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New Jersey State Library

STATE OF THE CASE.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

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Between

HYMAN S. LICHTENSTEIN,  
*Complainant-Appellant,*

and

ALBERT ISRAEL, *et ux., et*  
*al.,*

*Defendants-Appellees.*

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On Appeal from  
Chancery.  
State of the Case.

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1. The complainant, Hyman S. Lichtenstein, on 20  
the twenty-ninth day of April, 1929, filed a bill of  
complaint in the above matter, the general object  
of which was to foreclose a certain mortgage on the  
lands and premises situate in the City and County  
of Camden and State of New Jersey, commonly  
known and designated as Nos. 901, 903 and 905  
Broadway.

2. On the sixth day of May, 1929, one J. Hartley 30  
Bowen was appointed receiver to take charge of  
the mortgaged premises and to manage the same  
with power to collect the rents, issues and profits  
thereof.

## 3. Final Decree.

## FINAL DECREE.

(Filed July 22nd, 1929.)

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72-608.

IN CHANCERY OF NEW JERSEY.

	Between	
	HYMAN S. LICHTENSTEIN,	} On Bill, etc. Final Decree
	Complainant,	
	and	
20	ALBERT ISRAEL and HAR- RIET ISRAEL, <i>et als.</i> , Defendants.	

30 This cause being opened to the Court by Aaron Heine, solicitor of the complainant, and the complainant's bill having heretofore been taken as confessed against the defendants, Albert Israel and Harriet Israel, his wife, Broadway-Spruce Corporation and Quality Credit Shop; and it appearing that the defendants, Broadway Trust Company (now known as the Broadway-Merchants Trust Company), and Orlando M. Bowen, trustee for the Victory Trust Company, South Camden Trust Company of Camden, N. J., and the First Camden National Bank and Trust Company, who hold mortgages on

the mortgaged premises described in the bill of complaint herein, which are subsequent to the complainant's, have given notice to the complainant that they desire to have their encumbrances or liens reported upon; and it further appearing that the defendant, South Camden Trust Company of Camden, N. J., who is a judgment creditor herein, which lien is subsequent to complainant's has given notice to the complainant that it desires to have its encumbrance or lien reported upon; whereupon and upon reading the report on file made by John T. Cleary, Esq., one of the Masters of this Court, bearing date the second day of July, 1929, whereby it appears that there is due to the defendant, Broadway Trust Company (now known as the Broadway-Merchants Trust Company) for principal and interest on the mortgage held by it made by Albert Israel and Harriet Israel, his wife, to Hyman S. Lichtenstein, dated the second day of November, 1925, to secure the sum of twenty thousand (\$20,000.00) dollars, which mortgage was recorded in the Register of Deeds office of Camden County in Book No. 267 of Mortgages, page 411, and which mortgage was assigned by the said mortgagee to the defendant, Broadway Trust Company (now known as the Broadway-Merchants Trust Company), which assignment was dated the fourteenth day of January, 1926, and recorded in the office of the Register of Deeds of Camden County in Book No. 66 of Assignment of Mortgages, page 384, the sum of twenty thousand eight hundred dollars (\$20,800.00); that there is due to the defendant, Broadway Trust Company (now known as the Broadway-Merchants Trust Company) on a mortgage held by it and made by Albert Israel and Harriett Israel, his wife, the sum of six thousand five hundred and twenty-seven dollars and ninety cents (\$6,527.90); that there is due to the defendant,

South Camden Trust Company of Camden, N. J., on its judgment against Albert Israel, the sum of one thousand five hundred and ninety-three dollars and thirty-seven cents (\$1,593.37); that there is due Orlando M. Bowen, trustee for Victory Trust, Company, the First Camden National Bank and Trust Company and the South Camden Trust Company of Camden, N. J., the total sum of five thousand six hundred and eighty-five dollars and nine cents (\$5,685.09), that is, there is due to the First  
10 Camden National Bank and Trust Company the sum of two thousand nine hundred and fifty-nine dollars and thirty-one cents (\$2,959.31), and there is due to the South Camden Trust Company of Camden, N. J., the sum of two thousand seven hundred and twenty-five dollars and seventy-eight cents (\$2,725.78), or a total sum due of five thousand six hundred and eighty-five dollars and nine cents (\$5,685.09); that the mortgage of the complainant which  
20 was assigned to the said defendant, Broadway Trust Company (now known as the Broadway-Merchants Trust Company) is first in priority and is entitled first to be paid; and that the said mortgage of the defendant, Broadway Trust Company (now known as the Broadway-Merchants Trust Company) is second in priority and is entitled secondly to be paid; that in the opinion of the Master, it is necessary that the said premises be sold together as one parcel and as a whole; and no cause appearing or being shown  
30 to the contrary:

It is, on this 22nd day of July, 1929, ordered adjudged and decreed that the said report and all the matters and things therein contained to stand ratified and confirmed and that the mortgaged premises described in the said bill of complaint be sold, as aforesaid, to raise and satisfy the money due to the defendants, Broadway Trust Company (now known

as the Broadway-Merchants Trust Company) the South Camden Trust Company of Camden, N. J., and Orlando M. Bowen, trustee for the Victory Trust Company, First Camden National Bank and Trust Company and the South Camden Trust Company of Camden, N. J., that is to say, to pay and to satisfy unto the defendant, Broadway Trust Company (now known as the Broadway-Merchants Trust Company) the sum of twenty thousand eight hundred dollars (\$20,800.00), together with lawful interest thereon to be computed from the second day of July, 1929, being the date of the Master's report, with the complainant's costs to be taxed, including a counsel fee of \$204.00, which is hereby allowed to the said complainant, Hyman S. Lichtenstein; to pay and satisfy unto the defendant, Broadway Trust Company (now known as the Broadway-Merchants Trust Company), the sum of six thousand five hundred and twenty-seven dollars and ninety cents (\$6,527.90), together with lawful interest thereon from the date last mentioned; and that any surplus money arising from the sale of the said mortgaged premises after the payment to the defendant the said sums due with interest on its said mortgages, together with the taxed costs of this proceeding and the costs of this sale, be brought into this court to abide the further order of this Court, unless otherwise previously disposed of by this Court; and that a writ of *feri facias* issue for that purpose, out of this court, directed to the sheriff of Camden County, commanding him to make sale, according to law, of the said mortgaged premises, described in the bill of complaint filed herein, and that out of the money arising from said sale, he pay to the defendant, or its solicitor, its said debts, interests and costs, and that any surplus money arising from the sale of the said mortgaged

premises after the payment to the defendant the said sums due on its said mortgages, together with the taxed costs of this proceeding and the costs of this sale, be brought into this court, to abide the further order of this Court, unless previously disposed of by this Court, and that the sheriff make his return without delay, of his proceedings by virtue of said writ.

10 And it is further ordered, adjudged and decreed, that the defendants stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises when sold as aforesaid by virtue of this decree.

E. R. WALKER,  
C.

4. On the twenty-fifth day of October, 1929, Walter T. Gross, Sheriff of Camden County, sold at public vendue, the lands and premises described in the  
20 writ issued in the within cause, to the Broadway-Merchants Trust Company, for the sum of six hundred (\$600.00) dollars.

5. Petition for discharge of receiver.

PETITION FOR DISCHARGE.

(Filed January 6, 1930.)

72-608.

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IN CHANCERY OF NEW JERSEY.

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Between

HYMAN S. LICHTENSTEIN,  
*Complainant,*  
and

ALBERT ISRAEL and HAR-  
RIET ISRAEL, *et als.,*  
*Defendants.*

On Petition for Re-  
ceiver.  
Petition for Dis-  
charge.

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

The petition of J. Hartley Bowen, of the City  
and County of Camden and State of New Jersey,  
respectfully shows that:

30

1. The petitioner is receiver heretofore appointed  
by this Court by order dated the seventeenth day of  
June, 1929, to take charge of the mortgaged prem-  
ises mentioned in said petition and particularly de-  
scribed in the bill of complaint filed herein, which  
mortgaged premises are known as Nos. 901, 903, and

905 Broadway, in the City of Camden aforesaid, and to manage the same with power to sue for, collect the rents, issues and profits thereof, to let the said premises or any part thereof at such time or times as may prove necessary or proper and for that purpose to make agreements or leases for the rental of said premises; and otherwise to do all things necessary or proper for the due care and proper management of the said mortgaged premises.

10

2. Pursuant to said order, petitioner assumed the control and management of the said mortgaged premises and collected certain rents, issues and profits thereof and made certain disbursements for the care, maintenance and leasing of the said premises.

20

3. The said petitioner collected as rent during his said control of the said mortgaged premises the sum of two thousand eight hundred fourteen (\$2,814.00) dollars, and made certain disbursements for the care, insurance and other items more particularly enumerated in the schedule hereto annexed, amounting to one thousand four hundred sixty-one dollars and eighty-three cents (\$1,461.83), leaving a net balance of one thousand three hundred fifty-two dollars and seventeen cents (\$1,352.17), for distribution.

30

4. Petitioner is informed and verily believes that the mortgaged premises have been duly sold, by the Sheriff of Camden County, and the deed for the said premises delivered to the said purchaser.

5. The defendants in the suit are, Albert Israel and Harriet Israel, his wife, Joseph C. Brownstone, trading as Quality Credit Shop, Broadway-Mer-

chants Trust Company, South Camden Trust Co., of Camden, N. J., Orlando M. Bowen, trustee, Penn Mutual Life Insurance Company and Broadway-Spruce Corporation.

Petitioner, therefore, prays that an order may be made allowing him a commission of one hundred forty dollars and seventy cents (\$140.70), for his services as receiver, and three hundred fifty (\$350.00) dollars, counsel fee to the solicitor, and that an order be entered disposing of the net proceeds in his hands; that thereupon he be discharged from any further duties and liabilities as said receiver.

AARON HEINE,  
*Solicitor for Petitioner.*

20

STATE OF NEW JERSEY }  
COUNTY OF CAMDEN } ss.

J. HARTLEY BOWEN, of full age, being duly sworn according to law, on his oath deposes and says:

That I am the petitioner in the foregoing petition named. That I have read all of the statements of the said petition and said statements are true to the best of my knowledge and belief.

30

J. HARTLEY BOWEN.

Sworn and subscribed to before me, this 4th day of January, 1930.

ISABEL C. LELAND,  
*Notary Public of N. J.*

## ACCOUNT OF RECEIVER.

72-608.

## IN CHANCERY OF NEW JERSEY.

10

Between

HYMAN S. LICHTENSTEIN,  
*Complainant,*

and

ALBERT ISRAEL and HAR-  
RIET ISRAEL, *et als.,*  
*Defendants.*On Petition for  
Receiver.  
Account of Receiver.

20

Pursuant to an order made in the above entitled cause, on the seventeenth day of June, 1929, I, the undersigned, and receiver duly appointed in this matter, hereby report that I have collected the rent, issues and profits of premises Nos. 901, 903 and 905 Broadway, in the City and County of Camden and State of New Jersey, particularly described in the bill of complaint filed in the within cause and beg herewith to present my account of the receipts and disbursements made by me from the gross receipts received by me:

30

## RECEIPTS.

Amt. transferred from old account of	
Israel 5-31-29	\$210.00
May Rent, 5-21-29	300.00

*Account of Receiver*

11

Sidewalk Rental, 6-3-29	4.00	
Back Rent on 905 Broadway, 6-20-29	500.00	
June Rent, 7-1-29	300.00	
July Rent, 8-1-29	300.00	
August Rent, 9-1-29,	300.00	
September Rent, 10-1-29,	300.00	
October Rent, 10-24-29	300.00	
November Rent, 11-22-29,	300.00	
	<hr/>	
	\$2,814.00	10

DISBURSEMENTS.

Receiver's Bond	\$90.00	
\$7500 Fire Insurance, Expir- ing 5-29-30	30.38	
First Mtg. Interest due 5-20-29	1,290.00	
\$7500 Fire Insurance, Expir- ing 10-7-30	30.38	20
Cleaning Windows	2.00	
Removing Trash from Store	4.50	
	<hr/>	
	\$1,447.26	
Receipts Brought Forward		\$2,814.00
Brought Forward	\$1,447.26	
Sheriff's Costs	6.12	
County Clerk	3.45	
Approving Bond	5.00	1,461.83
	<hr/>	
		30
Net Balance	\$1,352.17	

Commissions  
Counsel Fee  
Distribution

J. HARTLEY BOWEN,  
*Receiver.*

## ORDER TO SHOW CAUSE.

72-608.

## IN CHANCERY OF NEW JERSEY.

10

Between

HYMAN S. LICHTENSTEIN,  
*Complainant,*

and

ALBERT ISRAEL and HAR-  
RIET ISRAEL, *et als.,*  
*Defendants.*On Petition for  
Receiver.  
Order to Show Cause.

20

This matter being open to the Court by Aaron Heine, solicitor of the petitioner, J. Hartley Bowen; and it appearing that a duly verified petition and account of the said receiver has been duly filed in this court; and that the premises described in the bill of complaint have been duly sold by the Sheriff of Camden County;

30

It is, therefore, on this 6th day of January, 1930, on motion of Aaron Heine, solicitor of the petitioner, ordered, that the said defendants show cause before this Court on the 13th day of January, 1930, at the Chancery Chambers, in the court house, in Camden, why an order should not be made approving the account of the said receiver, allowing the said receiver his commission amounting to one hundred forty dollars and seventy cents (\$140.70) and allowing a counsel fee of three hundred fifty (\$350.00) dollars,

and providing for the payment of the net balance remaining in the hands of the said receiver;

It is further, ordered, that the said petition and account be filed with the sergeant-at-arms, in Camden, open to examination of all persons interested;

It is further, ordered, that a copy of this order be served upon Joseph C. Brownstone, trading as Quality Credit Shop, Broadway-Spruce Corporation, Broadway-Merchants Trust Company, and Orlando M. Bowen, trustee, and that a copy of this order be 10  
mailed to Albert Israel and Harriet Israel, his wife, Penn Mutual Life Insurance Company, within 2 days from the date thereof.

Respectfully advised:

E. B. LEAMING,  
V. C.

14 *Petition for Funds in the Hands of Receiver*

6. Petition and affidavit by complainant for funds in the hands of the receiver.

PETITION FOR FUNDS IN THE HANDS OF  
THE RECEIVER.

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(Filed January 13th, 1930.)

72-608.

IN CHANCERY OF NEW JERSEY.

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20	Between HYMAN S. LICHTENSTEIN, <i>Complainant,</i> and ALBERT ISRAEL and HAR- RIET ISRAEL, <i>et als.,</i> <i>Defendants.</i>	} On Petition for Receiver. Petition for Funds in the Hands of the Receiver.
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*To the Honorable Edwin Robert Walker, Chancellor  
of the State of New Jersey:*

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The petition of Hyman S. Lichtenstein, of the City and County of Camden and State of New Jersey, respectfully shows that:

1. The petitioner is the complainant in the above entitled cause, the principal object of which was to foreclose a certain mortgage made by the defen-

*Petition for Funds in the Hands of Receiver* 15

dants, Albert Israel and Harriet Israel, his wife, covering lands and premises described in the bill of complaint, given to secure the sum of twenty thousand (\$20,000.00) dollars.

2. The petitioner assigned said mortgage to the defendant, Broadway-Merchants Trust Company, as collateral security for certain money due to the defendant from the said petitioner.

10

3. The said mortgaged premises, subject to the encumbrances, taxes and other municipal charges, were duly sold by the Sheriff of Camden County to satisfy the decree entered in the said foreclosure suit.

4. Since the entry of the foreclosure decree in said foreclosure suit, the said petitioner obtained a release of all debts or claims for any money due from the said petitioner to the said Broadway-Merchants Trust Company, a copy of which is annexed hereto and made a part hereof.

20

5. The petitioner is informed and verily believes that the receiver appointed in the within cause has collected the sum of two thousand eight hundred fourteen (\$2,814.00) dollars, and has made certain necessary disbursements amounting to one thousand four hundred sixty-one dollars and eighty-three cents (\$1,461.83), leaving a net balance of one thousand three hundred fifty-two dollars and seventeen cents (\$1,352.17) for distribution, out of which the said receiver has asked for an allowance of one hundred forty dollars and seventy cents (\$140.70), for his commissions, and to the solicitor three hundred fifty (\$350.00) dollars, as counsel fees, which

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16 *Petition for Funds in the Hands of Receiver*

sums the said petitioner is willing should be allowed by this Court.

Your petitioner, therefore, prays that the balance in the hands of the said receiver, after the allowance of said receiver's commissions and counsel fees, be paid to him.

And your petitioner will ever pray, etc.

AARON HEINE,

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*Solicitor for Petitioner.*

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STATE OF NEW JERSEY {  
COUNTY OF CAMDEN } ss.

HYMAN S. LICHTENSTEIN, of full age, being duly sworn according to law, on his oath deposes and says:

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That I am the petitioner in the foregoing petition named. That I have read the statements and facts contained in said petition and that they are true, to the best of my knowledge and belief.

HYMAN S. LICHTENSTEIN.

Sworn and subscribed to before me this eighth day of January, 1930.

ISABEL C. LELAND,

*Notary Public of N. J.*

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COPY.

KNOW ALL MEN BY THESE PRESENTS, THAT IT, the BROADWAY-MERCHANTS TRUST COMPANY, a banking corporation of the State of New Jersey, for and in consideration of the

*Petition for Funds in the Hands of Receiver* 17

sum of Three hundred and five Dollars and ten cents (\$305.10), lawful money to it in hand paid by HYMAN S. LICHTENSTEIN, of the City and County of Camden and State of New Jersey, and upon the further consideration of the conveyance by deed dated the twelfth day of December, 1929, by Lichtenstein & Co., Inc., to Elias Davis and Clarence N. Haven, and deed dated the twelfth day of December, 1929, by Hyman S. Lichtenstein, et ux, to Elias Davis and Clarence N. Haven, of certain lands and premises, has remised, released and forever discharged, and by these presents does for itself, its successors and assigns, remise, release and forever discharge the said Hyman S. Lichtenstein, his heirs, executors, administrators and assigns, of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, premises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, which against the said Hyman S. Lichtenstein, the said Broadway-Merchants Trust Company ever had, now has or which it, its successors and assigns can, shall or may have, for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents. 10

IN WITNESS WHEREOF, the said Broadway-Merchants Trust Company has caused these presents to be signed by its proper officers and its corporate seal to be hereunto affixed, this eighteenth day of December, 1929. 30

BROADWAY-MERCHANTS TRUST  
COMPANY,

By (Signed) EDWIN C. NORCROSS,  
Vice-President.

18 *Petition for Funds in the Hands of Receiver*

Signed, sealed and delivered  
in the presence of—

Attest:

(signed) JAMES C. PIERCE

Ass't-Secretary.

STATE OF NEW JERSEY }  
COUNTY OF CAMDEN } ss.

10 BE IT REMEMBERED, that on this 18th day of  
December in the year of our Lord one thousand nine  
hundred and twenty-nine, before me, a Notary Pub-  
lice of the State of New Jersey, personally appeared  
James C. Pierce, who being by me duly sworn on  
his oath saith, that he is the Ass't. Secretary of the  
BROADWAY-MERCHANTS TRUST COMPANY,  
the Releasor within named; that deponent knows  
the common or corporate seal of said Releasor and  
that the seal annexed to the within Release is such  
20 common or corporate seal; that the said Release was  
signed by the said Vice-President and the seal of  
said Releasor affixed thereto in the presence of the  
deponent; that said Release was signed, sealed and  
delivered as and for the voluntary act and deed of  
said Releasor for the uses and purposes therein ex-  
pressed, pursuant to a resolution of the Board of  
Directors of said Releasor; and at the execution  
thereof this deponent subscribed his name thereto  
as witness.

30 (Signed) James C. Pierce

Sworn and subscribed,  
the day and year  
aforesaid  
W. F. Reitz,  
Notary Public  
My commission expires  
July 23, 1933.

7. Affidavit of Edwin C. Norcross.

AFFIDAVIT.

(Filed February 3rd, 1930.)

IN CHANCERY OF NEW JERSEY.

10

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Between  
HYMAN S. LICHTENSTEIN,  
    *Complainant,*  
    and  
ALBERT ISRAEL and HAR-  
RIET ISRAEL, *et als.,*  
    *Defendants.* } Affidavit.

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STATE OF NEW JERSEY }  
COUNTY OF CAMDEN } ss.

EDWIN C. NORCROSS, of full age, being duly sworn according to law, on his oath deposes and says:

I am the Vice-President of the Broadway-Merchants Trust Company, whose principal banking houses and places of business are in the City and County of Camden, State of New Jersey. 30

I have been shown a copy of a petition in this matter signed by Aaron Heine, Esquire, solicitor for Hyman S. Lichtenstein and a copy of a release attached thereto and purporting to be signed by me as Vice-President of said Broadway-Merchants

Trust Company. By way of answer to said petition, I say as follows:

1. Said Lichtenstein was complainant in said foreclosure suit to foreclose the mortgage there mentioned.
- 10 2. Said Lichtenstein did assign said mortgage to Broadway-Merchants Trust Company as collateral security for loans by this company to Lichtenstein of \$22,200.00, besides such interest as might accrue thereon. Lichtenstein, through said attorney, started foreclosure proceedings on the mortgage which was so assigned to the bank I represent. In the bill of complaint filed by said Lichtenstein, he claims that there was due to said Trust Company only the sum of \$7000.00, which statement was untrue and on answer, filed by said Trust Company, and hearing before a Master, the Master found and  
20 the Chancellor thereafter decreed that there was due on said mortgage, the sum of \$20,800.00, with interest from the date of the Master's report. The said mortgage, in fact, was inadequate to cover the full amount due to the said Trust Company from Lichtenstein.
- 30 3. The premises covered by said mortgage were sold by the sheriff, subject only to the taxes and other municipal charges thereon and a first mortgage.
4. The date of the sale mentioned in paragraph 3 was October 25th, 1929.
5. The date of the release mentioned in paragraph 4 is December 18th, 1929. The actual facts

and circumstances with reference to the execution and delivery of said release by said Trust Company to Lichtenstein, are as follows:

Prior to the sale under said foreclosure proceedings, the attorney for Lichtenstein called a meeting of the sundry banks who were creditors of Lichtenstein. I attended that meeting of creditors at the office of Aaron Heine, Esquire, attorney for Lichtenstein. I understood at said meeting that Broadway-Merchants Trust Company was the only bank holding security for loans made to Lichtenstein. I was asked at said meeting what said Trust Company was willing to do in view of an offer made by Lichtenstein to settle with the creditors twenty-five cents on the dollar. I stated that said Trust Company was willing to and would take over the said mortgage of \$20,000.00 so held by it, as its property, at a valuation of \$20,000.00 and would credit that sum on the debt owed by Lichtenstein to said Trust Company. This suggestion was acceptable to the others present as well at this meeting as at a subsequent meeting of all creditors. Said Trust Company, as a result thereof, and as a part of the settlement proposed to be made by Lichtenstein with all of said banks, did take over, as its own property absolutely, said mortgage of \$20,000.00 and credited said valuation, to wit: the sum of \$20,000.00 upon the indebtedness of Lichtenstein to said Trust Company.

The foreclosure proceedings thereupon went forward and a sale was had by the sheriff at which sale said Trust Company bought in said property as mortgagee subject to the first mortgage upon the said property on a bid of \$600.00. At the time of the sale by the sheriff, Broadway Merchants Trust Company was the absolute owner of said mortgage and was not the mere collateral holder thereof and upon

said sale, became the absolute owner of said property subject to said prior encumbrance.

As a result of said sale there was a deficiency in the amount due from Lichtenstein to the Trust Company and this deficiency, after crediting the value of said mortgage, to wit: the sum of \$20,000.00, was the sum of \$2208.96. In order to complete the settlement which the banks generally had agreed to make with Lichtenstein the said Broadway-Merchants Trust Company received from Lichtenstein the sum of \$305.10 being 25 per cent. of the money remaining due by Lichtenstein to said Trust Company and I executed and had delivered to Lichtenstein, through his attorney, Aaron Heine, the release which is attached to Lichtenstein's petition in this matter.

I, at no time, agreed to waive on behalf of said Broadway-Merchants Trust Company, its right as mortgagee to assert all its rights as mortgagee and owner of the said mortgage. In fact, there were taxes against said property which were supposed to be paid by the receiver and interest on the first mortgage as well. Said Trust Company was compelled, immediately after said sale, to pay a large amount of taxes and assessments against said property, to wit; \$9799.99. It was never suggested by Lichtenstein or his attorney that this Trust Company would lose its right as owner of said mortgage to claim any moneys collected from rents to liquidate a deficiency due said Trust Company under the foreclosure proceedings. Before the sale took place I spoke to the receiver, Mr. J. Hartley Bowen, about payment of taxes because the first mortgagee was making demands upon this Trust Company to have said taxes paid. Mr. Bowen did not have money in his hands sufficient to pay the taxes and I was requested by him to pay taxes and, as I understood, the money in the receiver's hands

would be turned over to the Trust Company to, in part, liquidate those taxes.

Lichtenstein was not the owner of said property. He simply held the said \$20,000.00 mortgage as mortgagee and thereafter assigned it to Broadway-Merchants Trust Company.

This Trust Company, besides a decree in said proceedings that there was due to it upon this first mortgage the sum of \$20,800.00, with interest, it also in said proceedings was the holder of a second mortgage made directly by the owner of said property to said Trust Company. This was given to secure the sum of \$10,000.00, for which decree was also entered in favor of said Trust Company in the sum of \$6527.80, but this last named mortgage was wiped out by the foreclosure proceedings. 10

6. J. Hartley Bowen was appointed receiver to collect rents on said property pending the foreclosure proceeding and he did collect the rents on said property and has filed his account in this court. 20

EDWIN C. NORCROSS.

Sworn to and subscribed before me, this 2nd day of February, 1930.

IDA M. STRANG,  
*Notary Public of N. J.*

8. Affidavit of J. Hartley Bowen.

AFFIDAVIT.

(Filed February 3rd, 1930.)

10 IN CHANCERY OF NEW JERSEY.

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Between HYMAN S. LICHTENSTEIN, <i>Complainant,</i> and ALBERT ISRAEL and HAR- RIET ISRAEL, <i>et als.,</i> <i>Defendants.</i>	}	Affidavit.
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STATE OF NEW JERSEY } COUNTY OF CAMDEN }	} ss.
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J. HARTLEY BOWEN, of full age, being duly sworn according to law, on his oath, deposes and says:

I am the receiver appointed in these proceedings.

30 I collected rents and made disbursements therefrom as shown by my account filed in this court.

Before the sheriff's sale, Edwin C. Norcross, Vice-President of the Broadway-Merchants Trust Company, asked me to pay out of the receiver's hands taxes on the property. I did not have the funds in hand with which to pay the taxes, but I did pay one-half year's interest on the first mortgage. I told

Mr. Norcross that his Trust Company should put up the money for the taxes, as I understood the matter, the moneys in my hands as receiver would go to his bank to liquidate, in part, the deficiency due the bank upon the sale. I did not have sufficient funds in my hands at any time to pay the taxes.

J. HARTLEY BOWEN.

Sworn to and subscribed before me, this 3rd day  
of February, 1930.

10

VIRGINIA DiPAOLO,

*Notary Public.*

Commission expires January 28, 1931.

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30

9. Affidavit of Charles H. Laird, Jr.

AFFIDAVIT.

(Filed February 3rd, 1930.)

10      IN CHANCERY OF NEW JERSEY.

Between  
HYMAN S. LICHTENSTEIN,  
    *Complainant,*  
    and  
ALBERT ISRAEL and HAR-  
RIET ISRAEL, *et als.,*  
    *Defendants.* }      Affidavit.

20

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

CHARLES H. LAIRD, JR., of full age, being duly sworn according to law, on his oath deposes and says:

30      I am the Vice-President of the West Jersey Trust Company.

I was present at a meeting of certain banks, creditors of Hyman S. Lichtenstein, at which it was proposed by Lichtenstein that a settlement be made with the banks at twenty-five cents on the dollar.

The Broadway-Merchants Trust Company, through Mr. Edwin C. Norcross, as Vice-President,

was present at said meeting and stated that it had security. At the request of the others present Mr. Norcross agreed to take over the mortgage which it held as collateral security for its debt, to wit; a mortgage of \$20,000.00, at the face value of the principal thereof, namely, the sum of \$20,000.00 and credit that sum upon the indebtedness of Lichtenstein and to accept 25 cents on the dollar for the balance of the indebtedness after taking over and crediting the value of said mortgage on said indebtedness. 10

CHAS. H. LAIRD, JR.

Sworn to and subscribed before me, this 3rd day of February, 1930.

DANIEL R. CREATO,  
*Notary Public in and  
for the State of N. J.*



2. Said receiver has filed his account and has asked approval thereof and instructions as to disposition of the net proceeds.

3. Upon the return day of the order to show cause, issued upon the aforesaid application, deponent made application for the payment of the said net proceeds, as the said premises did not bring a sum sufficient to pay the amount due to the complainant, on which there was a deficiency of approximately \$22,500.00. 10

4. The said mortgage was assigned by the deponent to the defendant, Broadway-Merchants Trust Company, as collateral security for a loan, upon which, at the time of the institution of the foreclosure proceedings, was due approximately \$7,000.00. Said deponent was also indebted to the said Broadway-Merchants Trust Company, upon an open account for approximately \$15,200.00, and owed the said bank, an additional \$5,000.00, which was secured, however, by a certificate of deposit, in a like sum; so that deponent's total indebtedness, both secured and unsecured, amounted to approximately \$27,200.00. The note which the said deponent signed at the time of the obtaining of the loan upon the said mortgage contained a provision whereby said bank could apply the amount obtained from the collateral toward the unsecured indebtedness, which privilege had never been exercised by the bank previous to the institution of the suit, but after the said foreclosure suit was commenced, it advised the deponent that it would demand upon its indebtedness, all of the moneys realized from the sale of the premises under the said foreclosure suit. 20 30

5. Thereupon the said deponent called his other

bank creditors together and explained his financial difficulties and in pursuance thereof, an agreement was entered into whereby twenty-five per cent. of the balance remaining due would be paid to each of the several banks, allowing, however, the several banks to take full credit for the certificates of deposit held by them and the said settlement of twenty-five per cent. was to be calculated on the sum remaining. Insofar as it pertains to the Broadway-Merchants  
10 Trust Company, this bank agreed that it would credit his indebtedness with \$20,000.00, which arrangement was made apart from the bank creditors, and it was contingent upon the purchase of the said property at the foreclosure sale by the said bank. This arrangement was entered into by the bank and deponent on the day of the sale, as evidenced by a letter, a copy of which is annexed hereto and made a part hereof.

20      6. The consideration of the said settlement was two-fold. It provided for the payment of cash and for the conveyance to trustees for the several banks, of all of the real estate of the said deponent, with an assessed valuation of upwards of one hundred twenty-five thousand (\$125,000.00) dollars, and in which deponent had a considerate equity over and above the mortgages encumbering the properties. The cash consideration for the release by the Broadway-Merchants Trust Company, of the sum remain-  
30      ing due, was the sum of \$552.24, and was paid as follows: \$305.10, in cash, from deponent to the bank, and the balance of \$247.14, was retained by the bank out of the moneys on deposit by deponent, in said bank. The sum of \$552.24 represented twenty-five per cent. of the sum agreed upon as due from deponent to the bank and was arrived at in the following manner; the total indebtedness was \$27,308.96,

and there were credits of \$20,000.00, as above stated, and \$5,000.00 secured by the certificate of deposit.

7. The first meeting of the bank creditors relating to the compromise of the debts was held on September sixth, 1929, after this foreclosure suit had been instituted. On November second, 1929, the understanding between the deponent and the banks was reduced to writing by letter received from Lewis Starr, Esq., of Starr, Summerill and Lloyd, a copy of which is annexed hereto and made a part hereof. The foreclosure sale of the premises was held on October twenty-fifth, 1929, and on December thirty-first, 1929, a letter was received from Lewis Starr, Esq., of Starr, Summerill and Lloyd, relating to the amounts due to the said banks, a copy of which letter is annexed hereto and made a part hereof. The general release from Broadway-Merchants Trust Company was executed on the eighteenth day of December, 1929, but was not delivered by Judge Starr until January fourth, 1930.

8. All of the arrangements and agreements were discussed prior to the foreclosure sale, but not consummated until fully two months thereafter, and more than a month after the said foreclosure sale and after the deed had been delivered to the bank or its assignee, of the said foreclosed premises.

9. There was never any agreement nor arrangement whereby deponent made a complete and full assignment of his mortgage or his rights thereunder. The said bank did not by any word or action ask for a complete assignment of said mortgage, nor that it be substituted as complainant in said proceedings, and has never acted in said matter as

though it were the outright owner of the said mortgage.

10. Although the property was purchased by the Broadway-Merchants Trust Company at the sheriff's sale, it assigned its bid to the Bankers Security Company, who now holds title to the property, and the said taxes were paid after the sheriff's sale.

- 10      11. In the letter from the Broadway-Merchants Trust Company, dated October twenty-fourth, 1929, the portion appearing in capital letters in the body of the letter itself, was written in by the solicitor for the said bank immediately prior to the sale, and the memorandum appearing at the bottom of the letter was written in by the solicitor and signed by the Vice-President of said bank, after the date of the sale. Although the said letter bears date the  
20      twenty-fourth day of October, 1929, it was not received by deponent until the twenty-fifth day of October, 1929, the date of the sheriff's sale.

HYMAN S. LICHTENSTEIN.

Sworn and subscribed to this fifth day of February, 1930.

ISABEL C. LELAND,  
*Notary Public of N. J.*

COPY.

Law Offices  
STARR, SUMMERILL & LLOYD  
Camden, New Jersey

November 2, 1929.

Aaron Heine, Esq.,  
548 Federal St.,  
Camden, N. J.

Dear Mr. Heine: In re: Hyman Lichtenstein

10

This letter is written for the purpose of making a record of the understanding reached between you, as attorney of the debtor, and the representatives of the various banks, with respect to an adjustment of the latter's claims.

The banks will accept twenty-five percent in cash of their respective claims, this amount to be based upon the net amount due each institution, after giving credit for any certificates of deposit, which they may hold, the balances in the demand accounts in each institution to be either turned over to Lichtenstein or applied on account of the twenty-five per cent to be paid.

20

Upon an absolute conveyance in fee simple to the banks, or their nominees, of all of Lichtenstein's real estate, the latter will be released from the payment of any further moneys due on the claims held by the banks. The real estate already transferred to the Lichtenstein Corporation is to be re-conveyed to Lichtenstein, and the latter, together with his wife, is to convey the same to the bank creditors or their nominees.

30

As a condition of this settlement, all moneys due the merchandise and other creditors, exclusive of the banks by Lichtenstein, is to be settled, so that there is no further obligation thereon.

34      *Answering Affidavit of Complainant*

If possible, you are to secure an extension of the payment of the \$25,000. blanket mortgage until March 2, 1932, with the understanding, of course, that the interest falling due thereon and taxes are to be paid.

Pending the carrying out of this arrangement, judgments are not to be taken in the suits now pending, with respect to the notes due the various banking institutions.

- 10      No counsel fees are to be paid by the banks to you or any one representing Lichtenstein.

Very truly yours,

(Signed) Lewis Starr

LS:G      FOR STARR, SUMMERILL & LLOYD  
P. S. The arrangement as to the balances in the demand accounts in each institution to be either turned over to Lichtenstein or applied on account of the twenty-five per cent to be paid is not to apply to the deposit already credited by the First Camden

- 20 National Bank and Trust Company. Furthermore, I think there should be mutual releases given between Lichtenstein and the banks when the matters are finally adjusted.

L. S.

COPY.

Law Offices  
STARR, SUMMERILL & LLOYD  
Camden, New Jersey

December 31, 1929.

Aaron Heine, Esq.,  
548 Federal Street,  
Camden, N. J.

10

Dear Mr. Heine: In re Lichtenstein

Herewith I enclose you an original and copy of the proposed agreement with the banks and Lichtenstein, in relation to the effect of the releases given in case the settlement is set aside or vacated. Have the original and one copy signed by Lichtenstein and I will attend to getting the signatures from the banks.

I have talked with the various banks with reference to the amounts due and find that you are correct. 20

In the matter of the South Camden Trust Co., the deposit was \$62.77, making the net to be paid representing the 25% less the deposit of \$1643.48.

So far as the West Jersey Trust Company is concerned, the deposit there was \$106.91, which deducted from \$3,000.00, being 25%, makes \$2893.09.

The amount due the Broadway-Merchants is \$552.24, and the deposit is \$247.14, leaving the net due \$305.10. 30

Some arrangement will have to be made with reference to the payment of the few merchandise creditors who have, to date, refused to accept the 25%. It seems to me there ought to be a special deposit to take care of these amounts, to the extent of 100% in case they have to be paid that sum.

I have directed all the banks to furnish me the financial statements, which were given by Lichtenstein.

Very truly yours,  
(Signed) LEWIS STARR — G.  
LS:G      FOR STARR, SUMMERILL & LLOYD

10

—  
COPY.

BROADWAY MERCHANTS TRUST COMPANY  
Camden, New Jersey.

October 24, 1929.

Aaron Heine, Attorney,  
548 Federal Street,  
20 Camden, N. J.

Dear Sir:

We confirm our telephone conversation of today, stating that we will credit on account of the indebtedness of H. S. Lichtenstein individually and trading as Lichtenstein & Co., amounting to \$27,200.00, the full principal of a certain bond and mortgage for \$20,000.00 covering premises situate at the S. W. Corner of Broadway and Spruce Street, Camden, and a Certificate of Deposit for \$5,000.00, provided  
30 the cash settlement of 25%, which was offered by Lichtenstein to all his creditors, on the balance of our indebtedness is consummated. PROVIDED SAID PROPERTY IS PURCHASED BY BROADWAY MERCHANTS TRUST COMPANY AT SHERIFF'S SALE OCTOBER 25, 1929. (Signed on margin—Edwin C. Norcross)

We further agree not to charge against H. S. Lichtenstein any interest on the above Mortgage.

Very truly yours,  
(Signed) Edwin C. Norcross,  
Vice-President  
Walnut Street Office

Property having been purchased said credit of \$25,000.00 is agreed as above set forth.

(Signed) Edwin G. Norcross, V. P.

10

11. Memorandum.

MEMORANDUM.

(Filed March 10th, 1930.)

IN CHANCERY OF NEW JERSEY.

20

Between

HYMAN S. LICHTENSTEIN,  
*Complainant,*  
and  
ALBERT ISRAEL, *et als.,*  
*Defendants.*

On Bill to Foreclose  
Mortgage.  
Hearing on Petition  
for Distribution of  
Money in Hands of  
Receiver.  
Memorandum.

30

AARON HEINE, ESQ., for complainant.

HENRY F. STOCKWELL, ESQ., of BLEAKLY, STOCKWELL & BURLING, ESQS., for defendant, Broadway-Merchants Trust Company.

LEAMING, V. C.

I am satisfied that the balance in the hands of the foreclosure receiver, after allowances are deducted, must be paid to Broadway-Merchants Trust Co.

The primary dispute touching the facts is whether the truth is, as sworn to by Mr. Norcross, that the settlement agreement contemplated the Trust Company's becoming the absolute owner of the mortgage for an agreed credit to Mr. Lichtenstein of \$20,-  
10 000.00. I cannot easily conceive a Trust Company with a management of sufficient intelligence to transact ordinary business making provision to acquire the mortgage either presently or later without including the incidental right to the money in the hands of the foreclosure receiver. That the receivership money was not overlooked is shown not only by Mr. Norcross' affidavit but also by the affidavit of the receiver to the same effect. If not overlooked it is safe to assume it was not intended to go to the  
20 debtor. I think the evidence justifies the conclusion that the settlement was that the Trust Company should be the absolute owner of the mortgage. If so, the receivership money would go with the rights so acquired. The suggestion that the settlement was contingent on the Trust Company's becoming the purchaser at the sale is not material, since at the sale it did become the purchaser.

The allowances prayed will be decreed and distribution of the balance ordered as above disclosed.

30 Submitted February 3rd, 1930.  
Determined March 5th, 1930.

12. Order approving receiver's account, &c.

ORDER APPROVING RECEIVER'S ACCOUNT,  
ETC.

(Filed April 14th, 1930.)

IN CHANCERY OF NEW JERSEY.

10

Between:

HYMAN S. LICHTENSTEIN,  
*Complainant,*

and

ALBERT ISRAEL and HAR-  
RIET ISRAEL, *et al.,*

*Defendants.*

On Petition for  
Receiver.  
Order Approving Re-  
ceiver's Account,  
Etc.

20

This matter coming on to be heard in the presence of Aaron Heine, solicitor of J. Hartley Bowen, the receiver appointed in this cause, and Bleakly, Stockwell & Burling, solicitors of the defendant, Broadway-Merchants Trust Company, and it appearing that the order to show cause made in this matter on the sixth day of January, nineteen hundred and thirty, which contained a statement of the allowances asked by the said receiver and the solicitor of said receiver for their services in this cause, has been duly served, as, in and by said order directed, and that the final account and report of said receiver have remained on the files of the clerk of this court,

30

40 *Order Approving Receiver's Account, Etc.*

in accordance with the directions of said order; and the complainant having requested the Court to pay the moneys in the hands of the receiver, after deducting allowances to the complainant and submitting affidavits in support of said contention, and the defendant, Broadway-Merchants Trust Company having submitted to the Court affidavits in support of its contention that the said fund should be awarded to said Broadway-Merchants Trust Company, and the Court having read and considered the petition and accompanying affidavits and the answering affidavits of the Broadway-Merchants Trust Company, and having read said report and account and having heard the arguments of counsel, and being satisfied that the said receiver's account is correct and no reason appearing or being shown to the contrary;

It is, on this 14th day of April, nineteen hundred and thirty, ordered, adjudged and decreed that said account filed by said receiver in this cause be and the same is hereby allowed and confirmed, and that the said receiver has in his hands a balance of \$1,352.17;

It is further ordered that the said receiver be allowed for his services the sum of \$140.70 and the solicitor for said receiver be allowed for his services the sum of \$25.00 and his costs in this receivership proceeding to be taxed; that the application by the complainant, Hyman S. Lichtenstein, for the net funds in the hands of the said receiver, be and is hereby denied; and that after paying the amounts so allowed to said receiver and solicitor of said receiver and the said taxed costs, the said receiver is hereby directed to pay the said net funds remaining in his hands to the Broadway-Merchants Trust Company.

It is further ordered that said receiver file with

the clerk of this court a statement of his disbursements under these proceedings, and of the distribution and disposition of the moneys in his hands at the time of filing his said account.

It is further ordered, adjudged and decreed that after filing the aforesaid statement and carrying out the directions of this court, the said receiver be discharged from all further duties and liabilities with respect to said trust.

Respectfully advised, 10  
E. B. LEAMING,  
V. C.

13. Notice of appeal.

NOTICE OF APPEAL.

(Filed April 19th, 1930.)

IN CHANCERY OF NEW JERSEY. 20

Between  
HYMAN S. LICHTENSTEIN, )  
Complainant, )  
and )  
ALBERT ISRAEL, et als., )  
Defendants. )  
On Appeal.  
Notice of Appeal. 30

The complainant, Hyman S. Lichtenstein, hereby appeals from so much of the final order made in the above entitled cause on the fourteenth day of April, 1930, (upon the advice of Honorable E. B. Leaming,

Vice-Chancellor), as denies the application of the complainant, Hyman S. Lichtenstein, for the net funds in the hands of the foreclosure receiver, and directs the said receiver to pay the said net funds to the defendant, Broadway-Merchants Trust Company, to the Court of Errors and Appeals in the last resort in all causes.

10

AARON HEINE,  
*Solicitor for and of Counsel with Complainant.*

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

20

AARON HEINE,  
*Of Counsel with Complainant.*

30

14. Affidavit of service of notice of appeal.

AFFIDAVIT OF SERVICE OF NOTICE OF  
APPEAL.

72-608.

IN CHANCERY OF NEW JERSEY. 10

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Between	}	On Appeal. Affidavit of Service of Notice of Appeal.
HYMAN S. LICHTENSTEIN, <i>Complainant,</i>		
and		
ALBERT ISRAEL, <i>et als.,</i> <i>Defendants.</i>		

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

That I am a clerk in the office of Aaron Heine, Esq., a practicing attorney of the State of New Jersey, having offices at No. 548 Federal Street, Camden, New Jersey, who is the solicitor for the complainant, in the above entitled cause.

That on the seventeenth day of April, 1930, I 30 served a copy of the notice of appeal, in the above matter, upon Bleakly, Stockwell and Burling, Esqs., solicitors for the defendant appellee, Broadway-Merchants Trust Company, by leaving same at their office between the hours of ten o'clock A. M. and four o'clock P. M., on said date.

NORMAN HEINE.

Sworn and subscribed to this seventeenth day of April, 1930.

ISABEL C. LELAND,  
*Notary Public of N. J.*

My commission expires August 15, 1934.

15. Petition of Appeal.

10

PETITION OF APPEAL.

(Filed April 19th, 1930.)

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

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20	Between	}	On Appeal from Chancery. Petition of Appeal.
	HYMAN S. LICHTENSTEIN, <i>Complainant-Appellant,</i>		
	and		
	ALBERT ISRAEL, <i>et als.</i> , <i>Defendants-Appellees.</i>		

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30 *To the Honorable, the Court of Errors and Appeals  
in the Last Resort in all Causes:*

The petition of Hyman S. Lichtenstein, the appellant in the above entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by an order made in the Court of Chancery by His Honor, Ed-

win Robert Walker, Chancellor of the State of New Jersey, on the advice of the Honorable E. B. Leaming, Vice-Chancellor, bearing date the fourteenth day of March, 1930, in a certain cause in the said Court of Chancery wherein the said Hyman S. Lichtenstein was complainant, and the said Albert Israel, Harriet Israel, Quality Credit Shop, Penn Mutual Life Insurance Company, Broadway-Merchants Trust Company, South Camden Trust Company, Orlando M. Bowen, trustee, and Broadway-Spruce Corporation, 10 were defendants, in this respect to wit:

“That the application by the complainant, Hyman S. Lichtenstein, for the net funds in the hands of the said receiver, be and is hereby denied; and that after paying the amounts so allowed to said receiver and solicitor of said receiver and the said taxed costs, the said receiver is hereby directed to pay the said net funds remaining in his hands to the Broadway-Merchants Trust Company.” 20

2. The petitioner appeals from that part of the order of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that the defendant, Broadway-Merchants Trust Company, who is the appellee here, is not entitled to the balance of the net funds in the hands of the foreclosure receiver, under all the circumstances in the case; and that the Chancellor should have made an order directing the said net funds remaining in the hands of the said foreclosure receiver be paid to your petitioner. 30

Petitioner, therefore, prays that the said order of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that petitioner may have such other and further re-

46 *Affidavit of Service of Petition of Appeal*

lief in the premises as to this Court shall seem proper.

AARON HEINE,  
*Solicitor for and of Counsel with Appellant.*

16. Affidavit of service of petition of appeal.

10 AFFIDAVIT OF SERVICE OF PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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20 Between  
HYMAN S. LICHTENSTEIN, }  
Complainant-Appellant, } On Appeal from  
and } Chancery.  
ALBERT ISRAEL, *et als.*, } Affidavit of Service of  
Defendants-Appellees. } Petition of Appeal.

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STATE OF NEW JERSEY }  
COUNTY OF CAMDEN } ss.

30 NORMAN HEINE, of full age, being duly sworn according to law, on his oath, deposes and says:

That I am a clerk in the office of Aaron Heine, Esq., a practicing attorney of the State of New Jersey, having offices at No. 548 Federal Street, Camden, New Jersey, who is the solicitor for the appellant, in the above entitled cause.

*Affidavit of Service of Petition of Appeal* 47

That on the twenty-first day of April, 1930, I served a true copy of the petition of appeal, in the above matter, upon Bleakly, Stockwell and Burling, Esqs., solicitors for the defendant-appellee, Broadway-Merchants Trust Company, by leaving same at their office between the hours of ten o'clock A. M., and four o'clock, P. M., on said date.

NORMAN HEINE.

Sworn and subscribed to this twenty-fifth day of 10 April, 1930.

ISABEL C. LELAND,  
*Notary Public of N. J.*

My commission expires August 15, 1934.



NEW JERSEY COURT OF ERRORS  
AND APPEALS.

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Between

HYMAN S. LICHTENSTEIN,  
*Complainant-Appellant,*  
and

ALBERT ISRAEL, *et ux., et al.,*  
*Defendants-Appellees.*

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ON APPEAL FROM CHANCERY.

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BRIEF FOR COMPLAINANT-APPELLANT.

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STATEMENT OF FACT.

(Parenthetical references are to the State of Case.)

1. The complainant-appellant, Hyman S. Lichtenstein (for the sake of convenience, hereinafter called "Lichtenstein"), on the twenty-ninth day of April, 1929, filed a bill to foreclose a certain mortgage held by him, given to secure the principal sum of twenty thousand (\$20,000.00) dollars, covering certain property in the City of Camden, New Jersey (page 1, lines 20 to 28).

2. On the sixth day of May, 1929, one J. Hartley Bowen was appointed receiver of the property, to collect the rents, issues and profits thereof (page 1, lines 28 to 33).

3. At the institution of the foreclosure suit, "Lichtenstein" was indebted to the defendant, Broadway-Merchants Trust Company (which for the sake of convenience, is hereinafter called "bank") in the sum of twenty-seven thousand two hundred (\$27,200.00) dollars, composed as follows: Five thousand (\$5,000.00) dollars, secured by a certificate of deposit of five thousand (\$5,000.00) dollars, fifteen thousand two hundred (\$15,200.00) dollars, upon an open account, and the balance of seven thousand (\$7,000.00) dollars, secured by the bond and mortgage foreclosed in the within suit (page 29, lines 12 to 25).

4. The said foreclosure proceeding was instituted by "Lichtenstein" as complainant, and the said "bank," among others, as defendants.

5. The foreclosure proceedings proceeded to a point that, on the twenty-second day of July, 1929, a final decree was entered, which provided that there was due under the said bond and mortgage, the principal sum of twenty thousand (\$20,000.00) dollars, together with interest of eight hundred (\$800.00) dollars; that said sums should be paid to the said "bank," in liquidation of the amounts due by "Lichtenstein" to the "bank" (page 5, lines 6 to 10).

6. On the sixth day of September, 1929, the said "Lichtenstein" called the said "bank," together

with certain other bank creditors, to a meeting for the purpose of discussing his insolvent condition (page 31, lines 2 to 4).

7. On the twenty-fourth day of October, 1929, said "bank" and "Lichtenstein" entered into an agreement in writing whereby said "bank" agreed to credit "Lichtenstein," on account of the indebtedness amounting to twenty-seven thousand two hundred (\$27,200.00) dollars, with twenty thousand (\$20,000.00) dollars, the full principal of the bond and mortgage, and five thousand (\$5,000.00) dollars, secured by a certificate of deposit, provided "Lichtenstein" paid twenty-five per cent of the balance due, and provided, further, that the property covered by the mortgage foreclosed in the within suit, was purchased by the said "bank," at the sheriff's sale, on the twenty-fifth day of October, 1929 (page 6, lines 15 to 22). Said property having been duly sold by the Sheriff of Camden County, on the twenty-fifth day of October, 1929, and purchased by the "bank," said "bank" allowed said "Lichtenstein" the sum of twenty-five thousand (\$25,000.00) dollars, as agreed upon, in writing (pages 36 and 37, lines 10, etc.).

8. On the thirty-first day of December, 1929, a further communication was received by the solicitors of said "bank," Starr, Summerill and Lloyd, stating that the balance due to the "bank" by "Lichtenstein" was \$552.24, less the deposit of \$247.14, leaving the net balance due of \$305.10 (page 35, lines 27 to 30), and upon the payment, on the fourth day of January, 1930, the said "bank" delivered to "Lichtenstein," a general release from all indebtedness (pages 16 and 17, lines 30, etc.).

9. On the sixth day of January, 1930, the said receiver filed a petition praying for the approval of his account and for an order allowing fees and distributing the net funds in his hands (pages 7, 8, 9, 10, 11, 12 and 13). (At that time, "Lichtenstein" was not indebted to the bank," having made complete settlement with it.)

10. On the return day of the order to show cause, issued upon the petition of the receiver, "Lichtenstein" and the "bank" made application for the funds, and Vice-Chancellor Leaming, before whom the matter was heard, awarded the net funds in the hands of the receiver, to the "bank."

#### GROUPS OF APPEAL.

1. The Court of Chancery erred in admitting in evidence, affidavits introduced by the "bank," in support of its application for the net funds in the hands of the receiver.

2. The Court of Chancery erred in finding that "Lichtenstein" assigned the mortgage, after a final decree had been entered.

3. The Court of Chancery erred in finding that "Lichtenstein" agreed to assign the rents in the hands of the receiver to the "bank."

4. The Court of Chancery erred in disregarding the written agreement regarding the consideration for the cancellation of the debt due by "Lichtenstein" to the "bank" and relied upon a prior alleged oral agreement.

5. The Court of Chancery erred in decreeing that the net funds in the hands of the receiver should be paid to the "bank," under all the circumstances of the case, and in refusing to direct the net funds remaining in the hands of the foreclosure receiver, to be paid to "Lichtenstein."

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BRIEF OF THE ARGUMENT.

AS TO THE FIRST GROUND OF APPEAL.

The Court of Chancery erred in admitting in evidence, affidavits introduced by the "bank," in support of its application for the net funds in the hands of the receiver.

The "bank," in application for the funds in the hands of the receiver, relied on three affidavits, one from Edwin C. Norcross, vice-president of the "bank" (pages 19, 20, 21, 22 and 23); another from Charles H. Laird, Jr., Vice-President of the West Jersey Trust Company, one of "Lichtenstein's" bank creditors (pages 24 and 25), and another from J. Hartley Bowen, the foreclosure receiver (pages 26 and 27).

The appellant will treat each affidavit in turn and in the order listed above.

The affidavit of Norcross attempts to show that the within bond and mortgage was assigned absolutely by "Lichtenstein" to the "bank" and states that this took place at a meeting of the "bank" creditors. This affidavit states that (page 21, lines 3 to 29) "Prior to the sale under said foreclosure proceedings, the attorney for Lichtenstein called a meeting of the sundry banks who were creditors of Lichtenstein. I attended that meeting of creditors

at the office of Aaron Heine, Esquire, attorney for Lichtenstein. I understood at said meeting that Broadway-Merchants Trust Company was the only bank holding security for loans made to "Lichtenstein." I was asked at said meeting what said Trust Company was willing to do in view of an offer made by "Lichtenstein" to settle with the creditors twenty-five cents on the dollar. I stated that said trust company was willing to and would take over the said mortgage of \$20,000.00 so held by it, as its property, at a valuation of \$20,000.00, and would credit that sum on the debt owed by Lichtenstein to said trust company. This suggestion was acceptable to the others present as well at this meeting as at a subsequent meeting of all creditors. Said trust company, as a result thereof, and as a part of the settlement proposed to be made by Lichtenstein with all of said banks, did take over, as its own property absolutely, said mortgage of \$20,000.00 and credited said valuation, to wit: the sum of \$20,000.00 upon the indebtedness of Lichtenstein to said trust company."

This paragraph is the only one in the affidavit that deals with the attendant circumstances surrounding the alleged absolute assignment of the mortgage by "Lichtenstein" to the "bank." It will be noted that nowhere in the affidavit does it state that "Lichtenstein" was present at a meeting or that he assented to such an agreement, or did anything on his part to effectuate the absolute assignment alleged by the "bank." This affidavit was, therefore, clearly incompetent.

*Ex parte* evidence must conform to the same rules of evidence as to that in litigated matters. "The same rules, as far as may be, apply to *ex parte* testimony, as to that in litigated matters." *Ball v. International Power Co.*, 87 N. J. E. 1; 99 A. 111.

The affidavit of Laird is just as vague as that of Norcross. All that he states (pages 26 and 27) is that "Lichtenstein" proposed a settlement with the banks of twenty-five cents on the dollar, and that the Broadway-Merchants Trust Company, through Norcross, its vice-president, at the request of the others present, agreed to credit the indebtedness of "Lichtenstein" by the principal of the mortgage, to wit: the sum of twenty thousand (\$20,000.00) dollars, and accept twenty-five cents on the dollar for the balance. Whether "Lichtenstein" was among the "others" present is not stated. By wording the affidavit in so vague and indirect a manner, "Lichtenstein" is attempted to be drawn into a conversation, or is attempted to be made to appear as though present at an alleged conversation, to which, by his silence, he gave his consent. The parties representing the "bank" are men of high intelligence. If "Lichtenstein" did make such an agreement, that would have been noted in some positive manner by them. "Lichtenstein" is entitled to the best kind of proof from the "bank" in its attempt to substantiate its alleged absolute assignment, and the failure on its part to offer such proof, appears to be a most reasonable argument that such a contract never was entered into by the "bank" and "Lichtenstein." Whether that was the understanding by the "bank" with the other bank creditors, is not the issue. This affidavit, therefore, under the case of *Ball v. International Power Co.*, *supra*, is also inadmissible.

The affidavit of J. Hartley Bowen, the foreclosure receiver, related to an alleged conversation between Norcross and him. The affidavit does not lay any foundation for its competency, as it does not state it was made in "Lichtenstein's" presence, or that he had any knowledge thereof, or assented thereto.

None of the affidavits give the date of the alleged conversations nor whether they were made when the receiver was first appointed or sometime before the letter which was sent by Norcross to "Lichtenstein," dated October twenty-fourth, 1929, nor do they state when the assignment of the mortgage or of the rent was to or did take effect. In a litigated matter, testimony of this character would certainly be objectionable. It is inadmissible under the case of *Ball v. International Power Co.*, *supra*. It is also objectionable, under the rule that hearsay testimony is just as incompetent in affidavits as in oral testimony. *O'Neill v. Linowitz*, 92 N. J. E. 179; 111 A. 659.

There was no competent proof on the part of the "bank" in support of its application for the funds in the hands of the foreclosure receiver. Upon the incompetent testimony offered, its application should have been disregarded.

#### AS TO THE SECOND GROUND OF APPEAL.

The Court of Chancery erred in finding that "Lichtenstein" assigned the mortgage, after a final decree had been entered.

It is undisputed that the first meeting of the bank creditors took place on the sixth day of September, 1929, and that the final decree in the foreclosure suit was entered on the twenty-second day of July, 1929.

On the entry of the final decree, the mortgage thereupon merged into the decree and the debt then became one of record. *Hudson Trust Co. v. Boyd*, 80 N. J. E. 267; 84 A. 715. As the mortgage was merged in the decree, it could have not been there-

after assigned by "Lichtenstein" to the "bank." The affidavits throughout, on the part of the "bank," speak of an assignment of the mortgage itself. At the best, there could only have been an assignment of the decree. The record is clear of any suggestion that there was an assignment of the decree or that the "bank" was substituted as complainant. It was represented by eminent counsel, who are undoubtedly familiar with this rule.

Had there been any such intention, there would have been something more explicit upon which the "bank" could put its finger in support of its contention. The failure to present such proof surely is a strong indication that no such understanding existed between the "bank" and "Lichtenstein."

The final decree entered on the twenty-second day of July, 1929 (page 5, line 10), awarded to the Broadway-Merchants Trust Company, the sum of twenty thousand, eight hundred (\$20,800.00) dollars, the amount due under the bond and mortgage which it was entitled to receive in the place of the complainant, by reason of the collateral assignment. On September sixth, 1929, at the time of the first meeting of the creditors, the final decree still remained in full force. The sheriff's sale was not held until the twenty-fifth day of October, 1929. The "bank," under the final decree, obtained a decree for the amount of the mortgage, which was to be paid prior to any payments to "Lichtenstein," the complainant. The contention, therefore, of the "bank" that it was willing to accept the full amount of the principal of the mortgage in extinguishment of that much of its claim against "Lichtenstein," in every day language, therefore, means that even if the mortgaged premises did not bring, at the sheriff's sale, a sum sufficient to satisfy the principal of the mortgage, it was to be considered that whatever was

obtained out of the foreclosure sale was to be retained by the "bank" and a credit was to be allowed as though the full amount was realized out of the mortgaged property. In other words, it practically said to the other bank creditors that if any deficiency arose on its collateral, it would not present that claim when distribution was to be made of twenty-five cents on the dollar. The "bank," therefore, relied solely upon the acquisition of the real estate to satisfy its debt, which is supported by the letter of Norcross, dated October twenty-fourth, 1929, written to "Lichtenstein." (pages 36 and 37).

It would have, therefore, been absurd on the part of the "bank" to ask for an assignment of the mortgage, when the amount that they could have realized thereunder, was secured to them by the final decree. But appellant believes that this theory is only brought into the cause because it is the only way the "bank" can justify its application for the funds in the hands of the receiver, a question which is later on argued against in the brief.

#### AS TO THE THIRD GROUND OF APPEAL.

The Court of Chancery erred in finding that "Lichtenstein" agreed to assign the rents in the hands of the receiver to the "bank."

It will be noted that the record is absolutely clear of any suggestion that "Lichtenstein" agreed to assign to the "bank," his rights in the foreclosure suit. It has been read into the case by the Court of Chancery on the ground that the Court could not "easily conceive a trust company with a management of sufficient intelligence to transact ordinary business making provision to acquire the mortgage either

presently or later without including the incidental right to the money in the hands of the foreclosure receiver" (page 38, lines 10 to 16). But it is urged on the part of the appellant, with equal force that if the management was of the intelligence spoken of, it certainly would have been reduced to writing in some manner, or the records would have disclosed a direct agreement with "Lichtenstein" to that end. But it is respectfully reiterated that there is nothing in the record to justify a conclusion that men of intelligence always act in such a way as to include into a transaction all the loose ends. It may be true that Norcross thought about it, spoke of it to the receiver, but the test is, was such an arrangement made with "Lichtenstein." Since the "bank" desires to acquire a right to the funds to which it is not entitled under the original circumstances, it having received full satisfaction for its claim, certainly the burden of establishing its right rests upon the "bank" and the "bank" certainly has not carried this burden.

#### AS TO THE FOURTH GROUND OF APPEAL.

The Court of Chancery erred in disregarding the written agreement regarding the consideration for the cancellation of the debt due by "Lichtenstein" to the "bank" and relied upon a prior alleged oral agreement.

Even if the "bank's" contention is true that "Lichtenstein" agreed to assign absolutely to the "bank" the mortgage in question, this agreement merged into the written agreement embodied in the following letter, reprinted for the sake of convenience:

“Broadway-Merchants Trust Company  
Camden, New Jersey.

October 24, 1929.

Aaron Heine, Attorney,  
548 Federal Street,  
Camden, N. J.

Dear Sir:

We confirm our telephone conversation of today, stating that we will credit on account of the indebtedness of H. S. Lichtenstein individually and trading as Lichtenstein & Co., amounting to \$27,200.00, the full principal of a certain bond and mortgage for \$20,000.00 covering premises situate at the S. W. corner of Broadway and Spruce Street, Camden, and a Certificate of Deposit for \$5,000.00, provided the cash settlement of 25%, which was offered by Lichtenstein to all his creditors, on the balance of our indebtedness is consummated. PROVIDED SAID PROPERTY IS PURCHASED BY BROADWAY-MERCHANTS TRUST COMPANY AT SHERIFF'S SALE, OCTOBER 25, 1929 (Signed on margin—Edwin C. Norcross)

We further agree not to charge against H. S. Lichtenstein any interest on the above Mortgage.

Very truly yours,  
(Signed) Edwin C. Norcross,  
Vice-President  
Walnut Street Office.

Property having been purchased said credit of \$25,000.00 is agreed as above set forth.

(Signed) Edwin G. Norcross, V. P.”

It will be noted from Norcross's letter that the credit of twenty-five thousand (\$25,000.00) dollars,

twenty thousand (\$20,000.00) dollars, secured by the mortgage and five thousand (\$5,000.00) dollars, secured by a certificate of deposit, it was allowed immediately after the sheriff sale, and credited by the "bank" to the indebtedness of "Lichtenstein." All that remained due was twenty-two hundred (\$2,200.00) dollars, and this was paid in accordance with the arrangement by the delivery of a deed from "Lichtenstein" of all of his real estate and by the payment in cash of twenty-five cents on the dollar and upon said payment, a general release was delivered by the respective banks to "Lichtenstein." There could not have been any subsequent arrangement to the terms of the letter because it was completely executed immediately following the sheriff's sale and no prior parol agreements to the contrary would have a binding force as they would have become merged in the letter.

The Court of Chancery completely disregarded this written agreement because it found that "Lichtenstein" agreed to make an absolute assignment of the mortgage in consideration of the extinction of twenty thousand (\$20,000.00) dollars, of indebtedness, but this theory is entirely at variance with the written terms set forth in the above letter. Such a finding was error.

"It is well settled law in this State that contemporaneous or preceding oral agreements cannot be introduced to vary or extend the terms of a written contract." *Naumberg v. Young*, 44 N. J. Law 341.

The underlying reason for this letter can very easily be understood. The "bank" held as collateral security the mortgage in question. It also held a subsequent mortgage for approximately \$6,500.00. It was, therefore, in the position, where, in order to protect the mortgage assigned by "Lichtenstein" and its other mortgage that it had to purchase the

property, unless there were outside bidders who would pay as much or more than the decrees in its favor. "Lichtenstein's position, so far as bidding was concerned, was comparatively simple, since the "bank" had to protect its interest or else lose sixty-five hundred (\$6,500.00) dollars. He was safe in bidding the amount of the decree of \$20,000.00 and have it applied upon his indebtedness. The "bank" recognizing the weakness of its position and realizing that the bid at the sheriff's sale would avail it nothing, attempted to save the sheriff's fees of a bidding on the part of "Lichtenstein," by entering into the agreement set forth in the letter.

Several letters (pages 33 and 34 and pages 35 and 36), were given by the solicitors for the respective banks, among which was the Broadway-Merchants Trust Company to counsel for "Lichtenstein," dealing with the arrangements regarding the payment of the amount due. All of these letters are barren of any reference either of the alleged absolute assignment or of the alleged assignment of the rents. These letters set forth with great particularity all of the points to be covered, yet they are silent as to the assignments which the "bank" claims were agreed upon.

The letter from Starr, Summerill and Lloyd, dated November twenty-second, 1929 (page 33), commences as follows: "This letter is written for the purpose of making a record of the understanding reached between you, as attorney of the debtor, and representatives of the various banks, with respect to the adjustment of the latter's claims."

This letter obviously was for the purpose of reducing to writing, the understanding agreed upon and it contains no reference to an alleged assignment which the "bank" claims was so clearly understood.

However, it is the appellant's contention that even if the "bank's" theory be correct, the evidence supporting it would be inadmissible under the case of *Russell v. Russell, et al.*, 60 N. J. E. 282; 47 A. 37, which holds that "where an agreement in writing is complete on its face, and purports to contain the entire agreement of the parties, parol proof of another term will not be received, although the written contract may contain nothing on the subject to which the parol proof is directed."

That the letters sent by both the "bank" and its solicitors are both complete cannot be denied. In the letter from Norcross, the transaction therein contemplated was executed immediately after it was written and in the later letter from the solicitors of the "bank," it expressly states that what is contained in that letter is to be the agreement between the parties.

The Court of Chancery erred when it disregarded all of the written agreement and relied upon an alleged parol agreement.

#### AS TO THE FIFTH GROUND OF APPEAL.

That the Court of Chancery erred in decreeing that the net funds in the hands of the receiver should be paid to the "bank," under all the circumstances of the case, and in refusing to direct the net funds remaining in the hands of the foreclosure receiver, to be paid to "Lichtenstein."

By two solemn promises, to wit: the letter from Norcross and the general release, duly executed by the "bank" to "Lichtenstein," the debt of "Lichtenstein" to the "bank" was extinguished, so that at the time of the petition of the receiver for the

order of distribution, in so far as the decree in favor of the complainant was concerned, "Lichtenstein" was first entitled to be paid out of the funds in the hands of the receiver. It will be recalled that the mortgaged premises only brought six hundred (\$600.00) dollars, at the sheriff's sale, and that the decree in his favor was for approximately twenty thousand, eight hundred (\$20,800.00) dollars. His right to receive such funds under this theory was not contested either by the subsequent creditor defendants or even by the "bank" itself, the "bank" merely asking that it be substituted in his place. That the "bank" was not entitled to receive the rents either through the final decree or through an alleged absolute assignment of the mortgage, or by reason of the incidental right to the funds in the hands of the receiver, has been previously discussed. It is claimed, therefore, by the appellant, that the "bank" was not entitled to participate in the funds until "Lichtenstein's" deficiency had been satisfied. Therefore, the order of the Court of Chancery in awarding the funds in the hands of the receiver to the "bank" was erroneous. The decree should have been in favor of "Lichtenstein."

The complainant-appellant respectfully requests that the decree of the Court of Chancery be set aside and for nothing holden and this Honorable Court award the funds in the hands of the receiver to him.

Respectfully submitted.

AARON HEINE,  
*Solicitor for and of Counsel  
with Complainant-Appellant.*

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

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Between

HYMAN S. LICHTENSTEIN,  
*Complainant-Appellant,*

and

ALBERT ISRAEL, *et ux.,*  
*et al.,*  
*Defendants-Appellees.*

} On Appeal from  
Chancery.

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BRIEF FOR BROADWAY MERCHANTS  
TRUST COMPANY, DEFENDANT-  
APPELLEE.

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(Parenthetical references are to the State of Case.)

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STATEMENT.

The title of this cause is in reality the title in a certain foreclosure suit brought by Hyman S. Lichtenstein against Albert Israel and others to foreclose a mortgage on Camden property. The mortgage was made by Albert Israel, *et ux.*, to Hyman S. Lichtenstein, in the sum of \$20,000.00. That mortgage was assigned by Hyman S. Lichtenstein,

mortgagee, to Broadway Merchants Trust Company as collateral security for indebtedness owed by Lichtenstein to the bank, amounting to \$27,200.00. This mortgage was a second mortgage and subject to a prior first mortgage of \$43,000.00. The amount of the first mortgage is not recited in these proceedings, but the Receiver's account on page 11 of the State of the Case shows that an instalment of interest amounted to \$1290.00, which in turn shows that the principal of the mortgage was \$43,000.00. The Trust Company also held a third mortgage on the same property, but this mortgage was made direct by the owner, Israel, to the Trust Company to secure loans made by it to Israel. Lichtenstein, in his own name, started foreclosure proceedings on the second mortgage and made as a party defendant the Trust Company, the actual assignee and holder of the mortgage.

In Lichtenstein's bill of complaint, he alleged that Lichtenstein owed the Trust Company only the sum of \$7,000.00 (page 20). The Trust Company filed its answer, claiming that there was due to it upon the said mortgage the full principal thereof, to wit, the sum of \$20,000.00, the face of the mortgage, with interest, and the Master reported and the Court of Chancery decreed that there was due to it the sum of \$20,800.00 under the said mortgage, and also decreed that there was due to it, under its third mortgage, the sum of \$6,527.80 (page 23). Prior to the sale, Lichtenstein called a meeting of his creditors. The Trust Company appeared to be the only bank that held security. At the request of the other creditors, said Trust Company offered to take over the \$20,000.00 mortgage, which it already held as collateral security for Lichtenstein's loans, at the sum of \$20,000.00 and credit that sum on the indebt-

edness of Lichtenstein, to wit, amounting to the sum of \$27,200.00 (page 36). At the time of the sale, this arrangement was reduced to writing, and upon the sale actually taking place and the property being bought in by the said Trust Company, the credit of \$20,000.00 was actually made, which, together with \$5,000.00 on deposit in the Trust Company, made the full credit of \$25,000.00 mentioned in its letter to Lichtenstein's attorney under date of October 24, 1929 (pages 36-37). At the time of the Sheriff's sale, therefore, the Trust Company was entitled to be first paid out of the proceeds of the foreclosure the amount due under its \$20,000.00 mortgage, interest and costs, and was also entitled, in the event of any surplus being available, to receive upon its second mortgage the amount decreed to be due upon it.

Pending the foreclosure proceedings, one Bowen was made Receiver to collect the rents. The Receiver did not collect sufficient to keep down the interest on the first mortgage and the taxes. The Receiver requested the Trust Company to pay the taxes, on the theory that it would be reimbursed out of the rents. (Bowen, pages 24-25; Norcross, page 20.)

Following the foreclosure sale, the Receiver, Bowen, filed his petition for discharge through the solicitor of complainant, Lichtenstein (pages 7-8 and 9) praying that

“an order may be made allowing him a commission of one hundred forty dollars and seventy cents (\$140.70) for his services as receiver, and three hundred fifty (\$350.00) dollars, counsel fee to the solicitor, and that an order be entered disposing of the net proceeds in his hand; that thereupon he be discharged

from any further duties and liabilities as said receiver.”

An order to show cause was issued upon a verified petition being filed by complainant, Lichtenstein, through his solicitor, Aaron Heine, Esquire (pages 14-15 and 16), praying that

“the balance in the hands of the said receiver, after the allowance of said receiver’s commissions and counsel fees, be paid to him.”

In opposition to the petition and affidavit of complainant, the Trust Company filed its affidavits (pages 19 to 27) opposing the payment of these moneys to Lichtenstein, and claiming for the Trust Company the fund in the hands of the Receiver. Lichtenstein was again given further time in which to answer these opposing affidavits (pages 28 to 32, inclusive). The Vice-Chancellor heard and decided to whom the balance in the hands of the Receiver belonged, upon the consideration of the original petition, and the said several affidavits on behalf of Lichtenstein on the one side and the affidavits submitted by the Broadway Merchants Trust Company on the other.

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## ARGUMENT.

### I.

The objection of appellant to the form or contents of the affidavits submitted by the Trust Company is without merit. The *ex parte* affidavits were submitted by both sides and without objection. The

Court heard and decided the cause on the basis of those affidavits. The affidavits of the Trust Company are in no sense hearsay. They speak of matters within the knowledge of the respective affiants.

We must, however, direct the Court's attention to the use by the appellant of two letters from Starr, Summerill & Lloyd to Aaron Heine, Esquire, attorney for Lichtenstein (on pages 33-34-35). Those letters are in no way binding upon the Broadway Merchants Trust Company, were not written at its instance, and there is no showing that it even had any knowledge of the writing of any such letters. In short, the only hearsay evidence of which complaint should be made lies in these two letters recited by the complainant. We refer to them because they have no part in the case. Furthermore, they are entirely immaterial and prove nothing.

## II.

The learned Vice-Chancellor had to consider conflicting statements in these affidavits. He considered and weighed the statements of the parties making those affidavits and the circumstances surrounding the entire transaction, and the question of fact was resolved in favor of the Broadway Merchants Trust Company. We submit that that finding should be sustained.

## III.

The explanation by the Trust Company of this transaction is the only reasonable one.

The Trust Company had security for its debt. At

the request of the other creditors, not of Lichtenstein, it offered to take over the mortgage it already held as collateral security at the face of that mortgage, to wit, \$20,000.00. The bond accompanying the mortgage was not that of Lichtenstein. The bond is made by Israel, the mortgagor. Lichtenstein was a mere mortgagee, who then assigned that mortgage to the Trust Company as collateral security for loans. There was no reason whatever for the Trust Company to allow a credit of \$20,000 for the mortgage in its hands, except upon a theory that it was to own absolutely that bond and mortgage for what they might be worth. There is no suggestion in any of the affidavits presented, that any statement was made to the bank at the time the credit was allowed that Lichtenstein expected to make any claim for rents in the hands of the Receiver. There is nothing in Lichtenstein's affidavits to show that he at any time made it known to the bank that he would make claim for any moneys in the hands of the Receiver. The bank not only held the second mortgage of \$20,000.00, which was assigned by Lichtenstein to it, but it also held a third mortgage covering the property and made by Israel to the bank to secure loans to Israel. Therefore, the bank had every reason to hold and make use of, to the limit, all the rights of the mortgagee of that bond and mortgage for \$20,000.00. In the words of Vice-Chancellor Leaming:

“I cannot easily conceive a trust company with a management of sufficient intelligence to transact ordinary business making provision to acquire the mortgage either presently or later without including the incidental right to the money in the hands of the foreclosure receiver. That the receivership money was not overlooked is shown not only by Mr. Norcross' affidavit but

also by the affidavit of the receiver to the same effect. If not overlooked it is safe to assume it was not intended to go to the debtor" (page 38).

In other words, every presumption is against the claim of Lichtenstein. If any such arrangements as claimed by Lichtenstein had been intended, then Lichtenstein would certainly have obtained some writing from the bank showing any such alleged right in the mortgage or under that mortgage.

#### IV.

The moneys in the Receiver's hands should equitably be applied first to the liquidation of taxes on the property. Mr. Norcross, of the bank, paid the taxes; but he understood from the Receiver that the bank would be reimbursed for such payment from the funds in the hands of the Receiver. The taxes had to be paid to prevent a foreclosure of the first mortgage. The fund in the hands of the Receiver would not be sufficient to pay the taxes which were against the property at the time of the sale, not to mention the balance due to the bank upon its decree as second mortgagee in the Lichtenstein foreclosure. The bank as already shown held a third mortgage on the same property for loans to Israel.

In the face of this situation, Lichtenstein wishes the money turned over to him, the debtor, and leave unpaid the bank, which was his creditor.

We submit that the claim of Lichtenstein has no basis in equity, that it is against the weight of the evidence as manifested by the affidavits before the

Court and is contrary to reason and fair dealing as well.

Respectfully submitted,

BLEAKLY, STOCKWELL &  
BURLING,

*Solicitors for and of Coun-  
sel with Broadway Mer-  
chants Trust Company,  
Defendant-Appellee.*



