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Petition for Confirmation of Agreement of Sale.

(Filed Aug. 2nd, 1924.)

In Chancery of New Jersey

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In the Matter
of
The Dissolution of the NEW JERSEY REFRIGERATING COMPANY.

On Bill, &c.
(Premises known as the plant—Numbers 221-223-225 Henderson Street, 509 Henderson Street and 183 Tenth Street, Jersey City, N. J.)

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

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The petition of Frank J. Bock and Edward H. Wright, Receivers of the New Jersey Refrigerating Company, respectfully shows:

1. That your petitioners came into possession, upon their appointment as Receivers of the New Jersey Refrigerating Company, of a large number of parcels of real estate, among which were the premises known as Numbers 173 Ninth Street, Jersey City, comprising the plant of the corporation, consisting of twelve parcels of real estate with the buildings thereon, and premises known by the Numbers 221, 223 and 225 Henderson Street, 509 Henderson Street and 183 Tenth Street, in the City of Jersey City, in the County of Hudson and State of New Jersey, all of which premises are more particularly described in the contract hereto annexed and hereby made a part hereof, marked "Exhibit A."

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Petition for Confirmation of Agreement.

2. That under the instructions of this Court that the real estate of the New Jersey Refrigerating Company should be sold through sealed bids, your petitioners issued invitations for bids on the sale of the property known as Number 173 Ninth Street, Jersey City, comprising the plant of the corporation, consisting of twelve parcels of real estate with the buildings thereon, a spur track leading into the plant from the Erie Railroad Company and a lease for twenty years from 1920 of a portion of a warehouse owned by the Erie Railroad Company, alongside of which the aforesaid spur track runs. There was also included in the invitations for bids, as part of the property comprising the plant to be sold, all the fixed machinery, fixed equipment and all other equipment, machinery, tools, six 6-ton and one 3½-ton Packard motor trucks and the supplies used in or about the refrigerating business, together with the good-will of the refrigerating business and also an ordinance of the City of Jersey City permitting the construction of the aforesaid spur track along and over the streets of Jersey City.

3. That in response to the invitations for bids, as aforesaid, your petitioners received a bid from Charles T. Brown for \$425,000 in cash, or, in the alternative, \$432,000, \$100,000 thereof to be paid in cash, the balance of \$332,000 by taking the property subject to the outstanding bonds of an issue of \$500,000 secured by a mortgage or trust deed held by the Commercial Trust Company of New Jersey. They also received a bid from Aldred H. Abeel for \$340,000 in cash. No cash deposit, as required by the Receivers' invitations for bids, accompanied Abeel's bid. They also received a bid

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from the John J. Reilly Stevedoring Co., Inc., for \$600,000, \$100,000 to be paid in cash, \$500,000 of the purchase price to be paid "by taking the property subject to a first mortgage now a lien on said property maturing 1932 and held by the Commercial Trust Company of New Jersey." The Receivers rejected the bid of Charles T. Brown as, in their opinion, it was too low. The Receivers rejected the remaining two bids because they did not conform to the invitations for bids, in that the bid of Abeel contained no cash deposit, as required by the invitations for bids, and the bid of the John J. Reilly Stevedoring Co., Inc. was based upon the assumption that the property could be bought and paid for by taking it subject to an existing mortgage for \$500,000, which was not a fact.

4. That thereafter, and on July 17, 1924, upon the petition of the Receivers, an order was granted herein authorizing the Receivers, subject to the approval of this Court, to negotiate for the sale of and to negotiate and enter into a contract for the sale of, the plant of the New Jersey Refrigerating Company, known as Number 173 Ninth Street, Jersey City, consisting of twelve parcels of real estate with the buildings thereon, the spur track leading into the plant from the Erie Railroad Company, and a lease for twenty years from 1920 of a portion of a warehouse owned by the Erie Railroad Company, alongside of which the aforesaid spur track runs, and also all the fixed machinery, fixed equipment and all other equipment now upon said premises, or in any building thereon, for use in connection therewith, and in the discretion of the Receivers, all other equipment, machinery, tools, six 6-ton and one 3½-ton Packard motor trucks, and supplies used in and about the refrigerating

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business, together with the good-will of the refrigerating business, and in connection with the sale of said plant, to negotiate for the sale of, and to negotiate and enter into a contract for the sale of, the five parcels of real estate known and designated by the street numbers 163 Ninth Street (otherwise known as 509 Henderson Street), which property is on the corner of Henderson Street and Ninth Street, 521-523 and 525 Henderson Street, corner of Tenth Street, and 183½ Tenth Street (the correct number thereof being 183 Tenth Street), in the City of Jersey City, which last five parcels of real estate should be deemed part of the plant for the purposes of the sale in said order authorized if, in the course of their negotiations, it appeared to the Receivers advisable so to do.

5. Your petitioners thereupon entered into negotiations for sale of the premises known as Number 173 Ninth Street, Jersey City, comprising the plant of the corporation and also for the sale of the aforesaid five parcels of real estate in connection with the plant, and your petitioners obtained a bid in the sum of \$525,000 for the aforesaid property from Charles T. Brown and a bid in the sum of \$550,000 for the aforesaid property from John J. Reilly Stevedoring Co., Inc. Both bids contained a provision that a part of the purchase price should be paid by taking the premises subject to the balance outstanding and unpaid, to wit, the sum of \$332,000 on the mortgage or trust deed held by the Commercial Trust Company of New Jersey, as trustee, to secure an issue of bonds in the amount of \$500,000 and covering the premises known as the plant, consisting of twelve parcels. The balance of the purchase price was to be paid

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as follows: \$25,000 upon the signing of the contract, the rest in cash upon delivery of the deed.

6. The said bid of John J. Reilly Stevedoring Co., Inc. was, in the opinion of your petitioners, the better of the two bids received, and, on July 31, 1924, they entered into an agreement for the sale of the premises above described to said John J. Reilly Stevedoring Co., Inc., for the sum of \$550,000 subject to the terms and conditions in said agreement of sale set forth, as appears by said agreement hereto annexed, marked "Exhibit A," and subject likewise to the approval of the Court of Chancery of New Jersey.

7. Your petitioners believe that the sum of \$550,000 offered by John J. Reilly Stevedoring Co., Inc., represents the reasonable market value of said premises and is the highest sum now obtainable therefor, and that the conditions set out in said agreement to purchase, hereto annexed, are the best terms obtainable upon the sale of said premises.

Your petitioners, therefore, are advised and believe that the consummation of said sale will be for the best interest of the New Jersey Refrigerating Company.

Your petitioners therefore pray that the agreement of sale with John J. Reilly Stevedoring Co., Inc., be approved by this Court and that an order may be made authorizing and directing them to consummate said agreement of sale in accordance with the terms thereof, and to make, execute and deliver unto said John J. Reilly Stevedoring Co., Inc., or its assigns, good and sufficient conveyances in the law of the land and premises, and to pay to Samuel Lesser five per cent. commission on the

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amount of the purchase price (\$500,000) of the premises known as the plant, consisting of twelve parcels of real estate, and two and one-half per cent. on the amount of the purchase price (\$50,000) of the other five parcels of real estate upon the consummation of the contract and the acceptance of the deed or deeds by the purchaser, or such other order or direction herein as the nature and circumstances of the case may require and as shall be agreeable to equity.

And your petitioners will ever pray, etc.

FRANK J. BOCK,
EDWARD H. WRIGHT,
Petitioners,
Receivers of New Jersey
Refrigerating Company.

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

FRANK J. BOCK and EDWARD H. WRIGHT, being duly sworn on their respective oaths according to law, say that they are the Receivers of the New Jersey Refrigerating Company, and the petitioners named in the foregoing petition; that the foregoing petition has been read by them, and that the matters and things therein stated are true to the best of their knowledge, information and belief.

FRANK J. BOCK.
EDWARD H. WRIGHT.

Sworn and subscribed to before me }
this 1st day of August, 1924. }

HANNAH D. BALDWIN,
Notary Public of New Jersey.

Petition for Confirmation of Agreement.

EXHIBIT "A"

THIS AGREEMENT, made this 31st day of July, nineteen hundred and twenty-four, by and between Frank J. Bock and Edward H. Wright, Receivers appointed by the Chancellor of the State of New Jersey of New Jersey Refrigerating Company, formerly Lembeck and Betz Eagle Brewing Company, parties of the first part.

And JOHN J. REILLY STEVEDORING CO., INC., a corporation organized and existing under the laws of the State of New York, with its principal place of business at 53rd Street and East River, in the Borough of Manhattan, City, County and State of New York, party of the second part;

WITNESSETH, That the said parties of the first part, for and in consideration of the sum of FIVE HUNDRED AND FIFTY THOUSAND (\$550,000.) DOLLARS, to be paid and satisfied as hereinafter mentioned, hereby agree to sell unto the said party of the second part, all those certain lots, tracts or parcels of land and premises hereinafter particularly described situate, lying and being in the City of Jersey City, in the County of Hudson, and State of New Jersey;

(See additional Memo herewith attached)

ALL the property above described is sold subject to restrictions appearing of record, if any; to party wall and party wall agreements, if any, and rights, if any, of adjoining property owners in such party walls; to all encroachments if any and mislocation of fences, if any; and to municipal taxes, assessments and other charges not yet levied or confirmed, if any; to tenement house and other State, County and Municipal laws, ordinances and

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regulations, if any; to easements of electric, tele-
phone and telegraph poles, wires and equipment,
if any; to sewers, drains, ditches, pipe lines and
conduits, if any; to present leases and rights of
tenants and occupants in possession, if any; and
10 to such other facts as a survey and inspection
would disclose; to easements for light and air
pertaining to adjoining lands.

And the said John J. Reilly Stevedoring Co.,
Inc., for itself, its successors, assigns and legal
representatives, doth covenant, promise and agree
to and with the said parties of the first part, and
their successors, that John J. Reilly Stevedoring
Co., Inc., the said party of the second part, will
20 pay and satisfy, or cause to be paid and satisfied,
unto the said parties of the first part, the said sum
of FIVE HUNDRED and FIFTY THOUSAND (\$550,000)
DOLLARS, as and for the purchase money of the
foregoing described land and premises, in the fol-
lowing manner, that is to say:

On Execution of this agreement, for
which this is also a receipt \$25,000.00
of which \$10,000. is the sum deposited
with the Receivers on the submission
30 of the party of the second part's
sealed bid on June 16, 1924.

On delivery of deed, cash 193,583.00
The balance, or the sum of 331,417.00

by purchasing the premises subject to the amount
outstanding and unpaid at the time of the closing
of the title and delivery of the deed, hereinafter
fixed, of a mortgage or trust deed for \$500,000.
now upon said premises, bearing date the first day
40 of May, 1912, made by the Lembeck & Betz Eagle
Brewing Company to the Commercial Trust Com-

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pany of New Jersey, as Trustee, to secure an issue
of Refunding First Mortgage Gold Bonds to the
amount of \$500,000. with interest at six per cent,
said mortgage or trust deed being recorded in the
office of the Register of Hudson County in Book
766 of Mortgages, page 105; and the party of the
10 second part, for itself, its successors and assigns,
agrees to perform and carry out all the covenants
and agreements contained in said mortgage and
assumes and agrees to pay, as part of the pur-
chase price, the bonds outstanding and unpaid at
the time of the delivery of the deed, which are
secured by said mortgage or trust deed, accord-
ing to the tenor of said bonds, and it shall be so
stated in the deed hereinafter provided for. In
20 arriving at the amount of principal of said bonds
and mortgage or trust deed for \$500,000, still un-
paid, the amount of the sinking fund in the pos-
session of the Trustee named in the mortgage, at
the time of the delivery of the deeds hereafter
fixed shall be deducted from the principal of said
bonds and mortgage or trust deed. If the amount
of the sinking fund in the possession of the Trus-
tee at the time fixed herein for the delivery of the
deed has been increased over the amount it re-
30 ports at this time in its possession proper adjust-
ment on the closing of the title shall be allowed
the Receivers. The Trustee reports at this date
that it holds in the sinking fund 168 bonds of the
company for \$1,000. each and cash in the sum of
\$582.97.

The rents of the said premises, including the
rents under lease by Erie Railroad Company to
Lembeck & Betz Eagle Brewing Company, insur-
ance premiums, and water rents, taxes and in-
40 terest on mortgage, if any, shall be adjusted, ap-

Petition for Confirmation of Agreement.

portioned and allowed up to the date of taking title and thereafter be taken over and assumed by the said party of the second part.

10 The risk of loss or damage to said premises by fire or otherwise, until the delivery of said deed is assumed by the parties of the first part.

And the said parties of the first part on receiving payments as above set forth, shall deliver to the said party of the second part duly executed bargain and sale deeds conveying said premises to said party of the second part, free from all encumbrances except as aforesaid, and also a duly executed assignment of the aforesaid lease by the Erie Railroad Company to the Lembeck & Betz Eagle Brewing Company subject to the rents, covenants and conditions contained therein, all of which the party of the second part shall agree therein to pay, assume and perform, and also a duly executed assignment of all the right, title and interest of the New Jersey Refrigerating Company under an ordinance passed January 27, 1920 by the Board of Commissioners of the City of Jersey City granting permission to the New Jersey Refrigerating Company (then known as Lembeck & Betz Eagle Brewing Company), its successors and assigns, *et al.*, to lay, maintain and operate a track of standard gauge upon and across Henderson Street and Tenth Street in Jersey City, subject to all the terms, provisions, conditions and yearly payments set forth in said ordinance and subject to the conditions contained in a certificate of the Board of Public Utility Commissioners of the State of New Jersey dated March 2, 1920 in an application entitled "In the Matter of the application of the Lembeck & Betz Eagle Brewing Company and United States Railroad Administration,

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Petition for Confirmation of Agreement.

Erie Railroad, for permission to construct siding over Henderson Street and along and across 10th Street, at grade, in the City of Jersey City, New Jersey."

Said deeds and assignments shall be delivered at the office of J. H. Harrison, 810 Broad Street, Newark, New Jersey, Ninety (90) days after the approval of the Court of Chancery of the terms of their contract at 11 o'clock in the forenoon or sooner upon ten days' notice in writing by the purchaser. 10

It is hereby understood and agreed that Samuel Lesser is the broker who effected this sale, and said parties of the first part hereby agree to pay said broker a commission of five (5) per cent for the sale of the plant and a commission of two and one-half (2½) per cent for the sale of the other parcels, or such other commission as may be approved by the Court of Chancery, if and when this sale is consummated and the purchase price paid. 20

This contract shall be held and construed to be an entire contract, but it is understood and agreed that if title to one, any or all of the five separate parcels, known as 521-523-525 Henderson Street, 183 Tenth Street and 509 Henderson Street, shall prove to be unmarketable, then abatement shall be made in the purchase price according to the following schedule: 30

Defective title to 521 Henderson Street,	\$9,000	
Defective title to 523 Henderson Street,	9,000	
Defective title to 525 Henderson Street,	14,000	
Defective title to 183 Tenth Street,	3,500	
Defective title to 509 Henderson Street,	14,500	
	<hr/>	
	\$50,000	40

Petition for Confirmation of Agreement.

It is further understood and agreed that if title to any one or all of premises known as Numbers 521-523 and 525 Henderson Street shall prove to be defective, then the party of the second part shall have the right to reject title to said three
 10 parcels, and the purchase price shall abate to the extent of \$32,000; if, however, the title to said three parcels, Numbers 521-523 and 525 Henderson Street, is rejected, as aforesaid, and the title to premises Number 509 Henderson Street also proves to be defective, then the party of the second part may reject title to all the five parcels, and the purchase price shall abate in the sum of \$50,000; further if the title to the three parcels,
 20 Numbers 521-523 and 525 Henderson Street, is rejected, as aforesaid, and title to 183 Tenth Street proves defective, then title to all the said four parcels may be rejected, and the purchase price shall abate in the sum of \$35,500.

In no event shall the receivers be liable to the purchaser for damages in case the title to any or all of said properties proves to be unmarketable or not a good title.

It is further agreed by the party of the second part, in behalf of itself, its successors and assigns,
 30 that the parties of the first part may occupy the easterly corner room on the second floor of the office building of the plant for the purpose of an office in connection with their duties as Receivers for a period of one year from the date of the delivery of the deeds at a nominal yearly rental of one dollar (\$1.00) and the party of the second part agrees to execute a lease to the parties of the first part to that effect at the time of the delivery of the deeds. The lease, however, shall contain a clause that in the event that the party of
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the second part decides to tear down said building during its term, then and in that event the parties of the first part will vacate said premises within 30 days after notice in writing to that effect.

And for the performance of all and singular the covenants and agreements aforesaid, the said
 10 party of the second part does bind itself and its successors, and it hereby agrees to pay, upon failure to perform the same, the sum of TWENTY FIVE THOUSAND (\$25,000) DOLLARS, which is hereby fixed and settled as liquidated damages therefor.

And it is further agreed, that this agreement is made subject to the approval of the Court of Chancery of New Jersey and shall be consummated in accordance with the statutes in such case made and provided and under the direction of
 20 said Court of Chancery.

The words "party of the second part," when used in this agreement, shall for all purposes be taken, held and construed to mean, include and describe John J. Reilly Stevedoring Co., Inc., its successors and assigns.

It is further agreed that all notices of violation of municipal ordinances, orders or requirements issued by the Tenement House or other departments having jurisdiction against or affecting the premises at the date of the signing of this agreement, shall be complied with by the seller, and the premises shall be conveyed free of the same, and this provision of the contract shall survive delivery of the deed hereunder.
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If at the time of the delivery of the deed the premises or any part thereof shall be or shall have been affected by an assessment or assessments which are or may become payable in annual installments, of which the first installments
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Petition for Confirmation of Agreement.

10 is then a charge or lien or has been paid, then for the purposes of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller upon the delivery of the deed.

IN WITNESS WHEREOF, the parties of the first part have hereunto set their hands and seals and the party of the second part has caused these presents to be signed by its President and its corporate seal to be hereunto affixed and attested by its Secretary the day and year first above written,

20 FRANK J. BOCK (LS)
EDWARD H. WRIGHT,
Receivers.

JOHN J. REILLY STEVEDORING CO. INC.
By JOHN J. REILLY Pres.

Signed, sealed and delivered
in the presence of August Roche Jr.

30 WM. WEINBAUB
A True Copy
THOMAS BARBER
Clerk

Order to Show Cause.

(Filed Aug. 2nd, 1924.)

IN CHANCERY OF NEW JERSEY.

In the Matter
of
The Dissolution of the NEW JERSEY REFRIGERATING COMPANY. } On Bill, &c. 10

Upon reading and filing the verified petition of Frank J. Bock and Edward H. Wright, receivers of the New Jersey Refrigerating Company, from which it appears that, among other matters, the said Receivers have entered into an agreement on July 31, 1924, for the sale of the properties, formerly of the New Jersey Refrigerating Company, that is to say, the premises known as Number 173 Ninth Street, Jersey City, N. J., comprising the plant of the corporation consisting of twelve parcels of real estate with the buildings thereon and all the fixed machinery and fixed equipment now upon said premises, or in any building thereon, for use in connection therewith, and all other tools and supplies used in or about the refrigerating business, together with the good-will of the refrigerating business, also the sidetrack from the Erie Railroad across Henderson Street and along the northerly side of Tenth Street as the same appears in a blueprint attached to a lease made in duplicate the first day of April, 1920, by and between the Erie Railroad Company and Lembeck & Betz Eagle Brewing Company for a term of 20 years covering 239 feet of the easterly end of the

Order to Show Cause.

warehouse of the Erie Railroad Company, and located on the northerly side of Tenth Street between Grove and Henderson Streets and subject to the terms, provisions and conditions of an ordinance passed January 27, 1920, by the Board of Commissioners of Jersey City regulating the construction, operation and maintenance of said sidetrack on Tenth Street and over Henderson Street, and subject to all the conditions contained in a certain certificate dated March 2, 1920, made by the Board of Public Utility Commissioners of the State of New Jersey in an application entitled "In the matter of the application of the Lembeck & Betz Eagle Brewing Company and United States Railroad Administration, Erie Railroad, for permission to construct siding over Henderson Street and along and across Tenth Street at grade in the City of Jersey City, New Jersey," and also the above-mentioned lease by the Erie Railroad Company to the Lembeck & Betz Eagle Brewing Company and also 5 parcels of real estate in the City of Jersey City, known as Numbers 509 Henderson Street, 521-523 and 525 Henderson Street and 183 Tenth Street, to John J. Reilly Stevedoring Co., Inc., for the consideration of \$550,000 to be paid as follows: \$332,000 thereof by taking the premises subject to the balance outstanding and unpaid on a certain mortgage or trust deed made by the Lembeck & Betz Eagle Brewing Company to Commercial Trust Company of New Jersey, as trustee, under date of May 1, 1912, to secure the payment of bonds in the amount of \$500,000, and agreeing to assume the payment of all the said bonds outstanding at the time of the delivery of the deed, and to perform and carry out all the covenants and agreements contained in said mortgage and

Order to Show Cause.

bonds, the balance of said purchase price to be paid in cash, \$25,000 of which was paid to the Receivers upon the signing of the agreement for sale, and the remainder to be paid in cash at the time of the delivery of the deeds, and it further appearing that said agreement for the sale of said premises contains a further provision for the payment of commission to Samuel Lesser, as broker, of 5 per cent. of the purchase price (\$500,000) of the plant and a commission of 2½ per cent. of the purchase price (\$50,000) of the other 5 parcels if and when the sale is consummated and the purchase price paid.

And said agreement of sale having been made subject to the approval of the Court of Chancery, and said Receivers having prayed in said petition for an order authorizing and directing them to consummate said sale and to execute and deliver unto the above-named purchaser, for the properties contracted to be sold to it, or its assigns, good and sufficient conveyances in the law, in accordance with the terms of said agreement of sale, and said Receivers having further prayed for authority to pay to Samuel Lesser, the broker who consummated said agreement of sale, commissions of 5 per centum on the amount of the purchase price (to wit, \$500,000) of said plant, and 2½ per centum on the purchase price (to wit, \$50,000) of the other five parcels included in the sale, upon the consummation of the transaction and the acceptance of the deeds by the purchaser, or for such other order or direction herein as the nature and circumstances of the case may require, and as shall be agreeable to equity.

It is, on this second day of August, 1924, on motion of J. H. Harrison, Esquire, solicitor and of counsel with said Receivers:

Order to Show Cause.

10 ORDERED, that the stockholders of the New Jersey Refrigerating Company and Commercial Trust Company of New Jersey, as Trustee for the bondholders under a certain mortgage or trust deed, dated May 1, 1912, covering the 12 parcels of real estate known as the plant, show cause before this Court on Tuesday, the nineteenth day of August, 1924, at the Chancery Chambers, City of Trenton, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard thereon, why an order should not be made authorizing, empowering and directing the Receivers of the New Jersey Refrigerating Company to consummate the sale of the real estate of said Company comprehended and included in said agreement of sale with John J. Reilly Stevedoring Co., Inc., who has contracted to purchase the same and to make, execute and deliver good and sufficient conveyances thereof to John J. Reilly Stevedoring Co., Inc., or its assigns, in accordance with the terms of said agreement of sale; and it is further

20 ORDERED, that said stockholders show cause at the time and place aforesaid why said Receivers should not be authorized and directed to pay to Samuel Lesser, the real estate broker who negotiated said sales, 5 per cent. commission on the purchase price (to wit, \$500,000) of said plant and 2½ per cent. commission on the purchase price of the other five parcels included in the sale according to their respective values as stated in the agreement of sale, upon the consummation of the agreement of sale and the acceptance of deeds by the purchaser; and it is further

40 ORDERED, that a copy of this order (which need not be certified) be served upon each of the stock-

Order Confirming Sale.

holders of the New Jersey Refrigerating Company and the Commercial Trust Company of New Jersey personally, or upon their several and respective solicitors, or by mailing true copies thereof to the stockholders and the Commercial Trust Company of New Jersey at their several respective post office addresses, if the same can be ascertained, with postage prepaid thereon, within five days from the date of this order.

E. R. WALKER,
C.

Order Confirming Sale.

(Filed Sept. 17th, 1924.)

IN CHANCERY OF NEW JERSEY.

<p>In the Matter</p> <p>of</p> <p>The Dissolution of the NEW JERSEY REFRIGERATING COMPANY.</p>	<p>ON BILL, ETC. On Petition for Confirmation of Agreement of Sale (Premises known as the Plant—Nos. 521-523-525 Henderson Street, 509 Henderson Street and 183 Tenth Street, Jersey City, N. J.)</p>
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This matter coming on to be heard in the presence of J. H. Harrison, Esq., solicitor and of counsel with Frank J. Bock and Edward H. Wright, Receivers of the New Jersey Refrigerating Company, Edward Maxson, Esq., for Reilly Stevedoring Company, Inc., and Samuel Lesser, Perkins & Drewen, Esqs., for Thomas A. Lembeck and Sarah Lembeck, stockholders, Albert C. Wall for Otto A. Lembeck, stockholder, Fisk & Fisk, Esqs., for Ida L. Bowen, stockholder, Shirley N. Carr for Eleanor Betz Howe and G. Arthur Betz, stockhold-

Order Confirming Sale.

ers, Merritt Lane, Esq., for Gustav W. Lembeck individually and as trustee of Estate of Henry Lembeck, deceased, stockholders, and it appearing that on August 19, 1924, a petition was presented to this Court setting forth agreement entered into on July 31, 1924, between the Receivers of the New Jersey Refrigerating Company and the John J. Reilly Stevedoring Company, Inc., for the sale for the sum of \$550,000 of the real and personal property comprising the plant of the New Jersey Refrigerating Company, and more particularly described in the petition of said Receivers and the contract annexed thereto, and said petition having prayed for an order authorizing and directing said Receivers to consummate said sale and to pay Samuel Lesser, broker who consummated said agreement of sale, the commissions set forth in said agreement of said sale, and said agreement of sale having been made subject to the approval of the Court of Chancery, and it appearing that by an order of this Court dated August 19, 1924, it was ordered that said sale to said John J. Reilly Stevedoring Company, Inc., be not then consummated, and it further appearing from the report and petition of the receivers of the New Jersey Refrigerating Company presented to the Court on September 2, 1924, that said receivers, pursuant to said order of this Court, made August 19, 1924, offered at public auction on Thursday, August 28, 1924, the real and personal property comprising the plant of the New Jersey Refrigerating Company, and more particularly described in said petition and the contract between said receivers and Charles T. Brown, the purchaser at said sale, annexed to and made a part of said report and petition; and it further appearing that

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Order Confirming Sale.

one Charles T. Brown was the highest bidder at said sale, and that said property was struck off and sold to said Charles T. Brown for the sum of \$625,000, without brokerage, and subject to a mortgage, or deed of trust, now a lien upon the premises known as the plant, which was given to secure an issue of bonds in the amount of \$500,000, on which issue there is now outstanding the sum of approximately \$332,000; and it further appearing that said Charles T. Brown deposited the sum of \$25,000, as required by the conditions of said sale, and that the said receivers entered into a contract with said Charles T. Brown for the sale of said property, a copy of said contract being annexed to and forming a part of the report and petition of the receivers in this matter; and proof having been made of the service upon the stockholders of the New Jersey Refrigerating Company and the Commercial Trust Company of New Jersey, trustee, of the order of this Court in this matter, dated August 19, 1924, which order provided, among other matters, that the sale to be made under said order be reported to this Court for confirmation on Tuesday, September 2, 1924, and said receivers having prayed in their report and petition that said sale to Charles T. Brown be ratified and confirmed by this Court, and that an order be made authorizing and directing said receivers to consummate said sale in accordance with the conditions of sale and the terms of the contract between said receivers and said Charles T. Brown, and the John J. Reilly Stevedoring Company, Inc., and Samuel Lesser appearing and objecting to the confirmation of said sale to Charles T. Brown and urging that said agreement of sale with the John J. Reilly Stevedoring Company, Inc., be confirmed

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Order Confirming Sale

and the Court being of the opinion that said sale to said Charles T. Brown should be ratified and confirmed, and that the matter of the payment of the brokerage commissions under said agreement with the John J. Reilly Stevedoring Company, Inc., should be referred to the receivers, and no reason appearing to the contrary:

IT IS, on this seventeenth day of September, 1924, on motion of J. H. Harrison, Esq., solicitor and of counsel with Frank J. Bock and Edward H. Wright, receivers of the New Jersey Refrigerating Company, ORDERED, that said sale to Charles T. Brown be in all things ratified and confirmed, and that the said receivers be and they hereby are authorized, empowered and directed to consummate said sale in accordance with the conditions thereof and the terms of the contract entered into between said receivers and the said Charles T. Brown, and to make, execute and deliver unto said Charles T. Brown, or his assigns, a good and sufficient conveyance, in the law, of the land and premises, comprehended in said sale, and to transfer and assign the lease with the Erie Railroad Company and the rights, privileges and franchises under the ordinance passed by the commissioners of Jersey City, New Jersey, and the personal property mentioned and included in said agreement of sale, and to make, execute and deliver such bills of sale, assignments or other instruments as may be necessary, to transfer title and possession to the said Charles T. Brown in, of and to the property described and comprehended in said contract of sale, and to do such other matters and things as may be necessary to effectuate said sale, and

Order Confirming Sale.

It is further ORDERED, that said receivers hold the moneys derived and to be derived from said sale to abide the further order of this Court, and

It is further ORDERED, that the agreement of sale to the John J. Reilly Stevedoring Company, Inc., dated July 31, 1924, be not approved and be not consummated, and that the sum of \$25,000 of the John J. Reilly Stevedoring Company, Inc., now held by said receivers as a deposit on account of said agreement of sale be returned by said receivers to said John J. Reilly Stevedoring Company, Inc., and

It is further ORDERED, that the claim for commissions by Samuel Lesser, under said agreement between said receivers and the John J. Reilly Stevedoring Company, Inc., of July 31, 1924, be reserved and referred to the said receivers for disposition according to law, and that the said Samuel Lesser be, and he hereby is, given ten days from the service upon him by mail of a copy of this order, which need not be certified, to file with the receivers a duly verified proof of his claim against the receivers.

E. R. WALKER,
C.

A true copy.

THOMAS BARBER,
Clerk.

Conclusions.

(Filed September 12th, 1924.)

IN CHANCERY OF NEW JERSEY.

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<p style="text-align: center;">In the Matter of The Dissolution of the NEW JERSEY REFRIGERATING COMPANY.</p>
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On Bill, etc.

On petition for confirmation of sale to Charles T. Brown.

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- Mr. J. HENRY HARRISON, for receiver.
- Mr. EDWARD MAXSON, for Reilly Stevedoring Company, Inc., and Samuel Lesser.
- Messrs. PERKINS & DREWEN, for Thomas A. Lembeck and Sarah Lembeck, stockholders.
- Messrs. FISK & FISK, for Ida L. Bowen, stockholder.
- Mr. MERRITT LANE, for certain other stockholders.

WALKER, Chancellor:

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On July 17, 1924, an order was made in the above stated cause that Frank J. Bock and Edward H. Wright, receivers of the defendant corporation, be directed, subject to the approval of this court, to negotiate, and enter into a contract for, the sale of certain property of the defendant company (describing it). In pursuance of this order the receivers issued invitations for bids, and in response received sealed bids, one from the

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Conclusions.

John J. Reilly Stevedoring Company, Inc., which appeared to the receivers to be the highest, and it was accepted and a contract entered into between them and the company, July 31, 1924, which contract recited that in consideration of \$550,000 they agreed to sell to that company, the property, describing it, \$25,000 to be paid upon the execution of the agreement, \$193,583 on the delivery of the deed, and the balance of \$331,417, being the amount outstanding and unpaid on the mortgage, and subject to the lien thereof. The agreement contained a clause that settlement should be made ninety days after the approval by this Court of the terms of the contract; and it contained this stipulation:

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“It is hereby understood and agreed that Samuel Lesser is the broker who effected this sale, and said parties of the first part (receivers) hereby agree to pay said broker a commission of five (5) per cent. for the sale of the plant and a commission of two and one-half (2½) per cent. for the sale of the other parcels, or such other commission as may be approved by the Court of Chancery, if and when this sale is consummated and the purchase price paid.”

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And contained this still further provision:

“And it is further agreed, that this agreement is made subject to the approval of the Court of Chancery of New Jersey and shall be consummated in accordance with the statutes in such case made and provided, and under the direction of the said Court of Chancery.”

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Conclusions.

On August 19, 1924, an order to show cause why the receivers should not consummate the sale of the property included in the agreement of July 31st with the John J. Reilly Stevedoring Company, Inc., for the gross consideration of \$550,000, and why the receivers should not be directed to pay the real estate broker who negotiated the sale the commissions mentioned in the agreement, was returnable, having been served upon the stockholders of the defendant company and the Commercial Trust Company, the mortgagee trustee; and Charles T. Brown, in open court, having offered to pay the sum of \$560,000, without brokerage, for the property, an order was entered that the agreement of sale of July 31, 1924, be not then consummated and that no commissions be then allowed to the broker who effected said contract; and it was further ordered that the receivers advertise for sale at public auction on Thursday, August 28, 1924, the real estate and personal property referred to and more particularly described in the petition filed August 2, 1924, and the above mentioned order to show cause made thereon, and that they be directed, subject to the approval of this Court, to enter into a contract with the purchaser at that sale and report the same for confirmation on Tuesday, September 2, 1924. And now on the return of the last mentioned order to show cause the receivers, on notice to the parties interested, report that pursuant to the order of August 19, 1924, they offered the property for sale at public vendue, comprising the plant of the defendant company and other property therein described, and that Charles T. Brown then and there bidding the sum of \$625,000 for the premises, and no one bidding so much, or more, for the same,

Conclusions.

the property was struck off and sold to him for that sum, he being the highest bidder therefor. The conditions of sale were that the property comprising the plant would be sold subject to the mortgage bond issue, on which there was then due approximately \$332,000, that the successful bidder would be required to sign a contract, subject to the approval of this Court, which contract was signed and annexed to their report.

The cash for the equity of redemption under the Reilly bid at private sale reported August 19, 1924, is \$191,750, and that of the Brown bid, at public sale, reported September 2, 1924, is \$293,000, making a difference of \$101,250 in favor of the Brown bid, being over 52% excess.

On August 19, 1924, on the return of the order to show cause and when the bid of the John J. Reilly Stevedoring Co., Inc., was reported, that concern was represented by a New York attorney, who was not associated with any solicitor of our State, and, having no audience in our courts, he could not be introduced *pro hac vice*. The order of that date calling for a resale at public vendue was not opposed by anyone who had standing before the court.

The Reilly Stevedoring Company did not bid at the public sale, but was represented before the court on September 2, 1924, by counsel on the return of the order to show cause and the report of the receivers of the sale of August 28, 1924, and insisted that that company's bid reported on August 19, 1924, should be confirmed instead of the Brown bid reported on September 2, 1924.

Reliance for this position is principally rested upon the doctrine of *Morrissee v. Inglis*, 46 N. J. Eq. 306; *Rogers v. Rogers Locomotive Co.*, 62 N. J.

Conclusions.

Eq. 111; *Bethlehem Iron Co. v. Phila. Seashore R. R. Co.*, 49 N. J. Eq. 356, to the effect that mere inadequacy of a bid, if the sale is regular and made without fraud, and where no accident or mistake has intervened to prevent fair competition, will
10 not warrant the court in setting it aside and ordering a resale and depriving the *bona fide* bidder of the advantage of his bid, because it is the policy of the law to encourage the attendance of bidders at judicial sales.

Counsel for the receivers contends that this case does not come within the rule laid down in the cases cited, because those cases refer only to public sales and not private ones, and because the difference in the price in this case is so far greater
20 than those in the others. The excess offered in *Morrissee v. Inglis* was approximately 10%, in *Rogers v. Rogers Locomotive Co.*, approximately 10% and in *Bethlehem Iron Co. v. Phila. Seashore R. R. Co.*, approximately 20%, while here it is approximately 52%.

But in *Porch v. Agnew Co.*, 66 N. J. Eq. 232, Vice Chancellor Grey had before him a sale of property which brought \$33,000, when it appeared
30 it was actually worth \$60,000 to \$100,000, and he ordered a resale, making it a condition that at least \$60,000 should be bid at the subsequent sale as an up-set price. This case was affirmed on the opinion of the Vice Chancellor, *Porch v. Agnew Co.*, 67 N. J. Eq. 727.

The case in hand is more nearly like that of *Porch v. Agnew Co.* than it is like *Morrissee v. Inglis*, *Rogers v. Rogers Locomotive Co.*, or *Bethlehem Iron Co. v. Phila. Seashore R. R. Co.* And
40 the very great disparity in the bids, over 52%, would incline me to the opinion that the Reilly

Conclusions.

Company's bid at private sale was so grossly inadequate, considering what must be the value of the plant, as to call for a denial of confirmation of the sale to Reilly, and on the contrary, the confirmation of that to Brown, especially in view of
10 the very great amount of disparity, namely, over \$100,000.

Furthermore, the Reilly concern has not been diligent in its own behalf in that it did not protect its interests on August 19, 1924, by appearing and urging confirmation of the sale to, and agreement with it, as reported. Besides, its bid and contract was, by the agreement, expressly made subject to the approval of the court. Upon this phase of
20 the matter I am of opinion that the bid of the Reilly Stevedoring Co., Inc., should be rejected and that of Charles R. Brown confirmed; and the receivers ordered to make conveyance to him according to the terms of the contract between them and him, upon his complying with the terms of sale.

One other matter remains; that concerning the claim of Samuel Lesser for commissions for negotiating the sale to the Reilly Stevedoring Company, Inc. His counsel contends that he rendered
30 laborious, time-consuming and valuable services to the receivers in bringing about the offer, and tentative sale, to the Reilly concern, which ultimately resulted in benefit to the estate, citing *Day v. Codman*, 39 N. J. Eq. 258, 268.

In *Hill v. Hill*, 79 N. J. Eq. 521, Judge Rellstab in the orphans' court, whose opinion is printed as an appendix to that of Pitney, Ordinary, at
40 p. 545, said, at p. 546, that "on a sale of the testator's land the intervention of a broker may or may not be necessary. If not necessary, the brok-

Conclusions.

10 erage paid will not be allowed, unless it can be shown that by employing a real estate agent the estate has been benefited in a pecuniary sense to at least the amount of expense incurred by such employment." And at p. 547, that "in passing upon such employment, the test on the question of compensating the agent out of the estate is, was it necessary or was it to the interest of the estate? If it was, the expenses thus incurred are allowed; if not, they will be disallowed. Upon this question the burden of proof is upon the accountants. For New Jersey cases on this subject see 3 N. J. Dig. Ann., Div. Ex'rs & Ad'mrs., § 92. And for cases in other states, see 7 Am. & Eng. 20 Encycl. L. 431; 18 Cyc. 272, and cases noted in 64 L. R. A. 554." And Chancellor Pitney in his opinion in the prerogative court, at p. 542, said that upon the question of broker's commissions he concurred in the views expressed by Judge Rellstab.

30 Receivers, like executors, are trustees; the same law generally and in similar circumstances applies equally to all of them. In this case the receivers' circulars offered to pay a commission to real estate brokers who represented successful bidders, if and when the sale was consummated and the purchase price paid; and the contract of the receivers with the Reilly concern stipulated that Lesser was the broker who effected the sale, and the receivers agreed to pay him a certain commission named, or such commission as might be approved by the court, if and when the sale was consummated and the purchase price paid. Mr. Lesser was not a party to that contract but it was one made for his benefit, and on which it appears 40 he is entitled to sue. *Burt v. Brownstone Real*

Conclusions.

Estate Co., 95 N. J. L. 457. And the supreme court held in *Klipper v. Schlossberg*, 96 N. J. L. 397, that unless a broker and his employer have stipulated to the contrary, the broker is entitled to his compensation upon the completing of the negotiations he undertook, irrespective of whether or not the contract negotiated is ever consummated, so long as the failure to carry it through to a successful completion is not due to any fault of the broker. It may be that the broker is entitled to be compensated in this case, but this question it is neither necessary nor proper now to decide. He should make his claim to the receivers in the usual way, whose duty it would then become to allow or disallow it. He will be given ten days in which to file his claim with the receivers. 10 20

If he should be aggrieved by their determination, the claim being against a corporation which has been dissolved and is in process of being wound up, it seems that his remedy would be by suit at law, under P. L. 1921, p. 724, instead of by appeal to the Chancellor, under Comp. Stat., p. 1649, Sec. 78.

The sale to Brown will be confirmed; Lesser's claim for commissions in negotiating the Reilly sale will be reserved and referred to the receivers. Order accordingly. 30 40

Claim.

IN CHANCERY OF NEW JERSEY.

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In the Matter of The Dissolution of the NEW JERSEY REFRIGERATING COMPANY.

To FRANK J. BOCK and EDWARD H. WRIGHT, Receivers of the New Jersey Refrigerating Company:

20 PLEASE TAKE NOTICE that the New Jersey Refrigerating Company, of which you are Receivers, is indebted to me in the sum of twenty-six thousand two hundred and fifty and 00/100 (\$26,250.00) dollars, with interest from the 31st day of July, 1924, as appears from the affidavit annexed hereto.

Yours respectfully,

SAMUEL LESSER,
 Claimant.

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Affidavit.

IN CHANCERY OF NEW JERSEY.

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In the Matter of The Dissolution of the NEW JERSEY REFRIGERATING COMPANY.

State of New York, }
 County of New York, } ss.:

SAMUEL LESSER, of full age, being duly sworn, deposes and says:

20 That the New Jersey Refrigerating Company is justly indebted to me in the sum of twenty-six thousand two hundred and fifty and 00/100 (\$26,250.00) dollars for services rendered to the said Company as a real estate broker in connection with the sale of the real estate and plant of the Company.

30 That your deponent was one of the real estate brokers called in by said Receivers to assist them in procuring a purchaser for the real estate and plant of the Company, and began work on a proposed sale of the property in January, 1924, continuing to perform such services until the 31st day of July, 1924, when a contract was entered into between Frank J. Bock and Edward H. Wright, as Receivers of the New Jersey Refrigerating Company, and the John J. Reilly Stevedoring Co., Inc., for the sale of the real estate and plant of the Company.

40 That in said contract your deponent was named

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Affidavit.

as a broker, and it was therein agreed that the Receivers would pay to the broker, by way of commission, five (5%) per cent. on the purchase price of the said plant.

10 That the John J. Reilly Stevedoring Co., Inc., the purchaser procured by your deponent, under the terms of said contract, was to pay to the Receivers of the New Jersey Refrigerating Company, the sum of five hundred and fifty thousand and 00/100 (\$550,000) dollars, for the plant and real estate of the Company.

20 That the John J. Reilly Stevedoring Co., Inc. was ready and willing to buy the plant and property of the New Jersey Refrigerating Company, and their bid of five hundred and fifty thousand and 00/100 (\$550,000) dollars for the same was accepted by the said Receivers.

30 That the sum of twenty-six thousand two hundred and fifty and 00/100 (\$26,250.00) dollars, with interest from the 31st day of July, 1924, is now justly due and owing to your deponent. That no payment has been made; that there are no offsets to the same, and that the same is not secured by judgment or mortgage, or expressly charged upon the real estate of said Company, or any part thereof.

SAMUEL LESSER.

Sworn to before me, a Notary Public in and for the County of New York, State of New York, this 19th day of Sept., 1924.

40 (Seal) JOHN F. DEANGELI,
Notary Public.
New York County Clerk's No. 50.
New York Co. Register's No. 6056.
Term Expires March 30, 1926.

Amended Claim.

IN CHANCERY OF NEW JERSEY.

In the Matter
of
The Dissolution of the NEW JERSEY REFRIGERATING COMPANY.

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To FRANK J. BOCK and EDWARD H. WRIGHT, Receivers of the New Jersey Refrigerating Company:

PLEASE TAKE NOTICE that the New Jersey Refrigerating Company, of which you are Receivers, is indebted to me in the sum of twenty-six thousand two hundred and fifty and 00/100 (\$26,250.00) dollars, with interest from the 31st day of July, 1924, as appears from the affidavit annexed hereto.

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Yours respectfully,

SAMUEL LESSER,
Claimant.

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Affidavit.

IN CHANCERY OF NEW JERSEY.

10 In the Matter
of
The Dissolution of the NEW JER-
SEY REFRIGERATING COMPANY.

State of New York, }
County of New York, } ss.:

SAMUEL LESSER, of full age, being duly sworn,
deposes and says:

20 That the New Jersey Refrigerating Company is
justly indebted to me in the sum of twenty-six
thousand two hundred and fifty (\$26,250) dollars,
for services rendered to and performed for the
said Company as a real estate broker in connec-
tion with the sale of the real estate and plant of
the company.

30 Your deponent was one of the real estate brokers
called in by said Receivers to assist them in pro-
curing a purchaser for the real estate and plant of
the Company, and began work on a proposed sale
of the property in January, 1924, continuing to per-
form said service until the 31st day of July, 1924.

40 On the 31st day of July, 1924, a contract was
entered into between Frank J. Bock and Edward
H. Wright, as Receivers for the New Jersey Re-
frigerating Company, and the John J. Reilly Steve-
doring Co., Inc. for the sale of the real estate and
plant of the Company. In said contract your depo-
nent was named as broker, and it was therein
agreed that the Receivers would pay to your depo-

Affidavit.

ment, the broker therein named, by way of com-
missions, five (5%) per cent. on the purchase price
of the said plant.

10 That your deponent rendered service to the said
New Jersey Refrigerating Company at its special
instance and request continuously between the
month of January, 1924, and the 31st day of July,
1924, when the contract was entered into. That
the services performed for the said Company were
reasonably worth the sum of twenty-six thousand
two hundred and fifty (\$26,250) dollars, and al-
though duly demanded no part of said sum has
been paid.

20 That the John J. Reilly Stevedoring Co., Inc., the
purchaser procured by your deponent, under the
terms of the contract entered into between it and
the Receivers of the New Jersey Refrigerating Co.,
Inc., was to pay to the Receivers the sum of five
hundred and fifty thousand (\$550,000) dollars for
the plant and real estate of the Company.

30 That the John J. Reilly Stevedoring Co., Inc. was
ready and willing to buy the plant and property at
the price stipulated in the contract wherein your
deponent was named as the broker, and their bid
of five hundred and fifty thousand (\$550,000) dol-
lars for the plant and real estate of the Company
was accepted by the Receivers of the New Jersey
Refrigerating Company.

40 That the sum of twenty-six thousand two hun-
dred and fifty (\$26,250) dollars, with interest from
the 31st day of July, 1924, is now due and owing
to your deponent. That the services rendered by
your deponent were of the reasonable value of
twenty-six thousand two hundred and fifty
(\$26,250) dollars. That no payment has been made
although duly demanded, and there are no offsets

Supplemental Claim of John Craven & Son Co.

to the same. That the same is not secured by judgment or mortgage or expressly charged upon the real estate of said Company or any part thereof.

SAMUEL LESSER.

10 Sworn to before me, a Notary Public
in and for the County of New York,
State of New York, this 17th day of
Oct., 1924.

JOHN F. DEANGELI,
(Seal) Notary Public.
New York County Clerk's No. 50.
New York Co. Register's No. 6056.
Term Expires March 30, 1926.

20 Supplemental Claim of John Craven & Son
Company on Sale of Bayonne Park.

IN CHANCERY OF NEW JERSEY.

In the Matter
of
The Dissolution of the NEW JER-
SEY REFRIGERATING COMPANY.

On Bill, &c.

30 To Frank J. Bock and Edward J. Wright, Esqs.,
Receivers of The New Jersey Refrigerating
Company:

The petition of John Craven & Son Company,
a corporation of the State of New Jersey, respect-
fully shows:

40 1. That at all times hereinafter mentioned,
John Craven & Son Company was a duly author-

Supplemental Claim of John Craven & Son Co.

ized brokerage agent, licensed under the laws of
the State of New Jersey, and Samuel Lesser was
likewise licensed.

2. That for a long time prior to the month of
August, 1924, the said petitioner and the said
Samuel Lesser had been endeavoring jointly to
dispose of various properties of the above named
company, as such real estate brokers, in an en-
deavor to earn commissions which would be paid
for their services. 10

3. That said Receivers are thoroughly familiar
with the work which was done by said petitioner
and said Samuel Lesser, and which in most in-
stances resulted in great financial advantage to
the said estate. 20

4. That as the correspondents between the said
John Craven & Son Company and said Receivers
and their counsel, Mr. J. H. Harrison, will show, a
continual effort was being made to sell for the
said Receivers the property known as the Bayonne
Park, Bayonne, New Jersey, and other property.

5. That the correspondence between the said
John Craven & Son Company and the said Re-
ceivers, on account of the sale of said property,
began in the month of June, 1923, when petitioner
submitted an offer of one hundred thousand dol-
lars for the property which was declined. 30

6. That thereafter and from time to time, con-
tinual endeavors were made by petitioner and the
said Samuel Lesser to sell and dispose of the said
property until finally said petitioner brought about
the sale of said property accepted by the said Re-
ceivers, and subsequently conveyed for the sum
of one hundred two thousand six hundred dollars. 40

Supplemental Claim of John Craven & Son Co.

7. That in effecting the sale of said premises, as has been explained to said J. H. Harrison, your counsel, a large part of the commission of two and one-half per cent. of said sale price was donated to a charitable cause, otherwise said sale could not have been consummated; that this fact was brought to the attention of Mr. G. Arthur Betz, one of the largest stockholders of the company, who agreed that if the contract was signed and the sale put through, that he would recommend that your petitioner be paid five per cent. of the purchase price instead of two and one-half per cent., as in the contract named; that in addition thereto, Mr. Bock, one of the Receivers, agreed that although the contract contained a clause for two and one-half per cent. commission, that five per cent. would be paid; that Mr. Gustave Lembeck, one of the stockholders of the said company likewise agreed.

8. That under all the circumstances and relying on the representations made and believing that the same would be carried out, your petitioners produced the purchaser of said property, the contract was signed and subsequently the property conveyed, so that the estate received its full consideration mentioned in said contract.

9. That the said agreement to pay your petitioners five per cent. was not carried out however; it received but two and one-half per cent. of the purchase price, amounting to the sum of twenty-five hundred and sixty-five dollars, instead of the sum of fifty-one hundred and thirty dollars, which it expected, and under all the circumstances should have received; that out of the said sum of twenty-five hundred and sixty-five dollars which it received, as heretofore stated, it had to

Supplemental Claim of John Craven & Son Co.

donate a large part so that the commission received by the said petitioner jointly with the said Samuel Lesser, was small and trifling.

Wherefore your petitioner prays that this entire matter may be inquired into and it may be determined that your petitioner is entitled to the additional two and one-half per cent. on said sale price, of twenty-five hundred and sixty-five dollars, and that the said sum may be paid to it and that it may have such other and further relief as the nature of the petition may require.

And your petitioner will ever pray, &c.

JOHN CRAVEN & SON COMPANY,
By WILLIAM H. BROWN,
Treasurer.

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

WILLIAM H. BROWN, being duly sworn on his oath according to law, says, I am the treasurer of the John Craven & Son Company; I have read the foregoing petition; the matters and things therein set forth are true excepting as to such matters as are on information and belief, and as to those matters, I believe them to be true.

WILLIAM H. BROWN.

Sworn and subscribed to before me }
this 5th day of November, 1924. }

JAMES J. HIGGINS,
Attorney at Law
of New Jersey.

Supplemental Claim of John Craven & Son Co.

Frank J. Bock and Edward H. Wright, Receivers
of the New Jersey Refrigerating Company,

to

John Craven & Son Company, Dr.

10 Balance due on commission on sale of premises
known as Bayonne Park, Bayonne, New Jersey,
as follows:

Rate of commission allowed on sale
2½% \$2,563—should have been at
5%—\$5,126.

Balance due \$2,563.

Received Payment.

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

WILLIAM H. BROWN, being duly sworn according
to law, on his oath deposes and says:

I am the treasurer of John Craven & Son Com-
pany and am familiar with the accounts of said
corporation, and have charge thereof.

30 On date contract was entered into between the
Receivers of New Jersey Refrigerating Company
and Hub Realty Company for sale of premises
known as Bayonne Park, Bayonne, New Jersey, the
sale price of which was \$102,600, that John Craven
& Son Company is the agent who negotiated said
sale and is, therefore, entitled to commission there-
on; that the commission set forth in said contract
of sale was at the rate of 2½%, whereas said com-
mission should have been at the rate of 5% of said
selling price, to wit, the sum of \$5,126 instead of
40 \$2,563, making an amount due John Craven & Son
Company, Agents, on said commission, of \$2,563.

Supplemental Claim of John Craven & Son Co.

That no part of said balance of \$2,563 has been
paid to said John Craven & Son Company, or any
one for said John Craven & Son Company, but
remains wholly due and unpaid.

WILLIAM H. BROWN.

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Sworn and subscribed to before me }
this 28th day of August, 1924. }

FRANCES P. CULL,
(Seal) Notary Public of New Jersey.

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**Dispute of Claim of John Craven & Son
Company.**

IN CHANCERY OF NEW JERSEY.

10	In the Matter of The Dissolution of the NEW JER- SEY REFRIGERATING COMPANY.	}	On Bill, etc.
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To John Craven & Son Company, 77 Railroad Ave-
nue, Jersey City, N. J., and Peter Bentley, Esq.,
its attorney, 1 Exchange Place, Jersey City,
N. J.:

20 TAKE NOTICE that the undersigned, the Receivers
of the New Jersey Refrigerating Company, dispute
the whole and every part of the claim of John
Craven & Son Company for brokerage commis-
sions on the sale of premises known as Bayonne
Park, Bayonne, N. J., proof of which, sworn to
August 28, 1924, was on or about September 3,
1924, presented to the said Receivers.

30 FRANK J. BOCK,
EDWARD H. WRIGHT,
Receivers of New Jersey Refrigerating Co.

J. H. HARRISON,
Counsel for Receivers.

Dated, Newark, N. J., September 9, 1924.

Dispute of Claim of Samuel Lesser.
IN CHANCERY OF NEW JERSEY.

In the Matter of The Dissolution of the NEW JER- SEY REFRIGERATING COMPANY.	}	On Bill, &c.	10
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To Samuel Lesser, No. 77 Railroad Ave., Jersey
City, N. J., and to Edward Maxson, Esq., At-
torney for Samuel Lesser, Prudential Build-
ing, Newark, N. J.

SIRS:

PLEASE TAKE NOTICE that the undersigned, the 20
Receivers of the New Jersey Refrigerating Com-
pany, dispute the whole and every part of the
claim of Samuel Lesser sworn to September 19,
1924, and subsequently filed with the Receivers,
and also the whole and every part of the amended
claim of Samuel Lesser sworn to October 17, 1924,
and subsequently filed with the Receivers, said
claim and said amended claim both being in the
sum of twenty-six thousand two hundred fifty 30
(\$26,250.00) dollars, which claim and amended
claim the said Receivers herewith reject and re-
fuse to pay.

Dated, January 2, 1925.

FRANK J. BOCK and EDWARD H. WRIGHT,
Receivers for
New Jersey Refrigerating Company.

Dispute of Supplemental Claim of John Craven & Son Company on Sale of Bayonne Park.

IN CHANCERY OF NEW JERSEY.

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In the Matter
of
The Dissolution of the NEW JERSEY REFRIGERATING COMPANY.

On Bill, &c.

To John Craven & Son Company, Railroad Ave.,
Corner Newark Avenue, Jersey City, N. J.
To Peter Bentley, Esq., Solr. for John Craven
& Son Company, 1 Exchange Place, Jersey
City, N. J.

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SIRS:

TAKE NOTICE that we, Frank J. Bock and Edward H. Wright, as Receivers of the New Jersey Refrigerating Company, hereby dispute the whole and every part of the supplemental claim of John Craven & Son Company on sale of Bayonne Park, verified November 5, 1924, and subsequently filed with the Receivers, said supplemental claim being in the sum of \$2,565.00, which supplemental claim the said Receivers hereby reject and refuse to pay.

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January 3, 1925.

FRANK J. BOCK,
EDWARD H. WRIGHT,

Receivers of New Jersey Refrigerating Company.

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Statements, etc. taken on Hearing of Lesser on Claim for Commission.

IN CHANCERY OF NEW JERSEY.

In the Matter
of
The Dissolution of the NEW JERSEY REFRIGERATING COMPANY.

ON SALE OF
PLANT.

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Hearing held at the office of J. H. Harrison, 810 Broad Street, Newark, New Jersey, Monday afternoon, October 6, 1924, at 2 o'clock.

APPEARANCES:

FRANK J. BOCK, EDWARD H. WRIGHT, Receivers, New Jersey Refrigerating Co.;
J. H. HARRISON, counsel for Receivers, New Jersey Refrigerating Co.

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EDWARD MAXSON, counsel for Samuel Lesser.

J. FISHER ANDERSON, counsel for Ida L. Bowen; Commercial Trust Co. of Jersey City; also for A. C. Wall, counsel representing Otto Lembeck individually and as executor of the Estate of Henry Lembeck.

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EUGENE BLANKENHORN, counsel for G. W. Lembeck, individually and as trustee for Estate Henry Lembeck.

Mr. DREWEN, of PERKINS & DREWEN, counsel for Emma Lembeck and Sarah Lembeck.

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Statements, etc. taken on Hearing.

Claim filed by Samuel Lesser September 20, 1924; amount \$26,250.

10 Mr. Harrison: Hearing before Frank J. Bock and Edward H. Wright, Receivers of New Jersey Refrigerating Co. upon claim of Samuel Lesser for commissions aggregating \$26,250 alleged to be due on sale on plant 173 Ninth Street, Jersey City, New Jersey, and fringe parcels, said claim, under order of the Chancellor, bearing date September 17, 1924, having been referred to the receivers for disposition.

By Mr. Maxson:

JOHN J. REILLY appears on behalf of proponents of claim.

20 Q. Mr. Reilly, you are connected with the Reilly Stevedoring Co.? A. Yes.

Q. And that is the company which made a contract with the receivers of the New Jersey Refrigerating Company to purchase the plant in Jersey City a while back? A. Yes.

Q. Did you, or did you not, represent the Reilly Stevedoring Co. in reference to that transaction? A. I represented them.

30 Mr. Maxson: Of course, the contract itself is the willingness of the Reilly Stevedoring Co. to purchase and its readiness to do it.

Q. Mr. Reilly, now what have you to say as to the carrying out of this contract? A. We were ready.

Q. I know you were willing, but were you ready? A. We had the money all procured.

40 Q. During the negotiations leading up to the making of the contract of sale dated July 31, 1924,

Statements, etc. taken on Hearing.

were there any real estate agents concerned in the transaction? A. Mr. Lesser.

Q. You, personally, know some of the work he did in connection with putting through this sale?

10 Objection by Mr. Anderson: To any testimony from Mr. Reilly that would tend to alter, vary or modify the written contract between the Reilly Stevedoring Co. and the Receivers insofar as it relates to real estate commissions specified in this contract. The contract provides for payment of commission only on confirmation of contract by the Court and this testimony is immaterial and irrelevant for that reason.

Q. Do you know when Mr. Lesser began work? 20 A. Yes, in January, I believe.

Q. Of this year? A. 1924.

Q. How frequently did you, personally, see him in connection with the proposed sale? A. Right after the first of February I saw him at least three times a week for a month. About that time, possibly around the first of March, he had me interested enough to go to see the property.

30 Q. Did he go with you? A. Yes, he took me to the office of the Receivers, or the New Jersey Refrigerating Co. at Ninth Street. There I think I met Mr. Bock the first time. While there we went through the plant. Continually after that, up to the making of the contract, I have seen Lesser getting certain information I wanted in regards to the plant—measurements—they did not jibe with our engineer's reports, and we had to get Mr. Rogers to come to my house to clear up the differences.

40 Q. Who is Mr. Rogers? A. I believe he is superintendent of the plant.

Statements, etc. taken on Hearing.

Q. How long did that condition, that is, your association and conferences with Mr. Lesser continue? A. Up to the contract.

Q. Up to the date of the making of the contract? A. Yes.

10 Q. Did you go anywhere with him besides to the plant? A. Yes, I went through various other properties surrounding it, the railroads checking up as to the volume of business that went there previously; out here to Newark to the Senator's office. We were called the Siamese twins in this office, because we usually came in together.

Q. Were the Receivers always here on these occasions? A. No.

20 Q. They were not always here, but you saw Senator Harrison, counsel for them? A. Yes, and Mr. Sanford and sometimes the young lady here.

Mr. Reilly: I am ready now to consummate the contract of July 31, 1924.

SAMUEL LESSER, called.

Examination by Mr. Maxson:

30 Q. Mr. Lesser, when were you first informed that the New Jersey Refrigerating Co. property was for sale? A. Around November.

Q. Last year, 1923? A. 1923.

Q. What did you do when you found out that the property was offered for sale? A. I tried to interest some other people in November and I got wind of Mr. Reilly, through a friend of mine, that he was negotiating for the George Ehret property on 62nd St., New York.

Q. Then you went to see Mr. Reilly? A. Yes.

40 Q. Before you went to see Mr. Reilly was your

Statements, etc. taken on Hearing.

attention called to the invitation for bids? A. That was before the invitation for bids.

Q. When did you first see the invitations for bids? A. Sometime after May 28, 1924. A letter was sent out. I have the letter of May 28, to say the property would be sold at sealed bids and I could get the information for bids at the office. 10

Q. Did you go to the plant? A. I think either I or Mr. Brown, who was my cooperating broker.

Q. Did you get the information? A. I did. I think Mr. Reilly has a copy of it.

(Witness refers to invitation for sealed bids requested in letter sent out by Receivers on or about May 28, 1924.)

Q. When did you first get in touch with Mr. Reilly of the Reilly Stevedoring Co.? A. The first time I met him was around November. The first time I got in touch with him by telephone. 20

Q. When did you first discuss with him the prospective sale of the New Jersey Refrigerating Co.? A. The last part of December, 1923.

Q. What did you do? A. I was also in conference with a man named Gordon with reference to the plant.

Q. Who was he? A. Part owner of a cake plant. 30

Q. Was he a prospective purchaser? A. Yes—

Objection to line of testimony by Mr. Anderson.

Objection overruled.

A. —I also brought Mr. Gordon to the plant and introduced him to Mr. Betz and I think one of the receivers was there with Mr. Harrison.

Q. Eventually you got Mr. Reilly interested in the matter, did you not? A. Yes. 40

Statements, etc. taken on Hearing.

Q. Then, after that, what did you do? A. I was in continual conference with Mr. Reilly from the last part of January, continuously during February and March. Around the 15th of February we were in the plant, and after combative suggestions made to him by his engineers to off-set any schemes, I would see him three times a week comparing real estate values, looking up the possibilities of the new vehicular tunnel; into railroad yards and interviewing railroad men as to possibilities, checking up on their freight of the year so as to check up on the information that we got so we could arrive at some value on the plant, as we had no idea or basis upon which to work. At that time we did not have the engineers' report of the plant, not until around March did we get the engineer's report, which was entirely out of question and could not be used as a basis.

Q. What did you do after that in connection with the Reilly Stevedoring Co.? A. Why continually I was at his place waiting for hours to see him.

Q. In New York? A. Yes. Going to lunches with him. Meeting some of his people who were interested with him in this proposition and conferences continually even in the evenings at his home I would meet him trying to get all possible information as could be got in this matter, so as to make a basis for this bid.

Q. Other than the trips you made to his place of business in New York and to his home and to the plant, did you go anywhere else? A. We were out to Newark a great deal of the time, having conferences with certain people.

Q. With whom? A. The receivers and their counsel; with different people interested in the proposition which cost me on an average of \$5

Statements, etc. taken on Hearing.

a day for lunches, telephone calls, taxicabs, etc. Mr. Reilly did not always want me to spend the money, but I paid expecting to be compensated.

Q. Have you estimated how much expense you have incurred? A. I guaranteed Mr. Reilly, at the time after the 16th of June, when our fees were paid, to combat certain informalities in this proceeding,—I promised to compensate Mr. Reilly for certain additional engineer's reports that he would have to get to offset certain information by some of the people in the company.

Q. You made a calculation of approximately the amount of disbursements you had in connection with this sale? A. I would say I spent about \$600 in different entertainments, etc., aside from the bill Mr. Reilly will render me to pay him. Mr. Reilly did not give it to me.

Q. About how much is due Mr. Reilly? A. About \$1,500.

Q. How much did you agree to give Mr. Reilly of it? A. I agreed to give him all of it.

Q. So that you have incurred approximate obligations of \$2,100? A. Yes. Mr. William H. Brown and I had made arrangements even to go to Chicago to see some interests there, when Mr. Reilly got interested enough to stop our trip.

Q. Do you know how frequently Mr. Brown was engaged in the matter? A. Mr. Brown was engaged pretty near every day to keep in touch with all the happenings that might arise in this matter.

Q. Over what period was he active in the matter? A. Over the entire period, as my cooperating broker.

Q. That is from November, 1923, to July, 1924? A. Yes. He interviewed Mr. Betz, and sometimes when I could not get the information, Mr. Brown would go out and get it for me.

*Statements, etc. taken on Hearing.**Cross examination by Mr. Anderson:*

Q. Mr. Lesser, when you went and got the conditions of sale at the plant, did you read them? A. Yes, sir.

10 Q. You found in there a provision that commissions would be paid only on confirmation of sale by the court? A. I think so. I do not remember the exact wording.

Q. Were you present when Reilly's contract with the receivers was signed? A. Yes, I think I was.

Q. Where was that signed? A. Right in the next room.

20 Q. Do you know if there was a provision in there that commissions would be paid if and when confirmed by the court? A. The contract was drawn up and we were arguing and scrapping about certain things. I may have seen it and I might not.

Q. This contract was signed without your knowledge? A. There was a clause in there, but the exact clause I could not recall at this time.

Q. There was a clause on some such nature in there? A. Yes.

30 Q. You made a remark on your direct examination that you felt you would be compensated if anything came out of it? A. What did I say? I don't remember anything like that. I said I would compensate Mr. Reilly for any expense he might have to incur to entertain certain people who were interested in the concern.

40 Q. My recollection is that on these various expenses, outside of Reilly reimbursements, that you felt you would be compensated if anything came out of it. A. I do not remember making such a remark.

Q. When did you first meet the receivers? A. In November, on other contracts.

Statements, etc. taken on Hearing.

Q. On this contract? A. I introduced Mr. Reilly to Mr. Bock and Mr. Harrison in the office at 173 9th Street, Jersey City, on or about the 15th of February, and we went through the plant.

10 Q. How long before this did you try to get Mr. Reilly interested? A. My first interview was on the telephone with Mr. Reilly, in November, 1923.

By Mr. Blankenhorn:

Q. Did the receivers ever promise to pay you for your services? A. They said I would get my commission.

20 Q. Under the terms given you when you went there to find out what the terms were? A. They said—it was the general thing—I was to get my commission.

Q. Who said that? A. When I got my commissions?

Q. Yes; who said that? A. I think Mr. Harrison—I cannot just recall what it was. The contract says I get my commissions.

30 Q. What was the agreement that you had with the receivers for the payment of any commission? A. I was supposed to get 5% commission on the sale of the plant, and 2½% on the fringe properties.

Mr. Wright: If you sold the plant?

A. If I sold the plant.

Mr. Maxson: We contend he did.

Mr. Blankenhorn: Whether the sale was confirmed or not?

Mr. Lesser: I do not remember that being brought up.

40 Mr. Wright: The contract has to be confirmed by the court and the property has to be conveyed.

Statements, etc. taken on Hearing.

Mr. Maxson: That is undoubtedly a question of law.

Mr. Anderson: There were other brokers working on this sale?

10 Mr. Lesser: I don't know; it was none of my business.

Mr. Anderson: Didn't you ever run into any of them?

Mr. Lesser: I would not say.

Mr. Maxson: Say it, if it is a fact.

Mr. Lesser: I met Mr. G. W. Lembeck; there was no broker on it.

Mr. Anderson: I am not speaking of licensed brokers in the State of New Jersey.

20 Mr. Lesser: Yes, Mr. Lembeck seemed to be very interested in the sale, too.

Mr. Anderson: When did the receivers hire you to sell this plant for them?

Mr. Lesser: They actually hired me when I introduced Mr. Reilly to them and spoke about the sale of the property.

Mr. Anderson: Who hired you? Which one?

Mr. Lesser: Mr. Harrison, Mr. Bock and Mr. Betz.

30 Mr. Anderson: What did Mr. Bock say to you?

A. We talked about the plant, generally. He gave me the information he had on it.

Mr. Anderson: Why do you say he hired you?

Mr. Lesser: He understood I was a broker.

Mr. Bock: What Mr. Anderson wants to know is if you were hired and no one else.

40 Mr. Lesser: They didn't hire me only, and no one else.

Statements, etc. taken on Hearing.

Mr. Drewen: Whatever you did, you did for yourself as a broker?

Mr. Lesser: Yes.

Mr. Drewen: You did it for yourself as a broker.

Mr. Lesser: I worked for compensation. 10

Mr. Maxson: He was working for the people for whose benefit he was doing the work.

Mr. Anderson: Why did you file a claim based on the written contract between the receivers and Reilly when you say your contract was really to be paid for the services given the receivers in aiding them to sell the plant?

Mr. Lesser: You will have to ask my lawyer. He tells me what to do. 20

Mr. Maxson: It seems to me that outside of *quantum meruit* for claim, there is nothing to it at all. It all turns on the question of law on the claim and not the contract. What purpose can the hearing serve with respect to that?

Mr. Wright: I have no personal feeling in the matter at all. I would like to see every one get their commission, but I did not enter into any agreements; I do not know anything about any agreements. Most of these conferences took place while I was away. 30

Mr. Maxson: These brokers are in the same position as any real estate agents. They do this work at the invitation of the receivers and procure for them a buyer, who was satisfactory, and they entered into a contract with him. In the ordinary case 40

Statements, etc. taken on Hearing.

10 there would be no question at all. The only question that arises is, whether they can be relieved of any obligation because of that clause in the contract which says that he is to receive his commission if the sale goes through. It does not say the contract. The sale did go through, as far as the receivers are concerned, and some one came in and made another bid, and if the Reilly Stevedoring Co. had been represented by counsel, the sale would undoubtedly have gone through. There would have never been any question about it. The court never would have refused to confirm this sale with an increase of \$10,000; the only thing that stood in the way of confirmation. My contention is, that the receivers accepted the services of the real estate brokers and entered into a contract with a man ready, willing and able to take the property.

20 Mr. Anderson: The contract, of course, speaks for itself. I am entering my objections to the payment of commissions,

30 First, because the contract, itself, provides that the commissions are payable and sale consummated if and when confirmed by the court;

Second, On the *quantum meruit* of Lesser about "conditions of bidding" and contract itself with the clause concerning commissions evidences the acceptance of payment on that basis;

Third, because there has been no hiring proved of Lesser in the sale of the plant.

40 Mr. Blankenhorn and Mr. Drewen concur in objections made by Mr. Anderson.

Petition.

IN CHANCERY OF NEW JERSEY.

In the Matter
of
The Dissolution of the NEW JERSEY REFRIGERATING COMPANY. 10

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

The petition of Samuel Lesser respectfully shows:

20 That he is a real estate agent, having a license from the State of New Jersey to do business within the State.

That in and about the month of January, 1924, your petitioner was engaged by Frank J. Bock and Edward H. Wright, Receivers of the New Jersey Refrigerating Company, as real estate agent, to procure a purchaser for the property of said company in the City of Jersey City, County of Hudson, State of New Jersey.

30 That your petitioner immediately engaged in an effort to procure a purchaser, and continued in this service until the 31st day of July, 1924, when a contract was made between the said Receivers and the John J. Reilly Stevedoring Co., Inc., for the sale of the real estate and plant of said company. That your petitioner procured the said John J. Reilly Stevedoring Co., Inc., as a purchaser, and its offer was accepted by the said Receivers, as will more fully appear by the said contract.

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Petition.

That the said John J. Reilly Stevedoring Co., Inc., was at all times ready, willing and able to take title to and pay the purchase price for the said plant.

10 That in the contract above referred to, your petitioner was named as the broker, and it was therein agreed, as will more fully appear by the terms of the contract, that the Receivers should pay by way of commission, 5% on \$500,000, and 2½% on the remaining \$50,000, making a total of \$26,250. That the purchase price therein named was the sum of \$550,000.

20 That in the month of September, 1924, your petitioner filed a formal claim with the said Receivers for the sum of \$26,250. That subsequent to the filing of said claim, and in the month of September, 1924, your petitioner appeared before the Receivers at a hearing in Newark, and gave testimony as to the character and extent of the work performed under said contract, and the amount of disbursements necessarily incurred.

That although the matter was formally submitted at that time, the Receivers have neither accepted nor rejected the claim.

30 That there was incurred during the time your petitioner was acting as agent for said Receivers, in an effort to procure a purchaser for the plant, expenses amounting to over \$2,000.

40 That during the time your petitioner was actively engaged on behalf of said Receivers, the offers for the purchase of the said plant were increased from \$425,000 to \$625,000, and that both these offers were made by the same individuals or group of prospective purchasers, who eventually secured the plant, and that your petitioner was largely responsible for bringing about the

Petition.

condition which resulted in the Receivers getting \$625,000 for the property, and that your petitioner therefore rendered these and other valuable services to the said Receivers.

Your petitioner therefore prays that an order be made by this honorable Court, directing the said Receivers, Frank J. Bock and Edward H. Wright, to pay to the petitioner herein, the sum of \$26,250 or that permission be granted to the petitioner to institute a suit against the Receivers to recover said amount, and that the Court grant to your petitioner such other and further relief as in the premises may be just. 10

EDWARD MAXSON,
Sol'r and of Counsel with Petitioner. 20

State of New York, }
County of New York, } ss.:

SAMUEL LESSER, being duly sworn, deposes and says: That he is the petitioner named in the within petition; that he has read the foregoing petition, and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes them to be true. 30

SAMUEL LESSER.

Sworn and subscribed to before me, a notary public in and for the County of New York, State of New York, this 17th day of Dec., 1924.

(Seal) JOHN F. DE ANGELI.

Answer.

IN CHANCERY OF NEW JERSEY.

10 In the Matter
of
The Dissolution of the NEW JER-
SEY REFRIGERATING COMPANY.

On Petition of
Samuel Lesser.

The answer of Frank J. Bock and Edward H. Wright, the receivers of the New Jersey Refrigerating Company, to the petition of Samuel Lesser, petitioner:

20 1. They deny knowledge or information sufficient to form a belief as to the allegations contained in the first paragraph of the petition.

2. They deny each and every allegation contained in the second paragraph of the petition.

30 3. They deny each and every allegation contained in the third paragraph of the petition. For the terms and provisions of the contract of July 31, 1924, made between the receivers and the John J. Reilly Stevedoring Co., Inc., for the sale of the plant and fringe parcels of the New Jersey Refrigerating Company, the receivers refer to the contract itself heretofore filed with this Court; the pertinent provisions of which contract, so far as they relate to petitioner, are that said receivers agreed to pay the commissions set out in the petition filed by said Lesser herein or such other commissions as might be approved by the Court of Chancery if and when said contract of sale was consummated and the purchase price provided for

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Answer.

therein had been paid, and that said agreement was made subject to the approval of the Court of Chancery, to be consummated in accordance with the statutes in such case made and provided and under the direction of said Court of Chancery.

4. They deny knowledge or information sufficient to form a belief as to the allegations contained in the fourth paragraph of the petition, and say that the order of this Court dated September 17, 1924, directed that said contract of sale of July 31, 1924, be not consummated and that no commission be then allowed to petitioner.

5. They deny the allegations contained in the fifth paragraph of the petition, and refer to the contract mentioned in said paragraph, and heretofore filed with this Court, for its terms and conditions, and to paragraph 3 of this answer.

6. They admit the allegations contained in the sixth paragraph of the petition, and say that petitioner filed an original notice of claim with the receivers on September 20, 1924, and an amended notice of claim on October 18, 1924.

7. They deny the allegations contained in the seventh paragraph of the petition, and allege that they have rejected the claim of the petitioner, and served notice of dispute of said original and amended notices of claim upon the petitioner and upon the petitioner's counsel, Edward Maxson, on January 3, 1925; that the receivers delayed making such rejection because they had been informed by their counsel that negotiations were pending for settlement or adjustment of the claim of petitioner.

8. They deny each and every allegation con-

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Answer.

tained in the eighth paragraph on page two of the petition.

10 9. They deny knowledge or information sufficient to form a belief as to so much of the ninth paragraph of the petition, where it alleges, "That during the time your petitioner was actively engaged on behalf of said receivers, the offers for the purchase of the said plant were increased from \$425,000 to \$625,000, and that both these offers were made by the same individuals or group of prospective purchasers, who eventually secured the plant." They deny each and every other allegation contained in the ninth paragraph on page two of the petition.

20 10. The receivers pray to be hence dismissed with their reasonable costs and charges in their behalf most wrongfully sustained.

FRANK J. BOCK,
EDWARD H. WRIGHT,
Receivers of the New Jersey
Refrigerating Company.

J. HENRY HARRISON,
Solicitor and of Counsel
with Receivers.

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

FRANK J. BOCK and EDWARD H. WRIGHT, being severally duly sworn, each for himself, upon his oath, deposes and says:

40 That he is one of the receivers of the New Jersey Refrigerating Company named in the within answer; that he has read the foregoing answer, and knows the contents thereof; that the same is true

Notice.

to his own knowledge, except as to the matters therein stated to be alleged upon information, and that as to those matters he believes them to be true.

.....
Sworn and subscribed to before me }
this day of , 1925. }

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Notice.

IN CHANCERY OF NEW JERSEY.

In the Matter
of
The Dissolution of the NEW JERSEY REFRIGERATING COMPANY.

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SIRS:

PLEASE TAKE NOTICE, that upon the annexed petition, the record of the hearings before the Receivers in respect to the claim of Samuel Lesser, and on the contract heretofore entered into, and on the record in this proceeding, we will move before the Chancellor, at the Chancery Chambers in Trenton, on Tuesday, December 30th, for an order, directing the Receivers herein to pay to Samuel Lesser, the petitioner, his commission, or for an order, directing the said Samuel Lesser to

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Notice.

sue the Receivers on his claim, and for such other and further relief as to the Court may seem just.

Yours, etc.,

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EDWARD MAXSON,
Sol'r of Petitioner,
Prudential Building,
Newark, N. J.

To

J. HENRY HARRISON, Esq.,
Sol'r of Frank J. Bock &
Edward H. Wright, Receivers.

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PERKINS & DREWEN, Esqs.,
Sol'rs of Thomas A. Lembeck and
Sarah Lembeck.

ALBERT C. WALL, Esq.,
Sol'r of Otto A. Lembeck.

FISK & FISK, Esqs.,
Sol'rs of Ida L. Bowen.

SHIRLEY N. CARR, Esq.,
Sol'r of Eleanor Betz Howe and
H. Arthur Betz.

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MERRITT LANE, Esq.,
Sol'r of Gustav W. Lembeck, indiv.
and as trustee of Estate of Henry Lembeck.

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Notice.

IN CHANCERY OF NEW JERSEY.

In the Matter
of
The Dissolution of the NEW JER-
SEY REFRIGERATING COMPANY.

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SIRS:

PLEASE TAKE NOTICE, that I shall apply to the Chancellor of this State, on Tuesday, January 6th, 1925, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, at the State House, in the City of Trenton, for an order continuing the hearing on the petition of Samuel Lesser, &c., to Tuesday, January 13th, 1925, and for such other and further relief as to the Court may seem just.

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Yours, etc.,

EDWARD MAXSON,
Sol'r of Petitioner,
Prudential Building,
Newark, N. J.

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To

J. HENRY HARRISON, Esq.,
Sol'r of Frank J. Bock &
Edward H. Wright, Receivers.

PERKINS & DREWEN, Esqs.,
Sol'rs of Thomas A. Lembeck and
Sarah Lembeck.

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Notice.

ALBERT C. WALL, Esq.,
Sol'r of Otto A. Lembeck.

FISK & FISK, Esqs.,
Sol'rs of Ida L. Bowen.

10 SHIRLEY N. CARR, Esq.,
Sol'r of Eleanor Betz Howe and
H. Arthur Betz.

MERRITT LANE, Esq.,
Sol'r of Gustav W. Lembeck, indiv.
and as trustee of Estate of Henry Lembeck.

Notice.

20 (Filed January 27th, 1926.)

IN CHANCERY OF NEW JERSEY.

In the Matter
of
The Dissolution of the NEW JER-
SEY REFRIGERATING COMPANY.

30 SIR:

PLEASE TAKE NOTICE, that upon the annexed
verified petition, a motion will be made before the
Chancellor, at the Chancery Chambers in Trenton,
New Jersey, on Tuesday, the 26th day of January,
1926, at eleven o'clock in the forenoon of said day,
or as soon thereafter as counsel may be heard,
for the relief prayed for in said petition, and for

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Petition.

such other and further relief as to the Court may
seem just.

Dated, New York, January 13, 1926.

Yours, etc.,

EDWARD MAXSON,
Solicitor of Petitioner.

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To

J. HENRY HARRISON, Esq.,
Solicitor of Receivers.

Petition.

(Filed January 27th, 1926.)

IN CHANCERY OF NEW JERSEY.

20

In the Matter
of
The Dissolution of the NEW JER-
SEY REFRIGERATING COMPANY.

To His Honor, EDWIN ROBERT WALKER, Chancellor
of the State of New Jersey:

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The petition of Samuel Lesser respectfully
shows to the Court.

That on or about the 17th day of December,
1924, your petitioner filed in this Court a petition,
setting forth a claim against Frank J. Bock and
Edward H. Wright, receivers of the New Jersey
Refrigerating Company; that said petition to
which your petitioner refers for the purpose of
this proceeding, prayed for an order of this Court
either directing the said receivers to pay to your

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Petition.

10 petitioner herein the sum of twenty-six thousand two hundred and fifty (\$26,250) dollars for commissions and services rendered by said petitioner to the said receivers at their request in connection with the sale of certain property, consisting of a plant at 9th and Henderson Streets, in the City of Jersey City, County of Hudson and State of New Jersey, or that permission be granted to said petitioner to institute a suit at law against the said receivers to enforce said claim.

That upon the hearing of said petition, and on or about the 20th day of January, 1925, by an order of this Court, permission was granted to your petitioner to institute a suit at law against the said receivers for the collection of said claim.

20 That the said petitioner thereupon instituted a suit in the New Jersey Supreme Court against said receivers, which said suit is still pending.

30 That your petitioner respectfully prays for permission to discontinue said suit at law, and to re-submit the matter contained in said previous petition to this Honorable Court for its disposition, and for an allowance of twenty-six thousand and twenty-five (\$26,025.00) dollars, as prayed for in the original petition hereinbefore referred to, and for such other and further relief as in the premises to the Court may seem just.

EDWARD MAXSON,
Solicitor and of Counsel with
Petitioner.

State of New York, }
County of New York, } ss.:

40 SAMUEL LESSER, being duly sworn, deposes and says: That he is the petitioner named in the with-

Petition.

in petition; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes them to be true.

SAMUEL LESSER.

Sworn to before me, a Notary Public in and for the County of Westchester, State of New York, this 13 day of Jan., 1926.

(Seal) IDA L. KING,
Notary Public,
Westchester County.
Cert. filed New York County No. 609.
New York County Register's No. 7443.
Term expires March 30, 1927.

Petition.

(Filed Jan. 14, 1927.)

IN CHANCERY OF NEW JERSEY.

In the Matter
of
The Dissolution of NEW JERSEY
REFRIGERATING COMPANY. } On Petition of
Samuel Lesser.

The petition of Samuel Lesser of Jersey City, Hudson County, New Jersey, says that:

1. That heretofore a bill was filed in the above entitled cause for the purpose of having the above named New Jersey Refrigerating Company dis-

Petition.

solved according to the statute in such case made and provided; that Frank J. Bock and Edward H. Wright were duly appointed receivers of said company in dissolution.

10 2. That petitioner is and has been during all the times hereinafter mentioned, a duly licensed real estate broker of the State of New Jersey.

3. That the John Craven & Son Company, a corporation of the State of New Jersey, has likewise been, during the times hereinafter mentioned, a duly licensed real estate broker of the State of New Jersey.

20 4. On July 17th, 1924, an order was made by your Honor in this cause that the receivers of the company, subject to the approval of this Court, negotiate and enter into a contract for the sale of certain property of the defendant corporation, a description of which property was annexed to said order; that in pursuance of said order, the receivers issued invitations for bids.

30 5. That shortly after the issuing of bids by the said receivers for the sale of the property of said company, the receivers thereof importuned petitioner and the John Craven & Son Company to accept lists of the property so to be offered for sale and to endeavor to find and procure purchasers for any or all of the property owned by the defendant.

40 6. That from time to time, petitioner and employees of the John Craven & Son Company, conferred with the receivers of said company and their employees in an endeavor to assist such persons in disposing of their properties and in finding purchasers for some or all of the properties of the

Petition.

company; that these conferences were frequent; that advice was sought of the said persons for the best manner in which to dispose of the properties, for the formulation of plans, for the manner of plotting and division and for other information; that said persons necessarily had to and did devote a great deal of time and attention and incur great expense in investigating the properties, offering them to various persons and in obtaining information whereby they could and did advise the receivers and their employees as requested. 10

7. That the list of properties exceeded eighty in number and ran in value from approximately \$4,500.00 to upwards of \$500,000.00; that said premises were scattered throughout Jersey City, Bayonne, Hoboken, Secaucus and other cities in the State of New Jersey and in New York City, Brooklyn, the Bronx, Staten Island and other cities in the State of New York; that said tracts consisted of a single lot and others of large tracts of land; that most of the property had valuable improvements erected thereon. 20

8. That immediately upon receiving the lists of the property as aforesaid, petitioner and employees of the said John Craven & Son Company, set about to bring to the attention of their customers the fact that said properties were for sale; that the efforts of such parties were extended over the major portion of a year; that almost every piece of property was inspected, data was obtained with respect to the value thereof and then offered for sale to various persons; that from time to time the parties aforesaid made many offers for the majority of pieces of property owned by defendant to said receivers or their employees; that subse- 30 40

Petition.

10 quently petitioner learned that the offers made by the customers of petitioner and said John Craven & Son Company were used by the receivers and their employees for the purpose of obtaining higher bids from other people; that the common practice was for the bids of the customers afore-

20 said to be shown to other persons and thereby induce them to make offers in excess of those shown in the various bids; that the information of this practice did not reach your petitioner or the said John Craven & Son Company until long after the practice was instituted and the defendant had disposed of virtually all of its property; that your petitioner, with William H. Brown of the John Craven & Son Company, and John J. Reilly, hereinafter referred to, formed a corporation under the laws of the State of New Jersey and actually bought from said receivers, in the name of said corporation, property worth thousands of dollars.

30 9. That among the properties owned by the defendant was a piece in the City of Bayonne known as the Bayonne Park; that petitioner interested one of his customers in the purchase of said property and finally, due to the efforts of petitioner, a contract was made by said customer to purchase said property for the sum of \$106,200.00; that before the execution of said contract, petitioner and the John Craven & Son Company, which was interested with petitioner as broker and whose name was inserted in the contract as the broker, for business reasons, asked that the commission to be paid petitioner and said John Craven & Son Company be stated at 2½% of the purchase price although it was understood and agreed that the commission to be paid should

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Petition.

10 be 5%; that one of said receivers and one of its employees who was one of the largest stockholders of said company agreed to such plan but after said property was sold and contrary to said agreement, said receivers paid said John Craven & Son Company only the sum of \$2,655.00 which was 2½% of the purchase price although one of said receivers admitted that said agreement had been made to pay said 5% commission even though a commission of 2½% was stated in the contract; that the property above described consisted of a large tract of land located between the Hudson County Boulevard and the Newark Bay, in the City of Bayonne, New Jersey; that the improvements thereon were of comparatively little value; that the property was considered vacant land; that under the rules and practice among real estate brokers and various real estate boards, a commission of 5% was the proper charge under all the circumstances; that there is still due and owing to John Craven & Son Company, for commission on said contract, under the conditions hereinbefore described, the sum of \$2,655.00

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30 10. That among the properties owned by the company was what is known as the plant, consisting of a large piece of ground and improvements thereon, in the City of Jersey City; that said receivers informed petitioner that it had been endeavoring to dispose of this property without any success; that the improvements on said property were peculiarly adopted for certain purposes and it was a difficult thing to find anyone who was interested therein; that the great value in said property was in the improvements; that thereupon petitioner with the employees of the John Craven & Son Company interested the John J. Reilly Steve-

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Petition.

10 doring Company, Inc., in said property with the result that on or about July 31st, 1924, the said company agreed in writing to purchase said property for the sum of \$550,000.00 by the payment of \$25,000.00 in cash, \$193,583.00 to be paid on the
 20 delivery of the deed and the balance of the purchase price of \$331,417.00 to be paid by the purchaser taking said premises subject to certain liens thereon; that in said contract it provided that petitioner was the broker who effected the sale and agreed to pay petitioner a commission of 5% thereon or such other commission as may be approved by this court if and when the sale was consummated and the purchase price paid. Said contract further provided that it was subject
 20 to the approval of this court and under its direction; that said purchaser paid said deposit of \$25,000.00 to said receivers and was ready, able and willing to complete its contract of purchase.

30 11. As petitioner subsequently learned, the contract which said company executed for the purchase of said property was used by the said receivers and their employees, unjustly and unfairly for the purpose of procuring others to bid on said premises a sum greater than that bid by the Reilly Company, when said purchaser and petitioner had been led to believe that said contract was made in good faith and that said receivers would recommend to your honor that an order be made approving said sale and instructing the receivers to convey said premises to said Reilly Company upon its complying with the conditions thereof.

40 12. That due to the practices of the receivers referred to in the foregoing paragraph, when the application was made to your Honor for the ap-

Petition.

10 proval or the non-approval of said contract, there was produced in open Court another bidder who offered the sum of \$560,000.00 without brokerage for the property and that thereupon an order was made by your Honor that said property be re-
 10 advertised for sale and sold at public auction to the highest bidder; that at said sale which was held on August 28th, 1924, the said Brown bid the sum of \$625,000.00 for said premises and the same were struck off to him and subsequently, as petitioner is informed and believes, said premises were conveyed to said Brown.

20 13. That on August 19th, 1924, upon the return of the order to show cause why the bid of the Reilly Company should not be approved, the said Reilly Company was unrepresented by a New Jersey solicitor or anyone to speak for it so that the question of Reilly's rights under his said contract as claimed were not brought to the attention of the Court; that had the contract held by the Reilly Company been approved, petitioner would have been entitled to the payment of his commission of 5% of the purchase price.

30 14. That the claim of petitioner for commissions for effecting the sale of the property to Reilly was referred to the said receivers; that subsequently petitioner filed a written verified claim with said receivers, claiming that he was entitled to receive from them the sum of \$26,250.00 as and for his commissions for the services he had rendered under the terms of said contract; that this claim was rejected by said receivers.

40 15. That subsequently and on or about December 23rd, 1924, application was made to your Honor for an order directing said receivers to pay

Petition.

petitioner said sum; that said application was disposed of by your Honor authorizing petitioner to sue said receivers at law.

10 16. That since said time, petitioner has endeavored to induce said receivers to consider the services rendered by him to said estate and to allow petitioner such sum or sums as said petitioner was fairly entitled to for the services he had rendered and the commissions which he claimed he was entitled to for the sale of said property which the said receivers have and still refuse to recognize or pay.

20 17. That heretofore and during the month of January, 1925, your petitioner brought on for hearing before your Honor, an application to direct the said receivers to pay him the said sum of \$26,250.00; that the said application was fully argued before your Honor but has not been, to the knowledge of your petitioner, decided.

30 18. Your petitioner further shows that the said John Craven & Son Company has assigned to him any and all moneys claimed to be due and owing to it by the said receivers for commissions and services which it has rendered in this matter.

19. That petitioner feels that he is justly entitled, on account of the matters and things set forth herein, to be paid by said receivers for the services rendered by him and the said John Craven & Son Company as hereinbefore described and the commissions therein referred to.

40 Wherefore, your petitioner prays that an order may be made in this cause directing that the entire matter in dispute herein may be referred to one of the special masters of this Court to hear

Petition.

and determine for your Honor and to report as to such sums as his services were fairly and reasonably worth in producing purchasers and the prices brought for the properties sold for the said receivers of said New Jersey Refrigerating Company; and why an order should not be made dismissing the former application heretofore made by petitioner to your Honor and that your petitioner may have such other and further relief as the nature of the application may require.

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And your petitioner will ever pray, etc.

EDWARD MAXSON,
Solicitor and of Counsel with
Petitioner.

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

SAMUEL LESSER, being duly sworn on his oath according to law, says: I am the petitioner mentioned in the foregoing petition; that the matters and things therein set forth are true.

SAMUEL LESSER.

Sworn and subscribed to before me }
this 10th day of January, 1927. }

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JAMES J. HIGGINS,
Attorney at Law,
of New Jersey.

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Answer of Receivers.

(Filed Jan. 14, 1927.)

IN CHANCERY OF NEW JERSEY.

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<p style="text-align: center;">In the Matter</p> <p style="text-align: center;">of</p> <p style="text-align: center;">The Dissolution of the NEW JERSEY REFRIGERATING COMPANY.</p>
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On Petition of Samuel Lesser.

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The answer of Frank J. Bock and Edward H. Wright, receivers of the New Jersey Refrigerating Company, to the petition of Samuel Lesser, verified January 10, 1927.

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1. They admit the allegations contained in Paragraph 1 of the petition; and say that they were appointed receivers herein by order of this court dated June 13, 1923.

2. They deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 2 of the petition.

3. They deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 3 of the petition.

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4. As to the allegations of Paragraph 4 of the petition, they say that said order of July 17, 1924, directed the receivers, subject to the approval of the court, to negotiate and enter into a contract for the sale of premises in the City of Jersey City, New Jersey, known as the "plant" of the New Jersey Refrigerating Company and five contiguous

Answer of Receivers.

parcels which for the purposes of the sale thereby directed were deemed to be part of the "plant." The receivers deny that in pursuance of said order, they issued invitations for bids, and say that they negotiated with and entered into a contract, dated July 31, 1924, with John J. Reilly Stevodor-ing Co., Inc. for the sale of said "plant" for \$550,000.

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5. They deny the allegations of Paragraph 5 of the petition; and say that beginning in the month of January or February, 1924, petitioner and other real estate agents were informed of the properties that the receivers had for sale and that the receivers were prepared to receive bids for the purchase of said properties.

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6. They deny the allegations of Paragraph 6 of the petition.

7. They deny the allegations of Paragraph 7 of the petition.

8. They deny the allegations of Paragraph 8 of the petition.

9. They deny the allegations of Paragraph 9 of the petition, except that they admit that, under contract dated May 9, 1924, for the sale of Bayonne Park to Hub Realty Company for the price of \$102,600, John Craven & Son Company was the broker who effected the sale and received a commission of \$2,565, being 2½% of said purchase price, under an order of this Court dated May 20, 1924, confirming said sale.

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10. They deny so much of Paragraph 10 of the petition as alleges "that said receivers informed petitioner that it had been endeavoring to dispose

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Answer of Receivers.

of this property without any success; that the improvements on said property were peculiarly adapted for certain purposes and it was a difficult thing to find anyone who was interested therein; that the great value in said property was in the improvements; and they admit the remainder of said Paragraph.

11. They deny the allegations of Paragraph 11 of the petition.

12. They deny the allegations of Paragraph 12 of the petition, except so much thereof as alleges "that thereupon an order was made by your Honor that said property be re-advertised for sale and sold at public auction to the highest bidder; that at said sale, which was held on August 28, 1924, the said Brown bid the sum of \$625,000 for said premises and the same were struck off to him."

13. They deny the allegations of Paragraph 13 of the petition, except so much as alleges that the Reilly Company was not represented by a solicitor of this Court on August 19, 1924, on the return of the order to show cause of August 2, 1924.

14. They admit the allegations of Paragraph 14 of the petition.

15. They admit the allegations of Paragraph 15 of the petition, and say that, pursuant to an order of this Court, dated January 20, 1925, an action was commenced by the petitioner in the Supreme Court of this state against them by service upon them of the summons and complaint on February 18, 1925, which action is still pending and undetermined in said Court, the petitioner having failed to proceed in said action further than by

Answer of Receivers.

serving said summons and complaint and having failed to comply with a demand for a bill of particulars served upon him pursuant to the statute in such case made and provided.

16. They admit the allegations of Paragraph 16 of the petition. 10

17. They admit the allegations of Paragraph 17 of the petition, except that they deny that the hearing referred to in said paragraph was brought on during January, 1925, and say that said hearing was brought on during January, 1926.

18. They deny knowledge or information sufficient to form a belief as to the allegation of Paragraph 18 of the petition. 20

19. They deny knowledge or information sufficient to form a belief as to the allegation of Paragraph 19 of the petition.

As and for separate defenses to the petition herein, they say:

1. That the claim of petitioner for commissions on sale of the "plant" which is a part of the subject matter of the petition herein, verified January 10, 1926, was brought on for hearing before this Court during the month of January, 1926; that said matter is still pending and undetermined. 30

2. That as to the claim of petitioner for commissions on the sale of Bayonne Park and other properties of New Jersey Refrigerating Company, other than the "plant," petitioner has not complied with the statute in such case made and provided, to wit, "A Supplement to an Act Entitled 'An Act Concerning Corporations (Revision of 1896)', approved April 8, 1921 (P. L. 1921, p. 724); and pe- 40

Answer of Receivers.

titioner is baned from any action therefor or on account thereof by the giving of the notice required by said statute and the due filing of proof of such notice.

10 3. That petitioner fails to allege authority in writing for the sale of the lands mentioned in the petition and signed by the receivers, and fails to allege the making of an oral agreement followed by five days' notice in writing to the receivers setting up the terms of such oral agreement, according to the statute in such case made and provided, being "An Act for the Prevention of Frauds and Perjuries" as amended (P. L. 1918, p. 1020).

20 4. That the petitioner has not made or stated such a case as entitles him in this Court to any relief as to any of the matters contained in his petition.

WHEREUPON the receivers pray that said petition be dismissed.

Dated at Newark, N. J., January 18, 1927.

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.....
30 Receivers of the New Jersey Refrigerating Company.

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Solicitor and of counsel
with receivers.

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

40 FRANK J. BOCK and EDWARD H. WRIGHT, being severally duly sworn, each for himself, upon his oath, deposes and says:

Order.

That he is one of the receivers of the New Jersey Refrigerating Company named in the within answer; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information, and that as to those matters he believes them to be true. 10

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Sworn and subscribed to before me }
this day of January, 1927. }

Order.

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(Filed Jan. 12th, 1927.)

IN CHANCERY OF NEW JERSEY.

In the Matter
of
The Dissolution of NEW JERSEY
REFRIGERATING COMPANY. } On Petition of
Samuel Lesser.

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This matter being opened to the court by Edward Maxson, solicitor for the petitioner Samuel Lesser, and upon reading and filing the petitioner's verified petition;

It is on this 11th day of January, 1927, ORDERED that Frank J. Bock and Edward H. Wright, receivers of the above-named New Jersey Refrigerating Company, show cause before this court at the State House in Trenton, New Jersey, on the 18th day of January, 1927, at the hour of ten 40

Order of Reference.

o'clock in the forenoon or as soon thereafter as the matter may be heard, why the prayer of the petition of Samuel Lesser this day filed in this cause, should not be granted.

10 And it is further ORDERED that copies of the petition of the said Samuel Lesser, the affidavit thereto annexed and of this order be served upon the said receivers within two days from the date hereof; that such copies so to be served may be certified by the solicitor of the petitioner as true copies.

EDWIN ROBERT WALKER,
C.

Order of Reference.

(Filed Feb. 8th, 1927.)

IN CHANCERY OF NEW JERSEY.

In the Matter
of
The Dissolution of the NEW JERSEY REFRIGERATING COMPANY.

On Petition of
Samuel Lesser.

30 This matter being opened to the Court by Edward Maxson, Esq., solicitor for Samuel Lesser, upon return of an order to show cause heretofore granted on the petition of Samuel Lesser, verified January 10, 1927, and in the presence of J. H. Harrison, Esq., solicitor for Frank J. Bock and Edward H. Wright, receivers of the above named New Jersey Refrigerating Company; and
40 the said Samuel Lesser praying in his said petition that an order may be made in this cause

Order of Reference.

directing that the entire matter in dispute herein may be referred to one of the Special Masters of this Court, to hear and to report such sums as his services were fairly and reasonably worth in producing purchasers and the prices brought for the properties sold for the said receivers of said New Jersey Refrigerating Company, and further directing that the former application heretofore made by petitioner be dismissed and for such other and further relief as the nature of the application may require; and it appearing that heretofore and during the month of December, 1924, the said Samuel Lesser filed his petition in this cause, praying, among other things, that the said receivers should pay to the said Lesser the sum of \$26,250.00, or that permission be granted to the said Lesser to institute a suit against the said receivers to recover said amount, and that, said receivers having filed their answer to the abovenamed petition, an order was made by this Court on January 20, 1925, permitting the said Samuel Lesser to institute suit against the said receivers for the collection of his claim; and it appearing further that thereafter and during the month of February, 1925, said Samuel Lesser instituted a suit against the said receivers in the New Jersey Supreme Court to recover the sum of \$28,250.00, with interest from the 31st day of July, 1924, for work, labor and services performed for them in procuring a purchaser for the property of the New Jersey Refrigerating Company in Jersey City, and for disbursements incurred in behalf of said receivers, which said suit is not at issue and is undetermined; and it appearing further that on or about January 26, 1926, the said Lesser filed his petition in this cause, praying for permission to

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Order of Reference.

discontinue said suit at law and to re-submit the matter contained in said previous petition to this Court for its disposition, and for an allowance of \$26,025.00, as prayed for in the petition of December, 1924, above referred to, and said receivers having opposed said petition, and the matter having been argued before this Court and being still undetermined, and the said receivers having filed their answer to the petition of said Lesser, verified January 10, 1927, and the said Samuel Lesser having agreed in open Court to formally discontinue, by writing, his said suit pending in the New Jersey Supreme Court, and the Chancellor having considered the argument of the respective solicitors on the matters involved, and being of the opinion that the claims of Samuel Lesser against the said receivers, arising out of the sale of the respective premises known as the Bayonne Park property and as the plant of the company in Jersey City, should be referred to a Vice Chancellor to hear, consider and report upon said claims;

It is, on this 8th day of February, 1927, ORDERED, that the petition of the said Samuel Lesser, verified January 10, 1927, be and the same hereby is denied as to any and all claims against the said receivers other than for claims based upon the sale of the real property designated in the petition as being the Bayonne Park property and the plant of the New Jersey Refrigerating Company in Jersey City, New Jersey.

And it is further ORDERED, that the petition of the said Samuel Lesser to this Court, hereinbefore referred to, and filed in this cause during the month of December, 1924, excepting so much thereof as prays for permission to institute a suit against said receivers, the answer of the receivers

Order of Reference.

thereto, duly filed, and the petition of Samuel Lesser, verified January 13, 1926, filed in this cause during the month of January, 1926, opposed by said receivers, and argued before this Court, but still undetermined, be and the same hereby are referred to the Honorable Alonzo Church, one of the Vice Chancellors of this Court, to hear for the Chancellor and to advise what sum or sums, if any, should be paid to said Samuel Lesser on his said claims relating to the Bayonne Park property and the plant of the New Jersey Refrigerating Company in Jersey City, New Jersey.

And it is further ORDERED, that the petition of the said Samuel Lesser to this Court, verified January 10, 1927, and filed in this cause on the 11th day of January, 1927, in so far as it relates to the claim of the said Samuel Lesser against the said receivers in connection with the real property of the New Jersey Refrigerating Company described in said petition as the Bayonne Park property and the plant of the New Jersey Refrigerating Company in Jersey City, New Jersey, and the answer of the receivers thereto, be and the same hereby are referred to the Honorable Alonzo Church, one of the Vice Chancellors of this Court, to hear for the Chancellor and to advise what sum or sums, if any, should be paid to said Samuel Lesser on his claims.

And it is further ORDERED, that within twenty days the said Samuel Lesser shall cause to be discontinued his suit against the receivers of the New Jersey Refrigerating Company pending in the New Jersey Supreme Court.

E. R. WALKER,
Chancellor.

Transcript.

IN CHANCERY OF NEW JERSEY.

In the Matter
of
10 The NEW JERSEY REFRIGERATING
COMPANY on two claims of
SAMUEL LESSER. One for \$26,-
500, etc.,
and
A second claim arising out of the
sale of property in the City of
Bayonne, etc.; both of said
claims being for agents' com-
missions claimed to be due to
said Lesser.

Book No. 1
Pages 1 to 10.

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Transcript of shorthand notes of testimony taken
in the above entitled cause before his Honor,
Alonzo Church, Vice-Chancellor, at the Chancery
Chambers, Newark, New Jersey, on April 27,
1927.

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Transcript.

IN CHANCERY OF NEW JERSEY.

April 27, 1927.

In the Matter
of
10 The NEW JERSEY REFRIGERATING
COMPANY on two claims of
SAMUEL LESSER, one for \$26,500,
arising out of the sale of the
plant of the New Jersey Re-
frigerating Company on Ninth
Street, Jersey City, and fringed
parcels connected therewith;
and a second claim arising out
of the sale of property in the
City of Bayonne, known as
Bayonne Park; both of said
claims being for agents' com-
missions claimed to be due to
said Lesser.

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APPEARANCES:

EDWARD MAXSON and PETER BENTLEY, for
Complainant Lesser. 30
J. H. HARRISON, for Frank J. Bock and
Edward H. Wright, Receivers; George
J. Carr for Eleanor Betts Howe; and
G. Arthur Betts, stockholders; Merritt
Lane for Gustav W. Lembeck and other
stockholders.

Mr. Maxson: May it please the Court, this peti-
tion was filed after a suit was instituted at law
on the contract entered into by the receivers and 40

Transcript.

the petitioner, and after that suit had been discontinued, a petition was filed with the Chancellor asking that this matter be determined on its merits; and then a reference was made to you.

10 The facts are about these: Some time in 1924 the receivers offered the property in Jersey City for sale, and in January of that—I don't remember the dates exactly, but Mr. Lesser, the petitioner came into the situation as a broker, made a contract with the receivers that he should have five per cent. on any sale satisfactory to them and which was confirmed by the Court of Chancery. Before he came in, or at the time he came in there was an offer before the receivers of \$425,000 for the property. After having worked on the matter, 20 as his testimony before the Receivers said, for about three days a week for nine months, he finally got a purchaser who offered \$550,000 for the property. This offer was submitted to the Chancellor for confirmation. On the day the motion was made to confirm, the Chancellor inquired whether the real estate brokers were represented by counsel or not, local counsel, and they said they were not, they had no counsel. He then stated that the matter could go over until they were represented. It went over and in the meantime 30 counsel was retained.

On the next hearing of the matter the same parties who had made the original offer of \$425,000 came in with an offer of \$560,000. The Chancellor then said that the matter should go to public sale and it was advertised and finally sold to the same people who made the original offer for \$625,000, but at that time there was included in the transaction some property, which, according to the 40 receivers, was worth approximately \$50,000 so

Transcript.

that our claim is that we brought to this estate about \$150,000 in benefits by the work we did. The work went over nine months.

It is conceded that these men were busy almost all the time on it.

10 Mr. Lesser in his testimony before the receivers said that he had expended about \$2,000 that he had to get—felt that they needed the opinion of experts as to the character of the property, the opportunities for business, the railroad facilities and all that sort of thing which went with a big plant and its operation; and those opinions were secured and cost approximately \$1,500, and then they calculated that they spent about \$500 in other disbursements.

20 Now, that these petitioners rendered service to the receivers, I think, is clearly shown by the fact that the receivers accepted them, they accepted their bid and moved the Court of Chancery to confirm it, so that, if it had been an ordinary situation where these men had not been officers of the court, there would have been undoubtedly, a contract. They brought the purchaser, who was satisfactory to the seller and they accepted his bid and they earned their commission, but because of the peculiar circumstances of this case, and because these people who had originally bid \$425,000 30 found out that the property was worth more, in the meantime, or thought they did, they came along and offered ten thousand dollars more and the sale is defeated.

Now, it is conceded that certain services were rendered and we have agreed that ten thousand dollars is a fair settlement for the sale of the property in Jersey City and the \$2,650 which the 40

Transcript.

receivers concede that they owe for the sale of the Bayonne property.

10 Mr. Harrison: If the Court please, this matter has been before the Chancellor in person for over two years. On these claims which have been referred by him to you under an order of reference of February 8, 1927.

Originally, without going into the matter in detail, the Lesser claims were referred back to the receivers by the Chancellor, were rejected by the receivers and then, based upon those rejections, the petitions to which I have just referred, brought before the Chancellor.

20 I would like, in passing, to refer your Honor to the Chancellor's opinion *in re*: New Jersey Refrigerating Company 96 Equity, page 431, where the history of this case is set out in detail and which, I think, so far as the prices are concerned, has been substantially summarized by Mr. Maxson.

30 The position of the receivers in this matter is this, that, while it is true that Lesser brought to the attention of the receivers the Reilly Stevedoring Company with a signed contract for the purchase of this property at \$550,000; that he did but little more or nothing more than any real estate agent interested in a prospect would have done; and that the supervision of the Reilly contract, which was that the real estate brokers who represent successful bidders would be paid five per cent. commission on the purchase price, if approved by the Court of Chancery, if and when the sale was consummated and the purchase price paid, was the measure of the receivers' responsibility to Lesser, and that that contract not having been consummated, therefore there was no
40 legal liability to Lesser for the work which he did.

Transcript.

It is urged by the receivers, in answer to the contention that Lesser is entitled to compensation upon a *quantum meruit* that the statute of frauds may be interposed and that the benefit to the estate is questionable.

10 Now, it is suggested further, and the third point by Mr. Maxson, as I understand it that perhaps it was the interference of the receivers which prevented the consummation of the Reilly contract and that there is some sort of fraud, as it were—or perhaps, fraud is not charged, but interference, bringing in, if you please, by the receivers of Brown, the bidder who overbid—

20 Mr. Maxson: Excuse me, Senator, for interrupting. We are not criticizing the receivers in this situation, that is, if the suggestion has been made by implication, we do not mean to criticize them at all.

Mr. Harrison: I am referring merely to the recitation made in the petition, so, if that is withdrawn there is no use of making any point of it.

30 There seems to be a doubtful point of law here involved in the cases, as I understand it, although under the Commission Section of the contract to which I referred, the position of the receivers is that the broker, having entered into a contingent contract, cannot be compensated for his services unless the contingency happened.

40 However, the receivers realize that Lesser spent a great deal of time in this matter, that he incurred substantial expenses, that this bidder which he brought in, the Reilly Stevedoring Company, was helpful in enabling the receivers to raise the price so that there was an increase in the value obtained for this property of some \$101,000.

Now, their attitude is that irrespective of the

Transcript.

10 legal objections which have been brought to their attention by their counsel, that as a business proposition they are disposed to accede to the proposition of the claimant and to accept the settlement of \$10,000, provided the Court will approve such settlement, and, under the remittitur which came down originally, these are matters which are peculiarly to be submitted to the attention of the Court for the Court's approval.

The Court, as your Honor knows, has been in close contact with this estate from the time it started and we, therefore, submit the matter to your Honor with the recommendation on the part of the receivers that the settlement suggested, that both of these claims for the gross sum of \$10,000 without costs be approved.

20 The Court: If I— (interrupted).

Mr. Harrison: Pardon me. May I interrupt your Honor to say this, that Mr. Carr representing the Betts interest, authorizes me to say that he thinks that from the standpoint of his stockholding interest that this is a satisfactory settlement, and Mr. Lane, representing the G. W. Lembeck interest, also approves this settlement. I have not heard from any of the other stockholding interests.

30 The Court: If I have to decide this case as in the nature of a contested case, there might be some doubt in my mind as to the authority of this Court to allow any commissions whatever under the circumstances that have been stated by counsel, but, it seems to me now that—an agreement between the receivers and this claimant having been submitted to the Court, the situation is entirely different. These receivers stand in the place and act for the corporation and under the cases, as I

Order Allowing Claims.

remember them, the receivers can take any reasonable action which it was in the power of the Corporation through its directors to take, and I cannot see why, if those were matters which came before the directors of this corporation and they decided as a matter of good business judgment that this man should get ten thousand dollars— I can't see why that wouldn't be perfectly legal and proper and therefore when the receivers come before me and make the same statement, I cannot see why such a settlement, having been agreed upon by the receivers is not good in law.

Therefore, I will confirm this settlement, and I might add, quoting from Holy Scripture as I have sometimes before, "Behold how good and how pleasant it is for brethren to dwell together in unity."

Order Allowing Claims.

(Filed May 17th, 1927.)

IN CHANCERY OF NEW JERSEY.

In the Matter
of
The Dissolution of the NEW JERSEY REFRIGERATING COMPANY.

IN
DISSOLUTION
On Petition of
Samuel Lesser
for payments of
commissions for
sales of property.

This matter being opened to the Court by Edward Maxson, Esq., solicitor for the petitioner, and in the presence of J. Henry Harrison, Esq., solicitor for Frank J. Bock and Edward H. Wright, Receivers in Dissolution of the New Jersey Refrigerating Company, and in the presence of George J. Carr, of the New York Bar appearing

Order Allowing Claims.

pro se and of counsel with Eleanor Betz Howe and G. Arthur Betz, and in the presence of Merritt Lane, Esq., solicitor for Gustav W. Lembeck, upon the petition of Samuel Lesser, individually, and as assignee of the John Craven & Son Company, and the answer of said receivers, in and by which petition said Samuel Lesser prayed that an order of this Court, in this cause, directing the said Receivers to pay to such petitioner such sums as his services were fairly and reasonably worth in producing purchasers for the sales of the property of the said New Jersey Refrigerating Company described in said petition as the Bayonne Park and Plant of the company on Ninth Street, Jersey City, and upon all the other papers referred by the order of this Court dated February 8, 1927, to the Honorable Alonzo Church, one of the Vice-Chancellors of this Court, to hear for the Chancellor and to advise what sum or sums, if any, should be paid to the said Samuel Lesser on his claims relating to the Bayonne Park property and the plant and "fringe parcels" of the New Jersey Refrigerating Company in Jersey City, New Jersey; and the said Receivers, recommending to the Court that the sum of \$10,000.00 should be paid by them, as such receivers, to the said Samuel Lesser in full for all services rendered and for all expenses and disbursements incurred by said petitioner and John Craven & Son Company in and about the sale of said two described properties; and the said Samuel Lesser, petitioner, stating in open Court, through his solicitor, that he was willing to accept said sum of \$10,000.00 in full payment for services rendered and for all expenses and disbursements incurred by him and John Craven & Son Company in and about the sale of said two described prop-

Order Allowing Claims.

erties; and the court being of the opinion that the recommendation of the said receivers should be accepted,

It is, on this 17th day of May, 1927, ORDERED, that Frank J. Bock and Edward H. Wright, receivers of the New Jersey Refrigerating Company, upon the said Samuel Lesser filing with them a duly executed and acknowledged assignment by John Craven & Son Company to said Samuel Lesser of any and all moneys claimed to be due and owing to John Craven & Son Company from the said receivers for commissions and services which John Craven & Son Company claims to have rendered the said receivers in connection with the sale of any and all the real estate of the New Jersey Refrigerating Company, be, and they hereby are, authorized and directed to pay unto Samuel Lesser from the moneys of said New Jersey Refrigerating Company in their possession, the sum of \$10,000.00, which said sum is in full payment of any and all services rendered and expenses and disbursements incurred by the said Samuel Lesser or his assignor, the John Craven & Son Company, in producing purchasers and the prices brought for the premises described in said petition of said Samuel Lesser and known as the Bayonne Park in Bayonne, Hudson County, New Jersey, and the plant of the said New Jersey Refrigerating Company on Ninth Street, with "fringe parcels," Jersey City, Hudson County, New Jersey.

That the said sum of \$10,000.00 is to be paid without the costs of the petitioner on this application.

Respectfully advised,

ALONZO CHURCH,
 V. C.

Petition of Appeal.

(Filed June 10th, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

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In the Matter
of
The Dissolution of NEW JERSEY
REFRIGERATING COMPANY.

On Appeal from
the Court of
Chancery.

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

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The petition of Otto A. Lembeck and Ida L. Bowen, respectfully shows:

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That your petitioners find themselves 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 the 17th day of May, 1927, advised by the Honorable Alonzo Church, Vice Chancellor, in a cause entitled, "In the matter of the Dissolution of New Jersey Refrigerating Company, in dissolution on petition of Samuel Lesser, for payments of commissions for sales of property" in which your petitioner, Otto A. Lembeck, is one of the Trustees under the Will of Henry Lembeck, deceased, holding 2636 shares of the stock of said company, and also holding individually 156 shares of said stock, and also as a legatee under the will of Henry Lembeck of certain interests in said shares; and your petitioner Ida L. Bowen, is the owner and holder of one-seventh of said 2636 shares, in this respect, to wit:

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Petition of Appeal.

That said order orders and adjudges that Frank J. Bock and Edward H. Wright, Receivers in Dissolution of New Jersey Refrigerating Company, be authorized and directed to pay unto Samuel Lesser from the moneys of said company in their possession, the sum of ten thousand dollars (\$10,000), said sum to be in full payment of any and all services rendered and expenses and disbursements incurred by the said Lesser or his assignor, The John Craven & Son Company, in producing purchasers and the prices brought for the premises described in the petition of said Lesser and known as Bayonne Park in Bayonne, Hudson County, New Jersey, and the plant of said New Jersey Refrigerating Company on Ninth Street, with "fringe parcels" Jersey City, Hudson County, New Jersey.

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And your petitioners humbly appeal from that part of the said order which orders as aforesaid upon the ground that said order is erroneous in that any services performed by said Samuel Lesser were governed by his contract with the Receivers which provided that commissions should be paid to him on the consummation of the contract and the acceptance of a deed by the purchaser, and upon approval of the contract by the Court of Chancery, but only in the event that the sale referred to in the contract be consummated and the purchase price paid; whereas in fact the sale referred to in the contract between the Receivers and Lesser was never consummated and never confirmed; and on the further ground that the Court of Chancery did not have jurisdiction to make the order allowing the claim of Lesser, and also that Lesser failed to file his claim with the Receivers in time, in accordance with the statute in such case made and provided; and also that

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Answer of Samuel Lesser.

Lesser's remedy is by suit at law under the 1921 statute; and also that said Lesser made an election to sue at law and while said suit was pending and undetermined made the application referred to in the order.

10 Your petitioners therefore pray that the said order of the Chancellor may be reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this honorable Court shall seem meet.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors of Appellants.

ALBERT C. WALL,
Of Counsel.

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Answer of Samuel Lesser to Petition of Appeal.

(Filed June 22nd, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

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In the Matter
of
The Dissolution of NEW JERSEY REFRIGERATING COMPANY.

On Appeal from
the Court of
Chancery.

The answer of Samuel Lesser, the appellee in the above appeal to the petition of appeal of Otto A. Lembeck and Ida L. Bowen, appellants, is:

40 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

Answer of Samuel Lesser.

that an order was on the 17th day of May, 1927, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the form and substance of said order this appellee begs leave to refer thereto when the same shall be produced. 10

This appellee is advised and believes that the said order is agreeable to equity; and that the said appellants have no legal right or authority as individual stockholders of the said New Jersey Refrigerating Company, to take or prosecute an appeal from said order because the said order was based upon the judgment of the receivers of said New Jersey Refrigerating Company who stood in the place and stead of its Board of Directors and their judgment, which was honest and fair, cannot be attacked except for fraud and fraud has not been alleged against the judgment of said receivers; and he prays that the said order may be affirmed with costs to be taxed in his favor. 20

EDWARD MAXSON,
Solicitor for and of Counsel with Appellee.

Endorsed:

Service of a copy of within answer of Samuel Lesser to petition of appeal is hereby acknowledged this 20th day of June, 1927. 30

WALL, HAIGHT, CAREY & HARTPENCE,
Sol'rs. of Appellants
Otto A. Lembeck and Ida L. Bowen.

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Answer of Frank J. Bock and Edward H. Wright, as Receivers of New Jersey Refrigerating Company.

(Filed June 29th, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

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In the Matter
of
The Dissolution of the NEW JERSEY REFRIGERATING COMPANY.

On Appeal from
the Court of
Chancery.

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The answer of Frank J. Bock and Edward H. Wright, as receivers of the New Jersey Refrigerating Company, respondents, to the petition of appeal of the above named appellant.

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These respondents not acknowledging all or any of the matters, which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, say and admit that an order was, on the 17th day of May, 1927, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe that the said order is agreeable to equity, and they pray that the same may be confirmed, with costs to be adjudged to these respondents.

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J. H. HARRISON,
Solicitor and Counsel for Receivers of
New Jersey Refrigerating Company.

Order for Public Sale of Plant.

(Filed August 19, 1924.)

IN CHANCERY OF NEW JERSEY.

In the Matter
of
The Dissolution of the NEW JERSEY REFRIGERATING COMPANY.

On Bill, etc.
On Order to Show Cause.
Order for public sale of premises known as plant Numbers 521, 523, 525 Henderson Street, 509 Henderson Street, 183 Tenth Street, Jersey City, N. J.

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This matter coming on to be heard in the presence of Randolph Perkins, Esquire, Solicitor of Thomas A. Lembeck and Sarah Lembeck; Arthur C. Wall, Esquire, Solicitor of Otto A. Lembeck; J. Fisher Anderson, Solicitor of Ida L. Bowen and the Commercial Trust Company of New Jersey, Trustee; Eugene Blankenhorn, Esquire, Solicitor of Gustav W. Lembeck; Shirley N. Carr, Esquire, Solicitor of Eleanor Betz Howe and G. Arthur Betz; J. H. Harrison, Esquire, Solicitor of Frank J. Bock and Edward H. Wright, Receivers of the New Jersey Refrigerating Company:

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And it appearing to the Court that notice of the order to show cause, issued herein, directing the stockholders of the New Jersey Refrigerating Company and the Commercial Trust Company of New Jersey, as Trustee, to show cause why the Receivers of the New Jersey Refrigerating Company should not consummate the sale of the real and personal property of said company comprehended and included in a certain agreement of sale bear-

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Order for Public Sale of Plant.

ing date July thirty-first, nineteen hundred and
 twenty-four, with the John J. Reilly Stevedoring
 Co., Inc., for the gross consideration of five hun-
 dred and fifty thousand dollars (\$550,000.00) and
 which property is more particularly described in
 10 the petition upon which said order to show cause
 was issued, and why said Receivers should not be
 directed to pay the real estate broker who ne-
 gotiated said sale a brokerage of five per centum
 on the purchase price of said plant and two and
 one-half per centum on the purchase price of the
 other five parcels included in said agreement of
 sale, has been served upon the stockholders of the
 New Jersey Refrigerating Company and the Com-
 mercial Trust Company of New Jersey, Trustee, in
 20 accordance with the terms of said order to show
 cause, and Charles T. Brown having offered in
 open court to pay the sum of five hundred and
 sixty thousand dollars (\$560,000.00), without brok-
 erage, and agreeing to permit the sum of ten thou-
 sand dollars (\$10,000.00) heretofore paid by said
 Brown to the receivers on a previous bid made
 by said Brown to remain in the hands of the Re-
 ceivers as a deposit and forfeit on his said bid of
 five hundred and sixty thousand dollars, and hav-
 30 ing offered in open court to make an additional
 deposit of fifteen thousand dollars (\$15,000.00) on
 account of his said bid of five hundred and sixty
 thousand dollars (\$560,000.00) within three days
 from the date hereof;

And the solicitors who appeared having no ob-
 jection to the sale at public auction of said real
 and personal property;

It is, on this nineteenth day of August, 1924,
 40 ORDERED that said agreement of sale, dated July

Order for Public Sale of Plant.

31, 1924, with the John J. Reilly Stevedoring Co.,
 Inc., of the real and personal property mentioned
 and described in the petition filed in this matter,
 and in said order to show cause, be not now con-
 summated, and that no commissions be now al-
 lowed to the broker who effectuated said contract
 with the John J. Reilly Stevedoring Co., Inc.; 10

It is further ordered that Frank J. Bock and
 Edward H. Wright, Receivers of the New Jersey
 Refrigerating Company advertise for sale, at pub-
 lic auction, on Thursday, August twenty-eight,
 nineteen hundred and twenty-four, at two o'clock
 in the afternoon (daylight saving time), at 173
 Ninth St., Jersey City, N. J., the real and personal
 property hereinbefore referred to and more par-
 ticularly described in the petition of the Receivers
 filed herein on August 2, 1924, and in the order
 to show cause made on said date; and that said
 Receivers give notice of said sale by advertising
 in the Jersey Journal at least one week before
 said sale and by such other advertising as the Re-
 ceivers may determine to be proper or advisable; 20

It is further ordered that the upset price of five
 hundred and sixty thousand dollars (\$560,000.00),
 without brokerage, be and the same hereby is fixed
 as the minimum bid to be received and that in
 default and upon the failure of said Charles T.
 Brown to make a bid of at least five hundred and
 sixty thousand dollars (\$560,000.00), without brok-
 erage, at said sale that the deposit of ten thousand
 dollars made by said Brown and the deposit of
 fifteen thousand dollars, to be made by him, be
 and become a penalty and not a forfeiture, and
 be held and treated as such; 30

And it is further ordered that the Receivers be
 authorized to sell said real and personal property 40

Order for Public Sale of Plant.

for cash, or, in their discretion, subject to the mortgage held by the Commercial Trust Company of New Jersey, as Trustee, upon which there is now outstanding and unpaid a sum approximating \$332,000.00, and the purchaser assuming and agreeing to perform the covenants and terms and provisions of said mortgage or trust deed;

And it is further ordered that the Receivers be and they hereby are authorized and directed, subject to the approval of this Court, to enter into a contract with the purchaser at said sale for the said real and personal property and report the same to this Court for confirmation on Tuesday the second day of September, 1924, at ten-thirty o'clock in the morning (daylight saving time) at the Chancery Chambers, State House, Trenton;

And it is further ordered that copies of this order, which need not be certified, be served upon each of the stockholders of the New Jersey Refrigerating Company and the Commercial Trust Company of New Jersey, as Trustee, or upon their several and respective solicitors, personally, or by mailing true copies hereof to the stockholders and the Commercial Trust Company of New Jersey, Trustee, at their several respective post office addresses, if the same can be ascertained, with postage prepaid thereon, within five days from the date of this order.

E. R. WALKER,
C.

New Jersey Court of Errors and Appeals

<p>In the matter of the dissolution of NEW JERSEY REFRIGERATING COMPANY.</p>	}	<p><i>On Appeal from Chancery.</i></p> <p><i>Order Directing Compromise of Claim of Real Estate Broker.</i></p> <p>CHURCH, V.-C.</p> <p><i>Appeal of Otto A. Lembeck and Ida L. Bowen.</i></p>
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BRIEF FOR GUSTAVE W. LEMBECK, RESPONDENT.

(Italics mine except where otherwise noted.)

THE FACTS.

The receivers were appointed in dissolution proceedings under section 56 of the General Corporation Act, 1 C. S. of N. J., page 1636.

The matter came here on appeal from the order appointing receivers, the present appellants being also appellants there, and the result was an affirmance.

In re New Jersey Refrigerating Co., 95 N. J. E. 215.

In the administration of their trust it became necessary for the receivers to dispose of the real

estate of the company and an order was made directing them, subject to the approval of the court, to negotiate and enter into a contract of sale. In pursuance of that order the receivers issued invitations for bids. In January, 1924, Lesser (the claimant, a real estate broker) had gotten in contact with the receivers, had seen Bock, one of the receivers, Mr. Harrison, counsel for the receivers, and Betz, who was in charge of the plant for the receivers (pp. 55, 56, 57) and had been informed that he would be paid a commission of five per cent. on the sale price of the plant and $2\frac{1}{2}$ per cent. on the sale price of what is known as the fringe property (p. 55) if he produced a purchaser who would purchase the property at a price satisfactory to the receivers. Lesser did a great deal of work, conferred with the receivers and with prospective purchasers (p. 52) and, after the invitation for sealed bids had been sent out by direction of the court, by the receivers on or about May 28, 1924, succeeded in securing the John J. Reilly Stevedoring Co., Inc., to offer \$550,000 to the receivers upon terms satisfactory to them, and, on the 31st day of July, 1924, the receivers made a contract with the Stevedoring Co., for the sale of the property to it, which contract contained the following provision: "It is hereby understood and agreed that Samuel Lesser is the broker who effected this sale, and said parties of the first part (the receivers) hereby agree to pay said broker a commission of five (5) per cent. for the sale of the plant and a commission of two and one-half ($2\frac{1}{2}$) per cent. for the sale of the other parcels, or such other commission as may be approved by the Court of Chancery, if and when this sale is consummated and the purchase price paid" (p. 11).

The receivers presented their petition for confirmation of the sale on August 2, 1924 (p. 1), and an order to show cause went to stockholders (p. 50). Confirmation was opposed by certain stockholders, among others this respondent, with the result that, on August 19, 1924, the return day of the order, the court directed that the sale to the Stevedoring Co., should not be *then* consummated and that the receivers offer the property at public auction on August 28, 1924 (p. 20). At the hearing on August 19, 1924, Charles T. Brown, in open court offered to pay the sum of \$560,000 without brokerage for the property (p. 434). At the auction sale Brown was the highest bidder for the sum of \$625,000 without brokerage, and, upon that sale being reported to the court, on September 17, 1924 (p. 22), it was confirmed.

It is clear from the evidence (Reilly p. 48, Lesser p. 50), the petitions of Lesser (pp. 59, 36), the petition of the receivers for confirmation of sale and from the conclusions of the Chancellor, in *re New Jersey Refrigerating Co.*, 96 N. J. E. 431, which conclusions are printed in the State of Case, p. 24) that, from the latter part of November, 1923, until the purchaser, Reilly Stevedoring Co., Inc., was procured in July, 1924, Lesser had been persistently working on the sale of this property, consulting with the receivers, interviewing prospective purchasers and bringing them in contact with the receivers, and that it was *his* labor which resulted in the Stevedoring Co. bid of \$550,000, and it was the application of the receivers to confirm *that* bid, upon notice to the stockholders, which stirred the stockholders to secure Brown, upon the return of the order to show cause, to offer, in open court, \$560,000 which led to the sale at auction at which sale Brown bid \$625,000. Although the contract which

was consummated by Lesser was not finally approved by the court it was the labor of Lesser which created a condition, which otherwise would not have been created, which led to \$625,000 being realized for the property. There is no doubt whatever but that the services rendered by Lesser redounded to the benefit of the estate.

The matter of compensating Lesser was mooted before the Chancellor on September 8, 1924, when the matter of the confirmation of the sale to Brown, for \$625,000, came up and the Chancellor, commencing on p. 436 of 96 N. J. E., considered it and conceded that it might be that the broker was entitled to be compensated but that the question was neither necessary nor proper then to decide. He then suggested that Lesser make his claim to the receivers and they could then allow or disallow it and he said that, in case of disallowance, it *would seem* that his remedy would be by suit at law, under P. L. 1921, p. 724 (1 Cum. Supp. 47-75b, p. 677), instead of by appeal to the Chancellor under Comp. Stat. p. 1649, Sec. 78 (now Sec. 47-78-1 Cumulative Supplement, p. 677).

I respectfully suggest, as I will hereafter argue, that P. L. 1921, p. 724 (1 Cum. Supp. 47-75b, p. 677), and C. S. p. 1649, Sec. 78 (now Cum. Supp. 47-48 p. 677) apply only to claims against the corporation incurred before the appointment of the receivers. Lesser's claim was not one against the corporation before dissolution but one against the receivers as such. It could not therefore be asserted either under P. L. 1921, p. 724, or Compiled Statutes, p. 1649, Sec. 78. As a claim against the receivers, as such, if the receivers declined to pay, the remedy was by petition to the Chancellor to direct the receivers, his appointees and agents, to pay, by virtue of

his supervisory control—*Merchants &c. v. Newark &c.*, 98 N. J. Eq. 477.

In accordance with the suggestion of the Chancellor a claim for the commission was filed by Lesser (p. 32, amended claim p. 35.) These claims were treated as if they had been against the corporation and were disallowed by the receivers (p. 45) and, in accordance with the provisions of P. L. 1921, p. 724, a suit was brought at law. Before the case was reached for trial counsel conceived that, the claim being against the receivers as such, the proper practice was to apply to the court to direct the receivers to pay and, on or about the 13th day of January, 1926, filed a petition requesting that Lesser have permission to discontinue the suit at law and to submit the matter to the court for its determination (p. 69). That matter was argued but, before a decision came down, on January 14, 1927, Lesser filed a new petition (p. 71) going into the facts in detail and praying the court to direct compensation to him *in such sum as the court might deem his services were fairly and reasonably worth* in producing purchasers and the prices brought for the properties sold for the said receivers of said New Jersey Refrigerating Company. The receivers filed answers (p. 80). An order was made on February 8, 1927, after an order to show cause, directing Lesser to discontinue his suit pending at law against the receivers and referring the matter to Vice-Chancellor Church "*to advise what sum or sums, if any, should be paid to said Samuel Lesser on his said claims* relating to the Bayonne Park property and the plant of the New Jersey Refrigerating Company in Jersey City, New Jersey."

The order, in effect, referred all proceedings to the Vice-Chancellor.

On April 27, 1927, the parties appeared before the Vice-Chancellor (p. 27). All of the parties, including appellants here, were notified of all of the proceedings in the cause. Appellants here did not appear. Counsel for Lesser, for the receivers, for the Betz estate, large holders of stock, and for Gustave W. Lembeck and other stockholders appeared.

The matter of a settlement was taken up and it was agreed between the parties present that a payment of \$10,000 to Lesser as compensation for his services, having in mind the benefit to the estate as a result of those services, would be fair and equitable.

There were two claims presented by Lesser—one for \$26,500 for services rendered with respect to the sale of the plant of the New Jersey Refrigerating Company, which is that referred to in the claim (pp. 32, 33) and another of John Craven & Son Company for \$2,563 (p. 38), which had been assigned to Lesser. The receivers conceded that they owed John Craven & Son Company \$2,563 (p. 93) and the settlement of \$10,000 took care of both claims.

This settlement was agreed upon as wise and satisfactory by all persons present, including counsel for the Betz interests and counsel for Gustave W. Lembeck (p. 96).

The court thereupon made an order (p. 97) directing the payment of \$10,000 to Lesser "in full payment of any and all services rendered and expenses and disbursements incurred by the said Samuel Lesser or his assignor, the John Craven & Son Company, in producing purchasers and the prices brought for the premises described in said petition of said Samuel Lesser and known as the Bayonne Park in Bayonne, Hudson

County New Jersey, and the plant of the said New Jersey Refrigerating Company on Ninth Street, with 'fringe parcels,' Jersey City, Hudson County, New Jersey."

The proofs which had been taken before the receivers, which were before the court on the settlement, showed (p. 47, etc.) that: Lesser had been working upon the matter from November, 1923; he had interviewed the receivers and their representatives many times; he had been told by the receivers that he would be paid five per cent. commission on the sale of the plant and two and a half per cent. on the fringe property if he sold the plant (p. 55); he had been told this by the receiver, Bock, the representative of the receiver, Betz, and counsel for the receiver, Mr. Harrison; he had brought prospective customers to the plant and had inspected the plant; he had incurred in the work proximate obligations of \$2,100 (p. 53).

The result of his services had been the contract between the receivers and the Stevedoring Company (p. 7) for the sale of the plant at \$550,000 which contained the provision that, if the sale was approved by the court and consummated, he would receive a commission of five per cent. on the sale of the plant and of two and a half per cent. on the sale of the other properties, which resulted in the figure claimed of \$26,500, the making of which contract, procured through him, finally resulting in the sale of the plant to Brown for \$625,000 (p. 19).

From the order confirming the settlement this appeal is taken by Otto A. Lembeck and Ida L. Bowen. Otto A. Lembeck is one of the trustees under the will of Henry Lembeck, the estate holding 2,636 shares of the stock of the corporation,

the respondent, Gustave W. Lembeck, being the other trustee. Otto A. Lembeck also owns individually 156 shares of said stock, Ida L. Bowen is interested in one-seventh of the 2,636 shares held by the trustees of the estate of Henry Lembeck. No other stockholder objects to the settlement.

The settlement by the receivers, approved by the court, has the express or implied approval of a considerable majority of the stockholders of the corporation.

I.

IT WAS WELL WITHIN THE POWER OF THE RECEIVERS TO MAKE, AND THE COURT TO APPROVE, THE SETTLEMENT.

Under this head Points 1, 2 and 3 of appellants' brief will be discussed.

Counsel is mistaken in assuming (p. 13 of their brief) that all parties conceded that Lesser had no legal claim.

It is true that the contract, which was made between the receivers and the Stevedoring Co. provided for a commission of "five per cent. for the sale of the plant and a commission of two and a half per cent. for the sale of the other parcels, or such other commission as may be approved by the Court of Chancery, if and when this sale is consummated and the purchase price paid." It is likewise true that courts have made fine distinctions in dealing with contracts of this kind.

Compare *Hinds v. Henry*, 36 N. J. L. 328, and cases following it with *Stevenson Company v. Oppenheimer*, 91 N. J. L. 479.

The receivers actually reported the sale to the Chancellor with recommendation of confirmation.

The contract had been made in strict accordance with the provisions of the order of the court directing the receivers to invite bids and to enter into a contract. Because, spurred by the offer which had been made through the efforts of Lesser, a prospective purchaser was induced to offer, in open court, \$10,000 more than the Stevedoring Company contract price, the Chancellor declined to *then* confirm the contract entered into by the receivers and ordered a public sale. The public sale was had which resulted in the offer of \$625,000. Upon application for confirmation of that sale it was objected to by counsel for the Stevedoring Company and Lesser, and it was urged that the Stevedoring Company sale should be confirmed.

It is to be observed that the order which directed the public sale did *not* reject the contract made between the receivers and the Stevedoring Company but only directed that the contract "be not then consummated" (p. 20). In other words this contract, secured through Lesser, was retained awaiting the result of the auction sale. It was *used* by the receivers as a means of obtaining higher prices and of protecting the estate. Although not accepted, it was not rejected. The receivers, for the benefit of the estate, used the thing secured through the services of Lesser. The Chancellor in an elaborate opinion (p. 24 of the state of case 96 N. J. E. 436) distinguished the cases of *Morrissee v. Inglis*, 46 N. J. E. 306; *Rogers v. Rogers Locomotive Co.*, 62 N. J. E. 111; *Bethlehem Iron Co. v. Phila. Seashore R. R. Co.*, 49 N. J. E. 356, which had held that mere inadequacy of a bid, if the sale is regular and made without fraud and where no accident or mistake has intervened will not warrant the court in setting it aside, and refused to

confirm the agreement between the receivers and the Stevedoring Co., and confirmed the sale to Brown at \$625,000.

What the court did was to exercise its judgment, for the benefit of the stockholders of the corporation, securing them a price upwards of \$100,000 more than the \$550,000 bid of the Stevedoring Co., after the receivers had used this \$550,000 contract as a means of obtaining the \$625,000, holding the prospective purchaser liable until they had actually gotten the \$625,000.

It is now claimed that, because the court, reviewing the actions of its receivers, took this position for the benefit of the stockholders, Lesser is entitled to no compensation whatever for the services which he rendered in securing that which was not immediately rejected by the court but was retained and used by the receivers for the benefit of the stockholders.

But whether Lesser had a claim which he could assert, at law, under the contract, made between the receivers and the Stevedoring Co., because of the language of that contract hereinbefore referred to, it does not follow that, under the circumstances, he did not have any claim whatever which he could assert upon a *quantum meruit*, remembering that Lesser had been working upon this matter from November, 1923, and that the receivers had been co-operating with him, accepting his services, advising him that he would be paid a commission, which services had resulted in the contract for \$550,000 which, in turn, had resulted in the sale for \$625,000.

It is no answer to say that, in a suit at law upon a *quantum meruit*, he would be met with the plea that there was an express contract for that contract was not made until July 31, 1924,

and then *not* between Lesser and the receivers, and, while he might take advantage of the contract as made for his benefit, he could not be bound by its terms unless he did take advantage of it. His services commenced at least as early as January, 1924, and the receivers in an action at law were under no obligation to plead the statute of frauds.

But his proper forum was a court of equity if for no other reason than that the contract, while mentioning specific percentages proceeded "*or such other commissions as may be approved by the Court of Chancery.*" This was a submission by both parties to a determination of the value of the services by the Court of Chancery if the parties could not agree. And, although the contract provided that the commissions should be paid as and when the title passed, the receivers were under no obligation to insist upon this provision if they conceived that the services rendered had, in fact, benefited the estate.

The real situation is that Lesser was in a position to ask the court for compensation, under *Merchants, etc. National Bank v. Newark Rubber Co.*, 98 N. J. E. 477.

In *re New Jersey Refrigerating Co.*, 96 N. J. E. 431 (p. 29 of State of Case).

Both of these cases hold, upon a consideration of the authorities, that, where an agent claims compensation from a trustee, be he receiver, administrator, executor or otherwise, "the test on the question of compensating the agent out of the estate is, was it necessary or was it to the interest of the estate? If it was, the expenses thus incurred are allowed; if not, they will be disallowed."

Vice-Chancellor Backes in *Merchants &c. Nat. Bank v. Newark & Co.*, 98 N. J. E. 477, said that such compensation might be allowed even if no recovery could be had at law because of the statute of frauds. In that case he disallowed commission because he held that the facts were in such dispute as to indicate the wisdom of interposing the statute of frauds and he said:

“It does not follow, however, that an admittedly retained real estate agent is not entitled to compensation for negotiating a sale of real estate for a receiver if his authority is not in writing or he has failed to comply in other respects with the provisions of the statute. If his services are necessary or beneficial to the estate reasonable allowance will be made.”

The claim of Lesser was against the receivers and their estate, not against the corporation. Counsel say (p. 14, Point 3) that the statute of 1921 (p. 724) governs the claim and that the Chancellor so held (pp. 30, 31 of State of Case). The Chancellor, I submit, did *not* so hold. What the Chancellor said was: “It *seems* that his remedy would be by suit at law, under P. L. 1921, p. 724 (Cum. Supp. 47-75, p. 676), instead of by appeal to the Chancellor, under Comp. Stat. p. 1649, sec. 78”; (now 1 Cum. Supp. 47-78, p. 677) and he said that Lesser should make “his claim to the receivers in the usual way, whose duty it would then become to allow or disallow it.”

Reference to Chapter 225 of the Laws of 1921, P. L. 1921, p. 724, (1 Cum. Supp. 47-75 a and b, p. 676) will indicate that the claims which the statute provides should be filed with the receivers and, if disallowed by the receivers, should be prosecuted by suit, etc. (and it does not say whether the suit should be at law or in equity,

this depending upon the nature of the claim) are claims against the corporation accruing prior to the appointment of receivers, for the statute provides for the making of an order fixing a time within which all creditors or others having claims or demands “*against the said corporations* shall bring in the same,” etc.

The claim here involved was *not* against the corporation. It was an expense of administration incurred by the receivers under the powers conferred upon them by sections 54, 55 and 56 of the General Corporation Act, 1 C. S. of N. J. 1635.

Vice-Chancellor Backes in *Merchants &c. Nat. Bank v. Newark &c. Co.*, drew the distinction between a claim against a corporation and a claim against the receivers. I can do no better than to quote the language of the Vice-Chancellor (p. 479):

“Kraemer petitioned the court to direct the receiver to pay the commission. This was denied upon a statement of counsel in open court that the contract, if made, was verbal, within the statute of frauds, and that the receiver denied making it. *Leave to sue at law was given. That was wrong practice. The adjudication in this court should have been final.* Potter v. Spa Spring Brick Co., 47 N. J. Eq. 442; Vanderbilt v. C. R. R. Co., 43 N. J. E. 669. The action at law was by consent of the parties referred to a supreme court commissioner under section 155 of the Practice Act (a questionable practice—New York Metal Ceiling Co. v. Kieran, 73 N. J. Law 763), who found and reported that the petitioner negotiated the sale upon the receiver’s promise to pay him the commission, but as the promise was not in writing, and as the petitioner had not mailed a registered letter to the receiver within five days after the authorization to sell, as required by chapter 273 of the laws of 1918 (1

Comp. Stat. Cum. Supp. p. 1452), the agreement was within the statute and unenforceable."

The hearing before the Vice-Chancellor was on the petition of Kraemer to compel the receivers to pay the claim, and the court considered the matter on its merits (p. 480) and determined it upon its merits.

The receivers, by section 56, had full power "to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation or otherwise, all suits necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of its unfinished business."

A receiver appointed by the Court of Chancery takes over the powers of the directors as trustees prescribed by sections 54 and 55 of the act.

In the appeal from the appointment of receivers *In Re New Jersey Refrigerating Co.*, 95 N. J. E. 215, it was urged that, under the powers conferred by the statute upon such a receiver, there was no right in the receiver to continue the business. That matter came before this court upon interlocutory motion and this court, by order, permitted the receivers here to continue the business, and held that it was within the power of the Court of Chancery under section 57 of the act, 1 C. S. of N. J. 1637, which directed that "The court of chancery shall have jurisdiction of said application and all questions arising in the proceedings thereon, and may make such orders and decrees therein as justice and equity

shall require," to direct the receivers to continue the business so far as necessary to wind it up without loss, and, upon the final determination of the cause, this court did not modify its interlocutory order (95 N. J. E. 215, at p. 223).

In disposing of the property the receivers were authorized to avail themselves of the services of real estate agents.

The effect of the statutory provisions is that the receivers take the place of the directors of the corporation with all the powers of the directors necessary to finally settle the business of the company and divide its assets. The statute specifically provides that they may "do all other acts which might be done by such corporation, if in being," so far as necessary to finally settle its affairs.

The Court of Chancery not only had jurisdiction over the proceedings under the provisions of section 57 but also under its inherent jurisdiction.

Trustees of Sea Isle City v. First National Bank, 87 N. J. E. 84;

In Re New Jersey Refrigerating Co., 95 N. J. E. 215.

The court acts for the protection of the stockholders. Its supervision over the receivers is analogous to the control exercised by stockholders over directors except that the power of the court goes much further.

Under the circumstances existing in the case at bar, it could not, I submit, be said that the directors of the corporation could not compensate Lesser. While it is true that directors of a corporation cannot give away the property of the stockholders, it is *not* true that they cannot authorize payments, although no suit at law

could be brought against the corporation to recover such payments. The directors of a corporation may waive the statute of frauds or of limitations or any other strictly legal defense. They act for the corporate entity and have as much right, on behalf of the corporation, to waive such technical legal defenses, in the absence of fraud, as an individual would have for himself. So they may compensate for services which have been actually rendered although, at the time rendered, the person rendering them had no contract with the corporation. They may ratify the employment by making the payments. In a situation, similar to that at bar, the directors of the corporation would have, I submit, the absolute right to compensate Lesser in such sum as their business judgment dictated. All of this, of course, is in the absence of fraud, for, in case of fraud, as would be apparent if they attempted to compensate if no services whatever had been rendered, the stockholders might intervene by resort to a court of equity.

Such payments could be authorized by the directors without vote of the stockholders, and, indeed, in the absence of fraud, against the dissent of a majority.

But the receivers take the place of the directors and they are authorized "to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of its unfinished business." It was necessary to sell the company's property. To do so, it was necessary to accept the services of real estate agents such as Lesser. In the absence of fraud, exercising their business judgment, it is submitted that the receivers had the right to compensate Lesser for the services which he rendered to the estate even if such services were

rendered under such circumstances as that he could not recover either at law or in equity.

They had also the right to compromise the claim which Lesser *did* make against the estate in more than double the amount of the settlement. The claim had never been adjudicated. Final adjudication might take more than a year. In the meantime, the settlement of the estate would be held up and the stockholders deprived of money rightfully belonging to them.

As a pure matter of business judgment, the settlement was wise and was so considered by the stockholders except the two appealing. No objection came from any other stockholders. A large proportion of the stock actually agreed to the settlement. All except the appellants must be considered as acquiescing in it.

It is said that the disposition of the case indulged in here could only be accomplished upon consent of the owners of the property. There is consent, at least implied, of a majority of the stockholders, but if there were not, under the statute, the Court of Chancery has jurisdiction "of all questions arising in the proceedings thereon, and may make such orders and decrees therein as justice and equity shall require." The Court of Chancery is made by the statute the guardian of the stockholders' right. If directors of a corporation propose to make payments which are improper the only resort of the stockholders is to the Court of Chancery, which will restrain the directors in case of fraud. The power of the stockholders being removed by the proceedings in dissolution, the legislature has substituted the Court of Chancery to act for the stockholders, and if the receivers proposed an act, which would be in fraud of stockholders, the Court of Chancery would intervene to prevent it.

In this case, the matter has been submitted to the Court of Chancery and that court has approved the settlement as just and wise under all of the circumstances. There is no evidence before this court, I submit, which will warrant a finding that the court erred in that determination.

Counsel for appellants state on page 1 of their brief that the question involved is whether the funds of the company in dissolution may be paid out "for *business reasons* by the receivers under an order of the Court of Chancery which does not show consent of the owners of the property." If counsel mean by this that it is their contention that, in the proceedings in dissolution, the receivers and the Court of Chancery are circumscribed to performing acts which, by suit *in invitum*, they would be *required* to perform, then, I submit, that the difficulty of administration of estate and of insolvent corporations and of corporations in dissolution will be enormously increased. A receiver of an insolvent corporation is given the power to "*in his or their discretion to compound and settle with any debtor or creditor of the corporation, or with persons having possession of its property or in any way responsible at law or in equity to the corporation at the time of its insolvency or suspension of business, or afterwards, upon such terms and in such manner as he or they shall deem just and beneficial to the corporation.*"

A receiver of a corporation in dissolution is given the power to do any acts which might be done by the corporation if in being, which may be necessary for the final settlement of its unfinished business, and the Court of Chancery is given general jurisdiction to make such orders and decrees as justice and equity shall require.

The power of receivers of corporations in dissolution is no less than the power of receivers in insolvency proceedings. The powers may be expressed in different words but they are substantially the same.

It would seem that, if counsel's contention be correct, the receivers would be unable to recognize equitable claims against the corporation and would be obliged to set up every technical defense, notwithstanding the real merits of a claim. But further than this, if that reasoning is to be applied to the present case, they would not be permitted to recognize equitable claims against themselves but would be obliged to set up every technical defense whatever the merits of the claim might be. The Court of Chancery has repudiated this idea in *Merchants &c. Nat. Bank v. Newark &c., Co.*, 98 N. J. E. 477, at p. 480.

Counsel do not enlighten us as to what they mean, on p. 1 of the brief, when they use the language "which does not show consent of the owners of the property." It certainly cannot be that, if any consent of the stockholders is required, *one* stockholder not consenting can prevent a compromise of a claim. Assuming the best for appellants, if the corporation were in charge of its directors, the directors unquestionably could make a compromise settlement if that compromise settlement were ratified by a majority of the stockholders. This is certainly one of the matters of management which the stockholders, by their contract *inter sese*, assuming such a contract to exist, have committed to the will of the majority. But in this case *all* of the stockholders, except appellants, or more than a majority of the stockholders, have, at least, impliedly consented because no objections have been made by any except those appealing and all

stockholders had notice of the various proceedings and a very substantial proportion affirmatively consented (pp. 91, 97).

It is respectfully submitted that the settlement of this claim was one for the discretion and business judgment of the receivers under the supervision of the Court of Chancery, and that there is nothing in the record to show any abuse of discretion or any lack of exercise of good business judgment, and that these two stockholders out of a great number of stockholders should not be permitted to interrupt the speedy administration of the estate and the final distribution of its assets as desired by all other stockholders.

II.

THE APPELLANTS HAVE NO STANDING IN THIS COURT.

Appellants are not parties to the record. They have filed no petition for leave to intervene and, in the absence of an order permitting them to intervene, they may not prosecute this appeal. Had they asked leave to intervene and that leave had been denied, then this court might have reviewed the action of the Court of Chancery in declining leave to intervene and might have reversed its action if discretion had been abused.

Scattergood v. Am. Pipe, 249 Fed. 23 (C. C. A. 3rd Circuit);

Penn. Steel Co. v. New York, etc., (C. C. S. D. N. Y.) 181 Fed. 285;

Hosmer v. Darrah, 85 App. D. (N. Y.) 485.

in which case intervention was permitted to oppose a compromise *which would expose the stockholder to liability.*

Fletcher Cyc. Corp., Vol. 6, page 6859.

Notwithstanding the fact that stockholders are not parties to the record, notice of all of the proceedings were given to them, including appellants. Notice of hearing before the Vice-Chancellor was given to the stockholders including appellants, and certain stockholders appeared. Appellants did not.

They say (p. 17) that they are not barred from appealing because they did not appear and object to the order because (p. 17)—“These appellants had the right to assume that the receivers and the court would not seek to exercise power which has not been conferred upon them.”

The court unquestionably had power to determine whether any amount should be paid to Lesser and if so what amount. By the order made on the 8th day of February, 1927 (p. 86), of which order appellants had notice, it was referred to the Vice-Chancellor “to hear for the Chancellor and *to advise what sum or sums, if any, should be paid to said Samuel Lesser * * **” No appeal was taken from any part of this order. It was the hearing under this order, which took place on April 27, 1927 (p. 91), of which hearing appellants had notice.

Appellants complain because the receivers “reversed their position in opposing the claim without notice to the owners of the company.” It is not at all an unusual thing for a case to be settled during the course of the hearing and that is what was done in the case at bar. Appellants may well have assumed that, during the course of the hearing upon the question as to what sum or sums if any, should be paid to Lesser, a compromise agreement might be arrived at. Other stockholders apparently so considered for they appeared by counsel.

Counsel complain (p. 16) that Lesser has changed his tribunal from time to time. But the change of tribunal was made under permission of the orders of the Court of Chancery, of which orders appellants had notice and did not appeal.

Lesser, undoubtedly, in the first instance, mistook his remedy but that could not bar him from abandoning that mistaken remedy and pursuing a proper remedy *i. e.* an application to the Court of Chancery to direct the receivers to compensate him.

The remedy is pointed out by Vice-Chancellor Backes in *Merchants, &c., Nat. Bank v. Newark, &c., Co.*, 98 N. J. E. 477, at p. 479.

It is respectfully submitted that the order should be affirmed.

MERRITT LANE,
Of Counsel Gustave W. Lembeck.

47 OCT. 1. 1927

New Jersey Court of Errors and Appeals

In the Matter of the Dissolution of NEW JERSEY RE- FRIGERATING COMPANY.	}	On Appeal from Chancery. On Petition of Samuel Lesser for Commissions.
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BRIEF ON BEHALF OF OTTO A. LEMBECK AND ADA L. BOWEN.

This is an appeal from an order advised by CHURCH, V. C., permitting the Receivers in Dissolution of New Jersey Refrigerating Company to pay Samuel Lesser, a real estate agent, \$10,000 for commissions and services in connection with the sale of the company's plant in Jersey City under a contract of sale providing that the commission was contingent on the Court's approval of the sale. The sale was never consummated or approved.

Question Involved.

The question involved is whether the funds of a company in dissolution may be paid out "for business reasons" by the Receivers under an order of the Court of Chancery which does not show consent of the owners of the property. The order appealed from is printed on page 97 of the case.

Facts.

Bock and Wright are Receivers in Dissolution of New Jersey Refrigerating Company appointed by the Court of Chancery.

On page 14, lines 15-21, was this further provision:

"And it is further agreed, that this agreement is made subject to the approval of the Court of Chancery of New Jersey and shall be consummated in accordance with the statutes in such case made and provided and under the direction of said Court of Chancery."

The sale to John J. Reilly Stevedoring Co., Inc., was never consummated or confirmed. The sale which was consummated and confirmed was to Charles T. Brown (see order confirming that sale, p. 19 of Case).

Under Section 56 of the Corporation Act of 1896 they entered into a contract for the sale of the company's plant in Jersey City to John J. Reilly Stevedoring Co., Inc. (see Contract, Exhibit A, Case, p. 7).

This contract provided specifically for a contingent commission of 5% for the sale of the plant as follows (Case, p. 11, lines 15-25):

"It is hereby understood and agreed that Samuel Lesser is the broker who effected this sale, and said parties of the first part hereby agree to pay said broker a commission of five (5) per cent. for the sale of the plant and a commission of two and one-half (2½) per cent. for the sale of the other parcels, or such other commission as may be approved by the Court of Chancery, if and when this sale is consummated and the purchase price paid."

See opinion *In re New Jersey Refrigerating Company*, 96 N. J. E. 431, where the Chancellor sets out fully the facts in reference to the bid and Lesser's part in connection with it. The conclusions are printed (p. 24 of Case).

From this opinion it appears that on August 19th, 1924, order to show cause was made why

receivers should not consummate sale in accordance with the contract with the Reilly Company (Case, p. 26).

On the hearing one Charles T. Brown in open court offered better terms. The Court ordered that the Reilly contract be not consummated and that no commissions be paid to Lesser (Case, p. 26).

A public sale was ordered at which Brown was high bidder. The Reilly Company did not bid at the public sale (Case, p. 27, line 30).

On the hearing for confirmation of the public sale the Reilly Company insisted that its bid, reported on August 19th, 1924, should be confirmed instead of Brown's bid at the public sale (Case, p. 27, line 38).

The Court held that the Reilly bid was expressly subject to the approval of the Court (Case, p. 29, lines 15-18), and further, that the Reilly bid be rejected and the Brown bid confirmed. The Court said (p. 29, line 25, *et seq.*):

"One other matter remains; that concerning the claim of Samuel Lesser for commissions for negotiating the sale to the Reilly Stevedoring Company, Inc. His counsel contends that he rendered laborious, time-consuming and valuable services to the receivers in bringing about the offer, and tentative sale, to the Reilly concern, which ultimately resulted in benefit to the estate, citing *Day v. Codman*, 39 N. J. Eq. 258, 268.

"In *Hill v. Hill*, 79 N. J. Eq. 521, Judge RELLSTAB in the orphans' court, whose opinion is printed as an appendix to that of PITNEY, Ordinary, at p. 545, said, at p. 546, that 'on a sale of the testator's land the intervention of a broker may or may not be necessary. If not necessary, the brokerage paid will not be allowed, unless it can be shown that by employing a real estate agent the estate has been benefited in a pecuniary sense to at least the

amount of expense incurred by such employment.' And at p. 547, that 'in passing upon such employment, the test on the question of compensating the agent out of the estate is, was it necessary or was it to the interest of the estate? If it was, the expenses thus incurred are allowed; if not, they will be disallowed. Upon this question the burden of proof is upon the accountants. For New Jersey cases on this subject see 3 *N. J. Dig. Ann., Div. Ex'rs & Ad'mrs.*, § 92. And for cases in other states, see 7 *Am. & Eng. Encycl. L.* 431; 18 *Cyc.* 272, and cases noted in 64 *L. R. A.* 554.' And Chancellor PITNEY in this opinion in the prerogative court, at p. 542, said that upon the question of broker's commissions he concurred in the views expressed by Judge RELLSTAB.

"Receivers, like executors, are trustees; the same law generally and in similar circumstances applies equally to all of them. In this case the receivers' circulars offered to pay a commission to real estate brokers who represented successful bidders, if and when the sale was consummated and the purchase price paid; and the contract of the receivers with the Reilly concern stipulated that Lesser was the broker who effected the sale, and the receivers agreed to pay him a certain commission named, or such commission as might be approved by the court, if and when the sale was consummated and the purchase price paid. Mr. Lesser was not a party to that contract but it was one made for his benefit, and on which it appears he is entitled to sue. *Burt v. Brownstone Real Estate Co.*, 95 N. J. L. 457. And the supreme court held in *Klipper v. Schlossberg*, 96 N. J. L. 397, that unless a broker and his employer have stipulated to the contrary, the broker is entitled to his compensation upon the completing of the negotiations he undertook, irrespective of whether or not the contract negotiated is ever consummated, so long as the failure to carry it through to a successful completion is not due to any fault of the broker. It may be that the broker

is entitled to be compensated in this case, but this question it is neither necessary nor proper now to decide. He should make his claim to the receivers in the usual way, whose duty it would then become to allow or disallow it. He will be given ten days in which to file his claim with the receivers.

"If he should be aggrieved by their determination, the claim being against a corporation which has been dissolved and is in process of being wound up, it seems that his remedy would be by suit at law, under P. L. 1921, p. 724, instead of by appeal to the Chancellor, under Comp. Stat., p. 1649, Sec. 78.

"The sale to Brown will be confirmed; Lesser's claim for commissions in negotiating the Reilly sale will be reserved and referred to the receivers. Order accordingly."

The order confirming the sale to Brown and disapproving the sale in which Lesser was broker is printed on page 19 of the case. In respect of Lesser it said (p. 23, line 18):

"It is further ORDERED, that the claim for commissions by Samuel Lesser, under said agreement between said receivers and the John J. Reilly Stevedoring Company, Inc., of July 31, 1924, be reserved and referred to the said receivers for disposition according to law, and that the said Samuel Lesser be, and he hereby is, given ten days from the service upon him by mail of a copy of this order, which need not be certified, to file with the receivers a duly verified proof of his claim against the receivers."

Claims were filed by Lesser (Case, pp. 32-38; p. 60, line 17).

The Receivers disputed the claims (Case, p. 45). Some evidence was taken (Case, p. 47, *et seq.*). Mr. Maxson, Lesser's counsel, says (p. 57, line 22):

"Mr. Maxson: - It seems to me that outside of *quantum meruit* for claim, there is noth-

ing to it at all. It all turns on the question of law on the claim and not the contract. What purpose can the hearing serve with respect to that?"

And on page 57, line 35, *et seq.*:

"Mr. Maxson: These brokers are in the same position as any real estate agents. They do this work at the invitation of the receivers and procure for them a buyer, who was satisfactory, and they entered into a contract with him. In the ordinary case there would be no question at all. The only question that arises is, whether they can be relieved of any obligation because of that clause in the contract which says that he is to receive his commission if the sale goes through. It does not say the contract. The sale did go through, as far as the receivers are concerned, and some one came in and made another bid, and if the Reilly Stevedoring Co. had been represented by counsel, the sale would undoubtedly have gone through. There would have never been any question about it. The court never would have refused to confirm this sale with an increase of \$10,000, the only thing that stood in the way of confirmation. My contention is, that the receivers accepted the services of the real estate brokers and entered into a contract with a man ready, willing and able to take the property.

"Mr. Anderson: The contract, of course, speaks for itself. I am entering my objections to the payment of commissions,

"First, because the contract, itself, provides that the commissions are payable and sale consummated if and when confirmed by the court;

"Second, on the *quantum meruit* of Lesser about 'conditions of bidding' and contract itself with the clause concerning commissions evidences the acceptance of payment on that basis;

"Third, because there has been no hiring proved of Lesser in the sale of the plant.

"Mr. Blankenhorn and Mr. DREWEN concur in objections made by Mr. Anderson."

On cross, Lesser said (p. 57, lines 1-10):

"Mr. DREWEN: Whatever you did, you did for yourself as a broker?"

"Mr. Lesser: Yes.

"Mr. DREWEN: You did it for yourself as a broker.

"Mr. Lesser: I worked for compensation.

"Mr. Maxson: He was working for the people for whose benefit he was doing the work.

"Mr. Anderson: Why did you file a claim based on the written contract between the receivers and Reilly when you say your contract was really to be paid for the services given the receivers in aiding them to sell the plant?"

"Mr. Lesser: You will have to ask my lawyer. He tells me what to do."

Lesser then filed a petition (p. 59) for an order directing Receivers to pay him the full 5% commissions—\$26,250 or that leave be granted to sue Receivers. The theory of the petition was that the sale to a different buyer at an enhanced price, which was the only price confirmed by the Court, was in some degree due to the efforts of Lesser in obtaining the unsuccessful bidder.

Receivers answered (p. 62) denying material allegations.

On December 23rd, 1924, the Chancellor disposed of this petition by authorizing Lesser to sue at law (Case, p. 77, Par. 15).

About January 13th, 1926, another petition was filed (Case, p. 69). It recites the filing of the earlier petition, the institution of a suit in the New Jersey Supreme Court, and the pendency of that suit. It prayed for—

1. Permission to discontinue;

2. Resubmission of the previous petition of December 17th, 1924;

3. An allowance of \$26,025.

On January 14th, 1927, Lesser filed his third and final petition (Case, p. 71). It sets up, *inter alia*, that the claim of Craven & Co. has been assigned to him (Case, p. 78, Par. 18) and Lesser bases his claim to compensation on services in producing purchasers.

He prays that entire matter be referred to a special master (Case, p. 78, bottom).

Receivers answered, denying material allegations (Case, p. 80). They set up these separate defenses (Case, p. 83):

1. That the claim of petitioner for commissions on sale of the "plant" which is a part of the subject-matter of the petition herein, verified January 10, 1926, was brought on for hearing before this Court during the month of January, 1926; that said matter is still pending and undetermined.

2. That as to the claim of petitioner for commissions on the sale of Bayonne Park and other properties of New Jersey Refrigerating Company, other than the "plant," petitioner has not complied with the statute in such case made and provided, to wit, "A Supplement to an Act Entitled 'An Act Concerning Corporations (Revision of 1896),'" approved April 8, 1921 (P. L. 1921, p. 724); and petitioner is barred from any action therefor or on account thereof by the giving of the notice required by said statute and the due filing of proof of such notice.

3. That petitioner fails to allege authority in writing for the sale of the lands mentioned in the petition and signed by the receivers, and fails to allege the making of an oral agreement followed by five days' notice in writing to the receivers setting up the terms of

such oral agreement, according to the statute in such case made and provided, being "An Act for the Prevention of Frauds and Perjuries" as amended (P. L. 1918, p. 1020).

4. That the petitioner has not made or stated such a case as entitles him in this Court to any relief as to any of the matters contained in his petition.

WHEREUPON the receivers pray that said petition be dismissed.

On February 8th, 1927, order of reference to CHURCH, V. C., reciting previous steps in the matter was made (Case, p. 86). Lesser was ordered to discontinue suit at law (Case, p. 89, line 33).

On April 27th, 1927, counsel for Lesser, for receivers and certain stockholders, appeared before CHURCH, V. C., and made statements to the Court (Case, p. 91). No proofs were taken. Only a portion of the stockholders was represented. The appellants were not represented although they had been represented on previous applications, as for example, Fisk & Fisk, counsel for appellant Bowen (Case, pp. 24, 47, line 27). Notices of previous applications had been sent to them (Case, pp. 66-68).

On April 27th, 1927, counsel for receivers stated that he had not heard from any of the other stockholding interests (Case, p. 96, line 29).

Senator Harrison, counsel for the receivers, said (p. 94, *et seq.*):

"Mr. Harrison: If the Court please, this matter has been before the Chancellor in person for over two years, on these claims which have been referred by him to you under an order of reference of February 8, 1927.

"Originally, without going into the matter in detail, the Lesser claims were referred back to the receivers by the Chancellor, were rejected by the receivers and then, based upon

those rejections, the petitions to which I have just referred, brought before the Chancellor.

"I would like, in passing, to refer your Honor to the Chancellor's opinion *in re*: New Jersey Refrigerating Company, 96 Equity, page 431, where the history of this case is set out in detail and which, I think, so far as the prices are concerned, has been substantially summarized by Mr. Maxson.

"The position of the receivers in this matter is this, that, while it is true that Lesser brought to the attention of the receivers the Reilly Stevedoring Company with a signed contract for the purchase of this property at \$550,000, that he did but little more or nothing more than any real estate agent interested in a prospect would have done; and that the supervision of the Reilly contract, which was that the real estate brokers who represent successful bidders would be paid five per cent. commission on the purchase price, if approved by the Court of Chancery, if and when the sale was consummated and the purchase price paid, was the measure of the receivers' responsibility to Lesser, and that that contract not having been consummated, therefore there was no legal liability to Lesser for the work which he did.

"It is urged by the receivers, in answer to the contention that Lesser is entitled to compensation upon a *quantum meruit* that the statute of frauds may be interposed and that the benefit to the estate is questionable.

"Now, it is suggested further, and the third point by Mr. Maxson, as I understand it, that perhaps it was the interference of the receivers which prevented the consummation of the Reilly contract and that there is some sort of fraud, as it were—or perhaps, fraud is not charged, but interference, bringing in, if you please, by the receivers of Brown, the bidder who overbid—

"Mr. Maxson: Excuse me, Senator, for interrupting. We are not criticizing the receivers in this situation, that is, if the suggestion

has been made by implication, we do not mean to criticize them at all.

Mr. Harrison: I am referring merely to the recitation made in the petition, so, if that is withdrawn there is no use of making any point of it.

"There seems to be a doubtful point of law here involved in the cases, as I understand it, although under the Commission Section of the contract to which I referred, the position of the receivers is that the broker, having entered into a contingent contract, cannot be compensated for his services unless the contingency happened.

"However, the receivers realize that Lesser spent a great deal of time in this matter, that he incurred substantial expenses, that this bidder which he brought in, the Reilly Stevedoring Company, was helpful in enabling the receivers to raise the price so that there was an increase in the value obtained for this property of some \$101,000.

"Now, their attitude is that irrespective of the legal objections which have been brought to their attention by their counsel, that as a business proposition they are disposed to accede to the proposition of the claimant and to accept the settlement of \$10,000, provided the Court will approve such settlement, and, under the remittitur which came down originally, these are matters which are peculiarly to be submitted to the attention of the Court for the Court's approval.

"The Court, as your Honor knows, has been in close contact with this estate from the time it started and we, therefore, submit the matter to your Honor with the recommendation on the part of the receivers that the settlement suggested, that both of these claims for the gross sum of \$10,000 without costs be approved.

"The Court: If I— (interrupted).

"Mr. Harrison: Pardon me. May I interrupt your Honor to say this, that Mr. Carr representing the Betts interest, authorizes me

to say that he thinks that from the standpoint of his stockholding interest that this is a satisfactory settlement, and Mr. Lane, representing the G. W. Lembeck interest, also approves this settlement. I have not heard from any of the other stockholding interests.

"The Court: If I have to decide this case as in the nature of a contested case, there might be some doubt in my mind as to the authority of this Court to allow any commissions whatever under the circumstances that have been stated by counsel, but, it seems to me now that, an agreement between the receivers and this claimant having been submitted to the Court, the situation is entirely different. These receivers stand in the place and act for the corporation and under the cases, as I remember them, the receivers can take any reasonable action which it was in the power of the corporation through its directors to take, and I cannot see why, if those were matters which came before the directors of this corporation and they decided as a matter of good business judgment that this man should get ten thousand dollars—I can't see why that wouldn't be perfectly legal and proper and therefore when the receivers come before me and make the same statement, I cannot see why such a settlement, having been agreed upon by the receivers, is not good in law.

"Therefore, I will confirm this settlement, and I might add, quoting from Holy Scripture as I have sometimes before, 'Behold how good and how pleasant it is for brethren to dwell together in unity.'"

On the 17th of May, 1927, Lesser was allowed \$10,000 (Case, p. 97). This is the order appealed from. No proofs were taken.

POINT I.

The Court of Chancery had no power to give away the property of the stockholders on any such basis as that set forth on pages 94, 95, 96 and 97 of the case.

It is plain that all parties realized that Lesser had no legal claim. This is shown in the statement of counsel for the receivers on page 94. It is also plain from the same statement that the receivers, as a "business proposition," were disposed to accede to the claimant's demand and accept a settlement of \$10,000. If the Court would approve (Case, top of page 96). Vice Chancellor CHURCH did approve, adding, "Therefore, I will confirm this settlement, and I might add, quoting from Holy Scripture as I have sometimes before, 'Behold, how good and how pleasant it is for brethren to dwell together in unity.'" With deference to the high authority quoted by the Vice Chancellor, we submit that the above holding was never intended to cover the case of receivers who defy the advice of their own counsel appointed by the Court, as to the legality of a payment, and proceed to give away a portion of the fund of the *cestui que trustent* whom they are supposed to represent as trustees, to the broker of the unsuccessful bidder whose contract for brokerage was specific and provided (Case, p. 11, lines 15-25) for a commission "if and when this sale is consummated and the purchase price paid."

Such a disposition of the case could only be accomplished on consent of the owners of the property.

POINT II.

The powers of the receivers and the Court are regulated by Section 56 of the Corporation Act.

These receivers were not receivers in insolvency.

Section 56 gives them power to do all acts which might be done by the corporation if in being that may be *necessary for the final settlement of its unfinished business*.

Not only was there no proof to bring into this category the payment to Lesser which up to this time the receivers had vigorously and successfully resisted and which their counsel, even on the settlement, still characterized as a claim without legal foundation, but citation of authority is unnecessary to show that a corporation could not give away the corporate funds without some basis of necessity.

POINT III.

The Statute of 1921, page 724, governed Lesser's claim against the receivers in dissolution.

Chancellor WALKER so held in this case (p. 31, line 20, *et seq*). That is by suit at law, a course which Lesser followed and then abandoned for some unexplained cause.

The case of Merchants' &c. Nat. Bank v. Newark Rubber Co., Vol. 4 No. 3 N. J. Adv. Repts. page 79, does not help the petitioner.

That case held that the validity of claims against a receiver in insolvency for liquidated sums should be adjudicated in equity, and also that the Statute of Frauds is available at law and in equity

to a receiver in bar of a claim by a broker for commissions on the sale of real estate.

In the present case the receivers are not receivers in insolvency, and the sum is only a liquidated sum because it is a claim for commissions, and if it is a claim for commissions, it is subject to the Statute of Frauds.

The petitioner points to this concluding paragraph of the opinion:

"It does not follow, however, that an admittedly retained real estate agent is not entitled to compensation for negotiating a sale of real estate for a receiver if his authority is not in writing or he has failed to comply in other respects with the provisions of the statute. If his services are necessary or beneficial to the estate, reasonable allowance will be made. In *Re New Jersey Refrigerating Co.*, 126 Atl. Rep. 174."

The application of this paragraph should be judged by the contract which forms the basis of Lesser's claim. On Lesser's theory every unsuccessful bidder at an auction held by a receiver could claim that his services were in some degree necessary or beneficial to the estate.

The Chancellor in the New Jersey Refrigerating Company case held (p. 96 N. J. E. bottom of p. 437) that the buyer whom Lesser represented was by its bid and contract under the agreement, expressly made subject to the approval of the Court; and further, that the receivers' circulars offered to pay a commission to real estate brokers who represented successful bidders if and when the sale was consummated and the purchase price paid.

Lesser contracted that he should receive his commissions only in the event of the happening of the following conditions:

1. If and when this sale is consummated and the purchase price paid.

2. The approval of the contract by the Court of Chancery. (See quotations from contract in re New Jersey Refrigerating Company, *supra*.)

In other words, Lesser agreed that he would not be paid unless the foregoing conditions were met. They have not been met and Lesser is therefore entitled to no payment.

The suit at law was upon *quantum meruit*. In his suit at law he would either have to prove the contract, upon proof of which he would be nonsuited, or if he based his case upon the *quantum meruit*, he would be nonsuited for inability to show a contract in writing for the payment of commissions as required by our statute.

He elected to go back into the Court of Chancery because of his obvious inability to succeed in his suit at law.

He shifted his ground of attack and bases his claim for the commissions specified in the contract upon the rendition of services necessary and beneficial to the receivership. In other words, his customer, the Reilly Stevedoring Company, having been unsuccessful, Lesser now wishes to be paid for the work done by him in procuring the contract of sale to Reilly which was never carried through. If the Court should adopt this theory it would let in claims by all the other real estate agents who worked on the sale of the plant property.

No reason for the proposed change of tribunals appears in the record. The position of the application is as if the petitioner, on January 11th, 1925, after the Chancellor had stated that the remedy was at law under the Statute of 1921, had replied that he wished to resubmit the matter on the same papers.

POINT IV.

The fact that the record does not disclose any objection to the order allowing the claim does not affect appellants' rights.

The Court had no power to make the order for reasons stated above, and the fact that the Receivers suddenly reversed their position in opposing the claim without notice to the owners of the company does not invest the Court with power to act simply because these appellants were not present and objecting. These appellants had the right to assume that the Receivers and the Court would not seek to exercise power which has not been conferred upon them.

POINT V.

The order allowing the claim should be set aside.

Respectfully submitted,

ALBERT C. WALL,
Of Counsel with OTTO A.
LEMBECK, Trustee and
individually as aforesaid.

FISK & FISK,
Of Counsel with IDA L.
BOWEN.

APPENDIX.

Chronology of Case.

- 1924
- July 31. Bock and Wright, Receivers, enter into a contract of sale (Case, p. 7) with Reilly's Stevedoring Company for sale of company's plant in Jersey City for \$550,000—contract and commissions to broker being contingent upon confirmation of sale by the Court of Chancery. Petition for confirmation (Case, p. 1).
- Aug. 19. Order of Court of Chancery that sale to Reilly's Stevedoring Co., Inc., be not consummated.
- Aug. 28. Public auction held by Receivers of real and personal property comprising plant.
- Sept. 2. Report and petition of Receivers showing sale at public auction to Charles T. Brown as highest bidder; contract with Brown, petition for confirmation, &c.
- Sept. 9. Notice that Receivers dispute claim of Craven (Case, p. 44).
- Sept. 12. Conclusions of Chancellor Walker holding that sale to Brown would be confirmed; that Lesser's remedy for commissions in negotiating Reilly contract would be reserved and referred to Receivers (Case, p. 31). The Chancellor also held Lesser's remedy was by suit at law under P. L. 1921 (p. 724) instead of by appeal to Chancellor (Case, p. 31).
- Sept. 17. Order confirming sale to Charles T. Brown and further order that the sale to Reilly's Stevedoring Co., Inc., be not approved and be not consummated and that the deposit be returned to the company; also that Lesser's claim for commission under the unconsummated contract of sale be reserved and referred to the Receivers for disposition according to law; that he be given ten days from service of copy of order to file a verified proof of claim with the Receivers.

1924

- Sept. 19. Verified claim of Samuel Lesser for commissions filed.
- Oct. 17. Amended claim of Lesser.
- Nov. 5. Claim of Craven & Son Co. on sale of Bayonne Park (Case, p. 38).
- Dec. 17. Petition of Lesser to Chancery Court that Receivers be directed to pay him \$26,250 and that permission be granted him to sue Receivers (Case, p. 59).
Answer of Receivers to the petition of Lesser.

1925

- Jan. 2. Notice that Receivers dispute claim of Lesser (Case, p. 45).
- Jan. 3. Notice that Receivers dispute supplemental claim of Craven (p. 46).

1927

- Jan. 10. Petition of Lesser (Case, p. 71) reciting that John Craven & Son Co. has assigned to him all its claims against the Receivers for commissions and services (Case, p. 78, Par. 18). Prays for an order referring entire matter to Special Master and for an order dismissing former application by Lesser (Case, p. 79).
- Jan. 11. Receivers' order to show cause on January 18th, 1927, why prayer of petition of Lesser verified January 10th, 1927, should not be granted (Case, p. 85).

1926

- Jan. 13. Petition of Lesser for leave to discontinue suit at law and resubmit matter contained in previous petition to Chancery Court (p. 69).

1927

- Jan. 14. Receivers' answer to petition verified January 10th, 1927 (Case, p. 80).

1925

- Jan. 20. Chancery Court grants permission to Lesser to institute suit at law against Receivers (Case, p. 70, line 15).

1927

- Feb. 8. Ordered that Lesser's petition verified January 10th, 1927, be denied as to all claims against Receivers other than for claims based upon the sale of real estate designated in the petition as Bayonne Park property and the plant of New Jersey Refrigerating Co. Further ordered that petition of Lesser filed during December, 1924, excepting so much as prays for permission to institute a suit against the Receivers, the answer of the Receivers thereto and petition of Lesser verified January 13th, 1926, argued before the court but undetermined, be referred to the Hon. Alonzo Church, V. C., to hear for the Chancellor and advise what sum, if any, should be paid to Lesser on his claims relating to the Bayonne Park property (Craven & Son claim) and the plant of the Refrigerating Company; further ordered that the petition of Lesser verified January 10th, 1927, in so far as it relates to claim of Lesser against the Receivers in connection with the property of the Refrigerating Co. described as Bayonne Park property and the plant of the Refrigerating Co., and the answer of the Receivers thereto, be referred to Vice-Chancellor Church.

Ordered Lesser to discontinue his suit against Receivers pending in the N. J. Supreme Court (Case, p. 88, *et seq.*).

- Apr. 27. Transcript of statement of counsel before Vice-Chancellor Church (Case, p. 91). His reasons for allowing claim (Case, p. 96, *et seq.*).

1927

- May 17. Order of the Chancery Court advised by Church, V. C. (Case, p. 97) ordering payment of \$10,000 to Lesser in full of all services rendered and expenses and disbursements incurred by Lesser or his assignor, Craven & Son, in producing purchasers and prices brought for the premises described in petition of Lesser and known as Bayonne Park property and the plant of the Refrigerating Company with "fringed parcels." This is the order appealed from (Case, p. 97).

47 OCT. 7. 1927

New Jersey Court of Errors and Appeals

IN THE MATTER

of

The Dissolution of the NEW JERSEY REFRIGERATING COMPANY.

On Appeal from
Chancery.

On Petition of
Samuel Lesser.

This presents an appeal from an order advised by Vice Chancellor Church directing the receivers in dissolution of the New Jersey Refrigerating Company to pay to Samuel Lesser \$10,000.00 for his commissions, fees and disbursements and those of the John Craven & Son Company which had been assigned to Lesser.

Question Involved.

The question involved in this appeal is (1st) whether or not, upon the receivers in dissolution being satisfied that Lesser was entitled to be paid for the services and disbursements mentioned and upon submitting to the Court their sound judgment that that sum ought to be paid, whether or not the Court had authority to order it paid; (2nd) whether or not, under the circumstances in this case, the order directing the payment of these moneys is appealable.

Facts.

Frank J. Bock and Edward H. Wright were appointed receivers of the New Jersey Refrigerating Company, in dissolution, by the Court of

[7685]

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Chancery of New Jersey, by an order dated June 13th, 1923 (Case, p. 80, line 22). Upon the appointment of the receivers they came into possession of a large number of parcels of land, *inter alia*, 173 Ninth Street, Jersey City, consisting of the plant of the company, in which were included twelve parcels of real estate with improvements thereon; 521, 523, 525 and 509 Henderson Street and 183 Tenth Street, Jersey City (Case, p. 1, lines 25 to 37); under instructions of Court the receivers were directed to sell, through sealed bids, the property just referred to, with a lease of a spur leading into the plant from the Erie Railroad Company and certain personal property (Case, p. 2, lines 2 to 27).

In response to invitations for bids issued by the receivers, Charles T. Brown bid for the property \$425,000.00, Aldred H. Abeel bid \$340,000.00 but made no cash deposit (Case, p. 2, lines 30 to 40). John J. Reilly Stevedoring Co., Inc., bid \$600,000.00 (Case, p. 3, lines 7 to 10). All three bids were rejected. The Abeel bid for the reason stated, the bid of Brown because too low and the bid of Reilly (as that bidder will be referred to) because he bid under a misapprehension that it could be purchased subject to a \$500,000.00 mortgage, which was not the fact (Case, p. 3, lines 10 to 20).

On July 17, 1924, the Chancellor signed an order authorizing the receivers, subject to the approval of the Court of Chancery, to again negotiate for the sale of the premises described (Case, p. 3, lines 20 to 30). The receivers received a second bid from Brown in the sum of \$525,000.00 and a second bid from Reilly for the sum of \$550,000.00 (Case, p. 4, lines 21 to 31).

In the petition to the Chancellor, to have the sale to Reilly confirmed, from which the foregoing facts have been taken, the receivers said in

paragraphs 6 and 7 thereof, on page 5 of the printed case:

“6. The said bid of John J. Reilly Stevedoring Co., Inc., was, in the opinion of your petitioners, the better of the two bids received, and, on July 31, 1924, they entered into an agreement for the sale of the premises above described to said John J. Reilly Stevedoring Co., Inc., for the sum of \$550,000 subject to the terms and conditions in said agreement of sale set forth, as appears by said agreement hereto annexed, marked ‘Exhibit A,’ and subject likewise to the approval of the Court of Chancery of New Jersey.

7. Your petitioners believe that the sum of \$550,000 offered by John J. Reilly Stevedoring Co., Inc., represents the reasonable market value of said premises and is the highest sum now obtainable therefor, and that the conditions set out in said agreement to purchase, hereto annexed, are the best terms obtainable upon the sale of said premises.

Your petitioners, therefore, are advised and believe that the consummation of said sale will be for the best interest of the New Jersey Refrigerating Company.”

Then follows the prayer for the confirmation of the sale to Reilly (Case, p. 5, lines 31 to 39).

The receivers further prayed direction:

“to pay to Samuel Lesser five per cent. commission on the amount of the purchase price (\$550,000) of the premises known as the plant, consisting of twelve parcels of real estate, and two and one-half per cent. on the amount of the purchase price (\$50,000) of the other five parcels of real estate upon the consummation of the contract and the acceptance of the deed or deeds by the purchaser, or such other order or direction herein as the nature and circumstances of the case may require, * * *”.

(Case, p. 5, line 39, to p. 6, line 13.) Then follows the affidavit of the receivers as to the truth of the matters set forth in the petition.

A copy of the agreement between the receivers and Reilly is set forth on pages 7 to 14. Reference is made to the commission to be paid Lesser in that contract as set forth on page 11, lines 16 to 24. It is further provided, page 13, lines 16 to 21, that the sale was subject to the approval of the Court of Chancery and the statute in such case made and provided.

On August 2nd, 1924, on motion of the solicitors of the receivers, an order to show cause was made, returnable before the Court of Chancery, at Trenton, on the 19th day of August, 1924, why an order should not be made directing the receivers to consummate the sale to Reilly and to execute and deliver good and sufficient conveyances of the property described in the contract (Case, p. 18, lines 11 to 24). It was further ordered that the stockholders show cause why the receivers should not be directed to pay to Samuel Lesser, the broker who negotiated the sale, a commission in accordance with the terms of the agreement (Case, p. 18, lines 27 to 38).

On the 19th day of August, 1924, the order to show cause just above referred to, came on for hearing before the Chancellor, the receivers and a number of the larger stockholders represented by counsel, according to the order made on that date. Neither Reilly nor Lesser were represented. This order was not printed in the state of the case as originally submitted. Upon demand a copy of it was printed and is shown on pages 105 to 108. The order recites Brown offered to pay \$560,000.00 without any commissions. It was then ordered

“that said agreement of sale dated July 31, 1924, with the John J. Reilly Stevedoring Co.,

Inc., of the real and personal property mentioned and described in the petition filed in this matter, and in said order to show cause, be not now consummated, and that no commission be now allowed to the broker who effectuated said contract with the John J. Reilly Stevedoring Co., Inc.”

It was further ordered that the receivers advertise the property for sale to be held August 28, 1924. An upset price of \$560,000.00 was then placed on the property by the order. The result of the sale was directed to be brought before the Chancellor for confirmation on the 2nd day of September, 1924. The matter was not brought before the Court until September 17th, 1924.

The sale to Brown was ratified and confirmed and the receivers were directed to consummate the contract, the agreement for the sale to Reilly was not approved and it was ordered that it be not consummated. It was further ordered that the \$25,000.00 down payment made to the receivers by the Reilly Company and “now held by said receivers as a deposit on account of said agreement of sale be returned by said receivers to said John J. Reilly Stevedoring Co., Inc.” It was further ordered “that the claim for commissions by Samuel Lesser under said agreement between said receivers and the John J. Reilly Stevedoring Co., Inc., of July 31st, 1924, be reserved and referred to the said receivers for disposition, according to law, and that the said Samuel Lesser be, and hereby is, given ten days from the service upon him by mail of a copy of this order, which need not be certified, to file with the receivers a duly verified proof of his claim against the receivers” (Case, p. 23, lines 9 to 28).

In the opinion of Chancellor Walker, upon which the foregoing order was predicated (which order is on pages 24 to 31, both inclusive) in referring to the claim of Lesser, it was said:

"One other matter remains; that concerning the claim of Samuel Lesser for commissions for negotiating the sale to the Reilly Stevedoring Company, Inc. His counsel contends that he rendered laborious, time-consuming and valuable services to the receivers in bringing about the offer, and tentative sale, to the Reilly concern, which ultimately resulted in benefit to the estate, *Day v. Codman*, 39 N. J. Eq. 258, 268.

"In *Hill v. Hill*, 79 N. J. Eq. 521, Judge Rellstab in the orphans' court, whose opinion is printed as an appendix to that of Pitney, Ordinary, at p. 545, said, at p. 546, that 'On a sale of the testator's land the intervention of a broker may or may not be necessary. If not necessary, the brokerage paid will not be allowed, unless it can be shown that by employing a real estate agent the estate has been benefited in a pecuniary sense to at least the amount of expense incurred by such employment.' And at p. 547, that 'in passing upon such employment, the test on the question of compensating the agent out of the estate is, was it necessary or was it to be the interest of the estate? If it was, the expenses thus incurred are allowed; if not, they will be disallowed. Upon this question the burden of proof is upon the accountants. For New Jersey cases on this subject see 3 N. J. Dig. Ann., Div. Ex'rx & Ad'mrs. 92. And for cases in other states, see 7 Am. & Eng. Encycl. L. 431; 18 Cyc. 272, and cases noted in 64 L. R. A. 554.' And Chancellor Pitney in his opinion in the prerogative court, at p. 542, said that upon the question of broker's commissions he concurred in the views expressed by Judge Rellstab.

"Receivers, like executors, and trustees; the same law generally and in similar circumstances applies equally to all of them. In this case the receivers' circulars offered to pay a commission to real estate brokers who represented successful bidders, if and when the sale was consummated and the purchase

price paid; and the contract of the receivers with the Reilly concern stipulated that Lesser was the broker who effected the sale, and the receivers agreed to pay him a certain commission named, or such commission as might be approved by the court, if and when the sale was consummated and the purchase price paid. Mr. Lesser was not a party to the contract but it was one made for his benefit, and on which it appears he is entitled to sue. *Burt v. Brownstone Real Estate Co.*, 95 N. J. L. 457. And the supreme court held in *Klipper v. Schlossberg*, 96 N. J. L. 397, that unless a broker and his employer have stipulated to the contrary, the broker is entitled to his compensation upon the completing of the negotiations he undertook, irrespective of whether or not the contract negotiated is ever consummated, so long as the failure to carry it through to a successful completion is not due to any fault of the broker. It may be that the broker is entitled to be compensated in this case, but this question it is neither necessary nor proper now to decide. He should make his claim to the receivers in the usual way, whose duty it would then become to allow or disallow it. He will be given ten days in which to file his claim with the receivers.

"If he should be aggrieved by their determination, the claim being against a corporation which has been dissolved and is in process of being wound up, it seems that his remedy would be by suit at law, under P. L. 1921, p. 724, instead of by appeal to the Chancellor, under Comp. Stat., p. 1649, Sec. 78.

"The sale to Brown will be confirmed; Lesser's claim for commissions in negotiating the Reilly sale will be reserved and referred to the receivers. Order accordingly." (Case, p. 29, line 26 to page 31, line 31.)

As shown on pages 32 to 38, both inclusive, Lesser filed his claim with the receivers for \$26,250.00 being the amount which he claimed he was entitled to under the terms of the contract.

Pages 47 to 58, both inclusive, sets forth the examination of Lesser and Reilly before the receivers, showing that Reilly was ready, willing and able at all times to comply with his part of the terms of the contract.

After the receivers had formally rejected the claim of Lesser, he filed his petition with the Chancellor, a copy of which is set forth in pages 59 to 61. Lesser prayed that the receivers be directed to pay his commission of \$26,250.00 for procuring Reilly as a purchaser for the property described. The receivers filed their answer to the petition, a copy of which is set forth on pages 62 to 64, both inclusive, denying that Lesser was entitled to any commission. On the petition and answer the matter came on for hearing before the Chancellor. The application was not decided by the Chancellor.

The John Craven & Son Company, a real estate agency of the State of New Jersey, filed its petition with the receivers during the month of November, 1924, in which it claimed \$2,565.00 for commissions due it for having acted as a real estate broker in the sale of the premises known as the Bayonne Park, for the benefit of the estate and at the request of the receivers. This petition is set forth on pages 38, line 20, to page 43, line 4. This claim arose in this manner, as set forth by the Craven Company; that although the contract contained a clause for the payment of 2½% commission, that it was agreed by Gustave Lembeck, one of the largest stockholders of the company, G. Arthur Betz, another of the large stockholders of the company and one of the receivers, that if the sale was consummated, that even though the contract provided for a payment of 2½% commission, 5% would be paid. The reason for this was because if the sale was to be effected, it was necessary for a contribution to be made to a chari-

table organization of the major portion of the 2½% commission. The 2½% commission was paid. The other half amounts to \$2,565.00 which was claimed by the said Craven Company. This claim was promptly disallowed by the receivers (Case, p. 44, line 20).

On January 14th, 1927, there was filed with the Chancellor an additional petition by Lesser. A copy of this petition is set forth on pages 71 to 79. In this petition Lesser set forth generally the services he and the Craven Company had rendered to the receivers in obtaining purchasers for the properties and the manner in which the receivers had rendered such services the basis for increased bids, to the great advantage of the estate. It was further set forth in that petition that the Craven Company had assigned to Lesser its claim against the receivers. It was prayed that the entire matter in dispute (as set forth in the petition) might be referred for hearing so a report might be made as to the reasonable value of the services of Lesser and the Craven Company and for payment therefor.

The receivers filed their answer which is set forth on pages 80 to 84, both inclusive.

Upon this matter coming before the Court, on the petition and answer just referred to, on February 8th, 1927, the Chancellor ordered that the petition of Lesser be denied as to any and all claims against the receivers other than for claims based upon the sale of the real property designated in the petition as being the Bayonne Park property and the plant of the New Jersey Refrigerating Company in Jersey City, New Jersey (Case, p. 88, lines 27 to 34). The Chancellor then referred to Vice Chancellor Church the petition of Lesser filed in the Court in December, 1924, and the second petition of Lesser filed in the month of Janu-

ary, 1926, directing the Vice Chancellor to hear these petitions and advise what sum or sums, if any, should be paid to Samuel Lesser on his claims relating to the Bayonne Park property and the plant of the New Jersey Refrigerating Company (Case, p. 89, lines 1 to 60). It was further ordered that a Supreme Court action which Lesser had instituted against the receivers to recover his commissions on the plant property, should be discontinued; this was done.

Under the order of reference, the matter came before Vice Chancellor Church for final hearing on April 27, 1927. The record shows, page 91, that the petitioner was represented; that J. Henry Harrison, Esq., appeared for the receivers; George J. Carr, Esq., for Eleanor Betz Howe and G. Arthur Betz, stockholders and Merritt Lane, Esq., for Gustave W. Lembeck and other stockholders. Reference is made to these appearances because the present appellants, Otto A. Lembeck and Ida L. Bowen, were not represented. At this hearing, pages 91 to 96, line 30, there was a discussion among the solicitors of an offer of Lesser to take the sum of \$10,000.00 in full payment of his claim and the recommendation of the solicitor for the receivers approving of the payment of the \$10,000. This settlement was also approved by George J. Carr, Esq., solicitor for two of the large stockholders and Merritt Lane, Esq., representing Gustave W. Lembeck, a like stockholder and others. There was no objection to the order. The Court thereupon stated its conclusion which is found beginning on page 96 at line 31 and terminating at page 97, line 21.

On May 17th, 1927, an order was advised by Vice Chancellor Church, a copy of which appears on pages 97 to 99. The recitals in this order disclose the theory upon which the order was granted.

The order directs the payment of the \$10,000.00 recommended by the receivers upon Lesser complying with the terms of the order.

Otto A. Lembeck, individually, and as trustee, and Ida L. Bowen, who were unrepresented at the hearing before Vice Chancellor Church, filed a joint petition of appeal (p. 100). These appellants were not parties to the cause. Lesser filed an answer to the petition of appeal (p. 102) in which he challenged the right of the appellants, as individual stockholders of the Refrigerating Company, to take or prosecute an appeal from said order because it was based upon the judgment of the receivers of the Refrigerating Company who stood in the place and stead of its board of directors and insists that their judgment, which was honest and fair, cannot be attacked except for fraud and fraud was not alleged against the receivers (Case, p. 103, lines 13 to 25).

The receivers filed a formal answer to petition of appeal in which they say they are advised and believe that the order is agreeable to equity.

POINT I.

The Court had power under the statute to make the order to pay Lesser.

Sections 56 and 57 of the Corporation Act (C. S., pages 1637-1638) govern the situation. Section 57 provides:

“The court of chancery shall have jurisdiction of said application and of all questions arising in the proceedings thereon, and may make such orders and decrees therein as justice and equity shall require.”

The receivers stand in the place of the board of directors. If in the judgment of the board of directors the claim was considered a meritorious one and one which should be paid, the directors would have had power to have paid the claim. The receivers had the same right.

Friendship Telephone Co. v. Newark, 88 N. J. Equity 562.

Upon a full consideration of what was done by Lesser, and the possibility that he would have been successful in obtaining a judgment for a very much greater sum, can it be said that the receivers were not justified in recommending the settlement for \$10,000.00? The receivers had the benefit of the sound judgment of a competent adviser and after a full consideration with him, the recommendation was made to the Court for the adjustment of the claim and the Court, approving of the settlement, ordered the money to be paid.

In this connection attention is drawn to the fact that the present appellants were not represented at the time that the order was made by the Court although they could have been then and there heard. In addition to that, a number of the principal stockholders of the company, who took occasion to be represented when the order was made, were in favor of the order.

POINT II.

The appellee was not left to his remedy at law.

It is argued in the brief of the appellants that the appellee had no course but to resort to an action at law. Such is not the case. While he might be defeated in an action at law, he nevertheless might be successful in equity. The adminis-

tration of the whole estate is in the court of chancery. That Court is thoroughly familiar with all conditions and is the proper form to hear the appellee's application. If there was merit in the application, relief should be afforded. If there was not merit, the receivers should be permitted to interpose the statute frauds. There was merit in the claim of the appellee. He produced a purchaser ready, able and willing to buy the property of the Refrigerating Company. It was Reilly. Reilly entered into a contract, paid a deposit of \$25,000.00 and the receivers recommended the confirmation. They reported to the Court that it was the best price obtainable and was advantageous to the corporation. Reilly was then made use of to increase the purchase price. When an offer was made in open Court to pay more than Reilly had bid, the Chancellor ordered a re-sale with an upset price of \$560,000.00. At this time Reilly's contract was held and he was held to it. His money was retained. More than two weeks later, and after Reilly's contract had been used to increase the bid for the property, the Chancellor ordered the return of Reilly's down payment of \$25,000.00 on his contract and that the contract be not consummated. Thus it plainly appears that Reilly, who was produced by Lesser, was of great benefit to the estate. Using Reilly's bid, the estate prospered to the extent of \$101,250.00 or an excess over the Reilly bid of 52%. It should not be lost sight of that Brown's first bid was only \$425,000.00. His second bid was \$560,000.00. The production of Reilly by Lesser produced this increased bid (Case, p. 27, line 13). A very different situation might have arisen if the Chancellor had not held Reilly's contract and Reilly's down payment of \$25,000.00. Reilly would have then been free. As it was if, under the re-sale order, there had not

been a bid higher than Reilly's, Reilly would have been held to his contract.

Merchants and Manufacturers National Bank v. The Newark Rubber Company,
98 N. J. Equity 477.

POINT III.

Stockholders are not proper parties and have no right to appeal.

The corporation is the only party in this litigation. Stockholders have no standing to prosecute an appeal from an order. If it should be decided that any stockholder has a right to appeal, it can be readily perceived that where dissatisfaction might be present in a single stockholder, holding but a few shares in a large corporation, that interminable delay and great injustice might not only be done to the corporation but to the creditors and stockholders.

Whitman v. Cox, 26 Maine, 335.

POINT IV.

It is therefore respectfully submitted that under all the circumstances the order appealed from should be affirmed.

EDWARD MAXSON,
Solicitor for and of counsel with
Samuel Lesser, Appellee.