company. On the strength of these assertions Mr. Paine made his advance (page 631).

The observations of the learned Vice Chancellor to the effect that Mr. Gunnell and Mr. Hardy had knowledge of the situation are purely gratuitous. It does not appear that the assignment to Gunnell, which was dated November 30th, was actually delivered on that day or prepared on that day. It does not appear that Mr. Paine actually knew of the existence of these assignments. But, even assuming that Mr. Paine did know of their existence, it is no very extraordinary situation. It is a matter of common knowledge that contracting concerns in the City of New York and elsewhere, in doing municipal work, at the very outset of their jobs make assignments of all retained percentages to the bank which finances them. That this is done is no indication that a company is insolvent or is contemplating insolvency. That Mr. Paine desired to be secured, both as to the moneys previously advanced and as to the moneys presently advanced, is no indication that he had knowledge of the insolvency of the Company and the assignments themselves expressly contemplated that there might possibly be further advances by Mr. Paine.

Is it conceivable that Mr. Paine, if he knew of the hopeless condition of the Glen Co., would have actually advanced $4,950 on December 1st?

Considerable has been said as to the propriety of Mr. Plaine's causing a petition in bankruptcy to be filed against the Glen Co. on December 9th or

10th, 1910. As appears from the record, Mr. Paine was not advised by Mr. Gunnell as to the condition of the Company until December 8th. That Mr. Gunnell could not give to Mr. Paine information as to the condition of the Company prior to that time is borne out by the testimony of Mr. Wake, the accountant who testified that it would take him a week or perhaps a month to ascertain the condition of the Company (page 621). When Mr. Paine did discover the condition of the Company he caused the petition in bankruptcy to be filed for the purpose of stopping any further work by the Company and the further involving of laborers and material men in further losses. He did it for their protection—not for his own. Had he his own interest in mind he might better have let the Company go along and put the burden of filing the petition on parties other than himself.

Again, the observations of the Vice Chancellor to the effect that Mr. Hardy and Mr. Gunnell, as agents of Mr. Paine, were charged with knowledge and that knowledge was imputable to Mr. Paine is not borne out by the record. It affirmatively appears that Mr. Gunnell and Mr. Hardy did not on December 1, 1910, have any information as to the condition of the Company on December 1st, and it further does not appear that either Mr. Hardy or Mr. Gunnell were the general agents of Mr. Paine.

The remarks of the learned Vice Chancellor as to the absence of Mr. Hardy and Mr. Gunnell are hardly fair. Although it does not so appear in the record, it is a fact that on April 10, 1912, counsel for Mr. Paine had Mr. Gunnell in attendance at Jersey City, prepared to call him to the stand. The date mentioned was the date on which hearings were to proceed, but the Vice Chancellor had adjourned the hearing of the case without noti-

fication to the attorneys for Mr. Paine, and counsel was unable later to obtain the attendance of Mr. Gunnell as Mr. Gunnell's duties call him away from New York a great part of the time.

In connection with this entire subject we call attention to

Regina Music Box Co. vs. *Otto*, 56 Atl., 715.

We also call attention to

Mechanic's Lien Law of the State of New Jersey, Section 6;

and the

Corporation Law of the State of New Jersey, Section 83 *and Section* 84;

which provide generally that the persons whose wages were paid by the funds supplied by Mr. Paine were entitled to a priority in payment over all the other creditors.

Having paid these claims Paine is entitled to be subrogated to their rights.

Mills vs. *Hendershot*, 70 N. J. Eq., 258.

We further submit that on common principles of fairness no presumption should be indulged against Mr. Paine. He is asking here simply the return to him of the present advance made by him on December 1, 1910. He made this advance to pay the claims of the most needy creditors of the Glen Co., and to pay the claims of creditors whose rights, under the statutes refered to, were prior to those of the creditors here represented. He has, as it were, gathered up all the claims and rights of the

preferred creditors and melted them into the present assignment. He got no benefit from the transaction in question, but, as a matter of fact, he has by the transaction brought upon himself this present contest. It cannot be said that the Glen Co. became more insolvent after the transaction than it was before. It was merely an exchange of funds, and all that this claimant now asks is that there be reserved to him out of this fund the exact amount of cash which he, on December 1, 1910, gave to Glen Co., and in claiming this Paine does not stand in the same position as the other creditors herein. It is fair to assume that the lien creditors have filed liens for the last dollar that was possible. This includes, we may presume, a fair profit. The Bank likewise includes in its claim its rate of discount. What Paine claims is exactly the amount of the cash advanced by him on the faith of the security offered to him.

Under the facts in this case it appears that Paine had no greater or other means of knowledge of the condition of the Company than was open to any one of the claimants herein. That they should be allowed to share in the fund and Paine should be excluded, when they had the same information as Mr. Paine, neither seems to be fair or equitable.

POINT II.

The assignment to Paine, if valid, should take precedence over the lien of the Frank Miller Lumber Company.

The assignment to Mr. Paine was made on December 1, 1910, and was filed December 9, 1910. The Frank Miller Lumber Company lien was filed

December 9, 1910, an hour before the filing of the Paine assignment.

There is nothing in the Law of New Jersey requiring the filing of such assignments, nor does the contract between the Board of Education of the City of Paterson and the Glen Co. require any assignment to be filed. A mechanic's lienor acquires his right only upon the filing of his statutory notice,—he has no inchoate right of lien.

New Jersey Lien Law, Section 5.
Somers Brick Co. vs. *Souder,* 71 N. J. Eq., 759.
Somers Brick Co. vs. *Souder,* 70 N. J. Eq., 388.
U. S. Fidelity & Guaranty Co. vs. *City of Newark,* 74 N. J. Eq., 454.
Cogan vs. *Canover,* 69 N. J. Eq., 809.
National Fire Proof Co. vs. *Daly,* 74 Atl., 152.

Under the above authorities the assignment having been executed and delivered prior to the filing of the Frank Miller Lumber Company's notice of lien, has priority over that lien.

POINT III.

It was error for the Court to tax counsel fees against the appellant Paine personally.

The decree appealed from contains a provision directing Paine to pay counsel fees to the Frank Miller Lumber Company and the Joseph Sharpe Construction Company. We understand that under the Act the allowance of costs and counsel fees is largely a matter of discretion.

We think the rule has been stated in *Hall Co. vs. Jersey City,* 64 N. J. Eq., 766:

If this were a case where the claimant Paine asserted a claim that was obviously unfounded and which was interposed for the purpose of vexing, harassing and delaying the other claimants, there would be some reason for mulcting Paine. We think it is quite obvious that the claim of Paine was asserted in good faith. It is amply established that Mr. Paine advanced the sum of $4,950 in cash to the Glen Co. in reliance upon the assignment herein involved, and it would seem that Mr. Paine's attempt herein to assert his security under such circumstances was in no wise vexatious. Whatever claim the Joseph Sharpe Construction Company may have for counsel fees, we see absolutely no ground for the taxing of counsel fees in favor of the Frank Miller Lumber Company.

The claim made by Paine to the effect that his assignment preceded the Frank Miller Lumber Company was argued for the first time upon the final submission. It in no wise protracted the litigation and in no wise caused any lengthening of the record. Counsel for the other claimants, and principally the counsel for the Frank Miller Lumber Company, insisted upon going over matters time and time again, insisted upon introducing in evidence large and ponderous volumes and documents, in some cases without any apparent relevancy and in other cases where a mere reference to the book or the contents thereof would have sufficed. For these reasons the trial was protracted. The parts of the record referring to the Paine assignment did not exceed in all 50 pages.

Under the circumstances, we therefore submit that there was no reason for taxing these counsel fees against the appellant Paine.

Wiltse on Mtge. Foreclosures, Sec. 882.
Norton vs. *Whiting,* 1 Paige Chancery, 759.
Openheimer vs. *Walker,* 3 Hun, 30.

For the reasons above stated, we respectfully submit that the decree appealed from should be reversed as to Mr. Paine and the claim of Mr. Paine should be reinstated as a valid claim against the fund.

WILLIAM F. DELANEY,
Solicitor for Appellant Paine.

ARTHUR M. WOODFORD, Esq.,
of Counsel.

NOAH A. STANCLIFFE, Esq.,
Of the New York Bar,
Of Counsel.

New Jersey Court of Errors and Appeals

BETWEEN JOHN AGNEW COMPANY, *Complainant-Respondent,* *and* THE BOARD OF EDUCATION OF THE CITY OF PATERSON, ET ALS., *Defendants and Respondents* *and* MARTIN S. PAINE, *Defendant-Appellant.*	*On Appeal From Chancery.* *Appeal of Martin S. Paine.*

Brief for Joseph Sharpe Construction Company, Defendant-Respondent.

STATEMENT

The defendant-respondent Joseph Sharpe Construction Co. is a lien claimant upon the funds in the hands of the City of Paterson standing to the credit of the contract made by the city with the Glen Engineering Company for the erection of the Paterson High School.

In order of priority among lien claimants it stands third. The John Agnew Company is first. The Frank Miller Lumber Company is second, and the Sharpe Company third. There is no dispute that the Sharpe Company is a lien claimant, nor as to the order of its priority among lien claimants.

The only dispute as to priority is between the Frank Miller Company and the Sharpe Company on the one side, and the First National Bank of the Town of Union and Martin S. Paine, the two appellants, on the other. The amount in the hands of the City of Paterson being

$29,696.31 besides interest, and the total claims of the appellants aggregating but $19,950, the Agnew claim is not involved, as there is a sufficient balance to meet it in any event.

The respective claims of the appellants rest on their respective assignments of the fund in the hands of the city made by the contractor, the Glen Engineering Company. If either of these assignments be adjudged valid, the fund will be exhausted before the turn of the Sharpe Company to be paid is reached. In a measure, this is also true of the Frank Miller Lumber Company. Hence, the legal positions of the latter Company and the Sharpe Company, on this appeal, in regard to said assignments, are identical save that one is a New Jersey ~~and the other a foreign~~ corporation and the other a non-resident individual. They both challenge the validity of the assignments.

POINT I

The validity of the assignments made to Mr. S. Paine and under which he claims, is to be determined by the law of New Jersey, and not the law of New York.

The proceeding to enforce the liens and claims against the funds is a proceeding *in rem*, in which no personal judgment can be procured.

Delafield Co. vs. Sayre, 31 *Vr.*, 449.

Norton vs. Sinkhorn, 18 *Dick.*, 766.

Garrison vs. Borrio, 16 *Dick.*, 236.

National Fireproof Co. vs. Daly, 74 At., 152.

Though a foreign corporation, the Glen Engineering Construction Co. in regard to its assets in New Jersey was subject to the provisions of our corporation act.

N. J. Corporation Act, Sec. 96.

The maxim, *mobilia personam sequuntur,* does not apply to an assignment by an insolvent foreign corporation, its assets having their *situs* in New Jersey, as against the Sharpe Co., a New Jersey corporation.

Wharton, 3d ed., pp. 759-761.

Dicey, Am. ed. Moore, 537.

Minor, Conflict of Laws, 280.

Varnum vs. Camp, 13 *N. J. L.,* 326.

Moore vs. Bonnell, 31 *N. J. L.,* 90.

Griel vs. United Electric Co., 69 *N. J. E.,* 397.

Schmidt vs. Perkins, 74 *N. J. L.,* 784.

People vs. Granite State, &c., 161 N. Y., 492.

POINT II

The assignments made to Mr. Paine were all made by the Glen Company when it was in fact insolvent and when Mr. Paine knew as a fact that it was insolvent, and were made in contemplation of insolvency; and though Mr. Paine paid a partial consideration therefor at the time, they are void under section 64 of the New Jersey Corporation Act.

N. J. Corporation Act, Sec. 64.

Cope vs. Walton Co., 77 *E.* 512; 79 *E.,* 166.

Regina Musix Box Co. vs. Otto, 65 *E.,* 582.

Russell & Erwin Co. vs. Faitoute, 62 *At.,* 421.

Skirm vs. Rubber Co., 57 *E.,* 179.

POINT III

The Paine assignments are void under sections 11, 12 and 13 of the Statue of Frauds.

Russell & Erwin Co. vs. Faitoute, supra.

Hancock vs. Elmer, 61 *E.*, 558.

Life Ins. Co. vs. Haight, 35 *L.*, 279-282.

Tantum vs. Green, 21 *E.*, 364.

Meade vs. Combs, 19 *E.*, 112.

Holt vs. Creamer, 34 *E.*, 181-187.

Smith vs. Perkins, 74 *L.*, 784.

POINT IV

The Paine Assignments are void under section 66 of the Stock Corporation Law of New York.

Kingsley vs. Bank, 31 *Hun.*, 329, 335.

Munson vs. Genesee Works, 37 *Sp. D.*, 203.

Cole vs. Millertown, 133 *N. Y.*, 164.

Receiver vs. Ithaca, 21 *N. Y.*, 400.

Olney vs. Baird, 7 *Ap. Div.*, 95.

Pauling vs. Crone Steel Co., 94 *N. Y.*, 341.

Hurd vs. Co., 167 *N. Y.*, 89.

Throop vs. Co., 125 *N. Y.*, 530.

Hilton vs. Ernst, 38 *Ap. Div.*, 94.

Concord Co. vs. Plante, 137 *Ap. Div.*, 243.

Paulding vs. Co., 94 *N. Y.*, 334.

POINT V

The Paine assignments are void under section 35 of the Personal Property Law of New York.

Concord Co. vs. Plante, 137 *N. Y.,* 243.

Greenwald vs. Wales, 174 *N. Y.,* 140-5.

Billings vs. Russell, 101 *N. Y.,* 206.

Starin vs. Kelly, 88 *N. Y.,* 421.

Baldwin vs. Short, 125 *N. Y.,* 553-559.

POINT VI

There was no error in the taxing of counsel fees against the appellant Paine, personally.

N. J. Chancery Act, Sec. 91.

McMullin vs. Doughty, 68 *E.,* 776.

Buttlar vs. Buttlar, 70 *E.,* 675.

Diocese vs. Toman, 70 *A.,* 881.

For the argument upon the foregoing points leave is respectfully asked to refer to the brief in this cause in behalf of the Frank Miller Lumber Company on the appeal of M. S. Paine.

Respectfully submitted,

WM. I. LEWIS,

Of Counsel With Joseph Sharpe Construction Co.

New Jersey Court of Errors and Appeals

BETWEEN JOHN AGNEW COMPANY, *Complainant-Respondent,* *and* THE BOARD OF EDUCATION OF THE CITY OF PATERSON, ET ALS., *Defendants and Respondents,* *and* MARTIN S. PAINE, *Defendant-Appellant.*	*On Appeal from Chancery.* *Appeal of Martin S. Paine.*

BETWEEN JOHN AGNEW COMPANY, *Complainant-Respondent,* *and* THE BOARD OF EDUCATION OF THE CITY OF PATERSON, ET ALS., *Defendants-Appellants.*	*On Appeal from Chancery.* *Appeal of First National Bank of Town of Union.*

Brief for John Agnew Company

The Board of Education of the City of Paterson entered into an agreement with Glen Engineering Construction Company on July 2nd, 1909, to erect and finish the mason, carpenter, painting, structural steel and iron, and electrical work of the Paterson High School for the sum of $285,423.00, p. 12.

The Company prosecuted the work until December 9, 1910. A petition in bankruptcy was filed against the Company in New York upon December 10, 1910, and the Company which was a New York corporation was on that day adjudged to be bankrupt. Upon December 12, 1910, an ancillary Receiver was appointed for the District of New Jersey.

Notices of lien from time to time were filed under the Municipal Lien Act by several creditors. There were also some assignments of the fund. The chronological order of filing these papers, *so far as affects the claim of the complainant below,* is as follows:

CLAIM	CLAIMANT	DATE
Lien	James Healey	Sept. 21, 1910 (p. 166).
Ass't.	1st Nat. Bank	Sept. 22, 1910, at 9 a. m., p. 174.
Lien	Ingalls Stone Co.	Sept. 22, 1910, at 2 p. m. (p. 166).
Lien	John Agnew Co.	Nov. 28 (p. 166).

The liens of James Healey and Ingalls Stone Company were released owing to the substitution of a bond under the statute securing the claims (p. 658).

This left only the assignment to the First National Bank of the Town of Union in point of time preceding the notice of the John Agnew Company, the complainant below.

This assignment was dated September 15th, 1910, and purported to assign to said Bank the retained percentage due and owing to said Glen Engineering Construction Company by the Board of Education to secure, as it was alleged, the amount due to it. A copy thereof was filed September 22, 1910. In the answer of the Bank the amount for which the assignment was given was said to be $15,000 (p. 99).

The next notice of lien was that of the complainant-respondent John Agnew Company. This notice was filed on November 28th, 1910, for $11,933.29 with interest.

The amount due from the city as fixed by the decree (p. 687) was $29,696.31.

The complainant, therefore, is not affected by the consideration of the question whether the assignment to the First National Bank of the Town of Union is valid or not. If valid, it can only be, of course, for the amount claimed in its answer $15,000 (p. 99). As the fund in the hands of the city is $29,696.31 this leaves sufficient funds to pay the complainant below the amount due to it. Notice, lis pendens and bond were regular. The testimony in support of the claim of the complainant below is found on pages 516, 517, 518, 519 and 520.

It is respectfully submitted that the decree of Vice Chancellor Stevenson, so far as it affects the claim of the John Agnew Company should be affirmed.

WILLIAM B. GOURLEY,

Counsel for John Agnew Company.

New Jersey Court of Errors and Appeals.

Between

JOHN AGNEW COMPANY,

Complainant,

and

BOARD OF EDUCATION OF THE CITY OF PATERSON, FRANK MILLER, doing business as FRANK MILLER LUMBER COMPANY, JOSEPH SHARPE CONSTRUCTION COMPANY, *et al.*, respondents, and FIRST NATIONAL BANK OF THE TOWN OF UNION and MARTIN S. PAINE,

Appellants.

On appeal from Chancery.

BRIEF IN BEHALF OF FRANK MILLER, DOING BUSINESS AS FRANK MILLER LUMBER COMPANY, ESTABLISHING THAT THE ASSIGNMENTS MADE BY THE GLEN ENGINEERING CONSTRUCTION COMPANY TO MARTIN S. PAINE, A DIRECTOR THEREOF, AND EDWARD GUNNELL, HIS REPRESENTATIVE, ON THE 30TH OF NOVEMBER AND THE 1ST OF DECEMBER, 1910, ARE INVALID AND VOID AS AGAINST THE LIEN CREDITORS AND THE TRUSTEE IN BANKRUPTCY OF THE GLEN ENGINEERING CONSTRUCTION COMPANY.

The brief submitted in behalf of Martin S. Paine in this appeal is remarkable for the number of misstatements of fact therein contained, for the gratuitous statements therein contained not warranted by the record, and for its impudent and wholly unjustifiable criticism of the Trial Court.

The brazen manner in which it is attempted in said brief to cloak over the real facts and the fraudulent conduct of Paine as proved in the record, might be entitled to serious consideration, if the proof of the grasping and fraudulent conduct of the respondent Paine and his agents was not so obvious. The Vice-Chancellor in his memorandum of opinion was conservative in stating his views of Paine's conduct. Every statement made by the Vice-Chancellor is full substantiated by the record. He said:

> "3. The next lien in chronological order alleged to be charged upon the fund in question is that of Martin S. Paine for $4,900, and interest. This lien is claimed under two assignments from the Glen Company to Mr. Paine, dated December 1st, 1910 (p. 556). These assignments were executed, acknowledged, and delivered at the same time, and thereupon Mr. Paine gave his check for $4,900 to the Glen Company, the assignors, to meet a payroll about to come due (p. 556). The status of Mr. Paine's claim depends upon quite a large number of facts, circumstances and conditions, the more important of which it may be convenient to set forth herein without undertaking, however, anything approaching a complete examination and discussion of the evidence.
>
> The leading facts above referred to are as follows:
>
> Mr. Paine holds one share of stock, evidently to qualify him to be a member of the

Board of Directors of the Glen Company (pp. 467-448). The treasurer of the company, Mr. Downey, was his friend, and it appears that through such friendship Mr. Paine was induced to make loans to the company (pp. 468-469). He took no part in the business of the company, and attended very few of the meetings of its directors (pp. 475-583). On the thirtieth of November, 1910, Mr. Paine's loans made in three amounts during the preceding four months, amounted to $21,000 (p. 564). On the thirtieth of November, 1910, Mr. Edward Gunnell, as agent for Mr. Paine (p. 566), procured an assignment from the Glen Company of the 'retained percentages' on the Paterson contract amounting approximately to $42,813.45, to secure the payment of these three sums of money aggregating $21,000, and interest thereon (pp. 578, 723). Whether Mr. Gunnell had previously had these sums or a portion of them nominally assigned to him by Mr. Paine, does not appear. At this time Mr. Paine employed Mr. Gunnell to examine the books of the Glen Company, and this examination was proceeding during the latter part of November or the first of December (pp. 567-568, 578, 579, 595-596, 601-624).

It is a significant fact that this assignment to Mr. Gunnell expressly recites that it is 'subject and subordinate to the rights acquired by said First National Bank of the Town of Union under' its assignment, and directs and empowers the said bank to pay to Mr. Gunnell, or his assigns, out of all moneys which the bank shall collect under its assignment, 'any excess over the amount due to said First National Bank of the Town of Union in accordance with the terms of the said assignment, up to but not in excess of the sum of $21,000, with interest; setting forth the three separate loans which aggregate that sum (p. 723). Notwithstanding this recognition of the validity of the assignment of

the bank, counsel for Mr. Paine strenuously argues that the bank's assignment was an unlawful preference and, therefore, should be declared void in this suit. But the important point to observe is that Mr. Paine's representative and agent who procured this preferential assignment on November 30th, 1910, recognized that the fund already was charged with the indebtedness due to the bank, and no effort was made to show that the amount of this indebtedness—the amount for which the bank claimed to hold the assignment—was not known to Mr. Gunnell or to Mr. Paine. The Paterson contract, therefore, on December 1st was already covered with mortgages to secure $36,000, or at least $31,000, within the view of Mr. Paine or his agents whose knowledge is imputable to him.

On December 1st, 1910, the directors of the Glen Company, Mr. Alford, the president, Mr. Downey, the treasurer, and Mr. Paine, met at the office of Mr. Hardy (p. 554) who was Mr. Paine's attorney (p. 572). There can be no doubt, I think, from the testimony that Mr. Paine's accountant had in part at least examined the books of the Glen Company and discovered that its financial condition was perilous and that Mr. Paine had received this partial report (pp. 578-579, 595-596). Mr. Alford testifies that Mr. Paine's attorney, Mr. Hardy, told, him, at the interview or meeting of directors when the assignment was arranged for, that from what he had learned from the examination of the books presumably by Mr. Gunnell, it appeared that things 'looked rather bad' (pp. 624, 626, 627), and Mr. Hardy further stated that to lend the required $4,900 'might be just losing that much more' (p. 627). Mr. Paine, on cross examination, declined to testify whether or not Mr. Hardy had made those statements to him as Mr. Alford stated (p. 579). He said that he did not 'recall.' It may be noted that neither Hardy nor Mr. Gunnell, nor any of

the other agents of Mr. Paine who figured in this case, were placed upon the stand to give their testimony. Mr. Paine appears to be a business man of somewhat large affairs, whose connection with the Glen Company was very slight. He operated in getting these assignments through agents who are not brought as witnesses to tell what they learned and what they knew while acting for their principal.

The arrangement made by these gentlemen on Dec. 1st, 1910, and which was immediately carried out, was that Mr. Paine should advance the required payroll ($4,900) and thereupon the company would give to him the two assignments (Exhibits C. 8 and C. 9). Both of these assignments as well as the assignment C. 7 made to Mr. Gunnell the day before (November 30th), appear to have been drawn by Mr Hardy or in his office. All have the same backs upon which Mr. Hardy's business card is printed. By one of the assignments of December 1st, 1910 (Exhibit C. 9) all moneys due or to become due to the Glen Company upon the Paterson contract were assigned 'as security to said Paine for moneys advanced by him to and for the benefit of the Glen Engineering Construction Company, and for such moneys as may hereafter be advanced to or for the benefit of said Company.' It will be observed that this assignment on its face did not undertake to secure specifically the new loan of $4,900 contemporaneously made to the company. It covered generally all present and future indebtedness, and for a reason, which is not disclosed in the evidence but may be surmised, it ignored the assignment to the bank.

The other assignment (C. 8) executed December 1st, 1910, is to the same effect as its companion, securing 'moneys advanced' by Mr. Paine, and 'such moneys as may hereafter be advanced.' This second assignment, however, covers all moneys due and to become due to the assignor on its three contracts in New

Jersey, the Paterson contract, the Newark contract and the Staten Island contract. Mr. Paine admits in his testimony that he knew that these were the three contracts that the company was performing in the year 1910, and evades the question whether he knew that they were its only contracts (pp. 471, 582 stated case). Mr. Alford testified that when the assignment was first suggested he (Alford) asked Mr. Hardy 'what value it would be' and thereupon Mr. Hardy stated he 'would take it for what it was worth' or words to that effect. This was said in the presence of Mr. Paine, and yet Mr. Paine is silent in his testimony in regard to the matter, and Mr. Hardy is not put upon the stand (p. 624).

Mr. Paine having procured assignments covering practically all the assets of the company on November 30th and December 1st, caused his three notes which constituted his claim of $21,000 to be assigned for no consideration to three agents or dummies of his (p. 577) who thereupon used the same to qualify them to file a petition in bankruptcy on December 9th, 1910, against the Glen Company (pp. 576-734).

I have thought it worth while to state some of the facts relating to these Paine assignments in their chronological order, but without further discussion of the evidence I may state my conclusion of fact that all these assignments were void under §64 of the Corporation Act of New Jersey, and under the provisions of the bankrupt act prohibiting preferences.

Counsel for Mr. Paine with great astuteness undertook to present this case as if the transaction between Mr. Paine and the Glen Company consisted solely of his making a loan on December 1st of $4,900 to meet a payroll, and accepting for such loan the assignments which he held. The transaction in my judgment will not bear that character nor do I think that Mr. Paine's situation in procuring an assignment of practically all the remaining assets of

this insolvent company to secure $25,900 of indebtedness is strengthened by the fact that $4,900 of this sum was advanced when the assignments were made. I find that Mr. Paine stands charged with notice that the assignments which he received were unlawful attempts to prefer him to the extent of $21,000 of pre-existing indebtedness. It is true as decided in Frost *vs.* Barnert (56 N. J. Eq., 290) that an assignment by an insolvent corporation to a party who has no notice of such insolvency, may be held good as to so much of the consideration as was paid at the time the assignment was made, while it stands void under our statute as to so much of the consideration as consisted of a pre-existing debt. To hold that Mr. Paine personally and through agents who bound him in the matter had no notice that these assignments were made to him when the Glen Company was insolvent, or in contemplation of insolvency, as preferences over other creditors, would in my opinion involve a method of dealing with evidence and human nature contrary to sound rules of law and of common sense."

It is quite clear that the proof of the fraud upon the part of Paine was difficult, because it had been taken from the mouth of Paine, from the written evidence in the case, and from the testimony of his fellow director, Smith Alford, who was obviously not unfriendly to him. Counsel for the lienors and the trustee in bankruptcy could not call as witnesses, Paine's counsel Hardy, he was not within the jurisdiction of the Court, or Gunnell, Paine's agent, but nothing prevented Hardy or Gunnell or Stancliffe, who assisted in the trial of the cause for Paine, from taking the stand and testifying if they had wanted to. They obviously did not want to for reasons best known to them.

The facts concerning the Paine assignments are very simple. They are as follows:—

Mr. Paine was a director of the Glen Engineering Construction Company for upwards of two years (p. 448). Prior to the first of December, 1910, he had loaned the Glen Company over $20,000 (pp. 467-468-469). He had a substantial interest in the company, and was very close in his relations to Mr. Downey, the treasurer of the company (pp. 467-468). The evidence of his conduct around the first of December, in taking practical control of the office of the Glen Company, shows that he had, at the time he took these assignments, absolute power over that company. Mr. Paine claims that the Glen Company on the first of December, 1910, borrowed $4,950 from him (p. 554), and at that time he got an assignment (pp. 555-556). Now the evidence shows, and the fact is, that he got no assignment to secure an advance of $4,950, but that he took three assignments (Exh. C. 7, C. 8, C. 9; pp. 723-731), at this time, which covered every contract the Glen Engineering Construction Company had at that time (pp. 529, 560, 557, 582). These assignments were transfers to him or his nominee Gunnell (pp. 563-566) by the Glen Company of all its interests in the contract at Paterson, in the contract at New Dorp, Staten Island, and in the contract at Newark, which were the only contracts the Glen Engineering Construction Company had at that time (p. 529). These assignments left nothing at all for the other creditors, if they were sustainable, and they were taken to secure a past indebtedness of $20,000 as well as a present advance of $4,900. They do not recite that they or any of them were made for a present advance of $4,900.

Of course, Mr. Paine, when he comes into court now, does not claim on all his assignments for the full amount. It would be obviously unwise for

him to do so. He therefore merely makes claim for the amount of $4,950, which he alleges he advanced when he got these three assignments. Edward Gunnell, one of the Assignees, was his representative (pp. 449-454, 563, 566).

It is clearly established as a fact in the case, that when Mr. Paine got these three assignments, his absolute and obvious intention was to grab everything that the Glen Company had, so as to prevent the other creditors from getting anything, and the reason he got these assignments, was that he was fully aware of the condition of the company, and that it was absolutely insolvent. He admits that Edward Gunnell, one of his assignees, examined the books of the Glen Engineering Construction Company for him (pp. 450, 563, 566), and he admits that the books were taken to his attorney, Charles J. Hardy's office on December 1 (p. 563, line 40). He admits that Gunnell was working for him on November 30, 1910 (pp. 567-568, 578); that Gunnell was brought in by him to examine the books of the company as he says, a day or two before he got his assignments, or advanced the $4,950 (pp. 578-579, 595-596), and Ross, Gunnell's assistant, as he testifies, was sent up to the Glen offices, as he says, a day or two before December first, when he got his assignments, to look over the books (pp. 578-579, 594-596), and it appears by his own admission, that on November 30th, the day before he claims he advanced the $4,950, that he had sufficient control over the Glen Company to require it to make an assignment to him, or to his representative, Gunnell, of all its interests in all its contracts (pp. 485, 578, 596).

Mr. Paine was to say the least a cautious witness, and he knew as a fact that he had his accountants in the office of the Glen Company for

some time before he made his advance of $4,950, and got the assignments of everything the Glen Company had, and so he was forced to admit it on cross examination (pp. 578, 594, 595). He was asked the question whether or not on December first, when he claims he advanced the $4,950, he was informed of the condition of the Company, and whether his attorney, Charles J. Hardy, told him that from the work the accountants had done on the books at that time, the condition of the company looked very bad (pp. 467-468, 578-579). While he would not admit this was the fact, he absolutely refused to swear that such a statement was not made to him prior to the time he advanced the $4,950 (p. 579).

His impudence in refusing to testify upon this point shows clearly the character of his claim.

> "Q. And they told you didn't they, from what they saw of it it looked pretty bad? A. Whom do you refer to as 'they,' Mr. Hardy?
>
> Q. Well, either Mr. Gunnell or Mr. Hardy? A. I don't think they said anything about that, I employed Mr. Gunnell.
>
> Q. Now you are very clear on that point aren't you, Mr. Paine? A. How could they tell me anything about the books—
>
> Q. I am not asking you that; I am asking you if your recollection is very clear? A. On what?
>
> Q. That Mr. Gunnell and Mr. Hardy did not tell you that from what they had seen so far the condition of the company looked pretty bad? A. I don't recall that they did.
>
> Q. You won't swear that they didn't tell you that? A. No and I won't swear that they did.
>
> Q. Will you swear that they didn't? A. I have answered the question."

Paine in this testimony absolutely refused to state the facts. That he did know that the con-

dition of the company was bad before he advanced the $4,950 is clear from Smith Alford's testimony, who was obviously friendly to Paine, but who would not lie (pp. 624, 626 and 627).

Paine says he cannot fix the exact date, when Gunnell went up to work on the books, but that Gunnell might fix it (pp. 593), but he does not produce as a witness either Gunnell, or Charles J. Hardy, who could either one of them solve the problem by their testimony, or Stancliffe who was trying the case for him and who took the acknowledgment as notary to one of the assignments to Paine on December 1st (p. 731).

Now the facts in reference to these three assignments to Mr. Paine and his representative, Gunnell, are these, and they are undisputed or testified to by Smith Alford, President of the Glen Co., and Miss Conway, a disinterested witness.

In the middle of November, Mr. Ross and Mr. Gunnell, representing Mr. Paine, came up to the Glen offices to work on the books (p. 601). At that time Paine was a director of the company, and had been for two years (p. 581), and he knew about its contracts (p. 581), and at the time the assignments were made, and the application was made to Mr. Paine to advance the payroll, it was stated to Paine by his attorney, Charles J. Hardy, that from the examination of the books made by Mr. Paine's accountants, the condition of the company looked ver bad at that time (pp. 624, 626, 627). Gunnell and Ross were at the Glen Company's offices several days before (p. 624) and were there at the time of this conversation (p. 626). At this time Mr. Paine was told by his attorney, Charles J. Hardy, that in putting up this money, he might lose just that much more (p. 627)

and Hardy said that from the examination he had been able to get of the books, the condition of the company looked pretty bad (p. 627).

With this statement in his mind, of his own attorney, Mr. Paine took three assignments from the Glen Company, covering everything they owned, and every interest they had left in any contract (Exh. C. 7, C. 8, C. 9; pp. 723-731). He DID NOT TAKE AN ASSIGNMENT TO SECURE A PAYMENT OF $4,950. He grabbed everything in sight, with the obvious purpose and intent of depriving the other Glen creditors of anything. He held these assignments until the 9th of December, and having made up his mind that he had secured everything that he could get, he proceeded to wind up the company, and put it into bankruptcy. With this purpose in view, his attorney, Charles J. Hardy, directed him to assign the notes of the Glen Company which he held to persons named O'Connor, Ross and Hovey, to file a petition in bankruptcy against the Glen Company on December 10 (pp. 572, 574, 576—petition in evidence end of stated case). Mr. Paine does not remember whether these assignments of these notes were made the same day that he got his assignments (p. 574) but he admits that he got no consideration for the assignment of the notes (p. 577). He admits that the bankruptcy of the Glen Company was entirely handled for him by his attorney, C. J. Hardy (p. 576). The fact is that he made the officers of the Glen Company come down to his attorney's office, and sign a statement that the company was in fact insolvent, about which fact there can be very little dispute (p. 737).

Although Mr. Paine had a week previously taken an assignment of everything that the Glen Company had, just before the petition was filed, his representative saw to it that all the money in the

Glen Company bank accounts was drawn out at the direction of his attorney, and turned over to Marshall S. Hagar, who filed the petition in bankruptcy in Paine's behalf, with Paine's assignees as petitioning creditors, and who was retained to do so by Mr. Hardy, Paine's attorney (pp. 574, 576, 581, 600-601). These bank balances were drawn out just before the filing of the petition (p. 625). The check stubs of the Glen Company in evidence show this to be the fact (pp. 732-733-734).

The petition, in bankruptcy together with the petition upon which a receiver was appointed, are in evidence in the case, and marked Exhibits D 1, March 21, 1912, and Exhibits D 8, March 21, 1912.

It must practically be conceded that at this time the Glen Company was absolutely insolvent, and this is the fact as of December 1 and November 30th, when Mr. Paine got his assignments. The books show on the date of November 30th, that the Glen Company was insolvent by more than $36,904.90 (pp. 508-509-510, 617-618, Trustee's Exh. D 6, March 21, 1912; end of stated case). As a matter of fact, the company had no assets as of this date, had no sources of income other than the cash in the bank, and the percentages on the Newark, Paterson and New Dorp contracts (p. 633), and its office furniture and equipment. Mr. Paine on November 30th and December 1st, took all the interest remaining in any of these contracts, if there was any, and there was nothing left for the Receiver (p. 645, Trustee's Ex. D 10, March 21, 1912; pp. 744-745-746).

As pointed out under Point III of the brief submitted by the Frank Miller Lumber Company in opposition to the assignment of the Bank of the Town of Union, the facts show that in September, the Glen Company had no interest whatever

in any of these contracts, and whatever little interest it had, was wiped out by December 1st, and if there was any interest in any of these contracts, Mr. Paine saw to it that on this date he got it, and then to make sure that the company would have no assets at all, his attorney had drawn out all the little bank balances so that the Receiver, when he took charge, got nothing but the office furniture (Exh. D 10; pp. 744-5). The facts proved as to the condition of the company as of this date, the conduct of Mr. Paine in grabbing everything in sight, the fact that it had no assets at all remaining, and as appears in the record in this case, and as pointed out under Point III of the brief against the Bank of the Town of Union, had very great liabilities; show and there is no question, and there can be no question, that Mr. Paine took his assignments, and even if he put up $4,950, did so for the privilege of grabbing everything in sight, and with the obvious intention of hindering, delaying and defrauding the creditors of the Glen Engineering Construction Company, and with the absolute knowledge that the Glen Company was in fact insolvent, and that the assignments were made to him in contemplation of insolvency. In fact to show that there was both fraud, and that the assignments were made in contemplation of insolvency, and with knowledge of the insolvency, all that any one need show, is that Mr. Paine on November 30th and December first, took assignments of everything which the Glen Company might have, later in the week drew out every dollar that the Glen Company had in the bank, and then through his attorney, filed a petition in bankruptcy, and attempted to get away with it, by controlling the bankruptcy, until he was evicted by the indignant creditors (p. 747, line 10).

That the assignments to Mr. Paine were made in fraud of creditors, and in contemplation of insolvency, and with absolute knowledge of the insolvency on his part, is too plain for argument.

It is submitted that the assignments under which Mr. Paine claims must be set aside as invalid and void. It is ridiculous for Mr. Paine to come into this case and plead innocence and good faith. The whole transaction is stamped with bad faith and with fraud.

Mr. Paine can no more put himself in the shoes of the laborers than he can make black into white. The laborers' hands are clean; his are not. It is obvious from the record that he tried to get away with the assets of the company, and when he failed, he attempts by hypocritical methods to claim the small amount of cash he put up and to hide and gloss over his grasping conduct. Counsel for Paine ask if it is conceivable that if he knew the hopeless condition of the Company, he would advance $4,950 on December first. The answer to that question is obviously "yes." The consideration for such advance being the privilege granted to Paine to grab everything the Company had to secure himself and then to put it into bankruptcy, and he put it into bankruptcy himself, in order to control the situation, which he did do up to the time his representative was evicted (pp. 747-10). To allow him to prevail in this cause, would, as the Vice-Chancellor said in his memorandum, "involve a method of dealing with evidence and human nature contrary to sound rules of law and of common sense."

POINT I.

The validity of the assignment made to Mr. Paine and under which he claims, is to be determined by the law of the State of New Jersey, and not the law of the State of New York.

This subject is fully covered under Point I of the brief submitted by the Frank Miller Lumber Company against the Bank of the Town of Union, and the undersigned respectfully asks to refer to that Point here, and incorporates the same to avoid repetition.

POINT II.

The assignments made to Mr. Paine or any one of them, were made by the Glen Engineering Construction Company when it was in fact insolvent and when Mr. Paine knew as a fact that it was insolvent, and were made in contemplation of insolvency, and the fact that Mr. Paine paid a partial consideration therefor at the time, makes no difference. They are void under Section 64 of the New Jersey Corporation Act.

It has already been pointed out under the statement of facts above given, that Mr. Paine took the three assignments which he has in this case (Exhibits C7, C8 and C9) with knowledge of the condition of the company, after his own accountants had examined the books and with the obvious

purpose and intention of grabbing everything in sight, and when he was at the same time, and had been for two years, a director of the Company. It has been pointed out, too, that the assignments under which he claims were made by the officers of the Glen Company in contemplation of insolvency, and when the Company was in fact insolvent, and that Mr. Paine knew it. Under this state of facts, the assignments to Mr. Paine, or any one of them, under which he claims, must be set aside as void, even though he paid a partial consideration at the time.

Section 64 of the New Jersey Corporation Act covers the case. Under that section, an assignment by a corporation when insolvent, or in contemplation of insolvency, to a purchaser who parts with a present cash consideration, but who has notice of the insolvency, or contemplation of insolvency, is void as against creditors. It is particularly void against the Frank Miller Lumber Company, who was a creditor at the time to the extent of $10,955.14 (pp. 264, 266, 267) and the trustee in bankruptcy. The provisions of the statute are as follows:—

> "Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, neither the directors nor any officer or agent of the corporation shall sell, convey, assign or transfer any of its estate, effects, choses in action, goods, chattels, rights or credits, lands or tenements; nor shall they or either of them make any such sale, conveyance, assignment or transfer in contemplation of insolvency, and every such sale, conveyance, assignment or transfer shall be utterly null and void as against creditors; provided, that a bona fide purchase for a valuable consideration, before the corporation shall have actually suspended its ordinary business, by any person without

notice of such insolvency or of the sale being made in contemplation of insolvency, shall not be invalidated or impeached."

That under this statute assignments such as made to Mr. Paine are void, is clearly established in the following cases:

Cope *v.* C. B. Walton Co., 76 Atlantic, 1044; Affirmed Court of Errors and Appeals, 79 N. J. Eq 165

In this case an assignment was made for a present consideration, and to secure subsequent advances. The assignment was given to an individual who knew or should have known that the company was in fact insolvent at the time, and continued to advance money under the assignment to the amount of $6,866. The Construction Company failed, and there was a balance left on completion in the hands of the city. In a suit similar to the one in the case at bar, the question arose as to the rights of the assignee and the subsequent lienor. Chancellor Pitney, now Justice of the United States Supreme Court, held that though the assignment was given for a present consideration, even then it was void under the statute, because the assignee took it with knowledge of the insolvency of the company. The Court said:—

"On the subject of insolvency and notice to the assignee, Regina Music Box Co. *v.* Otto & Sons, (65 N. J. Eq., 582, aff'd 68 N. J. Eq., 801) is an authority. In that case it was held in the Court of Chancery, whose opinion was adopted by the Court of Errors and Appeals, that a security given by a corporation which is insolvent, or which contemplates insolvency for a present moving consideration, is valid if the person taking the security be with-

out notice of such insolvency, or contemplation of insolvency. The same doctrine was held by the Court of last resort in the case of Cogan *v.* Conover Mfg. Co. (69 N. J. Eq., 809-815). These cases are express authority to the effect that an assignment, although for a valid and presently moving consideration, if made by an insolvent corporation, so known to be by the assignee, or by a corporation contemplating insolvency, or with such contemplation known to the assignee, will be void as against creditors. Judged by these standards the assignment under review is invalid, and a decree must be awarded in favor of creditors. Insolvency is the only thing that dethrones the Allen assignment."

The attempt of counsel for Paine to distinguish this case at page 19 of their brief, line 10, shows what an impossible position they are in. That there was a present consideration in the Walton case, is obvious from the record and the decision; that the present consideration was valuable must also be conceded, and counsel for Paine, therefore, attempted to distinguish the case on the ground that the present consideration in the Walton case was not *cash* while it was cash, to wit: $4,950 in the case at bar. A valuable consideration can just as well be property as cash, and no distinction can be made upon that ground. Moreover, the present consideration in the Walton case was cash. The case is directly in point and is controlling.

The same interpretation of the statute was adopted in

Regina Music Box Co. *v.* Otto & Sons (1903), 65 N. J. Eq., 582, 56 Atl., 715.

To relieve a temporary embarrassment, Otto & Sons had put a mortgage on their property for

$115,000, of which $75,000 was to secure old debts and $40,000 to secure a present cash loan. The Court at page 595 said:—

> "Complainant's contention is that, at the time the mortgage was made, insolvency existed or was contemplated. Of the $115,000 secured, $40,000 was for cash paid at the time, and $75,000 was for pre-existing indebtedness. As to these there is this distinction: if a company be in fact insolvent, or if it contemplate insolvency, it cannot secure a pre-existing debt, whether the mortgagee have or have not notice. But if the mortgagee advance money to an insolvent company, or to a company contemplating insolvency, and take a mortgage at the time of the making of the advance, then, if he has no notice, his security will stand. * * *
>
> Section 64, does, indeed, make a distinction between the case of an antecedent debt and the case of a bona fide purchase for valuable consideration paid at the time by a person without notice. In the former case, if the company be in fact insolvent, or if it contemplate insolvency, the ignorance of the creditor is immaterial (Brouwer *v.* Harbeck, 9 N. Y., 594), while in the latter want of notice will protect him.

An appeal was taken from this decision and the judgment was affirmed in the Court of Errors and Appeals, which court adopted the opinion of Stevens, J., in the Court below.

A like conclusion was reached by Emery, V. C. in.

Russell & Erwin Mfg. Co. *v.* E. C. Faitoute Hardware Co., 62 Atl., 421.

In that case a transfer of book accounts had been made by an insolvent corporation for both a past and a present consideration. The transfer was

held to be void *in toto,* on two grounds: (1) because it was made after actual suspension of business; and (2) because the assignee had knowledge of the insolvency. At p. 424 of the opinion, the Vice-Chancellor said:—

> "The only part of the consideration for the December assignment, which was a present valuable consideration, were those accounts included in the November assignment still uncollected and continued in the respondent's security by the December assignment and the money (if any) in Beach's hands, received from the assigned accounts. The surrender and cancellation of the November assignments operated as a relinquishment of title thereunder to the accounts uncollected, and a release of claim thereunder to the proceeds of accounts collected and actually in the control or possession of the company. To this extent, but to this extent only, the consideration for the December assignment was a present valuable consideration, but as this surrender and cancellation, the valuable consideration paid, was made with notice of insolvency, the assignment made 'utterly void as against creditors' by the statute cannot be validated even to this extent. The statute of frauds, making conveyances with intent to defraud creditors utterly void and of no effect as against creditors, contains a proviso saving conveyances for a good consideration and bona fide to a grantee not having notice or knowledge of the fraud. Gen. St., pp. 1604, 1605, §§11, 12, 15. Under this proviso, a conveyance with notice is void, although full consideration be paid. Tantum *v.* Green (Err. & App., 1869) 21 N. J. Eq., 364, and if only a partial consideration is paid, the conveyance is also to be declared void *in toto.* Mead *v.* Combs (Zabriskie Ch., 1868), 19 N. J. Eq., 112; Holt *v.* Creamer (Van Fleet *v.* Ch., 1881) 34 N. J. Eq., 181, 187. The express language

of the sixty-fourth section of the Corporation Act controls the case."

To the same effect in the case of

Skirm *v.* Eastern Rubber Mfg. Co., 57 N. J. Eq., 179.

Deferred payment notes, bearing the personal endorsement of the president of the corporation, one Magowan (who was also the principal stockholder) had been given to certain creditors to cover their claims. On default of payment, these notes so endorsed, were surrendered for corporate bonds secured by mortgage. The Court said at page 185:

> "Nor do I see any substance in the insistence that the creditors who took these bonds were *bona fide* purchasers for valuable consideration. * * * In the second place, the evidence taken upon this point seems to show that the endorsement of Magowan could, with difficulty, be regarded as possessing any value. But the conclusive answer, in my judgment, is that when this mortgage was taken these creditors had knowledge of the previous career of this company and of its financial embarrassments and cannot be regarded as purchasers without notice."

and the claim of the trustee for the bondholders, that theirs was a preferred claim, was rejected.

That the above interpretation of the statute is correct, is clear from the plain wording of it. There are only three authorities which oppose this view, and they are decisions by Vice-Chancellor Gray, who seems to hold that where a present consideration is paid, the transaction will be

upheld for the amount of the present consideration.

Reed *v.* Helois Carbide Specialty Co., 64 N. J. Eq., 241;
Miller *v.* Gourley, 65 N. J. Eq., 237;
Barrett *v.* Perth Amboy Shipbuilding & Engineering Co., 73 N. J. Eq., 62.

All these cases, turn, however, upon the point that the transactions as far as present consideration are involved, were done in good faith, and with the obvious purpose of helping the assigning co-partners. These cases are absolutely distinguishable from the case at bar, because Mr. Paine did not act in good faith, but he acted in fraud of the creditors, and his assignments are void even including the present consideration that he paid. None of the decisions by Vice-Chancellor Grey, above cited, seem to intimate that a present consideration advanced in good faith with notice validates the transaction and they have not been sustained in this Court upon that ground, while this Court in the case of

Regina Music Box Co. *v.* Otto & Sons, *supra,*

in adopting the opinion of the Court below, construed the statute, and held that an assignment taken with notice was void even if a partial present consideration was paid.

POINT III.

The assignment to Mr. Paine is void under Sections 11, 12 and 13 of the General Statutes of the State of New Jersey known as the statutes against frauds and perjuries, pleaded in respondent Miller's answer.

It has already been pointed out that Mr. Paine took his assignments herein with full knowledge of the condition of the company, and just a week before the bankruptcy and after he had grabbed everything which the Company had, leaving nothing whatever for the Receiver or any of the creditors. The assignments are undoubtedly void as made with the intent to hinder, delay and defraud creditors. Sections 11 and 12 of the statute provides as follows:

> "11. Deeds of Gift and Conveyances in Trust of Goods, Etc., for Use of Person Making Them, Void.—That every deed of gift and every conveyance, transfer and assignment of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against creditors. (Rev. 1877, p. 446.)
>
> 12. Conveyances, Etc., and Judgments in Fraud of Creditors, Void as Against Persons Defrauded.—That every conveyance, grant or alienation of lands, tenements, hereditaments, or goods and chattels, or of any estate or interest therein, whether made by writing or otherwise, and every judgment and execution which have been or shall be contrived in fraud, covin or collusion, with intent to hinder, delay or defraud creditors and others of their lawful actions, debts, damages or demands, shall be deemed and taken (only as against

those persons, their executors, administrators or assigns, whose actions, debts, damages or demands are or may be hindered or defeated by such covinous or fraudulent devices and practices) to be utterly void and of no effect; any feigned consideration, color or other pretense to the contrary notwithstanding. (Rev. 1877, p. 466.)"

Under the construction given to the statutes above quoted, and the authorities, it is clear that the assignments to Mr. Paine are void thereunder.

Russell & Erwin Mfg. Co. *v.* E. C. Faitoute Co., 62 Atl., 421.

In that case the Court said:

"The statute of frauds making conveyances with intent to defraud creditors utterly void, and of no effect, as against creditors, contains a proviso saving conveyances for a good consideration and *bona fide* to a grantee not having notice or knowledge of the fraud. (Gen. st. §§11, 12, 15, pp. 1604-1605.) Under this proviso a conveyance with notice is void although full consideration be paid. Tantum *v.* Green (Err. & App., 1869; 21 N. J. Eq., 364), and if only a partial consideration is paid, a conveyance is also to be declared void *in toto*. Mead *v.* Combs, Zabriskie Ch. 1868, 19 N. J. Eq., 112; Holt *v. Creamer* (Van Fleet *v.* Ch., 1881), 34 N. J. Eq., 181, 187. The express language of the sixty-fourth section of the Corporation Act controls the case."

That the assignments to Mr. Paine and his representative Gunnell were made with intent to hinder, delay and defraud creditors, and with knowledge of the condition of the Company, cannot upon the statement of facts made at the opening of this brief be questioned, and such a fraudu-

lent conveyance to a person taking with notice, is void under the above statute, although a full consideration be paid, and this statute applies to the assignments of accounts.

Russell v. Erwin Mfg. Co. *v.* E. C. Faitoute Co., *supra;*
Hancock *v.* Elmer, 61 N. J. Eq., 558.

The words "goods" and "chattels" in the above statute include an assignment of a chose in action.

International Life Ins. Co. *v.* Haight, 35 N. J. Law, 279-282;
Terhune *v.* Gray's executors, 16 N. J. Law, 53-54.

The assignments to Mr. Paine are, therefore, void under the statute of frauds in New Jersey, as well as under the N. J. Corporation Act, even though a partial consideration was paid at the time.

Tantum *v.* Green, 21 N. J. Eq., 364;
Mead *v.* Combs, 19 N. J. Eq., 112;
Holt *v.* Creamer, 34 N. J. Eq., 181-187.

Mr. Paine, being a director of the Company, this transaction of his taking the assignments is void as well under the common law of the State of New Jersey.

Smith *v.* Perkins, 74 N. J. Law, 784;
Montgomery *v.* Phillips, 53 N. J. Eq., 203.

The transaction as pointed out above was obviously an attempt on the part of Mr. Paine and the other directors of the Company to prefer him as a creditor just before the bankruptcy, which is condemned in the above cited cases.

POINT IV.

Even if the Law of New York could be applied in determining the validity of Mr. Paine's assignments, it is void under Section 66 of the Stock Corporation Law of the State of New York.

Section 66 of the Stock Corporation Law of New York is stated in full under Point IV of this brief submitted by the undersigned against the assignment to the Bank of the Town of Union. Under the authorities there cited, even when a consideration is paid, unless the same is in the hands of a purchaser for a valuable consideration, without notice, an assignment or a transfer of corporate property is void. The statute says:

> "No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice."

Throop *v.* H. & L. Co., 125 N. Y., 530

and cases cited under Point IV of the brief against the Bank of the Town of Union.

Montague *v.* Hotel Gotham Co., 208 N. Y., 442

in which the Court held that payment of its entire assets by an insolvent stock corporation to a single creditor while largely indebted to others constitutes an illegal preference under Section 66 Stock Corporation law.

Under the statute of New York, as under the statute of New Jersey, for an assignment such as in the case at bar to be sustained, even where a present consideration is given, it must appear that the assignee took without notice, and in good faith.

That does not appear from the facts in the case at bar, but the contrary is clearly established. The assignments are, therefore, void under Section 66 of the Stock Corporation Law of New York.

POINT V.

Even if the Law of New York is applied in determining the validity of the assignments to Mr. Paine, they are all void even though a partial present consideration was paid under Section 35 of the Personal Property Law of the State of New York.

Under the facts above stated, it is clear if there ever was a case where an attempt was made by officers of a corporation to have the corporation make a transfer for the purpose of hindering, delaying and defrauding creditors of that corporation, this is such a case. Such transfers are void under Section 35 of the Personal Property Law of the State of New York, which is pleaded in the defendant Millers' answer. Section 35 of the Personal Property Law of the State of New York reads as follows:

> "Transfers and Charges with fraudulent intent. Every transfer of any interest in personal property or of the income thereof and every charge on such property or income, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced or decree or judgment suffered with such intent is void as against every person so hindered, delayed or defrauded."

Under this statute, assignments such as those made to Mr. Paine in the case at bar, are absolutely void, even though full consideration has been paid.

Concord Construction Co. *v.* Plante, 137 App. Div., 243.

In that case an assignment was made similar to the assignment in the case at bar, and it was held absolutely void under the above quoted statute, as against subsequent lienors, who were creditors at the time, as is the fact with regard to the Frank Miller Lumber Company, who was a creditor for $10,955.14 at the time of the assignments (pp. 266-667) to Mr. Paine. In that case the Court said:

> "Not only this, but the only conclusion which I am able to draw from the undisputed facts is that the assignment was given and accepted with the intent of hindering and defrauding the lienors, and the trial court so found. It was, therefore, void as to them even if his voluntarily paying the note constituted a consideration. (Greenwald *v.* Wales, 174 N. Y., 140; Starin *v.* Kelly, 88 N. Y., 418). And for that reason the same was properly set aside. (N. Y. Lumber Co. *v.* 73rd Street Building Company, 5 App. Div., 87; Gross *v.* Daly, 5 Daly, 540; Linnermen *v.* Bieber, 85 Hun, 477, Tisdale *v.* Moore, 8 Hun. 19)."

It is not necessary in the case at bar for the contesting lienors to give direct evidence of fraud, although that has been done in this case. Fraud is rarely susceptible of direct proof, and it may be inferred from the facts and circumstances which warrant the conclusion.

Greenwald *v.* Wales, 174 N. Y., 140, 145.

In the case at bar, no other conclusion can be drawn from the facts. The presumption is that

the Glen Company and Mr. Paine intended the natural consequences of their acts, and if the effect of the assignments was to deprive the creditors of the Glen Company of all right against any of the assets of that company, which is the fact, and all means of collecting their debts, it will be presumed that that was the motive or object with which the assignments were given.

Greenwald *v.* Wales, *supra;*
Bailey *v.* Fransioli, 101 App. Div., 140;
Hitchcock *v.* Cowperthwait, 134 App. Div., 617.

And the fact that a present valuable consideration was paid by Mr. Paine is not inconsistent with the fact that the transfer of the property was made with the intent to defraud.

Greenwald *v.* Wales, *supra;*
Billings *v.* Russell, 101 N. Y., 226;
Starin *v.* Kelly, 88 N. Y., 421;
Vogodes *v.* Beakes, 38 App. Div., 380;
N. Y. Ice Co. *v.* Cousins, 23 App. Div., 560-564;
Howe *v.* Summers, 22 App. Div., 417-419;
Baldwin *v.* Short, 125 N. Y., 553-559;
Woods *v.* Van Brunt, 6 App. Div., 220-221;
Levy *v.* Hamilton, 68 App. Div., 277-280.

In the case of

Billings *v.* Russell, *supra,*

the Court said:—

"From this review of the authorities it seems clear that, where there is an actual intent to defraud, no form in which the transaction is put can shield the property so transferred from the claims of creditors, even

though a full and adequate consideration be received for the same."

The fact that Mr. Paine paid a partial consideration for the assignments, makes no difference. The assignments under the statute of frauds above quoted are void *in toto,* and the assignee cannot recover even the consideration advanced.

In

Baldwin *v.* Short, *supra,*

at page 559, the Court said:—

"The contention that the conveyance to Mrs. Short may be sustained to the extent of the adequate and honest part of the consideration, is full answered by the authorities which hold that where the deed is fraudulent against creditors, it is wholly void and cannot stand to any extent as security or indemnity. (Boyd *v.* Dunlap, 1 Johns. Ch., 478; Dewey *v.* Moyer, 72 N. Y., 70; Billings *v.* Russell, 101 id., 226). A different rule would put a premium upon fraud. Almost invariably some honest consideration is made the agency for floating a scheme of fraud against creditors, and if that may always be saved, nothing is lost by the effort and the temptation to venture it is increased. We are thus unable to find in the record any error which will justify a reversal. Indeed, since the ground of recovery against the defendants rests almost wholly upon the single fact of a false and fraudulent consideration, fabricated by the joint act of both grantor and grantee, and distinctly admitted by each to have been without an honest foundation, the questions of evidence raised can hardly be said to have affected the ultimate result."

This rule has been approved by the Appellate Division of the Second Department in the cases of

Levy *v.* Hamilton, *supra;*
Woods *v.* Van Brunt.

To the same effect is

Mandeville *v.* Avery, 124 N. Y., 376-387,

in which the Court, at page 387, states:—

> "He cannot, therefore, assert against the claim of other creditors, the honesty of his own debt. The mortgage being void, all the proceedings under it were void, and although he may possess an honest claim, he cannot retain property obtained by him under a fraudulent mortgage against a pursuing creditor. The proceedings taken to collect the debt are unlawful."

POINT VI.

The cases cited by counsel for Mr. Paine in support of his claim are not in point.

Counsel for Mr. Paine cites the case of

Bank *v.* Commercial Travelers Home Assn., 108 App. Div., 78; 185 N. Y., 575;

and the case of

Converse *v.* Sharp, 161 N. Y., 571,

and other cases.

The lien creditors do not question the propositions as to the law of New York laid down in these cases. They, however, are not in point here. There is no good faith in this case. The facts establish that Mr. Paine was guilty of bad faith; that he took his assignments with notice of the

condition of the company, and with the obvious purposes and intention of hindering, delaying and defrauding the creditors of the company. That point is not covered by the cases cited by counsel for Mr. Paine. They are not in point, or controlling upon the case at bar.

POINT VII.

The counsel fees were properly granted and are reasonable in amount.

CONCLUSION.

Upon the above facts and the authorities cited it is clear that the assignments to Martin S. Paine are void under Section 64 of the New Jersey Corporation Act, and under the statute of Frauds and Perjuries of the State of New Jersey, and even if the New York law is applied thereto, they are void under Section 66 of the Stock Corporation Act of the State of New York, and Section 35 of the Personal Property Law of the State of New York, and the decree should, therefore, be affirmed with costs and a reasonable counsel fee.

Respectfully submitted,
DAVID F. EDWARDS,
Solicitor and of counsel for Deft.,
Frank Miller Lumber Company.

CHARLES THADDEUS TERRY.
EDWARD WARD MCMAHON,
Of Counsel.

FRANK H. HALL,
Of Counsel for Charles L. Strong,
Trustee in Bankruptcy.

INDEX.

PAGE

Bill of Complaint (Filed, Feb. 20, 1911) 1
Answer of Joseph Sharpe Construction Co. (Filed, March 10, 1911) 21
Answer of Frederick G. Ebsary (Filed, March 27, 1911) 35
Answer of Herringbone Metal Lath Company (Filed, April 20, 1911) 48
Answer of Frank Miller Lumber Company (Filed, May 13, 1911) 51
Amended Answer of Frank Miller, Trading as Miller Lumber Company (Filed, May 15, 1912) 62
Answer of Defendant Martin S. Paine (Filed, May 29, 1911) 79
Answer of Charles L. Strong, Trustee of Glen Engineering Construction Company (Filed, May 31, 1912) 91
Answer of Defendant First National Bank of Town of Union, N. J. (Filed, June 12, 1911) 97
Amended Answer of Martin S. Paine (Filed, July 24, 1911) 105
Answer of Russell Holmes, et al. (Filed, Jan. 24, 1912) 116
Answer of The Board of Education of The City of Paterson (Filed, February 2, 1912) 122
Answers 131
Order of Reference (Filed, Sept. 9, 1911) 132
Bill of Complaint of Frank Miller Lumber Company (Filed, March 6, 1911) 133

New Jersey State Library

PAGE

Bill of Complaint of Cortlandt Engineering Company (Filed, March 8, 1911) 157
Answers to Bills of Complaint 158
Case 159
Memorandum of Conclusions (Filed, February 14, 1914) 656
Final Decree (Filed, Nov. 7, 1913) 684
Notice of Appeal of Martin S. Paine (Filed, Nov. 20, 1913) 691
Petition of Appeal of Martin S. Paine (Filed, Dec. 10, 1913) 694
Answer of Frank Miller, Trading as Frank Miller Lumber Company, to Petition of Appeal of Martin S. Paine (Filed, January 10, 1914) 700
Answer of Defendant-Respondent, The First National Bank of the Town of Union (Filed, January 19, 1914) 702
Notice of Appeal of The First National Bank of the Town of Union (Filed, Nov. 20, 1913) 704
Petition of Appeal of The First National Bank of the Town of Union, Defendant-Appellant (Filed, Dec. 9, 1913) 706
Answer of Defendant-Respondent, Martin S. Paine (Filed, Jan. 9, 1914) 712
Answer of Frank Miller, Trading as Frank Miller Lumber Company, to Petition of Appeal of The First National Bank of the Town of Union (Filed, Jan. 10, 1914) ... 714
Answers to Appeals 715
Notice of Argument—Martin S. Paine 716
Notice of Argument—First National Bank of Union 717

TESTIMONY.

		PAGE
James F. Dunphy,		
	Direct	162
	Recalled, direct	223
	Recalled, direct	241
	Recalled	242
James J. Curran,		
	Direct	174
	Recalled, direct	241
William T. Fanning,		
	Direct	179
	Cross	182
	Direct	193
	Recalled, direct	195
	Recalled, cross	196
	Recalled, direct	197
	Recalled, direct	199
	Recalled, direct	201
	Recalled, direct	202
	Direct	205
	Cross	209
	Recalled, direct	634
John Agnew,		
	Direct	209
	Cross	211
Fred B. Haley,		
	Direct	212
Joseph W. Sharpe,		
	Direct	217
Leroy F. Duke,		
	Direct	225
	Cross	227
Charles Van Ness,		
	Direct	229
	Recalled, direct	279
	Recalled, cross	280

PAGE

Frederick C. Wendelburg,
Direct 230

Joseph Dujat,
Direct 231

James Healey,
Direct 235
Cross 238

Charles Galencia,
Direct 239

Joseph Mazzella,
Direct 240

Frank G. Funkie,
Direct 243
Resuming, direct 264

Elliott P. Livermore,
Direct 248

Samuel G. McKiernan,
Direct 267
Cross 270

Frederic Benzler,
Direct 271

William Van Ness,
Direct 277
Cross 278

Frank W. Shuyter,
Direct 281
Cross 284

Fred G. Ebsary,
Direct 286

John T. Sutphen,
Direct 291

George B. Van Nest,
Direct 292

PAGE

M. William Hilbert,

Direct 293
Cross 305
Re-direct 342
Cross 344, 349
Re-direct 346

Frederick J. Stuhr,

Direct 350
Cross 353

John Conway,

Direct 354
Cross 371
Re-direct 391

Albert Hoffmann,

Direct 392
Cross 397

Leon L. Darling,

Direct 404
Cross 407

Smith Alford,

Direct 409
Recalled, direct 447
Recalled, cross 458
Recalled, re-direct 459
Cross 474
Resuming 512
Resuming 569
Recalled, direct 622
Recalled, re-direct 625
Recalled, cross 628

Marie Conroy,

Direct 410
Cross 416
Recalled, direct ...525, 596
Cross 538, 597
Recalled, direct 600
Recalled, cross 602

PAGE

Robert D. Argue,
Direct 433
Cross 443
Charles Agnew,
Direct 518
Cross 519
Martin S. Paine,
Direct 553
Cross 562
Resuming, cross 571
Re-direct 583, 590
Cross 590, 591
Re-cross 595
Morgan Gribble Wake,
Direct 604
Cross 618
Recalled, direct 651
Frank H. Hall,
Direct 638
Recalled, direct 642

EXHIBITS.

Exhibit C-4 718
Exhibit M. S. P. D-2 720
Exhibit Trustee, D-1 721
Exhibit S. & M., D-1 721
Exhibit T. of U., D-4, March 7, 1912 722
Exhibit C-7 723
Exhibit C-8 727
Exhibit C-9 729
Exhibit F. M. L. Co., D-12 732
Exhibit F. M. L. Co., D-15 733
Exhibit F. M. L. Co., D-14 733
Exhibit F. M. L. Co., D-11 733

PAGE

Exhibit F. M. L. Co., D-6 733
Exhibit F. M. L. Co., D-17 734
Trustee Exhibit D-7 734
Trustee Exhibit D-8 738
Trustee Exhibit D-10 744
Exhibit T. of U., D-1 750
Exhibit Trustee, D-2 750
Exhibit T. of U., D-2 751
Exhibit F. M. L. Co., D-3 751
Exhibit F. M. L. Co., D-5 752
Exhibit F. M. L. Co., D-1 753
Exhibit Trustee, D-7 753
Exhibit F. M. L. Co., D-2 754
Exhibit Trustee, D-6 754
Trustee Exhibit D-3 755
Trustee Exhibit D-4 756
Trustee Exhibit D-8 757
Trustee's Exhibit D-5 764
Exhibit F. M. S. Co., D-20 767
Trustee's Exhibit D-9 768
Trustee's Exhibit D-10 769
Exhibit F. M. L., D-22—(Summary) 770
Exhibit (at end of book) .....
Trustee's Exhibit D-2 (at end of book) .....
Trustee's Exhibit D-5 (at end of book) ....
Trustee's Exhibit D-6 (at end of book) ....

Yrn 203 (end of book)

Bill of Complaint (Filed, Feb. 20, 1911).

In Chancery of New Jersey.

To his Honor, Mahlon Pitney, Chancellor of the State of New Jersey:

Complaining shows unto your Honor, your orator John Agnew Company, a corporation created by, and existing under, the laws of the State of New Jersey:

That on or about the second day of July, nineteen hundred and nine, The Board of Education of the City of Paterson, in the County of Passaic, a corporation of this State vested with the power and privilege to enter into contracts for the erection of school houses in the City of Paterson, in the County of Passaic, entered into a written contract with the Glen Engineering Construction Company, a corporation of the State of New York, wherein and whereby the said Glen Engineering Construction Company agreed to erect and finish all mason, carpenter, painting, structural steel and iron, and electrical works on the new high school building to be erected on the site bounded by Hamilton Street, Lee Place and De Grasse Street, in the City of Paterson and known and designated as the Paterson High School, within four hundred working days from the date of said contract, according to the drawings and specifications made by William T. Fanning, architect, copies of which are annexed to the said contract and formed part thereof, for

and in consideration of the sum of Two hundred and eighty-five thousand four hundred and twenty-three dollars ($285,423.00) payable as follows: that is to say, as the work progressed the architect should give a certificate to the said The Board of Education, in writing, certifying the value of the work performed, and The Board of Education should pay eighty-five per cent. (85%) of the amount so certified, retaining fifteen per cent. (15%) until after the said high school building should be completed and accepted, a copy of which contract is hereto annexed to which your orator respectfully refers.

That your orator, thereafter, to wit, in the month of July, nineteen hundred and nine agreed to furnish materials to the said Glen Engineering Construction Company, consisting of brick, cement, lime, and plaster to be used in the erection of the said high school building, on orders given day by day, and, subject to previous quotation of prices.

That the said Glen Engineering Construction Company in accordance with its said contract with the said Board of Education did enter upon the construction of the high school building and did supply certain labor and materials for the construction of same; that thereafter the said Glen Engineering Construction Company abandoned the construction of the said building and its said contract and was in the month of December, nineteen hundred and ten, adjudged a bankrupt by the United States District Court for the Southern District of New York, and thereafter, to wit, on the twelfth day of December, nineteen hundred and ten, one Benjamin Barker, was appointed ancillary receiver of the said Glen Engineering Construction Company by the United States District Court

for the District of New Jersey; that at the time of the abandonment of the contract as aforesaid there was due to the said Glen Engineering Construction Company under said contract a sum in excess of Eighty thousand dollars, and still a further sum will be due to it upon the completion and acceptance of said building, but the exact amount now due or to become due under said contract your orator is not informed.

That your orator pursuant to the agreement between it and the said Glen Engineering Construction Company as aforesaid has supplied materials, consisting of brick, cement, lime and plaster upon orders received by it from the Glen Engineering Construction Company, day by day, in accordance with their said agreement for which the said Glen Engineering Construction Company promised to pay, and that materials so supplied were actually used in the erection of the said high school building; that there is now due to your orator from the said Glen Engineering Construction Company for brick, cement, lime and plaster used in the erection of said school building, after deducting all just credits and offsets, the sum of Eleven thousand nine hundred and thirty-three dollars and twenty-nine cents ($11,933.29), with lawful interest thereon.

That your orator has frequently demanded payment of said sum so due to your orator as aforesaid, from the said Glen Engineering Construction Company, and that said Glen Engineering Construction Company has failed to pay the same, or any part thereof; that on the twenty-eighth day of November, nineteen hundred and ten, before the completion of said building, and before the said Glen Engineering Construction Company was ad-

judged a bankrupt as aforesaid, your orator served a notice, duly verified by the oath of its president, upon the president of The Board of Education of the City of Paterson in the County of Passaic and did also on the same day serve a notice duly verified, upon the Comptroller of the City of Paterson and upon the Treasurer of the City of Paterson, being the financial officers of said city a copy of which notices is hereto annexed and to which your orator respectfully refers; that your orator also, at the same time, filed with the financial officer of the said city a bond in a sum equalling twenty per cent. of the amount claimed in said notice which sum had been fixed by such financial officer as the amount of such bond and which bond is conditioned for the payment of legal interest for the time the said moneys may be withheld from the said contractor in the event that your orator does not perfect its lien by instituting an action or that the decree be made in favor of the contract or in any such action, and conditioned further for the payment of the costs of any such actions if the judgment be for the contractor.

Your orator charges that by virtue of the acts and allegations aforesaid your orator has acquired a lien under and by virtue of an act of the legislature of this State, entitled, "An Act to secure the payment of laborers, mechanics, merchants, traders, and persons employed or furnishing materials toward the performance of any work in public improvements in cities, towns, townships and other municipalities in this State," approved March thirtieth, eighteen hundred and ninety-two, and the acts amendatory thereof and supplementary thereto, on the moneys due and to grow due under the contract between the said Glen Engineering

Construction Company and said The Board of Education of the City of Paterson, in the County of Passaic, as aforesaid.

That your orator is informed and believes it to be true that a written agreement was made between the said Glen Engineering Construction Company and the First National Bank of the Town of Union, New Jersey, bearing date the fifteenth day of September, nineteen hundred and ten, purporting to assign, the retained percentage due and owing to the said Glen Engineering Construction Company by the said Board of Education, to secure the payment to the said bank of the amount due it by the said Glen Engineering Construction Company, which agreement was filed with the clerk of the Board of Education on or about the twenty-second day of September, nineteen hundred and ten; but your orator charges that the said alleged assignment, if a lien at all upon the moneys now due or to become due to the said Glen Engineering Construction Company upon the contract aforesaid, is subsequent to the lien of your orator upon said money; that your orator is also informed and believes it to be true that another written agreement was made between the said Glen Engineering Construction Company and Matthew S. Payne, bearing date the first day of December, nineteen hundred and ten, purporting to assign among other things all moneys due and to become due to it under the said contract with the said The Board of Education, which assignment is given as collateral security for moneys advanced by him for the benefit of the said Glen Engineering Construction Company, and for such moneys as he may have thereafter advanced to it; and which assignment was filed with the clerk of the Board

of Education, on the ninth day of December, nineteen hundred and ten; but your orator charges that said alleged assignment, if a lien at all upon any moneys now due or to become due to said Glen Engineering Construction Company upon the contract aforesaid, is subsequent to the lien of your orator upon said moneys; that your orator is informed and believes it to be true, that another written agreement was made between said Glen Engineering Construction Company and the said Matthew S. Payne, bearing date the first day of December, nineteen hundred and ten, purporting to assign, as collateral security all moneys due or to become due under the said contract between the said company and the said The Board of Education of the City of Paterson to which the said company was entitled under the said contract for work done and materials furnished during the month of November, nineteen hundred and ten; and which assignment was filed with the clerk of The Board of Education on the ninth day of December, nineteen hundred and ten; but your orator charges that said alleged assignment if a lien at all upon any moneys now due or to become due to the said Glen Engineering Construction Company upon the contract aforesaid, is subsequent to the lien of your orator upon said moneys; that your orator is informed and believes it to be true that another written agreement was made between said Glen Engineering Construction Company and Edward Gunnell bearing date the thirtieth day of November, nineteen hundred and ten, purporting to assign Twenty-one thousand dollars of the moneys to become due to the said Glen Engineering Construction Company under its said contract with The Board of Education of the City of Paterson;

and which assignment was filed with the clerk of The Board of Education on the ninth day of December, nineteen hundred and ten; that your orator charges that said alleged assignment if a lien at all upon any moneys due or to become due to said Glen Engineering Construction Company upon the contract aforesaid is subsequent to the lien of your orator to said money; that your orator is also informed and believes it to be true that the following claims were also served on The Board of Education in the City of Paterson, in the County of Passaic, and upon the financial officer of said city, but whether they were served before or after your orator's said notice it is not informed, to wit: James Healey, Seven hundred and sixty-one dollars and twenty cents; Frank Miller doing business as Frank Miller Lumber Company, Ten thousand nine hundred and fifty-five dollars and fourteen cents; Herringbone Metal Lath Company, Seven hundred and sixty-one dollars and twenty-five cents; Joseph Sharpe Construction Company, Three thousand and thirty-seven dollars; Cortlandt Engineering Company, Two thousand five hundred and thirty-seven dollars; Fred G. Ebsary, Nine hundred dollars; Architectural Plastering Company, One thousand six hundred and eighty dollars; American Lumber Company, Two hundred and forty-two dollars and ninety cents; George A. Myers & Company, Five hundred and twenty-three dollars and ninety-six cents; Sutphen & Myer, a partnership consisting of John S. Sutphen and Charles R. Myer, Twenty-four hundred dollars; Ingalls Stone Company, Two thousand one hundred and fifteen dollars; McKiernan & Bergin Company, One thousand one hundred and forty-eight dollars and eighty cents; J. A. Van Winkle Co., Three hun-

dred and thirteen dollars and thirty-seven cents; Louis Pasquali, trading as Italian Marble Mosaic Company, Two thousand one hundred and fourteen dollars and thirty-nine cents; James W. Johnson, Two hundred forty-four dollars and twenty cents; E. Ricker & Son Company, One thousand six hundred and fifty-eight dollars and sixteen cents; P. S. Simmons Painting Company, Four hundred and ninety-nine dollars and sixty cents; that your orator is also informed and believes it to be true that the following claims for labor were also served upon the said The Board of Education of the City of Paterson, in the County of Passaic and upon the financial officers of said City, whether they were served before or after your orator's said notice it is not informed, to wit: Martin Troost, Six hundred and twenty-six dollars and seventy-five cents; Russell Holmes, Twenty-four dollars and fifty cents; Antonio Deets, Twelve dollars and seventy-nine cents; Fred Benzten, Twelve dollars and seventy-one cents; Hugh McPherson, Twenty-eight dollars; Thomas W. Ward, Twenty-six dollars and sixty cents; Peter Magie, Ten dollars and twelve cents; David Hawthorne, nine Dollars and ninety-five cents; James Gallagher, Nineteen dollars and sixty cents; Angelo Touche, Nineteen dollars and sixty cents; James O'Leary, Twenty dollars and thirty cents; James Wehr, Thirty-three dollars and sixty cents; William Noble, Thirty-three dollars and sixty cents; John McMullen, Thirty-three dollars and sixty cents; John Van Blarcom, Twenty-six dollars and sixty cents; Arthur Daniels, Twenty-eight dollars and eighty cents; William H. Ogaethry, Twenty-six dollars and sixty cents; James Ferguson, Twenty-eight dollars; George Cunningham, Twenty-eight dollars; James Gordon,

Twenty-eight dollars; George Van Blarcom, Twenty-six dollars and sixty cents; Thomas Handbridge, Twenty-six dollars and sixty cents; John Columbus, Twelve dollars and seventy-nine cents; Thomas Cummings, nineteen dollars and sixty cents; Alexander Crawford, Jr., Thirty-three dollars and sixty cents; John F. Rose, Twenty-six dollars and sixty cents; Charles Van Ness, Fifty-five dollars; William Van Ness, Fifty-five dollars; Walter Venable, Thirty-four dollars and fifty cents; William H. Rea, Thirty-three dollars and sixty cents; James Kingsland, Thirty-three dollars and sixty cents; Edward Harrison, Thirty-three dollars and sixty cents; Alexander Crawford, Sr., Thirty-nine dollars and twenty cents; Robert Maxwell, Twenty-six dollars and sixty cents; Otto Temple, Twenty-six dollars and sixty cents; Thomas Moran, Thirteen dollars and eighteen cents; Leonard Brink, Twenty-six dollars and sixty cents, and Welcome R. Steinmetz, Forty-two dollars and fifty cents.

And your orator further shows, that the said fund in the possession of the said Board of Education of the City of Paterson is, by virtue of the bankruptcy proceedings aforesaid and the appointment of the said Benjamin Barker ancillary receiver of the said Glen Engineering Construction Company, in the custody of the said United States District Court for the District of New Jersey, and that upon the petition of your orator the said United States District Court for the District of New Jersey did, by order made on the twentieth day of February, nineteen hundred and eleven, grant leave to your orator to foreclose its said lien and enforce its said claim against the said fund by suit in this court.

In consideration of the premises and to the end that the defendants may make full answer, without oath, to the premises and make discovery of the amount of money due and to grow due on said contract between the said The Board of Education of the City of Paterson, in the County of Passaic, and said Glen Engineering Construction Company, and the date of service of notices and filing of the bonds, and amount due on said several assignments and claims and that an account may be taken on the direction of this Court of the amount due to your orator and defendants on their said debts, and that the said The Board of Education of the City of Paterson, in the County of Passaic, and The Mayor and Aldermen of the City of Paterson, or either of them may be decreed to pay over to your orator its said debt out of the moneys due and to grow due on said contract between said The Board of Education of the City of Paterson, in the County of Passaic and said Glen Engineering Construction Company, and that your orator may have such other relief in the premises as may be equitable.

May it please your Honor, the premises considered, to grant unto your orator the State's writ of subpoena issuing out of and under the seal of this Honorable Court directed to The Board of Education of the City of Paterson, in the County of Passaic, and The Mayor and Aldermen of the City of Paterson, Glen Engineering Construction Company, Benjamin Barker Receiver, The First National Bank of the Town of Union, Matthew S. Payne, Edward Gunnell, James Healey, Frank Miller doing business as Frank Miller Lumber Company, Herringbone Metal Lath Company,

Joseph Sharpe Construction Company, Cortlandt Engineering Company, Fred G. Ebsary, Architectural Plastering Company, American Lumber Company, George A. Myers & Company, John S. Sutphen and Charles R. Myer, trading and doing business as Sutphen & Myer, Ingalls Stone Company, McKiernan & Bergin Company, The J. A. Van Winkle Company, Louis Pasquali, trading as Italian Marble Mosaic Company, James W. Johnson, E. Ricker & Son Company, P. S. Simmons Painting Company, Martin Troost, Russell Holmes, Antonio Deets, Fred Benzten, Hugh McPherson, Thomas W. Ward, Peter Magie, David Hawthorne, James Gallagher, Angelo Touche, James O'Leary, James Wehr, William Noble, John McMullen, John Van Blarcom, Arthur Daniels, William H. Ogaethry, James Ferguson, George Cunningham, James Gordon, George Van Blarcom, Thomas Handbridge, John Columbus, Thomas Cummings, Alexander Crawford, Jr., John F. Rose, Charles Van Ness, William Van Ness, Walter Venable, William H. Rea, James Kingsland, Edward Harrison, Alexander Crawford, Sr., Robert Maxwell, Otto Temple Thomas Moran, Leonard Brink and Welcome R. Steinmetz, commanding them and each of them on a day to be appointed therein, to be and appear in this Court and make answer to the premises and abide by such decree as this Court may make therein.

And your orator will ever pray &c.

WILLIAM B. GOURLEY,
Solicitor for and of counsel with Complainant.

Contract, Board of Education and Glen Co.

ARTICLES OF AGREEMENT, made the second day of July, in the year of our Lord, one thousand nine hundred and nine, between the Board of Education of the City of Paterson, in the County of Passaic, a corporation of the State of New Jersey, of the first part and Glen Engineering Construction Company, a corporation of the State of New York having its principal office in the City of New York, in the County of New York and State of New York, of the second part:

WITNESSETH

The said party of the second part does hereby for itself and its successors covenant, promise and agree to and with the said party of the first part, its successors or assigns, that it, the said party of the second part, its successors shall and will for the consideration hereinafter mentioned within four hundred working days from the day of the date hereof well and sufficiently erect and finish all of the mason, carpenter, painting, structural steel and iron, and electrical works (the mason work aforesaid to include the granite alternate proposition No. 2 mentioned in the mason specifications) of the new high school building to be situate on the lands of the party of the first part fronting on Hamilton, Lee Place and De Grasse Streets, in the City of Paterson, New Jersey, agreeably to the drawings and specifications made by William T. Fanning, architect, and hereunto annexed, which drawings and specifications form and are to be considered part of this contract, within

the time aforesaid, in a good workmanlike and substantial manner, under the direction of the said architect, to be testified by a writing, or certificate, under the hand of the said architect, as hereinafter mentioned, and, also shall and will find and provide such good, proper and sufficient materials of all kinds whatsoever, as shall be proper and sufficient for the completion and finishing of all the works aforesaid particularly mentioned in the specifications aforesaid for the sum of Two Hundred and eighty-five thousand, four hundred and twenty-three dollars.

And the said party of the second part further agrees that in case it is found necessary to increase the depth of the foundation walls from that indicated on the drawings, it will do all the excavating, filling and concreting for that purpose at the price of six dollars and fifty cents for each additional cubic yard of concrete so required.

And the said party of the first part does hereby for itself and its successors covenant, promise and agree to and with the said party of the second part, its successors, that it, said party of the first part, its successors, shall and will in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part as specified herein, well and truly pay or cause to be paid and the said party of the second part, its successors, the said sum of Two hundred and eighty-five thousand, four hundred and twenty-three dollars, lawful money of the United States of America, in manner following, that is to say, the architect shall from time to time as the work progresses certify to the party of the first part, in writing, the value of the work performed by the

party of the second part under this contract to the date of such certificate and thereupon the party of the first part shall pay to the party of the second part eighty-five per centum of the amount so certified, retaining, at all times, fifteen per centum of the amount so certified until thirty days after the said school building is completed, ready for occupancy and accepted, at which time, upon the presentation to the party of the first part of a final certificate, in writing, by the architect to the effect that this said contract has been fully completed in all details the said fifteen per centum so retained shall be paid by said party of the first part.

It is distinctly understood, that the aggregate of the payments hereunder during the progress of said work shall not, at any time, exceed eighty-five per centum of the value of the work done under this contract as certified by the architect as aforesaid.

And the said party of the second part does hereby further covenant and agree to and with the party of the first part to make good any defects arising or discovered in its work within two years after the completion of the same and acceptance thereof by said architect whether from shrinkage, settlements or faults in labor or material, except as otherwise provided in the specifications aforesaid.

And it is hereby further agreed by and between the parties hereto, in addition to any and all clauses in the specifications hereto annexed contained, as follows:

1. The specifications and the drawings are intended to co-operate so that any works exhibited

in the drawings and not mentioned in the specifications or vice versa are to be executed the same as if they were mentioned in the specifications, and set forth in the drawings to the true meaning and intentions of the said drawings and specifications, without any extra charge whatsoever. Copies thereof certified by the architect to be true copies shall be furnished to the contractor.

2. The party of the second part, at its own proper costs and charges, is to provide all manner of materials, labor, scaffolding, implements, moulds, models, and cartage of every description for the due performance of the several erections.

3. Should the party of the first part, at any time, during the progress of said building, request any alterations, deviations, additions or omissions from the said contract it shall be at liberty to do so and the same shall in no way affect or make void the contract, but will be added to or deducted from the amount of the contract as the case may be by a fair and reasonable valuation.

4. Should the party of the second part at any time during the progress of said work refuse or neglect to supply a sufficiency of materials or workmen the party of the first part shall have power to provide materials and workmen after three days' notice, in writing, being given to finish the said work and the expense shall be deducted from the amount of the contract.

5. Should any dispute arise respecting the true construction or meaning of the drawings or specifications the same shall be decided by William T.

Fanning and his decision shall be final and conclusive, but should any dispute arise respecting the true value of the extra work or of the work omitted the same shall be valued by two competent persons one employed by each of the parties hereto and those two shall have power to name an umpire whose decision shall be binding on all parties.

6. The party of the first part shall not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said works or any part or parts thereof respectively or for any materials or other things used and employed in finishing and completing the same.

7. No alterations or extra work shall be done without a formal order from the party of the first part, approved by the architect as in the specifications mentioned.

8. The party of the first part will insure the building in the joint names and interest of the parties hereto against loss or damage by fire in such sums as may from time to time be agreed upon by the parties hereto.

9. All work and materials delivered on the premises to form part of the works are to be considered the property of the party of the first part and are not to be removed without its consent; but the party of the second part shall have the right to remove all surplus materials after the completion of the works.

10. Neither the party of the second part nor the architect shall without formal consent of the par-

ty of the first part have authority to vary, alter, mend, or change this contract or any of the plans or specifications herein referred to.

IN WITNESS WHEREOF, the parties have caused their respective seals to be hereto affixed, and these presents to be signed by their respective presidents the day and year first above written.

THE BOARD OF EDUCATION OF THE CITY OF PATERSON,
in the County of Passaic,
by
WILLIAM H. KEARNS,
President.

Attest:
J. F. DUNPHY,
as to the party of the first part.

GLEN ENGINEERING CONSTRUCTION COMPANY,
by
SMITH ALFORD,
President.

Attest:
THOMAS F. MCCRAN,
as to the party of the second part.

To the President of the Board of Education of the City of Paterson, in the County of Passaic, and to the Comptroller of the City of Paterson:

YOU ARE HEREBY NOTIFIED that the Glen Engineering Construction Company is justly indebted to the undersigned, The John Agnew Com-

pany, a corporation of the State of New Jersey, having its principal office corner Prince and Slater Streets, in the City of Paterson, in the County of Passaic, in the sum of eleven thousand nine hundred and thirty-three dollars and twenty-nine cents, ($11,933.29) after deducting all just credits and offsets, for materials consisting of brick, cement, lime and plaster, furnished by the undersigned to the said Glen Engineering Construction Company, at its request, and for which it promised to pay the sum aforesaid, in the erection of the new high school building to be situate on the lands of the Board of Education fronting on Hamilton, Lee Place and De Grasse Streets, in the City of Paterson, New Jersey, and which is mentioned and described in a certain written contract made between the said Glen Engineering Construction Company and the Board of Education of the City of Paterson, in the County of Passaic, bearing date the second day of July, A. D. Nineteen hundred and nine, wherein the said Glen Engineering Construction Company agreed in consideration of the sum of two hundred and eighty-five thousand four hundred and twenty-three dollars ($285,423.00) to well and sufficiently erect and finish all of the mason, carpenter, painting, structural steel and iron, and electrical works on said new high school building within four hundred working days from the date of said contract, according to the drawings and specifications made by William T. Fanning, architect, and which are annexed to the said contract; that the consideration aforesaid, under the terms of the said contract, were to be paid to the said Glen Engineering Construction Company, as follows, viz.—as the work progressed the architect should give a certificate to the said Board of Education,

in writing, certifying the value of the work performed and the Board of Education should pay 85% of the amount so certified retaining 15% until after the school building should be completed and accepted; which said contract was filed with the secretary of the said Board of Education on or about the second day of July, 1909 and now remains on file in said office: that the materials aforesaid were furnished and used in the erection of the aforesaid new high school building, and were furnished on orders given day by day, and, subject to a previous quotation of prices: that the said sum of eleven thousand nine hundred and thirty-three dollars and twenty-nine cents is now justly due and owing to the undersigned by the said Glen Engineering Construction Company for materials furnished as aforesaid; that the materials furnished as aforesaid by the undersigned were all actually used in the execution and towards the completion of the said contract which the said Glen Engineering Construction Company had entered into with the said Board of Education of the City of Paterson for the erection of the said new high school building; and that said materials were furnished by the undersigned and used in said new high school building under the agreement which it had with the said Glen Engineering Construction Company as aforesaid.

Dated, November 28, 1910.

JOHN AGNEW COMPANY,
by Charles Agnew,
President.

State of New Jersey, }
County of Passaic, } ss.:

Charles Agnew, being duly sworn upon his oath, deposes and says that he is the president of The John Agnew Company named in and who signed the foregoing notice: that the said Glen Engineering Construction Company is indebted to the said John Agnew Company as therein stated in the sum of eleven thousand nine hundred and thirty-three dollars and twenty-nine cents after deducting all just credits and offsets for materials furnished as therein stated, and that the matters and things in said notice mentioned and set forth are true.

CHARLES AGNEW.

Sworn and subscribed to before
me this 28th, day of November,
Nineteen hundred and ten.

ALBERT COMSTOCK,
Master in Chancery of New Jersey.

Answer of Joseph Sharpe Construction Co. (Filed, March 10, 1911).

IN CHANCERY OF NEW JERSEY.

Between JOHN AGNEW COMPANY, Complainant, and THE BOARD OF EDUCATION OF THE CITY OF PATERSON, et al., Defendants.	On bill to foreclose lien against the Glen Engineering Construction Company of the Joseph Sharpe Construction Company and others. Notice &c.

To James J. Curran, Comptroller of the City of Paterson: the financial officer thereof:
Sir:

PLEASE TAKE NOTICE that the answer of the Joseph Sharpe Construction Company, a copy of which is hereto annexed, has been this day filed in the Court of Chancery of New Jersey and that an action is pending in said Court in said cause which is brought in pursuance and under the provision of an act of the legislature of the State of New Jersey entitled "An Act to secure the payment of laborers, mechanics, merchants, traders and persons employed upon or furnishing material toward the performing of any work in public improvement in cities, towns, townships and other municipalities in this state," approved March 30, 1892 and the act amendatory thereof and supplementary thereto and its object, among other things is to have said

court decide, among other things, as to the extent, justice and priority, not only of the claim of said complainant against the Glen Engineering Construction Company, but, as well, the extent, justice and priority of the claim of the undersigned, The Joseph Sharpe Construction Co. a corporation organized under the laws of New Jersey, against said Glen Engineering Construction Company, a notice of which claim was filed with you on the tenth day of December, A. D., 1910.

Dated March 10th, A. D., 1911.

THE JOSEPH SHARPE CONSTRUCTION COMPANY by
WM. LEWIS,
its Attorney.

IN CHANCERY OF NEW JERSEY.

Between: JOHN AGNEW COMPANY, Complainant, and THE BOARD OF EDUCATION OF THE CITY OF PATERSON, et al., Defendants.	On Bill, etc., Answer of The Joseph Sharpe Construction Company.

The answer of the Joseph Sharpe Construction Company, a corporation organized under the laws of the State of New Jersey, one of the defendants in the above stated cause to the bill of complaint of John Agnew Company complainant.

This defendant for answer thereunto, or unto so much thereof as this defendant is advised it is material or necessary for him to make answer unto answering says:

1. It admits the allegations of paragraph one of the bill of complaint.

2. It admits the allegations of paragraph two of the bill of complaint.

3. It admits the allegations of paragraph three of the bill of complaint.

4. It has no knowledge, nor has it information sufficient to base a belief upon as to the truth of the allegations of paragraph four of the bill of complaint and prays that the complainant may make such proof thereof as it may be advised to be proper.

5. That it has no knowledge nor information sufficient to form a belief as to the truth of the allegations of the fifth paragraph of the bill of complaint and prays that complainant may make such proof thereof as it may be advised to be proper.

6. Defendant admits the truth of the allegations of paragraph seventh as to the written agreement made between the Glen Engineering Construction Company and the First National Bank of the Town of Union, New Jersey.

It admits the allegations of the bill of complaint as to the written agreement between said Glen Engineering Construction Company and Mathew S. Payne, dated December 1, 1910.

It admits the allegations of the bill of complaint as to the other written agreement between the last mentioned company and said Payne dated the first day of December, 1910.

It admits the allegations of the bill of complaint as to the written agreement between said Glen Engineering Construction Company and Edward Gunnell.

This defendant charges as to each and every of the above mentioned assignments that they were made without consideration and that each and every of them failed to operate as an assignment or transfer of the money due or to grow due to the Glen Engineering Construction Company from the defendant the Board of Education of the City of Paterson, either in law or equity, or, that if any consideration was paid for the said alleged assignments or any or either of them that said consideration was given before the execution thereof and that said assignments, and each of them if operative at all, operated to create a preference in favor of the parties to such assignments respectively, which preference in each and every instance were unlawful and void under the provisions of the bankruptcy laws of the United States.

This defendant is also informed and believes it to be true that claims were served upon the Board of Education of the City of Paterson, in the County of Passaic and upon the financial officers of said city by the persons and for the amounts named in the seventh paragraph of the bill of complaint.

It admits the allegations of the seventh paragraph of the bill of complaint as to the complain-

ant's petition to the United States District Court for the District of New Jersey and the order thereupon made.

7. This defendant further charges that it performed labor and provided materials in placing granilite pavement on DeGrasse Street, Lee Place, Hamilton Street and pavement in rear, reenforced concrete stairs and platform and boundary curb to and for the said Glen Engineering Construction Company at its request for which the latter company promised to pay the amount in the claim hereinafter referred to; that such labor was performed and materials furnished in the performance of the contract of the Glen Engineering Construction Company with said Board of Education in said bill of complaint mentioned, under a contract made between this defendant and said Glen Engineering Construction Company bearing date the tenth day of August, A. D. nineteen hundred and ten. That this defendant has frequently demanded payment of the sum so due to your orator as aforesaid from the said Glen Engineering Construction Company, and that said Glen Engineering Construction Company has failed to pay the same, or any part thereof; that on the tenth day of December, A. D. nineteen hundred and ten before the completion of said building and before the said Glen Engineering Construction Company was adjudged a bankrupt and before a receiver therefor in said bankruptcy proceedings was appointed and qualified, your orator served a notice duly verified by the oath of its secretary and treasurer, upon the President of the Board of Education of the City of Paterson in the County of Passaic and did also on the same day serve a notice duly verified

upon the Comptroller of the said City of Paterson, being the financial officer of said city, a copy of which notices is hereto annexed made part hereof marked Schedule A and to which this defendant respectively refers; that this defendant also at the same time filed with the financial officer of the said city a bond in the sum equalling 20 per cent. of the amount claimed in said notice which sum had been fixed by such financial officer as the amount of such bond and which bond is conditioned for the payment of legal interest for the time the said moneys may be withheld from the said contractor in the event that this defendant does not perfect its lien by instituting an action or that decree be made in favor of the contractor in any such action, and conditioned further for the payment of the costs of any such action if the judgment be for the contractor.

That on or about the twentieth day of February, 1911, defendant was served with a subpoena to answer in this cause, and, on the sixth day of March, A. D. nineteen hundred and eleven it served a notice of the pendency of said action with James J. Curran, Comptroller of the City of Paterson, the financial officer thereof, notifying him of the pendency of said action. That a copy of said notice is hereto annexed made part hereof and marked Schedule B, and to which this defendant begs leave to refer.

This defendant joins in the prayer of the bill of complaint and prays that all parties, named in said bill of complaint who have filed claims under this act may have the extent, justice and priority of the same decided by this honorable court; that said court should determine the validity of the lien as aforesaid, the amount due from the debtor,

said Board of Education, to the contractor under his contract, and from the contractor to the respective claimants and alleged assignees, if anything, and shall render judgment, directing that the said Board of Education shall pay over to the claimants for the work done and the materials furnished in the execution of said contract, whose respective claims or liens or assignments it should hold to be valid and just, in the order of their priority as determined by this court to the extent of the sum found due to said claimants from the contractor, so much of said funds or money as may be due from said municipality to the contractor, said Glen Engineering Construction Company, under its contract against which the lien is filed, as will satisfy their respective liens or claims with interest and costs to the extent of the amount due from said municipality to said contractor.

THE JOSEPH SHARPE,
CONSTRUCTION COMPANY,
By JOSEPH SHARP,
President.

Attest:
J. WILSON SHARPE,
Secretary.
(Seal)

W. I. LEWIS,
Solicitor and Counsel
for Complainant.

State of New Jersey, }
County of Passaic. } ss.:

The answer of the defendant, The Joseph Sharpe Construction Company was taken this tenth day of March, A. D. nineteen hundred and eleven before me, under the common seal of said corporation as by their said seal thereto affixed appears.

FRANK SMIT,
A Master in Chancery
of New Jersey.

Schedule A.

To the President of the Board of Education of the City of Paterson, in the County of Passaic, and to The Comptroller of the City of Paterson:

You are hereby notified that the Glen Engineering Construction Company, a corporation of the State of New York is justly indebted to the undersigned, The Joseph Sharpe Construction Co., a corporation of the State of New Jersey, whose principal office is in the City of Paterson, in said State, in the sum of three thousand and thirty-seven dollars, after deducting all just credits and offsets for labor and materials performed and provided in placing Granilite Sidewalks on De Grasse Street, Lee Place, Hamilton Street and pavement in rear, reinforced concrete stairs and platforms and boundary curb, to and for the said Glen Engineering Construction Company at its request,

and for which it promised to pay the sum aforesaid, such labor and materials being performed and furnished toward the performance of the contract of the said Glen Engineering Construction Company in the erection of the new High School Building on the land of the said Board of Education bounded on Hamilton Street, De Grasse Street and Lee Place, in the City of Paterson aforesaid and which is mentioned and described in a certain written contract made between the said Glen Engineering Construction Company and the Board of Education of the City of Paterson, bearing date the second day of July, A. D. nineteen hundred and nine, wherein the said Glen Engineering Construction Company agreed in consideration of the sum of two hundred and eighty-five thousand four hundred and twenty-three dollars to well and sufficiently erect and finish all of the mason, carpenter, painting, structural steel and iron, and electrical work on said new High School Building, within four hundred working days from the date of said contract, according to the drawings and specifications made by William T. Fanning, Architect, and which are annexed to the said contract; that the consideration aforesaid, under the terms of the said contract were to be paid to the said Glen Engineering Construction Company as follows, to wit, as the work progressed the architect should give a certificate to the said Board of Education in writing, certifying the value of the work performed and the Board of Education should pay (85%) eighty-five per cent. of the amount so certified, retaining fifteen per cent. until after the school building should be completed and accepted; which said contract was filed with the secretary of said Board

of Education on or about the second day of July nineteen hundred and nine and now remains on file in said office; that the labor was performed and the materials were furnished as aforesaid by the undersigned and used in the performance of said contract between said Board of Education and said Glen Engineering Construction Company and were performed and furnished pursuant to the contract made between the undersigned and the Glen Engineering Construction Company, dated the tenth day of August, A. D. nineteen hundred and ten for providing the material and performing the work in placing Granilite sidewalks on DeGrasse Street, Lee Place, Hamilton Street and pavement in rear, including the driveway from building to concrete fence and construct the rear concrete boundary fence, the vault cover including vault lights, the border curb and posts on Hamilton Street, gutters, etc., concrete work within and without front entrance, all stairs, including safety treads, platforms, balustrades and base in the four stair towers for Paterson High School Building to be erected at Paterson, N. J., as aforesaid in accordance with and as shown on the drawings or mentioned or described in the specifications prepared by said architect for the contract price of seven thousand dollars on account of which contract labor has been performed and materials provided by the undersigned to the amount or value of five thousand four hundred dollars and upon which there has been paid the undersigned the sum of twenty-three hundred and sixty-three dollars leaving a balance due the undersigned of three thousand and thirty-seven dollars which under the terms of the contract of the undersigned was payable to him in current funds, as follows, in monthly installments of

eighty-five per cent. of work in place payable on or before the fifteenth of the following month, balance in full within thirty days after completion satisfactory to construction department and under which said sum of three thousand and thirty-seven dollars becomes due to the undersigned as follows, the sum of two thousand and fifty-seven dollars for work in place on December 1st, 1910, and payable on December 15, 1910, the sum of one hundred and seventy dollars for work in place done since December 1st, 1910, and payable on January 15, 1911, and the sum of eight hundred and ten dollars being the said fifteen per cent., or balance, which is payable within thirty days after completion of said contract of the undersigned satisfactory to said construction department.

That the materials furnished and the labor performed as aforesaid by the undersigned, were all actually used in the execution and toward the completion of the said contract which the said Glen Engineering Construction Company had entered into with the said Board of Education of the City of Paterson for the erection of the said new High School Building; and that said materials were furnished by the undersigned and used in the said new High School Building under the said agreement, which it had with the said Glen Engineering Construction Company as aforesaid.

Dated, December tenth, A. D., nineteen hundred and ten.

THE JOSEPH SHARPE
CONSTRUCTION COMPANY,

JOSEPH SHARPE,
President.

(Corporate Seal)

J. WILSON SHARPE.

State of New Jersey, }
County of Passaic. } ss.:

Joseph Wilson Sharpe, being by me duly sworn according to law, deposes and says: That he is the Secretary and Treasurer of the Joseph Sharpe Construction Co., a corporation of the foregoing claimant and as such has knowledge of the fact, matters and things set forth in the foregoing notice; that the said Joseph Sharpe Construction Co. is engaged in the business of making cement and concrete for sidewalks, buildings and other structures and performing the labor of laying and making such sidewalks and erecting such buildings and other structures; deponent further says that he has read the foregoing notice, and knows the contents thereof; that he is personally acquainted with all the facts, matters and things therein stated and set forth and that the same are true; that there is due and owing to the said Joseph Sharpe Construction Company, from the said Glen Engineering Construction Company, contractor, the sum of three thousand and thirty-seven dollars as in said notice set forth for labor and materials performed and provided in placing Granilite sidewalks on De Grasse Street, Lee Place, Hamilton Street and pavement in rear reinforced concrete stairs and platforms and boundary curb, the said last mentioned amount being the balance due therefor, which said labor and materials were performed and provided by the said claimant to the said Glen Engineering Construction Company with the Board of Education of the City of Paterson for the erection of a new high school building on lands situate in the City of Paterson as mentioned in the foregoing notice.

Deponent further says that a detailed statement of the amount of said claim, together with all credits and allowances and setoffs to which the said Glen Engineering Construction Company is entitled is correctly set forth in said claim and the said sum of three thousand and thirty-seven dollars is justly due and owing to the said claimant at the time and as is in said claim set forth. Deponent further says that said claim or notice correctly sets forth the residence of the claimant, the amount claimed, from whom due, when due, the amount of the demand, after deducting all just credits and offsets, the name of the person to whom said materials were furnished and for whom labor was provided, also a statement of the term, time given and conditions of the contract of said contractor and of said claimant.

J. WILSON SHARPE.

Sworn and subscribed before me this
tenth day of December, A. D.,
nineteen hundred and ten.

WILLIAM I. LEWIS,
A Master in Chancery of N. J.

Schedule B.

To James J. Curran, Comptroller of the City of Paterson, the financial officer thereof.

SIR: PLEASE TAKE NOTICE that an action is pending in the Court of Chancery of New Jersey, wherein John Agnew Company, a corporation,

is complainant and the Board of Education, of the City of Paterson, in the County of Passaic, The Mayor and Aldermen of the City of Paterson, Glen Engineering Construction Company and others, including the undersigned corporation are defendants: that the said action is brought in pursuance and under the provisions of an act of the legislature of the State of New Jersey entitled "An act to secure the payment of laborers, mechanics, merchants, traders and persons employed upon or furnishing materials toward the performing of any work in public improvement in cities, towns, townships and other municipalities in this State," approved March 30, 1892, and the act amendatory thereof and supplementary thereto, and its object, among other things is to have said court decide, among other things, as to the extent, justice and priority, not only of the claim of said complainant against the Glen Engineering Construction Company, but, as well, the extent, justice and priority of the claim of the undersigned, The Joseph Sharpe Construction Co. a corporation organized under the laws of New Jersey, against said Glen Engineering Construction Company, a notice of which claim was filed with you on the tenth day of December, A. D. 1910.

Dated, March 4th, A. D. 1911.

THE JOSEPH SHARPE CONSTRUCTION COMPANY,

by Joseph Sharpe, President.

(corporate seal)

Answer of Frederick G. Ebsary (Filed, March 27, 1911).

IN CHANCERY OF NEW JERSEY.

Between

JOHN AGNEW COMPANY,
Complainant,
and
THE BOARD OF EDUCATION OF THE CITY OF PATERSON, et als.,
Defendants.

Answer.

The answer of Frederick G. Ebsary of the City of New York, County and State of New York with office at 1123 Broadway in said City, defendant in the above entitled cause respectfully shows:

1. That it is true that on the second day of July, nineteen hundred and nine, The Board of Education of the City of Paterson entered into a written contract with the Glen Engineering Construction Company to erect and finish all mason, carpenter, painting, structural steel and iron, and electrical works on the new High School building to be erected in the City of Paterson for and in consideration of the sum of Two hundred and eighty-five thousand four hundred and twenty-three dollars.

2. That the defendant, thereafter, to-wit, on December fifteenth, nineteen hundred and nine agreed to do work and furnish materials to the said Glen Engineering Construction Company to be used in the erection of the said High School building, in placing partitions, flues and columns, coverings of

adamant block and mortar as per agreement in writing, dated December fifteenth nineteen hundred and nine, for which labor and materials the said Glen Engineering Construction Company agreed to pay this defendant the sum of Four thousand nine hundred dollars in monthly payment, to the value of eighty-five per cent. of the work in place as estimated by architect, balance in full within thirty days after completion.

3. This defendant admits that the said Glen Engineering Construction Company abandoned the construction of the said building and its said contract and was in the month of December, nineteen hundred and ten, adjudged a bankrupt by the United States District Court for the Southern District of New York, and thereafter, to-wit, on the twelfth day of December, nineteen hundred and ten, one Benjamin Barker, was appointed ancillary receiver of the said Glen Engineering Construction Company by the United States District Court for the District of New Jersey; that at the time of the abandonment of the contract as aforesaid there was due to the said Glen Engineering Construction Company under said contract a sum in excess of eighty thousand dollars, and still a further sum will be due to it upon the completion and acceptance of said building, but the exact amount now due or to become due under said contract this defendant is not informed.

4. That this defendant pursuant to the agreement between him and the said Glen Engineering Construction Company as aforesaid furnished the said labor and materials according to the terms of said agreement and that said materials so supplied were actually used in the erection of the said

high school building; that there is now due to this defendant from the said Glen Engineering Construction Company for labor and materials used in the erection of said school building, as per said agreement, after deducting all just credits and offsets, the sum of Nine hundred dollars.

5. That this defendant has frequently demanded payment of said sum so due as aforesaid, from the said Glen Engineering Construction Company, and that said Glen Engineering Construction Company has failed to pay the same, or any part thereof; that on the tenth day of December, nineteen hundred and ten before the completion of said building, and before the said Glen Engineering Construction Company was adjudged a bankrupt as aforesaid, this defendant served a notice, duly verified by oath upon the President of the Board of Education of said City of Paterson upon the Comptroller, Treasurer and the financial officers of the said city, a copy of which notices is hereto annexed; that at the same time, this defendant filed with the financial officer of the said city a bond in a sum equalling twenty per cent. of the amount claimed in said notice which sum had been fixed by such financial officer and the amount of such bond and which bond is conditioned for the payment of legal interest for the time the said moneys may be withheld from the said contractor in the event that this defendant does not perfect his lien by instituting an action or that if the decree be made in favor of the contractor in any such action, and conditioned further for the payment of the costs of any such actions if the judgment be for the contractor.

6. That by virtue of the acts and allegations aforesaid this defendant has acquired a lien under

and by virtue of an act of the legislature of this State, entitled, "An act to secure the payment of laborers, mechanics, merchants, traders, and persons employed or furnishing materials toward the performance of any work in public improvements in cities, towns, townships and other municipalities in this State, approved March 30, 1892," and the acts amendatory thereof and supplementary thereto, on the moneys due and to grow due under the contract between the said Glen Engineering Construction Company and said The Board of Education of the City of Paterson in the County of Passaic, as aforesaid.

7. This defendant is informed and believes it to be true that a written agreement was made between the said Glen Engineering Construction Company and the First National Bank of the Town of Union, New Jersey, bearing date the fifteenth day of September, nineteen hundred and ten, purporting to assign, the retained percentage due and owing to the said Glen Engineering Construction Company by the said Board of Education, to secure the payment to the said bank of the amount due it by the said Glen Engineering Construction Company, which agreement was filed with the clerk of the Board of Education on or about the twenty-second day of September, nineteen hundred and ten; but the said alleged assignment, if a lien at all upon the moneys now due or to become due to the said Glen Engineering Construction Company upon the contract aforesaid, is subsequent to the lien of this defendant upon said money; that this defendant is also informed and believes it to be true that another written agreement was made between the said Glen Engineering Construction

Company and Matthew S. Payne, bearing date the first day of December, nineteen hundred and ten, purporting to assign among the other things all moneys due and to become due to it under the said contract with the said The Board of Education, which assignment is given as collateral security for moneys advanced by him for the benefit of the said Glen Engineering Construction Company, and for such moneys as he may thereafter have advanced to it; and which assignment was filed with the clerk of the Board of Education, on the ninth day of December, nineteen hundred and ten; but this defendant's charges, that said alleged assignment, if a lien at all upon any moneys now due or to become due to said Glen Engineering Construction Company upon the contract aforesaid, is subsequent to the lien of this defendant upon said moneys; that this defendant is informed and believes it to be true, that another written agreement was made between said Glen Engineering Construction Company and the said Matthew S. Payne, bearing date the first day of December, nineteen hundred and ten, purporting to assign, as collateral security all moneys due or to become due under the said contract between the said Company and the said The Board of Education of the City of Paterson to which the said Company was entitled under the said contract for work done and materials furnished during the month of November, nineteen hundred and ten; and which assignment was filed with the clerk of The Board of Education on the ninth day of December, nineteen hundred and ten; but this defendant charges that said alleged assignment if a lien at all upon any moneys now due or to become due to the said Glen Engineering Construction

Company upon the contract aforesaid, is subsequent to the lien of this defendant upon said moneys; that this defendant is informed and believes it to be true that another written agreement was made between said Glen Engineering Construction Company and Edward Gunnell bearing date the thirtieth day of November, nineteen hundred and ten, purporting to assign, Twenty-one thousand dollars of the moneys to become due to the said Glen Engineering Construction Company under its said contract with The Board of Education of the City of Paterson; and which assignment was filed with the clerk of The Board of Education on the ninth day of December, nineteen hundred and ten; this defendant says that said alleged assignment if a lien at all upon any moneys due or to become due to said Glen Engineering Construction Company upon the contract aforesaid is subsequent to the lien of this defendant to said money.

That this defendant is also informed and believes it to be true that the following claims were also served on The Board of Education in the City of Paterson, in the County of Passaic, and upon the financial officer of said City, but whether they were served before or after this defendant's said notice he is not informed, to-wit: James Healey, Seven hundred and sixty-one dollars and twenty cents; Frank Miller doing business as Frank Miller Lumber Company, Ten thousand nine hundred and fifty-five dollars and fourteen cents; Herringbone Metal Lath Company, Seven hundred and sixty-one dollars and twenty-five cents; Joseph Sharpe Construction Company, Three thousand and thirty-seven dollars; Cortlandt Engineering Company, Two thousand five hundred and thirty-seven dollars; Architectural Plastering Company, One

thousand six hundred and eighty dollars; American Lumber Company, Two hundred and forty-two dollars and ninety cents; George A. Myers & Company, Five hundred and twenty-three dollars and ninety-six cents; Sutphen & Myer, a partnership consisting of John S. Sutphen and Charles R. Myer, Twenty-four hundred dollars; Ingalls Stone Company, Two thousand one hundred and fifteen dollars; McKiernan & Bergin Company, One thousand one hundred and forty-eight dollars and eighty cents; The J. A. Van Winkle Company, Three hundred and thirteen dollars and thirty-seven cents; Louis Pasquali, trading as Italian Marble Mosaic Company, Two thousand one hundred and fourteen dollars and thirty-nine cents; James W. Johnson, Two hundred and forty-four dollars and twenty cents; E. Ricker & Son Company, One thousand six hundred and fifty-eight dollars and sixteen cents; P. S. Simmons Painting Company, Four hundred and ninety-nine dollars and sixty cents; that this defendant is also informed and believes it to be true that the following claims for labor were also served upon the said The Board of Education of the City of Paterson, in the County of Passaic and upon the financial officers of said City, whether they were served before or after this defendant's said notice he is not informed, to wit: Martin Troost, Six hundred and twenty-six dollars and seventy-five cents; Russell Holmes, twenty-four dollars and fifty cents; Antonio Deets, twelve dollars and seventy-nine cents; Fred Benzten, twelve dollars and seventy-one cents; Hugh McPherson, twenty-eight dollars; Thomas W. Ward, twenty-six dollars and sixty cents; Peter Magie, ten dollars and twelve cents; David Hawthorne, Nine dollars and ninety-five cents; James Galla-

gher, Nineteen dollars and sixty cents; Angelo Touche, Nineteen dollars and sixty cents; James O'Leary, Twenty dollars and thirty cents; James Wehr, Thirty-three dollars and sixty cents; William Noble, Thirty-three dollars and sixty cents; John McMullen, Thirty-three dollars and sixty cents; John Van Blarcom, Twenty-six dollars and sixty cents; Arthur Daniels, Twenty-eight dollars and eighty cents; William H. Ogaethry, twenty-six dollars and sixty cents; James Ferguson, Twenty-eight dollars; George Cunningham, Twenty-eight dollars; James Gordon, Twenty-eight dollars; George Van Blarcom, Twenty-six dollars and sixty cents; John Columbus, Twelve dollars and seventy-nine cents; Thomas Cummings, Nineteen dollars and sixty cents; Alexander Crawford, Jr., Thirty-three dollars and sixty cents; John F. Rose, Twenty-six dollars and sixty cents; Charles Van Ness, Fifty-five dollars; William Van Ness, fifty-five dollars; Walter Venable, Thirty-four dollars and fifty cents; William H. Rae, Thirty-three dollars and sixty cents; Edward Harrison, Thirty-three dollars and sixty cents; James Kingsland, Thirty-three dollars and sixty cents; Alexander Crawford, Sr., Thirty-nine dollars and twenty cents; Robert Maxwell, Twenty-six dollars and sixty cents; Otto Temple, Twenty-six dollars and sixty cents; Thomas Moran, Thirteen dollars and eighteen cents; Leonard Brink, Twenty-six dollars and sixty cents and Welcome R. Steinmetz, Forty-two dollars and fifty cents, which notices were intended to and were claimed to be in compliance with the requirements of the provision of the act entitled "AN Act to secure Mechanics and others payment for their labor and materials in erecting any building approved June 14th, 1898," by virtue

of which the claimants mentioned in the foregoing answer severally claim to have some lien or interest on the said balance of money due as aforesaid to the Glen Engineering Construction Company, but the defendant charges that the said notices or lien claims are defective for they were not properly served according to the requirements of the statute in such case made and provided and do not represent the correct amount due them from the said The Engineering Construction Company and that such liens or interest, if any, of said defendant and of said complainant are subsequent and postponed to the lien of this defendant Frederick G. Ebsary.

GAETANO M. BALFATTO,
Sol. for Frederick G. Ebsary,
Defendant.

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

Frederick G. Ebsary, the defendant named in the foregoing answer, being duly sworn according to law on his oath says that the matters and things set forth and contained in the foregoing answer such as relates to his own acts and deeds are true and so far as relates to the deeds of other persons that he believes them to be true.

FREDERICK G. EBSARY.

Sworn to and subscribed before
me this 27th day of March, 1911.

GAETANO M. BALFFATTO,
M. C. C. of N. J.

To the Mayor and Common Council of the City of Paterson; Herman J. Kohlhaus, Auditor of the City of Paterson; Eugene Wickham, Treasurer of the City of Paterson; James J. Curran, Comptroller of the City of Paterson; C. Frank Kircker, and School Commissioners of the City of Paterson.

Gentlemen:

You are hereby notified that the undersigned, Frederick G. Ebsary, of the City of New York, County and State of New York, has in conformity with the terms of a contract made between The Board of Education of the City of Paterson and Glen Engineering and Construction Company, a corporation of said City of New York, County and State of New York, which contract is dated the Second day of July, Nineteen hundred and nine, and is for the performance of all and every part of the work and the labor and material, which might be required in and for the erection, construction and completion of the Paterson High School building, situated on Hamilton Avenue, De Grasse Street, and Lee Place in said City of Paterson, furnished materials and performed labor towards the performance and completion of said contract, and by virtue and pursuant to the provisions of a certain act entitled, "An act to secure the payment of laborers, mechanics, merchants, traders and persons employed upon, or furnished materials towards the performance of any work in public improvements, in Cities, Towns, Townships and other municipalities in this State approved March Thirtieth, Eighteen hundred and ninety-two, and the several supplements thereto, claims a lien for the value of said materials furnished and work per-

formed upon the moneys in the control of said City of Paterson due or to become due on the said contract, to the amount of such claim as hereinafter stated.

The claimant further states as follows:

FIRST.—The principal office of the claimant is at Number 1123 Broadway in the City of New York, County and State of New York.

SECOND.—The said labor was performed for, and the said materials were furnished to the said Glen Engineering Construction Company, in pursuance of a contract made between this claimant and the said Glen Engineering Construction Company, dated December fifteenth, nineteen hundred and nine, by which contract this claimant agreed to place partitions, flues, and column coverings of adamant blocks and mortar, as specified in the specification annexed to the contract between the said The Board of Education of the City of Paterson and the said Glen Engineering Construction Company, for the erection of said Paterson High School building, agreeably to the drawings and specifications in the first above mentioned contract, and strictly in accordance therewith, in a good workmanlike and substantial manner, under the direction of William T. Fanning, architect and contractor, referred to in said contract and to be done under the direction and to the full satisfaction of said architect, shall find and provide good, proper and sufficient materials of all kinds and whatsoever as it shall be proper and sufficient for the completing and finishing of all the partitions, flues, and columns covering of adamant blocks and mortar at the said Paterson High School building,

mentioned in the said specifications for the sum of Four thousand and nine hundred dollars.

THIRD.—That the said sum was by said contract to be paid as follows, in monthly payments to the value of eighty-five per cent. of the work in place, as estimated by the said architect and the balance in full within thirty days after the completion of said work.

FOURTH.—The amount claimed by this claimant under his contract with the Glen Engineering Construction Company is the sum of Four thousand and nine hundred dollars, of which the sum of Four thousand dollars has been paid to said claimant, and the sum of Nine hundred dollars is now due and payable to this claimant from said Glen Engineering Construction Company.

FIFTH.—The said work was done and the materials were furnished to said contractor, Glen Engineering Construction Company to be used, and were actually used in the execution and completion of said contract between the said Glen Engineering Construction Company and the Board of Education of the City of Paterson.

SIXTH.—The following is a bill of particulars of the aforesaid labor performed and materials furnished and the price at which and the times when the same were performed and furnished and giving credit for all the payments thereupon and deductions that ought to be made therefrom and the exhibiting the balance justly due to claimant from said Glen Engineering Construction Company.

To furnishing from the fifteenth day of December, nineteen hundred and nine to the first day of

August, Nineteen hundred and ten all the labor and materials necessary for the placing partitions, flues, and column coverings of adamant blocks and mortar for the erection of the Paterson High School building as per contract aforesaid,

$4900.00

CREDITS.

1910	May 17th	$1000.00	
1910	June 15th	1000.00	
1910	July 1st	500.00	
1910	Sept. 12th	500.00	
1910	Sept. 29th	500.00	
1910	Nov. 17th	500.00	
		$4000.00	$4000.00
	Balance due		$900.00

SEVENTH.—There are no offsets to this account; that the said Frederick G. Ebsary has demanded the payment of the said sum of Nine hundred dollars from said Glen Engineering Construction Company, but the latter has refused to pay the same or any part thereof.

FREDERICK G. EBSARY.

Dated, December ten, Nineteen hundred and ten.

Attest:

G. M. BELFATTO.

Answer of Herringbone Metal Lath Company (Filed, April 20, 1911).

IN CHANCERY OF NEW JERSEY.

Between

JOHN AGNEW COMPANY,
Complainant,
and
THE BOARD OF EDUCATION OF THE CITY OF PATERSON, et al.,
Defendants.

Answer.

The answer of the Herringbone Metal Lath Company, defendant, to the bill of complaint of John Agnew Company, complainant.

This defendant answering says:

That it admits the matters and things set forth in paragraph one of said bill of complaint.

That as to the matters and things set forth in paragraph 2 of said bill of complaint this defendant has no knowledge and therefore denies the same.

That as to the matters and things set forth in paragraph 3 of said bill of complaint this defendant believes them to be true and therefore admits.

That as to the matters and things set forth in paragraphs 4, 5, 6 and 7 of said bill of complaint this defendant has no knowledge and therefore denies the same.

And this defendant further answering says that it is a corporation of the State of New York, having its principal office at No. 257 E. 133rd Street in the city of New York and State of New York; and

was and is a merchant within the terms of the statute relating to liens on municipal buildings referred to in said bill of complaint; that it did furnish to the Glen Engineering & Construction Company, the defendant named therein, certain materials at the dates and for the prices set forth as follows:

Mar. 5, 1910—100 lbs. staples	$6.00
June 7, 1910—400 " "	24.00
June 15, 1910—4500 yds. key lath, 24Q. painted	731.25
Total	761.25

That all said materials were furnished and delivered to said Glen Engineering & Construction Company and were actually used by it in the construction of the Paterson High School Building described in said bill of complaint; that this defendant made demand upon said Glen Engineering & Construction Company for payment of the amount so due to it but that payment was refused; that the terms of the sale of said goods by this defendant to said contractor were net thirty days, and that the amount fell due from said contractor to this defendant on the fifteenth day of July, nineteen hundred and ten; that no part of said sum of seven hundred and sixty-one dollars and twenty-five cents ($761.25) has been paid but it is still due from said company to this defendant.

That the same constitutes a lien upon the moneys due and to grow due under the contract between said Glen Engineering & Construction Company and said Board of Education of the City of Paterson, set forth in said bill of complaint, and that this defendant served upon the proper officers

notices of its said claim, setting forth the facts required by the statutes commonly known as the Mechanics lien law and the Municipal lien law respectively, which said claims were served upon the officers required by said statutes in the manner therein particularly set forth on the tenth days of December, nineteen hundred and ten, and the day of December, nineteen hundred and ten, respectively.

That this defendant is informed and believes that various other claimants have filed claims with said Board of Education wherein it is alleged that they have certain liens upon said moneys but this defendant expressly charges that said lien claims and each of them are in many respects imperfect and invalid and that they do not conform with the provisions of said statutes and were not served as required therein and that this defendant is entitled to priority of payment out of said fund.

This defendant further answering charges that the said assignments made by said Glen Engineering & Construction Company set forth in said bill of complaint are subject to the lien of amount due to this defendant as aforesaid and that this defendant is entitled to be first paid out of the moneys due or to grow due under said contract between the said Board of Education and the said Glen Engineering & Construction Company.

This defendant, therefore, prays that this Court may decree that it is entitled to receive and be paid out of the moneys due or to grow due under said contract between said Engineering & Construction Company and said Board of Education, the amount so due to it and for that purpose said Board of Education may be decreed to account and set forth how much is due thereunder and that this defend-

ant may be hence dismissed with its costs most wrongfully sustained.

HUGH B. REED,
Solr. and of Counsel with
Defendant Herringbone Metal Lath Co.

Answer of Frank Miller Lumber Company (Filed, May 13, 1911).

IN CHANCERY OF NEW JERSEY.

Between

JOHN AGNEW COMPANY, a corporation created by and existing under the Laws of the State of New Jersey,
Complainant,
against
BOARD OF EDUCATION OF THE CITY OF PATERSON, COUNTY OF PASSAIC, FRANK MILLER doing business under the name and style of FRANK MILLER LUMBER COMPANY, et al,
Defendants.

The answer of Frank Miller doing business under the name and style of Frank Miller Lumber Company to the bill of Complaint of John Agnew Company, a corporation created by and existing under the Laws of the State of New Jersey, Complainant.

This defendant answering says:

FIRST.—He admits the making of the contract between the Board of Education of the City of Paterson, County of Passaic, and the Glen Engineering Construction Company, as set forth in paragraph "1" of Complainant's Bill, but this defendant alleges that he has no knowledge or information sufficient to form a belief as to the truth of the allegation that the contract annexed to the bill of complaint is a true copy of the original contract.

SECOND.—He alleges that he has no knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in the paragraph of said bill of complaint therein designated "2."

THIRD.—He admits the facts stated in the paragraph of the bill of complaint therein designated "3."

FOURTH.—He alleges that he has no knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in the paragraph of said bill of complaint therein designated "4," and therefore denies the same.

FIFTH.—He alleges that he has no knowledge or information sufficient to form a belief as to the truth of each and every one of the allegations contained in the paragraph of the bill of Complaint therein designated "5," and therefore denies the same.

SIXTH.—That as to the allegations contained in the paragraph of said Bill of Complaint therein designed "6" that the complainant has acquired a

lien on the moneys due or to grow due under the contract between said Glen Engineering Construction Company and The Board of Education of the City of Paterson County of Passaic, by virtue of the act of the legislature of the State of New Jersey as stated in said paragraph, this defendant alleges that he has no knowledge or information thereof sufficient to form a belief as to the truth of each and every one of said allegations, and therefore denies the same, and this defendant further alleges that the lien of the said complainant, if a lien at all on said moneys, is subject and subsequent to the lien of this defendant as hereinafter stated.

SEVENTH.—That as to the allegations in the paragraph of said bill of complaint therein designated as "7" this defendant believes it to be true that on or about the 22nd day of September, 1910, the First National Bank of the Town of Union filed with the Board of Education of the City of Paterson, a writing purporting to be an assignment, to wit: by the Glen Engineering Construction Company of the retained percentages of fifteen per cent. of the amount of the contract between said Glen Engineering Construction Company, and said Board of Education of the City of Paterson, County of Passaic for the erection of a high school building in said City of Paterson, amounting to the sum of forty-two thousand eight hundred and fifteen and 45/100 ($42,815.45) dollars, which said sum should become payable to the Glen Engineering Construction Company upon the completion of said contract, and which amount is the final payment thereunder, but this defendant charges the fact to be that said assignment is irregular and void, and without consideration: that whatever right or in-

terest or lien if any, may have been acquired by the First National Bank of the Town of Union, in or to any of said moneys remaining unpaid on account of said contract, is subsequent to and subject to the lien of this defendant upon and against the same; and as to the charge the lien of the complainant is prior to the said assignment, this defendant has no knowledge but leaves the same to be determined in such manner as the Court may direct.

And this defendant believes it to be true that Matthew S. Paine and Edward Gunnell filed on the 9th day of December, 1910, at 4:40 P. M. on that day a writing purporting to be assignments to each of them respectively from the said Glen Engineering Construction Company of all moneys due or to grow due said Glen Engineering Construction Company under its contract with the said Board of Education of the City of Paterson, and as to the charge that the lien of the complainant is prior to said alleged assignments, this defendant has no knowledge but leaves the same to be determined in such manner as the Court may direct; and this defendant alleges that whatever lien the said complainant, the said Mathew S. Paine or the said Edward Gunnell or either of them has on said moneys that the same is subsequent to the lien of this defendant as hereinafter stated; this defendant believes it to be true, that Matthew S. Paine and Edward Gunnell did on the 9th day of December, 1910, at 4:40 P. M. file another writing purporting to be an assignment to him from the Glen Engineering Construction Company of all moneys due or to grow due said Glen Engineering Construction Company under its contract with the Board of Education of the City

of Paterson particularly the payment due the said Glen Engineering Construction Company for work done and material furnished in the month of November, 1910, under said contract, and as to the charge that the lien of the complainant is prior to said assignments, this defendant has no knowledge but leaves the same to be determined in such manner as this Court may direct; and this defendant alleges that whatever lien the said complainant or the said Matthew S. Paine or either of them has on said moneys that the same is subsequent to the lien of this defendant as hereinafter stated; this defendant believes it to be true that the said Ingalls Stone Company and James Healy have filed with the Board of Education of the City of Paterson notices claiming liens upon the moneys due under said contract between The Board of Education of the City of Paterson and the said Glen Engineering Construction Company, but as to whether the claim of complainant is prior to said claims, this defendant has no knowledge, but leaves the same to be determined in such manner as the Court may direct, and this defendant alleges that whatever lien the said Ingalls Stone Company or said James Healy, or either of them, or the said complainant has on the moneys due or to grow due under said contract, that the same is subsequent to the lien of this defendant as hereinafter stated; this defendant believes it to be true that the other persons named in paragraph of said bill of complaint therein designated "7" filed papers purporting to be notices of liens with the Board of Education of the City of Paterson, County of Passaic against the said Glen Engineering Construction Company as therein stated, as to the charge that the said claims or liens are subsequent

to the claim of the complainant this defendant has no knowledge but leaves the same to be determined in such manner as the Court may direct, and this defendant alleges that its said claim as hereinafter set forth is prior to any or all of the said claims set forth in the paragraph of the bill of complaint therein designated "7."

EIGHTH.—That this defendant admits that an involuntary petition in bankruptcy was filed in the United States District Court of the Southern District of New York against the Glen Engineering Construction Company and that Benjamin Barker was appointed receiver of said corporation, and this defendant has no knowledge or information as to the truth of the allegation that the complainant secured an order granting it leave to foreclose its alleged lien by suit in this Court.

NINTH.—This defendant alleges that after the making of the contract mentioned in paragraph "1" of the bill of complaint herein, this defendant entered into a contract with the said Glen Engineering Construction Company, on or about the first day of March, 1910, wherein and whereby it did agree to furnish the Glen Engineering Construction Company in pursuance of said contract in writing the mill work on said High School Building, including the wood hand-rails for stairs and the pantasote covered doors in accordance with the plans and specifications prepared by the architect of said High School Building, and made part of the contract between the said Glen Engineering Construction Company, and the Board of Education of the City of Paterson as aforesaid, not including glass or glassing or metal covered work,

priming, filling, varnishing rough grounds, sleepers, firrings, bucks or any other such material as would come under the heading of "rough work" or "hardware," and not including the erecting of any of the above material for the contract price of twelve thousand five hundred ($12,500) dollars; said material to be furnished and delivered by this defendant at such times as requested by the said Glen Engineering Construction Company.

TENTH.—That thereafter, this defendant truly and fully performed all the terms and conditions of said contract on his part to be performed, and this defendant up to the time of the abandonment by said Glen Engineering Construction Company of its contract with the Board of Education of the City of Paterson, for the erection of the High School Building aforesaid, and the bankruptcy of said Glen Engineering Construction Company as hereinafter alleged, has furnished to the said Glen Engineering Construction Company whenever requested so to do, the mill work and material under said contract, all in accordance with the plans and specifications of the architect aforesaid, to the amount of nine thousand five hundred ($9,500) dollars which was all the material which said Glen Engineering Construction Company requested this defendant furnish under said contract, and which said material was actually used in the erection and construction of said High School Building, and accepted by the architect thereof, and in addition to the foregoing, this defendant furnished and delivered material pursuant to the order of the Glen Engineering Construction Company for an agreed

price, and used by it in the erection and construction of said High School Building, outside and apart from the written contract aforesaid, as follows, to wit: extra window frames, doors and beams, and other lumber to the amount of Two hundred and eighty-nine and 36/100 ($289.36) dollars, and certain flooring to the amount of Eleven hundred and sixty-five and 78/100 ($1,165.78) dollars, and there is now due to this defendant from said Glen Engineering Construction Company, after deducting all just credits and offsets, the sum of Ten thousand nine hundred and fifty-five and 14/100 ($10,955.14) dollars, besides interest; the said amount being the sum of Nine thousand five hundred ($9,500) dollars for material furnished under the contract aforesaid, plus the reasonable value and agreed price of the aforesaid material furnished on orders of the Glen Engineering Construction Company, amounting to One thousand four hundred and fifty-five and 14/100 ($1,455.14) dollars.

ELEVENTH.—That this defendant has demanded the said sum of Ten thousand nine hundred and fifty-five and 14/100 ($10,955.14) dollars from the said Glen Engineering Construction Company, but the said Glen Engineering Construction Company has refused to pay the same, or any part thereto to this defendant.

TWELFTH.—That on the 9th day of December, 1910, at 3:15 P. M. of that day, before the whole work to be performed by said Glen Engineering Construction Company was completed, or accepted by the Board of Education of the City of Pater-

son, this defendant served upon C. Frank Kireker, the president of the Board of Education of the City of Paterson, in the County of Passaic, and upon the Clerk of said Board, the said Board having charge of the erection of of the High School Building aforesaid, and upon James J. Curran, Comptroller of the City of Paterson, being the financial officer of said City of Paterson, and said Board of Education of the City of Paterson, a notice duly verified, setting forth the residence of this defendant, and that this defendant had furnished the materials toward the performance of, and the completion of said contract between the said Glen Engineering Construction Company and the Board of Education of the City of Paterson, to the amount aforesaid, of Ten thousand nine hundred and fifty-five and 14/100 ($10,955.14) dollars, which amount was due to this defendant for materials so furnished after deducting all just credits and offsets and further setting forth the terms and conditions of the contract between this defendant, and the said Glen Engineering Construction Company, as well as the terms and conditions of the contract of the Board of Education of the City of Paterson, in the County of Passaic which said notice in all things did conform with the statute in such case made and provided, whereupon this defendant became entitled to have and receive from the Board of Education of the City of Paterson, the money due to it for materials so furnished, and to have such moneys retained out of moneys due or to grow due to the said Glen Engineering Construction Company, from the said Board of Education of the City of Paterson.

THIRTEENTH.—That this defendant did at the same time of the filing by him of the said notice,

and claim against the said Glen Engineering Construction Company, file with James J. Curran, Comptroller of the City of Paterson, and the financial officer of the said Board of Education of the City of Paterson, a bond in the sum of Twenty-two hundred ($2,200) Dollars, being a sum not exceeding twenty (20%) per cent. of the amount claimed by this defendant in said notice, and fixed by said Comptroller of the City of Paterson; said bond being conditioned for the payment of legal interest for the time the said moneys might be withheld from the said contractor in the event that the said claimant, this defendant, would not perfect his lien by instituting an action, or that decree be made in favor of said contractor in any such action, and conditioned further for the payment of costs if judgment be for the contractor; that within ninety (90) days after the filing of the notice of lien aforesaid, this defendant instituted an action to enforce said lien, and the said action is now pending in this Court.

FOURTEENTH.—This defendant charges that by virtue of the acts and allegations aforesaid, this defendant has acquired a lien under and by virtue of an act of the legislature of the State of New Jersey entitled "An Act to secure the payment of laborers, mechanics, machinists, merchants, traders and persons employed upon or furnishing materials toward the performing of any work on public improvements in cities, towns, townships and other municipalities in this State, approved March 30, 1892, and the supplements thereof, and amendments thereof," on the moneys then due or to grow due under the contract between said Glen Engineering Construction Company, and said

Board of Education of the City of Paterson, in the County of Passaic aforesaid; and this defendant therefore alleges that it is entitled to receive out of the moneys in the hands of the Board of Education of the City of Paterson, County of Passaic, due under the said contract between the said Board of Education of the City of Paterson and the said Glen Engineering Construction Company, or to grow due thereunder the amount of its claim as aforesaid, together with interest and costs, before any sum is paid by said Board of Education of the City of Paterson to any person or corporation, whether as assignee of the fund or claimant by reason of labor done or material furnished.

WHEREFORE this defendant prays that an account be taken under the direction of this Court of the amount due to the complainant and defendants on their respective claims against the moneys aforesaid, and that this defendant be paid out of said moneys the amount of its said claim in order as to priority under which said claim is or may be payable, with all reasonable costs and charges in this behalf sustained.

And this defendant as in duty bound will ever pray.

DAVID F. EDWARDS,
Solicitor for and of counsel
with defendant, Frank Miller,
doing business under the
name and style of Frank
Miller Lumber Company.

Amended Answer of Frank Miller, Trading as Miller Lumber Company (Filed, May 15, 1912).

IN CHANCERY OF NEW JERSEY.

Between:

JOHN AGNEW COMPANY, a corporation created by and existing under the Laws of the State of New Jersey,

Complainant,

against

BOARD OF EDUCATION OF THE CITY OF PATERSON, COUNTY OF PASSAIC, FRANK MILLER doing business under the name and style of FRANK MILLER LUMBER COMPANY, et al.,

Defendants.

The amended answer of Frank Miller doing business under the name and style of Frank Miller Lumber Company to the Bill of Complaint of John Agnew Company, a corporation created by and existing under the Laws of the State of New Jersey, complainant.

This defendant answering says:

FIRST.—He admits the making of the contract between the Board of Education of the City of Paterson, County of Passaic, and the Glen Engineering Construction Company, as set forth in paragraph "1" of Complainant's Bill, but this defendant alleges that he has no knowledge or in-

formation sufficient to form a belief as to the truth of the allegation that the contract annexed to the bill of complaint is a true copy of the original contract.

SECOND.—He alleges that he has no knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in the paragraph of said bill of complaint therein designated "2."

THIRD.—He admits the facts stated in the paragraph of the Bill of Complaint therein designated "3."

FOURTH.—He alleges that he has no knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in the paragraph of the Bill of Complaint therein designated "4" and therefore denies the same.

FIFTH.—He alleges that he has no knowledge or information sufficient to form a belief as to the truth of each and every one of the allegations contained in the paragraph of the Bill of Complaint therein designated "5" and therefore denies the same.

SIXTH.—That as to the allegations contained in the paragraph of said Bill of Complaint therein designated "6" that the complainant has acquired a lien on the moneys due or to grow due under the contract between said Glen Engineering Construction Company and the Board of Education of the City of Paterson, County of Passaic, by virtue of the act of the Legislature of the State of New Jer-

sey as stated in said paragraph, this defendant alleges that he has no knowledge or information thereof sufficient to form a belief as to the truth of each and every one of said allegations, and therefore denies the same, and this defendant further alleges that the lien of the said complainant, if a lien at all on said moneys, is subject and subsequent to the lien of this defendant as hereinafter stated.

SEVENTH.—That as to the allegations in the paragraph of said Bill of Complaint therein designated as "7" this defendant believes it to be true that on or about the 22nd day of September, 1910, the First National Bank of the Town of Union filed with the Board of Education of the City of Paterson, a writing purporting to be an assignment, to wit: by the Glen Engineering and Construction Company of the retained percentage of fifteen per cent. of the amount of the contract between said Glen Engineering Construction Company, and said Board of Education of the City of Paterson, County of Passaic, for the erection of a high school building, in said City of Paterson, amounting to the sum of Forty-two thousand eight hundred and fifteen and 45/100 ($42,815.45) Dollars, which said sum should become payable to the Glen Engineering Construction Company upon the completion of said contract, and which amount is the final payment thereunder, but this defendant charges the fact to be that said assignment is irregular and void and without consideration. The defendant further answering says that the said assignment to the Bank of the Town of Union is void and without consideration under the provi-

sions of Section 64 of the New Jersey Corporation Act in full force and effect at the time of said execution of said assignment, which provides as follows:

> "Whenever any corporation shall become insolvent, or shall suspend its ordinary business for want of funds to carry on the same, neither the directors or any officer or agent of the corporation shall sell, convey, assign or transfer any of its estate, effect, choses in action, goods, chattels, rights, or creditors, lands or hereditaments; nor shall they or either of them make any such sale, conveyance, assignment or transfer in contemplation of insolvency and every such sale, conveyance, assignment or transfer shall be utterly null and void as against creditors provided, that a bona fide purchase for valuable consideration before the corporation shall have actually suspended its ordinary business, by any person without notice of such insolvency or of the sale being made in contemplation of insolvency shall not be invalidated or impeached."

in that it was made while the Glen Engineering Construction Company was insolvent for a just consideration and without present consideration; —and is void under the provisions of Section 66 of the Stock Corporation Law of the State of New York, in full force and effect at the time of the execution of said agreement, which provides as follows:

> "§66. PROHIBITED TRANSFERS TO OFFICERS OR STOCKHOLDERS.—No cor-

poration which shall have refused to pay any of its notes or other obligations, when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment or transfer of any property of any such corporation by it or by any officers, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it, or by any officer, director or stockholder when the corporation is insolvent, or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid, except that laborers' wages for services shall be preferred claims, and be entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or incumbrances. No corporation formed under or subject to the banking, insurance or railroad law, shall make any assignment in contemplation of insolvency. Every person receiving by means of any such prohibited act or deed any property of the corporation, shall be bound to account therefor to its creditors or stockholders or other trustees. No stockholder of any such corporation shall make any transfer or assignment of his stock therein to any person in contemplation of its insolvency. Every transfer or assignment or other act done

in violation of the foregoing provisions of this section shall be void."

in that said assignment was made while the Glen Engineering Construction Company was insolvent and in contemplation of insolvency without present consideration, and is void under the provision of the Bankruptcy Act of the State of New York, having been made while the Glen Engineering Construction Company was insolvent and within four months of the filing of the petition in bankruptcy and was a preference; that whatever right or interest or lien if any, may have been acquired by the First National Bank of the Town of Union, in or to any of said moneys remaining unpaid on account of said contract, is subsequent to and subject to the lien of this defendant upon and against the same; and as to the charge the lien of the complainant is prior to the said assignment, this defendant has no knowledge but leaves the same to be determined in such manner as the Court may direct.

This defendant believes it to be true that Matthew S. Paine and Edward Gunnell filed on the 9th day of December, 1910, at 4:40 p. m. on that day, a writing purporting to be assignments to each of them respectively, from the said Glen Engineering Construction Company of all moneys due or to grow due said Glen Engineering Construction Company under its contract with the said Board of Education of the City of Paterson, and as to the charge that the lien of the complainant is prior to said alleged assignments, this defendant has no knowledge but leaves the same to be determined in such manner as the Court may direct, and this

defendant alleges that whatever lien the said complainant, the said Matthew S. Paine or the said Edward Gunnell or either of them has, on said moneys, that the same is subsequent to the lien of this defendant, as hereinafter stated; this defendant believes it to be true that Matthew S. Paine did on the 9th day of December, 1910, at 4:40 p. m. file another writing purporting to be an assignment to him from the Glen Engineering Construction Company of all moneys due or to grow due from said Glen Engineering Construction Company under its contract with the Board of Education of the City of Paterson, particularly the payment due the said Glen Engineering Construction Company for work done and materials furnished in the month of November, 1910, under said contract, and as to the charge that the lien of the complainant is prior to said assignment this defendant has no knowledge, but leaves the same to be determined in such manner as this Court may direct; and this defendant alleges that whatever lien the said complainant or the said Matthew S. Paine or either of them has on said money, that the same is subsequent to the lien of this defendant as hereinafter stated. The defendant further answering says that the said assignments to M. S. Paine and Edward Gunnell filed as aforesaid are void and without consideration under the provision of Section 64 of the New Jersey Corporations in full force and effect at the time of the execution of said assignment, which provides as follows:

"Whenever any corporation shall become insolvent, or shall suspend its ordinary business for want of funds to carry on the same, neither

the directors or any officer or agent of the corporation shall sell, convey, assign or transfer any of its estate, effect, choses in action, goods, chattels, rights or creditors, lands or hereditaments; nor shall they or either of them make any such sale, conveyance, assignment or transfer in contemplation of insolvency and every such sale, conveyance, assignment or transfer shall be utterly null and void as against creditors; provided, that a bona fide purchase for valuable consideration before the corporation shall have actually suspended its ordinary business, by any person without notice of such insolvency or of the sale being made in contemplation of insolvency shall not be invalidated or impeached."

in that said assignments were made while the Glen Engineering Construction Company was insolvent for a just consideration and if any consideration was given for any of said assignments the same is nevertheless void as being made with notice to the assignee of the insolvency of the Glen Engineering Construction Company—and is further void as being a transfer of the corporation while insolvent for the benefit of a director thereof—and is further void under the provision of the Statute of Frauds of the State of New Jersey in full force and effect at the time being made while the Glen Engineering Construction Company was insolvent with the full intent to hinder, delay and defraud its creditors and this defendant, such transfer being made void by said statute, and is further void under the provision of Section 66 of the Stock Corporation Law of the State of New

York, in full force and effect at the time of said transfer and which provides as follows:

"§66. PROHIBITED TRANSFER TO OFFICERS OR STOCKHOLDERS.—No corporation which shall have refused to pay any of its notes or other obligations, when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it, or by any officer, director or stockholder when the corporation is insolvent, or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid, except that laborers' wages for services shall be preferred claims and be entitled to payment before any other creditors out of the corporation asssets in excess of valid prior liens or incumbrances. No corporation formed under or subject to the banking, insurance or railroad law, shall make any assignment in contemplation of insolvency. Every person receiving by means of any such prohibited act or deed any property of the corporation, shall be bound to account therefor to its creditors or stockholders or other trustees. No stock-

holder of any such corporation shall make any transfer or assignment of his stock therein to any person in contemplation of its insolvency. Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void. No conveyance, assignment or transfer of any property of a corporation, formed under or subject to the Banking Law, exceeding in value one thousand dollars, shall be made by such corporation, or by any officer or director thereof, unless authorized by previous resolution of its Board of Directors, except promissory notes or other evidences of debt issued or received by the officers of the corporation in the transaction of its ordinary business, and except payments in specie or other current money, or in bank bills made by such officers. No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice. Every director or officer of a corporation who shall violate or be concerned in violating any provisions of this section, shall be personally liable to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of any loss they may respectively sustain by such violation."

And under the provisions or sections 35-38 and 40 of the Personal Property Law of the State of New York known as the Statute of Frauds, in full force and effect at the time, and which provides as follows:

"§35. Transfer and charges with fraudulent intent.—Every transfer of any interest in personal property, or the income thereof, and every charge on such property or income, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, or decree or judgment suffered, with such intent, is void as against every person so hindered, delayed or defrauded."

having been made while the Glen Engineering Construction Company while insolvent with the intent to hinder, delay or defraud the creditors of said corporation and the defendant, and taken by said assignee with notice of the insolvency and of said intent—and is further void under the provisions of the United States Bankruptcy Act.

This defendant believes it to be true that the Ingalls Stone Company, and James Healy have filed with the Board of Education notices claiming liens upon the moneys due under said contract between the Board of Education of the City of Paterson, and the said Glen Engineering Construction Company; but as to whether the claim of complainant is prior to said claims, this defendant has no knowledge, but leaves the same to be determined in such manner as the Court may direct, and this defendant alleges that whatever lien the said Ingalls Stone Company or said James Healy, or either of them or the said complainant has on the moneys due or to grow due under said contract,

that the same is subsequent to the lien of this defendant as hereinafter stated; this defendant believes it to be true that the other persons named in paragraph of said Bill of Complaint therein designated "7" filed papers purporting to be notices of liens with the Board of Education of the City of Paterson, County of Passaic against the said Glen Engineering Construction Company as therein stated, as to the charge that the said claims or liens are subsequent to the claim of the complainant, this defendant has no knowledge but leaves the same to be determined in such manner as the Court may direct, and this defendant alleges that its said claim as hereinafter set forth is prior to any or all of the said claims set forth in the paragraph of the bill of complaint therein designated "7."

EIGHTH.—That this defendant admits that an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York against the Glen Engineering Construction Company and that Benjamin Barker was appointed receiver of said corporation and this defendant has no knowledge or information as to the truth of the allegation that the complainant secured an order granting it leave to foreclose its alleged lien by suit in this Court.

NINTH.—This defendant alleges that after the making of the contract mentioned in paragraph "1" of the Bill of Complaint herein, this defendant entered into a contract with the said Glen Engineering Construction Company, on or about the first day of March, 1910, wherein and where-

by it did agree to furnish the Glen Engineering Construction Company in pursuance of said contract in writing, the mill work on said High School Building, including the wood hand-rails for stairs and the pantasote covered doors in accordance with the plans and specifications prepared by the architect of said High School Building, and made part of the contract between the said Glen Engineering Construction Company and the Board of Education of the City of Paterson as aforesaid, not including glass or glazing or metal covered work, priming, filling, varnishing rough grounds, sleepers, furrings, bucks, or any other such material as would come under the heading of "rough work" or "hardware," and not including the erecting of any of the above material for the contract price of twelve thousand five hundred ($12,500) Dollars; said material to be furnished and delivered by this defendant at such times as requested by the said Glen Engineering Construction Company.

TENTH.—That thereafter, this defendant truly and fully performed all the terms and conditions of said contract on his part to be performed, and this defendant up to the time of the abandonment by said Glen Engineering Construction Company of its contract with the Board of Education of the City of Paterson, for the erection of the High School Building aforesaid, and the bankruptcy of said Glen Engineering Construction Company as hereinafter alleged, has furnished to the said Glen Engineering Construction Company whenever requested so to do, the mill work and material under said contract, all in accordance with

the plans and specifications of the architect aforesaid, to the amount of nine thousand five hundred ($9,500) Dollars, which was all the material which said Glen Engineering Construction Company requested this defendant furnish under said contract, and which said material was actually used in the erection and construction of said high school building, and accepted by the architect thereof, and in addition to the foregoing, this defendant furnished and delivered material pursuant to the order of the Glen Engineering Construction Company for an agreed price, and used by it in the erection and construction of said High School building, outside and apart from the written contract aforesaid, as follows, to wit: extra window frames, doors and beams, and other lumber to the amount of two hundred and eighty-nine and 36/100 ($289.36) Dollars, and certain flooring to the amount of eleven hundred and sixty-five and 78/100 ($1,165.78) Dollars, and there is now due to this defendant from said Glen Engineering Construction Company, after deducting all just credits and offsets, the sum of ten thousand nine hundred and fifty-five and 14/100 ($10,955.14) Dollars, besides interest; the said amount being the sum of nine thousand five hundred ($9,500) Dollars for material furnished under the contract aforesaid, plus the reasonable value and agreed price of the aforesaid material furnished on orders of the Glen Engineering Construction Company, amounting to one thousand four hundred and fifty-five and 14/100 ($1,455.14) Dollars.

ELEVENTH.—That this defendant has demanded the said sum of ten thousand nine hundred and

fifty-five and 14/100 ($10,955.14) Dollars from the said Glen Engineering Construction Company, but the said Glen Engineering Construction Company has refused to pay the same, or any part thereof to this defendant.

TWELFTH.—That on the 9th day of December, 1910, at 3.15 P. M. of that day, before the whole work to be performed by said Glen Engineering Construction Company was completed, or accepted by the Board of Education of the City of Paterson, this defendant served upon C. Frank Kireker, the president of the Board of Education of the City of Paterson, in the County of Passaic, and upon the Clerk of said Board, the said Board having charge of the erection of the High School Building aforesaid, and upon James J. Curran, Comptroller of the City of Paterson, being the financial officer of said City of Paterson, and said Board of Education of the City of Paterson, a notice duly verified, setting forth the residence of this defendant, and that this defendant had furnished the materials toward the performance of, and the completion of said contract between the said Glen Engineering Construction Company and the Board of Education of the City of Paterson, to the amount aforesaid of ten thousand nine hundred and fifty-five and 14/100 ($10,955.14) Dollars, which amount was due to this defendant for materials so furnished after deducting all just credits and offsets, and further setting forth the terms and conditions of the contract between this defendant and the said Glen Engineering Construction Company, as well as the terms and conditions of the contract of the Board of Education of the

City of Paterson, in the County of Passaic, which said notice in all things did conform with the statute in such case made and provided, whereupon this defendant became entitled to have and receive from the Board of Education of the City of Paterson, the money due to it for materials so furnished, and to have such moneys retained out of moneys due or to grow due to the said Glen Engineering Construction Company, from the said Board of Education of the City of Paterson.

THIRTEENTH.—That this defendant did at the same time of the filing by him of the said notice, and claim against the said Glen Engineering Construction Company, file with James J. Curran, Comptroller of the City of Paterson, and the financial officer of the said Board of Education of the City of Paterson, a bond in the sum of twenty-two hundred ($2200) Dollars, being a sum not exceeding twenty (20%) per cent. of the amount claimed by this defendant in said notice, and fixed by said Comptroller of the City of Paterson; said bond being conditioned for the payment of legal interest for the time the said moneys might be withheld from the said contractor in the event that the said claimant, this defendant, would not perfect his lien by instituting an action, or that decree be made in favor of said contractor in any such action, and conditioned further for the payment of costs if judgment be for the contractor; that within ninety (90) days after the filing of the notice of lien aforesaid, this defendant instituted an action to enforce said lien, and the said action is now pending in this Court.

FOURTEENTH.—This defendant charges that by virtue of the acts and allegations aforesaid, this defendant has acquired a lien under and by virtue of an act of the Legislature of the State of New Jersey, entitled, "An Act to secure the payment of laborers, mechanics, machinists, merchants, traders and persons employed upon or furnishing materials toward the performing of any work on public improvement in cities, towns, townships and other municipalities in this state, approved March 30, 1892, and the supplements thereto, and amendments thereof," on the moneys then due or to grow due under the contract betwen said Glen Engineering Construction Company, and said Board of Education of the City of Paterson, in the County of Passaic aforesaid; and this defendant therefore alleges that it is entitled to receive out of the moneys in the hands of the Board of Education of the City of Paterson, County of Passaic, due under the said contract between the said Board of Education of the City of Paterson and the said Glen Engineering Construction Company, or to grow due thereunder, the amount of its claim as aforesaid, together with interest and costs, before any sum is paid by said Board of Education of the City of Paterson to any person or corporation, whether an assignee of the fund or claimant by reason of labor done or material furnished.

WHEREFORE, this defendant prays that an account be taken under the direction of this Court of the amount due to the complainant and defendants on their respective claims against the moneys aforesaid, and that this defendant be paid out of said moneys the amount of its said claim in

order as to priority under which said claim is or may be payable, with all reasonable costs and charges in this behalf sustained.

And this defendant as in duty bound will ever pray.

DAVID F. EDWARDS,
Solicitor for and of counsel with defendant, FRANK MILLER, doing business under the name and style of FRANK MILLER LUMBER COMPANY.

Answer of Defendant Martin S. Paine (Filed May 29, 1911).

IN CHANCERY IN NEW JERSEY.

Between JOHN AGNEW COMPANY, Complainant, and GLEN ENGINEERING CONSTRUCTION COMPANY, et al., Defendants.	Answer. On Bill, etc.

ANSWER OF THE DEFENDANT MARTIN S. PAINE.

This defendant, answering the bill of complaint herein, alleges:

1. Admits the allegations contained in paragraphs "1" and "3" of the bill of complaint herein.

2. He denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "2" and "4" of the bill of complaint herein, as he is not informed as to any matters therein alleged and leaves the complainant to its proof thereof.

3. That defendant has no knowledge or information of the matters set out in paragraph "5" of the bill of complaint herein as to the Glen Engineering Construction Company's failure to pay the sums therein specified or the filing of any notices or bond by the complainant and leaves the complainant to its proof as to these matters.

4. Denies any knowledge or information as to matters set forth in paragraph "6" of the bill of complaint herein.

5. He believes to be true the matters stated and set forth in paragraph "7" of the bill of complaint herein.

AND THIS DEFENDANT FURTHER ANSWERING THE BILL OF COMPLAINT HEREIN AND BY WAY OF CROSS-BILL EXHIBITED AGAINST THE COMPLAINANT AND DEFENDANTS, SAYS:

6. That on or about the 2nd day of July, 1909, the Board of Education of the City of Paterson, in the County of Passaic, a corporation of this State, and vested with the power and privilege to enter

into contracts for the erection of school houses in the City of Paterson, County of Passaic, entered into a written contract with the Glen Engineering Construction Company, a corporation of the State of New York, wherein and whereby the said Glen Engineering Construction Company agreed to erect and finish all mason, carpenter, painting, structural iron and steel and electrical works on the new high school building to be erected on the site bounded by Hamilton Street, Lee Place and De-Grasse Street, in the City of Paterson, and known and described as The Paterson High School, within four hundred (400) working days from the date of said contract according to the drawings and specifications made by William T. Fanning, architect, copies of which are annexed to the said contract and formed part thereof, for and in consideration of the sum of Two hundred and eighty-five thousand, four hundred and twenty-three Dollars ($285,423.00), payable as follows, that is to say: As the work progressed the architect should give his certificate to the said Board of Education in writing certifying the value of the work performed and the Board of Education should pay 85% of the amount so certified, retaining 15% until after the said High School Building should be completed and accepted, and which contract was filed in the Office of the Board of Education of the City of Paterson on the 2nd day of July, 1909, and now remains on file in said Office. A copy of said contract is set out in full in the bill of complaint herein and this defendant hereby refers to said contract as if fully set forth herein.

7. That the said Glen Engineering Construction Company, in accordance with its said contract

with the said Board of Education, did enter upon the construction of the High School Building and did supply certain labor and materials for the construction of the same.

That thereafter the said Glen Engineering Construction Company abandoned the construction of the said building and its said contract and was, in the month of December, 1910, adjudged a bankrupt by the United States District Court for the Southern District of New York, and thereafter, to wit: on the 12th day of December, 1910, one Benjamin Barker was appointed ancillary receiver of the said Glen Engineering Construction Company in the United States District Court for the District of New Jersey.

That at the time of the abandonment of the contract as aforesaid, there was due to the said Glen Engineering Construction Company on the said contract a sum in excess of Eighty thousand Dollars ($80,000) and still a further sum will be due to it upon the completion and acceptance of said building, which said sum this defendant is informed and believes exceeds the sum of Thirty-three thousand Dollars ($33,000).

8. That in and by said contract between the Board of Education of the City of Paterson and the Glen Engineering Construction Company it was provided as follows:

> "And the said party of the first part (The Board of Education) does hereby for itself and its successors, covenant, promise and agree to and with the said party of the second part (the Glen Company) its successors, that it, said party of the first part, its suc-

cessors, shall and will in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part as specified herein, well and truly pay or cause to be paid unto the said party of the second part, its successors, the said sum of Two hundred and eighty-five thousand four hundred and twenty-three Dollars ($285,423.00), lawful money of the United States of America, in manner following, that is to say: the architect shall from time to time as the work progresses certify to the party of the first part, in writing, the value of the work performed by the party of the second part under this contract to the date of such certificate and thereupon the party of the first part shall pay to the party of the second part eighty-five per centum of the amount so certified, retaining, at all times, fifteen per centum of the amount so certified until thirty days after the said school building is completed."

That pursuant to said foregoing provision, the architect so specified made and delivered his certificate in writing, certifying to the payments to be made to the Glen Engineering Construction Company and said certificates were paid as in said contract provided, down to and including the architect's certificate for the work performed and materials furnished during the month of October, 1910. That thereafter and in the early part of December, 1910, the Glen Engineering Construction Company made its requisition for payment for the labor performed and materials furnished under said contract during the month of November, 1910,

and on information and belief the said architect made and delivered his certificate requiring the payment by the Board of Education of the City of Paterson to the Glen Engineering Construction Company of a sum in excess of Fifteen Thousand Dollars ($15,000.00).

9. That between the 25th day of August, 1910, and the 10th day of December, 1910, this defendant, at the request of the Glen Engineering Construction Company, loaned and advanced to the Glen Engineering Construction Company, to enable it to carry on the work as provided in said contract and this defendant did for that purpose loan to it the sum of Twenty-five thousand nine hundred and fifty Dollars ($25,950.00).

10. That to secure to this defendant the payment of said advances, the Glen Engineering Construction Company, on the 1st day of December, 1910, assigned, transferred and set over to this defendant, all its right, title and interest in and to the payment due or to become due to the Glen Engineering Construction Company to which it was entitled under its said contract for work done and materials furnished during the month of November, 1910, and for which it had made its requisition, and also assigned, transferred and set over to this defendant all moneys due or to become due to it by virtue of the contract aforementioned—all with the consent of the Board of Education of the City of Paterson, in the County of Passaic, and the Clerk of said Board, and the Comptroller of the City of Paterson, and for the purpose of making such assignments more effective, said Glen Engin-

eering Construction Company, in and by said written assignments, gave to this defendant its power of attorney by which it made, constituted and appointed this defendant its true and lawful attorney for it and in its name, to receipt for and receive from the Board of Education of the City of Paterson, the payment due or to become due for labor performed and materials furnished during the month of November, 1910, and for all moneys due or to become due to it by reason of the contract aforesaid.

11. That in pursuance of and in conformity with the statute in such cases made and provided, on the 9th day of December, 1910, at 4:30 P. M. on that day, before the whole work to be performed by said Glen Engineering Construction Company was completed or accepted by the Board of Education of the City of Paterson, this defendant served upon C. Frank Kireker, President of the Board of Education of the City of Paterson, in the County of Passaic, and upon the Clerk of said Board, the said Board having charge of the erection of the High School Building aforesaid, and upon James J. Curran, Comptroller of the City of Paterson, being the financial officer of said City of Paterson, and said Board of Education of the City of Paterson, the assignments above referred to by the Glen Engineering Construction Company to this defendant containing the said powers of attorney for the collection of payments by this defendant.

12. That no part of said loans and advances have been paid, although demanded, and the whole thereof is now due and owing.

13. This defendant charges that by reason of the acts and allegations aforesaid, this defendant has acquired a right to the moneys then due or to grow due under the contract between said Glen Engineering Construction Company and said Board of Education of the City of Paterson, in the County of Passaic, aforesaid.

14. That this defendant is informed and believes it to be true that a written agreement was made between the said Glen Engineering Construction Company and the First National Bank of the Town of Union, New Jersey, bearing date the 15th day of September, 1910, purporting to assign the retained percentage due and owing to the said Glen Engineering Construction Company by the said Board of Education, to secure the payment to the said bank of the amount due it by the said Glen Engineering Construction Company, which agreement was filed with the Clerk of the Board of Education on or about the 22nd day of September, 1910, but this defendant charges that the said alleged assignment, if a lien at all upon the moneys now due or to become due to the said Glen Engineering Construction Company upon the contract aforesaid, is subsequent to the lien of this defendant upon said money; that this defendant is informed and believes it to be true that another written agreement was made between said Glen Engineering Construction Company and Edward Gunnell bearing date the 30th day of November, 1910, purporting to assign Twenty-one Thousand Dollars ($21,000.00) of the moneys due to the said Glen Engineering Construction Company under its said contract with the Board of Education of the City of Paterson; and which as-

signment was filed with the Clerk of the Board of Education on the 9th day of December, 1910; that this defendant charges that said alleged assignment if a lien at all upon any moneys due or to become due to said Glen Engineering Construction Company upon the contract aforesaid is subsequent to the lien of this defendant to said money; that this defendant is also informed and believes it to be true that the following claims were also served on the Board of Education in the City of Paterson, in the County of Passaic, and upon the financial officer of said city, but whether they were served before or after said defendant's assignment, he is not informed, to wit:

James Healy	$761.20
Frank Miller, doing business as Frank Miller Lumber Company	10,955.14
Herringbone Metal Lath Company	761.25
Joseph Sharpe Construction Company	3,037.00
Cortlandt Engineering Company	2,537.00
Fred G. Ebeary,	900.00
Architectural Plastering Company	1,680.00
American Lumber Company	242.90
George A. Myers & Company	523.96
Sutphen & Myer, a partnership consisting of John S. Sutphen and Charles R. Myer	2,400.00
Ingalls Stone Company	2,115.00
McKiernan & Bergin Company	1,148.80
The J. A. Van Winkle Company	313.37
Louis Pasquali, trading as Italian Marble Mosaic Company	2,114.30

James W. Johnson	244.20
E. Ricker & Son Company	1,658.16
P. S. Simmons Painting Company	499.60

That this defendant is also informed and believes it to be true that the following claims for labor were also served upon the said Board of Education of the City of Paterson, in the County of Passaic, and upon the financial officers of said city, whether they were served before or after this defendant's assignment, he is not informed, to wit:

Martin Troost	$626.75
Russell Holmes	24.50
Antonio Deets	12.79
Fred Benzten	12.71
Hugh McPherson	28.60
Thomas W. Ward	26.00
Peter Magie	10.12
David Hawthorne	9.95
James Gallagher	19.60
Angelo Touche	19.60
James O'Leary	20.30
James Wehr	33.60
William Noble	33.60
John Van Blarcom	26.60
John McMullen	33.60
Arthur Daniels	28.80
William H. Ogaethry	26.60
James Ferguson	28.00
George Cunningham	28.00
James Gordon	28.00
George Van Blarcom	26.60
Thomas Handbridge	26.60
John Columbus	12.79

Thomas Cummings	19.60
Alexander Crawford, Jr.	33.60
John F. Rose	26.60
Charles Van Ness	55.00
William Van Ness	55.00
Walter Venable	34.50
William H. Rea	33.60
Edward Harrison	33.60
James Kingsland	33.60
Alexander Crawford, Sr.	39.20
Robert Maxwell	26.60
Otto Temple	26.60
Thomas Moran	13.18
Leonard Brink	26.60
Welcome R. Steinmetz	42.50

15. That this defendant charges that the lien of any of the foregoing persons set forth in paragraph "14" of this answer upon the moneys due, if they or any of them have any lien, by virtue of the filing of said notices upon the moneys due or to become due under the said contract with the said Glen Engineering Construction Company upon and after the filing of said notices, such liens are subsequent to and subject to the lien of this defendant upon or against the same.

16. That on the 10th day of December, 1910, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York, against the said Glen Engineering Construction Company, and upon that date, one Benjamin Barker was appoited by order of said Court, Receiver for said corporation, and that thereafter, on the 12th day of December, 1910,

said Benjamin Barker was appointed Ancillary Receiver of said corporation, for the State of New Jersey, by the United States District Court, for the District of New Jersey, and that thereafter, said Glen Engineering Construction Company was duly adjudged a bankrupt and the said Benjamin Barker has since been acting, and is now acting, as the Receiver and Ancillary Receiver of said corporation.

17. This defendant, therefore, prays that his claim against the said fund in the hands of the Board of Education of the City of Paterson, County of Passaic, be enforced, and that it be determined by this Honorable Court how much is due from the Board of Education of the City of Paterson, in the County of Passaic, to the said Glen Engineering Construction Company, and how much is due from said Glen Engineering Construction Company to this defendant, and how much is due from the said Glen Engineering Construction Company to the other persons who have filed notices as set forth herein, and that the order of priority of said claims be ascertained; that a reference be had for that purpose if necessary, and that it be decreed by this Court that the amount so found due from the said Glen Engineering Construction Company to this defendant be paid to this defendant by the Board of Education of the City of Paterson, in the County of Passaic, or by such person as may have the funds in hand, and that this defendant may have such other and further relief in the prem-

ises as may be agreeable to equity and good conscience.

WILLIAM T. DELANEY,
Solicitor for and of Counsel,
with Defendant Paine.

I hereby consent to the filing of the within answer as of time.

WILLIAM B. GOURLEY,
Solicitor of Complainant.

Answer of Charles L. Strong, Trustee of Glen Engineering Construction Company (Filed May 31, 1912).

IN CHANCERY OF NEW JERSEY.

Between JOHN AGNEW COMPANY, Complainant, and THE BOARD OF EDUCATION of the CITY OF PATERSON, et al., Defendants.	On Bill, &c.

This defendant answering says:

(1) That he admits that the Board of Education of the City of Paterson entered into a contract with the Glen Engineering Construction Company

about July 2nd, 1909, for the construction or partial construction of a high school building to be erected in the City of Paterson, substantially in the terms set forth in Paragrph 1 of the bill of complaint herein.

(2) This defendant has no knowledge of the matters set forth in Paragraph 2 of said bill of complaint and leaves the complainant to make such proof thereof as it may be advised.

(3) This defendant admits that said Glen Engineering Construction Company entered upon the construction of said high school building and supplied certain labor and materials therefor, and afterwards abandoned the said construction and was, in the month of December, 1910, adjudged a bankrupt, by the United States District Court, for the Southern District of New York, and that thereafter one Benjamin Barker was appointed ancillary receiver of said Company, by the United States District Court for the District of New Jersey, and that at the time of the abondonment of said contract, there was a substantial sum due to said Glen Engineering Construction Company, but the amount of such sum this Defendant does not know, and leaves the complainant to make such proof thereof as it may be advised.

(4) This Defendant has no knowledge of the matters set forth in Paragraphs 4 and 5 of said bill of complaint, and leaves the complainant to make such proof thereof as it may be advised.

(5) This Defendant denies that by virtue of the acts and allegations contained in said bill of complaint the said complainant has acquired a lien on

the moneys due and to grow due under said contract between the said Glen Engineering Construction Company and said Board of Education as alleged in Paragraph 6 of said bill of complaint.

(6) This Defendant further answering says, that he has no knowledge of any agreement made between said Glen Engineering Construction Company and the First National Bank of the Town of Union, purporting to assign any moneys due and owing to said Glen Engineering Construction Company by the said Board of Education, or whether any such agreement was filed with the Clerk of said Board of Education, but this Defendant further answering alleges and charges the fact to be that if any such agreement was made the same is void and of no effect against this Defendant and the creditors of said Glen Engineering Construction Company, for the reason that the same was made at a time when the said Glen Engineering Construction Company was insolvent and known so to be by said First National Bank of the Town of Union, and for the further reason that said agreement, if made, was made for the purpose of securing and unlawfully preferring the First National Bank of the Town of Union as a creditor of the said Glen Engineering Construction Company, contrary to the provisions of the United States Bankruptcy Laws and the Statutes of the State of New Jersey.

(7) This Defendant, further answering says, that he has no knowledge of any written agreements made between said Glen Engineering Construction Company and Matthew S. Payne or Edward Gunnell, or whether the same were filed with the Clerk

of the Board of Education of the City of Paterson, as in Paragraph 7 of said bill of complaint set forth but this defendant further answering alleges and charges the fact to be that if any such agreements were made the same are void and of no effect against this Defendant and the creditors of said Glen Engineering Construction Company for the reason that the same were made at a time when the said Glen Engineering Construction Company was insolvent and known so to be by said Matthew S. Payne, and Edward Gunnell, and for the further reason that said agreements, if made, were made for the purpose of securing and unlawfully preferring Matthew S. Payne and Edward Gunnell, as creditors of the said Glen Engineering Construction Company, contrary to the provisions of the United States Bankruptcy Laws and the Statutes of the State of New Jersey.

(8) This Defendant further answering says, that he has no knowledge of the claims served on the Board of Education in the City of Paterson, and upon the financial officer of the said City, or of the times when notice thereof were so served by the several persons, firms or corporations named in Paragraph 6 of said bill of complaint, nor whether any of such persons, firms or corporations have done any work, supplied any materials or labor for or in the construction of said high school building, but leaves the complainant and the said several persons, firms or corporations to make such proof thereof as they may be advised.

(9) This Defendant, however, alleges and charges the fact to be that the rights and interests of any of said persons, firms or corporations in any

moneys now due and owing by the said Board of Education of the City of Paterson, to said Glen Engineering Coustruction Company under said contract for the construction of said high school building, are subject to the right and interest of this Defendant as Trustee in bankruptcy of the said Glen Engineering Construction Company.

(10) This Defendant, further answering, says, that he admits that the said fund in the possession of said Board of Education was, at the time of filing said bill, by virtue of the bankruptcy proceedings, aforesaid, and appointment of the said Benjamin Barker, Receiver of the said Glen Engineering Construction Company, in the custody of the United States District Court, and this Defendant further answering says, that since the filing of the said bill of complaint, this Defendant has been elected Trustee by the creditors of said Glen Engineering Construction Company, and duly appointed such Trustee by order of the United States District Court, and has qualified by giving the bond required in such order, and that said Benjamin Barker, as Receiver of said Glen Engineering Construction Company, has transferred and conveyed to this Defendant as such Trustee, all the right, title and interest of said Benjamin Barker as such Receiver, in and to any and all property of the said Glen Engineering Construction Company, including any and all moneys due or to grow due to said corporation under said contract, with said Board of Education in the City of Paterson.

(11) This Defendant further answering says, that he is advised and therefore charges that because of certain defects in the several notices filed

with the Board of Education and the Comptroller of the City of Paterson, by the said complainant, and the several persons, firms or corporations mentioned in Paragraph 7 of the said bill of complaint, and also because of certain defects in the manner of serving or filing such notices, each and all of the said notices do not comply with the provisions of an Act of the Legislature of the State of New Jersey entitled, "An Act to secure the payment of laborers, mechanics, merchants, traders and persons employed or furnishing materials toward the performance of any work in public improvements in cities, towns, townships and other municipalities in this State," approved March 30th, 1892, and the several acts amendatory thereof or supplementary thereto, and that therefore said several persons, firms or corporations have not acquired and are not entitled to any lien on the moneys now in the hands of the Board of Education of the City of Paterson, or of the City of Paterson, and due to said Glen Engineering Construction Company under the contract made between that Company and said Board of Education, for the construction of said high school building, but that this Defendant, as Trustee in bankruptcy of said Glen Engineering Construction Company, is entitled to all of said moneys for distribution among the creditors of said Bankrupt estate.

And this Defendant humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

FRANK H. HALL,
Solicitor for and of Counsel
with Defendant, Strong.

Answer of Defendant First National Bank of Town of Union, N. J. (Filed June 12, 1911).

In Chancery of New Jersey.

Between:
John Agnew Company,
Complainant,
and
The Board of Education of the City of Paterson, in the County of Passaic, and others,
Defendants.

On Bill, etc.

The answer of the defendant, First National Bank of Town of Union, N. J., styled in said bill of complaint the First National Bank of the Town of Union, New Jersey, to the complainant's bill of complaint.

1. This defendant answering says, that it admits the matters and things set forth in paragraph one of the complainant's bill of complaint.

2. This defendant further answering says, that it has no knowledge of, and therefore neither admits nor denies the matters and things set forth in paragraphs two, three, four and five of said bill of complaint, but leaves the complainant to make such proof thereof as it may be advised.

3. And this defendant further answering says that it denies that the complainant has acquired a lien under and by virtue of an act of the Legislature of the State of New Jersey, entitled, "An

act to secure the payment of laborers, mechanics, machinists, merchants, traders and persons employed upon or furnishing materials toward the performing of any work on public improvement in cities, towns, townships and other municipalities in this State," approved March 30th, 1892, and the supplements thereto, and amendments thereof, on the moneys due or to grow due under the contract between the said Glen Engineering Construction Company and said Board of Education of the City of Paterson in the County of Passaic aforesaid, as set forth in paragraph six of said complainant's bill.

4. And this defendant further answering says, that it admits that on or about the twenty-second day of September, nineteen hundred and ten, it filed with the said Board of Education of the City of Paterson in the County of Passaic, an assignment to it by the defendant, Glen Engineering Construction Company, of the retained percentage of fifteen per cent. (15%) of the amount of said contract for the erection of said high school building, amounting to the sum of forty-two thousand eight hundred and thirteen dollars and forty-five cents, which should become payable by the Board of Education of the City of Paterson to said Glen Engineering Construction Company, upon the completion of the contract between said Glen Engineering Construction Company and said Board of Education of the City of Paterson referred to in paragraph one of the complainant's bill of complaint, and which amount is the final payment thereunder; but this defendant denies that whatever right or interest, if any, it may have acquired,

by virtue of said assignment, in and to the moneys remaining unpaid on account of said contract, is subsequent to and subject to complainant's lien upon or against the same, but on the contrary this defendant answering says, that the consideration of said assignment was the sum of fifteen thousand dollars, moneys due and owing by the defendant Glen Engineering Construction Company to this defendant for moneys loaned and advanced by this defendant to the Glen Engineering Construction Company at its request, at and prior to the date of said assignment, to wit, the fifteenth day of September, nineteen hundred and ten, and this defendant denies that the right or interest of this defendant, acquired in and to the moneys remaining unpaid on account of said contract, is subsequent to and subject to the lien of complainant upon or against the same.

5. This defendant further answering says, that it has no knowledge of, and therefore neither admits nor denies the matters and things set forth in the remainder of paragraph seven of said bill of complaint, but leaves the complainant to make such proof thereof as it may be advised.

6. This defendant further answering says, that on the fifteenth day of September, nineteen hundred and ten, the said defendant Glen Engineering Construction Company, being then justly indebted to this defendant in the sum of fifteen thousand dollars for moneys loaned and advanced by this defendant to the said Glen Engineering Construction Company, at and prior to said fifteenth

day of September, nineteen hundred and ten, did, by an assignment in writing under its corporate seal, signed by its president and treasurer and duly attested and proved, sell, assign, transfer and set over unto this defendant, its successors, or assigns, a certain debt, the retained percentage, due and owing to it, the said Glen Engineering Construction Company by the Board of Education of the City of Paterson, amounting to forty-two thousand eight hundred and thirteen dollors and forty-five cents, which sum of money would become due and payable to the said Glen Engineering Construction Company upon completion of a certain contract with the said Board of Education of the City of Paterson, and which amount is the final payment on the said contract, a copy of which said assignment is annexed to and made part of this answer, and marked Schedule "A."

7. And this defendant further answering says, that on or about the twenty-second day of September, nineteen hundred and ten, this defendant filed with the Board of Education of the City of Paterson, the said assignment referred to in the preceding paragraph of this answer, a copy of which is hereto annexed and marked Schedule "A," and that by virtue of said assignment this defendant is entitled to be paid the moneys due to the defendant Glen Engineering Construction Company, from the defendant Board of Education of the City of Paterson, in the County of Passaic, under the terms of the contract referred to in paragraph one of the complainant's bill of complaint.

8. And this defendant submits to this honorable Court, that all and every of the matters in said complainant's bill of complaint mentioned and complained of, are matters which may be tried and determined at law, and with respect to which the said complainant is not entitled to any relief in this court; and this defendant hopes it shall have the same benefit of this defense as if it had demurred to said complainant's bill.

9. All of which matters and things this defendant is ready to aver, maintain and prove, as this honorable Court may direct, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

Attest:

LEON L. DARLING,
Cashier.

(Seal) EDWARD W. BERGER,
President.

JOHN J. FALLON,
Solicitor of and counsel
with defendant, The
First National Bank of
Town of Union, N. J.

State of New Jersey, }
County of Hudson, } ss.:

The answer of the defendant, First National Bank of Town of Union, N. J., was taken this

tenth day of June, in the year nineteen hundred and eleven, before me, under the common seal of the said corporation, as by their said seal, thereto affixed, appears.

GEORGE A. ENRIGHT,
Master in Chancery of New Jersey.

Schedule "A."

Know All Men By These Presents, That the Glen Engineering Construction Company, a Corporation of the State of New York in consideration of the sum of one dollar and other valuable consideration, to it paid by the First National Bank of the Town of Union, of New Jersey, a corporation, the receipt whereof is hereby acknowledged, has sold, assigned, transferred and set over, and by these presents does sell, assign, transfer and set over to the said First National Bank of the Town of Union, its successors or assigns, a certain debt, the retained percentage, due and owing to the said Glen Engineering Construction Company by the Board of Education of the City of Paterson, a Corporation of the State of New Jersey, amounting to $42,813.45, which sum of money will become payable to the said Glen Engineering Construction Company upon completion of a certain contract with the said Board of Education of the City of Paterson, and which amount due is the final payment on the said contract. The said Glen Engineering Construction Company hereby constitutes the said First National Bank

of the Town of Union, of New Jersey, its Attorney and in his own name and for its own use to demand, receive, prosecute, sue, compound and release and discharge the same, at its own costs and charges, as fully as if the Glen Engineering Construction Company was present and acting thereon, and it does further ratify and confirm all its lawful acts in the premises.

It being understood that moneys so collected is placed to the credit of the Glen Engineering Construction Company at the First National Bank of Town of Union, of New Jersey, and the amount due the said Bank to be deducted therefrom.

In Witness Whereof it has caused these presents to be signed by its Corporate Seal, this 15th day of September, one thousand nine hundred and ten.

Signed, sealed and delivered
in the presence of

GLEN ENGINEERING CONSTRUCTION CO.,
SMITH ALFORD,
President.
P. H. DOWNEY,
Treasurer.

Attest:
MARIE CONROY,

State of New York,
County of New York, } ss.:

On this 16th day of September, in the year nineteen hundred and ten, before me personally came Patrick H. Downey, to me known, who being by me duly sworn, did depose and say, that he resided in the City and County of New York; that he is the Treasurer of the Glen Engineering Construction Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

C. G. HICKS,
Notary Public 291,
N. Y. Co.

Cert. No. 1321,
Comm. Expires March 30, 1911.

Amended Answer of Martin S. Paine (Filed July 24, 1911).

IN CHANCERY OF NEW JERSEY.

Between, JOHN AGNEW COMPANY, Complainant, and GLEN ENGINEERING CONSTRUCTION COMPANY, et al., Defendants.	Amended Answer on Bill, etc.

This defendant answering the bill of complaint herein by this his amended answer, alleges:

1. He admits the allegations contained in paragraphs "1" and "3" of the bill of complaint herein.

2. He denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "2" and "4" of the bill of complaint herein, as he is not informed as to any matters therein alleged and leaves the complainant to its proof thereof.

3. That defendant has no knowledge or information of the matters set out in paragraph "5" of the bill of complaint herein as to the Glen Engineering Construction Company's failure to pay the sums therein specified or the filing of any notices or bond by the complainant and leaves the complainant to its proof as to these matters.

4. Denies any knowledge or information as to the matters set forth in paragraph "6" of the bill of complaint herein.

New Jersey State Library

5. He believes to be true the matters stated and set forth in paragraph "7" of the bill of complaint herein.

AND THIS DEFENDANT FURTHER ANSWERING THE BILL OF COMPLAINT HEREIN SAYS:

6. That on or about the second day of July, 1909, the Board of Education of the City of Paterson, in the County of Passaic, a corporation of this State, and vested with the power and privilege to enter into contracts for the erection of school houses in the City of Paterson, County of Passaic, entered into a written contract with the Glen Engineering Construction Company, a corporation of the State of New York, wherein and whereby the said Glen Engineering Construction Company agreed to erect and finish all mason, carpenter, painting, structural iron and steel and electrical works on the new high school building to be erected on the site bounded by Hamilton Street, Lee Place and DeGrass Street, in the City of Paterson, and known and described as The Paterson High School, within four hundred (400) working days from the date of said contract according to the drawings and specifications made by Willaim T. Fanning, architect, copies of which are annexed to the said contract and formed part thereof, for and in consideration of the sum of Two Hundred and Eighty-five Thousand Four Hundred and Twenty-three Dollars ($285,423), payable as follows, that is to say: As the work progressed the architect should give his certificate to the said Board of Education in writing certifying the value of the work performed and the Board of Education should pay

85% of the amount so certified, retaining 15% until after the said High School Building should be completed and accepted, and which contract was filed in the office of the Board of Education of the City of Paterson on the second day of July, 1909, and now remains on file in said office. A copy of said contract is set out in full in the bill of complaint herein and this defendant hereby refers to said contract as if fully set forth herein.

7. That the said Glen Engineering Construction Company, in accordance with its said contract with the said Board of Education, did enter upon the construction of the High School Building and did supply certain labor and materials for the construction of the same.

That thereafter the said Glen Engineering Construction Company abandoned the construction of the said building and its said contract and was, in the month of December, 1910, adjudged a bankrupt by the United States District Court for the Southern District of New York, and thereafter, to wit, on the 12th day of December, 1910, one Benjamin Barker was appointed Ancillary Receiver of the said Glen Engineering Construction Company in the United States District Court for the District of New Jersey.

That at the time of the abandonment of the contract as aforesaid, there was due to the said Glen Engineering Construction Company on the said contract a sum in excess of Eighty Thousand Dollars ($80,000) and still a further sum will be due to it upon the completion and acceptance of said building, which said sum this defendant is informed and believes exceeds the sum of Thirty-three Thousand Dollars ($33,000).

8. That in and by said contract between the Board of Education of the City of Paterson and the Glen Engineering Construction Company it was provided, as follows:

"And the said party of the first part (The Board of Education), does hereby for itself and its successors, covenant, promise and agree to and with the said party of the second part (the Glen Company) its successors, that it, said party of the first part, its successors, shall and will in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part as specified herein, well and truly pay or cause to be paid unto the said party of the second part, its successors, the said sum of Two Hundred and Eighty-five Thousand Four Hundred and Twenty-three Dollars ($285,423), lawful money of the United States of America, in manner following, that is to say, the architect shall from time to time as the work progresses certify to the party of the first part, in writing, the value of the work performed by the party of the second part under this contract to the date of such certificate and thereupon the party of the first part shall pay to the party of the second part eighty-five per centum of the amount so certified, retaining, at all times, fifteen per centum of the amount so certified until thirty days after the said school building is completed."

That pursuant to said foregoing provisions, the architect so specified made and delivered his certificate in writing certifying to the payments to be made to the Glen Engineering Construction Company and said certificates were paid as in said con-

tract provided down to and including the architect's certificate for the work performed and materials furnished during the month of October, 1910. That thereafter and in the early part of December, 1910, the Glen Engineering Construction Company made its requisition for payment for the labor performed and materials furnished under said contract during the month of November, 1910, and on information and belief the said architect made and delivered his certificate requiring the payment by the Board of Education of the City of Paterson to the Glen Engineering Construction Company of a sum in excess of Fifteen Thousand Dollars ($15,000).

9. That between the 25th day of August, 1910, and the 10th day of December, 1910, this defendant, at the request of the Glen Engineering Construction Company, loaned and advanced to the Glen Engineering Construction Company, to enable it to carry on the work as provided in said contract and this defendant did for that purpose loan to it the sum of Twenty-five Thousand Nine Hundred and Fifty Dollars ($25,950).

10. That to secure to this defendant the payment of said advances, the Glen Engineering Construction Company, on the 1st day of December, 1910, assigned, transferred and set over to this defendant, all its right, title and interest in and to the payment due or to become due to the Glen Engineering Construction Company to which it was entitled under its said contract for work done and materials furnished during the month of November, 1910, and for which it had made its requisition, and also assigned, transferred and set over

to this defendant all moneys due or to become due to it by virtue of the contract aforementioned—all with the consent of the Board of Education of the City of Paterson, in the County of Passaic, and the Clerk of said Board, and the Comptroller of the City of Paterson, and for the purpose of making such assignments more effective, said Glen Engineering Construction Company, in and by said written assignments, gave to this defendant its power of attorney by which it made, constituted and appointed this defendant its true and lawful attorney for it and in its name, to receipt for and receive from the Board of Education of the City of Paterson the payment due or to become due for labor performed and materials furnished during the month of November, 1910, and for all moneys due or to become due to it by reason of the contract aforesaid.

11. That in pursuance of and in conformity with the statute in such case made and provided, on the 9th day of December, 1910, at 4:30 P. M. on that day, before the whole work to be performed by said Glen Engineering Construction Company was completed or accepted by the Board of Education of the City of Paterson, this defendant served upon C. Frank Kireker, President of the Board of Education of the City of Paterson, in the County of Passaic, and upon the Clerk of said Board, the said Board having charge of the erection of the high school building aforesaid and upon James J. Curran, Comptroller of the City of Paterson, being the financial officer of said City of Paterson, and said Board of Education of the City of Paterson, the assignments above referred to by the Glen Engineering Construction

Company to this defendant containing the said powers of attorney for the collection of payments by this defendant.

12. That no part of said loans and advances have been paid, although demanded, and the whole thereof is now due and owing.

13. This defendant charges that by reason of the acts and allegations aforesaid, this defendant has acquired a right to the moneys then due or to grow due under the contract between said Glen Engineering Construction Company and said Board of Education of the City of Paterson, in the County of Passaic, aforesaid.

14. That this defendant is informed and believes it to be true that a written agreement was made between the said Glen Engineering Construction Company and the First National Bank of the Town of Union, New Jersey, bearing date the 15th day of September, 1910, purporting to assign the retained percentage due and owing to the said Glen Engineering Construction Company by the said Board of Education, to secure the payment to the said bank of the amount due it by the said Glen Engineering Construction Company, which agreement was filed with the Clerk of the Board of Education on or about the 22nd day of September, 1910; but this defendant charges that the said alleged assignment, if a lien at all upon the moneys now due or to become due to the said Glen Engineering Construction Company upon the contract aforesaid, is subsequent to the lien of this defendant upon said money; that this defendant is informed and be-

lieves it to be true that another written agreement was made between said Glen Engineering Construction Company and Edward Gunnell, bearing date the 30th day of November, 1910, purporting to assign Twenty-one thousand Dollars ($21,000.00) of the moneys due to the said Glen Engineering Construction Company under its said contract with the Board of Education of the City of Paterson; and which assignment was filed with the Clerk of the Board of Education on the 9th day of December, 1910; that this defendant charges that said alleged assignment, if a lien at all upon any moneys due or to become due to said Glen Engineering Construction Company upon the contract aforesaid, is subsequent to the lien of this defendant to said money; that this defendant is also informed and believes it to be true that the following claims were also served on the Board of Education in the City of Paterson, in the County of Passaic, and upon the financial officer of said city, but whether they were served before or after said defendant's assignment, he is not informed, to wit:

James Healy	$761.20
Frank Miller, doing business as Frank Miller Lumber Company	10,955.14
Herringbone Metal Lath Company	761.25
Joseph Sharpe Construction Company	3,037.00
Cortlandt Engineering Company	2,537.00
Fred G. Ebeary	900.00
Architectural Plastering Company	1,680.00
American Lumber Company	242.90
George A. Myers & Company	523.96
Sutphen & Myer, a partnership consisting of John S. Sutphen and Charles R. Myer	2,400.00

Ingalls Stone Company	2,115.00
McKiernan & Bergin Company	1,148.80
The J. A. Van Winkle Company	313.37
Louis Pasquali, trading as Italian Marble Mosaic Company	2,114.30
James W. Johnson	244.20
E. Ricker & Son Company	1,658.16
P. S. Simmons Painting Company	499.60

That this defendant is also informed and believes it to be true that the following claims for labor were also served upon the said Board of Education of the City of Paterson, in the County of Passaic, and upon the financial officers of said city, whether they were served before or after this defendant's assignment, he is not informed, to wit:

Martin Troost	$626.75
Russell Holmes	24.50
Antonio Deets	12.79
Fred Benzten	12.71
Hugh McPherson	28.60
Thomas W. Ward	26.00
Peter Magie	10.12
David Hawthorne	9.95
James Gallagher	19.60
Angelo Touche	19.60
James O'Leary	20.30
James Wehr	33.60
William Noble	33.60
John Van Blarcom	26.60
John McMullen	33.60
Arthur Daniels	28.80
William H. Ogaethry	26.60
James Ferguson	28.00
George Cunningham	28.00

James Gordon	28.00
George Van Blarcom	26.60
Thomas Handbridge	26.60
John Columbus	12.79
Thomas Cummings	19.60
Alexander Crawford, Jr.	33.60
John F. Rose	26.60
Charles Van Ness	55.00
William Van Ness	55.00
Walter Venable	34.50
William H. Rea	33.60
Edward Harrison	33.60
James Kingsland	33.60
Alexander Crawford, Sr.	39.20
Robert Maxwell	26.60
Otto Temple	26.60
Thomas Moran	13.18
Leonard Brink	26.60
Welcome R. Steinmetz	42.50

15. That this defendant charges that the lien of any of the foregoing persons set forth in paragraph "14" of this answer upon the moneys due, if they or any of them have any lien, by virtue of the filing of said notices upon the moneys due or to become due under the said contract with the said Glen Engineering Construction Company upon and after the filing of said notices, such liens are subsequent to and subject to the lien of this defendant upon or against the same.

16. That on the 10th day of December, 1910, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York against the said Glen Engineering Construction Company, and upon that

date one Benjamin Barker was appointed, by order of said Court, Receiver for said corporation, and that thereafter, on the 12th day of December, 1910, said Benjamin Barker was appointed Ancillary Receiver of said corporation, for the State of New Jersey, by the United States District Court, for the District of New Jersey, and that thereafter said Glen Engineering Construction Company was duly adjudged a bankrupt and the said Benjamin Barker has since been acting, and is now acting, as the Receiver and Ancillary Receiver of said corporation.

17. This defendant, therefore, prays that his claim against the said fund in the hands of the Board of Education of the City of Paterson, County of Passaic, be enforced, and that it be determined by this Honorable Court how much is due from the Board of Education of the City of Paterson, and the County of Passaic, to the said Glen Engineering Construction Company, and how much is due from said Glen Engineering Construction Company to this defendant, and how much is due from the said Glen Engineering Construction Company to the other persons who have filed notices as set forth herein, and that the order of priority of said claims be ascertained; that a reference be had for that purpose if necessary, and that it be decreed by this Court that the amount so found due from the said Glen Engineering Construction Company to this defendant be paid to this defendant by the Board of Education of the City of Paterson, in the County of Passaic, or by such person as may have the funds in hand, and that this defendant may have such other and

further relief in the premises as may be agreeable to equity and good conscience.

WILLIAM F. DELANEY,
Solicitor for and of Counsel
with Defendant Paine.

10

Answer of Russell Holmes, et al. (Filed, Jan. 24, 1912).

IN CHANCERY OF NEW JERSEY.

Between JOHN AGNEW COMPANY, Complainant, and THE BOARD OF EDUCATION OF THE CITY OF PATERSON, IN THE COUNTY OF PASSAIC, et al., Defendants.	On Bill &c. Answer.

20

30 The joint and several answers of Russell Holmes, Antonio Deets, Fred. Benzler, impleaded as Fred. Bentzen, Hugh McPhierson, impleaded as High McPherson, Thomas W. Ward, Peter McGee, impleaded as Peter Magie, David Hawthorne, James Gallagher, Angelo Tuccia, impleaded as Angelo Touche, James O'Leary, James Wier, impleaded as James Wehr, William Nobel, John McMullen, John Van Blarcom, Arthur Daniels, William H. Oglethorp, impleaded as William H. Ogaethry, James Ferguson, George Cunningham, James Gor-

40

don, George Van Blarcom, Thomas Handbridge, John Columbus, Thomas Cummings, Alexander Crawford, Jr., John F. Rose, Charles Van Ness, William Van Ness, Walter Venable, William H. Rea, James Kingsland, Edward Harrison, Alexander Crawford, Sr., Robert Maxwell, Otto Temple, Thomas Moran and Leonard Brink, to the bill of complaint of John Agnew Company, complainant.

These defendants, answering, say:

1. That the matters and things set up in the first paragraph of said bill are true so for as these defendants know and as they believe.

2. These defendants do not know whether the matters and things set up in the second paragraph of said bill are true, but leave complainant to its proof thereof.

3. The matters and things set up in the third paragraph of said bill are true so far as these defendants know and as they believe.

4. These defendants do not know whether the matters and things set up in the fourth paragraph of said bill are true, but leave the complainant to its proof thereof.

5. These defendants do not know whether the matters and things set up in the fifth paragraph of said bill are true, but leave the complainant to its proof thereof.

6. These defendants do not know whether the matters and things set up in the sixth paragraph of said bill are true, but leave the complainant to its proof thereof.

7. These defendants say that they believe it to be true, that the assignments set forth in the seventh paragraph of said bill of complaint, were duly made by said Glen Engineering Company as therein alleged, but that the said assignments and each of them, if a lien at all upon said fund, are subsequent to the liens of these defendants; these defendants charge, that said assignments were invalid and of no effect in that the same were not made in good faith and for a valuable consideration, but fraudulently for the purpose of defeating the liens and claims of these defendants. And these defendants further say that they and each of them did perform work and labor for the Glen Engineering Company in and upon the Paterson High School Building in pursuance of the contract set forth and referred to in the first paragraph of the bill of complaint. That for such labor so performed, there is due and owing to these defendants the amounts set out in the table below; that before the completion of the work under the contract above referred to, each of these defendants did, at the time shown in the table below, file with the President of the Board of Education of the City of Paterson, in the County of Passaic, and with the Comptroller of the City of Paterson, notices stating the residences of each of these defendants, verified by his oath, stating the amount then due and claimed, from whom the same was due, the name of the person by whom employed, and also a statement of the terms, time given and condition of his contract; and also that the said labor was performed for the Glen Engineering Company and was actually performed in the execution and completion of said contract of said Company with said Board of Education; all of which particulars are shown by the following table; viz;

TABLE NO. 1.

Claimant	Residence	Nature of Employment	Employed and not Paid	Rate per Hour	Amount Claimed
Hugh McPhierson,	Paterson, N. J.	carpenter	56 hrs.	$ .50	$28.00
Peter Mc Gee,	Paterson, N. J.	laborer	54 hrs.	.18¾	10.12
David Hawthorne,	Paterson, N. J.	laborer	54 hrs.	.18¾	9.95
Angelo Tuccia,	Paterson, N. J.	laborer	56 hrs.	.35	19.60
John Columbus,	Paterson, N. J.	laborer	68 hrs.	.18¾	12.79
Thomas Moran,	Paterson, N. J.	watchman	(1 week &) (1 day)	11.75 per week	13.18
James Kingsland,	Paterson, N. J.	plasterer	56 hrs.	.60	33.60
James Weir,	Paterson, N. J.	plasterer	56 hrs.	.60	33.60
Fred. Benzler,	Paterson, N. J.	timekeeper	(1 week &) (1½ days)	10.00 per week	12.71
Antonio Deets,	Paterson, N. J.	laborer	68 hrs.	.18¾	12.79
John McMillan,	Paterson, N. J.	plasterer	56 hrs.	.60	33.60
Alex. Crawford, Jr.,	Paterson, N. J.	plasterer	56 hrs.	.60	33.60
Alex. Crawford, Sr.,	Paterson, N. J.	plasterer	56 hrs.	.70	39.20
William Noble,	Paterson, N. J.	plasterer	56 hrs.	.60	33.60
James Gallagher,	Paterson, N. J.	laborer	56 hrs.	.35	19.60
James Ferguson,	Paterson, N. J.	carpenter	56 hrs.	.50	28.00
Arthur Daniels,	Paterson, N. J.	plasterer	48 hrs.	.60	28.80
James O'Leary,	Paterson, N. J.	laborer	58 hrs.	.35	20.30
Walter Venable,	Paterson, N. J.	plasterer	57½ hrs.	.60	34.50
William H. Rae,	Paterson, N. J.	plasterer	56 hrs.	.60	33.60
Thos. Cummings,	Paterson, N. J.	laborer	56 hrs.	.35	19.60
Edward Harrison,	Paterson, N. J.	plasterer	56 hrs.	.60	33.60
John F. Rose,	Paterson, N. J.	carpenter	56 hrs.	.47½	26.60
Geo. Van Blarcom,	Paterson, N. J.	carpenter	56 hrs.	.47½	26.60
Robert Maxwell,	Paterson, N. J.	carpenter	56 hrs.	.47½	26.60
Otto H. Temple,	Paterson, N. J.	carpenter	56 hrs.	.47½	26.60
Thos. Handbridge,	Paterson, N. J.	carpenter	56 hrs.	.47½	26.60
Wm. H. Oglethorp,	Paterson, N. J.	carpenter	56 hrs.	.47½	26.60
Thos. W. Ward,	Paterson, N. J.	carpenter	56 hrs.	.47½	26.60
John Van Blarcom,	Paterson, N. J.	carpenter	56 hrs.	.47½	26.60
Russell Holmes,	Paterson, N. J.	carpenter	.70 hrs.	.35	24.50
Geo. Cunningham,	Paterson, N. J.	carpenter	56 hrs.	.50	28.00
James Gordon,	Paterson, N. J.	carpenter	56 hrs.	.50	28.00
Charles Van Ness,	Paterson, N. J.	lather	110 hrs.	.50	55.00
William Van Ness,	Paterson, N. J.	lather	110 hrs.	.50	55.00
Leonard Brink,	Paterson, N. J.	carpenter	56 hrs.	.47½	26.60

	Claimant.	Table No. 2. When filed with pre-sident of Board of Education.	When filed with City Comptroller.
	Hugh McPhierson	December 16, 1910.	December 14, 1910.
10	Peter McGee	December 19, 1910.	December 14, 1910.
	David Hawthorne	December 22, 1910.	December 14, 1910.
	Angelo Tuccia	December 16, 1910.	December 14, 1910.
	John Columbus	December 16, 1910.	December 14, 1910.
	Thomas Moran	February 4, 1911.	December 15, 1910.
	James Kingsland	December 19, 1910.	December 15, 1910.
	James Weir	December 16, 1910.	December 14, 1910.
	Fred. Benzler	December 21, 1910.	December 14, 1910.
	Antonio Deets	December 16, 1910.	December 14, 1910.
	John McMillan	December 16, 1910.	December 14, 1910.
20	Alex. Crawford, Jr.	December 16, 1910.	December 15, 1910.
	Alex. Crawford, Sr.	December 17, 1910.	December 15, 1910.
	William Noble	December 16, 1910.	December 14, 1910.
	James Gallagher	December 16, 1910.	December 14, 1910.
	James Ferguson,	December 17, 1910.	December 14, 1910.
	Arthur Daniels	December 17, 1910.	December 14, 1910.
	James O'Leary	December 16, 1910	December 14, 1910.
	Walter Venable	December 21, 1910.	December 15, 1910.
	William H. Rae	December 19, 1910.	December 15, 1910.
	Thomas Cummings	December 19, 1910.	December 15, 1910.
30	Edward Harrison	December 16, 1910.	December 15, 1910.
	John F. Rose	December 17, 1910.	December 15, 1910.
	George Van Blarcom	December 17, 1910.	December 14, 1910.
	Robert Maxwell	December 17, 1910.	December 15, 1910.
	Otto H. Temple	December 21, 1910.	December 15, 1910.
	Thomas Handbridge	December 21, 1910.	December 14, 1910.
	William H. Oglethorp	December 17, 1910.	December 14, 1910.
	Thomas W. Ward	December 21, 1910.	December 14, 1910.
	John Van Blarcom	December 19, 1910.	December 14, 1910.
	Russell Holmes	December 21, 1910.	December 14, 1910.
40	George Cunningham	December 19, 1910.	December 14, 1910.
	James Gordon	December 19, 1910.	December 14, 1910.
	Charles Van Ness	December 19, 1910.	December 15, 1910.
	William Van Ness	December 19, 1910.	December 15, 1910.
	[illegible] Brink	February 3, 1911.	December 15, 1910.

8. And these defendants further show that each of them did file with the Comptroller of the City of Paterson, at the same time as the filing of said notices, a bond in an amount fixed by said Comptroller, conditioned for the payment of the legal interest for the time said moneys may be withheld from said Glen Engineering Company, in the event that said claimant did not perfect his lien, by instituting an action or that decree be made in favor of said contractor in said action; and conditioned further for the payment of the costs of any such action if judgment be for the contractor.

9. Each of these defendants charge that by virtue of the acts and allegations aforesaid, these defendants have acquired a lien under and by virtue of an act of the legislature of this State, entitled, "An act to secure the payment of laborers, mechanics, merchants, traders and persons employed or furnishing materials toward the performance of any work in public improvements in cities, towns, townships or other municipalities in this State," approved March thirtieth, Eighteen hundred and ninety-two, and the acts amendatory thereof and supplementary thereto, on the moneys due and to grow due under the contract between the said Glen Engineering Construction Company and the said Board of Education of the City of Paterson, in the County of Passaic, as aforesaid.

And each of these defendants humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

JOHN POMFRET,
Solicitor of Defendants.

Answer of The Board of Education of The City of Paterson (Filed February 2, 1912).

IN CHANCERY OF NEW JERSEY.

Between,
JOHN AGNEW COMPANY,
Complainant,
and
THE BOARD OF EDUCATION OF THE CITY OF PATERSON, in the County of Passaic, et al.,
Defendants.

On bill &c., Answer.

The answer of The Board of Education of the City of Paterson, in the County of Passaic, defendant, to the bill of complaint of John Agnew Company, complainant or unto so much thereof as this defendant is advised it is necessary to make answer unto;

This defendant answering says:

1. That it is true that the defendant is a corporation of this state vested with the power and privilege to enter into contracts for the erection of school houses in the City of Paterson and that this defendant pursuant to such power did, on the second day of July, nineteen hundred and nine, enter into a written contract with the Glen Engineering Construction Company, a corporation of the State of New York, wherein and whereby said Glen Engineering Construction Company did, among other things, agree to well and sufficiently erect and finish, within four hundred working

days, all of the mason, carpenter, painting, structural steel and iron and electrical works of the new High School building to be situated on the lands of this defendant fronting on Hamilton, Lee Place and DeGrasse Streets, in the City of Paterson, agreeably to the drawings and specifications made by William T. Fanning, architect, in a good, workmanlike and substantial manner under the direction of the said architect to be testified by a writing or certificate under the hand of said architect, and also find and provide such good, proper and sufficient materials of all kinds whatsoever as should be proper and sufficient for the completion and finishing of all the works aforesaid particularly mentioned in said specifications aforesaid for the consideration or sum of Two Hundred Eighty Five Thousand, Four Hundred Twenty Three Dollars ($285,423), which said consideration it was therein further agreed should be paid unto the said party of the second part in the manner following, that is to say: that the architect should from time to time as the work progressed certify to this defendant, in writing, the value of the work performed by the said Glen Engineering Construction Company under said contract to the date of such certificate, and that thereupon this defendant should pay to the said Glen Engineering Construction Company eighty five per centum of the amount so certified, retaining at all times fifteen per centum of the amount so certified until thirty days after the said school building should be completed, ready for occupancy and accepted, at which time, upon the presentation to this defendant of a final certificate in writing by the architect to the effect that said contract had been fully completed in all

detail, the said fifteen per centum so retained should be paid by this defendant; that it was therein further distinctly understood and agreed that the aggregate of the payments under said contract, during the progress of said work, should not at any time exceed eighty five per centum of the value of the work done under said contract as certified by the architect aforesaid; that it was therein further covenanted and agreed that should the said Glen Engineering Construction Company at any time during the progress of said work refuse or neglect to supply a sufficiency of materials or workmen this defendant should have power to provide materials and workmen after three days' notice, in writing, being given to finish the said work and that the expense thereof should be deducted from the amount of said contract; which said contract, together with the drawings and specifications thereto annexed and forming part thereof, this defendant now brings here into Court and will produce the same when and where said Court may direct.

2. This defendant further answering says, that it has no knowledge of the facts set forth in paragraph two except on information, and leaves the said complainant to such proof thereof as it may introduce before this honorable Court.

3. This defendant further answering admits that the said Glen Engineering Construction Company entered upon the construction of the said High School building and that during the progress of said work did supply certain labor and materials for the construction of the same, and that same company did thereafter abandon the construction

of said building and was adjudged bankrupt as in said paragraph set forth, and that an ancillary receiver was appointed to take charge of the business and affairs of said company; but this defendant denies that at the time of the abandonment of said contract there was due to said Glen Engineering Construction Company, under the contract of this defendant as aforesaid, a sum in excess of Eighty Thousand Dollars, or any other sum of money, or that any further sum will become due to said company upon the completion and acceptance of said building.

4. And this defendant further answering says, that as to the allegations set forth in the fourth paragraph of said bill of complaint this defendant has no knowledge except on information, and leaves the complainant to such proof as it may introduce before this honorable Court.

5. And this defendant further answering says, that it has no knowledge of the demand for payment from the Glen Engineering Construction Company as alleged in the fifth paragraph of said bill; but this defendant admits that the said complainant caused to be served upon this defendant a notice, and did file with the financial officer of the City of Paterson a bond with the conditions as in said paragraph mentioned.

6. This defendant further answering denies that the notice served by the complainant gave to the complainant any lien upon the moneys due and to grow due under said contract pursuant to the statute in such case made and provided.

7. And this defendant further answering says, that it is informed and believes that the agreements in writing were made between the parties and of the purport in the seventh paragraph of said bill of complaint mentioned and set forth, but this defendant denies that said agreements did in any wise assign or effect any moneys in the hands of this defendant or which should subsequently accrue; that it is true that claims were served on this defendant, upon the financial officer of the City of Paterson, as in paragraph seven set forth; that this defendant is informed and believes it to be true that the complainant did procure from the District Court of the United States for the District of New Jersey an order as in said seventh paragraph set forth.

8. This defendant further answering says, that after the said Glen Engineering Construction Company entered upon the execution thereof of the contract aforesaid, and during the progress of said work, said company did receive from time to time payments on account of said contract, pursuant to the terms thereof, and that said payments amounted to the sum of Two Hundred Three Thousand Eight Hundred Seventy One Dollars and Fifty ($203,871.50) Cents.

And this defendant further answering says, that after the said payments so made as aforesaid, the said Glen Engineering Construction Company, in violation of the terms of the contract made by it with this defendant as aforesaid, did, in the month of December, nineteen hundred and ten, refuse and neglect to supply a sufficiency of ma-

terials and workmen, and did cease all work upon said building and abandoned the contract so made as aforesaid; that this defendant, pursuant to the terms of said contract, did after the abandonment of said contract as aforesaid, cause to be served upon the said Glen Engineering Construction Company and upon Benjamin Barker, a Receiver in Bankruptcy, theretofore appointed to take charge of the property and effects of said Glen Engineering Construction Company by virtue of a decree or order of the District Court of the United States for the Southern District of New York, and upon all other persons then in interest, a notice of the failure of said Glen Engineering Construction Company to provide a sufficiency of materials and workmen to proceed with the completion of said building and that after three days from the service thereof this defendant would provide material and workmen to finish said work and that the expense of the same would be deducted from the amount of the contract aforesaid; that said Glen Engineering Construction Company and the Receiver thereof as aforesaid did refuse, fail and neglect to comply with the notice so served upon them as aforesaid, and that after the expiration of the time so specified in said notice and pursuant to the terms of the contract aforesaid, this defendant did thereupon proceed to supply material and workmen and is now engaged in completing the work required to be done under the contract aforesaid; that this defendant cannot, at this time, say whether or not there will remain in the hands of this defendant after the completion of the work so abandoned by said Glen Engineering Construction Company as aforesaid any moneys under the

said contract entered into between this defendant and said Glen Engineering Construction Company as aforesaid.

9. And this defendant further answering says, that it denies that upon any act or allegation of the said complainant has it required any lien upon any moneys due or to grow due under the said contract between this defendant and the Glen Engineering Construction Company.

10. And this defendant further answering says, that on the twenty-second day of September, nineteen hundred and ten, the First National Bank of Town of Union filed with the Secretary of this defendant a writing purporting to be an assignment to it by the said Glen Engineering Construction Company of the retained percentage of fifteen per centum of the amount of said contract for the erection of said High School amounting to the sum of Forty-two Thousand Eight Hundred and Thirteen Dollars and Forty-five ($42,813.45) Cents, and which should become payable to said Glen Engineering Construction Company upon the completion of its said contract; and this defendant further answering says, that as to said assignment so served as aforesaid it believes the same to be irregular and void and charges that said assignment does not in anywise transfer from this defendant any of the moneys then due or which may hereafter accrue by reason of the contract aforesaid; that this defendant under the terms of the contract aforesaid has a right to use and is now using the moneys which were attempted to be assigned as aforesaid by the said Glen Engineering

Construction Company to said First National Bank of Town of Union.

11. This defendant further answering says, that on the twenty-second day of September, nineteen hundred and ten, The Ingalls Stone Company filed with this defendant a notice claiming a lien upon moneys due or to become due to the Glen Engineering Construction Company for the sum of Twenty-one Hundred Fifteen ($2,115) Dollars, and that on the tenth day of October, nineteen hundred and ten, James Healey filed with this defendant a like notice claiming a like lien for the sum of Seven Hundred and Sixty-one Dollars and Twenty ($761.20) Cents, and that on the twenty-eighth day of November, nineteen hundred and ten, The John Agnew Company filed a like notice claiming a like lien for the sum of Eleven Thousand Nine Hundred Thirty-three Dollars and Twenty-nine ($11,933.29) Cents.

12. And this defendant further answering says, that the said Glen Engineering Construction Company abandoned the work upon its contract as aforesaid and that this defendant after giving the notice prescribed in the said contract as hereinbefore mentioned did proceed to finish the work upon the said building; and this defendant further answering says, that if the complainant has furnished the balance of the interior trim and woodwork called for by the plans and specifications as set forth in the fourteenth paragraph of its said bill of complaint then it has done so under some contract with some person not a party to this suit.

13. This defendant further answering says, that

it cannot at this time determine whether or not there will remain in the hands of this defendant any moneys upon the contract aforesaid after the completion of the building aforesaid, pursuant to the terms of said contract and under the work which this defendant is now doing in the completion of said building by reason of the refusal, neglect and failure of said Glen Engineering Construction Company or other parties in interest to complete the same, but that in the event that any moneys should remain after the completion of said building as aforesaid, this defendant submits to the jurisdiction of this Court in the determination of the question of whether any of said moneys should be paid to the complainant or to any other person or persons other than the said Glen Engineering Construction Company or its Receiver as aforesaid.

This defendant, therefore, prays to be hence dismissed in this cause and its reasonable costs and charges in this behalf so wrongfully sustained.

THOMAS F. McCRAN,
Solicitor of The Board of Education
of the City of Paterson, in the
County of Passaic.

Answers.

Answers were also filed by the following-named defendants on the date set forth opposite each name, to wit:

E. Ricker & Son Company, April 10th, 1911.

George A. Myers & Company, April 11th, 1911.

Louis Pasquali, trading as Italian Marble Mosaic Company, April 13th, 1911.

Martin Troost, April 13th, 1911.

The J. A. Van Winkle Co., April 14th, 1911.

McKiernan & Bergin Company, April 29th, 1911.

Ingalls Stone Company, June 6th, 1911.

Cortlandt Engineer Company, June 7th, 1911.

Sutphen & Myer, June 14th, 1911.

Architectural Plastering Company, June 21st, 1911.

P. S. Simmons Painting Company, September 21, 1911.

The Mayor and Alderman of the City of Paterson, February 2nd, 1912.

James Healey, February 2nd, 1912.

Order of Reference (Filed, Sept. 9, 1911).

IN CHANCERY OF NEW JERSEY.

Between: JOHN AGNEW COMPANY, Complainant, and THE BOARD OF EDUCATION OF THE CITY OF PATERSON, in the County of Passaic, et al., Defendants.	On Bill, &c. Order of Reference.

IT IS, on this eighth day of September, in the year nineteen hundred and eleven, on motion of William B. Gourley of counsel with the complainant, ordered, that the above-stated cause be referred to Hon. Eugene Stevenson, one of the Vice Chancellors, to hear the same for the Chancellor, and to report thereon to him, and advise what order or decree should be made therein.

MAHLON PITNEY,
C.

Bill of Complaint of Frank Miller Lumber Company (Filed, March 6, 1911).

In Chancery of New Jersey.

To His Honor,
Mahlon Pitney,
Chancellor of the State of New Jersey.

Humbly complaining shows unto your Honor, your orator, Frank Miller, doing business under the name and style of Frank Miller Lumber Company, a resident of the City of Bridgeport, State of Connecticut, and doing business in said City and State as a wholesale and retail dealer in lumber and interior woodwork:

I. That on or about the 2nd day of July, 1909, the Board of Education of the City of Paterson, in the County of Passaic, State of New Jersey, a corporation of this State, vested with the power and privilege to enter into contracts for the erection of school houses in the City of Paterson aforesaid, entered into a written contract with the Glen Engineering Construction Company of the City, County and State of New York, a corporation of the State of New York, wherein and whereby said Glen Engineering Construction Company agreed to well and sufficiently erect and finish within four hundred (400) working days all masonry, carpentering, painting, structural, steel and iron and electrical work, according to the plans and specifications and proposals, copies of which were thereunto annexed, and form part of said contract, of the new High School Building to be erected on the lands of said Board of Education of the City of Paterson, fronting on Hamilton Street, Lee

Place, and De Grasse Street, in the City of Paterson, for and in consideration of the sum of two hundred and eighty-five thousand, four hundred and twenty-three ($285,423) Dollars, payable under the terms of said contract as follows, to wit: the architect shall from time to time as the work progresses, certify to the said Board of Education of the City of Paterson, in writing, the value of the work performed by said Glen Engineering Construction Company under said contract, to date, of such certificate, and thereafter, the party of the first part to the said contract the said Board of Education of the City of Paterson, should pay to the party of the second part thereto, the said Glen Engineering Construction Company, eighty-five (85%) per cent. of the amount so certified until thirty (30) days after the said High School Building is completed, ready for occupancy, and accepted, at which time upon certificate by the architect to the effect that said contract has been completed in all details, the fifteen (15%) per cent. retained shall be paid to the said party of the second part, the Glen Engineering Construction Company, as by said contract reference being thereunto had when produced, will more fully appear, and which said contract was filed with the Secretary of the Board of Education of the City of Paterson, on the 2nd day of July, 1909, and now remains on file in said office.

II. That the erection of said High School Building in the City of Paterson was a public improvement in and for the Board of Education of the City of Paterson, and in and for the City of Paterson, in the County of Passaic, State of New Jersey, and designed for public use within the

meaning of the acts of the legislature of this State, providing for the payment of workmen and others employed upon, or furnishing material toward public improvements in cities and other municipalities, approved April 14th, 1891, and March 30, 1892, respectively, and the various supplements and amendments thereto.

III. That after the making of the said contract, the said Glen Engineering Construction Company entered upon the execution thereof, and that during the progress of the said work, the said Glen Engineering Construction Company, contractor, did from time to time receive payments on account of said contract pursuant to the terms thereof, up to the time of the abandonment of said contract by the said Glen Engineering Construction Company, and the adjudication of said corporation a Bankrupt, as hereinafter alleged, and that there is now in the hands of the Board of Education of the City of Paterson, a substantial sum of money due or to grow due to the said Glen Engineering Construction Company, under its said contract, which amount your orator is informed and believes amounts to upwards of thirty-three thousand ($33,000) Dollars.

IV. That your orator on or about the first day of March, 1910, did agree to furnish the said Glen Engineering Construction Company in pursuance of a contract in writing between your orator and the said Glen Engineering Construction Company, the mill work on said High School Building, including the wood hand-rails for stairs, and the pantasote covered doors in accordance with the plans and specifications prepared by the architect

fo said High School Building, and made part of the contract between the said Glen Engineering Construction Company and the Board of Education of the City of Paterson as aforesaid, not including glass or glazing or metal covered work, priming, filling, varnishing rough grounds, sleepers, firrings, bucks, or any other such material as would come under the heading of "rough work" or "hardware," and not including the erecting of any of the above material for the contract price of twelve thousand five hundred ($12,500) Dollars; said material to be furnished and delivered by your orator at such times as requested by the said Glen Engineering Construction Company.

V. That thereafter your orator truly and fully performed all the terms and conditions of said contract on his part to be performed, and your orator up to the time of the abandonment by said Glen Engineering Construction Company of its contract with the Board of Education of the City of Paterson for the erection of the High School Building aforesaid, and the bankruptcy of said Glen Engineering Construction Company, as hereinafter alleged, has furnished to the said Glen Engineering Construction Company whenever requested so to do, the mill work and material under said contract, all in accordance with the plans and specification of the architect aforesaid, to the amount of Nine thousand five hundred ($9,500) Dollars, which was all the material which said Glen Engineering Construction Company requested your orator furnish under said contract, and which said material was actually used in the erection and construction of said high school building, and accepted by the architect thereof, and in ad-

dition to the foregoing, your orator furnished and delivered material pursuant to the order of the Glen Engineering Construction Compaany for an agreed price, and used by it in the erection and construction of said high school building, outside and apart from the written contract aforesaid, as follows, to wit: extra window frames, doors and beams, and other lumber to the amount of Two hundred and eighty-nine and 36/100 ($289.36) Dollars, and certain flooring to the amount of Eleven hundred and sixty-five and 78/100 ($1,165.78) Dollars, and there is now due to your orator from said Glen Engineering Construction Company, after deducting all just credits and offsets, the sum of Ten thousand nine hundred and fifty-five and 14/100 ($10,955.14) Dollars, besides interest; the said amount being the sum of Nine thousand five hundred ($9,500) Dollars, for material furnished under the contract aforesaid, plus the reasonable value and agreed price of the aforesaid material furnished on orders of the Glen Engineering Construction Company, amounting to One thousand four hundred and fifty-five and 14/100 ($1,455.14) Dollars.

VI. That your orator has demanded the said sum of Ten thousand nine hundred and fifty-five and 14/100 ($10,955.14) Dollars from the said Glen Engineering Construction Company but the said Glen Engineering Construction Company has refused to pay the same, or any part thereof to your orator.

VII. That on the 9th day of December, 1910, at 3.15 P. M. of that day, before the whole work to be performed by said Glen Engineering Construc-

tion Company was completed, or accepted by the Board of Education of the City of Paterson, your orator served upon C. Frank Kireker, the President of the Board of Education of the City of Paterson, in the County of Passaic, and upon the Clerk of said Board, the said Board having charge of the erection of the high school building aforesaid, and upon James J. Curran, Comptroller of the City of Paterson, being the financial officer of said City of Paterson, and said Board of Education of the City of Paterson, a notice duly verified, setting forth the residence of your orator, and that your orator had furnished the materials toward the performance of, and the completion of said contract between the said Glen Engineering Construction Company and the Board of Education of the City of Paterson, to the amount aforesaid, of Ten thousand nine hundred and fifty-five and 14/100 ($10,955.14) Dollars, which amount was due to your orator for material so furnished after deducting all just credits and offsets, and further setting forth the terms and conditions of the contract between your orator and the said Glen Engineering Construction Company, as well as the terms and conditions of the contract of the Board of Education of the City of Paterson, in the County of Passaic, which said notice in all things did conform with the statute in such case made and provided, whereupon your orator became entitled to have and receive from the Board of Education of the City of Paterson, the money due to it for materials so furnished, and to have such moneys retained out of moneys due or to grow due to the said Glen Engineering Construction Company, from the said Board of Education of the City of Paterson.

VIII. That your orator did at the same time of the filing by him of the said notice, and claim against the said Glen Engineering Construction Company, file with James J. Curran, Comptroller of the City of Paterson, and the financial officer of the said Board of Education of the City of Paterson, a bond in the sum of Twenty-two hundred ($2,200) Dollars, being a sum not exceeding twenty (20%) per cent. of the amount claimed by your orator in said notice, and fixed by said Comptroller of the City of Paterson; said bond being conditioned for the payment of legal interest for the time the said moneys might be withheld from the said contractor in the event that the said claimant, your orator, would not perfect his lien by instituting an action, or that decree be made in favor of said contractor in any such action, and conditioned further for the payment of costs if judgment be for the contractor.

IX. Your orator charges that by virtue of the acts and allegations aforesaid, your orator has acquired a lien under and by virtue of an act of the Legislature of the State of New Jersey, entitled "An Act to secure the payment of laborers, mechanics, machinists, merchants, traders and persons employed upon or furnishing materials toward the performing of any work on public improvement in cities, towns, townships and other municipalities in this State, approved March 30, 1892, and the supplements thereto, and amendments thereto," on the moneys then due or to grow due under the contract between said Glen Engineering Construction Company, and said Board of Education of the City of Paterson, in the County of Passaic, aforesaid.

X. That your orator is informed and believes it to be true that on or about the 22nd day of September, 1909, the First National Bank of the Town of Union filed with the said Board of Education of the City of Paterson, a writing purporting to be an assignment to it by the said Glen Engineering Construction Company, of the retained percentage of fifteen (15%) per cent. of the amount of said contract for the erection of said High School Building amounting to the sum of Forty-two thousand eight hundred and thirteen and 45/100 ($42,813.45) Dollars, which should become payable by the Board of Education of the City of Paterson, to said Glen Engineering Construction Company, upon the completion of said contract, and which amount is the final payment thereunder, but your orator charges the fact to be that the said assignment is irregular and void, and without consideration and that whatever right or interest, if any, may have been acquired by said First National Bank of the Town of Union in and to the moneys remaining unpaid on account of said contract, is subsequent to and subject to the lien of your orator upon or against the same.

XI. That your orator is informed and believes that on or about the 22nd day of September, 1909, the Ingalls Stone Company, a corporation of the State of New York filed with the Board of Education of the City of Paterson, a notice claiming a lien upon the moneys due or to become due to the said Glen Engineering Construction Company under its said contract, for the erection of the said high school building for the sum of Twenty-one hundred and fifteen ($2,115) Dollars, for mate-

rials furnished to said Glen Engineering Construction Company, and claimed and alleged to have been used in said building; your orator is further informed and believes that on the 10th day of October, 1910, one James Healy, filed with the Board of Education of the City of Paterson, and the Comptroller of the City of Paterson, a notice claiming a lien upon the moneys due or to become due the said Glen Engineering Construction Company under its said contract for the erection of said high school building, for the sum of Seven hundred and sixty-one and 20/100 ($761.20) Dollars, for materials furnished to said Glen Engineering Construction Company, and claimed to have been used in said building, your orator is further informed and believes that on the 28th day of November, 1910, the John Agnew Company filed with the Board of Education of the City of Paterson, and with the Comptroller of the City of Paterson, a notice claiming a lien upon the moneys due or to become due said Glen Engineering Company, under its contract for the erection of said high school buildinng, for the sum of Eleven thousand nine hundred and thirty-three and 29/100 ($11,933.29) Dollars, for materials furnished to said Glen Engineering Construction Company, and claimed and alleged to have been used in said building.

And your orator charges and is informed and believes that by reason of irregularities in the form or manner of service of the notice of the said claimants above set forth, said claims have been extinguished by force of the statute above cited, and your orator, therefore, charges that his claim for ten thousand nine hundred and fifty-five and 14/100

($10,955.14) Dollars with interest is a first lien against said fund, and is prior to any other claim thereon filed under said statute.

XII. That the following persons, your orator is informed and believes, in addition to the said Ingalls Stone Company and the said James Healy, and the said John Agnew Company, and the said First National Bank of the Town of Union, and in addition to your orator, have filed with the Board of Education of the City of Paterson claims against the said Glen Engineering Construction Company for amounts due them respectively, under assignments, or for work done or labor furnished in the construction of the said High School Building in the City of Paterson, to wit:

A. Edward Gunnell, filed on the 9th day of December, 1910, at 4.40 o'clock P. M. on that day, an assignment to him from the said Glen Engineering Construction Company of the money due or to grow due to the said Glen Engineering Construction Company under its said contract with the Board of Education of the City of Paterson, to the amount of twenty-one hundred ($2,100) Dollars.

B. Matthew S. Paine filed on the 9th day of December, 1910, at 4.40 o'clock P. M., on that day, an assignment to him from the said Glen Engineering Construction Company, of all the moneys due or to grow due to the said Glen Engineering Construction Company under its contract with the Board of Education of the City of Paterson.

C. Matthew S. Paine filed on the 9th day of December, 1910, at 4.40 o'clock P. M. on that day, an

assignment to him from the said Glen Engineering Construction Company of all moneys due or to grow due to the said Glen Engineering Construction Company under its contract with the Board of Education of the City of Paterson, particularly the payment due to the said Glen Engineering Construction Company for work done and materials furnished in the month of November, 1910, under said contract.

D. Joseph Sharpe Construction Company on the 10th day of December, 1910, filed with the said Board of Education of the City of Paterson and the Comptroller of the City of Paterson a notice claiming a lien upon the moneys due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of the said High School Building for the sum of three thousand thirty-seven ($3,037) Dollars for materials furnished said Glen Engineering Construction Company, and claimed and alleged to have been used in said building.

E. Frederick G. Ebsary on the 12th day of December, 1910, filed with the said Board of Education of the City of Paterson, and with the Comptroller of the City of Paterson, a notice claiming a lien upon the moneys due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of the said High School Building, for the sum of nine hundred ($900) Dollars, for materials furnished said Glen Engineering Construction Company, and claimed and alleged to have been used in said building.

F. Herringbone Metal Lath Company on the 10th day of December, 1910, filed with the said Board of Education of the City of Paterson and the Comptroller of the City of Paterson, a notice claiming a lien upon the moneys due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of the said High School Building, for the sum of seven hundred and sixty-one and 25/100 ($761.25) Dollars for materials furnished said Glen Engineering Construction Company and claimed and alleged to have been used in said building.

G. Cortlandt Engineering Company on the 12th day of December, 1910, filed with the said Board of Education of the City of Paterson and the Comptroller of the City of Paterson, a notice claiming a lien upon the moneys due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of the said High School Building for the sum of Two thousand five hundred and thirty-seven ($2,537) Dollars for materials furnished said Glen Engineering Construction Company, and claimed and alleged to have been used in said building.

H. Architectural Plastering Company on the 12th day of December, 1910, filed with the said Board of Education of the City of Paterson and the Comptroller of the City of Paterson, a notice claiming a lien upon the moneys due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of the said High School Building for the sum of one thousand six hundred and eighty ($1,680) Dol-

lars for materials furnished said Glen Engineering Construction Company, and claimed and alleged to have been used in said building.

I. George A. Myers & Company on the 12th day of December, 1910, filed with the said Board of Education of Paterson and the Comptroller of the City of Paterson, a notice claiming a lien upon the moneys due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of the said High School Building, for the sum of five hundred and twenty-three and 96/100 ($523.96) Dollars for materials furnished said Glen Engineering Construction Company, and claimed and alleged to have been used in said building.

J. American Lumber Company on the 12th day of December, 1910, filed with the said Board of Education of the City of Paterson and the Comptroller of the City of Paterson, a notice claiming a lien upon the moneys due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of the said High School Building for the sum of five hundred and forty-two and 90/100 ($542.90) Dollars for materials furnished said Glen Engineering Construction Company, and claimed and alleged to have been used in said building.

K. Sutphen & Myer, a partnership consisting of John S. Sutphen and Charles R. Myer, on the 12th day of December, 1910, filed with the said Board of Education of the City of Paterson and the Comptroller of the City of Paterson, a notice claiming a lien upon the moneys due or to become due to the said Glen Engineering Construction Company un-

der its said contract for the erection of the said High School Building for the sum of twenty-four hundred ($2,400) Dollars for materials furnished said Glen Engineering Construction Company, and claimed and alleged to have been used in said building.

L. McKiernan & Bergen Company on the 13th day of December, 1910, filed with the said Board of Education of the City of Paterson and the Comptroller of the City of Paterson, a notice claiming a lien upon the moneys due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of the said High School Building for the sum of eleven hundred and forty-eight and 80/100 ($1,148.80) Dollars for materials furnished said Glen Engineering Construction Company, and claimed and alleged to have been used in said building.

M. Martin Troost on the 14th day of December, 1910, filed with the said Board of Education of the City of Paterson and the Comptroller of the City of Paterson, a notice claiming a lien upon the moneys due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of the said High School Building for the sum of six hundred and twenty-six and 75/100 ($626.75) Dollars, for materials furnished said Glen Engineering Construction Company, and claimed and alleged to have been used in said building.

N. James F. Carroll on the 14th day of December, 1910, filed with the Board of Education of the City of Paterson, and with the Comptroller of the City of Paterson, a notice claiming a lien upon

the moneys due or to become due to the said Glen Engineering Construction Company under its said contract, for the erection of the said High School Building for the sum of five hundred and sixteen and 96/100 ($516.96) Dollars, for labor performed and furnished to the said Glen Engineering Construction Company upon said building, by the following laborers, who assigned their said claims to the said James F. Carroll. The names of the Laborers and the amount of each of their claims so assigned being as follows:

Russell Holmes	$24.50
Antonio Deets	12.79
Fred. Benzler	12.71
Hugh McPherson	28.00
Thomas M. Ward	26.60
Peter McGee	10.12
David Hawthorne	9.95
James Gallagher	19.60
Angelo Pouche	19.60
James O'Leary	20.30
James Weir	33.60
William Noble	33.60
John McMullen	33.60
John Van Blarcon	26.60
Arthur Daniels	28.80
William H. Oglethirp	26.60
James F. Ferguson	28.00
George Cunningham	28.00
James Gordon	28.00
George Van Blarcon	26.60
Thomas Handbridge	26.60
John Columbus	12.79
	$516.76

O. J. A. Van Winkle Company, on the 15th day of December, 1910, filed with the said Board of Education of the City of Paterson and the Comptroller of the City of Paterson, a notice claiming a lien upon the moneys due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of the said High School Building for the sum of three hundred and thirteen and 37/100 ($313.37) Dollars, for materials furnished said Glen Engineering Construction Company, and claimed and alleged to have been used in said building.

P. James F. Carroll on the 15th day of December, 1910, filed with the Board of Education of the City of Paterson, and with the Comptroller of the City of Paterson, a notice claiming a lien upon the moneys due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of the said High School Building for the sum of four hundred and fifty-seven and 28/100 ($457.28) Dollars, for labor performed and furnished to the said building, by the following laborers, who assigned their said claims to the said James F. Carroll. The names of the laborers and the amount of each of their claims so assigned being as follows:

Thomas Cummins	$19.60
Alexander Crawford, Jr.	33.60
John F. Rose	26.60
Charles Van Ness	55.00
William Van Ness	55.00
Walter Vanable	34.50
William H. Rae	33.60
James Kingsland	33.60

Edward Harrison	33.60
Alexander Crawford, Sr.	39.20
Robert Maxwell	26.60
Otto H. Temple	26.60
Thomas Moran	13.18
Leonard Brink	26.60

Q. Louis Pasquali on the 16th day of December, 1910, filed with the said Board of Education of the City of Paterson and the Comptroller of the City of Paterson, a notice claiming a lien upon the moneys due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of the said High School Building for the sum of two thousand and fourteen and 39/100 ($2,014.39) Dollars, for materials furnished said Glen Engineering Construction Company, and claimed and alleged to have been used in said building.

R. Robert Gray, Peter Cannon, Adam Gorman and Henry Pierce filed with the said Board of Education of the City of Paterson, and the Comptroller of the City of Paterson, notices claiming liens upon the money due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of said High School Building, for the following sums respectively:

Robert Gray	$19.60
Peter Cannon	33.60
Adam Gorman	33.60
Henry Pierce	33.60

for labor furnished and rendered the said Glen Engineering Construction Company in the erection of the said High School Building.

S. C. S. Janson filed with the said Board of Education of the City of Paterson, and the Comptroller of the City of Paterson, on the 16th day of December, 1910, a notice claiming a lien of the money due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of said High School Building for the sum of four hundred and seventy-six ($476) Dollars, for labor furnished and rendered the said Glen Engineering Construction Company in the erection of the said High School Building.

T. Edmund Stephen, Edward Smith and Thomas Halberts filed with the said Board of Education of the City of Paterson, and with the Comptroller of the City of Paterson, on the 17th day of December, 1910, notices claiming liens of the money due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of said High School Building for the following sums respectively:

Edmund Stephen	$12.37
Edward Smith	33.60
Thomas Halberts	33.60

for labor furnished and rendered the said Glen Engineering Construction Company in the erection of the said High School Building.

U. William H. Holmes filed with the said Board of Education of the City of Paterson, and the Comptroller of the City of Paterson, on the 21st day of December, 1910, a notice claiming a lien of the money due or to become due to the said Glen Engineering Construction Company under its said

contract for the erection of said High School Building, for the sum of seventy ($70) Dollars for labor furnished and rendered the said Glen Engineering Construction Company in the erection of the said High School Building.

V. James W. Johnson, on the 24th day of December, 1910, filed with the said Board of Education of the City of Paterson and the Comptroller of the City of Paterson, a notice claiming a lien upon the moneys due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of the said High School Building for the sum of two hundred and twenty-four and 20/100 ($224.20) Dollars, for materials furnished said Glen Engineering Construction Company, and claimed and alleged to have been used in said building.

W. Welcome R. Steinmetz filed with the Board of Education of the City of Paterson, and the Comptroller of the City of Paterson, on the 3rd day of January, 1911, a notice claiming a lien of the money due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of said High School Building for the sum of forty-two and 50/100 ($42.50) Dollars, for labor furnished and rendered the said Glen Engineering Construction Company in the erection of the said High School Building.

X. E. Ricker & Son Company on the 11th day of January, 1911, filed with the said Board of Education of the City of Paterson and the Comptroller of the City of Paterson, a notice claiming a

lien upon the moneys due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of said High School Building for the sum of one thousand six hundred and fifty-eight and 16/100 ($1,658.16) Dollars, for materials furnished said Glen Engineering Construction Company, and claimed and alleged to have been used in said building.

Y. P. S. Simmons Painting Company on the 18th day of January, 1911, filed with the said Board of Education of the City of Paterson and the Comptroller of the City of Paterson, a notice claiming a lien upon the moneys due or to become due to the said Glen Engineering Construction Company under its said contract for the erection of said High School Building for the sum of four hundred and ninety-nine and 60/100 ($499.60) Dollars, for materials furnished said Glen Engineering Construction Company, and claimed and alleged to have been used in said building.

XIII. That your orator charges that the liens of any of the foregoing persons set forth in paragraph "XII" of this Bill of Complaint, upon the moneys due, if they or any of them are a lien, by virtue of the filing of said notices, upon the moneys due or to become due under the said contract with the said Glen Engineering Construction Company upon and after the filing of said notices, such liens are subsequent to and subject to the lien of your orator upon or against the same.

XIV. That on the 10th day of December, 1910, an involuntary petition in bankruptcy was filed

in the United States District Court for the Southern District of New York, against the said Glen Engineering Construction Company, and upon that date, one Benjamin Barker was appointed by order of said Court receiver for said corporation, and that thereafter, on the 12th day of December, 1910, said Benjamin Barker was appointed Ancillary Receiver of said corporation, for the State of New Jersey, by the United States District Court, for the District of New Jersey, and that thereafter said Glen Engineering Construction Company was duly adjudged a bankrupt, and the said Benjamin Barker has still been acting, and is now acting as the receiver and Ancillary Receiver of said corporation and that on or about the 6th day of March, 1911, by order duly made in the United States District Court, for the District of New Jersey, your orator was duly granted leave to begin an action to foreclose his lien aforesaid, and to make the said Benjamin Barker as receiver and Ancillary Receiver of said Bankrupt corporation a party defendant in said action.

XV. That after the adjudication in bankruptcy of the said Glen Engineering Construction Company, the Board of Education of the City of Paterson terminated its contract therewith, because of the abandonment of said contract by said Glen Engineering Construction Company, and said Board of Education of the City of Paterson proceeded with the erection and the completion of said High School Building, and for such purposes, relet the unfinished work to complete said building, and your orator has furnished upon said building the balance of the interior trim and wood work

called for by the plans and specifications, and under the contract between your orator and the said Glen Engineering Construction Company above referred to.

XVI. Your orator, therefore, prays that his lien against the said fund in the hands of the Board of Education of the City of Paterson, County of Passaic be enforced, and that it be determined by this Honorable Court how much is due from the Board of Education of the City of Paterson, and the County of Passaic, to the said Glen Engineering Construction Company, and how much is due from said Glen Engineering Construction Company to your orator, and how much is due from the said Glen Engineering Construction Company to the other persons who have filed notices as set forth herein, and that the order of priority of said liens be ascertained; that a reference be had for that purpose if necessary, and that it be decreed by this Court that the amount so found due from the said Glen Engineering Construction Company to your orator be paid to your orator by the Board of Education of the City of Paterson, in the County of Passaic, or by such person as may have the funds in hand, and that your orator may have such other and further relief in the premises as may be agreeable to equity and good conscience.

In consideration whereof, and for as much as your orator is without adequate remedy in the premises at and by the strict rules of the common law, and can only obtain relief from this Honorable Court where matters of this nature are properly cognizable and relievable.

To the end, therefore, that the said defendants, the Board of Education of the City of Paterson,

in the County of Passaic, the Mayor and Aldermen of the City of Paterson, Benjamin Barker, receiver and ancillary receiver in bankruptcy of the Glen Engineering Construction Company, First National Bank of the Town of Union, Ingalls Stone Company, James Healy, John Agnew Company, Edward Gunnell, Matthew S. Paine, Joseph Sharpe Construction Company, Frederick G. Ebsary, Herringbone Metal Lath Company, Cortlandt Engineering Company, Architectural Plastering Company, George A. Myers & Company, American Lumber Company, Sutphen & Myer, McKiernan & Bergen Company, Martin Troost, James F. Carroll, J. A. Van Winkle Company, Louis Pasquali, Robert Gray, Peter Cannon, Adam Gorman, Henry Pierce, C. S. Jensen, Edmund Stephen, Edward Smith, Thomas Halberts, William H. Holmes, James W. Johnson, Welcome R. Steinmetz, E. Ricker & Son Company, and P. S. Simmons Painting Company, may without oath, and answer on oath being hereby expressly waived, to the best of their respective knowledge, remembrance, information and belief, full, true and perfect answer make to all and singular the matters aforesaid, as if the same were repeated, and they and every one of them distinctly interrogated thereto.

May it please your Honor, the premises considered, to grant unto your orator the said writ or writs of subpoenas issuing out of and under the seal of this Honorable Court, to be directed to the said Board of Education of the City of Paterson, in the County of Passaic, the Mayor and Aldermen of the City of Paterson, Benjamin Barker receiver in bankruptcy, and ancillary receiver of the Glen Engineering Construction Company, First National Bank of the Town of Union, Ingalls Stone

Company, James Healy, John Agnew Company, Edward Gunnell, Matthew S. Paine, Joseph Sharpe Construction Company, Cortlandt Engineering Company, Frederick G. Ebsary, Herringbone Metal Lath Company, Architectural Plastering Company, George A. Myers & Company, American Lumber Company, Sutphen & Myer, McKiernan & Bergen Company, Martin Troost, James F. Carroll, J. A. Van Winkle Company, Louis Pasquali, Robert Gray, Peter Cannon, Adam Gorman, Henry Pierce, C. S. Jensen, Edmund Stephen, Edward Smith, Thomas Halberts, William H. Holmes, James W. Johnson, Welcome R. Steinmetz, E. Ricker & Son Company, and P. S. Simmons Painting Company, commanding them and each of them by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this Honorable Court; then and there to answer all and singular the premises, and to stand to, abide and perform such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and good conscience.

And your orator as in duty bound will ever pray, etc.

DAVID F. EDWARDS,
Solicitor and of Counsel for Frank Miller, doing business under the name and style of Frank Miller Lumber Company.

Bill of Complaint of Cortlandt Engineering Company (Filed, March 8, 1911).

IN CHANCERY OF NEW JERSEY.

Between CORTLANDT ENGINEERING COMPANY, Complainant. and THE BOARD OF EDUCATION OF THE CITY OF PATERSON, et als., Defendants.	On Bill of Complaint.

On March 8th, 1911, Cortlandt Engineering Company filed its bill of complaint in the Court of Chancery, which bill makes similar allegations to bill filed in Agnew suit, and alleging the filing of the following claims for labor in addition to those set forth in the Agnew bill, and making the claimants parties defendant, to wit:

Robert Dray,	$19.60
Peter Cannon,	33.60
Adam Gorman,	33.60
Henry Pierce,	33.60
Charles S. Jensen,	476.00
Edmund Stephens,	12.37
Edward Smith,	33.60
Thomas Holberts,	33.60
William H. Holmes,	70.00

James F. Carroll claims to have an assignment of the claims of Russell Holmes, Antonio Deets,

Fred Bensler, Hugh McPherson, Peter McGie, David Hawthorne, James Gallagher, Angelo Touche, James O'Leary, James Weir, John McMullen, John Van Blarcom, Arthur Daniels, William H. Oglethry, James Furgeson, George Cunningham, George Van Blarcom, Thomas Handbridge, John Columbus, Thomas Cummings, Alexander Crawford, Jr., John F. Rose, Charles Van Ness, Walter Venable, William H. Rea, James Kingsland, Edward Harrison, Alexander Crawford, Robert Maxwell, Otto Temple, Thomas Moran and Leonard Brink.

Answers to Bills of Complaint

Answers were also filed by the defendants to the bills of complaint of Frank Miller, trading as Miller Lumber Company, and Cortlandt Engineering Company; said suits were consolidated with Agnew suit by an order consolidating said suits advised by Vice Chancellor Stevenson, and referred to in his opinion.

COUNTY COURT HOUSE, PATERSON.

Friday, February 2, 1912, 10 A. M.

IN CHANCERY OF NEW JERSEY.

Between

THE JOHN AGNEW COMPANY,
Complainant,

and

THE BOARD OF EDUCATION of the City of Paterson, et als.,
Defendants.

On Bill &c.

Transcript of the shorthand report of the testimony and proceedings taken in the above stated cause, at the County Court House in Paterson, on Friday, February 2, 1912, at ten o'clock in the forenoon, before His Honor

EUGENE STEVENSON, Vice Chancellor.

APPEARANCES:

WILLIAM B. GOURLEY, Esq., for the Complainant.
DAVID F. EDWARDS, Esq., Solicitor, by Edward Ward McMahon, Esq. (of the New York Bar), for Def't Frank Miller Lumber Co.
WILLIAM M. DREW, Esq., for Cortlandt Engineering Company.
GUSTAV A. HUNZIKER, Esq., for Ingalls Stone Company.
WILLIAM F. DELANEY, Esq., and NOAH A. STANCHCLIFFE, of New York Bar, for Matthew S. Paine.

WILLIAM I. LEWIS, Esq., for Joseph Sharpe Construction Company.

G. M. BELFATTO, Esq., for F. G. Ebsary.

GEORGE MILLS, Esq., for E. Ricker & Sons Company.

J. W. DEYOE, Esq., for George A. Myers & Company.

Messrs. FREEMAN & WESTERHOFF, for Martin Troost and Louis Pasquali, trading as Italian Marble Mosaic Company.

Mr. for The J. A. Van Winkle Co.

HUGH B. REED, Esq., for Herringbone Metal Lath Company.

JAMES HIGGINS, Esq., for McKiernan & Bergin Company.

JOHN J. FALLON, Esq., for First Nat. Bank of Town of Union.

JOHN O. BENSON, Esq., for Sutphen & Myer.

ALBERT COMSTOCK, Esq., for Architectural Plastering Company.

MUNSON FORCE, Esq., for James Healey.

JAMES G. BLAUVELT, Esq., for P. S. Simmons Painting Company.

JOHN POMFRET, Esq., for Thirty-seven Workmen.

EDWARD F. MERREY, Esq., THOMAS F. MCCRAN, Esq., for the City of Paterson and Board of Education.

FRANK H. HALL, Esq., for the Trustee in Bankruptcy.

Mr. McCran: This suit before your Honor is the suit of John Agnew Company, and grows out of various claims for labor and materials used in the construction of the Paterson high school. There are three other suits that have been brought which are of a

similar character and I now desire to make application to consolidate the four cases, which are The John Agnew Company, The Frank Miller Lumber Company, The Ingalls Stone Company, and The Cortlandt Engineering Company,—all arising out of moneys due to them on this Paterson high school work. This application is made on behalf of the Board of Education of the City of Paterson in whose custody the moneys now are.

The Court: What jurisdiction has the Court of the parties in these three other suits which have not, as I understand it, been referred to me for hearing?

Mr. McCran: The Cortlandt Engineering Company is now the only remaining suit that has not been referred, and I believe they withheld for the purpose of coming in on a consolidation—in other words, putting in their proofs with the Agnew suit. The other three have been referred to your Honor.

The Court: Very well, you may read the bill, or state the substance of it.

(Mr. Gourley states in substance the contents of the bill.)

The Court: I will now hear counsel for the defendants, in the order in which the answers have been filed, which will be a convenient order. Just state what the answers are.

(The respective counsel thereupon stated, in the order named above as appearing in the case, the substance of their answers.)

JAMES F. DUNPHY, sworn on behalf of the complainant, testified as follows:

Direct Examination by Mr. Gourley:

Q. You are connected with the Board of Education of the City of Paterson?

A. Yes, sir.

Q. In what capacity?

A. Assistant Secretary.

Q. How long have you been Assistant Secretary?

A. Twenty years.

Q. I show you two papers and ask you, as Secretary, had you the custody of those papers?

A. Yes, sir, I did; I signed one of them.

Q. What are they?

A. One is a contract of the Glen Engineering Construction Company with the Board of Education, signed by the President of the Board and Mr. Alford, President of the Glen Engineering Construction Company.

Mr. Gourley: I offer that paper in evidence.

(The same is admitted and marked Exhibit C-1.)

Q. And the other paper is what?

A. The contract bond of the Glen Engineering Construction Co.

Mr. Gourley: I also offer that in evidence.

(Admitted and marked Exhibit C-2.)

Q. Did the Glen Engineering Construction Company proceed with the erection of that building?

A. They started work, yes, sir.

Q. Were any moneys paid them on account of the work done?

A. Yes, sir.

Q. Have you a record of the payments made by the City?

A. Yes, sir.

Q. And have you the certificates of the Architect?

A. Yes, sir.

Q. You may produce them, if you will.

A. Here they are, in their order, beginning with No. 1.

Q. How many certificates in all?

A. Fifteen.

Q. The aggregate of which amount to how much?

A. $203,871.50.

Mr. Gourley: I offer these certificates.

The Court: If there is no objection they can be put in an envelope and marked as one exhibit, inasmuch as they are easily identified and there isn't much danger of substitution.

Mr. Merrey: We might have it noted on the record the dates of those certificates.

Mr. Gourley: We have prepared a typewritten statement of those payments, I think.

Q. How are those payments made to the company? What is the usual form, first, upon the production of the certificate?

A. Why, they bring the certificate to the office and we attach it to one of our heads and have it

signed by the Committee, and then the Board of Education draws a warrant upon the Comptroller.

Q. For the payment of the certificate?

A. For the payment of the amount of the certificate.

Q. Are each of these certificates countersigned by the Committee in charge of the work?

A. By the Committees in charge of the work, yes.

Q. There are different Committees?

A. Yes, Committees on Building and Committees on Finance.

Q. Have you made a typewritten statement of the amount of these disbursements before you?

A. Yes, sir.

Q. Made for this case?

A. Yes.

Q. You may state what the substance of it is.

The Court: You can have it marked, if that is the statement.

(The same is marked Exhibit C-3.)

Q. That statement is the result of the certificates?

A. Yes, taken right from the certificates. I have here the amount of the contract and the amount for extra work, and then the payment of the fifteen certificates to the Glen Engineering Construction Company, and then the cost of completing the building, together with a deduction for some brick that the Board of Education afterwards furnished, as a credit, and it shows a balance of $29,696.31.

Q. Is that balance the result of the payments and credits on the books?

A. Yes, sir.

Mr. Gourley: I also offer this statement, as a summary showing the items which result in the balance of $29,696.31.

(The same is admitted in evidence and marked C-4.)

Mr. Merrey: I take it that the payments have actually been made. Of course, as to any payments that were afterwards made we reserve the right to object to.

The Court: The paper will be admitted for what it is worth. The Secretary of the Board says that this paper shows the payments which have been made and exhibits the correct balance. The paper itself is not an instrument of evidence; the evidence comes from the witness. If there is no objection the paper will be admitted in evidence. That does not prevent anybody from showing any statement in the paper as incorrect, and if no evidence is produced to show that there is any error in this paper, why of course what that paper states will be admitted to be proved.

Q. Have you any notice of claim filed against this fund?

A. I have. Mr. McCran has them.

Q. And have you brought with you the notices of lien claims against this fund?

A. Yes, sir, they are here.

Q. Have you produced them here in court now?

A. Mr. McCran has them in his possession.

Q. Have you made any statement of these claims?

A. I have a little book here that I kept at the time.

Q. You have no typewritten statement?

A. No, sir.

Q. Who made the endorsements upon the lien claims when received?

A. I made some and Mr. Ridgeway made some.

Q. Who is Mr. Ridgeway?

A. He is Secretary of the Board.

Q. Who is Mr. Kireker?

A. He was President of the Board at that time.

Q. Well, can you give us the order of the receipt of those lien claims—those papers?

A. I have here (reading from book) "John Agnew Company" filed with us November 28, 1910, 5:25 P. M.

Q. Is there no notice prior to the Agnew claim?

A. I have here "James Healey, September 21, 1910, 4:20 P. M."

Ingalls Stone Company, September 22, 1910, 2 P. M.

John Agnew Company, November 28, 1910, 5:25 P. M.

Frank Miller Lumber Company, December 9, 1910, 3:25 P. M.

Joseph Sharpe Construction Co., December 10, 1910.

Herringbone Metal Lath Company, December 10, 1910, 9:30 P. M.

Cortlandt Engineering Company, December 12, 1910, 10:08 A. M.

Fred G. Ebsary, December 12, 1910, 1:35 P. M.

Architectural Plastering Company, December 12, 1910, 3:40 P. M.

American Lumber Company, December 12, 1910, 3:40 P. M.

George A. Myers & Company, December 12, 1910, 4:05 P. M.

Sutphen & Myer, December 12, 1910, 4:25 P. M.

McKiernan & Bergin Company, December 13, 1910, 2:08 P. M.

Martin Troost, December 14, 1910, 3:25 P. M.

The J. A. Van Winkle Company, December 15, 1910, 10:23 A. M.

Workingmen's claim, December 16, 1910, 4 P. M. There were sixteen claims in the lot.

Louis Pasquali, trading as Italian Marble Mosaic Company, December 16, 1910, 5:50 P. M.

Q. (By Judge Lewis.) The workingmen's claims are sixteen in number, I understood you to say; may I ask whether any of them are more than a hundred dollars?

A. I am not acquainted with that fact. I have only the dates here in this memorandum.

Then after the Italian Marble, I have workmen's claims, twelve more in number, December 17, 1910, 11:45 A. M.

Eight claims of workmen, December 19, 1910, 10:40 A. M.

Five claims of workmen, December 19, 1910, 3:15 P. M.

Six claims of workmen, December 21, 1910, 11:35 A. M.

One claim of workman, December 22, 1910, 4:15 P. M.

James W. Johnson, December 24, 1910, 10 A. M.

Welcome R. Steinmetz, for wages, January 3, 1911, 3:55 P. M.

E. Ricker & Son Co., January 12, 1911, 11 A. M.

The P. S. Simmons Painting Company, January 18, 1911, 4 P. M.

Workman's claim, Leonard Brink, February 3, 1911, 4 P. M.

Workman's claim, Thomas Moran, February 4, 1911, 11 A. M. That is all.

Q. Have you all the notices of all these claims you have read here before you?

A. Here are the papers; I haven't checked them up. Mr. McCran has had this and I have not.

Q. Can you, by reference to any papers, give us the names of the laborers who filed these claims? You have given them in bunches of eight and twelve.

A. I suppose their names would appear in here.

Q. Pick out the precise ones, so that we can give the names to the stenographer. You can identify them by the time of filing.

The Court: It would be very convenient, Mr. Gourley, if the Secretary or some competent clerk would make a tabulated statement of these claims, giving the names, amounts, and dates of filing, corresponding with the other statement you put in a little while ago.

The Witness: Yes, I can readily do that.

Mr. Hall: And put on the date of filing in the Comptroller's office.

Mr. Gourley: I offer the John Agnew notice, sir; I presume the other counsel will offer the others. I do not know anything about their claims; one or two, perhaps, may be questioned.

The Court: You offer the claim of the complainant, the John Agnew Company?

Mr. Gourley: Yes.

The Court: There being no objection, it will be received in evidence. (Same is marked Exhibit C-5.)

Mr. Hall: I think we ought to reserve the right to object to them as not complying with the statute.

The Court: The paper is offered in evidence for the purpose of showing the claim that was in fact filed with these officers; that is all. With the legal effect we have nothing to do now; it is only a question of identity. If there is no objection all these papers will be received in evidence, simply to show that they were, at the time stated, delivered to the officers mentioned.

Mr. Gourley: I offer them for that purpose, sir.

The Court: Do I understand that these papers that are now offered, starting with the John Agnew claim, correspond with the list that the witness has given?

Mr. Gourley: Mr. Comstock has been checking them off.

Mr. Comstock: They check up with ours.

The Court: Then all the papers which have been referred to by the Secretary of the Board of Education may be put in an envelope and marked as an exhibit, simply to show that these documents which he produces were delivered to the Board of Education at the time indicated and that is all. The legal effect of the papers is a matter for determination hereafter. The only thing that binds counsel now is the proof that these papers were in fact delivered at that time to the Board of Education under the statute.

Mr. Reed: Does this cover the service on the present Secretary only?

The Court: What does the act say about that?

Judge Lewis: "Chairman or other head officer."

The Court: I understand that this witness says that these papers were delivered to the head officer of the Board of Education. Now is the time to determine that, gentlemen.

Mr. Gourley: Some were served on the President of the Board, some on the present witness, and some on Mr. Ridgeway.

Q. What do those initials mean?

A. W. J. B. means the President of the Board after January. Mr. Kireker was President of the Board in 1910, and Mr. W. J. Bridges in 1911.

(Envelope containing notices above referred to is marked Exhibit C-5.)

The Court: Well, gentlemen, the claim of the John Agnew Company against the Glen Engineering Construction Company, amounting to $11,922.29, shown by the witness to have been served upon the Board of Education, bears upon it this endorsement: "Received November 28, 1910, 5:25 P. M., C. F. K.," which I understand means the initials of the President of the Board. Now, if there is any other objection to the service upon the Board, according to the statute, now is the time to make it. If there is any objection to the proof of service of

any of these claims now is the time to make it.

Mr. McMahon: I think service at the office of the Board would be sufficient service.

The Court: All the claims, therefore, are considered as proved to have been served pursuant to the statute. Of course, no finding is made—no adjudication—as to their effect to create liens or to affect the assignments, but the service under the statute is being proved now and in the absence of any objection to such service the claims will be considered as proved to have been served pursuant to the statute.

Mr. Gourley: Mr. Comstock actually made service upon Mr. Kireker.

Mr. Hall: On behalf of the Trustee I am prepared to admit those papers in evidence, with the qualification that they were served upon the persons whose names are endorsed upon each claim. I think that is all that we should be asked to admit. I am willing to admit that the endorsements were signed by the initials of the several individuals and were made at the time by the party upon whom the claim was served, but I do not want to admit that that party was the head officer.

The Court: Well, gentlemen, if you cannot agree we will have to put in claim after claim.

Mr. McMahon: I don't see that there is any issue on that score. If the President was in Florida and he had a man there representing him, that is sufficient. At least, it is so far as we are concerned.

The Court: You can adopt various views; the question now is whether service of these papers is conceded to have been made pursuant to the statute. That is all. There ought not to be any surprise here—ought not to have any argument at the end of the case as to what a particular endorsement means on any of these papers, or as to whether the initials "C. F. K." must be considered the initials of Charles F. Kireker, and that he was the Chairman or head officer of the Board of Education.

Mr. McMahon: I am prepared to admit that; that those papers were received by the persons who signed the endorsements and whose initials appear upon them.

Mr. DeYoe: Your Honor, I think it ought to be proved who those persons are. I am prepared to admit that Mr. Kireker was the President of the Board of Education.

Mr. Delaney: Couldn't these papers be received as papers which were produced by the witness—as coming from his custody—so that we can get at least that far, having the papers in court.

Mr. Hall: I think perhaps my objection was a little technical. I will withdraw that objection and admit them on behalf of the Trustee.

Mr. Delaney: On behalf of the Paine account I admit it merely restricting the objection to the liens. The assignments have not yet been offered.

The Court: Is that admitted, then? If so, it will save a great deal of time. We

might be trying for two days the question whether service was made on these two officers. No doubt the head officer had notice of the claim when it was left at the office.

Mr. Hall: I consent to that.

Mr. Delaney: And it applies to the liens and assignments also?

The Court: Yes. This, then, is the proposition of fact which the Court considers as proved, with the consent of counsel representing all the claimants, namely, that all these claims and the four assignments were served pursuant to the statute upon the Chairman or head officer of the Board of Education of the City of Paterson, at the dates which have been stated and which appear endorsed upon them. We have not as yet the admission of any proof in regard to service upon the Comptroller.

Mr. Merrey: If the Court please, at this time I suppose that everybody admits that the City was entitled to go ahead and finish this work and doing away with the necessity of showing the service of the three days' notice under the contract.

The Court: I do not recall that the pleadings admit that.

Mr. Merrey: I am asking now if counsel do admit that.

Mr. Gourley: Judging by the silence, I think we all admit that.

The Court: The admission is that the City of Paterson and the Board of Education, in pursuance of their rights under the

contract, gave to the contractor who had abandoned his work at that time the three days' notice to the contractor or his representative at that time, the Receiver in Bankruptcy, called for in the contract, and thereupon, after the expiration of the time limit in the notice went on and completed the work; notice was duly given to both the contractor and to the Receiver in Bankruptcy of the contractor.

Q. Mr. Dunphy, will you now produce the four assignments of the Glen Company and read them?

A. Here is the assignment of the First National Bank of the Town of Union, dated September 22, 1910, 9 A. M.; also the assignment of M. S. Paine, dated December 9, 1910, 4:30 P. M. Two were received at the same date and hour. Then Edward Gunnell, dated December 9, 1910, 4:30 P. M.

Mr. Gourley: I offer those assignments in evidence.

(The same are admitted as one exhibit and marked Exhibit C-6.)

JAMES J. CURRAN, sworn on behalf of the complainant, testified as follows:

Direct Examination by Mr. Gourley:

Q. You are the Comptroller of the City of Paterson?

A. Yes, sir.

Q. And have been how long?

A. Since the first of January, 1910.

Q. And as such Comptroller did you have served upon you notices of lien claims against the fund in the hands of the Board of Education for the high school?

A. Yes, sir.

Q. Have you them with you?

A. Yes, sir; I have.

Q. Will you produce them, please.

A. I have a list of them in book form, and the originals are all here.

The Court: I suggest that we have a schedule of these papers, showing the date of filling in each case.

Mr. Gourley: I suppose we had better read into the record the name and time of service?

The Court: Take your own course.

Q. Have you made a list of those?

A. No, sir.

Q. Will you read from the claims the name and the time of filing and then we will have a chart prepared. I don't suppose you can give them in chronological order.

A. No.

The Court: Do you intend to have a schedule made?

Mr. Gourley: Yes.

The Court: Why not let this pass until you get that schedule; then you can read it off.

Mr. Gourley: All right, we will.

Q. On whom were they served?

A. On the Comptroller.

Q. Upon you personally?

A. Yes.

Q. Did you at the time endorse them over your signature?

A. Yes, sir.

Q. And does that endorsement appear on the papers?

A. Yes, sir.

Q. Does also the time of filing appear there?

A. Yes, sir.

Q. Have you the liens there?

A. Yes, sir.

Q. And have you the bonds accompanying the lien claims?

A. Yes, they are all in here.

Mr. Gourley: We offer the notices served upon the Comptroller, together with the book in which they were recorded, and the bonds accompanying the lien claims.

(The same are admitted in evidence and the exhibit numbers are to be given each exhibit when the schedule is made out.)

The Court: In the absence of any argument or contrary contention, the Court will admit service upon the Chairman or head officer of the Board of Education and upon the Comptroller of the City of Paterson as satisfying the requirements of the statute in regard to service.

Q. Now, the notice of lis pendens, Mr. Curran, is that filed?

A. Whatever notice of lis pendens there is is in here.

Q. In each claim?

A. Oh no, only those that there were.

Mr. Gourley: I want specially to call attention to the fact that the John Agnew Company notice is here produced in the cause.

Mr. Merrey: I think the notice should be read into the record, because under the statute it is not necessary to file the lis pendens if they are named in the lis pendens of any other.

The Court: Very good.

Mr. Gourley: I offer the notice of lis pendens of the John Agnew Company, that was served upon the Comptroller February 20, 1911, at 11:50 A. M.

The Court: How many parties are claimants here before the court not in the schedule of names?

Mr. Merrey: There are several, but they came in the suit of the Frank Miller Lumber Company—seven or eight laborers.

The Court: You may read it.

Mr. Merrey: It can be admitted if everybody is willing that all the defendants are named in the two notices.

Mr. McMahon: If you put in the Agnew and Miller notices that will cover everybody.

Mr. Hunziker: Excepting the Ingalls Stone Company suit. Their notice was not filed until after three months and the notice in their suit should be offered in evidence in order to make it appear that they filed this notice and began suit within the time required by statute.

The Court: The Ingalls people are not in this notice?

Mr. Hunziker: They are, but this notice

was subsequent to the three months after the lien was filed which the statute requires suit to be brought.

The Court: And during that time suit was brought?

Mr. Hunziker: Yes, sir; and notice filed.

The Court: Is there any reason why we should put more than these notices of lis pendens in?

Mr. Gourley: Not at all.

The Court: Let them be marked.

(The same are to be marked later in the trial.)

Examination by Judge Lewis:

Q. I ask you, Mr. Comptroller, to produce a notice served upon you by the Joseph Sharpe Construction Company, dated March 10, 1910, and also ask when it was served upon you.

The Court: I think we are making confusion. Is this an original claim that you have shown to the witness?

Judge Lewis: No, sir, mere notice of lis pendens in the suit. I did it as a safeguard. I gave notice of the pendency of the suit and the filing of the answer, and I now ask the witness if he has a notice from the Joseph Sharpe Construction Company of the filing of their answer in the Agnew suit?

A. Yes, sir.

Judge Lewis: I offer that notice in evidence.

(Admitted and marked J. S. C. Co. D-1.)

Recess until 2 o'clock.

Afternoon session.

WILLIAM T. FANNING, sworn on behalf of the complainant, testified as follows:

Direct Examination by Mr. Gourley:

Q. Mr. Fanning, you are an architect by profession?

A. Yes, sir.

Q. And was the architect who drew the plans, and supervised the erection of the high school building?

A. Yes, sir.

Q. I want to ask you something about these payments to the Glen Engineering Construction Company; I suppose that is the company with whom the contract was made?

A. Yes.

Q. Have you looked over that statement and are you familiar with it (exhibiting to witness C-4)?

A. Yes, sir; that is a true copy.

Q. Will you look at C-3, comprising a number of certificates, and tell us whether or not those were the certificates under which the payments were made?

A. (After examining each certificate carefully) I issued those certificates, Mr. Gourley.

Q. The signature "William T. Fanning" is your signature?

A. Yes, sir.

Q. Did you as payment was made deduct fifteen per cent. of the price of the work then done?

A. I did.

Q. And that is so through all the payments?

A. Yes.

Q. What persons were there on the ground representing the Glen Engineering Construction Company for the receipt of material?

Q. They had a superintendent, a Mr. Steinmetz, at one time during the progress of the work, and also a Mr. Holmes; and they had a time-keeper, and I think they had a gang of boys who were in authority and laborer boys.

Q. The material that we are specially concerned about now is that furnished by the John Agnew Company, such as brick and mason's supplies; how was that worked into the building as it arrived? I mean, were there large quantities of it?

A. No, I think, Mr. Gourley, it came as they needed it. There was very little stored on the premises, on account of the limited space and they wanted to prevent blockading the street.

Q. So that, as the mason's supplies came from the Agnew Company it was worked into the building?

A. Yes, sir.

Q. After December 10, 1910, the day when the petition in bankruptcy was filed, no payments were made at all?

A. No, sir.

Q. So that the condition of things, financially remained as they were until the present time, except such moneys as were used in the completion of the building?

A. Yes, sir.

Q. I want to ask you about the cost of completing that building, Mr. Fanning; tell us something about those figures, although I don't know as there is any dispute about them?

A. (Looking at Exhibit C-4) As you know, Mr. Gourley, all this work was done by contract and was duly advertised for and we had very good competition, with the exception of some work which the Board offered different sub-contractors; that is, they agreed to enter into contracts with them for the balance of the amount of the contract owing to them by the Glen Company, provided it was satisfactory, and in that instance they took the Joseph Sharpe Construction Company, and the Architectural Plastering Company, and the P. S. Simmons Painting Company, and the Italian Marble Mosaic Company, and the balance of the work was advertised for and opened by bids.

Q. Well, are there other items there requiring explanation as to the cost?

A. That is all, Mr. Gourley. This extra charge $8 on the dust chute was due to the fact that the Glen Engineering Construction Company used the dust chute for a cement hopper and it disfigured the chute and we were called upon to clean it off and paint it for a distance of some fifty feet. The room referred to with the side walls soiled was a room that was used for the office and the walls and ceiling of the room were discolored, because of the fact of having a stove in use, and the other items for the painting of the backs of the trim were also included in that.

Q. Well, then, those were necessary improvements to be made to complete the building in accordance with the plans and specifications?

A. Yes, sir. We didn't have any extras on the final work.

Q. Who is Carl Dimmick?

A. Carl Dimmick is a time-keeper.

Q. For whom?

A. For the Glen Engineering Construction Company.

Q. Do you know his signature? Have you seen him write?

A. I can't identify it here; I have records in the office, though, I think that will enable me to do so.

Mr. Gourley: Is there any contest over the delivery of any of these items? If not, we will pass on.

(No response by counsel.)

Cross Examination on behalf of the City by Mr. Merrey:

Q. Had the building been completed according to specifications?

A. Yes, sir.

Q. That is, outside of that called for in the original plans and specifications?

A. Yes, sir.

Q. And have you ordered these payments made to the various other contractors who completed the building?

A. Yes, sir.

Q. There is a charge there for architect's fees; what is that for?

A. That is for preparing new specifications and additional blue-prints, and re-drawing details, and making a detailed inspection of the work and ascertaining just the amount of unfinished work and making specifications of the parts of the work to be completed.

Q. Then, in finishing this building after the Glen Company abandoned it, it was necessary for you to go over the building and find out exactly what was left uncompleted?

A. Yes, sir.

Q. And new specifications then prepared, so that bids could be solicited for the completion of the building?

A. Yes, sir.

Q. And that is what this charge is made for?

A. Yes, sir.

Q. Preparing those specifications and the necessary plans for the new bidders?

A. That is it.

Mr. Merrey: Is there any objection made to any of these payments by any of the complainants, that the city has overpaid the man who finished the building, so that we can have it practically admitted?

The Court: Mr. Fanning testified, as I understand it, in substance, that the city completed the building and paid what it cost to complete the building, and this proof stands. If anybody is going to show to the contrary they must bring evidence.

Mr. Hall: Is that a proper charge under the contract?

The Court: What doubt could there be about the propriety of that as a charge for completing the building, within the meaning of the contract? The contractor runs away and leaves an immense building in process of construction and the public authorities have to put the work out for competitive bids, have they not?

Mr. Merrey: Not absolutely, no.

The Court: Very well, they are obliged to do it and everybody recognizes that that is a very proper method of getting the work done in the best way and at the cheapest price, and of course it goes without any proof that it is necessary that there should be careful details, in order that bidders would act intelligently.

Mr. Hall: The question is whether that is a proper charge under the contract.

By Mr. Merrey:

Q. (Continued) Is the amount charged a reasonable charge?

A. It is, in view of the work that I had to do and considering the magnitude of the work. It entailed work on my part extending over six months or more. It is reasonable—very reasonable. It is less than two per cent. of the cost of completing the contract, which was somewheres around $52,000.

By the Court:

Q. You had five per cent. on the whole?

A. Yes.

Q. And now you have two per cent. extra on the unfinished work?

A. Yes.

Q. And that you had to have finished by other contractors?

A. Yes.

Q. What was your extra work? A. Going through the building and ascertaining just the

amount of the unfinished state and providing for the finishing of the building providing additional tracings and blue-prints, and so forth.

Q. The blue-prints were from the original plans, not from new plans?

A. No. We had about twenty sets so as to get competition. We had probably forty men bidding on it. The time was limited and we had to get the bids in, and each bidder would retain the set of plans for the full period, and afterwards we had considerable difficulty in getting the original full-sized details from the Glen people; they were in the Glen Company's office. The trim and such work had to be retraced and put on detail drawing paper, and that was considerable work.

By the Court:

Q. Who passed on your bill for this extra work?

A. The Board of Education.

Q. The entire Board?

A. The entire Board.

Q. Now, has any charge been made against this fund for the delay in the completion of the building beyond the contract time?

A. No.

Q. In doing the work you hired an inspector at your own expense who was constantly on the job there?

A. Yes.

Q. And by reason of the delay were you compelled to employ him for a longer time than you would have done?

A. He was there practically six months extra.

Q. And was there any extra charge made for his time?

A. No, I simply put that all in together.

Mr. Hall: I don't think that is material. I assume there was no cessation of the contract because it took six months longer to complete. The question is, whether the City would enforce a penalty or not, and not whether Mr. Fanning employed somebody to do the work.

Mr. Merrey: The charge of $1,000 which Mr. Fanning made covers this item for the inspector's time, and Mr. Fanning wasn't obliged to keep that man there for six months extra and pay him for that extra time.

By the Court:

Q. How is it your inspector had to be there six months longer than he would have been there if the contract by the Glen Company had been carried out by them?

A. Well, we expected to get into the building the first of February and we didn't get into the building until the first of June. We had strikes and everything else intervening at that time, otherwise we would have gotten into the building by the first of February, and the strikes we had were caused by the default of the Glen Company in paying its workmen.

Q. You refer to these men whose claims are in here?

A. Yes.

The Court: Anything further from this witness?

Mr. McMahon: I would like to examine him.

Judge Lewis: I would also like to examine him.

The Court: Is there any, strictly speaking, cross examination?

Mr. Hall: May I ask Mr. Fanning if the bill he rendered for extra service included cement work?

A. It does not.

Cross Examination by Mr. Hall:

Q. How long before the Glen Company ceased to work did you make a payment for work done?

A. How long before they ceased to work?

Q. Yes, before your last payment was made.

A. Why, I think it was probably a week.

Q. So that within a week of the Glen company ceasing from work you were sufficiently posted on the amount of work to issue certificates on which the city paid?

A. Yes, generally. I could estimate brick by the thousand or two thousand, or something like that, but I would have to know absolutely if I was preparing a detailed statement for a man to figure on, because if I didn't have the exact quantities he would come back immediately and want the extra right away. This work has been completed without any extra charge.

Examination by the Court:

Q. When you inspected the building in order to find out what stage of completion it had reached and how much work remained to be done, did you have to make an estimate of the amount of work to

be done on all the various parts of the building that were not finished?

A. Yes, an estimate.

Q. How many brick had to be laid, for instance, how many yards of plaster, and so forth?

A. Yes, sir.

Q. You made that estimate, did you?

A. Yes.

Q. As the basis of competitive bids?

A. No, that was to enable the men to find out regarding this certificate.

Mr. Hall: That was done a week before the Glen company ceased to work.

Q. What certificate do you refer to?

A. Before they ceased work—I didn't make anything before they ceased to work because I didn't have any requisition for payment.

Q. I am speaking now of the figures made prior to the last payment made to the Glen company; how near to the time when the work was abandoned by the Glen company did you give in your last certificate when you made an estimate of the amount of work that had been done in order that the Glen company might receive eighty-five per cent? How near was the date to the time when the work was abandoned?

A. I think it was probably five weeks.

Q. So that the contractor, the Glen company, worked for five weeks adding material and labor to the building, which was not and had not been the subject matter of any certificate or any estimate?

A. Yes, sir.

By Mr. Hall:

Q. But during those five weeks hadn't requisitions been made for further payment?

A. No, no requisition was made.

By the Court:

Q. How far apart were these other certificates, Mr. Fanning?

A. The last certificate was November 1, 1910, for $5,000.

Q. About five weeks from the time they abandoned the contract?

A. Practically around five weeks.

Q. How did they come to do all that work without getting a certificate for it?

A. They might have indicated a payment of what they probably requisitioned and I suppose it was refused.

Q. The claimants and assignees didn't intervene?

A. No.

By Mr. Hall:

Q. Did you have a contract with the city originally for the five per cent?

A. I had an understanding.

Q. Not a written contract?

A. No.

Q. By resolution of the Board?

A. By resolution of the Board, yes.

Mr. Hall: Is that resolution in court?

Mr. Merrey: No, the resolution is quite old, I think we haven't got it.

Mr. Hall: I would like to have that produced,—the point being that that resolution

might cover not only the original contract but everything subsequent.

Mr. Merrey: The resolution under which Mr. Fanning was hired was passed a couple of years before the building was started, because plans were drawn and accepted and bids asked and they were too high and the Board didn't go ahead with the work.

Mr. Hall: If the City will furnish a certified copy or have the resolution drawn off so that it could be put in evidence we would know just what the contract between the city and the architect was.

The Court: Any further examination of this witness?

Cross Examination by Mr. Delaney:

Q. Can you tell me when the last requisition was made for payment?

A. I think it was a week before they received this $5,000.

Q. When was that?

A. November 1st, 1910.

Q. So that after November 1, 1910, you don't know of any requisition having been made?

A. No.

Q. Can you tell what was the payment for the work done and materials furnished during the month of November, 1910?

A. $5,000.

Q. That was for work done and materials furnished in November?

A. Yes.

By the Court:

Q. Mr. Fanning, did you give a certificate about once a month?

A. Approximately once a month.

By Mr. Merrey:

Q. And in making up your certificates they were based on requisitions made by the company?

A. The company submitted to me at the outset a cost-sheet for enumerating the work in the different parts—so many rough bricks, so many face brick, so many yards of plaster, so many square feet of fire-proofing, and so forth, to enable me to estimate on the work intelligently, and all my certificates were based on their cost-sheet.

Q. Then, when they wanted a payment they would tell you about what they considered had been done?

A. They would submit an estimate to me.

Q. They had a great many sub-contractors on the building, did they not?

A. Yes, quite a few.

Q. For different kinds of work?

A. Yes.

Q. And frequently their requisitions would refer to the character of the sub-contractor's work?

A. Yes.

Q. And then you could ascertain from that order about how much had been done?

A. Yes, I could figure the proportion of work with respect to their cost-sheet.

Q. And for that reason you couldn't tell exactly what was left undone, could you?

A. O no, no.

Q. You had to designate the parts of the building where brick was to be laid and plastering done?

A. Yes.

Q. Did the completion of the work require considerable patching where holes had been made by contractors?

A. O yes, odds and ends of trimming and the like were left out, work started and left in a semi-complete state.

Q. Some of which had been paid for and which the company should have gone over and done over again?

A. There was work that was destroyed and became defective afterwards.

Q. For which the Glen company would have been under obligations to complete or do over again?

A. Very little of it, Mr. Merrey.

Q. But you made a list of all that?

A. Yes.

Cross Examination by Mr. Comstock:

Q. Do you know whether tthe Architectural Plastering Company was one of the sub-contractors of the Glen company?

A. Yes.

Judge Lewis: I thought the Vice Chancellor said we were to finish the cross examination first.

The Court: Is there any further cross examination of this witness first?

By Mr. Hall:

Q. Mr. Fanning, won't you point out in the contract the section in which the Glen company were

to be removed from the work and the work completed by the city.

A. That was in the legal department, but I think it was section four.

The Court: Doesn't the contract speak for itself?

Mr. Hall: The contract itself says, "Should the party of the second part," that is, the Glen Company, "at any time during the progress of said work refuse or neglect to supply sufficient materials or workmen, the party of the first part shall have power to provide materials and workmen within three days, etc." It doesn't seem to me that the architect's fee would come within that clause.

The Court: That is all a matter of argument; it isn't cross examination of this witness. Mr. Fanning isn't here as an expert to expound the meaning of the contract. Is there any strict cross-examination of this witness? If not, then if any counsel desires to make this witness their own they can do so. I am not sure who comes first.

WILLIAM T. FANNING called as a witness on behalf of defendant the Frank Miller Lumber Company, testified as follows:

Direct Examination by Mr. McMahon:

Q. Mr. Fanning, by whom was the carpenter work supplied on that high school, and lumber?

A. You mean the materials for the carpenter work?

Q. Yes.

A. I understand it was from the Frank Miller Lumber Company.

Q. Who performed the labor up to the time that the Glen Engineering Construction Company failed?

A. Who performed the labor?

Q. Yes.

A. Why, the Glen Engineering Construction Company.

Q. And after the Glen Engineering Construction Company failed and you re-let the contract for the labor and carpenter work, who did it?

A. The David Henry Building Company of Paterson.

Q. And in both instances the material was supplied by the Frank Miller Lumber Company?

A. That is my understanding.

Q. Both to the Glen Engineering Construction Company and, afterwards, to the David Henry Lumber Company?

A. Yes, sir.

Q. And at this time the work of the Frank Miller Lumber Company to furnish that carpenter work and the material for it on that building, according to the specifications, has been completed?

A. Yes, sir.

Q. And they have furnished all the lumber and materials for carpenter work on that building?

A. Yes, sir.

Q. Did anyone else have any contracts to furnish carpenter work or lumber in connection with the carpenter work in that building?

A. You mean the finishing lumber?

Q. I mean the material that went in there.

A. Finishing lumber, no; I don't think so.

Q. It was all furnished by the Frank Miller Lumber Company?

A. Yes, sir, that is, the finishing lumber.

Q. The only other lumber you refer to is the rough lumber, such as beams, etc.?

A. Yes, sir.

Q. You haven't with you any memorandum of the contract price or the value of the lumber furnished on that building at this time?

A. No, I have not.

Q. But you are quite sure about this, that the material in connection with the carpenter work outside of the rough lumber work was furnished by the Frank Miller Lumber Company alone?

A. Yes, sir.

WILLIAM T. MANNING recalled as a witness on behalf of defendant, The Cortlandt Engineering Company, testified as follows:

Direct Examination by Mr. Drew:

Q. Do you know who had the sub-contract for the electrical and telephone work on that building?

A. Yes, the Cortlandt Engineering Company.

Q. Can you tell me now the amount that you had certified that was due for work and material under that contract up to December 1, 1910?

A. No, I can't, Mr. Drew; I haven't any record of it.

Q. I show you this statement here and ask you if that has been shown to you before—if that refreshes your recollection as to the amount due? I call your attention to these figures here (showing

the witness a statement made by the defendant, the Cortlandt Engineering Company, showing the amount of work which was done on the building at that time, counsel stating: "I show it to the witness for the purpose of seeing if I can refresh his mind as to the amount of work certified to have been done by that company on December first, 1910)."

The Court: No objection is made, but you don't seem to show that this is a proper memorandum to refresh the recollection of the witness—a statement made by the claimant.

Q. Have you a copy of the certificate issued to the Glen Engineering Construction Company on that day for the electrical and telephone work?

The Court: What date?

Mr. Drew: December 1st.

The Court: The witness says that he made no estimate at all of the work done on this building, as I understood him, after November 1st. Am I correct, Mr. Fanning?

A. That is correct, yes.

Q. Have you any estimate of work done on November 1st, then?

A. I couldn't recall, because the work was subdivided, together with the masonry and other trades.

Q. There was no other contract for that work, was there, that you know of?

A. That was the only contract for the electric light and telephone work.

Cross Examination by Mr. Gourley:

Q. This was the only contract with the Glen Engineering Construction Company in the city?

A. Yes.

WILLIAM T. FANNING recalled on behalf of the defendant, The Ingalls Stone Company, testified as follows:

Direct Examination by Mr. Hunziker:

Q. Mr. Fanning, in the contract for the erection of this building there was a considerable quantity of limestone specified, was there not?

A. Yes, sir.

Q. Do you know whether the Glen Engineering Construction Company had a sub-contract for the furnishing of that stone with any firm or corporation?

A. Yes.

Q. Do you know with whom?

A. I think, if I recall the name, it was the Ingalls Stone Company.

Q. From Binghamton, New York?

A. Yes.

Q. And can you recall now when the building had reached the stage where it was enclosed?

A. I can.

Q. Can you tell us about when that was?

A. About the 15th of August, 1910.

Q. At that time can you tell whether or not all the limestone specified in your general contract had been and furnished and put in the building?

A. I think it had.

Q. Did the Glen Engineering Construction Company at any time before the building was enclosed, or up to that time, apply to you to approve the limestone furnished and put in the building by the Glen Engineering Construction Company?

A. Yes, I think they did.

Q. Do you remember what action you took upon their request?

A. I told them that I couldn't approve any of the work in part until it was finally completed.

Q. At that time when the building was enclosed, Mr. Fanning, or, rather, after that time, did you make any certificates for further payments to the Glen Engineering Construction Company on account of the work done—after the enclosing of the building about August 15, or any further payments to the Glen Engineering Construction Company on account of the contract?

A. I think there was.

Q. And before you issued the certificates for these payments you would make an inspection of the building and of the work done?

A. Yes, sir.

Q. Can you say whether or not there were any defects or omissions in respect to the limestone furnished which you may have called to the attention of the company before making these certificates?

A. I think the work at that time was satisfactory.

Q. Was there any time subsequent to that time when you found fault with the condition of the limestone?

A. Yes, the work was in some instances chipped, due to the taking down of the scaffolding for cleaning the concrete and to the use of the rigging generally.

Q. That was due to the installation of the stone in the construction of the building on the part of the contractor?

A. That was due practically to the carelessness of the men in cleaning the building down.

Q. It was not due to the quality of the stone at the time it was received or anything that could be blamed on the party furnishing the stone?

A. No.

WILLIAM T. FANNING, recalled on behalf of The Joseph Sharpe Construction Company, testified as follows:

Direct Examination by Judge Lewis:

Q. Do you know whether the contract of the Glen Engineering Construction Company with the City of Paterson called for placing granilite pavement on DeGrasse street, Lee Place, Hamilton street, and pavement in rear, re-inforced concrete stairs and platform and boundary curb?

A. It did.

Q. Do you know whether they sublet that portion of their contract?

A. Yes, sir.

Q. Do you know to whom they sublet it?

A. To the Joseph Sharpe Construction Company of Paterson.

Q. Can you tell what proportion of the work was completed by the Joseph Sharpe Construction Company at the time the Glen Engineering Construction Company gave up its work?

A. What proportion of the work?

Q. Yes. You have no figures by which you can tell, I suppose?

A. I think it was about two-thirds completed, Judge.

Q. Do you know, as a matter of fact, who did the work?

A. That I have mentioned in "Concrete Sidewalks"—

Q. And stairs, and platforms, and curbs—who actually did the work called for by the contract?

A. The contractor was the Joseph Sharpe Construction Company.

Q. Do you know Joseph Sharpe?

A. Yes, sir.

Q. Is he an officer of that company, do you know?

A. I believe he is Secretary.

Q. Were you present on the work while it was going on?

A. Yes, a part of the time.

Q. Did you see him there?

A. Yes, he looked after the operation.

Q. And superintended the work there on the building?

A. He did.

Q. Do you know whether the contract of the Joseph Sharpe Construction Company had been performed in a satisfactory manner up to the time of the stopping of the Glen Engineering Construction Company?

A. It was performed in a satisfactory manner.

Q. Can you tell us whether there was due him for work under his contract up to the first of December, 1910, the sum of $2,057.00?

A. I think so, Judge.

Q. Can you tell us whether the work done after the first of December up to the time of throwing up of the contract by the Glen Engineering Construction Company amounted to the sum of $170 —that is, from December 1st to the time of the Glen Engineering Construction Company ceasing to perform its contract?

A. I think he did some work after the assignment, but just the amount and character of the work I can't recall.

Q. The City didn't retain his percentage, though, did it?

A. No.

Q. Did you make any measurement of the work that had been performed under this sub-contract at the time, or before the time, that the City made new contracts for the completion of the work, for the purpose of finding how much was left to be done?

A. Yes.

Q. Can you say that, for the work that had been done by the Joseph Sharpe Construction Company, assuming that the whole work was to be done for $7,000, that the sum of $5,400 had been earned under the contract?

A. I would, yes.

WILLIAM T. FANNING, recalled on behalf of the Ingalls Stone Company, testified as follows:

Direct Examination by Mr. Hunziker:

Q. Mr. Fanning, did you know what the terms of the contract were between the Glen Engineering Construction Company and the Ingalls Stone Company?

A. I don't know, but I think it was the same as the contract with the city.

Q. Do you know how much the Glen Engineering Construction Company owed the Ingalls Stone Company at the time the building was enclosed?

A. I can't recall that, Mr. Hunziker.

Q. You don't know whether there was any percentage of the contract retained or not up to that time?

A. No, I don't recall.

WILLIAM T. FANNING, recalled on behalf of The Herringbone Metal Lath Company, testified as follows:

Direct Examination by Mr. Reed:

Q. Mr. Fanning, do you know what kind of lath was used in the building and who furnished it?

A. We had two kinds of lath, metal and wood.

Q. Do you know who furnished the metal lath?

A. Oh, I don't know; I think it was the Herringbone Metal Lath Company. I am not sure about that.

Q. Can you tell from the specifications the amount of lath that was required?

A. Why, I should think about forty thousand square feet.

Q. And was that in the building at the time the Glen Engineering Construction Company quit the job?

A. I think it was.

Q. It had all been put in?

A. Yes.

Q. Would any of these estimates that you spoke of the Glen Engineering Construction Company furnishing you as a basis for the estimate for the monthly payment show the amount charged for that material?

A. No, it would not, because their cost-sheet stipulated plaster on walls and plaster on lath. Plaster on lath was put in at the same price. Naturally, plaster on lath would cost more.

Q. That would show whether the lath had been installed at that time?

A. Yes.

Q. And you say you don't know that that was so?

A. Yes, sir.

Examination by The Court:

Q. How did you deal with the case where there was a sub-contractor who had partially done his work; did you in almost every case, or every case, renew the contract on behalf of the Board of Education with that contractor for the completion of the work?

A. Yes.

Q. The Board of Education agreed to pay the sub-contractors the balance of their contract—the amount of the balance of their contract—to complete the portion of their work?

A. Yes, and I think that was done in all instances, except in the case of the painter and the electrical worker.

Q. But if the electrical sub-contractor, or the glass sub-contractor, had a contract for a certain amount, say, $4,000 and he had received $2,000 and done $2,500 worth of work, what kind of a contract would you make with him for the completion of this job?

A. We would give him the balance of the contract that we made with this company for $1,500. If he had a contract for $4,000 and did $2,500 worth of work we would make the contract for $1,500 to finish the work.

Q. And his claim here would be how much?

A. Well, he wouldn't have any claim.

Q. Against the fund?

A. No. He would only have the difference between $1,500 and $2,000; we would have to pay him $1,500.

Q. And that is the way, as you understand it, these cases are made out?

A. Yes.

ON BEHALF OF THE JOSEPH SHARPE CONSTRUCTION COMPANY.

By Judge Lewis:

Q. I would like to ask, did the Joseph Sharpe Constuction Company finish its contract; did you make a new contract with them?

A. Yes, sir.

Q. What was paid the Joseph Sharpe Construction Company?

A. Well, I can't recall the amount of the contract with the Glen people, but the balance of their contract was $1,987.

By the Court:

Q. What do you mean by that, "the balance of the contract"?

A. The balance of money due them on the completion of the contract was $1,987.

Q. Is that the proportionate value of the work not done at the time of the abondonment?

A. Yes.

Q. Then you had to make an estimate of the work that had been done in all these departments?

A. Yes, sir. It is a question now whether they got the money from the Glen people. The Glen company produced the contracts and we ascertained what money had been paid them and the difference was offered the contractors and they accepted it in some cases and other cases they didn't.

Q. And the difference between the amount of work they had done for the Glen company down

to the date of the abandonment of the contract by the Glen company and the cash they received would be what they would look to the fund for?

A. Yes.

By Judge Lewis:

Q. Are you sure that the amount isn't $1,600 and not $1,987?

A. $1,600, that is it.

Q. So that if the contract of the Joseph Sharpe Construction Company was $7,000, they had completed, according to your estimate, $5,400 worth of work?

A. Yes, sir.

By Mr. Reed:

Q. How much was the amount furnished by the Herringbone Metal Lath Company?

A. I said 40,000 square feet.

Q. 45,000 is the amount charged.

A. There might be that number; I am only guessing at it.

WILLIAM T. FANNING, examined on behalf of The Architectural Plastering Company, testified as follows:

Direct Examination by Mr. Comstock:

Q. I show you a sub-contract between the Glen Company and the Architectural Plastering Company, which shows that the contractor's price was $1680.

The Court: This won't do. The Court is allowing the parties to use this gentleman as their witness for certain purposes, not for any such purpose as that. If he is a witness to that paper you can prove the paper by him.

Q. Do you know what the contract price was for the architectural plastering in that high school?

The Court: This witness is not to be used for those purposes. If any counsel wishes to ask this witness any question that will assist him in making out his claim affirmatively he may do so.

Q. Do you know that the Architectural Plastering Company furnished any material for this high-school building?

A. I believe they did.

Q. What did they furnish?

A. They furnished the cast ornamental plastering.

Q. And when the contract was abandoned by the Glen Engineering Construction Company was a new contract made with the Architectural Plastering Company?

A. There was.

Q. What was the consideration of that new contract?

A. $380.

Q. And up until that time how much plaster work had the Architectural Plastering Company put into this building? In other words, do you know the total contract price?

A. I should say somewheres around $1400—somewheres around there.

ON BEHALF OF THE FRANK MILLER LUMBER CO.

By Mr. McMahon:

Q. The material and carpenter work supplied by the Frank Miller Lumber Company was in all respects satisfactory?

A. Yes, sir.

ON BEHALF OF THE McKIERNAN & BERGIN COMPANY.

By Mr. Higgins:

Q. Do you know whether any stone was used in this building?

A. There was.

Q. Do you know by whom it was furnished?

A. I believe it was furnished by Samuel G. McKiernan.

Q. Did he furnish all the crushed stone in the building?

A. I think he did.

Q. You passed upon the material, I suppose?

A. Yes, sir.

Q. And found everything all right?

A. Yes, sir.

Q. Found no objections to it?

A. None whatever.

Q. Do you know if anything was paid to the company?

A. I couldn't say that.

Q. You don't know the amount of their claim?

A. No, sir.

ON BEHALF OF JAMES HEALEY.

By Mr. Force:

Q. Do you know who did the setting of the columns and piers in the highschool building?

A. Mr. Healey.

Q. James Healey?

A. Yes, sir.

Q. Did he have a contract with the Glen Engineering Construction Company for that work?

A. Yes, sir.

Q. Do you know how much they paid him?

A. No, I am not familiar with the accounts, Mr. Force.

Mr. Hunziker: On behalf of Mr. James G. Blauvelt, who could not be here today, I desire to examine Mr. Fanning in reference to the claim of P. S. Simmons Painting Company.

By Mr. Hunziker:

Q. Do you know whether the Glen Engineering Construction Company had a sub-contract with the P. S. Simmons Painting Company for materials and labor on the highschool building?

A. Yes, sir.

Q. Do you know whether that contract was performed on the part of the painting company or not?

A. It was.

Q. Fully performed?

A. Yes, sir.

Q. That was before the job was abandoned by the Glen Engineering Construction Company?

A. Yes. The work was satisfactory.

Q. Was the contract fully completed by them?

A. Oh, no, no.

Q. They had performed some work up to the time of the abandonment of the contract by the Glen Company?

A. Yes.

Cross Examination by Mr. Hall:

Q. Did the City contract with Simmons to complete the painting work?

A. Yes, for the difference between what they had done and the work yet to be done.

Q. How much was paid to the Simmons company for the completion of their contract?

A. $3500.

Q. And that was for the work that remained to be done on the contract?

A. I think it was, yes.

JOHN AGNEW, sworn on his own behalf, testified as follows:

Direct Examination by Mr. Gourley:

Q. You are President of the John Agnew Company?

A. Yes, sir.

Q. What business is your company engaged in?

A. Mason's materials and coal.

Q. Had you a contract with the Glen Engineering Construction Company in relation to the supplying of material for the highschool?

A. Yes, sir.

Q. What was the nature of that contract—how was it made?

A. It was to furnish cement, brick, plaster and material, and lath.

Q. How did the prices range between you and the company?

A. Well, mostly favorable.

Q. How delivered?

A. Well, to be delivered as they needed it from time to time.

Q. Did you supply the material mentioned in the notice to the company, for the highschool?

A. Yes, sir.

Q. I show you some yellow slips and ask you what they are?

A. These are slips for each load as delivered.

Q. Will you look at the names on them and tell me whether they are the names of the persons who were in charge of the Glen Engineering Construction Company for the receipt of the goods?

A. (After examining the slips) Yes, sir, different names,—watchmen, foremen ,and time-keepers —all men in authority to sign for the goods.

Q. And how frequently were those goods supplied? I suppose your books would show that?

A. Well, almost daily while the work was in progress.

By the Court:

Q. Would your books show the account with the Glen Engineering Construction Company of

all the goods delivered and used in the building?

A. Yes, sir.

Q. These are the books here before you (indicating the books)?

A. Yes.

Q. Have you your book-keeper here?

A. Yes, sir.

Q. Do you yourself know how much it amounts to?

A. Well, not just accurately. Eleven thousand and some three hundred odd dollars.

Q. The book-keeper can state exactly?

A. Yes. I think the amount is $11,933.29.

Q. This notice of lien claim was signed by you as President of the Company?

A. Yes, sir.

Q. Left with us for service upon the proper department?

A. Yes.

By the Court:

Q. Has any balance of this claim been paid to you?

A. No, sir.

Q. It is all due and unpaid?

A. Yes.

Q. No credits or countercharges, or anything like that?

A. No, sir.

Cross Examination by Mr. McMahon:

Q. After the Glen Engineering Construction Company ceased working on that contract did you supply any more material?

A. Supplied some material for the new contractor.

Q. The Board of Education of Paterson?

A. Material used for the completion of the building.

Q. You haven't any goods charged for in your claim here that was supplied after the Glen Engineering Construction Company stopped work?

A. Oh, no sir, no sir.

Q. That was entirely a separate charge?

A. Oh yes, another company altogether.

Q. And those receipts all covered deliveries prior to filing your liens?

A. Yes.

Q. And are dated prior to that?

A. Yes, Oh yes.

FRED B. HALEY sworn on behalf of the complainant, testified as follows:

Direct Examination by Mr. Gourley:

Q. You are the book-keeper of the John Agnew Company?

A. Yes.

Q. And were during the period covered by this contract?

A. Yes.

Q. Turn to your books and tell us the amount due from the construction company for mason's materials and supplies used in the highschool.

A. $11,933.29.

Q. Are there any offsets or credits charged against that?

A. None at all.

Q. Now, what is the last date there of supplying material?

A. November 22.

Q. Those are your books of account?

A. Yes, sir.

Mr. Gourley: I offer those books in evidence.

By the Court:

Q. Are they books of original entry?

A. Yes, sir.

Q. Do the books, or the day-book, show in detail all these deliveries?

A. Yes.

The Court: They may be received in evidence.

(The ledger is marked C-10 and the day-book C-11.)

The Court: I will say here, before this case is closed it will be necessary to have all these exhibits marked and described in an intelligible way on the record. This case may go beyond this court and at present the papers have been offered in bulk. These books are now marked and it will probably not be necessary to have them here again.

CHARLES STANSBURY, sworn on behalf of the complainant, testified as follows:

Direct Examination by Mr. Gourley:

Q. In November, 1910, were you a representative in charge of the place, the highschool?

A. Yes, sir.

Q. Were you representing them November 10?

A. Yes, sir.

Q. Do you remember whether or not the Glen Engineering Construction Company was getting material from the Agnew Company?

A. Yes, sir.

Q. Were they using up daily the supplies delivered to the building?

A. They were.

Mr. Gourley: The complainant rests.

The Defense.

ARTHUR SCHWARZENBACH, sworn on behalf of defendant the Ingalls Stone Company, testified as follows:

Direct Examination by Mr. Hunziker:

Q. Mr. Schwarzenbach, are you connected with the Ingalls Stone Company?

A. I am one of the officers.

Q. Is that company incorporated?

A. In New York State, yes.

Q. And your company had a contract with the Glen Engineering Construction Company with reference to furnishing materials for the high school building in Paterson?

A. Yes, sir.

Q. I show you this paper and ask you if that is the original contract?

A. It is the original contract.

Q. That is signed by your company and by the construction company, Smith Alford, President; do you know those signatures?

A. I do.

Mr. Hunziker: I offer that contract in evidence.

(Admitted and marked I. S. Co. D-3.)

Q. Mr. Schwarzenbach, can you say whether or not this agreement was performed on the part of your company?

A. It was.

Q. And all the stone mentioned in the contract delivered to the Glen Engineering Construction Company?

A. All was delivered, yes.

Q. And can you say whether it was incorporated in the highschool building or not?

A. It was put in the highschood building.

Q. Did you have occasion to visit the building while it was in course of construction?

A. I visited it every month, sometimes more often—two or three times.

Q. Can you say from your personal observation that the stone furnished by your company for this building was incorporated therein?

A. From my own observation I saw the stone go in the building and saw the men working on it.

Q. Do you know, Mr. Schwarzenbach, how much money was paid by the Glen Engineering Construction Company on account of the amount due under this contract?

A. We received all the money except fifteen per cent. of the total amount of the contract.

Q. That is the fifteen per cent. mentioned in the contract to be reserved until a certain stage of completion had been attained?

A. Yes, sir.

Q. Do you know how much that fifteen per cent. amounts to?

A. That fifteen per cent. amount to $2,115.00.

Q. Has that ever been paid?

A. No.

Q. No part of it?

A. No part of it.

Q. Have all the credits and allowances to which the Glen Engineering Construction Company are entitled been allowed them up to that time?

A. Everything has been allowed them.

Q. And that is the amount, $2,115, remaining due under this contract?

A. That is the amount, yes, sir.

Q. Can you say, Mr. Schwarzenbach, when this building was enclosed?

A. It was enclosed about the 20th of August, 1910.

Q. And did you at that time, or after that, make any demand upon the Glen Engineering Construction Company for the payment of this fifteen per cent.?

A. I did.

Q. Upon whom did you make the demand?

A. Upon Mr. Alford, the President of the company.

Q. You are the officer of the company who made the affidavit attached to the notice in the suit? A. I am.

Q. Were you authorized by your company to act for it in that capacity?

A. Authorized by the Board of Directors.

JOSEPH W. SHARPE, sworn on behalf of the defendant, the Joseph Sharpe Construction Company, testified as follows:

Direct Examination by Judge Lewis:

Q. Where do you reside?

A. Paterson.

Q. What is your business?

A. Reinforced concrete work.

Q. Do you know the Joseph Sharpe Construction Company?

A. Yes, sir.

Q. Were you, prior to 1910 an officer of that company?

A. Yes, sir.

Q. What office did you hold?

A. Secretary and Treasurer.

Q. Are you familiar with the seal of the Joseph Sharpe Construction Company?

A. Yes, sir.

Q. I show you this paper and ask you what it is?

A. It is the contract we entered into with the Glen Engineering Construction Company.

Q. And by whom is it executed?

A. By Joseph Sharpe as President and myself as Secretary as a witness to it.

Q. And who executed it for the Glen Engineering Construction Company?

A. Smith Alford.

Q. Were the seals put on in your presence?

A. Yes, sir.

Judge Lewis: I offer the contract in evidence and ask to have it marked.

(Admitted in evidence and marked J. S. C. Co. D-2.)

Q. Did you enter upon the performance of this contract?

A. Yes, sir.

Q. Do you remember when the Glen Engineering Construction Company failed to make payments according to its terms, to you?

A. Why, the first of December, or rather, the first of November.

Q. I call your attention to the fact that the contract, Exhibit J. S. C. Co. D-2, provides that you shall be paid for the work the sum of $7,000.

A. Yes, sir.

Q. In monthly installments of 85% for all work in place, payable on or before the 15th of the following month, balance in full within thirty days after completion, satisfactory to construction department, and I ask you how much money was paid to you upon that contract price?

A. Why, we received the sum of $2363.

Q. How much of the work was done when the Glen Engineering Company failed to make its payments to you under the contract?

A. Work amounting to $5400.

Q. All together?

A. Yes.

Q. Please state how you received your monthly payments from the Glen Engineering Construction Company?

A. By requisition to them for payment for the work performed.

Q. What period in the month would you put those requisitions in?

A. The first of each month.

Q. For what period of time would the work for which you put in requisitions be?

A. For about thirty days, the previous month.

Q. Up to December 1st, for instance, you would make an estimate and then send in the requisition for work done up to that time since the last requisition was sent in?

A. Yes.

The Court: Does the contract you put in evidence provide for the retaining fifteen per cent.?

Judge Lewis: Yes.

Q. How would you make these requisitions; I mean to say, what sort of an estimate would you make and how would you work it out as the basis of your requisitions?

A. By actual measurement of the work in place.

Q. Who would make those measurements?

A. I did it myself.

Q. As I understand it, you had been paid up to the first day of November for work done up to the first of November, is that right?

A. No, I think the payment we received—Yes, I think that is correct.

Q. When did you send in the next requisition?

A. On December first.

Q. Was that paid?

A. That was not paid.

Q. How much was that requisition for?

A. That was for about $2,000.

Q. Can you tell exactly?

A. Yes, I can. (Witness refers to papers.) That was for $2,057.

Q. And how did you arrive at that as being 85% of the work which you had done since the preceding November?

A. By measuring up the total amount of work that was then in place and deducting the amount for which we made previous requisitions.

Q. Would that include the 15%, the $2,057?

A. That was the net amount.

Q. You made these measurements where?

A. At the building.

Q. Paterson high school building?

A. Yes.

Q. You were there as superintendent of the work continually? A. Yes, sir.

Q. After the first day of December did you do any work, after the requisition of December had been put in?

A. Yes, between the 1st and the 10th.

Q. Do you know what the value of that was?

A. Why, the gross amount was $200; the net amount $170 after having deducted the 15%.

Q. How did you arrive at that?

A. By measuring the work.

Q. And finding what had been done between the first of December and the 10th of December?

A. Yes, sir.

Q. And who made those measurements?

A. I did.

Q. How much, then, is now due you from the Glen Engineering Construction Company, for work done under contract Exhibit J. S. Con. Co. D-2?

A. $3,037.

Q. No part of it has been paid?

A. No, sir.

Q. Did you demand payment from the Glen Engineering Construction Company?

A. We did.

Q. Upon what did you base the amounts for which you made requisitions; how did you calculate it?

A. I took the items from the original estimate.

Q. And what items do you refer to?

A. Well, for instance, pavements; those were all classified.

Q. Classified by Union prices?

A. Yes.

Q. So much for sidewalks and so much for balusters—

A. Balustrades, and so much for steps, stairways and so forth.

Q. And had you used that basis of estimating all the way through in making your requisitions?

A. Yes.

Q. And you made your requisitions upon the Glen Engineering Construction Company upon that?

A. Yes, sir.

Q. And have you been paid up to the requisition of December 1st?

A. Yes.

Q. You have demanded payment of the balance from the Glen Engineering Construction Company?

A. Yes, sir.

Q. Your firm, the Joseph Sharpe Construction Company, performed this work itself?

A. Yes.

Q. And you were present and saw the performance personally?

A. Yes, sir.

Q. And all the material called for by the contract, and the work required by the contract went into that building known as the highschool, and mentioned in the Glen Engineering Construction Company contract?

A. Yes, sir.

By the Court:

Q. Mr. Sharpe, did your company complete the unfinished work in a contract with the City, or with the Board of Education?

A. We did.

Q. And did you make a bid for that work?

A. The Board of Education asked if the sub-contractors would be willing to go on and complete the work for the difference between the work that was actually in place and that coming to them, and gave the sub-contractors the privilege of taking that work up. I believe a number of them acquiesced.

By Mr. Merrey: If the Court please, if you wish that information, it was all done in a formal manner and it is shown upon the minutes of the Board of Education. We have those minutes here if you wish them produced.

Judge Lewis: Shall I put in the minutes of the Board of Education?

The Court: Just as you see fit.

JAMES F. DUNPHY, recalled on behalf of the defendant, the Joseph Sharpe Construction Company, testified as follows:

Direct Examination by Judge Lewis:

Q. Mr. Dunphy, I ask you to produce the minutes of the Board of Education.

A. I have the minutes of the regular meeting held December 28, 1910.

Q. Is there any record in the minutes of the awarding of a contract to the Joseph Sharpe Construction Company?

A. Yes, sir, here is a resolution by Commissioner Hand, and I will read it:

> RESOLVED, That the following contracts be awarded for the completion of certain works on the new highschool building: To Joseph Sharpe Construction Company, to complete balance of granolithic and concrete work, except basement floors and wardrobe partitions, for the price of their sub-contract less payments already made and the amount of lien claim filed. Amount of sub-contract, $7,000; amount paid on same, $2,363, amount of lien claim, $3,037. The total of these last items would be $5,400, leaving a balance due of $1,600.

Q. Is there any other reference in those minutes to the Joseph Sharpe Construction Company proceeding?

A. I have here a meeting of December 16, 1910, by Commissioner Scott:

WHEREAS, The Glen Engineering Construction Company, which is under contract with this Board to erect and finish all of the mason, carpenter, painting, structural steel, iron and electric wires of the new highschool, has failed to provide the sufficient material and workmen to complete said works, and notice to that effect having been given by this Board to said company, its Receiver and sureties on its bonds more than three days ago, and

WHEREAS, the said Glen Engineering Construction Company has heretofore entered into sub-contracts for various portions of said work, that is to say, for granilite and re-enforced concrete work with the Joseph Sharpe Construction Company, for ornamental plaster with the Architectural Plastering Company, for terrazo work with the Italian Marble Mosaic Company, for painting work with the P. S. Simmons Painting Company, for electrical work with the Cortlandt Engineering Company, for structural steel and iron work with the Goeller Iron Works, for marble work with the Italian Marble Mosaic Company,

NOW, THEREFORE, be it Resolved, That this Board tender to each of said sub-contractors a contract to complete each of said works for the price of their said contract, less payments already made and the amount of lien claim as filed, and

FURTHER, that Bids be advertised for to finish the mason and carpenter work, to be received by this Board on the 16th day of January, 1911, and that the Glen Engineering

Construction Company be requested to furnish this Board the amount of the various sub-contracts and the amount paid on each of same to date, and that said sub-contractors above mentioned be requested to communicate their acceptance or refusal of the above offer before the 21st day of December, 1910.

Judge Lewis: I offer the Minute Book in evidence.

(The same is admitted in evidence.)

Judge Lewis: We rest for the Joseph Sharpe Construction Company.

THE CORTLANDT ENGINEERING COMPANY.

LEROY F. DUKE, sworn on behalf of the Cortlandt Engineering Company, testified as follows:

Direct Examination by Mr. Drew:

Q. Mr. Duke, are you an officer of the Cortlandt Engineering Company?

A. Yes.

Q. What office do you hold?

A. President.

Q. Where is your place of business?

A. 39 Cortlandt Street, New York.

Q. Is your company a corporation?

A. It is, incorporated under the laws of New York.

Q. I show you a paper and ask you what it is, and by whom it was executed?

A. That is a contract with the Glen Engineering Construction Company for the electrical work in the highschool building in Paterson, and it was executed by myself.

Q. And who else?

A. Smith Alford for the Glen Engineering Construction Company.

Q. He was an officer of the Glen Engineering Construction Company?

A. He was President.

Mr. Drew: I offer this contract in evidence.

By the Court:

Q. What is the total amount?

A. $5,995.

Q. And does the contract provide for the retention of fifteen percent by the Glen Engineering Construction Company?

A. It does.

(The contract is admitted and marked C. E. Co. D-1.)

Q. Now, Mr. Duke, did your company proceed to perform the work under that contract?

A. It did.

Q. What other position do you hold in the company with regard to the work?

A. I follow up and actually superintend all work.

Q. You were superintending on the job?

A. Yes, sir.

Q. Do you know the amount of work that was performed under that contract by your company?

A. I do.

Q. What is the amount that was performed by your company, to the time of the abandonment of the contract by the Glen Engineering Construction Company?

A. The gross amount was $4,755.

Q. How was that made up?

A. Monthly payments from the time we started on the job up to that date.

Q. And how much has your company received on that?

A. $2,218.

Q. Leaving a balance due on this contract for work of how much?

A. $2,537.

Q. Has any part of that been paid?

A. There has not.

Q. Has the Glen Engineering Construction Company refused to pay it?

A. It has.

Q. That includes labor and materials?

A. Labor and materials furnished on the job.

Q. And the amount still owing to you is how much?

A. $2,537.

Cross Examination by Mr. Hall:

Q. Have you a statement of the payments made?

A. Yes, I have.

Q. Will you give us the dates?

A. Yes: Nov. 24, 1909, by check $300.
Dec. 4, 1909, by check 200.
Dec. 24, 1909, by check 200.
Jan. 17, 1910, by check 250.
Jan. 27, 1910, by check 150.
Apr. 24, 1910, by check 150.

May 27, 1910, by check 200.
Sep. 20, 1910, by check 114.53
Sep. 30, 1910, by check 250.
Nov. 7, 1910, by check 100.
Nov. 11, 1910, by cash 100.
Nov. 17, 1910, by check 200.

On November 23, 1910, we received a note for $1,000, and as the Glen Engineering Construction Company failed before that note became due it went to protest, so that we have not included that.

Q. Didn't you receive a payment on July 1, 1910?

A. No, sir, we did not.

Q. Or on August 5, 1910?

A. No, sir.

Q. The first one being for $200?

A. The first payment which we received—

Q. No, the payment of July 1st; didn't you receive a payment July 1, 1910, for $200?

A. No payment in July at all.

Q. Or August 5, 1910, for $300?

A. No, sir.

Q. September 20, 1910?

A. One thousand dollars and $114.53 was applicable to the Paterson highschool contract and the balance of that thousand dollars was applicable —$614 of it was to be charged to the job at New Dorp, and Bergenfields school, $271.47. That is for the thousand dollar check.

Q. October 22, 1910, did you receive a payment?

A. No, sir.

Q. The original contract price was $5,595?

A. $5,995.

Q. $5,995?

A. Yes, sir; I think the original contract is here somewhere.

Mr. Hall: $5,995 is right; it is entered wrong in the book.

HERRINGBONE METAL LATH COMPANY CLAIM.

CHARLES VAN NESS, sworn on behalf of the defendant, the Herringbone Metal Lath Company, testified as follows:

Direct Examination by Mr. Reed:

Q. Mr. Van Ness, you are the mason, I believe, who did the plastering on the Paterson highschool job?

A. No, sir.

Q. What connection did you have?

A. Lathing.

Q. And what metal lath did you use?

A. Well, what we used at that time is called the "Berger."

Q. From what company did it come?

A. That I couldn't say.

Q. How much of it was used?

A. I think between five and six thousand yards.

Q. And was that all on before the Glen Engineering Construction Company quit the job?

A. No, sir.

Q. How much was on?

A. Well, I should say maybe a hundred yards.

Q. All but a hundred yards?

A. Yes, sir.

FREDERICK C. WENDELBURG, sworn on behalf of defendant, The Herringbone Metal Lath Company, testified as follows:

Direct Examination by Mr. Reed:

Q. With whom are you now, Mr. Wendelburg?
A. Herringbone Metal Lath Company.
Q. In what capacity?
A. As bookkeeper.
Q. Is that company a corporation?
A. Yes, sir, a corporation of the State of New York.
Q. Where is the principal office?
A. The principal office is in New York.
Q. Did your company furnish any lath to the Glen Engineering Construction Company?
A. Yes, sir, we did.
Q. I show you a letter from the Glen Engineering Construction Company, dated June 6, 1910; was that received from them?
A. Yes, sir.
Q. An order for the lath you speak of?
A. Yes, sir.

Mr. Reed: I offer that letter in evidence.
(Admitted and marked H. M. L. D-1.)

Q. Was that order filled?
A. That order was filled, the staples shipped from New York and the lath shipped from the West, according to their instructions.
Q. Where was it shipped to?
A. To Paterson, New Jersey, care of the Paterson highschool; notify Glen Engineering Construction Company, New York address.

Q. And what amount of lath?
A. 4500 yards.
Q. What else?
A. 400 lbs. staples.
Q. All included in that order?
A. Yes, sir.
Q. What was the total charge?
A. The total charge for lath and staples was $755.25.
Q. When did that become due?
A. That became due thirty days after June 15, the date of the second charge—thirty days net.
Q. July 15?
A. Yes.
Q. Was that ever paid for?
A. No, sir.
Q. Was anything paid on contract?
A. No, sir.
Q. It is now due?
A. Oh, certainly.

Mr. Reed: The Herringbone Metal Lath Company rests.

The Court: Your proof is rather meagre about the lath going in the building.

ARCHITECTURAL PLASTERING COMPANY CLAIM.

JOSEPH DUJAT, sworn on behalf of the defendant, The Architectural Plastering Company, testified as follows:

Direct Examination by Mr. Comstock:

Q. Are you the President of the Architectural Plastering Company?
A. I am.

Q. Is that a corporation?

A. Corporation in the State of New York.

Q. Did that company submit an estimate of what it would furnish the architectural plastering for the highschool of Paterson?

A. It did.

Q. To whom did it furnish that estimate?

A. To the Glen Engineering Construction Company.

Q. Was it based upon the specifications contained in the contract between the City and the Glen Engineering Construction Company?

A. It was.

Q. What was the amount of that estimate?

A. $1,600.

Q. Did the Glen Engineering Construction Company send you this acceptance of that estimate?

A. Yes, sir, it did.

Mr. Comstock: I offer that in evidence.
(Admitted and marked A. P. Co. D-1.)

Q. What did the Architectural Plastering Company on their part do with reference to performing this contract?

A. Furnished and erected all that portion of the contract up to $1,300 worth of work.

Q. And when the Glen Engineering Construction Company abandoned the work on the highschool how much work had been done by the Architectural Plastering Company?

A. About $1,300 worth of work.

Q. Was a new contract entered into between the Architectural Plastering Company and the School Board of Paterson?

A. Yes, sir.

Q. What was the amount of that new contract?

A. $380.

Q. Which was the balance?

A. Balance between what the claim was—

Q. Did you go to Paterson during the progress of this work?

A. I did.

Q. How often?

A. At least twice a week.

Q. Did you see whether the work furnished by the Architectural Plastering Company was used in the construction of the highschool?

A. It was.

Q. And $1,300 worth of work was furnished at the time the contract was abandoned?

A. Yes.

Q. At that time was that work actually done in the building?

A. Yes, sir, it was.

Q. It was erected?

A. Yes.

By the Court:

Q. Who estimated the amount of that work to be done up to the time of the abandonment of the contract by the Glen Engineering Construction Company?

A. I did.

Q. That was accepted by the City?

A. It was, and we contracted for the difference with the City.

Q. Mr. Fanning, the architect, approved that?

A. Well, the contract was made with the City; I suppose it would naturally come to the attention of Mr. Fanning.

By the Court:

Q. Any part of this been paid to you?
A. Not at all--not any.

The Court: Are there any other claimants here whose witnesses are from abroad? (No response) Well, then, the further proving of claims will be laid over until Friday, February 9, 1912, at ten o'clock in the forenoon here in the presence of the stenographer, it being expected that counsel will agree upon a mode of swearing the witnesses. There ought not to be any trouble about that; they can be sworn before any officer. If that arrangement will suit the convenience of counsel and is consented to it will expedite the trial of the cause, because I can appoint an early day in regard to the assignments. The proof of the claims only, not of the assignments, will be taken on Friday next before the stenographer, on the understanding that counsel will act in a harmonious and friendly way and complete the proofs with as little friction as possible. The records that are from the city officials will be here, and I would suggest that it would be well for counsel to have these schedules made and then on the argument of this cause it will be necessary to have the list of exhibits verified. As I said, this case is liable to go beyond this court, and a great mass of papers has been offered here in bulk, and we want to have them all numbered carefully. And I will repeat, that those papers which were produced from the

Secretary of the Board of Education and by the Comptroller are considered as having been offered, all of them, by the complainant, as a matter of convenience, and they will be marked as Complainant's exhibits, beginning with C-1, all the papers being marked separately, and then, of course, all the other papers will be marked by initials indicating the claimant on whose behalf they have been offered.

AGNEW vs. BOARD OF EDUCATION (continued) County Court House, Paterson, Friday, February 9, 1912, 10 A. M. Hearing on behalf of claimants.

JAMES HEALEY CLAIM.

JAMES HEALEY, sworn in his own behalf by Mr. Edward O'Byrne, Master in Chancery, by consent of the parties, testified as follows:

Direct Examination by Mr. Munson Force:

Q. Mr. Healey, you are one of the defendants in this proceeding, are you?

A. Yes.

Q. Did you do any work on the highschool building in Paterson?

A. I set all the stone—granite and limestone.

Q. And did you have any arrangement with the defendant construction company for that purpose?

A. I did the setting of the limestone and lake stone.

Q. Did you have anything in writing showing any arrangement between you?

A. Yes, sir.

Q. What was it? Produce it if you have it. (The witness produces a letter.)

Mr. Force: I offer that in evidence.

(The same is marked Exhibit J. H., D-1.)

Q. What work did you do in pursuance of that agreement?

A. I completed the work to the satisfaction of the architect.

Q. What did that amount to?

A. 11,500 feet of stone, that is, between limestone and lake stone, and it was agreed that I was to be paid 35 cents a foot for it, as that letter states.

Q. That is what you charge?

A. Yes.

Q. Outside of that was there any extra work?

A. Yes, sir.

Q How much was the extra work?

A. $265 all told.

Q. What charge did you make for the extra work—on what basis?

A. Well the basis was, the time that the frost had got into the flooring, the reinforced concrete, etc., it fell down—it bursted out some of the piers and some lintel courses, and some of the other limestone, and I had to reset it by orders from the Superintendent, and I charged on the same basis for that. There was a hundred feet of it at 35 cents a foot, $35. Then I have charged, in addition to that, for fitting now and then as the work progressed $25, and for patching the stone that got

broke the expense also amounted to $25. Now, the columns all around the building was composed of eighteen shafts and the plans show them in pieces of six sections each, and in order to save on the cutting the Glen Engineering Construction Co. and Mr. Fanning also had them put up in three pieces, which they never acquainted me with at all, and as I figured on the plans as they showed for so much a foot, therefore when the columns came twice that size I had to employ extra men and had to have extra rigging, and I also had to shore up the floors of the building in order to carry the derrick for lifting this heavy stone, at a cost to me of $10 a shaft extra.

Q. How many shafts?

A. Eighteen.

Q. That represents, all together, how much?

A. $761.20.

Q. Has there anything been paid on account of that $761.20?

A. No, nothing has been paid on that.

Q. The question is, how much did it amount to without reference to any payments at all?

A. You mean the extras?

Q. The extras and the original, all together.

A. Oh, that would be—the contract amounted to $4,025, and I received on account $3,411.30, leaving a balance of $761.20 all told.

Q. You signed notices and had them duly served on the city?

A. Yes.

Q. Was this extra work necessary to be done in order to complete the contract?

A. Why certainly.

Q. Was it done under the order of the Superintendent?

A. Yes.

Q. And at the request of the Glen Engineering Construction Company?

A. Yes, sir, Mr. Steinmetz.

Q. Who represented the Glen Engineering Construction Co.?

A. Yes, and as I understood, one of the firm.

Q. At any rate, he was the superintendent in charge?

A. Yes.

Q. On his direction you did this work?

A. Yes, sir.

Q. It was necessary and the charges are very reasonable?

A. Very fair.

Cross Examination by Mr. Hall:

Q. $3624.50 you have received, according to the books.

A. I can show you how you make that out. I set the trusses and received $75 for that and that is charged in. I have got that, but they have got it charged against me on the job, see? Also there is a hundred dollars that they paid me before they made the contract with me, or a little over $100.

By Mr. Force:

Q. And you haven't charged for it in here?

A. They have charged it against me, not stating what it is for.

Q. You haven't charged that item on your bill here? That was all passed on before you got this letter Exhibit J. H. D-1?

A. Before that, yes.

By Mr. Hall:

Q. It is $114.60 according to the books, apparently paid for prior to November 30?

A. Yes, that is right—that is about right. Now, the $75 that I charged for setting the trusses you will find there somewhere.

Q. Let's see: I make it a difference of $218. It is pretty small anyhow and I guess we won't bother with it.

CHARLES GALENCIA, sworn on behalf of defendant, James Healy, by Mr. Edward F. Merrey, by consent, testified as follows:

Direct Examination by Mr. Force:

Q. You know James Healey?

A. Yes, sir.

Q. Did he do some work on the Paterson high-school building?

A. Yes, sir.

Q. Did you work for him?

A. Yes, sir.

Q. What was your work?

A. Setting stone.

Q. And is that what Mr. Healey did over on the building, setting stone?

A. Yes.

Q. And did you work for him during the whole of the work that he had there to do?

A. I started on the job and finished on the job.

Q. Who else worked with you?

A. I had five or six laborers around me.

Q. Did you have another man work with you who is here?

A. Yes.

Q. What is his name?

A. Joe Mazzella.

Q. Did he work with you at the same time you worked for Mr. Healey?

A. Yes.

Q. You know he did the work?

A. Yes, sir.

Q. And you know what he did?

A. Yes.

Q. Do you know that extra work was done on the building?

A. Yes.

Q. Was it necessary to be done as Mr. Healey has described it?

A. Yes.

JOSEPH MAZZELLA, sworn on behalf of defendant James Healey, by Mr. Edward F. Merrey, by consent, testified as follows:

Direct Examination by Mr. Force:

Q. Did you work for Mr. Healey on the Paterson highschool job?

A. Yes, sir.

Q. What did you do?

A. I worked on the rigging, putting up the derrick.

Q. Were you working there when this witness on the stand last was there?

A. Yes, sir.

Q. Were you working there up to the last?

A. Yes, from the limestone up to the finish—washing down and everything.

Q. How many men besides you and the other man did Mr. Healey have?

A. Sometimes four or five and sometimes six or seven.

Q. And they all worked for Mr. Healey on this job?

A. Yes, sir.

Case on Behalf of the Healey Claim Closed.

ON BEHALF OF THE AGNEW CLAIM.

JAMES F. DUNPHY, recalled on behalf of the John Agnew Company, testified as follows:

Direct Examination by Mr. Merrey:

Q. Have you got here a statement showing the dates of the filing of all the papers in your office?

A. Yes, sir (producing two sheets, which is offered in evidence and admitted without objection, and the same is marked Exhibit C-12).

Q. And is that a corect statement?

A. Yes sir, it has been checked up this morning by two other people.

JAMES F. CURRAN, recalled on behalf of the John Agnew Company, testified as follows:

Direct Examination by Mr. Merrey:

Q. Mr. Curran, have you examined this statement, marked C-12?

A. Yes, sir.

Q. Does that show correctly the dates of the filing of all papers in all lien claims against the highschool in your office?

A. Yes, sir.

Q. The claims marked here Brick Terra Cotta & Tile Company, Lake Stone Company, Dillistin Lumber Company, and the Harbinson-Walker Refractory Company have been settled, have they not?

A. I haven't got the Harberson-Walker Refractory Company claim.

Q. The Dillistin Lumber Company claim was settled, was it not?

A. Yes, sir.

Q. And what about the Brick Terra Cotta & Tile Company?

A. The Brick Terra Cotta & Tile Co. and James Healey—there was a surety bond filed with the liens and the lien was released on the strength of the bond.

Q. In all the other cases here where lien claims were filed with you was a bond filed with them?

A. There was a bond filed in each of those lien claims.

Q. And those bonds were approved by you in all cases as to the amount?

A. Yes.

Q. And the amount of the bond fixed by you?

A. Yes.

JAMES F. DUNPHY, recalled on behalf of the Agnew claim, testified as follows:

By Mr. Merrey:

Q. Explain about these three claims (showing witness C-12).

A. I have here the claim of Robert Gray for $19.60, filed with the Board of Education December

16, 1910, 4 P. M., and it is shown again as having been filed December 19, 1910, 3:15 P. M. Then there is the claim of Peter Cannon, $33.60, filed December 16, 1910, 4 P. M., and it is shown again as having been filed December 19, 1910, 10:40 A. M. There is also the claim of James Ferguson, $28, filed December 17, 1910 at 11:45 A. M. and again December 19, 1910, at 3:15 P. M. The claim of James Gordon, $28 is filed December 17, 1910, at 11:45 A. M. and James Gordon again December 19, 1910 at 3:15 P. M. George Cunningham, $28, December 19, 1910, 11:45 A. M. and George Cunningham again $28 December 19, 1910, at 3:15 P. M. Those are the ones that are duplicated.

ON BEHALF OF THE FRANK MILLER LUMBER COMPANY.

FRANK G. FUNKIE, sworn by Mr. Merrey, by consent, on behalf of the Frank Miller Lumber Company, testified as follows:

Direct Examination by Mr. McMahon:

Q. What position do you occupy, Mr. Funkie, in the Frank Miller Lumber Company?

A. Outside Manager.

Q. And what are your duties outside?

A. To make contracts, attend to collections and I have a general supervision over the deliveries of materials.

Q. Did you have charge of the work and materials supplied by your company for the Paterson high-school?

A. Yes.

Q. Who was the President of the Glen Engineering Construction Company?

A. Mr. Alford.

Q. Did you have any conversation with him in reference to the trim to be supplied on the Paterson highschool?

A. Yes, several times.

Q. Did your company make an estimate for that work?

A. Yes, they did.

Q. Did you have any conversation with Mr. Alford in reference to that estimate?

A. Yes, sir.

Q. What was that conversation?

A. Why, on or about March 5th, I submitted an estimate to furnish all the finished mill work on that job, to him.

Q. Was that estimate in writing?

A. Yes, it was.

Q. I show you a paper and ask you what that is.

A. That is a duplicate copy of our estimate to him on that job.

Q. Which you personally handed to Mr. Alford?

A. I did, yes sir.

Q. What did he say?

A. He stated that he was satisfied and that we could enter the order. He confirmed it in writing in due course of mail.

Mr. McMahon: I offer this estimate in evidence. (Admitted without objection and marked F. M. L. Co. D-1.)

Q. In due course of mail did you receive that confirmation which I now show you?

A. We did, yes.

Q. That is signed by whom?

A. Mr. Alford.

Q. Mr. Alford was President of the Glen Engineering Construction Company at that time?

A. He was, yes sir, and also the manager.

Mr. McMahon: I also offer that confirmation. (Admitted without objection and marked F. M. L. Co. D-2.)

Q. Did you have any conversations with Mr. Alford prior to the time of the submission of this estimate, in reference to the flooring for the Paterson high school?

A. Yes, I did.

Q. What was that conversation?

A. Well, he requested a price on some flooring.

Q. He asked you what your price was for flooring?

A. He did, yes.

Q. What did you tell him?

A. I told him we could deliver the flooring he inquired about at $42.75 per thousand feet.

Q. And he told you he would order it from time to time as he needed it?

A. He did, yes.

Q. And some time prior to October, 1909, did you receive an order from Mr. Alford?

A. We did, yes.

Q. For how much—how many cars?

A. Two cars.

Q. Did you personally attend to seeing that that flooring was gotten out?

A. I superintended the getting of it out at the mill.

Q. How many feet of flooring was gotten out?

A. 36,042.

Q. When that flooring arrived in Paterson to whom was it billed?

A. To the Frank Miller Lumber Company.

Q. What did you do when you found it in Paterson, billed to the Frank Miller Lumber Company?

A. I notified the Glen Engineering Construction Company and also the freight agent to deliver it to the Glen Engineering Construction Company.

Q. And to your personal knowledge, was it turned over to them?

A. It was, yes.

Q. After it was turned over to them what did they do with it?

A. They unloaded it and stored it in the building.

Q. Where was it put?

A. In a building adjoining the school building, on the same lot.

Q. Did you see it in that building adjoining the school?

A. Yes, I did.

Q. Some time in January, 1910, did they begin to take out that flooring?

A. Yes, they began to lay it.

Q. Did you personally see that floor laid?

A. Yes, I did.

Q. How many times during that year did you go there and were you over the work?

A. Oh, I was over there several times.

Q. About once a month?

A. Easily, yes.

Q. And during these times you saw this flooring laid?

A. I did, yes.

Q. Prior to December 10, or up to December, 1910, how much of the flooring was laid?

A. Why, all of the flooring was laid prior to December 1, 1910.

Q. 36,042 feet?

A. Yes.

Q. I show a paper and ask you what that is.

A. Why, this is a communication from Mr. Alford of the Glen Engineering Construction Company in reference to the flooring.

Q. At Paterson?

A. At Paterson, yes.

Mr. McMahon: I offer that paper in evidence.

(The same is admitted without objection and marked F. M. L. Co. D-3.)

Q. I show you two papers and ask you what they are.

A. They are copies of the freight on these two cars.

Q. Where did you get those two papers?

A. From the freight agent.

Q. At Paterson?

A. At Paterson, yes.

Mr. McMahon: I offer those in evidence.

(Admitted without objection and marked F. M. L. Co. D-4 and F. M. L. Co. D-5.)

Q. Have you calculated, Mr. Funkie, the value of the 36,042 feet of flooring at $42.75.

New Jersey State Library

A. Yes, I figure it $1540.78.

Q. On account of that flooring has the Frank Miller Lumber Company received any payment?

A. Yes, they received a payment of $375.

Q. Crediting that on the total amount what is the balance?

A. $1165.78.

Q. Is that sum, $1168.78, for flooring still due the Frank Miller Lumber Company?

A. It is.

Q. Are there any offsets or counterclaims against it?

A. No, there is not.

Q. You have seen that 36,042 feet of flooring laid in the building from time to time and you know of your own knowledge it was all laid prior to December 1, 1910?

A. Yes, I do.

Mr. McMahon: I will suspend with you, Mr. Funkie, for a moment.

ELLIOTT P. LIVERMORE, sworn by Mr. Merrey by consent on behalf of the Frank Miller Lumber Company, testified as follows:

Direct Examination By Mr. McMahon:

Q. What is your position with the Frank Miller Lumber Co.?

A. Superintendent of the manufacturing department.

Q. Are you familiar with the plans and specifications of the Paterson High School?

A. I am.

Q. I show you a paper and ask you what that is.

A. Those are the specifications of the Paterson High School.

Specifications shown witness are same as mentioned in Exhibit C-1.)

Q. I have a bundle of papers here, Mr. Livermore; did you put these papers together?

A. I did.

Q. Will you tell me what they are?

A. They are the blue-print drawings of the Paterson High School, containing full sized details of the wood-work.

Q. All the wood-work including the interior trim?

A. Yes.

Q. Are you familiar with these papers and have you examined them?

A. Yes, sir.

Q. And you put them up in the present form in which they now are?

A. I did.

Mr. McMahon: I offer these blue-prints in evidence.

(The same are admitted without objection and marked Exhibit F. M. L. Co., D-6. They were left with the Custodian of the Court House at the close of the hearing.)

Q. Did the contract which Mr. Funkie referred to for the interior trim cover what is known as "rough work"—rough lumber?

A. It did not.

Q. I show you a paper, Mr. Livermore, and ask you what that is?

A. Order for some extra window frames for the Paterson high school from the Glen Engineering Construction Company.

Q. Prior to the receipt of that letter did you have any conversation with Mr. Holmes in reference to window frames?

A. Yes.

Q. Who was Mr. Holmes?

A. He was the man who had charge of the work on the building.

Q. For the Glen Engineering Construction Company?

A. Yes, sir.

Q. What conversation did you have with him in reference to window frames?

A. The window frames originally were built the wrong sizes and they would not fit the opening. They cut down some and authorized me to make the balance.

Q. What did you say to him?

A. I told him I wanted an official order from the Home office to execute the work by.

Q. And after that did you receive this paper in the due course of mail?

A. I did, sir.

Q. Is that your stamp of receipt on it?

A. Yes, sir.

Q. And that is the order authorizing the work?

A. To make those frames, yes.

Mr. McMahon: I offer that in evidence.

(Admitted without objection and marked F. M. L. Co. D-7.)

Q. You say this order was an extra order; will you explain how that was, Mr. Livermore?

A. The frames were originally made wrong through an error of the office of the Glen Engineering Construction Company, and we made them over again, or a part of them, according to the order contained in that letter.

Q. Were the original frames that you made made in accordance with the plans and specifications which are in evidence?

A. They were, yes, sir.

Q. And were those frames in which a change was made, furnished by you in accordance with the plans and specifications?

A. Yes. The change was made at the building.

Q. How many frames were made under this order?

A. Twelve openings.

Q. Did you personally attend to the getting out of these frames?

A. I did, sir.

Q. After the order was received what did you do?

A. The draftsman made out the cutting tickets and it was put through the mill, executed, and shipped to the Glen Engineering Construction Company of Paterson.

Q. Did you see them in the building after they were installed?

A. I did.

Q. Were you through the building and did you see them there prior to December 1, 1910?

A. Yes, sir.

Q. Installed in the building?

A. Yes, sir.

Q. Mr. Livermore, how long have you been in the business of manufacturing and buying and selling interior trim?

A. Thirty years.

Q. During that time have you continuously manufactured, bought and sold interior trim and trim such as these window frames contemplated by this order?

A. Yes, sir.

Q. Are you familiar with the reasonable value of such material?

A. Yes, sir.

Q. And were you at that time?

A. Yes, sir.

Q. What was the reasonable value?

A. $144.50.

Q. Has that sum ever been paid for those window frames by the Glen Engineering Construction Company, or by anybody else?

A. No, sir.

Q. Is there any offset or counterclaim against them?

A. No, sir.

Q. I show you a paper, Mr. Livermore, and ask you if you received that in the due course of mail?

A. I did, sir.

Q. And is that your stamp of receipt on that paper?

A. Yes, sir.

Q. What is that paper?

A. That is a letter from the Glen Engineering Construction Company, signed by Mr. Holmes—an order for some false beam work.

Q. Is that false beam work considered rough or trim?

A. As rough.

Q. Was that within your contract?

A. No, sir.

Q. What does that order call for, Mr. Livermore?

Q. Calls for 180 lineal feet of beam work and 37 feet of half beam work.

Q. Will you explain what you mean by 180 feet of lineal beam work?

A. Well, beam work is composed of several different members, cast in wrought concrete iron form.

Mr. McMahon: I offer that letter in evidence.

(Admitted without objection and marked F. M. L. Co. D-8.)

Q. On Defendant's Exhibit D-8 will you explain what that diagram is?

A. That is the lay-out of the room where the beams are that he wanted to cover.

Q. When you say 180 lineal feet you mean that that lumber was to cover each side of a beam?

A. Two sides and the bottom and the moldings on the angles.

Q. How many actual feet did that call for?

A. Called for 180 lineal feet there and we shipped 188, on account of the fact that we couldn't run out the exact feet.

Q. How many times would that 180 be duplicated to cover the sides of the beams?

A. Four times.

Q. And pursuant to that diagram and this order how many lineal feet did you ship? Have you got any memorandum to refresh your recollection as to that?

A. I have, sir (witness taking paper from his pocket).

Q. Just read the items.

A. 188 lineal feet of 7/8x9¼,
188 " " 1⅛x7¾,
188 " " 7/8x2,
188 " " ¾x ¾,
94 " " 7/8x8¾.

Q. And that material which you have just stated was necessary to comply with this order which is marked Defendant's Exhibit D-8?

A. It was.

Q. Do you know the reasonable value of such lumber at the time you shipped it?

A. I do.

Q. What was the value of it?

A. $51.70.

Q. You have been through the building from time to time?

A. Yes, sir.

Q. And checked it up with the specifications and plans?

A. I have.

Q. And with the material which you shipped there?

A. Yes.

Q. Did you see this material which you just testified to in the building prior to December 1, 1910?

A. Yes, sir.

Q. And you know of your own knowledge that it was there and used in the construction of the building prior to December 1st, 1910?

A. I do.

Q. Mr. Livermore, I show you another paper and ask you what that is?

A. That authorizes us to change the window frame pulleys from one grade to another.

Q. Did you receive that in the due course of mail?

A. I did, sir.

Q. After the receipt of that what did you do?

A. Purchased the pulleys acording to their instructions in this order.

Q. At how much?

A. 17 cents per window opening.

Q. How many did you purchase?

A. Five hundred and forty-eight.

Mr. McMahon: I offer that in evidence.

(Admitted without objection and marked F. M. L. Co. D-9.)

Q. Is that the reasonable value of 548 brass fronts such as were called for by this order?

A. Yes, sir.

Q. Seventeen cents?

A. Seventeen cents an opening.

Q. Have you totalled that up?

A. Yes, it amounts to $93.16.

Q. Did you attend to getting that material out and having it shipped to the building?

A. I did, sir.

Q. After it was gotten out did you see it in the building?

Q. Yes, sir.

Q. Saw it used in the building?

A. Yes.

Q. Prior to what time?

A. 1909.

Q. Was it there in 1909?

A. Yes, sir.

Q. And it was there long prior to December 1, 1910?

A. Yes, sir.

Q. Will you state generally, Mr. Livermore, what the practice of your mill is when they have an estimate accepted for certain work?

A. Why, it is entered in the contract book and checked over and as we get the plans the details are billed off on cutting tickets, put through the different departments of the factory and executed, and shipped to the party that has purchased it.

Q. When you say "billed off on cutting tickets" you mean each item is billed off on cutting tickets separately?

A. Yes, sir.

Q. And when the estimate is made up is each item or opening valued separately?

A. Yes, sir.

Q. Covering the entire contract?

A. Yes, sir.

Q. Are you familiar with the contract made between the Glen Engineering Construction Company and the Frank Miller Lumber Company, covering the trim on the Paterson High School?

A. Yes, sir.

Q. Are you familiar with the estimate which was made covering that contract?

A. Yes, sir.

Q. Was an estimate made covering that contract?

A. There was.

Q. In which every item or opening was valued at the time the estimate was made?

A. Yes, sir.

Q. After that contract was accepted, Mr. Livermore, and the estimate made did you have cutting tickets made up?

A. I did.

Q. Covering that entire work?

A. Yes, sir.

Q. Have you those cutting tickets with you?

A. Yes, sir.

Q. Will you produce them?

A. (The cutting tickets are produced by the witness.)

Q. Those two envelopes which you hand to me are the cutting tickets for this work done on the Paterson High School for the Glen Engineering Construction Company?

A. Yes, sir.

Q. That is, up to December 1st, 1910?

A. Yes, sir.

Mr. McMahon: I offer those two packages of cutting tickets in evidence.

(Admitted without objection and marked Exhibit F. M. L. Co. D-10 and F. M. L. Co. D-11, respectively.)

Q. And from what are those cutting tickets made up?

A. From the plans and detailed drawings.

Q. Now, these two envelopes marked Defend-

ant's Exhibits D-10 and 11, contain the cutting tickets for the work done for the Glen Engineering Construction Company prior to December 1, 1910?

A. Yes, sir.

Q. For the Paterson High School under the contract which you had with the Glen Engineering Construction Company?

A. Yes, sir.

Q. From what were those cutting tickets made up?

A. From the plans and details.

Q. And they were made up under your personal supervision and direction?

A. Yes, sir.

Q. Did you superintend and direct the getting out of that material?

A. I did.

Q. Was each item gotten out separately?

A. Yes, sir.

Q. And a cutting ticket is made out for each item?

A. Yes, sir.

Q. After a certain amount of that material is shipped what is your practice in reference to charging for it?

A. When it is shipped the preceding month is charged the first of the following month.

Q. What was the first shipment made under your direction and supervision under this contract?

A. The sash and trim.

Q. When was it made—I mean, when was the first charge made for shipment?

A. September 31, 1910.

Q. Prior to that time how much had been shipped?

A. $4,500 worth.

Q. When that charge is made how is it calculated, Mr. Livermore?

A. The same ratio as estimated on the contract sheet.

Q. When was the second charge made?

A. October 31, 1910.

Q. What was the amount of that?

A. $5,000.

Q. What did that cover?

A. Covered doors.

Q. What shipment did it cover?

A. Those made in September.

Q. The first shipment, as you say?

A. That was charged.

Q. Charged in September?

A. That was delivered the month before.

Q. Let me see if I understand you: The first charge was made September 30, 1910?

A. Yes, sir.

Q. Covering shipments made prior to that time?

A. Made prior to that time.

Q. The second was made October 31?

A. Yes, sir.

Q. Covering shipments made from September 30th to October 31st?

A. Yes, sir.

Q. What was the amount of the second charge?

A. $5,000.

Q. From your original cutting slips and your records have you made up a memorandum of how this charge was made up?

A. Yes, sir.

Q. Did you make that memorandum up personally (showing memorandum to witness). You had

that memorandum made up from the original cutting tickets?

A. Yes, sir.

Q. It was made up under your directions?

A. Yes, sir.

Q. What does that memorandum show?

A. It shows the trim and sash for the window frames of the Paterson High School, and some of the interior trim, that was gotten out and delivered to the Glen Engineering Construction Company of Paterson.

Q. Prior to December 1, 1910?

A. Yes, sir.

Q. And is the value of each item stated thereon?

A. Yes, sir.

Q. Where is that gotten from?

A. Taken from the original estimate.

Q. Did you take that yourself from the original estimate?

A. Yes, sir.

Q. Was all that material there gotten out under your direction and supervision and shipped prior to December 1, 1910?

A. Yes, sir.

Q. All the material called for on those three pages?

A. Yes, sir.

Q. And the values there stated are proportionate values of that material, as a part of the original contract, which had been shipped up to December 1st, 1910?

A. Yes, sir.

Mr. McMahon: I offer that in evidence.

(Admitted without objection and marked F. M. L. Co. D-12.)

Q. After this material had been delivered at the Paterson High School and prior to December 1st, 1910, did you go through that building and check it up with the plans and specifications?

A. Yes, sir.

Q. Did you check up the items called for on this Exhibit F. M. L. Co. D-12?

A. Yes, sir.

Q. Can you testify of your own knowledge that every item called for on these papers is in the building?

A. Yes, sir.

Q. Did you see it in the building and installed there prior to December 1st, 1910?

A. I did.

Q. And did you see all the extras which you have testified about in the building prior to December 1st, 1910?

A. Yes, sir.

Q. According to these three sheets, Mr. Livermore, which you made up from original records, what is the total value of the material delivered under the contract which the Frank Miller Lumber Company had with the Glen Engineering Construction Company for the trim on the Paterson High School, up to December 1st, 1910?

A. $9,500.

Q. How is that calculated? Now, let me see if I understand you: When you made the original estimate you valued each opening or item in that estimate?

A. Yes, sir.

Q. Covering the entire contract. That estimate is made up from the plans and specifications which you have produced in court here?

A. Yes, sir.

Q. And checking up with your cutting tickets all the material delivered to the Glen Engineering Construction Company with the values of each of those items as shown on your original estimate you can calculate the amount and value of the material delivered to the Glen Engineering Construction Company by December 1, 1910?

A. Yes, sir.

Q. And calculated in that way what is the amount of it?

A. $9,500.

Q. You continued to deliver material on that work up to the time the Glen Engineering stopped work on it?

A. Yes, sir.

Q. Was there any protest or objection made to to any of the material which you delivered?

A. No, sir.

Q. Either by the architect or by the contractor?

A. Neither one.

Q. Have you calculated the amount and value of the flooring delivered by the Frank Miller Lumber Company to the Glen Engineering Construction Company for this work on the Paterson High School?

A. Yes, sir.

Q. How much flooring was there and what is the total cost of it?

A. (Referring to memorandum) 36,042 feet.

Q. That totals what?

A. $1,540.78.

Q. Were there any payments made on account of that?

A. Yes, sir.

Q. How much?

A. 375.

Q. Leaving a balance of what?

A. $1,165.78.

Q. Are there any offsets or counterclaims against that?

A. No, sir.

Q. Have you totalled up the value of the extras delivered by the Frank Miller Lumber Company, to which you have testified here to-day about?

A. Yes, sir.

Q. What is the total?

A. $289.36.

Q. Are there any offsets or counterclaims against that?

A. No, sir.

Q. And you have calculated and testified as to the value of the material delivered under the contract prior to December 1, 1910?

A. Yes, sir.

Q. Showing the value of each particular piece, according to the estimate?

A. Yes, sir.

Q. Or each particular item which had been shipped prior to December 1, 1910, and which you saw in the building prior to that time?

A. I did.

Q. And the value of that was $9500?

A. $9500.

Q. Have you totalled up the total amount for the flooring, the extras and the contract?

A. Yes, sir.

Q. How much is it?

A. $10,955.14.

Q. Are there any offsets or counterclaims against that of any nature or description?

A. No, sir.

Q. Has any payment been made to you by the Glen Engineering Construction Company, or to the Frank Miller Lumber Company by the Glen Engineering Construction Company or anybody else on account of that claim?

A. No, sir.

Q. And that sum has been due since when?

A. December 1st, 1910.

Q. Or sometime prior to that?

A. Sometime prior to that.

FRANK G. FUNKIE resumes the stand for further examination on behalf of the Frank Miller Lumber Company.

Direct Examination (continued) by Mr. McMahon:

Q. You have had the entire charge of collecting under this contract with the Glen Engineering Construction Company?

A. Yes.

Q. And you have entire charge of the outside collecting in New York and in this vicinity?

A. Yes.

Q. For the Frank Miller Lumber Company?

A. I have, yes.

Q. And you have made a transcript from your books of the account with the Glen Engineering Construction Company up to December 1st, 1910?

A. I have had it done under my supervision, yes.

Q. I show you a paper and ask you what that is?

A. That is a transcript of their account.

Q. And do you know of your own knowledge that that shows the value and amount due for material supplied under the contract and for extras?

A. Yes.

Q. And for the flooring?

A. And for the flooring, yes.

Mr. McMahon: I offer that transcript in evidence.

(Admitted without objection and marked F. M. L. Co., D-13.)

Q. Have you been through the building, Mr. Funkie, of the Paterson high school?

A. I have.

Q. And have you checked up the material there with the plans and specifications?

A. Yes.

Q. Can you testify of your own knowledge that the material which is called for by these three sheets and by the extra orders, was delivered and used in that building prior to December 1, 1910?

A. Yes.

Q. You can?

A. Yes, I can.

Q. There are no offsets or counterclaims against that amount of $10,955.14?

A. There are none, no.

Q. And no payments have been made on account of it, either by the Glen Engineering Construction Company or by anybody else?

A. No.

Q. And that sum is now due?

A. Yes.

Q. And that sum has been due since when?
A. Prior to December 1st, 1910.

Mr. McMahon: I want to offer in evidence a certified copy of the order permitting the Frank Miller Lumber Co. to begin an action against the Receiver of the Glen Engineering Construction Company to foreclose its lien.

Mr. Hall: The trustee will admit that the Frank Miller Lumber Company procured orders from the United States District Court for the Southern District of New Jersey, permitting them to begin actions against the receiver of the Glen Engineering Construction Company, to foreclose liens in the above entitled action.

Mr. McMahon: I offer in evidence the notice of the pendency of suit, served by the Frank Miller Lumber Company on the Board of Education of the City of Paterson, on March 6, 1911, at 3:21 P. M., and on the Comptroller of the City of Paterson, March 6, 1911, at 3:20 P. M. This has been previously marked as complainant's exhibit.

Mr. McMahon: And I also offer, for the purpose of making the record complete, the notice of lien of the Frank Miller Lumber Company, filed with the Board of Education December 9, 1910, at 3:25 P. M., and with the Comptroller December 9, 1910, 3:15 P. M., together with the bond filed with the Comptroller at the same time, covering 20% of the amount claimed, the bond being the

bond of the American Surety Company. Those papers have been previously offered and marked as complainant's exhibits.

Mr. McMahon: If there is no cross-examination, I am finished—that is my case.

CASE OF THE FRANK MILLER LUMBER COMPANY IS CLOSED.

SAMUEL G. McKIERNAN, sworn in his own behalf by Mr. Merrey, by consent, testified as follows:

Direct Examination by Mr. Higgins:

Q. What is your position in the McKiernan & Bergin Company?

A. I am President and Treasurer.

Q. Was there any agreement between the McKiernan & Bergin Company and the Glen Engineering Construction Company?

A. Yes, oral agreement.

Q. For what?

A. Furnishing the stone for the high school.

Q. With whom did you make that arrangement or agreement?

A. With Mr. Downey and Mr. Steinmetz.

Q. Of that company, the Glen Engineering Company?

A. Yes, sir.

Q. And for the purpose of furnishing what material?

A. Crushed stone for the concrete work.

Q. What were the prices that were quoted for that material?

A. The regular prices in the city here, one eighty for inch and half and one ninety for three-quarter.

Q. For the erection of the high school building?

A. Yes. That is what the material was sold for and delivered.

Q. What was the arrangement as to the delivery of these materials?

A. We delivered them as and when wanted.

Q. And that is from day to day, I suppose?

A. Yes.

Q. At the prices arranged between you?

A. Yes.

Q. Were those materials delivered?

A. Yes.

Q. At the high school site?

A. At the high school site. Every load that was sent there was receipted for by their authorized agent at the job.

Q. I show you this package; what are those?

A. Those are vouchers for the stone. The driver had two of them and we kept one. They receipted the one we kept and they kept one themselves.

Q. In other words, these are the receipts for the material as it was delivered to the building?

A. Yes.

Mr. Higgins: I offer those vouchers in evidence.

(Admitted without objection and marked McK. & B., D-1.)

Q. When was this agreement entered into?

A. Prior to the starting of the building here; I think it was in June.

Q. And you continued those deliveries up to when?

A. The deliveries were made up to—I have the dates here (witness referring to memorandum)—the last month's delivery was November, 1910.

Q. Did you render bills for these deliveries from time to time?

A. Yes, bills were rendered monthly.

Q. I show you this statement, Mr. McKiernan; is that a statement containing the deliveries by months?

A. Yes, for this term, and this is for the deliveries that have not been paid for.

Q. The balance due to McKiernan & Bergin Company is what?

A. $1148.80.

Mr. Higgins: I offer that statement in evidence.

(Admitted by consent and marked McK. & B., D-2.)

Q. Now, those deliveries have been made, and do you know, of your own knowledge, Mr. McKiernan, whether or not these materials were used in the construction of the high school building?

A. I know they were. I passed by the building three or four times a day and saw them.

Q. And of your own knowledge you know they were used in the building?

A. Yes.

Q. Have all just claims, set-offs and credits been allowed them?

A. Yes.

Q. So that the sum of $1148.80 is owing to the McKiernan & Bergin Company?

A. Yes.

Q. Have you received any payment on account of this balance from anyone?

A. Of this balance?

Q. The $1148.80?

A. No.

Q. Neither from the Glen Engineering Construction Company or from any other person?

A. We have never received a dollar from anyone for this sum that we are making claim for.

Q. So that this sum of $1148.80 is now owing to the McKiernan & Bergin Company?

A. Yes.

Cross Examination by Mr. Hall:

Q. What was the last payment you received on account, Mr. McKiernan?

A. In July, 1910, for stone delivered in March.

Q. How much was that?

A. Well, I would have to look that up (Witness refers to page 83 of book).

Q. (By Mr. Higgins.) That is the book of accounts that you have there?

A. Yes, sir.

Mr. Higgins: I offer it in evidence.

(Admitted without objection and marked McK. & B., D-3.)

Q. Do you know when the last payment was made?

A. Yes, in July, 1910, for the stone furnished in March. There was none paid for after that.

Q. What was the amount paid?

A. $402.80.

Q. That checks with my books. As I understand you, Exhibit McK. & B., D-2 is a statement of the deliveries made in each month as set forth on that statement?

A. Yes, that is right, except that there were deliveries prior to that that were paid for. This is the deliveries as delivered in those months and these are the vouchers for them (referring to Exhibit McK. & B., D-1).

THE CASE OF McKIERNAN & BERGIN COMPANY CLOSED.

ON BEHALF OF THE LABOR CLAIMS.

FREDERIC BENZLER, sworn by Mr. Merrey by consent on behalf of the labor claims, testified as follows:

Direct Examination by Mr. Merrey:

Q. Mr. Benzler, were you the time-keeper on the high school job in Paterson for the Glen Engineering Construction Co.?

A. Yes, I was.

Q. For how long were you time-keeper?

A. Six months.

Q. And were you there at the time that the Glen Company quit work on the high school building?

A. I was.

Q. Did you keep the time of the workmen who were employed by the Glen Company?

A. I did.

Q. And who paid off the workmen?

A. I did.

Q. And who brought you the money?

A. Mr. Downey, or it was given to the superintendent, Mr. Holmes, to bring over.

Q. Do you remember when the company quit work and left the men unpaid?

A. I do.

Q. Do you know the names of the men and the amounts that were due to them?

A. I do.

Q. Have you got the memoranda here of the time of the men?

A. Yes, sir.

Q. Can you tell me if there is any money due to Hugh McPherson?

A. There is.

Q. How much? Just tell us the men who were employed by the company and the amounts due to them, when they quit work—each one individually? ly?

A. It is all there.

Q. Just read it off, so that the stenographer can get it.

A. Hugh McPherson, No. 198, $28.

Peter McGee, No. 7, $10.12.

David Hawthorne, No. 8, $9.95.

Angelo Touche, No. 23, $19.60, and also No. 38. He had two numbers on the pay-roll.

John Columbus, No. 10, $12.79.

Thomas Moran, watchman, he didn't have any number, $13.18.

Edward Smith, No. 125, $33.60.

Henry Pierce, No. 105, $33.60.

James Kingsland, No. 118, $33.60.
Thomas Halberts, No. 124, $33.60.
Edmund Stephens, No. 181, $12.37.
James Weir, No. 106, $33.60.
Frederic Benzler—I didn't have any number,—$12.71.
Antonio Deets, No. 2, $12.79.
John McMillan, No. 112, $33.60.
Alexander Crawford, Jr., No. 113, $33.60.
Alexander Crawford, Sr., No. 120, $39.20.
William Noble, No. 108, $33.60.
James Gallagher, Nos. 31 and 21, $19.60.
Peter Cannon, No. 114, $33.60.
James Ferguson, No. 191, $28.
Arthur Daniels, No. 119, $28.80.
William H. Holmes. He was the superintendent; he didn't have a number. I didn't keep any record of his time. He was paid weekly.
James O'Leary, Nos. 40 and 24, $20.30.
Walter Venable, No. 103, $34.50.
William H. Rae, No. 126, $33.60.
Thomas Cummings, Nos. 37 and 22, $19.60.
Edward Harrison, No. 104, $33.60.
Adam Gorman, No. 115, $33.60.
John F. Rose, No. 171, $26.60.
George Van Blarcom, No. 176, $26.60.
Robert Maxwell, No. 195, $26.60.
Otto H. Temple, No. 183, $26.60.
Thomas F. Hanbridge, No. 184, $26.60.
William H. Oglethorp, No. 178, $26.60.
Thomas W. Ward, No. 189, $26.60.
John Van Blarcom, No. 175, $26.60.
Russel Holmes, Nos. 179 and 25, $24.50.
Robert Gray, No. 20, $19.60.
James Gordon, No. 196, $28.

George Cunningham, No. 193, $28.

Leonard Bunk, No. 188, $26.60.

Q. Do you remember at the time the building was finished of receiving any communication about the men's pay?

A. Why, yes, I did.

Q. What word did you receive?

A. I was told not to let the men start on Saturday morning.

Q. By whom?

A. By the time-keeper of the Newark job.

Q. And did you receive any word from the President of the company or the superintendent?

A. When I got to work in the morning.

Q. What morning was that?

A. Saturday morning; I don't know the day.

Q. Was that December 10th?

A. I don't know.

Q. Was it the day they stopped?

A. Yes, Saturday morning.

Q. What time does your time-sheet say they stopped?

A. The 10th.

Q. Your time-sheet shows it December 10th?

A. December 10th is the last.

Q. That was the last day that the men worked?

A. Yes.

Q. And on that day you got what word?

A. Word from the watchman in the morning to let them go ahead.

The time-keeper informed me that evening.

Q. What time-keeper?

A. Of the Newark job.

Q. What did he tell you?

A. That he received notice from Mr. Steinmetz to stop the men.

Q. What time did you receive any word from the superintendent of the company to stop?

A. He did not tell me to stop; he said "let them go right ahead and finish up the day."

Q. When the men quit Saturday night what was the usual time for making payments?

A. Pay-day was on Saturday.

Q. On that Saturday when the men quit work did the money come up for them?

A. No, sir.

Q. Did you receive word about it?

A. Mr. Holmes told me there wouldn't be any.

Q. He was the superintendent?

A. Yes.

Q. Were the men paid at any time?

A. They were paid by Mr. Carroll, the Recorder.

Q. That was money advanced by third parties?

A. Yes.

Q. It wasn't payment from the company?

A. No, sir.

Q. The men refused to continue to work for the new contractors, did they not, until they were paid?

A. Yes, sir.

Q. And somebody advanced money through Mr. Carroll?

A. Yes.

Q. Did you see Mr. Steinmetz afterwards?

A. Yes, sir.

Q. Who was he?

A. He was the superintendent of the job in Newark.

Q. He had ceased to be superintendent of the Paterson job?

A. Yes.

Q. But he had been superintendent for a long time?

A. Yes.

Q. And did you receive any word from Mr. Downey?

A. No, sir.

Q. Or Mr. Alford?

A. No, sir.

Q. They simply failed to come there with the money on that day?

A. Yes.

Q. And the men quit?

A. Yes.

Q. Now you have the time-sheets on which you kept the time of the men, have you?

A. Yes.

Mr. Merrey: I offer those in evidence.

(Admitted without objection and marked L. C. D-1.)

Q. You knew all these men, did you not?

A. Yes.

Q. Personally?

A. Yes, sir.

Q. And you know they did work there?

A. Yes.

Q. What kind of work did they do?

A. Laboring, mason work, carpenters—

Q. There wasn't any other kind of laborers than those you mention?

A. Only the foreman, Mr. Holmes.

Q. And yourself. Your own claim as time-keeper, and the watchman?

A. Yes.

Q. Who was the watchman?

A. Thomas Moran.

Q. Now, have you got the time on the William Van Ness and Chas. Van Ness claims?

A. I didn't keep their time.

ON BEHALF OF THE VAN NESS LABOR CLAIM.

WILLIAM VAN NESS, sworn by Mr. Comstock, by consent, testified as follows:

Direct Examination by Mr. Merrey:

Q. Mr. Van Ness, you did some work on the Paterson high school for the Glen Engineering Construction Company?

A. Yes, sir.

Q. What was it?

A. Lathing.

Q. And do they owe you some money for that?

A. Yes, sir.

Q. How much?

A. Two of us done the job. $125 between the two of us.

Q. Who is the other?

A. My brother.

Q. Was it a contract you had?

A. No.

Q. Well, what was your agreement with the Glen Company?

A. We were to take care of our own time and give it in separate to the superintendent.

Q. And how much were you to get paid for the whole work?

A. Well, he refused to sign a contract with us and so we went ahead on a verbal agreement, and

he gave us our money as we called every Saturday.

Q. How was he to pay you?

A. As much as the work was done every Saturday.

Q. Yes, but at what rate, so much for the job or so much a day?

A. $4.50 a day.

Q. To each of you?

A. Yes.

Q. How much do they owe you?

A. $125.

Q. Both of you?

A. No, between the two of us, that is, $62.50 apiece.

Q. That hasn't been paid to you?

A. No, sir.

Cross Examination by Mr. Hall:

Q. You say your arrangement with the Glen Engineering Construction Company was $4.50 a day?

A. Yes.

Q. To each of you?

A. Only two of us worked on the job.

Q. And when was this arrangement made?

A. That was made at the time we started in. We gave him a bid and he refused to sign a contract.

Q. You gave him a bid to do the work at that price, $4.50?

A. No, we gave him a lump figure at first.

Q. When was the last payment you received?

William Van Ness (Labor Claim) Feb. 9, 12.

A. Well, that I can't recollect. We were off the job previous to the week we worked there, which was the last week that they wound up.

Q. That was in December?

A. Yes.

Q. And you don't know when you received a payment before that?

A. Not long before.

Q. Did you do all the work yourselves?

A. Yes.

Q. Didn't employ anybody else to help you?

A. Didn't employ nobody.

CHARLES VAN NESS, recalled on behalf of the Van Ness Labor Claim, testified as follows:

Direct Examination by Mr. Merrey:

Q. Mr. Van Ness, did you work for the Glen Engineering Construction Company?

A. Yes, sir.

Q. What kind of work?

A. Lathing.

Q. And what was the agreement that you had for payment involved?

A. Well, we were to get our payments weekly.

Q. Who were?

A. My brother and myself. We were to have a contract first, but they wouldn't sign no contract, and they said they didn't want to bother with us—just wanted us to make an agreement that we would do it for so much money and we told them we would and then they were to pay us so much every week as we went along.

Q. How much were they to pay you?

A. At the rate of $4.50 a day.

Q. Did they pay you anything at that rate?

A. Yes, sir.

Q. How much do they owe you?

A. Well, they owe me $62.50.

Q. Have you received any money on this last account?

A. No, sir.

Q. When did you do this work there that you weren't paid for?

A. Oh, that was between last November and December.

Mr. Hall: You don't mean that?

Q. You mean 1911 or 1910?

A. 1910.

Cross Examination by Mr. Hall:

Q. How does it happen that your claim is only $55?

A. Well, we filed a claim in the first place for $55; we thought we would just take that much off to get the money out of it. We were always put on the pay-roll and we filled that in for just that amount.

Q. You were put on the pay-roll?

A. Yes, we were put on the pay-roll weekly.

Q. Weren't you paid by check?

A. No, sir, cash. We received our money in an envelope, just the same as the rest of them.

The case on behalf of Van Ness claim closed.

ON BEHALF OF THE GEORGE A. MYERS CO. CLAIM.

FRANK W. SHUYTER, sworn by Mr. Merrey, by consent, on behalf of the George A. Myers Company claim, testified as follows:

Direct Examination by Mr. Comstock:

Q. Are you in the employ of the George A. Myers Company?

A. I am, yes, sir.

Q. In what capacity?

A. Bookkeeper.

Q. Did George A. Myers Company furnish any hardware for the Glen Engineering Construction Company?

A. They did, yes.

Q. When?

A. From the time of the commencing of the building to nearly the end of November, 1910.

Q. From the beginning of the Paterson high school until the last of November, 1910?

A. Yes, sir.

Q. What arrangement did the Geo. A. Myers Company have with the Glen Engineering Construction Company as to how this hardware was to be paid for?

A. It was to be paid every time we supplied them.

Q. There was no contract made?

A. No, sir.

Q. No written contract?

A. No, sir.

Q. Have they paid you anything?

A. They have paid us something, but not the balance of what they owe us.

Q. Did you render a bill every month?

A. Yes.

Q. For the hardware they had received during the previous month?

A. Yes and also the amount still due.

Q. Was there no agreement as to the price before the goods were delivered?

A. No, sir.

Q. How much were they to pay?

A. Fair market price.

Q. Have you got the day-book and ledger here showing this account?

A. I have.

Q. And on what page does it appear in the day-book?

Mr. Hall: Haven't you got just a summary of it?

Mr. Comstock: Yes I have, but I want to put the books in. I offer in evidence the day-book and ledger of the Geo. A. Myers Company, showing this account.

(Admitted without objection, and the day-book is marked G. A. M. Co. D-1, and the ledger, G. A. M. Co. D-2.)

Q. I show you the account of the Glen Engineering Construction Company and ask if that was taken from your ledger by you?

A. That is a copy of our account from our ledger.

Q. Does that show the full account?

A. No, it does not.

Q. What does that show?

A. Material furnished to them for the construction of that particular building.

Q. Up until what date?

A. November 18, 1910.

Q. Did you furnish any material to them after that date?

A. No, we did not.

Q. That was the last you furnished?

A. That was the last we furnished.

Mr. Comstock: I offer that statement in evidence.

(Admitted without objection and marked G. A. M. Co. D-3.)

Q. Does that show all the credits that the Glen Engineering Construction Company is entitled to?

A. It doesn't show any.

Q. Are they entitled to any?

A. They are not, no, sir.

Q. Have you visited the high school since these materials were delivered there?

A. I have, yes.

Q. When?

A. Different times—on different occasions.

Q. Were you there after the last item mentioned in that book was furnished?

A. Yes.

Q. Were all the items shown to have been delivered to the Glen Engineering Construction Company actually used in the construction of the building?

A. To the best of my knowledge they were, so far as I could see. There was none on the ground there.

Q. What is the total amount of your claim?

A. $523.96.

Q. And that is now justly due to the Geo. A. Myers Company?

A. Yes.

Q. Is the Geo. A. Myers Company an incorporation?

A. They are.

Cross Examination by Mr. Hall:

Q. Do I understand you to say that the Myers Company received no payments from the Glen Company at all on account of the Paterson high school job?

A. They have, but not on this account. From the starting of the account we have payments.

Q. When was the account started?

A. November, 1909.

Q. No payments were made after that date?

A. Payments were made shortly after this, but it applied on a previous account.

Q. How much was that payment?

A. Five hundred and some odd dollars. I think $519.

Q. Do you remember when it was paid?

A. I could tell you right here (witness referring to Ledger Exhibit D-2) September 14, 1910.

Q. How much was it?

A. $500. Previous to that we had $58.24 and that balanced that account up to October, 1909.

Q. What was that $500 for?

A. Miscellaneous material furnished in the building there.

Q. When was it furnished?

A. Why, the account starts in July, 1909.

Q. Up to November 22, 1909, what is the balance?

A. $584.24.

Q. And you received a check?

A. We received a check in payment of that.
Q. And one in July, 1910?
A. One in July and one in September.
Q. Aggregating $558.24?
A. Yes, sir.
Q. And those were for the goods delivered prior to November 9, 1909?
A. Yes, sir.

By Mr. Comstock:

Q. Have you received payments on account of the bills shown in the claim filed by the George Myers Co. with the City?
A. No, sir, we have not.

Q. Are those slips which you have in your hand the driver's delivery slips which were received on delivering these goods?
A. Yes, we have two of them and one is returned to us.
Q. And they show the deliveries made to the Glen Construction Company?
A. They do, yes.

Mr. Comstock: I offer those driver's slips in evidence.

(Admitted without objection and marked G. A. M. Co. D-4.)

The case on behalf of Geo. A. Myers Company Closed.

ON BEHALF OF THE FRED G. EBSARY CLAIM.

FRED G. EBSARY, sworn in his own behalf, testified as follows:

Direct Examination by Mr. G. M. Belfatto:

Q. Mr. Ebsary, you are a claimant against the money due by the Board of Education of the City of Paterson to the Glen Engineering Construction Company?

A. Yes, sir.

Q. How much is the amount of your claim?

A. $900.

Q. Now this claim is due under and by virtue of a written agreement bearing date the 15th day of December, 1909, entered into between you and the said Glen Engineering Construction Company?

A. Yes, sir.

Q. I show you a paper and ask you if that is the agreement which was signed by you and said company?

A. Yes, sir.

Q. What kind of work were you to do under this agreement?

A. Fire-proof partition work.

Mr. Belfatto: I offer that contract in evidence.

(Admitted without objection and marked F. G. E. D-1.)

Mr. Hall: No further proof is necessary for the admission of the contract.

Q. Now, when did you start to work on this building, Mr. Ebsary?

A. December the 15th, 1909.

Q. And when did you finish it?

A. August the 19th, 1910.

Q. Was your work all completed?

A. Yes, sir.

Q. And accepted?

A. So far as I know, yes—no complaints.

Q. Was the architect aware of the fact that the work had been finished—did he ever complain that the work was not finished?

A. No.

Q. Was any claim made by the Glen Engineering Construction Company with reference to the work?

A. No, sir.

Q. Now, you received different payments on account of this $4,900, did you not?

A. Yes, sir.

Q. Could you state the time and amounts when those payments were made?

A. Yes, sir, May 17, 1910, $1,000; June 15, $1,000; July 1, $500; September the 12th, $500; September the 29th, $500; November the 17th, $500.

Q. You have been reading from a statement signed by the Glen Engineering Construction Company?

A. Yes, I asked them for a statement with our account with them previous to the last two payments.

Q. How much is there due you now?

A. $900.

Q. Has anything been paid on account of this balance since the institution of this proceeding?

A. No, sir.

Q. Now, you filed a lien claim in this case, did you not, with the Board of Education?

A. Yes, sir.

Mr. Belfatto: I understand the service of the lien claim is admitted.

Mr. Hall: I understand that admission was that the claims as produced by the clerk of the Board of Education were filed with the Board at the times and in the manner shown on each claim, and also the same with the Comptroller's office.

Q. Did you demand the sum of $900 of the Glen Engineering Construction Company before you filed a lien claim?

A. Yes, we demanded our final payment.

Q. And they refused to pay it?

A. They kept putting us off.

Q. And after you received a refusal I suppose you filed a lien claim for the money due?

A. Yes, sir.

Q. Mr. Ebsary, your office is where?

A. 1123 Broadway, New York City.

Q. And you are a resident of New York?

A. Yes, Huguenot Park, Staten Island.

Mr. Belfatto: I offer in evidence the notice with reference to the pendency of the action, which was served on the 14th day of February, 1911, upon the Auditor, Herman J. Kohlhass.

(Admitted without objection and marked F. G. E. D-2.)

The case on behalf of the Ebsary Claim is closed.

AGNEW vs. B'D EDUCATION OF PATERSON,

Chancery Chambers, Jersey City,
Wednesday, February 21, 1912, 10 A. M.

Adjourned hearing on the Assignments.

Present:

WILLIAM B. GOURLEY, Esq., for the Complainant.
EDWARD WARD MCMAHON, Esq. (of the New York Bar), for The Frank Miller Lumber Company.
WILLIAM F. DELANEY, Esq., Solicitor.
NOAH A. STANCHCLIFFE, Esq. (of N. Y. Bar), of Counsel, for Matthew S. Paine.
Hon. WILLIAM I. LEWIS, for Joseph Sharpe Construction Co.
JAMES HIGGINS, Esq., for McKiernan & Bergin Company.
JOHN J. FALLON, Esq., for First National Bank of Town of Union.
JOHN O. BENSON, Esq., for Sutphen & Myer.
FRANK H. HALL, Esq., for the Trustee in Bankruptcy.

Mr. Hall: I think I ought to state now that we had expected to have Mr. Alford here, who was the President of the Glen Engineering Construction Company. He is not a resident of New Jersey, but he promised on Saturday last that he would be here. Yesterday afternoon when we reached him we learned that his employer would not let him off for to-day, although he said he might be here in the afternoon. We might go on and reserve Mr. Alford's testimony for some motion day when your Honor will be here.

Mr. Fallon: I would like to know if the assignments made by the Glen Engineering Construction Company are in court. They were offered in evidence at the first hearing, but I seem to be unable to locate them.

(Upon further inquiry the fact developed that the assignments, after being admitted in evidence at the first hearing, were returned to the custody of the Comptroller of the City of Paterson, and that no provision had been made to have them brought here to-day.)

The Court: Is there any testimony ready to be taken here to-day on the part of any of the defendants?

Mr. Fallon: I can proceed with some testimony, I think.

Mr. Benson: I have proofs to submit on behalf of the Sutphen & Myer lien claim. I have the books here and also the proof that the material was used in the building.

The Court: Why have you not undertaken to prove this claim before? The last hearing was had to finish up those matters and we were to take up only the assignments to-day.

Mr. Benson: There was some misunderstanding on the part of the witnesses and they were not present at the last hearing, and for that reason no proofs were submitted at that time.

The Court: Well, we will go as far as we can, gentlemen. You may proceed, Mr. Benson.

ON BEHALF OF THE SUTPHEN & MYER LIEN CLAIM.

JOHN T. SUTPHEN, sworn on behalf of the claim of Sutphen & Myer, testified as follows:

Direct Examination by Mr. Benson:

Q. Mr. Sutphen, what business are you in?
A. In the glass business.
Q. With whom?
A. The firm is Sutphen & Myer.
Q. That is a partnership?
A. Yes.
Q. Will you tell us the individual names of the firm?
A. John T. Sutphen and Charles R. Myer.
Q. Did you have any transaction with the Glen Engineering Construction Company?
A. I did.
Q. And that you are familiar with?
A. Yes, sir.
Q. Did you submit a proposal to the Glen Engineering Construction Company to do glazing work on the highschool building in Paterson?
A. Yes, sir.
Q. Was that proposal accepted?
A. It was.
Q. Is that the letter of acceptance (showing witness letter)?
A. That is their letter of acceptance.

Mr. Benson: I offer that letter in evidence.

(Admitted and marked S & M, D-1.)

Q. How much was that proposal for?

A. $3,299.

Q. Was any material delivered at the building?

A. There was.

Q. Have you a memorandum showing the amount delivered?

A. I have.

Q. Can you tell us how much material was delivered in place in the building?

A. $2,400 delivered on the contract.

Q. And was there anything paid on account of that?

A. No, sir.

Q. And there is still due $2,400?

A. There is.

GEORGE B. VAN NEST, sworn on behalf of the Sutphen & Myer claim, testified as follows:

Direct Examination by Mr. Benson:

Q. Are you employed by the Sutphen & Myer firm?

A. Yes.

Q. And were you employed by them to do some work on the Paterson highschool?

A. I had charge of the work there.

Q. Do you know whether material to the extent of $2,400 was placed in that building?

A. Yes, sir.

Q. And you were in charge of the work during the entire time?

A. Yes, sir, in charge of all the work.

Case closed on behalf of the Sutphen & Myer Lien Claim.

On behalf of the Assignment to
THE FIRST NATIONAL BANK OF THE TOWN OF UNION.

M. WILLIAM HILBERT, sworn on behalf of the First National Bank of the Town of Union, testified as follows:

Direct Examination by Mr. Fallon:

Q. Mr. Hilbert, where do you live?

A. 151 Nesbitt Street, Weehawken, N. J.

Q. Are you acquainted with Smith Alford and P. H. Downey who were connected with the Glen Engineering & Construction Company?

A. Yes, sir.

Q. Were you acquainted with both of those parties before the 19th day of April, 1910?

A. Yes, sir.

Q. I show you this paper and ask you when this paper was signed by those parties, if you know?

A. Signed on April 19, 1910.

Q. Where?

A. At the office of the Glen Engineering Construction Co.

Q. Who was present with you at the time, if you remember, outside of the parties whose names are on the note?

A. Mr. Albert Hofmann.

Q. At that time were you connected with the First National Bank of the Town of Union?

A. I was.

Q. In what capacity?

A. Assistant Cashier.

Q. And did you hold some other position besides that in that bank?

A. One of the directors of the institution.

Q. Before the making of this note had you had dealings with the Glen Engineering Construction Company in respect to notes?

A. Yes, sir.

Mr. Hall: If your Honor please, no note has been proven yet.

Mr. Fallon: I offer this note in evidence.

Mr. McMahon: I object, on the ground that the signatures are not formally proven.

Q. Do you know Mr. Downey's signature?

A. Yes.

Q. Did you see both of those parties sign this note?

A. Yes.

Mr. Fallon: I now offer the note in evidence.

Mr. McMahon: Objected to as not formally proven.

Mr. Fallon: It is signed "Glen Engineering Construction Company, Smith Alford, President."

The Court: The objection is that there is no evidence that these men, or either of them, were officers of the Glen Construction Company.

Mr. Fallon: Then, I will have to call Mr. P. H. Downey.

By the Court:

Q. Do you know this corporation, the Glen Engineering Construction Company?

A. I do.

Q. Have you had business dealings with them?

A. Only in a banking way.

Q. Well, that is a very important part of the business of a corporation. Do you know who the officers were?

A. Yes, sir.

Q. Who were they?

A. Smith Alford, President, and Mr. P. H. Downey, the Treasurer.

Q. They acted in that capacity in the banking business done with you for this corporation?

A. Yes, sir.

Q. Do you know whose signatures were on the books of the bank?

A. Yes, sir.

The Court: Well, proceed.

Mr. Fallon: Is there any further objection?

Mr. McMahon: I will withdraw the objection on the ground that they were not officers of the company.

Mr. Fallon: I offer the note again in evidence.

Mr. McMahon: No objection.

The Court: It will be received.

(The same is marked T. of U. D-1.)

Q. I show you another note for $5,000, dated "Town of Union, N. J., July 27, 1910," signed P. H. Downey; did you see Mr. Downey sign that note?

Mr. McMahon: I object as irrelevant and immaterial, because it is not a note of the Glen Engineering Construction Company.

Mr. Fallon: I am going to show that this money was loaned by the bank for the benefit of the company and the money was received by the company.

The Court: We haven't the assignment here and I do not know what the terms of that assignment are. Have you got a copy there?

Mr. Fallon: It reads, "It being understood that moneys so collected shall be placed to the credit of the Glen Engineering Construction Company at the First National Bank of the Town of Union and the amount due said bank to be deducted therefrom." Now, my insistment is that this $5,000 was loaned by the bank through the endorsement of Mr. Downey for the Glen Engineering Construction Company.

Mr. McMahon: On the credit of Mr. Downey and not on the credit of the company, obviously.

Mr. Fallon: My purpose is to show that it was loaned on the credit of the company, the note being made by Downey, and I think it will so appear by the witness.

The Court: Well, your case on this note looks to me very thin. I will take the testimony subject to the objection and deal with it on the argument.

Q. With reference to this first note, the one marked T. of U. D-1, will you state to the Court

the circumstances under which it was made and what was said by Mr. Alford, the President of the Company, at the time the note was made.

Mr. McMahon: I object, on the ground that the note speaks for itself.

The Court: Proceed. I will take it subject to the objection.

Q. State all that was said, please.

A. Mr. Alford wanted to secure an additional amount of money at this time, April 19, 1910, and I told him I didn't think we could grant any additional moneys without he gave us an assignment of the payments which he said was coming to him or would be due from the City of Paterson.

Q. (By the Court) Coming to him?

A. To the Company.

Q. What Company?

A. The Glen Engineering Construction Company. I insisted upon getting an assignment from him and he agreed to give that assignment and he failed to do it at that date. In the meantime, the loan had been granted by the officers of the bank to the Glen Engineering Construction Company, but not in my presence.

Judge Lewis: That is not at all responsive. He is telling what the transactions of the bank were, without it appearing in any way at all that the witness has any knowledge of it other than hearsay.

The Court: This is the Assistant Cashier of the bank.

Judge Lewis: But he is now speaking about the Board of Directors.

A. (Continuing) I am speaking about the Glen Engineering Construction Company.

By the Court:

Q. I do not quite follow your testimony, however. You are now testifying in regard to circumstances under which the note which you hold in your hand (Exhibit D-1) was made, of April 19, 1910, are you not?

A. Yes, sir.

Q. Oh, this is the note of $10,000?

A. Yes.

Q. Before that note was made at the bank had you business transactions with the Glen Engineering Construction Company?

A. Yes, sir, we did.

Q. And at the time, or shortly before, that note was made had the bank loaned any money to that company?

A. They did.

Q. And this conversation that you are giving you say took place at the time they made application for this loan of $10,000?

A. Yes.

Q. Now was Mr. Smith Alford, the President of that company, the only one that was spoken to about the making of that assignment to secure any moneys advanced?

A. No, sir, Mr. Downey was also spoken to.

Q. And were they both present at the one time when these statements were had?

A. Yes, sir.

Q. Was there more than one talk had between yourself and those parties, with respect to the making of that assignment, before the note was discounted?

A. There was.

Q. Was this note discounted by the bank for the benefit of the Glen Engineering Construction Company?

A. Yes, sir.

Q. Well, did the Glen Engineering Construction Company, or Mr. Smith Alford, the President of that company, for the company give to the bank the assignment which you say had been spoken of at the time the note was discounted?

A. No, he did not.

Mr. McMahon: I object to that, if your Honor please. He can't bring in proofs of assignments in this manner. I move to strike out the answer.

Mr. Fallon: I want to show that no assignment was given at that time, and I want to show what was said.

The Court: The witness answers no. I will let it stand.

Q. What was further said about the assignment, if anything?

A. Why, Mr. Alford said that he would see that the bank would procure the assignment.

By the Court:

Q. That the bank would have an assignment?

A. Would have the assignment—would give the assignment to the bank, and besides that, he said he would communicate with the President and Vice-President of the institution to that effect.

Q. What institution?

A. The first National Bank of the Town of Union.

Q. Now, with respect to the note dated July 27, 1910, can you say whether or not the moneys represented by that note were paid to the Glen Engineering Construction Company by the bank?

A. Yes, sir, they were.

Q. What were the circumstances attending the making of that note?

A. Why, the Glen Engineering Construction Company wanted to secure additional moneys and I told them, under the banking law we would not loan more than ten per cent. to one individual or corporation, and that—

Q. Ten per cent. of what?

A. Of its capital—but that if they would secure the personal note of Mr. Downey we could take Mr. Downey's personal note and let Mr. Downey secure the $5,000 and pay that over and credit it to the account of the Glen Engineering Construction Company.

Q. What is the capital of the First National Bank of the Town of Union—what was it at that time?

A. $100,000.

Q. Was there anything said at the time this $5,000 note was made about an assignment?

A. I don't recall it. I think there was to Mr. Hofmann or to Mr. Conway.

Q. You have no personal knowledge of that?

A. No.

Mr. Fallon: I offer this note in evidence.

Mr. McMahon: It is objected to upon the

ground already stated,—it is not a company note and no evidence of indebtedness against the company.

By the Court:

Q. I understand you to say that the proceeds of that note that the bank discounted were credited to the account of the Glen Engineering Construction Company?

A. It was credited to the account of Mr. Downey and he in turn drew a check and that check was credited to the account of the Glen Engineering Construction Company.

Judge Lewis: I object to that, sir, as hearsay.

Q. Do you know that to be a fact?

A. I know it to be a fact.

Judge Lewis: The check speaks for itself.

The Court: Yes, and the books. For what interest do you appear, Judge?

Judge Lewis: For the Joseph Sharpe Construction Company, whose claim comes after the assignments, and I am hostile to those assignments.

Mr. McMahon: I would like to add to my objection that it is void under the banking laws, as well.

The Court: All these questions about this transaction will be taken up at the final hearing.

Mr. Fallon: Has counsel any objection to my asking the witness any questions in re-

spect to making the assignment to the First National Bank of the Town of Union? I have not the assignment here before me, but I would like to inquire into it. If there is no objection I would like to go into that; it will save time.

The Court: Proceed; put your question.

Q. Mr. Hilbert, will you tell the Court what you know about the transaction between the Glen Engineering Construction Company and the First National Bank of the Town of Union in the making of an assignment by the construction company to the bank in September, 1910—tell when the assignment was made and where it was made.

A. The assignment was made the latter part of the summer, I don't know when—latter part of August or the first part of September—and it was made at their office—the office of the Glen Engineering Construction Company—on that date in the presence of several witnesses.

Q. Who were they?

A. Mr. John Conway, Mr. Albert Hofmann, and Miss Marie Conroy.

Q. Was Miss Marie Conroy in the employ of the Glen Engineering Construction Company at that time?

A. Yes, sir.

The Court: Have you a copy of the assignment there, Mr. Fallon?

Mr. Fallon: Yes, sir (handing it to the Court).

Q. Was Mr. Downey there at the time, did you say?

A. Yes, Mr. Downey and Mr. Alford were both there.

Q. And was that signed in your presence there by Downey and Alford?

A. Yes, sir.

Q. And was the name of Marie Conroy, which is attached to it as a witness, signed in your presence there?

A. Yes, sir.

Q. After the signing of the paper what was said or done as between yourselves and Mr. Downey and Mr. Alford with respect to the further execution of the paper?

A. I think Mr. Hofmann asked whether they had a Notary in the office and they said they did not, and Mr. Hofmann and Mr. Conway went out of the office to the office of a Notary Public somewheres in the building, I don't know where, I didn't go out of the office.

Q. Did you see who went out?

A. Mr. Hofmann and Mr. Conway, and Mr. Downey.

Q. Were they away long?

A. I shouldn't judge more than twenty minutes or a half an hour.

Q. Then when they came back what was done with the paper?

A. It was delivered to Mr. Hofmann.

Q. By whom?

A. By Mr. Alford.

Q. Now the bank had transactions with the Glen Engineering Construction Company other than those two notes, did they, or do you know?

A. They had other transactions.

Q. Outside of those two notes?

A. Not that I know of.

Q. Well, was there a note discounted by the bank before the $10,000 note?

A. Yes, sir, there was.

Q. How much was that note, if you remember?

A. I think it was $6,000.

By the Court:

Q. How long had the Glen Company been borrowing money from the bank? Do you recollect the time the first loan was made?

A. I think that was the first loan granted.

Q. Which one?

A. The $6,000.

By the Court:

Q. And how long before the date of this $10,000 note was it?

A. Probably three months—two months; no, I don't believe it was that long—about two months.

By the Court:

Q. Were either of the officers of the Glen Company officers, directors or stockholders of the bank?

A. No, sir, they were not.

Q. Had the Glen Company been a dealer at the bank—depositor?

A. Yes.

Q. For how long?

A. Several months.

Q. Before the first loan?

A. About one month before the first loan was granted—probably about a month.

Q. Did the Glen Company have an office near the bank?

A. No, they had offices at 156 Fifth Avenue, but all of their work was over here in New Jersey.

Q. Fifth Avenue in New York?

A. New York City, yes, sir.

Q. Now through whom were the negotiations originally between the Glen Engineering Construction Company and the First National Bank of the Town of Union?

A. Originally through myself. I secured the account for the First National Bank.

Q. You are no longer connected with the bank, are you?

A. No, sir.

Q. How long have you been out of the bank?

A. About a year.

Q. When did you cease to be Assistant Cashier of the bank?

A. Sometime in 1910, October.

Q. When did you cease to be a director of the bank?

A. Sometime in October or November of 1910.

Cross Examination on behalf of the Trustee in Bankruptcy:

By Mr. Hall:

Q. Mr. Hilbert, I understand you to say that this conversation about the assignment took place at the time the bank discounted the $10,000 note?

A. Yes, sir.

Q. Prior to that time the bank had discounted a note of $6,000 for the Glen Company?

A. Yes, sir.

Q. And nothing was said at that time about an assignment, I understand?

A. Well, there was. I told them if they required any more money they would have to give an assignment to the bank for $6,000.

Q. You told them they would have to give the assignment?

A. Yes, sir.

Q. Well, they didn't give it then, did they?

A. No, sir, they did not.

Q. Now when was the next time after that $6,000 note transaction that the assignment was referred to?

A. I should judge several weeks.

Q. Was anything said about it prior to the conversation and at the time of the $10,000 note?

A. Yes, sir, there was.

Q. It was talked in between?

A. Yes, sir.

The Court: This is proper cross-examination, undoubtedly, but I should be very glad if any counsel would intimate to me what the relevancy of this negotiation for the assignment is. What difference does it make whether they talked about an assignment or whether an assignment was demanded or not? The question is whether in September or October, after this indebtedness is said to have been created, an indebtedness of ten thousand or fifteen thousand dollars had been created, and an assignment was given. If the assignment was given then we must turn to the assignment to find out what security the bank got. What difference does

it make whether they talked from time to time about an assignment being made?

Mr. Hall: That would be my view of it, and perhaps it was due to an excess of caution on my part. I rather think that counsel for the bank is endeavoring to build up a case of an agreement made which would be construed as a consideration for this assignment.

The Court: Well, proceed.

Q. Were you in the office of the Glen Company frequently about that time?

A. I was.

Q. Which I understand was in March or February, 1910?

A. Yes, sir.

Q. Now, will you give us, please, just what you said and what Mr. Alford said in April, 1910, with regard to the assignment, at the time of the $10,000 note transaction.

A. I said to him that the First National Bank was insisting upon securing that assignment that he agreed to give me when they made the first loan and that the officers of the bank had put it up to me at one of the meetings that I was to secure an assignment. He said that he would agree to give it to me and he would talk over matters with his uncle, who was the Treasurer of the Glen Engineering Construction Company and explain matters to him.

Q. Is that all he said?

A. He said that he would see that I would get the assignment.

Q. Now was Mr. Downey present at that time?

A. Mr. Downey was not present at that particular time.

Q. And that conversation took place in the Glen Company's office in New York?

A. In the Glen Company's office in New York.

Q. Who else was there besides yourself and Mr. Alford?

A. At this first conversation there was nobody present but Mr. Alford and myself.

Q. Miss Conroy wasn't there?

A. No, not at that conversation.

Q. Now when was the next time after that that you recall having referred to this assignment, or referring to getting an assignment?

A. A few days after the $10,000 loan was granted—the loan had been granted in the meantime and Mr. Hofmann, the Vice-President, together with Mr. Conway and myself went over to the office of the Glen Engineering Construction Company, and Mr. Hofmann made another demand upon Mr. Alford for this assignment.

Q. What did Mr. Hofmann say?

A. He said, "you people agreed to give us an assignment and you have not done it. We must insist upon having an assignment." And Mr. Alford said "all right" that he would take care of it.

Q. Now that was within a few days after the $10,000 note was discounted, I understand?

A. Yes.

By the Court:

Q. At the New York office?

A. At the New York office of the Glen Engineering Construction Company.

Q. Do you recall any time after that that the question of the assignment was discussed between you and the officers of the Glen Company?

A. Only the time when they finally gave the assignment.

Q. That was in September?

A. In September.

Q. It wasn't referred to again, so far as you remember?

A. So far as I am concerned it was not, but so far as the officers of the bank are concerned it was.

Q. You don't know that?

A. No.

By the Court:

Q. Did you have the first conversation, so far as you know, with anyone on behalf of the bank with Mr. Alford in regard to the assignment?

A. I had the first conversation.

Q. Had you seen a copy of the contract between the Glen Engineering Construction Company and the Board of Education?

A. I had, sir.

Q. What kind of an assignment did you demand of him?

A. I demanded assignments of all their ten per cent. from the city of Paterson.

Q. Under this contract?

A. Under this contract.

Q. What did he say to that?

A. Mr. Alford was agreeable to it.

Q. What did he say?

A. He said they would be only too willing to give it to us.

Q. And did you state what the object of the assignment was?

A. Yes, sir, I did; I told him the object of the assignment was as collateral to the bank.

Q. As collateral? Did you tell him what it was to secure?

A. I told him it was to secure the loan that they had granted to him.

Q. The loan of $10,000 or $6,000?

A. $10,000.

Q. Not the six?

A. No, sir.

Q. If you a moment ago spoke about the assignment when the $6,000 loan was negotiated you were mistaken?

A. The $6,000 loan had been paid off with this $10,000 loan.

Q. There was no talk about the assignment as collateral to the $6,000 loan when that loan was negotiated?

A. Yes there was—there was some talk with Mr. Alford in regard to it.

Q. You had that talk with him?

A. Yes, sir.

Q. Well, what did he say?

A. He said he would take care of it; that is all he said to me, he would arrange that it would be taken care of.

Q. He didn't promise to give the assignment?

A. He promised to give it. He said, "I will see that you get the assignment; I must talk first to my uncle about it."

Q. That was when the $6,000 note was discounted?

A. Yes, sir.

Q. And then you renewed the matter, did you?

A. Yes, when the $10,000 loan was made.

Q. And what you demanded was an assignment as collateral to secure that $10,000 loan?

A. Yes, sir.

Q. Did you ever vary that demand in any way?

A. No, sir.

The Court: Proceed.

Q. Did I understand you to say that the $6,000 note was paid out of the proceeds of the $10,000 note?

A. The note was paid around that time; I can't recall just when.

Q. Don't you know that the $6,000 note was paid before you were asked to discount the $10,000 note?

A. If it was it was only paid within a few days before the $10,000 loan was made.

Q. Wasn't the fact possibly in your mind at that time that inasmuch as the $6,000 note had been paid you felt more easy about not requiring an assignment?

A. No, it is not.

Q. You still thought you would need the assignment?

A. Yes, sir.

Q. I show you a paper and ask you if that was the $6,000 note to which you refer?

A. I think it is.

Q. Well, don't you know?

A. I am not positive; I couldn't tell without I had the records of the bank.

Q. There is nothing by which you can identify it, eh?

A. No, sir.

Q. Who made that letter "H" on the top of it?

A. I did.

Q. Does that refresh your mind in any way about it?

A. Only that the loan was approved on March 10, 1910, by the Discount Committee. I was Secretary of the Board and initialed the note.

Q. You didn't discount any other $6,000 note for them at that time, did you?

A. No, sir.

Q. Who wrote the word "cancelled" across it?

A. I don't know; I presume one of the tellers of the bank. It is not my writing.

Q. You don't recognize the writing?

A. No, sir.

Mr. Hall: I ask that the note be marked for identification.

(The same is marked Trustee D-1 for identification).

Q. I show you a paper dated April 12, 1910, and ask you if you know what it is?

A. It is a check to pay off this loan of $6,000.

Q. And that was received by the First National Bank of the Town of Union?

A. Yes, sir.

Q. And it paid the note in full?

A. Paid the note in full, yes, sir.

Mr. Hall: I offer that check in evidence.

(Admitted and marked Trustee D-2).

Q. That was a week before you were asked to discount the note for $10,000, wasn't it?

A. Yes, sir.

Q. Now, at that time did you have any reason to believe that the Glen Company didn't have good credit?

A. No, sir; I didn't have any reason to believe it.

Q. Well, why did you want an assignment?

A. For protection.

Q. Protection of what?

A. Protecting the First National Bank, not because there was any difficulty, but in case any difficulty should ever arise, and I knew that the other institutions required it. I have had dealings in New York where they require it.

Q. Had you had dealings with the Glen Engineering Construction Company in New York?

A. No, with other people where I required them to give an assignment.

Q. And that was the only reason you thought it advisable for your bank to have an assignment of this money, was it?

A. Yes, sir.

Q. Now, the bank discounted a note for the Glen Company in June, 1910, didn't it? Do you recall a $4,000 note?

A. Yes, sir; I recall it.

Q. Was anything said at that time about an assignment?

A. I don't recall.

Q. And the bank discounted a further note for the Glen Company in August, didn't it?

A. I would have to see the note to testify to that.

Q. Well, if you don't recall, say so.

A. I don't recall it.

Q. Now coming down, Mr. Hilbert, to the time

when the so-called assignment was executed, I understand that took place in the New York office of the Glen Company; is that right?

A. Yes, sir.

Q. And that was on the date that is put in the assignment, whatever the date is?

A. Yes, sir.

Q. It is dated on the day that it was actually executed?

A. Yes, sir.

Q. That was in the month of September, 1910. You were then in the Glen Company's office. Would you tell us, please, the conversation that led up to the actual execution of that assignment?

A. Why, Mr. Hofmann spoke to Mr. Alford and told him that they wanted this assignment; that the First National Bank had been waiting long enough for it. They had made several promises and Downey agreed to turn over an assignment, which they had promised to give to the bank, and that the bank insisted upon having this assignment; that the matter had been talked over at the Board of Directors' meetings several times and they wanted this assignment now.

Q. Mr. Downey and Mr. Alford were both present?

A. Yes, Mr. Alford and Mr. Downey were present.

Q. Do you recall asking whether the Board of Directors of the Glen Company had adopted any resolution about an assignment?

A. I don't recall.

Q. Do you recall their saying anything about action taken by the Board of Directors of the Glen Company?

A. No, I do not; I don't recall.

Q. You don't recall anything being said about action on the part of the Board of Directors?

A. No, sir.

Q. When you went to the office of the Glen Company that day did you have the assignment with you ready for execution?

A. Yes, sir.

Q. Where had it been drawn up?

A. It was drawn up at the office of Judge Stuhr.

Q. In Jersey City?

A. In Jersey City, yes, sir.

Q. And how long prior to that day?

A. Well, that I could not answer.

Q. I show you a paper and ask you if you recall having seen it before?

A. Yes, sir.

Q. You dictated that to Miss Conroy, didn't you?

A. Yes, sir.

Q. And that pencil change,—is that not in your handwriting?

A. Yes, sir.

Q. Was that dictated to Miss Conroy on the date of the execution of the assignment?

A. No, sir.

Q. It was not?

A. No, sir.

Q. You are quite positive about that, are you?

A. Yes, sir.

Q. Was it dictated to Miss Conroy on the date that it bears date?

A. Yes, sir.

Q. You are quite positive about that?

A. Yes, sir.

Q. You haven't seen it since that time, have you?

A. No, sir.

Q. Nor one like it?

A. No, sir.

Mr. Hall: I offer that in evidence.

(Admitted and marked Exhibit Trustee D-3).

Q. Now, that refers to an assignment of moneys due on the Central Commercial and Manual Training High School at Newark, to be assigned to the Merchant's National Bank of Jersey City; were you also connected with that bank?

A. No, sir, I was not.

Q. You had no connection with the Merchant's National Bank?

A. Only as a depositor.

Q. You were not a stockholder, officer or director?

A. No, sir.

Q. Did you at the same time dictate a similar paper for the assignment of moneys due from the Paterson High School to the First National Bank?

A. I may have, but I don't recall it.

Q. Do you recall having seen such a paper?

A. Yes, sir.

Q. That is a copy of it (showing paper to witness)?

A. Yes, sir.

Q. That never was executed either?

A. No, sir.

Mr. Hall: It is the same thing as the other, only with the name First National

Bank of the Town of Union instead of the Merchant's National Bank. I offer it in evidence.

(Admitted and marked Exhibit Trustee D-4).

The Court: That is the date of it?

Mr. Hall: August 30, 1910.

Q. Now, isn't it a fact, Mr. Hilbert, that at the time the assignment to the First National Bank of the Town of Union was executed the Glen Company also executed an assignment to the Merchant's National Bank covering moneys on the Newark school?

A. I don't think they did—not when this assignment to the First National Bank was drawn up at their office. I don't believe there was another one executed.

Q. You don't think the Merchant's National Bank got an assignment?

A. Only from hearsay.

Q. You didn't know it?

A. Several of the officers told me.

Q. Didn't you see one executed?

A. No, I did not.

Q. Now, you never took any part in securing moneys from the Merchant's National Bank for the Glen Company, did you?

Mr. Fallon: Well, I object to that as being immaterial and irrelevant. I can't see what bearing that can have upon the transaction between the First National Bank of the Town of Union and the Glen Company.

The Court: Well, the question seems to be irrelevant. How is it relevant, Mr. Hall?

Mr. Hall: I want to show what the con-

nection was between the Merchant's National Bank and this witness and the assignment.

The Court: I will allow it.

A. Only in securing the account for the Merchant's National Bank.

Q. That is, you got the Glen Company to deposit in the Merchant's National Bank?

A. Yes.

Q. And you took no part whatever in connection with loans which the Merchant's National Bank made to the Glen Company?

A. Only acted as broker in bringing the account there. The Merchant's National Bank told me that they would loan them any money that they desired if they would give them an assignment.

By the Court:

Q. Where was the Merchant's National Bank?

A. Jersey City.

Q. Where?

A. Central Avenue.

Q. Was that bank connected with your bank?

A. No, sir.

Q. Were your relations very close?

A. Our business relations were close. They acted as a reserve agent for our bank.

Q. Did you get such an assignment?

A. I did not, because I left that in the hands of the officers of the Merchant's National Bank.

Q. Do you know whether they got an assignment or not?

A. I don't know positively. I didn't see any

assignment pass to them; I couldn't testify to that.

Q. Now, Mr. Hilbert, isn't it a fact that the date of the assignment to the First National Bank of the Town of Union was executed was the same date that you dictated Trustee's Exhibit D-4 to Miss Conroy?

A. It was not. This is dated August 30 and that assignment was dated some time in September.

Q. That doesn't answer my question.

Mr. Hall: Will you repeat my question, Mr. Stenographer.

Q. (Question read by the stenographer) I am not asking you for the dates on the papers, I am asking you if that transaction regarding the assignment to the First National Bank of the Town of Union didn't take place at the same time as the transactions with the Merchant's National Bank?

A. No, it did not.

Q. And the same thing applies to Trustee's Exhibit D-3, which was the assignment of the Newark moneys?

A. Yes, sir.

Q. That was not dictated on the same date that the Glen Company gave an assignment to the Merchant's National Bank?

A. No, sir.

Q. But these two papers, Trustee's Exhibit D-3 and D-4, which are dated August 30, 1910, were both dictated that day?

A. They were dictated August 30th.

Q. Both of them?

A. Yes, sir.

Q. Do you know how much money the Merchant's National Bank loaned to the Glen Engineering Construction Company?

Mr. Fallon: I object, on the ground that it is immaterial and irrelevant.

Mr. Hall: I will withdraw the question.

Q. Did you ever make an examination of the books of the Glen Company?

A. I never made a thorough examination, no, sir.

Q. Did you make any examination?

A. Only through Mr. Alford, and I don't believe that was an examination. He wanted to prove to me that their company was all right.

Q. Were the books placed in your possession?

A. No, sir, they weren't.

Q. Not at all.

A. No, sir.

Q. You didn't go through the books at all?

A. I glanced over them; I did not go through the books.

Q. Did you make any memorandum of what you found in the books?

A. I think I did.

Q. Have you got that memorandum anywhere?

A. No, I have not.

Q. Do you remember when that was?

A. No, sir, I do not.

Q. Do you remember that it was at the time of the execution of the assignment?

A. No, sir, I do not.

Q. Do you remember that it wasn't at that time?

A. No, I do not.

Q. Do you remember what the result of your examination was?

A. That the company was all right, according to their books.

Q. Did you find out what its indebtedness was?

A. I don't recall that.

Q. Did you find out how much capital stock had been issued?

A. I think it was $10,000.

Q. And how much had been paid for it?

A. I didn't find that out—only took the word of Mr. Downey and Mr. Alford.

Q. Did you find out what accounts receivable that company had?

A. I did.

Q. What were they?

A. I don't recall the amounts. Of course they were receivable from several contracts, I think.

Q. And what were the contracts?

A. One at Newark, N. J., and one at Paterson, N. J., and one at New Dorp, Staten Island, and another contract which I don't recall.

Q. Those three contracts were all under way, as you understood it, at the time?

A. Yes, sir.

Q. Do you know, whether, from your examination of the books, much work had been done under any of those contracts?

A. Why, I believe there was several of them pretty nearly completed.

Q. Well, when you say several of them are you referring to the Paterson Contract and the Newark contract?

A. I am referring to the Paterson contract and I believe the New Dorp contract.

Q. You think the Paterson contract was nearly completed?

A. Yes.

Q. That is your recollection from your examination of the books?

A. Yes, sometime in September.

Q. That is what I want to know—we have got down to it at last. Sometime in September you made an examination of those books, didn't you, 1910?

A. Yes, sir.

Q. And wasn't that the very day that you took the assignment?

A. No, sir, it was not.

Q. Do you remember the day of the week that you took the assignment?

A. No, I do not; I don't remember.

By the Court:

Q. Was it before or after you took the assignment?

A. I believe it was after we secured the assignment.

By the Court, continued:

Q. What makes you believe that?

A. Why, the reason of that is, the Merchant's National Bank of Jersey City were about to loan the Glen Engineering Construction Company some moneys and they asked me to try to find out what their assets and liabilities were—what they had above their outstanding accounts and accounts receivable.

Q. You think that was after the assignment had been procured?

A. I am very positive that it was; I feel quite positive, but am not sure.

Q. Would not the ordinary inference be that you made that investigation before you took the assignment? A. Well, it would. Yes, I guess it would.

Q. Well, what is your recollection now, or have you any at all?

A. Why, I have not; I couldn't testify truthfully to it because I don't know.

The Court: Proceed.

Q. Did you make a report to the Merchant's National Bank as to the results of your investigation?

A. Yes, sir; I think I did.

Q. Was it in writing?

A. No, sir.

Q. Do you know whether it is a matter of record in the books of the Merchant's National Bank?

A. No, sir, I do not.

Q. And you didn't keep any copy for your own information?

A. No, sir.

Q. You didn't give anybody a copy?

A. I don't recall that; I am not positive whether I did or not.

Q. Did you give Mr. Alford a copy of it?

A. I don't recall that.

Q. Do you recall that you didn't give him a copy of it?

A. No, I don't know; I don't recall it.

Q. It was in writing, was it?

A. I don't recall it.

Q. You don't recall making any figures on paper at all in connection with that examination, do you?

A. I recall making some figures, but I don't remember anything about it, whether I gave a copy to Mr. Alford or whether I didn't.

Cross Examination on behalf of the Joseph Sharpe Con. Co. by Judge Lewis:

Q. You said awhile ago that the reason the examination was made was that Mr. Alford wanted to prove to you that the company was all right; is that right?

A. Yes, sir.

Q. How did the question about the company being all right come up?

A. In regard to securing additional moneys from the Merchant's National Bank.

Q. Were you connected with the Merchant's bank?

A. Only as a depositor—no connection only as a depositor.

Q. Individual depositor or depositor of funds of the First National Bank of the Town of Union?

A. Both.

Q. What was the surplus of the First National Bank of the Town of Union?

A. $25,000.

Q. In the month of July, 1910, what was the surplus?

A. I can't tell that.

Q. The bank was entitled to loan ten per cent. of the capital and surplus too, was it not?

A. Not the way I understand the law.

Q. When did the Glen Engineering Construction Company cease to deposit money in the First National Bank of the Town of Union?

A. I couldn't answer that.

Q. Did it make any deposits subsequent to the 29th day of August, 1910?

A. I believe it did; I couldn't testify to that; I would have to see the books.

Q. Were you still connected with the First National Bank of the Town of Union when you made the examination of the books you speak of?

A. Yes, sir.

Q. And you left the First National Bank of the Town of Union in the month of October, 1910?

A. October or November.

Q. You said in October, did you not?

A. October, yes.

Q. Do you remember the date?

A. I do not.

Q. Who is Mr. Conway?

A. He was formerly President of the Institution.

Q. Of which institution?

A. First National Bank.

Q. Who is Mr. Hofmann?

A. He is the Vice President of the First National Bank.

Q. And you and Mr. Conway and Mr. Hofmann, as I understand it, went over to New York, to the Glen Engineering Construction Company at the time that you got this assignment; is that so?

A. Yes, sir.

Q. Why was it necessary for the whole force of the bank, practically, to go over to the office of the company in New York to get that assignment?

A. I believe at the time Mr. Conway was going over there on other business he had with the Glen Engineering Construction Company and the officers of the bank insisted upon Mr. Hofmann securing this assignment, and I went over with Mr. Hofmann to verify the statements that Mr. Alford had made in regard to giving the assignment.

Q. What officers of the bank had insisted that this assignment should be procured?

A. Why, the entire board of directors.

Q. When, in relation to this visit of all the officers?

A. Sometime in April or May; in fact, they had several times.

Q. Do you mean to say, then, that although the Board of Directors had insisted in April or May that this assignment should be procured, the officers didn't act upon it until the month of September, 1910?

A. Why, the officers of the bank left it in the hands of Mr. Conway to take care of and I believe that he was looking after it.

Q. Well, then, why did they all go in September, 1910, and what was the immediate cause of that visit?

A. Well, the cause was they wanted to get the assignment which they had been promised several times.

Q. Do you know what the other business of Mr. Conway was there?

A. I don't know, I think furnishing some material. I don't really know.

Q. He was furnishing material to the Glen Engineering Company?

A. To the Glen Engineering Construction Company.

Q. What materials?

A. I think it was slate and tile; that is his business, at any rate.

Q. Has he any claim against that company now for any indebtedness?

A. I don't know.

By the Court:

Q. Besides being President of the bank he ran a slate business?

A. Yes, sir.

Q. Where?

A. In the Town of Union.

Q. Did Mr. Conway want payment of his account at that time?

A. I think he went there several times for payments, I don't know—I don't know Mr. Conway's business.

Q. Well, do you remember whether he asked for payment at that time?

A. I think he did.

Q. And do you know how much was owing to him?

A. I don't recall.

Q. When did they promise that they would pay him?

A. I don't know.

Q. They didn't pay him that day?

A. Well, I couldn't tell you that; I don't know about that.

Q. Well, you were there all the time with him, were you not?

A. He was there with Mr. Alford alone in some conversation; I don't know what they were talking about.

Q. Are you now connected with the Merchant's National Bank?

A. No, sir.

By the Court:

Q. What is your present business?

A. Why, I am in a surety business.

Q. Not connected with either of the banks?

A. No, sir.

Q. And not stockholder in either one of them?

A. No, sir.

Q. Now, Mr. Hilbert, why was it that you questioned Mr. Alford when he said to you that the Glen Engineering Construction Company was all right?

A. Only as a matter of business.

Q. Well, what did you say to him that led him to go so far as to take you up there to examine the books?

A. Why, I said that the Merchant's National Bank would not make any loans without they felt that their company was all right and he said, "Well, I will let you look over the books." I don't believe I examined the books; I just ran over the books—over several of the accounts there.

Q. At that time the Glen Engineering Company was a depositor in the Merchant's National Bank, wasn't it?

A. Yes, they were.

Q. Did it change its account from your bank to the Merchant's?

A. No, sir; it had not changed the acount at all.

Q. Did it cease to make deposits in your bank after it opened the account in the Merchant's National?

A. I don't know.

Q. Now, you know about that, don't you, Mr. Hilbert?

A. No, I don't recall that.

Q. Do you remember some loans that were made by the Merchant's National Bank to the Glen Engineering Construction Company?

A. Yes, sir; I do; the first loan that they made.

Q. That was made through your agency, was it not?

A. Yes, sir.

Q. You enabled them to get credit there?

A. Yes, sir.

Q. And they compensated you for your services in that respect?

Mr. Fallon: Well, I object to that as being immaterial.

The Court: I will take it.

A. Yes, sir.

Q. And how much did they pay you as commission for securing these loans?

Mr. Fallon: Same objection.

The Court: I will take it, subject to your objection.

A. Why, they paid me $250.

Q. And that was paid to you each time there was a renewal?

A. No, sir.

Q. How many times did they pay you $250?

A. Once.

Q. Didn't they pay you five times, Mr. Hilbert?

A. No, sir; they did not.

Q. Did they pay the other four to someone else?

A. I know nothing about it.

Q. It was the Glen Company that paid the commission to you?

A. Yes, sir; paid me $250.

Q. And don't you remember when they paid that?

A. It was either the day after the loan was secured or the day before.

Q. What day was it that the loan was secured?

A. I don't recall that.

Q. Who arranged with you to pay this commission, Mr. Hilbert?

A. Mr. Alford.

Q. The note then discounted was a three-months note, as I understand it?

A. I don't recall the time or the amount of the notes.

Q. Didn't Mr. Alford rather protest against paying such large discount on a note of that size?

A. He certainly did not.

Q. Well, is it customary for business concerns in good standing to pay such a bonus as that for discount?

Mr. Fallon: I object as immaterial and irrelevant.

The Court: I will take it.

A. It certainly is; they do pay bonuses.

Q. Business houses in good standing?

A. Yes, sir.

Q. Do they deal with the bank of the Town of Union or with the Merchant's National?

A. No, sir.

Q. Would the paper of that business house, Mr. Hilbert, be considered a good piece of paper where they were paying a bonus of $250 upon a loan of $5,000?

Mr. Fallon: I object on two grounds, as irrelevant and immaterial and as in no way binding upon the First National Bank of the Town of Union.

The Court: I will allow it; proceed.

A. Yes, sir.

By the Court:

Q. Did the Directors of the First National Bank of the Town of Union know that you had received the $250 for securing this loan?

A. No, sir; it was an outside transaction—private matter between myself and Mr. Alford.

Cross Examination on behalf of the Frank Miller Lumber Co. by Mr. McMahon:

Q. In reference to that $250, did you have any understanding with anybody as to how that $250 was to be divided?

Mr. Fallon: I object, on the ground as incompetent, irrelevant and immaterial, as

to what understanding he had with anybody.

The Court: I will take it.

Q. You understand my question, don't you? I will repeat the question: Did you have any understanding with anybody as to a division of that $250, or did you have any understanding that you were to pay it over to anybody else?

A. No, sir; not that $250 I did not.

Q. Did any dispute arise afterwards in reference to that $250 with anybody, that you recollect?

Mr. Fallon: I object, on the same grounds as my former objection.

The Court: I will take it.

A. None with reference to that $250.

Q. Or with any other $250?

Mr. Fallon: I object on the same grounds as before.

The Court: I will take it.

A. (Pause.)

Q. Why do you hesitate so long in answering my question?

A. Your Honor, I would have to explain the entire transaction.

Q. No, you can answer my question; you are under cross examination by me, and I ask you with any other $250.

A. No, I did not have a dispute over any other $250.

Q. Well then, I understand there was no other $250 besides the first $250 paid to you for securing loans?

A. I was to be paid $500 by Mr. Alford and he never paid me.

Q. For that first loan of $5,000?

A. Yes, sir.

By the Court:

Q. The first loan of $5,000 or $6,000?

A. $5,000. Counsel was talking about the first National Bank—my procuring the account for the Merchant's National Bank. I never requested any fee or bonus for procuring the account with the Merchant's National Bank.

Q. Did you ever ask any of the officers of the Glen Company to endorse a note for you?

Mr. Fallon: I object upon the ground as immaterial, irrelevant and incompetent.

The Court: Well, the objection is simply that it is irrelevant.

Mr. Fallon: And immaterial and incompetent.

The Court: Well, immaterial is the same thing. It certainly is competent. I will take it; proceed.

A. I did.

Q. And that note was endorsed in the First National Bank of the Town of Union, wasn't it?

A. Yes, sir.

Q. When was that note endorsed by those officers?

Mr. Fallon: If the Court please, I want to object also upon the ground that it is

not proper cross examination; if he is going to continue he must make him his own witness.

The Court: That is another matter. How is this cross examination?

Mr. McMahon: They have already shown the connection of this man with the First National Bank of the Town of Union.

The Court: You appear to be going into an entirely separate transaction that has no relation whatever to the matter we are trying.

Mr. McMahon: I will withdraw the question.

By Mr. Fallon:

Q. When did you get that $250 Mr. Hilbert,—the first $250?

A. I believe the day when the loan was granted.

Mr. Fallon: I will object again, if the Court please, upon the ground stated, that it is not proper cross examination, not relating to this transaction. It is entirely foreign to the First National Bank of the Town of Union transaction—transaction between this witness and the Merchant's National Bank.

The Court: I have some slight doubt whether this objection is not well taken. But my grasp of the testimony that has already been taken is so slight that I hesitate to exclude anything on the border-line. I think I will take it.

Q. That is, the first loan by the Merchant's National Bank?

A. The first loan, yes, sir, the day after.

Q. It was after that time, wasn't it, that Mr. Alford and you and Mr. Conway and Mr. Hofmann went over to the office of the Glen Engineering Construction Company and got this assignment?

A. I don't recall that.

Q. You don't know either one way or the other,—whether it was before or after?

A. No, I do not.

Q. Haven't you got any recollection on that point at all?

A. No, sir; I have not.

Q. Have you any means of refreshing your recollection on that point?

A. No, sir.

Q. Now, as I understood you a little while ago, you testified that you were the man that brought the Glen people to the First National Bank?

A. Yes, sir.

Q. You were the one that got the business for the bank?

A. Yes, sir.

Q. And you were at that time Secretary of the Board of Directors of the First National Bank of the Town of Union, and Assistant Cashier?

A. Yes, sir.

Q. And a director of the bank of the Town of Union?

A. Yes, sir.

Q. And a stockholder of that bank?

A. Yes, sir.

Q. You held at that time 221 shares of the stock of the First National Bank of the Town of Union?

A. Yes, sir.

Q. During all that time there was a relationship between you and the First National Bank of the Town of Union and the Merchant's National Bank which continued during that summer and up to October, 1910; isn't that right?

A. Yes, sir.

Q. And during all that time you were a stockholder of the First National Bank of the Town of Union?

A. Yes, sir.

Q. And during all of that time a part of the consideration for that stock was a note of yours which was held by the Merchant's National Bank? Isn't that right?

Mr. Fallon: I object to that, upon the ground that it is entirely irrelevant and immaterial, and not proper cross examination.

The Court: Well, how is it cross-examination?

Mr. McMahon: I am showing the connection that this witness had, who was the man who dealt with the Glen Engineering Construction Company, with the two banks. He knew what was going on.

The Court: Why is it important to go into the private source of the money with which the witness purchased his stock in the bank?

Mr. McMahon: Only to show his friendly relationship and intimate relationship with the Merchant's National Bank.

The Court: You are too far afield.

Mr. McMahon: I understood him a little while ago to testify that he wasn't connected with that at all.

The Court: I haven't so understood his testimony.

Mr. McMahon: He testified, first, that he was only a depositor with the Merchant's National Bank and didn't know anything about their affairs.

The Court: He was the broker who negotiated the first loan of $5,000 with the Merchant's National Bank for the engineering company.

Mr. McMahon: I want to show, not only was he the broker at that time but that he brought these people to the First National Bank of the Town of Union, and when their credit was exhausted there he brought them over here.

The Court: He testified to those two facts. Why should we go into the borrowing money from the one bank and buying stock in the other. I do not think that is near enough to what we have on trial to allow it.

Q. Mr. Hilbert, I show you a book and ask you if that is the bank book of the Glen Engineering Construction Company with the First National Bank of the Town of Union?

A. Yes, sir.

Q. And there are some entries in that book in your handwriting?

A. Yes, sir (after examining the book).

Q. You occasionally used to bring that book over and make deposits for the Glen Engineering Construction Company in your bank?

A. Yes, sir.

Q. You went over to their office on Fifth Avenue and made the deposits in your bank and then returned the book?

A. Yes, sir.

Q. And that book shows all the transactions with the First National Bank of the Town of Union?

A. It should show.

Q. On the part of the Glen Engineering Construction Company?

A. It should show them.

Q. Well, when a bank book is balanced all the transactions that appear on your books are entered in here, aren't they?

A. Yes, sir.

Q. So that it does, in fact, show all the transactions?

A. It must.

Q. You will notice that it has been balanced three times?

A. Yes, sir.

Q. Three balances made like that without any deposit would unquestionably satisfy you in your mind that it does cover all the transactions, would it not?

A. It should, according to that.

By the Court:

Q. Well, did they have any other account than what is entered in that book in your bank?

A. Not the Glen Engineering Construction Company.

Mr. McMahon: I offer that book in evidence.

(Admitted in evidence and marked Trustees Exhibit D-5.)

Q. Did you ever make any deposits in the Merchant's National Bank of moneys for the Glen Engineering Construction Co.?

A. No, sir.

Q. You never took deposits over there?

A. No, sir.

Q. Getting back to that first $250; when you received that didn't you say that you would turn it over to somebody?

A. I did not.

Q. When you received one of these two fifties, either the first one or any other one, didn't you say you would turn it over to somebody?

A. No, sir, I only received one.

Q. Was there $250 besides that $250 paid to you which was supposed to have been paid to somebody else for that first loan?

Mr. Fallon: I object, if the Court please, to this line of examination, upon the ground as urged before, that it is not cross-examination and it is not competent and relevant to the issue.

The Court: Well, I will take it. The question is in bad form on account of the use of that word "supposed." I suggest that you reconstruct it.

Q. Was another $250 to be paid to somebody else for that first loan besides that $250 paid to you?

A. It was to be paid to me; I was to receive $500.

Q. Was anybody to get a part of that $500?

A. Yes, sir.

Q. Who?

A. Why, it was to be paid for expenses to the Merchant's National Bank.

Q. Who, I say; answer my question.

A. Paid to one of the officers.

Q. Which officer?

A. Dr. Albanesius.

Q. President of the Merchant's National Bank.

A. (No answer.)

FURTHER CROSS EXAMINATION ON BEHALF OF THE TRUSTEE:

By Mr. Hall:

Q. Did you take the $5,000 note of the Glen Company that was discounted by the Merchant's National Bank from the Glen Company to the Merchant's and have it entered in the book?

A. I don't recall.

Q. You don't remember whether you actually did it or not?

A. No, I don't.

Q. Do you remember the date when it was done?

A. No, I do not—I don't remember the date. I think it was some time in September, but I don't know.

Q. It was on the first $5,000 note discounted by the Merchant's Bank for the Glen Company that you received a commission of $250?

A. Yes, sir.

Q. Now wasn't that about the first of September, 1910?

A. It was about the time the loan was granted.

Q. Whenever the loan of $5,000 was granted it was that date and you don't recall whether that was prior to the time you took the assignment to the Town of Union Bank or not?

A. No, I don't recall.

Q. Was there ever in the minute book of the Town of Union bank any record of this assignment?

A. I don't recall that.

Q. You don't recall the directors passing any resolution requiring an assignment or directing somebody to go and get an assignment?

A. I think there was some resolution passed directing Mr. Conway to do it.

Q. You were the Secretary of the Board of Directors of the Town of Union Bank?

A. Yes.

Q. Have you the minute-book here?

A. No, sir, I have not.

Q. Is it here?

A. I don't know where it is; it may be here.

Q. Could you get it and have it here this afternoon?

Mr. Fallon: I will say that he certainly will not get it; he has got nothing to do with the bank now.

Mr. McMahon: Can you get it and have it here this afternoon, Mr. Fallon?

Mr. Fallon: I think I can get it.

Q. Was there any other letter written by you or any other officer of the Town of Union Bank, demanding this assignment?

A. I don't recall; I don't remember what was written.

Q. You don't recall anything having been put on paper and sent out demanding it?

A. I don't think there was.

Q. You don't recall ever having written it?

A. No, sir, I don't think I did.

Q. Do you remember, Mr. Hilbert, whether you made an examination of the Glen Company's books for the purpose of that first $5,000 loan by the Merchant's National Bank?

A. Yes, I believe I did, because I was requested by the Merchant's National Bank to do so.

Q. Then you must have made that examination prior to the time of the assignment, didn't you?

A. I should have, but I don't think I did. I made it after the assignment.

Re-direct Examination by Mr. Fallon:

Q. Mr. Hilbert, after making the examination that you did of the books of the Glen Engineering Construction Company did you recommend to the Merchant's National Bank the making of the loan.

Judge Lewis: I object to that, if your Honor please.

The Court: Why?

Judge Lewis: It is irrelevant.

The Court: I will take it.

A. Yes, sir.

Q. And did the examination that you made evidence to you that the Glen Company was in good financial condition?

Judge Lewis: I object to that. That isn't competent evidence.

The Court: How is it competent?

Mr. Fallon: If there is objection to it I will withdraw it.

Q. In the talk that you had with Smith Alford and Mr. Downey of the Glen Construction Company was there any mention made between you as to the concern being insolvent or contemplating insolvency?

A. No, sir, there was not.

By the Court:

Q. Did you hear nothing said in any meeting of the Board of Directors of the First National Bank of the Town of Union about the Glen Company being insolvent?

A. No, sir.

Q. You never heard the subject mentioned?

A. Not as to their insolvency or solvency, owing to the fact that they thought the company was all right, and that was the reason for granting loans to them.

Q. No, but after that second loan of $5,000 had been made and before the assignment was procured,

did you hear no talk in the Board, or in the Committee of the Board, about the Glen Company probably being insolvent?

A. No, sir.

Q. Or that it might become insolvent?

A. No, sir.

Q. Or that it would be a wise policy to get that assignment as soon as possible?

A. No, sir, there was nothing said, because they required that assignment when they made their first loan—when they agreed to the first loan.

Judge Lewis: I would like to ask a few questions. I am a little out of order.

FURTHER CROSS EXAMINATION ON BEHALF OF JOS. SHARPE CON. COMPANY.

By Judge Lewis:

Q. How often did the Directors meet at your bank?

A. Once a month.

Q. How were the discounts made by the bank between meetings of the Board?

A. Why, by the approval of the Discount Committee, approval of the Board, or one of the officers of the institution.

Q. You will observe I asked between meetings of the Board; the Board cannot approve between meetings?

A. By the Discount Committee.

Q. Who was your Discount Committee?

A. Some of the officers and some of the Directors.

Q. Who of the officers—what are the names of the officers that were on the Discount Committee?

A. Mr. Conway, Mr. Hofmann, Mr. Hannan—

Q. Was he an officer?

A. He was a Director.

Q. I am asking for the officers.

A. There were two other officers besides myself; I don't recall their names.

Q. And what directors?

A. Mr. Hannan, Mr. Booth and two others I don't recall.

Q. You were on the Committee?

A. Yes, sir.

Q. Did the Committee have regular meetings?

A. Yes, sir.

Q. Did it keep minutes?

A. Yes, sir.

Q. How many made a quorum?

A. Five.

Q. Where is the Minute Book of the Committee?

A. I don't know.

Q. Who kept it?

A. I suppose it is in the bank.

Q. Who kept it?

A. I kept the minute book.

Q. Of the Discount Committee?

A. Yes, sir.

Q. How often did they meet?

A. Weekly.

Q. And how were discounts made between discount meetings?

A. Made by any officer of the Discount Committee.

Q. Any officer?

A. Yes.

Q. They had power to discount notes for the bank?

A. No, not without the approval of each one of the Discount Committee. I had to call them up and secure their permission before a loan could be discounted.

Q. You mean to say that if a customer came to the bank to have a note discounted you would call each member of the Committee up on the telephone and ask him whether that particular note should be discounted?

A. Yes, sir.

Q. Did you do that in every instance?

A. In some I believe I did.

By the Court:

Q. Sometimes you took the risk, did you, of your action being ratified by the Committee?

A. Yes, sir.

Q. Were the minutes of the Discount Committee kept in the same book that the Directors' minutes were kept in?

A. Yes, sir.

Further Re-direct Examination by Mr. Fallon:

Q. Is there any particular reason why you negotiated between the Merchant's National Bank and the Glen Engineering Construction Company for loans?

A. Yes, sir, there was.

Q. What was the reason?

A. The reason was that we wouldn't loan them any additional money.

Q. They had borrowed up to the limit, according to the National banking laws, had they?

A. Yes.

Q. And there was no other reason that actuated you, was there?

A. No, sir, no other reason whatsoever.

Examination by the Court:

Q. Let me ask you whether you had heard any talk about the Glen Engineering Company being liable to be insolvent in the Board meetings or Committee meetings? Did you have any talk on that subject with the President or Treasurer?

A. No, sir, I did not.

Q. Did you have any talk with them about there being some little risk about this loan and, therefore, you ought to get the assignment?

A. Only that they had said this to them, that they ought to be protected should anything happen to them, which I thought was necessary to get and which I had agreed to get from the start.

Q. What did they say to that?

A. They didn't say anything; only said that I was responsible and I would have to get this assignment, because they made these loans on those conditions.

Q. Do you recollect now whether it was in pursuance of one of those talks that you made the examination of the books of the Company?

A. Why, no, sir. The reason I made the examination was due to the Merchant's National Bank and not due to any conversation or any talk by the officers of the First National Bank.

Q. Wholly because of the loan which was to be made by the Merchant's Bank?

A. Yes.

Q. What loan was that?

A. Why, the first loan was $5,000. They were to loan them up to $20,000, the Merchant's National Bank—they agreed to loan them up to that amount.

Q. The first loan was for $5,000?

A. $5,000.

Q. What was the second?

A. That I don't recall, Judge.

Q. Well, was it with reference to making the second loan that you made the examination?

A. That might be possible, in regard to making the second loan.

Q. May it have been that you made an examination before any loan was made?

A. It may have been.

Q. What was the date of the first loan?

A. That I don't recall; some time in September.

Q. Well now, try and recall, Mr. Hilbert. At that time the Glen Company was indebted to the bank on one note for $10,000?

A. Yes, sir.

Q. And the Glen Company had received the proceeds of another note for $5,000?

A. Yes, sir.

Q. And now it was about to borrow up to $20,000 from the Merchant's National Bank?

A. Yes, sir.

Q. And you were acting as broker in making that arrangement?

A. Yes, sir.

Q. Now, can you tell whether you made the

examination of the books of the Glen Engineering Construction Company at the request of the Merchant's Bank before they agreed to loan up to $20,000?

A. I am not positive about it; I couldn't recall it.

Q. Can you tell whether it was a part of your negotiation when you went to the bank and you opened the matter and stated the circumstances, and you were putting in a proposition to have the bank loan up to $20,000 to this concern—can you tell whether you were then instructed to look up the concern, examine their books and report to the bank before they went into the enterprise?

A. Why, if I recall it, I think the first loan that they made to them was made without looking at the books. If I recall the conversation I had with the Merchant's National Bank officials, before they could get any additional amount of money they were to know something about the company.

Q. Now, when was it understood that they were to have the loan up to $20,000, when the first loan was made or later?

A. Practically when the first loan was made.

Q. And then you think before they went on and carried that program out it occurred to them that they had better have the books examined?

A. Yes, sir.

Q. What was the amount of the second loan?

A. That I don't recall; I think it was $5,000.

Further Cross Examination, on behalf of the Trustee, by Mr. Hall:

Q. I show you a paper and ask you if you can identify that as the first note discounted by the

Merchant's National Bank for the Glen Company?

A. Yes, sir.

Q. And the date of that is August 25th, 1910?

A. Yes, sir.

Q. Now, wasn't it just prior to that that you made the examination of the books?

A. It must have been between these dates—August 25th and August 30th.

Mr. Hall: I offer the note in evidence.

(Admitted in evidence and marked Trustee's Exhibit D-6.)

FREDERICK J. STUHR, sworn on behalf of the First National Bank of the Town of Union, testified as follows:

Direct Examination by Mr. Fallon:

Q. Mr. Stuhr, you are a counsellor at law of the State of New Jersey?

A. Attorney at law of the State of New Jersey.

Q. Were you attorney for the First National Bank in September, 1910?

A. I attended to some of their matters.

Q. Do you recall preparing a paper which has been referred to as an assignment between the Glen Engineering Construction Company and the First National Bank of the Town of Union?

A. Yes, sir. You mean the fact of the preparation thereof?

Q. Yes.

A. Yes, I do.

Q. Do you remember when that was prepared?

A. No, I can't recall now unless referred to by the document itself.

Q. Will you state under what circumstances you prepared that paper?

A. It was, I think, late in the summer of 1910. I had prepared an assignment for the Merchant's National Bank for some building that was being constructed in Newark by the Glen Engineering Construction Company, and Mr. Conway, who was then President of the Bank of the Town of Union, rang me up on the 'phone and said, "I understand that you have prepared an assignment for the Glen Engineering Construction Company relative to a Newark institution; will you be good enough to prepare one for me, or for our bank, on the Board of Education" (I believe it was) "in Paterson," and I said,

"All right, I will." And then he proceeded to give me a few of the facts, that is, so far as the amount was concerned and what it was for.

I had hardly hung up the receiver from Mr. Conway when I was again called to the telephone and it was Mr. Alford—I distinctly recollect it was Mr. Alford because he has a Southern accent—of the Glen Engineering Construction Company and he said, "I understand that you are preparing an assignment" or "that you are going to prepare an assignment for the First National Bank of the Town of Union."

I said, "Yes, Mr. Conway has just directed me to do so."

"Wait a minute," he said, "and I will put you in touch with our attorney" and he then connected me with his attorney. I could recall the name dis-

tinctly if I heard it, but I don't remember the name now, over in New York. And with a brief intermission of perhaps a half a moment I was in communication with the attorney of the Glen Engineering Construction Company, and he said concerning this assignment, "I will send you over a few of the facts that I want you to put in," and I said, "all right" and I then waited.

The next day brought to me just a few facts concerning the assignment, with a communication that I should prepare it that way. I did prepare the assignment then, the following day, with those facts from the Glen Engineering Construction Company represented by this attorney, and the facts concerning the amount and the date and one thing and another that Mr. Conway had given me of the First National Bank of the Town of Union.

I then forwarded that assignment, upon the request of this attorney from New York—he said, "When you have got the thing completed send it over to me and I will examine it and have the Glen Engineering Construction Company execute it." I did so and the next I saw of the document was that it was returned to me executed by the Glen Engineering Construction Company, with the request that I file it with the Board of Education at Paterson.

Q. Did you so file it?

A. And I did file it with the Board of Education. I think a day or two after I had received it back I filed it with the clerk of the Board of Education at Paterson.

Q. This assignment that you prepared for the First National Bank of the Town of Union you say was not prepared at the same time with the assign-

ment of the Glen Engineering Construction Company to the Merchant's National Bank?

A. Oh, no.

Q. How much time intervened, if you recall?

A. I am quite sure a week or two weeks, perhaps even longer.

By the Court:

Q. That is to say, you drew the papers that far apart?

A. Yes. As to their execution I don't recall.

Q. You don't know?

A. No, I don't know. The documents themselves would show when they were executed.

Q. And I suppose you have a book which would give the date when you drafted each agreement?

A. I have not.

Q. Have you no record by which you can fix the date?

A. I have not.

Cross Examination, on behalf of the Trustee in Bankruptcy, by Mr. Hall:

Q. You have a letter which you received from the New York attorney with the facts that were to be put in the assignment?

A. No, it was only a draft and I destroyed it the same day that I prepared the assignment, and when I submitted the assignment, together with the facts that Mr. Conway had given me over the 'phone—I destroyed that; I threw it in the basket, and mailed the assignment over to this lawyer in New York, whose name I have forgotten.

Q. Do you know how Mr. Conway had learned that you were to draw an assignment for the Merchant's National Bank?

A. I do not.

Q. He told you, as I understand it, over the telephone that he knew you had drawn such an assignment?

A. Yes, he said that.

Q. What did you do with the assignment of the Merchant's National Bank when you drew it?

A. Well, I don't recall what I did with that; I don't remember whether it was filed in Newark with the clerk or not.

Q. I mean prior to its execution, when you first drew the assignment to the Merchant's National Bank, to whom did you give it?

A. I don't recall that now.

Q. Do you recall whether you delivered it to some person or sent it by mail?

A. Before it was executed?

Q. Yes.

A. Oh, I sent it over to this same lawyer in New York. He asked me to send it over.

Q. Do you keep a letter book?

A. I do not.

Q. Or copies of letters?

A. I do have copies of letters, yes.

Recess until two o'clock.

Afternoon Session.

JOHN CONWAY, sworn on behalf of the First National Bank of the Town of Union, testified as follows:

Direct Examination by Mr. Fallon:

Q. Mr. Conway, what business are you engaged in?

A. Marble and slate business.

Q. And where do you live?

A. 71 Columbia Terrace, Weehawken.

Q. And where is your place of business?

A. 396 Broadway, Union Hill.

Q. What is the name of your concern?

A. Structural Supply Company.

Q. And you were the President of the First National Bank of the Town of Union in 1910?

A. Yes, sir.

Q. And were you President before that time?

A. Yes, sir.

Q. How long?

A. During the last four months of 1909.

Q. And up to what time were you the President of the bank?

A. Up to the first of February, 1911.

Q. I show you exhibit marked T. of U. D-1, being a note of $10,000, and ask you if you recall the circumstances of making that note?

A. Yes, sir.

Q. Just tell us with whom you talked about the making of that note—what was said and when it was said.

A. Mr. Hilbert induced the Glen Engineering Construction Company to open an account in our bank and it was a question of requiring some discount with that company and I wanted to know something about their standing, and he furnished me a contract on the highschool in Paterson which was somewheres around $300,000, and I asked what equity there was there, and he said the City of Paterson retains 15%.

Q. With whom did you have this talk?

A. Smith Alford.

Q. Where did this talk take place?

A. In our office. And a copy of the contract was left there.

Q. You mean in the office of the bank?

A. Yes, sir.

Q. And who else was present at the time of this conversation?

A. Mr. Hilbert was present and I believe Mr. Hofmann was present.

Q. Was this conversation had before this note was made?

A. Oh, yes, it was before the first note of $6,000 was discounted.

Q. Was the $6,000 note discounted before the $10,000 note was discounted?

A. Yes, sir.

Q. Now, when this $10,000 was sought for and before the note was discounted, was there any conversation between you and Smith Alford, the President of the Glen Engineering Construction Company?

A. Yes. We had a duplicate of the contract. It was not the assignment that I stated it was when I first looked at it—

Q. You say you had a duplicate of the contract?

A. It was a duplicate of the contract showing the amount of the contract and showing all the payments in the different stages of the work.

Q. What talk did you have with Smith Alford before this note was discounted?

A. And then Mr. Alford agreed, if that wasn't what I expected it was to give me an assignment.

Mr. McMahon: He is asked for the conversations and not what he expected.

Q. Tell us what was said?

A. He agreed to give me the excess of balance over the 15%.

Q. Just tell us what he said and what you said.

A. I told Mr. Alford we wanted an assignment of some payments.

Q. Did you tell him why? Was any reason stated by you?

A. The $10,000 loan was too big a loan.

The Court: Try now and give us the conversation that occurred—what you said and what he said, and then after that if you do not narrate the whole of it counsel will suggest questions to you.

A. (Continuing) It is hard to give it word for word; just the essence I can give you.

By the Court:

Q. Give it as near as you can. What took place back and forth; who opened the subject?

A. Mr. Hilbert. I sent him over and he brought Mr. Alford over to our office. I told Mr. Alford what we wanted and he agreed that we should have it.

Q. What did you say?

A. I told him I wanted an assignment of some payments on that job.

Q. You say "on that job;" what job?

A. On the Paterson school. Mr. Alford said, "I will give you an assignment of the balance, which will reach about $42,000, and whatever comes over and above what we owe you you can turn over to us." So I agreed to that. Then the matter rested for quite a long while, and the Board of Directors pushed me to get that assignment. I went over for it and came back again, and then went to Judge

Stuhr and had Judge Stuhr draw up an assignment.

Q. I want to know when that talk was had between you and Smith Alford about that assignment; was it before making the $10,000 loan or afterwards?

A. We did not get it then, so I threatened to call the note unless I got it.

Q. How long before you made this $10,000 note was it that you talked with Smith Alford about making an assignment?

A. Well, the $6,000 note was paid off about seven days before the request was made.

By the Court:

Q. I understood you to say the talk about an assignment was had when Mr. Alford was brought over to your office?

A. Yes.

Q. By Mr. Hilbert?

A. Yes, sir.

Q. Was that the first time that you had met Mr. Alford?

A. Yes, that is the first time; I never seen him before.

Q. Now, at that time I understand you to say you had a talk about the assignment?

A. We talked about the assignment and in place of the assignment I got a duplicate of the contract.

Q. When did you get that duplicate?

A. When we first started to do business.

Q. Now, we will go back again. Before you had discounted the $6,000 note you had a talk, you say, with Mr. Alford about getting an assignment?

A. Yes, getting security.

Q. That is right, isn't it?

A. Yes, that's right.

Q. And you say that he agreed to give you an assignment?

A. An assignment, yes.

Q. And when did he send you the duplicate, that same day?

A. Just as soon as we opened the account we got that duplicate.

Q. But when, with reference to that day?

A. Mr. Hilbert brought over the duplicate, probably three or four days afterwards.

Q. And was that after you had discounted the $6,000 note?

A. After I agreed to discount it; the note wasn't through at that time.

Q. Then Mr. Hilbert brought the duplicate of the contract over and you examined it?

A. I looked it over and kept it.

Q. And then you discounted the note?

A. I discounted the note.

Q. Did you have any more talk about the assignment?

A. Not immediately at that stage of the game.

Q. And when did you next have a talk about the assignment?

A. In passing the $10,000 note. He wanted it enlarged and I wanted some substantial security.

Q. Well, when was it?

A. This was about April.

Q. Well, what is the date of the note?

A. April 19.

Q. Can you tell us about when that conversation occurred—the next conversation—the second conversation—about when was that between you and Mr. Alford about an assignment?

A. I can't remember the circumstances exactly. It was on the action regarding this note, and that must be either the 18th, 17th or 19th.

By the Court (continued):

Q. Was it before or after the $6,000 loan had been paid?

A. After the $6,000 loan.

Q. Are you sure of that?

A. Yes, sir.

The Court: Proceed.

Q. And when he applied for this further $10,000, what conversation did you and he have then with respect to security, if any?

A. He agreed to give me a payment.

Q. What did you say to him and what did he say to you?

A. I told Mr. Hilbert he would have to have some security and he told Mr. Alford and Mr. Alford came over.

Mr. McMahon: I object.

Q. I am asking you to tell only the conversation between you and Mr. Alford.

A. Mr. Alford came to our office and I told him we would have to have some security, and he told me "I will give you security on the last payment when the building is fully accepted."

Q. Did he tell you what kind of security?

A. The last payment on the Paterson school.

Q. What was he to give; what was he to do?

A. By assignment.

Q. Who suggested the assignment, he or you?

A. I suggested it.

Q. Did he say anything then—how much money would be coming from that job?

A. About $42,000.

Q. What else did he say at that time about the assignment or about anything else pertaining to that note?

A. You see, he give me the assignment. I had sent over after it two or three times. I then went to Mr. Stuhr and had him draw up an assignment.

Q. That was months afterwards?

A. Yes.

Q. Before you discounted this note what did you do about getting an asignment? What was said?

A. I had the promise of an assignment of $42,000.

Q. How long did you hold up this note before you discounted it, after this conversation you had with him?

Mr. Hall: Oh, that is too leading, if your Honor please.

Q. Well, I will put this question, Mr. Conway: I want you to tell the Court, when you spoke about the assignment and he said he would give it to you, whether you then discounted the note—whether you did it at the time that talk was had or whether some time after?

Mr. McMahon: The bank records speak for that; this is not the best evidence.

The Court: No objection is pending.

Mr. McMahon: I object to it on the ground that it is not the best evidence.

Q. Do you know when this note was discounted?
A. Yes, sir.
Q. On what date was the note discounted?
A. The 19th of April.

By the Court:

Q. How do you know that?
A. By the date of the note.

Q. When was that note first exhibited to you, do you know, or can you tell from the paper itself, or in any other way?
A. (No answer.)

By the Court:

Q. Was it ever exhibited to you? Did you ever see it before this suit arose?
A. This note was exhibited, yes.

Q. Was this note brought to your attention before the note was discounted?
A. Yes, sir.

By the Court:

Q. Was it brought before the Board?
A. Before the whole Board, yes.

Q. And was the note then present at that meeting of the Board?
A. Yes, sir, the note was present.
Q. And exhibited?
A. And exhibited.
Q. And then was there action taken by the Board?

A. Action was taken by the Discount Committee.

Q. Now, perhaps you can answer the question put you a little while ago: When with reference to that Board meeting at which this note was accepted and discounted did the conversation occur between you and Mr. Alford in which he promised to give the bank an assignment of the final payment on the school? Was it that day, the day before, or three days before, or the day after, or when?

A. Security was promised maybe two or three days afterwards, but before the note was discounted. I had to wait to see. I don't know whether the note came in on Monday or Wednesday.

Q. You say that note is dated the 19th?

A. Yes, but I don't know what day that was.

Q. Could you say whether it was before the note was dated or bears date that any application was made for discount?

A. It would be before the date.

Q. Was the talk you had with Alford on the very day that the note bears date or was it before that?

A. It was before I presented the matter before the Board of Directors. Whether it was the same date this note was made or between times I can't exactly say.

Q. And was it after that note was made that you had spoken of an assignment?

A. It was before the note was discounted.

Q. Well, then, was there anything said as between you and Mr. Alford, as to why you wanted this assignment? I wish you would tell us, in your own way, everything you know about this. I don't

want to be putting questions to you; you are an intelligent man and ought to be able to tell us all you know about it.

A. Now, I will tell you the whole story: Mr. Alford came to our office one Monday night and talked over opening an account with us. He showed us he had over $500,000 worth of work, had a school in Bergenfields, hospital in New Dorp, Staten Island, a large school in Newark, and a large school in Paterson, and there was 15% of all this money to be retained by the various municipalities and companies, and that is what I was basing his credit on to some extent; but when it come to be a $10,000 obligation I had him come over there and then I wanted some security.

Q. Tell us what was said.

A. I told Mr. Alford in order to discount this I required an assignment of some of his contracts. He agreed to give me an assignment of the 15% retained by the City of Paterson on the high school. I did not get that for some time. Mr. Hofmann and I went over there one day and demanded it. Mr. Downey was there and Mr. Alford was there, and that day we got the assignment of the last payment.

Q. That was September, 1910, was it?

A. That was in September, yes—early part of September.

Q. After you had the talk with Mr. Alford with respect to the proposed assignment and when you presented this note to the Board of Directors for their consideration did you say anything to them about a talk that you had had with Alford respecting the assignment?

A. I certainly did; I told him I wanted to get security on the last payment on the Paterson school.

Q. Did you tell them just how that security was to come?

A. I told him what it amounted to, 15% of the whole thing.

Q. Did you tell them just what the nature of the security was to be?

A. Yes, I told him I was going to get an assignment on the last payment on the Paterson high school, which was 15% of the whole contract.

Q. Were you instructed then by the Board of Directors as to what you should do with the note?

A. The Board of Directors passed the note, with the understanding that they got that security.

Q. And was the note then discounted?

A. Yes, sir.

Q. Did you do anything afterwards, then, with respect to obtaining this assignment from the Glen Engineering Construction Company?

A. Yes, I called for it from time to time. I was there from time to time and I was in on other business as well as after the security, in their place in New York. Every time I was there I asked for this security.

Q. What did you say to them and what did they say to you?

A. It was Mr. Alford I was dealing with.

Q. What did you say and what did he say?

A. I was asking for the assignment for that last payment. He said it was all right, I could get it any time.

Q. You were also dealing in your Structural Supply Company with the Glen Engineering Construction Company, were you not?

A. Yes, sir.

Q. And did you call there at the office of the Glen Engineering Construction Company to see

them about the bank assignment all the time, or the proposed assignment, or did you call there on your private business?

A. I called often on my private business.

Q. Now when you obtained the assignment in September, 1910, what were the circumstances under which you obtained it? Had there been any talk between you and Alford, or how did you get it? I want to know what led up to your obtaining the assignment in September which you had tried to get months before.

A. The Directors of the bank were after it.

Q. The Directors of the bank at the beginning told you to get the assignment, did they not?

A. Yes, and they got impatient because I didn't furnish it.

Q. Do you know what the custom of the bank then was with respect to getting collateral for notes that they were discounting?

Mr. McMahon: I object to that, if your Honor please. It is not material here what the custom of the bank was. It is entirely incompetent.

The Court: I will take it.

A. Yes, sir.

Q. What was the custom?

A. The custom was to get security first. If they couldn't get sufficient security not to discount the note.

Q. Now did you communicate with Judge Stuhr and ask him to prepare an assignment for the bank?

A. Yes.

Q. How came you to do that?

A. The reason for doing that was, the Board of Directors were pushing me to get that assignment

and it wasn't forthcoming, and I went to the trouble of drawing it myself.

Q. Do you remember telephoning to Judge Stuhr, or did you go to see him?

A. I went to see him and I telephoned him a couple of times besides.

Q. Well now, coming down to the day when the paper was signed, which is the assignment in question, where was that paper signed?

A. It was signed in the office of the Glen Engineering Construction Company.

Q. Who was present?

A. Mr. Downey and myself was there, Mr. Hilbert and Mr. Hofmann was there.

Q. Was Mr. Alford there?

A. Yes.

Q. Was Miss Conroy there?

A. Yes, in one office.

Q. Were the papers signed there while you were there?

A. Yes.

Q. After it was signed what was done with it?

A. Mr. Downey went out and acknowledged it.

Q. Did he leave the office where you were in?

A. Yes, sir.

Q. How long was he away?

A. Not more than five minutes.

Q. And when he returned what was done with the paper?

A. Handed to Mr. Hofmann.

Q. And then it was brought to the bank later?

A. Brought to the bank later.

Q. Was it you that sent it to Judge Stuhr afterwards to be filed with the Clerk of the Board of Education in Paterson?

A. I think I instructed the cashier to mail it to Judge Stuhr to have it filed.

Q. Now, Mr. Conway, was there at any time, before you obtained this assignment, any question at all in your mind as to the financial condition of the company?

A. No, sir.

Mr. McMahon: I object to that, if your Honor please, and move to strike out the answer as incompetent.

The Court: I will allow it.

Q. And was there at any time, up to the time that you heard this concern went into bankruptcy, any question in your mind as to its financial condition?

A. No, sir. I was estimating on the Paterson high school myself, to give them over $6,000 of credit.

Q. When was that that you were so estimating?

A. The latter part of August.

By the Court:

Q. I do not understand you.

A. Counsel was questioning me about what I thought of their credit.

Q. You say you were considering giving them credit?

A. Yes.

Q. Personally, in your own private business for material?

A. Yes, sir.

Q. What credit did you give them?

A. Oh, I gave them about $1,500 worth.

Q. How long did you continue that credit?

A. Oh, I got paid for what I did in about three months' time. I didn't know the people very long.

Q. How long were you dealing with them and supplying them with material?

A. About June, I think, of 1910, and finished about September.

By the Court (continued):

Q. You supplied material as late as September?

A. Yes, sir.

Q. On what credit?

A. Just on their name.

Q. Yes; on what credit, how much time did you allow them on a bill?

A. I allowed them sixty and ninety days. That bill was not settled.

Q. What bill?

A. The one that I am talking about now.

Q. What bill, the last bill?

A. Yes.

Q. The bill for the last goods that you supplied them?

A. Yes, sir.

Q. You haven't got paid for that?

A. Not yet, no.

Q. And you say that was a bill for material on thirty days' credit?

A. Thirty or sixty days' credit.

Q. Do you know the date of it?

A. There was labor went with that. The last was finished about the last of September.

Q. What labor?

A. Slate work.

Q. Where was that work done?

A. New Dorp, Staten Island, the hospital down there.

Q. You understood Mr. Alford had contracts for about $500,000 worth of work?

A. Yes, and more, too.

Q. And he said there was 15% retained on that?

A. Yes.

Q. What do you know about this $5,000 loan, Mr. Conway, of July 27, 1910, marked Exhibit T. of U. D-2?

A. That note was discounted by Mr. Downey on account of the Glen Engineering Construction Company. He drew a check and paid it over to the Glen Engineering Construction Company.

Q. Why do you say it was discounted by Downey for the Glen Engineering Construction Company? Tell us the conversation.

A. The Glen Engineering Construction Company had the loan of us of $10,000, and to meet the payroll they had to have $5,000 more, and they would have a payment due of something like $18,000 in a few days, and we discounted this note to help them along. Our capital stock was only a hundred thousand dollars and consequently we can't loan only 10%, and to accommodate them we had to take this note.

Q. Did you tell Downey or Alford of the Glen Engineering Construction Company anything to the effect that you couldn't loan them any more than $10,000 because of your capitalization?

A. I did not, no; I wasn't in touch with them in making this loan; it was Mr. Hilbert.

Q. You had nothing to do with making this loan?

A. No.

By the Court:

Q. Did that note go before the Board?

A. It went before the Discount Committee; didn't go before the full Board.

Q. Did any members of the Discount Committee inquire whether the assignment had been made to secure the former note of $10,000?

A. Yes; in fact, this note helped to make us more anxious to get that assignment. The loan was getting too big.

Cross Examination, on behalf of the Trustee in Bankruptcy, by Mr. Hall:

Q. Mr. Conway, did I understand you to say that there was a written application for the discounting of this $10,000 note?

A. No.

Q. There was no written application?

A. Not to my knowledge, no.

Q. I understood you to say there was an application in which it was stated that security was to be given?

A. I said we applied for it in person; I didn't say there was any written application.

Q. I understood you to say this conversation about giving you the assignment took place between you and Mr. Alford and I think you said you met him in connection with that in the Town of Union bank?

A. I was introduced to him in his office before that, but that was the first time he came to our office and talked about a loan.

Q. Had the Glen Engineering Construction Company at the time of this conversation any deposits in your bank?

A. No.

Q. It was when they were first brought to your bank as a customer that you had this conversation?

A. Yes, sir.

Q. And you say at that time they talked over the question of getting discounts and giving you security?

A. Yes, sir.

Q. Did you give them a discount at that time?

A. They made a deposit and the deposit must have been a few days before they got the discount.

Q. What do you call a few days?

A. Two or three days; I don't recall the circumstances just exactly.

Q. I show you Trustee's Exhibit D-1; now you think it was a few days prior to the date of that note?

A. Yes.

Q. That you had this conversation?

A. Yes, sir.

Q. And at the time you had the conversation the Glen Company had no deposit in the First National Bank of Union?

A. That I can't say exactly just now. The books will show that.

Q. No, but you said the conversation took place when Mr. Alford was introduced to you with the idea of the Glen Company becoming a customer of your bank. Is that right?

A. That is right.

Q. And that is when you had the conversation about giving security?

A. And making discounts.

Q. Did they ask you for a discount at that conversation?

A. He didn't ask for any specific discount, but he wanted discounts.

Q. How long after that was it that he did ask you for a specific discount?

A. I couldn't recall the dates exactly.

Q. Was it a week, a day, or a month?

A. Well, that is nearly a year and a half ago and I can't remember it exactly.

By the Court:

Q. Do you remember whether the account was opened with a discount?

A. I don't think it was.

Q. He made a deposit first?

A. Yes. It is a rule not to open an account with discount. Whether there was any exception to this rule or not I don't remember.

Q. Now, when that first conversation about the assignment took place was it then that Mr. Alford informed you about the Paterson contract and referred to an assignment of moneys due on that contract, or did he refer to any specific money that he was going to assign you?

A. The duplicate contract we got was for the Paterson school. At that time I don't think they had the Newark school.

Q. Was reference made at that time to the Paterson school at all?

A. Oh, yes.

Q. Wasn't it a general conversation in which Mr. Alford said, "we want to get discount," and you said, "we will give it to you if you will give us security"—wasn't it a general conversation of that sort?

A. What was brought up to me was the Paterson contract or a duplicate of it.

Q. When was that duplicate contract brought up to you with respect to the discounting of this note for $6,000, Trustee's Exhibit D-1?

A. I could not positively remember dates.

Q. How long after your conversation about the assignment did you get the duplicate contract?

A. It was long before the time we got the duplicate.

Q. No, no, your conversation about the assignment; how long after that conversation did you get the duplicate contract?

A. About security?

Q. Yes.

A. Oh, it couldn't be over a month. It was right in the cold weather.

By the Court:

Q. Mr. Conway, referring to this note for $6,000 (D-1), I call your attention to the fact that this is a note on demand. Now, at the time of that first transaction between the Bank and the Glen Company was the Bank in the habit sometimes of discounting demand notes without collateral?

A. Well, no; we wanted collateral.

Q. What was their actual practice; did they sometimes do it?

A. They sometimes did do it.

Q. If the parties were good?

A. If the parties were good and the sum was small.

Q. Now, Mr. Conway, Exhibit D-5 is the Glen Engineering Construction Company pass book in the First National Bank of the Town of Union, isn't it?

A. Yes, sir.

Q. And from that book it appears that the account was opened February 17, 1910?

A. Yes.

Q. Now, that was almost a month before you were asked to discount a note?

A. Yes.

Q. Now, then I want to ask you again whether your conversation about security took place when they opened the account in the bank or when they asked you to discount the $6,000 note?

A. In opening the account we had a talk about discounts.

Q. When did you have a talk about security; that is what I want to know?

A. It must have been about this time.

Q. About the time of the discounting of the $6,000 note?

A. Yes.

Q. You didn't have any talk about it, then, when you first met Mr. Alford?

A. About certain security. The question was with Mr. Alford about discount when he opened the account, and I answered him, "yes, we will do all we can" and the amount was one that would require security.

Q. Do you consider $6,000 a large amount?

A. Yes, sir.

By the Court:

Q. What was it he said?

A. In opening an account they required discount.

Q. Who said that?

A. Mr. Alford, when Mr. Hilbert brought him in. I said we would do all we could in that line; would be glad to get the account.

Q. Nothing was said about the assignment at that time?

A. Not until the obligations were being made.

Q. When men evidently doing a good business and a large business open an account in your bank you were not in the habit of taking assignments in case they wanted any loans, were you?

A. Not until applications were made for loans.

Q. Now, you say, then, when you discounted this $6,000 note Mr. Alford and you talked about security, and for that he sent you a copy of the Paterson contract; is that right?

A. I had that copy before that note was discounted.

Q. You had the copy of the Paterson contract before this note was discounted?

A. Of course, that was no security.

Q. Did you talk with Mr. Alford about the form of the assignment at all?

A. No.

Q. Did you suggest whether his attorney or your attorney should draw it?

A. I had my attorney draw it.

Q. You had your attorney finally draw it, but I mean when you first talked about it, about giving the assignment?

A. Yes, we did talk about whether his attorney or my attorney should draw it.

Q. When was that talk?

A. I think Mr. Alford showed me a copy that he had in the office, but that one we didn't use. I got this drawn by Judge Stuhr.

Q. You never wrote Mr. Alford or the Glen Company a letter about this assignment, did you?

A. I guess we did. I think the bank did.

Q. You think the bank wrote letters about this assignment?

A. I think so.

Q. You wrote some yourself, didn't you?

A. No.

Q. Who did write?

A. The cashier or Mr. Hilbert.

Q. You think that Mr. Hilbert wrote the Glen Company letters about this assignment?

A. I think so; he wrote them once or twice. I have sent them word if they didn't come I would call the note. They waited three or four weeks before we got the assignment or security.

Q. Now, when you told Judge Stuhr about drawing the assignment did you say anything to him about his having drawn an assignment for the Merchant's National Bank?

A. I don't think I did.

Q. Did you know it at that time?

A. I heard it, yes; I heard that such an assignment was drawn up.

Q. That was when you first went to Judge Stuhr?

A. Yes.

Q. Do you remember when that was?

A. No; it must have been in August. It must have been a week or two before I had it signed.

Q. Are you very sure that this conversation that you had with Mr. Alford about the assignment took place in your office in the bank?

A. Yes.

Q. And not in the Glen Company's office in New York?

A. No.

Q. You didn't go to the Glen office in New York?

A. I often went there, but we didn't talk much about bank business.

Q. When you went to the Glen office in September, when the assignment was excuted, did you say anything to them about material sold them?

A. Usually I did.

Q. You were going there to collect money?

A. Yes.

Q. They owed you then about eight or nine hundred dollars?

A. Yes.

Q. How long had they owed you that at that time?

A. Oh, since last fall.

Q. Since the fall before?

A. Since the fall before, yes.

Q. Almost a year?

A. Yes.

Q. Almost a year they had owed you that eight or nine hundred dollars?

A. Yes.

Q. Had you been in there several times to collect it?

A. Occasionally. The work was done, but it wasn't finished. We had to wait a little while before we cleaned up, and they had some complaints and we had to fix that up, and it wasn't generally due.

Q. You got a payment shortly after that assignment was executed?

A. I don't think so.

Q. Didn't you get a payment of $500 September, 1910?

A. No, I don't think so.

Cross Examination on behalf of Joseph Sharpe Con. Company:

By Judge Lewis:

Q. How long have you known Mr. Downey?

A. Since the early part of 1910.

Q. And how long have you known Mr. Alford?

A. The same time.

Q. How long did you know any other members of the Glen Engineering Construction Company?

A. That was my first introduction to the Glen Engineering Company, the early part of 1910.

Q. I understood you to say that the Glen En-

ginering Construction Company had been owing you eight or nine hundred dollars since the fall of 1909?

A. No.

Mr. Hall: That is what he said.

A. (Continuing.) No, the fall of 1910—due in the fall of 1910.

Q. What did you mean when you said it was due you since the fall before?

A. I didn't mean to say that at all; I made a mistake in the date.

Q. How many contracts have you had with the Glen Engineering Construction Company?

A. Two.

Q. And what were they?

A. One of them was some blackboards in the Bergenfields public school and the other was for the hospital in Staten Island.

Q. When you speak of the hospital in Staten Island you mean the New Dorp work?

A. Yes, sir.

Q. And the money is all secured to be paid to you on the New Dorp work now, isn't it?

A. No, I got a letter day before yesterday requesting us to make a settlement of fifty cents on the dollar.

Q. There is nothing due you on the Paterson high school?

A. Yes.

Q. How much?

A. About $129.

Q. When was that work performed?

A. There was no work performed; some slate delivered there.

New Jersey State Library

Q. When?

A. Must be last spring.

Q. When did you complete the performance of your contract with the Glen Engineering Construction Company in relation to the work on the Paterson high school?

A. I didn't complete any work at all; I just delivered some slate there. I didn't set it.

Q. Well, when did you make your last delivery in Paterson?

A. There was only one delivery. I think it was delivered last April or May.

Q. April or May of 1910?

A. 1911.

Q. How much was that contract?

A. There was no contract. The material was just ordered by mail and shipped there.

Q. What was the value of the whole of it?

A. I think $119, or something like that.

Q. And were you paid that money after or before the discounting of the note of $10,000?

A. I haven't been paid that yet.

Q. What was the eight or nine hundred dollars due you for?

A. Marble work and some slate on the New Dorp job.

Q. Did all your relations with this Glen Engineering Construction Company begin, then, after your connection with the bank?

A. Yes; that is when I first met them.

Q. You never had anything to do with them before that?

A. No.

Cross Examination on behalf of Frank Miller Lumber Company:

By Mr. McMahon:

Q. Now, as I understand it, Mr. Conway, you did some work for the Glen Engineering Construction Co. some time before they failed in December, 1910—the Structural Supply Company supplied material in Staten Island during the early part of 1910 and the latter part of 1909; isn't that the fact?

A. The early part of 1910 we began and finished in the latter part of 1910.

Q. And that whole work was finished some time in 1910, wasn't it?

A. Well, it was supposed to be. There was some little things that we had to go back and fix up.

Q. When you say you supplied the material on the Paterson High School, did you supply it to the Glen Engineering Construction Company?

A. Yes.

Q. April or May, 1911.

Q. You mean in April or May, 1910, because they never did any work there in 1911.

A. It was before the grating was done there; I supplied some slate for the job.

Q. You know that the Glen Company stopped work on their contract in December, 1910, don't you?

A. I thought it was later than that.

Q. You remember when they went into bankruptcy, don't you?

A. Yes.

Q. You remember they went into bankruptcy in December, 1910?

A. Yes. I must have billed my stuff in the summer of 1910.

Q. You undoubtedly mean April or May, 1910, instead of 1911; they owed you this money all the way through the summer of 1910 and up to September, 1910?

A. That's right; it was the early part of 1910. I can't place the date of that order, but I can get it for you.

Q. You were going to the office of the Glen Company quite frequently during this summer, endeavoring to get payments on your New Dorp contract?

A. Well, they treated me fairly well in the early part as to payments.

Q. And in September, 1910, you were particularly pressing about payments, weren't you?

A. I am always pressing about payments; I am short all the time.

Q. And you pressed them so hard in September, 1910, that they paid you $500 on your contract?

A. Was it 1910 that they paid me $500?

Q. Just answer my question, please.

A. They paid me one payment of $500.

Q. In September, 1910?

A. And another $250; I don't know whether it was the same one or not.

Q. Do you remember whether they paid you $500 in 1910?

A. I do not.

Q. I show you a check and ask you if that is your endorsement on that check?

A. It certainly is.

Q. What is the amount of that check?

A. $500.

Q. What is the date of it?

A. September 20, 1910.

Q. So that you did press them so hard in September, 1910, that they made a payment?

A. That is a payment on the $900—the balance.

(The check is marked for identification, Trustee D-7.)

Q. You were going there quite frequently to collect that account or get a check from them?

A. Oh, occasionally.

Q. And you had to go there more than once before you got that check?

A. Oh, yes.

Q. Now, do you say that you had your talk with Mr. Alford with reference to this assignment in the Glen office or in the bank office?

A. It was in the bank office.

Q. Do you remember the conversation you had with Mr. Alford in September, 1910, when you told him that your bank had a demand note and you were going to proceed on it?

A. September, 1910? No, I think I told him that before that time. I didn't say we were going to proceed; I was going to call it unless they gave the security they had promised in the first place.

Q. And he told you if you did that you would never get any of the money you loaned the company?

A. He did not.

Q. It was some time after that conversation when you and Mr. Hofmann and Hilbert went over to the office to see about the assignment? Is that so?

A. Well, that conversation you speak of—it was after that conversation? That conversation never took place. I couldn't place the date.

Q. Well, part of the conversation took place and, so far as you told them, you said you were going to call the loan?

A. That took place many a time. I threatened to call that loan three or four times.

Q. But you never did call it, did you?

A. Oh, yes, I did.

Q. When was that note protested, do you remember?

A. I do not.

Q. Well, read that notice of protest and tell me when that note was protested (showing witness Exhibit T. of U., D-1).

A. The 17th day of February, 1911.

Q. Was James J. McClelland a notary public of yours in the bank?

A. Yes, sir.

Q. Now, you were the president of the bank, weren't you?

A. Yes, sir.

Q. And you say that Mr. Alford gave you a duplicate copy of the contract?

A. Yes, sir.

Q. And you looked it over when you got it?

A. Yes, sir.

Q. As a president of the bank you knew the difference between a contract and assignment, didn't you?

A. I certainly did, yes.

Q. You asked him for the contract because you wanted to arrange the deposit of the money under that contract in your bank?

A. No such intention at all.

Q. And you told him when this $6,000 note was borrowed that you wanted him to deposit all the money under that contract in your bank; isn't that so?

A. No, I didn't tell him I wanted all the money; I wanted as much as possible.

Q. And that is why you got the contract to see

when the payments were going to be made; isn't that so?

A. No, the contract was to show what he had coming—the proof regarding the job.

Q. You say you had some conversation with your Board of Directors with reference to this assignment?

A. Yes, sir.

Q. Did you have any conversation with them in September?

A. No, before September.

Q. Was it in August?

A. July.

Q. You haven't any distinct recollection as to exactly when it was?

A. Not the exact date.

Q. You haven't got any definite idea as to the month or the day?

A. Not exactly, no.

Q. Did I understand you to say that Mr. Hilbert introduced the Glen Company to you?

A. Yes, sir.

Q. You had some conversation with Mr. Hilbert when he brought them over to you, didn't you?

A. Yes, sir.

Q. And that was about two months before they ever asked you to discount any paper?

A. Must have been about that—probably a month and a half.

Q. Now, before you talked with Judge Stuhr about drawing this assignment you had heard that the Merchant's National Bank had gotten an assignment; is that right?

A. No, I heard they were going to get an assignment.

Q. How did you hear that?

A. I don't know how I heard it; I heard it through some one. I don't remember just who told me.

Q. Some one told you that the Merchant's National Bank was going to get an assignment from the Glen Engineering Construction Company?

A. Yes.

Q. The relations between the Merchant's National Bank and the First National Bank of the Town of Union were very close, weren't they?

A. No more than between some other banks.

Q. Many of the directors of the First National Bank of the Town of Union borrowed money from the Merchant's National Bank to pay for their stock, didn't they?

A. Not a great many; probably two or three.

Q. And the Merchant's National Bank carried those notes?

A. Carried those notes.

Q. And it was after you learned that the Merchant's National Bank was going to get an assignment that you and Mr. Hofmann and Hilbert all got on the train and rode over to New York and went into the office of the Glen Engineering Construction Company and demanded this assignment?

A. You are entirely mistaken. Our assignment was drawn before that.

Q. But just as soon as you heard that the Merchant's Bank was going to get an assignment you called up Judge Stuhr; is that right?

A. What do you mean by that?

Q. I mean just exactly what I say.

A. You make a statement and want me to coincide with it.

Q. I am asking you to answer my question.

A. That isn't a question; you are making an assertion.

Q. I am asking you this: After you had a talk with somebody and that somebody had told you that the Merchant's National Bank was going to get an assignment you called up Judge Stuhr about getting up an assignment for your bank?

A. We had ours ordered two weeks previous to that.

Q. Now you heard Judge Stuhr's testimony this morning, didn't you?

A. I did, yes, sir.

Q. Then you want to say that Judge Stuhr is wrong?

A. No, I don't want to say that Judge Stuhr is wrong.

Mr. Fallon: I object to that. You can't characterize the testimony of another witness in that way.

The Court: No, it is not proper.

Q. When was the first loan made by the Merchant's National Bank?

A. I don't know.

Q. Some time in August?

A. I can't say.

By the Court:

Q. Do you remember, Mr. Conway, when you heard that the Merchant's bank was going to get an assignment of the contract?

A. Yes.

Q. Who told you?

A. I don't remember who told me, but I heard

it about the early part of September that they were going to get an assignment and that they had sent certain representatives to Newark to inquire about the standing of the company.

Q. And did you hear at some time who was going to draw the assignment?

A. Judge Stuhr was counsel at the time.

Q. And thereupon did you telephone to Judge Stuhr?

A. Mr. Fallon was away and I telephoned—I went down and saw Judge Stuhr.

Q. To get him to get up your assignment?

A. Yes, the same as this one. I had one drawn two weeks previous to that.

Q. Who had drawn that?

A. It was a printed one.

Q. Who had drawn that?

A. I had it filled in myself. I wasn't satisfied with it.

Q. What did you do with that?

A. Destroyed it.

Q. You didn't go over with that to the Glen office, did you?

A. No.

Q. And you hadn't called up Judge Stuhr at that time at all when you had that one that you filled in yourself?

A. No.

So it is a fact that after you learned that Judge Stuhr was drawing an assignment for the Merchant's National Bank you did call up Judge Stuhr and ask him to draw an assignment for your bank? Isn't that right?

A. Yes, but we had one two weeks before that.

Q. I am not asking you about the one you pre-

pared yourself; I am asking you about the one you called Judge Stuhr up about. You called Judge Stuhr up in reference to that assignment after you had learned from some one that the Merchant's National Bank was going to have an assignment drawn up? Isn't that right?

A. I heard they had one, yes, sir.

Q. How long after you heard about the Merchant's National Bank assignment did you call up Judge Stuhr?

A. Maybe a couple of days—maybe that, and maybe I done it right away.

Q. And it was after you called up Judge Stuhr that you and Mr. Hofmann and Mr. Hilbert took this assignment which Judge Stuhr prepared over to the Glen Company's office and got them to sign it?

A. Yes, sir.

Q. Did you get the assignment from the Glen Company's lawyer?

A. No, I got it from Mr. Alford.

Q. Who took the assignment over there; did you?

A. I think it was mailed over there and I went over to get it. I was very often in the city, and I met Mr. Hofmann and we called up to get the assignment. We didn't go specially for that.

Further Cross Examination on behalf of the Trustee:

By Mr. Hall:

Q. Why did you prepare an assignment yourself, Mr. Conway?

A. Well, I thought it was simple enough to do.

Q. What was the occasion?

A. This security had been promised for quite a while and we wasn't getting it and the Directors was pushing me about it.

Q. I understand you prepared that assignment yourself a couple of weeks before you heard that one was being drawn up for the Merchant's National Bank?

A. That is right. I expected to get one from Mr. Alford, made out previous to that.

Q. But you hadn't discounted any new note and they hadn't come and asked you to discount any new note when you prepared that assignment yourself?

A. No, I done that to fulfill the promise they made when we discounted the previous note.

Q. What put that into your head about that assignment?

A. That was bothering me all the time, to get that assignment.

Q. It was bothering you ever since the March previous?

A. Until I got it.

Further Cross Examination on behalf of Joseph Sharpe Con. Co., by Judge Lewis:

Q. Mr. Conway, on one of the occasions when you were talking with Mr. Alford about the assignment, you say you found that he had a form of an assignment—copy of an assignment—in his office; is that right?

A. Mr. Alford had a copy of assignment, yes.

Q. Did he show it to you?

A. He told me about it; I don't know whether he showed it to me or not; I think he did.

Q. Whom was it to?

A. I don't know who it was to—just an assignment that I might use.

Q. An assignment made by the Glen Engineering Construction Company?

A. I couldn't say who it was made by; I think it was one that was bought—it was printed.

Q. When was that?

A. About a week before I got this one from Judge Stuhr, or two weeks.

Q. What did you tell him then about it; did you ask him to prepare one like that?

A. Ask Mr. Alford?

Q. Yes.

A. I don't know whether I did or not; I don't remember.

Q. How did he come to show this to you?

A. Just talking about the kind of security. We called the note. That was the status.

Q. Was there any arrangement made between you about any assignment?

A. No, as long as we got the security we let the note run along.

Q. Did you know then about the Merchant's National Bank assignment?

A. No, not at that time.

Q. Then it was at least three weeks previous to that time?

A. Three weeks previous, yes.

Re-direct Examination by Mr. Fallon:

Q. Mr. Conway, I understood you to say there was some trouble with the architect on the work which you had done in New Dorp?

A. Yes.

Q. Is that the reason why you had difficulty in getting your money?

Judge Lewis: That is very leading, your Honor.

The Court: Very.

Mr. Fallon: That is all.

ALBERT HOFMANN, sworn on behalf of the First National Bank of the Town of Union, testified as follows:

Direct Examination by Mr. Fallon:

Q. Mr. Hofmann, what is your business?
A. Print cutting.
Q. Are you in business for yourself?
A. Yes.
Q. What is the name of the concern?
A. Hofmann Brothers.
Q. Where is your place of business?
A. 124 Fulton Street, Union Hill.
Q. Are you connected with the First National Bank of the Town of Union?
A. I am.
Q. Were you so connected in April, 1910?
A. I was.
Q. Were you an officer of that bank?
A. Yes, sir.
Q. And are now?
A. Yes.
Q. What office do you hold?
A. First vice-president.
Q. Are you a director of that bank?

A. Yes, sir.

Q. I show you Exhibit D-1, being a note for $10,000, dated April 19, 1910, and ask you if you recall anything about the making of that note and the circumstances attending it.

A. I do.

Q. Did you have a talk with Smith Alford about the making of that note before it was discounted?

A. I did, several days—two or three days—before the making of this note.

Q. Just tell the Court now what you know about the matter.

A. I was at work in my factory when Mr. Conway called me on the 'phone and asked me to call at the bank; that Mr. Hilbert was there with Mr. Alford and Mr. Alford wanted a loan of $10,000. He wanted me to come over to the bank and talk it over and I went over to the bank and met Mr. Conway, Mr. Hilbert and Mr. Alford there, and Mr. Alford stated his proposition. I said to him that I had previously heard through Mr. Conway and Mr. Hilbert that he had offered an assignment on the Paterson high school on a $6,000 loan we had previously made and which we didn't get, and so I told him if he would make an assignment such as he proposed I would vote in favor of passing this note. Mr. Alford stated he would guarantee that the assignment would be forthcoming. On the strength of that guarantee from Mr. Alford we put the note before the Discount Committee and passed it.

Q. What further do you know about the matter of this assignment?

A. After the note was passed I personally kept at Mr. Conway to get the assignment.

Q. Did you look after the Glen Engineering Company yourself for the purpose of obtaining this assignment?

A. After speaking to Mr. Conway several times about getting this assignment I called up the Glen Engineering Construction Company and asked them why the assignment wasn't forthcoming. They then told me over the wire—

Mr. McMahon: One moment; is he testifying to a telephone conversation?

Q. Do you know whether it was Mr. Alford who was talking?

A. I could tell Mr. Alford's voice as the man I was talking with. Mr. Alford then said he would see that the assignment would come. I waited several more weeks and it didn't come, so I spoke to the cashier of the bank at the time, in the absence of Mr. Conway, and told him if the assignment wasn't forthcoming to call the loan. I believe the loan was called at the time and they then guaranteed again that they would get the assignment to us and to extend the loan.

Q. Well, in September, 1910, did you go over to the office of the Glen Engineering Construction Company to obtain this assignment?

A. Well, the assignment was being prepared before that.

Q. Tell us all you know about it.

A. I believe some time in August I was at Mr. Conway day after day to get the assignment. I told him—in fact he knew it—that the Board of Directors were at every meeting asking Mr. Conway why he didn't obtain the assignment—I say I

was at him all the time to go over there and it seems when he got over there they talked about other business and Conway always neglected to get the assignment; and so I made it my business to go over and I did go over and got it.

Q. When you went over to get it who was present?

A. Mr. Alford, Mr. Downey and Mr. Hilbert, and Miss Conroy.

Q. Now, have you been with the bank since its organization?

A. Yes, sir.

Q. And have you been an officer and director of the bank since that time?

A. Yes, sir.

Q. Have you been a member of the Discount Committee since the organization of the bank?

A. Yes.

Q. Has there ever been a time when any other party got a loan from the bank without collateral security?

A. No, sir.

Q. What was the rule of the bank then with respect to obtaining security for loans, if you can tell us?

A. The rule of the bank is not to loan over a thousand or fifteen hundred without obtaining collateral security.

Q. Now, with respect to the $5,000 loan (showing witness Exhibit T. of U. D-2) are you familiar with that matter?

A. Yes, sir.

Q. Do you know how that came to be made?

A. Yes, sir.

Q. Just tell us about that, please.

A. The note appears to be in the name of P. H. Downey. This was, I believe, on a Wednesday or Thursday, before the Glen Engineering Construction Company made up their pay-roll. I believe they paid on Fridays—or made up their pay-roll on Friday. Mr. Hilbert came over with this note—

Q. Just tell us the talks you had with Alford or Downey, or someone connected with the Glen Company.

Q. (By the Court) Did you have any talk with the Glen Company? Or was your talk with Mr. Hilbert?

A. Mr. Hilbert brought this in the very first and I had a talk with the Glen Engineering Construction Company, and afterwards I called up the Glen Company and told Mr. Alford that we couldn't pass another $5,000 loan for them unless—we had already passed the $10,000 loan and we couldn't pass any more one-tenth of our capital to any one party. It was then suggested that the note could be made by Mr. Downey and that Mr. Downey would open an account with the First National Bank and then put it through his personal account, which he did. He opened an account of $2,000 and on the strength of the opening of the account we passed this note to Mr. Downey, and the very same day we passed the note the check came in from Mr. Downey making the $5,000 payable to the Glen Engineering Construction Company, and I believe those checks are here.

Q. I show you this paper signed P. H. Downey and ask you if that is the check you refer to?

A. That is the check we paid.

Mr. Fallon: I offer that check in evidence.

Mr. McMahon: I object to it, upon the ground that it is incompetent and irrelevant.

The Court: I will take it subject to the objection.

(Admitted and marked T. O. U. D-3).

Cross Examination on behalf of Joseph Sharpe Con. Company:

Q. (By Judge Lewis) How often are you at the bank, Mr. Hofmann?

A. Well, about every day.

Q. Do you have meetings of this Discount Committee every day?

A. No, sir.

Q. How often did you inquire at the bank whether this expected assignment had been made to the bank of the moneys growing due on the Paterson high school?

A. I believe that I asked almost every two or three weeks. I asked Mr. Conway whether he got the assignment yet. It was left to him to get the assignment.

Q. How do you explain that you waited six months without getting that assignment if you were so anxious to get it?

A. The question usually came up at a monthly meeting of the directors, whether the assignment had been obtained, and Mr. Conway would say, "no, it hadn't been obtained yet, but the Glen Engineering Construction Company promised to get it the following week" and it was put off from week to week and month after month until I said, "I will make it my business now to get it."

Q. When the question of loaning Mr. Downey came up didn't you consider that you were evading the law by making a loan in that manner?

A. No, I believe Mr. Alford stated at the time that they had a payment coming on some other job —what job I forget now, but there was a payment of $18,000 or $20,000 coming and this loan was to be only for a week or so until that payment was received, and I figured for so short a time we would accommodate them.

Q. But you knew you were evading the law by making the loan in that way?

A. I never looked at that as evading the law; I did it as an accommodation to them.

Q. You say you refused to make the loan of this $5,000 direct to the Glen Company because your capitalization woud not permit it under the banking laws?

A. Yes.

Q. Then you proposed, as I understand it, to make the loan, but to do it in such a way as to escape the consequences of some illegal act on your part in making such a loan?

A. I did not propose that; that was proposed by the Glen Engineering Construction Company.

Q. But you assented to it?

A. I agreed to make that loan for that short time, for $5,000, at that time, yes.

Q. Although you knew the law prohibited it?

A. It was paid back inside of a week.

Examination by the Court:

Q. Did you make any loan of $5,000 to the Glen Engineering Construction Company?

A. No, sir, we did not.

Q. Take that paper marked T. of U., D-2 and look at the note.

A. That loan was made to P. H. Downey.

Q. P. H. Downey?

A. Yes, sir.

Q. You knew what Mr. Downey was going to do with the proceeds of the note, I suppose?

A. Mr. Downey said that he would probably hand it over to the Glen Engineering Construction Company. He didn't tell me that, but it was proven that he did when the checks came in.

Q. Mr. Downey had it in his power to pay it over to anybody?

A. Yes.

Q. He could have checked it out to you?

A. Yes, sir.

Q. Or apply it to any purpose he saw fit?

A. Yes.

Q. I understand you to say you declined to violate the law and loan the $5,000 to the Glen Engineering Construction Company?

A. The additional $5,000, yes.

Q. You insisted that the loan should be made to Mr. Downey personally?

A. That was suggested by the Glen Engineering Construction Company that we make the note to Mr. Downey and Mr. Downey would draw his check on his personal account for $2,000.

Cross Examination on behalf of Frank Miller Lumber Company:

Q. By Mr. McMahon) You say that you were the one that got this assignment?

A. I was the one that went over that day to get it, yes, sir, on the 16th day of September.

Q. The 16th of September?

A. I believe so.

Q. And you were not the one who called up Judge Stuhr and had the assignment prepared, were you?

A. No, sir.

Q. Did anybody tell you about the assignment to the Merchant's National Bank?

A. At the time we had our first assignment prepared Mr. Conway had one drawn up and I knew nothing about that at that time.

Q. I am asking you at any time before the time this assignment was actually signed by anybody? I am asking you about the assignment to the Merchant's National Bank.

A. No, sir.

Q. Were you one of those who had notes in the Merchant's National Bank for your stock in the First National Bank of the Town of Union?

Mr. Fallon: I object as incompetent, immaterial and irrelevant, and not proper cross-examination.

The Court: How is it cross-examination.

Mr. McMahon: I want to show the relationship between these men and the Merchant's National Bank.

A. I refuse to answer it.

The Court: It is too remote. The witness refuses to answer and the Court will not compel him to.

Q. You know Mr. Hilbert, don't you?

A. Yes, sir.

Q. You know Mr. Hilbert brought this Glen Engineering Construction Company over to the bank of the Town of Union?

A. He introduced him to us, yes, sir.

Q. And they opened an account there with a deposit?

A. Yes, sir.

Q. A couple of months after that they made an application to your bank for a loan?

A. Yes, sir.

The Court: Isn't that all undisputed? Are we not wasting a great deal of time?

Mr. McMahon: Not with this witness.

Q. Now, you didn't have any conversation with Mr. Alford, or with anybody connected with the Glen Engineering Construction Company, when this account was opened, did you?

A. No, sir.

Q. When did you have any conversation with him, when the first note was discounted?

A. What note are you referring to?

Q. The first note of $6,000.

A. Made some time in March?

Q. Yes.

A. On March 23rd, wasn't it?

Q. March 10.

Mr. Hall: Discounted on the 22nd.

Mr. McMahon: Dated the 10th day of March.

A. I was at that meeting when that note was discounted.

Q. I am asking you when you had a conversation with the Glen Engineering Construction Company.

A. Not at that time, no, sir.

Q. So that the first time you had some conversation was about this $10,000, when the note came up in your Discount Committee meeting?

A. Before that $10,000 note came up.

Q. When was the application made for a loan of $10,000?

A. The day I was called over from my office to the bank to meet Mr. Alford.

Q. What day was that?

A. A few days before the granting of that loan.

Q. What day was it, do you know?

A. That I can't recollect.

Q. What date was it, do you know?

A. I can't recollect; must have been the 17th or 16th—a few days before the loan was granted.

Q. Was the note there then?

A. I believe that Mr. Alford spoke of discounting that note; he may have had it. The note came up at the next Discount Committee meeting.

Q. When was the next Discount Committee meeting?

A. On a Wednesday, I believe.

Q. Who were at that Discount Committee meeting?

A. I can't recollect just the ones that were there.

Q. How many on the Committee?

A. I believe there were eight at that time.

Q. Who were they?

A. Mr. Conway, Mr. Hilbert, myself, Mr. Hannan—

Q. What was his first name?

A. John H. or John M.

Q. Was he in business in the Town of Union?

A. Yes, sir.

Q. Who were the others?

A. I believe Mr. Booth was one.

Q. Who were the others?

A. I believe Mr. Brand; I am not sure now, but that is my recollection.

Q. Who were the others?

A. I believe that is all.

Q. Who were the members of the Board of Directors at that time?

A. Mr. Conway, and myself, Mr. Menger, Mr. Berger, Mr. Brand, Mr. Booth, Mr. Fallon, Mr. Hilbert—there were fifteen, I don't know whether I have got them all or not.

Q. You knew who they were?

A. Yes, sir. There was Mr. McClelland, Mr. Hannan—

The Court: Can we not get along a little faster. This doesn't seem to be of vital importance.

A. (Continuing) Mr. Minschel—it is pretty hard to remember them all. I guess that is all I can remember just now.

Q. The Discount Committee met once a month?

A. Once a week.

Q. And the Board of Directors once a month?

A. Yes, sir.

Cross Examination on behalf of the Trustee in Bankruptcy:

Q. (By Mr. Hall) Did you look over the minute book to-day of the directors and Discount Committee?

A. To-day?

Q. Yes.

A. No, sir.

Q. Have you looked over it in the court room here?

A. Yes, sir.

Q. You kept the minutes, I understand?

A. Yes, sir.

Q. Both of the Board of Directors and Discount Committee?

A. Yes, sir.

Q. Do you know, as a matter of fact, whether there is any entry in the minutes of a meeting of the Board of Directors or of the Discount Committee referring to an assignment from the Glen Engineering Construction Company?

A. That I couldn't tell you; I haven't looked over it for some time.

Q. Do you know whether the minute book is in court to-day?

A. I believe it is.

LEON L. DARLING, sworn on behalf of the First National Bank of the Town of Union, testified as follows:

Direct Examination by Mr. Fallon:

Q. Mr. Darling, what is your business?

A. Cashier.

Q. Of what bank?

A. First National Bank of the Town of Union.

Q. Since what time have you been cashier of that bank?

A. November 16, 1911.

Q. Have you here the books of the bank—

A. (Interrupting) Pardon me, Mr. Fallon, I wish to correct that; it is November 16, 1910.

Q. (Continuing) Showing the account between the Glen Engineering Construction Company and the First National Bank of the Town of Union?

A. Yes, sir.

Q. Will you refer to those books and tell us on what date, as appears from those books, the note for $10,000 was discounted by the bank for the company.

Mr. McMahon: That is objected to on the ground, first, that it appears that the witness didn't keep the books, but he had those entries made; and, secondly, because the books of the bank are not binding upon the defendants here.

The Court: Are you now offering the books on that point?

Mr. Fallon: I am asking him to look at the books and tell us from the books upon what day the note for $10,000 was discounted.

The Court: That is a very objectionable form of question. The objection will be sustained. Is there any real dispute about these things, gentlemen?

Q. Can you tell, Mr. Darling, from your books how much appears to be due and owing the First National Bank of the Town of Union from the Glen Engineering Construction Company?

Mr. McMahon: I object to that upon the same grounds.

Mr. Fallon: I submit that this man is the custodian of those books and he can tell us what is due and owing.

The Court: The objection is that the witness is asked to testify from the books. That is the point of the question.

Q. Mr. Darling, is the sum of $15,000, which is the sum of the two notes D-1 and D-2, now due and owing to the First National Bank of the Town of Union?

A. Yes, sir.

Mr. McMahon: That is a conclusion of law.

The Court: Counsel heard the question and is too late with his objection.

Q. Since you have been connected with the institution have either of those notes been paid?

A. No, sir.

Q. Have you been the custodian of those notes since you have been the cashier of the institution?

A. Yes, sir.

Q. (By the Court) Mr. Darling, let me see if I understand your testimony: You were asked a question that was not objected to and you answered it to the effect, as I understood you, that the books showed an indebtedness of $15,000 from the Glen Engineering Construction Company to your bank—

Mr. McMahon: He didn't testify to that, if your Honor please; he testified that it

was that sum that is due and owing the bank.

The Court: No objection was made to it.

Q. (By the Court continued) You have answered that the sum of $15,000 was due to your bank on these notes, the note for $10,000, of April 19, 1910, and the note for $5,000 dated July 27, 1910, and I ask you, referring to this note of $5,000, is the amount due on that note due from the maker and endorsers of it?

A. (after examining the notes) Yes, sir.

Q. The amount of that $5,000 note?

A. Yes, sir.

Q. The proceeds of it were credited to the account of Mr. P. H. Downey, were they not?

A. Yes, sir.

Q. And to no other person?

A. No, sir.

Q. Is it a fact that on the same day when these moneys were so credited that there was a check drawn for a like amount to the order of the Glen Engineering Construction Company?

A. Yes, sir.

Cross Examination on behalf of the Trustee in Bankruptcy:

Q. (By Mr. Hall) Have you the minute book here?

A. The minute book is in the rear of the room.

By Judge Lewis:

Q. You don't keep the minutes, do you? A. A. No, I do not.

By Mr. Hall:

Q. Who does keep the minute book?

A. Mr. Brand, the Assistant Cashier.

By Judge Lewis:

Q. Mr. Hilbert formerly kept them?
A. Yes.

By Mr. Hall:

A. (After examining the notes) Yes, sir.
Q. You don't know anything about the minutes?
A. No, sir.

The further hearing is adjourned to Thursday, March 7, 1912, ten o'clock in the forenoon, at the Chancery Chambers in Jersey City.

Chancery Chambers, Jersey City,
Thursday, March 7, 1912, 10 A. M.

PRESENT:

WILLIAM B. GOURLEY, Esq.,
For the Complainant,
FRANK H. HALL, Esq.,
For the Trustee in Bankruptcy,
EDWARD WARD MCMAHON, Esq.,
For Frank Miller Lumber Company,
Hon. WILLIAM I. LEWIS,
For Joseph Sharpe Construction Company.
JOHN J. FALLON, Esq.,
For First Nat. Bank of Town of Union.
WILLIAM F. DELANEY, Esq.,
For Matthew S. Payne,
ANDREW L. BOYLAN, Esq.,
For Herringbone Metal Lath Co.

The Court: Are counsel ready to proceed?

Mr. Hall: Your Honor will remember the Herringbone Metal Lath Company's claim was to have been proved at the last hearing, but Mr. Alford wasn't here, and I understand counsel is here to prove that claim.

Mr. Boylan: If there is no objection I would like to put in our proofs on that claim.

Mr. Delaney: I also want to say, in the matter of the Payne assignment, that Mr. Stanchcliffe, of the New York bar, is tied up in the trial of a case and will not be able to be here until this afternoon. I understand there will be other testimony this morning that will occupy your Honor's time.

The Court: There seems to be no objection to your matter going over until two o'clock, provided we can occupy the time until that hour. I do not know how much evidence there is to be taken this morning. Well, proceed, gentlemen.

On behalf of the Herringbone Metal Lath Co. Lien Claim.

SMITH ALFORD, sworn on behalf of the lien claim of the Herringbone Metal Lath Company, testified as follows:

Direct Examination by Mr. Boylan:

Q. Where do you reside?
A. Flushing, Long Island.
Q. What is your occupation?
A. Engineer and builders.
Q. And were you connected with the Glen En-

gineering Construction Company in March, 1910?

A. I was.

Q. In what capacity?

A. I was President and General Manager.

A. And as such were you familiar with the firms or individuals who furnished material for the construction of the Paterson high school?

A. I was.

Q. What kind of lath was used in that building?

A. Herringbone Metal Lath.

Q. And who furnished that?

A. The Herringbone Metal Lath Company.

Q. Do you know about how much was furnished?

A. Between four and five thousand yards, I think.

Q. And was there anything else furnished with the lath?

A. Some staples.

Q. Do you know about how much of that was used?

A. I don't remember the quantity—enough to put on that number of yards of lath.

Q. And can you say what the value of that metal lath and staples was?

A. Why, $750.

No Cross Examination.

On behalf of the Assignment of the First National Bank of the Town of Union.

(Miss) MARIE CONROY, sworn on behalf of the First National Bank of the Town of Union, testified as follows:

Direct Eamination by Mr. Fallon:

Q. Miss Conroy, where do you live?

A. Glen Ridge.

Q. New Jersey?

A. Yes.

Q. You were in the employ of the Glen Engineering Construction Company, were you not, in March and April, 1910?

A. I was.

Q. In what capacity?

Q. Bookkeeper and stenographer.

Q. I show you Exhibit C-6 offered in this case, and ask you if that signature "Attest, Marie Conroy" is your handwriting?

A. It is.

Q. And were the names "The Glen Engineering Construction Company, Smith Alford, President, P. H. Downey, Treasurer" signed to that instrument in your presence?

A. Yes.

Q. And do you know the seal affixed to that instrument to be the seal of the Glen Engineering Construction Company?

A. Yes.

The Court: Do you offer the assignment in evidence?

Mr. Fallon: It has been offered heretofore. If there is any doubt about it I offer it again.

Mr. McMahon: I object to it, because it is not properly proved and not shown to be an act of the corporation. It is not shown that there was a resolution by the Board of Directors, authorizing any such assignment or that the officers had any power in the absence of the Board of Directors to execute any such assignment.

The Court: It will be received in evidence as prima facie of the assignment of the company. The seal is proved. It will be received in evidence as an assignment; before, I think it was offered in evidence as a paper in the files of the Comptroller; I surmise that was the extent of the offer before.

(Assignment to First National Bank of the Town of Union admitted in evidence as Exhibit C-6.)

Q. Miss Conroy, I show you a book which has the word "Ledger" on the outside of it, and ask you if you can identify this book as a book of the Glen Engineering Construction Company, as kept by you?

A. I do.

Q. I refer you to page 250 of the Ledger and ask you if that is the account between the First National Bank of the Town of Union and the Glen Engineering Construction Company?

A. Yes.

Mr. Fallon: I offer this book in evidence.

(Admitted in evidence and marked T. of U. D-3.)

Q. Will you tell us from that account what amount appears to be due and owing to the First National Bank of the Town of Union from the Glen Engineering Construction Company.

Mr. McMahon: The account speaks for itself.

Q. Will you just dictate to the stenographer those amounts, so that we can get it in the record.

A. On the Credit side is the following:

April 4,	Check, ...	$6,009.00
June 30,	Interest, ...	118.33
July 8,	Check, ...	4,005.33
Aug. 22,	Check, ...	5,000.00
Oct. 22,	Interest (PHD $76.67, GLEN interest $153.33, making a total of),.....	230.00

On the Debit side I find the following:

Mar. 16,	Check, ...	$6,000.00
Apr. 20,		10,000.00
June 30,	.....	4,000.00
Aug. 14,	P. H. Downey,	5,000.00

Q. Do you know what this item of August 14, $5,000 P. H. Downey, refers to? Why is that "P. H. Downey" written in there?

A. That was money that Mr. Downey drew from the bank.

Q. Do you know what bank?

A. The First National Bank of the Town of Union.

Q. And paid over to the Glen Engineering Construction Co.?

A. Yes.

Q. And from whom did you receive this information to make the entry?

A. I don't know.

Judge Lewis: I object, if your Honor please, to the admission of the book as evi-

dence of any loan of $5,000 by the First National Bank of the Town of Union to the defendant The Glen Engineering Construction Company, upon the ground that it now appears from the evidence that the loan was not made to the Glen Engineering Construction Company by the bank, but was made by the bank to Mr. Downey, who made the loan to the Glen Engineering Construction Company.

The Court: I will admit the book, not at all upon the theory that it proves an indebtedness from the Glen Engineering Company to the bank on this note of $5,000, or for any other $5,000, but it is an admission on the part of the Glen Engineering Company that it owes $5,000, or did owe $5,000, apparently on this note, or as the result of this transaction for which the note was given, directly to the bank. Proof of such loan is another matter, but it tends towards that and therefore I will admit it. The force of it, of course, will be a matter for argument.

Judge Lewis: I may have misunderstood your Honor; I understood your Honor to say that it appeared that the note had been given directly to the bank by the Glen Engineering Construction Company.

The Court: No, not at all; certainly not. We have here a transaction which, it will be contended on one side, was an indebtedness pure and simple, or resulted in an indebtedness pure and simple, from Mr. Downey and the endorser—the President, I think (to the bank), but it is claimed that

in fact the result of that transaction, in equity, was to create an indebtedness direct from the Glen Engineering Construction Company to the bank. That is, apparently, the difficult proposition which the bank has to make out in this case. There may be a great deal of proof on that subject; there are various ways by which it may be shown, during the course of this trial, that, in fact, either at the time of the transaction or at a subsequent time an indebtedness of $5,000 arose directly from the Glen Engineering Construction Company to the bank, out of a series of transactions of which the giving of the note was only a part—the first part. Now then, inasmuch as this proof may be presented, and we have an admision on the part of the Glen Company that it was owing $5,000 directly to the bank, I shall take the proof in that view. The force of it, as I said before will be a matter for argument later. Proceed. If counsel cannot proceed without this note I should feel obliged to give them an opportunity to cross-examine later. I do not know what the importance of this cross-examiination is; is it a matter of much consequence,

Mr. McMahon: I expect to show that there is no admission on this note, because that doesn't appear on that note at all. I think I can show it.

Mr. Fallon: My insistment is against that, anyway.

The Court: You require the notes for that, do you?

Mr. McMahon: I may be able to show it without that, if your Honor please.

Cross Examination on behalf of Frank Miller Lumber Co.:

Q. (By Mr. McMahon) Will you turn to page 279 of the ledger, please; is there an item on there, "July 27, P. H. Downey, $5,000?"

A. Yes.

Q. Will you please explain what that item is. What is that account on that page?

A. It is money advanced by Mr. Downey.

Q. Whose account is it?

A. P. H. Downey's.

Mr. Fallon: I object to this as not proper cross-examination. I have only referred to page 236.

The Court: I will allow it.

Q. Is this entry in your handwriting?

A. Yes, it is.

Q. "July 27, First National Bank, $5,000?"

A. Yes.

Q. What does the 98 refer to?

A. Cash book.

Q. And is that a credit to Mr. Downey of that amount?

A. No, it is a debit.

Q. (By Mr. Hall) What do you mean by a debit?

A. I mean it is money the company owes Mr. Downey. Then it is a credit, isn't it?

Q. Yes, just a matter of point of view.

Q. I show you page 98 of the cash book; is the corresponding item shown on that page?

A. Yes.

Q. Now, what transaction does that item in the ledger of July 27, $5,000 and the item in the cash book of July 27, P. H. Downey, $5,000—being page 98 in the cash book and page 279 in the ledger—represent?

A. Why, that represents the money Mr. Downey got from the First National bank.

Q. And on a note of Mr. Downey's of July 27?

A. Yes.

Mr. Fallon: I shall object to that, unless the witness knows of that transaction concerning the $5,000 note.

The Court: Presumably, the witness will answer questions from her knowledge. It is proper cross-examination.

Mr. Fallon: I object, furthermore, on the ground that it is not proper cross-examination.

Mr. McMahon: That has been ruled on once.

The Court: Proceed.

Q. And that was the note upon which Mr. Downey borrowed $5,000 on July 27, from the First National Bank?

A. Yes.

Q. Does that $5,000 note of July 27 appear on the Glen Engineering Construction Company account at all with the First National Bank of the Town of Union?

A. No.

Q. That does not appear on the account of the First National Bank of the Town of Union at all?

A. No.

Q. Which is Exhibit T. of U. D-3? Does it appear on that page at all?

A. No.

Mr. McMahon: I offer page 279 of the ledger and page 98 of the cash book in evidence.

Mr. Fallon: I object, until I have a chance to cross-examine the witness on it. I do not think that the matter is testified to within her personal knowledge, and that is the reason I want a chance to cross-examine.

Mr. McMahon: If that objection is raised, if your Honor please, I object now and ask your Honor to strike out the page of the ledger, 256, upon the ground that it appears from the further testimony of the witness that it is entirely irrelevant and immaterial to the issues involved in this case and doesn't contain any admission against the Glen Engineering Construction Company.

The Court: I will allow it to stand, and will admit this.

(Page 297 of the Ledger and page 98 of the Cash book are admitted in evidence on behalf of the Frank Miller Lumber Company.)

Q. Under date of July 30 in Ledger marked Exhibit "T. of U. D-3," page 256, appears an item "Note, $4,000." I show you a note and ask you what that is?

A. That is this note here (indicating on Ledger D-3).

Q. The one dated June 30, for $4,000?

A. Yes, on page 256.

(Note marked for identification "F. M. L. Co. D-1, Mar. 7, 12.")

Q. You say that this note marked "F. M. L. Co. D-1" for identification is the note which is set forth on page 256 of the Ledger "T. of U. D-3," dated June 30, for $4,000?

A. Yes, sir.

Q. Was that note paid?

A. Yes.

Q. Does that appear on that page 256 anywhere?

A. Yes, under date of July 8.

Q. I show you a check and ask if that isn't the check which paid that note (check being marked for identification F. M. L. Co. D-2, Mar. 7, 12)?

A. Yes.

Q. Both the body of the check marked "F. M. L. Co., D-2" and the body of the note marked "F. M. L. Co., D-1" are in your handwriting?

A. Yes.

Q. I show you a note for $5,000 and ask you if that appears on that account?

A. Yes.

Q. Where does it appear, in this item of August 14th?

A. Yes.

Q. "P. H. Downey, $5,000"?

A. Yes.

Q. Was that note paid?

A. Yes, paid August 22nd.

(Note marked for identification "F. M. L. Co., D-3, Mar. 7, 12.")

Q. I show you a check and ask you if the body of that check is in your handwriting (showing

check marked for identification "F. M. L. Co., D-4, Mar. 7, 12")?

A. Yes.

Q. Is this check marked "F. M. L. Co., D-4" the check that paid that note?

A. Yes.

Q. And the amount of that check is $5,000, dated August 22, 1910?

A. Yes.

Q. And does the note marked "Trustee's Exhibit D-1," which I now show you, appear on that account?

A. Yes, March 16 is the date of the entry in the book.

Q. Besides the three entries, one of $4,000 on a note of $4,000, marked Exhibit D-1, F. M. L. Co., and the entry of $5,000 on a note for $5,000, marked Exhibit F. M. L. Co., D-3, and a note of $6,000, marked Trustee D-1, is there any other item on there of money advanced by the First National Bank of the Town of Union, except the $10,000 note on April 20?

A. No.

Q. And does that account show all the transactions with the First National Bank of the Town of Union?

A. Yes.

Q. The only transaction was the transaction of Mr. Downey, which you have pointed out to me on page 279 of the ledger and page 98 of the cash book?

A. Yes.

Cross Examination on behalf of the Trustee in Bankruptcy:

Q. (By Mr. Hall.) Miss Conroy, as I understand it, the First National Bank of the Town of Union discounted two notes of Mr. Downey's of $5,000 each?

Mr. Fallon: I object, on the ground that those books do not show anything about notes.

Mr. Hall: I am asking her for the facts.

Mr. Fallon: Then I object unless she knows it to be a fact, because all the knowledge she has is contained in these books.

Q. (By Mr. McMahon.) Miss Conroy, did you make out all the notes for the company?

A. Yes, very nearly all.

Q. From 1908 to the year 1910, did you take care of their back account and check up the bank account?

A. Yes.

Q. Did you draw up all the checks?

A. Yes.

Q. And make all the entries in that book?

A. Yes.

Q. Were you always in the office of the company?

A. Yes.

Q. And were the officers of the company engaged a good deal of the time on outside work?

A. Yes.

Q. Did you attend to the management of the office?

A. Yes.

Q. Now, I ask you the question,—read it, Mr. Stenographer.

(Question read as follows:) "Miss Conroy, as I understand it, the First National Bank of the Town of Union discounted two notes of Mr. Downey's of $5,000 each?"—one dated July 27 and the other August 19, 10?

A. Yes.

Q. And Mr. Downey gave his checks for those amounts of $5,000 each to the Glen Engineering Construction Company?

A. Yes.

Q. And one of those $5,000 was placed in the account of Downey on the books of the Glen Engineering Construction Company and one was placed in the account of the Town of Union Bank?

A. Yes.

Q. Now, referring to Exhibit T. of U., D-3, being page 256 of the ledger, and the item "August 14, P. H. Downey, $5,000," what do the figures in red "102" refer to?

A. The cash book.

Q. I show you a book and ask you if that is the cash book of the Glen Engineering Construction Company?

A. Yes.

Q. And I show you page 102 of that book, the item of August 19, P. H. Downey, First National Bank, $5,000, and the figures "256" in red; what do those figures refer to?

A. To the ledger.

Q. I will ask you, then, if this item on page 102 of the cash book, of August 10, isn't the same $5,000 that appears on page 256 of the ledger under date of August 14?

A. Yes.

Q. I will also show you page 102 of the cash book, Trustee's Exhibit. Now, referring to page 98 of the cash book, an item appears: "July 27, P. H. Downey, $5,000," with the figures "297" in red; what do those refer to?

A. The ledger.

Q. They refer to that page in the ledger, do they?

A. Yes.

Q. And on page 297 of the ledger appears, under date of July 27, First National Bank, $5,000, with the figures "98" in red; what do those refer to?

A. That refers to page 98 of the cash book.

Q. Then the item appearing on page 256 of the ledger, in the account of the First National Bank of the Town of Union, under date of August 14, $5,000, has nothing whatever to do with the $5,000 turned over to the Glen Company by Mr. Downey on July 27, 1910?

A. Nothing, no.

Q. And that amount appearing in the First National Bank account August 14, 1910, was subsequently paid, I understand, to that bank on August 22?

A. Yes.

Q. What does that ledger show the balance due from that bank to the Glen Company?

A. Well, of course there is interest included here.

Q. I mean, what does it show right there, the balance?

A. $10,000.

Re-direct Examination by Mr. Fallon:

Q. Miss Conroy, did Mr. Downey or Mr. Alford report to you the $5,000 transaction of July 27, 1910?

A. I don't remember.

Q. You don't know anything about that?

A. No.

Q. Then there may be transactions which were had by Mr. Alford and Mr. Downey in connection with the Glen Engineering Construction Company which they did not report to you?

A. Very seldom.

Q. But all that you mention in your books here are things that were reported to you; that is so, isn't it?

A. Not always; sometimes I knew myself.

Q. Do you know anything about a transaction of July 27, 1910, whereby Mr. Downey received from the First National Bank of the Town of Union the sum of $5,000, and whereby Mr. Downey on that day paid over to the Glen Engineering Construction Company that same sum of $5,000?

A. On July 27?

Q. Yes.

A. No.

Q. Didn't know that?

A. Why, yes, it is here.

Q. That says, "July 27, First National Bank, $5,000"?

A. Yes.

Q. That is a debit charge against the account of Downey, isn't it?

A. Yes.

Q. Now, to whom was that paid?

Mr. Hall: Paid by whom, Mr. Fallon?
Mr. Fallon: This was a debit charge.

A. He received that from the bank.

Q. But he paid it out again, didn't he, as appears from that book?

A. Yes.

Q. This part of the account that I now refer you to is a charge against him?

A. Yes.

Q. Evidencing that he paid out this $5,000 under date of July 27—

The Court: A charge against him?
Mr. Fallon: Yes.

Q. Does not this entry that I now refer you to, "July 27, First National Bank, $5,000," evidence that Mr. Downey on that date paid over to the First National Bank that sum of money?

Mr. McMahon: I think we ought to have the note here.

The Court: I think it is too late. Counsel agreed to go on without the note and we cannot stop the examination now.

A. Let me see the book (counsel hands witness the book). No, that has nothing to do with the company; that has something to do with Mr. Downey.

Q. It has nothing to do with the company?

A. No.

Q. Is this book which I now show you, page 98 of which is now before you, the book of the Glen Engineering Construction Company?

A. Yes.

Q. And what does the entry of July 27, "P. H. Downey, $5,000," refer to?

A. It refers to this item on page 279 of the ledger.

Q. Those two books do evidence, do they not, that on the 27th of July, Mr. Downey paid over to the Glen Company, $5,000?

A. Yes.

Q. What does the reference "First National Bank" mean in the ledger account after the entry "July 27"?

A. That he got the money from the First National Bank.

Q. This is not a receipt; this is a charge that I am referring to.

A. You are asking me what that is there for?

Q. Why should you put in a charge account against him the place where he received the money from?

Mr. Hall: You are all wrong on that; this is not a charge account.

The Court: I do not understand how, on the books of the Glen Engineering Construction Company, there can be a charge against Mr. Downey of $5,000. I can understand how there can be a credit, but how he can be charged with $5,000 I am unable to understand.

Q. I will take this one side of this book, page 279; refer to the credit and debit side.

A. This is the credit (pointing to the left) and this is the debit side (pointing to the right).

Q. You didn't make out a note on July 27, 1910,

for $5,000, did you—the note which passed through the First National Bank in the name of Mr. Downey?

A. I don't remember whether I did or not.

Q. Well, do you remember whether any such note was reported to you by Mr. Downey?

A. No.

Q. It was not reported to you?

Mr. Hall: I beg pardon, she said she didn't remember.

Q. You don't mean that it was not reported to you? Do you think it may have been reported to you?

A. You mean July 27?

Q. Yes.

A. I don't remember.

Q. If it was reported to you you would enter it in your books, wouldn't you; you didn't make mistakes in that respect, did you?

A. Well, it is an entry against the company on that day.

Q. If it had been reported to you by Mr. Downey as a transaction of the Glen Engineering Construction Company you would have entered it upon the books of the company, would you not?

A. Yes.

Q. And you don't remember whether it was so reported to you or not?

A. No.

Q. Were you told by Mr. Downey what that item of $5,000 was that was being paid to the First National Bank, or received from the First National Bank on the 27th of July, 1910?

A. Was I told what it was for?

Q. Yes.

A. No, I wasn't told what it was for.

Q. Did Mr. Downey tell you that he had borrowed from the First National Bank of the Town of Union on July 27, 1910, the sum of $5,000 in his own name for the company?

A. Yes, he borrowed $5,000.

Q. And he told you that it was for the company, didn't he?

Mr. McMahon: I object; that isn't binding on us.

The Court: Yes, how is that competent what Mr. Downey said at the time?

Q. Do you know anything at all of the transaction of July 27, 1910, between Mr. Downey, the First National Bank of the Town of Union, and the Glen Engineering Construction Company?

A. No, that was between Mr. Downey and the bank.

Q. How do you know it was between them?

A. Because I didn't have anything to do with it, that I remember now.

Q. Well, if you remember what was done tell us what you remember of it.

Mr. Hall: Before that question is answered I would like to ask if the witness remembers things that took place in her presence or remembers something that was told her afterwards. I think the question is misleading.

The Court: That seems to call for the witness's own knowledge.

A. You mean, why Mr. Downey borrowed that $5,000? I don't understand the question.

Q. Did you have anything to do with it?

A. I really didn't have anything to do with the money at that time, but I knew of Mr. Downey's getting it and why he got it.

Q. Why did he get it?

Mr. McMahon: I object. Mr. Downey wanted to borrow $5,000 on his own credit; he can't ask this witness why Mr. Downey got it. The books speak for themselves.

The Court: Can't we get along, gentlemen? It seems to me we are wasting an enormous amount of time.

Mr. Fallon: I submit, I think the question is a proper one.

Mr. Hall: You want to show that this money was turned over by Mr. Downey to the Glen Company?

Mr. Fallon: Yes.

The Court: Suppose this lady did hear this man borrowed money from the First National Bank; isn't it perfectly plain—is there any doubt what that transaction was?

Mr. Fallon: That is all.

The Court: The defendant's case on behalf of the bank is rested.

Mr. Hall: Is the minute book of the bank here, Mr. Fallon?

Mr. Fallon: I have got a lot of books here, but not the minute book.

Mr. Hall: The books were here the last time and Mr. Fallon didn't want me to look at them, because there was a great deal of confidential information in them, and I suggested then that they ought to be examined and find out if, between March and September, there was any reference in the minutes to the assignment, and I presumed it had been done. It has been testified that those minutes of the directors and discount committee should show discussion and resolutions about this assignment.

Mr. Fallon: I am informed by Mr. Hofmann that there is nothing in the book to the effect that there was an assignment to be obtained.

The Court: It is admitted, then, that the minutes of the meetings of the Board of Directors and of the Discount Committee of the bank do not show any entries pertaining to that assignment?

Judge Lewis: Prior to its being obtained, Mr. Fallon. I will admit that for my client, sir, the Joseph Sharpe Construction Company.

The Court: Your claim is hostile to the bank assignment?

Judge Lewis: Yes.

Mr. Fallon: I am willing to admit on the record that there is nothing in the minutes.

The Court: Nothing in the minutes of the meetings of the Directors or of the Discount Committee, or other Committees of the bank?

Mr. Fallon: Yes, but I want to reserve the right to put in proof that it was, in fact, discussed, although there is nothing on the minutes.

The Court: Now, gentlemen, make no mistake; the admission that the Court receives is unqualified and broad that the minutes of the bank, Director's meetings, and Committee meetings, contain no entry whatever relating to this assignment, or any assignment, from the Glen Company to the bank; that is the admission, is it?

Mr. Hall: That is an admission on the part of the bank; it isn't binding on the rest of us. If we can prove that there was something to the contrary we want to be at liberty to do so.

The Court: The statement of Mr. McMahon, or one of you gentlemen, was that you wanted to have these books show negatively that they contained nothing prior to the assignment.

Mr. McMahon: I don't ask for the admission after the assignment.

The Court: It will not hurt you any—doesn't prove anything—it is only an admission on their part.

Mr. Hall: We don't ask them to admit that there is nothing on the minutes of the company concerning the assignment at or about its date; what we ask is an admission that there is nothing upon the minutes of the bank concerning the assignment at the times which has been testified that the matter of assignments were considered by the bank and its board of directors.

The Court: Well, you can take as much of the admission as you want, or as little as you want. The admission is a little broader than that.

Mr. Hall: At the last session, if your Honor please, you will recall some question arose about the proof of an alleged contract between the Agnew Company and the Glen Engineering Construction Company. I wrote Mr. Gourley that I would bring that on this morning, and I see he has been here all the morning. As that is the only matter he is probably interested in, I am willing to take that proof now with your Honor's consent.

Mr. Gourley: Mr. Agnew is not here. I expect him this afternoon.

Mr. Hall: Then you want to wait?

Mr. Gourley: Yes.

Mr. Hall: Then I would like to change the order of my proof a little. I have been the Secretary of the Board of Education at Newark, who has brought the data of that board with reference to the contract between the Glen Company and the Newark Board of Education, and his testimony relates to conditions existing at or about the time of the bankruptcy; I want to put him on so that he can go.

ON BEHALF OF THE TRUSTEE IN BANKRUPTCY:

ROBERT D. ARGUE, sworn on behalf of the Trustee in Bankruptcy, testified as follows:

Direct Examination by Mr. Hall:

Q. You are connected with the Board of Education of the City of Newark?

A. Yes, sir.

Q. In what capacity?

A. Secretary.

Q. And you have been in that office for how long?

A. Well, about seventeen years.

Q. Did the Board of Education of Newark have a contract with the Glen Engineering & Construction Company for the building of a school in Newark?

A. They did.

Q. And the school was known as what?

A. Central Commercial & Manual Training High School.

Q. Have you the contract with you?

A. I have.

Mr. Hall: If your Honor please, these are official records and the only thing I desire from that contract is the date. I do not want to impound the records of the Board of Education.

The Court: I think we can get along without doing that. Proceed and we will see what arrangements we can make.

Q. Will you give us the date that contract was executed, Mr. Argue?

A. That was February 26, 1910.

Q. And the total price for which the school was to be completed?

A. They didn't have all the contract.

Q. I mean the total price for this contract.

A. $377,448. That was for their work only.

Q. Now, the Glen Company entered upon the work under that contract, did they?

A. Yes, sir.

Q. And proceeded until what time?

A. Well, along about December, 1910.

Q. And have you any data as to the payments that have been made by the City of Newark to the Glen Company on account of that contract, down to that time?

A. Yes, sir.

Q. How much did they aggregate?

A. They received $120,900. That was the total payments they have received.

Q. And when was the last payment made?

A. Along about—oh, about November. Now, I didn't post myself on that, the date.

Q. Have you the amount of it?

A. Nor I haven't the amount of it. It is easy to get it when I am at the office.

Q. In December, 1910, did the Glen Company cease working on the contract?

A. They did.

Q. And what action was thereafter taken by the Board of Education with respect to the completion of the building?

A. The contract for the completion of the Glen Engineering Construction Company contract was awarded to Fred Kilgus, another contractor of the same nature.

Q. I understand the Board of Education took action, removing the Glen Company from the work and appointing a new contractor?

A. Yes.

Q. (By the Court.) What was the date when that was done?

A. The date of that contract was February 10, 1911—that is, Kilgus's contract.

Q. Do you know when the Glen Company ceased to carry out their contract?

A. That is, the exact date—

Q. About; give it approximately.

A. Well, about December.

Q. What part of December?

A. The early part—around, say, from the 5th to the 10th or thereabouts.

Q. About the time that liens began to be filed?

A. Yes, sir.

Mr. Fallon: I object to that, putting words in the witness's mouth.

Q. When you said December you referred to December in what year?

A. 1910.

Q. At any time have claims been filed with the Board of Education by persons claiming to have supplied material or labor for the construction of that building for the Glen Company?

A. Yes, sir.

Q. Have you the claims here?

A. I have.

Q. The originals?

A. I have.

Q. Have you made up a schedule showing those claims?

A. Yes.
Q. With the dates of filing?
A. Yes.
Q. And the amounts?
A. The amounts also.
Q. And you have that here?
A. I have (witness producing schedule).

Mr. Hall: If there is no objection I will offer that in evidence along with the original claims.

Mr. Delaney: I object to its going into evidence, on the ground that it is incompetent. It covers transactions back as far as September, 1910.

The Court: On that ground you say it is irrelevant?

Mr Delaney: Yes.

The Court: I will admit it over such objection.

Mr. Hall: You don't offer any objection on the ground that it is a copy?

Mr. Delaney: Oh no; it is correct, I guess.

Mr. Hall: I offer the statement in evidence.

(Admitted and marked Trustee's Exhibit D-8.)

Q. According to this statement. Mr. Argue, the claims filed by James Crowell September 19, 1910, and the Builder's Material Supply Company October 18, 1910, are marked with an asterisk and at the bottom, opposite another asterisk, appears the words: "Auditor's books show liens released;" will you explain that, please?

A. In making up this list—I didn't make up this list to bring over here; this was my list in case—well, for information in my own office, and those two claims of September 19, 1910 and October 18, 1910, appeared on the list, but the Auditor's books show that they had been released and paid; hence, I didn't take it into consideration. I have deducted those.

Q. That was at the time you made up the list?

A. Yes.

Q. And when was that, approximately?

A. This last January.

The Court: What is the amount, Mr. Hall?

Q. What is the total amount of the claims filed, as shown by your statement?

A. $33,538.49.

The Court: Are the dates of filing there?

Mr. Hall: Yes.

Q. (By the Court.) What is the date of the first one?

A. December 3, 1910.

Q. And the last?

A. August 1, 1911.

Q. The total which you give of $33,538.49 is exclusive of the claims of Crowell and the Builder's Material Supply Company at the date of the release?

A. It is.

Q. Have you here the contract between the City of Newark and Kilgus for the completion of the work?

A. Yes, sir.

Q. And that you said was dated February, 1911?

A. February 10, 1911.

Q. And what was the total amount for which Kilgus was to complete the work then unfinished by the Glen Company?

A. $247,700.

Q. And has he completed that work?

A. Just about completed it.

Q. Did the Board of Education, or you as the Secretary of that Board, receive a communication from the Glen Engineering Construction Company in September, 1910?

A. Yes, sir.

Q. I show you a letter dated September 14, 1910, and ask you if that is the communication?

A. That is one.

Mr. Hall: I offer that communication in evidence.

Mr. Fallon: I object to it, upon the ground that it is incompetent, irrelevant, with respect to the claim of the First National Bank of the Town of Union under its assignment.

Mr. Delaney: I also object to the same testimony, upon the same ground.

Mr. Hall: I appreciate the objections when neither counsel has looked at the communication. This is a letter dated September 14, 1910, from the Glen Engineering Construction Company directed to the Board of Education.

The Court: What is the date of the assignment?

Mr. Hall: September 15th.

The Court: Is this offered as an admission of the Company—a statement against their interests—bearing upon the question of their insolvency?

Mr. Hall: No, this is offered for the purpose of showing that at that time—it is for the purpose of checking up the dates of the two assignments—the assignment to the Merchant's National Bank and the assignment to the First National Bank of the Town of Union. Your Honor will remember last week we had a great deal of difficulty in getting at the relation of the drawing to the execution of those two assignments. This is offered for the purpose of showing that, at the very time—the day before the Town of Union bank assignment was executed a letter had been written to the Board of Education of Newark, asking that Board to consent to an assignment of the moneys on that contract to the Merchant's National Bank.

The Court: How is that evidence in this case? It may be evidence against the writer of it, the Glen Engineering Construction Company.

Mr. Hall: Not on the question of insolvency merely, on the question of dates. You see, we have not here the date of the assignment to the Merchant's National Bank; we don't know when the Merchant's National Bank assignment is dated.

The Court: Do I understand that you are trying to show that date by a letter?

Mr. Hall: Not that the assignment was dated that day.

The Court: Well, can you put in evidence in that form a letter of the Glen Company to establish anything with reference to the date of the assignment?

Mr. Hall: I should think I could put it in evidence, just the same as I could put the original assignment in evidence if I had it.

The Court: The date mentioned in the assignment presumably is not the date when the assignment was delivered.

Mr. Hall: I am offering this for the purpose of showing that the assignment had not been executed by September 14, 1910.

The Court: The difficulty is, it is objected to as incompetent. You are offering an unsworn statement—a mere letter—of the Glen Company. How is that evidence against these parties?

Mr. Hall: It is certainly evidence that at that date the Glen Company had not executed an assignment.

The Court: But how is that evidence?

Mr. Hall: Because it asks the Board of Education the question whether or not they can assign it.

The Court: How can we receive an unsworn statement of the Glen Company in a letter. If the officer who wrote that letter should be put on the stand he might say he wrote that and use it as a memorandum in testifying. Then we have sworn evidence. But how can this letter be taken as an instrument of evidence, to tell us anything in this case, binding upon the parties to

this litigation. Of course, it is evidence against the Glen Company; it is their statement.

Mr. McMahon: There has been some controversy as to when the request was made of the Board of Education in Newark to make this assignment to the Merchant's National Bank and this letter would be evidence of that fact, that such a request was made of the Board of Education and that the Board of Education did receive such a request as of that date.

The Court: If it is important to know in this case when the Board of Education received such a request, why that is another matter. Of course, this witness can testify that he received such request through this letter and fix the date; but that is not what the letter is offered for.

Mr. Hall: Of course, I can prove the letter by Mr. Alford.

The Court: It isn't a question of proving the letter; it is a question of proving the facts alleged in the letter.

Mr. McMahon: The question came up, whether or not this assignment to the bank was given at the same time as the assignment to the Merchant's National Bank and we have shown—in the cross-examination at least—the connection between these two banks; that they both got an assignment at the same time. That is an important and material piece of evidence in the case.

The Court: I have to deal with the objection that this is not competent evidence—

that this letter is not an instrument of evidence to prove the facts, or any facts, contained in it or alleged in it. That is the objection that I have to meet. We are now trying a controversy over this fund. Of course, the Glen Company are parties to the suit, but the litigants who are contesting the ownership of the fund are the assignees on the one hand and the lienors under notice, on the other, and the Trustee in Bankruptcy—

Mr. Hall: The Trustee in Bankruptcy has all the rights of the Glen Company.

The Court: That only makes it worse. If the Trustee succeeds, the Glen Company cannot prove anything in this case by their own letter; they must put witnesses on the stand to swear to facts. Of course, any party can produce a letter, if it is relied on simply to fix a date when the letter was deceived and when the party by whom it was received had notice of a fact, but there is no way by which this letter written by an officer of the Glen Company can be allowed to speak as evidence in this controversy over the ownership of this fund. A letter from the Glen Company is no more evidence here than a letter of the Trustee in Bankruptcy on his behalf, or a letter from one of the assignees on his behalf, or a letter from one of the lienors on his behalf. Any of those letters might be entirely competent to show a date and to show when notice was given, and what the notice was, but beyond that the letter cannot go. They are also

good as admissions, of course, but they cannot prove things.

Q. Mr. Argue, do you know the total amount of the payments that have been made to Mr. Kilgus? Didn't you make up a memorandum of that?

A. He has been paid up to the last payment. His last payment is probably about $35,000.

Cross Examination on behalf of the M. S. Payne Assignment:

Q. (By Mr. Delaney.) Mr. Argue, I would like to ask you to read that letter over to Charles J. Hardy (showing letter to witness marked for identification "M. S. P. D-1").

A. (The witness reads the letter to himself.)

Q. Now, Mr. Argue, can you tell the Court how much the Glen Engineering Construction Company had been paid on the contract with the high school at Newark up to January 3, 1911?

A. Why, that is $120,900.

Q. State, will you please, the balance that remains on that contract.

A. $256,000. I have the figures all down there on this paper (Witness refers to paper and continues) $256,548.

Q. (By the Court.) What is that figure?

A. That is the amount due the Glen Engineering Company on their contract.

Q. You mean the total price?

A. No, sir, what is due after deducting what has been paid.

Q. At the time, about, when the Glen Engineering Company ceased doing the work, can you state how much of the 6th payment had been completed by them?

A. That is about $20,000 worth. I take that from the architect's statement.

Q. That was $20,500?

A. About that. It was estimated so at the time.

Q. That is, eighty per cent.?

A. Yes.

Q. (By the Court.) What figure was that?

A. $20,500. That was what we called the sixth payment, 80% of the work done up to that time.

Q. And under that contract was the Board of Education retaining 15% of all payments as they came due?

A. Yes.

Q. Can you tell me the payments that had been made, in the aggregate, by the Board of Education to the Glen Engineering Company, up to the time they ceased doing work there?

A. I can give you the record here to make that—$120,900.

Q. Is that the total amount paid?

A. Yes, $120,900.

Q. What was the retained percentage by the Board of Education?

A. Eighty per cent. I am giving you the language of the contract when I say that at the time this contract was made there was a specific payment mentioned—when certain work was done so much would be paid. When the roof was on, so much would be paid, and so forth.

Q. (By the Court) Let me see if I understand you, Mr. Argue: At the time the contractor went away—gave up the job—he had received $120,900?

A. Yes, sir.

Q. About $18,000 was held in reserve under the 15% clause and he had done work amounting to about $20,000; is that right?

A. Yes, $20,500 was the sixth payment.

Q. Then he got paid for his work without any reservation when he went away, including the 15% reservation he had due him about $38,500?

A. Well, no, that isn't exactly right, your Honor. The $20,500 was the 6th payment, as I stated before.

Q. That was after allowing 15%? Was the $20,500 the figure representing the value of the work which had been done since the last certificate?

A. Yes, sir.

Q. And that included the 15%?

A. Well, that was our figures; that was under a stipulation—

Q. One moment, I want to have that clear: Was the $20,500 the value of the work with or the value of the work without deducting the 15%?

A. That was the value of the work, but the 15% and the 85% are misleading, because they are not considered in this. They don't show in the contract. The contract says there shall be a number of payments, which is so much when one part of the work is done and so much for another.

Q. Wasn't 15% retained each time?

A. No, sir.

Q. What is the amount of the 6th payment, as provided for in the contract?

A. $20,500.

Q. He was entitled to about 85% of that amount, was he?

Mr. Hall: I object.

Q. I understand you to state that 85% of the work called for was done; is that correct?

A. No, 15% and 85% are mixed up in here. As I stated, the contract does not make any specifi-

cation of that kind, but a certain number of payments are made.

Q. (By the Court) Do I understand the contract does not provide for the retaining of 15%?

A. No, sir.

Q. It does not?

A. No, sir.

Q. I understood you point blank the other way, Mr. Argue.

A. I don't think so.

Q. Then I misunderstood you. Then there is no 15% reservation, but there are specified payments which are provided for at a certain stage of the work specified; is that right?

A. Yes, sir.

Q. Well, for work that had been done was there any sum due to the Glen Engineering Construction Company at this time, other than with regard to the 6th payment, January 3, 1911?

A. The architect stated—

Mr. Hall: I object.

The Court: The witness cannot give the statement of the architect.

A. (continuing) How is it possible for me to say?

The Court: Counsel recognizes that fact.

Q. Well, Mr. Argue, you were familiar with the work done upon this building at Newark, were you not, as Secretary of the Board?

A. In what way?

Q. Were you not familiar with the amount of work which was done at the various times?

A. Only as regards making payments. I never looked at the building with an expert's eye to see how much was done.

Q. But you have a construction department, have you not?

A. Yes.

Q. And your payments were based upon reports made to you by your construction department?

A. Yes.

Q. And are your reports not made up by the figures submitted to you by the construction department?

A. For payment?

Q. Yes.

A. Yes, sir.

Q. Now, as a matter of fact, don't you know about how much of the work called for by that sixth payment had been done by the Glen Engineering Construction Company about January 3, 1911?

A. I do not.

The Court: I think the witness has so stated a good many times. Is it possible counsel can get any evidence from this witness in regard to the value of the work done; he acted upon his reports and certificates, so far as he acted at all.

SMITH ALFORD, recalled on behalf of the Frank Miller Lumber Company, testified as follows:

Direct Examination by Mr. McMahon:

Q. You were president and general manager of the Glen Engineering Construction Company during the years 1908, 1909 and 1910?

A. I was.

Q. And up to the time of the failure of the Glen Engineering Construction Company?

A. Yes.

Q. Who were the officers of the company?

A. Mr. P. H. Downey—

Q. What office did he hold?

A. He was treasurer of the company.

Q. Who were the directors of the company?

A. Mr. Downey, Mr. Paine and I.

Q. Only three directors?

A. They were the three directors at the time.

Q. Did Miss Conroy have charge of the books of the company and the office?

A. She did, yes.

Q. During the years 1908, 1909 and 1910?

A. Yes.

Q. And up to the time of the failure?

A. Yes.

Q. And did she keep the bank books of the company?

A. She did.

Q. And check up the balances?

A. She and Mr. Downey.

Q. Who filled out the body of the checks?

A. Miss Conroy, as a rule; very few otherwise.

Q. Where did the company do its business in the latter part of 1910?

A. Principally in New Jersey.

Q. Did you attend to the making of the Paterson contract?

A. I did.

Q. For the construction of the high school in Paterson?

A. Yes.

Q. Where was that contract made?

A. In Paterson, N. J.

Q. Did you sign it there?

A. I did.

Q. And where was the Newark contract made?

A. In Newark, N. J.

Q. Did you sign it at Newark?

A. I did.

Q. During the latter part of 1910 where did the company keep its bank account?

A. At the First National Bank, Union Hill, and the Merchant's National Bank, Jersey City.

Q. Were you either on one or the other of the jobs in Paterson or Newark?

A. Almost continually.

Q. Did the company have a superintendent on each one of those jobs?

A. It did.

Q. Have an office on each one of those jobs?

A. It did.

Q. And maintained an office on the job of both of them?

A. As long as we were there.

Q. During the year 1910 was all its plant in New Jersey?

A. Yes.

Q. Do you remember when the account in the First National Bank of the Town of Union was opened?

A. Yes, shortly after the failure of the Carnegie Trust Company, in February, if I remember right.

Q. I show you a check marked for identification, "F. M. L. Co., D-5," and, after refreshing your recollection, see if you can testify on what date the account in the First National Bank of the Town of Union was opened.

A. February 17.

Q. Is that the check of the Glen Engineering Construction Company?

A. It is.

Q. And signed by you?

A. It is.

Q. And payable to the order of the First National Bank of the Town of Union?

A. Yes.

Q. In the amount of $3,000?

A. Yes.

Mr. McMahon: I offer that check in evidence.

(Admitted in evidence as Exhibit F. M. L. Co., D-5.)

Q. And is that the check with which the account was opened?

A. It is.

Q. And the corresponding item is shown in Trustee's Exhibit D-5, being the bank book of the Glen Engineering Construction Company with the First National Bank of the Town of Union, as of that date, February 17?

A. Yes.

Q. A deposit of $3,000?

A. Yes.

Q. Now, was the First National Bank of the Town of Union accessible to your office in New York, or Paterson, or Newark?

A. It was not.

Q. Where was it in relation to those places?

A. About an hour's trip—greater part of two hours consumed in going over there and back from our main office, and two hours' ride in the

street car from Paterson, and from Newark almost an hour, I should say.

Q. Who asked you to bring your account over to that bank?

A. Mr. Hilbert.

Q. When did you first meet Mr. Hilbert?

A. Oh, possibly in the summer of 1909.

Q. In what connection did you meet him?

A. I met him in the office of George Frank Sweeney, representing a bond company with whom we did business, and Mr. Hilbert was, at that time, selling bank stock.

Q. Of this bank?

A. Of this bank.

Q. Did you have any conversation with him or did he say anything to you about the stock of this bank?

A. Yes, he wanted the officers of the Glen Engineering Construction Company to buy some stock.

Q. Did he ask you to bring your account over there?

A. Yes, sir, shortly after that. We were then banking at the Carnegie Trust Company.

Q. And after the Carnegie Trust Company closed you went to the Garfield National Bank?

A. Yes, temporarily we went to the Garfield.

Q. Did he promise you any accommodation of any kind?

Mr. Fallon: Objected to as immaterial and irrelevant. I cannot see how that is binding upon the bank.

Mr. McMahon: He was an officer of the bank and was soliciting this account. They

went into the entire transaction and I am inquiring into the circumstances in rebuttal.

The Court: What has that to do with the case; what have they to do with the opening of this account on February 17?

Mr. McMahon: They have testified as to the entire conversation about the assignment at that time—at the opening of this account—and I think I can show facts contrary to that; that not only were they anxious about the account, but they were doing everything they could to get it, and offered every inducement to this company to come there and give them the account. I think I am entitled to that.

The Court: Why?

Mr. McMahon: As a fact and circumstance in rebuttal to the testimony which they gave, that at the time the account was opened they asked for assignments to secure them.

The Court: If we were to allow every party to this litigation to rebut everything which has been put in without objection we would be trying this case for weeks and weeks.

Mr. McMahon: I will withdraw the question.

Q. At the time Mr. Hilbert asked you to bring your account over there did you have any conversation with him about the account?

A. I did.

Q. What was that conversation?

Mr. Fallon: I object on the ground that it is incompetent and immaterial.

The Court: It seems to be the same matter.

Mr. McMahon: I withdraw the question again.

Q. Do you remember just when the account was opened?

A. In February, 1910.

Q. At the time that account was opened, or just before that account was opened, did you have any conversation with Mr. Hilbert in reference to discounts to be secured by an assignment?

Mr. Fallon: I object as incompetent and immaterial.

The Court: I think I shall have to sustain the objection. The question is too broad.

Q. Did you have any conversation with him with reference to an assignment?

A. I did not.

Q. Did you go to the First National Bank of the Town of Union at the time the account was opened?

A. I did not.

Q. At the time you had this conversation with Mr. Hilbert just before the account was opened, when he solicited the account, who was present?

A. Mr. Downey and Miss Conroy, I think.

Q. Did you say anything at that time to Mr. Hilbert about an assignment?

Mr. Fallon: That is objected to as incompetent, irrelevant and immaterial.

The Court: I will take it.

A. I did not.

Q. Did anybody say anything to you or in your presence at that time about an assignment?

A. No, sir.

Mr. Fallon: I object.

Q. Did Mr. Hilbert say anything to you about an assignment?

A. He did not.

Q. I show you a note, marked "Trustee's Exhibit D-1 for Identification" and ask you if that was the note upon which the first money was borrowed from the First National Bank of the Town of Union by the Glen Engineering Construction Company?

A. It was.

Q. Where was that note signed?

A. In our office.

Q. Who was there at the time it was signed?

A. Mr. Hilbert and Mr. Downey and I, and Miss Conroy made it out on the typewriter.

Q. That was typewritten by Miss Conroy on the machine, was it?

A. It was.

Q. At the time that note was signed, did you have any conversation with Mr. Hilbert about the assignment?

A. I did not.

Q. Did he say anything to you about an assignment at that time?

A. He did not.

Q. Did he say anything in your presence, to either Mr. Downey or Miss Conroy about the assignment?

A. He never did.

Q. Who took that note over to the bank to get it discounted?

A. Mr. Hilbert.

Q. Whose initial is that on there?

A. Mr. Hilbert's.

Q. At the time that note was presented did you go over to the First National Bank of the Town of Union?

A. I did not.

Q. Do you remember when the $10,000 note was discounted?

A. About a month after that, if I remember right.

Q. That note is dated April 19, as I understand it—

The Court: No doubt about it, that is the date.

Q. Where was that note signed?

A. In our office.

Q. (By the Court.) In New York?

A. In New York City.

Q. Who was present when it was signed?

A. Mr. Downey, Mr. Hilbert and I, and I think Miss Conroy. I am not positive whether she was in the room or not.

Q. Who went over with that note to the First National Bank of the Town of Union?

A. Mr. Hilbert did, I think. I don't know whether I did or not.

Q. Did you take it over there?

A. No, Mr. Hilbert took it from our office.

Q. You were in the office when that note was signed; did Mr. Hilbert say anything to you about an assignment or security?

A. He did not.

Q. Did you say anything to him about an assignment or security?

A. I did not.

Q. Did he say anything to Mr. Downey in your presence about an assignment or security?

A. He did not.

Q. Did you hear Mr. Downey say anything to Mr. Hilbert about assignment or security?

A. No, sir; never mentioned it.

Q. Did he say anything to you about the Bank of the Town of Union and insist upon securing an assignment before they gave you this loan?

Mr. Fallon: I think this witness ought to be required to tell what was said.

Q. At the time that the $10,000 note was signed did you go over to the Bank of the Town of Union?

A. I did not.

Q. Were you at that time sent for to come over there?

A. I was not.

Q. Did you meet Mr. Hoffmann at that time, either in the office of the company or at the bank?

A. I hadn't met Mr. Hoffmann at all up to that time.

Q. Then you didn't have any conversation with him?

A. No.

Q. Do you remember whether or not you were called on the telephone or asked by Mr. Hilbert to come over to the bank?

A. I don't remember now—not in connection with this note.

Q. Did you have any conversation with any officer of that bank with reference to an assignment at the time that note was signed?

A. No, I did not.

Q. Did Mr. Hoffmann come to your office in April, 1910?

A. Not that I saw—not while I was there.

Q. Now that $6,000 note, which is marked "Trustee's Exhibit D-1 for Identification" was paid some time before the $10,000 note was discounted?

A. I think so, yes.

The Court: The check is in evidence that paid that note.

Q. Mr. Alford, to whom did you give a copy of the Paterson contract?

A. To Mr. Hilbert.

Q. Did you have any conversation with him when you handed him that contract?

A. He said he wished a copy of the contract at Paterson, and as I saw no reason why he shouldn't have it I gave it to him.

Q. (By the Court.) When was that?

A. That was just about the date of the first loan of $6,000, if I remember right, when we were asking for money.

Q. Well, I suppose when you applied for that loan the bank wanted you to make some statement of your affairs, did it?

A. Why, yes. I told him we needed money to help finance the Paterson job and the idea of asking for that contract was to see the amount of the contract and when the payments were to come due, as we were supposed to bank the funds received from that job with the First National Bank of the Town of Union.

Q. You were supposed to bank on that job with the Town of Union Bank; was there any talk with you to that effect?

A. Yes.

Cross Examination on Behalf of the Trustee in Bankruptcy:

Q. (By Mr. Hall.) What was the talk between you and Mr. Hilbert on that subject?

A. Mr. Hilbert asked us to come to this bank, and we told him we would if Mr. Downey would consent to it and they would grant us certain accommodations, and he said they would let us have up to $10,000, and possibly by changing the reading of the notes to different officers of the company they might stretch it to $5,000 more, and then I saw Mr. Downey and the account was transferred.

Q. What was the conversation about the contract?

A. Well, nothing, except that the bank would like to have a copy of the contract.

Q. Well, I didn't understand what you mean in answer to the Court's question, that you were to finance or carry on that Paterson contract through the Town of Union Bank; what was the conversation on that subject?

A. We wanted the $10,000 to help finance this contract. That is where we were borrowing the

money. At that time there was no other contract, only the Paterson contract, and we told him that we would bank with him—we wouldn't take the money and put it in the New York bank, and we would be banking with them on this job.

Q. That is, the money you received from the Paterson job would be deposited in your account in that bank?

A. Yes, sir.

Re-direct Examination on Behalf of the Frank Miller Lumber Co.:

Q. (By Mr. McMahon.) During June and July Mr. Conway had some business relations with your company through the Structural Supply Company, had he not?

A. He did.

Q. Was he in your office frequently?

A. He was. And, Mr. McMahon, in that connection, if you will let me state how the business was opened up, Mr. Conway distinctly said that he wished me to consider all business with him separate from the bank, or with him as an officer of the bank.

Q. When he came in there did he ever make any request of you for an assignment?

A. He did not.

Q. You know Mr. Hofmann, do you?

A. I do now.

Q. When did you first meet Mr. Hofmann?

A. I have been thinking over that and trying to place it exactly. I believe it was in mid-summer, along in July or August; certainly after the dates that you speak of.

Q. Where did you meet him?

A. I was introduced to him in our office, I think.

Q. At the time you met him in your office did he say anything to you about an assignment?

A. No, not at that time. It was more of a social call than business.

Q. At the time the $10,000 note was discounted had you met him?

A. That was in April, wasn't it?

Q. Yes.

A. I had not.

Q. So that at that time you didn't have any conversation with him about the assignment?

A. No.

Q. And at that time he couldn't have said to you that he wouldn't vote to pass this $10,000 note unless you gave an assignment?

Mr. Fallon: I object to the form of the question.

The Court: Change the form of your question, Mr. McMahon.

Q. At that time he didn't say to you that he wouldn't pass that note unless you gave an assignment?

Mr. Fallon: I object to the form of the question; it is leading and objectionable.

Q. State whether or not he said to you at that time that he wouldn't vote to pass the note unless you gave an assignment?

A. No assignment was under discussion whatever.

Q. Did the officers of the Glen Engineering Construction Company get any more money from

that bank after the discounting of that $10,000 note?

A. I think they did, yes.

Q. Do you know how much those notes amounted to?

A. I think about $14,000.

Q. And they were gotten in the summer?

A. Yes, subsequent to April.

Q. And at any of the times that those three notes were procured did any officer of that bank say anything to you about the assignment or security?

A. No, there was no assignment mentioned at that time.

Q. Now, two of those subsequent loans were paid, were they not?

A. Yes, two were paid. One $5,000 was unpaid.

Q. Did Mr. Downey have an account with that bank?

A. I think he did, Mr. McMahon.

Q. When was it that the Glen Engineering Construction Company opened an account in the Merchant's National Bank of Jersey City?

A. I think it was in August, or about that date. I don't remember dates.

Q. Nineteen hundred and ten?

A. Yes, the summer of 1910.

Q. Who brought you to that bank?

A. Mr. Hilbert.

Q. State whether or not, prior to the time that you went to the Merchant's National Bank, you had any conversation with any officer of the bank of the Town of Union with reference to an assignment or security?

A. I don't think I did, Mr. McMahon.

Q. You have no recollection of any?

A. No, I have none.

Q. (By the Court.) Prior to what time?

A. Prior to the time that we opened our account with the Merchant's National Bank in August.

Q. You had no conversation with any officer of the Bank of the Town of Union?

A. No.

Q. The Merchant's National Bank account was opened some time around the 25th of August?

A. Some time in August; I don't remember the date.

Q. Who brought you over to the bank?

A. Mr. Hilbert.

Q. Do you remember how that account was opened in the Merchant's National Bank?

Mr. Fallon: I object as immaterial and incompetent.

The Court: Well, how is it material?

Mr. McMahon: I will withdraw the question.

Q. At the time that that Merchant's National Bank account was opened, state whether or not the Glen Engineering Construction Company had plenty of money or was pinched for money?

A. We needed money.

Q. How much discount were you to get at the Merchant's?

Mr. Fallon: I object as incompetent and immaterial.

The Court: I will take it.

A. We were promised up to $20,000, I believe.

Q. (By the Court) Was anything said about

giving an assignment of the contract as security?

A. At this bank there was.

Q. At the opening of your account?

A. At the opening of our account. I was told that it had to be met.

Q. How?

A. By paying the bank; that we were not only to give them a discount but assignment.

Q. Assignment of what?

A. Contract moneys upon certain conditions at Newark.

Q. I understand you to say that that was the bargain when you opened the account?

A. At the Merchant's Bank it was the understanding, yes.

Q. And that was around the 25th of August, 1910?

A. It must have been in August, yes.

Q. And did you make an assignment to the Merchant's National bank after that?

Mr. Fallon: I object to that as calling for a conclusion.

Q. (Continuing) —of the payment of moneys due on the Newark contract?

Mr. Fallon: I object to that as calling for a conclusion of law.

The Court: Well, the objection seems to be good.

Q. At that time did you take up with the officers of the Merchant's National Bank the matter of giving them some instrument by which they could collect the payments on the contract?

Mr. Fallon: I object to that unless some person is stated, and also as incompetent and immaterial.

The Court: The question simply asks for an answer "yes" or "no."

A. I did at that time, with Judge Stuhr, their attorney.

Mr. Fallon: I ask to have the latter part of the answer stricken out.

The Court: What is your objection to that?

Mr. Fallon: He doesn't know Judge Stuhr was the attorney.

The Court: He answers that he did take it up with Judge Stuhr. Proceed.

Q. Was it after that that you took up with the officers of the First National Bank of the Town of Union any kind of assignment?

A. Just about the same time.

Q. Who asked you for an assignment?

A. Mr. Hilbert, first.

Q. When was that?

A. The latter part of August.

Q. Was that the first time an assignment was ever spoken of to you?

A. The first time.

Q. What did you say when he asked you for the assignment?

A. At first I protested against it and told him that I didn't see why the bank wanted it; an assignment gotten from us and filed in Paterson would mean that they would lose everything probably that they had advanced.

Q. (By the Court) When was this?

A. The latter part of August, 1910.

Q. And you had this conversation with whom?

A. Mr. Hilbert.

Q. Where?

A. In our office, 156 Fifth Avenue, New York City.

Q. Can you fix the date of that conversation?

A. Your Honor, I cannot, after two years, but I know that the two assignments came together.

Q. Down to that time, Mr. Alford, had you had any notice that the Town of Union bank desired an assignment of the Paterson contract?

A. I had not, sir.

Q. (By the Court, continued) Was this the first opening of the matter with you?

A. The first opening of an assignment as security. I had been called by their cashier upon the 'phone, asking us if he couldn't do something with our account; that we were large borrowers and that our account was practically nothing.

Q. That had nothing to do with the assignment?

A. None whatever.

Q. My question is whether this was the first opening of the matter of an assignment between the bank and yourself?

A. It was.

Q. And the bank and your company, so far as you know?

A. So far as I know.

Q. Now, after that did you have any conversation with Mr. Conway about the assignment?

A. Yes. Then it was agreed upon by us to give this assignment to the First National Bank, and Mr. Conway did come in with Mr. Hofmann, I think, to get it.

Q. Was that the day the assignment was executed?

A. The day the assignment was executed. Mr. Conway may have been there a day or so before while it was in process, with Mr. Hilbert, but I remember Mr. Hilbert, and Mr. Conway, and Mr. Hofmann came that afternoon, or that day, to get their assignment.

Q. And that was in what month?

A. That was in September, I believe.

Q. In what year, 1910?

A. 1910.

Q. Who prepared the assignment to the Merchant's National Bank?

A. Mr. Gilbert really dictated that assignment, of Mayer & Gilbert.

Q. And who acted for the Merchant's National Bank?

A. Judge Stuhr.

Q. Who prepared the assignment for the Bank of the Town of Union?

A. Well, I didn't see that prepared; I understood Judge Stuhr prepared that.

Q. Now, at the time that assignment was signed or given, or at the time you had your talk in August about it with Hilbert did the Glen Engineering Construction Company borrow any money from the Bank of the Town of Union?

A. No.

Q. Or after that assignment did they ever borrow any money from the Bank of the Town of Union?

A. I don't think so.

Q. (By the Court) Did they borrow money from other sources?

A. They did from other sources, Merchant's National Bank.

Q. Any other?

A. No other bank.

Q. Do you know what the last loan was which the Glen Company obtained from the Merchant's National Bank?

A. $5,000.

Q. And when?

A. It was in, I think, October—latter part of September or October, I think. No, it was late in the fall; it was in October. We borrowed three sums from the Merchant's National Bank as we required it from time to time, and I think the last sum was in October.

Q. Were there any other loans from any other bank or individuals?

A. Yes, Mr. M. S. Paine and Mr. P. H. Downey.

Q. Do you know the total amount of loans from Mr. Downey after the assignment of September 14, 1910?

A. I do not remember after the assignment.

Q. Would the books of the concern show?

A. The books of the concern will show, sir.

Q. Do you know whether there were any loans after the assignment of September 14?

A. There was.

Q. Do you know the amounts?

A. I know of but one, I think, of $5,000, and one of $4,900.

Q. What was the last loan to Mr. Payne?

A. It was in the summer.

Q. Did Mr. Payne have any interest in the company?

A. He had a nominal interest, I may say; he was a director of the company and a stockholder.

Q. Substantial stockholder?

A. Well, yes, in money; through Mr. Downey he was.

Mr. Delaney: I object to that and ask that it be stricken out.

A. (Continuing) I mean his interest in Mr. Downey made him a substantial investor in the company.

Mr. Delaney: I ask that that be stricken out as a conclusion, and as incompetent and immaterial. It is not for this witness to say whether he was a substantial investor in the company.

Q. (By the Court, continued) What do you mean by saying he had a substantial interest in the company through Mr. Downey?

A. I mean that the amount of money the books will now show he put in the company will justify me in stating that he had a substantial interest in the company.

Q. You mean, then, that he had advanced a good deal of money that had gone into the company?

A. He had.

Q. Was he related to Mr. Downey?

A. He was not.

Q. Were those advances direct advances from him to the company?

A. To the company, yes.

Q. Why do you say through Mr. Downey?

A. Well, from him friendship. I don't think

if it was a straight business proposition he would have done it.

Mr. Delaney: I object to the witness's statement, "if it was a straight business proposition" and ask that it be stricken out.

The Court: No, it is immaterial; we will not strike it out.

Q. Mr. Alford, do you know the amount of loans Mr. Payne made?

A. In the neighborhood of $20,000—somewhere around $20,000, maybe $25,000.

The Court: Proceed.

Q. At or about the time the Merchant's National Bank account was opened in August did Mr. Hilbert say anything to you about the financial affairs of the company?

Mr. Fallon: I object, upon the ground as incompetent and immaterial so far as the assignment of the First National Bank is concerned.

The Court: Well, I will take it.

A. He did.

Q. At that time what did he say to you?

Mr. Fallon: Same objection, as incompetent and immaterial.

The Court: We are not reaching anything, apparently, that is relevant yet.

A. Why, he asked me for a statement of the company and I told him that we were very busy

and I couldn't stop business and take an inventory and make a statement; that the Surety Company had a statement under a certain date and if he wished a statement he could refer to the books and get it.

Q. What did he do?

A. I left him working on some such statement.

Q. (By the Court) Did he have access to your books?

A. He had access to the books, and he was making a statement out.

Q. What did he do with that statement, do you know?

A. I do not.

Q. Now, in September, around the time of this assignment, did you have any liens filed against either one or the other of these jobs by material men?

A. Yes, in September there was some liens filed.

Q. And they had been threatening liens for some time?

Mr. Fallon: I object to the question as leading.

Q. State what the fact was, how long you held them off.

A. Contractors always threaten with liens.

Q. Did you have a payment due to you in Paterson in September?

A. Yes, we received monthly payments at Paterson.

Q. Did you get any payment in September?

A. I don't think so, no.

Q. Did you have a payment in Paterson held up?

A. We did.

Q. How long was that payment held up?

A. Well, as I remember it, about a month.

Q. (By the Court) How was it held up?

A. By liens against the payment.

Q. Do you know when the first lien was presented?

A. I do not know the exact date, but it was along about the middle of September, if I recollect right.

Q. Before or after the assignment was made to the Town of Union Bank?

A. Well, after the assignment had been agreed to.

Q. No, no, not after the assignment had been agreed to; when with reference to the time of making that assignment was the first lien filed?

A. Well, about the same time.

Q. Can you tell, Mr. Alford?

A. I cannot tell the exact date. If I could see the books and refer to them and know the dates of those liens I might be able to fix it.

Mr. McMahon: I think the record shows it Sept. 16.

Q. At the time of the execution of the assignment to the Town of Union Bank, which bears date September 15—at that time when the company made that assignment were you anticipating the filing of liens?

A. Why, no. I would like to answer your question frankly: The giving of this assignment was not prompted by the fear of liens.

Q. But at that time did you anticipate the filing of liens so that you thought it was a fair thing to carry out your promise and make the assignment?

A. No, the assignment was not given for that reason.

Q. No one asked you about the reason for the assignment. As a matter of fact, when you gave the assignment did you anticipate the filing of liens within a few days?

A. I knew we owed money and the people we owed money to held off at that time, and we had payments coming in all the time and I thought we had a fighting chance to get through.

Q. When the Court asked you the question about carrying out your promise to give the assignment, had you made any promise prior to September to give the assignment?

A. Not prior to the latter part of August.

Q. That was the first time an assignment was ever spoken of by you?

A. It was.

Q. Was Mr. Hilbert in and out of your office throughout the summer of 1910?

A. He was.

Q. Did he keep in close touch with the affairs of the company?

Mr. Fallon: I object. This witness says he was always out.

Q. (By the Court.) Did he have access to the books and was he in position to see what the company was doing?

A. Well, he was in position to, but I can't tell how much he knew.

Q. How often did he go there?

A. Well, every week, sometimes two or three times a week.

Q. And when he would come there he would talk to you about the affairs of the company?

A. Well, not always, no—not always about the affairs of the company. He was in and out of the office as a good friend and as a man.

Q. Did he seem to be interested in the affairs of the company?

A. He had access to the books.

Q. Did he go in to where the books were and have access to the books, that you noticed, when he was there?

A. Yes, on one occasion; we never kept the books away from him—never concealed anything from him.

Q. Did you talk to him about any disputes you had had with the material men that threatened liens?

A. No, they are all matters of record. I hardly know how to answer that. As I say, the contractors are always threatened with liens if he is doing any business. I don't remember any distinct conversation with Mr. Hilbert in which I told him that there were any liens there.

Q. He at one time was going to buy some stock in your company?

A. Yes.

Q. That stock in the company he was going to buy was your stock?

A. Part of it, one share.

Cross Examination on behalf of the Trustee in Bankruptcy, by Mr. Hall:

Q. What was the conversation between you and Mr. Hilbert when you told him the effect you thought the filing of the assignment with the Board of Education would have? Just tell us what the conversation between you was.

A. The conversation in the latter part of August?

Q. Yes. I understand that took place when they first asked you for the assignment.

A. That was the latter part of August, yes.

Q. Now, just tell us.

A. Well, there was one paper brought on. Mr. Hilbert said that they would like to have an assignment, inasmuch as the Merchant's National Bank was going to get an assignment. We had borrowed money from them. He said our account was very small and the men of the bank wanted an assignment; a special agitation, as he expressed it, on the part of Mr. Hofmann, and the first paper was prepared in which I made some changes, and then I took that paper over to Mr. Conway or Mr. Conway returned it—possibly Mr. Hofmann, I am not sure about that, and they weren't satisfied with it and said that Judge Stuhr would get up an assignment.

Q. But what was your talk with Mr. Hilbert about the effect of recording that assignment or filing it with the Board of Education?

A. I advised them not to file it, as it would jeopardize the interests of the bank.

Q. Did you tell him why?

A. Yes, it would bring material men and people with whom we had business dealings down on top

of them. Naturally an assignment is just like a red flag to a bull to a material man.

Q. Was anything further said about your ability to meet that situation if it was to come down on you?

A. Why, yes.

Q. Give us the whole conversation now.

A. We could not meet any such situation as that; no other contractor could. We had at that time the 15%, representing about $30,000, lying there idle.

Mr. Delaney: Of course, this testimony is not competent; it is not binding on defendant Payne.

Mr. Hall: It is a conversation between him and Mr. Hilbert.

A. (Continuing) I think I told Mr. Hilbert that I advised him not to file it. That is as I remember it. It must have been about two years.

Q. At the time of the execution of the assignment to the Town of Union Bank was Mr. Payne present?

A. No.

Q. He was then a director of the company?

A. He was.

Q. Was any director's meeting held?

A. Well, there was not. We were not very strict in holding director's meetings in a close corporation.

Q. (By the Court.) Did you, at the time you had this conversation with Mr. Hilbert, in which you advised him you think not to file the assignment as creditor of the company, consider that the

filing of the assignment would be liable to precipitate insolvency upon the company?

A. Why, yes, certainly.

Q. Did you and Mr. Hilbert or any other officer of the Town of Union Bank ever have any discussion about the smallness of the capital of the company and the size of the contracts that you were taking?

A. No, not in regard to the smallness of the capital.

Q. Wasn't it discussed where your money was to come from to carry on these contracts?

A. No, we were asking for money from them.

Mr. Hall: If your Honor please, I want to examine this witness about two exhibits that were offered, under date of August 30, purporting to be copies of resolutions of the directors, but the exhibits are not here. They had pencil memorandums on them. I am a little at a loss to know what to do without these exhibits.

Q. Do you remember, Mr. Alford, anything being said by Mr. Hilbert, that he desired or the bank required a resolution of the directors about this assignment?

Mr. Fallon: Which bank now?

Mr. Hall: Town of Union.

A. Yes, sir, Mr. Hilbert did say that the bank of the Town of Union required a resolution in order to make it in proper form.

Q. Was that before or after the execution of the assignment?

A. Well, my impression is that it was after, but I am not at all positive.

Q. And do you recall whether he then dictated some such papers to Miss Conroy?

A. I think the resolution was dictated by Mr. Hilbert and written by Miss Conroy in our office.

Q. Following that did you have a meeting of the directors, or was there any discussion about adopting it at such meeting?

A. We had no formal meeting, no, sir.

Q. Well, was there any meeting at all, formal or informal?

A. No.

Q. Now, using this paper as a memorandum, I will ask you if you can tell whether it was then or after September 14, 1910, that the Glen Company gave the assignment to the Merchant's National Bank?

A. At the time this letter was written we had, I think, given the assignment to the Merchant's bank.

Q. You had given the assignment?

A. We had been asked for an assignment.

Q. Using that letter now, simply to refresh your recollection, I ask you if you had not, on September 14, executed and delivered the assignment?

A. We had not at that time.

Mr. Fallon: That is, to the Merchant's Bank?

Mr. Hall: Yes.

The Court: Does the record show what these papers are that you are indicating?

Mr. Hall: This, if your Honor please, is the letter—

The Court: Was that marked for identification?

Mr. Hall: No, sir, it is merely used by the witness.

The Court: Proceed. How the record is going to be I don't know. When it is written out it will appear that he is testifying in reference to a paper which he has described and which is not in any way identified.

Mr. McMahon: I want to reserve examination on the Paine assignment until that assignment is taken up.

The Court: What testimony has now been taken of course would be applicable to the Payne assignment so far as it is applicable. Both parties can put in additional testimony this afternoon. We will take our recess until two o'clock.

Recess until two o'clock P. M.

By Mr. Fallon:

Q. Mr. Alford, how many times did you visit the First National Bank of the Town of Union?

A. The total number of times, altogether, Mr. Fallon?

Q. Yes, sir.

A. I used to go over frequently for pay-rolls.

Q. How many times did you meet Mr. Conway or Mr. Hilbert, or Mr. Hofmann at the bank?

A. I saw Mr. Hilbert several times, and Mr. Conway some, but I don't remember seeing Mr. Hofmann.

Q. Do you remember being at the bank on one occasion when you were seated in the private office

occupied by Mr. Conway who was then the President of the bank?

A. I do, sir.

Q. Do you recall when that was?

A. Yes, I have reference to it somewhere here.

Q. Well, were you there more than once in that room?

A. I don't think so; I may have been twice, but not very often.

Q. When is the occasion that you have referred to, that you distinctly remember being there?

A. Well, it was the time that I went over to see about a note—a personal note of Mr. Hilbert's.

Q. Was there anyone there besides Mr. Conway at the time?

A. No, not that I remember.

Q. Do you remember being there on one occasion when Mr. Conway called up on the 'phone to Mr. Hofmann, and Mr. Hofmann coming there while you and Mr. Conway were there together?

A. It may have been possible, Mr. Fallon, but I do not remember it.

Q. And do you recall that, on the occasion that I refer to, the $10,000 note was discussed and Mr. Hofmann said that he for one would not care to be a party to the making of the loan unless the assignment was forthcoming?

A. No, Mr. Fallon, I don't remember that.

Q. Do you mean that you don't remember any such conversation or will you say that no such conversation took place?

A. To the best of my memory no such conversation ever took place in that bank at that time.

Q. But you are not sure?

A. Well—I am reasonably sure, yes.

Q. Why did you hesitate about it?

A. Because it has been two years since, Mr. Fallon, and I am telling you to the best of my recollection.

Q. And you seemingly have some doubt, though, as to whether or not the assignments were spoken of before August, 1910, have you not?

A. Why, no, I have no doubt that the assignments were spoken of before August.

Q. Why did you say in answer to counsel's question that you spoke to Mr. Conway in June or July, but that he did not ask you then for the assignments; now, when you made that answer did you consider that he may have spoken to you about it and that you didn't remember it, it being so long ago?

A. No, I had no talk with Mr. Conway, or Mr. Hofmann, or Mr. Hilbert previous to the latter part of August about any assignment to the First National Bank of Union.

Q. What did you mean, then, by answering counsel that in June or July, in a conversation with Mr. Conway you did not remember his having asked you for the assignment?

A. Well, I don't remember.

By the Court:

Q. Mr. Alford, I understood you a moment ago, in reply to a question from counsel, to say or intimate that you had heard about the assignment to the bank before August?

A. No; If I did I wish to correct that, your Honor. I didn't mean to give any such impression.

Q. You also said, in answer to counsel's question when he was speaking to you about the Mer-

chant's account which you say was opened in August, 1910, "I don't think I had any talk with Mr. Hilbert about the assignment at that time"; what did you mean saying that you don't remember you had any talk with him?

A. I don't know to what you refer. The first I ever heard of the agitation or any request for any assignment from the bank officials was sometime about the latter part of August or the first of September.

Q. Didn't I understand you to say, in reply to Mr. Hall's question, that the assignment to the Merchant's National Bank was spoken of about the 14th of September? He showed you a letter to refresh your memory as to that.

A. Well, that letter that he showed me, Mr. Fallon, was simply a request on our part to the Board of Education asking that they grant us the privilege of giving an assignment to the Merchant's National Bank.

Q. Now, when was that assignment made, do you know?

A. It was being agitated at that time, but it was made, I think, the latter part of September.

Q. Don't you know, as a matter of fact, that you and Mr. Downey at least, if not other of the stockholders and directors—or directors, rather—held a meeting on the 29th of August, 1910, at which it was stated that an assignment was made to the First National Bank of the Town of Union?

A. I said the latter part of August was the first I heard of it.

Q. Was that also the time that the assignment was voted to the Merchant's National Bank?

Mr. McMahon: Your question assumes certain facts.

A. No, the arrangements had been made a few days before that with the Merchant's National Bank when we opened our account with them to give them an assignment.

Q. Isn't it a fact that you did have a meeting at which you adopted a resolution authorizing the giving at least the First National Bank assignment?

A. Yes; I think that resolution that you have reference to was in regard to the first assignment paper which they objected to. I am not positive on that point.

Mr. Hall: I object to that answer and move to have it stricken out as not responsive.

The Court: That is not a proper matter for you to object to. You cannot object that the answer is not responsive to the question of the interrogator. That is his affair. He can have it stricken out if it is not responsive, but you cannot. If the answer is competent and relevant you cannot object. Proceed.

Q. Do you recall counsel asking you whether there was a meeting or not held by your Board of Directors, authorizing the making of the assignment to the First National Bank of the Town of Union and your saying that you didn't recall such a meeting?

A. I recall that I said that I didn't think there was a formal meeting.

Q. What do you mean by "formal meeting"?

A. I mean with notices as required by law to be sent out in advance calling for a meeting. No such thing was done.

Q. You do know, though, that a meeting was held, whether formal or otherwise, at which you and Mr. Downey were present, and that a resolution was adopted authorizing the making of this assignment to the First National Bank of the Town of Union? You do remember that, don't you?

A. I do.

Q. And you remember it was on the 29th of August?

A. I know it was the latter part of August.

Q. And you know that Mr. Downey gave a certificate which contained a copy of the resolution which was at that time adopted at that meeting?

A. I don't know that he did, but if you say it, why all right.

Q. Didn't you and Mr. Downey talk as to the necessity of holding that meeting at which the resolution was adopted?

A. We talked over this assignment then, yes.

Q. Now, you say the first suggestion regarding that assignment was made by the Merchant's National Bank?

A. Yes, I think it was when we opened our account.

Q. How did it come that you didn't tell the Merchant's National Bank that you didn't file their assignment with the Newark authorities?

A. They didn't demand it.

Q. You didn't suggest that it would be to the injury of your concern to file that assignment with the Newark authorities?

A. I think Mr. Gilbert talked that matter over with Judge Stuhr.

Q. You said you suggested to Mr. Hilbert that it was advisable that the First National Bank

should not file the assignment with the Paterson authorities, because of the bad effect it would have on the company?

A. Yes.

Q. You had no such talk with the Merchant's National Bank with respect to the Newark assignment?

A. No, Mr. Hilbert attended to that.

Q. Isn't it a fact that the Newark assignment was made before the Paterson assignment?

A. About the same time. Judge Stuhr was preparing both.

Q. Didn't you say here to-day that some one from the First National Bank came to you and said that they had heard that you were making an assignment to the Merchant's National Bank?

A. Yes, sir.

Q. And at that time Downey did make the assignment to the Merchant's National Bank?

A. No.

Q. Are you sure about that?

A. I think so.

By the Court:

Q. Does it appear in evidence what the date of the assignment to the Merchant's National Bank was?

A. Yes, the latter part of September, if I remember right, about the 25th.

Q. Do I understand you now to testify, Mr. Alford, that as a matter of fact the assignment of the Newark contract to the Merchant's National Bank was made a week or more after the assignment to the Union Bank, which bears date September 15?

A. It was filed, I think, on the 24th, but it was drawn up about the same time.

Q. Now, when was it executed, with reference

to the execution of the assignment to the Town of Union Bank?

A. I think the final paper was executed about the 20th of September.

Q. When you agreed to give the assignment to the Town of Union Bank, in the latter part of August, had you agreed to give the assignment to the Merchant's National Bank?

A. Provided in case that the Board of Education of Newark would accept it. It was in violation of a paragraph of the contract.

Q. There was no question of contemplated insolvency of your company at that time, was there?

A. No, none that I know of. We were working on our contract; I had no idea of any insolvency.

Q. And the first intimation that you had of any apparent insolvent condition of the company was in the latter part of November, was it not?

A. Yes, we were getting pressed for money, Mr. Fallon.

Q. And because in the latter part of November, when you were getting pressed for money, you considered that you would have to go to the wall or make an assignment?

A. Yes.

Q. Mr. Downey is your uncle, isn't he?

A. He is.

Q. Is it not a fact that you and Mr. Downey and Mr. Paine were the only ones interested in the Glen Company?

A. My wife held some shares of stock.

Q. The only others interested were yourself, Mr. Downey and Mr. Paine?

A. Yes, Mr. Fallon.

Q. Now, you had been making financial state-

ments to Surety Companies after September, 1910, had you not?

A. I don't think so, Mr. Fallon.

Q. When did you take this New Dorp job?

A. Way back in the previous years, in November, I think, just before the winter began.

Q. When was that completed?

A. Well, it was completed by others, but was practically completed by us before the assignment —I mean the assignment of the company—bankruptcy of the company.

Q. You mean December, 1910?

A. Yes.

Q. Now, are you not sure, or are you sure, that after September, 1910, you did not make a sworn statement to a surety company?

A. No, I prepared no statement for any surety company.

Q. You know Mr. Sweeney?

A. Yes.

Q. There were some liens filed against some of the work that you were doing in September, 1910?

A. Yes.

Q. Do you remember that?

A. Yes.

Q. Those liens were released, were they not—two or three liens?

A. Yes.

Q. And they were released by your filing bonds?

A. Yes.

Q. Now what was the name of the surety company that entered into the bond with you to release those liens?

A. The Illinois Surety Company.

Q. That was about the 21st of September, was it not?

A. Well, it was in September; I don't know the date.

Q. Didn't you make a statement to that surety company at that time before you entered into that bond?

A. We gave them the last statement available. No new statement was prepared by me at that time.

Q. When was the last statement made by your company as to its financial condition, do you know?

A. I don't know when we secured the—probably five or six months; I don't know exactly when. Our bonds were written by a company that seemed to know about us, and even then I didn't prepare any statement.

Q. Well, when you went to deal with the Merchant's National Bank you represented to Mr. Albenesius and Mr. Smith, two of the officers of that bank, what the financial condition of your company was?

A. I never made any representations to Dr. Albanesius or Mr. Smith in regard to the financial condition of our company.

Q. Did you talk to them at all about the procurement of loans?

A. I talked to Dr. Albanesius.

Q. (By the Court) What was the claim that was put in liens by notice on which you had a release by giving a bond of the surety company?

A. It was a claim of the terra cotta company and a claim of the limestone company, and a fellow named Healey which we intended to contest. That is why I bonded it.

Q. Did you intend to contest them all?

A. No, sir, those two that we bonded.

Q. You thought you had a meritorious defense?

A. We certainly did.

Q. Did you so state to the surety company?

A. I did.

Q. You did make several statements, don't you recall, to the First National Bank as to the financial condition of your company?

A. No, I didn't make any statements.

Q. Well, did Mr. Downey tell you that he had made any statements?

A. Mr. Downey did not, because I know; I don't think Mr. Downey did.

Q. Do you remember having made a statement to R. G. Dun & Company during the year 1910?

A. I made several statements to R. G. Dun & Company.

Q. During the year 1910?

A. I don't know whether it was 1910 or 1909. I knew Mr. Breckenridge. I don't think I did in 1910.

Q. Didn't you make a statement on the 10th of February, 1910?

A. Possibly. I don't remember it at the present time.

Q. And didn't you make a statement to them in April, 1910, to R. G. Dun & Company?

A. I don't remember; I may have.

Q. Who is Mr. Breckenridge?

A. An old representative of R. G. Dun & Company for years.

Q. Now, what was your purpose in going to Mr. Hilbert and giving him a copy of the Paterson contract at the time that you obtained the loan of $6,000?

A. Why, Mr. Hilbert wanted to know the amount of the contract and about how the payments would fall due, and that was all I knew about it.

Q. And you stated in answer to the Court that they (referring to the First National Bank) at the time counted on your banking the money that was coming from the Paterson job to secure them? Do you remember saying something to that effect?

A. No, I didn't.

Q. Do you remember saying the words "that they banked" and the words "coming from the Paterson job?"

A. No, I would see that the moneys coming from the Paterson job would pass through the bank.

Q. What was your purpose, then, in so handing him a copy of the Paterson contract?

A. We were borrowing money from them.

Q. Did you consider that that was going to be any security to them?

A. No, they didn't ask for any security.

Q. Then did you make inquiry for the $10,000 loan?

A. I did not, not at the bank.

Q. Well, did you make a request at all yourself?

A. I probably told Mr. Hilbert.

Q. I want to know all the facts about that.

A. I don't remember why I shouldn't; I probably did. I don't think he would give it to us without asking for it.

Q. Do you remember some talk about paying off the $6,000 note before you got any more money?

A. Yes, we paid it off.

Q. Didn't you pay that off ten days before you got the $10,000 loan?

A. Some days before, yes.

Q. Before you got the $10,000 loan what was said between you and any of the officers of the company in respect to how you would pay it off and what security you would give?

A. We were to give no security.

Q. It was a demand loan?

A. All those loans from the banks to construction companies are demand loans.

Q. Is there any loan you borrowed from anybody else without giving security?

A. The Merchant's National Bank loan was $15,000 with a power of attorney.

Q. Authorizing them to collect in your behalf the moneys coming from the Newark job; is not that a fact?

A. (no answer).

Q. But the only transaction you had with the bank whereby you got a loan to the extent of $10,000 without security was the First National Bank? Is that so?

A. Why yes, we were never borrowers before at the Merchant's National or from any bank.

Q. You never borrowed before?

A. No, we never borrowed any money before to any extent—I mean from the banks—if that is what you refer to.

Q. Well, from any source—the moneys that you borrowed from Payne; you didn't borrow at all long after that?

A. Mr. Downey was loaning money from time to time.

Q. When you say "before" what date have you reference to, before April 19, 1910?

A. No, we borrowed very little money before that.

Q. Now, you remember the $5,000 transaction of July 27, 1910, as between Mr. Downey and the bank, don't you?

A. Yes.

Q. And you remember Mr. Downey made a note to the bank with your endorsement, do you not?

A. I do.

Q. And you remember that that transaction was for the benefit of the Glen Engineering Construction Company

A. It was.

Q. And that money was received by the Glen Engineering Construction Company?

Q. It was.

Q. And it was turned over by Mr. Downey to the Glen Company that very day that he received it?

A. I think it was.

The Court: Are we not wasting a great deal of time in proving these things that stand proved. There is no possible dispute about that.

Q. Do I understand you to say, Mr. Alford, that you never met Mr. Hofmann at the First National Bank until some time in the latter part of the summer of 1910?

A. I said I didn't remember ever having met Mr. Hofmann previous to that time, and previous to August, 1910. I don't remember having any conversation with Mr. Hofmann in regard to business. On behalf of the Frank Miller Lumber Company.

Q. (By Mr. McMahon.) Mr. Alford, counsel has asked you if you had a meeting of the Board of Directors on August 29; on August 29 was Mr. Payne in your office when the assignments were discussed?

A. I don't think Mr. Payne was.

Q. Well, you would know if he was there, wouldn't you?

A. Yes.

Q. And he was a member of your company at that time, was he not?

A. Yes, sir, he was.

Q. Then no meeting was held of the Board of Directors prior to August 29, 1910?

A. No.

Q. Had Mr. Paine been asked to come there?

A. No.

Q. Had a notice of a meeting of the Board of Directors been sent out?

A. No.

Q. Then what you mean is that you and Downey were in the office there and between you discussed the demand of the bank made for the assignment?

A. Yes.

Q. Not that any meeting of the Board of Directors was held?

A. No.

Q. Prior to the taking of the Newark and Paterson contracts did your company ever take any large contracts?

A. No, not that large.

Q. (By the Court.) How long had you been in business?

A. Since December, 1905.

Q. Was that company organized?

A. Yes, sir.

Q. Had you been in the same business yourself individually before that?

A. In a small way, yes.

Q. Before that time you had performed a contract erecting a school in Bergenfield, N. J., had you not?

A. Yes.

Q. And a contract building a church in Hackensack, N. J.?

A. Yes.

Q. And a contract building an academy at Montclair, N. J.?

A. Yes.

Q. What was the size of each one of these contracts?

A. The Hackensack church was $60,000, and the Montclair job a little less than $40,000, and the Bergenfield school about $35,000.

Q. Well, on a capital of $10,000, which I understand you had, did you as a contractor consider, Mr. Alford, that you could perform these contracts in Newark and Paterson?

Mr. Fallon: I object, on the ground as incompetent and immaterial.

The Court: I shall not impose the rule that counsel shall conclude his whole examination at the first examination; we have not enforced that rule and I shall not begin to lay it down now. The only question is whether the testimony is competent and relevant at any stage of the examination. I will allow it.

A. No.

Q. Then when you went into those contracts you knew that you would have to acquire a good deal of money; that your capital was not sufficient?

A. We had small capital, yes.

Q. But you took both of those contracts and were performing them in the spring and summer of 1910?

A. Yes.

Q. In the first part of those contracts, you weren't as much in need of money as you were towards the end of it; is that right?

A. Right.

Q. That is the general experience of contractors when they begin a contract the money comes along faster than it does when it is half through?

A. Yes, it is.

Q. Now both of these jobs were well under way in the summer of 1910, weren't they?

A. Yes, under full blast.

Q. And what was your experience about getting money from those jobs at that time?

A. Almost impossible.

Q. (By the Court.) What do you mean by that?

A. I mean that the Paterson job was tied up with liens.

Q. What period have you in mind in making that answer?

A. In August, 1910, we were tied up in Paterson; we could not get any money, practically, from August to October.

Q. Were liens filed in August?

A. No, in September; our August work had to be done before we could get money in September.

Q. Then the tie-up came in September, did it?

A. Yes, sir. And at the same time we were plastering and Mr. Fanning was working on his monthly payments and we had very little as he figured it, but his figuring prevailed.

Q. And that was in August, 1910?

A. Yes.

Q. And you were in a condition in August, 1910, where you had to have money?

A. Yes.

Q. You were familiar with the bank balances of the company during that period and how much money they had in the various banks at different dates and different times?

A. I looked at the bank balances in the office, yes, from time to time.

Q. And you were familiar at that time with the number of creditors the company had and generally how much was due to each one of those creditors?

A. I tried to carry it in my head, yes.

Q. Would you say that your company, from your knowledge of what money they had incoming and their bank balances, was able to meet its current obligations as they came due?

Mr. Fallon: I object to that as being incompetent, because it doesn't seem to me that would indicate solvency.

The Court: I do not, perhaps, quite understand the question. Does counsel mean to ask the witness whether he so thought at that time?

Q. Was the company in a position to pay its bills?

A. No, but—

Mr. Fallon: No, but what?

The Court: Finish your answer, Mr. Alford; develop your whole opinion.

A. (Continuing.) But all the bills weren't requested at one time. The company had a line of credit.

Q. (By the Court.) I think you stated this morning that you thought at that time that the company had a fighting chance; does that describe its situation as you now think, justly?

A. Why, yes; I shouldn't ask for money from people if I didn't think the company had a good chance to get through.

Q. The officers of the company had put their hands in their pockets quite frequently during that period?

A. They did.

Q. And you had frequent demands from creditors during August, 1910?

A. Yes.

Q. For instance, the Frank Miller Lumber Company made frequent demands during August, 1910?

A. Yes.

Q. (By the Court.) Did the company owe you anything that late; in August, 1910?

A. It did not, no.

Q. Did you receive a salary?

A. I did.

Q. How much?

A. I think it was $2,000 a year.

Q. And did Mr. Downey receive a salary?

A. Similar salary.

Q. Same amount?

A. Same amount.

Q. Was there any other salary to any of the officers of the corporation?

A. No.

Q. Were there times in August when you didn't draw your salary?

A. Well, I didn't have any stated time for drawing it, Mr. McMahon.

Q. There were times around there, weren't there, when you went and borrowed money outside for living expenses?

A. Right near the end.

Mr. Delaney: I object to the question as to his borrowing money outside for his living expenses, as irrelevant.

The Court: I will take it, if that is the objection. Proceed.

A. (Continuing.) When the company went into bankruptcy they owed me about $200, that is all.

Q. During September, October and November, and up to the time the company failed did it suffer any extraordinary loss from any cause, that you know of?

A. No.

Q. Went on in the regular course of its business until it couldn't go on any further?

A. Yes.

EXAMINATION ON BEHALF OF THE TRUSTEE IN BANKRUPTCY:

Q. (By Mr. Hall) What do you mean by the expression that the company had a fighting chance up to that time?

A. Why, I mean just before they stopped—

Q. No, in August or September?

A. I thought the company was going to pull through on its contract.

Q. In order to do that did you think that they had to borrow money?

A. Yes, but figuring on receiving some payments and not borrowing any more than they had borrow-

ed I thought we could run along about the same until we could get to the end.

Q. Did you figure at that time that they would need to borrow more than you were getting from the Merchant's Bank?

A. Why no, not at that time.

Q. Hadn't representations been made that Mr. Downey and Mr. Paine would finance the company through their loans?

A. Not at that time, no.

Q. When were such representations made?

Mr. Delaney: I object, if your Honor please. There is no proof of any representations having been made.

Mr. Hall: I am asking him when such representations were made at any time.

Mr. Fallon: I object as incompetent and irrelevant.

Mr. Delaney: I object on the further ground that the question is leading.

The Court: It is not excluded as irrelevant. The question is whether it is competent. I will allow the question.

A. Before the Newark contract.

Mr. Fallon: Is the question "were such representations made?"

The Court: Yes.

Mr. Fallon: Then I think the witness ought to answer "yes or no."

The Court: You can move to strike out anything which the witness says that is incompetent or irrelevant. The witness should answer the question directly yes or no.

A. Not in July or August.

Q. No, but at any time?

A. Yes.

Q. And when?

A. Before the taking of the Newark contract.

Q. Now, is it not a fact, Mr. Alford, that when the Glen Company took the contract for the Newark high school job, having in mind your obligations at that time on the Paterson job and on the St. John's Guild job, you knew that it would be impossible to perform that Newark contract without securing money in the shape of loans from outside sources?

Mr. Fallon: I want to object to this as being incompetent so far as the First National Bank of the Town of Union is concerned.

Mr. Delaney: I also object on the part of M. S. Payne.

The Court: I will allow it.

A. I did know it was necessary.

Q. And it was at that time, I understand, when that contract was taken that Mr. Paine and Mr. Downey, or both of them, assured the company that they would loan the money sufficient to carry out the contract?

A. No, Mr. Downey said "Go ahead and take the contract; we will put it through," but in justice, Mr. Hall, I ought to say the demand for money at a later date was much larger than anybody thought.

Q. Now then, when you got down to August and September, 1910, and your money was not coming in on the Paterson contract then your demands for

money had been the greatest in the history of the company?

A. Yes.

Q. And in that stress of circumstances, having then a loan from the Town of Union Bank for $10,000 you turned to the Merchant's National Bank for additional credit, and as a condition in getting that additional credit from the Merchant's Bank you were obliged to pay commissions to Mr. Hilbert or somebody?

A. For discounts, yes.

Q. And that was at the rate of $250 for every $5,000 note?

A. It was.

Q. Or was it $500 for every $5,000 at that time?

A. Only one of them cost $500.

Q. One of the $5,000 discounts did cost you $500?

A. Yes, sir.

Q. (By the Court) Was the period of the loan specified?

A. All the loans were on demand notes.

Q. Was there any understanding between you as to the period of the loan?

A. Well, until the next payment would come in and then we could cancel, and then if we got short we could borrow again.

Q. And was that the maximum period contemplated?

A. At Newark—

Q. No, no, I mean at that particular time when the $5,000 note was gotten?

A. Until the next payment came in from Newark?

Q. And what would that period be, about?

A. Maybe three weeks or a month—two weeks, maybe.

Q. Two months, possibly?

A. No, hardly that long, your Honor.

Q. Do I understand you paid a bonus of 10% for that accommodation?

A. For one $250 on $5,000—five per cent.

Q. You paid at one time, I understand, $500 bonus for a $5,000 loan?

A. Well, we didn't know we were doing it.

Q. What do you mean by that?

A. Well (witness smiling) I suppose I will have to answer. Mr. Hilbert came to take $250 over to the Merchant's National Bank and when I went over to borrow the second $5,000, I was informed at the bank that the $250 for the first $5,000 had never been paid, and upon inquiry I was told by Mr. Hilbert that he and the President of the bank had some kind of a money deal whereby the President of the bank was entitled to the $250 that Mr. Hilbert had started to the bank with and the President of the bank refused to let us have another $5,000 until our obligation was kept in regard to the $5,000. We had to pay $250 additional for that $5,000 and $250 for the next five.

Q. That was $500 bonus for two $5,000 notes?

A. $750.

Q. Leaving out the first $250 you had to pay $500 more?

A. We did.

Q. And you paid, or expected to pay, the face of the note, with interest?

A. Yes, in three weeks. It was almost negligible to us; it was almost hopeless to me.

Q. During what perior was this?

A. From August on—from the end of August on, when these bonuses began coming.

Q. I understand from the end of August you regarded the situation as hopeless?

A. I knew it was only a question of time when we would have to quit.

Q. I understood you to say the situation was hopeless, and I ask you was that your view at the end of August?

A. Well, almost hopeless.

Q. That seems to correspond with what you said this morning that you regarded at the end of August the company had a fighting chance?

A. Why, then I still thought, your Honor—I thought it was no time for us to quit. We would have more money if we could drive these contracts through.

Q. What you mean by "fighting chance" is, if at the end of August you could have borrowed some money with fair chances of getting it on reasonable terms you would have had a fighting chance of pulling through?

A. I think we would have pulled it through.

Q. (By the Court.) I suppose you would like to borrow from some source the equivalent of the money that was tied up—the fifteen per cent?

A. Yes, on both jobs, at Paterson and 15% at Newark.

Q. Now, isn't it a fact, Mr. Alford, that on the Paterson job in particular, at the beginning or the work the money came in in comparatively large proportion—the money came from the Board of Education in comparatively large proportion with what the Glen Company had expended on the work?

A. When was that?

Q. At the beginning of the Paterson job, your earlier payments?

A. Yes, we were going along nicely then.

Q. But when you got down to this period around in July and August the requisitions that you put in weren't honored by the Newark high school at anything like the proportion you asked for?

A. No, not on the face of our requisition.

Q. So that at that time, in July and August, 1910, you were not receiving from the Board of Education of Paterson or from Newark either payments in accordance with the estimates that you required?

A. That is it.

ON BEHALF OF THE FIRST NATIONAL BANK OF THE TOWN OF UNION.

Q. (By Mr. Fallon.) Between February, 1910, and September, 1910, the Glen company made money, did it not? I mean, it didn't lose money?

A. We got our money in from the contracts and it looked as though we were getting along all right.

Q. And in February, 1910, is it not a fact that you had cash in the bank amounting to $9,400, accounts receivable $34,000, all of which you stated were good, and machinery and fixtures $1,600, making a total of $45,372.91, of assets that you had at that time, and so represented?

Mr. Hall: I think it is unfair for counsel; this is the second or third time that he has referred to a paper and asked if statements were made, and the witness said he didn't remember making such statements. I think he should show the statements to him.

Q. Do you remember making a statement to R. G. Dun & Company on February 10, 1910, or thereabouts, that the entire amount of your net assets was $45,000?

A. I don't remember such statement, as I told you before, Mr. Fallon.

Q. Well, would you say now that your assets were approximately that, about that time?

A. I can't say that either. The books ought to show that.

Q. Will your books show any such large loans of money by the bank or others, between February and June or between April and September, 1910?

Mr. Hall: I object to that question. The books show that, your Honor.

Mr. Fallon: I am asking him; let the books show it.

The Court: The objection is that the books are the best evidence.

Q. Do you remember stating to counsel that Mr. Downey and Mr. Paine had made large loans to your company before September, 1910, to carry on these contracts?

A. They were making loans from time to time. If you will give me the books I can tell you the exact dates. I don't remember the exact dates.

Q. You stated, on your Paterson job you didn't get any money between August and October, but you did get money in October, didn't you?

A. Only a part of that, Mr. Fallon.

Q. How much, do you remember?

A. I think that requisitions of about $4,000 came to us the night before pay-roll day, which was immediately put right in the pay-roll the following day.

Q. Now this fighting chance that you thought the company had—isn't it a fact that that fighting chance was right near the end, meaning by that the latter part of November or the first of December, 1910?

A. No, I said when we began paying bonuses it looked sort of hopeless to me.

Q. You didn't get your first loan from the Merchant's National Bank until about the first of September?

A. The first one then, and it ran on.

Q. And you say you got another one in October?

A. We got three loans, the dates of which I can't tell you now.

Q. Up to the time you began to pay bonuses, your company was all right; you had no trouble?

A. I didn't say that. When we began to pay bonuses we were a great deal worse off.

Q. (By the Court.) Did you pay a bonus for the $10,000 on April 19?

A. No, sir.

Q. You didn't pay any bonus?

A. No, sir.

Q. You didn't pay a dollar of bonus for any loan you got from the First National Bank of Union?

A. I did not, and I put that question right up to them, too.

Q. And I understood you to say that there were no extraordinary losses that you sustained before November, 1910; now, I want to ask you if it isn't a fact that you had erected a foundation wall on the Newark job that you were compelled to tear down at a loss?

A. Yes, sir, $1,300 it cost us, Mr. Fallon.

Q. And at that time you didn't have much money?

New Jersey State Library

A. Well, I guess that was May or June—about June, if I remember right, and we didn't erect that wall. We preferred charges against a man responsible for that.

The Court: Is the book of the Merchant's bank here

Mr. Hall: Yes, sir, but I don't think it has been put in evidence.

The Court: It has been referred to, has it not?

Mr. McMahon: It has been referred to to fix the date when the account was opened, that is all.

Q. Did you know that the company made assignments to Mr. Payne about the 10th of December, 1910?

Mr. Delaney: I object to that; the assignments will speak for themselves.

The Court: Has that assignment been offered in evidence?

Mr. Delaney: In connection with the other papers at the first hearing; they are in evidence to that extent, subject to the formal introduction of our proof.

By the Court:

Q. Mr. Alford, I call your attention to this book, which I understand is recognized as the pass-book of the Glen Engineering Construction Company, showing its account with the Merchant's National Bank, and showing that the account was opened by the deposit of $3,000 on August 25, 1910; is that correct?

A. Yes, Merchant's National.

Q. Now I understand you to say that the agreement between your company and the Merchant's National Bank for the assignment of the Newark contract, subject to the consent of the Newark authorities, was made before this account was opened, or at the time it was opened?

A. Just about the time.

Q. You say "just about"?

A. Yes, sir, at that time.

(By the Court, continued):

Q. Did or did not the bank refrain from opening this account until you had made that promise?

A. Well, I didn't open the account, your Honor.

Q. Who did?

A. Mr. Downey.

Q. Mr. Alford, I refer you to Exhibit C-8 and C-9, purporting to be assignments made by the Glen Engineering Construction Company to M. S. Payne, which appear to have been made December 1, 1910; do you recall that they were made at that time?

Mr. McMahon: That is not within the re-direct examination, and I understood we were to take these issues up separately.

Mr. Fallon: My contention is that when they made these assignments they did it with the expectation of protecting Payne.

The Court: All that is fair matter for argument, but the question is whether you had not better wait until you get to the Payne assignment. The trial of the cause

has been very much confused and I think counsel ought to endeavor to do what they can to avoid confusion. Now, I think, gentlemen, we will have to rule that you close the examination of this witness. He has been examined back and forth two or three different times like a shuttle-cock.

Examination on Behalf of the Trustee:

By Mr. Hall:

Q. Isn't it a fact that your arrangements for opening a deposit account with the Merchant's National Bank were at the same time there was made the arrangement about securing the discount of notes from that bank?

Mr. Fallon: I object to that, because I do not understand that this witness had anything to do with the opening of this account.

The Court: The witness knows that he is to answer simply from his own knowledge. I will allow it.

A. I don't know, sir; I can answer only from hearsay.

EXAMINATION ON BEHALF OF THE M. S. PAYNE ASSIGNMENT:

By Mr. Delaney:

Q. Can you say, Mr. Alford, about how much of the work on the 6th payment of the Newark job was completed on the first of December, 1910—what percentage of the work?

A. Why, about ninety or ninety-five, I can say.

Q. You said something about 15% in connection with the Newark job; will you state what you meant by that statement?

A. Our terms of payment called for the payment of moneys at certain intervals as the work progressed. Those payments were figured first as actual cost of work at that time, 15% taken off of the cost of the first payment, and the cost of the second payment was figured as a total 15%. In other words, every one of the payments that came to us was 85% of the actual value.

By the Court:

Q. Not actual value, but value as estimated, as I understand it, which was the only difference between the Newark contract and the Paterson contract; that is at the end of each month or each period the architect figured up to what he estimated to be the amount of work you had done?

A. That is right.

Q. And then you got that amount less 15% and in the case of the Newark contract the estimate was made beforehand and each payment was provided for as a specified sum which was calculated upon the amount of work that would be done at that time less 15%. Is that it?

A. That's it.

Q. So that the amount that had been paid to you by the Newark Board of Education was 15% below the estimated value of the labor which was put into the building at that time, December first?

A. Labor and material.

Mr. McMahon: I want to offer this note of March, 1910, in evidence.

Admitted and marked "Trustee's Exhibit D-1.")

ON BEHALF OF THE JOSEPH SHARPE CONSTRUCTION COMPANY:

By Judge Lewis:

Q. You answered Mr. Fallon's question, as to whether you were making money from the spring of 1910, and I understood you to say these moneys were coming in well at that time. I want to ask you upon that if it is possible for you to say that you were making money at that period, excepting upon the assumption that there was a profit in your contract when completed?

A. Only in that sense.

Mr. Hall: I want to take up the proof on the contract between the Glen Company and the Agnew Company, if we can interject it here.

The Court: Perhaps we had better finish the assignments first. You can start in with your affirmative proof on your side to sustain that assignment if you are ready to do so. I think I shall have to require you, Mr. Delaney, to go on with your proof without waiting for counsel from New York.

Mr. Delaney: I understood Mr. Gourley had some proof to submit. If that could be taken up it wouldn't force me to go ahead with my proof.

The Court: Certainly; I understood you wanted to go on with your case.

Mr. Delaney: Not just yet.

Mr. McMahon: I have two more witnesses, but I understand Mr. Gourley wants to get away; he has been here twice.

The Court: What is your proof, Mr. Gourley?

Mr. Gourley: I have been waiting for the attack on me.

Mr. Fallon: May I ask the Court and counsel if they will permit me to offer Mrs. Hicks as a witness as to the due acknowledgment of the assignment. I appreciate the assignment is now offered in evidence. The reason I want this proof taken is because Mr. Downey has made oath before this notary that this instrument was executed by direction of the Board of Directors. Now, they are bringing in proof here that there was no meeting of the Board of Directors.

The Court: Do I understand you now offer the acknowledgment as proof of those facts?

Mr. Fallon: Yes, sir. I have Miss Hicks here before whom the oath was made.

The Court: How does that prove that there was a resolution of the Board of Directors on that subject?

Mr. Fallon: It doesn't prove it, but it seems to me it is to be taken most strongly against them. It is for them to prove to the contrary.

The Court: Mr. Fallon, it cannot possibly be that that affidavit against objection can be received as evidence in this case. That affidavit, if correct in form under the statute, might have the effect to make the

instrument receivable in evidence if it were a conveyance of land, but, as I reminded counsel the other day, we haven't any such law as they have in New York permitting any instrument to be received in evidence and which is acknowledged, whether it relates to land or not, and if we had it wouldn't make any difference, because the sole force of the proof would be to make the instrument admissible in evidence. It wouldn't prove the things alleged in the affidavit to be true at all.

Mr. Hall: I would ask Mr. Alford to take the stand again.

SMITH ALFORD resumes the stand for further examination on behalf of the Trustee in Bankruptcy.

By Mr. Hall:

Q. Mr. Alford, I show you a paper—

The Court: One moment, Mr. Hall; why do you want to put Mr. Alford on the stand again?

Mr. Hall: This is on the claim of the John Agnew Company, another branch of the case.

The Court: Proceed.

Q. Mr. Alford, I show you a paper dated July 10, 1909, signed John Agnew Company, and marked Trustee's Exhibit D-9 for identification, and ask you if you received that from the John Agnew Company at or about that date?

A. We did.

Q. I also show you a letter from the Glen Engineering Construction Company to John Agnew Company, dated July 23, 1909, and marked D-10 for identification, and ask you if that was your reply?

A. Yes, sir.

Mr. Hall: I offer the two letters in evidence.

The Court: Read them.

Mr. Hall: Exhibit D-9 reads as follows:

Paterson, N. J., July 10, 1909.

The Glen Engineering Construction Co.,

Gentlemen:

We do hereby agree to furnish to you in the erection of the new high school the following material at the following prices: Three and one-half million brick at seven dollars and seventy-five cents per thousand delivered on the ground; Atlas Portland Cement, one dollar and eighteen cents per barrel in bags, four to the barrel, bags to be charged at ten cents apiece in addition to above quotation and credited at same price when returned.

Respectfully yours,

JOHN AGNEW CO.

Mr. Hall: Trustee's Exhibit D-10 reads as follows:

New York, July 23, 1909.

John Agnew Company,
Paterson, N. J.

Gentlemen:

We are just in receipt of a letter from Mr. Fanning, Architect, copy of which is herewith enclosed, which is self-explanatory in regard to the rough brick Paterson Job.

Will you kindly see to it that all brick delivered on this job meets with the Architect's requirements?

We acknowledge your proposition of $1.18 per barrel for Atlas Portland Cement, delivered on the job in amount sufficient for the life of the job.

Your quotation of $7.75 for Mountain View brick in accordance with above requirements to the amount of one million and a half is herewith accepted.

Very truly yours,

GLEN ENGINEERING CONSTRUCTION COMPANY,
SMITH ALFORD,
General Manager.

Q. I show you a paper, consisting of twelve sheets, appearing to be an account between the Glen Engineering Construction Company and John Agnew Company, commencing November

1st, 1909, and ending October 31, 1910, and ask you if that is a statement of accuont received by the Glen Company from the Agnew Company, in or about the month of November, 1910?

A. Yes.

Q. And the items on that statement, "hard brick and cement," were the brick and cement purchased by the Glen Company from the Agnew Company pursuant to the two letters, Trustee's Exhibits D-9 and D-10?

A. Part of them were.

Mr. Gourley: I object to the account. The witness said no.

Q. What do you mean by that, Mr. Alford?

A. I mean you have some $8 brick here and the contract in this letter that was referred to—we exhausted that supply of brick, if I remember right, and purchased elsewhere, and then, again running short, we asked Mr. Agnew to help us out.

Q. But, with the exception of that brick on this bill charged at $8, the other brick and the cement were the brick and cement furnished by the Agnew Company pursuant to the correspondence that I have referred to?

A. The brick up to a million and a half are the brick. I haven't been all over this thing, but up to a million and a half.

Q. And all of the cement was used in the building?

A. The cement was for the life of the job.

Cross Examination by Mr. Gourley:

Q. How many articles were included in the materials supplied by the Agnew Company?

A. They were brick, plaster—

Q. Oh, well, I mean 11, 12 or 13 items?

A. Yes, somewhere around there—flue lining and miscellaneous items.

Q. As you needed them you simply called on the Agnew Company and they told you what the price was and you ordered them from him?

A. Yes, sir.

Q. You knew before you ordered just what the price was?

A. Yes, we had no kick on the price, never did.

Q. I say these other items you speak of you knew the prices by telephone before the goods were delivered?

A. Yes, in any amount.

Q. Now, the three and one-half millions of brick —there was only a million and a half that was delivered from Agnew Company; you went somewhere else?

A. Yes.

Q. And you had a right, in your judgment, to go anywhere else for the remainder?

A. Yes.

Q. And that was so as to the cement?

A. Well, no, I bought cement for the life of the job. I think Mr. Agnew would have objected if I went elsewhere for that.

Q. I am not asking you what he thought; he may have a different opinion from you; I ask you what you did.

A. Bought from Agnew.

Q. Now, the customary way was to find out in advance of the job what the price was for a given article that you needed; that is so, isn't it, and order it from day to day?

A. Yes.

Q. Now, you had other kinds of cement, didn't you?

A. Keene cement, a kind of plaster cement for floors, and Portland is now used on buildings.

Q. But Agnew had different kinds of cement, didn't he?

A. Oh, yes, different brands.

Q. Brands I meant; that was so?

A. Yes.

Q. Do you remember going to Mr. Agnew and asking him what he would supply you cement for—I mean personally, before this letter was written?

A. Yes, Mr. Agnew's brother.

Q. The Agnew Company?

A. Yes.

Q. And did you ask him what he would supply brick for?

A. Yes, sir.

Q. And they told you?

A. They did.

Q. Did you later ask him to send that letter, so that they could be checked up?

A. So that we could have them.

Q. Did you, after Mr. Agnew told you what the price were, ask him to send a note with the prices, so that you could check up the bills when they came in?

A. I did, yes.

CHARLES AGNEW, recalled on behalf of the John Agnew Company, testified as follows:

Direct Examination by Mr. Gourley:

Mr. Agnew, I show you a letter marked Trustee's Exhibit D-9, and ask you to state the circumstances under which that letter was written.

A. I wrote this at Mr. Alford's suggestion. I quoted him the price on this material, this cement and brick, and he asked me to write this and send it to the office so that they would have it for that purpose in checking up their account.

Q. Is that why that letter was sent?

A. Yes, sir.

Q. How many items were there on this account, all together?

A. Oh, I should say there were sixteen or seventeen all together of different kinds of material.

Q. How much of this brick was sent by you?

A. We furnished about a million two hundred thousand—million and a quarter.

Q. Of this amount?

A. Yes.

Q. Where did he get the remainder of the brick? Did he get them from you?

A. No, sir.

Q. Was there any time given on this agreement —any arrangement made—as to the payment—any time conditions, any terms of any kind?

A. No, sir.

Q. Had the amount of cement that you were to furnish anything to do with the price of it for such a job as that?

A. Well, no. They didn't make any distinction as to quantity.

Q. You do a very extensive business?

A. Yes.

Q. And particularly in cement?

A. Yes, sir—mason's materials.

Cross Examination on behalf of the Trustee:

Q. (By Mr. Hall.) Did you have a similar arrangement with the Glen Company in respect to the patent plaster that you had with respect to the cement? That is, at a certain date you gave them a quotation of price that would cover all the patent plaster that you supplied them on that job?

A. I gave Mr. Alford a quotation.

Q. And that price wouldn't fluctuate throughout the job?

A. Well, no.

Q. When he asked you for a quotation on patent plaster you fixed a price that you agreed to supply all the patent plaster for the Paterson high school?

A. Yes; no quantity specified.

Q. And you did supply them with Ivory King's Adamant Patent Plaster?

A. No, sir, supplied them with the Ivory.

Q. Do you recall the price agreed upon?

A. I don't, offhand; I think $11 a ton. I am not just clear about that.

Examination by the Court:

Q. Mr. Agnew, did you make any contract with the Glen Company in regard to the credit that you were giving—terms of payment—for such goods as you delivered under this arrangement?

A. No, sir.

Q. What, in fact, was the credit that you gave?

A. Well, I don't know, your Honor, as anything was said about credit; I don't recall there was. It was always understood, of course, when they got a

payment they would make us a payment. I don't think there was any discussion as to that.

Q. Is that the usual way in which material men like yourself had with these big contractors?

A. Yes.

Q. Fix a price that was to rule for all goods that you supplied?

A. Yes, sir.

Q. And then the amount that you supply from time to time and the terms of payment were left open?

A. Yes, sir.

By Mr. Gourley:

Q. Was that observed in this case—that rule of practice?

A. Oh, yes.

Mr. Gourley: I offer in evidence that whole account. The books have been admitted in evidence and this is merely for convenience.

The Court: The statement is taken from the books, as I understand it?

Mr. Gourley: Yes.

The Court: Is that so, Mr. Agnew?

Mr. Charles Agnew: Yes.

(Admitted and marked "J. A. Co., C-1, Mar. 7, 1912.")

Cross Examination on behalf of Jos. Sharpe Construction Co.:

Q. (By Judge Lewis.) The account seems to indicate the last payment was some time in the month of May, Mr. Agnew?

A. I think that statement will show that.

Q. How is it such a large account was run up; your claim is over $12,000—over $11,000, wasn't that a very large credit to give them?

A. Yes, it was.

Q. Had you been trying to get money from them?

A. O yes, sir.

Q. When your bills were due they were presented, were they?

A. We would mail our bills every month.

Q. But they weren't paid in due course?

A. No, sir.

Q. Did you try to get payment from the company?

A. O yes.

Q. You made efforts which were unsuccessful?

A. Yes.

Q. And when did you begin to do that unsuccessfully?

A. Well, we had been doing that right along; I can't tell you just when.

Q. The last payment is in May?

A. Yes. I had been calling at their office several times.

The Court: The account shows deliveries from May right on until when?

Mr. Hall: To the 30th of November, about. There is $5,100 balance due after that payment in May.

Mr. Gourley: These balances did not increase any from the beginning of August, 1909. Payments were made backwards and forwards and the balances against them did not increase until the last few months. For example, in August, 1909, $1,769, September, $6,100, October 1st, $8,100.

The Court: Mr. Gourley, that may be important, but that isn't the matter I am now inquiring about. I want counsel to tell the state of the account at the time of the last payment, which was in May, when there was a balance of $5,100, and then $7,000 was delivered in various amounts until December. About how many items are there, a large number?

Mr. Gourley: An item for every day.

Examination by the Court:

Q. What is the reason you went on after May, delivering these goods until you had added $7,000 to the account, when you didn't get any pay?

A. They kept promising to pay. I kept going there myself to collect the money, and from day to day—I won't say from day to day, but from week to week they kept promising to pay me. One time when I was there Mr. Downey was to give me a check of $8,000; he was to get a payment somewhere of $8,000, I have forgotten where, and he was going to turn that over to me, and he kept promising in that way.

Q. Do you recollect when that was that he made that promise of $8,000 payment?

A. Oh, I don't know; I can't remember now. I went there so often I can't remember the time.

Q. When with reference to May was it, do you think?

A. Oh, it was after that.

Q. As late as August?

A. I rather think it was in the summer months, around July or August.

By Judge Lewis:

Q. In due course, your bills ought to have been paid monthly, I suppose?

A. Well, in this kind of work we are supposed to get it when the contractor gets payment; he is supposed to pay us when he gets paid.

Q. You knew nothing about these assignments, or the assignment of the First National Bank of the Town of Union, when it was made?

A. No, sir.

Q. You wouldn't have gone on delivering goods to them if you had?

A. No.

By the Court:

Q. Did you deliver any goods at all after you heard of the assignment?

A. Why, after we filed a lien we delivered, I think, about $200 worth, that isn't in this claim. We were anxious to get the job finished.

Q. No, no, apart from that, did you deliver any goods to the Glen Company after you had learned of the filing of the assignment?

A. Oh, no, sir.

The Court: What is the date of the filing of the assignment?

Mr. McMahon: The First National Bank assignment was filed September 22, 1910.

By Mr. Gourley:

Q. Are you going to say anything about the price of the brick?

A. Mr. Hall made some allusion to the fact that the prices had been changed on the bill. That was toward the end of the finishing of the job. I

think there were a few brick sent there—we hadn't been furnishing any brick for the building; they had bought them elsewhere, and we didn't consider we had any contract at all.

By Mr. Hall:

Q. That is, after you had delivered a million and a half?

A. We didn't deliver a million and a half—a million and a quarter. We didn't consider we had any contract with them; they went off and bought the brick elsewhere. So that the price of $8 was for two or three thousand or three or four thousand, something like that, at the end of the bill, that they wanted to finish up with, and we charged them $8. Brick had advanced in the market and we didn't consider the other arrangement at all.

Q. I show you what appears to be a copy of a letter to the John Agnew Company, under date of November 3rd, and ask you if you remember receiving the original of that letter.

A. No, I don't remember; I can't say now. All the letters we received we have on file. If it isn't among those letters—

Q. You didn't bring them all here to-day?

A. Yes. Very few of them we received.

Q. You brought all the letters here to-day that you received from the Glen Company?

A. Yes, all the letters. That is, I didn't bring any; Mr. Gourley has them.

Mr. Hall: Have you a letter, Mr. Gourley, of November 3, 1909?

Mr. Gourley: No such letter here.

CASE ON BEHALF OF THE JOHN AGNEW COMPANY CLOSED.

FIRST NATIONAL BANK OF THE TOWN OF UNION.

(Miss) MARIE CONROY, recalled in rebuttal, on behalf of the Frank Miller Lumber Co., testified as follows:

Direct Examinatin by Mr. McMahon:

Q. You were bookkeeper, stenographer and office manager for the Glen Company in 1908, 1909 and 1910, as I understand it?

A. Yes.

Q. During that period were you the only person who kept the books and made entries in the books?

A. Yes.

Q. Now, I have the books here, Miss Conroy, and I want first to have the stenographer mark them for identification.

The Court: Is this testimony taken on the claim of the John Agnew Company?

Mr. McMahon: No, I am going back with Miss Conroy in rebuttal on the First National Bank of the Town of Union Assignment.

Q. What is this book, Miss Conroy, which has been marked "F. M. L. Co. D-6 for identification"?

A. Cash book.

Q. What is this book that has been marked "F. M. L. Co. D-7 for identification"?

A. Contract book.

Q. What is this book marked "T. of U. D-3"?

A. General ledger.

Q. What is this book that has been marked "F. M. L. Co. D-9 for identification"?

A. Journal.

Q. And this one, marked "F. M. L. Co. D-10 for identification"?

A. Trial balance.

Q. And what is this book marked "F. M. L. Co. D-11 for identification"?

A. Carnegie Trust Company book.

Q. And that shows the account up to the close of it?

A. Yes.

Q. Up to the close of the account?

A. Yes.

Q. What is this book marked "F. M. L. Co. D-12 for identification"?

A. Merchant's National Bank Book.

Q. And does that show the account up to the close of the account?

A. Yes.

Q. And what is this book marked "F. M. L. Co. D-13 for identification"?

A. Carnegie Trust Company.

Q. Is that an earlier book than the one already marked D-11?

A. Yes, that is the first book.

Q. What is this book marked "F. M. L. D-14 for identification"?

A. Garfield National Bank book.

Q. Does that show the account up to the close of it?

A. Yes.

Q. What is this book marked "F. M. L. Co. D-15 for identification"?

A. Check book on the Bowery Bank.

Q. Does that show the account up to the close of it?

A. Yes.

Q. And this book marked "F. M. L. Co. D-16 for identification"?

A. That is also a bank book of the Bowery Bank.

Q. What is this book marked "F. M. L. Co. D-17 for identification"?

A. Check book of the First National Bank of the Town of Union.

Q. What is this marked "F. M. L. Co. D-18 for identification"?

A. First check book of the First National Bank of the Town of Union.

Q. And what is this marked "F. M. L. Co. D-19 for identification"?

A. First book of the Garfield National Bank.

Q. And what is this book marked "F. M. L. Co. D-20 for identification"?

A. Pass book in the Merchant's National Bank.

Q. And what is this marked "Trustee's Exhibit D-5"?

A. Pass book of the First National Bank of the Town of Union.

Q. Now, will you explain—

The Court: Do you offer these books in evidence?

Mr. McMahon: I do.

(Admitted in evidence without objection).

Q. Will you explain, Miss Conroy, your system of bookkeeping?

A. This is an ordinary set of books, consisting of a journal, cash book, contract ledger, and a general ledger. The contracts were kept in the contract ledger and the personal accounts were kept in the general ledger.

Q. And can you identify those books as the books that were used by the Glen Engineering Construction Company during the period that you were there?

A. Yes.

Q. And are the entries in those books in your handwriting from January, 1908, to December, 1910, or around that time?

A. Well, I don't know about 1908, but shortly after that.

Q. That is, during the years 1909 and 1910, up to the time the company stopped?

A. Yes, and I guess 1908, too.

Q. And you had charge of making of the entries of the transactions of the company during that period?

A. Yes.

Q. And you had charge of the check books and made out all the checks and checked up the balances?

A. Yes.

Q. How did you make up the entries, from reports that came in to you, from bills, etc. that were sent into the office?

A. Yes, whenever we had bills, or contracts.

Q. Were the payments of the company made by check?

A. Yes.

Q. And for the period in question, Miss Conroy, while you had charge of the books, do the entries in those books correctly state the transactions of the Glen Engineering Construction Company?

A. Yes, sir.

Q. Were you continually in the office during that period?

A. Yes.

Q. What contracts were the Glen Engineering Construction Company performing during the latter part of 1910?

A. Bergenfield school, Paterson high school, New Dorp, Staten Island, Seaside Hospital and the Central Commercial school in Newark.

Q. And during that time you had charge of the office?

A. Yes.

Q. Do you know Mr. Hilbert?

A. Yes.

Q. Do you remember when the account of the Glen Engineering Construction Company was opened in the First National Bank of the Town of Union?

A. In February.

Q. And do you remember that that was opened with a check of the company—I have the check here somewhere (counsel looks for check, but does not produce it).

A. Yes, I think it was.

The Court: Doesn't that already appear, Mr. McMahon?

Mr. Fallon: I think that was brought out by Mr. Alford.

The Court: I think so.

Q. Do you remember when the first note was made, Miss Conroy?

A. Some time in March—latter part of March, I think.

Q. Was that first note made out by you?

A. I think it was.

Q. Was that note marked "Trustee's Exhibit D-1 for identification," and also offered in evidence, typewritten on your machine?

A. Yes.

Q. Where was that signed?

A. In our office.

Q. At the time the note was signed who was there representing the First National Bank of the Town of Union?

A. Mr. Hilbert.

Q. Were you present during the conversation had at the time this note was signed?

A. Yes.

Q. State while you were there and during that conversation whether anything was said about an assignment?

A. There wasn't anything said then about an assignment.

Q. Who made the deposits for your company in the First National Bank for the Town of Union?

A. Usually Mr. Hilbert did.

Q. And who took the notes over there?

A. Mr. Hilbert.

Q. And Mr. Hilbert would come to your office and get the money and take it back over to the bank?

A. Yes.

Q. And then the entry marked in that book?

A. Yes.

Q. Which is the pass book of the First National Bank of the Town of Union, and marked "Trustee's Exhibit D-5"?

A. Yes.

Q. And was Mr. Hilbert there at the time that

note marked "Trustee's Exhibit D-1" was signed?

A. No.

Q. Were you present in the office when the $10,000 note was signed, Miss Conroy?

A. Yes.

Q. About what time was that when that was signed?

A. What date was it, you mean?

Q. Yes.

A. April 19.

Q. Did you make out the note at the time?

A. I think I did.

Q. And was it signed at the same time you made it out?

A. Yes.

Q. Who was present when that note was signed, Miss Conroy?

A. Mr. Hilbert and Mr. Downey and Mr. Alford.

Q. At the time that note was signed where was it signed?

A. In our office.

Q. At the time that note was signed did you hear Mr. Hilbert say anything about an assignment?

A. No.

Q. Were you there all the time?

A. Yes.

Q. And did Mr. Alford or Mr. Downey say anything about an assignment?

A. No.

By the Court:

Q. Do you know when you first heard about an assignment made, or to be made, by the Glen Com-

pany to the First National Bank of the Town of Union?

A. Yes, about the first part of September.

Q. Who took that $10,000 note over to the bank?

A. Mr. Hilbert.

Q. Did you make a practice of answering the telephone in the office, Miss Conroy?

A. Yes.

Q. Around April 19, did Mr. Hofmann telephone the office about that note?

A. About the note?

Q. Yes, that $10,000 note?

A. No.

Q. Do you remember whether Mr. Alford went over there to the bank with that note?

A. I don't remember.

Q. During June or July or August—or June or July, at any occasion when you were in the office, did any officer of of the Town of Union Bank come in there and ask for an assignment?

A. No.

Q. After the $10,000 was borrowed on the note of April 19, was some money borrowed from the bank on the notes of the officers of the company?

A. Yes.

Q. Did you make out those notes?

A. Yes, I think I did.

Q. And who took those notes over to the bank?

A. Mr. Hilbert.

Q. At the time those notes were made out was there any conversation had in the office about any assignment or security?

A. No.

Q. When was it you first saw Mr. Hofmann in the office of the company?

A. I am not quite sure, but I think it was some time in July—the early part of July.

Q. Do you remember any conversation he had at that time with you or with any officer of the company in your presence?

A. No, I think he just came over to be introduced to the officers.

Q. Did he say anything about an assignment at that time as security?

A. No.

Q. I show you two notes, one marked "F. M. L. Co., D-3, March 7, 1912" and the other marked "F. M. L. Co., D-1, March 7, 1912," and ask you if they are both in your handwriting?

A. Yes, both are.

Q. And I ask you whether, subsequently to the date of those, they were both paid?

A. Yes.

Q. Were those two notes made after the note of April 19, 1910?

A. Yes.

Q. Do you recollect about the execution of the assignment that has been offered in evidence here?

A. I think I do.

Q. You were present there that day when this paper, marked C-6 was signed?

A. Yes.

Q. Was there any meeting of the Board of Directors held prior to the execution of that paper?

A. No.

Mr. Fallon: That she is aware of.

Q. That you are aware of?

A. Not in our office.

Q. And how long before this assignment was executed was it talked of?

A. Only about a couple of days.

Q. And do you remember who came there at the office when it was executed?

A. Mr. Conway, and Mr. Hofmann, and Mr. Hilbert.

Q. Do you remember when the account with the Merchant's National Bank was opened?

A. Yes, I think some time in the latter part of August.

Q. Can you refresh your recollection from Exhibit "F. M. L. Co., D-20?"

A. (After examining Exhibit D-20) Yes, August, 25th.

Q. Where did the money come from with which that account was opened?

A. That came from Mrs. Downey.

Q. I show you a stub of a note book, which is marked "F. M. L. Co., D-21, and ask you if that is in your handwriting?

A. Yes.

Q. And is that the stub of a note that was given to Mrs. Downey?

A. Yes, sir.

Q. And the memorandum therein says that it was given to her for the moneys that were deposited in the Merchant's National Bank?

A. Yes.

The Court: What is the date of that?

Mr. McMahon: August 25th.

Q. And does that also appear on page 279 of the ledger, under "Account with P. H. Downey?" (Referring to T. of U., D-3).

A. Yes, but it is ruled out.

Q. (By the Court) Is that an account with Mr. or Mrs. Downey?

A. Mr. Downey.

Q. When, with reference to the opening of the account with the Merchant's National Bank was this assignment talked of to the First National Bank?

A. Some time just shortly after opening up the account with the Merchant's National Bank.

Q. Were you in the office when Mr. Conway came in and asked for the assignment?

A. At that time—

Q. Who was it that first asked for the assignment; was it asked for in your presence?

A. I think Mr. Hilbert did.

Q. Did you hear the conversation?

A. No.

Mr. McMahon: I will offer the books of the Glen Engineering Construction Company, as identified by the bookkeeper, in evidence.

Q. From your knowledge of the check books, were you familiar during the time you were there with the credits of the company and how much was due them?

A. Yes.

Q. And were you familiar with the bank balances of the company?

A. Yes.

Q. And from your knowledge of the credits and what was due them, and what the company had on deposit in August and September, 1911, was the

company able to pay its current bills and meet its obligations?

Mr. Fallon: I object to that. I think the books are the best evidence as to that. Surely, we don't want the witness's conclusion. I object to it as incompetent and immaterial.

Mr. Delaney: I object, on the same grounds.

The Court: I incline to think that this witness can answer that question, although it necessarily involves an opinion. The witness seems to have been perhaps as well acquainted with the financial condition of the company and its financial operation as any officer of the company. The mere fact that the witness is a woman—young woman—and may not have had the ability to form a just opinion as a business man of more mature years simply goes to the probative force of the testimony. I think it is competent. The witness can express an opinion and we will take it for what it is worth.

A. No.

Q. Was the company's bank balance well drawn down?

Mr. Fallon: I object, upon the ground that it is incompetent and immaterial.

The Court: It seems to be incompetent. We have the books here.

Q. At the time the assignment was executed, Miss Conroy, was any money borrowed by the com-

pany from the First National Bank, that is, on the 16th of September?

A. No.

Q. No money was received from the bank at that time?

A. No.

Q. Or around that time?

A. No.

The Court: Was there a schedule of the loans from the Merchant's Bank to the Glen Company, showing the debts?

Mr. McMahon: The account is there, if your Honor please, and I think every note now has been marked.

The Court: Where does the account appear?

Mr. McMahon: In the account with the Merchant's National Bank.

The Court: In the pass-book?

Mr. McMahon: No, in the general ledger, together with the testimony.

The Court: Miss Conroy, will you just turn to the account with the Merchant's National Bank, so as to exhibit the dates of the different loans.

(Witness turns to pages 280 to 281 of Exhibit "T. of U. D-3.")

The Court: Proceed.

Q. Do you know Mr. Conway?

A. Yes, I do.

Q. During the summer of 1910, that is, in July and August and June, was he doing business with the Glen Engineering Construction Company?

A. Yes.

Q. Did he come into the office once in a while?

A. Quite frequently.

Q. During that time when he came into the office did you ever hear him ask for an assignment before the latter part of August?

A. No.

CROSS EXAMINATION ON BEHALF OF THE TRUSTEE IN BANKRUPTCY.

Q. (By Mr. Hall.) Miss Conroy, do you remember Mr. Hilbert dictating a paper to you about the directors taking action on these assignments?

A. You mean a set of resolutions?

Q. Yes.

A. Yes.

Q. And writing it out and then having it changed in pencil and recopying it?

A. Yes.

Q. Do you remember whether that was dictated to you and written by you before or after the execution of the assignment to the Town of Union bank?

A. Before?

Q. Before the execution?

A. Before the original, yes. There was one written up before which was made out in error and the resolutions were made up at that time.

Q. Do I understand that you wrote out one and Mr. Hilbert took that away and then came back with it and had it re-written?

A. Yes.

Q. It was first written prior to the signing of the assignment?

A. Yes.

Q. Do you recall Mr. Hilbert's looking over the books of the Glen Company?

A. Yes.

Q. And what books did he have?

A. Why, he had the general ledger and the contract ledger.

Q. I show you a book—

A. (Continuing.) Oh, I guess he had all the books.

Mr. Fallon: I object to the witness's guessing being put upon the record.

A. (Continuing.) I am almost sure he had all the books.

Q. About how long was he working over them?

A. I don't know the exact time. He came in the afternoon and he didn't leave until late in the evening, about six o'clock.

Q. About what time do you think he came?

Mr. Fallon: I object to the witness stating her guesses. I submit that facts ought to be given. I object to the form of the question.

The Court: The witness is giving her best recollection.

A. About four o'clock.

By Mr. McMahon:

Q. Did the company suffer any considerable loss, or any loss out of the ordinary, from about August to December, 1910, Miss Conroy, that you know of?

A. No.

Q. Just went on in the ordinary course of business until they had to stop?

A. Yes.

EXAMINATION ON BEHALF OF THE FIRST NATIONAL BANK OF UNION:

Q. (By Mr. Fallon.) You don't pretend to say you heard all the conversations that passed around the office between persons that entered there, do you?

A. Not all the conversation.

Q. And there may have been conversations between Mr. Hilbert and Mr. Downey and Mr. Alford about assignments that you didn't hear?

A. I don't think so.

Q. You say you don't think so, but there seems to have been one conversation with Mr. Hilbert had when he first spoke about the assignment which you said you didn't think you heard; now what did you mean by that?

A. I don't think I said that.

Q. Do you remember saying here to-day when you were asked what the conversation was between Mr. Hilbert and some representative of the company with respect to the assignments and your saying, "I didn't hear the conversation"?

A. I didn't hear it.

Q. Then there was some conversation—

A. I don't know whether that was a conversation about an assignment or not.

Q. The question that was put to you related to an assignment.

A. Then I didn't hear it.

Q. There were a number of conversations had

when Mr. Hilbert and others were in the office that you didn't hear; is that not a fact?

A. Usually, the company would tell me about it afterwards.

Q. You are telling us something that may have been repeated by Mr. Downey and Mr. Alford after they left?

A. I usually heard it all.

Q. You were attending to your business there, weren't you, keeping your books; you weren't listening to what was said?

A. It was usually in the office.

Q. What was it that was said on the day the assignment was made, the 15th of September; as near as you heard the conversations tell us what was said on that day.

A. Well, I don't remember.

Q. And there were about four persons present at that time, all talking about the assignment?

A. I don't remember, to go into the details, what was said about it.

Q. Do you remember who were there?

A. Yes, I do.

Q. Who?

A. Mr. Hilbert, Mr. Conway, Mr. Hofmann and Mr. Alford and Mr. Downey.

Q. And that was the day the assignment was made and you don't remember what was said?

A. I didn't attach any particular importance to it.

Q. Did you attach any particular importance to any other conversation that was had between these parties when they were there?

A. Well—(the witness pauses).

Q. I show you this paper and ask you if that

was written out by you (handing witness Exhibits T. of U. D-4 of Mar. 7, 12).

A. Yes, I wrote it.

Q. Did you write it on August 30, 1910, the day it bears date?

A. I think I did.

Q. And is this name attached to it "P. H. Downey, Secretary," the signature of P. H. Downey, the secretary of the company?

A. Yes.

Q. Is that the seal of the Glen Engineering Construction Co.?

A. Yes.

Q. You know that this paper recites that there were resolutions adopted at a meeting held August 29, 1910, at six o'clock P. M.?

A. Mr. Hilbert drew that up.

Q. Mr. Downey signed it and the seal of the corporation was put on it, and you typewrote it?

A. Yes.

Q. You have stated to Mr. McMahon that no meeting was held.

A. There wasn't any meeting.

Q. You wrote this paper and you say it bears Mr. Downey's signature, and you see it is recited in there that Mr. Downey certifies that there was a meeting at six P. M., and yet you say that is not a fact, do you?

A. There wasn't any meeting.

Q. You mean you don't know whether there was a meeting held on the 29th or not?

A. Mr. Downey and Mr. Alford were the only ones present if there was a meeting.

Q. How do you know that?

A. Because I was there.

Q. Were you there on the 29th of August after six o'clock?

A. Yes.

Q. (By the Court) Who was the other director?

A. Mr. Payne.

Q. Was he ever there?

A. I don't think he was.

Q. Did you know of Mr. Paine attending any directors' meeting?

A. I don't remember.

Q. Do you remember of any directors' meeting of that company being had?

A. Yes, in the beginning of the company, I did.

Q. After the organization of the company did you ever know of a directors' meeting?

A. I think a meeting was held once down in Mr. Paine's office,—and, yes, once in our office, too.

Q. Was that when there was an election of somebody?

A. I don't know what it was for, but I know there was a meeting.

Q. Did the directors hold meetings to authorize contracts and to direct the officers to enter into ways of doing business, or did the officers go ahead without those meetings?

A. Well, in the latter part of it they went ahead.

Q. Well, when did the officers have a meeting to authorize any contracts; name one in particular?

A. I think there was a meeting—I am not quite sure—just before the signing of the contract for the Newark high school.

The Court: Are the minutes in evidence?

Mr. Fallon: I haven't seen it.

Q. Was there any minute book of the Glen Company?

A. Yes. I don't know whether it was kept up or not, though.

Q. Who had the custody of that book?

A. I never wrote up the minutes in it.

Q. Was the book in your possession with those other books that you have produced here in court?

A. It was. They were in the safe, I know.

Q. Did you ever write anything in the book at all?

A. I think I did once. I wrote it on my typewriter and pasted it in the book, but I don't think I wrote it with my handwriting.

Q. Do you want the Court to understand that you wrote this paper out marked "T. of U. D-4" which reads: "Be it resolved that all restraining moneys for any work completed or to be completed on the Paterson high school building, Paterson, N. J., are hereby assigned to the First National Bank, Town of Union, N. J.,

WHEREAS, Be it Further Resolved, that the said Assignment is made as collateral against a certain loan, or any further loans which may be granted to the said Glen Engineering Construction Company. Said moneys so collected are to be placed to the credit of the Glen Engineering Construction Company.

The above is a true copy of resolutions passed at a special meeting of the Board of Directors, held at the office of the Glen Engineering Construction Company, 156 Fifth Avenue, New York City, August 29th, 1910, at six o'clock P. M., by P. H. DOWNEY, Secretary"—with the seal of the com-

pany. Now, do you want the Court to understand that you wrote this paper out on your typewriter and saw Mr. Downey sign it as Secretary, and affix the seal of the corporation to it, well knowing it was false in fact?

A. Mr. Hilbert said it was a mere matter of form.

Mr. Hall: I object. Is it material to this issue here whether Mr. Downey signed something, for that is all this question is.

The Court: If counsel thinks he can discredit the young woman by showing that she couldn't typewrite what she was instructed to take down by her employer, he can do so. I do not see the force of the cross-examination, however.

Q. Is this the matter that you referred to as the minute book?

A. Yes.

Q. (By the Court) Do you know of any other minute book besides that?

A. I don't know anything about that; I didn't have anything to do with it. I don't remember any other minute book.

Mr. Fallon: If I have not already done so I will offer in evidence "T. of U. D-4."

Mr. McMahon: I object to that.

The Court: You are offering it to contradict the witness?

Mr. Fallon: Yes.

The Court: How does it contradict the

witness? She says that she knew of no meeting held that day.

Mr. Fallon: She positively asserted that there was not.

The Court: Very good, suppose she did. Of course, she was stating in a negative way, which means, "With the information and knowledge that I have there was no meeting held that day, because I know there was none." You are trying to discredit her. How can you discredit her by showing that she took down from dictation, under the direction of her employer, what you say is false, or from her point of view would be false. She was bound to take down what she was told to take down. If you had Mr. Downey on the stand and he stated there was no meeting that day, then this paper would have no force.

Mr. Fallon: Well, I will withdraw the offer at this time.

Q. What time did you leave the office, as a rule?

A. Five o'clock.

Q. Then it is likely that a meeting could have been held on the 29th of August, 1910, at six o'clock without your knowing anything about it?

A. We all left together.

Q. Do you remember the 29th of August, particularly?

A. I remember drawing up that paper.

Q. But you drew this up on the 30th of August.

A. I didn't leave any other time.

Q. What time did you leave on August 30th?

A. I wrote that before six o'clock.

Q. You mean on the 29th?

A. The day it is dated.

Q. This paper recites that a meeting was held August 29, 1910, at six o'clock P. M.; did you write that paper that night?

A. I don't remember whether I wrote it that night or not.

Q. Well, did you write it at a time when Mr. Downey and Mr. Alford were present?

A. Yes, I think they both were present.

Q. Was it at the direction of both of those gentlemen that you wrote this paper?

A. I don't believe Mr. Downey was in at the time. He came in later after it was already dictated.

Q. Which one directed you to prepare this paper?

A. Mr. Hilbert.

Q. When was it that Mr. Hilbert directed you to prepare this paper marked "T. of U. D-4"?

A. The day it is dated.

Q. The 30th of August?

A. Yes.

Q. What time of the day?

A. I think it was in the morning about 11 o'clock.

Q. And was Mr. Alford and Mr. Downey present?

A. Mr. Downey came in later. He was present, but he wasn't present in the morning all the time; he came in about half-past eleven.

Q. Now, Miss Conroy, you said that you first saw Mr. Hofmann at the office of the Glen Company in July, 1910; how do you remember that?

A. I said I thought it was July.

Q. Well, if you thought it was about July, tell us how you thought that?

A. Because it was warm weather.

Q. Well, June was warm weather and so was August, wasn't it? Why should you say July?

A. Simply because I think it was July.

Q. Are you thinking about many of these things that you have been testifying, or are you giving your observation and testifying to facts?

A. I am testifying to facts the best I know how.

Q. Then when you testified to the fact that it was in July why did you say so?

A. Well, because I know that I took a vacation sometime in August and Mr. Hofmann just came not very long before I took my vacation.

Q. Was he alone when he came there?

A. No, Mr. Conway came with him. I think Mr. Hilbert introduced him, so that Mr. Hilbert must have come, too.

The Court: One moment, Mr. Fallon. I would like to know whether counsel for the parties who are disputing the validity of this assignment to the Bank of the Town of Union intend to take the position on the argument that it was necessary that there should be a meeting of the Board of Directors and a resolution authorizing this assignment. I just ask the question, yes or no.

Mr. McMahon: Relying on the decisions of the Court of Errors and Appeals, I take that position. I understand—

The Court: Proceed, Mr. Fallon.

Q. Whom did Mr. Hofmann meet there on that visit that day?

A. I remember now, Mr. Conway and Mr. Hofmann came together.

Q. Wasn't it in August that Mr. Conway and Mr. Hofmann came there?

A. They came there several times.

Q. How many times was Mr. Hofmann there?

A. I don't remember how many times, but I know he wasn't there very often.

Q. Did you hear the conversation that passed between Mr. Hofmann and Mr. Alford and Mr. Downey on either of those occasions?

A. The first time he didn't stay very long; the second time I don't remember any particular conversation.

Q. Do you remember any particular part of the first conversation?

A. They didn't stay very long; they simply introduced Mr. Hofmann, that was all.

Q. Then you didn't hear any conversation between them; that is what you mean, isn't it?

A. I think I was present.

Q. Tell us what was said if you heard the conversation.

A. I don't remember anything in particular that was said.

Q. Then how can you swear—why did you swear, then, that there was nothing said about an assignment?

A. Because I would know about that.

Q. You think you would know about that?

A. Yes.

Q. Was there anything said about contracts?

A. No, I don't think they discussed business at all at the first meeting.

Q. But will you swear that they didn't?

A. Yes, I will.

Q. You will swear that you didn't?

A. I don't remember anything in particular that was being said only they brought Mr. Hofmann there to be introduced to the officers of the company; they only stayed a short time.

Q. Why did you say that the company was not able to pay its debts at or about the month of August or September, 1910?

A. Why did I say what?

Q. Do you mean to say that at any time prior to September, 1910, the company was not in a position to pay its debts, its obligations?

A. I said "current debts."

Q. What did you mean by that?

A. I meant the bills that were payable at that time were not paid when they were due.

Q. And there were moneys receivable that were not paid to you; was not that so?

A. That is a matter of opinion.

Q. I am asking you for a fact.

A. We were drawing all that we could draw on our contracts.

Q. You mean you were trying to get all the money that you could from every source and other people were trying to get all they could from you?

A. Yes.

Q. You don't know what the condition of the assets of the company was, do you?

A. I know we were not paid up, if that is what you mean.

Q. Was there ever a time that you were paid up during the time that you were there?

A. Well, it was much better at first than in later years.

Q. Was there any time when you were fully paid up?

A. Oh, yes, there was.

Q. Tell me when.

A. I couldn't really tell you what time or what part of the year, but I know that the accounts didn't run as long as they did just at the ending of the company.

Q. When you say "ending of the company" you mean in November and December?

A. I mean the last year of the company.

Q. There was nothing the matter with the company during the summer months, was there; bills were being paid as they came in?

A. No.

Q. Do you mean to say that bills were not being paid during the summer?

A. Well, they were being paid, but they weren't all paid up to date.

Q. And that is the reason you said you didn't think they were able to meet their obligations, because the bills weren't paid up to date?

A. No, they weren't.

Q. Which of the books did Mr. Hilbert examine at the office of the company?

A. We had all the books out on the table.

Q. He had all the books, then?

A. Yes.

Q. What books?

A. The general ledger and the contract ledger, and—

Mr. McMahon: And the cash book?

A. (Continuing) And the cash book.

Q. Why did you have to wait until you were reminded about the cash book by counsel before answering?

A. The cash book isn't material, because everything from the cash book was in the ledger.

Q. You didn't think it was necessary for him to examine it?

A. No.

Q. You don't know whether he did examine it?

A. I know he had all the books.

Q. You don't know whether he did examine it?

A. What difference does it make; he gets all his information from the ledger?

Q. If you saw Mrs. Downey loan this sum of money that has been mentioned here wherein a note was given, why didn't you enter that in Mrs. Downey's account instead of under the account of P. H. Downey?

A. I didn't recognize any account with Mrs. P. H. Downey. All the money that we received from Mrs. Downey went into his account.

Q. And those items that were mentioned in P. H. Downey's account you say did not come principally from P. H. Downey?

A. I don't say all. Some of them didn't, and I know quite a few came from Mrs. Downey.

Q. Who gave you that information?

A. Because I made out notes to Mrs. Downey.

Q. That is all you know about it?

A. No, Mrs. Downey came down to the office and gave the money.

Q. Why didn't you open an account with Mrs. Downey if she was loaning the firm money?

A. I had no particular reason not to.

Mr. McMahon: I rest my defense against this assignment, with the exception that I desire to reserve the right to call our accountant, Mr. Wait.

The Court: Well, the Paine assignment logically comes next. You may proceed, Mr. Delaney.

ON BEHALF OF THE MARTIN S. PAINE ASSIGNMENT.

MARTIN S. PAINE, sworn in his own behalf, testified as follows:

Direct Examination by Mr. Delaney:

Q. Mr. Paine, are you one of the defendants in this suit?

A. Yes.

Q. Do you know, and up to December 1st, 1910, were you acquainted with the Glen Engineering Construction Company?

A. I was.

Q. Do you know Mr. Smith Alford, the president of that company?

A. Yes.

Q. And you knew that he was president of the company?

A. I did.

Q. Do you know Mr. Downey?

A. Very well.

Q. What office did he hold in that corporation?

A. He was Treasurer.

Q. Did you, on the first day of December, 1910,

make any loan to the Glen Engineering Construction Company?

A. Yes, sir.

Q. Will you tell the Court, please, how much the transaction involved that day in making that loan to the Glen Engineering Construction Company? State what was said and done by you and these officers. First, was there a meeting held that day?

A. Yes.

Q. Where was it held?

A. At the office of my attorney.

Q. What is his name?

A. Charles J. Hardy.

Q. And the address?

A. 165 Broadway, New York City.

Q. Who was present at that meeting?

A. Mr. Downey, and Mr. Alford, Hardy and myself.

Q. Will you state what was said to you, if anything, by either of those officers at that time?

A. Why, they said—

Q. Who said?

A. Mr. Downey and Mr. Alford, both of them, said that they were in need of some funds for pay-roll that was due on the third and this was the first of December, and wanted to know if I would loan them this money; that they expected to pay me—

Q. (By the Court.) How much money?

A. $4,950, for which I gave them check.

Q. Did they ask for that amount of money?

A. They did, to meet the pay-roll.

Q. Did they ask you to advance it to them?

A. They did.

Q. Did you make the advance to them at that time?

A. I did.

Q. I exhibit to you a check, dated December 1, 1910, to the order of the Glen Engineering Construction Company for $4,950, and ask you whether that is your signature on the check?

A. It is.

Q. Is that the check which you speak of in connection with that loan to the Glen Engineering Construction Company?

A. Yes.

Mr. Delaney: I offer the check in evidence.

(Admitted and marked "M. S. P. D-2 Mar. 7, 12.)

Q. Was that check afterwards paid by your bank?

A. Yes.

Q. That was afterwards cashed by the Glen Engineering Construction Company?

A. Yes, their endorsement is on it.

Mr. Delaney: I also offer the endorsement on the check.

Q. Will you state, please, what, if anything, was said at this interview in regard to an assignment?

A. Why, they agreed to give me an assignment.

Q. Who said so?

A. Mr. Alford and Mr. Downey.

Q. They said that the corporation would give an assignment to you?

A. Yes.

The Court: I would suggest that you let this witness—he is an intelligent man—state what the bargain was, in his own way.

Q. I show you a paper, dated December 1, 1910, purporting to be signed Glen Engineering Construction Company, by Smith Alford, President, and heretofore marked Exhibit C-9; and another paper, dated December 1, 1910, purporting to be signed in the same manner, heretofore marked Exhibit C-8, and ask you whether those papers were delivered to you that day?

A. They were delivered to me before I turned over the check, on the first of December, 1910, for pay-roll.

Q. Are you acquainted with the signatures of Smith Alford and P. H. Downey?

A. I am.

Q. I show you these two papers, Exhibits C-8 and C-9, and ask you whether those signatures are the signatures of Smith Alford and P. H. Downey of this company?

A. Yes, those are their signatures.

Q. Did you see those signatures put on?

A. I did, with the seal.

Q. And is the seal upon those two papers the seal of the Glen Engineering Construction Company?

A. Yes.

Q. And those papers were signed and sealed, then and there, that day?

A. Yes, in my presence.

Q. And were they then delivered to you?

A. Yes.

Mr. Delaney: I offer those papers in evidence, marked C-8 and C-9.

Judge Lewis: They are already in evidence.

The Court: Now, then, what are they? They bear date December 1, 1910—

Mr. Delaney: December 1, 1910, C-8, from the Glen Engineering Construction Company to M. S. Paine, assigning all moneys due and to become due to the Glen Engineering Construction Company, on the contracts with the Board of Education of Paterson, for the Paterson high school, with the Board of Education of Newark, for the Central Commercial and Manual Training high school, and the contract with St. John's Gild at New Dorp.

And the assignment from the Glen Engineering Construction Company, marked Exhibit C-9, to M. S. Paine, is dated December 1, 1910, being the assignment of a contract made by that company with the Board of Education of the City of Paterson, for the construction of the Paterson high school, and particularly the payment to which the Glen Engineering Construction Company is entitled under its said contract for work done and materials furnished during the month of November, 1910, and after it has made its requisition.

Both of these exhibits come from the office of the Board of Education in Paterson.

I also offer in evidence the assignments that were filed with the Comptroller of the City of Paterson.

Q. (By the Court.) Mr. Paine, will you just state what the bargain was between you and your associates in regard to this loan?

A. Well, Mr. Downey told me that they were short for pay-roll that was about to come due, that they had been held up on their payments by the Board of Education for the job at Paterson and in Newark, and while they had been promised it, it had not materialized and this money would help them out; and I was a little reluctant about furnishing that amount of money unless they gave me an assignment—

Q. Of what?

A. Assignment for money that was due to the company.

Q. On these contracts?

A. On these contracts.

Q. And that was all agreed to, was it, before the papers were drawn?

A. Yes.

Q. Where was it that this arrangement was made?

A. At the office of my attorney, 165 Broadway.

Q. Did you meet there?

A. I had them meet me there.

Q. Did they talk over the matter in relation to your advancing the money for pay-roll there?

A. Yes.

Q. Did they say anything then about an assignment?

A. No, but I made up my mind if I let them have it I would want an assignment.

Q. Then after they made this request did you take it under advisement.

A. Yes.

Q. And brought about this meeting in your lawyer's office?

A. Yes.

Q. Was it then that you told them you would require an assignment? Was that the matter of conversation between them and your attorney?

A. Yes, sir, it was.

Q. Do I understand the papers were exchanged then and there, and the assignment drawn up?

A. Mr. Hardy drew up the assignment while I was there.

Q. And delivered it to you?

A. Yes.

Q. And thereupon, what did you do?

A. I kept the assignments until the company got into trouble.

Q. You did something else?

A. I filed them.

Q. Didn't you give your check?

A. Certainly.

Q. Did you get the assignment when you delivered the check?

A. Yes.

Q. All one transaction?

A. Yes, one transaction.

Q. (By Mr. Delaney.) Did they make any statements to you about the payments coming from their various jobs?

A. They did.

Q. What did they say?

Mr. McMahon: I object to that as incompetent and as not binding on us in this proceeding—any statements of Mr. Downey made to him at the time.

The Court: It may bear directly upon the defense which is set up on the assignment. I will allow it.

A. I was informed—

Q. By whom?

A. Mr. Downey and Mr. Alford—they were both there—

Q. What were you informed?

A. That they had some moneys due that had not been received and that they would see that I would get my money just as soon as they received their money—they would turn over their check to me.

Q. Did they say anything as to the length of time they would need this money?

A. They said it would be needed only a few days.

Q. Did they tell you that any payments were coming due on the job?

A. They did; they so informed me.

Q. On what job?

A. Paterson job and I believe on the Newark job.

Q. Any other jobs?

A. Well, there was some money due them, they told me, from a job they had finished over in New Dorp, Staten Island—some hospital, I believe.

Q. Did they make any further statements to you?

A. I think there was $6,000 due them on that job—something like that.

Q. Did they say anything about the Newark job?

A. Yes, they said they had some money coming to them; I don't remember exactly how much it was, but two or three times more than what my check was for.

Q. Did they say anything as to whether there was any profit on that job?

Mr. McMahon: I object to that, if your Honor please; he has been leading the witness right along.

The Court: No, that is not leading; he has to suggest a topic. He was asked if anything was said to him about profit.

Judge Lewis: I urge, further, the objection for this reason: It appears that Mr. Paine was then a director of this company, and the mere representation of his fellow directors to him as to the condition of the company can be no excuse to him for acting in ignorance.

The Court: You are going to argue that Mr. Paine, being a director of the company, is charged with notice of all the facts in relation to the financial condition of the company, which he would have learned if he had used due diligence and performed his duty?

Judge Lewis: Yes.

The Court: That is a matter of argument. I will now take the testimony subject to your objection.

A. They did.

Q. What did they say about that?

A. They said it was going to turn out very profitably and I would receive my money.

Cross Examination on behalf of Frank Miller Lumber Co.:

By Mr. McMahon:

Q. Mr. Paine, you were a very close friend of Mr. Downey?

A. I was.

Q. You had been interested in this company with him from shortly after it started?

A. To the extent of one share of stock to make an organization.

Q. And you were a director of the company?

A. Yes.

Q. Do you know a man by the name of Gunnell?

A. I do.

Q. And Mr. Gunnell is an accountant?

A. Certified Public Accountant.

Q. And Mr. Gunnell is employed in Mr. Hardy's office?

A. No, he is not; he has an office with Mr. Hardy.

Q. And do you know a man named Beverly D. Hovey?

A. Yes.

Q. And do you know a man by the name of John H. Ross?

A. No, I do not.

Q. Or Edmund J. O'Connor?

A. No.

Q. You were assigning some claims to him around the first of December?

A. To Mr. O'Connor?

Q. To Mr. Hardy?

A. Yes.

Q. And to Mr. Ross?

A. Yes.

Q. And to Mr. O'Connor?

A. I won't swear to the name.

Q. And Mr. Gunnell examined the books of the Glen Engineering Construction Company for you, didn't he?

A. He did, for the loan of this money.

Q. He came up there somewhere around the 15th of November and got those books, didn't he?

A. No, he didn't.

Q. And those books were brought down to Mr. Hardey's office?

A. Mr. Gunnel never—

Q. Just answer my question; if you understand my question answer it.

A. No, it is not so.

Q. Were you in Mr. Hardey's office when this talk about the assignment came up?

A. Yes.

Q. And when you were asked to advance money for the pay-roll you asked for some security?

A. Yes.

Q. And Mr. Hardy said to you at the time, "You can talk assignment, but I don't think it will do you any good"?

A. I don't remember any such conversation as that.

Q. (By the Court.) Who was Mr. Hardy?

A. He was my attorney.

Q. And Mr. Hardy said to you, too, didn't he, that the report of Gunnell established that the company was in pretty bad?

A. Gunnell had never made a report up to December 1st. I employed him after December 1st, if I remember correctly.

Q. When were the books taken down there?

A. About December 1st.

Q. Which is the day you say you got this assignment?

A. Yes.

Q. And just as soon as you got this assignment you immediately started in this fellow working on the books?

A. I wanted to see the condition of the company.

Q. And then a week after that your attorney had you assign three of your claims against the company to three different people in his office?

A. No, they are not all in his office.

Q. Well, connected with his office?

A. No, not connected.

Q. Well, Mr. Gunnell has an office with him?

Q. He is not connected with Mr. Hardy?

A. He has an office on the same floor.

Q. And Mr. Ross has an office on the same floor right around there?

A. I don't know about that.

Q. (By the Court.) Mr. Paine, what claims are you speaking of?

A. It has nothing to do with this claim.

Q. That relates to other assignments?

A. Yes.

Q. You had at this time advanced to the company about $21,000?

A. Yes.

Q. Before you advanced this last pay roll?

A. This last pay roll, yes.

Q. And you didn't have any chance of getting that money at that time, did you?

A. Yes, I did; I expected to get it all.

Q. Did you make any request for it?

A. No.

Q. Did they tell you that they could pay any of it then?

A. No.

Q. When did you advance the first $5,000?

A. I don't remember that.

Q. Some time in October?

A. No, some time early in the year, I believe. I was away at the time. I think one of them was early in October.

Q. And there was an assignment by you to Mr. Gunnell of two of these Paterson payments at the same time?

A. This first one?

Q. Of this payment due to the Glen Company on the Paterson contract?

A. I don't remember that.

Q. You know a Mr. Ross, don't you?

A. No.

Q. Do you know him as an assistant to Mr. Gunnell, an accountant?

A. Yes, now I know who you mean. There are two or three Rosses there.

Q. And Ross and Mr. Gunnell were working for some time up in the Glen office, were they not, going over the books?

A. Two or three days—oh, about a week, probably.

Q. Do you remember when the petition in bankruptcy was filed?

A. No, I do not.

Q. You were there, weren't you?

A. No, I don't remember.

Q. Were you in Hardy's office the day the petition in bankruptcy was drawn up?

A. Not that I remember.

Q. You don't remember Mr. Alford coming down there and asking you to advance another pay-roll?

A. After this $4,900?

Q. Yes.

A. No; I wouldn't advance any more.

Mr. Delaney: I have had the clerk of the Board of Education of Paterson here all day. Now that these assignments are in evidence, and he would like to get back to Paterson. I have put in four assignments in evidence, two filed with the Board of Education and two with the Comptroller, and the Clerk of the Board of Education has them both in his custody.

The Court: Is there any reason why we should retain in the custody of the Court these four papers? It seems to me there is nothing about those papers as evidence that requires that the originals should be on hand—nothing about the paper, or the ink, or the signatures, or the seals that is to be inspected or compared. If that is the case, I would suggest that the papers might well go back to the office where they are on file.

Mr. Hall: That is satisfactory to me.

The Court: There being no objection, the Clerk may take them back.

Q. Now, when Mr. Gunnell took this assignment he merely represented you, didn't he; he was merely acting for you?

A. Yes.

Q. And when he examined the books he was merely acting for you?

A. I had a right to know what the condition of the company was.

Q. And if he examined them prior to December first he examined them, then, for you?

A. He never examined the books prior to December 1st, that I know of.

Q. Immediately after this assignment was taken you say that Mr. Gunnell and Mr. Ross went up to the office of the Company and examined all the books?

A. Yes.

Q. And then before the petition in bankruptcy was filed do you remember, Mr. Paine, that your attorney drew out of the banks the entire balances of the Glen Engineering Construction Company?

A. I know nothing of the kind.

Q. Part of them to pay Mr. Gunnell and the rest of them to pay your attorney, Mr. Hardy?

A. I paid Mr. Gunnell with my personal check.

Q. How much did you pay him?

A. I don't remember now; I will have to look that up—two or three hundred dollars.

Q. Well, Mr. Gunnell wasn't in your employ, was he?

A. I employed him then.

Q. Was he in your employ on December 1st?

A. He was shortly after that; I think on the 2nd.

Q. Well, if he wasn't in your employ on December 1st how come it that you got this assignment of November 30th?

A. He has done work for me off and on. He is a certified public accountant and takes jobs wherever he can get them.

Q. This assignment says that he got it on November 30; he must have been working for you then?

The Court: What assignment is referred to?

Mr. McMahon: Assignment of money, Exhibit C7.

A. That man works for me every month for a few days. He works for one of our companies. I don't pay him, the company pays him.

The Court: Will the cross-examination be much longer?

Mr. McMahon: The cross-examination I am afraid is going to occupy considerable time.

The Court: Then we might as well stop here, as it is long after the usual hour for adjournment. If we could finish tonight I should be willing to remain until after six o'clock. Can counsel go on with this case tomorrow?

Mr. McMahon: I have an argument tomorrow that cannot be put off.

The Court: Well, it seems that this case was set down for to-day with the expectation that it would be concluded today, and therefore there was no express arrangement that we should go on tomorrow. Under those circumstances I shall not proceed with the case tomorrow if counsel has made other arrangements, which seems to be the case. The first day I can give to this case is March 21st, Thursday. Counsel will take note that this case is adjourned to Thursday, March 21st, at 10 o'clock in the morning, at the Chancery Chambers here. There is one question, before we adjourn, which I would like to ask Mr. Alford.

SMITH ALFORD resumes the stand for further examination by the Court.

Q. Mr. Alford, I show you a pamphlet composed of typewritten sheets fastened together, entitled "Minutes of the Glen Engineering Construction Company" which was produced a little while ago and stamped for identification, and without a number, and I ask you do you know of any other minutes of the Glen Engineering Construction Company except what are contained in that pamphlet?

A. No, I do not, your Honor.

Q. That appears to be typewritten paper, prepared at the time of the organization of the company when the first meeting was held; is that right?

A. It is.

Q. Now, did you ever keep any other minutes?

A. Yes, we wrote other minutes up, but whether in book form or not I don't know.

Q. Who did it?

A. Mr. Dickerson used to write the minutes of the company, if I remember correctly, in long hand.

Q. In a book?

A. Yes, sir.

Q. Whereabouts is the book

A. Well, I don't know where the book is. I think it was a little red book.

Judge Lewis: He ceased to be Secretary in 1907.

Q. After that were there any minutes written up that you know?

A. They were written up, but not in book form.

Q. In what form?

A. On a typewritten sheet.

Q. Do you know of any minutes thus written up on sheets of paper or otherwise, excepting the minutes of meetings when there was an election?

A. Yes, once I remember.

Q. When was that?

A. That was when we were in the office just above us, at a time when there was some shares of the company stock for sale that Mr. Downey bought.

Q. And you had a meeting over that, did you?

A. The by-laws required three days' notice to call a meeting and we sent out those cards.

Q. To authorize the issue of this stock?

A. Well, in regard to this stock and such other business as might properly come before the directors.

Q. Now then, in regard to the transactions of the company, in the transaction of its business, taking of contracts, and the execution of papers of any kind, did you hold any meetings of the directors to authorize the doings of those things, or did you and Mr. Downey go ahead and do it.

A. Mr. Downey and I went ahead and did it.

Q. Was that the course of the business from the foundation of the company?

A. Not from the foundation, but in later years.

Q. From 1907?

A. Yes, and afterwards.

Q. Did you ever have Mr. Paine attend any meetings of the directors excepting on those occasions you mention?

A. No, we generally met down at his office when matters of great importance arose, because he was a busy man, but no formal meetings that I remember.

Mr. McMahon: I offer in evidence the Minutes of the Board of Directors of the Glen Engineering Construction Company.

(Admitted and marked "F. M. Co. D-22".)

The Court thereupon adjourned the further hearing on the assignments to Thursday, March 21, 1912, 10 A. M., at the Chancery Chambers in Jersey City.

AGNEW vs. BOARD OF EDUCATION,

Chancery Chambers, Jersey City,

Thursday, March 21, 1912, 10 A. M.

PRESENT:

FRANK H. HALL, Esq., For the Trustee in Bankruptcy;
CHARLES THADDEUS TERRY, Esq., and EDWARD WARD McMAHON, Esq., For Frank Miller Lumber Company;
NOAH A. STANCLIFFE, Esq., WILLIAM F. DELANEY, Esq., For M. S. Paine;
JOHN J. FALLON, Esq., For First National Bank of the Town of Union;
HON. WM. I. LEWIS, For Joseph Sharpe Construction Company.

M. S. PAINE resumes the stand for further cross-examination.

By Mr. McMahon:

Q. As I remember it, at the last hearing, Mr. Paine, I asked you if you knew Edward Gunnell

and you said "yes", and you stated also that Mr. Gunnell had offices near those of your attorney Mr. Charles J. Hardy; is right.

A. That is right.

Q. And you testified also, as I understand it, that Mr. Ross was an assistant to Mr. Gunnell?

A. I think he was a public accountant with Mr. Gunnell.

Q. Who is Mr. Beverly D. Hovey?

A. He is a clerk in 111 Broadway where my offices are; not with me, though.

Q. Is he employed in your company?

A. No.

Q. But you know him, do you?

A. I do. He used to be employed by me.

Q. And who is Edmund J. O'Connor?

A. I don't know him.

Q. Now, Mr. Hovey and Mr. Ross and Mr. O'Connor bought assignments from you of notes which you held against the Glen Engineering Construction Company?

A. Yes.

Mr. Delaney: If your Honor please, is this proper cross examination? Nothing like that has been brought out on direct.

The Court: Well, it is very difficult for me to rule on that objection, if it be an objection. I do not recall the direct examination; I haven't had an opportunity to look through it, but I am trying to do so now. I shall have to admit it; I cannot say that it is not cross examination.

Q. You assigned those notes to those three men, in writing, Mr. Paine?

Mr. Delaney: I object on the ground that it is not proper cross examination.

The Court: Well, counsel will then have to argue the point.

Mr. McMahon: I point out to your Honor that Mr. Paine is making a claim here for money advanced to the Glen Company a week before the bankruptcy. Now, it is my purpose to show that the bankruptcy petition was filed by persons who were assignees of his a week after the assignment.

Mr. Delaney: Nothing of that character has been testified to by Mr. Paine.

Mr. McMahon: Why, he has just testified in answer to me that these men are assignees of his.

Mr. Stancliffe: If I may be permitted—the claim of Paine which we are presenting is for $4,950, the amount of the check passing from Mr. Paine to the Glen Engineering Construction Company for payroll which was to become due on the 3rd of December. Nothing has been said in the direct examination as to any prior claims of Mr. Paine or any subsequent claims. The testimony now sought to be elicited is not in anywise connected with the one claim that we are presenting for adjudication, the claim for $4,950.

Mr. McMahon: It is not my purpose to examine as to the subsequent or other claims he has, but it is my purpose to show that he assigned three claims a week before the bankruptcy.

Mr. Stancliffe: I fail to see any materiality to that line of cross examination.

The Court: The question will be allowed.

A. I don't remember.

Q. You don't remember whether you did or not?

A. No, I do not.

Q. Was that done about the same day that you got the assignment, Mr. Paine?

A. I couldn't tell you that; I don't recall that claim, if there was one.

Q. Did you deliver the notes to those three men, Mr. Paine?

A. No.

Q. Did you keep them yourself?

A. No.

Q. What did you do with them

A. I gave them to my attorney, Mr. Hardy.

Q. And did he assign them or has he got them yet?

A. I suppose he assigned them. I am not running his business.

Q. Well, did you tell Mr. Hardy to turn the notes over to those three men?

Mr. Delaney: I object to that question as immaterial and irrelevant.

Mr. McMahon: I will withdraw that.

Q. When did you turn the notes over to Mr. Hardy?

Mr. Delaney: I object to that question as immaterial and irrelevant.

The Court: I will allow it.

A. I don't remember; it was some time previous to the 3rd of December.

Q. Then you know, do you not, that Mr. Hovey, Mr. Ross and Mr. O'Connor, your assignees, joined in petition in bankruptcy against the Glen Company?

A. No, I don't know that.

Q. I show you a paper and ask you if that refreshes your recollection on that point?

A. I don't see my name.

Q. I show you Trustee's Exhibit D-1 of this date and repeat the question, Mr. Paine: You know, don't you, that your assignees, Beverly D. Hovey, John H. Ross and Edmund J. O'Connor, afterwards filed a petition in bankruptcy against the Glen Engineering Construction Company?

Mr. Stancliffe: There is no necessity of going over the matter two or three times.

Mr. McMahon: He hasn't answered my question yet. He testified that he didn't see his name on the paper, which wasn't what I asked him.

Mr. Fallon: I have assumed that the examination of this witness now has relation only to the assignment of Paine. If the other side are intending in any way to connect my client with this examination, then I object to it, on the ground as incompetent, irrelevant and immaterial so far as the First National Bank of the Town of Union is concerned.

The Court: Proceed. Question allowed.

A. I don't remember it.

Q. Do you mean to say that you don't know that?

New Jersey State Library

A. I don't remember the transaction.

Q. Well, you know that there was a petition in bankruptcy filed against the Glen Engineering Construction Company?

A. Mr. Hardy had charge of that matter.

Q. And he was your attorney?

A. Yes.

Q. And you know that you assigned notes which you had of the Glen Engineering Construction Company to Hovey, Ross and O'Connor?

A. Yes.

Q. And you know that they were the ones that Mr. Hardy had file the petition, do you not?

A. I don't know who he had to file the petition.

Q. Were you not informed about that?

A. No.

Mr. Delaney: I object, if your Honor pleases. It is immaterial.

The Court: I will allow it.

Q. Now, Mr. Paine, you had been advancing to the Glen Engineering Construction Company for some time money, had you not?

A. Yes.

Q. And before that first of December you had advanced considerable money to the company?

A. Yes.

Q. And before they took either the Newark or Paterson contracts that question was put up to you, was it not; they discussed that with you?

A. I didn't loan them any money before they took the Paterson contract?

Q. They discussed it with you whether they should take those contracts?

A. No.

Q. You talked it over with Mr. Downey, didn't you?

A. Mr. Downey may have mentioned the matter to me, but not at the office. I might have met him, you know, casually.

Q. And you may have met him in your office?

A. He may have come to my office.

Q. You didn't get any consideration, did you, for the assignments of your notes to Hovey, Ross and O'Connor?

Mr. Stancliffe: I shall object to that. I don't see any materiality at all to that.

The Court: Question allowed.

A. No.

Q. And in filing the petition in bankruptcy Mr. Hardy represented you?

A. Yes.

Q. And the thing was handled for you by your attorney Charles J. Hardy?

A. Yes.

Mr. Stancliffe: I ask counsel to be fair with the witness and not turn away when he is putting his question. I don't think Mr. Paine understood what you said.

Q. Did you understand my question perfectly?

A. I don't know.

Q. (Question read by the stenographer.)

A. Mr. Hardy represented me.

Q. And you and Mr. Hardy arranged, did you not, to have Mr. Gunnell and Mr. Ross go over the books of the company?

A. I think I arranged that.

Q. What is your recollection about that, Mr. Paine; was that done some time around the last week in November or later?

A. I think it was about the first of December. I had loaned this money for payroll, and I wanted to know the condition of the company.

Q. Well, you had loaned them $20,000 before that and you were somewhat interested in knowing the condition of the company; isn't that so?

A. That is so.

Q. You remember that I showed you the other day the original assignment made to Mr. Gunnell?

A. Yes.

Q. And you remember that I showed you that that assignment was dated November 30 and acknowledged on that day; you remember that, don't you?

A. I think I do.

Q. Well, the fact is, then, that Mr. Gunnell was brought into the thing before?

A. I said about December 1st; that is a day or two before.

Q. And he had at that time sent Mr. Ross up to the office of the company to work on the books, hadn't he?

A. Yes, I think so.

Q. And at the time this application to you was made for payroll Mr. Ross and Mr. Gunnell were in the office, were they not—in Mr. Hardy's office?

A. No.

Q. Well, at the time it was discussed you knew, or Mr. Hardy told you what their examination up to that time showed, did he not?

A. Mr. Hardy or Mr. Gunnell informed me that the books hadn't been written up and that it would take several days to post the books which they had and they knew nothing of the condition and couldn't inform me of the condition of the company for several days to come.

Q. And they gave you the general idea that the thing was somewhat mixed up, didn't they?

A. Nothing excepting the books had been neglected and hadn't been posted.

Q. And they told you, didn't they, from what they saw of it, it looked pretty bad?

A. Whom do you refer to as "they," Mr. Hardy?

Q. Well, either Mr. Gunnell or Mr. Hardy.

A. I don't think they said anything about that. I employed Mr. Gunnell.

Q. Now you are very clear on that point, are you, Mr. Paine?

A. How could they tell anything about the books—

Q. I am not asking you that; I am asking you if your recollection is very clear.

A. On what?

Q. That Mr. Gunnell and Mr. Hardy did not tell you that from what they had seen, so far, the condition of the company looked pretty bad?

A. I don't recall that they did.

Q. You won't swear that they didn't tell you that?

A. No, and I won't swear that they did.

Q. Will you swear that they didn't?

A. I have answered the question.

Q. Now, who wrote the books up, Mr. Paine, Mr. Ross, or Mr. Gunnell?

A. I don't know.

Q. You know, too, don't you, Mr. Paine, that before the petition in bankruptcy was filed the money that the Glen Company had in its various accounts was all drawn out?

A. I had no way of knowing that.

Q. Well, your accountants had charge of the books of the company, didn't they—after the first of December, at least?

A. My accountants had charge of the books. I thought the Glen Company had charge of the books.

Q. Well, Mr. Ross and Mr. Gunnell were working on the books, were they not, up to the time of the filing of the petition?

A. Yes, some time up around the 8th of December, I think.

Q. And at least for the last week some of the books had been brought down to Mr. Hardy's office, 165 Broadway?

A. I never knew that to be the case.

Q. Didn't you ever see the books in Mr. Hardy's office, or any of them?

A. I have seen the minute book; never saw anything else.

Q. When did you see the minute book there, Mr. Paine?

A. Some time about the time of the bankruptcy proceedings.

Q. What kind of a looking book was it?

A. Oh, I don't know. I see a great many minute books and I can't recall.

Q. What makes you recollect it was the minute book of the Glen Engineering Construction Company?

A. Because I contemplated holding a meeting in Mr. Hardy's office after I found out about the company.

Q. That was on December 9th?

A. Somewhere along that time.

Q. Were the other books down there then?

A. I said I didn't see them.

Q. Were any of the check-books down there then?

A. I didn't see them. All I saw was the minute book. I think somebody brought it down there for the purpose of having a meeting.

Q. And you remember that day Mr. Hardy drew up a written statement that the company was unable to meet its obligations and he drew up the petition in bankruptcy?

A. I don't know whether Mr. Hardy did that or not.

Q. Or he had it drawn up?

A. Very likely.

Q. Do you remember who drew it up?

A. No.

Q. Would it refresh your recollection any if I told you it was Marshall S. Hagar?

A. I don't know Mr. Hagar.

Q. Did you ever hear of him?

A. No.

Q. You were a director of this company for two or three years or more, weren't you, Mr. Paine?

A. I should say about two years, yes.

Q. And during the last year you knew pretty well what they were doing? I mean, what contracts they were performing?

A. Well, I knew about two of their jobs. I knew

that they had a job in Paterson and a small job out on Staten Island.

Q. And you knew about the job at Newark?

A. They were trying to secure a job at Newark; I didn't know they had it at the time.

Q. You knew that those were the three contracts they were performing during the summer of 1910?

A. Yes, I think so.

Q. And they were the only contracts they had?

A. I wasn't familiar with the affairs of the Glen Company.

Mr. McMahon: I move to strike that out; I am not asking that.

A. (Continuing.) You are asking me all about their business.

The Court: The latter part that is not responsive to the question may be stricken out.

Q. You talked over the affairs of the company frequently with Mr. Downey?

A. No.

Q. He told you about them?

A. Not frequently. You said "frequently."

Q. Well, he told you about them?

A. When I happened to meet Mr. Downey, which might have been once in three or four months perhaps.

Q. Well, during the last year it was very frequently and not every three or four months, because he had to come to you to ask you for money?

A. Yes.

Q. When they came and asked you for money, of course, they talked to you about the affairs of the company?

A. Yes, and Mr. Alford also talked to me about the affairs of the company.

Q. Now, when Mr. Gunnell reported to you, did he report to you in writing, Mr. Paine?

A. I think he did give me some figures, yes.

Q. And you mean just rough figures or regular accountant's report?

A. No, he didn't give me an accountant's report.

Q. He just gave you some rough sheets of paper?

A. Yes, sir.

The Court: Anything further from this witness?

Re-direct Examination by Mr. Stancliffe:

Q. How many meetings of the board of directors of the Glen Company did you attend, Mr. Paine, during the time that you were a director of the company?

A. I don't recall more than two—possibly three.

Q. Do you recall having received any notice of any other meetings other than the ones that you attended?

A. I never received any notices.

Q. Your office was at 111 Broadway?

A. Yes.

Q. And the company's office at 156 Fifth Avenue?

A. Yes.

Q. How frequently were you in the office of the Glen Company?

A. I don't believe during all the time I was interested in was in there more than two or three times.

Q. I understand your interest in the company was represented by one share of stock?

Mr. Hall: May I ask how this is re-direct?

The Court: Well, I haven't enforced that rule. I hope, however, counsel will not be repetitious.

Mr. Stancliffe: I shall go through it very hurriedly, if your Honor please.

A. That is right.

Q. Did you ever go over the books of the company, Mr. Paine?

A. I never saw the books of the company.

Q. They were kept at 156 Fifth Avenue?

A. I suppose so.

Q. At no time up to the time that you made this last loan to the company had you seen the books of the company?

A. No.

Mr. Hall: Objected to as leading.

The Court: The question is not in proper form. It can be very easily reconstructed.

Q. Had you, at any time prior to the time of making the last loan, seen the books of the company?

A. I have never seen the books of the company until I saw them here.

Q. Your business is not contracting?

A. No, sir.

Q. Nor is it that of an accountant or bookkeeper?

A. No.

Q. At the time of the passing of your check for $4,950 I understand that Mr. Alford, Mr. Downey and Mr. Hardy and yourself were present?

Judge Lewis: I object, if your Honor please. At this point it seems to me very important that the questions should not be leading.

The Court: Yes, the questions are very objectionable.

Q. May I ask you who were present on that occasion?

A. When I passed the check?

Q. Yes.

A. Mr. Alford, the President of the company, Mr. Downey, the Treasurer, and Mr. Hardy and myself.

Q. Was Mr. Downey a director of the company?

A. Yes.

Q. And Mr. Alford was a director of the company?

A. Yes.

Q. And you were a director of the company?

A. Yes.

Q. That constituted the entire Board of the company, did it not?

Judge Lewis: That is a pretty leading question.

Q. Will you state what conversation took place on that occasion, and I direct your attention particularly to what conversation took place as to any profits that were to be made on any of the jobs of the Glen Company, if there was such conversation.

Mr. McMahon: That has already been gone into on direct-examination and Mr. Paine has testified to it.

Mr. Stancliffe: I admit that it has been gone into but this is a little different.

The Court: I cannot recall the testimony and we cannot stop now to see whether this ground has been traversed.

Mr. Stancliffe: It has been traversed to this extent, that Mr. Paine did testify that the assignment was to cover certain moneys which they expected to receive from three separate jobs. What I am directing his attention to now is the conversations that were had at that particular time, as to the profit to be realized out of these jobs.

The Court: The only question is whether or not the witness has not already testified in regard to that matter.

Mr. McMahon: If your Honor will look at page 447 of the record you will find the testimony fully covers that subject.

The Court: Well, Mr. Stancliffe, why does not this testimony here, which I believe is your direct-examination, cover this very topic?

Mr. Stancliffe: My purpose was to make it a little more definite.

The Court: Well, I will allow it. I have not enforced the rule.

Q. (Question read by the stenographer).

A. Why, Mr. Alford and Mr. Downey informed me of the condition of the company in saying that there was a profit accumulating on some job at Newark, I think, whereby they were holding back fifteen per cent., and out of which they were to reimburse me when that job was completed, and this money for the pay-roll would have taken care of other payments they were to receive. One payment they were to receive was at New Dorp, Staten Island, a hospital they were about finishing, and they figured up, I think, some thirty or forty thousand dollars in extras which they expected to receive.

Mr. McMahon: I object to his stating what he thinks.

A. (Continuing.) I will swear that they told me there was some thirty or forty thousand dollars in extras coming to them.

Mr. McMahon: Who told you?

A. (Continuing.) Mr. Downey and Mr. Alford. That is one thing I know about the company.

Mr. Hall: Which one?

A. Mr. Downey, the Treasurer of the company.

Mr. Hall: Give us Mr. Downey's language.

The Court: This is very irregular.

Counsel should not interrupt the examination, unless to interpose an objection. We will proceed now regularly.

Mr. Hall: I move to strike the answer out.

The Court: On what ground?

Mr. Hall: On the ground that he uses the word "they," without specifying the particular person. He doesn't say who told him, simply "they" told him.

A. I will say both.

The Court: I will allow it to stand. The question seems to elicit a conversation that occurred between the witness and these gentlemen upon an occasion named. If that is not the correct expression the matter can be straightened out on cross-examination.

Mr. Hall: I don't object to the question; I object to the answer in not telling who was making the conversation.

The Court: I will allow it. It was a conversation that occurred upon a certain occasion when these two gentlemen were present. Proceed.

A. Mr. Downey informed me and I believe Mr. Alford. They were both there.

Q. In one of the assignments which was offered in evidence, reference is made particularly to the moneys which the Glen Company was entitled to, for labor and materials furnished during the month of November, 1910; was there any conversation in regard to that requisition or that payment?

A. Why, they told me that they expected a payment in a few days.

Q. And that this money was to tide them over?

A. Tide them over.

Mr. Hall: I object to the question; it is a repetition. I understood your Honor to say that the rule would be enforced after the previous question was asked. Now this question should not be allowed.

The Court: The question is very improper in respect to form. If counsel wish the testimony to have any probative force the question had better be reconstructed. But in regard to this other point, I am not going to interrupt the re-examination. I caution counsel, it is useless to repeat. It doesn't strengthen the testimony at all; it oftentimes weakens it, and I suggest that so far as possible you confine yourself to new matter and after the re-direct examination is over counsel on the other side may cross-examine upon the matters which have been introduced on this re-direct and that will be the end of the examination of this witness. That is the rule I meant to indicate.

Q. Has any part of this $4,950 which you loaned to the Glen Company on December 1, 1910, been paid back?

A. No.

Mr. Stancliffe: If your Honor please, we claim interest on this particular amount.

May I suggest the amount, subject to correction?

The Court: That is a mere matter of calculation.

Mr. Stancliffe: I want it on the record, subject to correction. It is $372.

Cross Examination on behalf of Frank Miller Lumber Co.:

Q. (By Mr. Terry) Where were the books of the Glen Company when your expert examined them?

A. Why, I suppose they were at the office of the company, 156 Fifth Avenue.

Q. And you told him to go up there and look at them?

A. Yes.

Q. And he and his assistant Ross worked on them several days?

A. I think about a week.

Q. Prior to the time when he told you one of them told you, Ross or Gunnell—that he found that the books hadn't been posted up to date?

A. Yes, Gunnell told me that. I didn't know Ross very well.

Re-direct Examination by Mr. Stancliffe:

Q. When was the first time you had any report as the financial condition of the company?

A. The 8th of June.

Judge Lewis: I understood that the cross-examination would end the examination of this witness. There is nothing new elicited by Mr. Terry's questions.

The Court: This is rather in the nature of re-cross examination.

Q. (Question read by the stenographer).
A. About the 8th of June.
Q. (By the Court) What year?
A. 1910.

Mr. Delaney: The witness says June.

A. (Continuing) December, I meant to say; about the 8th of December.

Cross Examination by Mr. McMahon:

Q. I understand you to say that when you passed over this check to the company Mr. Downey and Mr. Alford were there?

The Court: That is a new matter.

Mr. McMahon: I think on re-direct Mr. Stancliffe asked him about the director's meeting, whether any notice of the meetings were sent out.

A. No, I never saw a notice for a meeting.
Q. So that the discussion between you and Mr. Alford and Mr. Downey in reference to your check was entirely informal?
A. Yes.

Cross Examination by Mr. Terry:

Q. If I may have a little bit of indulgence for one moment, I think there is a little confusion as to what I was asking: I call your attention to the

suggestion that was made, that there was some rough figures given to you by your accountant on one occasion; you recall saying that, do you not?

A. That was about the wind-up of the examination. I think he informed me of that.

Q. And prior to that you had talked with your accounts from time to time while they were working?

A. No.

Q. You say Mr. Gunnell or Mr. Ross called up on the telephone?

A. No, I called them up to find out whether they had finished and they told me they couldn't tell me anything. I won't say that I called up; they may have called me up.

Q. When you talked with them by telephone they said they were still working on the books?

A. I didn't have any conversation with Mr. Ross; I didn't know Mr. Ross.

Q. Mr. Gunnell said he was still working on the books?

A. Mr. Gunnell said he wasn't ready to make any report.

Q. And you told him to go on working on the books?

A. Certainly. I paid his bill; I wanted a report.

Q. And the first time you spoke to Mr. Gunnell about going to work on the books did you arrange for him to do it personally or for Mr. Ross—which?

A. I didn't care who did it as long as he was a certified public accountant who did it. He has done work for me.

Q. And that was the beginning of the seven day period that you have spoken of?

A. About the first of December.

Q. (By the Court) Was the date of the employment of Mr. Gunnell fixed?

A. I think it was about December the first; it may have been a day earlier or a day later.

Q. Can you fix that date, Mr. Paine?

A. I imagine it was on the first of December.

Q. Would not Mr. Gunnell's bill show the date of his employment and the date when he began to work there?

A. Well, I don't know but what it would. I don't know that I ever saw the bill of Mr. Gunnell. I asked him what I owed him and I gave him a check. Mr. Gunnell may have a record.

Mr. Terry: I am glad your Honor asked that question; I hardly dared to. I want Mr. Paine to be frank with us about that, if he will.

Q. Now, I understood in one portion of your testimony, Mr. Paine, that you said you employed Mr. Gunnell probably two or three days before the first of December, and I want you to be frank with us about that.

A. I don't think that is so, Mr. Terry.

Q. Well, one or two days before the first of December?

A. When this question of pay-roll came up—

Q. No, Mr. Paine—

A. I am going to tell you why I did employ him.

Q. I would like very much if you would keep your mind down to that one question. I know you want to be frank with us and I hope you will on

this point. Was it two or three days before the first of December, or something like that?

A. I can't swear that it was two or three days. My impression is that it was the day before—within a day, I will say, the 30th of November probably.

Q. Would this be a fair way to put it: That a day or two before the first day of December you employed Mr. Gunnell to work on the Glen Company's books?

A. I would rather say I think it was the day before.

Q. And you told him you wanted him to find out quickly for you the condition of the company?

A. Yes, I had money in there and I wanted to know what condition the company was in.

Q. Will you be good enough to tell us, Mr. Paine, whether Mr. Gunnell, as far as your knowledge goes, had ever looked at the Glen Company's books before that?

A. I think not, no. I don't think the books were looked at very often.

Q. At the time you employed Mr. Gunnell did you have some conversation with him about the condition of the Glen Company?

A. No, other than they owed me quite a lot of money and telling me of a great deal of money due them which wasn't forthcoming.

Q. And you were somewhat worried?

A. Yes, I wanted to know the condition.

Q. And at that time, Mr. Paine, how much did the company owe you?

A. $21,000 up to the first of December, or the 30th of November.

Q. And that was a considerable time overdue?

A. Why no, it was a demand note. I had been promised—

Q. You had held the note some time?

A. Yes, two or three months. Well, from October.

The Court: Counsel is going into an entirely new topic now.

Mr. Terry: Well, I don't want to do that, if your Honor please.

Q. Reverting to the one point, have you any data —any bill—from Gunnell—any letter from Gunnell —which will enable you, as far as you know now, to fix the exact time when you employed him?

A. I don't believe I have. Mr. Gunnell may have a record from which I could find out, perhaps.

Q. But you have nothing of your own?

A. O no. I have a check I can show you.

Cross Examination by Mr. Hall:

Q. Mr. Paine, perhaps this will refresh your memory on that point: Did you assign your claim for $21,000 against the Glen Company to Mr. Gunnell?

A. If I did?

Q. Did you?

A. Why yes, I have testified to that.

Q. The Glen Company made an assignment to Mr. Gunnell to secure a claim of $21,000 which was money due to you from the Glen Company, did they not?

A. I believe they did.

Q. And that was on November 30, 1910?

A. Yes.

Q. Now was it on the same day that you employ-

ed Mr. Gunnell to go over the books of the company?

A. I think it was—I think it was that day.

Q. So that the very day you employed him to examine the books of the company you directed the Glen Company to assign to him these very accounts receivable on the Paterson and Newark jobs, to secure to him the money that was due to you, did you?

A. I think that is correct.

By Mr. Stancliffe:

Q. Was the telephone conversation Mr. Terry referred to you had with Mr. Ross or Mr. Gunnell prior to December first or after?

A. After December first.

By Mr. Stancliffe:

Q. Mr. Paine, was this $20,000 loan by you to the Glen Company after September, 1910?

A. I think part of it was.

(Miss) MARIE CONROY, recalled on behalf of the Paine assignment, testified as follows:

Direct Examination by Mr. Stancliffe:

Q. Do you remember, Miss Conroy, the receipt by the Glen Engineering Company of the sum of approximately $4,950 on or about December 1, 1910?

A. The receipt?

Q. The receipt by your company?
A. Oh, yes.

Mr. McMahon: If your Honor please, I suggest in regard to that point that the check is in evidence.

The Court: Let me see the check. (Check handed to the Court).

Q. Do you remember of the company receiving that amount of money?
A. Yes, for pay-roll.
Q. On what date?
A. Oh, I don't remember the date. It was about a week before the company failed.
Q. That was about the 3rd, say, of December?
A. No, I don't think it was as early as that. I don't recollect the date, though.
Q. Until what time did the Glen Company continue its business?
A. I don't remember. I know it was in December, but I just don't remember the date.
Q. It continued through the first week in December, did it not?
A. Well, I don't remember at all. The books will show that.

Cross Examination by Mr. Fallon:

Q. I ask you by whom you are employed now?
A. Ebsary Fire Proofing Company.

Mr. Stancliffe: I hope your Honor will pardon this suggestion: It seems to me, in view of the fact that the Glen Company was

a New York corporation at the time the assignments were made, that even though the fund was in New Jersey the question of the validity of the assignments and the relation of Mr. Paine to the company as affecting the validity of the assignments, should be controlled by the New York law. If I understand the rule which is adopted here in New Jersey it is the same as prevails in New York, that to get the New York law into a case you have to testify. Do I understand the rule correctly?

The Court: No, that is not our rule. The present evidence Act regulates that. You can put in the books. You can prove the law of a foreign state by an expert witness from that state. You are not confined to proof here.

Mr. Stancliffe: I so understood that rule, and if I have your Honor's premission I shall state the rule as a witness.

Mr. McMahon: Why not offer the statutes?

The Court: You will probably find it more convenient to follow the usual course here and prove the New York law by producing the statutes and decisions.

Mr. Stancliffe: I now offer in evidence the official decisions of the Court of Appeals in the State of New York, as follows:

1. First National Bank vs. Commercial Home, 108 A. D., 78, af'd 185 N. Y., 575.

2. Converse vs. Sharp, 161 N. Y., 571.

3. Rudd vs. Robinson, 126 N. Y., 116.

4. Hull vs. Herter, 83 Hun, 19.

5. United Wine Grower's Association vs. Eisner, 22 A. D., 1.

6. And the General Corporation law of the State of New York, Sec. 43.

That is Mr. Paine's case.

The Court: Then counsel for Mr. Paine rests.

Mr. Fallon: May I put in a reference to the New York case on which I expect to rely in regard to the First National Bank of the Town of Union case, which is the case of The Rogers Construction Company, reported in 79 N. Y. S., 444, affirmed in 175 N. Y., 509.

The Court: Well, gentlemen, you put those decisions in evidence?

Mr. Fallon: Yes, sir.

Mr. Stancliffe: I assume, in giving the general propositions outlined in any of these cases, we are not restricted to any one case when it comes to the argument.

The Court: Well, you should put in the cases on which you rely to show what the law of the State of New York is, and, of course, after you put those cases in you may make a great many arguments collateral to them. You may bring in English cases and cases of other states, in order to sustain the argument as to these propositions laid down by the Court of Appeals in fixing the law of the State of New York.

Mr. Hall: As I understand the case of Mr. Paine, he abandons all claim against the assets of the Glen Engineering Construction Company, excepting the $4,950?

Mr. Delaney: And interest.

Mr. McMahon: I would like to recall Miss Conroy. There are a few things I would like to bring out.

The Court: Any objection, Mr. Hall? I understand you were about to put on your expert.

Mr. Hall: No, sir.

(Miss) MARIE CONROY, recalled for further examination on behalf of the Frank Miller Lumber Company:

Direct Examination by Mr. McMahon:

Q. I notice through the various check books, Miss Conroy, that on the date of December 9, the balances of the Glen Engineering Company in all the banks were drawn out by bearer checks; do you know what was done with those checks, and if you know state what was done with them?

Mr. Stancliffe: I object to that. It seems to me not within the issues here.

Mr. Hall: Suppose they were paid out to Mr. Paine on account of his indebtedness; the question would then be material.

The Court: Oh, it may be material and it may not. What is the point of it?

Mr. McMahon: I want to show that most of the money was paid and taken down to Mr. Hardy's office.

Mr. Stancliffe: Do I understand that that would be payment to Mr. Paine?

Mr. McMahon: If you concede that.

Mr. Stancliffe: I will concede that the money was given to Mr. Marshall S. Hagar.

Mr. McMahon: That all the bank balances were drawn out by—

Mr. Stancliffe: By Mr. Alford and Mr. Downey and turned over to Mr. Hardy, who turned it over to Mr. Hagar. If that is the purpose of the inquiry I shall object further, that it is entirely incompetent and outside of the issues.

The Court: I will take it. You may weed out immaterial matters later.

Q. (Question read by the stenographer.)

A. They were taken down to Mr. Gunnell's office.

Mr. Stancliffe: Whom were they given to, Miss Conroy?

The Court: One moment; the examining counsel has the witness. Put in a proper objection, otherwise there should be no interruption.

Mr. Stancliffe: I shall then move to strike out the answer.

The Court: The answer may stand. If the witness is answering from hearsay that may be brought out on cross-examination.

Q. Miss Conroy, do you remember when Mr. Ross and Mr. Gunnell came up to the Glen office to work on the books?

A. About the middle of November.

Q. And do you remember that some of the books were taken out of the office?

A. Yes, about the latter part of it. I don't know what books they were, though.

Q. Did you do any work on the books after December 1st?

A. No.

Q. Except to draw some checks?

A. Yes, I drew some checks.

Q. Did you have in mind December, 1910, in answering the last question?

A. Yes.

Cross Examination by Judge Lewis:

Q. I would like to ask you to tell us what part of the money paid by Mr. Paine to the company was used for the payment of wages.

A. What part of the check?

Q. What part of the $4,950 that was paid to the company by Mr. Paine?

A. $4,400 was for pay-roll.

Q. And the pay-rolls on what jobs?

A. The jobs then in operation—the Paterson high school, the Newark school, and I don't know what other jobs.

Q. How much on the Paterson job, could you tell?

A. I expect I could if I looked at the books, but I can't tell from memory now.

Q. Which book would you want, this book (referring to the contract ledger)?

A. Yes, that or the cash book. (The contract ledger is given to the witness and after examining it she continued:) $1,009 for Paterson and $35 before to be added on.

Q. Then of the entire $4,950 that was all that was applied to the Paterson payroll, the $1,009, plus $35?

A. Yes, sir.

Cross Examination by Mr. Stancliffe:

Q. You have referred to certain checks which were drawn to bearer under date of December 9,

1910; do you know the aggregate amount of those checks?

A. No, I don't.

Q. To whom were they given after you made them out?

A. Well, all but the First National Bank of the Town of Union check for something like $60, and that check Mr. Steinmetz drew out in lieu of salary; the other checks—

Q. To whom were they given?

A. Why, to a messenger to bring downtown. They were just delivered to a messenger; I didn't know who the messenger was, but I know they were sent downtown.

Q. I will ask you this question again, and hope there will be no objection on the ground of repetition: At the time the company received this money from Paine the work of the Glen Company was going on actively, was it not?

A. Yes, sir.

Cross Examination by Mr. Fallon:

Q. With the permission of the Court I would like to ask you to describe the location of the offices of the Glen Company.

Mr. McMahon: I object, if your Honor please, on the ground that Mr. Fallon has closed his case.

The Court: I will allow that.

Q. Will you explain the location of the offices of the Glen Company as they were in September, 1910, and state how many offices were occupied by that company?

Mr. McMahon: He is trying to cross-examine again. We are talking now about

the Paine assignment; if he is examining the witness on that, why all right.

The Court: He asks for leave now to reopen his case to prove a physical fact, as I understand it. I do not know what bearing that physical fact may have upon the case.

Mr. Fallon: I will state to the Court—

The Court: No, proceed; I will allow it.

A. Entering from the hall was the drafting room and the receiving room, and then my room, and then Mr. Alford's room, and then Mr. Downey's room.

Q. Mr. Downey's room was the farthest from the entrance?

A. Yes, sir.

By the Court:

Q. And the number was what on Fifth Avenue?

A. 156 Fifth avenue it was at that time.

Q. What building? A. Presbyterian Building.

By Mr. McMahon:

Q. And the connections through the offices left open?

A. Always, yes.

MORGAN GRIBBLE WAKE, sworn as an expert on behalf or the Trustee in Bankruptcy, testified as follows:

Direct Examination by Mr. Hall:

Q. Mr. Wake, what is your business?

A. That of Certified Public Accountant.

Q. How long have you been a Certified Public Accountant?

A. About eight years.

Q. And you are with the Universal Audit Company, of New York?

A. I am.

Q. In your experience as a Certified Public Accountant have you had occasion to examine and report on the conditions of corporations and other institutions, and their financial condition?

A. I have.

Q. Frequently or infrequently?

A. Frequently.

Q. Have you made an examination of the books of the Glen Engineering Construction Company covering a period or several periods in the year 1910, showing the financial condition of the company?

A. I have.

Q. State what books you had and what examination you made.

A. I had the contract ledger, general ledger, cash book, journal, trial balance book—five in all.

Q. Did you make an examination of the books showing the condition of the company as shown by the books on the several days from August 25th to September 1, 1910?

A. I did.

Q. A separate statement for each date?

A. I did.

Q. And have you that statement with you?

A. I have.

Q. Using that statement as a memorandum to refresh your memory, will you please state the financial condition of this company, as shown by its books, on August 25th, 1910.

Mr. Stancliffe: I shall object, if your Honor pleases, on the ground that there is

no testimony to show that the books were correctly written up, or that the books properly interpret or reflect the financial condition of the concern.

Mr. Fallon: I also want to object on behalf of the First National Bank of the Town of Union. My present recollection is that the $5,000 that was obtained by Downey from the First National Bank of the Town of Union was for the benefit of the Glen Company and it does not appear in the transactions as between the Glen Company and the bank. The item of $5,000 of the so-called Downey note remains unexplained as to whether or not that money was actually paid over to the Glen Company. Mr. Alford says that it was, but the books do not show.

Mr. McMahon: They show it in Downey's account, of course they do.

Mr. Hall: I think counsel are misinterpreting the purposes of this examination. Your Honor will remember that Mr. Hilbert, an officer of the Town of Union bank, testified that he did look over these books at or about the time of the opening of the account with the Merchant's National Bank, or at the time that bank made discounts of notes, and which he subsequently identified as between August 25th and Sept. 1st. Now, the purpose of this examination is to show what Mr. Hilbert must have found in looking over the books on those dates. Whether they are true entries or not we don't know.

The Court: The books are all in evidence?

Mr. Hall: Yes.

The Court: You may use, of course, this expert as a convenient means of getting before the Court what the books show—

Mr. Hall: On that date?

The Court: On that date. The objection has not been made, but still, Mr. Hall, you have gone beyond that; you are asking him to draw a conclusion as to the financial condition of the company at the time.

Mr. Hall: No, I think not. I am asking him to point out to us what the facts are as they appear from the books.

The Court: Proceed.

Q. Taking it from your statement there, Mr. Wake, will you please give us the financial condition of the company, as shown by its books, on August 25th, 1910?

A. There was an excess of liabilities over assets of $41,295.37.

Q. Now, tell us what the books show as assets and what they show as liabilities.

A. As assets, $450,714.38.

Q. You misunderstood my question. My question was that you give those in detail.

A. Oh, in detail:

Cash on hand as per cash book,	$7,190.99
Accounts receivable,.....	4,086.76
Due on contracts uncompleted, Board of Education Paterson, ...	108,244.69
St. John's Guild, New Dorp,..	8,258.58
Board of Education, Newark..,	309,698. flat.
Sub-contractors' debit balances,	595.50
St. John's Guild Contract. Expenditure and sub-contrac-	

tors' amounts in excess of contract price representing loss to date,.....	9,609.67
Equipment and office furniture,	3,030.19
Total assets,.....	$450,714.38

Q. Now the liabilities.

A. Liabilities:

Loans. First National Bank, Town of Union, New Jersey,	$10,000.00
P. D. Downey,.....	10,700.00
M. S. Paine,.....	5,000.00
Sub-contractors' balances,.....	152,381.27
H. J. Burchell, credit balance on contract,.....	80.05
Uncompleted contracts as per contract ledger, Paterson, N. J.,.....	75,926.69
Newark, N. J.,.....	227,921.74
Capital stock,.....	10.000.00
Total, ...	$492,009.75

Q. In ascertaining the amount of the Paterson contract which you put down as an asset as $108,244.69,—how do you arrive at that figure?

A. I took the amount of the contract and extras, as charged to them, namely, $285,511.94 and deducted the cash received, $177,267.25, leaving a balance as shown by the books, $108,244.69.

Q. Does not that item of $108,244.69 represent the balance of contract price in excess of what it had already received, irrespective of whether the contract was completed or not?

A. That is so.

Q. How did you ascertain the figure, in liabil-

ities, of the amount due on the Paterson contract, of $75,926.69?

A. I took the figures on the contract ledger, which shows that the contract was credited with the full contract price and charged with the full sub-contractors' prices and the actual cash paid to date, which left a balance of $75,926.69.

Mr. Hall: Now, if the Court please, it might be a convenience and save time if this schedule were put in without reading all these figures into the record. The witness has the original, I have a copy, and I am willing that the other side should have a copy of this schedule. If counsel prefer, however, I will have it all read in the record.

The Court: It is entirely proper, after the books have been put in evidence, to put transcripts made by experts in the case. They are not instruments of evidence at all, they are convenient means whereby what the instruments of evidence testify to may be ascertained; that is all. They are subject to correction at any time by reference to the books. When they are submitted to both sides, a competent expert prepares them, and he says there is exhibited on the schedules what the books in evidence show and nobody contradicts him, they are generally received without the court or jury undertaking to go over the books, although the schedules themselves are not instruments of evidence.

Q. From your schedule, Mr. Wake, will you tell us whether or not the books show that the liabil-

ities of the Glen Company exceeded its assets on August 26, 1910, and if so by what amount.

A. On that day the liabilities exceeded the assets by $37,356.46.

Q. And the details by which you arrive at that result are contained on the schedule which you now have before you?

A. They are.

The Court: Let the schedule be marked.

Mr. Hall: I will offer it right now.

(The same is marked Trustee's Exhibit D-2, Mar. 21, 12.)

Q. And are made up in the same way as the details of August 25th?

A. They are.

Q. Take August 27 and give us the same information in regard to the assets and liabilities of the company, as shown by its books on that date?

A. The liabilities exceed the assets by $37,356.46, the same as on the previous day.

Q. And on August 28?

A. The liabilities exceed the assets by $37,356.46, the same as on the previous day.

Q. August 29?

A. The liabilities exceed the assets by $40,533.93.

Q. August 30?

A. The liabilities exceed the assets by $38,533.93.

Q. August 31?

A. The liabilities exceed the assets by $37,533.93.

Q. And September 1st?

A. The liabilities exceed the assets by $39,533.93.

Q. Now, I will ask you, Mr. Wake, about how

long a time it took you to ascertain the conditions of the company that you have just testified to, as to each date?

A. Three or four hours.

Q. And in that time you were able to produce, for this whole statement, as I understand it, these conditions?

A. I was.

Q. Now, did you also make an examination of the books of the company as of the 15th day of September, 1910?

A. I did.

Q. And did you make any efforts to ascertain what was due from the company to creditors as of that date?

A. I did.

Q. And what investigations did you make in that regard?

A. I called for all the invoices from the creditors that could be found and they were given to me. Subsequently I ascertained that a lot of statements were in the hands of the Trustee; consequently, I was only able to give an approximate statement.

Q. But did you make up a statement as the result of such investigations from which you received definite information, from the creditors?

Mr. Delaney: I object on the ground as leading the witness.

Mr. Hall: I suppose that is leading.

The Court: The objection is not valid and will be overruled. Answer the question.

A. I did.

Q. Is this the statement which I now show you?

A. That is the statement.

Q. Consisting of two sheets?

A. Yes.

Mr. Hall: I offer those two statements for identification.

(The same are marked Trustees' Exhibits for identification D-3 and D-4.)

Q. Now, referring to this paper, Trustee's Exhibit D-4 for identification, March 21, 1912, you made up this statement yourself, as I understand it?

A. I did.

Q. From the result of your investigation of the books and from the invoices you obtained from creditors?

A. I did.

Q. Tell us, please, what the names and amounts, and the data on that page refer to?

A. It refers to a list of creditors on the Paterson, New Dorp, and Newark contracts, of which I could ascertain, and it also refers to the names of those creditors; the amounts I could not ascertain.

Q. At the top of that exhibit it says, "List of creditors (ascertained) September 5, 1910," and then follows a number of names with specified amounts; tell us what those amounts are.

Mr. Delaney: I object, on the ground that this paper has not been offered in evidence and counsel in this way is practically trying to get the paper in evidence.

The Court: How is it competent?

Mr. Hall: If This accountant testifies that a certain condition existed from the

books; that in addition to that he secured from the files of the company invoices of creditors showing indebtedness to them, and in addition to that he knows, or we know from the proofs in this case, that there are other claims the amounts of which are not ascertainable or were not at that time, then he can tell us what the books and files of the company showed—what the condition was on that date.

The Court: The difficulty is that you have shown that this witness made up the statement that you have had marked for identification not only from these books which are in evidence but also from invoices, papers and information derived from other sources, and now you ask him, with the paper before him, to testify really to the results of his investigation—what he thought he discovered. It is pure hearsay.

Mr. Hall: I didn't anticipate that it would be required to produce those invoices. I have them in my office as Trustee's counsel and they can be produced.

The Court: All the papers that are properly in evidence can be submitted to the expert for examination and then the expert can make his schedule and show what they show; but the books have to be here or else the schedule has no force whatever, and he cannot testify by refreshing his recollection from the document before him any more than he can testify directly as to the result of his investigation.

Mr. Hall: I shall then have to discontinue that branch of my proof and put it in

on some other day. The documents are very bulky and fill a file case.

Judge Lewis: May I suggest that we continue with the evidence upon the understanding that counsel is to produce the original documents on which he bases that conclusion of the expert. It is simply putting the cart before the horse, that is all.

The Court: That is the trouble about it.

Judge Lewis: It is merely a matter of order of proof, and I suppose it would save considerable expense to the estate not to bring the expert here again in order to prove these obligations.

The Court: The difficulty is that objection is made, and I do not think this testimony should be received under objection. I think also Mr. Wake testified that some portion of material that he used in making up this schedule now before him, marked for identification, consisted of inquiries and investigations made by him.

Mr. Hall: I will ask him.

Q. Did the investigation which you made as to the amounts due creditors include anything except the sums on record in the files of the Glen Company?

A. No, it did not.

By the Court:

Q. Is this schedule based wholly upon what is disclosed by the books of the company which are in evidence and what is disclosed by the bills which you found on file?

A. Yes, your Honor.

Q. (By the Court, continued.) Bills showing claims against the company?

A. Yes.

Mr. Hall: I will submit it to the investigation of counsel on the other side; they are at liberty to look at it.

The Court: Counsel may make any arrangement which they may see fit. This testimony may be taken subject to putting in evidence the additional bills. I do not know that they are receivable in evidence; I know nothing about it. I cannot tell what these papers are. However, counsel may consent and then subsequently the testimony can be stricken out if the documents are not produced. I have no other suggestion to make.

Mr. Hall: Your Honor will remember that at the last hearing the counsel for the Town of Union Bank requested that he be given an opportunity to put experts on the books if he desired. Now, my suggestion is that we take this testimony and the same sources of information will be turned over to their experts if they desire it, and they can come in here and prove their testimony. Unless that is done I shall have to ask for an adjournment to some other day.

Judge Lewis: Might I further suggest to your Honor, isn't this matter within the control of the Court, as to the order of proof, very much as to the declarations of an agent are received before the existence of the agency is established.

The Court: I have given due heed to that consideration and I would be very glad to follow the suggestion of counsel, but this testimony—the testimony of an expert—is confined strictly, as I stated a little while

ago, to the work of exposition; he simply stands in the presence of the books and he says, "I have given time and care and study to those books—I have spent four hours in doing that." The Court cannot give four hours to the study of the books. The witness stands as an expositor, and he says, "I have gone all through the books, and here is a statement of what they show." It is not original testimony or direct testimony, it is an interpretation of the testimony which the books give. Now, to give their interpretation before the books have been produced is very irregular and I do not think it is allowable against objection. I should be disposed to exercise the discretionary power of the court in respect to the order of proof, by allowing an expert bookkeeper to say that the books of this company show so and so when the books haven't been produced at all, merely when counsel say they are going to produce them. We do not know what these papers are. They may be subject to objection and not admissible in evidence. I think it would be an unusual departure from the usual course to allow the testimony to be given at this time. The documents should all be here from which he compiled his statement. If counsel choose to make any arrangement among themselves as to the admission of this testimony now, they may do so; if not, I will give counsel another opportunity to produce them at a later day.

Q. Did you make up your statement from the books of the company which are here, as of September 15, 1910?

A. I did.

Q. Have you the result of that statement?

A. I have.

Q. And is the paper which I now show you the result of that examination (showing witness paper marked for identification, Trustee's Exhibit D-5, March 21, 1912)?

A. Yes, sir.

Q. Referring to this statement marked "Trustee's Exhibit D-5, for identification, March 21, 1912," did the assets exceed the liabilities, or the liabilities exceed the assets on that date, and if so by what amount?

Mr. Stancliffe: This appears from the books?

Mr. Hall: Yes.

A. The liabilities exceed the assets by $47,682.60, as shown by the books.

Q. And what did you find on the books as the assets of the company at that time?

A. Cash on hand, as by cash book, $2,815.90.

Accounts receivable, $4,086.76.

Due on contracts uncompleted Board of Education, Paterson, New Jersey, $97,244.19.

Q. Now, let me interrupt you: You made this statement up in the same manner as you did the previous statement, Exhibit D-3?

A. I did.

Q. Without reading the balance of the statement contained on Trustee's Exhibit D-5 for identification of this date, I will ask you if they are

made up in the same manner as you made up the statement in Trustee's Exhibit 2 of this date?

A. They are.

Q. How much time did you spend altogether on the examination of the books of this company?

A. You mean including that other statement?

Q. Including all of these statements which you have made up.

A. About four or five days—or do you mean to include the making of the report?

Q. I mean the time spent in the examination of the books.

A. About between three and four days.

Q. Did you also make up a statement of the condition of the company as of November 30, 1910?

A. I did, from the books.

Q. Have you it there?

A. I have.

Q. And does that show whether or not the liabilities exceed the assets, as shown by the books on that date?

A. It does; it shows the liabilities exceeds the assets by $26,904.90.

Mr. Hall: I offer that in evidence.

(Admitted and marked Trustee's Exhibit D-6, Mar. 21, 12.)

Q. Was that statement prepared in the same method as the previous statements D-2 and D-5?

A. It was.

Cross Examination by Mr. Stancliffe:

Q. When did you make up this statement, Mr. Wake?

A. About a month ago.

Q. Where did you find the books?

A. At the office of counsel, Mr. Hall.

Q. Was there any other data there other than the ordinary books of the concern—that is, when I refer to "ordinary books," I mean the cash-book, journal and ledger?

A. There was a whole lot of data.

Q. What did that consist of?

A. I didn't have time to examine the whole of the data; it would take me probably a week. It consisted of correspondence, invoices of creditors, etc.

Q. Did you consider those invoices in making up this statement?

A. I did not; these statements are made up from the books.

Q. These are made up from what appears on the books?

A. That is all.

Q. (By the Court.) And these are the books, I understand, before the Court in evidence, which you had before you?

A. They are.

Q. So I understand that these statements are just what appear on the books?

A. They are.

Q. At what date was the last trial-balance taken off the books, do you know, or does it appear on the books?

A. I can only tell by referring to the trial-balance book.

Q. Is there any such book?

A. There was.

Q. Can you, by referring to it, tell the time the last trial-balance was taken off?

A. I can. (Witness refers to Exhibit F. M. L. Co., D-10.) The last one would appear to be about July, and in making an examination of the books the accountant would ignore a book like that; he takes off his own trial-balance.

Q. The last-trial balance that appears to have been taken off this book was in July, 1910?

A. That is what appears by the books.

Q. Up to what date had the books been written at the time that you started your examination?

A. November 30, 1910.

Q. Could you state generally what was the condition of the books as far as they were written up with respect to accuracy, or whether they had been kept as they should be done to properly keep accounts of the corporation's affairs?

A. The books were kept in very poor condition, but they were sufficient for me to gather the facts to present to the Court.

Q. That is, to an expert like yourself?

A. I am.

Q. No, I say there was sufficient data in the books for an expert as you are?

A. Or to any intelligent man.

Q. Did anybody assist you in this work, and if so, who?

A. They did not.

Q. I didn't ask "did they," I asked "did anybody"?

A. Nobody did.

Q. You received all the papers and all the books from which you made your examination from Mr. Hall?

A. I did.

Q. You didn't go through all this data in these various invoices?

A. No, I did not.

Q. Have you any notion of how long it would have taken you to go through all this data?

A. Yes, I think it would take me anywhere from a week to three months.

Cross Examination by Mr. McMahon:

Q. Mr. Wake, when you say "data," do you mean letters and correspondence of the company in its files?

A. (Pause.)

Q. I understood you to testify this morning that you went through those files and found the invoices of the various creditors against the company?

A. I inquired and found the names of the creditors and looked for their initials in the alphabet of files and picked them out.

Q. And picked out the invoices of those creditors as you had taken them from the books?

A. Yes, sir.

Q. And you examined all the invoices that appeared in the files of the creditors whose names appeared on the books?

A. All that I could find. There were a lot missing.

Q. And those that are missing you haven't put any amount in your statement?

A. I put their names on the statement.

Q. But not the amounts?

A. But not the amounts.

Q. When you said it would take from two weeks to three months to go through all the data in the office what did you mean?

A. I meant by taking every piece of paper that there was and looking at it.

Q. Letters and everything, no matter whether they referred to creditors' claims, invoices or anything else?

A. Or anything else, yes.

Q. And do those files hold an accumulation of years—that is, letters for a number of years?

A. They do, for many years.

Cross Examination by Mr. Delaney:

Q. Did you examine that collection of data to see what it was?

A. Yes, I just looked through it.

Q. How many years did you say that covered?

A. I couldn't say for certain. I know it goes back to 1907 and 1908, some of it.

Recess until two o'clock.

AFTERNOON SESSION.

SMITH ALFORD recalled on behalf of the Trustee in Bankruptcy, testified as follows:

Direct Examination by Mr. Hall:

Q. Mr. Alford, on page 383 of the record I am reported as having asked you this question: "What you mean by fighting chance is if at the end of August you could have borrowed some money with fair chances of getting it on reasonable terms you would have had a fighting chance of pulling through?" and you answered that question: "I think we would have pulled it through." Now, I

will ask you, putting the question in the following manner, what you would answer: What you mean by fighting chance is, if at the end of August you could have borrowed some money at fair interest and use of credit and upon fair terms you would have had a fighting chance of pulling through?

A. Yes.

Q. Then I understand your answer to that question would have been the same answer as you made before, "I think we would have pulled it through"?

A. Yes, sir.

Examination by Mr. McMahon on Behalf of Frank Miller Lumber Co.:

Q. Mr. Alford, you remember when the Glen Company made an application to Mr. Paine to loan them money for a pay-roll in around November 30, or the first of December, 1910?

A. Yes, the first week in December, I think it was.

Q. Were you there at the time that application was made to Mr. Paine?

A. I was.

Q. Where did you talk to Mr. Paine?

A. At Mr. Hardy's office.

Q. And that was on or before the first of December, was it?

A. I don't know; it was a short time previous; it was a week before the company assigned.

Q. What do you mean by "assigned"; went into bankruptcy?

A. Yes.

Q. Do you remember the conversation that took place at that time, Mr. Alford?

A. Yes, I remember some of it.

Q. Who was present there?

A. Mr. Downey, and Mr. Paine, and Mr. Hardy, and I.

Q. Do you remember what, if anything, was said about an assignment?

A. Yes, when we asked for money for our payroll Mr. Paine asked what security he would have, and in some way the assignment was suggested; I don't know by whom.

Q. What did you say with reference to the assignment when it was first suggested?

A. I asked what value it would be.

Q. And did Mr. Hardy say anything?

A. Well, he said he would take it for what it was worth. I think that was about the idea; I don't mean to quote his exact words.

Q. Was anything said at the time, Mr. Alford, about the condition of the company at that time, or what any investigation which may have been had showed at that time?

A. Well, I think it was stated—

Q. Who stated it, please?

A. Mr. Hardy, I think, said, from the hasty report he had been able to get, it looked rather bad, or something to that effect.

Q. What did he say again?

A. He said, from the report—hasty report—he had been able to get that it looked rather bad. That was the idea.

Q. And Mr. Paine was there at that time?

A. Yes, I think so.

Q. Now, when did Mr. Ross and Mr. Gunnell go up to the office of the Glen Company, do you know, and work on the books?

A. Several days before, Mr. McMahon; I don't know how long exactly.

Q. Was it in November?

A. If it was it was the last day or so. They had been up there four or five days—less than a week.

Q. Four or five days before this conversation which you testified to?

A. I think so; I won't be positive. It was only a few days, then.

Q. Now, Mr. Alford, you know, do you not, that on the day before the petition was filed the balances of the company were drawn out by various checks?

A. Yes, I think they were.

Q. Do you know what became of those checks?

A. I do not.

Q. Do you know who got them?

A. I do not.

Q. Do you know where the proceeds went?

A. I have heard, Mr. McMahon, but not of my own knowledge.

Q. Was it at the time of this conversation you speak of between Mr. Paine, and Mr. Hardy, and yourself, and Mr. Downey that the Paine assignment was executed?

A. I don't know whether it was on this Friday or the subsequent Friday, Mr. McMahon.

Q. It was one or the other, was it?

A. Yes.

Re-direct Examination by Mr. Hall:

Q. Mr. Alford, at the time you got this money from Mr. Paine—this $4,950—do you know whether Mr. Gunnell or Mr. Ross, the accountants, had made any report to either Mr. Hardy or to Mr. Paine?

A. I do not.

Q. Do you know whether Mr. Hardy or Mr. Paine were in touch with Mr. Gunnell and Mr. Ross about the affairs of the company about that time?

Mr. Stancliffe: I don't know that the witness can state that.

A. I know Mr. Gunnell was up in our office going over the books, Mr. Hall.

Q. Well, isn't it a fact that at that time Mr. Hardy stated to Mr. Paine, in effect, "From what I have learned from the report of Gunnell and Ross it looks to me as if what you have put in is gone and the only chance of saving it is to put in some more?"

Mr. Stancliffe: I shall object to this manner of examination, whether it be attempted cross or redirect. Mr. McMahon has been indulging in leading questions and I don't think it is fair that Mr. Hall should indulge in leading questions and putting the answers in the mouth of the witness.

The Court: I would suggest to counsel that questions of this sort elicit testimony which is entitled to far less probative force than if the question was put in a different way. Mr. Alford is a very intelligent man and is capable of telling what took place. Of course, you can suggest a topic after he has told us what he remembers of the conversation.

Mr. Stancliffe: I don't object to his suggesting a topic.

Q. Do you recall whether Mr. Hardy said anything at that time regarding the danger of loss of money that Mr. Paine had already put into the company?

A. Yes, he said that in putting this in he might be just losing that much more.

Q. Did he say anything about the money that had already been put in?

A. Well, I think I answered that in that other question; he thought that he might be losing that much more.

Q. In making those statements was any reference made to the result of any examination of the books by accountants?

A. From Paine's examination, you mean, don't you, Mr. Hall?

Q. All right, if you don't understand the question, ask me.

A. Well, if you would try to make it clear—you mean from the examination of Mr. Paine and Mr Hardy?

Q. No, I mean when Mr. Hardy made some statements to Mr. Paine about the danger of loss, did Mr. Hardy refer to reports from Gunnell or Ross, or other accountants, who had been over the books?

A. I don't know, Mr. Hall.

Q. (By the Court.) Was anything said about an examination of the books having been conducted during that interval?

A. Yes, he said from the examination that he had been able to get it looked rather bad.

Q. Who said that?

A. Mr. Hardy, I think it was.

Cross Examination by Mr. Stancliffe:

Q. You said—and I think I didn't misunderstand you—Mr. Alford, that Mr. Gunnell or Mr. Ross went to the office of the Glen Company four or five days before this conversation; did you mean four or five days before this conversation of December 1st, or four or five days before the pay-roll came due for which this money was advanced?

A. Well, I shouldn't like to say four or five days, but I do know that Mr. Ross and Mr. Gunnell had been in our office examining the books several days—at least two or three days. I don't know how long. It may have been a week and it may have been only two days. I do not know.

Q. (By the Court.) Two days before the loan was made?

A. If that was on December 1st, it was at least two or three days before that.

Q. It might have been a week, mightn't it?

A. Why, yes.

Q. And it might not?

A. It might not.

Q. Now at the time of the conversation, which has been fixed in the testimony as December 1st, 1910, Mr. Paine gave to your company—either to you or to Mr. Downey—a check, did he not?

A. He did.

Q. And the amount of that check was $4,950, was it not?

A. I think it was.

Q. And that check was turned over to you, pursuant to either a request from you or from Mr. Downey, for an advance for the coming pay-roll?

A. It was.

Q. Isn't that correct?

A. It is.

Q. Did you at that time expect to be able to reimburse Mr. Paine for that advance?

A. We did.

Q. Out of what funds did you expect to reimburse him?

A. Out of the payment at Newark that was all but due.

Q. (By the Court.) And was that covered by the assignment to Mr. Paine?

A. I think he got an assignment but not of this one payment; I don't think this one payment was mentioned in the assignment.

The Court: Is that assignment in evidence?

Mr. Stancliffe: Yes, there are two assignments. They were offered last week.

The Court: And they are separate assignments, one for Paterson and the other for Newark?

Mr. Delaney: There were two assignments given on December 1st. One of them relates exclusively to the Paterson job and the other one refers to four or five jobs, one of which is the Paterson job.

The Court: Are the assignments here?

Mr. Delaney: The originals are not here, but we have copies. They were here at the last hearing. They are in the custody of the clerk of the Board of Education and he took them back to Paterson with him.

Q. (By the Court.) Now, Mr. Alford, you speak of your expectation that the loan would be repaid

and you were asked out of what fund. I want to understand your answer. Was it to be repaid out of the fund which was covered by the assignment, or don't you know?

A. No; I do remember we told Mr. Paine that we would pay him back the $4950 when this next payment came in.

Q. Where from?

A. From Newark.

Q. Wasn't that covered by the assignment?

A. Yes, I think the assignment covered all.

Q. Did you not also refer specifically to a payment which was then due for labor and materials supplied on the Paterson job during the month of November, 1910?

A. Then due?

Q. I shall ask you to look at this paper (Exhibit D-9), a copy of the assignment which is in evidence and see if you can refresh your recollection as to that.

The Court: That is the Newark or Paterson job?

Mr. Stancliffe: That is the Paterson job.

A. Yes.

Q. So you did tell Mr. Paine that there was money coming due from the Paterson high school on account of labor and material put in during the month of November?

A. The assignment says, "for which we made requisition," yes.

Q. You wouldn't have asked Mr. Paine to advance $4950 to his company if you believed that it was done for or hopeless, would you?

A. No, not unless we had expectation of paying him out of that Newark payment.

Q. And you did expect that if you could get this pay-roll paid, it would carry you over until you got this payment from Newark? Wasn't that your expectation?

A. It was.

Q. And didn't you so express it to Mr. Paine?

A. I did.

Q. So that your expressions on that occasion to Mr. Paine, as to the condition of the company, was not that it wasn't solid but that you could tide this over until you could get this payment—until you could complete your jobs; is not that a fact?

A. It is.

Q. And on that statement Mr. Paine advanced $4950 to your company, didn't he?

A. He did.

Q. And that money which you received from that check was disbursed how, for pay-roll?

A. For pay-rolls.

Q. And that was the pay-roll, I believe, of December 3, 1910, was it not?

A. December 1st or 2nd—the first week.

Q. Mr. Paine, although a nominal director and a nominal stockholder—or, let me not use those words as I see Mr. McMahon is going to object—although he was a director and stockholder, owning but one share, yet he had nothing to do with the business of the concern, had he?

Mr. McMahon: This is argumentative.

Mr. Stancliffe: There is nothing argumentative about that.

Mr. McMahon: It is calling for a conclu-

sion as well. It is a leading question, undoubtedly.

Mr. Stancliffe: Well, I will put it this way:

Q. Of the four gentlemen who were present at this conversation that has been related as occurring December 1st, 1910, who were the active men in the business of the Glen Company?

A. Why, Mr. Downey and I.

Q. And you were the only active men, were you not?

A. We were.

Q. And Mr. Paine, who was there on that occasion, had not had anything to do with the business end of the concern, had he?

A. No.

By Mr. Hall:

Q. Mr. Alford, how soon after December 1st, did you expect to receive your payment from the Newark or Paterson contracts?

A. The Newark contract we expected to get the following week. The Paterson contract was problematical.

Q. On December 1st, or at the time of the loan by Mr. Paine of the $4,950, your expectation was that before the next pay-roll came due on your various contracts you would have received sufficient payment to meet those pay-rolls and also repay Mr. Paine the $4,950?

A. I did.

Q. You thought the payments would be large enough?

A. Yes, the Newark payment was $21,000, if I remember right.

Q. Was anything said by Mr. Paine at that time with respect to advancing further moneys to meet your next pay-roll?

A. No. If it was said it wasn't definitely—I don't think, Mr. Hall—I would rather not testify on that.

Q. Let me ask you one question, Mr. Alford—I don't think it is re-direct and perhaps it is already in the record—but on September 15, 1910, did the Glen Company have any sources of income, or any assets, other than the cash in bank at that time and the moneys on hand—percentages on the Paterson, Newark and New Dorp contracts?

A. No.

Q. And its office furniture and equipment?

A. No.

By Mr. Stancliffe:

Q. In carrying these jobs on your books you didn't carry on your books as an asset the materials delivered to the job, did you, or did you?

Mr. McMahon: We had the bookkeeper here this morning.

A. As an asset?

Q. Yes.

A. No.

Q. You don't know anything about that?

A. No, I don't know anything about bookkeeping.

WILLIAM T. FANNING, recalled on behalf of the Paine assignment, testified as follows:

Direct Examination by Mr. McMahon:

Q. Mr. Fanning, you were, as I understand it, the architect of the Paterson high school of the City of Paterson?

A. Yes, sir.

Q. And you followed up the work done by the Glen Engineering Construction Company on that high school up to the time that they stopped the work?

A. Yes, sir.

Q. And you know how much the amount of their contract was?

Mr. Fallon: Isn't this already in evidence. I understood this witness to testify to this matter in Paterson.

Mr. McMahon: I am going to qualify him on another point, if you will let me lead up to it.

A. $285,423 was the amount.

Q. And you know how much more work had to be done on the contract before the job was completed when the Glen Engineering Contracting Company stopped working on December 10, 1910?

A. Well, the building had to be plastered and trimmed.

Q. And you made a specification, did you not, of all the work that had to be done in order to complete the building after the Glen Company quit?

A. Yes, sir.

Q. Did you check up the value of how much it would cost to complete the work after the Glen Company quit?

A. Why, I made an approximate figure for my own information.

Q. That is, from inspection of the work?

A. Yes.

Q. Now, will you state, Mr. Fanning, from your knowledge of the matter which you have testified to whether or not the Glen Company could have completed that work and realized any profit on that contract?

Mr. Stancliffe: I shall object to that, if your Honor pleases. I think it is a conclusion based upon no facts which are shown here to warrant an expert opinion, especially in view of the fact that he has no knowledge of the inside workings of the Glen Engineering Construction Company, or the contracts or arrangements that may have been made for its material or labor.

Mr. McMahon: I submit there is no man more familiar with that work than Mr. Fanning.

The Court: Mr. McMahon, are you not merely intending to show, in the judgment of this architect as an expert in constructing buildings or completing buildings half constructed, what the cost, reasonable cost—of finishing this building was? We know what the contract price was; we know what was paid, and now you are asking him, leaving out extra work, what in his judgment would be a reasonable cost of completing

the contract. Isn't that it; isn't that all that he can testify to?

Mr. McMahon: Yes.

The Court: We cannot take his judgment as to whether the Glen Engineering Construction Company or anybody else could make a profit out of it. That is a mere inference after we have got the cost of completing the work before us and the remainder of the contract price to be paid.

Mr. McMahon: I will withdraw the last question and ask Mr. Fanning this question:

Q. Do you know, Mr. Fanning, how much it cost to complete the work? Have you got any memorandum?

Mr. Delaney: This was all put in evidence at the first hearing.

A. I think around $50,000.

Q. And were there any changes made in the specifications or in the plans which would in any way increase the cost of completing that work?

A. No.

Q. Were there any changes made which would decrease the cost of completing that work?

A. Yes.

Q. What were those changes?

A. Changes we made in the electrical installation. The authorities figured on using fifty Ampere plugs, according to the table, but the corporation wouldn't allow that character of plug and we changed it to five Ampere plugs, which reduced the size and character of the wire.

Q. So that the city completed it more cheaply than the Glen Engineering Construction Company could have done it under the original plans and specifications?

Mr. Stancliffe: I shall object to that.

The Court: That is not the correct form.

Q. State whether or not the sum of money spent by the City in completing the work was more or less than it would have cost the Glen Company?

Mr. Stancliffe: If your Honor pleases, it strikes me, in the place place—

The Court: It is objectionable: I do not think he should pass judgment upon what it would cost the Glen Engineering Construction Company as compared with the City.

Q. State whether or not what it cost the City to complete the work was less than it would have cost the City to complete the work without the modifications?

Mr. Stancliffe: I object to that.

The Court: It has no value whatever. The witness has given the facts; his inference is one that everybody must draw. It costs you less to get ten barrels of flour from the market than it does to get twenty. That is all there is in it.

Q. State whether or not the sum of money which the city paid to complete the work under the

plans and specifications and under the contract which the Glen Company had was a reasonable sum for that work—reasonable amount for that work?

A. I believe it was.

FRANK H. HALL, sworn on behalf of the St. John's Guild job, testified as follows:

I am the attorney for the Trustees in Bankruptcy of the Glen Engineering Construction Company, and as such attorney had charge of the litigation arising in New York State over the foreclosure of mechanic' liens on the property of the St. John's Guild, the lien claimants having been material men and laborers and sub-contractors of the Glen Engineering Construction Company on that work.

On February 13, 1912, that cause was decided by Justice Townsend Scudder in Special Term of the Supreme Court at Staten Island, and I have my own copy of the judgment order that was entered at that time fixing the amount due from the St. John's Guild and the amounts to be paid thereupon to the various lien claimants and material men out of that fund. The memorandum which I hold in my hand is a true copy and was made at the time by me.

As a result of that judgment it was determined and ascertained that St. John's Guild was then indebted to the Glen Engineering Construction Company in the sum of $9,085.26 as a balance due on the completion of the contract between the St. John's Guild and the Glen Engineering Construction Company for the hospital buildings at New

Dorp, and that sum was paid out by direction of the Court in the following manner:

To Regan & McGrath, the plaintiffs in the action and lien claimants, for materials supplied and work done in the building, $2,398.20.

To Jules Fehr, a subcontractor and material man, $1,848.

To Herbert S. Brower, another lien claimant who had supplied materials and labor, $918.12.

To William S. Van Clief, a material man, $1,906.

To The John Douglas Company, material men, $841.82.

To Lockwood Company, material men, $562.50.

To the Structural Supply Company, $430.06.

To Leiber, Schrenkeisen & Nobbe, material men, $115.56.

And to Fred G. Ebsary, $65.

Those amounts in total equalling the balance on hand, in the hands of the St. John's Guild.

The amounts paid to the several lien claimants, with the exception of Jules Fehr, were less than the amounts actually due to these lien claimants for work done and for which they had filed liens, and the judgment was the result of a compromise with all the parties in reference to the matter.

Mr. Stancliffe: I move to strike out all the testimony of Mr. Hall on this subject as incompetent, and, second, on the ground that it has no probative force; in the third place, as irrelevant and immaterial and having no probative force, in view of the fact simply because it was an agreement between all the creditors to divide up the fund which they found in the hands of the St. John's

Guild among themselves, which they agreed should be taken. It is not relevant to this issue, in view of the fact that there was no time stated at which they became creditors or when their claims became matured.

The Court: The objection on the ground of incompetency comes too late.

Mr. Stancliffe: I waited as a matter of courtesy, in the first place, and in the second place I am not objecting on the ground that the proper record is not produced, but it is simply a compromise, as stated by Mr. Hall.

The Court: The point may be well taken, but the testimony has no relevancy—has no force. I have not heard the parties to that action named by the witness as yet, but I will let the matter stand.

Mr. Hall (the witness): I was just going to state the parties when Mr. Stancliffe interrupted me.

The Court: Go ahead with your statement.

A. The parties to the action in the Supreme Court were Daniel P. Regan and Hugh F. McGrath, partners under the name of Regan & McGrath Company, plaintiffs, and the defendants were The St. John's Guild, The Glen Engineering Construction Company, Julius Fehr, Herbert S. Brower, William S. Van Clief, The Banker's Surety Company, John Douglas Company, The Lockwood Company, the Structural Supply Company, William C. Leiber and others, partners as Leiber, Schrenkeisen & Nobbe, Frederick G. Ebsary, William H. Spellman, James Gibby, Charles L. Strong,

as trustee in Bankruptcy of the Glen Engineering Construction Company, bankrupt, and Mary McRoberts.

Mr. Stancliffe: I now renew my motion.

Mr. McMahon: I would like to ask if it is Mr. Stancliffe's point that we have not produced here the original files to show that each one of these defendants here had a lien on the fund. We can do that, if that is your point. Do you dispute that?

Mr. Stancliffe: I simply say that you are offering incompetent and irrelevant evidence.

Mr. McMahon: Well, of course, on the question of relevancy it wouldn't make any difference.

Mr. Stancliffe: There is nothing to show when the lien attached—whether it was subsequent to December 1st or prior to that.

The Court: I do not see that the testimony has any relevancy now. I have ruled that this objection as to the competency of the testimony came too late, because counsel knew from the very start that the witness was testifying from a memorandum. I have always ruled that counsel cannot sit by and when certain testimony that is brought out suits him let it stand and when it doesn't suit him have it stricken out, and this is a very plain case where it was apparent the witness was going to testify from a memorandum from the start.

As to the probative force of the testimony, I confess I cannot see much in it, but I will let it stand until I hear argment upon that

point later on. But you now go beyond that, and whether it has any relevancy at all I have very grave doubt. But that can be disposed of later on. I am very loth to strike out any testimony on the ground of irrelevancy.

Mr. McMahon: I will put Mr. Hall on the stand myself later on, and he can then give the date.

The Court: That would be subject to the same objection; still, you can offer any evidence you see fit. It is not for me to pass upon it until offered and objected to.

FRANK H. HALL, recalled on behalf of the Frank Miller Lumber Company, testified as follows:

Direct Examination by Mr. McMahon:

Q. (By the Court.) I believe this was a judgment entered by consent, wasn't it, Mr. Hall?

A. In a way, yes. It was on motion without a hearing, and I mean in the sense without a hearing, without the taking of testimony as to the amounts claimed by the various parties, but the amounts taken in each case were less than the amounts for which liens were filed, and therefore there was no dispute about that.

Q. Have you a memorandum, Mr. Hall, by which you can testify as to the dates when the various liens against that fund in that action were placed upon the job?

A. Those dates appear in the copy of the judgment which I have.

Q. Using the copy of the judgment will you give us the dates when those liens were filed?

Mr. Stancliffe: I shall object, on the ground of incompetency.

The Court: Well, that is a different matter. It is objected to and isn't competent proof.

Mr. McMahon: Then I will get a copy of the record on that subject. I understood that Mr. Stancliffe didn't object on the ground that it wasn't an original record.

The Court: The Court will not allow any advantage to be gained by anybody in this action from mere lack of technical proof at the time. I will give you an opportunity to put in the technical proof. Anything further?

Mr. Hall: If your Honor please, I desire to offer in evidence exemplified copy of the Petition in Bankruptcy filed against the Glen Engineering Construction Company, in the United States District Court for the Southern District of New York, on December 10, 1910, and also the verification.

Mr. Fallon: I object to it as incompetent, irrelevant and immaterial, so far as our claim is concerned.

(The same is marked Exhibit D-1, Mar. 21, 12.)

Mr. Hall: I also desire to offer in evidence exemplified copy of the petition of

Edmund J. O'Connor, one of the petitioning creditors in bankruptcy, for the appointment of a receiver, filed in the United States District Court for the Southern District of New York, to which petition there is attached a statement that the Glen Engineering Construction Company "hereby admits that it is unable to pay its debts in full and is insolvent. It is willing to be adjudged a bankrupt on that ground and consents hereby that a receiver be appointed of its business and assets, both in New York and in New Jersey." It was dated and acknowledged December 9, 1910.

Mr. Fallon: I desire to offer the same objection on behalf of the First National Bank of the Town of Union, on the ground that it is irrelevant and had no relevancy to the question of the insolvency of the concern at the time when the claim of the First National Bank arose under the assignment.

The Court: So far as that objection is concerned the paper, I think, should be admitted; but I notice that this was an adjudication of the bankruptcy based upon an act of bankruptcy consisting of the admission on the part of the alleged bankrupt that it was insolvent and unable to pay its debts —"I was willing to be adjudged a bankrupt." Now, the question is whether that has any possible effect as evidence upon the claims of these parties. The status of creditors who have taken transfers from an alleged insolvent corporation—an alleged bankrupt—surely cannot be affected by the subsequent confession of the party making the assignment that it was a bankrupt and

consented to have its affairs administered as a bankrupt. I will take the papers, gentlemen. This is a matter that will come up on final hearing.

(The same is marked Trustee's Exhibit D-7, Mar. 21, 12.)

Mr. Hall: I also desire to offer in evidence an exemplified copy of the order made by the United States District Judge for the United States District Court for the District of New Jersey, appointing Benjamin Barker receiver of the Glen Engineering Construction Company, and the bond of the receiver duly filed in the United States District Court for the District of New Jersey.

(The same is marked Trustee's Exhibit D-8, Mar. 21, 12).

Mr. Hall: Also an exemplified copy of an order, made by Judge Hand, appointing Benjamin Barker, receiver, of the United States District Court for the Southern District of York, and a copy of the bond of the receiver attached, which order was made December 10, 1910.

(The same is marked Trustee's Exhibit D-9, Mar. 21, 12).

Mr. Hall: I also offer an exemplified copy of the report of Benjamin Barker, as receiver, filed in the United States District Court for the Southern District of New York, on October 9, 1911.

(The same is marked Trustee's Exhibit D-10, Mar. 21, 12).

Mr. Hall: That is all, I guess, subject to our right to further examine Mr. Wake, the

expert, after the production of his data from which he made up his report.

The Court: Well now, counsel for the Trustee in Bankruptcy rests, subject to the further examination of the expert, Mr. Wake, upon the production of further data referred to by him. Now, do all the other parties rest?

Mr. Fallon: The First National Bank of the Town of Union rests.

Mr. McMahon: The Frank Miller Company rests.

Mr. Fallon: I haven't all the exhibits before me, but I am a little doubtful whether the check of $5,000 and two notes of $5,000 and $10,000 and the assignment to the First National Bank of the Town of Union—those four exhibits—are in evidence.

Mr. McMahon: Yes, they are.

The Court: Any exhibit can be offered at the final hearing.

Mr. Fallon: Also another paper I had on the last day, which I offered in evidence, and that is a certificate over the name of P. H. Downey as Secretary, with the seal of the company.

Mr. McMahon: That was excluded by the Court.

Mr. Fallon: Then I again offer that paper in evidence. It seems to me from the testimony of Mr. Alford that he believes that a meeting was held. I think he says there was was a meeting held.

The Court: Well, Mr. Fallon, I shall not go into it now. If you think that evidence which has been adduced puts it in a different position, so that it becomes competent evi-

dence you can offer it again at the next session. Mr. McMahon, you spoke a little while ago of producing some proof in regard to the lien claims on the Staten Island job.

Mr. McMahon: Oh, yes; if Mr. Stancliffe requires it I shall produce a certified copy of the Clerk's record showing liens on the Staten Island job and the dates of filing.

The Court: I do not recall anything further that remains open, with the exception of these two items specified. Subject to those and Mr. Fallon's motion, the case is closed. How long do counsel think the argument of this case will take?

Judge Lewis: I would like to have an hour. I imagine I will have to take that much to dispose of my case.

Mr. McMahon: I would like to have at least an hour.

The Court: An hour for you, too, Mr Hall?

Mr. Hall: Why, I don't think so. I think the other interests cover the same features.

The Court: What is your estimate of the time you will require, Mr. Stancliffe?

Mr. Stancliffe: Perhaps a half hour.

The Court: How much do you want Mr. Fallon?

Mr. Fallon: It seems to me that there is going to be quite an onslaught on these assignments and I couldn't very well say, but my impression is that I would not require more than three-quarters of an hour. Mr. Gourley will want to be heard, too.

The Court: I will set this down for Monday, May 13 next. There will be no motions before me on that day and I shall attend

here, as it will probably be more convenient for all.

Mr. Hall: I have a trial before Vice Chancellor Garrison on that day.

The Court: I do not suppose I could set a day that would be convenient for all of counsel, there are so many here.

Mr. McMahon: I might suggest, if your Honor would give us, say, an hour or two some times to put in Mr. Wake's testimony—

Mr. Hall: You can do that on any Monday, I guess.

The Court: Well, I can close up the testimony on April 10, at ten o'clock in the morning, on the theory that it will not occupy more than a half an hour or an hour. We will close the case on that day and then I will hold May 13, at 10 o'clock for the argument. That is a Monday but I shall not hear motions. As there are two other Vice Chancellors to hear motions regularly, I shall probably have to hear the argument in the small room (No. 3).

AGNEW vs. BOARD OF EDUCATION.
Chancery Chambers, Jersey City.

Monday, May 13, 1912, 10 A. M.

PRESENT:

WILLIAM B. GOURLEY, Esq., for the Complainant,
FRANK H. HALL, Esq., for the Trustee in Bankruptcy,
EDWARD F. MERREY, Esq., for the City of Paterson.
Hon. WILLIAM I. LEWIS, for Jos. Sharpe Construction Co.
JOHN J. FALLON, Esq., for First Nat. Bank of Union.

WILLIAM F. DELANEY and NOAH A. STANCLIFFE, Esq., for Paine Assignment,
GUSTAV A. HUNZIKER, Esq., for Ingalls Stone Company,
CHARLES THADDEUS TERRY, Esq., and EDWARD WARD MCMAHON, Esq., for Frank Miller Lumber Co.
MUNSON FORCE, Esq., by representative, for James Healey.

The Court: Are counsel ready to proceed in the case of John Agnew Company against the Board of Education?

Mr. Hall: Yes, sir. Before we start I would like to make a correction in the record. At the hearing of March 21, 1912, I offered in evidence Trustee's Exhibit D-1 and it is referred to merely as an exemplified copy of the Petition in Bankruptcy. As a matter of fact attached to that is the order of adjudication, which is an essential part of the record and should have been mentioned in that offer. After the words "Petition in Bankruptcy" should be added "with the order of Adjudication". This is on page 537.

(The correction is made without objection).

Judge Lewis: I wish also to make a correction or two in the record: The first correction is in Mr. Dunphy's testimony on page 8. It reads:

Q. Is there no notice prior to the Agnew Claim?

A. I have here James Healey, September 21, 1910, 4:20 P. M. Ingalls Stone Company, September 22, 1910, John Agnew Company, November 28th 1910, Frank Miller Lumber Company, December 9, 1910, and so it goes on, but omits the claim of the Jo-

seph Sharpe Construction Company, which he mentioned and which appears in Exhibit C-12 which was made up by Mr. Dunphy, so that I wish to have the evidence corrected, if there is no objection, by inserting, after "Frank Miller Lumber Company, December 9, 1910," "Joseph Sharpe Construction Company, December 10, 1910".

The Court: Is it what he testified to or is it a mere accidental omission?

Judge Lewis: He says he testified to it.

The Court: Upon that statement what do counsel say; do all agree that that correction should be made? Of course Judge Lewis would have an opportunity afforded to him to put in additional testimony to correct a little mistake like that. Well, upon Judge Lewis's statement and with the consent of counsel the Court finds that the testimony of the witness, in making this enumeration, included the claim of The Joseph Sharpe Construction Company, December 10, 1910, and that will be interlined on page 9, between the third and fourth line from the top.

Judge Lewis: The other correction is on page 510, in the evidence of Mr. Wake, the bookkeeper, beginning on page 509, as follows:

Q. And does that show whether or not the liabilities exceed the assets, as shown by the books on that date?

A. It does; it shows the liabilities exceeds the assets by $6,104.90.

That answer should be $26,904.90.

The Court: Any objection? The correction will be made.

Mr. McMahon: At the first hearing your Honor allowed me to file an amended answer

setting up the statute, and I now have that amended answer (counsel handing it to the Court).

The Court: This is an amended answer filed on behalf of the Frank Miller Lumber Company?

Judge Lewis: If your Honor please, leave was given to make those amendments. I haven't prepared my amendment yet. It was for the purpose of setting up the New York and New Jersey corporation act, I think.

The Court: How about the answer of the Trustee in bankruptcy?

Mr. McMahon: He filed his when the leave was granted.

The Court: Any objection?

Judge Lewis: Your Honor gave me also leave to amend, but I would like to extend the time to make the formal amendment.

MORGAN G. WAKE recalled on behalf of the Trustee in Bankruptcy, testified as follows:

Direct Examination by Mr. Hall:

Q. In making up your statement of assets and liabilities of the Glen Engineering Construction Company as of September 15, 1910 (Trustee's Exhibit D-5 in this case) will you tell us whether you found on the books of the company, as creditors and included among the liabilities, any amount as due to James Healey—

A. No.

Q. John Agnew Company?

A. No.

Q. Herringbone Metal Lath Company?

A. No.

Q. The McKiernan & Bergin Company?

A. No.

Q. The J. A. Van Winkle Company?

A. No.

Q. William S. Van Clief?

A. No.

Q. E. M. Rodrock?

A. No.

Q. None of those names appeared on the books of the company as creditors?

A. No, sir.

Q. Did the American Lumber Company appear as a creditor?

A. They did for $11.40.

Q. In making up your statement, then, you included the American Lumber Company as a creditor for $11.40?

A. Yes, sir, I did.

Q. Did you include the Passaic Water Company as a creditor?

A. I did not.

Q. So that any amounts that may be shown to be due to any of those persons whom I have now named as creditors would increase the liabilities as shown by Trustee's Exhibit D-5?

A. They would.

Q. Now, Mr. Wake, taking Trustee's Exhibit D-6, showing the statement of assets and liabilities as of November 30, 1910, there appears an entry "St. John's Guild Contract, expenditure and sub-contractors' amounts in excess of contract price representing loss to date, $13,258.16"; that item you put down as an asset?

A. I did.

Q. Will you tell us why it was so entered?

A. Because it was a method of bookkeeping; it showed that the expenditures exceeded the contract price, and I had to show it because it was not written off.

Q. Then, as a matter of fact that $13,258.16 would represent the excess cost of the St. John's Guild contract over and above the amount the Glen Engineering Construction Company was to receive from that contract?

A. That is so.

Q. And would be, in effect, a loss—a liability?

A. It would be a loss.

Q. That is merely included in your statement as an asset because the books so show it?

A. That is so.

Q. Why is it put down as an asset, do you know?

A. Because this statement is drawn up as per the books.

Q. What, as an expert accountant, would you interpret the entry as signifying on the books?

A. It would signify a loss on the contract and should have been written off.

Mr. Hall: In order that there may be no mistakes about the record I offer in evidence Trustee's Exhibit D-5, which appears to have been only offered for identification—statement of the financial condition as of September 15.

The Court: That is a transcript drawn by the accountant from the books, is it not?

Mr. Hall: Yes.

The Court: It makes no difference how it is marked; it is not an instrument of evidence.

Mr. Hall: Do counsel want me to prove these several bills, or are they willing to admit the amounts as shown by them? I will offer in evidence, if the Court please, a statement of William S. Van Clief against the Glen Engineering Construction Company, as taken from the files of the company, and showing an indebtedness on July 31, 1910, of $1,903.13.

(Admitted in evidence and marked Trustee's Ehibit D-1, May 13, 1912).

Mr. Hall: Also bill of the American Lumber Company against the Glen Engineering Construction Company, dated September 30, 1910, showing on that date owing $3,211.27, and showing as of September 15, $2,182.81.

(Admitted in evidence and marked Trustee's Exhibit D-2 May 13, 1912.)

Mr. Hall: As to both of those others to which I have referred I will leave the claimants in this case to prove detailed statements as to the amounts they claim. That is all I have, if the Court please.

Mr. McMahon: I expected to have today a transcript of liens filed against the New Dorp job against the Glen Engineering Construction Company to offer in evidence, but I haven't got it. It is just a certified copy of the lien record in the County Clerk's office. It got into the hands of another attorney and I asked for it and couldn't get it. I can probably get it tomorrow.

The Court: Well, how is that relevant?

Mr. McMahon: It is relevant inasmuch as it shows whether or not the Glen Engineering Construction Company had any money interest in that fund.

The Court: Mere proof of filing claims does not show an indebtedness was due. Anybody can file a claim.

Mr. McMahon: Well, the judgment roll in that action would show.

The Court: Oh, it went to judgment, did it?

Mr. McMahon: Yes, Mr. Hall offered the judgment roll at the time—

Mr. Hall: I offered my own testimony as to what it was.

The Court: By consent was that accepted?

Mr. Hall: I think it was objected to.

Mr. McMahon: I will offer a certified copy of the judgment roll.

The Court: I have an idea that some objection was made.

Mr. Hall: I had a copy of the judgment roll in that case from which I was testifying. The objection was that I needed a certified copy of the judgment roll.

The Court: You now offer it?

Mr. McMahon: Yes. But I would like more time in which to put it in?

The Court: Have you got a copy of it here?

Mr. McMahon: Yes, your Honor, Mr. Hall has it. (Counsel produces copy).

The Court: Is there any objection to this copy being temporarily admitted, upon the theory that in all probability Mr. McMahon will present tomorrow or at a later day a properly certified copy which will show that this is a true copy. Of course, this copy is admitted for the purpose of the argument only. If there is no objection we will close the case, with that understanding. Counsel may use this copy in the argument, condi-

tioned upon the record being properly certified and produced at a later day.

Counsel may proceed with the argument.

Case Closed.

(Counsel for the complainant and some of the counsel for the defendants present their arguments and at 4:15 P.M. the Court announced that further arguments would be heard at the County Court House in Paterson on Wednesday, May 29, 1912, at two o'clock in the afternoon, and that any briefs that counsel may wish to submit should be handed in within ten days, or on or before May 23rd.)

Memorandum of Conclusions, Filed February 14, 1914.

IN CHANCERY OF NEW JERSEY.

Between

THE JOHN AGNEW COMPANY,
Complainant,

and

THE BOARD OF EDUCATION OF THE CITY OF PATERSON, et als.,
Defendants.

Consolidated suits under the Municipal Improvements Lien Act.

Final hearing on bills, answers, replications and proofs taken in open court.

Mr. WILLIAM B. GOURLEY for the Complainant, The John Agnew Company.

Mr. EDWARD F. MERREY and Mr. THOMAS F. MCCRAN for the City of Paterson and the Board of Education of the City of Paterson.

Mr. GUSTAVE A. HUNZIKER for defendant, Ingalls Stone Company.

Mr. MUNSON FORCE for Defendant, James Healey.

Mr. JOHN J. FALLON for Defendant, First National Bank of Town of Union.

Mr. WILLIAM F. DELANEY and Mr. NOAH A. STANCLIFFE (of the New York Bar) for Defendant, Martin S. Payne.

Mr. DAVID F. EDWARDS and Mr. EDWARD WARD MCMAHON (of the New York Bar) for Defendant, Frank Miller Lumber Co.

Mr. WILLIAM I. LEWIS for Defendant, Joseph Sharpe Construction Co.

Mr. HUGH B. REED for Defendant, Herringbone Metal Lath Co.

Mr. WILLIAM M. DREW for Defendant, Cortlandt Engineering Co.

Mr. G. M. BELFATTO for Defendant, F. G. Ebsary.

Mr. ALBERT COMSTOCK for Defendant, Architectural Plastering Co.

Mr. FRANK H. HALL for Defendant Trustee in Bankruptcy of the Glen Engineering Construction Company.

Mr. JOHN POMFRET for thirty-seven workman's claims for wages.

Other counsel appeared for other claimants apparently not interested in the decree or the appeal therefrom.

STEVENSON, V. C.

1. The decree will adjudge that any liens originally acquired by the Ingalls Stone Company and James Healey, by the filing of their respective notices, were released so that they have no participation in the distribution of the fund. Under the statute as amended in 1909, these parties are covered by a bond securing their entire claims. The provision for the substitution of a bond for the claimant's lien, which was injected into the statute in 1909, like many other provisions of the act is badly drawn. After a careful study of this amendment I have reached the conclusion that the words "decreed to be due from said contractor under any such claim" do not refer to the suit *in rem* which may or may not be brought at a later time, after the bond has been given, covering all claims at that time on file, but to any action in any court of competent jurisdiction in which any of these claimants may sue on their bond or otherwise for the recovery of their debts mentioned in the notices of "claim" which they filed. The word "decreed" must not be taken in a technical sense. This statute, borrowed from New York, confuses technical terms of law and of equity. The "complainant" in an equity suit is called the "plaintiff." To allow in this suit *in rem*, instituted in order to effect the distribution of this fund among parties who have liens upon it, any decree establishing the validity and amount of claims which are not liens on the fund at all, would, in my judgment, establish a very incongruous and inconvenient practice. If such a decree could be made, it would seem that the surety on the bond should be made a party to the suit. No

personal decree of any kind is allowable in the suit provided by this peculiar statute. The case of these two claimants from whose liens the funds due and to grow due on the contract have been released, it seems to me, remains precisely the same as if after their bond had been given, which included all liens on the fund which had been created up to that time, no further liens had ever been filed. Can there be any good ground for holding that these claimants after they had lost their liens on the fund and, as a substitute for such liens, had been protected to the full amount of their respective debts by the bond, could have brought any suit in the Court of Chancery of New Jersey under this statute or otherwise, to collect their money or to have the amount due them fixed by a decree? It may be observed that the bond does not merely secure to these claimants the amount which would have been adjudged or decreed due to them from the proceeds of the original contract of the municipality if their liens had not been discharged; the bond secures to them the payment of such sums as should be decreed "due from the said contractor under" their respective claims. The claims might aggregate a much larger sum than any sum which was due or could ever become due to the contractor from the municipality. In such case can there be any question that the remedy of the claimants covered by the bond would be by an action at law to be brought by them or on their behalf, in which the full amount of their claims would be recovered without regard to the amount which they would have recovered on their liens if no bond had been given.

No intimation is made that the joinder of these two claimants from whose liens the fund in question has been released, was not entirely proper. They may be proper although not necessary parties. They seem to occupy a position similar to that of encumbrancers who are brought into an ordinary foreclosure suit because their encumbrances stand uncancelled of record, although in fact, they have been paid. The mandate of the statute contained in §7 that "the plaintiff must make all parties who have filed claims * * * parties defendant" applies to the situation of affairs when the statute was enacted in 1892, without any provision for a release upon giving bond.

2. The first lien in point of time claimed upon the fund in this action is that of the First National Bank of Town of Union, N. J., for $15,000 and interest thereon. This lien is claimed under an assignment from the Glen Engineering Construction Company to the said bank, dated September 15th, 1910, delivered on September 16th, 1910. The indebtedness alleged to be secured by this assignment is represented by two notes, one for $10,000 and the other for $5,000. The Glen Company exhausted the lending power of the bank available to it under the national banking act, when it procured the discount by the bank of its note for $10,000. In this situation of affairs,the bank discounted the note of the officers of the Glen Company, all parties understanding that the proceeds of the note would be turned over to that Company. The bank now asks this Court to countenance what it alleges was an evasion of the national banking act, and to hold that this independent transaction, to which the Glen Company was not a party at all, nevertheless must be deemed

to have created a debt from the Glen Company to the bank so as to bring the same within the operation of this assignment. All this in the face of the fact that the bank refused to loan the Glen Company any amount beyond the $10,000 which had been loaned, because it was not lawful for them to make such a loan, and the bank thereupon scrupulously excluded the Glen Company from the new loan and made it, as appears by the books of the bank, strictly a loan to the individual who signed the note. Under no circumstances could this assignment on its face be stretched so as to cover any indebtedness beyond the $10,000 which was legally due from the Glen Company to the bank.

There has been no argument in regard to the description in the assignment of the money which was thereby intended to be transferred by way of mortgage to the bank, and I shall not deal with this matter.

My conclusion of law and of fact in regard to the validity of this assignment is that it was made to secure a pre-existing indebtedness when the assignor was insolvent or in contemplation of insolvency, and that therefore it is void under the 64th section of the Corporation Act of New Jersey. I also conclude that this assignment is void under the present United States Bankrupt Act.

It is not the purpose of this memorandum to discuss the evidence at length. Not even all the propositions of fact which I find established by the evidence will be set forth. In regard to the oral promise for an assignment of the contract alleged to have been made by the Glen Company to the bank when the loan of $10,000 was made, my conclusion is that the evidence is unsatisfactory and

entirely inadequate to establish at the present time that any such definite oral contract ever was made. Assuming, however, that such an oral promise was made in consideration of which the bank made the loan, the law is well settled and well founded in reason that no such oral promise can affect the status of the subsequent assignment made in pursuance thereof, as a preferential transfer under our Corporation Act or under the Bankrupt Act. We have to deal in this case with the character of this assignment made by the Glen Company to the bank on September 16th, 1910, to secure a loan made nearly five months prior thereto without the slightest regard to any oral promise from the Glen Company to the bank made at the time the loan was effected, and on the strength of which the loan may have been made.

The assignment is also probably void under the New York statute, but I have not deemed it necessary to decide this point because in my judgment the law of New Jersey controls in this case.

A foreign corporation under the principle of comity comes into New Jersey to do business, and takes large contracts for the construction of buildings in New Jersey, in which business it acquires property in New Jersey, and also contracts debts. It would be a most extraordinary result, indeed, if when this foreign corporation becomes insolvent it could still transfer its New Jersey assets acquired in its New Jersey business so as to make preferences among its New Jersey creditors, necessarily disadvantageous to some of them, in defiance of the law which prevents New Jersey corporations from doing this thing. Our statute expressly provides that "foreign corporations doing business in this State shall be subject to the provisions of this act so far as the same can be applied to foreign corporations"

(§96). There is not the slightest difficulty in applying the prohibition upon preferences contained in §64 of the Corporation Act to a foreign corporation and its assets, of the character and in the situation presented in this case. If the Glen Company had not been put in bankruptcy the statutory action based on insolvency, etc., provided for in §65 of our statute, might have been brought and the receiver appointed in such an action would have taken possession of all the New Jersey assets, including the right to collect this money from the City of Paterson, and would have administered the same precisely as they would have been administered in case the corporation had been created under our New Jersey statute.

3. The next lien in chronological order alleged to be charged upon the fund in question is that of Martin S. Paine for $4900, and interest. This lien is claimed under two assignments from the Glen Company to Mr. Paine, dated December 1st, 1910. These assignments were executed, acknowledged and delivered at the same time, and thereupon Mr. Paine gave his check for $4,900 to the Glen Company, the assignors, to meet a payroll about to come due. The status of Mr. Paine's claim depends upon quite a large number of facts, circumstances and conditions, the more important of which it may be convenient to set forth herein without undertaking, however, anything approaching a complete examination and discussion of the evidence.

The leading facts above referred to are as follows:

Mr. Paine holds one share of stock, evidently to qualify him to be a member of the Board of Directors of the Glen Company. The treasurer of the company, Mr. Downey, was his friend, and it appears that through such friendship Mr. Paine was

induced to make loans to the company. He took no part in the business of the company, and attended very few of the meetings of its directors. On the thirtieth of November, 1910, Mr. Paine's loans made in three amounts during the preceding four months, amounted to $21,000. On the thirtieth of November, 1910, Mr. Edward Gunnell, as agent for Mr. Paine, procured an assignment from the Glen Company of the "retained percentages" on the Paterson contract amounting approximately to $42,813.45, to secure the payment of these three sums of money aggregating $21,000, and interest thereon. Whether Mr. Gunnell had previously had these sums or a portion of them nominally assigned to him by Mr. Paine does not appear. At this time Mr. Paine employed Mr. Gunnell to examine the books of the Glen Company, and this examination was proceeding during the latter part of November or the first part of December.

It is a significant fact that this assignment to Mr. Gunnell expressly recites that it is "subject and subordinate to the rights acquired by said First National Bank of the Town of Union under" its assignment, and directs and empowers the said bank to pay to Mr. Gunnell, or his assigns, out of all moneys which the bank shall collect under its assignment, "any excess over the amount due to said First National Bank of the Town or Union in accordance with the terms of the said assignment, up to but not in excess of the sum of $21,000, with interest," setting forth the three separate loans which aggregate that sum. Notwithstanding this recognition of the validity of the assignment of the bank, counsel for Mr. Paine strenuously argues that the bank's assignment was an unlawful preference and therefore should be declared void in this suit. But the important point to observe is that Mr. Paine's

representative and agent who procured this preferential assignment on November 30th, 1910, recognized that the fund already was charged with the indebtedness due to the bank, and no effort was made to show that the amount of this indebtedness—the amount for which the bank claimed to hold the assignment—was not known to Mr. Gunnell or to Mr. Paine. The Paterson contract therefore on December 1st was already covered with mortgages to secure $36,000, or at least $31,000, within the view of Mr. Paine or his agents whose knowledge is imputable to him.

On December 1st, 1910, the directors of the Glen Company, Mr. Alford, the President, Mr. Downey, the treasurer, and Mr. Paine, met at the office of Mr. Hardy who was Mr. Paine's attorney. There can be no doubt, I think, from the testimony that Mr. Paine's accountant had in part at least examined the books of the Glen Company and discovered that its financial condition was perilous, and that Mr. Paine had received this partial report. Mr. Alford testifies (page 517) that Mr. Paine's attorney, Mr. Hardy, told him, at the interview or meeting of directors when the assignment was arranged for, that from what he had learned from the examination of the books presumably by Mr. Gunnell, it appeared that things "looked rather bad," and Mr. Hardy further stated that to lend the required $4,900 "might be just losing that much more." Mr. Paine on cross-examination declined to testify whether or not Mr. Hardy had made those statements to him as Mr. Alford stated. He said that he did not "recall." It may be noted that neither Hardy nor Mr. Gunnell, nor any of the other agents of Mr. Paine who figured in this case, were placed upon the

stand to give their testimony. Mr. Paine appears to be a business man of somewhat large affairs, whose connection with the Glen Company was very slight. He operated in getting these assignments through agents who are not brought as witnesses to tell what they learned and what they knew while acting for their principal.

The arrangement made by these gentlemen on December 1st, 1910, and which was immediately carried out, was that Mr. Paine should advance the required payroll ($4,900) and thereupon the company would give to him the two assignments (Exhibits C.8 and C.9). Both of these assignments as well as the assignment C.7 made to Mr. Gunnell the day before (November 30th), appear to have been drawn by Mr. Hardy or in his office. All have the same backs upon which Mr. Hardy's business card is printed. By one of the assignments of December 1st, 1910 (Exhibit C.9) all moneys due or to become due to the Glen Company upon the Paterson contract were assigned "as security to said Paine for moneys advanced by him to and for the benefit of the Glen Engineering Construction Company, and for such moneys as may hereafter be advanced to or for the benefit of said company." It will be observed that this assignment on its face did not undertake to secure specifically the new loan of $4,900 contemporaneously made to the company. It covered generally all present and future indebtedness, and for a reason, which is not disclosed in the evidence but may be surmised, it ignored the assignment to the bank.

The other assignment (C.8) executed December 1st, 1910, is to the same effect as its companion, securing "moneys advanced" by Mr. Paine, and "such moneys as may hereafter be advanced." This

second assignment, however, covers all moneys due and to become due to the assignor on its three contracts in New Jersey, the Paterson contract, the Newark contract and the Staten Island contract. Mr. Paine admits in his testimony that he knew that these were the three contracts that the company was performing in the year 1910, and evades the question whether he knew that they were its only contracts (page 471). Mr. Alford testified that when the assignment was first suggested he (Alford) asked Mr. Hardy "what value it would be" and thereupon Mr. Hardy stated he "would take it for what it was worth" or words to that effect. This was said in the presence of Mr. Paine, and yet Mr. Paine is silent in his testimony in regard to the matter, and Mr. Hardy is not put upon the stand.

Mr. Paine having procured assignments covering practically all the assets of the company on November 30th and December 1st, caused his three notes which constituted his claim of $21,000 to be assigned for no consideration to three agents or dummies of his who thereupon used the same to qualify them to file a petition in bankruptcy on December 9th, 1910, against the Glen Company.

I have thought it worth while to state some of the facts relating to these Paine assignments in their chronological order, but without further discussion of the evidence I may state my conclusion of fact that all these assignments were void under §64 of the Corporation Act of New Jersey, and under the provisions of the bankrupt act prohibiting preferences.

Counsel for Mr. Paine with great astuteness undertook to present this case as if the transaction between Mr. Paine and the Glen Company consisted

solely of his making a loan on December 1st of $4,900 to meet a payroll, and accepting for such loan the assignments which he held. The transaction in my judgment will not bear that character nor do I think that Mr. Paine's situation in procuring an assignment of practically all the remaining assets of this insolvent company to secure $25,900 of indebtedness is strengthened by the fact that $4,900 of this sum was advanced when the assignments were made. I find that Mr. Paine stands charged with notice that the assignments which he received were unlawful attempts to prefer him to the extent of $21,000 of pre-existing indebtedness. It is true as decided in Frost vs. Barnert (56 N. J. Eq., 290) that an assignment by an insolvent corporation to a party who has no notice of such in solvency, may be held good as to so much of the consideration as was paid at the time the assignment was made, while it stands void under our statute as to so much of the consideration as consisted of a pre-existing debt. To hold that Mr. Paine personally and through agents who bound him in the matter had no notice that these assignments were made to him when the Glen Company was insolvent, or in contemplation of insolvency, as preferences over other creditors, would in my opinion involve method of dealing with evidence and human nature contrary to sound rules of law and of common sense.

4. The lien notice of the complainant John Agnew Company for $11,933.29, filed November 28th, 1910, which stands first in point of filing, I find substantially complies with the requirements of the statute, and the amount of the claim stands as a first lien on the fund.

The notice prescribed by the statute is not to be

deemed a pleading or a paper which must be drawn with technical accuracy, or, according to technical rules. It corresponds with the stop-notices filed under the mechanics' lien act. The sufficiency of a notice is mainly to be determined by a consideration of the objects of the notice. The question is, does this paper filed in these offices convey the information which the statute intends all parties interested shall have. Measured by this test the notice seems to me to be ample. The argument *contra* is purely technical. In view of the doubt which has been expressed in regard to whether the notice of lien under the act must contain a statement of the terms, etc., of the claimant's contract, or of the contract of the contractor with the municipality, the notice of the complainant in this case seems to have been drawn so as to describe the terms, etc., of both contracts. No argument has been made that the notice is defective in respect of the original contract betweeen the Board of Education and the Glen Company. Perhaps counsel have assumed, what seems to me to be the correct view, that the statute intends that the notice shall describe the terms etc. of the claimant's contract. Accepting this view for the further consideration of this case, I think there are grounds for holding that the statute did not intend to require a claimant, perhaps a business man acting for himself, when drawing a notice of lien, to spell out accurately the exact legal contract into which he entered by means of letters and conversations and under which his material was furnished. I think that the contention on behalf of the complainant is correct that the letters which passed between the complainant and the Glen Company, and in pursuance of which the material was furnished, were mere quotations of prices. The notice in my judgment correctly states

that the materials were "furnished on orders given day by day, and subject to a previous quotation of prices."

In construing a statute as clumsily and unscientifically drawn as this Municipal Improvements Lien Act and its amendments, it is oftentimes impossible for the judicial mind to reach a satisfactory interpretation of phraseology employed by untrained minds. The difficulty naturally is greater when the statute is bodily carried from one State, where it belongs and fits into a judicial system, to another State where it does not belong, or to whose judicial system its adjustment is not easily made. Violent wrenches oftentimes are necessary in such cases. Rather than to adopt a construction of this Municipal Improvements Lien Act, which would render a notice of lien like that of the John Agnew Company inoperative, because of a purely technical objection like the one made in this case, the view might be adopted that the phraseology of the statute, "a statement of the terms, time given, condition of his contract" refers only to cases where the labor has been done or the materials have been furnished in pursuance of a written contract, or at least a definite and complete oral contract altogether different from the implied contracts under which labor and materials are generally furnished, which implied contracts embrace and adopt any definite matters which may have been agreed upon by letters or otherwise, such as a scale of prices.

The claim of the complainant will stand as proved as a first lien on the fund.

5. The next lien is that of Frank Miller Lumber Company for $10,955.14 filed December 9th,

1910. The important questions argued on behalf of this claimant related to the validity of the respective assignments to the First National Bank of Town of Union, and Martin S. Paine which have already been disposed of. No objection is made to the form of the notices or the amount of the claim as proved. The claim will therefore take its place next to that of the complainant.

6. The next claim in order is that of the Joseph Sharp Construction Company for $3,037 filed on December 10th, 1910, at 10.55 A. M. with the Comptroller, and at 11.10 A. M. with the Board of Education. No attack has been made upon this lien and the amount thereof will be allowed as proved.

7. Next comes the claim of the Herringbone Metal Lath Company for $761.25, filed December 10th, 1910, at 8.15 P. M. with the Comptroller, and at 9.30 P. M. with the Board of Education.

8. We find next two claimants who have a dispute in regard to priority *inter sese*. The Cortlandt Engineering Company filed a claim of $2,537 on December 12th, 1910, at 10.08 A. M. with the Board of Education, and at 10.15 A. M. with the Comptroller.

Fred G. Ebsary filed a claim for $900 on December 10th, 1910, at 12.04 P. M. with the Comptroller, and on December 12th, 1910, at 1.35 P. M. with the Board of Education. It thus appears that Mr. Ebsary filed his notice with the Comptroller before any notice had been filed by the Cortlandt Engineering Company in either office, but that the

Cortlandt Company completed its lien by filing its notice in both offices before Mr. Ebsary had so completed his lien. Counsel for Mr. Ebsary argues that it is the filing of notice of lien with the Comptroller which fastens the lien upon the fund. I am entirely unable to adopt that view. When a statute imposes two conditions—prescribes the doing of two things in order that a lien may be created, both the conditions must be performed; both the things must be done. The lien act which we have under consideration provides that any "claimant may file with the chairman or head of the department * * * and with the financial officer of said city * * * *notices*" setting forth certain facts. It is the filing of the *notices* which creates the lien, and until the notices are filed no lien exists. The Cortlandt Engineering Company will therefore take the fifth place in the line of encumbrances, and Mr. Ebsary will stand sixth.

9. The liens of the Architectural Plastering Company for $1,680 and the American Lumber Company for $242.90 take the seventh and eighth places in order respectively, there being no contest over the notices which created these liens or the amounts secured thereby.

10. The allowance of the eight liens in the order above set forth will exhaust the fund ($29,639.31) in the hands of the municipality, and I am not aware that any questions in respect of validity or priority arise with respect to the long list of claims filed subsequently to these eight. If the eight claims have correctly been established as valid,

these subsequent lienors have no interest in the cause.

11. On December 10th, 1912, an involuntary petition in bankruptcy was filed in New York against the Glen Company, and on the same day a receiver was appointed by that court.

On December 12, 1910, at 4 P. M. an order was filed in the Clerk's Office of the United States District Court for the District of New Jersey, appointing an ancillary receiver of the bankrupt estate, and investing such receiver with authority to take possession of the assets of the bankrupt in New Jersey, and enjoining all persons from interfering, etc., etc.

On December 13th, 1910, the ancillary receiver was duly qualified and presumably took such possession of the bankrupt estate in New Jersey as he was able to obtain. The bankruptcy receiver and the bankruptcy trustee are defendants in this suit, and on behalf of the trustee elaborate argument has been made against the validity of the two assignments to the bank and to Paine respectively, and to the lien of the John Agnew Company. It was conceded that the receiver in bankruptcy and the trustee took the fund in question subject to all valid liens acquired by filing notices under our statute prior to the entry of the order appointing the ancillary receiver by the New Jersey Federal Court. No argument, except the one on behalf of the labor claims hereinafter considered, was made to sustain the validity of lien notices filed as prescribed by our law after this order appointing the ancillary receiver was entered. I have, however,

made a careful examination of the authorities controlling this question as to the exact date after which no liens could be acquired upon this fund, by filing notices under the New Jersey statute, and it must be conceded that the effect of orders appointing receivers is a subject about which there has been a very wide difference of judicial opinion. We are not, however, dealing with the case of an ordinary receiver appointed by a court of equity under its general equity powers. The cases in different jurisdictions differ as to whether the estate of the defendant is put *in custodia legis,* when the order for the receivership is made, or when the receiver has qualified, or when the receiver has actually taken possession of the land or goods which he is appointed to receive. The question before the Court is less difficult because it involves the receivership of the estate of a bankrupt under the United States bankrupt law. Here again we find inconsistent views. There is some authority for the proposition, which counsel for the trustee in this case however does not undertake to sustain, that the assets of the bankrupt are put *in custodia legis* practically when the petition is filed so as to prevent the acquisition of liens. A dictum of Chief Justice Fuller, which has been to some extent discredited, is largely responsible for this view. *Mueller* vs. *Nugent, infra.*

My conclusion is that an order of the bankrupt court appointing a general receiver of the entire bankrupt estate, directing the delivery of such estate to him as far as possible by the bankrupt, and enjoining all other persons from transferring or otherwise interfering with the property, assets

and effects of the bankrupt, etc., effects a sequestration of the bankrupt's estate to such extent as to prevent the acquisition of any new lien. The creation of such a receivership in bankruptcy may be a very serious affair, and bankrupt courts wisely exercise caution in regard to the matter. There is a wide difference between the status of the alleged bankrupt's estate in its relation to himself and third parties, when merely a petition has been filed against him, and the status of that estate when the bankrupt court has appointed a receiver in order to strip the alleged bankrupt of all his assets and put them into the possession of such receiver. I think, therefore, that the proposition advanced by counsel for the trustee in bankruptcy that this receivership order prevented the creation of all liens by notice under our statute after December 12th, 1910, at 4 P. M. is sound law, so that if either by the decree of this court or by the decree of the Court of Errors and Appeals the lien of the John Agnew Company and the assignment to the First National Bank of Town of Union should be declared void, a substantial sum would pass to the trustee in bankruptcy to the exclusion of the long list of lienors whose notices were filed after the order appointing the receiver was entered.

The following are some of the authorities which will exhibit the difference of judicial opinion in regard to the time when an order of a court of equity appointing a receiver places the property of which the receiver is directed to take possession *in custodia legis;* and also the views which have been entertained or enforced by the United States bankrupt courts in regard to the corresponding ef-

fect of an order appointing a receiver of the entire bankrupt estate:

1 Pom. Eq. Rem., Secs. 158, 159, with notes and cases cited;
High on Receivers, 4th ed. (1910);
23 Am. & Eng. Ency., page 1095;
Edwards vs. Edwards, 1 Ch. Div., 454;
S. C. (on appeal), 2 Ch. Div., 291;
Ex parte Evans, 13 Ch. Div., 252;
In re Jensen Co., 128 N. Y., 550, 553;
1 Loveland on Bankruptcy, Sec. 30;
Id., page 106;
Frazier vs. Southern Loan, etc., Co., 99 Fed. Rep., 707, 713, 714;
In re Laplume, etc., Co., 145 Fed. Rep., 1013;
Horn vs. Pere Marquette R. Co., 151 Fed. Rep., 626, 633;
In re Alton Mfg. Co., 158 Fed. Rep., 367;
Mueller vs. Nugent, 184 U. S., 1, 46 L. Ed., 405, 411;
York Mfg. Co. vs. Cassell, 201 U. S., 353, 50 Law Ed., 785.

12. Large numbers of claims for wages were filed under our statute on different dates from December 17th, 1910, to February 4th, 1911. These claims, of course, do not get the benefit of the amendment of our Municipal Improvements Lien Act, passed in 1911 (Laws of 1911, page 777), giving such claims priority to assignments, but they do have the full benefit of Sec. 9 of the Act which gives them priority to liens for materials effected by notice. If, therefore, no bankruptcy receivership had intervened, these liens for wages would

have been created, and would have been entitled to the priority which the statute gives them. I think, however, that no liens were effected by the filing of these notices by the laborers who are the claimants, because the subject matter of the lien (the fund) was *in custodia legis* and under the control of the bankrupt court, and, therefore, the filing of the notices was entirely inoperative. This is not the case which has frequently puzzled the Courts where A has a lien prior to B, and B has a lien prior to C, and C has a lien prior to A. The laborers in this case never secured any lien. They had the power to acquire liens only while the fund was subject to the creation of liens under the statute. A number of causes may intervene which will prevent a claimant from obtaining a lien which if once obtained would be prior to other existing liens. If, before these notices for wages were filed the prior liens were all paid or discharged by bond, and the entire fund due and which could become due on the contract was paid to the contractor, the subsequent notices filed for wages would establish no lien. It must, at all times, be borne in mind that it is now settled that neither laborers, nor material men have any inchoate lien dating from the time when the materials were furnished, or the labor performed, or from the time when payment for such materials or labor became due. The lien is created only by the filing of the notices and takes effect from the completion of such filing in the two offices named.

The argument on behalf of the liens for wages is made that the Agnew and Miller notices, assuming that these notices, or either of them, created a valid lien, prevented the portion of the fund applicable to the satisfaction of such lien from fall-

ing into the hands of the court of bankruptcy, and left such portion beyond the custody of the bankrupt court, and so subject to the labor liens which were subsequently filed. This argument is ingenious, but I do not think that it is sound. The lien created by the effectual filing of notices under the statute, whether for materials or labor, attaches to the whole fund. If the bankruptcy receivership had not intervened the Agnew and Miller notices would rest upon the whole fund, one being superimposed upon the other, and the labor liens, if created thereafter, would, under the statute, cover the whole fund underneath both the Agnew and the Miller claims. The effect of Sec. 9 of the statute is to give the laborers the first lien on the fund without regard to the time when their notices may have been filed, provided such notices are filed so as to create any liens whatever. According to the theory which I think prevails in the Federal courts, which have the final determination of this question, the order appointing the bankruptcy receiver placed the whole fund *in custodia legis,* notwithstanding the fact that the trustee in bankruptcy has come into this court for the determination by this Court of the validity and extent of the liens upon the fund which was part of the bankrupt estate, and notwithstanding the adjudication by this Court that the trustee takes nothing because the liens which are established by the decree of this Court exhaust the fund.

The result is that the laborers must be referred to the bankrupt court for such remedy as they may there have.

13. A decree in accordance with this memorandum may be settled on notice, and upon such

settlement all questions relating to costs and also any other questions arising in this complex litigation, not covered by this memorandum, may be disposed of.

Notice of settlement of the decree having been given, further argument was had, and thereupon the Vice Chancellor furnished to counsel the following supplementary opinion:

The questions relating to the charge and allowance of interest in this case are difficult. It is well said in 16 Am. & Eng. Ency. of Law (page 922) that "there is no subject in the law with reference to which there is greater conflict and confusion in the cases than that of interest." Unless a case be found which is a conclusive authority establishing a precedent, the safest way for a court of law or equity is to decide all questions pertaining to interest according to the plainest and simplest considerations of justice and fair dealing. I do not think that there is any case in New Jersey which controls any of the points relating to interest, to be adjudicated in this case. Perhaps the most helpful judicial deliverances for present purposes are to be found in the opinions of Chancellor Magie, then Justice Magie, in Board of Freeholders vs. Veghte, 8 N. J. Law Jour., 145, and Chief Justice Ewing in the old case of Le-Branthwait vs. Halsey, 9 N. J. Law, 3. It should be borne in mind that the whole tendency of courts of law and courts of equity for a considerable period of time, has been to break away from hard and fast rules and charge and allow interest in

accordance with principles of equity, in order to accomplish justice in each particular case. In deciding these questions of interest in this case which came up on the settlement of the decree, I am more inclined to take the course indicated because two of the parties whose interests are large in this litigation have positively announced their intention to appeal. My adjudication now to be made, as well as the adjudications which have been already made in this cause, will, therefore, be reviewed by our Court of Last Resort.

1. My conclusion is that the City of Paterson justly should be charged 4% interest on the fund from the date about which there is no dispute. The city had this great and valuable public building, the high school building, in its possession, and enjoyed its use during the period covered by this litigation. It is true the payment of the money was stopped by an injunction, but the case is not like that with which Chief Justice Ewing had to deal, because it appears from the statement in open court, of the City Counsel, and the fact is notorious, that the City of Paterson did not retain this money in its treasury. The city, as counsel stated, expected to borrow the money whenever it was called upon to make payments unless the time for such payment happened to come when the city was in funds. The city borrows money at 4% in anticipation of its taxes, and then repays the money so borrowed when the taxes come in. For all moneys on deposit in the banks the city receives 2%. No evidence was offered to show during what periods the city has been paying 4% or receiving 2%. It is true that the city has not received this money from the parties or from any persons for

their use. The injunction simply stopped the city from paying its own money, and ordinarily, as appears from the LeBranthwait case, no interest would be chargeable. But the city has profited by this injunction, in my judgment, to the extent of 4% at least, excepting during brief periods, the extent of which has not been the subject of evidence. Perhaps it would be more accurate to say that the city has had the use of this school building in which these moneys in litigation, belonging to these claimants, have been expended. It has enjoyed the property into which the claimants have put their money, and the value of such enjoyment certainly can safely be held to include 4% interest on the money which the city has not been required to pay. If the city had seen fit to borrow this money at 4% and pay it into court, it might easily have taken that course, and, notwithstanding what Chief Justice Ewing says, I think that the ability of the city thus to discharge itself for the interest is a matter to be taken into consideration.

The gist of the topic under discussion can, perhaps, be summed up best in the proposition that the City of Paterson, during all this period, has had the use of $29,696.31 worth of this high school building, and this property in fact belonged to these claimants in the sense of having been created by their contributions of labor and materials, while the city has not lost the use of a dollar of its money. I cannot distinguish between the use by the city of a fund belonging to these claimants, out of which a just claim for interest would arise, and the use of this property into which the money of the claimants has gone. To give the city the free use of the school building while the claimants

lose all interest on their money possibly may be supported by a technical line of reasoning based on ancient and conflicting authorities, but, in my judgment, to permit this to be done would be inconsistent with the broad principles of justice which, at the start, I stated would be controlling in this case.

2. Each claim which has been allowed will have 4% per annum added. If the city should be obliged to pay 5%, or the so-called legal rate, 6% interest, all the claims in like manner would be allowed 5% or 6%. I do not think that it would be just to compel the City of Paterson to pay 6% interest when it has been able at all times to borrow at 4%. Nor do I think that the claimants are entitled to greater interest than that which is charged against the city. One or more of the large claimants offered in open court to waive all claim for interest, but no agreement was reached on that subject. It is notorious that money has been worth only four or five per cent. in the way of interest. What the money of those material men and contractors might have been worth to them in their business, of course, is a matter not to be considered.

3. The complainant will be allowed costs and a counsel fee of $200 out of the fund.

4. The costs and reasonable counsel fees of the defendants who, according to the decree of this Court, are successful in their struggle over the fund, will be charged against their defeated adversaries. Those costs, expenses of litigation, rendered necessary by the contest to establish claims of defendants, upon the fund which this Court has

rejected, should not be allowed to deplete the fund so as to cut off or diminish the amount which any claimant would have received if the defeated contestants had not prosecuted their unsuccessful litigation. A large part of the testimony in this case—I think the greater part of it, was taken in the contest which the two assignees made to establish claims which, according to the decree of this Court, are without legal foundation. I am unable to discover any ground on which it could be deemed just, either to deny the successful defendants their costs, including reasonable counsel fees, in accordance with the present practice of the Court, or to permit this substantial amount of money to be taken out of the fund instead of from the parties whose unsuccessful litigation was the sole cause of the outlay.

5. I do not find that the stenographer's bill was made the subject of discussion. There is an amount still due. This item can be cared for in a variety of ways. The stenographer's entire bill is a part of the expense of taking the testimony, and an apportionment of this expense must be made so as to determine how much shall be charged against the unsuccessful defendants.

6. I think that the foregoing covers the various points which were raised and discussed on the settlement of the decree. A new draft may be made and submitted to me as soon as convenient for counsel to meet. I can attend to the matter at Jersey City at 10 A. M. on October 28th, or on October 30th. Counsel may also appear next Monday, October 27th, but that is a motion day and it is impossible to say when during the day the mat-

ter can properly and conveniently be taken up. My intention is to have the decree actually put in final form while counsel are together, and I know of no reason why it should not be then and there advised. Subject to arrangements of counsel I will appoint the final settlement of the decree for October 30th.

Final Decree, Filed Nov. 7, 1913.

IN CHANCERY OF NEW JERSEY.

Between

JOHN AGNEW COMPANY,
Complainant,

and

THE BOARD OF EDUCATION OF THE CITY OF PATERSON, et al.,
Defendants.

On Bill, &c.
Final Decree.

This matter being opened to the Court by William B. Courley on behalf of the complainant, and on due notice to every party affected hereby, in the presence of Edward F. Merrey, Esq., of counsel with the defendants the Board of Education of the City of Paterson in the County of Passaic, and the Mayor and Aldermen of the City of Paterson, and John Pomfret, Esq., of counsel with the defendants Russell Holmes and all the other laborers who filed claims in this matter, and Albert A. Wilcox, Esq., of counsel with the defendants E. Ricker and Sons, and James G. Blauvelt, Esq., of counsel with the defendants P. S. Simmons Printing Company and

Freemman & Westerhoff, Esqs., of counsel with the defendants Martin Troost and Louis Pasqualli, and James Higgins, Esq., of counsel with the defendants McKiernan & Bergin and Albert Comstock, Esq., of counsel with the defendant Achitectural Plastering Company and William I. Lewis, Esq., of counsel with the defendant Joseph Sharpe Construction Company, and J. W. Deyoe, Esq., of counsel with the defendant George A. Myers Company, and John O. Benson, Esq., of counsel with the defendant Sutphen & Myer, and Michael Dunn, Esq., of counsel with the defendant Cortlandt Engineering Company, who has also filed its bill in this matter and whose suit was consolidated herewith for trial, and Josiah Dadley, Esq., of counsel with the defendant J. A. Van Winkle Company, and Munson Force, Esq., of counsel with the defendant James Healey, and Hunziker and Randall, Esqs., of counsel with the defendant Ingalls Stone Company, who had also filed its bill in this matter and whose suit was consolidated herewith for trial, and Frank H. Hall, of counsel with the defendant Charles L. Strong, trustee in bankruptcy of Glen Engineering Construction Company, and William F. Delaney, Esq., of counsel with the defendant Martin S. Paine, and David F. Edwards, Esq., of counsel with the defendant Frank Miller, who had also filed his bill in this matter, and whose suit was consolidated herewith for trial, and G. M. Belfatto, Esq., of counsel with the defendant F. G. Ebsary, and Hugh B. Reid, Esq., of counsel with the defendant Herringbone Metal Lath Company, and John J. Fallon, Esq., of counsel with the defendant First

National Bank of the Town of Union, the Complainant's bill having been heretofore taken as confessed against the other defendants; and this cause having been duly referred to his Honor Eugene Stevenson, Vice Chancellor, to hear and determine the same and advise what decree should be made herein, and the pleadings having been read and considered, and the testimony adduced by the respective parties having been heard and considered, and the arguments of the respective counsel thereon having been heard and considered; and it appearing to the Court that the defendants The Board of Education of the City of Paterson in the County of Passaic, holds the sum of Twenty-nine thousand six hundred and ninty-six Dollars and Thirty-one Cents to which it makes no claim and to which the complainant and defendants or some of them are entitled; and it further appearing that said defendant the Board of Education of the City of Paterson, in the County of Passaic, has had the use or benefit of said fund since the first day of September, 1911, chargeable with interest thereon from said time, which interest under the circumstances of the case is fixed by the Court at the rate of four per cent. per annun; and it further appearing that the liens originally acquired by the defendants Ingalls Stone Company and James Healey upon said fund were released by the substitution of a bond for their respective claims; and that the lien claimed by the defendant the First National Bank of the Town of Union under its assignment is void; and that the lien claimed by the defendant Martin S. Paine under his assignments is void; and it further appearing that no liens could be acquired upon said fund subsequent to the appointment of a re-

ceiver of the estate of the defendant, the said Glen Engineering Construction Company by the United District Court for the District of New Jersey, and that therefore the laborers who filed claims in this matter are not entitled to any share in the distribution of said fund by this Court; the costs of the defendants Frank Miller and Joseph Sharpe Construction Company by consent of counsel, are to be paid out of the fund, and no apportionment of the amount caused by the litigation between them and the First National Bank of the Town of Union and Martin S. Paine is to be made.

IT IS on this first day of November, in the year One thousand nine hundred and thirteen, ORDERED, ADJUDGED AND DECREED that the said fund amounting to the sum of Twenty nine thousand six hundred and ninety-six Dollars and Thirty-one Cents now in the hands of the defendant The Board of Education of the City of Paterson in the County of Passaic, be increased by the addition thereto of interest from the first day of September, 1911, to the date of payment at the rate of 4% per annum to be paid by the said defendant The Board of Education of the City of Paterson in the County of Passaic, and that said fund together with said interest thereon be paid out and distributed by the defendant The Board of Education of the City of Paterson in the County of Passaic, in the following order so far as said fund will allow:

FIRST.—The sum of Eleven thousand nine hundred and Thirty-three Dollars and Twenty-nine Cents, together with interest thereon from the twenty-eighth day of November, Nineteen hundred and ten, at the rate of 4% per annum to the date of payment to the Complainant, John Agnew Com-

pany, or its solicitors, with its cost to be taaxed, including the stenographer's fees for the transcript of testimony furnished the Court and the complainant, and including a counsel fee of Two hundred Dollars.

SECOND.—The sum of Ten thousand nine hundred and fifty-five Dollars and fourteen Cents, together with interest thereon from the ninth day of December, Nineteen hundred and ten, at the rate of 4% per annum to the date of payment, to the defendant Frank Miller, trading and doing business as Frank Miller Lumber Company, or his counsel, together with its cost to be taxed.

THIRD.—The sum of Three thousand and thirty-seven Dollars, together with interest from the tenth day of December, Nineteen hundred and ten, to the date of payment at the rate of 4% per annum to Joseph Sharpe Construction Company, or its solicitor, together with its costs to be taxed.

FOURTH.—The sum of Seven hundred and sixty-one Dollars and twenty-five Cents, together with interest from the tenth day of December, Nineteen hundred and ten, to the date of payment at the rate of 4% per annum to the Herringbone Metal Lath Company, or its solicitor, together with its costs to be taxed.

FIFTH.—The sum of Two thousand five hundred and thirty-seven Dollars, together with interest thereon from the twelfth day of December, Nineteen hundred and ten, to the date of payment at the rate of 4% per annum to Cortlandt Engineering Company, or its solicitor, together with its costs to be taxed.

SIXTH.—The sum of Nine hundred Dollars, together with interest from the twelfth day of December, Nineteen hundred and ten, to the date of payment at the rate of 4% per annum to the defendant Frederick G. Ebsary, or his solicitor, together with his costs to be taxed.

SEVENTH.—The sum of One thousand six hundred and Eighty Dollars, together with interest thereon from the twelfth day of December, Nineteen hundred and ten, to the date of payment at the rate of 4% per annum to the Architectural Plastering Company, or its solicitor, together with its costs to be taxed.

EIGHTH.—The sum of Two hundred and forty-two Dollars and ninety Cents, together with interest thereon from the twelfth day of December, Nineteen hundred and ten, to the date of payment at the rate of 4% per annum to the American Lumber Company, or its solicitor, together with its costs to be taxed.

NINTH.—It is further ordered, adjudged and decreed that the above mentioned complainant and defendants be paid in the order above set forth, and each in full until said fund is exhausted.

TENTH.—It is further ordered, adjudged and decreed that, in lieu of the fee allowed by law a counsel fee of Three hundred and seventy-five Dollars be allowed to the defendant Frank Miller, trading as Frank Miller Lumber Company and a like counsel fee to the defendant Joseph Sharpe Construction Company and that each of said counsel fees be paid by the defendant the First National Bank

of the Town of Union and that in case the same are not paid within twenty days from the date hereof execution for each of said sums may issue agreeable to the practice of this Court; and it is also ordered, that a counsel fee of One hundred and twenty-five Dollars be also allowed to said defendant Frank Miller trading as Frank Miller Lumber Company and a like counsel fee to said defendant Joseph Sharpe Construction Company and that each of said fees be paid by the defendant Martin S. Paine and that in case the same are not paid within twenty days from the date hereof execution therefor issue agreeable to the practice of this Court.

ELEVENTH.—And it is further ordered, that any party may apply for such further directions from time to time as occasion may require.

TWELFTH.—And it being represented to the Court by counsel for the defendant the First National Bank of the Town of Union and counsel of defendant Martin S. Paine, that said defendants intend forthwith to appeal from this decree. It is thereupon, upon application of said counsel, ordered that the execution of this decree be stayed for twenty days from the date hereof, and thereafter, in case such appeal shall be taken within said twenty days, until the further order of this Court.

And upon motion of counsel for defendants the Board of Education of the City of Paterson, in the County of Passaic, and the Mayor and Aldermen of the City of Paterson, it is further ordered that in case said appeal shall be taken within the time aforesaid, the said defendants may pay to the Clerk of this court in this cause the entire fund due

from them or either of them as hereinbefore set forth, including interest at the rate of four per cent. per annum, in full discharge of all liability of them or either of them in respect thereof.

Respectfully advised,

E. R. WALKER,
C.

EUGENE STEVENSON, V. C.

Notice of Appeal of Martin S. Paine, Filed November 20, 1913.

IN CHANCERY OF NEW JERSEY.

Between

JOHN AGNEW COMPANY,
Complainant,
and
THE BOARD OF EDUCATION OF THE CITY OF PATERSON, et al.,
Defendants.

On bill, &c.

The defendant Martin S. Paine hereby appeals from so much of the final decree made in this Court in the above stated cause as states that it appears that the lien claimed by the defendant Martin S. Paine under his assignments is void, and said defendant also appeals from so much of the said final decree as orders, adjudges, decrees and declares that the said fund together with said in-

terest thereon be paid out and distributed by the defendant The Board of Education of the City of Paterson in the County of Passaic to the defendants therein named in the order and the amounts therein stated, so far as said fund will allow, that the said defendants be paid in the order therein stated and each in full until said fund is exhausted, that a counsel fee of one hundred and twenty-five dollars be also allowed to said defendant Frank Miller trading as Frank Miller Lumber Company and a like counsel fee to said defendant Joseph Sharpe Construction Company, and that each of said fees be paid by the defendant Martin S. Paine, and that in case the same are not paid within twenty days from the date thereof execution therefor issue agreeable to the practice of this Court, and said defendant also appeals from such final decree inasmuch as it fails and omits to order, adjudge, decree and declare that the defendant Martin S. Paine acquired a good and valid lien upon said fund with said interest thereon for the sum of four thousand nine hundred and fifty dollars, and interest thereon from December first, nineteen hundred and ten, to the date of payment, at the rate of four per cent. per annum, under the assignments to him executed by the Glen Engineering Construction Company, and inasmuch as said final decree fails and omits to order, adjudge, decree and declare that after payment out of the said fund with said interest thereon of the sum therein directed to be paid to the complainant, or its solicitors, there be next paid out of said fund with said interest thereon and distributed by the defendant The Board of Education of the City of Paterson, in the County of Pasaic the sum of four thousand

nine hundred and fifty dollars; together with interest thereon from the first day of December, nineteen hundred and ten, at the rate of four per cent. per annum to the date of payment, to the defendant Martin S. Paine, or his solicitor together with his costs to be taxed, and inasmuch as said final decree fails and omits to order, adjudge, decree and declare that in lieu of the fee allowed by law a reasonable counsel fee be allowed to the defendant Martin S. Paine, to be paid in equal shares by the defendant Frank Miller, trading as Frank Miller Lumber Company, and the defendant Joseph Sharpe Construction Company,—to the Court of Errors and Appeals in the last resort in all causes.

WILLIAM F. DELANEY,
Solicitor for said Defendant.

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

ARTHUR M. WOODFORD,
of Counsel.

Petition of Appeal of Martin S. Paine. Filed December 10, 1913.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

JOHN AGNEW COMPANY,
Complainant,

and

THE BOARD OF EDUCATION OF THE CITY OF PATERSON, et al., Defendants and Respondents, and MARTIN S. PAINE,
Defendant and Appellant.

On Appeal from Chancery.

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

The petition of MARTIN S. PAINE, appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by final decree made in the Court of Chancery by his Honor EDWIN ROBERT WALKER, Chancellor of New Jersey, bearing date the first day of November, in the year nineteen hundred and thirteen, in a cause wherein John Agnew Company was complainant and The Board of Education of the City of Paterson, in the County of Passaic, and others, were defendants, in this respect, to wit, that the said decree recites and adjudges that the lien claimed by the defendant Martin S. Paine, under his assignments is void, and that the said decree orders, adjudges and decrees that said fund together with

said interest thereon, as therein provided, be paid out and distributed by the defendant The Board of Education of the City of Paterson, in the County of Passaic, in the following order so far as said fund will allow:

SECOND.—The sum of Ten thousand nine hundred and fifty-five Dollars and fourteen cents, together with interest thereon from the ninth day of December, nineteen hundred and ten at the rate of 4% per annum to the date of payment, to the defendant Frank Miller, trading and doing business as Frank Miller Lumber Company, or his counsel, together with its costs to be taxed.

THIRD.—The sum of Three thousand and thirty-seven dollars, together with interest from the tenth day of December, Nineteen hundred and ten to the date of payment at the rate of 4% per annum to Joseph Sharpe Construction Company, or its solicitor, together with its costs to be taxed.

FOURTH.—The sum of Seven hundred and sixty-one Dollars and twenty-five cents, together with interest from the tenth day of December, Nineteen hundred and ten to the date of payment at the rate of 4% per annum to the Herringbone Metal Lath Company, or its solicitor, together with its costs to be taxed.

FIFTH.—The sum of Two thousand Five hundred and thirty-seven Dollars, together with interest thereon from the twelfth day of December, Nineteen hundred and ten to the date of payment at the rate of 4% per annum to Cortlandt Engineering Company, or its solicitor, together with its costs to be taxed.

SIXTH.—The sum of Nine hundred Dollars, together with interest from the twelfth day of December, Nineteen hundred and ten, to the date of payment at the rate of 4% per annum to the defendant Frederick G. Ebsary, or his solicitor, together with his costs to be taxed.

SEVENTH.—The sum of One thousand six hundred and eighty Dollars, together with interest thereon from the twelfth day of December, Nineteen hundred and ten to the date of payment at the rate of 4% per annum to the Architectural Plastering Company, or its solicitor, together with its costs to be taxed.

EIGHTH.—The sum of Two hundred and forty-two Dollars and ninety cents together with interest thereon from the twelfth day of December, Nineteen hundred and ten to the date of payment at the rate of 4% per annum to the American Lumber Company, or its solicitor, together with its costs to be taxed;

that the said decree orders, adjudges and decrees that the above-mentioned defendants be paid in the order above set forth and each in full until said fund is exhausted, that a counsel fee of One hundred and twenty-five dollars be also allowed to said defendant Frank Miller, trading as Frank Miller Lumber Company, and a like counsel fee to said defendant Joseph Sharpe Construction Company, and that each of said fees be paid by the defendant Martin S. Paine, and that in case the same are not paid within twenty days from the date thereof execution therefor issue agreeable to the practice of said Court, that the said decree fails and

omits to order, adjudge and decree that the defendant Martin S. Paine acquired a good and valid lien upon said fund with said interest thereon for the sum of Four thousand nine hundred and fifty Dollars and interest thereon from December first, nineteen hundred and ten, to the date of payment, at the rate of four per cent. per annum, under the assignments to him executed by the Glen Engineering Construction Company, that after payment out of the said fund with said interest thereon of the sums therein directed to be paid to the complainant, or its solicitors, there be first paid out of said fund with said interest thereon and distributed by the defendant The Board of Education of the City of Paterson, in the County of Passaic, the sum of Four thousand nine hundred and fifty dollars, together with interest thereon from the first day of December, nineteen hundred and ten, at the rate of four per cent. per annum to the date of payment, to the defendant Martin S. Paine, or his solicitor, together with his costs to be taxed, and that in lieu of the fee allowed by law a reasonable counsel fee be allowed to the defendant Martin S. Paine, to be paid in equal shares by the defendant Frank Miller, trading as Frank Miller Lumber Company, and the defendant Joseph Sharpe Construction Company.

And your petitioner humbly appeals from that part of the said decree which decrees as aforesaid, upon the ground that the same is erroneous, for that your petitioner acquired a good and valid lien upon said fund with said interest thereon for the sum of Four thousand nine hundred and fifty dollars, and interest thereon from December first, nineteen hundred and ten to the date of payment, at the rate of four per cent. per annum, under and

by virtue of the assignments to him executed by the Glen Engineering Construction Company, and for that also none of the defendants therein are entitled to be paid out of said fund, and said interest thereon, the sums of money or costs therein stated or any part thereof prior to the payment therefrom to the defendant Martin S. Paine, of the amount of his said lien, with his costs to be taxed, and for that the said decree should have recited, ordered, adjudged and decreed that the defendant, Martin S. Paine, had acquired a good and valid lien upon said fund with said interest thereon for the sum of Four thousand nine hundred and fifty dollars, and interest thereon, from December first, nineteen hundred and ten to the date of payment, at the rate of four per cent. per annum, under and by virtue of the assignments to him executed by the Glen Engineering Construction Company, that after payment out of the said fund with said interest thereon of the sums therein directed to be paid to the complainant, or its solicitors, there be first paid out of said fund with said interest thereon and distributed by the defendant The Board of Education of the City of Paterson, in the County of Passaic, the sum of Four thousand nine hundred and fifty dollars, together with interest thereon from the first day of December, nineteen hundred and ten, at the rate of four per cent. per annum to the date of payment, to the defendant Martin S. Paine, or his solicitor, together with his costs to be taxed, and that in lieu of the fee allowed by law a reasonable counsel fee be allowed to the defendant Martin S. Paine, to be paid in equal shares by the defendant Frank Miller, trading as Frank Miller Lumber Company, and the defendant Joseph Sharpe Construction Company.

Your petitioner therefore prays that the said decree of the said Chancellor may be in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

WILLIAM F. DELANEY,
Solicitor of Appellant.

ARTHUR M. WOODFORD,
of Counsel with Appellant.

New Jersey State Library

Answer of Frank Miller, trading as Frank Miller Lumber Co., to Petition of Appeal of Martin S. Paine. Filed January 10, 1914.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

JOHN AGNEW COMPANY,
Complainant,

and

THE BOARD OF EDUCATION OF THE CITY OF PATERSON, FRANK MILLER, doing business under the name and style of FRANK MILLER LUMBER COMPANY, et al., Defendants and Respondents, and THE FIRST NATIONAL BANK OF THE TOWN OF UNION, and MARTIN S. PAINE,
Defendants and Appellants.

On Appeal from Chancery.

The answer of Frank Miller, doing business under the name and style of Frank Miller Lumber Company, one of the respondents in the above-entitled action, to the petition of appeal of Martin S. Paine, appellant herein, respectfully shows:

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 a decree bearing date the 1st day of November, 1913, was made and entered in the Court of Chancery, in the cause for that purpose mentioned in 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 believes that the said decree is agreeable to equity and he prays that the same may be affirmed with costs to be adjudged to this respondent, together with a reasonable counsel fee.

Dated New York, January 5th, 1914.

DAVID F. EDWARDS,
Solicitor for and of Counsel with Respondent.

Answer of Defendant-Respondent, The First National Bank of the Town of Union. Filed January 19, 1914.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

JOHN AGNEW COMPANY,
Complainant,

and

THE BOARD OF EDUCATION OF THE CITY OF PATERSON, et als.,
Defendants and Respondents.

On Appeal from Chancery.

The answer of the First National Bank of the Town of Union, respondent, to the petition of appeal of Martin S. Paine, 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 a decree was on the first day of November, nineteen hundred and thirteen, 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 believes, that the portion of the said decree appealed from, is agreeable to equity except in so far as said portion orders, adjudges and decrees that the complainant and defendants therein named be paid in the order therein named and each in full until said fund is exhausted, and except in so far as said decree orders, adjudges and decrees that in lieu of

the fees allowed by law a counsel fee of Three hundred and seventy-five Dollars be allowed to the defendant, Frank Miller, trading as Frank Miller Lumber Company, and a like counsel fee to the defendant, Joseph Sharpe Construction Company, and that each of said counsel fees be paid by the defendant, The First National Bank of the Town of Union, and also excepting in so far as said portion fails and omits to order, adjudge and decree that the defendant, The First National Bank of the Town of Union, acquired a good and valid lien upon said fund for the sum of Ten thousand Dollars, and interest thereon from the fifteenth day of September, nineteen hundred and ten, to the date of payment, under and by virtue of the assignment to it executed by the Glen Engineering Construction Company, and also fails and omits to order, adjudge and decree that in the distribution and payment of said fund held by the defendant, The Board of Education of the City of Paterson, in the County of Passaic, the defendant, The First National Bank of the Town of Union, be first paid out of said fund by said defendant, The Board of Education of the City of Paterson, in the County of Passaic, the sum of Ten thousand Dollars, together with interest thereon from the fifteenth day of September, nineteen hundred and ten, and costs of suit to be taxed, and respondent prays that the same except in so far as it orders, adjudges and decrees as aforesaid, and fails and omits to order, adjudge and decree as aforesaid, may be affirmed, with costs, to be adjudged to this respondent.

JOHN J. FALLON,
Solicitor for and of Counsel with
Respondent, The First National Bank
of the Town of Union.

Notice of Appeal of The First National Bank of the Town of Union, Filed Nov. 20, 1913.

IN CHANCERY OF NEW JERSEY.

Between JOHN AGNEW COMPANY, Complainant, and THE BOARD OF EDUCATION OF THE CITY OF PATERSON, in the County of Passaic, et als., Defendants.	On Bill, etc.

The defendant, The First National Bank of the Town of Union, hereby appeals from so much of the final decree made in this court in the above-stated cause, as declares "That the lien claim by the defendant, The First National Bank of the Town of Union, under its assignment, is void," and so much of said final decree as orders, adjudges and decrees, that the complainants and the defendants therein named be paid in the order therein set forth, and each in full until the fund therein mentioned is exhausted, and that a counsel fee of Three hundred and seventy-five Dollars be allowed to the defendant, Frank Miller, trading as Frank Miller Lumber Company, and a like counsel fee to the defendant, Joseph Sharpe Construction Company, and that each of the said counsel fee be paid by the defendant, The First National Bank of the Town of Union, and that in case the same are not paid within twenty days from the date thereof, execution therefor issue agreeable to the practice of this Court; and also appeals from said final decree in so far as said final decree fails and omits to order, adjudge and decree that the defendant, The First National Bank of the Town of

Union, acquired a good and valid lien for the sum of Ten thousand Dollars, and interest from the fifteenth day of September, nineteen hundred and ten, to the date of payment upon said fund under, and by virtue of the assignment to it executed by the Glen Engineering Company; and fails and omits to order, adjudge and decree that in the distribution and payment of the said fund held by the defendant, The Board of Education of the City of Paterson, in the County of Passaic, the defendant, The First National Bank of the Town of Union, or its solicitor be first paid out of said fund by said defendant The Board of Education of the City of Paterson, in the County of Passaic, the sum of Ten thousand Dollars, together with interest thereon from the fifteenth day of September, nineteen hundred and ten, together with its costs of suit to be taxed; and also in so far as said final decree fails and omits to order, adjudge and decree that in lieu of fees allowed by law, a reasonable counsel fee be allowed to the defendant, The First National Bank of the Town of Union, to be paid in equal shares by the defendants, Frank Miller, trading as Frank Miller Lumber Company, and the defendant, Joseph Sharpe Construction Company, to the Court of Errors and Appeals in the last resort in all causes.

JOHN J. FALLON,
Solicitor for and of Counsel with
Defendant, The First National Bank
of the Town of Union.

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

JOHN J. FALLON,
of Counsel with Defendant,
The First National Bank
of the Town of Union.

Petition of Appeal of The First National Bank of the Town of Union, Defendant-Appellant. Filed Dec. 9, 1913.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

JOHN AGNEW COMPANY,
Complainant-Respondent,

and

THE BOARD OF EDUCATION OF THE CITY OF PATERSON, in the County of Passaic, et als.,
Defendants-Appellants.

On Appeal, &c.

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

The petition of The First National Bank of the Town of Union, appellant, in the above stated cause, respectfully shows, that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the first day of November in the year nineteen hundred and thirteen, wherein the said John Agnew Company was complainant, and the said The Board of Education of the City of Paterson, in the County of Passaic, The First National Bank of the Town of Union, Frank Miller, trading and doing business as Frank Miller Lumber Company, Joseph Sharpe Construction Company, Herringbone Metal Lath Company, Cortlandt Engineering Company,

Frederick G. Ebsary, Architectural Plastering Company, American Lumber Company and others, were defendants, in this respect, to wit:

That the said decree recites "that the lien claimed by the defendant, The First National Bank of the Town of Union, under its assignment is void";

That the said decree orders, adjudges and decrees that the fund amounting to the sum of twenty-nine thousand six hundred and ninety-six dollars and thirty-one cents, now in the hands of the defendant, The Board of Education of the City of Paterson, in the County of Passaic, with interest thereon be paid out and distributed by the defendant, The Board of Education of the City of Paterson, in the County of Passaic, in the following order so far as said fund will allow:

"FIRST.—The sum of Eleven thousand nine hundred and thirty-three dollars and twenty-nine cents, together with interest thereon from the twenty-eighth day of November, nineteen hundred and ten at the rate of 4% per annum to the date of payment to the complainant, John Agnew Company, or its solicitor, with its costs to be taxed, including the stenographer's fees for the transcript of testimony furnished the Court and the complainant, and including a counsel fee of Two hundred Dollars."

"SECOND.—The sum of Ten thousand nine hundred and fifty-five dollars and fourteen cents, together with interest thereon from the ninth day of December, nineteen hundred and ten at the rate of 4% per annum to the date of payment, to the

defendant Frank Miller, trading and doing business as Frank Miller Lumber Company, or his counsel, together with its costs to be taxed."

"THIRD.—The sum of three thousand and thirty-seven Dollars, together with interest from the tenth day of December, nineteen hundred and ten to the date of payment at the rate of 4% per annum to Joseph Sharpe Construction Company, or its solicitor, together with its costs to be taxed."

"FOURTH.—The sum of Seven hundred and sixty-one Dollars and twenty-five cents, together with interest from the tenth day of December, nineteen hundred and ten to the date of payment at the rate of 4% per annum to the Herringbone Metal Lath Company, or its solicitor, together with its costs to be taxed."

"FIFTH.—The sum of Two thousand five hundred and thirty-seven Dollars, together with interest thereon from the twelfth day of December, nineteen hundred and ten to the date of payment at the rate of 4% per annum to Cortlandt Engineering Company, or its solicitor, together with its costs to be taxed."

"SIXTH.—The sum of Nine hundred Dollars, together with interest from the twelfth day of December, nineteen hundred and ten, to the date of payment at the rate of 4% per annum to the defendant Frederick G. Ebsary, or his solicitor, together with his costs to be taxed."

"SEVENTH.—The sum of One thousand six hundred and eighty Dollars, together with interest

thereon from the twelfth day of December, nineteen hundred and ten to the date of payment at the rate of 4% per annum to the Architectural Plastering Company, or its solicitor, together with its costs to be taxed."

"EIGHTH.—The sum of Two hundred and forty-two Dollars and ninety cents, together with interest thereon from the twelfth day of December, nineteen hundred and ten to the date of payment at the rate of 4% per annum to the American Lumber Company, or its solicitor, together with its costs to be taxed."

And further orders, adjudges and decrees that the above mentioned complainant and defendants be paid in the order above set forth, and each in full until said fund is exhausted.

That the said decree further orders, adjudges and decrees that in lieu of the fee allowed by law a counsel fee of Three hundred and seventy-five Dollars be allowed to the defendant Frank Miller, trading as Frank Miller Lumber Company, and a like counsel fee to the defendant, Joseph Sharpe Construction Company, and that each of said counsel fees be paid by the defendant, The First National Bank of the Town of Union, and that in case the same are not paid within twenty days, execution for each of said sums may issue.

And your petitioner also finds itself aggrieved by said final decree, in this respect, to wit:

That the said decree fails and omits to adjudge and decree that your petitioner, The First National Bank of the Town of Union, acquired a good and valid lien for the sum of Ten thousand Dollars,

and interest from the fifteenth day of September, nineteen hundred and ten, to the date of payment, upon the aforesaid fund, under and by virtue of the assignment to it executed by the Glen Engineering Construction Company.

And your petitioner humbly appeals from the parts of said decree of the Chancellor which orders, adjudges and decrees as aforesaid, upon the ground that the same is erroneous, for that, your petitioner acquired a good and valid lien upon said fund for the sum of Ten thousand Dollars and interest thereon from the fifteenth day of September, nineteen hundred and ten, to the date of payment, under and by virtue of the assignment to it executed by the Glen Engineering Construction Company, and the said Chancellor should have adjudged and decreed that your petitioner, The First National Bank of the Town of Union, acquired a good and valid lien for the sum of Ten thousand Dollars and interest thereon from the fifteenth day of September, nineteen hundred and ten, as aforesaid.

And also, for that, the complainant and defendants in said decree named are not entitled to be paid out of said fund the sum or sums of money or costs therein stated or any part thereof prior to the payment out of said fund to the petitioner of the sum of Ten thousand Dollars and interest and costs;

And also, for that, said final decree fails and omits to order, adjudge and decree that in the distribution and payment of said fund held by the defendant, The Board of Education of the City of Paterson, in the County of Passaic, your petitioner, The First National Bank of the Town of

Union, be first paid out of said fund by said defendant, The Board of Education of the City of Paterson, in the County of Passaic, the sum of Ten thousand Dollars together with interest thereon from the fifteenth day of September, nineteen hundred and ten, and costs of suit to be taxed.

Your petitioner prays that the said decree of said Chancellor, may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this Honorable Court may seem meet.

JOHN J. FALLON,
Solicitor of Defendant-Appellant.

JOHN J. FALLON,
of Counsel with Defendant-Appellant.

Answer of Defendant-Respondent, Martin S. Paine. Filed Jan. 9, 1914.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between JOHN AGNEW COMPANY, Complainant-Respondent, and THE BOARD OF EDUCATION OF THE CITY OF PATERSON, in the County of Passaic, et als., Defendants-Appellants.	On Appeal, &c.

The answer of Martin S. Paine, respondent, to the petition of appeal of the First National Bank of the Town of Union, 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 a decree was on the first day of November, nineteen hundred and thirteen, 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 believed that the portion of the said decree appealed from by said appellant, is agreeable to equity except in so far as said portion fails and omits to order, adjudge and decree that the defendant Martin S. Paine acquired a good and valid lien upon said

fund with interest thereon for the sum of Four thousand nine hundred and fifty Dollars, and interest thereon from December first, nineteen hundred and ten, to the date of payment, at the rate of four per cent. per annum, under the assignments to him executed by the Glen Engineering Construction Company, and that after payment out of the said fund with said interest thereon of the sums therein directed to be paid to the complainant, or its solicitors, there be first paid out of said fund with said interest thereon and distributed by the defendant, The Board of Education of the City of Paterson, in the County of Passaic, the sum of Four thousand nine hundred and fifty Dollars, together with interest thereon from the first day of December, nineteen hundred and ten, at the rate of four per cent. per annum to the date of payment, to the defendant Martin S. Paine, or his solicitor, together with his costs to be taxed, and that in lieu of the fee allowed by law a reasonable counsel fee be allowed to the defendant Martin S. Paine, to be paid in equal shares by the defendant Frank Miller, trading as Frank Miller Lumber Company, and the defendant Joseph Sharpe Construction Company, and respondent prays that the same, except in so far as it fails and omits to order, adjudge and decree as aforesaid, may be affirmed, with costs to be adjudged to this respondent.

WILLIAM F. DELANEY,
Solicitor of Martin S. Paine,
Respondent.

ARTHUR M. WOODFORD,
of Counsel with Respondent
Martin S. Paine.

Answer of Frank Miller, trading as Frank Miller Lumber Co., to Petition of Appeal of The First National Bank of the Town of Union. Filed Jan. 10, 1914.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

JOHN AGNEW COMPANY,
Complainant,
and
THE BOARD OF EDUCATION OF THE CITY OF PATERSON, FRANK MILLER, doing business under the name and style of FRANK MILLER LUMBER COMPANY, et al.,
Defendants and Respondents,
and THE FIRST NATIONAL BANK OF THE TOWN OF UNION, and MARTIN S. PAINE,
Defendants and Appellants.

On Appeal from Chancery.

The answer of Frank Miller, doing business under the name and style of Frank Miller Lumber Company, one of the respondents in the above entitled action, to the petition of appeal of the First National Bank of the Town of Union, appellant herein, respectfully shows:

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 a decree bearing date the 1st day of November, 1913, was made and entered in the Court

of Chancery, in the cause for that purpose mentioned in 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 believes that the said decree is agreeable to equity and he prays that the same may be affirmed, with costs to be adjudged to this respondent, together with a reasonable counsel fee.

Dated, N. Y., January 5th, 1914.

DAVID F. EDWARDS,
Solicitor for and of Counsel
with Respondent.

Answers to Appeals.

Answers to appeal of First National Bank of Union were also filed by

Joseph Sharp Construction Co., filed January 2, 1914.

John Agnew Company, filed January 10, 1914.

Answers to appeal of Martin S. Paine were also filed by

Joseph Sharp Construction Co., filed January 2, 1914.

John Agnew Company, filed January 10, 1914.

Notice of Argument—Martin S. Paine.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

JOHN AGNEW COMPANY,
Complainant,

and

THE BOARD OF EDUCATION OF THE CITY OF PATERSON, et al.,
Defendants and Respondents,
and MARTIN S. PAINE,
Defendant and Appellant.

On appeal from Chancery.

Sir:

TAKE NOTICE that the argument of the appeal of MARTIN S. PAINE in the above cause will be brought on at the next term of the Court of Errors and Appeals, to be held at the State House, at Trenton, on Tuesday the third day of March, next, at eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard.

WILLIAM F. DELANEY,
Solicitor of Appellant,
Martin S. Paine.

Notice of Argument—First National Bank of Union.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between JOHN AGNEW COMPANY, Complainant-Respondent, and THE BOARD OF EDUCATION OF THE CITY OF PATERSON, et als., Defendants-Appellants.	On Appeal From Chancery.

Sir:

TAKE NOTICE that the argument of the appeal of The First National Bank of Town of Union in the above cause will be brought on at the next term of the Court of Errors and Appeals, to be held at the State House, at Trenton, on Tuesday the third day of March, next, at eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard.

JOHN J. FALLON,
Solicitor of Appellant, The
First National Bank of
Town of Union.

Exhibit C-4.

Contract Glen Engineering Construction Company			$285,423.00
Nov. 5, 1909, Extra work for Mortar Stain for faced brick and four sides of first story		$30.00	
Jan. 11, 1910, Extra Work for Terra Cotta over Second Story Windows, three sides of building		88.94	
Mar. 1, 1910, Extra work for Terra Cotta over Third Story Windows, three sides of building		250.00	
May 4, 1910, Extra Contract for Fire Alarms, Corridors		190.00	558.94
			$285,981.94
Aug. 12, 1909,	First Payment (914)	$6885.00	
Sept. 10, 1909,	Second Payment (921)	13628.00	
Oct. 8, 1909,	Third Payment (929)	19000.00	
Nov. 9, 1909,	Fourth Payment (935)	17932.00	
Dec. 7, 1909,	Fifth Payment (939)	30000.00	
Jan. 7, 1910,	Sixth Payment (949)	13900.00	
Feb. 23, 1910,	Seventh Payment (956)	6690.00	
Apr. 9, 1910,	Eighth Payment (969)	22308.00	
May 11, 1910,	Ninth Payment (975)	14662.50	
June 14, 1910,	Tenth Payment (980)	14862.25	
July 7, 1910,	11th Payment (983)	11000.00	
Aug. 6, 1910,	12th Payment (988)	6400.00	
Sept. 9, 1910,	13th Payment (992)	11000.00	
Oct. 13, 1910,	14th Payment (1008)	10603.75	
Nov. 1, 1910,	15th Payment (1017)	5000.00	
Total paid to Glen Engineering Construction Company			$203,871.50
	Balance		$82.110.44

Exhibit C-4.

COST OF COMPLETING BUILDING.

Jos. Sharpe Construction Company, Balance on contract for concrete & Granilithic work		$1600.00	
Jos. Sharpe Construction Company, Contract for wardrobe partitions		1987.00	
Architectural Plastering Company, Balance Contract for Ornamental plastering		380.00	
P. S. Simmons Painting Company, Balance on Contract for painting & varnishing work		3500.00	
Italian Marble Mosaic Company, Balance on Contract for all Terrazzo work		3732.61	
W. R. Steinmetz	Mason Work	14000.00	
Jas. Radcliffe & Sons Co.	Iron Work	2496.00	
Terry & Weiss	Elec. Work	3589.00	
D. Henry Building Company,	Carpenter Work	19600.00	
		50.884.61	
P. S. Simmons Painting Co. Extra on Dust Chute		8.00	
Room, Side Walls, etc.		35.00	
Back of trim		158.75	
William T. Fanning, Architect Fees		1,000.00	52,086.36
			$30,024.08
To deduction (218512 faced brick at $1.50 per hhd.			327.77
			$29,696.31

Exhibit M. S. P. D-2.

No. 2700 New York, Dec. 1st, 1910.

The Bowery Bank of New York

Pay to the order of Glen Engineering Construction Co.

Forty nine hundred & fifty #.....Dollars

$4,950.00 PAID M. S. Paine.

M. S. Paine.

Endorsed

Glen Engineering & Construction Co.
P. H. Downey
Treasurer.

Mar. 7, 1912.

The Bowery Bank of N. Y.
Dec. 2, 1910.

Exhibit Trustee, D-1.

NEW JERSEY

$6,000.00 March 10, 1910.

Weehawken Post Office, N. J.

On demand we promise to pay to the Order of First National Bank, Town of Union, N. J. Six Thousand and No/100 .....Dollars. at First National Bank, Town of Union, N. J.

Value Received,

Due...../

GLEN ENGINEERING-CONSTRUCTION CO.
P. H. DOWNEY.
Treasurer.

SMITH ALFORD,
President.

(On face) cancelled

Endorsed on back:

GLEN ENGINEERING-CONSTRUCTION CO.

Smith Alford, Pres'd.
P. H. Downey, Treas.

Smith Alford.
P. H. Downey.

Exhibit S. & M., D-1.

Letter from Glen Engineering Company to Messrs. Sutphen & Myer, dated Sept. 27, 1909, accepting proposal to do all glazing work, exterior and interior, on Paterson High School Building, for $3,299.00.

Exhibit, T. of U., D-4, March 7, 1912.

GLEN ENGINEERING CONSTRUCTION COMPANY

156 Fifth Avenue

New York, Aug. 30, 1910.

Be it RESOLVED that all retaining moneys for any work completed or to be completed on the Paterson High School Building, Paterson, N. J., are hereby assigned to the First National Bank, Town of Union, N. J.

WHEREAS be it further RESOLVED that the said Assignment is made as collateral against a certain loan, or any further loans which may be granted to the said Glen Engineering Construction Company. Said moneys so collected are to be placed to the credit of the GLEN ENGINEERING CONSTRUCTION COMPANY.

The above is a true copy of RESOLUTIONS passed at a Special Meeting of the Board of Directors, held at the office of the Glen Engineering Construction Company, 156 Fifth Avenue, N. Y. City, August 29th, 1910, at six o'clock P. M.

By P. H. DOWNEY,
Secretary.

(Seal.)

Exhibit C-7.

KNOW ALL MEN BY THESE PRESENTS:

That GLEN ENGINEERING CONSTRUCTION COMPANY, a Corporation organized under the Laws of the State of New York, for one Dollar and other valuable considerations to it paid, receipt of which is acknowledged hereby, has sold, assigned, transferred and set over and by these presents does sell, assign, transfer and set over unto EDWARD GUNNELL, of Richmond County, New York, his heirs, executors, administrators and assigns, the sum of Twenty-One Thousand Dollars ($21,000.00) (with interest as hereinafter specified) of the moneys due and to become due to it, said Glen Engineering Construction Company, under and by virtue of the certain contract dated by it made with the Board of Education of the City of Paterson, New Jersey, for the construction of the Paterson High School.

Under the contract so as aforesaid made between Glen Engineering Construction Company and the Board of Education of the City of Paterson, the "retained percentages" now amount to (approximately) Forty-two Thousand, Eight Hundred and Thirteen and 45/100 Dollars ($42,813.45). This sum (with others) will become payable to Glen Engineering Construction Company upon the completion by it of its part of the said contract, as the final payment thereon.

Glen Engineering Construction Company has heretofore made an assignment of said retained percentage in the amount of Forty-Two Thousand, Eight Hundred and Thirteen and 45/100 Dollars ($42,813.45) to First National Bank of the Town of Union (New Jersey)—which amount when collected by said First National Bank of the Town of

Union is to be placed to the creditof said Glen Engineering Construction Company after the deduction therefrom of the amount then due by Glen Engineering Construction Company to said Bank:

This assignment is subject and subordinate to the rights acquired by said First National Bank of the Town of Union under the above recited assignment to it made by Glen Engineering Construction Company.

And Glen Engineering Construction hereby appoints Edward Gunnell, above named, its attorney with full right, power and authority to do and to cause to be done each and every act, thing or deed necessary, proper or advisable to make effective the purpose and intent of this assignment.

And Glen Engineering Construction Company hereby directs, authorizes and empowers the above named First National Bank of the Town of Union to pay for it, and on its behalf, unto Edward Gunnell, above named, his heirs, executors, administrators and assigns, out of and from all moneys which said First National Bank of the Town of Union shall collect or receive under the above recited assignment to it (said Bank) made, any excess over the amount due to said First National Bank of the Town of Union in accordance with the terms of the said assignment to it, up to, but not in excess of, the sum of Twenty-One Thousand Dollars ($21,000.00) with interest as follows:

Upon Five Thousand Dollars ($5,000) from August 25, 1910;

Upon Ten Thousand Dollars ($10,000) from October 19, 1910;

Upon Six Thousand Dollars ($6,000) from October 14, 1910.

IN WITNESS WHEREOF, GLEN ENGINEERING CONSTRUCTION COMPANY has caused these presents to be signed by its President, and its corporate seal to be affixed this 30 day of November, 1910.

GLEN ENGINEERING CONSTRUCTION COMPANY,
By SMITH ALFORD,
President.

(Seal.)

State of New York,
County of New York, } ss.:

BE IT REMEMBERED, that on this 30th day of November, A. D. One Thousand, Nine Hundred and Ten, before me personally appeared Smith Alford, to me known, who being by my duly sworn, did depose and say that he is the President of GLEN ENGINEERING CONSTRUCTION COMPANY, the corporation described in and which executed the foregoing instrument; that the seal affixed to such instrument is the corporate seal of said corporation; that it was so affixed by order of the Board of Directors of said corporation and that he, as such President, did sign such instrument as the voluntary act and deed of such corporation by order of the Board of Directors.

HENRY M. CARPENTER,
Notary Public,
Kings County,
Certificate filed in New York County.

Exhibit C-7.

State of New York, }
County of New York, } ss.:

No. 654,

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY that

Henry M. Carpenter,

whose name is subscribed to the Certificate of the proof or ackowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof and acknowledgment, a Notary Public acting in and for said County, duly commissioned and sworn, and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of the said Court and County the 9th day of Dec., 1910.

(Seal)

WM. F. SCHNEIDER,
Clerk.

Exhibit C-8.

GLEN ENGINEERING CONSTRUCTION COMPANY, a New York Corporation, hereby sells, assigns, transfers and sets over unto M. S. PAINE, of New York City, all moneys due and to become due to it, Glen Engineering Construction Company, under and by virtue of the following specified contracts, viz.:

Contract with the Board of Education of the City of Paterson for the construction of the Paterson High School, now in course of completion;

Contract with the Board of Education of the City of Newark for the construction of the Central Commercial Manual Training High School, now in course of completion;

Contract with St. John's Guild, of New Dorp, Staten Island, for 2 Ward Buildings at New Dorp, Staten Island, which contract has been completed.

The said Company hereby authorizes and empowers said M. S. Paine, as attorney for it and in its name or otherwise but on its own behalf, to do and cause to be done any and all things necessary or advisable to make effect this present assignment and to collect the moneys secured thereby.

This present assignment is made as security to said Paine for moneys advanced by him to and for the benefit of Glen Engineering Construction Company and for such moneys as may hereafter be advanced to or for the benefit of said Company.

Dated, December 1, 1910.

GLEN ENGINEERING
CONSTRUCTION COMPANY,
By Smith Alford,
President.

P. H. Downey,
Treasurer.
(Seal)

Exhibit C-8.

State of New York,
County of New York, } ss.:

On this 1st day of December, 1910, before me personally came Smith Alford, to me known, who, being my me duly sworn, did depose and say that he resided in that he is the President of the Corporation, GLEN ENGINEERING CONSTRUCTION COMPANY, the Corporation described in and which executed the foregoing instrument; that he knew the seal of the said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order.

HENRY M. CARPENTER,
Notary Public, Kings Co.,
Certificate filed in N. Y. Co.

No. 652.

State of New York,
County of New York, } ss.:

I, WILLIAM F. SCHNEIDER, Clerk of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY that Henry M. Carpenter, whose name is subscribed to the Certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof and acknowledgment, a Notary Public acting in and for said County, duly com-

missioned and sworn, and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County the 9th day of December, 1910.

(Seal.) WM. F. SCHNEIDER,
Clerk.

Exhibit C-9.

GLEN ENGINEERING CONSTRUCTION COMPANY, a New York Corporation, hereby sells, assigns, transfers and sets over unto M. S. PAINE, of New York City, all moneys due and to become due to it, Glen Engineering Construction Company, by virtue of the certain contract dated
made by said Company with the Board of Education of the City of Paterson for the construction of the Paterson High School, and particularly the payment to which Glen Engineering Construction Company is entitled under its said contract for work done and materials furnished during the month of November, 1910, and for which it has made its requisition.

The said Company hereby authorizes and empowers said M. S. Paine, as attorney for it and in

its name or otherwise but on its own behalf, to do and cause to be done any and all things necessary or advisable to make effective this present assignment and to collect the moneys secured thereby.

This present assignment is made as security to said Paine for moneys advanced by him to and for the benefit of Glen Engineering Construction Company and for such moneys as may hereafter be advanced to or for the benefit of said Company.

Dated, December 1, 1910.

GLEN ENGINEERING
CONSTRUCTION COMPANY,
By Smith Alford,
President.

(Seal.) By Smith Alford,

P. H. Downey,
Treasurer.

State of New York, }
County of New York, } ss.:

On this 1st day of December, 1910, before me personally came Smith Alford, to me known, who, being my me duly sworn, did depose and say that he resided in Flushing, Long Island, that he is the President of the Corporation, GLEN ENGINEERING & CONSTRUCTION COMPANY, the Corporation described in and which executed the foregoing instrument; that he knew the seal of the said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said

Corporation, and that he signed his name thereto by like order.

NOAH A. STANCLIFFE,
Commissioner of Deeds,
New York City.

No. 945.

State of New York,
County of New York, } ss.:

I, WILLIAM F. SCHNEIDER, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY, That Noah A. Stancliffe, whose name is subscribed to the Certificate of the Proof or Acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such Proof or Acknowledgment a COMMISSIONER OF DEEDS in and for The City of New York, duly commissioned and sworn, and authorized by the laws of said State to take the Acknowledgments and Proofs of Deeds of Conveyances for Land, Tenements or Hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Commissioner of Deeds, and verily believe that the signature to said Certificate of Proof or Acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County the 9th day of December, 1910.

WM. F. SCHNEIDER,
Clerk.

(Seal.)

F. M. L. Co., D-12.

(Check stub, Merchants' Bank.)

No. 327.
Dec. 9th, 1910.
Bearer $39.10.

(Further stubs, Merchants' Bank.)

No. 323.
1910.
Bearer $250.
Extra expense.

No. 322.
11/23, 1910.
Frederick Stuhr $25.00

No. 291.
Nov. 11, 1910.
Bearer $500.00
250 previous loan
250 last "

$500

No. 247.
Oct. 4, 1910.
Bearer $250.00
Extra expense.

F. M. L. Co., D-15.

(Bowery Bank check stubs.)

No. 2869.
Dec. 9th, 1910.
Bearer $59.46
$59.46
12.20
$47.26

F. M. L. Co., D-14.

(Garfield Bank check stubs.)

No. 3475.
Dec. 9, 1910.
Bearer $2.33

F. M. L. Co., D-11.

(Carnegie check stubs.)

No. 573.
Dec. 9, 1910.
Bearer $23.97

F. M. L. Co., D-6.

(Copy of cash book, page 98.)

Forward	$50,370.83
July 28, Job 523, Isidor S. Berman	18.81
" 27, (279) P. H. Downey	5,000.00
" 28, Relate Express Job 523	1.82

Exhibit F. M. L. Co., D-17.

(Check stub of First Nat'l Bank of Union.)

No. 531.
Dec. 9th, 1910.
Bearer $67.22

Trustee Exhibit D-7.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter of GLEN ENGINEERING CONSTRUCTION COMPANY, Alleged Bankrupt.	In Bankruptcy.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of EDMUND J. O'CONNOR respectfully shows and alleges:

1. That on the 9th day of December, 1910, your petitioner together with John H. Ross and Beverly D. Hovey, creditors of the above named alleged bankrupt, verified and filed a petiton in this Court that it be adjudged an involuntary bankrupt with-

in the purview of the United States Bankruptcy Act; that the said petition was based on an act of bankruptcy committed by the said Glen Engineering Construction Company, to wit: that on the 9th day of December, 1910, the said Glen Engineering Construction Company admitted in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground. That said proceeding is now pending and will not be determined for some time to come.

2. That the said Glen Engineering Construction Company is a New York corporation, with its principal place of business at No. 156 Fifth Avenue, in the Borough of Manhattan, City of New York, and is engaged in business as a contractor in building construction. That said Company has a number of large and important contracts on hand, and in process of completion, including the following:

St. John's Guild, New York City, for building; Board of Education, Paterson, N. J., for school building, Board of Education, Newark, N. J., for High School.

3. That the condition of the alleged bankrupt's affairs in business is such that it is absolutely necessary that a receiver be appointed at once to preserve said property and business, pending the issue of bankruptcy proceedings. That the facts in regard to same and the reasons for such appointment are as follows: that the Company has a large pay roll amounting to $3,000 due tomorrow, and no money in bank to meet same, and several liens and assignments have been filed against the various contracts and creditors both in New York and New Jersey are threatening legal proceedings.

4. That the alleged bankrupt by resolution of its Board of Directors has filed a consent in this proceeding to the appointment of a temporary receiver for its business and affairs.

5. That the assets of the said alleged bankrupt as your petitioner has been informed and verily believes consists of contracts for building construction partially completed, hereinbefore mentioned, and certain machinery, tools and office furniture and are of the estimated value of $10,000.

6. That no previous appliction has been made for this order.

WHEREFORE, your petitioner respectfully prays that a temporary receiver be appointed of all assets and property of every kind of said alleged bankrupt, and for such further order in the premises as may be just and proper.

Dated, New York, December 9, 1910.

EDMUND J. O'CONNOR,
Petitioner.

State of New York, }
County of New York, } ss.:

Edmund J. O'Connor, being duly sworn, says that he is the petitioner above named, that he has read the foregoing petition, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and

belief, and that as to those matters he believes it to be true.

EDMUND J. O'CONNOR.

Sworn to before me, this
9th day of December, 1910.

CHARLES E. SCOTT,
(Notarial Notary Public,
Seal.) New York County.

GLEN ENGINEERING CONSTRUCTION COMPANY hereby admits that it is unable to pay its debts in full and is insolvent.

It is willing to be adjudged a bankrupt on that ground and consents hereby that a receiver be appointed of its business and assets, both in New York and in New Jersey.

Dated, December 9, 1910.

GLEN ENGINEERING CONSTRUCTION CO.,
By P. H. DOWNEY,
Secretary and Treasurer.

(Corporate Seal.)

State of New York,
County of New York, } ss.:

On this 9th day of December, 1910, before me personally appeared P. H. DOWNEY, to me known and known to me to be the secretary and treasurer of the Glen Engineering Construction Company, the corporation who executed the above consent and duly acknowledged that he executed the same on behalf of said corporation.

HENRY M. CARPENTER,
Notary Public, Kings County,
Certificate Filed in N. Y. Co.

(The above copy is exemplified.)

Trustee Exhibit D-8.

At a Stated Term of the District Court of the United States, for the District of New Jersey, held at the Court House in the City of Trenton, on the 12th day of December, 1910.

Present—Hon. JOHN RELLSTAB, District Judge.

In the Matter
of
GLEN ENGINEERING CONSTRUCTION COMPANY,
Alleged Bankrupt.

Upon reading and filing the exemplified copy of the petition in involuntary bankruptcy, filed in the above entitled matter in the United States District for the Southern District of New York, and upon the certified copy of the order appointing Benjamin Barker, Esq., Receiver of the assets and effects of the above named alleged bankrupt, and upon the original order appointing said receiver, filed in the United States District Court for the Southern District of New York, and upon the petition of Edmund J. O'Connor, a creditor of the said above named bankrupt, verified the 10th day of December, 1910, and on motion of Marshal S. Hagar, attorney for said creditor, it is

ORDERED, that Benjamin Barker, Esq., of 55 Liberty St., New York City, be and he hereby is appointed ancillary receiver of the above named alleged bankrupt in and for the District of New

Jersey, with all the rights and powers to carry into force and effect the orders of the original court of jurisdiction.

AND IT IS FURTHER ORDERED that the said receiver furnish a bond to the People of the United States in the sum of $5,000 for the faithful discharge of his duties as such receiver.

AND IT IS FURTHER ORDERED, that the said alleged bankrupt forthwith deliver to the said receiver all of its property, assets and effects now in its possesson or under its control, and that the said alleged bankrupt and all other persons, firms, corporations, employees and all creditors of the said alleged bankrupt, as well as their and each of their attorneys, agents, servants and all sheriffs, marshals and other officers, deputies and their employees are hereby jointly and severally restrained and enjoined from removing, transferring or otherwise interfering with the property, assets and effects of the above named alleged bankrupt and from prosecuting and executing or suing out of any court any process, attachment, replevin or other writ for the purpose of taking possession, impounding or interfering with any of the assets or the effects of the above named alleged bankrupt, and molesting, disturbing or interfering with the receiver herein appointed in the discharge of his duties.

JOHN RELLSTAB,
D. J.

Trustee Exhibit—D-8.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

In the Matter

of

GLEN ENGINEERING & CONSTRUCTION COMPANY,
Alleged Bankrupt.

KNOW ALL MEN BY THESE PRESENTS; That we Benjamin Barker of 55 Liberty Street, Borough of Manhattan, City of New York as principal, and the Title Guaranty & Surety Company, a corporation organized under the laws of the State of Pennsylvania, and authorized to transact business in the State of New York, and having an office and place of business at 84 William Street, Borough of Manhattan, City of New York, as surety, are held and firmly bound unto the United States of America, in the sum of Five Thousand ($5,000.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, the said Benjamin Barker binds himself, his heirs, executors and administrators, and the said The Title Guaranty & Surety Company binds itself, its succesors and assigns, jointly and severally, firmly by these presents.

Signed and sealed this 13th day of December, 1910.

The Condition of this Obligation is such that whereas the above named Benjamin Barker was on the 12th day of December, 1910, appointed Ancil-

lary Receiver in Bankruptcy in the case pending in the above Court, wherein Glen Engineering & Construction Company is the Bankrupt, and he, the said Benjamin Barker, has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said Benjamin Barker as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all moneys, assets and effects of the estate of said Bankrupt, which shall come into his hands and possession and shall in all respects faithfully perform all of his official duties as said Ancillary Receiver then this obligation to be void, otherwise to remain in full force and virtue.

BENJAMIN BARKER. (Seal)

THE TITLE GUARANTY & SURETY COMPANY,
by FRED C. WILLIAMS,
Attorney-in-Fact.

Attest:
GEO. W. YUENGLING,
Resident Secretary.

Signed, Sealed and Delivered
in Presence of
(Seal) G. W. MARTLING.

State of New York,
County of New York, } ss.:

On this 13th day of December, 1910, before me personally came Benjamin Barker, to me known

and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

(Seal.) GERTRUDE W. MARTLING,
Notary Public (39),
New York County.

State, City and County of New York, ss.:

On this 13th day of December, A. D. 1910, before me personally appeared Fred C. Williams, to me known, who being by me duly sworn, did depose and say: that he resided in the Borough of Chatham, N. J., that he is the Attorney-in-fact of the Title Guaranty & Surety Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets, as ascertained in the manner provided by Section 3, Chapter 720, of the New York Session Laws of 1893.

And the said Fred C. Williams further said, that he was acquainted with Geo. W. Yuengling and knew him to be the Resident Secretary of said corporation; that the signaure of said Geo. W. Yuengling subscribed to the said instrument is in the genuine handwriting of said George W. Yuengling, and was thereto subscribed by like order of said Board of Directors and in the presence of him, the said Fred C. Williams, attorney-in-fact.

LILLIAN ROSENFELL, (Seal.)
Commissioner of Deeds,
City of New York.

At a meeting of the Executive Committee of The Title Guaranty & Surety Company, Scranton, Penna., held at the office of the Company, on the 23rd day of September, A. D. 1910, the following resolution was adopted:

"RESOLVED, that this Company do and it hereby does authorize and empower FRED C. WILLIAMS, as Attorney-in-Fact, attested by GEO. W. YUENGLING, Resident Secretary, of W. W. ALLEN, Resident Assistant Secretary; or GEO. W. YUENGLING, Attorney-in-fact, attested by W. W. ALLEN, Resident Assistant Secrtary, to execute, deliver and attach the seal of the Company to any and all bonds, recognizances or contracts of indemnity, and all instruments of reinsurance, and all other writings obligatory in the nature thereof, and all contracts guaranteeing the fidelity of persons holding places of public or private trust, guaranteeing the performance of contracts and executing and guaranteeing bonds or undertakings required or permitted in all actions or proceedings or by law allowed."

State, City and County of New York, ss.:

I, Geo. W. Yuengling, Res. Secretary of The Title Guaranty & Surety Company, have compared the foregoing resolutions with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution. Given under my hand and seal

of the Company at the City of New York this 13th day of December, 1910.

GEO. W. YUENGLING,
Resident Secretary.

(The foregoing is an exemplified copy.)

Trustee Exhibit D-10.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of THE GLEN ENGINEERING CONSTRUCTION COMPANY, Bankrupt.	Receiver's Report.

To the United States District Court for the Southern District of New York:

I, Benjamin Barker, do hereby make and file my report and account as temporary Receiver of the above named bankrupt.

(1) I was appointed temporary Receiver herein on the 10th day of December, 1909, and required to file a bond in the penalty of Five thousand Dollars. Having been notified of my appointment I

obtained a certific copy of the order thereof, and filed my bond in the penalty required, and in company with the attorney for the petitioning creditors I visited the premises of the alleged bankrupt, No. 156 Fifth Avenue, New York City, and there met and interviewed officers of the Company and others, and took possession of the offices and the property contained therein. I placed seals upon the safe, desks and cabinets contained within the offices and also upon the doors leading therefrom. I found that the bankrupt was a corporation organized under the Laws of the State of New York, and engaged in the general contracting business and I had several conferences with the officers of the Company and with various creditors in regard to the advisability of continuing the business, inasmuch as the Company had on hand contracts of the construction of a high school building in the City of Paterson and another one in the City of Newark, the former of which was almost entirely completed and the latter of which was less than one-half completed, as well as other contracts for the construction of buildings which were about finished. I also learned that the Company had received payments on account of work done in accordance with the terms of its several contracts, and that until further work was done under those contracts no further payments would be made. I also learned that the Company had assigned the moneys which had been retained by the owners of the buildings in course of construction, pursuant to the provisions of the contracts, and no estimate could then be formed as to what, if any, equity the alleged bankrupt might have in said moneys.

On December 12th, 1910, I procured myself to be appointed ancilliary Receiver by the United States

District Court for the District of New Jersey, in which State said alleged bankrupt was carrying on business, and I was required to file a bond in that State in the penalty of Five thousand Dollars, which was done.

On December 13th, 1910, I received a notice from the Board of Education of the City of Paterson to the effect that unless said alleged bankrupt proceeded with the construction of the building of the High School in that City within three days from the date of service of such notice, said Board of Education would undertake the work of such completion itself. Having no funds with which to carry on said work, I arranged to have said Board of Education of the City of Paterson delay the proceedings under said notice for some time in order that the creditors might have an opportunity to formulate some plan of raising the funds with which to carry on said work, and attended a conference of said creditors with that end in view.

On said December 13th, 1910, I presented a petition to this Court for leave to retain Mr. Marshall S. Hager, as my counsel in this matter, and an order to that effect was duly signed and entered.

For ten days after this time I had numerous interviews with the architects having charge of the several buildings then in course of construction by the said alleged bankrupt, with a view to ascertaining if there was any in the contracts for such work and finally reached the conclusion that while there was a substantial sum due to the said alleged bankrupt on account of said several contracts—yet the amount of liens filed against such moneys by contractors, material men and mechanics, who had furnished materials or done work in connection therewith, was considerably in

excess of the amount yet to be paid to said alleged bankrupt, upon the completion of the work.

On December 23rd, 1910, I attended a meeting of the creditors of said alleged bankrupt, at the office of Mr. Seaman Miller, the Referee in bankruptcy, to whom this matter had been referred, and at the request of said creditors subsequently presented a petition to this Court asking permission to substitute Mr. Frank H. Hall, of 25 Broad Street, Borough of Manhattan, New York City, as my counsel herein, in the place and stead of Mr. Marshall S. Hager. I also filed the consent of Mr. Hager to such change and subsequently secured an order in accordance with the prayer of said petition.

(2) The only property of said bankrupt which has come into my possession consists of the office furniture and equipment found by me at the Company's office, 156 Fifth Avenue, New York City. This I took possession of and on January 6th, 1911, had the same removed from said office to the warehouse of Mr. Charles Shongood, where the same was placed on storage until such time as a sale thereof should be directed by this Honorable Court. This furniture and office equipment consists of the items set forth in the schedule hereto annexed, and I desire to turn the same over to Mr. Charles L. Strong, who has now been elected the Trustee of said bankrupt by the creditors thereof.

I have received no compensation for my services as such Receiver, and have expended the sum of Thirty Dollars ($30.00) for premiums on bonds given by me as hereinbefore set forth, and the additional sum of Eight Dollars and Fifty cents ($8.50) for postage, foreign telephone messages, carfares and similar incidental expenses, making

the total amount expended by me Thirty-eight Dollars and Fifty cents ($38.50).

Wherefore, I respectfully pray that my account as such Receiver be passed and that suitable allowance be made to Messrs. Marshall S. Hager and Frank H. Hall, my attorneys, and to myself, as such Receiver, and that an order may be entered herein directing me to turn over to the Trustee of said bankrupt, the property now in my possession, and that I be discharged as Receiver herein.

All of which is respectfully submitted.

Dated, July 7, 1911.

BENJAMIN BARKER,
Receiver.

State of New York, }
County of New York, } ss.:

Benjamin Barker, being duly sworn, says, I am the Receiver of the Glen Engineering Construction Company, and the person named in the foregoing report and petition; that such matters and things set forth in said report and petition are true.

BENJAMIN BARKER.

Subscribed and sworn to at
New York City this
7th day of July, 1911.

Before me
GERTRUDE W. MARTHING,
(Seal) Notary Public (37),
New York County.

Trustee Exhibit—D-10.

Schedule of office furniture and equipment found by Benjamin Barker, Receiver of the Glen Engineering Construction Company, at the Company's office, 156 Fifth Avenue, New York City, and removed by him to the warehouse of Mr. Charles Shongood, Janury 6th, 1911.

Wardrobe in parts
2 Roll top desks
2 Flat top desks
5 Chairs
1 Table
2 Drafting boards
3 Revolving chairs
1 typewriter
1 Case hardware
1 Piece of Carpet
Lot of letter files
2 Boxes

(The foregoing copies are exemplified.)

(Sample Check.)

No.——Weehawken Post Office, N. J.————19—

FIRST NATIONAL BANK

TOWN OF UNION, N. J.

Payable at Merchants Nat. Bank, Jersey City.

Pay to the Order of————————————

———————————————— Dollars

$———— ————————————

Exhibit T. of U.—D-1.

$10,000.00

Weehawken Post Office, N. J., April 19th, 1910.

Upon demand we promise to pay to the Order of First Natianal Bank, Town of Union, N. J., Ten Thousand 00/100.....Dollars, at First National Bank, Town of Union, N. J. With interest 6%.

Value Received.

Due.....

NEW JERSEY

GLEN ENGINEERING-CONSTRUCTION CO.

P. H. Downey, Treasurer. Smith Alford, President

Endorsed on back:

GLEN ENGINEERING-CONSTRUCTION CO.

P. H. Downey, Treasurer. Smith Alford, President.

Smith Alford.

P. H. Downey.

Int. paid to Sept. 20.

Exhibit Trustee—D-2.

No. 179 New York, April 12th, 1910.

THE FIRST NATIONAL BANK

TOWN OF UNION, N. J.

Pay to the order of First National Bank, Town of Union $6,009.00/100 Six Thousand and Nine and no/100.....Dollars

GLEN ENGINEERING CONSTRUCTION CO.

GLEN ENGINEERING CONSTRUCTION CO.

Smith Alford, President. P. H. Downey, Treasurer.

Exhibit T. of U.—D-2.

$5,000.00/100

Town of Union, N. J., July 27, 1910.

On demand I promise to pay to the order of myself
Five Thousand and 00/100.....Dollars
at First National Bank, Town of Union, N. J.
Value received.
No. .... Due..... P. H. Downey.

Endorsed on back:

P. H. Downey
Smith Alford
P. H. Downey
Int. paid to Sept. 30.

Exhibit F. M. L. Co.—D-3.

$5,000.00 Town of Union, N. J., Aug. 19, 1910.

On Aug. 20th I promise to pay to the order of
P. H. Downey
Five Thousand and No/100.....Dollars
at First National Bank, Town of Union, N. J.
Value received.
No. .... Due ..... Smith Alford.

Stamped on face:

FIRST NATIONAL BANK
PAID
Aug. 23, 1910.
TOWN OF UNION, N. J.

Endorsed on back:

P. H. Downey
Smith Alford
P. H. Downey

Exhibit F. M. L. Co.—D-5.

Glen Engineering Construction Co.

No. 3470 New York, Feb. 17th, 1910.

THE GARFIELD NATIONAL BANK
5th Avenue & 23rd Street

Pay to the order of
First National Bank, Town of Union,
Three Thousand and No/100.....Dollars
GLEN ENGINEERING CONSTRUCTION CO.
Smith Alford, President. P. H. Downey, Treasurer.

$3,000.00/100

Stamped on back:

RECEIVED PAYMENT
THROUGH NEW YORK CLEARING HOUSE
FEB 18 1910
THE
61 FOURTH 61
NAT'L BANK, N. Y.
NOTE TELLER

CREDIT
FIRST NATIONAL BANK
TOWN OF UNION
Prior Endorsements Guaranteed
JOHN C. H. RUGGLES, Cashier.

RECEIVED PAYMENT
THROUGH NEW YORK CLEARING HOUSE
N FEB 18 1910 R
THE
61 FOURTH 61
NAT'L BANK, N. Y.
MAIL TELLER

PAY TO
FOURTH NATIONAL BANK
OR ORDER
FEB 18 1910
THE NATIONAL RESERVE BANK
OF THE CITY OF NEW YORK
NOTE TELLER

Exhibit F. M. L. Co.—D-1.

$4,000.00/100

Town of Union, N. J., June 29, 1910.

On demand after date I promise to pay to the order of M. William Hilbert,

Four Thousand and No/100.....Dollars

at First National Bank, Town of Union, N. J.

Value received.

No. .... Due ..... P. H. Downey.

Endorsed on back:

M. William Hilbert
P. H. Downey
Smith Alford

Exhibit, Trustee—D-7.

No. 214 Jersey City, N. J., Sept. 20th, 1910.

THE MERCHANTS NATIONAL BANK

Pay to the order of Structural Supply Co.

Five Hundred and No/100.....Dollars

GLEN ENGINEERING CONSTRUCTION CO.

Smith Alford, President. P. H. Downey, Treasurer.

$500.00/100

Endorsed on front:

MERCHANTS NATIONAL BANK,
Paid Sept. 19, 1910.
Jersey City, N. J.

Endorsed on back:

Structural Supply Co.
By J. Conway, Pres.
Pay to the Order of
ANY BANK, BANKER OR TRUST CO.
SEP 20 1910
Prior Endorsements Guaranteed
FIRST NATIONAL BANK,
TOWN OF UNION, N. J.
Weehawken, P. O.

Exhibit F. M. L. Co.—D-2.

GLEN ENGINEERING CONSTRUCTION CO.

No. 411 New York, July 8th, 191..

THE FIRST NATIONAL BANK

TOWN OF UNION, N. J.

Pay to the order of

First National Bank, Town of Union, N. J.

$4,005.33/100

Four Thousand and Five and 33/100.....Dollars

GLEN ENGINEERING CONSTRUCTION CO.

Smith Alford, President.

P. H. Downey, Treasurer.

Exhibit, Trustee—D-6.

$2,000.00/100

Jersey City, N. J., August 25th, 1910.

On August 30th after date we promise to pay to the order of Ourselves

Two Thousand and 00/100.....Dollars

at Merchants National Bank, Jersey City, N. J.

Value received

No. 1702 Due Aug. 30

Glen Engineering Construction Co..

by

Smith Alford, President.

P. H. Downey, Treasurer.

Endorsed on back:

Glen Engineering Construction Co.

by

Smith Alford,

President.

P. H. Downey,

Treasurer.

Smith Alford.

P. H. Downey.

Glen Engineering Construction Co.

by

P. H. Downey,

Treasurer.

Trustee Exhibit—D-3.

GLEN ENGINEERING CONSTRUCTION COMPANY
156 Fifth Avenue

New York, Aug. 30, 1910.

Be it RESOLVED that all retained moneys or payments for any work completed or to be completed on the Central Commercial and Manual Training High School, Newark, N. J., are hereby assigned to the Merchants National Bank of Jersey City, N. J.

WHEREAS be it further Resolved that the said Assignment is made as collateral against a certain loan or any further loans which may be granted to the said Glen. Said moneys so collected are to be placed to credit of Glen Eng. & Const. Co.

The above is a true copy of RESOLUTIONS passed at a Special Meeting of the Board of Directors, held at the office of the Glen Engineering Construction Company, 156 Fifth Avenue, N. Y. City, August 30th, 1910, at six o'clock P. M.

By .....

Secretary.

Trustee Exhibit—D-4.

Aug. 30, 1910.

Be it RESOLVED that all retaining moneys for any work completed or to be completed on the Paterson High School Building, Paterson, N. J., are hereby assigned to the First National Bank, Town of Union, N. J.

WHEREAS be it further RESOLVED that the said Assignment is made as collateral against a certain loan, or any further loans which may be granted to the said Glen Engineering Construction Company. Said moneys so collected are to be placed to the credit of the GLEN ENGINEERING CONSTRUCTION COMPANY.

The above is a true copy of Resolutions passed at a Special Meeting of the Board of Directors, held at the office of the Glen Engineering Construction Company, 156 Fifth Avenue, N. Y. City, August 30th, 1910, at six o'clock P. M.

By .....

Secretary.

2 N 2 W 3

Mrs. P. H. Downey

Aug	17	Advanced	33	✓	1 00000	Aug	24	Check	33	✓	1 00000		
Sept 1908	17	"	36	✓	1 50000	Sept	7	"	36	✓	1 50000		
" 1909	9	"	71	✓	5 00000	Aug 1909	27	Advanced	70		5 00000	✓	
Apr.	27	"	97	✓	50 29 17	Mar.	19	"	144		5 00000		
May	19	Check	3	✓	12 50 62 5	May	5	"	198		5 50000		
July	23	"	13	✓	2 37 1 65	June	21	"	18	✓	1 50000		
Sept	15	1909 "	25	✓	2 50 58 3	Aug	4	"	14	✓	3 00000	✓	
Apr.	14	1910 "	31	✓	2 00000	Sept	1	1906 "	17	✓	2 50000	✓	
"	15	Interest	73	✓	3 58	Mar.	31	1910 "	68	✓	1 50000	✓	
May	17	Check	81	✓	5 00 00 00	Apr	9	"	68	✓	50000	✓	
June	3	Interest	87	✓	9 15	May	6	"	76	✓	5 00000	✓	
Aug	8	Check	101	✓	2 00000	June	10	"	86	✓	2 00000	✓	
"		Interest	103	✓	2 00	July	27	First National Bank	98	✓	5 00000	+	
Sept.	28	"	111	✓	3 9 17	Aug	12	"	102	✓	2 00000		
						"	26	Goldbar D.K.	104	✓	2 00000	✓	
						"	29	Deposit (Merchants Nat'l Savings)	104	✓	~~0 00000~~	+	
						"	"	(100 / 280) Check	104	✓	~~0 00000~~		
						"	"	Cash	104	✓	50000		
						Sept.	1	Check M.K.B.	104	✓	1 00000		
						"	1	" John Tiche D.K.	104	✓	1 00000		
						"	2	" (Cheney) D.K.	104	✓	50000		
						"	16	" (E. Rucker)	157	✓	2 00000	✓	
						MSP	19	(Deposit Merchants Nat'l Savings)	108		~~0 00000~~		
						"		(100 / 280) Check	108				
						PR	16	Cash	108	✓	50000	✓	
						Nov.	11	Check	116	✓	5 00000		
						"	23	Cash	170	✓	50000		

1902

W. W. S. Paine

						Sept	29	Check	110	✓	6	00	00	00										
						Aug	25	Temporary	279	✓	3	00	00	00										
								"	"	279	✓	2	00	00	00									
						Sept	19	"	"	279	✓	1	00	00	00									

Merchants National Bank

						Aug	30	Check	105	✓	12	00	00	00	Aug	26	Mata	✓	104	✓	11	99	80	0
						Oct.	4	Interest	113	✓	1	25	83		Sept	2	"		104	✓	5	00	00	00
						"	30	Check	113	✓	12	00	46	70	"	30	"		111	✓	6	00	00	00
						Nov.	13	"	171	✓	15	75	00	00	Oct	7	"	✓	114	✓	2	00	00	00
						"	"	Interest	171	✓	1	97	57	75	Nov.	7	"	✓	116	✓	1	00	00	00
															"	11	"	✓	116	✓	4	75	00	00
															"	13	"		140	✓	5	00	00	00
																					24	74	80	2

GLEN ENGINEERING CONSTRUCTION COMPANY

STATEMENT OF ASSETS AND LIABILITIES AS PER BOOKS ON DATES SPECIFIED HEREUNDER

EXHIBIT "A"

A S S E T S	August 25, 1910	August 26, 1910	August 27, 1910	August 28, 1910	August 29, 1910	August 30, 1910	August 31, 1910	September 1, 1910
CASH ON HAND AS PER CASH BOOK	$ 7 190 99	$ 6 416 80	$ 6 416 80	$ 6 416 80	$ 239 33	$ 239 33	$ 1 239 33	$ 1 239 33
ACCOUNTS RECEIVABLE	4 086 76	4 086 76	4 086 76	4 086 76	4 086 76	4 086 76	4 086 76	4 086 76
DUE ON CONTRACTS UNCOMPLETED								
BOARD OF EDUCATION, PATERSON, N. J.								
Amount of contract and extras $385.511.94								
Less Cash Received 177.367.25	108.244.69							
ST. JOHN'S GUILD, NEW DORP, S. I.								
Amount of contract and extras $ 42.496.80								
Less Cash Received 34.238.22	8.258.58							
BOARD OF EDUCATION, NEWARK, N. J.								
Amount of Contract and extras $377.798.00								
Less Cash Received 68.100.00	309.698.00	426 201 27	426 201 27	426 201 27	426 201 27	426 201 27	426 201 27	426 201 27
SUB-CONTRACTORS' DEBIT BALANCES	595 50	868 70	868 70	868 70	868 70	868 70	868 70	187 35
ST. JOHN'S GUILD CONTRACT Expenditure and sub-contractors' amounts in excess of contract price representing LOSS to date	9 609 67	9 902 82	9 902 82	9 902 82	9 902 82	9 902 82	9 902 82	12 117 37
EQUIPMENT AND OFFICE FURNITURE	3 030 19	3 030 19	3 030 19	3 030 19	3 030 19	3 030 19	3 030 19	3 030 19
TOTAL ASSETS	450 714 38	450 506 54	450 506 54	450 506 54	444 329 07	444 329 07	445 329 07	446 862 27
DEFICIENCY AS PER BOOKS	41 295 37	37 356 46	37 356 46	37 356 46	40 533 93	38 533 93	37 533 93	39 533 93
	$ 492 009 75	$ 487 863 00	$ 487 863 00	$ 487 863 00	$ 484 863 00	$ 482 863 00	$ 482 863 00	$ 486 396 20
L I A B I L I T I E S								
LOANS	$	$	$	$	$	$	$	$
First National Bank, Town of Union, New Jersey	10 000 00	10 000 00	10 000 00	10 000 00	10 000 00	10 000 00	10 000 00	10 000 00
P. H. Downey	10 700 00	10 700 00	10 700 00	10 700 00	10 700 00	10 700 00	10 700 00	12 700 00
M. S. Paine	5 000 00	5 000 00	5 000 00	5 000 00	5 000 00	5 000 00	5 000 00	5 000 00
Merchants National Bank, Jersey City		2 000 00	2 000 00	2 000 00	2 000 00			
SUB-CONTRACTORS' BALANCES	153 381 27	153 181 27	153 181 27	153 181 27	149 181 27	149 181 27	149 181 27	151 249 47
H. J. BURCHELL CREDIT BALANCE ON CONTRACT	80 05	80 05	80 05	80 05	80 05	80 05	80 05	80 05
UNCOMPLETED CONTRACTS PER CONTRACT LEDGER - Paterson, New Jersey	75 926 69	73 289 79	73 289 79	73 289 79	73 289 79	73 289 79	73 289 79	72 754 79
Newark, New Jersey	227 921 74	224 611 89	224 611 89	224 611 89	224 611 89	224 611 89	224 611 89	224 611 89
CAPITAL STOCK	10 000 00	10 000 00	10 000 00	10 000 00	10 000 00	10 000 00	10 000 00	10 000 00
	$ 492 009 75	$ 487 863 00	$ 487 863 00	$ 487 863 00	$ 484 863 00	$ 482 863 00	$ 482 863 00	$ 486 396 20

Trustees Ex D 2
FOR IDENTIFICATION
DATE MAR 9 1 1912
A. R. ENSLEY, STEN'R

UNIVERSAL AUDIT COMPANY
SINGER BUILDING
NEW YORK

GLEN ENGINEERING CONSTRUCTION COMPANY

EXHIBIT "B"

STATEMENT OF ASSETS AND LIABILITIES AS PER BOOKS SEPTEMBER 15, 1910

A S S E T S

CASH ON HAND AS PER CASH BOOK			$ 2 815 90
ACCOUNTS RECEIVABLE			4 086 76
DUE ON CONTRACTS UNCOMPLETED:			
BOARD OF EDUCATION, PATERSON, NEW JERSEY			
Amount of Contract and Extras	385 511 94		
Less Cash Received	188 367 75	97 244 19	
ST. JOHN'S GUILD, NEW DORP, STATEN ISLAND			
Amount of Contract and Extras	42 496 80		
Less Cash Received	34 238 22	8 258 58	
BOARD OF EDUCATION, NEWARK, NEW JERSEY			
Amount of Contract and Extras	377 798 00		
Less Cash Received	68 100 00	309 698 00	415 200 77
SUB-CONTRACTORS' BALANCES			61 66
ST. JOHN'S GUILD CONTRACT			
Expenditure and sub-contractors' amounts in excess of contract price representing LOSS to date			11 892 04
EQUIPMENT AND OFFICE FURNITURE			3 030 19
			437 087 32
DEFICIENCY AS PER BOOKS			47 682 60
			$ 484 769 92

L I A B I L I T I E S

LOANS			
P. H. Downey		$ 13 300 00	$
M. S. Paine		5 000 00	
Merchants National Bank, Jersey City, New Jersey		5 000 00	
First National Bank, Town of Union, New Jersey		10 000 00	33 300 00
SUB-CONTRACTORS' BALANCES			155 749 27
H. J. BURCHELL CREDIT BALANCE ON CONTRACT			80 05
UNCOMPLETED CONTRACTS PER CONTRACT LEDGER			
Paterson, New Jersey		67 161 18	
Newark, New Jersey		318 579 42	285 740 60
CAPITAL STOCK			10 000 00
			$ 484 769 92

UNIVERSAL AUDIT COMPANY
SINGER BUILDING
NEW YORK

Trustee Ex DS
FOR IDENTIFICATION
DATE MAR 2 1 1912
A. M. BAILEY, STENR

GLEN ENGINEERING CONSTRUCTION COMPANY

EXHIBIT "C"

STATEMENT OF ASSETS AND LIABILITIES AS PER BOOKS NOVEMBER 30, 1910

A S S E T S

CASH ON HAND AS PER CASH BOOK			$ 2 259 05
ACCOUNTS RECEIVABLE			1 185 76
DUE ON CONTRACTS UNCOMPLETED:			
BOARD OF EDUCATION, PATERSON, NEW JERSEY			
Amount of Contract and Extras	285 511 94		
Less Cash Received	203 871 41	81 640 53	
ST. JOHN'S GUILD, NEW DORP, STATEN ISLAND			
Amount of Contract and Extras	42 496 80		
Less Cash Received	34 238 22	8 258 58	
BOARD OF EDUCATION, NEWARK, NEW JERSEY			
Amount of Contract and Extras	377 798 00		
Less Cash Received	120 900 00	256 898 00	346 797 11
SUB-CONTRACTORS' DEBIT BALANCES			216 79
ILLINOIS SURETY COMPANY BOND			1 000 00
ST. JOHNS GUILD CONTRACT			
Expenditure and sub-contractors' amounts in excess of contract price representing LOSS to date			13 258 16
EQUIPMENT AND OFFICE FURNITURE			3 030 19
			$ 367 747 06
DEFICIENCY AS PER BOOKS			26 904 90
			$ 394 651 96

L I A B I L I T I E S

LOANS			
P. H. Downey		21 200 00	
M. S. Paine		21 000 00	
Merchants National Bank, Jersey City, New Jersey		15 000 00	
First National Bank, Town of Union, New Jersey		10 000 00	67 200 00
SUB-CONTRACTORS' BALANCES			148 630 10
H. J. BURCHELL CREDIT BALANCE ON CONTRACT			80 05
UNCOMPLETED CONTRACTS PER CONTRACT LEDGER			
Paterson, New Jersey		20 670 38	
Newark, New Jersey		148 081 43	168 751 81
CAPITAL STOCK			10 000 00
			$ 394 651 96

Trustee Ex. 26
FOR IDENTIFICATION
DATE MAR 2 1 1912
A. B. BAILEY, STEN'R

UNIVERSAL AUDIT COMPANY
SINGER BUILDING
NEW YORK

Trustee, Exhibit D-8.

Jan. 8, 1912.

Lien Claims Filed Against Glen Engineering Construction Co.

Central C. & M. T. High School.

Materials.

Sept. 19, 1910	* James Crowell		$2,779.46
Oct. 18, "	* Builders' Material Supply Co.		12,652.98
Dec. 3, "	Commonwealth Roofing Co.		2,032.38
" 10, "	Builders' Material Sup. Co.	$4,780.57	
" " "	Duckworth-Crawford Co.	170.60	4,951.17
" 12, "	American Lumber Co.	3,991.08	
" " "	So. Amboy Terra Cotta Co.	7,250.00	
" " "	Concrete Steel Co.	4,759.32	
" " "	Bldg. Imp. Co.	2,875.62	
" " "	H. W. Palen's Sons	3,380.67	
" " "	American Woodstock Co.	331.57	22,588.26
" 14, "	National Fireproofing Co.		420.00
" 15, "	Rockaway Brick Co.	265.00	
" " "	Hull-Crippen & Co.	296.25	561.25
Jan. 19, 1911	Jachnig & Peoples, Inc.	145.54	
" " "	Mayer Cut Stone Co.	157.83	303.37
			$46,288.87
	* Auditor's books show liens "released"	$2,779.46	
		12,652.98	
	Deduct		15,432.44
			$30,856.43

Trustee Exhibit—D-8.

Labor.

	Dec.	27,	1910	Amzi L. DeGroat	$ 8.40	
	"	"	"	Alex. Bartholomew	26.00	
	"	"	"	Samuel Stopford	19.50	
	"	"	"	Dixey Fenner	10.32	
10	"	"	"	Thomas Williams	9.80	
	"	"	"	Frank Gillaland	20.15	
	"	"	"	Alfred Tucker	7.80	
	"	"	"	Lorence Reto	11.20	
	"	"	"	David Lawrence	7.00	
	"	"	"	John H. Sutton	18.20	
	"	"	"	# Peter MacKeith	27.00	
	"	"	"	Horace Middleton	19.50	
	"	"	"	Arthur Dickens	9.80	
	"	"	"	William Zabriskie	23.40	
20	"	"	"	William Adams	15.60	
	"	"	"	William A. McCurdy	19.50	
	"	"	"	Raffaele Liloio	7.00	
	"	"	"	Clarence Jones	8.40	
	"	"	"	Frank Feikel	14.63	
	"	"	"	William King	19.17	
	"	"	"	James Gray	26.00	
	"	"	"	Chas. Lardier	11.20	
	"	"	"	Chas. Cargo	7.00	
	"	"	"	Nicolo Lardier	11.20	
30	"	"	"	Luigi Delio	12.42	
	"	"	"	Sam Lardier	13.47	
	"	"	"	Peter J. Conway	36.00	$ 419.66

40

		Amount forward,		$ 419.66	
Dec.	29, 1910	Richard Salter	$11.20		
"	" "	Walter Woodfield	19.50		
"	" "	James Murdock	19.50		
"	" "	Alex. Trudean	18.20		
"	" "	# Hugo Hendrickson	26.00		
"	" "	John O'Connor	8.40		10
"	" "	Joseph Turner	4.20		
"	" "	Samuel Hunt	8.40		
"	" "	Bernard A. Ward	9.80		
"	" "	Richard Chapman	7.00		
"	" "	Patrick Burns	8.40		
"	" "	Robert Dolan	7.35	147.95	
Jan.	10, 1911	Dominick Milan	$ 7.00		
"	" "	Jims Suchio	21.75		
"	" "	Frank Resy	10.32		20
"	" "	Sam Ferrero	10.85		
"	" "	Alphonso Cittrullo	9.80		
"	" "	Frank DeLesio	7.43		
"	" "	Nicoli Casale	7.00		
"	" "	John Freda	11.20		
"	" "	Gerry Pisciotta	19.50		
"	" "	Antonio Liloio	11.02		
"	" "	Michael Ferrerro	7.00		
"	" "	Tom Palonta	12.60		
"	" "	Gerardo Sinchio	12.77		30
"	" "	Veto Racioppi	11.02		
"	" "	Louis DeRogatis	7.52		
"	" "	Joe Yacangelo	8.40		
"	" "	Alphonso Ianuzzi	11.02		
"	" "	Angelo Rizzolo	11.72		
"	" "	Joe Lounzo	11.55		
"	" "	James Stelleto	10.15		
"	" "	James Paresi	11.90		
"	" "	Robert Gualtney	11.20		
"	" "	Jim Garbardi	11.20	253.92	40

Trustee Exhibit—D-8.

Feb. 11, 1911	Angelo Russoman	$ 8.75	
" " "	#Gabriel Longmuir	26.00	
" " "	Patrick Flanagan	11.20	
" " "	Frank Sammese	9.62	
" " "	David Jacocks	6.65	
" " "	Gen DiVeto	11.55	73.77
March 7, 1911	Thomas Hill	$16.90	
" " "	John Folliard	15.60	
" " "	Royal Davis	7.70	
" " "	Harold Lane	10.50	
" " "	Joseph McGlone	10.50	
" " "	" "	13.00	
" " "	James Delaney	7.00	
" " "	Louis Alsen	19.82	
" " "	Benj. J. Sharkey	20.15	
" " "	John McCloskey	19.50	
" " "	Atkin Gaines	12.60	
" " "	Lewis Jones	11.55	
" " "	Patrick Quinn	7.00	171.82
	Amount forward		$1,067.12

Trustee Exhibit—D-8.

	Amount forward		$1,067.12
Aug. 1, 1911	Peter Ownes	$ 7.00	
" " "	John Tucker	8.40	
" " "	Raffaele Cicorelli	8.90	
" " "	William Gaines	7.00	
" " "	Thomas D. Phillips	24.35	
" " "	John Rupp	19.82	
" " "	Charles Zoppi	9.80	
" " "	Angelo Casali	2.80	
" " "	William Thomas	7.00	
" " "	William Edwards	5.60	
" " "	John J. Colton	27.00	
" " "	Frank Giaratano	9.80	
" " "	Joe Russo	7.00	
" " "	Toni Fillippo	4.35	
" " "	Thomas Moultrie	9.80	
" " "	Angelo Vezza	10.30	
" " "	Joseph Tracey	12.60	
" " "	Sebastian Russo	9.80	
" " "	Alfonso Dury	10.30	
" " "	James McCarson	20.15	
" " "	Wm. H. Nevard	44.25	
" " "	George Gibbons	18.20	
" " "	Fenton Smith	9.80	
" " "	John J. O'Connor	40.10	
" " "	Henry Gambla	9.80	343.92
			$1,411.04

Trustee Exhibit—D-8.

Labor Liens Assigned to Fred Kilgus.

March 29, 1911	J. Frederick Jay	$26.00	
" " "	Peter Gordon	28.00	
" " "	Thos. Eagleson	13.75	
" " "	Chas. Dougherty	12.50	
" " "	Edw. Robertson	44.54	
" " "	Jas. R. Miller	22.00	
" " "	Ludwig Skidmore	22.00	
" " "	Frank J. Fibich	26.00	
" " "	John Obermeyer	28.00	
" " "	William Wildes	22.00	
" " "	William Noble	26.00	
" " "	Edward M. Joyce	22.00	
" " "	Jas. Robertson	28.00	
" " "	Arthur W. Butler	26.00	$346.79

Assigned to Fred. Kilgus
but Included in Foregoing List.

Dec. 27, 1910	Peter MacKeith	$27.00	
" 29, "	Hugo Hendrickson	26.00	
Feb. 11, 1911	Gabriel Longmuir	26.00	$79.00

Water.

Jan. 10, 1911	City Water Department	$202.51

Insurance, etc., paid and to be paid by Board
for Glen Engineering Construction Co. Com. Min. page 583
13
202

Trustee Exhibit—D-8.

	Insurance			
Feb. 1, 1911	D. R. Faulkner	$198.80		
Sept. 1, 1911	Arthur Tillmes	122.49		
Feb. 1, 1912	D. R. Faulkner	79.52	$400.81	
	Watchmen			
Day	James Nolan	$108.00		10
Night	James Sierihio	209.56	317.56	
	Supplies			
	Kerosene oil		3.35	
			$721.72	
	SUMMARY.			
Materials, etc.		$30.856.43		
Labor		1,411.04		20
		$32,267.47		
Assigned to Fred. Kilgus		346.79		
		$32,614.26		
Water Department		202.51		
		$32,816.77	$32,816.77	
Paid by Board			721.72	
			$33,538.49	30

40

Trustee's Exhibit D-5.

FIRST NATIONAL BANK
Town of Union,
WEEHAWKEN, P. O., N. J.
in account with
Glen Engineering and Construction Company

FIRST NATIONAL BANK, In acc't with
Glen Engineering & Cons. Co.
Town of Union,
Weehawken, P. O., N. J.

Feby	17	H.	√3000 +
	25	H.	√6690 +—
Mch	2	H.	√2171 +25
	17	J.	√√1582 50+—
Cr. in exchange (1.40)			
		INT. FEB. 26 1910	1 40
		TOTAL CREDITS	13 445 15
		46 Cancelled Vouchers	13 204 77
1910		BALANCE	240 38
Mar	22	Balance	240 38
	22	R	√√6000 √+
Apr	11	H.	√√22308 √+
	15	R	√√4140 √+
	20	R	√√10000 √+
	29	R	√√2184 50+
	2	Def.	√√2231 25√+
		TOTAL CREDITS	47104 13
		85 Cancelled Vouchers	43475 37
1910		BALANCE	3628 76

Trustee's Exhibit D-5.

April	29	Balance	3628 76√
May	6	J.	√+5000 √
	11	H.	√+8595 √
	14	H.	√+14662 √
	16	R.	√+18300 √
		TOTAL CREDITS	50185 76
		34 Cancelled Vouchers	12423 88
1910		BALANCE	37761 88
May	16	Balance	37761 88
June	3	R	√+2082 50+
May	28	Dep.	√+50 √
	2	Dep.	√+50 √
June	3	Dep.	√+30 √
		TOTAL CREDITS	39974 38
		66 Cancelled Vouchers	36816 57
		BALANCE	3157 81
1910			
June	8	Balance	3157 81
	11	Dep.	√8045 √+
July	6	R	√22400 √+
June	16	Dep.	√14862 25√+
	22	Dep.	√3 75√+
	30	Dep.	√3000 √+
July	1	Dep.	√4000 √+
		TOTAL CREDITS	55468 81
		77 Cancelled Vouchers	33312 18
		1 Unpaid Cert 1670.77	
1910		BALANCE	22156 63

Trustee's Exhibit D-5.

July	7	Balance	22156	63
	15	H.	√√7940	√+
Aug	22	H.	√√10200	55√
	25	H.	√200	—√
July	8	D.	√√11327	78+
"	29	D.	√√5018	81√+
Aug	1	D	√1	82√+
	5	D	√4000	√+
	9	D.	√6400	√+
1910				
Aug	12	D.	√+2000	√—
	19	D.	√+5000	√—
	26	D.	√2000	√
	29	D	200	√
		TOTAL CREDITS	76445	59
	128	Cancelled Vouchers	76284	92
1910		BALANCE	160	67
Aug	31	Balance	160	67
		TOTAL CREDITS	160	67
	4	Cancelled Vouchers	83	45
Sept	30	BALANCE	77	22
		Cancelled Vouchers	10	
Nov	29	BALANCE	67	22

F. M. S. Co.—D-20.

THE MERCHANTS NATIONAL BANK,
JERSEY CITY, N. J.

Dr. *In account with* Cr.

Glen Engineering Construction Co.

Aug.	25	C.			√√3000	√
			2,000			
—	26	Dis		2.	√√1998	√
Sep.	1	S.			√√1000	√
Sept	1	Disc			√√5000	√
SEP	19, 1910		D		√√10000	√
Sept	9	R.			√√11000	50
	15	R.			√√2301	28√
"	21	R			√√100	
	29	R			√√600	
		Disc.			√√5000	
	30	R			√√6000	
					45996	78

		Total Credits	45999	78
	R	Less 53 Vouchers Ret'd per List	42281	91
		Oct 4—BALANCE	3717	87
OCT	14 1910	D	√4554	√10
Oct	7 Disc.		√2000	√
	20 R		26986	50
Nov	2 Disc.		√1000	√
"	3 R		√75	√
"	4 R		√4500	√
"	9 R		√500	√
"	11 Disc		4750	√
"	16 R		25787	√10
			73870	57
		Total Credits	73870	57

	Less 57 Vouchers		
	R Ret'd per List	62949	47
Nov 19—	BALANCE	10921	10
" 23 Disc		5000	
	Total Credits	15921	10
	R Less 25 Vouchers		
	Ret'd per List	15878	48
Dec 2—	BALANCE	42	62

Trustee's Exhibit D-9.

Telephone 192 Office of

JOHN AGNEW CO.,

Dealer in

MASON'S MATERIALS AND BLUE STONE,

PITTSTON AND LEHIGH COAL.

YARDS

Cor. Prince and Slater.
" Spruce and Slater.
" Ann and Tyler.

Paterson, N. J., July 10th, 1909.

The Glen Engineering and Construction Co.,

Gentlemen:

We do hereby agree to furnish to you in the erection of the New High School the following Material at the following prices, three and one half million Birch, at seven 75/100 Dollars per thousand $7.75 delivered on the ground, Atlas Portland Cement one 18/100 Dollars $1.18, per Barrel in Bags, four to the Barrel, Bags to be charged at ten Cents apiece in addition to above quotation and credited at same price when returned.

Resp yours

JOHN AGNEW CO.

Trustee's Exhibit D-10.

GLEN ENGINEERING CONSTRUCTION COMPANY.
156 Fifth Avenue
New York, July 23, 1909.

John Agnew Company,
Paterson,
N. J.

Gentlemen:

We are just in receipt of a letter from Mr. Fanning, Architect, copy of which is herewith enclosed which is self explanatory, in regard to the rough brick Paterson job.

Will you kindly see to it that all brick delivered on this job meets with the Architect's requirements.

We acknowledge your proposition of $1.18 per barrel for Atlas Portland Cement, delivered on the job in amount sufficient for the life of the job.

Your quotation of $7.75 for Mountain View brick in accordance with above requirements to the amount of one million and a half, is herewith accepted.

Very truly yours

Glen Engineering Construction Company
Smith Alford,
General Manager.

SA/MC

Exhibit F. M. L., D-22—(Summary).

Minutes of first meeting of incorporators of Glen Engineering-Construction Company, held December 1905, at 35 Nassau Street, New York City. Present Smith Alford, Frank Secor Dickerson, Patrick Henry Downey, Martin S. Paine, Frank Dickerson.

Mr. Alford elected chairman and Frank Dickerson Secretary. Secretary reported certificate of incorporation filed with Secretary of State of New York December 15, 1905. Certificate was presented and ordered filed. Certificate of incorporation shows purposes for which Company was formed are; the erection, repairing, raising and improvement of buildings, the buildings of stairways, fences, machinery and all kinds of construction work made of metal or other material, the building or repairing of bridges, the making of street improvements above and beneath the surface and the business of general contracting, the buying selling, renting and exchange of real property improved and unimproved, the building, construction or alteration of houses thereon and the management and development of real property generally. The amount of capital stock is $10,000.00 divided into 100 shares of the par value of $100 each, the Company begins business with capital of $10,000.00, its principal business is located in the City of New York, State of New York, its duration is perpetual. The number of directors is to be five. The names and address of the directors for the first year are:

Name	Post Office Address.
Patrick Henry Downey,	79 West 113th Street, New York City.

Smith Alford, Flushing, N. Y.
Frank Secor Dickerson, 181 Broadway, New York City.
Martin S. Paine, 111 Broadway, New York City
Frank Dickerson, 24 Spring Street, New York City.

Patrick Henry Downey subscribes for 37 shares, Smith Alford 37 shares, Frank Secor Dickerson 24 shares, Martin S. Paine 1 share, and Frank Dickerson 1 share, of said Company's stock. Certificate is dated December 1st, 1905, acknowledged same day. By laws were adopted regulating the affairs of the Company.

Minutes of the first meeting of the Board of Directors of the Glen Engineering-Construction Company was held at 35 Nassau Street, New York City, December 20th, 1905 2 P. M. Directors present; Smith Alford, Patrick Henry Downey, Frank Secor Dickerson. Mr. Smith appointed chairman, Mr. Dickerson Secretary. Minutes of incorporators read and approved. Officers elected as follows: Smith Alford President, Patrick Henry Downey, Treasurer, Frank Secor Dickerson, Secretary and Vice President.

THE LIBRARY
OF