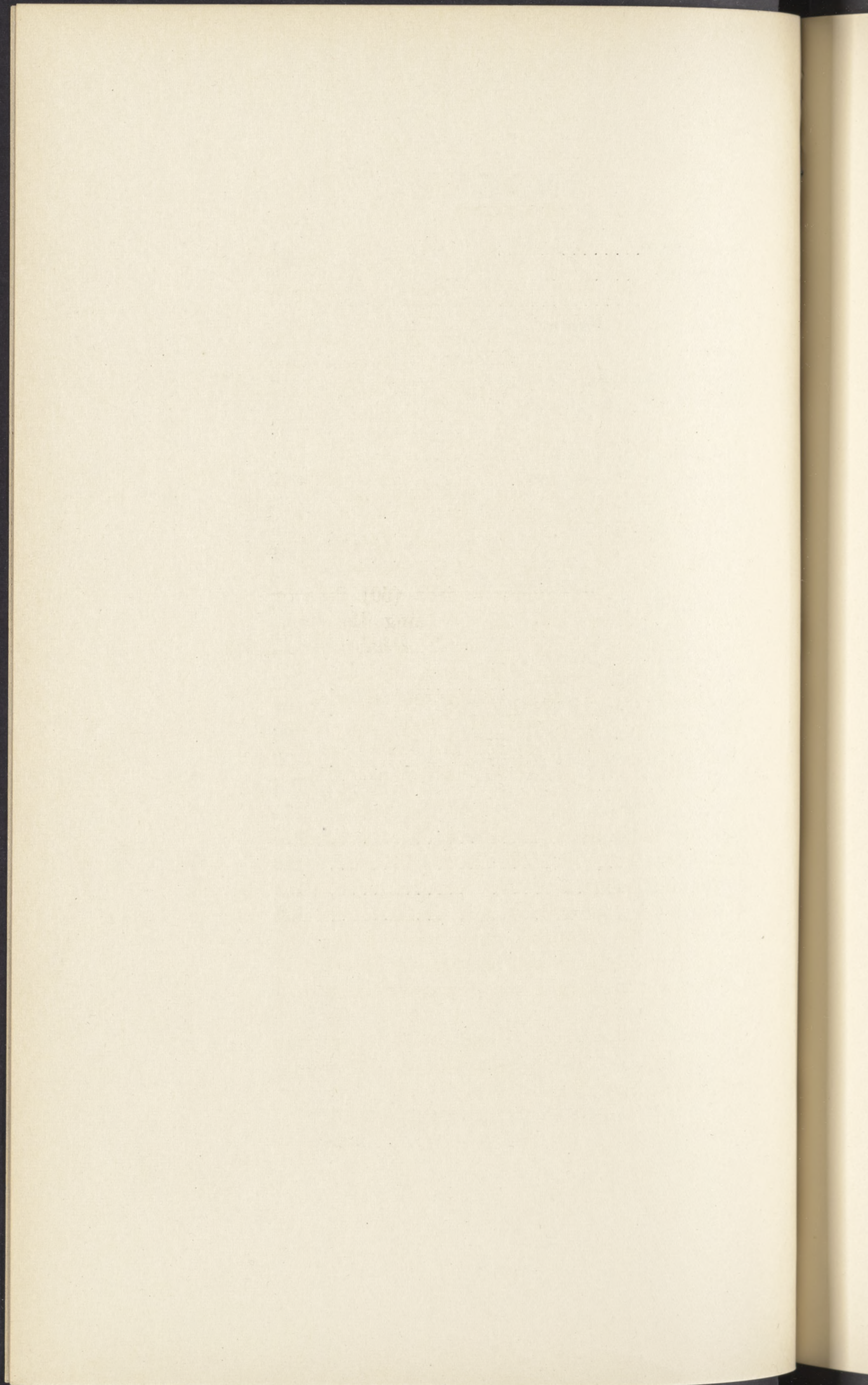


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Summons.

SUMMONS.

The State of New Jersey to Broad
and East Jersey Realty Company,
(L. S.) GREETING:

You are summoned to answer the
annexed complaint in an action at law 10
in the Supreme Court wherein the said James
N. Pappas and Peter J. Tutulis demand of you
the possession of the lands and premises described
as follows:

"BEGINNING at the northeast corner of
Broad and East Jersey Streets, in the City
of Elizabeth, having approximately fifty
(50) feet frontage on Broad Street and a
depth of approximately fifty (50) feet on
East Jersey Street, and being the same 20
premises conveyed to the Merchants Land
and Improvement Company, by Deed of
Harry M. Hyames and wife, recorded in
Book 461, page 441 of Deeds for Union
County. Said premises are known as 101
Broad Street and 1173 East Jersey Street,
Elizabeth, N. J."

And take notice that unless you file your answer
to said complaint with the Clerk of the Supreme 30
Court, at Trenton, within twenty days after
service upon you of this writ and the annexed
complaint, the plaintiff may proceed in the
action, and judgment will be entered against you
and you will be turned out of possession of said
property.

WITNESS, HONORABLE WILLIAM S. GUMMERE,
Chief Justice of the Supreme Court, at Trenton,
this 12th day of March, 1925.

EDWARD J. KELLEHER,
Clerk.

MERRITT LANE,
Attorney.

Complaint.

COMPLAINT.

New Jersey Supreme Court

UNION COUNTY.

10	JAMES N. PAPPAS and PETER J. TUTULIS, <i>Plaintiffs,</i> <i>vs.</i> BROAD & EAST JERSEY REALTY COMPANY, <i>Defendant.</i>	}	<i>In Eject- ment. Complaint.</i>
----	---	---	---

20 Plaintiffs, James N. Pappas and Peter J. Tutulis, of the City of Elizabeth, County of Union and State of New Jersey, demand of the Broad & East Jersey Realty Company the possession of all those certain premises, together with the buildings and improvements thereon, situate in the City of Elizabeth, County of Union and State of New Jersey, bounded and described as follows:

30 "BEGINNING at the northeast corner of Broad and East Jersey Streets, in the City of Elizabeth, having approximately fifty (50) feet frontage on Broad Street and a depth of approximately fifty (50) feet on East Jersey Street, and being the same premises conveyed to the Merchants Land and Improvement Company, by Deed of Harry M. Hyames and wife, recorded in Book 461, page 441 of Deeds for Union County. Said premises are known as 101
 40 Broad Street and 1173 East Jersey Street, Elizabeth, N. J."

Answer.

And the plaintiffs say that their right to the possession of the same accrued on or about the first day of January, 1925, and that the defendant wrongfully deprives the plaintiffs of the possession thereof, to wit: damage of \$50,000.00, and plaintiffs will demand the sum of \$50,000.00 for mesne profits and damages.

10

MERRITT LANE,
Attorney of Plaintiffs.

ANSWER.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

20

JAMES N. PAPPAS and PETER J.
TUTULIS,

Plaintiffs,

vs.

BROAD & EAST JERSEY REALTY
COMPANY,

Defendant.

*In Eject-
ment.*

Answer.

30

The Broad and East Jersey Realty Company, answering the complaint filed in the above-stated cause by the plaintiffs above named, says:

1. It denies each and every allegation contained in the plaintiffs' complaint.

LEBER & RUBACK,
Attorneys of Defendant.

40

*Stipulation of Facts.***STIPULATION.**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10 JAMES N. PAPPAS and PETER J.
TUTULIS,

*Plaintiffs,**vs.*

BROAD & EAST JERSEY REALTY
COMPANY,

*Defendant.**Stipulation.*

1. It is consented, stipulated and agreed that
20 the court may determine the above-entitled cause
without a jury both as to the right to possession
and to mesne profits and damages and the
amount of such mesne profits and damages and
that if the court shall determine that the plain-
tiff is entitled to judgment for possession and
for mesne profits and damages, the amount of
such mesne profits and damages shall be deter-
mined by the court, testimony with respect
30 thereto to be taken as the court shall direct
either before the court itself or if the court
shall so determine the amount of said mesne
profits and damages shall be fixed by a jury
upon a writ of inquiry or the amount of such
mesne profits and damages shall be fixed in such
manner as the court shall direct.

2. It is further stipulated that the case shall
be submitted except with respect to the amount
of mesne profits and damages upon the follow-
40 ing agreed statement of facts:

Stipulation of Facts.

A. On or about the 1st day of August, 1919, the Merchants Land and Improvement Company, a New Jersey corporation, was the owner of certain lands and premises in the City of Elizabeth, County of Union and State of New Jersey, being the premises described in the summons and complaint. On said August 1st, 1919, the said Merchants Land and Improvement Company leased said lands and premises and the improvements thereon to the National Drug Stores Corporation for a term of ten years, commencing January 1st, 1920, and ending January 1, 1930, for and upon the yearly rentals in said lease reserved. A true copy of said lease is hereunto annexed and made part hereof. 10

B. The said lease among its terms contains a provision that "the party of the second part (National Drug Stores Corporation) will not assign this lease without the written consent of the party of the first part, its successors or assigns, under penalty of forfeiture and damages." 20

C. After the making and acceptance of the aforementioned lease and demise, the owner of the demised premises, to wit, the Merchants Land & Improvement Company, sold and conveyed the demised premises to the defendants herein, Peter J. Tutulis and James M. Pappas, who are the present owners of said lands and premises. The legal title to said lands and premises was acquired by said defendants, James M. Pappas and Peter J. Tutulis, with knowledge of the existence of the aforementioned lease to the National Drug Stores Corporation and expressly subject to the said lease and the leasehold rights thereby created. 30 40

Stipulation of Facts.

10 D. On the 19th day of December, 1924, a bill of complaint was filed in the United States District Court for the Southern District of New York by David D. Vincent, a stockholder, against the National Drug Stores Corporation, the lessee, which said corporation was a corporation of the State of Delaware, alleging that said corporation was solvent but that suits were threatened against it in various jurisdictions which might result in the property of the defendant corporation being sold piecemeal and at a great deal less than the fair value and that to protect the creditors and stockholders it was advisable that a court of equity appoint a receiver; that on the 19th day of December, 1924, said corporation appeared in the United States District Court for the Southern District of New York and admitted the statements contained in the bill and consented to a receivership and thereupon on the 19th day of December, 1924, George W. Burleigh was appointed receiver in equity in the United States District Court for the Southern District of New York and thereafter and on the same day again, with the consent of the corporation, the said George W. Burleigh was appointed ancillary receiver of the National Drug Stores Corporation for the District of New Jersey, by the United States District Court for the District of New Jersey and of all of its properties and assets lying within this state, including its securities, deeds, leases, contracts, etc. The said George W. Burleigh duly qualified as such ancillary receiver. A copy of the order appointing said receiver is hereto annexed and made a part hereof.

40 E. The said receiver went into possession of the property of the said National Drug Stores

Stipulation of Facts.

Corporation and proceeded to conduct the business thereof and on the 29th day of January, 1925 in his capacity as a receiver in equity of the National Drug Stores Corporation presented a petition to the United States District Court for the District of New Jersey, a copy of which said petition is hereto annexed and made a part hereof and upon the 30th day of January, 1925, the United States District Court for the District of New Jersey made an order, a copy of which is hereto annexed and made a part hereof. In pursuance of such order the said George W. Burleigh as receiver in equity of the National Drug Stores Corporation and the National Drug Stores Corporation executed an assignment of the lease hereinabove mentioned and described, a copy of which assignment is annexed hereto and made a part hereof.

F. Neither the plaintiffs nor their predecessors in title were parties to the litigation in the United States District for the District of New York or in the United States District for the District of New Jersey and no notice was given to them of the application by the receiver for the order directing the assignment of the lease nor did they have any knowledge of said application or of said order or of the assignment of said lease until after the assignment of said lease had been in fact made.

G. On January 5, 1925, the said plaintiffs served or caused to be served on the ancillary receiver of the National Drug Stores Corporation a notice to the effect that they demanded possession of the said premises electing to terminate the lease upon several grounds, a copy of which said notice is hereto annexed and made a part hereof.

Stipulation of Facts.

10 H. That when the Broad and East Jersey Realty Company took possession of said lands and premises upon discovering that there had been an assignment of the lease, the plaintiffs caused a notice to be served upon the Broad and East Jersey Realty Company, a copy of which is hereto annexed and made a part hereof, which said notice was served upon the 11th day of March, 1924. The Broad and East Jersey Realty Company declining to give up possession, summons was issued out of this Court in this suit on the 12th day of March, 1925.

20 3. It is further stipulated between the parties that the only question at issue in this cause is whether the assignment signed by the receiver and the National Drug Stores Corporation of the lease as set forth herein was a breach of the covenant against assignment contained in the lease and whether it was such a breach of the said covenant as would entitle the owners of the demised premises, Pappas and Tutulis, to declare the lease at an end and demand possession of the demised premises, counsel stipulating that if the answer to the aforesaid question is in the affirmative, judgment should be for the plaintiffs and if in the negative, judgment should be 30 for the defendant. No other alleged cause for forfeiture is to be considered.

MERRITT LANE,
Attorney of Plaintiffs.

LEBER & RUBACK,
Attorneys for Defendant.

Lease.

This Indenture made this first day of August, in the years of our Lord One Thousand Nine Hundred and Nineteen, Between Merchants Land and Improvement Co., a New Jersey corporation, having its principal office in the City of Newark, County of Essex and State of New Jersey, of the first part; and National Drug Stores Corporation, a corporation of the State of Delaware, having its principal office at 405 Lexington avenue, in the City and State of New York, of the second part: 10

WITNESSETH that the party of the first part has let and demised and by these presents does lease and demise unto the said party of the second part all those certain premises together with the buildings and improvements thereon situate in the City of Elizabeth, County of Union and State of New Jersey, bounded and described as follows: 20

BEGINNING at the northeast corner of Broad and East Jersey streets, in the City of Elizabeth, having approximately fifty (50) feet frontage on Broad street and a depth of approximately fifty (50) feet on East Jersey street, and being the same premises conveyed to the Merchants Land and Improvement Company, by deed of Harry M. Hyames and wife, recorded in Book 461 p. 441 of Deeds for Union County. 30

Said premises are known as 101 Broad street and 1173 East Jersey street, Elizabeth, New Jersey, with the appurtenances for the term of ten years from the 1st day of January, A. D. 1920, at the yearly rent for the first five years of said term of Nine Thousand Dollars, payable in quarterly installments of Twenty-two Hundred and Fifty Dollars (\$2,250.00) quarterly in advance on the first days of January, April, July 40

Lease.

and October respectively in each year during said five years and at the yearly rent for the remaining five years of said term of Ten Thousand dollars, payable in equal quarterly installments, of Twenty-five Hundred Dollars (\$2,500.00) quarterly in advance as aforesaid during
10 the remaining five years of said term.

In addition to the yearly rent above specified, the party of the second part will pay all charges for water assessed against the demised premises and will repay to the lessor all taxes and assessments, except assessments for special benefits, levied, assessed or imposed upon the said premises during the term hereby created; such payments to be made by the lessee to the lessor within thirty days after notice is given to the lessee
20 by the lessor that the lessor has paid the said taxes or assessments and that they are therefore due hereunder and the lessee shall have the right at any time and as often as in its judgment may seem proper and reasonable to institute or intervene in any proceedings for the reduction of any taxes or assessments which the said lessee is liable to repay to the said lessor hereunder.

The said party of the second part covenants and agrees with the said party of the first part,
30 its successors, assigns, agents or attorneys, to pay the rent hereby agreed upon and the charges in addition thereto, above mentioned, at the times, in the manner, and by the installments aforesaid.

And it is further agreed that all necessary repairs both to the exterior and interior of the said premises, shall be made by the party of the second part at its own cost and expense including any changes to the leased premises necessitated
40 by any municipal law, rule, regulation, or ordi-

Lease.

nance, so far as such changes are due to the occupancy of the lessee or its tenants. The party of the first part, its successors or assigns shall not be liable for any damage or injury which may be sustained by the party of the second part or any other person or persons coming in and upon the demised premises and their appurtenances and if any claim for such damage shall be made upon the party of the first part, its successors or assigns, the party of the second part will indemnify and save harmless the party of the first parties successors, or assigns in such sum as may be recovered against it. 10

And it is further understood and agreed by and between the said parties that the party of the first part, its successors, assigns, agents or attorneys may enter into or upon said premises at reasonable hours in the daytime, to examine the same or to make such repairs or alterations therein as shall be necessary for the preservation thereof, in the event of the failure of the lessee to do so, or to exhibit them at any time during the last three months of the term from ten o'clock in the morning to five o'clock in the afternoon (Sundays excepted) to any person or persons and to put up notices "To Let" or "For Sale" on the outside wall thereof. 20 30

If the demised premises shall become vacant or be deserted during said term, the party of the second part shall thereby authorize the party of the first part, its successors, assigns, agents or attorneys, to re-enter the same at its option and re-let them, and receive and apply the rents so received to the payment of the rent so due by these presents; and such re-entry is not to void this lease unless the party of the first part shall exercise the option so to do, which option is hereby expressly granted. 40

Lease.

Said party of the second part hereby agrees to keep the demised premises in as good condition as they may be at the beginning of the term of this lease, wear and tear arising from reasonable use and damage by the elements excepted, and further agrees that it will comply with all statutes, ordinances, rules, regulations and orders of the Federal State and City Government and of any and all other departments and bureaus applicable to the use of said premises and at the expiration of said term to yield up the peaceable possession thereof to the party of the first part, its successors or assigns.

And the said party of the second part does further promise and agree that it will not use or permit the said premises to be used for any businesses designated as "extra hazardous" without the written consent of the party of the first part, its successors or assigns.

And it is agreed that if any rent shall be due and unpaid or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part, its successors or assigns, to enter the said premises and remove all persons therefrom.

And it is further agreed between the parties hereto that the party of the second part will not assign this lease without the written consent of the party of the first part, its successors or assigns, under penalty of forfeiture and damages.

This lease is and at all times during the term hereby created shall be subordinate to any mortgage or mortgages now or hereafter placed upon the demised premises not to exceed, however, the total principal sum of Fifty-five Thousand Dollars (\$55,000.00) and the lessee does hereby

Lease.

agree at any time or from time to time upon demand to execute any instrument or instruments which may be necessary to properly confirm such subordination with regard to any mortgage now or hereafter placed upon said premises hereunder, without cost.

It is further agreed that if the party of the second part shall become bankrupt, either voluntary or involuntarily, at any time during the term hereof, then the party of the first part, its successors or assigns, may at its option rescind this lease and thereupon the term of letting hereby granted shall be at an end, and said party of the first part, its successors or assigns may at its option re-enter said leased premises and have full use and possession thereof, without liability of any kind whatsoever. 10

It is further expressly understood and agreed that this lease is made subject to existing rights of tenants, in the demised premises; that a notice has been served on the present tenant of the corner store on the ground floor, terminating the tenancy of the said tenant on the 1st day of January, 1920, but if the said tenant fails or refuses to deliver up the possession of the said corner store on said day, the lessor will institute legal proceedings for the possession thereof and upon the termination of said proceedings, if possession is obtained by the lessor, then the lessor will give the lessee possession of the premises hereby demised immediately thereafter, but if possession of said premises is not obtained by the lessor, in such proceedings, then the party of the first part, its successors or assigns, and the demised premises, shall be free of any obligation under this lease, without liability to the party of the second part for any damages or expenses. 20 30 40

Lease.

10 The lessee shall have the right at any time during the term hereby created to make such alterations or changes in the buildings on the demised premises as may in its judgment seem reasonable and necessary, provided, however, that no changes shall be made by the lessee without written consent of the lessor which would in any way weaken the structure of said building.

20 In case the demised premises or a part thereof shall be condemned for a public or quasi-public use, or in case the buildings on the demised premises shall be condemned as unsafe through no act of the lessee, or be damaged or destroyed as a result of any condemnation proceedings, said buildings or premises shall be repaired as speedily as possible at the expense of the lessor and pending such repairs the rent shall be justly and proportionately abated or reduced, provided, however, that in the event that the entire premises are taken by such a condemnation, then and in that event, the lessee shall have no further rights under this lease against the lessor.

30 At the request of the lessee the lessor shall at any time or from time to time execute or cause to be executed and delivered all such papers as may be necessary to enable an occupant of the demised premises to obtain excise or other licenses in connection with the business of a retail druggist upon the demised premises.

40 It is further agreed that any notices necessary to be sent under this lease shall be sent by the lessor to the lessee at its main office in the City of New York, No. 405 Lexington avenue, or by the lessee to the lessor at the last address where rent was paid.

Lease.

The lessor further covenants that it has good right to lease the said premises in the manner aforesaid and the lessee upon paying the said rent and performing the covenants herein contained shall and may peaceably have, hold and enjoy the said premises for the term aforesaid, excepting subject to the rights of tenants aforesaid, and as herein otherwise provided. 10

It is further agreed that if the buildings hereby demised shall be injured by fire without the fault of the lessee, the landlord shall repair the same as speedily as possible, but if the lessee shall, by reason of such fire, be hindered and prevented in the conduct of its business, there shall be an abatement of the rent, not exceeding, however, the monthly rental agreed upon until such buildings shall be put into complete repair; and in case of the total destruction of such building or buildings by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thenceforth, the lease shall cease and come to an end. 20

IN WITNESS WHEREOF, the said parties have caused these presents to be signed by the respective officers, duly authorized and their respective corporate seals to be duly affixed hereto the day and year first above written. 30

JOSEPH FISCH,
President,

L. S. of Merchants Land & Improvement Co.

Attest:

Louis Lewis,
(SEAL) Secretary.

Lease.

NATIONAL DRUG STORES
CORPORATION,

By S. E. Kingsley,
Vice-President.

Attest:

10 E. S. Roche,
(SEAL) Secretary.

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

BE IT REMEMBERED, that on this fourth day
of August, in the year of our Lord One Thou-
sand Nine Hundred and Nineteen, before me the
subscriber, a Master in Chancery of New Jersey,
20 personally appeared Louis Lewis, who, being
by me duly sworn, on his oath says that he is the
Secretary of the Merchants Land and Improve-
ment Company, the lessor named in the within
instrument; that Joseph Fisch is the President
of said corporation; that deponent well knows
the corporate seal of said corporation; and the
seal affixed to said instrument is such corporate
seal and was thereto affixed, and said instru-
ment signed and delivered by said President as
30 and for his voluntary act and deed and as and
for the voluntary act and deed of said corpora-
tion, in the presence of deponent, who thereupon
subscribed his name thereto as witness.

LOUIS LEWIS.

Sworn and subscribed before me
at Newark the date aforesaid.

(Signed) EDWARD SCHOEN,
40 A Master in Chancery of New Jersey.

Lease.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.

BE IT REMEMBERED, that on this fourth day of August, in the year of our Lord One Thousand Nine Hundred and Nineteen, before me the subscriber, a Notary Public of New York, personally appeared E. S. Roche, who, being 10
by me duly sworn, on his oath says that he is the Secretary of the National Drug Stores Corporation, the lessee named in the instrument; that S. E. Kingsley is the Vice-President of said corporation that deponent well knows the corporate seal of said corporation; the seal affixed to said instrument is such corporate seal and was thereto affixed and said instrument signed and delivered by said Vice-President as and for his voluntary act and deed and as and for the 20
voluntary act and deed of said corporation, in presence of deponent, who thereupon subscribed his name as witness.

(Signed) E. S. ROCHE.

Sworn and subscribed before me
at New York the date aforesaid.

(Signed) JOSEPH E. HUMBERT,
(SEAL)

30

40

*Order Appointing Receiver.*IN THE DISTRICT COURT OF THE
UNITED STATES

FOR THE DISTRICT OF NEW JERSEY.

10	DAVID O. VINCENT, <i>Plaintiff,</i>	}	<i>In Equity.</i> <i>Order.</i>
	<i>vs.</i>		
	NATIONAL DRUG STORES CORPO- RATION, <i>Defendant.</i>		

20 This cause came on to be heard this day upon the bill of complaint filed herein and the answer thereto, and upon the motion for the appointment of an ancillary receiver for said defendant and the consent to the appointment of such ancillary receiver by the defendant as prayed for in said bill of complaint; and after hearing Irving Riker, of counsel for the plaintiff, and Alan Bruce Conlin, of counsel for the defendant, and after due deliberation,

30 IT IS ORDERED, ADJUDGED and DECREED that George W. Burleigh, of the City of New York, State of New York, be and he hereby is appointed ancillary receiver of said National Drug Stores Corporation and of all the property and assets of the defendant within the State of New Jersey, which is within this district, including real estate, factory buildings and equipment, offices and buildings and appurtenances of every kind, and equipment, tools, machinery, furniture, fixtures, materials, supplies, books of account, records and other books papers and accounts, cash in banks, on deposit and in hand, money, 40 debts, things in action, credits, stocks, bonds,

Order Appointing Receiver.

securities, deeds, leases, contracts, muniments
of title, bills receivable, rents, issues, profits and
income accruing and to accrue, as well as lease-
hold interests and other contracts, rights, inter-
ests, easements, profits, real estate, franchises
and other assets and property owned and pos-
sessed by it; drugs, medicines, paints, chemicals, 10
oils, dyestuffs, glassware, toilet articles, fancy
goods, druggists' sundries, perfumeries, surgical
apparatus, physicians' and hospital supplies and
general merchandise, medicinal, chemical, in-
dustrial and other preparations and articles,
compounds, cements, oils, paints, pigments and
varnishes, drug, dyeware, paint and color
grinders, electrical, chemical, photographic,
surgical and scientific apparatus and materials;
that said ancillary receiver be and he hereby is
authorized immediately to take possession of 20
the same and to operate, manage and conduct
the said factories and property of said defend-
ant within the territorial jurisdiction of this
court in such manner as will in his judgment
produce the most satisfactory results and to
exercise the authority and franchises of said
defendant, and to preserve and protect the prop-
erty of said defendant in proper condition and
repairs so that it may safely and advantageously 30
be used to protect the title and possession and
secure and develop the business of the same,
and in their discretion to employ and discharge
and fix the compensation of all such managers,
superintendents, agents and employees and to
make such contracts for the purchase of ma-
terials and sale of manufactured products as in
their discretion they may deem proper, and to
contract to make and to make such payments
and disbursements as may be needful and proper
in so doing; that such ancillary receiver be, and 40

Order Appointing Receiver.

10 he hereby is authorized to collect the rents, income, tolls and profits of said property and proceeds of the sale thereof either now on hand or thereafter manufactured by said ancillary receiver and to make proper payments therefrom on account of accruing rents and other expenses and charges arising from or in connection with the operation by him of the business of said defendant; and to pay for current necessities for services, labor and supplies and for no other purposes without the order of this Court.

20 IT IS FURTHER ORDERED that Messrs. Riker and Riker, of Newark, New Jersey, attorneys at law, are hereby appointed general solicitors and attorneys for said ancillary receivers with power and authority within their discretion to appoint and employ such attorneys and assistants as may be necessary for the proper conduct of the business of the receivership.

30 IT IS FURTHER ORDERED that said ancillary receiver be and he hereby is fully authorized and empowered to institute and prosecute all such suits, actions and proceedings as he may be advised by his counsel are necessary and proper for the proper protection of the property and trust hereby vested in him, and likewise to defend all such actions and suits against him as such ancillary receiver, and also to appear in, by his solicitors and attorneys, and conduct the prosecution or defense of any suits, actions or proceedings now pending in any court against such defendant, the prosecution or defense of which will in the judgment of said counsel for said ancillary receiver be necessary for the proper protection of defendant and of all parties
40 interested in its property and business.

Order Appointing Receiver.

IT IS FURTHER ORDERED that said ancillary receiver be and he hereby is authorized in his discretion from time to time, out of the funds coming into his hands to pay the expenses of operating said property and conducting said business and executing his said trust and to pay all taxes and assessments upon said property and business and the income thereof, or any part thereof, and such rents and installments as may become due upon any said property; and said ancillary receiver shall also pay all current and unpaid payrolls, and other current and accrued indebtedness in his opinion necessary or proper to be paid in order to preserve the property of defendant and secure the continuance of its operation. 10

IT IS FURTHER ORDERED that said ancillary receiver open proper books of account and cause to be kept due and proper accounts of the earnings, expenses, receipts and disbursements of his said trust, and preserve proper vouchers for all payments by him made on account thereof. 20

IT IS FURTHER ORDERED that said ancillary receiver be and he hereby is authorized to consider and determine which of the leases and other contractual arrangements between defendant and any and all other persons and corporations that they may lawfully renounce or adopt, they will renounce or adopt and that pending further order of this Court, none of their acts or omissions in the performance or failure to perform any of same shall constitute or be considered an election to adopt or an estoppel to renounce any of them. 30

IT IS FURTHER ORDERED that said ancillary receiver shall file with the clerk of this Court monthly reports of the operation by him of the 40

Order Appointing Receiver.

properties coming into his possession as such ancillary receiver and of the business conducted by him as such.

10 IT IS FURTHER ORDERED that each and every of the officers, directors, stockholders, creditors, agents and employees of said defendant and all other persons be and they are hereby required and commanded forthwith upon demand of said ancillary receiver or his duly authorized agent to turn over and deliver to said ancillary receiver or his duly authorized agent any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys, or other property (other than such as are pledged with and held by third parties as collateral security for the indebtedness of defendant) in his or their hands or under his or their control; and
20 each of such directors, officers, stockholders, agents and employees is hereby commanded and required to obey and conform to such orders as may be given them from time to time by said ancillary receiver, or his duly constituted representatives in conducting the operation of said property and in discharging his duties as ancillary receiver.

30 IT IS FURTHER ORDERED that said defendant and its officers, directors, stockholders, creditors, agents and employees and all other persons claiming to act by, through or under said defendant, and all other persons whosoever, are hereby enjoined and restrained from interfering with the possession or management of any part of the property over which said ancillary receiver is hereby appointed, or interfering in any way to prevent the discharge of his duties or in his operation or conduct of the business heretofore carried on by said defendant.
40

Order Appointing Receiver.

And all said persons, creditors and stockholders of said defendant and all persons who-soever are enjoined from instituting or prosecuting any actions, suits or proceedings against the defendant or any actions, suits or proceedings affecting any property in which defendant is interested without the order and permission of this Court. 10

IT IS FURTHER ORDERED that any party in interest may apply to this Court for further directions with reference to the property and conduct of the business aforesaid.

IT IS FURTHER ORDERED that said ancillary receivers as speedily as possible, after taking possession of said property of the defendant, cause to be made and filed with this Court a general inventory of the property and assets of which he is appointed ancillary receiver. 20

IT IS FURTHER ORDERED that said ancillary receiver give a bond in the sum of Ten Thousand Dollars conditioned that he will well and truly perform the duties of his office and duly account for all moneys or property that may come into his hands as such ancillary receiver, and abide by and perform all things which he shall be directed to do, said bond to be with sufficient surety to be approved by a judge of this Court, and to be forthwith filed in the office of the Clerk of this Court. 30

Dated Newark, N. J., December 19, 1924.

WM. N. RUNYON,
United States District Judge.

Order Appointing Receiver.

UNITED STATES OF AMERICA, }
 DISTRICT OF NEW JERSEY. } ss.

I, GEORGE T. CRANMER, Clerk of the District Court of the United States of America for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be a true copy of
 10 the original order appointing ancillary receiver, etc., on file, and now remaining among the records of the said court, in my office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed the seal of the said court, at Trenton, in said district, this twenty-sixth day of December, nineteen hundred and twenty-four.

20 GEORGE T. CRANMER,
 Clerk District Court, U. S.
 By R. S. Chevrier, Deputy.

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Petition.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY.

DAVID D. VINCENT,

Complainant,

vs.

NATIONAL DRUG STORES CORPO-
RATION, a corporation,
Defendants.

In Equity.
Petition.

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To the Honorable Judges of the United States
District Court for the District of New Jersey:

The petition of George W. Burleigh, Receiver
in Equity of National Drug Stores Corporation,
respectfully shows:

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1. That on or about the first day of August,
1919, the Merchants Land & Improvement Co., a
New Jersey corporation, leased to the National
Drug Stores Corporation premises in the City of
Elizabeth, County of Union and State of New
Jersey, known as No. 101 Broad street, and No.
1173 East Jersey street, for the term of ten
years, commencing the first day of January, 1920,
at the yearly rental for the first five years of
\$9,000 per year, and for the remaining five years
\$10,000 per year, payable in equal quarterly in-
stallments in advance. That in addition to the
yearly rental above specified the National Drug
Stores Corporation agree to pay all charges for
water assessed against the said premises and to
re-pay to the lessor of said premises such taxes
and assessments, except assessments for special
benefits levied against the premises during the
term, such payments to be made by the National

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Petition.

Drug Stores Corporation to the lessor within thirty days after notice should have been given to said corporation.

10 2. That subsequently the Merchants Land & Improvement Co. sold and conveyed the premises so as aforesaid leased to the National Drug Stores Corporation to Peter J. Tutulis and James N. Pappas; that in accordance with the terms of said lease there is due from the National Drug Stores Corporation to the said Peter J. Tutulis and James N. Pappas for taxes for the second half of the year 1924 the sum of \$2,169.86, and that in addition thereto there is due the sum of \$2,500 representing the quarterly installment of rent, payable January 1, 1925.

20 3. Your petitioner further shows that the National Drug Stores Corporation has not occupied said lands and premises for some time past, but has sub-let the premises in question to various tenants as hereinafter set forth:

30 (a) That on or about the 19th day of February, 1920, the National Drug Stores Corporation leased the rooms 6-7-8 located in the property 101 Broad street, in said City of Elizabeth, to Rae T. Kampher, for a period of five years, commencing the first day of May, 1920, for the yearly rental of \$600.00 payable at the rate of \$50.00 per month in advance, and that the said rooms are now occupied by the said Rae T. Kampher in accordance with the terms of said lease, and that rent for the month of January, 1925, is now due and unpaid.

40 (b) That on or about the 19th day of February, 1920, the National Drug Stores Corporation leased rooms 3-4-5 located in the property 101 Broad street, in said City of Elizabeth, to one

Petition.

Curtis W. Merrill, for the term of five years, commencing on the first day of May, 1920, for the yearly rental of \$720.00, payable at the rate of \$60.00 per month in advance, and that the said rooms are now occupied by the said Curtis W. Merrill in accordance with the terms of said lease, and that rent for the month of January, 1925, is now due and unpaid. 10

(c) That on or about the 19th day of February, 1920, the National Drug Stores Corporation leased room number one located in the property 101 Broad street, in said City of Elizabeth, to one John J. Collins, for the term of five years commencing on the first day of May, 1920, for the yearly rental of \$360 payable at the rate of \$30 per month in advance and that the said room is now occupied by the said John J. Collins in accordance with the terms of said lease, and that the rent for the month of January, 1925, is now due and unpaid. 20

(d) That on or about the 17th day of July, 1922, the National Drug Stores Corporation leased room number two located in the property 101 Broad street, in said City of Elizabeth, to one Walter C. Tenney, for the term of two years and eight months, commencing on the first day of August, 1922, for the yearly rental of \$240.00 for the first year and \$300 thereafter, payable in equal monthly installments in advance on the first day of each and every month; that to secure the payment of said rent the said Walter C. Tenney deposited with the National Drug Stores Corporation the sum of \$75 to be applied to the rent for the last three months of said term; that the said Walter C. Tenney is still occupying the said premises in accordance with the terms of the said lease; that rent for the month of Jan- 30 40

Petition.

uary, 1925, is now due and unpaid, and that the said National Drug Stores Corporation still retains said security as aforesaid.

10 (e) That on or about the 11th day of July, 1922, the National Drug Stores Corporation leased store and basement of property 101 Broad street, in said City of Elizabeth, to Harry and Maurice Greenburg Walk-Over Boot Shop, for the term of six years and eight months, commencing on the first day of May, 1923, at the yearly rental of \$5,500 for the first four years and \$6,000 for the last two years and eight months, payable monthly in advance on the first day of each and every month; that to secure the payment of said rent the said Harry and Maurice Greenberg, trading as Greenberg Walk-Over Boot Shop, deposited with the National Drug Stores Corporation the sum of \$3,000 to be applied to the rent for the last six months of said term, said deposit to draw interest at the rate of 3% per annum; that the said store is now occupied by the said Harry and Maurice Greenberg, in accordance with the terms of said lease, and that the said National Drug Stores Corporation still retains said security as aforesaid, and has not paid said interest; that the rent for the month of January, 1925, is now due and unpaid.

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(f) That on or about the 29th day of October, 1923, the National Drug Stores Corporation leased the third floor of the building known as 101 Broad street, in said City of Elizabeth, to one Charles B. Baden for the term of one and one-half years, ending on the 30th day of April, 1925, for the yearly rental of \$480, payable monthly in advance on the first day of each and every month; that to secure the payment of said rent the said Charles B. Baden deposited with

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Petition.

the National Drug Stores Corporation the sum of \$80, to be applied to the rent for the last two months of said term; that the said Charles B. Baden is still occupying the said premises in accordance with said lease and that the said National Drug Stores Corporation retains the security as aforesaid; that rent for the month of January, 1925, is now due and unpaid. 10

(g) That on or about the 9th day of February, 1924, the National Drug Stores Corporation leased the entire store and basement of premises located in the property 101 Broad street, in said City of Elizabeth, to the Broad & East Jersey Realty Company, a corporation of the State of New Jersey, for a period of five years and nine months, commencing on the first day of April, 1924, at the yearly rental of \$8,500 for the first four years and nine months, and \$9,000 per year for the balance of the term, payable in equal monthly installments in advance of the first day of each and every month, and in and by said lease the said National Drug Stores Corporation agreed to furnish coal to heat the said premises. That to secure the payment of said rent the said Broad & East Jersey Realty Company deposited with the National Drug Stores Corporation the sum of \$750 to be applied to the December rent, 1929, said deposit to draw interest at the rate of 4% per annum, payable semi-annually; that the said store is now occupied by the said Broad & East Jersey Realty Company, in accordance with the terms of said lease, and that the said National Drug Stores Corporation still retains said security as aforesaid and has not paid the interest referred to in said lease to the said company, and that rent for the month of January, 1925, is due and unpaid. 20 30 40

Petition.

4. Your petitioner further shows that the use of the premises is not necessary to his operation of the business of the defendant corporation, and that while the rents collected from sub-tenants created a profit for the corporation, that the amount thereof is small and uncertain of realization, and that in his opinion the leases should be sold and assigned.

5. Your petitioner further shows that he has received an offer from the Broad & East Jersey Realty Company to purchase the lease held by the National Drug Stores Corporation for the sum of \$6,000, of which \$2,095 is to be paid in cash upon the execution of an agreement selling and assigning said lease to said company, providing that the petitioner as receiver, shall pay all obligations which have accrued against the National Drug Stores Corporation up to and including the 31st day of December, 1924, \$3,905 to be paid by assuming the obligation of the leases aforesaid to the tenants of all deposits given to the National Drug Stores Corporation as security for the payment of rent and interest thereon; the Broad & East Jersey Realty Company further agrees to assume said leases as of January 1, 1925, and to pay the rent accruing on the first day of January, 1925, to the owners of said premises, and to have the right to collect all rents accruing from sub-tenants of said premises which fall due on and after January, 1925. The offer as aforesaid is subject to the condition that if the National Drug Stores Corporation shall subsequently be declared a bankrupt or do anything which will cause the leases which said Broad & East Jersey Realty Company agrees to purchase to become forfeited, that the amount of money actually paid by said Broad & East Jer-

Petition.

sey Realty Company shall be considered as a claim against the said corporation after crediting thereon such proportion of the amount paid as the time of actual occupancy of the premises under said lease shall bear to the term assigned.

6. Your petitioner further shows that in his opinion the offer of the Broad & East Jersey Realty Company is advantageous to the Estate of the National Drug Stores Corporation and should be accepted, and therefore prays that an order may be made authorizing your petitioner as such receiver to assign the lease hereinbefore referred to the Broad & East Jersey Realty Company upon the terms and conditions herein stated. 10

And your petitioner will ever pray, etc.

GEORGE W. BURLEIGH. (L. S.) 20
Petitioner.

RIKER & RIKER,
Solicitors for Petitioner.

STATE OF }
COUNTY OF } ss.

GEORGE W. BURLEIGH, being duly sworn according to law, upon his oath deposes and says that he is the petitioner in the foregoing petition named; that he has read the same and knows the contents thereof, and that the matters and things therein set forth are true to the best of his knowledge and belief. 30

GEORGE W. BURLEIGH. (L. S.)

Order.

Sworn and subscribed to before me
this 29th day of January, 1925.

MILTON FICHTENBAUM,
Notary Public Bronx Co. No. 142, Reg. No.
2641-L.

10 Cert. filed in N. Y. Co. No. 692, Reg. No. 6098.
(L. S.) Commission expires March 30, 1926.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

DAVID D. VINCENT,

Complainant,

vs.

20 NATIONAL DRUG STORES CORPORA-
TION, corporation,
Defendant.

In Equity.

Order.

30 This matter being opened to the Court by
Riker & Riker, solicitors for George W. Bur-
leigh, receiver in equity of the National Drug
Stores Corporation, and it appearing to the Court
that the National Drug Stores Corporation is the
owner and holder of a certain lease made by
Merchants Land & Improvement Co., bearing
date the first day of August, 1919, for premises
known as No. 101 Broad street, and No. 1173
East Jersey street, in the City of Elizabeth and
County of Union, and

40 It further appearing to the Court that the re-
ceiver has received an offer from the Broad &
East Jersey Realty Co., a corporation of New
Jersey, for the purchase of said lease, upon the
terms specified in the petition of said receiver,

Order.

and has recommended the acceptance of said offer.

It is, on this 30th day of January, 1925,
ORDERED that the said receiver be authorized to
accept the said offer of the Broad & East Jersey
Realty Co., as set forth in said petition, and that
the said receiver be authorized to enter into an
agreement satisfactory in form to said receiver 10
with said Broad & East Jersey Realty Co., a
corporation, to sell and assign the lease aforesaid
for the sum of \$6,000.00, to be paid as set forth
in said petition.

WM. N. RUNYON,
U. S. District Judge.

I approve the form of the above order.

JOSEPH? 20
Solicitors for Broad & East Jersey Realty Co.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF NEW JERSEY.

I, GEORGE T. CRANMER, Clerk of the District
Court of the United States of America, for the
District of New Jersey, in the Third Circuit, do
hereby certify that the foregoing is a true copy 30
of the original order on file, and now remaining
among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto sub-
scribed my name and affixed the seal of the said
court at Trenton in said District, this 4th day
of March, 1925.

GEORGE T. CRANMER,
Clerk District Court, U. S.

By R. S. Chevrier, 40
Deputy.

Assignment of Lease.

THIS AGREEMENT, made this 4th day of February, 1925, BETWEEN, GEORGE W. BURLEIGH, Receiver in Equity of the National Drug Stores Corporation, a corporation of Delaware, hereinafter known as the "Receiver," party of the first part, AND NATIONAL DRUG STORES CORPORATION, a corporation of the State of Delaware, hereinafter known as "Drug Stores Corporation," party of the second part, AND BROAD & EAST JERSEY REALTY COMPANY, a corporation of the State of New Jersey, hereinafter known as the "Realty Corporation," party of the third part:

WITNESSETH: that Whereas, the National Drug Stores Corporation is the lessee named in a certain lease made by the Merchants Land & Improvement Co., a corporation of New Jersey, for the premises known as No. 101 Broad street, and No. 1173 East Jersey street, in the City of Elizabeth, County of Union and State of New Jersey, bearing date the 1st day of August, 1919, and

WHEREAS, a bill has been filed in the District Court for the Southern District of New York in a suit by David D. Vincent as complainant and National Drug Stores Corporation, a corporation, as defendant, wherein George W. Burleigh was appointed receiver in equity of the "Drug Stores Corporation," and

WHEREAS, in a suit between said parties in the District Court for the District of New Jersey said George W. Burleigh was appointed ancillary receiver by said District Court of New Jersey, and

WHEREAS, said George W. Burleigh has taken over the burden of the administration of said estate as said "Receiver" and has succeeded to

Assignment of Lease.

the rights of said "Drug Stores Corporation" in said lease, and

WHEREAS, the lands and premises so as aforesaid leased are now occupied by sub-tenants in accordance with leases made and executed by said "Drug Stores Corporation" as are more particularly hereinafter set forth:

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Name of sub-tenant	Space Occupied	Lease dated
Rae T. Kampner	Rooms 6-7-8	Feb. 19, 1920
Curtis W. Merrill	Rooms 3-4-5	Feb. 19, 1920
John J. Collins	Room No. 1	Feb. 19, 1920
Walter C. Tenney	Room No. 2	Jul. 17, 1922
Harry & Maurice Greenberg, trading as Greenberg Walk-Over Boot Shop	Store and Basement	Jul. 11, 1922
Charles B. Baden	Third Floor	Oct. 29, 1923
Broad & East Jersey Music Co.	Store and Basement	Feb. 9, 1924

WHEREAS, the "Realty Corporation" has offered to purchase the lease made by the Merchants Land & Improvement Co., as aforesaid from said "Receiver" and said "Drug Stores Corporation" upon terms more particularly hereinafter set forth, and the said "Receiver" and said "Drug Stores Corporation" are willing to sell and assign said lease upon said terms, and

20

WHEREAS, the District Court of the United States for the District of New Jersey has, by Order bearing date the 30th day of January, 1925, authorized said "Receiver" to sell and assign said lease upon terms therein stated and by agreement satisfactory to said "Receiver":

30

Now, THEREFORE, in pursuance of the terms of said Order and upon the considerations hereinabove stated, and the mutual covenants hereinafter set forth, the said parties do covenant and agree as follows:

1. The "Receiver" and "Drug Stores Corporation" do hereby sell, assign and transfer to

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Assignment of Lease.

the "Realty Corporation" the lease made by the Merchants Land & Improvement Co., to the National Drug Stores Corporation, bearing date the 1st day of August, 1919, for the premises known as No. 101 Broad street and No. 1173 East Jersey street, Elizabeth, New Jersey, subject to all
 10 the terms and conditions therein contained, and subject to the rights of all tenants and occupants of said premises as set forth in the leases hereinbefore described, and to accept in payment therefor the sum of \$6,000.00 to be paid and satisfied as hereinafter set forth.

2. The said "Realty Corporation" does hereby agree to accept the assignment of the said lease and to pay for the same the sum of \$6,000.00 as hereinafter set forth and to assume
 20 and perform all the burdens and obligations contained in the said lease of the Merchants Land & Improvement Co., and of the leases of the sub-tenants as aforesaid therein to be performed by said "Drug Stores Corporation."

3. Payment of the sum of \$6,000.00 to be made as follows:

(a) \$2,095.00 to be paid in cash to the "Receiver" upon the signing and execution of this agreement.

30 (b) \$3,905.00 to be paid by assuming the obligation of the "Drug Stores Corporation" with respect to deposits paid by sub-tenants as security and as described in the leases affecting same as follows:

(1) \$3,000.00 by assuming the obligation of the "Drug Stores Corporation" contained in the lease made and executed by Harry & Maurice Greenberg, trading as Greenberg Walk-Over Boot Shop, with
 40 reference to the sum of \$3,000 deposited

Assignment of Lease.

as security with the "Drug Stores Corporation" and interest accruing thereon from and after January 1, 1925.

(2) \$80.00 by assuming the obligation of the "Drug Stores Corporation" contained in the lease made by Charles B. Baden, with reference to the sum of \$80.00 deposited as security with the "Drug Stores Corporation." 10

(3) \$75.00 by assuming the obligation of the "Drug Stores Corporation" contained in the lease made by Walter C. Tenney, with reference to the sum of \$75.00 deposited as security with the "Drug Stores Corporation."

(4) \$750.00 by assuming the obligation of the "Drug Stores Corporation" contained in the lease made and executed by Broad & East Jersey Music Co., with reference to the sum of \$750.00 deposited as security with the "Drug Stores Corporation" and interest accruing thereon from and after January 1, 1925. 20

4. It is mutually agreed that this assignment shall take effect as of January 1, 1925, and the said "Realty Corporation" hereby agrees that it will assume and pay the installment of rent due January 1, 1925, in accordance with the lease hereby assigned, and all subsequent installments thereof, and that it shall have the right to receive and collect all rents and other profits arising from said premises or accruing on and after January 1, 1925. 30

5. The said "Receiver" further agrees to pay to owners of said premises the sum of \$2,169.86 representing taxes for the second half 40

Assignment of Lease.

of the year 1924, which "Drug Stores Corporation" are now obligated to pay in accordance with the terms of said lease.

10 6. Said parties do further mutually agree that if the "Drug Stores Corporation" shall hereafter do or perform or suffer any act which shall cause the lease hereby assigned to be forfeited, that in such case the amount of money actually paid to the "Receiver" by the said "Realty Corporation" after deducting therefrom such proportion of the amount paid as the time of occupancy of said premises by said "Realty Corporation" prior to forfeiture shall bear to the balance of the term as assigned shall be and become a claim against the "Drug Stores Corporation," and that so far as may be legal the
20 said claim shall be considered as priority claim against the assets of said "Drug Stores Corporation."

7. Said "Realty Corporation" further agrees that it will save the said "Receiver" and "Drug Stores Corporation" harmless from any claims, suits or demands arising on account of the lease hereby assigned from and after January 1, 1925, except such as shall be caused by some act of the "Drug Stores Corporation" or said "Receiver."
30

8. Said "Realty Corporation" further agrees that it will save the said "Receiver" and "Drug Stores Corporation" harmless from any claims, suits, or demands whatsoever arising by virtue of any sub-leases affecting said premises from and after January 1, 1925, except such as may be caused by any act of said "Receiver" or said "Drug Stores Corporation."

9. In the event that any suit shall be brought
40 against the said "Realty Corporation" by reason

Assignment of Lease.

of any act of said "Drug Stores Corporation" or said "Receiver," the said "Realty Corporation" agrees that it will notify the said "Receiver" or said "Drug Stores Corporation" forthwith thereof, and said "Receiver" or said "Drug Stores Corporation" agrees that he or it will either defend the same at his or its own cost and expense or that said "Realty Corporation" may do so and charge the same to the estate or to the "Drug Stores Corporation" as the case may be. 10

10. This agreement shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the party of the first part has hereunto set his hand and seal, and the parties of the second and third parts have caused these presents to be signed by their respective presidents, attested by respective secretaries, and their corporate seals to be hereto attached, the day and year first above written. 20

Signed, sealed and delivered
in the presence of:

GEORGE W. BURLEIGH, (L. S.)
Receiver in Equity.

THEO. McC. MARSH. 30

NATIONAL DRUG STORES CORPORATION.

By AUSTIN S. ROTHWELL,
Vice-President.

Attest:

Secretary.

Assignment of Lease.

BROAD & EAST JERSEY REALTY COMPANY,

By HYMIN P. ARGYRIS,
President.

Attest:

10 ROSEMARIES KLINGEL,
Secretary.

IN CONSIDERATION of the execution of the annexed agreement by the parties thereto, we the undersigned do for ourselves and each of our heirs, executors, administrators, successors, or assigns, hereby severally waive and release any claim which we or any of us holds or may hold
20 against George W. Burleigh, receiver in equity of the National Drug Stores Corporation, or the National Drug Stores Corporation, on account of leases which we or any of us hold for premises located at No. 101 Broad street and No. 1173 East Jersey street, Elizabeth, N. J., or any deposit paid on account thereof, or for any interest due or to become due on any deposits for any time prior to January 1, 1925, or for any other matter whatsoever, and do agree to accept
30 the said Broad & East Jersey Realty Company, a corporation, in the place and stead of said George W. Burleigh, receiver as aforesaid, and for National Drug Stores Corporation, on account of the obligations contained in our several leases.

IN WITNESS WHEREOF, we and each of us have severally set our hands and seals this 4th day of February, 1925.

GEORGE W. BURLEIGH.

Demand for Possession.

To National Drug Stores Corporation and George
W. Burleigh, Rec'r:

TAKE NOTICE that we, P. J. Tutulis and James
W. Pappas, the owners of the building on the
northeast corner of Broad and East Jersey
streets, in the City of Elizabeth, New Jersey, de-
scribed in a certain lease made by the Mer- 10
chants Land and Improvement Company to the
National Drug Stores Corporation, dated Au-
gust 1, 1919, demand of you the possession of
said premises, the said owners electing to de-
termine the said lease at an end upon the ground
that within the contemplation of the language
of the said lease the said tenant has become
bankrupt, and upon the ground that the tenant
has defaulted in the performance of one of the
covenants of said lease in this that it has not 20
paid to the landlord, within thirty days after
notice, the amount of taxes paid by the landlord
on the 3rd day of November, 1924, to wit, the sum
of \$2,169.86, the second half of the taxes due for
the years 1924, to the City of Elizabeth, and
in that the tenant has breached the covenant in
said lease against assignment, and in that the
tenant has not complied with that provision of
the lease requiring it to make all necessary re- 30
pairs both to the exterior and interior of said
premises, and in that the said tenant has not kept
the said demised premises in as good condition
as they were at the beginning of the term, wear
and tear arising from reasonable use and dam-
age by the elements excepted, on the contrary a
portion of said building being permitted to get
so out of repair as that it is in a dangerous con-
dition.

Take further notice that unless you forthwith
surrender possession of said premises to the 40

Demand for Possession.

said landlord the landlord will be obliged to take such steps as may be necessary to enforce his rights.

Respectfully,

JAMES N. PAPPAS,
PETER J. TUTULIS.

10 Dated January 5, 1925.

To the Broad and East Jersey Realty Company:

Please take notice that we demand that you forthwith surrender to us the possession of the following described tract of land and premises:

20 "BEGINNING at the northeast corner of Broad and East Jersey Streets, in the City of Elizabeth, having approximately fifty (50) feet frontage on Broad Street and a depth of approximately fifty (50) feet on East Jersey Street, and being the same premises conveyed to the Merchants Land and Improvement Company, by Deed of Harry M. Hyames and wife, recorded in Book 461, page 441 of Deeds for Union County. Said premises are known as 101 Broad Street and 1173 East Jersey Street, Elizabeth, N. J."

30 We have elected that the lease of said lands and premises shall come to an end and cease because of violations of the provisions of said lease by the lessee. These violations are stated in a notice heretofore served by us on or about the 5th day of January, 1925, upon the National Drug Stores Corporation and George W. Burleigh, receiver, and there is further violation upon which we insist that on or about the month of January, 1925, the said George W. Burleigh,
40 receiver in equity of the National Drug Stores

Order to Show Cause.

Corporation and the National Drug Stores Corporation without our written consent and without our knowledge, assigned said lease to you.

JAMES N. PAPPAS.
PETER J. TUTULIS.

Served March 11, 1924, by John Tutulis.

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IN THE DISTRICT COURT OF THE
UNITED STATES

FOR THE DISTRICT OF NEW JERSEY.

DAVID VINCENT,

Plaintiff,

vs.

NATIONAL DRUG STORES CORPORATION,

Defendant.

In Equity.

*On Petition
for Relief.*

*Order to
Show Cause.*

20

This matter being opened to the Court by Riker & Riker, Esqs., attorneys for the petitioner, George W. Burleigh, ancillary receiver of the National Drug Stores Corporation, and Leber & Ruback, Esqs., attorneys for the petitioner, Broad & East Jersey Realty Company, and upon reading and filing the annexed petition,

30

It is on this 28th day of March, 1925, ORDERED, that the defendants, James M. Pappas and Peter J. Tutulis, show cause before this Court on Monday, the 6th day of April, 1925, why the prayer of said petitioners in said petition should not be granted and the relief therein sought be allowed.

40

Order to Show Cause.

And it is further ORDERED, that in the meantime and until the further order of this Court, the defendants in this proceeding, James M. Pappas and Peter J. Tutulis, and each of them, and all other persons acting for them or in concert with them, be and they are hereby restrained and enjoined from proceeding with the prosecution of the ejectment suit instituted by the said James M. Pappas and Peter J. Tutulis against the petitioner Broad & East Jersey Realty Company, in the Supreme Court of New Jersey, and from further proceeding with the prosecution of the suit instituted by them against said company in the Court of Chancery of New Jersey, except that the said James M. Pappas and Peter J. Tutulis may appear in said Chancery suit from time to time for the purpose of adjourning and continuing the same pending the determination of this proceeding in this Court, and the said James M. Pappas and Peter J. Tutulis and each of them are hereby restrained and enjoined from doing any matter, act or thing whereby the petitioner, Broad & East Jersey Realty Company, will be hindered or prevented from collecting and receiving the rents, issues and profits arising out of the premises particularly mentioned and described in the annexed petition.

And it is further ORDERED that a true but uncertified copy of this order and the annexed petition be served within three days either upon the said James M. Pappas and Peter J. Tutulis personally, or upon Merritt Lane, Esq., their attorney and solicitor.

And it is further ORDERED, that upon the hearing upon this order to show cause, the petitioners may read such further and other affidavits as copies whereof shall have been served upon the

Petition for Relief.

said defendants or their attorney at least two days before said hearing, and that the said defendants shall be at liberty to present and read only such affidavits as copies whereof shall have been served upon the petitioners' attorneys at least two days before said hearing.

WM. N. RUNYON, 10
Judge.

A True Copy.

IN THE DISTRICT COURT OF THE
UNITED STATES

FOR THE DISTRICT OF NEW JERSEY.

DAVID D. VINCENT,

Plaintiff,

vs.

NATIONAL DRUG STORES CORPO-
RATION,

Defendant.

In Equity.

*Petition
for Relief.*

20

To the Honorable Judges of the United States
District Court for the District of New Jersey: 30

Your petitioners, GEORGE W. BURLEIGH and
BROAD & EAST JERSEY REALTY COMPANY, a cor-
poration, respectfully shows as follows:

1. That the petitioner George W. Burleigh,
was by order of the District Court of the United
States for the Southern District of New York,
entered on December 19, 1924, in the above-
entitled cause, wherein David D. Vincent was
plaintiff and National Drug Stores Corporation 40

Petition for Relief.

was defendant, appointed receiver in equity of all the property and assets in New York State of the said defendant, National Drug Stores Corporation, for which appointment the said petitioner George W. Burleigh did duly qualify, and he has ever since acted in the capacity of such receiver.

10 Thereafter, to wit, on December 19, 1924, the petitioner George W. Burleigh, upon bill filed in this Court, was duly appointed Ancillary Receiver of the said National Drug Stores Corporation and of all its property and assets lying within the State of New Jersey, including its securities, deeds, leases, contracts, muniments of title and choses in action. Said petitioner, George W. Burleigh, duly qualified for said appointment as
20 directed by the order of this Court and has since the date of the said appointment acted in the capacity of such Ancillary Receiver.

2. The aforementioned National Drug Stores Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and is a citizen and resident of said State of Delaware. The petitioner, George W. Burleigh, is a resident of the City of New York in the State of New York. The petitioner Broad & East Jersey Realty Company is
30 a corporation organized and existing under the laws of the State of New Jersey and is a citizen and resident of said State of New Jersey. The defendants James M. Pappas and Peter J. Tutulis are citizens and residents of the State of New Jersey, residing in the City of Elizabeth, County of Union and State of New Jersey.

3. In and by the said order appointing the
40 petitioner, George W. Burleigh, Ancillary Re-

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ceiver of said National Drug Stores Corporation and of its property and assets within the District of New Jersey, this Court ordered as follows:

"It is further ORDERED that said defendant and its officers, directors, stockholders, creditors, agents and employees and all other persons claiming to act by, through or under said defendant, and all other persons who-
soever, are hereby enjoined and restrained
from interfering in any way whatever with
the possession or management of any part of
the property over which said ancillary re-
ceiver is hereby appointed, or interfering in
any way to prevent the discharge of his
duties or in his operation or conduct of the
business heretofore carried on by said de-
fendant.

And all said persons, creditors and stock-
holders of said defendant and all persons
whosoever are enjoined from instituting or
prosecuting any actions, suits or proceedings
against the defendant or any actions, suits
or proceedings affecting any property in
which defendant is interested without the
order and permission of this Court."

Attached hereto is a true copy of the afore-
mentioned order of appointment, to which these
petitioners for greater certainty hereby make
reference.

4. The petitioners further show that on or
about the 1st day of August, 1919, the Merchants
Land & Improvement Company, a New Jersey
corporation, was the owner of certain lands and
premises in the City of Elizabeth, County of
Union and State of New Jersey, commonly known
and designated as No. 101 Broad street and No.
1173 East Jersey street, Elizabeth, N. J., being

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lands and premises situate at the northeast corner of Broad and East Jersey streets in said City of Elizabeth, having approximately a frontage of fifty feet on Broad street and a depth of approximately fifty feet on East Jersey street. On said August 1, 1919, the said Merchants Land & Improvement Company leased said lands and premises and the improvements thereon to the
10 aforenamed National Drug Stores Corporation for a term of ten years commencing January 1, 1920, and ending January 1, 1930, for and upon the yearly rentals in said lease reserved. A true copy of said lease is hereunto annexed and made part hereof and to which these petitioners for greater certainly make reference.

20 The said National Drug Stores Corporation accepted the said lease and the demise thereby made, and did, in pursuance thereof, enter into possession of the demised lands, premises and building.

30 5. After the making and acceptance of the aforementioned lease and demise, the owner of the demised premises, to wit, the Merchants Land & Improvement Company, sold and conveyed the demised premises to the defendants herein, Peter J. Tutulis and James M. Pappas, who are to the knowledge and belief of the petitioners herein
40 the present owners of said lands and premises. The legal title to said lands and premises was acquired by said defendants James M. Pappas and Peter J. Tutulis with knowledge of the existence of the aforementioned lease to the National Drug Stores Corporation and expressly subject to the said lease and the leasehold rights thereby created.

40 6. Upon the appointment of the petitioner, George W. Burleigh, as ancillary receiver of

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said National Drug Stores Corporation and of its property within the State of New Jersey, the defendants, James M. Pappas and Peter J. Tutulis, were informed of that fact and became cognizant of the provisions contained in the order of this Court appointing the said petitioner ancillary receiver and particularly with that provision of said order restraining all persons from interfering in any way whatever with the possession or management of any part of the property over which said ancillary receiver was appointed and from instituting or prosecuting any actions, suits or proceedings, without the order and permission of this Court, affecting any property in which the said National Drug Stores Corporation was then interested. The said defendants have ever since been aware of the pendency of the cause in this Court wherein the petitioner, George W. Burleigh was appointed ancillary receiver and of the various restraints imposed by this Court for the purpose of protecting the property and assets that came into the hands of said ancillary receiver, and for the purpose of safeguarding the rights and interests of the stockholders and creditors of the said National Drug Stores Corporation.

7. On or about the 29th day of January, 1925, the petitioner, George W. Burleigh, in his capacity as receiver in equity of the National Drug Stores Corporation, presented his petition to this Court wherein he set forth the aforementioned lease from the Merchants Land & Improvement Company to the National Drug Stores Corporation, the conveyance by the said Merchants Land & Improvement Company to the said Peter J. Tutulis and James M. Pappas, the various sub-leases made by the National Drug

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Stores Corporation to divers persons, firms and corporations and the fact that the said National Drug Stores Corporation did not itself occupy any portion of the demised premises but had sublet portions of said premises, constituting in the aggregate the whole of said premises, to divers persons, and that the use of said demised premises was not necessary for the operation of the business of said National Drug Stores Corporation. In said petition the petitioner, George W. Burleigh, reported to this Court that he had received an offer from the petitioner, Broad & East Jersey Realty Company, to purchase the aforementioned lease for the sum of \$6,000.00, payable upon the terms particularly set forth in said petition, and that said offer is subject to the condition that if after the acceptance thereof and the payment of the said consideration of \$6,000.00, the National Drug Stores Corporation should be declared to be bankrupt or if it had done anything which would cause the said lease to become forfeited, that the amount of money actually paid by the said Broad & East Jersey Realty Company for said lease should be considered as a preferred claim against the estate of the National Drug Stores Corporation, after crediting against such amount such proportion of the amount paid as the time of actual occupancy under said lease by the Broad & East Jersey Realty Company shall bear to the term assigned. In said petition, the said George W. Burleigh reported for in his opinion such offer was advantageous to the estate of the said National Drug Stores Corporation and prayed that an order authorizing him to assign the aforementioned lease upon the terms and conditions stated in said petition.

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8. Upon the presentation and filing of the petition last aforementioned, the United States District Court for the District of New Jersey, made an order, entered on the 30th day of January, 1925, ordering and directing the said George W. Burleigh, receiver in equity as aforementioned, to accept the aforementioned offer of the Broad & East Jersey Realty Company and to sell and assign the aforementioned lease to the said Broad & East Jersey Realty Company for the sum of \$6,000.00, payable as set forth in said petition. 10

Thereafter, to wit, on February 4th, 1925, the petitioner, George W. Burleigh, in his capacity as receiver in equity of the National Drug Stores Corporation and acting in pursuance of the authority of this Court, granted in and by the aforementioned order of January 30, 1925, sold, assigned, transferred and set over unto the said Broad & East Jersey Realty Company the aforementioned Indenture of Lease and did accept in payment thereof the sum of \$6,000.00 in the manner set forth in the said receiver's petition to this Court and approved by the said order of January 30, 1925. The instrument whereby said lease was as aforesaid assigned and transferred to the said Broad & East Jersey Realty Company contains an express provision and agreement that if the National Drug Stores Corporation aforementioned should do or perform or suffer any act which shall cause the said assigned lease to be forfeited, that in such case the amount of money paid to the said receiver for the assignment of said lease, after deducting therefrom such proportion of the amount paid as the time of occupancy of said premises by the said assignee prior to forfeiture shall bear to the balance of the term assigned, 20 30 40

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shall be and become a claim against the estate of the National Drug Stores Corporation and shall be considered as a priority claim against the assets of said National Drug Stores Corporation.

9. Prior to the assignment by the said George
10 W. Burleigh, receiver, to the Broad & East
Jersey Realty Company of the aforementioned
Indenture of Lease, the said receiver duly tend-
ered to the owners of the demised premises,
James M. Pappas and Peter J. Tutulis, such rent
as was then in arrears and also the second half
of the taxes for the year 1924 levied against
said lands and premises, together with interest
thereon lawfully due. Said tender was refused
by the said owners, James M. Pappas and Peter
20 J. Tutulis. The petitioner, George W. Burleigh,
in his capacity as receiver aforementioned, does
hereby tender himself ready, willing and able
to pay unto the defendants, James M. Pappas
and Peter J. Tutulis, the amount advanced by
said defendants in payment of the taxes for the
second half of the year 1924, together with such
interest, if any, as this Court may determine
shall be lawfully due to the said defendants.

30 The petitioner, Broad & East Jersey Realty
Company, tendered to the defendants, James M.
Pappas and Peter J. Tutulis, the quarter-annual
instalment of rent due said defendants on the
1st day of January, 1924, and has at divers
times since January 1st, 1925, and before the
institution of the suits in the State Courts of
New Jersey hereinafter mentioned, tendered said
quarter-annual instalment of rent to said de-
fendants, which tender the said defendants re-
fused and still refuse to accept. The said Broad
40 & East Jersey Realty Company hereby tenders

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itself ready to pay to the said defendants the said quarter-annual instalment, together with such interest, if any, as this Court may determine to be lawfully due unto the said defendants, and also is ready and willing to pay the said defendants the quarter-annual instalment of rent that shall become due and payable to them on the 1st day of April, 1925. 10

10. On March 12, 1925, the defendants, James M. Pappas and Peter J. Tutulis, notwithstanding the restraint imposed by this Court in and by its order of December 19, 1924, mentioned in paragraph No. 3 of this bill, instituted an action in ejectment in the New Jersey Supreme Court against the petitioner Broad & East Jersey Realty Company, in which action the said James M. Pappas and Peter J. Tutulis demand of the Broad & East Jersey Realty Company the possession of the lands and premises demised in and by the aforementioned lease, and in their complaint in said ejectment action, they allege that the right to the possession of the said demised premises accrued on or about the 1st day of January, 1925, and that the defendant Broad & East Jersey Realty Company wrongfully deprives them of the possession thereof. The summons and complaint in said action was served on the Broad & East Jersey Realty Company on March 16, 1925, and the time for filing an answer to said complaint will expire on April 5, 1925. The said Broad & East Jersey Realty Company has not answered to said complaint or otherwise pleaded thereto. 20 30

A true copy of the summons and complaint in said ejectment suit are hereto annexed and made part hereof.

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11. On March 14, 1925, the defendants James M. Pappas and Peter J. Tutulis, notwithstanding the restraint imposed by the aforementioned order of this Court of December 19, 1924, presented and filed their bill of complaint in the Court of Chancery of New Jersey, in which, after setting forth their ownership of the aforementioned lands and premises, the existence of the aforementioned lease and various covenants therein contained, the appointment of George W. Burleigh as ancillary receiver of the National Drug Stores Corporation, the complainants allege that the said ancillary receiver without the written consent of the said James M. Pappas and Peter J. Tutulis and without their knowledge, assigned, transferred and set over the said lease to the Broad & East Jersey Realty Company, and thereupon the latter company went into possession of said premises and is now in possession thereof, and that the said owners paid on November 3, 1924, the sum of \$2,169.86 to the City of Elizabeth as the second half of the taxes for the year 1924, and that the lessee failed to pay the said amount to the lessor within thirty days after notice and also that the tenant did not comply with the provision of the lease requiring it to make necessary repairs to the exterior and interior of the premises, and that by reason of the foregoing alleged defaults, complainants on January 5, 1925, served notice upon the said ancillary receiver and upon the National Drug Stores Corporation to the effect that they demanded possession of said premises, electing to terminate the lease upon the ground that "the tenant had become bankrupt," and upon the ground that the tenant had defaulted in the performance of one of the covenants of the lease in the non-payment of the second half of the 1924

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taxes, and upon the further ground that the tenant had failed to make necessary repairs to the exterior and interior of the demised premises.

In said bill, the complainants therein allege the institution of the aforementioned ejectment suit in the Supreme Court of New Jersey, and say that they have been tendered a certain amount of money by the Broad & East Jersey Realty Company, but that they have refused to accept the money so tendered or any part thereof, and say that they cannot accept the said money without waiving and relinquishing their rights to enforce the forfeiture of the leasehold estate vested in the said Broad and East Jersey Realty Company. Said plaintiffs in said bill pray that they be permitted by the Court of Chancery to accept the tendered sums without thereby waiving their rights to enforce the said forfeiture or that a receiver be appointed of said lands and premises.

A true copy of said bill of complaint is hereto annexed and for greater certainty the same is hereby referred to.

12. Upon the filing of the bill of complaint lastly mentioned, the Court of Chancery of New Jersey made an order requiring the said Broad & East Jersey Realty Company to show cause on March 31, 1925, why an order should not be made by which the said Broad & East Jersey Realty Company would be required to pay to said James M. Pappas and Peter J. Tutulis and they be permitted to accept, pending the final determination of the ejectment suit in the Supreme Court a sum representing the rental value of the demised lands and premises or that a receiver be appointed of said lands and premises, and it was further ordered that in the meantime and until the further order of the

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10 Court of Chancery the said Broad & East Jersey Realty Company be restrained from collecting any rents, issues or profits of said lands and premises from any sub-tenants or otherwise, and also from disbursing any sums of money received by it as rents, issues and profits of said lands and premises, except only in the upkeep of said property.

A true copy of said order and ad interim restraint is hereby annexed and made part hereof, and to it these petitioners for greater certainty refer.

20 13. Petitioners hereby deny that the said National Drug Stores Corporation has become bankrupt and deny that the tenant has failed to make necessary repairs either to the exterior or interior of the demised premises, and deny that there has been any default in the repayment to the lessors of the amount of taxes advanced by them and deny that there has been any default in the payment of any rent due under said lease. On the contrary, these petitioners charge the fact to be that the National Drug Stores Corporation has not become bankrupt and that the assignment by the ancilliary receiver of said company to the Broad & East Jersey Realty Company of said lease was not in violation of any term, covenant, condition or provision of said lease, and that said assignment was lawfully made by said receiver under the order and by the direction of this Court. These petitioners further aver that all reasonably necessary repairs to the interior and exterior of the demised premises have been made by the National Drug Stores Corporation, by the said Receiver and by the said Broad & East Jersey Realty Company. These petitioners further aver that they

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have at all times been ready to repay to the defendants James M. Pappas and Peter J. Tutulis the taxes advanced by them, together with lawful interest and have frequently offered so to do and are still ready so to do, but that the said defendants, being desirous of enforcing a forfeiture of the leasehold estate, have refused and now do refuse to accept such tender and have also refused to accept from the Broad & East Jersey Realty Company the rent which became due on January 1, 1925, although often requested so to do. 10

These petitioners further say that there has been no such default in any term, covenant or provision of said lease as in law or equity constitutes a valid ground and reason for the forfeiture and termination of the leasehold estate and that the actions and doings of the defendants, with a view towards achieving and enforcing a forfeiture of such estate, are inequitable and contrary to good conscience and designed to deprive the petitioner Broad & East Jersey Realty Company of a valuable property right and leasehold estate and further designed to hinder and embarrass the petitioner, George W. Burleigh, in his administration as receiver in equity of the estate of said National Drug Stores Corporation and to cause great pecuniary loss to said estate and to the stockholders and creditors interested therein. 20 30

14. Petitioners further say that in view of the specific contracts and agreements existing between the said receiver and the said Broad & East Jersey Realty Company, entered into by the authority of this Court, the receiver and the estate being administered by him will suffer and sustain a loss of \$6,000.00 if the defendants are per- 40

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mitted to enforce the forfeiture of the said leasehold estate, in that the said receiver will be obliged to repay to the said Broad & East Jersey Realty Company out of the estate of said National Drug Stores Corporation the sum of \$6,000.00 as the priority claim, all of which will be to the loss and depletion of the said estate being administered by this Court through your petitioner George W. Burleigh and to the loss and prejudice of the stockholders and creditors of said National Drug Stores Corporation.

15. Your petitioners further show that the National Drug Stores Corporation after acquiring the leasehold estate aforementioned, entered into numerous sub-leases with divers persons, firms and corporation, in all of which leases the said National Drug Stores Corporation expressly covenanted and agreed that the sub-lessee upon paying the rent reserved and performing the covenants and agreements of the sub-lease, should at all times during the term of the sub-lease peaceably and quietly have, hold and enjoy the sublet premises without let, suit, trouble or hindrance.

The following is a schedule of the sub-leases made by said National Drug Stores Corporation, stating the name of the sub-lessee, the premises sub-let, and the date of expiration, all of which said leases are in full force and effect:

SCHEDULE.

Name of Sub-lessee	Premises sub-let					Date of Expiration	
Rae T. Campner	Part	of	1173	E. Jersey	St.	April	30, 1925
John J. Collins	"	"	"	"	"	"	"
Curtiss W. Merrill	"	"	"	"	"	"	"
Harry & Maurice Greenburg	"	"	101	Broad	St.	Dec.	31, 1929
Walter C. Tenney	"	"	"	"	"	April	30, 1925
Charles B. Baden	"	"	"	"	"	"	"
Broad & East Jersey Music Co.	"	"	"	"	"	Dec.	31, 1929

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All of the foregoing sub-leases were made by the National Drug Stores Corporation with the respective sub-lessees a long time before the said National Drug Stores Corporation and its properties were placed under the administration of any receiver. The various sub-lessees entered into possession of the premises sublet as aforesaid and they or persons claiming under them are now in possession under said sub-leases of the premises so as aforesaid sublet. Some or all of the sub-lessees are conducting large and profitable businesses upon the demised premises. Particularly valuable is the sub-lease of the Broad & East Jersey Music Co., by reason whereof the said Broad & East Jersey Music Co., has been realizing many thousands of dollars annually as a profit in the legal possession of the sub-leased premises.

Your petitioners say that even before the time of the alleged occurrence of the breaches upon which the said defendants, James M. Pappas and Peter J. Tutulis now rely, they announced and declared that it was their purpose and intention to avoid, if possible, the lease held by the National Drug Stores Corporation and to accomplish a forfeiture thereof and upon such accomplishment to evict and eject not only the National Drug Stores Corporation, but all persons claiming under said company as sub-tenants or otherwise. Thereafter and since the 3d day of November, 1924, the defendants, James M. Pappas and Peter J. Tutulis have reiterated their said purpose and intention and your petitioners now say that the actings and doings of said defendants James M. Pappas and Peter J. Tutulis are all in pursuance of a plan and scheme of long standing to defeat the said lease and lease-

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hold estate and to acquire unto themselves the benefit and advantage thereof by enforcing a forfeiture and removing from the demised premises all sub-lessees, tenants and all other persons claiming by, through or under the said National Drug Stores Corporation.

- 10 Your petitioners further show that should the said defendants James M. Pappas and Peter J. Tutulis be permitted to prosecute their aforementioned action in the Supreme Court of New Jersey and should they secure a judgment for possession, that they will thereupon promptly evict and eject from the demised premises all the aforementioned sub-lessees claiming under the National Drug Stores Corporation, whereby said National Drug Stores Corporation will thereby become immediately liable to each and every sub-lessee for a breach of the covenant of quiet possession and enjoyment contained in each of the said subleases. The measure of such liability will be very large, owing to the extensive damages that the sub-lessees would sustain by an eviction from said premises. The petitioners verily believe and charge the fact to be that the damages of the sublessee, Broad & East Jersey Music Co., alone, will amount to approximately \$20,000.00. All of the damages suffered and sustained by said sublessees would be and constitute a claim against the estate of the said National Drug Stores Corporation and against your petitioner, George W. Burleigh, in his capacity as receiver in equity of said National Drug Stores Corporation and its estate, all of which will be to the loss and depletion of the estate being administered by this Court through your petitioner George W. Burleigh and to the loss and prejudice of the stockholders and creditors of the said National Drug Stores Corporation.
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16. Petitioners further say that said leasehold estate constitutes a valuable asset in the hands of the said receiver and that he had a lawful right to dispose of the same by sale for the benefit and advantage of the estate being administered by him, and that the purchaser of said lease from said receiver took and acquired as large, full and ample a leasehold estate as the said receiver was possessed of and that the said purchaser is entitled in equity to the protection of this Court in the preservation of the leasehold estate so as aforesaid purchased by him from the receiver acting under the authority and direction of this Court. They further say that the said receiver and the estate being administered by him, the stockholders and creditors interested therein, are in equity entitled to the protection of this Court to the end that the receiver and said estate shall not be subjected to the aforementioned loss of \$6,000.00 by the repayment thereof as a priority claim and to such other and further losses as said receiver and said estate will necessarily incur if the aforementioned leasehold estate be forfeited, and the sub-lessees ejected. These petitioners further say that the protection of their rights requires that not only shall the ejectment suit pending in the Supreme Court of New Jersey be perpetually restrained by the decree of this Honorable Court, but that the suit now pending in the Court of Chancery of New Jersey be stayed and the complainants therein be perpetually restrained and enjoined from the prosecution thereof and that they and each of them be ordered and directed to discontinue said pending suits and actions and that they and each of them be perpetually restrained and enjoined from bringing any other suits, actions or

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proceedings founded upon any of the matters and things in this bill of complaint recited, and that pending the final determination of this suit that the defendants James M. Pappas and Peter J. Tutulis be restrained and enjoined from proceeding with the aforementioned ejectment suit in the Supreme Court of New Jersey and the aforementioned suit in the Court of Chancery of New Jersey and from instituting any other suit, action or proceeding founded on the causes afore-
10 stated, and further, that in the meantime and pending the final determination of this suit in this Court the said defendants James M. Pappas and Peter J. Tutulis, in their capacity as complainants in the aforementioned Chancery suit, be ordered and directed to apply to the Chan-
20 cellor of the State of New Jersey or any Vice-Chancellor of said State for an order modifying the restraint imposed by said Court upon the petitioner Broad & East Jersey Realty Company from collecting the rents, issues and profits arising out of the demised premises and from dis-
30 bursing the same, and that if such modification of said restraint cannot be accomplished, that some competent person designated by the peti-
tioners be appointed by this Court for the purpose of collecting and receiving such rents and disbursing the same in the management and operation of the demised premises.

Wherefore your petitioners say that they are without adequate remedy at law and can secure full, complete and adequate relief only in this Court where this matter is peculiarly cognizable and relievable, and they therefore pray:

40 1. That the defendants James M. Pappas and Peter J. Tutulis be perpetually enjoined and re-

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strained by the decree of this Court from proceeding with the ejectment suit instituted by them in the Supreme Court of New Jersey against the petitioner Broad & East Jersey Realty Company, and from further proceeding with the suit instituted by them in the Court of Chancery of New Jersey against the said Broad & East Jersey Realty Company, and that the said defendants and each of them be ordered and directed by this Court to discontinue the said pending suits and actions and that the said defendants and each of them be perpetually restrained and enjoined, by the decree of this Court, from bringing any other suits, actions or proceedings, founded upon any of the matters and things in this bill of complaint recited, and that pending the final determination of this suit that the said defendants and each of them be restrained and enjoined from proceeding with the aforementioned ejectment suit and the aforementioned suit in the Court of Chancery of New Jersey and from instituting any other suit, action or proceeding founded on the alleged causes in this bill of complaint set forth, and that in the meantime and pending the final determination of this suit in this Court, the said defendants and each of them be ordered and directed to apply to the Chancellor of the State of New Jersey or any Vice-Chancellor of said State for an order modifying and dissolving so much of the restraint as was imposed by the Court of Chancery upon the petitioner Broad & East Jersey Realty Company, as restrains said petitioner from collecting the rents, issues and profits arising out of the premises mentioned in this bill and from disbursing such rents, issues and profits, or that in the alternative, some competent person be appointed by this Court for the

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purpose of collecting and receiving such rents and disbursing the same in the management of said premises;

10 And your petitioners also pray that this Court grant to them an order upon the defendants, James M. Pappas and Peter J. Tutulis, requiring them and each of them to show cause before this Court by a short day in said order to be fixed, why the relief prayed for by your petitioner should not be granted, said order to contain such preliminary and *ad interim* restraint as has been above prayed for and as the nature of the case may render just and equitable;

20 And that your petitioners have such further and other relief in the premises as the nature of the case may require and as may be agreeable to equity and good conscience.

And your petitioners will ever pray, etc.

RIKER & RIKER,

Attorneys for Petitioner.

George W. Burleigh, Ancillary Receiver
of National Drug Stores Corporation.

LEBER & RUBACK,

Attorneys for Petitioner,

30 Broad & East Jersey Realty Company.

40 This indenture made this first day of August, in the year of Our Lord One Thousand Nine Hundred and Nineteen, between Merchants Land and Improvement Co., a New Jersey corporation, having its principal office in the City of Newark, County of Essex and State of New Jersey, of the first part; and National Drug Stores Corporation, a corporation of the State of Delaware,

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having its principal office at 405 Lexington avenue, in the City and State of New York, of the Second Part:

WITNESSETH that the party of the first part has let and demised and by these presents does lease and demise unto the said party of the second part all those certain premises together with the buildings and improvements thereon situate in the City of Elizabeth, County of Union and State of New Jersey, bounded and described as follows: 10

BEGINNING at the northeast corner of Broad and East Jersey streets, in the City of Elizabeth, having approximately fifty (50) feet frontage on Broad street and a depth of approximately fifty (50) feet on East Jersey street, and being the same premises conveyed to the Merchants Land and Improvement Company, by deed of Harry M. Hyames and wife, recorded in Book 461 p. 441 of Deeds for Union County. 20

Said premises are known as 101 Broad street and 1173 East Jersey street, Elizabeth, New Jersey, with the appurtenances for the term of ten years from the 1st day of January, A. D. 1920, at the yearly rent for the first five years of said term of Nine Thousand Dollars, payable in quarterly installments of twenty-two hundred and fifty Dollars (\$2,250.00) quarterly in advance on the first days of January, April, July and October respectively in each year during said five years and at the yearly rent for the remaining five years of said term of Ten Thousand dollars, payable in equal quarterly installments of Twenty-five hundred dollars (\$2,500.00) quarterly in advance as aforesaid during the remaining five years of said term. 30

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In addition to the yearly rent above specified, the party of the second part will pay all charges for water assessed against the demised premises and will repay to the lessor all taxes and assessments, except assessments for special benefits, levied, assessed or imposed upon the said premises during the term hereby created; such payments to be made by the lessee to the lessor within thirty days after notice is given to the lessee by the lessor that the lessor has paid the said taxes or assessments and that they are therefore due hereunder and the lessee shall have the right at any time and as often as in its judgment may seem proper and reasonable to institute or intervene in any proceedings for the reduction of any taxes or assessments which the said lessee is liable to repay to the said lessor hereunder.

The said party of the second part covenants and agrees with the said party of the first part, its successors, assigns, agents or attorneys, to pay the rent hereby agreed upon and the charges in addition thereto, above-mentioned, at the times, in the manner, and by the installments aforesaid.

And it is further agreed that all necessary repairs both to the exterior and interior of the said premises, shall be made by the party of the second part at its own cost, and expense including any changes to the leased premises necessitated by any municipal law, rule, regulation, or ordinance, so far as such changes are due to the occupancy of the lessee or its tenants. The party of the first part, its successors or assigns shall not be liable for any damage or injury which may be sustained by the party of the second part or any other person or persons com-

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ing in and upon the demised premises and their appurtenances and if any claim for such damage shall be made upon the party of the first part, its successors or assigns, the party of the second part will indemnify and save harmless the party of the first part, its successors, or assigns in such sum as may be recovered against it.

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And it is further understood and agreed by between the said parties that the party of the first part, its successors, assigns, agents or attorneys may enter into or upon said premises at reasonable hours in the daytime, to examine the same or to make such repairs or alterations therein as shall be necessary for the preservation thereof, in the event of the failure of the lessee to do so, or to exhibit them at any time during the last three months of the term from ten o'clock in the morning to five o'clock in the afternoon (Sundays excepted) to any person or persons and to put up notices "to let" or "for sale" on the outside wall thereof.

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If the demised premises shall become vacant or be deserted during said term, the party of the second part shall thereby authorize the party of the first part, its successors, assigns, agents or attorneys, to re-enter the same at its option and re-let them, and receive and apply the rents so received to the payment of the rent so due by these presents; and such re-entry is not to void this lease unless the party of the first part shall exercise the option so to do, which option is hereby expressly granted.

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Said party of the second part hereby agrees to keep the demised premises in as good condition as they may be at the beginning of the term of this lease, wear and tear arising from reasonable use and damage by the elements excepted,

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and further agrees that it will comply with all statutes, ordinances, rules, regulations and orders of the Federal, State and City government and of any and all other departments and because applicable to the use of said premises; and at the expiration of said term to yield up the
10 peaceable possession thereof to the party of the first part, its successors or assigns.

And the said party of the second part does further promise and agree that it will not use or permit the said premises to be used for any businesses designated as "extra hazardous," without the written consent of the party of the first part, its successors or assigns.

And it is agreed that if any rent shall be due and unpaid or if default shall be made in any of
20 the covenants herein contained, then it shall be lawful for the said party of the first part, its successors or assigns, to enter the said premises and remove all persons therefrom.

And it is further agreed between the parties hereto that the party of the second part will not assign this lease without the written consent of the party of the first part, its successors or assigns, under penalty of forfeiture and damages.

This lease is and at all times during the term
30 hereby created shall be subordinate to any mortgage or mortgages now or hereafter placed upon the demised premises not to exceed, however, the total principal sum of Fifty-five thousand dollars (\$55,000.00) and the lessee does hereby agree at any time or from time to time upon demand to execute any instrument or instruments which may be necessary to properly confirm such subordination with regard to any mortgage now or hereafter placed upon said premises here-
40 under, without cost.

Petition for Relief.

It is further agreed that if the party of the second part shall become bankrupt, either voluntarily or involuntarily, at any time during the term hereof, then the party of the first part, its successors or assigns, may at its option rescind this lease and thereupon the term of letting hereby granted shall be at an end, and said party of the first part, its successors or assigns, may at its option re-enter said leased premises and have full use and possession thereof, without liability of any kind whatsoever. 10

It is further expressly understood and agreed that this lease is made subject to existing rights of tenants, in the demised premises; that a notice has been served on the present tenant of the corner store on the ground floor, terminating the tenancy of the said tenant on the 1st day of January, 1920, but if the said tenant fails or refuses to deliver up the possession of the said corner store on said day, the lessor will institute legal proceedings for the possession thereof and upon the termination of said proceedings, if possession is obtained by the lessor, then the lessor will give the lessee possession of the premises hereby demised immediately thereafter, but if possession of said premises is not obtained by the lessor, in such proceedings, then the party of the first part, its successors or assigns, and the demised premises, shall be free of any obligation under this lease, without liability to the party of the second part for any damages or expenses. 20 30

The lessee shall have the right at any time during the term hereby created to make such alterations or changes in the buildings on the demised premises as may in its judgment seem reasonable and necessary, provided, however, that no changes shall be made by the lessee 40

Petition for Relief.

without written consent of the lessor which would in any way weaken the structure of said building.

10 In case the demised premises or a part thereof shall be condemned for a public or quasi-public use, or in case the buildings on the demised premises shall be condemned as unsafe through no act of the lessee, or be damaged or destroyed as a result of any condemnation proceedings, said buildings or premises shall be repaired as speedily as possible at the expense of the lessor and pending such repairs the rent shall be justly and proportionately abated or reduced, provided, however, that in the event that the entire premises are taken by such a condemnation, then and in that event, the lessee shall have no further rights under this lease against the lessor.

20 At the request of the lessee the lessor shall at any time or from time to time execute or cause to be executed and deliver all such papers as may be necessary to enable an occupant of the demised premises to obtain excise or other licenses in connection with the business of a retail druggist upon the demised premises.

30 It is further agreed that any notices necessary to be sent under this lease shall be sent by the lessor to the lessee at its main office in the City of New York, No. 405 Lexington avenue, or by the lessee to the lessor at the last address where rent was paid.

40 The lessor further covenants that it has good right to lease the said premises in the manner aforesaid and the lessee upon paying the said rent and performing the covenants herein contained shall and may peaceably have hold and enjoy the said premises for the term aforesaid, excepting subject to the rights of tenants aforesaid, and as herein otherwise provided.

Petition for Relief.

It is further agreed that if the buildings hereby demised shall be injured by fire without the fault of the lessee, the landlord shall repair the same as speedily as possible, but if the lessee shall, by reason of such fire, be hindered and prevented in the conduct of its business, there shall be an abatement of the rent, not exceeding, however, the monthly rental agreed upon until such buildings shall be put in complete repair; and in case of the total destruction of such building or buildings by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thenceforth, the lease shall cease and come to an end. 10

IN WITNESS WHEREOF, the said parties have caused these presents to be signed by the respective officers, duly authorized and their respective corporate seals to be duly affixed hereto, the day and year first above written. 20

MERCHANTS LAND & IMPROVEMENT CO.,

By Joseph Fisch,
President.

Attest:

LOUIS LEWIS,
Secretary. 30

NATIONAL DRUG STORES CORPORATION,

By S. E. Kingsley,
Vice-President.

Attest:

E. S. ROCHE,
Secretary.

Petition for Relief.

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

10 BE IT REMEMBERED, that on this fourth day of
 August, in the year of our Lord One Thousand
 Nine Hundred and Nineteen, before me, the sub-
 scriber, a Master in Chancery of New Jersey,
 personally appeared Louis Lewis, who, being by
 me duly sworn, on his oath says that he is the
 secretary of the Merchants Land and Improve-
 ment Company, the lessor named in the within
 instrument; that Joseph Fisch is the president
 of said corporation; that deponent well knows
 the corporate seal of said corporation; and the
 seal affixed to said instrument is such corporate
 seal and was thereto affixed, and said instrument
 signed and delivered by said Joseph Fisch,
 20 President, as and for his voluntary act and deed
 and as and for the voluntary act and deed of
 said corporation, in the presence of deponent,
 who thereupon subscribed his name thereto as
 witness.

LOUIS LEWIS.

Sworn and subscribed before me, at
 Newark, the date aforesaid.

30 EDWARD SCHOEN,
 A Master in Chancery of New Jersey.

Petition for Relief.

STATE OF NEW YORK, }
 COUNTY OF NEW YORK. } ss.

BE IT REMEMBERED, that on this fourth day of August, in the year of our Lord One Thousand Nine Hundred and Nineteen, before me, the subscriber, a Notary Public, personally appeared E. S. Roche, who, being by me duly sworn, on his oath says that he is the secretary of the National Drug Stores Corporation, the lessee named in the within instrument; that S. E. Kingsley is the vice-president of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said instrument is such corporate seal and was thereto affixed, and said instrument signed and delivered by said vice-president as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in presence of deponent, who thereupon subscribed his name as witness.

E. S. ROCHE.

Sworn and subscribed before me at
 New York City, the date aforesaid.

JOSEPH E. HUMBART,
 A Notary Public,
 Kings County, New York.

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*Order Appointing Receiver.*IN THE DISTRICT COURT OF THE
UNITED STATES

FOR THE DISTRICT OF NEW JERSEY.

10	DAVID D. VINCENT, <i>Plaintiff,</i> <i>against</i> NATIONAL DRUG STORES CORPO- RATION, <i>Defendant.</i>	}	<i>In Equity.</i> <i>No.</i> <i>Order.</i>
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This cause came on to be heard this day upon the bill of complaint filed herein and the answer thereto, and upon the motion for the appointment of an ancillary receiver for said defendant and the consent to the appointment of such ancillary receiver by the defendant as prayed for in said bill of complaint; and after hearing Irving Riker, of counsel for the plaintiff, and Alan Brun Conlin, of counsel for the defendant, and after due deliberation,

It is ORDERED, ADJUDGED and DECREED that GEORGE W. BURLEIGH, of the City of New York, State of New York, be and he hereby is appointed ancillary receiver of said National Drug Stores Corporation and of all the property and assets of the defendant within the State of New Jersey which is within this district, including real estate, factory buildings and equipment, offices and buildings and appurtenances of every kind, and equipment, tools, machinery, furniture, fixtures, materials, supplies, books of account, records and other books, papers and accounts, cash in banks, on deposit and in hand, money, debts, things in action, credits, stocks, bonds, securities, deeds,

Order Appointing Receiver.

leases, contracts, muniments of title, bills receivable, rents, issues, profits and income accruing and to accrue, as well as leasehold interests and other contracts, rights, interests, easements, profits, real estate franchises and other assets and property owned and possessed by it; drugs, medicines, paints, chemicals, oils, dyestuffs, glassware, toilet articles, fancy goods, druggists' sundries, perfumeries, surgical apparatus, physicians' and hospital supplies and general merchandise, medicinal, chemical, industrial and other preparations and articles, compounds, cements, oils, paints, pigments and varnishes; drug, dyeware, paint and color grinders; electrical, chemical, photographic, surgical and scientific apparatus and materials; that said ancillary receiver be and he hereby is authorized immediately to take possession of the same and to operate, manage and conduct the said factories and property of said defendant within the territorial jurisdiction of this Court in such manner as will in his judgment produce the most satisfactory results and to exercise the authority and franchises of said defendant, and to preserve and protect the property of said defendant in proper condition and repair so that it may be safely and advantageously used, and to protect the title and possession and secure and develop the business of the same, and in their discretion to employ and discharge and fix the compensation of all such managers, superintendents, agents and employees, and to make such contracts for the purchase of materials and sale of manufactured products as in their discretion they may deem proper, and to contract to make and to make such payments and disbursements as may be needful and proper in so doing; that

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Order Appointing Receiver.

10 said ancillary receiver be and he hereby is authorized to collect the rents, income, tolls and profits of said property and proceeds of the sale thereof either now on hand or hereafter manufactured by said ancillary receiver, and to make proper payments therefrom on account of accruing rents and other expenses and charges arising from or in connection with the operation by him of the business of said defendant; and to pay for current necessities for services, labor and supplies, and for no other purpose without the order of this Court.

20 IT IS FURTHER ORDERED that Messrs. Riker & Riker, of Newark, New Jersey, attorneys at law, are hereby appointed general solicitors and attorneys for said ancillary receiver with power and authority within their discretion to appoint and employ such attorneys and assistants as may be necessary for the proper conduct of the business of the receivership.

30 IT IS FURTHER ORDERED that said ancillary receiver be and he hereby is fully authorized and empowered to institute and prosecute all such suits, actions and proceedings as he may be advised by his counsel are necessary and proper for the proper protection of the property and trust hereby vested in him, and likewise to defend all such actions and suits against him as such ancillary receiver, and also to appear in, by his solicitors and attorneys, and conduct the prosecution or defense of any suits, actions or proceedings now pending in any court against said defendant, the prosecution or defense of which will in the judgment of said counsel for said ancillary receiver be necessary for the proper protection of defendant and of all parties
40 interested in its property and business.

Order Appointing Receiver.

IT IS FURTHER ORDERED that said ancillary receiver be and he hereby is authorized in his discretion from time to time, out of the funds coming into his hands, to pay the expenses of operating said property and conducting said business and executing his said trust and to pay all taxes and assessments upon said property and business and the income thereof, or any part thereof, and such rents and installments as may become due upon any said property; and said ancillary receiver shall also pay all current and unpaid payrolls, and other current and accrued indebtedness in his opinion necessary or proper to be paid in order to preserve the property of defendant and secure the continuance of its operation. 10

IT IS FURTHER ORDERED that said ancillary receiver open proper books of account and cause to be kept due and proper accounts of the earnings, expenses, receipts, and disbursements of his said trust, and preserve proper vouchers for all payments by him made on account thereof. 20

IT IS FURTHER ORDERED that said ancillary receiver be and he hereby is authorized to consider and determine which of the leases and other contractual arrangements between defendant and any and all other persons and corporations that they may lawfully renounce or adopt, they will renounce or adopt; and that pending further order of this Court, none of their acts or omissions in the performance or failure to perform any of same shall constitute or be considered an election to adopt or an estoppel to renounce any of them. 30

IT IS FURTHER ORDERED that said ancillary receiver shall file with the clerk of this Court monthly reports of the operation by him of the 40

Order Appointing Receiver.

properties coming into his possession as such ancillary receiver and of the business conducted by him as such.

10 IT IS FURTHER ORDERED that each and every of the officers, directors, stockholders, creditors, agents and employees of said defendant and all other persons be, and they are hereby required and commanded forthwith upon demand of said ancillary receiver, or his duly authorized agent, to turn over and deliver to said ancillary receiver or his duly authorized agent any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys or other property (other than such as are pledged with and held by third parties as collateral security for the indebtedness of defendant) in his or their hands or under his or their control; and each 20 of such directors, officers, stockholders, agents and employees is hereby commanded and required to obey and confirm to such orders as may be given them from time to time by said ancillary receiver, or his duly constituted representatives, in conducting the operation of said property and in discharging his duties as ancillary receiver.

30 IT IS FURTHER ORDERED that said defendant and its officers, directors, stockholders, creditors, agents, and employees and all other persons claiming to act by, through or under said defendant, and all other persons whosoever, are hereby enjoined and restrained from interfering in any way whatever with the possession or management of any part of the property over which said ancillary receiver is hereby appointed, or interfering in any way to prevent the discharge of his duties or in his operation or conduct of the business heretofore carried on by said defendant. 40

Order Appointing Receiver.

And all said persons, creditors, and stockholders of said defendant and all persons who-soever are enjoined from instituting or prosecuting any actions, suits or proceedings against the defendant or any actions, suits or proceedings affecting any property in which defendant is interested without the order and permission of this Court. 10

IT IS FURTHER ORDERED that any party in interest may apply to this Court for further directions with reference to the property and conduct of the business aforesaid.

IT IS FURTHER ORDERED that said ancillary receiver as speedily as possible, after taking possession of said property of the defendant, cause to be made and filed with this Court a general inventory of the property and assets of which he is appointed ancillary receiver. 20

IT IS FURTHER ORDERED that said ancillary receiver give a bond in the sum of ten thousand dollars conditioned that he will well and truly perform the duties of his office and duly account for all moneys or property that may come into his hands as such ancillary receiver, and abide by and perform all things which he shall be directed to do, said bond to be with sufficient surety to be approved by a Judge of this Court, and to be forthwith filed in the office of the Clerk of this Court. 30

WILLIAM N. RUNYON,
United States District Judge.

Summons.

The State of New Jersey to Broad
and East Jersey Realty Company,
(SEAL) GREETING:

10 You are summoned to answer the
annexed complaint in an action at law
in the Supreme Court wherein the said James
N. Pappas and Peter J. Tutulis demands of you
the possession of the lands and premises de-
scribed as follows:

20 "BEGINNING at the northeast corner of
Broad and East Jersey Streets, in the City
of Elizabeth, having approximately fifty
(50) feet frontage on Broad Street and a
depth of approximately fifty (50) feet on
East Jersey Street, and being the same
premises conveyed to the Merchants Land
and Improvement Company, by deed of
Harry M. Hyames and wife, recorded in
Book 461, page 441 of Deeds for Union
County, said premises are known as 101
Broad Street and 1173 East Jersey Street,
Elizabeth, N. J."

30 And take notice that unless you file your answer
to said complaint with the Clerk of the Supreme
Court at Trenton, within twenty days after
service upon you of this writ and the annexed
complaint, the plaintiff may proceed in the
action, and judgment will be entered against you
and you will be turned out of possession of said
property.

WITNESS, HONORABLE WILLIAM S. GUMMERE,
Chief Justice of Supreme Court, at Trenton, this
12th day of March, 1925.

EDWARD J. KELLEHER,
Clerk.

40 MERRITT LANE,
Attorney.

Complaint.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

JAMES N. PAPPAS and PETER J.
TUTULIS,

Plaintiffs,

vs.

BROAD & EAST JERSEY REALTY
COMPANY,

Defendant.

In Ejectment.

10

Complaint.

Plaintiffs, James N. Pappas and Peter J. Tutulis, of the City of Elizabeth, County of Union and State of New Jersey, demand of the Broad & East Jersey Realty Company the possession of all those certain premises, together with the buildings and improvements thereon, situate in the City of Elizabeth, County of Union and State of New Jersey, bounded and described as follows:

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"BEGINNING at the northeast corner of Broad and East Jersey Streets, in the City of Elizabeth, having approximately fifty (50) feet frontage on Broad Street and a depth of approximately fifty (50) feet on East Jersey Street, and being the same premises conveyed to the Merchants Land and Improvement Company, by Deed of Harry M. Hyames and wife, recorded in Book 461, page 441 of Deeds for Union County. Said premises are known as 101 Broad Street and 1173 East Jersey Street, Elizabeth, N. J."

30

And the plaintiffs say that their right to the possession of the same accrued on or about the

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Bill of Complaint.

first day of January, 1925, and that the defendant wrongfully deprives the plaintiffs of the possession thereof, to wit: damage of \$50,000.00 and plaintiffs will demand the sum of \$50,000.00 for mesne profits and damages.

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MERRITT LANE,
Attorney of Plaintiffs.

IN CHANCERY OF NEW JERSEY.

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

The complainants, James N. Pappas and Peter
J. Tutulis, of the City of Elizabeth, County of
20 Union and State of New Jersey, respectfully
shows:

1. They are the owners of certain lands and
premises described as follows:

30 "BEGINNING at the northeast corner of
Broad and East Jersey Streets, in the City
of Elizabeth, having approximately fifty
(50) feet frontage on Broad Street and a
depth of approximately fifty (50) feet on
East Jersey Street, and being the same
premises conveyed to the Merchants Land
and Improvement Company, by Deed of
Harry M. Hyames and wife, recorded in
Book 461, page 441 of Deeds for Union
County. Said premises are known as 101
Broad Street and 1173 East Jersey Street,
Elizabeth, N. J."

2. At the time they took possession of said
lands and premises there was a lease upon the
40 same executed by a prior owner, with the Na-

Bill of Complaint.

tional Drug Stores Corporation as lessee, dated the first day of August, 1919, for a period of ten years from the first day of January, 1920, at the yearly rent for the first five years of said term of \$9,000.00, payable in quarterly instalments of \$2,250.00 quarterly on the first days of January, April, July and October respectively for the first five years and the remaining five years of said term of \$10,000.00, payable in equal quarterly instalments of \$2,500.00 quarterly in advance as aforesaid. It was further provided that in addition to the yearly rent the lessee would pay all charges for water assessed against the demised premises and would repay to the lessor all taxes and assessments, except assessments for special benefits, levied, assessed or imposed upon the said premises during the term created; such payments to be made by the lessee to the lessor after thirty days' notice is given to the lessee that the lessor has paid the said taxes or assessments and that they are due under the lease. 10 20

3. It was further provided in said lease that if any rent should be due and unpaid or if default should be made in any of the covenants, then it would be lawful for the lessor, its successors or assigns, to enter said premises and remove all persons therefrom. 30

4. It was further agreed in said lease that the said lessees would not assign the lease without the written consent of the lessor, its successors and assigns, under penalty of forfeiture and damages.

5. It was further provided in said lease that all necessary repairs, both to the exterior and interior of the said premises, should be made 40

Bill of Complaint.

by the lessee at its own cost and expense, including any changes to the leased premises necessitated by any municipal law, rule, regulation or ordinance.

10 6. It was further provided that if the lessee should become bankrupt, either voluntary or involuntary, at any time during the term of the lease, then the lessor could rescind the lease and thereupon the term of letting would be at an end, and the lessor, its successors and assigns, could at its option, re-enter the said premises.

20 7. On or about the 19th of December, 1924, in a suit pending in the United States District Court entitled "David D. Vincent, plaintiff, *vs.* National Drug Stores Corporation," it was ordered, adjudged and decreed that George M. Burleigh be appointed ancillary receiver of said National Drug Stores Corporation and of all the property and assets of the said National Drug Stores Corporation within the State of New Jersey, and a receiver was appointed for said corporation in the United States District Court for the Southern District of New York.

30 8. That on or about the first day of January, 1925, the said George W. Burleigh, as receiver of the said National Drug Stores Corporation, without the written consent of complainants, and without their knowledge, assigned, transferred and set over the said lease to the defendant, Broad and East Jersey Realty Company, and thereupon the Broad and East Jersey Realty Company went into possession of said premises and is now in possession thereof.

40 9. Complainants paid on the 3rd of November, 1924, the sum of \$2,169.86, the second half of the taxes due for the year 1924, to the City of

Bill of Complaint.

Elizabeth and notice was immediately given to the lessee of said demand and the lessee did not within thirty days after notice pay to the lessor the amount of said taxes. The lessee did not comply with that provision of the lease requiring it to make all necessary repairs, both to the exterior and interior of the premises, a portion of said building being permitted to keep so out of repair as that it is dangerous. 10

10. Complainants served upon the National Drug Stores Corporation and George W. Burleigh, receiver, upon the 5th day of January, 1925, a notice to the effect that they demanded the possession of said premises, electing to determine the said lease at an end upon the ground that the tenant had become bankrupt, and had defaulted in the performance of one of the covenants of said lease in that it had not paid the landlord, within thirty days after notice, the amount of taxes paid by the landlord on the 3rd day of November, 1924, and in that the tenant had not complied with that provision of the lease in requiring it to make all necessary repairs both to the exterior and interior of the premises. Notwithstanding the notice George W. Burleigh, receiver of National Drug Stores Corporation, and the said National Drug Stores Corporation made the assignment of lease to the said defendant as hereinbefore set forth, without the written consent and without the knowledge of the complainants. 20 30

11. The Broad and East Jersey Realty Company is in possession of said lands, collecting the rents, issues and profits thereof and enjoying the same, and by the instrument of assignment it assumed the burden of paying to the com- 40

Bill of Complaint.

plainants the amount due to the complainants under the terms and conditions of said lease.

12. There is a large sum of money due to the complainants under the terms and conditions of the lease, to wit: the amount of moneys paid by complainants for taxes aforesaid, and rent for
10 the months of January, February and March, 1925. The rental value of said premises is in excess of the rent reserved in said lease.

13. Complainants have elected to treat the term as ended and have instituted a suit in the Supreme Court of New Jersey in ejectment to oust the said defendants of possession of said land and premises.

13. Tender has been made to complainants
20 of certain amounts of money by the said defendant, but complainants cannot accept the said moneys or any part thereof nor any moneys for the use and occupation of the said premises nor can they institute proceedings at law to recover the same or any part thereof without waiving and relinquishing their rights to and insist that the term granted by the said lease is ended and that they are entitled to said lands and premises and compensation for the rental thereof; that
30 defendant is in duty bound to pay to complainants a reasonable sum for the use and that equity requires that complainants be permitted to accept said sum without waiving its right in the suit now pending in the Supreme Court; or that a receiver be appointed of said lands and premises; that said lands and premises are sub-let and defendant is obtaining large sums of money and by the time said suit in ejectment may be determined the defendant will have received
40 large sums of money for said rents and com-

Bill of Complaint.

plainants will have no remedy. Complainants acquired title to the said lands and premises on or about the 27th day of September, 1923.

15. Complainants have no security for the payment of moneys which may be due for the use and occupancy of said premises pending the final determination of the suit now pending in the Supreme Court. 10

Complainants are without adequate remedy at law and therefore pray:

1. That the Broad and East Jersey Realty Company, who is the defendant, may answer this bill and each statement therein contained.

2. That defendant be required to pay complainant and that complainant be permitted to accept, pending the final determination of the case in the Supreme Court, and until the further order of the court, without waiving or relinquishing its rights to insist that the terms of the said leases is ended and that they, the said complainants, are entitled to the possession of the said premises and to compensation therefor and to their rights in the suit now pending and any other suit to be instituted, the sum representing the rental value of said premises to be fixed and determined by this Court or that a receiver be appointed of said lands and premises. 20 30

3. That complainants may have such other and further relief as may be proper.

4. That a writ of subpoena may be issued requiring the defendant to answer and to abide by and perform such order or decree as this Court may make in the premises.

MERRITT LANE,
Solicitor for and of Counsel with Complainants. 40

Bill of Complaint.

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

JAMES N. PAPPAS and PETER J. TUTULIS, of full age, being duly sworn according to law, on their respective oaths depose and say:

10 We are the complainants named in the foregoing bill of complaint. We have full and complete knowledge of the statements therein contained. The statements therein contained are true.

JAMES N. PAPPAS.
 PETER J. TUTULIS.

Sworn and subscribed to before me
 this 10th day of March, 1925.

20 JOHN J. FRANK,
 Notary Public New Jersey.
 Commission expires March 29, 1929.

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Order to Show Cause.

IN CHANCERY OF NEW JERSEY.

Between

JAMES N. PAPPAS and PETER
J. TUTULIS,

Complainants,

and

BROAD & EAST JERSEY REALTY
COMPANY,

Defendant.

On Bill, &c. 10
Order.

This matter being opened to the Court by Merritt Lane upon reading and filing the verified bill of complaint,

It is on this 14th day of March, 1925, ORDERED 20
that the defendant show cause before the Chancellor at Chancery Chambers, Newark, N. J., on Tuesday the 31st day of March, 1925, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, why an order should not be made, by which the said Broad and East Jersey Realty Company shall be required to pay complainants and that complainants be permitted to accept, pending the final determination of the case in the Supreme Court, and until the further order of the court without waiving or relinquishing its rights to insist that the terms of the lease, mentioned in the bill, is ended and that they, the said complainants are entitled to the possession of the said premises and to compensation therefrom and to their rights in the suit now pending and any other suit to be instituted, a sum representing the rental value of said premises to be fixed and determined by this Court, or that a receiver be appointed of said 40

Order to Show Cause.

lands and premises; and why the complainants should not have such other and further relief as may be proper;

10 And it is further ORDERED that in the meantime and until the further order of the court the said defendant be restrained from collecting any rents, issues or profits of said lands and premises from any sub-tenants or otherwise and also from disbursing any sums of money received by it as rents, issues and profits of said lands and premises, except only in the upkeep of said property;

20 And it is further ORDERED that a copy of this order, which need not be certified, together with a copy of the bill, which need not be certified, be served upon the said defendant by service upon one of its officers either personally or by leaving at his usual place of abode within five days of the date hereof.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

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Affidavit of George W. Burleigh, Receiver.

IN THE DISTRICT COURT OF THE UNITED
STATES

FOR THE DISTRICT OF NEW JERSEY.

DAVID D. VINCENT,

Plaintiff,

vs.

NATIONAL DRUG STORES CORPO-
RATION,

Defendant.

In Equity.

*On Petition
for Relief.*

10

STATE OF NEW YORK,
COUNTY OF NEW YORK.

ss.

GEORGE W. BURLEIGH, of full age, being duly
sworn according to law, on his oath deposes and
says: 20

I am the George W. Burleigh who is one of the
petitioners in the annexed petition.

On December 19, 1924, I was appointed by the
United States District Court for the Southern
District of New York, receiver in equity of the
National Drug Stores Corporation, the defend-
ant named in the above-entitled cause. I im-
mediately qualified and have ever since acted in
the capacity of such receiver. 30

On December 19, 1924, the United States Dis-
trict Court for the District of New Jersey ap-
pointed me ancillary receiver of said defend-
ant company and of its property and assets with-
in the State of New Jersey. I qualified as such
receiver and have ever since acted as such.

I have read the annexed petition for relief
and I say that all the facts and things therein
recited, respecting my acts and the acts of the 40

Affidavit of George W. Burleigh, Receiver.

National Drug Stores Corporation are true. All the statements in said petition regarding the actions of others, I believe to be true.

10 I say that the facts of residence and citizenship as set forth in paragraph 2 of said petition are true and also that the United States District Court for the District of New Jersey made the order particularly referred to paragraph 3 of said petition.

The present owners of premises No. 101 Broad street and 1173 East Jersey street, Elizabeth, New Jersey, are Peter J. Tutulis and James N. Pappas, according to the best of my information and belief.

20 They became the owners of said property by conveyance from the Merchants Land and Improvement Company a New Jersey Corporation and they acquired the title to said lands with knowledge of and subject to the indenture of lease made on August 1, 1919, by said Merchants Land and Improvement Company to the National Drug Stores Corporation. Said lease is of the character mentioned in the annexed petition and the copy of said lease attached to said petition is a true copy thereof.

30 On or about the 29th day of January, nineteen hundred and twenty-five, I, in my capacity as Ancillary receiver, applied to this Court by petition for leave to sell and assign to the Broad and East Jersey Realty Company the aforementioned indenture of lease, the same being an asset which had come into my hands as Ancillary receiver upon my appointment as such. I reported to this Court that I had been offered by said Broad and East Jersey Realty Company the sum of \$6,000 for an assignment of said
40 lease, said sum to be paid in the manner par-

Affidavit of George W. Burleigh, Receiver.

ticularly stated in said petition. I also reported therein that the offer was made upon condition that if the National Drug Stores Corporation were declared bankrupt, or did or suffered to be done any act whereby the lease would be forfeited the \$6,000 would be regarded by me as a Priority Claim in favor of the said Broad and East Jersey Realty Company and against the estate of said National Drug Stores Corporation. This Court on January 30, 1924, made and entered its order directing me to accept said offer of purchase and for the consideration and upon the terms reported, to assign said lease unto the said Broad and East Jersey Realty Company. Said order I obeyed and executed by assigning said lease to said Broad and East Jersey Realty Company and accepting payment therefor as sanctioned by this court, at the same time agreeing in writing that if the National Drug Stores Corporation became bankrupt or did anything to produce a forfeiture of the lease, that this \$6,000 would constitute a preferred priority claim against the estate being administered by me.

Before the assignment of said lease by me to said Broad and East Jersey Realty Company, I instructed Mr. Austin S. Rothwell, who had been assisting me and still assists me in the work connected with the administration of the drug company's estate, to call upon the owners of the property, Messrs. Tutulis and Pappas, and reimburse them for the second half of the nineteen twenty-four taxes, plus an accrued interest charge and also pay them the quarter-annual installment of rent which became due on January 1, 1925. I am advised by said Austin S. Rothwell, and I state the fact to be, that on or about

Affidavit of George W. Burleigh, Receiver.

January 29, 1925, he tendered to the owners of the leased premises in cash, a sum equal to the second half of the nineteen twenty-four taxes together with interest calculated to the date of tender and also in cash, the rent which became due on January 1, 1925. This tender was not
10 accepted by the owners, nor any reason assigned at that time for its non-acceptance, I stand ready now to pay to the owners the foregoing items—taxes, interest on taxes and rent due January 1, 1925. The reason why the said tender was not made much sooner was that upon my appointment on December 19, 1925, I found a most complicated situation to exist in the affairs of the National Drug Stores Corporation, requiring considerable time and study. I was also
20 considerably occupied with the matter of reorganization of the company. The interest and condition of the estate did not permit of any earlier payments or tender.

Should the owners, Tutulis and Pappas, be permitted to enforce a forfeiture of said lease, the estate being administered by me would be subjected to a priority claim of \$6,000 plus such liability and damages as may be legally enforced by the sub-tenants for breach of covenant for
30 quiet enjoyment made by the National Drug Stores Corporation in various sub-leases. Such damages might amount to a large sum of money owing to the destruction of going businesses, resulting from the eviction of the sub-tenants.

The National Drug Stores Corporation has never become nor been adjudicated a bankrupt. For some time preceding my appointment, at the time of my appointment and ever since and down to the present time, the National Drug Stores
40 Corporation has had good and substantial as-

Affidavit of George W. Burleigh, Receiver.

sets, amounting at a fair value to more than double the total amount of its liabilities.

I have instituted this proceeding in conjunction with the purchaser of said lease because I feel that in this Court I can secure that protection for my estate to which it and I are equitably entitled.

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GEORGE W. BURLEIGH.

Sworn and subscribed to before me
this 27th day of March, 1925.

MILTON FICHTENBAUM,
Notary Public of Bronx Co., N. Y.
Certificate filed in New York County.

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Affidavit of Austin S. Rothwell.

IN THE DISTRICT COURT OF THE
UNITED STATES

FOR THE DISTRICT OF NEW JERSEY.

10	DAVID D. VINCENT, <i>vs.</i> NATIONAL DRUG STORES CORPO- RATION, <i>Plaintiff,</i> <i>Defendant.</i>	}	<i>In Equity.</i> <i>On Petition for Relief.</i>
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STATE OF NEW YORK, }
COUNTY OF NEW YORK. } *ss.*

20 AUSTIN S. ROTHWELL, of full age, being duly sworn according to law, on his oath deposes and says:

I reside at Remsenburg, L. I., in the State of New York and have for five years last past been a director of said company, and for one year last past its vice-president.

30 I am entirely familiar with its business transactions and affairs. Said Company has never become, or been adjudicated bankrupt. Its assets have always exceeded its liabilities and even at the time of the appointment of George W. Burleigh as receiver in equity of said company, its good and substantial assets totaled approximately twice its liabilities.

Said company went into the hands of George W. Burleigh, as equity receiver, as a protective measure made necessary by a shortage of ready cash. It was not insolvent at the time and has never been insolvent, and the receivership in
40 equity was instituted with the view of accom-

Affidavit of Austin S. Rothwell.

plishing a reorganization of the company, so that the creditors would receive payment in full of their claims. This is being accomplished by the receiver, acting under the instructions of the United States District Court for the Southern District of New York.

I am personally acquainted with the property 10
of Peter J. Tutulis and James M. Pappas, the owners of the property mentioned in the petition to which this affidavit is annexed. I have known the condition of that property from the time the National Drug Stores Corporation took its lease down to the 29th or 30th of January, 1925.

During the five years of its occupancy of the premises the National Drug Stores Corporation made all reasonably necessary repairs to the interior and exterior of the building so as to maintain the same in as good condition as at the time of the commencement of the lease. The owner has never made any demand on the drug company for the making of any repairs and such repairs as were made were those which the drug company of its own initiative found necessary to make. The property on or about January 29, 1925, was in as good condition as it was on August 1, 1919, when the premises were turned over to the drug company. 20 30

On or about January 29, 1925, acting upon the instructions from George W. Burleigh, receiver in Equity of said drug company, I tendered to the owners of said property, Peter J. Tutulis and James M. Pappas, in cash, a sum equal to the second half of the 1924 taxes, plus interest thereon, calculated to the date of tender, plus the annual quarterly installment of rent which became due on January 1, 1925. I made tender either to Mr. Tutulis or Mr. Pappas. I do not 40

Affidavit of Austin S. Rothwell.

know which is which by name. While I would recognize personally the one to whom I made the tender I am unable to state his name, but I do say that it was one or the other of the said two persons.

10 He declined to discuss the matter of the lease with me and declined to say whether he would or would not accept the money I offered. He did, however, in fact, decline to accept the money tendered him and threatened to have me ejected from his store premises by his negro porter unless I left, which I did after once again offering him the money.

AUSTIN S. ROTHWELL.

20 Subscribed and sworn to before me
this 27th day of March, 1925.

MILTON FICHTENBAUM,
Notary Public of Bronx County, N. Y.
Certificate filed in New York County.

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Affidavit of Stephen Argyrus.

IN THE DISTRICT COURT OF THE
UNITED STATES

FOR THE DISTRICT OF NEW JERSEY.

DAVID D. VINCENT,

Plaintiff,

vs.

NATIONAL DRUG STORES CORPO-
RATION,

Defendant.

In Equity.

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*On Petition
for Relief.*

Affidavit.

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

STEPHEN ARGYRUS, of full age, being duly
sworn according to law, on his oath deposes and
says: 20

I am the president of the Broad and East Jer-
sey Realty Company, a corporation organized
and existing under and by virtue of the laws of
the State of New Jersey, and one of the peti-
tioners named in the petition to which this affi-
davit is annexed. Said petition has been read to
me and the matters and things therein stated so
far as they relate to anything done by my said
company are true, and so far as they relate to
anything done by any of the other persons named
in said petition, I believe them to be true. 30

My said company made the offer to George W.
Burleigh, the receiver of the National Drug
Stores Corporation, to purchase the leasehold
estates referred to in the aforesaid petition, upon
the terms and conditions set forth in the petition
of the said receiver filed with this Honorable
Court on or about the 29th day of January, 1925,
a true copy whereof is attached to the petition, 40

Affidavit of Stephen Argyrus.

and on the 4th day of February, 1925, my company purchased the aforesaid leasehold from said receiver upon the aforesaid terms and conditions and paid unto the receiver the consideration of \$6,000. Immediately thereafter, to wit, on the 5th day of February, 1925, your petitioner's
10 company made a tender to the defendants James M. Pappas and Peter J. Tutulis of all the rent that was then due and owing to them under said lease, and also tendered to them the amount of money due them for the second half of the taxes of 1924 assessed against the premises so as aforesaid demised by said lease. All of such tenders were refused by said James M. Pappas and Peter J. Tutulis and my company is now ready, able and willing to pay the several amounts so due
20 unto the said James M. Pappas and Peter J. Tutulis, together with any interest that this Court may adjudge to be due to them, and also tenders itself able and willing to pay unto them the quarter's rent falling due on the 1st of April next.

Shortly after we purchased the aforesaid leasehold from the receiver we spent several hundred dollars in repairs upon the building so as aforesaid demised, and I make the positive statement
30 that the said building is in good condition and is not in need so far as its interior or exterior is concerned of any repairs.

On March 12, 1925, the defendants James M. Pappas and Peter J. Tutulis instituted an ejectment action in the New Jersey Supreme Court against my said company, and annexed hereto is a true copy of the summons and complaint served upon my company on the 16th day of March, 1925. We have not filed an answer to said action.

40 On the 14th day of March, 1925, the defendants James M. Pappas and Peter J. Tutulis filed

Affidavit of Stephen Argyrus.

a bill of complaint in the Court of Chancery of New Jersey in which my company is named as defendant, and an order to show cause, together with a restraint, was issued by said court against us. A true copy of said petition and order are hereto attached. We have not as yet entered any appearance in said suit.

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I deny that the National Drug Stores Corporation is bankrupt or insolvent, and I deny that either it or we, since we have become the owners of the aforesaid leasehold, have failed to make necessary repairs either to the exterior or the interior of the demised premises. I deny that there was a default in the payment of the taxes or in rent prior to the commencement of the aforesaid ejectment suit or suit in Chancery. I deny that there has been any default in any term, covenant or provision of the aforesaid lease as in law or in equity constitutes a valid ground and reason for the forfeiture and termination of the aforesaid leasehold estate.

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On January 29, 1925, I went with Austin S. Rothwell and another gentleman to the place of business of Pappas and Tutulis in Elizabeth, N. J. Mr. Rothwell went there representing the receiver, Mr. Burleigh. He had with him in cash five thousand and some odd hundred dollars. In my presence he tendered to Tutulis and Pappas the money to repay the second half of the 1924 taxes, together with interest thereon, and also the installment of rent which became due on January 1, 1925. Both Tutulis and Pappas were there at the same time and Mr. Rothwell offered the money to Pappas while Mr. Tutulis stood alongside of him. Neither one took the money and Mr. Rothwell asked them whether they would or would not accept the money. They both said

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Affidavit of Stephen Argyrus.

that they had nothing to say, and upon Mr. Rothwell repeating his offer Pappas sent for his colored porter to throw him out of the place. Thereupon we left the premises.

10 While we were in the premises I spoke to the two men in Greek and asked them why they were causing all this trouble. They both said that they have been losing money because of the lease and that they had been waiting for a long time to get some ground to kick the tenants out, and now that they had the ground they were going to put everybody out. They also said all further talk on the subject would have to be with their lawyer, Mr. Merritt Lane. Thereafter and on the same day I went in the company of Mr. Murray Apfelbaum, Mr. Joseph Fuersman and a representative of Riker & Riker, representing
20 the receiver, to the office of Merritt Lane, to whom Pappas and Tutulis had referred me. The representative of the receiver had with him in cash the money. Mr. Lane refused to accept any money in payment of the taxes or current rent.

On February 4th I went to Elizabeth in the company of Mr. Rothwell and Mr. Edward Apfelbaum. We called upon Pappas and Tutulis at their place of business. I told them that my
30 company, the Broad & East Jersey Realty Company had just purchased the lease from the receiver of the Drug Company and I offered Pappas and Tutulis two certified checks of the receiver to their order, one for \$2,169.86, representing the second half of the 1924 taxes, and a check for \$21.70, representing interest thereon. At the same time I tendered them in cash the rent that became due on January 1, 1925. They said to me "There is nothing doing. We won't take the money and we will kick you out." Those
40 certified checks are in my possession, never

Affidavit of Stephen Argyrus.

having been redeposited, and I stand ready to deliver those checks together with the requisite cash to Pappas and Tutulis.

The various sub-lessees upon the leased property are doing good business and I believe that if they are evicted they will enforce large and substantial claims for damages against the National Drug Stores Corporation and the receiver thereof.

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STEPHEN P. ARGYRUS.

Sworn and subscribed to before me
this 28th day of March, 1925.

SARAH D. SEILER,
An Attorney-at-Law of New Jersey.

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Opinion.

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

	JAMES J. PAPPAS, <i>et al.</i> ,	}
	<i>vs.</i>	
10	BROAD & EAST JERSEY REALTY Co.	

Appearances:

Merritt Lane, Esq., for the plaintiffs.

Leber & Ruback, for the defendants.

This matter was heard and argued upon the following stipulation of facts:

20 "1. It is consented, stipulated and agreed that the court may determine the above-entitled cause without a jury both as to the right to possession and to mesne profits and damages and the amount of such mesne profits and damages and that if the court shall determine that the plaintiff is entitled to judgment for possession and for mesne profits and damages, the amount of such mesne profits and damages shall be determined by the court, testimony with respect thereto to be taken

30 as the court shall direct either before the court itself or if the court shall so determine the amount of said mesne profits and damages shall be fixed by a jury upon a writ of inquiry or the amount of such mesne profits and damages shall be fixed in such manner as the court shall direct.

"2. It is further stipulated that the case shall be submitted except with respect to the amount of mesne profits and damages upon the following

40 ing agreed statement of facts:

Opinion.

“A. On or about the 1st day of August, 1919, the Merchants Land and Improvement Company, a New Jersey corporation, was the owner of certain lands and premises in the City of Elizabeth, County of Union, and State of New Jersey, being the premises described in the summons and complaint. On said August 1, 1919, the said Merchants Land and Improvement Company leased said lands and premises and the improvements thereon to the National Drug Stores Corporation for a term of ten years, commencing January 1, 1920, and ending January 1, 1930, for and upon the yearly rentals in said lease reserved. A true copy of said lease is hereunto annexed and made part hereof. 10

“B. The said lease among its terms contains a provision that ‘the party of the second part (National Drug Stores Corporation) will not assign this lease without the written consent of the party of the first part, its successors or assigns, under penalty of forfeiture and damages.’ 20

“C. After the making and acceptance of the aforementioned lease and demise, the owner of the demised premises to wit, the Merchants Land & Improvement Company, sold and conveyed the demised premises to the defendants herein, Peter J. Tutulis and James M. Pappas, who are the present owners of said lands and premises. The legal title to said lands and premises was acquired by said defendants, James M. Pappas and Peter J. Tutulis with knowledge of the existence of the aforementioned lease to the National Drug Stores Corporation and expressly subject to the said lease and the leasehold rights thereby created. 30

“D. On the 19th day of December, 1924, a bill of complaint was filed in the United States 40

Opinion.

10 District Court for the Southern District of New York by David D. Vincent, a stockholder, against the National Drug Stores Corporation, the lessee, which said corporation was a corporation of the State of Delaware alleging that said corporation was solvent but that suits were threatened against it in various jurisdictions which might result in the property of the defendant corporation being sold piecemeal and at a great deal less than the fair value and that to protect the creditors and stockholders it was advisable that a court of equity appoint a receiver; that on the 19th day of December, 1924, said corporation appeared in the United States District Court for the Southern District of New York and admitted the statements contained in the bill and consented to a receivership and thereupon on 20 the 19th day of December, 1924, George W. Burleigh was appointed receiver in equity in the United States District Court for the Southern District of New York and thereafter and on the same day again, with the consent of the corporation, the said George W. Burleigh was appointed ancillary receiver of the National Drug Stores Corporation for the District of New Jersey, by the United States District Court for the District of New Jersey and of all of its properties and assets lying within this State, including its securities, deeds, leases, contracts, etc. The said George W. Burleigh duly qualified as such ancillary receiver. A copy of the order appointing said receiver is hereto annexed and made a part hereof. 30

40 "E. The said receiver went into possession of the property of the said National Drug Stores Corporation and proceeded to conduct the business thereof and on the 29th day of January,

Opinion.

1925, in his capacity as a receiver in equity of the National Drug Stores Corporation presented a petition to the United States District Court for the District of New Jersey, a copy of which said petition is hereto annexed and made a part hereof and upon the 30th day of January, 1925, the United States District Court for the District of New Jersey made an order, a copy of which is hereto annexed and made a part hereof. In pursuance of such order the said George W. Burleigh as receiver in equity of the National Drug Stores Corporation and the National Drug Stores Corporation executed an assignment of the lease hereinabove mentioned and described, a copy of which assignment is annexed hereto and made a part hereof. 10

"F. Neither the plaintiffs nor their predecessors in title were parties to the litigation in the United States District for the District of New York or in the United States District for the District of New Jersey and no notice was given to them of the application by the receiver for the order directing the assignment of the lease nor did they have any knowledge of said application or of said order or of the assignment of said lease until after the assignment of said lease had been in fact made. 20 30

"G. On January 5, 1925, the said plaintiffs served or caused to be served on the ancillary receiver of the National Drug Stores Corporation a notice to the effect that they demanded possession of the said premises electing to terminate the lease upon several grounds, a copy of which said notice is hereto annexed and made a part hereof.

"H. That when the Broad and East Jersey Realty Company took possession of said lands 40

Opinion.

and premises, upon discovering that there had been an assignment of the lease, the plaintiffs caused a notice to be served upon the Broad and East Jersey Realty Company, a copy of which is hereto annexed and made a part hereof, which said notice was served upon the 11th day of March, 1924. The Broad and East Jersey Realty Company declining to give up possession, summons was issued out of this court in this suit on the 12th day of March, 1925.

“I. Subject to objection of defendant that the facts herein stipulated under ‘I’ are immaterial and irrelevant. On the 28th day of March, George W. Burleigh, ancillary receiver of the National Drug Stores, and the Broad and East Jersey Realty Company filed a petition in the United States District Court for the District of New Jersey in the cause of David D. Vincent, plaintiff, *v.* National Drug Stores Corporation, defendant, a copy of which said petition is annexed hereto and made a part hereof; that such proceedings were had upon said petition as that upon the 21st day of September, 1925, an order was entered in the United States District Court for the District of New Jersey, a copy of which is annexed hereto and made a part hereof.

“If the foregoing facts under ‘I’ are considered by the court, an objection is to be noted for defendant as ground for appeal.

“3. It is further stipulated between the parties that the only question at issue in this case is whether the assignment signed by the receiver and the National Drug Stores Corporation of the lease as set forth herein was a breach of the covenant against assignment contained in the lease and whether it was such a breach of the said covenant as would entitle the

Opinion.

owners of the demised premises, Pappas and Tutulis, to declare the lease at an end and demand possession of the demised premises, counsel stipulating that if the answer to the aforesaid question is in the affirmative, judgment should be for the plaintiffs and if in the negative, judgment should be for the defendant. No other alleged cause for forfeiture is to be considered.” 10

* * *

OPINION.

By Stein, Alfred A., *J.*, Acting Circuit Court Judge:

The bill of complaint filed by David D. Vincent, a stockholder, in the United States District Court for the Southern District of New York, against the National Drug Stores Corporation, the lessee, alleged that the corporation was solvent, but that suits were threatened against it in various jurisdictions which might result in the sale of the corporation's property at much less than the fair value thereof, and to protect stockholders he sought the intervention of the equity powers of the court, by the appointment of a custodial receiver. The company appeared, admitted the statements contained in the bill, and consented to the receivership. George W. Burleigh was appointed ancillary receiver of the corporation for the District of New Jersey. 20 30

On January 30, 1925, the United States District Court of New Jersey, on the petition of the receiver, made an order that the receiver be authorized to accept an offer of the Broad and East Jersey Realty Company to purchase the 40

Opinion.

lease in question, and that he sell and assign the same for the sum of six thousand dollars, and in pursuance thereof the receiver executed an assignment of the lease to it.

10 The sole question now is whether in the face of the covenant contained in the lease, namely, "And it is further agreed between the parties hereto that the party of the second part will not assign this lease without the written consent of the party of the first part, its successors, or assigns, under penalty of forfeiture and damages," the assignment by the receiver was a breach of the covenant against the assignment thereof, and whether it was such a breach as would entitle the owners of the demised premises, Pappas and Tutulis, to declare the lease at an end and demand possession of the demised premises.

20 The application for a receiver in this instance was made by a stockholder, and consented to by the corporation in order to protect its assets, and was in the nature of an application for a custodial receiver, directed to the equity side of the court.

30 The plaintiff's insistment is that the covenant against assignment was breached when the receiver assigned the lease to the defendant without having obtained the consent of the parties. The defendant's contention is that the covenant was not breached because it prohibits only a voluntary assignment and that the assignment by the equity receiver was not a voluntary assignment; and bases his contention upon the decisions with relation to statutory receivers, which are to the effect that such assignments are by act and operation of law, rather than the act of the parties, and therefore no breach of the covenant.

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Opinion.

He relies, for support in his contention, chiefly on such cases as *Fleming v. Fleming Hotel Company* (69 N. J. Eq., 715), which was the case of a statutory trustee in bankruptcy, *Gazely v. Williams* (219 U. S., p. 41), a statutory assignee in insolvency; *Bemis v. Wilder* (100 Mass., p. 446).

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It is well settled that in the case of a receiver where the petitioner is insolvent, or of a trustee for a bankrupt that the title to the property of the insolvent or bankrupt passes to the receiver, and that, in such cases, the sale by the receiver of leasehold property, even in the face of a restrictive covenant such as we find here, would not be in violation of the covenant, since it would be an assignment by act and operation of law.

If this were the case of a receiver in insolvency, or that of a trustee in bankruptcy, title would undoubtedly pass by operation of law, for in such cases the receiver would take the title. For, as was held by the Supreme Court of the United States, in the case of *Gazely v. Williams*, that which follows in the case of bankruptcy is not by the act of the bankrupt, but by operation of law, transferring the bankrupt's property to the assignee. But in this case, which is purely an equity receivership, the receiver was a mere custodian and, therefore, could not dispose of this lease in the face of the covenant contained therein or give a greater title than the corporation itself possessed; but could only convey such right, title, and interest, as the corporation had in the *res* itself. Moreover, it appears that the plaintiffs were not parties to the federal proceedings in which the order to sell the lease was made, and it seems to me that the court was without power to make an order which would conclude their rights.

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Opinion.

10 The proceeding in which the receiver was appointed was not one in the interest of creditors, as is the case in statutory receiverships in insolvency and trustees in bankruptcy, but one where the corporation alleged that it had sufficient money to pay its debts, but that its property was subject to execution and would be dissipated, and perhaps creditors would not be paid, and stockholders would suffer; whereas, if it were given time and could do its business under the protection of the court, its debts could be paid and its property handed back to its stockholders. If, under such circumstances, it could go into a court to obtain a moratorium, as it were, and then dispose of its property without regard to restrictive covenants, such as contained in this lease, and later have its property
20 turned back to its stockholders free and discharged of the covenant, and thus receive the benefit of the breach thereof, it would open the door to much fraud and wrongdoing.

It seems to me that in this case the court, in effect, substituted itself, through the appointment of its receiver as its agent, for the officers and managers of the corporation. It did not take the property of the company for distribution among its creditors, as in the case of receiverships in insolvency and trustees in bankruptcy, and that therefore the rights of the receiver rose no higher than the rights of the corporation itself, and so, what the corporation could not do with its property, the court, through its receiver, could not do. Thence I have come to the conclusion that the receiver could not transfer or assign this lease without breaching the covenant therein contained against
30 the assignment thereof; and that the rule of law
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Opinion.

laid down in the case of statutory receivers and trustees in bankruptcy, does not apply.

Plaintiffs are entitled to possession of the demised premises and for mesne profits and damages; the amount of such mesne profits and damages to be fixed by a jury upon a writ of inquiry.

In arriving at the foregoing conclusions, the facts set forth in the stipulation under "I" were not considered by me. 10

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*Postea and Findings.***POSTEA AND FINDINGS.**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10	JAMES N. PAPPAS and PETER J. TUTULIS, <i>Plaintiffs,</i> <i>vs.</i> BROAD & EAST JERSEY REALTY COMPANY, <i>Defendant.</i>	}	<i>Action at Law.</i> <i>Postea and Findings.</i>
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20 This case was tried before the Honorable Alfred Stein, Judge of the Court of Common Pleas of the County of Union, to whom, by consent, this case was referred for trial under the provisions of the statute and without a jury, by consent of both parties thereto, at the Union Circuit in the April Term. The parties stipulated the facts in a stipulation as follows:

See stipulation of facts, state of the case, page 4.

* * *

30 In determining the case the court excluded from consideration the facts stipulated under sub-division I. Upon the facts so stipulated the court finds for the plaintiffs and against the defendant and that the plaintiffs are entitled to possession of the lands and premises mentioned in the complaint as of the 1st day of January, 1925, and that the defendant has since that date wrongfully deprived the plaintiffs of the possession thereof and that plaintiffs are entitled to

Rule for Judgment.

judgment and to mesne profits and damages to be fixed upon a writ of inquiry to be executed subsequent to the entry of judgment for possession.

ALFRED A. STEIN,
Judge.

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RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

JAMES N. PAPPAS and PETER J.
TUTULIS,

*Plaintiffs,**vs.*

BROAD & EAST JERSEY REALTY
COMPANY,

Defendant.

*Action
at Law.*

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*Rule for
Judgment.*

The plaintiffs having filed their complaint herein in ejectment against the defendant demanding possession of the lands and premises, to wit: 30

“BEGINNING at the northeast corner of Broad and East Jersey Streets, in the City of Elizabeth, having approximately fifty (50) feet frontage on Broad Street and a depth of approximately fifty (50) feet on East Jersey Street, and being the same premises conveyed to the Merchants Land and Improvement Company, by deed of Harry M. Hyames and wife, recorded in 40

Rule for Judgment.

Book 461, page 441 of Deeds for Union County. Said premises are known as 101 Broad Street and 1173 East Jersey Street, Elizabeth, N. J."

10 And the defendant having filed an answer and the cause being at issue and the issue having been sent to the Union Circuit for trial and having been referred by consent, under the statute, to the Honorable Alfred Stein, Judge of the Court of Common Pleas of the County of Union for trial; now on this day, to wit: on the 24th day of September, 1926, comes the said plaintiffs by their attorney before the said Justices of the Supreme Court at Trenton and the said Judge before whom, by consent, under the statute, the said cause was tried without a jury, sent
20 thither his record had before him, by which record it appears that upon facts stipulated before the court, the court found for the plaintiffs and against the defendant and that the plaintiffs are entitled to possession of the lands and premises hereinbefore described as of the 1st day of January, 1925, and that the defendant had since that date wrongfully deprived the plaintiffs of the possession thereof and that plaintiffs are entitled to judgment and to mesne
30 profits and damages to be fixed upon a writ of inquiry to be executed subsequent to the entry of judgment for possession and the parties having stipulated by written stipulation filed, that the said writ of inquiry shall be executed subsequent to the entry of judgment for possession.

Therefore, it is considered that James N. Pappas and Peter J. Tutulis, the plaintiffs, do recover against the defendant, Broad & East Jersey Realty Company, the possession of the
40 premises aforesaid with the appurtenances, to-

Rule for Judgment.

gether with the damages from the 1st day of January, 1925, from which said date the defendant wrongfully deprived the plaintiffs of the possession of said lands and premises to be assessed subsequent to the entry of this judgment and also costs amounting to the sum of

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And thereupon the said James N. Pappas and Peter J. Tutulis pray that a writ of the State of New Jersey be directed to the Sheriff of the County of Union to cause them to have possession of the said premises aforesaid with the appurtenances; and it is granted to them before our Justices aforesaid at Trenton aforesaid, on the 24th day of September, 1926.

Rule entered September 24, 1926.

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On motion of

MERRITT LANE,
Attorney.

30

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Stipulation.

STIPULATION.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10	JAMES N. PAPPAS and PETER J. TUTULIS, <i>Plaintiffs,</i> <i>vs.</i> BROAD & EAST JERSEY REALTY COMPANY, <i>Defendant.</i>	}	<i>Action at Law. Stipulation.</i>
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20 Judgment having been entered in the above-entitled cause in favor of the plaintiff and against the defendant containing a direction that mesne profits and damages should be ascertained and fixed upon a writ of inquiry from which judgment the defendant is about to appeal to the Court of Errors and Appeals;

Now, therefore, the parties hereto through their respective attorneys, stipulate and agree as follows:

30 An appeal will be taken by the defendant from the aforesaid judgment to be speeded in due course, and pending the final determination of said appeal, the proceedings to ascertain the mesne profits and damages upon a writ of inquiry shall stand suspended, to be instituted by the plaintiff after but only in the event of the affirmation of the aforesaid judgment. An appeal may be taken from the verdict of the jury

Notice of Appeal.

upon writ of inquiry by either party standing aggrieved thereby.

MERRITT LANE,
Attorney for Plaintiffs.

LEBER & RUBACK,
Attorneys for Defendant.

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Dated September 20, 1926.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

JAMES N. PAPPAS and PETER J.
TUTULIS,

Plaintiffs,

vs.

BROAD & EAST JERSEY REALTY
COMPANY,

Defendant.

*Action at
Law.*

*Notice of
Appeal.*

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To Merritt Lane, Esq., attorney of plaintiffs:

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TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

LEBER & RUBACK,
Attorneys of Defendant-Appellant.

Service of within Notice of Appeal acknowledged this 29th day of September, 1926.

MERRITT LANE.

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*Grounds of Appeal.***GROUND OF APPEAL.****New Jersey Court of Errors and Appeals**

10	JAMES N. PAPPAS and PETER J. TUTULIS, <i>Plaintiffs-Respondents,</i> <i>vs.</i> BROAD & EAST JERSEY REALTY COMPANY, <i>Defendant-Appellant.</i>	<i>Action at Law.</i> <i>On Appeal from the Supreme Court.</i> <i>Grounds of Appeal.</i>
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The appellant states the following grounds of appeal:

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(1) The court erred in rendering decision in favor of the plaintiffs against the defendant.

(2) The court erred in deciding that the plaintiffs are entitled to possession of the demised premises.

(3) The court erred in deciding that the plaintiffs are entitled to mesne profits and damages.

30 (4) The court erred in holding that the assignment by the receiver, George W. Burleigh, was a violation of the covenant contained in the lease mentioned in the complaint, which covenant was as follows:

“And it is further agreed between the parties hereto that the party of the second part will not assign this lease without the written consent of the party of the first part, its successors or assigns, under penalty of forfeiture and damages.”

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Grounds of Appeal.

(5) The court erred in holding that the said assignment by the receiver was such a breach of the covenant above set forth as would entitle the owners of the demised premises, the plaintiffs-respondents herein, to declare the lease at an end and demand possession of the demised premises.

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(6) The court erred in holding that the assignment of the lease mentioned in the complaint and in the stipulation filed in this cause by George W. Burleigh, receiver in equity of the National Drug Stores Corporation, was a voluntary assignment of the lease and therefore breached the covenant against assignment in (4) of these assignments specifically set forth.

(7) The court erred in holding that the rights of the receiver, George W. Burleigh, rose no higher than the rights of the corporation itself.

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(8) The court erred in holding that a Federal Court of Equity, having appointed a receiver, could not order the said receiver to assign the lease without breaching the covenant in assignment (4) hereinabove set forth.

LEBER & RUBACK,
Attorneys for Defendant-Appellant.

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Service of copy of within grounds of appeal acknowledged this 18th day of October, 1926.

MERRITT LANE,
Attorney, Respondents.

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(A) The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is one of the most important and interesting in the history of science, and that it has been the subject of many theories and hypotheses. The author then proceeds to discuss the various theories and hypotheses, and to show that the most plausible one is the one which assumes that life originated from non-living matter.

(B) The second part of the paper is devoted to a detailed discussion of the various theories and hypotheses. It is shown that the most plausible one is the one which assumes that life originated from non-living matter. The author then proceeds to discuss the various theories and hypotheses, and to show that the most plausible one is the one which assumes that life originated from non-living matter.

(C) The third part of the paper is devoted to a detailed discussion of the various theories and hypotheses. It is shown that the most plausible one is the one which assumes that life originated from non-living matter. The author then proceeds to discuss the various theories and hypotheses, and to show that the most plausible one is the one which assumes that life originated from non-living matter.

(D) The fourth part of the paper is devoted to a detailed discussion of the various theories and hypotheses. It is shown that the most plausible one is the one which assumes that life originated from non-living matter. The author then proceeds to discuss the various theories and hypotheses, and to show that the most plausible one is the one which assumes that life originated from non-living matter.

(E) The fifth part of the paper is devoted to a detailed discussion of the various theories and hypotheses. It is shown that the most plausible one is the one which assumes that life originated from non-living matter. The author then proceeds to discuss the various theories and hypotheses, and to show that the most plausible one is the one which assumes that life originated from non-living matter.

New Jersey Court of Errors and Appeals

JAMES N. PAPPAS, *et al.*,
Respondents,

vs.

BROAD & EAST JERSEY REALTY
COMPANY,
Appellant.

In Ejectment.

APPELLANT'S BRIEF.

The Case.

This appeal brings up for review a judgment entered in favor of the plaintiffs-respondents, against the defendant-appellant, in an Action of Ejectment, commenced by them in the Supreme Court of this State, Union Circuit (the lands lying in Union County) the trial of which was referred by the Justice holding that Circuit, pursuant to the Statute, to the Common Pleas Judge of that County. The facts not being in dispute, and there being only a single question of law, the parties entered into a stipulation of facts (See Case, pp. 4-8) and further agreed that the cause should be heard and determined by the Honorable Alfred Stein, *C. P. J.* of Union County, sitting without a jury. After argument and consideration, the Court below resolved the cause in favor of the plaintiffs (See Judge Stein's opinion, Case, p. 109), and Judgment was entered in accordance with his findings in favor of the plaintiffs and against the defendant (See Postea and Rule for Judgment, Case, pp. 114-117). The Court below awarded the right to damages for mesne profits to the plaintiffs and directed (pursuant to stipulation) that they

should be ascertained by a writ of inquiry directed to the Sheriff, etc. It was afterwards stipulated that the writ of inquiry should await the outcome of this appeal (See Case, p. 118).

The Facts.

The facts briefly stated are these: On August 1st, 1919, by Indenture of Lease (See Case, pp. 9-17) Merchants Land and Improvement Co. leased the realty in question to National Drug Stores Corporation, a Delaware corporation, for a term of 10 years from January 1st, 1920, at the rental and other charges therein reserved.

The Lease contained the following clauses:

“And it is further agreed between the parties hereto that the party of the second part will not assign this lease without the written consent of the party of the first part, its successors or assigns, under penalty of forfeiture and damages.”

See Case, page 12, lines 28-34.

No other provision in the lease has any bearing on this appeal.

After the lease was made the respondents became the owners of the lands and premises in question but subject to the existence of said lease.

On December 19th, 1924, David D. Vincent, a stockholder of National Drug Company, the lessee, filed a bill in equity in the United States District Court for the Southern District of New York against said corporation, in which he alleged that it was solvent but financially embarrassed and that it was threatened with lawsuits by some of its creditors, and feared that unless the Court to whom the petition was addressed,

would appoint a receiver to take charge, its assets would be jeopardized and reduced by forced sale to less than the fair market value thereof, etc. On the same day the defendant company came into court, admitted the statements contained in the bill and consented to the appointment of a receiver. Thereupon one George W. Burleigh was appointed receiver. Thereafter, but on the same day, said Burleigh with the consent of the company, and upon proper proceedings, was appointed by the United States District Court for the District of New Jersey, Ancillary Receiver of all of its properties and assets lying within this State.

See Case, pages 18-23.

One of these assets is the lease in question.

The Receiver took possession of all the assets of the company in this State, and proceeded to conduct its business.

Thereafter, on January 29th, 1925, the Ancillary Receiver, petitioned the U. S. District Court of New Jersey to permit him to sell the lease in question to the appellant for the price offered and the Court on January 30th, 1925, directed the sale *and directed the Receiver to assign the lease.*

See Petition and Order, Case, pages 25-33.

Thereafter, on February 4th, 1925, the Receiver assigned the lease in question to the appellant, who took possession thereunder.

See Case, pages 34-39.

On January 5th, 1925, the respondents served a notice on the Receiver terminating the lease and demanding possession of the demised premises on the grounds that (a) the tenant had become bankrupt; (b) the tenant had defaulted in

making payments demanded by the lease; (c) the tenant had failed to make interior and exterior repairs; and (d) that tenant had failed to keep the premises in good repair.

Case, page 41.

On March 11th, 1925, the respondents served a notice on the appellant, terminating the lease and demanding possession, for the reasons therein stated.

Case, page 42.

But the parties stipulated that there was but one issue in dispute between them, to wit; whether the assignment of lease signed by the receiver and the company was a breach of the covenant against assignment and whether it was such a breach of the covenant as would entitle the owners to terminate the lease and repossess themselves of the premises in question.

This stipulation narrows the dispute to one point.

The respondents insist that the covenant against assignment was breached at the moment when the Receiver assigned the lease to the defendant without having obtained their consent.

The appellant counters this contention with the answer that the covenant was not breached because the very nature of the covenant prohibits only a *voluntary assignment* and that *the assignment by the Equity Receiver was not a voluntary assignment, but an assignment by operation of law.*

SYNOPSIS OF POINTS.

The following is a synopsis of the position taken by the appellant:

(1) The burden of law and fact rested entirely upon the respondents, the plaintiffs below.

(2) The covenant against assignment without the written consent of the landlord simply prohibits a voluntary assignment. The nature of a voluntary assignment and the cases that have adjudicated the question are hereinafter discussed.

(3) The assignment of the lease in this case was not a voluntary assignment by the tenant. It is an assignment by a court of competent jurisdiction through its agent, the Receiver.

(4) The Federal Court, having taken possession of all of the assets of the National Drug Stores Corporation, through its agent, the Receiver, it had the right and the power to order a sale of any of the assets, including this lease, and the fact that the lease contained the covenant against assignment by the tenant without consent of the landlord does not in any way abrogate that right or diminish that power and the reason for this is plain and will be discussed at length in this brief.

(5) The contention by the respondents, that the Federal proceedings were voluntary proceedings because, the company confessed the bill and consented to the appointment of a receiver, and that therefore the assignment by the Receiver would be a voluntary assignment of the lease and violative of the aforesaid covenant against assignment, has no merit, for reasons hereinafter appearing.

(6) The contention by the respondents, that an Equity Receiver stands in the place of the

corporation and has, therefore, no greater property rights than the corporation does not in any way affect the issue before us because that rule of law applies only to the quantity of the title that an Equity Receiver can give and does not affect the right of the court to dispose of the property.

POINT I.

The Court's attention is called to the fact that the entire burden rests upon the plaintiffs below to make out to the satisfaction of the Court a clear case of right to claim the forfeiture of the lease in question. Forfeitures are not favored in the law. The law will not permit a forfeiture unless the right to it is absolutely clear. Where there is the slightest cloud upon the right to claim a forfeiture, the Court will not permit it to inure to the benefit of the person claiming that right. These are statements of elementary principles of law.

POINT II.

The Federal Court, having taken possession of all of the assets of the National Drug Stores Corporation, through its agent, the Receiver, it had the right and the power to order a sale of any of the assets, including the lease in question, and the fact that the lease contained the covenant against assignment by the tenant without consent of the landlord, does not in any way abrogate that right or diminish that power and the reason for this is plain and is here discussed at length.

The power of a Court of Equity to sell property which it has taken into its possession through the medium of its Receiver is so well

settled as to be beyond dispute. Smith in his work on "Receiverships," at page 98 says, with reference to this power:

"The court being in possession of the property through its receiver, for the benefit of the parties who shall ultimately be found to be entitled to it or to its proceeds in a proper case has an undoubted right to order a sale of such property and direct the receiver to bring the proceeds into court to await the final order of distribution, and this power with certain limitation extends to both real and personal property."

To the same effect, High in his work on "Receivers," page 192, says:

"A Court of Equity appointing a receiver to take possession of property pending a litigation concerning the rights of the parties thereto is vested with the power of selling property in the receiver's hands, whenever such course becomes necessary to preserve the interests of all parties."

See also *Crane v. Ford*, Hopkins Chancery 114;

Bank v. Shed, 121 U. S., p. 74.

The Supreme Court of Maryland in the case of *Gaither v. Stockbridge*, 67 Maryland 222, in language subsequently approved by the Supreme Court of the United States, in the case of *Quincy R. R. v. Humphry*, 145 U. S., page 82, says, with relation to the nature of an Equity Receiver:

"The ordinary receiver (receiver in equity) such as we have in this case is clothed with no estate in the property but is a mere custodian of it for the court, and, by special authority, may become an officer of the court to effect a sale of the property if it be deemed necessary for the benefit of the parties concerned. If the order of the court under which the receiver acts embraces the leasehold estate, it becomes his duty, of course, to take possession."

In the case of *Waring v. Van Slyck*, Hopkins Chancery (N. Y.), page 114, a bill was filed by one of two co-owners of a vessel, and a receiver was appointed. The court made an order directing the receiver to sell the vessel. An appeal was taken from that order on the ground that the suit at bar being one for an accounting and not a proceeding *in rem*, the court could not divest the parties of title to the vessel. The court there held that it had the power to sell the subject of litigation whenever such a measure became necessary to preserve the interests of the parties. Whenever an equity court appoints a receiver it has the power to direct him to sell the property over which he is appointed when such a sale becomes necessary or expedient.

In a proper case, the order to sell may even be included in the order appointing the receiver.

Forsaith v. Hope, etc., 13 S. E. 869 (N. C.);

La. Am. Trust Co. v. Crescent Ice Co., 62 So. 664;

Smith v. Burton (Va.), 32 Atl. 467.

Inasmuch as the appointment of a receiver sustains generally the corporation's right to function over its property and effects, it must necessarily follow that the court must have the right to dispose of the property for the protection of all concerned therein. As was said in the case of *Doe v. Bevan*, 3 M. & S. 353, by Bayley, Justice:

"Shall they (the courts) take it only for their own benefit or be obliged to retain it in their hands to the prejudice of the creditors for whose benefit the law originally cast it upon them? Undoubtedly that can never be."

The power of the Equity Court to order a sale of the lease in question is not abrogated

nor in anyway disturbed by the covenant against assignments contained in this lease.

Durand & Co. v. Howard & Co., 216 Fed. Rep. 585.

It is universally established that a covenant against assignment is not broken where the assignment is by operation of law.

See *Fleming v. Fleming Hotel Co.*, 69 N. J. Equity 715;

Jackson v. Corliss, 7 Johns N. Y. 531;

Jackson v. Silvernail, 15 Johns N. Y. 278;

Allen v. Bennett, 1 Fed. Cases 214.

If the lessor desired to protect himself against the assignment of this lease by operation of law he should have done so specifically, as was said by the U. S. Supreme Court in the case of *Gazely v. Williams, Trustee of Brown*, 219 U. S., page 41, per Mr. Chief Justice Fuller:

“An original covenant against said letting or assignment is not broken by a transfer of the leased premises by operation of law, *but the covenant may be so drawn as to expressly prohibit such a transfer and in that case the lease would be forfeited by an assignment by operation of law.*”

McAdam—Landlord and Tenant—page 501:

“A covenant not to assign is broken by a voluntary assignment for the benefit of creditors, but is not infringed by an assignment by operation of law, as, for instance, under the bankrupt laws in case of the tenant's bankruptcy, or under the insolvent laws in case of his insolvency or by means of an execution sale, for in such cases the assignment is not the act of the tenant but of the law, unless that be made the subject of an express stipulation. Thus, with the lessee as a trader and subject to the bankrupt laws, proviso may be introduced for re-entry in case the tenant shall commit an act of bankruptcy whereon a fiat shall issue;

and such a proviso is good in law, although it has the effect of preventing the interest in the term from passing to the assignees. And a provision for re-entry in case the term be taken on execution is also good.

These cases demonstrate that the landlord may protect himself against assignment by operation of law, by inserting after the usual covenant against assigning and underletting a clause to the effect that the tenancy shall be determined upon the lease being taken upon an execution, or upon its passing out of the tenant's hands, either by his own acts or by operation of law."

The covenant in the lease here under consideration not containing any provision against assignment by operation of law, it cannot be said that it in anyway interferes with the power of the Equity Court to sell it.

POINT III.

The contention by the respondents that the Federal proceedings were voluntary proceedings by the corporation, because it confessed the bill and consented to the appointing of a receiver, and therefore the assignment by the Receiver is a voluntary assignment of the lease and violative of the aforesaid covenant against assignment, has no merit.

Counsel for the respondents, in his argument below, proceeded upon the theory that the proceedings in which the Receiver in this case was appointed by the Federal Court was a voluntary proceeding. An examination of the exhibits attached to the stipulation will show that this argument proceeds upon an erroneous premise. In the case in the Federal Court resulting in the appointment of a receiver, a bill was filed by one David Vincent, a stockholder of the Na-

tional Drug Stores Corporation, alleging that the corporation was unable to pay its creditors and that its assets were in danger of being dissipated unless something was done to protect them and asked the appointment of a receiver to preserve the assets for the benefit of creditors and stockholders. The corporation then filed an answer admitting the statements contained in the petition of said Vincent and consenting to the appointment of the Receiver. Because of this answer, respondents argue the proceedings were voluntary. This, however, is a *non-sequitur*. Whether the proceedings are voluntary must be determined not by the answer of the defendant in the receivership proceedings, but by the filing of the bill. There is nothing to show that this bill was filed at the request of or by connivance with the corporation.

The burden of proving that this receivership was obtained through connivance with the corporation or for any fraudulent purpose such as to enable this corporation to get out of any just contract or obligation belongs to the respondents in this case. All the facts in the case must be taken as shown on the face of the stipulation filed herein. Nowhere is there a scintilla of evidence nor yet even a suggestion that the proceedings wherein the receiver as appointed were not as on the face of the pleadings they purport to be, *i. e.*, a proceeding to preserve through the medium of a receivership the property of the National Drug Stores Corporation from dissipation and destruction.

The appointment of this Receiver was no more voluntary than would be a judgment at law where the defendant failed to file an answer because he had no defense or where he appeared in court and admitted he had no defense and

consented to the entering of a judgment. The argument, therefore, that if the Federal proceedings were voluntary the assignment of the lease would be voluntary has no application under the facts of this case.

But even assuming that the proceedings in which the Receiver was appointed were voluntary, it would not in any event affect the nature of this assignment as being an involuntary assignment inasmuch as there is no indication, nor is there any allegation, anywhere by the respondents that the proceedings were colorable for the purpose of effecting this assignment.

In the case of *Bemis v. Wilder*, 100 Mass. 446, the court says:

"It is well settled that an assignment by operation of law passes the estate discharged of the covenant to the assignee; and *this would seem to be so where the transfer arises from voluntary proceedings in insolvency as distinguished from proceedings in invitum and where there is no indication that the proceedings are colorable merely for the purpose of effecting the transfer in fraud of the lessor.*"

See also *Smith v. Putnam*, 3 Pick. 221;

Taylor on Landlord and Tenant, Sec. 408.

This is no more a voluntary assignment than would be a sale by a sheriff under an execution where the judgment has been had by default or by consent and yet such sales have invariably been held sales by operation of law.

See *Tiffany, Landlord and Tenant*, page 907;

Willison v. Watkins, 28 U. S., page 50;

Joslin v. Ervien, 50 N. J. L., page 39 at page 41.

Another point to be considered in connection herewith is that an Equity Receiver does not

obtain title to the property. The functions of an Equity Receiver are stated as follows:

"A Chancery Receiver is an indifferent person appointed by the court to hold the property in litigation pending suit. He is a ministerial officer with the function of a custodian. He derives his authority from the court and not from the parties at whose instance he is appointed. He acts in behalf of no particular interest but guards the right of all. Being a mere holder, his appointment does not change the title to property in his charge nor alter any lien of contract."

Booth v. Clark, 17 Howard 322;

Quincy R. R. Co. v. Humphreys, 145 U. S. 82.

It being true that the Receiver gets no title, any act of the corporation, either in applying for, or consenting to, the appointment of the Receiver does not in any way change the title.

See *Durant & Co. v. Howard & Co.*, 216 Fed. 585 at 587. As there stated, "the Chancery Receivers are not assignees of the lease. By their appointment they acquire no title. They only obtain a right to the possession of the property as the officers of the court."

It being true that they acquire no title, it must necessarily follow that the act of the corporation with regard to consenting or acquiescing in the receivership has nothing to do with the making of the assignment. The subsequent act of the court in ordering the Receiver to sell is an independent act without relation to the consent of the corporation but made by virtue of its inherent power to preserve and protect the assets which have come into its hands from being dissipated. If, in the case at bar, the Receiver did not have sufficient funds in his

hand to pay the rental reserved in the lease, the landlord could forfeit the term and the Receiver would thereby lose a valuable asset and the creditors would thereby suffer accordingly. To preserve this particular asset from being lost, the court orders the Receiver to sell it. Such a sale has no relation to any act of the corporation but is purely a judicial act of the court and as such cannot be a voluntary assignment of the lease by the corporation. The corporation itself could not have prevented this assignment by the court had it been so minded.

The respondents, in their argument below, cited and relied on the case of *West Shore R. R. Co. v. Wenner*, 41 Vroom 233, as authority sustaining their contention that the receiver's assignment was a voluntary assignment by the company and therefore in violation of the covenant against assignment.

The decision* in that case, however, does not support their contention. This court had before it the following facts: The railroad company leased certain property to Kelly and the lease contained a covenant against assignment. The lessee mortgaged the lease as security for the payment of \$10,000 on a certain date. The lessee died and default was made by his personal representatives in the payment of the sum due the mortgagee. Thereupon the mortgagee foreclosed his mortgage and under the foreclosure sale the lease was sold to Wenner. The railroad company elected to declare the lease void because of the breach of the covenant against assignment. On behalf of Wenner it was contended, *inter alia*, that the assignment was made by operation of law. The court below upheld his contention but this court ruled that although the making of the mortgage was not

a violation of the covenant against assignment, yet the default in the payment of the money secured by the mortgage would operate as a grant to the mortgagee and for this reason this court held that the mortgage of the lease after default became an assignment of the lease voluntarily made by the lessee.

This is not our case.

POINT IV.

The covenant against assignment without the written consent of the landlord simply prohibits a voluntary assignment. The nature of a voluntary assignment and the cases that have adjudicated the question are herein discussed.

In the New Jersey case of *Fleming v. Fleming Hotel Co.*, 69 N. J. E. 715, the court (Bergen, V.-C.) says:

"I take it to be well settled that a covenant not to sell or assign the lease is not broken where the assignment is by operation of law, and that an assignment of this lease by the receiver as the agent of the law to a purchaser of the leasehold interest would not work a forfeiture; that the covenant under consideration only applies to voluntary sales and is not subject to forfeiture unless the proceedings at law under which the leasehold interest is disposed of were voluntary and collusive, with a view to defraud the landlord of his right, is well supported by the authorities."

Jackson v. Corliss, 7 Johns (N. Y.) 531;

Jackson v. Silvernail, 15 Johns (N. Y.) 278;

1 McAdams, Landlord & Tenant (1900), Sec. 235;

Bemis v. Wilder, 100 Mass. 446.

In the case of *Gazely v. Williams*, 219 U. S., page 41, the court, per Mr. Chief Justice Fuller, says:

“An ordinary covenant against subletting or assignment is not broken by a transfer of the leased premises by operation of law but the covenant may be so drawn as to expressly prohibit such a transfer and in that case the lease would be forfeited by an assignment by operation of law.”

In the case of *Smith v. Putnam*, 3 Pick. 220 at 223, the Court, per Parker, C. J. (Supreme Court Mass.) says:

“Covenants not to assign, transfer, etc., are broken only by a voluntary assignment by the lessee.”

In other words, a covenant against assignment such as we have in this case applies solely to a covenant against a voluntary assignment by the lessee.

A voluntary assignment is one executed voluntarily by the lessee without compulsion of law or without the order of a competent court, or without the intervention of an agency or power beyond the control of the lessee. An assignment by the order of a competent court has never been construed to be a voluntary assignment.

Clark in his work on “Receivers,” section 601, says:

“Upon a judicial sale of a leasehold, even though the lease was not assignable by the lessee, it becomes assignable by operation of law even without the lessor’s consent.”

Zweitusch v. Luehrig, 156 Wis. 96.

Burrill in his work on “Assignments,” at page 4, discussing assignments for benefit of creditors, which are voluntarily made by a debtor, says:

“Such assignments (assignments for benefit of creditors) are termed voluntary to

distinguish them from such as are made by compulsion of law as under statutes of bankruptcy and insolvency (the latter sometimes being terms statutory assignments), OR BY ORDER OF SOME COMPETENT COURT."

In the case of *Farwell v. Cohn*, 28 N. E. (Ill.) 35, the court, speaking of assignments, says:

"In the case of *Weber v. Mich*, 23 N. E. 646, in speaking of the subject of a voluntary assignment, the court said that such an assignment shall and always had been understood to be an instrument voluntarily executed by a failing debtor by which he assigns to some third person as assignee or trustee the whole or sometimes the bulk of his property to be by such trustee distributed among the assignor's creditors in satisfaction of their demands."

In the case of *Farwell v. Nelson*, 24 N. E. 74, the court says:

"According to the common acceptation of the term (voluntary assignment) it is a transfer without compulsion of law by a debtor of his property to an assignee in trust to apply the same or the proceeds thereof to the payment of his debts and to return the surplus, if any, to the debtor."

It is another general rule of law that restrictions upon alienation by the lessee are not favored and are to be construed strictly and a particular mode of alienation is not to be regarded as prohibited unless it is by words which admit of no other meaning.

See *Tiffany, Landlord & Tenant*, page 921, section 152B, and cases there cited.

For this reason a covenant such as we have in this instance always has and must be construed to mean an assignment voluntarily executed by the lessee of his own volition and without the interference, compulsion or order of any statute

or any court competent to make such an order. Even the execution of an assignment by the lessee himself when done under compulsion of law is not a voluntary assignment because it is not an assignment of his own volition.

The assignment in the case at bar clearly cannot fall within the purview of a voluntary assignment. There was a receiver regularly and duly appointed in a proceeding commenced and pending against the corporation by a court of competent jurisdiction. There was an order made by that court authorizing and directing the receiver to make the assignment in question. The receiver executed the assignment in accordance with the order of the court. That assignment was effective to transfer the lease without any interference by the corporation. The fact of the joining of the corporation in the assignment as hereinafter will be shown was a nugatory act which had no effect and could have no bearing on the passing of the title to the lease. The real assignment was made by the receiver and anything extraneous his assignment cannot affect the point at issue.

We submit, therefore, that the assignment in question was an involuntary assignment under compulsion of law by order of a court of competent jurisdiction and therefore not a breach of the covenant against assignment contained in the lease.

POINT V.

The assignment of the lease in this case was not a voluntary assignment by the tenant. It is an assignment by a court of competent jurisdiction through its agent, the receiver, and is, therefore, an assignment by operation of law.

As has been shown above, a restriction against a transfer is not as a general rule regarded as broken by an involuntary alienation or transfer by operation of law unless the lease by its own terms is so framed that a transfer by operation of law will void it at the lessor's option. It has been held in numerous cases that the transmission of the lessee's interest to his personal representatives by operation of law or a transfer of the leasehold upon execution or foreclosure sale or insolvency or bankruptcy proceedings does not amount to a breach of restriction against assigning or subletting, unless it appears that the proceedings were voluntary and collusive on the part of the tenant with a view to defraud the landlord of his rights. So also an assignment or sale of a leasehold by a receiver as agent of the law has generally been held not a breach of a covenant to assign.

See 35 C. J. 981, par. 64b and cases in notes;

See also *Fleming v. Fleming Hotel Co.*, *supra*;

Gazely v. Williams, *supra*;

Wood Landlord & Tenant, 23 Ed. 714;

1 Taylor L. & T. sec. 408;

Bemis v. Wilder, 100 Mass. 446.

An assignment by operation of law is merely an assignment by which the owner of an interest in property may be deprived thereof without his consent. Such an assignment may occur by

reason of a sale under an execution or bankruptcy proceedings or under condemnation proceedings or in any of the various ways in which a court may pass the title by its decree without regard to the consent first had of the owner thereof.

See Tiffany, Landlord and Tenant, page 1375.

We are now brought to the question of whether the assignment in this particular instance viewed in the light of the decision of the courts is an assignment by operation of law or by the act of the Drug Stores Corporation. This assignment admittedly was made by a chancery receiver appointed by the Federal District Court. As has been indicated a chancery receiver such as we have in this case gets no title to the property but is a mere custodian of the property for the court and by special authority of the court may become an officer thereof to effect a sale of the property, when in the opinion of the court it becomes necessary and expedient for the benefit of the parties concerned.

Pennsylvania Steel v. Railway Co., 198 Fed. 721. Such a receiver is an indifferent person appointed by the court to hold the property. He derives his authority from the court and not from the parties at whose instance he is appointed. He acts in behalf of no particular interest but guards the rights of all.

High on Receiverships, *supra*;

Booth v. Clark, 17 How. (U. S.) 322;

Gaether v. Stockbridge, 67 Md. 222.

The court having appointed a receiver for any purpose and the receiver having taken possession of the property under the court's order, the court has the power to deal with the property as it,

within its discretion, may deem for the best interest of the estate.

Waring v. Van Slyck, Hop. Ch. 114;

Forsaith v. Hope, 13 S. E. 869;

Smith v. Burton, 32 Atl. 467;

Louisiana American Trust Co. v. Crescent Ice, 62 Southern, 664.

Mr. High in his work on Receivers, Sec. 192, speaking of the power of the court of equity to decree a sale of the property in the hands of a receiver, says:

“A court of equity appointing a receiver to take possession of the property pending a litigation concerning the rights of the parties thereto, is vested with the power of selling the property in the receiver’s hands, whenever such course becomes necessary to preserve the interest of all parties.”

Crane v. Ford, Hop. Ch. 11;

Bank v. Shed, 121 U. S. 74.

The Court, having appointed its Receiver and having the power to sell, and exercising that power, the question then arises, is the exercise of such power by the Court and the sale of the leasehold interest by the Receiver under the order of the Court a sale by the corporation or a sale by operation of law? In other words, is the sale by the Receiver a judicial sale?

A judicial sale has been defined as one made by a court having jurisdiction over the proceedings and having the property under its control made by its clearly authorized officer on the order of the court and approved by it.

See *Brown on Jurisdiction*, sec. 65;

Clark on Receivers, sec. 601;

35 *Corpus Juris*, page 8, sec. 3.

The sale is either actually or constructively by the court and the court is the vendor. The sale

is not valid or binding and confers no right to the property until confirmed by the court.

Stokes v. Hoffman House, 167 N. Y. 554 at page 559;

Northern Brewer Co. v. Princess Hotel, 153 Pac. 37.

By such confirmation it is judicially made the act of the court and by this act it becomes and is a judicial sale.

Rorer on Judicial Sales, Sec. 2;

Dresback v. Stein, 44 O. S. 70.

A sale by a court through its receiver is therefore a judicial sale. The receiver acts in his official capacity precisely as does a sheriff or a commissioner. The master and receiver are representatives of a court of equity just as a marshal or a sheriff is a representative of a court of law.

Howard v. Beacon Hill, 9 Del. Ch. 232, 80 Atl. 805;

Cressler v. Trust Co., 107 N. E. 68;

Rice v. Ahlman, 126 Pac. 66;

Stasser v. Gar., 78 N. E. 987;

Pilliod v. Rwy. Co., 46 Ind. 719;

Minning Co. v. Mason, 145 U. S. 362;

Clark on Receivers, Sec. 591.

The sale by the Receiver being a judicial sale even though the lease was not assignable by the lessee, it becomes assignable by operation of law even without the lessor's consent.

Clark on Receivers, Sec. 601;

Zweitusch v. Luehring, 156 Wis. 96;

Smith v. Putnam, 3 Pick. 220.

But the respondents contend that the Receiver takes no title and when he passes title he passes it as the agent of the corporation and his act is the act of the corporation. This argument, however, is based on two fallacies.

The first fallacy is that it completely neglects and ignores the theory of judicial sales as outlined hereinabove. True, the Receiver gets no title, but by the same token the sheriff selling under execution sells without obtaining title, yet no one would argue that the sale by the sheriff is not one by operation of law. As an officer of the court he presumes to pass a title which was never devolved upon him.

See *Tiffany, Landlord & Tenant*, page 907;

Willison v. Watkins, 28 U. S. 50;

Joslin v. Irvine, 50 N. J. Law 39.

The sheriff selling by virtue of a *fi. fa.* issued to him in a foreclosure suit gets no title and yet passes the same by operation of law. The master who makes a deed for the court of chancery has no title and yet in all of these instances the courts repeatedly and from time immemorial have held that the title passes, not as the act of the party whose title is being divested, but by operation of law. What difference do the respondents show between a sale by a court of equity in a receivership proceeding and a sale by a court of equity or a court of law in other proceedings? We are unable to find any logical basis for such a difference.

The second fallacy in the argument of respondents is found in the statement that the Receiver when he acts does so as the agent or alter-ego of the corporation. The cases almost unanimously in dealing with the functions of a chancery receiver hold that the receiver is the arm of the court. On this point the language of Justice Rogers in the case of *Durand & Co. v. Howard & Co.* (C. C. A. 2nd Circuit N. Y. 1914, 216 Fed. at 587), is most clear. He says:

"The power of a court of equity to appoint a receiver has long been recognized

as one of as great utility as any which belongs to the court. It is exercised to prevent fraud or to save the subject of litigation from material injury or to rescue it from inevitable destruction. A receiver is appointed when it appears necessary to do so to preserve the rights of the parties interested in it. This was the purpose of the court in the appointment of the receivers in this cause. The intention was to prevent injury to creditors by a slaughter of assets through forced sales and also to prevent preference among creditors. This may well be kept in mind in passing upon the question which is presented. *The receivers have not been appointed for the benefit of any particular party but upon a principal of justice and for the benefit of all parties interested. These receivers are the representatives of the court and of all parties in interest. They have been put in possession of this property because the interests of justice can in this way be best secured. The receivers are but the arms and the hands of the court and part of the machinery of the court to work out the ends of justice. The property of which they have the possession is in custodia legis. It is elementary that the receivers have only such power and authority as are given them by the court and that they cannot be sued touching the property in their charge without the court's consent. It is said that the landlords have not consented in writing or otherwise to any assignments of the lease to the receiver * * *. And we do not regard the covenant against assignment as at all material for two reasons. The first is that such a covenant is not broken when the assignment is not voluntary but is done by operation of law. Taylor, Landlord & Tenant, section 408. In this case there has been no voluntary assignment of the lease by the lessees."*

In the case of *U. S. v. Whitridge*, 231 U. S. 144, at 149, the court speaking in relation to the

chancery receivers and the payment of an excise tax by them for the privilege of doing business, says:

“And we are unable to perceive that such receivers are within the spirit and purpose of the act any more than they are within its letter. True, they may hold for the time all the franchises and property of the corporation excepting its primary franchise of corporate existence. In the present case the receivers were authorized and required to manage and operate the railroads and to discharge the public obligations of the corporation in this behalf. *But they did this as officers of the court and subject to the orders of the court; not as officers of the respective corporations nor with the advantages that adhere in corporate organizations as such. The possession and control of the receivers constituted on the contrary an ouster of corporate management and control with the accompanying advantages and privileges.*”

If the receivers are the agents of the corporation and if the business they do is a business done by the corporation and for the corporation, how can it be said that the corporation is not exercising its functions and therefore is not liable to a tax for the privilege of doing business, and therefore the receivers should pay such tax. It would seem to us that the two contentions cannot be sustained side by side. It seems clear that if the receivers are not liable for an excise tax because they do business for the court, then a sale by the receivers is a sale by operation of law. On the other hand, if a sale by the receivers is not a sale by operation of law but a voluntary sale by the corporation, then the receivers are exercising the business powers of the corporation and should be liable for the tax imposed upon corporations for the privileges of doing business.

Respondents also point to the fact that the corporation's signature is appended to the assignment in this case and argue from that, that it was a voluntary assignment. The answer to that contention is that the appending of the corporate signature was a nugatory act and of no effect. The Receiver could have made this assignment without the signature of the corporation even had the corporation not joined. It was not ordered or required to join in the assignment. The reason it joined in the document is because the Receiver undertook in certain instances to indemnify the purchaser against certain losses or liabilities and the Receiver required the corporation to bind itself on this point. See case, page 38, lines 39, etc. If the signature of the corporation had been essential to the validity of this assignment, the corporation would have been compelled by order of the court to join in the assignment.

An examination of the order of January 30, under which this assignment is made, shows the following:

"It is on this 30th day of January, 1925, ordered that the said receiver be authorized to accept the said offer of the Broad & East Jersey Realty Company as set forth in said petition and that the said receiver be authorized to enter into an agreement satisfactory in form to said receiver with said Broad & East Jersey Realty Co., a corporation, to sell and assign the said lease for the sum of \$6,000.00 to be paid as set forth in said petition."

Not a word about the corporation mentioned. The Court orders the Receiver to assign; the Receiver does assign. We say the joinder of the corporation was immaterial and nugatory so far as the question of assignment was concerned. If the signing by the corporation had any effect

whatsoever, it was merely in connection with the covenants that the Drug Stores Corporation would not in the future do anything to jeopardize this lease after it was assigned, for, as has been noted, the corporation had no right to deal with this property after the appointment of the Receiver and it cannot pass any title thereafter. The functions of the corporation were suspended. It had been enjoined from acting with relation to its property. After the appointment of a receiver, the corporation cannot pass title to any of its property and any attempt by it to do so is nugatory.

In the case of *Lynnville v. Hadden*, 88 Maryland 594, the court says this must necessarily be so, otherwise both the receiver and the board of directors will be competent to exercise the rights, privileges and franchises of the corporation and needless confusion would result.

Since the corporation could not transfer the property after the appointment of the receiver, any attempt by it to do so was an empty gesture and had no effect upon the validity or invalidity of the assignment (See Cook on Corporations, section 866), and therefore can have no effect on the question of whether this assignment was a voluntary one or an assignment by operation of law.

We submit, therefore, that this assignment, being one by a receiver under order of the court, is a judicial assignment and one by operation of law and therefore not in violation of the covenant contained in the lease in question, which covenant applied solely to voluntary assignments made by the corporation of its own free will.

POINT VI.

The argument that because an equity receiver stands in the place of the corporation he has, therefore, no greater property rights than the corporation, does not in any way affect the issue before us because that rule of law applies only to the quantity of the title that an equity receiver can give and does not affect the right of the court to dispose of the property.

Respondents contend that because an equity receiver merely takes possession of the property as an officer of the court, he therefore stands in the place of the corporation and he thereby becomes a sort of an alter-ego of the corporation and can do only those things that the corporation might or could do and when he does them he acts as the agent of the corporation. In support of this contention, they relied on the case of *Bachfelder & Co. v. Bachfelder* (Mass.) The facts of that case are that the defendant sold to the Bachfelder Corporation a business and in the sale covenanted that he would not commence a competitive business. The corporation subsequently became insolvent and the business of the company was sold by the receiver. The defendant then attempted to start a business in violation of the restrictive covenant in his original sale. In an action to restrain him from continuing with the competitive business, the court held that the purchasers from the receiver acquired from him everything that the corporation owned, including the advantage of this restrictive covenant.

That case and the language in that case in no way refers to the question here at issue. It does not in any way tend to limit the court's rights to exercise its powers of sale. It merely

says that when the court does sell through the medium of its receiver, it sells everything the corporation owned.

Nor is there anything opposed to our view in the case of *Continental Candy Co., Bankrupt, supra*. In that case the court merely decides that where a receiver is appointed over a corporation, he must pay any franchise tax but is not liable for an excise tax for the right to do business. He must pay the franchise tax because the appointment of the receiver does not in itself dissolve the corporation but he is not liable for the excise tax because his appointment abrogates the functions of the corporation and it is the court through him that continues to carry on the business and not the corporation. We think that this case in a measure supports our own contention that when the court sells the assets of the corporation, it sells it not as an act of the corporation but as its own act with which the corporation has nothing to do and which the corporation can in no way avoid.

Conclusion.

We submit that the assignment in this case is an involuntary assignment made by operation of law in a proceedings *in invitum* the corporation, which proceedings were without the connivance or fraud of the corporation and which assignment the corporation was powerless to avoid and said assignment therefore did not violate the covenant in this lease contained and that the judgment below should be reversed.

Respectfully submitted,

LEBER & RUBACK,
Of Counsel with Appellants.

New Jersey Court of Errors and Appeals

JAMES N. PAPPAS and PETER J.
TUTULIS,

Plaintiffs-Respondents,

vs.

BROAD & EAST JERSEY REALTY
COMPANY,

Defendant-Appellant.

*Appeal from
Judgment for
Plaintiffs in
Ejectment.*

*Union
Circuit.*

*Heard Before
STEIN,
C. P. J.*

*On
Stipulated
Facts.*

BRIEF FOR RESPONDENTS.

(Italics, etc., unless otherwise noted, mine.)

This is an ejectment suit brought for the recovery of property at the northeast corner of Broad and East Jersey streets, Elizabeth, together with mesne profits and damages. The case was referred to the Hon. Alfred Stein, Judge of the Court of Common Pleas for trial. The facts were stipulated (p. 4).

The Court delivered an opinion (p. 104) and judgment was entered for plaintiffs for possession (p. 115). The opinion of the Court is full and complete and upon it I rely.

THE FACTS.

On August 1, 1919, the Merchants Land and Improvement Company, made a lease of the lands and premises to the National Drug Stores Cor-

poration, a corporation of Delaware. Respondents succeeded to the ownership of the fee.

That lease contained the following provision (p. 12):

“And it is further agreed between the parties hereto that the party of the second part will not assign this lease without the written consent of the party of the first part, its successors or assigns, under penalty of forfeiture and damages.”

The Court below held that there had been a breach of this clause of the lease which gave respondents the right to forfeit the lease.

The facts upon which the forfeiture arose are:

On December 19, 1924, a receiver was appointed by the United States District Court for the Southern District of New York of the National Drug Stores Corporation, the lessee. The proceedings were neither in insolvency nor bankruptcy but *solely in equity* and the type of the receivership established was that referred to in *Scattergood v. American Pipe and Construction Company*, 248 Fed. 23. On the same day the New York receiver was appointed ancillary receiver in the District of New Jersey (p. 18).

On January 30, 1925, the United States Court for the District of New Jersey, *without notice to respondents, lessors*, they not being parties to the suit nor brought into it, made an order directing the receiver in equity to accept an offer of the appellant to sell and assign the lease to it (p. 32).

On February 4, 1925, an assignment was executed by George W. Burleigh, as receiver of the National Drug Stores Corporation and *by the corporation itself* (p. 34).

Respondents had no notice of the assignment until on or about the 11th day of March,

1925, when, suspecting that there had been such an assignment but without real notice thereof, they served a notice on the appellant, which had taken possession of the lands and premises, demanding possession and stating:

“We have elected that the lease of said lands and premises shall come to an end and cease because of violations of the provisions of said lease by the lessee. These violations are stated in a notice heretofore served by us on or about the 5th day of January, 1925, upon the National Drug Stores Corporation and George W. Burleigh, receiver, and there is further violation upon which we insist that on or about the month of January, 1925, the said George W. Burleigh, receiver in equity of the National Drug Stores Corporation and the National Drug Stores Corporation without our written consent and without our knowledge, assigned said lease to you” (p. 42).

Thereupon, by summons tested March 12, 1925, this suit was instituted.

On March 28, 1925, George W. Burleigh, as ancillary receiver of the National Drug Stores, and the Broad and East Jersey Realty Company (the present appellant), filed their petition in the United States District Court for the District of New Jersey in the suit entitled “David D. Vincent, plaintiff, *v.* National Drug Stores Corporation, defendant,” applying for an injunction enjoining the prosecution of the ejectment suit and thereupon the respondents here were ordered to show cause before the United States District Court why the prayer of the petition should not be granted (pp. 45, 43). Such proceedings were had upon the petition as that on the 21st day of September, 1925, an order was entered in the United States District Court denying the application of the petitioners and

vacating the order to show cause and the injunctive restraint therein contained (p. 108).

ARGUMENT.

It has been held that an assignment of a lease made by a receiver appointed under the New Jersey act concerning corporations, or the assignment of a lease by a trustee in bankruptcy, is not a breach of a condition against assignment.

But the reasoning of the cases so holding does not apply to a receiver appointed in equity nor to a condition where the receiver appointed in equity *and* the corporation assign the lease.

The only case in New Jersey bearing upon the point is *Fleming v. Fleming Hotel Co.*, 69 N. J. Eq. 715, a decision by Vice-Chancellor Bergen. There was there involved a *statutory* receiver in insolvency and the Vice-Chancellor said:

“As to the second point, I take it to be well settled that a covenant not to sell or assign the lease is not broken where the assignment is by operation of law, and that an assignment of this lease by the receiver, as the agent of the law, to a purchaser of the leasehold interest, would not work a forfeiture. That the covenant under consideration only applies to voluntary sales, and is not subject to forfeiture unless the proceedings at law under which the leasehold interest is disposed of were voluntary and collusive with a view to defraud the landlord of his rights, is well supported by the authorities. *Jackson v. Corliss*, 7 Johns. 531; *Jackson v. Silvernail*, 15 Johns. 278, 280; 1 Mc Ad. Land & T. (Ed. 1900) Sec. 235; *Allen v. Bennett*, 1 Fed. Cas. 214; *Riggs v. Pursell*, 66 N. Y. 193; *Farnum v. Hefner*, 79 Cal. 575; 12 Am. St. Rep. 174; *Bemis v. Wilder*, 100 Mass. 446; and also *Stockton v. Mechanics and Laborers Savings Bank*, 32

N. J. Eq. (5 Stew.) 163, 169, where the Court said: 'The liability of the receiver in insolvency in such case is precisely the same as that of an assignee in insolvency or bankruptcy who may retain or surrender the lease according as it may seem most advantageous for the estate of the debtor.' "

The case has never, so far as I can ascertain, been approved or cited in this court or in any other court upon the point here in issue. To say the best, confining its application to a statutory receivership, it permits a disregard of contract obligations upon a very narrow construction of language.

It will be noted that the Vice-Chancellor relies upon *Riggs v. Pursell*, 66 N. Y. 193, but the case of *Riggs v. Pursell* has been expressly disapproved by this Court in *West Shore R. R. Co. v. Wenner*, 70 N. J. L. 233, in which case this Court held that a sale, under a mortgage foreclosure, voided a lease which contained a covenant against assignment and refused to consider that the sale, which *was claimed to be by operation of law*, was not a breach of the covenant. This Court said:

"In our judgment, a mortgage of the lease or estate carried out by the entry of the mortgagee or by a sale under the mortgage is an assignment and transfer within both the words and the intent of the covenant. We do not approve of the opposite view expressed by Judge Earl in *Riggs v. Pursell*, 66 N. Y. 193, which is at least counterbalanced by *Becker v. Weerner*, 98 Pa. St. 555."

This court indicated in the *Wenner* case that it did not approve, even in cases of forfeiture, such a narrow interpretation of words as to defeat the real intent of the parties. After all, in all cases, it is the intent which should govern.

The decision in the Fleming case must have been based upon the fact that by the 68th section of the corporation act "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 corporation shall be divested of the title thereto."

In other words, *by virtue of the statute* the receiver becomes vested, upon his appointment, with title to all of the property of the corporation and this, of course, includes leases and the title to these leases goes to him by *operation* of the statute or of the law.

And so in the case of a trustee in bankruptcy.

In *Gazley v. Williams*, 210 U. S. 41, 52 L. Ed. 950, the Supreme Court of the United States held that a sale by a trustee in bankruptcy, under order of Court, of his bankrupt's interest, as lessee in a lease of real property, is not a breach of a condition in such lease imposing a forfeiture if the lessee assigned the lease or if the lessee's interest should be sold under execution or other legal process without the lessor's written consent. And the theory of the case is as stated by the Supreme Court:

"All that has followed upon his bankruptcy is not by his act, but by the *operation of law, transferring his property to his assignees.*"

This case affirmed *Gazley v. Williams*, 147 Fed. 678, 14 L. R. A. (N. S.) 1119.

The theory of both of these classes of cases is that, by operation of law, *title goes*, in the case of State insolvency, to the receiver, and in the case of bankruptcy, to the trustee and that the transfer to the receiver and to the trustee is by operation of law.

It was however held in *Medinah Temple Co. v. Currey*, 162 Ill. 441, 53 American State Reporter, 320, 44 N. E. 839, that an assignee for the benefit of creditors under a statute could not assign a lease without breaching a covenant against assignment. The Court noted the fact that:

"We have held that a valid voluntary assignment under our statute transfers the title of all the assignor's property to the assignee."

And then the Court said:

"But it is claimed the transfer in the case of a voluntary assignment is by operation of law, and therefore, under the well-established rule of law, no breach of the assignor's condition. This position we regard as untenable. The act by which the title to the assigned estate is transferred from the assignor to the assignee is purely voluntary on the part of the former. Voluntary assignments for the benefit of creditors are transfers without compulsion of law. They are termed 'voluntary' to distinguish them from such as are made by compulsion of law, *as under statutes of bankruptcy and insolvency.* * * * Therefore, these authorities which hold that if the lessee makes an involuntary assignment the leasehold will pass by operation of law have no application here."

And see *Smith v. Goodman*, 149 Ill. 75, 36 N. E. 621.

A receiver appointed under the general equity power of a Court of Chancery, as was this receiver, is not in the position of a receiver appointed under the New Jersey statute concerning insolvency or of a trustee in bankruptcy. The receivership was like that involved in *Scattergood v. American Pipe and Construction Company*, 249 Fed. 23.

If appointed under the corporation act the receiver represents the corporation and its creditors and stockholders, he exercises all of the privileges and franchises of the corporation, has title to all of its property; becomes, to all intents and purposes, the corporation plus. The receiver appointed by the district court does not stand in the same position; he has, at most, custody and control over assets of which the corporation, as an entity, has been deprived; he has no title unless title has been conferred upon him by the corporate act. The corporation as such remains liable for all liabilities whatever the outcome of the litigation may be. Payments through the receivership reduce them only *pro tanto*.

The receivership in the instant case was, in effect merely to establish a moratorium.

The general rule with respect to ordinary Chancery Receivers is stated in 23 R. C. L. Title "Receivers" Sec. 57, p. 53:

"An ordinary chancery receiver is not, as a rule, vested with the legal title to the property. The utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property."

Section 60, p. 56:

"A receiver holds the property coming into his hands *by the same right and title* as the person for whose property he is receiver subject to liens, priorities, and equities existing at the time of his appointment. He becomes merely the assignee of the insolvent, and has exactly the same rights. He is not an innocent purchaser in any sense of that term."

And see 33 A. L. R. 489, 499, 3 A. L. R. 627, 12 A. L. R. 1079.

Section 61, p. 57:

"Since a receiver takes the claims in favor of the estate *subject to all the equities* between the parties, it is the well settled general rule that against a demand of the receiver the debtor is entitled to set off a claim in his own favor existing at the time when the receiver's title takes effect."

And section 66, p. 60:

"The general rule is well established that a receiver cannot ordinarily, through summary proceedings, take into custody property found in the possession of strangers to the record claiming adversely, and if he does so he will be liable individually therefor. The principles upon which the cases announcing this rule generally rest are *that the receiver merely stands in the place of, and has no greater rights than, the party over whose property he has been appointed receiver*; that everyone is entitled to his day in court; and that summary proceedings are not suitable to try conflicting claims to title."

In *Quincy, etc. R. R. Co. v. Humphreys*, 145 U. S. 682, 36 L. Ed. 632, the question came before the Supreme Court of the United States as to whether, upon the appointment of a receiver in equity, of a railroad company, the receiver became vested with title to a lease so that he became liable upon its covenants, etc. The Court said:

"It is not asserted that these receivers became the assignees of the unexpired term of the leasehold estate, with the right to dispose of it, but it is claimed that because they took possession of the railroad of the Quincy Company and held and operated it until August 1, 1885, they became liable to the extent of the rental up to that time. *But*

the receivers were not statutory receivers, nor did they occupy identically the same position as assignee in bankruptcy or insolvency and the like. They were ministerial officers appointed by the Court of Chancery to take possession of and preserve pendente lite the fund or property in litigation; mere custodians? coming within the rule stated in *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223, 236, where this Court said: 'A receiver derives his authority from the act of the Court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession in the property.'"

"As observed, in relation to such a receiver by the Supreme Court of Maryland, in *Gaither v. Stockbridge*, 67 Md. 232, 234, 8 Cent. Rep. 789, cited by counsel for appellees: 'It is manifest that the scope of his duties and powers are very much more restricted than those of an assignee in bankruptcy or insolvency. In the case of an assignee in bankruptcy, *the law casts upon such assignee the legal title to the unexpired term of the lease, and he thus becomes assignee of the term by operation of law, unless from prudential considerations, he elects to reject the term as being without benefit to the creditors. But not so in the case of receivers, unless it be, as in New York and some of the other states, where, by statute, a certain class of receivers are invested with the insolvent's estate, and with powers very similar to those vested in an assignee in bankruptcy. Booth v. Clark*, 58 U. S. 17 How. 331; 15 L. Ed. 167. The ordinary chancery receiver, such as we have in this case, *is clothed with no estate in the property, but is a mere custodian of it for the court; and, by special authority, may become an officer of the court to effect a sale*

of the property, if that be deemed necessary for the benefit of the parties concerned. If the order of the court, under which the receiver acts, embraces the leasehold estate, it becomes his duty, of course, to take possession of it. *But he does not, by taking such possession, become assignee of the term*, in any proper sense of the word. He holds that, as he would hold any other personal property involved, for and as the hand of the Court, and not as assignee of the term.' "

In other words, the receiver is directed to *take possession* of the leasehold; he does not get title to it; he does not become the assignee of it. In dealing with it he does so as the arm of the court and as such he *can only deal with it as the lessee could*. He is authorized, as the arm of the court, to perform such acts *as the lessee could perform*, and he acts *in the name of the lessee*, and, in *this case, the lessee actually joined in the assignment*; not being vested with title to the lease, as assignee, he does not therefore become an assignee by operation of law, and *the title to the lease is in nowise changed by operation of law*; the title to the lease remains exactly where it was, to wit, in the lessee; the lessee is deprived of power to assign it by the order of the Court; the receiver may be directed to assign it, *but when he does he does not transfer a title vested in him by operation of law, the person to whom he assigns the lease takes the title from the lessee directly*.

The general rule is also stated in Fletcher on Corporations, sec. 5282, Vol. 8, p. 8901:

"The general rule is that a Chancery receiver does not, merely by virtue of his appointment, take the legal title to the corporate property but that a statutory receiver does take the legal title."

Fletcher also says, sec. 5293, that

“the general rule is that the appointment of a receiver does not preclude the right of third persons to sue the corporation, provided such actions are not enjoined by the order of appointment and provided the corporation is not dissolved or the receiver appointed in a suit for dissolution.”

The Supreme Court of the United States in *Chemical National Bank v. Hartford Deposit Company*, 161 U. S. 1, 40 L. Ed. 595, had before it the question of the effect of the appointment of a receiver for a National Bank. In that case there was a lease. The receiver did not adopt it. Suit was brought in a State court against the corporation, notwithstanding the receivership, for damages, the property having been re-rented at a less rental and judgment went against the corporation. With respect to the effect of the appointment of a receiver of a National Bank the Supreme Court, quoting Mr. Justice Waite delivering the opinion in *Rosenblatt v. Johnston*, 104 U. S. 462, 463, 26 L. Ed. 832, 833, said:

“ ‘Such property and assets, in legal contemplation, still belong to the bank, though in the hands of a receiver, to be administered under the law. The bank did not cease to exist on the appointment of the receiver. Its corporate capacity continues until its affairs are finally wound up and its assets distributed.’ ”

The Court affirmed the judgment against the bank.

A receiver may either adopt or reject a lease. If he adopts it he adopts it with all of its terms and conditions.

Fletcher on Corporations, sec. 5291, Vol. 8.

In *Link Belt Machinery Co. v. Hughes*, Supreme Court of Illinois, 174 Ill. 155, 51 N. E. 179, the Court said:

"But in a case where the lease or contract is, of itself, a thing of value, and the receiver, under the order of the Court, takes possession of the premises, and conducts the business which the insolvent had been unable to continue, and, without any act of disaffirmance or notice to the owner of the premises, indicating that he would not be bound by the contract of terms of the lease, continues to hold the premises, and conduct the business under the order of the Court, receiving all the benefits of the possession of such premises, he has not the right to repudiate the contract, and pay rent for the premises only on the basis of *quantum meruit*."

In *Batchfelder & Co. v. Batchfelder*, Supreme Court of Massachusetts, 107 N. E. 455, the Court said:

"The title acquired by the purchasers at the receiver's sale, which was confirmed by the court, and of the plaintiff who claims under them, is in effect the same as if the corporation had wound up its affairs and made the transfer. (Citing cases.) And the rights of the parties are commensurate with the scope of the defendant's contract with the company which he organized."

In the matter of *Continental Candy Company, Bankrupt, ex parte People of the State of New York*, 291 Federal 773, the Court in holding that a trustee in bankruptcy was not liable for a

franchise tax imposed after he was appointed, said (p. 774):

"I need not consider the question of whether a receiver either in bankruptcy or in equity, would be liable to such a tax. Assuming that this is so, it is because a receiver *has no title, only possession*. He speaks in the right of the corporation of which he is in some sense, *an attorney in fact*. Even in suits, it is perhaps a mistake that we do not adhere to the more correct method of using the name of the corporation suing by its receiver. * * * His rights, generally speaking, are all those with which the corporation is still vested and *without the corporation's right to exist as such, he could not assert them.*"

The matter of the rights of a landlord under a lease with the National Drug Stores Co., was before the United States District Court in *Vincent v. National Drug Stores*, District Court, E. D. Pennsylvania, January 27, 1925, Vol. 3, 2 D., Federal Reporter, p. 505. In that case, the receivers were in possession under a lease. The lease contained the following provision:

"In addition to the said rentals, lessee agrees to pay all municipal taxes, water rents, and insurance on said premises during the term of this lease; the taxes to be paid on or before the 31st day of August of each and every year of the term."

There then followed a provision that if the lessee should fail to comply with the conditions of the lease the lease should become void. The National Drug Stores defaulted in the payment of taxes. The receivers were appointed and went into possession. There were taxes due. The landlord then gave notice that it exercised the option to terminate and demanded immediate possession. The receivers refusing to deliver possession application was made by the landlord

for an order directing them to deliver possession. The Court said:

"It is contended on the part of the receivers that, inasmuch as, under the covenant for payment of municipal taxes, such taxes are not included as rent, there has been no such breach as, under the terms of the leases, creates a forfeiture."

But the Court said:

"The agreement to pay the taxes was one of the covenants of the leases and has not been performed. Hence the lessor is at liberty, as it has done, to exercise its option and cause the termination of the lease."

The Court further noticed the nature of the case in which the receivers were appointed and said:

"The receivers are not parties to the sub-leases, but only acquire the rights of the National Drug Stores, Inc., in the lease. *Their rights rise no higher than those of the corporation.*"

The attempt of the landlord in that case was to protect subtenants. With respect to that attempt the Court said:

"If the corporation failed to protect its subtenants through its default under the covenants of the lease, it could not, in an action at law for forfeiture, defend against the results of its default by pleading the equity of its subtenants. * * * Equity follows the law, and, if the law would not allow the subtenants rights as a defense to a forfeiture of the lease, a court of equity will not interfere by depriving the landlord of its lawful right of possession, and compel it to bear the loss arising through sub-leases created without its consent."

Judge Runyon of the United States District Court for New Jersey delivered an opinion denying the relief prayed for by the appellant here

in the receivership proceedings and *inter alia* said:

“The receivership here involved is not one in bankruptcy, but in equity; not one designed primarily to be administered for the benefit of creditors, *but rather, through the agency of a virtual moratorium, for the benefit of stockholders.*

It is conceded that the corporation is a solvent one, and the receiver therefore took the corporate property into his hands for equitable administration, *but subject to all such antecedent or collateral conditions and equities as had burdened it while in corporate keeping, and endowed with no power regarding same in excess of that enjoyed by the corporation,* except as the receivership stayed the prosecution of adverse claims for the time being.

It appearing to the receiver that an assignment of said lease was advisable, and that the offer of the Realty Company was a suitable and proper one, application was made to this Court for permission to make said assignment, and authority therefore was given.

And at this point it seems but proper to state that at the time the various parties appeared before me to discuss the application for the order, it was recognized that the assignment of said lease might lead to litigation, and all the subsequent transactions were had with that possibility as a factor.

The litigation, apprehended at that time as a possibility, has since become a reality, taking the form of the ejectment suit in the New Jersey Supreme Court, looking to the ouster of the Realty Company, and a Chancery proceeding, designed to assist in the recovery of taxes and rent.”

Judge Runyon in this opinion drew the distinction between the powers of a receiver appointed under the statute or of a trustee in bankruptcy and a receiver in equity.

APPELLANT'S CONTENTIONS.

Counsel persist in likening the sale by the receiver to a sale under execution.

Western cases are cited to the effect that a sale under an execution is not a breach of a covenant against assignment, but every case which has reached this result has been decided upon the ground that *title passes by operation of law*, and, substantially, upon the ground that, when the landlord makes a lease, he must contemplate that, at some time or another, his lessee may contract debts and creditors may become interested in his property, and, so contemplating, if he desires protection against such a situation, must expressly provide for it in the lease.

As the California court said in *Farnum v. Hefner*, 79 Cal. 375, 12 Am. St. Rep. 174, at p. 177:

"If the landlord desires to avoid such involuntary transfer of the leasehold interest of the tenant, he may provide expressly in his lease that such transfer of the property shall work a forfeiture, and the same will be effectual;" citing cases.

But there is a forfeiture, where as the California Court says:

"* * * it appears that the judgment and sale has been submitted to in bad faith on the part of the lessee, or where he voluntarily places himself in such a position that a transfer must result, as, for example, where he deposits the lease as security, or gives a warrant of attorney, whereby he may be dispossessed by the creditor; *Doe v. Hawke*, 2 East 553. But this is placed upon the ground that the assignment in such cases must be regarded as voluntary."

Counsel has argued that there is an analogy between the act of the receiver in transferring a

lease and the act of a sheriff under an execution sale. He says the sheriff transfers a title although it has not devolved upon him and that it is held that his act in transferring is by operation of law and counsel refers also to a sale by a Master in Chancery. Underlying every execution sale is a liability fixed by the law *and the right to have title passed out of the debtor rests upon the law*. The law says that title shall pass. The deed of the sheriff is but *evidence* of the passing of title actually passed by operation of law and so with a sale by a Master in Chancery where the proceedings are *in invitum* and the decree is analogous to a judgment at law, *but* will it be contended that a Master's deed in partition proceedings will convey any higher right than the parties had? and will it be contended that, if two persons hold a lease as tenants *in common*, and a proceeding is brought to partition those rights that a sale on such proceedings would not be a breach of a covenant not to assign?

Counsel below argued that a sale under a foreclosure of a mortgage does not violate a provision against assignment and cited western cases to this effect. It has been otherwise decided by this Court in *West Shore R. R. v. Wenner*, 70 N. J. L. 233.

But all of these cases, as well as those holding that a sale by a trustee in bankruptcy does not breach a provision against assignment, (*Gazley v. Williams*, 147 Fed. 678, 14 L. R. A. (N. S.) 1119), are beside the mark, for they all rest upon the proposition, as does *Fleming v. Fleming Hotel Co.*, 69 N. J. Eq. 715, that the *title passes by operation of law*, i. e., in each instance by *force of the statute*; in the case of an insolvent corporation *the statute passes title* to the re-

ceiver; in the case of a trustee in bankruptcy *the statute passes title to the trustee*; in the case of a sale under execution *the statute passes title to the purchaser at the execution sale* and the deed by the sheriff is but an evidence of title; and they likewise rest upon the proposition that when a landlord makes a lease he must contemplate that his lessee may contract debts and that creditors may resort to the ordinary legal remedies provided for by statute and, knowing this, he should, if he so desires, protect himself by proper words in the lease.

This Case is Entirely Different.

The proceeding is not in insolvency and is not, in fact, *in invitam* the corporation. The corporation *consented* to the receivership. It merely *transferred the operation of its business to the United States District Court*. It is conceded that the corporation was solvent. The receivership was voluntary and similar to that considered by the Court in *Scattergood v. American Pipe and Construction Company*, 249 Fed. 23.

Under these circumstances, the Court has no more power and no more rights, with respect to third parties, than the corporation itself had. The Court acts as the agent of the corporation. The *only* right which the Court has, in cases of this kind, which the corporation has not, is to, *while it conducts the business of the corporation*, enjoin the enforcement of legal remedies against the corporation, or, in other words, *it has the right to establish a moratorium*, and that is the reason why resort is had to the Court.

The receiver takes the property of the corporation charged with all equities and subject to all disabilities under which the corporation

labored and it is beyond the power of the Court to transfer that which the corporation itself could not transfer. If it were otherwise, corporations, by coming into Court for the purpose of having these moratoriums established, *could create property rights in themselves.*

If the receiver can be permitted to disregard covenants in the lease against assignments, the result will be that a corporation, holding such a lease, perfectly solvent but in a condition where it is temporarily embarrassed, may have receivers appointed for it, not for the purpose of dissolution but for the purpose of *conserving the assets* until they can be turned back to the corporation when the emergency has passed away, for the purpose of establishing a moratorium in effect (and that is this case); these receivers may then transfer the lease to a third party, disregarding the contract between the parties and the covenant against assignments; the emergency may pass and the receivers may be discharged and the corporation become re-posessed of its property (*in the meantime having realized money for an assignment of a lease forbidden by its contract with the lessor*) or further still the third party may re-assign the lease to the corporation and the corporation, thus re-invested with its property, may hold the lease free from the covenant against assignment.

The essential difference between the two classes of receiverships is that a receivership in insolvency is for the benefit of *creditors*, whereas a receivership as in the instant case, is for the ultimate benefit of *stockholders*. In cases such as here involved the theory is that the company is solvent and that *the creditors are secure*, but that *the stockholders will be injured* if the property is permitted to be taken piecemeal, and

it is contemplated that, after the Court has administered the property under its moratorium, the property will be turned back *to stockholders*. The persons therefore primarily interested in this kind of a receivership *are stockholders* who are attempting to conserve their assets. *The stockholders are the corporation*. To permit a receiver in this kind of a case to assign a lease, where there is a provision against assignment, *would be to permit the corporation itself to disregard its own contract for the benefit, not of its creditors, but of its stockholders*. Counsel begged the question below when he said that to hold that the receiver cannot assign the lease without breaching the covenant against assignment, would be to hold "*that (the United States District Court) may order its receiver to take possession of the leasehold estate, and yet not dispose of it, because to dispose of it would be to void the very thing that the Court attempted to assign.*" The question is what are the rights of the *corporation*? The Court had the power to take the leasehold estate into its possession. *It had the power to hold the leasehold estate as the corporation held it*. When it was through with its administration, it had the power to return the lease and the corporation would become re-possessed of the leasehold estate. That is a substantial power. It could not dispose of it because the corporation itself could not dispose of it. The theory of the kind of an action in equity here involved is that the Court holds the property for the benefit of the corporation.

One might as well argue that, if the corporation owned real estate subject to a restriction upon its use or sale, the Court could order a sale, free of the restrictions, or, in other words, create property rights out of nothing.

Counsel seems to treat the power of the Court to take property into its possession as embracing power to dispose of that property. He fails to draw the distinction between the property and the right of the corporation *in* the property. The power of the Court to *take* property belonging to a corporation into its possession does not warrant the Court, with respect to third parties, in *enlarging* the right of the corporation *in* that property. What the Court has the power to do, having taken property into its possession is to dispose of the *right of the corporation in that property*. It has no right, as against third parties, to enlarge the interest of the corporation therein. True it may, under some circumstances, sell property free and discharged of *liens*, but it cannot sell property free and discharged of an adverse title therein. What we are dealing with here, when we are considering the right of the landlord, is not a lien but an adverse title, not *to the lease* but *to the property*.

To permit the corporation and its stockholders to resort to this kind of an equity receivership to get rid of the covenant in the lease against assignment would be to permit the corporation and its stockholders to take advantage of their own wrong.

Conclusion.

The decision of the United States District Court for the Eastern District of Pennsylvania in *Vincent v. National Drug Stores*, Vol. 3, 2nd Edition, Federal Reporter 505, the receivership here involved, expressly held that the rights of the receiver could not rise any higher than the rights of the corporation. I submit that the right of the landlord to forfeit because of the assign-

ment by the receiver is not controlled by *Fleming v. Fleming Hotel Co.*, 69 N. J. Eq. 715, because that involved a statutory receivership where title passed by operation of law, nor by *Gazley v. Williams*, 210 U. S. 41, 52 L. Ed. 950, because, in that case, also title passed by operation of law, but that the right is controlled by the long line of cases holding that in an equity receivership, the rights of the Court and of the receiver can rise no higher than the rights of the corporation and by the case of *Rosenblatt v. Johnston*, 104 U. S. 462, 463, 26 L. Ed. 832, 833, as well as *Batchfelder v. Batchfelder*, Supreme Court of Massachusetts, 107 N. E. 455, in which latter case the Court said:

“The title acquired by the purchasers at the receivers’ sale, which was confirmed by the Court, and of the plaintiff who claims under them, is in effect the same as if the corporation had wound up its affairs and made the transfer.”

It is respectfully submitted that the judgment should be affirmed.

MERRITT LANE,
Of Counsel,
Respondents.

