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Notice of Appeal.

(Filed May 29, 1930.)

In Chancery of New Jersey

Between

ARNOLD J. WALSER, Receiver of James Billington & Son, a corporation, *et al.*,

Complainants,

and

NORTHERN VALLEY BUILDING CORPORATION,

Defendant.

70—28.
On Bill, &c.

PLEASE TAKE NOTICE that Arnold J. Walser, Receiver of James Billington & Son, a creditor of the above named defendant corporation, and a party in interest in these proceedings, appeals to the New Jersey Court of Errors and Appeals, of last resort in all causes, from the order of the Chancellor, made on the advice of the Honorable John J. Fallon, Vice-Chancellor, bearing date May 29th, 1930, and from each and every part thereof, which said order orders that Charles M. Egan, Receiver, forthwith pay out of moneys in his possession from rents of the defendant corporation's property, 1929 taxes due to the City of Englewood on the said property.

Dated May 29th, 1930.

GROSS & GROSS,
Solicitors of Arnold J. Walser,
Receiver of James Billington
& Son.

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

JOEL GROSS,
Of counsel with Arnold J. Walser, Receiver of James Billington & Son.

Petition of Appeal of Arnold J. Walser, Receiver of James Billington & Son, Respondent-Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

ARNOLD J. WALSER, Receiver of James Billington & Son, a corporation, *et als.*,
Complainants,

and

NORTHERN VALLEY BUILDING CORPORATION,
Defendant.

On Appeal from the Court of Chancery.

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Arnold J. Walser, receiver of James Billington & Son, the appellant in the above entitled cause, respectfully shows:

Petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice-Chancellor Fallon,

which said order bears date May 29th, 1930, and is made in a certain cause in said Court of Chancery wherein Arnold J. Walser, receiver of James Billington & Son and others are complainants, and Northern Valley Building Corporation is defendant, and which said order directs that Charles M. Egan, receiver of Northern Valley Building Corporation forthwith pay, out of the moneys in his possession from the rents of the defendant corporation's property, 1929 taxes due to the City of Englewood on the said property, and petitioner appeals the aforesaid order of the Chancellor on the ground that the same is erroneous, in the following respects:

1. The Lower Court erred in ordering that Charles M. Egan, receiver of Northern Valley Building Corporation, should forthwith pay, out of the moneys in his possession from the rents of the defendant corporation's property, 1929 taxes due to the City of Englewood on said property.

2. The Lower Court erred in failing to dismiss the petition of Central Storage & Realty Company, which said petition prayed for an order directing Charles M. Egan, Receiver of Northern Valley Building Corporation, to pay the said taxes out of the said moneys, forthwith.

3. The Lower Court erred in failing to deny the prayer of the petition for order directing the receiver to pay taxes.

4. The Lower Court erred in failing to adjudge that the said fund in the hands of the said receiver, were not subject to be charged with the payment of the 1929 taxes due to the City of Englewood against the property of the defendant corporation.

WHEREFORE your petitioner prays that the said order of the Chancellor, hereinabove referred to, dated May 29, 1930, may be wholly reversed, set aside and for nothing holden, and for such other relief in the premises as this Court shall deem proper.

GROSS & GROSS,
Solicitors and of Counsel with
Arnold J. Walser, Receiver of
James Billington & Son,
Respondent-Appellant.

Answer to Petition of Appeal of Arnold J. Walser, Receiver of James Billington & Son.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

ARNOLD J. WALSER, Receiver of James Billington & Son, a corporation, *et als.*,
Complainants,

and

NORTHERN VALLEY BUILDING CORPORATION,
Defendant.

On Appeal from the Court of Chancery.

The answer of Charles M. Egan, Receiver of Northern Valley Building Corporation, respondent, to the petition of appeal of Arnold J. Walser, Receiver of James Billington & Son, appellant.

Answer to Petition of Appeal.

This respondent, not admitting the truth of any or all the matters in said petition of appeal contained, for answer thereto, nevertheless, admits that an order was, on May 29th, 1930, made and entered in the Court of Chancery in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said order, this respondent begs leave to refer thereto when the same shall be produced.

This respondent is advised and believes that the said order is agreeable to equity; and he prays that the same may be affirmed, with costs, to be taxed in favor of this respondent.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Solicitors for and of counsel with Charles M. Egan, Receiver of Northern Valley Building Corporation.

Answer to Petition of Appeal of Arnold J. Walser, Receiver of James Billington & Son.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

ARNOLD J. WALSER, Receiver of James Billington & Son, a corporation, *et al.*,
Complainants,

and

NORTHERN VALLEY BUILDING CORPORATION,
Defendant.

On Appeal from the Court of Chancery.

The answer of Central Storage and Realty Company, a corporation, appellee, to the petition of appeal of Arnold J. Walser, Receiver of James Billington & Son, complainant-appellant.

This appellee not admitting the truth of all or any of the matters in the said petition of appeal contained for answer thereto nevertheless admits that an order was on the 29th day of May, 1930, made and entered in the Court of Chancery of New Jersey in the above entitled cause for the purpose in said petition mentioned and as therein set forth; but as to the substance and form of said order this appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said order is agreeable to equity; and it prays that the same may be affirmed with costs to be taxed in favor of this appellee.

J. FISHER ANDERSON,
Solicitor for and of counsel with Appellee Central Storage and Realty Company.

Order Appointing Receiver.

(Filed September 17, ~~1930.~~ 1928)

IN CHANCERY OF NEW JERSEY.

Between

ARNOLD J. WALSER, Receiver of James Billington & Son, a corporation, JAMES BILLINGTON and W. STANLEY BILLINGTON,
Complainants,

and

NORTHERN VALLEY BUILDING CORPORATION, a corporation,
Defendant.

} On Bill, &c.

This matter coming before the court upon the adjourned date of an order herein made, directing all creditors and stockholders of the defendant corporation to show cause before this court, why a receiver should not be appointed for it, the said defendant, and why a decree should not be made and entered herein adjudging the said defendant insolvent; and it appearing that service of the said bill of complaint and the affidavit thereto annexed and the order thereon made, has been duly made in accordance with the court's direction, and the court having considered the pleadings and affidavits herein filed, and having heard the arguments of Joel Gross, of Gross & Gross, solicitors of the complainant, Arnold J. Walser, Receiver of James Billington & Son, and of Harry Schwartz, of Lichtenstein, Schwartz & Friedenberg, solicitors for complainants James Billington and W. Stanley Billington, and of William Carey, of Wall, Haight, Carey & Hartpence, solicitors of the defendant Northern Valley Building Corporation; and due

deliberation being had; and it appearing to the court that the appointment of a receiver of all and singular the property and assets of every nature, character and description, wheresoever situated and however held and owned or controlled by the defendant, is necessary in view of the present inability of the defendant to meet its pecuniary obligations as they mature by either available funds or by an honest use of credit, and that unless such appointment be made, the property of the defendant corporation will be wasted and dissipated and sacrificed and that costly and interminable litigation will ensue and result, to the great and irreparable injury of the creditors and stockholders of the said Northern Valley Building Corporation; and it appearing further that the said defendant cannot resume its business operations with safety to the public and with advantage to its stockholders; and that it is insolvent; it is thereupon on this 17th day of September, 1928, on motion of Gross & Gross, and Lichtenstein, Schwartz & Friedenberg, solicitors of the respective complainants in the above entitled cause;

ORDERED, ADJUDGED and DECREED, that it is necessary that a receiver be appointed forthwith to take possession of the defendant's assets and of all of its property of whatsoever kind and description and wheresoever located. And it is further

ORDERED, ADJUDGED and DECREED, that the said defendant corporation, its officers and agents, be and are hereby enjoined and restrained from exercising any of its privileges and franchises and from collecting or receiving any debts or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects

except to the receiver hereby appointed, and the said defendant corporation, its officers and agents are hereby ordered to refrain and desist from doing or attempting to do any of the acts above mentioned. And it is hereby further

ORDERED, that Charles M. Egan of Jersey City, New Jersey, be and is hereby appointed receiver for the said defendant corporation with the full possession of all the powers and charged with the performance of all the duties defined and prescribed by law, and especially by an act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations" approved April 21st, 1896 and the amendments thereof supplements thereto. And it is further

ORDERED, that the said Charles M. Egan before entering upon his duties as receiver, take the oath prescribed by law and file his bond in the sum of Fifty Thousand Dollars conditioned for the faithful performance of his duties as receiver, which bond shall be approved as to form and sufficiency of the surety by a Special Master of this court, and shall be filed in the office of the Clerk of this Court as required by law. And it is further

ORDERED, that each and every of the officers, directors, agents, attorneys and employees of the said defendant Northern Valley Building Corporation, its agents, representatives or attorneys, and all other persons whomsoever, be and they are hereby required and commanded forthwith, upon demand of the said receiver, or his duly authorized agent or agents, to turn over and deliver unto the said receiver or unto his duly constituted representative, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts,

moneys or other property in its and their hands or under its or their control, and all books and records pertaining to the affairs and to the business of the defendant Northern Valley Building Corporation, and/or pertaining or relating to the conduct and management of any lands, buildings or premises hithertofore owned by the said Northern Valley Building Corporation. And it is further

ORDERED, that an injunction issue restraining and enjoining the said defendant Northern Valley Building Corporation, a corporation and its officers, directors, agents, employees, representatives or attorneys, and all other persons claiming to act by, through or under the defendant and all other persons whomsoever, and they and each of them be and they are hereby enjoined and restrained from interfering in any way with the possession or management of any part of the property over which the receiver is hereby appointed, or from interfering in any way with the prosecution or with the discharge of his duties, or from instituting or prosecuting any suit or action against the defendant company or said receiver, at law or in equity or otherwise or against the property owned by the said Northern Valley Building Corporation, or from proceeding upon any judgment or execution issued in any suit against the said Northern Valley Building Corporation or against its property or against the receiver without leave of this court, and any party in interest may apply for further directions herein. And it is further

ORDERED, that said defendant and all persons acting by or under its direction, and any and all other persons upon presentation of a true copy of

this order (which copy may be certified to be true by the solicitors of the complainant herein) deliver to the receiver herein appointed, any and all properties of the defendant, real, personal or mixed in their possession or under their control, and any books, records, documents or papers of the said defendant company or relating to its affairs. And it is further

ORDERED, that the said receiver be and he is hereby authorized to continue, manage, operate and conduct the business of the defendant until the further order of this court, with full authority to carry on, manage, operate and conduct the said business in his discretion, to buy and sell merchandise, supplies or stock in trade for cash or on credit and as may be deemed advisable by the said receiver; to consider and determine which of the contracts, leases or other contractual arrangements between defendant and any and all other persons and corporations he will renounce or adopt, and to adopt and perform such of said contracts, leases or other contractual arrangements of the defendant as he may deem desirable or necessary in the conduct of the defendant's business or in furtherance of its interests or the interests of its stockholders and/or creditors to adopt and perform. And it is further

ORDERED, that the said receiver be and he hereby is authorized in his discretion, to employ such managers, agents, employees, servants, accountants, attorneys and counsel as may, in his judgment, be advisable or necessary in the management, conduct or custody of the affairs of the defendant and of the assets thereof. And the said receiver is hereby authorized to make such payments and disbursements as in his judgment may

be needful or proper for the preservation of the properties of the defendant. And it is further

ORDERED, that the said receiver be and he is hereby authorized and empowered to institute, prosecute and defend, compromise, adjust, intervene in or become party to such suit, action, proceedings at law or in equity including ancillary proceedings in State or Federal Courts and in the Courts of any foreign country as may in his judgment be necessary or proper for the protection, maintenance and preservation of the assets of the defendant for the carrying out of the terms of this decree, and likewise to defend, compromise or adjust or otherwise dispose of any and all suits, actions or proceedings instituted against him as receiver or against the defendant, and also to appear in and conduct the prosecution or defense of any suit or adjust or compromise any actions or proceedings now pending. And it is further

ORDERED, ADJUDGED and DECREED that Northern Valley Building Corporation, the defendant in the above entitled action, has become and is insolvent in that it is unable to meet its pecuniary obligations as they mature by means of either available assets, or an honest use of its credit, and that Northern Valley Building Corporation, a corporation, defendant herein, has suspended its ordinary business and is not about to resume the same in a short time with safety to the public and advantage to its stockholders, and that the business of the said defendant has been conducted and is being conducted at a great loss and greatly prejudicial to the interests of its stockholders and creditors and with danger to the public. And it is further

ORDERED, that a copy of this order, certified to be

true by the solicitors for the complainants herein, be mailed to the stockholders and creditors of the defendant corporation within 3 days from the date hereof.

E. R. WALKER,
C.

Respectfully advised,

JNO. J. FALLON,
V.-C.

Petition for Order Directing Receiver to Pay Taxes.

(Filed May 21, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

ARNOLD J. WALSER, Receiver of James Billington & Son, a corporation, *et al.*,

Complts.,

and

NORTHERN VALLEY BUILDING CORPORATION,

Deft.

70—28.

The petition of Central Storage and Realty Company, a corporation, respectfully shows:

1. It holds a second mortgage on the defendant's property amounting to $125,000 on which a decree has been entered in the suit foreclosing the first mortgage.

2. The first mortgage has been foreclosed and

decree for sale entered the amount due thereon being upwards of $622,000.

3. Taxes for the year 1929 on the property covered by said mortgages and being the defendant's property are unpaid.

4. The receiver of the defendant has in his possession from rents collected from the property approximately $18,000.

5. Petitioner prays that an order be entered directing the receiver to pay said taxes out of said moneys forthwith.

CENTRAL STORAGE AND REALTY CO.,
By J. FISHER ANDERSON,
Solr.

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

J. FISHER ANDERSON, being duly sworn on his oath, says that he is solicitor for the within petitioner and that the within petition is true to the best of his knowledge and belief.

J. FISHER ANDERSON.

Sworn to and subscribed before me this 21st day of May, 1930.

EUGENE BLANKENHORN,
Master in Chancery
of New Jersey.

Affidavit in Answer to Petition for Order Directing Receiver to Pay Taxes.

(Filed May 24, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

ARNOLD J. WALSER, Receiver of James Billington & Son, a corporation, *et al.*,

Complainants,

and

NORTHERN VALLEY BUILDING CORPORATION,

Defendant.

70—28.
On Bill, &c.

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

1. I was, by decree made in a cause pending in the United States District Court for the District of New Jersey, wherein John Ludin is complainant, and James Billington & Son, a corporation, is defendant, appointed receiver of the said defendant corporation, pursuant to the statutes of the State of New Jersey thereto appertaining.

2. That as such receiver I did file with Charles M. Egan, the receiver of the defendant corporation herein, a claim in the sum of $373,750.79; that in addition to the claim filed by myself, other creditors have filed claims with the receiver, and I am informed that the time for filing claims has expired.

3. That the only substantial assets of this estate consist of the property mentioned in the petition herein filed, and of moneys in the hands of

the receiver. That the said receiver of the above named defendant corporation has in his possession the sum of approximately $18,000.00.

4. The taxes assessed against the premises mentioned, and for the payment of which application is now made by the mortgagee holding the second lien against the said premises, amounts to the sum of $15,165.56, exclusive of interest.

5. That a decree in foreclosure has been entered under the first mortgage encumbering the said premises, under which it is adjudged that there is due to the complainant a sum in excess of the sum of $622,000.00, and by the terms of which decree it is ordered and adjudged that the mortgaged premises be sold to raise and pay the amount so found due it, and to the petitioner herein, Central Storage and Realty Company, the sum of $125,000.00, and interest.

6. I have no means of protecting any equity that may exist in the said property under the said sale which is about to take place under said decree, and the receiver of the defendant corporation herein has no means of protecting any equity that may exist under the said sale.

7. During the past year and a half, a great deal of effort has been exerted in an attempt to find a purchaser for the said premises in order to realize upon the equity in the same, if any existed, but the said efforts have proved unsuccessful.

8. No application for the appointment of a receiver of rents for the said premises, and no demand for the possession of the said premises has

been made by the said Central Storage and Realty Company.

ARNOLD J. WALSER.

Sworn and Subscribed to before me this 22nd day of May, 1930.

THEODORE H. MATTIL,
Attorney at Law
of New Jersey.

Affidavit in Answer to Petition for Order Directing Receiver to Pay Taxes.

IN CHANCERY OF NEW JERSEY.

Between

ARNOLD J. WALSER, Receiver of James Billington & Son, a corporation, *et al.*,

Complainants,

and

NORTHERN VALLEY BUILDING CORPORATION,

Defendant.

70—28.
On Bill, &c.

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

HARRY WYCOFF, of full age, being duly sworn, on his oath, deposes and says:

I am a licensed real estate broker of the State of New Jersey, and have been such for the past ten years. I am the Secretary of Wycoff-Masten Co., Inc., realtor, which for some time maintained an

office at 12 Depot Square, Englewood, N. J., which office is two or three minutes' walk from property known as Dwight Manor Apartments, and concerning which the present application is made.

I have had considerable experience in the negotiations and the consummation of sales of real estate in Bergen County, particularly in Englewood, and my experience is confined to vacant ground and apartment house properties.

I have made inspections of the said property from time to time, and most recently, at the request of Gross & Gross, I made an inspection of the said property, and a study thereof, on Friday, May 23rd. Prior to this date, I made numerous inspections and appraisals thereof for other interests.

The property consists of a five-story and basement brick apartment house, semi-fireproof, consisting of ninety-six apartments, and contains approximately three hundred rooms, divided into apartments running from one to seven rooms, and the house is kept in excellent condition, well maintained, excellently operated, and the service therein rendered is in keeping with the nature of the apartment, and the character of the neighborhood.

The real estate market presently is in a condition of depression, especially so with regard to properties such as that being disposed of, and buyers can only be attracted by offers to sell at sacrificial prices.

I am fully familiar with the renting conditions of similar properties, in the same and similar neighborhoods, and from knowledge of those conditions, I believe it to be impossible under present conditions to increase substantially the rental income from the property.

I have made a study of the carrying charges of

the building, and my analysis thereof convinces me that even at the price of $700,000, an owner of the property would have great difficulty in making any profit out of his investment. My own opinion is that it was a mistake to have built the apartment at the present time, in that locality. In the first place, the land value is too high for an apartment. In the second place, demand for such apartments is not so great at the present time as to have warranted such a large apartment house in that locality. In the third place, rentals which must be charged, in order to make the venture profitable, are out of line with what tenants in Englewood could be expected to pay.

It is my mature judgment that if the property was sold through a normally negotiated sale, the maximum that could be obtained therefor, would be the sum of $700,000, and I cannot opine with regard to what the property would produce at a forced sale, except to say that it would produce considerably less than the said sum of $700,000.

HARRY WYCOFF.

Sworn and subscribed to before me this 23rd day of May, 1930.

THEODORE H. MATTIL,
Attorney at Law of New Jersey.

Affidavit in Answer to Petition for Order Directing Receiver to Pay Taxes.

IN CHANCERY OF NEW JERSEY.

Between

ARNOLD J. WALSER, Receiver of James Billington & Son, a corporation, *et al.*,

Complainants,

and

NORTHERN VALLEY BUILDING CORPORATION,

Defendant.

70—28.
On Bill, &c.

PERCY A. GADDIS, of full age, being duly sworn according to law, on his oath, deposes and says:

1. I am President of Percy A. Gaddis Company, real estate brokers, with offices at #562 Newark Avenue, Jersey City, N. J. I have been in the real estate business continuously for myself for the past thirty-seven years, purchasing, selling, managing and appraising all classes of property, including apartment houses in Hudson County and Bergen County, and other parts of the State of New Jersey. I am a member of the local, state and national real estate boards; I am President of the Hudson County Real Estate Board, and Chairman of the State Appraisal Committee.

2. I have appraised apartment houses in Englewood, Bergen County, New Jersey, particularly for the purpose of placing loans thereon and bond issues. I appraised the property known as Dwight Manor, upon which Central Storage & Realty Company holds a second mortgage, in December, of

1926, at which time I secured a loan for the owners of the property in the sum of $400,000.00.

3. In the latter part of 1926, I made an appraisal of an apartment house in Englewood, N. J., known as Tudor Hall, and on the basis of my valuation and appraisal, a bond issue of $590,000.00 was placed on the said property.

4. In September of 1928, at the request of Messrs. Gross & Gross, I did make an investigation into the value of the property known as Dwight Manor, and involved in this application. As a result of that investigation, I made an affidavit, which was filed in this cause, and I at that time said that it was my matured judgment that it would be difficult to dispose of the apartment house at a price of $750,000.00 at that time in a normally negotiated sale.

5. Since the date of the making of that affidavit, the real estate market for properties such as the property in question has changed considerably, and there is no market for apartment properties such as that in question, except at extreme sacrifice prices.

6. I am informed that in the suit of Chatham-Phenix National Bank and Trust Company, *et al. v.* Northern Valley Building Corporation, *et als.*, Chancery Docket 75-151, a decree in foreclosure has been entered under the first mortgage against the property in question, by the terms of which decree it is adjudged that there is due to the complainant in the said cause under its said mortgage, a sum in excess of the sum of $622,000.00, exclusive of allowances and costs. In addition to the said first mortgage so foreclosed, the property in ques-

tion is encumbered by the second mortgage in the sum of $125,000.00, held by the Central Storage & Realty Company, and by a third mortgage in the sum of $15,000.00.

7. I have a peculiar acquaintance with the property in question, having seen the lot before the building was constructed thereon, and having visited the premises while the same were in course of construction. My visits to the premises in question were quite frequent and during numerous trips to Englewood and neighboring towns, I noted these premises and observed the manner in which it was being erected, and particularly from the time that I secured the acceptance of a $400,000.00 loan referred to hereinbefore, my observations of the manner of the construction and the progress of the work of the building were quite detailed.

8. The building in question is in a neighborhood very suitable for apartment houses, and the building is erected upon a plot of ground about 217 feet in front with an average depth of 215 feet. Upon these lands is a well constructed five-story and basement, brick apartment house, semi-fireproof, consisting of ninety-six apartments, very well laid out, containing in the aggregate about three hundred and twenty-five renting rooms, and the same are served by four automatic electric elevators. I have made a study of the management and operation of the apartment house for the past two years. The house is very efficiently operated and ably managed, and is kept in very excellent condition, and the service afforded is in keeping with the nature of the apartment house.

9. The following is an approximate statement of income and maintenance based on the operation of the apartment for two years:

Gross rental received per annum		$75,000.00
CARRYING CHARGES		
Taxes	$15,165.56	
INSURANCE		
Fire, per year	3,172.00	
Liability, $10,000 and $20,000	98.50	
Elevators (4)	195.36	
MAINTENANCE		
Light and Power	1,500.00	
Fuel for heat and hot water supply	15,000.00	
Telephone	500.00	
Repairs and decoration—		
325 rooms at $10 each	3,250.00	
Twenty halls at $50 each	1,000.00	
Agents' commissions	6,250.00	
HELP		
Superintendent	2,180.00	
Two porters at $80 per month each	1,920.00	
Two doormen at $100 per month each	2,400.00	
Two doormen's uniforms	100.00	
One handy man at $100 per month	1,200.00	
Two women cleaners at $75 per month each	1,800.00	
Janitors' supplies	1,000.00	56,731.42
Actual income		$18,268.58

This amount will only show a net return of 6% on $305,000.00 without any allowance for obsolescence and depreciation.

10. Based upon my numerous inspections of the building, and upon a recent inspection made this week, a study of the rental income from all angles,

an analysis of the carrying charges, recognizing the efforts of the present management of the property to rent the same, I consider, from my knowledge of the market with regard to apartment rentals in Englewood, that as much as can be realized from this property is at present being realized, and upon my general experience, I have arrived at the conclusion above set out, and it is my best judgment and opinion that at a forced sale under a decree in foreclosure, the property will be taken over by the first mortgagee. It is my firm judgment and belief, after my observations as aforesaid, and as a result of my long experience, that this property would certainly not bring, at a forced sale, by an outside bidder, a sum in excess of the sum of $300,000.00. The payment of a larger sum would be the capitalization of a hope in the improvement of the real estate market and of renting conditions of the property, but under no present conditions can I, as the result of my experience, see a reasonable basis for the payment of any sum in excess of the sum of $400,000.00.

PERCY A. GADDIS.

Sworn and subscribed to before me this 23rd day of May, 1930.

THEODORE H. MATTIL,
Attorney at Law of New Jersey.

Order Directing Payment of Taxes.

(Filed May 29, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

ARNOLD J. WALSER, Receiver of James Billington & Son, a corporation, *et al.*,

Complainants,

and

NORTHERN VALLEY BUILDING CORPORATION,

Defendant.

70—28.

On Petition for Order Directing Receiver to Pay Taxes.

Central Storage and Realty Company, a corporation, having filed its verified petition herein by which it appears that it holds a second mortgage of $125,000 on the property of the defendant corporation known as the Dwight Manor Apartment property in Englewood, New Jersey, and that a decree has been entered in this court for the foreclosure and sale of the first mortgage on said property, on which first mortgage there is due upwards of $622,000, and the taxes for the year 1929 on the said property are unpaid, and that the receiver has in his possession approximately $18,000 from rents collected from said property, and praying in said petition that an order be made directing the receiver to pay said taxes out of said moneys in his possession, and

This matter coming on to be heard in the presence of David Friedenberg of Lichtenstein, Schwartz & Friedenberg, solicitors of Charles M. Egan, the receiver, and Joel Gross, of Gross &

Gross, solicitors of Arnold J. Walser, receiver of James Billington & Son, and the court having read and considered the affidavits of Arnold J. Walser, Harry Wycoff and Percy A. Gaddis in opposition to the petition and having considered the arguments of counsel,

It is on this 29th day of May, 1930, ORDERED that Charles M. Egan, receiver, forthwith pay out of the moneys in his possession from rents of the defendant corporation's said property, 1929 taxes due to the City of Englewood on said property.

E. R. WALKER,
C.

Respectfully advised

JNO. J. FALLON.

Vice-Chancellor's Conclusions.

COURT OF CHANCERY OF NEW JERSEY.

Chambers of
Vice-Chancellor JOHN J. FALLON
Jersey City, N. J.

May 24, 1930.

Joel Gross, Esq.,
15 Exchange Place,
Jersey City, N. J.

J. Fisher Anderson, Esq.,
15 Exchange Place,
Jersey City, N. J.

Charles M. Eagan, Receiver,
15 Exchange Place,
Jersey City, N. J.

Gentlemen:

I will advise an order requiring the receiver to make payment, from funds in hand, which he de-

rived through the rents of the property of Northern Valley Corporation (Docket 70, page 28), of the taxes charged against the property of said insolvent corporation for the year 1929. Mr. Joel Gross, in opposing, in behalf of Arnold J. Walser, receiver of James Billington & Son, the payment of said taxes from the funds in the hands of the receiver, relies on the case of Long Dock Mill & Elevator Co. *v.* Alpine, 82 N. J. Eq. 190. The cited case, in my judgment, is inapplicable to the matter *sub judice.*

I have this day filed affidavits which I received through the mail today from Mr. Joel Gross, with his letter to me of May 23rd.

The receiver should submit to me an order to effectuate the aforesaid purpose. The order should be presented to me as soon as possible in order that when signed the receiver will be authorized to make payment of said taxes and thus stop the running of interest or penalty thereon.

Respectfully,

JNO. J. FALLON,
Vice-Chancellor.

Order Denying Application for Stay of Carrying Out of Order of May 29th, 1930, Pending Appeal.

(Filed May 29, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

ARNOLD J. WALSER, Receiver of James Billington & Son, a corporation, *et al.*,

Complainants,

and

NORTHERN VALLEY BUILDING CORPORATION,

Defendant.

70—28.
On Bill, &c.

Application being made by Arnold J. Walser, Receiver of James Billington & Son, a creditor of the above-named defendant corporation, and a party in interest in these proceedings, for stay of the carrying out of the order herein made by the Chancellor on the advice of the Honorable John J. Fallon, Vice-Chancellor, bearing date this day, and which said order directs Charles M. Egan, Receiver of the above-named defendant corporation, to pay out of the moneys in his hands as such Receiver, municipal taxes due the City of Englewood for the year 1929, which said taxes are levied against the lands and premises owned by the said Receiver, and known and designed as Dwight Manor; and the matter coming on to be heard in the presence of David Friedenberg, of Lichtenstein, Schwartz & Friedenberg, of counsel with Charles M. Egan, Receiver as aforesaid, and of J. Fisher Anderson, of counsel with Central Storage

& Realty Company, a corporation, and of Joel Gross, of Gross & Gross, of counsel with Arnold J. Walser, Receiver as aforesaid, and the Court having heard the argument of counsel, it is on this 29th day of May, 1930,

ORDERED, that the application for stay pending appeal, of the carrying out of the order herein made on this day, directing payment of taxes, be and the same is hereby denied.

E. R. WALKER,
C.

Respectfully advised,

JNO. J. FALLON,
V.-C.

Order Granting Stay.

(Filed June 4, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

ARNOLD J. WALSER, Receiver of James Billington & Son, a corporation, *et al.*,

Complts.,

and

NORTHERN VALLEY BUILDING CORPORATION,

Deft.

70—28.
On Petition.

Application being made for a stay pending appeal of the carrying out of the order directing payment of taxes herein entered on May twenty-ninth, 1930, and it appearing that a petition for an order

directing Receiver to pay taxes was filed herein on May twenty-first, 1930; that answering affidavits were thereafter filed on May twenty-fourth, 1930, and that the order complained of was thereafter entered on May twenty-ninth, 1930; that an application to stay the carrying out of the said order pending appeal was denied, but sufficient reason appearing for the making of this order;

It is, thereupon, on this fourth day of June, 1930, on motion of Gross & Gross, Solicitors of Arnold J. Walser, Receiver of James Billington & Son, ORDERED that the execution and carrying out of the order directing payment of taxes by the Receiver of the Northern Valley Building Corporation, be and the same is hereby stayed and enjoined until June nineteenth, 1930, and until the other order of the Court of Errors and Appeals, upon condition, however, that application be made to the said Court of Errors and Appeals on June nineteenth, 1930, for stay pending appeal.

E. R. WALKER,
Chancellor.

New Jersey Court of Errors and Appeals

Between

ARNOLD J. WALSER, Receiver of James Billington & Son, a corporation,
Complainant-Appellant,

and

NORTHERN VALLEY BUILDING CORPORATION,
Defendant-Appellee.

On appeal from the Court of Chancery on Order Directing Receiver to Pay Taxes.

BRIEF FOR CENTRAL STORAGE AND REALTY COMPANY.

Statement of the Case.

Northern Valley Building Corporation, a corporation of the State of New Jersey, in the above cause in the Court of Chancery was adjudicated insolvent, and the Hon. Charles M. Egan was, by order of the Chancellor made on September 17, 1928, appointed receiver of said corporation (Case, pp. 7-13).

Central Storage and Realty Company at the time of making the order appealed from held a second mortgage on the real property of Northern Valley Building Corporation (an apartment house—its only asset) in the sum of $125,000, on which a decree had been entered in a suit in the Court of Chancery foreclosing the first mortgage, the decree for sale in said foreclosure suit fixing the amount

due on the first mortgage to be upwards of $622,000 and also fixing the amount due on the mortgage of Central Storage and Realty Company to be $125,000 and interest (Case, pp. 13-14).

Taxes for the year 1929 amounting to $15,165.56, which accrued during the receivership, on the property of the defendant corporation covered by said mortgages were unpaid and the said receiver of Northern Valley Building Corporation had in his possession rents collected from the said property approximating $18,000.

The foregoing facts as to the mortgage of the petitioner Central Storage and Realty Company, and the first mortgage, the taxes and the rents appear in the petition on which the order was made directing the receiver to pay the 1929 taxes (Case, pp. 13-14).

On May 29, 1930, an order was made in Chancery in the above cause directing the receiver to pay out of the rent moneys from said property in his possession the 1929 taxes due to the City of Englewood on the said property (Case, pp. 25-26).

The appellant's application to the Chancellor for stay of the foregoing order pending appeal was denied (Case, pp. 28-29).

From this order appeal was taken by Arnold J. Walser, receiver of James Billington & Son, a creditor of Northern Valley Building Corporation, and the Chancellor by order made June 4, 1930, stayed the execution of the said order directing payment of said taxes until June 19, 1930, and until other order of this Court upon condition that application be made to this Court on June 19, 1930, for a stay pending the appeal (Case, pp. 29-30).

On June 19, 1930, appellant applied to the Court of Appeals for an order that pending this appeal the execution of the order directing the receiver to pay the taxes be stayed.

By order of this Court made on February 13, 1931 (which does not appear in the State of Case), the application for stay pending this appeal was denied.

Entry of the foregoing order was made on February 13, 1931, on the application of the appellee, the appellant having failed to procure entry of the same. This Court in July, 1930, denied the stay pending appeal.

The taxes in question were paid by the receiver in July, 1930, shortly after the announcement by this Court of the denial of the stay pending this appeal.

The property in question has been sold at Sheriff's sale.

POINT I.

Equity requires a receiver of an insolvent corporation to pay out of the income of the corporation's property the operating expenses and charges including taxes arising during the receivership.

The appellant, a general creditor of the insolvent corporation, in all probability would not question the payment by the receiver, out of the rents of the apartment house, of the insurance premiums, water rents, coal, electricity, wages of necessary employees and other operating and preservation charges.

It must be conceded that all the foregoing are proper charges against the income of real property of an insolvent corporation, being operated by a receiver.

It would be most inequitable to permit a receiver to collect the rents and not pay the operating and preservation charges.

Failure to pay the insurance premiums would result in cancellation of the policies.

Failure to pay the water rents would result in shutting off the water.

Failure to pay for coal and electricity would shut off the supply and the tenants would move out.

Failure to pay the wages would result in the employees ceasing to work.

While failure to pay the taxes would not bring as quick results, yet if the receivership lasted long enough the result would be the loss of the property through a tax sale.

In other words, the taxes accruing during the receivership are just as truly an operating and preservation charge as are all the other items above mentioned.

The receiver having been appointed September 17, 1928 (Case, pp. 7-8), and being still in office on May 29, 1930, the date of the order directing payment of the taxes, it is apparent that the 1929 real estate taxes which he was ordered to pay arose, accrued, attached and became a lien during the receivership. The 1929 taxes were assessed as of October 1, 1928 (P. L., 1918, p. 848).

The sole question before the Court is:

> "Can a receiver of an insolvent corporation owning an apartment house collect and hold the rents and fail or refuse to pay therefrom real property taxes accruing during the receivership and after the appointment of the receiver?"

Equity requires that the receiver keep down and pay out of the income of the property he is managing the charges necessary to be paid to prevent the property from being incumbered otherwise than it is incumbered when the receiver takes over.

It is an axiom of all proper business management that all operating charges, including recurring periodic taxes, should be paid out of income when income is available.

While it is true that the mortgagees gain a benefit to the extent that the taxes accruing during the receivership are paid out of the rents collected by the receiver and the imposition of new paramount tax liens is thereby prevented, yet such benefit is not an inequitable or improper benefit.

The general creditors derive the same benefit. They are benefited by having the property keep the same lien status in the receiver's hands which the property had when the receiver took it over.

No greater benefit is derived by the mortgagees than that derived by the general creditors.

The benefit is the same because in case of sale the amount of the bid or the price obtained is affected to the same degree by the amount of the paramount liens.

The fact of whether or not the value of the property is more or less than the amount of the mortgage liens does not justify the creation out of rents of a fund for the general creditors of the insolvent corporation by failing to pay taxes accruing during the receivership and thus subjecting the property to paramount liens which were not on the property at the inception of the receivership.

The cases of *Stewart* v. *Fairchild-Baldwin Company*, 91 N. J. Eq. 86; *Myers* v. *Brown*, 92 N. J. Eq. 348, and *Henn* v. *Hendricks*, 7 Adv. Rept. 201; 144 Atl. 602 (not officially reported), do not touch the point at issue on this appeal because those cases deal solely with the efforts of mortgagees to obtain rents of the mortgaged premises accruing prior to the appointment of a receiver or prior to the mortgagee obtaining possession of the mortgaged premises.

The point at issue in this appeal is not the right of a mortgagee to rents of the mortgaged premises but the duty of a receiver of an insolvent corporation to pay out of income received by him the liens and charges accruing during the receivership.

In *Schaffer* v. *Hurd*, 98 N. J. Eq. 143, at 148, Vice-Chancellor INGERSOLL said:

> "It is the duty of a mortgagor to pay taxes and municipal liens and to keep down prior encumbrances,"

and he commented (p. 148) that in that decision of this Court in *Stewart* v. *Fairchild-Baldwin Co.*, *supra*, overruling the same case in Chancery, 90 Eq. 139, the above statement was not criticised.

The duty to pay the taxes is passed along to the receiver of the insolvent corporation.

> "They are the custodians of the property for the benefit of the litigants and the property in their hands should bear whatever tax burdens it would be subject to in the hands of the owners or litigants."
>
> *McFarland* v. *Hurley*, 286 Fed. 365 (C. C. A., 5th Circuit).

See also:

> *Coy* v. *Title Guarantee & Trust Co.*, 220 Fed. 90 (C. C. A., 9th Circuit).

> "There can be no doubt that property in the hands of a receiver of any court either of a state or of the United States is as much bound for the payment of taxes state, county and municipal as any other property. Persons cannot, by coming into this court and for the promotion of their interests, applying for and obtaining the appointment of receivers, obtain exemption from the paramount duty of a citizen."
>
> *Baltimore & O. Ry. Co.* v. *Pittsburgh C. & St. L. Ry. Co.*, 55 Fed. 701 (Ohio Cir. Ct.).

POINT II.

The order directing the payment of the taxes having been executed the appeal should be dismissed.

This Court having denied a stay pending this appeal and the order appealed from having been executed by the payment of the taxes the appeal should be dismissed.

Coryell v. *Holcombe*, 9 N. J. Eq. 650.

Respectfully submitted,

J. FISHER ANDERSON,
Solicitor for and of Counsel with
Central Storage & Realty Co.

APPEAL PRINTING CO., 22 THAMES ST., NEW YORK CITY

New Jersey Court of Errors and Appeals

ARNOLD J. WALSER, Receiver of James Billington & Son, a corporation, Complainant, *v.* NORTHERN VALLEY BUILDING CORPORATION, Defendant.	On Appeal from the Court of Chancery from Order Directing Receiver to Pay Taxes.

BRIEF OF APPELLEE CHARLES M. EGAN, RECEIVER OF NORTHERN VALLEY BUILDING CORPORATION.

In view of the decisions of the Court of Errors and Appeals in the case of *Crown* v. *Regna Construction Co.*, 106 N. J. Eq. 192, 150 Atl. Rep. 420, and in the case of *United Security Corp.* v. *Townsend*, 108 N. J. Eq. 268, the Receiver does not believe that it would be proper for him to take sides in the argument of this appeal, especially in view of the fact that the appellant, Arnold J. Walser, Receiver of James Billington & Son, and the appellee Central Storage & Realty Company, upon whose petition the order appealed from was made, are both before this Court on said argument.

The Court, in the *Crown case, supra,* stated:

> "In theory of law at least, a receiver has no part in his own selection, but stands as the representative of the court impartially between the parties."

In another part of its opinion, the Court, referring to the receiver, said:

> "He is to stand indifferent between the parties, and may not be heard, either in the court which appointed him or in the appellate court, as to the rightfulness of any order which is a mere order of distribution between the parties."

Although we have prepared a brief in behalf of the receiver with reference to the questions raised on this appeal, we do not feel that it is proper, under the circumstances, to file the same, but will print and file such brief if directed so to do by the Court.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Solicitors for and of Counsel with appellee Charles M. Egan, Receiver of Northern Valley Building Corporation.

PRESS OF FREMONT PAYNE, 80 Washington Street, New York City.

[7443]

New Jersey Court of Errors and Appeals

ARNOLD J. WALSER, Receiver of James Billington & Son, a corporation, *et al.*,
Complainants,

v.

NORTHERN VALLEY BUILDING CORPORATION,
Defendant.

BRIEF FOR RESPONDENT-APPELLANT.

Preliminary Statement of Facts.

On September 17th, 1928, Charles M. Egan was appointed statutory receiver of Northern Valley Building Corporation (State of Case, p. 7).

The only substantial asset of the estate over which the receiver was appointed consisted of a large apartment house in the City of Englewood, New Jersey, known as Dwight Manor Apartments (State of Case, p. 15).

The present appellant is a creditor of Northern Valley Building Corporation, having filed its claim with the receiver in the sum of $373,750.79, this being the balance due it for work performed for the Northern Valley Building Corporation, as general contractor in the erection and construction of the apartment house in question (State of Case, p. 15).

From the date of his appointment up until May 21st, 1930, the statutory receiver of Northern Valley Building Corporation operated the apartment house and completed it, and collected the rents, issues and profits thereof. On May 21st, 1930, he had in his possession as such statutory receiver the sum of approximately $18,000.00 (State of Case, p. 14). On the last-mentioned date, the property in question was encumbered approximately as follows: By a first mortgage, upon which there was adjudged to be due $622,000.00, exclusive of allowances and costs; by a second mortgage, held by Central Storage & Realty Company, the petitioner in the present proceedings, in the sum of $125,000.00; by a third mortgage in the sum of $15,000.00, and by taxes in the sum of approximately $15,000.00 (State of Case, pp. 21 and 22). To the last four mentioned items should be added interest, and since the making of the affidavit of Mr. Gaddis (State of Case, p. 20), substantial costs and allowances have been decreed in the proceeding for foreclosure of the first mortgage, all of which items considerably swell the aggregate of the encumbrances against the property as of May 21, 1930. Taking the figures as they appear both in the petition of the Central Storage & Realty Company (State of Case, p. 13) and in the affidavit of Mr. Walser (State of Case, p. 16) and in the affidavit of Mr. Gaddis (State of Case, p. 21), the amount of encumbrances against the premises on May 21, 1930, was at least $780,000.00.

On May 21, 1930, Central Storage & Realty Company filed its petition in the Court of Chancery (State of Case, p. 13), in which petition it recites that it is the holder of a second mortgage in the sum of $125,000.00 on the defendant's property; that the first mortgage against the property has been foreclosed and a decree for sale entered, the

amount of the decree being upwards of $622,-000.00; that the taxes for the year 1929 against the property covered by the petitioner's mortgage are unpaid; that the receiver of the defendant corporation has in his possession, from rent collected from the property, approximately $18,000.00; and the petitioner prayed that the receiver be directed to forthwith pay those taxes out of the moneys in his possession.

No order to show cause was ever made upon this petition, and the real parties in interest, namely, the creditors of Northern Valley Building Corporation, received no formal notification of the application, and it was only through the accident of the present appellant's counsel being in court on another matter involved in this receivership, that the present appellant had any notice of the application. The present appellant sought and obtained leave to file affidavits in answer to the petition so filed by the Central Storage & Realty Company, and those affidavits appear on pages 15 to 24 inclusive of the State of the Case. Those affidavits conclusively demonstrate, and no proof was offered to controvert the facts and expressions of expert opinion therein contained, that the property in question was worth considerably less—considerably more than $18,000 less—than the aggregate of the encumbrances against the same, not including in the amount of those encumbrances the costs, allowances and interest items hereinabove referred to. It further appeared beyond dispute that the property, when put up at the foreclosure sale which was about to be held, would be lost to the receiver of Northern Valley Building Corporation and to its creditors and stockholders (State of Case, p. 16, pars. 5, 6 and 7; State of Case, p. 19, line 20, *et seq.*; State of Case, p. 23, par. 10).

It further appears by the proofs that no application for the appointment of a receiver of rents for the said premises, and no demand for possession of the said premises, had been made by the petitioner, Central Storage & Realty Company.

There is no allegation and no proof, either in the petition or in the affidavits, and there is no finding of fact by the Court, that the payment of the taxes requested to be paid would or could be of any benefit or advantage to the mortgagor, Northern Valley Building Corporation, or to its creditors, of whom the present appellant is one. On the contrary, the proof is uncontradicted that the payment of the sum requested to be paid in satisfaction of municipal taxes would be a loss to the mortgagor and to its creditors—and a complete loss—of the amount so paid.

POINT ONE.

Relief should have been denied the petitioner, Central Storage & Realty Company, and its petition should have been dismissed, because the facts of the case bring it within the doctrine of *Myers* v. *Brown*, 92 N. J. Equity 348 (affirmed by this Court in 93 N. J. Equity 196); *Stuart* v. *Fairchild*, 90 N. J. Equity 139 (as modified by this Court in 91 N. J. Equity 86), and *Henn* v. *Hendricks*, 7 Adv. Rep. 201; 144 Atl. 602.

In view of the decisions of this Court, and of the Court of Chancery, upon the questions here involved, the order appealed from is clearly erroneous, and should be reversed.

In

Myers v. *Brown*, 92 N. J. Eq. 348,

the question for decision was whether a mortgagee is entitled to rents which had accrued but were unpaid at the time of the appointment of a receiver in foreclosure proceedings, as against a judgment-creditor of the mortgagor. There was no dispute as to the facts in that case, and they are fully stated in the opinion filed by Vice-Chancellor BACKES. The Vice-Chancellor held that the mortgagee had no right to the rents of the mortgaged premises until he came into possession after default, either by taking possession himself, or through the instrumentality of a rent receiver, and that even when taking possession as aforesaid after default, the mortgagee is entitled only to such rents as accrue subsequent to the date of the taking of possession by him.

In the case referred to, the mortgagee had taken possession of the mortgaged premises through the instrumentality of a rent receiver. That receiver had collected rent which had accrued prior to the date of his appointment, and upon which the judgment-creditor of the mortgagor had levied. The Vice-Chancellor said:

> "(1) The judgment-creditor's lien, otherwise perfect, is not impaired by the fact that the fund was in *custodia legis* at the time the execution was levied. If the mortgagee had no right to the rents, then they belonged to the judgment-debtor, and as against her the levy is binding. If the mortgagee had no right to the rents, the receiver had none."

and further:

> "The rents belong to the mortgagor, and having been garnished in the hands of the receiver by the judgment-creditor, she is entitled

to be paid the amount of her judgment with costs."

In the case *sub judice,* up to the time of the making of the order appealed from, the petitioning mortgagee, Central Storage & Realty Company, had not sought or obtained possession of the mortgaged premises; had not made an application for the appointment of a receiver of rents, and had not demanded possession of the mortgaged premises, or of the rents, issues or profits thereof (State of Case, p. 16, par. 8).

The position of the appellant as a creditor of the mortgagor with regard to the rents in question is the same as that of the levying judgment-creditor in the case of *Myers* v. *Brown, supra.*

> "My conclusion, therefore, is that, both according to the true construction of the statute now under consideration, as well as according to the construction which has been given to kindred statutes, *it must be held that the debts of creditors at large of an insolvent corporation are fastened on the property of the corporation by the adjudication of insolvency and the appointment of a receiver."* (From opinion of Vice-Chancellor FLEET, *in re* Receiver of Graham Button Co. *v.* Charles Spielmann, *et al.,* 50 N. J. Eq. 120, at p. 126, which case was affirmed *per curiam* by this court in 50 Equity 796.)

See also:

Haston v. *Castner,* 31 N. J. Eq. 697, at p. 700;

National Trust Co. v. *Miller,* 33 N. J. Eq. 155.

The facts, then, of our case, seem to fit snugly, if not precisely, into the pattern of the fact situation in *Myers* v. *Brown, supra.* The only difference between the two cases, if any difference there

be between them, is that in *Myers* v. *Brown* the mortgagee prayed that the rents be turned over to it, whereas here, the mortgagee prayed that taxes against the property be paid. We shall address ourselves to this seeming difference later in the argument, but it suffices for the present to point out that the mortgagee in the case of *Myers* v. *Brown* made precisely the same request that is made by the mortgagee here, namely, that the taxes against the property, which had accrued during the pendency of the foreclosure proceedings, be paid. In answer to this proposition the Vice-Chancellor said:

> "Counsel makes the point that, as taxes had accumulated *pendente lite,* the rents ought to be applied to their liquidation, in preference to the judgment-creditor's lien. The Court of Appeals has ruled otherwise. Stewart *v.* Fairchild-Baldwin Co., *supra,*"

and accordingly denied the prayer of the petitioner in that regard. The Vice-Chancellor's conclusions were affirmed *per curiam* by this Court in 93 N. J. Eq. 196, for the reasons stated in the opinion filed in the Court below.

Again it should be noted that the petition in this case does not allege, nor is there any proof that it is the fact, that the rents in the hands of the receiver accrued and were paid to him during the period for which the Court was asked to direct him to pay taxes. The fact is that there is no allegation and no proof before the Court, either by the petitioner's petition or otherwise, of the exact period for which it is sought to have the receiver pay taxes, *nor are the receipts of the receiver during that period set out.* How, then, can it be said that the charge is properly one of administration expense?

In

Stuart v. *Fairchild,* 90 N. J. Eq. 139,

Vice-Chancellor LANE was called upon to decide whether a receiver appointed at the instance of a second mortgagee should be directed to collect rents accrued prior to his appointment, but unpaid, so far as the collection of the same might be necessary, to pay municipal taxes and liens, and interest on prior encumbrances. With regard to this point the Vice-Chancellor said:

> "So far as the rents, issues and profits may have been actually collected by the owner of the fee, the court, under the authorities, is helpless; but I can see no good reason why rents accrued, but not yet paid, at the time of the appointment of the receiver, should not be intercepted by the receiver and applied by him, as equity and good conscience requires them to be applied, toward the payment of taxes and municipal liens and interest upon prior incumbrances accrued prior to the time of the appointment of the receiver, and I think that this may be done upon the same theory as induced courts of equity originally to appoint a receiver and sequester rents, although not expressly pledged, because, otherwise, they might be diverted from their legitimate course."

On this holding the Court of Errors and Appeals reversed the Vice-Chancellor, the opinion of this Court being reported in 91 N. J. Eq. 86. Mr. Justice TRENCHARD, in speaking for this Court, said:

> "The mortgagee is not entitled to any special favor. He is a secured creditor and has dealt with open eyes. He must look to the security. It follows, therefore, when, as here, a mortgage does not expressly pledge the rents, issues and profits of the mortgaged premises as further security for the payment

> of the debt, the rents accrued prior to the appointment of a receiver in a foreclosure proceeding (appointed on the application of the second mortgagee) belong to the mortgagor or the owner of the fee, *and such receiver will not be directed to collect and apply them in payment either of unpaid taxes or interest on the mortgage.*"

And again

> "In the present case, the learned Vice-Chancellor thought that to permit the owner of the land to collect the rents that had accrued before the commencement of the foreclosure suit, and which remained uncollected, would work a fraud upon the mortgagee, in view of the fact that the owner had allowed taxes and interest to accrue. But, as we have pointed out, that view does not comport with the legal or equitable relationship of mortgagor and mortgagee.
>
> "The Vice-Chancellor looked upon the case at bar as an extraordinary one and as such not controlled by the ordinary rule which, of course, he clearly recognized. But we see nothing extraordinary about it except the fact that, by reason of the neglect of the owner to pay interest, taxes, and assessments, the security had become 'uncertain or precarious,' which fact justified the appointment of a receiver of the rents, issues and profits thereafter accruing during the pendency of the foreclosure proceedings. Leeds *v.* Gifford, 41 N. J. Eq. 464, 5 Atl. 795, affirmed, 45 N. J. Eq. 245, 19 Atl. 621."

The facts of the case *sub judice* bring it clearly within the facts of *Stuart* v. *Fairchild, supra,* and within the rules of law as expressed by this Court through Mr. Justice TRENCHARD in reversing that part of the order made by Vice-Chancellor LANE, hereinabove referred to.

We come now to a consideration of the most recent pronouncement in this Court upon the question here involved. It would be difficult to find a case, in this period of changing business complexities, which more nearly resembles the facts of the case at bar, than the case of

> *Henn* v. *Hendricks,* 7 Adv. Rep. 201; 144 Atl. 602.

A statutory receiver had been appointed for Clifford J. Heath, Inc., and he had entered into possession and occupancy of the mortgaged premises, and was collecting the rents, issues and profits thereof. Henn, who had a conveyance from the corporation for the property in question, which was held to be in legal effect a mortgage, petitioned the Court to direct the receiver of Clifford J. Heath, Inc., to turn over the rents to him. To quote from the opinion of the Chief Justice:

> "The only other question to be determined is whether Henn, as mortgagee, was entitled to an order directing the receiver to turn over to him the rents above referred to. Assuming that as mortgagee Henn had a right to take possession of the land, he did not see fit to exercise that right. The conveyances to him were made in December, 1926, and January, 1927. The bill for the appointment of a receiver was filed in August of the latter year. During this period Henn asserted no right of possession in the property nor a right to collect the rents. On the contrary, he allowed the property to remain in the possession of the corporation and the rents to be collected by the latter's agent and held by such agent for the corporation's benefit. *Where the mortgagee permits the mortgagor to remain in possession and collect the rent, the mortgagor, unless there is an agreement between the parties to the contrary, has a right to appropriate the rents collected by him to the payment of*

> *debts due to creditors other than the mortgagee.* Leeds *v.* Gifford, 41 N. J. Eq. 464, 5 A. 795. In the present case that right existing in the corporation passed to the receiver under his appointment, and he was entitled to exercise it until the legality of his possession of the premises was challenged by the appellant. This, however, was never done so far as the state of the case shows; the appellant's claim apparently being based upon the theory that the receiver, although lawfully in the possession of the premises, was, by implication of law, acting as the appellant's agent in collecting the rents thereof."

In our case the record shows (State of Case, p. 16, par. 8) that the legality of the possession of the premises by the statutory receiver was never questioned; that no demand for possession was ever made, and no application made for the appointment of a receiver of rents by Central Storage & Realty Company.

The petitioner-respondent may urge that there is a difference between the cases now being discussed and the case at bar. The cases discussed, it may be urged, with the exception of *Myers* v. *Brown,* present situations where the mortgagee is requesting that the rents be turned over to him, whereas in the case at bar, the application is that the rents collected be employed in the payment of taxes assessed against the mortgaged premises. Is this a distinction warranting a different holding in our case than that reached in the cases cited?

The proofs are plenary, *and uncontradicted,* that no possible benefit or advantage of any kind could come to the mortgagor, or to its creditors or stockholders, through the payment of the taxes in question. The value of the property was so far below the aggregate of the encumbrances against

it, that the payment of the taxes could not result in creating an equivalent, or any, equity in the property for the mortgagor, its creditors or stockholders. The encumbrances against the property totalled in excess of $780,000.00. The only evidence of value before the Court was the judgment of Mr. Wycoff, and the judgment of Mr. Gaddis (see State of Case, p. 17, through p. 24), and the affidavit of Mr. Walser (State of Case, p. 16, par. 7). The judgment of Mr. Wycoff is that the maximum that could be obtained for the property *at a normally negotiated sale* was the sum of $700,000.00, and that at a forced sale the property would bring considerably less than that sum. The judgment of Mr. Gaddis is that *at a normally negotiated sale* the property would bring $400,000.00, and at a forced sale, under a decree of foreclosure, the first mortgagee would, in all probability, be compelled to take the property over, and that the property would certainly not bring, by an outside bidder, a sum in excess of the sum of $300,000.00 (State of Case, p. 24). Under these circumstances, a reduction in the aggregate of the amount of the encumbrances by an amount necessary to pay taxes, could not have the effect of creating any equity whatever for the mortgagor or its creditors.

The evidence before the Court was that the first mortgage had been foreclosed; that the sale under the foreclosure decree was about to take place (State of Case, p. 13, par. 2; State of Case, p. 16, par. 5); that the receiver of the mortgagor company had no means of protecting any equity that might exist in the mortgaged premises (State of Case, p. 16, par. 6). It, therefore, was apparent from the proofs that the payment of the taxes requested to be paid could not possibly be of advantage or benefit to the mortgagor or to appellant,

a creditor of the mortgagor, in the sum of $373,-750.79 (State of Case, p. 15, par. 2), or to other creditors of the mortgagor company. The only parties who could possibly benefit by the payment were the first and second mortgagees. It was, therefore, conclusively demonstrated that the payment, if made, although not made to the mortgagee directly, was clearly and unmistakeably directed to be made for its benefit.

Under the cases above cited in this Court, and under the doctrine of numerous cases in the Court of Chancery (*Best* v. *Schermier,* 6 N. J. Eq. 154; *Cortelyou* v. *Hathaway,* 11 N. J. Eq. 39; *Syracuse City Bank* v. *Tallman,* 31 Barber [N. Y.] 201; *The Land Title and Trust Co.* v. *Kellog,* 73 N. J. Eq. 524; *Mahon* v. *Crothers,* 28 N. J. Eq. 567; *Broad and Market National Bank of Newark* v. *Larsen,* 88 N. J. Eq. 245) the mortgagee is entitled to the rents and to the benefit thereof, only from the time of the appointment of a rent receiver, or from the time of the taking of possession of the mortgaged premises by it. The mortgagee had not taken possession and had not applied for or secured the appointment of a rent receiver, and should not get indirectly—through the payment of taxes for its benefit—what it could not have gotten directly—that is, to have funds collected by the mortgagor turned over to it.

If a receiver had not been appointed for the mortgagor, and it, itself, had collected the rents, issues and profits, no one would maintain that such an order as that here made could be sustained, and the fact that a receiver had been appointed for the mortgagor should not increase the rights of the mortgagee any more than the rights of mortgagees are diminished by such appointment.

As was said by the Chancellor in the case of

Bankers Trust Co. v. *Maxson,* 100 N. J. Eq. 1:

> "* * * the receiver stands for the corporation and cannot impeach any act which the corporation could not successfully assail. See also, Kuser *v.* Wright, Rec'r, 52 N. J. Eq. 825, at p. 828, 31 A. 397; W. D. Cashin & Co. *v.* Alamac Hotel Co., 98 N. J. Eq. 432, at p. 443, 131 A. 117; Earle *v.* Nat. Metallurgic Co., *supra.*"

It would be unjust, as it would be paradoxical, to hold that while the mortgagee, before taking possession of the mortgaged premises, cannot deprive the mortgagor of the rents, that he can, nevertheless, direct the application of those rents for his own benefit, and to the detriment and prejudice of the mortgagor.

Nor is the proposition here urged unfair or inequitable to the mortgagee, as the cases above cited and those above discussed have pointed out. The mortgagee has the privilege, when the mortgagor is financially irresponsible, or unable to respond to a possible deficiency, and when the mortgaged premises become inadequate security for payment of the mortgaged debt, to apply for a rent receiver. The fact that the mortgagee did not do so in the case at bar is strongly indicative of its satisfaction with the adequacy of the security, and with the solvency of the mortgagor, up until the date of the making of the present application. But whether it was satisfied or not, the fact that the property is *at present* without an equity, or that it was without an equity at the time of the filing of the petition, is of no consequence in determining whether the property at some time in the past was of such insufficiency as to the security thereof, as to have warranted the Court, if application

had then been made to it, to appoint a receiver of rents. Cases are considered on the facts as they are presently presented, and not on the facts as they may be seen in retrospect. But the petitioner does not even now urge that the Court would some time ago have appointed a rent receiver if one had been applied for by the present petitioner. The fact is that the depression in the real estate market is recent, and that the property in question may well have been adequate security for payment of the mortgaged debt while the mortgagor, or its receiver, was collecting the rents therefrom, and before the making of the present application.

Since the taking of this appeal the petitioner herein, Central Storage & Realty Company, has applied for and has secured the appointment of a receiver of rents, and since the date of his appointment the said receiver has been collecting the rents issuing from the said mortgaged premises, and no sale of the mortgaged property under the decree in foreclosure has as yet been held.

It is urged that the principles of law applicable to the case at bar have been clearly and definitely settled by the cases hereinabove referred to, and that those principles of law, if applied to the facts of this case, necessitate a reversal of the order made below, and a dismissal of the petition of Central Storage & Realty Company.

POINT TWO.

The petition should have been dismissed and the prayer thereof denied under the doctrine of *Butler* v. *Commonwealth Tobacco Company*, 74 N. J. Eq., page 423, in this Court.

In the case of *Butler* v. *Commonwealth, supra,* Mr. Justice REED, speaking for this Court, on page 426, said:

> "That consideration is that for nearly three-quarters of a century *the act under which this insolvent corporation was being wound up has been regarded by the courts of this state as essentially a bankrupt statute, and a bankrupt rule of administration has been applied in the distribution of the assets of such corporations.*"
>
> "The chancellor (VROOM) held that while the independent debts could not be set off under our statute to enable mutual dealers to discount, yet they could be set off under the act of 1829, because *that act partook largely of a character of a bankrupt act,* and under the bankrupt system, the set-off was permissible."

And again on page 427:

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

And further, on page 427:

> *"The primary object of this act being the same as that of the bankrupt laws, in giving a construction to it we may properly examine those general principles which have been established by the courts in reference to transactions under those laws. And I may remark here that our courts have always recognized*

> *the object and provisions of the act in question and of the bankrupt laws to be essentially the same."*

And again on page 428:

> *"So it appears that in the decisions of questions arising in the administration of the assets of insolvent corporations, the courts of this state, since the earliest case, have uniformly regarded our statute as essentially a bankrupt act, and applied the doctrines which have controlled in bankruptcy proceedings."*

In the case of *Shields and another* v. *John Shields Construction Co.*, 83 Eq. 21, Vice-Chancellor STEVENS said:

> "The Court of Errors has very recently, in the case of Butler *v.* Commonwealth Tobacco Co., 74 N. J. Eq. 423, 70 Atl. 319, held that *our statute, in so far as it deals with insolvent corporations, is essentially a bankrupt act, and that its provisions should be construed accordingly."*

And the doctrine that our Corporation Act, in so far as it deals with insolvent corporations, is a Bankrupt Act, and that where its provisions are silent, the provisions of the National Bankruptcy Act should be held to apply, has just recently received additional sanction in the case of *Leech* v. *Campbell & Duncan, Inc.*, 6 A. R. 1194; 142 Atl. 364, in which Vice-Chancellor LEAMING said:

> "That view, in connection with the decision of our Court of Errors & Appeals in Butler *v.* Commonwealth Tobacco Co., 74 N. J. Eq. 423, 70 A. 319, declaring the provisions of our Corporation Act, in so far as they deal with insolvent corporations, essentially a bankrupt act, impelled the conclusion that the right of set-off obtained in favor of an unmatured indebtedness."

There is no provision in our Corporation Act directly dealing with the situation such as they here presented. The National Bankruptcy Act, however, contains a provision so explicit in its terms that it is not capable of two interpretations and applies, by its express terms, to the situation in hand. By Section 64-A of the National Bankruptcy Act (11 U. S. C. A., Sec. 104, as amended), it is provided:

> "64. Debts Which Have Priority. a. The Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality, *in the order of priority as set forth in paragraph (b) hereof; Provided, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court.* Upon filing the receipts of the proper public officers for such payments *the trustee* shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court." (Italics ours.)

The italicized portion of this section sets out the amendment of this section recently adopted by Congress in 1926.

> "The reasons for this latter amendment are that, at present, estates may be and are depleted, and, at times, consumed by the payment of taxes upon property in which the bankrupt has only a limited interest, with the result that the only beneficiaries in such a situation are mortgagees or other lienors, to the exclusion of creditors, who should not be required to contribute to the payment of taxes upon property, or interest in property, which is not applicable to the liquidation of their claims." (Report of Special Committee on

Practice in Bankruptcy, American Bar Association, 1925.)

When it is remembered that the proofs in this case disclose beyond doubt that there was no equity in the property, that no benefit could result to the creditors of the mortgagor by the payment of the taxes, and that the payment of the taxes simply was in depletion of the estate available to the mortgagor's creditors, it becomes clear that, under the doctrine of the cases above cited, this section of the Bankrupt Act is applicable and that the order advised by Vice-Chancellor FALLON is erroneous in matter of law and should be reversed. A different case might be made if the payment of the taxes *pro tanto* benefited the mortgagor and its creditors, but this not the situation in the case *sub judice.*

It is respectfully submitted that the order of the Court below, directing the payment of the taxes, should be reversed, and that the petition of Central Storage & Realty Company should be dismissed.

Respectfully submitted,

GROSS & GROSS,
Solicitors and of Counsel with Arnold J. Walser, Receiver of James Billington & Son, Respondent-Appellant.

JOEL GROSS,
Of Counsel.

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