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IN CHANCERY OF NEW JERSEY.

Between
McGraw Hill Publishing
Company, Inc.,
Complainant,
and
Sloan & Chace, Inc.,
Defendant.

Notice of Appeal.

Alice Anthony Morris and Robert Buermann, Executors of William McK. Morris, deceased, hereby appeal from a final decree made in this court in the above entitled cause, by the Chancellor on the advice of Vice Chancellor Alonzo Church, and from the whole and every part thereof, to the New Jersey Court of Errors and Appeals in the last resort in all causes.

PALMER & POWELL,
Sol'rs. of Appellants.

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

V. CLAUDE PALMER,
Of Counsel with Appellants.

Due and legal service of within notice is hereby acknowledged this fifth day of March, 1929.

MEISTERMAN & KATCHEN,
Sol'rs, for Receiver.

NEW JERSEY COURT OF ERRORS AND APPEALS

Between McGraw Hill Publishing Company, Inc., Complainant, and Sloan & Chace, Inc., Defendant.	On Appeal from Court of Chancery. Petition of Appeal.

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

The petition of Alice Anthony Morris and Robert Buermann, Executors under the last will and testament of William McK. Morris, deceased, the appellants in the above entitled cause, respectfully show that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 23rd day of January, 1929, wherein your petitioners were appellants, and the Receiver of Sloan & Chace, Inc., was respondent, in the following respects:

1. That said decree adjudges that the appellants, Alice Anthony Morris and Robert Buermann, Executors, were not entitled to be paid certain wage claims assigned to them by certain employes of Sloan & Chace, Inc., as preferred claims in the Receivership proceedings, wherein the said Sloan & Chace, Inc., was the defendant, to the amount of Six Thousand One Hundred Seventy-six Dollars and Seventy-eight Cents ($6,176.78).

2. That said decree adjudges that the said wage claims so assigned to the said Alice Anthony Morris and Robert Buermann, Executors as aforesaid, by

employes of Sloan & Chace, Inc., were not preferred claims within the meaning of Section 83 of an Act entitled, "An Act Concerning Corporations," in that the same were not assigned to the claimants within two months next preceding the decree of insolvency entered against said Sloan & Chace, Inc.

3. That said decree adjudges and confirms the action of the Receiver of Sloan & Chace, Inc., in his refusal to allow said wage claims as preferred claims against the assets of said Sloan & Chace, Inc.

Your petitioners humbly appeal from all of said decree of the Chancellor, which decrees as aforesaid upon the grounds that the same is erroneous for the following reasons:

(a) That said wage claims so assigned to your petitioners are preferred claims within the meaning of Section 83 of an Act entitled, "An Act Concerning Corporations," which provides that in case of insolvency, the wages of laborers and workmen in the regular employ of such corporation shall be a first and prior lien upon the assets of said corporation for the amount of wages due for services done and performed or rendered within two months next preceding the date when proceedings in insolvency were actually instituted and begun against such insolvent corporation.

(b) That the wage claims assigned to your petitioners were for services done and performed or rendered for the said Sloan & Chace, Inc., within two months next preceding the date when proceedings in insolvency were actually instituted and begun against such insolvent corporation.

(c) That the wage claims assigned to your petitioners were actually first assigned after the said Sloan & Chace, Inc., had become and was admitted by its officers to be insolvent.

(d) That the assignors of said wage claims were actually in the employ of the said Sloan & Chace, Inc., at the time of the assignment of the said claims.

(e) That the wage claims assigned to your petitioners were actually first assigned after a bill for the appointment of a Receiver for the said Sloan & Chace, Inc., alleging insolvency, together with supporting proofs, had been formally presented to the Chancellor, on the allegations in which bill and supporting proofs, the Chancellor subsequently adjudged the said company to be insolvent.

(f) That the said decree adjudges that insolvency proceedings are not actually instituted and begun against an insolvent corporation until the date of the decree of the Court of Chancery decreeing such corporation to be insolvent, whereas, in fact, the true meaning of the statute in such case made and provided, is that a corporation is insolvent when proceedings are actually instituted and begun against said corporation, upon which proceedings the said corporation is afterwards adjudged to have been insolvent.

(g) That the Court of Chancery was in error in adjudging that in this particular case the corporation was not insolvent, within the meaning of the statute in such case made and provided, until the date of the decree adjudging it to be insolvent, because in truth and in fact all the allegations and proofs of the insolvency upon which said finding was based, related to a prior date, when the bill and supporting proofs were presented to the Chancellor as of which date the said decree necessarily speaks.

(h) That the Court of Chancery was in error in adjudicating that in this particular case, the date of the presentation to, and lodgment with, the Chancellor, of the bill and supporting proofs upon which the decree of insolvency was subsequently entered in

this case, was not the date upon which said proceedings were instituted and begun within the true meaning of the statute in such case made and provided.

Your petitioners therefore pray that the said decree of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden. And that your petitioners may have such relief in the premises as to this honorable Court shall seem fit.

PALMER & POWELL,
Solicitors for Petitioners.

Service of copy of within petition of appeal is hereby acknowledged this fifth day of March, 1929.

MEISTERMAN & KATCHEN,
Sol'rs. for Receiver.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between McGraw Hill Publishing Company, a corporation, Complainant, and Sloan & Chace, Inc., a corporation, Defendant.	On Appeal from Court of Chancery. Answer to Petition of Appeal.

The answer of Oliver W. Hopkinson, receiver of Sloan & Chace, Inc., the above-named respondent to the petition of appeal of Alice Anthony Morris and Robert Buermann, Executors under the Last Will and Testament of William McK. Morris, deceased, the above-named appellant.

This respondent not admitting the truth of any of the matters in the said petition of appeal contained for answer thereto nevertheless admits that a decree was, on January 23, 1929, made and entered in the Court of Chancery of New Jersey in the above-entitled cause for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this respondent begs leave to refer thereto when the same shall be produced.

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 taxed in favor of this respondent.

MEISTERMAN & KATCHEN,
Solicitors for and of Counsel with Respondent.

IN CHANCERY OF NEW JERSEY.

TO THE HONORABLE EDWIN ROBERT WALKER, CHANCELLOR OF THE STATE OF NEW JERSEY:

Complainant, McGraw Hill Publishing Company, Inc., a corporation organized under the laws of the State of New York, having its principal place of business in the City, County and State of New York, a creditor of the defendant, Sloan & Chace, Inc., a corporation of the State of New Jersey, for and on behalf of itself and all other creditors of said corporation and the stockholders thereof who shall come in and contribute to the expense of this suit, shows that:

1. Complainant is a creditor of the said Sloan & Chace, Inc., to the extent of $2,010.28 for advertising services rendered to the defendant at the defendant's request by complainant for advertising in the American Machinist, a publication owned and operated by complainant. The said advertising services having been rendered during the period beginning June 24th, 1926, and ending July 28th, 1927, to the value of $1,861.40 with interest accrued thereon of $148.81, making the total sum of $2,010.28, which sum is now long past due and unpaid.

2. Said Sloan & Chace, Inc., the defendant in this suit, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having been incorporated September 2, 1925, with an authorized capital stock of $300,000.00; said defendant had been in existence for a longer period prior to said date of September 2, 1925, but the said date is that of its last re-organization and re-incorporation; said corporation was formed for the pur-

pose of engaging in the business of manufacturing and selling dies, jigs and precision machinery and similar products. That defendant, Sloan & Chace, Inc., maintains its office and manufacturing plant at No. 351 Sixth Avenue, corner North 13th Street, Newark, New Jersey, which address is also its registered office.

3. That the President of the said defendant company is William F. Smith; the Vice President and Treasurer, one Wechsler, and the Secretary, Harry B. Annin.

4. That on December 10th, 1927, complainant by its agent, Frederick H. Samuels, interviewed Harry B. Annin, Secretary of defendant company, and made demand for payment of complainant's bill. The said Harry B. Annin admitted to complainant's agent that the said bill was long past due and owing and was not in dispute, but he stated that the defendant company was short of money and unable to meet its bills, and he referred complainant's agent to Mr. Wechsler, the Vice President and Treasurer of defendant company, for further information. Said Wechsler then stated to complainant's agent that the defendant company could not pay any of its bills at the present time; that they would not decide until at least a week what disposition they would then make of all their creditors' bills; that the reason for the defendant's inability to pay its bills was that the accounts due it from its debtors were long past due and owing and so difficult of collection that no funds were becoming available for the company with which to meet its current obligations.

5. That there are other creditors of defendant company besides complainant who are pressing for payment of their claims; that on December 5th, 1927,

suit was started in the First District Court of Newark, New Jersey, by a creditor of defendant company whose suit is still pending and open of record. Complainant fears unless a receiver is appointed to take possession of defendant's property and to administer same as a trust fund for the benefit of all creditors and stockholders, that judgment may be obtained by the said creditor whose suit is pending or other creditors who may institute suit on their claims and execution sales held thereunder to the detriment of complainant.

6. COMPLAINANT CHARGES THAT THE SAID DEFENDANT CORPORATION IS INSOLVENT, WITHIN THE MEANING OF THE STATUTES OF THIS STATE IN SUCH CASE MADE AND PROVIDED; that the business of defendant corporation has been and is being conducted at a great loss and prejudicial to the interest of defendant's creditors and stockholders; that the same is not being and has not been conducted with safety to the public and its creditors and to the advantage of its stockholders; that the said defendant corporation is unable to pay its debts now long past due and payable, nor is there any probability or likelihood of its being or becoming able to pay same within a reasonable time in the near future; that the said defendant corporation is unable by realizing upon its assets, even at a great sacrifice, or by securing of further loans to meet current obligations which have already matured and which will mature in the near future; and that it will be impossible for the said defendant corporation in the near future to raise by loans through the operation of its said business or otherwise, sufficient funds to enable it to prosecute its business with safety to the public and its creditors and advantage to its stockholders.

7. That the assets of the said defendant corporation are subject to judgments, executions, and suits that may be brought against the said defendant corporation by its creditors; that unless the assets of the said defendant corporation are properly marshalled by a receiver or receivers to be appointed for the said company, said corporation will be subject to vexatious and costly litigation; that in the event of forced sales its property will bring very much less than its fair and reasonable value, all of which will be a great detriment to complainant and the other creditors and stockholders of the defendant corporation; and complainant believes that unless this Court, in view of the facts aforesaid, will deal with its property as a single trust fund, its property will be dissipated to such an extent that its stockholders will realize little or nothing from its holdings and in all probability the creditors will be unable to collect their claims or any substantial part thereof against said defendant, and that the intervention of this Court is necessary for the protection of the said stockholders and creditors of the said Company.

Complainant is without adequate remedy at law and therefore prays:

1. That the said defendant, Sloan & Chace, Inc., a corporation, may answer this bill of complaint without oath and each statement therein made.

2. That the said defendant corporation MAY BE DECREED TO BE INSOLVENT AND THAT ITS BUSINESS HAS BEEN AND IS BEING CONDUCTED AT A GREAT LOSS AND GREATLY PREJUDICIAL TO THE INTEREST OF ITS STOCKHOLDERS AND CREDITORS and that same cannot be conducted with safety to the public and advantage to the stockholders.

3. That a Receiver be appointed for said defendant corporation, according to the Statutes of this State in such case made and provided.

4. That an injunction issue from this Honorable Court, restraining the said defendant corporation and its officers, servants and agents from exercising any of its rights, privileges or franchises, granted by the State of New Jersey to said corporation and from paying out, selling, assigning, or transferring any of its assets, money, funds, lands and tenements or effects except to a Receiver appointed by this Court, until the Court shall otherwise order.

5. That the assets of the said defendant corporation and the rights of complainant and the other creditors and stockholders be ascertained.

6. That the Court fully administer the funds being the entire assets of the defendant corporation and for the purpose marshal and ascertain all of its assets, liens and priorities, if any, existing on all parts thereof and enforce the lawful liens and rights of all the creditors and stockholders of the said defendant corporation as they be finally ascertained.

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

8. That the complainant may have such other and further relief as the nature of the case may require.

MEISTERMAN & KATCHEN,
Solicitors for Complainant.
IRA J. KATCHEN,
Of Counsel.

IN CHANCERY OF NEW JERSEY.

Between
McGRAW HILL PUBLISHING COMPANY, a corporation,
Complainant,
and
SLOAN & CHACE, INC., a corporation,
Defendant.

Affidavit.

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

FREDERICK H. SAMUELS, being duly sworn according to law, on his oath deposes and says:

1. That complainant is a creditor of the said Sloan & Chace, Inc., to the extent of $2,010.28 for advertising services rendered to the defendant at the defendant's request by complainant for advertising in the American Machinst, a publication owned and operated by complainant, the said advertising services having been rendered during the period beginning June 24th, 1926, and ending July 28th, 1927, to the value of $1,861.40 with interest accrued thereon of $148.81, making the total sum of $2,010.28, which sum is now long past due and unpaid.

2. That said Sloan & Chace, Inc., the defendant in this suit is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having been incorporated September 2, 1925, with an authorized capital stock of $300,000,00; said defendant has been in existence for a longer period prior to said date of September 2, 1925, but the said date is that of its last re-organization and re-incor-

poration; said corporation was formed for the purpose of engaging in the business of manufacturing and selling dies, jigs and precision machinery and similar products. That defendant, Sloan & Chace, Inc., maintains its office and manufacturing plant at No. 351 Sixth Avenue, corner North 13th Street, Newark, New Jersey, which address is also its registered office.

3. That the President of the said defendant company is William F. Smith; the Vice President and Treasurer, one Wechsler, and the Secretary, Harry B. Annin.

4. That on December 10th, 1927, I interviewed Harry B. Annin, Secretary of defendant company, and made demand for payment of complainant's bill. The said Harry B. Annin admitted to me that the said bill was long past due and owing and was not in dispute, but he stated that the defendant company was short of money and unable to meet its bills, and he referred me to Mr. Wechsler, the Vice President and Treasurer of defendant company, for further information. Said Wechsler then stated to me that the defendant company could not pay any of its bills at the present time; that they could not decide until at least a week what disposition they would then make of all their creditors' bills; that the reason for the defendant's inability to pay its bills was that the accounts due it from its debtors were long past due and owing and so difficult of collection that no funds were becoming available for the company with which to meet its current obligations.

5. That there are other creditors of defendant company besides complainant who are pressing for payment of their claims; that on December 5, 1927,

suit was started in the First District Court of Newark, New Jersey, by a creditor of defendant company whose suit is still pending and open of record. Complainant fears that unless a receiver is appointed to take possession of defendant's property and to administer same as a trust fund for the benefit of all creditors and stockholders, that judgment may be obtained by the said creditor whose suit is pending or other creditors who may institute suit on their claims and execution sales held thereunder to the detriment of complainant.

COMPLAINANT CHARGES THAT THE SAID DEFENDANT CORPORATION IS INSOLVENT WITHIN THE MEANING OF THE STATUTES OF THIS STATE IN SUCH CASE MADE AND PROVIDED; THAT THE BUSINESS OF DEFENDANT CORPORATION HAS BEEN AND IS BEING CONDUCTED AT A GREAT LOSS AND PREJUDICIAL TO THE INTEREST OF DEFENDANT'S CREDITORS AND STOCKHOLDERS; that the same is not being and has not been conducted with safety to the public and its creditors and to the advantage of its stockholders; that the said defendant corporation is unable to pay its debts now long past due and payable, nor is there any probability or likelihood of its being or becoming able to pay same within a reasonable time in the near future; that the said defendant corporation is unable by realizing upon its assets, even at a great sacrifice, or by securing of further loans to meet current obligations which have already matured and which will mature in the near future; and that it will be impossible for the said defendant corporation in the near future to raise by loans through the operation of its said business or otherwise, sufficient funds to enable it to prosecute its business with safety to the public and its creditors and advantage to its stockholders.

That the assets of the said defendant corporation are subject to judgments, executions, and suits that may be brought against the said defendant corporation by its creditors; that unless the assets of the said defendant corporation are properly marshalled by a receiver or receivers to be appointed for the said company, said corporation will be subject to vexatious and costly litigation; that in the event of forced sales, its property will bring very much less than its fair and reasonable value, all of which will be a great detriment to complainant and the other stockholders and creditors of the defendant corporation; and complainant believes that unless this Court, in view of the facts aforesaid, will deal with its property as a single trust fund, its property will be dissipated to such an extent that its stockholders will realize little or nothing from its holdings and in all probability the creditors will be unable to collect their claims or any substantial part thereof against said defendant, and that the intervention of this court is necessary for the protection of said stockholders and creditors of the said company.

Sworn and subscribed to
before me this 10th day
of December, 1927.
Marie Sullivan,
A Notary Public of New Jersey.

FREDERICK H. SAMUELS.

IN CHANCERY OF NEW JERSEY.

Between McGraw Hill Publishing Company, a corporation, Complainant, and Sloan & Chace, Inc., a corporation, Defendant.	On Bill, &c. Order Appointing Custodial Receiver and Order to Show Cause.

This matter being opened to the Court by Meisterman & Katchen, Esquires, of counsel with complainant, whereupon and UPON READING AND FILING AND CONSIDERING THE BILL OF COMPLAINT AND THE AFFIDAVIT ANNEXED THERETO AND THE CONSENT OF THE DEFENDANT THERETO and the Court being satisfied of the sufficiency of the application made in this cause and sufficient reason having been shown requiring the immediate appointment of a custodial receiver of the above-named defendant company, pending the hearing on the application for the appointment of a statutory receiver herein, it is on this 9th day of January, 1928,

ORDERED that OLIVER W. HOPKINSON, ESQ., be and he is hereby appointed custodial receiver of the above-named defendant corporation and is hereby required to furnish a bond in the penal sum of $10,000.00 with a good and sufficient surety for the faithful performance of his duties, to be approved as to form and sufficiency by Richard Stockton, Esq., a Special Master of this Court; and it is further

ORDERED that the defendant, Sloan & Chace, Inc., a corporation, show cause before the chancellor at the Chancery Chambers, 1060 Broad Street, Newark, New Jersey, on the 17th day of January, 1928, at ten o'clock in the forenoon why,

(a) An injunction should not issue pursuant to the prayer of the bill.

(b) A receiver should not be appointed to take charge of all the property and estate, books and papers of said defendant corporation, pursuant to the Statute in such case made and provided.

(c) The complainant should not be permitted to inspect all the property and estate, books and papers of the said defendant corporation.

(d) A Master of this Court should not be appointed as Master to take testimony and report, with full power to investigate the affairs and transactions, debts, obligations, contracts and liabilities of the defendant company and claims against it and also the acts and conduct of any of the company's officers, agents, creditors or stockholders and the obligations and liabilities of any officer, agent, creditor, alleged debtor or stockholder of any nature and kind whatsoever, and with all the powers provided under Chapter 207 of the Laws of 1919 of the State of New Jersey, known as a Supplement to an Act entitled "An Act Concerning Corporations, Revision of 1896, approved April 21, 1896;" and it is further

ORDERED that until the further order of this Court, the said defendant corporation, its officers, agents and employees be and they are hereby restrained from selling, assigning, transferring, mortgaging, hypothecating or in any other manner disposing of any of the assets of the defendant corporation, except in the usual course of business of which a true and accurate account shall be kept ready to account to this Court; and it is further

ORDERED that true copies of any answering affidavits to be filed or read by defendant at the hearing to held on the return day of this order, shall be served upon the solicitor for complainant at least two days prior to said hearing; and it is further

ORDERED that a copy of this order, together with a copy of said Bill of Complaint and Affidavit thereto annexed (which copies may be certified by the solicitor for complainant) be served within three days from the date hereof, upon the said defendant corporation.

Application to modify or vacate this order may be made on one day's notice.

Respectfully Advised,
ALONZO CHURCH,
V. C.

E. R. WALKER,
C.

IN CHANCERY OF NEW JERSEY.

Between McGRAW HILL PUBLISHING COMPANY, INC., a corporation, Complainant. and SLOAN & CHACE, INC., a corporation, Defendant.	On Bill, &c. Order Appointing Statutory Receiver.

This cause coming on to be heard pursuant to an order dated January 9th, 1928, in the presence of Ira J. Katchen, Esq., of Meisterman & Katchen, solicitors of complainant, and Oliver W. Hopkinson, custodial receiver, Carl Feick, Esq., of Messrs. Pitney, Hardin & Skinner, solicitors of defendant, Sloan & Chace, Inc., and several creditors and stockholders who appeared pro se; and it appearing by proof of mailing filed herein, that notice of this proceeding was duly mailed to all creditors and stockholders of said defendant corporation within the time as required by the order of this Court; and the said matter having been continued from time to time to this date, by orders of continuance duly filed herein; and it appearing to the Court that the complainant is entitled to the relief sought and prayed for by it in its bill of complaint, AND THE COURT HAVING CONSIDERED THE PROOF OF COMPLAINANT, and sufficient cause being shown for the making of this order;

It is on this 21st day of February, 1928, on motion of Meisterman & Katchen, solicitors for and of counsel with the complainant, ORDERED, ADJUDGED and DECREED,

1. That defendant company, Sloan & Chace, Inc., a corporation, HAS NOT SUFFICIENT CASH to carry on its business and cannot meet its obligations as they mature, and that the business of defendant corporation has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors and stockholders so that its business cannot be conducted with safety to the public and advantage to its stockholders.

(2) That it is necessary for the protection and preservation of the respective rights and equities of complainant and of all creditors and stockholders of defendant, that a receiver or receivers of defendant's property be forthwith appointed with all the powers incident thereto. That the order to show cause dated January 9th, 1928, be, and it is hereby made absolute, and that Oliver W. Hopkinson be and he hereby is appointed receiver of all property of the defendant, real, personal and mixed, of whatsoever kind and description and wheresoever situate, including the business now conducted by it, and of all the lands, buildings, premises and properties owned, leased or operated by it, and all furniture, fixtures, machinery, equipment, materials and supplies, books of accounts, records, papers and accounts, cash in bank, on deposit and on hand, moneys, debts, things in action, credits, stocks, bonds, securities, leases, contracts, muniments of title, bills and accounts receivable, rents, issues, profits and income accruing and to accrue as well as all interest, easements, privileges and all assets of every kind.

3. That the said receiver is hereby vested with all the powers incident to those of a statutory receiver and he is directed to perform all duties imposed upon him by the statute of this State in such case made and provided.

4. That the bond heretofore filed by the custodial receiver be continued and be deemed effective and binding upon the receiver herein appointed.

5. That the said receiver shall take possession of all the property and assets of the said defendant and act for the same as this Court shall hereafter direct, and that the said defendant, its officers, directors and agents shall forthwith assign, transfer, convey and deliver to the said receiver all of the property and assets of the said defendant, both real and personal wherever situated and of whatsoever it may consist.

6. That the said defendant, its officers and agents, and all persons claiming under it, shall be and they hereby are restrained from interfering with said receiver taking possession of and managing said property and that all persons whomsoever and especially the creditors of the said defendant shall be and they hereby are restrained from bringing any action or preceeding at law or in equity either against the defendant or against the receiver without leave of the Court and from taking any further proceeding in any action or proceeding heretofore commenced, and any party in interest may apply for further directions.

Respectfully advised,

ALONZO CHURCH,
V. C.

E. R. WALKER,
C.

IN CHANCERY OF NEW JERSEY.

Between McGraw & Hill Pub. Co., Inc., Complainant, and Sloan & Chace, Inc., Defendant.	Copy of docket-entries, 66-646. Meisterman & Katchen, Sol'rs.

1928—Jan. 9, Bill: 2 Petitions: Affdt.: Order Show Cause: Order to Operate: Order to Retain Counsel: 19, Affdt. Service; Oath: Bond: 17, Order Continuance: 24, Order Continuance: Feb. 3, Affdt. Mailing, 15, Order Continuance: 21, Petitions: Order to Retain Counsel, Order to Continue: Order limiting Creditors: Order Apptg. Rec'r. Mar. 6, Order to Operate: Mar. 13, Petition: Order to Institute: Jan. 31, Order Continuance: Mar. 21, Order to Operate: 24, Affdt. Pub.: Order barring Creditors: Affdts. Mailing: Apr. 13, Petition: Order Show Cause: 24, Petition: Order to Remove: Order for Sale: Affdt. Mailg. 26, Petition: Order to Retain: May 29, Petition; Order for Resale; Jun. 7, Petition—Motion Denied: Jul. 3. Report Sale: Affdt. Pub.: Affdt. Mail'g.: Affdt., Posting; Affdt.; Order Confirming Sale; 6, Affdt. Pub.; Aug. 22, Petition: Order to Show Cause: Sept. 4, Affdt. Mail'g.: Order Settle Claim:

Dated, Sep. 14, 1928.

IN CHANCERY OF NEW JERSEY.

Between	On Bill, &c.
McGraw Hill Publishing Company, Inc., a corporation, Complainant,	Exceptions to Disallowance by Receiver of Claims.
and	Stipulation as to Facts on Claim of
Sloan & Chace, Inc., a corporation, Defendant.	Estate of William McK. Morris, Deceased.

It is hereby agreed and stipulated to between counsel for the receiver in the above-stated matter and counsel for the Estate of William McK. Morris as follows:

That on or about December 10th, 1927, the McGraw Hill Publishing Company, Inc., the above-named complainant by its counsel, Meisterman & Katchen, presented to Vice Chancellor Church, of the Court of Chancery of New Jersey, a bill in equity addressed to the Chancellor of the State of New Jersey duly authenticated, supported by an affidavit duly executed by Frederick H. Samuels, an agent of the said corporation complainant, wherein it was averred that the said corporation was then insolvent within the meaning of the Statutes of the State of New Jersey; that the business of the said corporation was then being conducted at a great loss and prejudicial to the interest of creditors and stockholders and without safety to the public; that the said defendant corporation was unable to pay its debts then long past due and payable; that it was impossible for the said defendant corporation in the near future to raise by loans sufficient funds to enable it to do its business with safety to the public and its creditors and advantage to its stockholders.

The said bill prayed, inter alia, that the said defendant corporation be decreed to be insolvent and that its business has been and is being conducted at a great loss and greatly prejudicial to the interest of the stockholders and creditors and that the same cannot be conducted with safety to the public and advantage to its stockholders.

In the supporting affidavit of Frederick H. Samuels to the said bill in equity, it was averred that on or about December 10th, 1927, the day of the execution of said affidavit, that the Secretary of the defendant corporation, Harry B. Annin, had stated to the affiant that the defendant company was short of money and unable to meet its bills, and that the Vice President and Treasurer of the company, Mr. Wechsler, had stated to the affiant, that the defendant company could not pay any of its bills at that time, and that they would not decide until at least a week what disposition they would make of all their creditors' bills. It is further averred in said affidavit that other creditors were pressing for payment of their claims and that on December 5th, 1927, suit was started in the First District Court of the City of Newark, New Jersey, by a creditor of defendant company and that unless a receiver was appointed to take possession of defendant company's property, a judgment might be obtained and execution had by the said creditor or other creditors to the detriment of the complainant.

On the same day, the said bill and supporting affidavit were exhibited to the said H. C. Wechsler, Treasurer of the above defendant company, who verbally stated to the counsel for the complainant and to the Vice Chancellor, that the financial condition of the said company was correctly stated in the averments contained in the said bill and supporting affidavits, but that negotiations for the sale of the assets of the said defendant company as a going concern

were pending or in prospect, which would be defeated by the filing of said bill and the appointment of receivers for the said company; that there was a large amount of work in process in the plant of the defendant company which could be finished at a profit and that the creditors of the defendant company would be benefited if the filing of the said bill could be deferred and the business of the company could be continued in operation, which he would endeavor to accomplish by requesting the Estate of William McK. Morris to purchase by assignment wage claims which the said defendant company was unable to pay and any additional wage claims that might arise through the continued operation of the business of the company with a view to effecting a sale of its assets as a going concern.

In compliance with the request so made on behalf of the company by its Vice President and Treasurer, Mr. Wechsler, the said bill and supporting affidavit were withheld from filing, in consideration of which, on the request of the officers of the defendant company, the Executors of the Estate of William McK. Morris thereafter did on December 13th, 1927, purchase by assignment various wage claims against the defendant company in the total of $683.61. Subsequently, upon like request, and in consideration of the further withholding of the said bill in equity from formal filing and in order to enable the operation of the company to be continued in the expectation of effecting a sale of its assets as a going concern, the Executors of the Estate of William McK. Morris, deceased, did on December 17th, 1927, purchase by assignment various wage claims against the defendant company in the total amount of $2,175.00; and likewise on December 26th, 1927, the Executors of the Estate of William McK. Morris, deceased, did purchase by assignment various wage claims against

the defendant company in the total amount of $2,-091.50; and likewise, on December 31st, 1927, the Executors of the Estate of William McK. Morris did purchase by assignment various wage claims against the defendant company in the total amount of 1,-226.67.

Thereafter, upon the failure of all efforts that were being made during this period to consummate a sale of the assets of defendant company as a going business, whereby the full value of same might have been secured for the benefit of creditors and stockholders, and upon the unwillingness of the Executors of the Estate of William McK. Morris to continue the purchase of wage claims as aforesaid, the bill and supporting affidavit aforesaid were duly presented to the Vice Chancellor and filed for action on January 9th, 1928, when an order was made by the said Court, based upon the reading and filing and considering of the said bill of complaint and the affidavit annexed thereto and the consent of the defendant company, which was given by its officers (as is recited in the said order) appointed Oliver W. Hopkinson, Esq., as Custodial Receiver of said defendant company, together with an order to show cause why the receiver should not be continued, etc., pursuant to the provisions of the statute in such case made and provided.

Subsequently, on February 21st, 1928, upon the return of the rule to show cause and upon the said bill and supporting affidavit and the admissions of the officers of the defendant company, a final decree was entered wherein and whereby it was adjudged:

"That the defendant company, Sloan & Chace, Inc., a corporation, has not sufficient cash to carry on its business and cannot meet its obligations as they mature, and that the business of the

defendant corporation has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors and stockholders, so that its business cannot be conducted with safety to the public and advantage to its stockholders."

And, it was ordered, inter alia,

"That the said receiver is hereby invested with all the powers of a Statutory Receiver and he is hereby directed to perform all the duties imposed upon him by the Statutes of this State, in such case made and provided."

That the total amount of claims for which claimant makes demand is $6,176.78; that the said claimant, the Estate of William McK. Morris, deceased, did thereupon file a formal claim for said amount with the receiver as a preferred claim to which was annexed the individual claims of wage earners totalling $6,176.78 and individual assignments from said wage earners to the said claimant.

The dates mentioned in the said wage claims for which the wages were advanced were December 13, 1927; December 20, 1927, and December 27, 1927.

That the said wage claims then maturing against the defendant company and the wage claims subsequently maturing were purchased by the Executors of the Estate of William McK. Morris because said Executors knew that the said company was admittedly insolvent and because proceedings against the company had been threatened and that the said Executors believed that under those circumstances the said wage claimants would be entitled to a preference over all general creditors of the said insolvent corporation and that the said wage claimants would not have continued in the employ of the said insol-

vent corporation if they had been unable to collect the moneys due and to grow due to them until after the assets of the said insolvent corporation had been liquidated in the manner provided by law.

That each of said wage claimants was in the regular employ of the defendant corporation on and after December 10th, 1927, and that the work, labor and services out of which said claims arise were performed within two months next preceding January 9th, 1928, the date when the proceedings in insolvency were formally begun against the said defendant corporation, said date being the date of the filing of the bill of complaint.

The receiver has disallowed the said claim as a preference, but has allowed same only as a general claim and from the receiver's determination this appeal is taken to the Court of Chancery upon the agreed state of facts aforesaid.

The Receiver has disallowed claim aforesaid as a preferential claim for the reason that he has been advised by his counsel that:

1. Although the statutes of New Jersey give the employee of an insolvent corporation a first lien for wages if an employee assigns his claim before insolvency is decreed, his assignee acquires no lien.

2. That the lien of a wage claimant comes into existence as a preference as of the date that insolvency is decreed and that if an assignment is made of such claim before such decree of insolvency, the assignee acquires no preferential lien because at that time the wage claimant has no lien in his favor.

3. That what is meant by insolvency is a judicial decree of insolvency by the Court of Chancery and that same dates from the filing of the bill of complaint in this cause.

Dated: October 11, 1928.

IN CHANCERY OF NEW JERSEY

Between
McGraw Hill Publishing Company, Inc., a corporation,
Complainant,
and
Sloan & Chace, Inc., a corporation,
Defendant.

OPINION

Meisterman & Katchen, for Receiver

Palmer & Powell, for William McK. Morris Estate

Church, Vice Chancellor:

This is an appeal from the action of the receiver in disallowing certain claims filed by complainant, or, rather, his refusal to regard them as preferred claims.

The facts are these: On December 10, 1927, this matter was first presented to me. The defendant corporation requested a continuation in order that a reorganization might, if possible, be effected. Complaintant's solicitors asked if I would retain the bill in my office. I said it must either be filed or retained by counsel. In the latter case there would be nothing to prevent an application to another Vice Chancellor or a proceeding in bankruptcy. The bill was not filed. January 9th, 1928, the bill was filed by me and I issued an order to show cause. On February 21st, 1928, I appointed a statutory receiver with the consent of the defendant corporation. This obviated the necessity of the issuance of subpoenaes. In the meantime complainant advanced money for the cor-

poration's payrolls, as there were no available funds, and took assignments of their claims from the employees. The total advancements made in this manner amounted to $6,176.78.

The receiver disallowed the claim as a preference because he said that if an employee assigns his claim before insolvency is decreed his assignee acquires no preferential lien, and also because the lien of a wage claimant comes into existence as of the date that insolvency is decreed and if an assignment is made of such claim before such decree, assignee acquires no preferential lien.

In the case of Delaware, Lackawanna & Western Railroad Company vs. Oxford Iron Co., 33 Equity, page 192, in discussing this question the Court says:

"The wages, to be within the protection of the statute, must be due to a person in the employ of the corporation at the time when it becomes insolvent. If, prior to that time, they are assigned, so that when insolvency occurs they are not due to an employee, no lien arises. Such, I think, is the plain direction of the statute. Its words are, 'In case of the insolvency of any corporation, the laborers in the employ thereof shall have a lien upon the assets thereof, etc.' Only those in the employ of the corporation at the time of its insolvency are within either the words or the policy of the statute. The purpose of the statute is obvious. It is sometimes a matter of the utmost importance to the public that the business of an insolvent corporation should be kept in operation, and it is almost always true that the property of such bodies cannot be preserved unless they are kept up as going concerns. The statute was designed to accomplish both of these purposes. And to this

end it was clearly necessary that the employees of a corporation in an insolvent condition, whose skill and labor are indispensable to the continuance of its operations, should be made secure for their wages. To enable an insolvent corporation to retain its employees is the primary object of the statute. Persons holding claims for wages who are not in the employ of a corporation at the time when it becomes insolvent are not, therefore, within its policy nor entitled to its protection.

It is undoubtedly true that the assignment of the debt carries with it any security which the assignor holds. But when these assignments were made the assignors had no security or lien. The right of lien arose subsequently, and though the assignors may still have been in the employ of the corporation when it became insolvent, the wages previously assigned were not due to them, but to persons not entitled to the character of employees. The statute creates a lien in favor of no person except an employee who is in the employ of a corporation at the time when it becomes insolvent and in favor of no debt except for wages due an employee who is in the employ of a corporation at the time when it becomes insolvent."

The Court, through Vice Chancellor Gray, goes even further in the case of Campbell v. Taylor Manufacturing Co., 64 Equity, page 622, in which the Court set aside the receiver's allowance of a preference where the wage claim was assigned, and comments on the general equities of the proposition as follows:

"The practice in this Court, in allowing these statutory preferences, has been to limit them to persons who were within the class named in the statute. Consolidated Coal Co. v. Keystone Chemical Co., 9 Dick Ch. Rep. 310. The terms used in the act expressly prescribe that the preference is given to laborers and workmen and persons doing labor in the regular employ of the company at the time of the insolvency. It is a purely statutory right, and it was probably created for the purpose of preventing a general exodus of the workmen employed by corporations in anticipation of the failure of the company. It is intended to induce employees to remain at their work, even if financial disaster be threatened, by assuring them that they shall not lose their wages. A company which has a large number of employees, may be in some financial straits, and may yet, if it can continue its business, regain its prosperity. But if its employees, anticipating that their wages will not be paid, leave its employ in panic, absolute disorganization and destruction of the business may follow. The statute here intervenes and assures them that they, at all events, shall be paid. It refers by its very words, to laborers, workmen and employees only, giving them a preference. There is neither provision for, nor recognition of, any power in the employees to assign their rights; nor of any right in anyone who may have loaned the company money with which to pay wages, to have any equitable subrogation to the privileges of the company's employees." See also Cogan v. Conover, 69 Equity 358.

This is admitted to be a correct statement of law by counsel for complainant. He says in his brief:

"The whole question involved and the only thing for this court's consideration is whether December 10, 1927, is the date upon which proceedings in insolvency were actually instituted and begun against such insolvent corporation."

Vice Chancellor Backes in Hermann v. Mexican Petroleum Corp., 85 New Jersey Equity 367, says at page 370:

> "It is true in common parlance we use the expression of 'filing of the bill' to denote the commencement of a suit in Chancery, instead of referring to the issuance and service of the subpoena, or the making of a bona fide attempt to serve it after the bill has been filed, which is the actual commencement of the suit in this court."
>
> And again in the words of the learned Vice Chancellor: "The authorities upon this point are collected in United States v. American Lumber Co., 80 Fed. Rep. 309: 85 Fed. Rep 827. The presentation of a bill to the Chancellor, and the granting thereon of an order to show cause why an injunction should not issue with an ad interim stay brings the litigation before him for a limited purpose and is not the institution of the suit. It is merely before him on a motion to consider the question whether an injunction should issue when the suit should be commenced."

In the case of D. L. & W. R. R. v. Oxford Iron Co., supra, the Court says at page 195:

> "The insolvency meant in the act is that ascertained by the court as a ground of its jurisdiction. Until a corporation becomes insolvent and this fact is laid before the court in the regu-

lar method of procedure, it has no authority to interfere with the corporation. Until insolvency is charged against it, in legal form the court is bound to presume it was solvent. Upon this point Chancellor Green in the case just cited (Bedford v. Newark Machine Co., 16 New Jersey Equity 117) said that the statute looks to the insolvency which leads to the proceedings resulting in a judicial determination of insolvency. He further said 'The Court cannot upon an inquiry of this nature (and the inquiry then before the court was as to who was entitled to this lien) undertake to investigate the financial ability of the corporation at previous periods, founded upon a mere failure to meet its engagements or upon the actual state of its finance after its business has been suspended'. The insolvency which gives rise to this lien is that which is judicially ascertained and becomes the ground of the court's jurisdiction. The court has nothing to do with the previous condition of the corporation. The lien given by the statute comes into existence as of the date which the court adjudges to be the time when the insolvency accrued which gives it jurisdiction."

In view of these cases I do not see how I can hold that there was an insolvency on December 10, 1927, when counsel discussed the matter with me, but filed no bill. Neither do I think there was an insolvency on January 9, 1928, when I filed the bill and advised an order to show cause. I did not then decree insolvency, only set a day to determine whether it existed. In my opinion the actual insolvency was decreed according to the statute and the reasoning of the cases which I have cited on February 21, 1928, when insolvency was found and a receiver ap-

pointed. The last assignment of wage claims was on December 31, 1927. This was before either the order to show cause or the actual adjudication. The assignments, therefore, having been made before insolvency, the assignee is not entitled to a preference.

I will dismiss the exceptions and confirm the action of the receiver.

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IN CHANCERY OF NEW JERSEY.

Between McGraw Hill Publishing Company, Inc., a corporation, Complainant. and Sloan & Chace, Inc., a corporation, Defendant.	On Bill, &c. Order.

This matter coming on to be heard in the presence of Meisterman & Katcheń, solicitors for the receiver of the defendant corporation, and Palmer & Powell, solicitors for the Estate of William McK. Morris, claimant, on an appeal from the action of the receiver in disallowing certain claims filed by the said claimant, William McK. Morris Estate, or rather the receiver's refusal to regard said claims as preferred claims, and the controversy having been submitted to the Court on agreed stipulated state of facts, and it appearing to the Court that the wage claims for which the claimant, the Estate of William McK. Morris, claims a preference were assigned to the said claimant on or before December 31, 1927, which date was before the order to show cause or the actual adjudication of insolvency and the appointment of a receiver, wherefore the said assignments having been made before insolvency, the Court is of the opinion that the assignee is, therefore, not entitled to a preference;

It is, therefore, on this 23rd day of January, 1929, ORDERED, ADJUDGED and DECREED that the exceptions to the disallowance by the receiver of the claims of the Estate of William McK. Morris as preferences are hereby dismissed and the action of the receiver in disallowing said claims of $6,176.78 as a

preference but allowing same as a general claim is hereby confirmed.

Respectfully advised,

ALONZO CHURCH,
V. C.

E. R. WALKER,
C.

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NEW JERSEY
COURT OF ERRORS AND APPEALS

Between

McGRAW HILL PUBLISHING COMPANY, INC.,
Complainant,
and
SLOAN & CHACE, INC.,
Defendant.

Appeal of Executors of William McK. Morris, Deceased.

Brief For Appellants.

STATEMENT OF FACTS.

This is an appeal by Alice Anthony Morris, executrix, and Robert Buermann, executor, of the Estate of William McK. Morris, deceased, from a decree of the Court of Chancery advised by Vice-Chancellor Church, dated January 23, 1929, sustaining a decision of the Receiver of Sloan & Chace, Inc., an insolvent corporation, in a decision disallowing certain claims of the executors of the Morris Estate as preferred claims under the statute, against the said Sloan & Chace, Inc., an insolvent corporation.

The Receiver refuses to recognize the claims as presented, as preferred claims, and from his decision an appeal was taken to the Court of Chancery which sustained the Receiver, and an appeal is now taken to this Court from the decree of the Court of Chancery.

The question to be decided is the status of the executors of the Morris Estate with reference to assignments of wage claims which they held from employees of Sloan & Chace, Inc. The facts involved are covered by the stipulations (S. C. p. 23), and are briefly, as follows:—On December 10, 1927, a bill was presented to Vice-Chancellor Church wherein the McGraw Hill Publishing Company, Inc., was complainant, and Sloan & Chace, Inc., was defendant, wherein and whereby it was alleged that the defendant corporation was then insolvent and praying for the appointment of a Receiver for the company. This bill was duly verified by the affidavit of Frederick H. Sandles, an agent of the defendant corporation. At the time of the presentation of this bill with the supporting affidavit to the Vice-Chancellor, it was verbally stated to the court by one H. C. Wechsler, treasurer of the defendant corporation, that the financial condition of the company was correctly stated in the bill and supporting affidavit, but that negotiations were under way for the sale of the assets of the defendant corporation as a going concern, and that there was a large quantity of work in process of being finished by the company, and that if the insolvency proceedings could be withheld for a short time, there was a very good chance of the sale of the property of the company at a price that would pay all creditors and also protect the stockholders; that the only thing that would prevent these negotiations was the fact that the defendant corporation was without funds to meet its payroll, but that if the filing of the bill could be deferred for a short time, the executors of the Estate of William McK. Morris, which estate was a large stockholder of the company, would advance money for the purpose of meeting the payroll, and would take assignments from the employees of their claims for wages. The

Vice-Chancellor agreed that this was a commendable effort on the part of the defendant corporation, and in compliance with the request, retained possession of the bill and affidavit, but did not mark the same as being actually filed in the Court of Chancery, so that the docket entries of this case (S. C. p. 22), show the bill as having been filed on January 9, 1928, instead of December 10, 1927, the date of presentation of the bill to the Vice-Chancellor. Thereafter, on December 13, 17 and 26, 1927, the executors of the Estate of William McK. Morris took assignments from the employees for their respective claims for wages, and paid to the said employees the wages then due upon those respective dates.

The negotiations for the sale of the business of Sloan & Chace, Inc. were not successful and consequently, on January 9, 1928, the matter was called to the attention of the Vice-Chancellor and the bill and affidavit theretofore presented to the Vice-Chancellor on December 10, 1927, were used as a basis for a rule to show cause why a Receiver should not be appointed, and a Custodial Receiver was at that time appointed, and he subsequently was appointed Statutory Receiver in these proceedings.

The Receiver proceeded to sell the property of the insolvent corporation for the purpose of securing funds with which to pay creditors, and in the course of the winding up of this corporation, the executors of the Morris Estate presented their claim based upon assignments of wage claims from employees, to the Receiver, aggregating the sum of Six Thousand One Hundred Seventy-six Dollars and Seventy-eight Cents ($6,176.78).

The Receiver disallowed this claim as a preferred claim, and said that it was entitled only to the status of a common claim.

ARGUMENT.

The statute governing this matter is Section 83 of the General Corporation Act of this state, which is as follows:—

> "In case of the insolvency of any corporation, the laborers and workmen, and all persons doing labor or service of whatever character, in the regular employ of such corporation, shall have a first and prior lien upon the assets thereof for the amount of wages due to them respectively for the labor, work and services done, performed or rendered within two months next preceding the date when *proceedings in insolvency shall be actually instituted and begun* against such insolvent corporation."

It is the contention of the appellants that December 10, 1927, the date of the presentation of the bill and supporting affidavits to the Vice-Chancellor, was the date when "proceedings in insolvency shall be actually instituted and begun." We maintain that the status of the corporation was the same on December 10, 1927, as it was on January 9, 1928, when the bill was actually marked filed, and the same as it was on February 21, 1928, when the order was actually signed appointing the Recevier. That the date when proceedings were actually instituted was December 10, 1927, because the bill was at that time presented to the court and the decree subsequently made was based upon the same bill and the same supporting affidavit, and that there had been no change whatsoever in the status of the company as to its insolvency. That the court acted in making the decree upon the facts as they were in existence on December 10, 1927, and that no change had taken

place in the condition of the company between those two dates. That, therefore, the date of the presentation of the bill to the Vice-Chancellor was the date when proceedings in insolvency were actually instituted and begun.

The Vice-Chancellor, in his opinion, relies upon some decided cases in this state, and it will be necessary to examine those cases considerably in detail to determine whether or not his reliance upon those decisions was justified in view of the facts in this case.

The first of these is the case of the Delaware & Lackawanna Western Railroad against the Oxford Iron Company, reported in 33 N. J. E. p. 192, and is an opinion by Vice-Chancellor vanFleet. In the discussion of this case in this brief, it will be referred to as the Oxford Iron Company case as a matter of convenience in argument.

The Corporation Act as it then existed with regard to priority claims, was as follows:—

> "In case of the insolvency of any corporation, the laborers in the employ thereof shall have a lien upon the assets thereof for the amount of wages due to them respectively, which shall be paid prior to any other debt or debts of said company; and the word 'laborers' shall be construed to include all persons doing labor or service of whatever character, for or as workmen or employees in the regular employ of such corporation."

Vice-Chancellor vanFleet in the Oxford Iron Company case, says:—

"Until a corporation becomes insolvent *and* this fact is laid before the court in the regular method of procedure, it has no authority to interfere with the corporation. Until insolvency is charged against it in legal form, the court is bound to presume it was solvent. Upon this point Chancellor Green, in the case just cited, (Bedford vs. Newark Machine Company 1 C. E. Gr. 117,) said that the statute looks to the insolvency *which leads to the proceeding* resulting in the judicial determination of insolvency."

This statement of the law is exactly the theory of appellants and the contention that we maintain should prevail in this case. That the court looks to the insolvency which leads to the proceedings resulting in a judicial determination of insolvency. Now if that language means what its says, namely, that the court looks to the insolvency which leads to the proceedings which result in the judicial determination of insolvency, then in the present case, the insolvency as it existed on December 10, 1927, is the controlling factor. That this is true as to the insolvency of the defendant corporation cannot be doubted, as it was the bill which was presented on that date and which had been sworn to on the 10th day of December, 1927, the same day as the presentation of the bill. And that was the insolvency that the court subsequently looked to and which resulted in the judicial determination of insolvency.

It is, of course, true that the court cannot examine the condition of the company at various dates and covering various periods of time for the purpose of judicially determining the exact moment at which a corporation became insolvent, but when the court acts in making a decree declaring a corporation in-

solvent, upon facts presented to it as of a certain date, and in this case on December 10, 1927, then certainly the insolvency which led to the proceedings resulting in the judicial determination of insolvency, was the insolvency as it existed at least on December 10, 1927. The court does not have to go back of that date. That is the date that it takes as being the time when the corporation was insolvent and by its decree, based upon facts existing at that time, judicially determines that the insolvency of the corporation must necessarily have existed as of that date. If this were not true, then in this case there was no foundation for the decree declaring insolvency to exist.

Vice-Chancellor vanFleet goes on to say in the Oxford Iron Company case:

> "It is sometimes a matter of the utmost importance to the public that the business of an insolvent corporation should be kept in operation, and it is almost always true that the property of such bodies cannot be preserved unless they are kept up as going concerns. The statute was designed to accomplish both of these purposes. And to this end it was clearly necessary that the employees of a corporation in an insolvent condition whose skill and labor are indisputable to the continuation of its operation, should be made secure for their wages."

And that is exactly the condition that we say existed in this case. That the company was insolvent, but that an effort was being made to sell the company as a going concern, and for the purpose of enabling its officers to try to effect this purpose, the executors of the William McK. Morris Estate came to the rescue of the corporation, and to try to help it pend-

ing these negotiations, paid for it wage claims then due and took assignments of those wage claims from the employees.

If this was not doing the very thing that the statute had in mind when it secured to employees their wages for a period of two months preceding insolvency, I am unable to see the purpose of the statute. The wages, to be preferred, must be those which have accrued within two months preceding insolvency. Insolvency existed according to the bill and affidavits and the decree of this court, on the 10th day of December, 1927, and if insolvency existed as of that date, I do not see how it makes any difference whether or not the court on that day made the decree declaring its insolvency, or made a decree some six weeks or two months later. The decree did not change the fact of insolvency. The decree was based upon the fact of insolvency as existing as of December 10, 1927. Whether that decree was actually signed, or when it was actually signed, did not and could not change the condition of the corporation. Now if it was insolvent on December 10, 1927, under the decision in the Oxford Iron Company case and all subsequent decisions, the claims of the Morris Estate were and are preferred claims.

Now the case of Campbell vs. Taylor Manufacturing Company, 64 N. J. E. p. 662, in an opinion by Vice-Chancellor Grey, deals with a set of facts not at all parallel to the present case. The court, in the Taylor Manufacturing Company case, found that the money which was claimed as a preferred claim, was loaned to the company, and without any evidence that it was loaned for the purpose of paying wages. In the present case, the money was not loaned to the corporation but was paid to the employees and as-

signments of their claims actually taken. In the Taylor case nothing of that kind existed, and the court said:

> "There is no pretense that there was any agreement between the laborers who had the right and Mr. Hart, that his advances of the money which paid their wages should be secured by a transfer of their right to collect their wages by preference against the company."

So that anything that was said by Vice-Chancellor Grey in the Taylor Manufacturing Company case can have no application here, as it is based upon an entirely different set of facts, and particularly that there was no evidence of any assignment by employees of their claims to the preferred claimant in that case.

In our case, the whole procedure is based upon the assignment by the employees to the executors of William McK. Morris Estate, of their claims, and the payment of their claims by the Morris Estate to the employees themselves.

In the case of Cogan vs. Conover Manufacturing Company, 69 N. J. E. p. 386, the court based its conclusions upon the Oxford Iron Company case alone, and without any discussion of the law or of that case.

In the opinion of Vice-Chancellor Church in this case, he quotes some New Jersey cases as to the meaning of the phrases "filing of the bill," or "commencement of the suit." I do not see how these opinions have any application to the present case. Because we are dealing with the statute which defines the matter in its entirety and the pertinent language of which is:

"Performed or rendered within two months next preceding the date when proceedings in insolvency shall be actually instituted and begun against such insolvent corporation."

It does not say the commencement of a suit against the corporation, but it says the date when proceedings in insolvency shall be actually instituted. If the decisions quoted in the opinion of Vice-Chancellor Church are true as to the meaning of the phrases "commencement of the suit," or "filing of the bill," they do not change or affect the theory of this case, because the statute in insolvency deals with the institution of proceedings and not with the commencement of a suit. So that they have no application in the determination of this question.

It is therefore respectfully submitted that the order of the Court of Chancery sustaining the decision of the Receiver should be reversed.

PALMER & POWELL,

Sol'rs. for and of
Counsel with Appellants.

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

New Jersey Court of Errors and Appeals

Between McGraw Hill Publishing Company, Inc., *Complainant,* *and* Sloan & Chace, Inc., *Defendant.*	*Appeal of Executors of William McK. Morris, Deceased.*

BRIEF FOR RESPONDENT.

Statement of Facts.

The statement of facts given in the brief for appellants is so clearly argumentative as to justify the re-statement of same on the part of the respondent.

This is an appeal from a decree of the Court of Chancery advised by Vice-Chancellor Church sustaining the decision of the receiver in disallowing certain claims of the appellants as priority wage claims on the ground that they were claims assigned before bill filed and decree thereon entered and, therefore, not within the provisions of Section 83 of the General Corporation Act.

The facts are clearly and precisely stated in the stipulation entered into between the parties (State of the Case, pp. 23-28), a summary of which follows:

On December 10, 1927, the McGraw Hill Publishing Company, Inc., by its counsel, Meisterman & Katchen, presented to Vice-Chancellor Church of the Court of Chancery of this State a bill in equity, supported by affidavit, setting forth

in essence that the defendant company, Sloan & Chace, Inc., was insolvent and praying for a writ of injunction and the appointment of a receiver (pp. 23-24).

On the same day, the said bill and supporting affidavit were exhibited to H. C. Wechsler, Treasurer of Sloan & Chace, Inc., who appeared before the Vice-Chancellor and admitted the averments of the bill and supporting affidavit, but stated that negotiations for the sale of the company as a going concern were pending and that if the bill were filed and a receiver for the company appointed, the negotiations would fail of consummation (pp. 24-25). He urged upon the Court that the filing of the said bill of complaint be deferred and the company permitted to continue its operation which he would endeavor to accomplish by requesting the appellants to purchase by assignment wage claims which the defendant company was unable to pay, and such other wage claims as might arise through the continued operation of the company's business (p. 25, ll. 1-17). In compliance with the request of the said Wechsler, treasurer, and also the Vice-President of the company, the said bill and supporting affidavit were withheld from filing, and the appellants purchased by assignment various wage claims against the defendant company in the total sum of $683.61 (p. 25, ll. 17-25). To quote more fully from the stipulation:

> "*Subsequently, upon like request, and in consideration of the further withholding of the said bill in equity from formal filing and in order to enable the operation of the company to be continued in the expectation of effecting a sale of its assets as a going concern, the Executors of the Estate of William McK. Morris, deceased, did on December 17,*

1927, purchase by assignment various wage claims against the defendant company in the total amount of $2,175.00'' (p. 25, ll. 25-34). (Italics ours.)

Additional wage claims were subsequently purchased until claims aggregating the sum of $6,-176.78 had been acquired by appellants in the manner above stated.

The efforts to sell the assets of the defendant company as a going concern having meanwhile resulted in failure, the bill of complaint and supporting affidavit aforesaid were duly presented to the Vice-Chancellor and filed for action on January 9, 1928, and Oliver W. Hopkinson, Esq., appointed by the Court as custodial receiver of the defendant company. To this order the defendant company consented (p. 26, ll. 7-25). Subsequently, on February 21, 1928, final decree adjudging the defendant company insolvent was entered, and the said Oliver W. Hopkinson appointed statutory receiver (pp. 26-27).

The receiver entered upon the administration of the estate and the appellants, in the course thereof, presented to the receiver as priority claims, the assigned wage claims in controversy. All the claims were assigned prior to January 9, 1928, the date when the bill of complaint was formally filed and the custodial receiver appointed, but subsequent to December 10, 1927, the day when the matter was first brought to the attention of the Vice-Chancellor and the application for deferring the filing of said bill was made through its officers by the defendant company.

The receiver disallowed the claim as a first and prior lien upon the assets of the company, but only allowed it as a general claim.

ARGUMENT.

The issue in this appeal may be briefly stated as follows: Is an assignee of wage claims prior to the date of the formal filing of the bill of complaint and the appointment of a receiver, entitled to a first lien upon the assets of the insolvent company under Section 83 of the General Corporation Act of this State? The appellants contend that he is if in fact the company was insolvent on the date of the assignment, or prior thereto, while respondent maintains that the criterion is not the actual insolvency of the company on the date of the assignments, but whether or not the assigned claims were claims for work "performed or rendered within two months next preceding the date when proceedings in insolvency shall be actually instituted and begun against such insolvent corporation." Though all the cases treated by appellants in their brief will be discussed, they will not be taken up in the order therein considered.

POINT I.

Wage claims are only a first and prior lien upon the assets of an insolvent corporation under Section 83 of the General Corporation Act if performed or rendered within two months next preceding the date when proceedings in insolvency shall be actually instituted and begun against such insolvent corporation.

In considering the law under this point, confusion sometimes arises because the present statute is somewhat differently worded than an earlier Act dealing with the same subject matter and which has been construed in the case of *Delaware, Lackawanna and Western R. R. Co.* v. *Oxford Iron Co.*, 33 N. J. Equity, p. 192, and

considerably relied upon by appellants in their brief. Although it is not assumed that the foregoing case favors the contention of the appellants, nevertheless it is desired to point out that the Act construed in said case is not the same as Section 83 of the Corporation Act applicable to the instant case. The earlier Act is set forth in the case of *Delaware, Lackawanna and Western R. R. Co.* v. *Oxford Iron Co.*, 33 N. J. Equity, p. 192 at p. 194 and reads as follows:

> "In case of the insolvency of any corporation, the laborers in the employ thereof shall have a lien upon the assets thereof, for the amount of wages due to them respectively, which shall be paid prior to any other debt or debts of said company; and the word 'laborers' shall be construed to include all persons doing labor or service of whatever character, for or as workmen or employees in the regular employ of such corporation." Rev. 188.

In that case the question arose as to when the lien of the wage claimant arises and the Court ruled that the lien of the statute comes into existence upon the date when, by a decree of the Court, the company is declared insolvent. To quote from the opinion of the Court at page 195:

> "The insolvency meant in the act is that ascertained by the Court as the ground of its jurisdiction. Until a corporation becomes insolvent, and this fact is laid before the court in the regular method of procedure, it has no authority to interfere with the corporation. Until insolvency is charged against it, in legal form, the court is bound to presume it was solvent. Upon this point, Chancellor Green, in the case just cited, said that the statute looks to the insolvency which leads to the proceeding resulting in a judicial determination of insolvency. He further said: 'The court cannot upon an inquiry of this nature (and the inquiry then

> before the court was as to who was entitled to this lien), undertake to investigate the financial ability of the corporation at previous periods, founded upon a mere failure to meet its engagements, or upon the actual state of its finances, after its business has been suspended.' The insolvency which gives rise to this lien is that which is judicially ascertained and becomes the ground of the court's jurisdiction. The court has nothing to do with the previous condition of the corporation. The lien given by the statute comes into existence as of the date which the court adjudges to be the time when the insolvency accrued which gives it jurisdiction. That date in this case, fixed by the decree of the court, is September 6th, 1878, and that must be taken as the time when the right of lien arose.''

It will be seen from an examination of the Act in question that the determining factor in deciding when the lien comes into existence is when the corporation becomes insolvent. That the Court construed to be the date when the decree of the Court determined that. As will be seen from a subsequent examination of the cases construing the present Act, an altogether different criteria is involved namely, when the proceedings in insolvency were commenced.

Another point considered in the foregoing case is whether or not the lien of the statute arises in favor of an assignee of a claim for wages who acquired his right prior to the date of the insolvency fixed by the decree. This proposition the Court decides in the negative, saying at page 196:

> ''The wages, to be within the protection of the statute, must be due to a person in the employ of the corporation at the time when it becomes insolvent. If, prior to that time, they are assigned, so that when insolvency occurs they are not due to an employee, no

lien arises. Such, I think, is the plain direction of the statute. Its words are, 'In case of the insolvency of any corporation, the laborers in the employ thereof shall have a lien upon the assets thereof, &c.' Only those in the employ of the corporation at the time of its insolvency are within either the words or the policy of the statute. The purpose of the statute is obvious. It is sometimes a matter of the utmost importance to the public that the business of an insolvent corporation should be kept in operation, and it is almost always true that the property of such bodies cannot be preserved unless they are kept up as going concerns. The statute was designed to accomplish both of these purposes. And to this end it was clearly necessary that the employees of a corporation in an insolvent condition, whose skill and labor are indispensable to the continuance of its operation, should be made secure for their wages. To enable an insolvent corporation to retain its employees is the primary object to the statute. Persons holding claims for wages, who are not in the employ of a corporation at the time when it becomes insolvent, are not, therefore, within its policy nor entitled to its protection.

It is undoubtedly true that the assignment of the debt carries with it any security which the assignor holds. But when these assignments were made the assignors had no security or lien. The right of lien arose subsequently, and though the assignors may still have been in the employ of the corporation when it became insolvent, the wages previously assigned were not due to them, but to persons not entitled to the character of employees. The statute creates a lien in favor of no person except an employee who is in the employ of a corporation at the time when it becomes insolvent, and in favor of no debt except for wages due an employee who is in the employ of a corporation at the time when it becomes insolvent."

It appears clearly, therefore, that even under this case and under the old Act, the appellants would not be entitled to a decree in their favor, inasmuch as the assignments of their wage claims were made prior to the entry of the decree declaring the defendant company insolvent.

Another case construing the earlier Act is *Bedford* v. *Newark Machine Company*, 16 N. J. Equity 117, and the question involved there was when the company would be held to be insolvent and the Chancellor there concluded that the act of insolvency contemplated by the statute is committed at the time when the company suspends its ordinary operations.

But that case too would be of little assistance to the appellants inasmuch as the assignments were admittedly made while the company was still in operation—in fact the very assignments were made in order to assure a continuance of that operation.

But that the earlier Act is inapplicable to the present situation is clearly apparent from the case of *Mingen* v. *Alva Glass Mfg. Co.*, 55 N. J. Equity, 463, where the Court held that the right to a preference in payment of wages given to workmen of an insolvent corporation is only created when insolvency proceedings are begun.

Before going into a discussion of this case, it will be advisable to quote Section 83 of the present Act which reads as follows:

> "In case of the insolvency of any corporation the laborers and workmen, and all persons doing labor or service of whatever character, in the regular employ of such corporation, shall have a first and prior lien upon the assets thereof for the amount of wages due to them respectively for all labor, work and services done, performed or ren-

dered within two months next preceding the date when proceedings in insolvency shall be actually instituted and begun against such insolvent corporation. (P. L. 1896, p. 303.)" (2 N. J. C. S. 1650.)

It will be noted that whereas in the earlier Act the criterion as to when the lien arises is the "insolvency" of the corporation, in the present Act it is when proceedings in insolvency are actually "instituted and begun."

A scholarly consideration of the original Act and its changes and amendments thereto is given by Vice-Chancellor Grey in the case above quoted at page 469; this will be examined in full.

"*An examination of the several statutes will show that the employes' lien has its origin in the taking of jurisdiction by a court to administer the assets of the insolvent company.* The lien which the laborer has upon the assets of the employing company does not attach coincidently with nor as attendant upon the making of the contract of employment, but only when all the prescribed statutory conditions which create that lien have come into being.

By section 63 of the act of 1875, it was only in case of the insolvency of the corporation that the workmen were given a lien on the assets of the corporation. The time when the lien attached was defined in the Bedford v. Newark Machine Co. case, *ubi supra,* to have been the period when the insolvency occurred.

The act of 1887 enlarged the class of workmen who might have the lien, and extended its benefits to include all claims for services rendered before the date which the court adjudged to be the time when insolvency occurred. The workmen had no lien under these acts against the assets of a solvent corporation engaged in the conduct of its ordinary business. They acquired none by their contract; it came as a pure gift, and only when

insolvency occurred. There is nothing submitted to me which in any way indicates that this company has become insolvent or suspended its ordinary business, whereby the workmen acquired a lien on its assets, before the act of April 8th, 1892 (P. L. of 1892, p. 426), was passed, which limited the workmen's lien to the amount of wages for services rendered within two months next before the insolvency proceedings were begun. The bill in this case was filed on the 25th day of November, 1895; the earliest act of insolvency set out in the bill was the permanent closing out of the works, which is stated to have been 'about two years ago'; that is about November 25th, 1893, more than eighteen months after the act of 1892 had on its passage gone into effect. As the workmen had acquired no lien under the acts of 1875 and 1887, they had no vested interest which the act of 1892 either could or did impair. The mere chance that they might continue to work for the corporation, until at some indefinite time in the future, when it might become insolvent and might be indebted to them, and they might, if insolvency proceedings were taken against it, claim a lien on its assets, is quite too remote a possibility to be recognized as a vested right protected against legislative action by the modification of the statute giving them a preference. There is no basis for the application of the principle that vested rights cannot be impaired by subsequent legislation, because there were no rights vested at the time when the subsequent legislation was enacted.

The insolvency proceedings in this case are controlled by the legislation in force at the time they were begun. This was the act of 1892, re-enacted in its substance in 1896. P. L. of 1896 p. 277. It is under this legislation that the receiver holds these assets, and it is under it that the lien of the workmen became fixed on the assets of the insolvent company. Their right to a preference was therefore given them by the same act

> which must guide and control the distribution, and no question arises as to the taking away of vested rights by subsequent legislation. Under this act of 1892 the workman acquires no lien on the assets of an insolvent company until the court has assumed jurisdiction to administer those assets. And even if the company be insolvent, and the court has assumed control of its assets, the workman, under that act, has no lien upon them, unless it has become indebted to him for wages earned during the two months next preceding the beginning of the insolvency proceedings. His preferential privilege is therefore created by the statute which authorizes the insolvent suit, *and is wholly dependent upon the institution of the insolvency proceedings.* He can reach the assets only through the receiver, who is appointed by the court to administer them. Hinkle *v.* Camden Safe Deposit and Trust Co., 2 Dick. Ch. Rep. 334." (Italics ours.)

In *Campbell* v. *Taylor Manufacturing Company,* 64 N. J. Equity 622, the Court held that a person not in the employ of the insolvent corporation who loaned money to the company for the purpose of paying wages to its labor, is not upon the corporation being decreed insolvent, entitled to the preference allowed by Section 83 of the General Corporation Act.

Although the facts of that case are not identical with the facts in the instant case in that in the case at bar the appellants acquired their rights by assignment rather than by means of a loan to the company, nevertheless the following from the opinion of Vice-Chancellor Grey at page 623 is instructive on the purpose and construction of the Act and will be quoted herewith:

> "The practice in this court, in allowing these statutory preferences, has been to limit them to persons who were within the

class named in the statute. Consolidated Coal Co. *v.* Keystone Chemical Co., 9. Dick. Ch. Rep. 310. The terms used in the act expressly prescribe that the preference is given to laborers and workmen and persons doing labor in the regular employ of the company at the time of the insolvency. It is a purely statutory right, and it was probably created for the purpose of preventing a general exodus of the workmen employed by corporations in anticipation of the failure of the company. It is intended to induce employes to remain at their work, even if financial disaster be threatened, by assuring them that they shall not lose their wages. A company which has a large number of employees may be in some financial straits, and may yet, if it can continue its business, regain its prosperity. But if its employes, anticipating that their wages will not be paid, leave its employ in a panic, absolute disorganization and destruction of the business may follow. The statute here intervenes and assures them that they, at all events, shall be paid. It refers, by its very words, to laborers, workmen and employes only, giving them a preference. There is neither provision for, nor recognition of, any power in the employes to assign their rights; nor of any right in anyone who may have loaned the company money with which to pay wages, to have any equitable subrogation to the privileges of the company's employes."

In this connection the quotation of Vice-Chancellor Berry in *Colyer* v. *Foster Screen Co.,* 99 N. J. Equity 734, from an earlier case is of interest:

"In Delaware, Lackawanna and Western Railroad Co. *v.* Oxford Iron Co., 33 N. J. Eq. 192 (at p. 202), Vice-Chancellor Van Fleet held that the preference given by this section of the Corporation act 'is in derogation of the common right of equality among creditors of the same rank, and the scope of

the statute should not, therefore be extended by construction.' " (p. 736.)

See also *Lehigh Coal and Navigation Co.* v *Central R. R. Co. of N. J.*, 29 N. J. Equity, 252, a case dealing with the earlier Act on the same point, at page 255:

> "The considerations against a latitudiuarian, or even liberal construction, are decisive. The preference given is in derogation of the common right of equality. The statute confers a special or exceptional right; it makes a distinction among persons having, according to the principles of natural justice, equal rights, and takes from all classes of creditors, secured and unsecured, except one, that that particular class may be paid in full. When a statute produces such a result, those who claim under it have a right to take what is clearly given by plain words, but nothing more."

And in *Cogan* v. *Conover Manufacturing Co.*, 69 N. J. Equity 386, the claim of Thomas Cogan is disallowed on the ground of the assignment having been made prior to the decree of insolvency. To quote from the opinion at 386:

> "But it has been held that if the employe assigns his claim before the insolvency is decreed there is at that time no lien in his favor, and his assignee therefore acquires no lien. Delaware, Lackawanna and Western Railroad Co. *v.* Oxford Iron Co., 33 N. J. Eq. (6 Stew.) 192 (at pp. 196, 197) (Vice-Crancellor Van Fleet, 1880)."

The decision on that case is evidently based upon the earlier case of *Delaware, Lackawanna and Western R. R. Co.* v. *Oxford Iron Co.*, which in turn construes the earlier Act and not the one now under consideration, for whereas under the earlier statute the criterion was the insolvency of the company, and that was determined upon the entry of the decree, the present Act makes

the institution of the insolvency proceedings the criterion upon which to determine the day when the lien arose.

To quote from Vice-Chancellor Berry's opinion in the case of *Colyer* v. *Foster Screen Co.*, 99 N. J. Equity 734, at 736:

> "To entitle a claimant to preference under this section the claim must be for wages due for labor or services rendered within two months next preceding the date of the institution of insolvency proceedings." (The section referred to is Section 83 of the General Corporation Act.)

It will be seen, therefore, that under the present Act the determining factor in ascertaining the time when the lien under the statute arises is the date when insolvency proceedings were instituted and that will be considered under Point II.

POINT II.

Proceedings in insolvency are actually instituted and begun against an insolvent corporation upon the filing of a bill of complaint.

From the wording of Section 83 of the General Corporation Act (heretofore quoted), it is clearly apparent that the lien of the wage claimant arises if the wages due are for labor, work or services performed within two months next preceding the date when proceedings in insolvency shall be actually instituted and begun against such insolvent corporation. The question to be decided, therefore, is what constitutes the institution and beginning of the insolvency proceedings.

The following cases, holding that a suit in Chancery is commenced by the issuance and service of subpoena or the making of a bona fide

attempt to serve it after the bill has been filed, are of some assistance in answering the question:

Hermann v. *Mexican Petroleum Corp.*, 85 N. J. Equity, 367;

Allman v. *United Brotherhood of Carpenters &c.*, 79 N. J. Equity, 150;

Lehigh Valley R. Co. v. *Andrus*, 109 Atl. Rep., 746 at p. 748;

Delaware River Quarry & Construction Co. v. *Board of Chosen Freeholders of Mercer County et al.*, 103 Atl. Rep., 18 at p. 20;

Forstmann & Huffmann Co. v. *United Front Committee of Textile Workers of Passaic and Vicinity et al.*, 133 Atl. Rep., 774 at p. 776;

Haughwout and Pomeroy, appellants, and *Murphy, respondent,* 22 N. J. Equity, 531;

Delaware River Quarry and Construction Co. v. *The Board of Chosen Freeholders of the County of Mercer et al.*, 88 N. J. Equity, 506 at p. 511.

If the commencement of the suit in the instant case is to be held as of the day when the bill was filed and subpoena issued, the date could not be prior than January 9, 1928, since on that date was the bill formally filed and the consent of the defendant corporation entered (making the issuance and service of a subpoena unnecessary) (p. 16, State of Case), but appellants contend that the cases on the commencement of a suit have no bearing on the issue involved because Section 83 of the Act has reference to institution of proceedings and not the commencement of a suit. Counsel for the appellants raise this point on page 10 of their brief, but do not refer to any cases or statutes which would define the " institution of proceedings" referred to in Section 83. Such a statute, however, exists in

the form of Section 65 of the General Corporation Act which sets forth the procedure to be taken to institute and begin insolvency proceedings against a corporation. Section 65 reads as follows:

> "Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, any creditor or stockholder may by petition or bill of complaint setting forth the facts and circumstances of the case, apply to the court of chancery for a writ of injunction and the appointment of a receiver or receivers, or trustees, and the court being satisfied by affidavit or otherwise of the sufficiency of said application, and of the truth of the allegations contained in the petition or bill, and upon such notice, if any, as the court by order may direct, may proceed in a summary way to hear the affidavits, proofs and allegations which may be offered on behalf of the parties, and if upon such inquiry it shall appear to the court that the corporation has become insolvent and is not about to resume its business in a short time thereafter with safety to the public and advantage to the stockholders, it may issue an injunction to restrain the corporation and its officers and agents from exercising any of its privileges or franchises and from collecting or receiving any debts, or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects, except to a receiver appointed by the Court, until the court shall otherwise order." (2 N. J. C. S., p. 1640.)

From that section it will be seen that the institution of insolvency proceedings are begun by filing a petition or bill of complaint setting forth the facts and circumstances of the case.

The question then resolves itself as to when was the bill of complaint in the instant case filed.

POINT III.

The bill of complaint in the case at bar was filed on January 9, 1928.

The docket entries in the office of the Clerk of the Court of Chancery showed that the bill was filed on January 9, 1928, (p. 22). Appellants in their brief, however, state that the bill was presented to the Vice-Chancellor on December 10, 1927, although they admit that it was not formally filed until January 9, 1928. This is not a matter for argument, but one of fact and may be best determined by reference to the stipulation of facts. To quote from said stipulation of facts contained in said State of the Case at page 24, etc.:

> "On the same day, (December 10, 1927) the said bill and supporting affidavit were exhibited to the said H. C. Wechsler, Treasurer of the above defendant company, who verbally stated to the counsel for the complainant and to the Vice-Chancellor, that the financial condition of the said company was correctly stated in the averments contained in the said bill and supporting affidavits, but that negotiations for the sale of the assets of the said defendant company as a going concern were pending or in prospect, *which would be defeated by the filing of said bill and the appointment of receivers for the said company;* that there was a large amount of work in process in the plant of the defendant company which would be finished at a profit and *that the creditors of the defendant company would be benefited if the filing of the said bill could be deferred* and the business of the company could be continued in operation, which he would endeavor to accomplish by requesting the Estate of William McK. Morris to purchase by assignment wage claims which the said defendant company was unable to pay and any additional wage claims that might arise through the

continued operation of the business of the company with a view to effecting a sale of its assets as a going concern.

In compliance with the request so made on behalf of the company by its Vice President and Treasurer, Mr. Wechsler, the said bill and supporting affidavit were witheld from filing, in consideration of which, on the request of the officers of the defendant company, the Executors of the Estate of William McK. Morris thereafter did on December 13, 1927, purchase by assignment various wage claims against the defendant company in the total of $683.61. *Subsequently, upon like request, and in consideration of the further withholding of the said bill in equity from formal filing and in order to enable the operation of the company to be continued in the expectation of effecting a sale of its assets as a going concern, the Executors of the Estate of William McK. Morris, deceased, did on December 17, 1927, purchase by assignment various wage claims against the defendant company in the total amount of $2,175.00;* and likewise on December 26, 1927, the Executors of the Estate of William McK. Morris, deceased, did purchase by assignment various wage claims against the defendant company in the total amount of $2,091.50; and likewise, on December 31, 1927, the Executors of the Estate of William McK. Morris, did purchase by assignment various wage claims against the defendant company in the total amount of $1,226.67.

Thereafter, upon the failure of all efforts that were being made during this period to consummate a sale of the assets of defendant company as a going business, whereby the full value of same might have been secured for the benefit of creditors and stockholders, and upon the unwillingness of the Executors of the Estate of William McK. Morris to continue the purchase of wage claims as aforesaid, *the bill and supporting affidavit aforesaid were duly presented to the Vice Chancellor and filed for action on January 9, 1928.*" (Italics ours.)

An interesting and what would seem to be a conclusive passage in the stipulation of facts is contained at page 28 of the State of the Case:

> "That each of said wage claimants was in the regular employ of the defendant corporation on and after December 10, 1927, and that the work, labor and services out of which said claims arise were performed within two months next preceding January 9, 1928, the date when the proceedings in insolvency were formally begun against the said defendant corporation, said date being the date of the filing of the bill of complaint."

In other words, it would seem that appellants admit not only that January 9, 1928, was the date when the proceedings in insolvency were formally begun against the defendant corporation, but also that that was the date when the bill of complaint was really filed. As to both points that in fact was the situation.

SUMMARY.

A consideration of the foregoing points, therefore, would seem to lead to the irrefutable conclusion that a wage claim assigned prior to the institution of insolvency proceedings would be entitled to no lien under the statute and that the proceedings in insolvency in the instant case were not instituted and begun until the filing of the bill of complaint, which under the facts of this case, cannot possibly be considered to have been prior to January 9, 1928, the date when all admit the bill was formally filed.

It is, therefore, urged that the decision of the receiver disallowing the claims of the appellants, which was sustained by Vice-Chancellor

Church in the decree appealed from, be affirmed by this court.

Respectfully submitted,

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