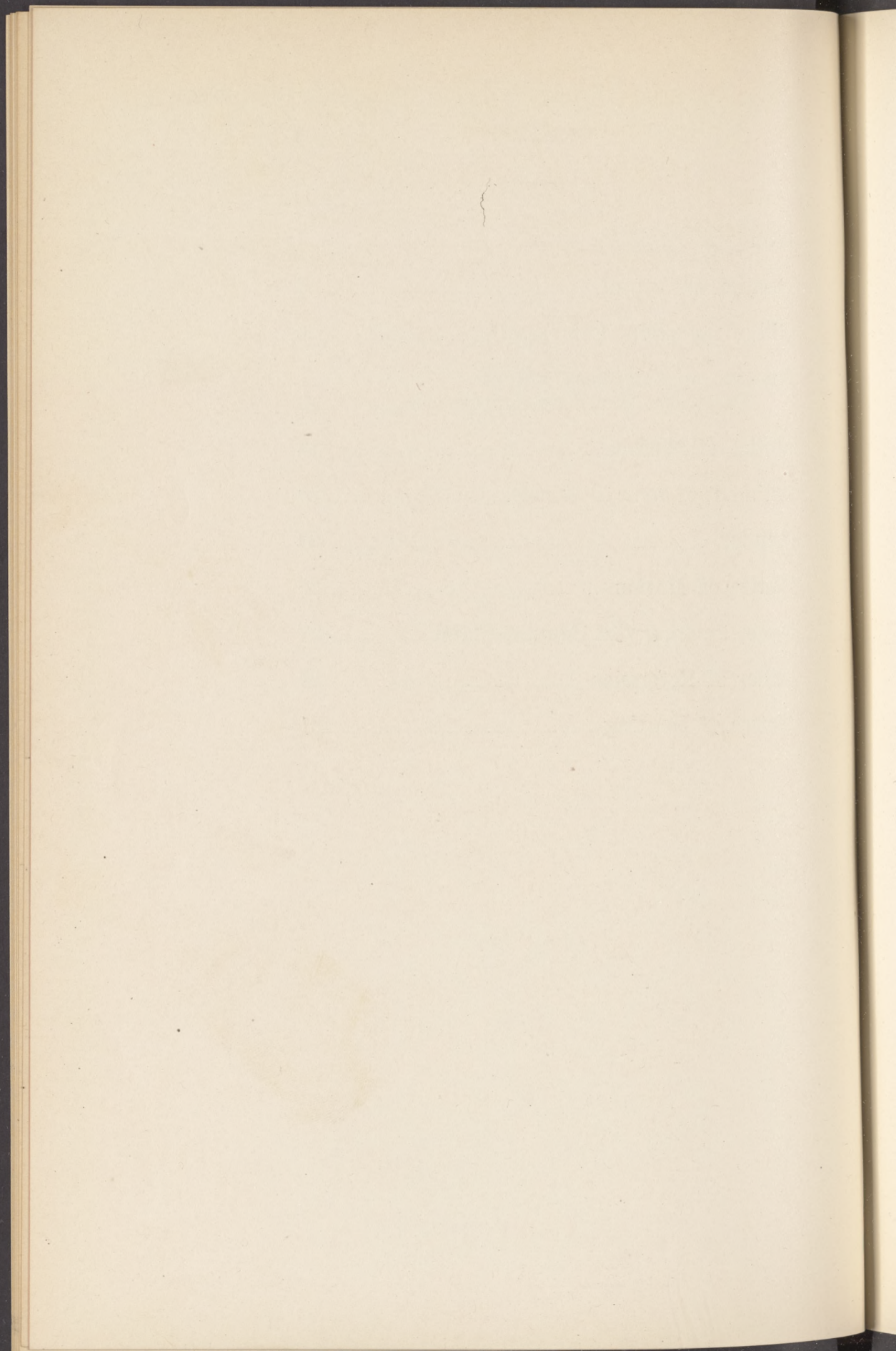


INDEX

i

	Page
Notice of Appeal.....	1
Petition of Appeal.....	3
Bill of Complaint (Abridged).....	6
Answer and Counter-Claim of Defendant American Supply Company.....	13
Notice of Motion.....	18
Affidavit of John A. Hensler.....	20
Opinion	23
Notice of Motion.....	25
Order Striking Out Counter-Claim.....	27
Order of Reference.....	29
Notice of Hearing.....	31



Notice of Appeal

1

NOTICE OF APPEAL

Filed August 8, 1931

IN CHANCERY OF NEW JERSEY

10

FREDERICK C. TORREY
and CHARLES S. SHINN,
Complainants,
vs.

SAMUEL BLAIR, et als.,

Defendants.
On Bill to
Foreclose

NOTICE OF
APPEAL

20

The Defendant, AMERICAN SUPPLY COMPANY, a body corporate of the State of New Jersey, hereby appeals from so much of the interlocutory decree made in the above entitled cause by the Chancellor, on the advice of Vice Chancellor Edmond B. Leaming, on the Second day of July, nineteen hundred and thirty-one, as orders and directs that the counter-claim filed on behalf of the Defendant, AMERICAN SUPPLY COMPANY, be stricken off, to the Court of Errors and Appeals in the Last Resort in All Causes. 30
Dated: July 30, 1931.

RUSSELL G. CONOVER,

Solicitor for and of Counsel with
Defendant American Supply Company. 40

2

Notice of Appeal

I conceive that there is good cause for appeal in the above entitled cause.

RUSSELL G. CONOVER,
Of Counsel with Defendant
American Supply Company.

10

ENDORSEMENT

Service of a copy of the within Notice is hereby acknowledged this 8th day of August, 1931.

SAMUEL P. HAGERMAN,
Solicitor of Complainant.

20

30

40

PETITION OF APPEAL

Filed August 8, 1931

NEW JERSEY COURT OF ERRORS AND
APPEALS

10

FREDERICK C. TORREY
and CHARLES S. SHINN,
Complainant-Appellees,

vs.

SAMUEL BLAIR, et als., AM-
ERICAN SUPPLY COM-
PANY,
Defendant-Appellant.

On Appeal
from the Court
of Chancery

PETITION OF 20
APPEAL

TO THE HONORABLE THE COURT OF
ERRORS AND APPEALS IN THE LAST
RESORT IN ALL CAUSES:

The Petition of AMERICAN SUPPLY
COMPANY, a body corporate of the State of
New Jersey, the Appellant in the above entitled
cause, respectfully shows that:—

30

1. The Petitioner finds itself aggrieved by
an interlocutory order made in the Court of
Chancery, by his Honor Edwin Robert Walker,
Chancellor of the State of New Jersey, on the 40

advice of Vice Chancellor Edmond B. Leaming, bearing date July 2, 1931, in a certain cause in said Court of Chancery wherein the said Frederick C. Torrey and Charles S. Shinn were Complainants and the said American Supply Company, among others, was Defendant, in this respect, to wit; that the said order adjudges and directs that the counter-claim filed on behalf of this Defendant, American Supply Company, be
10 stricken off.

2. And the Petitioner appeals from that part of the order of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, in that:

a. The learned Court erred in holding that Defendant, American Supply Company, was not entitled to discharge the mortgage lien upon lots upon which the Defendant holds a mechanics' lien by paying to the mortgagees the stipulated release money.
20

b. The learned Court erred in holding that the covenant contained in the complainants Mortgage whereby the mortgagees agreed to release to the mortgagor any lot from the lien of their mortgage upon the payment by the mortgagor to the mortgagees of the sum of One Hundred Dollars was limited in its application to releases by the mortgagees to the mortgagor upon the payment by the mortgagor to the mortgagees of the amount named.
30

c. The learned Court erred in striking out the counter-claim filed by the Defendant, American Supply Company.

40 The Petitioner therefore prays that the said

Petition of Appeal

5

order of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that the Petitioner may have such other relief in the premises as to this Court shall seem proper.

RUSSELL G. CONOVER,
Solicitor for and of Counsel with Appellant,

10

ENDORSEMENT

Service of a copy of the within Petition of Appeal is hereby acknowledged this 8th day of August, 1931.

SAMUEL P. HAGERMAN,
Solicitor of Complainants.

20

30

40

BILL OF COMPLAINT

Filed October 1930

DOCKET 81, PAGE 330

10

IN CHANCERY OF NEW JERSEY

To: THE HONORABLE EDWIN ROBERT
WALKER, Chancellor of the State of New
Jersey:

The complainants, Frederic C. Torrey, and
Charles S. Shinn, of in the County of Montgom-
ery in the Commonwealth of Pennsylvania re-
spectfully show that:

20

1. On September 21, 1929, Samuel Blair,
being indebted to the said Frederic C. Torrey
and Charles S. Shinn, in the sum of \$61,500.00
executed to them a bond on that date to secure
that sum, payable as follows:

30

"Ten thousand dollars within one year from
the date thereof, Ten thousand dollars with-
in two years from the date thereof, and the
balance, Forty-one thousand five hundred
dollars within three years from the date
thereof."

with interest at the rate of six per centum per
annum payable half yearly from the date of the
bond.

2. To secure payment of the bond said
40 Samuel Blair executed to said Frederic C. Tor-

rey and Charles S, Shinn a mortgage of even date with the bond; and thereby conveyed to them in fee the land hereinafter described on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage having been first duly acknowledged and certificate of acknowledgement duly endorsed thereon was recorded on September 26, 1929, in the office of the Clerk of the County of Ocean in Book No. 231 of mortgages page 203. 10

3. The mortgaged premises are described as follows:

"All those certain tracts or parcels of land and premises hereinafter particularly described, situate in the Borough of Lakehurst in the County of Ocean and State of New Jersey, and laid down on a certain map or plan entitled "Plan of the Westerly part of the Village of Manchester, New Jersey, showing the property of Elizabeth C. Torrey, August 1, 1895, filed in the office of the Clerk of the County of Ocean November 15, 1895, and known and designated on said Plan as and by the Blocks and Lots numbered as follows: 20

Lots Six to Seventeen (6 to 17) inclusive on Block Sixteen (16); Block Seventeen (17); Block Eighteen (18); Block Thirty-three (33); Block (32); Block Thirty-one (31); Block Thirty (30); Lots One and Four to Twenty-two (1 and 4 to 22) inclusive on Block Twenty-nine (29); Lots Three to Eighteen (3 to 18) inclusive on Block Twenty-eight (28); Lots Nine to Eleven (9 to 11) inclusive on Block Twenty-seven (27); 40 30

10 Block Thirty-four (34) and the unnumbered tract owned by the Grantors North of it, Block Thirty-five (35); Block Thirty-six (36); Block Thirty-seven (37); Lots One to Ten (1 to 10) inclusive and lots Fifteen to Twenty-two (15 to 22) inclusive on Block Thirty-eight (38); Block Forty-eight (48) and the unnumbered Tract owned by the Grantors North of it; Block Forty-seven (47); Lots One to Twenty-two (1 to 22) on Block Forty-six (46); Block Forty-five (45); Block Forty-nine (49) and the unnumbered tract owned by the Grantors North of it, Block Fifty (50); Block Fifty-one (51); Block Fifty-two (52); Block Fifty-three (53); Block Fifty-five (55); Block Fifty-six (56); Block Fifty-seven (57); Block Fifty-nine (59); Block Sixty (60); Block Sixty-one (61); Block Sixty-two (62); Block Sixty-three (63); Block Sixty-four (64); Block Sixty-five (65); Block Sixty-six (66); and the unnumbered tract owned by the Grantors North of it.

30 BEING the same premises which Frederick C. Torrey and Anna P., his wife, Charles S. Shinn and Leslie T., his wife, by Indenture dated September 21, 1929 and duly recorded September 25, 1929 in the Clerk's office of Ocean County in Book No. 837 of Deeds, pages 352 &c. for the consideration therein mentioned, part of said purchase price being intended to be secured by this mortgage, granted and conveyed unto the said Samuel Blair.)

40 "AND it is hereby expressly stipulated and agreed by the parties to these presents that any lot above mentioned shall be re-

leased by the mortgages herein named to the mortgagor upon payment by the mortgagor to the Mortgagees of the sum of One Hundred Dollars."

4. Both bond and mortgage contained and agreement that if any installment of interest should remain unpaid for thirty days after the same should fall due then the whole principal sum, with all unpaid interest should at the option of the mortgagee, his representatives or assigns, become immediately due. 10

5. Both bond and mortgage contained the agreement that the said mortgagors and obligors:

"shall pay the taxes assessed upon the premises hereinafter described for the first half of every year on or before the twentieth day of May therein, and for the second half of every year on or before the twentieth day of November therein, and shall produce receipts for taxes for each half of every year on or before the first day of June and the first day of December respectively therein; and shall also pay all other taxes, municipal assessments or charges in the nature thereof which may be laid or assessed upon the said premises immediately upon their assessment" 20 30

6. Both bond and mortgage contained the agreement:

"that if at any time default should be made in payment of interest or any installment of principal debt as aforesaid for the space of thirty days after any semi-annual payment 40

thereof should fall due, or in the payment of any tax or charge as aforesaid, as herinbefore provided, or in such production of tax receipts as aforesaid, on or before the days aforesaid, then and in either such case each and every installment of principal debt remaining due as aforesaid should at the option of the obligees therein named, their heirs or assigns, become due and payable immediately, and payment of each and every installment of principal debt as aforesaid remaining due, and all interest thereon, should be enforced and recovered at once."

19. On June 13, 1930 the American Supply Company, a New Jersey corporation, claimant filed a mechanics' lien claim in the Ocean County Circuit Court against Jarvis R. Call, builder, and Samuel Blair, owner, affecting: part of Lots Nos. 2, 3, 4, 5, 6, 20, 21 and 22 in Block 56. Shown on "Plan of the Westerly part of the Village of Manchester, N. J. showing the property of Mrs. Elizabeth C. Torrey, (Aug. 1, 1893)" Borough of Lakehurst," Any interest which said American Supply Company has in said land is subject to the lien of Complainants' mortgage.

30. On September 21, 1930, \$10,000.00 of the principal of said bond and mortgage fell due and no part thereof has yet been paid. Complainant has elected that the whole principal sum with all unpaid interest shall be now due.

31. On March 21, 1930 one-half year's interest fell due on complainant's bond and mortgage and there was paid on account the sum of \$200, and also collected from purchase price of certain of lots in question, whose agreements were assigned to Charles S. Shinn, one of the

Complainants herein, the sum of \$232.00; the balance of said interest has remained unpaid for more than thirty days thereafter, and no part thereof has yet been paid.

32. On September 21, 1930 one-half year's interest fell due on complainant's bond and mortgage and remained unpaid for more than thirty days thereafter, and no part thereof has yet been paid. Complainant has elected that the whole principal sum with all unpaid interest shall be now due. 10

33. The said Samuel Blair, Rosa Blair, his wife, George E. Sattler, Agnes Sattler, his wife, Lakehurst Industrial Corporation, Sarah P. Kerns, Joseph Frank Gerber, Katherine Gerber, his wife, Otha N. Gunn and Mary F. Gunn, his wife, Margaret L. Ayers, Ida L. Sheppard, Joseph Schwanberg, Nellie Wiener, Kathryn L. Stevenson, Jarvis R. Call, Staples & Company, Inc., American Supply Company, J. Wilbur Smith, Heulings A. Sever, Henry E. Geren, The State of New Jersey, Acceptance Banking Corporation, or one of them has always been in possession of the mortgaged premises. 20

34. The whole amount or principal, with interest thereon from September 21, 1929, less a credit of \$432.00 is due upon Complainant's bond and mortgage. 30

Complainant is without adequate remedy in the Courts of law, and therefore prays—

1. That Samuel Blair, Rosa Blair, his wife, George E. Sattler, Agnes Sattler, his wife, Lakehurst Industrial Corporation, Sarah P. Kerns, Joseph Frank Gerber, Katherine Gerber, his 40

wife, Otha N. Gunn and Mary F. Gunn, his wife, Margaret L. Ayres, Ida L. Sheppard, Josepha Schwaneberg, Nellie Wiener, Kathryn L. Stevenson, Jarvis R. Call, Staples & Company, Inc., American Supply Company, J. Wilbur Smith, Heulings A. Sever, Henry E. Gerken, The State of New Jersey, Acceptance Banking Corporation, who are the defendants to this suit, may answer this bill of complaint and each statement
10 therein made;

2. That an account may be taken of the amount due on complainant's mortgage.

3. That the defendants, or one of them may be decreed to pay complainant the amount so found due, with interest and costs, by a short day, to be appointed by this Court; and that in
20 default of such payment, the, and each of them, be debarred and foreclosed of all equity of redemption in said lands; or

4. That a decree may be made for the sale of the mortgaged premises to raise, and pay to complainant, the amount so found due on his mortgage, with interest and costs;

5. That a writ of subpoena may issue, commanding said defendants to answer this bill of
30 complaint and to abide by such decree as this Court may make in the premises,

SAMUEL P. HAGERMAN,
Solicitor and Counsel with Complainant.

Answer and Counter-Claim of Defendant
American Supply Company 13

ANSWER AND COUNTERCLAIM

Filed November 27, 1930

IN CHANCERY OF NEW JERSEY

Between,		10	
FREDERICK C. TORREY	} On Bill To		
and CHARLES S. SHINN,		Foreclose	
Complainants,		ANSWER and	
and		COUNTER-	
SAMUEL BLAIR, et als.,	CLAIM		
Defendants.)		20	

The Answer of the Defendant American Supply Company, and the Counter-claim of the Defendant, American Supply Company, against the Complainants, Frederic C. Torrey and Chas. S. Shinn;

The Defendant, American Supply Company, answering the Bill of Complaint filed herein, say 30 that:

1. This Defendant admits the allegations contained in Paragraphs 1 to 34, inclusive, of the Bill of Complaint.

By way of counter-claim against the Complainants, Frederic C. Torrey and Charles S. Shinn, the Defendant American Supply Company, say that: 40

**Answer and Counter-Claim of Defendant
American Supply Company**

14
10 1. The Mortgage given by Samuel Blair to the Complainants, Frederic C. Torrey and Chas. S. Shinn, as alleged in Paragraphs 2 and 3 of the Complainants' Bill of Complaint, contained an agreement that the mortgagees would release to the mortgagors any lot mentioned in the description of the mortgaged premises upon the payment, by the mortgagor to the mortgagees, of the sum of One Hundred Dollars.

2. That between March 12, 1930, and May 3, 1930, this Defendant, said American Supply Company, furnished materials for a certain building then being erected upon a part of the mortgaged premises by Jarvis R. Call, as Builder and for Samuel Blair, as Owner.

20 3. Thereafter, on or about June 13, 1930, this Defendant, not having been paid for said materials, filed, in the Office of the Clerk of the County of Ocean, a lien claim upon the premises hereinafter described, for the sum of \$2934.19, pursuant to an Act of the Legislature of the State of New Jersey entitled, "An Act to secure to mechanics and others payment for their labor and materials in erecting any building and in making certain improvements to land (Revision of one thousand nine hundred and ninety-eight)."

30 4. On June 21, 1930, a suit upon said lien claim was commenced by this Defendant in the Ocean County Circuit Court against said Samuel Blair, as Owner, and Jarvis R. Call, as Builder, and George E. Sattler and Heulings A. Sever; which said suit is still pending and undetermined before said the Ocean County Circuit Court.

40

Answer and Counter-Claim of Defendant
American Supply Company

15

5. The lands and premises upon which this Defendant claims a lien for materials furnished, as aforesaid, are described as follows:

BEGINNING at a point distant 330 feet and 22 Hundredths of a foot on a course South 75 degrees 27 minutes West from a marble monument standing at the North-east corner of Myrtle street and Union Avenue, as shown on a map entitled "Plan of the Westerly part of the Village of Manchester, N. J., showing the property of Mrs. Elizabeth C. Torrey, August 1, 1895, made by A. P. Irons, C. E." and filed in the office of the Clerk of the County of Ocean; the bearing of said Union avenue, towards the East, being South 86 Degrees East from said monument; and thence from said beginning point running, as the magnetic needle pointed in June, 1930, (1) North 2 Degrees 40 Minutes East 193 feet and 83 Hundredths of a Foot to a point; thence (2) North 87 degrees 20 Minutes West 112 Feet and 37 Hundredths of a Foot; thence (3) South 2 Degrees 40 Minutes West 193 Feet and 83 Hundredths of a Foot; thence (4) South 87 Degrees 20 Minutes East 112 Feet and 37 Hundredths of a Foot to the point or place of beginning, and containing One Half acre. Being parts of Lots Numbers 2, 3, 4, 5, 6, 20, 21 and 22, in Block 56, as shown on said map; the foregoing description by metes and bounds conforming, however, with the location of the streets and buildings as they now exist.

The said lots in Block 56 are according to the map or plan of lots referred to in the Complainants Mortgage.

40

**Answer and Counter-Claim of Defendant
American Supply Company**

16

6. This Defendant is informed and verily believes that the Complainant, Charles S. Shinn, resides in the State of Pennsylvania, and that the Complainant, Frederic C. Torrey, although alleged in the Bill of Complaint to reside in the County of Montgomery in the State of Pennsylvania, now is, and for some time has been, actually in the City of Washington in the District
10 of Columbia; that by reason of the Mortgagees being out of the State of New Jersey, and being widely separated, this Defendant is unable to meet said Mortgagees personally and to personally tender a proper sum of money and demand of them a release of such mortgaged lots as are affected by this Defendant's mechanics lien.

7. This Defendant is ready, able and willing, either individually or in conjunction with
20 other persons, firms or corporations who may have liens upon said property, to pay to the Complainants the sum of Eight Hundred Dollars, together with interest thereon from September 21, 1929, the same being the sum of One Hundred Dollars for each of said mortgaged lots affected by this Defendant's mechanics' lien; or to pay said sum, or such sum as the Chancellor shall deem equitable and just, to the Complainants, or to the Clerk in Chancery, as the Chancellor may
30 direct, for the purpose of having said lots released from the lien of the Complainant's mortgage in order to protect said mechanics lien or liens.

8. This Defendant alleges that unless the aforesaid lots are released from the lien of Complainants mortgage, the mechanics lien of this Defendant, as well as the liens of other lien claimants, will be cut off and rendered worthless by the foreclosure of the Complainants mortgage.
40 gage.

**Answer and Counter-Claim of Defendant
American Supply Company** 17

This Defendant is without an adequate remedy in the courts of law and therefore prays:

1. That the Complainants, Frederic C. Torrey and Charles S. Shinn, may answer this counter-claim and each statement therein made.

2. That a decree may be made directing this defendant, either individually or in conjunction with any other person or persons, firm or corporation, having a lien upon the same premises, to pay to the Complainants, or to the Clerk in Chancery, the sum of Eight Hundred Dollars, with interest, or such sum as in equity and good conscience ought to be paid, and that thereupon: 10

3. The Complainants be ordered and decreed to execute and deliver to this Defendant, or to any other person or persons, firm or corporations, as the Chancellor may direct, an instrument releasing from the lien of Complainants mortgage such mortgaged lots as may be affected by this Defendant's mechanics lien. 20

4. That such order or decree may be made in the premises as to the Chancellor shall seem equitable and just.

And the Defendant will ever pray, etc. 30

RUSSELL G. CONOVER,
Solicitor for and of Counsel with
Defendant, American Supply Co.

NOTICE OF MOTION

Filed December 22, 1930

IN CHANCERY OF NEW JERSEY

10	Between, FREDERICK C. TORREY and CHARLES S. SHINN, Complainants,	}	81/330 ON BILL TO FORECLOSE NOTICE OF MOTION TO DISMISS COUNTER- CLAIM AND TO ENTER A DECREE ON THE ANSWER
20	and SAMUEL BLAIR, et als., Defendants.		

To: Russell G. Conover, Esq., Solicitor for the
American Supply Company, one of the above
named defendants, Toms River, New Jersey:

Dear Sir:

Take notice that I shall move before the
Honorable Edmond B. Leaming, one of the Vice
Chancellors at the Chancery Chambers in the
30 City of Camden on Monday, December 22, 1930,
at ten o'clock A. M. or as soon thereafter as the
same can be heard for an Order to Dismiss the
Counter-claim filed on behalf of the American
Supply Company, one of the above entitled de-
fendants and to enter a decree on the facts ad-
mitted in the Answer of said defendant, based
upon the following reasons, namely:

1. That it is alleged in the Bill and admit-
40 ted by the Answer of said defendant that there

was a default in the payment both of principal and interest due on the mortgage involved and that complainant had elected by reason thereof that the whole principal sum become due.

2. That is it not averred in said Counter claim that any demand or tender for a release of any of the lots secured by said mortgage was made until after the maturity of said mortgage, after default in payment of both interest and principal, after bill was filed and subpoena ad respondendum issued and was served on or acknowledged by said defendant. 10

3. That the said Counter-claim discloses no equity in the said defendant.

SAMUEL P. HAGERMAN,
Solicitor for Complainant. 20

ENDORSEMENT

Due and legal service of the within notice is hereby acknowledged and consented to as within time.

RUSSELL G. CONOVER,
Solicitor for the American Supply Co. 30

AFFIDAVIT

 Filed December 22, 1930

IN CHANCERY OF NEW JERSEY

10 Between

 FREDERICK C. TORREY
 and CHARLES S. SHINN,
 Complainants,

and

 SAMUEL BLAIR, et als.,
 Defendants.

 On Bill to
 Foreclose
 AFFIDAVIT

 20 STATE OF NEW JERSEY } ss.:
 COUNTY OF OCEAN

JOHN A. HENSLER, being duly sworn according to law, upon his oath deposes and says:

1. I am the Treasurer of American Supply Company, one of the Defendants in the above entitled foreclosure suit.

30

2, Said American Supply Company, and also Staples & Co., Inc., and Heulings A. Sever, have mechanics' liens against a portion of the premises covered by the Complainants' mortgage. The part of said mortgaged premises against which mechanics' liens are filed covers all or part of eight lots, to wit: Lots numbers 2, 3, 4, 5, 6, 20, 21 and 22, in Block 56, as said mortgaged premises are described in the Complainants' mortgage.

40

3. Desiring to obtain a release of the lots covered by said mechanics' liens from the lien of Complainants' mortgage, on behalf of said American Supply Company, said Staples & Co., Inc., and said Heulings A. Sever, I did procure the sum of Eight Hundred and Sixty Dollars, (Eight Hundred and Fifty-six Dollars being estimated by me to be sufficient for the purpose), with the intent of tendering to the Complainants, Frederic C. Torrey and Charles S. Shinn, the sum of 10 Eight Hundred Dollars, being One Hundred Dollars for each lot, and the sum of Fifty-six Dollars for accrued interest thereon, and thereupon demand of Messrs. Torrey and Shinn a release of said mortgaged lots, if said mortgagees could be found.

4. I went to Lakehurst and stopped at the house of Charles S. Shinn and found no one there. I next called at the Torrey residence and found no one there. I next went down into the Village of Lakehurst and met a certain Mrs. O'Connell who is the sister of Frederic C. Torrey, and inquired of her as to the whereabouts of said Frederic C. Torrey and Charles S. Shinn. She told me that Mr. Torrey was located in Washington, D. C., and had been there for some time past, and also that Mr. Shinn resided at some place on the outskirts of Philadelphia, Penna. 20 30

5. I then proceeded to the City of Philadelphia, Pennsylvania, and called upon Samuel Hagerman, Esquire, Solicitor for the Complainants, and discussed with him the possibility of amicably procuring a release of said lots from the lien of said mortgage. I was accompanied by Russell G. Conover, Esquire, Solicitor for the Defendants, American Supply Company, and Staples & Co., Inc., and we left with Mr. Hager- 40

man a proper form of release for the purpose aforesaid, at the same time offering to transmit to him any reasonable amount which should be demanded upon the execution of said release. Said release, duly executed, since that time has not been received by me, nor do I believe that the same has ever been executed by the mortgagees.

10 6. Said American Supply Company, either individually or in conjunction with any other Defendant in this suit having a mechanics' lien upon said mortgaged premises, is ready, able, and willing, to pay the sum of Eight Hundred Dollars, plus accrued interest thereon, for a release for the purpose of protecting its or their mechanics' liens.

JOHN A. HENSLER.

20 Sworn and subscribed to this Twentieth day of December, A. D., 1930, before me,

ALBERT W. LILLIE,
Notary Public of New Jersey.

30

40

OPINION

Filed March 19, 1931

81|330

IN CHANCERY OF NEW JERSEY

Between			
FREDERICK C. TORREY	}	On Bill to	10
and CHARLES S. SHINN,		Foreclose	
Complainants,		Mortgage	
and		Hearing on mo-	
SAMUEL BLAIR, et als.,		tion to strike	
Defendants.		out counter-	
		claims	
		OPINION	

Samuel P. Hagerman, Esq.,	For Complainant,	20
	for the motion.	
Russell G. Conover, Esq.,	For Defendants, Am-	
	erican Supply Co.,	
	and Staples & Co.,	
	Inc.	
Hon. David A. Veeder,	For Defendant, Heu-	
	lings A. Sever.	30

LEAMING, V. C,

The only essential inquiry herein is whether the release clause contained in complainants' mortgage enables three defendants, each of whom has filed mechanic's liens for labor or materials supplied to a building on certain lots embraced in the mortgage, to discharge the mort- 40

gage lien on such lots by paying to the mortgagees the stipulated release money.

The release clause contained in complainants' mortgage is as follows:

10 "And it is hereby stipulated and agreed by the parties to these presents that any lot above mentioned shall be released by the mortgagees herein named to the mortgagor upon the payment by the mortgagor to the mortgagees of the sum of One Hundred Dollars."

20 The language of this covenant, like that in *Dimco vs. Ellenstein, et al*, 106 N. J. Ep. 298 (150 At. Rep. 675), specifically limits its application to releases by the mortgagees "to the mortgagor upon the payment by the mortgagor to the mortgagees" of the amount named. The right of the parties to so limit the operation of the covenant cannot be doubted.

30 In *Ventnor Investment Co. vs. Record Development Co.* 79 N. J. Eq. 103, cited by defendants, the terms of the release covenant were in no way restrictive, and the evidence disclosed that the covenant was contemplated by the parties and applied by them as a covenant available to and for the benefit of purchasers of lots.

This view renders unnecessary a consideration of the other objections made by complainant.

40 The Counter-claims will be stricken out Determined March 18th, 1931.

NOTICE OF MOTION

IN CHANCERY OF NEW JERSEY

Between

FREDERICK C. TORREY
and CHARLES S. SHINN,
Complainants,
and
SAMUEL BLAIR, et als.,
Defendants.

81|330
On Bill to 10
Foreclose
NOTICE

To: Russell G. Conover, Esq., Solicitor for Defendants, American Supply Co., and Staples & Co., Inc.

To: David A. Veeder, Esq., Solicitor for Heulings A. Sever, defendant,

To: Herbert A. Drake, Esq., Solicitor for defendants, George E. Sattler and Agnes, his wife:

Gentlemen:

Take Notice, that I shall apply to the Honorable Vice Chancellor Leaming, at the Chancery Chambers in the Court House, in the City of Camden, on Monday, June 22nd, 1931, at 10 o'clock A. M., or as soon thereafter as the same can be heard, (Daylight Saving Time) as follows:

1. For the entry of an order and fixing the terms thereof striking out the Counter-claims respectively filed by the American Supply Company, Staples & Co., Inc., and Heulings A. Sever, 40

defendants in accordance with the announcement by the Court granting the same, on March 19th, 1931 and

2. For an order of reference to a master as provided by statute and the rules of the Court, it appearing that the answers filed respectively by the defendants American Supply Company, Staples & Co., Inc., Heulings A. Sever, George
10 E. Sattler, and Agnes, his wife, do not set up any defense or to present any question except as may properly be referred to a master.

Yours respectfully,

SAMUEL P. HAGERMAN,
Solicitor for Complainants.

June 9th, 1931.

20

30

40

ORDER

Filed July 2, 1931

IN CHANCERY OF NEW JERSEY

10

Between	}	81 330
FREDERICK C. TORREY		On Bill to
and CHARLES S. SHINN,		Foreclose
Complainants,		Order Striking
and		out
SAMUEL BLAIR, et als.,	}	Counter-claims
Defendants.		

20

This matter coming on to be heard, in the presence of Samuel P. Hagerman, Solicitor for Frederick C. Torrey, and Charles S. Shinn, the Complainants, and of Russell G. Conover, Solicitor for the defendants, American Supply Co., and Staples & Co., Inc., and of David A. Veeder, Solicitor for Heulings A. Sever, one of the said defendants, and it appearing that answers and counter-claims were filed to the Bill of Complaint on behalf of the American Supply Co., of Staples & Co., and of Heulings A. Sever, defendants, and that notice of a motion to strike out the said counter-claims had been given; and the Court after having read the pleadings, and heard and considered the arguments of counsel in the matter, being satisfied that the said counter-claims are improper, and insufficient, and no reason appearing to the contrary.

40

28 **Order Striking Out Counter-Claim**

It is on this second day of July, nineteen hundred and thirty-one, ORDERED, that the counterclaims filed on behalf of the said American Supply Company, of Staples & Co., Inc., and Heulings A. Sever, defendants, be, and the same are hereby stricken off; further that leave be given to the said respective defendants to file proof of their respective claims as in case of notice to that effect given.

10

Respectfully advised.

E. B. LEAMING, V, C.

E. R. WALKER, C.

20

30

40

ORDER OF REFERENCE

Filed July 21, 1931

IN CHANCERY OF NEW JERSEY

Between	}	81/330	10
FREDERICK C. TORREY		On Bill to	
and CHARLES S. SHINN,		Foreclose	
Complainants,		ORDER OF	
and		REFERENCE	
SAMUEL BLAIR, et als.,	}		
Defendants.			

This matter coming on to be heard before the Court, in the presence of Samuel P. Hagerman, Solicitor for Frederick C. Torrey, and Charles S. Shinn, Complainants, and of Russell O. Conover, Solicitor for the defendants, American Supply Company, and Staples & Co., Inc., and of David A. Veeder, Esq., Solicitor for defendant, Heulings A. Sever, and of Herbert A. Drake, Solicitor for defendants, George E. Sattler, and Agnes Sattler, his wife, and it appearing that the Counterclaims filed respectively by the defendants American Supply Company, Staples & Co., Inc., and by Heulings A. Sever have been strickoff; and it further appearing that the answers filed respectively, by the American Supply Company, Staples & Co., Inc., Heulings A. Sever, George E. Sattler, and Agnes Sattler, his wife, do not set up any defense or present any question except as may properly be referred to a master; and it further appearing that due notice of this motion has been given,

and the Court after having read the pleadings, and heard the arguments of counsel, being satisfied as stated, and no reason appearing to the contrary:

It is on this 21st day of July, nineteen hundred and thirty-one, on motion of Samuel P. Hagerman, solicitor for said Complainants, ORDERED, that this matter be referred to George C.
10 Low, Esq., one of the Masters of this Court, to ascertain and report the amount due to the said Complainant, for principal and interest upon the mortgage held by the Complainant upon the premises described in the Bill of Complaint, and also the amount due, if anything to the said defendants upon their respective claims, and to report accordingly, and also to ascertain and report
20 the order and priority of the said claims respectively, whether they all embrace the same premises, and whether the said mortgaged premises should be sold, together or in parcels, and if in parcels, in what order. And that the said Master make his report with all convenient speed.

And all further equity is reserved until the coming in of the said Master's report.

30 Respectfully advised.

E. B. LEAMING, V. C. E. R. WALKER, C.

NOTICE OF HEARING

NEW JERSEY COURT OF ERRORS AND
APPEALS

FREDERICK C. TORREY and CHARLES S. SHINN, Complainant-Appellees,	} On Appeal from the Court of Chancery NOTICE OF HEARING	10
vs. SAMUEL BLAIR, et als., AM- ERICAN SUPPLY COM- PANY, Defendant-Appellant.		20

To: THE APPELLEES, FREDERICK C. TORREY and CHARLES S. SHINN:

TAKE NOTICE that the argument of the Appeal in the above entitled cause will be brought on at the next term of the Court of Errors and Appeals, to be held at the State House, at Trenton, on October 20th, 1931, at the hour 30 of eleven o'clock in the forenoon, or as soon thereafter as Counsel can be heard.

RUSSELL G. CONOVER,
Solicitor for and of Counsel with
Appellant, American Supply Company.

ENDORSEMENT

Due and legal service of a copy of the within Notice of Hearing is hereby acknowledged, this 25th day of September, 1931.

10

SAMUEL P. HAGERMAN,
Solicitor for Appellees, Frederick
C. Torrey and Charles S. Shinn.

20

30

40

NEW JERSEY COURT OF ERRORS AND APPEALS

FREDERICK C. TORREY and CHARLES S. SHINN, Complainant-Appellees, vs.	} On Appeal from the Court of Chancery
SAMUEL BLAIR, et als., AM- ERICAN SUPPLY COM- PANY, Defendant-Appellant.	
	BRIEF OF DEFENDANT -APPELLANT

I

INTRODUCTORY

The Complainants, Frederick C. Torrey and Charles S. Shinn, filed a Bill in Chancery to foreclose a \$61,500.00 mortgage (Case pp 6212) on a large tract of land situate in the Borough of Lakehurst in the County of Ocean, laid out in blocks and lots and so described (Case pp 7 & 8). The Defendant American Supply Company, had previously, on June 13, 1930, filed a mechanics' lien claim against, inter alia, the Defendant Samuel Blair, as owner, affecting a part of the mortgaged premises (Case p 10), and was consequently made a party defendant. This lien claim was for materials furnished for the erec-

tion of a building on the mortgaged premises in the amount of \$2,934.19 (Case p 14).

The lands subject to said mechanics' lien are particularly described (Case p 15) as follows:

BEGINNING at a point distant 330 feet and 22 Hundredths of a foot on a course South 75 degrees 27 minutes West from a marble monument standing at the North-east corner of Myrtle Street and Union Avenue, as shown on a map entitled "Plan of the Westerly part of the Village of Manchester, N. J., showing the property of Mrs. Elizabeth C. Torrey, August 1, 1895, made by A. P. Irons, C. E." and filed in the office of the Clerk of the County of Ocean; the bearing of said Union Avenue, towards the East, being South 86 degrees East from said monument; and thence from said beginning point running as the magnetic needle pointed in June 1930 (1) North 2 degrees 40 minutes East 193 feet and 83 hundredths of a foot to a point; thence (2) North 87 degrees 20 minutes West 112 feet and 37 hundredths of a foot; thence (3) South 2 degrees 40 minutes West 193 feet and 83 hundredths of a foot; thence (4) South 87 degrees 20 minutes East 112 feet and 37 hundredths of a foot to the point or place of beginning, and containing One Half acre. Being parts of Lots Numbers 2, 3, 4, 5, 6, 20, 21 and 22, in Block 56, as shown on said map; the foregoing description by metes and bounds conforming, however, with the location of the streets and buildings as they now exist.

The said lots in Block 56 are according

to the map or plan of lots referred to in the Complainant's Mortgage.

The Complainant's Mortgage contained a release clause (Case p. 8 1, 38), as follows:

"AND it is hereby expressly stipulated and agreed by the parties to these presents that any lot above mentioned shall be released by the mortgagees herein named to the mortgagor upon the payment by the mortgagor to the mortgagees of the sum of One Hundred Dollars."

The Defendant, American Supply Company, filed an Answer and Counter-Claim (Case p 13) admitting all of the allegations of the Complainant's Bill, and, by way of counter-claim setting forth its lien claim, and asking to be allowed to avail itself of the beneficial intent of the release clause contained in the Complainant's mortgage.

On application of the Complainants, this Defendant's Answer and Counter-Claim was stricken out (Case p 27), but with leave to prove its claim, and the matter referred (Case p 29) to George C. Low, one of the Masters In Chancery, to report thereon.

No question of fact has been raised. The sole question considered by the Court below was (Case pp 23 & 24) whether the release clause contained in the Complainant's mortgage enables three defendants, each of whom has filed mechanics' liens for labor or materials supplied

to a building on certain lands embraced in the mortgage, to discharge the mortgage lien on such lots by paying to the mortgagees the stipulated release money.

II

ARGUMENT

The Petition of Appeal filed by the Defendant-Appellant (Case pp 3 to 5) sets forth three grounds for appeal. The three grounds involve the same points of law and will be argued together.

A

The learned Court erred in holding that Defendant American Supply Company was not entitled to discharge the mortgage lien upon lots upon which the Defendant holds a mechanics' lien by paying to the mortgagees the stipulated release money.

The learned Court erred in holding that the covenant contained in the Complainant's Mortgage whereby the mortgagees agreed to release to the mortgagor any lot from the lien of their mortgage upon the payment by the mortgagor to the mortgagees of the sum of One Hundred Dollars was limited in its application to releases by the mortgagees to the mortgagor upon the payment by the mortgagor to the mortgagees of the amount named.

The learned Court erred in striking out the counter claim filed by the Defendant, American Supply Company.

1. The Defendant - Appellant, American Supply Company has an equitable right to demand that the Complainants perform their agreement and release the lots affected from the lien of their mortgage, upon the payment of the stipulated sum.

a. The general rule is that where a covenant to release parts of mortgaged premises upon the payment to the mortgagees of a stipulated sum is not limited as to time, the performance of such agreement and the execution of a proper release will be compelled, even though there has been a default in the terms of the mortgage and foreclosure suit commenced. *VanArsdale, et al. vs. Gorenflo, et al.*, 93 N. J. E., 486; *Ventnor Investment Realty Company vs. Record Development Company*, 79 N. J. E., 103; *American Net and Twine Co., vs. Githins*, 57 N. J. E., 539; *Hall vs. The Home Building Company*, 56 N. J. E., 304. And such a right continues in existence until the mortgage becomes merged in the final degree. *Savings Investment & Trust Co., vs. United Realty & Mortgage Co.*, 84 N. J. E., 472; *VanArsdale, et al. vs. Gorenflo, Supra*.

b. Equity will look to the substance rather than the form of an agreement. This general rule of equity jurisprudence is too well established to require citation. In the case at Bar, the mortgaged premises consisted of a large tract of land laid out in streets, blocks and lots (Case pp 7 & 8). The release clause (Case p 8) contemplates the release of "Any lot", i. e., the release from the lien of the mortgage one or more lots, from time to time, upon the payment of a stipulated sum per lot. Regardless of the precise wording

of the release clause, the parties must have contemplated the sale of lots to individual purchasers and the release of those lots for the benefit of the purchasers or such persons as might have an interest in the same, and, in fact, for the benefit of the land itself in so far as it would aid the scheme of development. In this respect, the case is exactly the same in principal as that of *Ventnor Investment Realty Company vs. Record Development Company*, *Supra.*, and *Malba Terrace Corporation vs. Portaupeck Properties, Inc.*, 105 N. J. E., 453. While it is true that the release clause in the case at Bar refers to the making of releases by the "Mortgagees" upon payment by the "Mortgagor" it could not have been the intent of the parties to strictly limit the operation of that agreement in accordance with those precise terms, for, by the very nature of this release clause, the land itself and any person acquiring an interest therein, as well as the Mortgagors, were to receive the ultimate benefit. Again, the only actual interest the Mortgagees have in the matter is the payment of their principal and interest, and they agreed to accept reductions of the principal amount at the rate of \$100.00 per lot and release their security accordingly. And there is nothing to indicate that any lots were to be preferred or that it made any difference to the mortgagees from whom such payments were to come.

2. It would be inequitable to allow the Complainants to insist upon a strict construction of the release clause in their mortgage to the detriment of the Appellant.

a. The Defendant-Appellant, having a me-

chanics' lien on a part of the mortgaged premises, has some real interest in the mortgaged lots by virtue of "An Act to secure to mechanics and others payment for their labor and materials in erecting any building and in making certain improvements to land. (Revision of one thousand eight hundred and ninety-eight)". They have advanced materials to the value of \$2934.19 (Case p 14) for the owner of the fee in the property. Thus, the mechanics leinor holds its interest, whatever it may be, under the mortgagor. To allow the Complainants to insist upon a strict interpretation of their release agreement, contrary to the obvious intent thereof, would be to deprive the leinor of its very just and equitable statutory remedy and result in the unjust enrichment of the Complainants. It is unconscionable that equity should lend its aid in allowing the Complainant to acquire something for nothing and injure an innocent party to the extent of nearly Three Thousand Dollars.

III

CONCLUSION

The case at Bar presents a different picture than that presented in the case of *Dineo vs. Ellenstein*, 106 N. J. E., 298. In the *Dineo* case the operation of the release clause was limited as to time; and again, the persons seeking releases did not hold individual lots directly under the Mortgagor but rather, had acquired the same through mesne conveyance and apparently sought, as a last resort in financial difficulties, to pay what they could and withdraw the more valuable parcels and confine the Complainants security to the less valuable portions. No such

attempt is presented by the case at Bar, but rather the bona fide plea of an innocent party, acting in good faith, to require the Complainants to do only what they had originally agreed to do.

Respectfully submitted,

RUSSELL G. CONOVER,
Solicitor for and of Counsel
with Defendant - Appellant,
American Supply Company.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

FREDERICK C. TORREY and CHARLES S. SHINN,
Complainants-Appellees,

v.

SAMUEL BLAIR, *et als.*,
AMERICAN SUPPLY COMPANY,
Defendant-Appellant.

ON APPEAL FROM COURT OF CHANCERY.

BRIEF OF COMPLAINANTS-APPELLEES.

STATEMENT OF CASE.

This suit is filed to foreclose a mortgage of \$61,500, secured upon premises situate in the Borough of Lakehurst, County of Ocean, and three defendants, one of whom was the American Supply Company, a plaintiff in a mechanic's lien suit, affecting eight lots, being part of the mortgaged premises, filed answers, substantially alike, admitting the allegations of the bill; each also filed a counter-claim,

wherein they tendered to pay for a release of the said eight lots on which an office or community house had been partially erected, and against which they respectively claimed liens. The complainant gave notice of a motion to strike out the counter-claims (Case, pages 18 and 19), and all three motions were argued. The opinion rendered by Vice-Chancellor Leaming, is found in State of the Case, page 23, and the order striking out the counter-claims is found on page 27. An appeal has been taken from this order only by the American Supply Company, the said holder of a mechanic's lien against the eight lots; the remainder of the mortgaged premises consisting of more than a hundred acres of land subdivided into building lots is not the subject of this appeal, and not affected thereby.

The release clause in the mortgage is as follows:

“AND it is hereby expressly stipulated and agreed by the parties to these presents that any lots above mentioned shall be released by the mortgagees herein named to the MORTGAGOR UPON PAYMENT BY THE MORTGAGOR TO THE MORTGAGEES of the sum of one hundred Dollars.”

The only person who was mortgagor is the defendant, Samuel Blair; there has never been any tender or demand for a release from this mortgage by the said Samuel Blair, mortgagor, or any payment by him to the mortgagee, on behalf of any of the lots covered by this mortgage, and especially none for the eight lots in question, on which the community house is erected.

The basis of the counter-claim of the appellant is

its claim to be entitled to exercise for itself, this right to a release of the lots covered by his lien by payment of the sum of \$100 per lot, or the sum of \$800.

STATEMENT OF QUESTION INVOLVED.

Can a mechanic's lien claimant demand a release of lots from the mortgage under the above clause, the mortgagor himself neither tendering nor paying the amount specified?

ARGUMENT.

In the first place, the above release clause makes it expressly a personal covenant with the mortgagor, Samuel Blair. It states that releases are to be made "to the mortgagor, upon payment by the mortgagor, to the mortgagees." In this case there is no payment or demand or tender by the mortgagor, Blair; nor does any grantee of entire tract, or vendee of any lot, claiming under him, make any tender, or demand. The words of the clause itself, expressly limiting its advantages to the person known as the mortgagor, the case is clearly distinguishable from the following doctrine, to wit:

Dimeo, et al., v. Ellenstein, et al., 106 N. J. E. 298:

"A covenant, *unlimited as to persons*, to release part of mortgaged premises, sub-divided

into lots for sale in a development enterprise, is deemed to be for the benefit of the sub-division and inures to lot owners, though the covenant be to the mortgagor and not also to his assigns. *Ventnor Investment & Realty Co. v. Record Development Co.*, 79 N. J. Eq. 103. *Vawter v. Crafts*, 41 Minn. 14, 42 N. W. 483."

The clause in question, not being "unlimited as to persons" this case does not control the case at bar.

On the other hand, instead of being unlimited, the clause is personal to the mortgagor, and the legality of so contracting has been always upheld where it is so distinctly provided. Quoting further from the said case of *Dimeo v. Ellenstein*, to wit:

"In the instant case, the mortgagees bound themselves to release upon demand of the mortgagors and payment by them of the consideration price. They alone were given the right to exercise the option—so the covenant reads. The language is unmistakable. The covenant is personal to the mortgagors. *Squier v. Shepherd*, 38 N. J. E. 331; *Clarke v. Cowan*, 206 Mass. 252, 92 N. E. 474, 138 A. M. St. Rep. 388; *Rugg v. Record*, 255 Mass. 247, 151 N. E. 95; *Pierce v. Kneeland*, 16 Wis. 672, 84 Am. Dec. 726; *Gilman v. Forgoyne (Me.)*, 149 Atl. 620. The covenant is circumscribed and the reason for restricting it to the mortgagors is well illustrated by the present effort of the Mansfield, Inc., to withdraw the more valuable of the security, leaving the dregs out of which to make the balance of the purchase money. It em-

phasizes why the mortgagees chose to deal only with the mortgagors, for they would be stimulated to further improve the land to realize the mortgage money and so discharge themselves of their bond obligation—an urge that would be absent in their assigns. This, plus confidence in their mortgagors' integrity, it is fair to presume, was part inducement to release to the mortgagors and negative an intention to deal with the mortgagors' assigns, who, as in this case, would have no responsibility. While the covenant undoubtedly was to benefit the land, that benefit was to be reached only so long as the mortgagors continued in ownership. The language of the covenant carried its own interpretation. The background supports the interpretation. There is no room for construction."

The eight lots on which the community house is erected are in the choicest location of the tract, and in addition to the value of the land, have the building itself. This entire part is sought to be separated and released from the mortgage, so that it will then have only the vacant ground for its security. As is said in the above case:

"The reason for restricting it to the mortgagors, is well illustrated by the present effort of the (American Supply Co.,) to withdraw the more valuable of the security, leaving the dregs out of which to make the balance of the purchase money."

In the above case, the owner of the title itself, who had purchased from the mortgagor, demanded

a release but was not recognized as having a right. In the case at bar the tender is made, as stated, not by an owner, or vendee, but by a mechanic's lien holder. At the hearing in the Court below, counsel for complainants-appellees stated, and counsel for defendant-appellant admitted, to the same effect, that they had not been able to find any precedent for granting a release even where there was no personal covenant, to any one who was not an owner, or vendee, and any authority that the right had ever been extended to judgment creditors, or holders of any kind. As stated, the tender is here made by one who is the plaintiff or holder of a mechanic's lien claim, and hence it is not qualified to demand a release from the land covered by a mortgage, which would be to the prejudice of the security of the mortgagee.

The defendant-appellant, in its argument, undertakes to set up certain principles to the effect that the mechanic's lien claimant has an equitable right superior to the right of the mortgagees; in it he discusses releases as to time of demanding that equity will look to the substance rather than the form of the agreement, and that a strict construction should not be allowed under the circumstances. In reply to these matters, it is contended that he fails to raise any principle, except such as has been settled otherwise by the line of cases included in the above quotations from the case of *Dimeo v. Ellenstein*, namely to the effect that where the language is such as to make the release privilege expressly personal, that the Courts construe and enforce a personal construction only.

Respectfully submitted,

SAMUEL P. HAGERMAN,

*Solicitor for and of Counsel
with Complainants.*