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NOTICE OF APPEAL.

In Chancery of New Jersey

<p><i>Between</i> MARK NASH, <i>Complainant,</i> <i>and</i> LEIDERMAN AND NASH BUILD- ING COMPANY, INC., <i>Defendant.</i></p>	}	<p><i>On Bill, etc.</i> <i>Notice of</i> <i>Appeal</i></p>	<p>10</p>
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Notice is hereby given that Eastern Sash & Door Company appeals to the Court of Errors and Appeals in the last resort in all causes from the order made by the Chancellor on the advice of Vice-Chancellor Alonzo Church, which order bears date February 17, 1928, and from the order and every part thereof, dated March 7, 1928. 20

MAURICE S. MAURER,
Solicitor for Eastern Sash
& Door Company. 30

PHILIP J. SCHOTLAND,
Of Counsel with Eastern
Sash & Door Company.

Notice of Appeal.

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

MAURICE S. MAURER,
Solicitor for Eastern Sash
& Door Company.

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PHILIP J. SCHOTLAND,
Of Counsel with Eastern
Sash & Door Company.

Service of a true copy of the within Notice of Appeal is hereby acknowledged this 8th day of March, 1928.

MILTON M. UNGER,
Solicitor for Complainant.

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PETITION OF APPEAL.

New Jersey Court of Errors and Appeals

Between

MARK NASH,

Complainant,

and

LEIDERMAN AND NASH BUILD-
ING COMPANY, INC.,

Defendant.

*On Appeal
from the
Court of
Chancery.*

*Petition of
Appeal.*

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*To the Honorable Judges of the Court of Errors
and Appeals in the last resort in all causes:*

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1. The Petition of Eastern Sash & Door Company, the appellants in the above-stated cause, respectfully shows that your petitioner finds itself aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date February 17, 1928, in a certain cause wherein the said Mark Nash is complainant and Leiderman & Nash Building Company, Inc., is defendant in this respect, to wit: The said order vacates that part of the order made by said Court of Chancery in said cause on November 4, 1925, which provides as follows:

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“The lien of the said Eastern Sash & Door Company, if established as prior to the lien of said mortgages affecting said property, or either of them, and to the extent that it is so established, shall be a first lien on the moneys now in the hands of said receiver

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ORDER APPOINTING RECEIVER.

Filed May 5, 1925.

IN CHANCERY OF NEW JERSEY.

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Between

MARK NASH,

Complainant,

and

LEIDERMAN AND NASH BUILD-
ING COMPANY, INCORPORATED,

Defendant.

On Bill, etc.

Order

*Appointing
Receiver.*

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This matter being opened to the Court by Milton M. Unger, solicitor of complainant, and it appearing that a copy of the bill of complaint and of the order to show cause made thereon, has been duly served within the time and as required by said order to show cause, on the defendant corporation by serving a copy thereof upon Jacob Leiderman, President of said defendant company, and Mark Nash, Secretary of said defendant company, and that a true copy of said order to show cause was mailed to each of the creditors and stockholders of the defendant corporation at his or its last known post office address within the time required by said order to show cause,

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And it further appearing to the Court that the said defendant company is unable to meet its current obligations or to continue its business with safety to the public or advantage to its stockholders and that its business has been and is being conducted at a great loss and greatly

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Order Appointing Receiver.

prejudicial to the interest of its creditors and stockholders, and that a receiver for the said defendant company should be appointed by this Court to take charge of and discover all of its assets and property, in accordance with the statute and no one appearing in opposition thereto;

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It is thereupon, on motion of Milton M. Unger, solicitor of complainant, on this 5th day of May, 1925, ORDERED, ADJUDGED and DECREED, as follows:

1. That Barney Larkey, of Newark, New Jersey, be and is hereby appointed receiver of Leiderman and Nash Building Company, Incorporated, the defendant corporation, and of all its assets and property of every character and description wheresoever situate, with full power and authority to demand, sue for, collect, receive and take into his possession all of the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of any and every description belonging to said Leiderman and Nash Building Company, Incorporated, or to which it may be entitled, and to sell and convey for the benefit of the creditors and stockholders any or all of the real and personal estate of said corporation, and to do and perform all of the duties imposed upon him and required by law and especially of an Act entitled "An Act concerning Corporations (Revision of 1896)" and act supplementary thereto and amendatory thereof.

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2. That said receiver before entering upon the discharge of his duties shall take the oath of office prescribed by law and shall enter into bond to the Chancellor of the State of New Jer-

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Order Appointing Receiver.

sey, with one or more surety or sureties, in the penal sum of \$4,000.00 conditioned for the faithful performance of his duties, which said bond shall be approved as to form and security thereof by one of the special masters of this Court.

10 3. That the said receiver do take possession of all of the property and assets of the said defendant corporation and account for the same as this Court shall hereafter direct, and that said defendant corporation, its officers, directors, and agents, shall forthwith assign, transfer, convey and deliver to said receiver all of the property and assets of the said corporation, both real and personal, wheresoever situate and of whatsoever it may consist.

20 4. That the said defendant corporation, its officers and agents and all persons claiming under them, be and they are hereby enjoined and restrained from exercising any of its privileges and franchises and from collecting or receiving any debts or paying out, selling or transferring any of its estate, money, funds, lands, tenements or effects except to said receiver appointed by this Court until this Court shall otherwise order, also restraining them, especially the creditors of said defendant corporation, from interfering
30 with said receiver's taking possession of and management of said property.

E. R. WALKER,
C.

Respectfully advised,
JOHN H. BACKES,
V.-C.

A true copy.

40 THOMAS BARBER,
Clerk.

ORDER OF SALE.

Filed June 22, 1925.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>MARK NASH,</p> <p style="text-align: right;"><i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>LEIDERMAN & NASH BUILDING COMPANY, INCORPORATED,</p> <p style="text-align: right;"><i>Defendant.</i></p>	}	<p>10</p> <p><i>On Bill, etc.</i></p> <p><i>Order of</i></p> <p><i>Sale.</i></p>
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20 This matter coming on to be heard upon the return of an order to show cause made by this Court on June 2, 1925, directing the creditors, lien claimants, mortgagees and others to show cause before the Chancellor, at the Chancery Chambers, Prudential Building, in the City of Newark, New Jersey, on the 9th day of June, 1925, at 10 o'clock in the forenoon, why the receiver should not, in accordance with the prayer of said petition, be authorized to finish the erection and construction of the buildings at 468, 470, 472 and
30 476 South 21st street, Irvington, New Jersey, or why the receiver should not sell and convey the said premises for \$48,000 to Harry Reisen, or why the receiver should not have such other and further relief as might be equitable and just, the said matter having on said 9th day of June, 1925, by an order dated June 10, 1925, been continued to June 16, 1925, at the same time and place, and coming on to be heard in the presence
40 of Scott German, Esquire, solicitor for the 11th

Order of Sale.

Ward Building and Loan Association; Allan Krieger, Esquire, solicitor for Louis Zucker and Allan Krieger; Edward R. McGlynn, Esquire, solicitor for Louis Morro; Maurice J. Maurer, Esquire, solicitor for Eastern Sash & Door Company, and Harold A. Eppston, Esquire, solicitor for Isidore Burstein and Eza Winarsky, trading as I. Burstein and E. Winarsky;

And it further appearing that by due proof on file in this Court, that a copy of the order to show cause has been mailed to or service acknowledged by or on behalf of all creditors, stockholders and lienholders;

And it further appearing to the Court that the said premises at 468, 470, 472 and 476 South 21st street, Irvington, New Jersey, more particularly described in the receiver's petition for sale are encumbered by the mortgages of the 11th Ward Building and Loan Association, and of Louis Zucker and Allan Krieger, as well as by mechanic's and other liens filed against the said mortgaged premises,

And it further appearing to the Court that the legality, order and priority of the said mortgages and liens has been brought into question, and that the property is of a character materially to deteriorate in value pending liquidation.

And it further appearing that one Nathan Turkel has offered the sum of \$53,000 to the receiver for the conveyance of the aforesaid premises, free and clear of all liens and encumbrances, except the lien and encumbrance of the mortgages of the 11th Ward Building and Loan Association, Louis Zucker and Allan Krieger, and that as to such liens, the said purchaser has offered to accept a conveyance subject thereto, the amount of such mortgages to be deducted

Order of Sale.

from the purchase price and to be allowed the purchaser upon the closing of title, and the Court deeming it for the best interest of all creditors and all other persons concerned that the property should be sold to the said Nathan Turkel for the said price and under the said terms and conditions, and no cause or reason appearing to the contrary, and all persons before the Court consenting thereto in open court,

It is on this 22nd day of June, 1925, on motion of Milton M. Unger, solicitor for said receiver, ORDERED, that the receiver do sell and convey the premises known and described in the receiver's petition to the said Nathan Turkel for the sum of \$53,000, upon the aforesaid terms and conditions, and that the said sale be made subject to the amount due on the mortgages of the 11th Ward Building and Loan Association, Louis Zucker and Allan Krieger, and that the amount thereof be deducted from the purchase price upon the closing of title; that the said sale be made free and clear of the liens, encumbrances and rights of lien of Louis Morro, Eastern Sash & Door Company, Isidore Burstein and Eza Winarsky, trading as I. Burstein and I. Winarsky, M. Egan, Essex Sash & Door Company, Tartar Roofing Company, Hawthorne Sash & Door Company, A. Hommer, Kroll & Korbin, August L. Lacombe, M. Meisler, S. Rabinowitz, Zuckerman Bros., Max Manduck, Avon Skylight Co., and free and clear of liens, encumbrances and rights of liens of all other creditors, persons and lienors; the liens and rights of all of the aforesaid persons, if any they have, shall attach to the proceeds of sale; that the said proceeds of sale shall be paid to the receiver herein, and shall remain in his hands subject to the same liens and

Order of Sale.

equities of all of the parties in interest as was the property before sale, to be disposed as the Court shall hereafter direct.

E. R. WALKER,
C.

10 Respectfully advised,
ALONZO CHURCH,
V.-C.

A true copy.
THOMAS BARBER,
Clerk.

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ORDER AS TO WARRANT.

Filed November 4, 1925.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i> MARK NASH, <i>Complainant,</i> <i>and</i> LEIDERMAN & NASH BUILDING COMPANY, INCORPORATED, <i>Defendant.</i></p>	}	<p>10 <i>On Bill, etc.</i> <i>Order.</i></p>
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The order heretofore made in this action, dated October 1, 1925, together with the affidavit whereon same was based, having been served upon the Eastern Sash & Door Company, a corporation, as by the terms of said order required, and said matter having been, at the request of Mr. Maurice S. Maurer, solicitor of said Eastern Sash & Door Company, a corporation, on the return day of said order, (October 6, 1925), continued to October 13, 1925, and this matter on said last-mentioned date having been opened to the Court by Mr. Milton M. Unger, solicitor of Mr. Barney Larkey, receiver of the above-named defendant, Mr. Elias A. Kanter, appearing as counsel for said mentioned solicitor, in the presence of Mr. Maurice S. Maurer and Mr. Philip J. Schotland, solicitors and counsel respectively of Eastern Sash & Door Company, a corporation, and the Court having heard the argument of counsel and having considered the said matter, it is hereby on this Fourth day of November, A. D., 1925,
ORDERED:

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Order as to Warrant.

1. Within five days after service of this order upon it, said Eastern Sash & Door Company, a corporation, shall deliver to Mr. Barney Larkey, receiver of the above-named defendant, its proper warrant, duly executed and proved, discharging and cancelling the lien claim heretofore filed by said Eastern Sash & Door Company, a corporation, said lien claim having been filed on April 30, 1925, in the Office of the Clerk of Essex County and now being therein recorded in Book 16 of Mechanic's Liens for said County at page 503.

2. Within five days after service of this order upon it, said Eastern Sash & Door Company, a corporation, shall also deliver to Mr. Barney Larkey, receiver of the above-named defendant, its proper warrant and release, duly executed and proved, cancelling and discharging the lands and premises conveyed to Nathan Turkel by Mr. Barney Larkey, receiver as aforesaid, from the lien, operation and effects of the judgment heretofore entered in the Essex County Circuit Court in an action wherein said Eastern Sash & Door Company, a corporation, is the plaintiff and Leiderman and Nash Building Company, Incorporated, a corporation, and others are the defendants.

3. The lien of the said Eastern Sash & Door Company, if established as prior to the lien of said mortgages affecting said property, or either of them, and to the extent that it is so established, shall be first lien on the moneys now in the hands of the said receiver, which he realized from the sale to Nathan Turkel of said lands and premises, and to the extent that said lien of the Eastern Sash & Door Company is not established as a

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Order as to Warrant.

prior lien to said mortgages, or either of them, it shall be a lien as against the funds in the hands of the receiver, in the same class with all other lien claimants, the priority to be determined according to law.

E. R. WALKER, C. 10

Respectfully advised,

ALONZO CHURCH,
V.-C.

I hereby consent to the above order as to form.

PHILIP J. SCHOTLAND,
Of Counsel with Eastern Sash & Door Co. 20

MAURICE S. MAURER,
Solicitor of Eastern Sash & Door Co.

A true copy.

THOMAS BARBER,
Clerk.

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DECREE.

Filed May 7, 1926.

IN CHANCERY OF NEW JERSEY.

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Between

MARK NASH,

Complainant,

and

LEIDERMAN AND NASH BUILD-
ING COMPANY,

Defendant.

On Bill, etc.

Decree.

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An order to show cause having been made herein directing the creditors and all parties in interest to show cause before the Chancellor, at the Chancery Chambers, Prudential Building, in the City of Newark, New Jersey, on the 27th day of April, 1926, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the report and account of the Receiver should not be allowed, why an order should not be made fixing and determining the fees and allowances of said Receiver in the administration of his trust and fixing and determining the fees, costs and allowances of his counsel, and directing the Receiver to dispose of any other moneys remaining in his hands;

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And it further appearing that in accordance with the provisions of said order, a copy thereof with a notice or statement of the filing of said account and a statement of the amount the Receiver would ask the Court to allow him as com-

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Decree.

pensation for his services, and the amount which the solicitor of the complainant and of the Receiver would ask to have him allowed for his services, has been mailed to each of the creditors, as by said order required, and that said final report was filed with the Clerk of this Court, and a copy lodged with the Sergeant-at-Arms of this Court at Newark, open to inspection and examination.

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And it further appearing that said Receiver's accounts are correct and the same ought to be allowed, and no reason appearing or being shown to the contrary,

It is on this 30th day of April, 1926, on motion of said Receiver, ORDERED, ADJUDGED and DECREED, that the amount filed by said Receiver in said cause be hereby allowed and confirmed.

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And it further appearing by said account that the receipts of said Receiver amount to \$11,343.50, and that the disbursements of said Receiver amount to \$1,628.10, leaving a balance in hand of \$9,715.40,

It is further ORDERED, that the Receiver be allowed the sum of \$1,000.00 for his services, besides his costs of suit to be taxed. That Milton M. Unger, solicitor of the complainant, be allowed a counsel fee of \$100.00 for his services and his costs of suit to be taxed; and that Milton M. Unger, solicitor for the Receiver, be allowed a counsel fee of \$1,000.00 and his costs of suit to be taxed; and

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It is further ORDERED, that the balance of the moneys in the hands of the Receiver, after making said allowances, be held by the Receiver until the

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Decree.

further determination of this Court as to the method and manner of distribution.

E. R. WALKER,
C.

Respectfully advised,

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ALONZO CHURCH,
V.-C.

I hereby consent to the within order.

MAURICE MAURER, and
PHILIP J. SCHOTLAND,
Solicitors and Counsel, Eastern Sash & Door Co.

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NOTICE.

IN CHANCERY OF NEW JERSEY.

Between

MARK NASH,

Complainant,

and

LEIDERMAN AND NASH BUILD-
ING COMPANY, INCORPORATED,
Defendant.

On Bill, &c.
Notice.

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To Messrs. Maurice S. Maurer, Esq., solicitor of Eastern Sash and Door Company, Elias A. Kanter, solicitor for Nathan Turkel:

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PLEASE TAKE NOTICE that on Tuesday, the 27th day of December, 1927, I will apply to the Chancellor (Vice-Chancellor Church) at the Chancery Chambers, 1060 Broad street, Newark, New Jersey, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, for an Order modifying that part of an Order made by this Court on November 4, 1925, and providing as follows:

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“The lien of the said Eastern Sash & Door Company, if established as prior to the lien of said mortgages affecting said property, or either of them, and to the extent that it is so established, shall be a first lien on the moneys now in the hands of the said Receiver, which he realized from the sale to Nathan Turkel of the said lands and premises, and to the extent that said lien of the Eastern Sash & Door Company is not estab-

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Notice.

lished as a prior lien to said mortgages, or either of them, it shall be a lien as against the funds, in the hands of the Receiver, in the same class with all other lien claimants, the priority to be determined according to law."

10 Said application will be made upon the ground that said above-quoted provision was not made upon the application of the said Receiver, or with his knowledge or consent; was improvidently entered, and also because said provision in said Order is contrary to the determination of the Receiver herein and contrary to the order of this Court herein affirming the determination of the said Receiver.

20 At the same time and place I will apply for an Order for the distribution among creditors and those entitled thereto, of the balance of the monies remaining in the hands of the Receiver.

Yours respectfully,

MILTON M. UNGER,
Solicitor of Barney Larkey, Receiver.

30 Due and legal service of the within notice is hereby acknowledged this 20th day of December, A. D. 1927.

KANTER & KANTER,
Solicitors for Nathan Turkel.

Service of a copy acknowledged this 23rd day of December, 1927.

M. S. MAURER,
Sol'r. of E. S. & D. Co.

AFFIDAVIT OF JOSEPH H. MAYZEL.
IN CHANCERY OF NEW JERSEY.

Between

MARK NASH,

Complainant,

and

LEIDERMAN AND NASH BUILD-
ING COMPANY, INC.,

Defendant.

On Bill, &c.
Affidavit.

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

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JOSEPH H. MAYZEL, of full age, being duly sworn, on his oath deposes and says:

I am the treasurer of the Eastern Sash & Door Co., a corporation duly organized and existing under the laws of the State of New Jersey, and having and maintaining its principal office in the City of Newark, County of Essex and State of New Jersey.

1. I am actively engaged in the business and take full charge of the financial end.

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2. The Eastern Sash & Door Co. is engaged in the business of selling rough and finished lumber for the erection of houses.

3. On January 13, 1925, the defendant corporation entered into a written contract with my company, by the terms of which my company agreed to supply certain building materials for four houses being erected by the defendant corporation at 468 So. 21st street, 470 So. 21st street,

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Affidavit of Joseph H. Mayzel.

472 So. 21st street and 476 So. 21st street in the Town of Irvington, County of Essex, and State of New Jersey, for the sum of \$10,131.14, which sum includes the extra materials supplied; said material was supplied in like quantities to each building, making \$2,532.79 worth of material supplied on each of said buildings. The last of the material that was supplied was supplied on April 13, 1925.

4. On the 30th of April, 1925, I caused to be filed a lien claim in the office of the Clerk of Essex County, under the provisions of the Mechanic's Lien Act, making claim for said sum.

5. On May 5, 1925, the defendant company, which was the owner of the said lands and premises, was adjudicated an insolvent corporation, and Barney Larkey, Esq., was appointed Receiver with the usual powers.

6. On June 22, 1925, this Court made an Order on the petition of the Receiver, directing the Receiver to sell the property of the bankrupt to Nathan Turkel, for the sum of \$53,000, free and clear of all liens, except the mortgages of the Eleventh Ward Building and Loan Association, and Louis Zucker, and Allan Krieger, and in said Order, directed that the net proceeds of the sale remain in his hands subject to the same liens and equities of all the parties in interest, as was the property before sale, to be disposed as the Court shall thereafter direct.

7. The situation at the time of the making of the said Order was that the written contract between the defendant company and my company, provided that payments were to be made on account of the contract, out of the proceeds of the

Affidavit of Joseph H. Mayzel.

Building and Loan Association mortgages, and specified the amount of each payment, so that my company would have been paid out of the proceeds of said mortgages; my contract was presented to the solicitor of the said Eleventh Ward Building and Loan Association, before any moneys whatever were paid out by the said Building and Loan Association. At the time when the said Building and Loan Association by its solicitor, paid out the proceeds of its mortgages, it did not pay my company the amount specified in the contract, and my company therefore refused to, and did not postpone its right of lien to the lien of the said Building and Loan Association mortgages. All of the other parties mentioned in the Order as lien claimants did postpone their rights of lien to the lien of the said Building and Loan Association mortgages, and the solicitor for the said Building and Loan Association disbursed the proceeds of said mortgages among said other defendants and direct to the defendant corporation.

8. On behalf of my company I did not appeal from the Order made on the 22nd of June, 1925, because I felt that my company was protected by that provision in the Order which reads:

"That the said proceeds of sale shall be paid to the Receiver herein, and shall remain in his hands subject to the same liens and equities of all the parties in interest as was the property before sale, to be disposed as the Court shall hereafter direct."

There was at the time of the making of said Order, pending in the Essex County Circuit Court the action-in behalf of my company against the defendant company, and against the said

Affidavit of Joseph H. Mayzel.

Eleventh Ward Building and Loan Association, under the Mechanic's Lien Law, in which action my company claimed priority over the lien of the said mortgages, and as the said Order recited that the money in the hands of the Receiver was to be subject to the same liens and equities as was the property before the sale, I proceeded with my action at law, which had been commenced before adjudication of the defendant company as insolvent, and before the appointment of a Receiver.

9. On November 4, 1925, and while the action on behalf of my company, was still pending in the Essex County Circuit Court, this Court, directed by its Order, my company to discharge the lien claim filed on April 30, 1925, and the general judgment entered against the defendant company, and the special judgment entered against the defendant company, as a lien on the lands and in and by said Order, protected the rights of my company by paragraph three and, therefore, I on behalf of my company, complied with said Order, and did not appeal from the same.

10. On April 30, 1926, the Receiver's accounts were presented upon due notice for approval, and the Receiver prayed for allowances and also for an Order providing for the distribution of the moneys in his hands; on behalf of my company I appeared with counsel, and we objected to the Order of distribution on the ground that our rights as to priority had not yet been determined in the action at law, and until said action was tried there could be no proper Order of distribution. Thereupon this Court made the Order on said date, confirming the account of the Re-

Affidavit of Joseph H. Mayzel.

ceiver, allowing his disbursements and fees and his solicitor, counsel fees, but as to the balance of said moneys, in the hands of the Receiver, said Order provided that it is to be held by Receiver, until the further determination of this Court, as to the method and manner of distribution, and upon that provision being inserted, counsel for my company, with my consent, signed their consent to the making of said Order.

11. The action at law was duly and diligently prosecuted on behalf of my company, and when it was reached for trial at the Essex County Circuit Court, by order of the Court, the same was referred to Hugh B. Reed, Esq., as referee. The issues were fully tried out by said Referee and he has made his report, finding that my company is entitled to the full amount of its claim, and that said claim is prior to the liens of the Eleventh Ward Building and Loan Association, to the extent of \$14,313.86, out of the \$35,000 which the said Building and Loan Association paid out on account of its said mortgages up to the time that the said lien claim was filed, and up to the time that the said Receiver was appointed. Both my company and the Eleventh Ward Building and Loan Association reserved the right when the Order of Reference was made, to trial by jury, and upon the coming in of the said Referee's report, the said Eleventh Ward Building and Loan Association demanded a trial by jury. The cause has therefore been put back on the list and is now No. 3134 on the December, 1927, term list of causes, in the Essex County Circuit Court.

The length of time that it has taken to have this cause disposed of was due to the delay in

Affidavit of Joseph H. Mayzel.

the case being reached for trial, and then to the time that it took to try the case before the Referee, and waiting for his decision and now waiting until it is reached.

10 I intend on behalf of my company to apply to the Circuit Court for a preferred position in order to have this matter disposed of as soon as possible.

JOSEPH H. MAYZEL.

Sworn and subscribed to before me
this 30th day of December, 1927.

HELEN JEDELL,
Notary Public of New Jersey.

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MEMORANDUM.

Filed

IN CHANCERY OF NEW JERSEY.

Between

MARK NASH,

Complainant,

and

LEIDERMAN AND NASH BUILD-
ING COMPANY, INC.,

Defendant.

10

Memorandum.

This memorandum is not to be published in 20
the official or unofficial reports.

Milton M. Unger for Receiver, Barney Larkey.

Maurice Maurer and Philip Schotland for
Eastern Sash and Door Company.

CHURCH, V.-C.

I will in this case advise an order vacating 30
the provision in the order of November 4, 1925,
complained of. The Eastern Sash and Door Com-
pany may then have the opportunity of proving
its claim against the fund in the Receiver's hands,
with the usual right to review.

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ORDER VACATING, &c.

Filed February 17, 1928.

IN CHANCERY OF NEW JERSEY.

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4166

Between

MARK NASH,

Complainant,

and

LEIDERMAN AND NASH BUILD-
ING COMPANY, INCORPORATED,
Defendant.

On Bill, etc.

Order.

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Application having been made to this Court by the Receiver herein upon notice to the solicitor of the Eastern Sash & Door Company, and Nathan Turkel, to vacate a part of an Order made by this Court on November 4, 1925, and the Court having heard and considered the said matter and the argument of counsel thereon, and being of the opinion that the part of said Order complained of was improvidently made and should now be vacated,

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It is on this 17th day of February, 1928, on motion of Milton M. Unger, solicitor of the Receiver, ORDERED, that that part of the Order made by this Court herein on November 4, 1925, which provides as follows:

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“The lien of the said Eastern Sash & Door Company, if established as prior to the lien of said mortgages affecting said property, or either of them, and to the extent that it is so established, shall be a first lien

Order Vacating, &c.

on the moneys now in the hands of said Receiver, which he realized from the sale to Nathan Turkel of the said lands and premises, and to the extent that said lien of the Eastern Sash & Door Company is not established as a prior lien of said mortgage, or either of them, it shall be a lien as against the funds in the hands of the Receiver, in the same class with all other lien claimants, the priority to be determined according to law.”

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be and the same is hereby vacated,

It is further ORDERED, that the Receiver accord to the Eastern Sash and Door Company the opportunity of proving its claim against all of the funds in the Receiver's hands, with the usual right to the Eastern Sash and Door Company, to review said Receiver's determination.

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E. R. WALKER,

C.

Respectfully advised,

ALONZO CHURCH,

V.-C.

A true copy.

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THOMAS BARBER,

Clerk.

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PETITION.

Filed September 1, 1925.

IN CHANCERY OF NEW JERSEY.

10 4166
Between
 MARK NASH,
Complainant,
and
 LEIDERMAN AND NASH BUILD-
 ING COMPANY, INCORPORATED,
Defendant.

On Bill, &c.
Petition.

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

The petition of Barney Larkey respectfully shows,

1. That he is the duly appointed, qualified and acting Receiver of the above-named defendant corporation.
- 30 2. At the time of petitioner's appointment the said corporation was the owner of four properties known as Nos. 468, 470, 472, 476 South 21st street, Irvington, New Jersey, upon which the 11th Ward Building and Loan Association hold four mortgages of \$20,000 each. Said mortgages were of the type known as construction mortgages, upon which the association advanced moneys from time to time as the building progressed.
- 40 3. On or about March 21, 1925, the said 11th Ward Building and Loan Association transmitted

Petition of Receiver.

to its attorney, Scott German, the sum of \$17,200.00, to be paid to the owners, Leiderman and Nash Building Company, Inc., as a payment on account of said mortgages. The said Scott German paid over said money to said owners with the exception of \$1,200, which sum remained and still remains in his hands.

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4. Petitioner has since conveyed said premises subject to the amount due on said building and loan mortgages, and upon such transfer, the purchaser was allowed the entire amount paid by said building and loan association, including the aforesaid payment of \$1,200, which is still in the possession of said Scott German.

5. Petitioner alleges that said moneys belonged to the defendant corporation at the time of the appointment of petitioner, and that he is now entitled to receive the same.

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6. Petitioner is informed and believes that Eastern Sash & Door Company, a creditor of the defendant corporation, claims to be entitled thereto or some interest therein.

Petitioner, therefore, prays for an order directing the 11th Ward Building and Loan Association and the said Eastern Sash & Door Company to show cause why said money should not be paid over to your petitioner as such Receiver.

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BARNEY LARKEY,
Petitioner.

A true copy.

THOMAS BARBER,
Clerk.

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ORDER TO SHOW CAUSE.

Filed September 1, 1925.

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i> MARK NASH, <div style="text-align: right; padding-right: 20px;"><i>Complainant,</i></div> <div style="text-align: center; padding: 0 10px;"><i>and</i></div> LEIDERMAN AND NASH BUILD- ING COMPANY, INCORPORATED, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>On Bill, &c.</i> <i>Order to</i> <i>Show Cause.</i>
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20 Upon reading and filing the petition of Barney Larkey, the Receiver herein, praying for an order directing the 11th Ward Building and Loan Association to pay over to said Receiver the sum of \$1,200 now in the hands of Scott German, its attorney,

30 It is on this 1st day of September, 1925, on motion of Milton M. Unger, solicitor for said Receiver, ORDERED, that the 11th Ward Building and Loan Association and Eastern Sash & Door Company, a corporation, show cause before the Chancellor, at the Chancery Chambers, Prudential Building, Newark, New Jersey, on Tuesday, the 8th day of September, 1925, why an order should not be made as in and by said petition prayed.

And it is further ORDERED, that a true but uncertified copy of this order be served on Scott German, attorney for said 11th Ward Building and Loan Association, and on the Eastern Sash

Order to Show Cause.

& Door Company, within three days of the date hereof.

E. R. WALKER,
C.

Respectfully advised,
 JOHN H. BACKES, 10
 V.-C.

A true copy.
 THOMAS BARBER,
 Clerk.

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ORDER TO PAY.

Filed September 22, 1925.

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i> MARK NASH, <div style="text-align: right; padding-right: 20px;"><i>Complainant,</i></div> <div style="text-align: center; padding: 0 10px;"><i>and</i></div> LEIDERMAN AND NASH BUILD- ING COMPANY, INCORPORATED, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>On Bill, &c.</i> <i>Order.</i>
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20 Barney Larkey, the receiver herein, having filed a petition praying that the sum of \$1,200.00 representing a payment by the Eleventh Ward Building and Loan Association on account of mortgages held by it upon properties at 468-470-472-476 South 21st street, Irvington, New Jersey, in the hands of Scott German, its solicitor, be ordered to be paid to the Receiver, and an order having been made on September 1, 1925, directing the Eleventh Ward Building and Loan Association and Eastern Sash & Door Company, a corporation, to show cause before the Chan-

30 cellor, at the Chancery Chambers, Prudential Building, Newark, New Jersey, on the 8th day of September, 1925, why an order should not be made as by said petition prayed, and said matter coming on to be heard on the 22nd day of September, 1925, in the presence of Philip J. Schotland, Esquire, representing the Eastern Sash & Door Company, a corporation, and Scott German, Esquire, representing the Eleventh Ward Build-

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Order to Pay.

ing & Loan Association, and the Court having heard the arguments of counsel and being of the opinion that said money should be paid to the Receiver,

It is on this 22nd day of September, 1925, on motion of Milton M. Unger, solicitor for said Receiver, ORDERED that the said Eleventh Ward Building & Loan Association and Scott German, Esquire, do pay to Barney Larkey, Esquire, the Receiver herein, the aforesaid sum of \$1,200.00, and that said moneys remain in the hands of said Receiver, and abide the further order of this Court.

E. R. WALKER,
C.

Respectfully advised,
ALONZO CHURCH,
V.-C.

A true copy.
THOMAS BARBER,
Clerk.

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ORDER TO MERGE, &c.

Filed March 30, 1926.

IN CHANCERY OF NEW JERSEY.

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Between

MARK NASH,

Complainant,

and

LEIDERMAN & NASH BUILDING
COMPANY,

Defendant.

*On Bill, &c.
Order.*

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Barney Larkey, the receiver herein, having heretofore determined that the sum of \$1,200 paid by the 11th Ward Building and Loan Association to the receiver herein belonged to and was the property of the above defendant corporation, and having determined that Eastern Sash and Door Company, a claimant with respect thereto was not entitled to the same, and the said Eastern Sash & Door Company having filed its exception and objection to the report and determination of the said receiver, and said exception and objection having come on to be heard before his Honor, Alonzo Church, Esquire, one of the Vice-Chancellors of the State of New Jersey, and after hearing Philip J. Schotland, Esquire, solicitor of the Eastern Sash & Door Company, in support of said exception, and Milton M. Unger, Esquire, solicitor of the receiver in opposition thereto, and the Court having considered the matter, and being of the opinion that the determination of the receiver is correct,

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Order to Merge.

It is on this 30th day of March, 1926, on motion of Milton M. Unger, solicitor of the receiver, ORDERED, that the determination of the said receiver, be and the same hereby is approved and confirmed and the aforesaid sum of \$1,200 be and the same hereby is merged with the other funds in the hands of the receiver belong to the above defendant corporation.

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E. R. WALKER,

C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

A true copy.

THOMAS BARBER,
Clerk.

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75 MAY.T.1928

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

New Jersey Court of Errors and Appeals

Between

MARK NASH,

Complainant,

and

LEIDERMAN & NASH BUILDING
COMPANY, INC.,

Defendant.

*On Appeal
from an
Order of the
Court of
Chancery
by Eastern
Sash & Door
Company.*

APPELLANT'S BRIEF.

Facts.

On January 13, 1925, the Leiderman & Nash Building Company, Inc., the defendant in the above-entitled cause, entered into a written agreement with the Eastern Sash & Door Company, the appellant, whereby the defendant agreed to purchase and the appellant agreed to supply building materials for four houses, which were being erected by the defendant on premises known as 468, 470, 472 and 476 South 21st street, in the Town of Irvington, County of Essex and State of New Jersey. The contract price is \$10,131.14, or \$2,532.79 for each building.

All of the material contracted for was delivered and supplied between January 13, 1925, and April 13, 1925, and the appellant, not having been paid, filed its lien claim in the office of the Clerk of Essex County, being the County where said lands are located and brought suit on said lien claim on April 30, 1925.

On May 5, 1925, the defendant company was adjudicated an insolvent corporation, and a receiver was appointed with the usual powers.

On June 22, 1925, Vice-Chancellor Church made an order directing the Receiver to sell the property of the defendant, which consisted of said four houses, together with the curtilage, to Nathan Turkel for the sum of \$53,000, free and clear of all liens, except the mortgages of the Eleventh Ward Building and Loan Association, Louis Sucker and Allan Krieger, and in said order directed that the net proceeds of the sale remain in the hands of the Receiver subject to the same liens and equities of all the parties in interest as was the property before the sale, the moneys to be disposed of as the Court shall thereafter direct (see copy of order, pp. 9-12, State of the Case).

When said order of June 22, 1925, was entered, all of the parties mentioned in the order *except the appellant* had signed written postponements of their rights of lien to the lien of the Building and Loan Association mortgages and had received payments on account out of the proceeds of said Building and Loan Association mortgages.

The appellant in its action at law, and before the Court of Chancery, maintained that its right of lien was prior and paramount to the lien of the Building and Loan Association mortgages to the extent that the proceeds of said mortgages were not applied to the buildings themselves, owing to the fact that this appellant had refused to postpone its right of lien to the lien of the Building and Loan Association mortgages and did not execute any postponement of its right of lien and received no payment whatsoever on account of its claim out of the proceeds of said Building and Loan Association mortgages; but did not appeal from the making of said order because it deemed itself protected by the clause in said order above-quoted that the liens and

equities of all the parties in interest shall be the same as before the sale of the property.

On November 4, 1925, while the action at law on appellant's claim of priority of lien over the Building and Loan Association mortgages was still pending before the Essex County Circuit Court, the Court of Chancery made an order directing this appellant to discharge its lien claim filed on April 30, 1925, and its general and special judgment entered against the defendant company as a lien on the lands, but the learned Vice-Chancellor in making said order, a copy of which appears in the state of the case at pages 13-15 protected the rights of the appellant by the following provision:

"The lien of the said Eastern Sash & Door Company, if established as prior to the lien of said mortgage affecting said property, or either of them, and to the extent that it is so established, shall be a first lien on the moneys now in the hands of the said Receiver, which he realized from the sale to Nathan Turkel of said lands and premises, and to the extent that said lien of the Eastern Sash & Door Company is not established as a prior lien to said mortgages, or either of them, it shall be a lien as against the funds in the hands of the Receiver, in the same class with all other lien claimants, the priority to be determined according to law,"

and the appellant's counsel consented to said order as to form and did not appeal from same on account of the protection contained in said provision for the benefit of appellant.

On April 30, 1926, the Receiver's Accounts were presented upon due notice for approval and the Receiver prayed for allowance and also for an order providing for the distribution of the

moneys in his hands; the appellant objected to the order of distribution on the ground that its rights as to priority had not then been determined in the action at law, and that until the action at law was determined fixing appellant's right of priority, if any, there could be no proper order of distribution. After argument before the learned Vice-Chancellor, he made the order which appears on pages 16-18 of the state of the case approving the accounts of the Receiver and making the allowances to the Receiver and his counsel, but embodied the following provision:

"It is further ordered that the balance of the moneys in the hands of the Receiver, after making said allowances be held by the Receiver until the further determination of this court as to the method and manner of distribution,"

and to the decree being made in this form appellant's counsel signed their consent; the rights of the appellant being thereby preserved and the protecting provision of the previous order upon which appellant argued before the Court of Chancery being thereby continued.

The action at law was duly and diligently prosecuted by the appellant but when it was reached for trial at the Essex County Circuit Court, owing to the fact that an accounting was partly involved, although in the opinion of appellant not sufficiently complicated to warrant a reference, the matter was referred to a referee, nevertheless, and after the issues were fully tried out before the Referee, Hugh B. Reed, Esq., he made his report finding that the appellant was entitled to the full amount of its claim and that its claim is a prior lien to the extent of \$14,313.86 out of the \$35,000, which had been disbursed by the Eleventh Ward Building and Loan Association to the lien of the mortgages of said Build-

ing and Loan Association. The attorney for the Eleventh Ward Building and Loan Association having reserved the right of trial by jury demanded a trial by jury and the case is now back on the Essex County Circuit Court calendar.

Notwithstanding this situation and without any evidence whatsoever, the solicitor for the Receiver served on the appellant the notice dated December 20, 1927, of an application to Vice-Chancellor Church, who made all of the orders in this cause to take out of the order made no November 4, 1925, the protecting provision above-quoted, which was inserted for the benefit of the appellant. (A copy of this notice appears on pp. 19-20 of the State of the Case.) In reply to this notice, the appellant filed the affidavit setting forth the facts and the reference to the orders entered in this cause, which appears on pages 21-26 of the state of the case. This affidavit constitutes the only evidence that came before the Vice-Chancellor. Argument was had before the Vice-Chancellor on said notice and answering affidavit and the learned Vice-Chancellor filed the memorandum granting the Receiver's motion which appears on page 27 of the state of the case and the order dated February 17, 1928, was made by the learned Vice-Chancellor pursuant to his memorandum. This order, which strikes out of the order of November 4, 1925, the above-quoted clause protecting the lien and the rights of the appellant, was applied for, more than two years after the order it modifies was entered and was itself entered more than two years and three months after the order it modifies. (A copy of this order appears on pp. 28 and 29 of the State of the Case.) From this last mentioned order which deprives appellant of its rights to have its right of priority determined in accordance

with the Mechanic's Lien Act of the State of New Jersey, and in accordance with all of the previous orders made by the Court of Chancery in this cause this appeal has been taken.

ARGUMENT.

In *Watkinson v. Watkinson*, 68 N. J. E. 632, Judge Vroom speaking for the Court of Errors and Appeals says:

"The time of appeal having expired when this application for leave to file the bill of review was made, the petitioner was barred unless her case could be brought strictly within the exception of newly-discovered evidence, or of some special equity that would give the court the discretionary power to make the order."

He also quotes with approval from the decision of the United States Supreme Court in the case of *Thomas v. Havier's Heir*, 10 Wheat. 147, as follows:

"There is no statute expressly limiting bills of review but the courts of the United States are governed in this particular by the analogous limitation of the right of appeal and therefore a bill of review cannot be filed after the lapse of five years from the final decree."

and then says:

"Applying this rule to the practice in our State, after the lapse of three years leave would not be granted to file a bill of review."

In the instant case the time within which an appeal could have been taken from the order of November 4, 1925, expired within forty days and therefore the Court of Chancery had no jurisdiction to modify the order on the application made by means of the notice which in effect was by analogy a bill for review so as to change the previous order.

There is no newly-discovered evidence in this case nor is there any special equity shown why the motion to change the order of November 4, 1925, should be entertained. On the contrary all of the facts were known to the Receiver and his solicitor, if not at the time of the making of the order of November 4, 1925, certainly at the time of the making of the order called a decree, which was filed May 7, 1926, and which because of the existence and the sustaining of the order of November 4, 1925, refrains from ordering a distribution of the moneys in the hands of the Receiver after making the allowances, but directs that same be held until the further determination of the Court as to the method and manner of distribution, and it is in that form that the solicitor and counsel for the appellant consented to the making of the decree (see pp. 16-18 of the State of the Case).

The service of the notice to modify the order of November 4, 1925, is more than seven months after the decree last mentioned and certainly refutes on its face any inference or argument that there is or can be any newly-discovered evidence.

On the other hand the special equities are all with the appellant and none with the Receiver. For the appellant has received no money whatsoever from the insolvent corporation out of the proceeds of the mortgage money and is the only one of the creditors who has not received any money and is also the only one of the creditors who did not postpone to the lien of the Building and Loan Association mortgages and whose rights, so far as it has been permitted to proceed, have been established as prior to the lien of the Building and Loan Association mortgages in a larger amount than the full claim of the ap-

pellant (see paragraph 11 of affidavit of Joseph H. Mayzel).

Furthermore, if the rights of the appellant had not been preserved in the making of all of the orders entered in this cause beginning with the order for the sale of the property entered on June 22, 1925 (see pp. 9-12 of the State of the Case) and ending with the decree dated April 30, 1926, but filed May 7, 1926, referred to above, it would have appealed to this court from the making and entry of any orders which would result in depriving appellant of its rights to maintain that its claim is a prior lien to the lien of the mortgages; and, all the other creditors having postponed their rights to the lien of the mortgages, appellant's claim is a first and prior claim on the moneys in the hands of the Receiver, and if the order of November 4, 1925, is allowed to stand as appellant contends it should, then as soon as appellant establishes its contention by the judgment of the Essex County Circuit Court, it is entitled to an order directing the Receiver to pay its claim first out of the moneys in his hands.

By revoking the provisions of the order of November 4, 1925, which allowed the appellant a prior lien on the moneys in the hands of the Receiver to the extent that it establishes its claim as a prior lien to the lien of the mortgages, the appellant is deprived of its right to complete the action at law after having procured the report of the referee in its favor because the appellant in obedience to the other parts of the order of November 4, 1925, executed its warrant discharging the lien claim and discharging the general and special judgment on the lands and the only thing that it could try before the Essex

County Circuit Court was the question of priority over the mortgagees reserved to it in said order of November 4, 1925.

Taking this provision out of the order of November 4, 1925, leaves nothing for the appellant to try out at law and puts the appellant in the position of losing its costs in the action at law, the fees and allowances to the referee with absolutely no recourse. Appellant, therefore, contends that all the equities are with it and not with the Receiver, and that even if the question of revoking the order of November 4, 1925, were within the discretion of the Court, such discretion, owing to the harm to the appellant with no benefit to the Receiver and no harm to the other creditors, who have by their own acts postponed their rights of lien, should not be exercised in favor of the Receiver and the order of November 4, 1925, should stand.

The Watkinson case above quoted from has been cited and the same rule approved in *Mitchell v. Mitchell*, 97 N. J. E. 298, in an opinion by Justice Parker, speaking for this court, and also in the case of *In re Robertson*, 95 N. J. E. 672, in an opinion by Justice Katzenbach, speaking for this court, in which he cites the Watkinson case and says on page 674:

“This court held that although there is no express statutory limitation as to the time in which the court may be asked by a defeated party to review its action, the analogous limitation of the right of appeal should govern.”

On the argument before the learned Vice-Chancellor the Receiver contended that the case of *Practical Building and Loan Association of City of Newark v. Meisol, et al.*, 139 Atl. 338 (not yet officially reported), is authority for the making of

the order appealed from because in that case Vice-Chancellor Berry says:

"Exceptant also claims priority with respect to the claim of Woodbridge Lumber Company. I cannot agree with this contention. As the record stands, the question of priority as between the second and third mortgagees and the Woodbridge Lumber Company is at issue and undetermined in the law court. But it may be determined here on application for surplus moneys."

but the learned Vice-Chancellor continues to say:

"No distribution affecting the rights of the second and third mortgagees and the Woodbridge Lumber Company will be made until this question is disposed of."

That case is, therefore, an authority in favor of the appellant and not of the Receiver.

The Receiver also contended before the Court of Chancery that the order directing the Building and Loan Association's solicitor (which appears on p. 34 of the State of the Case) to turn over the undisbursed \$1,200 in his hands to the Receiver is dispositive of the appellant's rights to claim priority. But all that order decides is that the money be held by the Receiver and it in no way adjudicates priorities nor settles the method of distribution.

Appellant, therefore, respectfully submits that the learned Vice-Chancellor had no authority or jurisdiction to make the order of February 17, 1928, which is the order appealed from, and that said order should be reversed and for nothing holden and the order of November 4, 1925, be held to remain in full force and virtue as originally entered.

Respectfully submitted,

PHILIP J. SCHOTLAND,
Solicitor and of Counsel with Appellant
Eastern Sash & Door Company.

New Jersey Court of Errors and Appeals

4166

Between

MARK NASH,

Complainant,

and

LEIDERMAN & NASH BUILDING
COMPANY, INC.,

Defendant.

*On Appeal
from the
Court of
Chancery.*

BRIEF FOR BARNEY LARKEY, RECEIVER, LEIDERMAN & NASH BUILDING COMPANY, Inc.

The Eastern Sash & Door Company, a creditor of the defendant corporation, appeals from an order dated February 17, 1928, made by the Chancellor on the advice of Vice-Chancellor Church. This order is found on page 9 of the case. The appellant complains that the order is illegal.

Vice-Chancellor Church advised this order, after argument, pursuant to notice of an application therefor (Case, p. 18). This notice stated that the application would be made upon the ground that the provision in the order complained of was not made upon the application of the Receiver, or with his knowledge or consent, was improvidently entered and contrary to the Receiver's determination and the determination of the Court.

It appears in this case that after the appointment of the Receiver an order for the sale of the real estate upon which the appellant claims a

mechanic's lien was made on June 22, 1925 (Case, p. 26). This order was made in the presence of the solicitor of the appellant and was not objected to. It provides for a sale free and clear of liens and that the liens of all the creditors attach to the proceeds of sale in the hands of the Receiver to be disposed of as the Court shall thereafter direct.

The difficulty in the case arose after the Receiver had made sale and delivered his deed in accordance with this order, when on November 4, 1927, there was presented to Vice-Chancellor Church by Mr. Kanter, stated to be counsel for Milton M. Unger, solicitor of the Receiver, an order requiring the Eastern Sash & Door Company to discharge its lien claim against the lands which had been sold by the Receiver and providing as follows:

"The lien of the said Eastern Sash & Door Company, if established as prior to the lien of said mortgages affecting said property, or either of them, and to the extent that it is so established, shall be first lien on the moneys now in the hands of the said receiver, which he realized from the sale to Nathan Turkel of said lands and premises, and to the extent that said lien of the Eastern Sash & Door Company is not established as a prior lien to said mortgages, or either of them, it shall be a lien as against the funds in the hands of the Receiver, in the same class with all other lien claimants, the priority to be determined according to law."

In so far as the first part of the order requiring the cancellation of the lien is concerned, it was totally unnecessary because by the previous order of the Court the property had already been sold free and clear of the lien of the appellant and the lien was transferred to the proceeds of sale. The order directing the cancellation of a judgment entered upon the lien claim (judgment

was entered after the appointment of a Receiver) did not in any way injuriously affect the rights of the appellant.

The difficulty, however, with the order was that in paragraph 3 it provided for the re-establishment of the lien of the appellant, Eastern Sash & Door Company, on funds in the hands of the Receiver contrary to the order made at the time of the sale, in which numerous other creditors were interested and made the rights of the appellant and other creditors depend upon the judgment of the Essex County Circuit Court.

When the Receiver discovered that this order had, without his knowledge or with the knowledge of the solicitor of the Receiver, been presented to the Vice-Chancellor, it became evident that the rights of all the creditors of the insolvent corporation had been seriously prejudiced and with that in view, the Receiver applied to the Court on notice to the appellant to vacate that order as improvidently made.

Although no testimony was taken on the return of the order, this appeared to the satisfaction of the Vice-Chancellor and it is presumed that the recitals in the order of February 17, 1928, that the previous order was improvidently made, were based upon competent testimony. Vice-Chancellor Church then vacated that provision complained of. This did not in any way injuriously affect the rights of the Eastern Sash & Door Company, inasmuch as the order made by Vice-Chancellor Church vacating the provision in question also provides that the Receiver accord to the Eastern Sash & Door Company the opportunity of proving its claim against all of the funds in the Receiver's hand, and with the right to the Eastern Sash & Door Company to review the Receiver's determination.

In other words, the order of Vice-Chancellor Church simply put the matter back where it was at the time of the sale of the real estate.

The principal complaint of the appellant is that the order vacating the provision complained of disturbed its right in the law court and interferes with its mechanic's lien. This is not so. If the appellant had a valid right of lien against the premises sold at the time of the appointment of a Receiver and the sale, that lien was effectually transferred to the proceeds of sale by the order hereinbefore referred to and its lien is against the funds in the hands of the Receiver in exactly the same way as it was irrespective of its suit at law.

The property has been sold and the appellant's lien can no longer follow the land. It is transferred to the fund in the Receiver's hands. By the order of the learned Vice-Chancellor, the appellant has the opportunity to and should prove its claim against the funds. If aggrieved by the Receiver's determination, it may appeal to the Court. Until aggrieved, it has not been injured.

This is not the case where the Receiver sought to appeal from an order made by the Vice-Chancellor, but it was the situation where the Vice-Chancellor improvidently made an order upon the application of one who had no authority from the Receiver or the solicitor of the Receiver to obtain or bind the Receiver by the order complained of, and when the mistake was discovered the Court corrected it.

Respectfully submitted,

MILTON M. UNGER,
Solicitor for and of Counsel with Barney
Larkey, Receiver, Leiderman and Nash
Building Company, Inc.

New Jersey Court of Errors and Appeals

4166

Between

MARK NASH,

Complainant,

and

LEIDERMAN & NASH BUILDING
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Vice-Chancellor Church advised this order, after argument, pursuant to notice of an application therefor (Case, p. 18). This notice stated that the application would be made upon the ground that the provision in the order complained of was not made upon the application of the Receiver, or with his knowledge or consent, was improvidently entered and contrary to the Receiver's determination and the determination of the Court.

It appears in this case that after the appointment of the Receiver an order for the sale of the real estate upon which the appellant claims a

mechanic's lien was made on June 22, 1925 (Case, p. 26). This order was made in the presence of the solicitor of the appellant and was not objected to. It provides for a sale free and clear of liens and that the liens of all the creditors attach to the proceeds of sale in the hands of the Receiver to be disposed of as the Court shall thereafter direct.

The difficulty in the case arose after the Receiver had made sale and delivered his deed in accordance with this order, when on November 4, 1927, there was presented to Vice-Chancellor Church by Mr. Kanter, stated to be counsel for Milton M. Unger, solicitor of the Receiver, an order requiring the Eastern Sash & Door Company to discharge its lien claim against the lands which had been sold by the Receiver and providing as follows:

"The lien of the said Eastern Sash & Door Company, if established as prior to the lien of said mortgages affecting said property, or either of them, and to the extent that it is so established, shall be first lien on the moneys now in the hands of the said receiver, which he realized from the sale to Nathan Turkel of said lands and premises, and to the extent that said lien of the Eastern Sash & Door Company is not established as a prior lien to said mortgages, or either of them, it shall be a lien as against the funds in the hands of the Receiver, in the same class with all other lien claimants, the priority to be determined according to law."

In so far as the first part of the order requiring the cancellation of the lien is concerned, it was totally unnecessary because by the previous order of the Court the property had already been sold free and clear of the lien of the appellant and the lien was transferred to the proceeds of sale. The order directing the cancellation of a judgment entered upon the lien claim (judgment

was entered after the appointment of a Receiver) did not in any way injuriously affect the rights of the appellant.

The difficulty, however, with the order was that in paragraph 3 it provided for the re-establishment of the lien of the appellant, Eastern Sash & Door Company, on funds in the hands of the Receiver contrary to the order made at the time of the sale, in which numerous other creditors were interested and made the rights of the appellant and other creditors depend upon the judgment of the Essex County Circuit Court.

When the Receiver discovered that this order had, without his knowledge or with the knowledge of the solicitor of the Receiver, been presented to the Vice-Chancellor, it became evident that the rights of all the creditors of the insolvent corporation had been seriously prejudiced and with that in view, the Receiver applied to the Court on notice to the appellant to vacate that order as improvidently made.

Although no testimony was taken on the return of the order, this appeared to the satisfaction of the Vice-Chancellor and it is presumed that the recitals in the order of February 17, 1928, that the previous order was improvidently made, were based upon competent testimony. Vice-Chancellor Church then vacated that provision complained of. This did not in any way injuriously affect the rights of the Eastern Sash & Door Company, inasmuch as the order made by Vice-Chancellor Church vacating the provision in question also provides that the Receiver accord to the Eastern Sash & Door Company the opportunity of proving its claim against all of the funds in the Receiver's hand, and with the right to the Eastern Sash & Door Company to review the Receiver's determination.

In other words, the order of Vice-Chancellor Church simply put the matter back where it was at the time of the sale of the real estate.

The principal complaint of the appellant is that the order vacating the provision complained of disturbed its right in the law court and interferes with its mechanic's lien. This is not so. If the appellant had a valid right of lien against the premises sold at the time of the appointment of a Receiver and the sale, that lien was effectually transferred to the proceeds of sale by the order hereinbefore referred to and its lien is against the funds in the hands of the Receiver in exactly the same way as it was irrespective of its suit at law.

The property has been sold and the appellant's lien can no longer follow the land. It is transferred to the fund in the Receiver's hands. By the order of the learned Vice-Chancellor, the appellant has the opportunity to and should prove its claim against the funds. If aggrieved by the Receiver's determination, it may appeal to the Court. Until aggrieved, it has not been injured.

This is not the case where the Receiver sought to appeal from an order made by the Vice-Chancellor, but it was the situation where the Vice-Chancellor improvidently made an order upon the application of one who had no authority from the Receiver or the solicitor of the Receiver to obtain or bind the Receiver by the order complained of, and when the mistake was discovered the Court corrected it.

Respectfully submitted,

MILTON M. UNGER,
Solicitor for and of Counsel with Barney
Larkey, Receiver, Leiderman and Nash
Building Company, Inc.