

INDEX

	PAGE
Summons	1
Complaint	2
Answer	6
Reply	8
Notice of Appeal	9
Specifications of Determinations and Direc- tions Appealed From	10
Additional Specifications of Determinations and Directions Appealed From	12
Transcript of Clerk's Docket	13
Stenographer's Minutes	14
Opinion	76
Certificate of Stenographer and Judge	78
Opinion of Supreme Court	103
Affirmance	104
Notice and Grounds of Appeal	106

TESTIMONY FOR PLAINTIFF.

Rudolph Feinberg:	
Direct	15
Cross	16
Redirect	19
Miles Lawrence:	
Direct	66
Cross	67
Jacob Sadosky:	
Direct	67
Cross	71
Jacob Sugarman:	
Direct	72

TESTIMONY FOR DEFENDANTS.

	PAGE
Alexander Seclow:	
Direct	20
Cross	27
Jacob Sugarman:	
Direct	38
Cross	55
Fred Feinberg:	
Direct	74

Summons.

(Filed January 14, 1930.)

THE STATE OF NEW JERSEY To Building Construc- 10
tion Company, a corporation of New
Jersey, Builder & Owner; Harry B.
[L. S.] Dembe, Receiver of the Building Con-
struction Company, an insolvent corpo-
ration, and Solomon Silberberg and Ida
Pecker, mortgagees.

YOU ARE SUMMONED to answer the annexed com-
plaint of David Feinberg of the City of Bayonne,
County of Hudson, and State of New Jersey, in an 20
action at law in the First District Court of Jersey
City, in which David Feinberg claims a building
lien on a certain building and land of the Building
Construction Company, builder and owner, de-
scribed in said complaint.

AND TAKE FURTHER NOTICE that unless you file
your answer to said complaint with the Clerk of
the said court, at Jersey City, New Jersey, within
twenty days after service upon you of this writ
and the annexed complaint, the plaintiff may pro- 30
ceed in the suit and judgment may be entered
against you.

WITNESS, August Ziegener, Esq., Judge of the
said Court at Jersey City, New Jersey, this 14th
day of January, 1930.

B. FRANCES MARRON,
Clerk.

FRED & MAX FEINBERG, 40
Attorneys for Plaintiff.

Complaint.

FIRST DISTRICT COURT OF JERSEY CITY.

(Filed January 14. 1930)

10

DAVID FEINBERG,
Claimant-Plaintiff,

v.

BUILDING CONSTRUCTION COMPANY,
a corporation of New Jersey,
Builder and Owner,

and

HARRY B. DEMBE, Receiver of the
Building Construction Com-
pany, an insolvent corporation,

20

and

SOLOMON SILBERBERG and IDA
PECKER,
Mortgagees-Defendants.

Action at Law.

On Mechanic's
Lien Claim.

Complaint.

The Plaintiff residing in the City of Bayonne,
County of Hudson, and State of New Jersey, says
that:

30

FIRST COUNT.

1. At the times hereinafter stated the defendant
Building Construction Company, a corporation of
New Jersey, was the owner of a lot or curtilage of
land situated in the City of Jersey City, County
of Hudson, State of New Jersey, as follows:

40

ALL that certain lot tract or parcel of land
and premises situate, lying and being in the
City of Jersey City, County of Hudson, and
State of New Jersey, and being more par-
ticularly described as follows:

Complaint.

Beginning at a point on the northerly side of Wilkinson Avenue, distant one hundred and twenty eight and twenty nine one hundredths (128.29) feet westerly from the corner formed by the intersection of the said side of Wilkinson Avenue with the westerly side of Garfield Avenue; thence running (1) northerly and at right angles to said side of Wilkinson Avenue one hundred (100) feet to a point; thence (2) westerly and parallel with the said side of Wilkinson Avenue twenty-five (25) feet to a point; thence (3) southerly and parallel with the first course run one hundred (100) feet to a point in the said side of Wilkinson Avenue; thence (4) easterly and along the said side of Wilkinson Avenue twenty-five (25) feet to the point or place of beginning. Being commonly known as #12 Wilkinson Avenue, Jersey City, New Jersey.

2. From the period commencing the 21st day of May, 1929, and ending the 1st day of November, 1929, he furnished and performed plumbing work and supplied the materials therefor, on the building described herein, erected on the land above described.

3. The particulars of the work and labor performed, and the materials supplied therefor, and the prices agreed to be paid therefor, are set forth in Schedule "A" which is annexed hereto and made a part hereof.

4. On January 14, 1930, he filed a mechanic's lien claim against the premises above described, together with the buildings erected thereon for

Complaint.

the labor performed and materials supplied, as set forth in this complaint.

10 5. The said indebtedness is a lien upon said land and building by virtue of a statute, entitled, "An act to secure to mechanics and others payment for their labor and materials in erecting any building and in making certain improvements to land (revision of one thousand eight hundred and ninety-eight)."

6. There remains due and owing the sum of \$500.00.

20 7. All the labor was performed and materials supplied between the 21st day of May and the 1st day of November, 1929, which last mentioned date is the day upon which the last work was performed.

8. The said defendant Building Construction Company is the owner of the land and the building erected thereon. This claimant contends that his lien is prior and paramount to the rights of said defendant, and will be cut off by a sale of premises.

30 9. Harry B. Dembe is made a party defendant because, that in certain proceedings pending in the Court of Chancery of New Jersey, for the adjudication of the said Building Construction Company, a corporation of the State of New Jersey, as insolvent, and pursuant to the statute in such cases made and provided, Harry B. Dembe was appointed Receiver of the assets and property of the said Building Construction Company, a corporation of the State of New Jersey.

40 10. Solomon Silberberg is made a party defendant because he holds a mortgage affecting the

Complaint.

premises herein described in the sum of \$1500.00 and recorded in the Hudson County Register's Office in Liber 1547 of Mortgages for said county, page 629, and which mortgage will be cut off under a mechanic's lien sale.

10

11. Ida Pecker is made a party defendant because she holds a construction mortgage affecting the premises herein described in the sum of \$7,500.00 and recorded in the Hudson County Register's Office of mortgages in liber 1553 of mortgages, page 191, and which mortgage will be cut off under a mechanic's lien sale.

SECOND COUNT.

1. He repeats all the allegations of the First Count.

20

2. He alleges that the work and labor performed as set forth in Schedule "A" and the materials supplied thereto were reasonably worth as set forth in said schedule.

THIRD COUNT.

He sues on a book account a true copy of which is hereto annexed and marked Schedule "A" and which is made a part hereof, as though more fully set forth.

30

Judgment will be demanded for the sum of Five Hundred (\$500.00) Dollars, besides lawful interest and costs of suit on either of the foregoing counts, generally against the defendant Building Construction Company, and specially against the land and building described herein.

FRED & MAX FEINBERG,
Attorneys for Plaintiff.

40

Answer.

SCHEDULE "A."

Building Construction Company

10 For performing plumbing work and furnishing the materials necessary therefor, on premises 12 Wilkinson Avenue, Jersey City, New Jersey, pursuant to contract, between the 21st day of May, 1929 and the 1st day of November, 1929 \$900.00
 Received on account 400.00

Balance justly due Claimant \$500.00

Answer.

(Filed January 29, 1930.)

20

FIRST DISTRICT COURT OF JERSEY CITY.

DAVID FEINBERG,
Claimant-Plaintiff,

v.

BUILDING CONSTRUCTION COMPANY,
a corporation of New Jersey, *et*
als.,

Defendants.

On Mechanics
Lien Claim.
Answer of De-
fendant Ida
Pecker.

30

The defendant, Ida Pecker, residing in the City of Bayonne, County of Hudson and State of New Jersey, answering the complaint in the above entitled cause, says that:

1. Paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the first count of the complaint are denied.

40 2. As to paragraphs 9 and 10 of the first count of the complaint, she leaves the plaintiff to his proof.

Answer.

3. As to paragraph 11 of the first count of the complaint, she admits that she is the holder of the mortgage mentioned in said paragraph, but denies that it will be cut off under a mechanics lien sale and alleges, as a matter of fact and law, that her mortgage is prior to the plaintiff's lien claim. 10

4. She denies paragraph 1 of the second count of the complaint.

5. She denies paragraph 2 of the second count of the complaint.

6. The allegations of the third count of the complaint which are set down in an unnumbered paragraph are denied.

FIRST SEPARATE DEFENSE TO FIRST, SECOND AND THIRD COUNTS. 20

1. All the allegations of the portion of the answer hereinbefore set forth are hereby repeated and incorporated by reference.

2. This defendant alleges that the plaintiff's lien claim, the complaint and all proceedings thereunder, are not in accordance with law and therefore invalid. 30

SECOND SEPARATE DEFENSE TO FIRST, SECOND AND THIRD COUNTS.

1. She alleges that she is the holder of a mortgage of \$7,500 made by the Building Construction Co., to Ida Pecker, on April 10th, 1929, and recorded in the Hudson County Register's Office in Book 1553 of Mortgages on page 191, and that the lien of said mortgage is prior and paramount to the plaintiff's lien claim, or any other right, title or interest which the plaintiff may claim in the said mort- 40

Reply.

gaged premises by virtue of said lien claim or otherwise.

Attorneys for Defendant,
Ida Pecker.

10 NOTICE ADDRESSED TO THE COMPLAINT AND LIEN CLAIM:

TAKE NOTICE, that at or before the trial of the above entitled cause, the defendant, Ida Pecker, will move to strike out the complaint upon the ground that the complaint and lien claim are defective.

SECLOW & NESSANBAUM,
Attorneys for Defendant,
Ida Pecker.

20

Reply.

FIRST DISTRICT COURT OF JERSEY CITY.

30	DAVID FEINBERG, <i>Claimant-Plaintiff,</i> <i>v.</i> BUILDING CONSTRUCTION COMPANY, a corporation of New Jersey, <i>et</i> <i>als.,</i> <i>Defendants.</i>	} On Mechanics Lien Claim. Reply to Answer of Defendant Ida Pecker.
----	--	--

The plaintiff replying to the answer of defendant Ida Pecker, joins issue with the defendant Ida Pecker on her answer.

FRED & MAX FEINBERG,
Attorneys for Claimant-Plaintiff.

40

Notice of Appeal.

(Filed April 10, 1930.)

FIRST DISTRICT COURT OF JERSEY CITY.

DAVID FEINBERG, <i>Claimant-Plaintiff,</i> <i>v.</i> BUILDING CONSTRUCTION Co., a cor- poration of New Jersey, <i>et als.,</i> <i>Defendants.</i>	}	On Mechanics Lien Claim. Notice of Appeal.	10
--	---	--	----

TO FRED AND MAX FEINBERG, Esqs., Attorneys for David Feinberg, Claimant-Plaintiff:

TAKE NOTICE that the defendant, Ida Pecker, hereby appeals to the New Jersey Supreme Court from the judgment of the First District Court of Jersey City, rendered in the above action on the 27th day of March, 1930, and which judgment awarded priority of the plaintiff judgment in the amount of \$260 besides costs of suit and interest to the mortgage of Ida Pecker. 20

Dated April 4th, 1930.

Yours, &c., 30

SECLOW & NESSANBAUM,
Attorneys for Defendant Ida Pecker.

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

SYLVIA MELTZER, being duly sworn according to law, deposes and says: That she is employed in the office of Seclow & Nessenbaum, attorneys of 40

Specifications of Determinations.

Ida Pecker, and that she served a true copy of the within notice of appeal upon Fred and Max Feinberg, the attorneys of David Feinberg, by delivering the same to them at their office on April 4, 1930.

10

SYLVIA MELTZER.

Sworn and subscribed to before me }
 this 4th day of April, 1930. }

SAMUEL KOBREA,
 An Attorney at Law
 of New Jersey.

20

**Specifications of Determinations and
 Directions Appealed From.**

(Filed April 5th, 1930.)

NEW JERSEY SUPREME COURT.

DAVID FEINBERG,
Claimant-Plaintiff,

v.

30

BUILDING CONSTRUCTION COMPANY,
 a corporation of New Jersey, *et
 als.,*

Defendants.

On Mechanics
 Lien Claim.

The defendant-appellant herein, herewith files her specification of determinations and directions of the First District Court of Jersey City, with respect to which she is dissatisfied in point of law:

40

1. Said court erred in refusing to direct a ver-

Specifications of Determinations.

dict in favor of the defendant, Ida Pecker, and against the plaintiff when thereunto moved at the close of the case which motion should have been granted for one or more of the following reasons urged in support thereof:

(a) That no work was commenced upon the building upon which the lien was claimed until after the recording of the mortgage and that, therefore, the mortgage is prior to the entire amount advanced to the mortgagor. 10

(b) That the last work performed by the plaintiff was more than four months from the date of the filing of the lien and that, therefore, the mortgage of the defendant, Ida Pecker, is prior.

(c) That in any event the mortgage of Ida Pecker to the extent of \$7,240 and interest is prior to the plaintiff's lien claim and judgment should be entered accordingly. 20

2. Said court erred in rendering a judgment that \$260 of the lien claim is prior to the whole of the mortgage of Ida Pecker.

3. Said court erred in finding that any portion of the lien claim was prior to any portion of the mortgage of Ida Pecker. 30

SECLOW & NESSANBAUM,
Attorneys for Defendant-Appellant.

**Additional Specifications of Determinations
and Directions Appealed From.**

(Filed April 15, 1930.)

NEW JERSEY SUPREME COURT.

10

DAVID FEINBERG,
Claimant-Appellee,

v.

BUILDING CONSTRUCTION COMPANY,
et als.,
Defendants,

and

20

IDA PECKER,
Defendant-Appellant.

On Mechanic's
Lien Claim.

The defendant-appellant herein, herewith files the following additional specification of determinations appealed from:

4. The trial court erred in excluding the offer of this defendant of the application for the mortgage loan as follows (case p.):

30

Mr. Seclow: I offer the application for the mortgage loan and which shows the conditions of the mortgage loan.

Mr. Feinberg: I object to it as immaterial, the condition of the mortgage loan.

The Court: Sustain the objection.

Mr. Seclow: Exception (granted).

40

SECLOW & NESSANBAUM,
Attorneys for Ida Pecker,
Defendant-Appellant.

Transcript of Clerk's Docket.

FIRST DISTRICT COURT OF JERSEY CITY.

#187328

<p align="center">DAVID FEINBERG, <i>Plaintiff,</i></p> <p align="center"><i>v.</i></p> <p align="center">BUILDING CONSTRUCTION Co., a corporation of New Jersey, Builder & Owner,</p> <p>HARRY B. DEMBE, Receiver of the Building Construction Company, an insolvent corporation, and SOLOMON SILBERBERG and IDA PECKER, mortgagees, <i>Defendants.</i></p>	<p align="right">10</p> <p>State of New Jersey, } Hudson County. } ss. City of Jersey City. }</p> <p align="center">Before AUGUST ZIEGENER, Esq., Judge.</p> <p>Mechanics Lien. FRED & MAX FEINBERG, Plaintiff's Attorneys.</p> <p align="right">20</p>
--	---

Bayonne

Costs

Summons & Copy \$1.80

Trial fee 1.50

A summons issued tested January 15, 1930. Service acknowledged by H. B. Dembe, January 24, 1930. Jacob Stern for Solomon Silberberg January 23, 1930, January 23rd, 1930 by Seclow and Nessenbaum for Ida Pecker. January 29th, 1930, answer of Ida Pecker filed. March 11th, 1930, on part of the plaintiff Rudolph Feinberg sworn and testified, one lien claim and one contract offered and received in evidence. 30

On part of the defendants, Alexander Seclow, Jacob Sugerman sworn and testified one contract offered and trial continued to March 18, 1930, when 40

Stenographer's Minutes.

for plaintiff Myles Lawrence, Jacob Sadoriski, Ferd Feinberg and Max Sacks, sworn and testified.

10 ~~Whereupon it is on this day of A. D. 1930, by this Court considered and adjudged that said Feinberg plaintiff recover against said March 27th, 1930, ordered that final judgment be entered in favor of said plaintiff, David Feinberg and against defendant, Building Construction Company, a corporation of New Jersey, and is also ordered that claim and judgment of claimant-plaintiff David Feinberg is prior and paramount to mortgage of the defendant Ida Pecker, to the amount of \$260 besides costs of suit in sum of \$20.55 and interest of \$2.60.~~

20 April 10, 1930. Notice of Appeal filed.

I hereby certify that the foregoing is a true transcript of the Clerk's Docket.

Dated - April 28th 1930.

B. Frances Marron.

Clerk First District Court of Jersey City.

(Seal of Court).

Defendants. }

Before—Honorable AUGUST C. ZIEGENER, Judge of the First District Court of Jersey City.

APPEARANCES:

40 FRED FEINBERG, Esq., for the Plaintiff.
ALEXANDER SECLOW, Esq., for the Defendants.

Stenographer's Minutes.

for plaintiff Myles Lawrence, Jacob Sadoriski, Ferd Feinberg and Max Sacks, sworn and testified.

10 ~~Whereupon it is on this day of A. D. 1930, by this Court considered and adjudged that said Feinberg plaintiff recover against said March 27th, 1930, ordered that final judgment be entered in favor of said plaintiff, David Feinberg and against defendant, Building Construction Company, a corporation of New Jersey, and is also ordered that claim and judgment of claimant-plaintiff David Feinberg is prior and paramount to mortgage of the defendant Ida Pecker, to the amount of \$260 besides costs of suit in sum of \$20.55 and interest of \$2.60.~~

20 April 10, 1930. Notice of Appeal filed.

Stenographer's Minutes.

FIRST DISTRICT COURT OF JERSEY CITY.

30	DAVID FEINBERG, <i>Claimant-Plaintiff,</i> <i>v.</i> BUILDING CONSTRUCTION Co., <i>et als.</i> , a corporation of the State of New Jersey, <i>Defendants.</i>	} Mar. 11th, 1930. } Mar. 18th, 1930.
----	---	--

Before—Honorable AUGUST C. ZIEGENER, Judge of the First District Court of Jersey City.

APPEARANCES:

40 FRED FEINBERG, Esq., for the Plaintiff.
 ALEXANDER SECLOW, Esq., for the Defendants.

Rudolph Feinberg, direct.

Mr. Feinberg: I offer in evidence a lien claim No. 7560, filed in the Clerk's Office on January 14th, 1930. The lien claimant is David Feinberg, and the defendants are Building Construction Company, a corporation, as Builder and Owner, Harry B. Dembe, Receiver of the Building Construction Company, an insolvent corporation, and Solomon Silberberg and Ida Pecker, mortgagees. The building described is a two-family frame dwelling house and garage to the rear thereof, describing premises commonly known as 12 Wilkinson Avenue, Jersey City. There is a balance claimed to be due of \$500.00, and a certificate of commencement of suit dated January 14th, 1930, and filed I think the 16th, it seems like the 16th here, in the Clerk's Office of the County of Hudson. 10
20

(Received in evidence and marked Exhibit P-1.)

(Certificate marked Exhibit P-2.)

RUDOLPH FEINBERG, being duly sworn, testified as follows:

Direct examination by Mr. Feinberg: 30

Q. What is your occupation? A. Plumbing contractor.

Q. Are you the son of David Feinberg, the plaintiff in this suit? A. Yes, sir.

Q. And you had charge of the building in question? A. Yes, sir.

Q. And I show you contract dated May 29th, 1929, between the Building Construction Co. and David Feinberg. Is this the contract under which the work was done? A. Yes, sir. 40

Q. Is this the signature of David Feinberg? A. Yes.

Rudolph Feinberg, cross.

Q. And is this the signature of Jacob Sugerman, president of the Construction Co.? A. Yes, sir.

(Offered in evidence and marked Exhibit P-3.)

10 Q. When was this job started? A. I started the job approximately May 21st.

Q. And when was the job completed? A. According to my contract, the job was entirely completed November 1st.

Q. November 1st, 1929? A. 1929.

Q. There is a balance due of \$500.00? A. \$500.00.

20 Q. Where is this balance due, on the new two-family house or on the alteration job? A. On the new two-family house.

Q. You have been paid on the other job. A. They lived up to the agreement until the final payment.

Q. Has all the work been done according to the contract? A. Absolutely.

Cross examination by Mr. Seelow:

Q. You say you started the job May 21st, 1929? A. May 21st, 1929.

30 Q. What did you do there directly after you started work? A. After I started the work I started work again.

Q. What work did you do? A. Plumbing work.

Q. Plumbing work. A. Absolutely.

Q. Don't you know that building was occupied in August?

40 Mr. Feinberg: I object to it. What materiality has that got to do with this case if that building was occupied in August?

Mr. Seelow: I withdraw the question.

Rudolph Feinberg, cross.

Q. You say you finished your work in November of this year? A. According to my contract, my job was entirely completed November 1st.

Q. Does your contract say that the job was completed in November? A. It doesn't say it has to be completed in November, but the job has been completed in November. 10

Q. What did you do in November on that job? A. My contract calls for installation of metering before completing the job. The meter was installed.

Q. What work did you do in November of 1929 on that job?

Mr. Feinberg: I object. He answered the question that the meter was installed. 20

By the Court:

Q. Did you install the meter? A. We don't install the meter. That is up to—

Q. Counsel asked you what you did? A. On November 1st I didn't do anything, but a few weeks before November 1st, I had done plumbing work there.

Q. What work did you do a few weeks before November 1st? A. I connected up my boiler with the steamfitter's paracoils. 30

Q. When was that? A. Approximately a few weeks.

Q. Three weeks, four weeks? A. Approximately three weeks.

Q. Three weeks before November 1st? A. Yes, sir.

Q. Don't you know as a matter of fact, that you didn't do any work in there after the end of July? A. I know for a matter of fact, as I stated before, that three weeks before November 1st, I did work 40

Rudolph Feinberg, cross.

on the job. The steamfitter held me back on the job, and the stoves were delivered by the Public Service, which I connected.

Q. When was that? A. I don't remember the exact dates, but within that same time.

10 Q. You say that the stove was delivered in October? A. I didn't say exactly.

Q. It may have been September or August? A. No.

Q. All this testimony you are giving now, you are just guessing at it, aren't you? A. No, absolutely not. I went down there day after day watching that job, and I wanted to complete the job, and I was held back on that job, and when I connected up my paracoils in the cellar and gas stove,
20 I found the meter wasn't there, and I went down to the Water Department.

Q. How long did it take you to connect up that paracoil? A. I worked there two or three days.

Q. You worked two or three days connecting up the paracoil? A. Not only that paracoil, the gas stoves, too.

Q. Was that all done the same time, the connecting of the paracoil and the gas stoves? A. Within three days.
30

Q. And you said you went there every day and you were waiting for the gas stoves to be delivered? A. Not every day. I watched the job to see if the stoves were there, and the steamfitter held me back.

Q. How long after these stoves were delivered did you start working on them? It was a few days, wasn't it, you kept watching? A. Naturally, I wanted to finish the job.

40 Q. Don't you know there were tenants in there before August 1st, and they were using the ranges

Rudolph Feinberg, redirect.

there at the time? A. When the ranges got there they moved in at the same time. When I was there they didn't have gas.

Q. And you say then that the tenants didn't move in until October or November?

Mr. Feinberg: I object.

10

A. I say now that I connected those stoves while the tenants were living there, and they had no gas there until I put them in.

Q. And you connected the stoves a few days after the ranges were delivered? A. I don't know when they were delivered. I found them there.

Q. You said you were going there daily? A. Not every day. Three or four times a week.

Q. But you were there and connected up these ranges within three or four days after the ranges were delivered? A. I watched the job, and I connected those ranges while the tenants were in.

20

Q. You watched the job, and found the ranges there? A. Yes.

Q. And you couldn't complete the work until the ranges were delivered? A. And the paracoils.

Q. And you did all that work, the connection of the ranges and the connection of the paracoils, within three days? A. Absolutely.

30

Q. And the tenants were waiting for them and couldn't use any gas until you did it? A. Absolutely, and didn't have any hot water until I put them in.

Redirect examination by Mr. Feinberg:

Q. The contract calls for you to install the water meter on No. 12 Wilkinson Avenue job and pay for the same; right? A. Absolutely.

Q. Now, is this the paper you received from the Water Department? A. Yes.

40

Alexander Seclow, direct.

Q. When was the meter installed, according to this?

Mr. Seclow: I object.

A. It is on here November 1st, according to their records.

10

The Court: If it is merely a letter I won't permit it. It may be stricken out.

Q. Do you know when the meter was installed?

Mr. Seclow: I object.

The Court: If he knows.

A. I know it was around November 1st.

20

Mr. Seclow: I ask that he answer the question, yes or no.

A. I do know.

Mr. Feinberg: That is the plaintiff's case.

ALEXANDER SECLOW, being duly sworn, testified as follows:

30

I am a member of the firm of Seclow & Nessenbaum, and I was in charge of the placing of the mortgage.

Mr. Feinberg: I want to object to the testimony on the ground that isn't the proper way of proving agency, by the agent himself.

The Court: I assume he is testifying to his actions as a member of the Bar.

Mr. Seclow: I acted as attorney in this matter.

40

The Court: That is what I understood.

I acted as the attorney for Ida Pecker, who

Alexander Seclow, direct.

placed this \$7,500 mortgage and I had complete charge of this matter. I disbursed the moneys for her and had charge of all legal matters in connection with this mortgage, and I also was in charge and acted for her in the disbursing of the funds. I offer a bond dated April 10th, 1929, made by Building Construction Co. to Ida Pecker for \$7,500. 10

Mr. Feinberg: I object to this on the ground it doesn't refer to this job. I think he ought to produce the mortgage first and prove the placing of the mortgage on that particular job.

The Court: I assume this bond is the bond accompanying the mortgage. Have you the mortgage? 20

Mr. Seclow: Yes. I produced the bond for primary evidence.

(Bond marked Exhibit D-1.)

The bond is made by Building Construction Co., a domestic corporation, to Ida Pecker, in the penal sum of \$15,000.00, conditioned for the payment of \$7,500.00 with interest at 6% per annum from the date of the bond, and the due date of the obligation is September 10th, 1929, with interest at 6% payable at maturity, and the bond contains this recital: "Subject to all conditions and covenants in the mortgage simultaneously executed by the obligor herein to the obligee herein, which mortgage is intended to be recorded in the Register's Office of the County of Hudson, State of New Jersey, and all of said conditions and covenants being herein incorporated by reference." I offer the mortgage recited in the bond, and covering the same premises described in the lien claim, which mortgage is dated April 10th, 1929, recorded on 30
40

Alexander Seclow, direct.

April 17th, 1929, at 10:51 o'clock in the forenoon, in Liber 1553 of Mortgages, page 191. This mortgage covers the same premises as described in the lien claim.

10 The Court: Including No. 12?

Q. This mortgage covers— As a matter of fact, this mortgage, when it was placed, covered a plot 50 x 100, which is on the city maps as one lot, and there was erected on this lot an old two-family frame house. This two-family frame house had a sort of side extension—

20 Mr. Feinberg: I object to this. I don't think that is material. I don't think this witness can testify as to those facts.

The Court: Is it the physical condition of it?

Mr. Seclow: Yes.

The Court: Has it any bearing on the construction of 12 Wilkinson Avenue?

Mr. Seclow: Yes.

The Court: I will permit it.

30 There was an old building on there, and this was on the westerly side of the lot, and there was an extension about 6 feet and 6 inches in width. In order to commence the construction of the house next door, it was necessary to dismantle this extension so that the driveway could be used. There is a driveway of 7 feet in width between the old house as it now stands and the new two-family house, which was erected on the easterly side of the lot. The plans for the erection of the new house and the dismantling of the old house were filed in the City Hall, on April 10th, 1929.

40 Mr. Feinberg: I want to object to this on the same ground.

Alexander Seclow, direct.

Mr. Seclow: I offer the plans, the blueprints in evidence, which is marked "Filed by the Building Department of Jersey City."

Mr. Feinberg: I want to object to it on the same ground that he objected to the admission of the letter. There is no doubt about its being filed, I have no objection to it otherwise, but I think he ought to prove it by the Building Department. 10

Mr. Seclow: There is a certificate on here, certified by the Building Department, with the number of the Building Department, No. 37766.

Mr. Feinberg: Do you know that of your own knowledge?

Mr. Seclow: That is the certificate. 20

Mr. Feinberg: Did you file that?

Mr. Seclow: I am reading the certificate of the City.

The Court: I think it should be connected up by the party who caused it to be filed.

Mr. Seclow: I will prove it.

The Court: I will exclude it at this time.

The mortgage was recorded on April 17th, 1929.

(Mortgage marked Exhibit D-2.) 30

Two days after April 10th, 1929—

Mr. Feinberg: Excuse me, if your Honor please, I would like to have it question and answer, so that I can object to the questions. I don't want to be too technical, but there are some important questions here that this witness isn't qualified to answer, and strictly prejudicial.

The Court: I think you are entitled to it, 40

Alexander Seclow, direct.

only I would suggest that a certain portion of the case, that would eliminate question and answer, might be done direct.

Mr. Feinberg: This is the important part of the testimony.

10 The Court: All right, you may have your motion granted.

Direct examination of Mr. Seclow by Himself:

Q. State the facts as to the commencement of the building.

Mr. Feinberg: I object to that. Do you know the facts of the commencement of the building.

20 A. Yes, I was there.

Mr. Feinberg: Were you present when the building was commenced?

A. I am only relating what happened to my knowledge.

Mr. Feinberg: I object to it on the ground that he doesn't state his knowledge of the commencement of the building. He cannot testify when the building was commenced.

30 The Court: I assume that, as a member of the Bar, the witness will not engage in hearsay testimony. He has represented to you a moment ago that what he is testifying to, will only be done by personal knowledge, and in the event of any evidence being given which is not, the Court will strike it out.

40 A. To my personal knowledge, the work was commenced on the old building, that is what is now the one-family house and commonly known as 14 Wilkinson Avenue, about April 12th, 1929. In that

Alexander Seclow, direct.

building, the contractor, the owner, changed the entire inside, ripped off an extension on the side and extended the cellar and the foundations.

Mr. Feinberg: I want to object to that.

The Court: I assume it is pertaining to 14 Wilkinson Avenue, and hasn't any relevancy to this case. The lien is being prosecuted in so far as 12. 10

Mr. Feinberg: My objection is this: The evidence Mr. Seclow gives is clearly hearsay, and he knows it. He begins to describe in detail the work that was done. He only represents the mortgagee, in charge of the disbursements, and he only saw the work after it was done, and he knows he has no knowledge of that testimony at all. 20

Mr. Seclow: I was there two or three times a week.

Mr. Feinberg: You weren't there when the building was commenced.

Mr. Seclow: I was there before the building was commenced.

Mr. Feinberg: You were not there when all the operations you describe were being carried on. 30

Mr. Seclow: Yes, sir, I was present, in order to make the payments, I visited that building two or three times a week, and I was there before the work commenced on the old building and the new building.

By the Court:

Q. From your own personal knowledge, when was the work commenced incident to the construction of what is known as 12 Wilkinson Avenue? 40

A. April 20th. It was on a Saturday and McCabe

Alexander Seclow, direct.

Brothers started excavating on that day, and their work was completed in two or three days. That was three days after the mortgage was recorded.

10 Q. Go ahead. A. I offer in evidence checks aggregating \$7,500 approximately \$4,000 of these checks were payable to Building Construction Co., which is the owner of the mortgaged premises and the mortgagor, and also contractors and material men. That is about \$4,000 and about \$3,200 was paid to Building Construction Co. and Jacob Sugarman. Jacob Sugarman held the contract for certain work on this building, and I now offer this contract in evidence.

20 Q. What character of work? A. The contract was for the materials and the labor on the old building, and the labor on the new building. That is, labor and material on 14, and labor on the new building at No. 12.

Mr. Feinberg: I object to this, on the ground there is no proper proof of the signatures, and no proof of any of the minutes of the corporation authorizing a contract such as this.

The Court: Sustain the objection.

30 The Witness: Out of the payments which went to Sugarman was a payment for insurance amounting to \$35. There was also a charge of \$225, \$210 of which represented a fee to Seclow & Nessenbaum for examining title and taking care of the other legal work in connection with this mortgage, such as drawing contracts with contractors, drawing and recording of papers, and other work in connection therewith. That \$225 covered
40 also \$15 which was charged to Building Construction Co. for defending a suit in the

Alexander Seclow, cross.

Bayonne District Court brought by David Feinberg, and which was settled. I offer the application for the mortgage loan, and which shows the condition of the mortgage loan.

Mr. Feinberg: I object to it as immaterial, the condition of the mortgage loan. 10

The Court: Sustain the objection.

Mr. Seclow: Exception (granted).

(Checks marked Exhibit D-3.)

By the Court:

Q. Just one other question before you cross examine. You testified as to when the work was commenced on 12 Wilkinson Avenue; when was it completed, if you know? A. The work on 12 Wilkinson Avenue was completed in the middle of the summer; that is, it had been completed before I made the last payment, which was August 15th, 1929, except as to, I think, there were 2 garage doors which were missing, and these were brought in about that time, but I made no inspection as to the interior of the building, as I knew there were two tenants in there in the month of August. 20

Cross examination by Mr. Feinberg: 30

Q. Mr. Seclow, you organized this corporation for Mr. Sugarman, the Building Construction Co.?

A. I don't think I had anything to do with it. I think it was done in my office.

Q. Who are the incorporators of this corporation? A. I don't know.

Q. Well, you testified you knew everything about the affairs of this corporation. A. No, I did not. I testified I was in charge of this mortgage loan.

Q. You know, as a matter of fact, that Mr. 40

Alexander Seclow, cross.

Sugarman is one of the incorporators of this corporation, don't you? A. He must be. I have no knowledge; I have never seen the certificate of incorporation, but I understand he is the president of the corporation.

10 Q. And you know, Mr. Seclow, that Mrs. Sugarman is an officer of the corporation; you know that as a matter of fact? A. No, I do not.

Q. You know, as a matter of fact, that your partner, Mr. Nessenbaum, is a member of the corporation also? A. Well, he probably holds one share of stock. That frequently happens, we supply a third person for a corporation.

Q. In other words, this is a closed corporation, operated by Mr. Sugarman? A. I don't know.

20 Q. And you placed a mortgage on there? A. Yes.

Q. Don't you know who the officers are? A. I know the persons who signed the bond and mortgage are the officers.

Q. And you know who the members of the corporation are, and you know, as a matter of fact, that this corporation is Mr. Sugarman? A. The corporation, I don't know what you mean.

30 Q. The stockholders of the corporation are Mr. Sugarman and his wife, Mrs. Sugarman? A. It may be.

Q. Now, this money was loaned to the Building Construction Co. to advance money as the building progressed, or to loan him the money in the construction of this building. This was a construction mortgage. A. That is correct.

Q. And you examined the plans before you loaned him the money? A. I don't know whether I did or not, I probably did not.

40 Q. And you don't know anything about this

Alexander Seclow, cross.

building except what Mr. Sugarman told you, and then you went down to investigate? A. Oh, no. Before this mortgage loan was placed, I went down to see the old building that was to be altered. I wanted to see if it was a feasible thing to carry through, and Mr. Sugarman told me what the company expected to do on the lot that would be cleared off, and it looked like a fitting proposition to me, and I told him I would give him the mortgage and make payments as the work progressed. 10

Q. And it was intended to be a construction mortgage. A. It was intended to, and it was.

Q. This was a transaction involving two houses? In other words, it was one single transaction, isn't that correct? A. It was one mortgage on the alteration of the old building and the erection of a new building. 20

Q. It was one operation. A. It was one operation, that is as far as the mortgage was concerned. It was one mortgage on the two houses, but each building was a separate entity.

Q. But it was one operation, you answered my question, is that so? A. Just what do you mean by operation.

Q. It was a mortgage intended to cover a building consisting of an alteration of one-family house, and building of a new two-family house. That is the reason the money was loaned? A. It was intended that the money should be used for that purpose. 30

Q. And it was, therefore, one operation? A. In an ordinary sense, it was one operation, because—

Mr. Feinberg: I object. He has answered.

Mr. Seclow: I am trying to explain it.

Mr. Feinberg: He said it was one operation. That is all I asked him. 40

Alexander Seclow, cross.

The Court: On the question at this time, we will eliminate the explanation.

Mr. Seclow: May I answer that? I commenced to answer it.

10 The Court: I sustained his objection under the strict rules of evidence. He says you are volunteering an explanation, and he only desired an answer as to whether you considered it one operation, which you said you did.

Q. Were you present when the first work was done on the buildings? A. On which building?

20 Q. On any of them? A. Yes, I was present on Friday, April 19th. I made the first payment for work which was done on the old building, the alteration on No. 14. I went down there every Thursday afternoon or Friday morning, and then I made a payment for it. This is the usual practice, to make payments on Friday, so the contractor can pay his men—

Q. Now— A. I haven't completed it yet.

Q. I haven't asked you any more. You can produce that yourself.

30 The Court: You asked the witness whether or not he attended the building, and the witness inquired of you which building and you said both. Now, I understand he has given the answer first as to 14 and then as to 12. Is that right?

A. Yes.

The Court: You may proceed.

40 A. And they had already been working on the building at No. 12, a considerable portion of the work had been done on that.

Alexander Seclow, cross.

The Court: Both counsel agree that No. 14 is out of this, as I understand it.

Mr. Feinberg: No, except as to commencement of the work.

The Court: All right; continue.

A. At that time, when I made the first check, on April 19th, that was on Friday, that was the same day, or the day before, I was there and they were working there on No. 14, which is the old house.

10

Q. You don't know that as a matter of fact? A. I was there, and they were working, and I gave a check for a week's work on the old house, No. 14, the alteration. On Friday, April 19th, no work had yet been commenced on the new house, No. 12. That work, they commenced the next day, excavating on No. 12. I know that, because I was there, at No. 12.

20

Q. I still ask you, when was the first time you were there on the building, and you say April 19th, is that correct? A. No, sir, I was at this building before they started to work.

Q. With reference to the commencement of the work on either building, when was the first day you were there? A. I was there before the 12th.

30

Mr. Feinberg: I ask your Honor to instruct the witness to answer the question.

Mr. Seclow: Counsel is assuming something which I haven't testified to with reference to the commencement of the building.

The Court: He says with reference to the commencement of this work on either one.

Mr. Seclow: He doesn't say as to both buildings.

40

Alexander Seclow, cross.

Q. I say as to both buildings, either one. A. With reference to the commencement of the old house at No. 14, I was there about three days after the work was commenced.

10 Q. And therefore, you don't know when the first day that the building commenced, is that right?

A. Except this, except that I was there prior to April 12th, and it hadn't been commenced yet, so it was commenced in between April 10th, or April 12th, and April 19th.

20 Mr. Feinberg: I object. This is not competent and purely hearsay. He says he was there a few days after the building was commenced, and he says it must be between these dates. Mr. Seclow has tried to give testimony as to facts and he now testifies that it is purely hearsay. "It must have been between those dates because I was there after the building was commenced and before the building was commenced"; and I, therefore, ask that all his previous testimony be stricken out.

The Court: I will strike out the answer and you may redirect the question.

30 Q. You testified the first day you were there was on April 19th, to deliver a check for work that had been done the previous week? A. No, I was there before this mortgage was placed, to look at the land.

Mr. Feinberg: Witness is not responsive—

The Court: I don't know that he isn't. You asked him when he was first there.

40 Mr. Feinberg: With respect to the commencement of the building, and I asked him

Alexander Seclow, cross.

specifically with reference to paying for that work that had already been done.

The Court: As I understand it, Mr. Seclow doesn't contend that he was there when the work was commenced on No. 14. He has never said so. He has tried to explain between certain dates when the work was not done, and when he returned to the premises some of the work was done. That is the explanation. If you want the exact date when work was commenced on No. 14 the witness has already said he didn't know. I stand corrected if that is not so.

10

Mr. Seclow: That is so.

Q. On your direct examination, you gave as a fact when the building was commenced? A. The new building, the two-family house.

20

Q. And also the old building? A. I don't recall that I did. If I did, I was mistaken.

The Court: The court knows so, that he testified on April 20th, on Saturday, he went to No. 12 and that the excavation was completed in about 3 days.

Mr. Seclow: Yes, it was commenced that day.

30

Q. But you testified that you knew all about it, from your own knowledge. A. I testified that whatever I am telling you about, I know about.

Q. Mr. Seclow, this was an operation consisting of a new two-family house and an old house, and you, as a matter of fact, of your own knowledge, know that before you commenced to excavate on the new building, to have to tear off the structure that was protruding on the premises that was to be occupied by the new building? A. No, I know

40

Alexander Seclow, cross.

of my own knowledge that the structure which was torn down, was 6 feet and 6 inches wide, and that would leave 6 inches clearance, because there was a driveway erected there.

10 Q. But in order to commence the construction of the new building, you had to tear down this structure that was in the way there. A. You wouldn't have to, but it is better to do it, because when the excavator is excavating, it is better for him not to have anything too close to the building line.

Q. It was done to facilitate operations on the new building? A. The old building was torn down because the driveway was intended there, but it would not be necessary.

20 Q. In other words, it was necessary to facilitate the commencement of the new building? A. I don't know, Mr. Feinberg.

Mr. Feinberg: I object to it. It is just a conclusion of his previous testimony.

The Court: The witness also testified that the removal of the obstruction or the operation over on No. 12 was for the purpose of gaining access to some driveway.

30 Mr. Seclow: Yes, there is a driveway created between the two houses. I have a survey here which shows the whole situation.

Q. Now, Mr. Seclow, how much money have you advanced for the erection of the new building, and how much money have you advanced toward the alteration and construction of the old building? A. I cannot answer that. The money was given indiscriminately and used on both buildings.
40 There were carpenters working on one building

Alexander Seclow, cross.

and carpenters on the other building, and the same with the other labor.

Q. You didn't make any apportionment at all as to these moneys? A. No.

Q. In other words, Mr. Sugarman may have applied all the money to the alteration of the one-family house, or he may have applied the money to the new two-family house, and it wouldn't have had any difference to you? A. He may have, but he didn't. I know of my own knowledge, because the money was paid out on both buildings, because your father, who did the plumbing work received a very considerable amount. 10

Q. But you can't say how much was paid on either building? A. No, the money was used indiscriminately on both. It would be impossible to allocate it, because labor was used indiscriminately on both; labor and in some cases, material. 20

Q. You say \$35.00 was paid to Mr. Sugarman for insurance? A. I think the premiums were \$35.00; yes.

Q. What insurance was that? A. Fire insurance.

Q. That came out of this construction loan? A. Came out of the construction loan, didn't go into the building. 30

Q. You charged him also the sum of \$225.00 as a fee, including \$15.00 for defending a suit started by me? A. Yes, \$210 and \$15.00.

Q. That didn't go into the building? A. That didn't go into the building.

Q. So there is a total so far of \$260.00 which didn't go into the building. A. That is correct.

Q. Now, you never inspected the interior of the premises, did you? A. Oh, yes.

Q. Didn't you testify on direct examination, that you didn't inspect the interior of the building? A. 40

Alexander Seclow, cross.

10 I said that in August, I didn't go into the two-family house, because the house was occupied, but I was in the other house; but I was in there before the tenants were in. I visited the building two or three times a week. On my way to the Court House, I would stop in there because when a request was made for payments, I wanted to know where the moneys were going to. I wanted to see how the moneys loaned were being used.

Q. After July, you didn't inspect the interior of the buildings? A. I did the one-family house, yes.

Q. But not the two-family house? A. Not after they were occupied.

20 Q. And you don't know of your own knowledge when the buildings were completed? A. Of my own knowledge, exactly when, no, sir.

Q. Now, Mr. Seclow, these checks you gave to Mr. Sugarman and the various contractors or both, you don't know whether all this money went into the building or not, do you, of your own knowledge? A. Yes, sir, I do.

30 Q. Of your own knowledge? A. Yes, I do. I know all this money, except the two items you mention to me, was used for the building, was used for labor and materials.

Q. Now, I show you a check dated May 24th, 1929, No. 8821, in the sum of \$150.00 to the order of Jacob Sugarman and Building Construction Co., endorsed by Jacob Sugarman and the Building Construction Co., do you know of your own knowledge where that money went to? A. Yes, sir.

Q. Where did it go? A. For labor and materials on that building, either one. I can't pick any one check and tell you just what that was used for.

40 Q. You gave that check to Mr. Sugarman. A. Yes, I gave it to him under his contract.

Alexander Seclow, cross.

Mr. Feinberg: I move that be stricken out. There is no contract in evidence.

The Court: I will strike it out.

Mr. Seclow: If the Court will permit me, I will prove it now. It might be necessary.

Q. You gave this check to Mr. Sugarman personally.

10

The Court: I might say to counsel that if you are going into the use of these checks and they are in furtherance of any terms of this contract, you might proceed to prove, if possible, the contract. Otherwise, there will be one objection after another.

Mr. Feinberg: No. The contract serves no purpose anyhow. It is between the corporation and one of the incorporators. The reason I am asking this question is to show that Mr. Seclow had no knowledge of where this money went. This check was given to Mr. Sugarman. Whether Mr. Sugarman paid material or laborers or carpenters, he doesn't know. He may have put it in his pocket.

20

Mr. Seclow: Mr. Sugarman is here, and I was going to call him on the stand and have him prove all those things.

30

Q. You are testifying as to your own knowledge. Do you know whether this money went to Mr. Sugarman or to whom it went, particularly this check of \$150.00; do you know of your own knowledge? A. No, sir.

Q. In other words, you want to change your previous testimony when you said you did know, is that correct? A. I may say this.

40

Jacob Sugarman, direct.

Q. Answer my question. A. If I did say that, I want to change my testimony.

Q. That may be true with almost every one of these checks, isn't that so? A. No, the checks that were given to persons other than Sugarman, I
10 know of my own knowledge, what they went for.

Q. Did you see them delivered to these contractors. A. They came to my office.

Q. And you saw them delivered. A. No. In some cases, the second check may not have been taken in my office, but when I make a check, for instance to David Feinberg, who did the plumbing work, I think I have sufficient knowledge it went to David Feinberg for plumbing work on that building.

20 Q. But not of your own knowledge otherwise? A. No.

Q. You don't know whether all this money went into the building, of your own knowledge? A. I believe it did.

Q. I ask you of your own knowledge. A. Those checks that went to Mr. Sugarman, I didn't see him pay the money out.

30 JACOB SUGARMAN, being duly sworn, testified as follows:

Direct examination by Mr. Seclow:

Q. Mr. Sugarman you are the president of the Building Construction Co.? A. Yes, sir.

Q. I show you a paper dated April 10th, 1929. Was that executed by you as president, and Pauline Sugarman as secretary, and the seal of the corporation on it? A. Yes, sir.
40

The Court: What paper do you refer to?

Jacob Sugarman, direct.

Mr. Seclow: Contract for certain work done on that building.

Mr. Feinberg: You don't want to introduce that contract? Do you want to introduce it?

Mr. Seclow: Of course I do, Mr. Feinberg. (Marked Exhibit D-4.) 10

Mr. Feinberg: Just a minute, I would like to cross examine him on this contract.

The Court: Go ahead.

By Mr. Feinberg:

Q. When is the first time you saw this contract, Mr. Sugarman? A. The same day when I made it.

Q. The same day you made it. A. Yes.

Q. What date was that? A. That was the same day. 20

Mr. Seclow: The contract speaks for itself.

Mr. Feinberg: The contract isn't in evidence yet.

Mr. Seclow: I don't think counsel has a right. He can cross examine as to the admissibility, not as to its weight. He is now asking questions that would go to the weight of the contract. 30

Mr. Feinberg: No, as to the admissibility. I want to show that this contract wasn't a proper contract under which Mr. Sugarman worked, because this was a closed corporation, and he makes a contract with himself for the making of the mortgage.

Mr. Seclow: I object to counsel's statement.

The Court: I will strike it out. I won't permit counsel to draw attention to a paper 40

Jacob Sugarman, direct.

purported to be a contract offered by you. He may examine the witness as to whether it is the paper to which he refers.

10 Q. Was this contract voted on by the corporation?

Mr. Seclow: I object to it as immaterial.

The Court: Sustain the objection.

Mr. Feinberg: Well, there is no proof of authorization of that contract by the corporation.

Mr. Seclow: That is for the corporation if they were denying the authority; they are not.

The Court: Sustain the objection.

20 Mr. Feinberg: Exception (granted).

Mr. Feinberg: I want to make objection to the admission of this contract on the ground that it is not properly proved by the minutes of the corporation and not a valid contract.

(Received in evidence and marked Exhibit D-4.)

By Mr. Seclow:

30 Q. Now, Mr. Sugarman, when was the work started on the new house, that is the two-family house, known as 12 Wilkinson Avenue.

Mr. Feinberg: I object to this, because, it is one transaction, admittedly so by Mr. Seclow, and it is immaterial when the construction work was started on the new house, because the mortgage was given on both houses and was one transaction.

40 The Court: That is directly opposed to your opening to the Court. You said you

Jacob Sugarman, direct.

had separated your liens and had apportioned it so that the lien existed as to only No. 12. No. 14 was fully provided for and paid.

Mr. Feinberg: Yes, but the point is this: Having been paid on one house, we properly apportioned the money that was due on the other house, but it was one transaction. 10

The Court: I will permit the question in so far as the commencement of the work on No. 12 is concerned. You may answer the question.

Mr. Feinberg: Exception (granted).

A. On April 20th.

Q. What did that work consist of? A. Started to dig. 20

Q. Who started to dig. A. McCabe Brothers.

Q. When was the two-family house No. 12 Wilkinson Avenue, completed?

Mr. Feinberg: I object to that.

The Court: Permit it.

A. About the end of July.

Mr. Feinberg: I object to that. It is too general a question, and he doesn't say if he knows of his own knowledge. 30

Q. What year? A. 1929.

Q. Did you work on this house? A. Yes.

Q. You built them, didn't you? A. I built both.

By the Court:

Q. How long have you been in the contracting business? A. 19 years.

Q. Do you know when a house is commenced and when it is completed from a contractor's 40

Jacob Sugarman, direct.

standpoint, and under this contract of yours? A. Yes.

Q. And when everything was completed was when on No. 12? A. By the end of July.

Q. What year? A. 1929.

10

By Mr. Seclow:

Q. When did the tenants move into No. 12, Mr. Sugarman? A. The week before August.

Q. You mean a week before August 1st. A. Before August 1st.

Q. Did the people themselves come in then, or was it merely the furniture that was moved in. A. They moved in the furniture and they was living there, too.

20

Q. Was the plumbing finished there in August, Mr. Sugarman? A. All the plumbing was finished.

Q. Now, Mr. Rudolph Feinberg testified on this stand before, that he connected up the ranges there sometime in November or in October of 1929. Is that true? A. No, that is not true.

Q. Were the tenants able to use their ranges? A. He had connected the ranges a couple of days later than the tenants moved in.

30

Q. And you say the tenants were in there at the beginning of August. A. A week before August 1st, the tenants moved in.

Q. Mr. Feinberg says that he worked on a paracoil there, he said he did that sometime in October. Is that so or not? Did he finish his work in August? A. He finished his work in August, the time the tenant was in. When the tenants moved in, there was a little leak, so he comes over and fixed it up, everything.

40

Q. How long was that after the tenants moved

Jacob Sugarman, direct.

in? You say there were some leaks there? A. About a week or two weeks.

Q. About a week or two weeks? A. Yes.

Q. Are you sure it wasn't later than August 15th, that Mr. Feinberg came to fix these leaks. A. It must be around the 10th.

10

Mr. Feinberg: Object to what it must be. He doesn't testify of his own knowledge.

By the Court:

Q. You may give your reason by setting the date. What date was it? A. I couldn't say the exact date, but I think it is around two weeks later after the tenant moved in.

Q. Do you say, from your own personal knowledge, that it was the month of August, 1929? A. Yes; the tenants moved in a week before the first of August.

20

Q. Do you say, as a matter of fact, from your own personal knowledge, that the work was completed in the month of August, 1929? A. Yes, it was.

By Mr. Seclow:

Q. Did you make a list of what you did with the moneys that you received which went to Jacob Sugarman and the Building Construction Co.? A. Yes.

30

Q. Have you got that list here? A. No.

Q. When did you make that list? A. At the time I come for the last payment, and you asked me I should give you a list.

Q. At the time you made this list, did you have a record? A. I have marked on different sheets of paper all the days when I made it up, and I

40

Jacob Sugarman, direct.

took it out exactly and I give it to Mr. Seclow all where that money was gone.

Q. You say you had it marked on different slips, and you put it all on one? A. Yes.

10 Q. Can you remember what you did with all those payments without looking at the sheet of paper which you have? A. No.

Q. You say you have to use that? A. Yes.

Q. I show you a check dated May 3rd, 1929, given to McCabe Brothers & Building Construction Co. Who were McCabe Brothers? A. That is the digger.

Q. Did they do the excavating there? A. Yes.

Q. Was this check given to them for part payment of their work? A. That is the first payment.

20 Q. On which house? A. On the new house. He was digging the cellar.

Q. That is May 3rd? A. Yes.

Q. I show you a check dated May 3rd, made to Moe Frank and Building Construction Co., for \$150.00. Who was Moe Frank? A. That was the mason contractor.

Q. And he did work on each house? A. On both.

30 Q. Was this check for the work on the old house or the new house, May 3rd? A. May 3rd, that was for the old house.

Q. That was for the old house? A. Yes, he made the cellar.

Q. He was working on the cellar of the old house? A. Yes.

Q. I show you a check dated May 3rd, given to Farino & Cherico and Building Construction Co., for \$150.00. What did they do there? A. That is the block man.

40 Q. Concrete blocks? A. Yes.

Jacob Sugarman, direct.

Q. And they supplied the concrete blocks? A. For the new cellar.

Q. That is the two-family house? A. Yes.

Q. I show you a check dated May 18th, 1929, for Charles H. Engler Lumber Co., and Building Construction Co., for \$450.00. A. That is the lumber man. 10

Q. What did they supply? A. Rough lumber for the new house.

Q. I show you a check dated May 24th, 1929, for McCabe Brothers for \$55.00. A. That is the balance.

Q. That is the balance due and that is the excavator? A. Yes.

Q. I show you a check dated June 5th, 1929, for Building Construction Co. and Sam Perlman for \$100.00. A. He is the lather. 20

Q. And he did work on the new house? A. New house.

Q. I show you a check dated June 6th, 1929, for \$100.00, made to Alfred R. Vetter and Building Construction Co. for \$100.00. A. That is the roofer.

Q. And he did work on which house? A. He made roofs on both houses.

Q. I show you a check dated June 7th, 1929, to Moe Frank and Building Construction Co. for \$150.00. Is that the same Moe Frank who did the mason work? A. Yes. 30

Q. Is that for work on these houses? A. The second payment.

Q. I show you a check dated May 29th, 1929, to Frank Greenspoon and Building Construction Co. for \$75.00. A. That is the electrician.

Q. He did electrical work on which house? A. On both houses. 40

Jacob Sugarman, direct.

Q. I show you a check dated June 7th, 1929, to Washburn Brothers, for \$300.00. A. That is for mason work.

J. Mason material? A. Yes.

10 Q. And Washburn Brothers supplied the mason material? A. Yes.

Q. I show you a check dated June 14th, 1929, to Moe Frank and Building Construction Co. for \$150.00. Is that the same Moe Frank? A. Same.

Q. What was that money used for? A. Work on his contract.

Q. On this two-family house? A. Yes.

20 Q. I show you a check dated June 14th, 1929, to Moe Frank and Building Construction Co. for \$50.00. Is that the same purpose and the same man? A. Yes, same man.

Q. I show you a check dated May 20th, 1929, to David Feinberg and Building Construction Co., for \$200.00. Who is David Feinberg? A. That is the plumber.

Q. Plumber? A. Yes. He is Mr. Feinberg.

Q. And he did the plumbing work on the two houses, and that was given to him on account? A. Yes, on account. He did more than that.

30 Q. I show you a check dated July 6th, 1929, to Miller Heating Co. and Building Construction Co. for \$150.00. A. That is the Miller Heating Co. that did the steam work.

Q. And this check was in payment on account of the work? A. Yes.

Q. I show you a check dated June 19th, to David Feinberg and Building Construction Co. for \$400.00. David Feinberg did the plumbing work? A. Yes.

40 Q. And that was on account? A. Yes.

Q. I show you a check dated July 12th, 1929, to

Jacob Sugarman, direct.

Miller Heating Co. and Building Construction Co. for \$100.00. Is that the same Miller Heating Co.?

A. Yes.

Q. I show you a check dated July 12th, 1929, to Moe Frank and Building Construction Co. for \$100.00. A. That's the same Moe Frank.

10

Q. And what was that money used for? A. That is his payments.

Q. And he was the mason contractor? A. Yes.

Q. I show you a check dated July 12th, 1929, to I. Rosenblum and Building Construction Co. for \$150.00. A. The parquet floor man.

Q. He did work on there? A. Yes.

Q. And this was in payment of his work? A. Yes.

Q. I show you a check dated July 19th, 1929, to Moe Frank for \$60.00. That is the same Moe Frank? A. Same man who did the mason work.

20

Q. And that was on account of his contract? A. Yes.

Q. I show you a check dated July 26th, 1929, made to Miller Heating Co., American Radiator Co. and Building Construction Co. for \$250.00. The Miller Heating Co. furnished labor? A. Furnished labor, and the American Radiator Co. furnished supplies.

30

Q. That was for steam work? A. And radiation.

Q. I show you a check dated August 2nd, 1929, to Building Construction Co. and Frank Green-spoon. A. The electrician.

Q. Was that for work done on this building? A. Yes, that is for the old house.

Q. I show you a check dated August 7th, 1929, to Israel Nortman for \$350.00. A. Israel Nortman was the painter.

40

Jacob Sugarman, direct.

Q. And he did work on this job, and that is for part payment? A. Yes, that's right.

Q. I show you a check dated August 9th, 1929, for \$100.00, payable to Israel Nortman and Building Construction Co. Was that the same man?

10 A. Yes, for painting work.

Q. I show you a check dated August 15th, 1929, for \$21.75, to I. J. Rosenblum and Building Construction Co. What did he furnish there? A. That is for shades.

Q. And Rosenblum furnished that? A. Yes.

Q. I show you a check dated May 20th, 1929, to Jacob Sugarman and Building Construction Co. for \$100.00, and signed by David Feinberg, endorsed by him. A. I gave him another check, my
20 check on account of the plumbing work.

Q. Now, Mr. Sugarman, if you will get that memorandum, which you have, I will ask you to tell me what you did with the payments that went directly to you. Now, out of this money that went to you, Mr. Sugarman, about \$3,300.00, did you buy any materials? A. I bought material and I paid for labor.

30 Q. What materials did you buy out of these moneys which went directly to you? A. What material?

Q. Yes. A. I bought lumber, I bought some stair material.

Q. What lumber did you buy? A. I bought stair material.

Q. From whom did you buy stair material? A. Consumers Coal & Ice Co.

Q. How much did you pay them for the stair material? A. I think \$130.00.

40 Q. I want you to refer to your memorandum if you are not sure.

Jacob Sugarman, direct.

Mr. Feinberg: I object. He testified that he drew it up at one time from papers he threw away.

Mr. Seclow: A stub of a pencil in a man's pocket, which will refresh his recollection, may be used by him. 10

Mr. Feinberg: That is not the best evidence.

The Court: At the same time, I think it is not the proper evidence.

Mr. Seclow: Your Honor, we are not offering it. I will cite your Honor any number of cases showing that evidence of this kind may be used merely to refresh the recollection. Our cases go so far as to say that a memorandum conceded to be incorrect, may be used to refresh the recollection. 20

By the Court:

Q. What became of these papers you made this memorandum from? A. I used to have little books and just mark it down every week what I spent out, and I keep them in the house. I didn't have any books, didn't keep regular books, ledgers; so after the last payment, Mr. Seclow he says to me I want to know what did you done and who did you pay all that money what I give to you, so I tell him I figure up everything, so I figured up these papers and I brought it in. 30

By Mr. Seclow:

Q. And that is the paper which you have now?
A. Yes.

Q. And you made that paper at my request when you got the last payment? A. Yes. 40

Jacob Sugarman, direct.

By Mr. Feinberg:

Q. Where are the books that you have? A. The little books?

10 Q. Where are they, home? A. Destroyed now. They are destroyed already with all the rest of the slips.

Q. Who destroyed them? A. Myself.

Q. You destroyed the slips? A. They were just little slips, sometimes little books.

Q. Have you got them home? A. No. This is the paper I make up.

Q. For Mr. Seclow? A. And I give it to Mr. Seclow.

20 Q. Haven't you got those books at home? A. No.

By the Court:

Q. And they are destroyed, all of them? A. They are little books, like weekly when I keep some man, and just mark it in how many times he works and so much money, and I pay them off. I didn't keep any regular books.

By Mr. Feinberg:

30 Q. But you remember this pretty well without the paper? A. I remember a lot.

Q. And you drew up the paper at Mr. Seclow's request? A. Yes.

Q. But you remember it without the paper, don't you?

Mr. Seclow: He says some things he does.

Q. You told Mr. Seclow before that you didn't need the paper, that you can tell without the paper.

40 A. I didn't say that.

Jacob Sugarman, direct.

By the Court:

Q. Do you remember all without reference to this paper in order to refresh your recollection?

A. No, I don't remember.

Q. You may use the paper.

10

By Mr. Seclow:

Q. You were just telling us about a payment of \$110.00 made to Consumers Coal & Ice Co., for stair material. A. That is stair material.

Q. Was that from the checks which were given to you directly? A. That is for the check which I got from you, and I paid them.

Q. Did that material go into the buildings? A. Both buildings.

20

Q. Out of these moneys which you received, did you buy any more materials? A. Yes.

Q. Tell us just what they were? A. I got checks for them.

Q. Tell us, Mr. Sugarman? A. I have \$110.00 for the stair material from the Consumers. Then I got channel iron.

Q. What did you use channel iron for? A. Garages.

Q. How much did you pay for this? A. \$75.00.

30

Q. And where did you buy this? A. On the West Side, a big factory.

Q. Was it Ryerson? A. Ryerson.

Q. What else did you buy? A. Hardware; that is, rough hardware.

Q. What did you use that for? A. That is for the garages.

Q. For garages? A. The hinges, big heavy hinges.

Q. How much did you pay for this? A. This is altogether \$75.00.

40

Jacob Sugarman, direct.

Q. Oh, that was included with the channel iron?

A. Yes.

Q. What else did you buy and use on that building? A. I bought another time lumber from the Consumers for roofing for the garages.

10 Q. How much was that? A. And beams.

Q. And beams. How much was that? A. I think altogether \$82.00—\$64.00 for the roofing, and the rest for beams.

Q. What other moneys did you spend there? A. I paid mason material for cash.

Q. And you bought some mason material for cash? A. Yes.

Q. How much did you pay for this? A. Asphalt shingles, \$42.00.

20 Q. But how about the mason materials, how much were those? A. 4 bags lime, 12 bags cement, 500 bricks.

Q. How much was that? A. \$86.00.

Q. What other money did you spend there? Did you have a watchman there? A. I had a watchman.

Q. Did you pay him out of this? A. For 17 weeks, \$12.00 a week.

30 Q. And was it out of this? A. Out of these checks that I took from you. And I bought some cinders and ashes.

Q. And how much did you pay for them? A. About \$64.00.

Q. Was that all used there? A. For both houses.

Q. Did you buy any shades? A. Yes, I bought shades, and I bought a lot of things. I bought new shades, I hung up shades, and they stole them, they took out all the shades.

40 Q. How much did you pay for the first shades? A. \$21.00.

Jacob Sugarman, direct.

Q. Was that out of this money? A. Yes. And then I had to put up again shades. I spent \$18.00 again. They left a couple of shades up. There is a record at Police Headquarters.

Q. I am going to give you these checks and ask you what you did with these moneys. April 19th, \$200.00, what did you use that money for? That is the first payment, Mr. Sugarman. A. April 19th, that is the time when I broke off the extension and started to remove the partition. 10

Q. In what house? A. The old house.

Q. That is No. 14? A. Yes.

Q. And did you use this money to pay these men? A. Yes, I had 5 men at the time.

Q. April 26th, 1929, \$150.00, check to Jacob Sugarman, what did you use that for? A. For labor and mechanics. 20

Q. Did you have any carpenters there? A. Certainly, I didn't do myself everything.

Q. May 3rd, 1929, \$175.00? A. That is the payroll for labor.

Q. May 11th, \$275.00. What did you use that for? A. That is the time when I raised the new house. I always had after that 5 or 6 carpenters, and a couple of laborers. 30

Q. May 18th, \$275.00? A. Same thing, payroll.

Mr. Seclow: I call the Court's attention to the fact that these checks are dated a week apart. I think they are all on Friday.

Q. May 24th, \$150.00? A. Same thing, payroll.

Q. May 22nd, \$28.00? A. That is the insurance check.

Q. May 29th, \$100.00? A. Payroll.

Q. June 7th, \$500.00? A. That's the time I bought the material, and I had a lot of trimming. 40

Jacob Sugarman, direct.

Q. You were trimming the new house? A. Both houses.

Q. And you bought some of these materials out of that? A. Yes.

10 Q. June 14th, \$275.00? A. Same. That time, I had to pay off \$110.00 for the stair builder.

Q. And the rest of it went for what? A. Laborers, day's work.

Q. June 20th, \$350.00? A. Same thing, I had every week. There is about 7 or 8 weeks I always had 7 or 8 men, about 6 mechanics and a couple of laborers.

Q. And that money went to pay mechanics and laborers? A. Yes.

20 Q. June 28th, \$250.00? A. There was a lot of materials bought, nails, and there was wages paid.

Q. And did that go for carpenters and laborers? A. Carpenter and material.

Q. July 2nd, \$60.00? A. That's when I cleaned up the whole buildings on the two houses, two trucks.

Q. You had to pay for removal of dirt? A. Yes.

Q. July 6th, \$240.00? A. Laborer and mechanic.

Q. July 12th, \$100.00, what was that used for? A. Laborer and mechanic.

30 Q. July 19th, \$125.00? A. Same thing.

Q. July 26th, \$225.00? A. Labor and mechanics, and some materials. Sometimes when I get a little more on the checks, I have to buy material. I had to buy 600 square foot lots of time.

Q. July 26th, \$75.00, what was that used for? A. Maybe I had to pay off the cinders, ashes.

Q. August 7th, \$50.00? A. That's the time I had the man to help make the garages.

40 Q. August 13th, \$25.00? A. \$25.00, one week to Rosenblum.

Jacob Sugarman, cross.

Q. You didn't give him this check directly, did you? A. Yes.

Q. I think you are mistaken about that Mr. Sugarman; here is the check for Rosenblum here.

A. I used to give away a lot of checks. You got one. There is one \$60.00 check. 10

Q. Did you use that \$25.00 on the building? A. Of course, I used it on the building.

Q. August 15th, \$3.25. A. Oh, wait a minute; that \$25.00, I had to put the windows in in the old house. I had all the glass broken, and I took a man from Ocean Avenue and he had to put it in.

Q. That was glass that had been broken? A. \$23.00 and some change I had to pay him, so I got a check.

Q. August 15th, \$3.25, Joseph Coller. A. That is the laborer who helped clean up the last things. He demanded cash. I didn't have cash, so I had to get a check. He cleaned up the rooms and everything. 20

Q. All these checks came from the mortgagee, didn't they, Mr. Sugarman? A. Yes, sir, all pay-rolls, everything.

Cross examination by Mr. Feinberg:

Q. Mr. Seclow gave you these checks as the work was done in order to pay the payroll. A. He used to come up on the job and see how many men there is. 30

By the Court:

Q. You have extensive building operations, haven't you? This wasn't the only job you had, was it? You are a builder? A. Yes.

Q. How many jobs did you have around this 40

Jacob Sugarman, cross.

time, in May up to November? A. That was the only one job that I had.

10 Q. Do you mean to say you didn't keep any books at all for all these materials, for the payroll, and the names of the persons who worked for you? You paid \$150.00 a week out. A. Sometimes, I have no use for what names they are. They are people who come around from different directions who ask for a job, and to get the jobs I just marked how much they are, and they come every day for pay.

Q. Where are these materials bills from the concerns with which you did business? A. I got them laying around somewhere.

Q. Where are they? A. I got them home.

20 Q. You have them home? A. Yes.

By Mr. Feinberg:

Q. When you got this money, what did you do, cash the check and use the check to pay them? A. I got to give cash, they don't take any checks.

30 Q. Mr. Seclow trusted you to pay out the money in the correct way? A. He used to come around and count over the men every week and see how many people I have, and I showed how much I have to pay out.

Q. Mr. Seclow used to keep an account of the men that were working there? A. I don't know.

Q. You testified before that the people moved in a week before August 1st, is that right? A. Yes.

Q. And the job was finished that time? A. Yes.

Q. A week before? A. Yes.

40 Q. And when was the painter finished his job, do you remember? A. The same time when the people moved in.

Q. When did you pay the painter? When he

Jacob Sugarman, cross.

was finished? A. No, the painter got his payment when he got his work nearly finished.

Q. Then you paid him? In other words, before he was finished, you paid him when he was nearly finished? A. That was only the first payment.

Q. That is what I mean, when he was nearly finished? A. He got the money after he had all the 10
woodwork done and the outside painted, beside the decoration, so he got the first payment.

Q. Then you gave him a payment? A. Then I took them all up to Mr. Seclow's and he gave me the payment.

Q. Then he did some more work? A. He finished.

Q. How many payments did you give him? A. I think he got two checks and one payment. 20

Q. Two checks and a cash payment, too? A. No cash payment. He got \$40.00 for scraping off the wall in the old house.

Q. When did he get that? A. I give him that in cash, and he started to paint the second coat on the old house, so the old paint started to come off like it was. He will tell you about it. So he didn't want to scrape off the walls until I give him \$40.00 in cash. 30

Q. How long was that after you gave him the last payment on the check? A. That was in July.

Q. I call your attention to a check to Israel Nortman, dated August 7th, 1929. Mr. Nortman didn't finish his work at that time, did he? A. Yes, he did. I will explain that to you, because he wants to get a check; according to my agreement, I am supposed to give him this \$350.00, so I brought him to Mr. Seclow's office and he wanted a check for \$350.00, and he refused to take it, so I didn't know 40
what he did with the check, and the next week he

Jacob Sugarman, cross.

10 came around and he said, "If you don't give me some money, I won't finish decorating inside," and the people already moved in, and the dining room and living room wasn't finished, and I came into Mr. Seclow's office, and I said you do me a favor, give this man another \$100.00.

Q. When he got the checks, he finished the work? A. He was putting the papers on the wall. He was working at that time, and he finished it.

Q. He finished the work after you gave him the two checks? A. He was working, and it was agreed that he was going to get another check for \$100.00.

20 Q. You testified that he wouldn't finish the work unless he got the check for \$450.00? A. Yes.

Q. Then he didn't finish the work until he got it, did he? A. The end of July, he is supposed to get his check, because he was entitled to it. He had the entire inside finished, and the outside finished, and the woodwork finished.

Q. Please answer the question. When he got this check, then he finished the work, is that right?

Mr. Seclow: It has been answered.

30 Mr. Feinberg: The witness testified that the work was finished the last week in July, and I am cross examining him on these checks dated August 7th and 9th, to test the credibility of the witness.

Mr. Seclow: The witness said the plumbing work was finished in July.

40 Q. He didn't finish the work until he got the check, did he? A. He finished the work the next week. He finished up his work when he got the checks.

Q. He finished the work the next day after he

Jacob Sugarman, cross.

got his check, is that right; and these checks are dated August 7th, for \$350.00, and August 9th, for \$100.00; and therefore, the work wasn't finished the last week in July, was it? A. It was everything finished, the only thing is the dining room.

Q. And you are a builder and you know when a building is completed? A. The dining room, the panels had to be put in. That was the only work to be finished. 10

Q. After the painter was through with his job, did the plumber come in afterwards and do any work there? A. Yes, a couple of leaks needed fixing.

Q. How long after the painter finished his job did the plumber come in and finish his work? A. About a week later. 20

Q. It may have been two weeks later? A. As soon as the people moved in and they started to work with the improvements, and it started to leak, and they started to get in water, hot water, and all the time the rooms got ruined, so it started to get leaks, so I called him up and he fixed these leaks.

Q. And he didn't do anything else after that? A. No. 30

Q. When was the meter put in? A. I couldn't tell you exactly when the meter was put in. The only thing I know, I saw the inspector, and he told me—

Mr. Seclow: I object to that. It is not proper.

The Court: It may be stricken out.

Q. The meter wasn't in at that time that the plumber went in to fix the leaks? 40

Mr. Seclow: He said he didn't know.

Jacob Sugarman, cross.

Q. Was it put in at the time the plumber fixed those leaks? A. I don't know.

Q. It may have been put in several months later?
A. I don't know. I wasn't there when the meter was put in.

10 Q. Now, Mr. Sugarman, do you know how much money went into the new building and how much money went into the old building? A. I couldn't tell you.

Q. Mr. Sugar, you started these two buildings, didn't you, at the same time, isn't that right? A. No, I started first the alterations.

Q. You started first the alteration, you say? A. Yes.

20 Q. Now, you took down a partition, didn't you?
A. Not a partition, an extension with a cellar foundation underneath, too.

Q. What was the purpose of taking down the partition?

Mr. Seclow: I object. Counsel objected to this line of questioning before on No. 14.

30 Mr. Feinberg: It is one operation. My contention is that this was one operation, and even so, we concede that the work commenced on the new building, if your Honor considers them separately, because there was an extension taken down to facilitate the erection of the new building.

The Court: Do I understand that counsel desires to have the entire expenditure accounted for in so far as both these buildings are concerned?

40 Mr. Feinberg: No. The question is, how much money went into the new building and how much into the old.

Jacob Sugarman, cross.

The Court: That will eventually lead us to a figure as to what moneys were actually advanced for the particular house.

Mr. Feinberg: They don't know that.

The Court: I am going to say one thing to counsel. I am going to take the right of the Court to refer these figures, because I don't think the time of the Court should be taken up with the question of the numerous figures, checks advanced, and bills and labor and material payments. It is just taking up the entire time of this Court, and I am going to exercise my right to refer this matter to take the testimony in that particular, and had I thought, Gentlemen, that it was resolving itself into such a question, I would have suggested that course before.

Mr. Seclow: May I say something, your Honor? It is absolutely impossible here, and we don't contend that that burden is on us. We cannot sustain any burden. We don't attempt to. We say it is unnecessary to show where that money is going. If the burden is on us, if it is incumbent on us to do so, we cannot show it, and I don't think it makes any difference, and I am willing to stand or fall on that.

The Court: The Court has that proposition in mind anyway, but I say if counsel insists upon accounting of both buildings and we reach it, we will take the Court's right of reference, because it is unfair to go into the matter of detail and figures and keep the other litigants in this Court waiting to be heard.

Mr. Feinberg: We have to apportion our

10

20

30

40

Jacob Sugarman, cross.

10 lien claims. We have to show how much labor and material went into a certain building. Mr. Seclow knows they didn't operate under this contract, it is for the protection of the mortgagee. This contract was never used. Look how new it is, even.

 Mr. Seclow: Do you suppose the builder carries it around. It is in my possession, your Honor.

 Mr. Feinberg: It is to protect the mortgagee.

 The Court: The hour of adjournment having arrived, the case will be continued to next Tuesday.

20

March 18th, 1930.

JACOB SUGARMAN, on the stand.

Cross examination by Mr. Feinberg:

 Q. You had a watchman on the job there, didn't you? A. Yes.

 Q. How many weeks did you have that watchman on the job? A. About 17 weeks.

30 Q. How much a week? A. \$12.00.

 Q. When did the watchman start on the job? A. On the first day when I started there.

 Q. When was it you started there? A. The 19th or 20th of April, I started on the old house, so I had to have a watchman right away.

 Q. They worked all during April, that is 11 days, and May, June, July. A. I had him until the tenant moved in.

40 Q. That was a week before the first of August, right? A. Yes.

 Q. And you had him there for 17 weeks. A. Yes.

Jacob Sugarman, cross.

Q. You had the watchman there the 19th or 20th? A. I had the watchman hired before I started to work on the house, because I had to break the wall outside.

Q. When did you hire the watchman? A. I can't remember exactly the day, I hired him before the 20th. 10

Q. Was it a month before the job started? A. No.

Q. A day before the job started, a week before? A. Before I started the job, I hired him.

Q. How many days before? You didn't need a watchman before you started the job, did you? A. Yes.

Q. What for? A. Because I started, before I got the permit I started myself the inside to tear apart. 20

By the Court:

Q. When did you start the inside work? A. The inside was a week before I gave the permit out.

Q. When was that? A. That was about the 10th or 12th of April.

Q. Is that the first time you employed the watchman? A. Yes. 30

Q. Didn't you, on direct examination, say that you employed the watchman when you started the work, which was on the 19th or 20th? A. I don't remember the exact date, but I know I hired him before I started the work.

Mr. Seclow: He tried to explain that, if your Honor please.

Mr. Feinberg: Let him explain it.

The Court: He testified on direct examination that he had the watchman for 17 weeks at \$12.00 a week, and he took him the 40

Jacob Sugarman, cross.

first day he started the work, and he designated the day as the 19th or 20th. He had the watchman until one week before the tenant moved in.

Mr. Seclow: eH tried to explain it.

10

By the Court:

Q. What have you to say about it, do you desire to correct that testimony? A. What I want to explain is this: I had him after that, I had him a few weeks, because he was watching another job on, I forget the name of the street, two six-family houses.

By Mr. Feinberg:

20

Q. But he wasn't on your job? A. So he was watching over there, so I hired him in the meantime he was to take care and rent that place. He rented the downstairs floor for me, and he was trying to rent the one-family house, too, because I couldn't stay on the job all the time, so I had him a couple of weeks after that when the tenant moved in.

Q. He was your renting agent? A. Yes.

30

Q. He wasn't the watchman, too? A. Yes, and in the meantime, if anyone came—

Q. What did he watch there? A. So that anybody shall break a window, and that nobody steal something, because the rooms were idle.

Q. And they are still idle? A. Yes.

Q. And they were idle when the corporation went insolvent?

Mr. Seclow: I object.

The Court: Sustain the objection.

40

Q. You started to work before you got the permit, didn't you? A. Yes, inside not outside.

Jacob Sugarman, redirect.

Q. How many carpenters is the most you had at one time on the job there? A. About seven.

Q. About seven carpenters at one time? A. Yes.

Q. How much did you pay them a day? A. Some of them was \$11.00, some \$12.00, some \$10.00.

Q. You are sure you had seven? A. Yes. 10

Q. You haven't got any bill for all the ashes you bought and all the other stuff; all you have is that paper, Mr. Sugarman? A. They bring them along, and I have to pay them in cash.

Q. No bill and no statement? A. No.

Redirect by Mr. Seclow:

Q. I would like to clear up a matter. You said you started work about April 19th or 20th, and then you said you did work on the inside before you got the permit. Now, inside of what, Mr. Sugarman? A. The partitions to take apart. 20

Q. On what? A. On the old building.

Q. When you testified that it was April 19th or 20th, that you started on the new building— A. That was digging the cellar.

Q. On the new building? A. Yes.

Q. So, when you say there was some work started, and you refer to the inside of the building, that is on the alteration of the old building at what number? A. No. 14. 30

Q. No. 14, that is the old building? A. Yes.

Q. And you got the permit, did you, April 10th or 12th? A. Yes.

Q. And you started some work about a week before that, inside? A. Yes, because I had to break off that extension so the digger would be able to get in with the steam shovel to build the cellar for the new house.

Q. I show you a piece of paper showing the 40

Miles Lawrence, direct.

payments received by you. Does that represent all the list of the payments?

Mr. Feinberg: I object.

10 Mr. Seclow: This simply summarizes all the payments shown on the checks.

Mr. Feinberg: I object to it at this time.

The Court: I won't permit it, unless it is consented to as a proper statement.

Mr. Seclow: That's all.

MILES LAWRENCE, being duly sworn, testified as follows:

Direct examination by Mr. Feinberg:

20 Q. You are connected with the Water Department of the City of Jersey City? A. Yes.

Q. And in charge of the record showing installation of meters? A. Yes.

Q. You have those records with you? A. Yes.

Q. Will you produce them? When was the meter installed in No. 12 Wilkinson Avenue? A. November 1st.

30 Mr. Seclow: I object to it as immaterial when the meter was installed.

Mr. Feinberg: It is material, it is part of the contract. The contract calls for installation of meter by the plumber.

Mr. Seclow: The plumber didn't install it. He simply pays for it.

The Court: Read the portion of the contract pertaining to meters.

40 Mr. Feinberg: "Party of the second part" (that is David Feinberg), "Is to install water meter at 12 Wilkinson Avenue and pay for

Jacob Sadosky, direct.

the same." It is a contract entered into between the parties themselves, as evidenced by their signatures. The contract is in evidence.

The Court: I will permit it.

Cross examination by Mr. Seclow:

10

Q. Did they have water there before the meter was installed? A. Yes.

Q. The purpose of installing the water meter is merely to measure the water consummation, isn't it?

Mr. Feinberg: Object to the purpose.

The Court: Permit it.

A. Yes.

20

JACOB SADOSKY, being duly sworn, testified as follows:

Direct examination by Mr. Feinberg:

Q. Where do you live, Mr. Sadosky? A. Before, I lived in Bayonne, now in New Market.

Q. Did you ever work for Mr. Sugarman? A. Yes.

Q. When did you start working for him? A. I forget what day, it is already three months. 30

Q. You started on the job? A. Yes, I started myself on the job.

Q. And you finished on that job, didn't you? A. Yes.

Q. And you worked there the whole time? A. Yes. Some rainy days I didn't work. There was no lumber a couple of days.

Q. How much were you getting on that job? A. \$10.00. My wages is \$12.00, and I couldn't get that, and he only paid \$10.00. 40

Jacob Sadosky, direct.

Q. Who else was working with you on that job?

A. Sugarman himself working, the father, the other man a couple of weeks. They worked three men.

10 Q. Three men were working there a couple of weeks? A. Yes.

Q. Two besides yourself? A. Yes.

Q. And Mr. Sugarman's father? A. Yes.

Q. And how much was Mr. Sugarman's father getting? A. I don't know.

Q. Did Mr. Sugarman tell you? A. I don't know. I was supposed to get \$12.00.

Q. Did you ever see seven men working on that job? A. Never.

20 Q. Did you ever see six carpenters working? A. Never.

Q. Did you ever see five carpenters? A. Yes.

Q. How long? A. About 2 or 3 weeks.

Q. Two or three weeks, did you say? A. Yes, two weeks, three or two weeks. I don't count them. I know it is myself working, I didn't see how many men working.

Q. Did you see the watchman on the job? A. Couple of times.

30 Q. And how long was the watchman on the job?

Mr. Seclow: I object, if the Court please.

The Court: Why?

Mr. Seclow: Will the Court permit me to cross examine him?

By Mr. Seclow:

Q. The watchman is there at night. You are there in the daytime, aren't you? A. I saw in the morning.

40

The Court: I will permit it.

Jacob Sadosky, direct.

By Mr. Feinberg:

Q. When you started on the job, did you see the watchman there? A. I not see him first.

By the Court:

Q. What were your hours? How long did you work on that job? A. About three months. 10

Q. What were your hours? A. Eight o'clock I start myself, half past four. Eight hours work every day.

Q. Did you ever work later than half past four? A. No, never. Some day, there is no watchman.

By the Court:

Q. You don't know of your own knowledge whether the watchman was there at night? A. Sometimes I see in the morning the watchman watching all my tools and things. 20

Mr. Seclow: There is no pretension that we had a watchman there all night at \$12.00 a week.

A. I see the watchman.

Q. When did you see the watchman? A. In the mornings. After I finish the job and go home and come back in the morning, I see. Night time, there is no watchman. I don't know; maybe in the night time, I don't know. 30

Q. Was this watchman watching another job, do you know? A. Yes, watching another job, another street, I don't know the name of the street.

Q. The first week you were there, you didn't see any watchman on the job? A. No.

Q. Did you see him the second week? A. Yes, the second week, I saw the watchman. 40

Q. And when you finished the job, did you see

Jacob Sadosky, direct.

a watchman there? A. Yes, I saw a watchman there.

Q. When did you finish on the job? A. I don't know the date.

10 Q. Did Mr. Sugarman pay you all the money on the job? A. No.

Q. Still owes you some money?

Mr. Seclow: I object to that.

Mr. Feinberg: He testifies he paid all the carpenters on the job.

The Court: If it is in contradiction of Mr. Sugarman's testimony, I will permit it.

A. \$90.00 he owes me.

Q. He still owes you \$90.00?

20

Mr. Seclow: If the Court please, I didn't ask him if he paid everybody on the job. I asked him what he used these moneys for. He said he used them for paying materials and wages. He didn't say he paid for all the labor and materials. He said he used it to pay for labor and materials.

Mr. Feinberg: He said he paid for all the labor.

30

Mr. Seclow: He didn't say that.

Mr. Feinberg: He said labor and materials.

The Witness: He owes me \$90.00.

The Court: I have no notes as to the testimony so far as the payment of this money is concerned.

40

Mr. Seclow: I merely asked Mr. Sugarman what he did with the money he got, with those checks, and he said he cashed them and used them to pay the men. Why

Jacob Sadosky, cross.

should I be bound by whether he didn't pay certain men on these jobs.

Mr. Feinberg: You have to show that the money went into the building.

Mr. Seclow: It is quite obvious, even if this man's testimony is correct, that there were 5 carpenters there, and they got \$10.00 a day for labor. I will withdraw the objection.

10

Q. He still owes you \$90.00 on the job, still owes you money? A. Yes, \$90.00.

Cross examination by Mr. Seclow:

Q. Did you do any trimming work there? A. Yes, sir, all complete.

20

Q. There were laborers working there, too? A. Yes.

Q. How many laborers were there? A. Laborer?

Q. Yes. A. One laborer, worked three days.

Q. Didn't they have a laborer tearing down the walls? A. The laborer worked three days. After they laid him off, they got another laborer, worked about a week.

Q. That's all? A. That's all.

Q. Who did all the grading there and the tearing down of the building? A. Laborer. That one worked there three days. After that, another worked about a week, maybe more, I don't know, I am not the boss myself.

30

Q. Was there a stair worker there? A. Me, myself.

Q. No; was there a stair worker there, a man making stairs? A. Yes.

Q. Two men, weren't there? A. One man.

Q. That was beside the carpenters, wasn't it? A. Yes.

40

Jacob Sugarman, direct.

Q. There was 5 carpenters, and a stair worker?

A. One week, worked like that.

Q. And one laborer? A. And one laborer.

Q. Were you subpoenaed to come here? A. Yes.

10 Q. Have you got the subpoena here? A. Yes.

(Produces subpoena.)

Q. You live in New Market, N. J.? A. Yes, now. Before, I lived in Bayonne.

Q. When this subpoena was served on you, were you in New Market? A. Yes, New Market. I live there about two months.

Q. And who brought you this subpoena? A. This other guy.

20

JACOB SUGARMAN, recalled.

Direct examination by Mr. Feinberg:

Q. I show you a check dated July 26th, in the sum of \$225.00. Do you know what you did with that money? A. Yes.

Q. What did you do with the money? A. July 26th, that was the carpenters.

30 Q. You had carpenters? A. Yes.

Mr. Seclow: I object to that, if the Court please. It is a check to Seclow & Nessenbaum for \$225.00.

A. I don't know what every check was for, but I know every check was paid out into the building.

Q. But you know the check was given for the carpenters?

40

Mr. Seclow: We have admitted that the checks was given to us.

Jacob Sugarman, direct.

Mr. Feinberg: He testified it was given to the carpenters.

A. I didn't look at the check.

Q. I showed it to you? A. You showed me the check that way, and I can't tell right away.

10

Mr. Feinberg: At this time, I would like to offer in evidence the interrogatories given by Ida Pecker, mortgagee, showing that all the money was advanced to the construction of the building; the moneys advanced by defendant, Ida Pecker, were used upon both buildings; the total amount advanced for both buildings is \$7,500.00.

Mr. Seclow: My case is closed except one witness. I have just one question to ask her. She is a tenant in the building. I want to ask her as to when those ranges were installed. I sent down for her, but her child had some sort of mishap and she had to take the child to the hospital. Will the Court permit me to put her on the stand if she comes in here before we are through with our summing up?

20

The Court: Can the fact be conceded that if she did appear she would testify to that effect?

30

Mr. Seclow: I spoke to her and she told me that the ranges were installed on August 14th.

Mr. Feinberg: I don't know if it is material or not. If anything, it hurts the defendant's case, because he testified that the buildings were completed a week before August 1st, when the tenants moved in.

Mr. Seclow: I fully understand that.

40

Fred Feinberg, direct.

Unfortunately, I have to rely on the testimony of the builder.

Mr. Feinberg: We will admit that the witness will testify to that.

The Court: What is the witness' name?

10

Mr. Seclow: Mrs. Hoagland.

The Court: It is admitted for the purpose of the record, that if Mrs. Hoagland, the witness referred to, were to testify, she would testify that the ranges were installed on August 14th, 1929. Otherwise, the case is closed.

Mr. Seclow: I would like to reopen the case with counsel's consent.

20

FRED FEINBERG, being duly sworn, testified as follows:

Direct examination by Mr. Seclow:

Q. Mr. Feinberg, you just stated in your summary, that this contract, which is marked Exhibit D-4, March 11th, 1930, was a writing that you had never seen before? A. I didn't make any such statement.

30

Q. Or that you insinuated that it had been made for this occasion? A. I made a statement—well, the Judge heard my statement.

Q. Now, Mr. Feinberg, didn't you say in your summary that if this contract had been used before Judge Dembe it would have been marked? Why wasn't it marked? A. Because there was an objection made to it.

40

Q. Didn't you say that, Mr. Feinberg? Didn't I say substantially what you said on your summing up? A. I said the contract was never intro-

Fred Feinberg, direct.

duced into evidence, although attempted to do so by you.

Q. You were present when I testified before Judge Dembe? A. Yes.

Q. You remember this testimony on my part: "Mr. Seclow: I offer in evidence the contract made April 10th, 1929, between Building Construction Co. and Jacob Sugarman. It covers certain work to be done by Sugarman as contractor, and also to pay for certain materials out of this money. The contract price is \$4,700.00. He never got \$4,700.00 to my knowledge." Do you remember that?

10

A. I remember that.

Q. And you remember "Mr. Rubenstein: I object to this contract. There is no privity of interest between mortgagee and my client, nor is there any privity mentioned in this contract. I cannot see how this is binding on any of the parties in this agreement."

20

Mr. Feinberg: I object to this testimony. He is trying to contradict his own witness.

Q. Do you remember?

The Court: You may answer.

A. That's true.

30

Q. You remember that? A. Yes.

Q. And you remember Judge Dembe said, "Do you know whether Sugarman actually did the work which he contracted to do"? Do you remember that? A. I don't remember it. It will have to be proved. This testimony was taken by your own stenographer, Miss Ida Pecker, and various statements were made there that were not taken down, as I sat next to her, and she didn't take down everything.

40

Opinion.

Q. You remember this contract that day before Judge Dembe? A. Yes, and I know it wasn't admitted in evidence on objection, and Mr. Rubenstein told you that you shouldn't try to introduce such a contract in the record.

10 Q. And don't you remember Judge Dembe saying it will have to be approved? A. If the facts are proven it will have to be approved.

(Motion made for a direction of verdict by Mr. Seclow, which was denied by the Court.)

(Exception taken by Mr. Seclow to the refusal of the direction of verdict.)

20 The Court: I think, in this case and the very status of Mr. Seclow's testimony, that he did as much as any legal representative could do under the circumstances. He was entrusted with the advancement of this money represented by this mortgage. He took precaution to see that the mortgage was properly recorded. He took precaution, either by his own checks or his clients, to expend this money in accordance with the labors performed or the materials furnished. I shall find
30 that the work was done in conformity with the lien claim as filed by the plaintiff in this case, and was performed during the periods stated as the commencement and was to the completion of this work. I do not see, however, that under the evidence as produced, that there would be included in any rights of this mortgage, money which admittedly didn't go into this building. I think from the evidence, it is practically from an undenied
40 standpoint, and the Court has no feeling to deprive counsel of his fees, as counsel in this case and all other cases are entitled to their fees, but it

Opinion.

is admitted that the sum of \$260.00, although properly applied, being in one instance toward the payment of legal services; and second, in reference to the payment of some insurance that was obligated for; and in the third place, in defense of some litigation coincident with this matter, did not go into this building. 10

You may frame your judgment in favor of the plaintiff as against the defendant builder and owner in the admitted sum of \$500.00 generally, but as against the mortgage I think there should be a judgment in the sum specified of \$260.00. You may frame your judgment accordingly.

I might say, in the apportionment of this matter, in view of the testimony, as well as the conceded condition that this judgment should justly attach to the property which has been designated as 12 Wilkinson Avenue, if counsel agree with the Court that that was the concession, that the moneys were fully paid incident to the property 14 Wilkinson Avenue. I shall also find as a fact that the moneys which have been testified to by Mr. Seclow and advanced by him to Mr. Sugarman, were used and applied toward the payment of the labor performed and the material furnished in this building, with the exception of the \$260.00 which the Court has referred to. 20 30

Judgment will be entered accordingly.

Certificate of Stenographer and Judge.

10 I, GERTRUDE JONES, a stenographer duly appointed to report stenographically the evidence given before the First District Court of Jersey City, in the case of David Feinberg *v.* Building Construction Co., a corporation of the State of New Jersey, *et als.*, Do HEREBY CERTIFY that the foregoing is a true and correct transcript of the evidence given on the 11th day of March and the 18th day of March, 1930, before Honorable August C. Ziegener, Judge of the said Court.

Dated Apr. 4th, 1930.

GERTRUDE JONES.

20 I, AUGUST ZIEGENER, Judge of the First District Court of Jersey City, Do HEREBY CERTIFY the foregoing transcript in the case of David Feinberg *v.* Building Construction Co., a corporation of the State of New Jersey, *et als.*, as the State of Case for appeal in the above stated cause.

Dated, April 4th, 1930.

AUGUST ZIEGENER,
Judge.

30

40

*Exhibits.***Exhibit P-1 and P-2.**

IN THE OFFICE OF THE CLERK OF THE
COUNTY OF HUDSON.

<p style="text-align: center;">DAVID FEINBERG, <i>Claimant,</i></p> <p style="text-align: center;"><i>v.</i></p> <p>BUILDING CONSTRUCTION COMPANY, a corporation of New Jersey, <i>Builder and Owner,</i></p> <p style="text-align: center;">and</p> <p>HARRY B. DEMBE, Receiver of the Building Construction Com- pany, an insolvent corporation, <i>Owner,</i></p> <p style="text-align: center;">and</p> <p style="text-align: center;">SOLOMON SILBERBERG and IDA PECKER, <i>Mortgagees.</i></p>	<p style="text-align: right;">10</p> <p style="font-size: 2em;">}</p> <p style="text-align: right;">Lien Claim.</p> <p style="text-align: right;">20</p>
--	--

County of Hudson, ss.:

BE IT KNOWN that David Feinberg of the City of Bayonne, in said County, claims a lien upon the building and lands hereinafter described, pursuant to the provisions of "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building," and the several supplements thereto, for a debt contracted and owing to him for labor performed and materials furnished for the erection and construction of said building as hereinafter set forth, to wit:

FIRST.—The said building is two family dwelling

Exhibits.

house, and garage to rear thereof on a lot of land or curtilage, situated in the City of Jersey City, in the County of Hudson and State of New Jersey, and more particularly described as follows:

10 ALL lot, tract or parcel of land and premises, hereinafter particularly described situate, lying and being in the City of Jersey City, County of Hudson, state of New Jersey.

20 BEGINNING at a point on northerly side of Wilkinson Avenue, distant one hundred twenty-eight and twenty-nine hundredths (128.29) feet Westerly from corner formed by intersection of said side of Wilkinson Avenue with Westerly side of Garfield Avenue, thence running, (1) Northerly and at right angles to said side of Wilkinson Avenue One hundred (100) feet to a point, thence (2) Westerly and parallel with said side of Wilkinson Avenue, twenty-five (25) feet to a point, thence, (3) Southerly and parallel with first course run, One hundred (100) feet to a point in said side of Wilkinson Avenue, thence, (4) Easterly and along said side of Wilkinson Avenue, Twenty-five (25) feet to point or place of beginning.

30 Being commonly known as #12 Wilkinson Avenue, Jersey City, New Jersey.

SECOND.—The name of the Owner of the said land and the estate therein, on which said lien is claimed, is the Building Construction Company, a corporation of New Jersey, who has an estate in fee simple therein.

40 THIRD.—The name of the person who contracted the said debt, and for whom and at whose request the said labor was performed, and materials furnished, for which the aforesaid lien is claimed, is the said Building Construction Company.

Exhibits.

FOURTH.—The following is a bill of particulars of the aforesaid labor performed and materials furnished by the said David Feinberg, the amount and kind of labor performed, and of materials furnished, and the prices at which and times when the same were performed and furnished, and giving credit for all the payments thereupon, and deductions that ought to be made therefrom, and exhibiting the balance justly due to him from the said Building Construction Company viz: 10

For performing plumbing work and furnishing the materials necessary therefor, on premises 12 Wilkinson Avenue, Jersey City, New Jersey, pursuant to Contract, between 21st day of May 1929 and first day of November, 1929.	\$900.	20
Received on account	400.	
	<hr/>	
Balance justly due Claimant	\$500.	

Harry B. Dembe is made a party defendant because that in certain proceedings pending in the Court of Chancery of New Jersey, for the adjudication of said Building Construction Company, a corporation of New Jersey, as insolvent, and pursuant to the statute in such cases made and provided, Harry B. Dembe was appointed Receiver of the Assets of the property of the said Building Construction Company, a corporation of New Jersey. 30

Solomon Silberberg is made a party defendant because he holds a mortgage affecting the premises herein described in the sum of \$1500., recorded in Hudson County Register's Office in Liber 1547 page 629, and which mortgage will be cut off under a Mechanics Lien sale. 40

Exhibits.

Ida Pecker is made a party defendant because she holds a construction mortgage affecting the premises herein described in sum of \$7500., and recorded in Liber 1553 page 191 which mortgage will be cut off under a Mechanics Lien sale.

10 All the above labor was performed and materials furnished between the 21st day of May 1929, and the 1st day of November 1929.

DAVID FEINBERG.

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

20 DAVID FEINBERG of Bayonne, N. J. of full age, being duly sworn, on his oath saith, that he is the claimant named in the foregoing claim; that the within bill of particulars and statements therein set forth are true; that the same is for labor performed and materials furnished by the claimant in the erection of the building in the said claim described, at the times therein specified, and that the amount, as claimed therein, is justly due and owing from the said Building Construction Company, to the claimant.

30 Sworn and subscribed before me, }
this 13th day of January 1930. }

MAX FEINBERG,
An Attorney-at-Law of N. J.

*Exhibits.***Exhibit P-3.**

ARTICLES OF AGREEMENT made this 29 day of May, 1929, by and between the BUILDING CONSTRUCTION COMPANY, a corporation of the State of New Jersey, hereinafter designated as the party of the First Part, and DAVID FEINBERG, of the City of Bayonne, County of Hudson, and State of New Jersey, hereinafter designated as the party of the Second Part, WITNESSETH: 10

That the party of the Second Part, in consideration of the agreements herein made by the party of the First Part, agrees to and with the said party of the First Part as follows:

1. The party of the Second Part in consideration of the sum of Nine Hundred (\$900.00) Dollars agrees to perform certain plumbing work and supplying the materials therefor as hereinafter specified at premises #12 Wilkinson Avenue, Jersey City, New Jersey, and also in consideration of the sum of Three hundred and eighteen (\$318.00) Dollars agrees to perform certain plumbing work and supply the materials therefor as hereinafter specified at premises #14 Wilkinson Avenue, Jersey City, New Jersey, as follows: 20 30

#12 Wilkinson Avenue, Jersey City—

2 sets plumbing according to plans.

baths—5' 6" x 30" on base, iron enamel
sinks—42" combination washtub & sink,
iron enamel pedestal basin 18" x 24",
iron enamel showers in apartment,
complete.

porcelain water closet bowl with mahogany seats. 40

Public Service Co.

Exhibits.

instantaneous heaters—combined with
 30 gallon boilers, 2 sets
 all brass pipes for all waterlines.
 combination faucets in baths & sinks.
 pop-up waste in basins.

10 Faucet to be installed in rear of building,
 and to be connected with piping to ex-
 terior of building.
 All fixtures and materials to be new.

Payments to be made as follows:

When roughing is installed	\$200
When fixtures are hanging	200
Forty days after completion of plumbing work balance	500
20	Total
	\$900

#14 Wilkinson Avenue, Jersey City—

New bathtub 5' 6" by 30" on base
 Hanging basin.
 2 toilet combinations with seats.
 One 2 valve shower.
 1 Humphrey heater. Boiler to be fur-
 nished by owner.

30 Faucet in rear of house as in #12 Wil-
 kinson Ave.
 all piping to be of brass.
 20 x 30 sink with combination faucet.
 Present washtub to be used.

Payments to be made as follows:

When roughing is installed	\$100
When job is completed	218
40	Total
	\$318

All fixtures and materials to be new except as
 aforesaid.

Exhibits.

Party of the Second Part is to install water meter on #12 Wilkinson Avenue, job, and pay for same.

All work to be performed by the party of the Second Part according to rule of Board of Health of City of Jersey City.

Party of the Second Part to supply and pay for permits. 10

The party of the second Part shall perform said work in a good workmanlike and substantial manner.

The party of the Second Part shall have the option of treating this contract as divisible and separate.

In the event the party of the First Part neglect or refuse to make payment as hereinbefore stated, the party of the Second Part shall not be obliged to proceed to completion of work remaining unfinished, and shall have the right to proceed by suit or mechanics lien. 20

The contract herein set forth contemplates all work which the party of the second part may perform on the premises, and the party of the second part shall not be required to perform any extra or additional work unless written authorization for such other work shall be given by the party of the First Part, with the price or prices to be charged for same. 30

IN WITNESS WHEREOF, the party of the first part has caused its corporate seal to be hereunto affixed and attested by its Secretary and these presents to be signed by its President, and the party of the

Exhibits.

second part has hereunto set his hand and seal the day and year first above written.

BUILDING CONSTRUCTION COMPANY

by JACOB SUGERMAN

President.

10

Signed, sealed and delivered }
in the presence of }

.....

Attested:

by

Secretary

20

DAVID FEINBERG

Exhibit D-1.

KNOW ALL MEN BY THESE PRESENTS: That Building Construction Co., a corporation of the State of New Jersey, is held and firmly bound unto Ida Pecker, in the penal sum of Fifteen thousand (\$15,000) Dollars, lawful money of the United States of America, to be paid to the said Ida Pecker, her heirs or assigns: FOR WHICH PAYMENT well and truly to be made, it binds itself and its successors firmly by these presents. Sealed with its corporate seal and signed by its President. Dated the 10th day of April One Thousand Nine Hundred and twenty-nine.

30

THE CONDITION of the above obligation is such that if the above bounden corporation or its successors, shall well and truly pay, or cause to be paid, unto the above named Ida Pecker her heirs, executors, administrators, or assigns, the just and

40

Exhibits.

full sum of Seventy-five hundred (\$7500) Dollars, on the 10th day of September which will be in the year One Thousand Nine Hundred and twenty-nine, and the interest thereon, to be computed from the date hereof at and after the rate of six per cent. per annum, and to be paid at maturity, without any fraud or other delay, then the above Obligation to be Void, otherwise to remain in full force and virtue. 10

Subject to all conditions and covenants in the mortgage simultaneously executed by the obligor herein to the obligee herein, which mortgage is intended to be recorded in the Register's Office of the County of Hudson, and State of New Jersey, and all of said conditions and covenants being herein incorporated by reference. 20

AND IT IS HEREBY EXPRESSLY AGREED, that should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable; and should the said interest remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrear for the space of sixty days then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of Seventy-five hundred (\$7500) Dollars, with all arrearage of interest thereon, shall, at the option 30 40

Exhibits.

of the said Ida Pecker, or her legal representatives or assigns, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding, and the said Obligee may at her option, pay such tax, assessment, or water rent in arrear, and the amount so paid shall be added to and become part of the principal sum secured by the said mortgage and by this Bond, and shall be payable on demand with interest at six per centum per annum.

BUILDING CONSTRUCTION Co.

(Seal)

By JACOB SUGERMAN

President.

Signed, Sealed and Delivered }
in the Presence of }

Attest:

PAULINE SUGERMAN
Secretary

Exhibit D-2.

THIS INDENTURE

Made the 10th day of April in the year of Our Lord One Thousand Nine Hundred and twenty-nine,

BETWEEN Building Construction Co., a corporation of the State of New Jersey, party of the first part, hereinafter known as the Mortgagor,

Exhibits.

AND Ida Pecker, of the City of Bayonne in the County of Hudson and State of New Jersey, party of the second part, hereinafter known as the Mortgagee,

WITNESSETH, that the said mortgagor, for and in consideration of the sum of Seventy-five hundred (\$7500) Dollars, lawful money of the United States of America, to it in hand well and truly paid by the mortgagee at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said mortgagor therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, enfeoffed, conveyed and confirmed, and by these present does give, grant, bargain, sell, alien, enfeoff, convey and confirm to the said mortgagee and to her heirs and assigns, ALL that certain lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Jersey City in the County of Hudson and State of New Jersey, which on a map entitled "Map of 60 Villa Sites and 75 lots at Bayview, Bergen Heights, Hudson County, N. J." and filed in the Clerk's (Now Register's) Office of said County, is distinguished as lot No. 2 in Block 6, said lot being Fifty (50) feet wide in front and rear and one hundred (100) feet deep throughout, and fronting on the Northerly side of Wilkinson Avenue.

Being the same premises conveyed to Building Construction Co., a corporation of New Jersey, by David Kamin and Jean Kamin, his wife, by deed dated April 3rd 1929 recorded April 6th 1929 in the Register's Office of Hudson County.

Subject to a first mortgage in the sum of \$4,000 held by Aniello Esposito.

Subject to a second mortgage in the sum of \$1500 held by Solomon Silberberg.

10

20

30

40

Exhibits.

TOGETHER with all and singular the profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining. Also all the estate, right, title, interest, property, claim and demand whatsoever of the mortgagor
10 of, in and to the same, and of, in and to every part and parcel thereof,

TO HAVE AND TO HOLD all and singular the above described tract or lot of land and premises with the appurtenances, unto the said mortgagee, her heirs and assigns, to the only proper use, benefit and behoof of the said mortgagee, her heirs and assigns forever. Provided always, and it is agreed
20 by and between the parties to these presents that if the said mortgagor, its successors and assigns do and shall well and truly pay, or cause to be paid, to the said mortgagee, her heirs and assigns, the sum of Seventy-five hundred (\$7500) Dollars on the 10th day of September, in the year Nineteen hundred and twenty-nine, with lawful interest for the same from the 10th day of April, 1929, at the rate of per cent. per annum, payable at maturity annually according to the conditions of a certain bond, bearing even date herewith, in the
30 penal sum of Fifteen thousand (\$15,000) Dollars, made by said Building Construction Co. without any deduction or defalcation for taxes, assessments, or any other imposition whatsoever, thence and from thenceforth these presents and said obligation shall cease and be void, anything herein and therein contained to the contrary in anywise notwithstanding.

The principal or any part thereof not less than
40 Five Hundred Dollars, may be paid at any time before maturity, on any interest day herein re-

Exhibits.

served, upon thirty days' written notice to the holder of the Mortgage.

It is agreed that the principal sum of this mortgage or the amount from time to time due hereunder for advancements thereon, together with interest at the rate stated, shall become immediately due and payable, although the period limited for the payment hereof shall not have arrived, upon the occurrence of any of the following events:

1. Upon failure to present to the mortgagee or successors and assigns, postponements of mechanic's liens from all material men or contractors who have furnished material or labor upon the premises in question, or upon failure to furnish evidence that all such persons, firms or corporations who have performed labor or furnished material have been paid in full.

2. Upon the filing of any mechanic's lien against said premises and the failure of the owner thereof to procure within 30 days after the same is filed, a cancellation of the said lien or a discharge thereof, in the manner and form provided by law.

3. Upon the abandonment of the work for 10 days or upon the failure of the said party of the first part or its assigns, to prosecute the work in a diligent and effective manner for a similar period; cessation of work on account of strikes not to be deemed abandonment.

4. Upon failure for 30 days to comply with any authority having jurisdiction over work similar in type herein contemplated to be erected or upon refusal for a period of 30 days to remove any work condemned by any of the said authorities or inhibited by law.

10

20

30

40

Exhibits.

It is agreed that during the construction of the building the lender or its employees shall have the privilege of inspecting the building.

10 Parts or whole of any installment may be advanced before they become due if the lender believes it advisable so to do, and all such advances and payments shall be deemed to have been made in pursuance of this agreement and not to be in modification thereof.

It is agreed also that upon the occurrence of any of the contingencies above mentioned, the holder of this mortgage shall be absolved from the obligation of making further advancements on account of said mortgage.

20 It is agreed that upon the default of the owners of said premises in the performance of the terms and covenants herein contained, or their failure to complete with dispatch construction of the said buildings in the manner above set forth, or upon the abandonment of the work for ten days or upon the absconding of said owners from the State of New Jersey, or their absence from said work for ten days, or should any event occur which entitles the holder of this mortgage to demand the principal thereof or to refuse any further advancements on account of said principal, the holder of this mortgage shall be fully and completely entitled, empowered and authorized and is hereby
30 empowered and authorized, irrevocably, by the said owners, without any further consent or authorization, to expend all sums of money which in their judgment and discretion shall be reasonably necessary, for the following purposes:

40 (a) To protect and preserve the mortgaged premises: (b) To complete the said building and

Exhibits.

to pay and satisfy all liabilities incurred for materials and labor employed in such construction: (c) To pay for all work and materials already provided and furnished to owners, the mortgagee being authorized either to continue the construction under outstanding contracts of the owners or to create independent contracts for such completion.

10

It is further agreed that if the mortgagee is obliged to expend, for the purposes aforesaid, sums of money which will exceed the amount of the principal agreed to be advanced hereunder, such excess, with interest at six per cent. per annum from the time of each advancement, shall be added to the principal due hereunder, and the mortgagee shall have all the remedies for the collection thereof which are herein specified regarding the principal hereof.

20

To induce the mortgagee to advance the principal sum secured hereby or any part thereof, and as a prime and essential consideration to the mortgagee, the said owners do, for themselves, their heirs and executors, administrators, successors and assigns, hereby constitute and appoint the mortgagee, irrevocably, as their agent for the purpose of making the expenditures aforesaid and for the purpose of carrying out in every respect the authorities herein granted, and, upon the completion of the said building, to enter into written or oral contracts, in the name of and on behalf of the said owners, for the renting or hiring of the said premises or any part thereof, under such terms and conditions as may seem advisable to the mortgagee and to use the rents, issues and profits for the upkeep and maintenance of the said premises and for the payment of prior liens and the liquidation

30

40

Exhibits.

of all interest due on mortgages as well to the mortgagee as to others, and for taxes, insurance, water charges, etc., and to apply any surplus to the amount due for principal on the within mortgage.

10 The lien of this mortgage shall attach to all materials brought in and about the premises, used or intended to be used in connection with the building to be erected.

20 AND THE SAID MORTGAGOR, for itself, its successors and assigns does covenant and grant to and with the said mortgagee, that it shall not nor will claim or demand or be entitled to receive any credit or credits on the interest payable hereon, or on the moneys to secure payment of which this mortgage is made, for so much of the taxes assessed against said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof.

AND THE MORTGAGOR, hereby warrants and defends the title to the said lands and premises.

30 The mortgagor shall and will keep the buildings erected and to be erected upon the lands above conveyed insured against loss or damage by fire by insurers, through such broker or brokers selected and in an amount approved by the mortgagee, her heirs and assigns, and assign the policy or policies and certificate or certificates thereof to the mortgagee, her heirs and assigns, as collateral security for the payment of the principal and interest aforesaid; and it is agreed that if the mortgagor, its successors and assigns, shall neglect to pay all or any tax, assessment or other municipal or governmental rate, charge, imposition, or any installment
40 or installments of monthly Building Loan dues and

Exhibits.

interest, or any sums payable under any lien superior hereto, or any premium for insurance, as aforesaid, on any day whereon the same shall become due and payable, after the period of default aforesaid, then it shall be lawful for the mortgagee, her heirs, and assigns, to pay such charges, and the sum or sums so paid shall be a lien on the said mortgaged premises added to the amount secured hereby, with interest at six per cent. per annum, and, in the event of such payment, at the option of the mortgagee, her heirs or assigns, the principal sum secured hereunder shall become due and payable, and agrees that if default be made in the payment of any installment of principal or of the said interest, or any part thereof, on any day whereon the same is made payable as hereinbefore expressed, and should the same remain unpaid and in arrears for the space of thirty days, or if default be made in the payment of any of said taxes, water rents or other municipal or governmental rate, charge, imposition or any money payable under the terms of any mortgage lien paramount hereto, on any day whereon the same shall become due and payable, and should the same remain unpaid and in arrears for the space of sixty days, or in the event that any building shall be demolished or removed from the mortgaged premises (or if the removal or demolition thereof is threatened) without the consent in writing of the mortgagee or holder of this mortgage, or in the event that the owner of the mortgaged premises shall fail, within ten days after written request therefor, to furnish a statement of the amount due and owing for principal and interest hereunder, or evidence of the payment of taxes, water rents, interest and principal of prior mortgages or any

10

20

30

40

Exhibits.

10 carrying charges, or in the event that default shall
be made in any of the terms, covenants and con-
ditions herein contained, or contained in any
mortgage constituting a lien upon the mortgaged
premises prior and superior to the lien hereof, or
should any action be commenced to foreclose any
such prior mortgage, or should the owner of the
mortgaged premises fail, for a period of thirty
days, to begin compliance with any requirements,
recommendation or recommendations of any of
the Department or authority of the State of New
Jersey, or the municipality where such mortgaged
premises are situate, such municipality or State
Department or authority having jurisdiction over
20 the mortgaged premises, or in the event of the ad-
judication in bankruptcy or insolvency of the
mortgagor or the owner of the mortgaged prem-
ises, then and from thenceforth, that is to say, after
the lapse or expiration of either of the said periods,
as the case may be, the aforesaid principal sum
of money, with all arrearages of interest thereon,
and any other charges paid by the holder of this
mortgage, shall, at the option of the mortgagee
and assigns, become and be due and payable im-
mediately thereafter, although the period first
30 above limited for the payment thereof may not
then have expired, anything hereinbefore con-
tained to the contrary hereof in anywise notwith-
standing.

AND agrees that the said mortgagee, her heirs
or assigns shall and may, from time to time, and
at all times after default shall be made in the per-
formance of the proviso or condition herein con-
tained, peaceably and quietly enter into, have,
40 hold, use, occupy, possess and enjoy all and singu-
lar the above granted and bargained premises, with

Exhibits.

the appurtenances, without the let, suit, trouble, hindrance or denial of the said mortgagor, its successors or assigns, or of any other person or persons whatsoever.

AND agrees that if default shall be made, as aforesaid, the mortgagee, her heirs and assigns, shall have the right forthwith, after any such default, to enter upon and take possession of the said mortgaged premises, and to let the said premises, and receive the rents, issues and profits thereof, and to apply the same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said rents and profits are, in the event of any such default, hereby assigned to the mortgagee, her heirs and assigns and the mortgagee, her heirs and assigns shall also be at liberty immediately after any such default, upon proceedings being commenced for the foreclosure of this mortgage, to apply for the appointment of a receiver of the rents and profits of the said premises, and be entitled to the appointment of such receiver as a matter of right, as security for the amounts due the mortgagee, her heirs and assigns, without consideration of the value of the mortgaged premises or solvency of any person or persons liable for the payment of such amounts.

AND it is agreed that the said Mortgagor shall and will keep the building or buildings and improvements now on said premises or that may hereafter be erected thereon, in good and substantial repair. Upon failure so to do, the whole indebtedness secured and represented by this mortgage and the bond accompanying same shall at once become due and payable, and also the said mortgagee may enter upon the premises and repair and keep in

Exhibits.

repair the same, and the expense thereof shall be added to the principal sum secured hereby with legal interest.

10 All of the covenants and conditions herein contained shall be for the benefit of and bind the heirs, executors, administrators, successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF the mortgagor hath caused these presents to be signed by its President, its corporate seal to be hereto affixed and attested by its Secretary, the day and year first above written,

BUILDING CONSTRUCTION Co.

By JACOB SUGERMAN
President.

20

(Corp Seal)

Signed, Sealed and Delivered }
in the presence of }

ATTEST:

PAULINE SUGERMAN
secretary.

30

40

Exhibits.

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

BE IT REMEMBERED that on this 15th day of April
 in the year of our Lord One Thousand Nine Hun-
 dred and twenty-nine, before me, the subscriber,
 A Master in Chancery of New Jersey personally
 appeared Pauline Sugerman who, being by me
 duly sworn on his oath, says that he is the Secre-
 tary of the Building Construction Co. grantor
 named in the within instrument; that Jacob Sugar-
 man is the President of said corporation; that de-
 ponent well knows the corporate seal of said cor-
 poration; and the seal affixed to said Instru-
 ment is such corporate seal and was thereto affixed, and
 said Instrument 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 deponent, who there-
 upon subscribed his name thereto as witness.

10

20

PAULINE SUGERMAN.

Sworn and subscribed before me, at }
 Bayonne, N. J. the date aforesaid }

ALEXANDER SECLOW,
 Master in Chancery
 of New Jersey.

30

40

Exhibit D-3.

LIST OF CHECKS.

	Date	Payee	Amount
	1929		
	April 19th	—Building Construction Co. & Jacob Sugerman	\$200.00
	April 26th	—Building Construction Co. & Jacob Sugerman	\$150.00
	May 3rd	—Building Construction Co. & McCabe Bros.	\$100.00
10	May 3rd	—Building Construction Co. & Moe Frank	\$150.00
	May 3rd	—Building Construction Co. & Farina & Chericho ..	\$150.00
	May 3rd	—Building Construction Co. & Jacob Sugerman	\$175.00
	May 11th	—Building Construction Co. & Jacob Sugerman	\$275.00
	May 18th	—Building Construction Co. & Jacob Sugerman	\$275.00
	May 18th	—Building Construction Co. & Charles H. Engler Lumber Co.	\$450.00
	May 20th	—Building Construction Co. & Jacob Sugerman	\$100.00
	May 20th	—Building Construction Co. & David Feinberg	\$200.00
	May 22nd	—Building Construction Co. & Jacob Tucker	\$35.00
	May 24th	—Building Construction Co. & McCabe Bros.	\$55.00
	May 24th	—Building Construction Co. & Jacob Sugerman	\$150.00
	May 29th	—Building Construction Co. & Sam Greenspoon	\$75.00
20	May 29th	—Building Construction Co. & Jacob Sugerman	\$100.00
	June 5th	—Building Construction Co. & Sam Perlman	\$100.00
	June 6th	—Building Construction Co. & Alfred R. Vetter ...	\$100.00
	June 7th	—Building Construction Co. & Jacob Sugerman	\$500.00
	June 7th	—Building Construction Co. & Washburn Bros.	\$300.00
	June 7th	—Building Construction Co. & Moe Frank	\$150.00
	June 13th	—Building Construction Co. & Moe Frank	\$150.00
	June 13th	—Building Construction Co. & Jacob Sugerman	\$275.00
	June 13th	—Building Construction Co. & Moe Frank	\$50.00
	June 21st	—Building Construction Co. & Jacob Sugerman	\$350.00
	July 4th	—Building Construction Co. & Jacob Sugerman	\$60.00
	July 6th	—Building Construction Co. & Miller Heating Co. ..	\$150.00
	July 8th	—Building Construction Co. & Jacob Sugerman	\$240.00
30	July 12th	—Building Construction Co. & David Feinberg	\$400.00
	July 12th	—Building Construction Co. & Jacob Sugerman	\$100.00
	July 12th	—Building Construction Co. & Miller Heating Co. ..	\$100.00
	July 12th	—Building Construction Co. & Moe Frank	\$100.00
	July 12th	—Building Construction Co. & Israel Wegodsky	\$150.00
	July 19th	—Building Construction Co. & Moe Frank	\$60.00
	July 19th	—Building Construction Co. & Jacob Sugerman	\$125.00
	July 26th	—Building Construction Co. & Jacob Sugerman	\$75.00
	July 26th	—Building Construction Co. & Miller Heating Co.— American Radiator	\$250.00
	July 26th	—Building Construction Co. & Seclow & Nessanbaum —fee	\$225.00
40	August 2nd	—Building Construction Co. & Frank Greenspoon ...	\$50.00
	August 7th	—Building Construction Co. & Jacob Sugerman	\$50.00
	August 7th	—Building Construction Co. & Israel Nortman	\$350.00
	June 28th	—Building Construction Co. & Jacob Sugerman	\$250.00
	August 9th	—Building Construction Co. & Israel Nortman	\$100.00
	August 13th	—Building Construction Co. & Jacob Sugerman	\$25.00
	August 13th	—Building Construction Co. & I. J. Rosenblum	\$21.75
	August 15th	—Building Construction Co. & Jacob Sugerman	\$3.25
	Total	\$7,500.00

*Exhibits.***Exhibit D-4.**

AGREEMENT made April 10th 1929, between Building Construction Co., a domestic corporation, party of the first part, herein called the owner, and Jacob Sugerman, party of the second part, herein called the contractor. 10

1. In consideration of the sum of Forty-seven hundred (\$4,700) Dollars, to be paid by the owner to the contractor as hereinafter set forth, the contractor agrees to perform all the labor and services and furnish the necessary materials where hereinafter stated upon the alteration of the frame dwelling house commonly known as 12 Wilkinson Avenue, Jersey City, New Jersey, and also the labor and services hereinafter mentioned in connection with the completion of the two-family frame five and six room house at No. 14 Wilkinson Avenue, Jersey City, New Jersey; said work to be done according to the plans of Maurice Kraut, Architect, and the work to be done by the contractor shall consist as follows. 20

2. Upon both houses, the contractor shall complete all the carpenter work, stairwork, woodwork, concrete work, grading and shall supply all necessary laborers and a watchman. The foregoing work shall not include the supplying of materials by the contractor. As to the old house where the alteration is to take place, the contractor shall do all tearing down where necessary, all excavating in the cellar, all mason work, all plastering, erection of any foundation walls, and the labor and materials for the plumbing in the old house. The contractor shall also supervise and manage the construction of the new house and the alteration of the old house and he shall have charge of the 30 40

Exhibits.

making of all necessary arrangements and agree-
 ments with all sub-contractors when purchasing
 materials, providing, however, that all contracts
 before they shall become binding on the owner
 shall be signed by its President and Secretary. In
 10 addition to the foregoing, the contractor shall
 purchase and supply at his own cost and expense
 all the hardware for the two houses and garages
 and all cinders necessary and also shades for the
 windows.

3. Payments are to be made as follows:
 On Friday of each week, the owner shall pay
 to the contractor a sum equivalent to the reason-
 able value of the work done during said week in
 20 proportion of the ratio which said work bears to
 the entire work and where hardware or other
 materials are purchased by the contractor, the
 owner shall pay to the contractor for the same
 providing payment does not exceed the reasonable
 value thereof.

IN WITNESS WHEREOF, the owner hath caused its
 corporate seal to be hereto affixed and attested by
 its Secretary and these presents to be signed by its
 President, and the contractor has hereunto set his
 30 hand and seal, the day and year first above written.

BUILDING CONSTRUCTION Co.
 By JACOB SUGERMAN
 JACOB SUGERMAN (L. S.)

Signed, sealed and delivered }
 in the presence of }

ATTEST:
 40 PAULINE SUGERMAN,
 Secretary.

Opinion.

(Filed May 19, 1930.)

NEW JERSEY SUPREME COURT.

No. 424—MAY TERM 1930.

DAVID FEINBERG, <i>Plaintiff-Respondent,</i>	10
---	----

v.

BUILDING CONSTRUCTION Co., <i>Defendant-Appellant.</i>	
---	--

Argued May 6th, 1930: Decided May 19th, 1930.

Before—Justices BLACK and CASE. 20

For the Plaintiff-Respondent, Messrs. FRED & MAX FEINBERG.

For the Defendant-Appellant, Messrs. SECLOW & NESSANBAUM.

PER CURIAM.

This suit was brought to recover the sum of \$500.00 for labor performed and materials supplied, between the 21st of May and the 1st day of November, 1929; which last mentioned date is the day upon which the last work was performed. The land is a lot located on the Northerly side of Wilkinson Avenue in Jersey City, N. J. 30

The case was tried by the Court without a jury resulting in a judgment for the plaintiff and against the builder and owner for the sum of \$500.00 generally; but, as against the mortgage of Ida Pecker the sum of \$260.00 of such amount is prior and paramount to the mortgage of Ida Pecker. The defendant appeals and files three grounds of appeal. The testimony sent up with the appeal is 40

Affirmance.

10 quite voluminous. The view that we take of the case renders it quite unnecessary to make any extended discussion. After hearing the argument presented on the appeal, a reading of the briefs and a consideration of the testimony we are satisfied with the conclusion reached by the trial court. The controverted questions involved are largely questions of fact. The judgment rendered is supported by evidence. The judgment of the First District Court of Jersey City is therefore, affirmed.

Affirmance.

(Filed June 19, 1930.)

20

NEW JERSEY SUPREME COURT.

30

DAVID FEINBERG,
Plaintiff-Respondent,
v.
 BUILDING CONSTRUCTION COMPANY,
 a corporation of New Jersey, *et*
als.,
Defendants,
 and
 IDA PECKER,
Defendant-Appellant.

On Appeal to
 the Supreme
 Court.

40

This cause having been duly argued at the present term of this Court, by Fred Feinberg, of Counsel with Fred & Max Feinberg, attorneys for the plaintiff-appellee, and Alexander Seclow of Counsel for the defendant-appellant, Ida Pecker, and the Court having considered the same, and finding

Affirmance.

no error in the record or proceedings in the District Court of the City of Jersey City;

It is thereupon ORDERED and adjudged that the judgment of the First District Court of Jersey City, removed by the appellant in this court, be affirmed, with costs, and that the record be remitted to the Circuit Court of Hudson County to be proceeded with in accordance with this judgment and the practice of said Court.

10

Entered June 19, 1930.

On motion of

FRED & MAX FEINBERG,
Attorneys for Plaintiff-Appellee.

FRED FEINBERG,
Of Counsel.

20

A true copy.

FRED L. BLOODGOOD,
Clerk.

30

40

Notice and Grounds of Appeal.

(Filed July 8th, 1930.)

NEW JERSEY SUPREME COURT.

10

DAVID FEINBERG,
Plaintiff-Respondent,

v.

BUILDING CONSTRUCTION COMPANY,
a corporation of New Jersey, *et*
als.,

Defendants,

and

IDA PECKER,
Defendant-Appellant.

20

TO FRED & MAX FEINBERG, Esqs., attorneys for plain-
tiff-respondent:

TAKE NOTICE that the appellant, Ida Pecker, ap-
peals to the Court of Errors and Appeals in the
last resort in all causes in New Jersey, from the
whole of the judgment entered in this cause on
the following grounds:

30

1. That the Supreme Court erred in affirming
the judgment of the First District Court of Jersey
City.

2. The Supreme Court affirmed the judgment of
the First District Court of Jersey City, although
there was error in doing so in these and other re-
spects:

40

(a) The undisputed testimony in the case proved
that \$7,240 was actually advanced upon the appel-
lant's mortgage and that said moneys went into

Notice and Grounds of Appeal.

and were actually used in the construction and erection of the building upon which the lien claim was filed by the respondent. Notwithstanding such proof, the judgment nevertheless gives the lien claim priority.

(b) The trial court found as a fact and so pronounced at the conclusion of the case that \$7,240 of the appellant's mortgage was actually advanced to the mortgagor and was actually used in the construction and erection of the building, but instead of awarding judgment of priority of said mortgage to the extent of \$7,240 and interest over the respondent's lien claim, the trial court awarded priority to a portion of the lien claim over the entire mortgage of the appellant.

(c) There was no testimony or evidence in the case to support the judgment of priority of the lien claim over the whole of the appellant's mortgage, the testimony being to the contrary.

(d) That the offer of the appellant of the application of the mortgage loan was improperly excluded.

Dated July 2nd, 1930.

Yours, &c.,

SECLOW & NESSANBAUM,
Attorneys for Defendant-Appellant,
Ida Pecker.

Service of a copy of the within notice and grounds of appeal is acknowledged this 3rd day of July, 1930.

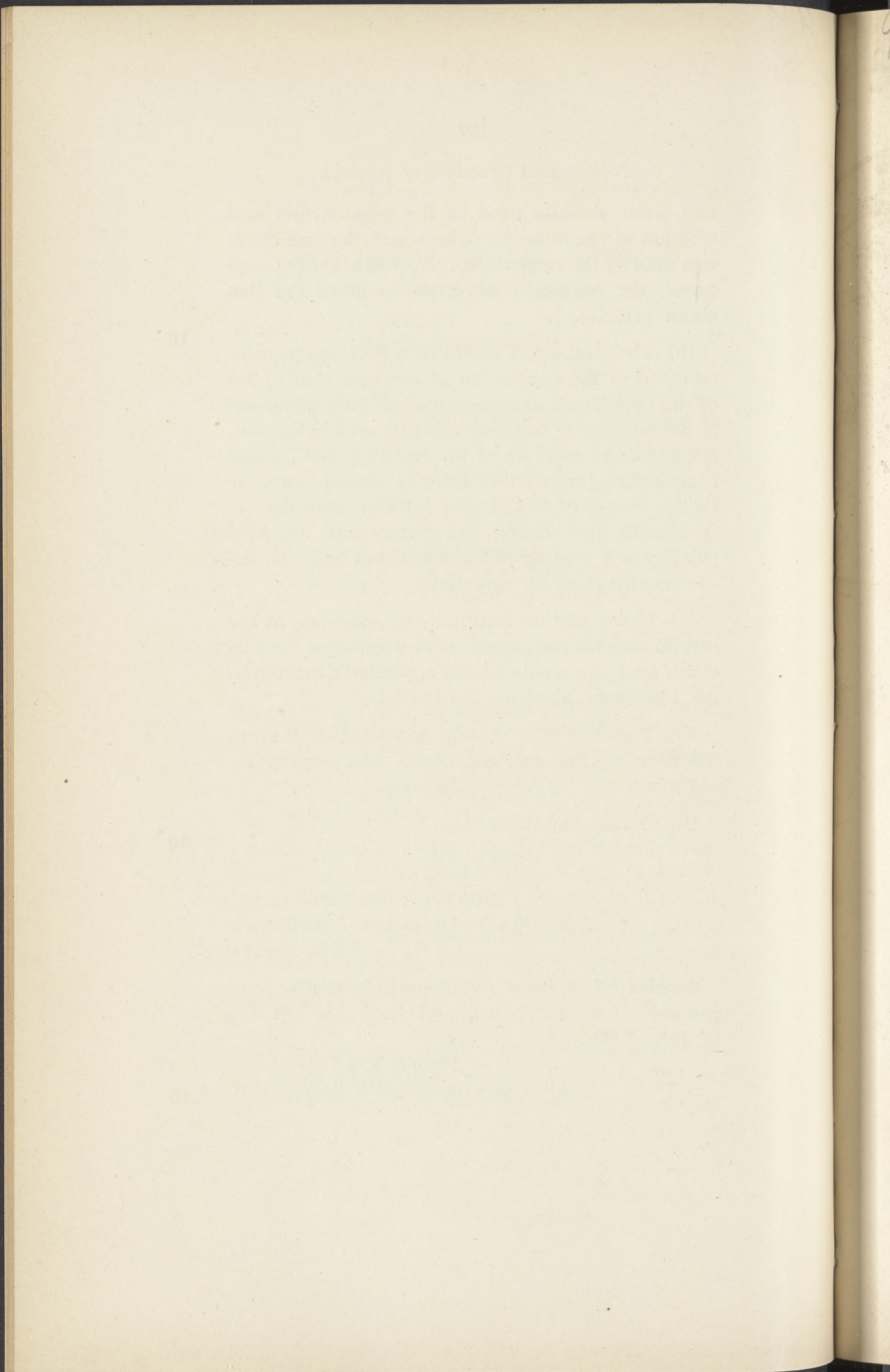
FRED & MAX FEINBERG,
Attorneys for Plaintiff-Respondent.

10

20

30

40



99

New Jersey Court of Errors and Appeals

DAVID FEINBERG,
Plaintiff-Appellee,

v.

BUILDING CONSTRUCTION COMPANY,
a corporation of New Jersey,
et als.,

Defendants,

and

IDA PECKER,
Defendant-Appellant.

On Appeal.

BRIEF AND POINTS FOR APPELLANT.

This appeal brings up for review a judgment of the Supreme Court affirming the judgment of the District Court awarding priority of a lien claim over a mortgage. The lien claimant had a contract for the plumbing work on two houses. He was paid for the work on one house, No. 14 Wilkinson Avenue, and there being a balance due for the other house, the new house, No. 12 Wilkinson Avenue, he filed his lien claim for \$500 and claimed priority over the mortgage of \$7,500 held by Ida Pecker.

The actual excavation for the house upon which the lien is claimed was commenced April 20th, 1930; the mortgage of Ida Pecker was recorded on April 17th, 1930. The trial court found as a matter of fact that all the moneys, viz., \$7,500, were paid over to the owner by the mortgagee,

and were actually used and applied toward the construction of the building, but that \$260 went for legal expenses and insurance, and therefore did not go into the building. The trial judge awarded judgment for \$500 and costs against the owner, as to which the mortgagee has no concern, and he awarded priority of \$260 of the lien claim and costs prior to the entire mortgage.

The lien claim was filed a considerable time after the last moneys were advanced under the Pecker mortgage, which was a construction mortgage.

POINT I.

The entire mortgage is entitled to priority over the lien claim.

The clear and undisputed testimony in the case was that the entire mortgage moneys were advanced to the mortgagee and that the excavation was not commenced on No. 12 Wilkinson Avenue, the house upon which the lien was claimed, until several days after the recording of the mortgage (Case pp. 25-41). The work of removing a portion of the old building cannot, should not, by any stretch of the imagination, be deemed the commencement of the new building upon which the lien is claimed.

In *Taylor v. LaBar*, 25 N. J. E. 222, it was held that

“The lien dates, not from the time of doing the work or furnishing the materials, but from the commencement of the building.”

And in that case the mortgage, having been recorded before the commencement of the building, that the mortgagee did not have to go further than show that he advanced the moneys to the mortgagor. This case was approved and followed by

our court of last resort in *Franklin Society for Home Building v. Thornton*, 96 Atl. 921; 85 N. J. E. 525, where the late Justice SWAYZE, speaking for this Court, said:

“This made it possible to assure a mortgagee of a first lien for advances made after the commencement of the building, provided only the mortgage was placed on record before the commencement of the building.”

Franklin v. Thornton was cited with approval in *Improved Building & Loan Association v. Larkin*, 101 Atl. 1043; 88 N. J. E. 52.

It is, therefore, quite obvious that the trial judge should have determined that the entire principal sum of the mortgage is prior to the lien claim. There is no dispute that all the moneys were advanced, nor is there any dispute as to the facts constituting the commencement of the building and the recording of the mortgage (Case p. 41). He should have given such directed judgment when thereunto moved, or should have rendered such a judgment at the conclusion of the case.

POINT II.

No portion of the lien claim should have been held prior to the entire mortgage.

At the conclusion of the case the trial court, acting as a jury, stated his findings of fact as follows:

“I shall also find as a fact that the moneys which have been testified to by Mr. Seclow and advanced by him to Mr. Sugarman, were used and applied toward the payment of the labor performed and the material furnished in this building, with the exception of the \$260.00 which the Court has referred to.”

The trial court then made two pronouncements, presumptively on the basis of the facts as found

by him. First he gave judgment in favor of the lien claimant and against the owner in the sum of \$500 and costs. He then was brought to a consideration of Section 15 of the Mechanic's Lien Act which is as follows:

“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 mortgage lands or any alterations, repairs or additions to any building on said lands; provided, such mortgage be registered or recorded before the filing of any such claim.”

In order to consider the application of Section 15, it was necessary to find that the building was commenced after the recording of the mortgage. Although the undisputed facts were otherwise let us assume that such was the case. One is at a loss to explain the finding that \$260 of the lien claim should come before the entire mortgage. One cannot perceive any rational relationship between this \$260 and the \$500 claimed by the lien claimant. There is no casual connection between them. If one is to seek for an explanation, it may be found in the fact-findings of the Court concerning moneys advanced by the mortgagee to the mortgagor and not used in the building. But why should the extent of the lien claimant's recovery prior to the mortgage be based on the amount of moneys which the mortgagor didn't use for labor or materials in the building? Suppose the amount were a thousand dollars or fifty dollars? The quantum of recovery of the lien claimant must represent labor or services from him to the building, not a penalty measured by the failure of someone else to put moneys into the building.

Now, as to the finding of priority. Not only did the undisputed testimony show that \$7,240 of the mortgage went into the building, but the trial court found this as a fact (Case p. 77). Applying Section 15, the judgment should have been that the mortgage to the extent of \$7,240 should be prior to the plaintiff's lien claim. Instead, and clearly a misapplication of Section 15, a portion of the lien, which is identical with the difference between \$7,240 and \$7,500, is placed ahead of the entire mortgage.

POINT III.

The application for the mortgage loan should not have been excluded.

The Court, over the exception of the mortgagee, excluded the offer of the application for the mortgage loan (Case p. 27). It was objected to as immaterial. This paper was relevant and material to the issue. It showed the conditions controlling the placing of the mortgage loan, and the manner and the conditions under which payments were to be made as the work progressed. It showed the entire arrangement with respect to the payments, and it obligated the mortgagee to comply with such arrangements. The exclusion of this document was harmful error.

POINT IV.

The judgment should be reversed, with costs.

Respectfully submitted,

SECLAW & NESSANBAUM,
Attorneys of Defendant-Appellant.

ALEXANDER SECLAW,
Of Counsel.

99

New Jersey Court of Errors and Appeals

DAVID FEINBERG,

Plaintiff-Appellee,

v.

BUILDING CONSTRUCTION COMPANY,
a corporation of New Jersey,
et als.,

Defendants,

and

IDA PECKER,

Defendant-Appellant.

On Appeal.

BRIEF AND POINTS FOR APPELLEE

This appeal brings up for review a judgment of the District Court awarding priority of appellee's lien claim over appellant's mortgage. This judgment was affirmed by the Supreme Court and is now here for review.

The lien claimant had a contract for plumbing work on two buildings No. 12 and 14 Wilkinson Avenue, Jersey City, New Jersey, upon which there remains due the sum of \$500 on house No. 12 Wilkinson Avenue. The premises in question consisted of a new two family house, No. 12 Wilkinson Avenue, and an old one family house, No. 14 Wilkinson Avenue, upon which alterations were made. The work was commenced as a single operation and the actual work was first begun on April 12, 1929. (Case p. 24, l. 38-42,

p. 25, l. 1-4). The mortgage of appellant was recorded on April 17, 1929.

POINT I.

The mortgage of appellant is a construction mortgage and, therefore, is subject to the provisions of section 15 of the Mechanic's Lien Act.

The uncontradicted testimony is that the buildings in question were commenced and intended as a single operation (Case p. 29, l. 22-41, p. 30, l. 1-15), and the date of the commencement of one building is the date of the commencement of both. Furthermore, there was an actual commencement of the work on the new building on April 12, 1929, as the driveway had to be cleared to facilitate the excavation work on the new building. (Case p. 34, l. 10-20). In fact, the appellant admits that the mortgage was a construction mortgage. (Case p. 29, l. 15-16).

The buildings were, therefore, commenced on the 12th of April, 1929, and the mortgage was recorded on the 17th of April, 1929, which brings appellant's mortgage within Section 15 of the Mechanic's Lien Act. (3 C. S. 3303).

POINT II.

The judgment of priority is a question of fact and is not reversible on appeal.

The appellant has the burden of proving by clear, certain, and convincing evidence that the money was actually applied for labor and materials in the erection of the buildings. *Thirteenth Ward B. & L. Assn. v. Kanter*, 105 N. J. Eq. 338.

In Fishgrund vs. Ericksen Real Estate Co. 105
N. J. Eq., p. 345 at p. 347, V. C. Backes says:

“To subordinate the lien to a mortgage subsequently executed and recorded, the burden rests with the mortgagee to establish by clear, certain, and convincing evidence that the mortgage money was actually used in the erection of the building. He must trace it into the hands of labor or material men. The money laid out for lawyer’s fees and for dues and interest on the building and loan mortgage is not available as a priority item, and there is no proof whatever that the persons to whom checks were given for material, furnished the material, and if furnished, that it was used on this building.”

The appellant admits that the sum of \$260 did not go into the buildings, and was applied for payment of search fees, defending of suit, and insurance charges. (Case p. 36, l. 30-41). The fact that the appellant did not sustain the burden of proof by the proper kind of evidence that the money did go into the buildings was a question of fact to be determined by the trial court, and is not reviewable on appeal. The trial court could have found as a fact that the appellant did not sustain the burden of proof as to the whole amount of the mortgage, and therefore the appellant cannot complain if the trial court awarded the plaintiff-appellee priority as to the sum of \$260.

The uncontradicted testimony and admission was that the appellant could not prove how much, if any, money, went into each building. (Case p. 34, l. 34-40; p. 35, l. 2-8). There was, therefore, absolutely no proof before the trial court that

any money at all went into the building upon which appellee claimed a lien, and therefore the trial court could have found in the absence of such proof that the appellant had advanced the money only as to the old building. It was purely a factual question, and the trial court found as a question of fact that the appellee was entitled to a priority of \$260 as to the new building.

A lien claimant having a priority dating from the commencement of the building, the trial court properly gave judgment for appellee as of the date of the commencement of the building.

In *Jersey Bond & Co. vs. Wesp Building Co.*, 105 N. J. Eq. 667, V. C. Buchanan said:

“Under Section 14 of the Mechanics’ Lien Act, the lien claimant is given priority over the lien of the advance money mortgage but ‘to the extent only of the moneys remaining to be advanced.’

“‘Remaining to be advanced’ at what time? The statute does not expressly say. But the only logical conclusion from the consideration of all the pertinent statutory provisions and of the factors entered into the situation seems to be that the date of inception of the lien claimant’s debt, the date which is meant.”

By parity of reasoning this also applies to this construction mortgage under Section 15 of the Mechanics’ Lien Act. The Court, having found priority in favor of the appellee, dated it as of the commencement of the building.

The determination of the District Court on

questions of fact, when there is evidence to support it, will not be reviewed on appeal. (*Van Nest vs. Hirsch*, 87 N. J. L. 336).

POINT III.

The application for the mortgage loan was properly excluded.

The application for the mortgage loan was merely in the nature of an offer or proposal which could have been withdrawn, and has no effect upon the actual placing of the mortgage and the application of the money thereto, because it does not show that the mortgagee was obligated to loan the money in accordance with the application. The mortgage money was applied, if at all, irrespective of the application. Its exclusion was not harmful and hence not reversible error.

POINT IV.

No transcript of the final judgment is contained in the appellant's state of the case, and the appeal for that reason should be dismissed, and judgment affirmed.

There is only what purports to be a transcript of the Clerk's Docket (Case pp. 13 and 14) contained in the State of the Case. There is nowhere contained in the State of the Case any transcript of the final judgment which has been signed by the District Court judge and which has been docketed in the Circuit Court of Hudson County. There is, therefore, nothing before this court on appeal. (*Katzin vs. Jenny*, 74 N. J. L. 131, 65 Atl. 192).

POINT V.

Appeal should have been taken from Circuit Court.

Under the Mechanics' Lien Act (3 C. S. p. 3313, Section 30 G) the judgment of the District Court must be docketed in the Circuit Court of the County wherein the premises are situated, and upon such docketing, the judgment becomes a Circuit Court judgment as if originally rendered in said Court. The said judgment was docketed in the Circuit Court of Hudson County before any notice of appeal was served. The appeal, therefore, should have been taken from the Circuit Court, and not from the District Court. There is, therefore, nothing before this Court on this appeal which can be reversed.

POINT VI.

Appeal should be dismissed because only a moot or academic question is at present involved.

The defendant in this case is the Building Construction Co., which was adjudicated an insolvent corporation in the Court of Chancery, and a receiver appointed. Permission was given for the plaintiff-respondent in this case to sue in the law court to establish his claim, and to determine his priority and the subject of this judgment is now before this Court for review. There is no personal judgment in this case against the defendant-appellant but only a special judgment, a judgment against the lands and buildings described in the lien claim, a judgment in rem. The remedy of the plaintiff-respondent in this case, is, whether the appeal be affirmed or reversed, a sale of the property in accordance with the priorities established

under Section 28 of the Mechanics' Lien Act, (3 C. S. p. 3370, Sec. 28).

Under an order of the Court of Chancery, dated May 12, 1930, the premises upon which the plaintiff-respondent had a lien claim was sold to Philip Nessianbaum, on the 4th day of June, 1930, free and clear of all lien claims and judgments, but subject to the mortgage of the defendant-appellant, Ida Pecker, in the sum of \$7,240.00, the sum found due the defendant-appellant by the Receiver. Subsequently the sale to Philip Nessianbaum was confirmed by an Order of the Court of Chancery, dated the 16th day of June, 1930, and a deed was delivered to the said Philip Nessianbaum, which deed was dated the 17th day of June, 1930, and recorded in the Hudson County Register's Office on September 22, 1930, as instrument No. 6425. This very same property has been sold by the said Philip Nessianbaum to one, Thomas Lowery, by deed dated September 19, 1930, and recorded in the Hudson County Register's Office on September 22, 1930, as instrument No. 6426.

Under these facts there is no longer a res against which the lien claim of the plaintiff-respondent will attach. There is no remedy to the plaintiff-respondent in the event that the judgment is affirmed; nor is there any benefit to the defendant-appellant in the event that the judgment is reversed.

Under the terms of the order confirming the sale, there will be no benefit to the defendant-appellant if this Court should reverse this judgment, inasmuch as the only effect of such a decision would be to place this plaintiff-respondent in a position of parity with the other general lien

claimants, with respect to the distribution of the moneys bid in at the sale. However, the defendant-appellant is in nowise aggrieved by such a finding, nor is any creditor, or any other person having any interest in the distribution, a party to this suit.

In *Machlin vs. Essex Park Realty Co.*, 139 Atl., p. 32, 101 N. J. Eq., p. 776, the Court of Errors and Appeals has held as follows:

HEAD-NOTE No. 1.

The legality of an order appointing a receiver in a foreclosure suit by the Court of Chancery on appeal will not be considered, after a decree pro confesso has been entered, the Master's report confirmed, a fieri facias issued and a sale of the mortgaged premises had, the sale confirmed, and the ordering of a conveyance of the land covered by the mortgage to the purchaser at the sheriff's sale. Held, the appeal will be dismissed.

Justice Black is speaking for this Court in this case says:

"In this situation, there is nothing for us to consider, except a moot or academic question, and this we decline to entertain. It is an elementary rule of law, long settled and firmly established, not only in this Court, but in other jurisdictions, that courts do not and will not consider *moot questions*; hence the appeal will be dismissed. As was stated by this Court in the case of *Coryell vs. Holcombe*, 9 N. J. Eq. 650; the appellant can derive no benefit from the judgment of this Court. The object of the order has been at-

tained. The order has been executed and its force spent. There is no redress which this Court can give to the appellant, even if we thought the order appointing a receiver was erroneous. The purchaser is in possession of the mortgaged premises. The sale has been confirmed by the Chancellor. We are powerless to change the existing status. Under the facts, a judgment of this Court would be an empty and profitless act. Under the statute (1 C. S. 1910, p. 450, Sec. 111), it is one aggrieved that may appeal to this Court. Other cases illustrating this principle are *Black vs. Del. & R. Canal Co.* 24 Eq. 455; *Camden and R. R. Co. vs. Elkins*, 37 N. J. Eq. 273; *Council of Gloucester City vs. Greene*, 45 N. J. Eq. 747; *Trustees of Huntington vs. Nicoll*, 3 Johns. R. 587. Many cases to the same effect are collected in 15 Corp. Jur. p. 783, Sec. 77.

“The appeal in this case is dismissed.”

It is, therefore, respectfully urged that the situation in the above case is actually in point, and should control the disposition of this case, and that, therefore, the appeal in this matter should be dismissed with costs.

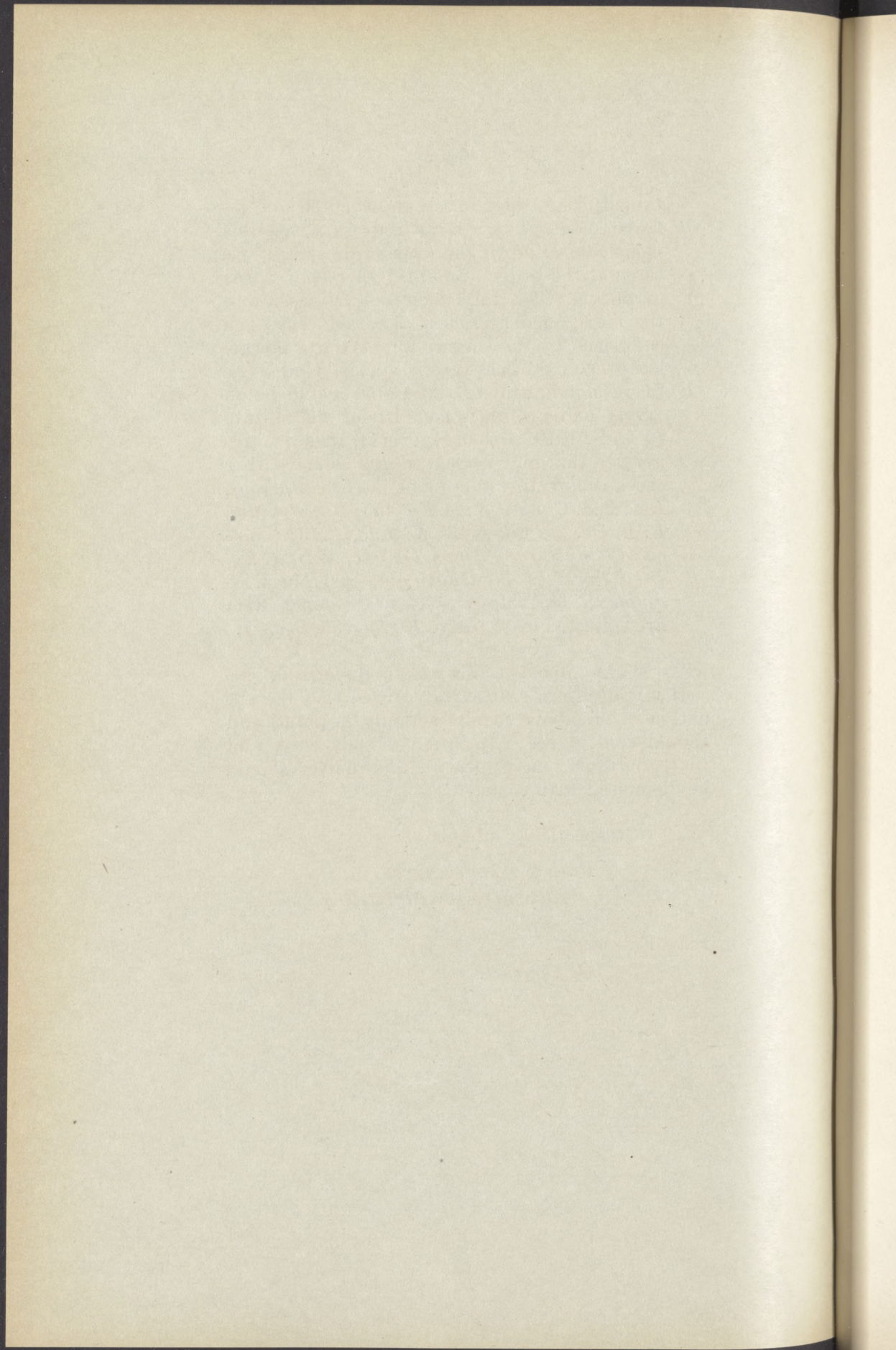
Respectfully submitted,

FRED & MAX FEINBERG,

Attorneys for Plaintiff-Appellee.

FRED FEINBERG,

Of Counsel.



*Filed after the Oral Arguments
by leave of Court.*

New Jersey Court of Errors and Appeals

DAVID FEINBERG,
Plaintiff-Respondent,

v.

BUILDING CONSTRUCTION COMPANY, a cor-
poration of New Jersey, *et al.,*
Defendants,

and

IDA PECKER,
Defendant-Appellant.

On Appeal from
the Supreme
Court.

**SUPPLEMENTAL BRIEF ON BEHALF
OF APPELLANT.**

Supplementary Facts.

The respondent in his brief under Point VI contends that this appeal should be dismissed because a moot or academic question is involved. The matter was argued at the present term on a motion to dismiss, and such motion was denied.

The contention of the respondent is not based on anything which appears in the record, but is based upon occurrences which transpired some time after this case was decided by the Supreme Court, and to substantiate his claim the respondent read certain affidavits and referred to copies of proceedings in a cause now pending in the Court of Chancery. The contention of the respondent is that because this is a mechanic's lien suit and because the receiver has sold the property, there

is no *res* for the parties to contend over, and, furthermore, that the appellant can derive no benefit from the judgment of this Court in her favor. The premises upon which the lien is claimed were subject to the appellant's mortgage amounting to \$7,500. The receiver, who has not yet been discharged because this controversy has not been terminated, sold the premises under Section 81 of the Corporation Act, free and clear of the respondent's lien, but subject, not to the entire \$7,500 and interest of the appellant's mortgage, but subject only to \$7,240 and interest of the appellant's mortgage, the sum of \$260 being the amount claimed as priority by the respondent. The order of June 16th, 1930, advised by Vice-Chancellor LEWIS which was made on the respondent's application reads, so far as this matter is concerned, as follows:

“And that said receiver hold the moneys derived therefrom to abide the further order of this court; and if judgment of David Feinberg against the defendant corporation be affirmed by the Court of Errors and Appeals or appeal dismissed, then the receiver shall pay first out of the proceeds of the sale, the amount of said judgment and costs.”

The appellant deposited \$50 with the Clerk of the Supreme Court as cash security for costs. The appellant has incurred charges for the printing of the case in this Court and in the Supreme Court and for briefs in a very substantial sum. The appellant in the affidavit filed with this Court in answer to the respondent's contention asserted her intention to make application to the receiver for the payment of \$260 and interest in the event that this appeal should result in her favor, and if such amount is received by her, her mortgage will of course be paid in full, if it is not, her mortgage will not have been paid in full.

POINT I.

This matter is *res judicata*.

The contention that the appeal is an academic one as argued under Point VI of the respondent's brief, was also the subject-matter of an application to dismiss the appeal. Such application came on as a motion upon affidavits and this Court denied the application. The subject-matter was identical with the subject-matter raised in Point VI; the parties were identical and there was a final disposition of the matter. Every element required to make the matter *res judicata* was present.

We therefore submit that this question cannot now be argued.

POINT II.

The question involved in this appeal is not a moot or academic question.

We do not find any authority to the effect that extrinsic matters affecting the subject-matter of an appeal and arising after an intermediate appellate court has decided the matter, should influence the appellate court whose jurisdiction is invoked. Many reasons may be urged why this Court should decline to consider such matters. If it be assumed that the judgment under review is not a sound one, this appellate court should be loath to permit it to stand as a precedent. Aside from the right of the aggrieved party to take an appeal from an intermediate appellate court which has pronounced upon his rights, we urge that the consideration of extrinsic matters arising after the determination of the intermediate court, by which it is necessary to go outside of the record, create

a precedent which will open the door to many applications of this kind, and which will in the last analysis make this Court a fact-finding tribunal in cases where it was the intention under our procedure to have a review of legal principles as applied to facts proven in an orderly way according to rules of evidence.

The contention of the respondent that no benefit can enure to this appellant by reason of a successful determination in her favor is untenable for the following reasons:

(a) The appellant has deposited a cash security for costs with the Clerk of the Supreme Court. A dismissal of this appeal will result in a loss of this security. If there be a reversal the cash security will be returned to the appellant. At least so far as these moneys are concerned, the appellant will suffer a loss if the appeal is dismissed and she will derive a benefit if the appeal is successful.

(b) If the appellant is successful in her appeal she will be entitled to have taxed in costs the very substantial outlay for briefs and the record on both appeals. So far as this element is concerned, there is a positive benefit on the one hand and a detriment on the other, depending upon the outcome of this appeal.

(c) The property was sold subject to the appellant's mortgage with the exception of \$260 and interest. This sale was held by the receiver under Section 81 of the Corporation Act for the obvious purpose, as shown in his application, of preventing a loss to the creditors by a prolonged dispute as to the rights and priorities of the lien claimant and the mortgagee. The effect was to substitute this fund in the receiver's hands in lieu of the property under the beneficent objects of the Cor-

poration Act. The appellant has not received this money, and of course, as stated in her affidavit, will make application for the same if this appeal be determined in her favor. The portion of the order with respect to the holding of these moneys by the receiver pending the outcome of the appeal was made upon the instance and application of the respondent. Should this appeal be dismissed without a review as to the merits of the appeal, this appellant would be foreclosed from making any application to the receiver for moneys which may belong to her. We contend that the respondent is estopped from raising such a contention in view of the provision made in the order at his request. Moreover, the contention of the respondent presupposes the validity and legality of all of the chancery proceedings and would accomplish the result that without a direct review of such proceedings, this Court in this collateral proceeding would in substance make a ruling tantamount to a confirmation. Such a contention, we submit, is untenable.

POINT III.

The appeal should not be dismissed.

Respectfully submitted,

SECLAW & NESSANBAUM,
Attorneys of Defendant-Appellant.

ALEXANDER SECLAW,
Of Counsel.

