# New Jersey Court of Errors and Appeals.

MACK MANUFACTURING COMPANY,
*Complainant-Appellant*,

and

CITIZENS CONSTRUCTION COMPANY *et al.*,
*Defendants-Respondents.*

**Exhibits Printed at the Request of the Broad Street National Bank, Respondent.**

After the preparation of the state of case the Broad Street National Bank insisted that the exhibits in this book be printed. It was and is insisted by the complainant-appellant that all of the exhibits referred to in this book with the exception only of the assignment made by the Citizens Construction Company to the Broad Street National Bank ought not to be printed. That they are sufficiently described in the evidence or are immaterial and irrelevant to the issue determined below or before this Court.

Request is therefore made that no matter what the outcome of the case, the cost of printing be taxed against the respondents.

# INDEX.

## MINUTES

The first meeting of the corporation was held on the Twenty-second day of April, Nineteen Hundred and Fourteen, at 5:30 o'clock in the afternoon, at the registered office of the company, in the City of Trenton, New Jersey. Said meeting was held on the waiver of notice of the incorporators and subscribers. The following incoporators were present in person:

| | |
|---|---|
| Thomas F. Riley, | 1 share |
| John H. Hurley, | 1 " |
| Thomas J. McGovern | 8 " |

being all the incorporators and subscribers to the capital stock of the company.

On motion, Mr. Thomas J. McGovern, was elected Chairman, and Mr. Thomas F. Riley, was appointed Secretary of the meeting.

The Chairman reported that the Certificate of Incorporation of the company had been duly recorded in the office of the Clerk of Mercer County, on the Ninth day of April, Nineteen Hundred and Fourteen, and filed in the office of the Secretary of State of New Jersey, and presented a certified copy of said certificate of incorporation.

The Secretary presented and read the waiver of notice.

The Secretary presented a form of By-Laws for the regulation and management of the affairs of the company, which were read article by article and unanimously adopted.

The Secretary presented the following transfer of subscription; from John H. Hurley to William F. McGovern, and upon motion duly seconded said

transfers of subscription were approved. Messrs. Thos. J. McGovern, John H. Hurley and Thos. Riley were nominated for Directors of the company to hold office for the ensuing year. No other nominations having been made, the polls were duly opened, and all the stockholders having voted by ballot, the polls were declared closed, and Mary O'Brien and J. Connor French having been appointed inspectors of election, and having taken their required oath, presented their report duly certified showing that the aforesaid gentlemen had been elected Directors of the company by the unanimous vote of all the stockholders.

Upon motion duly made and seconded, and by the affirmative vote of all present, the following resolution was adopted:

That the principal and registered office of the company be established and maintained at 103 East State Street, Trenton, N. J., and that a sign with the company's name thereon be conspicuously displayed at the entrance of such registered office.

That a stock and transfer book he kept at said registered office open to the inspection of any stockholder during business hours.

That Thomas J. McGovern be, and hereby is appointed the agent of this company in charge of such registered office, and said books, and that process against this company may be served upon the said Thomas J. McGovern.

That the said be, and hereby is authorized to register transfers of stock.

Upon motion duly made and seconded, and by the affirmative vote of all present it was,

RESOLVED, that the Board of Directors be and they are hereby authorized to issue the entire capital stock of this company in such amounts as from time to time shall be determined by the Directors,

and as may be permitted by law, and to accept in full or part payment thereof such property as the Directors may determine shall be necessary for the business of the company.

On motion, the meeting thereupon adjourned.

THOMAS F. RILEY,
Secretary of the Meeting.

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## BY-LAWS OF THE CITIZENS CONSTRUCTION CO

### OFFICES

The registered office shall be at 103 East State Street, Trenton, New Jersey.

The company may have offices at such other places as may from time to time be determined upon by the Directors.

### STOCKHOLDERS MEETING

All meetings of the stockholders shall be held at the registered office.

Stockholders may vote at all meetings, either in person or by proxy.

A majority of the stock issued and outstanding entitled to vote, represented by the holders thereof, either in person or by proxy, shall be and constitute a quorum at all meetings of the stockholders.

The annual meeting of the stockholders shall be held on the First day of April, in each year, at 10 o'clock in the fore-noon, when they shall elect, by plurality vote, by ballot, the Board of Directors, the number and tenor of which are hereinafter determined by these By-Laws. Each stockholder is entitled to vote at such election shall have one vote for each share of stock standing registered in his name on the twentieth day

preceeding the annual meeting exclusive of the day of the meeting.

At each election of directors, the polls shall be opened and closed, proxies and ballots shall be received, and all questions touching qualifications of voters be decided by two inspectors, who shall be appointed by the presiding officer of the meeting. Such inspectors shall be sworn faithfully to perform their duties, and shall report in writing the result of the ballot.

Written notice of the annual meeting shall be mailed to each stockholder at his registered address, upon the records of the company at least ten days prior to the meeting.

Special meetings of the stockholders shall, at the written request of any director, or of stockholders owning one-quarter of the capital stock issued and outstanding, be called by the secretary by mailing a notice stating the object of such meeting, at least five days prior to the date of meeting, to each stockholder at his registered address upon the records of the company.

## DIRECTORS

The Directors shall be three in number and shall be chosen from the stockholders. They shall hold office for one year, and until their successors are elected and qualify. One of the directors must at all times be an actual resident of the State of New Jersey.

## DIRECTORS MEETING

Regular meetings of the directors shall be held without notice on the First day of each month at 10 o'clock in the fore-noon at the registered office of the company in the city of Trenton.

A majority of the directors in office shall con-

stitute a quorum for the transaction of any business which may properly come before them.

Special meetings of the directors may be called by the President, and shall be called upon the written request of two directors.

Notice of a special meeting of the directors shall be given to each director, either personally or by mail, at least two days prior to the meeting. 10

The directors may hold their meetings and have one or more offices and keep the books of the company, except the stock and transfer book, outside of the state of New Jersey, at such place or places as shall from time to time be determined by resolution of the board.

## POWERS OF DIRECTORS

The board of directors shall have the management and control of the business and property of the company, and, subject to the provisions of the statute, the certificate of incorporation, and these by-laws, may exercise the powers of the corporation. 20

## OFFICERS

At the first meeting after election, the Board of Directors shall appoint a President and a Vice President from their own number, who shall hold office for one year and until their successors are appointed and qualify. 30

The Board of Directors shall annually appoint a Secretary, and a Treasurer, who need not be members of the board, and who shall hold office for one year, and until their successors are appointed and qualify; subject, however, to removal by the board at any time. The Board of Directors may also appoint such officers and agents for such periods as in the judgment of 40

the Board may seem best. Such officers and agents shall be subject to removal at the pleasure of the Board.

## THE PRESIDENT

The President shall be the chief executive office of the company, and during the intervals between the meetings of the board of directors and the executive committee, shall have general control and management of the business and affairs of the company. The President shall have custody of the seal of the company, and shall affix said seal to any instrument requiring the same. The President shall sign all certificates of stock.

## THE SECRETARY

The Secretary shall act as secretary of all meetings of the stockholders, the board of directors and the various committees of the company, and shall record all votes and minutes of the proceedings in a book to be supplied by the company and kept for that purpose. He shall give proper notice of all meetings of the stockholders and of the board of directors, and shall also give proper notice of all calls for installments to be paid by the stockholders. He shall, by his signature, attest the seal of the company to any instrument whereon such seal is properly fixed. He shall perform such other duties as shall from time to time be assigned to him by the board of directors, and shall be sworn to the faithful discharge of his duties.

## THE TREASURER

The treasurer shall keep full and accurate accounts of the receipts and disbursements in books

belonging to the company, and shall deposit all money and other valuable effects in the name and to the credit of the company, in such depositories as may be designated by the Board of Directors. He shall disburse the funds of the company as may be ordered and authorized by the president or by the board of directors, taking proper vouchers for such disbursements, and shall render the president and directors at the regular meeting of the board, and such other times as the president or board may require it, an account of all his transactions as treasurer, and of the financial condition of the company. Either the treasurer or secretary with the president shall sign all certificates of stock.

## VACANCIES

If the office of any director or of the president, secretary or treasurer, one or more, become vacant by reason of death, resignation, disqualification or otherwise, the remaining directors although less than a quorum, by a majority vote, may elect a successor or successors, who shall hold office for the unexpired term.

## DUTIES OF OFFICERS MAY BE DELEGATED

In case of the absence of any officer of the company, or for any other reason that may seem sufficient to the board, the directors may, by a majority vote of the board, delegate the powers and duties of such officer, for the time being, to any other officer, or to any director.

## NOTICE

Any notice required to be given by these By-Laws may be waived by the person entitled thereto.

## SEAL

A corporate seal shall be provided by the directors, and shall be of the form and design to be determined by the board.

## BOOKS

The directors shall supply the officers of the company with such books as are required by the provisions of the statute, and of these by-laws.

## TRANSFERS OF SHARES

Shares of the capital stock of the company shall be transferred only on the books of the company by the holder thereof in person, or by his attorney, upon surrender and cancellation of certificates for a like number of shares.

## FISCAL YEAR

The fiscal year of the company shall begin the first day of January in each year.

## DIVIDENDS

Dividends upon the capital stock of the company shall be payable on the first day of May in each year. Dividends shall be declared only from the surplus, or from the net profit of the company, and before declaring any dividends or making any distributions of profits, the directors may set apart out of the net profits or out of the surplus of the company as a reserve fund to be used as working capital or for any other proper purpose, such sum or sums as the directors shall, in their discretion, deem just and proper and for the best interest of the company.

## AMENDMENTS

The stockholders by the vote of a majority of stock issued and outstanding entitled to vote may,

at any annual or special meeting, alter, amend or repeal these By-Laws, if notice thereof be contained in the notice of the meeting.

The Board of Directors by vote of two members, may alter or amend these By-Laws at a regular or special meeting of the Board; provided, five days' notice in writing shall have been given to each of the directors of the proposed amendment.

## WAIVER OF NOTICE OF FIRST MEETING OF THE BOARD OF DIRECTORS

We, the undersigned, directors of the Citizens Construction Company, a corporation organized under the Laws of the State of New Jersey, do hereby waive notice of the time, place and purpose of the first meeting of the Board of Directors of said company, and we do hereby designate the twenty-second day of April, 1914, at 5:30 o'clock in the forenoon, as the time, and Forst-Richey Building, State and Warren Streets, in the city of Trenton, as the place of said meeting; the purpose of said meeting being the election of officers, the authorization of the issue of the capital stock of the company, the authorization of the purchase of property, and the transaction of such other business as the board may deem advisable to perfect the organization of said company and to enable it to successfully carry on the business for which the said company was organized.

Dated: April 22, 1914.

T. J. McGOVERN
JOHN H. HURLEY
THOMAS F. RILEY
WILLIAM F. McGOVERN

For directors, Thomas J. McGovern, Thomas F. Riley, and John H. Hurley.

| | | |
|---|---|---|
| Thomas J. McGovern, | 8 | Votes. |
| Thomas F. Riley, | 1 | " |
| John H. Hurley, | 1 | " |

Dated April 22, 1914.

10 State of New Jersey, }
County of Mercer, } ss.:

We, Mary O'Brien, and J. Connor French being severally sworn, upon our respective oaths do solemnly swear that we will faithfully and honestly perform the dutes as inspectors of election to be held this day by the stockholders of the Citizens Construction Company, and that we will perform such duties with strict impartiality, and a true re-
20 port of the result of such election.

MARY O'BRIEN
J. CONNOR FRENCH

Subscribed and sworn to before me }
this 22 day of April, 1914. }
Peter Backes,
Master in Chancery.

We, the undersigned, inspectors of election of
30 the Citizens Construction Company hereby report that having taken oath to faithfully, honestly and impartially conduct the election of said company we did receive the votes of the stockholders by ballot, and that the following directors were duly elected; said directors receiving the number of votes set opposite their respective names.

| Directors | No. of Votes. |
|---|---|
| Thomas J. McGovern | 10 |
| 40 Thomas F. Riley | 10 |
| William F. McGovern | 10 |

Dated April 22, 1914.

WHEREAS, Catherine Godshalk has offered to sell to this company property as follows:

One traction engine, complete.
One stone crusher, boiler, engine, bins, complete.
Seven dump wagons, new.
Five steel wagons.
One asphalt wagon.
One wagon with pump and air compressor. 10
Three steam drills complete.
Five steams pumps and engines, complete.
Two large boilers, complete.
Three gasolene engines and pumps complete.
One steam asphalt roller.
One complete asphalt repair outfit.
One concrete Mixer, complete.
One derrick, buckets and hoisting apparatus.
One horse roller. 20
One contractor's outfit consisting of forges, chains, blocks, braces, lumber, piping, picks, shovels, wheelbarrows, tool boxes, etc.
Office furniture consisting of two desks, table, typewriter, filing cabinet, cupboard, chairs, rugs, etc.

in consideration of the issue of stock of this company to the amount of Twenty thousand ($20,000) dollars, par value; and 30

WHEREAS, it appears to the stockholders that such property is necessary for the business of this company, and that the same is of the value of Twenty thousand ($20,000) dollars;

RESOLVED, that the Board of Directors of this company be and they are hereby authorized, in their discretion to purchase the property above mentioned for the said price and to issue stock in payment therefore. 40

Upon motion duly made and seconded, it was

RESOLVED, that this company accept the offer of Catherine Godshalk the property hereinafter described, and the Board of Directors do hereby adjudge and declare that said property is of the fair value of Twenty thousand ($20,000) dollars, and that the same is necessary for the business of this company.

IT WAS FURTHER RESOLVED that the proposition for the sale of said property presented at this meeting be, and the same is hereby approved, and

IT WAS FURTHER RESOLVED, that the President and Treasurer be, and they are hereby authorized and directed to issue certificates of the full paid capital stock of this company to the aggregate amount of Twenty thousand ($20,000) dollars for the purchase price of said property.

One traction engine, complete.

One stone crusher, boiler, engine, bins, complete.

Seven new dump wagons.

Five steel wagons.

One asphalt wagon.

One wagon with pump and air compressor.

Three steam drills complete.

Five steam pumps and engines, complete.

Two large boilers, complete.

Three gasolene engines and pumps complete.

One steam asphalt roller.

One complete sewer outfit.

One complete asphalt repair outfit.

One concrete mixer, complete.

One derrick, buckets and hoisting apparatus.

One horse roller.

One contractor's outfit consisting of forges, chains, blocks, braces, lumber, piping, picks, shovels, wheelbarrows, tool boxes, etc.

Office furniture consisting of two desks, table, typewriter, filing cabinet, cupboard, chairs, rugs, etc.

Four automobiles.

## MINUTES OF THE FIRST MEETING OF DIRECTORS.

The first meeting of the Board of Directors was held on the twenty-second day of April, Nineteen hundred and fourteen, at 5:30 o'clock in the afternoon, in the city of Trenton, pursuant to a written waiver of notice signed by all the directors fixing said time and place. 10

There were present Messrs. Thomas J. McGovern, Thos. Riley and William F. McGovern, constituting a quorum of the board.

Mr. Thomas J. McGovern was chosen chairman of the meeting, and Mr. Thomas F. Riley was appointed secretary of the meeting.

The Secretary presented and read a waiver of notice of the meeting signed by all the directors and the same was ordered filed. 20

The Minutes of the first meeting of the incorporators were read and approved.

The following gentlemen were unanimously elected officers of the company to serve for one year, and until their successors are elected and qualify.

| | |
|---|---|
| President, | William F. McGovern |
| Secretary, | Thomas J. McGovern |
| Vice President, | Thomas J. Riley 30 |
| Treasurer, | Thomas J. McGovern |

The President thereupon took the chair,

It was ordered that the Secretary take the oath of office and subscribe the written oath in the form presented at this meeting.

It was ordered that the Treasurer give a bond in the sum of One thousand ($1,000) Dollars in the form presented at this meeting, which was approved by the Board, and submit said Bond to the 40 Board for approval, as to the sufficiency of the surety.

The Secretary was authorized and directed to procure the necessary corporate books, and to send the stock book and transfer book to the registered office of the company to be kept at such registered office as required by the statute.

The Treasurer was authorized and directed to procure stock certificates for the company in the form submitted at this meeting.

10 Upon motion, duly made and seconded, it was

RESOLVED. That the seal hereto affxed and presented at this meeting be, and the same is hereby adopted as the corporate seal of this company.

RESOLVED, That the President and Treasurer be and they are hereby authorized to issue certificates of stock in the form submitted at this meeting.

20 Upon motion, duly made and seconded, it was

RESOLVED, That the treasurer be, and he hereby is authorized to open a bank account in behalf of this company with the First National Bank of Trenton, and the Broad Street National Bank of the city of Trenton, and with such other banks as the business of the company may require.

FURTHER RESOLVED, That until otherwise ordered, said banks be and hereby are author-
30 ized to make payments from the funds of this company on deposit with them upon and according to the check of this company signed in its name by the Treasurer, Thomas J. McGovern, of the company.

Upon motion, duly made and seconded, it was

RESOLVED, That an office of the company established and maintained at 103 East State Street, in the city of Trenton, State of New
40 Jersey, and that meetings of the board of directors be held at said office.

Upon motion, duly made and seconded it was

RESOLVED, That the proper officers of this company be and they hereby are authorized and directed in behalf of the company, and under its corporate seal, or otherwise to make and file the certificate or statement required by law to be filed in any state in which the officers of the company shall find it necessary to file the same to authorize the company to transact business in such state.

The Secretary was ordered to prepare, have executed by the proper officers, and cause to be filed in the office of the secretary of state of New Jersey the report of officers, directors, etc. required by Section 43 (as amended) of "An Act Concerning Corporations, (Rev. 1896) of New Jersey."

On motion, the meeting adjourned.

THOMAS F. RILEY,
Secretary of the Meeting.

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## WAIVER OF NOTICE.

We, the undersigned, incorporators and subscribers to the stock of the Citizens Construction Company, a corporation organized under and by the laws of the State of New Jersey, do hereby waive notice of the time, place and purpose of first meeting of the incorporators, and do fix the twenty-second day of April, Nineteen hundred and Fourteen at 5:30 o'clock in the afternoon, as the time, and the registered office of the company, 103 East State Street, Trenton, New Jersey, as the place of said meeting.

And we do hereby waive all the requirements of the statute of New Jersey as to notice of said meeting, and publication thereof, and do consent

to the transaction of such business as may come before said meeting.

Dated April 22, 1914.

T. J. McGOVERN
JOHN H. HURLY
THOMAS F. RILEY

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10 OATH OF SECRETARY

State of New Jersey, } ss.:
County of Mercer, }

I, Thomas F. Riley, having been elected Secretary of the Citizens Construction Company, a corporation organized under the laws of the State of New Jersey, do solemnly swear that I will faithfully discharge the duties of Secretary of the said company to the best of my skill and ability.

20 THOMAS F. RILEY.

Sworn and subscribed before me }
this 23d day of April, 1914. }

Peter Backes,
M. C. C.

At a meeting of the Directors of the Citizens Construction Company held on this Seventeenth day of September, Nineteen hundred and fourteen, Thomas J. McGovern, William McGovern and Thomas Riley being present, it was moved that an assignment of a certain contract made by the company with the City of Woodbury, the assignment dated on the Third day of August, Nineteen hundred and fourteen, in favor of the Broad Street National Bank of Trenton, and also of a certain order dated on said day, drawn by this company on Earnest Redfield, City Treasurer of the City of Woodbury, be and the same are hereby ratified and confirmed.

And it was further moved that an assignment

made by this company in favor of said bank, of certain contracts for the construction of pavements on Market Street, Hart Avenue and Swan Street, and of a certain order dated on said day, and drawn by this company in favor of said bank, on Edward Lee, City Comptroller, be and the same are hereby ratified and confirmed.

After a full discussion by the board, it was voted that in the judgment of the board, great loss would be sustained in continuing work on said contracts, and that a continuance of said work would engender great loss to the company, and would be greatly prejudicial to the interest of its creditors and stockholders, and, that in the judgment of said board, the business of the company should be discontinued.

And it was further moved that the Treasurer of the company make payment of all labor bills due on said contract.

And it was further moved that the Treasurer prepare a statement of the affairs of the said company, showing its indebtedness.

And it was further moved that the business of said company, should be discontinued, and that an application should be made for a receiver, and a winding up of the company's affairs.

**Exhibit For Bank, No. 2.**

(Copy.)

Trenton, N. J., Aug 3rd, 1914.

$3000.00

On Demand, for value received, we promise to pay to the order of The Broad Street National Bank of Trenton, at said Bank, Three thousand no/100 Dollars ($3000.00), with interest, and have pledged and delivered to said Bank as collateral security:

Demand Note of Citizens Construction Co. for $1000. dated Aug. 3, 1914, payable to the order of T. J. McGovern endorsed T. J. McGovern and R. B. Newton. Demand Note of Citizens Construction Co. for $1000 dated Aug. 3, 1914, payable to the order of T. J. McGovern, endorsed T. J. McGovern and Frank Clark. Note of Citizens Construction Co. for $1000.00 dated Aug. 3, 1914, payable to the order of T. J. McGovern, endorsed T. J. McGovern & F. E. Weeder.

Assignment of Sundry Contracts for work done or to be done in Trenton, N. J., Borough of Bogota, N. J., and City of Woodbury, N. J., and we promise to pledge and deliver, on demand, such additional security as may be required by the said, The Broad Street National Bank, acting by its proper officers, and until such further deposit be made, the said Bank shall have the right, until this note be paid, to retain and apply any money, securities or property of any kind belonging to us, that it may then have or thereafter acquire, to make good the deficiency.

In case of non-payment of this note according to its terms, we hereby authorize said Bank to sell said securities or property and apply the net proceeds of such sale, and any money in its pos-

session belonging to us to the payment of this note, and interest thereon; such sale to be made, at the Bank's option, without notice, at any Broker's Board or Public Exchange, or at public or private sale. We agree that should said securities, or any part thereof, depreciate in value before such sale or sales, the said Bank shall in no wise be answerable therefor, and that said Bank may become the purchaser of the securities or property so sold, and hold the same thereafter in its own right absolutely; and any amount which may then remain due hereon, we promise to pay to said Bank immediately after such sale, with legal interest.

It is further agreed that said securities, or any part of same, or any excess in the value thereof, or any surplus from the sale thereof, beyond the amount due hereon, shall be applicable upon any other note or claim held by said Bank against us, and for that purpose said securities may be sold in the manner above stated. In case of any exchange of or addition to the collaterals above named, the provisions of this note shall extend to such new or additional collaterals.

THE CITIZENS CONS. CO.,
T. J. McGovern,
Sect. & Treas.

The Citizens Const. Co.,
T. J. McGovern,
Treas.

UNITED STATES OF AMERICA.

Endorsed:

The Citizens Sons. Co.,
T. J. McGovern, Treas.

Be it known, That on the day and date hereof, I, George A. Katzenbach, Notary Public within the State of New Jersey, by lawful authority duly commissioned and sworn, residing in the City of Trenton, in said State, at the request of the Broad Street National Bank of Trenton, New Jersey, exhibited the original note (of which the above attached is a true copy) unto Edw. McHone Cashier The Broad St. Nat'l Bank at the Banking House thereof, and demanding payment, received for answer not sufficient funds.

Whereupon, I, the said Notary, at the request aforesaid, have and do hereby publicly solemnly protest against the maker of the said note and all others whom it doth or may concern, for all exchange, re-exchange, and all costs, damages and interest, suffered and to be suffered for want of payment thereof.

Thus done and protested at Trenton aforesaid, the 21st day of Sept., one thousand nine hundred and fourteen.

In Testimony Whereof, I have hereunto set my hand and affixed my notarial Seal the day and year above written.

GEORGE A. KATZENBACH,
[SEAL.] Notary Public.

7/30/15.

PROTEST.

Citizens Cons. Co.

| | |
|---|---|
| Note, | $3000.00 |
| Not'l Fee, | 1.50 |
| Postage, | .02 |
| | $3001.52 |

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Recorded in Vol. 7, page 224.

Trenton, N. J., Sept. 21, 1914.

Please take notice, that a (note made) by The Citizens Cons. Co., for 3,000 dollars.....cents in favor of Broad St. Nat'l Bank, dated August 3, 1914, payable on Demand after date at The Broad St. Nat'l Bank, endorsed by you, was this day protested for non-payment, and the holder looks to you for payment thereof.

20

Your humble servant,

GEORGE A. KATZENBACH,

Notary Public.

I, George A. Katzenbach, the Notary Public within named, do hereby certify that on the evening of the 21st day of Sept., 1914, I sealed and deposited in the Trenton Post Office, with the postage prepaid, notices of the within protest, of which the above is a true copy, directed as follows:

30

Citizens Cons. Co.,
Trenton, N. J.

The words "endorsed by you" erased in notice sent to

In Testimony Whereof, I have hereunto set my hand and notarial Seal, the day and year last above written.

40

GEORGE A. KATZENBACH,

[SEAL.] Notary Public.

**Exhibit for Bank, No. 3.**

(Copy.)

Trenton, N. J., Aug. 10th, 1914.

$2,000

On Demand, for value received, we promise to pay to the order of The Broad Street National Bank of Trenton, at said Bank, Two thousand no/100 Dollars ($2,000.00), with interest, and have pledged and delivered to said Bank as collateral security.

Check of J. C. Richardson dated Aug. 5, $1,000.00.

Check of J. C. Richardson dated Aug. 5, $1,000.00, and any other Collateral assigned to Bank and we promise to pledge and deliver, on demand, such additional security as may be required by the said, The Broad Street National Bank, acting by its proper officers, and until such further deposit be made, the said Bank shall have the right, until this note be paid, to retain and apply any money, securities or property of any kind belonging to us, that it may then have or thereafter acquire, to make good the deficiency.

In case of non-payment of this note according to its terms, we hereby authorize said Bank to sell said securities or property and apply the net proceeds of such sale, and any money in its possession belonging to us to the payment of this note, and interest thereon; such sale to be made, at the Bank's option, without notice at any Broker's Board or Public Exchange, or at public or private sale. We agree that should said securities, or any part thereof, depreciate in value before such sale or sales, the said Bank shall in no wise be answerable therefor, and that said Bank may become the purchaser of the securities or property so sold, and hold the same

thereafter in its own right absolutely; and any amount which may then remain due hereon we promise to pay to said Bank immediately after such sale, with legal interest.

It is further agreed that said securities, or any part of same, or any excess in the value thereof, or any surplus from the sale thereof, beyond the amount due hereon, shall be applicable upon any other note or claim held by said Bank against. . . ., and for that purpose said securities may be sold in the manner above stated. In case of any exchange of or addition to the collaterals above named, the provisions of this note shall extend to such new or additional collaterals.

THE CITIZENS CONS. CO.,
T. J. McGovern,
Treas.

T. J. McGovern,
The Citzens Const. Co.,
T. J. McGovern, Treas.

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UNITED STATES OF AMERICA.

Endorsed:
T. J. McGovern,
The Citizens Cons. Co.
T. J. McGovern, Treas.

Be it known, That on the day and date hereof, I, George A. Katzenbach, Notary Public within the State of New Jersey, by lawful authority duly commissioned and sworn, residing in the City of Trenton, in said State, at the request of the Broad Street National Bank of Trenton, New Jersey, exhibited the original note (of which the above attached is a true copy) unto Edwin M. Thorn, Cashier The Broad St. Nat'l Bank at the Banking House thereof, and demanding payment, received for answer not sufficient funds.

Whereupon, I, the said Notary, at the request aforesaid, have and do hereby publicly solemnly protest against the Drawee of the said note and all others whom it doth or may concern, for all exchange, re-exchange, and all costs, damages and interest, suffered and to be suffered for want of payment thereof.

10 Thus done and protested at Trenton aforesaid, the 21st day of Sept. one thousand nine hundred and fourteen.

In Testimony Whereof, I have hereunto set my hand and affixed my notarial Seal the day and year above written.

GEORGE A. KATZENBACH,
[SEAL.] Notary Public.

(Copy.)

20 PROTEST.

Citizens Cons. Co.

| | |
|---|---|
| Note | $2000 |
| Not'l Fee, | 1.50 |
| Postage, | 04 |
| | $200154 |

Recorded in vol. 7, page 225.

30 Trenton, N. J., Sept. 21, 1914.

Please take notice, that a Note made by The Citizens Cons. Co. for 2000 dollars .... cents in favor of Broad St. Nat. Bank, dated Aug. 10, 1914, payable on demand after date at The Broad St. Nat'l Bank endorsed by you, was this day protested for non-payment, and the holder looks to you for payment thereof.

Your humble servant,
40 GEORGE A. KATZENBACH,
Notary Public.

I, George A. Katzenbach, the Notary Public within named, do hereby certify that on the evening of the 21st day of Sept. 1914, I sealed and deposited in the Trenton Post Office, with the postage prepaid, notices of the within protest, of which the above is a true copy, directed as follows:

Citizens Cons. Co., Trenton, N. J.
T. J. McGovern. " "

10

The words "endorsed by you" erased in notice sent to .

In Testimony Whereof, I have hereunto set my hand and notarial Seal, the day and year last above written.

GEORGE A. KATZENBACH,
Notary Public.

---

20

**Exhibit for Bank, No. 3.**

LETTERHEAD OF

THE BROAD STREET NATIONAL BANK

Trenton, N. J., July 16, 1914.

Mr. Edward Lee,
City Comptroller,
Trenton, New Jersey.

30

Dear Sir,

Will you please pay to the Broad Street National Bank all money that may be due us on the follow-

40

ing contracts for paving the streets named below:

Market St. From a point 83 ft. west of Lamberton St. to Broad St. (City portion.)

Market St. Same location as above. (Trolley portion.)

Hart Ave. From Clinton Ave. to a point about 313 ft. South of Hurley St.

10

Swan St. From Hudson St. to Chestnut St.

9/11-1000.00

Thanking you for your courtesy in this matter,

Very truly yours,

THE CITIZENS CONSTRUCTION CO.,

T. J. McGovern,

Secretary.

20

(Corporate seal of
The Citizens Construction Co.
Trenton, New Jersey.
1914.)

Bank
#3
4/20/15, see p. 81, State of Case.

30

---

**Exhibit for Bank, No. 4.**

Trenton, N. J. Aug 3 1914

$1000.

On Demand after date we promise to pay to the order of T. J. McGovern at the Broad Street National Bank One thousand Dollars 00/100 Dollars.

40

Without defalcation or discount, for value received.

No..... Due.....

THE CITIZENS CONS CO

T. J. McGovern

Treas.

Written on face: Copy.

Endorsements: 10

T. J. McGovern

Frank J. Clark

Trenton, N. J., Aug. 3, 1914. We hereby waive protest, notice of protest and demand on within note, and hold ourselves as duly bound as if same had been legally protested and we had been notified thereof.

T. J. McGOVERN. 20

Frank J. Clark

The Citizens Construction Co. T J McGovern Treasurer

---

**Exhibit for Bank, No. 5.**

Trenton, N. J. Aug. 3 1914

$1000.00

On Demand after date we promise to pay to the order of T. J. McGovern at the Broad Street National Bank One thousand Dollars /100 dollars 30

Without defalcation or discount, for value received.

No..... Due.....

THE CITIZENS CONS. CO.

T. J. McGovern

Treas.

40

Written on face: Copy.

T. J. McGovern
R. B. Newton

Trenton, N. J., Aug. 3, 1914. We hereby waive protest, notice of protest and demand on within note, and hold ourselves as duly bound as if same had been legally protested and we had been notified thereof. T. J. McGovern. R. B. Newton.

The Citizens Construction Co. T J McGovern Treasurer.

---

**Exhibit for Bank, No. 6.**

Trenton, N. J. Aug. 3 1914

$1000.00

On Demand after date we promise to pay to the order of T. J. McGovern at the Broad Street National Bank One thousand Dollars /100 Dollars.

Without defalcation or discount, for value received.

No..... Due.....

THE CITIZENS CONSTRUCTION CO.
T. J. McGovern
Treasurer.

Written on face: Copy.

Endorsements:
T. J. McGovern
F. E. Weeden.

Trenton, N. J., Aug. 3 1914. We hereby waive protest, notice of protest and demand on within note, and hold ourselves as duly bound as if same

had been legally protested and we had been notified thereof. T. J. McGovern.

F. E. Weeden.

The Citizens Construction Co. T. J. McGovern Treasurer.

---

**Exhibit for Bank, No. 7.**

RETURNED BY 10

THE FIRST NATIONAL BANK
of Trenton, N. J.

| | |
|---|---|
| Not good | Official end't |
| Recalled | Guarantee of end't |
| Missing end't | Guarantee of am't |
| Date | Fraud |
| Payment Stopped √ | Signature |
| No account | Maker deceased |
| Not due | No authority to pay |
| Set wrong | Past due |
| Correct end't | Missing receipt |

Pass book must be at bank 20

Trenton, N. J. 8/5 1914 $1000

THE FIRST NATIONAL BANK 55-75
of Trenton, New Jersey.

Pay to the order of J. M. McGoven 30
One thousand ..... Dollars
J. S. RICHARDSON.

Written on face: Copy.
Stamped: Coll.

Endorsed:

T. J. McGoven The Citizens Cons Co T. J. McGovern Treas

4 Received payment through Trenton Clearing 40
House prior endorsement guaranteed Sept 22 1914
Broad St Nat'l Bank Trenton, N. J.

**Exhibit for Bank, No. 8.**

The Trenton Trust and Safe Deposit Co.
Trenton, N. J.

Returned unpaid—reason checked

| | |
|---|---|
| Date. | Ordered returned |
| No account. | Drawn against uncollected funds. |
| Not sufficient funds. | √ Payment stopped. |
| Not due | Guarantee of indorsement. |
| Past due. | Sent Wrong. |
| Official indorsement. | Guarantee of amount. |
| Missing indorsement. | For signature. |
| Improper signature. | Amount changed. |
| Not receipted. | Checking not allowed. |
| Maker deceased. | Refused. |
| Recalled. | No attention. |
| Check sent. | Never pays drafts. |
| Will remit. | Alteration of title |

Trenton, N. J. Aug 5 1914

TRENTON TRUST AND SAFE DEPOSIT CO.

Pay to the order of T. J. McGovern $1000.00
One thousand ..... Dollars
JAMES C. TATTERSALL

Written on face: Copy.

Stamped: Payment Stopped. Coll. Counter check.

Endorsed:

T. J. McGovern The Citizens Cons Co T. J. McGovern Treas

4 Received payment through Trenton Clearing House prior endorsements guaranteed Sept 22 1914 Broad St Nat'l Bank Trenton, N. J.

**Exhibit for Bank, No. 9.**

(Copy.)

THE ESTIMATED AMOUNT OF THE CONTRACTS LISTED BELOW AMOUNTS TO TWENTY THOUSAND DOLLARS.

KNOW ALL MEN BY THESE PRESENTS, that WHEREAS, a contract has been entered into between "The City of Trenton, New Jersey," of the one part, and "The Citizens Construction Company, a corporation incorporated under the laws of the State of New Jersey, of Trenton, Mercer County, New Jersey," of the other part, for the paving of the following streets: 10

MARKET STREET From a point 83 ft. west of Lamberton St. to Broad St. (City Portion).

MARKET STREET Same location as above. (Trolley Portion.) 20

HART AVENUE From Clinton Ave. to a point about 313 ft. south of Hurley Street.

SWAN STREET From Hudson St. to Chesnut Ave.

AND WHEREAS, the said Citizens Construction Co. have entered upon the work of said contract.

AND WHEREAS, the said Citizens Construction Co. in order to enable them to carry out said contract have borrowed from The Broad Street National Bank of Trenton, the sum of Five Thousand Dollars, and may desire to borrow from said Bank other additional sums: NOW THEREFORE, the said Citizens Construction Co., in consideration of the foregoing and the sum of One Dollar to me in hand paid by The Broad Street National Bank of Trenton, the receipt whereof is hereby asknowledged, have assigned, transferred and set over and by these presents do hereby assign, transfer and set over unto the said The Broad Street National 30 40

Bank of Trenton, any and all sum or sums of money now due and to grow due from "The City of Trenton, New Jersey," by reason or on account of the contract above referred to; and The Citizens Construction Co. does hereby give the said The Broad Street National Bank of Trenton, its successors and assigns, the full power and authority for its or their own use and benefit, but at its or their cost to demand, collect, receive, compound and give acquittance for the same or any part thereof, and in the name of the Citizens Construction Co. or otherwise prosecute and withdraw any suit or proceedings at law or in equity therefore.

IN WITNESS WHEREOF, the Citizens Construction Co. has hereto set its hand and corporate seal this Sixteenth day of July A. D. nineteen hundred and fourteen.

Thomas F. Riley, Vice President.

THE CITIZENS CONSTRUCTION CO.,
T. J. McGovern, Sec'y.

Signed, Sealed and delivered in the presence of, (Seal of Citizens Construction Co.)

---

**Exhibit for Bank, No. 10.**

(Copy.)

ESTIMATED AMOUNT OF CONTRACT LISTED BELOW AMOUNTS TO FORTY-FOUR THOUSAND AND FORTY DOLLARS.

KONW ALL MEN BY THESE PRESENTS, that Whereas, a contract has been entered into between the "City of Woodbury, New Jersey," of the one part, and the "Citizens Construction Company, a corporation incorporated under the laws of the State of New Jersey, of Trenton, Mercer County, New Jersey," of the other part, for the building of

a Pump Well, at the Pumping Station on the Mantua Creek.

AND WHEREAS, the said Citizens Construction Co. have entered upon the work of said contract,

AND WHEREAS, the said Citizens Construction Co. in order to enable them to carry our said contract have borrowed from the Broad Street National Bank of Trenton, the sum of Two Thousand Dollars, and may desire to borrow from said Bank other additional sums; NOW THEREFORE, the said Citizens Construction Co., in consideration of the foregoing and the sum of One Dollar to me in hand paid by the Broad Street National Bank of Trenton, the receipt whereof is hereby acknowledged, have assigned, transferred and set over and by these presents do hereby assign, transfer and set over unto the said The Broad Street National Bank of Trenton any and all sum or sums of money now due and to grow due from "The City of Woodbury, New Jersey," by reason or on account of the contract above referred to; and The Citizens Construction Co., do hereby give the said The Broad Street National Bank of Trenton, its successors and assigns, the full power and authority for its or their own use and benefit, but at its or their cost to demand, collect, receive, compound and give acquittance for the same to any part thereof, and in the name of the Citizens Construction Co. or otherwise prosecute and withdraw any suit or proceedings at law or in equity therefore.

IN WITNESS WHEREOF, the Citizens Construction Company has hereto set its hand and cor-

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porate seal this Third day of August, A. D. nineteen hundred and fourteen.

Thomas F. Riley, Vice President.

THE CITIZENS CONSTRUCTION CO.,

T. J. McGovern, Sec'y.

Signed, sealed and delivered
in the presence of

10 M. A. Vail.

---

**Exhibit for Bank, No. 11.**

(Copy.)

Estimated amount of contract named below, twenty-two thousand dollars.

KNOW ALL MEN BY THESE PRESENTS, that WHEREAS, a contract has been entered into
20 between "The Borough of Bogota, New Jersey," of the one part, and Thomas J. McGovern, of Trenton, Mercer County, New Jersey, of the other part, for the building of a sewerage system.

AND WHEREAS, the said Thomas J. McGovern has entered upon the work of said contract,

AND WHEREAS, the said Thomas J. McGovern in order to enable him to carry out said contract has borrowed from the Broad Street National Bank
30 of Trenton the sum of Two Thousand Dollars, and may desire to follow from said Bank other additional sums: NOW THEREFORE, I, the said Thomas J. McGovern, in consideration of the foregoing and the sum of One Dollar to me in hand paid by the Broad Street National Bank of Trenton, the receipt whereof is hereby acknowledged, has assigned, transferred and set over and by these presents does hereby assign, transfer and set over unto
40 the said The Broad Street National Bank of Trenton any and all sum or sums of money now due and

to grow due from "The Borough of Bogota, New Jersey," by reason or on account of the contract above referred to; and I do hereby give the said Broad Street National Bank of Trenton, its successors and assigns, the full power and authority for its or their own use and benefit, but as its or their cost to demand, collect, receive, compound and give acquittance for the same or any part thereof, and in my name or otherwise prosecute and withdraw any suit or proceedings at law or in equity therefore.

IN WITNESS WHEREOF, I have hereto set my hand and seal this Third day of August A. D. nineteen hundred and fourteen.

T. J. McGOVERN

Signed, sealed and delivered
in the presence of,
M. A. Vail.

---

**Exhibit For Bank, No. 12.**

TO THE CITY OF WOODBURY, NEW JERSEY:

You are hereby notified that the Citizens Construction Company, a corporation of New Jersey, has assigned to the Broad Street National Bank of Trenton all moneys now due or that may hereafter grow due to it from the City of Woodbury, New Jersey, for and on account of a contract entered into between the said Citizens Construction Company and the City of Woodbury for the building of a pump well at the pumping station on Mantua Creek.

You are, therefore, notified not to pay over any moneys due or to grow due under said contract either to the said Citizens Construction Company

or any other person other than the Broad Street National Bank of Trenton.

Trenton, New Jersey.

August 4, 1914.

BROAD STREET NATIONAL
BANK OF TRENTON.
Edwin M. Thorn
Cashier.

10

---

**Exhibit for Bank, No. 13.**

TO THE BOROUGH OF BOGOTA:

You are hereby notified that Thomas J. McGovern, of Trenton, has assigned to the Broad Street National Bank of Trenton all moneys now due or that may hereafter grow due to him from the Borough of Bogota, New Jersey, for and on account of a contract entered into between the said Borough and the said Thomas J. McGovern for the building of a sewerage system.

20

You are, therefore, notified not to pay over any moneys due or to grow due under said contract either to the said Thomas J. McGovern or any other person other than the Broad Street National Bank of Trenton.

Trenton, New Jersey.

30

August 4, 1914.

BROAD STREET NATIONAL
BANK OF TRENTON.
Edwin M. Thorn
Cashier.

40

**Exhibit for Bank, No. 14.**

(COPY.)

TRANSCRIPT OF ACCOUNT OF THE CITIZENS CONS. CO. FROM DAILY BALANCE BOOK #52, A. D. JULY-DEC., 1914.

| | | | | |
|---|---|---|---|---|
| 1914 | | | | |
| July 15 | | | 500 fr | |
| | July | 15 | 500 | 10 |
| | | 16 | 48.08 | |
| | | 18 | 50 | |
| | | 18 | 176.16 | |
| | | 20 | 500 | |
| | | 21 | 52 | |
| | | 22 | 2500 | |
| | | 25 | 308 | |
| | | 31 | 175.59 | |
| | | 31 | 17.10 | 20 |
| | Aug. | 1 | 200 | |
| | | 3 | 2500 | |
| | | 4 | 213.99 | |
| | | 4 | 25 | |
| | | 5 | 856.92 | |
| | | 6 | 501.09 | |
| | | 7 | 100 | |
| | | 7 | 800 | |
| | | 7 | 5.85 | 30 |
| | | 8 | 24.22 | |
| | | 8 | 50 | |
| | | 10 | 2.87 | |
| | | 11 | 11.68 | |
| | | 11 | 8.00 | |
| | | 11 | 9.61 | |
| | | 11 | 117.11 | |
| | | 11 | 2 | |
| | | 11 | 68 | 40 |
| | | 11 | 5.75 | |

| | |
|---|---|
| 12 | 2.90 |
| 13 | 643.60 |
| 14 | 27.82 |
| 14 | 150.72 |
| 14 | 60 |
| 15 | 150 |
| 15 | 3.50 |
| 17 | 16.53 |
| 17 | 40.14 |
| 17 | 3 |
| 17 | 15 |
| 17 | 40 |
| 17 | 11.35 |
| 18 | 583.89 |
| 18 | 40.25 |
| 19 | 60 |
| 19 | 98.49 |
| 19 | 100 |
| 19 | 895.01 |
| 20 | 100. |
| 20 | 25 |
| 22 | 100 |
| 24 | 50 |
| 24 | 35 |
| 24 | 6 |
| 25 | 300 |
| 25 | 28 |
| 26 | 35.90 |
| 26 | 139.92 |
| 27 | 1095.83 |
| 27 | 23.80 |
| 28 | 100 |
| 28 | 53.03 |
| 28 | 50 |
| 28 | 37.62 |
| 29 | 754.08 |

| | | | |
|---|---|---|---|
| Sept. | 1 | | 8.42 |
| | 1 | | 25.08 |
| | 1 | | 100 |
| | | | 15838.90 |
| Sept. | 1 | | 260.95 |
| | 1 | | 710.93 |
| | | Bal. | 433.22 |
| | | | 17244.00 |
| Sept. | 3 | | 100 |
| | 4 | | 150 |
| | 9 | | 6 |
| | 11 | | 500 |
| | 11 | | 100 |
| | 12 | | 1105.70 |
| | 14 | | 695.71 |
| | 15 | | 1585.65 |
| | 15 | | 200 |
| | 16 | | 289.65 |
| | 17 | | 129.90 |
| | 17 | | 500 |
| | 18 | | 6.20 |
| | 19 | | 22 |
| | 19 | | 7 |
| | | Bal | 232.63 |
| | | | 5630.44 |
| 1914 | | | |
| July | 15 | | 300 |
| | 15 | $500 note C. C. Co. and T. J. McG. for acct check | |
| | | | 499.01 |
| | 20 | | 550 |

| | | | |
|---|---|---|---|
| | | 20 | .58 |
| | | 22 | 2495.07 |
| | | 25 | 500 |
| | | 30 | 200 |
| | Aug. | 1 | 96.94 |
| | | 3 | 2500 |
| | | 4 D Loan | 3000 |
| | | 10 | 2000 |
| | | 18 | 1000 |
| | | 21 | 980 |
| | | 25 | 2100 |
| | Sept. | 1 | 1022.40 |
| | | | 17244.00 |
| | 1914 | | |
| | Sept. | 1 Bal. | 433.22 |
| | | 11 | 3597.22 |
| | | 15 | 1600 |
| | | | 5630.44 |
| | 1914 | | |
| | Oct. | 28 Bal. | 232.63 |

10

20

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**Exhibit for Bank, No. 15.**

30 (LETTERHEAD OF)

THE BROAD STREET NATIONAL BANK

Trenton, N. J. August 3, 1914.

Mr. Ernest Redfield,
City Treasurer,
Woodbury, N. J.

Dear Sir:

Will you please pay to the Broad Street National Bank of Trenton, N. J., all the money that may be due the Citizens Construction Company

40

on the Contract with the City of Woodbury for building the Pump Well?

Thanking you for your courtesy in this matter, I am,

Very truly yours,
THE CITIZENS CONSTRUCTION CO.,
T. J. McGovern, Sec.

---

10

**Exhibit for Bank, No. 16.**

(LETTERHEAD OF)
THE BROAD STREET NATIONAL BANK

Trenton, N. J. August 3, 1914.

The Comptroller,
Borough of Bogota,
N. J.

20

Dear Sir:

Will you please pay the Broad Street National Bank of Trenton, N. J., all the money that may be due me on the contract with the Borough of Bogota for building a sewerage system?

Thanking you for your courtesy in this matter, I am,

Very truly yours,
Signed, T. J. McGOVERN.

30

---

**Exhibit for Bank, No. 17.**

(Copy.)

Authorized signatures of

For the Broad Street National Bank of Trenton, N. J.

THE CITIZENS CONSTRUCTION CO.
T. J. McGovern
Treas.

40

Date 4/23/14 $500.00

**Exhibit for Bank, No. 18.**

Deposited In The
BROAD ST. NATIONAL BANK
of Trenton, N. J.

By Citizens Const. Co.

8/18 1914

10 Please list each check separately.

| | Dollars | Cents |
|---|---|---|
| Bank Notes | | |
| Specie | | |
| Checks as follows | | |
| City of Trenton. | 1,000. | |
| Total | $ | |

20

**Exhibit for Bank, No. 19.**

Deposited In The
BROAD ST. NATIONAL BANK
of Trenton, N. J.

By Citizens Const. Co.
T. J. McGovern, Treas.

Aug. 24 1914

30 Please list each check separately.

| | Dollars | Cents |
|---|---|---|
| Bank Notes | | |
| Specie | | |
| Checks as follows | | |
| Bogota check | 2100.00 | |
| Total | $ | |

40

**Exhibit for Bank, No. 20.**

Deposited In The
BROAD ST. NATIONAL BANK
of Trenton, N. J.

By Citizens Const. Co.
T. J. McGovern

Sept. 11 191 10

Please list each check separately.

Dollars Cents

Bank Notes
Specie
Checks as follows

3597.22

Total $ 20

---

**Exhibit for Bank, No. 21.**

Deposited In The
BROAD ST. NATIONAL BANK
of Trenton, N. J.

By Citizens Const. Co.

9/1/14

Please list each check separately. 30

Dollars Cents

Bank Notes
Specie
Checks as follows

758.40
264.

1022.40 40

Total $

**Exhibit for Bank, No. 22.**

Deposited In The
BROAD ST. NATIONAL BANK
of Trenton, N. J.

By Citizens Const. Co.

9/15 1914

10 Please list each check separately.

| | Dollars | Cents |
|---|---|---|
| Bank Notes | | |
| Specie | | |
| Checks as follows | | |
| Woodbury, N. J. | 1600 | |
| Total | $ | |

20

[7540]

30

40

# New Jersey Court of Errors and Appeals.

| | |
|---|---|
| MACK MANUFACTURING CO., Complainant-Appellant, and CITIZENS CONSTRUCTION COMPANY, J. CLARENCE RICHARDSON, SR., Receiver, BROAD STREET NATIONAL BANK OF TRENTON, and the MAYOR AND COMMON COUNCIL OF THE CITY OF TRENTON, Defendants-Respondents. | No. 1 Hart Avenue. |
| MACK MANUFACTURING CO., Complainant-Appellant, and CITIZENS CONSTRUCTION COMPANY, J. CLARENCE RICHARDSON, SR., Receiver, BROAD STREET NATIONAL BANK, MAYOR AND COMMON COUNCIL OF THE CITY OF TRENTON, JOSEPH R. RICHARDSON & SON, and FRANK E. AREND, Defendants-Respondents. | No. 2 Swan Street. |

On Appeal from Chancery.
V. C. Leaming.

## BRIEF FOR APPELLANTS-COMPLAINANTS.

### Statement.

These are appeals by the Mack Manufacturing Company from decrees made dismissing bills to enforce liens under the Municipal Lien Act, 3 Compiled Statutes of New Jersey, 3315.

The bills are practically identical in form and are printed pages 7 and 31.

The case which is entitled No. 1 is based upon a lien for the value of brick furnished by the Mack Manufacturing Company for the performance of work by the Citizens Construction Company upon a street known as Hart Avenue, in the City of Trenton. To this suit the only defendants are the Citizens Construction Company, and its receiver and the Broad Street National Bank, which claims out of the fund five thousand dollars, approximately, by virtue of an assignment alleged to have been made prior to the filing of the lien.

The suit entitled Suit No. 2 is based upon a claim of lien by the Mack Manufacturing Company for the value of brick furnished for the performance of work by the Citizens Construction Company upon a street in the City of Trenton known as Swan Street. To this suit there are, besides the above mentioned defendants, Joseph B. Richardson and Son, and Frank E. Arend, defendants who are also lien claimants.

The City of Trenton defaulted in both suits. The Citizens Construction Company and its Receiver in each suit filed an answer in which it was set up that in as much as the notices of lien were not filed until after the appointment of the Receiver the lien claimant obtained no priority, the effect of the appointment of the Receiver being to prevent the consummation of the lien.

The Broad Street National Bank in each suit filed an answer setting up its assignment and claiming thereunder.

In Suit No. 2 Joseph B. Richardson and Son filed an answer claiming a lien under their notice on the money due upon the Swan Street contract prior to the Mack Manufacturing Company, and Frank E. Arend filed an answer claiming a lien

upon his notice admittedly subsequent to the lien of the Mack Manufacturing Company.

There was and is no question raised as to the fact of the furnishing of the materials for the value of which the various notices were filed. Nor was, nor is there any question as to the form of the various notices nor as to the compliance in any wise by the Mack Manufacturing Company, the complainant, and Joseph B. Richardson and Son, and Frank E. Arend with the provisions of the statute.

A motion was made by the Receiver to strike out the bill of complaint upon the ground that it appeared from the bill that prior to the filing of the lien of the complainant a Receiver had been appointed under the statute and that the effect of such receivership was to prevent the consummation of the lien. This motion was denied in an opinion of the Chancellor, page 17.

The bill of complaint was amended by permission of the Court (p. 18), so as to set up that at the time of the appointment of the Receiver, while all of the brick for which the claim of the Mack Manufacturing Company was filed had been furnished for both streets and while most of the brick had been actually used on Swan Street, yet none of the brick had been actually used on Hart Avenue and that the brick was subsequently used by the Receiver who adopted the contracts of the Citizens Construction Company with the City of Trenton and completed the work under the order of the Court (p. 61, line 40).

The Mack Manufacturing Company, therefore, claimed not only under a lien in pursuance with the statute but also an equitable right for a prior payment as against the Receiver, to at least the extent of the value of the brick actually used by him in the performance of the contracts and which

performance resulted in there becoming due to the Receiver from the City of Trenton the funds now in Court upon which the liens are claimed.

The Vice-Chancellor in his conclusions (p. 49), took the position that because of the appointment of the Receiver prior to the actual filing of the notices of liens, the liens could not be consummated, and that in as much as the bill was filed to enforce a right under the statute and that having been declared against the complainant it was not within the jurisdiction of the Court to determine the equitable question raised by the complainant arising out of the use by the Receiver of its material on the streets in the performance of the contracts or to determine the validity of the claim of the Broad Street National Bank and therefore dismissed the bills in both cases without passing upon either of these questions.

## The Admitted Facts.

All of the facts save only those which relate to the validity of the Broad Street National Bank were admitted (p. 61).

On the third day of July, 1914, Trenton entered into a contract with the Citizens Construction Company for the pavement of Hart Avenue with Mack repressed paving blocks.

On the same day it entered into a contract with the Citizens Construction Company for the paving of a part of Swan Street with Mack repressed paving blocks.

On the 29th day of June, 1914, the Citizens Construction Company entered into a contract with the Mack Manufacturing Company under the terms and conditions of which it was to deliver the Mack repressed paving blocks for both streets (p. 60). The contract is printed (p. 170).

On the 18th day of September, 1914, J. Clarence Richardson was appointed Receiver of the Citizens Construction Company under the statute.

On the 29th day of September, 1914, by an order of the Court of Chancery without notice to any person (and I might add that the receivership proceedings were without notice to any one with the exception of the corporation itself, which acquiesced in the appointment), the Receiver was authorized to complete the work on both streets. He did so, and on October 19th, 1914, the work on Swan Street was completed and on November 24th, 1914, the work on Hart Avenue was completed. At the time of the appointment of the Receiver all of the brick had been delivered on the streets by the Mack Manufacturing Company. Most of it had been laid on Swan Street, the Receiver through his contractor the Newton Paving Company laying some. None of the brick had been laid on Hart Avenue. The Receiver laid it all. All of the money due the Mack Manufacturing Company under the terms of its contract was due at the time of the appointment of the Receiver. The contract provided payment should be made on the 15th day of the month succeeding shipments. All of the brick had been shipped during the month of August and on the 15th day of September the entire amount due under the contract of the Citizens Construction Company with the Mack Manufacturing Company had actually accrued.

There was due to the Mack Manufacturing Company for brick furnished on Hart Avenue the sum of $2,309.92; for brick furnished on Swan Street, $2,501.83. On the 7th day of October, 1914, notice of lien was filed by the Mack Manufacturing Company against the funds in the hands of the City of

Trenton, claiming a single lien upon the entire fund based upon two contracts between the Citizens Construction Company and the City of Trenton, but one contract between the Mack Manufacturing Company and the Citizens Construction Company; that on the 19th day of October, separate liens were filed (p. 65).

Notice of lien printed (p. 176).

On the 14th day of October, 1914, there was due to Joseph B. Richardson & Son for materials furnished on Swan Street, $1,278.66, and on that date its lien was filed.

On the 19th day of October, 1914, but subsequent to the filing of the notice of the Mack Manufacturing Company, Frank E. Arend filed a notice of lien for $139.40, the amount being correct.

Upon the work being completed by the Receiver there became due to the Newton Paving Company for work performed by it for the Receiver the sum of $5,921.57 which by consent was directed to be paid out of the funds in the hands of the City of Trenton by order (p. 179). This order, however, contains this provision: "and it further appearing that the several claimants to said fund admit the priority of the claim of the Newton Paving Company, and the right of the Receiver to pay said company for the work so performed by it in the completion of said contracts, except only that the Mack Manufacturing Company claims the right to insist that the free moneys in the hands of the Receiver be used for that purpose, this consent not to affect such claims or the claim to compel restitution to such fund of this money now withdrawn or subrogation."

After deducting the amount paid to the Newton Paving Company properly applicable to Swan Street there remained a balance due from the City of Trenton on Swan Street of $4,610.53. The total

claims against this fund amount only to the sum of $3,917.49 excluding the claim of the Broad Street National Bank and it is therefore immaterial as to whether the first notice filed by the Mack Manufacturing Company is effective or not if the claim of that bank is of no effect. After deducting the amount paid by the City of Trenton to the Newton Paving Company for the completion of Hart Avenue, to wit, $3,330.40, the City of Trenton owed upon the Hart Avenue contract the sum of $3,215.60, which is the other fund in Court. Against this fund there is no claim of lien except that of the Mack Manufacturing Company excluding the claim of the Broad Street National Bank which claim will be dealt with separately.

The Receiver got into his possession from sources other than these two contracts $3,558.52 and it is the contention of the Mack Manufacturing Company that this fund should have been taken so far as it would go to pay the amount due the Newton Paving Company for completing the contracts or be applied to the amount due on the Broad Street National Bank assignment so as to keep the funds which were in the hands of the City of Trenton at the time of the filing of notices of lien by the Mack Manufacturing Company intact.

At the time of the appointment of the Receiver there was a certain amount due from the City of Trenton to the Citizens Construction Company, both upon the Hart Avenue and Swan Street contracts. This amount has not been accurately ascertained. It is stipulated that it should be ascertained (p. 71). Prior to its ascertainment the determination of the Vice-Chancellor was given upon the narrow point.

It is claimed by the Mack Manufacturing Company that it at least has a lien upon such amount

as was due from the City of Trenton to the Citizens Construction Company at the time of the appointment of the Receiver.

**Points.**

1. The liens were not rendered incapable of consummation by reason of the appointment of the Receiver.

a. Because the lien is such a one as is not affected by such appointment.

b. Because the Receiver under the orders of the Court took over the completion of the contracts and so far as materialmen were concerned placed himself in the position of the Citizens Construction Company to complete the contracts *cum onere.*

c. Because the Receiver in completing the work used brick furnished by the Mack Manufacturing Company which was not at the time of his appointment either paid for or used in the work.

d. Because there was an amount due to the Citizens Construction Company upon these contracts as of the date of the appointment of the Receiver and the Receiver by completing the contract has so mingled the funds as to make the entire fund liable.

e. In any event, the liens are effective upon so much as was due from the City of Trenton to the Citizens Construction Company at the time of the appointment of the Receiver.

So far as the claim of the Broad Street National Bank is concerned statement of facts and argument will be given after the conclusion of the brief upon the main question.

## ARGUMENT.

### I.

**The liens were not rendered incapable of consummation by reason of the appointment of the Receiver.**

A. *Because the lien is such a one as is not affected by such appointment.*

The contention of the respondents rests upon the opinion of Vice-Chancellor Stevenson in 89 Atl., 1046, in John Agnew Co. *v.* Board of Education, the 11th and 12th subheads of that decision. The Vice-Chancellor was there dealing with the operation of the bankruptcy act and held that when under the order of the bankruptcy court a Receiver has been appointed for the assets of a corporation it had the effect of putting the assets *in custodia legis* and no liens could be acquired while the assets were in such condition. He based his determination upon the rule prevailing in the Federal Court and says on page 1054:

> "According to the theory which I think prevails in the Federal Courts, which have the final determination of this question, the order appointing the bankruptcy Receiver placed the whole fund *in custodia legis*, notwithstanding the fact that the Trustee in bankruptcy has come into this Court, for the determination by this Court of the validity and extent of the liens upon the fund which was part of the bankrupt estate, and notwithstanding the adjudication by this Court that the Trustee takes nothing because the liens which are established by the decree of this Court exhaust the fund. The result is that the laborers must be referred to the bankrupt Court for such remedy as they may there have."

An appeal was taken to this Court and the de-

cision affirmed for the reasons stated by Vice-Chancellor Stevenson in 90 Atl., p. 1135, but there was no appeal on behalf of any laborer. The question determined by this opinion so far as it affects the case at bar was not brought to the attention of this Court so far as appears from the reported case. It had no proper place there because the laborers who were there involved did not appeal.

The Vice-Chancellor in his opinion carefully indicates that his opinion is to be taken only as referring to the specific case before him. He says:

> "I have, however, made a careful examination of the authorities controlling this question, as to the exact date after which no liens could be acquired upon this fund, by filing notices under the New Jersey statute, and it must be conceded that the effect of orders appointing Receivers is a subject about which there has been a very wide difference of judicial opinion. We are not, however, dealing with the case of an ordinary Receiver appointed by a court of equity under its general equity powers. The cases in different jurisdictions differ as to whether the estate of the defendant is put *in custodia legis*, when the order for the receivership is made, or when the Receiver has qualified, or when the Receiver has actually taken possession of the land or goods which he is appointed to receive. The question before the Court is less difficult because it involves the receivership of the estate of a bankrupt under the United States bankrupt law. Here again we find inconsistent views."

The matter is open in this Court.

The statute under which the lien is alleged to have been created provides as follows:

> (Mechanics' Lien Act, Section 36, p. 3315, 3 Compiled Statutes of New Jersey):
>
> "That any person may have a lien for ma-

terials furnished, etc., on complying with the provisions of this act and shall have a lien for the value of such labor or material or either upon moneys in the control of the said City * * * due or to grow due under said contract with said city * * * to the full value of such claim or demand, and these *liens* may be filed and become an *absolute lien* to the full and par value of all such work and materials to the extent of the amount due or to grow due under said contract, in favor of every person or persons who shall be employed or furnish materials to the person or persons with whom said contract with said city * * * is made."

"Section 37 provides for the filing of notice. That at any time before the whole work to be performed by the contract is completed or accepted and within fifteen days after the same is completed or accepted any claimant may file, etc., notices, etc. And provided, however, that the filing of such notice shall not operate as a lien against such moneys as may be due or to grow due, notice, etc., until bond is filed, etc."

"Section 40, page 3319, provides that the lien shall attach from the time of filing thereof to the extent of the liability of the contractor for the claim preferred upon any funds which may be due or to grow due to said contractor from the said city."

Sections 39 and 41 provide for the action to enforce the liens.

It is to be observed that what Vice-Chancellor Stevenson was dealing with in the case of John Agnew Company *v.* The Board of Education was the operation of the Bankruptcy Act and the rule promulgated by the Federal Court. Whatever may be the law as established by the Federal tribunal with respect to the effect of an order in bankruptcy appointing a Receiver as being a se-

questration of the estate of the bankrupt to such an extent as to put it constructively *in custodia legis* so as to prevent the perfecting of liens under the Mechanic's Lien Act (and I insist the Vice-Chancellor misinterpreted the Federal Decisions) such is not the effect of the appointment of a Receiver under the statute of New Jersey.

That statute, providing for the appointment of a Receiver by the Court of Chancery; Section 68 provides that all the real and personal property of a corporation and all of its franchises, rights, etc., shall vest in him and the corporation shall be divested. Section 86 provides for distribution of the assets of the corporation after the satisfaction *of special and general liens.*

The rights and powers of the Receiver are set forth under the statute. The property is not *in custodia legis.* The Receiver is on the contrary the statutory successor of the corporation.

He has all of the rights of the corporation plus the rights of the stockholders, plus the rights of the creditors, but *not* plus the rights of judgment-creditors. He has *only* these rights. The property is *not in custodia legis.* It is by virtue of the statute passed to the statutory agent, vested by the statute with the rights of these three classes of interested parties.

Gallagher *v.* Asphalt Co. of Am., 65 Eq., 258, 67 Eq., 441.
Pierce *v.* Old Dominion, 67 Eq., 399.
Hoopes *v.* Bossic Company, 69 Eq., 679.

If these notices are ineffective for any reason it must be because in the right of the corporation or of its stockholders or of its general creditors the Receiver may defeat the liens. The corporation could not. The stockholders could not. The gen-

eral creditors could not, so that it does not seem that the Receiver representing *only* these three classes can.

In the case of Kuser *v.* Wright, 52 N. J. Eq., 830, the Court of Appeals speaking through Mr. Justice Van Syckel, said:

> "The fact that the mortgage to the bank was executed to secure an antecedent debt does not impair its standing as between the corporation and its creditor. It was taken in good faith, and it was as much the duty of the company to pay the debt as though it had been contracted at the date of the mortgage (Knowles *v.* Loom Works *v.* Vacher *et al.*, Supreme Court, February Term, 1895)."

In Receivers *v.* The Paterson Gas Light Company, 3 Zab., 283-292, Justice Green laid down the rule that the Receiver took as assignee by operation of law and that the assignment being by operation of law "passes the rights and property of the corporation precisely in the same plight and condition, and subject to the same equities as the corporation held them," and that the Receivers are in the position of personal representatives of the corporation. These words "personal representatives" are highly instructive. If this contractor were an individual and he had died and an Administrator had been appointed for him and the contract had been completed before his death, would it be contended that liens might not be enforced on the funds in the hands of the municipality, or if under the order of the Court the Administrator, or in case of a will, the Executor had completed the contract would it be contended for, that liens might not be enforced upon the fund in the hands of the municipality. The effect of our corporation act is by a decree of the Court to kill the corporation. It is dead, and

the Receiver becomes in the language of Chief Justice Greene, "its personal representative." The property is not any more *in custodia legis* than is the property of the estate of a deceased person while in the hands of its Administrator or Executor.

And see the language of Chief Justice Beasley in Wilkinson *v.* Rutherford, 20 Vr., 241, 245.

It must be kept in mind that the revision of 1896 providing for the vesting of title in the Receiver created no new estate, but left the situation precisely as Chief Justice Greene left it in Receivers *v.* Paterson Gas Light Company.

In Fourth St. National Bank *v.* Yardley, Recr., 165 U. S., 653, 41 L. Ed., 955, where an equitable lien was claimed against the Receiver of a National Bank, the Court sustained the lien saying:

> "The Receiver took no greater rights in the property of the insolvent bank which came into his possession, than that which the insolvent bank possessed."

In Scott *v.* Armstrong, 146 U. S., 499, 507, 36 L. Ed., 1059, the question was of the right to a set-off against the claim of the Receiver of an insolvent national bank. The Receiver of such a corporation is substantially the same as Receiver under our Corporation Act. Fuller, C. J., said:

> "We are dealing in this case with an equitable setoff. * * * The provisions of the act are not directed against all liens, securities, pledges or equities, whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency."

The equitable set-off was allowed.

In Kane *v.* Lodor, 11 Dick., 268, 271, Reed, V. C., held that as against the Receiver of a corpora-

tion the chattel mortgage of the corporation is good, without registry or affidavit; that the Receiver took the property "subject to all equities to which it was subject in the hands of the debtor," and that in this respect a Receiver "stands upon the same footing as an assignee for the benefit of creditors."

And in Shaw *v.* Glenn, 10 Stew., 32, 35, it was held that a chattel mortgage not recorded was valid as against an assignee for the benefit of creditors. After this decision the chattel mortgage act was changed so as to make chattel mortgages without proper registry ineffective as against general creditors and it is now held, of course, that the Receiver in his capacity as representing general creditors may in their right attack a chattel mortgage not properly recorded or without proper registry, but the effect of the decisions above referred to that the Receiver takes subject to equities and takes the property in the same plight that the insolvent corporation had it, it is not affected.

It was held in Fire Proofing Company *v.* Daly, 76 N. J. Eq., 35, affirmed by the Court of Appeals, 77 N. J. Eq., 583, that the Bankrupt Act does not invalidate liens created by the municipal mechanics lien act and citing

Fehling *v.* Goings, 67 N. J. Eq., 386.

In Fehling *v.* Goings, 67 N. J. Eq., 375, there was under discussion the effect of Section 3 of the General Mechanics' Lien Act. Section 3 of that act provides that whenever any master workman or contractor shall upon demand, etc., refuse to pay, where there is a filed contract, then it shall be the duty of the laborer or materialmen to give notice in writing to the owner or owners of such building of such refusal and of the amount due to him or

them and the owners shall thereupon be authorized to retain the amount so due and claimed.

This is commonly called the statutory remedy of stop notice and the effect of the notice is to assign *pro tanto* to the claimant the right of the builder in the fund.

Wightman *v.* Brennan, 11 C. E. Gr., 489.
Anderson *v.* Huff, 4 Dick., 349.

Dealing with this the Court in Fehling *v.* Goings, said, at page 386:

> "The right to have the transfer of the portion of the contract price noticed to be retained is given, not by the contractor, but by the law. *In consideration of the existence of that right, the workman and materialmen have accredited the contractor and enabled him to increase his assets by performing his contract. If he becomes a bankrupt after that right has been exercised, neither the letter nor the spirit of the Bankrupt Act includes, among those preferences which may be vacated, as made without four months next before the filing of the petition, the interest which the stop-noticing claimant has acquired in the contract price by serving his stop notice* under Section 3 of the Mechanics' Lien Law. *In re* Emelie, 102 Fed. Rep., 292."
>
> "In my view, the objection that the United States Bankrupt Law invalidates those claims which are based upon stop notices served after September 27th, 1901, on the ground that they are assignments within the operation of that law, cannot be sustained."

The effect of these decisions under Section 3 of the Mechanics' Lien Law upon the present situation is this: The Courts treat the operation of such notice under Section 3 as an enforcement of the right to have an assignment residing in the materialmen from the time he furnishes his material.

Now the effect of the Municipal Mechanics' Lien Act is precisely the same.

The effect of Section 37 permitting the filing of a notice is to assign *pro tanto* so much of the fund due and the effect of Section 36 is to give to the materialmen the right to that assignment. And as stated in Fehling *v.* Goings:

> "The right to have the transfer of the portion of the contract price noticed to be retained is given, not by the contractor, but by the law. In consideration of the existence of that right, the workman and materialmen have accredited the contract and enabled him to increase his assets by performing his contract."

The fact that the statute has used the term that the lien, that is the absolute lien, shall attach from the time of the filing of the notice, although it may prevent a legal lien being acquired, yet does not affect at all the *equity* which the materialman had from the beginning of the performance of his work and the corporation and its assets being subject to this equity the Receiver takes the property charged with it.

> Receivers *v.* Paterson Gas Light Company, 3 Zab., 332.
> Wilkinson *v.* Rutherford, 20 Vr., 245.

To hold that the appointment of a Receiver under the statute where the Receiver has the rights only of the corporation, its stockholders and general creditors, not judgment-creditors, prevent the complainant from perfecting the lien would be to bring the case clearly within the language of Vice-Chancellor Grey in Pierson *v.* Haddonfield, 66 N. J. Eq., 180, page 193, and quoted by the Chancellor in the case of Cope *v.* C. B. Walton Co., 77 N. J. Eq., 516:

> "Any other construction of the statutory lien

would make the statute a baited trap, inviting workmen and materialmen to give credits to contractors erecting public improvements upon the assurance that the payment of their claims would be secured, but depriving them of their security by the enforcement of a latent equity, to the creation of which they were not parties, and of which they knew nothing when they gave their credits, which in fact came into existence (if it ever did arise) because of circumstances happening long after the claimants' liens had attached."

In the case of Cogan *v.* Conover Mfg. Company, reported, Court of Appeals, 3 Rob., 809, and in the Court of Chancery in the same book, page 358, it appeared that the Conover Mfg. Company were under contract with the Public Service Corporation to build two condensers. The contract was entire. Conover Company gave to the Greenville Banking and Trust Company what purported to be an assignment of the moneys to become due under the contract. One of the condensers had been completed. No part of the contract price, as I recollect it, had been paid and thereupon a Receiver was appointed. The Receiver acting under the orders of the Court without notice of the assignment completed the contract, and the moneys became due to him as Receiver. Thereupon the Greenville Banking and Trust Company asserted its lien and in the Court of Chancery the Receiver prevailed. A perusal of the opinion of the Court of Chancery will indicate that all of the points which can be raised here were raised there. It was insisted and held below:

1. That the Receiver was an independent ego and that he took the property discharged of all obligations except legal liens.

2. That the equitable assignment not being a lien,

but an agreement to give a lien was not effective as against the Receiver.

3. That the Receiver, this independent ego, having completed the contract, the contract being entire, no moneys became due to the corporation and therefore there was nothing upon which the agreement to give a lien could attach.

The Court of Appeals reversed the opinion of Vice-Chancellor Garrison and held that the equitable assignment or the agreement to give a lien attached, and that the moneys which became due to the Receiver must be paid to the Greenville Banking and Trust Company under its lien.

So in the case at bar, although the materialman may not have a lien, yet he has an agreement to give a lien by virtue of the statute itself just as under the third section of the General Mechanics' Lien Act, and when the Receiver succeeded to the property of this corporation he took it subject to this equity.

It has been held in New York in the case of John P. Kane Co. *v.* Kinney, 174 N. Y., page 71, that under a general assignment for the benefit of creditors by a general contractor the assignee takes title to such moneys subject to liens filed by laborers, mechanics, materialmen or subcontractors subsequent to the assignment, but within the ninety days prescribed by statute.

The statute of New York upon which this case rested at the time of the decision provided that the contractor who performs labor or furnishes materials, etc., shall have a lien for the principal and interest of the bill, etc., "from the time of filing the notice of such lien as prescribed in this article" (Cumings and Gilberts General Laws of New York, Volume 2, p. 2144).

This language is much stronger in favor of the position taken by the Vice-Chancellor than the language of the Municipal Mechanics' Lien Act in this State, yet the Court of Appeals of New York in reversing the Appellate Division, said:

> "The object and purpose of the Mechanics' Lien Law was to protect a person who, with the consent of the owner of real property, enhanced its value by furnishing materials or performing labor in its improvement by giving him an interest therein to the extent of the value of such material or labor. The filing of the notice of lien is the statutory method prescribed by which the party entitled thereto perfects his inchoate right to that interest. That is the manner and mode of procedure in which the right is asserted. A certain time is allowed in which the lien may be asserted or lost. During that time there is a preferential statutory right in the nature of an unperfected equitable lien in favor of the laborer, mechanic, materialman or subcontractor. And when a notice of lien is filed that right is perfected. But until the ninety days allowed by the statute within which the lien may be filed have elapsed the right cannot be defeated by the voluntary act of the party against whom it might be asserted, such as a general assignment for the benefit of creditors. If such were the effect of the assignment no laborer or materialman's claim would be secure, and the beneficial purpose of the statute could be defeated unless a lien was filed at the time the work was commenced and from day to day thereafter. This, however, being a remedial statute, must be construed liberally with a view to carry out its intent and for the accomplishment of every beneficial purpose contemplated. It would, therefore, seem to be a very reasonable conclusion that the assignee for the benefit of creditors takes the title to the estate of his assignor, subject to the right of any lienor to assert his lien

against the property or the fund within the statutory time, that is, within the ninety days.

"In cases of a contest between the rights of a lienor and a general assignee for the benefit of creditors, the circumstances that the fund may have been and generally is earned by the labor or expenditure of the person filing the mechanics' lien is entitled to some weight. If, in such cases, the fund must be awarded to the assignee instead of the mechanic or materialman filing the lien within the statutory period, the statute is not very liberally construed in favor of the lienor and the general policy of the statute would seem to be defeated. It seems to me that upon principle and authority it should be held in this case that the lien of the plaintiff is prior and superior to that of the assignee."

The Court thereupon proceeded to cite cases and among others that of Reading Hardware Company *v.* City of New York, 27 Misc. Rep., 448, 450, 59 N. Y. Supp., 253.

This was a case arising under the Municipal Lien Law in New York from which our lien law was practically copied. Section 12, Cummings and Gilbert, General Laws of New York, 2154.

There the Court held that one who furnishes material and labor which was used in the construction of a public school house has a lien that takes precedence over the claims of creditors.

It is true that the Court referred to a provision of the New York Act which provided that the lien for materials furnished or labor performed in the improvement of real property shall have priority * * * over the claim of a creditor who has not furnished material or furnished labor, if such property has been assigned by the owner by a general assignment for the benefit of creditors within thirty days before the filing of such notice.

The opinion must be carefully read and it appears that the Court held that this provision of the statute did not apply, for the reason that the rule which was sought to be changed by such provision of the statute did not affect the case then at bar.

The rule under which it was contended that the lien claim was subsequent to the general assignment was that laid down in Noyes *v.* Burton, 29 Barb., 631; Quimby *v.* Sloan, 2 Abb. Prac., 92, Jackson *v.* Sloan, 2 Abb. Prac., 104.

The Court is careful to point out that that rule is this:

> "When *an owner* is insolvent and makes an assignment for the benefit of creditors, such assignee takes the property free from the lien, unless the notice of lien was filed prior to the assignment."

The Court says:

> "The rule which these defendants seek to invoke seems to us to have no application to the case at bar. This is not the case of a general assignment made by the owner of the property against which a mechanic's lien is filed. Here the general assignment is made by a subcontractor who has no interest in the property, and to whom the plaintiff lienor sustains the relation of materialman."

The Court then refers to the case of Smith *v.* Baily, 8 Daly, 128; McMurray *v.* Hutcheson, 10 Daly, 64; *In re* Christie Mfg. Co., 36 N. Y. Supp., 923, in all of which cases it was held that the mechanic's lien took preference of a general assignment. And the Court quotes with approval the language of *In re* Christie Mfg. Co., which case was referred to with approval by the Court of Appeals in John P. Kane Co. *v.* Kinney, as follows:

"The owner of the property, upon the filing of a lien by a subcontractor becomes responsible for the payment of the claim, although there is no privity of contract between him and the claimant, with the single limitation that such liability shall not extend beyond the amount then due from him to the person with whom he has directly contracted. Of course, this necessarily involves the right of the owner, upon paying any such lien, to charge his contractor with the amount thereof, and to deduct it from the contract price, as a payment made on account thereof. It is plain that the right of the owner to any such credit cannot be defeated by any transfer of the debt either made by the principal contractor, or effected by operation of law, in proceedings instituted against him. If a foreclosure of the lien should be instituted, on what theory could the owner successfully defend on the ground that the corporation which contracted with him for the performance of the work had passed into the hands of a Receiver? Does he not still owe the same amount of money on the same contract, and has not the statute thereupon subjected his property to the lien of the subcontractor *pro tanto?* He could, of course, show, if it were the fact, that the subcontractor had been paid, or that he had no claim against the principal contractor, but no such claim is presented here. The debt is still due to the subcontractor. It is the means of payment on the part of the principal debtor that is wanting, and this certainly is no defense."

And the Court proceeds:

"This reasoning is entirely decisive of the contest before us. In that case, as in this, the lien is asserted, not against the property of an insolvent in the hands of an assignee, but against the property of another, with whom the insolvent has contracted."

And again I draw the Court's attention to the

fact that the statutes in New York which are dealt with in these cases were statutes which provided that the lien should attach *from* the filing of notice yet the Court held that before the filing of a notice there was a preferential statutory right in the nature of an unperfected equitable lien and that such lien is good as against either an assignee for the benefit of creditors or a Receiver.

Applying the doctrine of these cases it must appear that if the lien is good under the New York statute as against either an assignee for creditors or a Receiver it is good as against the Receiver of a corporation in this state, who under the cases heretofore referred to stands so far as this matter is concerned in no better position than the assignee for creditors.

There are no cases that I have been able to find in the Federal Courts which support the position taken by Vice-Chancellor Stevenson in the Agnew Company case against the Board of Education that a lien under our Municipal Lien Act, or statutes analogous thereto cannot be perfected by filing a notice after the appointment of a Receiver or Trustee. There is no case that I have been able to locate dealing specifically with liens under such statutes. The Federal Courts have uniformly held in accordance with the opinion of the Supreme Court of this State in Fehling *v.* Goings, 67 N. J. Eq., 375, and Daly *v.* National Fire Proofing Company, 76 N. J. Eq., 35, affirmed by this Court
that a general Mechanics' Lien may be perfected after the appointment of a Receiver and Trustee and that proceedings may be taken under Section 3 of that act after such appointment.

The error into which the Courts have fallen has been in misinterpreting the rule of the New York Courts referred to in Reading Hardware Company *v.* City of New York, 59 N. Y. Supp., 253, and in

conceiving that the doctrine of the New York Courts was that an assignment by a contractor for the benefit of creditors would have the effect of displacing a lien whereas it really was that when the owner became insolvent and made an assignment for the benefit of creditors, the lien was displaced upon his property, an entirely different proposition.

Upon principle the doctrine of the Court in Pierson *v.* Haddenfield, 66 N. J. Eq., 180, in which it was held that the right to the lien arose when the material was furnished is correct. All of the material was furnished before the Receiver was appointed and the lienor had in equity the right to perfect the lien. If the right to the lien only arises upon filing the notice then the decisions of the Court of Chancery and of this Court in Daly *v.* Natoinal Fire Proofing Company are erroneous because the liens would be acquired within four months and therefore void under the Bankrupt Act whereas the reverse is held.

B. *Because the Receiver, under the orders of the Court, took over the completion of the contracts and so far as materialmen were concerned placed himself in the position of the Citizens Construction Co. to complete the contracts cum onere.*

The fact that the Receiver completed this contract and the moneys became due to him as Receiver does not prevent the lien attaching.

In Boiles *v.* Crescent Drug Co., 8 Dick., 614, 618, Reed, V. C., said:

> "An assignee, after his appointment, has a reasonable time to look over the ground and determine what contracts he regards as beneficial or otherwise to the estate which he is administering subect to the control of the Court appointing him. He can adopt an advantage-

ous contract and repudiate an unfavorable one, and, if he concludes to insist upon the completion of the contract by the contracting party, he must perform his side of the contract in full. If his performance involves the payment of money by him, such payment he must make; but, if he ignores the contract, the only redress of the other party is to ask leave to prove his debt or damages for the purpose of sharing in the assets of the insolvent."

When a Receiver elects to perform a contract such as this he stands in the shoes of the corporation and he assumes the obligations of the corporation so far at least as the particular contract is concerned.

When the Receiver was appointed he found these contracts incomplete. He found that no brick had been put in Hart Avenue and some had not been put in Swan Street. He then assumed to complete the contracts under the orders of Court; took the brick of the Mack Manufacturing Company; used them and completed the contract.

Whatever may have been the right of the materialman to file notice under the Municipal Mechanics' Lien Act in case the Receiver had found at the time of his appointment a sum due from the municipality and had elected not to complete the contracts but to permit the city to do it is beside the question. So far at least as the performance of these particular contracts are concerned, the Receiver stood in the shoes of the corporation and assumed the contracts and completed them. The fund which is in the hands of the City of Trenton due to the Receiver is due to the Receiver not in his capacity as Receiver of the Citizens Construction Company, but in his capacity as the representative of the contract or with the city. There is nothing under the Municipal Lien Act to prevent

the filing of a notice against funds due to the Receiver, if the Receiver should enter into a new contract for the performance of work for a municipality and should not pay his bills, precisely as funds due to any other contractor. When he elected to perform these contracts he did so as the Administrator or Executor or personal representative of the contractor. He assumed the contracts *cum onere* not only with respect to the obligations which he might owe to the city growing out of the contract, but also with respect to the obligations which he might owe to third parties. The statute giving the materialman the right to have this lien created by the filing of stop notices, when the Receiver assumed to act as contractor, in place of the contractor, he did the work charged with the equities of materialmen. This is clearly the effect of the opinion of this Court in Cogan *v.* Conover Manufacturing Co., 3 Rob., 809.

And this particularly in view of the fact that at the time the Receiver elected to perform the contract under orders of this Court, the brick which had been supplied by the Mack Manufacturing Company had not been placed in the street known as Hart Avenue and some of it had not been placed on Swan Street so with respect at least to the Mack Manufacturing Company when the Receiver proceeded to complete this contract using materials which had been furnished by the Mack Manufacturing Company, but which might have been withdrawn by the Mack Manufacturing Company in view of the insolvency the Receiver stood precisely in the position of the contractor performing the contractor's work.

The case of the Union Stone Co. *v.* Freeholders of Hudson County, 71 N. J., Eq., 657, is in point. There the contract had been completed by sureties

and the contention of the complainants, who were lien claimants, was that the sureties completed in the right of the contractor and that therefore they had a lien upon all of the funds due from the county, and the sureties could not get even what they had expected in the completion. The Court held *contra* upon the ground that

> "Upon a default by the contractor, the surety has the privilege of coming forward and completing the work. In doing so he is not acting for the contractor, nor in the right of the contractor. He is acting in his own right, which is to perform the obligation of his contract with the owner. * * * When the sureties, therefore, in the case at bar came forward to fulfill the obligation and perform the contract, they did so in their own right by reason of the privilege of suretyship so to do, and they were entitled to subrogation to all of the rights of the owner against the contractor to the extent necessary to reimburse them for their necessary outlay, but no further."

The Court then held that although the lien claimants' right must be subject to the right of subrogation of the sureties, yet they were entitled to a lien upon the sum which was in the hands of the county *over and above the actual cost of completion.*

No distinction can be drawn between this case and the case at bar. The Court in the Union Stone Company case held that, notwithstanding the fact that the work had been completed by persons acting in their own right, practically an assignment by operation of law of the contract, although the contention of the defendant was that because of this fact the complainants were without right of lien to any of the funds in the hands of the county, they were so entitled.

The case at bar is much stronger. The Receiver has completed these contracts in the right of the contractor and the lien claimants are unquestionably entitled to the balance due from the city.

C. *Because the Receiver in completing the work used brick furnished by the Mack Manufacturing Company which was not at the time of his appointment either paid for or used in the work.*

The bill was amended to insert the allegation that the brick, although on the work had none of it been used on Hart Avenue, and some of it had not been laid on Swan Street.

This is admitted. The Receiver found this brick there. He used it. In securing the fund which is now in Court the brick had not been paid for at the time the Receiver was appointed and was still technically within the control of the complainants. The right of stoppage in transit upon insolvency had not expired. Under the circumstances the complainant is entitled in equity to reimbursement out of the fund in Court at least to the extent of the value of all of the brick used in the completion of the work by the Receiver and this is a sum more than the present claim.

D. *Because there was an amount due to the Citizens Construction Company upon these contracts as of the date of the appointment of the Receiver and the Receiver by completing the contract has so mingled the funds as to make the entire fund liable.*

It is admitted that there was an amount due from the City of Trenton to the Citizens Construction Company at the time of the appointment of the Receiver on both contracts.

This amount was to be settled by stipulation.

It has not yet been settled. The Receiver without ascertaining this exact amount has gone on and completed the contract and has mingled the funds in such a way as to render the entire amount subject to lien.

E. *In any event, the liens are effective upon so much as was due from the City of Trenton to the Citizens Construction Company at the time of the appointment of the Receiver.*

Union Stone Company *v.* Freeholders of Hudson County, 71 N. J. Eq., 657.

## II.

## The assignment of the Broad Street National Bank.

### The Facts.

It is somewhat difficult from the evidence to gather what actually happened between McGovern and the Board of Directors. The bank claims by virtue of an assignment dated the 16th day of July, 1914, executed in the following manner:

> "Thomas F. Riley, Vice-Pres. Signed sealed and delivered in the presence of *The Citizens Construction Co.*, T. J. McGovern, Secretary."

Under which instrument it is recited:

> "And whereas the said Citizens Construction Company, in order to enable them to carry out said contract, have borrowed from the Broad Street National Bank of Trenton the sum of $5,000 and may desire to borrow from said bank any additional sums.
>
> "Now, therefore, the Citizens Construction Company, in consideration of the foregoing and the sum of one dollar to it in hand paid, have assigned, transferred and set over unto

> the said The Broad Street National Bank of Trenton, any and all sum or sums of money now due and to grow due from 'The City of Trenton, New Jersey,' by reason of such contracts," etc.,

giving the said Broad Street National Bank full power and authority to demand, collect, receive, compound and give acquittance, etc.

There was also delivered simultaneously to the Broad Street National Bank an order upon the City Treasurer which order states: "Will you please to pay to the Broad Street National Bank all moneys that may be due on the following contracts for paving the streets named below." And then follows the names of the streets.

By an assignment dated the 3rd day of August, 1914, there was also assigned to the bank a contract which Thomas McGovern had with the Borough of Bogota and upon the same day there was also assigned a contract which the Citizens Construction Company had with the Borough of Woodbury as security for the same debt. It also appears that the Citizens Construction Company gave a note signed T. J. McGovern, Secretary and Treasurer, dated August 3rd, 1914, for $3,000, page 87; upon the same day a note signed by the Citizens Construction Company, T. J. McGovern, Secy. and Treas. for $3,000; upon the 10th day of August, 1914, a note signed Citizens Construction Company, T. J. McGovern, Treasurer, for $2,000; upon the 3rd day of August, 1914, a note to the order of T. J. McGovern for $1,000, signed Citizens Construction Company, T. J. McGovern, Treasurer, endorsed, T. J. McGovern, Frank J. Clark and The Citizens Construction Company, T. J. McGovern, Treas.; upon the 3rd day of August, 1914, a note to the order of T. J. McGovern for $1,000, signed Citizens Construction

Company, T. J. McGovern, Treasurer, endorsed, T. J. McGovern, R. B. Newton and The Citizens Construction Company, T. J. McGovern, Treasurer. Upon the 3rd day of August, 1914, a note to the order of T. J. McGovern, for $1,000, signed The Citizens Construction Company, T. J. McGovern, Treasurer, endorsed, T. J. McGovern, F. E. Weeden and the Citizens Construction Co., T. J. McGovern, Treasurer. A check dated July 5th, 1914, to the order of T. J. McGovern for $1,000, signed J. C. Richardson, endorsed, T. J. McGovern, and The Citizens Construction Company, T. J. McGovern, Treasurer; a check dated August 5th, 1914, for $1,000 to the order of T. J. McGovern, signed James C. Tattersall.

An examination of the case discloses that the Broad Street National Bank as matter of fact secured as collateral not only everything of value which the Citizens Construction Company owned or might in the future own, but also outside collateral.

The assignments are not of the contracts but of the moneys to become due under the contracts.

After the assignment, warrants came from the City of Trenton to the Broad Street National Bank as payment on account of these contracts. Instead of retaining these moneys on account of its debt it gave the money to the Citizens Construction Company (p. 84).

There was collected in this way prior to the appointment of the Receiver more than would have been sufficient to pay off the loan secured.

There was no action by the Board of Directors of the company authorizing the giving of the assignments.

In an endeavor to correct this defect and undoubtedly in anticipation of the decision of this Court in Budke *v.* Schalkinbacher & Burke, 94

Atl., 586, it was proven that at a meeting held on the 17th day of September, 1914, in the office of Peter Backes, Esquire, the day before the receivership, and when all parties knew that the company was insolvent and had suspended its business and that a Receiver would be appointed on the next day, as a part of the resolution authorizing the application for the appointment of a Receiver the following was passed:

> "At a meeting of the Directors of the Citizens Construction Company, held on this 17th day of September, 1914, Thomas J. McGovern, William McGovern and Thomas Riley being present, it was moved that an assignment of a certain contract made by the company with the City of Woodbury, the assignment dated on the 3rd day of August, 1914, in favor of the Broad Street National Bank of Trenton, and also of a certain order dated on said day, drawn by this company on Ernest Redfield, City Treasurer of the City of Woodbury, be and the same are hereby ratified and confirmed.
>
> "And it was further moved, that an assignment made by this company in favor of said bank of certain contracts for the construction of pavements on Market Street, Hart Avenue, and Swan Street, and of a certain order dated on said day, and drawn by this company in favor of said bank, on Edward Lee, City Comptroller, be and the same are hereby ratified and confirmed."

This resolution appears upon page 94 of the record and the remainder of the resolution authorizing the appointment of Receivers appears on page 136.

The bill of complaint in the insolvency suit recited an actual suspension of business on September 17th, 1914, in the light both of suspending payment on its debts in ordinary course and of actually stopping all work on its contracts.

**Points.**

The Broad Street National Bank has no claim of priority under its assignment:

1. Because the assignment was not properly executed, being executed by Thomas F. Riley, assuming to act as Vice-President, whereas the by-laws provided for no such officer and because there was no authority from the Board of Directors.

2. That the alleged ratification on the 17th day of September, 1914, was insufficient because,

a. The corporation was insolvent at the time of its passage and it is void under Sections 64 and 65 of the Corporation Act, the resolution being passed in contemplation of insolvency and after the company had actually suspended its business and not to secure present advances and knowledge of the bank is immaterial.

3. Because the corporation was insolvent at the time of the loan in August, 1914, and the alleged delivery of the assignments and the bank either had knowledge of insolvency or such facts as put it upon inquiry.

4. Because the assignment is of moneys to become due to the Broad Street National Bank and as a matter of fact no moneys became due to that company.

5. Because the bank waived the benefit of the collateral when it received moneys from the City of Trenton and instead of applying them to the payment of the loan secured to the bank permitted them to be taken by the Citizens Construction Company thus in reality creating new loans unsecured.

## ARGUMENT.

### I.

**Because the assignment was not properly executed being executed by Thomas F. Riley assuming to act as Vice-President, whereas the by-laws provided for no such officer and because there was no authority from the Board of Directors.**

That the assignment was improperly executed admits of no question.

Budke *v.* Schalkinbacher & Burke, 94 Atl., 586, resting upon and quoting with approval Cogan *v.* Conover Manufacturing Company, 69 N. J. Eq., 916.

There not only was no authority from the Board of Directors to make the assignment but there was no such officer provided for by the by-laws as a Vice-President (see the By-Laws, p. 148).

By no stretch of the imagination can it be contended that under these by-laws the Secretary and Treasurer or Vice-President had the right to assign not only these contracts but as a part of the same transaction everything of value which the corporation possessed. The effect of the assignments was practically a transfer of all of the property of the corporation, an act which it may well be contended to be beyond the power of the Board of Directors.

## II.

**That the alleged ratification on the 17th day of September, 1914, was insufficient because:**

**A. The corporation was insolvent at the time of its passage and it is void under Sections 64 and 65 of the Corporation Act, the resolution being passed in contemplation of insolvency and after the company had actually suspended its business and not to secure present advances and knowledge of the bank is immaterial.**

If the company was insolvent and had suspended its business at the time the ratification took place then the ratification was made in contemplation of insolvency and was absolutely illegal and no notice to the bank was necessary because it was after suspension and not to secure a present advance.

> Cope *v.* C. P. Walton Co., 80 Atl., 473, Court of Errors and Appeals, Court of Chancery, 77 Eq., 512.

It needs no citation of authority to determine that if the original assignment was invalid the ratification must date as of the day the ratification was made.

That the company was insolvent admits of no question.

Its debts are stipulated on page 156. Its assets aside from those pledged with the Broad Street National Bank were practically nil. At the same meeting and as a part of the same resolution the Board of Directors resolved that application should be made for the appointment of a Receiver under the statute (p. 136).

Thomas F. Riley, one of the Directors, testified, page 160:

> "Q. You knew at that time (that is, the date of the ratification) that the corporation couldn't keep on, didn't you? A. Yes, sir.
>
> "Q. And that it had to go into the hands of a Receiver? A. It had to go into the hands of a Receiver?
>
> "Q. Mr. Riley, did you know before you went to that meeting that has been referred to and which I think is the last meeting of the Directors of the company; did you know before you went to that meeting of the financial condition of the company? A. Oh, yes, I knew it was in bad shape."

William McGovern, another Director knew prior to the 17th day of September, 1914, that the corporation had to go into the hands of a Receiver (p. 163):

> "Q. When did you first know that the Citizens Construction Company was going into the hands of a Receiver? A. I can't just recall dates. I was working at Woodbury, on one of their jobs at the time, and I happened to call up on the telephone, and was told that we were to quit; that they were going into the hands of a Receiver.
>
> "Q. Don't you remember when that was? Do you remember how long it was before they actually went into the hands of the Receiver? Days or weeks? A. Two or three days."

The testimony as to what actually happened between McGovern and the Broad Street National Bank is most unsatisfactory.

Thomas J. McGovern forgets practically everything. He testifies (p. 73):

> "Q. Didn't you deliver an assignment of the amount due on the contract for Woodbridge? A. I don't know whether that was—it ought

to show, the records will show. I don't know whether—what date that was.

"Q. Well, what record do you refer to? A. The assignment, the paper, the same as this one.

"Q. Then you don't remember very much about the transaction yourself? A. No, I have got a very poor memory."

He testifies again with respect to the meeting at which the resolution of ratification was adopted (p. 131):

"Q. How did the last meeting of your company come to be called, do you know? A. No, sir.

"Q. Did you receive any notice to attend a meeting? A. I don't know that I did.

"Q. How did the others receive notice, do you know? You were Secretary? A. I presume I notified them.

"Q. I don't want any presumption; do you know? A. No, sir, I don't remember."

On page 132:

"Q. Can you recollect why it was held? A. No, sir.

"Q. Do you recall who suggested it? A. No.

"Q. Someone suggested it, didn't they? A. I couldn't say about that.

"Q. You didn't, did you? A. I couldn't say.

"Q. You think you might have suggested it, and forgotten it at this time, is that it? A. I wouldn't say about that."

Page 133:

"Q. What took place at that meeting on the 17th of September? A. The minutes ought to show what took place.

"Q. To your personal recollection? A. I couldn't tell you, except by looking at the minutes.

"Q. Do you know of anything that took

place, except by reference to the minutes? A. No, sir, I don't. * * *

"Q. Have you any recollection of this last meeting? A. No particular recollection."

William McGovern, one of the Directors, testified with respect to the last meeting (p. 163):

"Q. Was anything done about securing the Broad Street National Bank for its loan of $5,000? A. I don't know; I can't recall.

"Q. Where was the meeting held? A. I can't recall.

"Q. Who asked you to go to that meeting? A. I couldn't tell you.

"Q. Do you know whether you were at a meeting? A. Yes.

"Q. Ever at any meeting at which the loan of the Broad Street National Bank was discussed or acted upon? A. I don't know."

Page 164:

"Q. Do you mean to tell us, Mr. McGovern, that you fail to recollect anything that was discussed at that meeting? The only one that you attended? A. Yes, sir; I do.

"Q. Do you know who was there? A. I don't.

"Q. Was Mr. Riley there? A. I can't tell you.

"Q. Was Mr. Thomas J. McGovern there? A. I can't tell you.

"Q. Mr. Backes was there, of course? A. I don't know. I remember being at that meeting, but I could not tell you whether Tom McGovern was there, or whether Tom Riley was there.

"Q. Thomas J. McGovern told you you would have to quit, did he? A. Yes.

"Q. What did he say? Did he say why? A. No, he didn't say why. I thought likely it was on account of not being able to finance the thing."

Thomas F. Riley testified (p. 157):

> "Q. Who was present at that meeting? (Referring to the meeting at which the resolution of ratification was presented.) A. Peter Backes, Tom McGovern, Billy McGovern; I don't know whether Mr. Hurley was there or not.
>
> "Q. What did Mr. William McGovern have to do with it? A. He didn't have anything to do with it that I know of.
>
> "Q. What was discussed at that meeting? A. The way I understood it, the bank loaned McGovern $5,000 with five endorsers of $1,000 each and certainly the meeting was, that they ought to take care of the $5,000. McGovern was in bad shape for money, and couldn't get it from the bank any other way (p. 159).
>
> "Q. Who suggested that this resolution be passed, ratifying that assignments of contracts to the bank, as security for that money? A. I don't know.
>
> "Q. It was suggested by somebody, wasn't it? You didn't suggest it? A. No.
>
> "Q. Can't you recall who did suggest it? A. No, I don't remember."

In Russell & Erwin Mfg. Co. *v.* E. C. Faitoute, Hardware Co., Court of Chancery, 1905, 62 Atl., 421, Vice-Chancellor Emery, said:

> "The first question relates to the time of the making of these assignments, and whether they were made after the corporation actually suspended its ordinary business for want of funds to carry it on. If actually made after such suspension, are not, as I read the act, protected by the proviso, even if the transfer was upon a present valuable consideration and without notice of the insolvent condition of the company."

Of course, it was not upon a present valid consideration because the moneys had been advanced upon an invalid assignment in August.

But the company had suspended its business.

Suspension of business is defined by the Court in the case of

> Reinhardt *v.* Interstate Telephone Company, 1 Buck., 78.

And the case of

> Miller *v.* Gourley, 65 N. J. Eq., 253.
> Fort Wayne Electric Corporation *v.* Franklin Electric Light Co., 57 N. J. Eq., 13.

And in all of the cases it is defined as including a suspension of the payment of the company's debts in the usual course of trade.

But the company had actually suspended work on the contract and discharged its employees. See the testimony referred to above and the bill in the case of McGovern *v.* Citizens Construction Company, upon which a Receiver was appointed.

No argument can be made that they had not suspended the payment of their debts in the usual course of trade. This is clearly indicated by the past due accounts as of the the 18th day of September, 1914, and by the fact that on the 17th they passed a resolution providing for the appointment of Receivers.

## III.

**Because the corporation was insolvent at the time of the loan in August, 1914, and the alleged delivery of the assignments and the bank either had knowledge of insolvency or such facts as put it upon inquiry.**

This corporation was incorporated in April, 1914. Although its capital stock was fixed at $20,000 there never was but $1,000 actually paid

in. Its stock was issued for property purchased which was sold by the Receiver after the receivership for approximately $1,200. At the time the bank loaned the $5,000 in August, 1914, it took as collateral every single contract that the corporation had also individual contracts of Thomas J. McGovern. Not satisfied with this it took as further collateral three notes made by outside parties, two certified checks made by outside parties, all of whom were responsible. In other words it was not satisfied with everything that the corporation itself had for this comparatively small loan but aside from that required the loan to be secured to its full extent and that in an unusual way, not by mere endorsements or guarantees, but by negotiable paper of ouside parties. There is no question but that the corporation was insolvent on the day of the giving of the assignment in August, 1914. Six weeks after it went into the hands of a Receiver. It had gotten to a point where it could not obtain money except by pledging everything it had.

On page 158 Thomas F. Riley testifies:

> "A. The way I understood it, the bank loaned McGovern $5,000 with five endorsers of $1,000 each, and certainly the meeting was, that they ought to take care of the $5,000. McGovern was in bad shape for money, and couldn't get it from the bank any other way."

The bank knew that it was insolvent when it took everything it had. The officers of the bank say they made no particular investigation as to its assets and liabilities. If so, they were negligent and charged with knowledge of what, if they had made investigations, would have been disclosed.

The case of Cope *v.* C. P. Walton Co., 77 Eq., 521, indicates what slight circumstances may be

sufficient to charge the person taking the assignment with knowledge of insolvency, the Court saying:

> "The very fact that it could not undertake the road making unless the entire project was financed by an outsider was in itself a cogent evidence of its financial irresponsibility, in other words, it insolvency."

And so in the case at bar. The bank knew that the corporation could not go on and do business without this loan secured by everything it had, thus not only depriving it from getting any further moneys, but also from going on in business. The receivership six weeks after must have been anticipated by men of ordinary business judgment.

In the Cope case, the corporation was not adjudged insolvent until about seven months after the giving of the assignment. In the case at bar within six weeks. Thomas J. McGovern testified that he advanced certain moneys to the corporation. To the extent that he did, the excess of liabilities over assets increased.

In Trust Co. *v.* Trustees of Wm. F. Fisher & Co., 1 Rob., 602, the Court of Errors and Appeals, says, in considering whether the Fisher & Co. was insolvent or not:

> "Its available assets were insignificant; its legitimate credit was practically exhausted, and within a month thereafter a petition was filed upon which it was adjudged bankrupt."

See, also a very recent case in this Court of Wright *et al. v.* American Finance and Securities Co., November, 1915, 96 Atl., 387, 6 Adv. Sheets.

## IV.

**Because the assignment is of moneys to become due to the Broad Street National Bank and as a matter of fact no moneys became due to that company.**

At the time of the appointment of the Receiver the Receiver took over the completion of the contracts. He used material which had not been paid for in completing the contracts and creating the fund in Court. No money became due to the Citizens Construction Company as the Citizens Construction Company. Such moneys became due to the Receiver. The moneys which became payable were not moneys for work which had been done prior to the appointment of the Receiver, but for work performed after the appointment of the Receiver and were materials furnished by the materialmen. Such moneys as became due therefore became due to the Receiver as Receiver or to the materialman whose material he had used.

## V.

**Because the bank waived the benefit of the collateral when it received moneys from the City of Trenton and instead of applying them to the payment of the loan secured to the bank permitted them to be taken by the Citizens Construction Company thus in reality creating new loans unsecured.**

Subsequent to the making of the assignment in August, 1914, the company received from the City of Trenton and other municipalities moneys on account of its assigned claims and deliberately permitted these moneys to be used by the Citizens Construction Company at the same time either knowing that the company was insolvent or having knowledge of facts which put it upon

inquiry. By so doing to the extent that it received such moneys and it received more than sufficient to pay its entire debt, it created new liens unsecured. To permit the bank to take an assignment of all of these contracts and then to permit the Citizens Construction Company to use the moneys so assigned coming in from the municipality without knowledge to the persons who were furnishing material that they were using the moneys would be to permit the perpetration of fraud upon materialmen. The bank by acting in the manner in which it did in receiving these moneys and permitting their use by the Citizens Construction Company waived their rights under the assignment.

**Finally.**

The Court below held that inasmuch as the appointment of a Receiver had the effect of preventing the consummation of the lien by filing the notice that it was without the jurisdiction of the Court to determine the rights of the complainant upon its equitable cause of action or the validity of the Broad Street National Bank claim. This it is insisted was erroneous.

The statute provides, Section 41, 3 Compl. Statutes of New Jersey, page 3319, that, "Any claimant who has filed the notice mentioned in the second section of this act may enforce his claim against the said fund, etc." And further provides, Section 42: "That the complainant must make all parties who have filed claims, the contractor and the said city, town, township or other municipality parties defendant." And further, "and the Court in which the action is brought may decide as to the extent, justice and priority of the claims of all parties to the action."

In Herman & Grace *v.* The Board, in 71 Eq.,

54, it was held that where the bank claimed a portion of the fund under the assignment as collateral for the payment of a debt in excess of that due complainant the bank was a necessary party to the suit whether complainant's claim was prior or subsequent to that of the bank.

It would appear that the suit is in the nature of an administration suit so far as the funds in Court are concerned, and just as in the suit brought under the corporation act to adjudge a corporation insolvent although the claim of the complainant in the subsequent proceedings may be entirely disallowed, yet the Court does not lose jurisdiction to administer the fund.

It is insisted, therefore, that when such a suit as this is brought by one who has filed a notice, the funds are brought *in custodia legis* and irrespective as to whether the claim of the complainant may be sustained or not, the Court must proceed to distribute the fund as the rights of the parties require.

It is respectfully submitted that the decrees should be reversed in each case and either that the record should be remitted with directions that decrees should be entered directing payment to the materialmen in the order of their priority out of the fund in Court prior to any claim of the Broad Street National Bank or with instructions to the Court of Chancery to proceed with the case and determine the claim of the Broad Street National Bank and the priorities of the respective parties.

Respectfully submitted,
MERRITT LANE,
Solicitor for and
Of Counsel with
Appellants-Complainants.

MacCrellish & Quigley Co., Printers, Trenton, N. J.

# NEW JERSEY
# Court of Errors and Appeals

Mack Manufacturing Company,
*Complainant-Appellant,*
*vs.*
Citizens Construction Company
et al.,
*Defendants-Respondents.*

Two Cases.

## Brief of George W. MacPherson and Nelson B. Gaskill for the Broad Street National Bank, one of the Defendants-Respondents.

I.

Recital of Facts.

The respondent corporation, Citizens Construction Company, was organized in April, 1914. The minutes of the meeting of the corporators show that Thomas J. McGovern, his cousin, Thomas F. Riley, and John H. Hurley, were the subscribers to the paid capital stock of $1,000.00 (minutes, p. 1). This money was advanced by T. J. McGovern (p. 78, State of Case). Riley held one share, for which he paid nothing (S. C. 157). Hurley was to have one share, but he withdrew, and

William McGovern, a brother of Thomas J. McGovern, was substituted (minutes, p. 1).

William McGovern was the President, Thomas J. McGovern was the Secretary and also the Treasurer. Thomas F. Riley was Vice-President. Thomas J. McGovern was the registered agent (2d Book, p. 13).

The tools and equipment of the corporation were transferred to it in exchange for stock. Its bank account with the Broad Street National Bank was opened by a deposit of $500.00 in cash, furnished by Thomas J. McGovern, who also advanced additional sums of money from time to time as the same were required. (S. C. 18.)

On July 3d, 1914, the Citizens Construction Company entered into contracts with the City of Trenton for certain paving work to be done on Hart avenue and Market street and Swan street. (S. C. 166.) Thomas J. McGovern had previously personally undertaken a contract with the Borough of Bogota, and although this contract, apparently, was not transferred by written assignment to the Citizens Construction Company, it was in fact executed by the Citizens Construction Company, and the funds arising under it treated as the funds of the Citizens Construction Company. About the same time the Citizens Construction Company had a contract with the City of Woodbury for certain municipal work.

Some time in August of 1914, Thomas J. McGovern, on behalf of the Citizens Construction Company, made application to the Broad Street National Bank for a loan of $5,000.00, for the purposes of the Company in financing the execution of these contracts. He tendered to the bank as collateral security for that loan assignments of the funds arising under these three contracts, and also a demand note of the Citizens Construction Company, endorsed by R. B. Newton, for $1,000.00, and a like note for $1,000.00 endorsed by Frank J. Clarke, and a like note for $1,000.00 endorsed

by F. E. Weeden, and checks of James C. Tattersall and J. C. Richardson for $1,000.00 each. (S. C. 86, *Exhibits 2 to 11*; 2d Book, pp 18–36.) This loan was made by the bank and the funds placed to the credit of the Citizens Construction Company. (S. C. 86.)

The contracting company had entered into an agreement with the Mack Manufacturing Company for its paving block for use in the performance of the contracts with the City of Trenton, and this material was furnished from time to time.

On September 18th, 1914, a Receiver was appointed for the Citizens Construction Company, not upon an allegation of insolvency, at which time neither the Mack Manufacturing Company, nor any other person claiming to be a creditor, had filed any notices or taken any other proceeding required by the statute to establish a lien upon the funds in the hands of the City of Trenton, remaining due and unpaid to the Citizens Construction Company upon the contracts in question.

A defective notice was filed by the Mack Manufacturing Company on October 7th, 1914, and amended notices were subsequently filed on October 19th, 1914.

The position and the relation of the appellant is, therefore, that of a general unsecured creditor of the Citizens Construction Company.

## II.

### Proceedings Antecedent to Appeal.

The appellant filed its bills of complaint in the Court of Chancery, based upon the notices of lien, above referred to, reciting the facts and circumstances, asserting compliance with the statute relating to the creation and enforcement of municipal liens, and charging the existence of a municipal lien in its favor upon the funds in the hands of the City of Trenton, due and unpaid to the Citizens Construction Company on account of its said contracts. In and by the same bills the appellant at-

tacked the assignment made by the Citizens Construction Company to the Broad Street National Bank of funds arising under the said contracts, asserting in said bills five reasons therefor, of which all but the fourth and fifth were withdrawn on the argument in the Court of Chancery (page 12). A motion to dismiss the bills (page 15) was denied (page 17), and after the taking of testimony the matter came on for hearing in due course before Vice Chancellor Leaming, who advised an order dismissing the bills, for the reasons set forth in the opinion reported in 96 *Atl. Rep.* 101. As the learned Vice Chancellor concluded that the appellant had not established a relation as a lien claimant, and as its bill was wholly based upon a claim of lien, the rights of the Broad Street National Bank could not be properly adjudicated in this suit, and consequently made no finding of fact and expressed no opinion as to the merit of the controversy upon that phase.

The appeal now pending proposes that the appellant has a valid and subsisting municipal lien, which it is not prevented from perfecting by the appointment of the Receiver; that the Receiver took over and completed the contracts subject to the appellant's lien *"cum onere"* and that upon the completion of the contracts the appellant's lien is effective against the Receiver, and that for at least the value of so much of the material as the Receiver used in the completion of the contracts, the appellant has a valid and subsisting lien.

The other averments of the petition of appeal will be considered later.

III.

THE APPELLANT IS NOT ENTITLED TO RECOGNITION AS THE HOLDER OF A MUNICIPAL LIEN.

In addition to the arguments upon this proposition, submitted to the Court in the brief of Peter Backes, Esquire, counsel for J. Clarence Richardson, Receiver, the following is respectfully submitted.

The theory that a claim less than a lien, but capable of being ripened into a lien, existed from the time when materials were furnished, had its origin apparently in the argumentative statement of Vice Chancellor Grey, in *Pierson* v. *Haddonfield,* 66 *Eq.* 180-189, in which the Vice Chancellor reasoned that the right to a municipal lien (which, throughout this discussion must be carefully distinguished from the ordinary mechanics' lien, where an inchoate feature distinctly arises because of statutory provision), perfected, as he says, by the filing of the notice, arises upon the furnishing of materials.

At almost the same time Vice Chancellor Reed filed an opinion in *Garretson* v. *Clark,* 57 *Atl. Rep.* 414, in which he held an entirely opposite view, denying the possibility of such imperfect lien claim existing. This conflict was before the Court of Chancery in *Cope* v. *Walton,* 77 *Eq.* 512, where it is pointed out that Vice Chancellor Grey evidently became converted to Vice Chancellor Reed's view, as illustrated by the opinion pronounced by Vice Chancellor Grey in *Somers Brick Company* v. *Souder,* 70 *Eq.* 388, in which he refers to the opinion of Vice Chancellor Reed and adopts the same view. This view was also accepted in *Cope* v. *Walton,* the decree of the Court of Chancery in which was affirmed by the Court of Errors and Appeals, 79 *Eq.* 165. There is, therefore, no inchoate or imperfect lien arising by reason of the furnishing of materials, which may be perfected by the subsequent filing of a notice, and which can be regarded as a proceeding instituted prior to a receivership, which may be continued with a resulting preference over other creditors, subsequent to the appointment and qualification of the Receiver.

Nor is there any validity in the appellant's proposition that the action of the Receiver in completing the contracts of the Citizens Construction Company, created a lien *"cum onere"* which the appellant could subsequently perfect and thereby establish a preference.

For whether the device which the appellant uses be called an inchoate lien or a lien "*cum onere,*" arising out of the completion of contracts by the Receiver, in purpose and in effect, if successful, it can only operate to create the preferential status of a perfect municipal lien to the detriment of other creditors.

The contemplated procedure and the desired relief, which the appellant seeks, do not conform to the terms of the municipal lien statute and cannot arise therefrom, and an equal result outside the statute, this Court cannot create.

In *Massey* v. *Camden and Trenton Railway Company,* 78 *Eq.* 539, the Camden and Trenton Railway Company being in the hands of a receiver, the General Electric Company presented to the receiver a claim for apparatus and supplies, delivered to the Railway Company within six months prior to the appointment of the receiver, which items of supplies were necessary to the daily operation of the railway. For these reasons the General Electric Company asked that it be adjudged a preferred claim in distribution. This petition was denied by the Chancellor, the claim being admitted as an unsecured claim with a denial of preference, from which order of the Chancellor an appeal was taken to the Court of Errors and Appeals.

The General Electric Company relying upon the line of authorities commencing with *Fosdick* v. *Schall,* 99 *U. S.* 235, to the effect that claims for traffic exchange and for maintenance incurred prior to receivership are preferred claims, urged a right for preference. These authorities, Mr. Justice Garrison declared, the courts of this State could not adopt, because he says:

> "The provision of our present Corporation Act upon this subject is in effect a declaration by the Legislature as to the preferences that are to be allowed in the winding up of insolvent corporations of this State, regardless of the rule upon that subject in force elsewhere."

And replying to the suggestion that the Courts of Equity in their peculiar jurisdiction might take cognizance of such conditions outside the statute, he says:

> "All therefore may agree that whatever jurisdiction equity may have, with respect to rights that are incidental to the administration of a quasi-public agency, such jurisdiction is conditioned upon the absence of any general legislative regulation of the subject, and hence falls whenever the legislative will in this respect has been declared." * * * "The opposite view for which the appellant must perforce contend, viz., that where statutory law has given a preferential lien to one class and has omitted to give it to some other class, a court of equity may extend such preference to a class so omitted as if no such legislative regulation of the general subject existed, leads in effect to the proposition that the court of equity may put into a statute all that the Legislature has determined to leave out; in which case it will be observed that the very fact that the Legislature has so determined, logically constitutes the jurisdictional basis of such equitable interference." * * * "Holding as we do the contrary view, our conclusion is that by force of the provisions of the Corporation Act of this State, the only preferential claims to be allowed in cases of insolvency are those that the Legislature has declared, and that upon this ground the order of the Chancellor denying a preference to the claim of the appellant, should be affirmed."

In a case similarly entitled, reported in 79 *Eq.* 652, the Receiver of the Camden and Trenton Railway Company, upon taking charge, had found a transportation agreement in effect between the Camden and Trenton Railway Company and the Public Service

Corporation, with a balance due for the services thereunder to the Public Service Corporation. This creditor presented a claim, which was allowed as a general unsecured claim, from which allowance an appeal was taken, the corporation contending that it should be paid in full. The Chancellor denied the preference and appeal was taken to the Court of Errors and Appeals, upon three propositions.

First, that under the agreement the Camden and Trenton Railway Company was trustee for the Public Service Corporation, which proposition was denied.

It was urged, in the second place, that the Receiver, by merely continuing the operation of the road, assumed such prior indebtedness and it thereby became entitled to preference, which contention the Court shortly disposed of by the statement, "We see no merit in this contention."

The third basis of appeal was that alleged in the case previously referred to, based upon the doctrine of *Fosdick* v. *Schall,* which was rejected upon the ground stated in the previous case.

This last authority completely refutes the claim of the appellant that the Receiver, in completing the contracts of the Citizens Construction Company, took them over, as he says, "*cum onere.*" This is precisely the contention which the Public Service Corporation advanced, that the Receiver, by continuing the operation of the road, assumed a prior indebtedness which thereby became entitled to preference, and as the Court of Errors denied such right in the case then pending, so the creation of a lien "*cum onere,*" as the appellant contends, must now be denied.

The result is that whether the appellant rests upon the doctrine of inchoate lien, or upon the doctrine of a continuing obligation assumed by the Receiver with the execution of the contracts, either path to his desired preference is barred by a decision of this Court.

IV.

In addition to the authorities cited in the brief on behalf of the Receiver, on the proposition that upon the appointment of a receiver no effective and valid lien can thereafter be created against the property in the custody of the Receiver, the attention of the Court may be directed to *Receivers* v. *Paterson Gas Light Company*, 23 *L.* 283, in which the Court said:

> "The act to prevent frauds by incorporated companies, so far as it relates to the estate of insolvent corporations, is in all its essential elements a bankrupt law. It leaves the creditor, indeed, the naked remedy of proceeding to judgment against the corporation, stripped at once of its property and the right of exercising its franchises, and thus avoids the constitutional objection of interfering with the obligation of contracts, but, like a bankrupt law, it vests the whole property of the corporation, by operation at law, in the hands of assignees, to be distributed among the creditors upon principles of justice and equity."

And in the case of *Van Wagener et al., Receivers,* v. *Paterson Savings Bank,* 10 *Eq.* 13, Chancellor Williamson said:

> "The object of the act to prevent fraud by incorporated companies is to secure all the creditors of such institutions an equal distribution of its assets. This is the primary object of the statute. Any act done with the view and for the purpose of defeating this object is a fraud upon the act and illegal. The primary object of this act being the same as that of the bankrupt laws, in giving a construction to it we may properly examine those general principles which have been established by the courts in

reference to transactions under those laws, and I may remark here that our courts have always recognized the object and provisions of the act in question and of the bankrupt laws to be essentially the same."

Likewise in *Spader* v. *Mural Decoration Mfg. Company*, 47 *Eq.* 18, Chancellor McGill said:

"The Receiver is not at liberty to recognize any liability or to make any payment which is not approved by the statute. Such is the view taken out of proceedings under the National Bankrupt Act, and it can hardly be questioned that the proceedings now considered partake of the same character."

To the same effect is the statement of Vice Chancellor Stevens in *Frost* v. *Barnert*, 56 *Eq.* 290:

"The act of 1829, which had become by reenactment section 63, and following, of the Corporation Act, had received a settled construction—that it had been repeatedly held to be, in its essential elements, a bankrupt act."

Section 68 of the Corporation Law, *Comp. Stat.* 1644,

"By operation of law upon the appointment of a receiver vests in him and divests the corporation of the title to all the real and personal property of an insolvent corporation, wheresoever situated, with all its franchises, rights, privileges and effects."

Under the Bankruptcy law the trustee becomes possessed of the title to the bankrupt property, for the purpose of equally distributing the proceeds thereof among the creditors of the bankrupt. He stands in the place of the bankrupt with power to do what the bankrupt ought to have done, that is pay the debts out of the assets. He becomes vested with the same kind of a title as though he was a purchaser, but such title is subject to all the rights and equities existing in

favor of third persons against the bankrupt, except as to fraudulent conveyances, transfers, preferences and other transactions in fraud of the Bankruptcy Act.

The appointment and qualification of a receiver is the judicial creation of an entirely new entity apart from and, in some respects, superior to the insolvent corporation. This entity is a statutory figure, deriving its powers and finding its limitations in the legislative declarations. The corporation remains in a state of suspended animation, while the receiver acquires and performs the functions of operation of the corporate affairs for the benefit of the creditors. To secure this equal distribution, the creation of preferences is strictly delimited by the Legislature, and the courts may not, by any device, after the establishment of the new entity of receivership, originate a preference, which prior thereto had no existence.

## V.

### The Status of the Assignment to the Broad Street National Bank and Its Possible Preference as a Creditor, is Not Properly Before the Court.

At the time of the appointment of the Receiver, the work upon the contracts in question had been partially performed by the Citizens Construction Company and some payments had been made upon account to that company by the City of Trenton. The contracts were finished by the Receiver, and there remained in the hands of the City of Trenton the balance of the contract prices, less the amounts previously paid to the Citizens Construction Company. Because proper occasion has never yet arisen, there has been no proof offered of the amount due the Citizens Construction Company at the time of the appointment of the Receiver for work performed by it and then not paid for. (S. C. 156.)

In order that this question might be properly determined at the proper time and in the proper form, and in order that the City of Trenton might be relieved from the necessity of defending any suits with reference to the disposition of the fund, and that the fund might bear interest for the benefit of all concerned, by the stipulation of all parties to the controversy the entire sum remaining in the hands of the City of Trenton was deposited in the hands of the Receiver, as trustee, reserving to the Broad Street National Bank all equities existing at the time of such deposits in trust, subject to a determination of such equities when the proper occasion should arise. (See quotation from this order at end of this brief.)

The Receiver, while accepting the claim of the Broad Street National Bank, has never issued any order of allowance or in any other form determined the allowance of the claim of the Broad Street National Bank as a preferred claim. All questions of preference of this bank, by reason of its assignments, over the other creditors, so far as the Receiver is concerned and, therefore, so far as the other creditors are concerned, still lie in the future action of the Receiver, at such time as, approaching distribution, he proceeds to determine under the statute the general and special liens, if any, in their lawful priority, and sufficiently indicates his actions and determinations with reference thereto.

The determination of priorities and preferences is primarily the function of the Receiver. Thus section 76 of the Corporations Act, *Comp. Stat.* 1648, provides for the submission of claims to the Receiver in writing and under oath, the submission of the claimant, if required, to examination by the Receiver, and a mandatory duty placed upon the Receiver, "To pass upon and allow or disallow the claims or any part thereof, and notify the claimants of his determination."

Section 78, as amended by Chapter 225, *P. L.* 1913, p. 410, provides for an appeal by any person aggrieved

by the proceedings or determination of such Receiver, to the Court of Chancery for disposition in a summary manner concerning the matter involved.

The Receiver having made no determination with reference to the claim of the Broad Street National Bank, the learned Vice Chancellor very properly declined to express any opinion upon the merits of that phase of the matter presented to him. The two bills are primarily bills to enforce municipal liens. With each bill was joined an attack upon an alleged preference in favor of the Broad Street National Bank, which the Receiver had not in fact allowed or determined. The bills being primarily to enforce municipal liens, the Vice Chancellor was entirely correct when, upon his finding that there was in fact no municipal lien as urged in the bill, he decided that finding disposed of the entire controversy because it disposed of the status of the complainant in the action then pending. The Vice Chancellor might properly have placed his decision in this respect upon the proposition that until the Receiver had allowed a preference to the Broad Street National Bank, that institution stood in the field of the receivership proceedings in the position of a creditor claiming preference, upon which claim no action had been taken, and that until the Receiver had acted upon the claim the appellate jurisdiction of the Court of Chancery was not properly invoked.

All the questions which the appellant sought to have adjudicated in the attack upon the claim of the bank, which it strangely joined with an action to enforce a municipal lien, may be determined, in the first instance, by the Receiver in allowing or disallowing the claim filed by the bank, as a preferred claim by reason of the assignments in question. If aggrieved as a creditor by the determination of the Receiver, the present appellant then has its remedy in an appeal to the Court of Chancery, but it has not yet been aggrieved in this

particular, either by order of the Receiver or as the result of an appeal upon such an order to the Court of Chancery.

In so far as the decision of the Court of Chancery was a refusal, under these circumstances, to consider the merits of the proposed controversy between the Mack Manufacturing Company and the Broad Street National Bank, with reference to any possible preference of the claim of the Broad Street National Bank, the decision of the Court of Chancery was entirely sound, whether it be based, as the opinion reads, upon the proposition that the status of the appellant was that of one seeking to enforce a municipal lien, which was denied, whereby all his controversy failed, or whether the judgment of the Court of Chancery in this respect be based upon the proposition that the determination of preferences, in the first instance, is the function of the Receiver, subject to appeal to the Court of Chancery, and that unless the statutory jurisdiction has been properly followed, another court will not intervene and assert its jurisdiction in derogation of the course prescribed by the statute.

In both aspects, therefore, the decree of the Court of Chancery should be affirmed.

## VI.

### The Assignment to the Broad Street National Bank is a Valid Assignment in Equity.

Wholly without relevance to the main issue raised by the appellant, which is an effort to establish a municipal lien, is an attack upon the claim of the Broad Street National Bank, a claim presented to the Receiver but not yet passed upon by him. Since this proposition is discussed at length in the brief of the appellant and is covered by the points stated in its petition of appeal,

precaution makes it necessary to discuss in reply the merits of a controversy, which this respondent, nevertheless, asserts is not presently within the jurisdiction of this court, and which this respondent contends must be disposed of in accordance with the decree pronounced in the Court of Chancery, irrespective of the conclusion reached by the court upon the main question as to the existence of the municipal lien.

The execution of the assignment in question is not accurately represented to the court, either by the form or the substance set forth in the appellant's brief. The phrase "Signed, sealed and delivered in the presence of" which, by the language of the brief, the court would be led to assume was immediately followed by the words "The Citizens Construction Company, T. J. McGovern, Secretary," stated without punctuation or explanation of the location of these various words upon the original paper, would lead the court to assume an inaccuracy, which in fact does not exist. This assignment was prepared by Mr. McGovern in his own office, evidently copied from an assignment prepared for use in some previous instance. (Pages 120-121.) This accounts for the fact that the words "Signed, sealed and delivered in the presence of" appear upon the assignment at all. The signature of Thomas F. Riley, Vice-President, is normally placed and, without reference to the attestation clause, the name "Citizens Construction Company" appears upon the face of the paper, stamped in red ink with the word "Secretary" and the signature of Thomas J. McGovern, the secretary. Considered in the light of its actual appearance, the confusion, which counsel for the appellant attempts to create by the form of statement used in his brief, disappears.

UNDER THE FIRST HEAD OF ARGUMENT ON THIS PROPOSITION, COUNSEL FOR THE APPELLANT ASSERTS THAT THE ASSIGNMENT WAS NOT PROPERLY EXECUTED BECAUSE THOMAS F. RILEY ASSUMED TO ACT AS VICE-PRESIDENT WITHOUT AUTHORITY AS SUCH OFFICER AND WITHOUT AUTHORITY FROM THE BOARD OF DIRECTORS.

In order to avoid the possibility of the Court being misled into the assumption that there was no such officer as Vice-President, and in order that the Court may fully understand the circumstances out of which the Vice-President and Secretary of the Citizens Construction Company received authority to execute the assignment in question, facts must be brought before the Court with relation to the internal arrangements of the Citizens Construction Company, all of which facts are found in the minutes of the Company, which minutes were before Vice Chancellor Leaming. These minutes will be found on pp. 1-17 of the second book containing the exhibits of this respondent.

The Citizens Construction Company was organized by Thomas J. McGovern, Thomas F. Riley and William F. McGovern. John Hurley's name appears as one of the incorporators, but he never paid his subscription nor took out his certificate of stock, and he was supplanted in the company by William McGovern. (S. C. 161-162.) It has previously been shown that William McGovern was the brother of Thomas J. McGovern and Thomas F. Riley was his cousin.

The By-Laws adopted at the first meeting provide that the directors shall be three in number. (Title "Directors," 2d book, p. 4.) A majority of the directors in office constituted a quorum. (Title "Directors' Meetings," 2d book, p. 4.) The officers of the corporation to be appointed by the Board of Directors were a President, a Vice-President, a Secretary and a Treasurer. (Title "Officers," 2d book, p. 5.) It is true that the By-Laws make no distinct provision as to the powers of

the Vice-President, which in the absence of limitation would be those normally adhering to such office. The By-Laws further provide that, in the absence of President, the Board of Directors should indicate the officer who is to execute his functions. (2d book, p. 7.)

Thomas J. McGovern, Thomas F. Riley and William McGovern, the stockholders of the Citizens Construction Company, elected themselves the Board of Directors of that Company (2d book, p. 10), and as Directors, representing themselves as stockholders, they elected William McGovern, President; Thomas F. Riley, Vice-President, and Thomas J. McGovern to fill both offices of Secretary and Treasurer. (2d book, p. 13.) William McGovern, the President of the Company and brother of Thomas J. McGovern, attended this first meeting of organization, but his inability to recall details as to the transactions of the Company, upon which counsel for the appellant lays so much stress as indicating fraud, is explained by his statement (page 163) that during the time when the loan was being negotiated with the Broad Street National Bank, he was working out of town most of the time. He was in charge of the work at Woodbury shortly before the final meeting. While the President was absent, and it is to be remembered that he held but one share of stock, the other two stockholders and directors of the Company, being a majority of the stockholders in interest and a majority also of the Board of Directors, namely, Thomas J. McGovern and Thomas F. Riley, his cousin, remained in Trenton. The loan was negotiated by Thomas J. McGovern who, as it clearly appears by the testimony of Riley, was practically the whole Company. The Company put Thomas J. McGovern, as Treasurer, forward to the bank as the person on whose signature the funds of the Company were to be disbursed. This appears both by the resolutions of the directors in the minutes and by the signature card taken from the file of the bank. (*Exhibit No.* 17.)

It appears, therefore, that by the action of the whole Board of Directors, who were also all the holders of stock, the office of Vice-President was a reality; that Thomas F. Riley was in fact the Vice-President and his signature and the seal of the Citizens Construction Company were duly proven. (Page 95.) Mr. McGovern's signature was also proven. (Page 95.) The absence of William McGovern, the President, indicates the necessity and the justification for the execution of the assignment by the Vice-President. Whether this be taken as a normal function adhering to the office of the Vice-President, in the absence of the President, or whether it be taken as the action of a majority of the Board of Directors is, as far as the result is concerned, immaterial. Upon either aspect the action of the Vice-President in executing the instrument in question is established, because it must always be remembered that the Board of Directors of this Company was constituted of three men, related by blood, and that the action of two of them was the action of a majority. Therefore, the action of McGovern and Riley in the execution of tihs instrument is a sufficient grant of power from the Directors. Neither McGovern nor Riley could be heard to deny this authority. William McGovern, the absentee President, being infromed, as he says, by his brother (page 163) of the loan from the bank, was sufficiently put upon notice, if he had any objecttion to make, and made none. The assent of the whole Board of Directors undoubtedly existed and continued to exist, even though there was no formal action taken at a meeting called for that purpose.

So far as the equity of the action is concerned, the result is precisely the same as though these three men, constituting all the stockholders, had met as such and authorized themselves as Directors to authorize the Vice-President and Secretary to execute the instrument in question. All necessary assents of all interests were in fact obtained. The essential difference is that, had

the meetings referred to been held and entries made in the minutes, there would have been formal record of formal action, which is merely a matter of proof by record instead of proof by circumstances. Neither in intent nor in spirit, nor in actual result, so far as equity is concerned, is there any difference. At no time could any of the three stockholders or three directors, in the same personalities, have been heard to question the validity of this assignment against the Company. The first proposition of the appellant therefore falls.

SECONDLY, THE APPELLANT ALLEGES THE ASSIGNMENT TO BE INVALID, BECAUSE THE ALLEGED RATIFICATION ON THE 17TH DAY OF SEPTEMBER WAS INSUFFICIENT, IN THAT THE CORPORATION WAS AT THAT TIME INSOLVENT.

In reply, it is confidently asserted by the respondent that the ratification on September 17th was an unnecessary act; that the assignment was, at the time of its execution and delivery, a valid and complete assignment and that the ratification was superogatory.

The assignment, proper in form, signed by proper officers and under seal, is *prima facie* a valid corporate act. This presumption is to be overcome only by clear proof of want of authority, based upon clear and satisfactory evidence. *Beach* v. *Amusement Company*, 90 *Atl. Rep., p.* 1120.

As we have already shown, two of the three directors executed this assignment, which presupposes their full knowledge of all details. The President and third director, absent at the time, was subsequently informed of the loan. We do not assent to the contention that any ratification was necessary, by reason of the absence of a formal meeting and the acquiescence thereat of a majority of the Board of Directors to the proposed loan and assignment. If ratification were necessary, it arose from the continued existence of the assignment and the transactions of the Company with the bank

based thereon, accompanied by the facts that the Company unquestionably received the benefit of the assignment, that a majority of its directors executed the assignment and the third had knowledge thereof. Ratification may arise either by formal action or may be implied from circumstances. As was said in the case of *Beach* v. *Amusement Company*, above referred to,

> "Ratification will be implied from acquiescence or acceptance of benefits with knowledge of the facts." 90 *Atl. Rep.*, *p.* 1119.

The Company accepted the benefits. Two of the three stockholders constituting a majority in interest of the stock, and in the same persons a majority of the Board of Directors, created and therefore had knowledge of the facts. The third was informed, and whether the third joins in the implied ratification or not, implied ratification no more requires a unanimous vote or unanimous action than does formal ratification. Neither in formal action nor in implied ratification is the joinder of William McGovern necessary, but as a matter of fact, as appears by the testimony previously referred to, he was informed by his brother, Thomas J. McGovern.

The contention that the ratification on the 17th day of September was insufficient in that the corporation was at that time insolvent, is therefore immaterial, because whatever ratification was necessary, if any at all was required, pre-existed and continued long prior to the 17th of September.

But even if it be assumed that ratification on the 17th of September was essential, still it is not established by the testimony that the ratification was made in contemplation of insolvency and after the company had suspended its business. None of the directors voting upon this proposition of ratification acquired or attained, as the basis of this action, any information with relation to the Company's financial condition, upon which they acted in voting for such a motion. There is nothing

in the evidence which warrants the conclusion that, at the time this meeting was held on the 17th of September, to the knowledge of the Directors, receivership was inevitable. William F. McGovern's testimony, found on page 163, says that two or three days before the 17th he was told to stop the Woodbury job, that the company was going into the hands of a Receiver. Who gave him this information he does not say, nor upon what authority the statement was based. It may have been nothing more than the speculation of a stenographer in the office, or a partial repetition of a statement greater in extent. Further in the testimony Mr. McGovern denies that receivership was suggested to him at this time. (Page 165.) In fact, he distinctly says that it was not at the time when he was told to stop the job that anything was said to him about the receivership. This part of the testimony is not referred to in the brief of the appellant and the later statement of the witness entirely destroys the significance which counsel attempts to attach to his earlier and unguarded statement. The extent of Mr. Riley's testimony upon the question is that he knew, some time prior to the meeting on the 17th, that the corporation was in bad financial condition, which, however, is very far from indicating a condition of insolvency.

Counsel for the appellant drove Thomas J. McGovern hard in the attempt to make him admit that, to his knowledge, insolvency was inevitable at the time of the meeting on the 17th, and signally failed to elicit this admission or entrap Mr. McGovern into its equivalent.

Page 120 this question and answer are found:

> *Question.* "How long before the 17th did you know you were going into the hands of a re-receiver?"
>
> *Answer.* "I didn't know it at all. I went to see my attorney and told him the way I felt about it and the way things were."

Again, page 126, Mr. Lane asked Mr. McGovern if the Citizens Construction Company was not insolvent from the beginning, and the witness asserted that it never was insolvent. (The Court will remember that the Receiver was not appointed upon a bill alleging insolvency.) The testimony upon page 127 indicates that, while on the 17th of September, if payment of all debts had been demanded, all could not be immediately paid, that this situation did not arise. On page 135 Mr. McGovern asserts that the reason why the Company went into the hands of a Receiver was because he was sick and was unable to take care of the business. The minute record of the meeting, at which it was voted to make application for a Receiver (page 136), does not indicate that it was pressure of debts that led to the application, but anticipated losses. The evidence fails to establish the position taken by the appellant that the Directors knew, at the time they passed the resolution of September 17th, that the Company was actually insolvent, and consequently that the ratification of that day was made in contemplation of insolvency.

THE ASSIGNMENT IS FURTHER ALLEGED TO BE INVALID BECAUSE, AS APPELLANT CLAIMS, THE CORPORATION WAS INSOLVENT AT THE TIME OF THE LOAN IN AUGUST, 1914, EITHER TO THE KNOWLEDGE OF THE BANK OR WITH KNOWLEDGE OF SUCH FACTS AS PUT IT UPON INQUIRY.

The contention which counsel for the appellant makes under this topic, pages 41 and 42 of this brief, is based upon a statement of facts, or deductions from facts, which the testimony does not warrant. It is true that the capital stock of the corporation was fixed at twenty thousand dollars, but it is not true that there was never but one thousand dollars actually paid in. Page 78, Mr. McGovern says that the corporation started with one thousand dollars, and he advanced himself sums, the exact amount of which he does not remember, five or ten thousand dollars.

Again, the value of the equipment turned into the Company is not to be gauged by the amount received at a sacrifice sale, nor does it follow that because the Company was small that it was necessarily insolvent from the beginning. The history of corporate enterprise, if tested by such a standard, in event of subsequent failure, would exhibit a large number of corporations necessarily insolvent from the beginning. The argument of the appellant seems to indicate that the bank demanded as security for its loan in question the security which it received, because of apprehension of insolvency or insecurity of the corporation. The contrary is the fact. General Sadler, President of the bank, page 82, says that the Citizens Construction Company tendered the security as collateral for the loan. Directly asked, page 84, whether he had any information or knowledge which would lead him to question the solvency of the Citizens Construction Company, he replied that the bank thought it was solvent. Page 104, on direct examination by Mr. Lane, General Sadler then being Mr. Lane's witness, said that to the knowledge of the bank the incorporation of the Company was communicated to them by Mr. McGovern, who explained what contracts they had and that the belief of the bank that the Company was solvent (p. 107) was based upon statements made by Mr. McGovern, and that he, General Sadler, had much more information, but the details of it he could not remember; that he had no knowledge (p. 108) of the pending receivership until the receiver was appointed on September 18th. On page 109, he was asked why the bank took the additional security, and he explains that it was because the applicant was a new corporation and the security was offered. In response to a question as to whether this was customary, General Sadler replied that it was a new corporation, and he thought it was good business to take the assignment of contracts and

the other collateral offered. He did not know that the assignments covered all the contracts that the corporation had, nor did he endeavor to get assignments of all contracts.

The course of dealing merely indicates caution on the part of a financial institution toward a new corporation, which had not by continued existence demonstrated a credit standing, which is entirely distinct from a condition of insolvency.

In fact, no greater demonstration of a general belief of solvency could have been presented to the officials of the bank than the willingness of five business men of Trenton, not connected in any way with the Citizens Construction Company, to become sureties, guaranteeing the validity of the loan. Were there facts in existence, which should have put the bank upon inquiry as to the solvency of the Company, the testimony of these five men, three of whom endorsed notes, and two of whom gave certified checks, would have dissipated any suspicion, but there were no such facts, none have been shown and the action of these independent citizens becoming sureties was an added guarantee of the existence of a solvent condition.

This is an entirely different state of facts upon which is based the decision in *Cope* v. *Walton*. In the present case the bank did not know and had no reason to believe that the corporation had assigned all its property to the bank as security for the loan in question. The contrary was the condition in the Cope case.

It may be easy in retrospect, examining the conditions surrounding the career of a corporation like this, to deduce a condition of insolvency existing through the corporate period, but this is not the test. If the bank could have had, at the time the loan was made, the knowledge of conditions which existed on the 17th of September, ordinary prudence would have prevented the making of the loan. Conditions then would have demonstrated that it was unwise to extend the credit,

but this was not the condition which existed at the time the application for the loan was made, nor did the bank then have the opportunity of the information presented by the examination of the corporate affairs by the Receiver, nor should its action in making the loan and taking the assignment be tested in the light of subsequent events.

AGAIN, THE ASSIGNMENT IS CHALLENGED AS AN ASSIGNMENT OF MONEYS TO BECOME DUE, WHEN, AS IT IS ALLEGED, NO MONEYS BECAME DUE THE CITIZENS CONSTRUCTION COMPANY.

On pages 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 of his brief, counsel for the appellant argues in support of the proposition that when the Receiver succeeded to the property of the Citizens Construction Company, he took it subject to pre-existing equities, and that his completion of the contract establishes a right to the enforcement of those equities.

For the respondent it is urged that if adopted by the Court, this view must result in the destruction of the claim of the appellant for preference against the equitable assignment to the Broad Street National Bank. Whether the assignment be treated as an entirety both of moneys due and to become due, or whether it be considered an assignment of moneys due and an implied agreement capable of being enforced in equity, to assign all other moneys coming due, which passed with the corporate property to the Receiver, the equitable rights of the bank under this assignment are prior to any subsequent lien which the appellant can acquire. The priority in time of the assignment over the municipal lien contended for is evident, and the status of the lien contended for is in no way superior to the rights created under the assignment to the Broad Street National Bank, because if the municipal lien has any preference at all, it is in the distribution of the assets of the insolvent estate and the doctrine contended

for, establishing the assignment, the moneys referred to therein and passing thereby do not and cannot become assets of the estate in any sense, but have been separated therefrom without any right on the part of the corporation or its representatives or its creditors to participate therein. It is a separate and distinct fund, existing by virtue of the assignment, and not an asset of the insolvent corporation subject to division among its creditors.

This proposition also disposes of the last argument advanced by counsel for the appellant. Because of the separate identity of the fund to which the assignment attaches, distinguishing it from the assets of the insolvent estate, no question can arise with reference to its application on the behalf of a complainant creditor. The effect of the alleged waiver lies entirely between the bank and the sureties.

The right of a creditor to raise the question of collateral arises only when the fund, which otherwise would be distributed to the creditor complaining, would be depreciated by the failure to collect from collateral first, and it is upon this basis that the creditor has a standing to enforce the payment from collateral first and proof against the insolvent estate for the balance, but, as has been argued above, funds arising from the performance of the Trenton contract being assigned to the bank, the creditors of the insolvent corporation have no interest therein, no right to participate in any part thereof, even if they do succeed in establishing municipal liens, which must be subsequent in order of priority, except as to any balance when that passes to the Receiver. (See *Texas Company* v. *United Paving Company*, 81 *Eq.* 434.)

The main argument, therefore, of counsel for the appellant, establishes the equitable assignment of this respondent as a valid and subsisting claim, capable of being enforced in equity against the funds arising out

of the Trenton contract, which are not part of the assets of the insolvent estate.

In conclusion, it is desirable that the court should understand that the fund in question arising out of the performance of the Trenton contract, was, by consent of all parties, paid into the hands of the Receiver, as trustee, by order of the Court of Chancery, dated in January, 1915, the concluding paragraph of which is as follows:

> "And it is further ordered that the said Receiver hold said moneys so received by him, subject to the same liens which the Mack Manufacturing Company, the Broad Street National Bank, Joseph B. Richardson & Son, and Frank E. Arend now have thereon, until it shall be finally determined to whom said fund shall be paid."

The fund so paid amounts to $8,498.96.

It is respectfully submitted upon this branch of the case, that if the appellant is entitled to a municipal lien, it is subsequent to the assignment to the Broad Street National Bank, which is entitled to be first paid from the funds which the Receiver now holds as trustee.

Respectfully submitted,

GEORGE W. MACPHERSON,
NELSON B. GASKILL,
*Solicitors and of Counsel for the Respondent, the Broad Street National Bank.*

The Modern Print Shop, 227 East State Street, Trenton, N. J.

# New Jersey Court of Errors and Appeals

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| *Between*<br>MACK MANUFACTURING COMPANY,<br>*Complainant,*<br>*Appellant,*<br>*and*<br>CITIZENS' CONSTRUCTION COMPANY, ET AL.,<br>*Defendants.*<br>*Respondents.* | On Appeal.<br><br>Brief for Joseph B. Richardson, et al., trading as Joseph B. Richardson & Sons, Respondents. |

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This is a suit growing out of municipal liens relative to contracts for the paving of Hart Avenue and Swan Street, in the City of Trenton. The contract paving work was being done for the City of Trenton by the Citizens' Construction Company. The work was being done by virtue of two separate and distinct contracts made between the Citizens' Construction Company and the Board of Commissioners of the City of Trenton. One of these contracts covered work done upon Hart Avenue and the other upon Swan Street. The Citizens' Construction Company went into the hands of a receiver. At the time that it went into the hands of a receiver appointed by the Court of Chancery of New Jersey, there was a balance due upon the Swan Street contract amounting to $4,610.53, and one due upon the

Hart Avenue contract of $3,199.01. The complainant claims a lien for $2,309.92 for materials furnished for the Hart Avenue contract and a lien for $2,501.83 for materials furnished on the Swan Street contract, pursuant to the Statute respecting Municipal Liens, approved March 30, 1892.

The receiver was appointed on September 18, 1914. Subsequent thereto, upon October 7, 1914, complainant filed its lien claim. It is to be noted that the claim was filed subsequent to the appointment of the receiver. The lien claim filed by the complainant was a single lien embracing a claim made upon both of the contracts made by the Citizens Construction Company with the Board of Commissioners of the City of Trenton, and covering both Swan Street and Hart Avenue. Prior to the appointment of a receiver and prior to the filing of the complainant's lien, an assignment of the interests of the Citizens Construction Company was made under these contracts to the extent of $5,000, to the Broad Street Bank, of Trenton, New Jersey. This said assignment was made upon August 5, 1914, and is claimed to have been made in perfect good faith, without any knowledge upon the part of the Bank of any difficulties under which the Citizens Construction Company labored financially, and it is claimed to have been regular in that it was filed with the Comptroller and Treasurer of the City of Trenton.

Subsequent to the filing of the complainant's lien the defendants, Joseph B. Richardson, et al., trading as Joseph B. Richardson & Sons, filed a lien claim for materials furnished the Citizens Construction Company for the Swan Street contract, amounting to $1,276.66. This claim was filed upon October 14, 1914.

Subsequent to the filing of the claim of Joseph B.

Richardson & Sons, which was in all respects regular, two other lien claims, one as against the sums due under each of the several contracts, was filed by the complainant. The first lien claim as filed by the complainant was defective, inasmuch as there was one claim filed as against the sums due under two contracts. The second claim filed by the complainant was filed subsequent to the claim of Joseph B. Richardson & Sons, as far as the funds due under the Swan Avenue contract were concerned.

## QUESTIONS.

The questions arising from these facts are:

1. Is the complainant entitled to file a Municipal Lien as against funds due under a contract between a municipality and a corporation after the receiver for the corporation has been appointed by the Court of Chancery, and the receiver vested with the title to all of the property of the insolvent corporation?

2. Was the assignment to the Broad Street National Bank made in good faith? Did the Bank actually advance the money? Had it no reason to suspect insolvency upon the part of the corporation? Has it filed with the proper persons notices of such assignment of interest?

3. Is not a single lien claim filed as against more than one municipal contract defective?

4. Can such lien claim be corrected as of the original date of the filing of the same as against two contracts by a subsequent filing of a lien claim as against each of the several contracts so as to be superior to lien claims regularly filed between the dates of the filing of the first lien claim and those filed as against the two contracts.

## ARGUMENT.

Upon the appointment of a receiver, all the real and personal property of the insolvent company wheresoever situate forthwith vests in him, and the company is divested of all its interest and title therein. *C. S.* 1644, *Sec.* 68. *Squire v. Princeton Lighting Company,* 72 *N. J. Eq.,* 883. At the time, then, that the complainant filed his single lien claim as against two contracts, all interest of the Citizens Construction Company in the moneys in the hands of the municipality, due on said contracts, had ceased, and the legal title to the moneys actually belonged to the receiver. In *John Agnew Company vs. Board of Education of Paterson,* 89 *Atlantic,* 1042, *affirmed by the Court of Errors and Appeals,* 90 *Atlantic,* 1136, the question arose whether the receiver in bankruptcy and the trustee therein took the fund subject to all the valid liens acquired by filing notice under the statute prior to the entry of the order of the ancillary receiver by the New Jersey Federal Court. The Vice-Chancellor says, "My conclusion is, that an order of the bankrupt court appointing a general receiver of the entire bankrupt estate directing the delivery of such estate to him as far as possible before bankruptcy, effects a sequestration of the bankrupt's estate to such an extent as to prevent the acquisition of any new liens." Under the Municipal Lien Act, a lien is created by the filing of a notice with a bond upon the municipal officers specified in the act. There is no lien prior to the filing of notices and such bond with such officers.

It would seem that at the time that the complainant filed his claim, he would be effectually estopped from asserting it by reason of the cases hereinbefore cited, particularly as there is no essential dif-

ference between the rights of a receiver of the Court of Chancery and a trustee of the bankrupt as to the title of the fund.

That under the Act of 1892 the lien attaches only when the statutory notice is filed, see *Garretson et al. v. Clark, et al., Harris v. Garretson, et al.,* 57 *Atlantic,* 414, where Vice-Chancellor Reed held, "that the lien attaches from the time of the filing and arises at the moment when the claims are filed, and not when the labor and material is furnished."

It was held that there is no inchoate lien on the fund, and that the lien attaches only to the portion of the contract price which remains unpaid when the lien claim is filed, in *Somers Brick Company v. Souder, et al.,* 70 *N. J. Eq.* 388.

With respect to the second question, relative to the assignment made to the Broad Street Bank, it was decided by Vice-Chancellor Leaming in the case of the *Board of Education of Riverton v. Tait,* 80 *N. J. Eq.* 96, that the claimants who hold orders are entitled to be paid from the funds before the lien claimants participate. In *Cope v. Walton Co.,* 77 *N. J. Eq.* 512, the right of the assignor was questioned upon the ground that there was reason to believe that the corporation was insolvent at the time of the taking of the assignment. It was not in such case intimated that in the absence of these facts, (and there is a serious question whether there is proof in the present case of the presence of them), there was an inchoate lien for materialmen in the fund superior to an assignment for consideration. In *Cogan v. Conover Manufacturing Company,* 69 *N. J. Eq.* 378, Vice-Chancellor Garrison says, "I think that their rights are fixed at the time of his (Receiver's) appointment, and those who had priorities then, must be first paid and the others must be paid equally."

With respect to the third question, it is obvious that under the Municipal Lien Act of 1892, the first lien filed by the complainant being one notice and one bond as against the fund due under two contracts, was absolutely defective. This was recognized by the complainant when it filed statutory notices to correct this at a subsequent date. Meantime, as against the fund due under the Swan Street contract, Joseph B. Richardson & Sons had filed their notice and bond.

This argument answers the fourth question, and would indicate that it is perfectly obvious that the statutory claim which was not good at its inception cannot be corrected to obstruct the rights of intervening parties subsequent to the period of such intervention.

## SUMMARY.

In the case at bar, then, provided it was decided that a lien claim can be established subsequent to the appointment and qualification of a receiver as is argued by the complainant, and provided it be established that the assignment to the Broad Street Bank comes under the case of *Cope v. Walton, supra,* as having been made with notice of insolvency upon the part of the Broad Street Bank, as is also argued, then the claim of Joseph B. Richardson & Sons would be prior to the claim of complainant with respect to the Swan Street contract as having been the first valid lien filed as against the funds due under the Swan Street contract.

The priority of the lien claims must be decided only (1), if the Court decides such funds under Municipal Contracts lienable after appointment of a receiver, and (2), also decides that the bank's assignment is good and not under the *Cope v. Walton*

*case, supra.* If the court decides that the fund cannot be liened after the appointment of a receiver, neither lien is good, and if the bank's claim is bad and liens can be filed there is money enough to pay both liens.

Respectfully submitted,

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*Solicitor for and of Counsel with Respondents Joseph B. Richardson & Sons.*

STATE GAZETTE PUBLISHING CO., Printers, Trenton, N. J.

# New Jersey Court of Errors and Appeals.

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| MACK MANUFACTURING COMPANY, Complainant-Appellant, vs. CITIZENS CONSTRUCTION COMPANY, J. CLARENCE RICHARDSON, SR., RECEIVER, ET ALS., Defendants-Respondents. | Appeals From Decree Dismissing the Bills of Complaint Filed to Enforce Municipal Liens. |

## Brief of Peter Backes, of Counsel with the Receiver.

Appellant filed its bills of complaint in the Court of Chancery, entitled as above, against the Citizens Construction Company, J. Clarence Richardson, Sr., Receiver, et al., defendants, to enforce liens against funds due from the city of Trenton, arising out of two municipal contracts made by the city with the said company, one for the paving of Swan street, on which there is due from said city $4,610.53, and the other for the paving 10
of Hart avenue, on which there is due the sum of $3,-199.01.

Appellant filed two notices of lien, one for $2,501.83, against the Swan Street fund; the other for $2,300.92, against the Hart Avenue fund. Pursuant to the statute

entitled "An act to secure the payment of laborers, mechanics, merchants, traders and persons employed upon or furnishing material toward the performing of any work in public improvements in cities, towns, townships and other municipalities in this state," approved March 30th, 1892. Comp. Stat., p. 3315.

## POINT I.

UNDER THE MUNICIPAL LIEN ACT, WHEN A RECEIVER IS APPOINTED BY THE CHANCELLOR BEFORE A NOTICE IS SERVED ON THE FINANCIAL OFFICERS OF THE MUNICIPALITY, NO LIEN AGAINST THE FUND CAN THEREAFTER BE FILED BY A CLAIMANT.

In the court below the receiver moved to dismiss the bills of complaint, and now moves to dismiss these appeals and urges the following reasons:

On September 18th, 1914, J. Clarence Richardson, Sr., was appointed receiver for the defendant company by the Chancellor, pursuant to the provisions of the statute entitled "An act concerning corporations." Comp. Stat., p. 1595.

Appellant did not file its notices of liens until after the appointment of the receiver. Its first notice was defective, as it included in one notice a claim for material furnished for two contracts—first, for the paving of Swan street, and second, for the paving of Hart avenue. This notice was filed on the *7th day of October, 1914*. Two amended notices of liens were subsequently filed on the *19th day of October, 1914*.

The receiver had been appointed and had qualified before any notice was served, hence no lien could attach in favor of claimant on these funds; and

*First*. The lien claims filed by the appellant are invalid and ineffective.

*Second*. All the right, title and interest under these contracts with the city of Trenton, by the order of the

Chancellor appointing the receiver, divested the Citizens Construction Company of any and all interest or claim therein, and vested the same in the receiver, who took the property free and clear of all liens; thereafter appellant could not file its liens against the said funds and cannot maintain its suits on such lien claims, and therefore the bills below and these appeals should be dismissed.

This same question was before this court in the case of John Agnew Co. *v.* Board of Education of the City of Paterson, 83 Eq. 49, and was affirmed by this court and reported in 83 Eq. 336, 339. 10

In that case it was conceded that the receiver and trustee in bankruptcy took the fund in question, subject to all the valid liens acquired by filing notice under our statute, prior to the entry of the order appointing the ancillary receiver by the New Jersey Federal Court.

No argument, except the one on behalf of the labor claims, was made to sustain the validity of the lien notices filed as prescribed by law, after the order appointing the ancillary receiver was entered. Vice Chancellor Stevenson said: "My conclusion is, that an order of the bankruptcy court appointing a general receiver of the entire bankrupt estate, directing the delivery of such estate to him as far as possible by the bankrupt, * * * effects a sequestration of the bankrupt's estate to such extent *as to prevent the acquisition of any new lien.*" 20

And, further on, he said: "I think, therefore, that the proposition advanced by counsel for the trustee in bankruptcy, that this receivership order prevented the creation of all liens by notice under our statute after December 12th, 1910, at 4 P. M., is sound law." 30

In the case before him the Vice Chancellor was considering the claims of numerous laborers for wages, which were filed before the amendment to the Municipal Lien act of 1911, page 777, which gives labor claims a preference over assignments. He said: "The laborers in this case *never secured any lien. They had the power to acquire liens only while the fund was subject to the crea-*

*tion of the liens under the statute.* * * * It must at all time be borne in mind that it is now settled that neither laborers nor materialmen have any inchoate lien dating from the time when the materials were furnished, or the labor performed, or from the time when payment for such materials or labor became due. *The lien is created only by the filing of the notice, and takes effect from the completion of such filing in the two offices named.*"

10 The Agnew case is almost a parallel with the one presented by appellant. It differs only in this, in the Agnew case the receiver was appointed by the Federal Bankruptcy Court, and in the present case the receiver was appointed by the Chancellor under the Corporation act.

## POINT II.

BOTH STATUTES VEST THE TRUSTEE OR THE RECEIVER WITH THE TITLE TO THE PROPERTY.

Section 70 of the "Act to establish a uniform system of bankruptcy throughout the United States," approved 20 April 1st, 1898, provides: "The trustee of the estate of the bankrupt upon his appointment and qualification * * * shall in turn be vested by operation of the law with the title of the bankrupt as of the date he was adjudged a bankrupt," and by our statute "An act concerning corporations" (Comp. Stat., p. 1644, sec. 68), it is provided that "all the real and personal property of an insolvent corporation wheresoever situated, and all its franchises, rights, privileges and effects shall, *upon the appointment of a receiver, forthwith vest in him* and the 30 corporation shall be *divested* of the *title thereto.*"

In Squires *v.* Princeton Lighting Co., 72 Eq. 883, the receiver was appointed under our statute; the question of priority of lien arose on a levy made on an execution on a judgment, which levy was made after the filing of the bill praying for the appointment of a receiver and before such an appointment was made.

This levy was held good, for the reason that the title to the property had not *vested*, and the company had not been divested of it by the appointment of a receiver.

## POINT III.

UNDER THIS STATUTE THE LIEN ATTACHES WHEN A NOTICE IS FILED WITH THE PROPER OFFICERS.

Under the Municipal Lien act the lien attaches only on filing the statutory notice.

In Garretson et al. *v.* Clark, 57 Atl. 414, Vice Chancellor Reed held that the *"lien attaches at the moment of the filing of the notice, and does not relate to the time when the labor or materials were furnished."* 10

In Somers Brick Co. *v.* Souder et al., 70 Eq. 388, Vice Chancellor Grey held that "there is no prohibition against anticipated payments, no inchoate lien on the fund, and no provision making the owner who prepays liable to a subsequent lien claimant, * * * *and the lien attaches only to that portion of the contract price which remains unpaid when the lien claim is filed."*

In Board of Education of Riverton *v.* Tait, 80 Eq. 94, Vice Chancellor Leaming held that "it is conceded by the claimants who claim under the Municipal Liens act that the two claimants who hold orders are entitled to be paid from the fund before their claims can participate. This concession is in accordance with the decision in Somers Brick Co. *v.* Souder, 70 Eq. 388, 394; S. C., 71 Eq. 759, 762, and Cope *v.* C. B. Walton Co., 77 Eq. 512, 517; S. C., 79 Eq. 165. The ground of these decisions is that the Municipal Liens act confers no *inchoate lien* on the fund in favor of laborers or materialmen *prior* to the *service of a notice* of claim of lien pursuant to the act." 20 30

It is admitted that under the Municipal Lien act a lien may be filed, and when filed in accordance with the statutory requirements, such a lien becomes perfect. But this right to a lien may be lost—

*First.* Where the contractor assigns his interest in the fund arising under the contract, or

*Second.* Where, on the appointment of a receiver, the assets of the corporation are vested in the receiver.

It is insisted that the appointment of a receiver before the statutory notice of a lien is filed, has the effect of vesting the title of the company's property in the receiver, and thereafter no *effective and valid* lien can be filed against the property placed in the custody of a re-
10 ceiver.

In this respect, no distinction can be drawn between a receiver appointed by our State court and a receiver appointed by the Federal Bankruptcy Court.

A receiver appointed under the Corporation act distributes the assets of the company under the eighty-sixth section (Comp. Stat., p. 1652) by paying—

*First.* The costs and expenses;

*Second.* And all special and general liens upon the funds of the corporation, to the extent of their lawful
20 priority.

In the case at bar, appellant has neither a special nor a general lien on the funds in the hands of the receiver, it had only a right to perfect a lien by filing the statutory notice, and as it failed to file such notice before the property passed to a receiver, no lien could attach or thereafter be perfected.

In Cogan *v.* Conover Manufacturing Co., 69 Eq. 358, Vice Chancellor Garrison said: "With respect to creditors against the funds in his (the receiver's) hands, I
30 think that their rights are fixed at the time of his appointment, and those who had priorities then, must be first paid and the others must be paid equally."

Appellant had no lien at the time the receiver was appointed. Up to that time no notice of lien had been filed.

The material for which liens are now claimed had all been delivered to the company, but all of it had not been used in the work at the time of the receiver's appointment.

The case of Kuser *v.* Wright, 52 Eq. 825, is relied on by the appellant, but the distinction to be drawn between the Kuser case and the appellant's case is this, in the former case, Kuser had a record lien, which the general creditors must recognize; while here claimants have no lien until they file their notices.

## POINT IV.

### UNDER THE STATUTE APPELLANT CAN HAVE NO EQUITABLE LIEN.

Appellant is entitled to a statutory lien after the filing of its notice. It acquired no inchoate lien by delivery of its material. 10

In Fehling *v.* Goings, 67 Eq. 375, the lien was filed under the third section of the Mechanics' Lien act, which gives to the materialmen an *inchoate lien* from the time of furnishing material. Of course, no such lien is disturbed by the Bankruptcy act.

While the effect of the giving of the statutory notice under the Municipal Lien act is the same as under the third section of the Mechanics' Lien law, yet there is this distinction—under the first act, a lien attaches from the time the material is furnished, and may be perfected at any time thereafter, even after the appointment of a receiver. 20

In the Cogan case, the lien consisted of an equitable assignment of parts of the contract price, and one of the condensers had been completed and delivered, and the account had become an account receivable, which had been assigned.

While the Chancery Court held that the assignee had no lien under his equitable assignment, yet this court reversed the decree principally on the ground that after one of the condensers had been delivered, and the proceeds therefor became an account receivable, the assignee's claim attached as a lien on the proceeds. 30

Appellant is not in this position, in the present case, as it has no equitable lien. It can have only a statutory lien which attaches on the fund when a notice is filed; this fund, having passed to and vested in the receiver, no lien can attach thereon which the receiver must recognize in the distribution of the assets.

## POINT V.

### THE RECEIVER ELECTED TO COMPLETE THESE CONTRACTS FOR THE BENEFIT OF ALL THE CREDITORS.

10 But this action by the receiver did not give appellant a right to file a lien against the fund earned by the receiver in completing the contracts for the benefit of all the creditors.

The receiver, on his appointment, found upon the ground, and there had actually been delivered to the contractor, the material furnished by the appellant, which was the property of the company; a return thereof could not have been demanded. The receiver used this property of the company in finishing the contracts, and 20 he assumed no obligations of the company when he elected to complete the work.

Appellant applied to the Court of Chancery to amend its bills of complaint by adding thereto an allegation that the material furnished by it was used by the receiver in finishing the work, and asserted a right to a lien for the value of the material furnished to the contractor.

The receiver, while finishing the incompleted work, was not a contractor. Under the act (Comp. Stat., pp. 3319–41) any claimant may enforce his claim against 30 said fund designated, and against the *person or persons liable for the debt.* The receiver is not liable for the debt, nor is he a contractor.

By this amendment appellant seeks to establish an equitable lien on the funds now in the receiver's hands. Such a claim cannot be established in this proceeding,

which is a strictly statutory proceeding, and an action *in rem.*

The bill as amended bears a dual character—

*First.* A foreclosure of appellant's lien for materials furnished, purely a statutory proceeding.

*Second.* For relief upon equitable grounds against the receiver, who, in the completion of the municipal contracts, used the materials which had been furnished and delivered to the company, and were upon the ground, but which had not been used in the work at the time the receiver was appointed or when the notices of liens were filed. 10

No lien was nor could be filed against the receiver.

These proceedings under the statute can only be brought to enforce and foreclose the specific liens given by the statute; appellant cannot therein set up an equitable lien against the receiver.

"Suits to ascertain and enforce the statutory liens must be brought in the Court of Chancery." Delafield Construction Co. *v.* Sayre, 60 L. 449. 20

There can be no personal judgment given in favor of the contractor against the municipality in case the fund exceeds all claims. Norton *v.* Sinkhorn, 63 Eq. 313.

Section 7 of the act provides that plaintiffs must make all parties who have filed claims, parties defendants, that the court may decide as to the extent, justice and priority of the claims of all the parties to the action.

## POINT VI.

THE ASSIGNMENTS OF THE CONTRACTS TO THE BANK ARE NOT VOID UNDER SECTION 64 OF THE CORPORATION ACT. 30

The assignments by the Citizens Construction Company of its contracts to the Broad Street National Bank to secure advances, are not void under the sixty-fourth section of the Corporation act (Comp. Stat., p. 1638),

and do not fall within the authority of the case of Cope *v.* Walton, 77 Eq. 512; S. C., 79 Eq. 165; Agnew *v.* Paterson, 83 Eq. 49; S. C., 83 Eq. 336, 339.

In the case of Cope *v.* Walton the assignment was made by a corporation known to the assignee to be insolvent at the time he took the assignment.

In the present case, the Citizens Construction Company had only been organized in the month of April; it had not undertaken to do any work, or assumed any obligations until the acceptance of the contracts with the city of Trenton, against which these liens are filed, and one small contract at Woodbury. The company owed no debt; part of the material had been furnished by appellant, but the debt was not due at the time the assignments were made to the bank, nor was the corporation insolvent.

At the time the bank loaned this money the company was in good financial standing, had incurred no obligations it had not up to that time paid, and there was no debt due to any creditor; and it had, at least, in addition to the money so borrowed, and the work partially completed under the contracts, all the tools and appliances and machinery for which it had issued its capital stock. Moreover, the company had not suspended its ordinary business; it was actively engaged in prosecuting the same and continued to do so until September 17th following, six or seven weeks after the date of the loan.

The mere placing of other and additional collateral with the bank to secure present or future loans is no evidence of insolvency.

## POINT VII.

THE ASSIGNMENT TO THE BANK WAS GIVEN BY THE COMPANY IN THE USUAL COURSE OF ITS BUSINESS.

Appellant contends that the assignments were not authorized by the company, that the same were the act of an officer of the company without any authority on the part of the company.

The answer to this contention is that the treasurer of the company borrowed this money for the uses of the company in the regular course of its business, and his action was fully ratified and confirmed by the directors.

The case of Budke *v.* Schalkenbach & Budke, Incorporated, in this court, decided June 14th, 1915, and reported in 94 Atl. 586, is cited by appellant to sustain its contention that the assignments are not the acts of the company. It was held in that case that the general authority of the president of a business corporation does not warrant him in transferring contracts made by the corporation, nor in assigning money not yet earned under such contract. In that case there was no proof that the execution of the assignment was either authorized or ratified by the board of directors. In the case at bar, the act of the treasurer was ratified by the board of directors. The directors of the company had knowledge of the fact that the treasurer had borrowed for the use of the company the money from the bank (see testimony of Riley and Wm. McGovern), and with this knowledge before them the board of directors ratified the action of its treasurer and general manager, and of its vice president, in the giving of these assignments to the bank.

The bank discounted the two notes in question and placed the proceeds to the credit of the Citizens company on the books of the bank (Katzenbach's testimony), and the proceeds of these discounts was used by the company for its own purposes.

In the Budke-Schalkenbach case the assignment was of the entire contract without the knowledge of the officers or treasurer of the company. It was signed by the president alone. The proceeds of the loan made on the strength of the assignment of the contract was placed to the credit of the personal bank account of the president, who negotiated the loan. The claimant in that case could not earmark the specific items which were paid out of the moneys which he had advanced, and therefore he could neither establish a specific lien, which he claimed

on the fund arising out of the contract, nor even a general lien as against the company, because the testimony shows that the claimant turned over to the president of the company a cashier's check drawn to the claimant's order, by him endorsed, and also endorsed by Schalkenbach & Budke, Incorporated, Robert M. Schalkenbach, President, and then endorsed by Robert Schalkenbach, and by him deposited to his own personal credit.

For the reasons hereinbefore given it is respectfully
10 submitted that the decree below should be affirmed and these appeals dismissed.

PETER BACKES,
*Of Counsel with J. Clarence Richardson,*
*Receiver-Respondent.*

# INDEX.

EXHIBITS.

# New Jersey Court of Errors and Appeals.

| | |
|---|---|
| MACK MANUFACTURING CO., Complainant-Appellant, and CITIZENS CONSTRUCTION COMPANY, J. CLARENCE RICHARDSON, SR., Receiver, BROAD STREET NATIONAL BANK OF TRENTON, and the MAYOR AND COMMON COUNCIL, OF THE CITY OF TRENTON, Defendants-Respondents, | No. 1—Hart Avenue. On Appeal from Chancery. V. C. Leaming. |
| MACK MANUFACTURING CO., Complainant-Appellant, and CITIZENS CONSTRUCTION COMPANY, J. CLARENCE RICHARDSON, SR., Receiver, BROAD STREET NATIONAL BANK, MAYOR AND COMMON COUNCIL OF THE CITY OF TRENTON, JOSEPH R. RICHARDSON & SON, and FRANK E. AREND, Defendants-Respondents. | No. 2—Swan Street. |

These two cases were tried together but one opinion was rendered. The decrees are the same with the exception of names of defendants, there being certain lien claimants in the second suit, not parties to the first. Suit No. 1 is that involving the construction of Hart Avenue, in which suit

Joseph R. Richardson & Son, and Frank E. Arend are not parties, and Suit No. 2 is that involving the construction of Swan Street, in which suit the last named are parties.

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## PLEADINGS IN SUIT No. 1.---HART AVENUE.

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### Notice of Appeal.

To Peter Baches, Esq., Solicitor for Receiver of Defendant Company.

George McPherson, Solicitor for Broad Street National Bank.

Sirs:

The complainant hereby appeals from the final decree made herein by his Honor, the Chancellor, on the 21st day of December, 1915, and from each and every part of such final decree, to the New Jersey Court of Errors and Appeals in the last resort in all causes.

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Dated December 30, 1915.

MERRITT LANE,
Solicitor for and of
Counsel with Complainant.

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

Dated December 30, 1915.

MERRITT LANE,
Of Counsel with Complainant.

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### Petition of Appeal.

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

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The petition of the Mack Manufacturing Company, the appellant in the above stated cause, re-

spectfully shows that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, upon the 21st day of December, 1915, wherein the said Mack Manufacturing Company was complainant and the said Citizens Construction Company,. J. Clarence Richardson, Sr., Receiver of the Citizens Construction Company, Broad Street National Bank of Trenton, and the Mayor and Common Council of the City of Trenton were defendants, in this respect, to-wit:

That said decree adjudges that money was advanced upon the assignment of the Broad Street National Bank of Trenton to the contractor corporation after the making of the contract with the City of Trenton, and before the receiver was appointed and qualified; and in this respect, to-wit, that the decree adjudges that the bill of complaint filed in this cause must be dismissed, and that therefore the rights of the bank on its said claim cannot be properly adjudicated; and in this respect, to-wit, that the said decree adjudges and determines that the complainant by the serving of its said notice of lien with the officials of the City of Trenton, and the filing of its bill of complaint to enforce a lien pursuant to the directions of the statute, acquired no lien under the provisions of said statute on the fund arising from the contract made between the Citizens Construction Company and the City of Trenton for the paving of Hart Avenue, and that upon the ground that a receiver had been appointed under the statutes of the State of New Jersey in such case made and provided; and in this respect, to-wit, that the said decree adjudges that upon making the decree in this cause appointing the receiver for the Citizens Construction Company, issuing

the injunction, and the qualifying of said receiver under said decree, the said company was divested of its title to its assets and the title to the same was forthwith vested in the receiver, subject only to the liens existing at the time of the receiver's appointment; and in this respect, to-wit, that the said decree adjudges that the controversy between the complainant and the receiver touching the ownership of certain materials used by the receiver in and about the completing of said municipal contracts by the receiver cannot be determined in this action; and in this respect, to-wit, that the said degree adjudges that the complainant's bill in this cause is wholly based on a claim of lien asserted by it under the provisions of the aforesaid municipal lien act, which claim of lien must fail for the reason that the property of the insolvent corporation was placed in *custodia legis* at the time of the appointment of said receiver and prior to the filing by the complainant of its notice of lien, and therefore complainant's claim of lien could not attach thereon, and that the action in this suit must fail; and in this respect, to-wit, that the controversy between the complainant, its action failing for the reason aforesaid, and the said Broad Street National Bank of Trenton, cannot therefore be properly adjudicated in this suit; and in this respect, to-wit, that the said final decree orders, adjudges and decrees that the complainant acquired no lien under its notice filed in accordance with the provisions of the aforesaid municipal lien act, and that therefore the bill filed in this cause must and the same was thereby dismissed with costs.

And your petitioner humbly appeals from the said decree and from each and every part thereof upon the ground that the same is erroneous for that the Court should have adjudged and declared

that the lien of the complainant, the Mack Manufacturing Company, was a valid and subsisting lien upon the moneys in the hands of the City of Trenton, and that the appointment of the receiver did not prevent the said Mack Manufacturing Company from perfecting its lien by the filing of notice and pursuing the statutory procedure, and that it should have been adjudged and declared that the receiver by virtue of the order empowering him so to do took over the contracts under which the said complainant had a lien cummonere, and that upon the completing of said contracts the lien of the complainant became effective as against the receiver, and that the said court should have adjudged and decreed that at least for the value of so much of the material of the complainant which was used by the said receiver the said complainant had a valid and subsisting lien, and in that the said court should have adjudged and decided the equitable rights of the complainant arising upon the facts, and in that the Court should have adjudged and decided that the assignment of the Broad Street National Bank of Trenton was invalid and ineffective for that:

1. No moneys were proven to have been advanced upon said assignment.

2. The said assignment was not shown to have been duly authorized by the said Citizens Construction Company.

3. Because the corporation was insolvent at the time of its attempted authorization, and the said assignment is void under the Corporation Act, Sections 64 and 65, the resolution being passed in contemplation of insolvency and after the company had actually suspended its business.

4. Because the assignment is of moneys to be-

come due to the Citizens Construction Company, whereas no moneys became due to that company.

5. Because the corporation was insolvent at the time of the advance by the Broad Street National Bank in August, 1914, and the alleged delivery of the assignments, and the bank had knowledge of such insolvency or of such facts as to put it upon inquiry.

6. Because the bank waived the benefit of the collateral when it received moneys from the City of Trenton, and instead of applying them to the payment of the loan secured by the bank permitted it to be taken by the Citizens Construction Company thus in reality creating a new loan unsecured.

7. Because the bank had other collateral and will be obliged to enforce its rights against the other collateral the lien claimants having no other fund to resort to.

8. And for that also the said court should have determined in any event that there was an amount due to the Citizens Construction Company upon the contracts upon the day of the appointment of the receiver, and at least to the extent of such fund the lien is effective, and for that it should have been held that by reason of the completion of the contracts by the receiver he has so mingled the fund as to make the entire fund liable to the lien, and for that the Court should have adjudged and decreed that the Mack Manufacturing Company had a valid and subsisting lien upon the funds in the hands of the City of Trenton which lien should be first paid out of such fund.

Your petitioner prays that the said decree of the said Chancellor may be in the particular aforesaid reversed, set aside and for nothing holden, and that the record may be remitted to the Court

of Chancery with the direction to enter a decree in accordance with the prayer of the bill of complaint, and that your petitioner may have such further relief in the matter as to your Honor shall seem meet.

MERRITT LANE,
Solicitor for and of Counsel with Appellant.

(Formal answers filed.) 10

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## Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

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

Complaining shows unto your Honor, your orator, Mack Manufacturing Company, a corporation of the State of Pennsylvania. 20

1. That on or about the 1st day of July, 1914, the Mayor and Comon Council of the City of Trenton, through its Board of Commissioners and Department of Streets and Public Improvements and the Commissioner in charge of the Department of Streets and Public Improvements entered into a certain contract with the Citizens Construction Company for the praving of Hart Avenue from Clinton to South Hurley Street, in the City of Trenton. 30

2. That the said Citizens Construction Company performed a part of said work and that thereafter by an order of this Court one J. Clarence Richardson, Sr., was appointed Receiver of said Citizens Construction Company under the statute in such case made and provided and that thereafter the said Receiver did complete all of the work which was to be performed as specified in the said 40

contract and specifications, which said contract and specifications your orator proffers and begs leave to refer so that there is now due from the City of Trenton for work performed in accordance with said contract the sum of approximately $6,-529.40.

3. That on or about the 29th day of June, 1914, the said Citizens Construction Company entered into a written contract, a copy of which is annexed hereto and to which your orator begs leave to refer under which said written contract your orator agreed to sell and the said Citizens Construction Company agreed to purchase approximately $284,340 of Mack repressed paving block for use in paving Hart Avenue from Clinton to South Hurley Street, 3,250 square yards, and for Swan Street from Hudson to Chestnut Street 3,520 square yards the City of Trenton, State of New Jersey, and said paving block to be delivered in carloads at Trenton, New Jersey, for the price of $27.50 a thousand; that said paving block was intended to be used in the performance of the contract hereinbefore referred to and for the paving of Swan Street under a similar contract entered into between the Citizens Construction Company and the Mayor and Common Council of the City of Trenton, to which contract your orator begs leave to refer, your orator showing that it has a claim upon the proceeds of the Swan Street contract for which it has filed a lien and a suit to enforce which it brings simultaneously herewith and to which suit and the proceedings thereunder it begs leave to refer; that upon the 7th day of October, 1914, and also upon the 13th day of October, 1914, there was due to your orator for brick furnished in accordance with such contract after deducting all credits and offsets and for brick actually used for the paving of Hart Avenue from

Clinton to South Hurley Street, in the City of Trenton under the contract between the said City of Trenton and the Citizens Construction Company aforesaid the sum of $2,309.92; that said brick were furnished to the said contractor and were actually used in the execution and completion of the contract of the said contractor with the City of Trenton; that upon the 7th day of October, 1914, and before the whole work to be performed by the contractor under said contract was completed or accepted or within fifteen days after the same was so completed and accepted your orator filed with Edward W. Lee, as Commissioner of Finance of the City of Trenton and also with him as Comptroller of the City of Trenton and also with Harry E. Evans, Treasurer of the City of Trenton and also with J. Ridgeway Fell, Commissioner of Streets and Public Improvements, and also with the Department of Revenue and Finance of the City of Trenton and also with the Department of Street and Public Improvements of the City of Trenton a notice of lien under the provisions of the statute in such case made and provided, a copy of which said notice is hereto annexed and made a part hereof; that at the time said notice was filed as aforesaid there was justly due to your orator for materials furnished for the paving of Hart Avenue from Clinton to South Hurley Street and for materials furnished for the paving of Swan Street from Hudson to Chestnut Streets, in the City of Trenton, under a contract entered into upon the 1st of July, 1914, between the Citizens Construction Company and the City of Trenton as aforesaid, and under a contract entered into between the Citizens Construction Company and your orator, a copy of which is annexed hereto and to which your orator begs leave to refer, the sum of $4,811.75, $2,309.92 of which was

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for materials furnished in the execution of the contract with respect to Hart Avenue and $2,501.83 of which was for the materials furnished for use in the paving of Swan Street; that the brick was furnished by your orator for both contracts between the Citizens Construction Company and the City of Trenton, in pursuance of the terms of a single contract between your orator and the Citizens Construction Company; that the statements contained in said notice and in the affidavits thereto annexed and in the accounts thereto annexed are true; that copies thereof are annexed to this bill of complaint and made a part hereof; that on the same day your orator caused to be filed with the Financial Officer of the said City of Trenton a bond in a sum fixed by said Financial Officer at twenty per cent. of the amount claimed in said notice and conditioned in accordance with the statute in such case made and provided and your orator claims and insists that it complied with all of the provisions of said statute.

4. Your orator further shows that on the 19th day of October, 1914, and before the work under such contract was completed or accepted by the said City of Trenton or within fifteen days after the same was so completed or accepted it caused to be filed with the Mayor and Common Council of the City of Trenton, the Treasurer of the City of Trenton, the Comptroller of the City of Trenton, the Commissioner in charge of the Department of Streets and Public Improvements and the Commissioner in charge of Revenue and Finance of the City of Trenton, a notice, a copy of which is hereto annexed and made a part hereof claiming that there was due to your orator from the Citizens Construction Company the sum of $2,309.92 after deducting all just credits and offsets, and that said debt accrued by reason of brick fur-

nished by your orator to the Citizens Construction Company for the paving of Hart Avenue from Clinton to South Hurley Street, in the City of Trenton, under a contract between the said City of Trenton and the Citizens Construction Company bearing date the 1st of July, 1914, as aforesaid; that the statements contained in said notice were true, and your orator begs leave to make them a part of this bill of complaint; that at the same time your orator caused to be filed with the Financial Officer of the said City of Trenton a bond in a sum fixed by said Financial Officer at twenty per cent. of the amount claimed in said notice conditioned as set forth in the statute, and your orator claims and insists that it has complied with all of the provisions of the statute in such case made and provided.

5. Your orator further shows that the Broad Street National Bank of Trenton claims and insists that on or about the 5th day of August, 1914, the Citizens Construction Company executed and delivered to it to secure said bank for the sum of $5,000 borrowed by the said Citizens Construction Company from the said bank to carry out the contract made by said company with the said City of Trenton for the paving among other streets of Hart Avenue an assignment in writing wherein and whereby the said company did assign, transfer, and set over unto the said Broad Street National Bank of Trenton any and all sums of money then accrued or to grow due from said City of Trenton by reason of or on account of the contract above referred to; that the said company did give to the said Broad Street National Bank of Trenton, its successors and assigns, full power to collect and receive from the said City of Trenton any and all sums of money so due to the said Bank, and that the said Bank claims that it advanced in all upon

said assignment the sum of $5,000, and that there is due to said Bank the sum of $5,000 and claims that it gave notice of such assignment and of said order by the said Citizens Construction Company to the Comptroller of the City of Trenton; your orator claims and insists:

1. That no such amount was advanced by the Broad Street National Bank of Trenton.

2. That large amounts were repaid on account of such moneys as were advanced.

3. That there is not due to the said Broad Street National Bank of Trenton the sum of $5,000 or any such sum.

4. That such assignment is not in form sufficient to defeat the lien of your orator's claim.

5. That your orator's claim is prior to the said assignment of the Broad Street National Bank of Trenton as matter of law and your orator claims and insists that any interest the said Broad Street National Bank of Trenton may claim is subject and subsequent to the lien and operation of your orator's claim.

6. Your orator further claims and insists that the Receiver of the Citizens' Construction Company is obliged to pay out of the free moneys in his hands said claim of the Broad Street National Bank of Trenton, or on account thereof so much as he may have money to pay, and that the Broad Street National Bank in any event is not entitled to claim more than what there may remain due, and your orator further shows that the Broad Street National Bank of Trenton also has under its assignment the right to resort, as it claims, to other funds, to wit, that arising from the paving of Swan Street, and that from the paving of Market Street, and your orator claims and

insists that it is obliged to first resort to such fund before resorting to the fund upon which your orator has a lien.

7. Your orator further shows that to its knowledge no other claims have been filed with the City of Trenton upon the fund arising from the paving of Hart Avenue and your orator claims and insists that it has a lien upon said fund to the extent of at least the sum of $2,309.92.

In consideration whereof and forasmuch as your orator is without adequate relief in the premises at and by the strict rules of the common law, but as this Court has full and complete jurisdiction in the premises, where matters of this nature are properly cognizable and relievable; to the end therefore that the said defendants, the Citizens Construction Company, J. Clarence Richardson, Sr., Receiver of the Citizens Construction Company, Broad Street National Bank of Trenton, the Mayor and Common Council of the City of Trenton, may, but without oath, the same being expressly waived, full, true and perfect answer make to all and singular the matters aforesaid, as fully and particularly as if they were here again repeated and they and each of them distinctly interrogated thereto, and that the said Mayor and Common Council of the City of Trenton and its agents may be enjoined and restrained from paying such sum of $6,529.40 to the said Citizens Construction Company or to the Receiver of the said Citizens Construction Company or anybody for him, and that the validity of the lien of your orator as aforesaid shall be determined; that the amount due from the Mayor and Common Council of the City of Trenton to the said Citizens Construction Company or J. Clarence Richardson, Sr., its Receiver, may be determined, and

that the validity of the claim of the Broad Street National Bank of Trenton may be determined, and the priority of your orator's claim, and that the claim of the Broad Street National Bank of Trenton, if any, may be determined, and a decree may be made that your orator is entitled to be paid said sum of $2,309.92 and to receive the same from the Mayor and Common Council of the City of Trenton, and that the same may be paid by the Mayor and Common Council of the City of Trenton to your orator, together with interest and costs, and that your orator's lien may be foreclosed, and that your orator may have such other and further relief in the premises as the nature of the case may require, and as may be agreeable to equity and good conscience, your orator showing that it simultaneously herewith has filed a bill to enforce its lien against the fund arising from the paving of Swan Street as aforesaid, and your orator shows that such suits should be consolidated and your orator so prays.

May it please your Honor, to grant unto your orator, not only the State's writ of injunction, issuing out of and under the seal of this honorable Court, directed to the said Mayor and Common Council of the City of Trenton, restraining it as aforesaid, but also the State's writ of subpœna, issuing out of and under the seal of this Honorable Court, directed to the said Citizens Construction Company, J. Clarence Richardson, Sr., Receiver of the Citizens Construction Company, Mayor and Common Council of the City of Trenton and the Broad Street National Bank of Trenton, therein and thereby commanding them and each of them, at a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor, then and there to answer the premises and to stand to, abide by and

perform such order and decree as to your Honor shall seem meet.

And your orator as in duty bound will ever pray, etc.

MERRITT LANE,
Solicitor for and of Counsel
with Complainant.

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**Motion to Dismiss Bill.**

Please take notice, that on Tuesday, the twelfth day of January, nineteen hundred and fifteen, at the hour of 10:30 o'clock in the forenoon on said day, that I shall apply to his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, at the State House in the City of Trenton, for an order to dismiss the bills of complaint filed in a cause wherein Mack Manufacturing Company is complainant, and Citizens Construction Company, J. Clarence Richardson, Sr., Receiver of the Citizens Construction Company, Broad Street National Bank of Trenton, and the Mayor and Common Council of the City of Trenton, are defendants, to enforce a certain municipal lien filed by said Mack Manufacturing Company for materials by it furnished for the paving of Swan Street in the Ctiy of Trenton, under a contract made by the Board of Commissioners of the City of Trenton with the Citizens Construction Company, which lien was filed on the seventh day of October, nineteen hundred and fourteen, and an amended notice of said lien being filed October nineteenth, nineteen hundred and fourteen; and on said hearing, I will urge the Chancellor to dismiss said bill of complaint for the following reasons:

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1. Because at the time of the filing of the first notice of lien, the materials supplied by the com-

plainant had not been actually used in and about the completion of said contract.

2. Because under the first notice so served, the complainant claimed a lien for materials furnished upon two separate and distinct contracts made by the Board of Commissioners with the Citizens Construction Company, namely, a contract for the paving of Swan Street, and another contract for the paving of Hart Avenue.

3. Because the complainant in and by its bill admits the appointment by this court of J. Clarence Richardson, Sr., as receiver of the said Citizens Construction Company, under the statute in such case made and provided.

4. Because at the time of the filing of said lien and the supplemental notice thereunder, there was no fund due or to grow due to the Citizens Construction Company from the City of Trenton.

5. Because the appointment of said receiver by this court was made and the receiver qualified before the complainant filed its notices of lien.

6. Because complainant had no lien upon any fund arising out of said contracts at the time it filed its notices.

7. Because on the eighteenth day of September, nineteen hundred and fourteen, at the time of the appointment of J. Clarence Richardson, Sr., receiver of the Citizens Construction Company, all right, title and interest of the said company in and to all the real and personal property of the said company wheresoever situate forthwith vested in the said receiver, and the said company was divested of its title thereto.

8. Because at the time of the filing of the notices

of lien by the complainant, pursuant to the statute, there was no fund due to the Citizens Construction Company under said contract upon which the lien of the complainant would attach.

9. Because the complainant is not entitled to any lien upon said fund by reason of it having furnished materials to the said Citizens Construction Company, for the completion of said work. 10

10. Because the complainant could not acquire any lien upon the said fund after the appointment of said receiver.

11. Because complainant's notices were filed after the appointment of said receiver, and therefore, created no lien and could not secure a lien upon said fund.

12. Because complainant has no lien on the 20 funds in the hands of the Board of Commissioners of the City of Trenton arising out of said contract.

PETER BACKES,
Solicitor of Receiver.

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**Opinion of Chancellor on Motion to Dismiss.**

On motion to dismiss bill.

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Mr. PETER BACKES, for the Motion.
Mr. MERRITT LANE, *contra.*

WALKER, C.:

This is a motion to dismiss a bill of complaint under Rule 213 of this Court, and is tantamount to a demurrer.

The bill was filed to enforce a lien under the municipal lien act which provides that the complainant must make all parties, who have filed 40

claims, defendants, and that the Court may decide as to the extent, justice and priority of the claims of all the parties to the action.

It is my opinion that the bill in such a suit as this may not be dismissed upon the motion of a defendant, but that the cause must go to final hearing and then be disposed of, as to all parties, on the law and the facts. This leads to the denial of the motion.

The complainant asks leave to amend its bill by adding an averment that the Receiver assumed the contract in question and completed the same and in its completion used the materials which had been furnished by the complainant to the contractor, and that, therefore, the complainant retained the right to file a lien, etc. The amendment will be allowed. Its ultimate validity will be determined on the hearing. Costs to abide the event.

Order denying motion to dismiss duly entered.

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## Amendment to Bill of Complaint.

On notice an order permitting an amendment to the bill was made and the following amendment was filed.

Amend the bill of complaint in the above entitled matter by inserting the following provisions:

"Your orator further shows that at the time of the appointment of the Receiver as aforesaid none of the brick furnished by your orator had been used upon the street; that subsequent to his appointment the said Receiver under the orders of this Court assumed the contract between the said Citizens Construction Company and the City of Trenton and completed the same and that in the completion of such work he used the brick which

had been furnished by your orator and which at the time the said Receiver was appointed your orator was entitled to reclaim the same, the same not having been paid for and being in the control of the complainant in cars, and your orator claims and insists that when the said Receiver assumed the obligations of the contract between the Citizens Construction Company and the City of Trenton and assumed to complete the same, taking and using the brick of your orator as aforesaid he stood in the shoes of the Citizens Construction Company and your orator retained the right to file a lien for the value of said brick under the Municipal Lien Act."

MERRITT LANE,
Solicitor for Complainant.

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**Answer of Broad Street National Bank.**

The answer of the Broad Street National Bank of Trenton to the bill of complaint in the above stated cause:

1. This defendant admits that on or about the first day of July, nineteen hundred and fourteen (July 1, 1914), the Mayor and Common Council of the City of Trenton, through its Board of Commissioners and Department of Streets and Public Improvements, and the Commissioners in charge of the Department of Streets and Public Improvements entered into the contract referred to in the said bill of complaint with the Citizens Construction Company, for the paving of Hart Avenue from Clinton to South Hurley Street, in the City of Trenton, as set forth in Paragraph One of the said bill of complaint.

2. It admits that the Citizens Construction Company performed a part of the work of paving Hart Avenue from Clinton to South Hurley

Street, in the City of Trenton; and it admits that by an order of this Court one J. Clarence Richardson was appointed Receiver of the said Citizens Construction Company, and has been informed and believes that the said Receiver completed all of the work of paving said Hart Avenue, and is informed and believes it to be true that there is due from the City of Trenton for said work approximately the sum mentioned in said bill of complaint, as set forth in Paragraph Two of said bill.

3. This defendant has no knowledge save from the said complainant's bill that on or about the twenty-ninth day of June, nineteen hundred and fourteen (June 29, 1914), or at any other date, the said Citizens Construction Company entered into a written contract (a copy of which is claimed to be annexed to said bill), under which the said complainant agreed to sell and the said Citizens Construction Company agreed to purchase the amount and kind of brick for use in paving Hart Avenue aforesaid, or for the paving of Swan Street, nor the price that was to be paid therefore; nor has it any knowledge that said paving block was intended to be used in the performance of the contract between the City of Trenton and the said Citizens Construction Company; nor has it any knowledge that said complainant has filed a claim upon the proceeds of the Swan Street contract, or that said complainant has filed any lien and suit to enforce such claim; nor has it any knowledge as to the amount due or claimed to be due from the said Citizens Construction Company to the said complainant, and therefore leaves the said complainant to make such proof thereof as it is advised is necessary; nor has this defendant any knowledge that the said brick were furnished

to the said Citizens Construction Company or were actually used in the execution and completion of the contract of the said Citizens Construction Company with the City of Trenton; nor has it any knowledge save from said bill that the said complainant filed with Edward W. Lee, as Commissioner of Finance, and as Comptroller, or with any other officer of the City of Trenton, a notice of lien under provisions of any statute of this State; nor has it any knowledge how much, if anything, was due to the said complainant for materials furnished or claimed to have been furnished by it either for the Hart Avenue paving or for the Swan Street paving, or what portion of it was for materials furnished with respect to the paving of Hart Avenue, or what portion of it was for materials furnished for the paving of Swan Street, nor under what contract said brick was furnished, but will leave the said complainant to make such proof thereof, and also proof of the statements contained in the notices above referred to, or in the affidavits annexed thereto, as it is advised is necessary; nor has it any knowledge as to whether the said complainant filed or caused to be filed with the Financial Officer of the City of Trenton the bond referred to in said bill, but will leave the said complainant to make such proof thereof as it is advised is necessary, but this defendant denies that the said complainant has complied with all the provisions of the statute of the State of New Jersey in order to enable the said complainant to have a lien upon the moneys due from the City of Trenton for said work of paving said streets, as set forth in Paragraph Three of the said bill of complaint.

4. This defendant further answering says that it has no knowledge save from said complainant's bill

that on the nineteenth day of October, nineteen hundred and fourteen (October 19, 1914), or at any other time, the said complainant caused to be filed with the Mayor, the Common Council of the City of Trenton and the other officers named in Paragraph Four of said bill the notice referred to in said bill, claiming there was due to said complainant from the Citizens Construction Company the sum set forth in said bill of complaint, or any other sum; nor has it any knowledge that if said notice was filed that the statements contained in said notice were true; nor has it any knowledge that at the same time or at any other time, the said complainant caused to be filed with the Financial Office of the City of Trenton the bond referred to in Paragraph Four of the said bill, but this defendant denies that the said complainant has complied with all the provisions of the statute of the State of New Jersey, so as to enable the said complainant to have a lien upon any of the moneys due for the paving of either of the said streets, as is claimed and set forth in Paragraph Four of the said bill of complaint.

5. This defendant further answering said bill of complaint says that it is true that on or about the fifth day of August, nineteen hundred and fourteen (August 5, 1914), the Citizens Construction Company executed and delivered to this defendant an assignment in writing wherein and whereby the said Citizens Construction Company assigned, transferred and set over unto this defendant any and all sums of money then accrued or to grow due from the City of Trenton by reason and on account of the contracts, made between the City of Trenton and the Citizens Construction Company for the paving of Hart Avenue and Swan Street, in the City of Trenton, and that the said Citizens Construction Company did give to this

defendant, its successors and assigns, full power to collect and receive any and all sums of money so due to this defendant; that said assignment is now in the possession of this defendant ready to be produced and proved as this Honorable Court shall direct; and this defendant insists that it is true that this defendant loaned and advanced to the said Citizens Construction Company the sum of $5,000, and that it is true that there is due to this defendant the said sum of $5,000, together with interest; and further says that it is true that this defendant gave noice of such assignment so as aforesaid made by the Citizens Construction Company to the Comptroller of the City of Trenton.

And this defendant further answering Paragraph Five of said bill of complaint denies Subdivision One of Paragraph Five of said bill of complaint that no such amount of money was advanced by the Broad Street National Bank of Trenton to the Citizens Construction Company, but on the contrary it asserts and insists that said sum of money was advanced and paid to the said Citizens Construction Company.

And this defendant further answering Subdivision Two of said Paragraph Five of said bill of complaint denies that large amounts were repaid on account of such moneys as were advanced, but on the contrary no part thereof of said sum so advanced has been repaid.

And this defendant further answering Subdivision Three of said Paragraph Five of said bill denies that there is not due to this defendant the sum of $5,000, or any such sum, but on the contrary it asserts and declares that there is due to this defendant the said sum of $5,000 together with interest.

And this defendant denies Subdivision Four of

Paragraph Five of said complainant's bill to the effect that such assignment is not in form sufficient to defeat the lien of said complainant's claim, but on the contrary it asserts and declares that such assignments is good both in form and substance to establish and maintain the right of this defendant to said sum of money so advanced to the said Citizens Construction Company, and sufficient to defeat the lien of the said complainant, so far as regards the sum of $5,000, with interest, due to this defendant.

6. And this defendant further answering that the complainant's claim is prior to the said assignment so as aforesaid made to this defendant as matter of law, and denies that the interest and claim of this defendant is subject and subsequent to the lien and operation of the said complainant's claim, but on the contrary it asserts and declares that the claim of this defendant is prior to the claim of the said complainant.

7. And this defendant further answering said bill denies that it, this defendant, must resort to other funds in the hands of the City of Trenton, or any officer of the City of Trenton, before resorting to the fund due for the paving of Hart Avenue, upon which the said complainant claims a lien, but on the contrary this defendant insists that it is entitled to receive the sum of $5,000, besides interest, from any funds which are covered by the assignment aforesaid and without reference to any lien of the said complainant.

8. And this defendant further answering said bill denies that the said complainant has any lien upon the funds in the hands of the City of Trenton due from the City of Trenton for the paving of Hart Avenue that is prior to the claim of this defendant.

All which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

GEORGE W. McPHERSON,
Solicitor and of Counsel,
With Broad Street National 10
Bank of Trenton.

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**Answer of the Citizens Construction Company and J. Clarence Richardson, Sr., Receiver.**

This defendant, J. Clarence Richardson, Sr., Receiver of the Citizens Construction Company, admits the first and second paragraphs of said 20 bill of complaint.

Answering the third paragraph of said bill of complaint, this defendant admits that the Citizens Construction Company made the contract with the complainant therein mentioned, and that such materials so contracted for were to be used in the paving of Hart Avenue, from Clinton Street to South Hurley Street, and on Swan Street, from Hudson Street to Chestnut Avenue, 30 but that the materials so contracted for by said company with the complainant were for two separate and distinct contracts which the Citizens Construction Company had with the Board of Commissioners of the City of Trenton.

This defendant admits that on the seventh day of October, nineteen hundred and fourteen, complainant filed with Edward W. Lee, as Commissioner of Finance, and with Harry E. Evans, 40 Treasurer, a notice of lien embracing a claim made upon both of said contracts, and claiming a

sum due to it for materials furnished on both of the said contracts; that said lien was filed in pursuance of the terms of a single contract which the said Citizens Construction Company had with the said complainant.

And further answering, this defendant admits that on the nineteenth day of October, nineteen hundred and fourteen, the complainant filed with the Comptroller of the City of Trenton, the Commissioner in charge of Public Improvements, and the Commissioner in charge of the Revenue and Finances of said City, another notice, claiming that there was due to it from the Citizens Construction Company, the sum of twenty-three hundred and nine dollars and ninety-two cents ($2309.92) for brick by it furnished for the paving of Hart Avenue from Clinton Street to South Hurley Street, under a contract between the said City of Trenton and the Citizens Construction Company, dated July first, nineteen hundred and fourteen.

And further admits that complainant filed its bond pursuant to the statute.

This defendant denies that the said complainant complied with all the provisions of the statute in such case made and provided.

This defendant further denies that there was due to the said complainant on the seventh day of October, or on the nineteenth day of October, nineteen hundred and fourteen, from the Citizens Construction Company, the sums of money so set forth in its notices of lien.

Answering the fifth paragraph of said bill of complaint, this defendant admits that the Broad Street National Bank holds an assignment for the sum of five thousand ($5,000) dollars loaned the Citizens Construction Company on the fifth day of August, nineteen hundred and fourteen,

and that said assignment was filed and due notice thereof given to the Comptroller and Treasurer of the City of Trenton, and that he is informed and believes it to be true that the said bank did advance to the said Citizens Construction Company the sum of five thousand ($5,000) dollars; that no part thereof has been paid; that the whole amount thereof still remains due and payable, and that the said assignment is in form sufficient to give it a prior lien on the said funds, prior in point of time to the lien of the complainant.

Answering the sixth paragraph of said bill of complaint, this defendant, the Receiver of said company, denies that he is obligated to pay to the said Broad Street National Bank its said claim out of any moneys which have come to his hands as such Receiver, but that said moneys so received by him are held subject to the claims of the unsecured creditors, and for the payment of the administration of said receivership.

Answering the seventh paragraph of said bill of complaint, this defendant denies that the said complainant now has any claim or lien upon the funds arising out of the contract for the paving of Hart Avenue, amounting to the sum of twenty-three hundred and nine dollars and ninety-two cents ($2309.92), or on any other sum.

Answering the amendment to said bill of complaint this defendant admits that at the time of his appointment as Receiver, a large number of bricks supplied by the said complainant to the Citizens Construction Company, had not actually been placed in the pavement, but that all of the said brick had been delivered to the Citizens Construction Company, and the same had been hauled by the said Citizens Construction Company, after the payment of freight thereon,

and the delivery thereof to it on the ground and along the sidewalk and upon the roadway of Hart Avenue, ready to be placed in the work as the same progressed; that a full and complete delivery of the said brick had been made to the Citizens Construction Company previous to the appointment of this defendant as its Receiver, and that at the time of this defendant's appointment as Receiver, the said complainant had no right or authority, nor could have it reclaimed and taken to itself the possession of the said brick.

And further answering this defendant denies that he assumed the obligations of the said Citizens Construction Company. He admits that under the order of this Court he did make a contract with the Newton Paving Company to complete the said work, and this defendant denies that he now stands in the shoes of the said Citizens Construction Company;

And further denies that the said complainant retained its right to file a lien for the value of said brick under the said Municipal Lien Act against this defendant.

And further answering the said bill of complaint, this defendant says that on the eighteenth day of September, nineteen hundred and fourteen, Thomas J. McGovern and William McGovern, stockholders and creditors, on behalf of themselves and other creditors and stockholders, filed their bill in this Court, alleging that the said company had no funds necessary to carry on its business, and that said business had been carried on at a great pecuniary loss to the stockholders, and that it could not pay its just debts, and prayed for the appointment of a Receiver; and that on the eighteenth day of September, by an order made in said cause, J. Clarence Richardson, Sr., was

duly appointed Receiver of the said company with full power to demand, sue for, collect and receive, and to take into his possession all the goods and chattels, rights and credits, moneys and effects, books, papers, choses in action, bills, notes and property of any and every description belonging to the said Citizens Construction Company at the time of its suspension of business, and that said Receiver immediately qualified and assumed the duties of said office. 10

That on the twenty-ninth day of September, nineteen hundred and fourteen, by an order dated on said day, the said J. Clarence Richardson, Sr., was continued as Receiver of the defendant company with all the power and authority incident thereto conferred upon him by the order made appointing him Receiver, and especially by the act entitled, "An Act Concerning Corporations (Rev. of 1906), and the supplements thereto and amendatory thereof." 20

And further answering this defendant says: That by virtue of the orders aforesaid, the property of said company vested in him as Receiver, at the time of his appointment.

And further answering this defendant says: That at the time of said appointment, the complainant had no lien, nor was it entitled to any lien on the property so vested in him. 30

And further answering this defendant says: That the said complainant could not thereafter file or obtain a lien on the property of the said company so vested in him.

And further answering this defendant says: That the said complainant obtained no lien on the said funds now in the hands of the City of Trenton by reason of its notices so filed with the financial officers of said City of Trenton on the seventh day of October and on the nineteenth day 40

of October, nineteen hundred and fourteen, because:

1. Because said notice or notices were filed with the financial officers of the City of Trenton, after the appointment of this defendant as Receiver.

2. Because said Receiver became vested with the property of the said company free of all liens, on September eighteenth, nineteen hundred and fourteen, and before the notices of lien were filed, on October seventh, and October nineteenth, nineteen hundred and fourteen.

3. Because at the time complainant filed its notices there was no fund due or to grow due to the contractor from the City of Trenton under the contracts for which the said liens were filed, and there was no funds upon which any lien could attach.

4. Because complainant has no lien under its said notices so by it filed as set forth in its said bill, and

5. Because the said bill of complaint sets forth and admits the appointment of this defendant as the Receiver of the said defendant company before the filing by it of its said notices of lien.

This defendant further answering insists that the said complainant has no lien by reason of its notices so filed, on the funds belonging to said company for the reasons herein stated, and this defendant hopes he shall have the same benefit of this defense under this answer as if he had demurred to the said complainant's bill.

Solicitor of the Citizens Construction Company and J. Clarence Richardson, Sr., Receiver.

Decree *pro con* taken against the City of Trenton

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**Pleadings in Suit No. 2.---Swan Street.**

Notice of appeal. Same as Suit No. 1.

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Petition of appeal. Same as Suit No. 1, except change in name of street. 10

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**Bill of Complaint.**

IN CHANCERY OF NEW JERSEY.

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

Complaining shows unto your Honor, your orator, Mack Manufacturing Company, a corporation of the State of Pennsylvania: 20

1. That on or about the first lay of July, 1914, the Mayor and Common Council of the City of Trenton through the Board of Commissioners and Department of Streets and Public Improvements and the Commissioner in charge of the Department of Streets and Public Improvements entered into a certain contract with the Citizens Construction Company for the paving of Swan Street from Hudson to Chestnut Streets, in the City of Trenton. 30

2. That the said Citizens Construction Company performed a part of said work and that thereafter by an order of this Court one J. Clarence Richardson, Sr., was appointed Receiver of said Citizens Construction Company under the statute in such case made and provided and that thereafter the said Receiver did complete all of the work which was to be performed as specified in the said 40

contract and specifications which said contract and specifications your orator proffers and begs leave to refer so that there is now due from the City of Trenton for work performed in accordance with said contract the sum of approximately $5,509.22.

3. That on or about the 29th day of June, 1914, the said Citizens Construction Company entered into a written contract, a copy of which is annexed hereto and to which your orator begs leave to refer under which said written contract your orator agreed to sell and the said Citizens Construction Company agreed to purchase approximately 284,340 of Mack re-pressed paving block for use in paving Hart Avenue from Clinton to South Hurley Street, 3,250 square yards, and for Swan Street from Hudson to Chestnut Streets, 3,520 square yards, in the City of Trenton, State of New Jersey, and said paving block to be delivered in car loads at Trenton, New Jersey, for the price of $27.50 a thousand; that said paving block was intended to be used in the performance of the contract hereinbefore referred to and for the paving of Hart Avenue under a similar contract entered into between the Citizens Construction Company and the Mayor and Common Council of the City of Trenton, to which contract your orator begs leaev to refer, your orator showing that it has a claim upon the proceeds of the Hart Avenue contract for which it has filed a lien and a suit to enforce which it brings simultaneously herewith and to which suit and the proceedings thereunder it begs leave to refer; that upon the 7th day of October, 1914, and also upon the 13th day of October, 1914, there was due to your orator for brick furnished in accordance with such contract after deducting all credits and off sets

and for brick actually used for the paving of Swan Street from Hudson to Chestnut Streets, in the City of Trenton under the contract between the said City of Trenton and the Citizens Construction Company aforesaid the sum of $2,501.53; that said brick were furnished to the said contractor and were actually used in the execution and completion of the contract of the said contractor with the City of Trenton; that upon the seventh day of October, 1914, and before the whole work to be performed by the contract under said contract was completed or accepted, or within fifteen days after the same was so completed and accepted your orator filed with Edward T. Lee, as Commissioner of Finance of the City of Trenton and also with him as Comptroller of the City of Trenton, and also with Harry E. Evans, Treasurer of the City of Trenton, and also with J. Ridgeway Fell, Commissioner of Streets and Public Improvements, and also with the Department of Revenue and Finance of the City of Trenton and also with the Department of Street and Public Improvements of the City of Trenton a notice of lien under the provisions of the statute in such case made and provided, a copy of which said notice is hereto annexed and made a part hereof; that at the time said notice was filed as aforesaid there was justly due to your orator for materials furnished for the paving of Hart Avenue from Clinton to South Hurley Streets and for materials furnished for the paving of Swan Street from Hudson to Chestnut Streets, in the City of Trenton, under a contract entered into upon the first of July, 1914, between the Citizens Construction Company and the City of Trenton as aforesaid, and under a contract entered into between the Citizens Construction Company and your orator, a

copy of which is annexed hereto and to which your orator begs leave to refer, the sum of $4,811.75, $2,309.92 of which was for materials furnished in the execution of the contract with respect to Hart Avenue and $2,501.83 of which was for the materials furnished for use in the paving of Swan Street; that the brick was furnished by your orator for both contracts between the Citizens Construction Company and the City of Trenton in pursuance of the terms of a single contract between your orator and the Citizens Construction Company; that the statements contained in said notice and in the affidavits thereto annexed and in the accounts thereto annexed are true; that copies thereof are annexed to this bill of complaint and made a part hereof; that on the same day your orator caused to be filed with the Financial Officer of the said City of Trenton a bond in a sum fixed by said Financial Officer at twenty per cent. of the amount claimed in said notice and conditioned in accordance with the statute in such case made and provided and your orator claims and insists that it complied with all of the provisions of said statute.

4. Your orator further shows that on the 19th day of October, 1914, and before the work under such contract was completed or accepted by the said City of Trenton or within fifteen days after the same was so completed or accepted it caused to be filed with the Mayor and Common Council of the City of Trenton, the Treasurer of the City of Trenton, the Comptroller of the City of Trenton, the Commissioners in charge of the Department of Streets and Public Improvements, and the Commissioner in charge of Revenue and Finance of the City of Trenton, a notice, a copy of which is hereto annexed and made a part hereof

claiming that there was due to your orator from the Citizens Construction Company the sum of $2,501.83, after deducting all just credits and offsets, and that said debt accrued by reason of brick furnished by your orator to the Citizens Construction Company for the paving of Swan Street from Hudson to Chestnut Streets, in the City of Trenton, under a contract between the said City of Trenton and the Citizens Construction Company bearing date the first day of July, 1914, as aforesaid; that the statements contained in said notice were true, and your orator begs leave to make them a part of this bill of complaint; that at the same time your orator caused to be filed with the Financial Officer of the said City of Trenton a bond in a sum fixed by said Financial Officer at twenty per cent. of the amount claimed in said notice conditioned as set forth in the statute, and your orator claims and insists that it has complied with all of the provisions of the statute in such case made and provided.

5. Your orator further shows that the Broad Street National Bank of Trenton claims and insists that on or about the fifth day of August, 1914, the Citizens Construction Company executed and delivered to it to secure said bank for the sum of $5,000 borrowed by the said Citizens Construction Company from the said bank to carry out the contract made by said company with the said City of Trenton for the paving among other streets of Swan Street an assignment in writing wherein and whereby the said company did assign, transfer, and set over unto the said Broad Street National Bank of Trenton any and all sums of money then accrued or to grow due from said City of Trenton by reason of or on account of the contract above referred to; that the

said company did give to the said Broad Street National Bank of Trenton, its successors and assigns, full power to collect and receive from the said City of Trenton any and all sums of money so due to the said bank, and that the said bank claims that it advanced in all upon said assignment the sum of $5,000, and that there is due to said bank the sum of $5,000, and claims that it gave notice of such assignment and of said order by the said Citizens Construction Company to the Comptroller of the City of Trenton; your orator claims and insists:

1. That no such amount was advanced by the Broad Street National Bank of Trenton.

2. That large amounts were repaid on account of such moneys as were advanced.

3. That there is not due to the said Broad Street National Bank of Trenton the sum of $5,000, or any such sum.

4. That such assignment is not in form sufficient to defeat the lien of your orator's claim.

5. That your orator's claim is prior to the said assignment of the Broad Street National Bank of Trenton as matter of law and your orator claims and insists that any interest the said Broad Street National Bank of Trenton may claim is subject and subsequent to the lien and operation of your orator's claim.

6. Your orator further claims and insists that the receiver of the Citizens Construction Company is obliged to pay out of the free moneys in his hands said claim of the Broad Street National Bank of Trenton or on account thereof so much as he may have money to pay and that the Broad Street National Bank in any event is not entitled

to claim more than what there may remain due, and your orator further shows that the Broad Street National Bank of Trenton also has under its assignment the right to resort, as it claims, to other funds, to wit, that arising from the paving of Hart Avenue, and that from the paving of Market Street, and your orator claims and insists that it is obliged to first resort to such fund before resorting to the fund upon which your orator has a lien.

7. That it is claimed that on or about the 14th day of October, 1914, Joseph B. Richardson & Sons, a partnership composed of Joseph B. Richardson, J. Clarence Richardson and William S. Case, filed their claim with the Comptroller and Director of Finance of the City of Trenton for materials by them furnished on Swan Street amounting to the sum of $1,276.66, but your orator claims and insists that such claim is ineffective and not a lien because it was not filed in accordance with the statute in such case made and provided with the Chairman or head of the Department, Council Board, Borough or Commissioner having charge of said work and with the financial officer of said State, town, township or other municipality; that such claim is not in accordance with the provisions of the statute and does not in accordance with such provisions state the amount claimed, from whom due, nor does it give the amount of the demand after deducting all just credits and offsets, nor does it give the name of the person by whom employed or to whom the materials were furnished, nor does it contain in accordance with the provisions of such statute a statement of the terms, time given, conditions of the contract between the said Citizens Construction Company and Joseph B. Richardson, nor that the said materials were

furnished to the said contractor and were actually used in the execution of the contract with said City of Trenton; that the said claim is not in accordance with the provisions of said statute nor was it filed with the proper officers; that as matter of fact the materials for the price of which the claim was filed were not furnished to the said Citizens Construction Company by the said Joseph B. Richardson & Sons, and if so furnished were not in accordance with the statute actually used in the execution and performance of the said contract; that no such amount of $1,276.76 is due from the Citizens Construction Company to Joseph B. Richardson & Sons; that if such claim is a valid claim then it is subsequent and subject to your orator's claim, your orator claiming and insisting that the notice filed by it upon the 7th of October, 1914, was effective to preserve the lien of your orator prior to any lien of Joseph B. Richardson & Sons; that the said Joseph B. Richardson & Sons did not in accordance with the statute in such case made and provided give the bond provided for in said statute.

And your orator further shows that upon the 19th day of October, 1914, it is claimed that Frank E. Arend filed with the Commissioner and Director of Finance of the City of Trenton a claim for materials furnished on Swan Street amounting to the sum of $139.40; that with respect to the claim of the said Frank E. Arend your orator repeats each and every allegation that it has made with respect to the claim of Joseph B. Richardson & Sons, and insists that the claim of the said Frank E. Arend if valid at all is subsequent and subject to the lien and operation of your orator's claim.

In consideration whereof and for as much as your orator is without adequate relief in the premises at and by the strict rules of the common law,

but as this court has full and complete jurisdiction in the premises, where matters of this nature are properly cognizable and relievable; to the end therefore that the said defendants, the Citizens Construction Company, J. Clarence Richardson, Sr., Receiver of the Citizens Construction Company, Broad Street National Bank of Trenton, the Mayor and Common Council of the City of Trenton, Joseph B. Richardson, J. Clarence Richardson and William S. Case, composing the partnership of Joseph B. Richardson & Sons, may, but without oath, the same being expressly waived, full, true and perfect answer make to all and singular the matters aforesaid, as fully and particularly as if they were here again repeated, and as they and each of them distinctly interrogated thereto, and that the said Mayor and Common Council of the City of Trenton and its agents may be enjoined and restrained from paying a sum of $5,509 22 to the said Citizens Construction Company or to the receiver of the said Citizens Construction Company or anybody for him, and that the validity of the lien of your orator as aforesaid shall be determined; that the amount due from the Mayor and Common Council of the City of Trenton to the said Citizens Construction Company or J. Clarence Richardson, Sr., its receiver, may be determined, and that the validity of the claim of the Broad Street National Bank of Trenton, Joseph B. Richardson & Sons and Frank E. Arend may be determined, and the priority of your orator's claim, and that the claims of the Broad Street National Bank of Trenton, Joseph B. Richardson & Sons and Frank E. Arend, if any, may be determined, and a decree may be made that your orator is entitled to be paid the sum of $2,501.83 and to receive the same from the Mayor and Common

Council of the City of Trenton, and that the same be paid by the Mayor and Common Council of the City of Trenton to your orator, together with interest and costs, and that your orator's lien may be foreclosed, and that your orator may have such other and further relief in the premises as the nature of the case may require, and as may be agreeable to equity and good conscience, your orator showing that it simultaneously herewith has filed a bill to enforce its lien against the fund arising from the paving of Hart Avenue as aforesaid, and your orator shows that such suits should be consolidated and your orator so prays.

May it please your Honor, to grant unto your orator, not only the State's writ of injunction, issuing out of and under the seal of this honorable court, directed to the said Mayor and Common Council of the City of Trenton, restraining it as aforesaid, but also the State's writ of subpoena, issuing out of and under the seal of this honorable court, directed to the said Citizens Construction Company, J. Clarence Richardson, Sr., receiver of the Citizens Construction Company, Mayor and Common Council of the City of Trenton and the Broad Street National Bank of Trenton, Joseph B. Richardson, J. Clarence Richardson and William S. Case, composing the partnership of Joseph B. Richardson & Sons and Frank E. Arend therein and thereby commanding them and each of them, at a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor, then and there to answer the premises and to stand to, abide by and perform such order and decree as to your Honor shall seem meet.

And your orator as in duty bound will ever pray, etc.

MERRITT LANE,
Solicitor for and of
Counsel with Complainant.

Notice to dismiss. Same as Suit No. 1.

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Conclusions and order refusing to dismiss. Same as Suit No. 1.

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Order permitting an amendment of bill. Same as Suit No. 1.

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Answer of Broad Street National Bank. Same as Suit No. 1, except changing name of street and amounts.

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Answer of Citizens Construction Company and J. Clarence Richardson, Receiver. Same as Suit No. 1, except changing name of street and amount.

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Decree *pro con* taken against the City of Trenton.

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**Answer of Frank E. Arend.**

The answer of Frank E. Arend, defendant, to the bill of complaint in the above-entitled cause, or to so much thereof as he is advised is necessary or material for him to make answer unto, answering, says:

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1. That he admits that on or about the first day of July, nineteen hundred and fourteen the Citizens Construction Company entered into a contract with the Inhabitants of the City of Trenton for the paving of Swan Street from Hudson Street to Chestnut Avenue in the City of Trenton.

2. That he admits that the Citizens Construction Company performed a part of said work and that thereafter by an order of this Court J. Clar-

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ence Richardson, Sr., was appointed Receiver of said Citizens Construction Company, and that thereafter the said Receiver completed all the work which was to be performed by it in compliance with its said contract, and that there is due from the Inhabitants of the City of Trenton for work performed in accordance with the said contract about the sum of five thousand five hundred and nine dollars and twenty-five cents, as alleged in said bill of complaint.

3. That he has no knowledge of the agreement by the Citizens Construction Company to purchase from the complainant approximately two hundred and eighty-four thousand three hundred and forty Mack repressed paving block for use in paving of Hart Avenue from Clinton to South Hurley Street, and for Swan Street from Hudson Street to Chestnut Avenue, and that said paving block was to be delivered in carload lots at Trenton for twenty-seven dollars and fifty cents per thousand, as alleged in the third paragraph of said bill; nor that there was due to the complainant on the thirteenth day of October, nineteen hundred and fourteen for bricks actually used for the paving of Swan Street from Hudson Street to Chestnut Avenue under the aforesaid contract, the sum of two thousand five hundred and one dollars and fifty-three cents; nor that the said bricks were furnished to the said contractor and were actually used in the execution and completion of the contract aforesaid, but leaves the same to the complainant to prove in such manner as he may be advised. But this defendant admits that on the seventh day of October, nineteen hundred and fourteen the complainant filed with Edward W. Lee, the financial officer of the City of Trenton, Harry E. Evans, Treasurer of the City of Trenton, J. Ridgeway Fell, Commissioner of Streets and Public Improvements, and

with the Department of Revenue and Finance of the City of Trenton, and also with the Department of Streets and Public Improvements of the City of Trenton, a notice set forth in the hird paragraph of the bill of complaint, and also that the complainant caused to be filed with the financial officer of the City of Trenton the bond as mentioned in the said paragraph of said bill.

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4. That he admits the filing with the respective persons named in the fourth paragraph of said bill the notice as therein set forth and also admits the filing with Edward W. Lee, the financial officer of the City of Trenton, of the bond as therein set forth.

5. That in answer to the fifth paragraph of said bill this defendant says that by two certain instruments in writing, each bearing date the sixteenth day of July, nineteen hundred and fourteen and purporting to have been made by the Citizens Construction Company, and which said instruments read as follows, viz.:

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> "Know all men by these presents, That whereas a contract has been entered into between the City of Trenton of the one part and the Citizens Construction Company, a corporation incorporated under the laws of the State of New Jersey, of Trenton, Mercer County, New Jersey, of the other part, for the pavement of the following streets:
>
> Market Street from a point 83 feet west of Lamberton St. to Broad St. (City portion).
>
> Market Street same location as above (Trolley portion).
>
> Hart Avenue from Clinton Ave. to a point about 313 feet south of Hurley St.
>
> Swan Street from Hudson St. to Chestnut Ave.

30

40

And whereas the said Citizens Construction Company have entered into and upon the work of said contract;

And whereas the said Citizens Construction Company, in order to enable them to carry out said contract, have borrowed from the Broad Street National Bank of Trenton the sum of $5,000 and may desire to borrow from said bank any additional sums:

Now therefore the Citizens Construction Company, in consideration of the foregoing and the sum of one dollar to it in hand paid, have assigned, transferred and set over unto the said The Broad Street National Bank of Trenton, any and all sum or sums of money now due and to grow due from 'The City of Trenton, New Jersey,' by reason or on account of the contract above referred to, and the Citizens Construction Company do hereby give the said Broad Street National Bank of Trenton, its successors and assigns, the full power and authority for its and their own use and benefit, but at its or their costs, to demand, collect, receive, compound and give acquittance for the same, or any part thereof, and in the name of the Citizens Construction Company, or otherwise, prosecute and withdraw any suit or proceeding at law or in equity therefor.

In witness whereof the Citizens Construction Company have hereunto set its hand and corporate seal this sixteenth day of July, A. D. nineteen hundred and fourteen.

Thomas F. Riley, Vice-Pres.

Signed, sealed and delivered
in the presence of

THE CITIZENS CONSTRUCTION CO.

T. J. McGovern,
Secretary."

"Trenton, N. J., July 16, 1914.

Mr. Edward Lee,
City Treasurer,
Trenton, N. J.

Dear Sir:

Will you please to pay to the Broad Street National Bank all moneys that may be due on the following contracts for paving the streets named below:

Market St. from a point 83 ft. west of Lamberton St. to Broad St. (City portion).

Market St. same location as above (trolley portion).

Hart Ave. from Clinton Ave. to a point 313 ft. south of Hurley St.

Swan St. from Hudson St. to Chestnut St.

Thanking you for your courtesy in this matter,

Very truly yours,
THE CITIZENS CONSTRUCTION CO.
[SEAL.] T. J. McGovern,
Sec."

the Broad Street National Bank of Trenton, New Jersey, claims that the Citizens Construction Company, assigned and transferred to it all moneys due and to grow due from The Inhabitants of the City of Trenton under the contracts aforesaid, and that by virtue of such assignments the said bank is the owner of and entitled to the moneys in the possession of the City of Trenton, due under said contract, but this defendant says that no such amount as five thousand dollars was advanced by the said The Broad Street National Bank of Trenton, to the Citizens Construction Company; that the said assignments so given to the said bank

by the said company, were given as collateral security for an antecedent debt due to the said bank from the said company, and are void as against this defendant's claim as well as the claims of the complainant and of Joseph B. Richardson, J. Clarence Richardson and William S. Case, partners trading as Joseph B. Richardson & Sons, or if the said assignments are not void, or ineffectual, and the said bank has any claim to said moneys by reason of such assignment, it is subsequent and subject to the claims aforesaid.

6. That he admits that on or about the fourteenth day of October, nineteen hundred and fourteen Joseph B. Richardson & Sons, the partnership aforesaid filed their claim with the Comptroller and Director of finances of the City of Trenton for materials furnished by them on Swan Street amounting to the sum of twelve hundred and seventy-six dollars and sixty-six cents as set forth in the seventh paragraph of said bill; but charges that the claim of the said Joseph B. Richardson & Sons is ineffective and not a lien upon the funds in the possession of The Inhabitants of the City of Trenton due to The Citizens Construction Company because of the facts as set forth by the complainant in the said seventh paragraph of his said bill.

And this defendant further answering says that he had furnished and supplied to the Citizens Construction Company material to the value of one hundred and thirty-nine dollars and forty cents in the execution and completion of the contract entered into by the Citizens Construction Company and The Inhabitants of the City of Trenton as aforesaid, and that the whole of said sum of one hundred and thirty-nine dollars and forty cents was due and owing to this defendant from the Citizens Construction Company on the

seventeenth day of October, nineteen hundred and fourteen, that the material so furnished by this defendant to the Citizens Construction Company and used by it in the completion of said contract consisted of one hundred and forty loads of P sand at eighty-five cents per load, each load consisting of two and a half tons, and also of thirty-four loads of fine sand at sixty cents per load; and that before the whole work to be performed by the Citizens Construction Company under its aforesaid contract with The Inhabitants of the City of Trenton was completed or accepted by the inhabitants of the City of Trenton, and on the nineteenth day of October, nineteen hundred and fourteen, this defendant served upon Frederick W. Donnelly, Esquire, Mayor of the City of Trenton and head of the Board of Commissioners of said city, having in charge the contract for paving of Swan Street from Hudson Street to Chestnut Avenue; and upon J. Ridgeway Fell, Esquire, head of the Department of Streets and public improvements of said Board of Commissioners; and upon Edward W. Lee, Esquire, head of the Department of Revenue and Finance of said Board of Commissioners, and financial officer of said City of Trenton, a notice setting forth the name and residence of this defendant, the amount claimed to be due to him from the Citizens Construction Company after deducting all just credits and setoffs, also a statement of the terms, time given and conditions of his contract; that the said material was furnished to the said Citizens Construction Company by this defendant and that all of said material was actually used in the execution and completion of said contract with The Inhabitants of the City of Trenton as aforesaid; and also setting forth that this defendant claimed a lien for said sum of one hundred and

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thirty-nine dollars and forty cents upon the moneys then due or which may thereafter become due to the Citizens Construction Company from the inhabitants of the City of Trenton under and by virtue of said contract; which said notice was duly verified by the oath of this defendant pursuant to the provisions of the act of the Legislature of the State of New Jersey entitled, "An Act to secure the payment of laborers, mechanics, merchants, traders and persons employed upon or furnishing materials towards the performance of any work in public improvements in cities, towns, townships and other municipalities in this State," approved March 30th, 1892, and the supplements thereto and amendments thereof.

And this defendant further answering says, that if the said complainant has any claim or interest in the funds in the possession of the City of Trenton due to the Citizens Construction Company for or on account of the contract aforesaid for the paving of Swan Street from Hudson Street to Chestnut Avenue, it is subsequent and subject to this defendant's claim or lien upon said funds, all of which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct.

WILLIAM J. BACKES,
Solicitor for Defendant,
Frank E. Arend.

**Conclusions in Both Suits.**

J. MERRITT LANE, Esq., for Complainant.

PETER BACKES, Esq., for Receiver of Defendant Company.

GEORGE W. MACPHERSON, Esq., and NELSON B. GASKILL, Esq., for Broad Street National Bank.

EDWARD L. KATZENBACH, Esq., for Joseph B. Richardson & Sons. 10

LEAMING, V. C.:

Two suits of the same title have been heard and considered together. They are in all material respects identical except that they relate to two separate municipal contracts. The bills are filed by complainant pursuant to the provisions of the act commonly referred to as our municipal liens act (3 Comp. Stat., p. 3315). Complainant seeks 20 to establish and enforce a claim of lien against money due from defendant municipality under certain contracts made by the municipality for public improvements, complainant's claim being for the value of materials supplied to the contractor, a corporation of this State.

Complainant's notices of claim of lien were served pursuant to the act after a decree of insolvency had been made by this Court against the 30 corporation contractor pursuant to the provisions of our corporation act and the usual decree of injunction had been issued and a Receiver in insolvency had been appointed and had qualified. There are no other parties claiming liens under the act, except by reason of lien claims filed after the Receiver's appointment and qualification.

I entertain the view that in these circumstances complainant has acquired no lien under the act 40 and its bill must be accordingly dismissed.

The insolvency provisions of our corporation

act render it clear that upon the appointment of a Receiver in insolvency the title of the insolvent corporation to its assets are divested and forthwith vested in the Receiver subject only to liens then existing, to the end that an equal distribution of the net assets may be made among general creditors. The assets are thus placed *in custodia legis* for the purpose stated.

10 It will not be contended that a judgment entered against the corporation by a general creditor after the appointment and qualification of a statutory Receiver in insolvency is operative to confer a lien prior to other general creditors. The creation of any liens against the assets after the appointment and qualification of a Receiver are utterly destructive of the obvious purposes of the act, unless, perchance, such liens may be prop-
20 erly based upon rights antecedent the receivership.

The statute under which complainant claims a lien expressly provides that the lien shall attach from the time it is filed, and our Courts have repeatedly held that this provision, unlike the provisions of the mechanics' lien act which relates the lien to a prior date, is destructive of the idea of an inchoate lien prior to that time. This has
30 been held in the following cases in this Court and in our Court of Errors and Appeals [Garretson *v.* Clark, and Harris *v.* Garretson (N. J. Ch.), 54 Atl. Rep., 414; Somers Brick Co. *v.* Souder, 70 N. J. Eq., 388, 394; s. c. on appeal, 71 N. J. Eq., 759, 162; Cape *v.* Walton Co., 77 N. J. Eq., 512, 517; Board of Education *v.* Tait, 80 N. J. Eq., 94, 96; Agnew Co. *v.* Paterson Board of Education, 83 N. J. Eq., 49, 66; s. c. on appeal, *ib.*, 336, 339].

40 The views stated by Vice-Chancellor Stevenson in Agnew Co. *v.* Paterson Board of Education, *supra,* touching the effect of a federal bankruptcy

receivership are, in my judgment, equally applicable to a receivership under our corporation act.

An amendment to the bill asserts that the Receiver, after his appointment, finished the work under the contracts of the insolvent contractor corporation and used material which had been theretofore supplied by complainant to the contractor. It is clear that this cannot have any effect upon the claim of lien filed by complainant for materials supplied to the contractor. The assets of the insolvent corporation, including its rights under the municipal contracts, passed to the Receiver; it was his privilege to finish the work and enhance the assets. Any controversy between complainant and the Receiver touching the ownership of materials used by the Receiver can find no place in this suit.

Complainant has also attacked the rights of the Broad Street National Bank which are asserted by that bank under an assignment from the contractor of moneys due or to grow due under these contracts. As complainant's bill is wholly based on a claim of lien the rights of that bank cannot be properly adjudicated in this suit. Under the statute it is the duty of the Receiver to pass upon the claim of the bank and his determinatoin is subject to review.

I will advise an order dismissing the bill.

Submitted, November 18, 1915.

Determined, December 8, 1915.

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The final decree in both cases were the same except the name of the street and the amount involved, and that in reference to Swan Street is printed.

**Final Decree.**

This cause coming on to be heard at the present term of the Court of Chancery, in the presence of J. Merritt Lane, Esq., appearing for the complainant; Peter Backes, Esq., appearing for the Receiver of the defendant company, and G. W. Macpherson, Esq., and Nelson B. Gaskill, Esq., appearing for the Broad Street Bank, and the pleadings and proofs having been read, and the arguments of the respective counsel having been heard and considered, and the Court having duly considered said pleadings, proofs and arguments:

It appeared that complainant's bill of complaint in this cause was filed pursuant to the provisions of an act entitled, "An Act to secure the payment of laborers, mechanics, merchants, traders and persons employed upon or furnishing material toward the performing of any work in public improvements, in cities, towns, townships and other municipalities in this State," approved March 30, 1892, commonly called the "Municipal Lien Act," to enforce a lien against the fund arising under a contract made by the City of Trenton with the Citizens Construction Company for materials furnished by the complainant to the said Citizens Construction Company, the contractor, for the paving of Swan Street, amounting to $2,501.83.

And it further appeared that before complainant had filed its notice of lien, a decree had been made by this Court in a cause wherein Thomas J. McGovern is complainant and the Citizens Construction Company is defendant, pursuant to the provisions of the statute entitled "An Act Concerning Corporations," and the supplements and amendments thereto, for an injunction and the appointment of a Receiver, and that the Receiver had been appointed and had qualified

pursuant to said decree before the notice of lien had been filed by the complainant.

And it further appeared that the notice of the lien claim filed by Joseph B. Richardson & Son was also filed after the decree appointing said Receiver in the cause aforesaid, after the issuing of the injunction, and after the Receiver had qualified.

And it further appeared that the complainant by an amendment to its bill of complaint asserted that the Receiver, after his appointment, had completed the contract of the insolvent contractor corporation and in so doing he had used the materials which had been theretofore supplied by the complainant to the contractor.

And it further appeared that complainant, by its bill of complaint, attacked the rights of the Broad Street National Bank of Trenton, which the Bank asserted under its assignment from the contractor corporation, of the moneys due or to grow due to the contractor from the City of Trenton under said contract, which assignment was dated and the money thereon advanced to the contractor corporation after the making of the said contract with the City of Trenton and before the Receiver was appointed and qualified, and before the complainant filed its notice of lien.

And it further appeared that complainant's bill is wholly based on a claim of lien arising under the aforesaid Municipal Lien Act, and that the bill of complaint filed in this cause must be dismissed and that therefore the rights of the bank on its said claim cannot be properly adjudicated in this action.

It is thereupon on this 20th day of December, 1915, by Edwin Robert Walker, Chancellor of the State of New Jersey, adjudged and deter-

mined and the said Chancellor by virtue of the power and authority of this Court, does adjudge and determine:

1. That the complainant by the serving of its said notice of lien with the officials of the City of Trenton and the filing of its bill of complaint to enforce a lien pursuant to the directions of the statute, acquired no lien under the provisions of said statute on the fund arising from the contract made between the Citizens Construction Company and the City of Trenton for the paving of Swan Street.

2. That upon making the decree in this cause appointing the Receiver for the Citizens Construction Company, issuing the injunction, and the qualifying of said Receiver under said decree, the said company was divested of its title to its assets and the title to the same was forthwith vested in the Receiver, subject only to the liens existing at the time of the Receiver's appointment.

3. That the notice of lien claim of Joseph B. Richardson & Son was also filed after the decree appointing the Receiver, the issuing of an injunction and the qualifying of said Receiver, and is therefore not entitled to any claim of lien.

4. That the controversy between the complainant and the Receiver touching the ownership of certain materials used by the Receiver in and about the completing of said municipal contracts by the Receiver cannot be determined in this action.

5. That the complainant's bill in this cause is wholly based on a claim of lien asserted by it under the provisions of the aforesaid Municipal Lien Act, which claim of lien must fail for the

reason that the property of the insolvent corporation was placed *in custodia legis* at the time of the appointment of said Receiver and prior to the filing by the complainant of its notice of lien, and therefore complainant's claim of lien could not attach thereon and his action in this suit must fail.

6. That the controversy between the complainant, its action failing for the reason aforesaid, and the said Broad Street National Bank of Trenton, cannot therefore be properly adjudicated in this suit.

7. It is therefore ordered, adjudged and decreed that the complainant acquired no lien under its notice filed in accordance with the provisions of the aforesaid Municipal Lien Act, and therefore the bill filed in this cause must and the same is hereby dismissed, with costs.

E. R. WALKER,
Chancellor.

Respectfully advised.
Edward B. Leaming,
Vice-Chancellor.

IN CHANCERY OF NEW JERSEY.

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|---|---|
| Between<br>MACK MANUFACTURING COMPANY,<br>Complainant,<br>and<br>CITIZENS CONSTRUCTION COMPANY,<br>Defendant. | On Bill, &c.<br>Final Hearing. |

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Before His Honor, E. B. LEAMING, Vice Chancellor, at the State House, Trenton, New Jersey, on Tuesday, April 20th, 1915.

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APPEARANCES:

J. MERRITT LANE, Esq., for Complainant.
PETER BACKES, Esq., for the Receiver of the Citizens Construction Company.
WILLIAM J. BACKES, Esq., for Frank Aaron, a lien claimant.
GEORGE W. MACPHERSON, Esq., for Broad Street National Bank.
EDWARD L. KATZENBACH, Esq., for J. B. Richardson & Sons, a lien claimant.

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Mr. Macpherson: If the Court please, I represent one of the defendants, the Broad Street National Bank, and I am somewhat embarrassed this day on account of the absence of a witness, General Sadler, who is the President of our bank; he is the Chairman of the committee having in charge the Masonic ceremonies that are taking place in Trenton today, which is quite an event, the dedication of the first Masonic Temple, and his hands

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are absolutely full. I did not apprehend that he would be needed today.

The Vice-Chancellor: Is this a municipal lien case?

Mr. Macpherson: Yes.

The Vice-Chancellor: Well, is there any controversey about the amount of money in the hands of the bank?

Mr. Macpherson: The money is not in the hands of the bank; the money is in this Court, as I understand it. 10

Mr. Peter Backes: No; the money is in the possession of the City of Trenton, not paid over. I think we can agree on a great number of facts, in fact, all the facts excepting the one relating to the claim of the bank. Is that correct?

Mr. Lane: I think that is correct.

The Vice-Chancellor: In these municipal lien cases there is usually only an item that is disputed, unless there is some question about the validity of liens, and that is a matter of law. Is this subject of real controversy one that touches Sadler's testimony? 20

Mr. Macpherson: Yes. As counsel on both sides say, that is where the issue is going to be. There was an assignment by this insolvent company of all the moneys due it under this contract with the City of Trenton and that, I understand, will be the subject of challenge. 30

The Vice-Chancellor: The bank is the assignee?

Mr. Macpherson: Yes. And, then, another thing I wish to call your Honor's attention to: The cashier of the bank last night was furnished with a subpœna to bring the books here, which would practically mean the closing of the institution; that is absolutely impossible to do. Now, we are willing to furnish transcripts. 40

The Vice-Chancellor: We have a system down in

Camden which, by mutual consent, all of the Bar have fallen into. They go to the bank and get the information and then agree on it.

Mr. Peter Backes: We are perfectly willing to do that.

Mr. Macpherson: This information can all be obtained at the bank, but to bring all these books here involves the personal ledgers that must be in use constantly.

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The Vice-Chancellor: We have either the parties to stipulate what the bank books show or else have somebody come in and testify to what the bank books show without bringing in the books. I find it very convenient. Now, then, we will have to dispose of this case at some other time, if Sadler cannot be here, and he is the important witness, you say?

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Mr. Macpherson: He is the President of the bank and had dealings with the parties in connection with these loans.

The Vice-Chancellor: It may be the case will not be reached; there is another ahead of it.

Mr. Peter Backes: Well, that other one ahead of it is off; the other one will not be moved.

The Vice Chancellor: Has it been settled?

Mr. Peter Backes: It has not been settled but a future time has been agreed upon between the parties because of the inability to produce their witnesses here to-day. I have a consent in my pocket asking that the matter be continued to some future time.

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Mr. Macpherson: I want to make my application, because I apprehend that all other facts in connection with this case can be practically agreed upon, and therefore the testimony will relate to the dealings of the bank with this company.

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The Vice Chancellor: How long will General Sadler's testimony take, I wonder?

Mr. Macpherson: I don't know.

The Vice Chancellor: Can't he get in here for a few moments?

Mr. Macpherson: No; he would have to familiarize himself with the situation. I did not apprehend at the time that he would be a material witness, I though that the cashier would be the one who would be familiar with all the facts, but yesterday afternoon late I found the situation to be different. 10

Mr. Peter Backes: If your Honor please, there will be a preliminary application and perhaps we may not need to meet this issue with General Sadler, which is raised on the bank account, on the question of whether these people have any lien at all or not, whether this municipal lien can be sustained. I think on those facts we are not in dispute except on the question of law. The facts are these: That the Citizens Construction Company, the contractor, went into the hands of a Receiver appointed by this Court on the 18th of September. The first lien was filed by the Mack Manufacturing Company on the 7th of October; that was a general lien embracing a claim under two separate contracts made by the city with the Citizens Company, but a single contract made by the Citizens Company with the Mack Company, the claimants, for the furnishing of brick to be used on two different jobs. Subsequently Mr. Lane amended his lien and filed two liens upon which the bills have been filed. Mr. Richardson, through Edward Katzenbach, filed a lien which is claimed to be prior to that of the Mack lien as amended. But the position taken by the Receiver, and I am representing the Receiver, is this: That the moneys now in the hands of the city should be paid to the Receiver, because the Receiver's appointment antedated that of the filing of the lien and under the statute they have no lien 20 30 40

only from the time of the filing of the notice; under the statute appointing the Receiver he takes over all the property of the Citizens Company and all the rights and claims they may have.

The Vice Chancellor (after argument): Suppose you stipulate the facts as far as can be done, so that we can make a record fully, then when we get up to General Sadler's testimony we will have to appoint some other time to hear him testify. Dictate it as a stipulation and any counsel who finds something he wishes to modify and does not desire to consent to can interrupt the stipulation and in that manner we can get a perfect record. Say, it is stipulated by the respective counsel as follows:

Mr. Peter Backes (reading from typewritten paper): "It is agreed that the Mack Manufacturing Company, a West Virginia Corporation, by an agreement dated June 29, 1914, agreed to deliver approximately 284,340 Mack Repressed Paving Blocks for the paving of Hart Avenue, from Clinton to South Hurley Street, 3,250 square yards, and for the paving of Swan Street, from Hudson to Chestnut Avenue, 3,520 square yards, to be delivered in carload lots in Trenton at the rate of $27.50 per thousand. That 147,400 of said paving bricks were delivered on Hart Avenue between August 8, 1914, and August 27, 1914."

Mr. Lane: Let me ask you there, Mr. Backes, where did that information come from?

Mr. Backes: From the railroad company's shipping and from the memorandum kept by us at the time the bricks were actually taken from the car.

Mr. Lane: The bricks were actually taken from the car and put on the street at that time?

Mr. Backes: Yes, sir. "That 139,000 of said paving brick were delivered on Swan Street between July 21, 1914, and August 12, 1914." That is taken from the same record. "That the last la-

bor performed by the Citizens Construction Company on Swan Street and Hart Avenue was on September 17, 1914. That the last shipment made by the Mack Manufacturing Company to the Citizens Construction Company under its contract was on August 17, 1914."

Mr. Lane: Does that agree with my account?

Mr. Backes: That agrees with your account. "That on the third day of July, 1914, the inhabitants of the city of Trenton made an agreement with the Citizens Construction Company for the paving of Hart Avenue with Mack Repressed Paving Blocks for the sum of $7,532.00, and that on September 2, 1914, a payment was made thereon amounting to the sum of $1,000", work having been commenced and in process of construction at the time this payment was made. "That on the third day of July, 1914, the inhabitants of the city of Trenton entered into a contract with the Citizens Construction Company for the paving of a part of Swan Street with Mack Repressed Paving Blocks, for the sum of $8,097.00;" that work was commenced and "that the following payments were made thereon: August 13, $1,000; August 21, $1,000; August"—I have the date blank—"$1,000." I think I can furnish that date later. "That 3,220 yards of brick work was laid by the Newton Paving Company on Hart Avenue for the receiver." In that connection I may say that all the preliminary work, the grading and so on, had been done and the bricks had been delivered on the side of the street ready to be laid, but had not been laid at the time the Receiver was appointed, and the Newton Paving Company entered into a contract with the Receiver, under an order of this Court, to complete that work, and in the course of that work it laid 3,220 yards, practically—well, it really had laid all the brick that was laid on Hart Avenue,

because the whole contract was only for 3,250 yards.

Mr. Lane: It did lay all the brick—no brick was laid an Hart Avenue at the time the Receiver was appointed.

Mr. Backes: I think that is right.

Mr. Lane: Now, I want right at this point to offer in evidence in this cause the order in McGovern *v.* Citizens Construction Company permitting the Receiver to proceed with this work.

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The Vice Chancellor: What was the nature of that order?

Mr. Lane: It in terms directs him or permits him to proceed and complete the contract.

The Vice Chancellor: Who were parties to it, and how was the order procured?

Mr. Lane: Why, it is for the purpose of enabling the Receiver under the direction of the Court itself to take over the performance of these contracts.

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The Vice Chancellor: The order was made in the receivership matter?

Mr. Lane: Yes, sir.

The Vice Chancellor: And was made on the application of whom?

Mr. Lane: The Receiver, I assume.

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The Vice Chancellor: Who were parties to the order? My inquiry arises from the fact that I do not see the necessity of any such order, and I cannot quite conceive how it arose.

Mr. Lane: I don't know. I assume that the Receiver did not want to go ahead without the instructions of this Court and assume the obligation of completing those contracts.

The Vice Chancellor: Are the files here? Perhaps it might be well to have that shown definitely. It may have been that the parties were given notices on which an order was made.

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Mr. Lane: Was notice given?

Mr. Backes: I don't know. It was on the case of McGovern.

The Vice Chancellor: Well, we will look into that later; that can be supplied later. It is not disputed, I understand, that that order was made?

Mr. Lane: No; and I will say that if it appears by the files that there was notice to the various creditors, then I want so much of the record in as shows that notice and the order. 10

The Vice Chancellor: You may supply as much of that record as you choose at the end of the stipulation.

Mr. Backes: My next stipulation is: "That all bricks had been laid on Swan Street, but some of them were laid by the Newton Paving Company." The fact is that 1,563.5 square yards of brick had been laid by the Citizens Construction Company and 2,063.38 square yards of brick were laid under the contract made by the Receiver by the Newton Paving Company, and then the Newton Paving Company completed the contract by grouting, and so on. I am putting these figures in on the question that Mr. Lane raised, that their brick were there on the ground but had not actually been placed in the pavement, so that the first lot were actually placed in the pavement, the second lot were subsequently placed in under the contract. 20 30

That on the 7th of October, 1914, there was due from the Citizens Construction Company to the Mack Manufacturing Company for Mack Repressed Paving Block, the sum of $4,811.75.

That of this sum $2,501.83 was due for blocks furnished for the paving of Swan Street, and $2,309.92 was due for blocks furnished for the paving of Hart Avenue. 40

That the notice filed with the officer of the

City of Trenton, pursuant to the statute, by the Mack Manufacturing Company on October 7, 1914, and before said contracts were completed, claimed a single lien for the moneys so due to the Mack Manufacturing Company, against both of the contracts made between the inhabitants of the City of Trenton and the Citizens Construction Company.

10 Mr. Katzenbach: Wouldn't it be possible here to let these various lien claims simply be introduced into the record?

Mr. Lane: I was going to suggest that.

Mr. Katzenbach: We can have the various lien claims and the bonds put in and the dates they were served stipulated. I don't suppose there will be any question about them. It is a mere matter of mechanical protection.

20 Mr. Lane: I think the records served on the city ought to be admitted so that they are before the Court.

Mr. Backes: "That on the nineteenth day of October, 1914, the Mack Manufacturing Company supplemented its notice by claiming a separate lien for materials so furnished by it to the Citizens Construction Company for the amount of $2,501.83 on Swan Street, and the sum of $2,309.92

30 on Hart Avenue." Now, if it is necessary I will offer the notices and bonds filed in the two claims filed by the Mack Manufacturing Company, and in the claim filed by Joseph B. Richardson & Sons, and so on.

The Vice-Chancellor: They can be offered at the end of your stipulation.

Mr. Lane: With the dates of their services.

Mr. Backes: Yes, sir. "That the notice of

40 lien and the bond required by the statute were duly filed on October 7th, 1914, and an amended notice thereof was duly filed on October 19th,

1914. That such notices were filed before the work was completed. That on October 14, 1914, Joseph B. Richardson & Sons filed their notice of lien pursuant to the direction of the statute for materials furnished on Swan Street, amounting to the sum of $1,278.66."

Mr. Katzenbach: And I would like it stipulated also that the bond required by the statute was likewise filed. 10

Mr. Lane: Well, offer it.

Mr. Katzenbach: Yes, we will offer those, and also may we have it stipulated here upon which officers these notices were served?

Mr. Lane: My idea is that we offer the lien claim notices, the bonds and a memorandum showing on what officers they were served.

Mr. Katzenbach: Produced by the City?

Mr. Lane: Yes. 20

Mr. Katzenbach: That will be satisfactory.

Mr. Lane: It makes the record complete. I think the original records ought to be here; I mean before the decision, I don't mean now, at this minute.

Mr. Katzenbach: It is also stipulated, I suppose, as it is in the Mack Construction Company case, that that amount of material was furnished by Joseph B. Richardson & Sons? 30

Mr. Lane: That is stipulated.

Mr. Katzenbach: For this Swan Street work.

Mr. Lane: What did that material consist of, Mr. Katzenbach?

Mr. Katzenbach: Of the cement and sand.

Mr. Backes: "That on the 19th day of October, Frank E. Arend filed his notice pursuant to the direction of the statute, claiming a lien for the sum of $139.40, for materials furnished for the paving of Swan Street." I think the same stipu- 40

lation can be made as to that, the same offer. "That on September 18, 1914, J. Clarence Richardson, Sr., was duly appointed Receiver of the Citizens Construction Company by the Chancellor of the State of New Jersey, and took upon himself the duties of said office."

Mr. Lane: That was under the statute, wasn't it? Receiver under the statute?

10 Mr. Backes: Under the terms of the corporation act of 1912, being unable to carry on its business. "That at the time the Receiver was appointed the work contracted for on Swan Street and Hart Avenue was unfinished." I think that already appears. "That on the 29th day of September, 1914, the Receiver was authorized to complete said work, and on the same day he entered into a contract with the Newton Paving Company 20 for the completion of the said work. That on October 19, 1914, the work on Swan Street had been completed, and on November 24, 1914, the work on Hart Avenue was completed." That on the 14th day of January, 1915, the Commissioners of the City of Trenton authorized the payment by its Treasurer to J. Clarence Richardson, the Receiver, of the sum of $898.69 on work done on Swan Street, and on the same day it authorized 30 the payment to the Receiver of $3,347.08 for work done on Hart Avenue. Now, it appears from a record taken from the books of the Comptroller of the City of Trenton that there is a balance due on said contract, on the Swan Street contract, of $4,610.53, and on the Hart Avenue contract of $3,199.01. I think that is all.

The Vice-Chancellor: Now, let counsel supplement the stipulation with such exhibits or other 40 stipulation as may occur to them.

Mr. Lane: I want to offer, if your Honor

please, the original contracts between the City of Trenton and the Citizens Construction Company for the paving of Swan Street and Hart Avenue.

Mr. Peter Backes: Do you also offer the contract made by the Mack Manufacturing Company with the Citizens Company?

Mr. Lane: Yes.

Mr. Peter Backes: I will furnish you a copy.

Mr. Lane: Of our contract? 10

Mr. Peter Backes: Yes.

Mr. Lane: I have the original.

Mr. Backes: All right; I have a duplicate of the original.

Mr. Lane: I spoke too quickly, Mr. Backes; I haven't the original.

The Vice-Chancellor: Let the record show that the execution of the contracts is admitted and they are marked Exhibits C1 and C2. 20

Mr. Peter Backes: And then the next contract is dated the 29th of June, 1914, Mack Manufacturing Company, with the Citizens Construction Company.

Said contract marked Exhibit C3.

The Vice-Chancellor: If there is any question that is to be raised touching the deficiency of any of the notices filed the originals had better be 30 filed, the stipulation be made modifying anything desired. Mr. Backes in his stipulation used language that perhaps foreclosed any question.

Mr. Lane: It was to avoid any foreclosure that I offered the original documents themselves in evidence so that we might have them before us. I do not know that there is any question.

The Vice-Chancellor: Have you them here that they may be identified and marked? 40

Mr. Lane: They are here.

Mr. Peter Backes: I don't think there is any question about them.

Mr. Lane: I don't know that there is; I haven't examined them all.

Mr. Katzenbach: As I understand it, there is no question raised as to the sufficiency of the services of the notices, it is simply as to the contents of the notices themselves that you wanted them in evidence for,—is that so?

Mr. Lane: A stop notice of Joseph B. Richardson and others, trading as Joseph B. Richardson & Sons, against the Citizens Construction Company, dated October 14th, 1914.

Said paper marked Exhibit C4.

Mr. Lane: A bond dated the 14th day of October, 1914, by and between Joseph B. Richardson and others partners, trading as Joseph B. Richardson & Sons, to the inhabitants of the City of Trenton, accompanying the foregoing stop notice, and in the sum of $255.34, approved October 14th, 1914, by Edward W. Lee, Comptroller, filed on October 14th, 1914, as 6:25 p. m., marked, "Approved as to form, Charles E. Bird, City Counsel, October 16th, 1914."

Said paper marked Exhibit C5.

Mr. Lane: Now, I offer the notice served by the Mack Manufacturing Company for $4,811.75, and the bond accompanying it for $962.35, approved October 7th, 1914, filed October 7th, 1914, 2:45 P. M.

Said paper marked Exhibit C6.

Mr. Lane: A notice by the Mack Manufacturing Company on Hart Avenue for $2,309.92; the bond accompanying it,—

Mr. Macpherson: Now, I suggest that as these exhibits are being offered by the complainant they be received subject to the objection that inasmuch

as they were filed after the appointment of the Receiver they are immaterial and irrelevant in connection with this case.

The Vice Chancellor: Yes.

Mr. Lane: The bond accompanying it in the sum of $461.98, approved as to sufficiency October 19th, 1914, and as to form and filed October 19th, 1914, at 1:45 P. M.

Said paper marked Exhibit C7. 10

Mr. Lane: Then I offer the notice Mack Manufacturing Company for $2,501.83, on Swan Street with the bond accompanying it, in the sum of $500.16, approved as to sufficiency and as to form and filed October 19th, 1914, at 1:45 P. M.

Said paper marked Exhibit C8.

Mr. Lane: I also offer the notice of pendency of suit filed December 31st, 1914, at 3:00 P. M., in the Swan Street case, and a similar notice filed 20 at the same time in the Hart Avenue case.

Said paper marked Exhibit C9.

Mr. Peter Backes: Now, if your Honor please, the question was raised whether the parties in this proceeding had notice of the application of Mr. Richardson for the making of the order that the work be completed, and I have here a copy of the order filed January 12th, 1913.

Mr. Lane: That is the order for payment, Mr. 30 Backes?

Mr. Peter Backes: Yes, order for payment in the case of McGovern against the Citizens Construction Company; that is consented to by Mr. Merritt Lane for the Mack Manufacturing Company, Mr. Macpherson for the bank, and I think Mr. Katzenbach appeared here, so that it appears that all the counsel had notice of the application.

Mr. Katzenbach: I was present, I remember, 40 on that occasion.

Mr. William J. Backes: The claim of Frank E. Aaron, for $139.40. Notice thereof was served upon Frederick W. Donnelly, J. Richard Fell and Edward W. Lee, on October 19th, 1914, and a bond to accompany same was filed with Edward W. Lee, the financial officer of the City of Trenton, in the sum of $27.

Mr. Macpherson: Objection is made to this offer upon the same ground, that it is immaterial, inasmuch as they were filed—notices were given after the appointment of the Receiver.

The Vice Chancellor: Now then, how far can you go, if the record is completed in all other respects, towards stipulating uncontroverted facts relative to the bank's controversy? There may be some things touching that which can be stipulated.

Mr. Macpherson: I thought to offer in evidence now the assignment,—I have just sent for it, the assignment to the bank of this money by the Citizens Construction Company. Is there any objection to that?

Mr. Lane: I cannot stipulate anything as to the bank claim.

Mr. Macpherson: I mean as to the offer in evidence of the paper itself.

The Vice Chancellor: I thought perhaps you could make some progress in the bank matter by stipulating uncontroverted matters.

Mr. Lane: It is one of those things—I can't tell anything about it, I don't know that there are any uncontroverted facts, I don't know that there any controverted facts, all the information is on the other side.

The Vice Chancellor: Have you any witnesses present who can testify, Mr. Macpherson?

Mr. Macpherson: No, I haven't; Mr. Thorn was here, but by the consent of Mr. Lane he was excused.

Mr. Lane: I assumed by what the Court said that we would have to have another day to go on with the bank matter.

Mr. Macpherson: His work would be shortened by Mr. Backes and Mr. Lane and counsel meeting in the bank and going over these books. Every facility will be afforded them in the bank.

Mr. Lane: I think if that is done it may shorten things up; if we have that opportunity then there may be some facts which will be uncontroverted, but at the present time— 10

The Vice Chancellor: Well, the opportunity must be given you, otherwise the proof will have to be brought here.

Mr. Macpherson: As to the convenience of counsel, they could do it at any time.

Mr. Lane: We could do it after working hours.

Mr. Macpherson: Yes, you could have then the help of the bank officials with all of the books. 20

The Vice Chancellor: Yes, that will be the better course. Is there anything more we can do to-day?

Mr. Lane: I think not. I have asked the City Engineer to give me an estimate of what there was, if anything, due from the City of Trenton to the Citizens Construction Company at the time of the appointment of the Receiver. He says you have such a memorandum, Mr. Backes. 30

Mr. Peter Backes: Showing that there was work that had been earned at that time?

Mr. Lane: Yes.

Mr. Peter Backes: I think we can agree on those facts, but we will have to be dependent upon the engineer's figures, and I think we can agree on those.

Mr. Lane: We can; he says he can do it; we have asked him to do it. 40

Mr. Katzenbach: It is stipulated that the stop-

notice filed by Joseph B. Richardson and others, partners, trading as Joseph B. Richardson & Sons, was served upon the 14th day of October, 1914, upon the persons named at the head of said stop-notice, and that said service was personal on Edward W. Lee, Commissioner of the City of Trenton, and Director of Public Finances and Comptroller of the City of Trenton; J. Richard Fell, Commissioner of the City of Trenton and Director of Streets and Public Improvements of the City of Trenton, N. J.; Harry E. Evans, City Treasurer of the City of Trenton, N. J.

Mr. Macpherson: I would like to prove this assignment now. Mr. McGovern is here and it will save time calling him back. He was the President of the Company.

The Vice Chancellor: Very well, put in anything you can to-day so we will take the shortest possible time at our next session.

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THOMAS J. McGOVERN, a witness produced in behalf of the Broad Street National Bank, being duly sworn according to law, on his oath says:

By Mr. Macpherson:

Q. Mr. McGovern, are you or were you the President of the Citizens Construction Company? A. I was Secretary and Treasurer.

Q. You were Secretary and Treasurer? A. Yes, sir.

Q. Who was the President or Vice-President? A. William F. McGovern was President.

Q. And who was the Vice-President? A. T. F. Riley

Q. I show you a paper marked Exhibit Bank 1. Look at that paper and tell me whether the signature of Thomas F. Riley as Vice-President is the signature of Thomas F. Riley? A. Yes, sir.

Q. And the seal of the company, Citizens Construction Company— A. Yes, sir.

Q. Was that affixed by you? A. Yes, sir.

Q. And that is the seal of the company? A. Yes, sir.

Q. And is that your signature as Secretary? A. Yes, sir.

Q. And you were Secretary at that time? A. Yes, sir. 10

Q. And did you deliver that to the Broad Street National Bank? A. Yes, sir.

Q. What, if anything, did you give to the Broad Street National Bank in addition to that paper? A. A note for $5,000.

Q. Do you recall whether that was one note or two notes? A. Two notes, I think, one of three thousand dollars and one of two.

Q. Do you recall the date of those notes? A. 20 No, sir; the notes will show for themselves.

Mr. Macpherson: That is as far as I can go with this witness.

Cross examination by Mr. Lane:

Q. Mr. McGovern, at the time you delivered this assignment to the Broad Street National Bank did you deliver any other assignments? A. Market Street, Hart Avenue and Swan Street. 30

Q. Well, did you deliver any other assignments? A. I don't know that I did.

Q. Didn't you deliver an assignment of the amount due on the contract for Woodbridge? A. I don't know whether that was—it ought to show, the records will show, I don't know whether—what date that was.

Q. Well, what record do you refer to? A. The assignment, the paper, the same as this one. 40

Q. Then you don't remember very much about

the transaction yourself? A. No, I have got a very poor memory.

Q. And your memory with respect to this assignment is only refreshed by seeing the assignment itself—is that right? A. Yes, sir, I know I made an assignment of other contracts but as to dates I couldn't remember those.

Q. Well, you did make an assignment of the Woodbridge contract, didn't you? A. Yes, sir.

Q. And were there any other contracts that you assigned? A. The Citizens Construction Company?

Q. Yes. A. No, sir, not that I remember of.

Q. How many assignments did you give of the contracts on Market, Hart and Swan Streets? A. How many assignments?

Q. Yes, how many paper writings evidencing assignment did you give other than this one? A. I don't understand that question.

Q. This is a paper writing assigning the Market, Hart and Swan Street contracts—you understand that? A. Yes, sir.

Q. How many papers like this did you give to the bank at any other time, or at different times; any? A. I couldn't tell you that.

Q. You couldn't tell? A. No.

By the Vice-Chancellor:

Q. Do you remember giving any more? A. I remember—I don't know whether the Woodbridge contract—I presume it was like this, I don't remember giving any more, I don't think there was any more, I don't think the Construction Company—

Mr. Lane: I call on Mr. Backes for the copies of the various assignments made by the Citizens Construction Company to the Broad Street National Bank.

Mr. Peter Backes: You have them all. I don't know why I should produce them, I haven't them, but I am producing all that there is here so far as I know. I also produce now an order that Mr. Lee just handed me, which is dated July 16th, 1914, addressed to Edward Lee, City Comptroller of Trenton, signed "Citizens Construction Company, T. J. McGovern, Secretary." 10

By Mr. Backes:

Q. Is that your signature? A. Yes, sir.

Q. Did that order on the Treasurer go with that assignment? A. Yes, sir.

Q. Did you execute any other assignments but those two to the Broad Street National Bank? A. No, sir, not to my knowledge.

Mr. Peter Backes: I offer that letter. 20

By Mr. Lane:

Q. Now, do you mean to say, Mr. McGovern, that you did not assign the Woodbridge contract? A. I won't say whether Woodbridge is on here or not.

Q. No, it is not. A. The Woodbridge contract and those contracts here are the contracts that was assigned to the bank and that is all, as far 30 as my knowledge now goes, there wasn't any other contracts and you couldn't assign anything else.

Q. Then you did assign the Woodbridge contract? A. Yes, sir.

Mr. Lane: Now, Mr. Backes, have you got a copy of the Woodbridge contract assignment?

Mr. Peter Backes: No, sir.

Mr. Lane: You did have it at one time, 40 I saw it.

Mr. Peter Backes: Did I?

Mr. Lane: Yes.

Mr. Peter Backes: Well, if you saw it—I will see if I have it.

Q. Did you assign anything to the bank individually at that time, Mr. McGovern? A. Any contracts I had individually?

10 Q. Anything at all, contracts, money, personal property or real estate. A. Nothing to the banks that I know, but contracts.

Mr. Macpherson: I cannot see the materiality of this. I apprehend that a person has a perfect right to take all the security they can get in the matter of a loan, they are not limited in taking any amount of security for a loan.

20 The Vice-Chancellor: I cannot say it is not an important question. I think the question had better be answered.

Q. (Question repeated.) A. Contracts that I had personally, why, I assigned to the bank; I have been accustomed to going to the bank and assigning contracts.

Q. For a long period of years? A. Yes, sir.

30 Q. And did you at the time you made this assignment, in order to secure the bank for the same amount of money that this assignment is made to secure, assign any property to the bank or otherwise secure them?

The Vice-Chancellor: For the same money, I suppose?

Mr. Lane: For the same money.

40 The Vice-Chancellor: In other words, did you give any securities for this loan other than those that here appear?

Mr. Peter Backes: I show you an-

other paper, Mr. McGovern—this is apparently a copy, Mr. Lane, it is not executed but apparently a copy of what purports to be an assignment to the Broad Street Bank of the Woodbridge contract.

A. Yes, I assigned the Woodbridge contract to the bank, according to this, but the bank has got whatever papers that I signed there, they can tell you better about that than I can from memory. 10

Q. Let me ask you again, Mr. McGovern—do you remember whether at the time you made this assignment in order to secure the bank for the same amount of money you gave—

The Vice-Chancellor: For the same money.

Q. For the same money—I beg your Honor's pardon—did you give to the bank any other security owned by yourself, not by the Citizens Construction Comapny, now—did you turn over anything else to them? A. I didn't turn over anything to the bank, but at the time that I was doing work—I may have other contracts in my name and made other assignments to the bank, that may be possible, but the bank records will show that if I have. 20

Q. At the same time that you were doing business as the Citizens Construction Company were you doing business individually also? A. Yes, sir. 30

Q. Where are the books of the Citizens Construction Company? A. All the papers and books—they didn't have any books—is turned over to the Receiver.

Q. No ledgers? A. No ledgers.

Q. No cash books? A. No, sir.

Q. No books of account of any other nature or description? A. No, sir. 40

Q. Did you have a bank book? A. Yes, sir.

Q. Where is that? A. The Receiver took it.

Q. Did you have a minute book in which you made a record of your minutes of your Directors? A. Why, the attorney may have.

Q. Who was the attorney? A. Mr. Backes.

Q. Mr. Peter Backes? A. Yes, sir. The company was only a short time in existence

Q. And the company started out with no capital, did it? A. Yes, sir, it had capital.

Q. What capital? A. A thousand dollars, and I throwed in myself I don't know how much, five or ten thousand.

Q. Have you any individual books which show —books that you kept yourself? A. No, sir.

Q. In your individual business you didn't keep any books whatever? A. No, sir, I tried to remember it in my head and that is the reason my memory is so bad. We have possibly some memorandums for contracts or something, don't you know, we kept some little record of it.

Q. Did you ever have a meeting of your Board of Directors? A. Yes, sir.

Mr. Macpherson: I object.

Mr. Lane: It is proper cross examination in this respect.

Q. There was no resolution of your Board of Directors authorizing the execution of this assignment, was there?

Mr. Macpherson: I object; the cases show that the act of an officer—

The Vice-Chancellor: *Prima facie* they are all right.

Mr. Lane: All the authorities hold that a president by virtue of his office has the implied power to assign, but no case holds that a secretary has.

Mr. Macpherson: Well, I further object that it is not the proper subject of inquiry at this time.

Mr. Lane: Why not? You have offered the assignment.

Mr. Macpherson: I simply offered it for the purpose of saving time now, before the bank puts in its claim, simply because Mr. McGovern is here. 10

The Vice-Chancellor: If there is any dispute about the sufficiency of the execution of this paper you can prepare and submit your proofs at another time.

Mr. Macpherson: My purpose now was to prove the signature of this paper while Mr. McGovern was here, to save time. Now, the further matters, concerning the consideration of the loan, will all be produced 20 and shown by the bank officers.

The Vice-Chancellor: You can establish his authority, if that question is to be raised, at any subsequent hearing, show what his course of dealing was.

Mr. Macpherson: Yes, sir.

By Mr. Lane:

Q. Let me ask you, Mr. McGovern, with what 30 officers of the bank did you have your dealings? A. With the President, Mr. Sadler.

Q. Who else? A. He was the man.

Q. With Mr. Thorn? A. I did business there with Mr. Thorn.

Q. And any one else in the bank? A. I guess that was all. I went before the Board of Directors and told them I wanted to borrow this money, if you mean that; they loaned it to me. 40

Mr. Macpherson: Mr. Lee is here. I

would like to offer in evidence a paper. Have you got the paper? The notice given by the Broad Street National Bank of the assignment by the Citizens Construction Company.

Mr. Lee: I have.

Mr. Macpherson: I would like to have that marked as an exhibit and put in evidence. This letter from the Citizens Construction Company, which has been offered by Mr. Backes—did that come from you?

Mr. Backes: No; I handed it to you, Judge Macpherson; I obtained it from you.

Mr. Macpherson: Did that come from your office?

Mr. Lee: Yes, sir.

Mr. Macpherson: And was served on you by whom?

Mr. Lee: Mr. McGovern.

Mr. Lane: I object to the offer of the—

The Vice-Chancellor: The witness was not sworn.

Mr. Lane: I will stipulate without swearing the witness, there is no question but what he is telling the truth. I object to the offer of the letter of July 16th, 1914, of the Citizens Construction Company, and I object to the offer of the assignment of July 16th, 1914, upon the ground that they have not been properly proven, that no authority has been shown in T. G. McGovern to assign moneys of the Citizens Construction Company.

The Vice-Chancellor: They can be marked subject to your privilege of offering further proof touching the course of dealings with the Construction Company or authority in Mr. McGovern.

Said letter marked Exhibit Bank 3.

The Vice-Chancellor: Is there any further proofs that can be made today or stipulations?

Mr. Lane: I will dictate in the record the service of my notices. The notice of $4,-811.75 was served on the 7th day of October, 1914, on the President of the Commissioners of the City of Trenton, on the Commissioner in charge of the Department of Streets and Public Improvements, on the Commissioner in charge of the Department of Revenue and Finance, on the Treasurer of the City of Trenton and the Comptroller of the City of Trenton; the other two notices, the one on Swan Street and the other on Hart Avenue, were served on the same person on the 19th of October, 1914.

The Vice-Chancellor: Now, I will let you complete the proofs in this case on Thursday, June 3rd, 1915, at 10:30 A. M.

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Testimony, &c., taken before me, Frederick W. Gnichtel, Special Master in Chancery of New Jersey, this thirtieth day of July, nineteen hundred and fifteen, at 10:30 o'clock in the forenoon, at my office, Room 709 Broad Street Bank Building, in the City of Trenton, New Jersey, in pursuance of an order of reference made in the above cause, and dated the twentieth day of July, nineteen hundred and fifteen.

Mr. George W. Macpherson and Mr. Nelson B. Gaskill appeared for the defendant, Broad Street National Bank.

Mr. Edward L. Katzenbach, appeared for defendant, Joseph B. Richardson.

Mr. PETER BACKES appeared for the Receiver.

Mr. Merrit Lane, solicitor for the complainant, Mack Manufacturing Company, stated that he could not be present, and asked for an adjournment, which was not granted, and requested that a copy of the testimony be sent to him, and he would produce witnesses to testify on behalf of his client on Friday, August 6th, 1915, at 10:30 o'clock.

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WILBUR F. SADLER, Jr., a witness produced on the part of the defendant, the Broad Street National Bank, being duly sworn according to law, on his oath testifies as follows:

Direct examination, by Mr. Gaskill:

Q. You are the President of the Broad Street National Bank? A. I am.

Q. You held that office in August, 1914? A. I did.

Q. Do you recall an application for a loan, made to your bank by the Citizens' Construction Company, in or about August, 1914? A. An application was made to the Board of Directors; I was away when it was made, but it was called to my attention immediately upon my return, for approval.

Q. Had the loan been consummated at the time the matter was brought to your attention? A. It had.

Q. Were the details and circumstances of the application submitted to you? A. They were.

Q. Do you recall what the nature of the application was? A. I do.

Q. What was the request of the Citizen's Construction Company? A. They made a request for

a certain amount of money, offering as collateral security, certain assignments of contracts, and certain collaterals.

Q. Do you recall the amount of the loan requested? A. For the moment I do not.

Q. Do you recall the nature of the collateral requested and which was furnished by the Citizen's Construction Company? A. You mean that we requested, and that they furnished? 10

Q. Yes. A. I do.

Q. What was it? A. Certain checks, and notes, and assignments of contracts.

Q. And those assignments of contracts, notes and checks, were deposited with your bank? A. They were.

Q. With what officer or agent of the Citizen's Construction Company did the bank deal and do business? A. Thomas J. McGovern. 20

Q. What office did he hold in that company? A. I think he was the President of it.

Q. After this loan had been consummated, do you know whether or not warrants on account of payments due on the performance of these contracts, were forwarded to the bank? A. They were.

Q. Was any request made to the bank by the Citizen's Construction Company, with reference to the disposition of the proceeds of these warrants? A. There was. 30

Q. What was that request? A. Mr. McGovern stated that he needed money to conduct his business and complete his contracts, and asked that those warrants be turned over to the Citizen's Construction Company.

Q. Did he say that he, personally, needed money, or did he say that the Citizen's Construction Company needed the money to carry out 40

the performance of these contracts? A. He said that the Citizen's Construction Company needed the money.

Q. What was the response of the bank to that request? A. The bank, feeling that it had plenty of collateral, in the way of warrants and endorsements, gave Mr. McGovern those warrants.

Q. Did the bank place any reliance upon the fact that these warrants represented only a small portion of the payments due on the contracts which would still come to the bank? A. It did.

Q. When you say that the bank gave these warrants to Mr. McGovern, do you mean that it gave them to Mr. McGovern individually, or to Mr. McGovern as President of the Citizen's Construction Company? A. As President of the Citizen's Construction Company.

Q. Have you had occasion to examine the books, or to determine how those warrants were used, and what became of the proceeds? A. I know they were placed to the credit of the Citizen's Construction Company; but I am not the bookkeeper, and I am not familiar with the details of the books of the bank.

Q. Did you as President of the bank, at the time this loan was made and ratified by you, have any information or knowledge which would lead you to question the solvency of the Citizen's Construction Company? A. We thought that it was solvent.

Q. At the time these warrants were released to the Citizen's Construction Company, did you have any knowledge or information which led you to question the solvency of the Citizen's Construction Company? A. No.

Q. Did you ever have any financial dealings in connection with this loan with any officer or agent of the Citizen's Construction Company,

other than the President, Thomas J. McGovern? A. I did not.

Q. Have you any personal knowledge of the form in which these warrants which were presented to you, and released, were made payable by the authorities who drew them? A. I think they were made payable to the Citizen's Construction Company.

Q. Did the bank make any loans to the Citizen's Construction Company prior to the loan in question? A. I am not positive about that. 10

Q. My attention has been called to a card in reference to the Citizen's Construction Company, which we will prove later, a signature card; I may have misled you in the presumption that Mr. McGovern was the President of the Citizen's Construction Company. I show you this card, which we will prove, and ask you whether that indicates that Mr. McGovern had any other relation to the company than President, or whether he was in fact another officer of the company? A. (Examining Card.) This indicates very clearly that he was the Treasurer of the Citizen's Construction Company, and not President, as I have previously stated. 20

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GEORGE KATZENBACH, a witness produced on the part of the defendant, the Broad Street National Bank, being duly sworn on his oath testifies as follows:

Direct examination by Mr. Macpherson:

Q. You are connected with the Broad Street National Bank, one of the defendants in this cause? A. Yes, sir.

Q. In what capacity? A. Assistant Cashier. 40

Q. Who is the Cashier? A. Edwin M. Thorn.

Q. Where is Mr. Thorn to-day, do you know?

A. Up in the Thousand Islands, I guess, or somewhere about there.

Q. Away on his vacation? A. He is, yes, sir.

Q. You are familiar with the bank's ways and methods of making loans, and keeping books? A. I am.

Q. I show you a note, made by the Citizen's Construction Company, signed, T. J. McGovern, Treasurer, dated August 3, 1914; is that note the property of the Broad Street National Bank? A. It is.

Q. And was it discounted by that bank? A. It was placed to the credit of the Citizen's Construction Company. It is a demand note, and was not discounted.

Q. It was placed to their credit? A. It was.

Q. What was the amount of the note? A. Three thousand dollars; on demand; dated August 3, 1914.

Q. I am also showing you another note, dated August 10, 1914, for $2,000; whose note is that? A. Citizen's Construction Company.

Q. Was that placed to the credit of that company? A. It was.

Q. And is now the property of the Broad Street National Bank? A. It is.

Q. What collateral, if any, have you for the security of the payment of these notes? A. A demand note of $1,000, endorsed by R. B. Newton; a demand note of $1,000, endorsed by Frank J. Clark; a demand note of $1,000, endorsed by F. E. Weeden; also assignments of contracts between the Citizen's Construction Company and the City of Woodbury, the City of Trenton, and the Borough of Bogota; and checks of James C. Tattersall and J. C. Richardson for $1,000 each.

Q. I show you a paper purporting to be an assignment of moneys due or to become due to the

Citizen's Construction Company by the City of Woodbury; is that one of the papers you refer to? A. It is.

Q. I show you a paper purporting to be an assignment by the Citizen's Construction Company to the Broad Street National Bank, of contracts for the City of Trenton—the paving of Market Street, Hart Avenue and Swan Street; is that one of the assignments you referred to? A. It is. 10

Q. I am also showing you paper purporting to be an assignment of a contract made between Thomas J. McGovern and the Borough of Bogota; is that one of the assignments that you referred to? A. It is.

Q. I also show you a check, dated August 5, 1914, for $1,000, signed by James C. Tattersall; is that one of the papers the bank held as security? A. Yes. 20

Q. I show you a check for $1,000 dated August 5, 1914, signed by J. C. Richardson; is that one of the papers you referred to? A. It is, yes, sir.

Q. I show you three several promissory notes of $1,000 each—one dated August 3, 1914, drawn by the Citizen's Construction Company in favor of T. J. McGovern, and endorsed by T. J. McGovern and Frank J. Clark; another endorsed by R. B. Newton, and another by F. E. Weeden; are they the notes that you referred to, that were a part of the collateral? A. Yes, sir. 30

Counsel for Broad Street National Bank, offers in evidence, the following:

1. A promissory note signed by Citizen's Construction Company, T. J. McGovern, Secy. and Treas., dated August 3, 1914, for $3,000, to the order of the Broad Street National Bank; marked Exhibit for Bank, No. 1. 40

2. Note dated August 3, 1914, signed by Citizens Construction Company, T. J. McGovern, Secy. and Treas., for $3,000, to the order of the Broad Street National Bank, with protest annexed; marked Exhibit for Bank, No. 2.

3. Note dated August 10, 1914, for $2,000, signed by Citizens Construction Company, T. J. McGovern, Treasurer; marked Exhibit for Bank, No. 3.

4. Demand note, dated August 3, 1914, to the order of T. J. McGovern, for $1,000, signed, Citizen's Construction Company, T. J. McGovern, Treasurer; endorsed, T. J. McGovern, Frank J. Clark, and The Citizen's Construction Company, T. J. McGovern, Treas. Protest waived; marked Exhibit for Bank, No. 4.

5. Demand note, dated August 3, 1914, to the order of T. J. McGovern, for $1,000, payable at Broad Street National Bank, signed Citizen's Construction Company, T. J. McGovern, Treasurer. Endorsed, T. J. McGovern, R. B. Newton, and The Citizen's Construction Company, T. J. McGovern, Treasurer. Marked Exhibit for Bank, No. 5.

6. Demand note for $1,000, dated August 3, 1914, to the order of T. J. McGovern, payable at Broad Street National Bank, signed, The Citizen's Construction Company, T. J. McGovern, Treasurer. Endorsed, T. J. McGovern, F. E. Weeden, and The Citizen's Construction Co., T. J. McGovern, Treasurer. Marked Exhibit for Bank, No. 6.

7. Check dated July 5, 1914, on First National Bank, to the order of T. J. McGovern, for $1,000, signed, J. C. Richardson, endorsed, T. J. McGovern, and The Ciitzen's Construction Company, T. J. McGovern, Treasurer. Marked, Exhibit for Bank, No. 7.

8. Check dated August 5, 1914, to the order of T. J. McGovern, for $1,000, drawn on Trenton Trust & Safe Deposit Company, signed, James C. Tattersall. Marked Exhibit for Bank, No. 8. 10

9. Assignment, The Citizen's Construction Company, to Broad Street National Bank; assigns moneys due on account of contracts between Trenton and Citizen's Construction Company, paving of Market Street, Hart Avenue and Swan Street; signed by Citizen's Construction Company; dated July 16, 1914. Marked Exhibit for Bank, No. 9. 20

10. Assignment to Broad Street National Bank, of moneys due from City of Woodbury to Citizen's Construction Company, dated August 3, 1914. Marked Exhibit for Bank, No. 10. 30

11. Assignment to Broad Street National Bank of moneys due from the Borough of Bogota, to Citizen's Construction Company, dated August 3, 1914. Marked Exhibit for Bank, No. 11.

Q. Do you know whether or not, any notice was given to the City of Woodbury, or to the Borough of Bogota, of the assignments of the contracts you have referred to? A. I think there was. 40

Q. I hand you two papers—were they found in

with the other papers constituting this loan? A. Yes.

Q. How are they marked? A. They are marked "Copy."

Q. And how are they signed? A. They are signed by Edwin M. Thorn, Cashier.

Q. Do you recognize that as his signature? A. I do.

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Q. Have you any personal knowledge as to the giving of this notice to these different municipalities? A. I know the notice was sent.

Counsel for Broad Street National Bank, offers in evidence the following notices:

Notice to City of Woodbury, of assignment of moneys due to Citizen's Construction Company, signed by Broad Street National Bank, dated August 4, 1914. Marked Exhibit for Bank, No. 12.

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Notice to Borough of Bogota, of assignment of moneys due to Citizen's Construction Company, signed by Broad Street National Bank, dated August 4, 1914. Marked Exhibit for Bank, No. 13.

Q. I have here a statement, which is a copy of all the entries in the books of the bank, relating to the transactions of the Citizen's Construction Company; moneys deposited by them or placed to their credit, and checks and debits drawn against the account. I make an offer of the books themselves, and for convenience here, I have caused a transcript to be made of those books, which shows all those transactions. I am showing you this paper, and ask you what it is? A. It is a copy of the account of the Citizen's Construction Company, as appears in our daily balance book, 52, A to D, from July 19 to December 19, 1914; its deposits and withdrawals.

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Q. And that copy is a true copy? A. It is.

Q. And made by you? A. By Mr. Thorn and myself.

Counsel for Broad Street National Bank offers in evidence transcript of account of Citizen's Construction Company with said bank, from the daily balance book of the Broad Street National Bank. Marked Exhibit for Bank, No. 14. 10

Q. I am calling your attention on this transcript, to some markings, as of calculation; does that appear on the books? A. That is simply the total of this amount of $1,153.50, made up of these several checks.

Q. Does that appear on your books? A. It does.

Q. I also call your attention to these lead pencil entries; do they appear on the books? A. They are notes. 20

Q. Do they appear on the books? A. Yes.

Q. And are entered in this way? A. Yes.

Q. Showing that this is a transcript of the record as appears upon your books? A. Yes, sir.

Q. The column shown here on the left hand of the account; what does that represent? A. Checks charged against the account, and drawn by the Citizen's Construction Company against their account. 30

Q. I also show you the right hand column; what does that represent? A. The amount deposited to the credit of the Citizen's Construction Company.

Q. On both pages, is that true? A. It is.

Q. I am showing you Exhibit No. 2 for the bank, and ask you when that note was placed to the credit of the Citizen's Construction Company? A. August 3, 1914. 40

Q. I show you also Exhibit No. 3 for the bank, being note dated August 10, 1914, for $2,000; when was that placed to the credit of the Citizen's Construction Company? A. August 10, 1914.

Q. Are you able to state whether or not there were any warrants of the City of Trenton, placed to the credit of the Citizen's Construction Company? A. They were turned over to Mr. McGovern, as Treasurer of the Citizen's Construction Company.

Q. I say, can you tell by that stateemnt, whether or not there were any warrants, and if there were, what disposition was made of them? A. There were warrants, and they were placed to the credit of the Citizen's Construction Company.

Q. From that account, are you able to identify what items represent warrants? A. I can't identify all of them.

Q. They were treated so far as deposits were made, as cash? A. Yes.

Q. And placed to the credit of the Citizen's Construction Company? A. Yes.

Q. Is there any way by which you can identify any of those warrants, or all of them? A. Yes, sir.

Q. How? A. By looking up our deposit slips, and taking the warrants off; our record of warrants.

Q. Now, those deposit slips, are slips that are made out by the person making the deposit, I understand? A. Yes.

Q. Do they set forth whether or not they are warrants, or how would they appear on the deposit slips, so that you would be able to identify them? A. Simply as the warrant comes in, it is turned over to the Construction Company's deposit, made out for them, and placed to their credit.

Q. Have you those slips? A. We have.

Q. Will you produce them? A. Yes.

Counsel offers to produce deposit slips later.

Q. Do you know what method was pursued with reference to the giving of any warrants under any of these contracts, that were held by the bank as collateral? A. The warrants were made out to the order of the Citizen's Construction Company, and either sent to the bank by the different municipalities, or brought by Mr. McGovern.

Q. And what was done with those warrants? A. They were turned over to Mr. McGovern, as Treasurer of the Citizen's Construction Company, and they were drawn to the order of the Citizen's Construction Company.

Q. And what was done with them? A. They were deposited to the credit of the Citizen's Construction Company, in the Broad Street Bank.

Q. The Citizen's Construction Company got credit for them on your books? A. Yes, sir.

Q. Is the full amount of these notes, with interest, still owing from the Citizen's Construction Company to the Broad Street National Bank? A. It is.

Q. On both of these notes? A. On both of them.

Q. And there has been no payment on account of either of them? A. No, sir.

Q. I am handing you a card; what is that card? A. A signature card, of the Citizen's Construction Company.

Q. Of what uses and purposes are such cards? A. Placed on file, for the payment of checks or notes.

Q. And this is the authority and warrant of the bank for that account? A. Yes.

Card offered in evidence, and marked Exhibit for Bank, No. 17.

Q. Were all these papers which you have referred to, taken by the bank as collateral for these two loans, in the possession of the bank before the loans were actually made? A. They were.

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THOMAS J. McGOVERN, a witness produced on the part of the Broad Street National Bank, being duly sworn, on his oath testifies as follows:

Direct examination by Mr. Macpherson:

Q. (Examining minute book of the Citizen's Construction Company, produced by witness.) I call your attention to a meeting of the Citizen's Construction Company, purporting to be held on the 17th day of September, 1914; is that a true record of the transactions of the company on that day? A. Yes, sir.

Counsel for Broad Street Bank reads minutes into the record:

"At a meeting of the directors of the Citizen's Construction Company, held on this 17th day of September, 1914, Thomas J. McGovern, William McGovern and Thomas Riley being present,

"It was moved that an assignment of a certain contract made by the company with the City of Woodbury, the assignment dated on the 3rd day of August, 1914, in favor of the Broad Street National Bank of Trenton, and also of a certain order dated on said day, drawn

by this company on Ernest Redfield, City Treasurer of the City of Woodbury, be and the same are hereby ratified and confirmed.

"And it was further moved, that an assignment made by this company in favor of said bank of certain contracts for the construction of pavements on Market Street, Hart Avenue, and Swan Street, and of a certain order dated on said day, and drawn by this company in favor of said bank, on Edward Lee, City Comptroller, be and the same are hereby ratified and confirmed."

Q. Was that transaction taken by the Directors of the company on that day? A. Yes, sir.

Q. I show you, Mr. McGovern, Exhibit No. 9 for the bank, purporting to be an assignment by the Citizens Construction Company to the Broad Street National Bank, of moneys due under a contract for the paving of Market Street, Hart Avenue and Swan Street, and I ask you whether that is your signature "T. J. McGovern"? A. It is.

Q. And is that the seal of the company? A. It is.

Q. Who is Thomas F. Riley? A. Vice-President of the Citizens' Construction Company.

Q. Is that his signature? A. Yes.

Q. I am also showing you an assignment made by yourself to the Broad Street National Bank, for moneys due under a contract with the Borough of Bogota; is that your signature? A. Yes.

Q. I am also showing you an assignment of moneys due under a contract between the Citizens' Construction Company and the City of Woodbury, made by the Citizens' Construction Company to the Broad Street National Bank; is that the signa-

ture of the Citizens' Construction Company? A. Yes.

Q. Is that your signature as Secretary? A. It is.

Q. Do you recognize the seal of the company? A. Yes.

Q. Is that the seal? A. Yes.

Q. Was Thomas F. Riley Vice-President at that time? A. Yes.

Q. Is that his signature? A. Yes.

Q. And you delivered these assignments to the Broad Street National Bank to secure the loan? A. Yes, sir.

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Mr. GEORGE KATZENBACH, being recalled, testifies as follows:

Direct examination by Mr. Macpherson:

Q. Mr. Katzenbach, since you were upon the stand this morning, have you found the deposit slips made by the Citizens' Construction Company? A. I have.

Q. Are you able to tell from those deposit slips what, if any, represented moneys having been received on account of the contracts had between the City of Trenton with the Citizens' Construction Company, the City of Woodbury with the Citizens' Construction Company, and the Borough of Bogota with Thomas J. McGovern? A. I am.

Q. I show you deposit slip dated August 18, 1914, in the name of the Citizens' Construction Company; what does that represent? A. A payment by the City of Trenton to the Citizens' Construction Company of $1,000.

Q. Was that deposited by the Citizens' Construction Company? A. It was.

Q. And went to their credit? A. Yes, on the 18th of August.

Q. Does that appear upon the books of the bank? A. It does.

Q. And is shown on this transcript which you have already testified to? A. Yes.

Slip referred to offered in evidence and marked Exhibit for Bank, No. 18.

Q. I show you a deposit slip, dated August 24, 1914; what does that represent? A. A check from the Borough of Bogota, to the Citizens' Construction Company. 10

Q. I observe the name of Thomas J. McGovern; the contract was made with Thomas J. McGovern? A. Yes.

Q. The deposit, however, was made by the Citizens' Construction Company? A. Yes.

Q. And went to their credit? A. Yes, on the 21st of August, 1914. 20

Q. Does that show on the books of the company? A. Yes.

Q. Does it appear on this transcript you have testified to? A. It does.

Deposit slip referred to offered in evidence and marked Exhibit for Bank, No. 19.

Q. I show you deposit slip, dated September 11, 1914; what does that represent? A. A check from the Borough of Bogota, for $3,587.22. 30

Q. Was that deposited by the Citizens' Construction Company? A. Yes.

Q. And placed to the credit of the Citizens' Construction Company? A. Yes, on the 11th of September, 1914.

Q. And does that appear on the books of the bank? A. It does.

Q. And also on the transcript you have testified to? A. It does. 40

Q. I show you deposit slip, dated September 1,

1914; what does that represent? A. It represents checks of the City of Trenton, deposited to the credit of the Citizens' Construction Company.

Q. More than one? A. Two checks, one of $750.40 and one of $264.

Q. Deposited to what account? A. Citizens' Construction Company.

Q. Does that appear on the books of your bank? A. It does.

Q. And on the transcript you have testified to? A. It does.

Two deposit slips above referred to offered in evidence and marked respectively, Exhibits for Bank, No. 20 and No. 21.

Q. I show you deposit slip dated September 15, 1914; what does that refer to? A. A check from the City of Woodbury for $1,600, to the order of the Citizens' Construction Company.

Q. Was that credited to the Citizens' Construction Company? A. It was.

Q. Does it appear on the books of the bank? A. Yes.

Q. And on the statement presented here? A. Yes.

Deposit slip referred to offered in evidence and marked Exhibit for Bank, No. 22.

Q. I am calling your attention to item of July 15, 1914, which is a credit to the Citizens' Construction Company; what does that represent? A. A note of the Citizens' Construction Company for $500, endorsed by Thomas J. McGovern.

Q. Have you any knowledge as to whether or not at that time, any check was given to the Citizens' Construction Company to cover that note? A. A certified check of $500 was issued to the Citizens' Construction Company.

Q. What was done at that time with reference to that check? A. The check was presented with a bid somewhere, of course, and was re-deposited on July 20th.

Q. Was that check certified by your bank? A. It was a check of the Citizens' Construction Company certified by the Broad Street National Bank.

Q. So far as the bookkeeping was concerned, what was done? A. A memorandum was charged to his account of $500. 10

Q. Does that charge appear on the books of the bank? A. It appears on the books of the bank.

Q. Also on the transcript presented here? A. It does.

Q. Afterwards what was done with it? A. On the 20th of July, it was deposited to the credit of the Citizens' Construction Company, and the note of $500 which was certified on July 15th, was charged against it. 20

Q. I call your attention to another note, of $2,500, appearing on the books; do you know whether or not any check was certified and given to the Citizens' Construction Company, representing the proceeds of that note? A. Check for $2,500.

Q. Was that charged at that time? A. Charged the same day, against the account of the Citizens' Construction Company. 30

Q. Was it returned? A. Returned, and deposited on the 3rd of August, 1914.

Q. What was done with the note? A. The note was charged against the account on the 3rd day of August.

Q. Do you know of any other transactions, where any other certified checks were obtained by the Citizens' Construction Company, and the same procedure was taken? A. I do not. 40

Q. Those were the only ones? A. Those were the only ones.

Counsel for Broad Street National Bank, offered in evidence, letter dated August 3, 1914, addressed to Edward Redfield, City Treasurer, signed "T. J. McGovern, Sec'y"; marked Exhibit for Bank, No. 15.

Letter to the Comptroller of the Borough of Bogota, dated August 3, 1914, signed "T. J. McGovern." Marked Exhibit for Bank, No. 16.

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Counsel for Broad Street National Bank, rests

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Hearing in above matter adjourned to Friday, August 6, 1914, at 10:30 o'clock.

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Continuation of the taking of testimony in the above entitled cause, before me, Frederick W. Gnichtel, Special Master in Chancery of New Jersey, this sixth day of August, nineteen hundred and fifteen, at 10:30 o'clock in the forenoon, at my office, Room 709 Broad Street Bank Building, in the City of Trenton, New Jersey, in pursuance of an order of reference made in the above cause, dated the twentieth day of July, nineteen hundred and fifteen.

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Special Master.

MR. MERRITT LANE appeared for the Complainant, Mack Manufacturing Company.

MR. GEORGE W. MACPHERSON and MR. NELSON B. GASKILL appeared for the Defendant, Broad Street National Bank.

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MR. PETER BACKES appeared for the Receiver of Citizens' Construction Company.

WILBUR F. SADLER, Jr., being recalled, testifies as follows:

The Master: Mr. Lane, do you call General Sadler for cross examination?

Mr. Lane: Yes.

Mr. Macpherson: We object, as the examination of Mr. Sadler had been concluded, and he is now used by Mr. Lane as his own witness. 10

Mr. Gaskill: At the time General Sadler was called as a witness, it was at a hearing duly called, of which Mr. Lane had notice, and his non-appearance and request for a continuance, was based upon the understanding that we should proceed in his absence; the testimony of Mr. Sadler and Mr. Katzenbach was taken accordingly, and we rested. We insist therefore, that any further examination of Mr. Sadler and Mr. Katzenbach, must be in accordance with the subpœnas, which Mr. Lane has caused to be served, bringing these parties here as witnesses on his own part, and for direct examination. 20

Mr. Lane: The day fixed by the Master was fixed without notice to me, and at a time during the Summer vacation. 30

Mr. Backes: You had notice of that. I sent notice to everybody concerned, and sent notice to you. You called me on the telephone, asking about the hearing, and I informed you that we were going on; that was the day of the hearing, last Friday.

Mr. Lane: I had no notice of the application to fix a day for the hearing. It was fixed at a time during the Summer vaca- 40

tion. On the day fixed for the hearing, I telephoned this office, and it was stated by Mr. Peter Backes that the witnesses were here, and that they were going on, and that he would not consent to an adjournment. The witnesses were examined, and I am now going to proceed to cross examine them, having brought them here by subpœna, so far as they were examined on direct, and as to other matters, I shall use them as my own witnesses.

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Mr. Backes: I want it to appear on the record, that Mr. Lane did receive notice, the same as the other counsel in the case, of the time fixed by the Master for the hearing.

Mr. Lane: That is true.

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Mr. Backes: That he replied at the time fixed for the hearing, and expressed his inability to come here because of another engagement.

The Master: I shall take this testimony, as cross examination, so far as it is cross examination of the direct examination, and counsel may reserve their objections, and argue them before the Vice-Chancellor.

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Cross examination by Mr. Lane:

Mr. Macpherson: "We enter our objection to the ruling, and the course taken by the Master."

Q. Mr. Sadler, you knew nothing about this loan, or these loans to the Citizens' Construction Company until after the loans had actually been made? Is that true? A. That is true.

40

Q. And the gentleman in your bank who had charge of the loans, was a Mr. Thorn, who is now away on his vacation, and who was away on

the day of the hearing before the Master; is that right? A. I believe that he and Mr. Katzenbach were equally familiar with the transactions.

Q. Did the matter come up before your Board of Directors, at any meeting? A. The matter of the loan to the Citizens' Construction Company came up before the board, in my absence; during my absence.

Q. Is there a minute of that meeting? A. There is no minute of what was done about the Citizens' Construction Company loan. 10

Q. Is there a minute of what transpired at that meeting? A. Yes, but it does not refer in any way to what took place while Mr. McGovern was before the board.

Q. Is there a minute that shows, as a matter of fact, that Mr. McGovern did come before the board? A. I don't think so. 20

Q. What day was it that he came before the board? A. I don't remember.

Q. Can you ascertain that? A. I think that I can.

Q. Who would know? A. I would have to get that by looking up the time of the loan, and then looking at the minute book.

Q. And by doing that you can locate it? A. I think so. 30

Q. Then there was no action taken by your Board of Directors with respect to this loan? A. I am inclined to think there was, but on matters of that sort, no minute is made by the Secretary.

Q. To what officer of your bank are such matters referred? A. The President, when he is at home; and to the cashier and assistant cashier.

Q. How long had your bank been dealing with Mr. McGovern? A. As an individual? 40

Q. Any way, either as an individual, or a corporation, or a number of corporations? A. As

an individual, I should say for twelve or fifteen years, in one way or another.

Q. Did your bank know of the incorporation of the Citizens' Construction Company? A. It did.

Q. Did it know of the incorporation before the incorporation actually went through; did it know it was going to be incorporated? A. I don't think so.

10

Q. When did your bank first hear that such a corporation had been incorporated? A. Mr. McGovern told us of it.

Q. Was that before you went away, or during the time you were away. I really don't remember.

Q. Who would know? A. I don't know who could answer that question.

20

Q. Did your concern know of the incorporation of the Citizens' Construction Company prior to this loan? A. Yes.

Q. How did it find out that the Citizens' Construction Company had been incorporated? A. Through Mr. McGovern.

Q. What did he say? A. I don't remember.

Q. Was the conversation with you? A. I think I remember that Mr. McGovern told me that he had formed the corporation, but when it was I don't remember.

30

Q. Did he say for what purpose? A. For the purpose of building roads, and paving, and general contracting.

Q. Did you know what contracts the Citizens' Construction Company had at the time the loan was made? A. I think that was explained by Mr. McGovern.

40

Q. Did you know what the capital stock of the Citizens' Construction Company was? A. I

am inclined to think I did, but I do not remember the figures.

Q. Well, if I refresh your recollection to the fact that the figures show it was $1,000; you remember the figures?

Mr. Macpherson: "This is not cross examination, and we object to it as such, and insist that if counsel pursues this course, he makes the witness his own witness." 10

A. I don't believe I do Mr. Lane; I don't recall just what was said in regard to that.

Q. The application for a loan was not made to you, and therefore you do not know what Mr. McGovern said to the bank officials at the time the application was made? A. Not in this particular case. I don't remember what he said to the board at that time. 20

Q. Or what he said to any of the officers of the bank? A. I don't think I was present. What I would tell you would be merely hearsay.

Q. Who are the members of your Board of Directors; or who were the members of your board in August, 1914, when this loan was applied for? A. Mr. O. O. Bowman—

Q. Are all of them of Trenton? A. Yes, with the exception of Mr. Ogden D. Wilkinson. 30

Q. What is his address? A. Philadelphia.

Q. What are the names of the Directors? A. Mr. O. O. Bowman, E. C. Hutchinson, J. W. Cornell, James J. Wilson, William H. Howell (he lives in Morrisville; does business in Trenton), J. V. B. Wyckoff, A. C. Reeves, Robert A. Messler, Leslie C. Pierson, and myself.

Q. During the time that the bank was doing business with the Citizens' Construction Company, was it continuing to do business with Mr. McGovern individually? Thomas J. McGovern? 40

A. I think we did have some transactions with him individually.

Q. Were those transactions greater, or lesser in extent than they had been prior to the incorporation of the Citizens' Construction Company? A. I think less.

Q. Have you the transcript of his account here? A. Transcript of what account?

10 Q. Mr. McGovern's account? A. I think Mr. Katzenbach has.

Mr. Katzenbach: "I have the ledger account."

Mr. Lane: "Let me see it". (Examining ledger.)

"On August 19th, there is a deposit to the account of Thomas J. McGovern, $100, and a note for $1,378.83, discounted; and on the same date, there was a check drawn for $1,500. Can you tell whether that was a check or a note?

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Mr. Katzenbach: Returned to Mr. McGovern. The records of our bank will show.

Mr. Lane: It does not appear from the ledger entry whether it is the taking up of a note, or a check.

30

Q. (To Mr. Sadler.) There were also carried in your bank, accounts of William F. McGovern, and the McGovern Construction Company; were there not? A. There were.

Q. Is the McGovern Construction Company a concern of Thomas J. McGovern's? A. He is interested in it.

Q. General Sadler, you testified last week that

40 you thought the Citizens' Construction Company, at the time you made the loan, or the bank made the loan, was solvent; upon what did you base

that assumption? A. From statements made by Mr. McGovern.

Q. Those statements were not made to you? A. Yes, Mr. Govern talked to me about that before he went before the board, and talked to me about it after the loan was made.

Q. Then you did know of the fact of the incorporation of the Citizens' Construction Company before you went away on your vacation? A. I am inclined to think that I did. He either told me that it was incorporated, or that he was going to incorporate, who he was going to take in, and what he was going to do; I don't remember, but he made a statement to me, I think.

Q. In writing? A. Yes.

Q. Have you that statement. A. I could not find it this morning; I looked among my papers, but was unable to find it.

Q. What did he say to you? A. It is a good while ago, and I don't remember the details.

Q. Do you remember any part of it? A. Generally, that he had gotten some gentlemen to go in with him, and that they were going to do business, and he told me he was expecting to get some contracts, etc.

Q. Did he tell you what the capital stock was? A. I don't remember.

Q. Was that all the information you had, to lead you to think that the Citizen's Construction Company was solvent? A. I had a good deal more than that, but I can't remember the details. So many of these things come up; I am not familiar with it now.

Q. Did you ask him what contracts he had, or whether he had any contracts? A. I think he was bidding at that time, or about to bid, on certain work. I looked over his contracts when I came

back and it was called to my attention, after the loan was made.

Q. But the contracts were not made until some time after the loan was made; is not that so? A. I don't remember that.

Mr. Macpherson: The contracts speak for themselves.

10 Q. (examining ledger): The first business you did with the Citizen's Construction Company was on the 15th of July, 1914, was it not? A. I wish you would ask Mr. Katzenbach these things; he keeps the books, and is more familiar with them than I am. I have only a general knowledge of these things.

Q. Did you have anything to do with the opening of the account of the Citizens Construction 20 Company? A. I had knowledge of it, that is all.

Q. Did you know that the account of the Citizens Construction Company was originally opened by the discounting of a note? A. I don't remember, but I don't think it was.

Q. How was it originally opened, do you know? A. I am not clear, but I think it was by the deposit of some cash; I don't remember.

Q. General Sadler, do you know anything about 30 two subsequent notes, one for $2,500 and one for $500, discounted for the Citizens Construction Company? A. I don't remember the details; it might have been for certified checks, for bidding; I don't remember.

Q. When did you first get the idea that the Citizens Construction Company was insolvent? A. Not until about the day that it went into the hands of a Receiver.

40 Q. You got securities from the Citizens Construction Company other than the securities of

that corporation, did you not, at the time you made the original loan? A. We did.

Q. Why? A. It was a new corporation, and it was offered, and the bank took it.

Q. Without request on the part of the bank? A. I am not positive, whether the Board on the day of the meeting, when the first note was discounted, asked for it or not. As I understood it, it was offered. 10

Q. And you knew nothing about the details of the loan, or the application for the loan, before you went away on your vacation? A. I don't remember about that.

Q. Is it customary for your bank, Mr. Sadler, to get from a solvent corporation, not only the notes of that solvent corporation, accompanied by assignments of all the contracts that that solvent corporation has, but also personal obligations, notes and checks, of complete outsiders? 20

Mr. Macpherson: I object, as what the custom or practice of the bank is in dealing with its customers, is not relevant, and is immaterial in this case.

A. It was a new corporation, and I think it is good business to take the assignments of contracts, and the other collateral. 30

Q. Had the fact that it was a new corporation anything to do with it, in view of the fact that you had been treating with Thomas J. McGovern, its principal owner, for some twelve years? A. But it was an entirely new corporation; and it was good business, I think, to get the assignments of the contracts and other collateral.

Q. You knew you had assignments of all the contracts that corporation had, did you not? A. I am not positive that we had all of them. 40

Q. You endeavored to get all of them, didn't

you? A. We got the assignments of the principal contracts; that I know. I don't know whether there were any smaller ones or not.

Q. You got assignments of all Mr. McGovern told you they had? A. I am inclined to think we did.

Q. And you knew that those contracts were all the property this corporation had, except what money it might have in your bank, and what tools it might have? A. I am inclined to think that that is so.

Q. And did you know how the tools had been acquired? A. No.

Q. Did Mr. McGovern tell you what amount of tools the company had? A. He made some statement in regard to his equipment, but I don't recall what it was at this time.

Q. You knew, didn't you, that the tools had been acquired by the company, for the issue of capital stock? A. I did not.

Q. Have any payments been made on account of the notes, or checks, held by your bank as collateral for this loan? A. No.

Q. Does your bank still hold the notes and checks? A. The collateral notes and checks, do you mean, Mr. Lane?

Q. Yes, the demand notes of R. B. Newton, Frank J. Clark, E. E. Weeden, as endorsers, and the checks of J. C. Tattersall and J. C. Richardson? A. It does.

Q. And no demands have been made to collect thereon? A. We have not brought suit, or thought of doing so, up to the present time.

Q. Were there any payments made on account of the contracts assigned to your bank? A. I remember there were certain warrants or checks given by the cities with whom Mr. McGovern had

contracts, and we turned those checks and warrants over to the Citizens Construction Company, because we felt that we were amply secure with the balance of the contracts and the collateral that had been deposited to secure the payment of the notes.

Q. Did you know what profit there was in those contracts? A. No.

Q. Make any attempt to find out? A. I don't remember. 10

Q. You knew, as a business man, that the company in completing the contracts, had to expend money for material and labor, I should say, General, up to eighty per cent. of the contract price? A. I knew of course, that they had to expend money to complete the work.

Q. You knew that it would not be unreasonable to expect that they would have to expend up to eighty per cent. of the contract price? That would be a large per cent., wouldn't it? A. It would be fair. Work of that kind. 20

Q. You knew they were not doing any other business, didn't you? A. I didn't know that.

Q. Did you ask anything about it? A. I imagine I did at the time.

Q. You knew they were carryng no other bank account? A. I did not know that. 30

Q. Did you know at the time? A. I did not.

Q. Were you advancing them moneys to the extent that you did, and permitting them to use warrants which were coming in that you might have retained, and discounting notes wherewith they could make bids, without knowing whether they were dealing with another banking institution to any extent? A. Yes. I don't think we knew whether they were doing business with another bank or not. 40

Q. Were all of the warrants that came into your

possession, deposited to the credit of the Citizens Construction Company? A. They were all given to the Citizens' Construction Company. I don't know whether all of them were deposited to the credit of the Citizens' Construction Company or not.

Q. What was the reason you permitted those warrants to go out of your possession?

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Mr. Macpherson: Objected to, on the ground that that question has already been asked and answered.

A. Because we felt that we had plenty of collateral in the amounts still due.

Q. What was the reason given by the Citizens Construction Company, for requiring the warrants to be turned over to them? A. They needed the money for pay-rolls, the other things. They wanted to use the money, and we felt that we had plenty of collateral.

20

Q. Can you explain this, Mr. Sadler: This assignment of the Trenton contract bears date the 16th day of July, 1914, when the loan was not made by the bank until the 4th day of August, 1914? A. It seems to me I remember that Mr. McGovern came to see me about the matter, and offered an assignment of the contracts; and some postponement was had in regard to presenting them to the Board for some reason, but I do not remember just what it was. It may have been that he did not need the money immediately; I don't remember just exactly what it was.

30

Q. Then if that is so, just how is it, that the assignment of the Trenton contract bears date the 16th of July, 1914, where the assignments of the Bogota contract and the Woodbury contract, bear date the third of August, 1914? A. Well, it may have been, that Mr. McGovern prepared to get

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the Trenton loan first, and the other loans afterward. I can't recall the details of the transactions; it is absolutely impossible.

Q. What is your explanation of this, then, General Sadler: That the assignment of the Trenton contract, bearing date the 16th of July, 1914, recites, that the Citizens' Construction Company, in order to carry out said contract, has borrowed from the Broad Street National Bank of Trenton, the sum of five (five written in over an erasure) thousand dollars; whereas, the assignment of the Bogota contract and the assignment of the Woodbury contract, made fifteen days later, recite, that whereas the Citizens' Construction Company, in order to carry out said contracts, has borrowed from the Broad Street National Bank, the sum of two thousand dollars? A. The last ones you mentioned, were made at the time the two thousand dollar loan was made; and the other may have gone before; I can't remember.

Q. As a matter of fact, on the 16th day of July, 1914, the Citizens' Construction Company had not borrowed from the Broad Street National Bank the sum of $5,000, or any other sum? A. I don't think it had, that day; I don't remember.

Q. And didn't, up until the 3rd day of August, 1914, at which time it discounted a note to raise $2,500 for the purpose of bidding on some contract? A. That was the time that that assignment was handed over to us—the Trenton assignment.

Q. Did the negotiations for this loan begin as far back as the 16th day of July, 1914? A. They may have; as I said to you, I don't recall.

Q. I call your attention to the assignment, which you saw at the time, didn't you? A. This was laid before me, when I came in after my vacation.

Q. You don't remember whether you saw it before? A. I don't remember.

Q. Do you notice the erasure, the five written over something? A. It was in that condition when it was handed to me.

Q. Can you see what was written under the five? A. Isn't it twenty? There is a "t" in the beginning, isn't there, and a "y"? A. That is in the same condition it was when it came to us.

10 Q. Is there any explanation as to why the five should be written over twenty, that you know of, Mr. Sadler? A. No.

Q. Wasn't the original application for a loan of twenty thousand dollars? A. I don't think so.

Q. Was the original loan for more than $5,000? That I don't remember.

Q. And do you remember whether the bank cut Mr. McGovern down? A. That I do not remember.

20 Q. Had Mr. McGovern, or any of the McGovern enterprises or concerns in which he was interested, defaulted in your bank before?

Mr. Macpherson: Objected to as immaterial.

A. We had a good many transactions with Mr. McGovern, of various kinds, but as I remember it, there was no paper under protest at that time.

30 Q. There had been, however, had there not? A. It might have been possible that there was some.

Redirect examination by Mr. Gaskill:

Q. In dealing with Mr. Thomas J. McGovern, or the corporations in which he was interested, in the applications for loans, was it the usual practice of the bank to have his contracts assigned to the bank for advances on account of the contracts? A. It was, just as it is in other cases.

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Recross examination by Mr. Lane:

Q. Was it also the usual custom, to give not only

assignments of the contracts, but checks and notes from independent persons, to the full amount of the loan? A. I don't know whether we demanded that in other corporations in which Mr. McGovern was interested, but I know we did demand that from a number of our customers.

Q. And you demand it because you have doubt as to whether or not the principal debtor can pay, don't you? A. We always get what collateral we can to make us secure; enough to make us secure. 10

Q. You make a distinction between your customers; from some of them you demand it, and from some you don't; why do you make that distinction? A. We want to be safe, always.

Q. And the reason you demand more from some of your customers than from others, is because you think they are not safe without that more that you demand? A. Well, in this case it was a new corporation. 20

Q. I am not asking you about this case; as to a customer; you say from some of your customers you demand them to do what you asked this corporation to do, and they offered to do it, to put up collateral of independent parties to the full extent of the loan. Why do you do that in some cases? A. In some cases, we have dealt with parties for years; we know them very well, and we know that the moral risk is very good. And in some cases, where there are new companies, we demand more at first than we do afterwards when we find that the company is going along easily and making money. 30

Q. And the fact that Mr. McGovern had been dealing with you for twelve years, had nothing to do with this particular loan? A. I did not regard this as a personal loan of Mr. McGovern. This was the Citizens' Construction Company loan. 40

Q. You knew he controlled the corporation? A. I knew that he was interested in it, but not that he owned the majority of the stock.

Q. You knew he was on the back of the notes? A. Yes.

Q. Can you in your own mind now, remember any single other occasion where you have demanded from a concern or an individual to whom you made a loan, any other than their personal obligation, or personal collateral; collateral of independent parties, to the full extent of the loan? A. Yes.

Q. And the same kind of a corporation; a new corporation? A. Yes.

Q. And one in which Mr. McGovern was interested, or not? A. No.

Q. And what kind of collateral was that? I don't want the name of the party? A. Personal endorsement.

Q. Personal endorsement, as well as assignments of contracts? A. Yes.

Q. Why wasn't this put in the shape of personal endorsements instead of in two instances, checks? A. I don't remember; that was the offer of Mr. McGovern.

Q. Did you know whether Mr. Newton, Mr. Clark, Mr. Weeden, Mr. Tattersall and Mr. Richardson were good or not? A. Yes, we considered them good.

Q. You knew them, as much as a banker can know? A. Yes.

Redirect examination by Mr. Macpherson:

Q. I am showing you the check of James C. Tattersall; that was part of the collateral given with this loan; was that check presented for payment? A. It was.

Q. And what was done with it? A. Payment was stopped.

Q. I also show you a check of Joseph C. Richardson; was that check presented for payment, to the bank on which it was drawn? A. It was.

Q. What was done with it? A. Payment was stopped.

Q. Under whose orders were these checks presented for payment? A. Under the cashier's; and corrected by me. 10

Q. How did you come to present them for payment on the 22nd of September, 1914? A. It was after the company went into the hands of a Receiver.

Q. Why has not the bank taken any steps to collect on these notes since? A. It feels that it has collateral in the shape of the contracts, which is perfectly good. 20

Q. Demand has never been made on the three promissory notes? A. I think it was made. The notes themselves show that demand was made.

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THOMAS J. McGOVERN, being recalled, testifies as follows:

Cross examination by Mr. Lane:

Mr. Macpherson: The same objection is made as to cross examination of this witness, as was made to the cross examination of General Sadler, and upon the same ground. 30

Q. Will you produce the minute book, Mr. McGovern, of the Citizens Construction Company? A. My attorney there, has all the papers of the Citizens' Construction Company. 40

Q. Mr. McGovern, did the Citizens' Construction Company keep any books? A. No, sir.

Q. None whatever? A. No, sir.

Q. Did it keep its return check stubs? A. Yes, sir.

Q. Have you got them? A. Yes, sir.

Q. Will you let me see them? A. Yes, sir.

Mr. Macpherson: We call attention to the fact that this is not cross examination.

10

Q. (Examining check stub book): Who is Harry E. Evans, Mr. McGovern? A. He is the Treasurer of the City of Trenton.

Q. This payment of $100 on account of note of $1,500, is that your individual note? It must be. A. I think it was, yes sir.

Q. The Citizens' Construction Company never had a note of $1,500, did they? A. They had several notes.

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Q. $1,500? A. They may have had one for $1,500; I don't know about that.

Q. This payment on Aug. 17th, to the Broad Street National Bank, of $100 on note of $1,500, is on your individual note, isn't it? A. I will say yes.

Q. Well, don't say it unless it is so. A. I look in the bank book here, and I don't see any other $1,500 note, so it must be mine.

30

Mr. Macpherson: I would like to ask the purpose of this examination; we object to it unless we know what the purpose is.

Mr. Lane: I am not going to put the purpose on the record now.

Mr. Macpherson: I object.

Q. Do you know what the payment of $100 to the Broad Street National Bank, on August 20th, 1914, was, Mr. McGovern? A. I think they are part payments on a note of $1,500 that I had there. (Produces checks returned from bank.)

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Counsel for Mack Manufacturing Company offers in evidence, check drawn on the Broad Street National Bank, to the Broad Street National Bank, for the sum of $100, endorsed, credit given T. J. McGovern.

Also, check dated August 20, 1914, made by the Citizens' Construction Company to the Broad Street National Bank, on that bank, for $100, perforated, indicating that it had been paid, but unendorsed.

Also check drawn on the Broad Street National Bank, to that bank, for $300, by the Citizens' Construction Company, endorsed in the handwriting apparently of an officer of the bank "cashier's check," and perforated, indicating that it had been paid, but unendorsed, dated August 24, 1914.

Mr. Gaskill: We object to the qualification of the endorsement as stated by counsel, apparently in the handwriting of the bank.

Also check dated September 1, 1914, drawn by Citizens' Construction Company to the Broad Street National Bank, on that bank, perforated, indicating payment, unendorsed.

Q. Have you another one, dated September 11, 1914? A. That is all the checks I have here. I suppose the Receiver has the others. I don't know whether they got them or not.

Q. They must have, because the book has been balanced. The book was balanced on the 28th of October, 1914, and the vouchers should have gone to the Receiver.

Checks produced by attorney for Receiver.

Counsel for Mack Manufacturing Company offers in evidence check dated September 11, 1914, to the Broad Street National Bank, on that bank, $100, endorsed on back in handwriting evidently of some bank official "cashier's ck", and perforated, indicating payment.

10 Also check dated September 15, 1914, for $200, to the Broad Street National Bank, on that bank, indorsed on bank, evidently in handwriting of an officer of the bank, "cashier's check," perforated, indicating payment.

Q. Mr. McGovern, you knew on September 17th, that you were going into the hands of a Receiver the next day? A. I went into the hands 20 of the Receiver on the 18th, so I must have known it on the 17th.

Q. Did you tell the bank you were going into the hands of a Receiver? A. No.

Q. Tell any of the officers? A. No, sir.

Q. How long before the 17th did you know you were going into the hands of a Receiver? A. I didn't know it at all; I went to see my attorney and told him the way I felt about it, and the 30 way things were.

Q. When was that, that you went to your attorney and had that conversation with him? A. Surely before the 17th.

Q. How many days before? A. I couldn't say.

Q. Five? A. I wouldn't want to say; a few days, or a day or two.

Q. Mr. McGovern when did you first negotiate with the bank for a loan for the Citizens' Construction Company? A. I couldn't tell you the 40 exact date.

Q. About when? A. Somewhere about the time these assignments were drawn up.

Q. How did you come to draw the assignments? A. I had been in the habit of going to the bank when I would get a contract for myself personally, or for any company that I was interested in, to get money to carry on the work.

Q. Who drew these assignments? A. They were drawn in my office.

Q. By whom? A. By the bookkeeper, or stenographer. 10

Q. Who is it? A. I guess a man by the name of Wallington, drew them.

Q. Where is he? A. I am not sure; it may have been a stenographer; I don't know. It was a copy of other assignments I had similar to that, which was drawn up first by an attorney, on different contracts; and these were made just the same.

Q. Did you draw these assignments, or any of them, before you saw the bank, or after? A. I don't know. The contracts I had had heretofore, were drawn in the same manner; I may have drawn them, and took them down to the bank, or I may have seen the President and spoken to him about them. 20

Q. Did you see the bank officials before the 16th of July, 1914? A. On that assignment?

Q. Yes. A. Probably I did. 30

Q. How much of a loan did you ask them for? A. I presume I asked them for a loan to the amount of the assignments.

Q. How much was that, at that time? $20,000 wasn't it? A. No, I never asked them for $20,000.

Q. $20,000 wasn't it? A. What is that?

Q. That you asked for? A. No, sir.

Q. Wasn't that assignment original for $20,000? A. I don't think so. 40

Q. What do you think it was? A. I think the stenographer, in making out the proposition, might have put the amount of the old contract in there, and seen her mistake, and then made it the amount I wanted it.

Q. Did the bank give you what you asked for? A. Yes, sir.

Q. Didn't cut you down at all? A. No.

10

Q. Who asked you for the certified checks, and notes, of Richardson, &c.? A. Nobody asked me for them. I brought them to the bank so there would be no question about it.

Q. Had you ever done that before? A. Yes, sir; I had brought the additional security into the bank before.

Q. Up to the full amount of the loan? A. Some times more than the loan.

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Q. Where the bank had assignments of contracts also? A. Yes.

Q. How did you come to give the bank the additional assignments, under date of August 3, 1914, of the Bogota and the Woodbury contracts? A. All those contracts were of different dates.

Q. And Woodbury and Bogota were before Trenton, weren't they? A. Bogota I think was before Trenton.

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Q. Yes, and the Woodbury? A. The date of the contract will speak for itself there.

Q. You don't remember when the Woodbury contract was made; whether it was before or after the Trenton contract? A. No, I couldn't tell that. The Bogota contract was first, but I don't know whether Woodbury was after Trenton, or before.

Q. Assuming now, that the Woodbury contract and the Bogota contract were before the Trenton contract, Mr. McGovern, how is it that when you went to the bank to get the loan, of $5,000,

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you didn't take the assignments also of the Woodbury and Bogota contracts? A. I couldn't answer that.

Q. Is it not because you originally went with your assignment of the Trenton contract, and the bank refused the loan unless you assigned all you had, and also gave them the checks and notes? A. No, the bank never asked me to assign all I had. 10

Q. Well, all the Citizens' Construction Company had? A. No, they never asked me to do anything.

Q. Why was it, when you were willing to give the bank everything, you didn't take at the time you took the Trenton assignment, the assignments of the Bogota and Woodbury contracts also? A. I couldn't answer that question.

Q. Why was it that when you drew up the assignment of the Trenton contract, that you didn't also draw up the assignment of the Woodbury and the Bogota contracts? A. They were different dates. 20

Q. Yes, the Bogota and the Woodbury contracts are before the Trenton contract. You drew the assignment of the Trenton contract before you drew the assignments of the Bogota and Woodbury contracts; why? A. No reason that I know of. 30

Q. You didn't deliver the notes and checks all at the one time to the bank, did you; the collateral notes and checks? A. I don't know; they speak for themselves, of the time I delivered them there.

Notes produced.

They may have gone down at the same time, but may not have been put to my credit the same time. 40

Q. Unfortunately, Mr. McGovern, they didn't go down at the same time. You say the bank did not demand from you any additional security, at any time? A. To the best of my memory.

Q. Are you a little uncertain about it now? A. No.

Q. Do you remember how it came about that you got the additional $2,000; what the negotiations were with respect to it? A. I didn't get the additional; I got it altogether.

Q. You made your arrangements originally for a $5,000 loan? A. Yes, sir.

Q. What did you tell the bank Directors at the time, with respect to the resources of the Citizens' Construction Company? A. I told the Directors that they were in good standing.

Q. What did you mean by that; was that all you told them? A. I told them what they had at that time.

Q. The different contracts they had? A. Yes, sir; the amount of the contracts; told them all in connection with it.

Q. What did you tell them; did you tell them what the profit was, or would be? A. They didn't ask about any profit.

Q. They only asked the amount of the contracts? A. I told them.

Q. And what contracts you had? A. Yes.

Q. And what else you owned, if anything? A. No, sir.

Q. You didn't own anything else, did you? A. I didn't; the Citizens' Construction Company owned a plant.

Q. What? A. Rollers, mixers, crushers; their whole plant.

Q. That is the property that has been sold by the Receiver for $1,200, isn't it? A. Some of it, yes, sir.

Q. All of it, is it not? A. No, sir; not all of it.

Q. Where did the rest of it go? A. It went up in the Bogota contract.

Q. For your own personal use? A. No, sir. The Citizens' Construction Company had that money too.

Q. How much was it? A. All that came from there. I don't remember what it was.

Q. Were the tools up there at Bogota at the time the Receiver took charge? A. Yes, sir. 10

Q. Are they there yet? A. I couldn't tell you anything about them.

Q. Do you know what they have there? A. No, sir.

Q. Are they as much as the tools were worth here in Trenton? A. I don't think so.

Q. All funds that went into the Citizens' Construction Company, went to its bank account, 20 didn't they? A. Yes, sir.

Q. You had no bank account except that of the Broad Street National Bank, had you? A. Oh, yes.

Q. Where? A. First National Bank of Trenton.

Q. Did you have any loans from that bank; have you your bank book here?

Bank book produced. 30

Q. (Examining book.) Were any of the checks that appear in this book account of the First National Bank of the City of Trenton, drawn to the order of T. J. McGovern, turned over to the Broad Street National Bank? A. I can tell you by looking at the check book.

Mr. Backes: I object, on the question of his own credit. 40

Q. To the Citizens' Construction Company? A. There is nothing there, is there?

Q. (Examining book.) There is nothing in this book. Have you refreshed your recollection, Mr. McGovern as to whether there were any other assignments drawn to the bank than these three which are here? A. No, sir.

10 Q. Were there or not, or don't you know; any beside the Trenton, Woodbury and Bogota contracts? A. No, sir; those are the only ones that have been drawn.

Q. Sure of that? A. Yes, sir.

Q. (To counsel, representing Receiver.) Mr. Backes, have you copies of any papers purporting to assign the Woodbury, Bogota and Trenton contracts, or either of them?

20 Mr. Backes: I have copies of them.

Q. Of any others than these? A. I never knew of any others. On investigating the affairs of the Citizens' Construction Company, I found no other assignments excepting these in question.

Q. My recollection was, that I had seen one when I went over the papers in your office; copies of assignments other than these? A. You probably saw an order, which was directed to the 30 City Treasurer, in each instance; I do not know whether you have copies of them, but they were here the other day at the hearing.

Q. (To witness, Mr. McGovern.) Mr. McGovern, the Citizens' Construction Company was insolvent from the beginning, wasn't it? A. Never was insolvent.

Q. Not even now? A. It is in the hands of a Receiver now.

40 Q. It is insolvent, isn't it? A. I presume so.

Q. When did it become insolvent? A. When it went into the hands of the Receiver.

Q. Is that the first time it was unable to pay its debts? A. As far as I know.

Q. Why didn't you pay the debts then, and not go into the hands of a Receiver? A. Pay what debts?

Q. Any debts which it owed? A. There wasn't anybody pressing the Citizens' Construction Company for money. 10

Q. You couldn't pay your debts, could you? A. Nobody was asking us to pay debts.

Q. Could you pay them if they had asked? A. We paid all debts that they asked.

Q. When did you come into the situation, that you could not pay for the brick that was furnished? A. We didn't get into that position.

Q. Not in it now, I suppose? A. The Receiver is attending to that now. 20

Q. So far as you know, you are in a position where you can pay your debts now? A. I don't know.

Q. Did you know about it when you made your affidavit on the 17th of September, 1914? A. I know what I made the affidavit to.

Q. Did you know you couldn't pay your debts then? A. There wasn't anybody demanding any payments. 30

Q. Did you know that you couldn't pay your debts if demand had been made? A. If demand was made for everything we contracted for, it couldn't be paid at that time.

Q. When did you first know that you were in a position where you could not pay your debts if demand was made for them? A. I don't know how to answer that question. If demand was made for everything the Citizens' Construction 40

Company owed immediately, I knew at the time I applied for a Receiver, but no such demand was ever made.

Q. When you made your first application to the bank, in August, 1914, how much had you loaned or advanced to the Citizens' Construction Company at that time? A. What date was that?

10 Q. August 1, 1914? A. How much did I put in?

Q. Yes. Was it $5,000? A. I couldn't answer that question; I know I had about eight or ten thousand dollars, and turned that over to the Citizens' Construction Company, at different times.

Q. And you keep no books at all? A. No, sir. If the Citizens' Construction Company wanted a thousand or two thousand dollars, I turned it

20 over to them.

Cross examination by Mr. Macpherson:

I am calling your attention to these checks drawn by the Citizens' Construction Company to the Broad Street National Bank, upon which you have been examined by Mr. Lane, and ask you whether any of those checks were for the payment or part payment, or were to be applied on these

30 notes for which you had obtained the money or your company had obtained the money, from the Broad Street National Bank, namely the thousand dollar and the two thousand dollar notes? A. No, sir.

Q. How do you know?

By Mr. Backes:

Q. Do you know how they were applied? A. Yes, on the $1,500 note; my personal note. My

40 money that I had advanced to the Citizens' Construction Company.

Q. These checks were properly chargeable against you? A. Yes, sir.

By Mr. Lane:

Q. At the time you got the loan from the bank you couldn't go on without that money, could you? A. Yes, sir; I was going on.

Q. Without it? A. Yes, I was going on.

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J. CLARENCE RICHARDSON, the Receiver, being duly sworn according to law, on his oath testifies as follows:

Direct examination by Mr. Lane:

Q. Did any account books of any nature or description, of the Citizens' Construction Company, come into your possession? A. No, sir.

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Hearing in the above matter adjourned to Thursday, August 12th, 1915, at 10:30 o'clock.

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Continuation of the taking of testimony in the above cause, before me, Frederick W. Gnichtel, Special Master in Chancery of New Jersey, this twelfth day of August, nineteen hundred and fifteen, at 10:30 o'clock in the forenoon, at my office, Room 709 Broad Street Bank Building, in the City of Trenton, New Jersey, in pursuance of said order, dated the twentieth day of July, nineteen hundred and fifteen.

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Special Master.

MR. MERRITT LANE appeared for the Complainant, Mack Manufacturing Company.

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MR. GEORGE MACPHERSON and MR. NELSON B. GASKILL appeared for the Defendant, Broad Street National Bank.

MR. PETER BACKES appeared for the Receiver of the Citizens' Construction Company.

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THOMAS J. McGOVERN, being recalled, upon his oath testifies as follows:

Redirect examination by Mr. Lane:

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Q. Mr. McGovern, were you present at the meeting of the Board of Directors of the Citizens' Construction Company, held on the 17th day of September, 1914? A. I was present at all the meetings.

Q. Were you present at that meeting? A. Yes.

Q. Do you remember that meeting particularly? A. No, not in particular.

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Q. How many meetings did your company ever have? A. The records will show; I can't tell from memory.

Q. The records show that you only had one meeting beside that one; can you recall that particular one? A. No.

Q. You can't? A. No.

Q. Notwithstanding the fact that you only had one meeting, that your first meeting; and a second meeting, that your last meeting—you can't remember particularly this last meeting? A. I can't remember particularly any of the meetings. The records will show whatever meetings we had.

30

Q. I am telling you the records show you had only two—your first meeting and your last meeting; your first meeting in April, 1914, and your last meeting in September, 1914, the day the application was made for the appointment of a Receiver. Now can't you remember that last meeting? A. No, sir.

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Q. Do you know who else was present beside

you? A. All the members, I presume, of the company.

Q. Do you know? A. All the members were present at every meeting we held.

Q. Do you know who was present at that last meeting? A. William F. McGovern and Thomas Riley and myself.

Q. Do you know, or are you guessing? A. To the best of my knowledge, they were present at all meetings. 10

Q. Then you do recall this last meeting, do you? A. I don't recollect having a meeting without all of them being present.

Q. How many meetings did your company have, do you know? A. No.

Q. How did the last meeting of your company come to be called, do you know? A. No, sir.

Q. Did you receive any notice to attend a meeting? A. I don't know that I did. 20

Q. How did the others receive notice, do you know? You were Secretary. A. I presume I notified them.

Q. I don't want any presumptions; do you know? A. No, sir; I don't remember.

Q. Where was the meeting held? A. All the meetings were held, I believe, at Mr. Backes' office. 30

Q. Where was the last meeting held? A. I believe they were all held there.

Q. I don't want your belief; do you know? A. To the best of my knowledge, they were all held there.

Q. Don't you know, Mr. McGovern? A. Mr. Backes is my attorney; he drew these papers, and kept the minute book; and all the meetings were held there. 40

Q. Now bearing in mind the fact that your company only had, according to your records, two meet-

ings, do you remember the first meeting? A. Organizing the company?

Q. Yes. A. I remember I was there at the meeting.

Q. You remember a meeting having been held? A. Yes, there was a meeting held.

Q. Now, bearing in mind the fact that you didn't hold any other meeting, so far as your records show, until the 17th day of September, 1914, the day the receiver was applied for, can't you recollect that last meeting, and tell me where it was held? A. No, I can't.

Q. Can you tell me who acted as Secretary? A. No; the records will show that.

Q. I am asking from your personal knowledge? A. I couldn't tell you.

Q. Can you recollect why it was held? A. No, sir.

Q. Do you recollect who suggested that you should ratify the assignment of the contract? A. I suppose my attorney did.

Q. Do you recall who suggested it? A. No.

Q Someone suggested it, didn't they? A. I couldn't say about that.

Q. You didn't, did you? A. I couldn't say.

Q. You think you might have suggested it, and forgotten it at this time, is that it?

Mr. Gaskill: Objected to, as involving possibilities.

A. I wouldn't say about that.

Q. When did you last see this minute book, referring to a book purporting to be a minute book of the Citizens' Construction Company? A. Seen it at the last hearing we had here.

Q. When did you see it last before that? A. I couldn't say that.

Q. Did you ever see it? A. Oh, yes.

Q. Will you tell me about how long before you saw it at this hearing, that you saw it before? A. No.

Q. When did you first see this minute? Referring now to the minute of September 17, 1914 (showing witness minute)? A. I presume after the meeting; after it was written up.

Q. Do you know? A. I seen it after the meeting some time. 10

Q. How long after? A. I couldn't answer that; whether it was a day or two days, or the same day.

Q. Did you ever see it? A. Yes, sir.

Q. Why didn't you sign it, as Secretary? A. I couldn't say about that.

Q. You signed the others, didn't you? Why didn't you sign that? A. (Examining book.) I will see if the others are signed.

Q. Well, they are. A. I didn't sign the others, as you say I signed. 20

Q. No? They are signed by the Secretary of the meeting. Why didn't you sign that? A. Why should I sign that? I didn't sign the others.

Q. Because you were Secretary then; the others are all signed. Do you know why you didn't sign it? A. There was no reason why I shouldn't sign it if I was supposed to have signed it. As I said, my attorney had charge of the company, and whether the girl wrote this minute up from another paper, and I neglected signing it, I couldn't say. I had no objections to signing it. 30

Q. What took place at that meeting on the 17th of September?

Mr. Gaskill: Objected to, for the reason that the minutes speak for themselves.

A. The minutes ought to show what took place. 40

Q. To your personal recollection? A. I couldn't tell you, except by looking at the minutes.

Q. Do you know of anything that took place, except by reference to the minutes? A. No, sir; I don't.

Q. And you don't know who was present at that meeting? A. I know the members of the company were present at all the meetings.

Q. They only had two; now with reference to this last one, have you any recollection of it at all? A. I know we never had a meeting that the members weren't present.

Q. Have you any recollection of this last meeting? A. No particular recollection.

Q. You don't know who called it? A. No, sir; I might have called the meeting.

Q. You don't know what it was called for? A. I suppose to transact some business of some kind.

Q. What business? A. Any business they had to transact.

Q. You only had two meetings; it is remarkable that you can't recollect what took place the day before you went into the hands of a Receiver. Do you know what that particular meeting was called for? A. No, sir.

Q. You have no recollection, aside from what the minutes say, as to what business was transacted? A. No, sir.

Q. Did you know at that time, that you were going into the hands of a receiver? A. I suppose I knew it, if that was the 17th and we went into the hands of the receiver on the 18th of September.

Q. You have already testified, in your previous testimony, that you knew it four or five days before you went into the hands of a Receiver.

Mr. Gaskill: Objected to. I don't recall that that is so stated.

A. Have I? I didn't know it.

Q. You have already testified that you knew four or five days before, that you were going into the hands of a Receiver. Is that true?

Mr. Gaskill: Objected to. I don't recall it in that form.

Q. Well, that you couldn't pay your debts, then? A. The company could always pay their debts. 10

Q. What did you go into the hands of a Receiver for then? For fun? A. I was sick at the time, and wasn't able to take care of the business.

Q. And that is the reason you went into the hands of a Receiver? You could pay your debts, and the company was not insolvent? Is that right? A. The company was not insolvent; if they were demanded, they could pay them.

Q. The company was not insolvent, and could pay its debts when you went into the hands of the Receiver, and when you made the affidavit? Is that right? A. I would say that they had no bills; nobody was pressing them for money. 20

Q. Answer my question, yes or no. The company was not insolvent, and could pay its debts when you went into the hands of a Receiver, on the 18th of September, 1914? Is that right?

Mr. Gaskill: Objected to, as the question has already been answered, both on this, and on the previous examination. 30

A. Yes, all the debts they had then, they could pay.

Q. Can you explain why it is that the company can't pay its debts at the present time? A. No.

Q. Was any great loss suffered between the 17th day of September, 1914, and the present 40

time, that you know of? A. I don't know anything about it, from that time.

Q. Where is William F. McGovern? A. In Trenton here.

Q. What is his address? A. 130 West Hanover Street.

Q. Where is Thomas Riley? A. Trenton.

Q. What is his address? A. Clinton Avenue, Trenton, New Jersey.

Q. Is Thomas Riley an employee of yours? A. No.

Q. Who is he? A. A cousin of mine.

Q. William F. McGovern your brother? A. Yes, sir.

Q. At the hearing before the last, a part of the minutes of the meeting of September 17th, 1914, was offered, and I now desire to read into the record the second part of these minutes, which is as follows:

> "After a full discussion by the board, it was voted that in the judgment of the board, great loss would be sustained in continuing work on said contracts, and that a continuance of said work would engender great loss to the company, and would be greatly prejudicial to the interest of its creditors and stockholders, and, that in the judgment of said board, the business of the company should be discontinued.
>
> And it was further moved that the Treasurer of the company make payment of all labor bills due on said contract.
>
> And it was further moved that the Treasurer prepare a statement of the affairs of the company, showing its indebtedness.
>
> And it was further moved that the business of said company should be discon-

tinued, and that an application should be made for a Receiver, and a winding up of the company's affairs."

Q. I also call your attention to the fact that there is not in this minute book, any record of any meeting except the first meeting of the Directors and stockholders, and this particular meeting; and that the minutes of this particular meeting are unsigned. On the 17th day of September, 1914, Mr. McGovern, what were your debts? A. I couldn't tell you that, sir.

Q. Can you tell me about what? A. No, sir.

Q. Can you tell me how I can find out? A. All the papers was delivered to the Receiver, and you can find anything you want there.

Q. What papers would I go to, to find out what your debts were on September 17, 1914? A. All the bills is there, that we owed.

Q. You owed the Mack Manufacturing Company $5500, didn't you? A. I couldn't say what the amount was we owed them.

Q. About that? A. I couldn't say what the amount was, from memory. If you got the papers there, I can tell you.

Q. You don't know how much you owed the Mack Manufacturing Company? A. No, sir.

Q. It was a large sum, wasn't it? A. What do you mean by a large sum?

Q. Well, I would call $5,000 a large sum for your corporation. A. No, they didn't owe Mack Manufacturing Company that much.

Q. How much? A. It wasn't that much.

Q. You have an idea as to how much it was; what was it? A. After the bricks were laid in the street, they owed them a dollar a yard for brick.

Q. How much was it altogether; I don't know anything about a dollar a yard? A. Over $3,000.

Q. That is for brick on Hart Avenue? A. Hart Avenue and Swan Street.

Q. Swan Street hadn't been laid at all, had it? A. Yes, sir.

Q. How much of it? A. About a thousand yards.

Q. Out of a total of how much? A. About 4000 yards I presume; I can tell you by the papers; I can't carry it in my head.

Q. You owed Richardson & Company how much? A. I couldn't say that.

Q. About $1,300, wasn't it? A. There was that much material possibly, delivered on the street by Richardson.

Q. And you owed the bank $5,000, didn't you? A. Yes, sir.

Q. And you owed Arend $140 or $150, didn't you? A. There was bills there for that amount.

Q. They were due, weren't they? A. No, sir.

Q. Why not? A. Because the men that furnished the material for those contracts had not come around to collect for them, and hadn't asked for their money.

Q. It was due, whether they asked for it or not, wasn't it? A. The company owed that much money, yes.

Q. And the company owed other moneys, aggregating about so that they total $14,000, didn't it? A. Yes, sir.

Q. What did you have to pay it with? A. Had the money that was coming in for the work, to pay it with.

Q. You had at that time in cash, $1400 about, didn't you; or $1600? Approximately, $1600? A. There was $1600 in the bank.

Q. Yes. And there wasn't anything else to become due from the City of Trenton until some more work was done, was there? A. Oh, yes.

Q. To become due before more work was done? A. Yes.

Q. How much? A. I couldn't say; but the city owed money on work already done.

Q. Which, under the terms of your contract, was payable before more work was done? A. Yes.

Q. You had received your August payment, hadn't you? A. I couldn't say about that. 10

Q. You had, hadn't you? Don't you know? A. No, I don't know.

Q. Look at your check book and see. A. The check book wouldn't tell the August payment.

Q. Your check book will tell you when you received the money from the City of Trenton; it ought to? A. That don't say there was nothing more due.

Q. Paid every month, weren't you? A. Every two weeks. 20

Q. Eighty per cent. of the contract price? A. Yes.

Q. You had received your 80 per cent. for the work done in August; and you had received your 80 per cent. for the first two weeks in September, hadn't you? A. I couldn't say about that.

Q. Well, look it up and see. A. The check books wouldn't tell that. What date was that? 30

Q. September 17th. A. These check books wouldn't tell you that.

Q. Don't you know whether you had received your payments up to the 14th of September, from the City of Trenton? You had charge of this business; you must know something about it. A. Up to the 14th of September?

Q. Yes. A. The check book wouldn't show whether the city paid the amount of money due up to the 14th of September. 40

Q. Do you know, without the assistance of the

check book? A. I know that when the work was completed on those streets, that the city owed the company money for work performed.

Q. How much? A. I couldn't say that.

Q. That was due, or that was to become due? A. That was due.

Q. Warrants for which should have been drawn by the City of Trenton; is that right? A. The work was performed, and the city could give the money if they felt disposed to do it.

Q. Why didn't you get it? A. Lots of times we don't get money when it is due; they hold it up for some reason, the city, and we can't help that; sometimes they hold it up for a month.

Q. On the 17th of September, 1914, the day before you went into the hands of a Receiver, you received $980; what was that for? A. That was for $1,000 warrant.

Q. From the City of Trenton? A. Yes; I don't know the date of the warrant; when it was passed; it may have been passed a month or two before that.

Q. You got it on the 17th, for $980? A. Is that the warrant?

Q. Yes. A. I may have got the warrant a month before that.

Q. If you got the warrant a month before that, and were in need of money, would you carry that warrant around in your pocket? A. That warrant that appears there?

Q. Yes. That was a $1,000 warrant; you discounted that warrant? A. Yes.

Q. And you got $980 for it? A. Yes.

Q. So you paid the bank $20 for discounting it? A. No, no; the bank didn't discount any warrants; that warrant shows there that Mr. Backes bought that warrant.

Q. Oh, you discounted it with Mr. Backes, for $980; is that right? A. Yes.

Q. And you carried that warrant around in your pocket a month before you discounted it? A. Sometimes I will leave warrants at the bank until I get a buyer for them, and they may lay there a week, or two weeks, until I get somebody to buy the warrant; and that warrant deposited on that day may have been received from the city two weeks, or three weeks, before that.

Q. Inasmuch as that warrant came in the day you held your meeting in Mr. Backes' office, and arranged for the appointment of a Receiver the next day, can you recollect that particular warrant, and tell me when you received that one? A. No, I couldn't tell you now.

Q. And can't you tell whether it represented payment by the City of Trenton, for work done up to the 14th day of September? A. I couldn't say that that particular warrant deposited there would do that.

Q. I draw your attention to the fact that on September 12th you received cash, a thousand dollars; what was that? Apparently, in your bank book, it was $1,000? A. I couldn't tell you.

Q. Have you the least idea what that is? A. I don't know whether it was a thousand dollar certified check I deposited, or what it was.

Q. There is a thousand dollars deposit there; you have no idea what it was? A. No.

Q. Can you tell me what the $100 check was, deposited on the same day? A. No, sir.

Mr. Backes: Mr. Lane, that is the First National Bank book you have there, isn't it?

Mr. Lane: Yes.

Q. I draw your attention to another entry of $980, under date of September 17th—"Check, bricks." What is that? A. You mean August?

Q. It says September. A. It must have been for another warrant.

Mr. Backes: You said "check." Do you mean deposit?

10 Q. I meant check. I draw your attention to a deposit reading as follows: "Sept. 17th, check, bricks, $980." A. That is another one from the City of Trenton.

Q. I draw your attention to another one of August 25th, "check, brick, $980." That is another one, isn't it? A. Yes, sir.

Q. I draw your attention to one of August 18th, "check, $1,000"; that is another one? A. No, I 20 couldn't say it was; it would be for $980 if that was a warrant.

Q. You don't know what that deposit refers to? A. No.

Q. Now, in view of the fact that there appears to have been deposited in your account, the proceeds of warrants of the City of Trenton, on August 25th, $980, and on September 17th, 2, $980, can you tell me whether or not the City of Trenton 30 did not pay right up for the work done, to the time of the appointment of the Receiver? A. I feel sure that they didn't.

Q. Can you tell me, give me any idea, as to what there was due to you from the City of Trenton, on the 17th day of September, 1914? A. I know that there was work done on Hart Avenue; I know that there was work done on Swan Street.

Q. That don't mean anything to me; how much 40 in money? A. A thousand dollars on Swan Street, and about a thousand dollars on Hart Avenue.

Q. That was all that was due to the company,

wasn't it? A. There might have been more, but in my judgment there was that much due.

Q. That is the only resource from which the company could get money; is that right? There was nothing else due to the company from anybody else, on any other contract, was there? A. There was Market Street, that the company was paving; I am not sure but there was some due on that.

Q. How much? A. I couldn't say.

Q. If it was anything, it would be a small amount, wouldn't it? A. I don't know what the amount would be.

Q. The whole balance of the contract, if the work was completed would only have been about $1,300, wouldn't it? A. Yes, possibly.

Q. And the work was not completed, was it? A. By whom?

Q. By you at that time? A. It was completed by the Receiver.

Q. It was not completed at that time? A. No, sir.

Q. And you know it would cost almost as much to complete that contract, as there was due on the contract? A. No, I don't.

Q. A difference of $400, wasn't there; something like that? A. I couldn't tell you.

Q. Anything else that the company had, was there? A. They had their plant.

Q. That was afterwards sold by the Receiver for $1,200, wasn't it? A. Sold by the Receiver for that.

Q. You couldn't raise any money, could you? A. Couldn't raise any money where?

Q. Anywhere? A. I wasn't in a condition to do anything.

Q. I say, the Citizens' Construction Company couldn't raise any money to go on with its work, could it? A. I suppose it could, if it tried.

Q. Didn't it try? A. I was the one who was looking after the financial arrangements of the Citizens' Construction Company, and I wasn't in fit shape to do anything.

Q. Didn't it try to raise money to go on with its work? A. It may have tried to get money from other sources.

10 Q. It couldn't get the money? A. It could, possibly, if it had went on and tried further to get money.

Q. You did try, and couldn't get it; is that right? A. I may have asked some people to let me have some money, and they didn't do it.

Q. When did you get into this condition of nervous debility? A. I have been in that condition for some time; I am not in good shape now.

20 Q. When did you first get in that condition? Were you in that condition on the 3rd of August? A. I couldn't tell you just when.

Q. How many months before the 17th of September, 1914? When you went into the hands of a Receiver? A. A month or so.

Q. Two months? A. Very likely.

Q. You had no difficulty, in this nervous condition, in getting from the Broad Street National Bank $5,000, did you? A. I didn't have any dif-
30 ficulty in getting it; no, sir

Q. Why did you have difficulty in raising it on the 17th of September? A. I didn't say that I had much difficulty.

Q. You didn't get it, did you? A. I didn't get any money.

Q. You tried to get it? A. I may have asked some people to let me have some money, but I didn't try very hard because I wasn't feeling good.

40 Q. You were not feeling good on the 3rd of August, were you, when you went to the Broad Street National Bank for money? A. I may have been

feeling worse on the 17th of September than I did on the 3rd of August.

Q. How long before the 17th day of September, 1914, had you seen Mr. Backes and told him about the condition of your company? A. Several days, possibly.

Q. And when you saw him several days before the 17th of September, 1914, you told him about the situation in which you were? A. Yes, sir.

Q. You told him you could not get money to go on with these contracts? A. No, sir; I did not tell him that.

Q. Did you tell him you could? A. They all said I could get the money, and they all said the company had money enough to go on, and advised me not to put it into the hands of a Receiver.

Q. Mr. Backes advised you not to go into the hands of a Receiver? A. I wouldn't want to say that, but I know the members were there, and we talked the situation over, and that was my understanding of it.

Q. That none of them wanted it to go into the hands of a Receiver? Can you tell me why they voted to put it in the hands of a Receiver? A. I told them I wasn't in shape to take care of it, and wanted a Receiver appointed.

Q. Between the time when you first saw Mr. Backes, and the time you had the meeting, on September 17th, did you endeavor to get the money? A. I couldn't say that; I don't remember what I tried to do then. The company must have been in good shape, because all the company's debts now, they can pay, except about $3,000. The company must always have been in good shape.

Q. Is that true? A. That is what I understand.

Q. You loaned the company yourself, some eight or nine thousand dollars, didn't you? A. Yes.

Q. They still owe it to you, don't they? A. They

may not owe me that eight or nine thousand dollars, because I got some back.

Q. How much do they owe you? A. I don't know.

Q. Do they owe you five thousand dollars? A. I couldn't tell you that.

Mr. Backes: Objected to, on the ground that this is not the proper proceeding.

10

Mr. Lane: It is the purpose of this examination to show that the company was insolvent on the 17th of September, 1914.

Q. What did the company owe you on the 17th day of September, 1914? A. I couldn't tell you that.

Q. They owed you something, didn't they? A. Owed me something.

20

Q. Can you say whether it was $4,000? A. I couldn't tell you what they owed me.

Q. How can I find out? A. You can find out from the books here, the check books and bills, &c.

Q. They will show me, will they? A. I presume they will.

Q. It was a considerable sum, wasn't it? A. I couldn't say that.

30

Q. Who took the minutes of the meeting of September 17th? A. I couldn't answer that.

Q. Was there a stenographer there? A. I couldn't say that.

Q. You didn't take them? A. No, sir, I didn't.

Q. Who suggested that the assignments of the contracts to the Broad Street National Bank should be ratified? A. I couldn't say.

Q. Did you testify before, that Mr. Backes suggested that? A. I may have done it. It was in Mr. Backes' office, and he had charge of the min-

40

ute books, and formed the company, and attended to it.

Q. Whoever suggested it, was any reason given for this ratification? A. Not that I know of.

Q. You thought then you could pay your debts, didn't you? A. Yes, sir.

Q. Can you imagine a reason for the ratification of what you had done in August? 10

Mr. Gaskill: Objected to, as involving a conclusion.

A. I couldn't say.

Q. Nothing was said as to any reason? A. No, sir.

Q. You didn't know whether anything was said or not? A. No, sir.

Q. And you didn't know anything about these minutes of the meeting of September 17, 1914, except that they happen to be pasted in this minute book? A. I know they held a meeting in Mr. Backes' office, and he was there, and had charge of the minute book, and he can tell you about it. 20

Q. You, yourself, don't know anything about it except that they happen to be pasted in this minute book? A. I know the minutes are in the book there.

Q. You don't know anything about it, except by reference to these minutes; is that right? You had nothing to do with putting them in the minute book? A. I had nothing to do with that. 30

Q. Nothing to do with the typewriting of it? A. No.

Q Don't know who did typewrite them? A. No.

Q. And you don't know what transpired at that meeting except by reference to these minutes? A. I knew at that time. 40

Q. You don't know now? A. I don't know now.

I knew at the time, before it was put in the minute book, what was transacted at the meeting.

Mr. Lane: I move to strike out the admission in evidence of the minute of the meeting of the Board of Directors of the Citizens' Construction Company, on the 17th day of September, 1914, on the ground that it now appears that the minutes have not been properly proven.

Mr. Gaskill: Also strike out the part you read into the record yourself?

Mr. Lane: I move to strike it all out.

I now offer in evidence, the by-laws of this corporation, under the title of "Offices and duties of the President, duties of the Secretary, and duties of the Treasurer," which are as follows:

THE PRESIDENT.

The President shall be the chief executive officer of the company, and during the intervals between the meetings of the Board of Directors and the executive committee, shall have general control and management of the business and affairs of the company. The President shall have custody of the seal of the company, and shall affix said seal to any instrument requiring the same. The President shall sign all certificates of stock.

THE SECRETARY.

The Secretary shall act as Secretary of all meetings of the stockholders, the Board of Directors and the various committees of the company, and shall record all votes and minutes of the proceedings in a book to be supplied by the company and kept for that purpose. He shall give proper no-

tice of all meetings of the stockholders and of the Board of Directors, and shall also give proper notice of all calls for installments to be paid by the stockholders. He shall, by his signature, attest the seal of the company to any instrument whereon such seal is properly affixed. He shall perform such other duties as shall from time to time be assigned to him by the Board of Directors, and shall be sworn to the faithful performance of his duties.

THE TREASURER.

The Treasurer shall keep full and accurate accounts of the receipts and disbursements in books belonging to the company, and shall deposit all money and other valuable effects in the name and to the credit of the company, in such depositories as may be designated by the Board of Directors. He shall disburse the funds of the company as may be ordered and authorized by the President or by the Board of Directors, taking proper vouchers for such disbursements, and shall render the President and Directors at the regular meeting of the board, and at such other times as the President or board may require it, an account of all his transactions as Treasurer, and of the financial condition of the company. Either the Treasurer or Secretary with the President shall sign all certificates of stock.

Q. Why, Mr. McGovern, would great loss be sustained in continuing work on the contracts by the Citizens' Construction Company? A. I can't answer why there would be a great loss.

Q. Your Board of Directors voted in the affirma-

tive at the meeting: "Resolved, that in the judgment of the board, great loss would be sustained by continuing work on said contracts." What did you mean when you voted on that? A. I wasn't in fit shape to attend to the contracts myself; and you take a contract that I could finance for $15,000, and put somebody else on it, it would cost $30,000.

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Q. Is that what you meant by "great loss," in continuing the work on said contracts? A. In the shape I was in, I wasn't fit to take care of the work.

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EDWIN M. THORN, being duly sworn according to law, on his oath, testifies as follows:

Direct examination by Mr. Lane:

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Q. Mr. Thorn, what official position do you hold in the Broad Street National Bank? A. Cashier.

Q. When did you first know that the Citizens' Construction Company desired a loan of $5,000? A. In the early part of August, 1914.

Q. Not before that? A. I don't recall it; there may have been an application earlier.

Q. The first note was made on the 3rd of August; how long before that was the application made? A. I don't know.

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Q. Was it some time before? A. The matter was considered by our Board, I think, on the 3rd of August.

Q. Who was present? A. I don't know. I don't know just who was present at that time.

Q. Have you the minutes of that meeting? A. Yes, downstairs.

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Q. Can you produce them? A. Yes.

Minutes produced.

Q. Is there anything in these minutes of August 3rd, 1914, indicating that Mr. McGovern appeared before your Board? A. Not a thing.

Q. Do you recollect—from your own recollection, that he was before the Board at that time? A. About that time; but as to that particular meeting, I don't know.

Q. What statement did he make before the Board with respect to the condition and the assets of the company; the Citizens' Construction Company? A. I don't know. 10

Q. Did you ask him about it? A. I didn't.

Q. Did anybody ask him? A. I don't remember.

Q. You don't remember that any statement was made? A. I do not.

Q. Do you know the amount of cash asked for? A. Five thousand dollars. 20

Q. Do you remember the security offered? A. He offered the assignments of contracts with the Borough of Bogota, and the City of Woodbury, and the City of Trenton; and then he had some checks, a check of Mr. Richardson and a check of Mr. Tattersall.

Q. Those checks came in later, didn't they? A. There were loans made at two different times.

Q. There were three notes endorsed, and two checks, given as collateral for the $5,000 loan? A. Three notes delivered with the $3,000, and the two checks with the $2,000. 30

Q. Why did the bank demand the additional security, other than the personal endorsement of Mr. McGovern, and the signature of the Citizens' Construction Company, and the assignments of contracts? A. They did not demand it. It was offered by Mr. McGovern. 40

Q. Did you know the condition of the Citizens' Construction Company, at any time prior to September 17th, 1914? A. Not particularly, no. Never had any statement from them.

Q. Isn't it your custom to get a statement from persons to whom you advance money? A. If the circumstances warrant it.

Q. Why didn't the circumstances warrant it in this case? A. I don't know.

Q. When did you first know the Citizens' Construction Company was going into the hands of a Receiver? A. I don't recall that I had any knowledge of it before the Receiver had been appointed.

Q. Was a request made for a loan of any larger amount than $5,000? A. Not to my knowledge.

Q. The first assignment to the bank, bears date July 16th, 1914; with that in mind, can you refresh your recollection as to whether the application for a loan was not made some time prior to August 3rd, 1914? A. I cannot.

Statement by Mr. Peter Backes:

The minutes appearing under date of September 17th, 1914, were taken by Miss O'Brien, a stenographer in my office.

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THOMAS J. McGOVERN, being recalled, testified as follows:

Redirect examination by Mr. Lane:

Q. The Citizens' Construction Company owed to E. A. Fisher, $50 for rent, didn't it? A. No, sir.

Q. What was the rent for? A. Office rent.

Q. How much a month? A. $10 a month; collected every six months.

Q. They owed the Steel Protected Concrete Company, $28.69? A. I don't think I did. I think I paid that.

Q. You owed Horace Fine, $5.50, didn't you? A. The Citizens' Construction Company did, I believe.

Q. Owed E. F. Weeden, $60.97? A. Yes, sir; and gave him a check for it.

Q. The check was not cashed, was it? A. No, sir.

Q. Howard S. Roberts & Co., $515? A. Yes, sir.

Q. White Elephant Brick Company, $188? A. Yes.

Q. John H. Briggs & Son, $123.60? A. He got a check for it.

Q. How long had you owed him that? A. I couldn't say that.

Q. Some time? A. No.

Q. West Jersey & Seashore Railway Company, $226.08? A. Yes, sir.

Q. How long had you owed that? A. Not long before. Generally paid every two weeks.

Q. You owed New Jersey Sand & Gravel Company $33.25? A. Yes, sir.

Q. How long had you owed that? A. Not very long.

Q. Lambertville Stone Quarry Company, $45.55? A. Yes, sir.

Q. How long had you owed that? A. Not very long.

Q. You owed Thomas Royle, $119.45? A. Yes, sir.

Q. How long had you owed that? A. Not very long.

Q. You owed Job Scott. $7.71? A. I presume so.

Q. Don't presume; did you owe it? Yes, or no. A. I might say yes, I am not sure.

Q. They owed the Mack Manufacturing Company, $617.20; that is the bill due on the Jersey

City Viaduct? A. The Citizens' Construction Company had nothing to do with that.

Q. The contract was made with the Citizens' Construction Company, Mr. McGovern, as appears by the contract; did they owe it or not? A. I don't think so. I think that contract was made separate with T. J. McGovern; I think you will find two different contracts; one signed by T. J. McGovern, and the other by the Citizens' Construction Company.

Q. They were both made by the Citizens' Construction Company. Did you owe the Mack Manufacturing Company $617.20 on the Jersey City contract? A. Not the Citizens' Construction Company, I don't think.

Q. Was the balance due on the Jersey City contract, about $617.20? A. Not by the Citizens' Construction Company, I don't think.

Q. Was the balance due? $617.20? A. I, personally, yes.

Q. About $617.20? A. Yes.

Mr. Lane: I offer in evidence the original contract, between the Mack Manufacturing Company and the Citizens' Construction Company, on the Jersey City contract.

Q. Did you owe Frank Arend about $139.40, on Hart Avenue? A. Yes.

Q. Joseph P. Richardson, on Market Street, $632.51? A. Yes.

Q. Joseph P. Richardson, on Swan Street, $1,276.66? A. Yes.

Q. Mack Manufacturing Company on Swan Street and Hart Avenue, $4,811.75? A. I am not sure.

Q. Broad Street National Bank, about $5,000? A. Yes, sir.

Mr. Lane, counsel for Mack Manufacturing Company, stated that he was through with the examination, except that it would be necessary for him to prove the amount of the debts of the Citizens' Construction Company, as of September 17, 1914, and the amounts due the Citizens' Construction Company at that time from the City of Trenton or any other source, unless counsel present would admit the amounts of the debts of the Citizens' Construction Company, as contained in a report of the Receiver, about to be filed, produced by Mr. Peter Backes. Counsel present would not admit same, and Mr. Lane stated that the testimony was closed, with the exception he had made.

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Testimony taken in the above cause, before me, Frederick W. Gnichtel, Special Master, at my office, Room 709, Broad Street Bank Building in the City of Trenton, New Jersey, this fourteenth day of September, nineteen hundred and fifteen, pursuant to said order.

F. W. GNICHTEL,
Special Master.

Mr. MERRITT LANE appeared for Complainant.

Mr. GEORGE W. MACPHERSON and Mr. NELSON B. GASKILL appeared for Broad Street National Bank.

Mr. PETER BACKES appeared for the Receiver of the Citizens' Construction Company.

It is stipulated, that on the 17th day of September, nineteen hundred and fourteen, the following

named parties were creditors of the Citizens' Construction Company, and in the amounts set opposite their respective names:

| | |
|---|---|
| Broad Street National Bank | $5,000.00 |
| Mack Manufacturing Co., Swan St. and Hart Ave. | 4,811.75 |
| Joseph B. Richardson & Son, Swan St. | 1,276.66 |
| Frank E. Arend, Hart Avenue | 139.40 |
| E. A. & Louis Fisher, rent | 50.00 |
| Steel Protected Concrete Co. | 28.69 |
| Waring Underwood Co. | 33.92 |
| Horace E. Fine | 5.50 |
| E. F. Weeden & Co. | 60.97 |
| Howard S. Roberts & Co. | 515.00 |
| White Elephant Brick Co. | 188.00 |
| John H. Briggs & Son | 123.60 |
| West Jersey & Seashore Ry. Co | 226.08 |
| New Jersey Sand & Gravel Co. | 33.25 |
| Lambertville Stone Quarry Co. | 45.55 |
| Thomas Royle | 119.45 |
| Job Scott | 7.71 |
| Mack Manufacturing Company, contract completed in Jersey City | 617.20 |

It is also agreed, that the amount due to the Citizens' Construction Company from the City of Trenton on the Hart Avenue, Swan Street and Market Street jobs, may be furnished, before the hearing, by the City Engineer, and used on the hearing. That from the Borough of Bogota, there was nothing due, and that from the Town of Woodbury there was nothing due. That the contract with Bogota was not a contract in which the Citizens' Construction Company had any interest.

THOMAS F. RILEY, being duly sworn according to law, on his oath testifies as follows:

Direct examination by Mr. Lane:

Q. Mr. Riley, your business is what? A. I am at the Imperial Porcelain Works.

Q. You were a Director, and one of the stockholders in the Citizens' Construction Company? A. Yes, sir. 10

Q. When did you become a stockholder? A. I don't know; whenever the company formed, whenever that was.

Q. And you became a Director at that time? A. Yes.

Q. And ceased to be a Director when? A. When the company failed.

Q. And that was when? A. I don't remember; a year or so ago, when it went into the hands of a 20 Receiver.

Q. How many meetings were there of the Board of Directors of the Citizens' Construction Company? A. I don't remember; about two, I guess; the meetings I attended were held at Mr. Backes' office.

Q. When was the first meeting? A. Now, maybe you will think this is funny, but I don't remember. I only had one share, and wasn't much 30 interested.

Q. Do you remember what it was about? A. No, I couldn't say.

Q. Do you know what was discussed there? A. The only thing I remember was that he was trying to get a company together, and certainly I went in there to help him out, and I didn't know whether I would do him any good or not.

Q. What do you mean by that; that you didn't 40 know whether you would do him any good or not? A. I thought maybe it might help him to get some contracts; but I only had the one share.

I didn't pay anything, or give anything, or anything of that sort; he was supposed to have all the shares. Mr. Hurley one, and I one, and he was to have all the others, that is, Tom McGovern.

Q. What was the other meeting about? A. About going into the hands of a Receiver.

Q. When was that? A. That I think, was about a year ago, somewhere around there.

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Q. Who was present at that meeting? A. Peter Backes, Tom McGovern, Billy McGovern; I don't know whether Mr. Hurley was there or not.

Q. What did Mr. William McGovern have to do with it? A. He didn't have anything to do with it that I know of.

Q. What was discussed at that meeting? A. The way I understood it, the bank loaned McGovern $5,000, with five endorsers of $1,000 each, and certainly the meeting was, that they ought to take care of the $5,000. McGovern was in bad shape for money, and couldn't get it from the bank any other way.

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Q. That was the day it was resolved to go into the hands of a Receiver? A. That was the day, or the day after, that it went into the hands of a Receiver.

Q. And you determined that day to go into the hands of a Receiver? A. They were talking about it, yes.

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Q. And that talk preceded and succeeded the talk about securing the bank, didn't it? A. Yes.

Q. You say Thomas McGovern couldn't get money from the bank any other way—why not?

Mr. Macpherson: Objected to. This meeting, as I understand, is a meeting the minutes of which were entered into the record. It was some time after the loan had been made by the Broad Street National Bank,

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and it was therefore not at that meeting, a question as to whether the company could get the loan, because they already had it.

Mr. Gaskill: I object further, for the reason that the defendant under investigation, is the Citizens Construction Company, and that the ability or inability of Thomas J. McGovern to borrow money, is immaterial. 10

A. The only way I can answer this question is, to go to the bank and ask them.

Q. You have told us that it was the only way Thomas McGovern could get money from the bank; what did he say to you with respect to his ability to get money from the bank?

Mr. Gaskill: Objected to, for the reason that the evidence is not competent. 20

A. I don't remember.

Q. This meeting that you refer to, was after he had actually gotten money from the bank, was it not? A. Oh, yes, he had the money before that. He had the money two or three months, I guess.

Q. Who suggested that this resolution be passed, ratifying that assignments of contracts to the bank, as security for that money? A. I don't know. 30

Q. It was suggested by somebody, wasn't it? You didn't suggest it? A. No.

Q. Can't you recall who did suggest it?

Mr. Macpherson: Objected to, as immaterial.

A. No, I don't remember.

Q. What was the reason given for making or ratifying the assignments at that time, when you 40 knew at that time that you were going into the

hands of a Receiver the next day? A. That I don't know.

Q. Who gave the reason, if any? A. If anybody gave the reason, it must have been Tom McGovern; I don't remember.

Q. How did you come to go to that meeting? A. I was sent for.

Q. By whom? A. I think it was Mr. Backes; I am not sure.

Q. You knew at that time, that the corporation couldn't keep on, didn't you? A. Yes, sir.

Q. And that it had to go into the hands of a Receiver? A. It had to go into the hands of a Receiver.

Cross examination by Mr. Macpherson:

Q. Mr. Riley, did you know before you went to that meeting that has been referred to, and which I think is the last meeting of the Directors of the company—did you know before you went to that meeting of the financial condition of the company? A. Oh, yes, I knew it was in bad shape.

Q. You knew, did you, that the loan had been made by the Broad Street National Bank? A. Yes, sir. This loan you are talking about is the $5,000 loan?

Q. Yes. You were willing, and you had no objection, had you, if there had been any formality lacking by the corporation, as to that loan; you had no objection to making the action of the company complete?

Mr. Lane: Objected to as immaterial, irrelevant, and not proper cross examination.

A. I didn't quite understand that; will you mind putting the—

Q. If there had been any informality on the part of the corporation with reference to this loan made to it by the Broad Street National Bank, you saw no objection on your part to correcting any informality that had taken place?

Mr. Lane: Same objection.

A. No.

Q. And you conceived it proper that the corporation should correct any such informality if there was any, to secure that loan? 10

Mr. Lane: Same objection.

A. Yes.

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JOHN H. HURLEY, being duly sworn according to law, on his oath testifies as follows: 20

Direct examination by Mr. Lane:

Q. Mr. Hurley, what is your business? A. I am trying to get in the saloon business. I have a hall here in the city I spend most of my time taking care of.

Q. When did you first become associated with the Citizens' Construction Company? A. I think it was 164 South Broad Street.

Q. When? A. Why, before the company was organized. 30

Q. You held how many shares of stock? A. I was practically supposed to have one. I think I was booked for one.

Q. How many meetings of the Board of Directors did you attend? A. Only the day they organized.

Q. You did not attend the one held on September 17th? A. I couldn't give you the date; I attended the first one. 40

Q. That the only one you attended? A. Yes.

Q. Since then you have paid no attention to their business at all? A. No.

Q. Do you know how long you remained a Director? A. I wasn't a Director at all. In this meeting, when they organized, I was supposed to have one share of stock, which was transferred to Billy McGovern, and I was excused.

10 Q. Mr. McGovern took your place? A. Yes.

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WILLIAM McGOVERN, being duly sworn according to law, on his oath testifies as follows:

Direct examination by Mr. Lane:

Q. Mr. McGovern you are a brother of Thomas J. McGovern? A. Yes.

Q. When did you first have anything to do with the Citizens' Construction Company? A. When it

20 was first organized.

Q. What did you have to do with it then? A. Well, I have been superintendent of the concern at different places where we have been working.

Q. When did you first become a stockholder? A. I can't tell you just the date.

Q. About what time? It must have been some time between April and September of 1914? A.

30 I couldn't say.

Q. How did you come to be a stockholder? A. I don't know whether it was transferred from Mr. Hurley, or how it was. I can't answer.

Q. How many shares of stock did you own? A. One.

Q. And did you become a member of the Board of Directors? A. I couldn't answer that.

Q. Did you attend any meetings of the Board of

40 Directors? A. I think one meeting.

Q. When? A. That I can't say.

Q. Was it the last meeting? A. I couldn't tell you that.

Q. What took place at the meeting you did attend? A. I don't know; I can't tell you.

Q. Was anything done about securing the Broad Street National Bank for its loan of $5,000? A. I don't know; I can't recall.

Q. Where was the meeting held? A. I can't recall. 10

Q. Who asked you to go to that meeting? A. I couldn't tell you.

Q. Do you know whether you ever was at a meeting? A. Yes.

Q. Ever at any meeting at which the loan of the Broad Street National Bank was discussed or acted upon? A. I don't know.

Q. Did you know that the corporation was indebted to the Broad Street National Bank? A. 20 Yes, sir.

Q. How? A. Through conversation with my brother, T. J. McGovern.

Q. What did he say to you about it? A. Said he had gotten $5,000 from the Broad Street Bank.

Q. When did he say that? A. I will tell you why I don't know when he said it. I was working out of town most of that time.

Q. It was after he had gotten it, at any rate? 30 A. Oh, yes.

Q. When did you first know that the Citizens' Construction Company was going into the hands of a Receiver? A. I can't just recall dates. I was working at Woodbury, on one of their jobs at the time, and I happened to call up on the telephone, and was told that we were to quit; that they were going into the hands of a Receiver.

Q. Don't you remember when that was? Do you 40 remember how long it was before they actually went

into the hands of the Receiver? Days, or weeks? A. Two or three days.

Q. And do you remember after that, being called to that meeting, at Mr. Peter Backes' office? A. I was called at one meeting. I don't know; I can't tell you whether it was before or after.

Q. Do you mean to tell us, Mr. McGovern, that you fail to recollect anything that was discussed at that meeting? The only one that you attended? A. Yes, sir; I do.

Q. You know it was held at Mr. Backes' office? A. Yes, sir.

Q. Do you know who was there? A. I don't.

Q. Was Mr. Riley there? A. I can't tell you.

Q. Was Mr. Thomas J. McGovern there? A. I can't tell you.

Q. Mr. Backes was there of course? A. I don't know. I remember being at that meeting, but I could not tell you whether Tom McGovern was there, or whether Tom Riley was there.

Q. Thomas J. McGovern told you you would have to quit, did he? A. Yes.

Q. What did he say? Did he say why? A. No he didn't say why. I thought likely it was on account of not being able to finance the thing.

Q. And you gathered that from your knowledge of the business of that corporation, didn't you? The business they were doing? A. They were doing enough business; had too much business.

Q. Too much business for financing? A. Yes.

Q. They hadn't enough capital? A. No.

Q. When did you first come to the conclusion that they would have to quit sooner or later? A. When I was called up on the 'phone; during the conversation, when it was mentioned.

Q. Did you ever have any idea of it before that? A. No, sir, I didn't.

Q. It must have been something that Mr. McGovern told you, that led you to the conclusion that they would have to quit because they couldn't finance it? A. Yes, sir.

Q. Do you recall what he said? A. Well, he said we would have to stop the job down there, at Woodbury, and I said all right, we would stop.

Q. Did he say anything about a Receiver? A. Not at that time, no. 10

Q. When did he? A. I don't know whether he did at all or not.

Q. Who did first suggest a Receiver to you, and when, and where? A. Well, I don't know; it may have been him that suggested a Receiver.

Q. When? A. Just about that time, when the work was stopped. Someone had to go on financing it.

Q. Before this meeting at Mr. Backes' office, wasn't it? A. I couldn't tell you. 20

Mr. Lane: I would like to offer in evidence the account of the Mack Manufacturing Company against the Citizens' Construction Company, showing the deliveries of brick, on Hart Avenue and Swan Street.

Mr. Macpherson: Objected to, as immaterial. 30

Mr. Lane: I offer the following schedule, showing the brick delivered on both Hart Avenue and Swan Street; showing the dates of shipment, the number of the cars, the quantity in the cars, the invoice prices, the freight when paid as per bills received, the estimated freight bills not returned, and the date of freight payments as per railroad bills. 40

It is stipulated, that all the brick which was shipped as shown by the annexed schedule, had

been delivered upon the ground before the appointment of a Receiver, and before the filing of the lien.

Testimony Closed.

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**Exhibit C1.—Agreement With City of Trenton With Respect to Hart Avenue.**

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Same as C2, except change in name of Streets and Amounts.

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**Exhibit C2.—Agreement With City of Trenton With Respect to Swan Street.**

This agreement, made on this third day of July, A. D. nineteen hundred and fourteen, between The Inhabitants of the City of Trenton, party of the first part, and The Citizens Construction Co., a corporation of the State of New Jersey, having its principal office in the City of Trenton, County of Mercer, and State of New Jersey, party of the second part,

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Witnesseth, that the said part of the second part hereby covenants and agrees, under the penalty expressed in a certain bond bearing even date herewith, to furnish all the work, labor and material required in paving Hart Avenue, from North Clinton Avenue to a point about three hundred thirteen (313) feet south of Hurley Street, with vitrified brick, and to otherwise improve said part of said street, and to well and sufficiently keep and maintain the same in good condition and repair, to the satisfaction of the Board or body having control of the streets of the City, during and at the end of the period of one year from and after the date of the acceptance of the work, and to do said work and furnish said materials in

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strict conformity to the requirements of the proposal and specifications hereto annexed and made a part hereof, and according to the plans and the profiles made by Abram Swan, Jr., engineer, in said specifications referred to.

And the said party of the second part does further covenant and agree with the said party of the first part, that all the said work mentioned and required in said specifications hereto annexed, shall be done in the best workmanlike manner, and that all materials furnished and used in said work shall be of the exact quality and dimensions described, mentioned and called for in said specifications.

And, also, that if the said The Citizens Construction Co., or any other person for it, shall bring or cause to be brought on said part of said street, any materials which do not strictly conform to the specifications hereto annexed and made a part of this contract, or to the City Ordinances, the Directors of Streets and Public Improvements of the city shall, on behalf of the city, have the right to order the same to be removed forthwith from such street; and, in case of the neglect or refusal of the said The Citizens Construction Co., or those employed by it to remove such materials, the said Director of Streets and Public Improvements shall cause the same to be removed at the expense of the said The Citizens Construction Co. and to deduct the cost of such removal and all other expenses thereon, from the amount of the contract.

And the said party of the second part does further agree as aforesaid, that if, at any time, the aforesaid work shall not progress according to the terms of this agreement, and the Board of Commissioners of the City of Trenton shall be of opinion that said work is unreasonably delayed,

the party of the first part shall have the power, by resolution of said Board of Commissioners of the City of Trenton, to appoint a superintendent of said work, and also to place such and so many other persons, by contract or otherwise, to work at and complete the same as shall be deemed advisable by said Board, and to use such materials as they may find on the ground, or to procure other materials sufficient to complete said work, and to charge the expense of all said work, labor and materials to said party of the second part, and to deduct the amount thereof from any moneys due or to become due to said party of the second part under this contract.

And the said party of the second part further agrees to receive as full compensation for the faithful performance of the above stipulated work, and for furnishing said materials, the following prices, to wit:

For furnishing and laying Mack Block the sum of two dollars and twenty-four cents ($2.24) per square yard.

For furnishing and setting new blue stone curb to line and grade, where required, the sum of forty cents (40c.) per linear foot.

For resetting and redressing all old curb required to line and grade, the sum of ten cents (10c.) per linear foot.

And the said party of the second part does further agree, as aforesaid, to commence work forthwith, within five (5) days from the date of the signing of this contract, and to complete the same within thirty (30) working days thereafter.

And the said party of the first part, in consideration of the premises, doth hereby agree to pay to the said party of the second part, the prices aforesaid for doing the said work and furnishing

materials there or as aforesaid, when the said work is completed, but the said Board of Commissioners may make advances to said party of the second part on account of such work while the same is in progress and before its completion, if it in its judgment shall think it proper and advisable so to do.

It is further agreed that no moneys shall be due or payable to said party of the second part, for any work done under this contract, whether as extra work or otherwise, unless at the time of each of the payments to be made he shall procure and deliver to the City Comptroller the release of all persons who may then have furnished materials for, or done work on said pavement, releasing any lien that they have or might have on any of the moneys due or to become due under this contract.

It is expressly agreed and provided by the parties hereto, that in case of the non-completion of said improvement, within the time above specified and allowed, the said party of the first part may deduct and retain out of the moneys due or to become due to said The Citizens Construction Co. such sum as shall be sufficient to pay the wages of any and all inspectors of said improvement appointed by the said Board of Commissioners of said city for each and every working day from the time so allowed for the completion of said improvement up to the time when the same shall be completed. And further, that the said party of the first part shall deduct, out of the sum due or which may become due to the said party of the second part, the further sum of ten dollars for each and every day which shall elapse after the expired time for completion aforesaid, until the date of actual completion.

And the said party of the second part further agrees not to assign or sublet any part of this

contract without the consent of the said party of the first part; and any breach of this covenant shall authorize the party of the first part to declare this contract null and void, and to refuse to make any further payments thereunder to the party of the second part.

It is further agreed that all the covenants and agreements herein contained on behalf of the said party of the second part, and made and entered into by it shall extend to and bind its successors, assigns, heirs, Executors and Administrators.

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Duly executed.

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**Exhibit C3.—Agreement Between Mack Manufacturing Company and Citizen Construction Company With Respect to Both Streets.**

THIS AGREEMENT, Made in duplicate this 29th day of June, 1914, between the MACK MANUFACTURING COMPANY, a West Virginia corporation, hereinafter called the Seller, and CITIZENS CONSTRUCTION COMPANY, of Trenton, New Jersey, hereinafter called the PURCHASER,

WITNESSETH, That it is mutually agreed between the parties hereto as follows, to wit:

FIRST: The Seller agrees to sell and the Purchaser to purchase approximately 284,340 Mack Repressed Paving Block for use in paving Hart Avenue, from Clinton to S. Hurley Sts., 3250 sq. yds., Swan Street, from Hudson to Chestnut Sts., 3520 sq. yds., in the City of Trenton, State of New Jersey, the said Paving Block to be delivered in carload lots at Trenton, New Jersey.

SECOND: The Purchaser agrees to pay the

Seller for each Thousand Paving Block so shipped the sum of Twenty-seven and 50/100 ($27.50); said payments to be made in cash on the 15th day of each calendar month for all Paving Block shipped during the preceding month, and in the manner stipulated in section nine of this agreement, and should the Purchaser fail to make payments as above, the Seller may discontinue shipments until payment is made as above. 10

THIRD: The Purchaser agrees to pay the freight on Paving Block delivered as aforesaid and to deliver at or prior to the date stipulated for payments hereunder, the receipted freight bills to the Seller to be credited as so much cash paid on account of the respective invoices, but no credit is to be allowed by the Seller for switching or demurrage charges incurred at the point of delivery, and the Purchaser hereby agrees to pay the same. 20

FOURTH: The Purchaser agrees, within six days from the time of arrival of any shipment, to notify the Seller by notice mailed to its principal office at New Cumberland, W. Va., of any defects, breakage or shortage in such shipment, and should the Purchaser fail to mail such notice within such time, the invoice accompanying the bills of lading will be conclusive evidence as to the quality, quantity and good condition of the Paving Block delivered in any such shipment; but in no event shall the Seller be held liable for any damage which may be caused or done in unloading or hauling at or from the point of delivery as above set forth. 30

FIFTH: The Seller agrees to commence shipments of the aforesaid Paving Block on or about as ordered, and will continue shipments there- 40

after without unreasonable delay at the rate of cars per , but the Seller is not to be held liable for delay where the same is occasioned by acts of God, labor troubles, car shortages, fires, floods, or any other cause or causes beyond its control.

SIXTH: The Seller agrees that the Paving Block shipped under this agreement shall be subject to the inspection of the City Engineer of the City of Trenton, New Jersey, or his duly authorized inspectors.

SEVENTH: The Seller guarantees that 42 Paving Block are sufficient to lay one square yard of pavement, but in no case is the total yardage laid, as determined by the City Engineer's measurement, to be used as a basis for determining whether this guarantee has been fulfilled.

EIGHTH: It is understood that this agreement binds the heirs, executors, administrators and the successors and assigns of the parties hereto as well as the parties themselves.

NINTH: It is understood that this agreement is not binding upon the MACK MANUFACTURING COMPANY until approved in writing by the General Manager of said Company, which approval shall be evidenced by the written signature of the said General Manager to this agreement.

No acknowledgment or receipt for the payment of money under this agreement shall be valid or binding upon the MACK MANUFACTURING COMPANY, except when signed by the Treasurer of said Company, or his duly accredited representative; which representative must have

authority in writing to receive any payment signed by the said Treasurer.

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Duly executed.

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First notice of Mack Manufacturing Company referring to both Swan Street and Hart Avenue, would be supplied in separate books. 10

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**Notice of Mack Manufacturing Company Referring to Hart Avenue.**

To the Mayor and Common Council of the City of Trenton: Department of Street and Public Improvements and the Commissioner in charge of the Department of Street and Public Improvements; Department of Revenue and Finance and the Commissioner in charge of Department of Revenue and Finance and the Treasurer of the City of Trenton: 20

Please take notice that the Mack Manufacturing Company, a corporation of the State of West Virginia, with its residence in New Cumberland, West Virginia, gives notice that there is due to it from the Citizens' Construction Company, a corporation of the State of New Jersey, the sum of $2,501.83, after deducting all credits and offsets; that said debt accured by reason of brick furnished by the Mack Manufacturing Company to the Citizens Construction Company for the paving of Swan Street from Hudson to Chestnut Streets, in the City of Trenton, under a contract between the City of Trenton, and the Citizens' Construction Company, bearing date the first day of July, 1914; that the said brick was furnished under a contract, a copy of which is hereto annexed and made a part of this notice, the terms, time given and 30 40

conditions of said contract being therein expressed; that said materials were furnished to the said contractor and were actually used in the execution and completion of the contract of the said contractor with the City of Trenton.

Take further notice that the Mack Manufacturing Company claims a lien under the provisions of an act entitled "An act to secure the payment of laborers, mechanics, merchants, etc., for public improvements, etc., Laws of 1892, page 369, and its supplements and amendments" upon all moneys due or to become due under said contract between the Citizens' Construction Company and said Mayor and Common Council of the City of Trenton.

Respectfully,

MACK MANUFACTURING COMPANY,

By S. G. Gaillard,

[SEAL.] Vice-President and Treasurer.

Dated October Thirteenth, 1914.

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State of West Virginia, }
County of Hancock, } ss.:

S. G. Gaillard, of full age being duly sworn according to law upon his oath deposes and says:

That he is the Vice-President and Treasurer of the Mack Manufacturing Company, and has personal knowledge of the transactions between that Company and the Citizens' Construction Company; that he has read the foregoing notice and has knowledge of the contents thereof and has knowledge of the facts upon which the same is based; that the contents of said notice are true.

Deponent further says that the Mack Manufacturing Company is a corporation of the State of West Virginia, having its principal place of residence in New Cumberland, State of West Virginia,

and that there is due from the Citizens Construction Company, a corporation of the State of New Jersey, to the Mack Manufacturing Company, the sum of $2,501.83 for brick furnished by the Mack Manufacturing Company to the Citizens Construction Company for the paving of Swan Street from Hudson to Chestnut Streets, in the City of Trenton, under a contract made between the City of Trenton, and the Citizens Construction Company, bearing date the first day of July, 1914, and that said amount is due after deducting all just credits and offsets; that the materials were furnished by the Mack Manufacturing Company to Citizens Construction Company and that annexed hereto and to said notice is a copy of the contract giving the trms, time given and conditions of said contract and that the materials were furnished to the said contractor and were actually performed and used in the execution and completion of the said contract with said City.

MACK MANUFACTURING COMPANY,

S. G. Gaillard,

Vice-President and Treasurer.

Subscribed and sworn to at New Cumberland, this thirteenth day of October, 1914, before me, a notary public in and for the County of Hancock, duly authorized to act in and for the county of Hancock, and duly commissioned and sworn, as witness my hand and official seal.

O. M. KINSON,

[SEAL.] Notary Public.

**Notice of Mack Manufacturing Company Referring to Swan Street.**

To The Mayor and Common Council of the City of Trenton: Department of Street and Public Improvements and the Commissioner in charge of the Department of Street and Public Improvements; Department of Revenue and Finance and the Commissioner in charge of Department of Revenue and Finance and the Treasurer of the City of Trenton:

Please take notice that the Mack Manufacturing Company, a corporation of the State of West Virginia, with its residence in New Cumberland, West Virginia, gives notice that there is due to it from the Citizens Construction Company, a corporation of the State of New Jersey, the sum of $2,501.83, after deducting all just credits and off sets; that said debt accrued by reason of brick furnished by the Mack Manufacturing Company to the Citizens Construction Company for the paving of Swan Street from Hudson to Chestnut Streets, in the City of Trenton, under a contract between the City of Trenton and the Citizens Construction Company, bearing date the first day of July, 1914; that the said brick was furnished under a contract, a copy of which is hereto annexed and made a part of this notice, the terms, time given and conditions of said contract being therein expressed; that said materials were furnished to the said contractor and were actually used in the execution and completion of the contract of the said contractor with the City of Trenton.

Take further notice that the Mack Manufacturing Company claims a lien under the provisions of an act entitled "An act to secure the payment of laborers, mechanics, merchants, etc., for public improvements, etc., laws of 1892, page 369, and its

supplements and amendments upon all moneys due or to become due under said contract between the Citizens Construction Company and said Mayor and Common Council of the City of Trenton.

Respectfully,

MACK MANUFACTURING COMPANY,

By S. G. Gaillard,

Vice-President & Treasurer.

Dated October Thirteenth, 1914. 10

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State of West Virginia, }
County of Hancock, } ss.:

S. G. Gaillard, of full age being duly sworn according to law upon his oth deposes and says:

That he is the Vice President and Treasurer of the Mack Manufacturing Company and has personal knowledge of the transactions between that company and the Citizens Construction Company; that he has read the foregoing notice and has knowledge of the contents thereof and has knowledge of the facts upon which the same is based; that the contents of said notice are true. 20

Deponent further says, that the Mack Manufacturing Company is a corporation of the State of West Virginia, having its principal place of busidence in New Cumberland, State of West Virginia, and that there is due from the Citizens Construction Company, a corporation of the State of New Jersey, to the Mack Manufacturing Company, the sum of $2,501.83 for brick furnished by the Mack Manufacturing Company to the Citizens Construction Company for the paving of Swan Street from Hudson to Chestnut Streets, in the City of Trenton, under a contract made between the City of Trenton and the Citizens Construction Company, bearing date the first day of July, 1914, and that said 30 40

amount is due after deducting all just credits and off sets; that the materials were furnished by the Mack Manufacturing Company to Citizens Construction Company and that annexed hereto and to said notice is a copy of the contract giving the terms, time given and conditions of said contract and that the materials were furnished to the said contractor and were actually performed and used in the execution and completion of the said contract with said City.

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MACK MANUFACTURING COMPANY,
S. G. Gaillard,
Vice President.

Subscribed and sworn to at New Cumberland, this Thirteenth day of October, 1914, before me, a Notary Public in and for the County of Hancock, duly authorized to act in and for the County of Hancock, and duly commissioned and sworn, as witness my hand and official seal.

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O. M. KINSON,
[SEAL.] Notary Public.
My Commission expires Dec. 17th, 1919.

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No question is raised as to other notices, bonds, etc., and they are not printed.

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Copies of assignment Broad Street Bank will be supplied in separate book.

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**Order Under Which Moneys Collected.**

IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| THOMAS J. MCGOVERN, Complainant, and CITIZENS CONSTRUCTION CO., Defendant. | On Petition of J. Clarence Richardson. Order. |

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Upon opening this matter to the Court by Peter Backes, of counsel with the petitioner, in the presence of Merritt Lane, of counsel with the Mack Manufacturing Company, of George W. Macpherson, of counsel with the Broad Street National Bank, of Edward Katzenback, of counsel with Joseph B. Richardson & Son, and of William J. Backes, of counsel with Frank E. Arend,

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And it appearing that there is due from the City of Trenton upon certain contracts made by the Citizens Construction Company for the paving of Swan Street, Hart Avenue and Market Street, the sum of thirteen thousand, nine hundred eighteen dollars and sixty-two cents ($13,918.62),

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And it further appearing that the said contracts were completed under and pursuant to an order made in this cause, directing J. Clarence Richardson, the Receiver, to complete the same, and that said Receiver did enter into a contract with the Newton Paving Company for the completion thereof, and that there is due to the said Newton Paving Company the sum of five thousand, nine hundred

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twenty-one dollars and fifty-seven cents ($5, 921.57),

And it further appearing that the said Newton Paving Company is first entitled to be paid said sum out of the moneys due from the said City of Trenton,

And it further appearing that the Mack Manufacturing Company, Joseph B. Richardson & Son and Frank E. Arend have each filed their respective liens pursuant to "An Act to secure the payment of laborers, mechanics, merchants, traders, and persons employed upon, or furnishing materials toward the performing of, any work in public improvements, in cities, towns, townships and other municipalities in this State," approved March thirtieth, eighteen hundred and ninety-two, with the Comptroller of the City of Trenton, and that by reason thereof they each claim to have a lien upon the said fund,

And it further appearing that the Broad Street National Bank of Trenton, claims to be the holder of an assignment for five thousand ($5,000) dollars, payable out of said funds,

And it further appearing that the several claimants to said fund admit the priority of the claim of the Newton Paving Company, and the right of the Receiver to pay said company for the work so performed by it in the completion of said contracts, except only that the Mack Manufacturing Company claims the right to insist that the free moneys in the hands of the Receiver be used for that purpose, this consent not to affect such claims or the claim to compel restitution to such fund of this money now withdrawn or subrogation,

And it further appearing that the claimants on said fund have all consented, and do hereby consent that of the moneys due from the City of Trenton, on the several contracts, the sum of five thou-

sand, nine hundred twenty-one dollars and fifty-seven cents ($5,921.57) should be paid to the Receiver appointed in this cause and that the said Receiver, out of the said funds should pay to the Newton Paving Company, the moneys so due it,

It is, thereupon, on this day of December, nineteen hundred and fourteen, on motion of Peter Backes, of counsel with the Receiver, and the above-named counsel of the respective parties consenting thereto, ordered that out of the moneys due from the City of Trenton on the said contracts for the paving of Swan Street, Hart Avenue and Market Street, amounting to the sum of thirteen thousand, nine hundred eighteen dollars and sixty-two cents ($13,918.62) the said Receiver to pay to the said Newton Paving Company the sum of five thousand nine hundred twenty-one dollars and fifty-seven cents ($5,921.57), in full for its claim for completing the work.

Consented to

Sol. Mack Mfg. Co.