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Testimony before Receiver—Charles Cohen.

STATEMENT.

A Statutory Receiver was appointed for the Goodwin Construction Company on the ground of insolvency on March 30, 1926, and the statutory injunction went against the corporation and it is being wound up in the Court of Chancery as an insolvent corporation. 10

TESTIMONY BEFORE RECEIVER.

In Chancery of New Jersey

Between

LINCOLN MATERIALS CO., INC.,
Complainant,

and

GOODWIN CONSTRUCTION COM-
PANY,
Defendant.

20

Examination of Mr. Charles Cohen, President of Goodwin Construction Company, before Walter Sherwood, Receiver, on August 10th, 1926, at the office of attorney of Receiver Joseph Steiner, 790 Broad St., Newark, New Jersey. 30

Marion Gibney sworn in.

CHARLES COHEN, being duly sworn, appearing by his attorney, Erwin W. Cohen, testifies as follows:

Examination by Charles Silber, appearing for the Receiver.

Q I have here a claim offered by Nathan Cohen in the amount of \$397.88? A Yes. 40

Testimony before Receiver—Charles Cohen.

Q Was this for hardware? A Yes, for hardware.

Q Did Mr. Nathan Cohen furnish all of the hardware in the schedule? A I could not tell you exactly about it; it is so long ago.

10 Q Did Mr. Cohen furnish all of these items?
A I think the schedule is correct.

Q Is this amount correct? A Yes, to the best of my memory.

Q All of these materials to the best of your memory were furnished? A Yes.

Q I have a claim by the Kearnee Boiler Co. v. John Finnigan and Goodwin Construction Company in the amount of \$1,152.27? A I do not think that is the correct amount.

20 Q What is the correct amount? A About \$1,090.00.

Q I have a claim by the John R. Blair Co. for \$1,665.86. Did you buy your flooring from the John R. Blair Company? A I bought it from Kaiser.

Q Did you sign any contract with Blair? A Not to my knowledge.

Q Who did you buy the flooring from? A From K. D. Flooring Company.

30 Q And you did no business with Blair at all? A I did no business with him.

Q Did you order flooring materials from the K. D. Flooring Company? A What do you mean?

Q Did you contract with them? Did you sign any contract? A Yes.

Q Have you a copy of the same? A Yes, in the file.

40 Q Did the K. D. Flooring Company deliver all of the flooring that was called for? A No. The kitchen flooring was bought from the Passaic

Testimony before Receiver—Charles Cohen.

Lumber Company. I had no agreement with Blair at all. I did not buy anything from Blair.

Q Do you owe the K. D. Flooring Company anything today? A \$1,000 on the completed building. The last time I remember giving them \$500 was when the job was stopped. The flooring is worth more than \$1,000. 10

Q I have a claim of the Lincoln Materials Co. for \$14,329.57? A It is coming to them. It is a valid claim. They delivered all the materials in the schedule as per agreement. As far as the bill is concerned, everything is delivered. I checked it myself.

Q I have a claim here of Isaac Ginsberg for \$763.00 for latting. A I do not remember how much I paid him, but I think he overcharged me. I cannot remember just now. 20

Q Did you have a contract with Ginsberg? A No.

Q A book account? A Yes.

Q Have you a record of how much work was done by Ginsberg's men? A Yes. (Exhibiting book to Mr. Silber.) I cannot tell exactly how much (meaning how much he owes them) to my knowledge I do not owe them so much.

Q I have a claim here for Max Chopik for \$1,833.45? A I cannot tell exactly how much I owe him yet. 30

Q Did you make any payments to Chopik for work done? Did you have a written contract with Chopik? A Yes.

Q And you signed it? A Yes.

Q I have here a claim of Henry R. Isenberg in the sum of \$3,900.00 for tile and marble. Did you sign a written contract with Isenberg for work to be done? A Yes. 40

Testimony before Receiver—Charles Cohen.

Q A written contract? A Yes. \$6,400.00 I think was the agreement.

Q I have here a claim of Passaic Bergen Lumber Company for \$4,808.95. Did you have a written contract with the Passaic Bergen Lumber Company? A I had some paper. I cannot remember.

10 Q Was it a contract? A I do not think it was a contract.

Q Did you make any payments to them? A No.

Q Did they deliver all materials to you? A This is not an agreement.

Q Have you a record of how much lumber was delivered? A Yes.

Q And none of the materials were paid for? A No.

20 Q I have a claim offered by Louis Schreneel in the amount of \$6,400.00. A The job is not completed.

Q What was the contract price? A The contract price was \$12,400.00.

Q Did you make any payments on the agreed contract price? A Yes, sir, and I gave him \$6,025.00.

30 Q He claims a balance of \$6,400? How much do you owe him? A When the building is completed I will owe him; but he has not completed the work.

Q Here is a claim from S. Rabinowitz for \$2-127. What was that for? A I do not know whether he charged me for the extra or not.

Q What kind of work does he do? A Iron work.

Q Did you have a written contract with Rabinowitz? A Yes, sir.

40 Q Did Rabinowitz complete his job? A About completed it.

Testimony before Receiver—Charles Cohen.

Q I have a claim by the Meyer-Benjamin Stone Company. Did you have a contract with them? A Yes, sir.

Q Signed by you? A Yes, sir.

Q Did they complete the work? A They completed the work.

Q They allowed you credit of \$750.00? A 10
That is correct.

Q \$450 balance? A Yes, that is a true balance.

Q I have here a claim from David Levy of Levy Bros. Co., Inc. for \$4,049.00. Did you sign a contract with them? A Yes, sir, and certain deductions are to be made by them for medicine closets.

Q The contract calls for a balance of \$5,600? 20
A I think I gave him \$1,200. I am not sure.

Q Have Levy Bros. Inc. delivered all materials called for in the contract? A No, sir.

Q You are the President of the Goodwin Construction Company? A Yes, sir.

Q Who are the other officers? A My wife, Edith Cohen.

Q What office does she hold? A She is the Secretary.

Q Who holds other offices in the company? A 30
My brother.

Q What is his name? A Erwin W. Cohen.

Q What other officers are there? A Charles Cohen is President and Treasurer.

Q Where are the books of the company? A
At Joseph Steinhart's office.

Q Is he the registered agent for the company? A Yes, sir.

Q How old is the Goodwin Construction Company? A It was incorporated in 1923. 40

Testimony before Receiver—Charles Cohen.

Q Where does the Goodwin Construction Company bank? A In the Weequahic Trust Company.

Q You sign the checks? A I do.

Q Where are the cancelled check stubs and vouchers? A I gave them the cancelled checks.
10 I do not know where the cancelled checks are.

Q Don't you keep a record of cancelled checks and stubs? A Yes, if I can. When I would get my stubs I would file them in their respective folders.

Q Where are these folders? A Steinhart kept them.

Q All of them? A All I could lay my hands on. I had an account in the Citizens National Bank. They mailed the checks to me but I never
20 received them.

Q Did you keep books when you started to build your property on Walnut street? A I kept the time books.

Q Where are those books? A I gave them to Mr. Sherwood.

Q Is the account at the Weequahic still open? A I think there is a small balance there. I do not know how much.

Q Are these the only books you kept? A
30 No. I had some books which I gave to Mr. Sherwood.

Q Did any accountants do any work for you in this Walnut street property? A No, sir.

Q Do you own any other property? A Goodwin Construction Company owns a parcel on Eagle Rock avenue. Vacant land.

Q What are the dimensions of the lot? A
58 x 125. It is an irregular lot.

Q In your estimation, what is that piece of
40 land worth? A If someone wants to use it, it is worth \$7,000, or \$8,000.

Testimony before Receiver—Charles Cohen.

Q Does the Goodwin Construction Company own any other property? A No.

Q Are there any encumbrances on this Eagle Rock avenue? A Yes, sir, a \$5,000 mortgage.

Q Who holds that mortgage? A Sussman had it and it was assigned to party by the name of Chernoff.

10

Q Do you yourself own any property personally? A No.

Q Do you have any individual bank accounts? A No, sir.

Q There is on record a mortgage to the Newark Holding Co. Who are the officers of the Newark Holding Co.? A I know one of the officers, that is Mr. Sussman.

Q Is he related to you? A Yes, my father-in-law.

20

Q What is the amount of the mortgage to the Newark Holding Company? A \$15,000.00.

Q When did you give Mr. Sussman that mortgage? A I bought a lot of 116 ft. front when I started to build. I intended to put up two buildings and I only put up one. I bought the lot from Sussman and he took back a mortgage, and he advanced me some money on contract.

Q That is on Eagle Rock avenue? A Yes. When I bought Walnut street and sold Eagle Rock avenue, I took the mortgage from Eagle Rock avenue and transferred it over to Walnut street.

30

Q What mortgage did you transfer to Sussman? Have you a mortgage on the entire tract? A Where?

Q On Eagle Rock avenue. Sussman had a mortgage of \$10,000 on the entire tract and you transferred that mortgage of \$10,000 to the Walnut street lot? A Yes.

40

Testimony before Receiver—Charles Cohen.

Q How much money did Sussman advance you on Eagle Rock avenue? A He advanced me \$5,000. I bought the lot from Sussman and he took back a purchase money mortgage in the amount of \$10,000.

10 Q How much money did he advance you? A \$10,000.

Q Did you pay any of that \$10,000? A Once I gave him \$1,000.

Q I want to know how much you owe him? A I owe him all that money, \$10,000. I bought a lot from my father-in-law, about \$100 a foot.

Q How much cash? A \$3,000.

Q When you purchased Eagle Rock avenue, how much of a mortgage did your father-in-law take back? A \$10,000.

20 Q A purchase money mortgage? A Yes. I bought it from him; it was his lot.

Q How much money did your father-in-law advance you when you started to build on Eagle Rock avenue? A \$5,000.

Q Did he advance any more money after the first \$5,000? A Yes.

Q How much money did he advance? A \$5,000.

Q Where did he raise the second \$5,000?

30 (Objection to last question by Erwin Cohen.)

Q When your father-in-law advanced you the money on Eagle Rock avenue did you give him a note or anything as an outstanding debt? A It was a friendly transaction.

Q Was there anything in writing to prove that he gave you that? A Yes, there are checks.

40 Q How much in checks? A I cannot remember. It was three or four years ago.

Testimony before Receiver—Charles Cohen.

Q When you sold your first parcel on Eagle Rock avenue, how much cash did you get in the transaction? A \$5,000.

Q Did you take back any mortgages? A \$5,500.

Q What happened to that mortgage? A I paid off creditors. 10

Q And you got \$5,000 in cash? What did you do with that? A Paid off creditors.

Q In other words, you took the mortgage that you got in selling Eagle Rock avenue and paid off creditors and you place a \$15,000 mortgage on Walnut street to cover indebtedness for Eagle Rock avenue. Is that right? A Yes.

Q Did you make any money when you sold Eagle Rock avenue? A About \$1,000.

Q How much did you get for the house on Eagle Rock avenue? A About \$48,000 or \$50,000. I cannot remember exactly. 20

Q How much was the first mortgage? A \$25,000.

Q Was there a second mortgage? A Yes. \$5,000 second mortgage held by Sussman.

Q Was there any other mortgages? A No, sir.

Q Did you take back a mortgage when you sold the property? A Yes. \$5,000. 30

Q Did you get the rest in cash; the difference between the amount of mortgages and the purchase price? A No. I took the Walnut street lot as part consideration for the purchase.

Q How much did you value the Walnut street lot when you negotiated the sale? A \$27,000 or \$28,000.

Q But according to the purchase price of the Eagle Rock avenue lot, you took the Walnut street lot in for about \$12,000? A Yes. 40

Testimony before Receiver—Charles Cohen.

Q How much mortgage was there on Walnut street? A A first mortgage of \$12,000 building and loan mortgage.

Q Any other mortgage on Walnut street? A No, sir.

10 Q You claim you owe Mr. Sussman \$15,000; \$10,000 representing the amount of money he is supposed to have advanced you on the Eagle Rock avenue property, and \$5,000 representing the amount of his interest in the mortgage on Eagle Rock avenue. In order to complete the purchase of the Walnut street property and the sale of Eagle Rock avenue property, you arranged for the \$15,000 equity indebtedness due to Sussman on Eagle Rock avenue, to be transferred to Walnut street.

20

(Above objected to by Erwin Cohen.)

Q What was the purchase price of the Walnut street lot? A About \$27,000 or \$28,000; I do not know exactly.

Q There was a \$12,000 first mortgage? A Yes.

Q Originally a \$15,000 equity on Walnut street? A Right.

30 Q How did you pay that \$15,000 equity? You induced Sussman to take a \$15,000 mortgage on Walnut street in exchange for the amount of money that he claimed you owed him on Eagle Rock avenue? A Yes.

Q Is that the way you account for the \$15,000 mortgage on the Walnut street property held by the Newark Holding Company? A Yes.

40 Q And these entries represent the amount Mr. Werbel gave you on the dates entered in your book? A Yes.

Testimony before Receiver—Hyman Sussman.

Q You have entered here a \$4,000 bonus? How did you pay that bonus due Mr. Werbel? On May 29th your books show that you got two payments of \$4,000 each from Mr. Werbel. Did you get the \$8,000 for yourself in cash? A No. I only got \$4,000 in cash for myself, and I endorsed \$4,000 back to Mr. Werbel as bonus for the mortgage. 10

Q Your books show that you recently entered the \$4,000 bonus, making a total of received payments of \$59,792. Did you get all of that money? Did you put all of that money in the job? A Yes.

Q All the money you got from Werbel went into the job? A Yes.

Q Where does Mr. Sussman live? A At 135 Mapes avenue. 20

Q Do you know where Mr. Werbel lives? A No.

We will adjourn this for two weeks (August 24th, 1926,) at 11:00 o'clock.

Examination of Mr. Hyman Sussman, before Walter Sherwood, Receiver, on September 14th, 1926, at the office of attorney of Receiver, Joseph Steiner, 790 Broad street, Newark, N. J. 30

May B. Schaefer sworn in.

HYMAN SUSSMAN, being duly sworn, does duly testify as follows:

By Mr. Silber.

Q Are you related to Mr. Cohen? A I am.

Q What way? A He is my son-in-law. 40

Testimony before Receiver—Hyman Sussman.

Q Do you own any property on Eagle Rock avenue? A I did.

Q Who did you sell that property to? A Goodwin Construction Company.

10 Q How much land did you own on Eagle Rock avenue? A There was about 100 ft. in front and about 160 or 170 ft. in some parts. It is not the regular depth.

Q Did you sell all of that to the Goodwin Construction Company? A Yes, sir.

Q How much did you get for it? A \$13,000.

Q Did you take back a purchase money mortgage? A I did.

Q In what amount? A \$10,000.

Q Then you received \$3,000 in cash? A Yes.

20 Q You took back a purchase money mortgage on the entire tract? A Two different mortgages; each \$5,000.

Q Do you still own those mortgages? A I do not.

Q What did you do with them? A I assigned them back to Goodwin Construction Company.

Q You assigned both mortgages to Goodwin Construction Company? A Yes.

30 Q Did you get any consideration for that assignment? A I did.

Q What was the consideration? A I got a mortgage on North Walnut street in the sum of \$15,000.

Q How do you account for the extra \$5,000? A I have certain checks to prove it and the balance I gave him in cash.

Q Do you have checks to show the difference in the consideration? A A part.

Q How much? A About \$3,000, I believe.

40 Q What were these checks given for? A For the \$15,000 mortgage.

Testimony before Receiver—Hyman Sussman.

Q Do you know the date of the \$15,000 mortgage? A I do not recall.

Q What do you estimate the date? A About January, 1925.

Q And these checks are dated anywhere from June, 1924 as late as March, 1925? A Yes, sir. I did not give him the whole amount in one check. 10

Q At the time you got that mortgage in the sum of \$15,000 you really were not entitled to a \$15,000 mortgage? A I was.

Q How do you figure that? A The reason why I did not give him this balance of a couple of thousand; that lot was supposed to be sold every day and I did not want to give him the balance. About April, I saw that it was only dragging; there was no sale; then I gave him the balance and put the mortgage on record. 20

Q You gave him this money in just consideration of the mortgage? A Yes.

Q Did you ever get paid? A I got some money.

Q How much? A I cannot exactly remember. I got paid once \$1,000. I got paid a second time about \$300 or \$400.

Q Do you mean to say your son-in-law owes about \$5,000 or \$6,000, on the Eagle Rock avenue property? A He does not owe me that much. 30

Q You just told me you advanced \$6,000 or \$7,000 to build on Eagle Rock avenue. You only get paid about \$1,300 or \$2,000? Then he owes you the balance? A He owed me previously to this transaction about \$3,000 or \$3,500. He owed from Eagle Rock avenue.

Q How could you prove that you put that much money in Eagle Rock avenue? A By those checks. 40

Testimony before Receiver—Hyman Sussman.

Q I show you Exhibit A. 1. Check dated June 10, 1924 in the sum of \$578.87, made by Hyman Sussman to the order of Charles Cohen. A That was at the time he built Eagle Rock avenue. It was advanced on the building; it was advanced to the Goodwin Construction Co. He
10 helped them build Eagle Rock avenue.

Q I show you Exhibit A. 2. Check dated June 26, 1924 in the sum of \$1,000, made by Hyman Sussman to the order of Goodwin Construction Co. A One of those checks I used to give him whenever he came around and was short.

Q Did you give him all of that money to go into the building on Eagle Rock avenue? A That was during the time he built Eagle Rock avenue.

20 Q I show you Exhibit A. 3. Check dated January 20, 1925 in the sum of \$850 made by Hyman Sussman to the order of Goodwin Construction Co. A During that time he was not only finishing up the Eagle Rock avenue job, but he had started already in North Walnut street.

Q Was this check given before or after you had taken the new mortgage on North Walnut street? A That was after.

30 Q Did you cancel the mortgage on Eagle Rock avenue? A Yes.

Q Exhibits A. 4 and A. 5. The balance of these checks were given to go into the construction of North Walnut street? A Yes. It was given for that mortgage. At that time he was already working on North Walnut street.

Q Mr. Cohen testified before me that you gave him money to help him build a house on Eagle Rock avenue. A Yes.

40 Q Did you ever get paid for that? A A certain amount I did not get.

Testimony before Receiver—Hyman Sussman.

Q How much money did you give him to help him build? A I cannot give the exact amount. I gave him considerable.

Q About how much? A I gave him about \$5,000, \$6,000 or \$7,000 during the operation.

Q How are you interested in the Newark Holding Company? A The Newark Holding Company is practically mine. 10

Q You own it? A Yes.

Q You are principal stockholder? A Yes.

Offered and received in evidence five checks, marked Exhibit A. 1 to A. 5 inclusive.

Q These checks you have just shown me are signed by you as an individual? A Yes.

Q You, as an individual, made these loans to your son-in-law— A Yes. 20

Q And the mortgage is made to the Newark Holding Company? A At that time, that was not the Newark Holding Company. I assigned that mortgage later to the Newark Holding Company.

Q Did you cancel both mortgages on Eagle Rock avenue? A I do not remember what became of those mortgages. He gave an assignment of those mortgages to the Goodwin Construction Company for the consideration of the other one on North Walnut street. 30

Q Tell me in your own words how you account for the difference in value between the two mortgages. How do you prove the extra \$5,000 between Eagle Rock avenue and North Walnut street? A I have those checks and the balance I gave him in cash. I do not remember how much cash I gave, but I gave every bit of \$3,000 to \$5,000. 40

Testimony before Receiver—Hyman Sussman.

Q Did you advance any money on the building on Eagle Rock avenue? A During the construction, I helped him a whole lot.

Q How much money did you give him? A About \$5,000, \$6,000 or \$7,000, around that.

10 Q At the time you took this mortgage for \$15,000, how much did Goodwin Construction Co. actually owe you? A About \$3,500, outside of the \$10,000.

Q Why did you take a mortgage for \$15,000? A I gave him the balance later. He said he is going to sell it. He would give me my money back.

Q Did you ever give him that balance? A Yes, I did.

20 Q These checks total up about \$3,000 and the cancelled mortgage was \$10,000? How do you account for the \$2,000? A I gave him cash.

Q Was there any interest due on the mortgage you cancelled? A I did not figure all the interest, just a certain amount, and the balance I figured up and gave him in cash.

30 Q If I were to ask you to prove to me the \$2,000 representing the difference, how could you do it? A If there is any proof through the bank, that I drew cash, that is the only way I could prove it.

Q Do you keep books, Mr. Sussman? A In my business, but this is my private account.

40 Q Your son-in-law claims under examination that you never put any money in North Walnut street, but in Eagle Rock avenue. Is that true? A Well if he claims he put it in Eagle Rock avenue, perhaps he knows better. If he put it on North Walnut street or Eagle Rock avenue, I could not say, because I did not watch what he did with the money.

Testimony before Receiver—Harold H. Pine.

IN CHANCERY OF NEW JERSEY.

Between

LINCOLN MATERIALS Co., INC.,
Complainant,

and

GOODWIN CONSTRUCTION COM-
PANY,

Defendant.

*Examination
in Re Claim
of John R.
Blair Com-
pany, Inc.*

10

Examination in the presence of Walter Sherwood, Receiver on April 8, 1927, at the office of attorney of Receiver, Joseph Steiner, 790 Broad street, Newark, New Jersey.

20

Appearances:

Francis M. Keating, attorney of John R. Blair Co., Inc.

Joseph Steiner, attorney of Receiver.

Marie A. Stewart sworn in.

HAROLD H. PINE, being duly sworn, testifies as follows:

Examination by Mr. Keating.

30

Q You are employed by John R. Blair Co. Inc., are you not? A Yes.

Q What do you do? A Salesman.

Q Did you receive an order to deliver materials to Goodwin Construction Company Inc., at North Walnut street near Main street, East Orange, N. J.? A I received an order from Mr. Kaiser to deliver materials to North Walnut street near Main street, East Orange, N. J.

40

Testimony before Receiver—Harold H. Pine.

Q Did you transmit this order to the home office? A Yes, by telephone.

Q Tell us what materials were to be delivered?

Cross examination by Mr. Steiner.

10

Q Was the order in writing? A No, not the one I received from Mr. Kaiser.

Examination by Mr. Keating.

Q What materials were to be delivered? A Why parquet flooring, strips and lines.

Q Did you accept the order or transmit it to the home office first for acceptance? A I turned it over to the home office as usual for acceptance.

20

Q Subsequent to the taking of the order did you find materials on the job? A Yes, I was at the job several times.

Q The bill sets forth: 3536 Sq. ft 13/16 x 2 1/4" No. 1 Common Oak at \$95 M \$335.92 was that a reasonable charge? A Yes, that was the price the order was taken at.

Q Also 5 kegs 8d Cut Nails, at \$4.75 per keg \$23.75, was that a reasonable charge? A Yes.

30

Q 108 L. Ft. 13/16 x 7/8" Common Hazel Lines, (Substituted Select Hazel Lines) at \$12.50 M \$12.60, was that a reasonable charge? A Yes.

Q 5100 Sq. Ft. 13/16 x 2 1/4 x 9 x 2-18 P. R. Blocks, at 13c \$663.00, was that a reasonable charge? A Yes.

40

Q 510 Sq. Ft. 13/16 x 2 1/4 x 9 x 9 2 P. R. Blocks at 13c \$66.30 was that a reasonable charge? A Yes.

Testimony before Receiver—Harold H. Pine.

Q 1032 L. Ft. 13/16 x 7/8" Common Hazel Lines (Substituted Select Lines for Common) at \$12.50 M \$12.88, was that a reasonable charge?

A Yes.

Q 2915 Sq. Ft. 13/16 x 2 1/4 x 9 x 18 2 P. R. Blocks, at 13c \$378.95, was that a reasonable charge? A Yes. 10

Q 314 Sq. Ft. 13/16 x 2 1/4 x 9 x 9 2 P. R. Blocks at 13c \$40.82, was that a reasonable charge? A Yes.

Q 915 Sq. Ft. 13/16 x 2 1/4" No. 1 Common Strips at \$95 M \$86.93, was that a reasonable charge? A Yes.

Q 3576 L. Ft. 13/16 x 1 1/4" Common Hazel Lines at \$12.50 M \$44.70, was that a reasonable charge? A Yes.

Q Were all charges reasonable? A Yes. 20

Q Did you have a conversation with Mr. Charles Cohen after the delivery of the materials in relation to your bill? A Yes.

Q Tell us what took place between you and Mr. Cohen? A I approached him in regard to the payment of the materials and was told that there were some building and loan payments pending and that the bill would be paid when he received his money.

Q Did he ever raise any question about the letter sent him? A No. 30

That is all.

Testimony before Receiver—Roy W. Messenger.

ROY W. MESSENGER, being duly sworn, testifies as follows:

Examination by Mr. Steiner.

Q Where do you live? A In Wyckoff, N. J.

10 Q What is your connection with the firm of John R. Blair? A Secretary.

Q Among your duties as secretary, do you have charge of the approving of orders submitted? A Yes.

Q Was this order of the Goodwin Construction Company submitted to you for approval? A Yes.

Q Did you approve of it? A Yes.

Q Was it in writing Mr. Messenger? A No.

20 Q Where did you get the order from? A Over the telephone.

Examination by Mr. Keating.

Q Did you talk to Mr. Cohen? A No.

Examination by Mr. Steiner.

Q Did you talk to anybody over the phone?

30 A Not personally. Mr. Pine gave us the order. I approve of all orders before they are shipped.

Q This particular order was submitted to you however in written form and you approved of it at the time? A Yes.

Testimony before Receiver—William F. Marshall.

WILLIAM F. MARSHALL, being duly sworn,
testifies as follows:

Examination by Mr. Steiner.

Q What is your connection with the firm of
John R. Blair? A Bookkeeper. 10

Examination by Mr. Keating.

Q Have you the books of account showing
the account of the Goodwin Construction Com-
pany? A Yes.

Q What is the balance due on this account?
A \$1,655.86.

Examination by Mr. Steiner. 20

Q Let me see it. Is this your handwriting,
Mr. Marshall? A Yes.

Mr. Steiner quoting from book of account:

“Book of account showing four items total-
ing (\$1,665.86) as follows:

Sept. 5, 1925	\$372.27	
Sept. 5, 1925.....	729.30	
Sept. 18, 1925	12.89	30
Sept. 21, 1925	551.40	

At the top of the items the following is
written Goodwin Construction Company,
Eagle Rock avenue, East Orange, N. J.”

Q Do you offer this in evidence? A Yes.

The account so described above is received
in evidence and marked Exhibit C “1.”

Testimony before Receiver—William F. Marshall.

Q Mr. Marshall, so far as you know were these materials delivered? A Yes.

Q Where were they delivered? A It shows on the invoice.

10 Q And if it shows Eagle Rock avenue, is that where they were delivered? A That is the address or headquarters of the Goodwin Construction Company.

Q Where were the materials delivered? A They were delivered to Walnut street near Main street, East Orange, N. J.

Q How do you know? A Only from the delivery tickets from which the invoices are made up.

20 Q Were you delivering to the Eagle Rock avenue job at that time? A No.

Q Then why is your account endorsed Eagle Rock avenue? A That was the address given as headquarters for the Goodwin Construction Company, that was the mailing address.

Q So where the address appears as Eagle Rock avenue that does not designate where the materials were sent but merely the address of the company? A Yes.

30 *Examination by Mr. Keating.*

Q Have you invoice slips? A Yes.

Q You have invoice No. 15333 showing the first delivery on September 5th. Will you tell us the delivery address as set forth on that invoice? A North Walnut street near Main street, East Orange, N. J.

40 Q You have invoice No. 15334 showing delivery on September 5th. Tell us the delivery address as set forth on that one? A North Walnut street near Main street, East Orange, N. J.

Testimony before Receiver—John Harrington.

Q And you have invoice No. 15594 showing delivery on September 18th. What is the delivery address on that invoice? A North Walnut street near Main street, East Orange, N. J.

Q And you also have invoice No. 15629 showing delivery for September 21st. What is the delivery address on that invoice? A North Walnut street near Main street, East Orange, N. J. 10

JOHN HARRINGTON, being duly sworn, testifies follows:

Examination by Mr. Steiner.

Q Where do you live, Mr Harrington? A 4608 Fifth avenue, Brooklyn, N. Y. 20

Examination by Mr. Keating.

Q Here is delivery ticket showing Driver H- No. 14669 and also delivery ticket showing Driver H- No. 14907. Can you tell us if you delivered these materials to the Goodwin Construction Company, North Walnut street near Main street, East Orange, N. J.? A Yes, sir.

Q Let us have an enumeration of the materials you delivered? A September 5, 1925, Delivery Ticket 14669 300 bundles 5100 sq. ft. 13/16 x 2¼ x 9 x 18 No. 2 P. R. Blocks, and 60 bundles, 510 sq. ft. 13/16 x 2¼ x 9 x 9 No. 2 P. R. Blocks. 30

September 19, 1925 Delivery Ticket 14907 175 bundles 2915 sq. ft. 13/16 x 2¼ x 9 x 18 No. 2 P. R. Blocks, 37 bundles 314 sq. ft. 13/16 x 2¼ x 9 x 9 No. 2 P. R. Blocks, 87 bundles 915 sq. ft. 13/16 x 2¼ No. 1 Common Strips, 116 bundles 40

Testimony before Receiver—Louis E. Kaiser.

3576 L. ft. 13/16 x 1/2 Common Hazel Lines. I delivered what is on them. Delivery tickets offered in evidence and marked Exhibits C "2" and C "3."

10

HENRY J. KOEBE, being duly sworn, testifies as follows:

Examination by Mr. Keating.

Q Mr. Koebe I show you delivery ticket No. 14891. Will you tell us if you delivered the material listed thereon and if so where? A Yes, sir, I delivered the material at North Walnut street near Main street, East Orange, N. J. Delivery Ticket offered in evidence and marked Exhibit C "4."

20

LOUIS E. KAISER, being duly sworn, testifies as follows:

Examination by Mr. Keating.

30 Q You were the man in charge of laying the flooring on the job of the Goodwin Construction Company at North Walnut street near Main street, East Orange, N. J.? A I was.

Q There is a claim filed with Receiver for materials delivered. Can you tell us whether or not they were all delivered to the job at North Walnut street near Main street and whether or not they were used in the construction of the building by you? A They were all delivered there and they were all used by me.

40

Testimony before Receiver—Louis E. Kaiser.

Q Note the price charged and inform us whether or not this charge is reasonable? A Yes.

Q You were engaged in the parquet flooring business at that time? A Yes.

Q And you were occasioned to buy materials at different times? A Yes. 10

Examination by Mr. Steiner.

Q How long were you in the parquet flooring business? A Thirty years.

Examination by Mr. Keating.

Q Tell us whether or not the prices charged were reasonable or not? A They positively were. 20

Q What company are you connected with? A K. D. Flooring Company.

Q What was your job, what were you supposed to do on this North Walnut street job? A Salesman and superintendent of construction.

Q For whom? A K. D. Flooring Company.

Q Now did you have a contract with the Goodwin Construction Company? A Yes.

Q For whom? A K. D. Flooring Company. 30

Examination by Mr. Steiner.

Q What did that job include? A Why it included the laying of all parquet flooring.

Q Where was the material to come from? A The material was, well I could order it where I desired, where I could buy it at the best price, so I bought it from the John R. Blair Company.

Q What was the K. D. Flooring Company to be paid by the Goodwin Construction Company? A \$3,750.00 for the work. 40

Testimony before Receiver—Louis E. Kaiser.

Q For what? A For labor and materials supplied.

Q Then your contract was to cover cost of materials and also the labor in laying the flooring, is that right? A Yes.

10 Q Did you receive any part of the (\$3,750.00) due you from the Goodwin Construction Company? A I did.

Q How much did you get? A \$1,000.00.

Q Did you pay any part of that to the John R. Blair Company? A I was not supposed to pay any of that. My contract called for materials to be paid by Goodwin Construction Company.

Q What was that? A I was not supposed to pay for the lumber. The lumber was to be paid for by the Goodwin Construction Company.

20 Q What were you to get \$3,750.00 for? A For labor and materials.

Q What other material is included besides lumber? A The shellac and paper. The contract called for the Goodwin Construction Company to pay for the lumber.

30 Q Mr. Kaiser, if things had gone right and if this building had gone through to completion, is it not a fact that the K. D. Flooring Company was to be paid \$3,750.00 from which money you in turn were to pay John R. Blair Company? A No. The contract called for the Goodwin Construction Company to pay so much money for the lumber and deduct that from the contract.

Q Deduct it from the \$3,750.00? A Yes.

Q So that if there was \$1,665.86 worth of lumber bought from the John R. Blair Company, they were to pay you just that much less, is that right? A Right.

40 Q Now did you and the officers of the Goodwin Construction Company ever sit down and

Testimony before Receiver—Louis E. Kaiser.

talk over how much lumber had been bought from the John R. Blair Company? A No, we never sat down.

Q Do you know how much lumber they bought from the John R. Blair Company? A Yes.

Q How much? A Well the invoices show how much. 10

Q What do they show? A Well, there was thirteen thousand two hundred and some feet of oak flooring bought, the lines, I do not know just how many lineal feet.

Q I show you a claim filed in this matter on behalf of the K. D. Flooring Company, signed K. D. Flooring Company, Minnie N. Kaiser as president, and ask you whether that claim was prepared under your instruction and supervision? A What was that? 20

Q Was that claim prepared under your instruction and supervision? Minnie Kaiser is your wife, is she not? A Yes.

Q Any other stockholders besides you and your wife? A I am not a stockholder.

Q Are you an officer of the company? A I do not hold any office. I was only employed by the company.

Q Are you employed by it now? A No. 30

Q Were you employed by it at that time? A I was.

Q You would be apt to know how much lumber your company used? A Yes.

Q Did you give Mr. Keating your counsel the facts upon which the claim of the K. D. Flooring Company was prepared? A Yes.

Q Were any of the Blair men on the job at any time? A Yes, to deliver materials, and Mr. Pine came several times. 40

Testimony before Receiver—Louis E. Kaiser.

Q What did he come there for? A Well he came to get orders and to get money from Mr. Cohen.

Q Did you order this lumber from the Blair Company? A I did.

10 Q Was there any flooring laid in the kitchens?
A There was.

Q Did you lay it? A I did.

Q Where did the lumber come from? A From Passaic Bergen Lumber Company.

Q Did anything else come from the Passaic Bergen Lumber Company? A Not for me with the exception of the kitchen flooring.

20 Q What kind of flooring is used for kitchen flooring, Mr. Kaiser? A Pine flooring. In 90% of the apartment houses, pine flooring is used in the kitchens.

Q Now look at the bill of the Goodwin Construction Company and tell me if there is any lumber listed in that bill that can be used for kitchen floors? A None of the flooring that is in this item can be used for kitchen flooring because it is much more expensive than pine.

30 Q Was there a written contract between your company and the Goodwin Construction Company? A There was.

Q Have you got it with you? A I have not.

Q What did that contract call for if you recall? A It called for the laying of all flooring in the house with the exception of the corridors and the bathrooms. The contract specifically specified the spaces that were to be laid.

Q How much cash did you get from the Goodwin Construction Company? A \$1,000.00.

40 Q No more? A No.

Testimony before Receiver—Louis E. Kaiser.

Examination by Mr. Keating.

Q Mr. Kaiser you came to my office and gave me the information with which to prepare the claim of the K. D. Flooring Company? A Yes.

Q This allowance for materials purchased \$1,947.36, what was the purpose of that allowance, was it in pursuance to the contract that you made that allowance? A Yes. 10

Q And that allowance includes materials furnished by John R. Blair Company? A Yes.

Examination by Mr. Sherwood.

Q That allowance for completing work, \$200.00 is that a fair allowance?

Objection by Mr. Keating. 20

I object to that, we are not proving the K. D. Flooring Company's claim.

Objection not sustained.

By Mr. Sherwood.

Q For completing work \$200.00 is that a fair allowance? A At that time it was.

Q What is the difference between that time and now? A A 1,000% difference. 30

Q How? A At that time the job was 95% completed and covered up with paper. In the intermission between the time I left the job and the time when they started to complete it, those floors all had to be done over which would not have been the case had I been able to complete them at the time.

Q What was that due to? A Due to the fact that the floors became uncovered and the weather got in, which caused them to be re-scraped and 40

Testimony before Receiver—Mr. Pine.

re-finished, which would not have to be done otherwise.

Q In the interim was the building closed up?

A Not entirely. There were windows there that permitted the weather to get in, the papers blew off the floors and this caused a dark streak to
10 run across the floor where the paper was off.

Q If the building had been completed in the usual course of event would that have happened?

A No.

Q What did you cover the floors with? A Paper.

Q Did you put it down in the usual secure manner? A Yes.

Q Nail it down? Tacked with lathe on the paper? A No, that makes a hole in the floor.

20 Q Isn't it usual to do that? A No.

Q Was there paper on the floors that were not scraped? A Yes.

Q You claim that while the building was standing idle that that hurt the floors? A Yes.

Q In what way did it hurt them? A The weather coming in caused them to swell and curl and this would cost more labor to scrape them than if they had been done originally.

30 Q Did you ever see any windows open up there? A Well the front doors did not close, there were no doors on a number of the apartments, most of the apartment doors were open, some of the windows were open, windows were broken and the rain came in on the floors.

Examination by Mr. Steiner.

40 Q Mr. Pine, did you have any conversation with Mr. Cohen before submitting this order to the home office in relation to the credit of the Goodwin Construction Company? A Yes.

Testimony before Receiver—Mr. Pine.

Q Did Mr. Cohen understand that if any materials were shipped that they were to be shipped on the credit of the Goodwin Construction Company? A He did.

Q Did he give you any references? A Yes.

Q Did you transmit these references to the home office? A I did. 10

Q Do you deny that the arrangement was that a contract was made with the K. D. Flooring Company and that you were to look to the K. D. Flooring Company for payment? A The order was given to me by Mr. Kaiser to give to Mr. Cohen for his approval and to charge it to the Goodwin Construction Company, which I did.

Q You heard Mr. Kaiser say that he had a direct contract with the Goodwin Construction Company to furnish materials and labor and in accordance with the terms of that contract he or the K. D. Flooring Company bought materials from you? A Yes, to be deducted from the contract price. 20

Q Did you ever send Mr. Kaiser a bill for the materials? A I do not know whether the office did or not, but he was familiar with the prices.

Q Is there any relationship between your company and the K. D. Flooring Company? A Only as buyer and seller. 30

Q It is your practice I suppose to charge all of your sales to the job, is it not? A They are charged to the job that they are going to, the order shows where the materials are to be delivered and the invoice shows where they have been delivered.

Q Wasn't this particular job ordered by Mr. Kaiser for the K. D. Flooring Company with instructions to be delivered to the North Walnut street job and in pursuance to Mr. Kaiser's in- 40

Testimony before Receiver—Mr. Marshall.

structions the materials were delivered there? A Yes, after being approved by Mr. Cohen.

10 Q What approval did you have from Mr. Cohen? A Well I approached him and told him about the order and I told him that if it was to be charged to the Goodwin Construction Com-
pany it would be necessary that I turn in some references with the order, and he showed me a
lien release that had several signatures on it and there I got some references which I turned in
to the office.

Q Did you get anything in writing from the Goodwin Construction Company guaranteeing the payment of materials purchased? A Mr. Cohen OK'd a memorandum slip that I had.

20 Q Have you got it with you now? A No.
Q Where is it? A It was turned in to the office.

Q Have they got it? A No, I believe it has been lost.

Q Do you remember what was on that slip? A The quantity of the material, strips, lines and nails.

Q Where does Mr. Cohen's name appear on the slip? A At the bottom.

30 Q How was the job identified on this slip? A North Walnut street near Main street, East Orange, N. J.

Q And the order for the materials was given to you originally by Mr. Kaiser? A Yes.

Q And what position do you hold with the Blair Company? A Salesman.

Mr. Steiner, directing conversation to Mr. Marshall:

40 Q What is your name? A Marshall.

Testimony before Receiver—Mr. Pine.

Q Mr. Marshall, you made the entries on Exhibit C. 1.? A Yes.

Q What did you have before you at the time these entries were made? A Invoice book.

Q Who prepares the original invoices? A The bill clerk, a girl in the office.

Q Where does she get instructions from? 10
A Takes them from the delivery tickets.

Q Who prepares the delivery tickets? A They are made up by the shipping clerk.

Q Now where does the shipping clerk get his information from? A He takes it from a copy of the order.

Q Who procured that order? A Mr. Pine.

Examination by Mr. Keating.

Q Mr. Marshall, you send out all the bills sent by the Blair Company, do you not? A Yes. 20

Q Tell us whether a bill was ever sent to the K. D. Flooring Company? A No.

Q Who was the bill sent to? A Goodwin Construction Company at the Eagle Rock avenue address.

Mr. Keating, directing conversation to Mr. Pine:

Q Mr. Pine, that conversation that you had with Mr. Cohen, was it before you submitted the order to the company and before the materials were shipped, that is, the conversation about the credit references? A Yes. 30

Lien claim offered in evidence and same is received and marked Exhibit C. "5.."
Original lien claim filed with the Essex County Clerk Nov. 20, 1925, with County 40

Testimony before Receiver—Mr. Lesser.

Clerk's endorsement thereon. Suit commenced Dec. 23, 1925. Complainant offers in evidence order of the Essex County Circuit Court dated Dec. 17, 1926 made by William A. Smith, Circuit Court Judge, which is an order extending.

10

Examination by Mr. Steiner.

Q Mr. Pine, what officer of your company if any signs postponement of lien claims to construction mortgages? A Mr. Blair or Mr. Lesser here.

Mr. Steiner directing conversation to Mr. Lesser:

20

Q Mr. Lesser, do you know whether your company signed a postponement of lien? A I believe it did.

Q For what mortgage do you know? A I do not know.

Q Well there was a mortgage of \$60,000.00 held by Samuel Werbel and that was the only mortgage at the time from which moneys were being advanced on this job? A Yes.

30 Q Do you recall whether or not your company executed a postponement on that mortgage? A I do not know.

Q Has your company had any money on this job at all? A No, none at all.

Examination by Mr. Keating.

Q You are Mr. Cohen? A Yes.

Q Do you want to testify? A No, Mr. Cohen is my father.

40

Q Is your father here? A No.

Testimony before Receiver—Mr. Pine.

Q Who signed R. Cohen on this delivery ticket? A I do not know, it was not me.

Adjourned to April 15, 1927.

SECOND DAY.

10

Appearances:

Francis M. Keating, attorney for John R. Blair Co., Inc.

Joseph Steiner, attorney of Receiver.

By Mr. Keating.

I recall Mr. Pine's conversation with Mr. Cohen, I want to refer to that (page 20). 20

MR. PINE, recalled.

Examination by Mr. Keating.

Q Mr. Pine, when you had the conversation with Mr. Cohen in reference to the credit references, was anyone present? A Yes, Mr. Cohen and Mr. Kaiser.

That is all. 30

Examination by Mr. Steiner.

Q There was no direct contract between the Blair Company and the Goodwin Construction Company at the time, was there? A No, no contract. There was a signed memorandum order slip.

Q Signed by whom? A By Mr. Cohen.

Q Did you ever see it? A Yes. 40

Testimony before Receiver—Mr. Pine.

Q Where is it? A It was mailed into the office.

Q But did you see it? A Yes.

Q And when you say there was a signed order you mean a ticket like this? A No, they are shipping tickets.

10 Q Where is that order? A It has been lost in the office.

Q Was there any other signed order in connection with this job that you may have seen? A Not regarding us, no, sir.

Q Regarding anybody else? A Well, Mr. Kaiser's contract with the Goodwin Construction Company.

Q Did you see that? A Yes.

20 Q What was that contract? A I do not recall the exact wording in it.

Q Was it on his letter head, either Mr. Kaiser's or K. D. Flooring? I show you a paper dated August 5, 1925, which purports to be an estimate submitted by the K. D. Flooring Company to the Goodwin Construction Company at North Walnut street and ask you if that is the order that you had in mind? (Paper passed to Mr. Pine.) That is the one.

30 Q That is what you saw at the job at the time that Mr. Kaiser and Mr. Cohen were there? A Not at that time.

Q Before that? A Yes.

Q And do you or do you not know whether or not Mr. Kaiser's order to your house for the materials was based on that estimate? A I know the order for the materials that Mr. Cohen approved was the order for the material for this job.

40 Q And you say Mr. Cohen's approval has been lost? A His signed approval, yes.

Testimony before Receiver—Mr. Pine.

Q Now when your shipments were made did you have a copy of that estimate before you? A This (referring to estimate), no.

Q Now at the time that the different shipments were made to the job, they were shipped were they or were they not shipped under Mr. Kaiser's order? A Well the order was placed as a lump order by— 10

Q That is not what I asked you, I asked you who authorized the various shipments at the time they were made. Mr. Cohen never called up directly for materials saying, "we are ready for eight bundles of common hazel or 2915 sq. ft. 9 x 18 blocks," did he? A Not to my knowledge.

Q But Mr. Kaiser was in charge of this job, was he not. He had a direct contract with the Goodwin Construction Company, didn't you know that, Mr. Pine? A Yes. 20

Q And these shipments were made when he called up and said he wanted more materials sent to North Walnut street, is it not so? A No, he did not have to call for the material that way.

Q Who called for the material when it was sent? A He advised me when the job was ready to start.

Q Then what? A And we started shipping to the job.

Q Who called up for the shipment that was made September 5th? A Well, I— 30

Q I show you Exhibit C. "2" and ask you who called up before that shipment was made? A I can not say, possibly I did.

Q Well if you called up or if you authorized it from whom did you receive your instructions? A From Mr. Kaiser.

Q I show you Exhibit C. "3" and ask you who authorized that shipment? A Possibly I did. 40

Testimony before Receiver—Mr. Pine.

Q Well, if you did under whose instructions was it? A Mr. Kaiser's.

Q I show you Exhibit C. "4" and ask you if you know who authorized that shipment to be made? A No doubt the same as the others, if there was any authorization it came from Mr. Kaiser, because he followed the progress of the job.

Q Do you know his handwriting? A Yes.

Q I show you paper of August 5th and ask you if that is Mr. Kaiser's signature? A That is not his signature.

Q Do you know whose signature that is? A Minnie Kaiser, president, that is Mr. Kaiser's wife.

Q Do you know her signature? A I could not swear to it, that it was her signature.

Q Did you ever have any other dealings other than this North Walnut street job? That is, with the K. D. Flooring Co.? A Yes.

Q Did you ever receive any written communications signed by their president? A No, not personally.

Q I mean your company? A They probably did at the office.

Q Have you ever seen any of these letters? A Not that I recall.

Q The only one you recall was this paper of August 5th? A Yes.

Q Did you see that before today, this particular one or the duplicate of it? A The one I saw was probably a copy of that.

Q And where do you think you saw that? A Before the job was started.

Q Where? A Either at the Walnut street job or at some other job.

Q Was it in your office? A I do not recall.

Testimony before Receiver—Mr. Pine.

Q Do you think you have a copy of that in your office? A I do not think so.

Q Do you think it was there but has been lost? A Not that one.

Q You think it might still be there? A Not that, no.

10

Examination by Mr. Keating.

Q Going back to the conversation you had with Mr. Cohen in reference to the credits, tell us what kind of an order you received from him, describe what it contained if you can? A The memorandum slip that Mr. Cohen signed was a small memorandum blank that we use for orders, I believe in your papers there you have one of them. They are used in the office for telephone messages. 20

Q Just what was on that memorandum blank? A The materials were listed there and the price.

Q How much was it, what was the price, do you recall? A I do not recall the item price, the total ran around \$2,000.

Q What else was on that memorandum? A Goodwin Construction Company and the place of delivery, mailing address which was Eagle Rock avenue, Orange or West Orange. 30

Q And what else? A The list of materials needed and down at the bottom it was O. K.'d by Mr. Cohen.

Q Mr. Cohen's signature or for the Goodwin Construction Company? A Mr. Cohen's personal signature.

Q And the name of the Goodwin Construction Company appeared on the slip? A Yes, at the head of the order. On the back of it it also had a list of the credit references taken from the postponement of lien release. 40

Testimony before Receiver—Mr. Pine.

Q Where did you get the postponement? A Mr. Cohen handed it to me and I looked it over and Mr. Kaiser looked it over and there we got the credit references, Lincoln Material Company, Levy and a couple of others.

10 That is all.

Examination by Mr. Steiner.

Q What did you say you did with the orders that are given, where are they filed? A When they are signed as it was in this case, they are mailed in to the office.

Q And so far as you know the original has been lost? A Yes.

20 *Examination by Mr. Keating.*

Q Why did you go to Mr. Cohen the president of the Goodwin Construction Company and ask him for his O. K. on this job before sending materials? A Because we could not charge any materials to the K. D. Flooring Company, and in that case they would have to be charged to the Goodwin Construction Company with Mr. Cohen's approval.

30 Q Mr. Kaiser was there at the time? A Yes he was present.

Q Did Mr. Kaiser show you the paper of August 5th at that time? A No, it was before that. I was familiar with the job before that time.

Q What was your conversation with Mr. Kaiser that brought you up there to the job? A Mr. Kaiser was.

40 Q No further back than that. How did you first know that there was a job there? A

Testimony before Receiver—Mr. Kaiser.

Through Mr. Kaiser. He told me that he was figuring on a job and naturally doing business with me, I would get the order.

Q And he told you that the job was at North Walnut street? A Yes.

Q And after he told you you went up there to see Mr. Cohen? A Yes. 10

Examination by Mr. Steiner.

Q Mr. Pine, you said, if I understand correctly that you could not charge anything to Mr. Kaiser or the K. D. Flooring Company, is that right? A Yes.

Q Why? A At that time his credit was up to its limit.

Q With you? A With the firm. 20

Q John R. Blair Co.? A Yes.

MR. KAISER, recalled.

Examination by Mr. Keating.

Q Mr. Kaiser, were you present at the conversation just recited to us by Mr. Pine, that is the talk about credit references? A I was. 30

Q Will you tell us what transpired, what documents were shown, if any, and what conversation took place? A I took Mr. Pine there so as to get the order and Mr. Pine asked Mr. Cohen what bank he dealt with and Mr. Cohen said, "what do you want to know that for, ain't my credit good enough" and then Mr. Pine explained that it was customary to do that, so then he mentioned the name of some bank, I do not remember the name. Mr. Pine also asked him 40

Testimony before Receiver—Mr. Kaiser.

for some references and he said "yes, I have plenty of references" and he pulled out a postponement to the mortgage and said "here all these men have already signed this postponement, these are the people I am doing business with."

10 Q What names appeared on the postponement? A Why Passaic Bergen Lumber Company, the plumber and several others. I am not positive whether Lincoln Material Company was there or not, but we took down the name as a reference and that is where we got the references from and we put them on the back of one of the order blanks.

Q What about the written O. K. of Mr. Cohen? A I was there when he signed it.

20 Q Did you know what its contents was? A The contents was for the amount of material to be shipped to the job.

Q And was it signed by him? A It was signed by Mr. Cohen.

Q And who did he give it to? A Mr. Pine.

Q No question about your seeing that? A Oh no, I saw it, I was there.

Examination by Mr. Steiner.

30 Q Did your company have an order from the Goodwin Construction Company for this job? A They had a contract for it.

Q I show you estimate dated August 5th marked "Respectfully submitted, K. D. Flooring Company, Minnie Kaiser, President" and ask you if that is the estimate you submitted? A That is an agreement.

40 Q You have the other copy of that, Mr. Kaiser, or that is the company has? A I do not know.

Testimony before Receiver—Mr. Kaiser.

Q But that was duly accepted by the Goodwin Construction Company? A Yes.

Marked Exhibit R. "1."

Q And it was this contract signed and accepted by Goodwin Construction Company that permitted K. D. Flooring Co. to take up delivery of this material with John R. Blair Company? A Yes. 10

Q Mr. Kaiser, the K. D. Flooring Company has filed a claim for \$3,750.00, that is correct is it not?

Mr. Keating: I object to that Mr. Steiner as he is not an officer of the company, is no longer connected with it in any capacity. 20

Examination by Mr. Steiner.

Q Mr. Kaiser, in the claim filed in this cause on behalf of the K. D. Flooring Company there is an item, "to allowance for materials purchased \$1,947.36" do you know how that item is made up? A Yes.

Q How is it made up? A \$1,665.86 to the John R. Blair Company. 30

Q Yes, and the balance? A And the balance to be allowed to the Goodwin Construction Company.

Q The \$1,665.86 covers materials that went on that job, to your knowledge from the John R. Blair Company? A Correct.

Q When the materials were ordered from the John R. Blair Company they were ordered delivered to the job, were they not, to conform with your contract of August 5th? A Yes. 40

Testimony before Receiver—Mr. Messenger.

Q And there were \$1,665.86 worth of materials ordered from the John R. Blair Company? A Yes, sir.

Examination by Mr. Keating.

10 Q Do you know or do you not know or rather did you know or did you not know when you submitted this order to John R. Blair Company for the materials to be sent to the Goodwin Construction Company, that your credit was good or bad with them? A I knew that.

Q You knew what? A I knew that the K. D. Flooring Company could not purchase any material on credit direct.

20 Q And do you know any reason for that? A Because we had no credit established with the John R. Blair Company or any other company and all of our contracts were taken that way.

Q What do you mean taken that way? A That the material was to be paid for by the builders.

MR. MESSENGER, recalled.

30 *Examination by Mr. Steiner.*

Q Mr. Messenger, you have charge of the files including the file of the Goodwin Construction Company? A Yes.

Q Was there ever a memorandum submitted to the home office of John R. Blair Company in which Goodwin Construction Company by its President Cohen O. K.'d materials ordered to the North Walnut street job? A Yes.

40 Q Did you see it? A Yes.

Testimony before Receiver—Mr. Messenger.

Q Where is that memorandum now? A It has been lost.

Q Have you instituted a search for it? A Yes.

Q What kind of a search? A A complete search of the files and records.

Q And did you find the memorandum? A No. 10

Q And you are sure you saw the memorandum? A Yes.

Q Is that the same memorandum referred to by Mr. Pine? A Yes.

Q Referring to the credit of the K. D. Flooring Company in August, 1925, was the credit of the K. D. Flooring Company good or bad? A Bad, its credit had not been established. 20

Q What is your connection with the Blair Company? A Secretary.

Q Were any instructions given to your salesmen as to how they were to take orders from the K. D. Flooring Company? A Yes, materials were to be sold and billed direct to the builder, and not to the K. D. Flooring Company.

Q What was the signature on that lost memorandum? A Mr. Cohen's signature. 30

Testimony before Receiver—Mr. Sam Werbel.

THIRD DAY.

Appearances:

Francis M. Keating, attorney for John R. Blair Co., Inc., Saul & Joseph E. Cohen, by Erwin Heller, of counsel with Sam Werbel, mortgagee.

MR. SAM WERBEL, being duly sworn, testifies as follows:

Mr. Heller: I want to make an objection to this hearing for the purposes of the record on the ground that it is improper as we are not properly assembled before the receiver and secondly we are called here to establish priority over a lien claim and we have not had an opportunity to cross examine.

Mr. Keating: That being the case I move that this hearing be adjourned and that the defendant Sam Werbel, mortgagee and Newark Holding Company mortgagee be duly subpoenaed according to law at the hearing to be held sometime in the future to dispose of the matter so that there will be no further objection.

Mr. Steiner: I think that is quite proper. Discussion.

Mr. Keating appearing for John R. Blair Co. Inc. and Mr. Heller appearing for Sam Werbel agree that Mr. Werbel's testimony is to be taken this morning and Mr. Werbel and his counsel are to have an opportunity to examine the testimony heretofore taken and if after reading same they conclude that they desire an opportunity to examine or

Testimony before Receiver—Mr. Sam Werbel.

cross examine any of the witnesses heretofore produced, these proceedings are not to be concluded until the said witnesses are brought in.

Mr. Heller: I offer in evidence a mortgage dated April 22, 1925 and recorded April 27, 1925 made by the Goodwin Construction Company a corporation to Sam Werbel and recorded in Book M-54 of Mortgages on page 181 etc covering property in the City of East Orange on the easterly line of North Walnut street and given to secure the sum of \$60,000.00. I also offer in evidence bond accompanying said mortgage. Mortgage is received and marked Exhibit W. 1. and bond marked Exhibit W. 2.

10

Q Mr. Werbel, are you the mortgagee mentioned in this mortgage? A Yes.

20

Q And did you advance any money on account of the principal sum in accordance with the terms of the mortgage? A Yes.

Q How much did you advance? A I advanced all the money and then I took out policies to insure it.

Q What is the full amount? A Policies and all?

Q That is right. A \$60,000.00 advanced and I took out some more policies.

30

Q How much additional? A \$138.67.

Q What other policies did you take out? A Three more policies at \$104.00 each.

Mr. Heller: I offer these policies in evidence.

Mr. Keating: I do not think that they should be introduced until it is shown that none were furnished by the mortgagor.

40

Testimony before Receiver—Mr. Sam Werbel.

By Mr. Steiner.

Q Did the Goodwin Construction Company supply you with insurance policies? A They did not.

10 Mr. Steiner: Policy No. 476702 Superior Fire Insurance Co. 1214 Walnut street, East Orange, amount \$20,000.00 expiration date May 28th, 1926, premium \$104.00, received and marked Exhibit W. 3.

Policy No. 1173379 Stuyvesant Insurance Co. 1214 Walnut street, East Orange, amount \$20,000.00 expiration date July 1, 1926, premium \$104.00 received and marked Exhibit W. 4.

20 Policy No. 1177951 Stuyvesant Insurance Co. 1214 Walnut street, East Orange, amount \$20,000.00 expiration date November 24, 1926, premium \$138.67 received and marked Exhibit W. 5.

Policy No. 6452 Superior Fire Insurance Co. 1214 Walnut street East Orange, amount \$20,000.00 expiration date May 28, 1927, premium \$104.00 received and marked Exhibit W. 6.

30 Policy No. 846886 Insurance Co. of the State of Pa. 1214 Walnut street East Orange, amount \$20,000.00 expiration date Sept. 11, 1927 premium \$104.00 received and marked Exhibit W. 7.

Policy No. 1223542 Stuyvesant Insurance Co. 1214 Walnut street, East Orange, amount \$20,000.00 expiration Nov. 24, 1927 premium \$104.00 received and marked Exhibit W. 8.

Testimony before Receiver—Mr. Sam Werbel.

By Mr. Heller.

Q Has anything been paid on account of the principal? A No.

Q Has anything been paid on account of interest? A No.

Q So there is due now the entire amount of the principal sum, the amount of insurance policies and interest on that sum from the date of the first payment? A Yes. 10

Q When was the first payment made? A May 20, 1925.

Q Have you a list of all the payments made on account of that mortgage? A Yes.

Q Tell us what payments were made on account of this mortgage as you have it in your records? 20

Mr. Keating: I think the proper way is to introduce the checks.

Mr. Heller: That will follow.

Q How were payments made on this mortgage? A According to when the money was needed.

Q To whom were the checks drawn? A To the Goodwin Construction Company. 30

Q Did you visit the job? A Yes, I was there almost every day and on Fridays I gave a check to the Goodwin Construction Company.

By Mr. Steiner.

Q How far finished was that building at the time the receiver was appointed in your opinion? A Most of the plumbing fixtures were in.

Q How much was it finished, 80% or 90% or what? A 95% completed. 40

Testimony before Receiver—Mr. Sam Werbel.

Q How often did you visit the property? A Practically every day.

Q And you made payments to the Goodwin Construction Company as to the procedure of the work based on your opinion? A Yes.

10 Q Did you pay by check or cash? A Checks.

Q Have you the cancelled checks with you? A Yes.

Q How many checks have you got with you? A 27.

Q On what banks are these various checks drawn? A Clinton Trust Company, Weequahic Trust Company and the Washington Trust Company.

20 Q And all of these checks are made payable to whom? A To the Goodwin Construction Company with the exception of one check which I paid for a release, a check to the Aidak Construction Company for \$50.00 and another check to the Goodwin Construction Company for \$200.00 endorsed to Aidak Construction Company.

30 Q Now these notations on the back of each one of these checks except check No. 339 on the Clinton Trust Company for \$50.00 to the Aidak Construction Company, "this is on account of mortgage for building being erected on Walnut street, East Orange, N. J.," who wrote that on these checks? A The bookkeeper.

Q And was that put on each before they were delivered? A Yes.

Q What is the total amount of these checks, Mr. Werbel? A \$59,792.00.

Checks offered in evidence, and handed to Mr. Keating for examination.

Testimony before Receiver—Mr. Sam Werbel.

By Mr. Heller.

Q The Aidak Construction Company, do you know who they are? A Yes.

Q What line are they in? A Building.

Q Did they do any building on this job? A They had the contract but could not go ahead and we had to pay them for a release. 10

Q Did the Goodwin Construction Company ask you to draw that check for \$50.00 to the Aidak Construction Company? A Yes.

Checks handed back to Mr. Steiner with no objections from Mr. Keating. Said 27 checks are received in evidence and marked as one packet W. 9.

By Mr. Keating.

20

Q Mr. Werbel on May 28th there are two checks each in the sum of \$4,000.00 to the Goodwin Construction Company; what point was the building up to on that date? A Up to the third story.

Q The one check dated May 28th for \$4,000.00 drawn on the Weequahic Trust Company was given to whom? A To the Goodwin Construction Company.

Q To what member of that company? A To Mr. Charles Cohen. 30

Q And what did he do with that check? A I do not know.

Q It would appear from the back of this check that it was taken direct to the Weequahic Trust Company and cashed. Do you recall going to the bank with Mr. Cohen to cash this check? A No, Mr. Cohen was a depositor there.

Q And you do not recall going to the bank with him? A No, I do not. 40

Testimony before Receiver—Mr. Sam Werbel.

Q In what banks did you have accounts at that time? A Washington Trust Company, Clinton Trust Company and Weequahic Trust Company.

Q Not in the Fidelity Union? A No.

10 Q On June 4, 1925 a check for \$4,000.00 was drawn; what point was the building up to on that date? A They were working between the third and fourth stories.

Q On June 12th you gave a check for \$1,500.00 drawn on the Weequahic Trust Company, at what point was the building up to at that time? A I cannot say exactly what point.

Q Did you make any payments to Mr. Cohen ahead of time? A I did some times.

20 Q How many payments did you give him ahead of time? A I gave him mostly all before as otherwise the work would stop.

Q So you made payments when you felt they were needed regardless of the provisions of the mortgage? A Yes, otherwise the work would have to stop.

30 Q On June 12th there is a check for \$500.00 drawn on the Weequahic Trust Company and this check was cashed at the Weequahic Trust Company; do you recall going with Mr. Cohen to the bank to cash this check? A I never did; he was a depositor there, he went himself, he was short for the pay roll and I had to give him the check.

Q June 26th, check for \$4,000.00 drawn on the Weequahic Trust Company, did you go with him on that day? A No.

Q Up to what point was the building at that time? A I do not know exactly.

40 Q Check July 2nd for \$4,000.00 drawn on the Weequahic Trust Company, did you take Mr.

Testimony before Receiver—Mr. Sam Werbel.

Cohen to the bank on that day? A I never took him to be identified, they knew him, he was a depositor there.

Q In all the checks that you gave Mr. Cohen for the Goodwin Construction Company, you never went to the bank with him? A I never went to the bank with him but I met him there once and gave him a check. 10

Q What was the amount of that check? A This is it a check for \$300.00 dated September 2, 1925, drawn on the Weequahic Trust Company.

Q What was the purpose of giving him this check when you met him at the bank? A I was at the building and he told me that he needed money for the pay roll.

Q You are in the mortgage business, Mr. Werbel? A Yes. 20

Q That is your main business, is it not? A Yes.

Q Is the \$60,000.00 your money, your clients money or what? A Mostly clients' money, not all of my own money.

Q Did the clients loan you and you paid them?

Objection by Mr. Heller.

I object to that question as it is immaterial. 30

Mr. Keating: Well I think it is material. He says that the moneys were not all his.

Mr. Steiner: This is between the Goodwin Construction Company and Sam Werbel. Mr. Werbel has shown that he performed his contract in bringing in here \$60,000.00 worth of his own checks which were endorsed by the Goodwin Construction Company. Now whether the money was his, whether it was 40

Testimony before Receiver—Mr. Sam Werbel.

stolen or borrowed is immaterial, the fact is the Goodwin Construction Company received the \$60,000.00.

Mr. Keating: I will let it lay for the time being.

10 Q Did you receive any interest on account? A No, sir.

Q Did you receive any payments on account of the mortgage? A No, sir.

Q Any bonus? A No.

Q Any fees, directly or indirectly? A No, sir.

Q Are you sure of that? A Yes.

Q As a matter of fact, did you not receive a 10% bonus?

20

Objection by Mr. Heller.

I object to the question as it is immaterial, irrelevant and not properly formed.

By Mr. Keating.

Q Would you have us believe that you loaned this \$60,000.00 and expected only 6%?

Objection by Mr. Heller.

30

I object to the question as it is immaterial.

A No, I did not.

Q You did not receive any bonus whatsoever?

A No.

Objection by Mr. Heller.

I object to that question as it is immaterial.

40 Q You were not paid anything? A I was not paid anything.

Testimony before Receiver—Mr. Sam Werbel.

Q Would you have us believe that you inspected that building every day as you say while it was going up and received nothing for your services?

Objection by Mr. Heller.

I object to the question on the ground that it is immaterial irrelevant and has nothing to do with the inquiry. 10

A It is up to you to believe what you want.

Q What did the Goodwin Construction Company pay you for procuring this mortgage? A They did not pay me anything.

Q Pay you nothing? A No.

You understand this is a proceeding Mr. Werbel where you are testifying under oath and if you falsify you are liable for perjury. 20

Q As a matter of fact you advanced \$59,792 on the mortgage plus \$658.67 for insurance premiums under the terms of the mortgage and you never received one cent on account of principal or interest on that mortgage? A No.

Q And you never received anything for loaning this money? 30

Objection by Mr. Heller.

I object on the ground that it is immaterial, irrelevant and not properly framed.

A No.

Q And you never received any money whatsoever for brokerage fees or bonus on that mortgage?

Objection by Mr. Heller. 40

Testimony before Receiver—Charles Cohen.

I object to that because I think these questions are unfair.

A No.

Q From no source whatsoever? A No.

10 Q What did Goodwin Construction Company pay you? A I just told you before, nothing.

That is all.

CHARLES COHEN, being duly sworn, testifies as follows:

By Mr. Heller.

20 Q Where do you live, Mr. Cohen? A 297 Hawthorne avenue, Newark.

Q What was your bank at the time the building was being constructed? A Weequahic Trust Company.

Q I show you these checks Exhibit W. 9 and ask you whether you received all of them? A I received all except the one in the sum of \$50.00 made payable to the Aidak Construction Company.

30 Q What officer are you of the Goodwin Construction Company? A President.

Q Edith Cohen is the secretary? A Yes.

Q The Aidak Construction Company who were they? A They had an agreement to do the labor on the job but the union would not let them go ahead. They would not sign a release unless we paid them.

Q Did they perform any work on the job? A The union would not let them get started.

40 Q Didn't they do any work there? A They were there two days getting ready to start.

Testimony before Receiver—Charles Cohen.

Q And you paid them \$250.00 for those two days? A Yes.

Q Whether they were entitled to it or not?

A We had to pay them for the release.

Q It has been testified that on September 2nd a check was drawn on the Weequahic Trust Company in the sum of \$300.00, do you remember that? A Yes, I remember that check. 10

Q What was that check for? A Well I met Mr. Werbel at the bank and he gave me that check for the payroll. When he was up at the job I told him I needed money for the payroll.

Q How often did Mr. Werbel visit the job? A Two or three times a week, sometimes he was there when I was not there.

Q What did you do with the money you received from Mr. Werbel? A Paid contractors and laborers, bought material. 20

Q Did you use any of this money for any other purpose other than paying for materials used on the Walnut street job? A For labor. All the money went into the job.

Q And the \$250.00 was given to the Aidak Construction Company to obtain a release? A Yes. They figures on the work and they gave us a very reasonable figure and I wanted them to get started but the union told them they could not work there so the Aidak Company had to quit and so I had to pay them \$250.00 in order to get a release from them. 30

Q How long did they work there? A They were only there a day and a half.

Q Was \$250.00 reasonable under the circumstances to get a release? A Yes.

Q But \$250.00 was not reasonable for the actual work done there? A No, not for the work they did. 40

Testimony before Receiver—Charles Cohen.

Q So \$250.00 was not reasonable for the work done? A I could get it done for less than \$250.00.

Q Did you give Mr. Werbel a note for the check dated September 2, 1925? A No, sir.

10 Q At what bank did you have an account with at that time? A Weequahic Trust Company.

Q And the Goodwin Construction Company had no other accounts at the time these payments were coming through? A I opened an account with \$200.00, I do not remember the name of the bank, I think it was the Citizens Trust Company.

Q Did you have an account with the Fidelity Union? A No.

20 Q Mr. Cohen, all the checks you received from Mr. Werbel you deposited in the Weequahic Trust Company or the Citizens Trust Company? A Not all of them. I cashed one check in the Clinton Trust Company on Clinton avenue, I remember a plumber identified me.

Q Did Mr. Werbel ever go with you to any of the banks? A I think he did go to the Washington Trust Company with me to cash a check.

Q What was the amount of that check? A I do not remember.

30 Q What took place between you? A Nothing, only a payment was due and he gave it to me, it was a certified check.

Q How much did you pay Werbel for this mortgage? A 6½%.

Q When did you pay him? A From the first payment.

40 Q There are two checks each in the sum of \$4,000.00, one drawn on the Weequahic Trust Company and the other on the Clinton Trust Company, can you tell which one you gave him?

Testimony before Receiver—Charles Cohen.

A It was one of them but I do not remember which one.

Q Did you go to the bank and have the check cashed and then turn the cash over to him? A Yes.

Q Well what was that for? A Well, everybody pays bonuses, this was a business affair, not a love affair.. 10

Q So that you paid Werbel 6½% of the \$60,000.00 for loaning that money? A Yes.

Q Who represented Mr. Werbel? A I met Mr. Werbel and I asked him for a mortgage and he said it would be 6½%. I gave him the facts and he had the mortgage drawn up by Cohen & Cohen's office.

Q How much was the counsel fee? A Everything was included in the 6½%. 20

Q There is no mistake in your mind that you paid 6½% in cash? A No, in fact all of the \$4,000.00 went for that, I think it was \$3,900.00 and the rest was for insurance.

Q And you turned over the \$4,000.00 to him? A Yes.

Q No mistake about that? A No.

By Mr. Heller.

Q Did you pay Saul & Joseph E. Cohen for legal fees? A No. 30

Q So this \$4,000.00 included Werbel's services and all charges? A Yes.

Q And you had to pay no lawyer's expenses? A No.

Q So that whatever services there were are included, counsel fee, search fee and feet for inspection of the building? A Yes.

Testimony before Receiver—Mr. Werbel.

MR. WERBEL, re-called.

By Mr. Keating.

10 Q Mr. Werbel you directed the office of Saul
& Joseph E. Cohen to take care of you and pro-
tect you in this mortgage loan, did you not? A
Yes.

Q How much did you pay them for their fees?

A I do not remember.

Q Well you can guess. A I do not remem-
ber.

Q Did you pay them by check or cash? A
By check naturally.

Q Have you got that check here? A No.

20 Q Can you get it? A I suppose I could get
it, I don't know.

That is all.

(Adjourned to May 11, 1927, at 11 A. M.)

30

40

Testimony before Receiver—Max Chopick.

FOURTH DAY.

Examination in the presence of Walter Sherwood, Receiver, on May 27th, 1927, at the office of attorney of Receiver, Joseph Steiner, 790 Broad street, Newark, N. J.

Appearances:

10

Francis M. Keating, Attorney of John R. Blair Co. Inc.

Joseph Steiner by Charles Silber, Attorney of Receiver.

Silver & Silver by David Silver, Attorney for Max Chopick.

I. Joseph Stein, Attorney for Montgomery Plumbing Supply Company.

Levy, Fenster & McCloskey, Attorneys for Levy Bros. 20

Max Krueger, Attorney for Henry R. Isenberg.

Jacob Silverman, Attorney for Hyman Sussman.

Marie A. Stewart sworn in.

MAX CHOPICK, being duly sworn, testified as follows:

30

By Mr. Silver.

Q Mr. Chopick, what business are you in? A Painting business.

Q And did you do any work for the Goodwin Construction Company? A Yes, sir.

Q Did you file a mechanic's lien? A Yes, sir.

Q When did you file it? A December, 1925.

Q Where was it filed, in the County Clerk's office? A Yes, sir. 40

Testimony before Receiver—Max Chopick.

Q And did you have a contract with the Goodwin Construction Co.? A Yes, sir.

Q And what is the balance due on your claim? A \$1,774.65.

Q Was the claim reduced to judgment? A Yes.

10 Q When was that? A On or about February 10th, 1926.

Q The total amount of judgment with court costs is how much? A \$1,833.45.

Q Is the Goodwin Construction Company entitled to any credits from you? A No.

By Mr. Silber.

Q Is that your work book that you have with you? A No, it was lost, this is a memorandum
20 book that I keep.

Q From your recollection, do you remember the original amount of the contract that you had with the Goodwin Construction Company? A \$3,300.00.

Q And did you receive any cash from the Goodwin Construction Company? A I received about \$1,400.00 in cash.

Q Did you do any extra work? A About \$300.00 worth.

30 Q And did you do all of the work you were supposed to do under your contract with the Goodwin Construction Company? A No, I could not finish it up because the buildings was closed up.

Q What type of work did you do? A Painting work.

40 Q In dollars and cents how much of the work didn't you complete because of the fact that the receiver was appointed? A I did not do the enameling and second coat on the wood work, the main hall was not finished and the fire escape.

Testimony before Receiver—

Q Anything else that you didn't finish that you were supposed to do? A No.

Q And you did all of the rest of the work? A All except the rooms in the cellar, I did not touch them at all. I did not have a chance to do them.

Q What would it cost to finish up the work that was not done? A The balance of the work that I did not do would cost me about \$800.00. 10

I. Joseph Stein, representing Montgomery Plumbing Supply Company.

I offer at this time certified copy of the lien claim filed by Louis Schrennel against Goodwin Construction Company.

By Mr. Silber.

Q Was judgment ever entered? A It was held up because of injunction issued. 20

Q Is the Montgomery Plumbing Supply Company the assignee of Louis Schrenell? A Yes.

By Mr. Stein.

I offer assignment of Louis Schrenell to the Montgomery Plumbing Supply Company assigning the claim just offered.

Levy, Fenster & McCloskey, representing Levy Brothers. 30

Offered in evidence certified copy of the lien claim and original agreement between Goodwin Construction Company and Levy Brothers.

By Mr. Silber.

Q Mr. Levy, of this \$5,600.00 amount set up in the original contract between the Goodwin Construction Company and yourself how much 40

Testimony before Receiver—

work did you do? A We did not deliver a few doors?

Q How much money do you think it would cost to complete the job? A \$351.00.

Q And the amount \$351.00 set up is a fair amount? A Yes.

10 Q And you did the balance of the work? A Yes.

Q Did you receive any money from the Goodwin Construction Co.? A Yes, \$1,200.00.

Q And the balance is (\$4,049.00)? A Yes.

Q Mr. Levy, how about the item involving medicine cabinets, you were supposed to furnish these were you not? A Yes, I think so.

Q How much do you think the furnishing of medicine cabinets is worth? A About \$6.00 apiece.

20 Q How many apartments are there? A I think about 26, I am not sure.

Q Then we are entitled to \$6.00 a cabinet for each apartment? A Yes.

Max Krueger, representing Henry R. Isenberg.

30 Offered certified copy of judgment entered on the lien claim. Judgment entered on the 12th day of November 1926 for (\$4,143.75). Receiver does not permit cross-examination as far as priority is concerned.

Jacob Silverman, attorney for Hyman Sussman.

40 I offer bond from Goodwin Construction Company to Hyman Sussman in the sum of (\$15,000.00) together with mortgage securing the same to Hyman Sussman, mortgage recorded in D. 54 of mortgages for Essex County on pages 15 and 17, together with the endorsements thereon. I further offer

Testimony before Receiver—Hyman Sussman.

in evidence assignment of mortgage from Hyman Sussman to Newark Holding Company with acknowledgment thereon which assignment is recorded in Book 171 of Assignments of Mortgages for Essex County on page 342.

Hyman Sussman sworn in.

10

By Mr. Silber.

Q How much is due you? A The whole amount, \$15,000.00.

Q Have you ever been paid any interest on it? A No.

Q What connection have you with the Newark Holding Company? A I am President.

Q And how much is due you on this mortgage? A \$15,000, with interest.

20

Q With interest from what date? A From the 2nd of January, 1925.

Q This mortgage from Goodwin Construction Company to you Mr. Sussman in the sum of (\$15,000.00), what consideration did you pay for this mortgage? A What consideration, cash.

Q \$15,000.00? A Yes, sir.

Q Did you give Goodwin your check for the \$15,000.00? A No, sir.

Q Was the \$15,000 paid at one time? A No, 30
I took the mortgage for \$10,000.00, gave it to the Goodwin Construction Company and paid a balance of \$5,000.00 in cash.

Q What did this \$10,000.00 mortgage cover? A It covered property in West Orange, on Eagle Rock avenue.

Q In other words you gave to the Goodwin Construction Company your mortgage on the Eagle Rock avenue property in the amount of (\$10,000.00) and cash in the sum of \$5,000.00, and

40

Testimony before Receiver—Hyman Sussman.

they in turn gave you this mortgage? A Yes, and the mortgage on Eagle Rock avenue was cancelled.

Q You and your son-in-law Charles Cohen, were both part owners? A No.

10 Q You owned the lot, did you not? A Yes.
Q And he built on it? A I sold him the lot, the \$10,000 mortgage was a purchase money mortgage.

Q Do you remember the date that you cancelled the Eagle Rock avenue mortgage? A I do not.

20 Q Do you remember how much time elapsed between the time you cancelled the Eagle Rock avenue mortgage and the placing of the mortgage on North Walnut street? A Some time, I can not remember.

Q If I told you that there was four months difference, how would you account for all of that time? A Perhaps it was about the time that you mention.

Q Isn't it true that you cancelled the Eagle Rock avenue mortgage a good while before you took over the mortgage on North Walnut street? A I do not know something which you ask me.

30 Q Well, had the Goodwin Construction Company bought North Walnut street before you cancelled the Eagle Rock avenue mortgage? A Yes.

Q How do you account for the fact that four months elapsed? A There was a reason for it. That lot was practically on a contract as sold and I expected every day to get the money for it.

40 Q Which lot? A That lot on North Walnut street. I waited until the sale was made and then I put the mortgage on record.

Testimony before Receiver—Hyman Sussman.

Q This \$5,000.00 difference in the amount between the cancelled Eagle Rock avenue mortgage and the mortgage on 14 North Walnut street, when did you give that money to Mr. Cohen? A I do not remember, the checks will show.

Q You testified previously that the checks offered in evidence were dated as early back as June 1924. Did you have an accounting with Mr. Cohen before you placed the North Walnut street mortgage? A Yes, sir. 10

Q When you put the mortgage on North Walnut street was there a plain lot or was work started on the apartment house? A There was a plain lot, but shortly after they started to build.

Q Do you remember how much money your son-in-law Charles Cohen owed you before you cancelled the Eagle Rock avenue mortgage? A He owed me above the amount of \$10,000.00. 20

Q Did he owe it personally? A No, the Goodwin Construction Company owed it to me.

Q For what? A For a lot that was sold them in Eagle Rock avenue.

Q How did the Goodwin Construction Company come to owe you \$5,000.00? A That was cash that I advanced to it.

Q In connection with what did you give the Goodwin Construction Company \$5,000.00 in cash? A In connection with the North Walnut street lot. 30

Q Toward the purchase price? A Yes.

Q How did you give them the \$5,000.00 extra, in cash or by checks? A Part in cash and part by check.

Q The checks were all made out to Charles Cohen individually? A No sir.

Q Do you remember the check offered by you in the amount of \$1,000 paid to the order of 40

Testimony before Receiver—Hyman Sussman.

Goodwin Construction Company June 26, 1924?

A I do not remember, if I see the check I will be able to say.

Q I show you check signed by Hyman Sussman, pay to the order of Goodwin Construction Company dated June 26, 1924 and ask you what
10 that is for? A That is part of the money that went to pay for the North Walnut street job, that is part of the \$5,000.00.

Q You say that the check offered by you and dated June 26, 1924, was part of the purchase price of the North Walnut street property six months later? A That was part of the pay roll for North Walnut street.

Q I show you check for \$578.87 dated June
20 10, 1924, signed by yourself to Charles Cohen individually and ask you whether that is part of the purchase price, or rather the purchase money that went into the North Walnut street job? A Yes.

Q This was made out to Charles Cohen was it not? A Yes but he endorsed it Goodwin Construction Company and I cashed it.

Q I show you check dated March 9, 1925 pay to the order of Charles Cohen for \$500.00 and ask you what that is for? A Part of the
30 \$5,000.00.

Q I show you check dated January 20, 1925, to the Goodwin Construction Company for \$850.00 and ask you what that is for? A That is the same, it applied to the same thing.

Q I show you check dated March 30, 1925, to the order of Charles Cohen for \$370 and ask you what that is for? A Same thing.

All checks taken by receiver and marked
D. 1 on the part of the Newark Holding Com-
40 pany.

Testimony before Receiver—Hyman Sussman.

By Mr. Silverman.

Q At the time you gave these checks what real estate was owned by the Goodwin Construction Company? A North Walnut street and also Eagle Rock avenue.

Q At the time you took this mortgage on North Walnut street, this \$15,000.00 mortgage, how much money did Mr. Cohen actually owe you at that time? A About \$12,000.00 or \$13,000.00. 10

Q At the time of recording the mortgage how much did he owe you? A A lot more than \$15,000.00.

Q When you advanced these various checks, I refer now to three checks made payable to Charles Cohen, one dated June 10, 1924 for \$578.87, March 19, 1925 for \$500.00 and March 30, 1925 for \$370.00, when you gave these checks, who was supposed to have use of this money? A Goodwin Construction Company. They were made out in error to Charles Cohen, but he endorsed them Goodwin Construction Company and I cashed them for him. 20

Q Who is Goodwin Construction Company? A Charles Cohen.

Q No the record shows that the title was acquired by Goodwin Construction Company to the North Walnut street parcel on the 22nd day of December, 1924, and two of these checks which have been offered in evidence by the receiver one dated June 10, 1924, and June 26, 1924, were given prior to the purchase of this property, do you know where that money was supposed to go? A If I am not mistaken he had to finish up the Eagle Rock avenue job, he needed money and I advanced it. 30

Q So that the money that you advanced went to the Goodwin Construction Company for the 40

Testimony before Receiver—Hyman Sussman.

purposes of the North Walnut street or Eagle Rock avenue houses? A Yes.

Q And at the time this mortgage went on record the total sum of \$15,000.00 was due to you? A A little over that.

10 Q And you say that you cancelled or assigned a purchase money mortgage on Eagle Rock avenue? A Yes, sir.

Q These checks total approximately \$3,300.00. How do you account for the balance of \$1,500.00 or so? A I gave Mr. Cohen money many times for the pay roll. In the meantime I moved my quarters and a lot of checks have been lost.

20 Q At the time he signed the mortgage, that is on January 2, 1925, he was indebted to you in the sum of \$15,000.00? A It owed me over \$15,000.00.

Q You expected to make advances to him? A I gave him advances. He got them in cash.

Q The property on Eagle Rock avenue, you sold both lots to the Goodwin Construction Company? A Yes.

Q How much did you sell them for? A I do not remember it now.

Q You do not remember the purchase price? A No, I can not recollect.

30 Q You took back a purchase money mortgage on both lots? A Yes, sir.

Q In the sum of \$10,000.00? A Yes.

Q Are there houses built on both of these lots? A I do not know. I have not been there for two years.

Q What do you estimate that lot is worth today? A I do not know, I have not been there for two years, I could not tell.

40 Q How much did you pay for it? A I did not buy it.

Testimony before Receiver—Harvey R. Springer.

Q How did you get it? A It was a present, it was willed to me.

Q How much did you pay for it? A I do not remember, what I paid for it does not matter.

Q Has the Newark Holding Company ever postponed its mortgage to any other mortgages now of record? A Not that I know of. 10

Q The Newark Holding Company's mortgage went on record after Werbel's mortgage did it not? A I do not know.

Mr. Keating: I demand to examine Mr. Sussman and the other officers of the Newark Holding Company on behalf of John R. Blair Co. Inc., so as to determine the priorities as to the mortgage and the lien claims.

20

Denied by Receiver.

Continued from May 27, 1927.

HARVEY R. SPRINGER, appearing as agent for Sterling Engineering Company, Messrs. Wall, Haight, Carey & Hartpence appearing for plaintiff.

30

By Mr. Silber.

Q Mr. Springer what is your connection with the Sterling Engineering Company? A Representative of the Sterling Engineering Co.

Q Did the Sterling Engineering Company supply any material on the job at 14 North Walnut street, East Orange? A Yes.

Q Did you place the order with the Goodwin Construction Company? A The order was placed by Mr. John Finnigan.

40

Testimony before Receiver—Harvey R. Springer.

Q Did John Finnigan contract directly with the Goodwin? A Yes.

Q The materials you furnished on the job at North Walnut street were furnished to the Goodwin for John Finnigan? A For John Finnigan.

10 Q Did Goodwin Construction Company guarantee your contract with John Finnigan? A They did.

Q What was the amount of that contract? A \$627.00 even.

Q Under the terms of your contract with John Finnigan what materials did you supply to the Goodwin Construction Company? A 108 No. 2 Radiator Traps; 48½-inch Radiator Valves; 60¾-inch Valves; 2 Vacu Air Vents; 1 Vacu
20 Float Vent; 1 No. 2 Return Trap.

Q And \$627.00 is a reasonable charge for all of that? A It is.

Q Have you received any moneys on account? A None whatever.

Q Did John Finnigan pay you any of that amount? A No.

Q Do you know whether he received any money from Goodwin Construction Company? A I do not know.

30 Q Did you ever demand the payment of this amount from him? A We tried to locate him but could not find him.

Q And he has never paid any part of it? A No.

Q Has Goodwin Construction Company any claim against you as a result of any of the materials furnished? A No, they have not.

40 Offered in evidence certified copy of the lien claim in this matter showing lien has

Testimony before Receiver—Louis D. Stratton.

been filed on the 7th day of January, 1926,
and summons issued on the same date.

LOUIS D. STRATTON, being duly sworn, testifies as follows: 10

By Mr. Silber.

Q How are you associated with Pierce, Butler & Pierce? A Credit manager.

Q On or about August 20, 1925, did you accept an order from Goodwin Construction Company? A Yes.

Q And under the terms of that order what were you to supply? A All the articles set forth in the lien claim. 20

Q And what was the contract price? A \$1,057.00.

Q Was all of that material delivered? A Yes, it was delivered on August 20th.

Q And the amount of \$1,057.00 is a reasonable amount for that? A Yes.

Q Have you received any moneys from Goodwin Construction Company on account? A Yes, we received one check for \$457.00, and the balance is \$600.00. 30

Q Has Goodwin Construction Company any counter-claims or set-offs as against that amount of \$600.00, that you know of? A No.

Q Was your contract directly with Goodwin Construction Company or with another contractor? A With Goodwin Construction Company direct.

Q Have you a written contract to that effect? A Yes, we have. 40

Testimony before Receiver—Mr. Cohen.

Q Do you have delivery slips signed for the delivery of all of the articles set forth in the lien claim? A We should have, I have not looked for them, I guess they are in our files.

10 Offered in evidence certified copy of the lien claim filed by Pierce, Butler & Pierce showing lien claim filed within time.

FIFTH DAY.

Appearances:

Walter Sherwood, Receiver in person.

20 Cohen & Cohen representing Charles Cohen.

Joseph Steiner, Attorney for Receiver.

By Mr. Steiner.

Q Mr. Cohen, you have heretofore been sworn in these proceedings have you not? A Yes.

Q And have heretofore testified? A Yes.

Q Mr. Cohen, did the Goodwin Construction Company have a bank account? A Yes.

30 Q In what bank did it bank? A In the Weequahic Trust Company.

Q Was it the practice of the Goodwin Construction Company to deposit its cash receipts in the bank? A No, sometimes the cash was used somewhere else.

Q What was your object in getting the checks cashed? A I needed the money for the pay roll so I cashed them because the bank would hold them up too long.

40 Q Do you remember how much money you received from Werbel? A I received all the

Testimony before Receiver—Mr. Cohen.

money minus bonus, and he paid some out to the mason contractor because the fellow threatened to hold up the job.

Q You had subcontracted your mason work?

A The mason work I intended to give out to a contractor but they backed out. Werbel wanted to get a release and they wanted \$1,000.00 so Werbel had some agreement with them and he gave them \$250 which was deducted. 10

Q Who did you pay in cash? A Some labor, some men, mostly the steam fitter.

Q How much was the steam fitter's contract?

A I do not know, I do not remember.

Q Who else did you pay in cash? A I gave some to the plumber, a little money for odds and ends on the job like delegates, etc.

Q You did not pay any supply houses in cash? 20

A No.

Q Everything else was paid by check? A I do not remember that exactly. I can not swear to that. Some would not take checks especially the delegates.

Q Now Mr. Cohen, this book which I hand you is the deposit book of the Goodwin Construction Company is it not? A Yes.

Marked Ex. Comp. 24.

30

Q Now when you deposited money in the bank you used the deposit book did you not? A No, sometimes I used slips.

Q Now if you deposited with slips, what happened to those slips? A I do not know, I think I have them, I gave them to Mr. Sherwood with all the papers.

Q Did you deposit money in the Weequahic Trust Company in June 1925? A I do not remember, I suppose I did. 40

Testimony before Receiver—Mr. Cohen.

Q Now you look in this deposit book and tell me if you made any deposits during June 1925?

A It does not seem so.

Q In July? A No.

Q In August? A No. There are none from May to September.

10 Q There are none from May to September?

A No.

Q Was there any money credited to the Goodwin Construction Co. at the time? A I think there was.

Q How much? A I do not know. I can not remember what happened three years ago.

20 Q Now I show you a check which has been marked Exhibit W. 9 L. for \$2,500 dated August 7, can you tell me whether that was deposited in the bank or not? A I do not know, maybe it was deposited.

Q I show you a check marked Exhibit W. 9 M. dated August 14th for \$3,000, can you tell me if that was deposited in the bank? A I do not know. That may be one of the checks that I cashed with Werbel that time.

30 Q I show you check marked Exhibit W. 9 N. dated August 20, 1925 for \$2000 and ask you whether it was deposited or not? A I think it was on a Friday or Saturday and I could not deposit so I had to have it cashed.

Q I show you Exhibit W. 9 P. which is a check for \$2,500 dated August 27, 1925, was that deposited or not? A That was a Saturday and I needed the money right away so I drew the cash. I did not have enough to pay the pay roll, the masons, steam fitters, etc.

40 Q Now when Werbel gave you cash, what happened to that cash? A I took the cash and paid off the men.

Testimony before Receiver—Mr. Cohen.

Q How big was the pay roll? A Well, it was a big pay roll.

Q What do you mean by big? A Oh about \$2,500 or \$3,000 according to the men working on the job.

Q How many men did you have on the job during August 1925? A I do not remember. 10

Q Did you have ten? A Ten, twenty or thirty, sometimes twenty besides masons and bricklayers.

Q Now Mr. Cohen on what day did you draw money for the pay roll? A Generally on Saturday, sometimes on Friday or during the week.

Q Now wasn't your plant to go to Cohen & Cohen's office or was it not? A No.

Q How did you and Werbel arrange matters? A When I needed money I would go to his house, call him up and ask him for some money, and he always would give me a little less. 20

Q Who kept this time book? A I kept it. Book marked Exhibit 25.

Q Referring to the time book, tell me how much money was due to the help for the first week in August, 1925? A I do not know what you mean.

Q What was the pay roll for the first week in August, 1925? A \$560 for plasterers, \$375 for carpenters and \$378 for plumbers. 30

Q For the week ending August 8, 1925? A Bricklayers \$412.15, laborers \$366.50, carpenters \$327.25 and steam fitters \$125.26.

Q For the third week in August? A \$715 for brick layers, \$356 for laborers, \$195 for carpenters and \$50 for 1 steam fitter.

Q For the 22nd of August? A \$876 for bricklayers, \$363.50 for laborers, \$356.04 for carpenters and for 1 steam fitter \$50. 40

Testimony before Receiver—Mr. Cohen.

Q For August 29th? A \$883 for plasterers, \$334 for laborers, \$365.50 for carpenters.

Q For Sept. 5th? A \$386 for brick layers, \$333.50 for laborers and \$483.35 for carpenters.

Q For Sept. 12th? A \$295 for bricklayers, \$180.20 for laborers and \$626.20 for carpenters.

10 Q For Sept. 17th? A \$402 for brick layers, \$758.60 for carpenters.

Q For Sept. 24th? A \$412.75 for laborers and brick layers, \$508.70 for carpenters and \$10.80 for one extra man.

20 Q When you planned the building of this apartment house what did you figure it would cost to build it, that is the total cost? A When I figured I had some figures from the Newark Construction Company, there is an agreement in Steinhart's office. He wanted \$115,000.00 for the labor only excluding the gas ranges, fixtures and ice boxes.

Q The Goodwin Construction Company did not give out the contract? A No.

Q You built it yourself, or rather Goodwin Construction Company built it itself? A Yes.

Q About how much did you figure this building would cost you to build? A About \$105,000 or \$110,000.

30 Q How much of that was figured as labor? A Well I do not remember exactly.

Q How much did you figure you had to spend for mason materials? A About \$18,000 or \$19,000 or maybe \$20,000. I do not remember.

Q How much did you figure for rough lumber? A From \$6,000 to \$7,000 for the rough lumber.

Q How much for the trim? A I forget what it cost.

40 Q I mean how much did you figure for it? A About \$5,000 or \$6,000.

Testimony before Receiver—Mr. Cohen.

Q How much for rough plumbing? A \$12,500.

Q Did that include all fixtures and labor on the plumbing? A Yes.

Q How much for the electrician? A \$2,500.

Q How much for paint? A About \$4,000 or \$4,500. 10

Q How about the parquet flooring? A \$3,500.

Q What about marble? A \$6,500 or \$7,000.

Q Any iron work? A Yes.

Q How much was it? A About \$5,000.

Q What else was there? A Roofing.

Q How much was that? A \$500 or \$600.

Q What about stairs? A \$1,000.

Q Tile work? A No. 20

Q Anything else? A Digging and excavating about \$1,500.

Q What about grading? A About \$500 or \$600.

Q What else? A Electric light fixtures \$1,000.

Q Ranges? A The ranges were about \$25 apiece, the ranges were about \$1,250.

Q How about the ice boxes? A About \$500.

Q How much did the labor cost? A About \$23,000 or \$24,000. 30

Q Bricklaying and plastering? A \$3,000.

Q Anything else? A Carpenter labor, \$7,500.

Q What else? A Steam fitting labor, \$7,000.

Q Any hardware? A Yes, weights and nails etc. about \$1,000.

Q What else? A Dumbwaiter \$240.

Q What about sheet metal work? A \$500 or \$600. 40

Testimony before Receiver—Mr. Cohen.

Q And you figured \$105,000 it would cost to build this house? A Yes, that's right, not counting any financing.

By Irving Cohen.

10 Q When you had a contract for \$115,000 why did you not give it out? A They backed out, they wanted some money in advance.

Q What else? A They claimed they could not make any profit on the job.

Q Did you figure \$105,000 before you started the job? A Yes.

Q As you were progressing with the work did you still think that \$105,000 would be enough? A No.

20 Q How much did you think it would cost? That is additional? A About \$5,000 or \$10,000 extra.

By Mr. Steiner.

Q Now Mr. Cohen your time book shows the amount that you really spent for labor, does it not? A I do not know exactly.

Q Then about how much do you think? A I do not know. The steam fitter is not there.

30 Q How much was the steam fitting, that is actually paid? A I don't remember.

Q Would \$5,000 cover? A I think so.

Q So that if you add what you have in the time book and the \$5,000 for the steam fitting, that it ought to give you the actual amount that went into the building for labor? A I don't know exactly, I can't remember that.

Q Well, not exactly, but in round figures? A Yes, about.

40

*Testimony before Receiver—Mr. Cohen.**By Irving Cohen.*

Q When you started work (referring to Exhibit C. 25) did you know? A I don't remember.

Q As a matter of fact do the amounts in this book represent that amount spent for labor? A I do not know. 10

Q Anywheres near it? A Yes.

Q Approximately how near? A It may vary a couple of thousand dollars, maybe \$2,000 or \$2,500.

By Mr. Steiner.

Q Now when you got your payments on the mortgage, suppose you tell me how you got a payment, how did you work it out? A First we made an agreement of payments and then when the payments came along sometimes I would be ahead and naturally he would not give me any more until I needed it. 20

Q Now referring to Exhibit C. 25 which is your time book, can you tell us how the payments were to be made on the mortgage? A Here they are. The first payment was \$8,000.

Q When were you to get that? A When the first tier of beams were laid. 30

Q How much did you get? A \$4,000.

Q What happened to the other \$4,000? A It went for bonus.

Q What was the second payment for? A \$4,000.

Q When were you to get that? A When second tier of beams were laid.

Q What did you do with that money? A Paid labor and materials. 40

Testimony before Receiver—Mr. Cohen.

Q What material did you pay for? A I do not remember. I did not use it myself, it went into the building.

Q These checks that are drawn from the Goodwin Construction Company to the Goodwin Construction Company and cashed at the Weequahic Trust Company, what were they for? A Pay roll and expensess on the job, for little things that you have to pay cash for.

Q Now how did you pay your laborers as shown in your time book, Exhibit C. 25 which is the book that you are now holding in your right hand, did you pay them by cash or check? A The laborers, I paid them by cash.

Q Now if you paid them by cash who got all of the proceeds of these checks all marked Goodwin Construction Co.? A I gave it to the carpenters, etc. I cashed the checks myself.

Q Look at the back of these checks and tell me what they were used for? A They were for pay roll I suppose. This one is for steam fitters' parts. The rest are all labor.

Q So that the only check that you find out of that whole group aside from the pay roll is the one for the steam fitters? A Yes.

Q That is labor isn't it? A Yes.

Q You drew these checks that I have just showed you for labor? A Yes.

Q Now in addition to that was there any money from the checks that Werbel gave you that you cashed that you used for labor? A Some of it, yes.

Q How much? A I don't remember.

Q How much money did you use to pay supply houses? A I do not remember.

Q How much should the labor have cost on that house in round figures up to the time you quit the job? A I told you that already, every-

Testimony before Receiver—Mr. Cohen.

thing was done except cleaning which would cost a couple of hundred dollars.

Q Your time book shows, Mr. Cohen, that the amount due for labor is \$27,339.00 and the total of the checks is \$26,710.00 so that you paid 95% of your labor by checks, didn't you? A Well I suppose so.

10

Q Now of the checks that you got from Werbel do you know how much of the money went in the bank and how much you cashed? A I could not tell. You can tell by the deposit slips.

Q What became of those slips? A To the best of my knowledge I gave them to Mr. Sherwood, or else I lost them.

Q You got \$59,000 from Werbel? A What do you mean, cash and checks?

Q No, I mean checks. A Without bonus about \$56,000.

20

Q Well, you got at least \$55,000 from Werbel didn't you? That is, in checks? A Yes.

Q Do you know how many you cashed at the bank? A Maybe one check I cashed at the Washington Trust Company.

Q How many at the Weequahic Trust Company? A I do not remember.

Q What did you do with the cash that came from Werbel's checks? A Spent it on the pay rolls. I did not spend it on myself.

30

Q How much did you spend on pay rolls? A I do not remember.

Q The labor on that apartment house was about \$28,000, wasn't it? A I do not know.

Q You got checks for \$27,339.00 for labor, didn't you? A Yes.

Q How could you use cash that you got from Werbel when you got checks for the labor? A I did not get so much cash.

40

Testimony before Receiver—Mr. Cohen.

Q How much cash did you get? A I don't remember.

Q Did you get many checks from outside banks? A No.

Q Have you any idea? A No, I think it was not many, I think maybe once or twice.

10 Q You have examined the claims against you, haven't you? A Yes.

Q You know how much they are claiming? A Approximately, yes.

Q What are you doing for a living, Mr. Cohen? A Maybe you have something for me to do?

Q Now, Mr. Cohen, there appears on the records a mortgage given by Goodwin Construction Company to Newark Holding Company. Who is the Newark Holding Company? A My father-in-law.

20 Q In other words tell us the name of the principal stockholders. A I do not know. Maybe you have a suspicion that it is a fake mortgage.

Q We do not think that at all, Mr. Cohen. Mr. Sherwood, the receiver, wants to know, and he has the right.

Q Now who are the principal stockholders? A My father-in-law and his wife.

30 Q What is their names? A Hyman Sussman and Bessie Sussman.

Q Now how did you come to give this mortgage to the Newark Holding Company? A I owed by father-in-law \$10,000 in the form of a mortgage.

Q What property was that mortgage on? A I had a building proposition, I wanted to build some buildings.

Q Did you build? A Yes.

40 Q Are the buildings up? A One of them is up.

Testimony before Receiver—Mr. Cohen.

Q When you say you, you mean the Goodwin Construction Company? A Yes.

Q What did you do with the borrowed money?
A I bought a lot from my father-in-law, from the Newark Holding Company.

Q Who represented the Newark Holding Company? A Joseph Steinhart. 10

Q Who represented the Goodwin Construction Company? A Joseph Steinhart.

Q Now did the Newark Holding Company have title to the lot when you bought it? A I bought it from Hyman Sussman.

Q Now, Hyman Sussman and his wife gave a deed for Eagle Rock avenue to Goodwin Construction Company and then Goodwin Construction Company gave a mortgage to Newark Holding Company? A Yes. 20

Q How much was that mortgage? A \$10,000.

Q Now how much did Goodwin Construction Company pay for that ground? A About \$13,000.

Q Was the other \$3,000 paid in cash? A Yes, it was paid in cash.

Q Now when did all this happen? A It happened a long time ago in 1924 or 1925.

Q Now when did you cancel that mortgage on Eagle Rock avenue? A I sold the building. 30

Q To whom did you sell it? A To Eagle & Clark.

Q Does the Goodwin Construction Company own the lot next door? A Yes.

Q Was this mortgage on the lot and the building or was it separated \$5,000 on the building and \$5,000 on the lot? A I don't know.

Q Was it a mortgage with a release clause or was it a blanket mortgage? A I don't know. 40

Testimony before Receiver—Mr. Cohen.

Q Well then, at the time you sold that building to Eagle & Clark how much ground did they get? A About 58 feet.

Q How long had Goodwin Construction Company owned North Walnut street when you sold one-half of Eagle Rock avenue to Eagle & Clark?
10 A I do not know. It was an exchange. Eagle Rock avenue was exchanged for North Walnut street.

Q Then Goodwin Construction Company got title from Eagle & Clark? A Yes.

Q Then the deal was this: Goodwin Construction Company gave one-half of its holdings on Eagle Rock avenue to Eagle & Clark and Eagle & Clark gave North Walnut street to Goodwin Construction Company? A Yes.

20 Q Was there any cash in this transaction?
A Some, yes.

Q Well who gave the cash? A I think Eagle & Clark.

Q How much did they give? A \$5,000 and a note which I cashed.

Q Had you started the building on North Walnut street? A No.

Q At that time Goodwin Construction Company owed Hyman Sussman or the Newark Holding Company \$10,000, didn't it, that is at
30 the time that you made this exchange? A Yes.

Q Did you convey to Eagle & Clark free and clear of the mortgage? A Yes.

Q Was it a second mortgage? A It was a purchase money mortgage. My father-in-law gave me the money to build a small building. He could not pay this mortgage off so he subordinated his mortgage to the building and loan. Then when we got it the building was not so fancy,
40 in fact the stores were empty so I made a deal

Testimony before Receiver—Mr. Cohen.

on North Walnut street. I had not intended to build at all if possible. I had to borrow on it and my father-in-law had to subordinate his mortgage to the building and loan.

Q You mean he subordinated his \$10,000 mortgage to a first mortgage of the building and loan?

A Yes.

10

Q Was there a \$5,000 mortgage on the improved piece and \$5,000 on the unimproved? A My impression is that my father-in-law subordinated \$5,000 on the improved piece to the first mortgage and kept the other \$5,000 as a first mortgage on the unimproved piece.

Q At the time of the exchange of the improved piece on Eagle Rock avenue for North Walnut street, you got your father-in-law to cancel this \$5,000 mortgage on Eagle Rock avenue so that you could convey free and clear? A He had to cancel his \$5,000 mortgage on Eagle Rock avenue in order to consummate a deal.

20

Q So that when the exchange was made he had no security for his \$5,000? A He still had his \$5,000 mortgage. When I built Eagle Rock avenue I had no money, so he gave me about \$5,000 until I could get a building and loan and by the time I was finished I owed him \$15,000 instead of \$5,000.

30

Q You said he loaned you \$5,000? A \$5,000 on the mortgage. He loaned me money besides.

Q Whose idea was it, Mr. Cohen, that the mortgage which Goodwin Construction Company gave to Hyman Sussman on North Walnut street should be drawn for \$15,000? A It was my father-in-law's idea.

Q Where did he hock the \$5,000 mortgage, on the unimproved to get you money? A In New York.

40

Testimony before Receiver—Mr. Cohen.

Q Do you know about what date the Goodwin Construction Company signed this mortgage to Hyman Sussman on North Walnut street? A No.

Q Do you know why that mortgage was kept off the records? A To my knowledge because
10 my father-in-law did not want me to build, he wanted the money, so he did not have it on record. He wanted to swop it in for something, but I wanted to build.

Q What kind of a building did you build on Eagle Rock avenue? A Six flats and three stores.

Q How much did it cost to build? A About \$48,000.

Q How much building and loan mortgage was there? A \$25,000.
20

Q Was there any second mortgage on that building? A There was a second mortgage. My father-in-law loaned me \$5,000 and the other mortgage that he hocked for \$5,000.

Q Where did you get the rest of the money? A From the money I got when I sold it.

Q How much cash did you get? A \$5,000.

Q Where did you get the rest of the money? A I had a little money in it myself.

Q Does the Goodwin Construction Company still own the lot on Eagle Rock avenue? A Yes.
30

Q In your opinion what is it worth? A I do not know.

Q Well what would you take for it? A About \$12,000 at least.

Q Are there any mortgages still on the unimproved lot on Eagle Rock avenue owned by Goodwin Construction Company? A Yes, to my knowledge there is a \$5,000 mortgage.

Q Who holds that mortgage? A A party in
40 New York.

Testimony before Receiver—Mr. Cohen.

Q What is his name? A Sarnoff. He is related to Mr. Sussman. He is in the family.

Q What is the relationship? A He is a cousin of mine.

Q By marriage? A No, he is a cousin of mine.

Q So your father-in-law raised \$5,000 on the mortgage to help you build Eagle Rock avenue? 10

A Yes.

Q Now you paid your father-in-law all you owed him by giving the \$15,000 mortgage on North Walnut street? A Yes.

Q Is there any reason why your father-in-law should not give back \$5,000 of that money to Sarnoff and get the mortgage cancelled? A Why should he give it back?

Q Because it was originally \$10,000. 20

Examination adjourned.

30

40

Exhibits before Receiver.

EXHIBITS BEFORE RECEIVER.

10 The mortgage of the Newark Holding Company, appellant, was dated January 2, 1925, made to Hyman Sussman to secure the payment of a bond in the penal sum of \$30,000. conditioned for the payment of \$15,000. on the 2nd day of July, 1925, with interest from date at the rate of 6%, payable semi-annually. The mortgage covers the premises sold by the order of the Court free of liens and contains the following provisions:

“This is a purchase money mortgage being given to secure part of the purchase price of the above mentioned premises. * * * This mortgage is rerecorded for the correction of the omission of the due date thereof.”

*The mortgage covers
14 Walnut St.,
East Orange.*

20 The mortgage is signed by the Goodwin Construction Company, Charles Cohen, President, and is attested by Irving Cohen, Assistant Secretary, and has the seal of the company. It was first recorded on the 1st day of April, 1925, at 1:55 o'clock in the afternoon, and recorded in book D-54 of mortgages for Essex County, page 15-17. It was re-recorded on the 29th day of April, 1925, at 11:01 o'clock in the forenoon, in liber C-54, page 332-334.

30 The bond is an ordinary bond in the penal sum of \$15,000.00.

The mortgage was assigned by written assignment on March 28, 1925, to Newark Holding Company, and the assignment was recorded in the office of the Register of Essex County on the 29th day of April, 1925, at eleven o'clock in the forenoon in book 171 of assignments of mortgages for said county on page 342.

40

Exhibits before Receiver.

Above documents offered in evidence just before the testimony of Hyman Sussman before the Receiver.

The mortgage was signed in the following manner:

“IN WITNESS WHEREOF, the said party of the first part hath caused its common seal to be hereunto affixed and attested by the signatures of its proper officers thereunto duly authorized the day and year first above written. 10

GOODWIN CONSTRUCTION CO.

Attest: CHARLES COHEN
IRVING COHEN Pres.”
Asst. Secy.

SEAL OF GOODWIN CONSTRUCTION Co.

20

The following is a copy of the acknowledgments appearing on the mortgage:

STATE OF NEW JERSEY } ss.:
COUNTY OF ESSEX

Be it remembered, That on this 29th day of April, in the year of our Lord, One Thousand Nine Hundred and Twenty-five, before me the subscriber, a Master in Chancery of New Jersey, personally appeared Irving W. Cohen, who being by me duly sworn on his oath, says that he is the Assistant Secretary of the Goodwin Construction Company, the mortgagor named in the within mortgage; that Charles Cohen is the President of said corporation that deponent well knows the corporate seal of the said corporation; and the seal affixed to said mortgage is such corporate seal and was thereto affixed, and said mortgage signed and delivered by said President, as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in presence of 30 40

Exhibits before Receiver.

deponent, who thereupon subscribed his name thereto as witness.

JOSEPH H. STEINHARDT.
A Master in Chancery of N. J.

10 “STATE OF NEW JERSEY }
 COUNTY OF ESSEX } ss.:

 BE IT REMEMBERED, That on this 2nd day
of January, in the year of our Lord One
Thousand Nine Hundred and Twenty-five,
before me the subscriber, a MASTER IN CHAN-
CERY OF N. J., personally appeared IRVING
W. COHEN, who being by me duly sworn
on his oath, says that he is the Secretary
of the Goodwin Construction Company, the
mortgagor named in the within mortgage;
20 that Charles Cohen is the President of said
corporation; that deponent well knows the
corporate seal of said corporation; and the
seal affixed to said mortgage is such cor-
porate seal and was thereto affixed, and said
mortgage signed and delivered by said Presi-
dent, as and for his voluntary act and deed
and as and for the voluntary act and deed of
said corporation, in presence of deponent,
who thereupon subscribed his name thereto
as witness.

 JOSEPH H. STEINHARDT.
30 A Master in Chancery of N. J.

Exhibit A-1 is a check drawn by Hyman Suss-
man to the order of Charles Cohen for \$578.87,
dated June 10, 1924, endorsed Charles Cohen,
Goodwin Construction Co.; cashed.

Exhibit A-2 is a check drawn by Hyman Suss-
man to the order of Goodwin Construction Co.
for \$1,000., dated June 26, 1924 and endorsed
Goodwin Construction Co., Charles Cohen, Presi-
dent; paid.

40

Exhibits before Receiver.

Exhibit A-3 is a check drawn by Hyman Sussman to the order of Goodwin Construction Co. for \$850., dated January 20, 1925, endorsed Goodwin Construction Co., Charles Cohen, President. This exhibit is also marked Exhibit D on behalf of Newark Holding Co.

Exhibit A-4 is a check drawn by Hyman Sussman to the order of Charles Cohen for \$500.00, dated March 19, 1925, endorsed Charles Cohen, Goodwin Construction Co., Charles Cohen, President; paid.

10

Exhibit A-5 is a check drawn by Hyman Sussman to the order of Charles Cohen for \$350., dated March 30, 1925, endorsed for deposit Charles Cohen, Goodwin Construction Co., Charles Cohen, President; paid.

20

Exhibit C-1 is a portion of the book of account of the Goodwin Construction Co., showing the account and is transcribed in full in the testimony of the witness William F. Marshall before the Receiver, page 21.

Exhibits C-2 to C-4 are delivery tickets showing deliveries by John R. Blair Co. Inc. to Goodwin Construction Co., the details of which are set forth in the testimony of the witnesses John Harrington and Henry J. Koebe before the Receiver.

30

Exhibit C-5 is the lien claim of John R. Blair Co. Inc., filed with the Essex County Clerk November 20, 1925, with the County Clerk's endorsement thereon "suit commenced December 23, 1925". There was offered in connection therewith an order of the Essex County Circuit Court dated December 17, 1926, made by the Circuit Judge extending time to prosecute. The lien claim alleges that the materials were fur-

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Exhibits before Receiver.

nished between the 5th day of Sept 1925 and the 21st day of Sept. 1925.

10 Exhibit R-1 is an estimate made by the K. D. Flooring Co., Minnie Kiser, President, by the terms of which K. D. Flooring Co. agree to furnish parquet flooring and labor and services at the price of \$602.83 which estimate was accepted by the Goodwin Construction Co.

Exhibits W-1 and W-2 are the bond and mortgage dated April 22, 1925, recorded April 27, 1925, made by the Goodwin Construction Co. to Sam Werbel and recorded in Book M-54 of Mortgages on page 181, given to secure the payment of the sum of \$60,000. The bond and mortgage are sufficiently described in the testimony of Sam Werbel given before the Receiver.

20 Exhibits W-3 to W-8 inclusive are insurance policies sworn to have been obtained by Sam Werbel, mortgagee upon the property covered by the mortgage given to him by the Goodwin Construction Co., and are sufficiently described in the testimony of Sam Werbel before the Receiver.

30 Exhibit W-9 is a group of twenty-seven checks drawn by Sam Werbel to the Goodwin Construction Co. and endorsed by that company and paid and totalling \$59,792.00, all bearing above the endorsement of the Goodwin Construction Co. the words "This is on account of mortgage for building being erected on Walnut Street, East Orange, N. J.", or words to similar effect, with one exception, a check for \$50.00 drawn to the order of the Aidak Construction Co. The checks are sufficiently described in the testimony of Sam Werbel given before the Receiver.

40 Exhibit D-1 offered on behalf of the Newark Holding Co. during the examination of Hyman

Exhibits before Receiver.

Sussman before the Receiver are the same checks as Exhibits A-1 to A-5 inclusive.

Exhibit Comp-24, offered during the testimony of Charles Cohen, is the deposit book of the Goodwin Construction Co. showing deposits in the Weequahic Trust Company in Newark from 10

May 10, 1924 to September 26, 1925, as follows:

May	10, 1924	510.13	
"	28	40.00	
June	10	150.00	
"	11	578.87	
Aug.	7	5,000.00	
June	26 Ledger	1,933.00	
	28 "	1,000.00	
July	14 "	250.00	
	18 "	50.00	
	21 "	25.00	
	26 "	398.67	20
Aug.	3 "	100.00	
	Total Credits	10,035.67	
Aug.	7, 1924		
	Total Debits	4,995.05	
	Balance	5,040.62	
	9/18	6,200.00	
Aug.	15	4,000.00	
"	Int.	4.27	
Sept.	3	25.00	
	Total Credits	15,269.89	
	Total Debits	9,013.86	30
Sept.	18, 1924		
	Balance	6,166.03	
	1/ 3/25	2,066.00	
	9/27 Int.	2.47	
	10/27	2,750.00	
	10/22	122.13	
	10/29 Int.	1.32	
	10/28	5.00	
	11/ 5	80.00	
	11/12	152.50	
	11/21	1,000.00	
	11/25	53.31	40
	12/ 3	40.00	

Exhibits before Receiver.

	12/ 5	.....	65.00
	12/13	.....	12.67
	12/31	.....	2,500.00
	Total Credits	.....	14,950.43
	Jan. 3, 1925		
	Total Debits	.....	10,881.81
	Balance	.....	4,068.62
10	7	.....	120.00
	20	.....	905.00
	Total Credits	.....	5,093.62
	Total Debits	.....	5,074.15
	Balance		
	1/31/25	.....	19.47
	Feb. 10 Ledger	.....	4,775.00
	10 "	.....	500.00
	Mar. 19	.....	500.00
	31	.....	370.00
	Apr. 4	.....	500.00
	7	.....	370.00
20	14	.....	300.00
	15	.....	500.00
	25	.....	500.00
	May 2	.....	500.00
	13	.....	1,000.00
	16	.....	40.00
	16	.....	200.00
	29	.....	4,000.00
	7/13	.....	4,000.00
	18	.....	2,000.00
	Sept. 26	.....	2,000.00

30 Exhibit Comp.-25 is the time book of the Goodwin Construction Co. and so far as material is set out in the testimony.

Exhibit D-1 offered in the testimony of Charles Cohen before the Receiver is as follows:

40 "Newark, N. J., March 14, 1925
We hereby agree to do all the digging required at #14 North Walnut St., East Orange, N. J. for the Goodwin Construction Co. according plans drawn by Mr. Ed. Warren architect for the sum of \$1.00 per cubic yard.

Exhibits before Receiver.

One half of the total sum due cash when completed and the other half by a 3 month note.
J. Lo Conte."

Exhibit D-2 is a judgment of voluntary non-suit in the suit on mechanics' lien of Lincoln Materials Company *v.* Goodwin Construction Company, as owner and Pride of Newark B. & L. Assn.; Newark Holding Co.; Samuel Werbel and Eleventh Ward B. & L. Assn. as Mortgagees and included the present claim of Lincoln Materials Company; *lien claim filed Oct 15-1925.* 10

Exhibit D-3 is a judgment entered in the suit of Passaic Bergen Lumber Company *v.* Goodwin Construction Company and Eleventh Ward Building & Loan Association which suit was based on mechanics' lien of the Passaic Bergen Lumber Company filed January 4, 1926 for the sum of \$4,808.95 and which mechanics' lien covered the present claim of the Passaic Bergen Lumber Company. The judgment reads as follows: 20

30

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Exhibits before Receiver.

“ESSEX COUNTY CIRCUIT COURT

PASSAIC BERGEN LUMBER,
Co., a corporation, Claim-
ant,

Plaintiff,

10

vs.

GOODWIN CONSTRUCTION
Co., a corporation,
Builder and Owner, and
PRIDE OF NEWARK BUILD-
ING AND LOAN ASSOCIA-
TION, a corporation, HY-
MAN SUSSMAN, NEWARK
HOLDING Co., a corpora-
tion, SAMUEL WERBEL,
Harrington Company, a
corporation, and
ELEVENTH WARD BUILD-
ING AND LOAN ASSOCIATION
OF NEWARK, N. J., a cor-
poration, Mortgagees,

20

Defendants.

*Action
at Law.*

On Default.

Judgment Entered

January 17, 1927

Damages\$5,169.68

Costs 78.13

30

Total\$5,247.81

John L. Hughes, Atty of Pltf.

Judgment on Default in the above entitled
Action on Mechanics Lien was rendered on
the Seventeenth day of January A. D. Nine-
teen Hundred and Twenty Seven in favor of
the Plaintiff Passaic Bergen Lumber Co. a
corporation, claimant and generally against
the defendant Goodwin Construction Co. a
corporation Owners and Builders for the

40

Exhibits before Receiver.

sum of Five Thousand One Hundred Sixty Nine Dollars and Sixty Eight Cents (\$5,169.68) damages and Seventy Eight Dollars and thirteen cents Costs of Suit to be specially made of the land and building in the complaint described; and it is further Ordered that judgment be also entered that the Mortgage of the defendant Eleventh Ward Building and Loan Association of Newark, N. J. in the complaint mentioned is subject to the plaintiffs Lien Claim. Judgment entered and signed, January 17, 1929. 10

WILLIAM S. GUMMERE,
Judge

Book 102, page 191." 20

Exhibit D-4 is a judgment entered in the suit of Henry R. Isenberg Co. upon a mechanics' lien filed Feb 20/26 which said judgment was entered against the Goodwin Construction Company and which said judgment did not provide for any priority of claimant over said Hyman Sussman or the Newark Holding Company, and which mechanics' lien and suit covered the present claim of Henry R. Eisenberg Co. 30

Exhibits before Receiver.

The judgment reads as follows:

“ESSEX COUNTY CIRCUIT COURT

10	HENRY R. ISENBERG Co., Inc., a corporation of New Jersey,	}	Plaintiff, <i>vs.</i> GOODWIN CONSTRUCTION Co., a corporation of N. J., Owner and Builder and NEWARK HOLDING Co., a corp. of N. J., SAMUEL WERBEL, 11th Ward B. & L. Ass'n., a corp. of N. J.	Action at Law. On Default.
20			Defendants.	

Judgment entered	
November 12, 1926	
Damage	\$4143.75
Costs	87.10
	\$4230.85
Total	

Max Krueger, Pltf. Atty.

30 Judgment On Default in the above entitled action was rendered on the Twelfth day of November, A. D. Nineteen Hundred and Twenty Six in favor of the Plaintiff Henry R. Isenberg Co. Inc. a corporation of New Jersey and against the defendant Goodwin Construction Co. a corporation of N. J. Owner and Builder for the sum of Forty One Hundred Forty Three Dollars and Seventy Five Cents (\$4143.75) damage and Eighty Seven Dollars and Ten Cents, costs of suit.

Judgment entered and signed Nov. 12, 1926.

40 WILLIAM S. GUMMERE
 Judge

Book 101 Circuit Court Judgments, Page 588.”

Addendum to State of Case.

No evidence was offered before the receiver with respect to the following lien claims, but the claims were filed with the receiver and disclose the following facts:

Sterling Engineering Company; filed January 7, 1926; materials furnished on September 8, 1925; suit commenced January 7, 1926; Newark Holding Co. was a party to the suit and filed answer. 10

Levy Bros.; filed December 3, 1925; work done and materials furnished between the 7th day of May, 1925, and October 3, 1925; suit commenced December 28, 1925; Newark Holding Co. made a party.

Nathan Cohen; lien claim filed November 18, 1925; labor and materials furnished between the 12th day of August, 1925, and October 10, 1925; suit commenced February 26, 1926, in Irvington District Court; Newark Holding Co., mortgagee, was a party both to the lien claim and in the District Court suit. 20

Isaac Ginsburg; lien claim filed March 12, 1926; labor and materials furnished between the 22nd day of June, 1925, and November 16, 1925; suit commenced March 12, 1926; Newark Holding Co., mortgagee, was a party both to the lien claim and to the suit.

The proceedings on the lien claim of the Consolidated Expanding Metal Co. were offered as Ex. D. 6, p. 159, and discloses the following facts: 30

Consolidated Expanding Metal Co.; two lien claims; one filed October 31, 1925, the other November 2, 1925; materials furnished on July 2, 1925; suit commenced November 2, 1925; lien claim did not mention Newark Holding Company as a party, but Newark Holding Co. was party to the suit and filed an answer.

Memorandum to State of Ohio

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Exhibits before Receiver.

Exhibit D-5 is the judgment entered in the suit of Max Chopik upon a mechanics' lien filed Dec. 11, 1925 judgment being entered against the Goodwin Construction Company, and to which suit neither Hyman Sussman nor Newark Holding Company was a party. The mechanics' lien covered the present claim of Max Chopik.

10

Exhibit D-7 is the original lien claim of Mayer-Bez Stone Company *v.* Goodwin Construction Company, setting out the delivery of Limestone for coping and window sills between the 13th day of May 1925 and the 5th day of October 1925 and claiming the sum of \$400. The lien claim was filed on the 6th day of November, 1925, and was not endorsed, *and no suit was brought.*

Exhibit D-8 is an original lien claim filed by Pierce, Butler & Pierce *v.* the Goodwin Construction Company and Newark Holding Co., Samuel Werbel; Eleventh Ward B. & L. Assn., and Pride of Newark B. & L. Assn., on the 21st day of December, 1925. Said lien claim is endorsed "Summons Issued, Dec. 21, 1925." Further proceedings upon said lien claim were as follows:

20

Affidavit of Merits filed Dec. 24, 1925, for Goodwin Construction Co.

Affidavit of Merits filed Dec. 24/25 for Newark Holding Co.

30

Affidavit of Merits filed Jan. 5, 1925 for Samuel Werbel.

Answer filed Jan. 5, 1925 for Samuel Werbel.

Answer filed Jan. 9, 1925 for Newark Holding Co.

Answer filed Jan. 9, 1925, for Goodwin Construction Co.

40

alleging last work done Aug 20-1925.

RECEIVER'S REPORT AND ACCOUNT.

Filed March 24, 1928.

IN CHANCERY OF NEW JERSEY.

10

*Between*LINCOLN MATERIALS Co., INC.,
*Complainant,**vs.*GOODWIN CONSTRUCTION COM-
PANY,*Defendant.**Receiver's
Report and
Account.*

20

To: His Honor, Edwin Robert Walker, Chan-
cellor of the State of New Jersey.The petition and report of Walter Sherwood
respectfully shows unto your Honor and alleges:

30

1. That he is the receiver of the above named
defendant corporation duly appointed and act-
ing as such, having furnished his bond pursu-
ant to the order of his appointment and having
taken his oath pursuant to the Statutes of the
State of New Jersey in such case made and
provided.2. That Joseph Steiner is his attorney duly
appointed by an order of this Court and acting
as such.3. That your petitioner did, after his ap-
pointment take possession of all of the assets of
the defendant corporation which assets are more
particularly set forth in Schdule "A" hereunto
annexed and made a part hereof.

40

Receiver's Report and Account.

4. That your petitioner acting under and pursuant to an order of this Court, did make sale of part of the assets of the defendant corporation, consisting of an unfinished twenty-four (24) family apartment house known and designated as #14 North Walnut Street, East Orange, New Jersey, which property is more particularly described in Schedule "A" hereunto annexed. That under the terms of the contract of said sale, petitioner completed the erection of said house and conveyed said completed house to one, John A. McKenna, the purchaser in said contract, and received the sum of (\$128,500) from him. In addition to said purchase price your petitioner has had other incomes as receiver all of which in income items are more particularly set forth in Schedule "B" hereunto annexed and marked Schedule "B." 10
20

5. That your petitioner, acting in his capacity as Receiver of the defendant corporation, did incur various and divers expenditures and disbursements which items are more particularly set forth in Schedule "C" hereunto annexed and made a part hereof.

6. That your petitioner has in his possession a balance of (\$92,565.96) to be disbursed as administration expenses and for payments to creditors and the amounts of their claims and the order of priority of said claims is specifically set forth in Schedule "D" hereunto annexed and made a part hereof. 30

7. Your petitioner prays that this his report may be passed upon and allowed and that he be granted an allowance as Receiver, and that his attorney, Joseph Steiner, be granted an allowance as attorney for said receiver and that after payment of the administration expenses the bal- 40

Receiver's Report and Account.

ance be divided among the creditors as set forth in Schedule "D" and that your petitioner be discharged from all further duties and liabilities with respect to said trust to the extent of the funds for which he has accounted.

And your petitioner will ever pray, etc.

10

SCHEDULE "A."

ASSETS OF THE COMPANY.

Receiver charges himself with having taken all of the assets of the defendant, Goodwin Construction Company, consisting of the following:

- (1) Unfinished 24-family apartment house known and designated as #14 North Walnut street, East Orange, New Jersey, which tract or parcel of land is more particularly described as follows:

20

30

"Premises in the City of East Orange, County of Essex and State of New Jersey—Beginning at a point in the easterly line of North Walnut street said point being distant one hundred and twenty-five feet and thirty one one-hundredths of a foot from the intersection of the easterly line of North Walnut street and the northerly line of Main street; thence south forty-five degrees thirty eight minutes east one hundred and nine feet to a point in the property line of the City of East Orange; thence along said lands of the City of East Orange north fifty-four degrees east seventy-two feet and ninety four one-hundredths of a foot; thence still along lands of the City of East Orange forty-five degrees thirty-eight minutes west one hundred and twenty-nine feet and ninety-seven one-

40

Receiver's Report and Account.

hundredths of a foot to the easterly line of North Walnut street; thence along said line south thirty-seven degrees twenty-five minutes west seventy-two and forty-four one-hundredths of a foot to the point and place of BEGINNING."

(b) Lot on Eagle Rock avenue more particularly described as follows:

"Premises in the Town of West Orange—
Beginning at a point in the new easterly line of Eagle Rock avenue distant one hundred twenty-nine feet and sixty-five one hundredths of a foot northerly from the intersection of said new easterly line of Eagle Rock avenue with the northerly line of Ashwood Terrace in line of lands recently conveyed by Anne E. Williams and Marion Williams to one Felix Karam; thence running along line of said land and with line of lands conveyed by Anne E. Williams & Marion Williams to Robert L. Chapman, Leo Silver and Raymond Kreest, south sixty-seven degrees forty-seven minutes east one hundred thirty feet and seventeen one hundredths of a foot; thence running north twenty-nine degrees twenty-five minutes east fifty feet to a mark on a rock situated in line of lands now or formerly of Virginia B. Williams; thence running along same North one degree fifty-two minutes east ninety feet and thirty-five one hundredths of a foot to a station situated in the southerly line of lands now or formerly of Michael Dooley; thence running along same north seventy-six degrees twenty-five minutes west one hundred twenty three feet and ninety-seven one hundredths of a foot more or less to an iron pipe situated

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Receiver's Report and Account.

in the new easterly line of Eagle Rock avenue and thence running along same south thirteen degrees thirty-five minutes west one hundred seventeen feet and four one hundredths of a foot to the point and place of BEGINNING."

10

SCHEDULE "B."

Receiver charges himself with having received the following items:

Items omitted—Total receipts, \$134,102.61.

SCHEDULE "C."

20 Receiver charges himself with having incurred the following expenses:

Items omitted—Total expenses, \$41,536.65.

SCHEDULE "D."

Claims proven and filed with the receiver in the order of their respective priority as determined by the receiver and in amounts proven and allowed by the receiver are herein set forth:

30

1. Samuel Werbel—on account of a mortgage made by the Goodwin Construction Company to him in the sum of \$60,000; the receiver finds that Samuel Werbel is entitled to priority in the sum of . . \$56,000.00 on account of the principal of said mortgage and interest on said mortgage from the date of its making until date of the ap-

40

Receiver's Report and Account.

pointment of the receiver in the
sum of..... 3,010.00

making a total due to Samuel
Werbel for which he is entitled
priority of payment..... 59,010.00 10
Receiver finds that \$4,000, the
balance of said mortgage, and
insurance advanced by Mr.
Werbel in the sum of \$658.67
should be accounted for among
the general claims of this estate
and paid with them.

2. The claimants hereinbelow listed
proved their claims before the
receiver in the amounts set op-
posite their names and are en-
titled to a pro rata payment 20
among them after the payment of
the above set forth mortgage:

- | | | |
|--|-----------|----|
| (a) Levy Bros. Co., Inc....\$ | 4,049.00 | |
| (b) Max Chopik | 1,774.65 | |
| (c) Passaic-Bergen Lumber
Co. | 4,809.95 | |
| (d) John R. Blair Company | 1,665.85 | |
| (e) Consolidated Expand-
ing Metals Co..... | 620.00 | 30 |
| (f) Mayer-Bez Stone Com-
pany, Inc..... | 400.00 | |
| (g) Nathan Cohen | 397.88 | |
| (h) Pierce, Butler & Pierce | 600.00 | |
| (i) Sterling Engineering
Company | 627.00 | |
| (j) Lincoln Materials Com-
pany | 14,329.57 | 40 |

Receiver's Report and Account.

(k)	Henry R. Isenberg Co.	3,900.00
(l)	Isaac Ginsberg	763.00

\$33,936.90

- 10 3. Newark Holding Company—on account of a mortgage held by it covering the premises in question which mortgage is in the principal sum of.....\$15,000.00 and interest thereon from the date of its making until date of the appointment of the receiver in the sum of 1,082.50 making a total due to the Newark Holding Company to be paid after the payment to Samuel Werbel and the items set forth in paragraph 2 16,082.50
- 20 4. The claimants hereinbelow listed proved their claims before the receiver in the amounts set opposite their names and are entitled to payment as general claimants after the payment of the above set forth claims:
- 30 (a) S. Rabinowitz Iron Works\$ 2,127.00
- (b) Louis Schrenell 6,400.00
- (c) K. D. Flooring Company 602.64
- (d) Commercial Casualty Insurance Company.. 263.70

Receiver's Memoranda.

(e) Samuel Werbel		
for principal		
of mortgage	\$4,000.00	
for insurance		
advanced ...	658.67	
	<hr/>	
	14,052.01	10
Total	\$123,081.41	

RECEIVER'S MEMORANDA.

Filed May 6, 1929.

I, the undersigned, Walter K. Sherwood, Receiver of the defendant Goodwin Construction Company, do hereby supplement the Receiver's Report and Memoranda heretofore filed by me with the following comment and the reasons why the claims in this matter were allowed and the reason why the priorities as set forth in the Report heretofore filed by me were so determined. 20

1. I find that Samuel Werbel was the holder of a mortgage of \$60,000.00 on the property and that but \$56,000.00 of the same was actually advanced to the defendant Goodwin Construction Company and actually went into the building. I find from the testimony taken before me that a fee of \$4,000.00 was charged for the use of this money. Werbel denies that it was a fee but the Cohens (officers of the defendant company) insist that it was a bonus charge and I find this to be a fact. While it is true that the defense of usury is not available to a corporation still, when priorities are considered as between mortgagees and mechanic lienors, it being impossible to say that the \$4,000.00 went into the building which it 30 40

Receiver's Memoranda.

is necessary to find in order that the mortgage preserves its priority, I find that the \$4,000.00 can only be treated as a general claim and for that reason I find that the \$4,000.00 in question should be treated as a general claim and not as an advance under the mortgage.

- 10 2. There was a mortgge of record given to and held by Newark Holding Company in the nominal sum of \$15,000.00. Considerable difficulty was experienced by the Receiver in attempting to ascertain the status of this mortgage. The Receiver is satisfied that this mortgage, although dated in January, was recorded in April and was not recorded before actual construction operations began on the building. The relationship, furthermore, between the parties
- 20 constituting the Newark Holding Company and the parties constituting the Goodwin Construction Company also leads the Receiver to believe that the mortgage was not placed in good faith but for the purpose of saving an added equity in the Cohens and their blood relations for past advances alleged to have been made and not proven. Under the law of this State, the Receiver is informed and, therefore, believes that unless this mortgage was a bona fide mortgage and recorded
- 30 before building operations were planned and begun, in the absence of subordination agreements entered into by prospective mechanic lienors and in the absence of proof, that the consideration of the mortgage went into the building, the mechanic lienors have a right prior to the mortgagee. No proof was offered to the Receiver that the mortgage given to the Newark Holding Company was for a then existing consideration at the time that the mortgage was executed,
- 40 neither was any proof offered to the Receiver

Receiver's Memoranda.

that the consideration of the said mortgage went into the building. And although the mortgage itself recites that it was a purchase money mortgage, no proof was adduced before the Receiver which would satisfactorily produce in the Receiver's mind the belief that there was an indebtedness existing arising out of the purchase money which the mortgage might secure. For the reasons above set forth, the Receiver concludes that the debt intended to be secured by the mortgage given to the Newark Holding Company is at most a general claim existing between Newark Holding Company as a creditor and Goodwin Construction Company as a debtor and then only for a consideration not growing out of the construction of the building, and therefore, subordinating it to the lien claimants whose rights grow out of the building operation itself.

3. The Receiver next finds that the following creditors filed lien claims against the property:

(a) Levy Bros. Co., Inc.....	4,049.00	
(b) Max Chopik	1,774.65	
(c) Passaic-Bergen Lumber C.	4,809.95	
(d) John R. Blair Company.....	1,665.85	
(e) Consolidated Expending Metals Co.	620.00	
(f) Mayer-Bez Stone Company, Inc.	400.00	30
(g) Nathan Cohen	397.88	
(h) Pierce, Butler & Pierce	600.00	
(i) Sterling Engineering Company	627.00	
(j) Lincoln Materials Company....	14,329.57	
(k) Henry R. Isenberg Co.	3,900.00	
(l) Isaac Ginsburg	763.00	

It is true that Max Chopik not only filed a lien claim but reduced it to judgment before the receivership but the testimony adduced before the Receiver leads the Receiver to believe that the

Receiver's Memoranda.

default judgment held by Max Chopik was a confessed judgment for the purpose of bringing about a sale which was enjoined through the Receivership. The Receiver finds no priority for this judgment creditor and puts him in a class with the general mechanic lienors. None of the
10 claims listed as (a) to (i) under this separate section being for labor and all being for materials, or if for labor and materials not being specifically established as how much for labor and how much for materials, the Receiver is unable to classify the labor claims as distinguished from the material claims and, therefore, can give no priority for the labor claims as permitted under the Mechanics' Lien Law and concludes that the claimants' liens (a) to (i) are entitled
20 to share equitably and pro rata in the proportion that their claims bear to the balance in the estate (after the payment of the Werbel claim) as set forth in the Mechanics' Lien Law.

(4) The Receiver then finds that the claim of the Newark Holding Company for \$15,000.00 and interest should next be paid assuming that all of the claims in paragraph three, that is to say the mechanics' liens are paid in full and bases his conclusion on the following line of reasoning.
30 While the Receiver does not believe that the mortgage given to Newark Holding Company as above set forth is entitled to priority over the mechanics' lien claimants, still as between Newark Holding Company as a creditor and Goodwin Construction Company as a debtor, the claim is valid and may be established. The mortgage having been recorded prior to the existence of the claims set forth in paragraph four of this report, the Receiver is of the opinion that it is entitled to recognition as a general unsecured claim
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Receiver's Memoranda.

only, on the basis of which it is now placed in this report.

(5) This leaves the following claims still to be disposed of:

(a) S. Rabinowitz Iron Works....	\$2,127.00	
(b) Louis Schrenell	6,400.00	10
(c) K. D. Flooring Company	602.64	
(d) Commercial Casualty Insurance Co.	263.70	
(e) Samuel Werbel for principal of mortgage	4,000.00	
For insurance advanced	658.67	

With reference to (a) S. Rabinowitz Iron Works, the Receiver finds two things, first, S. Rabinowitz Iron Works filed a lien claim which is defective on its face. It is not signed by the claimant and the description of the land and curtilage is defective. 20

With reference to the claim of Louis Schrenell (b), this claim is put in as a general claim because although Schrenell filed a lien claim it was not signed by him, the description is defective and the Receiver finds of his knowledge that the supplies furnished by Schrenell were pulled out by Schrenell and what were left were not protected against the elements and were permitted to freeze and cause additional expense to the estate. 30

K. D. Flooring Company (c) filed a claim which the Receiver is satisfied is embraced in the claim of John R. Blair & Co. and was filed by K. D. Flooring Company in duplication in the hope that between John R. Blair & Co. and K. D. Flooring Co., either or both of them would be paid. The testimony shows that John R. Blair & Co. was a supply house furnishing the flooring and K. D. Flooring Company was the contractor 40

Receiver's Memoranda.

who had the contract to furnish the flooring and to lay it.

Commercial Casualty Company (d) is not a mechanics' lien claim and their claim is merely for an insurance premium on an Owners' Landlords' and Tenants' Liability Insurance policy.

10 The claim of Samuel Werbel for \$4,000.00 and for insurance advanced amounting to \$658.67 has been previously disposed of by the Receiver in this report wherein it will be remembered that the Receiver concluded that these were not advances that can be said to have gone into the building.

All of which is respectfully submitted.

WALTER K. SHERWOOD,
Receiver.

20 Dated

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**ORDER TO SHOW CAUSE WHY RECEIVER'S
ACCOUNT SHALL NOT BE ALLOWED, ETC.**

Filed March 23, 1928.

*Order to show cause why Receiver's account shall
not be allowed and Receiver discharged.*

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Walter Sherwood, receiver of the above named defendant corporation, heretofore appointed by this Court, having presented and filed his report as such receiver, and it appearing that the receipts of said receivership amount to (\$134,102.61) and that the said receiver's disbursements amount to (\$41,536.60) leaving a cash balance in his hands amounting to (\$92,565.96) and that said receiver is desirous of having his account passed upon and allowed, and of having his fees and allowances as receiver and of being discharged from all further duties and liabilities with respect to said trust, to the extent of the funds for which he has accounted,

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It is on this TWENTY-THIRD day of MARCH, nineteen hundred and twenty-eight, on motion of Joseph Steiner, attorney for Walter Sherwood, receiver, ORDERED that the stockholders and creditors of the defendant corporation, who have filed claims with said receiver, show cause before the Chancellor at the Chancery Chambers in the Industrial Building, 1060 Broad street in the City of Newark, New Jersey on the THIRD day of APRIL, nineteen hundred and twenty-eight at ten o'clock in the forenoon or as soon thereafter as said receiver and/or his attorney can be heard, why the report of the receiver should not be allowed and approved and the accounts of the said receiver allowed and approved, and why an order should not be made, fixing and determining the fees and allowances of said re-

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Order to Show Cause.

ceiver in the administration of his trust, and fixing and determining the fees and allowances and disbursements of his attorney, and directing the distribution of the balance of the funds in the hands of the said receiver, if any, among the several creditors who have presented valid claims
 10 to said receiver, which claims have been approved and passed by said receiver in proportion to the amount of their respective claims as allowed by said receiver and in the order of their priority, which order of priority is more specifically set forth in Schedule "D" of said report, and why said receiver should not be discharged from further duties and liabilities with said trust to the extent of the funds for which he has so accounted.

20 Then follows provision for service, etc.

E. R. WALKER,

C.

Respectfully advised,

ALONZO CHURCH, V.-C.

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APPEAL OF NEWARK HOLDING COMPANY.

Filed April 4, 1928.

Appeal of Newark Holding Company.

The Newark Holding Company hereby appeals from the decision of the Receiver contained in the report of the Receiver filed with this court in so far as said Receiver deals with the mortgage of Newark Holding Company, in that he does not allow priority of said mortgage to the mechanics' liens or some or one of them, and in so far as he does not allow interest from the date of the Receivership; and in so far as he allows said mechanics' liens for the amounts and in the order of priority as allowed by him. 10

Respectfully, 20

JACOB W. SILVERMAN,
Solr. Newark Holding Co.

Dated: April 3, 1928.

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APPEAL BY SAMUEL WERBEL.

Filed April 13, 1929.

*Appeal by Samuel Werbel from Determination
of Receiver.*

10 To the Honorable, EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey:

The petition of Samuel Werbel respectfully
shows that:

1. He is a creditor of Goodwin Construction
Company, by reason of being the holder of a
bond of said defendant company in the principal
sum of \$60,000.00, dated April 22, 1925, which
provides, among other things, that interest is
20 payable thereon at the rate of 6% per annum,
and that your petitioner is obligated thereunder
to protect and preserve the mortgaged premises
and to insure the same and to advance and pay
the premiums thereon, and that said Bond is se-
cured by a mortgage in the aforesaid sum of \$60,-
000.00, on premises of it, designated as #14
North Walnut Street, in the City of East Orange,
County of Essex, State of New Jersey, and that
30 he presented his claim to the Receiver appointed
in this cause for allowance. Under the terms of
petitioner's mortgage, as set forth in next pre-
ceding paragraph, he advanced premiums in the
amount of \$658.67 on policies of insurance which
were necessary, placed for the protection of the
building erected on the mortgaged premises, for
which amount, your petitioner presented a claim
to said Receiver and asked that it be added to
and become a part of the principal of petitioner's
mortgage, pursuant to the terms of said mort-
40 gage. Said Receiver refused to so allow your

Appeal by Samuel Werbel.

petitioner, but did allow the aforesaid sum as a general claim against the estate.

2. The said Receiver allowed your petitioner's claim on said mortgage to the extent of \$56,000.00 and further allowed interest on the aforesaid sum of \$56,000.00, from the said bond and mortgage, to wit, April 22, 1925, to March 15, 1926, the date of the appointment of said Receiver as aforesaid, amounting to the sum of \$3,010.00, but refused to allow your petitioner interest on either the principal amount of said mortgage of \$60,000.00, or the sum of \$56,000.00 from the date of the appointment of said Receiver to the date of the payment to your petitioner of the said sum of \$56,000.00. 10

3. Your petitioner conceives that he is aggrieved by the said refusal of said Receiver to allow your petitioner interest on the sum of \$56,000.00, conceded by said Receiver to be due to your petitioner on his mortgage, from the date of the appointment of said Receiver until such time as the aforesaid sum of \$56,000.00 should be paid to your petitioner and insists that your petitioner is entitled to be allowed interest at 6% per annum on the aforesaid sum of \$56,000.00, not only from the date of said mortgage to the appointment of said Receiver, but also from the date of the appointment of said Receiver, to the date when the aforesaid sum of \$56,000.00 is paid to your petitioner. Your petitioner is also aggrieved because said Receiver refused to add the aforesaid insurance premiums, advanced by your petitioner, to the amount of the principal due on petitioner's mortgage and insists that petitioner is entitled to have the amount of such insurance premiums advanced, to wit, \$658.67, added to the principal of said mortgage and con- 20 30 40

Appeal by Samuel Werbel.

sidered as a prior lien and encumbrance to the other creditors, to the same extent and to the same priority as said mortgage.

10 4. And your petitioner respectfully appeals from said determination of said Receiver refusing as aforesaid to pay the interest due to your petitioner to this Honorable Court, and prays that the determination of said Receiver, as to the payment of said interest may be reversed, and as to the priority of your petitioner's claim for insurance premiums advanced as aforesaid, may be reversed, and such order made in the premises as shall be agreeable to equity and good conscience.

And your petitioner will ever pray, etc.

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SAMUEL WERBEL,
Petitioner.

SAUL & JOSEPH E. COHEN,
Solicitors for Petitioner.

C. WALLACE VAIL,
Of Counsel with Petitioner.

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APPEAL BY K. D. FLOORING CO.

Appeal from and Exceptions to the account and report of Walter Sherwood, Receiver.

K. D. Flooring Co., one of the mechanic's lien creditors of the above named defendant corporation, finding itself aggrieved by the determination of Walter Sherwood, Receiver of the Goodwin Construction Company, as set forth in his account and report filed herein on or about March 23, 1928, hereby appeals from said account and report, and excepts thereto, for the following reasons:

1. This creditor, K. D. Flooring Co., duly proved it's claim for the sum of \$602.64 before Walter Sherwood, Receiver for the Goodwin Construction Company, which has been allowed by the Receiver.

2. As to the claim for \$60,000 principal, and interest thereon made by Samuel Werbel, Walter Sherwood, Receiver, reports that he has allowed said claim as follows and with the following priorities. \$56,000 principal, and interest thereon from the date of the mortgage held by said Werbel to the date of the appointment of the Receiver herein amounting to a further sum of \$3,010.00 as a preferred claim to be first paid out of the assets of said corporation. The sum of \$4,000 balance of principal on said mortgage as a general creditor on a parity with the claim of this creditor.

3. Pursuant to a corrupt agreement theretofore entered into between Samuel Werbel and the Goodwin Construction Company by its officers or agents, or about April 23, 1925, the Goodwin Construction Company paid to said Samuel Wer-

Appeal by K. D. Flooring Co.

bel and the said Samuel Werbel received the sum of \$4,000 as an usurious bonus, premium or charge for the granting of said \$60,000 mortgage loan.

10 4. This creditor claims that by reason of the aforementioned payment pursuant to the corrupt agreement above referred to and pursuant to the statute in said case made and provided said Samuel Werbel is entitled to be paid only the amount or value actually lent, without interest or costs, to wit; The sum of \$56,000.

20 5. As to the claim for \$15,000 principal, and interest thereon made by Newark Holding Co., Walter Sherwood, Receiver, reports that he has allowed said claim as follows and with the following priorities. \$15,000 principal, and interest thereon from the date of the mortgage held by said Newark Holding Co., to the date of the appointment of the Receiver herein amounting to a further sum of \$1,082.50 as a claim, on a parity with this creditor.

30 6. This creditor claims that by reason of the fact that no money has been advanced by said holder of said mortgage, to Goodwin Construction Company, that the Newark Holding Co. is not entitled to the sum of \$16,082.50 as a creditor.

7. Said Receiver reports that the claim of Mayer-Bez Stone Company, Inc., amount to \$400 has been allowed as a mechanic's lien claim, as a preferred creditor together with other creditors, who filed mechanic's lien claims, and *commenced* suits thereon.

40 8. Said Mayer-Bez Stone Company, Inc., duly filed its mechanic's lien claim against the aforementioned premises on North Walnut street,

Appeal by K. D. Flooring Co.

East Orange, N. J., on November 6, 1925, setting forth therein that October 5, 1925, was the last date on which materials were furnished.

9. Said Mayer-Bez Stone Company, Inc., did not commence suit on its said mechanic's lien claim, nor was the time of issuing summons endorsed on the said mechanic's lien claim, within four months from October 5, 1925, the date the last materials were furnished for which said debt was due, as set forth in said mechanic's lien claim. 10

10. Said mechanic's lien claim was discharged prior to the filing of the bill of complaint herein and or appointment of the Receiver herein, by reason of the failure to endorse the time of issuing summons on the mechanic's lien claim. 20

11. This creditor, K. D. Flooring Co., contends that because of the foregoing reasons, and since the mechanic's lien claim of Mayer-Bez Stone Company, Inc., was discharged, and not a lien on said premises when the Receiver was appointed herein, that its (K. D. Flooring Co.) claim of \$602.64, allowed by the Receiver is not a preferred claim is not entitled to be allowed by the Receiver, is not a preferred claim is not entitled to the allowance of \$40. 30

K. D. FLOORING CO.,

By KEATING & KEATING,
Solicitors for and of Counsel with K. D. Flooring Co.,
Exceptant and Appellant.

APPEAL BY JOHN R. BLAIR COMPANY, INC.

Appeal from and exceptions to the account and report of Walter Sherwood, Receiver.

10 John R. Blair Company, Inc., one of the mechanics' lien creditors of the above named defendant corporation, finding itself aggrieved by the determination of Walter Sherwood, receiver of the Goodwin Construction Company, as set forth in his account and report filed herein on or about March 23, 1928, hereby appeals from said account and report, and excepts thereto, for the following reasons:

20 1. Said receiver prays allowance of \$542.82 by him disbursed on June 6, 1927 to Kewanee Boiler Co., or John T. Van Riper, its attorney, in payment of a judgment and costs recovered by said Kewanee Boiler Co. against said Goodwin Construction Co., and/or Walter Sherwood, Receiver.

30 2. Said disbursement by said receiver was not a proper charge against said estate, and was improper, because said judgment was recovered after the appointment of the receiver herein, and was not a preferred claim, or entitled to preference. Said disbursement was made from the proceeds of the sale of premises on North Walnut street, East Orange, N. J., owned by the defendant corporation at the time said receiver was appointed, and upon which this creditor had a lien and was a preferred creditor, by reason of having filed its mechanics' lien claim, and commenced suit thereon.

40 3. Said receiver reports that the claim of Max Chopik amounting to \$1,774.65, has been allowed as a mechanics' lien claim, on a parity with the

Appeal by John R. Blair Company.

claim of this creditor and other creditors, who filed mechanics' lien claims and commenced suit thereon, joining the holders of certain mortgages as party defendants.

4. Said Max Chopik duly filed his mechanics' lien claim against the aforementioned premises on North Walnut street, East Orange, N. J., and commenced suit thereon in the Essex County Circuit, and on February 11, 1926 entered judgment thereon for the sum of \$1,774.65 damages, against the Goodwin Construction Company and especially against the aforementioned premises. However, said judgment did not determine that it was prior to the mortgage held by Newark Holding Co., and Samuel Werbel. Further, said judgment was entered on a written confession of judgment, executed under the corporate seal of the corporation, by the officers thereof, when said Goodwin Construction Company was actually insolvent, to the knowledge of its officers, in order to give said Max Chopik an unlawful preference over the other creditors of said Goodwin Construction Company.

5. This creditor, John R. Blair Company, Inc., duly filed its mechanics' lien claim against the aforementioned premises on North Walnut street, East Orange, N. J., and commenced suit thereon in the Essex County Circuit Court, joining Newark Holding Co., Samuel Werbel, and 11th Ward Building and Loan Association, mortgagees as defendants both in said claim and in said suit.

6. Since this creditor joined said mortgagees as party defendants, and the proofs adduced before the receiver proved that this creditor's mechanics' lien claim was wholly or partly prior to the mortgage of Newark Holding Co., Samuel

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Appeal by John R. Blair Company.

Werbel and 11th Ward Building and Loan Association, and since the aforementioned judgment of Max Chopik is subject to said mortgages, and was entered on the confession of judgment of the insolvent corporation to give him an unlawful preference, this creditor contends that its claim
10 of \$1,665.85, allowed as a mechanics' lien claim by the receiver, is not on a parity with the claim of Max Chopik, but prior thereto.

7. Said receiver reports that the claim of Passaic-Bergen Lumber Co., amounting to \$4,809.95 has been allowed as a mechanics' lien claim, on a parity with the claim of this and other creditors who filed mechanics' lien claims and commenced suits thereon, joining the holders of certain mortgages as party defendants.

20 8. Said Passaic-Bergen Lumber Co. duly filed its mechanics' lien claim against the aforementioned premises on North Walnut street, East Orange, N. J., and commenced suit thereon in the Essex County Circuit Court, and on January 17, 1927, entered a judgment thereon for the sum of \$5,169 damages, against the Goodwin Construction Company, and especially against the aforementioned premises. Said judgment determined
30 that it was prior to a mortgage to the 11th Ward Building and Loan Association, but it did not determine that it was prior to the mortgages held by Newark Holding Co. and Samuel Werbel.

9. This creditor, John R. Blair Company, Inc., duly filed its mechanics' lien claim against the aforementioned premises on North Walnut street, East Orange, N. J., and commenced suit thereon in the Essex County Circuit Court, joining Newark Holding Co., Samuel Werbel and 11th Ward Building and Loan Association, mortgagees, as
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Appeal by John R. Blair Company.

defendants, both in the lien claim and in the suit based thereon.

10. Since this creditor joined said mortgagees as party defendants, and the proofs adduced before the receiver proved that this creditor's mechanics' lien claim was wholly or partly prior to the mortgages of Newark Holding Co., and/or Samuel Werbel, and wholly prior to the mortgage of the 11th Ward Building and Loan Association, and since the aforementioned judgment of Passaic-Bergen Lumber Co. is prior only to the mortgage of the 11th Ward Building and Loan Association, and subject to the mortgages of Newark Holding Co., and Samuel Werbel, this creditor contends that its claim of \$1,665.85, allowed by the receiver, is not on a parity with the claim of Passaic-Bergen Lumber Co., but prior thereto.

11. Said receiver reports that the claim of Consolidated Expanded Metals Company, amounting to \$620, has been allowed as a mechanics' lien claim, on a parity with the claim of this creditor and other creditors, who filed mechanics' lien claims and commenced suits thereon, joining the holders of certain mortgages as party defendants.

12. Said Consolidated Expanded Metals Company duly filed two mechanics' lien claims against the aforementioned premises on North Walnut street, East Orange, N. J., one on October 31, 1925 and the other on November 2, 1925. Said lien claim did not join Samuel Werbel and/or Newark Holding Co. mortgagees as party defendants, as did this creditor and other creditors.

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Appeal by John R. Blair Company.

13. Said Consolidated Expanded Metals Company did not commence suit on its said mechanics' lien claims, nor was the time of issuing summons endorsed on the said mechanics' lien claim, or either of them, within four months from July 2, 1925, the date the last materials were furnished
10 for which said debt was due, as set forth in both of said mechanics' lien claims.

14. Said mechanics' lien claim were both discharged prior to the filing of the bill of complaint herein and/or appointment of the receiver herein, by reason of the failure to endorse the time of issuing summons on the mechanics' lien claim.

15. This creditor, John R. Blair Company, Inc., contends that because of the foregoing reasons, and since the mechanics' lien claims of Consolidated Expanded Metals Company were discharged, and not a lien on said premises when the receiver was appointed herein, that its (John R. Blair Company, Inc.) claims of \$1,665.85, allowed by the receiver, is not on a parity with the claim of Consolidated Expanded Metals Company, but prior thereto.
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16. Said receiver reports that the claim of Mayer-Bez Stone Company, Inc., amounting to \$400 has been allowed as a mechanics' lien claim, on a parity with the claim of this creditor and other creditors, who filed mechanics' lien claims, and commenced suits thereon, joining the holders of certain mortgages as party defendants.
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17. Said Mayer-Bez Stone Company, Inc., duly filed its mechanics' lien claim against the aforementioned premises on North Walnut street, East Orange, N. J., on November 6, 1925,
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Appeal by John R. Blair Company.

setting forth therein that October 5, 1925 was the last date on which materials were furnished.

18. Said Mayer-Bez Stone Company Inc., did not commence suit on its said mechanics' lien claim, nor was the time of issuing summons endorsed on the said mechanics' lien claim, within four months from October 5, 1925, the date the last materials were furnished for which said debt was due, as set forth in said mechanics' lien claim. 10

19. Said mechanics' lien claim was discharged prior to the filing of the bill of complaint herein and/or appointment of the receiver herein, by reason of the failure to endorse the time of issuing summons on the mechanics' lien claim.

20. This creditor, John R. Blair Company, Inc., contends that because of the foregoing reasons, and since the mechanics' lien claim of Mayer-Bez Stone Company, Inc., was discharged, and not a lien on said premises when the receiver was appointed herein, that its (John R. Blair Company, Inc.) claim of \$1,665.85, allowed by the receiver, is not a parity with the claim of Mayer-Bez Stone Company, Inc., but prior thereto. 20

21. Said receiver reports that the claim of Pierce, Butler & Pierce Mfg. Corp., amounting to \$600, has been allowed as a mechanics' lien claim, on a parity with the claim of this creditor and other creditors, who filed their mechanics' lien claims and commenced suits thereon within four months from the date of the last materials furnished, as set forth in their respective mechanics' lien claims. 30

22. Said Pierce, Butler & Pierce Mfg. Corp. filed its mechanics' lien claim against the afore- 40

Appeal by John R. Blair Company.

mentioned premises on North Walnut street, East Orange, N. J., on December 21, 1925, therein setting forth that all the materials for which the debt was due, were furnished on August 20, 1925. On December 21, 1925 suit was commenced on said mechanics' lien claim and the time of issuing of summons duly endorsed on said mechanics' lien claim.

23. Said mechanics' lien claim was not filed, nor was suit commenced thereon, nor was the time of issuance of summons endorsed on said mechanics' lien claim, within four months from the date of the last materials furnished as set forth in said mechanics' lien claim.

24. This creditor, John R. Blair Company, Inc., contends that because of the foregoing reasons, and since said mechanics' lien claim was not filed within four months from the date of the last materials furnished, and since it was not a lien on said premises when the receiver was appointed herein, that its (John R. Blair Company, Inc.) claim of \$1,665.85, allowed by the receiver, is not on a parity with the claim of Pierce, Butler & Pierce Mfg. Corp., but prior thereto.

25. Said receiver reports that the claim of Sterling Engineering Co., amounting to \$627, has been allowed as a mechanics' lien, on a parity with the claim of this creditor and other creditors, who filed mechanics' lien claims and commenced suits thereon, joining the holders of certain mortgages as party defendants.

26. Said Sterling Engineering Co. filed its mechanics' lien claim against the aforementioned premises on North Walnut street, East Orange, N. J., and commenced suit thereon. However, in neither the mechanics' lien claim, nor the suit

Appeal by John R. Blair Company.

commenced thereon, did said Sterling Engineering Co., join Newark Holding Co., and/or Samuel Werbel, mortgagees, as defendants.

27. This creditor, John R. Blair Company, Inc., duly filed its mechanics' lien claim against the aforementioned premises on North Walnut street, East Orange, N. J., and commenced suit thereon in the Essex County Circuit Court, joining Newark Holding Co., Samuel Werbel and 11th Ward Building and Loan Association, mortgagees as defendants, both in the lien claim and in the suit based thereon. 10

28. Since this creditor joined said mortgagees as party defendants, and the proofs adduced before the receiver proved that this creditor's mechanics' lien claim was wholly or partly prior to the mortgages of Newark Holding Co., Samuel Werbel, and/or 11th Ward Building and Loan Association and since, a judgment, if entered on the aforementioned mechanics' lien or suit or Sterling Engineering Company could only be subject to the mortgages held by Newark Holding Co., Samuel Werbel, and 11th Ward Building and Loan Association, this creditor contends that its claim of \$1,665.85, allowed by the receiver, is not on a parity with the claim of Sterling Engineering Co., but prior thereto. 20 30

29. Said receiver reports that the claim of Lincoln Material Company, Inc., amounting to \$14,339.57, has been allowed as a mechanics' lien claim, on a parity with the claim of this creditor and other creditors, who filed mechanics' lien claims against said premises on North Walnut street, East Orange, N. J., and duly commenced suits thereon, and thereby acquired and retained liens on said premises. 40

Appeal by John R. Blair Company.

30. Said Lincoln Materials Company, Inc., duly filed its mechanics' lien claim, and commenced suit thereon, but on November 16, 1926, a judgment of voluntary non-suit was rendered in said suit, in favor of the defendants and against the plaintiff, and the said Lincoln Materials
10 Company, Inc., thereby discharged said mechanics' lien claim, and lost any lien that it had theretofore had on said premises.

31. Theretofore, to wit, on or about March 15, 1925, said Lincoln Materials Company, Inc., while its said mechanics' lien claim was still a lien on said premises, and while it was a preferred creditor of said Goodwin Construction Company, filed its bill of complaint herein to have
20 the defendant Goodwin Construction Company, adjudicated insolvent, and thereby said Lincoln Materials Company, Inc., waived its preference aforesaid.

32. Since Lincoln Materials Company, Inc., waived its mechanics' lien claim by filing the bill of complaint herein, and/or discharged said mechanics' lien claim by the entry of said voluntary non-suit in its action based upon its mechanics' lien claim, this creditor, John R. Blair
30 Company, Inc., contends its claim of \$1,665.85, allowed by the receiver, is not on a parity with the claim of Lincoln Materials Company, Inc., but prior thereto.

33. Said receiver reports that the claim of Henry R. Isenberg Co., Inc., amounting to \$3,900, has been allowed as a mechanics' lien claim, on a parity with the claim of this creditor, and other creditors, who filed mechanics' lien claims against said premises on North Walnut street, East Orange, N. J., and duly commenced suits thereon,
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Appeal by John R. Blair Company.

joining in said lien claims and said suits, the holders of certain mortgages.

34. Said Henry R. Isenberg Co., Inc., filed its mechanics' lien claim against said premises, and commenced suit thereon in the Essex County Circuit Court, and on November 12, 1926 entered judgment thereon for the sum of \$4,143.75 damages against the Goodwin Construction Company. Although both in the mechanics' lien claim and said suit, Newark Holding Co., Samuel Werbel, and 11th Ward Building and Loan Association, mortgagees were joined as party defendants, nevertheless, said judgment did not determine that it was prior to the said mortgages held by said Newark Holding Co., Samuel Werbel and 11th Ward Building and Loan Association.

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35. This creditor, John R. Blair Company, Inc., duly filed its mechanics' lien claim against the aforementioned premises on North Walnut street, East Orange, N. J., and commenced suit thereon in the Essex County Circuit Court, joining Newark Holding Co., Samuel Werbel, and 11th Ward Building and Loan Association, mortgagees as defendants, both in the lien claim and in the suit based thereon.

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36. Since this creditor joined said mortgagees as party defendants, and the proofs adduced before the receiver proved that this creditor's mechanics' lien claim was wholly or partly prior to the mortgages of Newark Holding Co., Samuel Werbel and 11th Ward Building and Loan Association and since the aforementioned judgment of Henry R. Isenberg Co., Inc., is subject to the said mortgages, this creditor contends that its claim of \$1,665.85, allowed as a mechanics' lien claim by the receiver, is not on a parity with the

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Appeal by John R. Blair Company.

claim of Henry R. Isenberg Co., Inc, but prior thereto.

10 37. This creditor, John R. Blair Company, Inc., excepts to the allowance by said receiver of the abovementioned claims on a parity with the claim of this creditor, claiming that it followed the statute in such case made and provided, to obtain and perfect its said mechanics' lien claim, whereas the creditors above mentioned did not follow the statute, and that its said claim is entitled to priority over each and every of the foregoing mentioned claims.

JOHN R. BLAIR COMPANY, INC.,

20 M. FRANCIS KEATING,
Solicitor for and of counsel with
John R. Blair Company, Inc.
Exceptant and Appellent.

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**APPEAL BY MONTGOMERY PLUMBING
SUPPLY COMPANY.**

Filed May 8, 1929.

*Appeal from and exceptions to Receiver's
report and account.*

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

The Montgomery Plumbing Supply Company, a lien claim creditor of the defendant in the above entitled cause, feeling aggrieved by the proceedings and the determination of the Receiver appointed by this Court in above entitled cause, hereby appeals from and takes exception to the report and account filed by the said Receiver on the following grounds: 20

First: The Montgomery Plumbing Supply Company was at the time of the adjudication of the said Goodwin Construction Co. a creditor of Louis Schrenell, having furnished and delivered materials used in the installation of the plumbing and heating apparatus and equipment in the building erected on the premises described in the bill of complaint filed in this cause, and the said Louis Schrenell was the plumbing and heating contractor who furnished and installed the plumbing and heating apparatus and equipment in the building above referred to, and the said Louis Schrenell, in order to secure to the said Montgomery Plumbing Supply Company payment of the indebtedness owing for materials furnished as aforesaid, did by deed of assignment sell, assign, transfer and set over unto the said Montgomery Plumbing Supply Company the indebtedness or amount then due or thereafter to 30 40

Appeal by Montgomery Plumbing Supply Co.

become due and owing from the said Goodwin Construction Co. to the said Louis Schrenell.

10 That at the time of the said assignment, the said Louis Schrenell had filed with the Clerk of Essex County a Lien Claim against the lands and premises owned by the said Goodwin Construction Co., and had instituted a suit to enforce the said Lien Claim, which said suit was then pending in the Essex County Circuit Court, and the prosecution of which was by order of this Court enjoined.

20 That the assignment of the claim hereinabove referred to included an assignment of the chose in action referred to in the preceding paragraph, and that the said Montgomery Plumbing Supply Company is the owner of the said claim and of the moneys due or to become due thereunder, and submitted proof to the Receiver of the amount due thereunder showing that there was a balance due and owing under said claim of the sum of \$6,300.00, and that the said Receiver did not dispute said claim or the amount thereof, but did allow the same as presented.

30 That the Receiver appointed in this cause has filed his report and account in which he has segregated certain of the lien claim creditors from others and has placed the claim of the Montgomery Plumbing Supply Company in the class of general creditors, the effect of which is that the Montgomery Plumbing Supply Company, as a lien claim creditor, will be excluded from participating in the moneys now in the hands of the Receiver for distribution.

40 That the said Montgomery Plumbing Supply Company is entitled to be placed in the same class that all of the other lien claim creditors who have been designated and placed in the

Appeal by Montgomery Plumbing Supply Co.

schedule annexed to the Receiver's report, as lien claim creditors entitled to share pro rata among themselves in the fund now in the hands of the Receiver, subject only to the payment of the several mortgages set forth in said report and to such allowance as this Court may make to the Receiver and his attorney for administration of the estate. 10

The Montgomery Plumbing Supply Company alleges that the segregation of its claim as a general creditor is contrary to law and to the proofs submitted to the said Receiver, and takes exception to the class in which it has been placed in the said report.

Second: That the claim of the Lincoln Materials Co. which had been placed in the class of lien claim creditors, has been placed in said class contrary to law and to the proofs submitted to the Receiver, and that the said claim is not entitled to share in the fund now in the Receiver's hands on the same basis as lien claim creditors and should be excluded from that class. 20

Third: That the claim of Max Chopik which has been placed in the class of Lien Claim Creditors has been placed in said class contrary to law and to the proofs submitted to the Receiver, and that the said claim is not entitled to share in the fund now in the Receiver's hands on the same basis as lien claim creditors and should be excluded from that class. 30

Fourth: That the claim of Consolidated Expanded Metals Company which has been placed in the class of Lien Claim Creditors has been placed in said class contrary to law and to the proofs submitted to the Receiver, and that the said claim is not entitled to share in the fund 40

Appeal by Montgomery Plumbing Supply Co.

now in the Receiver's hands on the same basis as lien claim creditors and should be excluded from that class.

10 Fifth: That the claim of Mayer-Bez Stone Company, Inc. which has been placed in the class of lien claim creditors has been placed in said class contrary to law and to the proofs submitted to the Receiver, and that the said claim is not entitled to share in the fund now in the Receiver's hands on the same basis as lien claim creditors and should be excluded from that class.

20 Sixth: That the claim of Pierce, Butler & Pierce Mfg. Corp. which has been placed in the class of lien claim creditors has been placed in said class contrary to law and to the proofs submitted to the Receiver, and that the said claim is not entitled to share in the fund now in the Receiver's hands on the same basis as lien claim creditors and should be excluded from that class.

This creditor, Montgomery Plumbing Supply Company, therefore excepts to the allowance by said Receiver of the above mentioned claims as Mechanics' Lien Claim Creditors and alleges that its claim is entitled to priority over each and every of the foregoing mentioned claims.

30 MONTGOMERY PLUMBING SUPPLY
COMPANY,

By HEYMAN & HEYMAN,
Solicitors for and of Counsel with Mont-
gomery Plumbing Supply Company.

**APPEAL BY LEVY BROTHERS COMPANY,
INC.**

Filed April 4, 1928.

*Exceptions to Receiver's Report and Account
and Appeal.*

10

Levy Brothers Company, Inc., one of the creditors of the Estate of Goodwin Construction Company hereby excepts to the account of the Receiver, Walter K. Sherwood and to the report of claims for the following reasons and appeals from said report.

1. Said Receiver has not charged himself with interest on the purchase price of the apartment by John McKenna. Said interest being due because of a delay in taking title.

20

2. The said Receiver has asked allowance for the sum of \$542.82 paid to John T. VanRiper, attorney for the Keewanee Boiler Co. for disbursement made June 6th, 1927. That said creditor, Levy Brothers Company, Inc., rights are prior to the rights of the Keewanee Boiler Co.

3. Said creditor, Levy Brothers Company, Inc. excepts to the allowance of the same priority of right of the creditor, Max Chopik. That said Max Chopik is not entitled to the same priority as this creditor, Levy Brothers Company, Inc., inasmuch as he failed to make the Newark Holding Company a party defendant to his Mechanics' Lien suit and the said creditor, Levy Brothers Company, Inc., did so make the Newark Holding Company a party defendant in his Mechanics' Lien suit and said Receiver has determined that the lien claim of Levy Brothers Company, Inc., is entitled to priority over the mortgage of the Newark Holding Company.

30

40

Appeal by Levy Brothers Company, Inc.

4. This creditor excepts to the allowance of the Meyer-Bez Stone Company's lien claim to the same priority as the claim of this exceptant on the ground that the said Meyer-Bez Stone Company did not commence suit nor was the issuance of summons endorsed of said lien claim,
10 within four months after the last date materials were furnished by the said Meyer-Bez Stone Company.

5. This creditor excepts to the allowance of the Pierce, Butler & Pierce Manufacturing Corporation's lien claim to the same priority as the claim of this exceptant on the ground that the said Pierce, Butler & Pierce Manufacturing Corporation did not commence suit on the said lien
20 within four months after the last date materials were furnished by the said Pierce, Butler & Pierce Manufacturing Company.

6. This creditor excepts to the allowance of the Consolidated Expanded Metals Company's lien claim to the same priority as the claim of this exceptant on the ground that the said Consolidated Expanded Metals Company did not join the mortgagees, Newark Holding Company and Samuel Werbel as a party defendant in its
30 lien claim suit, and also did not start suit within four months after the last date materials were furnished by the said Consolidated Expanded Metals Company.

LEVY BROTHERS COMPANY, INC.

By

Attorneys.

Charles Cohen, direct.

TESTIMONY BEFORE VICE-CHANCELLOR.

IN CHANCERY OF NEW JERSEY.

May 8th, 1928.

Between

LINCOLN MATERIALS COMPANY,
INC.,

Complainant,

and

GOODWIN CONSTRUCTION COM-
PANY,

Defendant.

10

Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor, Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Joseph Steiner, for Walter K. Sherwood; Merritt Lane for Newark Holding Company; M. Francis Keating for John R. Blair Company; Saul Tischler for Levy Brothers.

20

CHARLES COHEN, sworn.

30

Direct examination by Mr. Lane.

Q Mr. Cohen, where do you live? A 297 Hawthorne avenue.

Q What is your business? A Builder.

Q How long have you been in that business?

A Oh, since after the war, about 1919.

Q Did you own the property on Walnut street, I think it was, that has been referred to here?

40

A Yes, sir.

Charles Cohen, direct.

Q When was the first work done in the construction of that building? A The latter part—the first—the latter part of April, 1925.

Q And by whom was that work done? A By Loconte, contract digger.

10 Q And what was his business? What part of the work did he do? A Digging.

Q That is the excavating? A Excavating, yes, sir.

Q Was there any work done on the building before the first of April or the fourth of April at the time—about the time of the recording of this mortgage? A No, sir, not—no.

Q You owned the property which is known in these proceedings as the West Orange property, did you not? A Yes, sir.

20 Q And you afterwards purchased the Walnut street property? A Yes, sir.

Q From whom did you purchase the Walnut street property? A Huegel & Clark.

Q And what was his consideration which was to be paid for the purchase of the Walnut street property? A The building I built on Eagle Rock avenue.

Q At Eagle Rock avenue, West Orange? A West Orange, yes.

30 Q Anything else? A No. Well, money besides. He gave me some money, Mr. Huegel and Clark gave me some money too besides.

Q You transferred the Eagle Rock property for Walnut street? A For the Walnut street, yes, sir.

40 Q At the time of the transfer of the Eagle Rock property, or at the time of the negotiation of the transfer of the Eagle Rock property, with what was that property encumbered? A The Eagle Rock property was encumbered with a five thousand dollar second—twenty five thou-

Charles Cohen, direct.

sand dollar building and loan and a five thousand second.

Q The five thousand second was held by whom? A By H. Sussman, Hyman Sussman.

Q How much did you owe Sussman at that time? A At that time I owed Sussman about thirteen thousand five hundred dollars. 10

Q Now, five thousand dollars of it was represented by this mortgage on Eagle—West Orange? A Yes.

Q Eagle Rock, and how was the other represented? A Eagle Rock avenue was a tract of 160 feet front and I bought it originally from this Hyman Sussman and with the two mortgages on it and then—

Q Two mortgages held by him? A Held by him, yes. I bought the property from him and he aided me in the construction of the property on Eagle Rock avenue, gave me money to build it. 20

Q Now, wait a minute. Don't go so fast. The two mortgages held by him amounted to how much? A Five and five.

Q Five thousand on one part and five thousand on the other? A And five thousand on the other.

Q Go on. A And he gave me money to build with and when I took the permanent mortgage, the building and loan I didn't have enough—I didn't have any money to pay him off his money and at the same time I had that deal on, so I persuaded him to transfer his equity from Eagle Rock avenue to—I persuaded him to aid me to make the exchange because I thought Walnut street would be a very good parcel to build on, so he wanted security and would not—he wouldn't—naturally wanted something, so I said, "I will 30 40

Charles Cohen, direct.

give you a mortgage on Walnut street," so it satisfied him.

Q As I understand you the Eagle Rock property at that time, you said, was encumbered with a five thousand dollar mortgage held by Sussman? A Five and five and three thousand five
10 hundred.

Q And it was encumbered with two mortgages? A Two mortgages, yes.

Q Each for five? A Yes.

Q Now, that property was to be transferred in exchange for the Walnut street property free of those mortgages? A For Walnut street property? Yes, subject to the building and loan.

Q But free of those? A Free of those, yes. Only one. The other one I had to have some
20 money to pay off lessors, so the other mortgage—when I was building the Eagle Rock avenue I needed some more money, so I persuaded Mr. Sussman to get me—to hock—to pawn his mortgage with a friend of ours and he gave me some money which I—which aided me in procuring Walnut street.

Q Now, wait a minute. Before this deal was placed, one of the five thousand dollar mortgages which was held by Sussman, was used by him in acquiring five thousand more dollars, wasn't it?
30 A Well, he owed me—I owed him ten thousand—three thousand five hundred.

Q Wait a minute. Sussman originally had two mortgages, each of five thousand dollars on this property? A Yes, sir.

Q He held and continued to hold one of them? A No, the other one.

Q Well, he did hold one of them, didn't he? A Yes, he did hold one of them.

Q Now, what happened to the other one, is
40 what I am trying to find out. A The other one

Charles Cohen, cross.

I needed money and Mr. Sussman, I gave him a note, and he went—when we sold, he transferred the mortgage—or, sold the mortgage to a lady, to somebody which, and she gave me the money to procure Walnut street.

Q That is what I say. He sold his mortgage of five thousand dollars and got the five thousand dollars and gave it to you. A Yes; he assigned the mortgage and gave it to me. 10

Q And what did you do with that five thousand dollars? A I bought—I used it for the construction of the building.

Q Which building? A Walnut street.

Q And then Mr. Sussman, as a part of the deal for the transfer of Eagle Rock avenue, West Orange, for the Walnut street, cancelled his five thousand dollar mortgage on Eagle Rock avenue? A Right. 20

Q Now, how do you make the other— Well, I think that explains the testimony. So that Mr. Sussman's five thousand dollar mortgage went into Walnut street and Mr. Sussman's five thousand that he got from the sale of his mortgage on Eagle Rock avenue went into Walnut street? A Yes; sir; I couldn't make the exchange if Mr. Sussman wouldn't do these things, because I built in Eagle Rock avenue. I think the other one was a better proposition, the exchange. 30

Cross examination by Mr. Tischler.

Q Mr. Cohen, is Mr. Sussman a relative of yours? A Yes, sir.

Q What is his relation to you? A Father-in-law.

Q This five thousand dollar mortgage that you say Mr. Sussman hocked, to whom did he sell 40

Charles Cohen, cross.

that mortgage to? A To somebody in New York.

Q Who is that somebody in New York? A He is a friend of mine.

Q You are sure it is not a cousin of yours?

A Yes, it is.

10 Q He is a cousin of yours? A He is.

Q Named Mr. Sonoff? A Sonoff, yes.

Q I show you the original mortgage given by the Goodwin Construction Company to Hyman Sussman, and call your attention to the fact that it is for fifteen thousand dollars. A Yes.

Q I call your attention to the recital in the mortgage: This is a purchase money mortgage given to secure part of the purchase price of the above mentioned premises. Was fifteen thousand dollars advanced by Mr. Sussman for the purchase of the property on North Walnut street?

20

A Yes.

Q Didn't you just state that a five thousand dollar mortgage was on North Walnut street—the Eagle Rock property? A Yes.

Q And that Mr. Sussman cancelled that mortgage on the property so that you can convey the same free and clear to Huegel & Clark?

A Yes.

30 Q That is five thousand dollars? A Yes.

Q When did Mr. Sussman hock the other mortgage? A Oh, I think, later.

Q When? A No, no. I think before. I don't remember that exactly. I think, before.

Q Isn't it a matter of fact that that mortgage still exists as a lien on the property of the Goodwin Construction Company? A Yes.

40 The Court: What is the transaction of hocking a mortgage?

Charles Cohen, cross.

Mr. Tischler: I don't know. He must have borrowed on it.

Q Am I to understand that you borrowed on—that Mr. Sussman borrowed some money on that mortgage and transferred it to Mr. Sonoff, who is a cousin of yours? A Mr. Sonoff gave me the money directly. 10

Q By check or cash? A I think checks and some in cash.

Q Have you got—is Mrs. Sonoff in court today? A She is supposed to be.

Q Is she? A Yes.

Q She has the check in court? A I suppose she will have it; I don't know.

Q Mr. Cohen, when did you make a contract for the excavation of the North Walnut street property? A According to the agreement I saw yesterday, it was on March the fourteenth. 20

Q On March the fourteenth? A Yes.

Q 1925? A Yes.

Q That was before this mortgage was recorded? A It was—well, I think so, yes.

Q When were your plans drawn? A The plans, I don't remember.

Q They were drawn by a Mr. Warner, weren't they? A Warren. Yes, Edward Warren.

Q And in that agreement with the digger there is a reference to the plans already drawn. Isn't that a matter of fact? A I had two plans made on that. First there was supposed to be a two story building and then I changed my mind and I changed it to a four story building. 30

Q When were those plans drawn? A I couldn't tell you.

Q When were they filed? A I couldn't tell you that, either. 40

Charles Cohen, cross.

Q Were they filed before or after April four?

A I couldn't tell you that; I don't remember.

Q When were—when did the digging start?

A The digging started about the eleventh of April, the eleventh or sixteenth.

10 Q How soon after the contract was drawn was the property dug? A Oh, after what?

Q After the contract was signed, when did you start digging? A It was to aid to make the contract at that time, because in March the prices were lower and the contract held good.

Q Wasn't it a contract for immediate excavation? A Well, but it didn't—we couldn't dig immediately because it wasn't—(interrupted)

20 Q On Eagle Rock—on North Walnut street property wasn't there a building on that property when you— A Yes.

Q —when you demolished that building? A I started there before—before—

Q Before April the fourth? A Before I even had the plans.

Q And you immediately thereafter started excavation? A No, no.

Q You demolished the building and intended to erect a new building, prior to April four? A No.

30 Q When you demolished the building, was it your intention to erect a building thereon? A No; my intentions were to sell that lot.

Q Why, in March—you had a contract already for excavation in March. A Well, still I had—still I was negotiating with people to buy that lot. I can have these people prove it to you. I didn't intend—I intended to sell that lot.

40 Q Isn't it a matter of fact that they excavated that property from March sixth to March sixteenth, 1925? A What?

Charles Cohen, cross.

Q That excavation took place on March sixth to March sixteenth, 1925? A No, sir, absolutely not so.

Q You admit that, however, you made the contract in March four, 1925, for the excavation? A March fourteenth, I think it is.

Q March fourth. A Fourteenth, I think. 10

Q (Showing witness paper.) Is this a copy of the contract you received from Mr. LoConte?

A Yes; that is a copy.

Q What is the date of it? A The fourth. Make it the fourth.

Mr. Tischler: I would like to offer this contract. Well, I will have it identified.

Q Is this the contract you had with LoConte for the excavation of the property? A Yes, sir. 20

Q And that was taken from your files? A That was taken from my files. You see here—excuse me—here we got here a dollar a yard, and later on it would have been about a dollar and a half. That cellar had to be dug out anyway.

Q When did you give him any money on this job? A I had to give him some money in advance. I gave him some because he had it coming, don't you know, and he was not a rich man. 30

Q When did you give him that money? A On the eleventh of April.

The Court: You say you want to introduce that in evidence?

Mr. Tischler: Yes, I would like to. Is there any objection?

Mr. Lane: No objection.

The Court: Let it be marked.

(Paper marked Exhibit D. 1.)

Charles Cohen, cross.

Q When was this mortgage to Hyman Sussman executed? A Which one?

Q There was only one mortgage. On the Walnut street property. A I can't remember—it was—this was executed—it was done at the same time when he cancelled the mortgage on
10 Eagle Rock avenue.

Q Do you know the date? A No, sir.

Q Do you know when it was recorded? A No, sir; I can't remember that.

Q You knew there was—how do you definitely fix this April eleventh that the excavation commenced on that day? A Because I saw one of the checks.

Q What check? A That I gave him. I gave him four. I gave him a check as soon as he
20 started digging, in order to pay some men to have the shovel moved up on the job.

Q When is that check dated? A They got it on record.

Q When did you give him a note? A I can't remember.

Q Isn't it a matter of fact your contract called for one-half of the total sum to be paid after it was completed? A Yes, sir.

Q Isn't it a matter of fact that you gave your check after the work was completed? A No,
30 sir.

Q When did you give him—when did you make another payment to Mr. LoConte? A I gave him—there the records will show. If they got checks, it will show just how they got the payments.

Q I am asking you. A I couldn't remember. It is three years ago.

Q But you remember April the eleventh. A Well, because this one I looked up from the records myself.
40

Charles Cohen, cross.

Q Why was this mortgage kept off record for four months? A Well, because this Mr.—I intended to sell Walnut street. I never intended to build it. In fact, Mr. Sherwood knows it too.

Q I didn't ask you that. A I wanted to sell that lot and I had a builder come up there and look at it. 10

Q Then it was never your intention to place this mortgage on record? A It was the intention to place the mortgage on—in an exchange or we figured on getting cash for it all.

Q And you kept the mortgage off record, because you didn't think it was necessary to put the mortgage on the property? A It was necessary—no; as far as I was concerned, I didn't care if the mortgage never went on, but Sussman insisted on having something to show I owed him the money, so he held that mortgage. 20

Q But at your request he kept the mortgage on record four months? A At my request, yes, because he didn't want me building any more there. He says, "You better lay off apartment houses."

Q You know when this mortgage was recorded, don't you? A I don't remember.

Q Do you know when it was re-recorded? A I don't know that either, why or when. 30

Q But you remember April eleventh? A I remember April the eleventh for the reason that I looked it up—I saw the check yesterday.

Q Where did you see that check of April the eleventh.

Q For how much was that check? A For one hundred dollars. And that was before the commencement of the digging even. I remember that definitely, because I had to go to Hedges (?) to get a digger, to get a steam shovel. 40

Charles Cohen, cross.

Q Did you turn that check over to the receiver? A Did I? Yes, I turned everything over to the receiver.

Q Where did you see that check of April the eleventh? A I saw it yesterday.

Q Who had that check? A Silver.

10 Q You saw that check in Mr. Silver's office?

A I know it was April the eleventh because—
(interrupted)

Q No. Where was that check? A I haven't got it. I gave it up to the receiver.

Q Where did you see that check yesterday?
A I saw on the record there how they gave that money there and I saw it was April eleventh.

Q You answer that question. You say you saw that check of April the eleventh yesterday.
20 Where did you see that check? A I know it was—(interrupted)

The Court: Where did you see the check?
Answer the question.

Witness: After I saw Silver, was over at the office and I saw yesterday where he had the check.

Q Did Mr. Silver bring that check there or
30 did your lawyer have that check? A Maybe my lawyer had the check; I don't know who had it, but I saw the check.

Q And you did not turn that check over to the receiver at the time the order was made? A I turned everything over to the receiver. I haven't got anything at all.

Q I want to find out where that check is and that is important. What was the other five thousand dollars in this mortgage, as far as I understand it, only seems to be ten thousand that
40

Charles Cohen, cross.

this mortgage was supposed to have been given for? A What do you mean?

Q Five thousand for the resale of mortgage and five thousand on money loaned on this mortgage? A Yes.

Q Where is the other five thousand? A Cash advanced by Mr. Sussman towards the erection of Eagle Rock avenue. 10

Q When was that, before the building was commenced or after the building was commenced?

A That was building—a different building entirely, a building I built on Eagle Rock avenue.

Q Then that five thousand dollars had nothing to do with the North Walnut street job? A Why, it certainly did, according to my estimation. I don't know.

Q That money went into the Eagle Rock avenue job, didn't it? A Yes; to pay off Lienor's creditors. 20

Q Then it didn't go into the purchase price of this property? A Well, if—(interrupted)

Q He didn't advance any money to buy this property, did he? A If I didn't have any building there I couldn't make the exchange to buy Walnut street, could I?

Q But that was for a past debt for Eagle Rock avenue. 30

The Court: That is what he says.

Q Isn't it a matter of fact that the majority of those checks were made out to you personally on Eagle Rock avenue? A Well, I give the money to myself, securing the good one, he gave me checks.

Q But most of it was to you as an individual? A Yes, but I used it for the Eagle Rock avenue. 40

Charles Cohen, cross.

Q Eagle Rock avenue, but you didn't use it in Walnut street. He didn't advance any money on Walnut street. A He did.

Q But not at the time this mortgage was given. A No. He gave me, besides this money he gave me some more.

10 Q Did Mrs. Sonoff give you the money? A Yes.

Q Didn't she loan it to you directly? A Directly to the different construction companies.

Q The five thousand dollars— A She wouldn't—we gave her a mortgage.

Q She gave you the mortgage. She didn't give the money to Mr. Sussman? A No; she gave the money to me.

20 Q Mr. Sussman had assigned the five thousand dollar mortgage to her? A Yes.

Cross examination by Mr. Keating.

Q Mr. Cohen, are there two pieces of property in West Orange? A Two.

Q How many mortgages did Sussman have on the piece of property that you improved in West Orange? A On the one that I improved?

Q Yes. A One.

30 Q What was the amount of that mortgage? A Five.

Q And is that the piece of property you sold to Huegel & Clark? A Yes.

Q You didn't sell the other property to Huegel & Clark, did you? A No; the other property I did not sell.

Q That—and there was also a five thousand dollar mortgage on this other property in West Orange that you retained title to, is that right?

40 A Yes.

Charles Cohen, cross.

Q And that mortgage was also held by Sussman? A Yes.

Q So that when you exchanged this West Orange property with Huegel & Clark for the Walnut street property in East Orange there was only a five thousand dollar mortgage had to be cancelled on the West Orange property in order to enable you to convey free and clear of encumbrances; is that right? A No; I couldn't do that. 10

Q Why couldn't you? There was only one mortgage of five thousand dollars held by Sussman on that property; is that right? A Mr. Sussman wouldn't sign off anything unless he knows he was going to get his money for it.

Q How much of a mortgage was on the property that you conveyed to Huegel & Clark? A Five thousand dollars. 20

Q And Sussman cancelled that mortgage and in exchange took a mortgage of fifteen thousand on the East Orange property, didn't he? A Not in exchange for that other one. For other debts that I owed him, which he paid me towards the erection on Eagle Rock avenue and which he was supposed to get paid off if I sold it for cash. Otherwise, if I couldn't sell it for cash I had to secure him the money in order to make an exchange; otherwise he wouldn't budge. 30

Q How much money did you receive for this five thousand dollar mortgage? A Five.

Q What bonus did he charge you? A Nothing.

Q Not a nickel? A No.

Q What bonus did Mrs. Sonoff charge you? A Nothing. We don't do any business like this in our family. This was a friendly deal.

Q Sonoff loaned you the money direct, is that right? A Right. 40

Charles Cohen, cross.

Q When did you say you commenced demolishing the old building on the property on Walnut street? A I can't tell you.

Q It was around March some time? A Probably.

Q It was before you started to excavate? A
10 It is about this same time or a little before.

Q In other words, it was before April first, wasn't it? A I was working—I think so.

Q Mr. Cohen, there was an old one-family house on this property in East Orange, wasn't there? A Right.

Q And you started to demolish that building? A Right.

Q In order that you might build or sell the lot? A Exactly.

Q When did you start demolishing that building? A Because—
20

Q When did you start demolishing that building? A That is something I couldn't tell you.

Q Who demolished it for you? A Myself. I hired the men by the day because there was a lot of chimneys and the cellars was all brick which I used in the building.

Q Well, did you start demolishing that building before you signed that contract of excavation? A I think it must have been. I can't
30 tell you. I can't be sure.

Q It must have been before you signed the contract of excavation? A Either before or the same time.

Q How soon after you started to wreck the place did you start excavating? A After I started to wreck the place, it was laying there for a long—I couldn't wait.

Mr. Keating: That is all.

Charles Cohen, re-direct—re-cross.

Re-direct examination by Mr. Lane.

Q At the time you demolished this building, did you have any intentions of building the new building? A No, sir; my intentions were I intended to sell it, to sell that lot. I didn't like that apartment house to build, but then I was forced to build because I had to keep on payments in the building and loan which was on it and interest and other expenses, and I had nothing to do, and as long as I couldn't sell it I thought best that I should build and realize something. 10

Re-cross examination by Mr. Keating.

Q When you signed this agreement of March fourth to excavate, you then intended to erect the building there, didn't you? A No. 20

Q You mean to tell me you started to excavate and you did not intend to erect a building? A I had that time that lot almost sold to a builder by the name of Bell. There was another fellow by the name of Bordnoff was going to buy that lot.

Q Why did you excavate the property? A One minute. And I make a contract at that time for one dollar a yard was large, because the cellar had to be there anyway and I could have sold it after really excavating better than otherwise because excavating was in the summer time—is always more expense than at that time. 30

Re-cross examination by Mr. Tischler.

Q If you did not intend to build a building, why did you go to the expense of tearing down 40

Charles Cohen, re-cross.

the old building? A Well, because the time was very near I had to get—the building was no use to me because a broken down building, nobody would live there.

Q It cost you money to tear down that old building? A Why, certainly.

10 Q Why did you tear it down if you did not intend to build on it? A Because they go over on the land and the lot is clearer. It is better when everything is already there for the men to go in the building.

Q How long did it take you to tear down that building? A I don't remember. It was the winter time; it was terribly cold weather.

Q Oh, winter time? A Yes; it was cold that time. I had the brick laying there and I was dis-

20 gusted.

Q Did you have any trouble excavating on account of the cold? A No.

Q It was warm then? A After it was warm.

Q Was it raining during that time? Was it a rainy period? A Was it rainy period?

Q Yes. Did it rain during the time you excavated? A Maybe it rained a couple of days; I don't remember.

Q Did you have steady rain during that month? A I couldn't tell you. I don't think

30 so.

Q You don't think so? A (No answer.)

Mr. Keating: I offer in evidence judgment of the voluntary non-suit in Lincoln Materials Company versus the Goodwin Construction Company.

(Paper marked Exhibit D. 2.)

Mr. Keating: And judgment in Passaic Bergen Lumber Company versus Goodwin Construction Company.

40

Amelia Day, direct.

(Paper marked Exhibit D. 3.)

Mr. Keating: And judgment of Henry R. Eisenberg Co., Inc., versus Goodwin Construction Company.

(Paper marked Exhibit D. 4.)

Mr. Keating: And judgment of Max Chopik against Goodwin Construction Company. 10

(Paper marked Exhibit D. 5.)

AMELIA DAY, sworn.

Direct examination by Mr. Keating.

Q Miss Day, you are from the County Clerk's office? A Yes, sir. 20

Q Have you the mechanics' lien claim filed by the Consolidated Expanded & Metals Company?

A Yes.

Mr. Keating: I offer it in evidence.

(Paper marked Exhibit D. 6.)

Mr. Keating: And I also want to introduce the original mechanics' lien claim of Mayer-Bez versus Goodwin Construction Company. 30

(Paper marked Exhibit D. 7.)

Mr. Keating: And also the original lien claim filed by the Pierce, Butler & Pierce against the Goodwin Construction Company.

(Paper marked Exhibit D. 8.)

(Discussion.)

Mr. Vail: I appear on behalf of Samuel Wolper, a mortgagee, holding a mortgage 40

Amelia Day, direct.

10 of sixty thousand dollars against the Walnut street, East Orange property, and except from the determination of the receiver because we were not allowed interest on the amount of principal of mortgage, that was allowed to us from the date of the appointment of the receiver until the time when the principal of the mortgage was actually paid to Mr. Wolper, and also except because
20 under the terms of the mortgage we were obligated to pay out certain items of insurance which were not allowed to us by the receiver. The petition of the bill prays for the allowance of this insurance on the same basis as the principal of the mortgage and interest on the amount of principal of the mortgage from the date of the appointment of the receiver down to the date that money was actually paid.

The Court: You paid \$54,000, didn't you?

Mr. Vail: Yes, I received \$56,000, but no interest. And I might also state that we are entitled at this time to interest on the \$56,000 from the date of the mortgage down to the date of the appointment of the receiver, which we did not receive at the time the principal of the mortgage that was actually paid.
30

The Court: Anything else you want?

Mr. Vail: Nothing I can think of.

The Court: The only thing, then, Mr. Lane, is for your man to appear, if counsel wants to cross examine him.

Mr. Lane: All I want to show, the date of commencement. If they are not going to offer in evidence any contradiction of Mr. Cohen I don't know as I need him.
40

Joseph LoConte, direct.

The Court: Is there any other evidence to be offered?

Mr. Steiner: I understand that all the testimony that has been taken in this matter before me or before the receiver is part of the record.

Mr. Lane: I don't know of any testimony any record—in the record as to the date of the commencement of this suit. 10

The Court: That certainly should be in the record. Counsel ought to be able to agree on that.

Mr. Lane: Excepting the testimony of Mr. Cohen. Mr. Cohen has testified distinctly that it was after the eleventh of April.

Mr. Tischler also failed to produce the check which he says he refreshed his memory with, that it was in his possession. 20

Mr. Lane: It is not in his possession at all.

Mr. Tischler: It never was in the hands of the receiver.

Mr. Steiner: We have no further testimony.

(Discussion.)

The Court: Proceed. 30

JOSEPH LoCONTE, sworn for complainant.

Direct examination by Mr. Lane.

Q Mr. LoConte, where do you live? A 62 High street, city.

Q What is your business? A Excavator contractor. 40

Joseph LoConte, cross.

Q Did you do some work on the Walnut street property of the Goodwin Construction Company for Mr. Cohen? A Yes, sir.

Q In 1925? A Yes, sir.

Q Do you remember the job? A Yes, sir.

10 Q When did you start the excavating on that work? A That work was started about the middle of April.

Cross examination by Mr. Tischler.

Q Mr. LoConte, you have records of when you do work for people? A Yes, sir.

Q Have you got those records with you here? A I haven't got those records here.

20 Q When did you enter into this contract with Mr.—the Goodwin Construction Company? A The contract was given out to me about a month ahead of the time and he told me not to go ahead with the job until he let me know.

Q Then when you say—when was the contract? A The contract was given to me about March some time.

Q About what part of March? A I couldn't say the date.

Q Was it in February? A No; in March.

30 Q The first part of March? A Well, I should say it was.

Q Then, how soon thereafter did you start digging? A Well, after two or three weeks he called me up and said he was ready to go ahead with the job.

Q Mr. LoConte, you had to get permission from the street department in East Orange before you can excavate? A No.

40 Q Did you have to get permission to block the sidewalk? A No.

Joseph LoConte, cross.

Q When you got up there was the building already torn down? A Yes, sir.

Q When was it torn down, before the contract was signed? A The building was on, when I signed the contract they were working on it.

Q They were tearing it down at that time? A They were tearing it down at that time, yes. 10

Q Did they tell you what kind of a building they were going to put up? A No.

Q When you signed the contract what kind of a building was it? A Our contract called for so much a yard.

Q Dollar a yard? A Dollar a yard.

Q Did you know what kind of a house you were to make the excavation on? A Apartment house.

Q It was to be according to certain plans and specifications, wasn't it? A It was to be according to the directions he gave to us. 20

Q The architect's direction?

Mr. Lane: Wait a minute.

Witness: No; Mr. Cohen's direction.

Q Did you sign that contract? A I did.

Q And didn't the contract contain a clause it was supposed to be according to plans and specifications of a certain architect? A No according to plans and specifications. He had to give us direction how to do the work. 30

Q Have you those plans and specifications? A No, sir.

Q Did you ever see those plans and specifications? A No, sir.

Q How do you fix the middle of April as the date that you excavated? A Well, I have an old record there and I will look it up. 40

Joseph LoConte, cross.

Q You did not bring that record to court?

A No.

Q You were sitting over there just before, weren't you? A Yes.

Q Did you have a conversation with anybody? A No, sir.

10 Q Didn't you ask the person, "What date shall I say that the building commenced?" A No, sir.

Q You are positive about that? A I am positive about that.

Q Did they ask you to bring your records in court? A No.

Q When did you get paid any money on this job? A Well, we had the check while the work was going on.

20 Q While the work was going on? A Yes, sir.

Q How much was that check for? A Oh, I couldn't say.

Q How long after the work had commenced did you get that check? A Well, I will say, two or three days.

Q Two or three days after? A (Witness nods yes.)

Q Wasn't it two weeks after, about two weeks? A No; I don't think so.

30 Q How big a job was it? A Well, I couldn't say right offhand.

Q According to the contract weren't you supposed to get paid half when you finished the work and half by note? A By note; yes.

The Court: The contract is in evidence. The contract will tell you. Do not ask him.

40 Q Did you get any money when the contract was signed? A No.

Joseph LoConte, cross.

Q Did you get any a couple of weeks later?

A No.

Q Did you get any money before the contract was started? A No, sir.

Q Did you get any money to buy a shovel?

A Did I get any money to buy a shovel?

Q Yes, sir. A No; I never got any money to buy a shovel. 10

Q You never got any money from Mr. Cohen to buy a shovel? A I had the money. I didn't tell him what I had to do with the money.

Q And did you get any money before you started work? A We never—(interrupted)

Q You never got any money before you started work? A Before the work was gone.

Q How did you fix the date the middle of April? 20

The Court: He told you that once before.

Mr. Tischler: By his records, but he hasn't his records here.

The Court: Well, that is all he can say now.

Q Can you produce your records in court? A I think I can. It is an old book that I don't think the Court can understand. 30

Q But that book has got dates in it, hasn't it? A Yes, sir.

Q And that book—what date did it say it started? A It was around the fourteenth or fifteenth, something like that.

Q It was not before the first of April? A (Witness nods no.) No, sir.

Q Did you have a payroll book to show—or when you paid men out on that job? A Well, I got—this is the record of the work, the payroll book you know I had. 40

Joseph LoConte, cross.

Q You haven't got a payroll book? A I have a payroll book, but I haven't got that payroll book.

Q Did you ever have any conversations about this job with any persons? A Well, they called me up; they wanted to know if I remember when that job was start.

Q What did you tell them? A I told them if I could find any record then I can tell you.

Q Did you say you would bring the records to court? A No. They said, "Look it up. If you can find any record then we would like to see you down at the Chancery Court."

Q When did you tell them you started it in April? A Eh?

Q When was the first time you told them you started it in April? A That was last night.

Q That was last night? A Yes, sir.

Q Were you subpoenaed to come to court? A Yes, sir.

Q Did you have any conversation with anybody this morning about the date? A The date? No, sir.

Q You did not speak to anybody this morning? A No, sir.

Q While you were sitting over there? A I was over there. I just asked the people when they were going to get me on, because I got to go back to my job.

Q You didn't say anything about the date then, did you? A No, sir.

Q How many people were you speaking to over there? A Well, to Cohen. I know Cohen, the fellow that gave me the job.

Q "Not before the first of April?" A Never mentioned. I told them just what I know. I said that job was started about the middle of April; that is all I told them.

Joseph LoConte, re-direct—re-cross.

Q You told them that? They didn't tell you it was started then? A No, sir.

Re-direct examination by Mr. Lane.

Q Have you seen Cohen except last night—how long ago was it that you saw Cohen before last night? A Well, I see him all the time, but they never ask me about this thing, only last night they bring me a supboena for the court and they wanted to know if I could look it up and find out when that job was start. 10

Q Did anybody else ask you about the date that this work was started—some weeks ago? A Somebody called me up; I should say, about a month ago and they want to know when that job was start. 20

Q Did he say he was the receiver? A He didn't say who he was, but he gave me his name.

Q What was his name? A He is a real estate—I can't remember his name.

Q Sherwood? A I think it was, and I told him I couldn't say just when that job was start.

Q Did you tell him finally the date it was started? A No, sir.

Q Did you talk to Cohen about this at all, except when he saw you last night? A No; last night was the first I saw Cohen and asked me if I know when that job was start. 30

Re-cross examination by Mr. Tischler.

Q You didn't tell the receiver the job was started on April the fourteenth, did you? A No.

Q You didn't tell that man (indicating) that the job was started on April the fourteenth? A No. 40

Joseph LoConte, re-cross.

Q You said you didn't know the date? A I didn't know the date. That is what I told him.

Q But you know the date today. A I looked up the book to find out, the 1925 book.

10 Q Why didn't you look up the book when the receiver asked you to look it up? A If it was important—I said, "I can't remember offhand; I will have to look up my book."

Q Was the excavation done before the plans were filed? A I don't know nothing about plans of that.

Q Were the plans drawn when you started the excavation? A I don't know; I suppose it was started.

Q Did you see the plans? A I never saw the plans.

20 Q Who told you how deep to go? A Mr. Cohen.

Q And if you were subpoenaed to bring those records to court you could bring those records to court? A I have got an old book.

Q That book has dates in? A Has dates, yes.

30 Q And you said on cross examination that it was about three weeks after you signed the contract? A Well, I can't say right offhand when the contract was signed. He said, "I will let you know when you start in."

Q How many weeks? A I can't say offhand. The only thing I can show you is the date I got on the book when that job was start.

Q Previously you said it was about three weeks after. A I couldn't say that.

40 Q Was it a rainy spell during the time you were digging? A Well, I don't know; I can't say that.

Joseph LoConte, re-cross.

Q Did you have any extraordinary trouble during that month? Was it sold? A No; it was not sold, I don't think.

Q And had no rain? A We had rain, I suppose.

Q I mean, it was not the average rain? A I couldn't say that; I don't know it. I can't remember. 10

Mr. Lane: It is a pretty hard thing to say what an average rain is.

Mr. Tischler: The month of April has considerably more rain than March.

Mr. Lane: That depends on the year. I have seen April dry as a bone

The Court: Well, that is all. 20

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OPINION OF VICE-CHANCELLOR.

Filed June 6, 1929.

Memorandum of the Court, CHURCH, V.-C.

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

Joseph Steiner, solicitor for Walter Sherwood, Receiver.

Keating & Keating for John R. Blair & Company and K. D. Flooring Company.

Merritt Lane of counsel with Newark Holding Company, appellant.

Levy, Fenster & McCloskey, solicitors of Levy Brothers.

20 CHURCH, V.-C.

In this case I have read the briefs in the matter and also the Receiver's memorandum, giving his reasons for the Receiver's report.

I will advise a decree sustaining the report and dismissing all exceptions.

I will file the Receiver's memorandum giving his reasons, with the Clerk in Chancery.

30

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ORDER DISMISSING APPEALS.

Filed May 23, 1929.

Order dismissing appeals from and exceptions to Receiver's report.

This matter being opened to the Court by Joseph Steiner, solicitor for and of counsel with Walter K. Sherwood, Receiver, in the presence of Keating & Keating, appearing for John R. Blair Company and K. D. Flooring Company, exceptants, Levy, Fenster & McCloskey, solicitors of Levy Brothers, exceptants, C. Wallace Vail, appearing for Samuel Werbel, appellant and Merritt Lane, appearing for Newark Holding Company, appellant and the Receiver's Report having been brought on for hearing and the Court having heard the argument of counsel for the Receiver and the argument of counsel opposed and having read and considered all exceptions filed and also the appeals of all persons and corporations appealing from the Receiver's report, it is on this 23rd day of May, 1929,

ORDERED, ADJUDGED AND DECREED that all exceptions filed be and the same hereby are dismissed, and that all appeals filed be and the same hereby are dismissed, and that the Receiver's Report be and the same hereby is in all respects sustained and confirmed and it is further

ORDERED that the Receiver hereby is authorized and instructed to disburse first from the monies in his hands the residue of the estate to the persons hereinafter mentioned and in the mode and manner hereinafter prescribed:

To (a) Levy Bros. Co., Inc.

(b) Max Chopik

(c) Passaic-Bergen Lumber Co.

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Order Dismissing Appeals.

- (d) John R. Blair Company
- (e) Consolidated Expending Metals Co.
- (f) Mayer-Bez Stone Company, Inc.
- (g) Nathan Cohen
- (h) Pierce, Butler & Pierce
- (i) Sterling Engineering Company
- 10 (j) Lincoln Materials Company
- (k) Henry R. Isenberg Co.
- (l) Isaac Ginsburg

the full amounts of their claims with accrued interest from the date of the filing of their respective claims provided there is enough money in the estate to pay them in full, if not, then to each of the claimants above listed in such sums as the proportion of their filed claims bears to the total amount in the Receiver's hands.

- 20 After the payment of the aforesaid claims in full, if there is sufficient in the Receiver's hands to pay them in full and a remaining surplus, the surplus then to be applied to the mortgage held by the Newark Holding Company with accrued interest from the date of its proof to date, the balance, if any, then left in the Receiver's hands to be distributed among the following general creditors

- 30 (a) S. Rabinowitz Iron Works
- (b) Louis Schrenell
- (c) K. D. Flooring Company
- (d) Commercial Casualty Insurance Company
- (e) Samuel Werbel

these claims to be paid in full if the funds in the Receiver's hands will reach and if not, the distribution to be made equitable dependent upon the proportion which the claims as determined by their amounts bear to the entire fund still remaining in the Receiver's hands, and it is further

Order Dismissing Appeals.

ORDERED, ADJUDGED and DECREED that after disbursing the monies now in his hands in accordance with the findings made and the provisions set forth in this Order that the Receiver file a memorandum of his disbursements with the Clerk of this Court and that after the filing of the aforesaid statement and the carrying out of the directions of this Court in this Order made by the said Receiver that the said Receiver be discharged from all further duties and liabilities with respect to the said trust and that the said Bond heretofore filed by the Receiver be and the same hereby is discharged. 10

Respectfully advised
 Alongs church
 cc.

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E. R. Walker,
 C.

30

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AMENDMENT.

Filed June 28, 1929.

10 This matter being opened to the Court by Joseph Steiner, solicitor for and of counsel with Walter K. Sherwood, Receiver, and it now being made to appear that in drawing the Final Order in this matter made and dated the 23rd day of May, 1929, through inadvertence the Receiver's recommendation that accrued interest be paid to Samuel Werbel on his first mortgage from the date of the mortgage to the date of the receivership was omitted from said Order, and good cause being shown, it is thereupon on this 28th day of June, 1929,

20 ORDERED, ADJUDGED and DECREED that the said Final Decree and Order confirming Receiver's Report and dismissing the Appeals and Exceptions be amended by inserting the following provision:

“Prior to the payment of any sum or sums of money to any of the creditors, there shall first be paid to Samuel Werbel the sum of \$3,010.00, being accrued interest on his first mortgage from the date of the mortgage to the date that the Receiver was appointed.”

30 E. R. WALKER,

C.

Respectfully advised,

ALONZO CHURCH, V.-C.

NOTICE OF APPEAL.

Filed May 23, 1929.

Notice of Appeal.

Please take notice that the Newark Holding Company appeals from so much of the order of the Chancellor made on the advice of the Honorable Alonzo Church, Vice-Chancellor, bearing date May 23, 1929, as dismisses the appeal of the Newark Holding Company, and overrules the exception of that company to the report of the Receiver and as confirms the action of the Receiver with respect to the claim of the Newark Holding Company to the New Jersey Court of Error sand Appeals in the last resort in all causes. 10

Dated: May 23, 1929. 20

JACOB SILVERMAN,
Solicitor for Newark Holding Company.

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

MERRITT LANE,
Of Counsel Newark Holding Company 30

PETITION OF APPEAL.

Filed June 4, 1929.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10 *On Appeal of Newark Holding Company, Appell-*
lant, and Walter K. Sherwood, Receiver of
Goodwin Construction Company.
Petition of Appeal.

To the Honorable, the Court of Errors and Ap-
peals, in the last resort in all causes:

The humble petition of Newark Holding Com-
pany, the appellant in the above stated cause,
respectfully shows that your petitioner finds it-
20 self aggrieved by an order made in the Court
of Chancery by his Honor Edwin Robert Wal-
ker, on the advice of the Honorable Alonzo
Church, Vice-Chancellor, bearing date the 23d
day of May, 1929, in a cause wherein Lincoln
Materials Company, Inc., was complainant and
Goodwin Construction Company was defendant,
in this respect to wit: that the said order ad-
judges that the appeal of your petitioner from
the determination of the Receiver, which directed
30 that the amount due to your petitioner upon its
mortgage should be paid after the payment of
lien claims aggregating \$33,936.90, be dismissed,
and that the said order confirms the said Re-
ceiver's report and directs that the said Receiver
distribute the fund in his hands to certain lien
claimants therein referred to and then the bal-
ance to be applied on account of the mortgage of
your petitioner. And your petitioner humbly
appeals from such portions of the said decree, as
40 aforesaid, upon the ground that the same is er-
roneous for that:

Petition of Appeal.

a. The said court should have ordered, adjudged and decreed that the mortgage of your petitioner is a valid and subsisting lien and that it is entitled to priority in payment over the lien claims placed ahead of it by said order for the reason, among others, that said mortgage was recorded prior to the commencement of the building within the meaning of the statute in such case made and provided; and for the further reason that, if not so recorded, then, at least to the extent of \$5,000.00, upon the ground that to that extent it was a purchase money mortgage and to the extent of \$5,000.00 it should be preferred to the lien claims because, to that extent, the said moneys were used in the construction of the building. 10

b. It allowed the claim of the Consolidated Expanding Metals Co. as a mechanic's lien prior to the lien of your petitioner's mortgage notwithstanding that suit was not commenced upon said lien claim nor was issuance of summons endorsed thereon within four months from the date the last materials were furnished. 20

c. It allowed the claim of Pierce, Butler & Pierce Manufacturing Corp. as a mechanic's lien prior to your petitioner's mortgage notwithstanding that suit was not commenced nor was the issuance of summons endorsed on the original lien claim within four months from the date of the last material furnished. 30

d. It allowed the claim of Meyer-Bez Stone Company, Inc., as a mechanic's lien prior to your petitioner's mortgage notwithstanding that suit was not commenced nor was the issuance of summons endorsed on the original lien claim within four months from the date the last materials were furnished. 40

Petition of Appeal.

e. It allowed the claim of the Lincoln Materials Company as a mechanic's lien claim prior to your petitioner's mortgage notwithstanding the fact that in an action at law brought by said Lincoln Materials Company against the Goodwin Construction Company and others, on its said
10 lien claim there was a voluntary non-suit thereby discharging any lien that the said Lincoln Materials Company might have by virtue of filing its said lien claim.

f. It allowed the claim of the Passaic-Bergen Lumber Co. as a mechanic's lien claim notwithstanding the fact that in an action at law instituted upon said mechanic's lien claim a final judgment was entered with priority over the mortgage of the Eleventh Ward Building & Loan
20 Association but not over that of your petitioner.

g. It allowed the claim of Henry R. Isenberg Co. as a mechanic's lien claim notwithstanding the fact that an action at law was brought upon said claim and a judgment entered thereon which failed to provide for priority over your petitioner's mortgage.

h. It allowed the claim of Max Chopik as a mechanic's lien claim notwithstanding the fact that in a suit at law brought upon said mechanic's lien claim, your petitioner was not made a party and final judgment was entered without providing that the said lien claim should be prior
30 to the lien of your petitioner's mortgage.

Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that the record may be remitted to the Court of Chancery with directions
40 to enter a decree that your petitioner be paid

Petition of Appeal.

the amount due upon its mortgage prior to the payment of any of the alleged lien claimants and general creditors, or, that, to the extent that the court may hold that your petitioner's mortgage represents moneys advanced for the construction of the building or part of the purchase price, said amounts be paid prior to any lien claimants or general creditors, or that the lien claimants heretofore specifically referred to be decreed to be entitled to payment only subject and subsequent to your petitioner's mortgage. And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet. 10

JACOB W. SILVERMAN,
Solicitor of Appellant.

MERRITT LANE, 20
Of Counsel with Appellant.

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ANSWER TO PETITION OF APPEAL.

Filed June 25, 1929.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10 *On Appeal from the Court of Chancery. Answer
to Petition of Appeal.*

The answer of Walter K. Sherwood, Receiver of Goodwin Construction Company, the above named respondent, to the petition of appeal of Newark Holding Company, appellant.

20 This respondent not admitting the truth of all or any of the matters in said petition of appeal contained for answer thereto nevertheless admits that a Decree was on the 23d day of May, 1929, made and entered in the Court of Chancery in the above entitled cause for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree this respondent begs leave to refer there-
to when the same shall be produced.

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

JOSEPH STEINER,
Solicitor for and of Counsel
with Defendant-Respondent.

May 29, 1929.

ANSWER TO PETITION OF APPEAL.

Filed June 10, 1929.

NEW JERSEY COURT OF ERRORS AND APPEALS.

<p style="margin: 0;"><i>Between</i></p> <p style="margin: 0; padding-left: 40px;">LINCOLN MATERIALS COMPANY, INC.,</p> <p style="margin: 0; padding-left: 120px;"><i>Complainant,</i></p> <p style="margin: 0; padding-left: 100px;"><i>and</i></p> <p style="margin: 0; padding-left: 40px;">GOODWIN CONSTRUCTION COM- PANY,</p> <p style="margin: 0; padding-left: 120px;"><i>Defendant.</i></p>	}	<p style="margin: 0;"><i>On Appeal from Newark Holding Com- pany, Appel- lant, and Walter K. Sherwood, Receiver of Goodwin Con- struction Company.</i></p>	<p style="margin: 0;">10</p> <p style="margin: 0;">20</p>
		<p style="margin: 0;"><i>Answer to Petition of Appeal.</i></p>	<p style="margin: 0;">30</p> <p style="margin: 0;">40</p>

The answer of Levy Brothers Company, one of the mechanic's lien claimants, and one of the creditors of the above named defendant to the petition of the appeal of Newark Holding Com-

pany. This mechanic's lien claimant and creditor of the Goodwin Construction Company, not admitting the truth of all or any of the matters in said petition of appeal contained, for answer thereof, nevertheless admits that an order was on the 23rd day of May, nineteen hundred and twenty-nine, 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

Answer to Petition of Appeal.

substance and form of said order, this mechanic's lien claimant and creditor of the Goodwin Construction Company, begs leave to refer thereto when the same shall be produced.

10 This mechanic's lien claimant and creditor of the Goodwin Construction Company is advised and believes that the said order is agreeable to equity; and it prays that the same may be affirmed.

LEVY, FENSTER & McCLOSKEY,
Solicitors of Levy Brothers Company one of
the Mechanic's Lien Claimants, and Creditors
of the Goodwin Construction Company.

SAUL TISCHLER,
Of Counsel.

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Formal Answer to Petition of
Appeal filed by John R. Blair Co. and
K. D. Flooring Co. on June 29, 1929.

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51 and 121

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

New Jersey Court of Errors and Appeals*Between*LINCOLN MATERIALS COMPANY,
INC.,*Complainant,**and*GOODWIN CONSTRUCTION COM-
PANY,*Defendant.**On Bill.**On Appeal
of Mort-
gagee from
Determina-
tion of Re-
ceiver as to
Priorities.*On appeal of NEWARK HOLD-
ING COMPANY, mortgagee,
*Appellant,**and*WALTER K. SHERWOOD, re-
ceiver of Goodwin Construc-
tion Company, *et als*, lien
claimants,*Respondents.**Appeal from
Order
Dismissing
Appeal of
Mortgagee.**Sat below
CHURCH, V.-C.***BRIEF FOR APPELLANT
NEWARK HOLDING COMPANY.**

(Italics, etc., mine except where otherwise noted.)

Statement of the Case.

Walter K. Sherwood was appointed statutory receiver of the Goodwin Construction Company, on March 30, 1926, against which company the statutory injunction went under the Corporation Act upon the ground of insolvency. The corporation is being wound up in the Court of Chancery as an insolvent corporation (p. 1). At the time of the appointment of the receiver

the lands of the corporation on Walnut street, East Orange (p. 104) were subject to a mortgage, dated January 2, 1925, made by Goodwin Construction Company to Hyman Sussman, securing the payment of \$15,000, on the 2nd day of July, 1925. The mortgage was recorded on April 1, 1925, and re-recorded on April 29, 1925. The re-record was solely because there was an omission in the original mortgage of the due date. On March 28, 1925, the mortgage was assigned to appellant, Newark Holding Company, and on April 29, 1925 the assignment was recorded. The mortgage recites: "This is a purchase money mortgage being given to secure a part of the purchase price of the above mentioned premises" (p. 90).

There were the following mechanic liens filed against the premises:

1. John R. Blair Company, Inc., filed November 20, 1925; materials furnished between September 5, 1925 and September 21, 1925 (p. 93, Exhibit C. 5).
2. Passaic Bergen Lumber Co.; filed January 4, 1926; suit brought on mechanics' lien against the Goodwin Construction Company, as owner, and Eleventh Ward Building and Loan Association of Newark, N. J. and Newark Holding Co., as mortgagees; judgment entered January 27, 1927, against the owner generally and adjudging that the lien claim is prior to the mortgage of the Eleventh Ward Building and Loan Association of Newark, N. J.; *no adjudication* that it is prior to the mortgage of appellant, Newark Holding Company (Exhibit D. 3, pp. 97, 98).
3. Henry R. Eisenberg Co.; filed February 20, 1926, Exhibit D. 4; suit brought against the

owner, Goodwin Construction Company and the Newark Holding Company; judgment entered November 12, 1926, against the owner generally; no adjudication that the lien claim is prior to the mortgage of Newark Holding Company (pp. 99, 100).

4. Pierce, Butler and Pierce; filed December 21, 1925; last work performed *August 20, 1925*; suit brought against the owner and Newark Holding Company, as mortgagee; answer filed by Newark Holding Company; not prosecuted to judgment (p. 101, Exhibit D. 8).

5. Mayer-Bez Stone Company, Inc.; filed November 6, 1925; materials furnished between May 13, 1925 and October 5, 1925; no endorsement on lien claim of any summons issued and no suit brought (Exhibit D. 7, p. 101).

6. Max Chopik; filed December 11, 1925; suit brought against the Goodwin Construction Company, mortgagee, Newark Holding Company not being made party; judgment entered against the owner (Exhibit D. 5, p. 101).

7. Lincoln Materials Co., Inc.; filed October 15, 1925; suit brought, including Newark Holding Company as party; voluntary non-suit entered November 16, 1926 (Exhibit D. 2, p. 97).

8. Consolidated Expanding Metal Co.; two lien claims; one filed October 31, 1925, the other November 2, 1925; materials furnished on July 2, 1925; suit commenced November 2, 1925; lien claim did not mention Newark Holding Company as a party, but Newark Holding Co. *was* party to the suit and filed an answer (Exhibit D. 6, p. 159; p. 101).

9. Sterling Engineering Company; filed January 7, 1926; materials furnished on September

8, 1925; suit commenced January 7, 1926; Newark Holding Co. was a party to the *suit* and filed answer (p. 101).

10. Levy Bros.; filed December 3, 1925; work done and materials furnished between the 7th day of May, 1925 and October 3, 1925; suit commenced December 28, 1925; Newark Holding Co. made a party (p. 101).

11. Nathan Cohen; lien claim filed November 18, 1925; labor and materials furnished between the 12th day of August, 1925 and October 10, 1925; suit commenced February 26, 1926, in Irvington District Court; Newark Holding Co., mortgagee, was a party both to the lien claim and in the District Court suit (p. 101).

12. Isaac Ginsburg; lien claim filed March 12, 1926; labor and materials furnished between the 22nd day of June, 1925 and November 16, 1925; suit commenced March 12, 1926; Newark Holding Co., mortgagee, was a party both to the lien claim and to the suit (p. 101).

The Walnut street lands of the Goodwin Construction Company were sold under an order of the court free and discharged of all liens, including that of the mortgage of Newark Holding Company, the proceeds being subject to the liens. A hearing was had before the receiver as to the validity and priority of the liens (pp. 1 to 89). The receiver reported (p. 102) allowing all of the lien claims heretofore mentioned priority over the mortgage of Newark Holding Company, and determining that, after the payment of such lien claims, the mortgage of Newark Holding Company should be paid to the extent of the principal sum of \$15,000 with interest from its date until the date of the appointment of the receiver, and that after it, certain general claims of the corporation should be paid (p. 108).

An order to show cause why the report of the receiver should not be confirmed went (p. 115). Upon the return of the order, an appeal was filed by Newark Holding Company (p. 117) questioning the decision of the receiver "insofar as said receiver deals with the mortgage of Newark Holding Company, in that he does not allow priority of said mortgage to the mechanics' liens or some or one of them, and insofar as he does not allow interest from the date of the receivership; and insofar as he allows said mechanics' liens for the amounts and in the order of priority allowed by him." Other appeals were filed (pp. 118, 121, 124, 135). A hearing was had before Vice-Chancellor Church on May 8, 1928, and testimony taken (p. 141).

On May 6, 1929, the receiver filed a memorandum, which was the first intimation to Newark Holding Company or to the court as to the reason why the receiver had placed the claim of Newark Holding Company subsequent to those of the lien claimants.

The receiver's memorandum (paragraph 2, p. 110), states that: he had considerable difficulty in ascertaining the status of the mortgage; he is satisfied that it was not recorded *before actual construction operations began on the building*; the relationship between the parties constituting the Goodwin Construction Company "also leads *the receiver to believe* that the mortgage was not placed in good faith but for the purpose of saving an added equity in the Cohens and their blood relations for past advances alleged to have been made and not proven. * * * No proof was offered to the receiver that the mortgage given to the Newark Holding Company was for a then existing consideration at the time that the mortgage was executed, neither was any proof

offered to the receiver that the consideration of the said mortgage went into the building. And although the mortgage itself recites that it was a purchase money mortgage, no proof was ad-duced before the receiver which would satis-factorily produce in the receiver's mind the belief that there was an indebtedness existing arising out of the purchase money which the mortgage might secure." For these reasons he subordinated the mortgage to the lien claims here-tofore mentioned (p. 111).

In stating why he allowed the mortgage, for the full amount, after the lien claims, he said: "still as between the Newark Holding Company as a creditor and Goodwin Construction Com-pany as a debtor, the claim is valid and may be established" (p. 112).

The Vice-Chancellor decided the case June 6, 1929, without opinion except as the memorandum of the court adopts the opinion of the receiver. An order was made dismissing the respective appeals, including that of Newark Holding Com-pany (p. 171), and directing the distribution in accordance with the report of the receiver and from that order an appeal was taken by Newark Holding Company (Notice of appeal, p. 176; peti-tion of appeal, p. 176).

ARGUMENT.

The Decision Below.

There was no testimony before the receiver to "lead the receiver to believe that the mortgage was not placed in good faith, etc.," and more than a mere belief of the receiver is needed, I submit, before a document, such as a mortgage, can be completely ignored, and, if the receiver believed that the mortgage was not placed in

good faith but for the purpose of saving an added equity in the Cohens and their blood relations for past advances alleged to have been made and not proven, as he stated in his memorandum, how could he (p. 112) allow the mortgage in full as against the Goodwin Construction Company prior to the claims of creditors of that company. There is no distinction, so far as good faith is concerned, between mechanic lien claimants or other creditors after receivership.

The evidence shows that the mortgage *was* recorded prior to work having been commenced upon the building within the meaning of the statute, contrary to the statement of the receiver contained in paragraph 2 of his memorandum (p. 110), as will be hereafter argued. But the receiver has also allowed lien claims prior to the mortgage where the lien claimants have not brought suits upon their lien claims within the four months' period, that period expiring before the appointment of the receiver so that it cannot be urged that the appointment of the receiver excused them—Mayer-Bez Stone Company, Pierce, Butler and Pierce—and where the lien claimant has brought suits—but without making Newark Holding Company a party, Max Chopic—and where the lien claimants have brought suits making Newark Holding Company a party, but where judgments have been entered not giving priority of the lien claimants to the Newark Holding Company—Passaic Bergen Lumber Co., Henry R. Eisenberg Co.—and where the lien claimant has submitted to a voluntary non-suit—Lincoln Materials Co., Inc.

The failure of the lien claimants to perfect their liens and the entry of judgments in suits brought upon liens which do not provide for priority of the liens over the mortgage of

Newark Holding Company precluded the lien claimants from asserting their liens in the one case and from asserting priority over the mortgage of Newark Holding Company in the other.

Active Mortgage Co. v. Apex Building Co.,
7 N. J. Advance Reports 964.

The Facts.

The mortgage of Newark Holding Company, which was dated January 2, 1925, and which covered the property of Goodwin Construction Company, 14 Walnut street, East Orange, New Jersey, which is the property described in the receiver's report and account (paragraph 1, p. 104), mortgage (described p. 90), was recorded on April 1, 1925, and re-recorded on April 29, 1925. The re-record was only necessary because the due date had been left out of the mortgage. The record on April 1, 1925, was constructive notice of the existence of the mortgage. The mortgage grew out of the following circumstances.

The Walnut street property covered by the mortgage was purchased by Goodwin Construction Company, which is Charles Cohen, from Huegel & Clark. As part of the purchase price there was to be transferred to Huegel & Clark by Goodwin Construction Company a building previously constructed by that company at Eagle Rock avenue, West Orange. This Eagle Rock avenue property of the Goodwin Construction Company was to be transferred free and clear of encumbrances, except a first mortgage. The Eagle Rock avenue property had been purchased by Goodwin Construction Company from Hyman Sussman.

Sussman held two \$5,000 mortgages on the Eagle Rock avenue property (pp. 143, 144), (there were two parcels on Eagle Rock avenue) one on each piece. One of the mortgages was on the parcel which was to be conveyed to Huegel & Clark free and clear of it *as a part of the purchase price for the Walnut street property*. The other \$5,000 mortgage Sussman transferred to Sonoff, who advanced \$5,000 upon it. This \$5,000, instead of being paid to Sussman, who owned the mortgage, was paid to the Goodwin Construction Company and was used by that company *in paying the bills contracted for the erection of the building on the Walnut street property, or, in other words, was actually applied to the erection of the building* (pp. 144, 145).

Sussman had also advanced \$5,000 to Goodwin Construction Company for the erection of the Eagle Rock avenue building (pp. 144, 145; pp. 152, 153).

In consideration of Sussman cancelling the mortgage on the Eagle Rock avenue property in the amount of \$5,000, that cancellation being necessary to complete the purchase of the Walnut street property, and of Sussman assigning to Sonoff the other \$5,000 mortgage which he held on the other piece of the Eagle Rock avenue property, and of permitting the moneys received for the assignment to wit, \$5,000 to be used in the erection of the building on Walnut street, and of his releasing his claim for the additional \$5,000 which he had advanced to Goodwin Construction Company *and which had been used in the erection of the Eagle Rock avenue property*, the Goodwin Construction Company gave Sussman the \$15,000 mortgage, the subject matter of this controversy as a purchase money mort-

gage and it was subsequently assigned to Newark Holding Company, appellant.

There is no dispute with respect to these matters. They are testified to by Cohen, of the Goodwin Construction Company (p. 142; pp. 7, 9; Sussman, pp. 65, 67; pp. 12, 13).

I.

The mortgage is a good and valid security for the sum of \$15,000.

The receiver ignores the testimony and the written documents and permits himself to be influenced by something, which does not appear in the record, to a *belief* "that the mortgage was not placed in good faith but for the purpose of saving an added equity in the Cohens and their blood relations for past advances alleged to have been made and not proven" (p. 110). He further says: "No proof was offered to the receiver that the mortgage given to the Newark Holding Company was for a then existing consideration at the time that the mortgage was executed" (p. 110).

Of course, if the testimony of Cohen and Sussman is to be completely ignored, there *was* no proof before the receiver. *They* went into details as to how the advances were made. Not only did the receiver ignore the oral testimony, but he likewise ignored the checks, which showed advances (Exhibits A. 1 to A. 5, pp. 92, 93; testimony, p. 14).

But the *belief* of the receiver, which led him to his preferring the lien claimants, did not seem to influence him when he allowed, paragraph 4 of his memorandum (p. 112), the mortgage to the full extent of \$15,000 as against

the Goodwin Construction Company and its creditors.

Testimony of witnesses cannot be ignored upon belief.

Not only were the lien claims filed long after the recording of the mortgage, but the materials etc., represented by them were delivered after the recording of the mortgage. The lien claimants deliberately advanced their moneys knowing of the mortgage. They have no special equity.

II.

The mortgage was recorded prior to the commencement of the improvement and is, therefore, entitled to priority under the Lien Claim Act, irrespective of the purpose for which the monies were used.

The determination of this question depends upon a proper construction of Section 28 of the Mechanics' Lien Act, which provides:

“Under such special *feri facias* the sheriff or other officer shall advertise, sell and convey said building and lot * * * and the deed given by such sheriff * * * shall convey to the purchaser the estate which the owner had in the lands at the commencement of the building, or which he subsequently acquired, and also in the building, *subject only to all mortgages and other encumbrances created and recorded, or registered prior to the said commencement of the improvement*, and, also subject to the lien of any mortgage given and recorded, or registered, under the circumstances contemplated by and in conformity with the provisions of sections 14 and 15 of this act * * *”

3 Comp. Statutes of New Jersey, p. 3310, Luce Mechanics' Lien, Edition of 1923, p. 254.

The question is whether the building had been *commenced* before the recording of the mortgage. The cases cited by the lien claimants below dispose of the matter in the mortgagee's favor.

The proof is without dispute that the excavation, *which was the first work done upon the building*, was not commenced until the middle of April, 1925, after the recording of the mortgage (Testimony of Charles Cohen, pp. 142, 148, testimony of Lo Conte, p. 162).

If this excavation was the commencement of the work, then there is no doubt but that the mortgage is entitled to priority.

But it was argued by the lien claimants that, because an architect may have a lien for his services, the commencement of the work goes back to the preparation of the plans and it was further argued that, because there was an old building upon the premises, which was demolished, the commencement of the work goes back to the commencement of the demolition of the old building.

Neither contention is sound. The commencement of the work, referred to in the statute, must be some *visible work upon the ground which will indicate to observers that a new building is in progress of erection*.

In *Mutual Benefit Life Insurance Co. v. Rowand*, 26 N. J. Eq. 389, the Chancellor said at p. 391:

“The legislature intended to make the *actual and visible commencement of the building*, notice to all who might propose either to purchase or acquire liens upon the property. *The commencement of actual operations on the ground for the erection of a building*, is constructive notice to all such persons of the claims which those who may

contribute work or materials for the building, may thereafter make against the property by virtue of the mechanics' lien law. The excavation for the foundation is such notice, and it makes no difference that the excavation is made by the owner himself, or under his direction, and not under a contract. The excavation for the foundation is the 'commencement of the building,' within the meaning of the law. *Pennock v. Hoover*, 5 Rawle 291; *Brooks v. Lester*, 36 Maryland 65. In the former of these cases, the court says that it may safely be considered the universal understanding as to what constitutes the commencement of the building of a house, *that it is the first labor done on the ground which is made the foundation of the building, and to form part of the work suitable and necessary for its construction. In the latter case, the courts say that what the law means by the term 'commencement of the building,' is some work and labor on the ground, the effects of which are apparent, such as beginning to dig the foundation, or work of like description, which every one can readily see and recognize as the commencement of a building.'*

In *Jacobus v. Mutual Benefit Life Insurance Co.*, 27 N. J. Eq. 605, Justice Dixon, who voted with the majority of this court to reverse the judgment, said at p. 617:

"While it would not be safe to say, that, in the view of the legislature, the commencement of the building was the first work done upon the ground toward the erection of the structure, it is both consistent with the language of this statute, and accordant with its evident purpose, *to hold that when the permanent work upon the ground, whether of excavation or of construction, has progressed so far as to inform reasonable observers that it is designed for the erection of a building, then the building has commenced. It would be employing language in no unnatural sense for one to say he was engaged*

in building his house while in fact he was only digging his foundation or cellar."

The lien claimants disposed of these cases by saying that they do not decide "that this is the only commencement of the building."

Perhaps they do not as illustrated in *James v. Van Horn*, 39 N. J. L. 353, in which the Supreme Court said at p. 363:

"The commencement of a building is the doing of some act upon the ground upon which the building is to be erected, and in pursuance of a design to erect, the result of which act *should make known to a person viewing the premises, from observation alone, that the erection of a building upon that lot or tract of lands has been commenced.*

In *Jacobus v. Mutual Benefit Life Insurance Co.*, 12 C. E. Green 604, work done in breaking the ground for a cellar was held a commencement of the building, because it must have changed the appearance of the ground so as to show the purpose of the work.

Under this rule, I do not think it is possible to say that there is no evidence to support the finding of the judge sitting also as a jury, *that from the materials lying upon the ground and mortised for erection, a person viewing the premises would be appraised at once that a building was going up. Unless we can say there is no evidence to sustain the finding, we cannot reverse for error."*

It will be noted that, in all the cases, the commencement relied upon by the lien claimants has been some *open act* upon the ground "the result of which act should make known to all persons viewing the premises *from observation alone* that the erection of a building upon that lot or tract of land has been commenced."

If, as in *James v. Van Horn*, 39 N. J. Law 353, one sees material lying upon the ground "*mortised* for erection" it cannot be said, as a matter of law, that a finding of fact that a person viewing the premises would learn that the erection of a building had been commenced is erroneous.

There is nothing in the suggestion of the lien claimants that, because an architect may have a lien, the date of the commencement of the building under section 28, relates back to the time that the architect prepared his plans. Section 28 does *not give the lien* but defines the effect of the *feri facias*. The lien is given by Section 1, 3 Comp. Statutes of N. J., p. 3291, and the building is made liable "for the payment of any debt contracted and owing to any person for labor performed or materials furnished for the erection, etc., thereof, which debt shall be a lien, etc." A person may furnish materials long prior to the commencement of the building, but he acquires no lien until the building is in course of erection and *then* his lien dates, under section 28, from the *commencement of the building*, and that commencement of the building, as defined by the courts, is an open act upon the ground which will apprise an observer, *from observation alone*, that a building is in course of construction.

If the lien claimants' position be sound, no one could ever take a mortgage upon land because no one could *ever* tell how long, prior to the taking of the mortgage, some plans had not been prepared for the construction of a new building upon vacant land *or the demolition of an old building on land and the construction of a new one*.

But all the court said as to an architect's lien in the case of *Turk v. Allard*, 87 N. J. L. 721, is:

"We think that when, as here, the architect *not only drew the plans and specifications, but also supervised the erection of the building*, he is entitled to claim a lien for his entire service."

There is no proof in the case at bar as to when the plans for *the building which was erected* were, in fact, prepared, whether before or after the recording of the mortgage, for Charles Cohen, who is the only person who testified upon the subject, says (p. 147):

"Q And in that agreement (the agreement with the excavator) there is a reference to the plans already drawn. Isn't that a matter of fact? A I had *two* plans made on that. First there was supposed to be a two-story building and then I changed my mind and I changed it to a four-story building.

Q When were those plans drawn? A I couldn't tell you.

Q When were they filed? A I couldn't tell you that, either.

Q Were they filed before or after April 4th? A I couldn't tell you that; I don't remember."

The excavator saw no plans or specifications (pp. 163, 168). He did his work as directed orally by Cohen. Cohen told him how deep to go (p. 168). It is fair to assume that, had plans and specifications been prepared at that time, the excavator would have seen them. It is quite true that, in the excavator's contract of March 11, 1925 (Exhibit D. 1, p. 149) there is a statement to the effect that the excavator agrees to do all the digging required according to plans drawn by Edward Warren, architect, but there is no evidence whatever that the plans referred to were the plans for the building

which was, in fact, erected; and there is no evidence to contradict Cohen's statement that originally the plans were for a two-story building and then he had plans drawn for a four-story building, which was the building erected; and it is significant that the excavator, although his contract calls for digging required by certain plans, never saw the plans during the course of the excavation. And Cohen testified (p. 157):

"Q When you signed this agreement of March 4th to excavate, you then intended to erect the building there, didn't you? A No.

Q You mean to tell me you started to excavate and you did not intend to erect a building? A I had that time that lot almost sold to a builder by the name of Bell. There was another fellow by the name of Bordnoff was going to buy that lot.

Q Why did you excavate the property? A One minute. And I make a contract at that time for one dollar a yard was large, because the cellar had to be there anyway and I could have sold it after really excavating better than otherwise because excavating was in the summer time—is always more expense than at that time."

This fits in with the fact that the excavator had no plans at the time the excavation was made, and also with the fact that there is *no proof in the case from the lien claimants of the ordering or delivering of any material prior to or during the excavation*. There is no proof that the Goodwin Construction Company entered into any contracts looking toward the erection of the building. Usually, when one intends to erect a building, contracts are awarded and material purchased in advance of the excavation, or at least during the excavation. *There is no such proof in the case at bar and the act of excava-*

tion stands almost as isolated, so far as the erection of the building is concerned, as the act of demolishing the old building hereafter mentioned.

The contention of the lien claimants below that the act of demolishing the old building must be considered the commencement of the new building is not well founded and the cases cited by them do not apply.

Ruling Case Law, Title Mechanics' Lien, Sec. 44, pp. 914 and 915, and the note in Ann. Cases 1912B, p. 13, referred to by the lien claimants below, deal with the question as to whether, under a lien act, there *may be a lien* for demolishing a building and do *not* deal with the question as to what is the commencement of a building within the meaning of a statute such as ours.

It may be that, under certain circumstances, the demolishing of an old building may be so much a part of the erection of a new building as that those engaged in the demolition of the old building are entitled to a lien.

And it may be that, under *some* circumstances, the commencement of the demolition may be considered the commencement of the new building under that section of the statute which determines, not the existence, but the effect of the lien.

The only case cited by the lien claimants upon this subject was *Ketcham v. Land Title & Trust Co.* (Pa.) 101 Atl. 764, but in that case the demolition of the old building was *included in the contract for the new building*. All the work was under a *single contract* and the court below had found, as a fact, that:

“The defendant had actual knowledge that the work of demolition was done for con-

structive purposes, that is, as part of the work necessary to the new building. The specifications recited the work of demolition and construction as part of the same contract, and it was these specifications which the defendant insured should be carried out. Moreover, the money to pay for the whole was deposited with the defendant for distribution. It therefore had knowledge of the utility of the operation."

We have no such situation in the case at bar. The testimony is to the contrary. Cohen testified (p. 148):

"Q You demolished the building and intended to erect a new building, prior to April four? A No.

Q When you demolished the building, was it your intention to erect a building thereon? A No; *my intentions were to sell that lot."*

Again (p. 157):

"Q At the time you demolished this building, did you have any intentions of building the new building? A No, sir; my intentions were *I intended to sell it, to sell that lot. I didn't like that apartment house to build, but then I was forced to build* because I had to keep on payments in the building and loan which was on it and interest and other expenses, and I had nothing to do, and as long as I couldn't sell it I thought best that I should build and realize something."

And again (pp. 157, 158.):

"Q If you did not intend to build a building, why did you go to the expense of tearing down the old building? A Well, because the time was very near I had to get—the building was no use to me because a broken down building, nobody would live there.

Q It cost you money to tear down that old building? A Why, certainly.

Q Why did you tear it down if you did not intend to build on it? A Because they go over on the land and the lot is clearer. It is better when everything is already there for the men to go in the building.

Q How long did it take you to tear down that building? A I don't remember. It was the winter time; it was terribly cold weather.

Q Oh, winter time? A Yes, it was cold that time. I had the brick laying there and I was disgusted."

The demolition of the old building was long before the excavating, for it was demolished *in the winter time* (p. 158) and the excavating was not until mid April (p. 158). There is not a word of evidence to connect the demolition of the old building with the construction of the new, and the case is wholly unlike that referred to by the lien claimants, *Ketcham v. Land Title & Trust Co.*, 101 Atl. 764.

Bearing in mind that our courts have held in three cases, *Mutual Benefit Life Insurance Co. v. Rowand*, 26 N. J. Eq. 389, Court of Chancery; *Jacobus v. Mutual Benefit Life Insurance Co.*, 27 N. J. Eq. 605, Court of Errors and Appeals; *James v. Van Horn*, 39 N. J. L. 353, Supreme Court, that the commencement of the building must be the performance of some permanent work upon the ground, which has progressed so far "as to inform reasonable observers that it is designed for the erection of a building", it is clear I submit that the demolition of a building standing upon the ground cannot be considered the commencement of a new building merely because, following that demolition, a new building is in fact erected. If it were, then, wherever a building is demolished, no matter how long before the construction of a new building, the

commencement of the demolition would be considered the commencement of the new building.

It is therefore submitted that, this building was not commenced within the meaning of the statute until after the recording of the mortgage, and the mortgage is therefore entitled to priority over the lien claimants.

III.

The proof or acknowledgment of the mortgage is all sufficient and the record is effective as constructive notice.

Neither the receiver nor the Court held that the record of the mortgage was ineffective because the proof or acknowledgment was defective.

The lien claimants contended below that, because the proof affixed to the mortgage (p. 91) is not signed by the secretary, the mortgage was not entitled to record and, therefore, is not constructive notice, and they referred to *Dreier v. Dreier*, 139 Atl. 235 at 236, 101 N. J. Eq. 342, an opinion by the Chancellor. This case does not support their contention. What the Chancellor said was (139 Atl. p. 236):

“There are two methods of proving a deed or other instrument for the purpose of recording, etc. One is by an acknowledgment by the grantor before an officer authorized by law to take the same. The other is by proof on oath of the execution of the instrument (usually made in the case of corporations’ deeds, but that is not necessary, as they also can be acknowledged; see *Hopper v. Lovejoy*, 47 N. J. Eq. 573, 21 A. 298, 12 L. R. A. 588) but the oath does not have to appear on the instrument in the form of an affidavit subscribed by an affiant with a jurat by the officer taking the same, but may

be certified by the officer taking the proof, without signing by the affiant. In the case of proof of the execution of a corporate deed, the officer *generally* commences the certificate to the effect that, 'A. B. C., being duly sworn, etc., did depose and make proof to my satisfaction,' etc., and concludes by signing his name and making official designation under the certificate; but this proof *may be* in the form of an affidavit *signed by the affiant* and with a jurat signed by the officer, as is sometimes done. The statute authorizing acknowledgement or proof provides for a certificate thereof by the officer taking the same, and *does not require an affidavit.* See the act respecting conveyances, Comp. Stat. p. 1542, Sec. 22, also Sec. 23, which provides for a certificate, etc. These two sections are amended in Comp. Stat. Cum. Supp. pp. 628, 629, but do not appear to affect this acknowledgment.

The lien claimants laid hold of the language of the Chancellor that the proof *may be* in the form of an affidavit *signed by the affiant*, and with a jurat, etc., leaving out of consideration the other language of the Chancellor to the effect that there *may be proof without an affidavit and without any signature excepting that of the officer.*

They said that no *certificate* appears upon the mortgage. How so? (p. 92.)

The Chancellor says that the officer *generally* commences his certificate to the effect that, "A. B. C., being duly sworn, etc., did depose and make proof to my satisfaction, etc."

But the Chancellor does *not* say that this is the *only* way by which the officer may commence his certificate of proof.

The statute does not require any particular form of proof. It reads, Sec. 22, Act Concerning Conveyance, 2 Comp. Stat. of N. J., p. 1542:

“or if it shall have been or shall be proved by one or more of the subscribing witnesses to it, such witness or witnesses then having happened * * * that such party signed, sealed and delivered it as his voluntary act and deed, before any one of the above-named officers then having been or being anywhere in this state, and if a certificate of such proof, *signed by such officer*, shall be written upon, or etc. * * *”

The certificate in the case at bar commences with the words “Be It Remembered that on, etc.” and there follows a statement of the appearance of the officer of the corporation and that he was duly sworn. This is equivalent to the language which the Chancellor says the officer *generally* commences with, *i. e.* “A. B. C., being duly sworn and, etc., did depose and make proof to my satisfaction.” An affidavit commences “A, B, C, being duly sworn according to law upon his oath says,” and then the officer signs the jurat. The phrase “Be It Remembered” is a statement by the officer, and that phrase is used to introduce a most formal certificate. The ordinary acknowledgment of a deed, a certificate of which is required under Section 22 of the Act Concerning Conveyances, printed on the back of every form, begins, “Be It Remembered” and the officer signs it at the end.

What do the words “Be It Remembered”, followed by certain things and signed by an officer signify if not a certification that the acts referred to, after the words “Be It Remembered”, occurred? By this certificate the officer certified that there appeared before him the secretary of the company, who swore to certain things. It is not necessary that the officer use the words

which the Chancellor says he generally uses, *i. e.*, "and made proof to my satisfaction". The statute does not require any such thing. *All that the statute requires is that the instrument should be proved.* How is an instrument proved? It is proved, of course, by the oath of the subscribing witness. The proof must be that the party signed, sealed and delivered it as his voluntary act and deed, and that proof is made by the oath of the subscribing witness. And the officer in the case at bar sets forth that before him there appeared the secretary of the company, who made oath, or, in other words, who swore that (and then follows the statutory language).

But, considered as an affidavit, the proof is sufficient without the signature of the affiant. It is true that the Chancellor refers to an affidavit (as distinguished from proof) as being an affidavit "signed by the affiant and with the jurat signed by the officer". But, while the Chancellor uses this language, he had in mind only that that was a method sometimes used, for he says, "as is sometimes done." He could not have meant that the affidavit, to be a good affidavit, needed the signature of the affiant, for the law is well settled that, in the absence of a rule of court or some statute, an affidavit need *not* be signed by the affiant. *Hitzman and Burkit v. Garrard*, 16 N. J. L. 124. And Justice Garrison, presiding at the Gloucester Circuit, said in *Van Dyke v. Oliphant*, 13 N. J. Law Journal 45, after stating that neither of the affidavits filed by the defendant were signed although the jurat certified that they had been sworn and subscribed, "This is not fatal. The act in question does not require that the defendants shall subscribe to the affidavit, but that it shall be filed. The certificate as to the subscription is, therefore, surplussage;

as to the making of the affidavit it is presumptively conclusive. A sworn statement in writing is an affidavit whether signed or not."

In *Newark, etc. Traction Co. v. North Arlington*, 65 N. J. L. 150, the Supreme Court said:

"In the case in hand the collector signed due return and made oath thereto on February 1, 1898. He did not subscribe the oath, but the prosecutor's objection to that omission has no force, for in the absence of express statutory direction no oath need be subscribed by the affiant."

The statute with respect to acknowledgments and the method of certification, etc., is not to be strictly but liberally construed. *Hopper v. Lovejoy*, 47 N. J. E. 573 at p. 579.

In *Turner v. Seymour Mfg. Co. v. Acme Mfg. Co.*, 110 Atl. 123, the Chancellor, adopting the opinion of the Advisory Master, held that, notwithstanding the act of 1912, 1 Cum. Supp. of N. J. p. 646, title "Conveyances", sec. 44-138, a corporate acknowledgment might be taken in the same manner in which it could be taken under *Hopper v. Lovejoy*, 47 N. J. E. 573, and—

"The recording acts ought to be so construed as to effectuate the object, but not so construed as to invalidate transactions for no useful purpose. *American Soda Water Co. v. Stolzenbach*, 75 N. J. L. 721."

IV.

Irrespective of the date of record, the mortgage of the Newark Holding Company is entitled to priority to the extent that it was a purchase money mortgage, and to the extent that it secured monies which were used in the construction of the building.

The facts which are stated at the beginning of this brief (p.), show that, to the extent of

\$5,000, the mortgage represents a cancellation of a mortgage held by Sussman upon the Eagle Rock avenue property of the Goodwin Construction Company, which Eagle Rock avenue property was transferred to the vendor of the Walnut street property as part of the consideration.

To the extent of this \$5,000, I submit the mortgage of Newark Holding Company represents an advance for the purchase price of the Walnut street property.

The lien claimants cited *New Jersey Building & Loan and Investment Co. v. Bachelor*, 54 N. J. E. 600. That case is authority that, if the purchase money or a part of the purchase money be advanced by a third person, *a mortgage given by the vendee to him will have preference over a mechanics' lien as a purchase money mortgage*. The lien claimants answered that no moneys were advanced as a part of the purchase price and the mortgage is therefore not entitled to priority.

But the undisputed fact is that Sussman, holding a mortgage for \$5,000 on property which was to be, and was in fact, conveyed to the vendor of the Walnut street property in consideration of the conveyance of the Walnut street property to the Goodwin Construction Company, released that mortgage so that the property could be conveyed free and clear of it as was required by the contract of sale. *The result was a contribution by Sussman to the extent of \$5,000 of the purchase price*. No case cited by the lien claimants holds that money must be advanced *in cash* to the vendor. It was not so in *Clark v. Butler*, 32 N. J. E. 664. In that case property was encumbered by two mortgages, embracing also other lands. The owner of the

property agreed to sell to another. This agreement was made during the construction of a building upon the property. The mortgagee released the lien of these two mortgages on the land and took a new mortgage from the new owner. *This new mortgage was held a purchase money mortgage and entitled to priority over a lien claim.*

So here there is no doubt but that, at least to the extent of \$5,000 *there was a direct contribution by Sussman to the purchase price.*

And I submit that, with respect to an additional \$5,000, the mortgage must be considered as a purchase money mortgage.

Sussman had advanced \$5,000 for moneys which went into the construction of the building on the Eagle Rock avenue property which property was to be, and was, delivered to the vendor of the Walnut street property as part of the consideration of the sale. It is true that there is no proof in the case as to any lien that Sussman had upon the Eagle Rock avenue property so far as *this* \$5,000 is concerned. But he stood in the position of being able, by reason of his holding the \$5,000 mortgage upon the Eagle Rock avenue property, to prevent the transaction from going through unless he were secured for this \$5,000 put by him in the Eagle Rock avenue property, and the securing to him of *this* \$5,000, which released the Eagle Rock avenue property from any claim on his part, was a part of the consideration for the giving of the new purchase money mortgage by the Goodwin Construction Company on the Walnut street property to him, and therefore must be considered as an advance upon the purchase price.

Notwithstanding what Vice-Chancellor Stevens said in *New Jersey Building & Loan Investment Co. v. Bachelor*, 54 N. J. E. 600, and what this court said in *Franklin Society v. Thornton*, 85 N. J. E. 525, in referring to the Bachelor case, it is not, I submit, at all certain that a mortgage given co-incident with the passing of title to the mortgagor is not entitled to priority to the full extent of the moneys secured by it, whether those moneys were advanced as a part of the purchase price or not, and I submit that *Gibbs v. Grant*, 29 N. J. E. 420, so held and that Vice-Chancellor Stevens did not effectively distinguish it in *New Jersey Building & Loan Assn. v. Bachelor*, 54 N. J. E. 600. The theory upon which purchase money mortgages are held prior in lien to lien claims is that there is but a momentary seizing of the owner and the beneficial interest of the owner is at all times subject to the lien of the mortgage and that the lien claimants can seize upon nothing but the beneficial interest.

I know of no case in this court settling this conflict between *Gibbs v. Grant* and *New Jersey Building & Loan & Investment Co. v. Bachelor*. *Franklin Society v. Thornton*, 85 N. J. E. 525, does not settle it. This court in that case recognized the matter of momentary seizin. 85 N. J. E. 528. Vice-Chancellor Berry does not settle it in *Bloom v. Thirty-six Berwyn Street Corporation*, 136 Atl. 803, 101 N. J. E. 142.

To the extent of the remaining \$5,000, if, as a mortgage given coincident with the vesting of title in the mortgagor, the mortgage is not entitled to priority except to the extent that it actually secures a part of the purchase price, and if it is not entitled to priority to the full extent of the moneys secured because it was

recorded before the commencement of the improvement, it is entitled to priority under 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, * * * provided such mortgage be registered or recorded before the filing of any such claim."

It is not contended that this mortgage was not recorded prior to the filing of any lien claim.

The only answer made to this contention is, "No monies were advanced which went into the building." But the testimony is, that, to the extent of \$5,000 it secured monies advanced which went into the construction of the Walnut street property. As is set out in the statement of facts, Sussman held a \$5,000 mortgage on another portion of the Eagle Rock avenue property. He transferred that mortgage to Sonoff (p. 147). The money which was obtained from Sonoff, to wit, \$5,000 (p. 147) went into the Walnut street property.

Cohen so testified (pp. 145, 146). The money was Sussman's, for Sussman owned the mortgage on the Eagle Rock avenue property. That \$5,000 was used in the construction of the building on the Walnut street property, the proceeds of the sale of which is the fund in court. The mortgage in dispute was given to secure it. How can it be said then that \$5,000 was not advanced upon this mortgage and applied to the construction of the building? The lien claimants said below:

"If it is to be considered an 'advance money mortgage' notwithstanding the fact

it was placed on record prior to the commencement of the building, it is only prior to moneys actually advanced under said mortgage. *Franklin Society v. Thornton*, 85 N. J. E. 525."

Of course, if it is conceded that this mortgage was recorded *prior* to the commencement of the building, all that is said upon *this* point is waste motion, for, in *that* event, the mortgage is entitled to priority under section 28.

But assuming that the lien claimants are correct and that the mortgage was *not* recorded prior to the commencement of the building, *then* it is entitled to priority to the extent of \$5,000 which went into the construction of the building, not as an advance money mortgage under section 14, but as a mortgage recorded before the filing of any lien claim under section 15. The different sections of the statute dealing with rights of mortgagees are considered in *Franklin Society v. Thornton*, 85 N. J. E. 525.

V.

The lien claimants hereinafter mentioned lost any liens which they might have and their rights, as general creditors, are subsequent to the rights of the mortgagee.

a. Passaic Bergen Lumber Company. The lien was filed on January 4, 1926; suit brought against the Goodwin Construction Company as owner and Eleventh Ward Building and Loan Association of Newark, N. J., and Newark Holding Company, as mortgagees and prosecuted. Judgment was entered against the owner generally, and adjudging that the lien claim is prior to the mortgage of the Eleventh Ward Building and Loan Association of Newark, N. J., and with no adjudication that it is prior to the

mortgage of appellant, Newark Holding Company. It is *res adjudicata*, therefore, that the lien claimant is not entitled to priority over the Newark Holding Company.

Active Mortgage Co. v. Apex Building Co., 7 N. J. Advance Reports 964.

(Exhibit D. 3, p. 98)

b. Henry R. Eisenberg Co., lien claim filed February 20, 1926, Exhibit D. 4. Suit was brought against the owner and the Newark Holding Company and judgment entered November 12, 1926, against the owner generally with no adjudication that the lien claim was prior to the mortgage of the Newark Holding Company. It is *res adjudicata* that this claim has no priority over the mortgage.

Active Mortgage Co. v. Apex Building Co., 7 N. J. Advance Reports 964.

(pp. 99, 100).

c. Pierce, Butler and Pierce. Lien claim filed December 21, 1925; suit started December 21, 1925; last work furnished August 20, 1925. Answer filed by Newark Holding Company; not prosecuted to judgment (p. 101, Exhibit D. 8). The lien claim was not filed, nor was suit commenced within four months after the last work stated in the claim. The lien claim was therefore lost. Mechanics Lien Act. sec. 18, 3 C. S. of N. J. 3305.

d. Mayer-Bez Stone Company. Lien claim filed November 6, 1925; no endorsement on lien claim and no suit brought (Exhibit D. 7, p. 101). There not having been any suit instituted on the lien claim and no endorsement on the lien claim of the suit within four months after the furnishing of the last material, which was Octo-

ber 5, 1925, the lien claim was lost. (Mechanics Lien Act. sec. 18, 3 C. S. of N. J. 3305.)

It cannot be said that suit was excused because of the appointment of the statutory receiver for no receiver was appointed until March 30, 1926 (p. 1).

e. Max Chopik. Lien claim filed December 11, 1925; suit brought against the Goodwin Construction Company mortgagee; Newark Holding Company was not made a party; judgment entered against the owner only (Exhibit D. 5, p. 101). The lien claimant having prosecuted his suit to judgment without making Newark Holding Company a party, it is *res adjudicata* that the Newark Holding Company is entitled to priority.

f. Lincoln Materials Co., Inc. Lien claim filed October 15, 1925; suit brought, including Newark Holding Company as party; voluntary non-suit entered, November 16, 1926. By taking the voluntary non-suit Lincoln Materials Co. discharged its lien (Exhibit D. 2, p. 97).

It is submitted that the court below erred in considering that the claimants above referred to were entitled to liens prior to appellant's mortgage.

This leaves the only lien claimants entitled to liens against the property as follows:

Levy Bros., Inc., John R. Blair Company, Inc.; Consolidated Expanding Metal Co., Sterling Engineering Co., Nathan Cohen, and Max Ginsburg.

CONCLUSION.

It is respectfully submitted that the court below erred in sustaining the Master's Report and ordering distribution in accordance with the terms of that report, and it is submitted that the order of May 23, 1929, should be reversed, with directions to the court below to enter an order adjudging

1. That the mortgage of Newark Holding Company is entitled to priority to the full extent of the \$15,000 next after the amount due the first mortgagee, Samuel Werbel. (It will be noticed that the order of May 23, 1929, p. 171, which is the order appealed from, does not provide for the payment to Werbel. The explanation is that, subsequent to the receiver's report and during the hearing, a separate order was taken directing payment to him as first mortgagee.) or
2. That the mortgage is entitled to priority to the extent of \$10,000 as a purchase money mortgage or as a mortgage given coincident with the vesting of title in the mortgage, or
3. That the mortgage is entitled to priority to the extent of \$5,000 as a purchase money mortgage to that extent, and
4. That the alleged lien claimants, Max Chopik, Passaic Bergen Lumber Company, Mayer-Bez Stone Company, Pierce, Butler & Pierce, Henry R. Eisenberg Co., Lincoln Materials Co., Inc., have no liens upon the fund the proceeds of the sale of the real estate.

Respectfully submitted,

MERRITT LANE,
Of Counsel with Appellant.

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New Jersey Court of Errors and Appeals

Between
 LINCOLN MATERIALS COMPANY,
 Inc.,
 Complainant,
 and
 GOODWIN CONSTRUCTION COM-
 PANY,
 Defendant.

On appeal of NEWARK HOLDING
 COMPANY, mortgagee,
 Appellant,
 and

WALTER K. SHERWOOD, Receiver
 of Goodwin Construction Com-
 pany et als, lien claimants,
 Respondents.

On Bill.

On Appeal of
 Mortgagee
 from
 Determination
 of Receiver as
 to Priorities.

Appeal from
 Order Dis-
 missing
 Appeal of
 Mortgagees.

Sat below
 CHURCH, V. C.

BRIEF OF RESPONDENT WALTER K. SHERWOOD, RECEIVER OF GOODWIN CONSTRUCTION COMPANY.

Statement of the Case.

Walter K. Sherwood was appointed Statutory Receiver of the Goodwin Construction Company on March 20th, 1926. At the time of the appointment of the receiver the main assets consisted of an uncompleted apartment house dwelling on North Walnut Street, East Orange. This apartment house the receiver under Court Order proceeded to sell at private sale, one of the terms of

the sale being the delivery of a completed building, which building was actually completed by the receiver before its delivery to John A. McKenna, the purchaser (p. 103).

While engaged in the actual completion of the building, the receiver, holding in his custody the contract calling for the delivery of the sum of \$128,500. part of which was to be used for the completion of the building and the balance to be distributed among the creditors, undertook what he believed to be a thorough and most exhaustive examination of all of the claims presented including the claim of the appellant, Newark Holding Company, and as it appears from the case, examination of several witnesses was had; the matter adjourned from time to time; the receiver endeavoring to ascertain the validity of all of the claims including the claim of the appellant and their exact status with regard to the fund ultimately to be distributed by the receiver as provided for under the Order appointing him and the provisions of the Corporation Act of the State.

ARGUMENT.

The Decision Below.

An examination of the receiver's report (pp. 106, 7, 8, 9) indicates that the receiver took this general position; that so far as the Werbel mortgage was concerned (not the subject of this Appeal) it was a first lien to the extent of \$56,000.00 which sum was paid by Court Order, that next in order of priority were all claimants and all persons who on the day of the appointment of the receiver had filed and placed on record mechanic's liens based upon work, labor and services rendered or materi-

als furnished in the erection of the uncompleted building on North Walnut Street which went into the receiver's hands at the time that he took custody of the assets of the corporation; thereafter claims of a general kind, even though attempted as in the instance of appellant's claim to be covered by a Bond and Mortgage of questionable value and where the Mechanic's Lien Act in none of its parts came into the situation involved. The Receiver acting under the 76th Section of the Corporation Act took the position and still contends that as receiver he had the power to examine, under oath or affirmation, all witnesses produced before him touching the claims, and to pass upon and allow or disallow claims or any part thereof. In this instance the receiver, like the common law jury, had the benefit of seeing the witnesses as they testified, of forming his own opinion as to the validity and credibility of the statements made by them. Printed page and the most voluminous State of the Case would not and could not indicate to the Court the hesitancy, the reluctance and the confusion crossing the countenances of the persons who were produced before the receiver and whose testimony was used for the purpose of establishing the validity of the mortgage which is the subject matter of this appeal.

The Facts.

The facts concerning the mortgage in question are briefly as follows: Goodwin Construction Company was incorporated as a corporation under the General Corporation Act. At the time of the receivership it was admitted before the Receiver that the principal stockholder and party in interest was Charles Cohen and this contention is not disputed by the appellant, for in appellant's brief on page

8, second paragraph, we find the following statement:

“The Walnut Street property covered by the mortgage was purchased by Goodwin Construction Company, which is Charles Cohen, etc.”

Goodwin Construction Company purchased a piece of property at No. 14 North Walnut Street, East Orange. The \$15,000.00 mortgage in question was given by Goodwin Construction Company to Hyman Sussman (p. 90).

Hyman Sussman testified (p. 11) that Mr. Cohen was his (Sussman's) son-in-law. The mortgage was subsequently assigned to Newark Holding Company which as appears from Sussman's own testimony was his own company, he being the principal stockholder therein (p. 15). The mortgage although dated January 2nd, 1925, was not placed on record until April 1st, 1925. It was re-recorded on April 29th, 1925. It is submitted at the outset that the certificate of January 2nd, executed by Joseph H. Steinhardt and also the certificate of April 29th, 1925, executed by Joseph H. Steinhardt, is not in compliance with the conveying act and the County Register was not required to receive the instrument for record at any time during its existence.

POINT I.

The intended mortgage was not and is not good and valid security for the sum of \$15,000.00 or any other sum.

An examination of the State of the Case, bearing in mind the relationship between mortgagor and mortgagee (Cohen and Sussman) and the assignee of the mortgage, Newark Holding Company (Sussman again) clearly indicates that the hazy and incoherent statements and the forgetfulness of the witnesses themselves and their own reluctance to come forward to state the real facts as to the purport of the giving of the mortgage in question was enough to justify the receiver, not by way of penalty to be sure but as a person clothed with the judicial authority given to receivers under the 76th Section of the Corporation Act, in coming to the conclusion which he ultimately reached. Time and time again Cohen was asked about the mortgage and at no two times did he give the same story.

Thus on p. 8 Cohen was asked the following:

“Q. How much money did Sussman advance you on Eagle Rock Avenue?”

A. He advanced me \$5,000. I bought the lot from Sussman and he took back a purchase money mortgage in the amount of \$10,000.00.”

After taking this position then it appears that several months later Cohen was again asked (p. 84):

“Q. Now how did you come to give this mortgage to the Newark Holding Company?”

A. I owed my father-in-law \$10,000. in the form of a mortgage”.

A little later the following appears in the testimony (p. 85) :

“Q. Does the Goodwin Construction Company own the lot next door?

A. Yes.

Q. Was this mortgage on the lot and building or was it split \$5,000. on the building and \$5,000. on the lot.

A. I don't know.”

Again p. 86 :

“Q. At that time Goodwin Construction Company owed Hyman Sussman or the Newark Holding Company \$10,000.00, didn't it, that is at the time that you made this exchange?

A. Yes.”

Further on at p. 87 :

“Q. You mean he subordinated his \$10,000. mortgage to a first mortgage of the building and loan?

A. Yes.

Q. Was there a \$5,000.00 mortgage on the improved piece and \$5,000.00 on the unimproved?

A. My impression is that my father-in-law subordinated \$5,000. on the improved piece to the first mortgage and kept the other \$5,000. as a first mortgage on the unimproved piece.”

In observing the witness as he testified and in trying to ascertain the real facts with regard to this mortgage, the Court will note from the testimony that Cohen, himself, perhaps blurted out inadvertently the real status of the mortgage when the following transpired. At p. 84 :

“Q. Now, Mr. Cohen there appears on the record a mortgage given by the Goodwin Construction Company to the Newark Holding Company. Who is the Newark Holding Company?”

A. My father-in-law.

Q. In other words tell us the name of the principal stockholders.

A. I do not know. Maybe you have a suspicion that it is a *fake mortgage.*”

(Italics ours)

While it is true that the mortgage which is the subject of this appeal in this cause recites that it is a purchase money mortgage, it is also admitted that the North Walnut Street property was purchased from Huegel and Clark (see Appellant's brief, p. 8, 2nd paragraph).

While ample opportunity was afforded Charles Cohen and his witnesses, nevertheless it is a fact that no contention was ever made before the receiver and no proof ever given to him to show that the consideration of the alleged mortgage given to Sussman and then assigned to the Newark Holding Company was advanced to the Goodwin Construction Company for the purpose of enabling it to acquire title and purchase the premises in question. On the contrary the facts and figures with regard to the Eagle Rock Avenue transaction which were apparently part and parcel of the same deal out of which the acquisition of the North Walnut Street property arose, show that instead of the Goodwin Construction Company being indebted to Huegel & Clark, Huegel & Clark were indebted to Goodwin Construction Company and paid them \$5,000.00 in cash and also gave back a mortgage (p. 9). The mere fact that in the drawing of the mortgage which is the subject of the present appeal counsel inserted language which would indi-

cate that the mortgage was a purchase money mortgage of course does not make it such and it may well be that this clause was ingeniously inserted in the mortgage so as to lend confusion and to carry out a plan which the receiver believed and still believes was intended by the execution of the mortgage, namely the reservation of a possible \$15,000.00 equity in case the plan of the Goodwin Construction Company to erect an apartment house on the land in question and its sale for some particular reason, especially insolvency, did not meet with ultimate fruition.

It is elementary that the parties by their own language cannot give to a mortgage or the debt which it secures a status different from that which the facts of the transaction invite and the giving of the mortgage discloses. So in this case the only person or persons who could possibly hold a purchase money mortgage on the North Walnut Street property would be Huegel & Clark if there were a debit balance due them, they being the immediate vendor or any third party who it might have been shown advanced to Goodwin Construction Company monies which enabled said Goodwin Construction Company to acquire title to the premises. On the contrary as above shown in this case the fact was that Huegel & Clark owed Goodwin Construction Company money on the entire transaction, which money was paid in the form of \$5,000.00 in cash and the balance funded in the form of a \$5,000.00 mortgage on Eagle Rock Avenue property, so that there was no possible reason for the giving of a purchase money mortgage.

The attempted explanation on the part of the appellant of the facts underlying this mortgage (on pp. 8 and 9 of the appellant's brief) is in conflict with the testimony of Sussman, who was the orig-

inal holder of the mortgages and, who, more than anybody else, should know the history of the mortgages on Eagle Rock Avenue and what became of them, and we find in his testimony not that Sussman cancelled the mortgage on the Eagle Rock Avenue property, but, on the contrary, that he assigned both of the mortgages to Goodwin Construction Company (p. 12) and when asked (p. 15).

“Q. Did you cancel both of the mortgages on Eagle Rock Avenue?”

his answer was,

“A. I do not remember what became of those mortgages. He (I?) gave an assignment of those mortgages to the Goodwin Construction Company for the consideration of the other one on North Walnut Street”.

It is submitted for the consideration of the Court that on the several days that Cohen, the principal witness of the Goodwin Construction Company, was examined, and at the time that Sussman was before the receiver or even in the hearing before Vice Chancellor Church on the appeal from the Receiver's Report, that documentary evidence to substantiate the story of these witnesses was at no time produced. The production and marking into evidence of the contract of sale and purchase of the North Walnut Street property between Huegel & Clark and Goodwin Construction Company would have been helpful. The production of the assignment of the mortgage on the Eagle Rock Avenue property which is now being urged to substantiate the \$15,000.00 mortgage, was never offered in evidence, if indeed it is in existence at all. Neither is there any proof of the alleged cancellation of the \$5,000.00 mortgage on the Eagle Rock Avenue property nor was the Bond supporting it produced either before the receiver or the Vice Chancellor

so as to lend credence to the positions now taken by the appellant to support its contention. Nor was Sonoff, who was supposed to have been the assignee of these mortgages and the person who it is alleged advanced \$5,000.00 at any time produced as a witness on behalf of the Goodwin Construction Company or the Newark Holding Company. All that we know about Sonoff in the case is as follows (p. 145) :

“A. The other one I needed money and Mr. Sussman, I gave him a note and he went—when we sold, he transferred the mortgage—or, sold the mortgage to a lady, to somebody which, and she gave me the money to procure Walnut Street”.

On cross-examination (p. 146) when asked to whom the mortgage was sold to, he answered

“To somebody in New York”.

“Q. Who is that somebody in New York?

A. He is a friend of mine.

Q. You are sure that it is not a cousin of yours?

A. Yes, it is.

Q. He is a cousin of yours?

A. He is.

Q. Named Mr. Sonoff?

A. Sonoff, yes.”

We take it that enough has been developed to show the improbability of the story adduced on behalf of the appellant to substantiate the validity of its mortgage and that on the contrary there are enough facts in the case which would entitle the receiver to come to the conclusion to which he did come, namely, that there was nothing which would lead him to believe that the mortgage was put on in good faith for a valuable consideration as against persons who are entitled to relief under the Mechanic's Lien Law, and we respectfully con-

tend that in the absence of anything appearing in the record which would show that there is nothing upon which the receiver's conclusion could be founded and justified, that the finding of the receiver, based upon the admission of testimony and the omission to produce regular documentary testimony, the value of which is so much heralded by the appellant, where continuous examinations were had week after week, with several intervals in between examinations so as to permit the production of the records, mortgages, contracts and assignments hereinabove referred to, coupled with the fact that the receiver had an opportunity of determining the credibility of the witnesses produced before him—that in view of all of these facts, the conclusion of the receiver as to the true purpose of this mortgage should not be disturbed.

As was stated by Chancellor Runyon in the case of

De Mott vs. Stockton Paper Ware Manufacturing Co., 32 N. J. Equity 124, p. 132

“Receivers have the authority and it is their duty to settle the priorities of encumbrancers, and in case of dissatisfaction an appeal to the Chancellor is expressly given; and that in settling priorities they must inquire into the validity of the several claims and refuse to allow any which they may believe to be fraudulent or illegal.” Citing cases.

POINT II.**The mortgage was not recorded prior to the commencement of the improvement.**

The mortgage of Hyman Sussman if at all recorded was not recorded until April 2nd, 1925. Hyman Sussman, the party to whom the mortgage was given, testified before the receiver on September 14th, 1926, on p. 14, as follows:

“Q. I show you Exhibit A-3. Check dated January 20th, 1925, in the sum of \$850.00 made by Hyman Sussman to the order of Goodwin Construction Company.

A. During that time he was not only finishing up the Eagle Rock Avenue property but he had started already in North Walnut Street.

Q. Exhibits A-4 and A-5. The balance of these checks were given to go into the construction of North Walnut Street?

A. Yes. It was given for that mortgage. At that time he was already working on North Walnut Street.”

Exhibits A-4 and A-5 (p. 93). Exhibit A-4 is a check drawn by Hyman Sussman to the order of Charles Cohen for \$500.00, dated March 19th, 1923, endorsed Charles Cohen, Goodwin Construction Company, Charles Cohen, president. Exhibit A-5 is a check drawn by Hyman Sussman to the order of Charles Cohen for \$350.00 dated March 30th, 1925, endorsed for deposit Charles Cohen, Goodwin Construction, Charles Cohen, president.

We here have an admission against interest made by Hyman Sussman binding on himself and his assignee, the Newark Holding Company, of which company he, the said Hyman Sussman, is principal stockholder if not the entire company.

Before the Vice Chancellor considerable proof was made with an intent to show that the actual work in the excavation was subsequent to April 2nd. Charles Cohen (p. 148) testified that the digger started about the 11th day of April or the 16th, but as to other facts as to the erection of the building his answer is

“I couldn't tell you” (see p. 147)

On p. 149:

“Q. You admit that, however, you made a contract on March 4, 1925, for the excavation?

A. March 14th, I think it is.

Q. March 4th?

A. 14th, I think.

Q. (Showing witness paper). Is this a copy of the contract which you received from Mr. LoConte?

A. Yes; that is a copy.

Q. What is the date of it?

A. The fourth, make it the fourth.”

Thus it could be seen that while the fact that Charles Cohen testified that the excavation commenced on the 11th, his recollection as to other dates is hazy and, in fact, was shown to be incorrect as to the date when the contract was made with the excavator. If admittedly he testified that he was in error as to the date when the contract was signed is it not fair to infer that he was incorrect as to the date when excavating was commenced?

The other witness who was produced by the appellant at the hearing was a Joseph LoConte. Mr. LoConte testified (p. 162):

“Q. How soon thereafter did you start digging.

A. Well, after two or three weeks he called me up and said he was ready to go ahead with the job”.

Two or three weeks after the 4th of March, the date of the contract, would bring the commencement of the work not later than March 25th, which was still prior to the date of the recording of the mortgage. It is to be considered that neither Mr. Charles Cohen nor Mr. LoConte produced the records or memoranda which they stated they refreshed their memory with as to the date. It is also to be remembered that Charles Cohen testified that he gave the digger money prior to the commencement of the digging (p. 151), while Mr. LoConte testified that when he received the check work was already going on (p. 164). Even assuming that the mortgage was on record prior to the commencement of the building, it still remains a fact that it was not a purchase money mortgage, neither was it shown that any money was advanced under the mortgage prior to the time of the commencement of the building, nor was it shown that any moneys were advanced after the commencement of the erection of the building which went into the construction of the building and would give the mortgagee the protection contemplated by the Mechanic's Lien Law. Nowhere does it appear in evidence that there were checks exhibited by Hyman Sussman and/or Goodwin Construction Company which would settle the contention that \$15,000.00 was paid out under the mortgage and entitling the mortgage to the protection of the Mechanic's Lien Law.

POINT III.

There is no proof or acknowledgment of a mortgage entitling it to record nor was its recordation sufficient notice.

Drier vs. Drier, 101 N. J. Eq. 342.

POINT IV.

There is nothing in the record entitling the holder of the entire mortgage to priority as a purchase money mortgage, nor is there anything in the record to show that moneys were advanced on the mortgage which were used in the construction of the building.

This has all been disposed of in the argument above set forth and we again urge upon the consideration of the Court the testimony of Cohen as he appeared before the receiver together with the testimony of Sussman, together with the testimony of LoConte and the fact that their testimony is hopelessly irreconcilable and that they are the only three witnesses from whom any of the facts could be elicited. This should lead the Court to the conclusion that the receiver's findings for the reasons above set forth should not be disturbed.

POINT V.

The lien claimants mentioned in Appellant's brief did not lose any rights which they might have, neither are their rights those of general creditors nor are their rights subsequent to the rights of this mortgagee.

The receiver in this case was appointed March 26th, 1925. His determination of claims is based upon the status of the claims as he found then on that particular day. We do not believe that the receiver is bound by anything that happens in actions at law subsequent to the date of his appointment. To hold otherwise would lead to the adoption of a rule that so long as one single suit is pending in the Circuit Court on Mechanic's Lien

or otherwise, a receiver may not file his report and apply for his discharge. Upon the appointment of a receiver jurisdiction is given to the receiver under the 76th Section to determine all claims. What transpires in the lower courts subsequent to the appointment of the receiver is a surplus.

The case of

Active Mortgage Co. vs. Apex Building
Co. 7 N. J. Advance Reports 964,

cited by the appellant, has no bearing in this situation. In that case it was held that a judgment of the lower Court dismissing a mortgagee as a party defendant in a suit to enforce a mechanic's lien on the ground that the defendant's mortgage is a superior lien is *res adjudicata* in a suit to foreclose the mortgage. But the case is not authority for the proposition that where a receiver is appointed for an insolvent corporation that the receiver in his determination of the priority of claims is bound by what transpired in the lower courts *subsequent* to his appointment.

CONCLUSIONS.

It is respectfully submitted that there was no error in the Court below in substantiating the Receiver's Report and ordering the distribution in accordance with the terms of that Report and the Order based thereon and it is submitted that the said Order should be in all respects affirmed.

Respectfully submitted,

JOSEPH STEINER,
Solicitor for and of Counsel with Walter
K. Sherwood, Receiver, &c., Respondent.

New Jersey Court of Errors and Appeals

Between
 LINCOLN MATERIAL COMPANY,
 INC.,
 Complainant,
 and
 GOODWIN CONSTRUCTION COM-
 PANY,
 Defendant.

On appeal of NEWARK HOLDING
 COMPANY, *mortgagee*,
 Appellant,
 and
 WALTER K. SHERWOOD, Receiver
 of Goodwin Construction Com-
 pany, et als, lien claimants,
 Respondents.

On Bill.
 On Appeal of
 Mortgagee
 from
 Determination
 of Receiver as
 to Priorities.
 Appeal from
 Order Dis-
 missing
 Appeal of
 Mortgagees.
 Sat below
 CHURCH, V. C.

BRIEF FOR RESPONDENT

LEVY BROTHERS COMPANY, INC.

one of the mechanic's lien claimants, creditor of
 the Goodwin Construction Company.

(Italics, etc., ours except where otherwise
 noted).

(All references to pages are the State of
 Case, except where otherwise noted).

Statement of the Case.

Walter K. Sherwood was appointed statutory receiver of Goodwin Construction Company, on March 30, 1926, against which company a statutory injunction issued under the Corporation Act upon the ground of insolvency. The corporation is being wound up in the Court of Chancery as an insolvent corporation.

One of the assets of the Goodwin Construction Company was an unfinished twenty-four (24) family apartment house, designated as No. 14 North Walnut Street, East Orange, New Jersey (104).

Said premises were encumbered with a mortgage made by the Goodwin Construction Company to Hyman Sussman to secure the sum of \$15,000.00, which mortgage while dated January 2, 1925 was not recorded until April 1, 1925 and was subsequently re-recorded on April 29, 1925. On March 28, 1925 the said mortgage was assigned to the appellant, Newark Holding Company and on April 29, 1925 the assignment of said mortgage was recorded.

At the time of the appointment of a receiver, numerous mechanics liens were filed against the said No. 14 North Walnut Street, East Orange, New Jersey, amongst them being a mechanics lien filed by this respondent, Levy Brothers Company, Inc., whose claim was duly allowed by the receiver in the sum of \$4,049.00 (page 107), and this claim was not attacked by any creditor at any time and is not being attacked by the appellant.

The receiver allowed the claim of this respondent as a prior claim to a mortgage held by the appellant, Newark Holding Company, (page 102) and said Newark Holding Company appealed and the appeal was dismissed. It is from this dismissal that the Newark Holding Company appeals to this Honorable Court.

ARGUMENT.

The Decision of the Receiver.

By virtue of Section 76 of the General Corporation Act of the State of New Jersey, 2 Compiled Statutes 1648, the receiver has the power to pass upon and allow or disallow the claims of any person in connection with the insolvent corporation.

It was established in the early case of *Smith vs. The Trenton, Delaware Falls Company, et al*, 4 N. J. E. 505, 510, as follows:

“As to the priority of the encumbrances—the receivers have the authority, and it is their duty to settle them; and in case of dissatisfaction an appeal to the Chancellor is expressly given: *Elmers Dig. 36 Sec. 16, 18.*

In settling priorities they must inquire into the validity of the several claims, and refuse to allow any of them that *they may believe to be fraudulent or illegal.*”

This case was followed in the case of *DeMott vs. Stockton Paper Ware Manufacturing Company*, 32 N. J. E., page 124, which case was subsequently approved by this Court, in the case of *Ennis vs. Eden Mills Paper Co.*, 65 N. J. L. 577, 586.

Under the law, a receiver has the right to disallow a claim if, in his belief, the said claim is illegal or fraudulent.

In this case, in the receiver's memorandum (page 111) the receiver states:

“Also leaves receiver to believe that the mortgage was not placed in good faith.”

It is true that the receiver allows this mortgage as a general claim, but the mere fact that the receiver might have made an error which benefits the

appellant is no reason why his report should be disturbed which correctly disallows the said claim of the appellant as to his rights between mechanics lien claimants who have a superior equity in the proceeds other than general creditors. (As there is not sufficient money to pay all the mechanics lien creditors the question is an academic one).

The receiver's report (par. 2, page 110) states that:

"He had considerable difficulty in ascertaining the status of the mortgage."

An examination of the testimony taken before the receiver discloses the fact that the testimony of two persons is introduced to prove the validity of the mortgage, to wit: Charles Cohen, who is (Goodwin Construction Company) admitted in the brief of the appellant (page 8), and Hyman Sussman, the original mortgagee, and who is the Newark Holding Company, the appellant, (page 15). The said Hyman Sussman is the father-in-law of Charles Cohen.

Testimony affecting this mortgage appears on the following pages of the State of the Case:

Charles Cohen—6 to 10
 Charles Cohen—84 to 89
 Hyman Sussman—12 to 16
 Hyman Sussman—65 to 70
 The mortgage appears on page 90
 The alleged checks appear on page 93
 Before the Vice-Chancellor—Charles Cohen
 142 to 158
 Joseph LoConte—161 to 169
 Exhibits before the Vice-Chancellor appear
 on page 96

An examination of the testimony in this case will disclose that Charles Cohen contradicts Hy-

man Sussman, contradicts himself, and Hyman Sussman contradicts Charles Cohen and also contradicts himself. Illustrations of this will be shown later. Also that the appellant failed to produce witnesses, records and exhibits which might substantiate the story of the appellant witnesses, and in fact, Hyman Sussman never was cross-examined by the attorneys for any of the mechanics lien creditors, and in fact, the receiver refused permission for the creditors to examine Mr. Sussman (page 71). Mr. Sussman had the benefit of his own counsel in the examination, (page 69). Mr. Sussman did not appear before the Vice-Chancellor at all.

The Facts.

Goodwin Construction Company owned a parcel of real estate on Eagle Rock Avenue, West Orange, New Jersey. On this property, Hyman Sussman held two mortgages purporting to be purchase money mortgages, each in the sum of \$5,000.00. Upon a part of the Eagle Rock Avenue property the Goodwin Construction Company erected an apartment house.

In December, 1924, Goodwin Construction Company conveyed part of the Eagle Rock Avenue property to Huegel & Clark, and as part of the purchase price Huegel & Clark conveyed to the Goodwin Construction Company the North Walnut Street lot. Goodwin Construction Company received in addition to the North Walnut Street lot, the sum of \$5,000.00 in cash and a mortgage for \$5,500.00 or \$5,000.00 (page 9). (Then on May 27, 1927, Mr. Cohen testifies (page 86) that he received \$5,000.00 in cash and a note, which he cashed).

Mr. Sussman is supposed to have cancelled a mortgage of \$5,000.00 and some time prior is alleged to have assigned the other \$5,000.00 mortgage to a party by the name of Chernoff (page 7); or a man by the name of Mr. Sarnoff (page 146); or to some woman (page 145). Mr. Sussman himself never testified that he assigned any \$5,000.00 mortgage to anybody other than to the Goodwin Construction Company (page 15). If the mortgage was given for any valid consideration it was because of an indebtedness of the Goodwin Construction Company to Hyman Sussman in the sum of \$15,000. for monies given by Hyman Sussman, if at all, in the erection of the Eagle Rock Avenue property.

(Page 155)

Q. And Sussman cancelled that mortgage and in exchange took a mortgage of fifteen thousand on the East Orange property, didn't he?

A. Not in exchange for that other one. For other debts that I owed him, which he paid me towards the erection on Eagle Rock Avenue and which he was supposed to get paid off if I sold it for cash. Otherwise, if I couldn't sell it for cash I had to secure him the money in order to make an exchange; otherwise he wouldn't budge.

The first indication that the purchase money mortgage given by the Goodwin Construction to Hyman Sussman was not a valid mortgage comes out of the mouth of Charles Cohen where he says:

(Page 84)

Q. In other words tell us the name of the principal stockholders.

Q. I do not know. *Maybe you have a suspicion that it is a fake mortgage.*

Was Charles Cohen's guilty conscience bothering him?

I.

The mortgage is not a good and valid security for any sum as to this mechanics lien claimant.

The appellant states:

“Testimony of witnesses cannot be ignored upon belief.”

The witnesses were before the receiver and the Vice-Chancellor. They saw and heard the witnesses. Their vantage ground is much better than that of the Court for the determining of the credibility of the witnesses and the weight of their testimony.

The respondent no doubt is put upon the inherent probability of the story told by the parties to the transaction.

It is within the experience of all having familiarity with the examination of unscrupulous witnesses that sometimes the countenance; the tone of voice; the manner of the witnesses while testifying will contradict and deny the truth of the words that come from his lips, and the law does not require that the receiver or Vice-Chancellor sitting as a judge and jury, shall believe the testimony of one thus self-impeached. His quibbling, his reluctance, his hesitancy or zeal and apparent interest, not expressed, may discredit him and the Court is at liberty to refuse to find in accordance with the statements.

As Lord Chesterfield said to his son, (Letter CVIII):

“People can say what they will, but they cannot look just as they will and their looks frequently discover what their words are calculated to conceal.”

In the present case there are innumerable contradictions; the witnesses were reluctant to testify; evasive answers were given and there were many statements of probable facts. Many answers to questions involving collateral facts are answered, “I don’t remember.” convenient forgetfulness).

“Such inexplicable ignorance is, in my view, an unmistakable badge or falsehood. The witness who feigns forgetfulness of the circumstances collateral to his main story, and which he must recollect if he has any memory at all, and in respect to which he would be open to contradiction if his testimony is untrue, is unworthy of belief.”

Vice-Chancellor Van Fleet in case of Gibbons vs. Potter, 30 N. J. E. 204, 210.

“The evidence of the witnesses on this subject, who are the principal bondholder and his son, is evasive, and abounds with want of recollection of amounts, dates, and transactions which they should recollect, or as to which their deficiency of memory could have been supplied by reference to means within their power. No court could be satisfied to make a decree which depended upon it. For aught that appears, most of the money advanced on these bonds by the persons to whom they were issued, and by whom they are held, may have been advanced after the date of the mortgage. In fact, from the manner of testifying by these witnesses I am

far from being satisfied that any money or valuable consideration was advanced upon the faith of these bonds, at all."

Chancellor Zabriskie in the case of Wells vs. Rahway White Rubber Co., 19 N. J. E. 402, 405.

It is also to be remembered that much of the testimony given in support of the mortgage given by the Goodwin Construction Company to Hyman Sussman is given by Charles Cohen, who is the son-in-law of Hyman Sussman. The mere relationship of the parties shows the interest that Charles Cohen has to make the mortgage a valid one.

As aptly said in Vreeland vs. Vreeland, 48 N. J. E., 56 page 66,

"Evidence, to be worthy of credit, must not only proceed from a creditable source, but must, in addition, be credible itself, and by this is meant that it shall be natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it."

Charles Cohen, by virtue of his interest and relationship occupies such a position that even if he wanted to be truthful, his mind is impressed with facts which benefit his father-in-law, than facts which are against his father-in-law.

An examination of the deposit book of the Goodwin Construction Company (pages 95 and 96), does not show any deposit during the months of December, 1924 or January, 1925, in the sum of \$5,000.00. Isn't it a fair inference that probably the \$5,000.00 received from Huegel & Clark was paid to Hyman Sussman, for which he cancelled the mortgage?

In *Quock Ring vs. United States*, 140 U. S. 417; 11 Sup Ct. 733, 851, 35 L. Ed. 501—The Supreme Court said:

“Undoubtedly, as a general rule, positive testimony as to particular fact, uncontradicted by anyone, should control the decision of the Court; but the rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the Court or jury to disregard his evidence even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and to create the impression that he is giving a wrong coloring to material facts. All these things may be properly considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced.”

It is quoted in *Mulock vs. Mulock*, 31 N. J. E. 594-599, as follows:

“I am compelled, moreover, to say that neither the demeanor of these witnesses while giving evidence, nor their evidence itself, inspired my confidence. Their evidence bears marks which furnish cause for serious distrust; it is marked by evasion, an unnatural forgetfulness and an affected ignorance and dullness. No one can read the testimony of either without observing that, while their recollection is full and fresh on every point which an unprofessional mind would deem indispensable to the establishment of the fact that the deeds were legally executed, they have no recollection whatever of those

minor circumstances and details naturally and almost unavoidably forming a part of such a transaction, and which usually fasten themselves upon the memory more firmly than its more important features. Nor do I think any one can fail to see that the circumstances attending these very important transactions, as they describe them, are unnatural and improbable.

See the case of *Levy vs. Levy*, 57 Atl. 1011
(not officially reported)
and, see *Ruppert vs. Hurley*, 47 Atl. 281
(not officially reported)

in which cases the court dismissed the story told by parties interested in the case, regardless of the fact that there was no contradictory witness, basing it on the inherent probability of the story told.

It is common knowledge that builders, prior to erecting an apartment house place mortgages on the real estate, which mortgage is given to some friend or to some member of the family, and while construction is going on they obtain a permanent loan, and out of the proceeds of the permanent loan the supposedly valid mortgage is paid off, and the proceeds are subsequently turned over to builder, who subsequently goes into the hands of a receiver prior to the completion of the building. There is no question in our mind that the real intent and purpose of the mortgage given by the Goodwin Construction Company to Hyman Sussman was for this purpose. The mortgage was undoubtedly placed on record to protect a \$15,000.00 equity so that the builder himself (Cohen) would get \$15,000.00 out of the property, notwithstanding the fact that his company might subsequently

become insolvent, and this is just what Charles Cohen is attempting to do.

An examination of the case will disclose that Charles Cohen knows more about the mortgage and more about the details than the mortgagee himself, and on the appeal before the Vice-Chancellor, Charles Cohen is offered as a witness, but the mortgagee is in the background and not called as a witness. Again, why?

There is no question that the lien claims were filed long after the recording of the mortgage, and the materials for which the lien claims were filed were delivered, and work furnished, after the recording of the mortgage, but under the laws of this State, all mechanics liens attach from the commencement of the building, although the particular materials for which the lien is claimed were not delivered until after said time.

Sec. 28 of the Mechanics Lien 3 C. S. 3310
Luce Mechanics Lien Ed. 1923, page 254.

“The lien dates not from the time of doing the work or furnishing the materials, but from the commencement of the building.”

Taylor vs. LaBar, 25 N. J. E. 222-224.

Thus, there is no point to the argument of the appellant that Levy Brothers Company, Inc. supplied materials after the recording of the mortgage.

The appellant (page 10) states that there is no dispute in respect to these matters. We certainly disagree with this fact and in the following are illustrations of the contradictory statements:

(a) As to what the amount is of mortgage or mortgages that were on the Eagle Rock Avenue property held by Hyman Sussman.

(Page 8)—Charles Cohen testifies on August 10, 1926:

Q. How much money did Sussman advance you on Eagle Rock Avenue?

A. He advanced me \$5,000. I bought the lot from Sussman and he took back a purchase money mortgage in the sum of \$10,000.

(Page 12)—Hyman Sussman testifies on September 14, 1926, as follows:

Q. You took back a purchase money mortgage on the entire tract?

A. Two different mortgages; each \$5,000.

(Page 65)—Hyman Sussman testifies on May 27, 1927:

Q. Was the \$15,000 paid at one time?

A. No, I took the mortgage for \$10,000.00, gave it to the Goodwin Construction Company and paid a balance of \$5,000.00 in cash.

(Page 84)—Charles Cohen testifies on May 28, 1927:

Q. Now how did you come to give this mortgage to the Newark Holding Company?

A. I owed my father-in-law \$10,000 in the form of a mortgage.

(Page 85):

Q. Was this mortgage on the lot and building or was it separated \$5,000. on the building and \$5,000. on the lot?

A. I do not know.

(Page 143)—Charles Cohen testified on May 8, 1928:

Q. Now, wait a minute. Don't go so fast. The two mortgages held by him amounted to how much?

A. Five and five.

(b) What was done with the Eagle Rock Avenue mortgage or mortgages?

(Page 7)—Charles Cohen testifies on August 10, 1926:

Q. That is on Eagle Rock Avenue?

A. Yes. When I bought Walnut Street and sold Eagle Rock Avenue, I took the mortgage from Eagle Rock Avenue and transferred it over to Walnut Street.

(Page 12)—Hyman Sussman testifies on September 14, 1926:

Q. Do you still own those mortgages?

A. I do not.

Q. What did you do with them?

A. I assigned them back to Goodwin Construction Company.

Q. You assigned both mortgages to Goodwin Construction Company

A. Yes.

(Page 65)—Hyman Sussman testifies on May 27, 1927:

Q. In other words you gave to the Goodwin Construction Company your mortgage on the Eagle Rock Avenue property in the amount of (\$10,000.00) and cash in the sum of \$5,000.00, and they in turn gave you this mortgage?

A. Yes, and the mortgage on Eagle Rock Avenue was cancelled.

(Page 144)—Charles Cohen testifies on May 8, 1928:

Q. Now what happened to the other one is what I am trying to find out.

A. The other one I needed money and Mr. Sussman, I gave him a note, and he went—when we sold, he transferred the mortgage

—or, sold the mortgage to a lady, to somebody which, and she gave me the money to procure Walnut Street.

(c) For what purpose were advances made and what amount?

(Page 8)—Charles Cohen testifies on August 10, 1926:

Q. How much money did Sussman advance on Eagle Rock Avenue?

A. He advanced me \$5,000. I bought the lot from Sussman and he took back a purchase money mortgage in the amount of \$10,000.

Q. How much money did your father-in-law advance you when you started to build on Eagle Rock Avenue?

A. \$5,000.

Q. Did he advance any more money after the first \$5,000?

A. Yes.

Q. How much money did he advance?

A. \$5,000.

(Page 15)—Hyman Sussman testifies on September 14, 1926:

Q. How much money did you give him to help him build?

A. I cannot give the exact amount. I gave him considerable.

Q. About how much?

A. I gave him about \$5,000, \$6,000 or \$7,000 during the operation.

(Page 16):

Q. Did you advance any money on the building on Eagle Rock Avenue?

A. During the construction, I helped him a whole lot.

Q. How much money did you give him?

A. About \$5,000, \$6,000 or \$7,000, around that.

Q. Your son-in-law claims under examination that you never put any money in North Walnut Street, but in Eagle Rock Avenue. Is that true?

A. Well if he claims he put it in Eagle Rock Avenue, perhaps he knows better. If he put it on North Walnut Street or Eagle Rock Avenue, I could not say, because I did not watch what he did with the money.

(Page 67)—Hyman Sussman testifies on May 27, 1927:

Q. Do you remember how much money your son-in-law Charles Cohen owed you before you cancelled the Eagle Rock Avenue mortgage?

A. He owed me above the sum of \$10,000.

(Page 89)—Charles Cohen testifies on May 28, 1927:

Q. So your father-in-law raised \$5,000 on the mortgage to help you build Eagle Rock Avenue?

A. Yes.

Q. Now you paid your father-in-law all you owed him by giving the \$15,000 mortgage on North Walnut Street?

A. Yes.

(Page 144)—Charles Cohen testifies on May 8, 1928.

Q. But free of those?

A. Free of those, yes. Only one. The other one I had to have some money to pay off lessors, so the other mortgage—when I was building the Eagle Rock Avenue I needed some more money, so I persuaded Mr. Sussman to get me—to hock—to pawn his mortgage with a friend of ours and he gave

me some money which I—which aided me in procuring Walnut Street.

(Page 153)

Q. Where is the other five thousand?

A. Cash advanced by Mr. Sussman towards the erection of Eagle Rock Avenue.

(d) As to when Mr. Sussman assigned the mortgage to somebody in New York.

(Page 146)—Charles Cohen testifies on May 8, 1929.

Q. Didn't you just state that a five thousand dollar mortgage was on North Walnut Street—the Eagle Rock property?

A. Yes.

Q. And that Mr. Sussman cancelled that mortgage on the property so that you can convey the same free and clear to Huegel & Clark?

A. Yes.

Q. That is five thousand dollars?

A. Yes.

Q. When did Mr. Sussman hock the other mortgage?

A. Oh, I think, later.

Q. When?

A. No, no. I think before. I don't remember that exactly. I think, before.

Q. Isn't it a matter of fact that that mortgage still exists as a lien on the property of Goodwin Construction Company.

A. Yes.

These few illustrations of the conflicts in testimony between the parties themselves, certainly dispute the statements of the appellant that the facts were not in dispute.

II.

The mortgage given by the Goodwin Construction Company to Hyman Sussman was not a purchase money mortgage.

The mortgage given by the Goodwin Construction Company to Hyman Sussman contains a statement (page 9), that the mortgage was given to secure part of the purchase price of the above mentioned premises (to wit: North Walnut Street). This statement is absolutely an untruth and was inserted in the mortgage with the intent to defraud creditors of the Goodwin Construction Company into believing that the mortgage was a legitimate purchase money mortgage. As appears from the testimony of Charles Cohen on page 155, heretofore quoted, the mortgage was given for debts of the Goodwin Construction Company to Hyman Sussman for monies advanced by Hyman Sussman in the erection and construction of the building.

Title to the North Walnut Street property was taken by the Goodwin Construction Company on December 22, 1924, (page 69). The mortgage to Hyman Sussman is not dated until January 2, 1925. It is an elementary rule of law that in order for a mortgage to be a purchase money mortgage it must be executed simultaneously with the deed of the premises described in the mortgage and part of the same transaction.

Protection Bldg. & Loan Ass'n. vs.
Knowles, 54 N. J. E. 519, 527; affirmed
55 N. J. E. 822.

Franklin Society vs. Thorton, 85 N. J. E.
525.

- Brasted vs. Sutton, 29 E. 514.
 McShane Manufacturing Company vs.
 Kolb, 59 N. J. E. 146.
 Bradley vs. Bryan, 43 N. J. E. 422.
 Wallace vs. Silsby and Martin, 42 N. J.
 L. 1, 8.
 41 C. J. page 528, par. 470.

It is true that a mortgage may be a purchase money mortgage where given to other than vendor, but money must have been loaned with express intention that it should be used in paying purchase price.

See New Jersey Building Loan & Investment Co. vs. Bachelor, 54 N. J. E. 600.

It must appear that the monies were actually advanced for the purchase price and can have no further priority than to the sum which was used for the purchase price.

New Jersey Building Loan & Investment Co. vs. Bachelor, 54 N. J. E. 600.

Franklin Society vs. Thorton, 85 N. J. E. 525.

Appellant cites the case of Clark vs. Butler, 32 N. J. E. 664, as setting forth the proposition that monies need not be advanced.

However, as pointed out in the case of Hopler vs. Cutler, 34 Atl. 746 (not officially reported), in the Clark-Butler case the mortgage given by the vendee was not given to the vendor but to the holder of two mortgages existing at the time of the sale, which were released upon the execution of the mortgage. The mortgages held by the mortgagee were on the *same land* as that covered by the purchase money mortgage.

Thus, we have a situation that the mortgage to Hyman Sussman was not given contemporaneously with the deed to Huegel & Clark and also there was no proof that he actually advanced monies which were used for the purchase price of the property.

Again, from the testimony produced in the case, (Page 9), Charles Cohen testified that when he sold the Eagle Rock Avenue property he received in cash the sum of \$5,000.00 and also a mortgage for \$5,500. That he sold the Eagle Rock Avenue property for \$48,000.00 to \$50,000.00, and there was only a \$25,000.00 mortgage on it, leaving approximately a \$23,000.00 equity in the Eagle Rock Avenue property and that he took the Walnut Street property for \$12,000.00, and on page 10, it appears that there was a \$12,000.00 first mortgage on Walnut Street, so consequently it appears that Goodwin Construction Company received funds and a second mortgage on the property and there was no necessity for any advancement of any purchase price. Thus, the whole story as to the purchase money mortgage is inherently false and improbable.

III.

The mortgage was recorded subsequent to the commencement of the building.

(Page 14)—Hyman Sussman testifies on Sept. 14, 1926.

Q. I show you Exhibit A-3. Check dated January 20, 1925 in the sum of \$850 made by Hyman Sussman to the order of Goodwin Construction Co.

A. During that time he was not only finishing up the Eagle Rock Avenue job, *but he had started already in North Walnut Street.*

Q. Exhibits A-4 and A-5. The balance of these checks were given to go into the construction of North Walnut Street.

A. Yes. It was given for that mortgage. At that time he was already *working on North Walnut Street.*

(Page 93)

Exhibit A-4 is a check dated March 19, 1925.

Exhibit A-5 is a check dated March 30, 1925.

As the recording of the mortgage, if at all, was not until April 2, 1925 it shows clearly that by Mr. Sussman's own testimony work had been commenced long prior to the recording of the mortgage.

There is no proof other than this before the receiver as to the commencement of the building.

However, for the first time on an appeal to the Vice-Chancellor is an effort made to protect the mortgage by attempting to prove that the mortgage

was recorded prior to the commencement of the building.

What is attempted to be shown?

(page 142)—Mr. Cohen testifies as follows:

Q. When was the first work done in construction of that building?

A. The latter part—the first—the latter part of April 1925.

Note: The mortgage was recorded April 2, 1925.

(page 148)

Q. When were—when did the digging start?

A. The digging started about the eleventh of April, the eleventh or sixteenth.

(page 150)

Q. You knew there was—how do you definitely fix this April eleventh that the excavation commenced on that day?

A. Because I saw one of the checks.

Mr. Cohen remembers no other date other than April 11th or any other fact in connection with the commencement of the building, though on page 156 there appears:

Q. It was before you started to excavate?

A. It is about the same time or a little before.

Q. In other words, it was before April first, wasn't it?

A. I was working—I think so.

(page 157)—when asked when he made the contract for the excavating of the property he said it was March 14th.

(page 149)

Q. March fourth.

A. Fourteenth, I think.

Q. (showing the witness paper) Is this a copy of the contract you received from Mr. LoConte?

A. Yes; that is a copy.

Q. What is the date of it?

A. The fourth. Make it the fourth.

Thus, it can be seen that Mr. Cohen's testimony was irreconcilable and incorrect in other details, and also again we find the convenient forgetfulness of collateral matters.

The check which reminded Mr. Cohen of April 11th is not introduced in evidence. Why not?

Mr. LoConte also attempts to prove when the building was commenced. He states that it was around the 14th or 15th of April (page 165) and he states he remembers it from a certain book he had looked into before appearing in Court. Why didn't he bring this book?

However, he testified on page 162 that the contract was signed in March and that after two or three weeks, Mr. Cohen called him up and told him to start with the work. This too, makes the date of excavation prior to April 2, 1925, the date of recording of the mortgage. Without going into the question of law, it appears from the testimony in the case that work on the excavation commenced prior to April 2, 1925. It is admitted by counsel for the appellant that the old building was torn down on the land prior to the recording of the mortgage.

Generally it is the rule that the test of commencement of the building is "visual observation". A reading of the leading cases on the subject, *Jacobus vs. Mutual Benefit Life Insurance Company*,

27 N. J. E. 604, which case established the fact that there must be some evidence which would appraise a person that a building was going up; indicates that notice may have something to do with the fact of determining a question of the commencement of the building.

Justice Depue in reading one of the opinions in the case, page 606, indicates this view, on the ground that equity consider it a hardship to impose upon a mortgagee the chance of being wiped out by a mechanics lien where he had no knowledge of the fact that a building was being erected, but in the present case there is ample evidence that Hyman Sussman knew that a building was being erected prior to the time his mortgage was recorded; and so cannot complain of any hardship which was apparent in the Jacobus case. Where a party has actual knowledge of the erection of a building it is contended that the rule of "visual observation" should not apply.

It is also contended that the demolition of the old building on the land was a sufficient commencement of the building, because there certainly couldn't be a new building erected if the old building was on the land. Even if the mortgage went on prior to the commencement of the building, in the case of Franklin Society vs. Thorton, 85 N. J. E. 525, it was held that it was only entitled to priority to monies actually advanced on said mortgage. There was no proof that monies were advanced on this mortgage.

IV.

The mortgage to Hyman Sussman from the Goodwin Construction Company was never lawfully recorded.

It is a rule of general law that where a mortgage does not contain a proper acknowledgment or certificate of proof and is accepted for record by the Register of Deeds and Mortgages, that said mortgage, though recorded, is not constructive notice.

In *Dreier vs. Dreier*, 101 N. J. E. 342, Chancellor Walker indicates how a corporation instrument may be acknowledged or proved.

In the present case there is no acknowledgment so we are merely concerned with the fact whether or not there is a proper proof attached to the mortgage. Chancellor Walker indicates that the proof may be either in the form of affidavit, subscribed by the affiant with a jurat by the officer taking same. In the present instance there is no affidavit as the affiant does not sign the same, nor is there a jurat attached.

There is one other method which the appellant may rely upon, to wit: Is there a certificate by the officer taking the oath? It is contended by this respondent that the certificate attached to the mortgages signed by the officiating officer is not a certificate, because a certificate certifies as to facts that have occurred as indicated by the opinion of the Chancellor:

“A, B, C, being duly sworn, etc. *did depose*, and make proof to my satisfaction, etc.

In the present instance we have an incomplete affidavit and not a certificate.

An examination of New Jersey form books, Corbin's forms, page 36 and 37 and Honeyman's New Jersey Law forms, page 14, does not show any form of acknowledgment or proof which is similar to the one attached to the mortgage given by Goodwin Construction Company to Hyman Sussman.

V.

The Appellant's failure to produce witnesses is to be regarded as a presumption that said parties would testify against them.

As part of the \$15,000.00 claim by the plaintiff, the appellant claims \$5,000.00 for monies claimed to have been received by the Goodwin Construction Company as a result of a sale of a \$5,000.00 mortgage by Hyman Sussman to an individual whose identity this respondent has failed to discover.

On page 7, it is a party by the name of Chernoff; on page 89 it is a party in New York named Sarnoff, and in reference to said Sarnoff, Sarnoff is referred to as a male; on page 145 the mortgage was assigned to a lady, and on page 146 it is Mr. Sarnoff; on page 147 Mrs. Sarnoff is stated to be in Court with the check. The alleged Chernoff, Sarnoff, Mr. Sonoff or the lady in New York are never offered as a witness on behalf of the appellant.

As noted in the direct examination of Charles Cohen before the Vice-Chancellor, he refers to Mr. Sussman who is his father-in-law, as "this Hyman Sussman". He refers to Sarnoff as somebody from New York and then as a friend and subsequently on cross-examination is forced to admit that both Mr. Sussman and the Sarnoff person are related to him.

The appellant was guilty of intentional concealment of facts, and it is an elementary rule of law that where a person could produce witnesses that would testify in his favor and fails, there is a presumption raised that that persons testimony would be against him.

See Johnson vs. McKenna, 76 N. J. E. 217.

Jacoby vs. Jacoby, 6 Misc. Reports 86.

State vs. Raymond, 53 N. J. L. 260, 262.

Remembering what Lord Mansfield said, in the case of Blatch vs. Archer - Cowp. page 66, 98 English Reprint 969:

“It is certainly a maxim that all evidence is to be weighted according to the proof which it was in the power of one side to have produced and in the power of the other side to contradict.”

The same thing may be said true of the fact that the appellant failed to produce the original contract of sale between Huegel & Clark and the Goodwin Construction Company, the original cancelled mortgage that Sussman is alleged to have cancelled, the original assignment to Chernoff or whatever that persons name may be.

The failure to introduce the check from which Charles Cohen testifies as to the commencement of the building; the failure of LoConte to produce the books from which he is supposed to have found the date on which he commenced work.

Why was not this testimony introduced?

VI.

The mortgage given by the Goodwin Construction Company to Hyman Sussman is not entitled to priority over the mechanics lien of Levy Brothers Company, Inc. by virtue of the provisions of Sec. 15 of the Mechanics Lien Law.

In order for a mortgage to have priority under this Section, it must be shown that the monies were actually used in the erection of the building.

As heretofore brought to the Court's attention, page 16, Mr. Sussman testified that he don't know where the money went, either to Eagle Rock Avenue or North Walnut Street, and on page 155, Charles Cohen testified that the mortgage was given for debts of the Goodwin Construction Company in the erection of Eagle Rock Avenue.

To determine the priority of a mortgage over a mechanics lien it must meet the following test:

"The test is, whether the mortgage money has been loaned for and actually applied to the erection of the building.

Citing *Young vs. Haight*, 69 N. J. L. 453".
Porch vs. Agnew Company, 70 N. J. E. 328, 342; affirmed in 71 N. J. E. 305.

The mortgage in this case does not meet this test.

VII.

This Respondent concurs in the argument of the Appellant expressed in Point V.

In *Practical Building & Loan Association vs. Meisol*, 101 E. 636. Vice-Chancellor Berry held that a mechanics lien claimant who does not make a mortgagee a party defendant to his mechanics lien suit loses priority over said mortgage. This was true with the lien claim of Max Chopik.

As to the Lincoln Material Company, Inc., the receiver is bound to follow the adjudication of the law court. *DeMott vs. Stockton*, 32 N. J. E. 124.

It is respectfully submitted that if the decree of a Chancellor is to be modified in respect to the claims referred to in Point V of the appellant's brief, that this respondent is entitled to be first paid, because it is submitted that under the decision in *Meister vs. Meister, Inc.*, 6 Adv. Reports 1136; 142 Atl. 312, that where a mechanics lien is prior to a mortgage and other lien claimants are subsequent to a mortgage, the lien claim that is ahead of the mortgage is entitled to be paid first.

Conclusion.

1. It is respectfully submitted that the Court below correctly sustained the receiver's report, and that the order of distribution is correct, but that in the event that it is held that the mortgage of the Newark Holding Company is prior to the liens of Pasaic Bergen Lumber Company; Henry R. Eisenberg Co., Pierce, Butler and Pierce, Mayer-Bez Stone Company; Max Chopik and Lincoln

Materials Company, Inc. that the Court below should be directed to enter an order judging that the mechanics lien claims of Levy Brothers Company, Inc., John R. Blair Company, Inc., Sterling Engineering Co., Nathan Cohen and Max Ginsberg should be paid in full, and if there is not a sufficient amount to pay them then said claims should be pro rated.

2. That the mortgage of the Newark Holding Company is next entitled to priority.

Respectfully submitted,

LEVY, FENSTER & McCLOSKEY,
Solicitors of Levy Brothers Company,
mechanics lien claimant, Respondent.

SAUL TISCHLER,
Of Counsel.

51 and 121

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

New Jersey Court of Errors and Appeals

Between

LINCOLN MATERIALS COMPANY,
INC.,

Complainant,

and

GOODWIN CONSTRUCTION COM-
PANY,

Defendant.

On appeal of NEWARK HOLD-
ING COMPANY, mortgagee,
Appellant,

and

WALTER K. SHERWOOD, re-
ceiver of Goodwin Con-
struction Company, *et als.*,
lien claimants,

Respondents.

On Bill.

*On Appeal of
mortgagee
from
determina-
tion of
receiver as to
priorities.*

*Appeal from
order
dismissing
appeal of
mortgagee.*

*Sat Below
CHURCH,
V.-C.*

REPLY BRIEF OF APPELLANT, NEWARK HOLDING COMPANY, TO BRIEFS OF WALTER K. SHERWOOD, RECEIVER OF GOODWIN CONSTRUCTION COMPANY, AND BRIEF OF LEVY BROS.

(Italics, etc., mine except where otherwise noted.)

I.

The receiver (and Levy Bros. to a lesser extent) seems still to be imbued with the idea which he apparently had when he made his report (p. 110) that, *because he is receiver, act-*

ing under the 76th section of the Corporation Act, his *belief* justifies him in refusing to admit a claim against the corporation and to ignore written instruments. He seems to think that the effect of the receivership is, in some way, to alter the substantial rights of parties or to permit them to be altered by less proof than would otherwise be required and to change the burden of proof.

It is true that both briefs assume to discuss the testimony and advert to those circumstances which might influence a jury in determining the truth, but it is obvious that *both briefs* proceed upon the theory that it is the duty of the *mortgagee* to prove, almost to the point of demonstration: (a) that the mortgage is a valid security; (b) either (1) that the mortgage was recorded before the building was commenced or (2) that the moneys secured either represented purchase moneys or were used in the construction of the building.

This is a shifting of the burden of proof without justification.

The rule, of course, is that, after receivership, the substantial rights of the parties are precisely the same as before, and neither the appointment of the receiver nor the filing of lien claims shifts the burden of proof.

The mortgage, and the bond accompanying it, are still evidence both of the debt and of the security and the burden is upon him who asserts that the debt does not exist or that the security is invalid, to meet that evidence. 41 C. J. Title Mortgages, page 445, section 329.

McKinney v. Slack, 19 N. J. Eq. 164.

I submit that, under the statute (Mechanics' Lien Act), the burden is upon those who assert

that the mortgage was not recorded until after the commencement of the building, where, as here, the mortgage was recorded before the filing of any lien claims, to prove the date of the commencement of the building, for under section 28, upon that date depends the priority of the lien claim over a mortgage recorded before the filing of the lien.

Taylor v. La Bar, 25 N. J. Eq. 222, 40 C. J. Title Mechanics' Liens, p. 461, section 657 and page 462 same section.

It is conceded that, if it appears that the mortgage was recorded after the commencement of the building, then, to maintain priority, the burden is upon the mortgagee to prove, under the circumstances of this case, that the mortgage secured purchase moneys or that the moneys advanced upon it were used in the construction of the building.

Franklin Society v. Thornton, 85 N. J. Eq. 525.

II.

Both the receiver and Levy Bros. devote considerable space to a consideration of the testimony for the purpose of showing that the mortgage was fraudulent in its inception, but *such a finding would be wholly opposed to the determination of the receiver, which was sustained by the court, that the claim of the Newark Holding Company for \$15,000 is, as against the Goodwin Construction Company and its creditors, valid and may be established* (p. 112).

In the original brief I pointed out that, if the *belief* of the receiver be correct, i. e., that the mortgage was, in fact, a fraud, and given for the purpose of protecting stockholders of the

corporation, it is as invalid against general creditors of the Goodwin Construction Company, represented by the receiver, as it is against the mechanics' lien claimants, and yet the receiver and the court have drawn a distinction upon this subject between the two classes of creditors.

The only distinction between the two is that, with respect to the mechanics' liens, it has no priority unless recorded before the commencement of the building, or unless it represented purchase moneys, or unless the moneys went into the building. Its validity as a mortgage, securing a debt, is established by precisely the same kind of evidence if mechanics' lien claimants or general creditors are involved.

In the brief of Levy Bros. the statement is made (p. 11): "It is *common knowledge* that builders, prior to erecting an apartment house, place mortgages on the real estate, which mortgage is given to some friend or to some member of the family, and while, etc. * * * There is no question in our mind that the real intent and purpose of the mortgage given by the Goodwin Construction Company to Hyman Sussman was for this purpose."

And the receiver, in effect, says the same thing.

That which is stated in the brief of Levy Bros., at p. 11, may be *common knowledge* to Levy Bros., but I submit that it is *common knowledge* to no one else.

It implies fraud and the rule still is, even in this class of transactions, that men are presumed to act honestly and fraud must be proven.

Summerill v. Summerill, 83 N. J. Eq. 3, affirmed 83 N. J. Eq. 350.

Not only is no fraud proven in the case at bar but there is no evidence whatever of it, and the receiver could not have found it for he allowed the mortgage as a valid claim against the corporation and its general creditors.

III.

The extracts from the briefs, both of Levy Bros. (p. 12) and of the receiver (pp. 5, 6, 7, 9), do not fairly indicate the effect of the testimony.

I shall not consider all of the extracts set forth in these briefs but merely sufficient to indicate that no judgment can be based upon a reading of the excerpts, and that the statement I made on p. 10 of the original brief, to the effect that there was no dispute with respect to the matters theretofore set forth, is correct.

On p. 13 of the brief Levy Bros. refers to the testimony of Cohen and quotes from p. 8:

“Q How much money did Sussman advance you on Eagle Rock avenue? A He advanced me \$5,000. I bought the lot from Sussman and he took back a purchase money mortgage in the sum of \$10,000.”

Levy Bros. then jumps to p. 12 of the testimony of Hyman Sussman in which he says that he took two different mortgages, each for \$5,000, apparently for the purpose of indicating that the testimony of Cohen was to the effect that but \$5,000 was advanced and a \$10,000 mortgage taken.

Immediately after the question and answer quoted by Levy Bros. from p. 8 of the record we find the following:

“Q How much money did he advance you? A \$10,000.

* * * * *

Q When you purchased Eagle Rock avenue how much of a mortgage did your father-in-law take back? A \$10,000.

Q A purchase money mortgage? A Yes. I bought it from him; it was his lot.

Q How much money did your father-in-law advance you when you started to build on Eagle Rock avenue? A \$5,000.

Q Did he advance you any more money after the first \$5,000? A Yes.

Q How much money did he advance? A \$5,000."

Levy Bros. then sets forth the testimony of Cohen on p. 84 as follows:

"Q Now how did you come to give this mortgage to the Newark Holding Company?
A I owed my father-in-law \$10,000 in the form of a mortgage."

It apparently attempts to indicate that there was one mortgage for \$10,000. But, when the witness' testimony is considered as a whole, it is clear that there were two \$5,000 mortgages, and he said (p. 86), not quoted by Levy Bros.:

"Q At that time Goodwin Construction Company owed Hyman Sussman or the Newark Holding Company \$10,000, didn't it, that is at the time that you made this exchange? A Yes.

Q Did you convey to Eagle & Clark free and clear of the mortgage? A Yes.

Q Was it a second mortgage? A It was a purchase money mortgage. My father-in-law gave me the money to build a small building. He could not pay this mortgage off so he subordinated his mortgage to the building and loan. Then when we got it the building was not so fancy, in fact the stores were empty so I made a deal on North Walnut street. I had not intended to build at all if possible. I had to borrow on it and my father-in-law had to subordinate his mortgage to the building and loan.

Q You mean he subordinated his \$10,000 mortgage to a first mortgage of the building and loan? A Yes.

Q Was there a \$5,000 mortgage on the improved piece and \$5,000 on the unimproved? A *My impression is that my father-in-law subordinated \$5,000 on the improved piece to the first mortgage and kept the other \$5,000 as a first mortgage on the unimproved piece.*

Q At the time of the exchange of the improved piece on Eagle Rock avenue for North Walnut street, you got your father-in-law to cancel this \$5,000 mortgage on Eagle Rock avenue so that you could convey free and clear? A He had to cancel his \$5,000 mortgage on Eagle Rock avenue in order to consummate a deal.

Q So that when the exchange was made he had no security for his \$5,000? A He still had his \$5,000 mortgage. When I built Eagle Rock avenue I had no money, so he gave me about \$5,000 until I could get a building and loan and by the time I was finished I owed him \$15,000 instead of \$5,000."

And, on p. 14, of the brief of Levy Bros. a portion of the testimony of Hyman Sussman, p. 12, is quoted as follows:

"Q Do you still own those mortgages?

A I do not.

Q What did you do with them? A I assigned them back to Goodwin Construction Company.

Q You assigned both mortgages to the Goodwin Construction Company? A Yes."

This testimony could only have been quoted in this way to indicate that Hyman Sussman, in effect, admitted that he was dealing with mortgages that had no validity and assigned them to the owner. But, Hyman Sussman, said, immediately after the testimony quoted:

"Q Did you get any consideration for that assignment? A I did.

Q What was the consideration? A I got a mortgage on North Walnut street in the sum of \$15,000.

Q How do you account for the extra \$5,000? A I have certain checks to prove it and the balance I gave him in cash.

Q Do you have checks to show the difference in the consideration? A A part.

Q How much? A About \$3,000 I believe.

Q What were these checks given for? A For the \$15,000 mortgage."

Levy Bros. on p. 14 of its brief, quotes from Hyman Sussman's testimony on p. 65 a question and an answer without reference to the testimony both which precedes and follows the question and answer quoted, and from which testimony the transaction is made clear.

The most misleading excerpt, and one which demonstrates, I submit, that these recitations of the testimony in the brief of Levy Bros. are not entitled to any consideration is a quotation from the testimony of Cohen from p. 8 of the record (p. 15 of Levy Bros.' brief). This excerpt is quoted by Levy Bros. to show that there is dispute as to the purposes for which the advances were made, etc. The witness is quoted as stating as follows:

"Q How much money did Sussman advance on Eagle Rock avenue? A He advanced me \$5,000. I bought the lot from Sussman and he took back a purchase money mortgage in the amount of \$10,000.

Q How much money did your father-in-law advance you when you started to build on Eagle Rock avenue? A \$5,000.

Q Did he advance any more money after the first \$5,000? A Yes.

Q How much money did he advance? A \$5,000."

There is nothing to indicate but that the second question in this excerpt immediately follows the first answer. It does *not*. The record reads (p. 8)—

“Q How much money did Sussman advance you on Eagle Rock avenue? A He advanced me \$5,000. I bought the lot from Sussman and he took back a purchase money mortgage in the amount of \$10,000.

Q *How much money did he advance you?* A \$10,000.

Q Did you pay any of that \$10,000? A Once I gave him \$1,000.

Q I want to know how much you owe him? A I owe him all that money, \$10,000. I bought a lot from my father-in-law, about \$100 a foot.

Q How much cash? A \$3,000.

Q When you purchased Eagle Rock avenue, how much of a mortgage did your father-in-law take back? A \$10,000.

Q A purchase money mortgage? A Yes. I bought it from him; it was his lot.

Q How much money did your father-in-law advance you when you started to build on Eagle Rock avenue? A \$5,000.

Q Did he advance you any more money after the first \$5,000? A Yes.

Q How much money did he advance? A \$5,000.”

This consideration of the excerpts referred to in the briefs of Levy Bros. and of the receiver indicates, I submit, that the contention that there is a *real* dispute as to the facts, as set out on p. 8, etc. of my brief, is captious.

IV.

Under the title that “the mortgage was not a purchase money mortgage,” Levy Bros., Point II, pp. 19, 20 of its brief, and the receiver Point I, p. 7 of his brief, make the statement, with respect to the \$5,000 included in the amount secured by the

mortgage, alleged to represent a cancellation by Sussman of a \$5,000 mortgage, which he held on the Eagle Rock property, which was exchanged by the Goodwin Construction Company for the Walnut street property of Huegel and Clark, that it is impossible that this \$5,000 mortgage should have been cancelled for that purpose because, in the transaction, Huegel and Clark was indebted to the Goodwin Construction Company and paid it \$5,000 in cash and also gave back a mortgage, and they refer to Cohen's testimony p. 9. But the witness testified on p. 9—

“Q Did you take back a mortgage when you sold the property? A Yes, \$5,000.

Q Did you get the rest in cash; the difference between the amount of mortgages and the purchase price? A *No. I took the Walnut street lot as part consideration for the purchase.*

Q How much did you value the Walnut street lot when you negotiated the sale? A \$27,000 or \$28,000.

Q But according to the purchase price of the Eagle Rock avenue lot, you took the Walnut street lot in for about \$12,000? A Yes.

Q How much mortgage was there on Walnut street? A A first mortgage of \$12,000 building and loan mortgage.

Q Any other mortgage on Walnut street? A No, sir.

* * * * *

Q What was the purchase price of the Walnut street lot? A About \$27,000 or \$28,000; I do not know exactly.

Q There was a \$12,000 first mortgage? A Yes.

Q Originally a \$15,000 equity on Walnut street? A Right.

Q How did you pay that \$15,000 equity? You induced Sussman to take a \$15,000 mortgage on Walnut street in exchange for the amount of money that he claimed you owed him on Eagle Rock avenue? A Yes.

Q Is that the way you account for the \$15,000 mortgage on the Walnut street property held by the Newark Holding Company?

A Yes."

The same witness was called before the Vice-Chancellor on the appeal, at pp. 142, 143, 144, and clearly explains the transaction as well as that of Sussman assigning the other \$5,000 mortgage which he held on Eagle Rock avenue to secure moneys to advance to Goodwin Construction Company.

V.

Both Levy Bros. and the receiver criticise Newark Holding Company for not calling Sussman before the Vice-Chancellor. He *was* called before the receiver, examined and cross examined and had those, who were attacking the mortgage, desired to recall him they might have done so.

They also criticise Newark Holding Company for not putting in evidence the Huegel and Clark contract, the mortgages or records of the mortgages, which Sussman held upon the Eagle Rock avenue property (p. 9 of the brief of the receiver), the assignment by Sussman of one of the mortgages which he held upon the Eagle Rock avenue property, and which was said to have been transferred to another.

Both Levy Bros. and the receiver here again fall into the error, I submit, of assuming that there was a duty resting on Newark Holding Company to *demonstrate* that the mortgage was a valid instrument and that there had been advanced upon it the amount secured by it. They ignored the bond and mortgage as evidence of indebtedness. I repeat that the rule of evi-

dence is not changed by the appointment of the receiver nor by the intervention of lien claims. All that was required of Newark Holding Company was to produce the bond and mortgage. They are evidence that they represent a debt of the amount stated.

The burden, then, is on those who assert that they are fraudulent to prove it.

The burden was upon them, if they thought that these mortgages, contracts and assignments did not exist, to call for them, or to prove that they did not exist by an examination of the record.

This is *not* a case where the documentary proof was in the possession of one side and it was said by that side to exist and then it was not produced. Here part of the documentary proof, which was referred to, were records which were always available to both sides. If those questioning the validity of this mortgage wanted the contract between Goodwin Construction Company and Huegel & Clark they could have subpoenaed Huegel & Clark to produce it. Presumptively a duplicate copy of this contract, being a record of Goodwin Construction Company, *was in the possession of the receiver*. Neither it nor any one of the other original documents was in the possession of Newark Holding Company, the assignee of the mortgagee. Newark Holding Company never had the contract. It never had the mortgages of Sussman on the Eagle Rock avenue property. Even if we consider Sussman as the Newark Holding Company, Sussman had surrendered the mortgages on the Eagle Rock avenue property. The fact, therefore, is that this documentary evidence, which Newark Holding Company is criticised for not producing, was not in its possession

or within its control, and the records were as available to one side as to the other.

Yet great stress is now laid, to support the determination of the receiver, upon the non-production of this evidence. The receiver says (p. 9)— “The production and marking into evidence of the contract of sale and purchase of the North Walnut street property between Huegel & Clark and Goodwin Construction Company would have been helpful.”

He was the receiver of Goodwin Construction Company and presumptively had all of its records. Then why did he not produce it, if it was so important?

He further says: “The production of the assignment of the mortgage on the Eagle Rock avenue property which is now being urged to substantiate the \$15,000 mortgage, was never offered in evidence, if indeed it is in existence at all.”

The original document was not in the possession of Newark Holding Company or of Sussman and the record was available to either side.

The receiver further says: “Neither is there any proof of the alleged cancellation of the \$5,000 mortgage on the Eagle Rock avenue property nor was the bond supporting it produced either before the receiver or the Vice-Chancellor so as to lend credence to the positions now taken by the appellant to support its contention.”

The mortgage having been cancelled and the bond and mortgage surrendered, they were neither in the possession of Newark Holding Company nor of Sussman nor of Cohen. They were in the possession of Huegel & Clark, or

one of their grantees, for they had sold the property. They could have been produced as easily by the receiver and Levy Bros. as by appellant, Newark Holding Company. *But it is significant, the charge of fraud being made by Levy Bros. and the receiver and the burden being upon them to prove it, that they did not produce evidence which was easy for them to get, if it existed, to stamp the whole story of Cohen and Sussman as false. All they need to have done was to have produced the records and to have shown the absence of any record of a mortgage held by Sussman upon the Eagle Rock avenue property, or, if the record showed that such a mortgage did exist, then to produce the cancellation of that mortgage to show that it was not cancelled coincident with the transfer to Huegel & Clark. By that slight act, if the story told by Cohen and Sussman was not correct, it could have been demonstrated as false and the fraud proven.*

It is not to be considered that counsel for Levy Bros. and the receiver overlooked this fact and it must be presumed, in view of their failure to attempt to prove the absence of any record, that the facts are as stated by Sussman and Cohen. It is not to be presumed that counsel overlooked this opportunity of proving Sussman and Cohen perjurers.

Again, I repeat how was it possible, if the position now taken by Levy Bros. and the receiver be correct, for the receiver to allow this mortgage for the full amount as against the general creditors, who, by virtue of the appointment of the receiver, had a lien upon the property?

This is all in answer to Point V of the brief of Levy Bros. p. 26 and the statements contained in the receiver's brief, pp. 10, 11.

VI.

Under the receiver's Point II, p. 12, and Levy Bros., Point III, p. 21, dealing with the matter of the priority of the mortgage as affected by the date of the commencement of the building, both respondents refer to a statement of Sussman, testifying before the receiver p. 14, to the effect that, when he delivered the check of January 20, 1925, Goodwin Construction Company "was already working on North Walnut street" as evidence that the construction on North Walnut street had started as early as January, 1925.

They omit to inform this court that what Sussman must have been referring to was the *demolition of the old building on the land*. If the demolition of the old building, under the circumstances of this case, was the commencement of the new building, I must concede that the building was commenced before the mortgage was recorded, and I have argued that question on p. 12 etc. of the original brief.

From the testimony adduced by respondents Sussman could have been referring to nothing except the demolition of this building because the respondents proved that the contract for the excavation (which was the first work performed upon the building) was not made until March 4, 1925 (Ex. D. 1, p. 149).

Both Levy Bros. and the receiver criticise the testimony offered before the Vice-Chancellor as to when the building was commenced. I have referred to that testimony in my original brief (p. 16, etc.), and have nothing to add. It is not the fact, as stated by respondents, that Cohen remembered nothing else about the construction

of this building, except that the excavation was commenced between the 11th and 16th of April.

Newark Holding Company is criticised for not producing the check which refreshed the recollection of Cohen, which was given by him to the excavator before the digging was commenced. The explanation is found on pp. 150, 151, 152, 153 of the record. Cohen says that he had turned everything over to the *receiver*, and that he had seen the check in Mr. Silver's office and the inference to be gathered from his testimony is that the receiver has the check (pp. 152, 153).

There was no evidence offered by the receiver and no statement made by him to the effect that he had not. And yet Newark Holding Company is now criticised for not producing the check which, so far as the evidence discloses, is in the possession of the receiver.

From the testimony of Cohen and LoConte before the Vice-Chancellor I submit that it appears that this building was not commenced until after the record of the mortgage (Cohen, p. 141; LoConte, p. 161).

And if it had been commenced before such record it seems to me it would have been easy to prove it. The contracts for material and labor could have shown as well as payments or whatnot. The records were in the possession of the receiver (See p. 17 of my original brief).

Levy Bros. on p. 24 of its brief, cites *Franklin Society v. Thornton*, 85 N. J. E. 525. That case has no application to that at bar. Nor has section 14 of the Mechanics' Lien Act, with which section that case was concerned. Section 14 is confined to what is known as advance money mortgages, and the commencement of the build-

ing has nothing to do with their priority. The priority provided for those mortgages is determined by the date of the filing of the lien claim and the matter as to whether moneys were advanced upon the mortgage and used in the construction of the building. If the mortgage is recorded prior to the commencement of the building, as I insist here, the rights of the parties are determined, not under section 14 at all, but under section 28 (See p. 11, etc., of my original brief).

And the burden is upon the lien claimant seeking priority to prove that the commencement of the building preceded the record of the mortgage.

If there be no proof then the mortgage (if not an advance money mortgage) retains its priority if recorded before the filing of the lien claim.

VII.

I have answered Point IV of the brief of Levy Bros., which has to do with the acknowledgment of the mortgage under my Point III, p. 21 of my original brief.

VIII.

The receiver says that he is not bound by the proceedings in the law courts in the mechanics' lien cases, and that he determines the status of the claims as he found them on the date of his appointment March 26, 1925 (He is mistaken. He was appointed March, 1926, as he says on p. 1 of his brief). But the objections made to some of these lien claims were that they were not filed or suits were not commenced within the time prescribed by the statute, although the four months expired *before the appointment of the*

receiver, in which cases the liens are gone and the appointment of the receiver does not extend the time to file them, and in other cases it appeared that Newark Holding Company was not made a party defendant to the lien claim suits, in which cases no claim can be made to priority over the mortgage, and the receiver's appointment does not alter this situation. But even with respect to those cases in which liens were filed and suits were commenced within the time prescribed by the statute if, after the appointment of the receiver, the lien claimants elected to prosecute and took judgments, which gave no priority over the mortgage of Newark Holding Company, prior to the determination of the receiver, those judgments are, I submit, as between the lien claimants and Newark Holding Company, *res adjudicata* that the lien claimants are not entitled to priority over the mortgage. The receiver is not interested nor are the general creditors. It is a controversy between the mechanics' lien claimant and the mortgagee and the mechanics' lien claimant has elected to proceed to have the matter determined at law.

Practical Bldg. &c. Newark v. Meisol, 101 N. J. E. 636;

Wix v. Frankel, 87 N. J. E. 467;

Active Mortgage Co. v. Apex Bldg. Co.,
7 N. J. Advance Reports 964.

Respectfully submitted,

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