# INDEX

## Lien Claim.

(Filed April 23, 1928.)

HUDSON COUNTY CLERK'S OFFICE.

POSNAK & TURKISH, INC., a corporation of the State of N. J.,
*Claimant,*

*v.*

NESWIT REALTY COMPANY, a corporation of the State of N. J.,
*Builder and Owner,*

and

CENTER REALTY CO., a corporation of the State of N. J., *et als.,*
*Defendants.*

Be it known that Posnak & Turkish, Inc., a corporation of the State of New Jersey, claims a lien upon the building and lands hereinafter described, pursuant to the statute in such case made and provided, for a debt contracted and owing to it for labor performed and materials furnished for the erection and construction of said building; and, therefore, shows:

1. The said building is a five-story brick building on a lot or curtilage upon which this lien is claimed, and which is situated in the City of Jersey City, the County of Hudson and State of New Jersey, described as follows:

*Lien Claim.*

ALL that certain lot, piece or parcel of land and premises situate, lying and being in the City of Jersey City, County of Hudson and State of New Jersey, bounded and described as follows:

BEGINNING at the corner formed by the intersection of the northeasterly line of Grant Avenue with the southwesterly line of Bergen Avenue; thence (1) running northeasterly along the southeasterly line of Bergen Avenue one hundred (100) feet; thence (2) southeasterly parallel with Grant Avenue ninety (90) feet; thence (3) northeasterly at right angles to Grant Avenue forty-one and forty-seven one-hundredths (41.47) feet to the northeasterly line of lands known as the Nicholas Vreeland Homestead; thence (4) southeasterly along the said Vreeland Homestead line twenty-four and seventy-four one-hundredths (24.74) feet; thence (5) southwesterly at right angles to Grant Avenue one hundred thirty-nine and forty-five one-hundredths (139.45) feet to the northeasterly line of Grant Avenue; thence (6) northwesterly along the northeasterly line of Grant Avenue one hundred (100) feet to the point or place of beginning.

2. The name of the owner of the land and of the estate therein on which the lien is claimed is Neswit Realty Company, a corporation of the State of New Jersey.

3. The name of the person who contracted the debt and for whom and at whose request the labor was performed and the materials furnished for which such lien is claimed is the said Neswit

Realty Company, a corporation of the State of New Jersey.

4. Annexed hereto, and made a part hereof, and marked Schedule "A" is a bill of particulars, exhibiting 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 made thereupon and deductions that ought to be made therefrom, and exhibiting the balance justly due to the said Posnak & Turkish, Inc., claimant, from the said Neswit Realty Company, a corporation of the State of New Jersey.

All the labor mentioned in said schedule was performed and the materials furnished between the 17th day of March, 1927, and the 10th day of January, 1928, which said last mentioned date is the date of the last work done and materials furnished for which such debt is due.

5. Center Realty Co., a corporation of the State of New Jersey, holds two mortgages covering said premises, one mortgage for $125,000.00 made by the Neswit Realty Company, a corporation of the State of New Jersey, to the Center Realty Co., a corporation of the State of New Jersey, dated April 14, 1927, recorded in Book 1436 of Mortgages for Hudson County, page 286; the other mortgage for $10,000.00 dated September 21, 1927, made by Rose Soloway and Jacob Soloway, her husband, Max Soloway and Mollie Soloway, his wife, and the Neswit Realty Company, a corporation of the State of New Jersey, to Center Realty Co., a corporation of the State of New Jersey, recorded in Book 1469 of Mortgages for Hudson County, page 415. Both of said mortgages are subordinate to this claimant's lien claim.

*Lien Claim.*

6. Harry B. Dembe and Charles H. Dembe hold a mortgage for $5,000.00 dated August 3, 1927, made by the Neswit Realty Company, a corporation of the State of New Jersey, to Harry B. Dembe and Charles H. Dembe, recorded in Book 1446 of Mortgages for Hudson County, page 611. By agreement dated September 30, 1927, and recorded in Book 76 of Releases for Hudson County, page 104, the said Harry B. Dembe and Charles H. Dembe postponed said mortgage to the aforesaid mortgage held by the Center Realty Co., recorded in Book 1469 of Mortgages for Hudson County, page 415. Said mortgage of Harry B. Dembe and Charles H. Dembe is subordinate to this claimant's lien claim.

7. The Prudential Insurance Company of America, a corporation of the State of New Jersey, holds a mortgage covering said premises for $170,000.00, dated February 27, 1928, made by the Neswit Realty Company, a corporation of the State of New Jersey, to The Prudential Insurance Company of America, a corporation of the State of New Jersey, recorded in Book 1492 of Mortgages for Hudson County, page 370. Said mortgage of The Prudential Insurance Company of America is subordinate to this claimant's lien claim.

8. Charles H. Engler Lumber Company, a corporation, obtained a judgment in the Hudson County Circuit Court against the Neswit Realty Co., a corporation, on March 16, 1928, for $9,898.18, with costs, recorded in Book 75 of Circuit Court Minutes, page 474, which judgment is a lien on the lands herein described. Said judgment is subordinate to this claimant's lien claim.

9. Federal Terra Cotta Company, a corporation

recovered a judgment against Neswit Realty Co., Inc., a corporation, and Jacob Soloway on April 11, 1928, for $2,033.33, with costs, recorded in Book 75 of Circuit Court Minutes, page 615, which judgment is a lien on the lands herein described. Said judgment is subordinate to this claimant's lien claim.

10. John R. Blair Co., Inc., recovered a judgment on December 30, 1927, against the Neswit Realty Company for costs of motion, which judgment is recorded in Book 75 of Circuit Court Minutes, page 199; which said judgment is a lien on the lands herein described. Said judgment is subordinate to this claimant's lien claim.

11. The following lien claims were filed in the Hudson County Clerk's Office against the premises described herein:

| | | |
|---|---|---|
| February | 17, 1928—New York Heater & Supply Co., a corporation | $1,010.00 |
| March | 12, 1928—Benjamin Parnis | 1,400.00 |
| March | 12, 1928—Morris Portnoy and Abraham Lipschitz, trading as Lipschitz Parquet Floor Company | 3,300.00 |
| March | 13, 1928—Chas. H. Engler Lumber Company, a corporation | 9,727.94 |
| March | 13, 1928—Junction Milling Company, a corporation | 9,942.80 |
| March | 19, 1928—Nat Weisman | 1,000.00 |
| March | 28, 1928—Watson Elevator Company, a corporation of the State of New Jersey | 1,460.00 |
| April | 3, 1928—Max Black | 420.02 |
| April | 3, 1928—Harold J. Goldberg | 1,000.00 |
| April | 3, 1928—Kaplan-Zelnik Co., a corporation of New Jersey | 1,257.50 |
| April | 4, 1928—Hudson Structural Iron Works, Inc., a corporation | 1,279.50 |
| April | 4, 1928—U. S. Hardware Co., a corporation of N. J. | 1,384.66 |
| April | 5, 1928—Peter Goranson, trading as P. Goranson Dumb Waiter Company | 320.00 |
| April | 7, 1928—Julius Baroff, trading as New Jersey Cornice & Skylight Works | 826.50 |
| April | 10, 1928—James T. Hunter | 3,301.26 |
| April | 12, 1928—Auriemma & Macchi, Inc., a corporation of the State of New Jersey | 2,300.00 |

*Lien Claim.*

All of the above lien claimants have postponed their said respective liens to the mortgage of the Center Realty Co., a corporation of the State of New Jersey, for $125,000.00, hereinabove described, by reason whereof the liens of the said New York Heater & Supply Co., a corporation, Benjamin Parnis, Morris Portnoy and Abraham Lipschitz, trading as Lipschitz Parquet Floor Company, Charles H. Engler Lumber Company, a corporation, Junction Milling Company, a corporation, Nat Weisman, Watson Elevator Company, a corporation of the State of New Jersey, Max Black, Harold J. Goldberg, Kaplan-Zelnik Co., a corporation of New Jersey, Hudson Structural Iron Works, Inc., a corporation, U. S. Hardware Co., a corporation of New Jersey, Peter Goranson, trading as P. Goranson Dumb Waiter Company, Julius Baroff, trading as New Jersey Cornice & Skylight Works, James T. Hunter, Auriemma & Macchi, Inc., a corporation of the State of New Jersey, became and are subject and subordinate to the lien claim of this claimant.

POSNAK & TURKISH, INC.,
By KALMAN POSNAK,
President.

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

KALMAN POSNAK, being duly sworn, deposes and says that he is the President of Posnak & Turkish, Inc., the above named claimant; that the bill of particulars and the statements therein and in said claim set forth and shown are true; that the same is for labor performed and materials furnished in the erection and construction of the building in such claim described, at the time therein specified;

and that the amount as claimed therein is justly due and owing, from the said Neswit Realty Company to the said Posnak & Turkish, Inc. Deponent further says that he has personal knowledge of all the matters and things in the within claim set forth, and that he is duly authorized to make this claim on behalf of the said claimant.

KALMAN POSNAK.

Sworn to and subscribed before me this 23rd day of April, 1928.

FRANK W. HEILENDAY,
M. C. C. of N. J.

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**Summons.**

(Filed April 30, 1928.)

The State of New Jersey:

To: NESWIT REALTY COMPANY, a corporation of the State of N. J., Builder and Owner, Center Realty Co., a corporation of the State of N. J., Harry B. Dembe and Charles H. Dembe, and The Prudential Insurance Company of America, a corporation of the State of N. J., Mortgagees, Charles H. Engler Lumber Company, a corporation, Federal Terra Cotta Company, a corporation, and John R. Blair Company, Inc., Judgment-Creditors, New York Heater & Supply Co., a corporation, Benjamin Parnis, Morris Portnoy and Abraham Lipschitz, trading as Lipschitz Parquet Floor Company, Charles H. Engler Lumber Company, a corporation, Junction

(L. S.)

Milling Company, a corporation, Nat Weisman, Watson Elevator Co., a corporation of N. J., Max Black, Harold J. Goldberg, Kaplan-Zelnik Co., a corporation of N. J., Hudson Structural Iron Works, Inc., a corporation, U. S. Hardware Co., a corporation of N. J., Peter Goranson, trading as P. Goranson Dumb Waiter Company, Julius Baroff, trading as New Jersey Cornice & Skylight Works, James T. Hunter, Auriemma & Macchi, Inc., a corporation of the State of N. J., Lien-Claimants.

You, Neswit Realty Company, a corporation of the State of New Jersey, Builder and Owner; and Center Realty Co., a corporation of the State of N. J., Harry B. Dembe and Charles H. Dembe, and The Prudential Insurance Company of America, a corporation of the State of N. J., Mortgagees; and Charles H. Engler Lumber Company, a corporation, Federal Terra Cotta Company, a corporation, and John R. Blair Company, Inc., Judgment-Creditors; and New York Heater & Supply Co., a corporation, Benjamin Parnis, Morris Portnoy and Abraham Lipschitz, trading as Lipschitz Parquet Floor Company, Charles H. Engler Lumber Company, a corporation, Junction Milling Company, a corporation, Nat Weisman, Watson Elevator Co., a corporation of the State of New Jersey, Max Black, Harold J. Goldberg, Kaplan-Zelnik Co., a corporation of N. J., Hudson Structural Iron Works, Inc., a corporation, U. S. Hardware Co., a corporation of N. J., Peter Goranson, trading as P. Goranson Dumb Waiter Company, Julius Baroff, trading as New Jersey Cornice & Skylight Works, James T. Hunter, Auriemma & Macchi, Inc., a corporation of the State of N. J., Lien-

*Summons.*

Claimants, are summoned to answer the annexed complaint of Posnak & Turkish, Inc., a corporation of the State of New Jersey, in an action at law in the Circuit Court in and for the County of Hudson, in which the said Posnak & Turkish, Inc., a corporation of the State of New Jersey, claims a building lien on certain buildings and lands of the said Neswit Realty Company, a corporation of the State of New Jersey, described in the said complaint, and upon which the said Center Realty Co., a corporation of the State of N. J., Harry B. Dembe and Charles H. Dembe and The Prudential Insurance Company of America, a corporation of the State of N. J., hold mortgages of record, Charles H. Engler Lumber Company, a corporation, Federal Terra Cotta Company, a corporation, and John R. Blair Company, Inc. hold judgments of record, and the New York Heater & Supply Co., a corporation, Benjamin Parnis, Morris Portnoy and Abraham Lipschitz, trading as Lipschitz Parquet Floor Company, Charles H. Engler Lumber Company, a corporation, Junction Milling Company, a corporation, Nat Weisman, Watson Elevator Co., a corporation of the State of N. J., Max Black, Harold J. Goldberg, Kaplan-Zelnik Co., a corporation of N. J., Hudson Structural Iron Works, Inc., a corporation, U. S. Hardware Co., a corporation of N. J., Peter Goranson, trading as P. Goranson Dumb Waiter Company, Julius Baroff, trading as New Jersey Cornice & Skylight Works, James T. Hunter, Auriemma & Macchi, Inc., a corporation of the State of N. J., have filed lien claims. And Take Notice that unless you file your answer to said complaint with the Clerk of said Court at Jersey City within Twenty days after service upon you of this writ and the annexed com-

plaint, the complainant may proceed in the suit and judgment may be entered against you.

WITNESS, Frank L. Cleary, Esq., Judge of the Said court, at Jersey City, this 26th day of April, 1928.

JOHN J. McGOVERN,
Clerk.

AARON A. MELNIKER,
Att'y.

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## Complaint.

HUDSON COUNTY CIRCUIT COURT.

POSNAK & TURKISH, INC., a corporation of the State of N. J.,
*Plaintiff,*

*v.*

NESWIT REALTY COMPANY, a corporation of the State of N. J.,
*Builder and Owner,*

and

CENTER REALTY CO., a corporation of the State of N. J., *et als.,*
*Defendants.*

Action at Law
On Mechanics Lien

Plaintiff, a corporation of the State of New Jersey, having its principal office in the City of Bayonne, County of Hudson and State of New Jersey, says:

FIRST COUNT.

1. At the times herein stated, the defendant Neswit Realty Company, a corporation of the State

of New Jersey, was the owner of a lot or curtilage of land situated in the City of Jersey City, in the County of Hudson and State of New Jersey, and which is described as follows:

> ALL that certain lot, piece or parcel of land and premises situate, lying and being in the City of Jersey City, County of Hudson and State of New Jersey, bounded and described as follows:
>
> BEGINNING at the corner formed by the intersection of the northeasterly line of Grant Avenue with the southwesterly line of Bergen Avenue; thence (1) running northeasterly along the southeasterly line of Bergen Avenue one hundred (100) feet; thence (2) southeasterly parallel with Grant Avenue (90) feet; thence (3) northeasterly at right angles to Grant Avenue forty-one and forty-seven one-hundredths (41.47) feet to the northeasterly line of lands known as the Nicholas Vreeland Homestead; thence (4) southeasterly along the said Vreeland Homestead line twenty-four and seventy-four one-hundredths (24.74) feet; thence (5) southwesterly at right angles to Grant Avenue one hundred thirty-nine and forty-five one-hundredths (139.45) feet to the northeasterly line of Grant Avenue; thence (6) northwesterly along the northeasterly line of Grant Avenue one hundred (100) feet to the point or place of beginning.

2. At the times aforesaid, the said defendant Neswit Realty Company was erecting and constructing on said lot or curtilage a five-story brick apartment house.

3. On the dates mentioned in the Schedule hereto annexed and marked Schedule "A," the plaintiff sold and delivered to the said defendant Neswit Realty Company, the materials mentioned in said schedule, and the said defendant, in consideration thereof agreed to pay plaintiff therefor the prices in each case in said schedule stated, and amounting in the whole to the sum of $29,926.18.

4. Said materials were furnished to the said defendant Neswit Realty Company for the erection and construction of said building.

5. The said defendant Neswit Realty Company paid on account thereof the sum of $14,376.14, leaving a balance of $15,550.04, which amount is still wholly due and unpaid.

6. Said debt is a lien upon the said land and buildings by virtue of the statute entitled "An Act to secure to mechanics and others payment for their labor and materials in erecting and building and in making certain improvements to land (Revision of 1898)."

7. Center Realty Co., a corporation of the State of New Jersey, is made a defendant because it holds two mortgages of record upon said lands, one mortgage for $125,000.00 made by the Neswit Realty Company, a corporation of the State of New Jersey, to the Center Realty Co., a corporation of the State of New Jersey, dated April 14, 1927, recorded in Book 1436 of Mortgages for Hudson County, page 286; the other mortgage for $10,000.00 dated September 21, 1927, made by Rose Soloway and Jacob Soloway, her husband, Max Soloway and Mollie Soloway, his wife, and the Neswit Real-

ty Company, a corporation of the State of New Jersey, to Center Realty Co., a corporation of the State of New Jersey, recorded in Book 1469 of Mortgages for Hudson County, page 415. Both of said mortgages are subordinate to this claimant's lien claim, and will be cut off by a sale thereunder.

8. Harry B. Dembe and Charles H. Dembe are made defendants because they hold a mortgage of record against said land for $5,000.00 dated August 3, 1927, made by the Neswit Realty Company, a corporation of the State of New Jersey, to Harry B. Dembe and Charles H. Dembe, recorded in Book 1446 of Mortgages for Hudson County, page 611. By agreement dated September 30, 1927, and recorded in Book 76 of Releases for Hudson County, page 104, the said Harry B. Dembe and Charles H. Dembe postponed said mortgage to the aforesaid mortgage held by the Center Realty Co., recorded in Book 1469 of Mortgages for Hudson County, page 415. Said mortgage of Harry B. Dembe and Charles H. Dembe is subordinate to this claimant's lien claim, and will be cut off by a sale thereunder.

9. The Prudential Insurance Company of America, a corporation of the State of New Jersey, is made a defendant because it holds a mortgage of record against said lands for $170,000.00 dated February 27, 1928, made by the Neswit Realty Company, a corporation of the State of New Jersey, to The Prudential Insurance Company of America, a corporation of the State of New Jersey, recorded in Book 1492 of Mortgages for Hudson County, page 370. Said mortgage of The Prudential Insurance Company of America is subordinate to this claimant's lien claim, and will be cut off by a sale thereunder.

10. Charles H. Engler Lumber Company, a corporation, is made a defendant because it recovered a judgment against the defendant Neswit Realty Company in the Hudson County Circuit Court on March 16, 1928, for $9,898.18, with costs, recorded in Book 75 of Circuit Court Minutes, page 474, which judgment is a lien on the lands herein described. Said judgment is subordinate to this claimant's lien claim, and will be cut off by a sale thereunder.

11. Federal Terra Cotta Company, a corporation, is made a defendant because it recovered a judgment against the defendant Neswit Realty Co., Inc., a corporation, and Jacob Soloway on April 11, 1928, for $2,033.33, with costs, recorded in Book 75 of Circuit Court Minutes, page 615, which judgment is a lien on the lands herein described. Said judgment is subordinate to this claimant's lien claim, and will be cut off by a sale thereunder.

12. John R. Blair Co., Inc., is made a defendant because it recovered a judgment against the Neswit Realty Company for costs of motion on December 30, 1927, which judgment is recorded in Book 75 of Circuit Court Minutes, page 199; which said judgment is a lien on the lands herein described. Said judgment is subordinate to this claimant's lien claim, and will be cut off by a sale thereunder.

13. The following lien claims were filed in the Hudson County Clerk's Office against said premises:

| | | |
|---|---|---|
| February 17, 1928 | New York Heater & Supply Co., a corporation | $1,010.00 |
| March 12, 1928 | Benjamin Parnis | 1,400.00 |
| March 12, 1928 | Morris Portnoy and Abraham Lipschitz, trading as Lipschitz Parquet Floor Company | 3,300.00 |
| March 13, 1928 | Chas. H. Engler Lumber Company, a corporation | 9,727.94 |
| March 13, 1928 | Junction Milling Company, a corporation | 9,942.80 |
| March 19, 1928 | Nat Weisman | 1,000.00 |
| March 28, 1928 | Watson Elevator Company, a corporation of the State of New Jersey | 1,460.00 |
| April 3, 1928 | Max Black | 420.02 |
| April 3, 1928 | Harold J. Goldberg | 1,000.00 |
| April 3, 1928 | Kaplan-Zelnik Co., a corporation of New Jersey | 1,257.50 |
| April 4, 1928 | Hudson Structural Iron Works, Inc., a corporation | 1,279.50 |
| April 4, 1928 | U. S. Hardware Co., a corporation of N. J. | 1,384.66 |
| April 5, 1928 | Peter Goranson, trading as P. Goranson Dumb Waiter Company | 320.00 |
| April 7, 1928 | Julius Baroff, trading as New Jersey Cornice & Skylight Works | 826.50 |
| April 10, 1928 | James T. Hunter | 3,301.26 |
| April 12, 1928 | Auriemma & Macchi, Inc., a corporation of the State of New Jersey | 2,300.00 |

Said creditors are made defendants because all of them have postponed their said respective liens to the aforesaid $125,000.00 mortgage, wherefore said liens are subject to the lien claim of this plaintiff and will be cut off by a sale thereunder.

SECOND COUNT.

1. All the paragraphs of the first count and the allegations therein contained are made part of this count, with the exception of paragraph 3, and in lieu of that paragraph and its allegations, the plaintiff says:

2. On the dates mentioned in the schedule hereto annexed and marked Schedule "A," the plaintiff sold and delivered to the said defendant Neswit Realty Company the materials mentioned in said schedule, and the said Neswit Realty Company, in

consideration thereof, agreed to pay the plaintiff therefor so much as the same reasonably were worth.

3. The same reasonably were worth the sums in each case mentioned in said schedule, and amounting in the whole to the sum of $29,926.18.

THIRD COUNT.

1. All of the allegations of the first and second counts are repeated and made a part of this count.

2. This suit is also based upon a book-account of which a copy is set forth in Schedule "A," which is hereto annexed and made a part hereof, the materials mentioned in said schedule having been used in the erection and construction of said building.

Plaintiff demands judgment in the sum of $15,550.04, with interest thereon from January 10, 1928, on any of the foregoing counts generally against the defendant Neswit Realty Company, and especially to be made of the lands and premises herein described; and that the lien claim of the plaintiff is prior and paramount to the said mortgages of the defendants Center Realty Co., a corporation of the State of New Jersey, Harry B. Dembe and Charles H. Dembe and The Prudential Insurance Company of America, a corporation of the State of N. J., and to the judgments of Charles H. Engler Lumber Company, a corporation, Federal Terra Cotta Company, a corporation, and John R. Blair Company, Inc., and to the lien claims of the defendants New York Heater & Supply Co., a corporation, Benjamin Parnis, Morris Portnoy and Abraham Lipschitz, trading as Lipschitz Parquet Floor Company, Charles H. Engler Lumber

Company, a corporation, Junction Milling Company, a corporation, Nat Weisman, Watson Elevator Co., a corporation of New Jersey, Max Black, Harold J. Goldberg, Kaplan-Zelnik Co., a corporation of N. J., Hudson Structural Iron Works, Inc., a corporation, U. S. Hardware Co., a corporation of N. J., Peter Goranson, trading as P. Goranson Dumb Waiter Company, Julius Baroff, trading as New Jersey Cornice & Skylight Works, James T. Hunter, Auriemma & Macchi, Inc., a corporation of the State of N. J., respectively.

AARON A. MELNIKER,
Attorney for Plaintiff.

To the within named defendants:

TAKE NOTICE that if the within summons and complaint be served upon you personally and you intend to make defense, then you must file an affidavit of merits within Ten days of such service, and must file an answer within Twenty days of such service; and that in default thereof, judgment will be entered against you. Lawful service upon a corporation is deemed personal service.

AARON A. MELNIKER,
Attorney for Plaintiff.

## Answer of Defendant, Center Realty Co., a Corporation.

(Filed May 25, 1928.)

HUDSON COUNTY CIRCUIT COURT.

| | |
|---|---|
| POSNAK & TURKISH, INC., a corporation, *Plaintiff*, *v.* NESWIT REALTY COMPANY, a corporation, *et als.*, *Defendants.* | Action at Law On Mechanics Lien |

The defendant, Center Realty Co., a corporation of the State of New Jersey, answering the complaint herein, says:

ANSWER TO FIRST COUNT:

1. Paragraph 1 is admitted.

2. This defendant admits that the Neswit Realty Company, a corporation, erected and constructed on the land in said complaint described, a five (5) story brick apartment house, but it denies that the work thereon was commenced at the time alleged in said complaint.

3. This defendant denies paragraphs 3 and 4.

4. This defendant neither admits nor denies the 5th paragraph.

5. The 6th paragraph is denied.

6. This defendant admits that it is the holder of two mortgages as is in the 7th paragraph alleged,

but it denies that the liens thereof are subordinate to any lien which the plaintiff may have.

7. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraphs 8 to 13, inclusive.

ANSWER TO SECOND COUNT:

8. The answers to the several paragraphs of the First Count with the exception of paragraph 3 are repeated.

9. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraphs 2 and 3.

ANSWER TO THIRD COUNT:

10. All the answers to the several paragraphs of the First Count and Second Count are here repeated.

11. Paragraph 2 is denied.

FIRST SEPARATE DEFENSE TO ALL COUNTS:

12. This defendant says that the mortgage held by it in the principal sum of $125,000, bearing date April 14th, 1927, was recorded prior to the commencement of the erection of the five (5) story brick elevator apartment building upon the land described in the complaint and that by virtue of the provisions of an act of the legislature entitled "An act to secure to mechanics and others payment for their labor and materials in erecting any building," and the supplements thereto, this defendant's said mortgage is prior in lien to any lien which the plaintiff may have by virtue of the provisions of said Act.

SECOND SEPARATE DEFENSE TO ALL COUNTS:

13. This defendant says that the two mortgages held by it, one in the principal sum of $125,000, and the other in the principal sum of $10,000, were made and executed by the defendant, Neswit Realty Company, to this defendant, for moneys advanced and used by the said Neswit Realty Company in the erection and construction of the five (5) story brick elevator apartment building upon said land and that the liens of this defendant's said mortgages are superior to any lien which the plaintiff may have pursuant to the provisions of an act entitled "An Act to secure to mechanics and others payment for their labor and materials in erecting any building," and the supplements thereto.

THIRD SEPARATE DEFENSE TO ALL COUNTS:

14. This defendant says that the lien of the mortgage held by it as aforesaid, dated April 14th, 1927, is superior to any lien which the plaintiff may have against the lands described therein, because the said plaintiff did, on the twenty-sixth day of April, 1927, execute and deliver to this defendant an instrument under seal wherein and whereby it did postpone any lien which it then had or might in the future acquire by virtue of the provisions of "An Act to secure to mechanics and others payment for their labor and materials in erecting any building," and the supplements thereto, for materials furnished or to be furnished in the erection of the five (5) story brick elevator building upon the land described in the Bill of Complaint in favor of the mortgage held by this defendant, dated April 14th, 1927, for $125,000, and that by reason thereof any lien which the said

complainant, Posnak & Turkish, Inc., a corporation, may have in said mortgaged premises is subordinate to the lien of this defendant's said mortgage.

SAMUEL ROESSLER.
Solicitor for Defendant,
Center Realty Co., a corporation.

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## Reply to Answer of Defendant Center Realty Co.

(Filed May 30, 1928.)

HUDSON COUNTY CIRCUIT COURT.

POSNAK & TURKISH, INC.,
*Plaintiff,*

*v.*

NESWIT REALTY COMPANY, Builder and Owner, *et als.*,
*Defendants.*

Action at Law
On Mechanics Lien

REPLY TO FIRST SEPARATE DEFENSE TO ALL COUNTS.

1. Plaintiff denies the allegations of the first separate defense to all counts.

REPLY TO SECOND SEPARATE DEFENSE TO ALL COUNTS.

1. Plaintiff denies the allegations of the second separate defense to all counts.

REPLY TO THIRD SEPARATE DEFENSE TO ALL COUNTS.

1. Plaintiff denies the allegations of the third separate defense to all counts.

A. A. MELNIKER,
Attorney for Plaintiff.

## Plea *Puis Darrein Continuance.*

(Filed April 15, 1930.)

HUDSON COUNTY CIRCUIT COURT.

| | |
|---|---|
| POSNAK & TURKISH, INC., a corporation, *Plaintiff,* *v.* NESWIT REALTY COMPANY, a corporation, *et als.,* *Defendants.* | Action at Law On Mechanics Lien |

Defendant, Center Realty Co., a corporation, by leave of the Court first had and obtained, and without waiving any former answer or matters set up thereby by it filed, says:

1. That said plaintiff ought not to further maintain its action against this defendant or against the premises described in the complaint on file herein, for that the Sheriff of the County of Hudson sold the premises described in the plaintiff's complaint by virtue of a mechanic's lien judgment and special *fieri facias* thereunder in an action at law on mechanic's lien claim in the Hudson County Circuit Court wherein Charles H. Engler Lumber Co., a corporation, was plaintiff, and Neswit Realty Co., a corporation, was defendant, that at said sheriff's sale the sum of $1,861.77 was realized and which sum was deposited with the Clerk of the Hudson County Circuit Court; that on July 5th, 1928, a Rule for Distribution was filed in said case of Charles H. Engler Lumber Co. *v.* Neswit Realty Co., wherein it was ordered that the Clerk of Hud-

son County Circuit Court pay $487.84 to Posnak & Turkish, Inc., and that said payment was made by said Clerk to said Posnak & Turkish, Inc., the plaintiff herein; and that by the said sale under Section 28 of the Mechanic's Lien law and by the participation in said *pro rata* distribution of the funds realized therefrom, the lien claim and all right, title and interest in and to any lien in said premises by the plaintiff, Posnak & Turkish, Inc., has been wholly cut off and extinguished; that said sale and distribution under the judgment of the Charles H. Engler Lumber Co. is a bar to the plaintiff herein further prosecuting the within action.

2. That the said plaintiff ought not to further maintain the within action because defendant, Center Realty Co. says that in the proceedings in the Court of Chancery of New Jersey wherein Annie Harris was complainant and Samuel Neswit and others were defendants, both the plaintiff herein, Posnak & Turkish, Inc., and the Center Realty Co. were parties defendant; that the plaintiff herein filed a counterclaim in said Chancery proceedings which counterclaim contained practically the same allegations contained in the complaint on file herein, and which claimed a lien on the premises described in the complaint prior and paramount to the lien of the defendant Center Realty Co. and all the other lien claimants; that the Center Realty Co. filed an answer to said counterclaim of Posnak and Turkish, Inc., in said suit; that on July 3rd, 1928, the plaintiff herein, Posnak & Turkish, Inc., filed a petition in said cause upon which an order to show cause, returnable July 9th, 1928, was issued, which among other things restrained and enjoined the said Center Realty Co. from receiving payment of its mortgage, and/or mortgages

which were liens on the premises described in the bill of complaint filed in said matter; that thereafter a hearing was had on the return of said order to show cause, and on August 2nd, 1928, an order was entered herein, which among other things, provided that the amount of the Center Realty Co. mortgage or mortgages, which were liens on the premises described in the bill of complaint, filed in the said suit, equal to the amount of the claim of Posnak & Turkish, Inc., should be deposited with the Clerk of the Court of Chancery before the said Center Realty Co. should cancel, discharge or satisfy said mortgage of record; that subsequent thereto an appeal was taken from said order of August 2nd, 1928, in the New Jersey Court of Errors and Appeals, which said court on May 20th, 1928, decided said appeal in favor of the Center Realty Co., reversing said order of August 2nd, 1928, and deciding that by virtue of a sale of the premises described in the complaint filed in the within entitled matter, held by the Sheriff of Hudson County under a special *fieri facias* issued out of the Hudson County Circuit Court in a mechanic's lien action, the proceeds of which sale were distributed by proper proceedings had in the Hudson County Circuit Court to all mechanic's lien claimants, including Posnak & Turkish, Inc., that said sale had the legal effect of wiping out the lien claim of Posnak & Turkish, Inc.,; that the defendant, Center Realty Co. therefore charges that by virtue of the above facts, said plaintiff, Posnak & Turkish, Inc., has no enforceable lien against the property described in the complaint on file in this matter; that said orders and decisions in the said Court of Chancery and Court of Errors and Appeals of the State of New Jersey have finally de-

termined the matter of the claim of the plaintiff herein, said Courts being Courts of competent jurisdiction and having proper jurisdiction thereof, and said orders and decisions are a bar to the plaintiff further prosecuting his said action on his said lien claim.

Dated April 12, 1930.

STEIN, MCGLYNN & HANNOCH,
Attorneys for Defendant, Center Realty Co.

I hereby consent to the filing of the above plea *puis darrein continuance.*

A. A. MELNIKER,
Attorney of Plaintiff.

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## Reply of Posnak & Turkish, Inc., to Plea *Puis Darrein Continuance* of Center Realty Co.

(Filed April 16, 1930.)

HUDSON COUNTY CIRCUIT COURT.

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| POSNAK & TURKISH, INC., a corporation, *Plaintiff,* *v.* NESWIT REALTY COMPANY, a corporation, *et als.,* *Defendants.* | Action at Law On Mechanics Lien |

The plaintiff, Posnak & Turkish, Inc., replying to the plea *puis darrein continuance* of Center Realty Co., says:

1. It denies each and every allegation of said plea.

A. A. MELNIKER,
Attorney of Plaintiff.

## Stipulation of Facts.

(Filed June 30, 1930.)

HUDSON COUNTY CIRCUIT COURT.

POSNAK & TURKISH, INC., a corporation of the State of New Jersey,
*Claimant-Plaintiff,*

*v.*

NESWIT REALTY COMPANY, a corporation of New Jersey,
*Builder & Owner,*

and

CENTER REALTY COMPANY, a corporation of New Jersey,
*Mortgagee,*

and

MAX BLACK, *et als.*,
*Lien Claimants,*
*Defendants.*

On Mechanics Lien

IT IS HEREBY STIPULATED AND AGREED that the above entitled cause be submitted to the Court without a jury on the following statement of facts in addition to such other facts as may be proved or admitted upon the record in open Court:

1. On or about *December 23, 1925,* the defendant Neswit Realty Company acquired title to the lands described in the lien claim, subject to certain mortgages, one of which was held by Annie Harris, and upon which lands it commenced on or about March 1, 1927, to erect a building.

*Stipulation of Facts.*

2. Between *March 17, 1927,* and *January 10, 1928,* the plaintiff, Posnak & Turkish, Inc., furnished material for the construction and erection of the building upon said lands, delivering in all materials of the value of $15,550.04.

3. On *April 14, 1927,* the Neswit Realty Company mortgaged said lands to the defendant Center Realty Company for the sum of $125,000.00, which mortgage was recorded on April 14, 1927, in the Hudson County Register's Office in Book 1436 of Mortgages, page 286.

4. On *September 21, 1927,* the Neswit Realty Company again mortgaged the lands to the said Center Realty Company for the further sum of $10,000.00, which mortgage was recorded September 29, 1927, in the Hudson County Register's Office in Book 1469 of Mortgages, page 415, and also covered other property of the Neswit Realty Company.

5. On *March 13, 1928,* Charles H. Engler Lumber Company, which had also furnished materials in the erection and construction of said building, filed a mechanics lien against the said lands and premises, and instituted suit thereon in the Hudson County Circuit Court, in which suit only the Neswit Realty Company, the owner of the land, was made a party defendant, Engler Company having subordinated its lien to the Center Realty Co. mortgages.

6. On *April 23, 1928,* the above named claimant Posnak & Turkish, Inc. filed a mechanics lien against the said lands and premises, and instituted suit thereon in the Hudson County Circuit Court, making the Charles H. Engler Lumber Co. and the Center Realty Company defendants, as well as the Neswit Realty Company, Posnak & Turkish, Inc.,

claiming priority over the lien claim of the Charles H. Engler Lumber Company and over the mortgages of the Center Realty Company.

7. The suit of the Charles H. Engler Lumber Company on its lien claim went to judgment; execution was issued thereon on *March 16, 1928* and the Sheriff of Hudson County sold the lands and premises thereunder on *May 24, 1928* for $1,861.77 subject to the mortgages of the Center Realty Company.

8. Under an order of distribution made by the Circuit Court in the Engler suit, the above named plaintiff, Posnak & Turkish, Inc., received the sum of $487.84 as its distributive share of the proceeds of said sale.

9. On *April 11, 1928,* foreclosure proceedings were instituted on the mortgage held by Annie Harris, in which suit the plaintiff, Posnak & Turkish, Inc., and the defendant, Center Realty Company, were made defendants. Posnak & Turkish, Inc., filed an answer and counterclaim alleging that its lien claim was prior to the mortgages of the Center Realty Company. The Center Realty Company joined issue on this claim and the matter has been referred for final hearing and is now pending in the Court of Chancery.

10. In said foreclosure suit, the above named plaintiff obtained an order restraining the owner of the premises from paying off the mortgages of the Center Realty Company pending the foreclosure suit. An appeal was taken from this order to the Court of Errors and Appeals and the order was reversed. The opinion of the Court of Errors

and Appeals appears in 7 Advance Reports, 737; 146 Atlantic, 309.

A. A. MELNIKER,
Attorney of Claimant-Plaintiff.

STEIN, MCGLYNN & HANNOCH,
Attorneys of Defendant
Center Realty Company.

Dated June 7, 1930.

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HUDSON COUNTY CIRCUIT COURT.

Before—Hon. FRANK L. CLEARY, J.

POSNAK & TURKISH, INC., a Corporation of the State of N. J.

*v.*

NESWIT REALTY COMPANY, a Corporation of the State of N. J., *et als.*

Jersey City, N. J.,
June 30, 1930.

APPEARANCES:

AARON A. MELNIKER, Esq., for the Claimant.
EDWARD R. MCGLYNN, Esq., for Center Realty Co., Mortgagee.

Mr. Melniker: This is a suit on a mechanics lien. The property is located in Jersey City. The plaintiff-claimant furnished mason supplies, brick and plaster and other builders' materials, to the amount of approximately $16,000.

After the commencement of the building and

after the plaintiff had commenced supplying material, the owner Neswit Realty Co. put a mortgage on the property to the Center Realty Co. represented by Mr. McGlynn.

The claimant in this case Posnak & Turkish, Inc. filed a mechanics lien. There were Answers filed to our suit on mechanics lien, and while these proceedings were pending, judgment was obtained on another mechanics lien, which was filed prior to our mechanics lien.

In our suit, we claim priority as against the mortgages.

In the other suit in which judgment was entered, the suit of the Engler Lumber Company, there was no prior claim as against anybody, the only defendant being the owner of the property.

A judgment was entered in the Engler suit, to be made specially of the lands, and the lands were then sold under that judgment, subject to the Center Realty Co. mortgage.

Now, our contention is that that judgment in the mechanics lien suit, to which we were not a party and to which the mortgagee was not a party, does not affect our lien claim.

The defendant, Center Realty Co. claims that the judgment under which the property was sold, extinguished our lien claim and we have no further standing in court, on the theory that all lien claims are concurrent, and the sale under one mechanics lien judgment extinguished all mechanics lien judgments. Therefore, they claim we have no further standing in court.

While our suit was pending, and it is still pending, proceedings were instituted to foreclose the first mortgage on this property. In that suit, of course, Mr. McGlynn's client, Center Realty Co. the

third mortgagee, was made a party defendant and the lien claimants were made parties defendant.

In that suit the plaintiff filed an answer asserting that it was prior to the mortgage of the Center Realty Company.

The Court: What did the decree determine?

Mr. Melniker: There was no decree ever entered in that suit. That matter is still pending on final hearing.

During the pendency of that suit, the purchaser of the property at the Sheriff's sale, under the Engler lien claim judgment, undertook to pay off the mortgages.

We then went into the Court of Chancery and got an Order restraining the payment to the Center Realty Co., Mr. McGlynn's client, on the theory that we were ahead of them, and that if they were paid off, it might militate against our interests and the fund might be gone and we might have no protection. Vice-Chancellor Bently heard that, and thought our rights might be injuriously affected by this payment, and restrained the payment to the Center Realty Co.

The Center Realty Co. took an appeal to the Court of Errors and the Court reversed Vice-Chancellor Bently and decided we had no interest in the proceedings; if the owner chose to pay off the mortgages, he had a right to do that if he wanted and the restraining order was vacated, and I understand that thereafter the owner paid off the mortgagee.

Mr. McGlynn: They were paid off first.

Mr. Melniker: In the opinion of the Court of Errors determining that phase of the controversy, Mr. Justice Kalisch, at the conclusion of the opinion, said that if we were not affected by this Engler

judgment and the sale under it, that we had a right to go ahead and proceed and assert our lien against the property.

It is my contention that we were not affected by that sale under the Engler judgment, because of the fact that we were prior to the Engler judgment, and we were not made a party to it, and that we were prior to the Center Realty mortgage and therefore we have a right under that opinion and on the strength of some other cases which I will show your Honor, to proceed with our suit and get our judgment against the owner of the property, to be made specially of the lands and premises described in the lien claim, regardless of what has happened in this proceeding outside of that.

We claim now that the Center Realty Co., Mr. McGlynn's client, the mortgagee, has no interest in this proceeding for they got their money, they have been paid.

We claim the right to assert our lien and fasten it upon this property.

The Court: They don't object to that?

Mr. Melniker: Mr. McGlynn has some sort of idea that possibly if we do that, it might affect his client in some way.

Mr. McGlynn: We have no objection to your taking judgment against the builder and owner. We do object to your taking judgment and stating your judgment is prior to our mortgage.

Mr. Melniker: That is one thing I insist on; if we are prior to that mortgage, we are entitled to have that adjudicated.

That is, of course, a matter of law and one which your Honor can decide without much difficulty.

Mr. McGlynn: The only thing I want to say,

first, is that the Engler mechanics lien and the suit was filed prior to his.

When he filed his lien claim, or his client filed it, I have forgotten which, they made not only the builder and owner parties defendant; they made not only the mortgagees (and there was a string of mortgages on this property) parties defendant; but they also made the prior mechanics lien claimants parties to the lien claim suit.

Now, the Engler people went ahead and got their judgment, issued a special fi.fa., sold the property, and the sale of the property resulted in a surplus, which under the Statute, was paid into the County Clerk's office. Subsequent to that, a Rule to Show Cause was obtained and a distribution of that surplus to all the claimants, on the basis of a pro rata distribution.

The Court: Including his client.

Mr. McGlynn: Including his client, who received his proportionate share.

He went into the Court of Chancery and got a restraining Order, and the case was taken to the Court of Errors, and my contention before the Court of Errors was that under the Mechanics Lien Statute, which is a pure and simple statutory proceeding, you cannot enlarge its construction and you cannot narrow it down, when the Sheriff sold that land under that special fi.fa. he sold the entire fee.

He cannot now assert a lien against the piece of property, which now, at the Sheriff's sale has been bought by someone free and clear of every mechanics lien claim, subject to the mortgages.

Mr. Melniker: One thing I want to call to your Honor's attention: we did nothing toward participation in this distribution of the money. We re-

ceived a check from the Sheriff. We did not apply for it. We put in no claim against it.

We are willing to give credit for that amount of money, but we are in no way responsible for the way the Sheriff distributed the money.

We are not bound by anything the Sheriff did.

JAMES O'NEILL, sworn for the claimant:

*Direct examination by Mr. Melniker:*

Q. You are attached to the County Clerk's office? A. Yes, sir.

Q. Have you produced the mechanics lien in the suit of Posnak & Turkish, Inc. *v.* Center Realty Co. and others? A. Yes, sir.

Q. Is this it? A. Yes, sir.

Mr. Melniker: I offer it in evidence.

Mr. McGlynn: No objection.

(Accepted and marked as Exhibit P-1.)

Mr. Melniker: Mechanics lien claim entitled Posnak & Turkish, Inc., a corporation *v.* Neswit Realty Co., builder and owner, Center Realty Co. and others mortgagees, and Charles H. Engler Lumber Co. and others, judgment-creditors, New York Heater Co. and others, lien claimants. Filed on April 23rd, 1928, in the Hudson County Clerk's Office; summons issued on April 26, 1928; amount of claim $15,550.04 with interest from January 10, 1928.

The lands and premises described are located in the City of Jersey City, and described as follows:

All that certain lot, piece or parcel of land and premises, situated, lying and being in the City of Jersey City, County of Hudson

and State of New Jersey, bounded and described as follows:

Beginning at the corner formed by the intersection of the northeasterly line of Grant Avenue and the southwesterly line of Bergen Avenue; thence (1) running northwestwardly along the southeasterly line of Bergen Avenue one hundred (100) feet; thence (2) southeastwardly parallel with Grant Avenue ninety (90) feet; thence (3) northeastwardly at right angles to Grant Avenue forty one and forty seven one hundredths (41.47) feet to the northeasterly line of lands known as the Nicholas Vreeland Homestead; thence (4) southeastwardly along the said Vreeland Homestead line twenty four and seventy four one hundredths (24.74) feet; thence (5) southwestwardly at right angles to Grant Avenue, one hundred thirty nine and forty five one hundredths (139.45) feet to the northeasterly line of Grant Avenue; thence (6) northwestwardly along the northeasterly line of Grant Avenue one hundred (100) feet to the point or place of beginning.

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DOROTHY ROGOW, sworn for the claimant:

*Direct examination by Mr. Melniker:*

Q. What is your full name? A. Dorothy Rogow.

Q. Are you employed by Posnak & Turkish, Inc.? A. Yes, sir.

Q. In what capacity? A. Bookkeeper.

Q. Had Posnak & Turkish an account with the Neswit Realty Co.? A. Yes, sir.

Q. Will you turn to it, please. What is that account for? A. For material that was delivered to the Grant Avenue job.

Q. The building of the Neswit Realty Co. on Grant Avenue, Jersey City? A. Yes, sir.

Q. What does that account show as to the amount of indebtedness from the Neswit Realty Co. to Posnak & Turkish, Inc.? A. $15,550.04.

Q. I show you these papers and ask you what these are? A. These are delivery slips.

Q. For this material? A. Yes, sir.

Mr. Melniker: I offer the account in evidence, showing the balance due of $15,550.04.

(Accepted and marked as Exhibit P-2.)

Mr. McGlynn: What about the credit.

Q. You have a credit of a check received from the Sheriff? A. There is one check.

Q. $487.84 on July 12, 1928? A. Yes, sir.

Mr. Melniker: I offer the book in evidence.

Mr. McGlynn: No objection.

(Accepted and marked as Exhibit P-4.)

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JACOB SOLOWAY, sworn for the claimant:

*Direct examination by Mr. Melniker:*

Q. Mr. Soloway, what was your connection with the Neswit Realty Co.? A. I was President.

Q. And did the Neswit Realty Co. own premises on Grant Avenue at the corner of Bergen Avenue, Jersey City, as described in the lien claim? A. Yes, sir.

Q. When did you commence the building? A. 1927, February some time.

Q. Is this indebtedness of the Neswit Realty Co. to Posnak & Turkish, Inc., of $15,550.04 correct? A. Yes, sir.

Q. Was that for material delivered and used in the construction and erection of this building on Grant Avenue? A, Yes, sir.

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DOROTHY ROGOW, recalled:

*Direct examination by Mr. Melniker:*

Q. Will you look at the statement of account attached to the lien claim and the statement of account attached to the complaint, and tell us whether that is correct as it appears from your books? A. Yes, that is correct.

Mr. McGlynn: I have no testimony to offer.

Mr. Melniker: The plaintiff rests. We have a stipulation herein which contains some facts that we have not proven.

Mr. McGlynn: I move for a direction of verdict in favor of the defendant, Center Realty Co., in view of the facts in this case and under the situation as it exists here.

Mr. Melniker: I move for a direction of verdict in favor of the plaintiff, generally against the owner Neswit Realty Co. and specially to be made of the lands and premises described in the lien claim and complaint, and to have priority over the mortgage of the Center Realty Co.

The Court: I will deny the motion made by Mr. Melniker, in favor of the plaintiff-claimant, and allow an exception.

Mr. Melniker: Exception.

The Court: The motion to direct a verdict in favor of the defendant will be granted.

Mr. Melniker: Exception.

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## Rule for Judgment.

(Filed July 18, 1930.)

HUDSON COUNTY CIRCUIT COURT.

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| POSNAK & TURKISH, INC., a corporation of the State of New Jersey, *Claimant-Plaintiff,* v. NESWIT REALTY COMPANY, a corporation of New Jersey, *Builder & Owner,* and CENTER REALTY COMPANY, a corporation of New Jersey, *et als.*, *Mortgagee, Defendants.* | Action at Law On Mechanics Lien |

The above entitled cause having been regularly on the calendar for trial at the present term of this Court, and having been moved for trial before Hon. Frank L. Cleary, Judge of said Court, without a jury, at Jersey City, N. J., on June 30, 1930, a jury having been waived by the attorney for the plaintiff and the attorneys for the defendant Center Realty Company, the only defendant appearing, and the cause having been heard and submitted to the Court, and the attorneys for the de-

fendant Center Realty Company having moved for a verdict for the defendant Center Realty Company, and the attorney for the plaintiff having moved for a verdict for the plaintiff, the Court did thereupon deny the motion of the plaintiff and grant the motion of the defendant Center Realty Company;

Whereupon, it is on this 30th day of June, 1930,

ORDERED AND ADJUDGED that judgment final be entered in favor of the said defendant Center Realty Company against the plaintiff Posnak & Turkish, Inc.

FRANK L. CLEARY,
Judge.

[Rule actually entered July 18, 1930.]

## Notice of Appeal.

(Filed July 24, 1930.)

HUDSON COUNTY CIRCUIT COURT.

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| POSNAK & TURKISH, INC., a corporation of the State of New Jersey,<br>*Plaintiff-Appellant,*<br>*v.*<br>NESWIT REALTY COMPANY, a corporation of New Jersey,<br>*Builder & Owner,*<br>and<br>CENTER REALTY COMPANY, a corporation of New Jersey,<br>*Mortgagee,*<br>*Defendants-Appellees.* | Action at Law<br>On Mechanics Lien |

To the defendant Center Realty Company and Messrs. Stein, McGlynn & Hannoch, its attorneys:

TAKE NOTICE that the above named plaintiff appeals 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:

The Trial Court directed a verdict and judgment for the defendant Center Realty Company against the plaintiff Posnak & Turkish, Inc., upon motion of counsel for said defendant, whereas said Court should have denied said motion and should have directed a verdict and entered judgment for the plaintiff.

A. A. MELNIKER,
Attorney of Plaintiff-Appellant.

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# New Jersey Court of Errors and Appeals

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| POSNAK & TURKISH, INC., a corporation of New Jersey, *Plaintiff-Appellant,* *v.* NESWIT REALTY COMPANY, a corporation of New Jersey, *Builder and Owner,* and CENTER REALTY COMPANY, a corporation of New Jersey, *Mortgagee, Defendant-Appellee.* | Action at Law. On Appeal from Hudson County Circuit Court. |

## BRIEF FOR PLAINTIFF-APPELLANT.

### Statement of Case.

On April 23, 1928, the appellant filed a mechanic's lien claim against certain property of the Neswit Realty Company located in Jersey City (Case p. 1) and instituted suit on such lien claim in the Hudson County Circuit Court on April 26, 1928 (Case p. 7). The owner and certain mortgagees and lien and judgment-creditors were made defendants, the appellant claiming priority over them.

The only defendant who defended the suit was the appellee Center Realty Company, a mortgagee, which held two mortgages on the property, one for $125,000.00 made by the Neswit Realty Company to the Center Realty Company on April 14,

1927, the other for $10,000.00 dated September 21, 1927. The appellant claims that its lien claim is prior and paramount to these mortgages. This is denied by the defendant Center Realty Co., which further asserts in its answer (Case p. 18) that the $125,000.00 mortgage dated April 14, 1927, was recorded prior to the commencement of the erection of the building on the premises in question, and that the principal sum of both mortgages was used in the erection and construction of the building, and furthermore that the appellant had postponed its alleged lien to the liens of the defendant's mortgages.

The defendant further pleaded (p. 22) that the Sheriff of the County of Hudson had sold the premises in question under a judgment in another mechanic's lien suit in which the Engler Lumber Company was the claimant and the Neswit Realty Company, the owner, was the sole defendant; that at such sale the premises realized the sum of $1,861.77, of which the appellant had received its distributive share, and that said sale under the Engler judgment constituted a bar to the prosecution of the present suit.

The defendant further pleaded that, in a foreclosure suit in the Court of Chancery involving the same premises, the Court of Errors and Appeals had determined that the sale of the property by the Sheriff under the Engler judgment had the legal effect of extinguishing the appellant's lien claim.

Issue was joined on all these defenses.

The cause was submitted to the trial court without a jury on a stipulation of facts (Case p. 26) and upon testimony taken in open court (p. 29).

The proofs, aside from the stipulation, show the filing of the appellant's lien claim on April 23, 1928, in the Hudson County Clerk's office and the issuance of a summons on April 26, 1928 (Case

p. 34); the indebtedness of the Neswit Realty Co., the owners of the land, to the appellant in the sum of $15,550.04 for materials delivered for the building in question (Case p. 36); the commencement of the building in February 1927 (Case p. 36), and the fact that the materials delivered by the appellant were used in the erection and construction of the building in question.

There was no evidence that the principal sums of the mortgages held by the Center Realty Co. were advanced for the erection of the building in question, and there was no evidence of any postponement by the claimant of its lien claim to the mortgages of the Center Realty Co.

There was uncontradicted evidence that the building was commenced and that the claimant began delivery of materials for the erection of the building before the mortgages of the Center Realty Co. were recorded. The construction of the building was commenced in February 1927 (Case p. 36); the plaintiff-appellant commenced furnishing materials for the building on March 17, 1927 (Case p. 27), and the two mortgages of the defendant Center Realty Company were dated April 14, 1927, and September 21, 1927, respectively (Case p. 27), and presumably were recorded after those dates.

On May 24, 1928, the premises in question were sold by the Sheriff under a judgment obtained by the Engler Lumber Co., in a mechanic's lien claim suit in which only the owner, the Neswit Realty Co., was made a party defendant (p. 28), the premises being sold subject to all mortgages, including the mortgages of the appellee Center Realty Co.

The appellee claims that this sale operated to extinguish the appellant's lien claim, although appellant was not a party to the Engler suit, nor did the Engler Co. claim any priority over the Center

Realty Co. mortgages, while the appellant does claim such priority over both the Engler claim and the Center Realty Co. mortgages.

The appellee further contends that the decision of the Court of Errors and Appeals in the case of *Harris* v. *Neswit Realty Co., et al.*, 146 Atl. 309, 7 A. R. 737, is dispositive of the issues in the instant case. That was a foreclosure suit brought by the holder of a prior mortgage on the same premises, in which both appellant and appellee were parties defendant. In that suit the appellant sought to have the purchaser at the sheriff's sale of the property under the Engler judgment restrained from paying off the Center Realty Co. mortgages until the priority between the lien-claim of the appellant and the mortgages of the appellee had been determined, either in the foreclosure suit or in the instant case. An order of the Court of Chancery, directing the payment of the amount of appellant's claim into court, *pendente lite*, was vacated by this Court.

The appellant denies that the decision in that proceeding disposes of the question presented in the instant case, for the opinion in that case concludes as follows:

> "On the other hand, if the Sheriff's sale did not have the legal effect to extinguish the lien of the Posnak & Turkish, Inc., then it is quite obvious that the latter can enforce its lien against the land, irrespective of the fact whether or not the owner of the land pays off the mortgage encumbrance thereon."

The appellant contends that "the Sheriff's sale did not have the legal effect of 'extinguishing its lien, and that it can therefore enforce its lien against the land' irrespective of the fact whether or not the owner of the land pays off the mortgage encumbrances thereon."

Evidently the Court of Errors and Appeals did not intend by this decision to foreclose the appellant's right to enforce its lien against the land. That case merely holds that the purchaser of the lands at the Sheriff's sale, who buys them subject to any mortgages, may, if he chooses, pay off such mortgages; that such payment of the mortgages has no effect upon any other liens, and that other lien holders have no right to prevent the purchaser from paying off the mortgage encumbrances if he wants to do so.

Upon this testimony and upon said stipulation, the Court, sitting without a jury, which had been waived, directed a verdict for the defendant Center Realty Company, having first denied a motion for a verdict for the appellant (Case p. 37). From these rulings, the appellant takes this appeal.

The question presented for determination in this suit is whether the Sheriff's sale of the premises under the Engler judgment, which was against the owner alone, extinguished the appellant's lien.

## GROUNDS OF APPEAL.

**The trial court erred in denying appellant's motion for judgment for the plaintiff and in granting the defendant's motion for judgment for the defendant Center Realty Company** (Case p. 37).

## ARGUMENT.

The plaintiff-appellant claims that its lien claim is prior and paramount to the mortgages of the appellee Center Realty Co., and in view of the fact that the building was commenced in February 1927, that the appellant commenced delivery of materials on March 17, 1927, and that the appellee's

mortgage was not executed until April 14, 1927, and in view of the further fact that there is no testimony that the moneys advanced under the appellee's mortgages were used in the erection of the building in question, and that there was no proof that the appellant had executed an agreement postponing its lien claim to the mortgages of the Center Realty Co., it must be taken as established that the appellant's lien claim was prior and superior to the lien of the appellee's mortgages.

> "Mechanics liens have a statutory priority as of the commencement of the building. 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 materialmen."
>
> *Fischgrund* v. *Ericksen Real Estate Co.*, 147 Atl. 811; 105 N. J. E. 345.

It must also be taken as established that the Engler judgment was subject and subordinate to the appellant's lien claim. The plaintiff so alleges in its complaint (Case p. 14) to which there was no denial by the Engler Lumber Company, which was made a party defendant, nor by the appellee nor by any other defendant. Furthermore, the premises were sold under the Engler judgment subject to the appellee's mortgages, the Engler Co. having subordinated its lien to those mortgages (Case p. 27). It must, therefore, be conceded that the appellant's lien claim was prior and superior to the lien of the Engler Lumber Co., as the property was sold by the Sheriff under the Engler judgment subject to these mortgages, in a suit in which the appellant was not made a party.

To repeat, the question involved is, did the sale of the premises under the Engler judgment, sub-

ject to the Center Realty Co. mortgages, extinguish the appellant's lien claim, which is prior and superior to both the Engler judgment and the Center Realty Company mortgages?

To answer this question in the affirmative would be to defeat in a large measure the object of the Mechanics Lien Act. The title of the Act is as follows:

> "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."

It is true that, in the earlier cases, there was a disposition to construe this act strictly, on the theory that the remedy given by it is a creature of statute, unknown to the common law, subjecting the property of one man to the payment of the debt of another. The tendency of the later cases, however, has been to take a more liberal view of this Act.

In *Rizzolo* v. *Poysher,* 89 N. J. L. 618, Mr. Justice PARKER said:

> "Whereas the earlier cases leaned toward a strict construction of the Act, recent adjudications are somewhat to the contrary."

And as was said in *Gardner* v. *Herold,* 76 N. J. L. 524:

> "The object or aim of the Act is well stated in the title; it is to secure to mechanics and others payment for their labor and materials in erecting any building."

In the case of *Shoemaker* v. *Maloney,* 102 N. J. L., p. 365, Mr. Justice KALISCH said:

> "The Mechanics Lien statute is entitled 'An Act to secure to mechanics and others payment for their labor and materials in erecting any building.' Now it has always been

> the policy of our courts to construe the provisions of the statute in such a manner, so as to give effect to the purpose of this legislation. The statute in substance, declares that every building to be erected shall be liable for the payment of any debt owing to any person for labor performed or materials furnished in the erection and construction thereof, which debt shall be a lien on such building and on the land whereon it stands, except in the case where there is a contract and specifications on file, the land and building shall be liable to the contractor alone. Thus, it is quite clear that the building and land become security for the payment of the debts of the laborers and materialmen, except in cases where a contract and specifications are on file."

The appellee's contention is that the sale of the property under the lien-claim of the Engler Lumber Company extinguished the mechanic's lien of the appellant, even though the appellant was *not* made a party to the Engler suit and the Engler Lumber Company made no claim of priority as against the mortgages of the Center Realty Co., while the appellant does claim priority not only as against the Center Realty Company mortgages, but also as against the lien-claim of the Engler Lumber Company.

The appellant on the other hand contends that its lien, being against the estate not only of the owner of the land but also against the estate of the mortgagee, is not affected by the proceedings upon the lien-claim of the Engler Lumber Company which asserted no rights against the estate of the mortgagee, nor against the lien of the appellant.

The appellee relies upon Section 28 of the Mechanics Lien Law to support its contention, but the provisions of that section do not support it. That section provides that under the special *fieri*

*facias* the sheriff shall sell the land, and the deed given by the sheriff shall convey to the purchaser the estate which the owner had at the time of the commencement of the building, subject only to mortgages created and recorded prior to the commencement of the building, and also subject to the lien of any mortgage given and recorded in accordance with the provisions of Sections 14 and 15 of the Act.

Section 14 applies to purchase money mortgages and Section 15 applies to other than purchase money mortgages where the money is actually advanced and applied to the erection of the building. The appellee's mortgages do not come within either category.

The Engler Company may have been willing to concede the priority of the Center Realty Company's mortgages to its mechanic's lien and to have the premises sold subject to such mortgages, but the fact remains that these mortgages were in turn subject and subordinate to the appellant's lien-claim and selling the property under the Engler judgment subject to these mortgages could not destroy the plaintiff's priority and could have the effect only of passing title to the premises subject to the mortgages and to the appellant's lien-claim, to which the mortgages were subject.

That there may be different *classes* of lien-claims is clearly pointed out by Vice Chancellor BERRY in the case of *Meister* v. *Meister*, 142 Atl. 312, 6 A. R. 1136, in which he says:

> "It is claimed that the question is an open one in this State, but if there is no reported decision involving the question, the general rule has been followed by this court in at least one unreported case, *Scharff* v. *Natwein Realty Co.*, Chancery Docket, 61 page 2. But it would seem that the question is disposed by

the Mechanics Lien Act itself. Section 14 of that Act provides that advance money mortgages shall have priority over lien claims to the extent of moneys advanced and applied to the building, provided the mortgage is recorded before such lien claims are filed. Inferentially, such mortgage is subsequent to all lien claims filed before the mortgage is recorded. Some lien claims therefore may be prior to the mortgage and some subsequent as here. This divides the lien claims into two classes. The payment of the prior lien claims in preference to those subsequent to the mortgage is the reward of diligence. To prorate the lien claims in both classes would be to make all, in effect, prior or subsequent to the mortgage. Either the claims which the statute says are prior would be postponed to the mortgage, or those which are subsequent would, in effect, be advanced over the mortgage. The same lien cannot be both prior and subsequent."

Mr. Luce (3rd Ed.), page 263, says:

"By virtue of Section 6 *ante*, the claim of journeymen or laborers for wages are given a preference over other lien claims. The result would seem to be that all lien claims *of the same* class are concurrent *inter se;* but that claims for wages as a class are prior to other claims."

Consideration of Sections 14 and 15 of the Mechanics Lien Act also makes it clear that there may be at least two classes of mechanics lien claims, besides those of journeymen and laborers which constitute a third class. Under Sections 14 and 15, advance money mortgages are only superior to mechanics liens under certain circumstances therein stated, viz., where the mortgage is recorded or registered prior to the filing of the mechanics liens and only

(a) To the extent of money actually advanced or agreed to be advanced; or

(b) To the extent of money actually applied to the erection of the building, etc.

A mortgage recorded *after* lien claims are filed is *subject* to such lien claims, and is postponed to such liens, but it is *superior* to lien claims filed *after* the mortgage is recorded, under Section 14 to the extent of moneys actually advanced or agreed to be advanced, and under Section 15 to the extent of moneys actually applied in the erection of the building.

In other words, even when the mortgage is recorded *before* any lien claims are filed, it is *superior* to the lien claims only as indicated, and it is *subject* to lien claims for any part of the principal advanced which the mortgagee had not agreed to advance, or which had not been actually applied to the erection of the building.

This clearly means, as pointed out by Vice Chancellor BERRY in the *Meister* case, 142 Atl. 312, and by Vice Chancellor BACKES in the *Republic Fireproofing Co.* case, 136 Atl. 335, 5 Misc. 205, that there may be two classes of lien claims in any given case—some lien claims which are prior and paramount to a mortgage on the property and some which are subsequent and subject to the same mortgage.

And so we have in this case one mechanics lien-claim (the appellant's) which is prior and superior to the mortgages of the appellee, Center Realty Co., and one (Engler's) which is subject to the mortgages. The order of priority would therefore appear to be as follows:

First: Appellant's lien.

Second: Appellee's (Center Realty Company) mortgages.

Third: Engler's lien.

Appellee also relies upon Section 29 of the Mechanics Lien Law, and insists that, under the provisions of this Section, all mechanics liens are equal. This section reads partly as follows:

> "All lien claims for erecting, adding to, repairing or altering the same building shall be concurrent liens upon the building and the lands whereon the same is erected * * *."

It is quite clear, however, from a reading of the text that what is meant is that all liens of the same kind or character are concurrent. Manifestly, lien-claims of different classes cannot be and were not intended to be concurrent or equal. That the authors of the Act had such a distinction in mind, may be seen from a reading of Section 30 of the Act, which is as follows:

> "Where a summons has been issued and served in any way prescribed by this act, to enforce any building claim lien against any building and lands, all other suits commenced by summons subsequently issued, to enforce *concurrent* liens against the same building and lands, may be stayed, etc."

If all mechanics liens were *concurrent* and of the same character it would not have been necessary to use the word "concurrent" in this Section. The language would have been simply that "all other suits commenced by summons subsequently issued, to enforce liens against the same building, etc."

Consequently, it would seem to follow that the mortgages of the Center Realty Co., not being affected by the lien-claim and judgment of the Engler Co., the appellant's lien-claim which is

prior and superior to the mortgages of the Center Realty Co. would likewise be unaffected by any proceedings on the Engler lien-claim.

In the case of *Practical B. & L. Assn.* v. *Meisol,* 139 Atl., page 338, 101 N. J. E. 636, Vice-Chancellor BERRY in holding that the rights of a mortgagee not made a party defendant in a mechanics lien suit were not affected by a judgment in that suit, quotes from the opinion of Justice DIXON in the case of *Jacobus* v. *Mutual Benefit Life Insurance Co.,* 27 N. J. E., page 604, who, in discussing the question of proper parties to a mechanics lien suit, said:

> "From this premise, one logical conclusion seems to me to be that all those persons who, as mortgagees, at that time, own any interest in the land which the lien claimant desires to subject to his lien, must be made defendants as owners, else their estate will stand exonerated from the lien. The statute says that the claim shall designate the name of the owner of the estate in the land upon which the lien is claimed; and by what course of reasoning can it be asserted that he who owns the mere shell, as it were, of the estate, must be afforded opportunity of contesting the claim, before it is conclusively established, but that he who owns the kernel, the substance of that estate, may be passed by unnoticed, unheard."

From this it would seem to follow logically that if a mortgagee's interest is not affected by a mechanic's lien suit in which the mortgagee is not made a party defendant, then certainly another mechanic's lien claimant who has a claim prior and superior to that of such mortgagee could not be affected by a suit in which neither such superior lien claimant nor mortgagee are made parties defendant.

In the case of *Republic Fireproofing Co.* v. *Mo-Ray Realty Co.,* 136 Atl., page 335, 5 Misc. 205,

Vice-Chancellor BACKES, in dealing with the effect of a sale under a judgment corresponding to the Engler judgment in the present case, said:

> "It suggests itself, however, that as the complainant's judgment lien operates upon a different estate from that which was sold under the Decker judgment, it would be advisable for the complainant to prosecute its lien to special judgment and sell thereunder."

Evidently the Vice-Chancellor was not impressed with the argument that a sale under a mechanics lien extinguished all other mechanics liens on the same property, regardless of the estates upon which they operated. To apply the suggestion made in this opinion to the present case, it would appear that the Engler lien, operating only upon the estate of the owner, does not bar the appellant, whose lien-claim operates also upon the estate of the mortgagee, from prosecuting its lien-claim to judgment, notwithstanding the judgment on the Engler lien.

To sustain defendant's contention would do violence to the Mechanics Lien Law, and open wide the door to fraud, the possibilities of which are indicated by Vice-Chancellor BACKES in the case of *Republic Fireproofing Co.* v. *Mo-Ray* (*supra*).

It would make it possible for a small claimant, in collusion with an owner and mortgagee, to get a snap judgment in a suit in which there would be no defendant except the owner, sell the property under such judgment and thereby extinguish all other lien claims, and make good all mortgages on the property, although the mortgages were subordinate to other mechanics liens and could not have withstood an attack by any other lien claimant.

For example: A builds a house at a cost of $10,000.00. He executes a mortgage upon it to B

for $10,000.00, the proceeds of which do not go into the building at all so that the mortgage is subordinate to mechanics' liens. X files a lien claim for $10,000.00, claiming priority over the mortgage. Y files a lien-claim for $100.00, making only the owner a defendant and making no claim of priority against the mortgage. Y gets a judgment and sells the property subject to the mortgage.

If the defendant's contention is correct, then X's lien is extinguished by such sale, because, as defendant argues, all lien-claims are concurrent and a sale under a judgment upon one lien-claim extinguishes all others, and the other lien-claimants can only look to the proceeds of the Sheriff's sale under such judgment. As in the hypothetical case, the property would be sold subject to a mortgage of $10,000.00, it is obvious that there would not be much in the way of proceeds to divide.

The Court should not adopt a construction of the Act which would permit of such a startling result.

Or to state an even simpler case: Suppose A and B each were entitled to a mechanics lien claim on the property of X upon which Y held a mortgage which was subject and subordinate to such lien claims.

Suppose A postponed or subordinated his lien to Y's mortgage and then brought suit against X, the owner alone, got judgment and sold the property thereunder, subject to Y's mortgage, while B's suit on his lien claim was still pending. Could A in this way extinguish B's lien and leave B without a remedy except to share in the proceeds of the sale of the property under A's judgment subject to Y's mortgage?

Adopting the view of the Mechanics Lien Act, urged by the appellant, gives force and meaning to the concluding paragraph of Mr. Justice KAL-

ISCH'S opinion in the *Harris* v. *Neswit* suit, in which he said:

> "On the other hand, if the Sheriff's sale did not have the legal effect to extinguish the lien of the Posnak & Turkish, Inc., then it is quite obvious that the latter can enforce its lien against the land, irrespective of the fact whether or not the owner of the land pays off the mortgage encumbrance thereon."

The appellant's contention is that by the sale of the premises under the Engler judgment, subject to the mortgages, the purchaser took subject also to the appellant's lien claim, which is prior and paramount to the mortgages, and that the appellant's lien was not at all affected by the sale, not being against the same estate upon which the Engler claim was a lien and that the appellant is entitled to judgment upon its lien claim, declaring its lien to be prior to the mortgages of the Center Realty Co., and to be specially made out of the lands and premises described in the lien claim.

It may be argued that the payment by the Sheriff of a distributive share of the proceeds of the sale of the property, under the Engler judgment, subject to the Center Realty Co. mortgages, to the appellant, should estop the appellant from now asserting any priority over either the Engler judgment or the Center Realty Company mortgages, but such an assertion is not supported by any proper conception of the doctrine of estoppel. The appellant did not seek any share of such proceeds, and did nothing to bring about a distribution to it of any part of such proceeds. The Sheriff, in the performance of a purely ministerial function, took note of all the mechanics liens which he found on record and apportioned the proceeds of the sale among such lien claimants. He did it on his own initiative following his own interpretation

of the mandate of the Mechanics' Lien Act. The appellant had nothing to do with the proceedings, except to credit the amount received by the Sheriff against the amount due the appellant from the owner of the property. The appellant could not have interfered with the Sheriff in his scheme of distribution if it wanted to, and there was no reason for the appellant to interfere with it, even if it had such a right. No one changed his position by reason of appellant's acceptance of a share of the proceeds, so that the doctrine of estoppel has no application and whether the appellant received or rejected a share of the proceeds, could not affect appellant's priority over the appellee's mortgages if the Mechanics' Lien Law gave the appellant's lien such priority.

It cannot be argued that the purchaser at the Sheriff's sale under the Engler judgment was misled in any way by his purchase subject to the mortgages because he is charged with knowledge of the law, and with constructive notice of the fact that appellant's lien claim was on record. Said lien claim asserted priority over all these mortgages and when he bought the property at said sale subject to the mortgages, he knew, or at least had constructive notice of the fact, that these mortgages were in turn subject to the appellant's lien claim.

Furthermore, the appellee should not urge such an objection as it has been paid in full and its interest in the present proceedings are largely academic, if it has any interest at all. The appellee's mortgages have been satisfied and it is difficult to see upon what theory it bases its present opposition to the judgment sought by the appellant.

The decision in the case of *Harris* v. *Neswit, supra,* is not dispositive of the issues in the instant case. It is true that there are some statements in the opinion indicating that Mr. Justice KALISCH

may have taken the view that all mechanics lien claims are concurrent and that a Sheriff's sale under one extinguishes all the rest, but such expressions of opinion were *dicta,* as they were not necessary to the decision and were not directly before the Court and that Mr. Justice KALISCH was not altogether convinced on this point is indicated by the language of the concluding paragraph of the opinion, quoted above. The result reached in the *Harris* v. *Neswit* case can be sustained without resort to the observations of the Learned Justice regarding the concurrence of lien claims and the effect of a sale under one lien claim upon other lien claims, for the point involved in that case was merely and solely whether or not a purchaser at a Sheriff's sale under a lien claim, the premises being sold subject to existing mortgages, had a right to pay off such mortgages, regardless of other claims against the premises and the Court held that he did have such right, and that no other lien claimant asserting any lien against the premises had any right to object to such payment, which seems to be sound. And as Mr. Justice KALISCH says in the concluding paragraph of the opinion:

> "If the Sheriff's sale did not have the legal effect to extinguish the lien of the Posnak & Turkish, Inc., then it is quite obvious that the latter can enforce its lien against the land, irrespective of the fact whether or not the owner of the land pays off the mortgage encumbrances thereon."

That is just what Posnak & Turkish, Inc., is now endeavoring to do, namely, enforce its lien against the land, irrespective of the fact that the appellee had paid off the appellee's mortgages upon it. The statement in that opinion that "the legal effect of the sale made by the Sheriff by authority of the

special *fieri facias* under the lien claim judgment of the Engler Lumber Company was by virtue of Section 28 of the Mechanics Lien Law for the benefit of all the lien claimants, for the premises were apparently sold under and by force of such Section clear of all mechanics liens," begs the question and manifestly cannot be so if it is true that some lien claims can be prior and some can be subsequent to mortgages on the property. The appellant denies that the premises were sold clear of all mechanics liens. They may have been sold clear of all mechanics liens of the same class, but they could not have been sold clear of all mechanics liens when some mechanics liens were prior to mortgages and some mechanics liens were subsequent to mortgages.

Mr. Justice KALISCH further said:

> "There was no legal obstacle in the way of a lien claimant to protect such interest as he might have had in the property at the Sheriff's sale."

The question suggests itself, how could a prior lien claimant protect himself at such Sheriff's sale?

On the contrary, there was no way in which a lien claimant of the same class as the appellant, that is, one who claimed priority to the mortgages, subject to which the property was being sold, could have protected such interest at the Sheriff's sale—certainly not by bidding at the Sheriff's sale, because the property was then being sold subject to mortgages, and it needs no argument to demonstrate that a sale of property subject to $135,000 of mortgages would not realize as much as a sale free and clear of such mortgages. There was no way in which a lien claimant of the character of the appellant could have protected himself at the Sheriff's sale or could even have interfered with

such sale. Presumably the property brought all it was worth over and above the mortgages. The appellant certainly had no right to prevent the sale under the Engler judgment if the Engler Co. was willing to sell subject to mortgages.

Mr. Justice KALISCH further said:

> "It would be a preposterous position to take that each lien claimant is entitled to come in after a sale has been made of the property, under a special *fieri facias* and obtain another *fieri facias* to enforce his lien claim by a sale of the same property."

Of course it would be preposterous to take such a position, but the appellant does not take such a position. The appellant does not contend that *any* lien claimant is entitled to come in after the property has once been sold under a lien claim judgment. The appellant takes the position that a sale under a lien claim judgment, where the lien claim is subject to mortgages, cannot prevent a sale under a judgment upon a lien claim which is superior to the mortgages.

The learned Justice further said:

> "To avoid any such absurd results, Section 29 of the Mechanics Lien Act, provides that all liens are concurrent liens for erecting, adding to, repairing or altering the same buildings, etc., and ought to be paid *pro rata* out of the proceeds thereof, when sold by virtue of the Act."

Obviously, what is meant by the language of the Act is that all liens are concurrent which are of the same class, because, as pointed out before, the Mechanics Lien Act specifically provides that certain lien claims shall be superior to mortgages on the property and other lien claims shall be subject to the same mortgages, therefore, obviously, all lien claims cannot be concurrent, and could not be

paid *pro rata* out of the proceeds of the sale of the premises by virtue of the Act.

All of this reasoning was entirely unnecessary to reach the result attained in that case, which was, that the Posnak & Turkish, Inc., "had no interest whatever in the contemplated action of the owner of the property in paying off any or all of the mortgage encumbrances thereon," and that, therefore, the order impounding any part of the money belonging to the mortgagee, was, as the Court said. without "any legal basis."

And that Mr. Justice KALISCH evidently thought so himself, is evidenced by the concluding language of his opinion that

> "If the Sheriff's sale did not have the legal effect to extinguish the lien of the Posnak & Turkish, Inc., then it is quite obvious that the latter can enforce its lien against the land, irrespective of the fact whether or not the owner of the land pays off the mortgage encumbrances thereon."

If, as would appear from the language previously used in the opinion, all mechanics liens are concurrent and all mechanics liens are extinguished by a sale under one mechanics lien, why should the learned Justice have entertained for a moment the idea that the Sheriff's sale might *not* have had the legal effect of extinguishing the lien of Posnak & Turkish, Inc., as indicated in the concluding paragraph? And the syllabus seems to confirm appellant's contention that the learned Justice did not intend to decide that the appellant's lien claim was extinguished by the sale under the Engler judgment.

To hold otherwise would in effect nullify Sections 14 and 15 of the Act and would violate one of the fundamental rules of statutory construction. A statute should be so construed as to harmonize

and give effect to all its parts. If it can possibly be avoided, it should not be so construed as to nullify any part of it. To construe the Act as contended for by the appellee, the Court would be required to say that it is not possible for some mechanics liens to be prior to mortgages and other mechanics liens to be subsequent to mortgages on the same property, but that all mechanics liens must be either prior or all must be subsequent, which is just contrary to the provisions of Sections 14 and 15.

By construing the Act as contended for by the appellant, all parts of the Act are vitalized and harmonized. The Engler Co. is entitled to subordinate and postpone its lien claim to the lien of the mortgages, if it so desires, and sell the property subject to the mortgages, if it wishes, without impairing the rights of the appellant, who did not postpone or subordinate its lien to the lien of the mortgages, and who, by virtue of Sections 14 and 15, is entitled to priority over the mortgages.

The observations of Mr. Justice KALISCH in the *Harris* case are no authority to the contrary.

As was so well said by the late Vice-Chancellor STEVENSON in *Lister* v. *Lister,* 86 N. J. E., at page 43:

> "A case 'decides' what the court in the discharge of its duty is obliged to decide. All else is *dictum.* As that great jurist, Lord HALSBURY, remarks, 'A case is only an authority for what it actually decides.' Even the Supreme Court of the United States is powerless to decide with finality a question which is not a part of the issues presented by the pleadings or in some appropriate manner submitted for decision by the record merely because counsel see fit to argue that question and as a result of such argument the court is induced to entertain 'views.' "

Even if the observations of the learned Justice were considered in the light of "judicial" rather than "obiter" *dictum* and are entitled to the greatest consideration and respect, yet they have not the binding effect of precedent. As was said by the present learned Chancellor in the case of *Crescent Ring Co.* v. *Traveler's Indemnity Co.*, 102 N. J. L., at page 89:

> "While neither (obiter or judicial dictum) is binding as a decision, *judicial dictum* is entitled to much greater weight than the other and should not be lightly disregarded."

As was stated by Mr. Justice LAMAR in the case of *German Alliance Insurance Co.* v. *Home Water Supply Co.*, 226 U. S. 220, in effect, the language of

> "An opinion must be limited to the facts and issues involved in the particular record under investigation."

And referring to a similar situation, Mr. Justice BRADLEY in the case of *Hans* v. *Louisiana*, 134 U. S. 1, said:

> "It must be conceded that the last observation of the Chief Justice does favor the argument of the plaintiff. But the observation was unnecessary to the decision and in that sense *extra-judicial* and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion."

And even if the expressions of opinion should be given the force of *stare decisis*, the Supreme Court of the United States, speaking through Mr. Justice LURTON, in *Hurtz* v. *Woodman*, 218 U. S. 205, said:

> "The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed

> or departed from is a question entirely within the discretion of the Court, which is again called upon to decide a question once decided."

It is, therefore, respectfully submitted that the trial court erred in denying plaintiff's motion for judgment, and in granting the defendant's motion for judgment for the defendant, and that such judgment should be reversed, and judgment entered for the appellant, for the amount claimed, $15,550.04, with interest, generally against the owner, Neswit Realty Co., and specially to be made of the lands and premises described in the lien claim, and to have priority over the mortgages of the Center Realty Company.

Respectfully submitted,

A. A. MELNIKER,
*Attorney and of Counsel for Appellant.*

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# New Jersey Court of Errors and Appeals

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| POZNAK & TURKISH, INC., a corporation of the State of New Jersey,<br>Plaintiff-Appellant,<br><br>vs.<br><br>NESWIT REALTY COMPANY, a corporation of New Jersey,<br>Builder and Owner,<br><br>and<br><br>CENTER REALTY COMPANY, a corporation of New Jersey,<br>Mortgagee,<br>Defendant-Appellee. | Action at Law.<br><br>On Appeal from Hudson County Circuit Court. |

## BRIEF FOR DEFENDANT-APPELLEE, CENTER REALTY COMPANY, a Corporation of New Jersey.

### Statement of Facts.

This is an appeal by the plaintiff from a directed verdict in favor of the defendant, Center Realty Company, a corporation of New Jersey, mortgagee.

There were no disputed facts as will be seen from a reading of the Stipulation of Facts contained in the State of Case, pages 26-29 inclusive, and from the testimony which was taken by the plaintiff in an attempt to sustain its case, State of Case, pages 29 to 38 inclusive.

While the suit originally was an ordinary mechanics lien case, there were subsequent developments which made the situation rather unusual at the time of trial, and while the appellant's statement of the facts in its brief is practically full and complete and does not contain any mis-statement of facts, yet, at the expense of repetition, appellee desires to briefly set forth its viewpoint of the factual situation.

The original lien claim, State of Case, pages 1 to 6, and the summons and complaint, pages 7 to 17 inclusive, show that the plaintiff supplied materials to the defendant, builder and owner, to wit, Neswit Realty Company, to be used in the erection of a new building on property in Jersey City, located at the corner of Grand Avenue and Bergen Avenue. The value of the materials so delivered was $15,-550.04. A rather unusual feature of the lien claim and complaint just mentioned, is that in addition to containing the usual allegations with regard to the builder and owner and the mortgagee, they also contained allegations indicating various holders of judgments, and a long list of other mechanics lien claims upon the same property.

The only lien claim other than that of the plaintiff, which is involved in this appeal, is one filed March 13th, 1928 by the Charles H. Engler Realty Co. in the sum of $9,727.94, upon which a judgment of $9898.18 and costs was entered on March 16th, 1928.

The lien claim of the plaintiff-appellant, and the summons and complaint issued thereon, indicated that the plaintiff contended that the mortgages of the Center Realty Company, defendant-appellee, were subordinate to plaintiff's lien claim. The lien claim of Charles H. Engler Lumber Co. just mentioned, and the judgment thereon, were only against the builder and owner, and raised no ques-

tion as to priority over either appellant's mortgage or any other mortgage which was a lien on the property.

The property described in plaintiff's lien claim and summons and complaint, is the same property described in the Center Realty Company's mortgages.

Appellee held two mortgages, one of $125,000.00 dated April 14th, 1927, recorded in Book 1436 of Mortgages of Hudson County, page 286, and the other of $10,000.00 dated September 21st, 1927, recorded in Book 1469 of Mortgages for Hudson County, page 415. Appellee's mortgages were second mortgages, being subordinate to a first mortgage held by one Annie Harris in the sum of $40,000.00, dated December 23rd, 1925. The only defendant to file an answer to the mechanics lien claim suit of the plaintiff, just described, was the present appellee.

In the original answer the principal defenses raised were that the appellant had postponed its mechanics lien to the lien of the Center Realty Company mortgages, and that the mortgages of the Center Realty Company were entitled to priority because the money advanced on the mortgages had been used by the owner in the erection and construction of the building being erected upon the land described in the lien claim and mortgages.

Subsequent to the filing of the original answer in the mechanics lien suit, the first mortgagee, Annie Harris, filed a bill to foreclose her mortgage and in that proceeding both the plaintiff and the defendant herein were made parties, and by virtue of the pleadings which were filed in that suit the same issues raised in the within mechanics lien suit with regard to the priority of the plaintiff's lien claim and the priority of defendant's mortgages were made therein.

While both the mechanics lien suit and the foreclosure bill were pending, an execution was issued pursuant to the provisions of the Mechanics Lien Act, by the Charles H. Engler Lumber Company on its judgment of March 16th, 1928, under which the sheriff of Hudson County duly advertised and eventually sold the same land described in plaintiff's lien claim and in defendant's mortgages. Under this execution said lands were sold by the sheriff for the sum of $1861.77 subject to the mortgages which were liens on said land, including appellee's mortgages.

Proceedings were then had in that mechanics lien suit pursuant to the statute and an order of distribution entered, under which there was paid to the plaintiff herein the sum of $487.84 as its distributive pro rata share of the proceeds of said sale.

Subequently, the purchaser at said sale obtained a new first mortgage on the premises, and preparation was made to pay off all the then existing mortgages, including the mortgages belonging to the defendant Center Realty Company. The plaintiff herein then filed a petition in the pending foreclosure suit of Annie Harris, and obtained an order in the Court of Chancery restraining the owner of the premises from paying off the mortgages of the Center Realty Company pending the final determination of said foreclosure suit.

An appeal was taken from this order to this Honorable Court and the order was reversed. The opinion of this court appears in 7 N. J. Adv. Reports, pages 737, etc., and in 146 Atlantic Rep., 309.

Subsequent to the reversal of the order just mentioned, and the filing of the opinion by this Honorable Court, the defendant Center Realty Company filed in the within mechanics lien suit a plea *puis darrein continuance,* which plea, without waiving

any former answer, set up as additional defenses, to wit; that in the foreclosure suit in the Court of Chancery which involved the same premises which have been described, this Honorable Court had determined that the sale of the property by the sheriff of Hudson County on the Engler judgment had the legal effect of extinguishing appellant's lien claim, and also, that the sale by the sheriff of the County of Hudson under the Engler Lumber Company judgment in the mechanics lien suit, and the fact that the proceeds of that sale had been deposited in the Circuit Court and distributed in accordance with the provisions of the Mechanics Lien Act, constituted a bar to the prosecution of the present suit.

At the trial before the Hudson County Circuit Court in the within suit, the defendant Center Realty Company relied upon the last two defenses and made a motion for a direction in its favor, which motion was granted. To this action of the trial court the plaintiff took its proper exception, and it is on that exception that this appeal is based.

## ARGUMENT.

### POINT 1.

The reasons which will be advanced by appellee, why the action of the Hudson County Circuit Court in directing a verdict in its favor should be sustained, will be divided into the two following subdivisions:

1. That the decision of this Honorable Court in the case of Harris v. Neswit Realty Company, et als, 146 Atl. Rep. 309; 7 A. R. 737, established as a matter of law the fact that the lien claim of the plaintiff in the within suit was extinguished.

2. That by virtue of Section 28 of the Mechanics Lien Law, the sale by the sheriff of Hudson County under the Engler judgment had the legal effect of extinguishing plaintiff's lien claim in the within suit.

Appellee will therefore take up first the opinion of this Honorable Court in the case of Harris v. Neswit, cited *supra*.

Counsel for appellee has had occasion to compare the brief filed by the appellant in this cause with the brief by the same party as respondent in the case of Harris v. Neswit, cited *supra*, and the brief in the present case is almost exactly the same as the one filed in the case already decided by this Honorable Court. Appellee contends that the decision of this Honorable Court in the case just cited, is dispositive of the issues in the within case. The case just cited was a foreclosure suit instituted by the holder of a first mortgage on the same premises on which the plaintiff's lien claim was filed in the within suit, and in which foreclosure

suit both the appellant and the appellee were parties defendants.

Appellant had filed in that foreclosure suit an answer and counterclaim, in which counterclaim it sought to establish the priority of its lien claim over appellee's mortgages. To this counterclaim appellee filed an answer setting up the same defenses as it had set up in the within mechanics' lien suit. As has already been pointed out in the facts of the case at the beginning of this brief, during the pendency of the foreclosure suit and before there had been any final hearing therein, the Sheriff of Hudson County advertised and sold the premises described in the mortgage in the foreclosure suit and in the mechanics lien claim of the within suit, under and by virtue of the provisions of Section 28 of the Mechanics Lien Act. The deed given by the sheriff as a result of that sale, conveyed to the purchaser the estate which the owner had in the lands at the commencement of the building, or which he subsequently acquired, and also in the building, subject only to all mortgages and other encumbrances recorded and/or registered prior to the said commencement of the improvements, and also subject to the lien of any mortgage given and recorded or registered under the circumstances, contemplated by and in conformity with the provisions of Sections 14 or 15 of the Mechanics Lien Act. * * * The purchaser at that sale conveyed the property to another, who made preparation to pay off the mortgages on the property, subject to which the sheriff sold the same. Whereupon the present plaintiff-appellant filed a petition in the pending foreclosure suit and obtained an order restraining the then owner from paying off the mortgages of the Center Realty Company, defendant-appellee. Subsequently, an order was made by the Court of Chancery restraining the owner from

paying off said mortgages except upon the giving of a bond by the mortgagee, which was done. It was in connection with an appeal from that order that this Honorable Court rendered its opinion in the case of Harris v. Neswit, cited herein.

The following language taken from that opinion indicates most strongly that this Honorable Court passed upon the construction of Section 28 of the Mechanics Lien Act, and its legal effect as the result of the sale of the property by the sheriff of Hudson County under the Engler judgment:

> "We cannot perceive any legal basis for the Order. The legal effect of the sale, made by the sheriff, by authority of the special *fieri facias,* under the lien claim judgment of the Engler Lumber Company, was, by virtue of section 28 of the Mechanics' Lien Law, for the benefit of all the lien claimants, for the premises were apparently sold under, and by force of, said section, clear of all mechanics' liens. There was no legal obstacle in the way of a lien claimant to protect such interest as he might have had, in the property at the sheriff's sale.
>
> "It would be a preposterous position to take, that each lien claimant is entitled to come in, after a sale has been made of the property, under a special *fieri facias,* and obtain another *fieri facias,* to enforce his lien claim by a sale of the same property.
>
> "To avoid any such absurd result, section 29 of the Mechanics' Lien Act provides, that all liens are concurrent liens for erecting, adding to, repairing or altering the same building, etc., and are to be paid *pro rata,* out of the proceeds thereof, when sold by virtue of the Act. It is therefore quite obvious that the sale of the premises in question, under the lien claim judgment of the Engler Company, by force of section 28 of the Mechanics' Lien Act, had the legal ef-

> fect to wipe out the lien claim of the Posnak & Turkish, Inc. This being so it had no interest whatever in the contemplated action of the owner of the property in paying off any or all of the mortgage encumbrances thereon."

Appellee respectfully contends that the final paragraph of the opinion of this Honorable Court is not susceptible of the construction which appellant desires to place thereon. We believe that an examination of the facts and circumstances connected with the litigation which were before this Honorable Court at the time the opinion just cited was rendered, will indicate most clearly and strongly that the last part of the opinion is *obiter dictum,* and not the early part of the opinion as is contended for in the brief of the appellant.

While it may be true that citations from other jurisdictions are not really applicable, because of the difference in the wording of the different statutes dealing with the subject of mechanic liens, yet it is respectfully submitted that some of the general statements contained in text books and law notes may be helpful. In 47 L. R. A. (N.S.) page 706, under the following title *"Remedy of holder of Mechanics Lien, after judicial sale of property under a prior or contemporaneous lien and before distribution of fund" appears the following statement*:

> "It may, however, be stated that in most jurisdictions, the judicial sale by other lien holders divests the lien as to the property, at least where the lien upon which the sale was made is prior; and where the statutory action is wholly *in rem,* no action can be maintained upon the divested lien for the purpose of ascertaining the amount of the claim or fixing its standing, but in all such

cases the claimant has a corresponding lien upon the fund arising from the sale, and may have his standing fixed and the amount of his claim ascertained by the court distributing the fund. Where, for any reason, his lien is not divested of course, his surest remedy is to pursue the property in the hands of the purchaser."

Also, Phillips on Mechanics' Liens (Third Ed. 1893) par. 252:

"*When equality is provided by Statute* * * * * And accordingly when 'a *pro rata*' distribution is to be made to several mechanics, who have recovered judgment out of the proceeds of a sale made by a sheriff of the property subject to the liens, if one of the creditors receive from the sheriff more than his *pro rata* share of the proceeds, the other creditors may have a right to sue for the excess; but the suit cannot be brought in the name of the sheriff, because the latter has no such right. *The sale, however, by the sheriff upon any one of the lien claims divests the liens of all, and the purchaser will hold it discharged of the encumbrance.* * * * *"

Also, 18 Ruling Case Law (1917) page 968:

"In a number of jurisdictions the rule is settled that a mechanic's lien is discharged by a judicial sale of the real estate bound by the lien, when the sale was ordered on a claim or other lien having priority over the mechanic's lien, unless there is an agreement to the contrary. Under this rule, when the lien is lost, the claimant is remitted to the fund produced by the sale for the satisfaction of his claim. In such a case, and in a jurisdiction in which a suit to enforce a mechanic's lien is considered as strictly *in rem*, as the lien is divested the suit cannot be further maintained even to ascertain the amount

> of the claim, but the lienholder may have the amount of his claim ascertained and its standing determined before the court or the auditor who distributes the fund. This rule as to the discharge of a mechanic's lien by the judicial sale of the property bound by such lien does not obtain in all jurisdictions."

The following citation is illustrative of the fact that the Circuit Court has jurisdiction to handle all cases arising under the statute:

> *Pepiak v. Halbert,* 5 M. 471, 137 Atl. 834 (Cir. Ct. 1927)
>
> Sale of premises under judgment on mechanics lien. $1724.00 reserved to be held by Clerk to cover interest of Knoettners, whose claim had not yet been reduced to judgment. Knoettners now seek order to compel clerk to pay since lien claim has been on file for 3 months and no caveats filed. Now several lien claimants ask leave to litigate Knoetters' claim.
>
> DONGES, *J.*: Under Sec. 29. This Court can grant the requested leave to defend, because the statute charges this court with the duty to see to the proper disposition of the fund.
>
> At p. 473: "Lester A. Drenk, Trustee, the purchaser of the premises at the sale under the execution issued in this case, applied to be allowed to contest the Knoettners' claim. Inasmuch as the sale discharged the lien, it is not apparent how Drenk can have any interest in the disposition of the fund. The application of Drenk to be admitted to defend is denied."

A citation from Pennsylvania on this point is also interesting. *Anshutz* vs. *McClellond,* 5 Watts, 487 (Pa. 1836):

> "Where there are various liens filed, in conformity to the acts of assembly passed on the subject, by different mechanics and lumber and material men against the same house, for work done and lumber and materials furnished and used in the construction thereof, it is clear that a proceeding and sale of the house upon anyone of the liens will release it from the whole of them; and the purchaser at the sheriff's sale will accordingly hold it entirely discharged therefrom. This is perfectly manifest from the language of the Act of 1806, because it is expressly provided, that, 'if the house should not sell for a sum of money sufficient to pay all the demands for work and materials, then, and in such case, the same shall be averaged, and each of the creditors paid a sum proportioned to the several demands.' This shows demonstratively, that there can be but one sale, and that that having been once effected by a proceeding in the case of any of such lien-creditors, no proceeding can be carried on afterwards with a view to a second sale."

The Court's special attention is directed to the argument contained in appellants' brief on page 21, et seq., that most of the opinion of this Court reported in 7 N. J. Adv. Reports and 146 Atlantic, is *obiter dictum*. Appellee strenuously contends this is not so and to support its contention, refers to the following citations:

*Railroad Companies* vs. *Schutte*, 103 U. S. 118 (1880), p. 143:

> "As to the first question, we deem it sufficient to say that the Supreme Court of Florida has distinctly decided that in the case of this company, as well as the other, the statutory authority was complete. The point was directly made by the pleadings and as directly passed on by the court. Although the bill in the case was finally dis-

missed because it was not proved that any of the State bonds had been sold, the decision was in no just sense dictum. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."

*Union Pacific* vs. *Mason City Co.*, 199 U. S. 160 (1905), p. 166:

"Of course, where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on ~~either~~ neither is *obiter*, but each is the judgment of the court and of equal validity with the other. Wherever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum * * * *"

*Bowman* vs. *Freeholders of Essex*, 73 N. J. L. 543, p. 547:

"When a decision upon a point of law has been made upon solemn argument and upon mature deliberation, the community have a right to regard it as a just declaration or exposition of the law; and to regulate their actions by it. When a rule has once been deliberately adopted and declared, it ought never to be disturbed by the same court, except for very urgent reasons and upon a clear manifestation of error." I Kent Com.

475. Most of the present members of this court have been appointed since the promulgation of the two decisions referred to, and, perhaps, if the question presented by this writ of error was one of novel impression, a different conclusion might be reached. But this fact affords no ground for our refusal to accept and enforce the rule our predecessors have established. As has already been said, nothing short of an absolute conviction of its unsoundness would justify such action on our part. If the decision of a court of last resort is to be overturned by that body whenever its accuracy may be thought by the judges to be questionable, it is difficult to devise (in the language of the late Chief Justice Beasley, in *Graves* vs. *State,* 16 Vroom 208) upon what stable basis the administration of the law is to be conducted."

## POINT 2.

Appellant makes the contention that there are different classes of lien claims, and points out a decision of Vice-Chancellor Berry, an observation of Mr. Luce in his work of Mechanics Liens, and also an opinion by Vice-Chancellor Backes. Appellee contends that use of the word "class" in connection with mechanics lien claims is absolutely erroneous and does not properly describe what the Mechanics' Lien Act intended to create insofar as priorities or preferences as between mechanics lien claimants and mortgagees are concerned.

Appellee contends that there can be but one class of mechanics lien claims. Laborers, by virtue of the Act, are given preference. All other claims are concurrent. The only other distinction is that of priorities as between lien claims over mortgages on

the same properties. These questions may be affected by the provisions of the Mechanics' Lien Act itself, having in mind Sections 14 and 15, or these questions may be affected by virtue of the fact that the claimants may or may not have postponed their right of mechanics lien in any given case to the lien of mortgages on the same property.

Appellant in its brief also advances the contention that the construction of the Mechanics' Lien Act contended for by appellee, will nullify Sections 14 and 15 of the Act. This is absolutely not so. The Mechanics' Lien Act itself contains a provision especially enacted for the purpose of protecting persons who file mechanics lien claims on property where there is more than one claimant and where there may be the possibility of contention between claimants as to their respective rights of priority over one another, or over mortgages on the same property. The Circuit Court which is given jurisdiction has sufficient power to protect one claimant from taking advantage of another claimant. We are quoting herein in full Section 29 of the Mechanics' Lien Act, to wit: (italics ours)

> "All lien claims for erecting, adding to, repairing or altering the same building shall be concurrent liens upon the building and the land whereon the same is erected, and shall be paid *pro rata* out of the proceeds thereof, when sold by virtue of this act; and for the purpose of distribution, the sheriff or other officer shall pay such proceeds to the clerk of said circuit court, to be by said court distributed among such claims filed, or as shall be filed according to this act before petition filed in said court for distribution thereof, and among such only; but the amount paid to any claimant shall not be paid over to him until after his claim shall have been filed for three months; and if a caveat be filed against such claim by the

owner or by any claimant or claimants owning together one-third of the lien claims filed against such building, then, not until such claim shall have been established by a special judgment thereon; *and such circuit courts shall have full power to adopt such rules of practice and pleading, and to make all orders necessary and proper to carry into effect the objects of this act, and to secure a proper disposition of the proceeds of sales to all persons entitled thereto by the provisions of this act.* (P. L. 1808, p. 550)"

The plaintiff in the within suit knew when it filed its lien claim in the Hudson County Circuit Court that the Charles H. Engler Lumber Company had filed a mechanics' lien claim, and in its proceedings had not joined any mortgagees, and also that a judgment had been entered upon the lien claim of Charles H. Engler Lumber Company. For proof of this, see paragraph 11 of the Lien Claim, State of Case, page 5; paragraph 10 of the Complaint, State of Case, page 14; paragraph 13 of the Complaint as set forth on page 15 of the State of Case. The judgment of March 16th, 1928 entered on the lien claim of Charles H. Engler Lumber Company, referred to in the various portions of the State of Case just cited, is the judgment on which a special *fieri facias* was issued, and under which the sheriff sold the same land as described in the appellant's lien claim.

It is respectfully contended that the last portion of Section 29 set forth in full herein, gave the Hudson County Circuit Court full power to make any order necessary and proper to carry into effect the objects of the Mechanics' Lien Act and to secure a proper distribution of the proceeds of the sale of this property to any and all persons entitled thereto by virtue of the provisions of the Mechanics' Lien Act. That under and by virtue of Section

29 the present plaintiff could have made application to the Hudson County Circuit Court before the sale by the sheriff under the Engler judgment, and the Hudson County Circuit Court would have had full power to restrain such sale until the same could have been conducted so as to protect the rights not only of the appellant therein, but also of all other mechanics' lien claimants who had filed mechanics' lien claims against the same property. If such an application had been made by appellant, the present appellee would have had notice before said sale and both the appellant herein and the defendant Center Realty Company could have protected their respective interests in the property in question at such a sale by the sheriff of Hudson County. But instead of appellant in the within suit doing that, it interposed no objection to the sale by the sheriff of Hudson County of the property in question, subject to the mortgages of appellee, and it was sold in that manner. Appellee did not have to take any affirmative action in that sale, to protect its mortgages, because the purchaser bought the property subject to appellee's mortgages.

Appellee's argument before the Circuit Court and which it repeats now for the purpose of endeavoring to have this Honorable Court affirm the action of the lower court, is that when the sheriff of Hudson County sold the estate of the Neswit Realty Co. in and to the lands described in the Engler lien claims, which lands were the same lands as are described in the within plaintiff's lien claim, that that sale operated to extinguish any and all right, title and interest which the Neswit Realty Co. had in and to said land, and that the deed of the sheriff as provided for in Section 28 of the Mechanics' Lien Act conveyed to the purchaser at that sale, the estate which the Neswit

Realty Co. had therein at the commencement of the building being erected thereon. Consequently, the Hudson County Circuit Court at the time of the trial, being apprised by the pleadings and by the facts that the estate of the building and owner described in the lien claim and in the summons and complaint issued thereon, had been extinguished by operation of law in accordance with the provisions of the Mechanics' Lien Act, was absolutely correct in refusing to enter a special judgment in favor of the plaintiff against said builder and owner. Such a judgment would be an empty and useless act, and certainly, if the estate of the owner, to wit, Neswit Realty Co. was extinguished by operation of law by virtue of the writ of execution and the sale by the sheriff of Hudson County in the Engler case, and if the mortgages of the Center Realty Co. had been paid off and cancelled at the time of trial, then certainly the plaintiff was not entitled to a judgment in the within suit, establishing the priority of its lien claim as to the mortgages of the Center Realty Company. A mechanics' lien claimant in the Circuit Court certainly cannot have a judgment of priority over a mortgage which is cancelled of record, and surely can have no judgment of priority in any given case where it is not entitled to the special judgment permitted by the Mechanics' Lien Act.

Appellant raises in its brief the point (See page 17 of Appellant's brief) that appellee has been paid in full and its interest in the present proceedings is largely academic, if it has any interest at all. Still quoting from appellants' brief, it goes on and says:

> "The appellee's mortgages have been satisfied and it is difficult to see from what theory

> it bases its present opposition to the judgment sought by the appellant."

Appellee respectfully refers to the argument before the Hudson County Circuit Court as set forth on page 32 of the State of Case, beginning at line 21:

> "if appellant sincerely felt that the present appellee had no interest in the proceeding, it is difficult to understand why he did not discontinue against the mortgagee and take his judgment against the builder and owner."

This proposition was advanced before the Circuit Court and it is respectfully contended that by the insistment of appellant that it desired a special judgment, and also an established adjudication that the lien claim was prior to appellee's mortgages, made appellee a proper party in the Circuit and makes it a proper party in connection with this appeal.

Appellee therefore strenuously contends that by virtue of the various sections of the Mechanics' Lien Act which have been pointed out in this brief, and by virtue of the decision of this Honorable Court in the case of Harris vs. Neswit, the judgment of the Hudson County Circuit Court should be affirmed with costs.

Respectfully submitted,

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