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Notice of Appeal of Hudson & Essex Building and Construction Co.

(Filed May 29, 1928.)

In Chancery of New Jersey

Between

ALBERT & KERNAHAN, INC., a corporation,
Complainant,

and

FRANKLIN ARMS, INC., a corporation,
Defendant.

On Bill, &c.

Hudson & Essex Building & Construction Company hereby appeals from an order confirming Master's report made in this Court in the above stated caused by His Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice Chancellor Alonzo Church, on May 19, 1928, and from the whole and every part thereof, and particularly from that part of said order wherein it is adjudged that the report of Roy F. Anthony, Esq., Special Master in Chancery, be confirmed; and that the receivers herein, after the filing of their final report and account and after all payment of expenses of administration and fees shall distribute the funds in their possession in the following order of priority and in the following proportions, to wit:

FIRSTLY.—To pay to Roland J. Francis, trustee, or Service Trust Company, substituted trustee or its solicitors, the sum of $44,700.00, with interest from May 15, 1927.

SECONDLY.—To the following named mechanics lien claimants, pro rata the proportion that each of said claims bear to the aggregate of said claims, to wit:

Concrete Steel Co.	$1,577.57
with interest	
Albert Kernahan, Inc.	8,799.22
with interest	
Hudson Structural Iron Works, Inc.	6,717.40
with interest	
Orange Hardware Co.	254.82
with interest	
Juliano Construction Co.	30,000.00
with interest	
Joseph Amorose	12,000.00
with interest	

THIRDLY.—To Roland J. Frances or Service Trust Company, substituted trustee, $55,485.12, with interest from May 15, 1927.

FOURTHLY.—To Hudson & Essex Building & Construction Company, $9,500.00, with interest from April 9, 1928.

Dated May 28, 1928.

GROSS & GROSS,
Solicitors and of Counsel
with Hudson & Essex
Building & Construction
Company,
Appellant.

Notice of Appeal of Hudson & Essex B. & C. Co.

I conceive tnere is due cause for appeal in the above stated cause.

ISAAC GROSS,
Of Counsel with Hudson & Essex Building & Construction Company,
Appellant.

To

EDWARD R. MCGLYNN, Esq.,
Solicitors of Receivers and of Hudson Structural Iron Works.

MERRITT LANE, Esq.,
Solicitor of Fidelity & Deposit Company of Maryland.

WEINBERGER & WEINBERGER, Esqs.,
Solicitors of Service Trust Company, Substituted Trustees.

S. SIDNEY SILVER, Esq.,
Solicitor of Concrete Steel Co.

HOWE & DAVIS, Esqs.,
Solicitors of Orange Hardware Co. and Joseph Amorose.

POTTER & BERRY, Esqs.,
Solicitors of Juliano Construction Co.

JAMES P. MYLOD, Esq.,
Solicitor of J. W. Pierson & Co.

DALRYMPLE & CAMPBELL, Esqs.,
Solicitors of Henry D. Dietz.

Petition of Appeal of Hudson & Essex Building and Construction Co.

(Filed May 29, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

ALBERT & KERNAHAN, INC., a corporation,
Complainant,
v.
FRANKLIN ARMS, INC., a corporation,
Defendant.

On appeal of Hudson & Essex Building & Construction Company

To the Honorable the Court of Errors and Appeals in the last resort in all causes.

The petition of Hudson & Essex Building & Construction Company, the appellants in the above stated cause, respectfully shows:

1. That your petitioner finds itself aggrieved by an order confirming Master's report made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice Chancellor Alonzo Church, bearing date the 19th day of May, 1928, in a certain cause wherein Albert & Kernahan, Inc., a corporation is complainant, and Franklin Arms, Inc., a corporation, is defendant, in this respect, to wit:

That the said order adjudges that a certain report of Roy F. Anthony, Esq., Special Master in Chancery, filed in said cause in said Court of Chancery, wherein and whereby the said Special Master did report that the receivers appointed in said cause in said Court of Chancery, out of the sum of $110,000.00 raised by said receivers as the

proceeds of sale of certain lands and premises of said Franklin Arms, Inc., which has come into the hands of said receivers, be distributed in the following order and priority and in the following proportions, to wit:

FIRSTLY.—To pay to Roland J. Francis, Trustee, or Service Trust Company, substituted trustee, or its solicitors, the sum of $44,700.00, with interest from May 15, 1927.

SECONDLY.—To the following named mechanics lien claimants, pro rata the proportion that each of said claims bears to the aggregate of said claims, to wit:

Concrete Steel Co., with interest	$1,577.57
Albert & Kernahan, Inc., with interest	8,799.22
Hudson Structural Iron Works, Inc., with interest	6,717.40
Orange Hardware Co., with interest	254.82
Juliano Construction Co., with interest	30,000.00
Joseph Amorose, with interest	12,000.00

THIRDLY.—To Roland J. Francis or Service Trust Company, substituted trustees, $55,485.12, with interest from May 15, 1927.

FOURTHLY.—To Hudson & Essex Building & Construction Company, $9,500.00, with interest from April 9, 1926; be confirmed, and that the said receivers shall distribute the said funds in their possession in the order and priority as in said Master's report set forth and as hereinabove stated.

2. Your petitioner humbly appeals from that part of the order of said Chancellor which orders and adjudges as aforesaid, upon the ground that

the same is erroneous in that the said order should have provided, ordered and adjudged that there be paid to Hudson & Essex Building & Construction Company the sum of $9,500.00, with interest thereon from April 9, 1926, secondly and only after the payment to Roland J. Francis, trustee, or Service Trust Company, substituted trustee, of the sum of $44,700.00 with interest from May 15, 1927, and that the mortgage of Hudson & Essex Building & Construction Company in the sum of $9,500.00 with interest thereon from April 9, 1926, should have been ordered and adjudged to be secondly paid and paid prior to the payment of any sum or sums to mechanics lien claimants, to wit:

Concrete Steel Co.
Albert & Kernahan, Inc.
Hudson Structural Iron Works.
Orange Hardware Co.
Juliano Construction Co.
Joseph Amorose.

and also prior to the sum payable to Roland J. Francis, trustee, or Service Trust Company, substituted trustee, of $55,485.12 with interest.

Your petitioner therefore prays that the said order of said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden; and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

GROSS & GROSS,
Solicitors and of Counsel with Appellant
Hudson & Essex Building &
Construction Company.

ISAAC GROSS,
Of Counsel with Appellant
Hudson & Essex Building &
Construction Company.

Amended Petition of Appeal of Hudson & Essex Building and Construction Co.

(Filed August 1, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

ALBERT & KERNAHAN, INC., a corporation, *Complainant,* *v.* FRANKLIN ARMS, INC., a corporation, *Defendant.*	On appeal of Hudson & Essex Building & Construction Company

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

The petition of Hudson & Essex Building & Construction Company, the appellants in the above stated cause, respectfully shows:

1. That your petitioner finds itself aggrieved by an order confirming Master's report made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice Chancellor Alonzo Church, bearing date the 19th day of May, 1928, in a certain cause wherein Albert & Kernahan, Inc., a corporation is complainant and Franklin Arms, Inc., a corporation, is defendant, in this respect, to wit:

That the said order adjudges that a certain report of Roy F. Anthony, Esq., Special Master in Chancery, filed in said cause in said Court of Chancery, wherein and whereby the said Special Master

did report that the receivers appointed in said cause in said Court of Chancery, out of the sum of $110,000.00 raised by said receivers as the proceeds of sale of certain lands and premises of said Franklin Arms, Inc., which has come into the hands of said receivers, be distributed in the following order and priority and in the following proportions, to wit:

FIRSTLY.—To pay to Roland J. Francis, Trustee, or Service Trust Company, substituted trustee, or its solicitors, the sum of $44,700.00, with interest from May 15th, 1927.

SECONDLY.—To the following named mechanics lien claimants, pro rata the proportion that each of said claims bears to the aggregate of said claims, to wit:

Concrete Steel Co., with interest ..	$1,577.57
Albert & Kernahan, Inc., with interest	8,799.22
Hudson Structural Iron Works, Inc., with interest	6,717.40
Orange Hardware Co., with interest	254.82
Juliano Construction Co., with interest	30,000.00
Joseph Amorose, with interest	12,000.00

THIRDLY.—To Roland J. Francis or Service Trust Company, substituted trustees, $55,485.12, with interest from May 15, 1927.

FOURTHLY.—To Hudson & Essex Building & Construction Company, $9,500.00, with interest from April 9, 1926; be confirmed, and that the said receivers shall distribute the said funds in their possession in the order and priority as in said Master's report set forth and as hereinabove stated.

2. Your petitioner humbly appeals from that part of the order of said Chancellor which orders and adjudges as aforesaid, upon the ground that the same is erroneous in that the said order should have provided, ordered and adjudged that there be paid in the first place to Hudson & Essex Building & Construction Company, the sum of $9500.00, with interest thereon from April 9, 1926, prior and before the payment of any sums to Roland J. Francis, trustee, or Service Trust Company substituted trustee, or Concrete Steel Co., or Albert & Kernahan, Inc., or Hudson Structural Iron Works, or Orange Hardware Co., or Juliano Construction Co., or Joseph Amorose. Or that the said order should have provided, ordered, adjudged or decreed that there be paid to Hudson & Essex Building & Construction Company the sum of $9500.00 with interest thereon from April 9, 1926, secondly and only after the payment to Roland J. Francis, trustee, or Service Trust Company, substituted trustee, of the sum of $44,700.00 with interest from May 15, 1927, and that the mortgage of Hudson & Essex Building & Construction Company in the sum of $9,500.00 with interest thereon from April 9, 1926, should have been ordered and adjudged to be secondly paid and paid prior to the payment of any sum or sums to mechanics lien claimants, to wit:

Concrete Steel Co.
Albert & Kernahan, Inc.
Hudson Structural Iron Works
Orange Hardware Co.
Juliano Construction Co.
Joseph Amorose

and also prior to the sum payable to Roland J. Francis, trustee, or Service Trust Company, substituted trustee, of $55,485.12 with interest.

Your petitioner therefore prays that the said order of said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden; and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

GROSS & GROSS,
Solicitors and of Counsel with appellant, Hudson & Essex Building & Construction Company.

ISAAC GROSS,
Of counsel with appellant, Hudson & Essex Building & Construction Company.

Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

ALBERT & KERNAHAN, INC., a corporation,
Complainant,

v.

FRANKLIN ARMS, INC., a corporation,
Defendant.

On Appeal.

The answer of Service Trust Company of New Jersey, as substituted trustee, one of the above named defendants, to the petition of appeal of Hudson & Essex Building & Construction Company, the appellant.

Answer of Soverel and Haines.

The appellee, not admitting the truth of all or any of the matters in said petition of appeal contained, for answer thereto nevertheless admits that an order was made, in the Court of Chancery, confirming the report of the Master in the above entitled cause, for the purposes in said petition mentioned and as therein set forth, but as to the substance and form of said decree, this appellee begs leave to refer thereto when the same shall be produced.

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

Dated June 9th, 1928.

WEINBERGER & WEINBERGER,
Solicitors for and of Counsel with Appellee.

Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ALBERT & KERNAHAN, INC., a corporation,
Complainant,
v.
FRANKLIN ARMS, INC., a corporation,
Defendant.

On Appeal of Hudson & Essex Building & Construction Company from the Court of Chancery.

The answer of M. DeForest Soverel and James H. Haines, receivers of Franklin Arms, Inc., and Hudson Structural Iron Works to the petition of

appeal of Hudson and Essex Building & Construction Company, the above named appellant.

These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that an order was, on the nineteenth day of May, nineteen hundred twenty-eight, 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 substance and form of said order, these appellees beg leave to refer thereto when the same shall be produced.

These appellees are advised and believe that the said order is agreeable to equity and they pray that the same may be affirmed with costs to be taxed in favor of these appellees.

STEIN, MCGLYNN & HANNOCH,
Solicitors for and of Counsel with Appellees.

Notice of Appeal of Service Trust Co.

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,
Complainant,

v.

FRANKLIN ARMS, INC., a corporation,
Defendant.

} On Bill, &c.

Service Trust Company of New Jersey, as substituted trustee, of mortgage dated May 15th, 1926,

recorded in Book W-57 of Mortgages for Essex County, page 64, to secure an issue of bonds sold by G. L. Miller & Company, hereby appeals from an order confirming Master's Report made in this Court in the above stated cause by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice Chancellor Alonzo Church, on May 19th, 1928, and from the following parts thereof, and particularly from that part of said order wherein it is adjudged that the report of Roy F. Anthony, Esq., Special Master in Chancery, be confirmed; and that the receivers herein, after the filing of their final report and account and after all payment of expenses of administration and fees shall distribute the funds in their possession in the following order of priority and in the following proportions, to wit:

SECONDLY.—To the following named mechanics lien claimants, pro rata the proportion that each of said claims bear to the aggregate of said claims to wit:

Concrete Steel Co., with interest	$1,577.57
Albert & Kernahan, Inc., with interest	8,799.22
Hudson Structural Iron Works, Inc., with interest	6,717.40
Orange Hardware Co., with interest	254.82
Juliano Construction Co., with interest	30,000.00
Joseph Amorose, with interest	12,000.00

THIRDLY.—To Roland J. Frances or Service Trust Company substituted trustees, $55,485.12, with interest from May 15, 1927.

FOURTHLY.—To Hudson & Essex Building & Con-

struction Company, $9,500.00, with interest from April 9, 1928.

Dated June 27th, 1928.

WEINBERGER & WEINBERGER,
Solicitors and of Counsel with Service Trust Company of New Jersey, substituted trustee.

We conceive there is due cause for appeal in the above stated cause.

WEINBERGER & WEINBERGER,
Of Counsel with Service Trust Company of New Jersey, substituted trustee.

To

EDWARD R. McGLYNN,
Sol'rs. of Receivers and of Hudson Structural Iron Works.

MERRIT LANE,
Sol'r of Fidelity & Deposit Company of Maryland.

GROSS & GROSS,
Sol'rs of Hudson & Essex Building & Construction Co.

S. SIDNEY SILVER, Esq.,
Sol'r of Concrete Steel Co.

HOWE & DAVIS, Esqs.,
Sol'rs of Orange Hardware Co. and Joseph Amorose.

POTTER & BERRY, Esqs.,
Sol'rs of Juliano Construction Co.

JAMES P. MYLOD, Esq.,
Sol'r of J. W. Pierson & Co.

DALRYMPLE & CAMPBELL, Esqs.,
Sol'r of Henry D. Dietz.

Petition of Appeal of Service Trust Co.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ALBERT & KERNAHAN, INC., a corporation,
Complainant,
v.
FRANKLIN ARMS, INC., a corporation,
Defendant.

On appeal of Service Trust Company of New Jersey, Substituted Trustee.

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

The petition of Service Trust Company of New Jersey, a banking corporation, substituted trustee, the appellant in the above stated cause, respectfully shows:

1. That your petitioner finds itself aggrieved by an order confirming Master's Report made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advise of Vice-Chancellor Alonzo Church, bearing date the 19th day of May, 1928, in a certain cause wherein Albert & Kernahan, Inc., a corporation, is complainant, and Franklin Arms, Inc., a corporation, is defendant, in this respect, to wit:

That the said order adjudges that a certain report of Roy F. Anthony, Esq., Special Master in Chancery, filed in said cause in said Court of Chancery, wherein and whereby the said Special Master did report that the receivers appointed in said cause in said Court of Chancery out of the sum of

One Hundred ten thousand ($110,000) Dollars, raised by said receivers as the proceeds of sale of certain lands and premises of said Franklin Arms, Inc., which has come into the hands of said receivers, be distributed in the following order and priority and in the following proportions, to wit:

FIRSTLY.—To pay to Roland J. Frances, trustee, or Service Trust Company of New Jersey, substituted trustee, or its solicitors, the sum of Forty-four thousand seven hundred ($44,700.00) Dollars, with interest from May 15th, 1927.

SECONDLY.—To the following named mechanics lien claimants, pro rata, the proportion that each of said claims bears to the aggregate of said claims, to wit:

Concrete Steel Co., with interest ..	$1,577.57
Albert & Kernahan, Inc., with interest	8,799.22
Hudson Structural Iron Works, Inc., with interest	6,717.40
Orange Hardware Co., with interest	254.82
Juliano Construction Co., with interest	30,000.00
Joseph Amorose, with interest	12,000.00

THIRDLY.—To Roland J. Francis or Service Trust Company of New Jersey, substituted trustee, Fifty-five thousand four hundred eighty-five dollars and twelve cents ($55,485.12), with interest from May 15th, 1927.

FOURTHLY.—To Hudson & Essex Building & Construction Company, Nine thousand five hundred ($9,500.00) Dollars, with interest from April 9th, 1926; be confirmed and that the said receivers shall distribute the said funds in their possession

in the order and priority as is set forth in said Master's report, and as hereinabove stated.

Your petitioner humbly appeals from that part of the order of said Chancellor which orders and adjudges as aforesaid, upon the ground that the same is erroneous, in that the said order should have provided, ordered and adjudged that there be paid to Service Trust Company of New Jersey, substituted trustee, or its solicitors, the sum of Fifty-five thousand four hundred eighty-five dollars and twelve cents ($55,485.12) with interest from May 15th, 1927, secondly and only after the payment to the said Service Trust Company, substituted trustee, in addition to the sum of Forty-four thousand seven hundred ($44,700.00) Dollars, with interest from May 15th, and that the said sum should have been ordered and adjudged to be secondly paid and likewise prior to the payment of any sum or sums to mechanics lien claimant, to wit:

Concrete Steel Co.
Albert & Kernahan, Inc.
Hudson Structural Iron Works
Orange Hardware Co.
Juliano Construction Co.
Joseph Amorose

Your petitioner therefore prays that the said order of said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden; and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

WEINBERGER & WEINBERGER,
Solicitors and of Counsel with appellant, Service Trust Company of New Jersey, substituted trustee.

Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

ALBERT & KERNAHAN, INC., a corporation,
Complainant,

and

FRANKLIN ARMS, INC., a corporation,
Defendant.

On appeal of Service Trust Company of New Jersey, Substituted Trustee.

Answer of Fidelity Deposit Company of Maryland, Defendant-Respondent, to the Petition of Appeal of the above named Service Trust Company of New Jersey, substituted trustee:

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that an order was made on the 19th day of May, 1928, 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 this respondent prays to refer thereto when the same shall be produced, and this respondent is advised and believes that the said order is agreeable to equity and he prays that the same may be affirmed, the costs to be adjudged to this respondent.

MERRITT LANE,
Solicitor for and of Counsel with Fidelity & Deposit Company of Maryland, Defendant-Respondent.

Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ALBERT & KERNAHAN, INC., a corporation, *Complainant,* *v.* FRANKLIN ARMS, INC., a corporation, *Defendant.*	On appeal of Service Trust Company of New Jersey, Substituted Trustee.

The answer of the above-named respondent to the petition of appeal of the above-named appellant.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer therein, nevertheless, says and admits, that an order was, on the nineteenth day of May, nineteen hundred twenty eight, 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, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes, that the said order is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

July 19th, 1928.

STEIN, MCGLYNN & HANNOCH,
Solicitors for and of Counsel with Respondent.

Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

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

Complainant, Albert & Kernahan, Inc., a corporation of the State of New Jersey, with its principal office located in the City of Newark, County of Essex and State of New Jersey, a creditor of the Franklin Arms, Inc., for and on behalf of itself and all other creditors of the said company and the stockholders thereof, who shall come in and contribute to the expenses of this suit claim and say that:

1. It is a creditor of the said Franklin Arms, Inc., a corporation of the State of New Jersey, to the extent of $8,799.22, which indebtedness is for building materials sold and delivered to the said Franklin Arms, Inc., used in the erection and construction of a building as hereinafter described.

2. That said Franklin Arms, Inc., is a corporation, created and existing under and by virtue of the laws of the State of New Jersey, and was incorporated on the seventeenth day of April, nineteen hundred and twenty-six, under and pursuant to the terms and provisions of an Act of Legislature of the State of New Jersey, entitled "An Act concerning corporations" (Revision of 1896) and the several acts amendatory thereof and supplemental thereto.

3. The authorized capital stock of Franklin Arms, Inc., is one hundred shares of stock having a nominal or no par value. That the authorized capital stock of said corporation has been and is issued.

4. The objects for which the said corporation was organized were for general real estate and constructions business.

5. That said corporation became the owner of certain real estate located in the Town of Bloomfield, Essex County, located on the Southeast corner of Franklin Street and Berkeley Place, having a frontage on said Franklin Street of one hundred feet more or less, running back on Berkeley Place approximately one hundred thirty-four feet more or less. The said corporation commenced the erection of a four-story and basement brick apartment house containing approximately one hundred thirty-six rentable rooms, divided into apartments for forty-eight families. That the erection of said building was commenced without the execution of a general contract to any one firm or individual for all the work to be done in said building, but said defendant corporation made separate and direct contracts with masons, plumbers, electricians, and the various material supply people, who furnished material in the use and erection of said building.

6. That said defendant corporation in order to finance the erection of the building described in the preceding paragraph made and entered into an agreement dated May 15, 1926, with G. L. Miller & Company, Inc., a corporation of the State of Delaware, having its principal office in the City of New York, under and by virtue of which said defendant corporation executed bonds secured by a mortgage covering the real estate described in the preceding paragraph in the sum of Two hundred and fifteen thousand dollars. Said mortgage was made to one Rollin J. Francis, as trustee, and

was recorded in the Register's Office of the County of Essex. In connection with said agreement and bonds and mortgage there was also executed and delivered a surety company bond made by the Fidelity & Deposit Company of Maryland in the sum of Two hundred and twenty thousand dollars, which bond was intended to guarantee the completion of the building described in the preceding paragraph.

7. Complainant is informed and verily believes that under and by virtue of the terms of the agreement and mortgage referred to in the preceding paragraph there was advanced by the said G. L. Miller & Company, Inc., certain sums of money which were used for the purpose of paying expenses and commissions in connection with said bonds and mortgage and also interest for one year on said mortgage in advance and there was advanced to the defendant corporation approximately the sum of Forty-eight thousand dollars, and there was also advanced the sum of nine thousand dollars for the purpose of cancelling a prior mortgage lien on the property herein described.

8. Complainant is informed and verily believes that pursuant to the terms of the agreement and mortgage referred to in the within bill, said G. L. Miller & Company, Inc., was to advance to the defendant corporation as the construction work on the building referred to herein progressed certain sums of money resulting from the sale of the bonds secured by said mortgage.

9. Complainant is informed and verily believes that on or about September third, nineteen hundred twenty-six a certain proceeding commenced in the U. S. District Court for the District of New

York, an equity receiver was appointed for the said G. L. Miller & Company, Inc., and complainant is informed and verily believes that since the appointment of the said receiver said defendant corporation has been unable to collect any money from said G. L. Miller & Company, Inc., which was to be advanced to it under and by virtue of the mortgage and agreement referred to herein.

10. Complainant is informed and verily believes that said defendant corporation is indebted to its various contractors and material supply people in the sum of approximately forty thousand dollars, practically all of which indebtedness are claims which are entitled to protection of the statute commonly known as the Mechanics Lien Act and that practically all of said creditors have threatened the defendant corporation that Mechanics Lien Claims would be filed for the full amount of said claims.

11. Complainant is further informed and verily believes that said defendant corporation was forced on September eighth, nineteen hundred twenty-six to cease work on the building described herein because of its inability to pay its workmen, contractors and materialmen.

12. Complainant is further informed and verily believes that the only mortgage lien of record against the property described herein outside of the two hundred fifteen thousand dollar mortgage referred to aforesaid is a second mortgage of sixty-five hundred dollars. That the entire indebtedness of the defendant corporation, including all amounts alleged to have been advanced on the mortgage herein described is approximately one hundred fifty thousand dollars and that the value

of its two pieces of real estate is approximately two hundred thousand dollars.

13. Complainant is further informed and verily believes that the building referred to herein is about sixty-five per cent completed and is now ready for lathing.

14. That the only other asset of the said corporation is a vacant plot of ground adjoining the property herein described which is also subject to a mortgage of fifty-five hundred dollars; that the building herein described if completed would be reasonably worth between three hundred seventy-five thousand dollars to four hundred thousand dollars, and that in its present condition if sold at a forced sale would not realize sufficient to pay the amount of the indebtedness of the claims of the creditors for labor and materials.

15. Complainant is further informed and verily believes that said building is open to the elements and not protected from trespassers and there is a large amount of valuable building material stored in and about said building which if not properly protected will be removed or stolen and that defendant corporation is likely to suffer substantial damages by reason of the inability of the said G. L. Miller & Company, Inc., to advance the balance due under the mortgage aforesaid and that the creditors of the said defendant corporation are in great danger of losing valuable rights against the bonding company referred to herein.

16. Said corporation has no money or cash assets whatever wherewith to meet its pay roll or its current obligations and that it has exhausted all its means to raise funds wherewith to carry on its business.

17. Said corporation is unable by realizing upon its assets, even at a great sacrifice to meet its current obligations which have already matured and which will mature in the near future and that in view of the facts above set forth with regard to the threatened Mechanics Lien Suits and the refusal on the part of the said G. L. Miller & Company, Inc., to pay said defendant corporation money due it on said mortgage, it will be impossible for the company in the near future to raise by loans or otherwise sufficient funds to enable it to prosecute its business with safety to the public and advantage to its stockholders.

18. The assets of said corporation are subject not only to judgments and executions in suits brought against the company by its creditors, but also to municipal mechanic lien suits as above set forth, and unless the assets of the above corporation are properly marshaled by a receiver or receivers to be appointed for the said corporation, the said corporation will be subject to costly litigation, and in the event of forced sales, its assets will bring very much less than their fair and reasonable values, all of which would be of great detriment to complainant and the stockholders and other creditors of said corporation; and complainant believes that unless this court, in view of the inability of said corporation to meet its due and maturing obligations, will deal with its property as a single trust fund, its property will be dissipated to such an extent that its stockholders will realize little or nothing from their holdings of its stock, and that, in all probability, the creditors of said corporation will be unable to collect their claims or any substantial part thereof

against said corporation, and that the intervention by this court is necessary to the protection of the stockholders and creditors of said company, to the end that its property may not be dissipated by a multiplicity of suits to the detriment of the great body of creditors and stockholders thereof.

In Consideration Whereof and for as much as complainant is without adequate remedy without the assistance of this Honorable Court, where matters of this nature are particularly cognizable and relievable, it thereof reprays:

1. That the said company may full, true and perfect answer make to all and singular the matters and things hereinbefore stated, and that it may set forth and discover the goods and chattels, rights and credit, moneys and effects and real estate of every kind and description belonging to said corporation.

2. That complainant and the other creditors and stockholders of the said company may be paid what is justly due them.

3. That the said corporation may be enjoined from exercising any of its franchises and from receiving any debts due to it, and from paying and transferring any of its money and effects, and from continuing its said business.

4. That it may be decreed to be insolvent; or that it may be decreed that its business has been or is being conducted at a great loss and greatly prejudicial to the interests of its creditors or stockholders, so that its business cannot be conducted with safety to the public and advantage to the stockholders.

5. That a receiver may be appointed according to the form of the statute in such case made and provided, with the usual powers, and that the assets of the said corporation and the rights of complainant and all other stockholders and creditors of the said company may be ascertained and that the Court will fully administer the funds in which complainants are interested, being the entire assets of the said corporation, and will, for that purpose, marshal all of its assets and ascertain all of the respective liens and priorities, if any existing on any and all parts thereof, and enforce the liens and rights of all the creditors of said company as the same may be finally ascertained; and that complainant may have such further or other relief in the premises as may be agreeable to equity and good conscience.

6. That a writ of subpoena may be issued directed to the said corporation Franklin Arms, Inc., commanding it to appear before this Honorable Court at a certain date and under a certain penalty therein to be expressed, then and thereto answer the premises, and to stand to, abide by and perform such decree as to your Honor shall seem meet.

C. P. McGLYNN,
Solicitor for and of Counsel
with complainants.

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

G. FREDERIC ALBERT, being duly sworn, deposes and says that he is duly authorized to make this affidavit.

1. Deponent further says that said Albert &

Kernahan, Inc., is a creditor of the said Franklin Arms, Inc., a corporation of the State of New Jersey, to the extent of $8799.22, which indebtedness is for building materials sold and delivered to the said Franklin Arms, Inc., used in the erection and construction of a building as hereinafter described.

2. That said Franklin Arms, Inc., is a corporation created and existing under and by virtue of the laws of the State of New Jersey, and was incorporated on the seventeenth day of April, nineteen hundred and twenty-six, under and pursuant to the terms and provisions of an Act of the Legislature of the State of New Jersey, entitled "An Act concerning corporations" (Revision of 1896) and the several acts amendatory thereof and supplemental thereto.

3. The authorized capital stock of Franklin Arms, Inc. is one hundred shares of stock having a nominal or no par value. That the authorized capital stock of said corporation has been and is issued.

4. The objects for which the said corporation was organized were for general real estate and construction business.

5. That said corporation became the owner of certain real estate located in the Town of Bloomfield, Essex County, located on the South East corner of Franklin Street and Berkeley Place, having a frontage on said Franklin Street of one hundred feet more or less, running back on Berkeley Place approximately one hundred thirty four feet more or less. The said corporation commenced the erection of a four story and basement brick

apartment house containing approximately one hundred thirty six rentable rooms, divided into apartments for forty eight families. That the erection of said building was commenced without the execution of a general contract to any one firm or individual for all the work to be done in said building, but said defendant corporation made separate and direct contracts with masons, plumbers, electricians, and the various material supply people, who furnished material in the use and erection of said building.

6. That said defendant corporation in order to finance the erection of the building described in the preceding paragraph made and entered into an agreement dated May 15, 1926, with G. L. Miller & Company, Inc., a corporation of the State of Delaware, having its principal office in the City of New York, under and by virtue of which said defendant corporation executed bonds secured by a mortgage covering the real estate described in the preceding paragraph in the sum of two hundred and fifteen thousand dollars. Said mortgage was made to one Rollin J. Francis, as trustee, and was recorded in the Register's Office of the County of Essex. In connection with said agreement and bonds and mortgage there was also executed and delivered a surety company bond made by the Fidelity & Deposit Company of Maryland in the sum of two hundred and twenty thousand dollars, which bond was intended to guarantee the completion of the building described in the preceding paragraph.

7. Deponent is informed and verily believes that under and by virtue of the terms of the agreement and mortgage referred to in the preceding

paragraph there was advanced by the said G. L. Miller & Company, Inc. certain sums of money which were used for the purpose of paying expenses and commissions in connection with said bonds and mortgage and also interest for one year on said mortgage in advance and there was advanced to the defendant corporation approximately the sum of forty eight thousand dollars, and there was also advanced the sum of nine thousand dollars for the purpose of cancelling a prior mortgage lien on the property herein described.

8. Deponent is informed and verily believes that pursuant to the terms of the agreement and mortgage referred to in the within bill, said G. L. Miller & Company, Inc. was to advance to the defendant corporation as the construction work on the building referred to herein progressed certain sums of money resulting from the sale of the bonds secured by said mortgage.

9. Deponent is informed and verily believes that on or about September third, nineteen hundred twenty six a certain proceeding commenced in the U. S. District Court for the District of New York, an equity receiver was appointed for the said G. L. Miller & Company, Inc. and deponent is informed and verily believes that since that appointment of the said receiver said defendant corporation has been unable to collect any money from said G. L. Miller & Company, Inc., which was to be advanced to it under and by virtue of the mortgage and agreement referred to herein.

10. Deponent is informed and verily believes that said defendant corporation is indebted to its various contractors and material supply people in the sum of approximately forty thousand dollars,

practically all of which indebtedness are claims which are entitled to protection of the statute commonly known as the Mechanics Lien Act and that practically all of said creditors have threatened the defendant corporation that Mechanics Lien Claims would be filed for the full amount of said claims.

11. Deponent is further informed and verily believes that said defendant corporation was forced on September eighth, nineteen hundred twenty six to cease work on the building described herein because of its inability to pay its workmen, contractors and materialmen.

12. Deponent is further informed and verily believes that the only mortgage lien of record against the property described herein outside of the two hundred fifteen thousand dollar mortgage referred to aforesaid is a second mortgage of sixty-five hundred dollars. That the entire indebtedness of the defendant corporation, including all amounts alleged to have been advanced on the mortgage herein described is approximately one hundred fifty thousand dollars and that the value of its two pieces of real estate is approximately two hundred thousand dollars.

13. Deponent is further informed and verily believes that the building referred to herein is about sixty-five per cent. completed and is now ready for lathing.

14. That the only other asset of the said corporation is a vacant plot of ground adjoining the property herein described which is also subject to a mortgage of fifty-five hundred dollars; that the building herein described if completed would be reasonably worth between three hundred sev-

enty-five thousand dollars to four hundred thousand dollars, and that in its present condition if sold at a forced sale would not realize sufficient to pay the amount of the indebtedness of the claims of the creditors for labor and materials.

15. Deponent is further informed and verily believes that said building is open to the elements and not protected from trespassers and there is a large amount of valuable building material stored in and about said building which if not properly protected will be removed or stolen and that defendant corporation is likely to suffer substantial damages by reason of the inability of the said G. L. Miller & Company, Inc., to advance the balance due under the mortgage aforesaid and that the creditors of the said defendant corporation are in great danger of losing valuable rights against the bonding company referred to herein.

16. Said corporation has no money or cash assets whatever wherewith to meet its payroll or its current obligations and that it has exhausted all its means to raise funds wherewith to carry on its business.

17. Said corporation is unable realizing upon its assets, even at a great sacrifice, to meet its current obligations which have already matured and which will mature in the near future and that in view of the facts above set forth with regard to the threatened Mechanics Lien Suits and the refusal on the part of the said G. L. Miller & Company, Inc., to pay said defendant corporation money due it on said mortgage, it will be impossible for the company in the near future to raise by loans or otherwise sufficient funds to enable it to prosecute its business with safety to the public and advantage to its stockholders.

18. The assets of said corporation are subject not only to judgments and executions in suits brought against the company by its creditors, but also to mechanic lien suits as above set forth, and unless the assets of the above corporation are properly marshaled by a receiver or receivers to be appointed for the said corporation, the said corporation will be subject to costly litigation, and in the event of forced sales, its assets will bring very much less than their fair and reasonable values, all of which would be of great detriment to deponent and the stockholders and other creditors of said corporation, and deponent believes that unless this court, in view of the inability of said corporation to meet its due and maturing obligations, will deal with its property as a single trust fund, its property will be dissipated to such an extent that its stockholders will realize little or nothing from their holdings of its stock, and that, in all probability, the creditors of said corporation will be unable to collect their claims or any substantial part thereof against said corporation, and that the intervention by this court is necessary to the protections of the stockholders and creditors of said company, to the end that its property may not be dissipated by a multiplicity of suits to the detriment of the great body of creditors and stockholders thereof.

C. FREDERIC ALBERT.

Sworn to and subscribed before me this 15th day of September, 1926.

CHAS. E. ROGERS,
of N. J.

Order Appointing Temporary Receiver and Order to Show Cause.

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,

Complainant,

and

FRANKLIN ARMS, INC., a corporation,

Defendant.

On Bill, etc.

This matter being opened to the Court by E. R. McGlynn, of counsel with the complainant, and with the consent of the defendant corporation annexed hereto and made part hereof, and upon reading and filing the Bill of Complaint and affidavit thereunto annexed; and it appearing to the Court that the defendant has been unable to meet its current obligations, and that its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors and stockholders, and (no adjudication of insolvency being made) a Receiver for the defendant company should be appointed by this Court to take charge of and administer all its assets and property, it is, thereupon, on this tenth day of September, Nineteen hundred Twenty-six, on motion of E. R. McGlynn, solicitor of complainant,

ORDERED, ADJUDGED AND DECREED THAT James Haines of Bloomfield and M. DeForest Soverel of East Orange be and they are hereby appointed

Receivers of the said defendant corporation, Franklin Arms, Inc., and all of its assets and property of every character and description, with full power and authority to demand, sue for, collect, receive and take into possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of any and every description belonging to the defendant or to which it may be entitled, and to sell, convey and assign any or all of the real and personal property of the said corporation and to do and perform all the duties imposed upon them and required by Law, and especially an act entitled "An Act Concerning Corporation (Revision of 1896) and the Acts Supplementary thereto and Amendatary Thereof."

AND IT IS FURTHER ORDERED that the said Receivers, before entering upon the discharge of their duties, shall take the oath of office prescribed by law and shall enter into bond to the Chancellor in the penal sum of $10,000 conditioned for the faithful performance of their duties, which said bond shall be approved as to the form and security thereof, by John A. Bernhard, Esq., one of the Special Masters of this Court.

AND IT IS FURTHER ORDERED that the said Receivers shall take possession of all the property and assets of the said corporation and account for the same as this Court shall hereafter direct, and said defendant corporation, its officers, agents, and directors, shall forthwith transfer, assign, and deliver to the said Receivers all of the property and assets of the said corporation, both real and personal, wheresoever situated and of whatsoever it may consist.

Order Appointing Temporary Receiver.

AND IT IS FURTHER ORDERED, that the said defendant corporation, its officers, and agents, and all persons claiming under it shall be and they hereby are restrained from interfering with said Receivers taking possession of and maintaining said property, and that all persons whomsoever, especially the creditors of the said defendant corporation, shall be and they are hereby restrained from bringing any action or proceeding at law or otherwise against said corporation or from taking any further proceedings in any bringing any action or proceedings at law, or otherwise, against said corporation or from taking any further proceedings in any action or proceeding heretofore commenced.

AND IT IS FURTHER ORDERED that said Receivers be and they are in their discretion authorized to continue the performance of all or any part of the contracts upon which said Company is now engaged, and to take all such steps as may be necessary to perform the same, said Receivers being authorized in their discretion to use the income of said corporation or its property to provide funds to enable them to carry out and complete the said contracts.

AND IT IS FURTHER ORDERED that the creditors and stockholders of the said corporation do show cause before this Court at Room 638 Prudential Bldg. 763 Broad Street, Newark, N. J. at ten o'clock in the forenoon on Friday the 17th day of September, 1926, why the appointment of the said Receivers should not be continued.

AND IT IS FURTHER ORDERED that said Receivers, within three days from the date hereof, shall mail

copy of the within order, certified by the Solicitor of Complainant, to all creditors and stockholders of the above named defendant corporation, at their last known post office address.

Respectfully advised,

EDWIN ROBERT WALKER,
C.

ALONZO CHURCH,
V. C.

Pursuant to resolutions adopted by the Board of Directors of Franklin Arms, Inc., at a special meeting of the corporation held on September ninth, Nineteen Hundred and Twenty-six, Franklin Arms, Inc., hereby consents to the appointment by the Court of Chancery of New Jersey of a receiver for the said Franklin Arms, Inc., upon the ground that the business of the corporation cannot be conducted except at a great loss and in a manner greatly prejudicial to the interest of its creditors and stockholders.

IN WITNESS WHEREOF, Franklin Arms, Inc., has caused this consent to be signed by its President and its corporate seal to be hereto affixed and attested by its Secretary this Ninth day of September Nineteen Hundred and Twenty-six.

FRANKLIN ARMS, INC.
(L. S.) By JAMES HAINES.

Attest JULIUS H. HAINES,
Secretary.

Order Appointing Temporary Receiver.

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

BE IT REMEMBERED, that on this ninth day of September, Nineteen Hundred and Twenty-six, before me a Master in Chancery of New Jersey, personally appeared Julius H. Haines and made proof to my satisfaction that he is the secretary of Franklin Arms, Inc., the corporation named in the foregoing consent; and he well knows the corporate seal of the said corporation; that the seal affixed thereto is the corporate seal of the said corporation and that the said seal was so affixed and the said Consent signed and delivered by James Haines who was at the date thereof the President of the said corporation, in the presence of this deponent and said President at the same time acknowledged that he signed, sealed and delivered the same as his voluntary act and deed and as the voluntary act and deed of the said corporation and that deponent at the same time subscribed his name to said Consent as an attesting witness to the execution thereof.

JULIUS H. HAINES.

Subscribed and sworn to before me }
this ninth day of September, 1926. }

RANDOLPH C. BARRETT,
Master of Chancery of
New Jersey.

Order Adjudging Insolvency and Continuing Appointment of Receivers.

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,

Complainant,

and

FRANKLIN ARMS, INC., a corporation,

Defendant.

On Bill, etc.

This matter being opened to the court by E. R. McGlynn, solicitor for and of counsel with the above named complainant, and an order having been made in this cause on the tenth day of September, nineteen hundred twenty six, wherein among other things, the creditors and stockholders of the defendant corporation were ordered to show cause before this court on Friday, the seventeenth day of September nineteen hundred twenty six at ten o'clock in the forenoon or as soon thereafter as the matter can be heard, why James Haines and M. DeForest Soverel should not be continued, or why some other person should not be appointed receivers in their place; and proof of mailing of a copy of said order to the creditors and stockholders of said defendant corporation being now presented to the court and being duly filed; and it further appearing that the defendant corporation has filed an answer admitting all the allegations of the bill of complaint filed herein; it

is thereupon, on this 17th day of September, nineteen hundred twenty six,

ORDERED, ADJUDGED and DECREED that the said order to show cause be made absolute and that an injunction be issued pursuant to the prayer of said bill, according to the law and practice of this court and the statute in such case made and provided, restraining the defendant corporation and its officers and agents from exercising any of its privileges and franchises and from collecting or receiving any debts, or from paying out, selling, assigning or transferring any of its estate, moneys, etc., until this court shall otherwise order. And it is further

ORDERED that James Haines and M. DeForest Soverel be and they are hereby continued as receivers of the above named defendant corporation, with all the powers and authorities incident thereto, and conferred upon them by the order heretofore made appointing them receivers, and especially by the act entitled "An act concerning corporations (Revision of 1906)," and the supplements thereto and amendatory thereof.

Respectfully advised,

E. R. WALKER, C.

ALONZO CHURCH,
V. C.

Petition.

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,

Complainant,

and

FRANKLIN ARMS, INC., a corporation,

Defendant.

On Bill, etc.

1. The petition of James Haines and M. DeForest Soverel respectfully shows that they are the permanent receivers appointed in the above matter.

2. That the principal asset of the above named defendant corporation is a four story brick apartment house which is about sixty per cent. completed; that practically all of the creditors of the above named defendant corporation are mechanic lien claimants for material supplied and labor performed on said building.

3. Petitioners further show that the description of the property on which said building is being erected is as follows:

Premises situate in the Town of Bloomfield, Essex County, New Jersey,

BEGINNING at the intersection of the easterly line of Berkeley Place with the southerly line of Franklin Street; running thence southerly along the easterly line of Berke-

ley Place south twenty degrees thirty one minutes west one hundred thirty four and nine hundredths feet; thence south sixty nine degrees fifty eight minutes east one hundred seventy five feet; thence north twenty degrees thirty one minutes east one hundred eighty five and seventy eight hundredths feet to the southerly line of Franklin Street north eighty six degrees twenty three minutes west one hundred eighty two and eighty nine hundredths feet to the easterly line of Berkeley Place, the point or place of BEGINNING.

4. Petitioners further show that the only liens recorded against the above described property at the present time are two mortgages, the first in the sum of two hundred fifteen thousand dollars held by Rollin J. Francis, Trustee, with which there was recorded at the same time an agreement between the above named defendant corporation and G. L. Miller & Co., Inc., under which mortgage and agreement moneys were to be advanced to the above named defendant corporation from time to time as the erection of the above described building progressed.

The other mortgage is a mortgage of ~~sixty-five~~ ninety-five hundred dollars, second in priority to the mortgage just mentioned, held by the Hudson & Essex Construction Co.

5. Petitioners are informed and verily believe that said G. L. Miller & Company, Inc., has advanced certain moneys by virtue of said agreement and mortgage, some to the above named defendant corporation, some to the said G. L. Miller & Company, Inc., for services and expenses in con-

nection with said mortgage and agreement and some was retained to prepay the interest on said mortgage for one year in advance.

6. Petitioners are further informed that none of the creditors herein have executed any agreement, postponing their mechanic lien claims to the lien of any of the mortgages above mentioned.

7. Petitioners further allege and charge that the question of priorities as between the holders of the mortgages above mentioned and the various creditors holding mechanic lien claims, is in serious doubt and conflict and that there is also a very serious question with reference to how much if any money has been advanced on the first mortgage above mentioned; and there is also a serious question as to whether or not said defendant corporation is not entitled to a very substantial claim for damages as against said G. L. Miller & Company, Inc., for their failure to perform the agreement above mentioned which is part of the mortgage held by the said Rollin J. Francis, Trustee.

8. Petitioners further allege and charge that while said mortgage and agreement above referred to provided for the issuance of definitive bonds at the request of said G. L. Miller & Company, Inc., or said Rollin J. Francis, Trustee, they are informed and verily believe that no such bonds have been issued and that all moneys which have been advanced by the said G. L. Miller & Co., Inc., were advanced from the funds of the said G. L. Miller & Co., Inc., and that if the said G. L. Miller & Co., Inc., sold to any persons any interest in the mortgage above described, or bonds to be issued thereunder and in connection with any such sales, the only receipts which were given by the said G.

L. Miller & Company, Inc., to the purchasers of such an interest or of such bonds was a receipt which legally obligates the said G. L. Miller & Company, Inc., to the holders thereof and does not entitle said holders to any interest or claim in the mortgage and agreement herein referred to.

9. Petitioners further allege and charge that because of the incompleted state of the building above described the same is open to the elements and if allowed to remain in its present condition will deteriorate very rapidly and will cause substantial damage to the same.

10. Petitioners therefore pray that an order to show cause may be allowed them, directed to all stockholders, creditors, lien holders and mortgagees, etc., in this matter, why an order should not be made either permitting petitioners to complete the building described and in connection with said completion to borrow sufficient moneys to complete the said building on receiver's certificates, or to sell said building at public auction free and clear of all liens, in their present condition.

And petitioners will ever pray, etc.

JAMES HAINES,
M. DE FOREST SOVEREL,
Petitioners.
E. R. GLYNN,
Solicitor of Petitioners.

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

JAMES HAINES and M. DE FOREST SOVEREL, being duly sworn according to law, on their oaths, respectively say that they are the permanent re-

ceiver of Franklin Arms, Inc., a corporation, and the petitioners in the foregoing petition named; that the facts therein contained are true.

JAMES HAINES.
M. DE FOREST SOVEREL.

Sworn and subscribed to before me this 29th day of September, 1926.

E. M. JACOBUS,
Notary Public of N. J.

Order to Show Cause Why Receiver Should Not Be Permitted to Complete Building and Have Permission to Borrow on Receiver's Certificates, or Why Property Should Not Be Sold in Its Present Condition Free and Clear of the Lien of All Mortgages, Mechanic Lien Claims, etc.

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,

Complainant,

and

FRANKLIN ARMS, INC., a corporation,

Defendant.

On Bill, etc.

Upon reading and filing the duly verified petition of James Haines and M. DeForest Soverel, receivers herein, and on motion of E. R. McGlynn, their solicitor; it is, on this 6th day of October, nineteen hundred and twenty-six,

Order to Show Cause.

ORDERED that the creditors and stockholders of the above named defendant corporation, and the Hudson & Essex Construction Co., Rollin J. Francis, Trustee of G. L. Miller & Company, Inc., and Edward Maxson and Lawrence Berenson, receivers of said G. L. Miller & Company, Inc., show cause before the Chancellor, at the Chancery Chambers, 1060 Broad Street, Newark, on Tuesday, the 19th day of October, nineteen hundred twenty-six at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, why an order should not be made permitting the receivers herein to complete the building erected on the property on the southeast corner of Berkeley Place and Franklin Street, Bloomfield, New Jersey, and for that purpose to make such contracts and agreements, etc., as may be necessary to accomplish said purpose, and why said receivers should not be permitted to borrow a sum not exceeding one hundred thousand dollars for the purpose of completing said building, said receivers' certificates to be a lien on all the assets of the above named defendant corporation, first in priority and prior to all existing mortgages, mechanic lien claims, etc.; or why said receivers should not be permitted to sell the premises on the southeast corner of Berkeley Place and Franklin Street, Bloomfield, as described in the petition filed herewith, together with the buildings thereon erected, in their present condition, free and clear of the mortgage lien of the Hudson & Essex Construction Co. in the sum of ninety-five hundred dollars, and free and clear of the lien of the mortgage held by Rollin J. Francis, Trustee, dated May 15th, 1926, in the sum of two hundred fifteen thousand dollars, and the lien of agreement dated May 15th, 1926, between the above named defendant

corporation and G. L. Miller & Company, Inc., and free and clear of the lien if any, of all creditors who have supplied materials and performed labor in and about said building and who have or can file mechanic lien claims under and by virtue of the statute in the State of New Jersey, in such case made and provided. And it is further

ORDERED that a copy of this order or a notice containing the provisions thereof, be sent by mail with postage prepaid to all the creditors and stockholders of the above named defendant corporation, at their last known post office address, and that a copy of the petition in the within matter and of this order to show cause be served upon said Hudson & Essex Construction Co., Rollin J. Francis, Trustee and the said G. L. Miller & Company, Inc., or its receiver or receivers, mailing the same by registered mail with postage prepaid thereon to the last known address of each of the above named, within three days from the date hereof.

E. R. WALKER, C.

Respectfully advised,
ALONZO CHURCH, V. C.

Order to Show Cause Why Receiver Should Not Be Permitted to Complete Building and Have Permission to Borrow on Receiver's Certificates, or Why Property Should Not Be Sold in Its Present Condition Free and Clear of the Lien of All Mortgages, Mechanic Lien Claims, etc.

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,
Complainant,

and

FRANKLIN ARMS, INC., a corporation,
Defendant.

On Bill, etc.

Upon reading and filing the duly verified petition of James Haines and M. DeForest Soverel, receivers herein, and on motion of E. R. McGlynn, their solicitor; it is, on this 6th day of October, 1926,

ORDERED that all the creditors and stockholders of the above named defendant corporation, and the Hudson & Essex Construction Co., Rollin J. Francis, Trustee of G. L. Miller & Company, Inc. and Edward Maxson and Lawrence Berenson, receivers of said G. L. Miller & Company, Inc. show cause before the Chancellor, at the Chancery Chambers, 1060 Broad Street, Newark, on Tuesday, the 19th day of October, 1926, at ten o'clock in the forenoon or as soon thereafter as counsel can be

heard, why an order should not be made permitting the receivers herein to complete the building erected on the property on the southeast corner of Berkeley Place and Franklin Street, Bloomfield, N. J., and for that purpose to make such contracts and agreements, etc., as may be necessary to accomplish said purpose, and why said receivers should not be permitted to borrow a sum not exceeding one hundred thousand dollars for the purpose of completing said building, said receivers' certificates to be a lien on all the assets of the above named defendant corporation, first in priority and prior to all existing mortgages, mechanic lien claims, etc.; or why said receivers should not be permitted to sell the premises on the southeast corner of Berkeley Place and Franklin Street, Bloomfield, as described in the petition filed herewith, together with the buildings thereon erected, in their present condition, free and clear of the mortgage lien of the Hudson & Essex Construction Co. in the sum of ninety-five hundred dollars, and free and clear of the lien of the mortgage held by Rollin J. Francis, Trustee, dated May 15th, 1926, in the sum of two hundred fifteen thousand dollars, and the lien of agreement dated May 15th, 1926, between the above named defendant corporation and G. L. Miller & Company, Inc., and free and clear of the lien if any, of all creditors who have supplied materials and performed labor in and about said building and who have or can file mechanic lien claims under and by virtue of the statute in the State of New Jersey, in such case made and provided. And it is further

ORDERED that a copy of this order or a notice containing the provisions thereof, be sent by mail with postage prepaid to all the creditors and stock-

holders of the above named defendant corporation, at their last known post office address, and that a copy of the petition in the within matter and of this order to show cause be served upon said Hudson & Essex Construction Co., Rollin J. Francis, Trustee and the said G. L. Miller & Co., Inc., or its receiver or receivers, mailing the same by registered mail with postage prepaid thereon to the last known address of each of the above named, within three days from the date hereof.

E. R. WALKER, C.

Respectfully advised
ALONZO CHURCH, V. C.

Order Directing Receivers to Sell Real Estate.

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,
Complainant,

and

FRANKLIN ARMS, INC., a corporation,
Defendant.

On Bill, etc.

This matter having been opened to the Court by E. R. McGlynn of counsel with James Haines and M. DeForest Soverel, Receivers of the above named defendant company, and proof having been filed of the service of the order to show cause, and petition as directed in said order on creditors and stockholders, including Lawrence Berenson, Re-

ceiver of G. L. Miller & Co., Inc., and the Fidelity and Deposit Company of Maryland, and no one appearing in their behalf, and Albert C. Wall having appeared on behalf of Rollin J. Francis, Trustee, and Merritt Lane having appeared on behalf of Edward Maxson as Receiver of G. L. Miller & Co., Inc., and Gross & Gross having appeared on behalf of the Hudson & Essex Building & Construction Co., and Weinberger & Weinberger having appeared on behalf of a Committee of ad interim certificate holders, and it having been represented to the Court that the said Fidelity and Deposit Company of Maryland had been called upon to complete the building being erected upon the land described in the petition filed herein by the receivers in accordance with the terms of the bond given by the said Fidelity and Deposit Company of Maryland, and it appearing that the said Fidelity and Deposit Company of Maryland refused to proceed with the erection of said building and denied all liability under its said bond, and the Court having considered the argument of counsel and the answering affidavits filed by some of the above named parties, and being of the opinion that it is necessary that the lands and premises, and the appurtenances in and about the same, belonging to the above named defendant company, and more particularly mentioned and described in the petition for leave to sell, should be sold, and it appearing that at the time of the appointment of receivers herein said property was encumbered with mortgages and other liens, the legality of which is brought into question, and it appearing that the property is of a character which will materially deteriorate in value pending litigation, it is on the 9th day of November, 1926, on motion

of E. R. McGlynn of counsel with said receivers as aforesaid,

ORDERED, ADJUDGED AND DECREED that James Haines and M. DeForest Soverel, as receivers of the Franklin Arms, Inc., be and they are hereby authorized, empowered and directed to sell said lands mentioned in said petition, and therein described as follows, to-wit.:

Premises situate in the Town of Bloomfield, Essex County, New Jersey,

BEGINNING at the intersection of the easterly line of Berkeley Place with the southerly line of Franklin Street; running thence southerly along the easterly line of Berkeley Place south twenty degrees thirty-one minutes west one hundred thirty-four and nine hundredths feet; thence south sixty-nine degrees fifty-eight minutes east one hundred seventy-five feet; thence north twenty degrees thirty-one minutes east one hundred eighty-five and seventy-eight hundredths feet to the southerly line of Franklin Street north eighty-six degrees twenty-three minutes west one hundred eighty-two and eighty-nine hundredths feet to the easterly line of Berkeley Place, the point or place of BEGINNING.

Together with any and all buildings, improvements and loose material now standing or placed upon said land or any part thereof, fixtures, fittings, equipment and property used or to be used in the operation of said premises or any part thereof, and it is further

ORDERED that the said property shall be sold free

and clear of all liens and encumbrances and mechanics' liens now filed or hereafter filed, and especially free and clear of the liens, claims and rights of the following named parties, to-wit.:

(a) Rollin J. Francis, as Trustee under a trust mortgage by the defendant corporation in the sum of $215,000.00 dated May 15th, 1926, and recorded in the Register's office of the County of Essex in Book U 57 of Mortgages at page 361.

(b) Also the lien of mortgage held by the Hudson and Essex Building & Construction Co., dated April 9, 1926, originally in the sum of $15,000.00, on which there is a balance due of $9,500.00; said mortgage having been postponed to the mortgage last mentioned by postponement dated June 3rd, 1926, recorded in book 88 of Postponement of Mortgages at page 315.

(c) Also free and clear of the right and claim, if any, of G. L. Miller & Co., Inc., or its receiver or receivers.

(d) Also free and clear of mechanics' lien claims, whether now filed or hereafter filed, for materials furnished or labor performed on the above described premises, and it is further

ORDERED that the receivers shall advertise said sale in accordance with the statute in such case made and provided, and it is further

ORDERED that the successful bidder at said sale shall sign an acknowledgment of his bid in writing and shall be required to pay ten per cent. of the purchase price, the balance to be paid within thirty days after confirmation of said sale unless the time is extended by said receivers, and it is further

Order Directing Receivers to Sell.

ORDERED that said sale shall be made subject to confirmation by this Court and the receivers herein shall within three days from the date of said sale file a report of sale to this Court and obtain an order to show cause why said sale should not be confirmed, a copy of which order to show cause shall be mailed to all creditors and stockholders of the defendant corporation at least five days prior to the date fixed for the hearing as to the confirmation of such sale, and it is further

ORDERED that this order shall be without prejudice to the rights of the defendant corporation, to the rights of the receivers or any creditor of said defendant corporation as against the Fidelity & Deposit Company of Maryland, and that a true but uncertified copy of this order shall be served within three days by registered mail on the Fidelity and Deposit Company of Maryland, and that said company may apply on twenty-four hours notice to the receivers of the defendant corporation for a modification or a revision of any of the terms of this order, and it is further

ORDERED that the sale of the within described property by said receivers shall be upon the condition that the receivers or this Court will have the right to reject any and all bids, and it is further

ORDERED that the amount due the Hudson & Essex Building & Construction Co., on its mortgage herein recited, the sum of $9,500.00 with accrued interest, shall be paid in full from the proceeds of said sale, without any deduction for administration expenses or costs of said sale.

E. R. WALKER,
C.

Respectfully advised.
ALONZO CHURCH,
Vice Chancellor.

Order Directing Receivers to Sell Real Estate.

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,
Complainant,

and

FRANKLIN ARMS, INC., a corporation,
Defendant.

} On Bill, etc.

This matter have been opened to the court by E. R. McGlynn, of counsel with James Haines and M. DeForest Soverel, receivers of the above named defendant company, and proof having been filed of the service of the order to show cause, and petition, as directed in said order, on creditors and stockholders, including Lawrence Berenson, receiver or trustee in bankruptcy of G. L. Miller & Co., Inc., and the Fidelity and Deposit Company of Maryland; and no one appearing in their behalf, and Albert C. Wall having appeared on behalf of Rollin J. Francis, Trustee, and Merritt Lane having appeared on behalf of Edward Maxson as receiver of G. L. Miller & Co. Inc., and Gross & Gross having appeared on behalf of the Hudson & Essex Building and Construction Co., and Weinberger and Weinberger having appeared on behalf of a Committee of ad interim certificate holders; and it having been represented to the court that the said Fidelity and Deposit Company of Maryland had been called upon to complete the building be-

ing erected upon the land described in the petition filed herein by the receivers in accordance with the terms of the bond given by the said Fidelity and Deposit Company of Maryland; and it appearing that the said Fidelity and Deposit Company of Maryland refused to proceed with the erection of said building and denied all liability under its said bond; and it further appearing that said Fidelity and Deposit Company of Maryland has filed with the receivers herein a contingent proof of claim for any damages it may sustain or be required to pay in the future by virtue of its bond heretofore given to the said Rollin J. Francis, Trustee and G. L. Miller & Co., Inc.; and the court having considered the argument of counsel and the answering affidavits filed by some of the above named parties, and being of the opinion that it is necessary that the lands and premises, and the appurtenances in and about the same, belonging to the above named defendant company, and more particularly mentioned and described in the petition for leave to sell, should be sold; and it appearing that at the time of the appointment of receivers herein said property was encumbered with mortgages and other liens, the legality of which is brought into question; and it appearing that the property is of a character which will materially deteriorate in value pending litigation; it is, on this 16th day of November, nineteen hundred twenty-six, on motion of E. R. McGlynn, of counsel with said receivers as aforesaid,

ORDERED, ADJUDGED AND DECREED that James Haines and M. DeForest Soveral, as receivers of Franklin Arms, Inc. be and they are hereby authorized, empowered and directed to sell said lands

mentioned in said petition, and therein described as follows, to wit;

Premises in the Town of Bloomfield, Essex County, New Jersey:

> BEGINNING at the intersection of the easterly line of Berkeley Place with the southerly line of Franklin Street; running thence southerly along the easterly line of Berkeley Place south twenty degrees thirty one minutes west one hundred thirty four and nine hundredths feet; thence south sixty nine degrees fifty eight minutes east one hundred seventy five feet; thence north twenty degrees thirty one minutes east one hundred eighty five and seventy eight hundredths feet to the southerly line of Franklin Street, thence along the southerly line of Franklin Street north eighty six degrees twenty three minutes west one hundred eighty two and eighty nine hundredths feet to the easterly line of Berkeley Place, the point or place of BEGINNING.

Together with any and all buildings, improvements and loose material now standing or placed upon said land or any part thereof, fixtures, fittings, equipment and property used or to be used in the operation of said premises or any part thereof, and it is further

ORDERED that the said property shall be sold free and clear of all liens and encumbrances and mechanic liens now filed or hereafter filed, and especially free and clear of the liens, claims and rights of the following named parties, to wit:

a Rollin J. Francis as trustee under a trust mortgage by the defendant corporation in the sum of $215,000. dated May 15th, 1926, and recorded in the Register's office of the County of Essex in Book U 57 of Mortgages at page 361;

b Hudson & Essex Building & Construction Co., mortgage dated April 9th, 1926, originally in the sum of $15,000.00, on which there is a balance due of $9,500.00; said mortgage having been postponed to the mortgage last mentioned by postponement dated June 3rd, 1926; recorded in Book 88 of Postponements of Mortgages at page 315;

c G. L. Miller & Co., Inc., or its receiver or receivers, trustee or trustees in bankruptcy;

d Also free and clear of mechanic lien claims, whether now filed or hereafter filed, for materials furnished or labor performed on the above described premises; And it is further

ORDERED that the receivers shall advertise said sale in accordance with the statute in such case made and provided; and it is further

ORDERED that the receivers at said sale shall not take any bid for a sum less than one hundred ten thousand dollars ($110,000.00); and it is further

ORDERED that the successful bidder at said sale shall sign an acknowledgment of his bid in writing and shall be required to pay ten per cent. of the purchase price, the balance to be paid within thirty days after confirmation of said sale unless the time is extended by said receivers; and it is further

Order Directing Receivers to Sell.

ORDERED that said sale shall be made subject to confirmation by this court and the receivers herein shall, within three days from the date of said sale, file a report of sale in this court and obtain an order to show cause why said sale should not be confirmed, a copy of which order to show cause shall be mailed to all known creditors and stockholders of the defendant corporation at least five days prior to the date fixed for the hearing as to the confirmation of such sale; and it is further

ORDERED that this order shall be without prejudice to the rights of the defendant corporation, to the rights of the receivers or any creditor of said defendant corporation as against the Fidelity & Deposit Company of Maryland, and that a true but uncertified copy of this order shall be served within three days by registered mail on the Fidelity and Deposit Company of Maryland, and that said company may apply on twenty four hours' notice to the receivers of the defendant corporation for a modification or a revision of any of the terms of this order; and it is further

ORDERED that the sale of the within described property by said receivers shall be upon the condition that the receivers or this court will have the right to reject any and all bids; and it is further

ORDERED that the claim of the Hudson & Essex Building & Construction Co. on its mortgage herein recited, is recognized as a valid and subsisting lien to the extent of ninety five hundred dollars with accrued interest, and that said lien shall be subsequent in priority to such amount if any, which this court may hereafter determine is due on the first mortgage held by Rollin J. Francis, Trustee, and prior to such amount as this court may here-

after determine is due to the holder or holders of any mechanic lien claim against the within described property for work done and materials furnished.

E. R. WALKER,
C.

Respectfully advised
ALONZO CHURCH,
V. C.

Report of Receivers of the Sale of Real Estate and Petition in Connection with Private Bids for Same.

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,
Complainant,

and

FRANKLIN ARMS, INC., a corporation,
Defendant.

} On Bill, etc.

The report of M. DeForest Soverel and James Haines respectfully shows that on Monday, December 20, 1926, they offered for sale the real estate belonging to the above named defendant corporation, located on the Southeast corner of Berkeley Place and Franklin Street, Bloomfield, New Jersey, first having advertised the same in accordance with the statute in such case made and provided. They further report that they complied in all respects with the details of the order of November 16, 1926, made in this matter with respect to the sale of said real estate, and further report that although said sale was very largely attended,

they were unable to obtain any bid for the upset price, set in the order just referred to, to wit, $110,000.00.

They further report that only one bid was made to them at said sale, and that that was made by a committee representing all Mechanic's Lien creditors interested in the real estate being offered for sale, which committee bid to your Receivers the sum of $75,000.00 for the property described in the order of November 16, 1926, to which reference has been made.

The Receivers further report that at the sale held on November 20, 1926, the same committee of Mechanic's Lien creditors stated to your Receivers that they would make a bid of $110,000.00, but not in accordance with the conditions of sale announced by your Receivers at the time of sale. Subsequent to said sale, the Receivers received a bid from the committee of Mechanic's Lien creditors, a true copy of which is annexed hereto and made a part hereof.

Receivers further report that on December 23, 1926, they received another private bid for said property in the sum of $80,000.00, a true copy of which is annexed hereto and made a part hereof.

Receivers therefore respectfully pray that an order to show cause may be granted, directing the creditors and stockholders of above corporation to show cause why the proceedings hereinbefore instituted for the public sale of property should not be vacated, and why either one of the bids received by the petitioners, up to this time, should not be accepted or for any other relief to which Receivers may be entitled in the prmisees.

M. De Forest Soverel,
Receiver.

James Haines,
Receiver.

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

M. DeForest Soverel and James Haines, being duly sworn according to law upon their oaths, depose and say that they are the Receivers herein named; that they are familiar with all the facts set forth in the foregoing petition and report, and that the same are true to the best of their knowledge and belief.

Sworn and subscribed to before me this day of December, nineteen hundred and twenty-six.

JAMES P. MYLOD
Counsellor at Law
738 Broad Street
Newark, N. J.

Dec. 21, 1926

Messrs. M. DeForest Soverel, and
James Haines,
Receivers of Franklin Arms, Inc.

Gentlemen:—

The undersigned, representing a committee composed of all the mechanics lien creditors on the Franklin Arms Apartment house with lien claims aggregating approximately $65,000.00, do hereby offer you for the real estate and buildings as described in your recent advertisement, the sum of $110,000, payable in the following manner:

$5,000.00 upon the acceptance of this bid,

45,000.00 upon confirmation by the Court of Chancery and the proper orders empowering the Receivers to convey title to the said property free and clear of all encumbrances.

60,000.00 by the assignment or release of the mechanics lien claims against the Franklin Arms Corporation on the property hereby described, it being understood and agreed that this assignment or release of mechanics lien claims shall act as security to the Receivers for the payment to said Receivers of any and all amounts which may hereafter, by proper proceedings, be directed by the Court of Chancery of New Jersey, to be paid to mortgagees, lienors, or creditors, whose claims are ascertained to be prior liens to the mechanics lien claims, in excess of the $50,000.00 in cash described in this offer.

Very truly yours,

JAMES P. MYLOD,
Attorney for Committee
Mechanics' Lien Creditors.

Newark, N. J., Dec. 23rd, 1926

James Haines and M. DeForest Soverel,
Receivers of Franklin Arms, Inc.
c/o E. R. McGlynn,
810 Broad St.,
Newark, N. J.

Gentlemen:

I hereby offer you the sum of Eighty Thousand

($80,000.00) dollars for the partially completed building, known as the Franklin Arms Apartment at the corner of Berkeley Place and Franklin Street, in the Town of Bloomfield.

Respectfully submitted

(Signed) MORRIS TZESES
Morris Tzeses

Order to Show Cause Why Proceedings in Connection With Public Real Estate Should Not be Vacated, and Why Either One of Private Bids Should Not Be Accepted.

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,
Complainant,

and

FRANKLIN ARMS, INC., a corporation,
Defendant.

} On Bill, etc.

Upon reading and filing the report of the Receivers herein, with reference to the public sale of real estate of the above named corporation, and their report of private bids received at and since said sale, it is on this twenty-ninth day of December, nineteen hundred and twenty-six, on motion of E. R. McGlynn, Solicitor of and of Counsel with Receivers, ORDERED, that the creditors and stockholders of the above named corporation and Ro-

land J. Francis, Trustee of G. L. Miller & Co., Inc., Hudson and Essex Construction Company, Lawrence Berenson, Trustee in Bankruptcy of G. L. Miller & Co. and the Fidelity & Deposit Company of Maryland, show cause before the Chancellor, at the Chancery Chambers, 1060 Broad Street, Newark, New Jersey, on Tuesday, the 11th day of January, nineteen hundred and twenty-seven, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be made vacating the proceedings heretofore had for the sale of the real estate located on the southeast corner of Berkeley Place and Franklin Street, Bloomfield, New Jersey, and to further show cause at the same time and place, why the Receivers herein, should not be authorized and directed to accept any of the private bids received by them for said real estate, namely, one bid of $75,000.00 in cash, and the other bid of $110,000.00 conditioned on $50,000.00 in cash being paid to said Receivers and the payment of the balance to be secured by an assignment or release of Mechanic's Lien claims, and a bid of $80,000.00 in cash or any other bid which may be made. And it is further

ORDERED, that a copy of this order be sent by mail with postage prepaid to all the creditors and stockholders of the above named defendant corporation, at their last known post office addresses, and that a copy of the petition and order to show cause be served upon the Hudson and Essex Construction Company, Lawrence Berenson, Trustee in Bankruptcy, by mailing same by registered mail with postage prepaid thereon, at the last known address of each of the above

named, at least five (5) days prior to the return date named herein.

E. R. WALKER,
C.

Respectfully advised,
ALONZO CHURCH, V. C.

Order Modifying Proceedings in Connection With the Public Sale of Real Estate and Directing Receivers to Accept Private Bid for Real Estate.

IN CHANCERY OF NEW JERSEY.

Between
ALBERT & KERNAHAN, INC., a corporation,
Complainant,
and
FRANKLIN ARMS, INC., a corporation,
Defendant.
} On Bill, etc.

It appearing to the Court that the Receivers herein have reported their inability to sell certain real estate at public sale in accordance with the terms of the order directing them to do so; and

It appearing to the Court that an order to show cause was heretofore issued in this matter, dated December twenty-ninth, nineteen hundred twenty-six; and

It further appearing to the Court that creditors and stockholders of the above named corporation, including Fidelity & Deposit Co. of Maryland,

were served with a copy of said order to show cause and the petition upon which the same was issued, as directed in the same; and

It further appearing that said order to show cause came on for hearing and in the presence of E. R. McGlynn, solicitor for and of counsel with the Receivers herein, and Weinberger & Weinberger, Solicitors for a committee representing the bondholders under the mortgage of G. L. Miller & Co. or Rollin J. Francis, Trustee, who objected to the entry of this order; and

It further appearing that it is for the best interest of the creditors and stockholders herein that the bid of one hundred ten thousand dollars made by a committee of mechanic lien creditors as described in the petition filed herein, should be accepted; and

It further appearing that said bid was assigned by James P. Mylod who made the same on behalf of the creditors to the Berkeley Court Company, and filed herein; it is, on this 17th day of February, nineteen hundred twenty-seven,

ORDERED that the proceedings heretofore had with reference to the Public sale of certain real estate owned by the above named defendant corporation, should be and the same are hereby ratified and confirmed in all respects except the method of sale which is changed from public sale to a sale on private bid (inasmuch as the Receivers herein were unable to obtain any bid in accordance with the terms of an order heretofore made directing the public sale of said real estate). And it is further

ORDERED that the receivers herein be and they

are hereby authorized and directed and empowered to accept the private bid of one hundren ten thousand dollars for the following described property:

Premises in the Town of Bloomfield, Essex County, New Jersey:

BEGINNING at the intersection of the easterly line of Berkeley Place with the southerly line of Franklin Street; running thence southerly along the easterly line of Berkeley Place south twenty degrees thirty one minutes west one hundred thirty four and nine hundredths feet; thence south sixty nine degrees fifty eight minutes east one hundred seventy five feet; thence north twenty degrees thirty one minutes east one hundred eighty five and seventy eight hundredths feet to the southerly line of Franklin Street; thence along the southerly line of Franklin Street; north eighty six degrees twenty three minutes west one hundred eighty two and eighty nine hundredths feet to the easterly line of Berkeley Place, the point or place of BEGINNING.

Together with any and all buildings, improvements and loose material now standing or placed upon said land or any part thereof, fixtures, fitting, equipment and property used or to be used in the operation of said premises or any part thereof.

And it is further

ORDERED that the said receivers shall accept the payment of said bid in the manner and form as described in the private bid made to said Receivers,

namely, fifty thousand dollars in cash and sixty thousand dollars by the assignment or release of mechanic lien claims against the property above described, said assignments or release of mechanic lien claims being made to the receivers as security for the payment to them of any and all amounts which may hereafter, by proper proceedings herein, be directed by this court to be paid to mortgagees, lienors or creditors whose claims are in said proceedings ascertained and found to be prior liens to the mechanic lien claims against the property herein described, in excess of fifty thousand dollars directed by this order to be paid to said receivers. And it is further

ORDERED that the said receivers shall procure on agreement in writing to be signed by each of the creditors participating in said bid, that said creditor will pay to said receivers any sum hereafter found by this court to be a lien prior to said mechanic lien claims as described in the preceding paragraph of this order. And it is further

ORDERED that said receivers, upon the payment to them of said fifty thousand dollars in cash and the delivery to them of the agreement signed by the creditors as herein described, shall be authorized, directed and empowered to convey the property herein described to the Berkeley Court Company, a corporation, to which the bid which the receivers are hereby ordered to accept, was assigned. And it is further

ORDERED that said conveyance by said receivers shall be free and clear from all claims, encumbrances and mechanic lien claims now filed or hereafter filed and especially free and clear of the liens, claims and rights of the following named parties:

A. Rollin J. Francis as Trustee under a trust mortgage by the defendant corporation in the sum of $215,000.00 dated May 15, 1926, and recorded in the Register's office of Essex County in Book U 57 of Mortgages at page 361;

B. Hudson & Essex Building and Construction Co. mortgage dated April 9, 1926, originally in the sum of $15,000.00 on which there is a balance due of $9,500; said mortgage having been postponed to the mortgage last mentioned by postponement dated June 3, 1926, recorded in Book 88 of Postponements of Mortgages at page 315;

C. G. L. Miller Co., Inc., or its receiver or receivers, trustee or trustees in bankruptcy;

D. Also free and clear of mechanic lien claims, whether now filed or hereafter filed, for materials furnished or labor performed on the above described premises.

And it is further

ORDERED that this conveyance shall be without prejudice to the rights of the defendant corporation or of said receivers, or of any creditor of said defendant corporation as against the Fidelity and Deposit Co. of Maryland. And it is further

ORDERED that this order be entered *nunc pro tunc* as of January 11th, nineteen hundred twenty-seven.

E. R. WALKER,
C.

Respectfully advised
ALONZO CHURCH,
V. C.

Rule to Show Cause.

IN CHANCERY OF NEW JERSEY.

Between
ALBERT & KERNAHAN, INC., a corporation,
Complainant,

and

FRANKLIN ARMS, INC., a corporation,
Defendant.

This cause being opened to the Court by Weinberger & Weinberger, Esqs., solicitors of and of counsel with Frank Silver, individually and as a member of the Committee of interim receipt holders, and in behalf of those similarly situated, and it appearing to the Court upon reading the papers on file in this cause, that there is sufficient merit in the application made for the substitution of the Service Trust Company of New Jersey, as trustee, to take the place and stead of Rollin J. Francis, as trustee;

It is, therefore, on this 21st day of January, 1927, ORDERED that M. DeForest Soverel and James Haines, Receivers of Franklin Arms, Inc., Edward Maxson, Receiver of G. L. Miller & Co., Inc., Hudson & Essex Building & Construction Co., contractors, Rollin J. Francis, trustee, Fidelity & Deposit Company of Maryland, a corporation, show cause before the Chancellor, on the 25th day of January, 1927, at the Chancery Chambers in the City of Newark, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order

should not be made substituting Service Trust Company of New Jersey, as trustee, for Rollin J. Francis, trustee, to act as such trustee in all respects as the said Rollin J. Francis, trustee, might or could do under and by virtue of said trusteeship, and enjoy all of the rights and privileges accorded in the various agreements made or related to or in anywise connected with Franklin Arms, Inc., and property described in the mortgage hereinafter referred to, made by the Franklin Arms, Inc., a corporation duly organized and existing under the laws of the State of New Jersey to Rollin J. Francis, as such trustee, duly recorded in the Register's office of Essex County, and why the said Service Trust Company of New Jersey, should not be substituted as a party defendant in the above entitled cause, in the place and stead of Rollin J. Francis as such trustee, and why Weinberger & Weinberger should not be substituted as attorneys in behalf of the said substituted trustee.

It is further ORDERED that uncertified copy of this order to show cause be served upon each of the parties hereinbefore named, or their solicitors, within two days from the date hereof, which said copies may, however, be certified as true copies by the solicitors of the said Frank Silver.

E. R. WALKER,
C.

Respectfully advised,
ALONZO CHURCH, V. C.

A true copy.

WEINBERGER & WEINBERGER,
Solicitors of Frank Silver,
Individually, &c.

Order.

IN CHANCERY OF NEW JERSEY.

Between
ALBERT & KERNAHAN, INC., a corporation,
Complainant,
and
FRANKLIN ARMS, INC., a corporation,
Defendant.
} On Bill, etc.

The order to show cause heretofore made herein coming on to be heard in the presence of Harry H. Weinberger, Esq., of counsel with Frank Silver, E. R. McGlynn, Esq., of counsel with M. DeForest Soverel and James Haines, Receivers of Franklin Arms, Inc., Merritt Lane, Esq., of counsel with Edward Maxson, Receiver of G. L. Miller & Co., Inc., Gross & Gross, Esqs., of counsel with Hudson & Essex Building & Construction Co., contractors; Albert G. Wall, Esq., of counsel with Rollin J. Francis, trustee, and Charles E. Hendrickson, Esq., of counsel with Fidelity & Deposit Company of Maryland, a corporation; and it appearing that said Rollin J. Francis, Trustee, desires to resign on being assured that his solicitors and counsel shall be paid and that he desires no compensation for his own services as trustee; and it further appearing that Wall, Haight, Carey & Hartpence, solicitors for said Trustee, have this day handed to the Court their consent to a blank order of substitution; and no one objecting to the resignation of said Trustee, and the compensation of his solici-

tors in the sum of One thousand dollars ($1000.00) to cover their services and the services of Messrs. Stoddard and Mark, Counsellors-at-Law.

It is, on this 1st day of February, 1927, ORDERED that SERVICE TRUST COMPANY OF NEW JERSEY be and is hereby substituted in the place and stead of Rollin J. Francis as Trustee under the mortgage or deed of trust dated May 15th, 1926, made by Franklin Arms, Inc., to said Francis as Trustee and recorded in the office of the Register of Essex County in Libert W-57 of Mortgages at page 364; and said Service Trust Company of New Jersey is hereby substituted as a party defendant in the above entitled cause in the place of Rollin J. Francis as said trustee.

It is further ORDERED that the compensation of Messrs. Wail, Haight, Carey & Hartpence in full of their services as solicitors and of counsel with said Trustee, including and in full of legal services of Messrs. Stoddard & Mark, of the New York Bar, be fixed at the sum of One thousand dollars ($1,000.00) said fees to be paid to the said solicitors as the Court may direct out of any funds which may come into the hands of the Receiver herein, and said fees shall constitute a lien upon said funds first in order after the lien of the receivers' fees herein.

It is further ORDERED that a copy of this order (which need not be certified) be served upon the persons interested within three days from the date hereof to the end that they may on the 8th day of February, 1927, at the Chancery Chambers in the City of Newark, at ten o'clock in the forenoon,

show good cause before the Chancellor to the contrary, if may there be.

EDWIN ROBERT WALKER,
C.

Respectfully advised.
ALONZO CHURCH,
V. C.

Petition of Receivers for Order of Reference to Special Master on Question of Priorities in Connection with Mortgages and Lien Claims.

IN CHANCERY OF NEW JERSEY.

Between
ALBERT & KERNAHAN, INC.,
Complainant,
and
FRANKLIN ARMS, INC.,
Defendant.
} On Bill, etc.

The petition of James Haines and M. DeForest Soverel respectfully shows that:

1. They are receivers duly appointed in the above entitled matter and that they heretofore sold a certain piece of real estate belonging to the defendant corporation under and by virtue of the terms of an order of this court, whereby the question of priorities as between alleged mortgages, mechanic lien claims, etc., was to be determined after the sale of said real estate, and the proceeds of the sale of said real estate are to be held subject to the same claims as the real estate was before said sale.

2. Petitioners further show that the real estate sold by them as aforesaid was encumbered by an alleged first mortgage in the sum of two hundred fifteen thousand dollars held by Roland J. Francis, Trustee, who has since resigned and by an order entered herein, the Service Trust Co. of Passaic has been substituted as trustee under said alleged mortgage.

3. Petitioners further show that said property is also encumbered by a second mortgage in the sum of ninety-five hundred dollars held by the Hudson & Essex Building Construction Company.

4. Petitioners further show that said property at the time of sale had a partially erected building thereon, and that certain mechanic lien claims had been filed by material supply people and contractors, a complete list being as follows:

Albert & Kernahan, Inc.,
Hudson Structural Iron Works Co.,
Juliano Construction Co.,
Joseph E. Amorose,
Henry D. Dietz,
Tuorto Cut Stone Co.,
Concrete Steel Co.,
Orange Hardware Co.

5. Petitioners are further informed and verily believe that none of said material supply companies or contractors executed a postponement of lien, postponing their mechanic lien claims to either of the mortgages above set forth, and that the holders of said mechanic lien claims claim priority over the lien of said mortgages.

6. Petitioners further show that they are desirous of making the Fidelity and Deposit Co. of

Maryland a party to these proceedings because of the fact that they executed a completion bond covering the building erected on the property herein described.

7. Petitioners further show that said real estate was sold by them for the sum of one hundred ten thousand dollars, and that they are desirous of having the question of priorities between the above named parties decided so that distribution can be made of the proceeds of said sale.

Petitioners therefore pray that the question of the amount due on the mortgages, mechanic lien claims, etc., described herein, and the question of priorities as between said several claimants, be referred by this Honorable Court to a Special Master who shall be authorized to take testimony of said several claims and report his findings to this court.

And petitioners will ever pray, etc.

JAMES HAINES,
M. DEFOREST SOVEREL,
Petitioners.

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

JAMES HAINES and M. DEFOREST SOVEREL, being duly sworn according to law, on their oaths depose and say, respectively; that they are the receivers of Franklin Arms, Inc., and the petitioners in the foregoing petition named; that the facts therein set forth are true, and those facts alleged

to be upon information and belief, they believe to be true.

JAMES HAINES,
M. DEFOREST SOVEREL.

Sworn and subscribed to before me this 23rd day of May, 1927.

DREXEL,
Notary Public of N. J.

Order to Show Cause.

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,
Complainant,

and

FRANKLIN ARMS, INC., a corporation,
Defendant.

On Bill, etc.

Upon reading and filing the duly verified petition of James Haines and M. DeForest Soverel, receivers herein, and on motion of Stein, McGlynn & Hannoch, their solicitors; it is, on this 25th day of May, nineteen hundred twenty seven,

ORDERED that Hudson & Essex Building Construction Company, Fidelity & Deposit Co. of Maryland, Albert & Kernahan, Inc., Hudson Structural Iron Works Co., Juliano Construction Co., Joseph E. Amorose, Henry D. Dietz and Tuorto Cut Stone Co., and Concrete Steel Co. and Orange Hardware Co., show cause before the Chancellor, at the Chancery

Order to Show Cause.

Chambers, 1060 Broad Street, Newark, on Tuesday, the 31st day of May, nineteen hundred twenty seven at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, why an order should not be made, referring to one of the Special Masters of the Court of Chancery the question of the amount due if anything on the mortgage made by the defendant herein to Roland J. Francis, Trustee, in the nominal sum of two hundred fifteen thousand dollars, and what if anything is due to the Hudson & Essex Building Construction Company on its alleged mortgage of ninety five hundred dollars, and the amounts due if any, on the mechanics lien claims of Albert & Kernahan, Inc., Hudson Structural Iron Works Co., Juliano Construction Co., Joseph E. Amorose, Henry D. Dietz and Tuorto Cut Stone Co., and Concrete Steel Co. and Orange Hardware Co., and also to determine the question of priorities as between said several mortgages and mechanic lien claims, and to return the evidence so taken by him together with his findings thereon, with all convenient speed. And it is further

ORDERED that a copy of this order to show cause, certified to by the solicitors of the petitioner, be mailed to each of the above named, and the Fidelity & Deposit Company of Maryland, within ten days from the date hereof.

E. R. WALKER,
C.

Respectfully advised,
ALONZO CHURCH,
V. C.

Order of Reference to Special Master in Connection with Amounts Due on Mortgages and Other Claims and Order of Priority.

(Filed May 31, 1927.)

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,

Complainant,

and

FRANKLIN ARMS, INC., a corporation,

Defendant.

On Bill, etc.

It appearing to the court that an order to show cause was heretofore issued on a petition of the receivers herein; and

It further appearing that proof of the service of copies of said order to show cause has been filed herewith; and

It further appearing to the court that there should be an order of reference to a Special Master on the petition of the receivers as recited above; it is, on this thirty first day of May, nineteen hundred twenty-seven, on motion of Stein, McGlynn & Hannoch, solicitors of the receivers,

ORDERED that the question of the amount due if anything on the mortgage made by the defendant corporation to Roland J. Francis, Trustee, in the nominal sum of two hundred fifteen thousand dol-

lars, and the amounts due if anything on the mortgage held by the Hudson & Essex Building and Construction Co. in the sum of ninety five hundred dollars, and the amounts due if anything on the mechanic lien claims of Albert & Kernahan, Inc., Juliano Construction Co., Concrete Steel Co. Henry D. Dietz Co., Tuorto Cut Stone Co., Fidelity & Deposit Co. of Maryland, Hudson Structural Iron Works, Inc., Joseph E. Amorose and Orange Hardware Co., and also the question of priorities as between the said several mortgages and the mechanic lien claims above mentioned, be referred to Roy F. Anthony one of the Special Masters of this court for the purpose of taking testimony; and it is further

ORDERED that said Special Master shall return his report together with the evidence taken by him thereon with all convenient speed.

E .R. WALKER,
C.

Respectfully advised,
ALONZO CHURCH,
V. C.

Master's Report.

(Filed January 8, 1928.)

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,

Complainant,

and

FRANKLIN ARMS, INC., a corporation,

Defendant.

On Bill, etc.

In pursuance of an order of this court, entered in the above cause, bearing date May 31, 1927, I have been attended by the solicitors of the complainant and by the solicitors of the various defendants, and in the presence of the parties attending me, I have considered of the matters thereby referred to me.

In the early part of One Thousand Nine Hundred and Twenty-Six, James Haines purchased a tract of land on Franklin Street, Bloomfield. The property was then encumbered by a mortgage held by the Estate of Anny M. Day, which mortgage also covered other lands. Haines executed a purchase money mortgage for $15,000 to Hudson & Essex Building & Construction Company, covering this land and the tract adjoining. The owner decided to erect a large apartment house on the premises in question, and made an agreement with G. L. Miller & Company, of New York City, to advance $215,000.00 to finance the project. A corporation

was formed by Haines and his brother, Julius, known as Franklin Arms, Inc., and the property conveyed to this corporation, which executed a mortgage of $215,000 to Rollin J. Francis, Trustee, dated May 15, 1926, recorded in Book W-57 of Mortgages for Essex County, page 64, to secure an issue of bonds to be sold by G. L. Miller & Company. The holders of the $15,000 mortgage released the premises in question from the lien of that mortgage, taking in payment of the release a mortgage of $5,500 on the adjoining tract, thus leaving $9,500 due on the premises in question. They also executed under date of June 3, 1926, a postponement of their mortgage in favor of the Trustee's mortgage, the postponement being recorded in the Register's Office of Essex County in Book 88 of Postponements of Mortgages of Essex County, on page 315. Work on the apartment house had been begun long before the recording of the Trustee's mortgage. Certain moneys were advanced to the owner by G. L. Miller & Company during the progress of the work. Before the completion of the building, G. L. Miller & Company became insolvent, and ceased to make payments under the mortgage, leaving a large amount due for work performed and materials furnished for the erection of the building. A number of liens were filed by such material men and contractors. The present reference is to determine the amount due the various claimants and the priority of their respective claims.

I.

The $215,000 Mortgage to Rollin J. Francis, Trustee.

This mortgage having been placed upon record

after the commencement of the building, the Trustee's right to priority over the liens rests upon Section 15 of the Mechanic's Lien Law. Under this section the mortgage has priority to the extent of the moneys advanced and actually applied to the erection and construction of the building. It appears that only two cash payments were made by the G. L. Miller & Company to the owner; one of $16,350 June 22, 1926, and one of $26,350 July 28, 1926. Both of these checks were deposited in the Corn Exchange National Bank, New York City, to the credit of Franklin Arms, Inc. Other moneys of the owner to the extent of about $13,000 were deposited in this account during the brief period it was in existence. Mr. Julius Haines testified (page 101) that all checks drawn on this account were for materials furnished or work performed in connection with the erection of the building. Unfortunately, the Trustee was unable to procure any records or checks of Franklin Arms, Inc., which would show the particular items to which this money was applied. The Haines brothers testified that they had sent all of their books and vouchers to G. L. Miller & Company, by request, shortly before the insolvency, but the Receivers of that Company were unable to find any such papers. I do not pass on the credibility of the story told by the Haines; but the fact remains that it was not possible for the Trustee to produce any documentary proof of the application of the moneys to the building. Mere proof that the mortgagee has paid money to the person charged with the duty of paying the material men, of course, is not proof that the money was actually applied to the erection of the building. In the present case, I am of the opinion that the testi-

mony of Mr. Haines, that all of the moneys in the Corn Exchange Bank were expended for the erection and construction of the apartment, is sufficient proof that money under the trust mortgage to the extent of $44,700 was actually applied to the construction of the building.

In addition to the cash actually advanced by G. L. Miller & Company to the owners, there were certain other items totaling $55,485.12, for which a lien is claimed. These items were all approved by the mortgagor, and are therefore entirely proper charges as against it. As against the lien claimants, however, the following items plainly are not moneys actually applied to the construction of the building:

Commission		$21,500.00
Disbursing and selling expenses		2,150.00
Bond issue expenses		3,225.00
Consulting Architect		1,075.00
Interest from May 15, 1926, to May 15, 1927	$15,050.00	
Less interest assumed	627.08	14,422.92
Income tax May 15, 1926 to May 15, 1927		600.00
Trustees' fees for the same period		200.00
Fire		12.20
Taxes		1,000.00
Premium on completion bond		3,300.00

There was also an item of $8,000 representing the principal of a mortgage held by the Estate of Anna M. Day and paid off by the Trustee. It appears that this mortgage originally covered a large

tract of land sold by the Day Estate. From time to time various plots were released and the mortgage gradually reduced. It was stipulated by counsel that at the time it was paid off by the Trustee this mortgage was a lien not only on the apartment house site, but also on other lands in Bloomfield (page 84). It was decided in the case of Improved Building & Loan Association *v.* Larkin, 85 N. J. E., p. 52, that mortgage money used to pay off a mortgage on the land was not money applied to the erection of the building. I therefore find as to the Trustee's mortgage that it is entitled to priority over the lien claimants to the extent of $44,700 and that it is subordinate to the lien claims to the extent of $55,485.12.

II.

MECHANIC'S LIEN CLAIMANTS.

Proof was made before me by various materialmen and contractors of labor performed and materials furnished for the erection of the apartment house in question. Under the statute all of these claimants have concurrent liens and are to be paid pro rata in case the fund is insufficient to satisfy them in full. I find and report that the following amounts are due the respective lien claimants:

Concrete Steel Co.	$1,577.57
Albert & Kernahan, Inc.	8,799.22
Hudson Structural Iron Works, Inc.	6,717.40
Orange Hardware Co.	254.82
Juliano Construction Co.	30,000.00
Joseph Amorose	12,000.00

III.

HUDSON & ESSEX BUILDING & CONSTRUCTION COMPANY MORTGAGE.

This mortgage, originally in the sum of $15,000 and reduced by the taking of the $5,500 mortgage on the adjoining tract to $9,500, was postponed to the Trustee's mortgage on June 3, 1926. Counsel for this mortgagee claims a lien on the mortgaged property prior to the Trustee's mortgage, and prior to all mechanics' liens. I am entirely unable to follow the course of reasoning by which they reach this conclusion. The postponement reads: "The party of the first part postpones and subordinates the above stated mortgage made to it, and the lien thereby acquired on the premises therein described, to the said party of the second part in favor of said mortgage for $215,000 and interest, made to the said party of the second part, as Trustee, so that said mortgage shall be the first lien in order of priority and superior to the lien of the mortgage to said Hudson & Essex Building & Construction Company." In the fact of this agreement I cannot see how any claim can be made to priority over the Trustee's mortgage, even if the Trustee did not take the precautions he might have taken to maintain his priority over mechanic's lien claimants. I am also of the opinion that this mortgage is not only subordinate to the Trustee's mortgage, but is also subordinate to the mechanic's liens above enumerated. It is true that a postponement of a mortgage in favor of another mortgage does not ordinarily operate as a postponement in favor of mechanic's liens, which might thereafter follow. Counsel have cited Bloom *v.* 36 Berwyn Street, 136 Atl. Rep., p. 803. In that case, however,

it appeared that all of the money advanced under the mortgage in favor of which a postponement had been made, was actually applied to the construction of the building. Naturally, the original mortgage is subordinate to no greater amount of lien than provided in the postponement. In making a postponement it is presumably the intention of the holder of the prior lien to subordinate his mortgage to a lien equal to the amount of the new mortgage. In the present case it was undoubtedly the intention of Hudson & Essex Building & Construction Company to subordinate its $9,500 mortgage to a lien of $215,000. If G. L. Miller & Company had not become insolvent, there would have been no mechanic's lien claimants, for the mortgage money would have been used to pay the various materialmen and contractors. If payments had continued long enough to pay for the materials and work for which liens are now filed, amounting to some $60,000, the amount due the Trustee would have been increased by that amount, which would have been unquestionably prior to the Hudson & Essex Building & Construction Company's mortgage. The fact that the $60,000 is due the lien claimants, instead of the mortgagee, in no way injures the Hudson & Essex Building & Construction Company. By the terms of the postponement, that company is entitled to no money out of the property until the entire amount due the Trustee has been paid. As $55,485.12 of the amount due the Trustee is subsequent to the mechanics' liens, it must necessarily follow that Hudson & Essex Building & Construction Company can get no money until the liens are satisfied.

In summary I find and report that various par-

ties are entitled to the following liens and the following priorities:

To be firstly paid:

Rollin J. Francis, Trustee..	$44,700.00	
Interest from May 15, 1927	2,059.92	$46,759.92

To be secondly paid:

Concrete Steel Co.	$1,577.57	
Interest	126.21	1,703.78
Albert & Kernahan, Inc. ..	$8,799.22	
Interest	703.94	9,503.16
Hudson Structural Iron Works, Inc.	$6,717.40	
Interest	537.39	7,254.79
Orange Hardware Co.	$254.82	
Interest	20.40	275.22
Juliano Construction Co...	$30,000.00	
Interest	2,400.00	33,400.00
Joseph Amorose	$12,000.00	
Interest	960.00	12,960.00

being concurrent liens and to be paid pro rata.

To be thirdly paid:

Rollin J. Francis, Trustee	$55,485.12	
Interest from May 15, 1927	2,566.93	58,052.05

To be fourthly paid:

Hudson & Essex Building & Construction Company..	$9,500.00	
Interest from April 9, 1926	840.00	10,340.00

All which is respectfully submitted this day of January, 1928.

ROY F. ANTHONY,
Special Master in Chancery.

Exceptions to Master's Report.

(Filed January 12, 1928.)

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,
Complainant,

and

FRANKLIN ARMS, INC., a corporation,
Defendant.

On Bill, etc.

Exceptions taken by the Hudson & Essex Building & Construction Company to the report of Roy F. Anthony, one of the Special Masters of this court, to whom it was referred to take proofs and determine the amounts due to the various claimants to the fund created by the sale of the property of Franklin Arms and the order of priority for the payment of same.

FIRST.—This exceptant objects to that part of

the said Master's report in which said master finds that it released the said mortgaged premises from the $15,000.00 mortgage held by it, whereas he should have reported that all that this exceptant did was to subordinate its said mortgage to the mortgage of Rollin J. Francis, trustee.

SECOND.—That the said Master has in and by his said report certified that the mortgage of said exceptant should be fourthly paid, whereas he ought to have certified that the same should have been firstly paid.

THIRD.—That said Master has in and by his said report, certified that said G. L. Miller & Company or Rollin J. Francis, as trustee, are entitled to credit on account of their mortgage for commission $21,500.00; disbursing and selling expenses $2,150.00; bond issue expenses $3,225.00, consulting architect $1,075.00; interest from May 15, 1926, to May 15, 1927, less interest assumed $14,422.92; income tax May 15, 1926, to May 15, 1927, $600.00; trustee's fees for the same period $200.00; taxes $1,000.00; premium on completion bond $3,300.00; whereas he ought to have certified that said items or some of them are not entitled to be added to or credited to the mortgage of said G. L. Miller & Company and Rollin J. Francis, as trustee.

FOURTH.—For that the said Master has in and by his said report certified to be firstly paid to Rollin J. Francis, trustee, $46,759.92; to be secondly paid Concrete Steel Co. $1,703.78; Albert & Kernahan, Inc., $9,503.16; Hudson Structural Iron Works, Inc., $7,254.79; Orange Hardware Co. $275.22; Juliano Construction Co. $32,400.00; Joseph Amorose $12,960.00; to be thirdly paid Rollin J. Francis, trustee $58,052.05; to be fourthly

paid exceptant Hudson & Essex Building & Construction Company $10,340.00, whereas he ought to have certified the payment of exceptant's mortgage and the amount due to it thereunder after payment only of the amount actually advanced on the mortgage of said Rollin J. Francis, trustee and G. L. Miller & Co.; the amount so actually advanced under said latter mortgage to be applied first towards reimbursing said Rollin J. Francis, trustee and G. L. Miller & Co. what they or either of them actually advanced and applied toward the erection and construction of the building, and the remainder of such actual advances to be paid pro rata to said Concrete Steel Co., Albert & Kernahan, Inc., Hudson Structural Iron Works, Inc., Orange Hardware Co., Juliano Construction Co. and Joseph Amorose, so that the amount due and payable to exceptant should be paid immediately after payment out of said fund, only the amount actually advanced by said Rollin J. Francis or G. L. Miller & Co. on their mortgage, regardless of to whom the amount so due and payable on said mortgage of Rollin J. Francis and G. L. Miller & Co. should be ordered to be paid to.

FIFTH.—For that the said Master has in and by his said report, certified that there was due on the mortgage of said Rollin J. Francis, trustee $100,185.12 besides interest; whereas he ought to have certified that the total amount due on said mortgage as against the mortgage of exceptant is the sum of $44,700.00 besides interest. And that the mortgage of exceptant with interest in the sum of $10,340.00 was entitled to be paid secondly after the payment to said Rollin J. Francis trustee of said sum of $44,700.00 with interest thereon.

In all which particulars the report of said Mas-

ter is, as the said Hudson & Essex Building & Construction Co. exceptant is advised, erroneous, and the said Hudson & Essex Building & Construction Co. appeals therefrom to the judgment of this Honorable Court.

GROSS & GROSS,
Solicitors and Counsel of Hudson & Essex Building & Construction Co., Exceptant.

Order Confirming Master's Report .

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,
Complainant,

and

FRANKLIN ARMS, INC., a corporation,
Defendant.

On Bill, etc.

It appearing to the court that an order was heretofore entered, referring to Roy F. Anthony, Esq., Special Master in Chancery, the question of determining the amounts due various claimants and the priority of their respective claims, which order was dated May thirty-first, nineteen hundred twenty-seven; and

It further appearing that said Special Master has filed the testimony taken by him and his report in connection with the same; and

It further appearing that notice of motion has been given to all the interested parties therein, and that said notice of motion was returnable Tuesday, January thirty-first, nineteen hundred twenty-eight; and

It further appearing that said motion has been adjourned from time to time; and

It further appearing that exceptions to said Master's report have been filed on behalf of the Hudson & Essex Land Co., and said matter coming on for argument in the presence of E. R. McGlynn, solicitor of the Receivers, and Merritt Lane, solicitor of Fidelity & Deposit Company of Maryland, and Gross & Gross, solicitors of Hudson & Essex Building Co., and Weinberger & Weinberger, solicitors of Service Trust Co., substituted trustee; and the court being satisfied with the Master's report should be confirmed; it is on this 19th day of May, nineteen hundred twenty-eight.

ORDERED that the report of Roy F. Anthony, Esq., Special Master in Chancery, heretofore filed, be and the same is hereby confirmed. And it is further

ORDERED that the receivers herein, after the filing of their final report and account, and after the payment of all administration expenses and fees, and the fees and expenses of said Special Master as hereafter set forth, shall distribute the funds in their possession in the following order and priority and in the following proportions, to wit:

First, To pay to Roland J. Francis, Trustee, or Service Trust Co., substituted trustee, or its solicitors, the sum of forty-four

thousand seven hundred dollars ($44,700) with interest from May 15th, 1927;

Secondly, To the following named mechanic lien claimants, said claims to be concurrently paid in the pro rata proportion that each of said claims bear to the aggregate of said claims, to wit:

Concrete Steel Co.,	$ 1,577.57
Albert & Kernahan, Inc.	8,799.22
Hudson Structural Iron Works, Inc.	6,717.40
Orange Hardware Co.	254.82
Juliano Construction Co.	30,000.00
Joseph Amorose	12,000.00

with interest;

Thirdly, To pay to Roland J. Francis, Trustee, or the Service Trust Co., substituted trustee, $55,485.12, with interest from May 15th, 1927;

Fourthly, To the Hudson & Essex Building & Construction Company, $9,500.00 with interest from April 9th, 1926. And it is further

ORDERED that the fees of the said Special Master for services in the above entitled matter, are hereby fixed at the sum of $1,500.00, together with all his costs and disbursements, including stenographer's fees, and the same shall be forthwith paid by said receivers. And it is further

ORDERED that no distribution shall be made by the receivers in accordance with the terms of this order, until after their final report has been filed

and all fees and allowances fixed by this court. And it is further

ORDERED that nothing herein contained shall bar the receivers from making an application at the time of the hearing on their final report to have the fees and expenses of the administration of the receivership charged pro rata against the various claims of the defendants whose claims were reported upon by the Special Master in his report which is confirmed by this order.

E. R. WALKER,
C.

Respectfully advised,
ALONZO CHURCH,
V. C.

Letter of Vice Chancellor in re Opinion.

COURT OF CHANCERY OF NEW JERSEY

ALONZO CHURCH
Vice Chancellor
Newark, N. J.

May 11, 1928

Messrs. Gross & Gross.
15 Exchange place,
Jersey City, N. J.

Re: Albert & Kernahan *v.* Franklin Arms.

Gentlemen:

In reply to your letter of May 10 I will say that it is unnecessary for me to write an opinion in the matter of Albert & Kernahan *v.* Franklin Arms because I merely endorsed the report of the special master. You appeal on his report, affirmed by me.

Yours truly,

ALONZO CHURCH.

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,
Complainant,

and

FRANKLIN ARMS, INC., a corporation,
Defendant.

Transcript of testimony taken in the above entitled cause before Roy F. Anthony, Esq., a Special Master in Chancery of New Jersey, at the office of Stein, McGlynn & Hannoch, 17 Academy Street, Newark, New Jersey, on Friday, June 10, 1927, at 10 A. M., pursuant to an order of reference made by Hon. Alonzo Church, Vice Chancellor.

APPEARANCES:

Messrs. STEIN, MCGLYNN & HANNOCH, Solicitors of Receivers.

RAYMOND H. BERRY, Esq., Representing James Haines, Julius H. Haines, Albert & Kernahan, Inc., Hudson Structural Iron Works, Inc.

S. SIDNEY SILVER, Esq., Representing Concrete Steel Co.

FREDERICK H. OBER, sworn in behalf of Concrete Steel Co., on his oath testified as follows:

Direct examination by Mr. Silver:

Q. Mr. Ober, whom are you employed by? A. Concrete Steel Co.

Q. In what capacity? A. Auditor.

Q. Have you the original entries of an account against the Franklin Arms, Inc.? A. I have.

Q. Will you produce them here? A. (Producing same.)

Mr. Silver: I offer them in evidence as an exhibit for the Concrete Steel Co.

(Marked Exhibit 1 for Concrete Steel Co.)

Q. Tell me what is the amount owing from the Franklin Arms? A. $1,577.57.

Q. And that sum is now due and owing, Mr. Ober? A. That is right.

Q. Can you tell us what this was for? A. Mainly for some steel trusses that we supplied for the roof.

Q. It went into the job at Franklin Place in Franklin Street, Bloomfield; do you know that of your own knowledge? A. Yes.

Mr. Silver: I desire to reserve the right to file with the master proofs of filing mechanics liens, and will do that by certificate from the County Clerk.

Mr. Lasser: I desire to introduce certificate of the Essex County Clerk certifying that mechanics' lien in the case of Albert & Kernahan, Inc., in the within cause was filed by Albert & Kernahan, Inc., a corporation, claimant, against Franklin Arms, Inc., a corporation, and James Haines and M. DeForest Soverel, Receivers, builders and owners, and Rollin J. Francis, Trustee and mortgagee, and the said certificate also setting forth that a mechanic's lien claim had been filed on behalf of Hudson Structural Iron Works, Inc., a corporation, claimant against

the Franklin Arms, Inc., a corporation, James Haines and M. DeForest Soverel, Receivers, owners and builders, and Rollin J. Francis, trustee mortgagee.

(Marked Exhibit 2 for Albert & Kernahan, Inc., and for Hudson Structural Iron Works, Inc.)

EDWARD J. KERNAHAN, sworn on behalf of Albert & Kernahan, Inc., on his oath testified as follows:

Direct examination by Mr. Lasser:

Q. You are an officer of the firm of Albert & Kernahan, Inc.? A. Yes, sir.

Q. You are familiar with the transactions had between your company and the Franklin Arms, Inc.? A. Yes.

Q. Have you got your account here? A. Yes; the original sheets and the original delivery tickets, all signed.

Q. What in a general way was the material that was delivered by your company? A. Framing lumber, flooring beams and stuff of that kind.

Q. By referring to your records can you tell how much is due to you from the defendants in this case? A. I can.

Q. How much? A. $8,799.22.

Q. Have you given them credit for all of the credits they are entitled to? A. We have.

Q. All the allowances they are entitled to? A. We have.

Q. And that is the net amount? A. That is the amount. One credit of $87.30 was all that was coming to them, and it has been already deducted

from the bill. There was an additional small credit of $27.26 as well.

(Orange Hardware Company represented by Abraham Levine.)

ABRAHAM LEVINE, sworn on behalf of the Orange Hardware Company, testified as follows:

Direct examination by Mr. Lasser:

Q. What office do you hold with the Orange Hardware Company? A. This is only a trade name.

Q. You are the boss? A. Yes.

Q. You own the company? A. Yes.

Q. And with whom did you have your transactions with reference to this claim? A. Franklin Arms.

Q. You haven't got your original books here, have you? A. No, I have not; I have the tickets and everything signed by them.

Q. What is the amount that you claim is due from them? A. $254.82.

Q. Any part of that been paid to you? A. No, sir.

Q. Are they entitled to any credits or allowances? A. No, sir.

Q. The full amount of $254 is due? A. Yes.

Q. You say that a mechanics lien has been filed on your behalf by Howe & Davis, your attorneys? A. Yes.

Q. What did you sell to Franklin Arms? A. Hardware, nails and stuff like that as shown in the bill—hardware, nails, beam hangers, chicken wire.

Q. And that was used in the construction of this building? A. Yes.

The Master: Leave is given to Howe & Davis, attorneys for this claimant, to present at the adjourned hearing on June 17th, a County Clerk's certificate setting forth the filing of the lien claim.

(Juliano Construction Co., represented by Potter & Berry, by Mr. Berry.)

LOUIS JULIANO, sworn on behalf of Juliano Construction Co., on his oath testified as follows:

Direct examination by Mr. Potter:

Q. Mr. Juliano, are you engaged in the building trade? A. Yes.

Q. And did you do work for the Franklin Arms Company? A. Yes.

Q. In the Town of Bloomfield? A. Yes, sir.

Q. I show you here a copy of a book account, and I ask you if that is a true copy of the account of labor and material which you put into the building, plus the credits which you received therefor? A. Yes.

Q. The total amount of the work and labor which you did and for which you put in your claim was the amount of $38,149.83? A. Yes.

Q. Did you reach any agreement with Mr. Haines and Mr. Soverel, the receivers of the said corporation, as to the amount which you would accept in settlement thereof? A. Yes, we did.

Q. What was that amount? A. $30,000.

Q. Have you received anything on account of that sum? A. Not on the $30,000.

Q. Then there is now due and owing to you for work done and material furnished on the building in Bloomfield, the sum of $30,000? A. $30,000, yes, sir.

Q. You have filed a mechanics lien through my firm for the original amount and have agreed to accept in compromise $30,000? A. Yes.

Q. And to waive your mechanics lien? A. That is right. We have discharged the mechanics lien already.

The Master: Leave is given to offer in evidence a County Clerk's certificate of the filing of the lien claim and summons and complaint.

(Adjourned to June 17th, at 11 o'clock in the forenoon.)

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,

Complainant,

and

FRANKLIN ARMS, INC., a corporation,

Defendant.

On Bill, &c.
Master's Hearing.

Continuation of hearing in the above entitled cause, before Roy F. Anthony, Esq., a Special Master in Chancery of New Jersey, at the office of Stein, McGlynn & Hannoch, 17 Academy Street, Newark, New Jersey, on Friday, the 17th day of June, A. D. 1927, at eleven o'clock in the forenoon, pursuant to an order of reference dated as aforesaid.

APPEARANCES:

Messrs. STEIN, MCGLYNN & HANNOCH, EDWARD M. MCGLYNN, Esq. (present), of Counsel with the Receivers.

Messrs. POTTER & BERRY, THOMAS POTTER, Esq. (present), attorneys for Juliano Construction Co.

Messrs. WEINBERGER & WEINBERGER, HARRY H. WEINBERGER, Esq. (present), and

Messrs. BURNSTINE & GEIST, HENRY C. BURNSTINE, Esq. (present), GEORGE E. NUTTER, Esq. (present), BERNARD WIESS, Esq. (present), of New York Bar, Attorneys for Interim Receipt Holders, and Trustee.

JOSEPH AMOROSE, being duly sworn by the Master, testified as follows:

Direct examination by Mr. McGlynn:

Q. Mr. Amorose, what work did you do on this property on the corner of Berkeley Place and Franklin Street, Blomfield? A. Plumbing and heating.

Q. Did you have a claim against those premises at the time of the appointment of the receivers? A. I did.

Q. Do you know the amount without referring to papers? A. $12,000.

Q. An even $12,000? A. Even $12,000.

Q. And that was the amount for which you filed your mechanic's lien? A. Yes, sir.

Q. And no part of the $12,000 has been paid? A. No, sir.

Mr. Weinberger: With regard to the legality of the lien claims, it shall be my

contention in this case that where the receivers have as a matter of fact reduced lien claimant's amount to a sum less than that specified in the lien claim in a substantial manner, that the lien claim is a nullity in so far as the claim itself is concerned, and that as a matter of law the Master should find against these lien claimants, and for the purpose of establishing the correctness of these various items in the lien, and for the purpose of determining the validity of the lien, I should like to have the privilege of cross examining the lien claimants.

Mr. McGlynn: The lien claims were not affected at all. The only thing affected before the receivers were the claims filed with the receivers. The receivers did not affect the lien claims as lien claims; they merely took testimony to investigate the claims as filed with them as receivers. In the receiver proceedings, the receivers felt they had a perfect right to fix the amount of claims, when it comes to distribution, if any. Lien claimants may file their claims as if they had prosecuted them to judgment.

Mr. Weinberger: That gets to the next question, the question of what is due on our mortgage. So we can have formal proof of that, I offer in evidence—proceeding now with regard to the proof of the interim receipt holders and mortgage trustees, Service Trust Company of New Jersey—I offer in evidence a trust mortgage of the Franklin Arms, Bloomfield, New Jersey, Inc., to Rollin J. Francis, as trustee, bearing date May 15th, 1926, securing an issue of $215,000

worth of first mortgage, seven per cent., gold bonds, and ask—acknowledged on the 7th day of June, 1926, recorded June 17th, 1926, in Book W 57, at page 64.

(Marked Exhibit S-1.)

(Discussion off of the record.)

Mr. Weinberger: It is our view in this matter that the reference embraces within its subject-matter, the question of all priorities with regard to the first mortgage, second mortgage, mechanic lien claimants, and it is our desire here too, to establish under this reference, the question of responsibility with regard to the surety company, and we take it that under the reference we have that privilege. I offer in evidence Franklin Arms, Inc. agreement with the G. L. Miller and Company, Inc., as underwriter, bearing date May 15th, 1926, concerning the property on the southeast corner of Berkley Place and Franklin Street, Bloomfield, New Jersey, acknowledged on the 7th day of June, 1926, and recorded on the 17th day of June, 1926, in Book W 57 of Mortgages, pages 364 to 370, and ask that be marked Exhibit S-2.

(Marked Exhibit S-2.)

Mr. Weinberger: It is stipulated by and between counsel that Franklin Arms, Inc. was a duly organized corporation under the laws of the State of New Jersey, and that it had, by appropriate resolution, the authority to execute and make the agreements that are being offered in evidence. Now, we offer in evidence an agreement known and characterized as an underwriting agreement, made by John Haines and James Haines, as agents

for a corporation to be formed, and the G. L. Miller Company, concerning premises on the southeast corner of Franklin Street and Berkley Place, executed by the parties on the 31st day of March, 1926, and ask that that be marked Exhibit S-3.

Mr. McGlynn: I make formal objection that I do not concede the materiality of it now, but if we find later on—

Mr. Weinberger: I would rather have it disposed of now. We contend that it is evidential upon the ground as it is an underwriting agreement in pursuance of which the trust mortgage heretofore referred to and marked in evidence, was in fact executed, and specifically referred to in this agreement and part of it, and we think it is evidential for that reason.

Mr. McGlynn: My objection to it is that I can not see how a former agreement with the company can be evidential when there is a formal recorded document and mortgage on record, with the corporation. This is an agreement, as I see it, made between John Haines and James Haines, for a corporation to be formed. It apparently is a preliminary agreement which is merged in and became a part of the two documents already marked in evidence.

Mr. Weinberger: The law of merger has no application because of the fact the trust agreement does not embrace all the terms in this underwriting agreement, and it is specifically made part of the trust agreement under its terms.

The Master: I will admit it for what it is worth.

(Marked Exhibit S-3.)

Mr. Weinberger: Also put on the record that the law of merger has no application because of the further fact that the parties to that underwriting agreement specifically provided that it was for a corporation to be formed. Merger only applies to the same parties.

Mr. McGlynn: Don't you concede that the Franklin Arms is the corporation that is mentioned in that S-3?

Mr. Weinberger: I do, but they weren't in existence at the time of the agreement and could not be merged. Now, we offer in evidence a bond characterized as the temporary bond, made and executed by Franklin Arms, Inc., by its president, James Haines, attested by the secretary, John Haines, on the 15th day of May, 1926, in the sum of $215,000, and specifically referring to various installments aggregating in the total $215,000, the bond being specifically referred to in the trust agreement heretofore referred to.

(Marked Exhibit S-4.)

Mr. Weinberger: We now offer in evidence a bond executed by the Fidelity and Deposit Company of Maryland, Baltimore, and the Franklin Arms, Inc., through their duly authorized officers, and bears date the 8th day of June, 1926, the bond running in the sum of $220,000, and ask it be marked Exhibit S-5.

(Marked Exhibit S-5.)

Edward R. McGlynn, direct.

EDWARD R. McGLYNN, being duly sworn by the Master, testified as follows:

Mr. McGlynn: On June 2nd, 1927, I wrote a letter to Mr. Charles E. Hendrickson, 75 Montgomery Street, Jersey City, who represents the Fidelity and Deposit Company of Maryland in this matter, and mailed to him a summons, original and copy, and asked him to acknowledge service on the original and return to me at his earliest convenience. I also received a letter from the Fidelity and Deposit Company of Maryland, signed by Francis X. Stephens, Jr. attorney, requesting a copy of the order of reference in this matter, and on June 5th I wrote Mr. Stevens sending him a copy of the order of reference in this matter.

JAMES HAINES, called as a witness on behalf of the interim receipt holders, being duly sworn by the Master, testified as follows:

Direct examination by Mr. Weinberger:

Q. Mr. Haines, you are the president of the Franklin Arms, Inc.—were the president? A. Yes.

Q. And receiver in this cause? A. One of them, yes.

Q. And are you the James Haines that is referred to in all of the various papers offered in evidence where the name James Haines appears? A. So far.

Q. You received certain payments, did you not, from G. L. Miller & Company? A. Yes.

Q. On the Franklin Arms, Inc. How much did you receive? A. Well, I don't remember exactly how much; it is on record.

Q. About how much? A. I can't recall definitely.

Q. No. You don't remember at all? A. I can't recall on that. Just the records would show that.

Q. Can you give us some approximate idea without having your memory refreshed at all? A. I couldn't, positively. So many figures transpired since then it would be difficult for me to tell you at present.

Q. Where did you deposit the money that you got? A. Our treasurer deposited it in the bank.

Q. What bank? A. I think it was either the Newark and Essex or the Corn Exchange; I didn't handle the finances.

Q. Well, you are receiver now, are you not? A. Yes.

Q. As receiver you have got all the returned checks, vouchers and books of this company, have you not? A. Yes.

Q. Have you checks showing payments made by this company to various people with regards to the proceeds of this loan? A. I haven't got them here; I suppose you can find them.

Mr. Julius H. Haines: They are over at G. L. Miller.

Mr. Weinberger: I haven't asked you any questions, and I am asking you not to interfere in this examination.

Q. You don't mean to tell this Court that the papers which are the Franklin Arms, Inc.'s property are over in G. L. Miller's place of business?

Mr. McGlynn: Is this the way to prove the amount advanced?

Mr. Weinberger: This is the way I am going to prove it.

Mr. McGlynn: Go ahead and take all the time you want.

Mr. Weinberger: I am going to prove it my way.

Mr. McGlynn: Go ahead; I am glad to know how you propose to prove it.

Q. Where are the checks and vouchers and all of the property—record property of the Franklin Arms, Inc., as receiver, I ask you?

Mr. McGlynn: I object to the question. I cannot see what materiality that has on an order of reference, the amount advanced by the mortgagee in this case.

The Master: Sustain the objection.

Mr. Weinberger: Will your Honor hear me first?

The Master: Yes.

Mr. Weinberger: I think it is absurd to have an objection of that kind made where a receiver testifies that he, as one of the officers of the company, received money from G. L. Miller and deposited it in a certain bank account. I am now asking him to show me distribution of that fund.

Mr. McGlynn: There is no statement that he deposited it. He said the treasurer did. Your statement is wrong right off the bat.

Mr. Weinberger: I will supplement that.

Mr. McGlynn: Withdraw the question?

Mr. Weinberger: No, I will stand on the record and ask for an exception on the court's ruling.

Q. As a matter of fact, who signed checks of the Franklin Arms, Inc. to withdraw moneys in this bank account? A. The treasurer of the company.

Q. Did the president countersign? A. No.

Q. Did you sign any checks? A. No, sir.

Q. Never signed any? A. Never.

Q. As president? A. Never signed checks; only the treasurer of the company.

Q. Well, sir, as receiver you took possession, didn't you, of the checks of the Franklin Arms, Inc.? A. I took possession of all the papers that were available at the time.

Q. Did you have possession of the checks?

Mr. McGlynn: I object; I think he has answered the question. He took possession of all the records that were available. He couldn't take possession of something the Franklin Arms didn't have.

Q. (Question read by the stenographer.) A. I don't remember.

The Master: He has answered it now.

Q. You don't remember. Well, I demand of you, as receiver, to produce the checks, or if you conscientiously discharged your duties as receiver, where are they?

Mr. McGlynn: I object. This is not a hearing before the Court of Chancery on contempt of the receiver.

Mr. Weinberger: It may be.

Mr. McGlynn: Go ahead.

Mr. Weinberger: I have a perfect right to prove this case my way, and I say my way is to produce the check showing moneys paid out. There is an attempt here by the receiver in this case to raise the question as to where the moneys of this mortgage went, and I charge him with attempting to secrete

and hide and suppress evidence which will show the fact that this money went for that mortgage.

Mr. McGlynn: Now, Mr. Master, it seems to me that the parties in this case should not be burdened with the expense of speeches by Mr. Weinberger. All this fireworks don't mean a thing to me.

Mr. Weinberger: That bunk may be costly and mean nothing, but what I said a moment ago is a matter which I press and urge, and I request that the Master direct the witness to produce the check.

The Master: I have no power to do that.

Mr. Weinberger: I think your Honor has. This is a matter concerning the Court of Chancery. This man is an officer of the Court, and you, as an officer of the Court have authority to do it, sir, and I request that it be done.

The Master: It doesn't appear that the witness has the checks.

Mr. Weinberger: He is the receiver.

The Master: He didn't say so.

Mr. Weinberger: Didn't say he was receiver?

The Master: He didn't say he had the checks.

Mr. Weinberger: He said he has all the papers.

Mr. McGlynn: He did nothing of the kind.

The Witness: I didn't say it.

Mr. McGlynn: He said, "All that were available."

The Master: What checks may or may not be there.

Mr. McGlynn: He told you that the checks you want were in the possession of your own G. L. Miller Company.

Mr. Weinberger: That isn't so, Mr. McGlynn, and you know it isn't so. How could G. L. Miller Company have Franklin Arms' checks?

Mr. McGlynn: Because they insisted that he give them to him.

Mr. Weinberger: Let him put that on the record.

Mr. McGlynn: I won't put that on the record.

Mr. Weinberger: Don't you interfere with that thought.

Mr. McGlynn: I am going to object all I want to.

Mr. Weinberger: You can do that, but you have no right to telegraph the witness statements that are untrue.

Q. Do you now say that you didn't come into possession of the checks of the Franklin Arms, Inc.? A. I don't remember, sir, what I did get.

Q. Well, sir, where are the papers that you did come in possession of? A. I haven't any papers at present, sir.

Q. Where are they? A. A great many papers were delivered before this case came up to the G. L. Miller and Company.

Q. I ask you whether you delivered any papers, such as checks, of the Franklin Arms, to the G. L. Miller Company? A. I don't know what papers I delivered. Everything that belonged to Franklin Arms went over there.

Q. As a receiver in this cause you said you re-

ceived certain papers. Do you deny that? A. I received certain papers.

Q. Where are they? A. Some papers are in my file at home.

Q. What papers do they consist of? A. I don't remember, sir.

Q. Have you looked over them? A. Yes, at a time.

Q. Have you any idea as to any of them? A. I don't recollect, sir.

Q. Where are the bank books? A. The bank books were examined; were in the hands of the treasurer.

Q. As receiver, did you get them? A. I haven't any bank books, sir.

Q. Why didn't you get them? A. It was irrelevant at the time.

Q. Irrevelant. What bank accounts did this company have,—the Franklin Arms, Inc.? A. I think it had two accounts, not simultaneously.

Q. With what banks? A. One account at a time with the Hudson and Essex—Newark and Essex, rather.

Q. National Newark and Essex? A. I don't remember the exact name; Newark and Essex; the other, one of the branches of the Corn Exchange.

Q. New York or New Jersey? A. New York.

Q. Which branch? A. I don't remember which branch; my brother was the treasurer.

Q. Did you have anything to do with the erection and construction of the building? A. Only with the erection and construction.

Q. Did you make payments to any of the creditors who were entitled to payments on that building? A. I O. K'd payments, but I never made payments.

Q. Were you the contractor on this job? A. I have been the president of the company.

Q. Only as president? A. Yes, sir.

Q. Do you know how much money you paid out for materials and labor on this job? A. I don't remember.

Q. The contractor in this case was who? A. There was no specific contract; they were sub-contractors.

Q. You gave out all the sub-contracts for the Franklin Arms? A. Yes, sir.

Mr. McGlynn: Don't use "sub-contractor" in the legal sense, because there was no general contractor.

The Witness: Individual contractors.

Q. You distributed the work to individual men and laborers, as president of the Franklin Arms; there was no general contract? A. No general contract.

Q. Did you receive payment on the 28th day of July, 1926, of $28,000? A. I don't remember, sir, how much.

Q. Did you receive another payment on the 22nd of June, 1926, for $20,000? A. I don't remember.

Q. Do you deny it? A. I don't deny it I ever received any money, but I don't remember the dates and the amounts. That was about my original statement, sir.

Q. Where are the books of the Franklin Arms? A. They are in the hands of G. L. Miller Company.

Q. All of the books? A. With the exception of certain data that I still have at home, I suppose, in my file.

Q. Whom did you give the books to? A. I don't remember who they were requested, but they were delivered to G. L. Miller Company.

Q. Where did you deliver them? A. In their offices.

Q. Where? A. I don't remember their offices; it is on Forty-second Street.

Q. You don't know who you gave them to, you don't know where you took them to, you don't know what they were that you took there, is that right? A. Counsellor, there were several hundred offices in that organization, and every one had a certain specific duty; a certain gentleman requested for books and papers.

Q. Of course, there were several hundred. Is that why you say you gave it to one of them, because you thought it might be safe to say that? A. You are asking me who in particular, and I don't remember who in particular.

Q. Didn't you want to know who you gave your books to when you gave them? A. To some responsible party.

Q. Did you get a receipt for them? A. We didn't ask for any at the time.

Q. What did you give them for? A. They asked for the books.

Q. For what reason? A. They asked for them and we gave them.

Q. What did they want with your books? A. I don't know.

Q. Don't you know that isn't true? A. It is true, absolutely, sir.

Q. Don't you know, as a matter of fact, you never took your books over to the G. L. Miller Company? A. I deny that statement, sir.

Q. You deny it? A. Yes, sir.

Q. Will you tell us when you took that over? A. I don't remember.

Q. Will you tell us why it was you took them over? A. I don't remember, sir, why.

Q. Will you tell us who you gave them to? Was it before the bankrupcty of G. L. Miller you took them over? A. I don't remember dates, your Honor.

Q. You do remember bankruptcy; you know about that business? A. I don't remember, sir. I am telling you the frank truth in the matter, because since that time certain things came up in my own household that I absolutely had to forget these things; there were more important issues than this.

Q. Well, sir, eliminating your household troubles for the minute, they didn't exist at the time you delivered your books, did they? A. Not then, no.

Q. Well, was the G. L. Miller Company in bankruptcy at that time or not? A. I don't remember.

Q. Don't you know they were not? A. I don't remember.

Q. What month was it you took it over? A. I don't remember the date.

Q. What year was it? A. 1927, I think, this year.

Q. This year. You mean that too, do you? A. This year.

Q. You mean that too, do you? Your brother just told you no, you didn't mean it. Who is telling the truth, you or your brother? A. I said, I think I said 1927.

Q. Do you mean that now? A. I don't remember the exact dates.

Q. Now, your brother has told you it wasn't this year. Do you want to change that statement? A. I don't change any statement.

Q. I show you a signature and ask you if you

remember signing that on that paper? A. It is my signature.

Q. Which is your signature? A. The first one.

Q. How much did you get on the date which you signed a receipt for? A. This is the amount of the requisition, $28,000.

Q. How much money did you get? A. I don't remember how much I got.

Q. Do you deny getting that amount? A. I deny getting the amount; this is the amount of the requisition, sir.

Q. Read your receipt there, will you please, into the record? A. "Receipt of the above amount is hereby acknowledged and applied on above contract."

Q. It doesn't say that, does it? A. "On above account."

Q. "And applied on above account. Franklin Arms Building Co., by James Haines." What date was that? A. July 28th or 29th, 1926.

Q. Do you deny that that was given to you? A. I don't deny that the amounts in here were part of an agreement to be given us—

Q. Your memory went bad?

Mr. McGlynn: Just a minute, Mr. Weinberger; let him answer.

A. I don't deny that these amounts were part of an agreement to be given us, but I don't remember that we ever received the total amount. There were certain deductions that had been constantly to be made from us, and we were given to understand that this was the amount to be received.

Q. Your memory went bad on account of your household difficulties, didn't it?

(Discussion off of the record.)

Q. (Question read by the stenographer.) Did it? A. I don't know.

Q. You know you are under oath here, don't you? A. Yes, sir.

Q. I want you to answer this question, if you can, by yes or no. Do you deny or affirm that you did or did not get $28,000 on the date receipted for by you, from the G. L. Miller and Company? A. What do you want me to answer?

Q. The truth, if you know what that means. A. I am answering the truth. I have given my answer before.

Q. You answer it now, sir, in the way I just asked you, if you can. Do you deny or affirm the fact that you received and receipted for the money stated on this writing which has just been handed to you? A. I deny having received the full amount.

Mr. Weinberger: I ask that that be marked in evidence.

(Marked Exhibit S-6.)

Q. How much of it did you receive? A. I don't remember, sir.

Q. How do you know whether you got it all or not if you don't remember how much you got? A. I remember at every transaction they made allowances, that is the only way to come to it; that is the reason why my answers was that way. I don't remember how much exactly that we received, but I do remember that there were certain deductions made at every payment, and I don't know why or I don't know how.

Q. Have you any way of telling how much was deducted, if there ever was a deduction? A. I can't remember.

Q. You know G. L. Miller Company is in bankruptcy, do you not? A. I do.

Q. You are of the opinion, are you not, and are testifying by the words "I don't remember" and denying your own receipts because you think there is no way of impeaching your testimony, isn't that right? A. That is not so.

Q. Then will you tell the Court how much money was taken off that paper? A. I don't remember, sir.

Q. About how much? A. I don't remember.

Q. Was it taken off in cash, or how? A. I don't remember whether in cash or checks.

Q. Did you give your check? A. I did not.

Q. Do you say that the check was not given for the amount on that particular certificate? A. I don't remember how the deductions were made, sir.

Q. You haven't the slightest recollection now of any part of that transaction? A. I have not.

Q. And don't know how much, if anything, was taken off? A. I don't remember how much.

Q. Well, could you tell us how you would be able to find that out? A. I could not, at present.

Q. There isn't any way in the world that you could possibly have of determining how much you got on that day? A. No.

Q. By any record in the world? A. Not in my possession.

Q. In anybody's possession? A. I don't know.

Q. Well, we get to the next payment. I ask you whether you remember whether that is your signature? A. It is my signature.

Q. Do you remember the date that you signed it, by looking at the paper? A. June 22nd, 1926.

Q. And did you get the $20,000 mentioned in that certificate? A. I don't remember.

Q. Do you deny that you got it? A. I deny having gotten the entire amount.

Q. You do? A. Yes, sir.

Q. Well, did you get a check at that date or did you get cash? A. This was the amount requisitioned, and I don't remember whether I got the check or not. I took my brother along with me, and my brother received the money and deposited it. I don't remember how much he received.

Q. Were you interested in the welfare of the company? A. I was interested, but we had a specific agreement between ourselves that my brother was to handle the finances. I was absolved of any other work except signing for receipt of moneys.

Q. I want to read this to you and ask you whether it was true, "Receipt of the above amount is hereby acknowledged and applied on the above account. Franklin Arms, Inc. Building Co. by James Haines, President." Was that true or false? A. It was true.

Q. Did you get that money? A. I don't remember whether we got the full amount, or how much was deducted as part of the agreements.

Mr. Weinberger: I ask that that go in evidence and be marked Exhibit S-7.

(Marked Exhibit S-7.)

The Master: Mr. Haines, if you didn't get the full amount of these payments, one of $20,000 and one of $28,000, why did you sign a receipt for that amount? If there were deductions, why did you sign a receipt for the full amount?

The Witness: Well, the transactions

were made in a very irregular way at the time, and we were bound by certain conditions to fulfill these.

The Master: That doesn't answer the question.

The Witness: I am just giving you the version in my own way, your Honor. For instance, there was a question of paying for a bond, the premium for a bond, which amounted, I believe, three to four thousand dollars. Now, these deductions were made continuously, until we subsequently made our payments to them in full.

The Master: That still doesn't answer the question. There are two receipts here signed by you, one for $20,000, and one for $28,000. Now, if you didn't get that much money, why sign a receipt for the full amount?

The Witness: We were forced to under the conditions, to sign in order to be able to get money on requisitions. We needed the money at the time.

Q. Who forced you? A. Ourselves; the circumstances forced us to receive the money because we needed money to pay out.

Q. You don't want to go on record here by saying that you signed for more money then you got? A. No; we have subsequently paid, or we made payments for certain demands on certain contracts—I don't remember specifically what they were, but they were deducted.

Q. Did you get any other payments? A. I don't remember.

Q. Do you suffer with the disease of lapsed

memoria, as they term it? A. I don't remember how much money we have gotten at times, and how much money we have gotten altogether from the G. L. Miller Company.

Q. Well, there was a deduction made when you got the $28,000, and there was a deduction made when you got the $20,000. Now, what were they for? A. I don't remember what they were for.

Q. How much were they for? A. I don't remember, your Honor, how much they were for.

Q. Was it $100 or $1,000? A. I have no recollection.

Q. Are you interested in any of the concerns that have lien claims filed in this case? A. I am not interested in them.

Q. Are you getting a rake-off? A. I am not getting anything, not even receiver's fees.

Q. You are not getting any part of the lien claims? A. I am not getting any moneys out of the receiver's claims.

Q. You won't get any receiver's claims, if I can help that, in view of the testimony given here this morning, as receiver. Isn't it true that whenever a deduction was made, you signed a receipt authorizing the deduction? A. I don't remember whether I signed it.

Q. You don't deny that? A. I don't deny or affirm; I don't remember.

Q. What do you want to do, play safe?

> Mr. McGlynn: If the Court please, this is ridiculous. Here is a man representing a creditors' committee and trustee under a mortgage, and there is one way to prove it, and he is going all the way around the back door trying to build up a record for what I don't know.

Mr. Weinberger: Pardon me. You haven't heard the end of this case. There is going to be some more in this case yet; we haven't started with this proof yet.

Q. When a deduction was made did they tell you what it was for? A. Apparently they did.

Q. Did you agree to it? A. Apparently I did.

Q. How much did they amount to, do you know? A. I don't remember.

Q. Did you sign an authorization for such a deduction? A. I don't remember; possibly I did.

Q. Isn't it true that that is what the method was? A. I think it was; the method was to sign. I don't know how much and when, what circumstances.

Q. Well, now, your company surely was interested to know how the money was coming in and what deductions were being made, wasn't it? A. My company consisted of my brother and myself.

Q. Yes, sir, but I mean you were interested to keep a record, weren't you? A. Yes.

Q. Did you keep such a record? A. My brother kept a record.

Q. Did you get that record as receiver? A. At the time I did.

Q. Where is the record? A. I turned it back to him.

Q. Do you mean after you were in the hands of the receivers, Franklin Arms, you thereafter took books back to G. L. Miller? A. Not books, just memoranda. I am just saying I received some records, but not in the form of books, but in the form of memoranda.

Q. Did you give them back to your brother after you were appointed receiver? A. There was nothing to be given back; memoranda got—

Q. Did you give him anything back after you were appointed receiver? A. I suppose I did.

Q. What right did you have to do that? A. I don't know.

Q. Who told you to do it? A. Nobody.

Q. Why did you give it back to him? A. I don't remember having given back any.

Q. I thought you said a moment ago that you did? A. Just memoranda what—I stated before I took down memoranda from memoranda; no books and no records.

Q. As receiver you took down memoranda from memoranda? A. From my brother.

Q. Why didn't you take the memoranda from him? A. There was no necessity of taking memoranda.

Q. You were receiver? A. Yes.

Q. Were you not? A. Yes.

Q. And you didn't take— A. It wasn't necessary to take any memoranda as long as there were no books.

Q. I show you a letter to G. L. Miller and Company, Inc., and ask you if that is your signature? A. That is my signature.

Q. Do you remember signing that letter of the 8th of June, 1926? A. That is my signature; I suppose it is on that date.

Q. Do you remember signing it? A. I don't remember dates, but if it is my signature, and I acknowledge the signature, it evidently has been that date.

Q. You have gone behind your signature today, haven't you, on receipts you have gotten?

Mr. McGlynn: He has not; he has admitted every signature.

Q. Didn't you say a moment ago, even after you signed that receipt for certain money, you didn't get what you signed for? A. That is what I stated, I think.

Q. Perhaps this likewise doesn't truly set forth what the facts are. A. This is my signature; I suppose it is on that date.

Mr. Weinberger: I ask that this be marked S-8.

(Marked Exhibit S-8.)

Q. Do you remember signing that? A. It is my signature; I remember having signed a paper of this kind and this is my signature.

Mr. Weinberger: I ask that that be marked Exhibit S-9.

Mr. McGlynn: No objection.

(Marked Exhibit S-9.)

Q. Now, isn't it true that the only deductions that were ever made by the company are referred to in the exhibits of G. L. Miller and Company—are referred to in the exhibits marked Exhibits S-8 and S-9? A. I don't remember whether that is the only deductions made or not.

Q. Doesn't the reading of those two authorizations by you to the G. L. Miller Company refresh your recollection so that you now can testify that those were the only deductions? A. Apparently, according to these.

Q. So that you received, did you not, the $52,800, which is in the form of the Exhibit S-9, $3,300 in the form of the Exhibit S-8, and $48,000 as evidenced by Exhibits 6 and 7?

Mr. McGlynn: I object to the form of the question, may it please the Court, because

Mr. Weinberger in his question says, "You received." Now, apparently from reading the exhibits to which he refers, it was not received; it was advanced by the company—

Mr. Weinberger: I will withdraw that. I think the objection is well taken.

Q. You authorized G. L. Miller and Company to charge your mortgage of $215,000, the sum of $52,800 on Exhibit S-9, and $3,300 on Exhibit S-8, is that right? A. Yes, sir.

Q. And in addition to that you received the sum of $20,000 under Exhibit S-7 and $28,000 under Exhibit S-6? A. I didn't receive the entire amounts. This is the amount of requisitions which we had signed—which I had signed as a full receipt and not received the full amounts.

Q. Now, you say, do you, that aside from the deductions referred to in Exhibits S-8 and S-9, there were other deductions made? A. There were deductions made; I don't remember what kind of deductions.

Q. Do you say now that there were deductions made from Exhibits S-7 and S-6, despite the fact that you saw the two exhibits, 8 and 9, offered in evidence here? A. They were possibly more deductions have been made; I don't remember which they were.

Q. When you say "possibly more," you say you don't know? A. I don't know.

Q. Then you don't know if there were any more, aside from 8 and 9, in which form deductions— A. You are asking me to answer your question that has a bearing on my previous statement that these were requisitions and I don't know what deductions were made on what contracts.

Q. Mr. Haines, you only had one transaction with G. L. Miller and Company? A. One transaction.

Q. That was Franklin Arms? A. Yes, sir.

Q. And you signed, did you not, Exhibits S-8 and 9? A. Yes.

Q. Those indicate deductions for surety bond, underwriter's fee— A. Yes.

Q. Consulting architect's fee, selling and disbursing expense, bond issue expense, and year's interest, at seven per cent. from May 15th, 1926, to May 15th, 1927, $15,050, total $43,000. Trustee's fee for one year, from May 15th, 1926, to May 15th, 1927, $200; federal and state income tax for one year, May 15th, 1926, to May 15th, 1927, $600, total of $43,800, and to the order of William Day and Randolph C. Barrett, as executors and so forth, of Anna M. Day, deceased, payment of mortgage, $8,000; New York Title Company, account of taxes, $1,000; Franklin Arms, Inc., by James Haines, President. Do you remember those deductions? A. I remember the document.

Q. Didn't you get a copy of this when you signed the original? A. I don't know how I got it and where I got it, and where it is; possibly in the hand of my attorney; maybe my brother has it.

Q. Who is your attorney? A. My attorney of record was Randolph C. Barrett.

Q. As a matter of fact, these deductions were made pursuant to your agreement, were they not? You weren't forced to make those, were you? A. I think it was in accordance with the agreement.

Q. On June 8th, 1926, there was $3,300 deducted —authorized to be deducted by you, as president of the company, in payment of the premium of the surety bond issued by the Fidelity and Deposit

Company of Maryland, is that correct, for $220,000? A. Apparently so.

Q. Was that in pursuance of your agreement? A. If it is in the agreement, it is so. I don't remember whether it was in the agreement or not.

Q. Will you tell the Court one item that you now recall of any kind or character, which was also deducted, that is not on either of those two exhibits? A. I don't remember.

Q. Who is Julius H. Haines, Inc.?

Mr. Julius H. Haines: I am not incorporated.

Q. Do you deny that the Corn Exchange got these payments of $20,000 and $28,000? A. I don't deny anything; I haven't had anything to do with the finances of the company.

Q. Do you deny that you handed these two checks for $20,000 and $28,000 to your brother? A. I don't deny, sir, anything, but I don't remember how much we received.

Q. You have repeatedly said this morning that there were certain deductions made of $28,000 and $20,000. Do you still say that you didn't give your brother the full amount of the $28,000 and the $20,000? A. I don't remember how much I turned over to him.

Q. Well, sir, you have repeatedly testified here under oath this morning that there were deductions made, and that means you didn't give the full amount to your brother, isn't that so?

Mr. McGlynn: I object to the question because it is a misstatement of what has been gone over not once, but six times, by examining counsel. The witness has re-

peatedly said he doesn't remember whether deductions were made.

Mr. Weinberger: The Court took the witness in hand on that—

The Master: He said right along he didn't remember, he had nothing to do with the financial transactions.

Mr. Weinberger: If your Honor please, you yourself asked the question despite the fact he receipted for $28,000 and $20,000, whether he took less and receipted for more, and he said yes.

Mr. McGlynn: He did nothing of the kind.

Mr. Weinberger: I beg your pardon; the record bears out what I say, and I took him up when your Honor got that question from him, and he has gone on record, and the record is unmistakable in its purport and effect that he never got the full amount, that there were deductions made of the $28,000 and $20,000, and I just asked him despite S-9 and despite S-8—

The Master: If you have the checks, introduce them.

Mr. Weinberger: I want that question on record—

The Master: He said he didn't remember.

Q. Mr. Haines, do you now desire to say that you don't remember whether you got the full $28,000 and the full $20,000, or that you do remember that you did not get the full amount? A. I don't say that, neither did I say it; I said I don't remember under what circumstances, or how much deductions were made at the time of receiving moneys.

Q. Do you say that you did not get the full

amount? A. I don't know how much I received at a time.

Q. Did you get the full amount, or didn't you? A. I don't remember how much I got.

Q. That is your answer now, is it? A. Yes.

Mr. McGlynn: Seventeen times.

Mr. Weinberger: I will show you that it is there seventeen different ways.

Mr. McGlynn: Suppose there is; there is no jury here; we are trying to get at facts.

JULIUS H. HAINES, called as a witness on behalf of the interim receipt holders, being duly sworn by the Master, testified as follows:

Direct examination by Mr. Weinberger:

Q. You are the traesurer? A. I was.

Q. You were treasurer of the Franklin Arms, Inc.? A. Yes, sir.

Q. Do you know how much money you got from the G. L. Miller and Company in all? A. I don't know.

Q. No idea? A. No.

Q. Any records in the world showing how much you got? A. Yes.

Q. Where are they? A. You have them.

Q. I have them? A. Yes, sir.

Q. When did you give them to me? A. They came back to G. L. Miller.

Q. When you say that I have them, you mean that Mr. Harry H. Weinberger has them? A. You represent, I understand, G. L. Miller.

Q. I wish that you were right, but I know that you are wrong. A. What right have you got to come here if you don't represent them?

The Master: Tell what you did with the records.

Q. Who did you give the records to? You don't mean now that you gave them to me? A. What records?

Q. The records that you say you took back to G. L. Miller. A. I took no records back to G. L. Miller.

Q. Are there any records that you ever made, which you have, of Franklin Arms, Inc., that show the amount of money which you received from G. L. Miller Company? A. The checks ought to show.

Q. I didn't ask you what ought to show, I asked you— A. The checks show.

The Master: He asked you records that you made.

The Witness: I have no records except the deposits that were made on preparing those checks out.

Q. Did you have any books of account? A. I had the books, yes.

Q. Where are they? A. I understand G. L. Miller has them.

Q. Who gave them to them? A. I brought down some packages and my brother brought down some packages.

Q. What books did you have? A. Everything pertaining to Franklin Arms.

Q. What books did you have, if any? A. Book accounts, checks—

Q. What books did you keep? A. Cash book.

Q. Who kept it, you? A. Yes.

Q. In your own handwriting? A. No; accountant.

Q. What was the name of the accountant? A. Ledger Audit Company.

Q. Where are they at? A. They are in the telephone book; I don't recall.

Q. New Jersey or New York? A. New York.

Q. They prepared your books for you? A. Yes.

Q. What other books did you have? A. That is all, as far as I remember, and the check books.

Q. Did you have a book showing who worked on this job, a time book? A. No.

Q. Who made up the payroll? A. When I received the amounts I issued a check—

Q. Received the amount from whom? A. My brother.

Q. You would issue a check for that. Where are those checks? A. I haven't got them and I don't know.

Q. Do you know what amounts, if any, you paid for materials on that building? A. No.

Q. Do you know whom you paid money on account of that building? A. No.

Q. Do you know who you paid labor on that building? A. No.

Q. Do you know what you did with the money that you received from the G. L. Miller Company? A. No.

Q. You haven't any checks showing whom you paid? A. No.

Q. What you paid or when you paid? A. No.

Q. All the moneys that you got from G. L. Miller Company you deposited to the account of Franklin Arms? A. Yes, sir.

Q. Those were deposited in what banks? A. Corn Exchange, 86th Street and Lexington Avenue, New York City; the National, Newark and Essex Banking Corporation, in Newark, New Jersey, and

I don't recollect, the Second National or First National Bank of East Orange.

Q. One of the banks in East Orange. It is a national bank in East Orange? A. Yes.

Mr. McGlynn: Orange or East Orange?

The Witness: East Orange.

Mr. McGlynn: Corner of Harrison Street and Main?

Q. As a matter of fact, when you got money from G. L. Miller and Company you deposited it in one of those accounts? A. Yes.

Q. And it went to the credit of the Franklin Arms, Inc.? A. Yes.

Q. And when you received that money you paid it out to the material men and laborers on this job? A. Yes, paid out money to the Franklin Arms.

Q. And you would make your payroll up and material items by check? A. By checks, and some times by cash.

Q. Those checks, you don't know where they are today? A. I understand G. L. Miller has all our records.

Q. You didn't give any yourself to them? A. I gave some records, yes.

Q. I mean the checks? A. Well, I don't remember what I gave; I gave records to G. L. Miller.

Q. When did you give them the records and why? A. I really don't remember when.

Q. Why? A. I know it was in nineteen-twenty—let us see, when did they fail?—They failed in August, 1926—in 1926.

Q. You don't know whom you gave them to? A. No.

Q. Why did you give them to them? A. They requested us.

Q. Did you get a receipt? A. No.

Q. Why not? They had failed. A. I ought to ask them that question myself.

Q. You didn't get any? A. No.

Q. What did you deliver? A. A package of the papers.

Q. Did you demand a receipt? A. No.

Q. Do you know the name of the man? How was it asked for, by letter? A. No, by person. We were at their office.

Q. They were in bankruptcy at the time you gave them to them? A. I don't remember whether that was the time, or prior to that time.

Q. Wasn't it after they went in bankrupcy that they were asked? A. I don't remember that.

Q. Was there an equity receiver at that time? A. I don't remember.

Q. Well, anyway, all of the money which you received amounted to how much, from the G. L. Miller Company? A. I don't know.

Q. About how much? A. I don't know.

Q. All the money you ever got from the company was by check, was it not? A. Yes.

Q. From the G. L. Miller Company? A. Yes.

Q. You knew there was a receiver appointed at the time you took your records back there? A. I don't remember when I took the records there.

Q. Did you know there was a receiver there, or they were in trouble at the time you took them back? A. I don't remember.

Q. You don't remember that either? A. No.

Q. I thought you said a few minutes ago you went there because they were in the hands of a receiver? A. I didn't say that.

Q. You don't know when it was, the month of August, July, September? A. I know it was in 1926.

Q. Did you ever ask for your books after the appointment of a receiver? A. Never asked for them.

Q. Why not? A. Didn't need any.

Q. Was it before you went into the hands of a receiver that you gave the books, or after? A. I really don't remember.

Q. Will you tell me what they wanted your books for? A. According to the agreement they had the right to take our books and look them over, if you will please read the agreement. That is our agreement.

Q. And they asked you for them under the agreement? A. Yes, sir.

Q. Now, as a matter of fact, Mr. Haines, you did receive, did you not, $48,000 to deposit to the account of the Franklin Arms, Inc. as evidenced by two certificates which your brother signed for? A. I don't know.

Q. Do you deny that you received those checks? A. I don't deny.

Q. Do you deny you used that money for the purpose of paying material men and laborers for the erection of that building? A. I don't remember.

Q. What did you do with the money, if not that? A. What would I do?

Q. What did you do? A. I deposited it in the bank.

Q. For what purpose? A. For the Franklin Arms credit.

Q. What did you do with the money? A. I don't remember.

Q. What? A. I don't remember.

Q. Didn't you pay your bills with it? A. Paid bills, yes.

Q. That is what I am asking you. And you paid it all, didn't you? A. I paid bills.

Q. You paid all the bills for Franklin Arms, for this apartment house, with this money? A. I haven't paid all bills.

Q. I mean as much as you had money for, I don't mean all. I don't remember.

Q. What do you mean you don't remember? A. What I am telling you; I don't remember.

Q. Well, Mr. Haines, are you getting any part of the lien claim money from any of these creditors for liens that are filed here? A. I don't get any money from any lien claims.

Q. You don't? A. No, sir.

Q. Have you filed a lien, or anybody in your behalf filed a lien? A. I think my counsellor was supposed to file it; I don't know whether he did file it.

Q. For what? A. For damages that the Miller Company has done us, for breaking the agreement; also for the money that the stockholders have advanced.

Q. Will you produce here a transcript of your bank accounts so that we won't have to bother the banks to come here at the next examination? A. A transcript?

Q. Yes, showing the payments made by you. A. I will request them.

Mr. McGlynn: Ask the bank to give you a transcript.

Q. Of the three accounts. A. Certainly.

Mr. McGlynn: They know what a transcript is.

The Witness: Sure, they have a record.

Q. Your accountants, of course, have a copy of your records?

Mr. McGlynn: How does he know that?

A. I don't know.

Q. You have no objection to giving us a letter authorizing your accountants to let us have whatever papers they have of the Franklin Arms, and to produce them here?

Mr. McGlynn: The receivers have no objection.

Q. Now, as a matter of fact, Mr. Haines, there was deducted in all $52,800 under a letter of June 7th. Were you familiar with that? A. I know this paper because I saw my brother sign it.

Q. That was true, was it not? A. I don't know if it was true or if it isn't true.

Mr. McGlynn: Read it over.

The Witness: Yes.

Mr. McGlynn: The answer is "yes."

The Witness: Deducted from what?

Q. From the mortgage of $215,000. A. We never got $215,000.

Q. Authorized that that be deducted from it? A. Yes.

Q. On June 8th, Exhibit S-8, there was a deduction authorized there of $3,300, was there not? Is that right? A. Yes.

Q. In all is it not true the deductions—those payments amounted to $100,185.12? A. If that was

the amount. It is fifty-two and 3058, according to these papers.

Q. And this was $48,000. A. You have no more papers?

Q. I don't know about that. Those are the only four I am talking about. A. What is this?

Mr. McGlynn: Read it.

A. What did you ask me, counsellor?

Q. The deductions, plus those certificates representing the payment of $48,000, total $100,185.12, which your company received by deduction and by moneys? A. What is the question.

Q. That is the question. (Question repeated by the stenographer.) Is that correct? A. I don't know whether the company received those amounts.

Q. Do you deny that they received them? A. I don't deny.

Q. For the purpose of the record, Mr. Haines, you have no objection, have you, to us getting, if we can get, if they have in their possession any and all copies of your accounts with this Ledger Audit Company? A. No objection.

Mr. McGlynn: I told you that.

Mr. Weinberger: I just wanted his permission.

The Witness: No. No.

(Adjourned to Friday, June 24th, 1927, at 10:30 A. M.)

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,

Complainant,

and

FRANKLIN ARMS, INC., a corporation,

Defendant.

Continuation of testimony in the above cause before Roy F. Anthony, Esq., Special Master in Chancery of New Jersey, at the office of Stein, McGlynn & Hannoch, Academy Building, Newark, New Jersey, on Friday, June 24, 1927, at 10 A. M.

APPEARANCES:

STEIN, MCGLYNN & HANNOCH, by EDWARD R. MCGLYNN, Esq., for Receivers.

Messrs. WEINBERGER & WEINBERGER, by HARRY WEINBERGER, Esq., and

BURNSTINE & GEIST, by HENRY C. BURNSTINE, Esq., and

BERNARD WIESS, Esq., for Interim Receipt Holders and Trustee.

RANDOLPH BARRETT, Esq., for Estate of Anna M. Day.

GROSS & GROSS by ISAAC GROSS for Hudson & Essex Building & Construction Co.

ABRAHAM J. GOLDSTEIN, sworn.

Direct examination by Mr. Gross:

Q. Mr. Goldstein, you are treasurer of the Hud-

son & Essex Building and Construction Company? A. Yes.

Q. I show you a bond and mortgage made by James Haines to the Hudson Building and Construction Company for $15,000, dated April 9, 1926, which mortgage appears to be recorded in the office of the Register of Essex County on April 16, 1926, in Book T-57 of Mortgages, pages 13-15, and ask you whether your company is the holder of this bond and mortgage? Your company owns this bond and mortgage? A. Yes.

Q. How much is due on it? A. Nothing was paid.

Q. How much is due on this particular bond and mortgage? A. $9,500.

Q. Has any interest been paid on it? A. No, sir.

Q. So that interest is due you from the date of the mortgage? A. Yes.

Q. How is it that only $9,500 is due on this $15,000 mortgage? A. We apportioned it and took a mortgage on a piece of land alongside of it for $5,500, so we deducted $5,500 from the original $15,000 and it remains $9,500.

Q. You released part of the property covered in this mortgage of $15,000 for a mortgage on adjoining property for $5,500? A. That is right.

Q. And the part of the property that was released from this mortgage is the property described in the $5,500 mortgage? A. Yes, sir.

Mr. Gross: I offer the bond and mortgage of $15,000 in evidence.

(Marked Exhibits H-1 and H-2.)

Q. I show you, Mr. Goldstein, a mortgage of $5,500, made by Franklin Arms to Hudson & Essex Building and Construction Company, and ask you

whether that mortgage is the $5,500 mortgage you just mentioned? A. Yes, sir.

Q. And this mortgage of $5,500 describes the part of the property covered by the $15,000 mortgage which you released; is that correct? A. Yes.

Q. Was any part of this $5,500 mortgage paid? A. No, sir.

Mr. McGlynn: I offer this mortgage in evidence.

(Marked Exhibit H-3.)

I offer this mortgage to show the part of the first mortgaged property which has been released.

It is stipulated by counsel that there is of record in the Essex County Register's Office a postponement of mortgage executed by the Hudson & Essex Building and Construction Company to Rollin J. Francis, Trustee, dated June 3, 1926; recorded June 17, 1926, in Book 88 of Postponement of Mortgages, page 315, which instrument postpones the mortgage introduced in evidence this morning, Book T-57, page 15, to the mortgage made by the Franklin Arms, Inc. to Rollin J. Francis, trustee which was introduced in evidence at the last hearing, to secure the sum of $215,000.00 agreed to be advanced thereon for the erection of the apartment house.

Q. There is due interest from the date of the mortgage? A. Yes.

Mr. Gross: I desire all proceedings in this case to be considered.

Cross examination by Mr. Weinberger:

Q. You originally owned this land? A. Yes.

Q. And sold it to whom? A. Sold it to James H. Haines.

Q. You took back a purchase money mortgage, and this mortgage represents a mortgage for $15,000.00? A. Yes.

Q. The property was conveyed to the Franklin Arms, Inc., and they gave back a mortgage to the Hudson & Essex Construction Company in the sum of $15,000.00. A. Yes.

Q. That $15,000 mortgage, there was how much due on that? A. $9,500.00 against this particular property.

Q. Have you the dates of the payments? A. No payment was made.

Q. None were made? A. No, sir.

Q. The $15,000 mortgage was divided so that there was a balance due of $9,500 on that and $5,500 on another mortgage? A. Yes.

Q. Which is also referred to? A. Yes.

Mr. McGlynn: The $5,500 is not on our property; it is on property to the east, vacant land.

Q. This $5,500 mortgage does not cover the land upon which the apartment house known as the Franklin Arms is constructed? A. No, sir.

Q. Did you receive any interest on the mortgage of $15,000 upon which you say there is now due $9,500? A. No, sir.

Q. No payment at all? A. No, sir.

Q. Any interest paid on it? A. No, sir.

Q. There was a mortgage on this property at the time that you owned it? A. Yes.

Q. Held by the executors of the Anna M. Day Estate? A. Yes.

Q. That mortgage was for how much? A. Mortgage, $8,000.

Q. It is true, is it not, that that mortgage was paid? A. Yes.

Q. Did you pay it? A. No, sir.

Q. Did you have anything to do with the paying of it? A. No, sir.

Q. Do you know who did pay it? A. I understood it was paid—

Q. Not what you understand; do you know who paid it? A. Yes—

Q. Of your own knowledge? A. I—

Q. Yes or no. A. I know it was paid.

Q. You were not present when it was paid? A. No, Mr. Barrett knows about it.

Q. On that $5,500 mortgage, which was a unit of the $15,000 mortgage, was there any interest paid on that? A. No, sir.

Q. The entire principal on that is due, you say, $5,500? A. Yes.

Q. I think you have already testified that you did accept a subordination permitting this mortgage of the Franklin Arms of $215,000 to become a first and prior lien to your mortgage of $15,000?

Mr. McGlynn: That is in by the stipulation agreed to before.

MEYER ZARIN, sworn for Hudson Structural Iron Co.

Direct examination by Mr. McGlynn:

Q. You are an officer of the Hudson Structural Iron Company? A. Yes.

Q. Your company furnished iron work for these apartments? A. Yes.

Q. Corner of Berkeley Place and Franklin Street, Bloomfield? A. Yes.

Q. Was that by virtue of a contract? A. Yes.

Q. With whom? A. Franklin Arms.

Q. Have you got the contract with you? A. Yes, sir.

Q. These two papers which you give me represent your contract for this iron and steel work in this apartment? A. Yes.

Q. One dated May 27, 1926, and the other dated July 12, 1926? A. Yes, sir.

Mr. McGlynn: I offer these in evidence.

(Marked Exhibits 3 and 4 for Hudson S. I. Co.)

Q. At the time of the appointment of the receivers in this matter how much was due your company for work done under these contracts? A. $6,717.40.

Q. Had anything been paid your company on account of material or work done previous to the appointment of the receivers? A. Yes, $4,000. I got $4,000 in cash and a bum note.

Q. I don't care about the bum note. Without the note. A. $4,000.

Q. And that balance you testified to, was after applying the credit of $4,000? A. Yes.

Q. Can you give us the date of that payment of $4,000? A. Yes, I could; I got July, 1926, $500; July 23, $500; July 30, $1,500, and August 5, $500, August 10, $500, August 20, $500.

Q. That totals $4,000? A. Yes.

Q. Is the balance the amount for which you filed your mechanics lien against this property? A. Yes, sir.

Cross examination by Mr. Weinberger:

Q. Have you the books showing the dates of payment? A. Yes, sir.

Q. Where are they? A. Right here (producing books).

Q. You don't keep this book, do you? A. No, sir.

Q. Who does? A. A young lady.

Q. What is her name? A. Miss Bernstein.

Q. This is your ledger, is it? A. Yes.

Q. Where is your cash book? A. I haven't got it with me.

Q. This is the only book you brought? A. Yes.

Q. What other books have you that go to make up your system of bookkeeping? A. A regular set of books.

Q. You have your charge book? A. Yes.

Q. Your daily charge and your daily cash book? A. Not exactly; they wouldn't be a daily—

Q. This is your ledger? A. Yes.

Q. But you have a cash and charge book before you to make your entries into the ledger? A. No, we just have slips and monthly bills. This is entered in the ledger accordingly.

Q. The Franklin Arms, Inc., Franklin and Berkeley Street, Bloomfield, June 2, 1926, is when you started this business with them? A. Yes. I wouldn't exactly say the date; I think I started before June.

Q. As a matter of fact you entered into a certain contract on the twenty-seventh of May, 1926, did you? A. Yes.

Q. On the twelfth of July you gave an additional estimate for additional work for $200; is that correct? A. Yes.

Q. There is nothing in this book which indicates

that you took a contract for $12,700, is there? A. That shows you just all the material that went out there. It shows you all the shipments.

Q. You don't know anything about these books, then, except as they appear by Miss Bernstein? A. Why shouldn't I know? I collect rent, and every time I get a check of Franklin Arms, I had to go down for it and ask for it, and I know something about it.

Q. You know something about the transactions between the Franklin Arms, but you have no personal knowledge of the entries in these books of what they are and what they are made up of and how they are made up; you don't know anything about that? A. Yes, as the material is shipped—

Q. That is your practice? A. Yes.

Q. In this particular case, do you know what "folio 3184" means? You are not a bookkeeper? A. No.

Q. You wouldn't know what that means, would you? A. No.

Q. You don't know why it is in this book here, either, "Folio 3184"? A. It gives you a certain shipment.

Q. No, it doesn't, does it? A. I cannot swear to it.

Q. What does "Folio 3293" mean? A. It means—

Q. Don't guess; if you don't know, say so. A. I don't.

Q. What does "Folio 3675" mean? A. The same answer.

Q. You don't know. As a matter of fact, this was a contract job? A. Yes.

Q. And you say that whenever a shipment was made you made a debit or charge against the contract; is that right? A. Yes.

Q. Did you make the complete shipment in this case?

Mr. McGlynn: Prior to the receiver?

Q. Prior to the receiver coming into possession.
A. No.

Q. Did you do any work after the receiver was in possession?

Mr. McGlynn: I object; I don't see that it makes any difference. The claim can only be had for the amount due at the time of the appointment of the receiver.

Mr. Weinberger: Does the lien go beyond that?

Mr. McGlynn: No.

Mr. Weinberger: I want to find that out. I withdraw the question.

Q. As a matter of fact did you file a lien in this case? A. I did.

Q. How much money was due you at the time that you filed the lien? A. $6,717.40.

Q. How do you know that? A. My books show me that.

Q. You rely on the book which I have here, which is kept by Miss Bernstein? A. There is something else; I carry around a bunch of them.

Q. You carry around a bunch of these papers in your pocket? A. Yes.

Q. And that is why you say there was a balance due you of $6,717.40? A. Yes.

Q. Who prepares these bills? A. The office.

Q. Who is the office? A. We have a force there, an accountant.

Q. Which one of the accountants or people in the office made this bill, will you tell me? A. I cannot.

Q. You don't know whose writing it is? A. It is Miss Bernstein's.

Q. You depend on what she puts here for your statement under oath here today? A. I checked this.

Q. What do you mean by "checked"? A. See if it is right.

Q. How? A. By going through the ledger.

Q. Did you go through the ledger? A. I did.

Q. You went through this ledger? A. Yes.

Q. And you checked it personally? A. Yes.

Q. Why is it you don't know what "Folio 3184" means, if you did that? You know you never did any such thing; why don't you tell us what the fact is? You are not a bookkeeper? A. No, I am not.

Q. You think you have good employees in your office there, don't you? A. Yes.

Q. And you depend on their accuracy, don't you? A. Yes.

Q. Like all business men, as a rule? A. Yes.

Q. You never had occasion to go and check up this book to find out what everything in this ledger means, did you? A. No.

Q. You never checked it up as a matter of fact with anything else? A. To a certain extent, I did.

Q. Only partially? A. Yes.

Q. To see if the totals were right, I suppose? A. Yes.

Q. You never checked it up with the day book, to see what money came in, did you? A. The accountant does that.

Q. That is his business; that is what they are paid for? A. Yes.

Q. So you haven't any personal knowledge as to the accuracy of any of the items in this ledger,

have you? A. If they wouldn't be right, I would hear of it.

Q. If you found a mistake, you would make somebody else hear about it? A. Yes.

Q. Are you friendly with the Haines? A. I am.

Q. Did you pad a bill for them in this case? A. I do not pad any bills.

Q. You did not pad? A. I don't pad any bills at all.

Q. You didn't do any padding in this case? A. No, sir.

Q. You are sure of that? A. Yes, sir.

Q. By the way, you say that—how did you receive the payments, cash or check? A. Check.

Q. Do you know whose checks you received? A. Franklin Arms.

Q. Do you know what banks they were? A. I cannot recall.

Q. On July first you received a payment of $500 according to the entry in this book. Do you know what "Folio C112" means? A. No.

Q. On July 23 you received $500; do you know what "Folio C114 means"? A. I know that I received $500 on account.

Q. When did you receive the last payment? A. Do you mind letting me have the bill?

Q. Can you tell without referring to the bill? A. I cannot. I cannot carry that much in my mind; you wouldn't expect me to.

Q. By the way, this bill which you carried around in your pocket; that is a correct bill, is it? A. Yes.

Q. And it shows the whole transaction? A. Yes.

Q. And shows all the payments that you received on the Franklin Arms, Inc.? A. Yes.

Q. And it shows the dates when you received them? A. Yes.

Q. Is that true, now? A. Yes.

Q. You filed your lien for $6,717.40 for that reason, is that right? A. Yes.

Q. Did you receive a payment on the tenth of August of $500? A. Yes.

Q. Did you receive a payment there on the thirty-first of August of $2,000? A. That was—

Q. On the bill that you are reading from? A. No, sir. I would like the bill.

Mr. McGlynn: He is answering your question.

The Witness: That was a payment on a note.

Q. I didn't ask you that. Does it appear on the bill that you are reading from? A. This note is attached to the bill. This is only to fresh out your memory.

Q. What do you use to fresh out your memory? Does that bill set forth a true statement of the payments? A. Yes, sir.

Q. Is there a payment on that bill of $2,000 on the thirty-first of August? A. No, on this bill we only have cash.

Q. Is there a mortgage on that bill? A. No, sir.

Q. You filed your lien for $6,700? A. $6,717.40.

Q. Isn't it true that you received a payment of $2,000, which you didn't credit on there? A. No, sir.

Q. Isn't it true that on the thirty-first of August there was paid to you $2,000? A. In a note; we make out monthly bills; this bill was made out after, when this note was protested.

Q. I don't understand that.

The Witness: Are you just trying to tangle me up?

Mr. Weinberger: I am trying to straighten you out.

Q. Did you get a payment of $2,000 on the $6,700? A. In a note. $6,700?

Q. Yes. A. (No answer.)

Q. You did not? A. Sixty-seven, no, sir.

Q. Did you get a payment of $2,000 on August 31? A. If you want to call it a payment, yes; it is a note.

Q. Wasn't the payment of the note a credit that date? A. At the time it was.

Q. Whose note was it? A. Franklin Arms.

Q. When you got this $2,000 payment, which appears in this ledger, why is it it don't appear on the bill? A. Because this bill was made only about six weeks ago, or probably a month; I wouldn't swear to it. We were making out monthly bills as it stands, the Franklin Arms today, or three months, as it appears here, $6,717.40.

Q. How much cash did you get in altogether up to the thirty-first of August, 1926? A. $4,000.

Q. Isn't it true you got $6,000 according to your ledger? A. No, sir. If you look further, you will see that that is credited when the note was protested.

Q. Look at your book and tell me in your book whether you didn't get a payment of $2,000 which is a credit? A. I did, and then we credit that account again.

Q. Where is the credit there? A. This here is the time when the note was protested (indicating).

Q. The note of $2,000 was protested? A. Yes.

Q. Was there any other payment after that? A. No, sir.

Q. What was the payment of January 31? A. $9.95; that was an overcharge.

Q. Was this an endorsed note or note of the corporation? A. An endorsed note.

Q. How was it endorsed; by whom? A. By Julius Haines and James Haines.

Mr. Weinberger: I ask that this note be marked in evidence.

(Marked Exhibit S-1.)

Q. You have some more to deliver under this contract yet? You haven't delivered all the materials on this contract? A. At the time of the day of the appointment of the receiver.

Q. Up to the time of the appointment of the receiver?

Mr. McGlynn: It is admitted he didn't.

Q. How much was the total amount delivered up to the time of the appointment of the receiver? A. The total amount was—

Q. You don't know that, do you?

Mr. McGlynn: Give him a chance.

A. $12,717.46.

Q. Up to the time of the appointment of the receiver there was delivered $12,717.40? A. Yes.

Q. Where did you deliver those materials? A. Franklin Arms. It is right there where the contract specifies.

Q. You have drivers, have you? A. Yes.

Q. How many? A. It all depends who you want to call a driver.

Q. It all depends on how many you use to drive and deliver materials; how many? A. About nine, including myself.

Q. Where are your delivery slips? A. In the office.

Q. Have you any of the slips here showing any delivery to the premises in question of any material on that job? A. No, sir.

Q. Did you deliver material to any other job for these people at the time you had this contract? A. No, sir.

Q. Or any other job at any time during the course of this contract? A. No, sir; I wouldn't trust them enough.

Q. You personally made no deliveries of any materials on this job? A. I did.

Q. What materials did you deliver personally and what date? A. Do you know what bread lines are?

Q. In Democratic times we had bread lines. A. We have them now, too.

Q. Have you delivery slips showing your deliveries? A. No.

Q. How many deliveries did you make yourself; one? A. About; yes; I wouldn't swear to it, about.

Q. Do you know how many deliveries there were in all? A. No, sir, I do not.

Redirect examination by Mr. McGlynn:

Q. Mr. Zarin, how often were you on this job from the time it started until the time of the appointment of the receiver? A. Mostly every day.

Q. And in those trips of yours to those premises corner of Franklin Street and Berkeley Place, did you see the material which had been delivered by your drivers from time to time? A. Yes, sir.

Q. And these books, one of which is here, a ledger, are they kept under your supervision by the bookkeeper? A. No, I have a special man for that.

Q. Under your supervision? A. Yes.

Q. What is your position with the company? A. President.

Recross examination by Mr. Weinberger:

Q. Who is your attorney in this case?

Mr. McGlynn: Mr. McGlynn. Put that on the record, please. I am not ashamed of it. Would you like to see the delivery slips?

Mr. Weinberger: Yes.

Q. Didn't you just a moment ago say that you saw all of the materials on this building or land? A. Every piece of it? I am not as good as that.

Q. The practice of the company is that you have delivery slips signed by the party on the job when you make a delivery? You are not a driver? A. Not all the time.

Q. And in this particular case, of course, you charged according to the contract, didn't you? A. Yes.

Q. Based on $12,700, the value of the contract; is that right? A. What was that last question?

Q. The contract was $12,700? A. Yes.

Q. When you made a delivery according to your delivery slips, how did you charge for the material that appears on the delivery slips? A. The contract is not $12,700, or whatever it is. I have shipped up to that date to the amount of $12,717.40.

Q. Just understand my question. Your contract was $12,700, and the second contract was $200, or a total of $12,900? A. Yes.

Q. When you made those charges in your lien claim and in this book, how did you base your charge; on what did you fix the amount or charge

that you entered in your book? A. Actually what the amount of the material shipped to the job was.

Q. That was based on the contract price? A. Yes.

Q. So if your contract is $12,700 and you shipped what you call this bridle iron, if you shipped 100 bridle irons, you would charge for 100 bridle irons on the basis of $12,700, if that was the contract price? A. Why take a small item; there were larger items.

Q. That was the basis upon which you made your charge? A. Yes.

Q. That was the basis on which you made your items of charges in the lien which you filed in this case? A. Yes, the actual amount delivered on the job.

Q. You take the quantity of material? A. Yes.

Q. And charge at the rate or basis of the contract price? A. Yes.

Q. Is that correct? A. Yes.

Redirect examination by Mr. McGlynn:

Q. Take a contract such as you have in this case, do you make up estimates for material that is going to be used in that building? A. Yes.

Q. And that total of each item added up gives your contract price? A. Yes.

Q. But when you ship to a job and their work is stopped before it is finished, you charge in your books the value of that material based on the price which you figured in your original estimate? A. Yes.

Q. That is the practice, isn't it? A. Yes.

Q. And if the job is finished, the total amount of your charges on your books would be $12,900, or

whatever the contract happened to be? A. There is something whose shows.

Q. This is your original estimate sheet on which the contract was taken? A. Yes.

Q. And that is an itemized list of each and every piece of iron and the reasonable cost of it? A. Yes.

Q. And the total carried out is $12,782.50? A. Yes, which is just one copy—a part of one contract that I had.

Q. The footing will come out $12,700, and you take a contract for $12,700, that is what you mean? A. Yes.

Q. So in delivering the material charged for here, you use the same rate as you charge in this estimate? A. Yes.

Recross examination by Mr. Weinberger:

Q. Do you mean to say that you charge according to the contract price or according to the reasonable value of the things that you delivered; which do you do? A. The contract price.

Q. Not the reasonable value of them? A. No.

Q. You didn't make any charge in your lien claim according to reasonable value of what you delivered, did you? A. I don't know.

Q. Who should know better than you? A. My attorney.

Q. Should know better than you? A. In this particular case.

Q. Did he do the fixing in this matter or did you make the price? A. No.

Q. Why do you say your attorney should know better? A. You ask me law points.

Q. Did you charge according to what the market price was when you filed your lien claim? A. No.

Q. Didn't you charge according to the market price of the goods that you delivered? A. Yes.

Q. I thought so. A. And some extra stuff.

Q. You don't mean to say now, do you, that you charged market price only? A. I mean to say that I didn't expect to charge total cost. I am giving a true statement according to the contract, and there is the estimate. If you want to tangle me up, give me a chance and I will be ready for you.

Q. What chance do you want? A chance to do what? What chance do you want; to go out and talk it over with someone? A. No.

Q. What do you want? A. To get all my things together.

Q. I am going to see if I cannot help you. You made certain charges in your lien claim, didn't you? A. Yes.

Q. And of course it was your idea to be fair and reasonable in your charges that you made in your lien claim? A. Not only fair, but honest about it.

Q. And therefore you charged the lowest rates that prevailed at the time that you filed your lien claim for the merchandise that you delivered on this job? A. Yes.

Q. And that was the way that you made each of the charges that you made entry of in your lien claim? A. Yes.

Q. And the total amount of your lien claim of $6,700 was based in the same way all the way through on all of the charges made, honest, fair, reasonable charge prevailing at the time that you made your lien claim? A. Yes. Do you wish to state from A to Z? You will start a lot of them;

there was no exception made in this particular account.

Q. That was the standard and the only standard which you used in making the charges?

Mr. McGlynn: You want to have the bookkeeper with the cash book and journal, Mr. Weinberger, to tell you what you want to know.

Mr. Weinberger: You will have to prove everything. I will ask your Honor to give me the privilege in each case, because I am very frank to tell you—I have no desire to be captious, but I certainly don't think that where people innocently part with moneys involved here, that I should be rushed by your Honor or anybody else and pay the penalty and sacrifice any rights that my clients have.

The Master: Nobody is rushing you. You were notified to be here at the first hearing; you did not come here.

Mr. McGlynn: He can have all the opportunity he wants to cross examine these people.

RANDOLPH BARRETT, sworn in behalf of Service Trust Company; and the Interim Receipt Holders.

Direct examination by Mr. Weinberger:

Q. Mr. Barrett, you are a practicing attorney, of this State, are you not? A. I am.

Q. I believe that you are likewise one of the executors of the will of Anna M. Day? A. Yes.

Q. Did you receive any money in behalf of the estate from G. L. Miller & Co. with regard to a

mortgage covering property upon which the Franklin Arms, Inc., erected an apartment house? A. Yes.

Q. I show you what purports to be a check dated June 7, 1926, and ask you whether or not that is the check which you received as the executor? A. Yes.

Q. How much was that check for? A. $8,000.

Q. What was that in payment of? A. It was in part payment of the amount due on a mortgage covering the property in Bloomfield.

Mr. Weinberger: I offer the check in evidence.

Mr. McGlynn: I object to it on the record; I don't think that a payment by the G. L. Miller Company—I assume it is in liquidation of a mortgage on the land—under our cases, is a proper item to become part of a mortgage which would be prior claims in a hearing such as this.

The Master: It is material as proving the amount due on this mortgage as between the receivers and the Service Trust Company. I don't think that under the cases it entitles you to priority over the lien claimants.

Mr. McGlynn: You are right.

Mr. Weinberger: I think your Honor is wrong on that.

(Marked Exhibit S-11.)

Q. This mortgage which was on the property and which was a purchase money mortgage? A. Yes.

Q. And by reason of the payment received, as evidenced by Exhibit S-11, plus whatever addi-

tional moneys were paid, this mortgage was cancelled and satisfied of record? A. Yes.

Q. This money was paid as and for part of the purchase price of the land? A. Yes; I didn't understand that.

Q. This was given as part payment of the purchase price of the land? A. This check was given in payment of the mortgage; the mortgage was originally a purchase money mortgage for a large amount which had been reduced by payments on account when releases were given.

Q. I say that this money paid to you as executor was in part payment of the land? A. No, this was in payment of the mortgage; the mortgage was in part payment for the land.

Q. It was a purchase money mortgage which was paid and satisfied which represented part of the purchase price on the land in question?

Mr. McGlynn: I object to the question. I think you should go a step further when you say on the land in question, and say what you mean. I think the mortgage covered other lands.

A. The mortgage covered a large tract of land which was originally sold by the executors of the Estate of Anna M. Day at various times.

Mr. Weinberger: I have no objection, if your Honor please, that Mr. McGlynn stipulate here what ground it covered.

It is stipulated between counsel that this mortgage paid by the check before mentioned, not alone covered the land upon which the apartment was erected, but other lands in addition.

Mr. McGlynn: That is right, Mr. Barrett?
The Witness: That is right.

Cross examination by Mr. Mc Glynn:

Q. Is it your recollection that when the check was paid to the executors, that they receipted the mortgage for cancellation? A. Yes; there was another payment made by the Haines Brothers at the same time in order to pay off the full amount then due on the mortgage.

Q. By the Haines Brothers or by the Franklin Arms? A. I don't remember. The Franklin Arms had just been incorporated at that time; I don't remember whose check it was.

Q. While you are on the stand, I would like to ask another question, using you as my witness. You incorporated the Franklin Arms, Inc., did you not? A. Yes.

Q. You had charge of the legal details in connection with this what we call the G. L. Miller mortgage held by Mr. Francis as trustee? A. Yes.

Q. Do you know of your own knowledge whether any work had been started by the Franklin Arms, Inc., on the building which was being erected on this property on the corner before the recording of the Francis mortgage? A. I don't remember that.

Mr. McGlynn: Mr. Julius Haines is here to be recalled at your request.

It is stipulated that the check No. 5381, dated June 7, 1926, drawn by G. L. Miller & Co. to the order of New York Title & Mortgage, in the sum of $1,000, is offered in evidence and marked Exhibit S-12.

It is stipulated and agreed that this money was used by the Title Company named on

the check for the purpose of paying taxes on the real estate covered by the mortgage.

Mr. McGlynn: The receivers reserve the right to object to this item on the question of priority only.

It is stipulated and agreed that the receiver will not require production of actual checks showing the payment of items enumerated on Exhibit S-9 of June 11, and waives further proof of the payment thereof, except that the question as to whether or not it is a proper credit on the mortgage is to be determined by the Master.

Mr. Weinberger: We offer these checks; we have had photostat copies made of them. All of these were testified to at the former hearing, I believe.

We offer in evidence check dated June 22, 1926, for $18,350, check of G. L. Miller & Co. on the Mortgage Trust Company of New York, endorsed "For deposit Franklin Arms, Julius H. Haines, Treasurer," stamp mark "Paid."

Mr. McGlynn: The receiver has no objection to the introduction of this exhibit and reserves the right to object to it as a proper item, and reserves the right to question the priority.

(Marked Exhibit S-13.)

Mr. Weinberger: I offer in evidence check No. 5926, for $1,650, also endorsed "Pay to the Order of Chemical National Bank, Sheldon Brokerage Company," to the order of Franklin Arms, Inc., on the Mortgage Trust Company of New York, and signed by G. L. Miller & Co., and endorsed "Pay to the order

of Sheldon Brokerage Company, Inc., Franklin Arms, Inc., John Haines, Secretary," which together with the check just put in evidence makes up the sum of $20,000.

Mr. McGlynn: The receiver consents to the marking of the exhibit and reserves the right to question the priority thereof.

(Marked Exhibit S-14.)

Mr. Weinberger: I offer another check in evidence, No. 72b July 29, 1926, for $26,350, to the order of the Franklin Arms, Inc., on the Chemical National Bank, check of G. L. Miller & Co., for deposit to Franklin Arms, Inc.

(Marked Exhibit S-15.)

I offer check No. 73b, July 29, 1926, $1,650, Franklin Arms, Inc., payee, on the Chemical National Bank, check of G. L. Miller, endorsed as follows: "Pay to the order of Sheldon Brokerage Company, Inc., Franklin Arms, Inc., by Julius Haines, President. Pay to the order of the Chemical National Bank, Sheldon Brokerage Company, Inc."

(Marked Exhibit S-16.)

Mr. McGlynn: The receiver objects to the advancement of these moneys represented by these checks.

JULIUS H. HAINES, recalled.

Direct examination by Mr. McGlynn:

Q. Who was the Sheldon Brokerage Company, Inc., do you remember? A. I don't know; I never heard of it.

Q. Do you know what brokerage company or insurance office had charge of the issuance of the

completion bond of the Fidelity & Deposit Company? A. No.

Cross examination by Mr. Weinberger:

Q. Have you brought those checks? A. Yes.

Q. Did you find any of them? A. (Producing two bank statements.) The National Newark & Essex did not send me the statement yet.

Q. Mr. Haines, you have produced here today a statement of the Franklin Arms, Inc., with the East Orange Bank, of East Orange, showing deposits from August 12 down to September 10, 1926, and checks drawn on that account from August 21 down to September 10, inclusive; is that correct? A. Yes.

Q. Likewise, a statement on the Corn Exchange Bank of New York, showing a transcript of the account of the Franklin Arms, with checks drawn against the deposits made from June 28, 1926, down to September 11, 1926, and deposits from June 28, down to August 27, inclusive; is that correct? A. Yes.

Q. You have not produced a transcript of the account of the National Newark & Essex Bank because you have not yet received it? A. That is right.

Q. Have you the checks in your possession, or do you know in whose possession the checks may be? A. No, I have not in my possession any checks; I do know where they are.

Q. Where are they? A. In Miller's office.

Q. Have you personally made any investigation to get these checks back or find out who has them? A. No.

Q. You don't know when you took them there? A. Sometime in 1926.

Q. The fact is that this mortgage is dated May, is it not? A. I guess so.

Q. The fact is that this account was closed September 11, is it not? A. Yes.

Q. In the Corn Exchange? A. Yes.

Q. And September 10, on the East Orange Bank? A. Yes.

Q. So that these checks were not taken out of the bank until September 10? A. I suppose so.

Q. You say now, do you, that after the account was closed in New York in September, or thereafter, you took these checks down to the G. L. Miller Company? A. I don't say anything of the kind.

Q. What do you say with regard to the time when you took these checks down? A. I don't remember the time; I know I took them down sometime in 1926, when I took books and papers and so forth.

Q. Mr. Haines, isn't it true that you didn't get the checks from the bank until September 11? A. I don't know about that.

Q. Do you deny that? A. I don't deny anything.

Q. Will you say you got them before September 11? A. I got some checks before.

Q. Any of the checks mentioned on this statement? A. Yes.

Q. You got before? A. Yes.

Mr. McGlynn: September 11?

Q. Before September 11? A. Of course.

Q. You certainly wouldn't take the checks down for July in June, would you? A. No.

Q. You took all these down together at one time? A. I don't know about together.

Q. Do you mean to say you took checks down

there on some one occasion? A. I took down a number of checks and books on one occasion.

Q. And they were the checks which you mentioned, in these statements? A. I said they were the checks, some of them, perhaps. I don't know when I took the books down. I know in 1926.

Q. You do know this, don't you, that you on one occasion took your books and checks down? A. Yes.

Q. You also know that these books which you did take down you left with G. L. Miller? A. Yes.

Q. And you do know, don't you, that you didn't go down but once, and that must have been after September 11? A. I went down more than once.

Q. With books and papers? A. No.

Q. I am talking about books and papers. A. I don't know when it was; it might be September 11 and it might have been after.

Q. Where are the checks that you took down after that time; did you have any others? A. After what time?

Q. The time you went to G. L. Miller? A. I took no other checks.

Q. So you took all of the checks down; that is what I am trying to ask you. A. I don't know about that.

Q. If there were any checks that you didn't take down, where are they? A. I don't know.

Q. What excuse have you got for those checks? A. I have no excuse.

Q. Where should they be? A. What checks?

Q. The ones that you didn't take down. A. I don't know which I didn't take down.

Q. Were there any checks left in your possession after you went and made this trip to G. L. Miller? A. I have seen no checks afterwards.

Q. So that you took them all down? A. I don't know whether I took them all down.

Q. Didn't you intend to take them all down? A. What for?

Q. What did you take any of them down for? A. They asked me to bring books and papers and so forth.

Q. Did they say what they wanted the checks for? A. No.

Q. Did they tell you they wanted to look at them for some purpose? A. They said they wanted to see books and papers and what not, so we brought them down.

Q. Have you learned since your last examination where it was you took them? A. To G. L. Miller.

Q. At Forty-second Street? A. Yes.

Q. You left them in what office? A. In their office.

Q. Was that before they were in trouble or after? A. I do not recall.

Q. Do you know to whom any of these checks were delivered that you have on this statement? A. No.

Q. You know, do you not, that there is an attempt here—

Mr. Weinberger: I withdraw that.

Q. Did you pay any creditors any money out of the money you received from G. L. Miller for materials delivered on that building? A. I don't know.

Q. From what other source did you receive any money that you deposited in this bank account? A. From all sources.

Q. Tell us one. A. From various sources.

Q. Tell us one. A. (Same answer.)

Q. What is your right name? A. Julius Harry Haines.

Q. Is that your correct name? A. Yes.

Q. Did you have any other name before you took the name of Haines? A. None of your business.

The Master: Answer the question.

The Witness: Julius Harry Haimovici.

Q. When did you change your name? A. I have a copy from the Court.

Q. When? A. I don't remember.

Q. What year? A. I don't remember.

Q. You haven't any idea when you changed your name? A. No.

Q. Why, wasn't it right after you were in some big trouble, that you changed your name? A. No.

Q. You don't remember that either? A. No.

Q. You didn't have any big trouble, did you? A. No.

Q. You didn't have any big bankruptcy matter in which you were a bankrupt? A. No.

Q. That wasn't the reason you changed your name? A. No.

Q. Did you have a fire? A. Yes—not me.

Q. When was that? A. I had no fire.

Q. When was it? A. I don't remember.

Q. You don't remember when there was a fire that made you change your name? A. No.

Q. Who had the fire? A. My father was in business.

Q. What was his name? Haimovici? A. Yes.

Q. When was that? A. I don't remember.

Q. You don't remember what? A. What question did you ask me?

Q. Don't you know what I asked you? A. No.

Q. Why did you say you don't remember? A. Because I don't know what question you asked me.

Q. No idea as to what year it was that you changed your name at all? A. No, you will find it in court.

Q. I know all about it; you know I know it, don't you? A. You just tell it to me now. Suppose you do know.

Q. When did you change your name? A. The court will show when I changed my name.

Q. You won't tell us the date? A. I don't remember.

Q. The year? A. I don't remember.

Q. How many years ago? A. I don't remember.

Q. Do you care to remember? A. Why should I; I have a record that my name was changed in court.

Q. Your brother was also a Haimovici before he became a Haines? A. Yes.

Q. He is the receiver in this case? A. Yes.

Q. He changed his name at the same time? A. I don't know.

Q. Did you make the application to change your name? A. Yes.

Q. What court? A. I don't know.

Q. Where; what state? A. I will have to ask the lawyer. Perhaps I can find out from him.

Q. You don't know what state either? A. In New York State.

Q. Were you drunk when you made it? A. I don't know. I don't want you to use any such words to me.

Q. You don't mean to remember things and I will refresh your recollection, before I get through. A. If you have a statement, bring it out, and you will save time.

Q. You will have to ask your lawyer in what state it was?

Mr. McGlynn: Tell him the state.

A. New York State.

Q. Who was your lawyer? A. Mr. Gustave Rosen; he is in the Woolworth Building.

Q. You haven't any books? A. No.

Q. You are what they call a professional destroyer of books, are you not? You have had experience in that direction; you are what they call a professional destroyer of books for the purpose of destroying evidence and are familiar with that line of business?

Mr. McGlynn: I object to the question.

The Master: I sustain the objection.

Mr. Weinberger: I ask that my exception be noted, on the ground that there is no such profession, if there is such an activity.

Mr. McGlynn: He is your own witness. You certainly called him.

Q. On the twenty-eighth of June, 1926, there is a deposit shown here of $18,350 in the account of the Corn Exchange Bank; where did you get that money? A. I don't know.

Q. Haimovici, or Haines, or whatever your name is, don't you know where you got that money? A. My name is Haines.

Q. Where did you get the money? A. I don't know.

Q. Where in the world, other than from G. L. Miller could you get the money? A. Perhaps.

Q. Is there any place in the world that you can mention that you ever got $18,350 in June, 1926, other than from G. L. Miller & Co? A. I don't know.

Q. You know that as a matter of fact you are

the man who has had these lien claims filed for the purpose of bolstering up a claim to get half of what is involved there? A. I don't know anything about it.

Q. Are you now the owner of that property? A. No.

Q. Are you indirectly or directly a party in interest in the property? A. No.

Q. You have no interest in it? A. No.

Q. Have you been supervising that building since the receivership? A. No.

Q. Been around the building? A. Yes.

Q. Your brother or you? A. My brother lives next door.

Q. Who owns that building today? A. We don't.

Q. Who does? A. I don't know.

Q. Are you or your brother interested in the ownership of that building, directly or indirectly? A. No, sir.

Q. Are there any stockholders of the Franklin Arms, Inc., that are the owners of that building? A. No.

Q. Any one related to you? A. No.

Q. You don't know who is the owner? A. No.

Q. Do you mean that? A. Yes.

Q. You had nothing to do with the purchase of the building and didn't get any creditors to buy it in their names for you or your brother? A. We didn't purchase the building.

Q. Wasn't it your request that any of these creditors in this particular matter purchase the building for your protection or your brother's protection, or for you or your brother? A. We didn't purchase the building and nobody purchased the building for us. Maybe they did; it is their business.

Q. You don't know anything about it? A. No.

Q. What is your name? A. Julius H. Haines.

Q. Is that your endorsement on that check, referring to Exhibit S-13? A. Yes.

Q. Haimovici, did you ever sign that? A. My name is Haines.

Q. I mean Mr. Haines. A. Yes.

Q. Did you ever sign that name? A. Yes.

Q. How much was that check for? A. $18,350.

Q. You are now reading from Exhibit S-13? A. Yes.

Q. Will you look at this statement, Corn Exchange Bank, which I offer in evidence as Exhibit S-17? A. Sure.

Q. Look at the first item of the deposit there, $18,350, and tell the court whether or not that is the deposit? A. I suppose it is.

Q. Don't you know? A. It must be. June 28—June 22; I suppose it is.

Q. What did you say? A. I suppose it is.

Q. Is there any doubt about it in your mind? A. No, there is no doubt, except that I wonder why this check is deposited on the 28th, and it is dated June 22nd. This is the check.

Q. The fact of the matter is, that there is a stamp on there showing the same date of the deposit? A. Yes.

Q. It is only when you are confronted by proof that there cannot be any doubt, that you are willing to answer "Yes" to?

Mr. McGlynn: I object to the question.

Mr. Weinberger: I think it is the duty of Mr. McGlynn to go before the Vice Chancellor and ask for the arrest of this man for the testimony that he has given in this case, as well as the receiver.

Q. Mr. Haimovici—Mr. Haines, I beg your pardon, what did you do with that $18,350? A. I deposited it in the bank.

Q. On the 28th of June you issued a check for $2,500; to whom? A. I don't know.

Q. You said that Mr. McGlynn was your attorney? A. I didn't say anything of the kind.

Q. At the last hearing?

Mr. McGlynn: He did not.

Q. Is he your attorney? A. No.

Q. Has Mr. McGlynn represented you in any matter? A. No.

Q. Or your Franklin Arms? A. No.

Q. Did you erect or contruct any other building aside from the Franklin Arms, Inc., in June, 1926? A. No.

Q. Were you engaged in the construction of any other work during that time? A. No.

Q. Have you been engaged in erecting or constructing anywheres? A. No.

Q. So that the only apartment house that you were building in June up to the time that you went into bankruptcy was this Franklin Arms, Inc.? A. Yes.

Q. And that was the only apartment house that you were building? A. Yes.

Q. You were doing no other building at that time? A. No.

Q. What is your business? A. Importing and jobbing.

Q. Importing what? A. Importing anything I can import.

Q. In June, 1926, what was your business? A. Importing.

Q. Importing what? A. Anything that I could import.

Q. Did you do any importing in June, July and August or September, 1926? A. Yes.

Q. The Franklin Arms? A. No, I myself.

Q. The Franklin Arms didn't do any importing? A. No.

Q. And I take it the Franklin Arms only used its money for this particular building? A. I suppose so.

Q. You signed checks, didn't you? A. Yes.

Q. So that every check that was ever given was always given for this particular building and the work that was going on in that building? A. Yes.

Q. And so that all of the checks drawn on this account of the Franklin Arms from June 28 down to the date of September 11 was for material delivered or work performed and done in connection with the erection of this building? A. Yes, work done.

Q. And so down the line, each of the payments, from July 1, $1,500, was given to a creditor for labor or material, as you have denoted on both transcripts of the Franklin Arms? A. I know I gave them for the purpose of various kinds of work for the Franklin Arms.

Q. For example what? A. Building, erection of the building.

Q. Does that hold true equally as well for different items showing payments on the statement that you haven't got, of the National Newark & Essex, of the Franklin Arms? A. Yes; I will bring the National Newark as soon as I get it.

Mr. Weinberger: I offer the statement of the East Orange Bank.

(Marked Exhibit S-18.)

Q. I show you Franklin Arms check marked

S-15; where did that check go? A. $26,350, I think it must have gone to the bank for deposit. Does it show on the statement?

Q. Where do you think it went? A. Corn Exchange Bank.

Q. I show you an item here July 30, 1926, $26,350, and ask you if that refreshes your recollection? Does it make you feel satisfied that that is where that chek went? A. Yes.

Q. You say that money was used in the same way, to pay for merchandise and material delivered to that building? A. Yes, for the erection of that building.

Q. You are sure of that? A. Yes.

Q. By the way, there was a purchase money mortgage on the land, was there not? A. I don't know what you mean; please explain.

Q. There was a mortgage covering the ground of $9,000, which was made for eight or nine thousand dollars? A. I don't recollect how much it was.

Q. $8,000? A. Whatever it was.

Q. You heard Mr. Barrett testify this morning? A. I wasn't here.

Q. Mr. Haines, you owed no money to any materialmen or anybody else prior to your—you had paid off everybody up to the 28th of July by moneys that you had gotten from G. L. Miller? A. I don't know about that.

Q. As a matter of fact when did you start this building? A. I don't remember, but it must have been in January or February, 1926.

Q. And when you got your mortgage loan was the building partially constructed? A. I don't know how far we were, but I think we must have been on the third tier of beams. I am not positive. You see they held us back with money, so when my

brother put a requisition through, I think that it must have been the third tier of beams, and then I think there was another reason; they said they will not give us any money until they had a mortgage on record. I think that was their answer to us, and that was, I think, June 8th.

Q. Had you paid your debts right along, or did you have to get mortgage money to pay your debts? A. We paid money right along.

Q. Originally? A. Yes, I did.

Q. And that money which you paid, did that pay all of the debts, or did you need more of the mortgage money to pay it? A. I do not recall exactly now.

Q. As a matter of fact did you have anybody who was entitled to a lien—the right to file a lien for any materials or for any work on that property, that they had done or delivered, when you got your check of July 28? A. I don't know; I know we owed money.

Q. You are sure about that, too? A. Yes.

Q. Could you tell us how much you owed; how do you fix the fact in your mind now with such positiveness, that on the 29th of July, when you got the check for $28,000, that you owed money? What makes you so sure about it? A. We owed money all the time.

Q. When you got this check marked Exhibit S-15 for $26,350, you owed, then, of course, considerable money, I suppose? A. I don't know.

Q. You say you owed money all the time? A. We owed money, but I don't know the exact dates we owed money and when we did not.

Q. I am only speaking of this building? A. Yes, there was no other building.

Q. You don't know how much you owed? A. No.

The Witness: Your Honor, may I ask a question of him?

Mr. Weinberger: Go ahead.

The Witness: My accountant called me up a few days ago and said that he gave him all the data and the information, so I said I was glad, because I wanted him to have it.

Q. Gave it to whom? A. To the people from the G. L. Miller.

Q. Do you know that your accountant told the attorneys in this matter that he had no records at all and claimed that he returned them to you? A. He didn't tell me anything of the kind; he said that G. L. Miller were there, the same people, and asked for records, and he said, he gave me the books, and that he also gave you some information about them. I would like to know what information he gave you about them, because we will prove—

Mr. McGlynn: You mean the affidavit?

The Witness: Yes, because we will prove—

Q. Who told you that he gave the G. L. Miller people or his attorneys in this matter, meaning Mr. Weinberger or Messrs. Burnstine & Geist, or anyone connected with them, an affidavit? A. I said people from G. L. Miller.

Q. When? A. A few days ago; he called me up yesterday.

Q. He told you he gave that under oath? A. He said they asked him and he gave a statement to them.

Q. You are not sure about that? A. Yes.

Q. The accountant did tell you that he had the

books and they had been returned to you? A. He told me that he told you that, which was so.

Q. Did you want to ask any other question? A. I want to ask why you do not reproduce the books you have, checks and everything?

The Master: Don't argue.

Mr. McGlynn: I will have available for Mr. Weinberger all lien claimants who were here at the first session when he was here, with their books and records, and finish up with them. Do you know how much time you will want to do that?

Mr. Weinberger: I think when we get the lien claims in shape we ought not have much difficulty in this matter.

Adjourned to Monday, June 27th, 1927, at 10 A. M.

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,

Complainant,

and

FRANKLIN ARMS, INC., a corporation,

Defendant.

Continuation of testimony in the above entitled matter, taken before Roy F. Anthony, Esq., a Special Master in Chancery of New Jersey, at the office of Messrs. Stein, McGlynn & Hannoch, Academy Building, Newark, New Jersey, on Monday, the

27th day of June, A. D. 1927, at ten o'clock in the forenoon.

APPEARANCES:

Messrs. STEIN, MCGLYNN & HANNOCH, EDWARD R. MCGLYNN, Esq. (present), counsel for the Receivers.

Messrs. WEINBERGER & WEINBERGER, HARRY H. WEINBERGER, Esq. (Present), and

Messrs. BURNSTINE & GEIST, of the New York Bar; HENRY C. GEIST, Esq. (present); BERNARD WIESS, Esq. (present), for Interim Receipt Holders and Trustee.

LEONIE DOCTOR, being duly sworn according to law, on her oath testified as follows:

Direct examination by Mr. McGlynn:

Q. Miss Doctor, you are employed by whom? A. Albert & Kernahan, Incorporated.

Q. They are in the lumber business? A. Yes.

Q. Will you just explain briefly these papers that you have here so that we will know what they are—these pink slips are what? A. Those are the signed delivery tickets, this is the ledger sheet—

Q. That isn't in sequence. A. This is first—this is the contract.

Q. Under which these materials were shipped? A. Yes. These are the signed delivery tickets, this is the original charge for the material delivered, and this is the ledger sheet, a sort of summary of the charges.

Q. In other words, to the ledger is posted the aggregate amount of the charges? A. For each month, yes.

Q. Now, from an examination of those records which you have produced and on which your firm's

charges are based, are there any credits at all? A. No, no credits. Just a minute. Credits for material returned, yes, sir.

Q. No credits for cash or any payments made on account? A. No.

Q. Were there any payments made on this account? A. None at all.

Q. What do your records show to be the total amount due your concern from Franklin Arms, Inc.? A. $8,799.22.

Q. And can you tell from looking at these delivery slips, or from the other papers, where this material was delivered? A. Yes, it is marked on each ticket, 51 Berkley Place, Bloomfield, New Jersey.

Q. And was this the only account that you had against this company? A. Yes.

Cross examination by Mr. Weinberger:

Q. Are you the bookkeeper of the concern? A. I am.

Q. Were these goods sold under contract, or how? A. Under contract.

Q. Have you the contract here? A. Yes. (Witness produces contract.)

Mr. Weinberger: This has not been offered, has it?

Mr. McGlynn: I will put them all in. Before we proved it informally. I will offer all these documents if you want to use them.

Mr. Weinberger: I think they ought to go in evidence.

Mr. McGlynn: Let us mark them now. Let us mark the contract.

(Marked Exhibit K-2.)

Mr. McGlynn: Now, next, Miss Doctor, would be the delivery slips?

The Witness: Yes.

Mr. McGlynn: Mark those.

(Marked Exhibit K-3.)

Mr. McGlynn: What do you call the next?

The Witness: Sales record.

(Marked Exhibit K-4.)

The Witness: And this is the ledger sheet.

(Marked Exhibit K-5.)

Q. Now, this contract which has been marked Exhibit K-2, called for certain materials, the amount of which were $8,344.84. Were all those materials delivered, or only partially delivered? A. That I cannot say. I may be able to tell you if you let me look at that contract.

Q. What records, if any, have you here which would indicate whether there was a complete delivery? A. These checkings on here in pencil are supposed to indicate part deliveries.

Q. You don't make those? A. No.

Q. So you don't know anything about the accuracy of that? A. I know that they are accurate; I don't know whether the contract was fully completed.

Q. You don't know anything— A. I know the entries on here are accurate; I haven't totaled them up to see if the contract was delivered in full.

Q. What records, if any, would you have which would indicate whether or not there was a complete delivery? A. The records are on there, but I haven't summed them up to see. Those pencil figures indicate deliveries from time to time.

Q. Who made those? A. One of the clerks in the shipping department.

Q. Where would those pencil entries come from —what records would they be based on? A. Based on orders received for delivery from time to time.

Q. Where are those orders? A. I don't know.

Q. Where would they be? A. Well, if they were verbally ordered there wouldn't be any record except that.

Q. You don't mean to tell me that if you receive an order today to deliver a certain thing, either by an oral statement or by a written order, that you wouldn't have some evidence of it other than these pencil notations on this sheet? A. There is the delivery ticket.

Q. Now, have you a book which would indicate deliveries made other than the delivery slips charging this particular account? A. Yes, sir.

Q. Where is that record? A. It is in the office, I believe.

Mr. McGlynn: What is that record?

The Witness: It is just a memo to the yard superintendent to make the deliveries.

Q. Well, I am—

Mr. McGlynn: When you say orders verbal and written, you mean orders against the contract?

The Witness: Received from the Franklin Arms, Inc.

Mr. McGlynn: To deliver part—

The Witness: This is the record of the deliveries as they are made from time to time, but the orders to the yard superintendent to deliver are not here.

Mr. McGlynn: I mean those orders are against this contract?

The Witness: Yes, all of them are against that contract. No other deliveries were made.

Mr. McGlynn: I mean they are not extra orders for anything else except for materials as they were needed, from that contract?

The Witness: Yes.

Q. Well, to make it still clearer, there were no other orders excepting this agreement here? A. Oh, no; no other orders at all.

Q. And all the charges were made against this particular order of July 8th, 1926? A. Yes.

Q. Now, the specific separate orders made from time to time are kept by the yard superintendent? A. Against that contract, you mean?

Q. Yes. A. They are kept on file, they are not kept by him.

Q. I mean they are records made by him, or given to him, and filed with you after? A. Yes.

Q. They are not here? A. No.

Q. Now, do you know how much of this agreement was actually complied with? A. No, I don't know, except what the records that are here show.

Q. May I ask you whether you know the date—when was this account first started? A. I think the 2nd of July was the first delivery.

Q. Where would that be? A. 1926.

Q. And that would be shown on the delivery slip? A. The top delivery ticket.

Q. Now, would there be a charge made for this entry of July 2nd, 1926, of any specific amount here? A. On here—on the sales record.

Q. How much? A. Two charges, one of $112.88 and one of $39.

Q. That price would be based on the market price prevailing at the time? A. Based on the contract which you have there.

Q. Would its price govern in each instance? A. Yes.

Q. So that on July 2nd, delivery made, the charge which you have on that sales sheet would be made as per the terms of the contract? A. Yes.

Q. The next item of July 7th, would be what? A. $120.98.

Q. Now, there is another item of July 7th. A. $135.22.

Q. And there would be another of July 7th. A. $168.35.

Q. And there is another on July 8th. A. $255.84.

Q. And there is another on July 8th. A. There are two charges on that, $154.18 and $62.53.

Q. There is one here of July 10th? A. $312.

Q. Another on July 8th. A. Two charges, $288.99 and $35.

Q. What is your next charge? A. July 16th.

Q. What is that? A. $267.29.

Q. Your next charge? A. There are seven charges on July 17th.

Q. July 17th, you said? A. Yes.

Q. How much? A. Seven items.

Q. Aggregating how much? A. I will have to do some compilation.

Q. Give us the individual items? A. $77.63, $65, $51.75, $39, $15.53, $10.40, $37.95.

Q. July 21st. A. There is one of July 19th. Perhaps they are not quite in the same order.

Q. I beg pardon; there is one here? A. There

are several charges on that, $121.68, $110.06, $111.15. That is all on that.

Q. 21st next. A. Yes, $65.80, $173.16 and $22.23.

Q. 21st? A. $305.64.

Q. 26th? A. $260.68.

Q. Next, July 26th? A. I have read that, $260.68.

Q. July 28th? A. Two charges, $266.76 and $50.76.

Q. Are there any credits up to that time at all made—payments made up to that time? A. No, no credits.

Q. July 28th there is another one, is there not? A. There is another one of $251.16.

Q. Now, you haven't totalled the amount charged up to July 28th, have you? A. No.

Q. It is all one lump sum that you have? A. Ours is a lump sum for the whole month of July. There is one here for $23 slightly out of its order at the end, out of its chronological order.

Q. Charged? A. Yes, charge of $219.35.

Q. Have you compared these delivery slips with the various items appearing on your sales slip? A. Yes.

Q. Your practice is to deliver, is it not, one of the delivery slips to the man who signs for the delivery? A. I believe it is.

Q. You don't know? A. I can't swear to it.

Q. How many sheets of this delivery slips when they are originally made out? A. I don't know.

Q. You are not familiar with that? A. No.

Q. How did you apprise Franklin Arms of what they owe you? A. We sent them daily bills and a statement at the end of the month.

Q. Do you know Mr. Haines here? A. No, I do not. He may have been in the office, but I don't remember them.

Q. And in this particular case did you send daily bills to the Franklin Arms Company? A. Yes.

Q. Where to? A. 251 Berkley Place, Bloomfield.

Q. Was there any account ever about any charges made on this account? A. Not to my knowledge.

Q. You have nothing to do with the delivery yourself? A. No.

Q. Whether these deliveries were in fact made you don't know? A. I take it for granted they were, because the tickets are signed.

Q. That is a conclusion, but you don't know. If I signed any delivery slip there you wouldn't know? A. I would know because I have seen them, I have inspected them, and I know when they were signed and who they were signed—

Q. Had my signatures appeared on there you wouldn't know? A. No.

Q. Where they were delivered, too, you don't know of your own knowledge? A. No, I wasn't there when they were delivered; only from the record.

Q. Would the delivery slips disclose who could have delivered these materials A. I think they do; I think the driver's name is on them. Yes.

Q. In each case there is a driver's name? A. Yes.

Q. When was the last delivery made, according to your sales record? A. On August 29th, 1926.

Q. August 29th. What are the credits, if any, that these defendants received from your company? A. There are two credits for material returned, one on July 31st, for $27.26, and August 6th, for $87.30.

Q. Were there any other jobs where any materials were delivered in this case that you know,

or don't you know? A. I don't know what you mean.

Q. Was there any other work that this concern, the Franklin Arms, were doing, and where these goods were delivered during this period of time? A. As far as I know, the only job that they have ever had at the Franklin Arms is this one.

Q. That is the only one you know of? A. Yes.

Q. You gave us the last date of delivery as August 29th, didn't you? A. Yes.

Q. This is the entire account with reference to the Franklin Arms job, at Berkley Place, number 51? A. Yes.

Q. That is correct, is it? A. Yes.

Q. And all of the charges on those particular goods were made against this particular contract, is that right? A. Yes.

Q. And for this particular work? A. Yes.

Mr. Weinberger: Let me have offered on the record a technical objection—a formal objection that we object to the introduction of the records in this case upon the ground that they have not been properly proven, and upon the further ground that certain of the records are based upon data or items kept by others who are not present, and which records are not also proven for the purpose of proving the entire chain constituting the bookkeeping, and upon the further ground that there is no evidence or proof relating to the delivery of the material to the premises in question.

JULIUS HAINES, recalled, for

Direct examination by Mr. McGlynn:

Q. I ask you to look over these delivery slips which have been marked in evidence K-3, and please look at the signatures at the bottom of each one of those and tell me whether the signatures or initials on the bottom of each delivery slip is the signature or the initial of anyone employed by the Franklin Arms, during the erection of the building, for the receipt of material?

Mr. Weinberger: Does your Honor have to rule on that other objection first? I notice that Mr. McGlynn is going to apparently supply it.

The Master: He is going to try to overcome one of your objections.

Mr. Weinberger: I think we ought to have a ruling on it.

The Master: The objection is overruled.

Mr. Weinberger: I ask for my exception.

The Master: Yes.

A. Mostly all of them were signed by my brother, Mr. James Haines.

Q. And the rest of them? A. Perhaps workers on the job, or the foreman on the job.

Q. Do you recognize the initials outside of your brother's as being somebody employed— A. No, because there were quite a few people on the job.

Cross examination by Mr. Weinberger:

Mr. Weinberger: Now, I ask that the evidence submitted at present with regard to the papers offered in evidence be stricken from the record upon the ground that they

have failed to establish or prove—they have not been legally proved.

The Master: Objection is overruled.

Mr. Weinberger: I ask for an exception.

Q. "J. H." stands for who? A. Mr. James Haines.

Q. Your brother? A. Yes, sir.

Q. You recognize his initials on there? A. Yes.

Q. Did you know that material was delivered there? A. Well, I don't know; I wasn't on the job all the time. I know the Albert and Kernahan people delivered merchandise on the job.

Q. Some of those are signed by you too, are they? A. No.

Q. None at all? A. No. It is possible, perhaps, if I was on the job there once and some material was delivered, but I haven't seen any there.

Q. Well, in July you knew that Albert and Kernahan were delivering materials there. I mean what days in July you don't know? A. No.

Q. First part of July, first week, second week—A. I knew my brother closed up a contract with them.

Q. You knew at the end of that contract they delivered materials to you, or the early part of July—would be the whole month of July. You know that? A. Yes.

Q. You knew that, of course, in July, didn't you? A. Yes.

Q. No question about that? A. No question about that.

ESTHER R. BERNSTEIN, being duly sworn according to law, on her oath testified as follows:

Direct examination by Mr. McGlynn:

Q. You are employed by the Hudson Structural Iron Works? A. That is right.

Q. As bookkeeper? A. As bookkeeper.

Q. Have you your books here this morning? A. I have.

Q. Now, will you get them for us and turn to the account of the Franklin Arms, Inc., starting in with your original book— A. Yes.

Q. Suppose you start in with what your first record is, delivery slips, contract, or what-not. Before you do that tell us what your system is, Miss Bernstein, and how you run your charges through your books? A. We have a shipping clerk, who makes out all charges, and it is run through by me and charged up according to per pound, which I enter into my ledger—my customers' ledger.

Q. Is there a sales book before you get to that? A. Well, I post direct from the sales charge.

Q. What are the other books you have here? A. My sales book and my cash book and my journal, and my sales return book.

Q. Now, if there is a contract—if the goods are being shipped under a contract, is the contract in force in the manner with which the charges are made, or just the amount of the charges? A. I don't quite understand you.

Q. Does it make any difference whether a man buys just one piece of iron or whether he buys under contract? A. No; we ship according to contract.

Q. Then your charges, if there is a contract, are based on the contract? A. On the contract.

Q. Do you have a copy of that in your record so you know? A. Yes.

Q. Where do you enter that? A. The contract?

Q. Yes. A. The contract price, you mean?

Q. Yes. A. On the top of the ledger sheet.

Q. Does this ledger sheet show such an entry? A. It does.

Q. What indicates that? A. The original contract was $12,700; the additional contract was made later for $200.

Q. And the total is underneath that? A. $12,900.

Q. Then you charged up each individual shipment? A. Each individual shipment is charged up.

Q. And was the entire contract, according to your records, shipped here? A. No, it was not.

Q. If the entire contract had been shipped, would the total charges— A. It should coincide with the top total.

Q. If not, what would you do, make some journal entry to equalize it? A. It should equal it at the end.

Q. Oh, it should? A. Yes.

Q. Now, you say you post this ledger direct from your— A. Direct from my charge.

Q. What are the little notations in the columns? A. That is my charge number.

Q. Delivery tickets, you mean? A. My delivery tickets.

Q. Which is in the first column? A. Right.

Q. Delivery ticket in the second? A. Right, and the total.

Q. And the footing is the amount of the material shown on the delivery slip at the contract price per pound, is that the idea? A. Yes.

Q. On the other side of that credits? A. Is the cash received.

Q. The first column is the date? A. Date, folio, page number of the cash book and the amount received.

Q. Now, these slips that you have before you are the original delivery slips? A. That is the third copy; office voucher copy.

Q. And do all of the numbers in your ledger agree with these delivery slips which you have before you? A. They do.

Q. You have checked them yourself? A. I have.

Q. Those entries were made by you? A. Yes.

Mr. McGlynn: I offer the delivery slips, the third copy.

Mr. Weinberger: May I examine on them?

Mr. McGlynn: Go ahead.

Mr. Weinberger: These are the delivery slips, are they? (Referring now to batch of papers appearing on the stationery of the Hudson Structural Iron Works, Inc.)

The Witness: They are.

Mr. Weinberger: Are they made out in duplicate or triplicate?

The Witness: Triplicate.

Mr. Weinberger: This is one of the three?

The Witness: One of the three.

Mr. Weinberger: What becomes of the other two?

The Witness: The second copy is turned over to the builder. The first copy is signed and returned by the builder.

Mr. Weinberger: Where is the one that is signed by the builder?

The Witness: I have them with me. (Presents batch of tickets.)

Mr. Weinberger: This is the original therefore signed by the builder,—or should be signed by the builder?

The Witness: Yes.

Mr. Weinberger: Have you examined these originals?

The Witness: Well, I have gone through them.

Mr. Weinberger: Are they all signed?

The Witness: They are not all signed, no.

Mr. Weinberger: Are not?

The Witness: Because the materials may have been delivered after hours; may have been delivered on a Saturday afternoon; nobody may have been on the job who would sign for them.

Mr. Weinberger: There may be many reasons why they weren't signed?

The Witness: Yes.

Mr. Weinberger: The materials may not have been delivered?

The Witness: No, that couldn't be; they were delivered.

Mr. Weinberger: I didn't ask you that. There is no reason why they could not have been delivered. If the driver was dishonest they wouldn't be delivered?

The Witness: No tickets would have been made if they weren't delivered.

Mr. Weinberger: Delivery tickets are made out before the goods are sent out?

The Witness: They are sent out with the driver.

Mr. Weinberger: They are made out for the driver to take to the job with him with the materials?

The Witness: Yes.

Mr. Weinberger: Now, if he don't deliver them, that would be one reason why they are not signed?

The Witness: No, it would not.

Mr. Weinberger: What?

The Witness: No, it would not.

Mr. Weinberger: Do you mean that?

The Witness: Yes; no one on the job—

Mr. Weinberger: I didn't ask you that. If the goods weren't delivered, these would not be signed?

The Witness: Not necessarily.

Mr. Weinberger: What?

The Witness: They could be dropped without being signed for.

Mr. Weinberger: They could be removed somewhere other than the job and not be signed for?

The Witness: Would that job be missing in the material? Wouldn't they call for it again?

Mr. Weinberger: Will you answer my question? That is one of the several reasons why they may not be signed, isn't it?

The Witness: Not in that particular case.

Mr. Weinberger: I thought you were a bookkeeper?

The Witness: I am.

Mr. Weinberger: Now, you don't know anything about the delivery of these goods on the 27th of July, do you?

The Witness: I wasn't on the truck.

Mr. Weinberger: You don't know where they were delivered?

The Witness: My records show—

Mr. Weinberger: Will you answer my question, please. Do you know where they were delivered?

The Witness: To Bloomfield.

Mr. Weinberger: You know that of your own knowledge?

The Witness: Of my own knowledge.

Mr. Weinberger: You are prepared to swear under oath and tell this Court that you know these goods were delivered there, and you weren't there when they were delivered, is that how far you want to go?

The Witness: To my knowledge.

Mr. Weinberger: Personal knowledge; you saw them delivered there?

The Witness: No, I didn't see them delivered.

Mr. Weinberger: Will you tell us what there is on this statement on July 23rd, 1926, that will make you say positive that they were delivered on this job?

The Witness: Why, it is all that material is written there.

Mr. Weinberger: Where is there a signature to show delivery?

The Witness: That I can't account for.

Mr. Weinberger: Did you say anything to the driver about this?

The Witness: I did not, no.

Mr. Weinberger: Why not?

The Witness: It wasn't necessary.

Mr. Weinberger: That wasn't the way you do your business?

The Witness: If these tickets are returned you can't send the drivers back to be signed.

Mr. Weinberger: Did you see this delivery slip when it came in?

The Witness: I didn't, no.

Mr. Weinberger: Did you notice that it didn't have a signature on it?

The Witness: I did not, no.

Mr. Weinberger: And isn't that the reason why you kept them all in the folder and didn't produce them this morning and gave me the white batch?

The Witness: Not necessarily; I gave you the copy I work from.

Mr. Weinberger: Why didn't you produce them?

The Witness: I work from the third copy, not the original.

Mr. Weinberger: Isn't this supposed to be a duplicate of that?

The Witness: It is.

Mr. Weinberger: Is it identical?

The Witness: It is.

Mr. Weinberger: Are you sure of that?

The Witness: I am positive.

Mr. Weinberger: Did you make this delivery slip out?

The Witness: No.

Mr. Weinberger: It isn't even in your handwriting?

The Witness: No.

Mr. Weinberger: Whose handwriting is it in?

The Witness: The shipping clerk.

Mr. Weinberger: Where did he take it from?

The Witness: From his shipping book.

Mr. Weinberger: Where is that book?

The Witness: In the office.

Mr. Weinberger: You didn't bring that either?

The Witness: No.

Mr. Weinberger: So that the first step in this transaction would be the shipping clerk's book, is that right?

The Witness: If you consider it such.

Mr. Weinberger: What do you consider it in your bookkeeping?

The Witness: My third copy.

Mr. Weinberger: Isn't it a fact that before you get this copy it is made up by a shipping clerk, and if he makes a mistake the whole works have the mistake in it, into even your ledger, your cash book and every other book?

The Witness: Before those tickets are made out it has gone through several hands before I get it.

Mr. Weinberger: So there are more hands than the shipping clerk's that they go through; who are they? Mention the different men?

The Witness: Well, Morris, the layerout.

Mr. Weinberger: He isn't here, is he?

The Witness: No.

Mr. Weinberger: Next?

The Witness: And the shipping clerk.

Mr. Weinberger: That is two. Who else?

The Witness: The driver would get them third and I would get them fourth.

Mr. Weinberger: Now, this delivery slip which is unsigned and is dated July 23rd, 1926, you had nothing to do with until it was returned into your office for entry purposes?

The Witness: Right.

Mr. Weinberger: And you entered it, did you, this charge of July 23rd, at what amount?

The Witness: May I have the number of that charge please?

Mr. Weinberger: 3492.

The Witness: $538.25.

Mr. Weinberger: And that was the reasonable value of the merchandise delivered; do you know that?

The Witness: That was.

Mr. Weinberger: And that is why the charge was made there?

The Witness: That was the charge.

Mr. Weinberger: Because it was the reasonable market charge and price?

The Witness: Yes.

Mr. Weinberger: You know that of your own knowledge?

The Witness: I know that of my own knowledge.

Direct examination (continued) by Mr. McGlynn:

Q. Will you get your cash book now, Miss Bernstein? Now, will you turn to your first entry on the credit side of your ledger on this account that appears on your cash book? What page are you reading from the cash book? A. C-112.

Q. What is the entry that appears there? A. Franklin Arms, $500, July 1st, 1926.

Q. Is there anything in that entry to indicate whether it is by check or cash? A. No, sir.

Q. You have here all the other entries for credits similar to that? A. Yes.

Q. And there was some discussion here the other day about a note that was received? A. Yes.

Q. Will you turn to your entry in your cash book on that, or is it a separate book? A. It is a journal—

Q. Journal entry. What does that show? What page is it on? A. J-120.

Q. How does it read? A. August 31, Notes Receivable, to Franklin Arms, Inc., received note in consideration of account.

Q. How much? A. $2,000.

Q. Now, does your record show what happened to that note? A. Yes, it does.

Q. Where? A. That note was not paid when it was due, and I offset it by a charge, "Received notice from the bank on October 1st for $2,011.45, $10 interest, $1.45 protest fees."

Q. Now, where did you post that from to your ledger? A. I have a journal entry showing that.

Q. What page? A. J-130.

Q. What does that say? A. Franklin Arms, Inc., note of $2,000, interest $10, protest fee $1.45; two notes receivable, $2,000, to charge former for protesting note.

Q. Now, what was that other book that you had over there, Miss Bernstein? A. Our sales returned allowance.

Q. And does that mean the materials came back? A. Came back, and over-charged. When we run through our tickets we sometimes find an overcharge, and I pass it through the sales returned.

Q. Sales returned? A. Or allowance.

Q. What entries have you in there that apply to this account? A. Just Franklin Arms, Inc., $9.95.

Q. What is that for? A. Showing that there was an overcharge on the Franklin Arms, Inc., account,

which should pass through the credit side of my accounts receivable ledger.

Q. Direct from that little book you have there? A. Yes.

Q. And indicated in some way that you posted it? A. By a check.

Q. That comprises the entire system of your records on this account? A. Yes.

Q. Shows a balance due your concern of what? A. $7,017.40.

Mr. McGlynn: I offer the books, slips, and all that goes with them.

Cross examination by Mr. Weinberger:

Q. This doesn't constitute your entire bookkeeping system; there are a couple of things that aren't here. A. It constitutes everything so far as I am concerned.

Q. As to the accuracy of the shipping clerk's entries you are not concerned at all? A. No.

Q. Whether they are right or wrong makes no difference to you? A. No.

Q. Whether these slips are right or wrong makes no difference to you either? A. I work from my third copy.

Q. You don't know whether they are right or wrong? A. Well, they are supposed to be right when they come in.

Q. Whether they are or not is none of your concern? A. To my knowledge they are.

Q. Please answer my question. Whether they are right or wrong is none of your concern? A. No.

Q. Whether they are sent or not is none of your concern? A. No.

Q. Whether they are delivered or not is none of your concern? A. No.

Q. Well, now, as a matter of fact, it is your concern to see that the prices are charged as per the market price prevailing, so that you are interested in the charge? A. Yes.

Q. That charge in this case is as of a market price prevailing, the reasonable charge? A. Yes.

Q. That was done in each case? A. Yes.

Q. You checked and verified that market price all the time, or somebody in the concern, to see that the reasonable price was charged? A. I do.

Q. That is the way you charged in this particular case? A. Yes.

Q. That you are sure of? A. I am positive.

Q. And in these particular charges you consulted with this gentleman there, Mr. Zaen? A. Yes.

Q. He is the man who fixed the charge in this case? A. No, I have my estimate from which I work.

Q. In order to determine the market prevailing price, you take it up with Mr. Zaen, is that right? A. Mr. Zaen.

Q. Now, on July 13th I find a delivery slip without any signature on. That is the original which should have the signature, is that correct? A. Yes.

Q. Referring now to slip 3450? A. Yes.

Q. I call your attention to the fact that slip 3455 has likewise no signature? A. Yes.

Q. You know that, do you not? A. I do.

Q. Did you see this slip this morning before you came here? A. I did.

Q. You noticed they weren't signed? A. I did.

Q. On the 16th of July I likewise find a slip, 3468, and find no signature. Did you notice that this morning? A. Yes, sir, I do.

Q. You have testified before? A. No, sir, I have not.

Q. 3488 likewise no signature. You know that, do you? A. Yes.

Q. Slip 3492 no signature. A. No.

Q. Would the driver's name appear on here? A. No, it would not.

Q. Who delivered in this particular case? A. Well, we have several drivers. It may have been one of six or seven; I don't know which one.

Q. 3419 no signature; you know that? A. I do.

Q. Have you a record in your book which shows which ones are not signed? A. I have not, no.

Q. 3293, no signature; did you notice that? A. I did.

Q. How much is that amount? A. May I have that charge memorandum again, please?

Q. 3293, June 17th. A. $234.15.

Q. What is the amount of the item, July 6th, 3419? A. $233.70.

Q. July 8th? A. $3,435, is that the number?

Q. 3435. A. $231.95.

Q. 3455, July 13th. A. $236.75.

Q. 3450, July 13th. A. $424.30.

Q. July 16th, 3468. A. $304.50.

Q. 3488, July 22nd. A. $638.50.

Q. July 23rd, 1926. A. $538.25.

Q. August 3rd, 3546, no signature, how much? A. $635.60.

Q. 3514, July 28th, no signature. A. $74.25.

Q. July 30th, 1926, 3396, how much? A. $548.55.

Q. When was this date corrected and by whom, do you know, on that slip? A. That is my writing.

Q. What was the cause of the error? A. I may have had my few charges to use after the first, and I thought I would change the date—I don't

know whether the July first or July thirtieth—June first or June thirtieth.

Q. Don't you think it is June thirtieth or July first? A. Well, there is 6/1 and 6/30, I don't know which it is.

Q. Does it look like a seven to you? A. There may be a seven over it.

Q. It looks like 6/1 or 7 over the 6, or 6/30. Which it is, you don't know? A. It may be either one.

Q. Which book would show the truth of it? A. The ledger.

Q. That is based on the writing? A. On my charge.

Q. On what date did you charge that? A. June 30th.

Q. When did you make up your mind that it ought to be June 30th? A. There isn't much difference between the 7/1 and 6/1, as long as it was delivered in the month of June.

Q. It makes no difference to you what date it is delivered on as long as you feel it is delivered? A. Yes.

Q. It has not been signed for, though. What effect, if any, did that have on your mind? A. None whatsoever.

Q. Who delivered those materials, if anybody? A. I can't—I don't know who the driver was at the time.

Q. Could you tell us what the total aggregate of the bills were up to July 28th of the deliveries—you haven't got that tabulated, have you? A. I haven't them as of June 28th.

Q. Up to July 28th? A. I beg your pardon. $5,976.55.

Q. That was the amount delivered up to that time? A. Yes.

Q. Are there any payments made on account? A. $2,500 made on account.

Q. Was there a note included in that? A. No, sir, that is all cash.

Q. How much was paid? A. $2,500.

Q. Date of payment? A. July 1st, $500; July 23rd, $500; July 30th, $1,500.

Q. Those are the only payments? A. Only payments in the month of July.

Q. What payments were made thereafter? A. On August 5th, $500; August 10th, $500; August 20th, $500; and the note that was protested came in on the 31st.

Q. When was that given to you, do you know? A. On August 31st.

Q. Given to you? A. Given to me on August 31st.

Q. Payable when? A. It was a three months' note.

Q. You have the note? A. I have the note. I beg your pardon, it was a thirty days' note.

Q. Dated when? A. August 30th.

Q. Payable when? A. Thirty days.

Q. After date? A. After date.

Q. Now, you have given us a list of all of the payments, and aside from this, were there any payments they were entitled to aside from the $9 overcharge? A. Yes.

Q. You do not keep a record anywhere of who the driver is who takes every slip? A. I do not.

Q. There is nothing in the business which would indicate which of the drivers delivered these materials? A. No.

Q. You don't know who took them for delivery either, do you? A. No.

Q. Whether he delivered them or not you

wouldn't know either, if you don't know who took them? A. I would not.

Redirect examination by Mr. McGlynn:

Q. Miss Bernstein, some of the questions and answers I have heard the words "reasonable market price" used. In this particular case, if I recall correctly, one of the first questions he asked you was on what you based the prices for the materials delivered. Did I understand you to say a contract? A. A contract price.

Q. And you have mentioned some sort of an estimate? A. Estimate.

Q. What does the estimate have on it that deals with prices? A. It shows the material that was taken from the plans, the original plans, and what the Franklin Arms, Incorporated building was entitled to.

Q. You mean a description of the various kinds of iron? A. That is right.

Q. What does it have on it with reference to price, if anything? A. Total amount of the iron, structural steel, would be $8,600.

Q. No, no; what does that original estimate slip have on it, if anything, which governs the price per pound of the various material to be delivered? A. Total number of pounds, 144,000 pounds.

Q. Was it all the same price per pound? A. Yes.

Q. Then all the iron, according to that estimate, would total so many thousand pounds at so much per pound, is that the idea? A. Yes.

Q. Is that the sum which you used in your charges? A. No, it is not.

Q. Why wasn't it used? A. The first ticket was

made out by error, and it was advisable to follow up the charges at the same price.

Q. What? A. The first ticket was charged up by error and it was advisable to use the same price at the same charges.

Q. What do you mean, at the wrong price? A. At five cents; one cent less.

Q. You mean according to the estimate it should have been charged at six cents? A. According to the estimate the contract was averaged at six and charges were put through at five.

Q. And are all the charges in your ledger based on five cents a pound? A. That is right.

Q. And that same rate was carried all the way through the account? A. That is right.

Q. So when you, in answer to questions of Mr. Weinberger, said something about reasonable value, or market price, it didn't make any difference whether the market went up or down, the charges are carried through at five cents a pound? A. That is right.

Q. The same as the first question? A. That is right.

Mr. Weinberger: I think these questions are highly leading.

Recross examination by Mr. Weinberger:

Q. Now, we are all agreed on this, aren't we, Miss Bernstein, that the price as per the estimate was not charged? A. No.

Q. And by that you mean that the item which was six cents in the contract was not charged in this case, that is correct, is it? A. Right.

Q. That is right? A. Right.

Q. More by an act of kindness reduced the price? A. Not necessarily, no.

Q. For some reason the price was reduced? A. Reduced.

Q. And you took it upon yourself to charge another lower price? A. Right.

Q. That agreement was never modified or changed in writing, was it? A. No.

Q. That is why you answered me as you did, that you were charging according to the reasonable market price prevailing, is that right? A. Right.

Q. Now, are we sure on that? A. Yes.

Q. And I believe you said you were familiar with the market price and therefore charged five cents. A. No, I didn't say with the market price, I said I was familiar with my estimate.

Q. Well, you didn't go according to your estimate in this case, did you? A. Well, I didn't charge more.

Q. Why didn't you charge three cents? A. Because we don't sell iron at three cents a pound.

Q. You don't sell? A. No.

Q. What do you mean by that? A. We don't contract our buildings at that price.

Q. Four cents? A. No.

Q. You have sold at four? A. We have not.

Q. You never went down as low as four in any contracts? A. No.

Q. When did you make up your mind that it ough to be five cents? A. Well, that depends upon the material. That is my price that I usually go by.

Q. What materials were these that you changed there, weren't they the six cent materials? A. Yes.

Q. But you charged only five? A. Well.

Q. And you only charged five because you felt five was enough? A. No, I did not.

Q. Why did you charge five? A. Because it is my usual standard price that I charge up.

Q. Well, you agree on this? A. Well, we made an error in the first charge and we followed out the rest of the charges.

Q. Who got this estimate, Mr. Zaren? A. No.

Q. Who? A. Mr. Abelson.

Q. Where is he? A. I can't account for his whereabouts just now.

Q. Is he employed by the company? A. He is.

Q. Who approved that when it was brought in? A. Mr. Abelson signed the contract.

Q. Has he authority to do that? A. He has, yes.

Q. He broke the contract—made the reduction? A. He didn't break no contract.

Q. Who made the reduction? A. I did.

Q. You decided five was enough? A. I didn't do anything.

Q. Who did it?

Mr. McGlynn: I object, Mr. Master; this is the third time we have gone into that.

The Master: I will sustain the objection.

Mr. Weinberger: We ask that an exception be noted. Your Honor can not answer, neither can Mr. McGlynn answer the question as to what this young lady did, why she did it and how she did it.

Mr. McGlynn: I can tell you.

Mr. Weinberger: No man living can tell us why this young lady decided to do it.

Mr. McGlynn: I have heard three times her explanation.

The Master: It doesn't make any difference why she did decide it; she did it. Any more questions?

Mr. Weinberger: Unless your Honor doesn't want me to ask any more.

The Master: It all depends what the questions are.

Q. The first bill—delivery slip, you have made no charges on any of the delivery slips, have you? They don't contain price? A. No.

Q. Do you know Mr. Haines, or either of them? A. I know Mr. James Haines.

Q. You do know him. Has he been around to see you about this matter at any time? A. Not to see me.

Q. Ever talk to him? A. I did speak to him.

Q. Not about this contract? A. Not about the contract.

Q. Not about this job at all? A. No.

Q. Now, you didn't charge according to the estimate at any time throughout this entire job? A. I did charge up fully when all the structural steel was delivered; I put a final charge through the balancing account.

Q. What was the final charge? A. $2,100—$2,135.35.

Q. Which was a credit? A. No, it was a charge.

Q. What was the reason for the charge? A. Because the steel had been charged at five cents and it was taken at six.

Q. So you added it? A. I did.

Q. In other words, you charged up five throughout the entire time of the deliveries? A. Right.

Q. And then you made up your mind you ought to get six again. When was that?

Mr. McGlynn: I object to "making up her mind." There is a written contract in this case, an estimate. The young lady has ex-

plained three times that she made an error on the first entry, and the same error was carried through, and now she has explained—

Mr. Weinberger: She didn't make an error, she said she wanted to charge five cents.

Mr. McGlynn: She said she made an error and she carried the same error through, and now she explains she made a journal entry, or some kind of an entry, to bring the thing up to the contract price, which had never been deviated from.

Mr. Weinberger: I press the question.

Q. (Question read by the stenographer.)

Mr. McGlynn: I say it is objectionable.

The Master: I will allow the question.

A. When my final charge was put through?

Q. Yes. A. August 31st.

Q. That is after they were in bankruptcy?

Mr. McGlynn: I object; it is not.

Q. Was it not?

Mr. McGlynn: As a matter of fact, they were never in bankruptcy.

Q. Or insolvency?

Mr. McGlynn: I object.

The Master: I think the question is a proper question, if she knows.

A. I don't know when they went into bankruptcy or insolvency.

Q. Who told you to make that extra charge? A. No one.

Q. When did you decide that you were going to raise the price from five to six cents?

Mr. McGlynn: I object to this, counsel asking this witness when she made her mind up to raise any prices; there is a definite contract in evidence in this case. She couldn't raise or lower the price.

The Master: It doesn't appear, Mr. Weinberger, that she had anything to do with it; it was a written contract.

Mr. Weinberger: I submit this young lady said she fixed the price at five; she thought it was plenty.

Mr. McGlynn: She did not.

Mr. Weinberger: I thought so.

Mr. McGlynn: You asked her what she based five—

The Master: There is a written contract.

Mr. McGlynn: I don't care particularly—

Q. Is there anything in here which says six cents? A. There is not.

Mr. Weinberger: I never heard of any such misrepresentations to a court.

Mr. McGlynn: What do you mean "misrepresentations"? How do you get that way?

Mr. Weinberger: Where is there anything in that about six cents?

Mr. McGlynn: She said 144,000 pounds divided into the contract price made six cents a pound. Don't talk about misrepresentation to courts.

Q. Well now, let us see if we got this right. Do you now want to say that 144,025 pounds—is that right? A. Yes.

Q. The cost should be— A. $8,600.

Q. And that was at the rate of how much? A. Six cents a pound.

Q. And that was at the rate of how much? A. Six cents a pound.

Q. Was that the price for all? A. It was closed for $8,640; that was the total, and in closing the contract, it was closed for $12,700 even, which reduced the price down $40 on structural.

Q. Do you now say the amount of iron, 144,028 pounds, equalled the same total that you before mentioned at six cents a pound? A. $8,640.

Q. Was that at six cents per pound? A. Yes.

Q. Without any allowance or deduction? A. There was a deduction of $40.

Q. Is that on the contract? A. It was closed for $12,700.

Q. I didn't ask you that. Is there anything in Mr. Abelson's writing here showing a deduction? A. You can see here.

Q. Where? A. "Taken for $12,700."

Q. Then you didn't make an error of a cent through this transaction, did you? A. Not quite a cent, no.

Q. Is there any other difference in this estimate and charge? A. I don't know of any.

Q. Look at it, please, Miss Bernstein. A. There was none.

Q. Where is your contract? A. (Witness produces contract.)

Q. Now, this contract here for $12,700 itemized the amounts, didn't it? A. It did not itemize the amounts.

Q. It didn't. How much was the sum total that you charged there after you make that additional charge for twenty-odd some hundred dollars,

would that be equal at six cents? A. No, it would balance the account.

Q. Balance. You were charging five cents, according to your books from what date down to what date? A. From June 2nd to August 18th—no, to August 5th.

Q. And then after the 5th of August it was that you added the additional cent for the whole back account? A. Right.

Q. Under whose instructions, if anybody? A. My own.

Q. Was the reasonable market value five cents at the time? A. Six cents was what the job was taken for.

Q. I didn't ask you that. A. I don't set the price for contracts.

Q. Did you know the reasonable value was five cents? A. That is the price I went by by error.

Q. Did you know that the market price was five cents? Isn't that why you charged five cents? A. I don't go by market value price.

Q. You don't? A. No.

Q. So what you testified originally in this hearing with regard to questions asked by me of you is not correct? A. Well, I am judging from other jobs that were taken.

Q. What you told me then on cross examination then isn't it true? A. To my knowledge it was taken for the reasonable market price.

Q. Five cents? A. Six cents.

Q. Did you say five cents was the reasonable market price? A. It was six cents. If I make an error, that has nothing to do with it; it was taken for six cents per pound.

Q. Isn't the reason for the error the fact that

the market price was five and that is why you charged five? A. Absolutely not; it was not.

Q. Will you explain from your books or records, if you can, how you came to make that error? A. None whatsoever; I cannot explain it. The estimate may have been out of the file at the time I made the first charge.

Q. How about the contract? A. The contract doesn't show per pound.

Q. Doesn't it itemize it? A. It does not.

Q. Well, if there was no estimate on file at the time, did you consider it as a contract job— A. As a contract job.

Q. Where did you look to find out what the contract was if you didn't have the estimate? A. I don't get your question.

Q. Where did you look to find out how you were to charge in this case? A. I didn't have to look. From my knowledge of the business I know what I should have done.

Q. That is why you charged five cents, isn't it? A. Not necessarily, no.

Q. Why did you charge five? A. That was the best I could have done without the estimate on hand.

Q. What do you mean "best you could have done"? A. To my knowledge it was the best I could have done.

Q. You mean the price of five was the best price you could have charged at the time? A. No, it is not.

Q. Why did you charge it? A. If an error is made once it had to be followed through.

Q. Will you tell why you have to follow an error through when you have an estimate? A. It isn't advisable to change when you have an error.

Q. Why did you change later? A. I didn't change; I balanced up the account.

Q. Why didn't you balance the bill by sending a bill? A. It isn't necessary; we have our contract that we follow by.

Q. Miss Bernstein, do you mean to say that from the date that you made the first entry down to August 5th, you never had that estimate in your possession? A. I did.

Q. Why didn't you change it before August 5th? A. Because it wasn't necessary. I had full intentions of balancing when all structural steel was delivered.

Q. Was it delivered fully on August 5th? A. No, it was not.

Q. Why did you change it then if it was your intentions to do it when it was all delivered? A. I balanced it up at the end of the month when I was balancing my accounts.

Q. You did it for July? A. No, I did not; I did for August.

Q. Didn't you balance July? A. No.

Q. End of June? A. No.

Q. August 5th was the first you balanced? A. August 31st.

Q. Why did you enter it on August 5th? A. I didn't enter it on August 5th; I entered it on August 31st.

Mr. McGlynn: You asked for the last charge in August and she said August 18th. No structural—the last shipment of structural steel was August 5th.

Q. When did you raise it from five to six in the book here? A. I didn't raise it.

Q. At no time? A. At no time.

Q. The charge which you made of $2,135.35 was on the 31st of August? A. Right.

Q. Now, where is there anything in your books to show why you did it? Turn to the records and show us in your record an explanation of why you changed that? A. (Witness indicates on slips.)

Q. In the books, I said. A. In the books it is here.

Q. Before it got in the ledger it had to be on the books? A. I posted straight from the charge.

Q. Pardon me. On August 30th, 1926, you produce here a slip, 3676? A. Right.

Q. Sold to balance account? A. Right; "accounts" not "account."

Q. Balance accounts? A. Right.

Q. Are these all for the Haineses? A. It is not.

Q. There are different accounts? A. Right.

Q. Who made this out? A. I did.

Q. Have you an original of that type here? A. That is the original.

Q. When did you make this up? A. August 30th.

Q. These are delivery slips, aren't they? A. It is my privilege of taking one of these and balancing the account.

Q. I am not talking about your privilege; you have taken a good many of them, you have on the delivery slip 3676 certain items? A. Right.

Q. This is a delivery slip? A. Right.

Q. There have been no duplicates made of that and this don't read deliveries? A. No.

Q. You are bringing this into court as a record upon which you wish to justify a charge of $2,135.35, is that correct? A. I am bringing it in as one of the charges.

Q. You have, amongst several items there, Boyar-

sky & Densca, $5.30. Is that an overcharge? A. That is not an overcharge.

Q. What is that? A. It is to balance the account.

Q. You balance all accounts that way, do you? A. I do.

Q. Whenever you are wrong and you want to balance it by adding money to an account and straighten it up, is that it—is that the method? A. Franklin Arms is what is in question just now.

Q. I am not asking you that. You have given me this slip. A. Are they privileged to ask about other jobs?

Q. It is one of my privileges, and it is your privilege to answer it.

The Master: Not about other jobs.

Mr. Weinberger: I ask that this witness be instructed to answer everything on this question.

The Master: I will not direct any such thing.

Mr. Weinberger: I will ask a specific question.

The Master: Go ahead; spend the whole morning.

Mr. Weinberger: I will spend the whole morning unless your Honor wants to stop me.

The Master: Go ahead.

Q. This slip which you have handed me, is this part of your bookkeepping? A. It is.

Q. And this slip is the slip which you seek to justify the entry on, is that right? A. It is.

Q. It contains matter relating to other accounts too, does it not? A. It does.

Q. The same principle which you used in Franklin Arms is just the same as you used in the other, B. Caminsky, Gautier Avenue, $675. That is the same principle that you do in the others? A. It isn't the same.

Q. Different principle? Was that an error too? A. That wasn't an error.

Q. Why did you make that slip? A. The material may have been shipped without charge being made.

Q. Overlooked? A. Not on my part.

Q. On somebody's part overlooked? A. Yes.

Q. Franklin Arms is undercharged, is that right? A. I didn't get that question.

Q. Is it an undercharge or overcharge? A. It is an undercharge.

Q. M. Gernitsky & Co., $704.66? A. I still maintain it has nothing to do with the Franklin Arms.

Q. Was it an over or undercharge? A. An undercharge. I am giving you balancing accounts which could be an overcharge.

Q. You had so many things on your form of bookkeeping that I want to find out is it an over or undercharge? A. It cannot be an overcharge.

Q. An error? A. No, it is no error.

Q. You don't make those? A. Very seldom.

Q. Not very seldom? A. Very seldom.

Q. Quite frequently? A. Never.

Q. On August 31st you have here an extra contract, additional $200, is that right? A. Right.

Q. At what price did you charge the iron there? A. I charged at the contract price, $200.

Q. Is that based on five or six cents? A. I took the contract price, $200; that is what it was closed for, $200.

Q. Well now, Miss Bernstein, is there anything

in the cash book or charge book other than the ledger showing anything about this item on this delivery slip? A. No, there is not.

Q. Is there anything in the work in any of your books which will show or explain this unusual piece of bookkeeping? A. Other than the accounts receivable ledger, no.

Q. So from a delivery slip made by you in your handwriting, upon which only appears "Franklin Arms, Inc., $2,135.35, dated August 30, sold to balance accounts," there is nothing in the bookkeeping system that you have that will explain that charge, is that right, the sum of $2,135.35? A. Only what is there, to balance the accounts.

Mr. Weinberger: Now, I formally object to the account upon the ground, first, that they have not been legally proven—

Mr. McGlynn: Will you hold your objection a second?

CARL JAFFE, being duly sworn according to law, on his oatn testified as follows:

Direct examination by Mr. McGlynn:

Q. You are an accountant? A. I am.

Q. What, if anything, do you have to do with the books and records of the Hudson Structural Iron? A. Well, we audit the books twice a month.

Q. You are familiar then with the system of bookkeeping maintained by them? A. I am.

Q. Have you made an audit since the latter part of August, 1926? A. I have.

Q. Have you examined the records in connection with their account against Franklin Arms? A. I have.

Q. From the records which have been used this

morning can you say that the transaction which appears on their books showing a charge against Franklin Arms is correctly entered? A. I do.

Cross examination by Mr. Weinberger:

Q. You audit the books? A. Audit the books.

Q. You don't work in the place? A. No.

Q. Just the accountant? A. Yes.

Q. Certified accountant of this state? A. Public accountant of New York.

Q. Certified? A. No.

Q. You know nothing about the accounts other than the fact that they tally, from a bookkeeping angle? In other words, if a $2,100 item appears in the books you take it for granted that it was properly put there? A. Correct.

Q. You don't know anything about the accuracy of that or the reasonableness of the charge? A. Well, it has got to agree with the amount of the contract that has been taken out in their time.

Q. As a mater of fact, if there is no item mentioned in the estimate, and the young lady charges five cents, in going over June and July you would imagine five was the correct item? A. In going over June and July, but as long as it agrees with the total of the contract when the contract is completed, that satisfies us entirely.

Q. In other words, all you know is that there is an item up here of $12,900? A. Right.

Q. If the items down at the bottom tally with that you are satisfied? A. Right.

Q. How they are made up you don't care? A. As long as it agrees with the contract.

Q. When you put down the item of $2,135.35, how do you justify that item? A. We check all items through. I will give you an idea of the sys-

tem used. These slips, the third tickets are kept in a folder. From these slips, in running through, they are entered into a sales book.

Q. Sales what? A. Well, the sales book is a duplicate of the binder that contains these slips.

Q. Does it contain the price? A. No, it simply says "Franklin Arms, 3557, August 5th, Franklin Arms, $167.70."

Q. It doesn't contain the price? A. It doesn't contain the price. Now, we check these slips in the sales book. We total the sales book for the total sales.

Q. To determine the items? A. To determine sales for the month. At the end of every month a slip like this slip dated August 30th, number 3176, sold to balance accounts, is made up balancing off all completed jobs that were completed during that month, irrespective of how they were charged or at what price they were charged. In other words, they have got to total up to the amount of the contract as originally taken, and that is why this item of $2,135.35 on this slip number 3676, and entered in the ledger here under date of August 31st as $2,135.35, was entered at that time, and that is contained in our sales book.

Q. $2,135.35 is in the sales book? A. Is in the sales book.

Q. I asked the young lady whether there was any record which had any item of this kind in it and the answer was no. A. That is why at the time—

Q. That is why you thought she didn't understand the question? A. Correct.

Q. Now, as a matter of fact, this account jibed perfectly with the rate of five cents per pound, didn't it ? A. That I don't know.

Q. Did you personally supervise these books or did you have one of your representatives or assistants— A. I personally do the audits on these books every month.

Q. Every month? A. Every month.

Q. The estimate in question contains 144,025 pounds, is that right? A. I don't know. Let me see.

Q. I beg your pardon. A. Correct.

Q. At five cents you would have to deduct that $2,135.35? A. Not necessarily.

Q. Find out.

Mr. McGlynn: What do you mean? I don't get that question.

Q. Isn't it true that the $2,135 would not be a proper charge if five cents is the basis of the agreement?

Mr. McGlynn: You would have to calculate every one of these deliveries.

Mr. Weinberger: I thought he knew it.

A. In addition to these 144,000 pounds you have got other things that go into that contract.

Q. What? A. I don't know. The contract calls for—

Q. Was it all dependent on weight? A. You have got structural 144,000 pounds, amount $8,-640, which is at the rate of six cents a pound. But you have also got an item there of stairs and other incidentals that went into that contract.

Q. What are they at? A. Well, we have got an item there of stairs, $1,800; a flat price for the stairs of $1,800. Now, at the time that this contract—that they stopped work on this particular job, evidently there was $11,000 worth of work and

labor and material to go into that job, that is why the $2,135.35 charge was made.

Q. As I see it now—perhaps I am wrong—in order to make the accounts tally, it is the privilege of the young lady or auditor to take whatever the deficiency is and make that charge to the account in order to equalize? A. Correct.

Q. That is what was done in this case? A. Yes.

Q. On the fifth of August there was a sum— A. August 31st.

Q. August 31st there was a sum needed to equalize $12,700? A. Not $12,700.

Q. What was it? A. $11,015.90.

Q. At that time the whole contract had not been completed yet? A. No.

Q. August 31st was the time that a sum was necessary to equalize? A. Equalize for the particular work done up to that particular day.

Mr. McGlynn: I now offer the books, delivery slips and charge slips.

Mr. Weinberger: We make formal objection to the delivery slips on the ground that under the case of Crane *v.* Brighton Mills, it is incumbent upon the plaintiff to establish affirmatively delivery of the goods to the premises in question. As it now appears they fail to prove delivery, fail to identify the delivery slips because on certain of them there does not appear the signature of the person who received the goods if they were delivered, and there is nothing to identify they were the goods—that deliveries having been made to the premises in question, and under our cases that is improper and not permissible—or admissible evi-

dence. I therefore object to them, and they being the basis—it further appears in this case that the delivery slips in this case were based upon certain particular records which were not produced, and I will therefore object to them on the further ground that the basis for these records have not been properly testified to and established; and on the further ground that the remaining of the books which are the basis of the delivery slips of necessity are not evidential because the manner upon which they are based or predicated has not been legally established.

The Master: Objection overruled.

Mr. Weinberger: I will have my exception.

(Marked Exhibit Hudson Iron 2.)

ALBERT N. SCHUTT, being duly sworn according to law, on his oath testified as follows:

Direct examination by Mr. McGlynn:

Q. You are employed by who? A. Julliano Construction Company.

Q. Did you keep their records in connection with this Franklin Arms job? A. I did.

Q. Was this a contract job as far as they were concerned? A. A contract job, yes, sir, mason work.

Q. Just the labor, or labor and material? A. Labor and material.

Q. Do you know the amount of the contract price? A. $66,346.

Q. Now, how were the payments made to the Julliano Construction Company on their contract?

A. Why, some were in cash and some were—one was in a note.

Q. How were they supposed to be paid? Do you know whether— A. When the work reached a certain stage there was a certain payment to be made.

Q. That contract of theirs was recorded, as I understand? A. Recorded, yes, sir; the contract is in the Hall of Records, and I haven't got it for that reason.

Q. Now, how did you charge? What did you do, make one charge? A. We don't make any charge on a contract until the contract is complete. It would take up too much figuring.

Q. In other words, there were no charges made, —just a question of credits? A. Yes, there was charges for extras. Extras I have charged because they were completed as we went along. In June and July I have some charges for extras.

Q. What charges have you got for extras in June? A. Labor furnished and insurance for some special work, $86.11. That is the week of June 18th to the 25th.

Q. What are your charges for July for extra work? A. July 27th, extra work not shown on plans. That pertained to extra work below the grade to bring it up to grade. That amounted to $3,833.50. Then there was some piers which were not on the contract, $188.56. That was both July 27th.

Q. Any charges on the contract? A. We don't put anything until it is complete. This extra is all complete, which we bill it to them at the time it is completed.

Q. Then up to the time of the appointment of the receivers—here is September 8th, what is that en-

try? A. September 8th, that is another additional charge. That was for some extra work on dumb-waiters, $109.20.

Q. Those are the total charges for extras in addition to the contract, up to the time of the appointment of the receivers? A. That is correct.

Q. Now, turn to your credits. A. The credits are here.

Q. Where are they posted from? A. They are posted from the cashbook.

Q. What is the first entry shown on your books as a payment against this contract? A. $2,500 on the 26th of June. That is page six.

Q. Page six of the cash book showing an entry for payment of $2,500 on June 26th? A. June 28th, same, cash, $4,500.

Q. What amount July? A. This will be on page seven of the cash book. July 15th we applied to extras, on account of extras, $1,000, and on the 19th another $1,000. Now, on the 30th, this applies to the general account. It is $3,000, $2,000 and $2,000.

Q. Those are all the credits in July against this contract and extra work? A. Yes.

Q. What about August? A. Now, there is a note here of July 30th on journal nine which amounts to $3,000. It was handed to us and we handed it to Pierson Company, and credited Franklin Arms—

Q. Pierson was your supply man? A. Yes. I simply, to make one entry and save a lot of work, handed the paper to Pierson, debited him with it and credited Franklin Arms.

Q. Shows a credit to Franklin Arms for $3,000? A. For a note.

Q. Is there any record showing whether that

note was paid? A. That note was not paid, and at a later date I again show on journal 23, we had to debit Franklin Arms and credit Pierson again with the $3,000 because it wasn't paid.

Q. Now, were there any payments made in August on this account? A. Yes. On journal ten, I have extra brick. When Mr. Haines and our foreman who measured up the brick, they found that they had included—it was common brick and face brick, and they had given me a total of 45,000 brick, and so many face brick. Well, I charged the full amount, but it seemed when they measured it up, these face brick were included in the common brick, so I had to give the credit of $240, which I did on page ten. You see,—

Q. Just read the entry, please, as it appears on journal ten? A. Extra work, common brick, charged both as common and face; face should have been deducted from gross amount of brick used, so I gave a credit of $240. Now, on August 21st, cash 7, we got a cash payment of $1,000. That is on cash 7.

Q. Credit on what payment? A. That is on the general contract.

Q. Credited on what payment? A. That is the third payment, $1,000, and then on the 23rd a credit of $1,000 on the third payment; that is on the same page. That totals the receipts.

Q. No other cash or notes received? A. No other cash or notes received or any other receipt.

Q. Now, that shows then a total cash credit on the contract and extras of— A. Well, I have it right here. Well, it is $18,240.

Q. $240 was a credit? A. Yes.

Q. It shows the general cash credit of $18,000? A. Yes.

Q. Cash credit of $18,000, note credit of $3,000, which was later charged back, merchandise credit practically of $240, is that right? A. That is correct.

Cross examination by Mr. Weinberger:

Q. What book is it you have here, Mr. Schutt? A. This is—the front part of it is the cash book, and the rear is the sales book or book of original charges.

Q. That is all your original bookkeeping? A. No, we have a journal here, and this is my ledger, but as the ledger is an assembling of the books of original entry I didn't bring it all down.

Q. It is a loose-leaf system? A. Yes, the ledger, but all the others are fixed leaves, and all parts of this are taken from fixed leaves.

Q. This particular account with Franklin Arms is the only one you had with that concern? A. With the Franklin Arms. We have later on another one, but it has nothing to do with this. We have completed a building, but it is practically a court company.

Q. Who is that? A. That is the creditors and receivers; it is a company of them.

Q. Are the Haineses in that too?

Mr. McGlynn: I object, may it please the Court. In the first place, it isn't cross examination.

A. I don't know—

Mr. McGlynn: That isn't the way to prove it.

Mr. Weinberger: Just a casual question.

Mr. McGlynn: I know all about it; there is no secret about it.

Mr. Weinberger: That is one reason why I didn't think there would be any objection.

The Witness: This is just memoranda.

Q. Now, where is this particular account? A. What particular account?

Q. Franklin Arms. A. Well, here is the ledger.

Q. Cash book? A. It shows on various places, page six, seven.

Q. Showing the items, payments? A. Yes; you can take it and look at it.

Q. Will you give us dates of the payments from that? A. Give me the cash folio and I will tell you.

Q. Cash folio six. A. And the amount of the payment?

Q. Yes. A. Is how much? $2,500?

Q. Yes. A. Right here, 26th.

Q. Haines Brothers, $2,500? A. Yes.

Q. This charge was made against Haines Brothers? A. The charge was made against the Franklin Arms, but I happened to get the check from Mr. Haines and I indicated it as I got the check.

Q. Was it the check of Haines or check of the Franklin Arms? A. Sometimes it was Mr. Haines, sometimes Franklin Arms. Sometimes Franklin Arms didn't have money quick enough from G. L. Miller Company and Mr. Julius Haines gave his money in advance.

Q. Can you tell us whose check this was? A. I can't recall that.

Q. On the 26th day of June you have a credit in this book for Haines Brothers for $2,500? A. Yes.

Q. On the same date you have another check for $4,500? A. That is correct.

Q. Is that correct? A. That is correct.

Q. Or is that two days later, June 28th? A. Probably, yes. June 28th.

Q. Why is it here the 26th? A. Well, I can't answer that.

Q. On the ledger you have it June 28th? A. I posted it the same day I got it and I may have overlooked the 28th in here; that isn't very material.

Q. The next item, July 15th, on account, $1,000? A. What page is that?

Q. C-7. A. I have it here again.

Q. That is Haines Brothers? A. Yes.

Q. Account of extras, and this is your ledger? A. Yes.

Q. Where is there a book which will show what this was for? A. That is in the other part of this book—sales.

Q. What was the $2,500—$4,500 payment on account? A. That was the first payment on account of the contract.

Q. You had a contract? A. Yes. The first payment was $7,000. When we reached a certain stage of the work.

Q. Then you had $7,000 on the contract and then you had this extra $1,000? A. Yes.

Q. On the 24th of July, C-7, $1,000. A. That is another one.

Q. Who made that payment, according to your books? A. According to my books, Haines Brothers.

Q. Turning now to July 24th, C-7, $1,000, you just gave that? A. Yes.

Q. July 30th, J-9, $3,000? A. July 30th?

Q. J-9. A. J-7.

Q. J-9. A. Oh, J-9. That is that journal entry. That is the note for $3,000.

Q. That wasn't paid? A. No, that wasn't paid.

Q. Protested? A. Protested.

Q. We are not entitled to that credit? A. No.

Q. The next is July 30th, C-7, $3,000. A. Yes, Franklin Arms, $3,000, $2,000 and $2,000.

Q. Now, here you have a payment July 30th, $3,000, marked Franklin Arms. A. Yes.

Q. Then, 30th, Franklin Arms, $2,000? A. Yes.

Q. Then, 30th, Franklin Arms, $2,000, is that correct? A. That is all correct.

Q. You wouldn't know what bank these checks were on? A. No.

Q. Now, our next item appears in August second? A. August second. That is a credit I gave them for the bricks which I have testified to before.

Q. August 21st, C-7. That is Franklin Arms? A. Yes, that was a part payment of the third payment.

Q. $1,000 and another one of $1,000? A. Yes.

Q. Two credits, is that right? A. Yes.

Q. On the 21st and 23rd of August? A. Yes.

Q. Now, the extra work, was there an agreement for that? A. The agreement was at the time—

Q. In writing? A. No, no agreement in writing.

Q. How much was the total amount of the extras? A. $4,217.37.

Q. Now, this is a book of account, is that right? A. This is the book or original entry of a sale or a completed contract.

Q. Let me ask you this question: delivery is made— A. We don't make deliveries.

Q. What do you do? A. We furnish work; we do work.

Q. Labor? A. Material is supplied by the material men.

Q. Was there any material supplied in this case? A. Plenty of it, yes.

Q. Through whom? A. J. W. Pierson, Newark, mason supplies, quite a number of them, I just can't recall who they were.

Q. What you really did in this case is to make a contract for a lump sum? A. Yes.

Q. What book—or is it books—show charges and credits against that contract? A. What I have here is a book showing charges for the work that has been completed and the amount of money that they have paid against that and against the contract which I haven't as yet entered.

Q. Now, what did your contract call for—how many bricks? A. It doesn't call for any specified number of bricks.

Q. What does it call for? A. Calls for "according to plans and specifications."

Q. Do you get delivery slips signed? A. We don't get delivery slips signed. J. W. Pierson Company, or whoever it may be supplies the brick, or whatever the material is, one of our foremen signs that ticket. The material men send us a bill. I check my slips against that bill. If it is correct, I credit the material man with that amount of money in that book.

Q. Whoever does the supplying of materials for you, as was done in this case, receives a delivery slip signed by your foreman on the job? A. Yes.

Q. And that was done in this case? A. Yes.

Q. Those delivery slips they have in their files? A. I don't know whether they have or not.

Q. Have you got a copy of them? A. I have a copy of it because I have got to see that the men got it, as I know the signatures the same as a paying teller in a bank, and unless I get that ticket I don't credit the material man with the material.

Q. In this particular case who were the different

men who delivered materials there? A. I mentioned J. W. Pierson, Newark, mason supplies; Igoe Brothers, Suppro Building people—they are out on Long Island—several of them; that is four, I think.

Q. Their materials aggregate a certain amount of money? A. Yes.

Q. The slips for those you haven't here? A. No, I have not. My attorney has them. When he filed the lien I furnished the bills and slips and all that.

Q. Who was the attorney? A. Thomas Potter.

Q. The delivery slips which you claim deliveries were made under, your attorney has? A. The deliveries were made before. The other people claim delivery, and I acknowledge delivery when I see that they are delivered by a proper signature on the slips.

Q. But what they delivered on the premises is evidenced by those delivery slips which are not in your possession, they are in your attorney's possession? A. They are in my attorney's possession.

Q. Can you give us how much money they owed you up to July 28th? A. Up to July 28th?

Q. Is there any way of telling us that? A. No, that would be a tough proposition because that would have to be figured—

Mr. McGlynn: I object to the question. This is a contract providing for payments; first payment, as he has testified, if foundation walls are up, $7,000; one third tier beams are set, $10,000; when the building was enclosed, and so forth; you know how they go.

Mr. Weinberger: What I wanted to know, how many certificates were issued up to July 28th.

Mr. McGlynn: There weren't any, probably.

The Witness: Payments were in arrears. We were beyond our work.

Q. On the 28th of July? A. Yes, we were beyond our work.

Q. You were entitled, of course, to your first payment before that time? A. Oh yes, we were entitled to more money than we had at that time.

Redirect examination by Mr. McGlynn:

Q. I see in your records a notation of credit on the third payment. According to the contract the first payment was $7,000, the second payment $10,000, the third payment $7,000, that is a total of $24,000, without the extra work? A. Third payment, yes.

Q. $7,000? A. Yes.

Q. So that third payment you didn't get; that was $24,000? A. Possibly that may have been—

Q. You don't know what I am going to ask you. If you only received a total cash and credit of $18,000, then your third payment had not been paid, isn't that right? A. That is correct, yes.

Q. They were in arrears? A. Yes.

Mr. Weinberger: I haven't any objection to that contract going in evidence.

Mr. McGlynn: I don't see any materiality to it because it is recorded up in the Court House; there is no question about it.

(It is stipulated and agreed that the Court shall have reference to the lien claim and the contract attached to it, for the purpose of determining the lien claim.)

Mr. Weinberger: Now we make formal

objection that this claim has not been properly and legally proven because they have failed to establish by competent legal evidence the delivery of the materials referred to in the claim.

The Master: Objection overruled.

JULIUS HAINES, recalled for further

Direct examination by Mr. McGlynn:

Q. Mr. Haines, from what sources did this corporation receive any money outside of the Miller Company? A. My brother gave, I think, about $12,000 ahead of the time—

Q. Your brother? A. James Haines.

Q. Before the Miller mortgage came into existence? A. Yes.

Q. Who else? A. I gave money.

Q. About how much did you give? A. I think—well, about $12,000.

Q. Anybody else advance any money? A. No.

Q. Did you discount any notes in the bank, or was this money that you raised by notes? A. I raised by friends, life insurance policies, my grandmother, my mother and my wife.

Q. You and your brother James advanced about $24,000? A. Yes, sir.

Q. Which went into this proposition? A. Yes.

Q. Then the only other source of income, so far as moneys were concerned, was the Miller Company? A. Yes, sir.

Q. Now, did you pay the Miller Company any money before you got the mortgage? A. Yes.

Q. How much? A. $2150.

Q. What was that, ten per cent. of the amount of the mortgage as a deposit? A. That is right.

Q. Was that to be credited against anything later on? A. It was supposed to be returned when the first payment was made.

Q. Was it returned? A. No.

Q. Well, in addition to the material men and contractors, who furnish material and performed labor on this building? Did you at any time check out any money from these bank accounts to people for salaries or overhead items of a general nature? A. Yes.

Q. Just describe to us briefly the character of those items? A. I don't recollect, Mr. McGlynn. I do remember we had a number of expenses, expense accounts, and I know my brothers went around—my brother and I and another brother that went around to look around for property, and I know that they have given some money—I understand that they have given some money to some brokers ahead of time, I understand they have given some broker to finance this Miller mortgage plan.

Q. How about architects? A. Yes, architects, and then we have given excavation and planning and surveying, and we have paid a great deal of lumber material before we got in with Miller-Albert and Kernahan.

Q. Let me understand the situation; you started the erection of this building before you actually obtained the Miller mortgage? A. Yes. I didn't come in until sometime in May.

Q. Now, from seeing the property itself, its physical situation, had there been work done on the erection of this building before this Miller transaction was consummated? A. Oh, yes.

Q. And these same bank accounts that you testified to here, they were maintained by the com-

pany, Franklin Arms, Inc., were the accounts that you deposited this other money that you and your brother raised? A. I think I deposited some of the money, yes. I think there was one deposit about $9,000, and I think there was a $1,000 deposit, and then I brought money to my brother—you see, payrolls we have to use cash—I brought money to my brother and he paid out.

Q. Were any of the bank accounts in the name of the Franklin Arms, Inc., exclusively money from Miller—any one of the three that you can recall? A. Any of the bank accounts?

Q. Yes; for instance, you had three bank accounts? A. Yes.

Q. Now, were any one of those three bank accounts solely money which came from Miller? A. No, not solely.

Cross examination by Mr. Weinberger:

Q. When you put your own money into the accounts, if you put in any, or your brother or your mother or whoever your family may have been, all that money went together with the Miller money to pay the bills for the erection of that building? A. It went to pay bills.

Q. And the fact is you were short, anyway, with all the money which you put in there and which the Miller Company actually gave you to pay creditors, what you actually owed, and also labormen for what they did there? A. Yes.

Q. Now, you have got in your bank account about $50,000 in the G. L. Miller Company. Is there any doubt in your mind that every dollar of that money was used exclusively for the erection and construction of that building? A. I received about—I have the records—

Q. It was approximately $50,000; it is $48,000, I believe. A. Forty-eight less thirty-three; I think they deducted some more money—well, I don't recall now.

Q. Whatever you received you deposited? A. Yes, it was deposited in the bank.

Q. You made payments like this concern that was here and other concerns that did work there? A. Yes.

Q. Is there any doubt in your mind that you used every dollar of it for that purpose? You weren't speculating in Florida? A. I used all the moneys that Franklin Arms had in its possession for the purpose of putting up this building.

Q. And in addition to that you also spent your own money? A. Yes.

Q. And considerable of it? A. Yes.

Q. And then it was that later on this G. L. Miller bust hurt your finishing the financing, didn't it? A. I should say they did.

Q. Now, what I would like to know is this: every check that you issued on those three accounts for the withdrawing of any money, was not used in gambling, was not used in speculating, it was used for materials and labor in that building, wasn't it? A. For various purposes.

Q. For the building itself? A. For the building and for other purposes.

Q. What other purposes? A. Well, outside of building we went around to look over property; we had several—they bought a machine, I think—I don't know how much they paid in, whether $1,000 or $2,000 payment.

Q. From whom? A. From Montclair; from in Montclair.

Q. When? A. Sometime in July.

Q. What kind of a car was it? A. Hupmobile.

Q. For the Franklin Arms? A. I don't know for whom they bought it. It was bought for the purpose of business.

Q. Whose check was used? A. I don't know.

Q. You don't know whether it was Franklin Arms or Haines? A. May I explain?

Q. Go ahead. A. You see, I had orders, telephone calls, most of the time. I was on the job, coming down every day, that is why I moved here to Newark, so my brother told me he needs $2,000 or $3,000 or $5,000, and as he need them I said, "All right, I am going to get you the money," and I had to bring cash. I went to the bank and drew out smaller amounts because I was cautious on account of holdups, so I brought smaller quantities until I brought up that amount to three or four or five thousand dollars as he requested it. Now, what he used it for I don't know, because I had implicit faith in my brother. I was the engineer on the job and he told me that he had to pay off bills or he had to pay off expenses, incidental expenses, or he had to pay off contracts; I have no recollection, that is all I say, when I issued the money.

Q. Do you mean that those were the checks that you personally took out of your own accounts to get the cash to help him along because you didn't have enough money in the Franklin Arms? A. When he had no money in the Franklin Arms account I gave him my money.

Q. You don't charge your brother with not using it in the building now, do you? A. I don't charge my brother of not using any money in any direction except for the purpose of advancing our business.

Q. That is this Franklin Arms business? A.

Franklin Arms and any other real estate business or any building business.

Q. Do you want to go on record now as saying that Franklin Arms, Inc., money which was intended to be used for this building was diverted from that company? A. I don't say it was diverted.

Q. Do you say it wasn't exclusively— A. I say it wasn't exclusively.

Q. Do you want to go on record as saying that the testimony you gave the other day when you said that all of the money which was given to the Franklin Arms or was in Franklin Arms was used for the erection and construction of that building is not true? A. I don't say it wasn't true; it was used for Franklin Arms and for the purpose of advancing the building and any other proposition connected with the building or connected with real estate or building.

Q. You said you weren't doing any other building at the time? A. Well, we went around to look up property.

Q. Didn't you have your hands full with that one building? A. That was before G. L. Miller failed.

Q. Didn't you have your hands full with the erection of that building? A. No, we didn't, for the building went along nice and smooth.

Q. You didn't have any difficulty in getting payments from G. L. Miller and Company? A. Yes, we had.

Q. Weren't you in arrears with some of your contractors up to the time of the failure of G. L. Miller? A. Perhaps we were.

Q. What other businesses do you say Franklin Arms had besides this particular building? A. Had general real estate and general building.

Q. What? Name one other proposition? A.

We had no particular proposition, but we looked around for property and we had all kinds of expenses in connection—

Q. Tell us what expenses you had? A. Well, I don't recollect now.

Q. Mention one dollar bill you spent anywhere? A. Well, I can't say offhand how much money and how it was spent.

Q. Mention one check of a dollar for anything that you took out of Franklin Arms except for the building of the Franklin Arms and used that for materials and labor? A. I can't offhand now recall because I have no recollection.

(At this time the hearing was adjourned to Tuesday, July 19th, 1927, at 9:30 o'clock in the forenoon.)

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,

Complainant,

and

FRANKLIN ARMS, INC., a corporation,

Defendant.

Continuation of testimony in the above entitled cause, taken before Roy F. Anthony, a Special Master in Chancery of New Jersey, at the offices of Stein, McGlynn & Hannoch, 17 Academy Street, Newark, New Jersey, on the 19th day of July, 1927, at ten o'clock in the forenoon, in the presence of

Messrs. Stein, McGlynn & Hannoch, by Edward R. McGlynn, Esq., counsel for the receivers; Messrs. Weinberger and Weinberger by Harry H. Weinberger; and Messrs. Burnstine & Geist of the New York Bar by Henry C. Burnstein and Bernard Wiess, solicitors for the interim receipt holders and trustees; and Messrs. Hendrickson & Hendrickson by Charles E. Hendrickson, Esq., attorneys for the Fidelity & Deposit Company of Maryland.

JAMES HAINES, recalled.

Direct examination by Mr. Weinberger:

Q. Mr. Haines, by the way, have you had occasion to look at those transcripts of the accounts of the banks? A. Which transcripts?

Q. Corn Exchange Bank and also of the East Orange Bank. A. Not recently.

Q. You are not familiar with the finances, I understood you to say? A. No.

Q. And you are not today? A. With the exception of the personal accounts within the corporation.

Q. Have you a record of all the money you actually paid into the corporation? A. The books will show.

Q. What books? A. Of our company.

Q. Where are they? A. With Miller & Company.

Q. Well, assuming that those books that you speak of as having been given to Miller & Company cannot be found, have you any other records which would assist you in determining just when you put money in and how much you put in? A. I could not; I haven't any records at all except what were presented in books.

Q. Well, I take it that you have some knowledge as to where you got this money to put into the company? A. Borrowed it from various sources.

Q. Borrowed? A. Yes.

Q. And whereabouts and how much did you borrow? A. Oh, I borrowed at intervals, three, four, five, sometimes ten thousand, an aggregate of about thirty-five to forty thousand dollars.

Q. That was paid out? A. Out of the proceeds of the corporation I did pay back.

Q. First you put it in. Now, tell us who you got it from. You filed a proof of claim—Mr. McGlynn hands me proof of claim showing that there is due the sum of $14,474.41. Do you recall that? A. Due, yes. I don't recall the total amount, but if it is there, that is about the balance due me.

Q. In other words, you have here a claim, have you not, addressed to yourself as one of the trustees, signed by you and presented to yourself and your co-trustee, is that right? A. Yes, sir.

Q. Did you sign that? A. That is my signature.

Q. Now, are you familiar with the contents of that claim? A. Yes, this is a claim that I have against the Franklin Arms for $14,000.

Q. Now, will you refer to that claim and tell us in your own way what that claim is based on? A. On moneys advanced to the corporation.

Q. And how much money? A. Why, I can't recall definitely how much in dollars and cents, but as I said before, I must have—

Q. You have the claim in front of you here. A. This is the claim of the balance due me for moneys invested in the corporation.

Q. All right. How much is the balance due you? A. This is about the balance.

Q. How much is it? A. Well, the amount is right here, $14,474.41.

Q. Well, now, when you made that claim you also swore to it, did you not? A. Yes, sir.

Q. And the oath which appears there was taken, was it not, by the subscribing individual to the oath? A. Yes, sir.

Q. And on the date that it is designated, the 16th of December, 1926. A. I don't remember the date.

Q. Well, look at it. A. Whenever the file says.

Q. There is the affidavit; is that true? A. It is true if it is there.

Q. Well, is it there and is it true? A. It is on that day, 16th of December, 1926.

Q. Were you sworn and did you take that oath on that date? A. Yes, sir.

Q. And so what you—and was what you stated on that oath true? A. Yes, sir.

Q. Now, you have made up that claim of various items, have you not? Do you recall what is in the claim? A. I don't recall what is in the claim.

Q. Do you know what you based your claim on? A. I do not.

Q. Would you look at this paper or affidavit of claim and tell us whether or not the items appearing therein were made by you? A. They were.

Q. Now, you know what it is made up of? A. Yes, sir.

Q. Are the statements contained on page 2 of that claim correct? A. Yes; that is correct; that is absolutely correct.

Q. Now, on the 16th of December, 1926, you made that claim up from your books, did you not? A. Yes, sir.

Q. You made that up from your books? A. Yes, sir; that is right.

Q. You had your books then to make it up, didn't you? A. Yes, sir.

Q. Now, you are sure of that? A. Yes, these items were taken from the books, sir.

Q. And those are the books which you now say were given to C. L. Miller & Company at some time after the 16th of December, 1926? A. I don't know when the books were given; I know they were given.

Q. Well, you surely had possession of them on December 16th, 1926, when you made up this claim.

Q. I don't know whether they were taken from the books at that time or whether they were taken from records.

Q. You do say, do you not, that they were taken from your books? A. Yes, sir.

Q. That is correct? A. That is correct, positively, sir.

Q. Now, you say "To salary as supervising engineer and superintendent of construction from April 16th, 1926, to July 9, 1926, at the rate of $125.00 per week, $1,500." A. Yes, sir.

Q. What book had that record? A. I don't know what book; I didn't keep the books, sir.

Q. You made it up from certain books, didn't you? A. They were made up from books. My brother made it up from the books.

Q. Did you make it up or did your brother make it up? A. My brother made it up for me and I signed it as verified correct.

Q. You personally did not take the item from the books? A. I verified it as correct.

Q. Did you take it from the books? A. I don't know whether I took it from the book personally or not.

Q. You made it up? A. I made it up with his assistance.

Q. Well, what did you have in front of you when you made it up? A. I had the book and it was made up from the book.

Q. You remember what books it was? Was it the ledger? A. I don't remember; I am not the bookkeeper.

Q. Now "To money advanced to Franklin Arms, Inc., secured by notes referred to below, $12,757.50." Where did you get that record? A. They were all taken from the books.

Q. I thought you had notes for them. A. Well, they were the notes that were entered in the books.

Q. Do you have the notes? A. Yes.

Q. Where are they? A. I don't know where they are.

Q. You didn't give them to G. L. Miller, did you? A. I don't know who has them.

Q. Did you give them to anybody? A. I don't know. I have never handled the matter with G. L. Miller & Company and the like.

Q. Your notes which are evidence of the debt due you would be in your possession? A. The notes were in my possession some time ago. I don't know what became of them since then, whether they are in Mr. Barrett's office—he used to keep a lot of our records—or in my possession; I don't remember whether I put them in the vault —I had a personal vault in the Bloomfield Trust Company, but I haven't got it now. I don't know where—I don't remember where they are, but I had them and Mr. Barrett knows, I think, but—

Q. What were the dates of the notes? A. I don't remember.

Q. Who made the notes? A. Franklin Arms Corporation.

Q. Were they one, two, three or four notes? A. I don't remember how many there were.

Q. What was the largest note for? A. I don't remember.

Q. What was the smallest note for? A. I don't remember.

Q. What was the term of the note? A. Payable at maturity, I think.

Q. I hope there was a date of maturity on them; what was the date of maturity? A. I don't remember.

Q. What was the date of making? A. I don't remember, Mr. Weinberger.

Q. Where were they payable, if ever? A. Payable in Bloomfield.

Q Bloomfield where? A. Bloomfield, New Jersey.

Q. At what place in Bloomfield? A. I don't know the customary way of paying, either on the job or the bank. I know they were payable at maturity or some time to me.

Q. Well, sir, $12,757.50 is quite an item, isn't it, to you? A. I should say it is.

Q. And you are not in the habit of promiscously throwing aside notes that are evidence of debts due you that you expect to collect some day? A. I don't know as I threw them away. You can interrogate later on my brother.

Q. This hearing has been going on for some time. A. It isn't my fault the hearing has been postponed. I have been waiting for the hearing longer than that. I have to make a living.

Q. Aren't you anxious to prove your claim of $12,750? A. I would like to.

Q. Weren't you anxious to bring your note so as to establish your claim?

The Witness: Pardon me. Where are my notes?

Mr. Julius Haines: Mr. Barrett has the notes.

A. Well, we have the notes; Mr. Barrett has the notes.

Mr. McGlynn: I think Randolph Barrett has all of them.

Mr. Weinberger: Just put Mr. McGlynn's statment down so in case there is a way of having them I would like them.

Q. By the way, I suppose you took that money from some bank to give it to the company. A. No, sir.

Q. Where was that money stored? A. I had money of my own and my wife had money.

Mr. McGlynn: Just a minute. Let the witness finish.

A. I had money of my own; my wife had money. We simply pooled our interests together.

Q. Where did you get that money? A. It came in.

Q. Where did you keep it? A. I didn't keep it anywheres; we had it. We got money as we needed; we borrowed it.

Q. You had it, you borrowed it and you kept it.

The Witness: Your Honor, may I mak a reservation in here?

The Master: Why don't you answer the question? Answer the question, Mr. Haines; it is a simple question.

Q. Where did you keep the money? A. I keep it— if it was borrowed money, Mr. Weinberger, I took it from wherever it came. If I had it, it came from a bank, from my own bank, if I had it personally.

Q. Now, let us see. You had $12,757.57, you claim you gave Franklin Arms as a loan. A. Yes.

Q. From time to time. A. Yes.

Q. And you got back note; is that correct? A. Yes, sir.

Q. Well, now, you gave somebody a note when you borrowed, didn't you? A. Yes, sir.

Q. Now, who did you give a note to and for how much? A. To Franklin Arms—I see what you mean; I didn't give any notes.

Q. Well, you owed it to somebody. A. I didn't give any money in my borrowing transactions.

Q. Did you owe anybody any money? A. Yes, sir.

Q. Who did you owe it to? A. To various people.

Q. To who? A. Well, if I am to say, I still owe to my brother.

Q. Which brother? A. William.

Q. William Haines? A. Haines.

Q. Where does he live? A. He lives in Brooklyn.

Q. What is the address? A. I don't remember; he is in the telephone book.

Q. When did you get it from him and how much? A. I don't know when, but at various intervals I got money from him.

Q. Give the amounts. A. I don't remember the amounts.

Q. Give us the total. A. I don't know the total.

Q. In what months did you get i? A. I don't know.

Q. What year did you get it? A. I think it was 1926.

Q. Well, don't you know? A. Well, I don't know when the transaction occurred. I think it was 1926.

Q. Well, 1926 has twelve months in it, according to my calendar. What month was that in 1926? A. I don't remember.

Q. Was it by check or cash? A. Cash.

Q. What is your brother's business? A. Dry goods business.

Q. Did you give him a note back? A. No.

Q. Did you ever pay it back? A. On previous—some moneys I did pay back on this to him.

Q. Do you owe it to him now? A. I don't owe him now much, I still owe him money.

Q. How much do you owe him? A. I possibly owe him about $3,000 now.

Q. Possibly owe him about three thousand? A. Possibly.

Q. Don't you know how much you owe your brother? A. I don't know; I haven't got my records with me.

Q. You have records? A. I have.

Q. Where are they? A. In my house.

Q. What—would those records show it? A. Yes.

Q. You are sure you didn't deliver them to G. L. Miller? A. No, sir; that is personal account.

Q. Your records would show dates when and times when you got money and how much you still owe? A. Yes, sir.

Q. They are kept in your own handwriting? A. My own handwriting; yes.

Q. They would show who you got the money from? A. Who I got money from at intervals.

Q. In other words, whether your records show

how much you received and from whom you received it. A. Well, all moneys that I still owe.

Q. Wouldn't it show the moneys you received? A. Well, yes, all moneys that I still owe.

Q. What you paid and to whom you paid? A. I haven't any more records of these things that I have paid.

Q. You have none at all? A. No.

Q. Did you ever have any records at any time before you paid them? A. I had, yes.

Q. Where are those records? A. I haven't any more. I destroy papers occasionally.

Q. Were they books? A. No books, just memoranda.

Q. But this particular one is a book now that you still owe on? A. I don't know if it is a book or memorandum. I have the records in my possession.

Q. Well, now, let us see; you had a bank account? A. Yes, sir.

Q. And when you got this money, of course you put it into your bank account? A. I don't know whether it is the personal bank account or my wife's bank account or what.

Q. You had an account—you have an account and your wife has an account? A. My wife hasn't any more. I still have an account, but it is run down to a dollar, I think.

Q. But you did say that your wife had a bank account? A. I don't know whether she has. I said either my bank account—I don't know whether she had a bank account—either my wife's bank account or my own.

Q. Mr. Haines— A. I don't know whether my wife has a bank account.

Q. Didn't you say she had a minute ago? A. I

said either my wife's bank account, but that doesn't mean she has one; I don't know.

Q. You said your wife's bank account, you said she didn't know whether she had one or not? A. I didn't know whether it is a private bank or her own bank or bank account.

Q. Will you tell me what that last statement means, you don't know whether it is her bank or bank account or her private bank? What do you mean by that? A. Your question was, Mr. Weinberger, whether I had taken money from my wife—what was the question then?

Q. (Question read by stenographer.) A. I don't think she had a bank account, but if she had I have taken money from her. I don't know whether she had taken it from a bank account or not.

Q. Did you ever get money from your wife? A. Oh, yes.

Q. How much? A. I don't remember.

Q. When did you get it? A. I can't state the definite times.

Q. Will you state what you gave her in return for the money? A. I don't know as I gave her anything.

Q. Can you give us the largest amount you got from her? A. I could not.

Q. The smallest amount? A. I could not.

Q. Any time when you were to pay it back fixed? A. No.

Q. Did you ever pay it back? A. I did pay her back.

Q. How? A. As she needed it.

Q. By cash or check? A. Cash.

Q. Where did you get the cash? A. I drew from my own bank account.

Q. What was the name of your own bank? A. Bloomfield Trust Company.

Q. And that account would disclose and show just how much you drew as when you drew money? A. Yes.

Q. Now, sir, this $12,575.57—

Mr. McGlynn: May I interrupt at this point and ask Mr. Weinberger what the purpose of this examination is with reference to the amount due on the mortgage?

The Master: Mr. Weinberger is so amiable this morning I didn't want to cross him myself.

Mr. McGlynn: I don't want to stop him from doing anything he wants to—

Mr. Weinberger: This is our object. We are here for the purpose of establishing how much money is due on this mortgage. Now, they claim, as a matter of fact, that certain moneys which went into these bank accounts were used for other purposes, and we claim, of course, that these moneys went to specific chattels. Now, for the purpose of getting where these moneys went that they claim were taken out of the Franklin Arms, what the reason was for the taking, and we are going into this question—

Mr. McGlynn: Why not get to it?

Mr. Weinberger: This is just for the purpose of showing how accurate they are. I won't waste any time, but you will see the relevancy of it in a few seconds.

Mr. McGlynn: Go ahead.

Q. Now, as a matter of fact, the company owes you $14,474.41, is that correct? A. Yes, sir.

Q. $12,757.50 of that you claim was loaned to the company? A. Yes, sir.

Q. You never got that back? A. I did not.

Q. You never gave it any more? A. I advanced to the company considerable before the loan was granted.

Q. Where did you get that money from? A. I had my own money.

Q. Where did you have it? A. I borrowed it and I had it.

Q. Where did you have it? A. I had money when I lived in New York—I had money in the Colonial Bank—

Q. You started to build this building when? A. I think it was in May, 1926.

Q. All right. Now, in May, 1926, you didn't have a Colonial Bank account, did you? A. I think I had.

Q. You say you had money there, thousands of dollars? A. Not thousands of dollars, but I had an account. I don't remember how much.

Q. What was the biggest amount you ever had in the Colonial Bank in New York? A. I don't remember.

Q. What branch of the Colonial? A. 164th Street and Broadway.

Q. Did you keep that account there from May down to the end of the year 1926? A. No.

Q. When did you close it? A. I don't remember.

Q. So you didn't take any money out of the Colonial into the Franklin? A. I took it out in cash and gave it for the job. I may not have given it to the Franklin Arms at the time, Franklin Arms wasn't organized, but I have give it to the job, because we started the job long before the company received the loans from the—

Q. What was the most you ever had in that account at any one time? A. I don't remember, maybe two or three thousand dollars.

Q. Now, did you have any other accounts? A. No; I did not.

Q. Now, who did you borrow money from in May? A. Why, I borrowed from a great many sources, I don't remember who.

Q. Who? A. Personal accounts; I borrowed from a friend of mine, a doctor.

Q. Who? A. Dr. Brodsky in New York.

Q. What is his address? A. I don't remember the address. He is Isaac Brodsky.

Q. How much did you borrow from him? A. I don't remember how much.

Q. Was that in May or after May, 1926? A. I really don't remember whether it was in May or after May or before May; I know I borrowed it for this job.

Q. Well, you started to build in May. A. I borrowed it for the job. I think I got title to this property long before and I needed money right along. I don't remember whether it was for the Franklin Arms.

Q. How much did you get from friends? A. I don't remember how much.

Q. About how much? A. I don't remember. His record will show.

Q. Did you repay it to him? A. Yes.

Q. From the Franklin Arms? A. From my own account.

Q. From your own account? A. From my personal account.

Q. Was it a check from the Franklin Arms? A. It wasn't from the Franklin Arms.

Q. Why didn't you take it from the Franklin

Arms? A. Because I borrowed it personally and I had given my personal account.

Q. Did you get it back from the Franklin Arms? A. I don't know whether that particular loan was given back to me or not, but the Franklin Arms—

Q. Who should know, if you don't know? A. I don't know whether that one was given to me, I don't remember, but I know Franklin Arms owed it to me because it was advanced for Franklin Arms.

Q. You don't know the amount, you don't know whether you got it back— A. I don't know if it was a thousand or five hundred dollars.

Q. What was the biggest sum you ever borrowed from the doctor? A. I don't remember.

Q. How many times did you borrow from the doctor? A. Probably twice.

Q. Anybody else? A. Yes; I borrowed quite considerable.

Q. From whom? A. Well, I borrowed about seventy-five hundred dollars from a borrowing institution in New York City, the Forum Business Corporation.

Q. When? A. Well, I don't remember whether— Anyway, during the operation and before the operation started.

Q. And by check—I suppose they gave you a check. A. Yes.

Q. And that check, of course, you put into what account? A. Why, as conditions warranted—

Q. Will you answer my question? A. I was going to answer the question.

Q. That check— A. Those checks were pending when they were borrowed, when the money was borrowed. If it was borrowed through the Franklin Arms, it was advanced to me and I advanced it to the Franklin Arms.

Q. Did you put this check into the Franklin Arms that you got from the Forum? A. Not to the Franklin Arms, my own money.

Q. Why not? A. Because it wasn't borrowed for the Franklin Arms.

Q. You said you gave it to Franklin Arms. A. It was loaned to me and I gave it to Franklin Arms after.

Q. First of all you got seventy-five hundred from the Forum. Was that all one transaction? A. About seventy-five, not one transaction.

Q. How many transactions? A. Two or three transactions.

Q. Was all of the seventy-five hundred used for Franklin Arms? A. Yes, sir.

Q. You are sure of that? A. Positively; yes, sir.

Q. You are also sure that that was by check which you deposited to your account? A. Not all of it.

Q. What did you do, cash some of these checks? A. Some of them I must have cashed.

Q. Did you? A. I don't remember. I think it was. Some of the moneys were not drawn by me personally. My brother borrowed for me. The aggregate was about seventy-five hundred dollars. He deposited it and gave it to me. I cannot give you the actual condition—the actual way in which this money was deposited and given out.

Q. Of course, you understand that we are trying now to find out what you did with the money of the G. L. Miller Company. You are familiar with that, aren't you? A. Yes, sir.

Q. And you are also familiar with the fact that if the G. L. Miller Company is paid first and their claim allowed, you won't get anything on your claim. A. I do realize it.

Q. And you, of course, realize the fact that the records and so forth that you claim you gave to G. L. Miller would be helpful in finding and tracing what you did with the money of the G. L. Miller Company; is that right? A. Yes.

Q. You know that? A. Yes.

Q. You know that if these books are not available it is going to help your case? A. I don't think so.

Q. And you know it won't help G. L. Miller Company. A. I don't know.

Q. You know it won't help the bondholders. A. I don't know. I wish to God the bondholders get all their money before I get mine.

Q. You know that the books are very necessary on this transaction. A. I don't know how they are necessary.

Q. You just said you knew they were. A. How much they are necessary?

Q. You don't know. Didn't you have a note for five thousand dollars from the Franklin Arms bearing date May 29th, 1926? A. I had a note from the Franklin Arms?

Q. Yes. A. You mean out of my moneys advanced the Franklin Arms?

Q. Did you have a note dated May 20, 1926, for five thousand dollars? A. I don't know what date it is.

Q. Did you have such a note? A. I don't remember the date.

Q. Did you? A. I don't remember the date.

Q. What did you get a note from the Franklin Arms for? A. For moneys advanced.

Q. What was it for? A. For the erection of the building?

Q. Was it a debt that the company owed you? A. Yes, sir.

Q. You wanted a record of it? A. Yes, sir.

Q. Those were the only notes due? A. Balances due.

Q. Had you been paid all the others? A. I have been paid all the others.

Q. By check, of course? A. By cash.

Q. Well, in order to get the cash the company had to have a check issued, didn't it? A. I assume it had; I don't know how the money was drawn.

Q. Wasn't all the G. L. Miller Company money and all the money Franklin Arms ever got put in the bank? A. Yes.

Q. Weren't checks drawn on that? A. Yes.

Q. Would the checks show what the moneys were for and what it went for? A. I presume it would.

Q. These moneys you used for the building and was a debt to you was for the construction of the building? A. All of it was.

Q. Was it for any other purpose? A. All of it was for the building.

Q. All the moneys paid by you to the Franklin Arms all went into the building, is that correct? A. All went into the building, yes.

Mr. McGlynn: Mr. Haines, will you look at that slip I have just handed to you? Have you looked at it?

The Witness: Yes.

Mr. McGlynn: Now, look at your proof of claim filed with the receiver and see if that slip helps you in any way explain the claim to Mr. Weinberger?

Mr. Weinberger: Yes, that helps.

Mr. McGlynn: What is your explanation now?

The Witness: Mr. Weinberger didn't see it.

Mr. McGlynn: What is the explanation of the amount of your claim represented by three notes which aggregate $12,757.50?

The Witness: That is made up of all these items, moneys advanced on these items.

Q. This $12,757.50, in whose handwriting is that slip?

Mr. Weinberger: Will you have that marked for identification, please?

(Marked R-1 for Identification.)

Q. Whose handwriting is that? A. That was prepared by me in my brother's handwriting, my brother Julius.

Q. Prepared in his handwriting, but under your direction? A. Yes, my memorandum.

Q. You gave him the items, is that correct? A. Yes, sir.

Q. When was this written up? A. I don't know; I don't remember when it was.

Q. Where was it written up? A. In Bloomfield.

Q. How long ago? A. I don't remember how long ago.

Q. Within the last week? A. Oh, no; that was long before.

Q. How long ago? A. That was immediately as I advanced money. I don't remember how long. It was taken from records.

Q. Each time you advanced money this record was made? A. No, no.

Q. When was it made? A. I don't remember when it was made, but it was made up from my memorandum as soon as I found this memorandum when we were preparing these notes.

Mr. McGlynn: Or the claims?

The Witness: The claim, I mean.

Q. "Excavation and grading $522." That was the time the building was first started and being commenced? A. Yes, considerably long before we had any transaction with the mortgage.

Q. Did you pay that by check or cash? A. Cash.

Q. "Excavation $21.60," check or cash? A. That was check, I think, from the Bloomfield Trust Company, my own check.

Q. "Labor—grading, ground testing, $3,130." A. That was done by cash every now and then as we needed it.

Q. "Labor—clearing and so forth, $270." A. That was by cash.

Q. "Engineering and architect's fees, $2,500." A. That was done by cash.

Q. Who was that paid to? A. Myself and assistants.

Q. You got that cash? A. Cash for myself and assistants.

Q. Well, engineering— Which part of that—were you the engineer or the architect? A. I wasn't the architect.

Q. What did you get of that twenty-five hundred dollars? A. Very little, but mostly for my assistants.

Q. "Engineering and architect's fees, $2,500." A. Yes, including what I got personally out of this amount.

Q. For which work? For what? A. Before we ever started this building.

Q. "Engineering and office supplies, $219." A. Yes, sir.

Q. "Organization expense, $800." A. That is cash.

Q. By cash? A. Yes, cash expense. I think it is taken from my bank as cash or from my bank as check.

Q. "And Sundry building expenses, $495," check or cash? A. Either check or cash.

Q. Well, it has got to be one of the two. A. I don't remember how it was taken. For instance, I will explain them: If I had to buy drawing materials or something else—

Q. Do you remember whether it was check or cash? A. I don't remember.

Q. "Building permits, $216." Which is it, check or cash? A. That, I think, was cash.

Q. "Telephone $5.50." A. Must have been check.

Q. "Deposit with G. L. Miller, $2,150." A. That was check.

Q. That was the first dealing that you had with Miller was when the $2,150 was paid? A. Yes; that is the first. That is the time we signed the contract.

Q. General expense—

Mr. Hendrickson: Will you ask what that was paid for?

Q. "General expense, $300." Check or cash? A. Check or cash.

Q. "$2,150" was a check or cash? A. That was a check that I drew.

Q. That was given for what purpose? A. I think that was given for the one per cent. deposit, I think, on the contract. We were supposed to pay down on the formal agreement one per cent. deposit on the loan.

Q. Now, this statement says, "Bill of particulars submitted by James Haines on May 29th, 1926." Is that correct? A. Yes; that is correct.

Q. Now, none of this was ever paid back to you? A. I don't know what amount of money was paid out, but that none of this amount.

Q. None of this money was ever paid back to you? A. No.

Q. It was the first money you ever expended on that building and was incurred already by you before you got your loan? A. That was done before.

Q. And yet you never took your money back? A. No.

Q. Why not? A. We expected to get money from G. L. Miller on $2,150 on the third payment. We didn't get it—

Q. You had received several payments from G. L. Miller & Company. Why is it you didn't deduct the first money you gave out? A. There was more urgent payment to be made.

Q. But you took some items that were taken from yourself? A. They were more urgent payments taken on short loans from friends, brothers, mother.

Q. Do you claim now that once you had all this money in your own name anywhere in your accounts? A. Oh, yes, I had more than that, I think, my seventy-five hundred dollars and moneys—cash moneys borrowed at times.

Q. Now, we have it on May 29th, 1926, you had more money in the bank than this amount here? A. I don't remember whether I had it on May 29th.

Q. That is the date you paid it out. A. Yes, on May 29th—up to the date of May 29th I paid this amount, not on May 29th. The bill of particulars was submitted on May 29th.

Q. But you did say that you never had in the

bank more than three thousand dollars at any one given time. A. I said I didn't have more than three thousand dollars in the Colonial Bank.

Q. Did you have any other bank? A. I had in the Bloomfield Trust Company later on.

Q. In May, 1926? A. I think it was in May.

Q. So you had two bank accounts then? A. I think I did say I had and I think I did have, but the one in the Colonial which I closed at that time and went in the Bloomfield Trust Company.

Q. Now, let me see if we get this thing straight. Do you claim now that in both bank accounts you had as high as twelve thousand dollars in the month of May?

Mr. McGlynn: If it please the Court, Mr. Haines never said he had this twelve thousand at one time. This list of several items over a period of months that was laid out—

Q. Well, did you have twelve thousand dollars in the aggregate in both bank accounts? A. I don't know whether it was in the aggregate or less or more. I know definitely—

Q. Have you your personal checks showing what moneys you withdrew from either of these accounts? A. Yes; I have.

Q. Will you produce them? A. I think I can. I don't know whether I have them all, but I think I have them.

Q. Will you produce a transcript of your check account? A. Yes; I will produce the transcript.

Q. Getting down now to the building in question; how much did your brother put in, do you know? A. I don't remember.

Q. Did anybody besides your brother and you put any money in that building? A. Nobody.

Q. I take it you have your check books home too, the old ones? A. I think I have.

Q. Will you produce them too, with the other records? A. Whatever I find I can produce.

Q. You don't know how much your brother put in that building? A. I don't know, eight or ten—I don't remember; I never kept the financial end of it—

Mr. McGlynn: His claim is here, Mr. Weinberger.

Mr. Weinberger: I ask that the claim of James Haines go in evidence.

(Marked Exhibit S-19.)

Q. Now, of course, the Franklin Arms Company owed money to you in May, didn't they, as evidenced by your claim now? A. Yes, sir.

Q. I take it they owed money too, did they not, to your brother at that time? A. I think yes.

Q. I suppose they owed money to creditors at that time, didn't they? A. In May when? When the building stopped?

Q. In May 1926 when the building was starting. A. I don't think we did owe anything to creditors.

Q. On the 29th of May the company already owed you— A. The company owed me that.

Q. I mean they owed creditors money too. A. They didn't owe creditors money; the company owed me money.

Q. You weren't a creditor of the company? A. I was a creditor of the company but you are asking outside of me.

Q. As a matter of fact, the company owed your brother some money too. A. Yes.

Q. And they owed your brother, according to his claim, do you know how much? A. I don't remember.

Q. And no part of that claim, you say, was ever paid to you? A. No part of this claim was paid to me.

Q. And is there due to you from the date you say, May 29th, and down to the present time, none of it having been paid? A. None of it.

Q. Your brother claims, $11,163.53 due him. Is that right? A. I don't remember how much.

Q. You knew as president of the company, did you not? A. I don't know now.

Q. That you owe him so much? A. I think either eight or ten thousand.

Q. You are now looking at your brother's claim, are you not? A. Yes.

Q. Will you look at that record claim and tell us what money your brother was entitled to? A. To that amount of money $11,163.53.

Q. No part of that was ever paid to him? A. I don't think so.

Q. Not by you anyway, as president of the company? A. Not by me.

Mr. Weinberger: I ask we have that marked in evidence.

(Marked Exhibit S-20.)

Q. You know, don't you, that thereafter, June and July, you purchased considerable goods, materials and so forth, from creditors and that the company became obligated to these companies for materials? A. We purchased sub-contracts.

Q. I mean whatever you had there? A. Yes.

Q. —do you know what the amount was you owed in June or July? A. I don't remember. I think it was established in court by lien claims.

Q. But you don't know what the amount is? A. No.

Q. Do you know about what they total? A. I don't know whether it is sixty or seventy or forty or fifty.

Q. But there was a substantial sum due by the 15th of July? A. There was a sum due but I don't remember how much.

Q. I show you a letter bearing date July 28th, 1926, and ask you whether or not that letter was signed by you? A. Yes, that was signed by me.

Mr. Weinberger: I ask that be marked in evidence.

(Marked Exhibit S-21.)

Mr. Weinberger: I would like to substitute a photostatic copy if you have no objection.

Mr. McGlynn: All right; I have no objection.

Q. Is that statement true or false? A. That is true.

Q. You owed no money to anybody— A. I owed no money—it owed no money at the time it received the payment because we paid out sums of money of our own private accounts.

Q. Mr. Haines, you read that exhibit, didn't you? A. Yes.

Q. You prepared it too, to get money with from G. L. Miller? A. That was essential.

Q. And you knew that on the strength of that you were to get money, didn't you? A. I don't know whether it was due on the strength of that, but it was due us and that was requested of us.

Q. What did you mean when you just said it was essential. A. That was one of the requests of the G. L. Miller Company.

Q. Why did they ask you, do you know, for a

statement showing that you owed no debts? A. To show that the previous obligations had been paid.

Q. Was it true that you had met all of your previous obligations as you have stated in that letter? A. I presume at that time they were made.

Q. Will you tell this Court, if you will, how you reconcile your affidavit bearing date December 16th, 1926, wherein you swore on the 29th of May there was due you the sum of $27,155.50, and that letter? A. The reference was only to Lienors, to people that had actually performed work and furnished materials on the building, but not so far as I was concerned. My claim was not for any work performed and the material supplied in the building. It was a claim for money advanced to the company.

Q. Is that your explanation now? A. That is a fact.

Q. You want to stand on that explanation? A. Well, that is a fact.

Q. Did the Franklin Arms pay all the bills on account of work done up to date in connection with the Franklin Arms on July 28th, 1926?

Mr. McGlynn: I object to the question unless he says of bills that were due.

Mr. Weinberger: It says all bills on account of work up to date—

Mr. McGlynn: That were due.

Mr. Weinberger: Oh, no.

Mr. McGlynn: The letter may not state that—

Mr. Weinberger: But you want to read that in.

Mr. McGlynn: You don't want to anticipate it, do you?

Q. Do you want to add what Mr. McGlynn just suggested, namely that this letter—

Mr. McGlynn: I made an objection, may it please the Court, to the question.

Mr. Weinberger: I will withdraw the question.

Q. Your letter of July 28th, 1926, says, "We hereby certify that all the bills on account of work done up to date in connection with the Franklin Arms Apartments being erected by us on the southeast corner of Franklin Street and Berkley Street, Bloomfield, New Jersey, have been paid by us." Is that true? A. Yes; the bills due for work performed.

Q. There was no money due you at that time, was there? A. Oh, yes.

Q. There was not any money due you for excavation and for architect's fees and for other things? A. Not to contractors; the money—

Q. There were no bills due by the Franklin Arms for work done. A. Not for work done at the time we made our requisition. We paid out of our own accounts.

Q. You paid out of what? A. Yes.

Q. Did you put this money into the account of the Franklin Arms that you paid? A. Not this money, no.

Mr. McGlynn: May it please the Court, do we have to go all over this so many times?

The Witness: Not this money. When this letter was produced we had paid out of our moneys, we had paid out the contractors so we had our records clean.

Q. Isn't it a fact on the 28th of July there was money due you according to your claim? A. Yes.

Q. Do you still say that when you wrote this particular statement, "Bearing date July 28th, 1926," that you didn't intend under this letter to make it appear to G. L. Miller Company that there was no money due from the Franklin Arms? A. This was not intended—

Q. That is the answer?

Mr. McGlynn: You don't dictate what the answer is.

The Witness: This letter is intended to show bills paid for work done and material purchased for the job, not for accounts due me personally.

Q. Were there any other accounts due by the Franklin Arms besides this at the time this letter was given? A. Well, my brother advanced some money to the company.

Q. And that was due at the time too? A. Yes.

Q. Upon the money which you advanced to the company, that you say was advanced, wasn't that due for labor and materials? A. Well, but it was prior—it was a personal obligation prior to the time of the Franklin Arms organization.

Q. It wasn't the debt of the Franklin Arms, you say, now? A. It was the debt of the Franklin Arms, but it was advanced for the Franklin Arms, it was not advanced for actual work.

Q. Whatever money you claim in that statement is for work done up to the date, wasn't it, that you specify in your statement? A. Yes, but if $2,150, for instance, advanced for one per cent. deposit to G. L. Miller, is also to be included in that, I don't know how I could answer this question.

Q. How about the other items? A. They were paid out.

Q. They were for work done? A. Yes, but they were paid out.

Q. Well, you swore to that, didn't you? A. Yes, sir.

Q. And you swore to that before a notary public on the 27th day of July, 1926? A. Yes, sir.

Q. Where was that sworn to, do you remember? A. I think in Bloomfield.

Q. And the notary public was Donald Peck? A. Donald Peck, yes.

Q. Did you mail this or deliver it in New York? A. Delivered it.

Q. When you delivered it you then got the money from G. L. Miller? A. I don't know whether we got it the same day.

Q. That was the check offered in evidence here bearing date the 28th of July— A. I don't know whether it was the same day. It was supposed to be a proof going into the requisition.

Q. Now, Mr. Haines, can you tell us in your own way how much the building cost up to the time that you got any money from G. L. Miller? A. Up to the time we got any money from G. L. Miller? Well, I don't know. I don't know whether twenty-five or thirty—I really can't remember; I don't remember the stages.

Q. Have you any records showing that? A. No, no, not any more.

Q. Is there any record showing the amount paid, to whom paid, up to the time of the G. L. Miller loan? A. No.

Q. Any way of showing where you got the loan up to the time of the Miller loan? A. No.

Q. There is no way of supplying that proof? A. No.

Q. Then you got the loan from the G. L. Miller? A. Yes.

Q. All the money which you received from any sources up to the time that you got the money from G. L. Miller were used in the erection of that building, weren't they? A. Yes, sir.

Mr. McGlynn: How could it be used in the erection of the building if the building had not been started?

Mr. Weinberger: That is what I am asking him.

Mr. McGlynn: The building had not been started; it is surveying—

The Witness: It is part of—

Mr. McGlynn: I know what he means and Mr. Weinberger's question—

Mr. Weinberger: I am asking the question and he is the witness and he ought to know whether I am right or wrong.

Q. All the preliminary expenses and all the work up to the time of the G. L. Miller loan, the money was used by you for the payment of those bills, wasn't it? A. Yes.

Q. All the preliminary work was paid out by you before you got that loan? A. Yes.

Q. So that you personally or your brother or your friends helped to pay for the architect's fees and preliminary work up to the time the G. L. Miller loan was obtained? A. Yes.

Q. Then the G. L. Miller money was only used for the purpose of the erection of the building and the payment of bills for labor and material? A. Part.

Q. Can you place and point out to one single dollar of the money which went for any other pur-

pose, of any of the G. L. Miller money? A. I cannot.

Q. Did you file an income tax statement? A. I didn't have to file any.

Q. Did you file any? A. No.

Q. Wasn't your gross income over five thousand dollars? A. It wasn't, no.

Q. Was your gross income, irrespective of losses, more than five thousand dollars? A. I don't think so.

Q. Wasn't it? A. I don't think so.

Q. Did the Franklin Arms file an income tax? A. I think they did.

Q. Did you ever file an income tax? A. Yes.

Q. What was the last year you filed one? A. I don't remember.

Q. Did you file one in 1925? A. I think I did.

Q. None in 1926? A. No; I didn't file any in 1926; I didn't have any income.

Q. Any in 1927? A. No.

Q. In 1926 you say the Franklin Arms filed an income tax statement? A. I didn't say it did. I think it did.

Q. Do you know? A. I don't remember.

Q. It was required, was it not, to file on? A. I don't remember whether it was filed or not.

Q. Did the receiver file one? A. I don't think we did.

Q. Now, as a matter of fact, Mr. Haines, in 1926, when you were erecting this building you said you had several businesses, didn't you? A. I didn't say that.

Q. Weren't you a contractor? A. I was not.

Q. Weren't you a builder? A. No.

Q. What was your business? A. I am a civil engineer.

Q. Were you practicing your profession in 1926? A. I was not.

Q. You weren't? A. No.

Q. Do any work for anybody at all during that year? A. No.

Q. Did you have any income of any kind in 1926? A. Not but what I had some savings.

Q. Didn't you file a claim in this case saying there was due to you for labor and services the sum of $1,500 from April to July? A. Yes.

Q. All right. Now, your personal bank account handled your money—from what sources did you deposit? A. Borrowed it.

Q. What did you borrow money for?

Mr. McGlynn: Do we have to go into this again?

Q. I mean besides this building. A. Borrowed money for this building.

Q. Only for this building purpose? A. Yes.

Q. So there was no loan made for anything but this building? A. Only for this building.

Q. Do you own any real estate of your own now? A. I don't now.

Q. In 1926? A. I owned that parcel of land.

Q. Besides that? A. No.

Q. Didn't you own that land and sell that to the Franklin Arms? A. Yes; I am telling you that.

Q. How much did you sell it for and how much profit did you make? A. I don't remember how much it was sold for.

Q. What? A. Yes?

Q. How much did you pay for the land? A. I don't remember how much I paid for it; the records will show.

Q. Wasn't your profit on that more than five

thousand dollars? A. Well, I think it was more than five thousand dollars.

Q. Well, why didn't you file your income tax statement? A. I don't know.

Q. A moment ago you said you didn't have any income. Now it appears you had an income of over five thousand dollars as a profit you made on the land upon which you erected this building and sold to the Franklin Arms. Will you tell us why then you said you didn't have any income? A. I didn't consider that as an income.

Q. What did you consider it as? A. A liability.

Q. The money which you took from the Franklin Arms in the form of a profit you considered a liability, did you? A. Yes.

JULIUS H. HAINES, recalled.

Direct examination by Mr. Weinberger:

Q. Mr. Haines, you filed a claim in this Court, did you not? A. Yes, sir.

Q. And that has been marked Exhibit S-20. Is that your signature? A. Yes.

Q. Did you take the oath which appears on that claim? A. Yes, sir.

Q. Did you swear to it on the date specified and the month designated? A. Yes.

Q. Was that a true statement of fact? A. Yes, sir.

Q. And you claim there was due you $11,163.53? A. Yes, sir.

Q. And that became due to you when? A. It became due some time last year; it is due now.

Q. That was for moneys advanced by you in part to the Franklin Arms? A. Yes.

Q. There was $10,200 advanced by you to the Franklin Arms in cash. A. Yes.

Q. For which you received notes? A. Yes, I made them up myself.

Q. Where are those notes? A. Mr. Barrett has them.

Q. Where are your brother's notes? A. Also Mr. Barrett.

Q. I take it that those notes correspond with the checks which were advanced by you to the Franklin Arms, don't they? A. Correspond with the books that the Miller Company has.

Q. Well, now, you made this claim up on the 16th of December, 1926. A. I don't know when the claim was made up. Mr. Barrett made it up.

Q. Well, the date that you took the oath on, you had the books with you and you made them from your books, that is correct, isn't it? A. Yes.

Q. So that the various items you now have here were made up by you from your books? A. From the Franklin Arms books and they are correct.

Q. After that you took the books over to G. L. Miller Company? A. I don't know. I had some note, you see, and regular memorandum.

Q. I mean, it was after this date upon which you made this affidavit that you took the books for the G. L. Miller Company? A. Yes; it is after the claim. The claim was made after the books were held by G. L. Miller. I said the claims were made—

Q. You mean the books were delivered to G. L. Miller after you made your claim? A. I said the claim was made from memoranda I had from my own notes.

Q. Do you mean to say you didn't have the

books when you made this claim? A. How could I have the books when Miller had them?

Q. You are sure of that now? A. Absolutely.

Q. Where are those memorandums? A. I had some memorandums.

Q. Where are they? A. I haven't got them now.

Q. What did you keep them for? A. I made my memorandums the approximate amount what I gave out, what I advanced.

Q. Why did you keep memorandums when you had books? A. Because I didn't have the books in my possession.

Q. Did you make a copy of the books? A. I didn't make any copy.

Q. Why did you have memorandums there? A. The approximate amount to file a claim; I just guessed about it.

Q. You guessed on this claim? A. Yes, about.

Q. You don't know whether it is correct or not? A. Well, about; more or less. Maybe a few pennies more or a few dollars or some—I don't know. I had to guess because I had no books.

Q. I thought you just said you had memoranda showing the amount. A. I had little memorandums of the money issued—of the moneys given out.

Q. A moment ago you did say you made that from your books of record, didn't you? A. My books?

Q. The company's books. A. These records; I didn't say anything of the kind.

Q. You didn't mean that? A. I don't say I don't mean, I said this—these records were made from certain memorandums and these record memorandums were somewhat corresponding with the records of the books and the books will show that.

Q. Now, as a matter of fact, "To money advanced to Franklin Arms, Inc." referred to the notes referred to below, $10,200? A. Yes.

Q. How many notes were there? A. I don't know whether there were two or three notes.

Q. When were they dated? A. I don't know.

Q. Were they dated on the day you gave the money to the company? A. No; I don't think so; I don't remember. I don't remember these things; the books will show that.

Q. You don't know when they were dated? A. I don't know.

Q. Don't know how long they had to run? A. I don't remember; the notes will show.

Q. Of course, you haven't any records which would show these notes, because you gave them all to G. L. Miller Company? A. I gave them all to Mr. Barrett.

Q. I am speaking of the books. A. I have no record of any books.

Q. You gave Mr. Barrett the notes, you said? A. Yes.

Q. Now, you know that these books are important for the purpose of showing just how much money was paid into this building by you and others? A. Very important to us.

Q. Those are the only records or books that could show how much you gave towards this company? A. Exactly.

Q. Or anybody else gave to this company; is that correct? A. Exactly; yes.

Q. And you also know that without those books it would be an impossibility for you to account for the money which you received from G. L. Miller and other sources, with accuracy. A. Yes; with accuracy it would be an impossibility.

Q. I believe you said that you are going to fight to the last ditch to get your money in this matter, didn't you? A. I hope so.

Q. That is what you said? A. Mr. Barrett promised me.

Q. You said that? A. Yes.

Q. In order to succeed in getting your money it is important that G. L. Miller don't get its money. A. I didn't say that.

Q. I mean the bondholders. A. I didn't say anything of the kind.

Q. You know it is important in this litigation for the bondholders to prove how much money actually went in this building, don't you? A. I don't know what the bondholders have to prove.

Q. You know that is important to prove how much exactly went into the building. A. I know G. L. Miller has to prove.

Q. You also know if they don't prove it you may collect something, but if they do prove it, you get nothing? A. I don't know about that.

Q. You know how much money there is in the estate? A. I know there is about fifty thousand dollars.

Q. You know the G. L. Miller claim is for practically that amount, claiming that amount went into the building. A. Their claim?

Q. The bondholders. A. I don't know what their claim is.

Q. You don't know what the claim is? A. No.

Q. You know your brother is a receiver in this matter? A. Yes.

Q. You haven't found out the date you took the books over, have you? A. No.

Q. You haven't found out the month? A. No.

Q. You haven't found out the name of the person you gave them to? A. No.

Q. You don't remember how he looked either? A. No.

Q. You don't know where it was you gave it to them? A. I brought them in the office.

Q. You didn't get a receipt, you haven't found a receipt for them? A. No, never got any receipt.

Q. Did you find out how many books you took over there? A. A number of papers—

Q. I am talking about books. A. I don't know what kind of books; it was quite a few packages my brother and I took over.

Q. You didn't take over the checks and check books? A. Everything we had in our possession.

Q. What was the idea of taking your check books over? A. They told us they wanted to see our records, our papers and our books, and they wanted to make out some statement for Indiana or Pennsylvania.

Q. Why did you take your check books?

Mr. McGlynn: How does he know what was moving Miller's mind in wanting these books? We can keep this up all summer if we come back and repeat every time.

Q. Well, now, where did you get this money that you claim you advanced to Franklin Arms? A. Some I had, some I borrowed.

Q. Some you had and some you borrowed? A. Yes.

Q. I supposed you had it in the bank, that which you had? A. I wouldn't say where I had it; I had it in several places.

Q. Where did you have it? A. I had it in my pocket.

Q. How much did you have in your pocket? A. I don't remember.

Q. About how much? A. I don't remember.

Q. A couple of thousand you always carry in your pocket? A. I don't remember.

Q. About how much? A. I don't remember.

Q. Several thousand? A. I might have had more than several thousand.

Q. You carried that around with you always? A. I don't remember.

Q. You don't remember? A. No, sir.

Q. Who would remember? A. I don't remember what I had at the time.

Q. What was the most you carried around in your pocket for thirty days at a stretch? A. I don't remember.

Q. About five thousand? A. I don't know.

Q. I mean big bills? A. I don't know.

Q. About how much? A. I don't know.

Q. Did you ever carry a thousand dollars for a month or about five or four or three? A. No.

Q. Single bills, were they? A. I told you I don't remember.

Q. How much did you keep in the bank? You carried all that big money in your pocket; how much did you keep in the bank? A. I don't know how much I kept; I don't know how much I got now, how much I keep now.

Q. Well, in the year 1926 you had how many personal bank accounts? A. I don't know.

Q. You don't mean you don't know how many bank accounts you had in banks in 1926? A. I don't know how many accounts, but I know where I got the money; I know where I will pay it.

Q. You don't know where you had your bank accounts? A. No.

Q. You won't tell us the names of the banks during the year 1926?

Mr. McGlynn: He has already told you at previous hearings.

Mr. Weinberger: They were Franklin Arms.

Mr. McGlynn: He told you these too.

Q. Where were your bank accounts? A. I had with the Corn Exchange Bank.

Q. Your own? A. My own, yes; with the First National Bank.

Q. Was that one hundred and twenty-six East 86th Street branch, your personal account? A. 86th Street, right.

Q. And you had with what other bank? A. With the State National Bank.

Q. Your personal account and what branch? A. Prince Street and Broadway; I don't know whether it was in 1926; I don't remember.

Q. I am talking about 1926. A. I don't remember.

Q. The time when you had all this big money in your pockets? A. I don't remember; I can't remember that.

Q. Well, what other banks? A. I had no other banks.

Q. I suppose you had some home in a sock in the closet, didn't you? A. I suppose so.

Q. How much did you have there? A. I don't know.

Q. What other places besides the sock did you have it? A. I don't remember where I had it.

Q. Well, where did you have it? A. I don't know.

Q. Were there so many places that you cannot keep track of them? A. Yes; quite a few places.

Q. And in the kitchen stove in the summer time? A. Perhaps.

Q. Did you? A. Perhaps. Under the cushion.

Q. I suppose you filed an income tax for all that money? A. I didn't file any income tax.

Q. How much profit did you make? A. I didn't make any profit.

Q. How much did you buy the land for? A. I didn't buy the land.

Q. Who owned it? A. My brother.

Q. Did you get any part of the profit? A. I didn't get any profit.

Q. Did you get any part of the alleged profits? A. I didn't get any profits.

Q. Who got it all? A. Nobody got it.

Q. There wasn't any? A. There wasn't any.

Q. How much did your brother buy the land for? A. I don't know.

Q. How much did the Franklin Arms pay for the land? A. I don't remember; the books will show it.

Q. About how much? A. I don't remember; the books will show it.

Q. You don't know how much this company paid for that land without the books? A. I don't know because the books will show it.

Q. Did the company file an income tax? A. No.

Q. Why not? A. Because they had no necessity of filing an income tax; they haven't made any profit.

Q. Did you borrow any money in 1926? A. I did.

Q. From whom? A. From various people.

Q. And your books show that, or don't you re-

member that? A. The books will show how I followed it.

Q. You don't know without the books? A. I do remember I borrowed on my life insurance policy.

Q. How much? A. From the Mutual and from the—

Q. How much? A. From the Mutual and from the Travelers.

Q. How much? A. I don't remember exactly, but I can find it out for you.

Q. Your book you didn't give to the G. L. Miller Company? A. I had no books.

Q. What book will show from whom you borrowed your money? A. I have no books.

Q. You said your books would show whom you borrowed money from. A. I didn't say my books would show.

Q. Who did you borrow money from? A. From friends and from various people.

Q. Give us the names of them in 1926. A. Rosenbloom, Mr. Israel Rosenbloom of the Paramet Chemical Corporation.

Q. What relation is he to you? A. He is no relation to me; he is a personal friend.

Q. How much did you get from him? A. I don't remember.

Q. When did you get it? A. 1926.

Q. For this building? A. Yes, Mr. George Weintraub of the Varnol Chemical Corporation and Mr. Herman Dorf of the Independent Forwarding Company and Mr. William D. Bilsie of Orange, New Jersey—

Mr. McGlynn: You didn't give us the amounts.

The Witness: I still owe money and I am still paying now and I haven't paid my in-

surance policy yet, but that is why I told you I will fight you to the last, because I owe it to my wife, a duty to get back the money I put into that business.

Q. You expect to pay them back, but how much you do not know? A. I put a lot of money, I don't know how much I put, and as a matter of fact, I don't pay for it now.

Q. I appreciate that. A. You don't appreciate it; I appreciate it and my friends appreciate it.

Q. You don't know how much you owe, but you are going to pay them back? A. Whenever I have it or they ask me. They told me not to worry, to go along and drop in some money as I can pay it.

Mr. McGlynn: These accounts that you mentioned, are they in your own name or the name of your company?

The Witness: My own name.

Q. I suppose you got all this money in cash from these people. A. By cash for payroll purposes.

Q. You were carrying around your money in your sock and in your stove and in your pockets and you had so much of those big bills you were borrowing from people. A. I never said I carried around money in stockings or anywheres. I borrowed money and whatever I could I took it to the job and put it out for payrolls. I gave it to my brother and he paid it out.

Q. Were you present when that letter of July 28th was given to the company? A. I don't know whether I was present, but I know my brother did give a letter.

Q. You knew that he swore to it? A. Yes, I think I knew he swore to it.

Q. Did you see the letter before it was given—that affidavit was given? A. I think I did.

Q. You knew that was one of the terms required by the company in order to obtain the money? A. I didn't know the terms.

Q. You signed it as a witness, didn't you? A. Did I? I didn't sign it.

Q. You didn't? A. No, sir.

Q. Look at the original and tell us whether that Julius Haines on the right—the left-hand corner is yours. A. I beg your pardon; that is John Haines.

Q. I beg your pardon. I stand corrected. That is your Brooklyn brother, John? A. Yes.

Q. Is he the merchant? A. He is also in the building game.

Q. Was he part of this Franklin Arms Company? A. He worked for us.

Q. I thought he was the man—

Mr. McGlynn: William. Your memory is bad this mornning.

A. I think he originally went in with my brother and got a loan and I think they gave him $2,100.

Q. Well, you knew about that statement contained in that letter there? A. Yes.

Q. That was one of the conditions upon which you were given the money after you presented that? A. One of the conditions what?

Q. One of the terms required by the company before they paid any money? A. I don't know whether that was one of the terms required. I know my brother gave them that letter.

Q. Now, as a matter of fact, Mr. Haines, you agreed, did you not, with the G. L. Miller Company and in fact, represented to them that you had all

the money required to finish that building over and above the amount they were giving you on the mortgage? A. Well, I did agree.

Q. By which you meant that Franklin Arms was in a position to build that building with their money. A. Exactly.

Q. Was that true? A. Yes.

Q. Nevertheless all along from the time you started this building down to the date of July 28th the company was borrowing money from people. A. It didn't borrow from G. L. Miller; it borrowed from us. We loaned it to G. L. Miller.

Q. It had none of its own money. A. Where is money when I gave it? Who was I? Wasn't I stockholder with the Franklin Arms?

Q. You were making a loan? A. Yes.

Q. It had no money of its own? A. It had some of its own money.

Q. Where did it get it from? A. Which we brought in.

Q. As a loan which you are now filing claim for? A. Yes.

Q. So it had no money of its own at the time? A. I don't know. I remember I gave it—I think in June if I am not mistaken—I don't remember exactly the time when I came in.

Q. How much was the capital of the company paid in? A. One hundred shares, no par value.

Q. How much was actually paid for that stock? A. I don't remember; the books will show, I am positive, because it was transferred and some work that was done prior to the incorporation, prior to the opening of the bank account, and the books will show all those things.

Q. Where are the corporate records and the minute book? A. We have them—Mr. Barett. By the

way, that transfer was taken out of the minutes—that amount—that expenditure.

Mr. McGlynn: This exhibit?

The Witness: Exactly. That was twelve thousand and some odd dollars.

Mr. McGlynn: R-1 of today's date.

Q. That was taken out of the minute book? A. Yes.

Q. That was not taken out of the records given to G. L. Miller? A. We have record of this in the minute book.

Q. It was not taken out of the G. L. Miller records? It was taken out of the minute book? A. I took this from the minute book.

Mr. Burnstine: It is hereby stipulated and agreed by and between the receivers and the substituted trustee and the committee for the protection of the interim receipt holders and said interim receipt holders as follows:

1. That after making the agreement entered into between Franklin Arms, Inc., and G. L. Miller & Co., Inc., and the other parties mentioned in said agreement (marked Exhibits S-1, S-2, S-3, S-4 and S-5) and said G. L. Miller & Co. Inc. offered to the public first mortgage seven per cent. gold bonds of Franklin Arms, Inc. in various denominations aggregating the principal sum of $215,000 mentioned in the temporary bond aforesaid, Exhibit S-4, in the form prescribed by said mortgage.

2. That in furtherance of the sale of said bonds, G. L. Miller & Co. Inc. advertised them in the public press in substantially the

same manner, form and substance, and by the same descriptions used in the Circular S-22, which it likewise distributed among the public, and similarly represented through its salesmen, who called upon the public soliciting purchasers of said bonds.

3. That the form and substance of said advertisement, circulars and salesmen's representations, salesmen's solicitations, and said efforts of G. L. Miller & Co. Inc. to secure purchasers of said bonds were known to said Franklin Arms, Inc.

4. That as a result of the efforts aforesaid, G. L. Miller & Co. Inc. did procure purchasers for the bonds aforesaid to the extent of $115,000 par value upon the date, in the amounts and to the persons set forth on the list, Exhibit S-23, and received from them the said amount of $115,000 as the purchase price of said definitive bonds.

5. That in each case of such purchase of said definitive bonds, the purchaser thereof received from G. L. Miller & Co. Inc., upon making payment, pending preparation of said definitive bonds for delivery, an interium receipt in the form Exhibit S-24, for each definitive bond so purchased, bearing serial number and maturity date and amount corresponding with the serial number and maturity date and amount of the definitive bond so purchased, and exchangeable therefor upon delivering up of said interium receipt when said bond corresponding therewith was ready for delivery.

Mr. Burnstine: Now we offer in evidence circular above mentioned, Exhibit S-22.

(Marked S-22.)

Mr. Burnstine: We offer the list of interim receipt holders.

(Marked Exhibit S-23.)

Mr. Burnstine: We offer in evidence form of interium receipt.

(Marked Exhibit S-24.)

Mr. Hendrickson: I object to the use of the words, in Paragraph 3, "were known to the Franklin Arms, Inc." for the reason that there is no evidence that the Franklin Arms, Inc. had any knowledge. Further, I object in Paragraph 4 to the characterization of the thing sold as definitive bonds and call attention to the fact that the agreement, bond or mortgage, Exhibits S-1, 2, 3, 4, and 5 or one or more of them contains the statement that if the definitive bond is not issued, that Miller & Company will return to the purchaser the cash paid for the same with interest, and insist that what was actually sold was an interim receipt and therefore object to the use of the words "definitive bonds" as used in the paragraph as an improper characterization of the thing sold.

As to Paragraph 5 I further object to the use of the words "sale of a definitive bond" for the reasons above set forth as the evidence shows that what was sold was the interim receipt exchangeable thereafter for a bond if such definitive bond was thereafter issued or the return in cash, as provided in said agreement. As to the other matters stated in the stipulation, the facts as to the

exhibits, the amount of the mortgage contained in Paragraphs 1 and 2 I have no objection, and I also accept the stipulation in Paragraph 4 as to the amount of money received from customers at the time or times when the ad interim receipts were delivered to them by G. L. Miller & Co.

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,

Complainant,

and

FRANKLIN ARMS, INC., a corporation,

Defendant.

Continuation of testimony in the above entitled cause, taken before Roy F. Anthony, a Special Master in Chancery of New Jersey, pursuant to an order of reference, at the offices of Stein, McGlynn & Hannoch, 17 Academy Street, Newark, New Jersey, on Thursday, the thirteenth day of October, A. D. 1927, at ten o'clock in the forenoon.

APPEARANCES:

MESSRS. STEIN, MCGLYNN & HANNOCH, EDWARD R. MCGLYNN, Esq. (Present). Attorneys for the Receivers.

MESSRS. WEINBERGER & WEINBERGER, HARRY H. WEINBERGER, Esq. (Present).

and

MESSRS. BURNSTINE & GEIST, of the New York Bar. HENRY C. BURNSTINE, Esq. (Present). BERNARD WIESS, Esq. (Present). Attorneys for Interim Receipt Holders and Trustee.

Mr. Weinberger: I think that the lien claims should be filed and counsel should be furnished with a copy.

Mr. McGlynn: That will be done. We will offer them in evidence.

Mr. Weinberger: Showing the amount of the indebtedness and the amount of credits and dates when payments were made; and second, that the Haineses be ordered and directed to appear at a date to be fixed now. We would like to have a date fixed for the taking of our testimony. We offer in evidence an *ad interim* receipt, referred to in the stipulation as Exhibit S-24.

(Interim receipt marked Exhibit S-24.)

Mr. McGlynn: I have just received word to appear before Judge Dungan in the Circuit Court to try a case, and the jury is actually being called. I suggest that you proceed to examine the witness on direct, reserving to me the right to cross examine at a later date.

Mr. Weinberger: That is agreeable to us.

VAN DYCK RUSLING, produced as a witness on behalf of the Interim Receipt Holders, being duly sworn according to law, on his oath, testified as follows:

Direct examination by Mr. Burnstine:

Q. Mr. Rusling, what is your occupation? A. Contracting engineer.

Q. What is your address? A. 26 Courtland Street, New York—business address.

Q. Are you a member of the committee of interim receipt holders of Franklin Arms, Inc.? A. I am.

Q. And have you been such since the organization of that committee? A. I have.

Q. Will you state whether or not that committee was organized for the purpose of protecting the rights of the interim receipt holders of the Franklin Arms, Inc.? A. I understood it was.

Q. Can you state approximately when that committee was organized? A. Some time during the winter of last year.

Q. Was it shortly after the Miller case? A. Very shortly.

Q. Did that committee have any meetings at which you were present? A. Yes.

Q. Did you ever meet either of the Haines, Julius Haines or James Haines? A. I met both of them.

Q. I refer to the Haines, the men who had to do with this Franklin Arms enterprise? A. Yes.

Q. Did you meet them as a member of the committee with other committeemen? A. Yes.

Q. On how many occasions, if more than one? A. I know that I met them once in the office of Burnstine and Geist.

Q. Was that at a meeting of the committee? A. At a committee meeting.

Q. On that occasion will you state whether or not they appeared before the committee in order to be interrogated as to matters having to do with the Franklin Arms property? A. I understood that they were there for that purpose.

Q. Will you state whether or not they were interrogated regarding such matters by members of the committee? A. They were interrogated by members of the committee, yes, and by counsel for the committee.

Q. In your presence, as well as the presence of other members of the committee? A. Yes.

Q. Will you say what was said by members of the committee and its counsel in interrogating these gentlemen as to matters connected with Franklin Arms, and what they said to members of the committee and such counsel, in answer to such questions? A. In what specific instance?

Q. I mean in reference particularly to matters of work, money and expenditures in connection with the construction of this Franklin Arms house? A. They were questioned on several matters, of course, in connection with this Franklin Arms.

Q. What was asked them, if you remember? A. Of course, it is a pretty hard matter for me to remember exactly what was asked at that time.

Q. I don't mean the words of the questions or the answers, but I mean the substance. A. They were, of course, questioned as to the amount of work that had been done and the amount of money that had been received.

Q. Did they say how much money had been received by them from G. L. Miller and Company? A. As I remember it, they did.

Q. Do you recall how much they said in all had been received, directly or indirectly? A. About $57,000 or $57,500.

Q. Were they asked how much money had been expended in the construction work in connection with the Franklin Arms? A. Yes, I think they were.

Q. What did they state in reference to that? A. They said that of that $57,500, as I remember it, $9,000 had been used to pay off an existing mortgage, and the balance had gone into the construction of the building.

Q. I believe you have stated that they were asked as to how much work had been done on this enterprise, did you not? A. I think they were.

Q. That is, how much money in all had been expended in connection with it? A. I don't remember that. I do know that they had said that in addition to the money that they had received from Miller, they had also put in some $30,000 of their own.

Mr. Weinberger: Were they both present at the time?

The Witness: They were both present at the time these negotiations took place.

Q. I might ask you, Mr. Rusling, if you remember approximately how long this meeting took place in which the Haines were present on this occasion? A. I know it was dark when they came out of the office. Whether it was a late afternoon meeting or an early evening meeting—I think it was a late afternoon meeting.

Q. Can't you state how long they were in session there with the Haines? A. That must have been over two hours.

Q. And how many members were there and are there on this committee, about? A. I think six.

Q. Do you recall who acted as chairman of the committee on that occasion? A. I think Mr. Gilmore was chairman of the committee.

Q. You refer to counsel for the committee having been there and that the committee asked the Haines questions on these matters. Who was he? A. Mr. Geist was there, and I think Mr. Weinberger was there.

Q. Do you recall that Mr. Netter of the office of Burnstine and Giest was also there? A. I think so. Of course, I wasn't familiar with Mr. Netter by name, but I think that was the gentleman that was there. He was there at the starting of the meeting, and Mr. Geist came in a little later.

Q. And Mr. Netter continued there after Mr. Geist? A. Yes.

Q. And was Mr. Weinberger there throughout the meeting? A. He wasn't there at first; he came there later.

BENJAMIN ZUCKERMAN, produced as a witness on behalf of the Interim Receipt Holders, being duly sworn according to law, on his oath testified as follows:

Direct examination by Mr. Burnstine:

Q. What is your occupation, Mr. Zuckerman? A. Certified public accountant.

Q. How long have you been such? A. I have been a certified public accountant since 1921.

Q. Where are you located? A. 217 Broadway, New York City.

Q. With whom, if anybody, are you associated? A. I am associated with the firm of Bernard Reis and Company on certain matters.

Q. What is the business, if you know, of Bernard Reis and Company? A. That is a firm of public accountants.

Q. Do you know whether or not Bernard Reis and Company act and have been acting as the accountants for the receiver in the matter of G. L. Miller and Company? A. They are. They are the accountants in that matter.

Q. Do you know how long they have been their accountants in this matter? A. They have been the accountants in this mater since the time of the receivership, which I believe is September 3rd, 1926.

Q. You just said that you have been associated with them in certain matters? A. Yes.

Q. What matters? A. Including the matters I have been associated with them is the matter of G. L. Miller and Company.

Q. Have you been associated with them in that matter since they have been acting in that matter? A. I have.

Q. Do you know whether or not an equity receivership of G. L. Miller and Company was declared by the United States District Court for the Southern District of New York? A. I do.

Q. And whether a receiver was appointed by that court in that proceeding? A. I do.

Q. Do you know who the receiver was? A. The receiver was Lawrence Berenson.

Q. Do you know when Mr. Berenson was appointed by the court receiver of G. L. Miller and Co. in these equity proceedings? A. I think September 3rd. I may be one day off, I am not certain as to the exact date. I think it was September third.

Q. What year? A. 1926.

Q. At that time were you associated with Bernard Reis and Company? A. I was.

Q. Do you know whether or not Bernard Reis and Company were retained—or was retained by Mr. Berenson as receiver of G. L. Miller and Company, Inc., in this equity proceeding? A. I do, because Mr. Berenson called us up that same day to come to see him and take complete charge.

Q. Do you know when Bernard Reis and Company was retained? A. On September 3rd, 1926.

Q. You say that Mr. Reis had some conversation with you by 'phone in reference to the matter? A. Mr. Berenson.

Q. Mr. Berenson? A. Yes. Mr. Reis was in Europe at the time.

Q. Were you in charge of the office of Reis and Company while Mr. Reis was in Europe? A. I was in complete charge of his office.

Q. So that the retainer of that firm by Mr. Berenson was through you personally? A. It was.

Q. And that was on September 3rd, 1926? A. Yes.

Q. Pursuant to what Mr. Berenson said to you on the subject of that retainer, will you state what, if anything, you did? A. I went up to see Mr. Berenson at the office of G. L. Miller and Company, 30 East 42nd Street, New York City, and had a conversation with Mr. Berenson in which he told me—

Q. I am not interested in what he told you. As a result of the conversation with Mr. Berenson, what, if anything, did you do on behalf of Bernard Reis and Company? A. I accepted the retainer and planned the work to be done, and the first thing I did, I was supposed to seal all the safes up there. That is all that could be done

the first day. I made arrangements to count all the securities or records the next day.

Q. You say that you saw Mr. Berenson there on this particular day? A. Yes.

Q. And what day was that? A. September 3rd, 1926.

Q. Will you state whether or not Mr. Berenson was at that time in possession of those premises of G. L. Miller and Company, Inc., as the receiver? A. Mr. Berenson was in possession.

Q. Do you know, and did you know at that time, the title of Mr. Berenson? A. I do.

Q. What was it? A. He was a practicing attorney.

Q. A lawyer? A. A lawyer.

Q. Do you know where his offices were? A. Yes, at 27 William Street, New York City.

Q. Did Mr. Berenson personally remain there and in possession of the offices and affairs of G. L. Miller and Company, Inc.? A. He did.

Q. In person? A. He did. He spent all his time up there from that day on all the time.

Q. Who else, if anyone, was there after that date? A. Mr. Goldmark and Mr. Collin.

Q. Do you know who Mr. Goldmark was? A. Yes, I knew who Mr. Goldmark was. At that time he was a member of the firm of Rosenberg and Ball, who were the attorneys to the receiver of G. L. Miller and Company.

Q. Mr. Berenson's attorneys as receiver? A. Yes.

Q. Who else, if any one, was up there after that date? A. Mr. Rosenberg was there a few times.

Q. What I meant was this: Did these gentlemen, Mr. Berenson and Mr. Rosenberg and Mr. Collin and Mr. Goldmark, remain there continu-

ously all the time, or did they simply come there from time to time? A. Mr. Berenson was there all the time, you might say, during regular working hours. Mr. Berenson was there all the time. Mr. Goldmark was there all the time and Mr. Collin was there most of the time, and Mr. Rosenberg came up once in a while.

Q. I mean while the offices were open? A. That is right.

Q. Did you know who Mr. Collin was? A. I did.

Q. Who is he? A. He was a member of the firm of Rosenberg and Ball.

Q. And who else was there? A. My assistants were there, and also some of the old employees of G. L. Miller and Company.

Q. Do you know who were there of your assistants? A. I do. I don't think I can remember all. I don't think I can give you all their names. I will try to give you some of their names.

Q. Were there many of them? A. Yes. I think one day we had twelve or fourteen men in the beginning.

Q. Were they working under you? A. They were.

Q. Were you there? A. I was.

Q. Were you there every day, all day while the offices were open? A. I was there practically all the time. I can't say I was there every hour.

Q. What work were these men doing, your assistants under you? A. The first thing we did, we made a complete inventory of everything, all the securities, and a complete record of all the books.

Q. When you went in there you found, did you, different departments in the office of G. L. Miller & Company? A. I did.

Q. In charge of different men, or had been in charge of different men? A. Yes, I did.

Q. Different activities in these different departments? A. Yes.

Q. Were those activities closed? A. The selling activities closed, but I believe there was a little administration activity left which was taken over by Mr. Berenson immediately. Mr. Berenson took complete charge there and he kept a few of the departments there for a time.

Q. What departments, if you recall, were kept going there at the time the receiver went into possession? A. There was the general executive office in which all the general books of account were kept of the firm of G. L. Miller & Company. Then there was the treasurer's department in charge of Mr. Coart, and a New York branch office.

Q. Was Mr. Coart a Miller man or Reis man? A. A Miller man. He was the old assistant treasurer of G. L. Miller & Company.

Q. Anybody else in a supervisory or managerial capacity? A. No, only with the exception of Mr. Coart. He was the only one of the officers of G. L. Miller & Company that was retained by the receiver.

Q. You were the only man in a managerial capacity of the Reis outfit that was there? A. That is correct.

Q. These various men that were working under you, they simply worked on the books there? A. They did, books and records.

Q. They didn't see people that came there to see some one to transact any business? A. No, they did not.

Q. Who saw such people? A. Most of the

people were seen by Mr. Berenson, and I saw some people.

Q. Did any one else there after September 3rd see people who wanted to talk or transact business regarding the Miller affairs? A. I can't think of anybody else with the exception of the attorneys for the receiver. They may have seen some people.

Q. Did you yourself see people? A. I did.

Q. Do you know, or did you ever meet Julius Haines or James Haines who are connected with the Franklin Arms enterprise? A. I did not.

Q. Did you ever receive from them for or on behalf of G. L. Miller and Company, or otherwise, any books or papers which were delivered by either of them there? A. I did not.

Q. Did you ever see in that office any books or papers or records of Franklin Arms, Inc.? A. I did not.

Q. Did you go through and see what books and papers and books that were there? A. A complete inventory of all the books and papers was made by my assistants.

Q. That is of all books and records of all kinds, character and description? A. Yes, that is correct.

Q. No matter what they had to do with, that were in that place of business? A. That is correct.

Q. When was that done? A. I think that was done the latter part of 1926.

Q. Do you know whether among your list there were any books, records or papers of Franklin Arms, Inc.? A. There were not.

Q. Is that the only office in New York City, if you know, that G. L. Miller & Company, Inc., had? A. That office on 30 East 42nd Street was the only office that G. L. Miller & Company had in New

York down to some time this year when the trustee moved part of the office, as the accounting part of the office, down to 70 Broadway, New York City.

Q. That occurred just a short time ago? A. Yes.

Q. How long ago? A. I think May first, 1927.

Q. And up to that time, however, the Miller offices were retained as they had been at the time of the Miller business? A. They were.

Q. With all books, records and papers that were there? A. That is right.

Q. You say that you had charge of the Reis activities there? A. I did in the beginning.

Q. How long after September 3rd did you continue in charge? A. Up to the end of September, 1926.

Q. Will you state whether in the performance of your duties there you would have known about it had any books and records and papers of the Franklin Arms, Inc., been brought there by the Haines or anyone else and left there? A. I would.

Q. I have referred in my questions to you, Mr. Zuckerman, to books, records and papers of Franklin Arms, Inc. I meant to include among those also checks, check books, cancelled check vouchers, and all papers and records of every kind, nature and description. Did you ever see any such papers? A. I did not.

Q. Were any such papers ever delivered there to you? A. No.

Q. Or to anybody, as far as you know? A. No, not as far as I know.

Q. At any time? A. No.

Q. You say that you were there in charge for Reis and Company until when? A. The end of September, 1926.

Q. Who was in charge after that? A. Mr. Reis was in charge after that.

Q. He returned from Europe, is that right? A. At the end of September, 1926.

Q. After his return from Europe at the end of September, 1926, did you remain there but under him? A. I did.

Q. You continued right there doing the same things you had been doing? A. Yes.

Q. Except that your superior was then also present? A. That is correct.

Q. Will you state in the performance of your duties after Reis returned from Europe and was there, you would have known about it had any of such papers, records and books as I have described, of Franklin Arms, Inc., been delivered there by the Haines, or anybody, after the end of September, or the latter part of September, 1926? A. Yes.

Q. And there were none delivered before that either? A. No, not as far as I know.

Q. Or up to this date? A. No.

(At this time the hearing was adjourned to October 27th, 1927, at ten o'clock in the forenoon.)

Case.

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,

Complainant,

and

FRANKLIN ARMS, INC., a corporation,

Defendant.

Continuation of testimony and proceedings in the above cause before Roy F. Anthony, Esquire, Special Master in Chancery, at the office of Stein, McGlynn & Hannoch, 17 Academy Street, Newark, New Jersey, on Thursday, October 27, 1927.

APPEARANCES:

Mr. EDWARD R. MCGLYNN, for Receivers.

Messrs. BURNSTINE & GEIST and Mr. HARRY H. WEINBERGER for Interim Receipt Holders and Trustee.

Mr. Burnstine: Van Dyck Rusling, the witness, was produced at this hearing for cross examination and an opportunity afforded and counsel decided that he did not care to cross examine?

Mr. McGlynn: Right.

Mr. Rusling: I think I said there were six members on the committee, and my recollection is that there were seven.

JULIUS H. HAINES, recalled on behalf of the Trustee, Service Trust Co.:

Direct examination by Mr. Weinberger:

Q. I direct your attention to the lien claim of Albert & Kernahan, Inc., a corporation, against Franklin Arms, &c., filed on the sixth day of November, 1926, in the County Clerk's Office of Essex County, and ask you if the total amount of the bill was as stated in this lien claim $8,799.22? A. Yes, sir.

Q. Were any payments made to Albert & Kernahan? A. No, sir.

Q. None whatever? A. No, sir; except I think there was something returned about one hundred and some odd dollars.

Q. With the exception of two return items, one for $27.26 and another for $87.30, amounting to $114.56, there were no other credits due you on that lien claim? A. No, sir.

It is stipulated and agreed between counsel that copy of lien claim which Mr. McGlynn has prepared and very kindly offers, is to be marked in evidence, in lieu of the original.

(Marked Exhibit 1 for Albert & Kernahan, October 27, 1927.)

Mr. Weinberger: This testimony should be put in by Mr. McGlynn.

MARY B. RATCHFORD, called on behalf of Receivers; being duly sworn, testified as follows:

Direct examination by Mr. McGlynn:

Q. You are connected with the County Clerk's Office of Essex County? A. I am.

Q. You have produced here the original papers on file in your office in five mechanic lien cases designated as follows:

Hudson Structural Iron Works *v.* Franklin Arms, Inc.;

Juliano Construction Co. *v.* Franklin Arms, Inc.;

Albert & Kernahan, Inc. *v.* Franklin Arms, Inc.;

Abraham Levine, trading as Orange Hardware Company *v.* Franklin Arms, Inc., and

Joseph E. Amorose *v.* Franklin Arms, Inc.?

A. Yes.

Q. And in each one of these files you have produced there is, among other things, a copy of the original lien filed in each of the lien claims just mentioned? A. Yes.

Mr. McGlynn: I offer in evidence five original lien claims. The lien claims are filed in the Clerk's Office, and the jackets under the control of the courts.

(Marked Exhibit 1 for Hudson Structural Iron Works, October 27, 1927.)

(Marked Exhibit 1 for Juliano Construction Co., October 27, 1927.)

(Marked Exhibit 1 for Albert & Kernahan, Inc., October 27, 1927.)

(Marked Exhibit 1 for Abraham Levine, trading as Orange Hardware Company, October 27, 1927.)

(Marked Exhibit 1 for Joseph E. Amorose, October 27, 1927.)

Q. These jackets are the papers in the suit in-

stituted in the Circuit Court on the lien claims? A. Yes, and the liens are simply a judgment filed in the Circuit Court.

Mr. Weinberger: All the proceedings and pleadings are in these envelopes?

The Witness: Yes, and the liens are separate.

Mr. McGlynn: I have copies of these lien claims, which we can use.

JULIUS H. HAINES, recalled for further:

Direct examination by Mr. Weinberger:

Q. Mr. Haines, in the Juliano Construction Company, how much money was paid on account? A. I cannot just remember; I know we paid them various payments.

Q. You don't remember? A. No.

Q. May I refresh your recollection and ascertain from you whether these are the amounts and the dates upon which payments were made: June 26, 1926, $2,500. The lien claim sets forth what I am reading now as payments. Do you know whether that was paid? A. Well, I imagine it was paid.

Q. Was it paid by check or cash? A. I cannot remember.

Q. Were there any cash payments made to the concern, to the Juliano Construction Co.? A. Yes.

Q. There were cash payments? A. Yes.

Q. June 28, 1926, $4,500? A. That I remember.

Q. Was that check or cash? A. Check.

Q. July 15, 1926, $1,000? A. I don't remember.

Q. July 24, 1926, $1,000? A. I don't remember.

Q. July 30, $3,000? A. I think I gave them that.

Q. July 30, $4,000? A. I might have given it, but I do not remember.

Q. August 21, $1,000, and August 23, $1,000, a total of $18,000? A. I don't remember whether that was the total amount; I know we gave them—

Q. Do you think you paid any more than $18,000? A. I cannot tell.

Q. Do you have any way of knowing whether you paid more than $18,000? A. No.

Mr. Weinberger: I note that the lien itself filed in this case is not signed: It is as follows:

(In typewriting) Juliano Construction Company
Per Louis Juliano
President
Attest: Anna Juliano,
Secretary.

The signature, the name, Juliano Construction Company, is in typewriting, and the two officers just mentioned signed. The lien claim is signed in typewriting.

Q. Hudson Structural Iron Works, I direct your attention to the fact that there appears in this lien claim credits: "To credit by cash $4,000"? A. Yes.

Q. Was that cash or check? A. I cannot remember.

Q. The total claim appears to be $11,017.40, upon which there is a credit of $46. Was this one payment? A. I cannot remember. I think I gave them several payments, because Mr. Zanin kept on all the time and said that his money—

Q. You do not know whether that was one payment or more than one? A. No.

Q. You do not know whether this was by check or cash? A. No.

Q. You have no means of finding that out ? A. No.

Q. From any of your records? A. No, I haven't any records.

Q. Were there any other payments made by you to any of the other creditors who did any work? (No answer.)

Q. Can you tell us whether there were any payments made to any persons who didn't file liens? A. I know that I had the mason man that we paid.

Q. How much did you pay him, about? Not Juliano. A. Juliano was the mason man.

Q. I asked you beside these lien claimants. A. Beside the iron man and the mason men we had a steamfitter, the plumber.

Q. He filed no lien? That is who? A. Amorose.

Q. You made no payment to him? A. Yes, I think we did.

Q. How much? A. I think we made payment of four or five thousand dollars to him just before Miller failed.

Q. Any other payments to anybody for any work or material done or furnished to that building? A. Excavation before the Miller people came in, and grading.

Q. And to whom? A. We had labor work, general labor work, LaConte Construction Co.

Q. They were doing the excavating? A. Yes.

Q. How much did you pay them and when did you make the payments? A. I don't remember.

Q. Do you know how much you paid them? A. I cannot tell you.

Q. About how much did you pay them? A. I

know the excavation, I think it ran up to about $6,000, grading and excavating.

Q. And all that money was paid by you personally or your brother? A. We paid that.

Q. Check or cash? A. I cannot just think how we paid that; I know it was weekly payment.

Q. Do you know now was that with the money of G. L. Miller; did you use that money? A. No.

Q. You didn't use that? A. No, that was before the Miller people gave us the mortgage.

Q. That was before the mortgage was given? A. Yes.

Q. Where did that money come from? A. It was our own money.

Q. Was there any particular account which you got it from? A. From my own money.

Q. It was a bank account somewhere that you got it from? A. I got it; I had it.

Q. I know; I am trying to find out where, so we might be able to trace it? A. There are several sources.

Q. Has it a bank account? A. I don't remember; because we had weekly pay-rolls; it was pay-rolls every week.

Q. This money which you speak of having paid for these excavations, apparently came from some source; it was a big sum, wasn't it? A. Yes, there were different times and different periods.

Q. How long did it take to excavate?

Mr. McGlynn: It seems to me that this has all been gone into before. You are going into the details of where he got the money for the excavation.

Mr. Weinberger: I don't want to duplicate any work we have done. He seems to have no knowledge generally where the

money came from. I want to know whether that applied to the excavation.

The Master: I will receive it.

A. I have no recollection. I know I paid out the money.

Q. So that we can get it clearly: the only places that you ever had any money were in banks? A. No.

Q. Did you have it any other place? A. I borrowed money; I had money home; I cannot remember where I had the money.

Q. At home you kept it as you already testified, in the stove, and in the sock? A. I didn't say anything of the kind.

Q. Where did you keep it? A. I don't remember.

Q. You don't even remember where you kept the money home? A. I was glad that I got the money to pay the bills.

Q. Where did you keep the money at home? A. I cannot tell you.

Q. Did you keep it in so many different places?

Mr. McGlynn: I don't think we should spend money for repetition.

Mr. Weinberger: I will not press the question.

Q. I will reframe the question. You stated this building what time—the excavation? A. I wasn't there when my brother started it, but I came in June, I think.

Q. When was it started? A. I don't know whether it was started in March, February or in January.

Q. Between the time of its starting and the time

you appeared on the scene in June, did you borrow any money from any banks? A. I didn't borrow from banks.

Q. Did you get any loan from any banks at any time during the course of the construction of this building? A. No.

Q. Never had occasion, you or your firm or your company that you were affiliated with? A. The Franklin Arms never had any money from any banks in the form of loans.

Q. You did, however, take money from your friends? A. I took money from my friends.

Q. And from what period to what period were these loans taken? A. I don't remember.

Q. Is there any way in the world you can tell us when it was you got this money from your friends, and how much? A. I cannot tell.

Q. When you got the money from your friends, I take it you deposited that in banks, did you not? A. I don't remember.

Mr. McGlynn: This has all been covered before.

Q. I direct your attention to the fact that all of the work done by the Hudson Structural Iron Works, Inc., was done between the months of June and August, 1926, is that correct? Do you know? A. I don't know.

Q. Will you say it wasn't done during that time? A. No.

Q. Was it done during that time? A. I don't know. May I say that I know it was done?

Q. It was done between those months? A. I don't know whether between those months; I know it was done.

Q. You spent some money beside the excavation for what? A. Carpenter work.

Q. Who was the carpenter? A. We had laborers by the day.

Q. How much did you pay them? A. I don't know how many thousands of dollars.

Q. About how much? A. I don't know.

Q. Have you any idea? A. I have no idea.

Q. You claim that this money didn't go through the banks that you paid? A. I don't claim anything.

Q. Do you claim that it did go through banks? A. As I said, I don't remember.

Q. Have you your statement here of your other personal accounts? A. I have no statement.

Q. Your transcripts? A. I have none; I gave you all the transcripts.

Q. The Franklin Arms had an account with the National Newark & Essex Bank. I call your attention to the fact that that account never had in it more than—the most it ever had in it was one item of one thousand dollars? A. Yes.

Q. You certainly didn't use that account to pay any of these excavation bills, did you? A. I don't know.

Q. You didn't use it to a greater extent than the sum of one thousand dollars, did you? A. No.

Q. The Bloomfield Trust Company transcript shows an account with James Haines, is that correct? A. That is my brother.

Q. Did you have an account there? A. No.

Q. Did you use any of your personal accounts for any moneys, to pay any bills, such as the carpenter or labor bill, such as the excavator or laborers? A. I don't know for what purpose it was

used; I know I gave money, cash, every day and every week, whenever it was required.

Q. Gave to whom? A. To my brother.

Q. You say the money was gotten out of your bank? A. I got it at the time; when it was needed, I brought it there.

Q. Did it come out of your bank account? A. I had no bank account.

Q. Did you have any at all ? A. I did.

Q. Did any of the money come out of the bank account? A. I don't remember at present; I don't know.

Q. How much was the carpenter job on that building altogether? A. I really don't know.

Q. About how much? A. I don't know whether it was twelve or fifteen or eighteen; I don't know because we had payrolls every week and sometimes daily payrolls; people quit and they go and we take on more people.

Q. How much were the lumber bills? A. You have the bill there.

Q. Is that the only bill? A. I think we bought some more lumber.

Q. When? A. I don't know.

Q. You want to say now you don't know even where you got the lumber for that building? A. I wasn't all the time on the job there.

Q. You certainly made out checks and you had payrolls and made payments? A. Yes.

Q. You certainly made some inquiry to find out where the money was going? A. I wasn't interested; I gave the money whenever they needed it.

Q. You just said you may have bought lumber from someone else. A. Perhaps.

Q. Who was the someone else? A. I don't know.

Q. Didn't you say you bought some from someone else? A. I say I might have.

Q. You don't know positively? A. No.

Q. You say that all the lumber you ever bought was on this building? A. I don't know.

Q. You say that all the lumber you ever bought was from the lien claimant who filed a lien here for the lumber materials? A. I don't know if they filed all the lien claims.

Q. I direct your attention to the fact that the Abraham Levine work was furnished between the fourth of August and twenty-seventh of August, 1926; did Levine do any other work on that job beside what is in the lien claim for which he claims the sum of $254? A. I don't know.

Q. Referring to Joseph E. Amorose lien claim, which is also in evidence, I direct your attention to the fact that all the work and lumber was performed between July 2, 1926, and the 22nd of August, 1926. Was there any other work beside that done by Amorose? The amount of this claim being $12,000. A. I know he had the plumbing contract; whether he did more than that, I don't know.

Q. Did you pay him anything on account of this job? A. I think I did.

Q. How much? A. I don't know. Before Miller failed I think we gave him some money.

Q. How much? A. I cannot just remember.

Q. About how much? A. I don't remember.

Q. Did you do any other work besides that which is specified in the lien claim? A. I don't know what is specified in the lien claim.

Q. The lien claim specifies that it is for work done and the balance justly due is $12,000. A. For work done?

Q. Yes. A. He must have done the work. I knew he did the work.

Q. If you had to pay this money now, you would testify as you are, too, would you? A. Quit your kidding.

Q. I ask you whether or not you paid Amorose any money? A. I did.

Q. About how much? A. I don't remember whether it was a thousand or three or four or six.

Q. Did you have any work done by Amorose except by a written contract? A. There was a written contract.

Q. How much was the contract for? A. I think it was $30,000.

Q. If you only owed him twelve on thirty-one thousand dollar contract, there must have been nineteen thousand paid? A. He wasn't ready with the entire job.

Q. He didn't complete his work? A. No, he only had the roughing in; the building was enclosed when Miller failed.

Q. Then as a matter of fact, his claim of twelve thousand dollars, you don't know if that is due him either, do you? A. It must be, because if he put it in there, it must be due.

Q. What did he put in? A. I cannot tell you.

Mr. McGlynn: The work?

Mr. Weinberger: Yes.

Mr. McGlynn: He means the work he did in the building.

The Witness: I think he put in roughing, plumbing and boiler. My brother will tell you, because he was the engineer.

Q. When did he stop work on the place? A. I don't know.

Q. When did you last examine the place and when you did examine it, how much work was there done by him? A. I didn't examine the place. Occasionally I was there and saw him working.

Mr. Weinberger: Mr. McGlynn agrees to furnish a copy of the lien claim of the Concrete Steel Company, represented by Mr. Silver.

Mr. McGlynn: Yes.

Q. All work on the building was actually stopped, so far as you were concerned, on what date? When was the last you had anything to do with the building? A. I don't remember.

Q. What month? A. I know we worked in August, and I think we did some work in September.

Q. Some carpenter work, 1926? A. Yes.

Q. That was the last you were on the building? A. The last I remember. I was on the building many—

Q. I mean doing any work. A. Some time the early part of September.

Q. Have you any idea what the whole building cost you up to the time that you were on the building last? A. No, I cannot say; approximately, I can.

Q. You have no idea how much money you and your brother and the Franklin Arms had expended or spent for the erection of the building up to the time you left? No idea at all? A. No, I have no idea.

Q. The approximate sum was about how much? A. There might have been one hundred and forty or one hundred and fifty, I don't know, or one hundred and thirty; I cannot just say.

Q. Dollars or thousands? A. Thousands of dollars; about one hundred and thirty or one hundred and forty thousand dollars, I don't know now.

Q. And that you claim is the amount which was spent for what, the hundred and thirty thousand or one hundred and forty thousand? A. For the work that went in the building up to the time that Miller failed.

Q. When you say about one hundred and thirty or one hundred and forty thousand dollars, you mean for the labor of all kind that was put in the building and for which you paid your own payrolls and for the materials that went into the building? A. Yes.

Q. The excavation? A. Yes.

Q. And for everything that actually went in the building? A. Everything else with financing and promoting and putting the building in shape to go ahead with the work, including $25,000 or $21,000 deposit that was given to Miller.

Q. That includes the $21,000 given to Miller? A. I think it was $25,000 or $21,000.

Q. If I understand right from your answer, the actual money expended for materials and labor and for financing amounted to $120,000 or $130,000? A. Around that, I think.

Q. I mean approximately; I am not binding you down. A. Yes.

Q. The financing charges you referred to as being embraced in that sum were paid G. L. Miller $21,500; were any other finance charges paid anybody else in the world? A. I don't know now; I cannot tell you. I say I think not, no; I cannot tell you.

Q. You only financed with certain people for this

building; one of them was the G. L. Miller Company? A. Yes.

Q. And that is the only one you did any financing with? A. Yes.

Q. So that if there were no further finance charges, you already testified that you had occasion to borrow in all about $15,000 in the aggregate from friends? A. I don't know how much I borrowed.

Q. Approximately; what is the maximum that you borrowed? A. I don't know; I owe money that I am paying off now.

Q. I am not asking you what you are doing now; I asked you how much you got in all of that $120,000 or $130,000 from friends? A. I don't know.

Q. The maximum that you could have gotten from anybody? A. I don't know; I don't remember.

Q. You don't know that either? A. No.

Q. No idea as to the amount at all? A. I borrowed money and I put it in there. I don't know how much, because some of my friends don't ask me for the money; they say as soon as I can pay them, I should pay them off.

Q. You wouldn't venture a guess as to the amount that you may have had in all from your friends? A. No.

Mr. McGlynn: No payments were made to Mr. Amorose. His contract was $30,000 and some hundred.

Mr. Weinberger: I desire to call the Master's attention that Mr. Amorose, who has testified in this case, testifies on page 9 to the extent of half a page, which constitutes all of his testimony, and in it there is no

reference as to a contract; the contract isn't produced upon which the claim is being predicated; there is no proof in the lien claim and there is no contract attached indicating what the claim is based on. The lien claim refers to merely one item, $12,000 balance justly due; that the lien claim is defective because the contract is not attached and made a part of it. The proceedings in their entirety are not established according to law, and we claim ought to be disallowed, and I move for its disallowance now and get a ruling.

The Master: The motion is denied.

Mr. Weinberger: I ask for an exception.

The Master: We are not deciding the case now. The case will be decided when all the testimony is in.

Mr. Weinberger: I have a right to ask for the extinguishing of a claim on a motion.

The Master: The motion is denied.

Mr. Weinberger: I ask an exception.

Q. Have you the contract here with Amorose? A. No.

Q. Do you know the exact amount of the contract? A. I think it was about $30,000.

Q. (Last question repeated.) A. About $30,000.

Q. Your memory seems to be rather faulty on all matters. You do know now that it was $30,000? A. No, about.

Q. Do you know the exact amount? A. No, I do not.

Q. When was it made? A. I don't know that.

Q. Do you know what work it was supposed to

embrace? Do you know all of the work that was mentioned in the contract to be done? A. No.

Q. Do you know the dates of the payments as provided for in the contract? A. No.

Q. Going back a moment to my former question of the $120,000 or $130,000 that you say actually went into that building for labor and material and financing, how much did the people that gave you any part of that $120,000 or $130,000—

Mr. McGlynn: I must insist that this is a repetition; we have gone into all these claims; I object.

The Master: I sustain the objection. We have been through this before at great length.

Mr. Weinberger: I object on the ground that this has not been asked and gone into, on the ground that there is no evidence to indicate that there was $130,000 or $120,000 that went into the building, and I have a right to obtain from this witness, if that is possible, as to how much money did go into the building and the source and the time when the money was given to him for the purpose of enabling him to pay these obligations, if any there were.

Q. Mr. Haines, did you receive loans from any banking institutions? A. No, sir.

Q. Any financial institution except the G. L. Miller Company, to assist or enable you to finance any part of this building? A. No, sir.

Q. Have you testified in this case to all of the sources where you got your money from and the amounts that you got from your friends? A. I don't know.

Q. Didn't you intend to give us all of the persons from whom you got the money, in the former testimony? A. I don't know whether I gave you all or not.

Q. Mr. McGlynn just said that this matter had all been gone over. Is it your understanding that you have given us a list of all the persons from whom you have received any money to help you in the financing of this building? A. Perhaps I did.

Q. What? A. Perhaps I did.

Q. Is there any doubt in your mind now that you gave it all? A. I don't know.

Q. Did you or didn't you give us the sources and all of the friends' names that you got the money from? A. I myself don't know where I got money to pay bills and to pay payrolls.

Q. You are paying them back now, aren't you? A. I don't know whether I am paying back, because wherever I can, I pay back.

Q. Has anybody of your claimants made claim since you have been in this case for any moneys you have received from them to finance this building? A. No.

Q. The persons you are paying back, you know, don't you? A. I am paying back, in some cases, working for other people.

Q. You know these people, though? A. I am paying back some claims.

Q. You know these people that you are paying back claims now, don't you? A. I suppose I do know.

Q. Don't you know? A. I don't know and I do not remember where I got money from.

Q. I ask you if you don't know to whom you are now paying money, if you are paying any back? A. I am not paying anybody now.

Q. You are sure of that? A. I am.

Q. When did you stop paying back? A. I do not remember.

Q. You have no idea now as to when you stopped paying your friends back any money?

Mr. McGlynn: I object. All of this is the same line of questions and the same line of answers which are already in the record.

Mr. Weinberger: I press the question.

The Master: I sustain the objection.

Mr. Weinberger: I ask for an exception.

Q. Since your abandonment of this building, having nothing more to do with it, I take it you knew who came and asked you for money that they advanced to you?

Mr. McGlynn: I object; it is the same thing in another way.

Mr. Weinberger: I press it.

The Master: I sustain the objection.

Mr. Weinberger: I ask for an exception.

Q. Mr. Haines, you claim there is some money due you, do you not? A. Yes.

Q. Do you know how much money is due you?

Mr. McGlynn: I object; that inquiry has also been gone into.

The Master: I sustain the objection. We have been through that before.

Mr. Weinberger: I withdraw the question.

Q. Where are the notes upon which you claim the money? A. I think they were with Mr. Barrett.

Q. Where are the notes?

Mr. McGlynn: His claim is outside of the reference to the Master.

Cross examination by Mr. McGlynn:

Q. See if I am correct in one thing: There has been some talk in your testimony of $120,000 or $130,000 or $140,000. Do I understand that is the value of the work which had been done up to the time of the appointment of the receivers or the amount of money spent? A. The amount of money spent.

Q. Actually spent? A. Actually spent, I think so.

The Master: Not what you owed?

Q. Does that include what was owing? A. No, not what we owed; everything including what that building cost, labor and material.

Q. Does that include the value of the materials due these various people we have been talking about today which haven't been paid? A. Yes.

Q. And the value of the work actually performed on that property at the time of the appointment of the receivers, in your estimation, was somewhere between $120,000 and $140,000? A. Yes.

Mr. Weinberger: He hasn't said that; he doesn't mean that.

The Witness: That is what I mean.

Further examination by Mr. Weinberger:

Q. What do you mean? A. What Mr. McGlynn—

Q. Tell us. A. Whether the amount that I said, in the neighborhood of $140,000 or $130,000, whether that covers the actual cost of the building up to the time that they failed.

Q. Including these debts? A. Including these debts.

Q. Do you mean that now, that they include these debts? A. I always meant it, the liens and everything.

Q. The total number of these lien claims is how much? A. I don't know.

Q. About how much? A. I don't know.

Q. What do you know? A. I don't know. You ought to know.

Q. Up to a moment ago you made a remark that the actual money which you spent for labor, for financing and for materials was $120,000 or $130,000. You meant that, didn't you? A. Yes.

Q. And you meant that that is what you paid, didn't you? A. Yes.

Q. And you still mean that, don't you? A. Yes.

Q. You are sure of that? A. Yes.

Q. And when you paid that money out, the $120,000 or $130,000, as you approximate it, you meant that that included $2,150 paid to the G. L. Miller Company for financing and for no other? A. Yes.

Q. And you meant that you paid your excavator, your labor men and carpenters and other laborers and materials that were actually used in the building, which amount to $120,000 or $130,000? A. Yes.

Q. You meant that, did you? A. Yes.

Q. The books and records which you say you delivered to G. L. Miller & Company contained all of the amounts that were due and all of the amounts of the payments that were made? A. I think so.

Q. It was a complete record? A. I think so.

Q. There is no doubt about that? There is no doubt about it, that there were papers and books

which G. L. Miller examined or were supposed to examine? A. I don't think they contained copies of the contracts.

Q. I asked you if you gave a detailed report of the debts due and the amount of money spent? A. I don't know what it contained, because the accountant had kept the books.

Q. It showed all the debts due? A. I think so.

Q. And showed the moneys that went into the building? A. Yes, I think so.

Mr. McGlynn: May I suggest to the Master that I have produced for Mr. Weinberger the two transcripts which he requested, being the only two that were missing, one from the National Newark and Essex Banking Company of the Franklin Arms, and one from the Bloomfield Trust Company, the personal account of James Haines.

The Master: They will be marked S-26 and 27 for Service Trust Company.

JAMES HAINES, recalled for Service Trust Company:

Direct examination by Mr. Weinberger:

Q. I show you what purports to be S-26, transcript in the Bloomfield Trust Company; that is your personal account, which shows the deposits? A. Yes, that is.

Mr. McGlynn: From April 1, 1926, or March 30, 1926, down to October 24th of this year.

Q. That is your account? A. Yes.

Q. I note that that account was started on the first of April or March 30, 1926, and it appears to be a transcript of both credits and debits of your account with the Bloomfield Trust Company? A. Yes.

Q. These payments that you made out of this account, was any part of that used for the Franklin Arms Building? A. Most of it was used up to the time of the receivership.

Q. Most of it was used? A. Practically all.

Q. You say mostly all was used in the building; you mean in the building and for the building? A. In the building.

Q. Whose money was this? A. It was my own money.

Q. Your personal funds? A. Personal I deposited from time to time.

Q. You didn't make any loans or get this money from the bank? A. No, I made no loans on the bank.

Q. Did anybody else give you any of this money? A. No.

Q. No loan was made from anyone? A. No.

Q. These were your own personal funds? A. Yes, my personal funds.

Q. I notice that there were payments extending all through 1927, October, 1927; that didn't relate to the building? A. This was my personal account and after the receivership I still maintained the account.

Q. That had nothing to do with the building? A. No.

Q. After the receivership whatever payments appear on this statement had no connection with the building at all? A. No.

Mr. McGlynn: While Mr. Weinberger is looking over the account you have given this date, what was the physical condition of the building at the time the receivers were appointed; how far completed was it, about?

The Witness: It was a difference of opinion.

Mr. McGlynn: Was the roof on?

The Witness: Yes, the roof was on.

Mr. McGlynn: The building was enclosed?

The Witness: Plumbing and heating was all roughed in and the roof was on.

Q. Partitions in? A. Partitions were in; the studding was in; the job was ready for lath and plaster, which meant about two-thirds of the building completed; about sixty-six per cent. completed.

Q. And the Miller mortgage transaction was consummated some time in June; is that right? A. The agreement was signed in June, some time in June.

Q. When did you actually start the building? A. The building was started either in March or in April.

Q. In this account you say all the money deposited there from March down to the date of the receivership went into the building. A. I didn't say all; most of it went into the building.

Q. Small items like $10? A. I have no recollection whether ten dollars went for payroll or something else, or for pail and shovel, I cannot tell you. I would tell you, but I don't remember.

Q. This statement, J. H. Haines, Trustee, July 28, 1926, marked Exhibit S-21, you delivered that, you said, did you not, in New York to the G. L. Miller

Company? A. That is my signature and I suppose I delivered it or mailed it to them.

Q. Which was done? A. I don't remember. It was either delivered; if I had time, I went down; if I didn't, it was mailed. I don't remember.

Q. The reason I ask you whether it was delivered or mailed, because I am anxious to find out now whether you got any payment at the time— A. I don't remember whether it was at the time— simultaneous transaction or after transaction.

Q. Isn't it true that you delivered this in person at the same time that you received this check of $28,000? A. I don't recall, Mr. Weinberger.

Q. Perhaps that will refresh your recollection. A. The money, whenever we did get a payment, which was twice, I think, we either had to call for it at a specified time, bring the affidavit along, or mail the affidavit, and then check would be mailed to us. I don't recall exactly.

Q. Look at that. A. I see the date corresponds, but I don't remember—

Q. Before whom was that oath taken? A. This oath—in fact, that was taken before a Notary Public; I think it was Donald Peck, in Bloomfield.

Q. Then it must have been taken in New Jersey? A. Yes, I don't remember whether we mailed it in prior—that was a legal way of settling the account.

Q. I am trying to find out whether you delivered or mailed it? A. I don't remember.

Q. It says, "Witness, John Haines"; is that your brother? A. That is another brother.

Q. Where was John? A. He was either in New York or Bloomfield; he used to live with me for a time.

Q. Do you personally know anything about whether any payments were made to any of those

men who filed lien claims, except those specified in the liens? A. I do; some were made in my presence.

Q. Were any payments made besides those mentioned in the lien claims? A. I don't think so.

The Master: Have you inspected the lien claims filed?

The Witness: At the time these lien claims were filed I familiarized myself with them, with the one exception that we have made payments prior to that, on materials and labor.

Q. From this same man? A. From other people.

Q. What they amounted to, you don't know? A. I do not remember.

Q. What the total aggregate of the amount expended was? A. There were thousands of dollars spent in connection with labor and miscellaneous lumber and rough hardware and surveying.

Q. Would you say that you needed so much money for that building, or it is all the money that you got from your friends and that you put it all into the building and on the job and that you were still short? A. What do you mean we were still short?

Q. You still owed money after putting in all you had and all you borrowed. A. I didn't say I owe now anything.

Q. Your brother says so. A. I don't know what he says, but I know I don't owe anybody a penny; I have paid up my friends; what I borrowed for the building, I paid up.

Q. Is it true that all of the money which you borrowed and your brother borrowed, the Franklin Arms borrowed, and the moneys which were

used for that building, and for the labor and the material, was all, taken together, insufficient to meet what you owed for work and labor done on that building? A. Correct.

Q. So that as a matter of fact, denying yourself what you needed, and your brother denying himself what he needed, all the money taken together that you received and used for that building, was insufficient to meet the debts due for materials and labor? A. Up to the time of the receivership.

Q. This check you received in New York, this $28,000 one, you signed a receipt? A. I think I did mention that before.

Q. You didn't get any payment outside of their office; you only got them in their place? A. I said either mailed or received them.

Q. That check? A. I don't remember. Is that in connection with the financing? (After examining same.) This is in connection with payments on work; I don't know whether I sent my brother for it.

Q. You signed it? A. I must have signed it; either go down subsequently, or mailed it to me. This is not a check; this is a certification of the check mailed to us.

Q. You don't know where you signed it? A. I did sign it.

Q. Referring to Exhibit S-6. A. My signature is on the bottom.

Q. The place; where? A. I don't know whether it was signed at home—

Q. Answer the question. A. I don't know whether it was signed at my home or in the G. L. Miller office.

Q. You did sign? A. Yes; I said that long ago. All these exhibits, your Honor, were exhibited to

me long ago, and I mentioned that they were signed.

Mr. Weinberger: That is all.

Direct examination by Mr. McGlynn:

Q. You said a few moments ago that all this money was not sufficient to pay the bills which were due and owing. Were those bills that were due and owing at the time the receivership was appointed, past due at that time, or were they incurred— A. They were incurred prior to the receivership.

Q. Was the arrangement with the creditors such that they were past due at that time? A. They were past due.

Direct examination by Mr. Weinberger:

Q. You say these were not due prior to the time of the receivership? A. According to the contract made, they were not past due.

Q. Then they were not due? A. Exactly, they were not past due according to the contract.

Q. Mr. Haines, the fact is, when the receivership was inaugurated or when it happened, you say that these debts were not due then? A. They were not due according to the contract.

Q. Then they were not due, is that right? A. You can take it that way.

Q. There is only one way to take it; they were either due or not due. A. They were not due according to the contract.

Q. The plumber's bill, Amorose, that was not due up to the time of the receivership? A. But work performed.

Q. You now said to Mr. McGlynn that the moneys

were not past due up to the time of the receivership. A. According to contract they were not due.

Q. If they were not due up to the time of the receivership, they never became due, so far as you were concerned, at any time after the receivership, did they?

Mr. McGlynn: I object to the question.

Mr. Weinberger: I withdraw that question.

Q. And that is true of the Juliano Company, you did not owe them any money at the time of the receivership? A. Not according to contract.

Q. You did not owe any money to Albert & Kernahan at the time, up to the time of the receivership? A. That is an exception.

Q. Albert & Kernahan furnished all material prior to the receivership. You did owe them money? A. Yes.

Q. And their bill was past due? A. Yes.

Q. When did it become due? A. It was past due. If I may say—there was no agreement when moneys paid on lumber—if it can be paid on the first or tenth of the month and the man takes the discount—

Mr. McGlynn: Technically, it was due.

Q. That is Albert & Kernahan? A. Yes. But that is the only one. The others were as far as the actual difference of contract performed and determination as to payments of contract.

Q. You had an account in the Bloomfield Trust Company which you say had nothing to do with the account of the Franklin Arms and antedated the time that you started the erection of this build-

ing? A. Correct. It may have antedated that an interval of a week.

Q. And it had nothing to do with any moneys paid on account of this building? A. No.

JULIUS H. HAINES, recalled for

Direct examination by Mr. Weinberger:

Q. You have not yet produced the personal account records, which you said you would? A. I have no personal accounts; I have never had any.

Q. You say you haven't any bank accounts and haven't had any personal bank accounts? A. I had accounts; I have no accounts now.

Q. You agreed, did you not, and you were requested by the Court to produce the transcript of your personal accounts; up to the present time you have not done so; will you tell us why not? A. Have I agreed, your Honor, to produce any?

Q. My recollection is that at a previous hearing you said you would produce a transcript of your personal account. A. If I did, I will have the bank make it up.

Mr. Weinberger: Will you see that that is handed to Mr. McGlynn and let us close that matter?

The Witness: Yes.

Mr. Weinberger: The accountant of Miller was here the last time. Do you want to cross examine?

Mr. McGlynn: No.

IN CHANCERY OF NEW JERSEY.

Between

ALBERT & KERNAHAN, INC., a corporation,
Complainant,

and

FRANKLIN ARMS, INC., a corporation,
Defendant.

October 27, 1927.

JAMES HAINES, recalled.

Direct examination by Mr. McGlynn:

Q. Mr. Haines, the receivers have been questioned by Duncan & Brown Company, with regard to a piece of machinery which this concern claimed was in the building just prior to the appointment of the receivers in this case. I understand the piece of machinery is a wood-working machine and was located on the third or fourth floor of the building. Do you remember what became of that saw? A. I know that we did order a saw just for trial. I don't know whether it was myself or my brother, but the other one, who acted as official timekeeper or superintendent occasionally in the absence of either of us, he gave the signature for the saw—

Q. I am not so much concerned in the buying; was the saw delivered on the job? A. There was a saw delivered on the job and was used, I believe for three weeks, but it wasn't used continuously

and it proved to be a failure, and we couldn't use it for our purpose, so we abandoned it, and we notified these people to take it away, but they neglected to take it away in time; so after a short while Mr. Eagan showed up at the building.

Q. A representative of Duncan-Brown? A. Yes, and asked if he had my permission to go and get the saw, and I said I would have to get permission from the co-receiver.

Q. This was after the appointment of the receivers? A. Yes, the demand for the saw was after the receivers were appointed.

Q. Was the machine there at that time? A. Then he came back in fifteen minutes afterwards, after making an examination of the premises, and he said the machine is gone; I could not account for it, because I had known the machine to be there, either on the third or four floor, and when I examined the building, I found the machine had gone, and then I said to you or someone else, that the machine had gone. There was a machine, and that is all I know about it.

Q. You have no idea who took it or what became of it? A. No.

Mr. McGlynn: Does that satisfy you, Mr. Eagan?

Mr. Thomas M. Eagan (representing Duncan-Brown Company of Westfield): That is the general situation.

Mr. Haines, apparently, didn't authorize the removal of the machine, and we believe it was stolen, and in order to receive our money from the Insurance Company, we have to have a statement to that effect.

[9378]

99 OCT.1.1928

New Jersey Court of Errors and Appeals

Between ALBERT & KERNAHAN, INC., a corporation, *Complainant,* and FRANKLIN ARMS, INC., a corporation, *Defendant.*	On Appeal from the Court of Chancery.

BRIEF ON BEHALF OF APPELLANT HUDSON & ESSEX BUILDING & CONSTRUCTION CO.

Preliminary Statement.

This appellant, Hudson & Essex Building & Construction Co., being the holder of a purchase money mortgage in the sum of $9,500.00 with interest, finds itself aggrieved by an order made by the Chancellor on the advice of Vice-Chancellor CHURCH, as a result of which order or decree this appellant will suffer the loss of the entire amount due it under its said mortgage, and hence this appeal. This appellant's notice of appeal is printed on page 1 of the state of the case, its amended petition of appeal on page 7.

An appeal has also been taken to this Court by Service Trust Company, as substituted trustee, which latter appeal we shall hereinafter attempt to show is not properly here and should be dismissed.

The Facts.

Hudson & Essex Building & Construction Co., this appellant, was the owner of a tract of land in the City of Newark, which on April 9th, 1926, it conveyed to James Haines and accepted in part payment, a purchase money mortgage contemporaneously executed by said James Haines to this appellant, in the sum of $15,000.00 which mortgage was duly recorded in the office of the Register of Essex County. Subsequently this appellant, at the solicitation of said Haines, released part of the lands covered by its said $15,000.00 mortgage, and accepted from him a separate and independent mortgage for $5,500.00 on the lands so released, with the understanding that the amount of said new mortgage of $5,500.00 should go in reduction of the $15,000.00 purchase money mortgage, thereby reducing it to $9,500.00. That there is due on this purchase money mortgage said sum of $9,500.00 with interest, and that same constituted a valid lien on the premises in question, is not disputed. This was the position of this appellant, as purchase money mortgagee, when on June 3rd, 1926, Franklin Arms, Inc., to which said Haines had conveyed said mortgaged lands (Franklin Arms, Inc., being a corporation formed by Haines and his brother for the purpose of carrying on a building venture on said lands under a corporate cloak) together with G. L. Miller & Company, acting with Rollin J. Francis, its nominated trustee, represented to this appellant that said G. L. Miller & Company had agreed to advance $215,000.00 to be applied toward and for the erection and construction of an apartment house on said mortgaged lands, and would advance said sum if this appellant would postpone the lien of its said $9,500.00 mortgage to a mortgage to be made by said Franklin Arms, Inc., to

Rollin J. Francis, trustee, for $215,000.00. This appellant believing that said sum of $215,000.00 would be advanced for the purpose aforesaid, and that its security would thereby be enhanced, did, on June 3rd, 1926, sign a postponement of its mortgage to the mortgage so made by the said Franklin Arms, Inc., to the said Rollin J. Francis, trustee, in the sum of $215,000.00, which sum was agreed to be advanced thereon for the erection of the apartment house in question (State of the Case, p. 142).

During the progress of the construction of said apartment house, said G. L. Miller & Co., after having actually paid by way of advance upon its mortgage to said Franklin Arms, Inc., sums aggregating in all $46,850.00, defaulted in its agreement to advance said sum of $215,000.00 and failed and refused to advance any further sums, for the reason that it had become insolvent and was unable so to do. This resulted in the not unusual situation of all further building operations by the Franklin Arms, Inc. on its said building, being suspended; the claims of creditors pressed, mechanics liens against the lands and building being filed, and the filing of the bill in this cause, which resulted in the appointment of receivers of said Franklin Arms, Inc. (p. 39). The receivers thereupon filed their petition (p. 41) alleging the partial completion of said building; that the said mortgage so held by Rollin J. Francis, as trustee, for $215,000.00 provided that it was to secure definitive bonds to be issued thereon at the request of said G. L. Miller & Company or said Francis, as trustee, and that *no such bonds had in fact been issued,* and that only receipts were given by said G. L. Miller & Company which legally obligate G. L. Miller & Company to the holders thereof, and do not entitle the holders to any interest or claim in the mortgage; and that there is a serious question as to whether or not said G. L.

Miller & Company is not liable for a substantial sum in damages for its failure to perform the agreement for the loan of said sum of $215,000.00 which said agreement was the basis for the making of the mortgage so held by said Francis, as trustee in said sum. There was no challenge of the mortgage held by this appellant made by this petition, nor was any answer thereto, nor denial of its said allegations filed by Miller & Company or Francis, trustee.

Upon the filing of this petition two orders to show cause were advised by the Vice-Chancellor; one appearing on page 45 and the other on page 48; the former requiring all creditors and stockholders of the Franklin Arms, as well as this appellant Miller & Company and Rollin J. Francis, trustee and others, to show cause why an order should not be made permitting the receivers to complete the building and to borrow money for such purpose, not exceeding $100,000.00 on receivers' certificates, or why said receivers should not be permitted to sell the premises in their present condition, free and clear of the mortgage liens of this appellant and of Rollin J. Francis, trustee, and free and clear of the liens of all creditors for material supplied or labor performed who have or can file mechanics liens thereon. The second order to show cause was substantially of the same purport.

Upon the return of these orders to show cause and after hearing from all parties in interest, an order was made directing the receivers to sell said property (p. 50) free of all liens thereon, at public sale, and there being no attack made upon the mortgage of this appellant, said order, in its last paragraph (p. 54, line 32) provided:

> "Ordered, that the amount due the Hudson & Essex Building & Construction Co., on its mort-

> gage herein recited, the sum of $9,500.00 with accrued interest, shall be paid in full from the proceeds of said sale, without any deduction for administration expenses or costs of said sale."

This order was made on November 9th, 1927. The second order to show cause having been at that time continued over for a week, there was, on November 16, 1927, another order made (p. 55) for the sale of said lands and premises, substantially as the former order, excepting that it fixed an upset price for the sale of said property at $110,000.00, and which said order provided (on p. 59, line 32):

> "Ordered, that the claim of the Hudson & Essex Building & Construction Co. on its mortgage herein recited, is recognized as a valid and subsisting lien to the extent of Ninety-five Hundred Dollars, with accrued interest, and that said lien shall be subsequent in priority to such amount if any, which this court may hereafter determine is due on the first mortgage held by Rollin J. Francis, Trustee, and prior to such amount as this court may hereafter determine is due to the holder or holders of any mechanic lien claim against the within described property for work done and materials furnished."

The receivers thereupon filed their report (p. 60) indicating that they had not been able to obtain any bid for the upset price of $110,000.00 but that a committee of mechanics lien creditors had made a bid of $110,000.00 a copy of which bid is annexed to said report (pp. 62-63) and praying that an order to show cause may be made why said bid should not be accepted. An order to show cause was made upon the filing of said report (p. 64) upon the return of which the previous orders for the sale of said property were modified by an order made

December 29, 1926 (p. 66), which, on page 67, line 29, provided:

> "Ordered, that the proceedings heretofore had with reference to the Public sale of certain real estate owned by the above named defendant corporation, should be and the same are hereby ratified and confirmed in all respects except the method of sale which is changed from public sale to a sale on private bid (inasmuch as the Receivers herein were unable to obtain any bid in accordance with the terms of an order heretofore made directing the public sale of said real estate)."

Pursuant to said last mentioned order, the receivers made sale and conveyance of said lands and premises and received therefor the sum of $110,000.00 which is in their hands for distribution among those entitled thereto.

By order made in this cause (p. 73) it was ordered that Service Trust Company of New Jersey be substituted in the place and stead of Rollin J. Francis, as trustee under the aforesaid mortgage of $215,000.00 made by Franklin Arms, Inc. to said Francis, as trustee.

Upon petition of the receivers (p. 75) to have the rights of the respective parties in the fund, so coming into their hands as the proceeds of sale of said real estate, determined, an order of reference was made (p. 80) whereby the cause was referred to Roy F. Anthony, one of the Special Masters of the Court, to determine the amounts due and the order of priorities of payment among the several claimants to said fund, including said Rollin J. Francis, trustee, appellant, and the following mechanics lien claimants:

Albert & Kernahan, Inc.
Juliano Construction Co.
Concrete Steel Co.

Henry D. Dietz Company
Tuorto Cut Stone Co.
Fidelity & Deposit Company of Maryland
Hudson Structural Iron Works, Inc.
Joseph E. Amorose and
Orange Hardware Company

Pursuant to this reference, said Master proceeded to take testimony, which appears in the state of the case, from page 97 to the conclusion of the book, and thereupon the said Master filed his report (p. 82) in which he finds and reports (p. 89) that there should be first paid to Rollin J. Francis, trustee, $46,759.92; and secondly pro rata amongst the following lien claimants:

Concrete Steel Co.	$1,703.78
Albert & Kernahan	9,503.16
Hudson Structural Iron Works	7,254.79
Orange Hardware Co.	275.22
Juliano Construction Co.	33,400.00
Joseph Amorose	12,960.00

thirdly, the Master finds there should be paid, to Rollin J. Francis, trustee, $58,052.05; and fourthly and lastly, to this appellant, Hudson & Essex Building & Construction Co., $10,340.00. It is apparent that under the order of payment so fixed, this appellant would receive nothing.

Upon the coming in of the Master's Report this appellant filed exceptions thereto (p. 90) which, after argument, the Court below overruled by an order confirming the Master's Report (p. 93) and directing the receivers to disburse the said sum of $110,000.00 in their hands pursuant to the order of priority as found by the Master. It is from this order that this appellant appeals. So that the record might not be considered deficient for the failure of the appellant to procure from the Court below, written reasons for its conclusions, we have printed (p. 96) a letter from the learned Vice-

Chancellor in which he states that it is unnecessary for him to write an opinion. This is in response to a letter from this appellant that he write the reasons for his conclusions.

We respectfully maintain that the Court below erred in fixing the order of priorities as it did, and in relegating the position of this appellant's mortgage to the fourth place.

The Law.

We shall present our argument in opposition to the propriety of the order of the Court below here under review under three heads, as follows:

1. The Court below committed error in its failure and refusal to apply the doctrine of so-called marshalling, as laid down by this Court in *Hoag* v. *Sayre,* 33 N. J. Eq. 552, and approved in subsequent decisions.

2. The Court below erred in failing and refusing to hold that this appellant's subordination or postponement of its mortgage, to the mortgage of Rollin J. Francis, trustee, was conditional upon the latter's fulfilling its agreement to advance the sum of $215,000.00 thereunder, for the erection of the contemplated building by Franklin Arms; and that because of his default and the default of G. L. Miller & Company for whom said Francis held said mortgage as trustee, in failing and refusing to advance said sum, the said agreement of subordination was inoperative as against this appellant's mortgage, and that this appellant was therefore entitled to be first paid out of the funds in the hands of the receivers as the proceeds of the sale of the mortgaged premises.

3. That the Court below erred in failing and refusing to hold that this appellant's mortgage

should be paid secondly, and only after the payment out of the funds in the hands of the receivers as the proceeds of the sale of the mortgaged premises, the amount actually advanced by G. L. Miller & Company on the mortgage so held by Rollin J. Francis, as trustee, to wit, the sum of $46,850 with interest; and that this appellant's mortgage should be paid prior to the claims of any mechanic's lien claimant.

POINT I.

Under the so-called doctrine of marshaling, this appellant's mortgage should have been ordered paid, and the order of priorities, as fixed by the Court below, is erroneous.

The order confirming the Master's Report, from which this appeal is taken (pp. 93, 94, 95 and 96) adjudges that the Master's Report (p. 82) be confirmed, and that out of the fund in the hands of the receivers, as the result of the sale of the mortgaged premises, payment should be made as follows: First, to Rollin J. Francis, trustee, or Service Trust Company, substituted trustee—$44,700.00 with interest; secondly, to the following named mechanics' lien claimants, pro rata, their claims, to wit: Concrete Steel Co.—$1,577.57; Albert & Kernahan, Inc.—$8,799.22; Hudson Structural Iron Works—$6,717.40; Orange Hardware Co.—$254.82; Juliano Construction Co.—$30,000.00; Joseph Amorose—$12,000.00; thirdly, to Rollin J. Francis, trustee or Service Trust Company, substituted trustee —$55,485.12 with interest; and fourthly and lastly, to this appellant, Hudson & Essex Building & Construction Co.—$9,500.00 with interest.

The proceeds of sale of said property in the hands of said receivers amounting to $110,000.00,

would of course under this order be insufficient to pay this appellant anything on account of its mortgage.

Since the interests of Francis, trustee (now Service Trust Co., trustee) and Miller & Co., under the $215,000.00 mortgage are one and identical, we shall hereinafter for the sake of brevity refer to this mortgage as the Francis-Miller mortgage.

By the Master's Report, and by the order confirming it, it is adjudged by the Court below that because this appellant subrogated its mortgage to the mortgage so made to the said Francis, as trustee, to secure the sum of $215,000.00 under "an agreement with G. L. Miller & Company of New York City to advance $215,000.00 to finance the project" (bottom p. 82), that therefore, since lien claimants have intervened, and have, because of the neglect or indifference of said Francis or Miller & Company to protect their rights as against such lien claimants, gained priority under the provisions of the mechanics lien law against said Francis-Miller mortgage to the extent of at least part thereof, that therefore, this appellant's mortgage is not only inferior to the amount due on the Francis-Miller mortgage, but also to the amount due mechanics lien claimants who claim to have priority over the latter mortgage. In other words, the Court below held that although this appellant held a purchase money mortgage, which under Section 14 of the Mechanics' Lien Act and the decision of this Court, in *Franklin Society, &c.* v. *Thornton,* 85 N. J. Eq., p. 525, is entitled to priority over mechanics lien claims, nevertheless, because it had agreed that its mortgage should be inferior in lien to the Francis-Miller mortgage, induced by the latter's agreement to advance $215,000.00 for the construction of a building on the mortgaged lands, therefore, lien claimants who had

performed work or furnished materials toward the erection of said building who were not paid and had, by operation of law, acquired priority to a considerable extent over the amounts claimed under the said Francis-Miller mortgage, such lien claimants also acquired priority over this appellant's purchase money mortgage. We maintain that such holding is contrary to law and the holdings of this Court. Such a holding might lead to this absurd and inequitable result; suppose A held a purchase money mortgage of $10,000.00 and B agreed to advance $50,000.00 to aid the owner toward the construction of a costly building on the mortgaged land to be secured by a mortgage thereon, to which said latter mortgage the purchase money mortgagee subordinated his purchase money mortgage lien; and suppose, also, that such lending mortgagee merely advanced $1,000.00 on account of his $50,000.00 mortgage and refused to advance any more after considerable work had been performed and materials furnished toward the erection of the building, and such materialmen and laborers had not been paid an amount of $100,000.00 for which they were entitled to enforce mechanics lien claims against said lands and building. Under the holding of the Court below in this case, the lien of the purchase money mortgage would be inferior not only to the extent of the $1,000.00 advanced upon the $50,000.00 mortgage, but also subject to the lien of lien claimants or in all, subject to $101,000.00. We respectfully submit that it is hardly necessary to argue *in extenso* that such a proposition is untenable.

It is held by this Court in *Hoag* v. *Sayre*, 33 N. J. Eq. 552, and followed in many subsequent decisions, that where there are three encumbrances on the same property the first of which is entitled to priority over the second, but is subordinate to

the third, which is subordinate to the second, they should be marshalled as follows: The third, if it be for as large a sum or a larger sum than the first, will be paid to the extent of the sum secured by the first; then the second encumbrance will be paid, and then the residue to the third; and then the first encumbrance will come in.

In the instant case there can be no question but that this appellant's purchase money mortgage of $9,500.00 with interest is prior to mechanics lien claims.

Bloom v. *Thirty-six Berwyn Street Corporation,* 136 Atl. Rep. 803 (not yet officially reported);

Franklin Society, &c. v. *Thornton,* 85 N. J. Eq. 525 (Err. & App.).

The amounts established by the proofs to have been advanced on the Francis-Miller mortgage are —June 7, 1926—$1,000.00 (bottom p. 162); June 22, 1926—$18,350.00 (p. 162, line 22); by check No. 5926—$1,650.00 (p. 163, line 347, &c.); July 29, 1926 —$26,350.00 (p. 164, line 13); July 29, 1926—$1,-650.00 (p. 164, line 20). The aggregate of these sums is $49,000.00. As against this, there was paid to Miller & Company $2,150.00, which was to be returned at the time of the making of the first payment on account of said mortgage, but was never so repaid (p. 236, line 36, &c.). The net amount therefore advanced on account of this mortgage was the sum of $46,850.00. If we assume that it is established by the proofs that all of this money went into the building, and that in spite of the default of Miller & Company to make the advances agreed by it to be made, and by virtue of which agreement it secured the subordination of this appellant's purchase money mortgage, that it is still entitled to priority over this appellant's

mortgage, it would be entitled to such priority only to the extent of the moneys so due to it as having been so advanced, and to that extent would be entitled to priority over the lien claimants, but this appellant's purchase money mortgage would also be entitled to priority over the lien claims. In that event, there should have been ordered paid to Francis, trustee, under his mortgage, the sum of $46,850.00 with interest; and secondly, the purchase money mortgage of this appellant with interest; and thirdly and lastly, the mechanics lien claims.

The inquiry before the Master was as to how much was due under the Francis-Miller mortgage and the order of its priority. It is respectfully submitted that since this was a mortgage upon which advances were to be made for the construction of the building and that nothing was due thereon at the time of its execution and delivery, that the burden of proving the amount advanced thereunder was upon the Francis-Miller mortgagee. The proofs in the case show that the only items advanced under said mortgage were, as above enumerated, amounting in the aggregate to $49,000.00 as against which Franklin Arms, the mortgagor, advanced to Miller & Company $2,150.00, thus leaving the net amount advanced on said mortgage, only $46,850.00. This we respectfully contend is all that is due upon said mortgage, and particularly under the circumstances of this case should be held by this Court to be the extent of the amount of the lien thereof as against this appellant, purchase money mortgagee.

Francis-Miller mortgagee, however, claims under its mortgage, a number of large items which we respectfully contend have no place for consideration as between that mortgage and the purchase money mortgage of this appellant or the claims

of the lien claimants. Particularly are these claims inequitable and devoid of any merit, when it is taken into consideration that this entire building venture collapsed because of the default of Miller & Company (see Master's Report, p. 83, line 25, &c.), and that these charges amount to $54,485.00 for a loan of only $46,850.00. These items appear in the Master's Report (p. 85, line 20) and are as follows: Commission—$21,500.00. This is a 10% commission charge on the face of the mortgage which was never advanced. Disbursing and selling expenses —$2,150.00. This is an additional 1% charge for selling expenses and disbursing $215,000.00 which was never disbursed. The next item is bond issue expenses—$3,225.00, or an additional charge of 1½% on $215,000.00, the face of the mortgage, which was never advanced. The next item—$1,-075.00 for consulting architect. There does not anywhere in the proofs appear that there ever was a consulting architect, and in fact the proofs are to the effect that the plans for this proposed building had been prepared before application was made for this $215,000.00 mortgage loan. The next item is interest from May 15, 1926, to May 15, 1927 —$15,050.00, less interest assumed $627.08, leaving a balance of this interest item—$14,422.92. This mortgage is dated May 15, 1926, and there was in all, less than $50,000.00 advanced on it. If the entire $215,000.00 had been advanced on the date of the mortgage, the interest at the maximum legal rate could not have amounted to the figure claimed, but certainly no interest is legally chargeable until and as the advances are made, and no such advances were made excepting as above set forth, on June 7, 1926, June 22, 1926, and July 29, 1926, upon which said amounts the mortgagee may be entitled to interest, and interest was in fact allowed thereon by the Master without regard or reference to

the items so set forth. The next item is income tax—May 15, 1926, to May 15, 1927—$600.00. The proofs show that this building venture was the only venture of Franklin Arms, the mortgagor; resulted in financial disaster; and that no income tax returns were filed by it, so that no such payment of income tax on its account could be charged. The next item is trustee's fees for the same period —$200.00. There is no proof of the payment of any such item. The next item is fire—$12.20. There is no proof submitted with respect to this item, but it is too small to contend for. The next item is taxes—$1,000.00. This is the item of $1,000.00 hereinabove by us conceded to have been advanced on June 7, 1926 (bottom p. 162 and top of p. 163) to pay for taxes, so that it has no further place in this schedule of additional claims. The next item is premium on completion bond—$3,300.00. There is no proof of the payment of any such item under said mortgage and we respectfully maintain that if said mortgagee desired to protect itself by a completion bond which undoubtedly is worthless because of the mortgagee's own default in performing its agreement to advance the funds necessary to complete, he should not be permitted to charge the cost thereof as against the purchase money mortgagee or lien claimants. If we keep in mind the fact that when this Francis-Miller mortgage was executed for $215,000.00 there was not a penny due thereon and that in spite of the subordination of the purchase money mortgage, it constituted no lien against the mortgaged premises unless and until moneys were advanced thereon, and only to the extent of moneys so advanced, it is manifest that the mortgagor and Francis and Miller could not get together and agree amongst themselves so as to bind the purchase money mortgagee who had so agreed to subordinate, that $215,000.00

or any other sum should be regarded as due upon said mortgage, although nothing had been advanced thereon. We cannot conceive that any judicial tribunal would in spite of such agreement between the mortgagor and Francis and Miller say that there was anything due on said $215,000.00 as against the purchase money mortgagee if nothing had in fact been advanced thereon. At most the Francis-Miller mortgage became a valid and living security as and when moneys were advanced thereunder for the purpose for which it was agreed with the purchase money mortgagee they should be advanced, that is, to erect a building which would tend to enhance the security, and only to the amount and extent of such advances. Assuming, however, that the Francis-Miller mortgage is entitled to be classed as a lien on the mortgaged premises to the extent of the charges so claimed thereunder for commission and other items above enumerated as appearing on page 85 (Master's Report), we respectfully contend that since these items did not go toward the erection and construction of the building, and that the lien claimants are entitled to priority over said items, nevertheless the purchase money mortgage is entitled to priority over the lien claims. Under the doctrine of *Hoag* v. *Sayre, supra,* the fund should be marshaled as follows: There having been actually advanced under the Francis-Miller mortgage—$46,850 as hereinabove first enumerated, and the additional credits, claimed thereunder for commissions, etc. (after deducting $1,000 for taxes already included in the $46,850 total advances), amounting to $54,485 or such portion thereof as this Court may find equitably allowable, the total credits claimed on said Francis-Miller mortgage would be $101,335. Out of this should be first paid under the Francis-Miller mortgage, the $46,850 actually advanced

thereunder. Secondly, the lien claimants being entitled to priority over the balance claimed on said mortgage, would be entitled, if the purchase money mortgagee were not in existence, to the remainder of the fund to the extent of their priority over the balance of said mortgage, but as between said lien claimants and purchase money mortgagee, the latter is entitled to priority, and therefore the purchase money mortgagee should first take out of said fund the amount due to it and the balance remaining due to mechanics lien claimants, after such deduction and payment, should go to them, and if there be a residue after the latter are paid, that should go to the Francis-Miller mortgage. The purchase money mortgagee would thereby merely be taking out of the fund to which the mechanics lien claimants would otherwise be entitled as against Francis-Miller mortgage, what is due to it, the purchase money mortgagee, as against said mechanics lien claimants without injury to the Francis-Miller mortgagee; for otherwise the amount so due to the said purchase money mortgagee would go not to the Francis-Miller mortgage, but to the mechanics lien claimants. The equities between the parties would be thus adjusted as between the Francis-Miller mortgage and the mechanics' lien claimants as if the purchase money mortgage were not in existence, and that, as between the purchase money mortgagee and mechanics lien claimants as if the Francis-Miller mortgage were not in existence. The equities between the parties should therefore be adjusted in this fund of $110,000 as follows: First, to the Francis-Miller mortgage—$46,850, with interest; secondly, to appellant, Hudson & Essex Building & Construction Co. on its purchase money mortgage—$9,500 with interest; thirdly, pro rata mechanics lien claimants aggre-

gating $59,349.01 less $9,500 with interest paid the purchase money mortgagee, or in all $49,849. The aggregate of these sums, being $108,349 which, with interest accrued thereon, will exhaust the fund in the hands of the receivers. If there were a surplus it should go to the Francis-Miller mortgage to satisfy any claims existing and valid as between it and the mortgagor, by which neither the purchase money mortgagee nor lien claimants are affected.

The Master in his report, reasons that the Francis-Miller mortgage to the full extent of all the moneys claimed thereunder, whether advanced, charged or otherwise, as well as all the lien claims, are prior to the purchase money mortgage of this appellant; that if the Francis-Miller mortgagee had paid in full the amount of these lien claims, it would have been entitled to priority to that extent and therefore, both it and the lien claims are entitled to priority over the purchase money mortgage. We respectfully submit that this reasoning is unsound. If the amount due these lien claimants had been paid by the Francis-Miller mortgagee, that mortgage would probably have been entitled to assert its lien to the extent of the amount so paid because the mortgage was intended to be a lien for the advances made thereunder, but it certainly does not follow that because, by provision of law, mechanics lien claims are made prior to some extent over the Francis-Miller mortgage, that the liens so created by law are to be treated in the same category as secured by a mortgage upon which moneys had been advanced. It is entirely likely that if Miller had advanced the moneys to pay these lien claimants there would have been no liens, and the building would have been entirely completed, to the benefit, advantage and saving of all parties interested. If there had been but

$100.00 advanced under the Francis-Miller mortgage so that that would be the extent of its lien, and $60,000 of mechanics liens had accrued, which would be by operation of law prior to the $100.00 lien of the Francis-Miller mortgage, could it be claimed that the purchase money mortgage of this appellant, which was prior to the lien claims, but by virtue of a subordination, subject to the $100.00 lien of the Francis-Miller mortgage, was subject to liens of $60,100 merely because the Francis-Miller mortgage might have paid the $60,000 lien and been a prior lien over the purchase money mortgage to that extent as well? We cannot believe that this Court would adopt any such impossible theory.

We believe that we can demonstrate that the order of the Court below appealed from, must be founded in error. Assume that it has been proved beyond doubt that every dollar claimed under the Francis-Miller mortgage had actually been advanced and applied for and toward the construction of the building, that is, both the $46,850 actually advanced, and the $54,485 of fabulous, mythical claims, making in all $101,335, there would then be no question but that that mortgage would be entitled to priority over mechanics lien claims. Certainly the purchase money mortgage is entitled to priority over mechanics lien claims and would assume the second position in the order of payment. The case would then be controlled absolutely by the case of *Bloom* v. *Thirty-six Berwyn Street Corporation*, 136 Atl. Rep. 803 (not yet officially reported), and the cases therein cited. So that if the Francis-Miller mortgage would receive $101,335 or such part thereof as it was lawfully entitled to have, this appellant's purchase money mortgage would be paid, to at least a considerable extent, out of the $110,000 in the hands of the re-

ceivers as the proceeds of sale of the mortgaged property. Is this appellant, purchase money mortgagee, to be prejudiced because the mechanics lien law, to some extent makes the position of the mechanics lien claimants superior not to it, the purchase money mortgagee, but to the Francis-Miller mortgage? Can it be that because the Francis-Miller mortgagee did not take the necessary precautions to see to the application of its advances to the construction of the building, that this appellant, purchase money mortgagee, should be injured without fault on its part?

If such a situation were admissible, the mere subordination of a purchase money mortgage to the lien of a subsequent mortgage might enable such subsequent mortgagee to again subordinate the lien of his mortgage to another of unlimited amount or extent, which would become prior to the mortgage first subordinated.

We are presenting these situations so that the Court might see the harm that might follow the adoption of the rule or theory followed by the Court below in the making of the order appealed from.

POINT II.

The Court below committed error in refusing to hold that because of the breach by Miller & Co. of its agreement to advance $215,000.00 for the erection of the building upon the faith of the performance of which this appellant subordinated the lien of its mortgage, that said agreement of subordination was inoperative, and this appellant's mortgage therefore restored to priority over the Francis-Miller mortgage.

The facts, in so far as the application of this point is concerned are, that when Franklin Arms proposed to erect the apartment house in question

Miller & Company agreed to advance the sum of $215,000.00 for the purpose of furnishing Franklin Arms with the funds to complete the building. This appellant thereupon agreed to and did execute the customary agreement for the postponement of the lien of its purchase money mortgage to the lien of the Francis-Miller mortgage, of course upon the implied representation and agreement on the part of Miller & Company that it would advance said sum of $215,000.00 for said purpose. It is manifest that without such an agreement and understanding there would have been no Francis-Miller mortgage and no subordination of this appellant's purchase money mortgage. That Miller & Company failed to keep its agreement because of its insolvency is not questioned. Neither is there any dispute of the fact that it was because of the breach of its agreement on the part of Miller & Company the entire building venture of Franklin Arms fell into financial difficulties resulting in a loss to everybody interested and resulting further in this litigation. It seems to us that the Francis-Miller mortgagee takes a very inequitable position when it insists that in spite of its failure to perform its agreement, upon the faith of which alone this appellant subrogated its mortgage, it may still insist upon the subrogation agreement and claim priority to any extent over this appellant's purchase money mortgage. Certainly does this point apply to that part of the claim on behalf of the Francis-Miller mortgage to the extent of the items amounting to approximately $54,485 for commissions, selling expenses, etc., shown on page 85 of the state of the case. The contention of Miller & Company is that in spite of its failure to perform the agreement upon the promise of performance of which it secured from this appellant

a valuable property right—a subordination of the lien of its purchase money mortgage—it may at all hazards insist upon the right so alleged to be acquired, in spite of its own delinquent conduct. The principle we are here contending for is laid down in the case of *Cummings* v. *Jackson,* 55 N. J. Eq. 805 (Errors and Appeals). In that case the mortgagee who sought to foreclose his mortgage, had subordinated the lien of his mortgage to a subsequent lease on the mortgaged lands under an agreement which provided that the same should be subordinate so long as certain payments were made on the mortgage. The payments on the mortgage were not made and this Court held that the priority of the mortgage was thereby *ipso facto* restored as if the subordination had not been made. While in that case the agreement containing this condition was in writing, it is not distinguishable from the case at bar, for if here, this appellant's purchase money mortgage was subrogated upon the understanding express or implied that it was to be subordinate to a mortgage upon which $215,000.00 was to be advanced for the erection of a building upon the mortgaged lands which, if performed, would have inured to the benefit of this appellant's purchase money mortgage, it is clearly to be implied that such agreement of subordination was based upon the agreement to advance the $215,000.00 or a substantial proportion thereof and but for such agreement, there would have been no $215,000.00 mortgage and no subrogation. The breach by Miller & Company, of its agreement to advance the $215,000.00, which is not disputed, entitles this appellant, as in the case of *Cummings* v. *Jackson, supra,* to insist that the priority of its mortgage is *ipso facto* restored to its original position, and its agreement of subordina-

tion rescinded, whether the condition be in writing or not. *Equity looks at the substance of a transaction rather than upon its form.* Were it otherwise, one in the position of the Miller-Francis mortgagee might, after having secured a subordination of a purchase money mortgage upon the holding out to the purchase money mortgagee of visions of a beautifully completed apartment house to be erected with funds to be advanced by it on the security of its mortgage, and then wilfully default in the performance of its agreement, wreck the entire venture to the serious loss of the purchase money mortgagee, and others, and still claim priority over them. This would create an unconscionable and inequitable state of affairs, and yet that is precisely what is attempted to be done in this case.

It is respectfully submitted that the purchase money mortgage of this appellant, to the extent of the amount due on it, to wit, $9,500.00 with accrued interest, should be restored to its original position as if no subrogation thereof had been made, and that it should be directed to be paid prior to the claims of mechanics lien claimants.

Another theory upon which this appellant's mortgage should have been directed to be paid, prior to the payment of any moneys to any of the other parties in interest, is, that under the order of the Court below for the sale of the mortgaged lands (p. 50) at page 54, line 32, it was

> "Ordered, that the amount due the Hudson & Essex Building & Construction Co., on its mortgage herein recited, the sum of $9,500 with accrued interest, shall be paid in full from the proceeds of said sale, without any deduction for administration expenses or costs of said sale."

This order remains in full force and unreversed, having been made after a full hearing of all of the parties. It peremptorily directs the payment of moneys due this appellant without any deduction or question of priority.

POINT III.

The Court below erred in failing and refusing to hold that this appellant's purchase money mortgage should be paid secondly and only after payment of the amount actually advanced by G. L. Miller & Company on the Francis mortgage, to wit, the sum of $44,700.00, and that this appellant's mortgage should be paid prior to the claim of any mechanics lien claimant.

Assuming that the Francis-Miller mortgage is entitled to be paid the sums which the Master has found was actually advanced thereon, to wit, $44,700.00, with interest (or, as we show above, $46,850.00) this appellant's purchase money mortgage of $9,500.00 with interest should have been ordered to be secondly paid and prior to the payment of any moneys to mechanics lien claimants; whereas, the Court below has ordered paid, first, the moneys actually advanced upon the Francis-Miller mortgage; secondly, the lien claimants; thirdly, some Fifty-odd thousand dollars, charges made by Miller & Company, for commissions, etc., as if a loan of $215,000.00 had actually been obtained and advanced on its mortgage, and lastly, for which there were no funds, the mortgage of this appellant.

On November 16, 1927, an order for the sale of the mortgaged premises was made by the Court below (p. 55) which provided, on page 59, line 32:

> "Ordered, that the claim of the Hudson & Essex Building & Construction Co. on its mortgage herein recited, is recognized as a valid and subsisting lien to the extent of Ninety-five Hundred Dollars, with accrued interest, and that said lien shall be subsequent in priority to such amount if any, which this court may hereafter determine is due on the first mortgage held by Rollin J. Francis, Trustee, *and prior to such amount as this court may hereafter determine is due to the holder or holders of any mechanic lien claim* against the within described property for work done and materials furnished."

Were it not for these orders this appellant would have resisted and had reviewed their propriety. It was by them lulled into security.

This order, in express and unambiguous language adjudicates the priority of this appellant's mortgage over the mechanics lien claimants and makes this appellant's purchase money mortgage only second to the amount actually due on the Francis-Miller mortgage, which we respectfully maintain is only what has actually been advanced thereon—$46,850.00. A court of conscience should certainly not permit Miller & Company, under the circumstances existing in this case, to claim security under the mortgage held by its trustee for items such as $21,500.00, being 10% commission for a loan of $215,000.00; and another item of $2,150.00, being based on 1% of a loan of $215,000.00 for selling expenses; or another item of $3,225.00, being 1½% of a loan of $215,000.00 for bond issue expenses, and other items dealt with above under Point I. On account of the actual advance of $49,000.00, as above indicated, $2,150.00 had been paid by Franklin Arms to Miller & Company so that the net amount actually advanced on this mortgage was $46,850.00. No advance of $215,000.00

was ever made and the mere statement that such items of charges as above specified, amounting to a sum of about $55,000.00, is attempted to be asserted as being secured by a mortgage upon which only $46,850.00 had been loaned and advanced, is sufficient in our opinion to show the unconscionable character of the claim, particularly when attempted to be asserted as against this appellant as purchase money mortgagee.

Under the order aforesaid, this appellant's purchase money mortgage, being prior to the claims of lien claimants (*Franklin Society, &c.* v. *Thornton,* 85 N. J. Eq. 525; *Bloom* v. *Thirty-six Berwyn Street Corporation,* 136 Atl. Rep. 803, not yet officially reported) should at worst have been held payable secondly after the payment to the Francis-Miller mortgage of $46,800.00, with interest, and in that way the rights of Miller & Co. for moneys actually advanced and applied to the construction of the building for which it is entitled to priority over lien claimants, and the rights of this appellant under its purchase money mortgage, which is likewise prior to mechanics lien claims, will be fully preserved and the contest would thereby be narrowed down between the lien claimants and the Francis-Miller mortgage as to which would be entitled to the balance of the funds in the hands of the receiver. Whether or not Miller and Company might assert as against the mechanics lien claimants, their claim for commissions, selling expenses, etc., above mentioned, is a matter with which this appellant as purchase money mortgagee is not interested.

The order of the Court below, above mentioned, was by a later order of the Court, made on December 29, 1926 (p. 66) on page 67, line 29, *ratified and confirmed,* in all respects except as to the manner

of sale. These orders remain unreversed and unimpaired and are in effect final adjudications of this appellant's rights. The attention of the Court below and of the Master was directed to them (bottom p. 142), but the Court below overruled this appellant's exceptions in spite of its own aforesaid orders which we respectfully maintain were *res adjudicata* as to this appellant's rights.

POINT IV.

Service Trust Company did not file exceptions to the Master's Report nor otherwise contend against the ruling of the Court below, and its appeal should be dismissed.

Neither Rollin J. Francis, original trustee under the Miller mortgage, nor Service Trust Company, substituted trustee thereunder, filed any exception or objection to the Master's Report, nor otherwise indicated its dissent therefrom. Rule 113 of the Court of Chancery speaks of the manner of bringing on argument on exceptions to Master's Reports, and Rule 178-A of the same Court, speaks of the procedure to be followed by the Court upon hearing of exceptions to a Master's Report. Certainly, if a party desires to challenge the correctness of a Master's Report he is required to file exceptions thereto, or otherwise will be held to have acquiesced in the correctness thereof. In the order of the Court below, confirming the Master's Report from which this appeal is taken (p. 93), on page 94, line 13, it is indicated, by way of recital, that the only objector to the findings of the Master was this appellant.

In this Court, said Service Trust Company, as substituted trustee, has likewise taken a definite position in its answer to this appellant's petition

of appeal (p. 10). In the concluding paragraph thereof (p. 11) it says:

> "This appellee is advised and believes that the said decree is agreeable to equity and prays that the same may be affirmed, &c."

How Service Trust Company, trustee, can, in view of its failure to except to the Master's Report or otherwise object thereto and then in this Court pray for the affirmance of the order of the Court below here appealed from, at the same time press an appeal therefrom, is beyond our comprehension.

It is respectfully submitted that the order of the Court below, made on May 19, 1928, confirming the Master's Report, should be reversed and that this Court should direct the payment of the moneys in the hands of the receivers in the following manner:

1. First to this appellant, the amount due on its purchase money mortgage, to wit, $9,500 with interest and costs.

2. The amount actually advanced by Miller & Company on the Francis-Miller mortgage of $215,000, to wit, $46,850 with interest.

3. Pro rata the amounts due the mechanics lien claimants.

4. The balance, if any, due Miller & Company or Service Trust Company, substituted trustee; or

I. To Service Trust Company, substituted trustee under the Francis-Miller mortgage, $46,850, being the amount actually advanced thereon with accrued interest.

II. To this appellant, the amount due on its purchase money mortgage, to wit, $9,500 with accrued interest and its costs.

III. To mechanics lien claimants, pro rata the amounts due them.

IV. The balance, if any, payable on the Francis-Miller mortgage.

Respectfully submitted,

GROSS & GROSS,
Solicitors and of Counsel
with Appellant, Hudson & Essex
Building & Construction Co.

ISAAC GROSS,
Of Counsel.

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

99 OCT.1.1928

New Jersey Court of Errors and Appeals

Between

ALBERT & KERNAHAN, INC., a corporation,
Complainant,

and

FRANKLIN ARMS, INC., a corporation,
Defendant.

REPLY OF APPELLANT HUDSON & ESSEX BUILDING & CONSTRUCTION COMPANY TO SUPPLEMENTAL BRIEF OF SERVICE TRUST COMPANY, TRUSTEE.

This brief is filed by special permission granted by this Court on November 20th, 1928, because of circumstances then brought to the attention of the Court, and which are as follows:

This appellant, Hudson & Essex Building & Construction Company, was the original appellant from the order of the Court of Chancery here under review, and as such assumed the burden of preparing the state of the case and briefs, as enjoined by the rules. In cooperation with all counsel interested in the case, and in particular, with counsel for Service Trust Company, substituted trustee, all of the material to be included in the state of the case was agreed upon and printed, at considerable expense. The state of the case so printed, and of which proofs had before printing

been submitted to all counsel and approved, was served in due time, and no objection thereto was made within the time provided by Rule 19-A of this Court; whereupon briefs were prepared by all of the counsel including Service Trust Company, on the basis of the state of the case so agreed upon. These were all in the hands of the sergeant-at-arms of this Court on the opening day of this term, for distribution.

On the opening day of this term, Mr. Weinberger, appearing for Service Trust Company, trustee, moved to have stricken from the state of the case as so filed, the amended petition of appeal as printed therein, which motion, after all of the facts above stated were brought to its attention, the Court denied, and thus, the Court in effect approved the state of the case as served and filed. As above stated, all briefs had then already been prepared and filed.

Much to the surprise of counsel for this appellant and of other counsel in the case, on the last day provided by the rules for filing briefs, there was left by the Service Trust Company with the sergeant-at-arms of this Court for distribution to the members thereof, a printed book, designated as "State of the Case with Exhibits," which contains nothing more than exhibits, and a brief, designated as "Supplemental brief on behalf of Service Trust Company of New Jersey, substituted trustee, appellant." This is, in reality, an entirely new brief, raising questions that were not discussed below. Both of these printed pamphlets seem to have been gotten out at considerable cost and expense which said Service Trust Company undoubtedly will eventually seek to charge as part of the costs in this matter, if successful.

While we desire to point out to the Court the sharp practice thus indulged in, we do not desire

to intimate that counsel of record for the Service Trust Company, trustee, is at all responsible therefor, since we are informed that these were gotten up by a New York lawyer who is associated with Mr. Weinberger in this case. We desire to again allude to the fact that Service Trust Company, substituted trustee, had filed no exceptions to the Master's report, nor urged any objection thereto, and is not, therefore, properly here as an appellant.

In this so called supplemental brief on behalf of Service Trust Company, much is said by way of statement of fact, for which there is not the slightest support in the case, and we shall, in view of the Court already being burdened with so much printed argument, as briefly as possible show the fallacy underlying its entire argument.

In the first place, this appellant, Hudson & Essex Building & Construction Company, purchase money mortgagee, holding a $9,500.00 mortgage, was not a party to the so called underwriting agreement between Miller & Company and Franklin Arms, and is not shown to have had the slightest knowledge of it. As far as it was concerned, it was subordinating its purchase money mortgage to a mortgage of $215,000.00, represented to it as securing a loan in that amount, the amount of which was to be advanced and used for the erection of an apartment house on the mortgaged premises.

Answer to Point One.

In this point, Service Trust Company, substituted trustee, attempts to show that Miller & Company was, in fact, the agent of the owner, Franklin Arms, and that Miller & Company was not identified with Francis, the trustee under the mortgage of $215,000.00. Counsel in this so called supplemental brief refers to several extracts from the underwriting agreement, by which this appellant,

Hudson & Essex Building & Construction Company is not bound to support his argument. On page 11 of said brief, he extracts Paragraph 9 of the underwriting agreement, in which it is provided that "The underwriter hereby underwrites said entire issue of bonds at the sum of $193,500.00." At the end of this paragraph, counsel says parenthetically, "Evidently the amount was changed to $215,000.00." From what it appears to him so evident is not made plain, for in Paragraph 2 of the same instrument (top page 2, State of Case with Exhibits), the owner agrees to issue bonds in the sum of $215,000.00.

Let us see what an underwriter in legal effect is: It is held in *re Licensed Victualers' Mutual Trading Association,* 42 Ch. D. I. 6, that an underwriting agreement means an agreement entered into before shares are brought before the public, for the taking of the whole or a portion of such shares at a given price, in the event of the public not taking them up. It is in our judgment the common understanding that it is in legal effect a purchase. Paragraph 9 of this underwriting agreement, recited on page 11 of the supplemental brief of Service Trust Company, makes this manifest, and does not require counsel's parenthetic statement that the figure of $193,500.00 was thereafter changed to $215,000.00, because the very instrument indicates that that is not so. The effect of this underwriting agreement was a purchase by Miller & Company of the bonds secured by the $215,000.00 mortgage for $193,500.00. In fact, nowhere in this underwriting agreement are we able to find that all that Miller & Company was required to turn over was the proceeds of the *sale* of the bonds, but the proceeds of the bonds, clearly indicating that Miller & Company had agreed to pay over the full amount agreed by them under

their contract. Miller & Company were further to be secured that the building would be completed by a completion bond with sufficient surety, to be approved by them (Par. 13, bottom page 8, State of the Case with Exhibits, p. 14). In fact all the provisions of this agreement clearly manifest that Miller & Company was dealing as a principal with Franklin Arms, Inc. The moneys to be paid over by Miller & Company were to be used in the erection of the building (Par. 12, p. 7), which was to proceed with all diligence and dispatch (Par. 14, bottom p. 9). The moneys were to be disbursed by Miller & Company as the building progressed (Par. 16, p. 11).

The argument on behalf of Service Trust Company is to the effect that Miller was a mere selling agent for the bonds, which argument, we respectfully maintain, is made absurd by the very nature of the transaction. Franklin Arms was in process of constructing a costly building, and needed the money with which to do so. It must have known that failure to obtain the necessary funds would result in financial disaster, and as the provisions of the underwriting agreement indicate, the underwriter must have well understood the same thing.

According to the contention of counsel, if Miller & Company was unable to market the bonds, it was free of any further obligation in the premises. The very case of *G. L. Miller & Company* v. *Claridge,* 14 Fed. (2nd) 859, cited by counsel at the bottom of page 15 of the supplemental brief, is against his contention. In that case, the contention was made that the mortgage was usurious, and such a defense not being a favored one, the Court seemed anxious to work out a theory to justify the extra legal charges made by Miller & Company, and the Court says:

> "While the written contract under which Miller & Company were to handle and distribute the bonds might justify the inference that Miller & Company acquired the bonds from defendant for a fixed amount, and that defendant had no further interest in their disposition after receiving the amount, yet the situation of the parties, what they desired to accomplish and the surrounding circumstances indicate that the parties contemplated *resales* of the bonds by Miller & Company as a necessary factor in procuring the money agreed to be furnished, and that the services in effecting the *resales,* looking through form to substance, were for the benefit of the defendant, and were of substantial value—not a cloak to cover usury."

In other words, the Court found that while Miller & Company actually purchased these bonds, it was contemplated that they were to market them on their own account, at an expense which justified the extra legal charge, and that the transaction was, therefore, not tainted with usury.

The extract from Referee's EHRHORN's opinion, appearing on page 18 of the supplemental brief, is illuminating, and, we respectfully contend, supports the argument made in our original brief to the effect that here not a single owner of a bond appears, nor does it appear that any holder of a receipt of Miller & Company could trace his advance to the particular security of the Francis-Miller mortgage. The Referee says:

> "The temporary bond, so far as the purchasing public is concerned, stands as security *pro tanto* to secure the bond, interim receipt and certificate holders in those cases *where title can be found to have passed to a definite security.*"

It does not appear in this case that the holder of any receipt for moneys paid to Miller & Com-

pany even knew of the existence of this $215,000.00 mortgage, or that the money was paid or received upon the faith of this security. We respectfully maintain that the burden rests upon the one alleging that this security is held for his benefit, to show it. A mere production of a receipt of Miller & Company, for so much money, which might have contemplated the issue of bonds on any number of mortgages, is not sufficient. That there are other such cases is apparent from the opinion of Referee EHRHORN above referred to.

To indicate quite clearly that our contention with reference to the effect of the underwriting agreement is the correct one, and that the contention of the Service Trust Company, substituted trustee, is untenable, we need only refer to Paragraph 20 of this underwriting agreement (p. 15, State of the Case with Exhibits) which provides, "The owner will pay to the underwriter the expenses in connection with this *loan,* including all attorneys' fees, etc."

Answer to Point Two.

In this point, counsel seems to stress an argument that this Court should protect innocent investors against this appellant's purchase money mortgage. We again maintain that there is not in this case the slightest proof that anyone other than Miller & Company became the purchaser of a single bond based upon the security of the $215,000.00 mortgage. His argument, that because in the postponement of the mortgage there was no express reservation of the right to have its priority restored upon default by Miller & Company, this appellant cannot prevail, seems to us to be untenable, for certainly equity does not look at the form but at the substance of the transaction.

Point Three deals with a controversy between Service Trust Company and the mechanic's lien claimants, with which we have dealt in our original brief.

Answer to Point Four.

This point, to our way of viewing the case, clearly exposes the entire fallacy in counsel's argument. In Point One, he contends that Miller & Company was the agent of Franklin Arms, and, of course, if so, upon its default would not be entitled to compensation. Certainly, *it* should not be protected by the mortgage security, since counsel's contention throughout its brief is that that security was intended for the benefit of the investing public. In Point Four the direct contrary is asserted, and credit is sought not for the benefit of the investing public, but for alleged charges by Miller & Company, with which we have dealt in our previous brief, and not one dollar of which is shown to have been advanced.

Counsel seems to urge that the item for consulting architect should be allowed. There might have been some substance to such an argument if it had anywhere in this case appeared that there was a consulting architect or that one had been paid for services rendered. These items, we again reiterate, are for items which Miller & Company might have earned had it performed its contract; but here it advanced but about 20% of what it agreed to advance, and thereby caused loss to all parties interested. True, that the Special Master said, as regards these items, that they are proper charges against the *mortgagor*, for the mortgagor might agree to make Miller & Company a gift of the entire bond issue, secured by the mortgage, but as against third parties, particularly this ap-

pellant, and the lien claimants as well, these items are not deserving of consideration.

We respectfully refer this Honorable Court to the points made in our original brief, and respectfully contend that the order of the Court of Chancery should be reversed or modified, as in our original brief contended for.

Respectfully submitted,

GROSS & GROSS,
Of Counsel with Appellant
Hudson & Essex Building &
Construction Company.

ISAAC GROSS,
Of Counsel.

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

New Jersey Court of Errors and Appeals

Between

ALBERT & KERNAHAN, INC., a corporation,

Complainant,

and

FRANKLIN ARMS, INC., a corporation,

Defendant.

SPECIAL REPLY BRIEF.

(Special permission to file same granted by the Court on November 20, 1928.)

The facts in this matter have been outlined fully in the three briefs which were filed before the Service Trust Co. filed its supplemental brief, which supplemental brief we will now answer.

The addenda to the State of the Case filed by the Service Trust Co., with its supplemental brief, contains only certain exhibits placed in evidence at the hearing held by the Special Master in Chancery, whose report is really the subject matter of this entire appeal.

Answer to Point One in Supplemental Brief.

Frankly, these respondents do not quite understand why this court should be burdened with the reading of ten printed pages dealing with a dissertation on the status of the G. L. Miller & Co., Inc. in the transaction between Franklin Arm, Inc. and the holders of the bonds secured by

the mortgage now held by the Service Trust Co. as substituted trustee.

The question of the amount due on the trust deed or mortgage, no matter what it is called, and the question of the amount due on the mechanics' lien claims of the various lienors and the question of the amount due on the mortgage of the Hudson & Essex Building & Construction Co. and the all important question of priorities as between the three contending lienors just mentioned was determined by the Court of Chancery and it seems to these respondents that these questions must be reviewed by this Honorable Court in the same way and manner as if the trust mortgage or deed was made to and held by an individual mortgagee. So far as this case is concerned, stripped of a lot of useless language and high-sounding phrases probably designed "to separate the public from its money," as is stated in the Service Trust Co. brief on page 4, this trust deed or mortgage and the preliminary agreement, Exhibit S-3, and the agreement set forth in the addenda to the State of the Case, pages 133-158, together constitute clearly an advance money mortgage recorded subsequent to the commencement of building operations. See State of the Case, page 237, lines 32-39; page 311, lines 28-31; page 300, lines 20-30.

Answer to Point Two in Supplemental Brief.

These respondents are not concerned with this point as it deals solely with a dispute between the Service Trust Co. and the Hudson & Essex Building and Construction Co.

Answer to Point Three in Supplemental Brief.

This really deals with the question of the Day mortgage and an item of $1,000 for taxes. We have fully discussed the Day mortgage proposition and still maintain that under no theory, not even subrogation, can this item be prior to the mechanics' lien claims because of the fact that admittedly the Day mortgage covered not only the land described in the Miller mortgage or Francis mortgage, but other lands belonging to the defendant, Franklin Arms, Inc.

As to the item of taxes, we do not believe that any of the cases cited in the supplemental brief have any relevancy or application and furthermore contend that there is no basis in New Jersey at least for any theory that because an item is paid by a mortgagee which, while it does not go into the erection of the building, but because its payment enures to the benefit of the mechanic lien claimant, should be allowed in priority to their claims. The Court will note that no citations are given in the supplemental brief upholding this theory, although it is stated on page 25 that "on principal and authority, the item under discussion should be given priority."

Answer to Point Four in Supplemental Brief.

This point deals with items deducted by G. L. Miller & Co., Inc., which were fully covered by these respondents in their original brief on pages 8 to 11.

We respectfully contend that a reading of the arguments advanced by the Service Trust Co. under Point Two of its original brief and Point Four of its supplemental brief will disclose absolutely the most ridiculous argument ever ad-

vanced to any court by an appellant and is really an insult to the intelligence of this Honorable Court.

Because our opponents do not yet seem to grasp the situation surrounding the mortgage on which their client is acting as substituted trustee, may we point out these pertinent excerpts taken from the recorded mortgage itself:

> "Section 4. Simultaneously with the execution and delivery of this indenture the Company has entered into a certain agreement with G. L. Miller & Company, Inc., bearing even date herewith, and intended to be filed in the office of the Register of the County of Essex, State of New Jersey, at the same time as this indenture is recorded; and this indenture and the Trustee hereunder and the holders of said bonds issued hereunder have the benefit thereof, and the holders of said bonds are in all respects bound by all the provisions of said last mentioned agreement, and said agreement is in all respects hereby made a part hereof to the same extent and with the same rights and remedies as if herein set forth at length. The Company covenants and agrees to and with the Trustee and the holders of said bonds that the Company will do and perform all of the agreements on its part contained in said agreement."

It will be observed from a reading of the portion of the mortgage just quoted that all of the provisions of the agreement recorded at the same time the mortgage was recorded became part of the mortgage and that all holders of bonds were bound by all the provisions of the agreement and it is therefore respectfully contended that apart from the fact that as a matter of law there can be no difference in position between a mortgage securing one bond held by a single person and a

mortgage securing numerous bonds held by any number of individuals, the rights of the bondholders in this case represented by the Service Trust Co. substituted trustee were, by the very terms of the indenture securing their bonds, made expressly subject to the terms of the agreement between G. L. Miller & Co., Inc. and Franklin Arms, Inc. Therefore, all the arguments advanced in this respondent's original brief sustaining the proportion of priority over the mechanics' lien claim are applicable and controllable.

Consequently, the only legal principles that can be involved in the determination of the amount due on the various mortgages and liens and the question of priorities as between them are those which, under our statutes and decisions deal with a mortgage recorded subsequently to the commencement of building operations, under which a mortgage merely is to be advanced as and when the erection of the building progresses. Naturally, in addition to such statutes and decisions as were just mentioned, there must be considered the status of the Hudson & Essex Building and Construction Co. mortgage and its postponement to the mortgage now held by the Service Trust Co. as substituted trustee and the legal status of the mechanics' lien claims under the New Jersey statutes as respects their priority as against the two mortgages on the property.

What distinction there is, if any, between a mortgage securing a single bond and one securing a similar indebtedness evidenced by a series of bonds, the learned counsel who prepared the so-called supplemental brief on behalf of the

Service Trust Co. as trustee, does not make clear. There is no distinction.

Respectfully,

STEIN, McGLYNN & HANNOCH,
Solicitors of Appellees.

E. R. McGlynn,
Of Counsel.

99 OCT.1.1928

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

New Jersey Court of Errors and Appeals

Between ALBERT & KERNAHAN, INC., a corporation, *Complainant,* *and* FRANKLIN ARMS, INC., a corporation, *Defendant.*	*On Appeal from the Court of Chancery.*

BRIEF ON BEHALF OF RECEIVERS AND MECHANICS' LIEN CLAIMANTS.

This is a reply brief in connection with two appeals now before this court in the above-entitled matter; one is an appeal by the Hudson & Essex Building & Construction Co., and the other by the Service Trust Co., Substituted Trustee.

This brief is filed on behalf of the following named respondents:

M. DeForest Soverel and James Haines, as Receivers of Franklin Arms, Inc.,
Concrete Steel Co.,
Orange Hardware Company,
Joseph E. Amorose,
Juliano Construction Co.,
Hudson Structural Iron Works, Inc.,
Albert & Kernahan, Inc.

As will be noted from an examination of the facts, these respondents are the receivers appointed by the Court of Chancery for Franklin Arms, Inc., a corporation of New Jersey, and all the mechanics' lien claimants on the land and building hereinafter described.

The appeal of the Service Trust Co., Substituted Trustee, as we understand it, deals with only two portions of the Special Master's report confirmed by the order now under review, to wit: the question of priority with respect to an item of $8,000.00 and with respect to the priority of an item of $47,485.12.

The appeal of the Hudson & Essex Building & Construction Co., as we understand it, questions practically all portions of the Special Master's report.

Facts.

On September 10, 1926, there was filed in the Court of Chancery a creditors' bill against the defendant, a New Jersey corporation, based on an admitted charge of insolvency. It appeared from the allegations of the bill and from facts later developed, that one James Haines had purchased a piece of property in Essex County, in the Town of Bloomfield, consisting of a large vacant plot of ground; that it was then encumbered by a mortgage which also covered other property, held by the Estate of Anna M. Day. This mortgage was later cancelled or released upon the payment of $8,000.00.

At the time of his purchase, Haines made and delivered a purchase money mortgage to his vendor, Hudson & Essex Building & Construction Co., in the sum of $15,000.00. Haines, contemplating the erection of one or more apartment houses on this ground then conveyed the entire tract purchased by him to a corporation organized for that purpose. The corporation was Franklin Arms, Inc., the defendant in the Chancery suit.

Building operations were commenced the early part of 1926, by Franklin Arms, Inc., on only a portion of its property. No general contract was entered into but the various kinds of work were contracted for with different concerns and contracts were made for the purchase of the building material.

A considerable time after the commencement of building operations, an agreement was made by Franklin Arms, Inc., with the G. L. Miller Co., a New York corporation, for the permanent financing of the completed building project. This agreement was dated May 15, 1926.

A bond and mortgage was executed and delivered by Franklin Arms, Inc., to one Roland J. Francis, as Trustee, dated May 15, 1926, recorded June 17, 1926, in Book W 57 of Mortgages for Essex County, page 64. This bond and mortgage were in the sum of $215,000.00 and the arrangement contemplated was a bond issue with bonds of small denominations to be apparently sold by G. L. Miller Co., to the public. They were to bear interest at the rate of 7% per annum. This mortgage will hereafter be called for the sake of brevity, the "Miller mortgage." The proceeds of this mortgage loan thus made was to be paid from time to time as the building operations progressed.

Matters apparently proceeded satisfactorily until the G. L. Miller Co. became financially embarrassed. Upon the appointment of a receiver, first in the New York courts and later in the United States District Court, of course payments to the Franklin Arms, Inc. ceased with the result that all work stopped in Bloomfield, and with the further result that the bill just described was filed and receivers were appointed

Hudson & Essex Building & Construction Company is not bound to support his argument. On page 11 of said brief, he extracts Paragraph 9 of the underwriting agreement, in which it is provided that "The underwriter hereby underwrites said entire issue of bonds at the sum of $193,500.00." At the end of this paragraph, counsel says parenthetically, "Evidently the amount was changed to $215,000.00." From what it appears to him so evident is not made plain, for in Paragraph 2 of the same instrument (top page 2, State of Case with Exhibits), the owner agrees to issue bonds in the sum of $215,000.00.

Let us see what an underwriter in legal effect is: It is held in *re Licensed Victualers' Mutual Trading Association,* 42 Ch. D. I. 6, that an underwriting agreement means an agreement entered into before shares are brought before the public, for the taking of the whole or a portion of such shares at a given price, in the event of the public not taking them up. It is in our judgment the common understanding that it is in legal effect a purchase. Paragraph 9 of this underwriting agreement, recited on page 11 of the supplemental brief of Service Trust Company, makes this manifest, and does not require counsel's parenthetic statement that the figure of $193,500.00 was thereafter changed to $215,000.00, because the very instrument indicates that that is not so. The effect of this underwriting agreement was a purchase by Miller & Company of the bonds secured by the $215,000.00 mortgage for $193,500.00. In fact, nowhere in this underwriting agreement are we able to find that all that Miller & Company was required to turn over was the proceeds of the *sale* of the bonds, but the proceeds of the bonds, clearly indicating that Miller & Company had agreed to pay over the full amount agreed by them under

their contract. Miller & Company were further to be secured that the building would be completed by a completion bond with sufficient surety, to be approved by them (Par. 13, bottom page 8, State of the Case with Exhibits, p. 14). In fact all the provisions of this agreement clearly manifest that Miller & Company was dealing as a principal with Franklin Arms, Inc. The moneys to be paid over by Miller & Company were to be used in the erection of the building (Par. 12, p. 7), which was to proceed with all diligence and dispatch (Par. 14, bottom p. 9). The moneys were to be disbursed by Miller & Company as the building progressed (Par. 16, p. 11).

The argument on behalf of Service Trust Company is to the effect that Miller was a mere selling agent for the bonds, which argument, we respectfully maintain, is made absurd by the very nature of the transaction. Franklin Arms was in process of constructing a costly building, and needed the money with which to do so. It must have known that failure to obtain the necessary funds would result in financial disaster, and as the provisions of the underwriting agreement indicate, the underwriter must have well understood the same thing.

According to the contention of counsel, if Miller & Company was unable to market the bonds, it was free of any further obligation in the premises. The very case of *G. L. Miller & Company* v. *Claridge,* 14 Fed. (2nd) 859, cited by counsel at the bottom of page 15 of the supplemental brief, is against his contention. In that case, the contention was made that the mortgage was usurious, and such a defense not being a favored one, the Court seemed anxious to work out a theory to justify the extra legal charges made by Miller & Company, and the Court says:

> "While the written contract under which Miller & Company were to handle and distribute the bonds might justify the inference that Miller & Company acquired the bonds from defendant for a fixed amount, and that defendant had no further interest in their disposition after receiving the amount, yet the situation of the parties, what they desired to accomplish and the surrounding circumstances indicate that the parties contemplated *resales* of the bonds by Miller & Company as a necessary factor in procuring the money agreed to be furnished, and that the services in effecting the *resales*, looking through form to substance, were for the benefit of the defendant, and were of substantial value—not a cloak to cover usury."

In other words, the Court found that while Miller & Company actually purchased these bonds, it was contemplated that they were to market them on their own account, at an expense which justified the extra legal charge, and that the transaction was, therefore, not tainted with usury.

The extract from Referee's EHRHORN'S opinion, appearing on page 18 of the supplemental brief, is illuminating, and, we respectfully contend, supports the argument made in our original brief to the effect that here not a single owner of a bond appears, nor does it appear that any holder of a receipt of Miller & Company could trace his advance to the particular security of the Francis-Miller mortgage. The Referee says:

> "The temporary bond, so far as the purchasing public is concerned, stands as security *pro tanto* to secure the bond, interim receipt and certificate holders in those cases *where title can be found to have passed to a definite security.*"

It does not appear in this case that the holder of any receipt for moneys paid to Miller & Com-

pany even knew of the existence of this $215,000.00 mortgage, or that the money was paid or received upon the faith of this security. We respectfully maintain that the burden rests upon the one alleging that this security is held for his benefit, to show it. A mere production of a receipt of Miller & Company, for so much money, which might have contemplated the issue of bonds on any number of mortgages, is not sufficient. That there are other such cases is apparent from the opinion of Referee EHRHORN above referred to.

To indicate quite clearly that our contention with reference to the effect of the underwriting agreement is the correct one, and that the contention of the Service Trust Company, substituted trustee, is untenable, we need only refer to Paragraph 20 of this underwriting agreement (p. 15, State of the Case with Exhibits) which provides, "The owner will pay to the underwriter the expenses in connection with this *loan*, including all attorneys' fees, etc."

Answer to Point Two.

In this point, counsel seems to stress an argument that this Court should protect innocent investors against this appellant's purchase money mortgage. We again maintain that there is not in this case the slightest proof that anyone other than Miller & Company became the purchaser of a single bond based upon the security of the $215,000.00 mortgage. His argument, that because in the postponement of the mortgage there was no express reservation of the right to have its priority restored upon default by Miller & Company, this appellant cannot prevail, seems to us to be untenable, for certainly equity does not look at the form but at the substance of the transaction.

Point Three deals with a controversy between Service Trust Company and the mechanic's lien claimants, with which we have dealt in our original brief.

Answer to Point Four.

This point, to our way of viewing the case, clearly exposes the entire fallacy in counsel's argument. In Point One, he contends that Miller & Company was the agent of Franklin Arms, and, of course, if so, upon its default would not be entitled to compensation. Certainly, *it* should not be protected by the mortgage security, since counsel's contention throughout its brief is that that security was intended for the benefit of the investing public. In Point Four the direct contrary is asserted, and credit is sought not for the benefit of the investing public, but for alleged charges by Miller & Company, with which we have dealt in our previous brief, and not one dollar of which is shown to have been advanced.

Counsel seems to urge that the item for consulting architect should be allowed. There might have been some substance to such an argument if it had anywhere in this case appeared that there was a consulting architect or that one had been paid for services rendered. These items, we again reiterate, are for items which Miller & Company might have earned had it performed its contract; but here it advanced but about 20% of what it agreed to advance, and thereby caused loss to all parties interested. True, that the Special Master said, as regards these items, that they are proper charges against the *mortgagor*, for the mortgagor might agree to make Miller & Company a gift of the entire bond issue, secured by the mortgage, but as against third parties, particularly this ap-

pellant, and the lien claimants as well, these items are not deserving of consideration.

We respectfully refer this Honorable Court to the points made in our original brief, and respectfully contend that the order of the Court of Chancery should be reversed or modified, as in our original brief contended for.

Respectfully submitted,

GROSS & GROSS,
Of Counsel with Appellant
Hudson & Essex Building &
Construction Company.

ISAAC GROSS,
Of Counsel.

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

New Jersey Court of Errors and Appeals

Between

ALBERT & KERNAHAN, INC., a corporation,

Complainant,

and

FRANKLIN ARMS, INC., a corporation,

Defendant.

SPECIAL REPLY BRIEF.

(Special permission to file same granted by the Court on November 20, 1928.)

The facts in this matter have been outlined fully in the three briefs which were filed before the Service Trust Co. filed its supplemental brief, which supplemental brief we will now answer.

The addenda to the State of the Case filed by the Service Trust Co., with its supplemental brief, contains only certain exhibits placed in evidence at the hearing held by the Special Master in Chancery, whose report is really the subject matter of this entire appeal.

Answer to Point One in Supplemental Brief.

Frankly, these respondents do not quite understand why this court should be burdened with the reading of ten printed pages dealing with a dissertation on the status of the G. L. Miller & Co., Inc. in the transaction between Franklin Arm, Inc. and the holders of the bonds secured by

the mortgage now held by the Service Trust Co. as substituted trustee.

The question of the amount due on the trust deed or mortgage, no matter what it is called, and the question of the amount due on the mechanics' lien claims of the various lienors and the question of the amount due on the mortgage of the Hudson & Essex Building & Construction Co. and the all important question of priorities as between the three contending lienors just mentioned was determined by the Court of Chancery and it seems to these respondents that these questions must be reviewed by this Honorable Court in the same way and manner as if the trust mortgage or deed was made to and held by an individual mortgagee. So far as this case is concerned, stripped of a lot of useless language and high-sounding phrases probably designed "to separate the public from its money," as is stated in the Service Trust Co. brief on page 4, this trust deed or mortgage and the preliminary agreement, Exhibit S-3, and the agreement set forth in the addenda to the State of the Case, pages 133-158, together constitute clearly an advance money mortgage recorded subsequent to the commencement of building operations. See State of the Case, page 237, lines 32-39; page 311, lines 28-31; page 300, lines 20-30.

Answer to Point Two in Supplemental Brief.

These respondents are not concerned with this point as it deals solely with a dispute between the Service Trust Co. and the Hudson & Essex Building and Construction Co.

Answer to Point Three in Supplemental Brief.

This really deals with the question of the Day mortgage and an item of $1,000 for taxes. We have fully discussed the Day mortgage proposition and still maintain that under no theory, not even subrogation, can this item be prior to the mechanics' lien claims because of the fact that admittedly the Day mortgage covered not only the land described in the Miller mortgage or Francis mortgage, but other lands belonging to the defendant, Franklin Arms, Inc.

As to the item of taxes, we do not believe that any of the cases cited in the supplemental brief have any relevancy or application and furthermore contend that there is no basis in New Jersey at least for any theory that because an item is paid by a mortgagee which, while it does not go into the erection of the building, but because its payment enures to the benefit of the mechanic lien claimant, should be allowed in priority to their claims. The Court will note that no citations are given in the supplemental brief upholding this theory, although it is stated on page 25 that "on principal and authority, the item under discussion should be given priority."

Answer to Point Four in Supplemental Brief.

This point deals with items deducted by G. L. Miller & Co., Inc., which were fully covered by these respondents in their original brief on pages 8 to 11.

We respectfully contend that a reading of the arguments advanced by the Service Trust Co. under Point Two of its original brief and Point Four of its supplemental brief will disclose absolutely the most ridiculous argument ever ad-

vanced to any court by an appellant and is really an insult to the intelligence of this Honorable Court.

Because our opponents do not yet seem to grasp the situation surrounding the mortgage on which their client is acting as substituted trustee, may we point out these pertinent excerpts taken from the recorded mortgage itself:

> "Section 4. Simultaneously with the execution and delivery of this indenture the Company has entered into a certain agreement with G. L. Miller & Company, Inc., bearing even date herewith, and intended to be filed in the office of the Register of the County of Essex, State of New Jersey, at the same time as this indenture is recorded; and this indenture and the Trustee hereunder and the holders of said bonds issued hereunder have the benefit thereof, and the holders of said bonds are in all respects bound by all the provisions of said last mentioned agreement, and said agreement is in all respects hereby made a part hereof to the same extent and with the same rights and remedies as if herein set forth at length. The Company covenants and agrees to and with the Trustee and the holders of said bonds that the Company will do and perform all of the agreements on its part contained in said agreement."

It will be observed from a reading of the portion of the mortgage just quoted that all of the provisions of the agreement recorded at the same time the mortgage was recorded became part of the mortgage and that all holders of bonds were bound by all the provisions of the agreement and it is therefore respectfully contended that apart from the fact that as a matter of law there can be no difference in position between a mortgage securing one bond held by a single person and a

mortgage securing numerous bonds held by any number of individuals, the rights of the bondholders in this case represented by the Service Trust Co. substituted trustee were, by the very terms of the indenture securing their bonds, made expressly subject to the terms of the agreement between G. L. Miller & Co., Inc. and Franklin Arms, Inc. Therefore, all the arguments advanced in this respondent's original brief sustaining the proportion of priority over the mechanics' lien claim are applicable and controllable.

Consequently, the only legal principles that can be involved in the determination of the amount due on the various mortgages and liens and the question of priorities as between them are those which, under our statutes and decisions deal with a mortgage recorded subsequently to the commencement of building operations, under which a mortgage merely is to be advanced as and when the erection of the building progresses. Naturally, in addition to such statutes and decisions as were just mentioned, there must be considered the status of the Hudson & Essex Building and Construction Co. mortgage and its postponement to the mortgage now held by the Service Trust Co. as substituted trustee and the legal status of the mechanics' lien claims under the New Jersey statutes as respects their priority as against the two mortgages on the property.

What distinction there is, if any, between a mortgage securing a single bond and one securing a similar indebtedness evidenced by a series of bonds, the learned counsel who prepared the so-called supplemental brief on behalf of the

Service Trust Co. as trustee, does not make clear. There is no distinction.

Respectfully,

STEIN, McGLYNN & HANNOCH,
Solicitors of Appellees.

E. R. McGlynn,
Of Counsel.

99 OCT.1.1928

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

New Jersey Court of Errors and Appeals

Between ALBERT & KERNAHAN, INC., a corporation, *Complainant,* *and* FRANKLIN ARMS, INC., a corporation, *Defendant.*	*On Appeal from the Court of Chancery.*

BRIEF ON BEHALF OF RECEIVERS AND MECHANICS' LIEN CLAIMANTS.

This is a reply brief in connection with two appeals now before this court in the above-entitled matter; one is an appeal by the Hudson & Essex Building & Construction Co., and the other by the Service Trust Co., Substituted Trustee.

This brief is filed on behalf of the following named respondents:

M. DeForest Soverel and James Haines, as Receivers of Franklin Arms, Inc.,
Concrete Steel Co.,
Orange Hardware Company,
Joseph E. Amorose,
Juliano Construction Co.,
Hudson Structural Iron Works, Inc.,
Albert & Kernahan, Inc.

As will be noted from an examination of the facts, these respondents are the receivers appointed by the Court of Chancery for Franklin Arms, Inc., a corporation of New Jersey, and all the mechanics' lien claimants on the land and building hereinafter described.

The appeal of the Service Trust Co., Substituted Trustee, as we understand it, deals with only two portions of the Special Master's report confirmed by the order now under review, to wit: the question of priority with respect to an item of $8,000.00 and with respect to the priority of an item of $47,485.12.

The appeal of the Hudson & Essex Building & Construction Co., as we understand it, questions practically all portions of the Special Master's report.

Facts.

On September 10, 1926, there was filed in the Court of Chancery a creditors' bill against the defendant, a New Jersey corporation, based on an admitted charge of insolvency. It appeared from the allegations of the bill and from facts later developed, that one James Haines had purchased a piece of property in Essex County, in the Town of Bloomfield, consisting of a large vacant plot of ground; that it was then encumbered by a mortgage which also covered other property, held by the Estate of Anna M. Day. This mortgage was later cancelled or released upon the payment of $8,000.00.

At the time of his purchase, Haines made and delivered a purchase money mortgage to his vendor, Hudson & Essex Building & Construction Co., in the sum of $15,000.00. Haines, contemplating the erection of one or more apartment houses on this ground then conveyed the entire tract purchased by him to a corporation organized for that purpose. The corporation was Franklin Arms, Inc., the defendant in the Chancery suit.

Building operations were commenced the early part of 1926, by Franklin Arms, Inc., on only a portion of its property. No general contract was entered into but the various kinds of work were contracted for with different concerns and contracts were made for the purchase of the building material.

A considerable time after the commencement of building operations, an agreement was made by Franklin Arms, Inc., with the G. L. Miller Co., a New York corporation, for the permanent financing of the completed building project. This agreement was dated May 15, 1926.

A bond and mortgage was executed and delivered by Franklin Arms, Inc., to one Roland J. Francis, as Trustee, dated May 15, 1926, recorded June 17, 1926, in Book W 57 of Mortgages for Essex County, page 64. This bond and mortgage were in the sum of $215,000.00 and the arrangement contemplated was a bond issue with bonds of small denominations to be apparently sold by G. L. Miller Co., to the public. They were to bear interest at the rate of 7% per annum. This mortgage will hereafter be called for the sake of brevity, the "Miller mortgage." The proceeds of this mortgage loan thus made was to be paid from time to time as the building operations progressed.

Matters apparently proceeded satisfactorily until the G. L. Miller Co. became financially embarrassed. Upon the appointment of a receiver, first in the New York courts and later in the United States District Court, of course payments to the Franklin Arms, Inc. ceased with the result that all work stopped in Bloomfield, and with the further result that the bill just described was filed and receivers were appointed

for the Franklin Arms, Inc. in the New Jersey Court of Chancery.

The receivers discovered that the building was only partially completed and open to the elements, and that there were considerable liens encumbering it, including the Miller mortgage of $215,000.00, the mortgage of the Hudson & Essex Building & Construction Co., originally in the sum of $15,000.00 on which only $9,500.00 was due, and numerous mechanics' lien claims aggregating approximately $70,000.00.

In the opinion of the receivers there was serious doubt as to the amount due on the Miller mortgage, the amount due on the mechanics' lien claims and substantial questions with reference to the position of priorities as between these various liens.

The receivers thereupon filed a petition in the Court of Chancery setting forth the above facts and obtained an order to show cause directed to creditors, lien holders, mortgagees, etc. why the receivers should not either complete the building or sell it in its then condition, free and clear of all liens. After the argument on this order to show cause, an order was entered authorizing the receivers to sell the uncompleted building free and clear of all liens, but with a provision that there should be an up-set price of $110,000.00. The reason for this action was that at that time, from the information in the possession of the receivers, it was thought that there was actually due on the liens covering the building, the following amounts, to wit:

Miller mortgage, approximately	$40,000.00
Hudson & Essex Building & Construction Co.	$10,000.00
Mechanics' lien claimants, approximately	$60,000.00

After due advertising the receivers reported to the court that they could not obtain a bid for $110,000.00 but had had some private bids. The court thereupon gave the receivers an order to show cause why the best private bid to be obtained should not be accepted. After due notice and argument on this order, the receivers were authorized to sell at private sale on a bid of $110,000.00, the conveyance to be free and clear of all liens, the liens to attach to the proceeds of sale in the same way and manner as they were on the land.

After the receivers conveyed the property they filed a petition asking for a determination of the amount due and the position of priorities of the various liens, so that they could distribute the funds in their possession to the lien holders and creditors and wind up the estate of the insolvent corporation. This question was thereupon referred by the Chancellor to Roy F. Anthony, Esq., one of the Special Masters of the Court of Chancery, who took testimony as to all liens, etc., and who subsequently filed a report fixing the amounts due and the priorities, as follows: (State of Case, pp. 89-90)

"To be firstly paid:

Rollin J. Francis, Trustee	$44,700.00	
Interest from May 15, 1927	2,059.92	$46,759.92

To be secondly paid:

Concrete Steel Co.,	1,577.57	
Interest	126.21	1,703.78
Albert & Kernahan, Inc.	8,799.22	
Interest	703.94	9,503.16

Hudson Structural Iron Works	6,717.40	
Interest	537.39	7,254.79
Orange Hardware Co.	254.82	
Interest	20.40	275.22
Juliano Construction Co.	30,000.00	
Interest	2,400.00	32,400.00
Joseph Amorose ..	12,000.00	
Interest	960.00	12,960.00

being concurrent liens and to be paid pro rata.

To be thirdly paid:		
Rollin J. Francis, Trustee	55,485.12	
Interest from May 15, 1927	2,566.93	58,052.05
To be fourthly paid:		
Hudson & Essex Building & Construction Company	9,500.00	
Interest from April 9, 1926	840.00	10,340.00

,,

The only exceptions filed to this report were filed by the Hudson & Essex Building & Construction Co. (See State of Case, pp. 90 to 93.)

Notice was thereupon given to all interested parties that application would be made for an order confirming the report.

On May 19, 1928, an order was entered to that effect (State of Case, pp. 93 to 96).

It is from that order that these appeals were taken.

The above is only a sketch of the general situation, and various other important facts will be referred to in the argument.

POINT 1.

As to the appeal of the Service Trust Co., Substituted Trustee, these respondents repeat the argument outlined in the brief filed herein by the Hudson & Essex Building & Construction Co., to wit:

The Service Trust Co., Substituted Trustee, filed no exceptions to the Master's report, but were represented by counsel when the Master's report of the only exception filed thereto was brought on for hearing before a Vice-Chancellor. (See Order Confirming Master's Report, State of Case, pp. 93-96.)

Therefore the question now raised by its appeal as to the $8,000.00 item and as described in its appeal, the $58,052.05 item not having been raised in the court below by proper exception, should be dismissed.

Furthermore, as was suggested in the brief of the Hudson & Essex Building & Construction Co., the Service Trust Co., Substituted Trustee, filed an answer to the petition of appeal filed by the Hudson & Essex Building & Construction Co. (State of Case, pp. 10-11), which concludes as follows:

> "This appellee (Service Trust Co., Substituted Trustee) is advised and believes that the said decree is agreeable to equity, and prays that the same may be affirmed with costs to be taxed in favor of this appellee."

This answer in the petition of appeal was dated June 9, 1928, so it is perfectly obvious that a notice of appeal dated June 27, 1928, and a

petition of appeal which must have been filed subsequent thereto by the same party who filed the answer just quoted from, to wit: Service Trust Co., Substituted Trustee, could not thus question the order now under review. But aside from the technical reasons, let us point out a dispositive answer on the merits of the case with respect to these items:

As to the $8,000.00 item; this is a payment apparently made by G. L. Miller Co., for the purpose of cancelling a prior mortgage held by the Estate of Anna M. Day, which admittedly was a lien not only on the property covered by the Miller mortgage but also on other property (State of Case, p. 161, ll. 20 to 40).

The case of *Improved Building & Loan Association* v. *Larkin*, 88 N. J. Eq. 52, amply sustains the above contention.

Now as to the item referred to in the brief of the Service Trust Co., Substituted Trustee, as $58,052.05; this item (See State of Case, p. 89, ll. 38-39.), really consists of two parts:

a—Rollin J. Francis, Trustee	$55,485.12	
b—Interest from May 15, 1927	2,566.93	
Total		$58,052.05

A computation of the figures in the Master's report (State of Case, p. 85), will show the various items that go to make up the above total, to wit:

"Commission	$21,500.00
Disbursing and selling expenses	2,150.00
Bond issue expenses	3,225.00
Consulting architect	1,075.00

Interest from May 15, 1926, to May 15, 1927,	$15,050.00	
Less interest assumed ..	627.08	14,422.92
Income tax May 15, 1926, to May 15, 1927		600.00
Trustee's fees for same period		200.00
Fire		12.20
Taxes		1,000.00
Premium on completion bond		3,000.00
		$47,185.12"

To these figures totaling $47,185.12 is to be added the $8,000.00 item just referred to, for cancellation of the Day mortgage.

Before commenting on the various items in the schedule just enumerated, appellees desire to repeat again that the Miller mortgage was not recorded until long after building operations commenced. Therefore the question of the priority of the money advanced on the Miller mortgage is to be determined by Section 15 of the Mechanics' Lien Act which provides:

> "Every mortgage given or to be given upon lands in this State shall have priority over any claim that may be filed in pursuance of this act to the extent of the money actually advanced and paid by the mortgagee and applied to the erection of any new building upon the mortgaged lands or any alterations, repairs or additions to any building on said lands; provided, such mortgage be registered or recorded before the filing of any such claim."

Had the question before the Special Master in this case been merely that of proving a debt as between the mortgagor and the mortgagee, there might be no serious objection to the sufficiency of the item just enumerated.

The Special Master however, was concerned with more than that, since the fund available was insufficient to pay all claimants and lien holders and the question of priorities was to really determine who was to get paid and who was not. It must be remembered that prior to 1895 a lien claim had priority over a mortgage given after the building was begun. Citing Justice Swayze in *Franklin Society* v. *Thornton*, 85 N. J. Eq. 525, it was only by virtue of subsequent legislation that mortgages were given protection, but the protection as we have seen it by reading Section 15 is limited to the extent of the money actually advanced and applied in the erection of a new building, etc. To obtain this protection at the expense of mechanics and material men, it has been said by our courts:

> "The mortgagees must prove that the moneys secured were actually advanced and paid by them and applied to the erection of the building upon the lot mortgaged."
> *Improved B. & L. Assn.* v. *Larkin,* cited *supra.*

> "The only test is whether the money has been loaned for the erection of, or alteration, repair or addition to the building and has been actually applied for that purpose."
> *Young* v. *Haight,* 69 N. J. L. 456.

Appellees do not believe that it is necessary to cite any further decisions to convince this Honorable Court that the payments or deductions made by G. L. Miller & Co. for commissions, selling expense of bonds, bond issue expense, consulting architect, interest in advance on a mortgage

which was never fully advanced, and for a period beyond the date of the cessation of payments to the mortgagee, and for income tax, trustee fees, taxes and premium on a completion bond, are clearly not items of money advanced for the erection of a building and actually applied to that purpose.

Apparently, the Service Trust Co., Substituted Trustee, was not certain of its own position as will be seen from an examination of page 13 of its brief. These appellees can see no logical or legal basis for the argument that because the mortgage is given to secure bonds which are to be sold to the public at large, that a lien is created which served notice on mechanics that the public is relying on the mortgage and that an innocent holder of a bond purchased from Miller & Co. is entitled to a lien to the full extent of the bond held and owned by such purchaser.

We therefore respectfully urge that the appeal of the Service Trust Co., Substituted Trustee, should be dismissed.

POINT 2.

As to the appeal of the Hudson & Essex Building & Construction Co. we will now briefly amplify the facts in connection with the mortgage of that company.

The original mortgage held by the Hudson & Essex Building & Construction Co. was in the sum of $15,000.00 and was dated April 9, 1926, recorded April 16, 1926, in Book T 57 of Mortgages for Essex County, pages 13 to 15.

It was a purchase money mortgage given by James Haines when he purchased the entire tract referred to in the facts at the beginning of this

brief. It was a second mortgage being second in priority to the $8,000.00 mortgage held by the Estate of Anna M. Day referred to in this brief. As was stated before, Haines conveyed the entire tract to Franklin Arms, Inc., the defendant in the insolvency bill which led to the appointment of the receivers, and when the G. L. Miller Co. recorded its mortgage it desired of course to have its mortgage a first lien. Miller & Co. therefore paid the Day mortgage of $8,000.00 and the Hudson & Essex Building & Construction Co. first released the lien of its mortgage from the balance of the tract receiving as consideration for this release, a new mortgage on the land described in the release of $5,500.00, and then postponed the lien of the balance then due on its mortgage, to wit: $9,500.00 to the lien of the Miller mortgage of $215,000. (See State of Case, pp. 141-142.)

The postponement contained among other things the following clause:

> "The party of the first part (Hudson & Essex Building & Construction Co.) postpones and subordinates the above-stated mortgage made to it (T 57-13, 15) and the lien thereby acquired on the premises therein described, to the said party of the second part (Rollin J. Francis, Trustee) in favor of said mortgage for $215,000 and interest made to the said party of the second part as trustee, so that said mortgage shall be the first lien in order of priority and superior to the lien of the mortgage to said Hudson & Essex Building & Construction Co."

Nothing was contained in said postponement concerning any conditions or covenants or agreements to be performed by Rollin J. Francis, Trustee or G. L. Miller & Co. or by any one else in order that said postponement should be

effective. It was an absolute postponement of lien.

These appellees recognized the fact that if the Miller mortgage had not been recorded and the mortgage of the Hudson & Essex Building & Construction Co. had been in its original position as a lien on that portion of the property on which the building operations described herein were had, there would have been no doubt as to the priority of the Hudson & Essex Building & Construction Co. over their lien claims.

The first point taken up in the brief of the Hudson & Essex Building & Construction Co. is that under the so-called doctrine of marshaling, their mortgage should have been ordered paid prior to the mechanic lien claims. Much stress was laid by this appellant both before the Special Master and the Vice-Chancellor, and now again before this Honorable Court, in its brief, that the case of *Hoag* v. *Sayre*, 33 N. J. Eq. 552, was a controlling decision in favor of its contention. These appellees do not agree with this contention.

The following is a definition given of marshaling in 38 Corpus Juris, at page 1365:

> "The doctrine of marshaling assets and securities is that, where a creditor has a lien on two funds in the hands of the same debtor, and another creditor has a lien on one of them only, equity, on the application of the latter, will compel the former to make his debt out of that fund to which the latter cannot resort."

In the case of Hoag *v.* Sayre, just quoted, the dispute was between the owners of two mortgages and the holder of a judgment. There was nothing in that case similar to the postponement of mortgage executed by the Hudson & Essex Build-

ing & Construction Co. and all of the arguments and reasons advanced by appellant in its brief do not and cannot, it seems to these appellees, overcome the force and effect of the executed document, to wit: the postponement of mortgage which was recorded and became notice to all contractors and material-men who now contend the their claims should be prior to the amount due on the Hudson & Essex Building & Construction Co. mortgage. Surely the mechanics' lien claimants are not responsible for the failure and neglect of the G. L. Miller & Co. or Rollin J. Francis, Trustee, to advance the full amount of the mortgage loan or to exercise due diligence so that the money actually advanced on the mortgage was used in the erection of the building

The case of *Bloom* v. *36 Berwyn St. Corp.*, 136 Alt. Rep. 803 (not yet officially reported) has no application in connection with this case, because, in that case, it was admitted that the entire proceeds of the mortgage loan had been actually advanced and used in the erection of the building.

The case of *Franklin Society* v. *Thornton*, 85 N. J. Eq. 525, Court of Errors and Appeals, has no application to the present case because, under the facts in the case just quoted, the question of priorities as between mortgagees and lien claimants came within Section 14 of the Mechanics' Lien Act and not Section 15 as does the present case.

Appellees seriously contend that even although the mortgage of the Hudson & Essex Building & Construction Co. had all of the recognized attributes of a purchase money mortgage, that when the holder of that mortgage first released a portion of the land described therein and then

postponed the lien as to the balance, to a mortgage which was admitted to be a construction mortgage, that it then lost its purchase money mortgage characteristics as against mechanics' lien claimants and under no circumstances should it be given a position of priority ahead of mechanics' lien claimants, especially in view of the fact that the construction mortgage failed to advance the full amount of its mortgage.

Appellees respectfully urge that this is not a case for marshaling of assets in direct opposition to the postponement executed and delivered by the party seeking to invoke such an equitable rule.

As to the argument advanced by the Hudson & Essex Building & Construction Co. under Point 2 of its brief, these appellees do not see how the breach by Miller & Co. can in any way take away the effect of the postponement of mortgage executed and delivered by the Hudson & Essex Building & Construction Co.

As to that portion of the argument dealing with the paragraph in the order of the Court of Chancery providing for the sale of this land (State of Case, p. 54, l. 32) in which it was provided that the amount due the Hudson & Essex Building & Construction Co. on its mortgage, to wit: $9,500.00, with accrued interest, should be paid in full from the proceeds of sale without any deduction for administration expenses or costs of sale, these appellees state that this provision was placed in the order in absolute good faith.

It will be seen from a reading of the order and from the petition filed prior thereto by the receivers, that it was necessary in order to give the Court of Chancery jurisdiction to sell the

real estate of the defendant corporation, free and clear of all liens, to allege and prove the jurisdictional facts in Section 81 of the Corporation Act, namely, that the legality of the liens was brought into question and that the property was of a character materially to deteriorate in value pending litigation.

The receivers having in mind the case of *Bahler* v. *Robert Treat Baths,* 100 N. J. Eq. 525, knew they could not confer jurisdiction by having the holder of any mortgage consent to the order providing for the sale free and clear of the liens, and therefore, inasmuch as the amount due on the Hudson & Essex Building & Construction Co. mortgage was not disputed, had inserted in the order of sale the paragraph just quoted, but did not as will be seen from a reading of the order, make any provision as to where said mortgage would be placed in the determination of priorities as between it and the other liens on the property. Certainly the Court of Chancery by such a provision in an order could not deprive other lien holders of their right to payment, if, by a later determination in the case fixing the order of priorities it so happened that the prior liens fixed in such determination exhausted the fund then in the hands of the Chancery receivers. It must be remembered that at the time of the making of the order just cited, neither the Court of Chancery nor its receivers knew or had any idea how much would be realized from a sale of the property of the defendant corporation.

With respect to the portion of the order of November 16, 1926, (State of Case, pp. 59-60) these appellees contend that the argument just given with reference to the terms of the order of

November 9, 1926, is equally applicable to the terms of this order.

It is difficult to understand why two orders were entered, both practically for the same purpose, to wit, the order of November 9th and that of November 16th, set forth in the State of Case, pp. 50 and 55 respectively, but the probability is that the solicitor of the receivers, in haste, overlooked the fact on November 16th that he had already entered an order on November 9th for the same purpose.

It is naturally embarrassing for the receivers to attempt to explain a provision of an order entered on their application which seems to be dispositive of the position of priorities with respect to the Hudson & Essex Building & Construction Co. mortgage, but it is contended that in the final analysis, the Court of Chancery cannot, by an order, enlarge the rights of a creditor in a receivership matter without a full hearing having been given to other creditors and lien holders whose rights and equities would be prejudiced by such a provision in an order.

The rights of the Hudson & Essex Building & Construction Co. were not prejudiced because they are now having a full hearing on this appeal and the determination of this case before this Honorable Court should result in the placing of its mortgage in its proper position of priority with respect to other lien holders and creditors.

POINT 3.

Appellees contend that a determination of the equities of the three contending lienors in this matter, to wit:

first, the Miller mortgage,

secondly, the Hudson & Essex Building & Construction Co. mortgage, and

thirdly, mechanics' lien claims,

should have been and were decided by the Special Master to whom the matter was referred by the Court of Chancery in the same way and manner as if the hearings which were held were the final hearings in a foreclosure suit instituted by either one of the mortgagees in question. There was no question but that as between the mortgagor and mortgagee in the Miller mortgage, there was due on the mortgage of $215,000.00 the sum of $99,885.12, this being the aggregate of the two items found by the Special Master as set forth on page 89 of the State of Case, to wit: $44,700.00 and $55,185.12, and there is no question but what the amount due on the second mortgage held by the Hudson & Essex Building & Construction Co. was $9,500.00 with interest. There is no serious doubt but what the amounts due on the respective lien claims of appellees were proven as set forth in the Master's report on page 86, State of Case. As has been said so many times in this brief, the sole question then was one of priorities as between the mortgagees and lien claimants.

It is of course true that under the wording of Section 15 of the Mechanics' Lien Law the second mortgage of the Hudson & Essex Building & Construction Co. having been recorded prior to the commencement of the building operations on the land in question, should have been prior to the amounts due on the various mechanics' lien

claimants, but in view of the fact that the holder of the mortgage in question had postponed the lien of its mortgage to the full amount of the lien of the Miller mortgage, to wit: $215,000.00, it became a practical impossibility to place the Hudson & Essex Building & Construction Co. mortgage prior to the lien claims, but subsequent to the full amount advanced on the Miller mortgage.

The real complaint at all times by the holder of the Hudson & Essex Building & Construction Co. mortgage has been and still is that the holder of the Miller mortgage was derelict in its duty in two particulars, first, in neglecting to advance the full amount of the mortgage; secondly, to properly apply the proceeds of the mortgage which were advanced and to see to it that the proceeds were actually applied to the building being erected upon the land in question.

Appellees do not see that the doctrine of marshaling as defined by New Jersey cases on that subject has any application to the present situation as against them, but they do contend that the Hudson & Essex Building & Construction Co. have a perfect right to request a marshaling as against the holder of the Miller mortgage due to the fact that it was by reason of the neglect of the holder of this mortgage as just stated, that the lien claims of appellees were legally placed in a position of priority.

An examination of the voluminous testimony taken by the Special Master will show conclusively that the holders of the Miller mortgage spent most of their time at the hearings before the Special Master attempting to prove their case in a very round-about manner. There is a great deal of useless, immaterial and irrelevant testi-

mony and far too much of the record taken up in lengthy speeches and haranguing of counsel.

It is respectfully contended that a reading of the testimony will show conclusively that not one single penny of the money actually advanced by G. L. Miller & Co. under the terms of its mortgage was really proven to have been paid by the mortgagee and applied to the erection of the building.

The rule in this connection was laid down very plainly by the late Vice-Chancellor Stevens in the case of *Improved B. & L. Ass'n* v. *Larkin*, cited *supra* in the following language:

> "If labor or material have gone into the building, money lent to pay for such labor or material would, of course, be within the rule, and, equally, it seems to me, would be money lent to pay a contractor or sub-contractor to whom, under his contract, payment is due for work actually done. *But money paid to a person charged with the duty of paying such contractor does not come within the rule*, unless it be further proved *that such money was actually paid over.*"

Appellees believe that from an examination of the testimony in the record, it will be found that Franklin Arms, Inc., had other moneys in their various accounts besides the sum of $44,700.00 paid to it by G. L. Miller & Co., and also it will be found that none of the three bank accounts mentioned in the testimony exclusively contained Miller money. These appellees agree that there is a great deal of testimony in the record which may be difficult to believe, but the burden of proving its respective contentions was upon Miller & Co. to prove not only the amount advanced but to prove to whom it was advanced and to prove that it actually was applied to the erection of the building.

The following excerpts from the testimony appellees think will be illuminating on this subject:

State of Case, p. 237, ll. 39, 40; p. 238, ll. 1 to 21;

> "Q And these same bank accounts that you testified to here, they were maintained by the company, Franklin Arms, Inc., were the accounts that you deposited this other money that you and your brother raised? A I think I deposited some of the money, yes. I think there was one deposit about $9,000, and I think there was a $1,000 deposit, and then I brought money to my brother—you see, payrolls we have to use cash—I brought money to my brother and he paid out.
>
> Q Were any of the bank accounts in the name of the Franklin Arms, Inc., exclusively money from Miller—any one of the three that you can recall? A Any of the bank accounts?
>
> Q Yes; for instance, you had three bank accounts? A Yes.
>
> Q Now, were any one of those three bank accounts solely money which came from Miller? A No, not solely."

State of Case, p. 239, ll. 25 to 39; on cross examination,

> "Q Now, what I would like to know is this: every check that you issued on those three accounts for the withdrawing of any money was not used in gambling, was not used in speculating, it was used for materials and labor in that building, wasn't it? A For various purposes.
>
> Q For building itself? A For the building and for other purposes.
>
> Q What other purposes? A Well, outside of building we went around to look over property; we had several—they bought a machine, I think—I don't know how much they paid in, whether $1,000 or $2,000 payment."

On cross examination, State of Case, p. 241, ll. 12 to 22;

> "Q Do you want to go on record as saying that the testimony you gave the other day when you said that all of the money which was given to the Franklin Arms, Inc., or was in Franklin Arms was used for the erection and construction of that building is not true? A I don't say it wasn't true; it was used for Franklin Arms and for the purpose of advancing the building and any other proposition connected with the building or connected with real estate or building."

State of Case, p. 241, ll. 36 to 39;

> "Q What other business do you say Franklin Arms had besides this particular building? A Had general real estate and general building."

Furthermore, it was testified that many of the payments made to contractors were made in cash, State of Case, p. 309, ll. 31, 32, 33;

> "Q Were there any cash payments made to the concern, to the Juliano Construction Co.? A Yes.
>
> Q There were cash payments? A Yes."

Under these conditions of proof before the Special Master, which is the only testimony upon which this Honorable Court can base its determination as to whether or not the order appealed from should be affirmed, reversed or modified, it is respectfully contended that the order of priorities should have been

1st—Payment of the mechanics' lien claims;

2nd—Miller mortgage, $99,885.12;

3rd—Hudson & Essex Building & Construction Co., $9,500.00 plus interest,

with a further direction that from the money due on the Miller mortgage, the amount due on

the Hudson & Essex Building & Construction Co. mortgage should have been paid, because of the breach of the contract on the part of Miller & Co. and because of its failure to properly apply the proceeds of the mortgage money to the building being actually erected on the land in question. The practical result of this in the distribution of the fund of $110,000.00 would have been payment in full to the mechanics' lien claimants of the aggregate of their claims, to wit: $59,-349.01, and payment to Miller & Co. of the balance of $110,000.00 fund, or $50,650.99, from which however, there would have been paid to Hudson & Essex Building & Construction Co. the sum of $9,500.00 with interest. This, is contended, would not only have been equitable to all interests concerned, but would also have been in absolute harmony with the decision of this state with respect to the rights of mechanics' lien claimants under the facts and circumstances as they existed at the time of the appointment of the receivers by the Court of Chancery. Inasmuch as the appeal of the Hudson & Essex Building & Construction Co. was from the entire order of May 19, 1928, confirming the Special Master's report, this Honorable Court has a perfect right to go into all the findings of the Special Master, including the finding of $44,700 to be firstly paid to Rollin J. Francis, Trustee, under the Miller mortgage, especially in view of the fact that the Hudson & Essex Building & Construction Co. filed exceptions to said Master's report, and thus properly raised the question before the order was entered confirming the Special Master's report.

In conclusion it is therefore respectfully urged and strenuously contended that the order of May 19, 1928, should either be affirmed or modi-

fied in the way and manner hereinbefore set forth.

Respectfully submitted,

STEIN, McGLYNN & HANNOCH,
Solicitors of Appellees.

EDWARD R. McGLYNN,
Of Counsel.

New Jersey Court of Errors and Appeals

Between

ALBERT & KERNAHAN, INC., a corporation,
Complainant,

and

FRANKLIN ARMS, INC., a corporation,
Defendant.

ON APPEAL FROM THE COURT OF CHANCERY.

BRIEF OF SERVICE TRUST COMPANY OF NEW JERSEY, SUBSTITUTED TRUSTEE, APPELLANT.

Statement of the Case.

This appellant, the Service Trust Company of New Jersey, substituted trustee, appeals from an order of the Chancellor, on the advice of Vice-Chancellor Church, made on the 19th day of May, 1928 (State of Case, p. 93), as a result of which order or decree, this appellant will suffer the loss of Sixty-three thousand four hundred eighty-five ($63,485.12) Dollars and twelve cents. This appellant's notice of appeal is printed on page 12 of the State of the Case and the petition is on page 15.

An appeal has also been taken by the Hudson & Essex Building & Construction Co., the holder of a mortgage for Nine thousand five hundred ($9,500.00) Dollars, which appeal we shall con-

tend should be dismissed for want of merit. The Service Trust Company of New Jersey is substituted trustee of a mortgage in the sum of Two hundred fifteen thousand ($215,000.00) Dollars originally made by the Franklin Arms, Inc., a corporation, to Roland J. Francis, trustee, dated May 15th, 1926. It was recorded June 17th, 1926, in Book W-57 of Mortgages, page 64 (State of Case, page 104). The mortgage and the underwriting agreement bearing date the 15th day of May, 1926, made by the Franklin Arms, Inc., with G. L. Miller & Company, Inc., as underwriter, recorded on the same day, constitute the contracts between the parties, and reference is being made to them at this point because they do not appear as exhibits in the State of the Case.

This matter was referred by Vice-Chancellor Church to Mr. Roy F. Anthony, as Special Master, under an order bearing date, May 31st, 1927.

In the early part of 1926, James Haines purchased a tract of land on Franklin Street, Bloomfield, New Jersey. The property was then encumbered by a mortgage held by the estate of Anna M. Day, which mortgage also covered other land. This mortgage was paid by the trustee under the terms of the Two hundred fifteen thousand ($215,000.00) Dollar mortgage. Claim was made that this payment was a payment which constituted a priority as against Mechanic Lien claimants. James Haines executed a purchase money mortgage for Fifteen thousand ($15,000.00) Dollars to Hudson & Essex Building & Construction Co. covering this land and the tract adjoining it. The Hudson & Essex Building & Construction Co. executed and delivered a postponement to the trustee under the Two hundred fifteen thousand ($215,000.00) Dollar mortgage on June 3d, 1926. In the brief of counsel for the Hudson & Essex

Building & Construction Co. on the entire appeal taken by this company, no reference is made to this postponement. We shall discuss this matter at some length hereinafter.

Certain moneys were advanced to the owner by the trustee under the mortgage, the Master allowing Forty-six thousand seven hundred fifty-nine ($46,759.92) Dollars and ninety-two cents as a first lien prior in payment to all other liens, and allowed to be secondly paid, approximately Sixty thousand ($60,000.00) Dollars to lien claimants, all being concurrent and to be paid pro rata. The sum of Fifty-eight thousand fifty-two ($58,052.05) Dollars and five cents was allowed to be thirdly paid to Roland J. Francis, trustee under the mortgage, or the substituted trustee, Service Trust Company of New Jersey. All of these items and the manner of payment appear on pages 89 and 90 of the State of the Case. The Master disallowed the Eight thousand ($8,000.00) Dollars mortgage which was paid (State of Case, page 85, line 40). The building and land were sold under an order of the Court, the sum of One hundred ten thousand ($110,000.00) Dollars being realized, which fund the Special Master recommended be distributed as stated on pages 89 and 90 of the State of the Case. From the report filed by the Master, an order was made confirming the same in all respects by the Chancellor upon advice of Vice-Chancellor Church.

The two appellants in this cause are the Service Trust Company of New Jersey as substituted trustee on the order made by Vice-Chancellor Church, and the Hudson & Essex Building & Construction Co., a mortgagee. The original petition of appeal filed made no attack on the order insofar as it directed payment to Roland J. Francis as trustee or the Service Trust Company of New

Jersey as substituted trustee, in the sum of Forty-six thousand seven hundred fifty-nine ($46,759.92) Dollars and ninety-two cents. Thereafter, an amended petition of appeal was filed attacking this aspect of the order. It is our contention that the appeal of the Hudson & Essex Building & Construction Co. should be dismissed for want of merit, and that the order of the Chancellor should be reversed insofar as it attempts to subject the claim of Roland J. Francis as trustee, or the Service Trust Company of New Jersey as substituted trustee, to the lien claimants, our contention being that the Fifty-eight thousand fifty-two ($58,052.05) Dollars and five cents is a prior lien to the Mechanics Lien Claims directed to be paid secondly (State of Case, page 89).

POINT I.

The Forty-four thousand seven hundred ($44,700.00) Dollars payments together with interest are clearly entitled to priority to the exclusion of all other liens.

It is an undisputed fact in this case that the trustee under the mortgage advanced Forty-four thousand seven hundred ($44,700.00) Dollars in the actual construction of the building. The Master in his report (Case, page 83) analyzes all of the payments with accuracy and precision. Mr. Julius Haines testified that the Forty-four thousand seven hundred ($44,700.00) Dollars so received was used for materials furnished and work performed in connection with the erection of the building. The Master's findings with regard to this aspect of the case were never questioned or assailed. There is plenary proof to justify the decision and the fact is that the present appellant

did not, in the original petition of appeal, consider it even advisable to take an appeal from the decision. As we read the brief of the appellant there is no serious question even now raised as to this aspect of the case. Pages 12 and 13 of counsel's brief obviously approve of the Master's finding on this score. We therefore contend that the order made by the Chancellor on this aspect of the case is unchallenged. Legally and equitably it is unassailable. The order should therefore be affirmed insofar as this item is concerned.

POINT II.

The two hundred fifteen thousand ($215,000.00) Dollar mortgage is prior to that of the Hudson & Essex Building & Construction Co. because of postponement dated June 3rd, 1926.

The Hudson & Essex Building & Construction Co. mortgage was originally for Fifteen thousand ($15,000.00) Dollars. This mortgage was reduced. The company executed a postponement to the trustee mortgage of Two hundred fifteen thousand ($215,000.00) Dollars which provided as follows:

> "The party of the first part postpones and subordinates the above stated mortgage made to it, and the lien thereby acquired on the premises therein described, to the said party of the second part in favor of said mortgage for $215,000 and interest, made to the said party of the second part, as Trustee, so that said mortgage shall be the first lien in order of priority and superior to the lien of the mortgage to said Hudson & Essex Building & Construction Company."

In the light of this agreement, it is inconceivable how the Hudson & Essex Building & Construction Co. can assert any priority over the entire sum found to be due on the trustee's mortgage. The contract between the parties must control. The rights of the parties are fixed and determined. The Master, in his report, makes this statement, and we agree with it:

> "I am entirely unable to follow the course of reasoning by which they reach this conclusion" (Case, page 87, line 15).

It is useless to further argue this question. The rights of the parties under the terms of the agreement of postponement and subordination are clear and decisive and determine the respective rights of participation in the fund. The trustee's mortgage is given priority. There was no alternative left to the Master except to make a decision in accordance with this agreement, and in this agreement we concur. It is clear, therefore, that the trustee's mortgage is entitled to priority on both items. This is in accordance with the findings of the Master and the confirmation of the Court.

We think that the argument made under Points 1 and 2 with regard to the so called doctrine of marshalling has no application to the case at bar. Counsel misconstrues the application of the decision of *Hoag* v. *Sayre,* 33 E. 552, in attempting to apply it to the state of facts in this case. The marked and distinguishing feature is this: Were the mortgage of Nine thousand five hundred ($9,500.00) Dollars to be relegated to a position in excess of Two hundred fifteen thousand ($215,000.00) Dollars, then and only then, would the doctrine be in vogue; but, whereas, in this case the junior mortgagee is kept in its original position as defined by the contract of subrogation, the doctrine

does not apply and the party is denied the right to make complaint of what his own judgment has created.

The Court will appreciate the fact that the trustee in bankruptcy was not a party to these proceedings. G. L. Miller & Company, Inc., were not represented. If the present mortgagee has a complaint or grievance against that company, they certainly have no right to assert the same in this proceeding. It is not within the issues of this cause. If the Hudson & Essex Building & Construction Co. have a grievance or complaint against the G. L. Miller & Company, Inc., they are, of course, privileged to institute an independent action or file a claim with the trustee in bankruptcy. No damages or proof of damages were offered in this cause upon this theory, or if an attempt to offer same were made, it would be clearly objectionable.

The mortgage, under its terms and provisions, and under the provisions of the agreement, clearly indicates that it was dealing with a building to be erected and constructed. When the postponement and subordination were executed, the mortgagee knew of that fact, or should have known. The subrogation and postponement were executed. In doing so, priority was given to the mortgage of Two hundred fifteen thousand ($215,000.00) Dollars. In accordance with this contract, therefore, the Court could not do other than it did, namely, find in favor of the mortgage of Two hundred fifteen thousand ($215,000.00) Dollars and direct priority to the extent of the item of Forty-four thousand seven hundred ($44,700.00) Dollars with interest, amounting in all to Forty-six thousand seven hundred fifty-nine ($46,759.92) Dollars and ninety-two cents, and priority in the sum of Fifty-five thousand four hundred eighty-five ($55,485.12)

Dollars and twelve cents, with interest, amounting to Fifty-eight thousand fifty-two ($58,052.05) Dollars and five cents. The trustee is entitled to a judgment in this Court affirming the order of the Court of Chancery as to both items.

Counsel refers to the case of *Cummings* v. *Jackson,* 55 E. 805, which is a decision of the Court of Errors and Appeals. This case has absolutely no application to the case at bar. It will be noted that the agreement contained various conditions, the violation of which destroyed the legal efficacy of the subordination in this case. In the case at bar, there was no such contract, and the subordination was absolute and unconditional, and the subject matter of the contract was entirely different. We think that the entire argument made by counsel on this phase of the case has no application whatever to the facts under discussion in the case at bar.

POINT III.

The Court below erred in decreeing that Fifty-eight thousand fifty-two ($58,052.05) Dollars and five cents should be paid thirdly instead of secondly and was subject to the Mechanics Lien claims amounting to approximately Sixty thousand ($60,000.00) Dollars.

The facts insofar as the application of this point is concerned are that the Court decreed that the Fifty-eight thousand fifty-two ($58,052.05) Dollars and five cents be paid thirdly and permitted claims approximating Sixty thousand ($60,000.00) Dollars to be paid secondly. This, we contend, constituted error. In the first place, the Juliano Construction Co. lien of Thirty thousand ($30,-

000.00) Dollars was not properly and legally proven. All the ingredients essential to establish this claim were not adduced. We desire especially to call the Court's attention to this testimony, page 101. It is very brief and only covers about one page of the record. We do not think that this claim is entitled to priority and in so adjudicating, the Court committed legal error.

An agreement to pay an indebtedness where the lien has been discharged, as in this case, certainly does not entitle one to priority, the lien claim having been discharged as appears under this testimony. It is our view that the claim must be recorded as that of a general creditor without preference. The very theory of the Mechanics Lien Law presupposes the fact that a claim is being set up as against the premises by virtue of the right accorded a materialman or laborer. Where the lien is not asserted in accordance with the mandate of the Statute, the priority contemplated becomes extinct and the character of the claim, that of a general claim. To this extent we believe that error was committed by the Master in his report and the Court fell into error in confirming the same. This opinion of ours is further confirmed by the testimony of James Haines (State of Case, page 335, line 15):

> "Q. And that is true of the Juliano Company, you did not owe them any money at the time of the receivership? A. Not according to contract."

We have carefully read the record insofar as the other Mechanic Lien claimants' liens are concerned and believe that they are all entitled to their claims with the exception of the Juliano Company claim. It is our view, therefore, that the

Court should affirm the order of the Court of Chancery in the following respects:

To be firstly paid:

Roland J. Francis, Trustee, or Service Trust Company of New Jersey, or its solicitors with interest.	$44,700.00

To be secondly paid:

Roland J. Francis, trustee	$55,485.12

Except the further sum of Eight thousand ($8,000.00) Dollars which we will hereafter argue should also be added to this item.

To be thirdly paid:

The lien claims to the extent that they are properly proven, especially excluding the Juliano Construction claim.

To be fourthly paid:

Hudson & Essex Building & Construction Co.	$9,500.00

POINT IV.

Service Trust Company, substituted trustee, has a right to appeal from the order of the Court of Chancery and surely has a right to take advantage of all exceptions filed by any exceptant on appeal.

The rules referred to under Point 4 of counsel for the appellant, the Hudson & Essex Building & Construction Co., have no bearing on the subject matter of this litigation. We are in accord with the finding of the Master and the confirmed finding of the Court of Chancery insofar as the mort-

gage of Hudson & Essex Building & Construction Co. are concerned. We can find no error in this decision. On the contrary, we think that the Hudson & Essex Building & Construction Co.'s position was one created by contract and the Court was in no position to extend to them any greater rights than they themselves contracted for.

With regard to the exceptions which were filed as to the position of the Mechanics Lien claims, as we have contended under Point 3, we have but one complaint to make, and that is with the position of the Juliano Construction Co. claim. We think the Court committed error and in this respect we agree with the Hudson & Essex Building & Construction Co. The Juliano claim is that of a general creditor and should be placed fifth and subsequent to the Nine thousand five hundred ($9,500.00) Dollar mortgage of the Hudson & Essex Building & Construction Co.

POINT V.

We believe that the Court committed error in disallowing priority on the trustee's mortgage on the items referred to on page 85 of the State of the Case, amounting to Fifty-eight thousand fifty-two ($58,052.05) Dollars and five cents, and likewise committed error in refusing to include as a prior claim, the Eight thousand ($8,000.00) Dollars paid to discharge a purchase money mortgage covering the land.

It has always been our impression that under the law, these were claims and such items as entitle the mortgagee to priority under a mortgage such as the one in question. The Master in his

report cited the cases under which these items should be disallowed.

We have not argued, because we believe that there is a serious question involved, that the sum of Fifty-eight thousand fifty-two ($58,052.05) Dollars and five cents is prior in right to all of the Mechanics Liens. The case is one of novel impression since the Mechanics Lien Law has become effective in this State. Prior, however, to the enactment of this legislation, there has been no question but that mortgages such as the one in question have been looked at with an entirely different legal view from the ordinary mortgage effecting real estate. In the case of *Central Trust Company* v. *Continental Iron Works,* 51 N. J. E. page 605, J. Van Syckel, speaking for the Court said:

> "If this well-established doctrine is shaken it will destroy the value of millions of securities of railroad and other corporations which have been negotiated on the faith of the priority of the mortgage which secures their issue.
>
> "In the case before us the lien claimants show no superior equity. They had full notice of the existence of the mortgage and the title which passed thereby to the trustee, and the purpose of the company to put the mortgage bonds upon the market for sale to bona fide purchasers without notice of the mechanics' lien. Charged with such knowledge, they took no active measures to restrain the issue of the bonds."
>
> * * * * * *
>
> "Aside from these adjudications, the bonds of corporations, secured as are these bonds, are dealt with in commercial transactions and are treated, almost without exception, by the courts as a class by themselves, not subject, in all respects, to the stricter rules which pertain between natural persons."

In the case of *Porch* v. *Agnew Company*, 70 E. 328, it was likewise so held. In this one case decided since the Mechanics Lien Law legislation has been enacted, but with an infirmity existing which does not exist in this case, the Court likewise seemed to intimate that this distinction would apply despite the fact that the Mechanics Lien Law was enacted. If this view is to become the settled law of the State, then there can be no question that all of these items admittedly advanced by the trustee and paid to the mortgagor, are items which should have been allowed by the Master, and which should have been confirmed by the lower court and which entitle the mortgagee to priority over all Mechanics Lien claims.

We have argued this point last because we have entertained a grave doubt as to just what the view of this Court would be on this subject. It is our view, and we respectfully urge, that under the terms of the Francis mortgage which was a mortgage given to secure bonds in the sum of Two hundred fifteen thousand ($215,000.00) Dollars sold to the public at large to the extent of One hundred fifteen thousand ($115,000.00) Dollars, created a lien which served notice upon Mechanics who delivered materials of the fact that the public at large was relying on the instrument and as such innocent holder of a bond, was entitled to assert his claim to the full extent of the bond held and owned by him. This is the law which we think should be the law for the purpose of enabling proper financing of large enterprises in this State so that the public at large might have no hesitancy in purchasing bonds in the assistance of financing of projects of this character. The rule should now be enunciated by this Court.

If, therefore, the decision of this Court is that these items constitute priorities, then, and in that

event, the decree of the lower Court should be reversed and this Court should direct the payment of the moneys in the hands of the Receivers, in the following manner:

To be firstly paid:

To the substituted trustee, Service Trust Company of New Jersey, as a first lien,

a. $46,759.92
b. $58,052.05
c. ..... $ 8,000.00

with interest thereon.

To be secondly paid:

To Mechanics Lien claimants, the amounts justified by the proofs to the exclusion of the Juliano claim.

To be thirdly paid:

To Hudson & Essex Building & Construction Co. as their interest may appear.

WEINBERGER & WEINBERGER,
Solicitors for and of counsel with Service Trust Company of New Jersey, substituted trustee, appellant.

99 OCT.T.1928

New Jersey Court of Errors and Appeals

Between

ALBERT & KERNAHAN, INC., a corporation,
Complainant,

and

FRANKLIN ARMS, INC., a corporation,
Defendant.

On Appeal from the Court of Chancery.

REPLY BRIEF OF APPELLANT HUDSON & ESSEX BUILDING & CONSTRUCTION COMPANY.

It is intended hereby to correct certain statements set forth in the brief of Service Trust Company, substituted trustee, so that this Court, in reviewing the case, will not be confused or be misled thereby.

While we have no quarrel with the attempt on the part of said substituted trustee, in the first two paragraphs of its brief, to imitate the style of the original brief submitted on behalf of this appellant, we do find fault with the statement made in its first paragraph to the effect that Service Trust Company, substituted trustee, would suffer a loss of $63,485.12.

In our original brief we specifically point out and refer to each item of actual advance made under the Francis-Miller mortgage, which is now represented by said Service Trust Company, it having been substituted as trustee in place of Francis,

the original trustee thereunder. This item of $63,485.12, which is so mentioned in the brief of Service Trust Company, does not represent one dollar advanced by it, or anyone else, according to the proofs.

On page 3 of the brief of Service Trust Company it speaks of an item of $8,000 disallowed by the Master, and in Point V of its brief likewise refers to this item. There is not a word in all of the proofs that G. L. Miller & Company, or Francis, trustee, or Service Trust Company as substituted trustee, ever paid this item of $8,000. There was proof under the Francis-Miller mortgage of the items advanced thereunder, each advance having been made by check which was produced and proved, and is referred to in our original brief. No other advances were made as far as the proofs show, and it is therefore that the Master entirely and properly disallowed this item of $8,000. It is not included in his computation of $14,700, nor in his computation of the items appearing in the Master's report (p. 85, State of the Case). There was proof that there was an $8,000 mortgage on the premises in question and other property which had been paid, but presumptively by the owner of the property, Franklin Arms. Possibly this payment was made out of the advances made under the Francis-Miller mortgage to Franklin Arms, Inc. the items of which have already been pointed out, and which in the aggregate amount to the sum of $46,800, so that any alleged loss which may be suffered under the Francis-Miller mortgage (and such loss will, of course, not be suffered by Service Trust Company, as substituted trustee under that mortgage) would be of the items which we maintain in our original brief, and here repeat, never were advanced, but are inequitable, unconscionable and highly usuri-

ous charges, such as 10% commission for a supposed loan of $215,000; 1% of a supposed loan of $215,000 or $2,150 for alleged disbursing and selling expenses; 1½% of a supposed loan of $215,000 or $3,225 for bond issue expenses; three-quarters of 1% of a supposed loan of $215,000 or $1,075 for consulting architect's expenses, etc. There never was a loan of $215,000 made, but on the contrary, the mortgagee breached the contract to advance that sum, and certainly has no right to claim these items. Their disallowance will constitute no legal loss.

Counsel for Service Trust Company, as substituted trustee, at the end of the first paragraph on page 2 of its brief, says that the mortgage and underwriting agreement constitute the contracts between the parties, and that the same do not appear as exhibits in the state of the case. In the first place, counsel for the substituted trustee cooperated with counsel for this appellant in preparing the state of the case, and it was considered by both as unnecessary to encumber the record with these documents, and they were, therefore, not printed. This is permissible under Rule 19 of this Court. In the second place, counsel has not objected to this feature of the state of the case, and under Rule 19-A of this Court the state of the case must be taken as complete. But for the Court's information it is well to state that the purport of the mortgage and underwriting agreement appears at the end of the stipulation of counsel on page 142 of the state of the case, line 30; that is, that the same were given "to secure the sum of $215,000 agreed to be advanced thereon for the erection of the apartment house." The agreement and mortgage were made for the purpose of securing to Miller & Company $215,000 which it agreed to advance to Franklin Arms, Inc.

for the purpose of erecting the apartment house in question, and which was the inducement for this appellant's executing a postponement of its purchase money mortgage. The arrangement was between the three parties as follows: Franklin Arms, Inc. agreed to complete the apartment house for which purpose Miller & Company agreed to advance $215,000 if this appellant would postpone its money mortgage of $9,500 which in view of this agreement it did. But Miller & Company did not carry out its part of the bargain and defaulted. Miller & Company admittedly having defaulted in its agreement, we respectfully maintain has no right to insist upon the benefit secured to it thereby, and enforce this appellant's postponement of its mortgage to the benefit of Miller & Company, and to the serious and irreparable injury of this appellant, without bearing the burden of its own agreement upon the faith of which alone it secured the postponement of the appellant's purchase money mortgage.

In Point V of the brief of the substituted trustee, an issue of bonds seems to be discussed. There is not the slightest proof in this case that a single bond was ever issued, and what all this discussion has to do with this case is entirely foreign to us. It was not mentioned or discussed in the Court below. In fact it has been conceded throughout this litigation that no bond issue was here involved. What happened was this: In the Francis mortgage, provision is made that the *trustee* thereunder may issue bonds and sell the same, and apply the proceeds toward the advances required to be made under the mortgage for the erection of the building. Miller & Company, and *not the trustee,* apparently received moneys and delivered to the persons from whom the same were received, receipts generally, for the moneys

so received, with the agreement on the part of Miller & Company to deliver bonds in the amount received "if, as and when issued," or to refund the money with interest. Miller & Company would have the right to deliver to the person so paying, bonds secured by a first mortgage on any building enterprise in which it was interested, with its guarantee of payment of principal and interest thereon. Such transactions are nowadays common. But not a single bond was ever issued by the *trustee* or anyone else under the $215,000 mortgage here in question, so that that is entirely out of this case, and was conceded so to be. Not a single holder of a receipt of G. L. Miller & Company (none having been made by the trustee) can or might point to this mortgage as being his security. The trustee did not pretend to issue bonds for which the mortgage was to act as such security, for the obvious reason that no such bonds were sold, and were not likely to be sold until the building was completed and the advances made as agreed upon under the said mortgage, so that the mortgage would constitute a lien upon a completed building, for the amount advanced upon it.

Looking at the matter practically, it is hard to conceive that the public would be purchasing bonds purporting to be secured by a mortgage under which advances are to be made for the completion of a building, before the building was half finished, and before any money was advanced under the mortgage for its completion.

In Point II of the brief of the Service Trust Company, as substituted trustee (p. 5 of its brief), is recited the postponement of this appellant's mortgage to the Francis-Miller mortgage. These provisions, we respectfully contend, must be taken in connection with the circumstances surrounding

the parties at the time of their making. At the time that this document was executed there was nothing due upon the Francis-Miller mortgage, the same merely representing an intended security for moneys to be advanced thereon for the erection of the apartment house under the agreement.

It is, of course, permissible to show, and it is stipulated between counsel, that the $215,000 mortgage did not represent a then existing security, but was to secure advances to the extent of $215,000 *agreed to be made* for the erection of the building.

Supposing, instead of this being a postponement of mortgage, it was a general release executed upon the releasee's agreement to pay a certain sum of money, which he afterwards refused to advance in defiance of his agreement so to do. Could not the releasor show the circumstances under which, and the consideration upon which the release was given? Would the releasee under such circumstances be permitted to insist upon and maintain the integrity of the release so procured? Yet that is what the substituted trustee is here contending may be done.

A leading case holding such a release in effect nugatory is

Illinois Central R. Co. v. *Keebler*, 27 Ky. L. Rep. 305 (84 S. W. 1167).

Respectfully submitted,

GROSS & GROSS,
Of Counsel with Appellant
Hudson & Essex Building &
Construction Company.

ISAAC GROSS,
Of Counsel.

New Jersey Court of Errors and Appeals

Between

ALBERT & KERNAHAN, INC.,
a corporation,
Complainant,

and

FRANKLIN ARMS, INC.,
a corporation,
Defendant.

ON APPEAL FROM THE COURT OF CHANCERY.

SUPPLEMENTAL BRIEF ON BEHALF OF SERVICE TRUST COMPANY OF NEW JERSEY, SUBSTITUTED TRUSTEE, APPELLANT.

Statement.

The Service Trust Company of New Jersey, substituted trustee under a trust mortgage, appeals from an order of the Chancellor on the advice of Vice-Chancellor Church made on the 19th day of May, 1928 (State of Case, p. 93). As a result of said order or decree, this appellant, as trustee, will suffer a loss of $65,485. This appellant's notice of appeal is printed on page 12 of the State of the Case and the petition is on page 15. An appeal has also been taken by the Hudson & Essex Building & Construction Co., the holder of the mortgage for $9,500.00.

The order appealed from confirms the report of the Special Master, Mr. Roy F. Anthony, with regard to the amounts due, and priority on claims

against the proceeds of the sale of the building of the defendant corporation. No appeal has been taken from this order other than the two appeals above mentioned.

Facts.

In the early part of 1926, James Haines purchased a tract of land on Franklin Street, Bloomfield, New Jersey. He acquired this property subject to a mortgage held by the estate of Anna M. Day, which will hereinafter be referred to as the Day mortgage. The property was also encumbered by a purchase money mortgage given by James Haines for $15,000 to Hudson & Essex Building & Construction Co. covering this land and the tract adjoining it. This mortgage will hereinafter be referred to as the Hudson & Essex mortgage.

Haines desired to improve the property by the erection of an apartment house thereon. For this purpose, he caused to be organized the defendant corporation, Franklin Arms, Inc., and conveyed to it the property here involved.

Also for the purpose of erecting this apartment house, Haines, as an agent for a corporation to be formed and subsequently the Franklin Arms, Inc., entered into agreements with G. L. Miller & Company, Inc., which provided for the financing of the building operations by the sale of the bonds of Franklin Arms, Inc., to the general public through G. L. Miller & Company, Inc. By the provisions of these agreements the bonds to be sold to the public were to be secured by a trust mortgage on the property (Exhibits S2 and S3).

In accordance with these agreements, Franklin Arms, Inc., duly executed and delivered to Rollin J. Francis, as trustee, a temporary bond in the

sum of $215,000 (Exhibit S4) and a trust mortgage securing said bonds and the definitive bonds of smaller denominations aggregating said total amount thereafter to be issued (Exhibit S1).

The bond delivered to Francis was denominated a temporary bond because it contemplated, as did all the other agreements referred to, that a large number of permanent definitive bonds of smaller denominations aggregating said principal amount of $585,000 would be engraved, signed and delivered to replace this temporary bond. But it was clearly provided, contemplated, intended and stated, and it is undisputed here, that this temporary bond should in all respects stand in the place of and have the same security as the definitive bonds to be thereafter delivered. There was no difference whatsoever between the rights and obligations evidenced by the temporary bond and those which would be evidenced by the aggregate of the definitive bonds. What was purposed was pursuant to the well-known and understood practice of G. L. Miller & Company, Inc., and those dealing with it, to raise on the property of Franklin Arms, Inc., by sale through G. L. Miller & Company, Inc., of bonds of the Franklin Arms, Inc., secured by the trust deed or mortgage given simultaneously with the temporary bond and constituting a first lien upon the land and building to be erected thereon. Obviously, no member of the public would purchase the entire amount and according to form and custom bonds for such smaller amounts as the various members of the public would consider purchasing had to be in that highly embellished style of certificate with attached coupons which from long usage the public had come to associate with securities, a form which might lend verisimilitude to an otherwise bald and unconvincing narrative of value.

Patently, these picturesque souvenirs were not ready at the instant that the Miller Corporation and Franklin Arms, Inc., completed their agreements. Preparation of these engraved and embellished certificates would take time and yet it was not consistent with good business or high finance that so small a matter should cause delay in the separation of the public from its money. Had the definitive bonds been instantly available, no temporary bond would have been necessary. Since they were not readily procurable, the temporary bond was used simply to save delay in making the deal and to get started in the sale of the bonds to the public. This temporary bond was thereafter delivered to Rollin J. Francis, as trustee, to be later replaced by definitive bonds which would be distributed to the respective purchasers.

What we have just said with regard to the temporary bond and its purpose is not a matter of inference but is contained in the various instruments in evidence. The trustee, therefore, held this temporary bond as he held the mortgage not for the benefit of the Miller Corporation but for the benefit of the members of the public to whom it was contemplated the Miller Corporation, as agent for Franklin Arms, Inc., would sell the bonds and to whom subsequently the Miller Corporation as such agent did actually sell the bonds and who paid to the Miller Corporation, as agent for Franklin Arms, Inc., the purchase price of said bonds. That the Miller Corporation was the agent or representative of Franklin Arms, Inc., for the sale of these bonds, will be hereafter more fully developed and demonstrated.

Before this trust mortgage was placed upon the property and in order that it might be a first lien upon the property, the $15,000 Hudson & Essex

mortgage was divided into two mortgages, one for $9,500 upon the property here involved and one for $5,500 on the adjoining parcel. The $9,500 mortgage was postponed to the lien of the trust mortgage by a postponement of mortgage executed by the Hudson & Essex Building & Construction Co. to Rollin J. Francis, trustee, and it is stipulated in the record that this postponement postponed the $9,500 Hudson & Essex mortgage to the trust mortgage made by Franklin Arms, Inc., to Rollin J. Francis (State of Case, p. 142). There was no condition, proviso, limitation or qualification in the postponement. It postponed the lien of the $9,500 Hudson & Essex mortgage to the lien of the trust mortgage. It should be noted that it ran to Rollin J. Francis, trustee, and that the Miller Corporation was not a party to it.

Out of the first proceeds of the sale of the bonds secured by the trust mortgage, $8,000 was used to pay off the Day mortgage and $1,000 to pay off taxes so that the trust mortgage might be a first lien upon the property.

Pursuant to the arrangement entered into, the Miller Corporation proceeded to offer to the public first mortgage 7% gold bonds of Franklin Arms, Inc., in various denominations aggregating the principal sum of $215,000, and in furtherance of the sale of said bonds, the Miller Corporation advertised them in the public press and by circulars and solicited purchasers by salesmen, and as a result of these efforts procured purchasers for the said bonds to the extent of $115,000 and received from the purchasers $115,000 as the purchase price of said bonds. Since the definitive bonds were not ready for delivery and since the temporary bond held by the trustee for the bond purchasers could not be parcelled out among the many purchasers as evidence of their rights and of the pay-

ment of the money by them, the Miller Corporation gave to each purchaser a receipt known as an interim receipt for each definitive bond so purchased, bearing serial number and maturity date and amount corresponding with the serial number, maturity date and amount of the bond so purchased, and exchangeable therefor upon delivering up of said interim receipt when said bond corresponding therewith was ready for delivery (State of Case, pp. 289-290).

During the course of the construction of the building, the Miller Corporation went into the hands of an equity receiver and subsequently into bankruptcy. Franklin Arms, Inc. also went into bankruptcy. At the time that the Miller Corporation went into receivership it had actually paid over to Franklin Arms, Inc., $44,700, and it is established and found and it is undisputed on this appeal that out of the proceeds of the sale of the bonds $44,700 was actually applied to the construction of the building (State of Case, p. 85) and it is also established and undisputed that $8,000 of the proceeds of the sale of the bonds was used for the purpose of satisfying the Day mortgage and $1,000 for the purpose of paying taxes which were a prior lien on the property (State of Case, p. 85).

In addition, under the terms of the agreements between the Miller Corporation and Franklin Arms, Inc., the Miller Corporation was entitled to retain for commissions, expenses, interest and for various other purposes various sums aggregating $46,485.12 (State of Case, p. 85). The remaining $14,813.88 of the $115,000 received by Miller from the bond purchasers remains unaccounted for by the Miller Corporation.

We are not concerned with any questions between the Hudson & Essex Building & Construc-

tion Co. and the mechanics' lienors. The questions with which we are concerned and which we intend to treat in this brief are the following:

1. Can the Hudson & Essex Building & Construction Co. prevail in the claim which it makes in its brief that notwithstanding it had unconditionally and unqualifiedly postponed or subordinated its mortgage to the trust mortgage and that in reliance on said postponement hundreds of persons have purchased what were stated and believed to be first mortgage bond, they may now be prior to the trust mortgage? We contend that it can not prevail in this claim.

2. The extent to which the trustee under the trust mortgage is entitled to priority over the mechanics' lienors. The special master has found that the substituted trustee is entitled to priority as to the sum of $44,700 with interest thereon from May 15th, 1927 (State of Case, p. 89). This report of the Special Master has been confirmed by the Vice-Chancellor (State of Case, p. 93). The mechanics' lienors have not appealed nor have the receivers. The question, therefore, on this appeal is narrowed down to this: Is the trustee under the trust mortgage entitled to priority in any greater amount, and if so, how much? This question may be divided as follows:

(a) Is the trustee entitled to priority over the mechanics' lienors as to the $8,000 which was used to pay off the Day mortgage and $1,000 which was used to pay off taxes? It is not disputed that the lien of the Day mortgage and of the taxes would have been prior to the mechanics' liens if they had not been paid. We claim that the trustee is subrogated to that priority.

(b) Is the trustee entitled to priority as to the $46,485.12 which was retained by the Miller Cor-

poration for commissions, expenses, interest in advance, premiums on bonds, architects' fees, etc.? We claim that these were necessary and proper expenses of the erection and construction of the building and should, therefore, be entitled to priority over the mechanics' liens. If the trustee is not entitled to priority as to all of these items, certainly, he is as to some, for instance:

Consulting architect's fees....	$ 1,075.00
Fire Insurance	12.20
Premium on completion bond	3,300.00
Interest from May 15th, 1926 to May 15th, 1927.....	15,050.00

As to the interest, the Court below allowed priority from May 15th, 1927 (State of Case, pp. 89 and 95), but not as to the interest from May 15th, 1926 to May 15th, 1927. We see no reason for this distinction and claim that the trustee should have priority as to all interest. We also claim that the trust deed is not governed by the rules applicable to ordinary mortgages.

(c) The question of whether the trustee is also entitled to priority as to the remaining $14,814.88 which was unaccounted for by the Miller Corporation, agent for the mortgagor, is academic on this appeal since the claims already advanced under "a" and "b" together with the $44,700 conceded, amount to $100,185.12. The total amount in the hands of the receiver is only $115,000 out of which necessarily must come receivers' fees and expenses and allowances to attorneys. We, therefore, do not stress this contention.

Before proceeding with the discussion of these questions, it is necessary that we correct certain erroneous statements and conceptions concerning the nature of the trust mortgage and the relationship between the mortgagor, the trustee and the

Miller Corporation which are contained in the brief for appellant, Hudson & Essex Building & Construction Co.

POINT I.

Consideration of the trust mortgage and of the relationship between the mortgagor, the Miller Corporation and the trustee.

Throughout the brief on behalf of appellant, Hudson & Essex Building & Construction Co., counsel speaks of the trust mortgage as the Francis-Miller mortgage and says at page 10 of that brief:

> "Since the interests of Francis, trustee (now Service Trust Company, trustee) and Miller & Co. under the $215,000 mortgage are one and identical, we shall hereinafter refer to this mortgage as the Francis-Miller mortgage."

This is an absolutely erroneous conception. No such contention was raised by the Hudson & Essex Building & Construction Co. below and this contention appears for the first time in its brief. There is no basis for linking together Francis and Miller or for the statement that their interests were one and identical. In this transaction they were separate persons standing in different positions and having different duties and functions. As we shall show more fully, the Miller Corporation was the agent or representative of Franklin Arms, Inc., the mortgagor, to sell to the public first mortgage bonds of Franklin Arms, Inc., and to receive and pay over the proceeds of the sale of said bonds. Persons who purchased these

bonds through the Miller Corporation were the *cestui que trust* of the trust of which Francis was the original trustee. He held the mortgage and the temporary bond for their benefit. His successor, Service Trust Company of New Jersey, is now in this proceeding, not as the representative of the Miller Corporation but as the representative of this *cestui que trust* who are the unfortunate investors who purchased the first mortgage gold bonds of Franklin Arms, Inc. Neither the Miller Corporation nor its trustee in bankruptcy is a party to this proceeding. Apparently, the special master clearly understood this situation for he says in his report (State of Case, p. 83) that Franklin Arms, Inc., "executed a mortgage of $215,000 to Rollin J. Francis, trustee, dated May 15th, 1926, recorded in book W 57 of mortgages for Essex County, page 64, to secure an issue of bonds *to be sold by* G. L. Miller & Company" (italics ours).

The entire tenor of the several instruments in evidence is that the Miller Corporation was the agent or representative of the mortgagor to sell the mortgagor's bonds and that the Miller Corporation was to receive the proceeds of the sale of the bonds in a fiduciary capacity and keep them separate and apart from its own assets and account for them and make certain payments out of the proceeds. The Miller Corporation was not buying and reselling these bonds for its own account as a sort of middleman or dealer in bonds but was acting as agent or fiduciary for the mortgagor who was the seller, nor was the Miller Corporation lending its own money. It never had title to the bonds and it never had title to the proceeds of their sale. Thus in the very first preliminary agreement between the Miller Corporation and Haines, made before Franklin Arms, Inc.,

was organized (Exhibit S3) it was provided as follows:

"9. The Underwriter hereby underwrites said entire issue of bonds at the sum of One hundred ninety three thousand five hundred ($193,500) Dollars, *which sum, without interest, and no more, such Underwriter is bound to account for to the Owner and to disburse in accordance with the terms and provisions of this agreement,* the Owner agreeing that the Underwriter shall retain all sums realized by it on the sale of said bonds in excess of the aggregate sums so underwritten, as aforesaid, to cover the Underwriter's expenses other than those elsewhere herein provided to be paid by the Owner, and *its compensation for services rendered, both in selling bonds and in disbursing the proceeds thereof,* for the purposes and in the manner hereinafter set forth." (Evidently the amount was changed to $215,000.)

* * * * * *

"11. *The Underwriter is hereby authorized to pay to the Trustee from the proceeds of the bond issue, any sums which may be due or become due,* to said Trustee for payments on interest, principal or other items under the terms of the trust deed, prior to the *time of final accounting by the Underwriter for the proceeds of the bond issue.*

"12. *The proceeds from said bonds as aforesaid, less any deductions which the Underwriter may be entitled to make therefrom under any provision of this contract, shall be used, except as hereinafter specified, in the construction of a building or buildings upon the lands,* hereinbefore described, which building or buildings (hereinafter referred to as the building) shall be Four story semi-fireproof of brick and stone apartment, containing not less than 136 rentable rooms as more

fully described in Schedule "A" hereto attached and made a part hereof.

* * * * * *

"16. *The proceeds of said bonds shall be disbursed by the Underwriter as the building progresses, in such amounts and at such times and dates, and in accordance with such regulations as the Owner and Underwriter may agree upon, or if they fail to agree, as the Underwriter may determine to be necessary and best.*

* * * * * *

"20. The Owner will pay to the Underwriter the expenses in connection with this loan, including all attorneys' fees for preparing trust deed or mortgage, giving opinion as to legal matters involved in the transaction, cost of and printing bonds, recording fees and mortgage taxes, Federal Internal Revenue Taxes, trustee's or other fees for certification of said bonds, making of drawings or water colors of the proposed building, and such other expenses in connection with the transaction as the Underwriter may incur. The Owner hereby agrees with the Underwriter that the sum of Three thousand two hundred twenty five ($3,225.00) Dollars shall be paid to the Underwriter to cover said expenses, and the Owner agrees to pay the said sum to the Underwriter, *or the Underwriter may deduct the said sum from the proceeds of the bond issue.*

* * * * * *

"29. *The Underwriter, its agents, officers and attorneys, shall incur no personal liability for what it or they do or omit to do under the powers and duties contained in this agreement except to faithfully account for the proceeds of said bonds as hereinbefore set out, and in case of its or their own gross negligence.*"

It will be noted that the Miller Corporation was not to purchase these bonds from the mortgagor nor was it to lend money to the mortgagor. It was to sell bonds for the mortgagor and account to the mortgagor for the proceeds of the sale of the bonds. It was to receive not interest or bonus for lending or profit on the purchase and resale of bonds, but it was to receive compensation for services rendered in selling bonds and disposing the proceeds thereof clearly indicating that it was an agent. Payments were to be made by the Miller Corporation out of the proceeds of the sale of the bonds and not out of its general funds indicating that the proceeds were to be used only for the specific purpose and not to be mingled with the general assets, and the proceeds were to be disbursed by the Miller Corporation obviously as the agent for the mortgagor as the building progressed in such amounts and at such times and dates and in accordance with such regulations as may be agreed upon and to be used only for the one purpose, namely, for the construction of the building. In conclusion it is made clear that the only duty of the Miller Corporation was to account for the proceeds of the sale of the bonds and to avoid gross negligence as is expressly provided in paragraph 29. This agreement sounds an agency. It is purely and simply a contract between principle and agent specifying the powers and duties of the agent, his right to sell bonds and his correlative duty to account for the proceeds and his right to receive compensation for services rendered. The same basic expressions and connotations of agency run through all the instruments. Thus in the building loan agreement (Exhibit S2), it is recited:

> "WHEREAS, *the Underwriter has agreed to sell and dispose of the said bonds and procure*

*and account for the face principal amount thereof, exclusive of any interest thereon, after deducting the Underwriter's commission and every other item of expense or disbursement which the Building Company has in this instrument or by separate contract in writing with the Underwriter agreed to pay, and have the net proceeds thereof after making the deductions and payments herein mentioned or provided for, ready for disbursement in the manner hereinafter provided, * * *.*"

That agreement goes on to provide:

"FIRST: *The Underwriter agrees to have available for the Building Company for disbursement in the manner herein provided for,* upon compliance by the Building Company with all the provisions of this agreement, and of said indenture, and the *Building Company agrees to take as well and when it shall become entitled thereto the remaining net proceeds of sale of $215,000 first mortgage bonds of the Building Company* secured by the aforesaid indenture hereinbefore referred to. *The net proceeds herein referred to are the proceeds of sale of said bonds in the face amount thereof less the amounts deducted for the payments heretofore made as above recited, and every other item of expenses or disbursements which the Building Company has herein, or by separate contract in writing between the parties hereto agreed to pay.*

* * * * * *

"THIRD: Subject to the provisions of this agreement, and on compliance by the Building Company with its agreements herein and in said indenture contained, the Underwriter agrees to *pay the remaining net proceeds of said bonds, if the Building Company shall become entitled thereto, in installments as set forth in Schedule C hereto annexed,* * * *

* * * * * *

"TENTH: *The Underwriter may at any time apply any of said unexpended balance of the net proceeds to the payment of any principal of or any interest on said bonds then due,* and/or to the payment of any rent or other charge becoming due and payable under said lease or any tax, assessment or water rates which shall have become a lien upon said premises, and/or to the payment, or deposit of the amount with the County Clerk of Essex County, New Jersey, of any mechanic's liens which shall have remained undischarged for ten days. Any of the aforesaid payments may be deducted from any of the payments provided for in Schedule C.

* * * * * *

"NINETEENTH: *It is expressly covenanted by the Building Company with the Underwriter that, subject to the Underwriter accounting for the proceeds of the sale of said bonds as hereinabove specified and in the manner hereinabove specified, the Underwriter, its agents, officers or attorneys, shall incur no personal liability, for what it or they may do or omit to do under the powers contained in this instrument, except in the case of its or their own gross negligence.*"

Thus again it appears that the Miller Corporation was an agent or representative to sell and to receive proceeds for the sale of bonds. The agreement provides neither for a loan by the Miller Corporation nor even for payment by the Miller Corporation, but for payment out of the proceeds of the sale of the bonds. Schedule C of this agreement provides that the payments therein provided for "are to be made from the unexpended balance of the net proceeds of the sale of said bonds".

In *G. L. Miller & Co., Inc.* vs. *Claridge,* 14 Fed. (2nd) 859, a case involving the same corporation where similar contracts were before the Court,

it was held that the Miller Corporation was neither lending money to the mortgagor nor buying bonds from the mortgagor but was performing services for the mortgagor in selling bonds to the public. In that case the Court said at page 860:

> "Applying the principles to the facts of this case: If the transaction was no more than a sale of the entire issue of bonds by the defendant to Miller & Co., and it was not contemplated that Miller & Co. were to resell in small lots at a substantial cost, in order to realize money for the bonds, then whether Miller & Co. be considered a lender or purchaser, the transaction would be infected with usury. The only consideration for the discount would then have been the use of the money furnished defendant by Miller & Co. On the contrary, both Miller & Co. and the defendant knew that the money agreed to be furnished was to come from the proceeds of resales in small lots of the bond issue, to be effected by Miller & Co.'s organization. Such services were to be rendered for defendant's benefit, since the needed money could be procured only in that way. While the written contract under which Miller & Co. were to handle and distribute the bonds might justify the inference that Miller & Co. acquired the bonds from defendant for a fixed amount, and that defendant had no further interest in their disposition after receiving the amount, yet the situation of the parties, what they desired to accomplish, and the surrounding circumstances indicate that the parties contemplated resales of the bonds by Miller & Co. as a necessary factor in procuring the money agreed to be furnished, and that the services in effecting the resales, looking through form to substance, were for the benefit of defendant, and were of substantial value—not a cloak to cover usury. The bonds had to be resold to finance the building. If Miller & Co. had stood the cost of handling and distributing, it could

not have taken over the bonds at their face value, unless it could have resold them at a substantial premium. The bonds bore interest, and this furnished the means of compensating for the use of the money. The discount retained by Miller & Co. was to compensate for the necessary expenditure incurred in handling and distributing the bond issue. It would not constitute usury, unless made with intent to defeat the usury law.

"In view of the necessity arising from the nature of the transaction and involved in a redistribution of the bonds, that such services be performed by some one, and the propriety of the defendant, as between it and Miller & Co., paying for them, I do not think that the record shows that the agreement for the discount was a mere evasion of the usury laws. It was to provide compensation for services agreed to be performed by Miller & Co. for defendant at its request."

It is true that the Court in that case did say at page 860:

"I do not think that it is important to determine whether the transaction evidenced by the underwriting agreement constituted Miller & Co. a selling agent, an underwriter, a lender or a vendee."

But the Court nevertheless proceeded to decide that question as appears from the quotation above set forth. Because if Miller was a vendee of the bonds, the transaction would of necessity have been usurious, because if A buys from B, B's own bond, which is only an obligation to pay money, and gives B, for that obligation to pay, a smaller sum, taking a discount greater than allowed by usury laws, that transaction is usurious, but if A sells to C B's own bond or obligation to pay money with interest at a legal rate and charges B a com-

mission or fee for the services rendered as B's agent, that transaction is not usurious.

What the Court held in the Claridge Manor case was that what Miller was receiving was not compensation for the loan of money to the mortgagor or a discount on the purchase of the bonds of the mortgagor, but compensation for services rendered in selling the bonds and getting in the money for the mortgagor from the various purchasers of the bonds.

The transaction was not lending money to the mortgagor. It was obtaining money for the mortgagor from the purchasers of bonds.

In the Matter of G. L. Miller & Co., Inc., bankrupt, Hon. Oscar W. Ehrhorn, the official referee in bankruptcy of that Court, has rendered a decision filed April 30th, 1927, but not reported in which he construes the relationship between the Miller Corporation and the mortgagors. In that opinion he states:

> "In this case and in all cases under consideration, it appears that the mortgagors executed and delivered to the bankrupt a temporary bond and by the arrangement existing between them authorized the bankrupt to sell their bonds to be issued, and thus in effect constituted the bankrupt the agent of the mortgagor for such purpose. The temporary bond, so far as the purchasing public is concerned, stands as security *pro tanto* to secure the bond, interim receipt and certificate holders in those cases where title can be found to have passed to a definite security, or where a lien, legal or equitable, under settled rules may be found to have attached."

There are thus two holdings directly in point that the position of the Miller Corporation in this transaction was not that of a mortgagee or lender

but was that of an agent for the mortgagor. It is therefore entirely improper to speak of a Francis-Miller mortgage or Francis-Miller mortgagee.

POINT II.

Having subrogated its mortgage to the trust mortgage, the Hudson & Essex Building & Construction Co. cannot now claim priority.

In this connection, the argument of the Hudson & Essex Building & Construction Co. is based upon the assumption that there was what was termed a Francis-Miller mortgage and that Francis as trustee under the mortgage and the Miller Corporation were somehow united in interest and stood in the same position, in *pari-delicto,* so to speak. We have shown in the preceding point that this conception was entirely erroneous and that there is no justification for hyphenating Francis and Miller, that their positions in this transaction were altogether dissimilar and that there was no union of interest between them. The Miller Corporation was the agent or representative of the mortgagor. Francis was, and his successor, Service Trust Co. is a trustee for the benefit of the bond purchasers, the real mortgagees. This being so, the entire argument of the Hudson & Essex Building & Construction Co. in this connection must fall because it is built upon a false foundation.

Moreover, the postponement of the subrogation executed by the Hudson & Essex Building & Construction Co. was absolutely unqualified and unconditional. They admit that this distinguishes the present case from the case of *Cummings* v. *Jackson,* 55 N. J. Eq. 805, where the postpone-

ment was conditional. Counsel for the Hudson & Essex Building & Construction Co. contend that this same condition should be read into the unconditional postponement but why this should be we do not understand, nor do they cite any authorities to support this amazing proposition. As we understand the contention of counsel for the Hudson & Essex Building & Construction Co., it is that their client could unconditionally postpone its mortgage to the trust mortgage so that the trust mortgage should appear upon record as a first mortgage and so as to permit the bonds of the mortgagor to be sold to the general public as first mortgage gold bonds and then come into this court of equity and claim that the unconditional postponement which they put on record and on the strength of which the bonds were purchased as first mortgage bonds actually contained a hidden and secret condition. We know of no rule of law or equity which either requires or permits any such ruling by this Court. Certainly, the contention is shocking to the conscience of a court of equity. The Hudson & Essex Building & Construction Co. could have protected itself at the time it executed the postponement as was done in *Cummings* v. *Jackson, supra.* The bond purchasers, who have purchased first mortgage gold bonds which according to the records were first mortgage gold bonds had no means whatsoever of protecting themselves. Under these circumstances there is no reason why a court of equity should strain for a construction which will protect the Hudson & Essex Building & Construction Co. as against these innocent investors.

Counsel for the Hudson & Essex Building & Construction Co. argues that the breach by Miller & Co. of its agreement to advance $215,000 entitles their client to insist that priority of its mort-

gage is restored. How are the bond purchasers who purchased the first mortgage gold bonds or their trustee who represents them responsible or liable for any breach of contract by G. L. Miller & Company, Inc.? Neither G. L. Miller & Company, Inc., nor its trustee in bankruptcy is a party to this proceeding.

Moreover, this contention of the Hudson & Essex Building & Construction Co. is advanced for the first time in this court. No such point was raised below either before the special master or before the Vice-Chancellor. Indeed it is only in the amended petition of appeal in this court that the contention first appears. It was not in the original petition. Counsel for the Hudson & Essex Building & Construction Co. state that all that was advanced under the trust mortgage was the $44,700. In this they are in error. That was all that was paid over by G. L. Miller & Company, Inc., agent for the mortgagor to the mortgagee, but that was not all that was advanced under the trust mortgage. The amount advanced under the trust mortgage was the amount which the bond purchasers, for whose benefit the mortgage was given to the trustee, paid in to G. L. Miller & Company, Inc., the agent for the mortgagor. That amount was $115,000.

By the very terms of the postponement executed by the Hudson & Essex Building & Construction Co., therefore, the trust mortgage is entitled to priority over the Hudson & Essex mortgage to the extent of the amount owing on the trust mortgage which is $115,000.

POINT III.

The Special Master and the Court below erred in denying to the trust mortgage priority over the mechanics' liens as to the $8,000 used to satisfy the Day mortgage and the $1,000 used to pay off taxes.

It is undisputed that if the Day mortgage and the taxes had not been paid they would have been entitled to priority over the mechanics' liens, and that the mechanics' liens would thus have been postponed to the $9,000 in addition to the $44,700, the proceeds of the principal mortgage admittedly applied to the erection of the building. The result of the decision below is that because this $9,000 was paid off with the money furnished by the purchasers of bonds secured by the trust mortgage, the benefit of that payment goes to the mechanics' lienors and not to the bond purchasers. The special master arrived at this result by holding that the money used to pay off the mortgage and taxes was not applied to the erection of the building. This is obviously true. However, the special master disregarded entirely the right of subrogation of the trustee under the trust mortgage to the priority of the liens which were discharged by the proceeds of the trust mortgage.

Barnett v. *Griffith,* 12 C. E. Gr. (27 N. J. Eq.) 201, was an action to foreclose a mortgage for $4,000 and interest. The mortgage was given after the construction of the building was begun but part of the money was used to pay off prior mortgages. The mortgagor had purchased the property subject to these prior mortgages. It was held that the plaintiff, the holder of the $4,000 mortgage, was subrogated to the lien of the prior

mortgage and had priority to the mechanics' liens. The Chancellor said at page 204:

> "In this case the mortgage was not recorded before the commencement of the building. But the complainant's mortgage is entitled to priority over the lien claims, in respect to the money paid by him out of the money intended to be secured by his mortgage upon the Hopping mortgages, which at the time of the payment, were liens only on the lot covered by the complainant's mortgage and the adjoining lot, the other lot having been released. The complainant advanced the money paid on account of those two mortgages, on the security of his mortgage, and to release the mortgaged premises from the encumbrance of those mortgages, which were prior liens to his mortgage and to the claims of the lien claimants. He is entitled to be subrogated to the rights of the mortgagee under those mortgages, to the extent of the money paid, and interest thereon."

In *Egbert* v. *Decamp*, 3 N. J. L., p. , it was held that where a mortgagee whose mortgage is subject to several liens claims pays a judgment recovered on one of such claims, he is entitled to be subrogated to the rights of the judgment claimant and entitled to use the judgment for all purposes for which it would be useful to him.

See also

Fracre v. *Chapman*, 32 N. J. Eq. 463.

The Special Master relied upon the case of *Improved Building & Loan Assn.* vs. *Larkin*, 88 N. J. Equity 52, 101 Atl. 1043. That was a decision of Vice-Chancellor Stevens. The facts in that case were entirely different. There Larkin held a purchase money mortgage for $2,000. The builders wanted a loan from the complainant

which complainant would give only if it were a first lien. The Builders asked Larkin to cancel her mortgage. She said she wanted money. She agreed to cancel her mortgage in reliance on the promise of the builders to pay her as soon as they got the first payment from the complainant's mortgage, and she did cancel it on December 3rd. On December 5th the builders got a check from the complainant for $3,312.80. The builders gave Larkin their check dated December 7th for $1,200 and an antedated deed as security for the balance of $860. The Vice-Chancellor held that when Larkin surrendered her lien in reliance on the promise of the builders

> "she did so, as far as appears, without reservation or limitation and without stipulating for any other lien. Mr. Grosso [attorney for Larkin] was content to rely upon the representations that Dorfman, Norelli and their attorney, Mr. Giordano, made to him" (p. 58) * * *
>
> "The mortgage having been surrendered and cancelled, it seems to be necessarily to follow that existing liens upon the property fastened themselves upon the mortgaged estate thus merged in the equity of redemption. If complainant's lien attached, so did the others. No subsequent act of the parties could revive the mortgage lien of Mrs. Larkin so as to give it precedence. The antedating of the deed could not have that effect for a deed takes effect from delivery, and the delivery, as averred in the answer and shown by the evidence took place when the note for $860 was given (December 7th)" (p. 59).

It was, therefore, held in that case that Larkin's security by way of deed must give way not only to complainant's mortgage, but also to the mechanic's liens. The question of subrogation of com-

plainant's mortgage to Larkin's prior lien was not discussed but of course that doctrine would have had no application to the facts of that case, since it held Larkin had given up her priority.

In the case at bar, however, there was no such interval during which the mechanics' liens could attach to the property free of the mortgage, between the release of the mortgage and the payment therefor out of the proceeds of the new mortgage as there was in the Larkin case. The Day mortgage was not satisfied of record until it was paid out of the moneys that were realized from the trust mortgage and when it was so paid the trust mortgage simultaneously became subrogated to its priority. The same is true of the taxes.

There is no reason why this payment out of the bond purchasers' money should enure to the benefit of the mechanics' lienors or of the Hudson & Essex Building & Construction Co.

The subrogation of the trust mortgage to the priority of the Day mortgage and of the taxes cannot injure the mechanics' lienors because had the Day mortgage and the taxes not been paid out of the trust mortgage proceeds, the mechanics' liens would still have been subordinate to that mortgage and the taxes. They are in no worse position because of the payment of those claims out of the trust mortgage and the subrogation of the trust mortgage to that priority. On the other hand, if subrogation is not allowed the mechanics' lienors will be unjustly enriched to the extent of $9,000 at the expense of the bond purchasers.

On principle and authority, therefore, and also as a matter of justice, the trust mortgage is entitled to priority to this $9,000 in addition to the $44,700 and the order below should have directed the payment first to the substituted trustee of at least $53,700 with interest instead of $44,700.

POINT IV.

The trust mortgage is entitled to priority as to the additional items amounting to $46,485, making $100,185.

The items which we will discuss in this point are the items which, according to agreements between the Miller Corporation and the mortgagor, the Miller Corporation was entitled to retain out of proceeds of the sale of bonds and which it did retain. These items are as follows:

Commission		$21,500.00
Disbursing and selling expenses		2,150.00
Bond issue expenses		3,225.00
Consulting Architect		1,075.00
Interest from May 15, 1926, to May 15, 1927	$15,050.00	
Less interest assumed	627.08	14,422.92
Income tax May 15, 1926 to May 15, 1927		600.00
Trustees' fees for the same period		200.00
Fire		12.20
Premium on completion bond		3,300.00

They are the items listed in the Master's Report on page 85 of the State of the Case, with the exception of the $1,000 tax item which has been discussed in the previous point. As to these items, the Special Master says that they are proper charges against the mortgagor, but that they are not entitled to priority over lien claimants because "they are not monies actually applied to the construction of the building".

It may be worthwhile noting that the language of Section 15 of the Lien Law is not "construction of the building" but "applied to the erection of any new building".

We submit that the Special Master was in error for the following reasons:

1. These items are properly to be considered as part of the cost of the erection of a building and therefore entitled to priority under the language of the Lien Law.

2. That this is not the ordinary type of mortgage contemplated by the Lien Law, but in fact, technically is a Trust Deed, not a mortgage and moreover, by the express language of the Trust Deed of which the mechanic's lienors had notice, it is entitled to priority to the full amount, regardless of whether or not the money was applied to the construction of the building.

1.

In the erection of any large building, the cost of financing is as much a part of the expense of the erection of the building as is the cost of bricks, mortar and physical labor. All builders and real estate people recognize this. If the statute is to be narrowly and strictly construed, so as to exclude from the cost of the erection of the building the important element of the cost of financing, then it will be construed in a manner which is not in accordance with the realities, and which is therefore not in accordance with the needs of the building and financing businesses which are interested in this matter. The purpose of the statute obviously is to protect material men and laborers against the diversion of funds by dishonest mortgagors and to place upon mortgagees the burden of seeing to it that the monies which should come to material men and laborers are actually applied to that purpose. But the monies which are under consideration now were not diverted from their

purpose. It was not intended that they should go to material men and laborers. They were intended to be applied to other expenses of the erection of the building and they were so applied. This expense was for the benefit of the material men and laborers as well as for the mortgagor and the Miller Corporation. Without this expense no mortgage could have been raised and without a mortgage the building could not have been undertaken. The $44,700 which actually was paid over to the material men and laborers was realized and made available as a result of these expenses. Had the receivership of the Miller Corporation and of Franklin Arms, Inc., not intervened, the material men and laborers would have benefited by this mortgage to a greater extent.

The Court should recognize that these are necessary and legitimate expenses of the erection of a building. If by a narrow and unwarranted construction of this section this Court should exclude these items from priority it would mean that that part of any mortgage which represents cost of financing could never have priority over a Mechanic's Lien. The result of this would be greatly to decrease the difficulty of obtaining loans to finance the erection of a building within the State of New Jersey and persons who are in the business of supplying material and labor for the erection of buildings will probably be worst hurt by such a result. We respectfully submit that a liberal construction of that Section should be adopted and these items be allowed, as what they are, namely, proper and legitimate expenses of the erection of the building.

2.

In our former brief, we pointed out that this case is one of novel impression, since the Mechanic's Lien Law has become effective in this State, but that prior to the enactment of this legislation there has been no question but that trust deeds such as the one now before this Court were looked upon from an entirely different legal point of view from the ordinary mortgage affecting real estate, and we referred to the cases of *Central Trust Co.* v. *Continental Iron Works,* 51 N. J. Eq. 605 and *Porch* v. *Agnew,* 70 E. 328.

In the instant case, however, we have additional grounds why this trust mortgage should be construed differently from an ordinary mortgage and should not be brought within the meaning of section 15 of the Mechanics' Lien Law. The trust mortgage provides that the premises are conveyed to the trustee:

> "IN TRUST, NEVERTHELESS, for the equal and proportionate benefit and security of all present and future holders of said bonds and coupons without preference, priority or distinction as to lien or otherwise of one bond over any other bond by reason of priority in time of issuance, negotiation, date of maturity thereof, or of when the Company shall have actually received the proceeds thereof, or otherwise (except as hereinafter provided), *and it is further intent hereof that the lien and security of this indenture shall take effect upon the day of the date hereof without regard to the time or times of any advance or advances of the money secured.*" (Italics ours.)

From the recitals at the beginning of the mortgage we learned that the Company referred to in the paragraph quoted is Franklin Arms, Inc., the mortgagor.

This trust deed was on record and the mechanics' lienors must be presumed to have had notice of its provision and particularly of this provision which in effect is that the lien of that indenture shall take effect upon the date thereof for the full amount without regard to the time or times of any advance or advances of the money secured. In other words, the instrument itself expressly negatives the proposition for which the mechanics' lienors contend in this proceeding that as to them it was a lien only as to the moneys actually applied to the payment of material men and laborers.

If the Court does not agree with us in this contention as to all of these items, certainly it must agree as to such items as the consulting architect's fee and the premium on the completion bond which are directly connected with the actual construction of the building.

With regard to the interest item, the special master allowed interest on the amount which concededly is to be paid only from May 15th, 1927. We do not see why this should be so. Assuming that the trustee under the trust mortgage is entitled to priority only as to the $44,700 allowed by the special master, it would seem logically to follow that he is entitled to priority on the interest on that amount from the date of the bond and mortgage. Certainly, there is nothing in the Lien Law which says that a mortgagee can get priority only on the principal which actually was used in the erection of the building and not priority on the interest on that amount. The right to the interest follows from the right to the principal. Similarly, as to whatever additional amounts of principal this Court may find the trustee entitled to priority, he will also be entitled to priority

as to the interest on such amount from May 15, 1926, the date of the trust mortgage.

We, therefore, respectfully submit that these items, aggregating $46,485.12 should be added to the amounts to be first paid so that out of the funds on hand there should first be paid to the trustee $100,185.12.

Respectfully submitted,

WEINBERGER & WEINBERGER,
Solicitors and of Counsel with
Appellant, Service Trust Company of New Jersey.

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Exhibit S-3.

Tr.'s Ex. 2
July 22/27.

RETAINED COPY—FRANKLIN ARMS.

G. L. MILLER & COMPANY
INCORPORATED
New York, N. Y.

UNDERWRITING AGREEMENT

This Agreement, made this 31st day of March, 1926, by and between John Haines and James Haines as Agents for a corporation to be formed of the City of Bloomfield and State of New Jersey (hereinafter designated "the Owner") and G. L. Miller & Company, Inc., a corporation organized under the laws of the State of Delaware, having a place of business in New York, N. Y. (hereinafter designated "the Underwriter").

WITNESSETH:

That for and in consideration of the mutual covenants herein contained, the parties agree as follows:

1. The Owner owns, or is about to acquire, certain real estate situated in the City of Bloomfield and State of New Jersey, which said real estate is described as follows:

Southeast corner Franklin Street and Berkeley Place, Bloomfield, New Jersey. Approximately 180′ x 122′ x 175′ x 170′.

Exact legal description to be furnished by the Owners within ten days of date hereof.

Exhibit S-3.

2. The Owner agrees to issue bonds aggregating the principal sum of Two Hundred Fifteen Thousand ($215,000.00) Dollars, to be made and executed by its President and Secretary in its name and behalf and to be secured by a First Trust Mortgage or Trust Deed covering the above described property, together with the buildings thereon or hereafter erected thereon and the furniture and equipment included therein, which bonds shall be dated May 15, 1926, and shall be payable as follows:

May 15, 1928	$ 6,000.
May 15, 1929	6,500.
May 15, 1930	7,000.
May 15, 1931	7,000.
May 15, 1932	8,000.
May 15, 1933	8,500.
May 15, 1934	9,000.
May 15, 1935	9,000.
May 15, 1936	10,000.
May 15, 1936	144,000.

3. The bonds shall be in such denominations as the underwriter may designate and shall bear interest from May 15, 1926, until paid at the rate of seven per cent. per annum, payable semi-annually on May 15th and November 15th in each year: both principal and interest to be payable at such place or places as shall be named by the Underwriter and in United States gold coin of present standard of weight and fineness; the bonds having attached thereto interest coupon notes to evidence the interest payments to be made before the maturity of the bonds, and the trust deed to be in such form and contain such provisions as the Underwriter and its Counsel may require, and

shall convey, under warranty to a Trustee to be selected by the Underwriter, the above described property.

4. To assure the accumulation of a sufficient sum to retire the bonds maturing in each year, when due, the Owner agrees to pay the Trustee named in trust deed or mortgage securing said bonds, one-twelfth (1/12) of the amount payable in each of said years except the last year, on the 15th day in each month in said year, the first payment to be made on May 15th, 1927. During the last year the monthly payments shall be one-twelfth (1/12) of Ten Thousand ($10,000.00) Dollars.

In order to create a fund sufficient to assure the prompt semi-annual payments of interest as they respectively mature, the Owner also agrees to pay to the Trustee named in such trust deed or mortgage one-twelfth (1/12) of the amount of interest which will accrue in each year on the fifteenth day of each month in said year in advance. The funds so accumulated by the Trustee for the purpose of paying the bonds maturing in any year and paying the interest coupons maturing in each year shall be accounted for without interest and shall be applied by said Trustee to the retirement of the bonds and to payment of interest.

The Underwriter is hereby authorized to disburse from the net proceeds of the bond issue any and all sums due or to become due the Trustee named in the Trust Mortgage for a period of one year from May 15, 1926, on or before the final disbursement is made to the Owner under this Agreement.

5. These bonds may be called on any interest date in inverse of their numerical order by giving ninety days' written notice, and in accordance with the following provisions: At 102 plus accrued interest to call date.

6. If the time for issuing said bonds shall be delayed, the Underwriter may, at its option, correspondingly or substantially defer the maturity dates and the date of the bonds and trust deed or mortgage, without deferring the date provided in this agreement for the commencement of the accrual of interest, and if the date of the bonds be so deferred the underwriter may deduct the amount of interest which shall have accrued to the date of said bonds from the net proceeds of the bond issue, or at the Underwriter's option the bonds may bear date of and interest begin to accrue on a subsequent date as may be designated by said Underwriter.

7. Within five days after the date hereof, the Owner will furnish to the Underwriter, or to its Attorneys, a certified copy of the Charter of the Owner, if it is a Corporation already organized, certified copies of its By-Laws and certified copies of the Minutes of the organization meetings held by the Incorporators, Stockholders and Directors of the Corporation to complete its organization, and at or before the time fixed for executing and delivering the bonds and trust deed, the Owner, if a Corporation, will cause its Stockholders and Directors to adopt such resolutions at meetings of such Stockholders and Directors, lawfully called and held, as the Attorneys for the Underwriter may demand or require, and will furnish prop-

erly certified copies of such resolutions to the Underwriter, or its Attorney.

If the bonds and trust deed or mortgage are to be signed by a Corporation to be formed, the Owner will cause proper application to be made for a Charter for such Corporation within five days from the date hereof, and will cause such meetings to be held and resolutions to be adopted, and will furnish such certificates and other documents in connection therewith as the Underwriter or its Attorneys may require. If said Charter be not granted and everything necessary to be done in connection with the organization of said Corporation be not completed before the date herein fixed for the date of the bond issue, the Underwriter may at its option cause suitable provisions to be inserted in the trust deed or mortgage providing that the interest shall begin to accrue on the date herein fixed, notwithstanding the bonds and trust mortgage are actually executed on a subsequent date; or the Underwriter may defer the date of the bonds and the maturity dates correspondingly or substantially, but in such latter case the Owner shall pay the interest from May 15, 1926, to the new date provided in the bonds for the commencement of the accrual of interest thereunder, or the Underwriter may deduct such sum from the proceeds of the bond issue.

The Owner or Mortgagor will upon request of the Underwriter, either before, at or after closing, execute such documents or instruments and take such corporate action and adopt such resolutions as may be reasonably required and necessary in connection with this bond issue or in connection with the license or permit under the Blue-

Sky Laws of any of the States of the United States, or of the District of Columbia.

8. The Owner will execute the trust deed or mortgage and the bonds secured thereby when requested by the Underwriter and deliver the trust deed or mortgage to the Trustee therein named, and the bonds with coupons attached to the Underwriter.

When in the option of the Underwriter it is desirable or necessary, pending the preparation and execution of the definitive bonds, the Owner will execute and deliver to the Underwriter a temporary bond or temporary bonds aggregating in amount the principal amount of the total issue of bonds to be secured by said trust deed, to be exchanged for the definitive bonds when the same have been executed and delivered to the Underwriter.

9. The Underwriter hereby underwrites said entire issue of bonds at the sum of One Hundred Ninety-three Thousand Five Hundred ($193,500.00) Dollars, which sum, without interest, and no more, such Underwriter is bound to account for to the Owner and to disburse in accordance with the terms and provisions of this agreement, the Owner agreeing that the Underwriter shall retain all sums realized by it on the sale of said bonds in excess of the aggregate sums so underwritten, as aforesaid, to cover the Underwriter's expenses other than those elsewhere herein provided to be paid by the Owner, and its compensation for services rendered, both in selling bonds and in disbursing the proceeds thereof, for the purposes and in the manner hereinafter set forth.

Exhibit S-3.

10. The Owner agrees to pay all expenses incurred by the Underwriter in the selling of said bonds and in disbursing the proceeds thereof. The Underwriter and the Owner have calculated and estimated such expenses and agree that the same will amount to Two Thousand One Hundred Fifty ($2,150.00) Dollars, and the Owner will pay to the Underwriter said sum for such purposes, or which sum may be deducted by the Underwriter from the proceeds of the bond issue. The Underwriter shall have full discretion and authority to expend said money in connection with such expenses as its judgment may dictate, without any interference by or accounting to the Owner.

11. The Underwriter is hereby authorized to pay to the Trustee from the proceeds of the bond issue, any sums which may be due or become due, to said Trustee for payments on interest, principal or other items under the terms of the trust deed, prior to the time of final accounting by the Underwriter for the proceeds of the bond issue.

12. The proceeds from said bonds as aforesaid, less any deductions which the Underwriter may be entitled to make therefrom under any provision of this contract, shall be used, except as hereinafter specified, in the construction of a building or buildings upon the lands, hereinbefore described, which building or buildings (hereinafter referred to as the building) shall be Four story semi-fireproof of brick and stone apartment, containing not less than 136 rentable rooms. To contain not less than 473,000 cubic feet as more fully described in Schedule "A" hereto attached and made a part hereof. Plans and specifications for the said building shall be prepared by to be

selected and approved by Underwriter, Architect, or by some other architect approved therefor in writing by the Underwriter, and shall embody the features and be in accordance with the details set forth in Schedule "A" hereunto annexed, and in respect to such matters as are not therein specifically detailed, the Owner will cause said plans and specifications to be prepared and amended so as to make them satisfactory to the Underwriter. Said plans and specifications shall be furnished to the Underwriter on or before April 15th, 1926, or in case it is impossible to furnish them at that date, then at such later date as may be satisfactory to the Underwriter. Construction upon said building shall not be begun until the said plans and specifications shall have been approved in writing by the Underwriter, or until the Underwriter shall have expressly consented in writing to such construction being begun. The building shall be built in strict accordance with said plans and specifications approved by the Underwriter, and in accordance with all laws, ordinances, and regulations of the City of Bloomfield and State of New Jersey. For the services of the Underwriter's Consulting Architect in connection with this transaction, there shall be allowed a fee of Ten Hundred Seventy-five ($1,075.00) Dollars which shall be paid to the Underwriter to cover said expenses, and the owner agrees to pay the said sum to the Underwriter, or the Underwriter may deduct said sum from the net proceeds of the bond issue.

13. The contract or contracts for the erection of the building and for the equipment and furnishing thereof, shall be in form approved by the Un-

derwriter and the contractor or contractors shall be satisfactory to and approved by the Underwriter before asking for bids.

The Owner shall furnish a joint surety bond or bonds in the amount of $240,000, guaranteeing the completion of the building in accordance with plans and specifications free and clear of mechanics or materialmen's liens, or other liens or claims which might be superior to that of the trust deed or mortgage herein provided for. Said surety bonds shall be in form approved by the Underwriter, and the surety or sureties thereon and their agent or agents shall be such as the Underwriter shall designate and approve, and no disbursements from the proceeds of the bond issue shall be requested or made until such approval shall have been given in writing.

Should the Underwriter so require, the Owner will at or before the signing of the trust deed or mortgage and the bonds, or at any later date, furnish surety bonds or such other guaranties as may be satisfactory to the Underwriter, guaranteeing the performance of this contract and the completion and furnishing and equipping of the said building free from all liens or claims prior to the trust deed or mortgage and in accordance with this agreement. It is agreed by the Owners that before disbursement of any funds are made by the Underwriter, they will carry the construction of said building to a point where the net proceeds of this bond issue, less all deductions provided for in this Agreement, shall fully complete said building in accordance with the plans and specifications.

14. Construction of the building shall commence as soon as possible after the date hereof

and shall be proceeded with continuously, with all the diligence and dispatch that the same is reasonably susceptible of, until such new building is entirely completed, equipped, and ready for occupancy, throughout, and the Owner will so complete and equip such building on or before May 15th, 1927, unless the Owner be delayed by strikes not the fault of the Owner, or by other causes beyond the Owner's control; and if the Owner be delayed by such strikes or other causes, the Owner will be allowed an additional period equivalent to the time covered by such delay within which to so complete and equip said building.

15. The Owner hereby represents to the Underwriter that he estimates the cost of construction of the said building to be erected at Two Hundred Forty-one Thousand Two Hundred Thirty ($241,230.00) Dollars, exclusive of Architect's fees and carrying charges of all descriptions, and represents that the cost of the land was Twenty-three Thousand Five Hundred ($23,500.00) Dollars and its present value is Twenty-five Thousand ($25,000.00) Dollars; that the total cost of the building complete and ready for occupancy will be Three Hundred Five Thousand ($305,000.00) Dollars; that the cost of the furnishings and equipment of the building will be .....
..... ($.....)
Dollars; and that the gross annual earnings of the said building will not be less than Forty-eight Thousand Nine Hundred Sixty ($48,960.00) Dollars, and the net annual earnings not less than Thirty-six Thousand Seven Hundred Twenty ($36,720.00) Dollars.

The Owner further represents that he has on hand sufficient funds, when added to the proceeds

of the said bonds, to entirely complete the building with its equipment and furnishings ready for occupancy, or will arrange for said funds in accordance with Schedule "B" hereto attached and made a part hereof.

Should the cost of the improvement prove, upon completion of plans and specifications and estimates based thereon, to be different from the sums above mentioned, or if it should be impossible to substantiate by appraisers satisfactory to the Underwriter the value of the property, or the income therefrom, as shown above, or if the Owner should fail to satisfy the Underwriter that the provisions of Schedule "B" herein referred to will be satisfactorily carried out, the Underwriter may, at its discretion, require a revision hereof, in accordance with the facts as they shall be determined, or may at its option declare this agreement null and void.

16. The proceeds of said bonds shall be disbursed by the Underwriter as the building progresses, in such amounts and at such times and dates, and in accordance with such regulations as the Owner and Underwriter may agree upon, or if they fail to agree, as the Underwriter may determine to be necessary and best.

The Owner shall furnish to the Underwriter such waivers of lien, vouchers, and receipts for payment of moneys for material and labor entering into the construction of the building as the Underwriter may require, or such other evidences as may be required by the Underwriter, as will under the law relieve the property from liens in favor of materialmen, mechanics, and contractors, so as to always maintain said trust deed or

mortgage as a first lien against said property, and shall require the contractor or contractors who shall erect the building to comply with the requirements of the Underwriter in this and other respects in connection with the work upon the building or the disbursement of the proceeds of the bond issue. Under no circumstances, however, shall the Underwriter be held liable to the contractor, materialmen, or laborers furnishing material, work or labor in the construction of the building, but only for a proper payment or disbursement of all moneys which the Underwriter is required to account for under this contract.

The Underwriter shall have the right to supervise the progress of the construction of the building and the disbursement of the moneys employed in the building to the end that this contract may be carried out so as to fully protect the purchasers and holders of said bonds. The Underwriter shall have the privilege of entering in and upon the premises of the building during construction for the purpose of examining the progress made and the material used, and shall have the privilege of having its engineers, architects, or contractors make periodical examination if such appears to it as necessary during the period of construction, provided such examinations or inspections do not interfere with workmen or construction progress, and any extra expenses incurred by the Underwriter in connection with such supervision, including the traveling expenses of its Consulting Architect, shall be paid by the Owner.

The Underwriter may at all times, should such action appear to it wise in order to protect the holders of said bonds, or for any other reason, hold sufficient of such funds to entirely complete

the building, free and clear from any and all liens which are prior to that of said trust deed or mortgage, and may at any time stop disbursement of said proceeds of said bonds until any deficiency between the funds available and the cost of the building shall be made up by the Owner.

The Underwriter, if it sees fit it to do so, may pay off and discharge from any of the funds deposited by it as the proceeds of said bonds, any lien or claim upon the building for labor or material without being obligated to determine whether such claim or lien is valid in law or not, provided that the work and labor went into the building and such payment shall be deducted as other payments from the proceeds of such bonds and and the Underwriter shall be given due credit for all such payments in the final accounting for the proceeds of said bonds.

The Underwriter may, at its option, at any time during construction of the building or thereafter, have access to and/or control over the accounts of construction, and shall be furnished such information as it may require concerning all contracts, agreements, and other matters related thereto which may be within the Owner's knowledge or control.

17. The name of the building shall be satisfactory to and approved by the Underwriter and the name of said building shall not be changed while any of the bonds remain outstanding and unpaid without the consent and approval of the Underwriter.

18. The Owner, at his own expense and prior to the closing of the bond issue, shall furnish to the Underwriter a plat of said above described prop-

erty certified to by a competent engineer, which plat will also show the location of the building to be erected thereon. The Owner will also at intervals during construction of the building, when requested so to do by the Underwriter, furnish additional plats or surveys showing the building lines, and such other data as the Underwriter may require. The Owner will also furnish to the Underwriter at his own expense and within a reasonable time after the date of this agreement, a complete abstract of title showing good merchantable title in the Owner to the above described premises, brought down to date of said trust deed or mortgage and showing record thereof.

19. The Owner, at his own expense and in forms required by the Underwriter, will furnish or cause to be furnished, to the Underwriter, a complete statement as of the date hereof of his financial condition and that of each of the signers or guarantors of the bonds, duly signed and verified by each such persons, and will, upon demand of the Underwriter, while any of the bonds remain outstanding and unpaid, obtain and furnish similar statements. The Owner will also supply the Underwriter with such reports, statements, audits and other information as may be required by the Underwriter during such period in connection with the property and building herein described, and if a corporation will, until said bonds are fully paid, have an audit of all of its books and transactions made once in each year, by a firm of public accountants of good standing, and approved by the Underwriter, showing the trial balance and balance sheet and the details of the Mortgagor's properties, earnings, expenditures, indebtedness and net earnings, and the re-

sult of its operations and business for the preceding year, and will deliver to the Underwriter once in each year such audit in detail made by said accountants.

20. The Owner will pay to the Underwriter the expenses in connection with this loan, including all attorneys' fees for preparing trust deed or mortgage, giving opinion as to legal matters involved in the transaction, cost of and printing bonds, recording fees and mortgage taxes, Federal Internal Revenue Taxes, trustee's or other fees for certification of said bonds, making of drawings or water colors of the proposed building, and such other expenses in connection with the transaction as the Underwriter may incur. The Owner hereby agrees with the Underwriter that the sum of Three Thousand Two Hundred Twenty-Five ($3,225.00) Dollars shall be paid to the Underwriter to cover said expenses, and the Owner agrees to pay the said sum to the Underwriter, or the Underwriter may deduct the said sum from the proceeds of the bond issue.

21. The Owner further assumes and agrees to pay the Normal Federal Income Tax not exceeding 4% against any interest payments payable upon said bonds so that the holders of said bonds shall have no deductions from such interest on account of such Normal Federal Income Tax to the extent aforesaid, and provision shall be made in the trust deed or mortgage securing said bonds for depositing with the Trustee therein named, in monthly payments proportionate to the amount of interest payable each month a sum of money sufficient to meet this liability on the part of the Owner to the bondholders for the Normal

Exhibit S-3.

Federal Income Tax not exceeding 4% as aforesaid, should the same be deductible from the income derived by the holders of said bonds thereon, and the Trustees named in said trust deed or mortgage shall be authorized and empowered to deal with said tax so assumed by the Owner in such manner and in accordance with such regulations as are imposed by the Federal Government in like cases, and to make such regulations for the administration of the sums so deposited as are in its opinion just and reasonable. The Trustee shall retain any unexpended portion of the sums thus deposited as compensation for its services in administering said fund.

The Owner also assumes and agrees to pay any State or District Taxes on said bonds up to five mills on the dollar of the principal amount of said bonds and any income taxes assessed against the income on said bonds by any State or District in the United States up to but not exceeding 6% and provision shall be made in the Trust Deed for deposit of sums to meet these obligations.

In order to fix the Owner's liability for refunding taxes as provided in Paragraph #21 hereof, it is agreed that the Owner shall pay to the Trustee the sum of Six Hundred Dollars ($600.00) in each and every year that any bond or bonds remain outstanding. Upon the payment of such sum to the Trustee, the Owner shall be discharged from further liability to the Trustee for the repayment of the Normal Federal Income Tax and State Taxes assessed against and paid by the holders of the bonds as mentioned in Paragraph #21; it being expressly agreed between the parties hereto that the Trustee in consideration of the sum of Six Hundred Dollars ($600.00)

per year paid to it by the Owner in the manner hereinafter provided shall assume the Owner's tax obligations to the Trustee outlined in Paragraph #21. The Owner shall pay to the Trustee annually the aforementioned sum of Six Hundred Dollars ($600.00) in twelve (12) equal monthly installments monthly in advance on the same dates upon which deposits are payable on interest and principal as provided in this Underwriting Agreement. Except to relieve the Owner from the aforementioned tax refunding obligation, the Trustee shall not be accountable to the Owner for said yearly payment of Six Hundred Dollars ($600.00).

22. The trust deed shall provide for payment to the Trustee named therein, to cover expenses incurred in performing the duties of the Trustee other than those necessary to be performed in case of default, a sum of money equal to $1.00 per year for each and every bond outstanding, and for payment to the Trustee monthly in advance, on the same dates upon which deposits are payable on interest and principal as hereinabove provided of one-twelfth (1/12th) of the amount due during the current year for this purpose.

In lieu of Paragraph #22 of this Agreement the following is agreed to by the parties: The Trust Deed shall provide for payment to the Trustee named therein, to cover expenses incurred in performing the duties of the Trustee other than those necessary to be performed in case of default, the sum of Two Hundred Dollars ($200.00) for each and every year that any bond or bonds remain outstanding, and for payment to the Trustee monthly in advance on the same

dates upon which deposits are payable on interest and principal as hereinabove provided of one-twelfth (1/12) of the sum of Two Hundred Dollars ($200.00) due during the current year for this purpose.

23. The Underwriter is authorized when progress on the building to be erected on said property has been such as to render the same liable to fire or tornado, or other damage which can be covered by insurance, to take out in the name of the Owner, or his legal representatives, heirs, or assigns, fire, tornado, and such other forms of insurance as the Trustee or the Underwriter shall determine to be proper, on the above described building, improvements, equipment and furniture, including Builders' insurance, at the Owner's expense and for the full insurable value of the property, such insurance to be taken in solvent Companies represented by the Underwriter at the usual rates of such insurance; such policies to be issued by insurance companies that are likewise acceptable to the Trustee named in the trust deed or mortgage and the policies to contain loss clauses making losses, if any, payable to such Trustee as its interests may appear; the policies to be deposited with said Trustee named in the trust deed. Such insurance shall at all times be maintained at the Owner's expense until all of said bonds shall be fully paid and retired, the Underwriter having the right and authority to renew said insurance from year to year throughout such periods of time. The Owner agrees to pay the premiums to the Underwriter on all such policies as the same respectively mature, or to refund the same promptly if paid by the Underwriter for the account of the Owner.

Exhibit S-3.

24. The Owner represents that no rental contracts with reference to the property herein described and the buildings thereon have been made prior to the date hereof, and agrees that no such contracts will hereafter be made without the consent and approval of G. L. Miller & Company, Inc., and of the Trustee of the bond issue. The Owner further agrees that G. L. Miller & Company, Inc., shall have the unconditional right at any time so long as any of the bonds remain outstanding to designate the Agent or Agents who shall collect rents from said property, or manage the same, and the form of agreements or contracts with such Agent or Agents.

25. The Underwriter shall have the privilege of placing on the lot during construction of the building a sign or signs stating its part in financing the building, and shall also be permitted to erect and maintain at a suitable location or locations in the building when completed, a neat bronze tablet or tablets commemorating the fact that the building was financed by the Underwriter.

26. The Owner agrees that no publicity shall be given the project herein described, or this bond issue, through newspapers or otherwise, unless the copy for such publicity is first submitted to and approved by the Underwriter.

27. The Owner covenants that he has, or is about to acquire, good title to said property and all taxes and other governmental assessments have been or will be paid; that there is no person in possession or claiming the right to the possession of any of said premises adversely to the

Owner; that he has or will have on May 15, 1926, a good and sufficient title to said property, free of all claims and incumbrances of every nature, superior to the trust deed or mortgage to be executed by such Owner under the provisions hereof, and that any furniture or equipment of said building which is hereby intended to be a part of the security for this bond issue will be placed in said building free and clear of any liens or incumbrances prior to the lien of the trust deed or mortgage securing said bond issue, and he warrants each of the statements herein made relating to said premises and improvements and the securities to be made and sold as true and made as an inducement to secure the services of the Underwriter and the underwriting by it of said bonds.

28. Should said bonds, interest coupons and trust deed or mortgage securing same, be not made, executed and delivered by reason of the Owner's refusal to do the same, or for any other reason not within the Underwriter's control, the Owner covenants and agrees to pay the Underwriter at once, on demand, all expenses or disbursements incurred or made by it in connection with this transaction and the further sum of three (3%) per cent. of the aggregate face amount of said bonds agreed to be made and executed as liquidated damages for the breach of this agreement. Upon the execution hereof, the Owner will pay to the Underwriter the sum of Two Thousand One Hundred Fifty ($2,150.00) Dollars on account thereof, which sum will be returned to the Owner when all the definitive bonds and the trust deed or mortgage shall have been executed, and duly delivered.

Exhibit S-3.

29. The Underwriter, its agents, officers and attorneys, shall incur no personal liability for what it or they do or omit to do under the powers and duties contained in this agreement except to faithfully account for the proceeds of said bonds as hereinbefore set out, and in case of its or their own gross negligence.

30. As an inducement to the making of this contract the Owner has executed and delivered to the Underwriters a BOND ISSUE APPLICATION consisting of four pages, a copy of which is hereto attached and made a part of this Agreement, and the Owner warrants the truth of the statements therein contained.

31. The place of performance of this contract is hereby fixed as New York, N. Y., and this contract will be construed by the laws of the State of New York. The Owner agrees to furnish to the Underwriter two appraisals valuing the land at not less than Twenty Five Thousand Dollars ($25,000.), two appraisals valuing the building at not less than Three Hundred and Five Thousand Dollars ($305,000.) and two appraisals estimating the gross and net annual income at not less than Forty Eight Thousand Nine Hundred Sixty Dollars ($48,960.) and Thirty Six Thousand Seven Hundred Twenty ($36,720.) respectively; all such appraisals to be from reliable and competent authorities satisfactory to the Underwriter. The Underwriter's acceptance of this Agreement is conditioned upon its acceptance and approval of each and/or all of the above mentioned appraisals.

Exhibit S-3.

This instrument was executed and delivered by the parties hereto on this 31st day of March, 1926.

(Signed) JOHN HAINES (Seal)
(Signed) JAMES HAINES (Seal)
(Signed) ..... (Seal)
(Signed) ..... (Seal)

If a corporation, sign here.

.....

By.....
President.

(Seal)

Attest:

.....
Secretary.

G. L. MILLER & COMPANY, Incorporated.

By P. J. FRANCIS,
Vice President.

(Seal)

Attest:
J. H. RAINWATER,
Asst. Secretary.

Exhibit S-8.

Tr's. Ex. 6.
July 22/27.

June 8, 1926.

G. L. Miller & Company, Inc.,
30 East 42nd Street,
New York, N. Y.

Re: Franklin Arms Inc.

Gentlemen:

In connection with the closing of the mortgage loan and bond issue affecting the above premises, you are hereby authorized to advance, in addition to the money already advanced by you on the closing for the account of this Company, the sum of $3,300. in payment of the premium for the surety bond issued by Fidelity & Deposit Company of Maryland for $220,000. and to charge the same against the proceeds of sale of said bond issue.

Very truly yours,

FRANKLIN ARMS INC.

By JAMES HAINES
President.

Exhibit S-9.

Tr's. Ex. 5.
July 22/27.

New York, June 7, 1926.

G. L. Miller & Company, Inc.,
30 East 42nd Street,
New York City.

Re: Franklin Arms, Bloomfield, N. J.

Dear Sirs:

In connection with the bond issue of $215,000. underwritten by your company, secured by a mortgage or deed of trust dated May 15, 1926, upon the above premises, please draw check to the order of your company for $43,800., made up as follows:

Underwriter's fee	$21,500.	
Consulting architect's fee	1,075.	
Selling and disbursing expenses	2,150.	
Bond issue expense	3,225.	
One year's interest at 7% from May 15, 1926 to May 15, 1927	15,050.	
		$43,000.

Exhibit S-9.

Trustee's fee for one year, from May 15, 1926 to May 15, 1927..	200.	
Federal and State Income Tax for one year, from May 15, 1926 to May 15, 1927.....	600.	
		800.
		$43,800.
And to the order of William F. Day and Randolph C. Barrett as Executors &c. of Anna M. Day, deceased, payment of mortgage	8,000.	
New York Title and Mortgage Company, account of taxes.....	1,000.	
		$52,800.

FRANKLIN ARMS, INC.

By JAMES HAINES
President.

Exhibit S-11.

-12.

50

G. L. MILLER & COMPANY

INCORPORATED

No. 5380

FIRST MORTGAGE BONDS

EXECUTIVE OFFICES NEW YORK, N.Y. June 7, 19 26

Pay to the order of William F. Day & Randolph C. Barrett as Executors of the Will of Anna M. Day $ 8000.00

THE SUM OF $8000 AND 00 CTS

To GUARANTY TRUST CO. OF NEW YORK
FIFTH AVENUE OFFICE
1-107 NEW YORK CITY

COUNTER-SIGNED R. H. Lesing

ASSISTANT TREASURER

SYMBOL OF SAFETY MILLER BONDS

PAY ANY BANK OR TRUST COMPANY BANKER

ALL PRIOR ENDORSEMENTS GUARANTEED
55-204 JUN 16 1926 55-204
BLOOMFIELD NAT'L BANK
BLOOMFIELD, N. J.

BANKERS CLEARING HOUSE ASSOCIATION

5 of 11 items

For deposit to the credit of Estate of Anna M. Day.
Wm. F. Day &
Randolph C. Barrett
as Executors

G. L. MILLER & COMPANY
INCORPORATED

No. 5381

FIRST MORTGAGE BONDS

EXECUTIVE OFFICES

NEW YORK, N.Y. June 7, 19 26

Pay to the order of New York Title & Mortgage Co. $ 1000.00

THE SUM OF $1000 AND 00 CTS

To GUARANTY TRUST CO. OF NEW YORK
FIFTH AVENUE OFFICE
1-107 NEW YORK CITY

COUNTER-SIGNED R. H. Leubing

SYMBOL OF SAFETY MILLER BONDS

ASSISTANT TREASURER

PAY TO THE ORDER OF
FEDERAL RESERVE BANK OF NEW YORK
PRIOR ENDORSEMENTS GUARANTEED
1-307 AMERICAN TRUST COMPANY 1-307
NEW YORK
J. L. OBERMAYER, TREASURER
JUN - 9 1926
RECEIVED PAYMENT THROUGH THE NEW YORK CLEARING HOUSE
PRIOR ENDORSEMENTS GUARANTEED
FEDERAL RESERVE BANK OF NEW YORK

PAY TO THE ORDER OF
AMERICAN TRUST COMPANY
FOR AGENCY ACCOUNT,
NEW YORK TITLE AND MORTGAGE COMPANY

Exhibit S-12.

TRUST MORTGAGE
FRANKLIN ARMS
Bloomfield, New Jersey

FRANKLIN ARMS INC.

to

ROLLIN J. FRANCIS
As Trustee

G. L. MILLER & COMPANY, INC.,
Underwriter & Depositary

New York City	Atlanta
Philadelphia	St. Louis
Pittsburgh	Knoxville
Buffalo	Memphis

Dated May 15, 1926

Securing an issue of $215,000 First Mortgage Seven Per Cent Gold Bonds

THIS INDENTURE, dated as of the 15th day of May, 1926, between FRANKLIN ARMS, INC., a corporation organized and existing under the laws of the State of New Jersey, and doing business therein under its articles of incorporation, and having its principal office at 56 Broad Street, Bloomfield, County of Essex, State of New Jersey, (hereinafter referred to as the "Company") party of the first part, and ROLLIN J. FRANCIS, residing at Summit, New Jersey, as Trustee, (hereinafter referred to as the "Trustee") party of the second part.

WITNESSETH:

WHEREAS, the Company has full power and authority under its charter to own, convey, lease, mortgage, operate and hold real estate in fee and to erect and own buildings and other improvements thereon, in the State of New Jersey, in and under and by virtue of the Laws of the State of New Jersey and also has full power and authority to make and issue its corporate negotiable bonds and to secure the same by mortgage, pledge or deed of trust and to convey by such mortgage, pledge or deed of trust any or all of its property, wherever situate, and has full power to execute and deliver this mortgage or deed of trust (hereinafter referred to as "indenture") and the temporary and definitive bonds (hereinafter referred to as the "bonds") secured thereby; and

WHEREAS, the Company desires to provide for its present and future financial requirements, including among other things the providing of funds for the erection and equipment of a building on the premises hereinafter described; and

WHEREAS, so to provide, the Company, by resolutions of its Board of Directors and of its stockholders, lawfully passed and approved, has duly authorized an issue of bonds of the tenor hereinafter set forth in the aggregate principal amount of Two Hundred and Fifteen Thousand ($215,000) Dollars and has, pursuant to the resolutions of its Board of Directors and its Stockholders, lawfully passed and approved, duly authorized the execution of its temporary bond for said principal amount, in accordance with the provisions hereinafter contained, and has agreed to execute and has duly authorized the making and issuing of its

definitive coupon bonds as soon as they are prepared, amounting in the aggregate to said principal amount of Two Hundred and Fifteen Thousand ($215,000) Dollars, bearing even date herewith and payable to bearer or to the registered owner as hereinafter provided for, and numbered consecutively from one to three hundred fifty-seven inclusive, a schedule of which bonds showing the respective bond numbers, denominations, amounts of principal and dates of maturity, is as follows:

Bond Numbers	*Denominations*	*Amount*	*Dates of Maturity*
1- 3	$1,000.	$3,000.	May 15, 1928
4- 9	500.	3,000.	May 15, 1928
10- 12	1,000.	3,000.	May 15, 1929
13- 19	500.	3,500.	May 15, 1929
20- 22	1,000.	3,000.	May 15, 1930
23- 28	500.	3,000.	May 15, 1930
29- 38	100.	1,000.	May 15, 1930
39- 42	1,000.	4,000.	May 15, 1931
43- 48	500.	3,000.	May 15, 1931
49- 52	1,000.	4,000.	May 15, 1932
53- 60	500.	4,000.	May 15, 1932
61- 64	1,000.	4,000.	May 15, 1933
65- 71	500.	3,500.	May 15, 1933
72- 81	100.	1,000.	May 15, 1933
82- 86	1,000.	5,000.	May 15, 1934
87- 94	500.	4,000.	May 15, 1934
95- 99	1,000.	5,000.	May 15, 1935
100-107	500.	4,000.	May 15, 1935
108-197	1,000.	90,000.	May 15, 1936
198-317	500.	60,000.	May 15, 1936
318-357	100.	4,000.	May 15, 1936
		$215,000.	

and

WHEREAS, all of said bonds are to be signed in the corporate name of the Company by the President or a Vice-President, attested by the Secretary or Assistant Secretary, and sealed with the corporate seal of the Company, the said interest coupons to bear the fac-simile signature of the Treasurer of the Company, said bonds to be payable in gold coin of the United States of America, of or equal to but not less than the standard of weight and fineness as now fixed by law and to bear interest from and after the 15th day of May, 1926, at the rate of seven (7%) per centum per annum until paid, said interest to be payable in like gold coin in semi-annual installments upon the presentation and surrender of said interest coupons, as they respectively mature, said bonds to be subject to the privilege of pre-payment and redemption, as provided in said bonds and as hereinafter set forth, and each of said definitive bonds to have attached thereto coupons for the successive installments of interest as aforesaid, the first of said installments of interest to fall due on November 15, 1926, and thereafter semi-annually on the 15th days of May and November in each year until paid, each of said temporary and definitive bonds having endorsed thereon the Trustee's certificate of authentication, which bonds, coupons, Trustee's certificate and Banker's certificate are to be in substantially the following form and tenor, subject to the necessary variations as to number, denominations and maturity, to wit:

Trust Mortgage, dated May 15, 1926.

(FORM OF BOND)

UNITED STATES OF AMERICA

STATE OF NEW JERSEY

FIRST MORTGAGE SEVEN PER CENT. GOLD BOND

OF

FRANKLIN ARMS, INC.

FRANKLIN ARMS BLOOMFIELD, NEW JERSEY

TOTAL ISSUE $215,000.

No..... $.....

For value received, Franklin Arms, Inc., a corporation organized and existing under the laws of the State of New Jersey, (herein referred to as the "Company") acknowledges itself to owe and promises to pay to the bearer, or to the registered owner hereof, in case of registration, as hereinafter provided, unless this Bond shall have been called for previous redemption and provision for its payment made, the sum of

Dollars in gold coin of the United States of or equal to the standard of weight and fineness as fixed by law at the date hereof, at any office of G. L. Miller & Company, Inc., or at the office of Guaranty Trust Company of New York, 140 Broadway, in the Borough of Manhattan, City of New York, N. Y., on the 15th day of May, 19 , with interest on said sum from the date hereof at the rate of Seven per cent. per annum until paid, payable semi-annually, in like gold coin, on the 15th days of May and November in each year at any office of G. L. Miller & Company, Inc., or at

the office of Guaranty Trust Company of New York, 140 Broadway, in the Borough of Manhattan, City of New York, N. Y., according to the tenor and effect of the coupons hereto attached but only upon the presentation and surrender thereof as they respectively mature. Both principal and interest are payable without deduction of any normal federal income tax up to but not exceeding four per cent. (4%), the payment of which the Company hereby agrees to assume (in so far as the Company may be permitted to pay or assume by any present or future law of the United States); and also as provided in the indenture herein mentioned, the Company will re-pay to the bearer, or if this bond is registered, to the registered owner hereof, any State and/or District of Columbia taxes not exceeding five mills per annum, on each dollar of principal amount hereof and any income taxes assessed against the income on this bond by any State and/or District of Columbia in any one year up to but not exceeding six per cent. (6%) thereof which may be lawfully assessed upon the income on this bond or upon such bearer or registered owner hereof, by reason of his ownership hereof, provided that in each and every instance, such tax shall have been paid by the bearer or registered owner hereof, and also that application for reimbursement shall be made within ninety (90) days after such tax, assessment, or charge has become due and payable by such bearer or registered owner.

This bond is one of a series of bonds of the Company, duly authorized, known as its First Mortgage Seven Per Cent. Gold Bonds (herein referred to as "bonds"), limited to an aggregate principal amount of $215,000. at any time issued hereunder

and outstanding, numbered consecutively from one (1) to three hundred fifty-seven (357), both inclusive, of like form, tenor, and effect, except as to denomination, numbers, and dates of maturity.

The payment of all of said bonds, as the said bonds shall be executed, authenticated and delivered, together with the interest thereon, is equally and ratably and without priority or preference of any bond over any other, for any reason whatsoever, secured by a mortgage or deed of trust (herein referred to as "indenture") bearing even date herewith, duly executed, acknowledged and delivered by the Company to Rollin J. Francis, as Trustee, and recorded on the day of , 1926, in the office of the Register of Essex County, State of New Jersey, in Mortgage Book at page . For a more particular description of the covenants of the Company, as well as a description of the mortgaged property and nature and extent of the security, the rights of the holders of the bonds and the terms and conditions upon which the bonds are issued and secured, and the method of payment thereof, reference is made to said indenture.

This bond is issued and accepted by the holder hereof subject to payment and redemption before maturity at the option of the Company on any interest payment date, by payment of the full amount of the principal hereof and all interest accrued hereon to the date of redemption, and said normal federal income and other taxes, if any, together with a premium of two per cent. of said principal, upon notice, in the manner and upon the terms set forth in said indenture.

This bond shall pass by delivery, unless registered as to principal in the holder's name on the

books of the Company at the office of the Trustee or of his successor in the trust, in the Borough of Manhattan, City and State of New York, such registration being noted hereon by or on behalf of the Company. After such registration no transfer hereof shall be valid unless made at such office by the registered owner hereof in person or by attorney thereunto in writing duly authorized and similarly noted hereon, but this bond may be discharged from registration by being in like manner transferred to bearer, whereupon transferability by delivery shall be restored and this bond may again from time to time be registered as to principal or discharged from registration in the same manner. Such registration, however, shall not affect the negotiability of the coupons hereto attached, which shall continue to be transferable by delivery.

Neither this bond nor any of the coupons hereto attached shall be valid until this bond is authenticated by the signature of said Trustee, Rollin J. Francis, or of his successor in the trust, and the banker's certificate endorsed hereon signed by the Chemical National Bank of New York.

Said indenture and this bond, as well as all of the other bonds aforesaid, are to be taken and considered together as parts of one and the same contract, and this bond and each coupon hereto attached are subject to all of the provisions of said indenture to the same extent as if said indenture were herein fully set forth.

In case of default in the payment of interest on or of the principal of any of said bonds, or in case of default in the performance of any of the covenants or conditions in said indenture, the principal of this bond may become due and payable be-

fore its regular maturity, together with the interest accrued thereon, as provided in said indenture.

The special agreement herein to pay interest hereon and said taxes, assessments and charges, at the respective rates aforesaid, shall be, and always be, construed as a contract made under and by virtue of the laws of the State of New Jersey in force at the time of the date hereof and is expressly made with reference thereto and shall be governed thereby regardless of the place of payment of the principal hereof, the interest hereon or the place of actual delivery hereof.

It is certified by the undersigned to the holder hereof that said interest at the rate aforesaid, with said taxes, assessments and charges in addition thereto, as herein agreed to be paid, are not in excess, in any case of the aggregate amount of interest on money as such, that the undersigned can now lawfully agree to pay for the use of moneys under the laws of the State of New Jersey, and the undersigned hereby certifies and warrants to the holder hereof that said special agreement above named to pay such interest and such income and other taxes, when claimed as aforesaid, is incontestable by the undersigned or by its successors.

Each holder of this bond by accepting the same shall be deemed to have assented to and become bound by all the terms, provisions and conditions of said indenture as effectually as if the terms, provisions and conditions thereof were fully set forth herein.

In witness whereof, the said Franklin Arms, Inc., has caused these presents to be signed by its President or Vice-President, and its seal to be hereunto affixed, and to be attested by its Secre-

retary or Assistant Secretary and has likewise caused the coupons attached hereto to be authenticated by the facsimile signature of its Treasurer, all as of the 15th day of May, 1926.

FRANKLIN ARMS, INC.,

By.....
President.

(Corporate Seal)

Attest:

.....,
Secretary.

NOTE: Each of said bonds shall bear and have printed thereon the following, viz: "Required U. S. Revenue stamps for this bond have been placed on the indenture securing the same, and duly cancelled."

(FORM OF COUPON)

No..... $.....

On the 15th day of , 19 , unless the Bond hereinafter mentioned shall have been called for previous redemption on or before that date and provision for its payment made, Franklin Arms, Inc. will pay to bearer, at any office of G. L. Miller & Company, Inc., or at the office of Guaranty Trust Company of New York, 140 Broadway, New York City, N. Y.,

Dollars in gold coin of the United States of or equal to the standard

of weight and fineness as fixed by law on May 15, 1926, being six months' interest then due on its First Mortgage Seven Per Cent. Gold Bond No.....

.....,

Treasurer.

(FORM OF TRUSTEE'S CERTIFICATE)

This is one of the Bonds described in the within mentioned indenture.

as Trustee.

REGISTRATION

Date of Registration	*Name and Address of Registered Owner*	*Signature of Registrar*
.....	.....	.....
.....	.....	.....
.....	.....	.....

Trust Mortgage, dated May 15, 1926.

(FORM OF BANKER'S CERTIFICATE)

Pursuant to the terms of the Indenture herein referred to, THE CHEMICAL NATIONAL BANK OF NEW YORK hereby certifies that it has caused the within mentioned Indenture executed by Franklin Arms, Inc. to Rollin J. Francis, as Trustee, dated May 15, 1926, and the bonds secured thereby, numbered one (1) to three hundred fifty-seven (357) inclusive, of the aggregate principal amount of $215,000., to be examined by its counsel who advise that this bond when duly authenticated by Rollin J. Francis as Trustee is one of the bonds described in said indenture and said indenture has been recorded in the Office of the Register of the County of Essex, State of New Jersey, on the day of , 1926.

THE CHEMICAL NATIONAL BANK OF NEW YORK,

By.....,
Assistant Trust Officer.

WHEREAS, at meetings lawfully called and held in pursuance of its by-laws the Board of Directors of the Company and the stockholders of said Company have lawfully authorized the execution, issuance and delivery of said bonds with interest coupons attached and of this indenture and in like manner have authorized a temporary bond to stand in lieu of said definitive bonds and interest coupons pending their engraving, execution, authentication and delivery; and

WHEREAS, all things necessary to make said bonds when duly authenticated by the Trustee, the valid, legal and binding obligations of the Company, and to make this indenture the valid, legal

and binding obligation of the Company for the purposes herein expressed, and to make this indenture a first lien upon the land and premises hereinafter described, have been duly performed; and

WHEREAS, the Company owns in fee the land and premises at Bloomfield, in the County of Essex and State of New Jersey, hereinafter described, and desires to secure the payment of the said bonds and the interest thereon as the same shall from time to time become due and payable, by a mortgage or deed of trust upon and of said property, to the end that the payment of said bonds and the interest thereon shall be secured in all respects by a first mortgage and lien upon said land and premises:

NOW, THEREFORE, in consideration of the premises and of the purchase and acceptance of said bonds by the holders thereof, and of the sum of One Dollar to it in hand paid, and in order to secure the payment of the principal indebtedness aggregating Two Hundred and Fifteen Thousand Dollars ($215,000) together with interest as provided in said bonds and in order to secure the payment of the principal of each of said bonds and the interest to accrue thereon according to the terms thereof, and the performance and observance of each and every of the covenants and conditions herein and in said bonds, and to declare the terms and conditions upon which said bonds are, and are to be issued, received and held, the Company by these presents, does hereby grant, bargain, sell, assign, alien, remise, release, mortgage, convey, pledge, warrant, confirm, transfer and set over unto the said Rollin J. Francis, as

Trustee, and to his heirs, his successors in trust and assigns forever:

ALL that certain piece or parcel of land with the buildings and improvements thereon, situate, lying and being in the Town of Bloomfield, Essex County, State of New Jersey, bounded and described as follows:

BEGINNING at the intersection of the easterly line of Berkeley Place with the southerly line of Franklin Street; running thence southerly along the easterly line of Berkeley Place south 20 degrees 31 minutes west 134.09 feet; thence south 69 degrees 58 minutes east 175 feet; thence north 20 degrees 31 minutes east 185.78 feet to the southerly line of Franklin Street; thence along the southerly line of Franklin Street north 86 degrees 23 minutes west 182.89 feet to the easterly line of Berkeley Place, the point or place of beginning.

TOGETHER with any and all buildings and improvements now standing or at any time hereafter constructed or placed upon said land or any part thereof, fixtures, furniture, fittings and equipment and articles used or to be used in the operation of said premises, or any part thereof, and with any and all replacements thereof, including screens, awnings, window shades, dynamos, motors, elevators, fire prevention and extinguishing apparatus, heating, plumbing and ventilating apparatus, gas and electric light fixtures, machinery, appliances, ash conveyor, garbage incinerator, power and machinery plant for running and operation of passenger and freight elevator, and every other article, chattel or things used or placed or to be placed in any building whether herein enumerated or not and which constitute a part of

the plant thereof and/or used in its operation, and all other equipment, and machinery, appliances, fittings and fixtures of every kind in or used in the operation of any building now, or hereafter standing on said premises and together, also, with all and singular the tenements, hereditaments, easements, appendages and appurtenances to said estate and property belonging, or in anywise appertaining, and all the estate, right, title and interest, property, possession, claim and demand whatsoever, as well in law as in equity, either in possession or expectancy of the Company, in and to the above described land and estate and every part and parcel thereof, together with the appurtenances, all of which estate, property, interest and rights hereby given, granted, bargained, sold, assigned, aliened, remised, released, mortgaged, conveyed, pledged, warranted, confirmed, transferred and set over or intended or agreed so to be are hereinafter in this indenture sometimes referred to as the mortgaged premises or trust estate.

TO HAVE AND TO HOLD the above granted premises unto the said Trustee, his heirs, his successors and assigns forever subject to an easement to use the alley on the south for ingress and egress granted by Hudson & Essex Building & Construction Co. to Abraham Lipton by deed dated Mar. 5, 1925.

IN TRUST, NEVERTHELESS, for the equal and proportionate benefit and security of all present and future holders of said bonds and coupons without preference, priority or distinction as to lien or otherwise of one bond over any other bond by reason of priority in time of issuance, negotiation, date of maturity thereof, or of when the Com-

pany shall have actually received the proceeds thereof, or otherwise (except as hereinafter provided), and it is the further intent hereof that the lien and security of this indenture shall take effect upon the day of the date hereof without regard to the time or times of any advance or advances of the money secured.

And it is expressly covenanted and agreed by the Company that all said bonds are to be issued, authenticated, delivered and negotiated and that said premises are conveyed to and are to be held and disposed of by the Trustee subject to the further covenants, conditions, provisions, uses and trusts herein set forth, that is to say:

ARTICLE I.

Issuance, Authentication, Negotiation and Registration of Bonds.

SECTION 1. The Company covenants that as soon as the definitive bonds to be secured hereby shall be ready, they shall be executed by it; the certificate of The Chemical National Bank thereon shall be executed by said bank and said bonds shall then be delivered to the Trustee for authentication and be by him delivered in exchange for and upon cancellation of the temporary bonds herein provided for. Such bonds shall be of even date herewith, shall bear interest from May 15, 1926, at the rate of seven per cent. (7%) per annum until paid, and shall be signed in the name of said Company by the Company's President or Vice-President and sealed with its corporate seal, attested by its Secretary or Assistant Secretary. No bonds shall be secured or entitled to any benefit or lien

hereunder unless authenticated by the certificate of the Trustee, or of his successors in the trust, endorsed thereon and certified by the certificate of said bank, and such certificates upon any such bond issued by the Company shall be conclusive evidence that such bond has been duly issued and is secured hereby.

The coupons attached to the bonds shall bear the facsimile of the signature of the present or any future Treasurer of the Company.

Said bonds, coupons and Trustee's certificate and Banker's certificate, shall be substantially of the respective forms, numbers, dates of maturity and denominations herein set forth.

Pending the preparation of said definitive bonds, the Company shall execute and deliver to the Trustee, and the Trustee upon the written request of the Company shall authenticate a temporary bond or bonds in the aggregate principal sum of Two Hundred and Fifteen Thousand Dollars ($215,000) substantially of the tenor of said definitive bonds, (except that said Bankers certificate herein referred to will not be endorsed thereon) with appropriate additions, substitutions and omissions, which said temporary bond or bonds shall bear a statement that "Required U. S. Revenue stamps for this bond have been placed on the indenture securing the same, and duly cancelled." Said temporary bond or bonds shall be redelivered to the Company and by it may be sold and negotiated. Such temporary bond or bonds shall be subject to all the terms and provisions hereof and shall be exchangeable without expense to the holder, for an equal aggregate principal amount of definitive bonds of corresponding maturities when the same are executed and properly authenticated by the

Trustee, and upon such exchange said temporary bond or bonds shall be cancelled by the Trustee and delivered to the Company for destruction. Until so exchanged, said temporary bond or bonds shall be entitled to the same security as the definitive bonds to the same extent as though the same were recited at length herein, and all the terms and conditions therein set forth are fully enforceable hereunder to the same extent as if the same were here recited. The term "bonds", as hereinafter used in this indenture, shall include temporary and definitive bonds.

SECTION 2. The amount of bonds which may be executed by the Company and authenticated and delivered by the Trustee hereunder is limited so that at no time shall there be issued hereunder bonds in an aggregate principal amount exceeding Two Hundred and Fifteen Thousand Dollars ($215,000), except as provided in Section 5 of this Article I in respect of lost, mutilated, destroyed or stolen bonds.

SECTION 3. Any of said bonds signed by the proper officer at the time of such signing and any such interest coupons bearing the facsimile signature of any present or future Treasurer of the Company, shall, notwithstanding any change of officers, prior to authentication or issue, bind the Company and be secured hereby as if no such change had occurred.

SECTION 4. There shall be kept at the office of the Trustee in the office of G. L. Miller & Company, Inc., in the City of New York, State of New York, as registrar, a register for the registration and transfer of said bonds, in which the registrar,

on payment of its reasonable charges by the Company, will register any such bond as to principal; such registration shall be noted on the bonds by the Registrar and thereafter no transfer thereof shall be valid unless made on said register by the owner in person or by attorney thereunto in writing duly authorized and similarly noted on the bond, but the same may be discharged from registration by being in like manner transferred to bearer and thereupon transferability by delivery shall be restored, but the bond may again from time to time be registered and transferred to bearer as before. No such registration shall affect the negotiability of the interest coupons which shall always be transferable by delivery merely. The holder of any of said bonds which shall not at the time be registered, and the holder of any interest coupon, shall be deemed the owners respectively of such bond or interest coupon, and none of the parties hereto shall be affected by any notice to the contrary. In the event that at any time the Trustee shall be incapacitated or unable to act as registrar, G. L. Miller & Company, Inc., may appoint a registrar to act in place of said Trustee.

SECTION 5. In case any bond issued hereunder, with the interest coupons thereto pertaining, shall, prior to the payment thereof, be mutilated, lost, destroyed or stolen, a new bond, with unmatured coupons, of like tenor and date, and bearing the same serial number, may, at the discretion of the Trustee, be executed by the Company and authenticated and delivered by the Trustee in exchange for and upon cancellation of the mutilated bond and its coupons, or in substitution for the bond

and coupons so lost, destroyed or stolen, upon receipt of (1) presentment of the mutilated bond and coupons or evidence satisfactory to the Trustee of the loss, destruction or theft of such bond and its coupons; (2) proof of ownership thereof; (3) indemnity to the Trustee and the Company satisfactory to them and G. L. Miller & Company, Inc., respectively, and (4) payment of such reasonable charges as the Company and/or the Trustee may require to cover the cost of preparing and authenticating said bond with or without coupons; or the Trustee or G. L. Miller & Company, Inc., may in their discretion, but without obligation so to do, and at a time when the bond or bonds or coupon or coupons so lost, mutilated, stolen or destroyed would by its or their terms be due and payable, pay any bond or coupon which may have been so lost, mutilated, stolen or destroyed upon presentation to it of like (1) evidence, (2) proof and (3) indemnity. The Trustee and G. L. Miller & Company, Inc., shall incur no liability for anything done by them under this Section nor for their failure or refusal to take action hereunder. In the event that G. L. Miller & Company, Inc., shall pay any bond or coupon pursuant to the foregoing provisions of this Section 5, the Company will on demand reimburse said G. L. Miller & Company, Inc., with interest from the date of payment if said G. L. Miller & Company, Inc., shall not have theretofore received the amount thereof.

SECTION 6. The bonds and coupons secured by this indenture are issued and delivered and are intended to circulate as negotiable instruments. Each successive holder or owner of any of the bonds by accepting the same shall be deemed to have agreed that said bonds and coupons shall be

construed as negotiable instruments and that his rights, risks and remedies in respect of any of the bonds and coupons held by him, as well as the rights and remedies of subsequent holders or owners thereof shall be those of holders of negotiable instruments. Each successive holder or owner of any of said bonds by the acceptance thereof shall be deemed to have agreed that the Trustee may deem and treat the bearer of any bond authenticated hereunder and not registered in the manner hereinbefore provided for, as the absolute owner of such bond for all purposes; and no innocent purchaser before maturity of any of the bonds shall, as to the lien which this indenture purports to effect, nor as to the obligation of the bonds be affected by any equities between the Company and the Trustee or G. L. Miller & Company, Inc., or between the Company or the Trustee, G. L. Miller & Company, Inc., or and/or any previous holder or owner of such bond.

ARTICLE II.

Payment and Redemption.

SECTION 1. The Company hereby covenants and agrees that it will duly and punctually pay or cause to be paid for the benefit of the holders of said bonds and coupons issued hereunder, the principal amount of said bonds, in annual installments as they respectively become due, and the interest thereon as it accrues thereon, together with the normal federal income tax or taxes thereon and the other taxes, as provided in said

bonds or in this indenture to be paid by the Company. Said installments are payable as follows:

$6,000.	on May 15, 1928
6,500.	on May 15, 1929
7,000.	on May 15, 1930
7,000.	on May 15, 1931
8,000.	on May 15, 1932
8,500.	on May 15, 1933
9,000.	on May 15, 1934
9,000.	on May 15, 1935
154,000.	on May 15, 1936
$215,000.	

The Company further specifically covenants and agrees to pay or cause the same to be paid in the following manner:

On the execution and delivery of this indenture a sum equal to one year's interest on the aggregate principal amount of bonds secured hereby and on the 15th day of May, 1927, and on the 15th day of each month next immediately succeeding thereafter, until and including April 15, 1936, regardless of the time of presentation or surrender of any said bonds or coupons, the Company agrees to pay to G. L. Miller & Company, Inc., at its office in the City of New York, New York, for the account of the bondholders, a sum of money which shall be equal to one-sixth of the installment of interest next to fall due upon said bonds hereby secured at the end of each semi-annual period respectively.

On the 15th day of May, 1927, and on the 15th day of each month next immediately succeeding thereafter, until and including April 15, 1935, re-

gardless of the time of presentation or surrender of any of said bonds, the Company covenants and agrees to pay to G. L. Miller & Company, Inc., for the account of the bondholders, a sum of money which shall be equal to one-twelfth of the installment of principal of said bonds secured hereby then next maturing and becoming due as therein and herein provided. On May 15, 1935, and on the 15th day of each month thereafter to and including April 15, 1936, each of such payments on account of principal shall be equal to one-twelfth of the sum of $10,000.

The intention hereof is that such aggregate payments one month before the date of each semi-annual interest payment shall be sufficient to meet such interest payments when due and as they mature; and that such aggregate payments one month before the date of each principal payment shall be sufficient to meet such principal payments when and as they mature, except as otherwise provided in respect to the last principal payment.

In order to create a fund with which to meet the income and other personal taxes herein contracted to be paid by the Company, the Company shall pay to G. L. Miller & Company, Inc., for the account of the Trustee on the execution and delivery of this indenture, the sum of Six Hundred Dollars ($600) and a like amount annually thereafter, and in order to provide a fund for the next annual payment, the Company shall pay in advance to said G. L. Miller & Company, Inc., a sum equal to one-twelfth of such amount on the 15th day of May, 1927, and on the 15th day of each month thereafter; such payments to continue un-

til all the bonds and coupons secured hereby are paid.

The Company expressly agrees to pay to the Trustee on the execution and delivery of this indenture, the sum of Two Hundred Dollars ($200) for his fees and expenses for performing the duties of Trustee hereunder, other than those which may be necessary in the event of default, and a like amount annually thereafter, and in order to provide for each subsequent annual payment, the Company shall pay monthly in advance to the Trustee a sum equal to one-twelfth of such amount on the 15th day of May, 1927, and on the 15th day of each and every month thereafter during the term of this indenture.

The Company hereby waives all interest upon any advance payments made by it as herein provided.

Except to relieve the Company from the aforementioned tax refunding obligations, said G. L. Miller & Company, Inc., shall not be accountable to the Company for said annual fund of Six Hundred Dollars ($600).

The provisions contained in this Section 1 are for the purpose of creating funds with which to meet payments of principal, interest and income taxes and other personal taxes as they respectively become due from the Company under other covenants herein and in said bonds contained, and except as provided in Section 3 of this Article, no provision of this Section 1 shall affect, impair, modify or be alternative to the other agreements of the Company contained herein or in said bonds.

If, however, all said bonds shall be called for redemption pursuant to the provisions of Section 6

of this Article and sufficient moneys shall have been deposited for that purpose as therein provided no further payments shall be required of the Company under this Section 1.

SECTION 2. In the event that said Trustee with the approval of G. L. Miller & Company, Inc., shall at any time in writing designate any other corporation to receive the payments and sums of money herein provided to be paid to G. L. Miller & Company, Inc., and if such written designation and written approval be served upon the Company, then thenceforth the Company shall and will pay to such substitute corporation, for the account of the bondholders, all sums of money which otherwise would have been payable pursuant to the provisions hereof, to G. L. Miller & Company, Inc., provided that such substitute corporation shall agree to make the same payments therefrom as are herein provided to be made by said G. L. Miller & Company, Inc.

In the event that the Trustee shall at any time make such designation and the same be not so approved by G. L. Miller & Company, Inc., or if G. L. Miller & Company, Inc., shall decline to accept such payments, or be incapacitated from so acting, by dissolution or other cause, thenceforth the Company shall and will pay, for account of the bondholders, to such Trust Company in New York City as shall be designated by the Trustee or by any Court of competent jurisdiction, all sums of money which the Company herein agrees to pay to G. L. Miller & Company, Inc.

SECTION 3. When and as each of the payments of principal or interest or on account of said income or other taxes shall be made to the Trustee

or his depositary, as provided in Section 1 of this Article, the liability of the Company with respect thereto shall be discharged, and the holders of the bonds and coupons covered by such payments shall look for payment thereof, solely to the Trustee or his substitute, designated as hereinabove provided in Section 2 of this Article, and shall cease to be entitled to the benefit of this indenture on account of said bonds or coupons to the extent of such payments.

SECTION 4. No bonds and/or coupons which may be paid, bought or redeemed by the Company or by any guarantor or surety or by any one in the Company's behalf, or by its successor or assigns shall be reissued but the same shall be forthwith delivered to the Trustee and cancelled and shall not thereafter be reissued or in any manner participate in the security of this indenture, and no offer or tender of payment made conditional on the delivery of any bond or coupon uncancelled, shall be valid hereunder.

In every case of a partial payment of any bond or coupon, such partial payment shall be noted on such bond or coupon.

SECTION 5. If at any time the Company or its assigns shall fail to pay any installment of principal or of interest secured hereby as and when the same falls due, any person, or corporation—other than the Company or any person or corporation acting in its behalf—may purchase and hold the bonds and coupons representing the items unpaid and such bonds and coupons shall not be subordinate to other outstanding bonds and coupons.

SECTION 6. Any or all of said bonds may be redeemed and prepaid on any interest date by payment of the full amount of principal thereof with interest and the normal federal income tax or taxes and the other taxes provided herein to be paid by the Company, to the date of redemption, and a premium of two per cent. (2%) upon the principal amount of the bonds so to be redeemed, but in each instance such prepayment of said bonds shall be in the inverse of their numerical order beginning with the bond bearing the highest number not previously called for redemption; such redemption shall be made as follows: at least ninety days prior to the date fixed for redemption the Company shall deliver to the Trustee and G. L. Miller & Company, Inc., written notice of its intention so to redeem, and shall pay at that time to G. L. Miller & Company, Inc., or to its successor or substitute designated as hereinabove provided in Section 2, if G. L. Miller & Company, Inc., shall for any reason refuse to act or be incapable of so acting in the premises, for account of the holders of the bonds and coupons called for redemption, the full amount of principal of said bonds so called for redemption, together with all interest to accrue thereon to the next ensuing interest payment date, and normal federal income tax or taxes upon each interest payment, and the other taxes, provided herein to be paid by the Company, together also with a premium of two per cent. (2%) of the principal of the bonds so to be redeemed, (so far as not theretofore paid as provided in Section 1, of this Article), and also shall pay to the Trustee an amount of money sufficient to pay the cost of publishing and mailing the

notices hereinafter provided for. Upon receipt of such notice the Trustee shall determine the numbers of the specific bonds to be redeemed and shall notify the Company and G. L. Miller & Company, Inc. (or its successor), thereof, and thereafter shall publish a notice that such bonds are called for redemption, once a week for four successive weeks prior to the date for redemption, in a daily newspaper of general circulation published in the Borough of Manhattan, City of New York, State of New York, and the Trustee or G. L. Miller & Company, Inc., or its successor, as the case may be, after receipt of such notice of the numbers of the specific bonds to be redeemed, shall mail a similar notice to each of the registered holders, if any, of the bonds so to be redeemed at their respective last known post office addresses in the register kept by said Trustee, at least four weeks before the date fixed for such redemption. But such notice by mail shall not be a condition precedent to such redemption and the failure to mail any such notice shall not affect the validity of the proceedings for such redemption, and such notice by publication shall be held and regarded as full and sufficient notice and the holder or holders of any of said bonds are bound by this provision. Upon the payment being made as aforesaid, the bonds so determined by the Trustee to be redeemed, shall cease to be entitled to any benefit of the lien of this indenture, and the Company shall be freed from all liability in respect thereto, and the money so deposited shall be applied by said G. L. Miller & Company, Inc. (or by the substitute designated if said moneys shall be paid to or deposited with it in the event that the Trustee

or G. L. Miller & Company, Inc., shall for any reason refuse to or shall not act in the premises) to the payment of such bonds called for redemption and interest thereon to date of redemption, and the payment of said normal federal income taxes and other taxes, if any, upon presentation and surrender of such bonds with the coupons maturing on the redemption date, and all subsequent coupons not due at the date of redemption, belonging to and originally affixed to each of said bonds so called for redemption, and said bonds and coupons shall be cancelled. If at the time of the discharge of this indenture any part of said fund shall remain in the possession of the said G. L. Miller & Company, Inc., or said Trustee, for the payment of bonds so called for redemption but not presented and surrendered, such balance shall be deposited with said G. L. Miller & Company, Inc., for the account of the Trustee for said purpose, and thereupon the Company shall be relieved of all liability in respect thereto. Such bonds so called for redemption, and as to which payments shall have been made by the Company, as aforesaid, shall cease to bear interest from the date thus fixed for their payment and all unmatured coupons shall become null and void immediately. The Company shall not have the right to redeem any or all of said bonds, if it shall be in default under the terms of this Indenture, unless the Trustee shall consent thereto. All redeemed bonds shall be deposited with the Trustee and cancelled. In case the Trustee or G. L. Miller & Company, Inc., shall fail, neglect, or refuse to act or be incapable of acting under the terms of this section then the said successor Trustee, or his

substitute designated as herein provided in the trust hereby created shall act, receive and disburse the redemption money.

SECTION 7. If any bond be presented for payment when due under any of the provisions thereof or of this indenture, not accompanied by all coupons thereto belonging, both unpaid and subsequently maturing, the holder thereof shall before receiving payment thereof indemnify the Company and the Trustee in a manner satisfactory to them and each of them against all loss, cost, damage or expense to which they or either of them may be subjected by reason of any claim or demand that may be made at any time upon such unpresented coupons.

SECTION 8. A Banker's Certificate shall be procured from The Chemical National Bank of New York, certifying in substance that the particular bond to which the certificate is attached is one of the issue of bonds secured hereby, and to the proper recording of this indenture; but it is expressly understood and agreed that said Bank is under no obligation to make any personal investigation of the facts certified to, nor to attend personally to the recording of said indenture, nor does it certify as to the validity of the lien of said indenture, nor of the amount due thereon, and may rely upon the statements of the Trustee and of the Company as to all things covered by the said certificate; that it may consult with counsel and upon the opinion of such counsel, may certify to any state of facts set forth in said certificate, in reliance upon such opinion of counsel, and shall not be liable to any of the parties herein mentioned or to any of the bondholders, or their successors,

for any error or omission in said statement or opinion, or for any erroneous certification, unless made in bad faith; it being the intention and purpose that the Bank shall use reasonable means to satisfy itself of the truth of the statements contained in the certificate, but it shall not be liable for any error or omission or any negligence on the part of itself, its agents, employees or attorneys.

No bond issued hereunder shall be a valid and/or subsisting obligation unless the Banker's Certificate attached thereto is signed by The Chemical National Bank of New York, through its duly authorized officer, except that the Banker's certificate shall not be required upon the temporary bond herein provided for.

ARTICLE III.

Title, Taxes, Liens, etc.

SECTION 1. The Company covenants that it owns and has good and indefeasible title in fee simple to the mortgaged premises and that the premises are free and clear of all prior liens and encumbrances (except an easement as aforesaid), and that it has good right and lawful authority to convey the said premises in the manner and form hereby conveyed, and will warrant and defend the same to the Trustee against the claims of all persons whomsoever, that this indenture is and will be kept a first and prior mortgage lien upon said premises and property, real and personal, and the Company will not at any time create or allow to accrue or exist any debt, estate, tenancy, interest, lien or charge which would be prior or equal to the lien of or title under this

indenture and/or the lien of the chattel mortgage or mortgages herein agreed to be given upon any part of the mortgaged premises and the property and that neither the value of the mortgaged premises and property nor the lien of this indenture will be diminished or impaired in any way by any act or omission of the Company. That the Company will forthwith cause this indenture to be recorded and re-recorded and filed and re-filed as shall be required by law in order to preserve the lien and right, title and interest of or under the same as a mortgage upon the property hereby covered, in the County of Essex and State of New Jersey until all the indebtedness secured hereby is fully paid, and will at any future time and as often as it may be or it shall deem necessary, execute upon demand of the Trustee all such other and further assurances, deeds, mortgages or other instruments in writing in due form and effect as may be necessary to preserve the lien of and title to said mortgaged premises, equipment and personal property under this indenture and to carry out the intent and meaning hereof.

SECTION 2. The Company further covenants that it will not at any time suffer any mechanics' or other lien to be established against said mortgaged premises, equipment and personal property or any part thereof; that it will pay all taxes and assessments, extraordinary as well as ordinary, water rents, municipal, governmental and other taxes, charges and impositions which shall at any time be or have been assessed, levied or imposed upon the Company or upon said premises and property or any part thereof, and will make such payments respectively from time to time

within thirty days after the same shall become respectively due and payable or become a lien on the mortgaged premises and property or any part thereof (irrespective of the time when such taxes, assessments, water rents or other charges may have been levied, assessed or imposed) and in due time to prevent any delinquency thereon or any forfeiture or sale thereof and will produce and deliver to the Trustee proper receipts or other satisfactory evidence of each of such payments within ten days thereafter.

The Company further covenants and agrees that it will not suffer the mortgaged premises, or any part thereof, to be sold for any taxes or assessments whatsoever, nor do, nor permit to be done to, in, upon, or about said premises or any part thereof, anything that may in any wise impair the value thereof, or weaken, diminish or impair the security intended to be given under and by virtue of this indenture.

Nothing in this indenture contained shall require the Company to pay any tax, assessment, impost, charge, claim, demand or lien whatsoever assessed or imposed against the mortgaged premises, so long as it shall in good faith and by appropriate legal proceedings contest the validity thereof, provided, however, in any such case, the Company shall deposit with the Trustee an amount of money sufficient to discharge such tax, assessment, impost, charge, claim, demand or lien in full, including costs and interest, to be used by the Trustee for the purpose of discharging the same in the event that the Company shall be unsuccessful in said contest and the right to make such payment is hereby granted to the Trustee. In lieu of depositing such money the Company

shall, however, have the right to give to the Trustee a bond with a surety and in an amount satisfactory to the Trustee, sufficient for the purpose, conditioned to pay such contested tax, assessment, water rent, impost, charge, claim, demand or lien in full, including costs and interest, in case the Company, if it shall be unsuccessful in said contest, shall not forthwith discharge the same in full and the right to make such payment is hereby granted to the Trustee.

SECTION 3. The Company further covenants and agrees that it will pay, without deduction therefor or thereof, all normal federal income taxes, assessments or charges, which the Company, the Trustee or said G. L. Miller & Company, Inc. may be required or permitted to pay on the interest and income yielded by said bonds or to deduct or retain therefrom under or by reason of any present or future law or laws of the United States, and the Company agrees to pay to said G. L. Miller & Company, Inc. for the respective bondholders, entitled thereto and claiming the same as required by law or herein provided, a sum equivalent to the amount of said taxes, assessments and charges which the bondholders may have to pay directly on account of the income represented by the interest on the bonds secured hereby, to be reimbursed to the holder as provided in this indenture; but the liability of the Company to or for account of any bondholders for such normal federal income taxes, assessments and charges for any one year provided for in this section shall not exceed four per cent. (4%) of such annual interest on said bonds.

The Company further covenants that it will pay to the holder of each bond, or registered owner

of any bond, if registered, any State and/or District of Columbia taxes not exceeding five mills per annum on each dollar of the principal amount thereof, and any income tax assessed against the interest on said bonds by any State or the District of Columbia in any one year up to but not exceeding 6%, which may be legally or lawfully assessed upon the interest on any such bond or upon such holder or registered owner by reason of his ownership thereof, provided that in each and every instance such tax shall have been paid by the holder or registered owner of such bond and also that such application for reimbursement shall be made within ninety days after such tax, charge or assessment shall become finally due and payable by such bondholder. In no event shall there be any liability to make reimbursement for any interest or penalty assessed to or paid by the bondholder in addition to the amount of such taxes originally assessed. Application for payment of or reimbursement for, the amount of such tax shall be made to the Trustee, and the certificate of the Trustee, of the fact of such application and the amount thereof, shall be binding upon the Company, and the Trustee shall not be obliged to disclose the name of the owner or the bonds with respect to which claims for payment or reimbursement have been made.

With respect to any of the income and/or personal property taxes herein provided for, G. L. Miller & Company, Inc., and/or the Trustee shall be entitled to make such rules and regulations for carrying out the provisions of this indenture for the due protection of the rights of the bondholders as in its or their judgment shall be reason-

able and best, and the Company agrees to abide by such rules and regulations.

SECTION 4. The Company for itself, its successors and assigns, covenants and agrees that without the written consent of the Trustee it and they will not hereafter apply for any deduction by reason of any mortgage, from the taxable value of the lands embraced in this indenture, and will not claim any credit on principal or interest on said bonds or coupons on account of the payment of any taxes upon said land, and in case of any such deduction or claim, or in the event of the passage after the date hereof of any law of the State of New Jersey, deducting from the value of the land, for the purpose of taxation, any lien thereon or compelling the Trustee to pay or deduct any taxes (other than income and other taxes hereinbefore provided for) which may be imposed or assessed upon said bonds or coupons or any of them or said mortgaged premises, or changing in any wise the laws of taxation for state or local purposes of mortgages or bonds secured by a mortgage or the manner of the collection of any such taxes, so as to affect this indenture, or the bonds or coupons hereby secured, the Trustee or the holders of Ten thousand dollars ($10,000) in aggregate face principal amount of the bonds hereby secured and then outstanding shall have the right to give thirty days' notice to the Company requiring the payment of said bonds and coupons then unpaid and outstanding with interest to date of payment; and it is hereby agreed that if such notice be given the entire indebtedness evidenced by said bonds hereby secured shall become due at the expiration of said thirty days,

anything herein contained to the contrary notwithstanding. The right of such holders of said bonds to declare the principal due shall be exercised only as provided in Article VII. Said Trustee or the Company shall have the option, in lieu of such notice requiring payment, and either before or after such notice, either to pay or contest the payment of said taxes, in which event the amount so voluntarily paid by the Trustee or which he may be ultimately obliged to pay after contest, shall forthwith become a lien hereunder in favor of the Trustee, upon said mortgaged premises paramount to all liens thereon, except the lien of this indenture, and the Company covenants and agrees to reimburse and repay to the Trustee making such payment, upon demand, the amount so paid by him with interest thereon from the date of any such advance until repaid, at the rate of seven per centum (7%) per annum, including costs, expenses and reasonable attorneys' fees; and any such payments by the Trustee or by the Company, or any such contest by the Trustee of the Company shall nullify any previous notice given as last above provided.

SECTION 5. At all times until the payment of said bonds issued hereunder, principal and interest, the Company and any subsequent owner of the premises will maintain an office at Bloomfield, in the County of Essex, State of New Jersey, where notices or demands in respect to such bonds or interest coupons or this indenture may be served, and from time to time the Company and such owner will give written notice to the Trustee and G. L. Miller & Company, Inc., of the location of such office. All notices and demands of the

Trustee or G. L. Miller & Company, Inc., hereunder, shall be deemed to be duly given, if either delivered personally to the Company or any subsequent then record owner of the mortgaged premises, or deposited in any general or branch post office, enclosed in a registered postpaid envelope, addressed to the Company, or to the then record owner of the mortgaged premises, at the last address furnished to the Trustee or G. L. Miller & Company, Inc., and if no such address has been furnished, by mailing such notice or demand to the then record owner of the mortgaged premises at the premises.

SECTION 6. The Company covenants that it will not execute or deliver, or place upon the premises herein described any other lien or encumbrance, whether the same be a second mortgage, a deed of trust, or other lien, or demise or to farm let said premises or any part thereof, or convey or by deed or otherwise create any interest therein, adverse to said Trustee's title, interest and lien hereunder unless there shall be inserted in the instrument creating such lien, right, title or interest and also in the bonds, notes or other evidences of the debt secured or to be secured thereby, a covenant and condition that the lien, title, and security created by such instrument is and shall at all times be junior, subordinate and subservient to the lien, title and security created by this indenture, whether or not the same shall then have accrued; and the Company further covenants and agrees not to convey (other than in conjunction with a sale of the land and building), or encumber or allow any lien or liens to come against, personal property, now or hereafter appurtenant to said

premises owned by said Company, whether the same be specifically covered by this indenture, or covered by a separate chattel mortgage as collateral to this indenture, until the bonds and coupons secured hereby, together with all interest thereon, as herein provided, shall be fully paid and discharged.

ARTICLE IV.

Erection and Maintenance of Buildings.

SECTION 1. The Company covenants that immediately from and after the execution and delivery of this indenture it will commence and continuously proceed with reasonable despatch to erect and complete on the said premises, and will complete and pay in full for the erection and equipment thereof and have ready for occupancy on said premises on or before May 15, 1927 (excepting only that if the said Company shall be delayed by actual strikes, lockouts, or other causes beyond its control, and which delay by the exercise of reasonable effort or foresight could not have been avoided, and without its default or act of omission or commission, the time for completion shall be extended for the duration of each such delay) a four story and basement housekeeping brick and stone semi-fireproof apartment building, more fully described in the agreement referred to in Section 4 of this Article, said building to contain not less than 136 rentable apartment rooms and to have a cubical content of not less than 473,000 cubic feet. Said building shall be constructed and erected substantially in accordance with the plans

and specifications prepared by Edward V. and Charles F. Warren of the City of Newark, N. J., Architects, or such other architect as shall have been approved in writing by G. L. Miller & Company, Inc., and in accordance with such additional or amended plans, details and specifications as may from time to time be approved by G. L. Miller & Company, Inc., as more particularly described in the agreement referred to in Section 4 of this Article.

SECTION 2. The Company expressly covenants fully to pay for said building and the equipment thereof and all bills or claims contracted or incurred in connection with the erection and construction and equipment thereof.

If the Company shall for any reason abandon or unreasonably delay the construction of said building or the equipment thereof, or shall fail to complete the same, or shall be prevented from completing the same by any cause whatsoever except as aforesaid, the Trustee at his election (but without prejudice to any other rights of the Trustee or the bondholders arising in consequence of such default), may complete the erection, construction and equipment thereof. For the purpose of completing said building and the equipment thereof, the Trustee may in such event make any and all contracts deemed by him to be necessary for architects, contractors, construction work, and for work, labor or materials, supplies and equipment in connection therewith in the name of the Company, and may sign the name of the Company as its attorney-in-fact, hereby irrevocably appointed for such purpose, to any and all papers and documents deemed by him necessary for such purpose;

or the Trustee may make such contracts in his own name, and may incur such indebtedness in his own name. The Trustee may in such event pay, at any time, any outstanding just bills or liability or indebtedness so contracted or incurred by the Company, or by the Trustee in the Company's behalf, and may make up any deficit, in connection with the construction and erection of said buildings, and the equipment thereof, and may pay any bills or indebtedness contracted by the Trustee in connection with any such contracts, or in connection with any liability incurred by the Trustee, as aforesaid, regardless of whether or not any mechanics' lien claims have been filed or established in any of the foregoing instances. The Company hereby expressly agrees to repay to the Trustee on demand any sums advanced by the Trustee in accordance with the foregoing provisions, and to reimburse the Trustee for and on account of any payment or payments made by reason of or pursuant to the foregoing provisions, together with interest at the rate of seven per centum (7%) per annum, and any and all sums advanced by the Trustee hereunder shall be deemed and be a charge and lien on said premises as provided in Article VI hereof.

SECTION 3. The Company expressly covenants that it will cancel and discharge any mechanics' and/or other liens or conditional bills of sale which may be filed or become a lien or charge against said premises or any part thereof, or any equipment therein contained, within thirty (30) days after the same have been filed or become a lien, and in default thereof, the Trustee may forthwith in his sole discretion pay, cancel and discharge

such liens or charges, and the Company agrees to repay to the Trustee on demand any and all sums so paid by the Trustee with interest at the rate of seven per cent. thereon.

SECTION 4. Simultaneously with the execution and deliverey of this indenture the Company has entered into a certain agreement with G. L. Miller & Company, Inc., bearing even date herewith, and intended to be filed in the office of the Register of the County of Essex, State of New Jersey, at the same time as this indenture is recorded; and this indenture and the Trustee hereunder and the holders of said bonds issued hereunder have the benefit thereof, and the holders of said bonds are in all respects bound by all the provisions of said last mentioned agreement, and said agreement is in all respects hereby made a part hereof to the same extent and with the same rights and remedies as if herein set forth at length. The Company covenants and agrees to and with the Trustee and the holders of said bonds that the Company will do and perform all of the agreements on its part contained in said agreement.

SECTION 5. The Company covenants to maintain, at all times, said premises and the building erected and to be erected thereon, including the contents thereof, in good first-class repair, working order and condition, and to make all necessary replacements and substitutions, to the satisfaction and approval of the Trustee, all building, fire and other departments of the Town of Bloomfield, County of Essex, the State of New Jersey, and the Federal Government, all insurance companies, the Board of Fire Underwriters and Fire Insurance Exchange, and all other similar organizations or

bodies having any interest in or jurisdiction over the same.

SECTION 6. The Company further covenants and agrees for itself, its successors and assigns, that it will keep and maintain all of said personal property, movable goods and chattels in good order and repair—usual wear and tear excepted—and if any of the same shall wear out and become useless or non-useable, that it will replace the same with new and satisfactory goods or chattels and will also make such additions thereto that may be necessary to keep said apartment building and its equipment in a first-class useable condition, and pay all the costs and expenses thereof and keep each and all of such replacements, renewals or additions in said goods and chattels free and clear of all other liens or claims whatsoever, and the same shall be well and truly secured and mortgaged by this indenture and also by any confirmatory chattel mortgage or mortgages hereafter made as herein provided. The Company further covenants and agrees not to commit waste on or of said property, and not to sell or assign or attempt to sell or assign (excepting in either case in conjunction with a sale of the land and building) or otherwise mortgage the said personal property, movable goods and chattels or interest therein, and not to allow or permit any writ, execution, attachment, or other writ or warrant to become a lien thereon or to be levied on said personal property, movable goods and chattels or any part thereof, and in default of the performance of any one or more of the covenants herein contained, or if a petition in bankruptcy shall be filed by or against said Company or its successors or assigns,

while the owner of the premises, then and in any of the aforesaid cases the Trustee and/or the holders of bonds and/or coupons of the requisite amount in this indenture provided for in other cases of default, and upon the same terms and conditions as in this indenture provided, shall thereupon have the right to take immediate possession of said property and for that purpose may pursue the same wherever it may be found and may enter upon the above described premises of the Company, or elsewhere with or without force or process of law wherever the said goods and chattels may be or be supposed to be, and search for the same and, if found, take possession and remove, sell and dispose of said property or any part thereof in the manner required by the laws of the State of New Jersey, for cash or on credit as they may elect, and out of the moneys arising from such sale, said Trustee or holder or holders of said bonds or of said coupons, as the case may be, shall retain all costs and charges including reasonable attorneys' fees for pursuing, searching for, taking, removing, keeping, storing, advertising and selling said goods and chattels, and all costs for removing prior liens thereon, if any, and the balance remaining shall be paid to the Trustee and be applied by him *pro rata* upon and among the holders of the bonds and coupons herein described, outstanding and unpaid and unredeemed, yielding the surplus, if any, remaining after the payment of all said indebtedness, interest, costs and advances, if any shall have been made hereunder, unto the said Company or its successors in interest. It is understood and agreed that the remedy herein provided is not exclusive of any other right or remedy or reme-

dies provided hereunder, or exclusive of any right or remedy allowed by the State of New Jersey, and that the rights and remedies in this paragraph specified shall be cumulative to and upon or of any or all other rights and remedies hereunder or existing by virtue of the laws of the State of New Jersey.

SECTION 7. The Company covenants that it will comply with all laws, ordinances, acts, rules, regulations and orders of any national, state, county, borough, town or city legislative, executive, administrative or judicial body, commission or officer exercising any power of regulation or supervision over the Company, or any part of said mortgaged premises including the street or avenue upon which said premises abut, whether the same be directed to the conduct of the business of the Company, repairs, manner of use, structural alterations or otherwise; provided, however, that the Company may contest any such law, ordinance, act, rule, regulation or order in any reasonable manner which will not affect the title of the Trustee or of said bondholders to any part of the mortgaged premises or property, the conduct of the Company's business, or the maintenance of that high standard of physical condition which is hereinabove set forth. The Company further agrees that until all of the indebtedness and interest secured hereby shall be paid and discharged, it will, at all times, maintain its corporate organization intact, and that it will not permit or suffer any use or non-use of its corporate authority and franchises whereby said corporate authority and franchises may become in anywise forfeitable or forfeited, and that it will not (without the consent of

G. L. Miller & Company, Inc., and of said Trustee) sell, transfer, convey or assign all or any of its interest in and to said premises or the building or improvements or equipment now or hereafter placed thereon until said building or improvements and the equipment thereof shall have been completed, constructed and erected and equipped free from all mechanics' liens, chattel mortgages and lawful claims or liens, and any sale or conveyance or lease of the mortgaged premises by the Company at any time shall be without prejudice to this indenture or the lien hereof, but shall be subject and subordinate hereto.

ARTICLE V.

Insurance.

SECTION 1. The Company hereby authorizes the said G. L. Miller & Company, Inc., to take out in the name of the Company, public liability insurance in an amount satisfactory to the Trustee, and fire and such other forms of insurance as the Trustee or said G. L. Miller & Company, Inc., shall determine to be proper on the before described building, improvements, equipment and furniture, including builders' risk insurance, at the Company's expense and for the full insurable value of the property, such insurance to be taken in solvent Companies at the usual rates for such insurance and may from time to time be procured and renewed by the insurance broker selected by said G. L. Miller & Company, Inc., as the agent of the Company. Said insurance broker as compensation for services in placing such insurance shall be entitled to any discount from or commis-

sion upon regular board rates obtained by such broker. The company further authorizes G. L. Miller & Company, Inc., and/or the Trustee, to change or modify the terms and conditions of any such insurance, and to cancel and/or rewrite any of the policies of insurance from time to time when in its or his judgment it is deemed necessary. All such policies are to be issued by insurance companies that are likewise acceptable to the Trustee and shall, except as to public liability insurance contain clauses making losses, if any, payable the Trustee, and the policies shall be deposited with and held by the Trustee. In respect of the public liability insurance the same shall cover both the Company and the Trustee as interest may appear. But the Trustee shall not be under any liability in respect to the form, conditions and/or sufficiency of such insurance, or the responsibility or solvency of the insurers. Such insurance shall at all times be maintained at the expense of the Company or its successor in interest until all the bonds and coupons issued and outstanding hereunder shall be fully paid. The Company agrees to pay to the said G. L. Miller & Company, Inc., the premiums of all such policies as the same respectively mature or to reimburse G. L. Miller & Co. Inc., or the Trustee for the same with interest promptly if paid by said G. L. Miller & Company, Inc., or the Trustee for the account of the Company.

Section 2. If any building and/or equipment upon the mortgaged premises shall be destroyed or damaged at any time by fire, or other causes whatsoever, the Company covenants forthwith to repair, rebuild, restore, renew and replace the same and to pay the cost thereof. The Trustee

may collect and receipt for all moneys due or payable under any policy or policies of insurance, and authority so to do is hereby granted, and any moneys due thereunder shall be paid to the Trustee and shall be deposited with the Trustee herein named and be withdrawn by said Trustee and disbursed under the provisions hereof. When the approximate cost or expenses of such repairing, rebuilding, restoring, renewing or replacing said building and/or equipment has been estimated by the sworn statement of an architect or general contractor, to be selected by the Trustee, the Company hereby expressly agrees to deposit with the Trustee the difference, if any, between such estimate and the net amount of the insurance moneys available for the same, or at the option of the Company it may in lieu of such deposit deliver to the Trustee a good and sufficient bond with sureties and in an amount satisfactory to the Trustee conditioned that the Company will within a reasonable period to be therein stated repair, restore, renew and replace the building and/or equipment upon the mortgaged premises and pay the cost thereof. In the event that the Company, in case of damage by fire or other cause to said building and/or equipment, or the destruction thereof, shall with reasonable dispatch repair, rebuild, restore, renew and replace the same, or construct and equip a new building on said mortgaged premises in place thereof, and, the Company having first deposited with the Trustee the aforesaid difference, or having furnished the bond herein provided, then in such case, but not otherwise, all insurance moneys which shall be received by the Trustee under said policies covering said building and equipment and property, and such

additional deposit, if any, shall (after the deduction therefrom of the charges of the Trustee in connection with the collection and disbursement of said moneys, including reasonable attorneys' fees), be paid out from time to time semi-monthly as the work progresses upon the certificate of the Trustee and said architect's or general contractor's certificates to the persons therein designated for the expense of such repairing, rebuilding, restoring, renewing or replacing of said building or buildings and equipment, but an amount of money shall at all times be retained by said Trustee deemed by the Trustee and said architect or general contractor (and so certified in writing to the Trustee) to be sufficient to pay for the completion of such repairing, rebuilding, restoring, renewing or replacing of said building and/or equipment, free from liens. The Trustee may conclusively assume that the Company has acted with reasonable dispatch if G. L. Miller & Company, Inc., so certifies to that effect.

In the event that any such loss shall exceed Ten Thousand Dollars ($10,000) the Company shall submit to the Trustee plans and specifications to be subject to the approval of an architect selected by the Trustee, and shall exhibit to the Trustee any contract or contracts for such work or for the supplying of any such materials and equipment. The Trustee may obtain from any disinterested architect or contractor an estimate of the cost of such repairing, rebuilding, restoring, renewing or replacing, and the cost of obtaining such estimate may be deducted from the amount of such insurance.

In the event of the total destruction of any building or buildings, or in the event of a loss

requiring substantially the reconstruction of the entire building or buildings, the Company shall forthwith proceed to construct, erect and complete and equip a new building or buildings on said premises, of equal or greater cost and value and to be substantially similar in all respects to the building or buildings and equipment so damaged or destroyed, and the said new building or buildings with equipment shall be erected and constructed substantially according to the present plans and specifications and equipment, or according to such other plans and specifications as the architect selected by the Trustee and G. L. Miller & Company, Inc., in their absolute discretion may approve. If it shall appear at any time that said insurance moneys are not sufficient to pay for the construction, erection and completion and equipment of said building or buildings, in accordance with the plans and specifications approved by the said architect and G. L. Miller & Company, Inc., the Company shall on demand deposit an amount equal to such shortage or deficit with the Trustee, or the Company may deliver to the Trustee a good and sufficient bond with sureties and in amount satisfactory to the Trustee conditioned that the Company shall and will within a reasonable period, to be therein stated, and not to exceed ten (10) months after the happening of such damage or destruction of such building or buildings, construct, erect and complete and equip such new building or buildings in accordance with said plans and specifications, free from all claims or mechanics' liens and other liens for equipment or material. Upon receipt of the amount equal to such shortage or deficit or upon being furnished with the said bond, the

Trustee shall disburse said insurance moneys and such additional deposit, if any, as aforesaid, but not otherwise, upon the certificates of said architect to the persons therein designated. In computing the period last mentioned for the construction, erection, completion and equipment of such new building or buildings on said premises, or any subsequent new building or buildings, any delay caused by insurrection, riots, strikes, storms, fire, the Act of God, or an unavoidable shortage of materials or labor or unusual or unavoidable delays in the transportation of materials, or other causes beyond the control of the Company shall be added to the time allowed, and the date of completion shall be extended to or postponed for the length of such delays.

After the completion of said new building or buildings, as aforesaid, free from all liens, as aforesaid, the balance of the proceeds from any and all fire insurance policies covering the mortgaged premises, damaged as aforesaid, and such additional deposits, if any, shall be disbursed by the Trustee, upon the order of the Company and upon its filing with said Trustee a written waiver of lien duly executed and proven, satisfactory to said Trustee by all contractors, subcontractors, materialmen, laborers and architects, towards the equipment of said building or buildings with suitable apparatus and equipment of at least equal quality to the same originally placed in said building, and to the payment of other costs of construction and equipment in manner aforesaid. Said orders shall be subject to the approval of the architect selected by the Trustee with respect to the construction, materials, work, apparatus and equipment covered thereby, and with respect

to the amounts thereof. The Trustee may accept the certificate of G. L. Miller & Company, Inc., as conclusive evidence that said building or buildings have been so completed; and they may conclusively assume that such waivers and orders are satisfactory if approved in writing by G. L. Miller & Company, Inc., and certified by it, to be the only waivers and orders required.

Any and all balances remaining in the hands of the Trustee after the complete repairing, rebuilding, restoring, renewing and replacing of said building or buildings, equipment and/or personal property as aforesaid and payment therefor in full shall, provided that the Trustee shall not have been notified that the Company is in default in any of the terms, conditions and provisions of this indenture, be paid over to the Company.

SECTION 3. In the event that the Company shall fail to forthwith repair, renew, restore, rebuild or replace the building or buildings, equipment and/or personal property and mortgaged premises as provided in the last section, then the Trustee, in his absolute discretion, is hereby authorized (but not required) and without prejudice to any other right or remedy hereunder, in the name of the Company, or otherwise, to do such repairing, rebuilding, restoring, renewing or replacing, and to have all insurance moneys, together with the moneys representing the difference, if any, theretofore paid as provided in said last section, applied toward the cost thereof, and to do all other needful things so as to preserve the security hereof, and in such event and for such purpose the interest of the Company in all insurance moneys herein referred to shall be and is, by virtue hereof, assigned and transferred to said Trustee.

The Trustee may elect to proceed with such work before said difference is deposited with the Trustee and in such event the Company agrees to pay to the Trustee on demand the difference between the aggregate of all insurance moneys collected by the Trustee and the total cost of such repairing, rebuilding, restoring, renewing or replacing.

Any and all balances remaining in the hands of the Trustee after the complete repairing, rebuilding, restoring, renewing and replacing of said building or buildings, equipment and/or personal property and mortgaged premises as aforesaid, shall, provided that the Trustee shall not have been notified that the Company is in default in any of the terms, conditions and provisions of this indenture, be paid over to the Company.

In the event that the Company shall fail to repair, renew, restore, rebuild, or replace the said building or buildings and/or equipment and/or personal property and mortgaged premises so damaged or destroyed by fire within the period aforesaid next after the happening of such damage or destruction, in accordance with the terms and conditions in this indenture contained, and the Trustee shall elect not to repair, renew, restore, rebuild or replace the building, equipment and mortgaged premises, then in such event said Trustee shall have and hereby is given the right to apply any and all proceeds of insurance policies and/or additional deposit to the repayment (1) of any and all charges, expenses and advances of and by the Trustee including reasonable attorney's fees; (2) of any and all sums of money which may theretofore have been advanced by said G. L. Miller & Company, Inc., or any bond-

holder, and shall not prior thereto have been repaid, together with interest thereon at the rate of seven per cent. (7%) per annum from the time of the advancement until the repayment thereof in full; and shall (3) next apply the same to the payment *pro rata* of principal and accrued interest of all bonds and coupons unpaid and outstanding; (4) next, apply the same to the payment *pro rata* of any income or other tax due to the holder of any bond or coupon; (5) and the balance, if any, shall be paid to the Company. In the event that the said funds shall not be sufficient to pay in full all of said charges, expenses, advances and interest, income and other taxes, principal and interest as hereinabove provided to be paid, then and in such event said Company shall forthwith pay over the deficiency in connection therewith to the Trustee to be applied as hereinbefore provided.

Section 4. The Company further covenants and agrees to procure, and pay the cost thereof, rent or occupancy insurance for the full insurable rental or occupancy value of the buildings located upon the parcel of land hereinbefore described, and to keep said insurance in force and effect until all the indebtedness secured hereby is paid. Said policies for said rent or occupancy insurance shall be made payable to the said Trustee as his interest shall appear, and be deposited with the Trustee as other insurance hereinbefore provided. In case of a loss occurring under any said policies, all of the insurance money due thereon shall be paid to and deposited with said Trustee as aforesaid and be paid out by him as aforesaid. If the Company shall not then be in default, it shall

have the right to direct the said Trustee to pay and disburse the said moneys for the payment and discharge of, (*a*) taxes, (*b*) insurance premiums, (*c*) payment herein otherwise provided to be made to G. L. Miller & Company, Inc., to meet accruing or accrued interest upon the outstanding and unpaid principal indebtedness secured hereby, and the payment of the principal of any of the bonds secured hereby as they respectively mature on any annual payment date as herein otherwise provided; and that any balance after making the payments aforesaid be paid to the Company. In case of a default by the Company under any of the terms hereof and as herein otherwise specified and defined, the said Trustee, until and unless the principal of all the outstanding bonds hereunder shall have been declared due and payable, shall pay and disburse the said moneys in the manner and in the order as aforesaid. In the event that the said bonds and coupons shall have been declared due and payable for default, then said Trustee shall apply and pay said rent or occupancy insurance first in reimbursement of all advances made as herein authorized and then *pro rata* to bond holders to proportionately discharge principal and interest then due by such declaration. If the Company shall not be in default and shall not direct the payment of the moneys in the manner aforesaid, then at and upon the restoration of the building or buildings and the equipment thereof and the payment of the cost thereof as herein otherwise specified in case of a loss or destruction or damage by fire, the Company shall have the right to demand, and the Trustee shall pay to the Company said insurance moneys;

otherwise the same shall be paid and disbursed as hereinbefore specified.

ARTICLE VI.

The Trustee May Act for the Company.

The Trustee is hereby authorized, but not required, or in case of his failure or refusal to act within ten (10) days after written request and tender of indemnity satisfactory to him by the holder or holders of any of the bonds, and/or the holder or holders of overdue coupons, and said holder or holders of any of the bonds and/or said holder or holders of overdue coupons hereby secured and outstanding at such time, are hereby authorized, but not required, whenever there shall be a delinquency of the Company in the performance of any of the covenants of this indenture, to perform and/or advance money for the performance of such covenant or covenants for and on behalf of the Company; to secure or renew insurance and pay the premiums therefor; to place the said mortgaged premises in proper condition and repair; to discharge taxes, assessments and/or other charges, levied, assessed or imposed upon the mortgaged premises or any part thereof, and to redeem the same from any tax sale or forfeiture and to purchase any tax title thereon; to remove any mechanics lien or other lien or incumbrance thereon; subject to the provisions and requirements contained in Article IX hereof, as to the aggregate principal amount of bonds and/or coupons owned by such holder or holders, to carry on the prosecution or defense of any suit

affecting the security for said bonds and coupons issued hereunder, and to advance or expend the necessary money for any or all of said purposes including the payment of reasonable attorneys' fees and court costs, stenographers' charges and expenses for procuring evidence, if any, and any and all costs for the preparation for trial or trials. It shall not be obligatory upon the Trustee to inquire into the validity of any such tax title or of such taxes, assessments or charges, or of sales therefor, or other items, in advancing moneys in that behalf, or doing any other act or thing herein authorized.

The Company expressly covenants to pay on demand, to the Trustee and/or to the holder or holders of any of the bonds and/or coupons hereby secured, all moneys advanced or expended, pursuant to all and any of the provisions of this indenture with interest on each item at seven per cent. (7%) per annum, all of which sums shall be deemed a lien on said premises subject only to the lien of this indenture and the bonds and coupons hereby secured, and are hereby declared to be so much additional indebtedness secured by this indenture and to be payable on demand in the same coin and in the same manner as the indebtedness secured hereby. Any action taken by the Trustee or by the bondholders and/or coupon holders under the provisions of this Article shall be without prejudice to and not exclusive of any other of their rights hereunder by reason of the default, if any, of the Company, which shall give rise to such action; and the provisions hereof shall not be construed as in any sense obligatory or as requiring any affirmative

action, on the part of the Trustee or the bondholders or coupon holders.

ARTICLE VII.

Right to Declare Bonds Due.

In case default shall be made in the payment of any installment of principal of or of any interest coupon on said bonds and (except as to payments of principal and interest due May 15, 1936) any such default shall continue for a period of twenty (20) days, or in case of the default, neglect or refusal of the Company to make the monthly payments provided for in Article II, Section 1 hereof for a period of five (5) days in any case, or in case of the default, neglect or refusal of the Company in or of the due observance or performance of any other covenant or condition whatsoever in this indenture required to be kept or performed by the Company, and any such last mentioned default shall continue for thirty (30) days after written notice thereof to the Company by the Trustee, or to the Company and the Trustee by G. L. Miller & Company, Inc., or by the holders of not less than Ten Thousand Dollars ($10,000) of the aggregate principal amount of the bonds secured hereby, or like amount in the aggregate of overdue coupons hereby secured and then outstanding, or like amount in the aggregate of both bonds and overdue coupons, specifying wherein such default consists, or in the event that the Company while the owner of said premises, or any subsequent owner of said premises while the owner thereof shall cease doing business or shall be dissolved or shall go into liquida-

tion or in the event that a receiver of the Company or of any of its property while the owner of said premises, or of any subsequent owner of said premises, while the owner thereof, shall be appointed, or in the event that the Company while the owner of said premises, or any subsequent owner of said premises while the owner thereof, shall be adjudicated a bankrupt or insolvent, or shall make an assignment for the benefit of its creditors, or shall voluntarily begin any proceeding or take any steps for the purpose of having itself declared or adjudicated a bankrupt or insolvent, then and in any such case the Trustee, in his discretion, upon the happening of any of such defaults, and without any action on the part of any bondholder, may, and/or upon the written request of the holders of not less than $10,000 in the aggregate principal amount of bonds, or the like amount in the aggregate of overdue coupons then outstanding, or like amount in the aggregate of both bonds and overdue coupons, and upon tender of indemnity satisfactory to said Trustee, shall, or in case of his refusal or failure so to act within ten (10) days after such request, the holders of bonds, or of overdue coupons of an aggregate principal amount of not less than $10,000, or like amount in the aggregate of both bonds and overdue coupons, as aforesaid, may, declare the principal of said bonds hereby secured and then outstanding together with the interest accrued thereon to be due and payable immediately, and upon such declaration the said principal of said bonds, together with the interest accrued thereon, shall become due and be due and payable immediately, at the place of payment aforesaid, anything in this indenture or in said

bonds or coupons to the contrary notwithstanding. The Company shall not be entitled to any notice of default with respect to principal of bonds or with respect to interest due May 15, 1936, or to any other notice not expressly herein provided for.

The above provisions, however, are subject to the condition that if, after the principal of said bonds shall have been so declared to be due and payable, and before any sale of said premises pursuant to any order, judgment or decree in a judicial proceeding for the foreclosure of the lien hereof, all installments of principal of said bonds due by lapse of time, and not by such declaration and all arrears of interest upon said bonds and interest on overdue principal and installments of interest at the rate of seven per cent. (7%) per annum, shall have been paid by the Company or collected out of said premises, and the Company shall also have performed all other things in respect to which it may have been in default hereunder, and shall have repaid all advances made by the said Trustee and said G. L. Miller & Company, Inc., and the holder or holders of bonds, with interest at the rate of seven per cent. (7%) per annum, and shall have paid the charges and expenses of the Trustee and said G. L. Miller & Company, Inc., and/or of the holders of said bonds, including reasonable attorneys' fee paid or incurred, the Trustee may, by written notice to the Company, waive such default and its consequences; but no such waiver shall extend to or affect any subsequent default or impair any rights consequent thereon, and the Trustee, and/or bondholders and/or coupon holders of the required amount as aforesaid, and as the case may be, may

make successive declarations of maturity in successive cases of default.

Any failure on the part of the Company to comply with any of the terms, covenants or conditions of this indenture, as in said indenture provided, or any event, fact, circumstance or condition, because of which the Trustee or any bondholder or bondholders may become entitled to enter upon and take possession of the mortgaged premises or to declare the principal of the bonds due and payable under the terms of this indenture, is hereby defined to be and shall be construed as an "event of default".

ARTICLE VIII.

Possession, Power of Entry and Trustee's Right to Take Possession.

SECTION 1. Until some default shall have been made in the payment of principal or interest of the bonds hereby secured, or of some part thereof, or in the performance or observance of some covenant or condition to be kept by the Company under this indenture, and until such default shall have continued after notice, if any, as provided herein, the Company shall be suffered and permitted to retain actual possession of all the mortgage premises and to manage, operate, use and enjoy the same, and every part thereof, with the rights appertaining thereto, and to collect, receive, take, use and enjoy the earnings, income, rents, issues and profits thereof, and may make leases thereof and of parts thereof, which leases shall be subject and subordinate hereto.

If the Company shall at any time default in the payment of any sum herein by it agreed to be paid, then, and in that event, and whether or not any legal proceedings shall have been commenced to enforce any right or rights secured hereunder to the Trustee, or to any bondholder or coupon holder, the rents, issues and profits of the said mortgaged premises are, from the date of any such default, hereby assigned to said Trustee as further security for the performance of each and every of the covenants and obligations of the Company under this indenture and in the said bonds and coupons contained.

SECTION 2. In any case in which under the provisions of Article VII hereof, the Trustee or the bondholders and/or coupon holders of a requisite amount as the case may be, have the right to declare the principal of said bonds hereby secured and then outstanding to be due and payable immediately, and also in the event of default in the prompt payment of the principal and interest or any part thereof due May 15, 1936, the Company covenants, at any time or times, upon the demand of the Trustee, forthwith to surrender to him, and the Trustee shall be entitled to take actual possession of the mortgaged premises as for condition broken, and may, as the attorney-in-fact or agent of the Company, or in the name of the Trustee, and under the powers herein granted, hold, manage and operate said mortgaged premises and collect the rents thereof and lease the same in such parcels and for such times and on such terms as he may see fit, and may cancel any lease or sub-lease for any cause or on any ground that the Company or the Trustee might lawfully cancel the same, and

may sign the name of the Company, or its successors or assigns, to all papers and documents in connection with such operation, and shall, after paying out of the revenue from said mortgaged premises all expenses of management and operation of the said mortgaged premises, including insurance premiums and the cost of such repairs, replacements and alterations as may in his opinion be necessary and proper, and all taxes, assessments and charges, and liens upon said mortgaged premises or any part thereof, together with attorneys' fees, and after retaining compensation as Trustee's fees for his services in that behalf, and such further sums as in the judgment of the Trustee may be sufficient to indemnify the Trustee against any liability, loss or damages on account of any matter or thing done in good faith in pursuance of the duties of the Trustee hereunder, apply the residue, if any, first to the repayment of any moneys advanced or paid out pursuant to this indenture together with interest thereon at the rate of seven per cent. (7%) per annum, and second, to the payment of the overdue coupons, if any, in the order of their maturity, with interest thereon at the rate hereinbefore prescribed therefor from the date of maturity thereof; third, to the payment of all other accrued interest upon all principal to date of payment together with all income tax payments, or other tax payments on said bonds and the interest thereon as herein provided, in connection therewith and next to the payment *pro rata* of principal of said bonds secured by this indenture due by lapse of time and not by declaration; in every instance such payment to be made ratably to the persons entitled thereto according to the amount of their respective holdings of said

bonds or coupons, without discrimination or preference. Upon the payment in full of all principal which shall have become due by lapse of time and not by declaration of all arrears of interest and of all other claims then owing and herein required to be paid by the Company—upon all such payments being made either out of the moneys received by the Trustee as hereinbefore in this Article VIII provided, or by the Company, before any sale of the premises or the entry of an order, judgment or decree for the sale thereof in a judicial proceeding for the foreclosure of the lien hereof, the Trustee, after making such provisions as to the Trustee may seem advisable for the payment of the next installments of principal and interest, shall restore to the Company the possession of said premises, which shall thenceforth be subject to this indenture as if such entry had not been made.

The power of entry and the powers incidental thereto as herein provided for may be exercised as often as occasion therefor shall arise, and their exercise shall not suspend or modify any other right or remedy hereunder.

ARTICLE IX.

Foreclosure, Sale and Distribution.

SECTION 1. In any case in which, under the provisions of Article VII of this indenture, the Trustee or holders of bonds and/or of coupons of the requisite amount have the right to declare the principal of said bonds hereby secured and outstanding to be due and payable immediately, and/or in the event of default in the prompt pay-

ment of the installments of principal and/or interest or any part thereof and the continuance of such default for the period of time specified in Article VII of this indenture, the Trustee may, without any action on the part of any holder of bonds or coupons, and with or without declaring said bond and coupons due, and, upon the written request of the holders of bonds or of overdue coupons or of both bonds and of overdue coupons of not less than $10,000 in the aggregate principal amount of said bonds and/or overdue coupons secured hereby and then outstanding, and upon the deposit of such bonds and/or overdue coupons with the Trustee, and upon tender of indemnity satisfactory to the Trustee, shall:

(*a*) cause the mortgaged premises then covered by this indenture or any part thereof to be sold at public auction at some convenient place in the County of Essex, State of New Jersey, after having first given notice of such sale as required by law. The Trustee may adjourn any such sale from time to time by announcement at the time and place appointed for such sale or for such adjourned sale, and upon the completion of any such sale shall execute or cause to be executed such deed, bill of sale, certificate or other assurance to the purchaser as may be necessary to pass the title to the premises so sold; or

(*b*) proceed to protect and enforce his rights and the rights of the holders of bonds and/or coupons herein, either by suit or suits in equity or at law, in any Court or Courts of competent jurisdiction, whether for specific performance of any covenant or agreement contained herein or in aid of the execution of any powers herein granted or

for any foreclosure hereof or hereunder, or for any other sale of the mortgaged premises or any part thereof, so far as may be authorized by law, or for the enforcement of such other or additional appropriate legal or equitable remedy as the Trustee may deem most effectual to protect and enforce the rights aforesaid.

Compensation for the services of the Trustee and all costs and necessary expenses, including all expense of preparing for trial, and trial, reasonable attorneys' fees, referee's fees, stenographers' or reporters' fees or charges for taking, reporting or transcribing any statement of witnesses or testimony or evidence, given or heard therein, expenses of procuring testimony and evidence, the cost of procuring abstracts of title, opinions of title and continuations thereof or a title guaranty policy or policies, and documentary evidence, if any, and printing bills incurred by the Trustee in any such proceeding or in the preparation therefor or incurred by bond holders in a proceeding instituted under Sections 3 and 8 of this Article, or in the preparation therefor shall become so much additional indebtedness secured by the indenture, and until the same are paid, such action or proceeding shall not be dismissed or discontinued.

Section 2. Upon or at any time after the commencement of any action or proceeding hereby authorized to be instituted or upon or after the commencement of any action or proceeding authorized or permitted under or by virtue of the laws of the State of New Jersey after any of the aforesaid events of default shall have happened the Court hearing the same, upon application and

by nomination by the complainant, as a matter of strict right and without notice to the Company or anyone claiming under it, and without regard to the then value of said mortgaged premises, or the solvency or insolvency of the Company, shall appoint a receiver or receivers of said mortgaged premises or any part thereof, and the Trustee or any successor hereunder may be appointed such Receiver in aid of the powers herein given, and the Company hereby irrevocably consents to such appointment and waives notice of any application therefor. Any such receiver shall have all of the usual powers and duties of receivers in like or similar cases and all the powers and duties of the Trustee in case of entry as hereinbefore provided, and shall continue as such and exercise all said powers until the delivery of a Referee's or Master's deed, or other deed or deeds or instrument of conveyance as shall or may be authorized or required by law at the time, and shall apply the money collected, to the payment of compensation for his and his attorney's and counsel's services, to be fixed by said Court, to the payment of the expenses and charges of operating and maintaining said mortgaged premises and property, including taxes, insurance premiums, water taxes and repairs, whether accruing before or after such sale, and the balance, if any, toward the payment of the indebtedness evidenced by the bonds and the coupons with interest thereon hereby secured, and of any deficiency judgment that may be entered in such proceeding. And any receiver appointed under any provision of this indenture or in any action or proceeding under or authorized by the laws of the State of New Jersey may operate and carry on the business of the Com-

pany completely and unrestrictedly as could such Company prior to such action or proceeding.

SECTION 3. In the event that said Trustee, upon the request of the holder or holders of bonds, or of overdue coupons, or of both bonds and overdue coupons, secured hereby and outstanding, and of the requisite amount as aforesaid, shall refuse or fail to commence any action or proceeding in foreclosure, or to take possession of the mortgaged premises or advertise the same for the sale as hereinabove provided he shall do, and such refusal or neglect shall continue for ten (10) days after such request is made and indemnity satisfactory to it is tendered, then said bond holders or holders of overdue coupons or a holder or holders of both bonds and overdue coupons of the requisite amount as aforesaid, in his, her, its or their own names may take and have such actions, proceedings or remedies as herein provided the Trustee shall take or have, and have all remedies for enforcement of payment of said indebtedness secured hereby allowed by law as herein provided and as shall at the time be provided or authorized by the laws of the State of New Jersey.

SECTION 4. In case of a sale under this instrument of said mortgaged premises or any part thereof, the proceeds of such sale, unless otherwise provided by law, shall be applied as follows:

(*a*) To the payment of all costs of the action, including compensation of the Trustee and/or of said bond holders or holders of coupons as the case may be, and their agents, attorneys and counsel, and of all costs and expenses of such proceedings as provided in Section 1 of this Article, and

of all costs of advertisement, sale and conveyance, and compensation of any receiver, his or its agents, attorneys and counsel and expenses of receivership;

(*b*) To the payment of all other expenses, charges and advances of the Trustee in connection herewith, with interest thereon at the rate of seven per cent. (7%) per annum;

(*c*) To the payment of all moneys advanced by G. L. Miller & Company, Inc., or the holders of said bonds and/or overdue coupons pursuant to the provisions of this indenture, or for any other purpose authorized or permitted by the terms of this indenture with interest thereon at the rate of seven per cent. (7%) per annum from the time of the respective advances of such sums until the repayment thereof; all of which items referred to in this and the above subparagraphs (*a*) and (*b*) shall be so much additional indebtedness secured by this indenture, and shall be included and allowed in the judgment or decree entered in such foreclosure suit;

(*d*) To the payment *pro rata* of all of the said bonds matured and unmatured and coupons matured, and interest on overdue bonds not represented by coupons and interest on overdue coupons, without preference of principal over interest or interest over principal. Only coupons which have matured and the earned portion of those next maturing, shall be entitled to participate in such proceeds;

(*e*) To the *pro rata* payment of any said normal federal income tax due the holder or holders of any bond or coupons not in excess of four per

cent (4%) of such interest and of other tax payments on said bonds or coupons thereon as herein provided;

(*f*) To the payment of the surplus, if any, to the Company.

SECTION 5. At any such sale any bond holders or coupon holders or the Trustee may bid for and purchase said mortgaged premises or any part thereof. The purchaser at any such sale shall be entitled in making settlement or payment for the property purchased, to use and apply any bonds and any matured and unpaid coupons hereby secured, by presenting such bonds and/or coupons in order that there may be credited thereon the sum apportionable and applicable to the payment thereof, out of the net proceeds of such sale; and thereupon such purchaser shall be credited on account of such purchase price payable by him, with the sum apportionable and applicable out of such net proceeds to the payment of the bonds and coupons so presented; PROVIDED, HOWEVER, that in all cases the purchaser or purchasers shall pay in money a sufficient sum to cover the items referred to in subparagraphs (*a*), (*b*) and (*c*) of Section 4 of this Article. No purchaser at any such sale shall be bound to see to the application of the purchase money or to inquire as to the authorization, necessity, expediency or regularity of any such sale. Any such sale shall operate to divest all right, title, interest, claim and demand whatsoever, either in law or in equity, of the Company, its successors and assigns, and of any person claiming through or under them, in and to the property so sold, and every part thereof. Should the Trustee become the purchaser at such

sale, the following rights, privileges and obligations are hereby created: (*a*) All the holders of bonds and coupons shall contribute and pay to the Trustee becoming such purchaser their respective and proportionate shares (in proportion to the amount of unpaid bonds and matured coupons owned by them respectively) of the total of the items referred to in subparagraphs (*a*), (*b*) and (*c*) of Section 4 of this Article, for which contribution and payment they shall be respectively liable as for money paid at their request and in default of such contribution and payment, and as a cumulative and not alternative right, the Trustee becoming such purchaser shall have a lien therefor upon the interest of such defaulting bond and coupon holders in said premises or in the proceeds of sale received by the said Trustee upon any subsequent sale thereof; (*b*) the Trustee becoming such purchaser may forthwith or at any time thereafter sell and convey said premises as a whole or in such parts and sole discretion of such Trustee may seem proper, but shall in no event sell for less than an aggregate amount which will be entirely sufficient to pay each bond and coupon holder his, her or its amount found due for principal, interest and any advances made or assessed to him, her or it hereunder, and any and all outlays, expenses, costs and attorneys' and trustees' and receivers' fees fixed or allowed by the court not otherwise met and paid out of rents, or by the Company, unless the consent in writing of bond and coupon holders having and owning three-fourths of the entire indebtedness evidenced by said bonds and coupons found to be due upon such foreclosure shall be first procured by or be given to said Trustee; and (*c*) until the Trustee so pur-

chasing shall thus sell and dispose of said premises, the Trustee shall be entitled to enter upon and take possession of the same, complete the construction and equipment and furnishing of any building, lease or operate, maintain and manage the same by such agents, servants and attorneys as he may select, and receive and collect the rents, earnings, income and profits thereof, and pay therefrom and from the proceeds of any sale thereof, all costs, charges and expenses of such construction and equipment, taxes, insurance premiums and cost of maintenance and operation, including compensation for such Trustee, his servants, agents and attorneys, and distribute the remainder of moneys thus received by him ratably among those entitled thereto.

SECTION 6. If any one or more of the events of default, as set forth in this indenture, shall happen, and shall continue for the period or periods as hereinbefore provided, and if by reason thereof the entire principal indebtedness hereby secured shall be declared to be due, the Company, on demand of the Trustee, will pay to the Trustee at the office of the Trustee in the City of New York, for the benefit of the holders of the bonds and coupons, in United States gold coin of not less than the standard of weight and fineness existing on the date hereof, as now fixed by law, a sum equivalent to the amount due on all outstanding bonds for principal and matured coupons with interest upon the overdue principal and installments of interest at the rate of seven per cent. (7%) per annum, plus all charges, expenses and advances incurred or made by said Trustee or G. L. Miller & Company, Inc., or the bond holders or

coupon holders, authorized by this indenture, with interest thereon at the rate of seven per cent. (7%) per annum, plus any moneys due from the Company for normal federal income tax or other taxes, as herein provided, and in case the Company shall fail to pay the same forthwith upon such demand the Trustee in his own name and as Trustee of an express trust shall be entitled to recover judgment against the said Company and/or any guarantor (subject to the terms of any such guaranty), either one or both of them, for the whole amount so due and unpaid. The Trustee shall be entitled to recover judgment as aforesaid either before or after or during the pendency of any proceeding for the enforcement of the lien of this indenture and his right to recover any such judgment shall not be affected by any sale hereunder or by the exercise of any other right, power or remedy for the enforcement of the provisions of this indenture or by the foreclosure of the lien thereof; and in case of a sale of the mortgaged premises or any part thereof and of the application of the proceeds of sale to the payment of the indebtedness represented by the bonds, coupons and claims for interest, the Trustee in his own name and as Trustee of an express trust shall be entitled to receive and to enforce payment of any and all deficiency or amounts then remaining due and unpaid upon said bonds and coupons then outstanding, for the benefit of the holders thereof, including interest thereon, and upon any advances with interest as above set forth, and shall be entitled to recover judgment against said Company and/or said guarantor (subject to the terms of any such guaranty) for any portion of such indebtedness remaining un-

paid, with interest. No recovery of any judgment by the Trustee and no levy of any execution under any such judgment upon property subject to the lien of this indenture or upon any other property shall in any manner or to any extent affect or impair the lien of the Trustee upon the mortgaged premises or any part thereof of any rights, powers or remedies of the Trustee hereunder or any rights, powers or remedies of the holders of said bonds and coupons, but such lien, rights, powers and remedies shall continue unaffected and unimpaired as before. Any moneys thus collected by the Trustee under this Section shall be applied by the Trustee as and in the manner provided for in Section 4 of this Article.

SECTION 7. The Company will not at any time insist upon or plead or in any manner whatsoever take the benefit or advantage of any stay or extension law now or at any time hereafter in force, nor will it claim, take or insist on any benefit or advantage from any law now or hereafter in force providing for the valuation or appraisement of the mortgaged premises or any part thereof prior to any sale or sales thereof to be made pursuant to any provision herein contained, nor will it claim or exercise any right under any law or statute now or hereafter in force to redeem said mortgaged premises or any part thereof, nor will it apply for or obtain any order or decree of any court of competent jurisdiction for the accomplishing of any of the aforesaid purposes, and it hereby expressly waives all benefit and advantages of any such right or rights, law or laws, orders or decrees, and covenants that it will not hinder, delay or impede the execution of any

power herein granted and delegated to the Trustee, but that it will suffer and permit the execution of every such power as though no such law or laws had been made and enacted.

SECTION 8. Whenever under the provisions hereinbefore contained it shall have become the duty of the Trustee to institute legal proceedings upon the written request of the requisite number of bond holders or holders of overdue coupons, or of holders of both bonds and overdue coupons as aforesaid and upon deposit or tender of deposit of the requisite number of bonds and/or overdue coupons with the Trustee and upon tender of indemnity satisfactory to him as herein required and the Trustee shall have refused or failed to act within ten (10) days after such request and tender of indemnity satisfactory to him, then and in any such case, but under no other condition (except as hereinafter provided), the same number of bond holders and/or coupon holders who under the provisions hereof have the right to demand action by the Trustee, may jointly institute such proceedings in law or equity as the Trustee was or is authorized to institute, but for the legal benefit of all holders of all the bonds and coupons then outstanding. Every holder of any of the bonds hereby secured, including pledgees, accepts the same subject to the express understanding and agreement that every right of action, whether at law or in equity, upon or under this indenture, is vested exclusively in the Trustee as Trustee of an express trust, and under no circumstances shall the holder of any bond or coupon, or any number or combination of such holders, have any right to institute any action at law upon any bond or bonds

or any coupon or coupons, or otherwise, or any suit or proceeding in equity or otherwise, except in case of refusal on the part of the Trustee to perform any duty imposed upon him by this indenture after request in writing by the holder or holders of bonds in aggregate face principal amount of at least $10,000 or at least a like aggregate amount of overdue coupons or a like aggregate amount of principal of unpaid outstanding bonds and of overdue coupons as aforesaid, and except as herein otherwise provided. No action at law or in equity shall be brought by, or on behalf of, the holder or holders of any bonds or coupons, whether or not the same be past due, except by the Trustee, or his successor or by a bond holder or holders or by holders of overdue coupons outstanding and secured hereby of at least the aggregate face amount as aforesaid acting under the provisions of this Section for the benefit of all the holders of bonds and overdue coupons then outstanding.

Section 9. No holder of any bond or coupon, or any number or combination of such holders, shall have any right to institute any action at law against the guarantors upon any guaranty hereof except upon the request in writing to the Trustee and tender of indemnity satisfactory to him by the requisite number of bond holders or of holders of overdue coupons or of holders of bonds and overdue coupons, as hereinbefore in Article VII provided and the deposit or tender of deposit of the requisite number of bonds and/or overdue coupons with the Trustee, and such Trustee shall have refused or failed to act within five days after such request and tender

of indemnity. PROVIDED, HOWEVER, that nothing herein written shall preclude or be construed as a prohibition against or to prevent a holder or holders of bonds secured hereby having a face principal amount of not less than 50% of the aggregate principal amount of bonds having the same maturity date from enforcement or seeking to enforce in any lawful action or proceeding the liability of the guarantor upon any such guaranty.

SECTION 10. In case the Trustee or bondholders or coupon holders shall have proceeded to enforce any right under this indenture, by foreclosure, entry or otherwise, and such proceedings shall have been discontinued or abandoned for any reason or shall have been determined adversely to such Trustee and/or the bondholders and/or the coupon holders then and in every such case the Company and the Trustee and bondholders and/or coupon holders shall be restored to their former position and rights hereunder.

ARTICLE X.

Liabilities, Duties, Powers and Rights of the Trustee.

SECTION 1. The Trustee accepts the trusts of this indenture and agrees to execute them according to the terms and conditions hereof and herein set forth to which the parties hereto and the holders of the bonds and coupons respectively agree. The recitals and statements contained herein and in the bonds issued hereunder shall be understood as made solely by the Company

and not as made or vouched for by the Trustee. The Trustee shall not have any responsibility for the validity of the lien of this indenture or the execution or acknowledgment thereof, nor as to the title, value or extent of the security afforded hereby, and shall be under no obligation to see to the recording, registration, filing or refiling of this instrument, or any instrument of further assurance, or to the affixing or cancellation of any revenue or documentary stamps either on this instrument or any instrument of further assurance or on the bonds issued hereunder, or any other instruments issued in connection herewith or to the giving of any notice thereof, or to see that any of the property intended now or hereafter to be conveyed in trust hereunder is subjected to the lien hereof, or to see to the use or application of the bonds or their proceeds, and the Trustee may authenticate and deliver temporary or definitive bonds before the recording hereof and irrespective of the recording, registration or filing hereof.

SECTION 2. The Trustee shall not be under any obligation to recognize any person, firm or corporation as the holder or owner of any of the bonds and/or coupons secured hereby, or to do or refrain from doing any act pursuant to the request of any person, firm or corporation, professing to be or claiming to be such holder or owner, until such supposed holder or owner shall produce the said bonds and/or coupons and deposit the same with the Trustee. But all powers and rights of action hereunder (except as otherwise specified) may be exercised and enforced at all times by the Trustee, at his election, without the

possession or production of any of said bonds or coupons, or proof of ownership thereof at any time whatsoever. The Trustee shall not be answerable for the default or misconduct of any agent or attorney employed by him in and about the execution of this trust if such agent or attorney shall have been selected with reasonable care. The Trustee shall not be personally liable for any debts contracted by him nor for damages to persons or property of any kind whatsoever, nor for salaries or non-fulfillment of contracts during any period wherein he shall manage the trust estate or premises upon entry.

SECTION 3. The Trustee shall not be in any way liable for the consequence of any breach of the covenants herein contained, or for any act done or anything omitted hereunder by the Company, and in no event shall the Trustee be liable to any bondholder, except for gross negligence or wilful misconduct or neglect. It shall be no part of the duty of the Trustee to effect or collect insurance against fire or other damage on any portion of said premises or to renew any policies of insurance or to inquire or keep informed as to the performance or observance of any covenant or agreement on the part of the Company, under this indenture, or to pay any taxes, assessments, or other charges upon the premises or to do any other thing not affirmatively and expressly agreed to be done by him hereunder, but the Trustee may at his option pay any tax assessment or other charge levied on the mortgaged premises and property covered by this indenture and shall be reimbursed by the Company therefor and shall have a lien for any such payments, with

interest as herein provided, on the mortgaged premises and property subject only to the lien of this indenture securing said bonds. The Trustee may conclusively assume that the Company is not in default hereunder, unless notified in writing of such default by G. L. Miller & Company, Inc., or by the holders of at least $10,000 in principal amount of bonds issued and outstanding, or by the holders of a like amount of overdue coupons, or a like amount of both bonds and overdue coupons.

SECTION 4. Anything herein contained to the contrary notwithstanding, the Trustee shall not be under obligation to defend any suit or proceedings brought against him by reason of any matter or thing connected with the trusts hereby created or by reason of being a Trustee hereunder, or to take any action towards the execution or enforcement of any trust hereby created, or of any guaranty, unless indemnified in an amount and by security satisfactory to such Trustee by the Company or by said holders of bonds and/or coupons or some of them, against all loss, costs, damages and expenses which might in his opinion result therefrom or be occasioned thereby; PROVIDED, HOWEVER, that nothing in this Section contained shall affect any discretion herein given to the Trustee to determine whether any action shall be taken.

Where Trustee has demanded or received indemnity under the provisions of this indenture, and it shall afterwards appear in the judgment of such Trustee, that the indemnity so demanded or received is or may become insufficient, such Trustee shall not be required to take any further

action hereunder until additional indemnity, satisfactory to such Trustee, shall have been furnished to him.

In any event of default by the Company the Trustee shall be entitled to be reimbursed for all proper outlays of every sort and nature, by him incurred in the discharge of said trust, or in defense of any action or proceeding brought against him, as Trustee hereunder, and to receive compensation for any duty that he may at any time perform in the discharge of said trust or in defense of such action or proceeding, and all such fees, commissions, compensations and disbursements, including attorneys' fees, shall constitute a lien hereunder on said premises subject only to the lien of this indenture and the other indebtedness secured hereby, and the Company hereby covenants and agrees to pay the same.

SECTION 5. The Trustee shall be entitled to act upon any notice, request, consent, certificate, bond, letter, telegram, or other instrument or paper believed by him to be genuine, and to have been properly executed, and shall be entitled, but not required, to receive as conclusive proof of any act or matter required to be ascertained by him hereunder, a certificate signed by the President or the Secretary of the Company, unless in this indenture otherwise specifically provided, and any such certificate or evidence prescribed by this indenture which the Trustee may accept, shall be full protection and justification for anything suffered or done by the Trustee in good faith in reliance thereon.

SECTION 6. It is covenanted and agreed that in all actions, suits, or proceedings, or dealings or

transactions in any way affecting or relating to this indenture, or to the premises or to the property covered by the lien of this indenture, or any part thereof, or to the title thereto, the Trustee shall be deemed the representative of the bond holders, except as herein otherwise provided or as may be provided by law, and in no case shall it be necessary to notify any bondholder or to make any bondholder a party to any action, suit or proceeding for the purpose of binding or concluding him, except as otherwise herein provided and as otherwise may be provided by law.

The Trustee is also hereby authorized and empowered to join in and enter into any lawful contract or agreement with the Company and owner or owners for the time being of any adjoining premises, fixing any dividing or boundary line which may be in dispute or respecting the erection or construction of any party or division wall or any party caissons upon or along any dividing line between the said mortgaged premises and any adjoining premises, including any contract or agreement terminating, abrogating, extending or modifying any such new or existing agreement. And it is hereby covenanted and agreed that the decision of the Trustee as to the necessity or expediency of any action, and any action taken by the Trustee, pursuant to the authority vested in him by this Section, shall be conclusive and binding upon the holder of any bond or coupon and every person at any time claiming or to claim under this indenture, and in no event shall the assent of any said holder of any bond or coupon or person as aforesaid, other than the Trustee, be required to give binding effect thereto. All powers conferred upon the Trustee by this indenture,

may be exercised at any time and from time to time by such Trustee in his absolute discretion whenever and as often as the occasion therefor may arise; provided, however, that the said powers shall be construed as optional with such Trustee and shall not be deemed in any sense obligatory or as imposing any affirmative duties on such Trustee.

SECTION 7. In case of any suit or proceeding in any way relating to or affecting said mortgaged premises, including any action or proceeding in connection with any Torrens Act, or Land Registration Act or Acts, so-called, wherein provision is or may be made for Registration of Land Titles, in which action or proceeding said Trustee or said bondholders, or any of them, shall be a party or parties, compensation for the services of the Trustee and all court costs and necessary expenses incurred by the Trustee, including reasonable attorneys' fees, stenographers' charges and costs of procuring abstracts of title and continuations thereof, or of a title policy or a continuation thereof, and costs of procuring testimony and evidence and statements of witnesses and documentary evidence, if any, incurred by the Trustee in or about such suit or proceeding or in the preparation thereof, shall be allowed to and paid to such Trustee by the Company on demand, and shall be a charge on the mortgaged premises and shall become so much additional indebtedness secured by this indenture, and, wherever possible, shall be provided for in any judgment or decree in such proceeding. And it is further agreed that any and all certificates of title issued under any such proceedings shall be delivered to and held by said Trustee until all of said indebtedness is paid.

SECTION 8. It is hereby further covenanted and agreed, and this trust is accepted upon the express condition that the Trustee shall not incur any liability or responsibility whatever in consequence of permitting or suffering the Company to remain or be in possession of the mortgaged premises, and to use and enjoy the same, nor shall he become liable or responsible for any destruction, loss, injury or damage which may be done or happen to the mortgaged premises either by the Company or its agents, servants, lessees, or by any person or persons whatever, or by or from any accident or any cause whatever.

The Trustee may advise with legal counsel, and any action under this indenture taken or suffered in good faith by the Trustee, in accordance with the opinion of such counsel, shall be conclusive on the Company and on G. L. Miller & Company, Inc., and on all holders of the bonds and coupons secured by this indenture and the Trustee shall be fully protected in respect thereof.

The Trustee shall not be liable for any error of judgment nor for any act done or step taken or omitted nor for any mistakes of fact or law, nor for anything which he may do or refrain from doing in good faith, nor generally shall he have any accountability hereunder except for his own wilful default.

SECTION 9. No implied covenant shall be read into this indenture against the Trustee but the duties of the Trustee to the Company and to all others shall be determined solely by the provisions of this indenture; and all questions or controversies as to the liability of the Trustee hereunder shall be decided and determined under the laws

of New Jersey, and no action, suit, or other legal proceedings against the Trustee shall be instituted or conducted in the courts of any other State unless with his voluntary written consent.

SECTION 10. Nothing herein contained shall prevent the Trustee or any successor in trust, individually and in any other capacity than as Trustee hereunder, and/or G. L. Miller & Company, Inc., individually, or in any capacity, from purchasing, selling, holding or otherwise dealing in the bonds or coupons secured hereby.

ARTICLE XI.

Proof of Ownership of Bonds, etc.

Any notice, request or other instrument required by this indenture to be signed or executed by bondholders or couponholders may be in any number of concurrent instruments of similar tenor and may be signed or executed by such bondholders or couponholders in person or by agents appointed in writing.

As a condition for acting hereunder, the Trustee may demand, but is not hereby obliged so to demand, proof of the execution of any such instrument, and of the fact that any person claiming to be the owner of any of said bonds or coupons is such owner, and may further require the actual deposit of such bonds or coupons with the Trustee.

The facts and date of the execution of any such instrument may be proved by the certificate of any officer in any jurisdiction, who by the laws thereof is authorized to take acknowledgments or proof of execution of deeds within such jurisdic-

tion, that the person signing such instrument acknowledged to him the execution thereof, or by any affidavit of a witness to such execution sworn to and acknowledged before any such officer.

The amount of bonds or coupons transferable by delivery held by any person executing any such instrument as a bondholder and the face amounts and issue numbers of the bonds held by such person and the date of his holding the same, may be proved by a certificate executed by any trust company, bank, bankers or other depositary acceptable to the Trustee, and in a form approved by the Trustee showing that at the date therein mentioned such person had on deposit with such depositary the bonds or coupons described in such certificate; such deposit shall be presumed to continue. Provided, however, that at all times the Trustee may require the actual deposit of such bonds or coupons with the Trustee.

ARTICLE XII.

Successors in Trust.

SECTION 1. In the event of the sickness, death, resignation, refusal to act, removal, disqualification, or other inability or incapacity of said ROLLIN J. FRANCIS, herein named as Trustee, WILLARD C. WHEELER, of Rye, N. Y., and/or AUGUSTUS B. WELLER, of Forest Hills, Long Island, N. Y., are hereby designated in the order named, to act as Successor Trustee hereunder in the place and stead of the acting Trustee herein named, with all the powers and authority and with the same force and effect as if said Successor Trustee had been originally named herein. It is the intention

SECTION 2. In the event of the sickness, death, resignation, refusal to act, removal, disqualification, or other inability or incapacity of the said Trustee herein named, or any Successor Trustee herein named when and while his services shall be required under any provisions hereof, then G. L. Miller & Company, Inc., shall appoint a Successor Trustee in the Trust hereby created by an instrument in writing recorded in the office of the official where this indenture shall have been recorded and notice thereof served on the Company and the Trustee. In the event of the failure of G. L. Miller & Company, Inc., to so appoint any successor trustee within sixty (60) days after the occasion therefor shall have arisen, then a Successor Trustee may be appointed by the holders of one-third in principal amount of the bonds hereby secured and at the time outstanding, by an instrument or concurrent instruments in writing signed by such holders and recorded in the office where this indenture shall have been recorded, and a copy thereof served upon the Trustee, if any, and the Company. Should there be more than one such appointment, the instrument signed by the holders of the greatest amount of bonds in principal amount shall control. But in case no such appointment shall be made by the bondholders within twenty (20) days after failure of G. L. Miller & Company, Inc., to make such appointment as aforesaid, a new Trustee may at any time thereafter be selected and appointed by any court of competent jurisdiction in the premises, upon the application of the Company or of holders of said bonds, upon notice to the Trustee, if any, and upon such notice as such court shall direct or as

shall be in accordance with the rules and practice of such court.

SECTION 3. Any new or Successor Trustee appointed hereunder shall execute, acknowledge and deliver to the Company an appropriate instrument in writing accepting such appointment hereunder, and thereupon such new or Successor Trustee, without any further act, deed or conveyance, shall become fully vested with all the estates, rights, trusts, powers and duties herein provided of the Trustee ceasing to act, and all the estate, right, title and interest of such Trustee ceasing to act in the trust estate shall wholly cease and determine; but the Trustee so ceasing to act shall, nevertheless, on the written request of the Successor Trustee or the Company execute and deliver an instrument transferring to such Successor Trustee, upon the trusts herein expressed, all the estate, properties, rights, powers, privileges and trusts of the Trustee so ceasing to act and shall duly assign, transfer and deliver to such new or Successor Trustee any cash or securities held hereunder and comprised in the trust estate, upon payment of all charges and expenses incurred or contracted by such retiring Trustee in the execution of the trusts hereunder including compensation for his services, counsel fees and other charges, disbursements or expenses incurred or contracted by said retiring Trustee in the execution of the trusts hereunder. Should any deed, conveyance or instrument in writing from the Company be required by the Successor Trustee for more fully and certainly vesting in and confirming unto such Successor Trustee such estates, rights, powers and duties, any and all such deeds,

conveyances and instruments in writing shall, upon the request of such Successor Trustee, be executed, acknowledged and delivered by the Company.

Each Successor Trustee in the trust shall have identically the same rights, powers and duties as hereby are vested in or imposed upon said Trustee herein named. The recital by any successor to the Trustee in the trust in any instrument executed by him, of the death, resignation, refusal, or other inability to act of the original Trustee or any other Successor in the trust, shall be sufficient evidence thereof when recorded in the office of the official where this indenture has been recorded.

SECTION 4. The Trustee and every Successor Trustee shall be exempt from giving any bond or surety in respect to the execution of the trusts or powers herein contained, or otherwise in respect of the premises.

ARTICLE XIII.

Miscellaneous Provisions.

SECTION 1. Whenever in this indenture there is any provision for any security or securities, indemnity, or indemnity or surety bond to be furnished by or to the Company, the Trustee or G. L. Miller & Company, Inc., said G. L. Miller & Company, Inc., or said Trustee unless expressly to the contrary provided are hereby respectively authorized to pass on the requisite amount, sufficiency, propriety and validity of the same, and the decision of said G. L. Miller & Company, Inc., and/or said Trustee, shall be conclusive, and binding on

said parties and the bond holders; provided, however, that said G. L. Miller & Company, Inc., and/or the Trustee shall not be liable for any action under this section in the absence of bad faith, and further provided that when the security, or securities, indemnity or indemnity bond or surety bond to be furnished is for the protection of the Trustee, the Trustee for whose protection such security or indemnity is furnished, alone, and not G. L. Miller & Company, Inc., shall have the right to pass on the amount, sufficiency and validity of the same.

SECTION 2. Whenever in this indenture any right or rights are granted or reserved to the Trustee, or to any bond holder or coupon holder, such Trustee, bond holder, or coupon holder shall at any and all times, and under all circumstances, have any and every right that he, it or they might, in any case, have in law or in equity or under any statute or rule of court or of practice. No delay or omission to exercise any remedy or right accruing on any default shall impair any such remedy or right, or shall be construed to be a waiver of any such default, or acquiescence therein, nor shall it affect any subsequent default of the same or a different nature. Every such remedy or right may be exercised from time to time and as often as may be deemed expedient.

SECTION 3. If the Company shall promptly pay, or cause to be paid, the principal amount of said bonds with the coupons thereon as the same shall respectively mature, or if the Company shall make the payments provided in Article II, Section 6 hereof, and shall also pay all other sums payable hereunder by the Company, and shall

have kept and performed all the things required of it herein, all the premises shall revert to the Company, and the estate, right, title and interest of the Trustee thereupon shall cease, determine and become void, and the Trustee, on demand of the Company, but only upon receipt by the Trustee from the Company and G. L. Miller & Company, Inc., of all paid bonds (or in lieu thereof an accounting satisfactory to the trustee therefor), and upon receipt by the Trustee of funds necessary to pay the bonds with the coupons called for redemption but not previously presented and surrendered, and all other moneys accrued, or due and payable hereunder, but at the Company's cost and expense, shall prepare and execute proper instruments releasing, satisfying and discharging the lien of this indenture. The Trustee in thus discharging said lien may assume the validity of all proceedings previously taken by the Company and by G. L. Miller & Company, Inc., for such redemption of said bonds. Such instrument shall be valid and effectual, in law, whether executed and delivered before or after maturity of said bonds, and without the necessity of and regardless of the production, surrender, delivery or cancellation of any of said bonds.

SECTION 4. It is further covenanted and agreed that in case the power of eminent domain be exercised and all or a part of said mortgaged premises is taken thereunder, then whatever moneys shall thereby become due the Company (not, however, exceeding the amount necessary to meet the items referred to in sub-paragraphs (*a*) and (*b*) hereof and to retire all bonds issued hereunder and then outstanding, with interest thereon to

date of payment, including a premium on bonds not due as provided in Article II, Section 6 hereof, and including any income tax, or other tax, as herein provided due hereunder the holders of any bonds with interest thereon and all other sums sufficient to entitle the Company to a release hereof, shall be paid to the Trustee, and be used toward the payment:

(*a*) of fees, costs, charges and expenses as provided in this indenture;

(*b*) of advances with interest as provided in this indenture.

(*c*) If the amount so received by the Trustee as aforesaid shall be less than twenty-five per cent. (25%) of the amount of all indebtedness secured by this indenture then remaining unpaid, the balance of said amount after making the payments above referred to in this Section may, in the discretion of the Trustee, be used by him in whole or in part toward the cost of repairing, restoring or rebuilding any building on said premises which shall have been damaged as the result of the exercise of the power of eminent domain.

(*d*) If the amount so received by the Trustee as aforesaid shall exceed twenty-five per cent. (25%) of the amount of all indebtedness secured by this indenture then remaining unpaid, the balance of said amount after making the payments above referred to in sub-paragraphs (*a*) and (*b*) of this Section, shall, in the discretion of the Trustee, be used by the said Trustee in whole or in part toward the cost of repairing, restoring or rebuilding any such building; PROVIDED, HOWEVER, that G. L. Miller & Company, Inc., or the holders

of fifty per cent. (50%) of principal face amount of the said bonds then outstanding and unpaid shall consent thereto.

(*e*) Any such work of repairing, restoring or rebuilding done under sub-paragraphs (*c*) or (*d*) of this Section shall be done according to such plans and specifications as the architect selected by the Trustee and as G. L. Miller & Company, Inc., may approve and any amounts so received by the Trustee shall be disbursed in the same manner as is hereinbefore provided in Article V for the disbursement of insurance moneys.

(*f*) If the whole or any part of the balance of the amount so received by the said Trustee, after making the payments provided in sub-paragraphs (*a*) and (*b*) hereof shall not be used toward the cost of repairing, restoring or rebuilding any such building, then such amount, or so much thereof as remains in the hands of the said Trustee, shall be used for the payment, *pro rata,* of all the said bonds matured and unmatured and coupons matured and interest on overdue bonds not represented by coupons and interest on overdue coupons, without preference of principal over interest or interest over principal. Only coupons which have matured and the earned portion of those next maturing shall be entitled to participate in such proceeds.

Section 5. Each and all of the covenants, agreements, conditions, promises and undertakings in this indenture, shall extend to and be binding upon the successors and assigns of the Company and any other corporation or corporations with which it shall merge or consolidate, the same

as if they were in every case named and expressed, and all of the covenants hereof shall bind them and each of them jointly and severally.

All of the covenants, conditions and provisions hereof shall be held to be for the sole and exclusive benefit of the parties hereto and their successors and assigns and of the holders of said bonds and coupons.

No transfer of said mortgaged premises by the Company shall operate to release or discharge the Company, it being agreed that the liability of the Company shall continue as principal until all said bonds and coupons are paid in full, notwithstanding any transfer of said premises, and notwithstanding any extension of time of payment of any one or more of said bonds and/or coupons.

SECTION 6. Any notice or communication which the Trustee or the bond holders shall desire to give or serve upon the Company, may be given or served in the manner provided in Section 5 of Article III hereof.

Any notices or communications which the Company or the bond holders may desire to give or serve upon the Trustee shall be served by registered mail to the address provided for below or personally by delivering a true copy thereof to the Trustee, at his office in New York City and to G. L. Miller & Company, Inc., at its office in New York City, or at such other addresses as the Trustee and G. L. Miller & Company, Inc., and either or both may from time to time furnish the Company.

SECTION 7. Wherever in this indenture reference is made to the Company, the Trustee, or to G. L. Miller & Company, Inc., it shall be held to

apply also to the respective successors or assigns of the party referred to, and each and every covenant entered into by the Company shall be a covenant running with the land above mentioned. Wherever in this indenture the word "bond" or "bonds" or "bond holder" or "bond holders", "coupon" or "coupons", "coupon holder" or "coupon holders" is used, it may, unless otherwise specifically provided, be held to include the singular as well as the plural number. Whenever in this indenture or in the bonds the word "holder" or "owner" or "bearer" is used, it shall be construed, in the case of a registered bond to mean the party in whose name the bond is registered. The word "Trustee" shall be held and construed to mean such Trustee for the time being whether original or successor in the trust. The word "State" shall be held and construed to mean any State of the United States of America. The words "federal income tax" or "federal income tax law" shall be held and deemed to refer to any internal revenue act of the United States of America now or in force or hereafter enacted and the regulations issued thereunder. The rule *ejusdem generis* shall not be observed in construing any provision of this indenture.

SECTION 8. The invalidity of any one or more phrases, sentences, clauses, provisions, sections or paragraphs shall not affect the remaining portions of this indenture or any part thereof, all of which are inserted conditionally on their being held valid in law, and in the event that one or more of the phrases, sentences, clauses, provisions, sections or paragraphs contained herein should be invalid, this instrument shall be construed as if such in-

valid phrase or phrases, sentence or sentences, clause or clauses, provision or provisions, section or sections and paragraph or paragraphs had not been inserted.

SECTION 9. The Company hereby expressly authorizes G. L. Miller & Company, Inc., or the then acting Trustee to make in its behalf any and all deductions required by any federal income tax law or under any ruling thereon or regulation thereof and authorizes each of them to make any and all reports, statements and returns in its behalf which may be required from G. L. Miller & Company, Inc., or such Trustee, by said laws, rulings or regulations. It is expressly agreed and understood, however, that neither the Company shall be entitled at any time to the names and addresses of any of the legal holder or holders of the bonds at any time outstanding, secured by this indenture, whether or not any of them shall claim refund or payment hereunder for income tax or other taxes.

SECTION 10. The Company covenants and agrees for the use and benefit of the Trustee hereunder and of all owners and holders of the bonds issued hereunder to have an audit of all its books and transactions relating to the mortgaged premises and the building constructed or to be constructed thereon once in each year by a firm of public accountants of good standing in the United States of America satisfactory to G. L. Miller & Company, Inc., showing the trial balance and balance sheets of its properties, earnings, expenditures, indebtedness and net earnings, and the result of each of their operations and business for the preceding year, and will deliver to G. L. Miller &

Company, Inc., once in each year, on or before the 31st day of January thereof, such audit in detail, made by said accountants; the first audit shall be furnished for the year ending December 31, 1927.

SECTION 11. It is hereby certified by the Company and recited that this indenture and each of said bonds and coupons secured hereby have been lawfully and properly authorized by the stockholders of the said Company and by the Board of Directors of said Company at meetings thereof lawfully convened in accordance with the laws of New Jersey, and the by-laws of said Company, by the unanimous affirmative vote of the holders in person, of all of the shares of stock of said Company outstanding entitled to vote thereon, and by the unanimous affirmative vote of the Directors of said Company at a meeting of said Directors at which meeting all of the Directors of said Company were present, as the lawfully binding corporate obligations of said company; and that all acts, consents, vote or votes, records of corporate meetings and authorities and things precedent to, and in the making, authorizing, signing, sealing and delivery of this indenture and of said bonds both temporary and definitive, and the coupons herein described and secured and to be secured hereby, have each and all been done, authorized and performed within the time and in the manner prescribed by law, and the by-laws, rules and regulations of said Company; and that the aggregate amount of said indebtedness secured and to be secured hereby does not exceed any statutory or constitutional limit (if any), of the amount of indebtedness which the said Company can at this time incur and lawfully bind and obligate itself

to pay and secure the payment of the entire amount thereof and interest thereon, by a good, valid and lawful mortgage or conveyance—this indenture—of all its real and personal property now owned or hereafter acquired as above described.

SECTION 12. The Company further covenants and agrees that, as further and additional security for the payment of each of the said bonds and coupons, the Company will on demand make, execute and deliver to the Trustee, his successors and assigns, a good, lawful and sufficient chattel mortgage or mortgages in such form as shall be satisfactory to the counsel for the Trustee and G. L. Miller & Company, Inc., covering all the personal property mentioned or referred to immediately following herein the description of the land covered by this indenture; that such chattel mortgage or mortgages, shall when given and ever afterward be a first lien upon all the property covered thereby; that the Company will so make, execute and deliver said chattel mortgage or mortgages within five days after demand therefor made by the Trustee or G. L. Miller & Company, Inc., and in any event within five days after the building upon said premises shall have been substantially completed and occupancy thereof shall have commenced; that the Company will cause such chattel mortgage or mortgages to be duly filed and/or recorded, and/or refiled or re-recorded in the proper public office or offices for the filing of the same. In case the Company shall fail, neglect or refuse to so make, execute, file or record said chattel mortgage or mortgages, to effect the lien, security and purposes and at and within the time

and in the manner aforesaid, the Trustee and/or the holders of bonds of the requisite amount above provided in other cases of default, and upon the same terms and conditions hereinbefore recited, may declare the entire indebtedness hereby secured to be due, and/or have foreclosure hereof, and such other remedies in the premises as for default in the payment of interest or principal of said indebtedness as herein otherwise provided, or as shall or may be provided by the laws of the State of New Jersey.

SECTION 13. Any action taken by the Trustee pursuant to this indenture upon the request or authority or consent of any person, who, at the time of making such request or giving such authority or consent, is the owner of any bonds secured hereby, shall be conclusive and binding upon all future owners of the same bonds (and of bonds issued in exchange therefor or in place thereof), or of such other indebtedness as the case may be.

SECTION 14. Any moneys received by the Trustee under any provision of this indenture may be treated as a deposit without any liability for interest, save such as he shall agree to pay thereon.

SECTION 15. The Company, for itself its successors and assigns, expressly covenants and agrees with said Trustee and his successor and with each of the holders and successive holders of all the bonds and coupons secured hereby, and it is hereby declared to be the express intention of all parties hereto, or of those having any interest now or hereafter herein or hereunder, that the contracts and obligations of the Company, its suc-

cessors and assigns herein, and in said bonds, temporary and definitive, for the payment of interest thereon and interest on the indebtedness secured hereby (with said taxes as herein and therein agreed) are New Jersey contracts and obligations, and are expressly made, and shall be construed as made, with reference to the laws of the State of New Jersey respecting amount or rates of interest that may be reserved, or paid under an agreement in writing, for the use and loan of money, in force at the date hereof and be governed thereby, notwithstanding that both principal and interest are or may be payable, and the actual sale and delivery of any or all of said bonds, temporary and definitive, shall and/or may be made, without the State of New Jersey.

SECTION 16. Nothing in this instrument or in any of the bonds secured hereby shall be construed so as to make The Chemical National Bank of New York insurer of the title to the property described herein, or guarantor of the payment of the principal or interest of the bonds secured hereby, nor of the validity of the lien of the indenture, nor of the amount due thereon, nor of the performance of any of the obligations imposed hereby upon either the Company or the Trustee; but it is specifically agreed by all parties interested herein, including the purchasers and holders of each of said bonds, that the sole and only duties of said The Chemical National Bank of New York are those as set forth in that certain certificate attached to each of the definitive bonds and designated thereon as "Banker's Certificate".

SECTION 17. This indenture is executed and delivered in one original and three counterparts,

which counterparts are each to be an original for all purposes.

IN WITNESS WHEREOF, the Company has caused this indenture to be signed in its corporate name, by its President or Vice-President, and to be sealed with its corporate seal, attested by its Secretary or Assistant Secretary, pursuant to authority given by its Board of Directors, and the said Trustee has hereunto set his hand and seal, to this indenture dated as of the day and year first above written.

FRANKLIN ARMS, INC.,

By JAMES HAINES,
President.

(Seal)

Attest:

JOHN HAINES,
Secretary.

ROLLIN J. FRANCIS (L. S.)
As Trustee.

Federal Revenue Stamps in the sum of $107.50 have been duly affixed to the original of the within indenture and duly cancelled as required by law.

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

Be it remembered, that on the 7th day of June, 1926, before me, the subscriber personally appeared John Haines, to me known, who being by me duly sworn, according to law, on his oath said: That he is the Secretary of Franklin Arms, Inc., the Corporation in the foregoing indenture mentioned; that he well knows the corporate seal of said Corporation; that the seal affixed to said indenture is the corporate seal of said Corporation; that it was so affixed by order of such Corporation. That James Haines is the President of the said Corporation; that he saw the said James Haines as such President, sign the said indenture and heard him declare that he signed, sealed and delivered the same as the voluntary act and deed of the said corporation by order of its Board of Directors, and that deponent signed his name thereto at the same time as an attesting witness.

JOHN HAINES.

Sworn and subscribed to before me the day and year first above mentioned.

RANDOLPH C. BARRETT,
Master in Chancery
of New Jersey.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } SS.:

BE IT REMEMBERED, that on this 7th day of June, 1926, before me, the subscriber, personally appeared ROLLIN J. FRANCIS, who, I am satisfied is the Trustee mentioned in the within Indenture, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed, and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

RANDOLPH C. BARRETT,
Master in Chancery
of New Jersey.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } SS.:

ROLLIN J. FRANCIS, of full age, being duly sworn according to law, on his oath saith:

I am the Trustee and party of the second part in the foregoing indenture named and am familiar with the details of this transaction and I do further depose and say that the true consideration of said indenture is as follows:

Said indenture is made to deponent as Trustee by Franklin Arms, Inc., herein referred to as the Company, to secure payment of a certain indebtedness of the Company in the principal amount of $215,000., for moneys advanced or to be advanced to the Company by G. L. Miller & Company, Inc., pursuant to the terms of a certain agreement dated May 15, 1926, made between the Company and said G. L. Miller & Company, Inc., and referred to in said indenture, which said indebtedness is represented by an issue of bonds made, executed, and delivered by the Company in accordance with the terms and conditions provided in said indenture and secured hereby.

I do further say that the amount due and to grow due on and under said indenture is the principal sum of $215,000., with interest at the rate of 7% per annum from May 15, 1926, according to the terms of said indenture, and said indenture is hereby made a part hereof.

ROLLIN J. FRANCIS.

Sworn to before me this }
7th day of June, 1926. }

RANDOLPH C. BARRETT,
Master in Chancery
of New Jersey.

Agreement, dated May 15, 1926.

[Duplicate-Original]

FRANKLIN ARMS, INC.

with

G. L. MILLER & COMPANY, INC.
Underwriter.

AGREEMENT

Dated May 15, 1926

Southeast corner Berkeley Place and
Franklin Street
Bloomfield, New Jersey

THIS AGREEMENT, dated as of the 15th day of May, 1926, between FRANKLIN ARMS, INC., a corporation organized and existing under the laws of the State of New Jersey (hereinafter referred to as the "Building Company"), and G. L. MILLER & COMPANY, INC., a corporation organized under the laws of the State of Delaware, doing a general brokerage business in mortgage securities and other personal property, whose address is 30 East 42nd Street, New York City (hereinafter referred to as the "Underwriter").

WHEREAS, simultaneously herewith, the Building Company has executed and issued to the Trustee hereinafter referred to, its temporary bond for the principal sum of TWO HUNDRED FIFTEEN THOUSAND ($215,000) DOLLARS, and interest, and the same has been delivered to the Underwriter on the written request of the Company, and has also

simultaneously herewith executed and delivered a mortgage or deed of trust (hereinafter referred to as indenture) to ROLLIN J. FRANCIS as "Trustee" for the purpose and with the powers and virtue as therein set forth, conveying to said Trustee the premises described in Schedule A hereto attached, together with the buildings and improvements erected or to be erected thereon and the equipment therein contained, and the Building Company has agreed in such indenture to execute, issue and deliver its definitive coupon bonds of various denominations, for said principal sum in the aggregate, to take the place of said temporary bond as soon as such definitive bonds have been executed and authenticated; and

WHEREAS, the Underwriter has agreed to sell and dispose of the said bonds and procure and account for the face principal amount thereof, exclusive of any interest thereon, after deducting the Underwriter's commission and every other item of expense or disbursement which the Building Company has in this instrument or by separate contract in writing with the Underwriter agreed to pay, and have the net proceeds thereof after making the deductions and payments herein mentioned or provided for, ready for disbursement in the manner hereinafter provided, and

WHEREAS, simultaneously herewith the Underwriter has paid to the Building Company and/or has paid for the account of the Building Company out of the proceeds of sale of said bonds, some of the expenses of the Underwriter incurred to this date in connection with this transaction and has paid to the Underwriter out of such proceeds, a sum of money on account of the commissions or

fees of the Underwriter as agreed between them, and the Building Company has taken out and used for other purposes of the Building Company including the payment of an existing mortgage and certain other moneys for the purpose of aiding the Building Company, the aggregate of all such items so paid at this date being the sum of $52,800.

NOW, THIS AGREEMENT WITNESSETH, that the parties hereto in consideration of their respective agreements herein contained and of the payments made as hereinbefore recited, DO HEREBY AGREE with each other, as hereinafter set forth, and the Building Company makes such agreements not only with the Underwriter, but also for the benefit of all subsequent holders of the temporary and/or definitive bonds secured and/or to be secured by such indenture and for the benefit of such Trustee:

FIRST: The Underwriter agrees to have available for the Building Company for disbursement in the manner herein provided for, upon compliance by the Building Company with all the provisions of this agreement, and of said indenture, and the Building Company agrees to take as well and when it shall become entitled thereto the remaining net proceeds of sale of $215,000 first mortgage bonds of the Building Company secured by the aforesaid indenture hereinbefore referred to. The net proceeds herein referred to are the proceeds of sale of said bonds in the face amount thereof less the amounts deducted for the payments heretofore made as above recited, and every other item of expenses or disbursements which the Building Company has herein, or by separate contract in writing between the parties hereto agreed to pay.

SECOND: The Building Company will, from and after the execution and delivery of this Agreement continuously proceed with all of the diligence and dispatch that is reasonably possible, to erect and complete upon the premises described in Schedule A, and will, in conformity with all laws, ordinances, rule and regulations, and in accordance with the provisions hereof, fully erect and complete thereon, and have the same ready for occupancy throughout on or before May 15, 1927, the building together with the equipment described in Schedule B hereto annexed (which is hereinafter sometimes referred to as the "building"). PROVIDED that if the Building Company be delayed in the erection or completion of said building by actual strikes, lockouts or other causes beyond its control, not occasioned by its default or that of its contractors, or by its inability with due diligence to obtain materials, and if within three days after the commencement of any such delay it serves written notice thereof upon the Underwriter, then the Building Company shall be entitled to an extension of time equivalent to the period of such delay. The contractor or contractors for such building or employed thereon shall be such as are approved by the Underwriter, and the Building Company agrees, if required by the Underwriter to furnish a surety bond or bonds to the Underwriter and the Trustee in a company approved by the Underwriter and the Trustee guaranteeing the erection and completion of the building in accordance with the plans and specifications as approved by the Underwriter, free of all liens and claims which might be equal or superior to the said indenture of mortgage or deed of trust.

THIRD: Subject to the provisions of this agreement, and on compliance by the Building Company with its agreements herein and in said indenture contained, the Underwriter agrees to pay the remaining net proceeds of said bonds, if the Building Company shall become entitled thereto, in installments as set forth in Schedule C hereto annexed, but the Underwriter may at its option pay any part of said net proceeds in advance of the time prescribed therefor in said Schedule C and/or (anything herein contained to the contrary notwithstanding) the said net proceeds may be disbursed from time to time by the Underwriter to the Building Company on the receipt of the Building Company only, in such installments as the Underwriter may deem proper and any such payments shall constitute an advance hereunder, without prejudice to any of its rights hereunder, or under said indenture, and/or without prejudice to any of the rights of the Trustee, and/or of the holders of any of said bonds under said indenture, and any such payment shall be deemed to have been made in pursuance of this agreement and not in modification thereof. The Underwriter or the Trustee shall not be obligated to see to the application by the Building Company of any part of said net proceeds.

FOURTH: Until the building be fully completed and equipped free of all liens and encumbrances, except said indenture, said net proceeds shall (except as herein otherwise specified, or unless the Underwriter shall otherwise expressly consent in writing), be applicable only to the payment of the cost of labor and materials which shall have entered into the construction and/or equipment of the building.

FIFTH: The Building Company will promptly pay, or cause to be paid, the several items and parts of the cost of construction and equipment of the building as and when they respectively become due. Payments out of said net proceeds of sale will be made by the Underwriter as construction work progresses as set forth in Schedule C hereto annexed. The Building Company will before applying for and/or requiring payment of any portion of the net proceeds of sale of said bonds not theretofore paid out, make the payments hereinabove provided to the persons, firms and/or corporations who shall have then furnished labor and materials in and about the construction and equipment of said building, and before applying for and/or requiring payment of any part of said net proceeds, the Building Company will furnish to the Underwriter sworn statements satisfactory to the Underwriter showing that the moneys previously advanced have been used for and in the construction and equipment of said building and giving the items and persons or corporations paid. Any part or all of such unexpended balance shall or may, at the option of the Underwriter, be paid by it direct to the persons, firms and/or corporations who shall have furnished labor and/or materials in or about the construction of the building and equipment, on account of the amounts due or to become due to them respectively for the same. None of such unexpended balance of the net proceeds at any time in the hands of either the Underwriter or the Trustee shall bear interest.

SIXTH: The Building Company will give to the Underwriter ten days' notice in writing before applying for or requiring the payment of any part

of the unexpended balance of the net proceeds of said bonds, and at the time of each application, will furnish to the Underwriter the sworn statements provided for in paragraph "Fifth" hereof.

SEVENTH: The Building Company agrees that all improvements upon said premises, exclusive of foundations, whether partially or wholly constructed, and the fixtures therein contained, shall be insured against loss or damage by fire and lightning and/or tornado for the full insurable value thereof, and for the full insurable value of the equipment as provided in said lease hereinabove referred to, and the Building Company further agrees to provide policies in amounts satisfactory to the Underwriter for the insurance of said premises and property against loss or damage to persons or property by explosion of any high pressure steam boiler, engine or fly-wheel on said premises and also to provide polices covering rent, public liability and elevator insurance and plate glass insurance. All said insurance shall be maintained until the entire indebtedness evidenced by said bonds and secured by said indenture shall have been paid and shall be in companies satisfactory to the Trustee. All insurance policies may from time to time be procured and renewed by the Underwriter, as agent of the Building Company, and the Building Company agrees in each case promptly to pay the premiums of said policies on presentation of statements of the amounts therefor. All insurance policies shall be delivered and made payable in the manner provided in said indenture. The Underwriter may deduct the premiums or cost of such insurance from the unexpended balance of the net proceeds of sale.

EIGHTH: If the Building Company shall at any time default in the performance of any agreement in this instrument or in said bonds, or indenture contained or if any of the events mentioned in paragraph "Eighteenth" hereof shall occur, and the Underwriter and the Trustee shall decide not to proceed with the erection and completion of the building as permitted in and provided by paragraph "Sixteenth" hereof, the Underwriter shall, and hereby agrees to, ten days after such decision is made, either pay over all such unexpended balance (after deducting its fees, commissions and other expenses and disbursements herein provided for) to the bondholders pro rata, or pay such unexpended balance (after making the aforesaid deductions) to the Trustee for the benefit of the bondholders.

NINTH: No payment shall be required from the Underwriter unless in the judgment of the Underwriter all work, usually done at the stage of construction when such payment is applied for, be done in good and workmanlike manner, and in conformity to the laws of the State of New Jersey, and the laws, ordinances and regulations of any federal, county or municipal authority, and their various departments having jurisdiction over the building, and unless all material and fixtures usually furnished and installed at such time, are properly furnished and installed; but the Underwriter may at any time make payment of the whole or part or parts of the unexpended balance of said net proceeds, and any payment so made shall be deemed to have been made in pursuance of this agreement and not in modification thereof.

TENTH: The Underwriter may at any time apply any of said unexpended balance of the net proceeds to the payment of any principal of or any interest on said bonds then due, and/or to the payment of any rent or other charge becoming due and payable under said lease or any tax, assessment or water rates which shall have become a lien upon said premises, and/or to the payment, or deposit of the amount with the County Clerk of Essex County, New Jersey, of any mechanics' liens which shall have remained undischarged for ten days. Any of the aforesaid payments may be deducted from any of the payments provided for in Schedule C.

ELEVENTH: At the time of each application for and/or payment to the Building Company of any part of said unexpended balance, the Building Company covenants and agrees that it will own said mortgaged premises free from all encumbrances and defects or objections to title, except a second mortgage and a right of way granted to Abraham Lipton to use the alley on the south, and if there shall at any time be a controversy between the parties in respect of any such matter, the same shall be referred to the title guarantee or insurance company which shall have examined the title for the Underwriter; or which shall have issued its policy of title insurance covering such indenture, and its willingness or unwillingness to guarantee and/or insure against alleged encumbrances, defects and objections shall determine such controversy and be conclusive and binding upon both parties hereto.

TWELFTH: In so far as complete plans and specifications of said building have not been approved

in writing by the Underwriter, the Building Company will cause the same to be prepared and to be amended within thirty days hereafter so that they shall be entirely satisfactory to the Underwriter. After being so prepared, such plans and specifications may be further amended to conform to any requirement of any governmental department or bureau claiming or having jurisdiction over the same or in any other manner approved by the Underwriter. But should any controversy arise as to the amendment to be made, in order to conform to such requirement, the decision of the Underwriter shall be final and conclusive as against the Building Company in respect thereto. The Underwriter shall not be required to make any payments out of the net proceeds of sale of said bonds until the plans and specifications for the building shall have been fully approved by all the governmental departments and bureaus claiming or having jurisdiction, and until complete plans and specifications have been furnished to and approved by the Underwriter.

THIRTEENTH: The Building Company will furnish to the Underwriter as often as the Underwriter shall require a survey of said premises made by a surveyor selected by the title insurance company which shall have insured title under such indenture. In the event that such survey shall show any encroachment upon yard, court-area, air-shaft, adjoining property or street, the Building Company will promptly remove such encroachment and no portion of such net proceeds shall be required to be paid until the same shall have been done.

FOURTEENTH: The payment of any part of the unexpended balance of the net proceeds of sale shall not be deemed an approval or acceptance by the Underwriter, or by the Trustee, of the work theretofore done or of the materials and equipment theretofore installed.

FIFTEENTH: From time to time hereafter the Underwriter and its architect, inspectors and engineers may inspect the buildings, and any machinery or materials necessary for or used in the construction of the buildings, and shall be furnished, if required by them, with copies of all plans, detail plans, shop-drawings and specifications relating to the construction of the building, and they may examine all plans, detail plans, shop-drawings and specifications which are kept at the work.

SIXTEENTH: If the Building Company shall for any reason abandon or not proceed with the construction of the building as herein provided, or shall fail to complete the same at the time herein provided, or shall be prevented from completing the same by any cause whatsoever, the Underwriter or the Trustee may employ a watchman to protect the building from depredation or injury and may preserve and protect the same and the fixtures and property therein; and/or the Underwriter or said Trustee, at the election of either (but without prejudice to any other rights in consequence of such default), may complete the erection thereof. The Underwriter or the Trustee may in such event make any and all contracts for architects, construction work and for other work, labor, materials, supplies and equipment in connection therewith in the name of the Building

Company, as its attorney-in-fact, hereby irrevocably appointed for that purpose; or the Underwriter or the Trustee may make such contracts in its or his own name and may incur such indebtedness in its or his name. The Underwriter or said Trustee may pay at any time any outstanding bills or liabilities or indebtedness contracted or incurred by the Building Company, or by the Underwriter or Trustee in the Building Company's behalf, and may make up any deficit in connection with the construction and erection of the building and the equipment, furniture and furnishing thereof, and may pay any bills or indebtedness contracted by the Underwriter or by the Trustee in connection with any such contracts, or in connection with any liability incurred by the Underwriter or by the Trustee as aforesaid, regardless of whether or not any mechanics' liens or claims have been filed or established in any of the foregoing instances. The Underwriter or the Trustee may devote and apply any part or all of the unexpended balance of the proceeds of sale to the purposes hereinbefore stated and the Building Company will pay to the Underwriter or to the Trustee on demand the amount of any deficit with interest thereon at the rate of seven per cent. per annum.

If the Underwriter and/or the Trustee shall elect to complete the erection, construction or equipment of the building as in this paragraph "Sixteenth" provided, the Building Company will upon demand assign to the Underwriter and/or to the Trustee all of the rights of the Building Company under any or all contracts relating to the construction of the building, and will cause the other parties to such contracts to consent

thereto and to agree that the Underwriter and/or the Trustee shall have the right by election of either the Underwriter or the Trustee to continue such contracts in case of default by the Building Company.

SEVENTEENTH: The following provisions shall be observed in and about the construction of the building:

(a) The building shall be constructed in strict accordance with the plans and specifications approved by the Underwriter and the Trustee.

(b) The Underwriter shall have sufficient notice to permit an examination of the bottom of the trenches before foundation concrete is started, if the Underwriter shall require such notice.

(c) The members of the steel work shall be painted after construction, a field coat different from the shop coat and of a quality of paint approved by the Underwriter.

(d) The details of the floor construction, and framing plans, shall be submitted to the Underwriter for approval before the contract therefor is let, if the Underwriter shall so require.

(c) Permanent stairs with temporary treads shall be erected as rapidly as the frame work is erected, but if the permanent stairs shall be delayed, temporary plank stairs shall be erected in lieu thereof.

(f) After floor filling is completed and before the wood or finished flooring is laid in each story, sufficient notice shall be given to the Underwriter to enable inspection of the same.

(g) The Underwriter shall have sufficient notice (if it so require) when tests of the plumbing and framing systems and structural work are to be made, and any further tests required by the Underwriter shall be made by the contractors for such work under the direction of the Underwriter, at the expense of the Building Company.

(h) The Underwriter shall (if it so require) be given an opportunity to examine all cast iron work used in the construction of the building before it is painted, and no cast iron members shall be used which are not approved by the Underwriter. Any such members which may not have been so approved which shall be incorporated in the building shall be removed whenever required by the Underwriter.

(i) The Underwriter at all times during the construction of the building shall have the right to object to any material or workmanship that is not satisfactory to the Underwriter. The material and workmanship objected to by the Underwriter shall be replaced with proper materials and workmanship by the Building Company.

EIGHTEENTH: Whenever and as often as any of the following events occur before the entire net proceeds have been paid, all obligation on the part of the Underwriter to make or procure any further payment shall cease, if the Underwriter so elects, and the said bonds shall become due and payable at the option of the Underwriter or the Trustee under said indenture, anything therein, herein or in said bonds to the contrary notwithstanding (but the Underwriter may procure or make payments without becoming liable to pro-

cure or make any further payments and without waiving the right to demand immediate payment of the principal of said bonds):

(a) If a copy of the plans and specifications of the building and of any modifications thereof be not furnished to the Underwriter whenever the Underwriter shall require the same.

(b) If the plans and specifications shall not be satisfactory to the Underwriter.

(c) If the plans be not approved by any Department claiming jurisdiction before an advance is demanded.

(d) If the building be not erected in strict accordance with the plans and specifications approved by the Underwriter.

(e) If the materials or construction of the building be not satisfactory to the Underwriter, but the Underwriter shall not require material or construction different than is usual in the construction of high class buildings of the type specified in Schedule B.

(f) If any materials, fixtures or articles used in the construction of the building or appurtenant thereto shall be purchased by the Building Company or any contractor or other person furnishing labor or materials to the building, so that the absolute ownership of such materials, fixtures or articles will not vest in the Building Company immediately on delivery thereof at the building.

(g) If the Building Company, if requested, shall not exhibit to the Underwriter, and furnish copies, of all bills of sale, agreements, con-

tracts and sub-contracts for the construction of the building or any part thereof, or the furnishing of labor or materials therefor.

(h) If the Building Company shall not proceed continuously with the erection and completion of the building (stoppage by reason of actual strikes, lockouts, other causes beyond its control, or actual shortage of materials excepted).

(i) If a survey shall show that the building encroaches upon property other than that described herein, to an extent deemed material by the Underwriter.

(j) If there shall be at any time any note or notice of violation of any law or of any municipal rule, regulation or ordinance, filed in or issued by any municipal or public department or authority against the building or against the Building Company by reason of any matter in or about the construction of the building, unless such violation be removed within ten days.

(k) If the Building shall be materially injured or destroyed by fire or other casualty.

(l) If the Building Company shall assign this contract or any interest therein, or any right to receive any payment or portion of a payment herein provided for, or issue any orders against any such payment herein provided to be made, or if said premises be conveyed or encumbered in any way, without the consent of the Underwriter.

(m) If the Building Company shall file a petition to be adjudged a bankrupt under the laws of the United States of America, or if in any proceedings a receiver of the said Building Company

shall be appointed and said receiver shall not be discharged within thirty days thereafter, or if the said Building Company shall be adjudicated a bankrupt under the laws of the United States of America, or if the said Building Company shall make a voluntary assignment for the benefit of creditors under the laws of any State, or if the Building Company shall be by decree adjudged dissolved or its corporate franchises annulled.

(n) If the Building Company shall convey said premises or any interest therein.

(o) If the premises shall become encumbered by any lien or encumbrance not herein provided for, unless such lien or encumbrance is specifically made subject to said indenture and to the full amount which may at any time be secured thereby or become due thereunder, together with interest.

(p) If default shall be made in the payment of any installment of principal or interest upon the bonds herein mentioned, or if default shall be made in the performance of any other covenant or condition of said indenture.

(q) In the event of the enactment of any law, which under any circumstances could or would give any person or corporation a lien or right to file a notice of lien on said premises superior to the lien of the advances then made hereunder.

(r) If there be a violation of any of the provisions or agreements or covenants herein contained.

(s) If the Building Company shall fail on demand to obtain and deliver to the Underwriter

or the Trustee fire and other insurance as provided in said lease or indenture.

(t) If the Building Company shall fail to furnish to the Underwriter each month and not more than ten days before the making of any advance, photographs, approximately 11 inches by 8 inches in size, showing the progress of the building by two separate and distinct views.

NINETEENTH: It is expressly covenanted by the Building Company with the Underwriter that, subject to the Underwriter accounting for the proceeds of the sale of said bonds as hereinabove specified and in the manner hereinabove specified, the Underwriter, its agents, officers or attorneys, shall incur no personal liability, for what it or they may do or omit to do under the powers contained in this instrument, except in the case of its or their own gross negligence.

TWENTIETH: Notices and demands by the Underwriter to the Building Company shall be deemed properly given if sent by registered mail to the Building Company at 56 Broad Street, Bloomfield, New Jersey, and when so mailed shall be deemed duly served for all purposes.

TWENTY-FIRST: The provisions hereof shall be binding upon the parties hereto and their successors in interest and shall enure to their benefit, and also to the benefit of the holders of said bonds and coupons.

IN WITNESS WHEREOF, each of the parties hereto has caused these presents to be subscribed by their respective Presidents or Vice-Presidents, and their corporate seals to be hereunto affixed,

and attested by their respective Secretaries or Assistant Secretaries, as of the day and year first above written.

FRANKLIN ARMS, INC.,

By JAMES HAINES
President.

Attest:

JOHN HAINES
Secretary.

[SEAL.]

G. L. MILLER & COMPANY, INC.,

By ROLLIN J. FRANCIS
Vice-President.

Attest:

PAUL NICHOLSON
Assistant Secretary.

[SEAL.]

ROLLIN J. FRANCIS (L. S.)
As Trustee.

Agreement, dated May 15, 1926.

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

Be it remembered, that on this 7th day of June, 1926, before me, the subscriber personally appeared John Haines, to me known, who being by me duly sworn, according to law, on his oath said: That he is the Secretary of Franklin Arms, Inc., the Corporation in the foregoing indenture mentioned; that he well knows the corporate seal of said Corporation; that the seal affixed to said indenture is the corporate seal of said Corporation; that it was so affixed by order of such Corporation. That James Haines is the President of the said Franklin Arms, Inc.; that he saw the said James Haines as such President, sign the said indenture and heard him declare that he signed, sealed and delivered the same as the voluntary act and deed of the said corporation by order of its Board of Directors, and that deponent signed his name thereto at the same time as an attesting witness.

John Haines.

Sworn and subscribed to before me the day and year first above mentioned.

Randolph C. Barrett,
Master in Chancery
of New Jersey.

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

BE IT REMEMBERED, that on this 7th day of June, 1926, before me, the subscriber, , personally appeared PAUL NICHOLSON, to me known, who being by me duly sworn, according to law, on his oath said: That he is the Assistant Secretary of G. L. MILLER & COMPANY, INC., the Corporation in the foregoing indenture mentioned; that he well knows the corporate seal of said Company; that the seal affixed to said indenture is the corporate seal of said Company; that it was so affixed by order of such Company. That ROLLIN J. FRANCIS is a Vice-President of the said G. L. MILLER & COMPANY, INC.; that he saw the said ROLLIN J. FRANCIS, as such Vice-President, sign the said indenture and heard him declare that he signed, sealed, and delivered the same as the voluntary act and deed of the said Corporation by order of its Board of Directors, and that deponent signed his name thereto at the same time as an attesting witness.

PAUL NICHOLSON.

Sworn and subscribed to before me }
the day and year first above mentioned. }

RANDOLPH C. BARRETT,
Master in Chancery
of New Jersey.

Agreement, dated May 15, 1926.

SCHEDULE A.

THE PREMISES REFERRED TO IN THE AGREEMENT TO WHICH THIS SCHEDULE IS ANNEXED.

All that certain piece or parcel of land with the buildings and improvements thereon, situate, lying and being in the Township of Bloomfield, Essex County, State of New Jersey, bounded and described as follows:

BEGINNING at the intersection of the easterly line of Berkeley Place with the southerly line of Franklin Street; running thence southerly along the easterly line of Berkeley Place south 20 degrees 31 minutes west 134.09 feet; thence south 69 degrees 58 minutes east 175 feet; thence north 20 degrees 31 minutes east 185.78 feet to the southerly line of Franklin Street; thence along the southerly line of Franklin Street north 86 degrees 23 minutes west 182.89 feet to the easterly line of Berkeley Place, the point or place of beginning.

SCHEDULE B.

The building to be constructed upon the land described in Schedule A is as follows:

A four story and basement housekeeping brick and stone semi-fireproof apartment building containing approximately 473,000 cubic feet and not less than 136 rentable rooms and covering substantially all the land that the law will permit; all to be built in strict conformity with all rules and regulations pertaining thereto and in accordance with plans and specifications for said building prepared by Edward V. and Charles F. Warren, architects.

SCHEDULE C.

Upon compliance by the Building Company with all the covenants and agreements contained herein and in the indenture of mortgage or deed of trust herein referred to, payments are to be made from the unexpended balance of the net proceeds of sale of said bonds in instalment payments as the work of the building progresses, as follows:

Prior to the making of any disbursements of the proceeds of sale of said bonds, the Building Company shall furnish the Underwriter:

(a) A detailed estimated cost of the construction of said building and equipping the same, made by the Architects who are selected to prepare the plans and specifications therefor, duly sworn to by them, on forms to be supplied by the Underwriter.

(b) All contracts made by the owner providing for or relating to such construction or equipment.

(c) A detailed estimated cost of said improvements showing unit price schedules and such other data as may be required by the Underwriter, made by the contractor or contractors with whom contracts are made by the Building Company for the construction of such improvements and the furnishing of equipment, etc., sworn to by such contractor or contractors.

(d) All contracts made by the owner with any contractor in any way relating to the construction of the building and improvements on said land and to the equipment of the said building. All contracts made by the Building Company shall be made subject to the approval of the Under-

writer if so required by it. The Building Company shall also deliver to the Underwriter, if requested so to do, at any time during the course of construction, copies of all subcontracts entered into by the contractor.

Ten days before the Building Company shall apply to the Underwriter for any payment after the first payment out of said unexpended balance, the Building Company shall furnish to the Underwriter, a detailed statement of its estimate revised to that date, of the cost of construction, which statement shall be sworn to by an officer of the Building Company and shall set forth, among other things, the estimated cost of each branch or class of work, and the contract price under each contract theretofore let by the Building Company.

At the time of each application for a payment and/or whenever demanded by the Underwriter, the Building Company shall furnish to the Underwriter, a like statement revised to the date of such application and setting forth the facts as they then exist. Payments shall be made upon certificates made out upon forms in use by the Underwriter, properly certified by the Building Company's architects and approved by the Underwriter's engineer or architect and properly authorized by the Building Company. Such payments shall be made as follows:

First: $52,800, at time of closing on account Underwriter's commission or fees and expenses; one year's interest, the payment of an existing mortgage in the sum of $9,000 and other expenses.

Second: $20,000.00 when excavations, footings and basement walls are completed; steel frame

erected to and including first floor; first floor construction in place; underground drainage and water lines installed, boiler set.

THIRD: $28,000.00 when masonry walls are built to third floor; steel frame erected to and including third floor; wood joists and underfloors to and including third floor in place; rough plumbing and steam risers to second floor installed.

FOURTH: $30,000.00 when building is enclosed; masonry walls and partitions are built; steel frame erected; floor and roof construction completed; roof made water tight and leaders connected; stud partitions completed; iron stairs erected and rough treads on; rough plumbing and steam risers practically completed.

FIFTH: $22,000.00 when brown coat of plaster is generally completed; window sash installed and glazed; plumbing roughing in practically finished; steam piping generally completed; electric wiring about 60% finished.

SIXTH: $30,000.00 when finish coat of plaster is generally completed; standing trim about 50% set; finished wood floors about 30% laid; marble and tile work about 50% completed; plumbing fixtures about 50% installed; radiators about 25% set; electric wiring generally finished; painting priming coat completed on finish carpentry and trim in place.

SEVENTH: $30,000.00 when building is substantially completed.

EIGHTH: Balance of net proceeds of sale of said bond issue thirty days after the building is substantially completed and delivery of certificate of occupancy and other certificates of ap-

proval from all departments having jurisdiction over the building, provided, however, that if at the expiration of said thirty days the building is not entirely completed, an amount shall be retained by the Underwriter sufficient, in the opinion of the Underwriter's engineer, to fully complete the building, until such entire completion as agreed upon by the Company's architect and Underwriter's engineer, and such amount so retained shall be paid within thirty days after the building is fully completed satisfactory to the Underwriter.

Should strikes or delays arise in any of the respective trades involved in the work in the above schedule, reasonable allowance and deduction will be made from the schedule payment where such delays or strikes occur.

Anything herein contained to the contrary notwithstanding, the said net proceeds may be disbursed from time to time by the Underwriter to the Building Company on the receipt of the Building Company only, in such installments as the Underwriter may deem proper, and any such payments shall constitute an advance hereunder.

The Underwriter or the Trustee shall not be obligated to see to the application by the Building Company of any part of said net proceeds of sale.

Bond Circular Letter.

NEW ISSUE

FRANKLIN ARMS

BLOOMFIELD, NEW JERSEY

$215,000

FIRST MORTGAGE 7% REAL ESTATE GOLD BONDS

SECURITY

Bonds of this issue will be secured, in the opinion of counsel, by a direct closed first mortgage on land and building appraised at $329,300, and a first claim in effect on net annual earnings appraised at $36,750. On the basis of these figures, which are the lowest appraisals given by outside firms familiar with Bloomfield conditions, the bond issue will be approximately 65% of the land and building value; and the net annual income is over 2.4 times the largest annual interest charges and over 1.7 times the largest annual combined charges for interest and principal on the bond issue.

APPRAISALS

Appraisals have been made as follows:

Land

Kierstead & Peck, Real Estate, Bloomfield, N. J.	$ 25,200
The Stevenson Company, Real Estate, Bloomfield, N. J.	24,300

Bond Circular Letter.

Building

The Stevenson Company	$310,000
Henry Albinson, Real Estate, Bloomfield, N. J.	305,000

Net Annual Income

The Stevenson Company	$ 37,000
Henry Albinson	36,750

GUARANTEED BONDS

Prompt payment of principal and interest on bonds of this issue will be unconditionally guaranteed for an annual premium of ½ of 1%. This guarantee is issued by the G. L. Miller Bond & Mortgage Guarantee Corporation, a separate but allied company, organized under and subject to the strict Insurance Law of the State of New York.

G. L. MILLER & Co.
Incorporated
30 East 42nd Street
New York, N. Y.

No Investor Ever Lost a Dollar in Miller Bonds

Atlanta	Memphis
Chicago	Knoxville
St. Louis	Buffalo
Pittsburgh	Philadelphia

SUMMARY OF INFORMATION

Amount: $215,000.

Security: Direct closed first mortgage on land and building appraised at $329,300, and a first claim in effect on net annual earnings appraised at $36,750.

Bond Circular Letter.

Location: Southeast corner of Franklin Street and Berkeley Place, Bloomfield, N. J.

Mortgagor: Franklin Arms, Inc., 56 Broad Street, Bloomfield, N. J.

Dated: May 15, 1926.

Term and Maturities: Serial annually, 2 to 10 years.

Interest Coupons Payable: May 15 and November 15.

Bonds and Coupons Payable: At any office of G. L. Miller & Co., Inc., or at the office of the Guaranty Trust Company of New York, 140 Broadway, New York.

Callable: Bonds of this issue will be callable in the inverse of their numerical order at 102 plus accrued interest on any interest payment date upon 90 days' prior written notice.

Trustee: Rollin J. Francis, successor in trust duly provided.

Certifying Agency: The Chemical National Bank of New York, 270 Broadway, New York.

Completion Bond: Completion of the structure free of liens prior to this mortgage will be guaranteed by a surety bond to be approved by G. L. Miller & Co., Inc.

Guarantee of Completion: In addition to the preceding provision, G. L. Miller & Co., Inc., unconditionally guarantees to the bondholders the completion of the structure.

Fire Insurance: Fire insurance and other forms of insurance deemed necessary by the Trustee will be carried for the protection of the bondholders.

Normal Federal Income Tax: Refunded or paid up to 4%.

State Taxes: Various State or District taxes refunded.

Title Guarantee: New York Title & Mortgage Co., 135 Broadway, New York.

Attorneys, Trust Deed and Bond: Stoddard & Mark, N. Y.

Architect: Edward V. and Charles F. Warren, 801 Essex Building, Newark, N. J.

Contractor: Franklin Arms, Inc., 56 Broad Street, Bloomfield, N. J.

Registration: Bonds of this issue may be registered as to principal.

Denominations: $1,000, $500, $100.

Location

Franklin Arms will be erected on a plot fronting approximately 180 feet on Franklin Street and 122 feet on Berkeley Place, Bloomfield, New Jersey. The site is an exclusively residential neighborhood about ten minutes' walk from the business section of Bloomfield. Surface railway and motor bus transportation to the business and shopping districts of Newark is available every few minutes. It is a fifteen minute bus ride from the site to the tubes to New York. Bloomfield is a separate municipality adjoining Newark, and, in addition to supporting a large amount of commercial activity, it is the home of thousands of people employed in Newark and New York City.

Bond Circular Letter.

Building

Franklin Arms will be a four-story apartment structure of approximately 139 rooms, divided into 49 apartments of two, three and four rooms with baths and kitchens or kitchenettes. The basement will contain a three-room apartment for the superintendent of the building as well as a laundry, storage bins for the tenants, and the heating plant. The exterior will be of clinker face brick with Indiana limestone trim.

Mortgagor

Bonds of this issue will be the direct obligation of Franklin Arms, Inc. The officers of the corporation are: James Haines, President; Julius Haines, Vice-President and Treasurer; John Haines, Secretary. The Haines brothers are experienced builders of apartment structures and are well recommended as financially responsible.

Taxes Refunded

The Mortgagor agrees to pay to the United States Government, through G. L. Miller & Co., Inc., such part of the normal Federal Income Tax as may be required by law, and will refund to bondholders the remainder, if any, required to be paid by the bondholders, provided such remainder, when added to the amount paid to the Government, does not exceed four (4%) per cent of the income derived from the bonds. The Mortgagor also agrees to refund, through G. L. Miller & Co., Inc., to bondholders subject to such taxes, any State or District taxes on these bonds up to but not exceeding 5 mills on the dollar of the principal, and any State or District income taxes as-

sessed against these bonds up to but not exceeding 6%.

Increasing Security

In accordance with the Miller Plan, a definite amount of this issue will be retired each year. But the mortgage on the entire property remains as security for the outstanding bonds. This increases the security behind each outstanding bond as shown in the following table:

Maturity Date	*Amount Maturing*	*Approximate Security Behind Each $1,000 Bond Outstanding*	*Interest Payment*	*Total Annual Payment*	*Average Monthly Payment*
May 15, 1927	.....	$1,521	$15,050	$15,050	$1,254.16
May 15, 1928	$6,000	1,521	15,050	21,050	1,754.16
May 15, 1929	6,500	1,564	14,630	21,130	1,760.83
May 15, 1930	7,000	1,615	14,175	21,175	1,764.58
May 15, 1931	7,000	1,673	13,685	20,685	1,723.75
May 15, 1932	8,000	1,735	13,195	21,195	1,766.25
May 15, 1933	8,500	1,812	12,635	21,135	1,761.25
May 15, 1934	9,000	1,901	12,040	21,040	1,753.33
May 15, 1935	9,000	2,006	11,410	20,410	1,700.83
May 15, 1936	10,000 144,000	2,123	10,780	20,780	1,731.66

Price: To yield 6.43% to 7% from date of issue, depending on maturity.

Bonds maturing 1928: Price, 101, to yield 6.43% from date of issue.

Bonds maturing 1929: Price, 101, to yield 6.62% from date of issue.

Bonds maturing 1930: Price, 100½, to yield 6.84% from date of issue.

Bonds maturing 1931: Price, 100½, to yield 6.86% from date of issue.

Bonds maturing 1932: Price, 100½, to yield 6.88% from date of issue.

All other maturities: Price: par and accrued interest to yield 7%.

Bond Circular Letter.

Representations made in this circular are as accurate as we have been able to determine; statements relative to value are, in our opinion, a very close approximation of the actual facts; statements relative to earnings, we believe, fairly represent the average income to be expected over the period of the bond issue.

The moderate size of this issue and the fact that it yields up to 7% interest make it an attractive investment for July funds. We will be pleased to accept your order or reservation for Franklin Arms Bonds in any amount, subject to prior sale. Use the order blank below.

BOND ORDER AND RESERVATION BLANK

Date.....192....

G. L. MILLER & Co. INC.,
30 East 42nd Street,
New York, N. Y.

Please enter my order for $..... bonds of the 7% FRANKLIN ARMS issue maturing..... ....., 19.....

1. Deliver to me immediately.
2. Deliver to me on....., 192.....
3. Send the bonds to.....Bank of ....., to be delivered to me on ....., 192...., and I will settle with the bank for them.

Name.....
Address.....
City.....State.....

[ ] *Check here if you wish your bonds guaranteed.*

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